UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SHARYL THOMPSON ATTKISSON, *et al.*,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 1:17cv364
UNKNOWN NAMED AGENTS OF THE DEPARTMENT OF JUSTICE, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO REFILE, OR, IN THE ALTERNATIVE, TO REOPEN THE EXISTING CASE UNDER FEDERAL RULE OF [CIVIL] PROCEDURE 60(b)

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ATTORNEYS FOR THE UNITED STATES, GENERAL HOLDER, AND POSTMASTER GENERAL DONOHOE[1]

DATE: January 23, 2020

[1]It is unclear from plaintiffs' motion whether they are attempting to return the United States, General Holder, and Postmaster General Donohoe as party defendants to this civil action – especially given that this Court twice dismissed the United States with prejudice, and plaintiffs did not seek appellate review of that dismissal. The caption plaintiffs utilize for their motion does not include the United States, General Holder, and Postmaster General Donohoe, and only identifies as party defendants the individuals that plaintiffs seek to name as new party defendants. Out of an abundance of caution, however, the United States, General Holder, and Postmaster General Donohoe are thus filing this paper as an "opposition" pursuant to Local Rule

INTRODUCTION

Over nineteen months ago, in May 2018, this Court entered judgment in favor of the defendants in this civil action. the Fourth Circuit subsequently affirmed that judgment, concluding, *inter alia*, that plaintiffs had not acted with the necessary diligence to justify further continuing the litigation:

> Whatever the minimum requirement for good cause may be, the plaintiffs have failed to show it. The facts that support the dismissal of the amended complaint under Rule 41(b) also show the plaintiffs' lack of diligence for purposes of Rule 4(m). The plaintiffs' significant periods of inactivity during three full years of litigation, their persistence in unjustifiably broad discovery requests despite repeated admonishments of the District Court and Magistrate Judge, and their decision not to present additional difficulties with discovery to the Court, show a lack of diligence in pursuit of their claims.

Attkisson v. Holder, 925 F.3d 606, 627 (4th Cir. 2019). Pursuant to the well-settled "mandate rule," this Court is precluded from taking any action that would run counter to the Fourth Circuit's holding.

But that is exactly what plaintiffs now ask this Court to do. Although the precise relief that they seek is somewhat unclear, plaintiffs' currently-pending motion asks this Court for relief from its previously-entered judgment pursuant to Federal Rules 60(b)(2), (b)(3), and (b)(6). That motion – which lacks an accompanying memorandum – has a myriad of threshold problems, including its use of the wrong caption, and its failure even to identify the text of the rules under which plaintiffs seek relief or any authority supporting their position. The gravamen of the motion, however, is that plaintiffs have received new information from an unnamed "whistleblower," which they maintain will allow them to bring new claims against new individual defendants. And indeed, plaintiffs *have* filed a brand-new civil action in the United

7(F)(1). If this Court were to conclude that plaintiffs are not seeking to return the United States, General Holder, and Postmaster General Donohoe as party defendants, the United States respectfully submits this paper, pursuant to 28 U.S.C. § 517, as a "statement of interest."

States District Court for the District of Maryland on these new allegations. Plaintiffs' motion in this Court, however, fails to provide this Court with any *evidence* to support their new contentions.

Whatever the merit of their new Maryland claims, this Court should summarily deny plaintiffs' instant motion. *First*, that motion is time-barred, as Federal Rule 60 provides that any motion seeking relief from judgment based on "newly-discovered evidence" or alleged "fraud" *must* be filed within one year of the District Court's entry of judgment. Nor can plaintiffs circumvent this limitations period by seeking relief under the limited "catch-all" provision of Federal Rule 60(b)(6). *Second*, plaintiffs have not provided *any* actual *evidence* to substantiate this new "information," and thus have presented this Court with nothing more than bald allegations, which cannot support a Federal Rule 60(b) motion. *Third*, plaintiffs cannot demonstrate either that they acted with diligence, or that they were prevented from litigating their case, during prior proceedings before this Court; indeed, the Fourth Circuit's unequivocal ruling to the contrary precludes plaintiffs from making this necessary showing.

BACKGROUND

Plaintiffs' instant motion, which asks this Court to exercise its discretion to provide them with "extraordinary relief" from the judgment it entered against them eighteen (18) months ago, spans just over four pages in length and provides virtually no discussion of the extensive procedural history of this civil action. As such, before identifying the numerous legal deficiencies in plaintiffs' application, it is important to provide a fulsome description of that procedural history – including both the judgment that this Court entered, and the Fourth Circuit's detailed affirmance of that judgment.

I. DISTRICT OF COLUMBIA PROCEEDINGS – PLAINTIFF'S FIRST THREE COMPLAINTS

Plaintiffs commenced this civil action by filing a complaint in the Superior Court for the District of Columbia, which was removed in February 2015 to federal district court in the District of Columbia (Dkt. No. 1). That complaint named, as party defendants, the Attorney General of the United States, Eric Holder, the Postmaster General of the United States, Patrick Donohoe, and a series of "unknown named defendants" of the Department of Justice, United States Postal Service, and the United States of America. Plaintiffs expressly averred that these "unknown named defendants" were "employees or agents of the federal government," and sued them in their *individual* capacities. *Id.* at 1; ¶9.

In April 2015, after the named defendants moved to dismiss their initial complaint (Dkt. Nos. 22-23), plaintiffs filed an amended complaint (Dkt. Nos. 29-30). For present purposes, this amended complaint was materially similar to the initial complaint – it named General Holder, Postmaster General Donohoe, and "unknown named agents" of the Department of Justice, United States Postal Service, and United States of America as party defendants (Dkt. No. 30). It also expressly sued these "unknown named agents" in their *individual* capacities, and again averred that they "were employees or agents of the federal government who acted under color of law." *Id.* The named defendants filed a new motion to dismiss plaintiffs' amended complaint (Dkt. No. 36). Plaintiffs would file no formal response to this motion; instead, in August 2015, plaintiffs elected to voluntarily dismiss their claims against the named defendants (Dkt. No. 38), thus leaving only the "unknown named defendants" in the action.

