Mark R. Gaylord, Esq. (#5073)
Melanie J. Vartabedian, Esq. (#10148)
Tyler M. Hawkins, Esq. (#13234)
BALLARD SPAHR LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001
gaylord@ballardspahr.com
vartabedianm@ballardspahr.com
hawkinst@ballardspahr.com

Attorneys for Defendants Jordanelle Special Service District, Jordanelle Special Improvement District No. 2005-2, Jay Price, and Dan Matthews

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

VR ACQUISITIONS LLC, **Plaintiff,** **v.** **WASATCH COUNTY, the JORDANELLE SPECIAL SERVICE DISTRICT, the JORDANELLE SPECIAL IMPROVEMENT DISTRICT NO. 2005-2, JAY PRICE and DAN MATTHEWS,** **Defendants.**	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LIMITED EXPEDITED DISCOVERY** **Case No.: 2:15-cv-00018-EJF** **Honorable Evelyn J. Furse**

Defendants the Jordanelle Special Service District ("JSSD"), the Jordanelle Special Improvement District No. 2005-2, Jay Price, and Dan Matthews (collectively, "Defendants"), by and through undersigned counsel, hereby submit this memorandum in opposition to Plaintiff's Motion and Memorandum in Support of Motion for Limited Expedited Discovery (the "Motion").

For the reasons set forth below, the Motion should be denied and the Court should resolve the threshold legal issues of jurisdiction, standing, and immunity before any discovery is had in this case.

INTRODUCTION

Plaintiff seeks leave to immediately embark on a fishing expedition in hopes of uncovering evidence to justify injunctive relief relieving it of its obligation to pay an assessment levied against its property for the right to use certain public improvements constructed for its direct benefit. In doing so, Plaintiff relies on events that occurred in 2004-2005, seven (7) years **before** VR Acquisitions, LLC even came into existence. The Court should reject Plaintiff's request for expedited discovery because, among other things, this Court lacks jurisdiction to even inquire into the matters and issues raised by Plaintiff.

Plaintiff knew development around the Jordanelle Basin was stagnant due to the Great Recession when in 2012 it purchased the 6,700 acres that comprise Victory Ranch. Yet Plaintiff brings this action, at the eleventh hour, in an attempt to extricate itself (and the "other Improvement District landowners") from the bargain its predecessor struck and consented to in 2005, on the flimsy notion that its substantive and procedural due process rights have been violated. The propriety, validity, and constitutionality of the 2005 Notice of Intention (and the adoption of the Creation Resolution and Assessment Ordinance) upon which all of Plaintiff's claims rely already has been litigated several times, by the "other Improvement District landowners" – namely Cummings Land & Livestock, LLC and BV Jordanelle, LLC, the latter of whom, like Plaintiff, acquired property within the assessment area **after** the adoption of the

Assessment Ordinance in July of 2009.[1] Plaintiff's claims are not new. In fact, they are virtually the same as those raised by "other Improvement District landowners" within Area C. The Fourth Judicial District Court (and in one instance, the Utah Court of Appeals) has previously ruled in Defendants' favor, dismissing claims similar to those raised by Plaintiff here. This action is but one more bite at the apple, albeit from a different landowner. As in each of the other cases, Plaintiff's allegations—though salacious—are utterly meritless and will not survive a motion to dismiss. Accordingly, Defendants should not be subjected to any discovery, let alone the hassle and expense of expedited discovery.

Expedited discovery should not be allowed for several other reasons. First, courts have repeatedly held that discovery, even limited, is inappropriate until threshold legal issues such as jurisdiction, standing, and immunity are resolved. Here, applicable law expressly bars untimely challenges to assessments. The 2005 Notice of Intention was only the first step in a statutory process to which the Prior Owner acknowledged and consented to pursuing. The 2005 Notice of Intention led to the adoption of the Creation Resolution and Assessment Ordinance in February 2006 and July 2009 respectively. Based on Utah Code Ann. § 11-42-106, the court has no

