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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828 DN **UNITED STATES' MOTION TO VACATE, IN PART, THE JULY 5, 2018, ORDER** Judge David Nuffer Magistrate Judge Evelyn J. Furse

I. Introduction and Facts

On June 22, 2018, immediately after closing arguments at trial, this Court issued a ruling from the bench finding that RaPower-3, LLC (and all other Defendants) engaged in a "massive fraud" for which they would be enjoined and disgorgement would be ordered.[1] The Court also issued an interim order of injunction requiring that, no later than June 29, Defendants 1) post a notice on their websites that this Court found tax information Defendants provided was false and 2) remove tax information from their websites.[2]

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.[3] On June 27, this Court found that an expedited response to the asset freeze motion was necessary and ordered Defendants to respond no later than July 2, 2018, by 9:00 a.m.[4] Also on June 27, this Court ordered Defendants to "take all necessary steps to ensure that all information pertaining to defendants' operations are preserved" to "ensure that complete information is available to support such remedies as may be imposed" in this Court's forthcoming full findings of fact and conclusions of law.[5]

On Friday, June 29 (the last business day before the deadlines for its response to the motion for asset freeze and receiver, and its required disclosure under the June 27 Preservation

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[1] Tr. 2515:5-11. This motion presumes familiarity with the facts in the ruling from the bench. Tr. 2514:9-2526:4 (attached).

[2] ECF No. 413.

[3] ECF No. 414.

[4] ECF No. 417.

[5] ECF No. 419 at 1.

Order), Defendant RaPower-3, LLC filed for bankruptcy.[6] According to Defendants, "all actions against [RaPower-3] are automatically stayed pursuant to 11 U.S.C. § 362(a)."[7] On July 5, 2018, this Court ordered that this case be stayed.[8]

II. The July 5, 2018, order should be vacated to enter the final opinion and order against all Defendants.

This Court has the inherent power to issue and vacate a stay in a case before it, "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[9] In assessing the propriety of a stay (or of vacating a stay), a district court should consider, among other topics committed to its discretion, whether the stay will cause substantial harm to the parties in the proceeding and the public interests at stake.[10] Here, all considerations weigh heavily in favor of the vacating, in part, the July 5 order to enter the final opinion and order in this case. After taking testimony and argument over 12 trial days and reading hundreds of pages deposition designations, this Court has already found that Defendants "sold solar lenses by emphasizing the purported tax benefits but knew or had reason to know that their statements were false or fraudulent as to materials matters" on numerous topics.[11] While the interim injunction grants some relief to the United States, "much broader relief" is warranted for

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[6] ECF No. 424.

[7] ECF No. 424 at 1 (emphasis omitted).

[8] *See* Docket Entry Order, July 5, 2018 (no docket number).

[9] *Landis, et al. v. North American Co.*, 299 U.S. 248, 254 (1936).

[10] *See United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003)

[11] ECF No. 413 at 1.

the enforcement of the internal revenue laws and will be ordered.[12] All that remains is for the final opinion and order to be drafted, subjected to review, and entered by the Court. Judicial economy and the public interest will be served by completing that work expeditiously, so that the time for appeal may begin and the United States may enforce the injunction provisions. The only countervailing interest is the bankruptcy proceeding initiated by RaPower-3.[13] But that proceeding is not cause to delay entry of the final opinion and order in this case.

A. Bankruptcy's automatic stay does not apply to cases like this one, to enforce a governmental unit's police or regulatory power.

In general, the filing of a bankruptcy petition stays, among other things, a pre-petition judicial proceeding against the debtor.[14] But § 362(b)(4) itself excepts from the stay "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power."[15] Where "a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."[16] Section

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[12] ECF No. 413 at 1.

[13] *See* Docket Entry Order, July 5, 2018 (no docket number).

[14] 11 U.S.C. § 362(a)(1).

[15] 11 U.S.C. § 362(b)(4).

[16] H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6299, *quoted in Martin v. Occupational Safety & Health Review Comm'n*, 941 F.2d 1051, 1054 n.2 (10th Cir. 1991); *Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782, 785-86 (10th Cir. 1991) ("It is clear from the legislative history that Congress intended to give government even greater protection from unfair application of the automatic stay than it gave to private creditors."), *overruled in part on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992); *S.E.C. v. Wolfson*, 309 B.R. 612, 618-19 (D. Utah 2004) ("[T]he [SEC's] prosecution of this civil fraud action is excepted from the automatic stay under the Bankruptcy Code Section 362(b)(4) . . . .") (Kimball, J.).

