Healy Gallagher, Erin (TAX)

From: Healy Gallagher, Erin (TAX) <Erin.HealyGallagher@tax.USDOJ.gov>
Sent: Monday, June 08, 2020 12:31 PM
To: Denver Snuffer; STEVEN PAUL; dbgarriott@msn.com; joshua.d.egan@gmail.com
Cc: Hines, Erin R. (TAX)
Subject: US v. RaPower-3, et al.: initiating Rule 11 procedures
Attachments: PLEX00974 TC Tr vol 3.pdf; PLEX00975 TC Mancini expert report.pdf; PLEX00976 TC Mancini rebuttal report.pdf; PLEX00970 IRS PreTrial Brief.pdf; PLEX00971 IRS PostTrial Brief.pdf; PLEX00972 TC Tr vol 1.pdf; PLEX00973 TC Tr vol 2.pdf; 2020 06 08 Rule 11 letter.pdf

Dear Messrs. Snuffer, Paul, Garriott, and Egan,

Please see the attached letter, initiating informal Fed. R. Civ. P. 11 procedures with respect to the Rule 60 motion that Mr. Paul signed and filed with the court, on behalf of Nelson, Snuffer, Dahle & Poulson, on Tuesday, May 26, 2020.

As stated in the attached, if you do not withdraw that motion at or before noon, MDT, Thursday, June 11, 2020, I will serve you with the United States' Rule 11 motion. That will initiate the 21-day safe harbor period before, if necessary, we will file the motion.

Thank you, Mr. Paul, for your consent on the phone earlier today, to the United States' motion to extend time to respond to the Rule 60 motion until after the Rule 11 process is resolved. I plan to file that motion presently.

Please contact me with any questions.

Regards,

Erin Healy Gallagher
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Plaintiff Exhibit
977

U.S. Department of Justice

Tax Division

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REZ:RSC:EHealy Gallagher
DJ 5-77-4466
CMN 2014101376

June 8, 2020

Via Email

Denver Snuffer
Steven Paul
Dan Garriott
Joshua Egan
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070

Re: *U.S. v. RaPower-3, LLC, et al., No. 2:15-cv-00828 (D. Utah): Initiating informal Rule 11 procedures*

Dear Messrs. Snuffer, Paul, Garriott, and Egan,

I write to initiate informal Fed. R. Civ. P. 11 procedures with respect to the Rule 60 motion that Mr. Paul signed and filed with the court, on behalf of Nelson, Snuffer, Dahle & Poulson, on Tuesday, May 26, 2020.[1] As described below, the motion fails the Rule 11 test because it is not based on fact or law. Further, it violates Court orders. I am alerting each of you to this action because your names appear on the motion (even if Mr. Paul is the only signatory) and "absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee."[2]

If you do not withdraw the Rule 60 motion at or before noon, MDT, on Thursday, June 11, 2020, I will serve you with the United States' Rule 11 motion and initiate the 21-day safe harbor period before, if necessary, we may file the motion.

I. The Rule 60 motion violates Rule 11 because it has no basis in fact or law and violates prior orders of this Court.

As you are aware, papers like the Rule 60 motion that are filed with the United States District Court for the District of Utah must comply with Fed. R. Civ. P. 11. By filing a written motion, an attorney . . . certifies that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that the "the factual contentions

[1] ECF No. 931.
[2] Fed. R. Civ. P. 11(c)(1).

have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" and 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."[3]

"'In deciding whether to impose Rule 11 sanctions, a district court must apply an objective standard; it must determine whether a reasonable and competent attorney would believe in the merit of an argument.'"[4] "Reasonableness of counsel's conduct necessarily depends upon the prevailing facts and circumstances of a given case."[5] This test looks to "factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar."[6]

A. The factual premises of the Rule 60 motion are false.

The United States' position regarding the solar lenses – that they do *not* qualify as "energy property" – is and has always been consistent. "Under § 48, a taxpayer may be allowed an 'energy credit' that reduces his income tax liability in a given year for certain 'energy property' he 'placed in service' during the tax year for which the taxpayer claims the credit. 'Energy property' means equipment with respect to which depreciation is allowed, and "which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat."[7] The United States advocated for all of the findings of fact that go into the conclusions of law that Defendants' customers' lenses were not (and are not) "energy property" before this Court.[8]

The IRS's position throughout the Tax Court litigation against the Olsens, including during the January 2020 trial, was – and is – entirely consistent with the United States' position in this litigation and this Court's findings and conclusions: the Olsens' lenses were not "energy property." The IRS argued and proffered evidence, at every stage, that the Olsens were not in a trade or business related to the lenses, and the lenses were not "placed in service," and therefore their claimed depreciation deduction was not allowable.[9] The IRS argued and proffered evidence,

[3] Fed. R. Civ. P. 11(b)(2).
[4] *Miller v. Wulf*, 2015 WL 423264, at *1 (D. Utah Feb. 2, 2015) (quoting *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of America*, 935 F.2d 1152, 1155 (10th Cir. 1991)) (Nuffer, J.).
[5] *ITN Flix, LLC v. Univision Television Grp., Inc.*, No. 2:15-CV-00736-DN-DBP, 2018 WL 2464502, at *1 (D. Utah June 1, 2018) (Pead, M.J.)
[6] Fed. R. Civ. P. 11 advisory committee's note to 1983 amendments
[7] *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1184 (D. Utah 2018), *aff'd* --- F.3d ----2020 WL 2844694 (June 2, 2020) (citations and alterations omitted); *see also id.* at 1173-85 (explaining why the defendants knew or had reason to know that the lenses did not qualify for a depreciation deduction).
[8] *E.g., RaPower-3*, 343 F. Supp. 3d at 1121 ("The United States submitted draft findings of fact and conclusions of law before trial, as did Defendants. Then, following trial, revisions and additional findings were delivered to the parties. The United States submitted revised draft findings of fact and conclusions of law, and Defendants objected.").
[9] Pl. Ex. 970, IRS's Pre-Trial Brief (hereafter, "IRS Pre-Trial Brief"), Jan. 6, 2020, at 3 ("Issues"), 7-14; Pl. Ex. 971, IRS's Post-Trial Brief (hereafter, "IRS Post-Trial Brief"), May 5, 2020 at 90-115; *see also generally* Pl. Ex. 972, Tax Court Tr., Jan. 21, 2020 ("T.C. Tr. vol. 1"), at 50:10-60:1 (opening statement by IRS Counsel); Pl. Ex. 973, Tax Court Tr., Jan. 22, 2020 ("T.C. Tr. vol. 2") at 160:6-316:24 (cross-examination of Preston Olsen); Pl. Ex. 974, Tax Court Tr., Jan. 23, 2020 ("T.C. Tr. vol. 3"), 463:5-502:7 (direct examination of Dr. Mancini), 519:24-523:24 (redirect & rebuttal examination of Dr. Mancini), 527:10-531:12 (discussing post-trial briefing required, including the factual and legal issues that go to whether the lenses qualified for a depreciation deduction or the energy credit).

at every stage, that the Olsens' lenses have never been used in a system that generates electricity, that heats or cools a structure or provides hot water for use in a structure, or provides solar process heat.[10]

Part of the IRS's evidence on the latter point was testimony from Dr. Thomas Mancini. He testified as an expert witness in the Tax Court litigation to offer facts and opinion evidence in support of the IRS's position that the lenses were not "energy property," just as he did before this Court. Specifically, Dr. Mancini testified to his two ultimate conclusions:[11]

> **Conclusion 1: Status of IAS Solar Dish Technology**
>
> The IAS Solar Dish Technology is in the research Stage 1 of development as described in Section 3 of this report. The "Technology" comprises separate component parts that do not work together in an operational solar energy system. The IAS Solar Dish Technology does not produce electricity or other useable energy from the sun.
>
> **Conclusion 2: Commercialization Potential of the IAS Solar Dish Technology**
>
> The IAS Solar Dish Technology is not now nor will it ever be a commercial-grade dish solar system converting sunlight into electrical power or other useful energy.