Plaintiffs then filed their *third* complaint in September 2015 – but in this instance, elected to do so through a *new civil action* (docketed at 1:15cv1437 (D.D.C.)). This complaint was also,

for present purposes, similar to plaintiffs' first two complaints. It named General Holder, Postmaster General Donohoe, and "unknown named agents" of the Department of Justice, United States Postal Service, and United States of America as party defendants, but added the United States of America – as an entity – as a party defendant. It expressly sued these "unknown named agents" in their *individual* capacities, and again averred that they "were employees or agents of the federal government who acted under color of law." *Id.* ¶10. Finally, plaintiffs maintained that the "unknown named agents" "act[ed] within the course and scope of their employment with the defendant United States of America." *Id.* ¶11. The District Court consolidated the two civil actions, and pursuant to the named defendants' motion to dismiss, ultimately transferred venue over that consolidated action to this Court (Dkt. Nos. 81-82).

II. PROCEEDINGS IN THIS COURT – PLAINTIFFS' FOURTH AND FIFTH COMPLAINTS

A. THIS COURT'S DISMISSAL OF SEVERAL CLAIMS WITH PREJUDICE

Subsequent to transfer to this Court, the named defendants renewed their motions to dismiss (Dkt. Nos. 99-100), and plaintiffs filed an opposition to the same (Dkt. No. 109). In an order dated September 13, 2017, this Court explained that during its consideration of those briefing papers, it could not determine which of plaintiffs' three prior complaints governed the action; as such, this Court ordered plaintiffs to "file a single Amended Complaint that contains *all of the claims* they wish to bring in this action, and which will be the *only* operative Complaint" (Dkt. No. 114 (emphasis added)).

Plaintiffs complied with this Court's order by filing their *fourth* complaint – one styled as a "Consolidated Complaint" – on September 15, 2017 (Dkt. No. 117). That complaint named as party defendants only General Holder, Postmaster General Donohoe, and "Unknown Named Agents" of the Department of Justice, United States Postal Service, and the United States of

America. *Id.* ¶¶9-11. Once again, the caption of plaintiffs' "Consolidated Complaint" identified that the "unknown named agents" were sued in their individual capacities. This "Consolidated Complaint," however, did not include the United States of America.

This Court held oral argument on the renewed motion to dismiss on September 22, 2018 (Dkt. No. 121). Later that same day, this Court entered an order that granted the renewed motion to dismiss in part (Dkt. No. 122). In pertinent part, noting that plaintiffs' counsel had "reiterated in open court" that the "Consolidated Complaint" was the "sole operative complaint in this civil action," this Court's order provided as follows:

> Although the United States had been named as a defendant in one of the previous Complaint filed in this civil action, it was not named as a defendant in the Consolidated Complaint and all of the individual defendants were served "individually" or "in their individual capacities." For the reasons stated in open court, defendants' Motion to Dismiss will be GRANTED as to Counts 7 [Virginia Computer Crimes Act] and 8 [Common Law Trespass] and HELD IN ABEYANCE as to Counts 1 through 6.

Id. And this Court further noted that the dismissal of plaintiffs' Virginia Computer Crime Act (Count 7) and Common Law Trespass (Count 8) were "with prejudice." *Id.*

On November 1, 2017, this Court issued an order and memorandum opinion on the remaining portions of the renewed motion to dismiss (Dkt. Nos. 133-34). In its memorandum opinion, this Court reiterated that the "Consolidated Complaint" was "the only operative complaint in this civil action," *Mem. Op.*, at 2 n.2, and that this complaint "dropped the United States of America as a defendant, leaving five defendants, all of whom are sued in their individual capacities," *id.* at 9. More substantively, on either jurisdictional or merits grounds, this Court dismissed each of the claims brought against General Holder and Postmaster General Donohoe. *Id.* at 11-23. And because its rationale on plaintiffs' Stored Communications Act claim (Count 4) applied equally to the "unknown named defendants," this Court ultimately dismissed that claim with prejudice. *Id.* at 21 n.22. Finally, in its accompanying order, this

Court provided that its resolution of the motion to dismiss left "Counts 1, 2, 3, 5, and 6 pending against the John Doe [or "unknown named"] defendants as the only issues in this litigation" (Dkt. No. 134).

Plaintiffs thereafter filed a motion that they styled as one to "add a party" (Dkt. No. 136), but in actuality asked this Court to allow them "to amend their Consolidated Complaint" yet again "to add the United States of America as a party to this civil action." This Court denied the motion in a detailed order dated November 16, 2017 (Dkt. No. 140). In that order, this Court noted that "[p]laintiffs first began this litigation in a different district nearly three years ago, during which time the Complaints have been amended multiple times." *Id.* at 3-4. Moreover, this Court "invested significant judicial time and resources in carefully considering" the renewed motion to dismiss "and in writing a Memorandum Opinion explaining its evaluation of the issues raised by that motion." *Id.* at 4. Noting that plaintiffs filed their motion "six weeks after" this Court's order indicating that the United States was no longer a defendant, this Court opined that "[a]llowing plaintiffs to add a defendant back into the litigation at this stage would lead to a regression of the litigation and impair judicial economy." *Id.* Nevertheless, even without the United States of America as a defendant, this Court noted that plaintiffs were still able to pursue their remaining allegations against the John Doe [or "unknown named"] agents. *Id.* at 5.

