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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH

In re: RAPOWER-3, LLC,  Debtor	Bankr. No. 18-bk-24865  Chapter 11  Hon. Kevin R. Anderson
<b>CREDITOR UNITED STATES DEPARTMENT OF JUSTICE, TAX DIVISION'S MOTION TO WITHDRAW THE REFERENCE</b>	

Debtor RaPower-3, LLC, has attempted to escape the consequences of its fraud. It ran to the bankruptcy court to hide from orders recently issued, or soon to be issued, by Chief Judge David Nuffer of the United States District Court for the District of Utah after a 12-day bench trial in *United States v. RaPower-3, LLC*, 2:15-cv-00828-DN-EJF (D. Utah).<sup>1</sup> For these reasons, and other cause, Creditor United States Department of Justice, Tax Division (“United States”), has moved to dismiss RaPower-3’s bankruptcy petition as a bad-faith filing, or in the alternative to convert the petition from Chapter 11 to Chapter 7, or in the alternative to appoint a Chapter 11 trustee.<sup>2</sup> Because the District Court is in the best position to decide that motion and all other substantive matters in the bankruptcy, pursuant to [28 U.S.C. § 157\(d\)](#), Fed. R. Bankr. P. 5011(a), and DUCivR 83-7.4, the United States respectfully moves to withdraw the reference for this case for cause.<sup>3</sup>

## **I. Facts and Procedural Posture**

This bankruptcy case is inextricably intertwined with the litigation in *United States v. RaPower-3, LLC*, 2:15-cv-00828-DN-EJF (D. Utah).<sup>4</sup> For more than ten years, Defendants Neldon Johnson,<sup>5</sup> RaPower-3, LLC, International Automated Systems, Inc. (“IAS”), LTB1, LLC (“LTB”), and R. Gregory Shepard promoted an abusive tax scheme centered on purported solar

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<sup>1</sup> For these reasons and others described below, if this motion is not initially assigned to Judge Nuffer, *see* DUCivR 83-2(a), the United States will move to transfer the motion to Judge Nuffer, *see* DUCivR 83-2(g).

<sup>2</sup> ECF Bankr. No. 13.

<sup>3</sup> *See also* [28 U.S.C. § 157\(a\)](#); DUCivR 83-7.1.

<sup>4</sup> This motion presumes familiarity with the facts in Judge Nuffer’s ruling from the bench on June 22, 2018. Gov. Ex. BK0001, Tr. 2514:9-2526:4.

<sup>5</sup> Neldon Johnson is the same person who has been signing documents for RaPower-3. *E.g.*, ECF Bankr. No. 1.

energy technology featuring so-called “solar lenses” to customers across the United States. The solar lenses were only the gloss on what Defendants were actually selling: unlawful tax deductions and credits. Defendants raked in more than \$50 million dollars from the solar energy scheme at the expense of the United States Treasury.

Judge Nuffer presided over the bench trial in this case over 12 days in April and June 2018.<sup>6</sup> Judge Nuffer took testimony from at least 24 witnesses, both live and via deposition designation, including 11 RaPower-3 customers. He received more than 650 exhibits in evidence, including many of the illusory transaction documents RaPower-3 supplied customers.<sup>7</sup> Judge Nuffer addressed numerous motions involving the parties’ legal arguments on topics including the propriety of disgorgement<sup>8</sup> and the appropriate equitable relief to ensure that the defendants in the District Court matter, including RaPower-3, do not dissipate assets<sup>9</sup>.

On June 22, 2018, immediately after closing arguments at trial, Judge Nuffer made partial findings of fact from the bench, concluding that RaPower-3, LLC (and all other defendants) engaged in a “massive fraud” for which they would be enjoined and disgorgement would be ordered.<sup>10</sup> Judge Nuffer 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

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<sup>6</sup> See Minute Entries for Trial, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF Nos. 372, 374, 378, 380, 386, 388, 391-93, 396, 409, 415.

<sup>7</sup> Bench Trial Witness and Exhibit Lists, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 416](#).

<sup>8</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 351](#), [ECF No. 352](#), ECF No. 359.

<sup>9</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 414](#), [ECF No. 423](#).

<sup>10</sup> Gov. Ex. BK0001, Tr. 2515:5-11.

