

John T. Morgan (USB #3839)

Trial Attorney

J. Vincent Cameron (USB #10006)

Assistant United States Trustee

**UNITED STATES DEPARTMENT OF JUSTICE**

Office of the United States Trustee

Washington Federal Bank Building

405 South Main Street, Suite 300

Salt Lake City, UT 84111

Telephone: (801) 524-5734

Facsimile: (801) 524-5628

Email: [John.T.Morgan@usdoj.gov](mailto:John.T.Morgan@usdoj.gov)

Attorney for Patrick S. Layng, United States Trustee

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

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In re:  <b>RaPOWER-3, LLC,</b>  Debtor.	<b>Bankruptcy Case No. 18-24865 KRA</b> (Chapter 11) Judge Kevin R. Anderson
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**UNITED STATES TRUSTEE'S MOTION FOR THE APPOINTMENT OF A  
CHAPTER 11 TRUSTEE AND MEMORANDUM IN SUPPORT THEREOF**

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Patrick S. Layng, the United States Trustee for Region 19, by and through his attorney, John T. Morgan, and pursuant to 11 U.S.C. §§ 1104(a) and (e) hereby moves this Court for the Appointment of a Chapter 11 Trustee in this case (the "Motion"). For the reasons set forth below, the court should grant this requested relief.

**RECITALS**

1. This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and venue is proper

pursuant to 28 U.S.C. § 1409.

2. This Motion is made pursuant to 11 U.S.C. §§ 1104(a) and (e), Rules 9013 and 9014 of the Federal Rules of Bankruptcy Procedure and Local Rule 9013-1.
3. The UST has standing to bring this Motion under 11 U.S.C. §§ 307 and 1104(a) and (e), and pursuant to the UST's authority to supervise the administration of bankruptcy cases under 28 U.S.C. §586(a)(3).
4. The relief sought is based upon this Motion and Memorandum, the records and files in the case and such other evidence as may be introduced prior to or at the time of the hearing on the Motion.

#### **STATEMENT OF FACTS**

1. The debtor, RaPower-3, LLC ("the debtor") commenced this case by filing a voluntary petition for relief in this court under Chapter 11 on June 29, 2018.
2. The debtor is a Utah limited liability company formed in November, 2009 and doing business in Oasis, Millard County, Utah. The initial and currently sole member of the Debtor is a corporation known as DCL16BLT Inc., originally formed in the state of Wyoming in October 2009, and thereafter domesticated as a corporation in the State of Utah in October, 2009.
3. In the database maintained by the Utah Secretary of State – Division of Corporations, as well as in the pleadings filed in this bankruptcy case, Neldon P. Johnson ("Johnson") is identified as the President of the Managing Member of the Debtor, DCL16BLT Inc., and as the "Manager" of the Debtor. Johnson is the President, Registered Agent and sole director of DCL16BLT Inc. He has also stated that he personally holds some percentage

of the shares of DCL16BLT Inc., but he did not know the exact percentage and could not identify any other shareholders by name or percentage of shares owned.

4. Johnson is in complete control of both DCL16BLT Inc., and of the Debtor. At all relevant times Johnson is and has been the sole or majority equitable owner of the Debtor and or the majority owner of the Debtor's managing member DCL16BLT Inc., and he is the person directing and controlling the actions of the Debtor.
5. Johnson claims to have invented certain solar energy technology. The debtor has operated a multilevel marketing venture from its headquarters in Oasis, Utah for the past eight years and is currently selling products described as "solar lenses" throughout the United States. A central component of the Debtor's business of selling solar lenses involves promoting a scheme for its customers to claim tax benefits including energy tax credits and depreciation expenses to which they are not entitled which practices were challenged by the United States Internal Revenue Service.
6. In 2015, the plaintiff United States Department of Justice – Tax Division ("USDOJ Tax Division") commenced an action against the Debtor and co-defendants International Automated Systems, Inc., Neldon Johnson, R. Gregory Sheppard, Roger Freeborn, and LTB1, LLC, in the United States District Court for the District of Utah, Civil No. 2:15-cv-00828 DN (the "federal court action") seeking an injunction against defendants and damages.
7. After proceeding for more than two years, the case was tried before United Stated District Court Chief Judge David Nuffer commencing in March, 2018. After 12 days of trial over a period of three months, after hearing the testimony of dozens of witnesses and viewing

thousands of pages of exhibits and documentary evidence, and considering voluminous written briefs and the oral arguments of counsel, Judge Nuffer ruled in favor of the government plaintiff and against the Defendants.

