

# Appendix A

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

June 15, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert  
Clerk of Court

ZACHARY R.E. RUSK,

Plaintiff - Appellant,

v.

FIDELITY BROKERAGE  
SERVICES,

Defendant - Appellee.

No. 20-4104  
(D.C. No. 2:15-CV-00853-RJS)  
(D. Utah)

ORDER AND JUDGMENT\*

Before HARTZ, BRISCOE, and BACHARACH, Circuit Judges.

This appeal grew out of Mr. Zachary R.E. Rusk's suit for discrimination by his former employer, Fidelity Brokerage Services. The district court dismissed the suit, and Mr. Rusk moved for sanctions under Federal Rule of Appellate Procedure 11. The district court denied the

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\* We conclude that oral argument would not materially help us to decide the appeal. So we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

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motion, and Mr. Rusk challenges the denial of his motion for sanctions.<sup>1</sup>

We affirm.

The district court denied the motion on grounds that Mr. Rusk had

- failed to serve opposing counsel at least 21 days before filing the motion,
- waited too long by moving for sanctions roughly 16 months after dismissal of the action, and
- failed to explain how defense counsel had caused the dismissal by making misrepresentations to the court.

Mr. Rusk waived a challenge to the third reason, and we agree with the first two reasons.

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<sup>1</sup> In the course of appealing the denial of sanctions, Mr. Rusk complains about three other rulings:

1. Dismissal of the suit (April 30, 2019)
2. Denial of the first motion to reopen (May 22, 2019)
3. Denial of the second motion to reopen (November 19, 2019)

The appeal is late for a challenge to the first two rulings. *See Fed. R. App. P. 4(a)(1)(A)* (providing a general 30-day deadline for appeals in civil cases), (a)(4)(A)(vi) (stating that a timely Rule 60 motion tolls the start of the appeal deadline until entry of the order on this motion), (a)(4)(B)(ii) (providing a 30-day period to appeal the denial of a Rule 60 motion).

The appeal is timely as to the third ruling, but he waived this issue by failing to develop a related argument. *See United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004) (declining to consider “issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation” (internal quotation marks omitted)).

Because the district court gave three independent reasons for denying the motion, Mr. Rusk had to challenge all of the reasons. *See Lebahn v. Nat'l Farmers Union Unif. Pension Plan*, 828 F.3d 1180, 1188 (10th Cir. 2016) (“When a district court dismisses a claim on two or more independent grounds, the appellant must challenge each of those grounds.”). Given Mr. Rusk’s failure to challenge the third reason for dismissal, we could affirm on this basis alone. *See Starkey ex rel. AB v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1252 (10th Cir. 2009) (“When an appellant does not challenge a district court’s alternate ground for its ruling, we may affirm the ruling.”).

Despite this failure by Mr. Rusk, we address his challenges to the first and second rationales. In assessing the correctness of these rationales, we apply the abuse-of-discretion standard. *Roth v. Green*, 466 F.3d 1179, 1187 (10th Cir. 2006). Under this standard, the district court did not err in denying Mr. Rusk’s motion for sanctions based on the first two rationales.

The federal rules require service of a motion for sanctions at least 21 days before filing it. Fed. R. Civ. P. 11(c)(2). Despite this requirement, Mr. Rusk did not serve his motion before filing it.

He argues that he substantially complied with the requirement by sending counsel a letter, which threatened to sue him for his misrepresentations. This argument fails factually and legally. The argument fails factually because Mr. Rusk’s threat did not mention Rule

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11, identify any misrepresentations, demand their withdrawal, or say that he was going to move for sanctions. The argument fails legally because our precedent requires service of the actual motion to be filed; warning letters are insufficient. *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006). Under this precedent, Mr. Rusk's threat to sue did not relieve him of the obligation to serve his sanctions motion 21 days before filing it. We thus uphold the district court's first rationale for denying the motion.

The court's second rationale is also sound. Mr. Rusk not only failed to serve the motion in advance but also filed it too late. In our circuit, a sanctions motion must be filed before the entry of judgment. *Id.* at 1193. But Mr. Rusk waited to file the motion for sanctions until roughly sixteen months after the entry of judgment. The court thus acted within its discretion in reasoning that Mr. Rusk had waited too long to file the motion for sanctions. *Cf. id.* (holding that the district court had abused its discretion by granting a motion for sanctions under Rule 11 that had been filed after the entry of judgment).