Defendants provided was false and 2) remove tax information from their websites.<sup>11</sup> Judge Nuffer indicated that broader relief will issue with his final opinion and order.<sup>12</sup>

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.<sup>13</sup> Judge Nuffer ordered Defendants to respond no later than July 2, 2018, by 9:00 a.m.<sup>14</sup>

On Friday, June 29, Defendant RaPower-3, LLC filed for bankruptcy.<sup>15</sup> The Deseret News quoted RaPower-3's lead trial attorney on July 3, 2018, describing the purpose of RaPower-3's bankruptcy filing: to delay enforcement of Judge Nuffer's imminent orders affecting its assets so that RaPower-3 could retain control of its assets.<sup>16</sup> Simply the "threat" of

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<sup>11</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 413](#).

<sup>12</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 413 at 1](#).

<sup>13</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 414](#).

<sup>14</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 417](#).

<sup>15</sup> ECF Bankr. No. 1. Nonetheless, nearly all activities in the District Court litigation, including those that have an impact on RaPower-3, will continue because they are largely excepted from the automatic stay under [26 U.S.C. § 362\(b\)\(4\)](#). See *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 429](#). The United States' motion on that topic is ripe for Judge Nuffer's decision. See *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, [ECF No. 437](#).

<sup>16</sup> Gov. Ex. BK0002, Amy Joi O'Donoghue, *Companies in Utah solar fraud case filing for bankruptcy*, Deseret News, July 3, 2018, available online at <https://www.deseretnews.com/article/900023656/companies-in-utah-solar-fraud-case-file-for-bankruptcy.html> (The bankruptcy filing "'will delay [Judge Nuffer's forthcoming order on the United States' motion to freeze assets and appoint a receiver with respect to RaPower-3] but ultimately not prevent it. . . . The receiver issue would be delayed and moved over to the bankruptcy court for resolution or for the debtor to remain in possession of the estate.'").

Judge Nuffer authorizing an asset freeze and receiver sent RaPower-3 running to the bankruptcy court.<sup>17</sup>

Thirteen of the 20 largest unsecured creditors identified by RaPower-3 are its customers, as are more than 340 of its 360 creditors.<sup>18</sup> Any claims against RaPower-3 by these customer-creditors almost certainly arise from the fraud perpetrated upon them by all defendants in the District Court litigation: Johnson, RaPower-3, IAS, LTB1, and Shepard.<sup>19</sup> Four of the 20 largest unsecured creditors (and all but three of the rest of RaPower-3's creditors<sup>20</sup>) are people or entities intimately involved with the District Court proceeding: Paul Jones the attorney who is representing RaPower-3 customers in Tax Court and as third-party witnesses in the District Court proceedings, at Neldon Johnson's expense; Kurt Hawes and Richard Jameson, so-called experts originally proffered by defendants but who were never called to testify; and Donald Reay, the attorney Neldon Johnson paid to represent Shepard in the District Court litigation.<sup>21</sup>

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<sup>17</sup> Gov. Ex. BK0002 (“The receiver power can virtually be unlimited,” Snuffer said. “We don’t know if the judge would seriously consider doing that, but what we have is the threat.”)

<sup>18</sup> Compare ECF Bankr. No. 6, List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders, at 2 (June 29, 2018) and the creditor’s mailing matrix for this case, with customer names and addresses in Pl. Ex. 749, a native Excel file with data extracted from RaPower-3’s customer database (on file with Judge Nuffer’s Chambers). Frank Lunn, identified as the second largest unsecured creditor, was a trial witness by deposition designation. See *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF Nos. 303, 303-1.

<sup>19</sup> See Gov. Ex. BK0001, Tr. 2515:5-2526:4.

<sup>20</sup> David E. Leta and Jeff D. Tuttle, of Snell & Wilmer, and Plaskolite, LLC, were not involved in the District Court litigation.

<sup>21</sup> *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 21 (Reay); ECF No. 256-37 at 1 (Jones); Gov. Ex. BK0003, Defendants’ Amended Witness List for Trial, at 1-2 (Hawes, Jameson). The remaining three creditors are the United States Department of Justice, Tax Division; Gary Peterson, purportedly RaPower-3’s accountant; and Glenda Johnson, who as Neldon Johnson’s wife is an insider and should not be on the list in any event. ECF Bankr. No. 6 at 2 (Glenda Johnson, Peterson).

Due to the District Court proceedings over nearly three years – and especially the bench trial – Judge Nuffer has been steeped in the facts relevant to addressing RaPower-3’s bankruptcy case. Therefore, he is in the best position to decide matters like the United States’ motion to dismiss RaPower-3’s bankruptcy petition as a bad-faith filing (or, in the alternative, for other relief), which might take this case out of the bankruptcy realm altogether. If such relief were to be granted, the asset freeze and receiver the United States seeks in the District Court proceedings would be equally applicable to RaPower-3 as to all defendants. Which is exactly what RaPower-3 was trying to avoid by filing for bankruptcy.