These are the exact same conclusions that Dr. Mancini reached, and testified about, in this case.[12]

In spite of the foregoing record as a whole, the Rule 60 motion claims that "the IRS expressly conceded in the Tax Court that . . . lenses qualify as solar energy property under the IRS code and regulations," such that "the lenses qualify for [§ 48] tax credits but may be limited to passive income, depending on the taxpayer's circumstances."[13] The Rule 60 motion offers misleadingly characterized and out-of-context block quotes of argument and testimony to

[10] IRS Pre-Trial Brief at 3, 7-14; IRS Post-Trial Brief at 90-115; *see also generally* T.C. Tr. vol. 1 at 50:10-60:1; T.C. Tr. vol. 2 at 160:6-316:24; T.C. Tr. vol. 3. 463:5-502:7, 519:24-523:24, 527:10-531:12.
[11] T.C. Tr. vol. 3 at 484:6-10, 486:3-9; Pl. Ex. 975, Expert Report of Dr. Thomas Mancini, Tax Court Exhibit 147-R ("T.C. Expert Report"), at 3. In Tax Court, unlike in federal district court, an expert's report is his direct testimony. Tax Court Rule 143(g)(2) ("The [expert] report will be marked as an exhibit, identified by the witness, and received in evidence as the direct testimony of the expert witness . . . ."). The Tax Court also received Dr. Mancini's rebuttal report as testimony. T.C. Tr. vol. 3 at 524:19-526:25; Pl. Ex. 976, Rebuttal Report of Dr. Thomas Mancini, Tax Court Exhibit 148-R. As referenced *supra*, Dr. Mancini testified live as well. T.C. vol. 3 at 463:2-527:9.
[12] *E.g., RaPower-3*, 343 F. Supp. 3d at 1149-51.
[13] ECF No. 931 at 2. The IRS argued, in the alternative, that *if* the Tax Court were to conclude that the Olsens' solar lenses qualified as "energy property," any related deduction should be limited to the extent that their money was "at risk" and any loss should offset only passive income. IRS Pre-Trial Brief at 14-15, IRS Post-Trial Brief at 115-19; T.C. Tr. vol. 1, at 50:10-60:1; T.C. Tr. vol. 3 at 527:10-530:13. The IRS never limited itself to those alternative arguments. This is consistent with this Court's findings and conclusions (and the United States' advocacy) in this matter. *E.g., RaPower-3*, 343 F. Supp. 3d at 1185-89.

support this assertion. We will not rebut each of them here, but attach all Tax Court documents cited herein which show the fallacies underneath each of the Rule 60 motion's unfounded claims.

In short: the United States has not changed its position or conceded anything: the Olsens' lenses – just like all of the lenses at issue in the injunction litigation – were not "energy property."

B. The legal standard for relief under Rule 60 only magnifies the motion's fabrications.

The motion purports to seek relief from this Court's final judgment under Fed. R. Civ. P. 60(b)(2) and (3), and (albeit without citation) under 60(d)(3). The motion does not recite the applicable standards for the moving party's burden under any of these provisions. They follow. The Rule 60 motion fails each of them.

"Rule 60(b) relief "is extraordinary and may only be granted in exceptional circumstances."[14] Under Rule 60(b)(2), such relief may be granted when the moving party shows that there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Among other things, for "newly discovered evidence" to justify Rule 60(b) relief, the moving party must show that such evidence "is material" and "that a new trial with the newly discovered evidence would probably produce a different result."[15]

Under Rule 60(b)(3), such relief may be granted when the moving party shows that an opposing party committed "fraud . . . misrepresentation, or misconduct." A moving party must show, by "clear and convincing proof," that the opposing party committed "fraud, misrepresentation, or misconduct" such that "the challenged behavior must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial."[16] Rule 60(b)(3) is intended to address "claims of fraud between the parties."[17]