[1] With the exception of Cummings Land & Livestock, LLC, the property owners who invited and requested the improvements financed by the assessments at issue in this case have long since departed. Like many developers throughout the country, they lay victim to the Great Recession, which prompted real estate developments across the country fail. Wasatch County and the State of Utah was not immune to this overarching downturn in the real estate market and development. Yet, subsequent land speculators (like Plaintiff and BV Jordanelle, LLC), hard money lenders (like BV Lending, LLC), and Cummings have now banded together under the moniker "Jordanelle Owners Group" to jointly seek to either invalidate the assessment and/or have legislation passed that has the same effect. Plaintiff's local counsel, Michael Johnson, and the law firm of Ray Quinney & Nebeker have represented BV Lending and BV Jordanelle since the summer of 2010 and filed suit on their behalf seeking similar relief. The Court rejected the BV Entities' claims and the result in the instant case should be no different.

jurisdiction to entertain Plaintiff's untimely attack on Defendants' creation of the assessment area, construction of the improvements and/or adoption of the assessments.

Plaintiff also lacks standing to challenge the assessment, as, among other things, Plaintiff purchased the Victory Ranch property in 2012**—three years after adoption of the Assessment Ordinance**—with full knowledge of the assessment. Finally, Messrs. Matthews and Price are government officials who, while acting in their official capacity, saw the governing body of JSSD pass resolutions and ordinances that led to the construction of the Improvements and imposition of the assessments. As such, they are entitled to governmental immunity. Accordingly, Defendants should not be subjected to any discovery, let alone expedited discovery, until the Court decides whether it has jurisdiction, whether Plaintiff has standing, and whether Matthews and Price are entitled to qualified immunity.

Moreover, there is no need for expediency, and the purported urgency prompting Plaintiff's request is of Plaintiff's own making. Defendants should not be punished for Plaintiff's unjustified, calculated delay. Plaintiff strategically waited until the eve of its payment deadline to file this suit so it could manufacture urgency and prompt the Court to subject Defendants to expedited discovery. Again, Plaintiff purchased the Victory Ranch property in 2012 from a Wells Fargo Bank entity. Wells Fargo had acquired the property because of the "Prior Owner's" default. Prior to purchasing the Victory Ranch property, Plaintiff's predecessors had already made three assessment payments in 2010, 2011 and again in 2012 without objection. Only after Plaintiff purchased the Victory Ranch property did it suddenly pay the annual assessment under a reservation of rights—not once, but twice; in 2013 and 2014. Now, Plaintiff wants the Court to excuse it from its obligations. There is no reason why Plaintiff cannot do the same this year, thereby eliminating the contrived sense of urgency and permitting this litigation to proceed in the

normal course.[2] Plaintiff has been an active participant with the Jordanelle Owners Group from the inception and known the facts giving rise to these claims for months, if not years.[3] Hence, Plaintiff sat on its purported constitutional rights only to now spring this copycat lawsuit on Defendants. Defendants should not be punished for Plaintiff's delay.

FACTUAL BACKGROUND

The following facts are intended to provide the Court with a brief background of the events that give rise to this latest effort by property owners within the "Improvement District" to avoid having to pay their proportionate share for Improvements constructed at their request and for their direct benefit. Significantly, as the Court examines these facts, it should be mindful that Plaintiff is not only directly benefitting from the Improvements, but is the only property owner within the Improvement District that is actually using the Improvements, including the water wells, sewer lines and pump stations constructed to allow its exclusive development to become a reality.[4]

In the early 2000s, the then owner of the Victory Ranch property, Victory Ranch, LLC (the "Prior Owner") desired to develop Victory Ranch. To this end, in 2005 it approached Wasatch

[2] On the other hand, permitting Plaintiff to withhold payment will lead JSSD to default on its bond obligations. At the present time, the District is now current on its obligations owing to the Bondholders having transferred title to foreclosed properties to Bondholders in full satisfaction of its obligations pursuant to Utah Code Ann. § 11-42-504. To allow Plaintiff to avoid paying its assessment obligations would be devastating to the District's efforts to fulfill its own contractual obligations.

[3] For example, Plaintiff's assertions regarding JSSD's acquisition of property from Fishin' with Bread, LLC is old news. These same allegations were asserted by Cummings Land & Livestock, LLC in a similar suit over two years ago. Had Plaintiff done any investigation into the transaction it would have discovered this claim has no merit.

[4] It is ironic that Plaintiff seeks the draconian remedy of voiding the assessment. Plaintiff operates a "luxury and residential and vacation development" that "includes a golf course" and will include "luxury residences, a lodge, and a member center." (Compl. ¶ 20.) If anyone needs the water and sewer improvements made possible by the assessment, it is Plaintiff.

