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**IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

In re <b>RAPOWER-3, LLC</b> ,  Debtor.	Bankruptcy Case No. 18-24865  (Chapter 11)  Judge Kevin R. Anderson
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**MOTION TO DISMISS BANKRUPTCY CASE**

Debtor RaPower-3, LLC (“**Debtor**”) hereby moves (this “**Motion**”) this Court, pursuant to 11 U.S.C § 1112, to dismiss the above captioned-case (this “**Case**”). In support of this Motion, Debtor states as follows:

**INTRODUCTION**

The Debtor did not file this Case to “hide” from Judge Nuffer, as the DOJ alleges, nor to avoid the entry of an order by Judge Nuffer in the pending United States District Court Case (the “**USDC Case**”). Rather, the Debtor filed for one simple reason: to preserve its right to appeal any orders or decisions made by Judge Nuffer in the USDC Case. Debtor is not forum shopping as the DOJ alleges. At the time this Case was filed, there was significant risk that the Debtor’s

appeal rights would not be preserved. In the USDC Case, the DOJ was seeking a broad form of receivership order that, if entered as proposed, essentially would have precluded the Debtor from appealing, would have precluded the Debtor from retaining counsel of its choice in connection with any appeal, and would have deprived the Debtor of fundamental due process. To preserve its appellate rights, to protect the interests of its legitimate creditors, and in good faith, the Debtor sought relief in this Court.

During this case, the Debtor has attempted to resolve the issues with the DOJ. On more than one occasion, the Debtor has informed the DOJ that it only seeks the ability to effectively and independently prosecute an appeal through counsel of its choice. Although a resolution has not yet been achieved, the Debtor's rehabilitation efforts have been irreparably hampered by the resulting uncertainty concerning these appeal rights. Absent a resolution of this question, the Debtor cannot obtain post-petition funding to continue as a debtor in possession. Initially, the Debtor's goal was to establish its right to appeal, obtain post-petition funding to enable it to prosecute the appeal, retain special counsel and other professionals to represent the Debtor in the appeal and during the Case, and suspend other activities in the Case pending the final outcome of the appeal. If the Debtor prevailed on the appeal, the DOJ claim and millions of dollars in contingent liabilities would be eliminated. Thereafter, the Debtor could propose a plan of reorganization or propose dismissal. If the Debtor did not prevail on appeal, then a reorganization would be hopeless, and the Debtor could then either move for dismissal or conversion. Now the prospects of post-petition funding are very dim due to the unresolved nature of the Debtor's appeal rights. Accordingly, to avoid further administrative expenses, the

Debtor has elected to seek preservation of its appeal rights solely in the USDC case and to have this bankruptcy case dismissed.

### **BACKGROUND FACTS**

1. Debtor filed its bankruptcy petition on June 29, 2018.
2. The DOJ filed its *Motion to Dismiss Bankruptcy Petition, or in the Alternative, Convert to Chapter 7, or Appoint Chapter 11 Trustee* [Dkt. No. 13] (the “**DOJ Motion to Dismiss**”) on July 27, 2018.
3. Debtor, the DOJ, and the UST had been in discussions related to stipulating to a dismissal of the Bankruptcy Case, but such discussions have not resulted in a stipulated dismissal because the Debtor will not stipulate that the bankruptcy petition was filed in bad faith.

### **STATEMENT OF POSITION**

#### **A. The Bankruptcy Petition Was Not Filed in Bad Faith.**

Debtor filed its bankruptcy to preserve its rights to appeal orders and rulings entered in the USDC Case. It did not file to prevent entry of such an order. In fact, the Debtor fully intended to stipulate to modification of the automatic stay to permit the entry of such orders, subject to preservation of its appeal rights. And, had the DOJ asked for such an order, it would have been entered by stipulation. Instead, the DOJ filed the DOJ Motion to Dismiss.

Preserving appellate rights is not bad faith. Furthermore, the DOJ’s continued refusal to agree to entry of orders in the USDC Case that preserve the Debtor’s appeal rights shows exactly why the filing of the petition was proper and in good faith. There is no rule that prohibits a debtor from exercising remedies available to it to pursue the avenues through which it can survive. In short, as of the filing of the petition, there was a proper reorganization purpose, and

the Debtor believed then, and continues to believe now, in its prospects to restructure or eliminate its liabilities through prosecution of an appeal.

