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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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**RAPOWER-3, LLC'S OMNIBUS RESPONSE TO CREDITOR UNITED STATES DEPARTMENT OF JUSTICE, TAX DIVISION'S (1) MOTION TO DISMISS BANKRUPTCY PETITION, OR IN THE ALTERNATIVE, CONVERT TO CHAPTER 7, OR APPOINT CHAPTER 11 TRUSTEE [Dkt. No. 13]; (2) MOTION TO WITHDRAW THE REFERENCE [Dkt. No. 15]; and (3) MOTION FOR PARTIAL STAY [Dkt. No. 18]**

Debtor RaPower-3, LLC ("**Debtor**") hereby files this omnibus response (this "**Response**") in response to Creditor United States Department of Justice, Tax Division's ("**DOJ**") *Motion to Dismiss Bankruptcy Petition, or in the Alternative, Convert to Chapter 7, or Appoint Chapter 11 Trustee* [Dkt. No. 13] (the "**Motion to Dismiss**"), its *Motion to Withdraw the Reference* (the "**Motion to WTR**") [Dkt. No. 15], and its *Motion for Partial Stay* ("**Stay Motion**", and collectively with the Motion to Dismiss and the Motion to WTR, the "**Motions**") [Dkt. No. 18]. In support of this Response, Debtor states as follows:

## INTRODUCTION

Debtor is not hiding in this bankruptcy case. Rather, it is attempting to preserve its right to prosecute appeals that it believes have been or may be wrongfully entered against it. Debtor is not forum shopping in an attempt to have this Court re-hear years-worth of litigation in hopes of a more favorable result. Postposition, Debtor has filed papers with Judge Nuffer taking issue only with the DOJ's overreaching attempts to freeze bankruptcy estate assets, and, importantly, *not* with the narrower concept of Judge Nuffer liquidating claims or entering other orders.<sup>1</sup>

Debtor has no issue with Judge Nuffer finishing what he started in this District Court Case and entering orders to resolve the case before him. Debtor is simply taking steps it believes necessary to preserve the ability to challenge claims against its assets and against orders related to its operations and potentially enable it to resume operations. The proposed orders in front of Judge Nuffer do not preserve these rights. With such goals in mind, and given the nature of the circumstances which would have prevented Debtor exercising its right to properly prosecute appeals, this case was filed in good faith.

While attempting to maintain the status quo in bankruptcy, Debtor has attempted to resolve the issues with the DOJ. Debtor has informed the DOJ on more than one occasion that Debtor seeks *only* the ability to effectively prosecute its own appeals, which includes the

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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 Case No. 2:15-cv-00828-DN-EJF in the United States District Court for the District of Utah, Central Division (the "**District Court 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."); 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."); 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.").

accompanying ability to make its own decisions related to the same.

Although no such resolution with the DOJ has been reached, not even the seemingly fundamental right to fully prosecute appeals of orders Debtor believes have been wrongfully entered against it, Debtor is willing to stipulate to (1) dismissal of the above-captioned bankruptcy case (the “**Bankruptcy Case**”), (2) entry of an order staying all proceedings in the Bankruptcy Case with the exception of the pending retention application for the undersigned proposed counsel; and (3) the lifting of any automatic stay that may be in place to allow Judge Nuffer to enter orders in the District Court Case.<sup>2</sup> Dismissal will obviate the need to withdraw the reference, as there will be no case to refer back to Judge Nuffer.

### **BACKGROUND FACTS**

1. Debtor filed its bankruptcy petition on June 29, 2018.
2. The DOJ filed the Motions 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 as recently as August 9, 2018, but such discussions have not resulted in a stipulated dismissal.

### **STATEMENT OF POSITION**

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

Debtor filed its bankruptcy to preserve its rights to appeal the orders entered in the District Court Case. It did not file to hide from forthcoming orders; in fact, it fully intended on stipulating to the entry of such orders provided it could reserve its appellate rights. Successful

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<sup>2</sup> As this court is aware, Local Rule 9013-1(e)(4) prohibits a respondent from making a motion in a response. However, to the extent the Court considers fashioning relief to the Motions other than that specifically prayed for, Debtor is hereby simply informing the Court that it would now stipulate to stay relief.

appeal of the existing and proposed orders would enable Debtor to remove significant contingent claims against the Debtor's estate. Furthermore, removal of the injunctions in place would allow Debtor to operate and service its obligations through a bankruptcy plan and beyond.

