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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH

In re: RAPOWER-3, LLC,  Debtor	Bankr. No. 18-bk-24865  Chapter 11  Hon. Kevin R. Anderson
<b>CREDITOR UNITED STATES DEPARTMENT OF JUSTICE, TAX DIVISION'S MOTION FOR PARTIAL STAY</b>	

Debtor RaPower-3, LLC, has attempted to escape the consequences of its fraud. It ran to the bankruptcy court to hide from orders recently issued, or soon to be issued, by Chief Judge David Nuffer of the United States District Court for the District of Utah after a 12-day bench trial in *United States v. RaPower-3, LLC*, 2:15-cv-00828-DN-EJF (D. Utah). For these reasons, and other cause, Creditor United States Department of Justice, Tax Division (“United States”), moved to dismiss RaPower-3’s bankruptcy petition as a bad-faith filing, or for alternative relief.<sup>1</sup> The United States also moved to withdraw the reference of this case to the Bankruptcy Court for the District of Utah for cause.<sup>2</sup> Now, the United States seeks a partial stay of further proceedings in this Court pending decisions on both motions. Specifically, to advance the goals of judicial economy, preserving the resources of the creditors and the debtor, and the public interest, we ask this Court to order that:

1. All parties in interest shall complete briefing on the United States’ motion to dismiss;
2. RaPower-3 shall meet any disclosure and reporting requirement imposed by statute, rule, and/or order of this Court; and
3. All matters governed by Fed. R. Bankr. P. 2004 shall proceed.

All other proceedings in this Court should be stayed pending 1) the District Court’s decision on the motion to withdraw the reference and 2) following that, the decision on the motion to dismiss.

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<sup>1</sup> ECF Bankr. No. 13.

<sup>2</sup> ECF Bankr. No. 15.

## I. Facts and Procedural Posture

This bankruptcy case is inextricably intertwined with the litigation in *United States v. RaPower-3, LLC*, 2:15-cv-00828-DN-EJF (D. Utah).<sup>3</sup> For more than ten years, Defendants Neldon Johnson,<sup>4</sup> RaPower-3, LLC, International Automated Systems, Inc. (“IAS”), LTB1, LLC (“LTB”), and R. Gregory Shepard promoted an abusive tax scheme centered on purported solar energy technology featuring so-called “solar lenses” to customers across the United States. The solar lenses were only the gloss on what Defendants were actually selling: unlawful tax deductions and credits. Defendants raked in more than \$50 million dollars from the solar energy scheme at the expense of the United States Treasury.

Judge Nuffer presided over the bench trial in this case over 12 days in April and June 2018.<sup>5</sup> Judge Nuffer took testimony from at least 24 witnesses, both live and via deposition designation, including 11 RaPower-3 customers. He received more than 650 exhibits in evidence, including many of the illusory transaction documents RaPower-3 supplied customers.<sup>6</sup> Judge Nuffer addressed numerous motions involving the parties’ legal arguments on topics

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<sup>3</sup> This motion presumes familiarity with the facts in Judge Nuffer’s ruling from the bench on June 22, 2018. Gov. Ex. BK0001, Tr. 2514:9-2526:4.

<sup>4</sup> Neldon Johnson is the same person who has been signing documents for RaPower-3. *E.g.*, ECF Bankr. No. 1.

<sup>5</sup> See Minute Entries for Trial, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF Nos. 372, 374, 378, 380, 386, 388, 391-93, 396, 409, 415.

<sup>6</sup> See generally Bench Trial Witness and Exhibit Lists, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 416 at 1-32.

including the propriety of disgorgement<sup>7</sup> and the appropriate equitable relief to ensure that the defendants in the District Court matter, including RaPower-3, do not dissipate assets<sup>8</sup>.

On June 22, 2018, immediately after closing arguments at trial, Judge Nuffer made partial findings of fact from the bench, concluding that RaPower-3, LLC (and all other defendants) engaged in a “massive fraud” for which they would be enjoined and disgorgement would be ordered.<sup>9</sup> Judge Nuffer also issued an interim order of injunction requiring that, no later than June 29, Defendants 1) post a notice on their websites that the District Court found tax information Defendants provided was false and 2) remove tax information from their websites.<sup>10</sup> Judge Nuffer indicated that broader relief will issue with his final opinion and order.<sup>11</sup>

Because of Defendants’ attempts to place their assets out of reach of the forthcoming disgorgement order, on June 22, the United States filed its second motion to freeze Defendants’ assets and appoint a receiver.<sup>12</sup> Judge Nuffer ordered Defendants to respond no later than July 2, 2018, by 9:00 a.m.<sup>13</sup>

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<sup>7</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 351](#), [ECF No. 352](#), [ECF No. 359](#).

<sup>8</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 414](#), [ECF No. 423](#).

<sup>9</sup> Gov. Ex. BK0001, Tr. 2515:5-11.

<sup>10</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 413](#).

<sup>11</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 413](#) at 1.

<sup>12</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 414](#).

<sup>13</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 417](#).

On Friday, June 29, Defendant RaPower-3, LLC filed for bankruptcy.<sup>14</sup> The Deseret News quoted RaPower-3's lead trial attorney on July 3, 2018, describing the purpose of RaPower-3's bankruptcy filing: to delay enforcement of Judge Nuffer's imminent orders affecting its assets so that RaPower-3 could retain control of its assets.<sup>15</sup> Simply the "threat" of Judge Nuffer authorizing an asset freeze and receiver sent RaPower-3 running to the bankruptcy court.<sup>16</sup>

Thirteen of the 20 largest unsecured creditors identified by RaPower-3 are its customers, as are more than 340 of its 360 creditors.<sup>17</sup> Any claims against RaPower-3 by these customer-creditors almost certainly arise from the fraud perpetrated upon them by all defendants in the District Court litigation: Johnson, RaPower-3, IAS, LTB1, and Shepard.<sup>18</sup> Four of the 20 largest

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<sup>14</sup> ECF Bankr. No. 1. Nonetheless, nearly all activities in the District Court litigation, including those that have an impact on RaPower-3, will continue because they are largely excepted from the automatic stay under 26 U.S.C. § 362(b)(4). See *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 429. The United States' motion on that topic is ripe for Judge Nuffer's decision. See *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 437.

<sup>15</sup> Gov. Ex. BK0002, Amy Joi O'Donoghue, *Companies in Utah solar fraud case filing for bankruptcy*, Deseret News, July 3, 2018, available online at <https://www.deseretnews.com/article/900023656/companies-in-utah-solar-fraud-case-file-for-bankruptcy.html> (The bankruptcy filing "'will delay [Judge Nuffer's forthcoming order on the United States' motion to freeze assets and appoint a receiver with respect to RaPower-3] but ultimately not prevent it. . . . The receiver issue would be delayed and moved over to the bankruptcy court for resolution or for the debtor to remain in possession of the estate.'").

<sup>16</sup> Gov. Ex. BK0002 ("The receiver power can virtually be unlimited,' Snuffer said. 'We don't know if the judge would seriously consider doing that, but what we have is the threat.'")

<sup>17</sup> Compare ECF Bankr. No. 6, List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders, at 2 (June 29, 2018) and the creditor's mailing matrix for this case, with customer names and addresses in Pl. Ex. 749, a native Excel file with data extracted from RaPower-3's customer database (on file with Judge Nuffer's Chambers). Frank Lunn, identified as the second largest unsecured creditor, was a trial witness by deposition designation. See *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 303, ECF No. 303-1.

<sup>18</sup> See Gov. Ex. BK0001, Tr. 2515:5-2526:4.

unsecured creditors (and all but three of the rest of RaPower-3's creditors<sup>19</sup>) are people or entities intimately involved with the District Court proceeding: Paul Jones the attorney who is representing RaPower-3 customers in Tax Court and as third-party witnesses in the District Court proceedings, at Neldon Johnson's expense; Kurt Hawes and Richard Jameson, so-called experts originally proffered by defendants but who were never called to testify; and Donald Reay, the attorney Neldon Johnson paid to represent Shepard in the District Court litigation.<sup>20</sup>

Due to the District Court proceedings over nearly three years – and especially the bench trial – Judge Nuffer has been steeped in the facts relevant to addressing RaPower-3's bankruptcy case. Therefore, he is in the best position to decide matters like the United States' motion to dismiss RaPower-3's bankruptcy petition as a bad-faith filing (or, in the alternative, for other relief), which might take this case out of the bankruptcy realm altogether. If such relief were to be granted, the asset freeze and receiver the United States seeks in the District Court proceedings would be equally applicable to RaPower-3 as to all defendants. Which is exactly what RaPower-3 was trying to avoid by filing for bankruptcy.