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We affirm the denial of Mr. Rusk's motion for sanctions. The district court gave three reasons for denying the motion, and Mr. Rusk did not address one of these reasons. We could affirm on this basis alone. But even if we were to disregard this omission, his challenges would fail: His threat to sue did not satisfy the duty to serve the motion for sanctions, and he

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improperly waited to file the motion until after the court had already entered the judgment.

Entered for the Court

Robert E. Bacharach  
Circuit Judge

# Appendix B

**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH**

ZACHARY R.E. RUSK,

Plaintiff,

v.

FIDELITY BROKERAGE SERVICES LLC,

Defendant.

**ORDER**

Case No. 2:15-cv-00853-RJS

Chief District Judge Robert J. Shelby

Plaintiff Zachary R.E. Rusk initiated this employment discrimination civil rights action in December 2015 against his former employer, Defendant Fidelity Brokerage Services LLC.<sup>1</sup> On April 30, 2019, the court entered an Order dismissing Rusk's Third Amended Complaint<sup>2</sup> and entered Judgment in favor of Fidelity.<sup>3</sup> On May 22, 2019, the court overruled Objections to the Order and Judgment Rusk had lodged on May 13, 2019.<sup>4</sup> On November 19, 2019, the court denied a Motion Rusk brought on October 23, 2019 pursuant to Federal Rule of Civil Procedure 60(d)(3).<sup>5</sup> Now before the court are certain Motions and other filings from Rusk:

1. Objection/Point of Information and Request for Clarification re: Order on Plaintiff's Rule 60 Motion,<sup>6</sup>

<sup>1</sup> Dkt. 4.

<sup>2</sup> Dkt. 266.

<sup>3</sup> Dkt. 267.

<sup>4</sup> Dkts. 271 (Objections) and 273 (Order).

<sup>5</sup> Dkts. 281 (Motion) and 282 (Order).

<sup>6</sup> Dkt. 286.

2. Ex-Parte Notice of [United States Supreme Court] Letter and ex parte Motion for

Extension to File Appeal/ Notice of Appeal to [United States Tenth Circuit Court of Appeals],<sup>7</sup>

3. Request to Submit for Decision, or Recuse,<sup>8</sup>

4. Rule 11 Motion, in which Rusk seeks to have the case reopened or for the court to  
sanction Fidelity's counsel,<sup>9</sup>

5. An Affidavit which attaches as an Exhibit a Letter of Intent to Sue counsel for  
Fidelity,<sup>10</sup>

6. An email purportedly from a process server regarding attempted service of an  
unidentified document on counsel for Fidelity,<sup>11</sup>

7. A single-page return of service indicating that a "LETTER, AFFIDAVIT IN  
SUPPORT OF RULE 11 MOTION WITH ANEXHIBIT [sic], RULE 11 MOTION, EXHIBITS"  
were served upon counsel for Fidelity,<sup>12</sup>

8. Request to Submit for Decision Rule 11 Motion,<sup>13</sup>

9. Ex-parte Request for Status Update,<sup>14</sup> and

10. Notice of New Information.<sup>15</sup>

The court takes up Rusk's filings in which he seeks relief in the following order, and for the  
reasons discussed below:

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<sup>7</sup> Dkt. 289.

<sup>8</sup> Dkt. 290.

<sup>9</sup> Dkt. 291.

<sup>10</sup> Dkt. 292.

<sup>11</sup> Dkt. 293.

<sup>12</sup> Dkt. 294.

<sup>13</sup> Dkt. 295.

<sup>14</sup> Dkt. 269.

<sup>15</sup> Dkt. 297.

1. The Objection<sup>16</sup> is *overruled*;
2. The Motion for Extension to File Appeal<sup>17</sup> is *granted in part*, as the court grants Rusk a fourteen (14) day extension of time to file a proper notice of appeal of the November 19, 2019 Order at issue, and *denied in part*, as the court denies Rusk's alternative request for a three-district judge hearing on his Rule 60 Motion;
3. The Rule 11 Motion<sup>18</sup> is *denied*;
4. The Request to Submit for Decision Rule 11 Motion<sup>19</sup> is *granted*;
5. The Request to Submit or Recuse is *granted in part* as the court is ruling on all pending motions and requests, and *denied in part*, as the court declines the alternative request to recuse; and
6. The Ex-Parte Request for Status Update<sup>20</sup> is *denied* as it is moot given the court's rulings.