Debtor is well aware of Judge Nuffer's orders and proposed findings in the District Court Case. A desire to challenge those findings through a proper appeal, a right that was *clearly* restricted by the last prepetition proposed order appointing a receiver filed by the DOJ in the District Court Case, is not a bad faith objective. The DOJ's continued refusal to agree to Debtor's appeal rights shows exactly why the filing of the petition was proper.

Debtor has prepared a retention application for Nelson, Snuffer, Dahle & Poulsen, P.C., which it had intended to get retained as special counsel to prosecute these appeals. The successful appeal of orders it believes to be wrongfully entered can keep Debtor in business and developing new technologies in the future. 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 Debtor believes in its prospect to restructure its liabilities through prosecution of appeals.

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

Even though Debtor has a good faith basis for being in bankruptcy, Debtor *now* believes, given its inability to secure debtor in possession financing as a result of the appellate uncertainty, that dismissal of this case is appropriate. For various reasons, dismissal is a better solution for creditors than conversion or appointment of a chapter 11 trustee.

There are not currently sufficient assets in the bankruptcy estate to reasonably fund a chapter 11 trustee. Although Debtor's revenue has significantly dropped due to the injunction in

place (that Debtor plans to appeal), Debtor has been discussing potential debtor-in-possession financing. Given the posture of the District Court Case and the orders entered thus far, Debtor has concerns about the collectability of its accounts receivable absent potential exoneration on appeal. Debtor will not only remove potential claims against it by its customers, but it will also be able to pursue the recovery of amounts such customers currently owe the Debtor. Until the appeal process can take place, Debtor has been discussing alternative financing, namely pledging the Debtor's assets (comprised of cash, contract rights, and stock in International Automated Systems, Inc.) as collateral for secured financing and/or obtaining cash or intellectual property contributions from outside sources. The only incentive an outside third party would have to provide such a contribution is the belief that Debtor will win its appeals and resume operations as a profitable company. Such financing will certainly not take place if a trustee is appointed. Debtor is stipulating to the entry of order in the District Court Case (see below), including appointment of a receiver, so conversion would serve no purpose.

**C. The Court Should Stay the Proceedings in this Bankruptcy Case, With the Exception of Snell & Wilmer L.L.P.'s Retention Application, Pending Determination of the Motion to Dismiss and Motion to Withdraw the Reference.**

The DOJ has asked for a stay of all proceedings until such time as the Motion to Dismiss may be considered by this Court. With the exception of the *Application of RaPower-3, LLC for Order Authorizing the Employment and Retention of Snell & Wilmer L.L.P. as General Bankruptcy Counsel for Debtor* [Dkt. No. 9] (the "**S&W Employment Application**"), Debtor agrees that such a stay is appropriate. The Snell & Wilmer Employment Application is set for hearing on August 14, 2018, with an objection deadline of August 13, 2018, and Debtor does anticipate a significant enough expenditure of estate resources to warrant staying that important

proceeding. Staying the other proceedings will allow the important issue of the dismissal of the Bankruptcy Case to be resolved first, potentially obviating the need to address other issues in this case.

**D. Debtor Consents to Lifting Any Stay That May Be in Place to Allow Judge Nuffer to Enter His Orders in the District Court Case.**

Debtor is not hiding in bankruptcy. Debtor has availed itself of the protections of the bankruptcy code, and subjected itself to the demands of the same, all in an effort to keep its appeal rights available. Debtor does not object to Judge Nuffer's entry of orders resolving certain matters in front of him (which matters are detailed in the Motions). While Debtor does not believe its appellate rights are adequately protected by the proposed orders themselves, Debtor will not be able to obtain sufficient DIP financing to retain special counsel to prosecute its appeals on behalf of the bankruptcy estate. It intends to propose its own form of orders to Judge Nuffer for consideration, that clearly spells out Debtor's appellate rights in the order, should this case be dismissed.

**CONCLUSION**

The Debtor asserts that it is entitled to challenge the findings made and orders entered in the District Court Case. This is Debtor's reason for being in this position, the reason it has put itself into the fishbowl of bankruptcy and complied fully with the reporting requirements imposed upon it to date. Debtor simply wants the power to control its appeals of orders it believes wrongfully entered to allow it to survive and thrive as an operating company. However, Debtor cannot obtain sufficient DIP financing to allow it to proceed with these objectives in bankruptcy. Therefore, Debtor stipulates to the DOJ's request to dismiss.

DATED this 9<sup>th</sup> day of August, 2018.

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

*/s/ Jeff Tuttle*

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