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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' OBJECTION TO EX PARTE MOTION TO CONTINUE 341 MEETING</b>	

The § 341 meeting of creditors in this case was properly noticed for August 9, 2018 at 3:00 p.m.<sup>1</sup> RaPower-3 filed a motion to continue the meeting thirty-five minutes before the meeting started.<sup>2</sup> Although counsel for RaPower-3 were present, RaPower-3 itself did not appear through any manager or other representative. The United States objects to Debtor RaPower-3, LLC's motion to continue the § 341 meeting of creditors pending this Court's "consideration" of RaPower-3's response to (among other motions) the United States' motion to dismiss its Chapter 11 bankruptcy petition.<sup>3</sup> RaPower-3 chose to file for bankruptcy; with that choice came obligations to disclose information about its finances to interested creditors in the time established by bankruptcy law and procedure. RaPower-3 should be ordered to appear at a § 341 meeting of creditors in the next 30 days, at a date and time certain set by the United States Trustee.

**I. RaPower-3's motion should be denied because it was untimely.**

The "primary purpose of the [§ 341] meeting of creditors is to enable creditors and other parties in interest to examine the debtor, under oath, with respect to the acts, conduct, and property of the debtor or any matter that might affect the administration of the debtor's estate or right to discharge."<sup>4</sup> A debtor should not take lightly the obligations imposed by § 341. This early meeting is critical for creditors to learn information about the debtor and its finances.

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<sup>1</sup> ECF Bankr. No. 12.

<sup>2</sup> ECF Bankr. No. 28.

<sup>3</sup> See generally ECF Bankr. No. 28.

<sup>4</sup> 2 Collier Bankruptcy Practice Guide ¶ 35.11 (2018); accord 11 U.S.C. § 343; Fed. R. Bankr. P. 2003.

Notice of the § 341 meeting goes to all creditors<sup>5</sup> in sufficient time for them to prepare and appear.

If a debtor wants to reschedule a § 341 meeting, the debtor must file a motion to reschedule “not later than 7 days prior to the scheduled § 341 Meeting. The debtor shall send notice of the motion to all parties in interest listed on the court’s most recent creditors’ matrix for the case.”<sup>6</sup> RaPower-3 filed its motion to continue the § 341 hearing far too late: thirty-five minutes before the meeting began. This untimeliness alone means the motion to continue should be denied.

Further, RaPower-3’s failure to timely move for a continuance of the § 341 meeting and its failure to appear for the scheduled § 341 meeting caused a great waste of time and expense for United States. There is no reason that RaPower-3 could not have moved for a continuance in the time required by Local Rule 2003-1(c) to reschedule. Because it did not do that, counsel for the United States traveled from Washington, D.C., to Salt Lake City and back on August 9-10, spending approximately 21 hours for that round-trip. All for nothing. RaPower-3’s tactics give this Court reason, on its own initiative, to issue an order to show cause why RaPower-3 and/or its counsel should not pay the fees and costs for counsel for the United States to appear at the fruitless § 341 meeting of creditors.<sup>7</sup> If RaPower-3 had followed the Local Rules of this Court,

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<sup>5</sup> See ECF Bankr. No. 12, Certificate of Notice.

<sup>6</sup> Local Rule 2003-1(c).

<sup>7</sup> Local Rule 2090-3 (Upon the Court’s “own initiative, and after a notice and hearing, the court may impose sanctions on an attorney for violation of these Local Rules, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, or other applicable rules. Sanctions may include, but are not limited to, the assessment of costs, [and/or] attorney’s fees . . . against an attorney or a party.”).

the Federal Rules of Bankruptcy Procedure, and applicable bankruptcy law, the United States' time and money would not have been wasted.

**II. RaPower-3's motion should be denied because it did not show cause for a continuance.**

RaPower-3 failed to show cause to continue the § 341 meeting.<sup>8</sup> RaPower-3 asserts that it “canceled its arrangements to have its manager and accountants appear at the scheduled 341 Meeting” because it “believed that all parties were in agreement [about] the unconditional dismissal of the Bankruptcy Case” before the § 341 meeting.<sup>9</sup> RaPower-3 asserts that counsel for the United States informed counsel for RaPower-3 that the United States would not agree to “the proposed stipulated dismissal” with “too little time to reverse course” and bring its manager and accountants to the § 341 meeting.

As an initial matter, due to a mis-typed email address, the proposal from counsel for RaPower-3 for a “conditional” dismissal did not reach lead counsel for the United States until approximately 5:15 a.m. on August 9 – the day of the § 341 meeting – as she was about to board her flight to Salt Lake City for the § 341 meeting.<sup>10</sup> She rejected that proposal before 6:15 a.m.<sup>11</sup> Then, at approximately 11:30 a.m., counsel for RaPower-3 proposed a jointly stipulated

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<sup>8</sup> See Fed. R. Bankr. P. 9006(b)(1) (“[W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order . . .”).