## **BACKGROUND**

Rusk litigated this action for over two years without legal counsel. During this time, he sent voluminous emails to Fidelity's counsel. Fidelity responded by moving the court to limit Rusk's communications. The court granted Fidelity's request in an Order Granting Defendant's Motion to Limit Contact (Order Limiting Contact), noting that some of Rusk's emails "contain[ed] veiled threats" while others were "simply irrelevant to the instant litigation."<sup>21</sup> The court limited Rusk's communication with Fidelity's counsel "to non-threatening, relevant

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<sup>16</sup> Dkt. 286.

<sup>17</sup> Dkt. 289.

<sup>18</sup> Dkt. 291.

<sup>19</sup> Dkt. 295.

<sup>20</sup> Dkt. 296.

<sup>21</sup> Dkt. 36 at 1.

matters involving this litigation,” and “to no more than three such communications per day,” warning Rusk that “[v]iolation of this order may result in sanctions.”

Rusk obtained counsel in February 2018.<sup>22</sup> Three lawyers represented him at various times, but by the spring of 2019, Rusk was again acting pro se.

On March 13, 2019, Rusk filed a Motion for Judgment on the Pleadings or, in the Alternative, for Partial Summary Judgment.<sup>23</sup> But the court stayed its consideration of Rusk’s Motion to first resolve Fidelity’s earlier-filed Motion for Order to Show Cause why Rusk should not be held in contempt for violating the Order Limiting Contact<sup>24</sup> requiring him to curtail communications with Fidelity’s counsel. Rusk had violated the Order by sending opposing counsel numerous and threatening emails.

Following a hearing on April 30, 2019, the court issued a Memorandum Decision and Order dismissing Rusk’s Third Amended Complaint as a sanction for his violations.<sup>25</sup> That same day, Judgment was entered in Fidelity’s favor,<sup>26</sup> and the case was closed.

On May 13, 2019, Rusk filed an Objection to Order,<sup>27</sup> objecting to the Memorandum Decision and Order and the court’s entry of Judgment.<sup>28</sup> Construing the Objection liberally as a Motion brought under Federal Rule of Civil Procedure 60(b), the court on May 22, 2019 overruled Rusk’s objections and denied any relief Rule 60(b) might have afforded.<sup>29</sup>

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<sup>22</sup> Dkt. 152, Notice of Appearance filed by Zachary Myers of the law firm Hepworth & Associates.

<sup>23</sup> Dkt. 243.

<sup>24</sup> Dkt. 36.

<sup>25</sup> Dkt. 266.

<sup>26</sup> Dkt. 267.

<sup>27</sup> Dkt. 271.

<sup>28</sup> *Id.* at 1.

<sup>29</sup> Dkt. 272.

Five months later, on October 23, 2019, Rusk brought a new Rule 60 Motion, specifically citing Rule 60(d)(3) and arguing under it that a fraud on the court had been perpetrated.<sup>30</sup> On November 19, 2019, the court issued an Order denying that second Rule 60 Motion.<sup>31</sup>

On November 21, 2019, Rusk objected to the November 19 Order on the grounds that the court had failed to “address [his] Rule 60 motion in terms of Rule 60(b)(6).”<sup>32</sup> Then, nineteen days later, on December 10, 2019, Rusk filed a Notice of Appeal alerting the court that he had appealed the denial of his October 2019 Rule 60 Motion to the Supreme Court.<sup>33</sup> A Petition for Writ of Certiorari to the Supreme Court dated December 4, 2019 is attached as an exhibit to that Notice.<sup>34</sup>

On January 13, 2020, Rusk filed with this court a Motion seeking an extension of time to appeal his case to the Tenth Circuit Court of Appeals, or alternatively for a rehearing of his Rule 60 Motion “en banc or at least a three judge district court panel.”<sup>35</sup> Rusk brought the Motion in apparent response to a December 19, 2019 letter from the Office of the Clerk of the Supreme Court.<sup>36</sup> In that letter, the Supreme Court Clerk identified certain deficiencies with Rusk’s Petition, and returned it to him.<sup>37</sup> One of the deficiencies identified was that a “direct appeal from a United States district court is allowed only from a three-judge district court order,” and

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<sup>30</sup> Dkt. 281.

