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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, 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 DISMISS THE COMPLAINT** 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] Although

[1] ECF No. 2-3.

his complaint does not seek injunctive relief, he also filed a motion for preliminary injunction.[2] The United States removed the case on October 31, 2018.[3] Johnson seeks damages for his alleged tortious injuries suffered in *United States v. RaPower-3, LLC, et al.* (over which Judge Nuffer is presiding). 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 relief can be granted.[4]

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."[5] 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

[2] ECF No. 2-5.

[3] ECF No. 2.

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

[5] 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); *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."); *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)).

customers that they could claim tax benefits from the purchase – a depreciation deduction and a solar energy credit.[6] These statements were false.

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:[7]

- 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.[8]
- Johnson knew or had reason to know that customers' lenses were not "placed in service."[9]
- Johnson knew or had reason to know customers were not allowed the depreciation deduction or solar energy tax credit.[10]
- 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

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

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

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

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

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

energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat' in the years in which the taxpayers bought the lenses and claimed credits."[11]

- 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.[12]
- 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.[13]

Johnson repeatedly ignored advice from attorneys and tax professionals in promoting his abusive tax scheme.[14]

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.[15] To ensure enforcement of the disgorgement order, Judge Nuffer also ordered an asset freeze.[16] Less than a week after Judge Nuffer issued findings from the bench and a preliminary injunction against him, and attempting

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

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

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

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

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

[16] *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.[17] Judge Nuffer dismissed that petition with prejudice.[18]

Johnson, through his attorneys of record in *RaPower-3*, has appealed the injunction and other orders in that case.[19]

Now 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 *RaPower-3* litigation.[20] The second is this suit, against the same defendants, originally filed in Utah state court and now removed.[21] The third is a Utah state court suit (also now removed) against Dr. Thomas Mancini, the United States' expert witness who evaluated the purported solar energy technology.[22] The claims in all three cases – just as

[17] *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).

[18] *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).

[19] 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. 2-2. For the sake of clarity and continuity with *RaPower-3*, we will number exhibits serially from the list started in that case.

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

[21] ECF No. 2-3.

[22] *Johnson v. Mancini*, Civil No. 4:18-cv-00087-DN, ECF No. 2

with his bad-faith bankruptcy filing – arise out of Johnson's dissatisfaction with the proceedings and results in *RaPower-3* before Judge Nuffer.[23]

In this case, filed *after* his attorneys noticed direct appeals of dozens of Judge Nuffer's orders,[24] Johnson attempts to relitigate matters decided in *RaPower-3*. Specifically, Johnson claims that all defendants caused him "tortious injury" by making "false and fraudulent claim[s]"[25] about him and/or his purported solar energy technology. He also complains, in conclusory and vague terms, that the Agencies took action "with the intent to . . . deprive him of property and his constitutional rights."[26] These claims are a collateral attack on Judge Nuffer's findings of fact after a 12-day bench trial (supported by Dr. Mancini's credible testimony) that 1) Johnson's "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";[27] and 2) that Johnson made false statements about the technology while selling it, including about the tax benefits Johnson claimed buyers were allowed[28]. His claims in this case also echo the docketing

[23] *Compare* ECF No. 2-3, *Johnson v. IRS, et al.*, 4:18-cv-00062-TS, ECF No. 1, *and Johnson v. Mancini*, Civil No. 4:18-cv-00087-DN, ECF No. 2, *with RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 *and with* Ex. 926.

[24] *RaPower-3*, ECF No. 445 & ECF No. 472.

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

[26] ECF No. 2-3 ¶¶ 2-3. Johnson does not offer any substantive allegations regarding actions by the Agencies – or any other person or entity – that purportedly violated his constitutional rights. *See generally* ECF No. 2-3.

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

[28] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF No. 467 at 90-119.

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.[29]

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."[30] 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."[31] Johnson proffered no other expert on solar energy technology at trial.[32]

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.[33] 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.[34] Attorneys for the receiver filed a

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

[30] Ex. 933, ECF No. 6-4, *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.

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

[32] *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)).

[33] *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.

[34] *RaPower-3*, ECF No. 491 ¶¶ 2, 44-47.

notice of stay in this case.[35] 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.[36]

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[.]"[37] A pleading for relief filed in federal court must contain "a short and plain statement of the grounds for the court's jurisdiction."[38] 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.[39] Johnson filed in state court, so he did not identify a statute giving this federal Court subject matter jurisdiction.

Even if he could point to such a statute, his complaint should still be dismissed under Fed. R. Civ. P. 12(b)(1) because this Court lacks subject matter jurisdiction over this case. First, this action against the United States is barred by principles of sovereign immunity. Second,

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[35] ECF No. 9.

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

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

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

[39] *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.").

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.[40] "[T]he existence of [the United States'] consent [to be sued] is a prerequisite for jurisdiction."[41] 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.[42] 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 – nor can he.

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.[43] Congress has not authorized suits against the Internal Revenue Service or the Department of Justice for the

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

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

[42] *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).

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

claims Johnson purports to bring.[44] Instead, the claims purportedly against those agencies are actually claims against the United States.[45]

Johnson has not identified a statute that allows him to sue the United States for the claims he purports to bring (under the most generous reading of his *pro se* complaint[46]): intentional tort claims for deprivation of property and constitutional rights, and libel and/or slander.[47] The United States has issued a limited waiver of sovereign immunity for certain tort claims under the Federal Tort Claims Act ("FTCA").[48] The FTCA allows claims against the government for "injury or loss of property or personal injury . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[49]

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[44] The United States is the only proper defendant. 28 U.S.C. § 1346(b)(1); *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.").

[45] 28 U.S.C. § 2679(a), (b)(1); *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).

[46] *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers."

[47] *See generally* ECF No. 1.

[48] *See* 28 U.S.C. § 2674.

[49] 28 U.S.C. § 1346(b)(1).

But this limited waiver does not include the tort claims Johnson alleges here. The "intentional torts exception" to the FTCA expressly excepts from its waiver of sovereign immunity "[a]ny claim arising out of . . . abuse of process, libel, slander, misrepresentation, [or] deceit . . . ."[50] "If a claim against the government falls within an exception to the FTCA, the cause of action must be dismissed for want of federal subject matter jurisdiction."[51] The intentional torts exception "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."[52] And 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.[53]

Even if Johnson's claims were not barred by the exceptions to the FTCA's waiver of sovereign immunity (which they are), they would be barred because he has not shown that he complied with the FTCA's notice and administrative exhaustion requirements.[54] If a potential plaintiff believes he has a claim under the FTCA, he must satisfy the statute's notice

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[50] 28 U.S.C. § 2680(h); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 853 (10th Cir. 2005).

[51] *Estate of Trentadue ex rel. Aguilar*, 397 F.3d at 853.

[52] *Mill Creek Grp., Inc. v. FDIC*, 136 F. Supp. 2d 36, 43-44 (D. Conn. 2001).

[53] *FDIC v. Meyer*, 510 U.S. 471, 477-78, 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).

[54] *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." (quotation omitted)).

requirements by filing an administrative claim with the proper agency before filing suit.[55] The claim must be in writing and signed by the claimant or his authorized agent or representative.[56] The claim must sufficiently describe the injury to enable the agency to investigate.[57] It must specify the exact amount of damages, a "sum certain."[58] The agency must deny the claim before the claimant may sue.[59] "Because the FTCA constitutes a waiver of the government's sovereign immunity, the notice requirements established by the FTCA must be strictly construed. The requirements are jurisdictional and cannot be waived."[60] The "exhaustion requirement is jurisdictional and cannot be waived."[61]

Johnson's complaint does not state that he has satisfied these requirements. For this additional reason, there is no waiver of sovereign immunity applicable to Johnson's claims and this Court lacks subject matter jurisdiction.[62]

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[55] 28 U.S.C. § 2675(a).

[56] 28 C.F.R. §§ 14.2(a), 14.3.

[57] *Estate of Trentadue ex rel. Aguilar*, 397 F.3d at 852 ("The jurisdictional statute, 28 U.S.C. § 2675(a), requires that claims for damages against the government be presented to the appropriate federal agency by filing (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." (quotation omitted)).

[58] 28 C.F.R. § 14.2(a); *cf.* 28 U.S.C. § 2675(b) (prohibiting suit seeking damages greater than those administratively claimed).

[59] 28 U.S.C. § 2675(a).

[60] *Estate of Trentadue ex rel. Aguilar*, 397 F.3d at 852 (quotation omitted).

[61] *Lopez*, 823 F.3d at 976 (quotation omitted).

[62] To the extent that other Circuits do not treat the notice requirement as a jurisdictional prerequisite for a FTCA claim, it is still at least "a condition precedent to the plaintiff's ability to prevail." *Smoke Shop, LLC v. United States*, 761 F.3d 779, 786 (7th Cir. 2014) (quotation omitted). Because Johnson did not meet the notice requirement, his complaint should be dismissed even under this standard his claim, but for failure to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6).

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 which is likely to be redressed by the requested relief (redressability).[63] "The party invoking federal jurisdiction bears the burden of establishing these elements."[64]

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."[65] Here, Johnson asks for damages arising from proceedings in *RaPower-3*. Essentially, he asks that this Court (and a jury) reevaluate Judge Nuffer's factual findings. But this Court is not a reviewing court for the *RaPower-3* orders and this proceeding cannot overrule, declare erroneous, or otherwise reverse the findings of fact or decisions in *RaPower-3*.[66] The proper avenue for redress of alleged error in that case is through the Court of Appeals for the Tenth

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

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

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

[66] *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.").

Circuit by direct appeal.[67] By the time he filed the complaint, Johnson had already taken this avenue through his counsel of record, who are 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 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."[68] "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."[69] 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.[70] For the same reasons that Johnson lacks Article III standing, he has failed to state a claim for which relief can be granted by this Court. Neither this Court, nor the jury Johnson has demanded, can give him relief from the factual findings and orders in *RaPower-3*.[71]

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[67] *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)).

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

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

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

[71] *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

(continued...)

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.[72] 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.[73] 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.[74] 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. But such service is "essential."[75] If Johnson does not properly serve the United States by January 14, 2019 (90 days after he filed the complaint), the case should be dismissed.[76]

(…continued)

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.").

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

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

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

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

[76] Fed. R. Civ. P. 4(m). The United States notified Johnson that service was defective as of October 31, 2018. ECF No. 6 at 9-10. 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).

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.*[77] Johnson is a Receivership Defendant subject to that order, and the order stays all civil actions "of any nature" involving Receivership Defendants.[78] 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. This Court should also dismiss Johnson's complaint for failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6). 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.

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[77] *See* ECF No. 9.

[78] ECF No. 9-1 ¶ 47.

Dated: November 29, 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 29, 2018, I electronically filed the foregoing UNITED STATES' MOTION DISMISS THE COMPLAINT with the Clerk of the Court through the CM/ECF system which served notice on all attorneys of record.

I hereby certify that on November 29, 2018, I electronically filed the foregoing UNITED STATES' MOTION DISMISS THE COMPLAINT 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