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

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC, INTERNATIONAL
AUTOMATED SYSTEMS, INC., NELDON
JOHNSON, and ROGER FREEBORN,

Defendants.

Case No. 2:15-cv-00828-DN-EJF

**RAPOWER-3, LLC'S LIMITED
OBJECTION AND RESERVATION
OF RIGHTS**

Defendant RaPower-3, LLC ("**RP3**") hereby files this Limited Objection and Reservation of Rights in response to the *United States' Motion to Vacate, In Part, the July 5, 2018 Order* (the "**Motion to Vacate**") [Dkt. No. 429] filed by Plaintiff United States of America ("**Plaintiff**"). RP3 files this Limited Objection to address issues with the relief requested by Plaintiff and to reserve any and all of their arguments and rights related to the Court's *Order Taking Under Advisement Plaintiff's Motion to Vacate Stay* ("**Order**") [Dkt. No. 430]. In support of this Limited Objection, RP3 states as follows:

I. INTRODUCTION AND FACTS

Plaintiff has filed its Motion to Vacate, which, at least as it relates to RP3, equates to a motion for relief from the automatic stay. The Motion to Vacate operates as a motion to terminate or modify the stay in place to allow certain orders to be entered by this Court. RP3 filed a chapter 11 petition on June 29, 2018, commencing Bankruptcy Case No. 18-24865 (the “**Bankruptcy Case**”), and is currently a debtor in bankruptcy. As such, RP3 is entitled to the protections of the automatic stay. Even if one of the very narrow exceptions applies to allow this Court to enter orders impacting a debtor in bankruptcy, such requests should be brought before the bankruptcy court, and any relief granted should take into account the protections granted to RP3’s bankruptcy estate under the Bankruptcy Code. In its Motion to Vacate, Plaintiff is not merely seeking to liquidate its claim against RP3; rather, Plaintiff is essentially requesting that this Court freeze assets and appoint a receiver over property of a debtor’s bankruptcy estate to assist collection on a potential judgment. Such a result would obstruct reorganization and strip away the protection of the Bankruptcy Code altogether.

Any fear that the Plaintiff or this Court may have surrounding RP3’s compliance with the injunction or unauthorized dissipation of assets is misplaced. RP3 is in full compliance with the injunction ordered by this Court and, as a debtor in bankruptcy, is subjected to the oversight of the Court as it relates to property of the bankruptcy estate. The urgent continuation of this case, particularly as it relates to RP3, is unnecessary, and the relief requested in the Motion to Vacate is too broad.

II. THE ORDER SHOULD NOT BE VACATED AND ANY STAY RELIEF SHOULD BE BROUGHT BEFORE THE BANKRUPTCY COURT

A. *RP3 is now a debtor in bankruptcy and is protected by the automatic stay.*

RP3 has filed a bankruptcy petition, whereby it availed itself of the protections provided by 11 U.S.C. 101 *et. seq.* (the “**Bankruptcy Code**”¹) and subjected itself to the obligations imposed therein. One such protection is the imposition of an automatic stay to enjoin certain actions, including litigation and collection activities, against a debtor in bankruptcy. *See* § 362(a). Such a stay enables the debtor to focus its energy and resources towards its reorganization (or liquidation) efforts. As a debtor in bankruptcy, RP3 is, without more, entitled to such a stay.

B. *The stay relief exception in § 362(b)(4) does not apply because the sole remaining purpose of Plaintiff’s activity is to protect its pecuniary interest.*

Plaintiff has asked for entry of outstanding findings and orders in the above-captioned case (the “**Litigation**”). Plaintiff argues that an exception to the automatic stay provisions exists and, therefore, such orders can and should be entered. While this reasoning may apply to liquidating a claim that can be administered as part of the bankruptcy procedure, the issues pending before this Court are far broader than that.

