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

In re RAPOWER-3, LLC, Debtor.	Bankruptcy Case No. 18-24865 (Chapter 11) Judge Kevin R. Anderson
RAPOWER-3, LLC'S OBJECTION TO UNITED STATES TRUSTEE'S MOTION FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE [Dkt. No. 24]	

Debtor RaPower-3, LLC (“**Debtor**”) hereby files this objection (this “**Objection**”) to the *United States Trustee’s Motion for the Appointment of a Chapter 11 Trustee and Memorandum in Support Thereof* [Dkt. No. 24] (the “**Motion**”). In support of the Objection, Debtor states as follows:

INTRODUCTION

Debtor filed its bankruptcy petition to preserve its right to appeal orders to be entered by Judge Nuffer in the pending United States District Court case (the “**USDC Case**”).¹ Debtor has never held itself out as the winner of the USDC Case nor is it seeking to evade entry of

¹ Case No. 2:15-cv-00828-DN-EJF filed in the United States District Court for the District of Utah, Central Division.

forthcoming orders. Debtor does not object to entry of final orders by Judge Nuffer in the USDC Case; rather, Debtor simply wants the right to appeal those orders, and any other rulings, to a higher court. It believes that Judge Nuffer erred and it wants an opportunity to show those errors to an independent body. These protections were not clearly preserved in the proposed orders pending before the court.

Appointment of a trustee is premature and unnecessary. If this Court uses Judge Nuffer's findings as grounds to appoint a trustee, Debtor's power to prosecute its own appeals is completely and inappropriately thwarted. Debtor is in the process of working on a proposed stipulated receivership order with the United States Department of Justice, Tax Division (the "**DOJ**"), the plaintiff in the USDC Case, that would preserve Debtor's appellate rights as part of the order appointing a receiver – *i.e.* an independent receiver would be in place, but Debtor would still have the due process right to prosecute its appeals.

Debtor has stipulated to the dismissal of the bankruptcy case (the "**Bankruptcy Case**") and the staying of all proceedings pending resolution of the DOJ's motion to dismiss the case, convert it to chapter 7, or appoint a trustee (the "**Motion to Dismiss**").² Debtor also has filed or intends to file its own motion to dismiss the Bankruptcy Case because it cannot obtain debtor in possession financing. Debtor has stipulated to the DOJ's Motion to Withdraw the Reference to allow the parties to resolve all issues in one court.³ Debtor is not operating, not pursuing its accounts receivable, not paying its accounts payable, and no longer pursuing debtor-in-

² See *RaPower-3, LLC's Amended 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][Dkt. No. 30] ("Debtor's Response to MTD")* filed on August 10, 2018. For the avoidance of doubt, Debtor does *not* stipulate to the DOJ's accusation that the Bankruptcy Case was commenced in bad faith.

³ See *Debtor RaPower-3, LLC's Limited Response to Creditor United States Department of Justice, Tax Division's Motion to Withdraw the Reference [USDC Dkt. No. 4]* filed on August 15, 2018.

possession financing that would sustain its bankruptcy estate. It is seeking to dismiss its bankruptcy, secure its appeal rights, and return before Judge Nuffer so the pending orders can be entered and the appeals process can begin.

In its Motion, and in discussions with the Debtor, the United States Trustee (the “UST”) has acknowledged that dismissal of the case is appropriate, and seeks the appointment of a trustee only as a backstop. With the pending motions to dismiss still to be determined, the Motion may be rendered moot by the relief that the Debtor, the DOJ, and the UST are all seeking. Having stipulated to the Motion to Withdraw the Reference, and in working on a stipulated receivership order, the Bankruptcy Case may soon be before Judge Nuffer with a stipulated agreement appointing a receiver to be entered upon dismissal. Not only would this receiver fulfill essentially the same role as a trustee, but, importantly, the order will preserve the Debtor’s appeal rights. For these reasons, the Motion should be continued and heard at the same time as the DOJ’s Motion to Dismiss, at which time, the Bankruptcy Case should be dismissed and no receiver should be appointed.

BACKGROUND FACTS

1. Debtor filed its bankruptcy petition on June 29, 2018.
2. The DOJ filed the Motion to Dismiss on July 27, 2018.
3. The UST filed the Motion on July 31, 2018.
4. Debtor, the DOJ, and the UST have been in discussions related to stipulating to a dismissal of the Bankruptcy Case, but such discussions have not resulted in a stipulated dismissal.
5. Debtor and the DOJ have been in discussions related to a stipulated order appointing a

receiver in the USDC Case, but such discussions have not resulted in a stipulated order.

STATEMENT OF POSITION

A. Dismissal of this Case, as Opposed to Appointment of a Trustee, 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. Debtor has been unsuccessful in obtaining debtor-in-possession financing given the current circumstances. 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 Chapter 11, 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. 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). The best interests of creditors will not be served by the appointment of a trustee and, therefore, dismissal is the preferred option of the Debtor, the DOJ, *and* the UST.

B. Appointment of a Trustee Will Rob Debtor of Rights It is Entitled to Protect and is Currently in the Process of Protecting

The Debtor and DOJ are negotiating a stipulated proposed receivership order that will give the DOJ all of the protections it seeks, but it will also acknowledge and secure the Debtor's appeal rights. This will give both sides what they need until such time as the appeals can be heard. The Bankruptcy Case will be dismissed, all orders pending in front of Judge Nuffer will be entered, and the parties can get on with the next steps of their dispute. Appointment of a trustee would cut off this process and leave the Debtor with no avenue to pursue its due process rights. Even if appointment of a trustee was merited, which it is not, in light of the other pending motions in front of this Court and Judge Nuffer that will resolve all outstanding issues, there is no reason to appoint a trustee in this instance.

CONCLUSION

The Debtor asserts that it is entitled to challenge the findings made and orders entered in the USDC Case. This is Debtor's reason for being before this Court. Debtor simply wants the power to control an appeal of orders and rulings entered in the USDC Case because it believes

those decisions are erroneous. Successful prosecution of an appeal will allow the Debtor to survive and thrive as an operating company outside of bankruptcy. Debtor is in the process of negotiating the appointment of a receiver in the USDC Case, which will preserve the Debtor's estate during the pendency of any appeal while still accomplishing the same objections as the appointment of a trustee. Thus, dismissal should be granted because it is cost effective, and protects the interests of creditors. Appointment of a trustee does not serve the best interests of creditors and the motion should be denied.

DATED this 17th day of August, 2018.

SNELL & WILMER L.L.P.

/s/ Jeff Tuttle

David E. Leta

Jeff D. Tuttle

Proposed Counsel for RaPower-3, LLC

CERTIFICATE OF SERVICE

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

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/s/ Joyce Kyle