JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*
DC Bar No. 985670, erin.healygallagher@usdoj.gov
ERIN R. HINES, *pro hac vice*
FL Bar No. 44175, erin.r.hines@usdoj.gov
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

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, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828 DN **UNITED STATES' RESPONSE TO NSDP'S MOTION TO WITHDRAW AS COUNSEL** Judge David Nuffer

After nearly three years of litigation and a 12-day bench trial, this Court concluded that Neldon Johnson and R. Gregory Shepard, and Johnson's entities International Automated Systems, Inc., RaPower-3, LLC, and LTB1, LLC, ran "a hoax funded by the American taxpayer by defendants' abusive advocacy of the tax laws."[1] The Court entered an injunction, an order of disgorgement, and judgment against all Defendants on October 4, 2018.[2]

On June 2, 2020, the United States Court of Appeals for the Tenth Circuit affirmed all pre-trial orders, and the judgment, in full.[3] The Tenth Circuit dismissed certain Affiliated Entities' appeal of this Court's "Affiliates Order"[4] on June 22, 2020.[5]

On May 26, 2020, Steven Paul, an attorney at Nelson, Snuffer, Dahle & Poulson ("NSDP"), filed a Rule 60 motion.[6] The signing attorneys seek to set aside the judgment against Defendants because of purportedly new evidence and for alleged fraud by the United States (both on Defendants and on the Court). According to the motion, the basis for the alleged new evidence derives from a bench colloquy between an IRS attorney and a Tax Court judge and

---

[1] Trial Tr. 2516:2-3.

[2] *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1120–21 (D. Utah 2018); ECF No. 468. Upon Defendants' motion to amend the technical language of the judgment, the Court entered an amended and restated judgment on November 13, 2018. ECF No. 507. The Court denied Defendants' subsequent Rule 59(e) motion on December 4, 2018. ECF No. 529. The Court is familiar with the record in this matter.

[3] *United States v. RaPower-3, LLC*, No. 18-4119, — F.3d —, 2020 WL 2844694 (10th Cir. 2020).

[4] ECF No. 636.

[5] *United States v. Solco I, LLC*, No. 19-4089, — F.3d —, 2020 WL 3407013 (10th Cir. 2020).

[6] ECF No. 931. Because Mr. Paul signed the Rule 60 motion with a "/s" and his name, and the docket reflects that the motion was filed under his ECF login and password, he signed the Rule 60 motion "for purposes of Federal Rule of Civil Procedure 11." D. Utah CM/ECF and Efiling Admin. Pro. Manual § II.A.1. Because "a law firm must be held jointly responsible for a [Rule 11] violation committed by its partner, associate, or employee," Fed. R. Civ. P. 11(c)(1), this response will refer to the "signing attorneys" throughout.

testimony during a Tax Court trial held January 21-23, 2020. Specifically, the signing attorneys claim that "the IRS expressly conceded" a critical point in the Tax Court proceedings and a key witness, Dr. Thomas Mancini, testified differently before the Tax Court than he did in this matter.[7] The signing attorneys conclude that these claimed inconsistencies in argument and testimony undermine the United States' position in this litigation and "materially affect[]" the Court's findings and conclusions that led to the injunction and order of disgorgement.[8] According to the motion, the Department of Justice's failure to alert the Court to the so-called "new position" and changed testimony is "grossly misleading," and therefore the Department of Justice "violate[d its] duty of candor to this Court."[9] Therefore, the signing attorneys contend, "this Court should reassess the prior decision, set it aside, and dismiss the case brought against the Defendants."[10]

The United States served a Rule 11 motion on the signing attorneys on June 12, 2020.[11] In it, we explained that the injunction, disgorgement order, and judgment in this case were and are well-founded in fact and law.[12] Nothing has changed the detailed findings of fact and conclusions of law this Court entered. The United States' positions and the facts supporting them

---

[7] *See* ECF No. 931 at 2, 8.

[8] ECF No. 931 at 2, 8.

[9] ECF No. 931 at 2, 8.

[10] ECF No. 931 at 8.

[11] Before any Rule 11 motion may be filed with the court, the moving party must allow the non-moving party or attorney an opportunity to withdraw the challenged paper. A Rule 11 motion "must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2). We served the motion only after having delivered a letter to the signing attorneys, inviting them to withdraw the Rule 60 motion. *See* ECF No. 935 at 2. They did not withdraw it by the date we requested.

[12] *E.g.*, *RaPower-3*, 2020 WL 2844694, at *7.