<sup>31</sup> Dkt. 285.

<sup>32</sup> Dkt. 286 at 1.

<sup>33</sup> Dkt. 288.

<sup>34</sup> Dkt. 288 at Ex. 2.

<sup>35</sup> Dkt. 289 at 1.

<sup>36</sup> Dkt. 289 at 10.

<sup>37</sup> *Id.*

the proper procedure in Rusk's case was to "timely petition... after entry of judgment in a United States court of appeals."<sup>38</sup>

On February 5, 2020, Rusk filed a Request to Submit for Decision, or Recuse.<sup>39</sup> In it, Rusk argues the court has acted improperly by not having ruled on his requests and motions, which were filed in the prior two and a half months. He asks the court to either recuse from the case or rule on the prior motions.

On August 1, 2020, Rusk filed what he styles a Rule 11 Motion.<sup>40</sup> In it, he asks the court to either: 1) reinstate the case and rule on his Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment; or 2) order Fidelity's counsel to pay him 4.3 million dollars. Rusk seeks this relief because, he argues, the court was led to rule against him based on alleged misrepresentations from opposing counsel.<sup>41</sup> Rusk alleges these misrepresentations are outlined in a June 9, 2020 judicial misconduct complaint he filed against the undersigned, a copy of which is attached to his Rule 11 Motion.<sup>42</sup> Following an opening paragraph describing his requested relief, the Motion itself simply recites Rule 11 and various Advisory Committee notes to it.<sup>43</sup>

In the weeks after filing his Rule 11 Motion, Rusk filed various documents pertaining to his complaints against Fidelity's counsel. These include: 1) an August 11, 2020 Affidavit attaching a July 8, 2020 'letter of intent to sue' Fidelity's counsel;<sup>44</sup> 2) an August 20, 2020 notice

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<sup>38</sup> *Id.* (citing 28 U.S.C. §§ 1253, 1254).

<sup>39</sup> Dkt. 290.

<sup>40</sup> Dkt. 291.

<sup>41</sup> *Id.* at 1.

<sup>42</sup> Dkt. 291-2 (Exhibit C).

<sup>43</sup> *Id.* at 1-11.

<sup>44</sup> Dkt. 292 and 292-1.

from a process server regarding attempts to serve Fidelity's counsel with an unidentified document,<sup>45</sup> and 3) an August 24, 2020, return of service of documents on Fidelity's counsel.<sup>46</sup>

None of these documents indicate that Rusk served Fidelity's counsel with the Rule 11 Motion before it was filed with the court on August 1, 2020.

On September 14, Rusk filed a Request to Submit his Rule 11 Motion for decision,<sup>47</sup> and on September 28, 2020, filed an Ex Parte Request for Status Update and Notice of New Information.<sup>48</sup> In the Request for Status Update, Rusk asks the court to "update the parties with the date it intends to make a decision on the matters pending before it."<sup>49</sup>

In the Notice of New Information, Rusk informs the court that he has filed police reports against persons he believes have filed false declarations or police reports. He asks that three pages be "enter[] into the record" showing what he believes "demonstrate that a falsified police report was filed by opposing [c]ounsel . . . in an effort to mislead the Court and try and get the case dismissed on improper grounds in their last ditch effort."<sup>50</sup> The three pages appear to be documents from Salt Lake City Police. They suggest that on April 3, 2019, an officer twice called Fidelity's counsel regarding an incident, leaving a detailed message inquiring if he "needed further police assistance," and asking counsel "that if he wish[ed] to have police assistance, to email me."<sup>51</sup> As of that date, the police file was to be closed for inactivity.<sup>52</sup>

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<sup>45</sup> Dkt. 293

<sup>46</sup> Dkt. 294.

<sup>47</sup> Dkt. 295.

<sup>48</sup> Dkt. 297.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.* at 1.

<sup>51</sup> Dkt. 291-1 at 2-3.

<sup>52</sup> *Id.* at 3.

