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

GLENDA E. JOHNSON, Plaintiff, vs. INTERNAL REVENUE SERVICE, DEPARTMENT OF JUSTICE, agencies of the United States, and DAVID NUFFER, an individual, Defendants.	Civil No. 2:20-cv-00090-HCN **UNITED STATES' REPLY ON ITS MOTION TO DISMISS THE COMPLAINT** Judge Howard C. Nielson, Jr.

On April 26, 2020, the United States moved to dismiss the complaint filed by Glenda Johnson against the Internal Revenue Service, the Department of Justice, and United States District Court Judge David Nuffer.[1] In the complaint, she seeks to stop further proceedings in

[1] ECF No. 1; ECF No. 1-2. Because of a scanning error, ECF No. 1-2 is the operative complaint in this matter. *See* ECF No. 5.

United States v. RaPower-3, LLC, et al. (over which Judge Nuffer is presiding) and damages for alleged injuries suffered in that case. In its opening brief, the United States showed why lawsuit should be dismissed under Fed. R. Civ. P. 12: this Court lacks subject matter jurisdiction over the claims she purports to bring, and she has failed to state a claim for which equitable relief can be granted.[2]

Glenda Johnson opposed the United States' motion on May 20, 2020.[3] Rather than directly addressing the United States' specific facts, authority, and legal arguments that favor of dismissing her complaint in this separate lawsuit,[4] she – in combination with a Rule 60 motion filed in *RaPower-3* – amplified certain otherwise incomprehensible allegations in her complaint about a pending case in Tax Court.[5] She appears to argue that Department of Justice attorneys in the *RaPower-3* litigation and IRS attorneys in separate Tax Court litigation advanced inconsistent positions about whether solar lenses at the heart of the tax scheme in *RaPower-3* qualified as "energy property" for purposes of a tax credit.[6] Specifically, she appears to argue that, in *RaPower-3,* the United States took the position that the solar lenses at issue were *not*

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[2] The undersigned attorney does not represent Judge Nuffer.

[3] ECF No. 8.

[4] *Compare* ECF No. 7 *with* ECF No. 8.

[5] *Compare* ECF No. 1-2 ¶¶ 26-27 *with* ECF No. 8 *and* "Rule 60 Motion To Set Aside Judgment Against Defendants (Newly Discovered Evidence) (Fraud On The Court)," *United States v. RaPower-3, LLC, et al.*, No. 2:15-cv-00828-DN-EJF (D. Utah) ("*RaPower-3*"), *available in that case at* ECF No. 931. 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.").

[6] *See* 26 U.S.C. §§ 46(2); 48(a)(1), (2)(A)(i)(II).

"energy property", and that that position resulted in the injunction (and subsequent orders that purportedly harmed her).[7] She also claims that, in a Tax Court trial in February 2020, the United States reversed position and "expressly conceded" that the lenses *are* "energy property."[8] According to Glenda Johnson, the United States' "failure to alert [the *RaPower-3* court]" to the changed position was "fraud on the [*RaPower-3*] court."[9]

Therefore, Glenda Johnson appears to be attempting to invoke the Court's inherent authority to "entertain an independent action" to relieve her from the *RaPower-3* judgment, orders or proceedings or to "set aside [the *RaPower-3*] judgment for fraud on the court."[10] According to the Tenth Circuit, "[t]he substance of the plea should control, not the label."[11] An independent action for relief from judgment, brought in the same court as the original lawsuit, does not require an independent basis for jurisdiction.[12] But "[i]ndependent actions must . . . be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata."[13] An independent action is "available only to prevent a grave miscarriage of justice."[14] Similarly, a claim of fraud

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[7] *E.g.*, United States v. RaPower-3, LLC, No. 18-4119, — F.3d. —, 2020 WL 2844694, at *3-4 (10th Cir. June 2, 2020).

[8] *See* ECF No. 8 at 1.