Courts in this jurisdiction take a totality of the circumstances approach to bad faith determinations. *See In re George Love Farming, L.C.*, 366 B.R. 170, 181-182 (Bankr. D. Utah 2007). In *George Love Farming*, the court identified eight factors that should be considered, including: “(1) whether the debtor has one asset; (2) whether the debtor’s pre-petition conduct has been improper; (3) whether there are only a few unsecured creditors; (4) whether the debtor’s property has been posted for foreclosure, and the debtor has been unsuccessful in defending against foreclosure in state court; (5) whether the debtor and one creditor have proceeded to a standstill in a prior forum, and the debtor has lost; (6) whether the filing of the petition effectively allows the debtor to evade court orders; (7) whether the debtor has no ongoing business or employees; and (8) whether there is a lack of possibility for reorganization.” *Id.* at 182. A review of these factors and considering the totality of circumstances, demonstrates that this case was filed in good faith.

1. *Whether the Debtor has one asset.* The Debtor has cash, contract rights, and common stock in a public company. This is not a one-asset case. This element weighs in favor of good faith.

2. *Whether the Debtor’s prepetition conduct has been improper.* Debtor does not deny that it lost in the USDC Case; however, Debtor’s need to preserve its rights to challenge those incorrect findings is the entire purpose for filings its petition. It is seeking to undo the very findings that deemed Debtor’s conduct improper.

3. *Whether there are only a few unsecured creditors.* In its statements and schedules,

Debtor identified more several hundred unsecured creditors. This element weighs in favor of good faith.

4. *Whether the Debtor's property has been posted for foreclosure.* This element is inapplicable.

5. *Whether the Debtor and one creditor have proceeded to a standstill in a prior forum, and the debtor lost.* Debtor acknowledges that it lost the USDC Case, but, because it vehemently disagrees with these findings, Debtor seeks to preserve its right to challenge those findings, not run from them.

6. *Whether the filing of the petition effectively allows the debtor to evade court orders.* Debtor has agreed that stay relief would be appropriate to enter certain orders,<sup>1</sup> agreed to withdraw the reference so that Judge Nuffer could hear and resolve all of the issues in the USDC Case and this Case,<sup>2</sup> and was willing to stipulate to dismissal of the Case until the DOJ added the condition of a stipulation that the petition was filed in bad faith. Debtor does not have, and has *never had*, any intention of evading court orders in the USDC Case. *Those are the exact orders the Debtor intends to appeal.* Despite the DOJ's unfounded insistence to the contrary, this element is simply not met in this instance, because the *entire purpose* of Debtor's bankruptcy is

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<sup>1</sup> See *RaPower-3, LLC's Limited Objection and Reservation of Rights* [Case Dkt. No. 434] ("**RP3's Limited Objection**") filed in the USDC Case pg. 3 ("While this reasoning [that § 362(b)(4) applies] *may apply to liquidating a claim* that can be administered as part of the bankruptcy procedure, the issues pending before this Court [i.e. freezing assets and appointing a receiver over the estate of a bankrupt debtor without bankruptcy court approval] are far broader than that.")(emphasis added); see also pg. 4 ("While there may be *judicial efficiencies that militate in favor of liquidating claims in this Court*, the [DOJ] has made no showing that it is entitled to the extraordinary relief that would naturally result from the entry of certain orders it is requesting: namely, that the assets of an existing bankruptcy estate would be frozen by a U.S. District Court, and/or subject to a court-appointed receiver, and completely obstruct the reorganization process of a debtor in bankruptcy.")(emphasis added); see also pg. 5 ("Although *some modified remedy may be appropriate*, given the broad nature of the request and the forum in which [the DOJ] is seeking such extraordinary relief, RP3 is obligated to object.")(emphasis added).

<sup>2</sup> See *Debtor RaPower-3, LLC's Limited Response to Creditor United States Department of Justice, Tax Division's Motion to Withdraw the Reference* [Dkt. No. 4] filed in the United States District Court for the District of Utah, Central Division, Case No. 2:18-cv-00608-CW.

based on appeals of the orders.

