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

NELDON PAUL JOHNSON, Plaintiff, vs. INTERNAL REVENUE SERVICE, DEPARTMENT OF JUSTICE, agencies of the United States, and DAVID NUFFER, an individual, Defendants.	Civil No. 4:18-cv-00062 **UNITED STATES' MOTION TO STAY RESPONSE TO THE "MOTION FOR PRELIMINARY INJUNCTION"** Judge Ted Stewart

On September 20, 2018, Neldon Johnson filed a complaint and a "motion for preliminary injunction" in this matter.[1] Johnson seeks to stop further proceedings in *United States v. RaPower-3, LLC, et al.* (over which Judge David Nuffer is presiding) and a declaration that those

[1] ECF No. 1; ECF No. 2.

proceedings are "void."[2] We respectfully request that this Court stay our response to the "motion" until after the Court decides our motion to dismiss the complaint. In the alternative, if this Court requires a response to the motion for preliminary injunction, we request that this Court stay our response until December 2, 2018, the same date our motion to dismiss is due.

I. Neldon 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 Neldon Johnson and R. Gregory Shepard, and Johnson's entities International Automated Systems, Inc., RaPower-3, LLC, and LTB1, LLC, ran "a hoax funded by the American taxpayer by defendants' abusive advocacy of the tax laws."[3] The hoax is an abusive tax scheme that Johnson created. He 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]

The Court found that 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 false or fraudulent."[5] They "knew, or had reason to know, that their customers were not in a trade or business [with respect to the] solar lenses and, therefore, that their customers were not allowed

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[2] ECF No. 2 at 5.

[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.

[4] *E.g.*, *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 22.

[5] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 123.

the depreciation deduction or solar energy tax credit."[6] The Court also found that the defendants' "purported solar energy technology does not produce electricity or other useable energy from the sun" and will never do so.[7] Judge Nuffer issued a comprehensive injunction against Johnson and the other defendants, and ordered them to disgorge their gross receipts from the scheme. Johnson was ordered to disgorge more than $50 million.[8] To ensure enforcement of the disgorgement order, Judge Nuffer also ordered an asset freeze and will be appointing a receiver to collect defendants' assets and distribute the proceeds.[9] Less than a week after Judge Nuffer issued findings from the bench and a preliminary injunction against him, and attempting to evade the orders that that Judge Nuffer would enter against him, Johnson's directed RaPower-3 to file a bad-faith bankruptcy petition.[10] Judge Nuffer dismissed that petition with prejudice.[11]

Johnson, through his attorneys of record in *RaPower-3*, has appealed the injunction and other orders in that case.[12]

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[6] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 43.

[7] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 48.

[8] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 130-139.

[9] *RaPower-3*, Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, ECF No. 444; Notice of Filing of United States' Proposed Receivers and Proposed Receivership Order, ECF No. 456.

[10] *See In re RaPower-3, LLC*, No. 18-24865 (Bankr. D. Utah): Order Dismissing Case (ECF No. 51); United States' motion to dismiss (ECF No. 13); United States' reply in support of its motion to dismiss (ECF No. 42).

[11] *See In re RaPower-3, LLC*, No. 18-24865 (Bankr. D. Utah): United States' motion to withdraw the reference (ECF No. 15); Order Dismissing Case (ECF No. 51); United States' motion to dismiss (ECF No. 13); United States' reply in support of its motion to dismiss (ECF No. 42).

[12] 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.

Johnson, acting *pro se*, has filed at least three frivolous lawsuits after Judge Nuffer's rulings. The first is this suit, against the Internal Revenue Service, the Department of Justice (jointly, the "Agencies"), and Judge Nuffer, for allegedly violating his equal protection and due process rights for actions taken in the course of the litigation.[13] The second is *Johnson v. IRS, et al.*, filed on October 16, 2018, against the same defendants, in Utah state court.[14] The third is a Utah state court suit against Dr. Thomas Mancini, the United States' expert witness who evaluated the purported solar energy technology.[15] The claims in all three cases – just as with his bad-faith bankruptcy filing – arise out of Johnson's dissatisfaction with the proceedings and results in *RaPower-3* before Judge Nuffer.[16] In particular, Johnson's "claims" in this case echo the docketing statement for the *RaPower-3* appeal.[17] Even the "claims" that do not track the docketing statement concern the process of litigation and trial in *RaPower-3*.[18]

[13] ECF No. 1.

[14] *Johnson v. IRS, et al.*, Civil No. 180700040, Doc. No. 1, Complaint (Fourth District Court for Millard County, Utah) (filed Oct. 16, 2018). A copy of the Complaint in that case is attached as Ex. 928. The United States will promptly remove that case to the District of Utah.