County (the "County") and requested that the County "create a special improvement district pursuant to [Utah law], for purposes of financing the costs of construction of the [certain water, sewer and related improvements]." (Acknowledgement and Consent between JSSD and Prior Owner dated November 16, 2005, attached as Exhibit 1.) The County obliged and adopted a Notice of Intention to create the Improvement District (the "2005 Notice"). (*See* 2005 Notice, Ex. A to Compl.) The 2005 Notice identified the method of assessment and the improvements proposed to be constructed. (*Id.* at 4–6.) In accordance with Utah law, the 2005 Notice was sent to all of the property owners located within the Improvement District. *See* Utah Code Ann. 11-42-202(3). It was also published in the Wasatch Wave.

No protests or objections to the 2005 Notice were received and in February 2006, the resolution creating the JSSD Improvement District No. 2005-2 (the "Creation Resolution") was adopted by the County. (*See* Creation Resolution, Ex. B to Compl., at 2–4.) The Creation Resolution was recorded against all properties located within the assessment area ("Area C"), including the Victory Ranch property. (*Id.*) Following the adoption of the Creation Resolution, the District commenced construction of the Improvements, which were funded through the issuance of interim warrants and bond anticipation notes as permitted by the Assessment Area Act. *See* Utah Code Ann. § 11-42-601 and 602.

On June 23, 2009, the County recorded a Notice of Proposed Assessment against Victory Ranch and all other property within the Improvement District. Copies of the Notice of Proposed Assessment were mailed to all property owners within Area C, including the Prior Owner and published in the Wasatch Wave as required by Utah law. *Id.* § 11-42-402. On June 30, July 1 and July 2, 2009, the Board of Equalization held hearings to allow any interested party to voice objections to the proposed assessment. On July 8, 2009, the County Council, as the governing

board of JSSD, adopted an Assessment Ordinance levying an assessment against property owners within Area C, including the Victory Ranch property. (Assessment Ordinance, Ex. C to Compl.) In doing so, the governing board of JSSD adopted the recommendations of the Board of Equalization, which included making adjustments to the assessment at the request of the Prior Owner. (*See id.* at 2 ("At the request of the property owner for Victory Ranch A and B, the total assessments for these properties have been adjusted upward slightly and the allocation between A and B has been modified.").) Additionally, Section 12 of the Assessment Ordinance provided that any party may challenge the Assessment Ordinance "not later than thirty (30) days after the effective date of the Ordinance. This action shall be the exclusive remedy of any aggrieved party." (*Id.* § 12.) A copy of the Assessment Ordinance was provided to the property owners in the District. (*Id.* § 13.) No objections were filed by any of the affected property owners within Area C or any other party, including the Prior Owner.

The Assessment Ordinance took effect on July 15, 2009. The Prior Owner did not file an action to contest the assessment or the proceedings to levy the assessment within 30 days after the effective date of the Assessment Ordinance. On September 24, 2009, the District caused a Notice of Assessment Interest to be recorded in the Wasatch County Recorder's Office, as Entry 652632, in Book 1000, at Pages 1569–1583. (Notice of Assessment Interest, Ex. D. to Compl.) The Notice of Assessment Interest expressly provided that: "Notice is hereby given that [JSSD] claims an interest in the property described in Exhibit 1 arising out of the [District] and the terms and provisions of the Assessment Ordinance . . . [adopted] on July 8, 2009, levying an assessment against certain properties in the District." (*Id.* at 1.) The properties levied included Victory Ranch.

On or about **November 1, 2009**, the District sent notice to all property owners of record of their right to elect to either pay the assessment in its entirety or pay the assessment over twenty years. With the exception of one land owner, Sorenson, who elected to pay the entire assessment, all other property owners within Area C, including the Prior Owner, elected to pay the assessment over twenty years. On February 1, 2010, the Prior Owner made the first assessment payment ($2,088,990.07) to Zions Bank, as trustee. On August 1, 2010, the Prior Owner made a deferred interest payment ($931,094.30) as required by the Assessment Ordinance. Due to the Great Recession, however, on November 10, 2010, a Wells Fargo entity, ATC Realty Sixteen, Inc., obtained title to Victory Ranch via a deed in lieu of foreclosure from the Prior Owner. (Compl. ¶ 21; Warranty Deed, attached as Exhibit 2.) Thereafter, on February 1, 2011 and 2012, ATC Realty made the required annual assessment payments without objection.