**II. The District Court should withdraw the reference of this case for cause.**

District courts of the United States are vested with jurisdiction over bankruptcy cases.<sup>22</sup> A district court may refer bankruptcy cases to the district’s bankruptcy judges.<sup>23</sup> The United States District Court for the District of Utah has exercised this authority and referred bankruptcy cases, including the captioned case, to the United States Bankruptcy Court for the District of Utah.<sup>24</sup> But, on the timely motion of any party or on its own motion, the District Court may withdraw that reference for any bankruptcy case “for cause shown.”<sup>25</sup> The District Court decides the motion to withdraw the reference.<sup>26</sup>

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<sup>22</sup> 28 U.S.C. § 1334(a).

<sup>23</sup> 28 U.S.C. § 157(a).

<sup>24</sup> DUCivR 83-7.1.

<sup>25</sup> 28 U.S.C. § 157(d).

<sup>26</sup> Fed. R. Bankr. P. 5011(a).

**A. This motion is timely.**

Timeliness is assessed from the time that the grounds for withdrawing the case became clear.<sup>27</sup> Here, RaPower-3 filed its bankruptcy petition on June 29, 2018. This motion to withdraw the reference is being filed four weeks after that date. Under DUCivR 83-7.1(c)(1), a motion to withdraw the reference for a bankruptcy case may be made at any time,<sup>28</sup> but this motion is timely under any standard.<sup>29</sup> In the time since RaPower-3 filed for bankruptcy, no substantial activity has taken place in the bankruptcy court. The nonmoving parties will not be prejudiced by this motion to withdraw the reference for this case.<sup>30</sup>

**B. Judge Nuffer’s in-depth knowledge of this matter and RaPower-3’s efforts to impede enforcement of his orders show cause to withdraw the reference.**

A district court may withdraw the reference for a case or proceeding, “for cause shown.”<sup>31</sup> “Cause” is not defined in the statute. But courts have identified relevant factors including efficiency, judicial economy,<sup>32</sup> “reducing forum shopping and confusion, conserving

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<sup>27</sup> *Zahn v. Yucaipa Capital Fund (In re Almac’s)*, 202 B.R. 648, 657 (D.R.I. 1996)

<sup>28</sup> DUCivR 83-7.1(c)(1).

<sup>29</sup> *E.g.*, *Zahn*, 202 B.R. at 657 (motion to withdraw the reference filed two months after the event indicating that withdrawal was appropriate was timely when there had been no significant developments in the case that would make withdrawal “inconvenient or inappropriate”); *In re Oil Co.*, 140 B.R. 30, 33 (E.D.N.Y. 1992) (motion to withdraw the reference timely made six weeks after precipitating event).

<sup>30</sup> *See In re AgFeed USA, LLC*, 565 B.R. 556, 566 (D. Del. 2016) (motions to withdraw the reference “filed at the very outset of [a bankruptcy] litigation, were timely made”); *In re Am. Cmty. Servs., Inc.*, 86 B.R. 681, 685 n.7 (D. Utah 1988) (A motion to withdraw the reference “should be made when developments in the bankruptcy case indicate that a motion to withdraw the reference is appropriate and when the motion will not prejudice the nonmoving parties.”)

<sup>31</sup> 28 U.S.C. § 157(d).

<sup>32</sup> *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2d Cir. 1993); *In re EquiMed, Inc.*, 254 B.R. 347, 351 (D. Md. 2000); *Big Rivers Elec. Corp. v. Green River Coal Co.*, 182 B.R. 751, 755 (W.D. Ky. 1995).

the resources of debtors and creditors, and expediting the bankruptcy process.”<sup>33</sup> Whether “cause” exists to withdraw the reference depends on the facts of each case.<sup>34</sup> “[P]ermissive withdrawal of the reference is within the sound discretion of the [district] court.”<sup>35</sup>

Here, all of these interests show that the most appropriate forum for the bankruptcy matter is the District Court, before Judge Nuffer.<sup>36</sup> Common questions of fact and law apply to the proceedings in the District Court and to the bankruptcy matters.<sup>37</sup> Judge Nuffer is well-acquainted with the facts regarding RaPower-3, its fraudulent business model, its customers for its “lenses” (according to Judge Nuffer, “a small, low value almost disposable component[] of an unproven energy production system”<sup>38</sup>), and the transaction documents that would give rise to any claims by RaPower-3’s customers.<sup>39</sup> The interests of efficiency, judicial economy, conserving the resources of debtors and creditors, *and* of expediting the bankruptcy process are served by withdrawing the reference so that Judge Nuffer may use all of the information he has

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<sup>33</sup> *In re Am. Cmty. Servs., Inc.*, 86 B.R. at 686 (citing *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985); accord *Orion Pictures Corp.*, 4 F.3d at 1101; *In re Pruitt*, 910 F.2d 1160, 1168 (3d Cir. 1990); *Bank Midwest, N.A. v. Cyberco Holdings, Inc. (In re Cyberco Holdings, Inc.)*, No. 1:05-CV-566, 2005 U.S. Dist. LEXIS 25834, at \*12-13 (W.D. Mich. Oct. 20, 2005); *F.T.C. v. Am. Inst. for Research & Dev.*, 219 B.R. 639, 647 (D. Mass. 1998).