7. *Whether the Debtor has no ongoing business or employees.* Debtor's business has been irreparably damaged by the injunction. While in bankruptcy, the Debtor has ceased marketing lenses, ceased collection attempts on its accounts receivable, and now ceased seeking outside financing. In short, the same orders Debtor is seeking to appeal has crippled its ability to operate.

8. *Whether there is a lack of possibility for reorganization.* When the Debtor filed its bankruptcy petition, it was confident it could obtain debtor in possession financing to allow it to challenge its contingent, unliquidated, and disputed unsecured claims. Debtor's hopes of obtaining debtor in possession financing have faded, but it remains confident in its appellate prospects. The Debtor's future lies with its appeals, and those rights were not being protected by proposed orders in the USDC Case. This element weighs in favor of good faith.

Debtor has not been able to obtain the debtor in possession financing it was hoping for, but the DOJ's continued refusal to stipule to very reasonable appeal rights in the proposed receivership order demonstrates exactly why a bankruptcy petition was appropriate. Despite the DOJ's arguments to the contrary in the DOJ's Motion to Dismiss, which cherry picks only certain of the elements, the totality of the circumstances demonstrate that the Debtor had a good faith reason for filing its bankruptcy petition.

**B. Dismissal of this Case Is Appropriate**

Even though the Debtor has a good faith basis for being in bankruptcy, the Debtor now believes, given its inability to secure debtor in possession financing, that dismissal is appropriate and in the best interests of creditors.

Currently there are insufficient assets in the bankruptcy estate to reasonably fund a Chapter 11 case. Although the Debtor's revenue has been eliminated by the injunction entered in the USDC Case, the Debtor is complying with the injunction. Debtor has been unsuccessful in obtaining debtor-in-possession financing given the current circumstances. In addition, unless and until an appellate court reverses Judge Nuffer's decisions, it will be impossible for the Debtor, or a trustee, to collect outstanding accounts receivable. Thus, absent reversal on appeal, the Debtor will not have a source of revenue to fund the administrative expenses of an estate under either Chapter 11 or Chapter 7, regardless of who is managing such an estate. Until the appeal process runs its course, there is no incentive for any party to pay contingent debts that are owed to the Debtor or to provide any form of alternative post-petition financing. The Debtor's assets (comprised of cash, contract rights, and stock in International Automated Systems, Inc.) would be of insufficient and questionable value to secure any such financing. The only incentive an outside third party would have to provide such a contribution is the belief that Debtor will win its appeal and resume operations. Such financing certainly will not take place if a trustee is appointed or if the case is converted. The only viable way for the Debtor to succeed is to prevail on an appeal, eliminate the DOJ claim and its other contingent liabilities, and resume operations outside of bankruptcy.

Section 1112 directs the Court to dismiss a Case for cause if doing so is in the best interest of the estate. Here, the Debtor cannot pursue a reorganization until it prevails on an appeal. It cannot obtain post-petition financing during the pending of an appeal. And, if it prevails on an appeal, then there will be no need for a reorganization or other bankruptcy relief because a successful appeal will eliminate the substantial claim of the DOJ, validate the Debtor's

operations, and make its accounts receivable collectable. Thus, the cause justifying dismissal is the substantial or continuing loss to or diminution of the estate, and the absence of a reasonable likelihood of rehabilitation under §1112(b)(4)(A). It is not because of any bad faith, or improper motive, on the part of the Debtor.

### **CONCLUSION**

Debtor filed the bankruptcy petition in good faith – with a valid objective and a possibility of reorganization. Due to the suffocating nature of the injunction in place, there is simply no way for Debtor to secure funding to prosecute a chapter 11 case until it successfully appeals the injunction. For that reason, this Case should be dismissed.

DATED this 17<sup>th</sup> day of August, 2018.

**SNELL & WILMER L.L.P.**

*/s/ Jeff Tuttle*

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

I hereby certify that on the 17<sup>th</sup> day of August, 2018, I electronically filed the foregoing document with the United States Bankruptcy Court for the District of Utah by using the Court's CM/ECF system. I further certify that the parties of record in this case, as identified below, are listed as registered CM/ECF users and will be served through the CM/ECF system:

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/s/ Joyce Kyle