On or about February 7, 2012, Plaintiff was formed as a Delaware LLC. (*See* Delaware Dept. of State: Div. of Corps. record, attached as Exhibit 3.) On information and belief, Plaintiff is a single purpose entity created solely to hold title to the Victory Ranch property. Plaintiff purchased the Victory Ranch property from the Wells Fargo special purpose entity on May 2, 2012, with full knowledge and notice of the assessment that had been levied against the property. (*See* Compl. ¶ 21; Special Warranty Deed, attached as Exhibit 4.) Upon selling the property to Plaintiff, Wells Fargo cancelled the note made by the Prior Owner and all other indebtedness secured by the deed of trust securing the note. (Substitution of Trustee with Deed of Reconveyance, attached as Exhibit 5.) Plaintiff acquired title to the Victory Ranch property subject to the assessment that had been a valid encumbrance upon title since as early as 2005, but no later than July 2009.

Since acquiring the Victory Ranch property, Plaintiff has elected to pay the annual assessment payment under a reservation of rights. In February of 2013, Plaintiff made a payment to Zions Bank in the amount of $2,042,219.16, under protest.

> The Owner has become aware of certain potential issues regarding the improvements that were to be performed and that are the subject of the assessment payments called for by the Assessment Bill. The Owner has not had the opportunity to fully investigate those potential issues. Nevertheless, today the Owner will be making the Assessment Payment to Zions Bank Public Finance. Because the Owner has not yet had the opportunity to fully and fairly investigate such potential issues, the Owner is making the Assessment Payment under protest, and in making the Assessment Payment, the Owner reserves all rights, and does not waive its rights, to investigate the facts and, if necessary, take appropriate action with respect to the Owner's rights.

(A copy of Plaintiff's February 1, 2013 Letter to JSSD and Zions Bank is attached hereto as Exhibit 6.) A year later, on January 31, 2014, Plaintiff made a second payment to Zions Bank in the amount of $2,027,939.18 under protest which protest contained the identical language above. (A copy of Plaintiff's January 31, 2014 Letter to JSSD and Zions Bank is attached hereto as Exhibit 7.)

ARGUMENT

By its Motion, Plaintiff seeks expedited discovery to support its pursuit of a preliminary injunction that seeks to have the Court allow it to avoid having to pay the annual assessment payments levied against the Victory Ranch property which it has paid for the past two years. Plaintiff implies that expedited discovery is granted as a matter of course when a party seeks a preliminary injunction. Not so. Expedited discovery is the exception, not the rule. "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . by court order." Fed. R. Civ. P. 26(d)(1). Here, the Court should not permit Plaintiff to conduct expedited discovery, because (i) no discovery should be undertaken until the Court

resolves the threshold legal issues of jurisdiction, standing, and immunity; and (ii), in any event, Plaintiff cannot demonstrate good cause for expedited discovery.

I. DISCOVERY SHOULD BE POSTPONED UNTIL JURISDICTION, STANDING, AND IMMUNITY ARE RESOLVED.

Discovery is generally inappropriate "while issues of immunity or jurisdiction [or standing] are being resolved." *See Daniels v. Dataworkforce LP*, 2014 WL 4783670, *2 (D. Colo., Sept. 25, 2014) (unpublished)[5]; *Bilal v. Wolf*, 2007 WL 1687253, *1 (N.D. Ill., June 6, 2007) (unpublished).[6] Many courts have in fact allowed stays of discovery "where the issue is a threshold one, such as jurisdiction, standing, or . . . questions of qualified immunity." *Bilal*, 2007 WL 1687253 at *1 (citations omitted) (citing *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 478 U.S. 72, 79–80 (1988); *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435, 437 (N.D. Ill. 1996); *Saucier v. Katz*, 533 U.S. 194, 200 (2001)); *In re Lithium Ion Batteries Antitrust Liti.*, 2013 WL 2237887, *2 (N.D. Cal., May 21, 2013) (unpublished)[7] ("Stays of discovery may be deemed warranted where a motion to dismiss can resolve a threshold issue such as jurisdiction, qualified immunity, or where discovery may be especially burdensome or costly."). Resolution of these threshold issues "at the earliest stages of litigation" is the correct approach—it conserves time, resources, and avoids the burden of needless discovery. *MAP v. Bd. of Trustees for Colo. Sch. for the Deaf and Blind*, 2013 WL 5389787, *1 (D. Colo., Sept. 26, 2013) (unpublished).[8]

[5] A copy of the *Daniels* decision is attached as Exhibit 8.