B. SUBSTITUTION OF THE "JOHN DOE" DEFENDANTS

Despite the fact that plaintiffs were able to take a Federal Rule 30(b)(6) deposition of a representative of the United States Postal Service, they sought additional time to obtain discovery concerning the identities of the putative "unknown named defendants." And as such, pursuant to plaintiffs' motion, on December 1, 2017, Magistrate Judge Anderson took the extraordinary step of vacating the previously-entered scheduling order (Dkt. No. 145). But that

relief came with a requirement of plaintiffs: recognizing that the only parties remaining in this action were the "unknown named agents," Magistrate Judge Anderson directed "to substitute new parties for the John Doe defendants by no later than January 5, 2018." *Id.* Before the expiration of this period, plaintiffs moved for an enlargement (Dkt. No. 148), which this Court granted, directing "plaintiffs [to] substitute new parties for the John Doe defendants by no later than February 5, 2018." *Ord.* (Dkt. No. 151), at 1. This Court, however, noted that "[t]his extension is the final extension that plaintiffs will receive because the interests of judicial economy and fairness to third parties and potential future defendants dictate that plaintiffs move forward with this litigation in as timely a fashion as possible." *Id.*

Plaintiffs' currently-pending motion unequivocally states that the United States "stonewalled all attempts at discovery." But this is simply untrue, as the Fourth Circuit would later confirm in a published decision that is now both "law of the case" and something that this Court must implement under the well-settled "mandate rule." *See Attkisson v. Holder*, 925 F.3d 606, 627 (4th Cir. 2019). Instead, as opposed to nuanced discovery requests seeking to obtain "readily-available information" concerning the identities of the "unknown named agents," plaintiffs served broad and wide-ranging subpoenas on seven agencies of the United States government. Those subpoenas sought, *inter alia*, all communications concerning either Sharyl Attkisson or CBS's reporting on both "Fast and Furious" and Benghazi – two of the most high-profile news events of recent memory – during a thirteen-year period. On January 12, 2018, Magistrate Judge Anderson denied plaintiffs' motion to compel compliance with these subpoenas, calling some of plaintiffs' discovery requests "too expansive" and "just . . . astounding" in their scope (Dkt. No. 173, at 27; 35-36), and directed plaintiffs to provide more specific requests (Dkt. Nos. 172-73). And Magistrate Judge Anderson further provided that

"obviously, the time period is short, so you . . . need to . .. focus on this and get it done as quickly as possible so that you can hopefully meet the February 5 deadline" (Dkt. No. 173, at 36-37).

Undersigned counsel did not hear further from plaintiffs in this regard until *sixteen days later* (just over a week before plaintiffs' deadline), when they sent a list of revised document requests that were not more specific or nuanced; rather, those revised requests *added* nine new requests, many with several sub-parts. *See Attkisson*, 925 F.3d at 618 ("Plaintiffs' lawyers later admitted to the court that they had not submitted any revised discovery requests to the government agencies until January 28, 2018 – just one week before their deadline."). After the federal agencies objected to these requests – on similar grounds to those that they identified months earlier – plaintiffs did not take any further action until *after* their February 5, 2018 deadline. *See id.* at 627 ("The Plaintiffs' significant periods of inactivity during three full years of litigation, their persistence in unjustifiably broad discovery requests despite repeated admonishments of the District Court and Magistrate Judge, and their decisions not to present additional difficulties with discovery to the court, show a lack of diligence in pursuit of their claims.").

C. PLAINTIFFS' FIFTH COMPLAINT – THE AMENDED CONSOLIDATED COMPLAINT

Plaintiffs filed their *fifth* complaint in this civil action – which they styled as their "First Amended Consolidated Complaint" – on February 5, 2018 (Dkt. No. 174). Despite this Court's prior orders, this complaint remarkably bore much similarity to the four previous complaints. Initially, despite this Court's unequivocal order that plaintiffs were *not* authorized to amend their complaint to add the United States of America as a party defendant, plaintiffs included the United States as a party defendant. And despite this Court's unequivocal order that the *only*

parties going forward would be the "unknown named agents" of the Department of Justice, United States Postal Service, and the United States of America, plaintiff's amended complaint identified no such agent. Instead, plaintiffs *kept* those "unknown named agents" as party defendants, and added a series of entities – not individuals – as party defendants: (1) the United States of America; (2) the Federal Bureau of Investigation ("FBI"); and (3) a series of corporate entities under the umbrella of the telecommunications company "Verizon." Plaintiffs' substantive claims also remained the same.

D. THIS COURT'S ENTRY OF JUDGMENT

The United States and the FBI moved to dismiss plaintiffs' "Amended Consolidated Complaint (Dkt. Nos. 200-02).[2] And in opposition to that dispositive motion, plaintiffs articulated the very same theory (*i.e.*, that "their attempts to get discovery into these matters have been stonewalled at every turn (Dkt. No. 206, at 9)), that animates – at least in part – their current post-judgment motion.

In an order dated May 15, 2018, this Court rejected plaintiffs' position and dismissed the "Amended Consolidated Complaint" and this civil action (Dkt. No. 213). More specifically, this Court noted that "none" of the parties in the "Amended Consolidated Complaint" were "appropriate substitutes for the John Doe defendants," and thus, plaintiffs had "gone well beyond the amendments for which they received leave of court." *Id.* at 4. This Court also reiterated its prior statement that because the putative events that gave rise to the civil action occurred a long time in the past, allowing the case to proceed would be "prejudicial to future defendants and would impair judicial economy." *Id.* at 4-5. In a rejoinder to plaintiffs' position about purported "stonewalling," this Court explained that because plaintiffs had made no appropriate progress in

[2]The Verizon defendants similarly moved to dismiss – a motion that this Court ultimately granted.

identifying the "John Doe" defendants, "the time ha[d] come to end this litigation against them as well." *Id.* at 6 & n.3. The same day, the Clerk of this Court entered judgment, pursuant to Federal Rule 58, against plaintiffs and in favor of defendants (Dkt. No. 214).

III. FOURTH CIRCUIT REVIEW & MANDATE

Plaintiffs noticed an appeal from this Court's adverse judgment to the Fourth Circuit (Dkt. No. 215). In that appeal, plaintiffs presented only three issues for the Fourth Circuit's review: (1) whether this Court erred in dismissing their *Bivens* claims against General Holder and Postmaster General Donohoe; (2) whether this Court erred in dismissing their Electronic Communications Privacy Act ("ECPA") claims against General Holder and Postmaster General Donohoe; and (3) whether this Court erred in dismissing their claims against the Verizon and "John Doe" defendants. *Attkisson v. Holder*, No. 18-1677 (4th Cir.) (Dkt. No. 21). Notably, plaintiffs did *not* challenge this Court's dismissal of the United States as a party defendant with prejudice. *Id.*

In an opinion first issued in March 2019,[3] the Fourth Circuit affirmed this Court's dismissal in full. *See Attkisson v. Holder*, 925 F.3d 606 (4th Cir. 2019). Initially, the Fourth Circuit panel affirmed this Court's dismissal of plaintiffs' claims against General Holder and Postmaster General Donohoe, holding that this Court correctly concluded that neither an implied *Bivens* remedy nor a cause of action under the ECPA was available under these circumstances (and that both individual capacity defendants were entitled to qualified immunity as to the ECPA claim in any event). *See id.* at 620-23.

[3]In May 2019, the Fourth Circuit granted plaintiffs' petition for *panel* rehearing on very limited grounds, and thus issued an amended opinion as to a single footnote that is immaterial to the issues currently before this Court (Dkt. No. 223). The Fourth Circuit would again amend its opinion in June 2019; again, in a limited fashion that is immaterial to the issues currently before this Court (Dkt. Nos. 226-27).

With respect to the "John Doe" and Verizon defendants, the Fourth Circuit explained that it was "entirely satisfied" that this Court "did not abuse its discretion in dismissing the Amended Complaint and denying the plaintiffs leave to further amend their complaint." *Id.* at 624. In this regard, the Fourth Circuit rejected plaintiffs' position that the United States (and Verizon) had "stonewalled" plaintiffs' attempts to obtain discovery. Noting in particular the "significant periods of inactivity by the plaintiffs," the Fourth Circuit explained that "the record simply fail[ed] to show that the plaintiffs acted '*diligently*' in pursuing that discovery." *Id.* at 626 (emphasis added). And the Fourth Circuit would repeat its conclusion that plaintiffs were not diligent during proceedings before this Court:

> Whatever the minimum requirements for good cause may be, the plaintiffs have failed to show it. The facts that support the dismissal of the Amended Complaint under Rule 41(b) also show the plaintiffs *lack of diligence* for purposes of Rule 4(m). The plaintiffs' significant periods of inactivity during three full years of litigation, their persistence in unjustifiably broad discovery requests despite repeated admonishments of the District Court and Magistrate Judge, and their decisions not to present additional difficulties with discovery to the court, show *a lack of diligence* in pursuit of their claims.

Id. at 627 (emphasis added). In the end, the Fourth Circuit clarified that this Court's dismissal of the "John Doe" defendants was without prejudice. *See id.* at 628.

The Fourth Circuit issued its mandate on July 9, 2019 (Dkt. No. 228).

IV. PLAINTIFFS' CURRENT RULE 60 MOTION & NEW CIVIL ACTION IN THE DISTRICT OF MARYLAND

On January 9, 2020 – over eighteen (18) months after this Court entered judgment against them – plaintiffs filed the current motion, which ostensibly seeks relief from that judgment pursuant to Federal Rule 60 (Dkt. Nos. 229; 232).[4] The very next day, January 10, 2020, plaintiffs filed a brand new civil action in the United States District Court for the District of

[4]Plaintiffs, for reasons that are not obviously apparent, filed that motion twice on this Court's docket.

Maryland against five new individual-capacity defendants. *Attkisson v. Rosenstein*, 1:20cv68 (D. Md.).

A. RULE 60 MOTION

Despite recognizing that the relief they seek is "extraordinary," plaintiffs' instant motion spans a scant four pages of text,[5] does not even identify the text of the relevant Federal Rules under which they seek such relief (let alone cite to any pertinent authority interpreting those rules), and uses a caption that this Court has not authorized and that includes defendants that are not now before this Court.

The gravamen of the motion is plaintiffs' bald statement that they have uncovered new information about the purported incursion into their personal computing technology:

> In August 2019 a former Government employee directly involved in the surveillance operation came forward to provide information about the illegal surveillance operation that resulted in surveillance of the Attkissons.

Mtn. (Dkt. No. 229), at 2. Nowhere do plaintiffs even identify, let alone submit any competent evidence (*e.g.*, an affidavit) from, this alleged "former Government employee"; indeed, the only "evidence" attached to plaintiffs' instant motion is an affidavit that they previously submitted to this Court, *id.* ex.A, and an affidavit recounting purported forensic analysis done on one of plaintiffs' computer in *2013*, *id.* ex.B – six *years before* this Court entered judgment against plaintiffs. Nevertheless, plaintiffs maintain that this former Government employee "has now established definitively" that their allegations are accurate, and that despite the Fourth Circuit's explicit rejection of this argument, "the Government" somehow concealed this "evidence" by "stonewall[ing] all attempts at discovery." *Id.* at 4.