[15] *Johnson v. Mancini*, Civil No. 180700041, Doc. No. 1, Complaint (Fourth District Court for Millard County, Utah) (filed Oct. 17, 2018). A copy of the Complaint against Dr. Mancini is attached as Ex. 929. *Compare* Ex. 929 *with RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 47-51.

[16] *Compare* ECF No. 1, Ex. 928, *and* Ex. 929 *with RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 *and with* Ex. 926.

[17] *Compare* ECF No. 1 at First Cause of Action *with* Ex. 926, Appellants' Docketing Statement § IV.A; *compare* ECF No. 1 at Second Cause of Action *with* Ex. 926, Appellants' Docketing Statement § IV.B; *compare* ECF No. 1 at Fourth Cause of Action *with* Ex. 926, Appellants' Docketing Statement § IV.H, J; *compare* ECF No. 1 at Sixth Cause of Action *with* Ex. 926, Appellants' Docketing Statement § IV.H, I, J.

[18] ECF No. 1 at Third Cause of Action; ECF No. 1 at Fifth Cause of Action.

II. Because this frivolous case should be dismissed, the United States should not be required to respond to the frivolous "motion for preliminary injunction."

As the United States[19] will explain more fully in a forthcoming motion, the complaint should be dismissed for numerous reasons. Johnson has not established that this Court has subject matter jurisdiction over this case.[20] 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.[21] But Johnson has not met this burden because he has not identified a statute waiving the United States' sovereign immunity.[22]

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[19] The United States' executive departments and agencies may only be sued in their own name if Congress has explicitly authorized such suits. *Blackmar v. Guerre*, 342 U.S. 512, 514-15 (1952). Neither the IRS nor the Department of Justice may be sued for the claims Johnson purports to bring. *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." (citing *Blackmar*, 342 U.S. 512)); *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*."); *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).

[20] Fed. R. Civ. P. 12(b)(1); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction[.]").

[21] *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).

[22] The doctrine of sovereign immunity protects the United States from suit except when Congress has "unequivocally expressed" its consent to be sued. *United States v. Nordic Village, Inc*., 503 U.S. 30, 33 (1992) (quotation omitted). "[T]he existence of [the United States'] consent [to be sued] is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Accordingly, in order to survive a motion to dismiss, a plaintiff who files an action against the United States "must demonstrate that there has been a waiver of sovereign immunity" that is applicable to his claims. *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). Johnson has not done so. *See generally* ECF No. 1 ¶ 4. Johnson asserts that 28 U.S.C. §§ 1340 and 1345 establish subject matter jurisdiction, but neither of those statutes waives the United States' sovereign immunity to be sued for the claims he makes. *Guthrie v. Sawyer*, 970 F.2d 733, 735 (10th Cir. 1992) ("Subject matter jurisdiction is provided by 28 U.S.C. § 1340 (1988), which states in pertinent part that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue." This statute, however, does not constitute a waiver of sovereign immunity. *See Arford v. United States*, 934 F.2d 229, 231 (9th Cir.1991)."). 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 Johnson's claims.

This Court also lacks subject matter jurisdiction because Johnson lacks Article III standing to sue. He has not pled a legal injury.[23] Johnson asserts that the defendants have infringed upon his "due process" and "equal protection" rights, at base, because he disagrees with decisions that Judge Nuffer made in the course of litigation and trial in the injunction matter. Even if those were valid legal injuries (which they are not), Johnson cannot establish causation because those results are not "fairly traceable" to actions taken by the United States. Rather, Johnson's alleged injuries are "fairly traceable" to his actions to promote an abusive tax scheme without remorse, wrongfully depriving the United States Treasury of tens of millions of dollars. Accordingly, any injury suffered by Johnson is a "self-inflicted" one which "sever[s] the causal nexus needed to establish standing."[24] For this reason, and for the reasons that Johnson's own allegations show that his "due process"[25] and "equal protection"[26] rights were more than

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[23] Under Article III, federal courts assert jurisdiction only over a case or controversy. *Williams v. Lew*, 77 F. Supp. 3d 129, 132 (D.D.C. 2015). A "core element of Article II's case-or-controversy" requirement is a plaintiff's ability to establish standing to bring suit. *Id.* 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 which is likely to be redressed by the requested relief (redressability). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[24] *Ellis v. Comm'r*, 67 F. Supp. 3d 325, 336 (D.D.C. 2014); *see also Nat'l Family Planning and Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F. 3d 826, 831 (D.C. Cir. 2006).