[6] A copy of the *Bilal* decision is attached as Exhibit 9.

[7] A copy of the *Lithium Ion Batteries* decision is attached as Exhibit 10.

[8] A copy of the *MAP* decision is attached as Exhibit 11.

The United Supreme Court has said that discovery should not be allowed when a threshold issue would resolve the case. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("In *Harlow* we said that '[u]ntil this *threshold* immunity question is resolved, discovery should not be allowed.'"). In *Siegert*, the Court said that "[d]ecision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant . . . to engage in expensive and time consuming preparation to defend the suit on its merits." *Id.* at 232. The Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all agreed with *Siegert*, and have stated that discovery, if allowed, should be allowed only to determine threshold questions of jurisdiction, immunity, and so on. *See, e.g.*, *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990) (stating that where jurisdiction is at issue, plaintiff may only be "allowed limited discovery with respect to the jurisdictional issue"); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) (stating that when "immunity has been claimed, unlimited jurisdictional discovery is not permitted as a matter of course," but that discovery should be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination'."); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1087–88 (9th Cir. 1999) (ditto); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) ("discovery and fact-finding should be limited to the essentials necessary to determining the preliminary question of jurisdiction."); *Rubin v. The Islamic Rep. of Iran*, 637 F.3d 783, 796–97 (7th Cir. 2011) ("'[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'"); *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) (ditto); *Phoenix Consulting Inc. v. Rep. of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) ("[Discovery] should not be authorized at all if the defendant raises either a different

jurisdictional or an 'other non-merits ground[] such as . . . personal jurisdiction' the resolution of which would impose a lesser burden upon the defendant." (internal citation omitted).

In *Garrett v. Stratman*, the Tenth Circuit noted that the threshold issue of immunity is not only meant to give government officials a right to avoid standing trial "but also to avoid the burdens of such pretrial matters as discovery, as inquiries of this kind can be *peculiarly disruptive of effective government*.'" 254 F.3d 946, 951 (10th Cir. 2001) (emphasis added). The Tenth Circuit therefore said that discovery, if allowed, should be limited to the threshold issue. *Id.* at 953. Principles such as the above are born out of the fact that discovery can be disruptive, burdensome, costly, and inefficient; especially when there is a threshold issue that may resolve the case. As the Supreme Court said, "one of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert*, 500 U.S. at 232 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

Here several threshold issues must be decided before Defendants should be subjected to burdensome discovery, much less expedited discovery. Specifically, Defendants will be moving to dismiss this case in its entirety for lack of jurisdiction and standing, and on the grounds that Messrs. Matthews and Price are entitled to qualified immunity.

1. The Court Lacks Jurisdiction.

First, the Court is without jurisdiction to consider Plaintiff's attack on the assessment. By this action, Plaintiff seeks to have the 2005 Notice of Intention, Creation Resolution and Assessment Ordinance declared void *ab initio*. (Compl. at 33.) It also claims that "JSSD has placed a lien on the VR Property, purportedly to secure Victory Ranch's obligation to pay assessments" and that the "lien is a cloud on and encumbers Victory Ranch's property." (*Id.* at

¶ 114.) Plaintiff then claims its substantive and procedural due process rights have been violated because it did not have an opportunity to be heard. (*See, e.g., id.* at ¶ 126.) The absurdity of these claims is best demonstrated by the fact that Plaintiff did not even exist when the 2005 Notice of Intention was issued in November 2005, when the Creation Resolution was passed in February 2006, or when the Assessment Ordinance was adopted in July 2009.