[5]In violation of the Local Rules of this Court, plaintiffs have not submitted a separate memorandum to accompany their motion, which is grounds alone to deny their requested relief. *See* Loc. Civ. R. 7(F)(1).

On this basis, plaintiffs "move for relief from the original judgment in the Eastern District of Virginia, CITE [sic], pursuant to Federal Rule of Civil Procedure 60(b)(2), 60(b)(3), or 60(b)(6)." *Id.* at 2-3. More specifically, plaintiffs ask this Court to "permit" them "to file a new Complaint naming the John Doe defendants, as per the Fourth Circuit's dismissal without prejudice, or alternatively grant relief from the earlier judgment under Rule 60(b) to allow plaintiffs to amend their original complaint to include the newly-acquired whistleblower information." *Id.* at 4-5. It is particularly unclear – especially given the caption that adorns plaintiffs' motion – whether plaintiffs seek only to name these new individuals as defendants, or again to name the United States, General Holder, and Postmaster General Donohoe as defendants (despite the fact that this Court's dismissal of those defendants had nothing whatsoever to do with the underlying merits of their allegations).

B. NEW CIVIL ACTION – DISTRICT OF MARYLAND

One day after filing the instant motion, on January 10, 2020, plaintiffs filed a new civil action in the United States District Court for the District of Maryland, bearing the same caption that they utilized in the instant motion. *Attkisson v. Rosenstein*, 1:20cv68 (D. Md.) (Dkt. No. 1) (attached as Exhibit A). That complaint names five new individual defendants, and is ostensibly premised upon the new allegations that plaintiffs reference in their motion.

The gravamen of this new complaint is plaintiffs' allegations that in his capacity as the former United States Attorney for the District of Maryland, Rod Rosenstein, ordered the incursion into their home computer network. *Id.* ¶¶12; 28. Plaintiffs generically aver that Rosenstein was assisted in this putative endeavor by other individuals "physically located in Maryland," including a former Secret Service agent (who is currently incarcerated as a result of "corruption"), a former FBI official, and two others. *Id.* ¶¶17-21. The remainder of plaintiffs'

new complaint is very similar, and does not add any material allegations, to their several complaints in this Court.[6]

ARGUMENT

As stated above, although they purport to seek relief pursuant to Federal Rule 60, plaintiffs do not even identify the text of that rule, let alone any of the authority interpreting the meaning of that rule and the significant burden that they face in obtaining their desired relief. Federal Rule 60 provides, in pertinent part, as follows:

> (b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, or, or proceeding for the following reasons:
>
> . . . .
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> . . . .
>
> (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). As plaintiffs seemingly recognize, the Fourth Circuit has held that "[i]n general, 'reconsideration of a judgment after its entry is an *extraordinary remedy* which should be used *sparingly*.'" *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (emphasis added).

As will be seen below, plaintiffs cannot come close to meeting this significant burden.

[6]Plaintiffs' motion seeks permission to "refile" their civil action or else to reopen this action pursuant to Federal Rule 60(b). Given that plaintiffs have already refiled their civil action in Maryland, it is unclear what they are asking this Court to permit with respect to "refiling." As such, this opposition addresses plaintiffs' Federal Rule 60(b) arguments.

I. PLAINTIFFS ARE NOT ENTITLED TO RELIEF BASED ON ALLEGED "NEWLY DISCOVERED EVIDENCE"

Plaintiffs first seek relief pursuant to Federal Rule 60(b)(2), which generally authorizes a court to reopen a final judgment based on "newly discovered evidence." Leaving aside the inescapable facts that plaintiffs have not presented this Court with any "newly discovered *evidence*" and the Fourth Circuit has now conclusively held that plaintiffs were *not* "diligent" during prior proceedings in this Court, plaintiffs' request is time-barred.

A. THE ONE-YEAR "ABSOLUTE" LIMITATIONS PERIOD PRECLUDES PLAINTIFFS' RESORT TO FEDERAL RULE 60(b)(2)

Although not identified in plaintiffs' motion, Federal Rule 60 places a strict one-year limitations period on certain motions for relief from a final judgment:

> (c)(1) A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) *no more than a year after the entry of the judgment* or order or the date of the proceeding.

FED. R. CIV. P. 60(c)(1) (emphasis added). As the Fourth Circuit has explained, this limitations period ensures the "[r]espect for the finality of judgments . . . engrained in our legal system." *Great Limited Express, Inc. v. Int'l Brot. of Teamsters*, 675 F.2d 1349, 1354-55 (4th Cir. 1982).[7]

The movants – here, plaintiffs – "bear the burden of showing timeliness." *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016). And this is a burden that plaintiffs have not attempted to, nor could in any event, bear. This Court formally entered judgment on May 15, 2018 (Dkt. No. 214), and plaintiffs filed their instant Federal Rule 60 motion on January 9, 2020 (Dkt. Nos. 229; 231) – well more than one year later. Importantly, as the text of the pertinent rule provides, the one year period runs from "the entry of the judgment," and thus, the existence of a pending

[7]Notably, this Court employed an analogous rationale in dismissing the claims against the "John Doe" defendants in the first instance. *Ord.* (Dkt. No. 213) (holding that because the events giving rise to plaintiffs' claims occurred long ago, allowing further litigation would "be prejudicial to future defendants and would impair judicial economy").

appeal does not toll the limitations period. *See, e.g.*, *Wyche v. Advanced Drainage Sys.*, 332 F.R.D. 109, 113 (S.D.N.Y. 2019) (collecting cases). Plaintiffs' Federal Rule 60(b)(2) motion is thus untimely, and should be denied on this ground alone.

