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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **NSDP'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS UNDER FRCP, RULE 11** Judge David Nuffer

Denver C. Snuffer, Jr., Steven R. Paul, Daniel B. Garriott, Joshua D. Egan, and the law firm of Nelson, Snuffer, Dahle & Poulsen, P.C. (collectively referred to as "NSDP"), hereby oppose the government's motion for sanctions under Rule 11.

INTRODUCTION

The Rule 11 motion should be denied for two reasons. First, the Rule 60 motion is now moot. Therefore, there is no underlying conduct for the Court to sanction NSDP under Rule 11. Second, if the Court is disinclined to deny the Rule 11 motion on mootness, it should nevertheless deny the Rule 11 motion because NSDP filed it for good cause based on arguments and evidence

that came to light during the IRS tax case against Preston Olsen wherein the IRS acknowledged that the Johnson solar energy technology could qualify as solar energy equipment under the IRS tax code and regulations, and its expert witness, Dr. Mancini changed his opinion that the Johnson solar energy technology would never be capable of generating electricity.

The grounds for the Rule 11 motion—that NSDP filed a bad-faith Rule 60 motion –does not rise to the level of a Rule 11 violation. The Rule 60 motion that was filed on May 26, 2020 [ECF 931], is moot, having been dismissed by this Court. It was based on a good faith understanding of the legal and factual concerns relating to these proceedings. In the Rule 11 motion, government's counsel addresses the merits of the Rule 60 motion. But that motion is now moot. Thus, the merits of the Rule 60 motion should not factor into the Court's consideration of the Rule 11 motion.

Even if the Rule 11 motion were not moot, NSDP filed it for good cause. NSDP and its attorneys take this motion, their obligations under Rule 11, and these proceedings very seriously. NSDP attorneys have all reviewed the letter and filings from Ms. Healy-Gallagher and contemplated the impact of the Rule 60 Motion and implications, not only in this case, but in their individual practices. The Rule 60 Motion was filed for a single reason: while attending the tax court case before Judge Albert G. Lauber as a spectator, Mr. Snuffer observed the preliminary discussion between the Court and counsel regarding the government's objection to hearing testimony from the taxpayer's proposed experts. The discussion began as an objection to the relevance of the experts' report and testimony. However, the discussion turned to whether the government was conceding the factual question of whether the lenses claimed by the taxpayer qualified as solar energy equipment. Mr. Snuffer's understanding of that colloquy was that the IRS conceded that the lenses were solar energy equipment and ***could*** potentially qualify under the IRS code and regulation for favorable tax treatment. NSDP awaited a transcript of the Tax Court

proceedings to verify if the dialogue and concession by the IRS was consistent with Mr. Snuffer's report of the discussion, and the transcript verified such a discussion took place on the record.

This concession appeared to be further supported by testimony from Dr. Thomas Mancini on the third day of trial when Dr. Mancini admitted that Mr. Johnson's solar energy technology could potentially result in viable energy production. The later-obtained transcript also confirmed this concession.

Based on these positions endorsed and elicited by IRS counsel before the tax court, the Rule 60 motion submitted to this Court to consider whether the change in position by the IRS was material and would affect the injunction and money judgment entered by this Court against Defendants.

ARGUMENT

Sanctions under Rule 11 are appropriate only when a court determines that subsection (b) has been violated. Fed. R. Civ. P. 11(c). The government wrongly claims NSDP violated Rule 11 by asking this Court to consider the effect of the legal position taken by the IRS in a related proceeding involving the same solar technology as this case, and testimony from the government's expert that appears to contradict both the letter and the spirit of his testimony on the same subjects before this Court.

The Rule 11 motion should be denied for two reasons. First, the Rule 60 motion is now moot. That motion serves as the basis for the government's Rule 11 motion. Now that the Rule 60 motion is no longer at issue, there is no basis for the Court to sanction NSDP for that motion. The Rule 11 motion should be denied for this reason.

Beyond the mootness of the Rule 60 motion, the Court should also deny the Rule 11 motion because the Rule 60 motion had merit. The government challenges the merits of the Rule 60 Motion. Based on the transcripts of the tax court proceedings in January of this year, the Rule 60

motion was justified in asking for reconsideration of the injunction issued by this Court against the continued development of the Johnson solar energy technology and the money judgment entered against the Defendants. The witnesses' testimony suggested the solar energy technology might have been viable. Given that testimony, NSDP had a duty to its clients to seek the relief the Rule 60 motion requested.

