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

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

On September 20, 2018, Neldon Johnson filed a complaint and a “motion for preliminary injunction” in this matter against the Internal Revenue Service, the Department of Justice, and

Judge David Nuffer.¹ Johnson seeks to stop further proceedings in *United States v. RaPower-3, LLC, et al.* (over which Judge Nuffer is presiding) and damages for his alleged injuries suffered in that case. The Court should dismiss Johnson’s complaint under [Fed. R. Civ. P. 12](#) because this Court lacks subject matter jurisdiction over the claims Johnson purports to bring, and he has failed to state a claim for which equitable relief can be granted.²

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 These statements were false.

¹ [ECF No. 1](#); [ECF No. 2](#).

² This motion is brought by the United States through its undersigned attorneys. The undersigned attorneys do not represent Judge David 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*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 22](#).

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

- Johnson knew, or had reason to know, that his customers were not in a trade or business with respect to the solar lenses because 1) the customers did not buy the lenses for the production of income; 2) customers had no control over their purported “lens leasing businesses”; 3) Johnson’s transaction documents were meaningless; and 4) Johnson knew that they promoted the scheme based on the tax benefits it would purportedly provide customers.⁶
- Johnson knew or had reason to know that customers’ lenses were not “placed in service.”⁷
- Johnson knew or had reason to know customers were not allowed the depreciation deduction or solar energy tax credit.⁸
- Johnson knew or had reason to know that customers did not qualify for the solar energy tax credit for the additional reason that the lens itself did not “use[] solar energy to generate electricity, to heat or cool (or provide hot water for use in) a

⁵ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 87-119, 123](#).

⁶ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 90-105](#).

⁷ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 105-110](#).

⁸ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 43, 90-110](#).

structure, or to provide solar process heat’ in the years in which the taxpayers bought the lenses and claimed credits.”⁹

- Johnson knew, or had reason to know that customers were not allowed to deduct their purported expenses related to the solar lenses against their active income, or use the credit to reduce their tax liability on their active income.¹⁰
- Johnson knew, or had reason to know, that that the full “purchase” price of the lenses was not at risk in the year a customer signed transaction documents.¹¹

Johnson repeatedly ignored advice from attorneys and tax professionals in promoting his abusive tax scheme.¹²

For all of these reasons (and others), 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.¹³ To ensure enforcement of the disgorgement order, Judge Nuffer also ordered an asset freeze.¹⁴ Less than a week after Judge Nuffer issued findings from the bench and a preliminary injunction against him, and attempting

⁹ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 109-10](#).

¹⁰ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 110-13](#).

¹¹ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 114-16](#).

¹² *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 116-19](#).

¹³ *RaPower-3*, Findings of Fact and Conclusions of Law, [ECF No. 467 at 130-139](#).

¹⁴ *RaPower-3*, Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, [ECF No. 444](#), and Corrected Receivership Order, [ECF No. 491](#).

to evade the orders that that Judge Nuffer would enter against him, Johnson's directed RaPower-3 to file a bad-faith bankruptcy petition.¹⁵ Judge Nuffer dismissed that petition with prejudice.¹⁶

Johnson, through his attorneys of record in *RaPower-3*, has appealed the injunction and other orders in that case.¹⁷

Now 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.¹⁸ The second is *Johnson v. IRS, et al.*, filed on October 16, 2018, against the same defendants in Utah state court, but now removed to this Court.¹⁹ The third is a Utah state court suit (now removed to this Court) against Dr. Thomas Mancini, the United States' expert witness who evaluated the purported solar energy technology.²⁰ The claims in all three cases – just as with his bad-faith bankruptcy filing – arise

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

¹⁶ See *In re RaPower-3, LLC*, No. 18-24865 (Bankr. D. Utah): United States' motion to withdraw the reference (ECF Bankr. No. 15); Order Dismissing Case (ECF Bankr. No. 51); United States' motion to dismiss (ECF Bankr. No. 13); United States' reply in support of its motion to dismiss (ECF Bankr. No. 42).

¹⁷ 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), available at [ECF No. 10-1](#). For the sake of clarity and continuity with *RaPower-3*, we will number exhibits serially from the list started in that case.

¹⁸ [ECF No. 1](#).

¹⁹ *Johnson v. IRS, et al.*, Civil No. 4:18-cv-00073-DB, [ECF No. 2](#).

²⁰ *Johnson v. Mancini*, Civil No. 4:18-cv-00087-DN, [ECF No. 2](#).

out of Johnson's dissatisfaction with the proceedings and results in *RaPower-3* before Judge Nuffer²¹

In this case, Johnson attempts to relitigate matters decided in *RaPower-3* by couching certain actions taken or results in that case as violations of his constitutional rights to due process and equal protection. For purposes of this motion, we assume that he asserts each cause of action against the United States. Specifically:

- In his First Cause of Action, Johnson claims that the United States violated his “due process” rights because we presented evidence through two summary witnesses.²² Johnson's attorneys objected to these witnesses and this evidence during *RaPower-3*, lost on the issue, and are appealing Judge Nuffer's decisions.²³
- In his Second Cause of Action, Johnson claims that the United States violated his “due process rights” because he did not receive a jury trial in *RaPower-3*.²⁴ Johnson's attorneys litigated this during *RaPower-3*, lost on the issue, and are appealing Judge Nuffer's decisions.²⁵

²¹ Compare ECF No. 1, *Johnson v. IRS, et al.*, Civil No. 4:18-cv-00073-DB, ECF No. 2, and *Johnson v. Mancini*, Civil No. 4:18-cv-87, ECF No. 2, with *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 and with Ex. 926.

²² ECF No. 1 at First Cause of Action.

²³ *RaPower-3*, ECF No. 338 (Memorandum Decision and Order denying Motion in Limine to Exclude Damages); ECF No. 376 (Docket Text Order denying Defendant's Doc 364 Motion in Limine to Strike Plaintiff's Summary Exhibit 752); ECF No. 377 (Docket Text Order denying Defendant's Doc 364 Motion in Limine to Strike Plaintiff's Summary Exhibits 734-741, 742(A) and 742(B), and Exhibit 750); ECF No. 472 at 2 (noting appeal of orders); Ex. 926, Appellants' Docketing Statement § IV.A.

²⁴ ECF No. 1 at Second Cause of Action.

²⁵ *RaPower-3*, ECF No. 43 (Memorandum Decision and Order granting Motion to Strike Jury Demand); ECF No. 322 (Memorandum and Order denying Motion to Reinstate Trial by Jury); ECF No. 472 at 2 (noting appeal of both orders); Ex. 926, Appellants' Docketing Statement § IV.B.

- In his Third Cause of Action and Fifth Cause of Action, Johnson claims that the United States violated his “due process rights” and his “equal protection” rights because, he alleges, our proof was insufficient to prove our claims.²⁶ Johnson’s attorneys litigated the sufficiency of our proof during *RaPower-3*, lost on the issue, and are appealing Judge Nuffer’s decisions.²⁷
- In his Fourth Cause of Action, Johnson claims that the United States violated his “equal protection” rights because, he alleges, we improperly interpreted statutory language in [26 U.S.C. § 48\(A\)\(3\)\(a\)\(i\)](#) to exclude his lenses from the definition of “energy property,” which excluded them from eligibility for the solar energy tax credit.²⁸ Johnson’s attorneys litigated this during *RaPower-3*, lost on the issue, and are appealing Judge Nuffer’s decisions.²⁹
- In his Sixth Cause of Action, Johnson claims that the United States violated his “equal protection” rights because, he alleges that other taxpayers have “received tax benefits from purchases of Fresnel lenses because they are solar equipment”

²⁶ [ECF No. 1](#) at Third Cause of Action and Fifth Cause of Action.

²⁷ *RaPower-3*, ECF No. 396 (minute entry noting counsel’s oral motion to dismiss the case under [Fed. R. Civ. P. 52\(c\)](#) and subsequent argument); [ECF No. 394](#) (submitting counsel’s oral motion in writing); [ECF No. 395](#) (submitting United States’ response); ECF No. 428 (docket text order noting bench ruling denying motion to dismiss); [ECF No. 444](#) (Memorandum Decision and Order Freezing Assets and to Appoint a Receiver); [ECF No. 467](#) (Findings of Fact and Conclusions of Law); No. 472 at 1-2 (noting appeal of orders).

²⁸ [ECF No. 1](#) at Fourth Cause of Action.

²⁹ *RaPower-3*, ECF No. 396 (minute entry noting counsel’s oral motion to dismiss the case under [Fed. R. Civ. P. 52\(c\)](#) and subsequent argument); [ECF No. 394](#) (submitting counsel’s oral motion in writing); [ECF No. 395](#) (submitting United States’ response); ECF No. 428 (docket text order noting bench ruling denying motion to dismiss); [ECF No. 413](#) (Initial Order and Injunction After Trial); [ECF No. 444](#) (Memorandum Decision and Order Freezing Assets and to Appoint a Receiver) at 10-12, 15-21; [ECF No. 467](#) (Findings of Fact and Conclusions of Law) at 109-110; No. 472 at 1-2 (noting appeal of orders).

and that we failed to prove that any of Johnson's customers through RaPower-3 decided to purchase his purported lenses because of the tax benefits.³⁰ If Johnson thought that these topics were relevant to the merits in *RaPower-3*, he had every opportunity to offer evidence about them. Instead, he rested his defense without calling a single witness.

Johnson tacks on some additional claims, not identified as "causes of action." First, he claims that our statutory interpretation of § 48(A)(3)(a)(i) and our proof on that issue constituted an "ex post facto law."³¹ "The ex post facto clauses prohibit the federal and state legislatures from enacting *criminal laws* that would be applied retroactively to conduct that was innocent when done, or that would increase the punishment for already completed actions."³² Because no element of *RaPower-3* or Johnson's current allegations involve criminal statutes, we will not address any "ex post facto" claim further. Second, Johnson claims that the United States' actions "wrongfully interfered with [his] contract rights" for the sale and lease of his purported lenses.³³

To remedy the alleged harm on all claims, Johnson seeks monetary damages and "an injunction prohibiting Defendants from proceeding further against [him] until a decision has been made about his Constitutional rights to Due Process and Equal Protection under the law."³⁴

³⁰ ECF No. 1 at Sixth Cause of Action.

³¹ ECF No. 1 at ¶¶ 90-93.

³² § 17.8(h), Notice, 3 *Treatise on Const. L.* § 17.8(h) (emphasis added).

³³ ECF No. 1 at ¶¶ 94-98.

³⁴ ECF No. 1 at Prayer for Relief. Johnson's actual purpose for filing the two lawsuits against the Agencies and Judge Nuffer may have been an attempt to force Judge Nuffer to recuse himself from *RaPower-3*. *RaPower-3*, Neldon Johnson's Pro Se Motion to Recuse Honorable Judge David Nuffer, ECF No. 495 at 2, 5-7. If that was his plan, it did not work. *RaPower-3*, Order Denying Motion for Recusal, ECF No. 499.

On October 31, 2018 Judge Nuffer appointed a Receiver in *RaPower-3* to collect defendants' assets and distribute the proceeds to enforce the disgorgement order.³⁵ As part of the receivership order, Judge Nuffer ordered all litigation involving Neldon Johnson be stayed, except for *RaPower-3* post-trial proceedings and appeals.³⁶ Attorneys for the Receiver filed a notice of stay in this case.³⁷ But this Court has not yet ordered that this case be stayed pursuant to Judge Nuffer's order.

II. Johnson's frivolous complaint should be dismissed.

Johnson's complaint should be dismissed because this Court lacks subject matter jurisdiction and Johnson failed to state a claim for which relief can be granted.³⁸

A. Johnson has not established that this Court has subject matter jurisdiction to hear any of his claims.

"Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction[.]"³⁹ A pleading for relief must contain "a short and plain statement of the grounds for the court's jurisdiction."⁴⁰ Even a *pro se* plaintiff bears the burden of establishing by a preponderance of the evidence that the Court has subject matter jurisdiction

³⁵ *RaPower-3*, Receivership Order, [ECF No. 490](#). The Court entered a Corrected Receivership Order on November 1, 2018, to correct certain formatting in the original. [ECF No. 491](#).

³⁶ *RaPower-3*, [ECF No. 491](#) ¶¶ 2, 44-47.

³⁷ [ECF No. 13](#).

³⁸ [Fed. R. Civ. P. 12\(b\)\(1\)](#); [Fed. R. Civ. P. 12\(b\)\(6\)](#).

³⁹ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

⁴⁰ [Fed. R. Civ. P. 8\(a\)\(1\)](#).

over the action.⁴¹ Because Johnson cannot meet this burden, his 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, this action against the United States is barred by principles of sovereign immunity. Second, Johnson does not have Article III standing to sue because he cannot show that his purported legal injuries are redressable by a favorable decision by this Court. Each is an adequate, independent basis for dismissal.

1. Johnson does not identify a statute waiving the United States’ sovereign immunity for his claims.

The doctrine of sovereign immunity protects the United States from suit except when Congress has “unequivocally expressed” its consent to be sued.⁴² “[T]he existence of [the United States’] consent [to be sued] is a prerequisite for jurisdiction.”⁴³ 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.⁴⁴ Johnson has not met this burden because he has not identified a statute waiving the United States’ sovereign immunity for the claims he purports to bring.

⁴¹ *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.”).

⁴² *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (quotation omitted).

⁴³ *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

⁴⁴ *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).

As an initial matter, 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.⁴⁵ Congress has not authorized suits against the Internal Revenue Service or the Department of Justice for the claims Johnson purports to bring.⁴⁶ Instead, the claims purportedly against those agencies are actually claims against the United States.⁴⁷

Johnson has not identified a statute that allows him to sue the United States for the claims he purports to bring.⁴⁸ Johnson asserts that 28 U.S.C. §§ 1340 and 1345 establish subject matter jurisdiction,⁴⁹ 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 waiver of sovereign immunity."⁵⁰ Section 1345, by its plain terms, establishes general subject

⁴⁵ *Blackmar v. Guerre*, 342 U.S. 512, 514-15 (1952).

⁴⁶ *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 nomine*."); *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.").

⁴⁷ 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).

⁴⁸ See generally ECF No. 1.

⁴⁹ See generally ECF No. 1 ¶ 4.

⁵⁰ *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)).

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.

Further, although the United States has waived sovereign immunity for certain tort claims under the Federal Tort Claims Act,⁵¹ that limited waiver does not include the tort claims Johnson alleges 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.⁵² There is no waiver of sovereign immunity for claims of interference with contract rights.⁵³

2. Johnson lacks Article III standing to sue.

This Court also lacks subject matter jurisdiction because 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

⁵¹ See 28 U.S.C. § 2674.

⁵² *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)).

⁵³ 28 U.S.C. § 2680(h); *Mill Creek Grp., Inc. v. FDIC*, 136 F. Supp. 2d 36, 43-44 (D. Conn. 2001) ("Specifically, "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contractual rights," 28 U.S.C. § 2680(h), is excepted from the jurisdictional grant of the FTCA. . . . [Section 2680(h)] does not exclude claims from the purview of the FTCA so that their prosecution under some other statutory scheme may be facilitated; rather, it restricts the waiver of sovereign immunity in such a way that claims of the type described therein may not be brought *at all* against the government or its agencies.").

which is likely to be redressed by the requested relief (redressability).⁵⁴ “The party invoking federal jurisdiction bears the burden of establishing these elements.”⁵⁵

Johnson does not have Article III standing because his alleged 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.”⁵⁶ Here, Johnson asks for damages and an injunction against further proceedings in *RaPower-3* until *this case* determines whether the United States and Judge Nuffer violated his constitutional rights (and, coincidentally, awards Johnson damages). But this Court is not a reviewing court for the *RaPower-3* orders and this proceeding cannot overrule, declare erroneous, or otherwise reverse the decisions in *RaPower-3*.⁵⁷ The proper avenue for redress of alleged error in that case is through the Court of Appeals for the Tenth Circuit by direct appeal.⁵⁸ Johnson has already taken this avenue through his counsel of record, who are

⁵⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁵⁵ *Lujan*, 504 U.S. at 561.

⁵⁶ *Spectrum Five, LLC v. FCC*, 758 F.3d 254, 260 (D.C. Cir. 2014) (quotation omitted).

⁵⁷ 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.”).

⁵⁸ *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)).

representing him before the Tenth Circuit. His claims are not redressable in this Court, so he does not have standing to sue.

B. 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.”⁵⁹ “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.”⁶⁰ 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.⁶¹

“[E]quitable relief is available only in the absence of adequate remedies at law.”⁶² Here, Johnson has an adequate remedy at law to air his grievances with the proceedings and results in *RaPower-3*, and is already using it: direct appeal of Judge Nuffer’s orders to the Tenth Circuit, then (if needed) to the Supreme Court.⁶³ Because Johnson is currently exercising the adequate

⁵⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁶⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

⁶¹ *Edwards v. Washington*, 661 F. Supp. 2d 13, 15 (D.D.C. 2009).

⁶² *Switzer v. Coan*, 261 F.3d 985, 991 (10th Cir. 2001)

⁶³ *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.”).

remedy the law provides for his dissatisfaction with Judge Nuffer's rulings, Johnson is "not entitled to declaratory or injunctive relief in this case."⁶⁴ His claim for an injunction should be dismissed for failure to state a claim.⁶⁵

C. This Court should dismiss the complaint if Johnson does not properly serve the United States.

The United States has not been properly served with process initiating this case, nor have the Agencies.⁶⁶ 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.⁶⁷ 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.⁶⁸ 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 any documents in this case. The IRS has not been properly served with any documents in this case. But such service is "essential."⁶⁹ If Johnson

⁶⁴ *Bolin*, 225 F.3d at 1243; *accord Switzer*, 261 F.3d at 991.

⁶⁵ *See Dougherty v. United States*, 156 F. Supp. 3d 222, 235-36 (D.D.C. 2016).

⁶⁶ *See Fed. R. Civ. P. 12(b)(5)*.

⁶⁷ *Fed. R. Civ. P. 4(i)(1)*.

⁶⁸ *Fed. R. Civ. P. 4(i)(1), (2)*.

⁶⁹ *Tuke v. United States*, 76 F.3d 155, 157 (7th Cir. 1996).

does not properly serve the United States by December 19 (90 days after he filed the complaint), the case should be dismissed.⁷⁰

III. If any part of Johnson’s suit is allowed to continue, this case should be stayed pursuant to Judge Nuffer’s order.

For all of the foregoing reasons, Johnson’s complaint should be dismissed with prejudice and this case ordered closed. But if any of Johnson’s claims were to survive this motion, all proceedings in this matter should be stayed pursuant to Judge Nuffer’s receivership order in *RaPower-3*.⁷¹ Johnson is a Receivership Defendant subject to that order, and the order stays all civil actions “of any nature” involving Receivership Defendants.⁷² This Court should not allow Johnson to waste receivership assets – even in the slightest amount – to pursue this frivolous matter.

IV. Conclusion

Johnson cannot overcome the substantive and procedural defects of his complaint. All of his claims should be dismissed with prejudice under [Fed. R. Civ. P. 12\(b\)\(1\)](#) because he has not identified a waiver of sovereign immunity for any of his claims, and none of his claims are redressable in this Court. 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 he

⁷⁰ [Fed. R. Civ. P. 4\(m\)](#). The United States notified Johnson that service was defective as of October 30, 2018. [ECF No. 10](#) at 8-9. In spite of having plenty of time to do so, he has failed to cure the defective service and therefore should not be given further extensions of time after December 19. [Kurzberg v. Ashcroft](#), 619 F.3d 176, 184-86 (2d Cir. 2010).

⁷¹ [See ECF No. 13](#).

⁷² [ECF No. 13-1 ¶ 47](#).

has an available remedy at law, which he is currently using – direct appeal of the adverse decisions in *RaPower-3*. Should this Court opt not to dismiss any portion of Johnson’s complaint, it should stay all remaining proceedings consistent with Judge Nuffer’s receivership order.

Dated: November 27, 2018

Respectfully submitted,

/s/ Erin Healy Gallagher
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**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 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, which sent notice to all attorneys of record.

I hereby certify that on November 27, 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