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

GLENDA E. JOHNSON, Plaintiff, vs. INTERNAL REVENUE SERVICE, DEPARTMENT OF JUSTICE, agencies of the United States, and DAVID NUFFER, an individual, Defendants.	Civil No. 2:20-cv-00090 **UNITED STATES' MOTION TO DISMISS THE COMPLAINT** Magistrate Judge Cecilia M. Romero

On February 12, 2020, Glenda Johnson filed a complaint in this matter against the Internal Revenue Service, the Department of Justice, and United States District Court Judge David Nuffer.[1] Johnson seeks to stop further proceedings in *United States v. RaPower-3, LLC, et*

[1] ECF No. 1; ECF No. 1-2. Because of a scanning error, ECF No. 1-2 is the operative complaint in this matter. *See* ECF No. 5.

al. (over which Judge Nuffer is presiding) and damages for alleged injuries suffered in that case. The Court should dismiss Glenda Johnson's complaint under Fed. R. Civ. P. 12 because this Court lacks subject matter jurisdiction over the claims she purports to bring, and she has failed to state a claim for which equitable relief can be granted.[2]

I. Glenda Johnson is attempting to use this suit to evade lawful orders of this Court.

After nearly three years of litigation and a 12-day bench trial, Judge David Nuffer concluded that Glenda Johnson's husband Neldon Johnson, along with Neldon Johnson's entities International Automated Systems, Inc. ("IAS"), RaPower-3, LLC, and LTB1, LLC, ran "a hoax funded by the American taxpayer by defendants' abusive advocacy of the tax laws."[3] The hoax is an abusive tax scheme that Johnson created. Neldon Johnson claimed to have "revolutionary" solar energy technology. He sold so-called "solar lenses" to individuals (and directed others to sell the lenses) by telling customers that they could claim tax benefits from the purchase – a depreciation deduction and a solar energy credit.[4] These statements were false.

The Court found that Neldon Johnson and the other defendants knew, or had reason to know, that their statements about the tax benefits purportedly related to buying solar lenses were

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[2] This motion is brought by the United States through its undersigned attorneys. The undersigned attorneys do not represent Judge Nuffer.

[3] Excerpts from Trial Transcript in *United States v. RaPower-3, LLC, et al.*, No. 2:15-cv-00828-DN-EJF (D. Utah) ("*RaPower-3*"), 2516:2-3, *available in that case at* ECF No. 429-1. We ask that the Court take judicial notice of all publicly filed matters referenced herein. *See* Fed. R. Evid. 201(b), (c)(2). These matters may properly be considered on this motion to dismiss. Fed. R. Evid. 201(d); *S.E.C. v. Goldstone*, 952 F. Supp. 2d 1060, 1192 (D.N.M. 2013) ("[W]hen considering a motion to dismiss, the court may take judicial notice of its own files and records, matters of public record, as well as the passage of time." (quotation and alteration omitted)). *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it.").

[4] *E.g.*, *RaPower-3*, 343 F. Supp. 3d 1115, 1134–35 (D. Utah 2018).

false or fraudulent.[5] Neldon Johnson repeatedly ignored advice from attorneys and tax professionals in promoting his abusive tax scheme.[6]

For all of these reasons (and others), Judge Nuffer issued a comprehensive injunction against Neldon Johnson and the other defendants, and ordered them to disgorge their gross receipts from the scheme. Neldon Johnson was ordered to disgorge more than $50 million.[7] To ensure enforcement of the disgorgement order, Judge Nuffer also ordered an asset freeze and appointed R. Wayne Klein as Receiver over RaPower-3, IAS, LTB1, their subsidiaries and affiliates, and the assets of Neldon Johnson.[8] Neldon Johnson and IAS, through their attorneys of record in *RaPower-3*, have appealed the injunction and other orders in that case.[9]

The Corrected Receivership Order in *RaPower-3* also required the Receiver "to 'provide a recommendation' regarding whether IAS should be 'liquidated or dissolved.'"[10] If the Receiver found liquidation appropriate, the Receiver was ordered to propose a liquidation plan.[11] After

[5] *RaPower-3*, 343 F. Supp. 3d at 1171-90.