8. On June 22, 2018, Judge Nuffer signed and entered an ‘Initial Order and Injunction after Trial’, (the ‘Initial Order’), a copy of which is attached hereto as Exhibit ‘A’.
9. In the Initial Order, Judge Nuffer ruled that Defendant Neldon Johnson and his individual co-defendants ‘were each involved in the organization of, and participated in sales of interests in, the plan or arrangement, and the plan or arrangement that constitutes this fraudulent tax scheme.’
10. The Initial Order went on to find that Johnson and his co-defendants had emphasized purported tax benefits to prospective customers that they knew or had reason to know were false or fraudulent as to material matters for the following reasons:
  - a. Johnson’s purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy;
  - b. The only way a customer has ‘made money’ from buying a lens is from the purported tax benefits;
  - c. No customer has been paid rental income generated from the use of his lens to generate power bought by a third party;
  - d. no customer has been paid a bonus;
  - e. Customers are not required to pay the full down payment, much less the full purchase price for a lens; and
  - f. Advice from independent professionals did not support Defendants’ claims about

tax benefits.

11. Judge Nuffer went on to rule that Defendants knew or had reason to know:

- a. That Johnson, and not the customers, controlled the customer's purported "solar lens leasing businesses";
- b. That the customers do not have special expertise or prior experience in the solar lens leasing business;
- c. That their customers were not in a "trade or business";
- d. That the lenses were not "placed in service";
- e. That the lenses were not held for production of income from the lenses;
- f. That the full "purchase" price of the lenses was not at risk in the year a customer signed transaction documents;
- g. That their customers were not allowed to deduct their purported expenses related to the solar lenses against their active income or use the credit to reduce their tax liability on active income;
- h. That the IRS disallowed their customers' depreciation deductions and solar energy tax credits and that the customers were not entitled to depreciation deductions and solar energy tax credits; and
- i. That the Oregon Tax court rejected their customer' depreciation deductions and solar energy tax credits.

12. Finally, Judge Nuffer ruled "In connection with sales to customers, Defendants made gross valuation overstatements as to the value of the solar lenses".

13. Judge Nuffer concluded “Defendants knew, or had reason to know, that their statements were false or fraudulent. Their claims of reliance on legal advice fails. Their claimed reliance was not reasonable. The advice document do not support the Defendants’ position“.

### ARGUMENT

#### **I. THIS MOTION IS REQUIRED UNDER 11 U.S.C. § 1104(e)**

11 U.S.C. § 1104(e) provides, in relevant part, that “[t]he United States Trustee shall move for the appointment of a trustee under subsection (a) “if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor’s chief executive or chief financial officer, or members of the governing body who selected the debtor’s chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor . . .”. See *In re The 1031 Tax Group, LLC*, 374 B.R. 78, 87 (Bankr.S.D.N.Y. 2007) (“the U.S. Trustee must seek an order requiring appointment of a chapter 11 trustee whenever the ‘reasonable grounds to suspect’ standard is met”).

Johnson signed the petition as President of the Managing Member of the debtor. He has stated that he is the sole “Manager of the Debtor”. There is no formally designated Chief Executive Officer or other managing authority for the debtor other than Johnson. Even if he lacks the formal designation, Johnson is the chief executive officer of the debtor.

Johnson has been the person in charge of the Debtor and its solar energy scheme since its inception. Neither the Debtor nor its Managing member has any officers other than Johnson – there is no board of directors, no chief executive officer, and no other governing body directing the management of the debtor other than Johnson. .

The complaint in the federal court action sets forth a plethora of allegations of specific wrongdoing and fraudulent conduct by Johnson and others which were the result of a multiyear investigation by the IRS and the Department of Justice and which culminated in an overwhelming victory for the government after twelve days of trial. The government is no longer resting on allegations - - there are specific findings of fact concerning the long standing fraudulent activities of Johnson and his cohorts in selling his solar lenses and bilking the United States Treasury out of millions of dollars. Judge Nuffer's ruling provides more than reasonable grounds to suspect that Johnson, the person in charge of the entire operation since its inception, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor.

The United States alleged and proved that Johnson fraudulently induced investors to purchase solar lenses with the claimed tax credits even after Johnson had clear knowledge of the fact that the purported solar technology did not work and would not work to generate commercially viable electricity or other energy, after he knew that his customers were not "in a trade or business" that would entitle them to depreciation deductions or solar energy tax credits, and after he had actual knowledge from his own attorneys and tax professionals that the tax benefits and tax credits he was touting were not allowable under the current United States tax laws.

Such deceptive conduct and knowing statements of material misrepresentations made to induce others to invest money in the debtor present a textbook example of actual fraud and dishonesty.