B. PLAINTIFFS' FEDERAL RULE 60(b)(2) MOTION FAILS ON ITS MERITS

Even if plaintiffs could overcome the time-barred nature of their motion, they have – for many reasons – come nowhere close to demonstrating entitlement to "extraordinary relief" based on "newly-discovered evidence." As the Fourth Circuit has held, one seeking relief pursuant to Federal Rule 60(b)(2) must establish the following:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that it is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989); *see also id.* (explaining that the standard under Federal Rule 60(b)(2) is the same as that which applies to motions brought pursuant to Federal Rule 59(b)). Plaintiffs' motion does not grapple with this analytical framework in any way, which is grounds alone to deny the motion. *See Quillin v. C.B. Fleet Holding Co.*, 328 Fed. Appx. 195, 203 (4th Cir. 2009) ("Quillin failed to meet this burden or even to meaningfully address the *Boryan* standard."). But in any event, plaintiffs' motion fails at several points of this framework.

1. *First*, and most fundamentally, plaintiffs have not presented this Court with any newly-discovered *evidence* whatsoever. Notwithstanding the cryptic statements about a putative government "whistleblower" contained within the body of their instant motion, they have not provided anything from this putative "whistleblower" (*e.g.*, an affidavit) that has any evidentiary

value.[8] In pursuit of "extraordinary relief," plaintiffs have thus provided this Court with only their own conclusory *contentions* about possible evidence, which – as several courts have cogently concluded, is simply insufficient to justify the type of "extraordinary relief" authorized by Federal Rule 60(b)(2).[9] *See Richie v. Taylor*, 701 Fed. Appx. 45, 48 (2d Cir. 2017) (affirming denial of Federal Rule 60(b)(2) motion because movant had only identified new "allegations" and "not admissible evidence"); *FDIC v. Arcero*, 741 F.3d 1111, 1118 (10th Cir. 2013) ("Newly discovered evidence must be *admissible* evidence in order to grant relief under Rule 59 or 60(b)(2)"); *Foster v. BNP Res. Props. Lim. Ptrn.*, 2008 WL 11348323, at *8 (D.S.C. Apr. 28, 2008) (rejecting Federal Rule 60(b)(2) motion because it relied on hearsay). As one scholarly treatment of the issue has explained:

> The requirements that newly-discovered evidence must be both admissible and credible would seem self-evident. There is no reason to set aside a judgment on the basis of evidence that could not be admitted at a new trial or, if admitted, would be unconvincing. For example, speculation about the existence of what some witness would testify to or what some document would show is *clearly incompetent evidence*.

12 MOORE'S FED. PRAC. § 60.42[6], at 60-132 (3d ed.) (emphasis added).[10]

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[8]Instead, as recounted above, the only "evidence" attached to plaintiffs' motion was an affidavit from a computer analyst that plaintiffs filed during previous proceedings before this Court, *Mtn.*, ex.A, and a 2018 affidavit from another consultant who examined one of plaintiffs' computers (at plaintiffs' request) in *2013*, *id.* ex.B.

[9]It should be noted that plaintiffs cannot "cure" this deficiency by providing such "evidence" in reply to this opposition paper. *See generally Bank of the Ozarks v. Perfect Health Skin & Body Ctr., PLLC*, 2019 WL 2513299, at *2 (E.D. Mich. June 18, 2019) ("Defendant cannot cure these defects in a reply brief."); *see also Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (holding that matters raised for the first time in a reply brief are not properly before the court of appeals).

[10]Placed in terms of the Fourth Circuit's *Boryan* framework, evidence cannot be either "material" or "likely to produce a new outcome if the case were retried" if that putative "evidence" solely consists of bald statements made in a legal memorandum. *See Schultz v. Butcher*, 24 F.3d 626, 631 (4th Cir. 1994) (holding that "a party seeking a new trial under Rule 60(b)(2) must show that the missing evidence was 'of such a material and controlling nature as

Because the only thing that plaintiffs have provided in conjunction with their instant motion is conclusory allegations in a legal memorandum about what an unnamed individual[11] told their counsel, and not actual *evidence* of any kind, this Court should deny their motion. *See, e.g.*, *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (refusing to consider "[c]ounsel's unsupported assertions in [a] brief" as evidence); *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) ("An attorney's unsworn statements in a brief are not evidence.").

2. *Second*, plaintiffs cannot demonstrate that they acted with the requisite "diligence" to justify Federal Rule 60(b)(2) relief.

Contrary to their current protestations to the contrary, the Fourth Circuit has *explicitly* held that they were *not* "diligent" in conducting discovery during prior proceedings before this Court. Indeed, it is hard to imagine how the Fourth Circuit could have been any clearer on this issue:

> Whatever the minimum requirement for good cause may be, the plaintiffs have failed to show it. The facts that support the dismissal of the Amended Complaint under Rule 41(b) also show the plaintiffs' *lack of diligence* for purposes of Rule 4(m). The plaintiffs' significant periods of inactivity during those three full years of litigation, their persistence in unjustifiably broad discovery requests despite repeated admonishments of the District Court and Magistrate Judge, and their decisions not to present additional difficulties with discovery to the court, show *a lack of diligence* in pursuit of their claims.

Attkisson, 925 F.3d at 627; *see also id.* at 626 (holding that "the record simply fails to show that the plaintiffs acted '*diligently*' in pursuing that discovery"). The well-settled "mandate rule"

[would] probably [have] change[d] the outcome'" (quoting *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 n.10 (1st Cir. 1988))).