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<sup>19</sup> David E. Leta and Jeff D. Tuttle, of Snell & Wilmer, and Plaskolite, LLC, were not involved in the District Court litigation.

<sup>20</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 21](#) (Reay); [ECF No. 256-37 at 1](#) (Jones); Gov. Ex. BK0003, Defendants' Amended Witness List for Trial, at 1-2 (Hawes, Jameson). The remaining three creditors are the United States Department of Justice, Tax Division; Gary Peterson, purportedly RaPower-3's accountant; and Glenda Johnson, who as Neldon Johnson's wife is an insider and should not be on the list in any event. ECF Bankr. No. 6 (Glenda Johnson, Peterson).

**II. This bankruptcy proceeding should be partially stayed pending decisions on the motion to withdraw the reference and the motion to dismiss.**

The rules governing bankruptcy procedure allow a bankruptcy judge to “stay, on such terms and conditions as are proper, proceedings pending disposition” of a motion to withdraw the reference.<sup>21</sup> Typically, courts evaluate whether “terms and conditions are proper” for a stay pending a motion to withdraw the reference by applying traditional preliminary injunction factors.<sup>22</sup> Therefore, the moving party must show that 1) it is likely to succeed on the merits; 2) it is likely to suffer irreparable harm without the stay; 3) “the balance of equities” favors the stay; and that a stay is in the public interest.<sup>23</sup> ““The manner by which a court considers the factors, the relative weight given to each, and the standards by which a movant is required to prove them, are driven by the special and unique circumstances of any given case.”<sup>24</sup> These factors show that Fed. R. Bankr. P. 5011(c) is satisfied. This Court should exercise its “broad discretion” and inherent authority to partially stay this case in the interests of “economy of time and effort for itself, for counsel, and for litigants.”<sup>25</sup>

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<sup>21</sup> Fed. R. Bankr. P. 5011(c).

<sup>22</sup> *In re Tres Hermanos Dairy, LLC*, No. 10-14240 T, 2013 WL 6198219, at \*2 (Bankr. D.N.M. Nov. 27, 2013).

<sup>23</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); accord *In re Tres Hermanos Dairy*, 2013 WL 6198219, at \*2.

<sup>24</sup> *In re Tres Hermanos Dairy*, 2013 WL 6198219, at \*3 (quoting *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 999 (10th Cir. 2004) (Seymour, J., concurring in part and dissenting in part), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)).

<sup>25</sup> *In re Tres Hermanos Dairy*, 2013 WL 6198219, at \*2 (quotation omitted).

**A. The United States is likely to succeed on the merits of the motion to withdraw the reference and the motion to dismiss.**

When evaluating a motion to stay bankruptcy proceedings pending a decision on a motion to withdraw the reference and a motion to dismiss, the moving party must show that those motions will likely be granted.<sup>26</sup> It is highly likely that both motions will be granted. In the first motion (which we incorporate here by reference<sup>27</sup>), the United States showed cause to withdraw the reference because of Judge Nuffer's extensive knowledge of the facts of RaPower-3's fraudulent conduct in selling an abusive tax scheme and its attempt to evade Judge Nuffer's forthcoming orders by its bad-faith bankruptcy filing, and many of the legal arguments applicable to this case. Withdrawing the reference would also further judicial economy, create efficiencies that would result for the creditors and the debtor, and block RaPower-3's attempt to forum-shop.<sup>28</sup>

The United States has also shown that RaPower-3's bankruptcy petition should be dismissed, or converted to Chapter 7, or the court should appoint a Chapter 11 trustee. In that motion (which the United States incorporates by reference here<sup>29</sup>), we showed that RaPower-3's bankruptcy petition was filed in bad faith; not only did it file the petition to "abuse the purposes

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<sup>26</sup> *In re Tres Hermanos Dairy*, 2013 WL 6198219, at \*2; *In re Eagle Enterprises, Inc.*, 259 B.R. 83, 88 (Bankr. E.D. Pa. 2001) (one reason for staying bankruptcy proceedings pending decision on a motion to withdraw the reference was that "[t]he District Court may likely withdraw the Complaint on the grounds that judicial economy would be served by trying both cases at the same time; that having the Complaint tried in New York would prevent forum shopping and reduce the risk of inconsistent outcomes; and that having both cases tried in the same proceeding would be an economic use of the litigants' resources.").

<sup>27</sup> ECF Bankr. No. 15.

<sup>28</sup> See 28 U.S.C. § 157(d); *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2d Cir. 1993); *In re EquiMed, Inc.*, 254 B.R. 347, 351 (D. Md. 2000); *F.T.C. v. Am. Inst. for Research & Dev.*, 219 B.R. 639, 647 (D. Mass. 1998).

<sup>29</sup> ECF Bankr. No. 13.



of the Bankruptcy Code, [and] to delay or frustrate the legitimate efforts of creditors to enforce their rights,”<sup>30</sup> but it “lacks a reasonable possibility of reorganization” under Chapter 11.”<sup>31</sup>

**B. The United States will suffer irreparable harm without the partial stay, and the balance of equities favors the United States.**

The United States will suffer irreparable harm if the partial stay is not granted and all proceedings in this Court continue. RaPower-3 is not an honest but unfortunate debtor. Its bankruptcy petition was filed in bad faith, to distract and dilute the United States’ resources from enforcing both the internal revenue laws and Judge Nuffer’s forthcoming orders with respect to *all* Defendants in the District Court litigation, including RaPower-3. Proceedings before Judge Nuffer to enter a final opinion and order (and enforce the final order, as needed) have already been delayed.<sup>32</sup> The United States will suffer if it is forced to continue split its resources between participating in proceedings in bankruptcy court (which are likely to be withdrawn to the District Court and dismissed) and pursuing the District Court litigation, to ensure the enforcement of the internal revenue laws and Judge Nuffer’s forthcoming orders, at the same time.<sup>33</sup> The requested partial stay will prevent continued waste of the United States’ time and resources.

Conversely, RaPower-3 faces no cognizable harm if the requested partial stay is entered.

With or without the partial stay, RaPower-3 would have to meet all of the disclosure and

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<sup>30</sup> *In re Winslow*, 949 F.2d 401, at \*2 (10th Cir. 1991) (unpublished); *see also Am. Inst. for Research & Dev.*, 219 B.R. at 647-48.

<sup>31</sup> *In re Nursery Land Dev., Inc.*, 91 F.3d 1414, 1416 (10th Cir. 1996) (evaluating “bad faith” in the context of an appeal of imposition of sanctions for a bad faith filing of a Chapter 11 bankruptcy petition).

<sup>32</sup> *See United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 429](#), [ECF No. 430](#), [ECF No. 431](#).

<sup>33</sup> *In re Eagle Enterprises*, 259 B.R. 83, 88 (“Were we not to stay the Complaint pending the District Court’s ruling on the Withdrawal Motion, Vigilant would suffer harm in the form of duplicative costs of litigating in this Court and in New York. On the other hand, the Plaintiffs would sustain minimal harm if the Complaint were stayed.”)

reporting obligations imposed by its bankruptcy filing. If the United States' motion to dismiss is ultimately granted, the partial stay would actually preserve RaPower-3's resources by avoiding continued wasteful spending on bankruptcy proceedings that will be dismissed. And if neither motion is granted and RaPower-3 continues in bankruptcy before this Court, a brief delay of the proceedings so that the Judge(s) may make important decisions about the future of this bankruptcy case will not cause RaPower-3 appreciable harm.

**C. The public interest will be served by entering the partial stay we request.**

The public interest will be best served by a partial stay of these proceedings that nonetheless requires RaPower-3 to continue its financial disclosure and reporting requirements, and allows for proceedings under Fed. R. Bankr. P. 2004. RaPower-3, directed by Neldon Johnson, resisted discovery of information about its financial condition throughout the District Court litigation.<sup>34</sup> It complained that the evidence presented by the United States about its financial condition was incorrect, but then offered no rebutting evidence.<sup>35</sup> Then, in an attempt to avoid Judge Nuffer's forthcoming orders for injunction, disgorgement, and an asset freeze and receivership, RaPower-3 filed for bankruptcy. Because of RaPower-3's demonstrated fraud, its obfuscation to date, and Neldon Johnson's total lack of respect for corporate form, it is clearly in the public interest to scrutinize RaPower-3's financial condition as soon as possible. Even if

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<sup>34</sup> *E.g.*, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 283](#), Memorandum Decision and Order Overruling Objection to the Magistrate Judge's Order.

<sup>35</sup> *Compare* Gov. Ex. BK0015, Tr. 893:11-896:12 (Defendants' argument regarding the United States' evidence) with *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF Nos. 396 and 409 (showing that, the next trial day after the United States rested its case, Defendants rested *their* case without calling a witness). Arguments by attorneys are not evidence. See *United States v. Espinosa*, 771 F.2d 1382, 1401 (10th Cir. 1985) (noting, with approval, that "the jury was instructed that the statements and arguments of counsel were not evidence and were not to be considered in rendering a verdict").

other matters in this case are stayed, RaPower-3 should not be permitted to avoid its disclosure and reporting requirements or proceedings under Fed. R. Bankr. P. 2004.<sup>36</sup>

Other matters in the public interest, like judicial economy, favor granting the partial stay. Both motions are likely to be granted. So there is no reason for this Court to spend more than a *de minimis* amount of time administering this bankruptcy proceeding before the ruling on that motion – except in the interest of enforcing bankruptcy rules and procedures to examine RaPower-3’s financial condition.

The partial stay would also conserve resources for RaPower-3, the United States Trustee, and all creditors in this matter. Without the clarity that will result from decisions on both motions, all interested parties could waste time and money moving forward with debtor-in-possession Chapter 11 proceedings that may be dismissed or converted. Because both the motion to withdraw the reference and the motion to dismiss are likely to be granted, for example, customer-creditors will not need to file proofs of claim in this Court *and* in the District Court litigation; instead, they could turn to the District Court litigation alone for potential claims against all Defendants’ assets, not just RaPower-3’s. The relatively short time it will take to obtain decisions on the motion to withdraw the reference and the motion to dismiss – even if they are both denied – is a good investment when compared with the potential duplication of efforts and confusion that could result if the bankruptcy proceedings continue while the motion to withdraw the reference and the motion to dismiss are pending.<sup>37</sup>

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<sup>36</sup> *C.f. In re TJN, Inc.*, 207 B.R. 499, 501 (Bankr. D.S.C. 1996) (denying a motion for a stay when previous “delays in discovery . . . mitigate[d] against further delay”).

<sup>37</sup> *See In re Martinez*, No. 09-15502-J7, 2010 WL 3075282, at \*3 (D.N.M. July 15, 2010).

### **III. Conclusion**

Every factor in the analysis weighs in favor of granting the partial stay we request. Both motions are likely to be granted, the United States will suffer irreparable harm if the partial stay is not granted, the balance of harms favors the United States, and a partial stay would advance the goals of ensuring judicial economy, conserving the resources of the creditors, the US Trustee, and the debtor, and preventing abuse of the bankruptcy process through RaPower-3's attempt to evade Judge Nuffer's forthcoming orders by forum-shopping. Accordingly, we respectfully request that this Court enter an order that:

1. All parties in interest shall complete briefing on the United States' motion to dismiss;
2. RaPower-3 shall meet any disclosure and reporting requirement imposed by statute, rule, and/or order of this Court; and
3. All matters governed by Fed. R. Bankr. P. 2004 shall proceed.

All other proceedings in this Court should be stayed pending 1) the District Court's decision on the motion to withdraw the reference and 2) following that, the decision on the motion to dismiss.

Dated: July 27, 2018

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