362(b)(4) expressly prevents the bankruptcy court from being "a haven for wrongdoers."[17] This Court has the authority to determine that vacating the July 5 order, in part, and entering the final opinion and order are actions that are excepted from the automatic stay under § 362(b)(4).[18]

The Tenth Circuit has identified two tests to determine whether a governmental unit is exercising its "police or regulatory power," such that proceedings are excepted from the automatic stay under § 362(b)(4): the "public policy" test and the "pecuniary purpose" test.[19] Under the "public policy" test, governmental actions taken to effectuate public policy are excepted from the stay, while "those aimed at adjudicating private rights" are not.[20] "Under the 'pecuniary purpose' test, the court asks whether the government's proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property and not to matters of public policy. If it is evident that a governmental action is primarily for the purpose of protecting a pecuniary interest, then the action should not be excepted from the stay."[21] An action need meet only one test to be excepted from the automatic stay under § 362(b)(4).[22]

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[17] *United States v. Fisher*, No. CIV.A.3:03-CV-2108-G, 2004 WL 62583, at *2 (N.D. Tex. Jan. 9, 2004) (quotation omitted); *In re Bilzerian*, 146 B.R. 871, 873 (Bankr. M.D. Fla. 1992).

[18] *E.g. Dominic's Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012); *Wolfson*, 309 B.R. at 617-18 ("The Court finds that it has jurisdiction to determine its own jurisdiction, as well as to decide whether the automatic stay is applicable to the instant litigation."); *see generally United States v. Moore*, No. 2:12-CV-04196-NKL, 2013 WL 7873535, at *1 (W.D. Mo. Mar. 27, 2013) ("Count V of the United States' Complaint is exempt from this automatic bankruptcy stay that arose when Defendants filed their bankruptcy petitions."); *Fisher*, 2004 WL 62583, at *1-3.

[19] *Eddleman*, 923 F.2d at 791.

[20] *Eddleman*, 923 F.2d at 791.

[21] *Eddleman*, 923 F.2d at 791 (citations omitted).

[22] *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108 (9th Cir. 2005) ("A suit comes within the exception of § 362(b)(4) if it satisfies either test."); *see Eddleman*, 923 F.2d at 791 (after concluding that an action met the "pecuniary purpose" test, the court noted that it was not "bound to [also] apply" the "public policy" test).

The Tenth Circuit's decision in *Eddleman v. U.S. Department of Labor* illustrates the scope of the exception in § 362(b)(4) and the application of each test to determine whether proceedings are excepted from the automatic stay.[23] The Eddlemans filed a Chapter 11 petition in August 1986.[24] In May 1987, the Department of Labor filed an administrative action against them, alleging that they engaged in pre-petition wage and benefit violations under the Service Contract Act while serving as contractors for the U.S. Postal Service.[25] The Department of Labor sought, among other relief, "to liquidate claims for back wages due the Eddlemans' employees" and "to include the Eddlemans on an official list of SCA violators," which would result in them losing certain contract renewal benefits and being barred from contracting with the government for three years.[26] The Eddlemans sought an injunction against the Department of Labor and damages for its alleged willful violation of the automatic stay.[27]

The Tenth Circuit concluded, however, that the Department of Labor's action fell squarely within the § 362(b)(4) exception under both the public policy test and the pecuniary purpose test.[28] With respect to the "public policy" test, the Tenth Circuit did not characterize the DOL's request for liquidation of back pay as an assertion of private rights. Instead, it concluded "that the request for liquidation of back-pay claims was but another method of enforcing the

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[23] 923 F.2d 782 (10th Cir. 1991)

[24] *Eddleman*, 923 F.2d at 783.

[25] *Eddleman*, 923 F.2d at 783.

[26] *Eddleman*, 923 F.2d at 783.

[27] *Eddleman*, 923 F.2d at 783.

[28] *Eddleman*, 923 F.2d at 791.

policies underlying the SCA. [The Tenth Circuit's] conclusion [was] bolstered by the fact that the back-pay claimants would not receive any extra priority by virtue of the DOL action. Actual collection of the back-pay claims must proceed according to normal bankruptcy procedures."[29] With respect to the "pecuniary purpose" test, the Tenth Circuit concluded that the "remedies sought by DOL [were] not designed to advance the government's pecuniary interest. DOL's pursuit of debarment and liquidation of back-pay claims was primarily to prevent unfair competition in the market by companies who pay substandard wages."[30] For these reasons, the Department of Labor's administrative proceeding was excepted from the automatic stay under § 362(b)(4).