[11]By failing even to name this individual, it is impossible for defendants – let alone this Court – to adjudge the credibility of any evidence that this individual might possibly provide in the future (leaving aside the reality that plaintiffs needed to produce such evidence *with their instant motion*). *See Daniels v. Pipefitters Ass'n Local Union No. 597*, 983 F.2d 800, 802 (7th Cir. 1993).

prevents this Court from entertaining any argument that in any way runs counter to the Fourth Circuit's opinion. *See, e.g.*, *Mangum v. Hallembaek*, 910 F.3d 770, 776 (4th Cir. 2019) ("[O]nce a case has been decided on appeal and a mandate issued, the lower court may not deviate from that mandate but is required to give full effect to its execution." (quoting *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414 (4th Cir. 2005)); *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) ("The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court had laid to rest."). Plaintiffs are thus barred from demonstrating that they acted with the necessary "diligence" to warrant the "extraordinary relief" authorized by Federal Rule 60(b)(2).[12]

II. PLAINTIFFS ARE NOT ENTITLED TO RELIEF BASED ON ALLEGED "FRAUD" OR "MISREPRESENTATION"

Plaintiffs also claim to seek relief pursuant to Federal Rule 60(b)(3), which authorizes relief from a prior judgment based on "fraud" or "misrepresentation." This sub-provision of Federal Rule 60(b), however, also provides no relief for plaintiffs under these circumstances.

A. THE ONE-YEAR "ABSOLUTE" LIMITATIONS PERIOD SIMILARLY PRECLUDES PLAINTIFFS' RESORT TO FEDERAL RULE 60(b)(3)

As its plain language demonstrates, the same one-year limitations period described above, *see* FED. R. CIV. P. 60(c)(1), applies equally to motions brought pursuant to Federal Rule 60(b)(3). And thus, the same discussion explaining that plaintiffs' Federal Rule 60(b)(2) motion

[12]Before leaving this issue, it is important once again to rebut plaintiffs' view that the United States somehow "stonewalled" discovery efforts. As the Fourth Circuit recognized, the United States simply insisted that plaintiffs adhere to the Federal Rules of Civil Procedure, especially as courts have interpreted those rules in the context of limited "John Doe" discovery. Although plaintiffs maintain here that the United States "concealed" evidence, they cite no legal authority for the proposition that the United States has some independent and affirmative duty to produce official government information to them in the absence of a proper discovery request under the Federal Rules. This Court should no longer countenance plaintiffs' repeated statements to the contrary.

is time barred, *see supra* Part I.A, applies equally to plaintiffs' Federal Rule 60(b)(3) motion. This court should deny plaintiffs' motion on this ground alone.

B. PLAINTIFFS' FEDERAL RULE 60(b)(3) MOTION FAILS ON ITS MERITS

Even absent the significant time bar problem, plaintiffs' Federal Rule 60(b)(3) motion is meritless. Once again, plaintiffs' motion does not discuss the analytical framework under which this Court must evaluate its motion, which should serve as grounds alone for denial. But in any event, the Fourth Circuit has "set forth three factors that a moving party must establish to prevail in a Rule 60(b)(3) motion":

> (1) the moving party must have a meritorious defense[13]; (2) the moving party must prove misconduct by clear and convincing evidence; and (3) the misconduct prevented the moving party from fully prosecuting its case.

Schultz, 24 F.3d at 630 (quoting *Square Constr. Co. v. Washington Metro. Area Trans. Auth.*, 657 F.2d 68, 71 (4th Cir. 1981)). Plaintiff's resort to Federal Rule 60(b)(3) fails on each of these elements.

1. *First*, for similar reasons to those described above, *see supra* Part. II.B.1, plaintiffs' sparse motion does not demonstrate that they have a "meritorious claim." Put simply, plaintiffs have failed to provide any *evidence* supporting their new assertion about the statements of this putative Government "whistleblower," much less a viable and meritorious claim. *See Ebersole v. Kline-Perry*, 292 F.R.D. 316, 321 (E.D. Va. 2013) (holding that the requirement of a "meritorious" claim requires "more than mere allegations" (quoting *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970)) That failure also alone requires denial, as this Court performs the

[13]The Fourth Circuit's opinion was issued in the context of a *defendant* seeking relief from an adverse judgment; thus, in a case in which a *plaintiff* seeks such relief, this initial element would be modified to require demonstration of a "meritorious claim." *See Tyson v. Ozmint*, 246 F.R.D. 517, 519 (D.S.C. 2007).

necessary "balanc[ing of] the competing policies favoring the finality of judgments and justice being done in view of *all the facts*." *Schultz*, 24 F.3d at 630 (emphasis added).

2. *Second*, plaintiffs have not established that the United States committed any "fraud" or "misconduct," let alone by "clear and convincing evidence." Indeed, although plaintiffs reflexively state in their motion that the United States made "clearly false statements suggesting that no cyber-intrusion occurred," *Mtn.*, at 3, that motion does not cite to, or even identify, the specific statements – whether contained in a transcript of an oral hearing or a written paper filed with this Court – that were allegedly false.[14] As such, it is next to impossible even to evaluate whether plaintiffs have identified any inaccuracy, let alone the type of "fraud" or "misrepresentation" necessary to warrant Federal Rule 60(b)(3) relief. In any event, plaintiffs' failure to provide *any* evidence concerning (or from) their putative "whistleblower" precludes them from proving the inaccuracy in any such statement, let alone by the required "clear and convincing evidence." Moreover, as the Fourth Circuit recognized here, *see Attkisson*, 925 F.3d at 626, it is certainly not "misconduct" of any kind for a party to require a litigant to present a proper discovery request that complies with the Federal Rules of Civil Procedure – and the orders of the District Court – before producing documentary material.

3. *Third*, even assuming that an inaccurate statement was made, plaintiffs cannot possibly satisfy their burden to establish that any purported inaccuracy specifically prevented them from "fully presenting" their "case." *See Richardson v. Bodche-Noell Enters., Inc.*, 78 Fed. Appx. 883, 889 (4th Cir. 2003) (affirming denial of Federal Rule 60(b)(3) motion because an attorney's misconduct "did not prevent" the movant "from fully presenting its case"); *see also Sanchez v. UPS, Inc.*, 2013 WL 5348224, at *1 (D. Ariz. Sept. 24, 2013) (holding similarly with respect to

[14]And although it potentially goes without saying, undersigned counsel vociferously denies making any intentionally inaccurate statement..

misstatement). And in fact, the Fourth Circuit has implicitly rejected any such argument by explaining that plaintiffs had a sufficient opportunity to litigate their case, and failed to do so with the proper amount of diligence. *See Attkisson*, 925 F.3d at 618 ("Because of the plaintiffs' multitude of procedural violations . . . the court declined to authorize the Plaintiffs to again amend their complaint."); *see also id.* at 626 ("[T]he District Court and the Magistrate Judge had both repeatedly warned the Plaintiffs to focus on identifying the "John Doe" agents prior to the February 5, 2018 deadline . . . the record simply fails to show that the plaintiffs acted 'diligently' in pursuing that discovery."). In order to prevail on their Federal Rule 60(b)(3) motion, plaintiffs must ask this Court to ignore the Fourth Circuit's ruling – which, pursuant to the mandate rule, this Court is powerless to do.

IV. PLAINTIFFS CANNOT CIRCUMVENT THE LIMITATIONS INHERENT IN FEDERAL RULES 60(b)(2) AND 60(b)(3) BY SEEKING RELIEF UNDER THE "CATCH-ALL" PROVISION OF FEDERAL RULE 60(b)(6)

Finally, plaintiffs ask this Court for relief pursuant to Federal Rule 60(b)(6), which is colloquially known as the "catch-all" provision. *Fattahi v. ATF*, 195 F. Supp. 2d 745, 748 n.6 (E.D. Va. 2002), *aff'd*, 328 F.3d 176 (4th Cir. 2003). It is by now well-established that a Rule 60(b)(6) motion "may not be granted absent "extraordinary circumstances." *Id.*; *see also Ackermann v. United States*, 340 U.S. 193, 199 (1950).

A. THE GRAVAMEN OF PLAINTIFFS' MOTION IS THE ALLEGED EXISTENCE OF "NEW EVIDENCE"

As the Supreme Court itself has held, when a party's request for Federal Rule 60 relief is premised upon circumstances addressed in one of the *specific* sub-provisions of the rule (*i.e.*, Federal Rule 60(b)(1)-(5)), a court is obligated to consider the motion under the appropriate *specific* sub-provision, and not the general "catch-all" sub-provision of Federal Rule 60(b)(6). *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988); *see also*

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Ptnr., 507 U.S. 380, 393 (1993). The reason for this conclusion is perhaps obvious – because the drafters of the Federal Rules placed strict limitations on relief pursuant to Federal Rules 60(b)(1)-(5) (including the one year time limit contained within Federal Rule 60(c)(1)), those limitations would be rendered meaningless if a litigant could circumvent them simply by identifying a different rule provision. *See, e.g.*, *Arrieta v. Battaglia*, 461 F.3d 861, 864-65 (7th Cir. 2006); *Cotto v. United States*, 993 F.2d 274, 278 (1st Cir. 1993).

The indisputable gravamen of plaintiffs' instant motion is their identification of potential new evidence from a putative "whistleblower"; indeed, every argument that plaintiffs present in their short motion revolves around these new allegations. *Mtn.*, at 2-4. Accordingly, plaintiffs' request for Federal Rule 60(b) relief – as they themselves implicitly acknowledge – falls easily within the ambit of Federal Rule 60(b)(2)'s provision of relief from a judgment based on newly-discovered evidence. *See Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011); *see also Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088-89 (9th Cir. 2001) (same). Under binding Fourth Circuit authority, plaintiffs' motion pursuant to Federal Rule 60(b)(6) thus fails at the threshold.

B. PLAINTIFFS HAVE NOT IDENTIFIED "EXTRAORDINARY CIRCUMSTANCES"

Notwithstanding their reflexive position that these circumstances – *i.e.*, a litigant's identification of new allegations post-judgment – are exactly the situation that "Rule 60(b) is meant to remedy," *Mtn.*, at 3, plaintiffs' motion provides no supporting authority. If the remedy of Federal Rule 60(b) is reserved for "extraordinary circumstances" that "should be used sparingly," plaintiffs' failure to provide an iota of supporting authority for their conclusory statements must itself require denial of the motion. This is only exacerbated by plaintiffs' failure to present this Court with any *evidence* confirming the bald allegations found in the motion.

More fundamentally, it is extremely difficult to overstate the limited nature of the relief available under Federal Rule 60(b)(6). Each of the arguments articulated above with respect to Federal Rules 60(b)(2) and (b)(3) would thus apply equally here to preclude Federal Rule 60(b)(6) relief. In addition, however, the Fourth Circuit (and its sister circuits) have specifically recognized that Federal Rule 60(b)(6) relief is not available to those litigants who seek relief from a judgment that was issued based on their own litigative choices. *See Schwartz v. United States*, 976 F.2d 213, 218 (4th Cir. 1992) (holding that "strategic decisions made during the course of litigation provide no basis for relief under Federal Rule 60(b)(6)"); *see also Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). And here, plaintiffs yet again run headlong into the Fourth Circuit's specific holding that they did not act with diligence in conducting discovery, by, *inter alia*, "insisting on unjustifiably broad discovery requests." *Attkisson*, 925 F.3d at 627. Federal Rule 60(b)(6) provides no relief to plaintiffs here.

CONCLUSION

For the reasons stated above, there are no grounds for this Court to order "extraordinary relief" from the judgment it issued in May 2018.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will transmit a true and correct copy of the same to the following:

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