The Rule 60 motion was grounded on a reasonable premise that the government changed its position. That change in position could significantly impact this Court's prior rulings against Defendants. NSDP's motivation in filing the Rule 60 motion should not be the basis for Rule 11 sanctions.

"Rule 11 places an affirmative duty on attorneys and litigants to make a reasonable investigation (under the circumstances) of the facts and the law before signing and submitting any pleading, motion, or other paper."[1] "Rule 11 imposes an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing. We evaluate an attorney's conduct under a standard of 'objective reasonableness—whether a reasonable attorney admitted to practice before the district court would file such a document.'"[2] "Because our adversary system expects lawyers to zealously represent their clients, the Rule 11 standard is a tough one to satisfy; an attorney can be rather aggressive and still be reasonable."[3]

"Rule 11 does not call for the imposition of sanctions whenever there are factual errors; the misstatements must be significant and sanctions will not be imposed when they are not critical and the surrounding circumstances indicate that counsel did conduct a reasonable inquiry. . . . The fact

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[1] 2 James Wm. Moore, Moore's Federal Practice § 11.11[2][a] (Matthew Bender, 3d ed. 2000).

[2] *Collins v. Daniels*, 916 F.3d 1302, 1320 (10th Cir. 2019) (quoting *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1182 (10th Cir. 2015).

[3] Id.

that a [pleading, motion or other paper] is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate."[4]

In its motion for sanctions, the government is improperly asking this Court to make a determination of the merits of the Rule 60 motion as justification for finding a violation. However, Rule 11 is not the appropriate vehicle for the government to address the merits of the claims in the offending pleading, motion or other paper.[5] Instead, Rule 11 requires that a "pleading be, to the best of the signer's knowledge, well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and . . . not interposed for any improper purpose."[6] In this case, the Rule 60 motion was grounded on a good faith understanding of the testimony adduced before the tax court.

NSDP took great care to confirm the record from the tax court contained the statements as recalled by Mr. Snuffer while he was present at the proceedings. Mr. Snuffer observed both the arguments regarding the admissibility of expert witness testimony for the taxpayer and the answers and opinions given by Dr. Mancini. The transcript was then reviewed by three other attorneys at NSDP before the motion was drafted. The Rule 60 motion and representations to this Court of what was said during the tax court case is accurate. A copy of the entire trial transcript is included with this response for the Court's review. See Exhibit 1. It confirms what the Rule 60 Motion states.

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[4] 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1335, at 67, 88 (1990)).

[5] See 5A Charles Wright, Arthur Miller & Edward Cooper, Federal Practice & Procedure § 1336 (3d ed. 2009) ("Rule 11 should not be used to raise issues as to the legal sufficiency of a claim or defense that more appropriately can be disposed of by a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or a trial on the merits."); see also *Truong v. Smith*, 28 F. Supp. 2d 626, 633 (D. Colo. 1998) (denying a motion for sanctions, because it invoked the merits of the case and "[s]uch arguments . . . are more properly presented in a motion for summary judgment").

[6] *Predator Int'l, Inc.* at 1182.

Rule 11 is meant to be reserved for egregious situations where counsel has not met its threshold burden of investigation and application and submitted a baseless filing.[7] The Court's inquiry here "is limited to whether there was an adequate factual basis and whether counsel conducted a reasonable investigation into the facts."[8] This case does not involve the situation where Rule 11 sanctions are appropriate. NSDP and its attorneys take this issue very seriously and believe the Rule 60 motion was justified, was not presented for any improper purpose, was warranted by existing law and was supported by the record from both cases. The entire case before the District Court would likely have been presented and argued differently if the same concessions were presented by DOJ during the trial before this Court.

There is sufficient basis under Rule 60 for the motion to be filed. The basis offered for the Rule 60 motion was "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)" and for "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party". The newly discovered evidence is the concessions before the tax court. The transcripts of the tax court trial were received on or about February 24, 2020, and after a review of that record the Rule 60 motion was filed on May 26, 2020.

Defendants made the decision to file the Rule 60 motion based on a reasonable, good faith belief that the change in position by the government would have made a material difference in the trial of the issues before this Court. The conclusions of this Court that the Johnson solar energy technology would never result in electricity production is a significant factor in its final orders.[9]

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[7] *Collins v. Daniels*, 916 F.3d 1302, 1322 (10th Cir. 2019)

[8] *ITN Flix v. Univision TV Grp., Inc.*, No. 2:15-cv-00736-DN-DBP, 2018 U.S. Dist. LEXIS 92422, at *8-9 (D. Utah May 31, 2018)

[9] Reference "Findings of Facts and Conclusions of Law", ECF 467, pages 54 and 101.