## **II. CAUSE EXISTS FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**

11 U.S.C. § 1104(a) provides that the court shall order the appointment of a trustee

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee

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(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case or similar cause ...; or

(2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

Section 1104(a)(1) requires the Court to order the appointment of a Trustee where cause exists. Cause is not limited to the factors listed in Section 1104 itself. See *In re Oklahoma Refining Co.*, 838 F.2d 1133 (10<sup>th</sup> Cir. 1988). Courts have found cause to appoint a trustee where the debtor has failed to maintain adequate financial records or has failed to adequately document transactions with insiders or affiliated entities; *In re Oklahoma Refining Co.*, 838 F.2d 1133 (10<sup>th</sup> Cir. 1988); *In re McCorhill Publishing, Inc.* 73 B.R. 1013, 1017 (Bankr. S.D.N.Y. 1987); to investigate allegations of fraud and wrongdoing by the Debtor; *In re Parr*, 1 B.R. 453, 456 (Bankr. E.D.N.Y. 1979); when circumstances evidence a lack of prudent business management occurring pre-petition; *In re North Eastern Lumber of Millwork Corp.*, 9 B.C.D. 425 (Bankr. E.E. Pa. 1982); and to prevent looting of the estate; *In re Bibo, Inc.*, 76 F.3d 256, 258 (9<sup>th</sup> Cir. 1996).

As stated by the United States Supreme Court in *Commodity Futures Trading Com'n v. Weintraub*, 105 S.Ct. 1986 (1985) at 1995 citing *Wolf v. Weinstein*, 372 U.S. 633 (1963) at 651:

"Indeed, the willingness of Courts to leave debtors-in-possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of the Trustee". Courts have uniformly recognized that an independent Trustee is necessary where the principals of the debtor have engaged in illegal or improper transactions which the debtor-in-possession cannot be reasonably expected to prosecute. See e.g., *In re Russell*, 60 B.R. 42 (Bankr. W.D. Ark. 1985); *In re W.H. Vaughan*, 40 B.R. 524 (Bankr. E.D. Pa. 1984); *In re Fisher Holding Co.*, 12 B.R. 195 (Bankr. S.D. Ind. 1981).

Johnsons' continuing managerial involvement with the Debtor and its multilevel marketing system falls squarely within conventional determinations of cause involving dishonesty by current management or gross mismanagement on a consistent or sustained basis. In this case, there have already been specific findings of long-standing fraud and dishonesty by current management. Indeed, the Debtors actions over many years evidence systematic and consistent conduct reflecting fraud, incompetence and gross mismanagement which constitute cause for the appointment of a trustee under section 1104(a)(1).

The United States Department of Justice – Tax Division has filed a Motion to Dismiss the Petition in this case (Docket #13). The United State Trustee concurs that such relief is appropriate, but in the event that relief is not granted, the appointment of a trustee is appropriate.

Consistent with the United States Department of Justice - Tax Division's Motion to Stay Proceedings (Docket #18), the United States Trustee requests that briefing on the instant Motion proceed, but that no decision be made thereon until after the United States District Court enters a decision on the pending Motion to Withdraw the Reference. (Docket #15).

**CONCLUSION**

WHEREFORE, the United States Trustee requests that the Court grant the U.S. Trustee's Motion to Appoint a Chapter 11 Trustee under either 11 U.S.C. §§ 1104(a) and (e) and for such other and further relief as the Court deems necessary and appropriate.

DATED: July 31, 2018

Respectfully submitted,

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/s/  
John T. Morgan  
Attorneys for the United States Trustee,  
Patrick S. Layng

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that, on July 31, 2018, I caused a true and correct copy of the foregoing **UNITED STATES TRUSTEE'S MOTION FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE AND MEMORANDUM IN SUPPORT THEREOF** to be electronically filed with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF System as noted below:

- Erin Healy Gallagher [erin.healygallagher@usdoj.gov](mailto:erin.healygallagher@usdoj.gov), [Russell.S.Clarke@usdoj.gov](mailto:Russell.S.Clarke@usdoj.gov)
- Erin R. Hines [erin.r.hines@usdoj.gov](mailto:erin.r.hines@usdoj.gov), [Central.Taxcivil@usdoj.gov](mailto:Central.Taxcivil@usdoj.gov)
- David E. Leta [dleta@swlaw.com](mailto:dleta@swlaw.com), [wkalawaia@swlaw.com](mailto:wkalawaia@swlaw.com), [csmart@swlaw.com](mailto:csmart@swlaw.com)
- John K. Mangum [john.mangum@usdoj.gov](mailto:john.mangum@usdoj.gov), [valerie.maxwell@usdoj.gov](mailto:valerie.maxwell@usdoj.gov)
- Christopher R. Moran [christopher.r.moran@usdoj.gov](mailto:christopher.r.moran@usdoj.gov), [central.taxcivil@usdoj.gov](mailto:central.taxcivil@usdoj.gov)
- Jeff D. Tuttle [jtuttle@swlaw.com](mailto:jtuttle@swlaw.com), [jpollard@swlaw.com](mailto:jpollard@swlaw.com), [docket\\_slc@swlaw.com](mailto:docket_slc@swlaw.com)