Utah law provides that an action to contest an assessment or any proceeding to designate an assessment area or levy an assessment "may not be commenced against and a summons relating to the action may not be served on the local entity more than 30 days after the effective date of the assessment resolution or ordinance." Utah Code Ann. § 11-42-106(2)(b). "An action under this section is the **exclusive remedy** of a person who claims an error or irregularity in an assessment or in any proceeding to designate an assessment area or levy an assessment." *Id.* § 11-42-106(3)(a). After the expiration of the 30-day period, the assessment bonds "**become** at that time **incontestable** against all persons who have not commenced an action." *Id.* § 11-42-106(5)(a). Finally, after the expiration of the 30-day period, a "suit" to enjoin the "levy, collection, or enforcement of an assessment or to attach or question in any way the legality of the assessment bonds, . . . or an assessment may not be commenced, and **a court may not inquire into those matters.**" *Id.* § 11-42-106(5)(b) (emphasis added). Plaintiff's complaint is over **five (5) years** beyond the 30-day period. The suit seeks to enjoin the "levy, collection [and] enforcement" of the assessment levied against the Victory Ranch property. Accordingly, Plaintiff's claims are barred and the Court lacks jurisdiction to "inquire into [these] matters." Before conducting expedited discovery, this Court should take up the issue of jurisdiction, which is a threshold issue. Therefore, the Motion should be denied.

2. Plaintiff Lacks Standing.

Plaintiff also lacks standing to challenge the assessment. To establish standing, a plaintiff must meet the following three requirements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between that injury and the challenged action of the defendant—the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party. Finally, it must be likely, not merely speculative, that a favorable judgment will redress the plaintiff's injury.

Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154 (10th Cir. 2005) (internal citations omitted). In order to satisfy the causation element, a plaintiff must prove "a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Id.* Here, Plaintiff cannot satisfy this standard. Plaintiff was not formed until 2012, nearly three years after the Assessment Ordinance was adopted and the property was levied. When Plaintiff took title to Victory Ranch, the 2005 Notice of Intention, Creation Resolution and Assessment Ordinance were all matters of public record. Therefore, the 2005 Notice of Intention, Creation Resolution and Assessment Ordinance did not cause injury to Plaintiff. At the time of these events, Plaintiff did not even exist as a legal entity. Plaintiff does not even allege its purchase of the Victory Ranch property was in any way related to the 2005 Notice of Intention, Creation Resolution and Assessment Ordinance.

Similarly, with no interest in the property until recently, Plaintiff had no constitutional rights related to the 2005 Notice of Intention, Creation Resolution and Assessment Ordinance. Plaintiff was not adversely affected by the challenged actions. Moreover, as a matter of law, Plaintiff cannot litigate the rights of its predecessors in title. Upon selling the property to Plaintiff, ATC Realty Sixteen, Inc. cancelled the note and all other indebtedness secured by the deed of trust executed by the Prior Owner. Thus, Plaintiff lacks standing to assert the constitutional rights of

either the Prior Owner or ATC Realty. Accordingly, Plaintiff lacks standing to pursue the claims it has asserted. Therefore, as with jurisdiction, the Court should take up the threshold issue of standing before addressing Plaintiff's request for expedited discovery.

3. Messrs. Price and Matthews Are Immune From Liability.

Finally, Messrs. Price and Matthews are entitled to qualified governmental immunity, because, even assuming the truth of Plaintiff's allegations, they acted with a reasonable belief in the constitutionality of their actions. *See, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010). Plaintiff asserts that Messrs. Matthews and Price, acting under the color of law, deprived Plaintiff of its rights under the U.S. Constitution in violation of 42 U.S.C. § 1983. In other words, Plaintiffs asserts that while acting in their respective capacities as a councilmember of the governing body of JSSD (Price) and as manager of JSSD (Matthews), these individuals violated Plaintiff's rights. Messrs. Price and Matthews are entitled to immunity and this threshold issue needs to be determined before the Court allows Plaintiff to embark on a fishing expedition. Therefore, the Court should deny the Motion.