[6] *RaPower-3*, 343 F. Supp. 3d at 1189-90.

[7] *RaPower-3*, 343 F. Supp. 3d at 1197-1202.

[8] *RaPower-3*, 325 F. Supp. 3d 1237 (D. Utah 2018) (Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, ECF No. 444), and Corrected Receivership Order, ECF No. 491.

[9] Ex. 926, *United States v. RaPower-3, LLC, et al.*, No. 18-4150, Appellants' Docketing Statement § IV at 4-5 (10th Cir. Oct. 24, 2018). For the sake of clarity and continuity with *RaPower-3*, we will number exhibits serially from the list started in that case.

[10] *Klein v. Glenda Johnson*, No. 2:19-CV-00625-DN-PK, 2019 WL 6700245, at *2 (D. Utah Dec. 9, 2019) (Nuffer, J.) (quoting Corrected Receivership Order ¶ 85).

[11] *Klein*, 2019 WL 6700245, at *2.

investigation, the Receiver determined that liquidating IAS was appropriate, drafted a plan for liquidation, and moved to cancel IAS shares.[12] The Court then cancelled IAS shares.[13]

As part of his duties to marshal assets of the Receivership, the Receiver sued Glenda Johnson to recover funds allegedly improperly transferred to her from Receivership Entities, in *Klein v. Glenda Johnson*.[14] Glenda Johnson is represented in that matter by the same attorneys representing IAS on appeal.[15] Through her attorneys of record, she "asserted counterclaims against [the Receiver] for inverse condemnation and a *Bivens* violation of due process relating to the cancellation of the IAS shares."[16] The Receiver moved to dismiss Glenda Johnson's counterclaims for lack of subject matter jurisdiction.[17] This Court granted the motion and dismissed Glenda Johnson's counterclaims on December 9, 2019.[18] Specifically, this Court found that Glenda Johnson's counterclaims were barred because: 1) she did not seek leave of the *RaPower-3* court to bring the counterclaims, and 2) she failed to show why the Receiver was not immune from suit because he was carrying out the orders of his appointing Judge by following the procedure for evaluating the need to, and then moving to, cancel IAS shares.[19] The Court observed that her counterclaims "effectively [sought] collateral review of judicial orders entered

[12] *Klein*, 2019 WL 6700245, at *2.

[13] *Klein*, 2019 WL 6700245, at *2.

[14] *Klein*, 2019 WL 6700245, at *1.

[15] *See* Ex. 926; Answer, Jury Demand and Counterclaim, *Klein v. Johnson*, No. 2:19-cv-00625, Docket No. 5 (filed Sept. 27, 2019).

[16] *Klein*, 2019 WL 6700245, at *1.

[17] *Klein*, 2019 WL 6700245, at *1-3.

[18] *Klein*, 2019 WL 6700245, at *1-3.

[19] *Klein*, 2019 WL 6700245, at *1-3.

in *RaPower-3* relating to [the Receiver's] authority as a receiver and the cancellation of IAS shares."[20]

After this Court dismissed her counterclaims in *Klein*, Glenda Johnson (acting *pro se*) initiated this suit on February 12, 2020.[21] Again, she is effectively seeking collateral review of judicial orders entered in *RaPower-3* – and, now, *Klein* as well – relating to the Receiver's authority and the cancellation of IAS shares. She attempts to skirt those prior orders by couching her allegations against the United States rather than directly against the Receiver. For purposes of this motion, we assume that she asserts each cause of action against the United States. Specifically:

- In her First Cause of Action, Glenda Johnson claims that the United States violated her "due process" rights because the United States did not provide her notice "before obtaining an order from Judge David Nuffer canceling the shares in IAS," including her own shares.[22]
- In her Second Cause of Action, Glenda Johnson claims that IAS was not properly a party to *RaPower-3*, and therefore the Court's order cancelling shares in IAS was improper.[23]
- In her Third Cause of Action, Glenda Johnson claims that the judgment in *RaPower-3* is void because "it violates the requirements for both Due Process and

[20] *Klein*, 2019 WL 6700245, at *3.