Claims of fraud upon the *court*, however, fall under Rule 60(d)(3). The Rule imposes no limitation upon a court's power to "set aside a judgment for fraud on the court."[18] Claims of fraud on the court are analyzed separately from claims of fraud between the parties "because they are much more difficult to prove."[19] "Fraud on the court is fraud which is directed to the judicial machinery itself."[20] "Generally speaking, only the most egregious conduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court."[21] A moving party must show "[i]ntent

[14] *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).
[15] *Zurich N. Am.*, 426 F.3d at 1290 (alterations and quotation omitted). Additional factors are that "the evidence was newly discovered since the trial; . . . the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence [is not] merely cumulative or impeaching." *Id.* (alterations and quotation omitted).
[16] *Zurich N. Am.*, 426 F.3d at 1290 (alterations and quotation omitted).
[17] *Zurich N. Am.*, 426 F.3d at 1291.
[18] Fed. R. Civ. P. 60(d)(3).
[19] *Zurich N. Am.*, 426 F.3d at 1291.
[20] *Zurich N. Am.*, 426 F.3d at 1291 (quoting *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002)) (alterations omitted).
[21] *Zurich N. Am.*, 426 F.3d at 1291 (quoting *Weese v. Schukman*, 98 F.3d 542, 552–53 (10th Cir. 1996)).

to defraud" to obtain relief.[22] "Proof of fraud upon the court must be by clear and convincing evidence."[23]

Judged against these standards, "it is clear that [the Rule 60 motion] has absolutely no chance of success under any existing law."[24] And the motion *must* be judged under these standards; when evaluating a Rule 11 motion, a court must view the factual and legal claims through the lens of the standard for the challenged document.[25] As the record before the Tax Court shows, the Rule 60 motion offers no "newly discovered evidence" at all, much less "material" new evidence that would probably produce a different result at a new trial. Similarly, the motion offers no evidence (much less clear and convincing evidence) of any fraud by the Department of Justice that "substantially interfered" with any party's ability to proceed at trial in this litigation.[26] The motion only passingly asserts (but does not offer clear and convincing evidence to meet its heightened burden to show) that the Department of Justice intended to engage in fraud on this Court, such as through an attempt to bribe the Court or an attorney's falsification of evidence.[27]

You are aware of the elements to prove that a piece of equipment is "energy property." All of the information about the IRS's litigating position in Tax Court was reasonably available to you before you filed the Rule 60 motion. You have access to at least part of the Tax Court transcript, and a reasonable investigation into the facts, under the circumstances presented here, would require a careful evaluation of the entire record described herein before filing the Rule 60 motion. You were not under time-pressure to file the motion. It is not objectively reasonable to level such serious accusations against another party without this careful review of the factual record, and the applicable legal standard (both for what qualifies as "energy property" and for Rule 60 relief). It is "not objectively reasonable" to "misstate[] facts" known to a filing attorney at the time a motion is filed. [28] It is "not objectively reasonable" to file a motion containing factual assertions contradicted by documents the filing party has, or should have had, in its possession – or to later advocate the same position.[29] Further, it is not objectively reasonable to