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## DISCUSSION

### 1. Objection/Point of Information and Request for Clarification re: Order on Plaintiff's Rule 60 Motion.<sup>53</sup>

Rusk argues in this filing that the court erred in its November 19, 2019 Order denying his Rule 60 Motion by failing to “address . . . [the] motion in terms of Rule 60(b)(6).”<sup>54</sup> Rule 60(b)(6) provides that the court may relieve a party “from a final judgment, order, or proceeding for . . . any other reason that justifies relief.” Rusk claims in this filing that relief is justified under this Rule because he “didn’t even get the chance at reasonable access to an attorney who would zealously represent [him]. . . .”<sup>55</sup> Rusk specifically quotes emails from various attorneys who declined to represent him from June 2015—six months before Rusk initiated this action—until January 2017, and complains that allegedly defamatory statements made in 2016 by a magistrate judge assigned to the case “could be seen to have barred Rusk from obtaining reasonable and fair access to attorneys.”<sup>56</sup>

The court overrules this Objection. First, while Rusk faults the court for not evaluating his Rule 60 Motion under Rule 60(b)(6), that provision was never cited in Rusk’s Rule 60 Motion. Instead, Rusk expressly brought the Motion under Rule 60(d)(3), arguing that a fraud perpetrated on the court warranted relief from the April 30, 2019 Order and Judgment. That basis for relief was thoroughly evaluated and rejected in the November 19, 2019 Order.

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<sup>53</sup> Dkt. 286.

<sup>54</sup> *Id.* at 1 and 4.

<sup>55</sup> *Id.* at 1.

<sup>56</sup> *Id.* at 4.

Second, in any event, Rusk is unpersuasive in arguing that any court statements in 2016 barred Rusk from obtaining counsel to pursue his employment civil rights claims.<sup>57</sup> Viewing the quotes from attorneys who declined representation, some did so in 2015, before the alleged 2016 statements. Others declining representation in 2016 and 2017 provide specific reasons for doing so unrelated to any statements from the court. For example, one in 2016 states that the case appears to be “a little bit bigger . . . than a firm our size would be able to take on . . . .” An attorney declining representation in 2017 did so because he was unlicensed to practice law in Utah, while another states that the attorneys at a nonprofit legal organization are already “at capacity.” Two attorneys in 2016 and 2017 do not offer a reason for declining representation, but there is no evidence linking any court statements to their decision to decline representation. Moreover, Rusk in fact had counsel for a period in this case, prior to its dismissal: three attorneys entered appearances on his behalf beginning in February 2018 until he was once again acting pro se in February 2019.

For these reasons, the Objection is overruled.

**2. Ex-Parte Notice of [United States Supreme Court] Letter and ex parte Motion for Extension to File Appeal/ Notice of Appeal to [United States Tenth Circuit Court of Appeals].<sup>58</sup>**

Citing Rule 4(a)(5), Federal Rules of Appellate Procedure, Rusk ask the court to grant him an extension of time to appeal the court’s November 19, 2019 denial of his Rule 60 Motion

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<sup>57</sup> In January 2016, the magistrate judge initially assigned to this case granted Rusk’s request for appointment of counsel, granting him counsel for the limited role of helping him evaluate whether his claims were legally cognizable and review the motions filed to date. Dkt. 19. In May 2016, the second magistrate judge assigned to this case reconsidered and denied the granting of appointed counsel because despite court staff efforts, willing counsel could not be secured even in a limited role, “[d]ue in large part to [Rusk’s] own actions.” Dkt. 44 at 3. The court further concluded that Rusk had not shown his claims to have sufficient merit or to be unduly complicated to warrant the appointment of counsel, or that Rusk could not adequately pursue the claims without counsel. *Id.* at 4. A second motion for appointed counsel was denied for the same reasons in April 2017 by the third magistrate judge assigned to this case. Dkt. 99 at 2.

<sup>58</sup> Dkt. 289.

to the Tenth Circuit Court of Appeals, or grant a rehearing on that Motion by a three-judge district court panel—relief Rusk hopes will facilitate a direct appeal to the United States Supreme Court.<sup>59</sup> This Motion is unopposed.