The filing of the Rule 60 motion is not the kind of egregious situation when sanctions are warranted, because the substance of the government's objection is that it disagrees with Defendants over the significance of the arguments and testimony in the tax court case. NSDP believes the difference is both significant and important. The government claims to disagree with that position. NSDP has provided the Court with the transcript of the argument and Dr. Mancini's testimony during the tax court case to allow this Court to determine that significance. Defendants, who filed the Rule 60 motion, believe that the argument and testimony could have persuaded this Court to reassess its reasoning on the injunction and judgment entered against Defendants following trial. The issue is that the Johnson solar energy technology has been demonstrated to work using a Stirling engine, and Dr. Mancini testified that with the right engineers and engineering principles, the technology could result in electricity generation on a usable scale.

NSDP carefully considered what was said during the tax court case and concluded, along with Defendants, that the arguments and testimony from the tax court case should be brought to the attention of this Court. NSDP and Defendants reasonably and in good-faith believe that this information is important to the Court for a reconsideration of the findings and conclusions relating to the Johnson solar energy technology. Specifically, the technology has potential merit, has the ability to potentially generate useable solar process heat, and with the right number of engineers and following engineering principles, potentially generate commercial grade electricity production. That is the purpose behind the Rule 60 Motion. There is no subterfuge or mischief that Defendants hope to accomplish with the motion.

Defendants provide this Court with what was said in the tax court:

THE TAX COURT TRANSCRIPT

The full transcript of the opening-trial proceedings is produced herewith as Exhibit 1. The issue we focus on in this motion and the Rule 60 motion relates to the designation of Johnny Kraczek as a testifying expert in the tax court case. The following is the conversation referred to:

> *[MR. SORENSEN (counsel for IRS)]: The last point, Your Honor, is, at no point in time has the Respondent ever contended that the lenses do not produce heat in some fashion.*
> *THE COURT: That's the point I want to get to. It seems like they were -- that Respondent concedes the point that they thought -- they demonstrated by their experiment.*
> *MR. SORENSEN: Concede is a strong word, Your Honor. We have never contested that the lenses do not produce some form of heat.*

(TR. Vol. 1, p. 15).

Upon hearing that concession, Mr. Snuffer determined he would review the record of the argument being made by the IRS when the transcript became available. As this Court knows, before the District Court, the IRS did *not* concede that the Johnson Fresnel lenses produced heat in any meaningful fashion. The argument relating to allowing the defense experts to testify continued, and it became clear the IRS appeared to concede the solar lenses purchased by the tax payer could be used in a fashion that could potentially generate measurable electricity:

> *MR. SORENSEN: Concede is a strong word, Your Honor. We have never contested that the lenses do not produce some form of heat.*
> *THE COURT: So Respondent does -- in your Pre-Trial Memo, you said you agree that the lenses can be used to produce enough heat that in some system --*
> *MR. SORENSEN: Some system somewhere.*
> *THE COURT: -- that could potentially produce energy electricity, right, in some system?*
> *MR. SORENSEN: Could produce electricity. That doesn't mean that it could commercially produce --*
> *THE COURT: Right.*
> *MR. SORENSEN: -- electricity or that it could utilize the system as Mr. Johnson envisioned it.*

(TR. 15-16).

This conversation eventually resulted in defense witnesses being excluded because the testimony was found to not address an issue in dispute (whether the lenses can be used to create

electricity) and the concession was made that the Johnson Fresnel solar lenses are potentially capable of being used in a system to generate measurable electricity:

> *THE COURT: If Respondent agrees that you can take these lenses, and they can be used to generate enough heat through some system to power an engine and produce electricity, if that's conceded, I don't see what more they prove by their experiment than that.*
> *MR. JONES: If I can get that concession on the record, I will agree. Yeah.*
> *THE COURT: Well, I think they said they have an agreement, but concession was too strong a word.*
> *MR. JONES: Right.*
> *MR. SORENSEN: We don't disagree, Your Honor, that the lenses do produce heat, and that heat, in some systems, can be then used to generate electricity. We do not dispute that.*
> *MR. SORENSEN: So is that -- the question, though, is that a concession. So –*
> *THE COURT: But let me read the relevant sentence of the report. Find it. Okay. It's on page 11, "Conclusion: It's clearly, by the most basic definitions, electrical power. The Johnson Fresnel Lens System produces enough solar process heat to run a Stirling engine and produce electricity. Selecting a Stirling engine size for this application and tuning the engine generator will likely improve performance".*