[21] ECF No. 1-2.

[22] ECF No. 1-2 at 4-5, First Cause of Action.

[23] ECF No. 1-2 at 5-7, Second Cause of Action.

Jurisdiction," and "violates [her] rights under the 14th Amendment of the US Constitution."[24]

Glenda Johnson tacks on an additional allegation, not identified as a "cause of action," that the United States violated the United Nations Convention Against Corruption, "[s]pecifically Article 19, Abuse of Functions."[25]

To remedy the alleged harm on all claims, Glenda Johnson seeks monetary damages; "an injunction prohibiting Defendants from proceeding further against [her] until a decision has been made about his [*sic*] Constitutional rights to Due Process and Equal Protection under the law;" "a declaration that the judgment in [*RaPower-3*] is void and of no effect;" and a "criminal investigation" purportedly under the United Nations Convention Against Corruption.[26]

II. Glenda Johnson's frivolous complaint should be dismissed.

Glenda Johnson's complaint should be dismissed because this Court lacks subject matter jurisdiction and she failed to state a claim for which relief can be granted.[27]

[24] ECF No. 1-2 at 7-8, Third Cause of Action.

[25] ECF No. 1-2 at 2, 4.

[26] ECF No. 1-2 at 8, Prayer for Relief. Glenda Johnson's complaint recites much of the same language as Neldon Johnson's *pro se* complaint against the same named parties. *Neldon Johnson v. IRS*, No. 4:18-cv-00062, Docket No. 1 (D. Utah, filed Sept. 20, 2018). That matter is stayed. *Neldon Johnson v. IRS*, No. 4:18-cv-00062, Docket No. 19 (entered Feb. 1, 2019).

[27] Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(b)(6).

A. Glenda Johnson has not established that this Court has subject matter jurisdiction to hear any of her claims against the United States.

"Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction[.]"[28] A pleading for relief must contain "a short and plain statement of the grounds for the court's jurisdiction."[29] Even a *pro se* plaintiff bears the burden of establishing by a preponderance of the evidence that the Court has subject matter jurisdiction over the action.[30] Because Glenda Johnson cannot meet this burden, her action should be dismissed under Fed. R. Civ. P. 12(b)(1).

This Court lacks subject matter jurisdiction over this case for two reasons. First, Glenda Johnson does not have Article III standing to sue because she cannot show that her purported injuries are redressable by a favorable decision by this Court. Second, this action against the United States is barred by principles of sovereign immunity. Each is an adequate, independent basis for dismissal with prejudice.

1. Glenda Johnson lacks Article III standing to sue.

This Court lacks subject matter jurisdiction because Glenda Johnson lacks Article III standing to sue. To establish Article III standing, a plaintiff must plead and prove an injury in fact (injury) that is fairly traceable to the defendant's allegedly unlawful conduct (causation) and

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[28] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[29] Fed. R. Civ. P. 8(a)(1).

[30] *Newby v. Obama*, 681 F. Supp. 2d 53, 55 (D.D.C. 2010); *Hassan v. Holder*, 793 F. Supp. 2d 440, 444 (D.D.C. 2011) ("Under Rule 12(b)(1), plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence."); *see also Klein*, 2019 WL 6700245, at *1-2.

which is likely to be redressed by the requested relief (redressability).[31] "The party invoking federal jurisdiction bears the burden of establishing these elements."[32]

Glenda Johnson does not have Article III standing to sue. Glenda Johnson has not suffered a legal injury caused by the United States.[33] Even if she had alleged injury and causation, however, any purported injuries are not redressable in this Court. To establish redressability, a plaintiff must show that it is "likely as opposed to merely speculative that the injury will be redressed by a favorable decision of the court."[34] Here, Glenda Johnson asks for damages and an injunction against further proceedings in *RaPower-3* until *this case* reviews and determines the propriety of orders entered in that case and Judge Nuffer's decision dismissing her counterclaims in *Klein*.