B. RaPower-3's bankruptcy filing does not preclude entry of the final opinion and order in this case.

For similar reasons, this Court's entry of the final opinion and order for injunction and disgorgement in this matter is excepted from the automatic stay under § 362(b)(4) because this action meets both the public policy and the pecuniary interest tests.[31] In this case, the United States is enforcing public policy by exercising its police or regulatory power to stop all Defendants from engaging in fraudulent conduct that violates the internal revenue laws.[32] The

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[29] *Eddleman*, 923 F.2d at 791.

[30] *Eddleman*, 923 F.2d at 791.

[31] *See, e.g.*, *F.T.C. v. Unified Glob. Grp., LLC*, No. 15-CV-422W(F), 2016 WL 489897, at *2 (W.D.N.Y. Feb. 9, 2016); *S.E.C. v. Vaughn*, No. CV 10-0263 MCA/WPL, 2010 WL 11441819, at *1-2 (D.N.M. Nov. 16, 2010); *In re D'Angelo*, 409 B.R. 296, 298-99 (Bankr. D.N.J. 2009); *In re Nelson*, 240 B.R. 802, 803-07 (Bankr. D. Me. 1999); *see also In re Bilzerian*, 146 B.R. at 873.

[32] *See, e.g.*, 26 U.S.C. § 7402(a) ("The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions . . . orders of injunction, . . . and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws."); *United States v. Elsass*, 978 F. Supp. 2d 901, 941 (S.D. Ohio 2013) ("[Section] 7402(a) is

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primary purpose of this case is to stop all Defendants – including RaPower-3 – from continuing to run a "fraud on the American people who have effectively paid to operate defendants' enterprise;" an enterprise that "has no sound scientific basis as a whole; has no demonstration of economic viability, not even the barest evidence; and does not qualify lens buyers for federal tax credit or depreciation deductions."[33] Having already concluded that the Defendants have perpetrated a "massive fraud"[34] and entered an interim injunction, the Court's anticipated "complete set of [final] findings and conclusions . . . will support much broader relief"[35]. That broader relief is necessary and appropriate to prevent Defendants' ongoing fraud against the U.S. Treasury.[36] Therefore, entering the final opinion and order in this case will effectuate a core public policy purpose for these proceedings generally: prevention of fraud and enforcement of the internal revenue laws by stopping the promotion of an abusive tax scheme. This meets the "public policy" test.[37]

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undoubtedly designed to prevent individuals from undermining the Nation's tax laws through exploiting loopholes in the [Internal Revenue Code's] overall regulatory scheme."); *Fisher*, 2004 WL 62583, at *2 ("Certainly, enjoining a debtor in bankruptcy from committing or promoting tax fraud is congruent with the purposes of § 362(b)(4) and furthers the public welfare by protecting taxpayers as well as the United States Treasury."); *see also In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997), *as amended on denial of reh'g* (Dec. 30, 1997) ("The question in this case is whether an IRS letter revoking the tax exempt status of a religious corporation meets either [the public policy or the pecuniary purpose test]. We hold it meets both. . . . [T]he revocation was an exercise of the IRS's police or regulatory power because revocation promotes public welfare by assuring the public and potential donors that contributions will be used for legitimate charitable purposes.").

[33] Tr. 2415:5-18.

[34] Tr. 2515:5-6

[35] ECF No. 413 at 1.

[36] *See* 26 U.S.C. §§ 7402(a), 7408.

[37] *See Moore*, 2013 WL 7873535, at *1 (injunctive relief under 26 U.S.C. § 7402(a) to compel defendants to withhold and timely pay over to the IRS all taxes required by law, including federal income, FICA and FUTA taxes

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Our request that this Court enter the final order fixing the amount of disgorgement for which all Defendants, including RaPower-3, are liable also meets both the public policy and the pecuniary interest test.[38] A final order would not "protect" the United States' interest in any property of RaPower-3's bankruptcy estate.[39] In its bankruptcy filings, RaPower-3 has already identified the United States as a creditor with a purportedly "[c]ontingent[,] [u]nliquidated[, and] [d]isputed" claim for an amount up to $32 million.[40] An order fixing the disgorgement amount for each Defendant, including RaPower-3, will not "confer any advantage on the [United States] vis-à-vis other [RaPower-3] creditors."[41] Instead, it will simply resolve any contingency or dispute and provide clarity as to the precise amount of disgorgement comprising the United States' claim with respect to RaPower-3. Once this Court enters the order fixing the disgorgement amount, the United States will turn to the bankruptcy proceedings to address its claim against RaPower-3 for RaPower-3's portion of disgorgement.[42] Accordingly, this Court

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was exempt from the automatic stay under 11 U.S.C § 362(b)(4)); *Fisher*, 2004 WL 62583, at *1-3 (action under 26 U.S.C. §§ 7402, 7407, and 7408 to prevent defendants from promoting allegedly illegal tax schemes exempt from the automatic stay under 11 U.S.C § 362(b)(4)).

[38] *Perez v. Cargill Heating & Air Conditioning Co.*, No. 14-CV-228-JDP, 2014 WL 5325372, at *3 (W.D. Wis. Oct. 20, 2014); *Vaughn*, 2010 WL 11441819, at *1-2; *see also Wolfson*, 309 B.R. at 619.

[39] *Eddleman*, 923 F.2d at 791.

[40] *In re RaPower-3, LLC*, No. 18-24865, Docket No. 6, List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders, at 2 (June 29, 2018) (attached as Pl. Ex. 917).

[41] *Solis v. SCA Rest. Corp.*, 463 B.R. 248, 254 (E.D.N.Y. 2011); *accord Eddleman*, 923 F.2d at 791 ("[T]he back-pay claimants would not receive any extra priority by virtue of the DOL action. Actual collection of the back-pay claims must proceed according to normal bankruptcy procedures."); *Perez*, 2014 WL 5325372, at *3, 5; *In re Bilzerian*, 146 B.R. at 873.

[42] *Eddleman*, 923 F.2d at 791; *Solis*, 463 B.R. at 254; *In re Nelson*, 240 B.R. at 805 n.8; *In re Bilzerian*, 146 B.R. at 873.

may fix the amount of disgorgement for which RaPower-3, and all other Defendants, are liable.[43] Vacating the July 5 order to enter the final opinion and order will also start the appeal clock and ensure that the United States may enforce the injunction. Any appeal would simply be the continuation of this action, which is excepted from the automatic stay under the plan terms of § 362(b)(4). That section also expressly excepts from the automatic stay actions or proceedings to "enforce[ ]. . . a judgment other than a money judgment."[44] With this exception, Congress ensured that a bankruptcy filing would not "strip [a] court of [its power to enforce its own orders], and instead permit a party to blatantly violate direct orders of the court and then seek shelter from a bankruptcy judge."[45]

III. Conclusion

Under § 362(b)(4), the automatic stay that arose when RaPower-3 filed its Chapter 11 bankruptcy petition does not preclude entry of the final opinion and order in this case against RaPower-3 or any other Defendant. Instead, considerations of judicial economy, the public interest, and prevention of continued harm to the United States all favor entering the final

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[43] *Martin*, 941 F.2d at 1053-54 ("While it is abundantly clear that we may not direct enforcement of a money judgment against CF & I, we may review the Commission's order insofar as the Secretary sought abatement of a safety violation (prospective enforcement) and a monetary penalty."); *NLRB v. Edward Cooper Painting, Inc*., 804 F.2d 934, 943 (6th Cir.1986) ("We thus affirm entry of a money judgment, but do not enforce that money judgment.") (emphasis in original); *Wolfson*, 309 B.R. at 619 ("Courts have explicitly held that the exception to the automatic stay provision 'extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment.'").

[44] § 362(b)(4).

[45] *Dominic's Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 761 (6th Cir. 2012) (quoting *In re Rook*, 102 B.R. 490, 493 (Bankr.E.D.Va.1989) (editorial marks, quotation marks, and citation omitted)); *accord United States v. Elsass*, No. 2:10-CV-336, 2017 U.S. Dist. LEXIS 63106, at *5 (S.D. Ohio Apr. 26, 2017) (denying enjoined promoter's motion to quash post-judgment subpoenas issued to evaluate whether promoter was engaging in enjoined conduct).

opinion and order in this case without further delay. Accordingly, we respectfully request that this Court vacate its July 5 order to:

1) set a new schedule for submission of the United States' draft opinion and order and Defendants' objections; and

2) upon receipt of the draft opinion and order and Defendants' objections, promptly enter the final opinion and order in this matter including fixing the amount of disgorgement for which each Defendant is liable, to trigger the appeal clock and allow the United States to enforce the injunction with respect to all Defendants.

Dated: July 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018 the foregoing document and its supporting documents were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin Healy Gallagher
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