<sup>34</sup> *In re Am. Cmty. Servs., Inc.*, 86 B.R. at 686.

<sup>35</sup> *In re Am. Cmty. Servs., Inc.*, 86 B.R. at 686.

<sup>36</sup> See generally *Am. Inst. for Research & Dev.*, 219 B.R. at 641-47 (withdrawing the reference in a bankruptcy case initiated by a bad-faith filing designed to interfere with the district court’s oversight of an ongoing fraud matter and the district court’s orders of injunction and equitable reimbursement).

<sup>37</sup> *In re Enviro-Scope Corp.*, 57 B.R. 1005, 1007 (E.D. Pa. 1985).

<sup>38</sup> Tr. 2523:10-12.

<sup>39</sup> *Am. Inst. for Research & Dev.*, 219 B.R. at 647 (“[t]he ‘traffic jam’ of colliding legal activity [in the case called] for one traffic cop, and [the district] court [was] in the best position to sort out the parties and, so to speak, get them through the intersection”); *Big Rivers Elec. Corp.*, 182 B.R. at 756 (a district court’s “knowledge of the facts is a factor that may be considered in deciding a motion to withdraw the reference”); *In re Sevko, Inc.*, 143 B.R. 114, 117 (N.D. Ill. 1992); *In re Wedtech Corp.*, 81 B.R. 237, 239 (S.D.N.Y. 1987).

learned to adjudicate all matters.<sup>40</sup> This includes the United States' motion to dismiss RaPower-3's petition as a bad-faith filing, in light of its fraudulent conduct to date and its efforts to impede or avoid Judge Nuffer's orders.<sup>41</sup> It would be a waste of judicial resources for a new judge in the bankruptcy court to spend the time and effort required to learn the facts and legal arguments central to this case.<sup>42</sup>

This is especially true because Judge Nuffer is on track to establish procedures that will require all other Defendants' assets be frozen and controlled by a receiver who will then administer claims. If the petition is not dismissed, Judge Nuffer could administer the bankruptcy case in parallel with the receivership. Withdrawing the reference would result in one judge, rather than two, addressing RaPower-3's creditors' claims.<sup>43</sup> Customers and, potentially other creditors, could have a larger pool of assets for their claims arising from the fraud in this case because (unlike in bankruptcy court) *all* Defendants' assets will be subject to Judge Nuffer's

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<sup>40</sup> *Big Rivers Elec. Corp.*, 182 B.R. at 755-56 (citations omitted) (“Where a proceeding in bankruptcy involves common issues of law and fact with a case pending in district court, “the overlapping of facts, transactions and issues in the two cases ... is good cause for withdrawal of the reference and consolidation with the district court proceeding.”); *see also Vacation Vill., Inc. v. Clark Cty.*, 497 F.3d 902, 914 (9th Cir. 2007).

<sup>41</sup> *Am. Inst. for Research & Dev.*, 219 B.R. at 647 (withdrawing the reference would prevent the debtor in that case “from manipulating the bankruptcy process to interfere with [the district] court’s oversight of the [underlying district court fraud litigation]).

<sup>42</sup> Often, the bankruptcy court is the court with the greatest knowledge of the facts and legal matters at issue. *E.g.*, *In re Royce Homes, LP*, 578 B.R. 748, 762 (Bankr. S.D. Tex. 2017); *In re Rock Structures Excavating, Inc.*, No. 2:12-CV-856 TS, 2013 WL 1284969, at \*2 (D. Utah Mar. 27, 2013) (Stewart, J.); *c.f. W. Utah Copper Co. v. Bridge Loan Capital Fund, LP*, No. 2:10-1039 TS, 2011 WL 52511, at \*2 (D. Utah Jan. 6, 2011) (Stewart, J.). That is simply not true here.

<sup>43</sup> *See In re Wedtech Corp.*, 81 B.R. at 239 (granting motion to withdraw the reference, in part, when “62% of the creditors interested in the results [in the bankruptcy court] are bondholders who are also plaintiffs in the [district court] action.” (citation omitted)).

jurisdiction.<sup>44</sup> If this Court does not withdraw the reference, two different judges will evaluate claims of Defendants' shared creditors (who will have to file two claims) – one judge with respect to RaPower-3 and one with respect to all other Defendants. In light of Judge Nuffer's finding about the lack of respect for corporate formalities by Neldon Johnson for the entities under his control,<sup>45</sup> refraining from withdrawing the reference could result in inconsistent determinations about which defendant owns which asset, and in which proceeding the asset should be administered. This weighs heavily in favor of withdrawing the reference to conserve judicial resources, creditors' resources, and RaPower-3's resources by conducting all litigation before Judge Nuffer.<sup>46</sup>

Last, RaPower-3's bankruptcy filing was a craven effort to forum-shop its way out of Judge Nuffer's orders and into bankruptcy court.<sup>47</sup> The timing of the filing is telling: it was immediately after Defendants' arguments failed and Judge Nuffer stated that he would be

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<sup>44</sup> See *In re Sevko, Inc.*, 143 B.R. at 117 (withdrawing the reference when a creditor could receive more comprehensive relief in that forum, because only one of the two parties from whom the creditor could recover was in the bankruptcy court).

<sup>45</sup> See Tr. 2519:8-21.

<sup>46</sup> *In re Sevko, Inc.*, 143 B.R. at 117 (withdrawing the reference to district court because “[r]educing duplicative proceedings to a single forum serves judicial economy, and spares the resources of the parties in the bankruptcy proceeding. It also serves to protect the parties from inconsistent factual results.”); *In re Wedtech Corp.*, 81 B.R. at 239-40 (grating motion to withdraw the reference, in part, because “[q]uestions in the district court action as to Chinn’s performance as a director of Wedtech and his alleged violation of his fiduciary duty to the company will hinge in large measure upon how the question of the alleged fraudulent conveyance is resolved. Questions as to what other directors knew or should have known will involve this issue among others. The existence or non-existence of an undisclosed fraudulent conveyance of \$1.14 million will come up with respect to the liability of accountants . . . and underwriters . . . under the securities laws in the district court action.”); *In re Oil Co.*, 140 B.R. at 34 (“This Court can think of no greater waste of this District’s already overworked resources than to litigate the issue of tax liability involved in a single alleged conspiracy one bankruptcy case at a time. Rather it would expedite the bankruptcy process, foster the economical use of both debtors’ and creditors’ resources in this instance, and save already scant judicial time and resource to, in effect, litigate the conspiracy charge and the tax liability claims associated therewith in one consolidated proceeding.”).

<sup>47</sup> *Am. Inst. for Research & Dev.*, 219 B.R. at 647.

entering an order of injunction and for disgorgement, and was seriously contemplating an asset freeze and receivership.<sup>48</sup> This alone shows that RaPower-3's intention was to avoid these serious consequences. But RaPower-3's own lead trial attorney made the intention explicit when he told the Deseret News that the purpose was to delay enforcement of Judge Nuffer's orders and to obtain a new forum in the bankruptcy court.<sup>49</sup>

### **III. Conclusion**

This Court should not indulge RaPower-3's blatant attempt to escape Judge Nuffer's orders. Instead, because Judge Nuffer has already learned all of the facts and many of the legal arguments that will have to be addressed in RaPower-3's bankruptcy proceeding and because of the efficiencies for the Court, creditors, and debtor that will result, this Court should withdraw the reference for RaPower-3's bankruptcy proceedings. At the same time, it should grant the United States' motion to dismiss RaPower-3's petition.<sup>50</sup>

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<sup>48</sup> *Am. Inst. for Research & Dev.*, 219 B.R. at 641-44, 47-48 (withdrawing the reference when a bank had failed to persuade the district court not to order equitable reimbursement from accounts it held, and then filed for bankruptcy to "thereby achieve an end run around the order [the bank] had previously been unsuccessful in opposing in the [district court] case").

<sup>49</sup> See *In re Rock Structures Excavating, Inc.*, 2013 WL 1284969, at \*2 ("The issue of forum shopping and confusion is another factor that weighs against withdrawal of the bankruptcy reference. Defendants have received several adverse rulings in the bankruptcy court. This Court finds no reason why Defendants should be permitted to relitigate the same issues in the district court.")

<sup>50</sup> See generally *Am. Inst. for Research & Dev.*, 219 B.R. at 641-44, 47-48 (withdrawing the reference and, in the same order, granting motion to dismiss bankruptcy petition filed to impede district court's orders).

Dated: July 27, 2018

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