And a little later:

> *THE COURT: -- opening argument now. But I'm just trying to -- I mean, if we take the word "system" out, if we just say that the conclusion of these engineers was that, by the most basic definition electrical power, the Johnson Fresnel Lens produces enough solar process heat to run an engine and produce electricity. If Respondent would agree with that, right --*
> *MR. SORENSEN: As long as there's not a commercial --*
> *THE COURT: Right. Right.*
> *MR. SORENSEN: -- determination.*
> *THE COURT: Right.*
> *MR. SORENSEN: That the lenses do produce sufficient heat, that the Stirling engine did produce some electricity, we have no problem with that.*
> *THE COURT: I think you've got the concession that --*
> *MR. JONES: Okay.*
> *THE COURT: -- you want. So on that basis, I will exclude this report as not relative to any point in dispute.*
> *MR. JONES: With that concession being part of the ruling?*
> *THE COURT: Right. Right.*
> *MR. JONES: Thank you.*

(TR. Vol. 1, pp. 26-27 and 28-29).

After hearing this concession by the IRS, Mr. Snuffer requested the transcript. That record was reviewed by Mr. Paul, Mr. Garriott and Mr. Egan, and all of them agreed this potentially represented a change in position from the trial before the District Court.

On the third day of trial before the tax court, the IRS called Dr. Mancini. This is the same expert who testified before the District Court in the government's case and who testified that the solar energy technology developed by Mr. Johnson was a series of unconnected components that would *never* work in harmony and would *never* generate electricity.

Mr. Snuffer considered Dr. Mancini's testimony after having deposed him in connection with the District Court case, and cross-examining Dr. Mancini in that trial. Given Mr. Snuffer's familiarity with Dr. Mancini's trial testimony, he recognized differences in testimony that was elicited by the IRS in the tax court case, and then further developed through cross examination and questions by the court.

Dr. Mancini appears to have been much more relaxed and informal in the tax court case than he was before this Court. A complete transcript of Dr. Mancini's testimony is attached hereto as Exhibit 1, in volume 3. He appeared to joke and spar with Judge Lauber. He stated in this case:

> *[DR. MANCINI]: . . . I remember, actually, there was three issues that I had taken into consideration, and considered this. And that is the system, as defined, wasn't going to operate, and could it be made to operate? And I thought, yeah, it probably could be. I mean, there would have to be some changes to the turbine; the current turbine wouldn't work. But that could probably be done. But I felt that the -- IAS and RaPower3 -- had a real -- they didn't have the intellectual capability. They didn't have the right people in the right training to take and define the concept and create and develop something that would work. I thought that there was -- I mean, there was no engineers working there. They weren't following an engineering process. Roughly -- with 12 or 15 people with hired contractors to help.*
> *THE COURT: But the lens itself, was that clever? Was that inventive?*
> *THE WITNESS: I thought it was inventive. I thought it was really clever. I had my concerns about it relative to some of my past experiences.*

(TR. Vol. 3, pp. 500-501).

> *But considering what Mr. Johnson had, if he hired a whole bunch of people and really went to work for five years, he could probably produce a system that would generate electricity. Would it be a commercial system? The efficiency of the system we're talking about here is very low. It's probably four times lower than the dish Stirling system I was talking about earlier . . . .*
> *There are no commercial dish systems operating today. The reason for that is fundamentally -- . . . . The shortcoming is the operation and maintenance cost and the scalability aren't*

> *there. And based on all of those reasons, I reached the conclusion that it's certainly unlikely -- and I even allowed myself to say never would be a commercial system.*

(TR. Vo. 3, pp 501-501).

Dr. Mancini contradicted the testimony he gave in the RaPower case. He did not testify in this case that the technology was "inventive" and that given the proper personnel and following an "engineering process" the technology could be productive (although not commercially viable—because no solar is *per se* ***not*** commercially viable)[10]. Dr. Mancini appeared to have admitted his testimony was overly condemning when he said it would never be commercially viable and when he appeared to suggest it was unlikely. From the tenor of his tax court testimony, he appeared to be pulling for the technology, because it was part of his background and expertise. But he condemned the technology in the RaPower case and unequivocally said in those proceedings that the components would never work individually or collectively.