[9] *See* ECF No. 8 at 2, 6.

[10] Fed. R. Civ. P. 60(d)(1) & (2).

[11] *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002).

[12] *United States v. Beggerly*, 524 U.S. 38, 46 (1998). Therefore, if the Court construes Glenda Johnson's complaint as an independent action under Rule 60(d)(1), it should not grant the United States' motion to dismiss based on the jurisdictional arguments in section II.A. in its opening brief.

[13] *Beggerly*, 524 U.S. at 46.

[14] *Beggerly*, 524 U.S. at 47; *accord Buck*, 281 F.3d at 1341.

on the court must show a "deliberate scheme to defraud" "directed to the judicial machinery itself."[15] A moving party must show "[i]ntent to defraud" to obtain relief.[16] Such claims are "difficult to prove."[17]

The allegations in Glenda Johnson's complaint offered the United States no notice that she was making such grievous claims. This reply brief is not an appropriate place for the fulsome response that her false accusations demand. A careful review of a Rule 60 motion about the United States' purported changed position would require broad and deep knowledge of the facts and law applicable to the *RaPower 3* litigation and the relationship of the proceedings in Tax Court to that matter. In fact, as mentioned above, a Rule 60 motion was filed in *RaPower-3* on May 26, 2020 – six days after Glenda Johnson opposed the United States' motion to dismiss. The *RaPower-3* Rule 60 motion appears to raise the exact same arguments that Glenda Johnson raised in her opposition to our motion to dismiss. The attorneys who signed and filed the Rule 60 motion are the same attorneys who represent Glenda Johnson in that matter. They also represent the *RaPower-3* defendants in their appeal of Judge Nuffer's injunction, order of disgorgement, and judgment – which the Tenth Circuit affirmed yesterday.[18]

Because of the factual and legal identity between the *RaPower-3* Rule 60 motion and Glenda Johnson's opposition brief, and because of his thorough understanding of the *RaPower-3*

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[15] *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1291 (10th Cir. 2005) (quoting *Buck*, 281 F.3d at 1342 (alterations omitted)).

[16] *Zurich N. Am.*, 426 F.3d at 1291 ("Intent to defraud is an 'absolute prerequisite' to a finding of fraud on the court." (quoting *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir.1995)).

[17] *Zurich N. Am.*, 426 F.3d at 1291.

[18] *RaPower-3*, — F.3d —, 2020 WL 2844694.

case, Judge Nuffer is in the best position to rule on the issues raised. The United States will show, in *RaPower-3*, that there is no factual, legal, or procedural basis for the Rule 60 motion. The outcome of proceedings following the *RaPower-3* Rule 60 motion will, therefore, likely obviate this action. Accordingly, the United States respectfully recommends, in the interests of judicial economy and avoiding inconsistent results, that any decision on this motion be stayed until the Rule 60 motion is resolved in *RaPower-3*. This is consistent with the "better practice" of asserting Rule 60 claims in the same matter as the challenged judgment, order, or procedure.[19] After a decision is entered in *RaPower-3*, the Court and the parties in this matter will be in a better position to revisit the allegations Glenda Johnson makes here, if needed.

Dated: June 3, 2020

Respectfully submitted,

/s/ Erin Healy Gallagher

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[19] *See Crosby v. Mills*, 413 F.2d 1273, 1275 (10th Cir. 1969) *cited in* Wright & Miller, Independent Action for Relief, 11 Fed. Prac. & Proc. Civ. § 2868 (3d ed.) ("The normal procedure to attack a judgment should be by motion in the court that rendered the judgment.").

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2020 the foregoing UNITED STATES' REPLY ON ITS MOTION TO DISMISS THE COMPLAINT 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 June 3, 2020, I caused the foregoing UNITED STATES' REPLY ON ITS MOTION TO DISMISS THE COMPLAINT to be served upon the following by U.S. Mail, first-class, postage prepaid:

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Plaintiff

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
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