Federal Rule of Appellate Procedure 4(a)(1)(A) provides that generally, in civil cases against parties other than the United States, a litigant must file a notice of appeal with the district clerk “within 30 days after entry of the judgment or order appealed from.”<sup>60</sup> But Rule 4(a)(5) provides that the “district court may extend the time to file a notice of appeal if:”

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

On December 4, 2019, Rusk timely appealed the court’s November 19, 2019 denial of his Rule 60 Motion—but to the Supreme Court, rather than the Tenth Circuit. The Supreme Court Clerk returned the appeal in a letter dated December 19, 2019 for a number of reasons, including that “[a] direct appeal from a United States district court [to the Supreme Court] is allowed only from a three-judge district court order.”<sup>61</sup>

Rusk urges the court to excuse his error in appealing to the wrong court because he was operating under a mistaken belief that the Supreme Court was the appropriate court to resolve what he perceived as a ‘circuit split’ in the law relevant to his Rule 60 Motion.<sup>62</sup> Rusk

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<sup>59</sup> Dkt. 289 at 3.

<sup>60</sup> Fed. R. App. P. 4(a)(1)(A).

<sup>61</sup> This was Rusk’s first motion brought expressly under Rule 60. A prior Objection, which the court liberally construed as a Rule 60 Motion, was filed and denied in May 2019. Dkts. 271 (Objections) and 272 (Order).

<sup>62</sup> Dkt. 289 at 2 (explaining Rusk appealed to the Supreme Court to “save[] cost[s] and resources and conserve[] the public record of the [Supreme Court] was to have jurisdiction and resolve the circuit split. Unfortunately[,] the rules appear to contradict this good faith intent and constrict said objective.”).

emphasizes that he timely appealed the November 19, 2019 Order “within 15 days after said order,” but to the wrong court.<sup>63</sup> He received the response from the Supreme Court “within around a week” after December 19, 2019,<sup>64</sup> and therefore could not have filed a timely appeal to the Tenth Circuit Court of Appeals within 30 days of the court’s November 19, 2019 Order.

Under the above-discussed Rules, Rusk was generally required to file his notice of appeal of the November 19, 2019 Order no later than December 23, 2019.<sup>65</sup> He timely did so, but filed his appeal in the wrong court. On January 13, 2020, Rusk timely filed his Motion for an extension of time to file an appropriate appeal well within thirty days of December 23, 2019.<sup>66</sup> The only issue remaining is whether Rusk has shown “excusable neglect or good cause.”<sup>67</sup>

“The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant.”<sup>68</sup> In determining whether excusable neglect exists, relevant considerations “include ‘the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.’”<sup>69</sup>

In contrast, good cause is shown in a “narrow class of cases” where “‘there is no fault—excusable or otherwise’” attributed to the party seeking an extension.<sup>70</sup> In such cases, “‘the need

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Fed. R. App. P. 4(a)(1)(A). December 21, 2019, the date thirty days after November 19, 2019, was a Saturday. December 23, 2019 was the first weekday following December 21.

<sup>66</sup> Fed. R. App. P. 4(a)(5)(i).

<sup>67</sup> Fed. R. App. P. 4(a)(5)(ii).

<sup>68</sup> Fed. R. App. P. 4(a)(5) Advisory Committee’s note (2002 Amendments).

<sup>69</sup> *Id.* at 1206 (quoting *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1045 (10th Cir.1994)).

<sup>70</sup> *Bishop v. Corsentino*, 371 F.3d 1203, 1207 (10th Cir. 2004) (quoting Fed. R. App. P. 4(a)(5) Advisory Committee’s note (2002 Amendments) (other citations omitted)).

for an extension is usually occasioned by something that is not within the control of the movant.”<sup>71</sup>

Rusk’s misdirected appeal set in motion the eventual delay at issue. Thus, his Motion is evaluated under the “excusable neglect” standard. The court concludes it has been met, and that a short extension of time to appeal the November 19, 2019 Order is warranted.

First, the court cannot conclude that there is a danger of significant prejudice to the nonmoving party. Fidelity was put on timely notice that Rusk had appealed the November 19, 2019 Order—but that Rusk had appealed to the Supreme Court. Thus, there is no surprise that Rusk was seeking to appeal, even if he initially did so improperly. Moreover, Fidelity has not opposed Rusk’s Motion. And while it undoubtedly does not wish to defend an appeal of the court’s November 19 Order, the prejudice from an extension does not appear significant, where there was only a short delay between the December 23, 2019 appeal deadline and Rusk’s January 13, 2020 Motion for an extension.