Dr. Mancini answered, on cross examination from Mr. Jones, that the lens arrays could be used in "any number of different systems that might generate or that would generate electricity".

> *BY MR. JONES: That's okay. Okay. So again, it sounds like we don't have a disagreement with the ring. The ring with the lenses on it comes to a focal point where there is heat absorption. And so from that point, do you believe that it's possible to implement* ***any number of different systems that might generate or that would generate electricity****?*
> *DR. MANCINI:* ***Yes****. I mean, I think the discussion yesterday about maybe putting photocells at that location or something like that, although there are other issues and so forth.* ***Yes. The answer to that is yes****.*

(TR. Vol. 3, pp. 506:17 -507:2 (emphasis added.)

Then Mr. Jones asked questions to clarify what Dr. Mancini meant in his earlier testimony when he said he thought the technology was viable. The testimony was:

> [*BY MR. JONES:] Yeah. So you testified in direct when Mr. Bradbury was asking you that you think it probably could be a viable system. And I got specific points here, but I think in your direct you said this so we can save some time here, but you kind of made the overarching statement that, yeah, get better personnel, I guess wash the lenses. I think you*

[10] All solar energy requires tax benefits to compete with other forms of energy production.

> *have an issue about sandblasting the towers and painting them, things like that. But get all this in place. You think the technology could probably work to generate electricity in five years, you said. Is that --*
> *[DR. MANCINI:] Oh, I don't know. I don't know five years. But I think if you got the right team on it, and you really invested the money in it, you could probably make something that would generate electricity using the concept as it stands.*

(TR. Vol 3, p. 516).

The testimony by Dr. Mancini in the tax court appears to be different than the testimony he gave before this Court. Based almost exclusively on Dr. Mancini's testimony, this Court found, and concluded:

> *258. Dr. Mancini credibly testified that Johnson's purported solar energy technology does not produce electricity or other useable energy from the sun.*
> *259. Johnson's purported solar energy technology consists, and has always consisted, of separate component parts that do not fit together in a system that will operate effectively or efficiently. For example, there is no evidence the turbine will work in the system.*
> *260. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate marketable electricity. There is no evidence they ever have or ever will.*
> *261. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to heat or cool a structure. They never have and they never will.*
> *262. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to provide hot water for use in a structure. They never have and they never will.*
> *263. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate solar process heat. "Solar process heat" is heat from the sun that accomplishes some function or application, like heating potash to speed the process of turning it into fertilizer. Shepard testified that the lenses produce heat and the only application that he heard of for that heat was to burn wood, grass, shoes, a man, and a rabbit. These are not examples of using heat from the sun for a useful application. The lenses never have been used to generate heat for some function or application, and they never will.*
> *264. Johnson's purported solar energy technology is not now, has never been, and never will be a commercial-grade solar energy system that converts sunlight into electrical power or other useful energy.*

(ECF 467, pp 53-54).

Dr. Mancini's testimony appears to be the primary basis to support the Court's conclusion that Mr. Johnson's technology was not viable. The change in position by the government's expert

was one of the bases for filing the Rule 60 motion. After attorneys at NSDP reviewed the transcript of this testimony, they all agreed a Rule 60 motion could be asserted. NSDP's duty to its clients to represent them zealously further suggested that they file the motion. Indeed, the consensus was that if they represented the government in the RaPower case, the NSDP attorneys all believed they would be under the obligation to disclose this information to the District Court. Because the government has failed to do so, the Rule 60 motion appeared necessary.

CONCLUSION

The Rule 11 motion should be denied. The Rule 60 motion, upon which the Rule 11 motion is based, is now moot. Therefore, there is no basis to grant the Rule 11 motion. Further, NSDP believes that the Rule 60 motion had merit after NSDP's review of the tax court proceedings. The burden Rule 11 imposes is high. That burden has not been met in this case to justify any sanction.

DATED this 10th day of August, 2020.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul
Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Joshua D. Egan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the court's CM/ECF filing system and that system sent notice of filing to all counsel and parties of record.

In addition, the foregoing was mailed or emailed as indicated to the following who are not registered with CM/ECF.

Greg Shepard (sent via email):

/s/ Steven R. Paul