<sup>9</sup> ECF Bankr. No. 28 at 1-2.

<sup>10</sup> Gov. Ex. BK0016, email from Erin Healy Gallagher to Debtor’s Counsel and US Trustee, Aug. 9, 2018. The time stamps on the emails attached to this motion are in Eastern time, but all times recited in this brief are in Mountain time.

<sup>11</sup> *Id.*

unconditional dismissal of the bankruptcy petition.<sup>12</sup> By approximately 12:30 p.m., counsel for the United States informed counsel for RaPower-3 by telephone that, because of the bad-faith bankruptcy filing, the United States would not agree to stipulate to dismiss the RaPower-3 petition. Instead, RaPower-3 could either consent to entry of an order granting the United States' motion to dismiss or file a motion itself to dismiss its petition. At no time was there any agreement that the United States would join in a stipulation to dismiss RaPower-3's bankruptcy petition without adverse findings.

No order dismissing the petition was entered before the time for the § 341 meeting. Instead, RaPower-3 decided not to appear through its manager, Neldon Johnson or any accountant. This alone is a reason to dismiss RaPower-3's bankruptcy petition for cause<sup>13</sup> – the kind of adverse finding that the United States seeks due to RaPower-3's abuse of the bankruptcy courts.<sup>14</sup>

**III. RaPower-3's motion should be denied because it would indefinitely postpone the time for RaPower-3 to answer creditors' questions under oath.**

RaPower-3 does not propose a date certain to reschedule the § 341 meeting. Instead, it wants the Court to “consider” its willingness to dismiss its own bankruptcy petition before rescheduling the § 341 meeting. But there are multiple problems with this approach. First, it assumes that this Court, and not the District Court, will decide the United States' motion to dismiss. But there is a pending motion to withdraw the reference for RaPower-3's bankruptcy

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<sup>12</sup> Gov. Ex. BK0017, email from Jeff Tuttle to counsel for the United States and the US Trustee, August 9.

<sup>13</sup> [11 U.S.C. § 1112\(b\)\(4\)\(G\)](#).

<sup>14</sup> *See also* ECF Bankr. No. 13.

case as a whole,<sup>15</sup> which the District Court should decide first. Only after the District Court decides the motion to withdraw the reference should any decision be made on the United States' motion to dismiss. If RaPower-3 wants its bankruptcy petition dismissed, it may consent to the relief requested by the United States in its motion to dismiss or file its own motion. It has done neither of these things.

Neldon Johnson, the manager of RaPower-3, has a pattern of engaging in obstructive tactics to delay, as long as possible, answering questions under oath. For example, on the date sworn discovery responses were due in the District Court injunction case against Johnson, RaPower-3, and others, instead of serving answers for himself and his entities under oath, Johnson substituted attorneys in the case<sup>16</sup> (effectively delaying the time that Johnson had to respond<sup>17</sup> – and even when he did respond, he did not do so fully<sup>18</sup>). And mere days before Johnson's noticed depositions (in his individual capacity and as the Rule 30(b)(6) representative for RaPower-3 and other defendant entities in the injunction case), he fired his attorneys,<sup>19</sup> again delaying the time for him to be examined under penalty of perjury.<sup>20</sup>

For all of these reasons, RaPower-3's motion to continue the § 341 meeting should be denied. There is no need for this Court to "consider" RaPower-3's amended omnibus response at

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<sup>15</sup> ECF Bankr. No. 15; ECF Bankr. No. 25.

<sup>16</sup> *United States v. RaPower-3, LLC, et al.*, [ECF No. 46](#); *e.g.*, [ECF No. 53 at 2](#).

<sup>17</sup> *United States v. RaPower-3, LLC, et al.*, [ECF No. 46](#); *e.g.*, [ECF No. 53 at 2](#).

<sup>18</sup> *United States v. RaPower-3, LLC, et al.*, [ECF No. 235](#); [ECF No. 283](#).

<sup>19</sup> *United States v. RaPower-3, LLC, et al.*, [ECF No. 164](#); [ECF No. 178 at 2](#).

<sup>20</sup> *United States v. RaPower-3, LLC, et al.*, [ECF No. 178 at 2](#); [ECF No. 197 at 1](#).

this time. Instead, consistent with RaPower-3's choice to file for bankruptcy and the obligations that came with that choice, this Court should order RaPower-3 to appear at a § 341 meeting of creditors in the next 30 days, at a date and time certain set by the United States Trustee.

Dated: August 14, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE BY ELECTRONIC NOTICE (CM/ECF)**

I hereby certify that on August 14, 2018, I electronically filed the foregoing CREDITOR UNITED STATES' OBJECTION TO EX PARTE MOTION TO CONTINUE 341 MEETING, and all of the exhibits cited therein, with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system.

I further certify that the parties in interest in this matter, as identified below, are registered CM/ECF users.

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