Second, Rusk has offered an explanation for his mistaken appeal to the Supreme Court—he believed the Court would resolve a circuit split. And though it does not excuse a failure to abide by the Rules, the court cannot ignore Rusk’s pro se status in making this mistake, which he promptly tried to remedy. In this instance, Rusk does not appear to be acting in bad faith by pursuing an extension under the Rules.

Finally, while Rusk’s failure to timely file a proper notice of appeal by December 23, 2019 appears at root to be caused by his decision to appeal on December 4, 2019 to the wrong court—an action within his control—that mistake may have been exacerbated by a timing issue

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<sup>71</sup> *Id.* (quoting Fed. R. App. P. 4(a)(5) Advisory Committee’s note (2002 Amendments)).

not directly within his control. It is unclear exactly when Rusk received the December 19, 2019 notice from the Supreme Court that his appeal was improper. Rusk has stated that it was not until sometime in the week after December 19, 2019. That week began on December 23, 2019, the last date for Rusk to appeal the November 19, 2019 Order. Assuming he did not receive notice from the Supreme Court before then, the timing of the Supreme Court letter left him unable to cure his own mistake with a timely notice.

Based upon the foregoing, the court concludes Rusk has shown excusable neglect and that a short extension of time for Rusk to file an appeal of the November 19, 2019 Order is warranted. The court grants Rusk an extension of fourteen (14) days from the date of this Order to file a proper notice of appeal. This conclusion renders moot Rusk's alternative request for rehearing of his Rule 60 Motion by a three-judge panel of district court judges, and that relief is therefore denied.

### **3. Rule 11 Motion.<sup>72</sup>**

In a paragraph-long argument, Rusk argues in his Rule 11 Motion that the court should piece together information variously attached as exhibits to conclude that Fidelity's counsel made misrepresentations to the court, which Rusk seems to suggest caused the court to dismiss his claims.<sup>73</sup> He asks the court to reinstate the case or to order Fidelity's counsel to pay him over four million dollars as a sanction. The court declines to do so, and instead denies the Motion.

Rule 11(b), Federal Rules of Civil Procedure, provides that “[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later

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<sup>72</sup> Dkt. 291.

<sup>73</sup> *Id.*

advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) 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) 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
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

The Tenth Circuit has emphasized that “the central purpose of Rule 11 is to deter baseless filings in district court and thus . . . streamline the administration and procedure of the federal courts.”<sup>74</sup> This is important, where “[b]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.”<sup>75</sup>

Under Rule 11(c)(2), a party may move the court to sanction a party or attorney if a violation has occurred. But a “safe-harbor” provision in that subsection requires a party to serve a copy of the Rule 11 motion on the other party to give that party an opportunity to withdraw or correct the challenged document before filing the sanctions motion with the court:

The 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.

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<sup>74</sup> *Collins v. Daniels*, 916 F.3d 1302, 1322–23 (10th Cir.), cert. denied, 140 S. Ct. 203 (2019), reh'g denied, 140 S. Ct. 567, 205 L. Ed. 2d 377 (2019) (citations omitted).

<sup>75</sup> *Id.* at 1323 (citations omitted).

Indeed, the Tenth Circuit Court of Appeals has held it is an abuse of discretion for a court to grant Rule 11 sanctions if the serving party did not comply with the safe harbor provision.<sup>76</sup>

Following this guidance, the court denies Rusk's Rule 11 Motion. Setting aside the lack of any clarity in his argument, Rusk has first and most clearly failed to demonstrate compliance with Rule 11's safe harbor provision. He has, at best, shown he served Fidelity's counsel with a letter of intent to sue him in July 2020, before filing the Motion on August 1. This is insufficient.

Second, the Motion is untimely. It comes nearly a year and a half after the case was dismissed and judgment entered, after multiple motions or objections Rusk filed opposing that dismissal order and judgment have been denied, and after Rusk attempted to file an appeal. Some of the complaints Rusk lodges concern denials in Fidelity's Answer to Rusk's Third Amended Complaint—an Answer filed nearly two years ago.<sup>77</sup> The purpose of Rule 11—to deter and cure alleged violations—would not be served by permitting these late complaints, particularly coupled with an outlandish alternative demand for over four million dollars.