(including Dr. Mancini's testimony) are, and have always been, consistent. The signing attorneys' factual assertions to the contrary are demonstrably false. The signing attorneys' request to vacate the injunction, disgorgement order, and judgment, is wholly unsupported by any legal authority for relief under that rule. For these reasons, the signing attorneys violated Fed. R. Civ. P. 11(b)(2) and (3), and sanctions are warranted.

In addition to those serious substantive defects of the Rule 60 motion, we also noted that the signing attorneys' authority to file the Rule 60 motion on behalf of the parties they purport to represent is in serious doubt. The signing attorneys filed the Rule 60 motion purportedly on behalf of Neldon Johnson, International Automated Systems, Inc., and LTB1, LLC.[13] The signing attorneys cite a portion of paragraph 10 of the Corrected Receivership Order as purported authority for that action.[14] But they omit other key provisions of that paragraph, which directly bear on the propriety of filing the Rule 60 motion:

> No person holding or claiming any position of any sort with any of the Receivership Defendants shall possess any authority to act by or on behalf of any of the Receivership Defendants. . . . [Neither] Johnson . . . nor anyone acting on [his] behalf[] shall make any court filings . . . on behalf of [IAS, RaPower-3, or LTB1] other than in this case or in the pending appeal of an order in this case.[15]

This Court entered the Corrected Receivership Order while the signing attorneys were still counsel of record for Neldon Johnson, IAS, RaPower-3, and LTB1. But on March 6, 2019, the Court granted the signing attorneys' own motion to withdraw as attorneys for those

[13] ECF No. 931 at 1.

[14] ECF No. 931 at 1.

[15] ECF No. 491 at 6 ¶ 10.

Defendants.[16] Yet by filing the Rule 60 motion, and without leave of Court, the signing attorneys purported to represent all four defendants *again* – while Neldon Johnson is represented by another attorney whose signature does not appear on the Rule 60 motion.[17] There is no explanation of who authorized this filing on behalf of Neldon Johnson or any entity. The Local Rules establish specific procedures for appearing or substituting counsel.[18] The Corrected Receivership Order and other orders of this Court strictly limit the authority that any person other than the Receiver may exercise on behalf of any Receivership Defendant.

Accordingly, there are serious questions regarding whether the signing attorneys had authority to claim to represent the Defendants on whose behalf they claim to have filed the Rule 60 motion. Nonetheless, they chose to file it. Now they ask to withdraw as district court counsel for these Defendants – at the same time that they suggest they may attempt to re-insert themselves later to "enlarg[e] the scope of the Rule 60 motion."[19] The United States identifies the following considerations for the Court's decision on whether to grant or deny the signing attorneys' motion to withdraw as counsel, and under what conditions.

[16] ECF No. 592.

[17] ECF No. 652, ECF No. 655. The order appointing counsel for Neldon Johnson, and counsel's subsequent notice of appearance, invoke a general (not a specific) appearance.

[18] DUCivR 83-1.3, 83-1.4.

[19] *Compare, generally*, ECF No. 939 *with id.* at 3 n.2.

A. The signing attorneys chose to file the Rule 60 motion. The Rule 11 procedures already underway with respect to that motion should continue.

After reviewing the United States' Rule 11 motion, the signing attorneys seek to withdraw due to a purported "conflict of interest:" they wish to "avoid dealing with Rule 11" but the Defendants want "their Rule 60 [m]otion heard."[20] This is exactly the choice that Rule 11 requires an attorney to confront *before* filing a motion. Rule 11 "require[s] litigants to 'stop-and-think' before initially making legal or factual contentions."[21] By filing a written motion in federal district court (or later advocating it), an attorney "certifies that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that: 1) the "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" and 2) that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[22] The entire purpose of Rule 11 is to prevent litigants – and enabling attorneys – from unduly burdening the Court with assertions and arguments that do not meet this standard.[23]

---

[20] ECF No. 939 at 2.

[21] Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments; *accord Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988).

[22] Fed. R. Civ. P. 11(b)(2)-(3).

[23] *See Peer v. Lewis*, 606 F.3d 1306, 1316 (11th Cir. 2010) ("[A]ttorneys are the filter upon which courts rely to maintain the integrity of, and trust in, our judicial process. Most parties do not know what legal ethics apply or what facts give rise to a legitimate claim. Neither sanctions nor a judgment against the client absolve the lawyer."); *see also id.* at 1315-16 (noting that "Rule 11 does not allow parties to protect themselves from 'hit and run' abuse of the judicial process" and remanding to the district court to evaluate "what sanctions should be imposed" under the court's inherent authority to sanction an attorney's "bad faith conduct" when he "knowingly filed a baseless claim

If the signing attorneys no longer wish to advocate the positions advanced in the Rule 60 motion, they may withdraw it.[24] There will be no prejudice to the Defendants on whose behalf they purported to file the motion. Neldon Johnson has separate counsel;[25] if that attorney wishes to argue for post-judgment relief, he may. The entity Defendants are bound by the terms of the Corrected Receivership Order and other orders of this Court; if they can adhere those orders and retain an attorney who will argue for post-judgment relief on their behalf, they may.

B. The signing attorneys were on notice of Defendants' inability to pay fees before they chose to file the Rule 60 motion.

The signing attorneys assert that they should be permitted to withdraw because they "no longer have the financial ability to continue as counsel for Defendants." But the signing attorneys chose to file the Rule 60 motion while fully on notice of 1) the purported balance already owed to them and 2) the asset freeze and receivership orders against Defendants. Despite

---

and then withdrew from the case before opposing counsel had the opportunity to discover" contrary facts that would have supported a Rule 11 motion against the attorney had he still been in the case).

[24] *See Del Giudice v. S.A.C. Capital Mgmt., LLC*, 2009 WL 424368, at *9 (D.N.J. Feb. 19, 2009) ("The Rule 11 violation committed by Federman and Smith was complete when they filed the Amended Complaint. It has not been cured. They make a belated attempt to rectify the wrong by arguing that, in what represents an insurmountable difference of opinion with their client Doctoroff, they have ceased to advocate the Amended Complaint's claims following Biovail's settlement of civil enforcement proceedings by the SEC and its guilty plea to criminal charges and, accordingly, have moved to withdraw as Doctoroff's counsel. This assertion, without a corresponding withdrawal of the offending document, does not expunge their initial wrongdoing in filing the Amended Complaint and, indeed, their ongoing wrongdoing in continuing to press claims based on tainted allegations long after the Owen sanctions order. *Counsel's insinuation that their hands are tied with regard to their ability to take corrective action, due to their disagreement with their client as to how to proceed, is similarly unavailing. See, e.g., Gold v. The Last Experience*, No. 97 Civ. 1459, 1999 WL 156005, at *4 (S.D.N.Y. Mar. 22, 1999) (imposing Rule 11 sanctions on withdrawing plaintiff's attorney following failure to withdraw lawsuit after receiving adequate safe-harbor notice, finding that withdrawal as counsel did not absolve attorney of liability under Rule 11)." (emphasis added)).

[25] ECF No. 652, ECF No. 655.

this knowledge, the signing attorneys made a free and informed choice to engage in the work to file the Rule 60 motion purportedly on behalf of Defendants.

C. This is only the most recent effort to delay litigation through attorney substitution or withdrawal.

Neldon Johnson and the entities he used to control have a history of changing, or attempting to change, representation at critical moments in litigation.[26] According to the Local Rules, "[w]ithdrawal may not be used to unduly prejudice the non-moving party by improperly delaying the litigation."[27] Here, it would unduly prejudice the United States to allow the signing attorneys to withdraw from this matter *without* the condition that before they are excused, they must withdraw the Rule 60 motion. The United States has already invested time and resources in taking appropriate steps in response to the Rule 60 motion by initiating Rule 11 procedures. To allow the signing attorneys to withdraw, and yet have the motion remain on the docket for decision would effectively allow the signing attorneys to avoid Rule 11's requirements while burdening the Court and the United States with a factually baseless and legally meritless motion. This would improperly delay resolution of this litigation.

For all of these reasons, if the Court decides to grant the signing attorneys' motion to withdraw as counsel, we respectfully submit that they should be required to withdraw the Rule

[26] *E.g.*, ECF No. 46 (substitution of counsel on the date discovery responses were due from Defendants, *see* ECF No. 53 at 2); ECF No. 164 (withdrawal of counsel on the eve of scheduled depositions of Defendants); Trial Tr. 4:19-12:19 (Neldon Johnson's assertion of *pro se* status at the start of trial); Civil Contempt Proceedings May 28, 2019 Tr. vol. 1, 3:4-10:2, 136:14-137:2, 149:24-150:5; *id.* vol. 2 70:19-71:8; ECF No. 685. As the more recent incidents show, the signing attorneys have participated in this pattern before.

[27] DUCivR 83-1.4(c)(3).

60 motion first. As described above, this will prevent a waste of time and resources by the Court and the United States, and will not prejudice the Defendants.

Dated: June 29, 2020

Respectfully submitted,

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
DC Bar No. 985760
Email: erin.healygallagher@usdoj.gov
Telephone: (202) 353-2452
ERIN R. HINES
FL Bar No. 44175
Email: erin.r.hines@usdoj.gov
Telephone: (202) 514-6619
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
FAX: (202) 514-6770
ATTORNEYS FOR THE UNITED STATES