But this Court is not a reviewing court for the *RaPower-3* or *Klein* orders and this proceeding cannot overrule, declare erroneous, or otherwise reverse the decisions in *RaPower-3* or *Klein*.[35] The proper avenue for redress of alleged error in either case is through the Court

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[31] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[32] *Lujan*, 504 U.S. at 561.

[33] *See Klein*, 2019 WL 6700245, at *1-3.

[34] *Spectrum Five, LLC v. FCC*, 758 F.3d 254, 260 (D.C. Cir. 2014) (quotation omitted).

[35] *See* 28 U.S.C. §§ 1291, 1292, 1294 (establishing, as a general matter, jurisdiction of appeals in the courts of appeals from decisions of the district courts of the United States); *Thomas v. Wilkins*, 61 F. Supp. 3d 13, 20-21 (D.D.C. 2014) ("[T]his Court lacks the authority to review another District Court's decisions . . . ."); *Sibley v. United States Supreme Court*, 786 F. Supp. 2d 338, 345 (D.D.C. 2011) ("This court is not a reviewing court and cannot compel . . . other Article III judges in this or other districts or circuits to act."); *Page v. Grady*, 788 F. Supp. 1207, 1212 (N.D. Ga. 1992) "Unlike the § 1983 context, in which there exists a long tradition of federal judicial oversight of state officials, premised on Congressional statute, there is no precedent for permitting one federal court to oversee, and effectively overrule, a co-equal court. This concern is made particularly vivid when one considers that, if injunctive relief were available against federal judges in *Bivens* action, there would be no formal limit on the power of a federal district court to enjoin actions or practices of a United States Court of Appeals Judge or a Justice of the United States Supreme Court.").

of Appeals for the Tenth Circuit by direct appeal.[36] Neldon Johnson and IAS have already appealed numerous orders in *RaPower-3* through counsel of record – the same attorneys representing Glenda Johnson in *Klein*. Glenda Johnson could have made a direct challenge to the order cancelling IAS shares in *RaPower-3*, or she can take a direct appeal when a final judgment is entered in *Klein*. But her claims are not redressable by "review" in this Court, so she does not have standing to sue on any of her three purported claims for relief.

2. Glenda Johnson does not identify a statute waiving the United States' sovereign immunity for her claims.

The essence of Glenda Johnson's complaint is that the Receiver and the Court carried out the procedures established in the Corrected Receivership Order regarding whether IAS shares should, or should not, be cancelled. Even if her claims were redressable in this Court, which they are not, Glenda Johnson has not identified a statute that allows her to sue *the United States* for the claims she purports to bring.[37]

The doctrine of sovereign immunity protects the United States from suit except when Congress has "unequivocally expressed" its consent to be sued.[38] "[T]he existence of [the United States'] consent [to be sued] is a prerequisite for jurisdiction."[39] Accordingly, in order to survive a motion to dismiss, a plaintiff who files an action against the United States "must demonstrate

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[36] *Bolin v. Story*, 225 F.3d 1234, 1242-43 (11th Cir. 2000) (observing that the remedy for alleged judicial misconduct is appeal to the appellate court or the Supreme Court); *Jafari v. United States*, 83 F. Supp. 3d 277, 279 (D.D.C. 2015) ("Seeking relief through an appeal to an appellate court is the sole remedy available to a litigant who seeks to challenge the legality of decisions made by a judge in her judicial capacity." (quotation omitted)).