Third, concerning the substance of the Motion, the court finds no violations of Rule 11, particularly violations warranting any sanctions, even in the late-filed documents Rusk has filed since his Rule 11 Motion. For instance, in producing police records suggesting Fidelity's counsel failed to return a call to the police concerning complaints against him, Rusk suggests that Fidelity's counsel filed a false police report to manufacture evidence to persuade the court to rule against Rusk. The court did not hinge its decision to dismiss Rusk's claims on the filing and pursuit of a police report—though it was mentioned in passing in the court's Order. The

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<sup>76</sup> *Mellott v. MSN Commc'ns, Inc.*, 492 F. App'x 887, 888 (10th Cir. 2012) (citing *Roth v. Green*, 466 F.3d 1179, 1191–92 (10th Cir. 2006)).

<sup>77</sup> Dkt. 201.

dismissal was based on Rusk's own actions in violating a prior order in the case limiting his emails and the threatening nature of the emails—which the court independently found.

Likewise, the court finds no merit in Rusk's suggestion in his Affidavit that the voluminous and threatening emails Fidelity's counsel relied on in seeking dismissal were inadmissible settlement discussions under Rule 408, Federal Rules of Evidence.<sup>78</sup> Setting aside the absurdity of shielding evidence of violations of a court order from view of the court by labeling them settlement discussions, Rule 408 does not support Rusk's contention. The Rule only bars admission of settlement discussions to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction. . . ."<sup>79</sup>

For these reasons, the court denies Rusk's Rule 11 Motion.

**4. Request to Submit for Decision Rule 11 Motion,<sup>80</sup> Request to Submit for Decision, or Recuse,<sup>81</sup> and Ex-Parte Request for Status Update.<sup>82</sup>**

Rusk's Requests to Submit seek rulings on the various Requests and Motions he has filed. Those Requests are granted, as the court has now ruled on the pending Requests and Motions. The alternative request for the court to recuse, and the request for a status update are denied as they are mooted by the court's rulings.<sup>83</sup>

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<sup>78</sup> Dkt. 292 at 2.

<sup>79</sup> Fed.R. Evid.408(a).

<sup>80</sup> Dkt. 295.

<sup>81</sup> Dkt. 290.

<sup>82</sup> Dkt. 296.

<sup>83</sup> Even if the alternative request for recusal were not moot, the undersigned would decline to recuse. Here, the court recognizes the judicial complaint that Rusk has lodged against him and placed in the record. Under some circumstances, a complaint might support recusal. But here they do not. The allegations in Rusk's complaint are largely directed to others. But even viewing the allegations against the undersigned, the court concludes under the circumstances of this case, recusal is unwarranted and would be inappropriate. *See also* Committee on Codes of Conduct, *Advisory Opinion No. 103*, Guide to Judiciary Policy, Vol. 2B, Ch. 2 at 187–192 (June 2009), [https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019\\_final.pdf](https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf) (discussing considerations for judges when litigants file complaints).

## CONCLUSION

For the foregoing reasons:

1. Rusk's Objection<sup>84</sup> is *overruled*;
2. The Motion for Extension to File Appeal<sup>85</sup> is *granted in part*, as the court grants Rusk a fourteen (14) day extension of time to appeal the November 19, 2019 Order at issue, and *denied in part*, as the court denies Rusk's alternative request for a three-district judge hearing on his Rule 60 Motion;
3. The Rule 11 Motion<sup>86</sup> is *denied*;
4. The Request to Submit for Decision Rule 11 Motion<sup>87</sup> is *granted*;
5. The Request to Submit or Recuse is *granted in part* as the court is ruling on all pending motions and requests, and *denied in part*, as the court declines the alternative request to recuse; and
6. The Ex-Parte Request for Status Update<sup>88</sup> is *denied* as it is moot given the court's rulings.

SO ORDERED this 30<sup>th</sup> day of September 2020.

BY THE COURT:



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ROBERT L. SHELBY  
United States Chief District Judge

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<sup>84</sup> Dkt. 286.

<sup>85</sup> Dkt. 289.

<sup>86</sup> Dkt. 291.

<sup>87</sup> Dkt. 295.

<sup>88</sup> Dkt. 296.