[25] *Compare* Introduction, 3 Treatise on Const. L. § 17.8(a) ("The essential elements [of due process] are: (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.") *and* Right to a Fair Decisional Process and an Impartial Decision-Maker, 3 Treatise on Const. L. § 17.8(g) ("Due process only guarantees an individual a fundamentally fair procedure. Nothing in the Constitution, or its amendments, guarantees that an individual will have the process that is most likely to result in a favorable ruling for that individual.") *with generally* ECF No. 1.

[26] *Compare* Introduction, 3 Treatise on Const. L. § 18.2(a) ("The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or "draw lines" in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals.") *with generally* ECF No. 1.

adequately protected in the injunction case, it follows that Johnson has also failed to state a claim for which relief can be granted.[27]

For these and other reasons, as the United States will show in a timely motion, the complaint in this case should be dismissed. Johnson's intention in filing the case, and the "motion for preliminary injunction," is to retaliate against those associated with the injunction litigation and interfere with the orderly enforcement of the law as established by Judge Nuffer's orders.[28] Accordingly, the United States should not be required to waste its resources to respond to the frivolous motion for preliminary injunction until *after* disposition of its motion to dismiss (if a response is even necessary at that time). This is an "order . . . [that is] necessary or appropriate for the enforcement of the internal revenue laws."[29] It is also consistent with this Court's inherent authority to mitigate the effects of litigants, like Johnson, "who abuse the court system by harassing their opponents."[30]

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[27] *See* Fed. R. Civ. P. 12(b)(6). Although the undersigned does not represent Judge Nuffer, Johnson has failed to state a claim against him because Judge Nuffer has judicial immunity. *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986).

[28] *See, e.g.*, *Overton v. United States*, No. MO-03-CV-092, 2004 WL 1005577, at *4 (W.D. Tex. Mar. 29, 2004) ("Plaintiff's many lawsuits regarding the assessment and collection of his taxes are an abuse of the federal judicial system."); *Salman v. Jameson*, No. CV-N-96-00605-HDM, 1997 WL 416340, at *1-3 (D. Nev. Apr. 14, 1997).

[29] 26 U.S.C. § 7402(a).

[30] *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989) (citing 28 U.S.C. § 1651(a); *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986) (when a *pro se* plaintiff sued numerous judges for purportedly violating his constitutional rights by dismissing his cases, the Tenth Circuit ordered that he be "prohibited from filing any further complaints in the United States District Court for the District of Colorado that contain the same or similar allegations as those set forth in his complaint" in an attempt to relitigate them); *Castro v. United States*, 775 F.2d 399, 410 (1st Cir. 1985), *overruled on other grounds by Stevens v. Dep't of Treasury*, 500 U.S. 1, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (1991) ("From the wording of the injunction issued in this case, it appears that the specific vice the district court was attempting to address, and prohibit, was appellants' propensity for filing frivolous and vexatious suits against the appellees aimed at repeatedly litigating the same or similar issues raised in this and prior cases concerning the nonrenewal of appellants' appointments. The injunction is tailored to fit that vice. It does not preclude access to the courts concerning other types of matters."); *Salman*, 1997 WL 416340, at *3 ("This court

(continued...)

III. If required to respond sooner, this Court should stay our response to the "motion for preliminary injunction" until December 2, 2018.

Under DUCivR 7-1(b)(3)(B), the response to a motion[31] filed pursuant to Fed. R. Civ. P. 65 must be filed within fourteen days after service of the motion "or within such time as allowed by the court." The fourteen day response time should not be deemed to have begun yet because neither the Agencies nor the United States have been properly served with process initiating a case against them.[32] They are not yet properly defendants in this case. To serve the United States, a plaintiff must 1) deliver a copy of the complaint and summons to the United States attorney, or that person's designee; and 2) send a copy of the complaint and summons to the Attorney General of the United States at Washington, D.C.[33] To serve an agency of the United States, the plaintiff must also send a copy of the complaint and summons by registered or certified mail to the agency.[34] Johnson served the United States Attorney for the District of Utah with a copy of the complaint and summons on October 3, 2018. The Attorney General has not been served with

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finds the plaintiff, A.R. Salman, to be a vexatious litigant. Accordingly, the plaintiff, A.R. Salman, is enjoined from filing any further actions, in any court in this district, against the United States or its agency, the Internal Revenue Service, or any employee/official/officer thereof, in which he contends that the Internal Revenue Service's collection activities are illegal or in violation of his rights in any manner, without prior permission of this court.").

[31] Calling the document Johnson filed a "motion" is generous, even under the standards for construing *pro se* documents. It copies allegations from the complaint and asks for a preliminary injunction against continued proceedings before Judge Nuffer. ECF No. 2. It does not contain "supporting authority" or legal argument suggesting that Johnson could or should be granted the relief he requests. *See* DUCivR 7-1(a)(1)(B).

[32] *See* Fed. R. Civ. P. 12(b)(5).

[33] Fed. R. Civ. P. 4(i)(1).

[34] Fed. R. Civ. P. 4(i)(1), (2).

any documents in this case. The IRS has not been properly served with any documents in this case. No attorney for the United States or the Agencies has made an appearance in this case.

Johnson delivered the motion for preliminary injunction to the US Attorney with the complaint. Even if the time for a response arguably began when the US Attorney's office received the motion (a point we do not concede), and thus the time for a response has recently expired, there is good cause to extend the United States' time to respond to the motion due to excusable neglect.[35] "The determination of whether excusable neglect has been established is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission including: (1) the danger of prejudice; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reasons for the delay which includes whether it was within the reasonable control of the party seeking to show excusable neglect; and (4) whether that party acted in good faith."[36] This is an equitable balancing test.[37] "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."[38]

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[35] Fed. R. Civ. P. 6(b)(1)(B). If the time for a response began on October 3, DUCivR 7-1(b)(3)(B), fourteen days later was October 17.

[36] *Holgers v. S. Salt Lake City*, No. 2:10-CV-532 TS, 2011 WL 2533019, at *1 (D. Utah June 24, 2011) (Stewart, J.) (quotation omitted).

[37] *Holgers*, 2011 WL 2533019, at *2.

[38] *United States v. Real Prop. located at (Redacted) Layton, Utah 84040*, No. 1:07-CV-6-TS, 2010 WL 2787859, at *3 (D. Utah July 14, 2010) (Stewart, J.) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)); *accord Jennings v. Rivers*, 394 F.3d 850, 856 (10th Cir. 2005).

The equitable factors tilt in favor of staying the United States' response until December 2, if it is required to respond at all. Here, the danger of prejudice of not allowing the United States to respond to the motion is high and the danger of prejudice to Johnson is nil. Johnson's complaint has no merit and neither does his "motion." Granting Johnson's motion simply because it is unopposed would result in one Judge of the District of Utah enjoining proceedings before another Judge of the District of Utah – an untenable outcome. Because Johnson's motion is meritless and his appeal in *RaPower-3* is pending, he will suffer no harm from a delay in the United States' response until December 2. Among the reasons for the delay are Johnson's failure to effect proper service on the Agencies or the United States. And his vigorous post-trial collateral attacks on Judge Nuffer's orders are unfounded, frivolous, intended to create confusion, and consume a great deal of time and resources. As soon as we realized that the Court might construe the deadline for a response to be fourteen days after the US Attorney received the motion, in spite of Johnson's failure to properly serve the Agencies or the United States, we sought relief in good faith. This is not part of a pattern of "deliberate dilatoriness and delay" by undersigned counsel; it is, at most, a "single unintentional incident."[39] Here the equitable factors weigh in favor of the United States' request.[40]

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[39] *See Jennings*, 394 F.3d at 856 (reversing and remanding district court's denial of Rule 60(b) motion, in part, because party may have demonstrated excusable neglect).

[40] *See Real Prop. located at (Redacted) Layton, Utah 84040*, 2010 WL 2787859, at *3 (allowing a claimant to file an answer in a civil forfeiture action more than three years after it was due because his claim "may be meritorious" and it was not "the interest of justice" for that claimant to suffer "because of minor procedural missteps" that were "within the court's broad discretionary power to forgive"); *RMA Ventures v. SunAmerica Life Ins.*, No. 2:03-CV-740, 2007 WL 4206952, at *3 (D. Utah Nov. 26, 2007) (Stewart, J.) (party that miscalendared a deadline to respond to a motion was allowed to file that response two weeks late when the impact on the moving party was de minimis and allowing the opposition resulted in the issue being fully briefed on the merits).

Therefore, if this Court requires a response to the motion for preliminary injunction *before* deciding the forthcoming motion to dismiss the United States respectfully requests that it stay our response until December 2, 2018, the same date it must answer or otherwise respond to the complaint.

Dated: October 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018 the foregoing UNITED STATES' MOTION TO STAY RESPONSE TO THE "MOTION FOR PRELIMINARY INJUNCTION" was electronically filed with the Clerk of the Court through the CM/ECF system.

I hereby certify that on October 30, 2018, I served the foregoing UNITED STATES' MOTION TO STAY RESPONSE TO THE "MOTION FOR PRELIMINARY INJUNCTION" upon the following by U.S. Mail, first-class, postage prepaid:

Neldon Paul Johnson
2730 West 4000 South
Oasis, UT 84624
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