[37] *See generally* ECF No. 1-2.

[38] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (quotation omitted).

[39] *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

that there has been a waiver of sovereign immunity" that is applicable to her claims.[40] Glenda Johnson has not met this burden because she has not identified a statute waiving the United States' sovereign immunity for the claims she purports to bring.

As an initial matter, Glenda Johnson named the Internal Revenue Service and the Department of Justice as defendants in this case. But the United States' executive departments and agencies may only be sued in their own name if Congress has explicitly authorized such suits.[41] Congress has not authorized suits against the Internal Revenue Service or the Department of Justice for the claims Glenda Johnson purports to bring.[42] Instead, the claims purportedly against those agencies are actually claims against the United States.[43]

Glenda Johnson asserts that 28 U.S.C. §§ 1340 and 1345 establish subject matter jurisdiction,[44] but neither waives the United States' sovereign immunity for equitable relief or damages. Section § 1340 may provide subject matter jurisdiction for suits over "any civil action arising under any Act of Congress providing for internal revenue," but it "does not constitute a

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[40] *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 136 (D.D.C. 2015); *accord Flute v. United States*, 808 F.3d 1234, 1239-40 (10th Cir. 2015).

[41] *Blackmar v. Guerre*, 342 U.S. 512, 514-15 (1952).

[42] *Pilon v. U.S. Dep't of Justice*, 796 F. Supp. 7, 13 (D.D.C. 1992) ("Plaintiff also sues for alleged violations of his rights under the Fourth, Fifth, and Ninth Amendments to the Constitution. However, as the Department correctly points out, for purposes of these claims it is not a suable entity. Further, if the United States were to be substituted for the Department of Justice as the defendant, sovereign immunity principles would bar the action." (citations omitted)); *Castleberry v. ATF, et al*., 530 F.2d 672, 673 n. 3 (5th Cir.1976) ("[C]ongress has not constituted the Treasury Department or any of its divisions or bureaus as a body corporate and has not authorized either or any of them to be sued *eo nominee*."); *Krouse v. U.S. Gov't Treasury Dep't I.R.S.*, 380 F. Supp. 219, 221 (C.D. Cal. 1974) ("The Department of the Treasury and the Internal Revenue Service are not entities subject to suit and they should be dismissed.").

[43] *See Smith v. United States*, 561 F.3d 1090, 1099 (10th Cir. 2009) ("The United States is the only proper defendant in an FTCA action." (quotation omitted)); *Devries v. IRS*, 359 F. Supp. 2d 988, 991-92 (E.D. Cal. 2005) (where taxpayers are authorized to sue on matters arising out of IRS actions, the United States is the proper party).

[44] *See generally* ECF No. 1-2 ¶ 4.

waiver of sovereign immunity."[45] Section 1345, by its plain terms, establishes general subject matter jurisdiction in suits or proceedings *commenced* by the United States. Even if it applied to this case, which it does not, it does not waive the United States' sovereign immunity for Glenda Johnson's claims. Although she cites the U.N. Convention Against Corruption, generally, in her complaint, Glenda Johnson does not identify a specific provision that effects a waiver of sovereign immunity of the United States.[46]

Further, although the United States has waived sovereign immunity for certain tort claims under the Federal Tort Claims Act,[47] that limited waiver does not include any tort claim Glenda Johnson may be attempting to allege here. There is no waiver of sovereign immunity for damages for alleged violations of constitutional rights brought against agencies of the federal government or the United States.[48]

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[45] *Guthrie v. Sawyer*, 970 F.2d 733, 735 n.2 (10th Cir. 1992) (citing *Arford v. United States*, 934 F.2d 229, 231 (9th Cir.1991)).