Further, I certify that I caused copies of the **MOTION** to be forwarded via U.S. Mail, first class, postage prepaid and properly addressed to the following:

RaPower-3, LLC  
2730 West 4000 South  
Oasis, UT 84624

\_\_\_\_\_/s/  
Lindsey Huston

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

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL  
AUTOMATED SYSTEMS, INC., LTB1,  
LLC, R. GREGORY SHEPARD, NELDON  
JOHNSON, and ROGER FREEBORN,

Defendants.

**INITIAL ORDER AND  
INJUNCTION AFTER TRIAL**

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

District Judge David Nuffer

Magistrate Judge Evelyn J. Furse

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This is an interim order for partial injunctive relief entered after trial, but before entry of a complete set of findings and conclusions which will support much broader relief.

Defendants Neldon Johnson, R. Gregory Shepard, and former defendant Roger Freeborn were each involved in the organization of, and participated in sales of interests in, the plan or arrangement, and the plan or arrangement that constitutes this fraudulent tax scheme.

Defendants made statements regarding allowability of tax deductions and credits from participation in the plan or arrangement; told prospective customers, and customers, about the structure of the transactions; and told them about Johnson's solar energy technology. They 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 material matters, for the following reasons:

- a. Johnson's purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy;

**EXHIBIT A**

- b. the only way a customer has “made money” from buying a lens is from the purported tax benefits;
- c. no customer has been paid rental income generated from the use of his lens to generate power bought by a third-party purchaser; and
- d. no customer has been paid a bonus;
- e. customers are not required to pay the full down payment, much less the full purchase price for a lens; and
- f. advice from independent professionals did not support Defendants claims about tax benefits.

Defendants knew, or had reason to know:

- a. that Johnson, and not the customers, controlled the customers’ purported “solar lens leasing businesses”;
- b. that the customers do not have special expertise or prior experience in the solar lens leasing business;
- c. that their customers were not in a “trade or business”;
- d. that the lenses were not “placed in service”;
- e. that the lenses were not held for production of income from the lenses;
- f. that that the full “purchase” price of the lenses was not at risk in the year a customer signed transaction documents;

- g. that their customers were not allowed to deduct their purported expenses related to the solar lenses against their active income or use the credit to reduce their tax liability on active income;
- h. that the IRS disallowed their customers' depreciation deductions and solar energy tax credits and that the customers were not entitled to depreciation deductions and solar energy tax credits;
- i. that the Oregon Tax Court rejected their customers' depreciation deductions and solar energy tax credits.

In connection with sales to customers, Defendants made gross valuation overstatements as to the value of the solar lenses.

Defendants knew, or had reason to know, that their statements were false or fraudulent. Their claims of reliance on legal advice fails. Their claimed reliance was not reasonable. The advice documents do not support the Defendants' position.

An injunction and other equitable relief are necessary and appropriate to enforce the internal revenue laws of the United States. At this early point, partial relief is ordered to prevent ongoing and significant fraud.

### **ORDER**

IT IS HEREBY ORDERED that this notice be immediately placed on [www.rapower3.com](http://www.rapower3.com) and [www.rapower3.net](http://www.rapower3.net) and [www.iaus.com](http://www.iaus.com) and any other site controlled by Defendants which is used in relation to marketing of lenses:

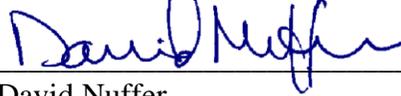
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in U.S. v. RaPower-3, LLC., et al., Case No., 2:15 cv 828, has determined that tax information provided by Neldon Johnson, RaPower-3, LLC, International Automated Systems (IAUS), XSun Energy, LLC, SOLCO I LLC, Greg Shepard, and others associated 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.

Defendants shall file a Declaration of Compliance, attesting that all tax related information has been removed from the websites and attaching copies of the web pages, on or before Friday June 29, 2018.

Dated June 22, 2018.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

David Nuffer  
United States District Judge