Section 362(b)(4) excepts from the automatic stay “the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit’s...police and regulatory power.” As Plaintiff points out, two tests, a “public policy” test and a “pecuniary purpose” test, are used by courts in the Tenth Circuit to determine whether a governmental unit is exercising its police or regulatory power, thereby triggering the stay exception. *See Eddleman v. U.S. Dep’t of Labor*, 923 F.2d 782, 791 (10th Cir. 1991). Governmental actions undertaken to effectuate public policy are not subject to the bankruptcy stay. *Id.* Under the “pecuniary purpose”

¹ Unless otherwise noted, all section references contained herein shall refer to the Bankruptcy Code.

test, the inquiry is whether the government's action relates primarily to the "protection of the government's pecuniary interest in the debtor's property and not to matters of public policy." *Id.* Importantly, as Plaintiff itself points out in its Motion to Vacate, "[i]f 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.*" *Id.* (emphasis added).

As it relates to the outstanding matters in the Litigation before this Court, the steps left to be taken all relate to the protection of Plaintiff's pecuniary interests. RP3 has complied with the injunction and has clearly listed the required information on its website.² To be clear, there is no public policy reason remaining to warrant urgent continuation of the case before this Court. Plaintiff's actions against RP3 at this point, *i.e.* requesting to liquidate a claim, freeze assets, and appoint a receiver to run the company and pay off creditors such as Plaintiff, are solely to protect its pecuniary interest. Plaintiff's own Motion to Vacate acknowledges the problem with this position. Actions commenced or continued solely to protect a governmental entity's pecuniary interest are *not* excepted from the automatic stay. *Id.*

RP3's assets are property of the bankruptcy estate and are protected by the automatic stay. While there may be judicial efficiencies that militate in favor of liquidating claims in this Court, the Plaintiff 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. The legal arguments that Plaintiff is making, even if this Court accepts them, only gets Plaintiff

² RP3's website home page contains the following language, highlighted in bold: "THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in U.S. v. RaPower-3, LLC, et. al., Case No., 2:15 cs 828, has determined that tax information provided by Neldon Johnson, RaPower-3, LLC, International Automated Systems (IAUS), XSun Energy, LLC, SOLCO I LLC, Greg Shepard, and others associated with them regarding solar energy lenses is false. Tax information related to solar energy lenses must not appear on this site until further order of the court."

halfway to the relief it is *actually* requesting – *i.e.* ostensibly pulling RP3 *out* of bankruptcy and keeping this Court in charge of its property. That is a bridge too far.

C. Plaintiff’s Stay Relief Issue Should Be Brought Before the Bankruptcy Court, Who Has Jurisdiction Over the Property of the Estate

“[M]otions to terminate, annul, or modify the automatic stay,” “matters concerning the administration of the [bankruptcy] estate,” and various matters related to property of the bankruptcy estate are included as enumerated core proceedings over which the bankruptcy courts have jurisdiction pursuant to 28 U.S.C. § 157. *See* 28 U.S.C. § 157(b)(2). RP3 has subjected itself to the jurisdiction of the bankruptcy court, availed itself of the protections of the Bankruptcy Code, and the relief requested by Plaintiff in the Motion to Vacate does more than just liquidate a claim that can then be administered in the bankruptcy case – the relief requested would actually exercise control over property of the bankruptcy estate. Such a request can be and should be made to the bankruptcy court where Plaintiff has already made an appearance. Conversely, rather than request relief in this Court that will rob RP3 of its rights in the bankruptcy court, if Plaintiff wants the broad and extraordinary relief it seeks in the Motion to Vacate – *i.e.* for this Court to maintain complete control – it should move to withdraw the reference pursuant to 28 U.S.C. § 157(d).

III. CONCLUSION

For the reasons stated above, RP3 objects to the relief requested in the Motion to Vacate. Although some modified remedy may be appropriate, given the broad nature of the request and the forum in which Plaintiff is seeking such extraordinary relief, RP3 is obligated to object. RP3 reserves any and all rights to assert these arguments in any appropriate forum, including, without limitation, in the bankruptcy court and/or on appeal.

DATED: July 18, 2018.

SNELL & WILMER L.L.P.

/s/ Jeff Tuttle

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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