[46] *See Merida Delgado v. Gonzales*, 428 F.3d 916, 920-21 (10th Cir. 2005); *Olegovna v. Putin*, No. 16-CV-586 (KAM), 2016 WL 3093893, at *3 (E.D.N.Y. June 1, 2016) ("The United Nations Convention against Corruption, which is also cited in the complaint, was ratified by the United States Congress on October 30, 2006 but does not by itself confer a private right of action in United States courts.").

[47] *See* 28 U.S.C. § 2674.

[48] *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994); *Buck v. Indus. Comm'n of Utah*, 51 F. App'x 832, 836 (10th Cir. 2002) ("A *Bivens* action alleging that a federal actor violated a plaintiff's constitutional right cannot be maintained against a federal agency."); *Smith*, 561 F.3d at 1099 ("*Bivens* claims cannot be asserted directly against the United States, federal officials in their official capacities, or federal agencies." (citations omitted).

B. Glenda Johnson's complaint fails to state a claim for which equitable relief can be granted.

A motion to dismiss should be granted under Fed. R. Civ. P. 12(b)(6) where a plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face."[49] "Determining whether a complaint states a plausible claim for relief [is] … a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[50] When ruling on a motion to dismiss, a court must accept factual allegations pleaded in the complaint as true, but it need not accept unsupported inferences or legal conclusions cast in the form of factual allegations.[51]

"[E]quitable relief is available only in the absence of adequate remedies at law."[52] Here, Glenda Johnson has an adequate remedy at law to air her grievances with the proceedings and results in *RaPower-3* and in *Klein*: if appropriate, directly appealing the orders to the Tenth Circuit, then (if needed) to the Supreme Court.[53] She is represented by counsel in both matters – the same attorneys that are representing IAS in its appeal currently pending before the Tenth Circuit. Because she has an adequate remedy at law to challenge this Court's rulings, Glenda

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[49] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[50] *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

[51] *Edwards v. Washington*, 661 F. Supp. 2d 13, 15 (D.D.C. 2009).

[52] *Switzer v. Coan*, 261 F.3d 985, 991 (10th Cir. 2001)

[53] *Switzer*, 261 F.3d at 991 ("Plaintiff's prayer for relief includes requests that the court vacate past adverse decisions and allow him discovery. This relief was available through such standard legal means as post-judgment motion, appeal, mandamus, prohibition, and/or certiorari review in the prior proceedings." (footnote omitted)); *Bolin*, 225 F.3d at 1243 ("[P]laintiffs may appeal any rulings, or actions taken, in their criminal cases not only to this Court but also to the Supreme Court. In addition, plaintiffs may seek an extraordinary writ such as a writ of mandamus in either this Court or the Supreme Court.").

Johnson is "not entitled to declaratory or injunctive relief in this case."[54] Her claim for an injunction should be dismissed for failure to state a claim.[55]

III. Conclusion

Glenda Johnson cannot overcome the substantive and procedural defects of her complaint. All of her claims should be dismissed with prejudice under Fed. R. Civ. P. 12(b)(1) because none of her claims are redressable in this Court and she has not identified a waiver of sovereign immunity for any of her claims. Glenda Johnson's equitable claims should be dismissed with prejudice for failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6) because she has an available remedy at law – direct appeal.

Dated: April 27, 2020

Respectfully submitted,

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[54] *Bolin*, 225 F.3d at 1243; *accord Switzer*, 261 F.3d at 991.

[55] *See Dougherty v. United States*, 156 F. Supp. 3d 222, 235-36 (D.D.C. 2016).

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020 the foregoing UNITED STATES' MOTION TO DISMISS THE COMPLAINT was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice to all attorneys of record.

I hereby certify that on April 27, 2020, I served the foregoing UNITED STATES' MOTION TO DISMISS THE COMPLAINT upon the following by U.S. Mail, first-class, postage prepaid:

Glenda E. Johnson
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Payson, UT 84651
Plaintiff

The Honorable David Nuffer
United States District Court for the District of Utah
351 S W Temple, Room 10.220
Salt Lake City, UT 84101
Defendant

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney