RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
Tax Division, United States Department of Justice

ERIN HEALY GALLAGHER
DC Bar No. 985670, erin.healygallagher@usdoj.gov
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

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

NELDON PAUL JOHNSON, Plaintiff, vs. INTERNAL REVENUE SERVICE, US DEPARTMENT OF JUSTICE, agencies of the United States, and DAVID NUFFER, an individual, Defendants.	Civil No. 4:18-cv-00073-DB **UNITED STATES' MOTION TO EXTEND TIME TO RESPOND TO THE COMPLAINT AND STAY ALL FURTHER PROCEEDINGS** Judge Dee Benson

On October 16, 2018, Neldon Johnson filed a complaint in Utah state court against the Internal Revenue Service, the Department of Justice, and District Judge David Nuffer.[1] He also filed a motion for preliminary injunction.[2] The United States removed the case on October 31,

[1] ECF No. 2-3.

[2] ECF No. 2-5.

2018.[3] Now, we respectfully request 60 days to respond to the complaint. We also ask that this Court stay all proceedings in this case, including 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 24, 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."[4] 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.[5]

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."[6] They "knew, or had reason to know, that their customers were not in a trade or

---

[3] ECF No. 2.

[4] 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.

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

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

business [with respect to the] solar lenses and, therefore, that their customers were not allowed the depreciation deduction or solar energy tax credit."[7] 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.[8] 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.[9] 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.[10] 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.[11] Judge Nuffer dismissed that petition with prejudice.[12]

Johnson, through his attorneys of record in *RaPower-3*, has appealed the injunction and other orders in that case.[13]

---

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

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

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

[10] *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.

[11] *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).

[12] *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).

[13] 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 a federal suit against the IRS, 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.[14] The second is this suit, against the same defendants, originally filed in Utah state court and now removed.[15] The third is a Utah state court suit against Dr. Thomas Mancini, the United States' expert witness who evaluated the purported solar energy technology.[16] 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.[17]

His claims in this case, that all defendants made "false and fraudulent claim[s]"[18] about him and/or his purported solar energy technology, constitute a collateral attack on Judge Nuffer's findings of fact after a 12-day bench trial (supported by Dr. Mancini's credible testimony) that his "purported solar energy technology does not produce electricity or other useable energy from the sun," and instead "consists, and has always consisted, of separate component parts that do not fit together in a system that will operate effectively or efficiently."[19] His claims in this case also

---

[14] *Johnson v. IRS, et al.*, 4:18-cv-00062-TS, ECF No. 1 (D. Utah) (Stewart, J.).

[15] ECF No. 2-3.

[16] *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.

[17] *Compare* ECF No. 2-3, *Johnson v. IRS, et al.*, 4:18-cv-00062-TS, ECF No. 1, *and* Ex. 929 *with RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 *and with* Ex. 926.

[18] *See generally* ECF No. 2-3.

[19] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 46.

echo the docketing statement for the *RaPower-3* appeal, in which he (through his attorneys of record) is challenging Judge Nuffer's factual findings about his purported solar energy technology.[20] All of this comes *after* Johnson tried and failed to be allowed to testify as his own expert witness on solar energy technology under Fed. R. Evid. 702, in part because Johnson's "methodology disclaims records, data, references and peer review."[21] According to Judge Nuffer, "Johnson does not have the capability of designing a system that can produce usable products from solar energy, . . . his claims of capability are not credible, and . . . he misrepresents the truth about his systems, their viability and third party confirmation of his skills and systems."[22] Johnson proffered no other expert on solar energy technology at trial.[23]

II. The United States should be allowed 60 days to respond to the complaint.

Pursuant to Fed. R. Civ. P. 6(b), 12, and 81(c)(2), we ask to be allowed to answer, or otherwise respond to, the complaint 60 days from the date of service on the United States attorney. Under Rule 12, the United States has 60 days from the date it is served with a complaint to answer or otherwise respond[24] – much shorter than the default provisions of Rule 81(c)(2), which do not take into account the particular circumstances of litigating on behalf of

---

[20] *Compare generally* ECF No. 2-3 *with* Ex. 926, Appellants' Docketing Statement § IV.D, H, J, & K.

[21] Ex. 933, *RaPower-3*, Excerpt of Trial Transcript at 2104:3-2107:16; *see also RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 51-53.

[22] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 51.

[23] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at Overview. ("Defendants rested their case without calling a single witness, but they thoroughly examined each witness called by the United States, including Defendants Neldon Johnson and R. Gregory Shepard. Defendants' thorough cross examination of Shepard and Johnson did not lend any credibility to their case." (footnote omitted)).

[24] Fed. R. Civ. P. 12(a)(2) & (3).

the United States and would require an response on November 13. Although, on information and belief, Johnson has not properly served any party, he served the United States Attorney's Office with a copy of the complaint and motion for preliminary injunction on October 23, 2018. Sixty days thereafter is December 22, 2018, a Saturday. Therefore, the United States' answer or other response to the complaint would be due on Monday, December 24 under its typical response time in Rule 12.

III. Because this frivolous case should be dismissed, this Court should stay all proceedings until after it decides the forthcoming motion to dismiss

As the United States[25] will explain more fully in a forthcoming motion, the complaint should be dismissed for numerous reasons. Johnson will not be able to establish that this Court has subject matter jurisdiction over the claims he asserts. Johnson has not established that this Court has subject matter jurisdiction over this case.[26] 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.[27] But Johnson has not met this burden because he cannot identify a statute waiving the United States' sovereign immunity for the claims he brings.[28] In providing for the

---

[25] 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 intentional tort claims Johnson purports to bring. *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 n.4 (10th Cir. 2001) ("The United States is the only proper defendant in an FTCA action."); *Walker v. United States*, 124 F. Supp. 3d 1177, 1178 (D.N.M. 2015).

[26] 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[.]").

[27] *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).

[28] 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)

(continued...)

limited waiver of sovereign immunity for certain tort claims against the United States sounding in negligence,[29] the United States expressly excepted from that waiver "[a]ny claim arising out of . . . abuse of process, libel, slander, misrepresentation, [or] deceit."[30] These are exactly the claims Johnson purports to bring here.

Johnson has also failed to state a claim for which relief can be granted.[31] Johnson has filed a post-trial motion seeking to alter or amend certain of Judge Nuffer's findings based on unsubstantiated hearsay evidence[32] and has appealed Judge Nuffer's factual findings about his purported solar energy technology in *RaPower-3* to the Tenth Circuit. Those are the appropriate avenues for his disagreement with Judge Nuffer's findings, not this collateral attack.

Johnson's intention in filing this case, and the "motion for preliminary injunction," is to retaliate against those associated with the injunction litigation and interfere with the orderly

---

(…continued)

(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).

[29] *See* 28 U.S.C. § 2674.

[30] 28 U.S.C. § 2680(h). *Walker v. United States*, 124 F. Supp. 3d 1177, 1179 (D.N.M. 2015) ("The United States of America has not consented to be sued for slander or defamation.").

[31] 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).

[32] *See RaPower-3*, Defendants' Rule 59(e) and Rule 52(b) Motion, ECF No. 451; *id*. United States' Opposition to Defendants' Motion to Alter or Amend Findings, Orders, and Judgement, ECF No. 460.

enforcement of the law as established by Judge Nuffer's orders.[33] Accordingly, the United States should not be required to waste its resources to respond to the frivolous motion for preliminary injunction or engage in early discovery practice[34] until *after* disposition of its motion to dismiss (if a response or further proceedings are even necessary at that time). This is an "order . . . [that is] necessary or appropriate for the enforcement of the internal revenue laws."[35] 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."[36]

---

[33] *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).

[34] *See* Fed. R. Civ. P. 26(f)(1) and 16(b)(2).

[35] 26 U.S.C. § 7402(a).

[36] *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 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.").

IV. If required to respond sooner, this Court should stay our response to the "motion for preliminary injunction" until December 24, 2018.

Under DUCivR 7-1(b)(3)(B), the response to a motion[37] 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 because neither the Agencies nor the United States have been properly served with process initiating a case against them.[38] 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.[39] 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.[40] Johnson served the United States Attorney for the District of Utah with a copy of the complaint and summons on October 23, 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.

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 will expire on

---

[37] 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. 2-5, in text nearly identical to the "motion for preliminary injunction" filed in *Johnson v. IRS, et al.*, 4:18-cv-00062-TS, 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).

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

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

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

November 6, 2018, there is good cause to extend the United States' time to respond to the motion.[41]

Johnson's complaint has no merit and neither does his "motion." He asks that one Judge of the District of Utah enjoin proceedings before another Judge of the District of Utah – an untenable outcome. Because Johnson's motion is meritless and both his post-judgment motion and his appeal in *RaPower-3* are pending on the same issues here, he will suffer no harm from a delay in the United States' response until December 24. 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.

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 24, 2018, the same date it must answer or otherwise respond to the complaint.

[41] Fed. R. Civ. P. 6(b)(1)(A).

Dated: October 31, 2018

Respectfully submitted,

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
DC Bar No. 985760
Email: erin.healygallagher@usdoj.gov
Telephone: (202) 353-2452
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
FAX: (202) 514-6770
ATTORNEY FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018 I electronically filed the foregoing UNITED STATES' MOTION TO EXTEND TIME TO RESPOND TO THE COMPLAINT AND STAY RESPONSE TO THE "MOTION FOR PRELIMINARY INJUNCTION" and its supporting documents with the Clerk of the Court through the CM/ECF system.

I hereby certify that on October 31, 2018 I served the foregoing UNITED STATES' MOTION TO EXTEND TIME TO RESPOND TO THE COMPLAINT AND 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
Salt Lake City, UT 84101
Defendant

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney