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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' BRIEF IN OPPOSITION TO JOHNSON'S MOTION FOR PRELIMINARY INJUNCTION** 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). We have moved to 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.[4] For the same reasons, because Johnson's motion is a non sequitur in this matter, and because Johnson has not met the standard for obtaining the preliminary injunction he seeks, this Court should deny his motion.

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

We incorporate by reference the statement of facts and procedural history included in the United States' motion to dismiss the complaint.[5] 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

[2] ECF No. 2-5.

[3] ECF No. 2.

[4] ECF No. 11. Like the motion to dismiss, this motion is brought by the United States through its undersigned attorneys. The undersigned attorneys do not represent Judge David Nuffer.

[5] ECF No. 11 at 2-8. DUCivR 7-1(a)(4) allows a party to "incorporate by reference the arguments and reasons set forth in another party's motion or memorandum to the extent applicable to that party," which avoids unneeded repetition and fosters efficiency for parties and the Court. The same considerations support a party incorporating by reference its own arguments and reasons from another filing.

laws."[6] 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.[7] These statements were false. Accordingly, 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.[9]

Johnson, through his attorneys of record in *RaPower-3*, has appealed the injunction and other orders in that case.[10]

In this case, filed *after* his attorneys noticed direct appeals of dozens of Judge Nuffer's orders,[11] Johnson attempts to relitigate matters decided in *RaPower-3*. Specifically, Johnson claims that all defendants caused him "tortious injury" by making "false and fraudulent

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[6] 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), (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).

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

[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, and Corrected Receivership Order, ECF No. 491.

[10] 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.

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

claim[s]"[12] 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."[13] 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";[14] and 2) that Johnson made false statements about the technology while selling it, including about the tax benefits Johnson claimed buyers were allowed[15].

His claims in this case also 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.[16]

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."[17] According to Judge Nuffer, "Johnson does not have the capability of designing a system that can produce usable products

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

[13] 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.

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

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

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

[17] 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.

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."[18] Johnson proffered no other expert on solar energy technology at trial.[19]

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.[20] 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.[21] Attorneys for the receiver filed a notice of stay in this case.[22] But this Court has not yet ordered that this case be stayed pursuant to Judge Nuffer's order.

II. Johnson's frivolous motion for a preliminary injunction should be denied.

A. This Court should dismiss Johnson's complaint and deny his motion as moot.

This Court should grant the United States' motion to dismiss, rendering Johnson's motion for preliminary injunction moot. We incorporate by reference all arguments we made in our motion to dismiss.[23] To summarize, however, this Court lacks subject matter jurisdiction over

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

[19] *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)).

[20] *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.

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

[22] ECF No. 9.

[23] ECF No. 11 at 8-16; *see supra* n.5.

this case, and therefore should dismiss it under Fed. R. Civ. P. 12(b)(1). Johnson has not identified a waiver of the United States'[24] sovereign immunity from suit for the claims he makes, and he lacks Article III standing.[25] This Court should dismiss Johnson's complaint under Fed. R. Civ. P. 12(b)(6) because Johnson has failed to state a claim for which relief can be granted.[26] Because this case should be dismissed, the motion for preliminary injunction should be denied as moot.

B. Johnson's motion for preliminary injunction seeks relief that is irrelevant in this matter, and should be denied.

In this case, Johnson sues for monetary damages for the purported tortious injuries of libel and slander. He refers in a glancing and conclusory fashion to some alleged deprivation of his constitutional rights by the Agencies. But he offers no facts to support this allegation. He also does not seek injunctive relief in his complaint. Yet he filed a motion seeking a preliminary

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[24] 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. *Blackmar v. Guerre*, 342 U.S. 512, 514-15 (1952). Congress has not authorized suits against the Internal Revenue Service or the Department of Justice 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. 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."). Instead, the claims purportedly against those agencies are actually claims against the United States. *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).

[25] ECF No. 11 at 8-14.

[26] ECF No. 11 at 14.

injunction against continued proceedings in *RaPower-3*, claiming that his constitutional rights are being violated in that case.[27] This filing is irrelevant to the issues presented by Johnson's complaint and its prayer for relief in this case, and should be denied for that reason alone.[28]

C. Johnson's motion should be denied because has not made a "clear showing" that he is entitled to preliminary relief.

Even if the motion were neither moot nor irrelevant, this Court should nonetheless deny it. Johnson, as the moving party, bears the burden of showing that he is entitled to a preliminary injunction that would grant him the relief he seeks in the motion.[29] That is, Johnson must show that he has a substantial likelihood of success on the merits; that he will suffer irreparable injury unless the injunction issues; that the claimed injury outweighs the damage to the opposing party; and that the injunction would not be adverse to the public interest.[30] Johnson's requested preliminary injunction is a "specifically disfavored preliminary injunction[]"[31] because it would alter the status quo in *RaPower-3* and would afford Johnson all the equitable relief he could recover at the conclusion of a full trial on the merits: "to void [*RaPower-3*'s] proceedings . . .

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[27] ECF No. 2-5.

[28] Comparing the motion in this case, with the motion for preliminary injunction Johnson filed in *Johnson v. IRS, et al.*, Civ. No. 4:18-cv-00062-TS, shows that the documents (minus some missing paragraphs) are nearly identical. *Compare* ECF No. 2-5 (the motion in this case) *with* ECF No. 2 (the motion filed in the case before Judge Stewart). In the case before Judge Stewart, Johnson alleged that the Agencies violated his constitutional rights in *RaPower-3*, sought an injunction in his prayer for relief, and moved for a preliminary injunction consistent with the relief he requested in that case. It appears that Johnson simply filed a (nearly) identical motion in this case too, regardless of its total lack of relevance to the claims and prayer for relief in this matter. Johnson did the same thing in his state court proceeding (now removed) against Dr. Thomas Mancini. Ex. 934, *Johnson v. Mancini*, Civil No. 180700041, Motion for Preliminary Injunction.

[29] *Schrier v. Univ. of Co.*, 427 F.3d 1253, 1258 (10th Cir. 2005).

[30] *Schrier*, 427 F.3d at 1258.

[31] *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098–99 (10th Cir.1991)).

because of constitutional violations or potential violations."[32] Therefore, Johnson must make a "clear showing" that he will prevail on the merits.[33] He must make a "strong showing" regarding the balance of harms.[34]

But Johnson has not shown that he is entitled to equitable relief at all. For all of the reasons stated in the United States' motion to dismiss his complaint in the case before Judge Stewart, Johnson has no chance of success on the merits of his equitable claims and he will not suffer an irreparable injury if the injunction is not granted.[35] "[E]quitable relief is available only in the absence of adequate remedies at law."[36] Here, Johnson has an adequate remedy at law to air his grievances with the proceedings and results in *RaPower-3* (and to cure any resulting injury), *and is already using it*: direct appeal of Judge Nuffer's orders to the Tenth Circuit (through his counsel of record), then (if needed) to the Supreme Court.[37] 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*.[38] Further, Johnson's motion does

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[32] ECF No. 2-5 at 7.

[33] *S.E.C. v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1296 (D. Utah 2017).

[34] *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 975.

[35] ECF No. 15; *supra* n.5 (incorporation by reference).

[36] *Switzer*, 261 F.3d at 991.

[37] *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.").

[38] *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*

(continued...)

not show that he is entitled to equitable relief based on any tort claims he made in the complaint in this case, which should be dismissed for the reasons stated in our motion[39]. The motion for preliminary injunction does not even mention the claims in this case.[40] For these reasons, Johnson is "not entitled to declaratory or injunctive relief in this case."[41]

Similarly, the balance of harms weighs heavily against Johnson. Judge Nuffer concluded, after a trial on the merits, that Johnson's abusive conduct caused such harm to the United States and to the public interest that Johnson should be enjoined and his assets frozen so that a receiver could enforce Judge Nuffer's disgorgement order.[42] Against Judge Nuffer's findings and conclusions, determined after three years of litigation, Johnson offers nothing but frivolous claims and baseless accusations. These are not sufficient to carry his heavy burden on this motion for preliminary injunction. Johnson's motion should be denied.

(…continued)

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.").

[39] ECF No. 11.

[40] *See generally* ECF No. 2-5.

[41] *Bolin*, 225 F.3d at 1242-43 (observing that the remedy for alleged judicial misconduct is appeal to the appellate court or the Supreme Court); *Switzer*, 261 F.3d at 991; *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)).

[42] *RaPower-3*, ECF No. 444 at 16-21 and ECF No. 467 at 121-30.

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 and the reasons stated in our motion to dismiss, Johnson's complaint should be dismissed with prejudice, his motion for preliminary injunction should be denied, and this case ordered closed. But if any of Johnson's claims were to survive our motion to dismiss or our opposition to his motion for preliminary injunction, all proceedings in this matter should be stayed pursuant to Judge Nuffer's receivership order in *RaPower-3*.[43] Johnson is a Receivership Defendant subject to that order, and the order stays all civil actions "of any nature" involving Receivership Defendants.[44] This Court should not allow Johnson to waste receivership assets – even in the slightest amount – to pursue this frivolous matter.

IV. Conclusion

Johnson cannot show that he is entitled to any preliminary relief that would change the status quo in *RaPower-3*. Johnson has an available remedy at law, which he is currently using – direct appeal of the adverse decisions in *RaPower-3*. Johnson's complaint should be dismissed and his motion for preliminary injunction should be denied.

[43] *See* ECF No. 9.

[44] ECF No. 9-1 ¶ 47.

Dated: November 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018 I electronically filed the foregoing UNITED STATES' BRIEF IN OPPOSITION TO JOHNSON'S MOTION FOR PRELIMINARY INJUNCTION 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' BRIEF IN OPPOSITION TO JOHNSON'S 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