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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
CREDITOR UNITED STATES' REPLY ON ITS MOTION FOR PARTIAL STAY	

On June 29, 2018, RaPower-3, LLC, filed a bankruptcy petition under Chapter 11.¹ On July 27, 2018, the United States moved to dismiss RaPower-3's bankruptcy petition as a bad-faith filing, or in the alternative to convert the petition from Chapter 11 to Chapter 7, or in the alternative to appoint a Chapter 11 trustee;² moved to withdraw the reference for the case;³ and moved for a partial stay in the bankruptcy court proceeding pending the decision first on the motion to withdraw the reference and second on the motion to dismiss⁴. On August 10, 2018, RaPower-3 filed an amended omnibus response to all three of the United States' motions.⁵ If the motion to dismiss is promptly granted, this motion for a partial stay will be moot. If the motion to dismiss remains pending, however, the motion for a partial stay should be granted.

The United States seeks only a partial stay of further proceedings pending decisions on the motion to withdraw the reference and the motion to dismiss or for alternative relief. 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

¹ ECF Bankr. No. 1.

² ECF Bankr. No. 13.

³ ECF Bankr. No. 15.

⁴ ECF Bankr. No. 18.

⁵ ECF Bankr. No. 30.

3. All matters governed by Fed. R. Bankr. P. 2004 shall proceed.

RaPower-3 misconstrues the United States' motion, and asserts that we asked for "a stay of *all* proceedings" until the motion to dismiss is decided.⁶ It consents to that relief,⁷ and does not address the United States' arguments for why a *partial* stay is proper here, pending disposition of the motion to withdraw the reference and the motion to dismiss⁸.

In our motion, we showed that 1) the United States is likely to succeed on the merits of the motion to withdraw the reference and the motion to dismiss; 2) the United States is likely to suffer irreparable harm without the partial stay; 3) "the balance of equities" favors the partial stay; and 4) that a partial stay is in the public interest.⁹ We will not belabor the unrebutted facts and law in our motion, all of which show why the terms and conditions of the partial stay satisfy these factors. But events since our motion was filed merit additional discussion of why the partial stay is in the public interest: RaPower-3 failed to appear for the properly noticed § 341 meeting of creditors on August 9, 2018.¹⁰ It has already dodged its obligation to "appear and submit to examination under oath at the meeting of creditors."¹¹

This kind of conduct shows why this Court should require RaPower-3 to continue its financial disclosure and reporting requirements, and allow for proceedings under Fed. R. Bankr.

⁶ ECF Bankr. No. 30 at 6-7 (emphasis added).

⁷ ECF Bankr. No. 30 at 7. RaPower-3 consents to a complete stay with the exception of court approval of its application to employ bankruptcy counsel. *Id.*

⁸ *See* Fed. R. Bankr. P. 5011(c).

⁹ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); accord *In re Tres Hermanos Dairy*, 2013 WL 6198219, at *2 (Bankr. D.N.M. Nov. 27, 2013).

¹⁰ ECF Bankr. Nos. 37, 39.

¹¹ 11 U.S.C. § 343.

P. 2004, particularly because 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 case¹² (effectively delaying the time that Johnson had to respond¹³ – and even when he did respond, he did not do so fully¹⁴). 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,¹⁵ again delaying the time for him to be examined under penalty of perjury.¹⁶

By these and other actions, RaPower-3, through Johnson, resisted discovery of information about its financial condition throughout the District Court litigation.¹⁷ It complained, at trial, that the evidence presented by the United States about its financial condition was incorrect, but then offered no rebutting evidence.¹⁸ Then, in an attempt to avoid Judge Nuffer’s

¹² *United States v. RaPower-3, LLC, et al.*, [ECF No. 46](#); *e.g.*, [ECF No. 53 at 2](#).

¹³ *United States v. RaPower-3, LLC, et al.*, [ECF No. 46](#); *e.g.*, [ECF No. 53 at 2](#).

¹⁴ *United States v. RaPower-3, LLC, et al.*, [ECF No. 235](#); [ECF No. 283](#).

¹⁵ *United States v. RaPower-3, LLC, et al.*, [ECF No. 164](#); [ECF No. 178 at 2](#).

¹⁶ *United States v. RaPower-3, LLC, et al.*, [ECF No. 178 at 2](#); [ECF No. 197 at 1](#).

¹⁷ *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.

¹⁸ 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”).

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 about its finances 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. Although other matters in this case should be stayed to avoid wasting time and resources for the Court and all parties, RaPower-3 should not be permitted to avoid its disclosure and reporting requirements or proceedings under Fed. R. Bankr. P. 2004.¹⁹

Accordingly, 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,"²⁰ while still holding RaPower-3 to the legal obligations imposed upon it from its choice to file a bankruptcy petition. 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

¹⁹ *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").

²⁰ *In re Tres Hermanos Dairy*, 2013 WL 6198219, at *2 (quotation omitted).

motion to dismiss. Of course, if the motion to dismiss is promptly granted, this motion will be moot.

Dated: August 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018, I electronically filed the foregoing CREDITOR UNITED STATES' REPLY ON ITS MOTION FOR PARTIAL STAY, 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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I further certify that I will serve the following individuals, who have appeared in *In re RaPower-3, LLC*, 18-bk-24865 (Bankr. D. Utah) with a copy of CREDITOR UNITED STATES' REPLY ON ITS MOTION FOR PARTIAL STAY via first class US Mail, postage prepaid, at the following addresses:

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Dated: August 17, 2018

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