In short, this case can be resolved in its entirety on jurisdiction and standing grounds. As to Messrs. Matthews and Price, the case should be dismissed on immunity grounds. The discovery Plaintiff seeks has nothing to do with these issues. Rather the expedited discovery seeks to investigate conduct that occurred almost ten years ago, several years before Plaintiff came into existence, relating to "the process utilized by and intention of the JSSD," "the financial dealings of Mr. Price and Mr. Matthews," and "the JSSD's acquisition of property on which the Facility was constructed." (Motion at 4.) For this Plaintiff seeks to depose nine individuals and entities. Plaintiff's request is ironically entitled "limited expedited discovery" when there is nothing "limited" about it. Such expansive discovery would, at minimum, be unnecessary, burdensome,

resource draining, costly, and disruptive—particularly here where Defendants and several of the proposed deponents are governmental units and public officials. This Court should therefore deny Plaintiff's request. A denial would be in keeping with the first rule of civil procedure—that all the other rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

II. EVEN ASSUMING THERE WERE NO THRESHOLD LEGAL ISSUES, PLAINTIFF CANNOT DEMONSTRATE GOOD CAUSE FOR EXPEDITED DISCOVERY.

Even assuming the Court could overlook the threshold legal issues, Plaintiff cannot demonstrate good cause for subjecting Defendants to expedited discovery. A party must demonstrate good cause before it will be permitted to conduct expedited discovery. *See Roundy v. Zions Bancorporation*, No. 2:13-cv-1053-TC-PMW, 2014 WL 317800, at *1 (D. Utah Jan. 28, 2014) (unpublished).[9] Among the factors to be considered in determining whether good cause exists for expedited discovery are

> (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if expedited relief is granted.

Cecere v. Cnty. of Nassau, 258 F.Supp.2d 184, 186 (E.D.N.Y. 2003); *see also McMann v. Doe*, 460 F.Supp.2d 259, 265 (D. Mass, 2006) ("The factors typically weighed in determining whether good cause exists for lifting the bar on pre-conference discovery include the purpose of the discovery, the ability of the discovery to preclude demonstrated irreparable harm, the plaintiff's

[9] A copy of the *Roundy* case is attached as Exhibit 12.

likelihood of success on the merits, the burden of discovery on the defendant, and the degree of prematurity.") Here, application of these factors weighs strongly against expedited discovery.

A. Plaintiff's Request for Expedited Discovery Is Excessively Premature.

The instant request for expedited discovery could not be more premature. Indeed, Plaintiff only served the Complaint on Friday, January 9, 2014. Defendants have had two business days to respond. Under these circumstances, summary denial of Plaintiff's Motion is appropriate. *See Nunez v. Nunez*, No. 1:13-cv-126-TS (D. Utah Sept. 19, 2013) (unpublished).[10]

Moreover, the purported urgency behind Plaintiff's request for expedited discovery is a problem of Plaintiff's own making. Plaintiff claims expedited discovery is necessary because it faces an impending assessment payment that it would like to avoid. Plaintiff does not inform the Court that the Prior Owner voluntarily and without objection made the annual assessment payments in 2010 and 2011. Wells Fargo also made the assessment payment in 2012 without objection. Only after the property was sold to Plaintiff in 2012 did it make the annual assessment payment under a reservation of rights. In doing so, Plaintiff expressly represented to JSSD (and Zions Bank) almost two years ago that it "has become aware of certain potential issues regarding the improvements that were to be performed and that are the subject of the assessment payments called for by the Assessment Bill. The Owner has not had the opportunity to fully investigate these potential issues." (*See* Letter, Exhibit 6 hereto.) Plaintiff acknowledges it was aware of "potential issues." Yet, it apparently sat on these issues for two years only to come before the Court now asking for expedited discovery. Plaintiff has not shown good cause.

[10] A copy of the *Nunez* decision is attached as Exhibit 13.

The annual assessment payment is an integral part of the obligations the beneficiaries of the Improvements agreed to when they created the Assessment Area in 2005. If Plaintiff was so concerned in 2013 about paying a $2.0 million assessment, it is reasonable to believe that they would not sit idly by for two years before filing this action. The fact of the matter is, they have not sat idly by. Instead, Plaintiff deliberately waited until the last minute to file this lawsuit on the eve of the payment deadline in order to manufacture a sense of urgency. Plaintiff (and/or its predecessors) were obligated to bring this suit years ago. Under these circumstances, Plaintiff's request is unjustified, improper, and premature.

B. Plaintiff Will Not Suffer Irreparable Harm Absent Expedited Discovery.

Plaintiff will not be irreparably harmed if not allowed to conduct expedited discovery. Nor will it be harmed by having this Court consider the threshold issues of jurisdiction, standing and immunity. Any urgency brought about by the impending assessment payment is a problem of Plaintiff's own making. Moreover, Plaintiff cannot show that it will be irreparably harmed if it makes the payment, even if made under a reservation of rights. Starting in 2013 Plaintiff made its annual payment under a reservation of rights,[11] and there is no reason why Plaintiff cannot do the same this year and seek a refund through this action. *See* Compl. at 33 (praying for a refund of all of the assessments paid pursuant to the assessment ordinance). More importantly, Plaintiff cannot deny it is directly benefiting from the construction of the Improvements. As of the filing of this action, Plaintiff is the only property owner within Area C using the public infrastructure constructed at the property owners' request. Plaintiff simply cannot show that it will be *irreparably* harmed without expedited discovery.

[11] *See* Letters attached hereto as Exhibits 6, 7.

C. There is No Probability of Plaintiff Succeeding on the Merits.

Plaintiff effectively concedes it is unlikely to succeed on the merits, emphasizing instead in its motion for preliminary injunction that it has raised questions that make them "a fair ground for litigation and thus more deliberate investigation." But unfortunately for Plaintiff, the propriety, validity, and constitutionality of the 2005 Notice of Intention upon which all of Plaintiff's claims rely has been litigated several times, by other members of the Jordanelle Owners Group—large, wealthy landowners whose development plans, like Victory Ranch's, largely fell victim to the Great Recession. In each instance, the courts decided in Defendants' favor the issues raised by Plaintiff's complaint. As in each of the other cases, Plaintiff's allegations here—though salacious—are utterly meritless and will not survive a motion to dismiss. Accordingly, the likelihood of Plaintiff prevailing on the merits is extremely low.

D. The Harm to Defendants Outweighs the Purported Harm to Plaintiff.

Any slight harm to Plaintiff from having to pay again under protest will be substantially outweighed by the harm to Defendants should the Court subject them to expedited discovery. Plaintiff characterizes the scope of expedited discovery as "limited." As noted above, however, it is anything but. Rather, Plaintiff seeks extensive discovery on all of the issues that go to the heart of the merits of this case.

Subjecting Defendants and their counsel to nine depositions and unspecified written discovery on the far reaching subjects identified above—into events that occurred almost ten years ago, well before Plaintiff was formed—will greatly prejudice Defendants. For one, it will distract them from preparing their motion to dismiss based on the threshold issues of jurisdiction, standing and immunity. Under these circumstances, no discovery should be had until the Court rules on Defendants' motion to dismiss. Subjecting Defendants to expedited discovery would be wholly

improper and unduly prejudicial to Defendants. *See Roundy*, 2014 WL 317800, *2 ("Requiring Defendants to engage in discovery before the court resolves issues of jurisdiction and immunity and before Defendants' motion to dismiss is decided would impose undue prejudice on Defendants. If Plaintiff's complaint survives dismissal, Plaintiff can pursue discovery at that time.").

CONCLUSION

For the foregoing reasons, Plaintiff's request for expedited discovery should be denied in its entirety.

DATED this 13th day of January 2015.

/s/ Mark R. Gaylord
Mark R. Gaylord, Esq.
Melanie J. Vartabedian, Esq.
Tyler M. Hawkins, Esq.
BALLARD SPAHR LLP
Attorneys for Defendants Jordanelle Special Service District, Jordanelle Special Improvement District No. 2005-2, Jay Price, and Dan Matthews

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LIMITED EXPEDITED DISCOVERY** was served to the following this 13th day of January 2015, in the manner set forth below:

[X] Through the CM/ECF System for the U.S. District Court

[ ] Hand Delivery

[ ] U.S. Mail, postage prepaid

[ ] E-mail: tmccaffrey@freeborn.com; mjohnson@rqn.com; rwing@rqn.com; jkorb@rqn.com; saltlakedocketclerk@ballardspahr.com

Timothy J. McCaffrey, Esq.
FREEBORN & PETERS LLP
311 South Wacker Drive, Suite 3000
Chicago, IL 60606

Michael R. Johnson, Esq.
Robert W. Wing, Esq.
Jennifer R. Korb, Esq.
RAY QUINNEY & NEBEKER P.C.
36 South State Street, 14th Floor
Salt Lake City, UT 84111

/s/ Mark R. Gaylord

INDEX