[22] *Zurich N. Am.*, 426 F.3d at 1291 ("Intent to defraud is an 'absolute prerequisite' to a finding of fraud on the court." (quoting *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir.1995)).
[23] *Buck*, 281 F.3d at 1342.
[24] *See Garth O. Green Enterprises, Inc. v. Harward*, 2017 WL 213787, at *7 (D. Utah Jan. 18, 2017) (Nuffer, J).
[25] *See Adamson v. Bowen*, 855 F.2d 668, 673-74 (10th Cir. 1988) ("For the Secretary's answer [in a Social Security case] to be objectively reasonable within the contemplation of Rule 11, the facts must have been sufficient to allow the Secretary to defend the agency ruling in objective good faith as being supported by 'substantial evidence.' See 42 U.S.C. § 405(g).").
[26] *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993-94 (10th Cir. 1999); *accord Thomas v. Parker*, 609 F.3d 1114, 1120 (10th Cir. 2010).
[27] *Med. Supply Chain, Inc. v. Gen. Elec. Co.*, 144 F. App'x 708, 716 (10th Cir. 2005) ("It is clear that at least MSC's claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even that he knew MSC existed. Therefore, it was abuse of discretion not to find that portion of the amended complaint frivolous."); *accord Salmon v. Nutra Pharma Corp.*, 687 F. App'x 713, 719 (10th Cir. 2017) (affirming imposition of Rule 11 sanctions when "Mr. Salmon had no objective basis to believe that NPC was responsible in any way for the calls placed to his cell phone, and . . . reasonable attorney would have brought a claim against NPC based on the information in his possession").
[28] *Mountain Crane Serv., LLC v. Wenneshiemer*, 2016 WL 5415665, at *3 (D. Utah Sept. 28, 2016) (Furse, M.J.).
[29] *Mountain Crane Serv.*, 2016 WL 5415665, at *3.

cling to "little evidence" that may tenuously support a position when "overwhelming evidence" shows contrary facts.[30]

For these reasons, the Rule 60 motion violates Rule 11(b)(2) and (3).

C. The Rule 60 motion violates the Corrected Receivership Order and other Court orders.

In addition to its other factual and legal deficiencies, the Rule 60 motion appears to violate the Corrected Receivership Order and other Court orders.

First, on March 6, 2019, the Court granted your motion to withdraw as counsel.[31] Now, without leave of Court, you purport to represent four defendants again – while Neldon Johnson is represented by another attorney whose signature does not appear on the Rule 60 motion.[32] There is no explanation of who authorized this filing on behalf of Mr. Johnson or any entity. The Local Rules establish specific procedures for appearing or substituting counsel.[33] Particularly in light of the clear terms of the Corrected Receivership Order, it is not objectively reasonable to purport to take action on behalf of Receivership Defendants in this fashion.

Second, even assuming you had proper authority to file the Rule 60 motion, it fails to provide an adequate statement regarding the source of funds to file it. The motion's conclusory statement "that no Receivership Property has been used to pay for the fees or costs associated with this motion" does not meet the standard set by paragraph 10 of the Corrected Receivership Order. First, Mr. Paul signed the motion, not Neldon Johnson or any other person purporting to have authority for any entity defendant. Second, the conclusory assertion does not "identify[] the source of the funds for the [Rule 60 motion] in sufficient detail to show that the funds are not Receivership Property or otherwise derived from the solar energy scheme." This failure is obvious from the plain text of paragraph 10 and the procedural history of this litigation. It is not objectively reasonable to have submitted this filing without the required statement regarding the funds used to file it.

II. If you do not withdraw the Rule 60 motion, the United States will serve you with its Rule 11 motion.

For all of the foregoing reasons, Rule 11 requires that you withdraw the Rule 60 motion. Prompt withdrawal of the motion "will protect . . . against a motion for sanctions."[34] If we are required to file a Rule 11 motion, the sanctions we may seek include, but are not limited to:

- an order that you name who authorized filing the Rule 60 motion, for each party on whose behalf you purported to file;

[30] *Adamson*, 855 F.2d at 674.
[31] ECF No. 592.
[32] 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.
[33] DUCivR 83-1.3, 83-1.4.
[34] Fed. R. Civ. P. 11, adv. comm. note for 1993 amendments.

- disgorgement to the Court of any fees you were paid to file the Rule 60 motion, plus an appropriate penalty paid to the Court if warranted, for the waste of judicial resources and time it caused;
- an award of attorney's fees costs to the United States, jointly and severally against any party, attorney, or other person responsible for the filing, including Nelson, Snuffer, Dahle, & Poulson; and
- an order that the United States need not respond to future filings by your firm on behalf of Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, and/or LTB1, LLC, unless the Court orders a response.

Please feel free to contact me if you have any questions.

Sincerely,

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney
Civil Trial Section, Central Region