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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

CREDITOR UNITED STATES' REPLY TO DEBTOR'S RESPONSE TO MOTION TO DISMISS BANKRUPTCY PETITION, OR IN THE ALTERNATIVE, CONVERT TO CHAPTER 7, OR APPOINT CHAPTER 11 TRUSTEE

Debtor RaPower-3, LLC agrees that the Court should dismiss its bankruptcy petition, but fails to offer any valid reason for filing the petition in the first place. RaPower-3 and its principals simply wanted to delay justice in the related District Court case. To preclude the debtor from filing another bankruptcy petition in the near future, the Court should adjudicate our motion on the merits, and dismiss RaPower-3's bankruptcy petition with prejudice.

I. RaPower-3 fails to justify its bankruptcy filing with facts or law.

The United States moved to dismiss Debtor RaPower-3, LLC's bankruptcy petition[1] because there were multiple indicia suggesting bad faith.[2] Specifically, we argued that (1) the debtor's pre-petition conduct was improper – it facilitated a fraudulent tax scheme that unjustly enriched its management by over $50 million– (2) it has few assets because management raided the corporate shell – reducing over $25 million in gross receipts to some $40,000 in cash, and $1.25 million in stock in its fraudulent co-defendant, IAS – (3) it decisively lost in a prior forum – 1 week before the petition, Judge David Nuffer found that the debtor's solar tax scheme was a "massive fraud" – (4) RaPower-3's bankruptcy petition effectively allowed it to evade Judge Nuffer's imminent orders; and (5) RaPower-3 has no hope of reorganizing.[3] RaPower-3's bad faith continued when it recently failed to attend the § 341 hearing, needlessly wasting resources.[4]

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[1] Bankr. ECF Doc. No. 13.

[2] *In re Nursery Land Dev. Inc*., 91 F.3d 1414, 1416 (10th Cir. 1996); accord *In re George Love Farming, LC*, 366 B.R. 170, 178 (Bankr. D. Utah 2007).

[3] Bankr. ECF Doc. No. 13, pp. 6-14.

[4] Bankr. ECF Doc. No. 32 & 39 (U.S. Trustee's Minute Entries noting debtor's non-appearance).

In response, debtor rebuts none of the facts we presented, and agrees to dismissal, but insists that it filed for bankruptcy in good faith.[5] Debtor does not even attempt to rebut our argument that applies Tenth Circuit precedent on bankruptcy bad faith bankruptcy to the facts of this case. Indeed, debtor's opposition does not cite *any* cases or legal authority, nor does it employ any legal analysis to argue that it filed in good faith. This is because RaPower-3 had no valid justification for filing bankruptcy.

According to the debtor, it filed for bankruptcy for one reason: "to preserve its right to appeal any orders or decisions made by Judge Nuffer" in the District court case.[6] The fact of the matter is that RaPower-3's *right*[7] to appeal was never in doubt.[8] If an entity-defendant's appellate rights were in such grave danger, why did International Automated Systems Inc. (represented by the same attorneys at Nelson, Snuffer, Dahle & Poulsen) not file for bankruptcy?

RaPower-3 offers no explanation for *why* it believed its appellate rights were in danger, beyond that it disagreed with certain provisions in a receivership order proposed by the United States, which did not even address appellate rights.[9] At the time RaPower-3 filed for bankruptcy, Judge Nuffer had not yet even entered a receivership order, and was awaiting the defendants'

[5] Bankr. ECF Doc. No. 30.

[6] Bankr. ECF Doc. No. 30, p. 2.

[7] RaPower-3's ability to *fund* an appeal is a different matter, and addressed below.

[8] Final decisions of district courts are appealable to the Courts of Appeal, 28 U.S.C. § 1291, and interlocutory decisions, *including receivership orders*, are appealable to Courts of Appeal. 28 U.S.C. § 1292.

[9] See *United States v. RaPower-3, et al*., Case No. 15-cv-828 (D. Utah), ECF Doc. No. 414-4 (United States' proposed order).

opposition to the United States' motion to freeze assets and appoint a receiver.[10] RaPower-3 never made its case to Judge Nuffer, unlike its co-defendants, who argued "the scope and breadth of the proposed Receivership Order from the Government (when it is entered) would strip Defendants from the ability to appeal this Court's final decision."[11] RaPower-3 simply assumes that Judge Nuffer would have unilaterally terminated the right to appeal and that such an order would have withstood appellate scrutiny. RaPower-3's justification for bankruptcy is conclusory and unsupported. If RaPower-3 believed that Judge Nuffer's eventual ruling was erroneous, the avenue for redress is through the United States Court of Appeals for the Tenth Circuit, not the Bankruptcy Court for the District of Utah.

Most telling is that now, after delaying entry of a final opinion and order in this case through a month and a half in bankruptcy, RaPower-3 is willing to dismiss its bankruptcy petition without getting, or even arguing for, any relief pertaining to its appeal rights in the District Court case. Even though RaPower-3 "does not believe its appellate rights are adequately protected by the pending proposed orders, the Debtor's litigation counsel will address those matters with Judge Nuffer outside of bankruptcy."[12] RaPower-3 should have addressed "those matters" with Judge Nuffer in the first instance, and not wasted the Bankruptcy Court, and the

[10] *United States v. RaPower-3, et al.*, Case No. 15-cv-828 (D. Utah), ECF Doc. No. 414 & ECF No. 417

[11] See *United States v. RaPower-3, et al.*, Case No. 15-cv-828 (D. Utah), ECF Doc. No. 423, p. 12.

[12] Bankr. ECF Doc. No. 30, p. 7. Debtor blithely references an inability to secure debtor in possession financing, but it was always fantasy to think any investor would rescue RaPower-3 after the District Court shut down its main source of revenues: fraudulent tax benefits.

Government's, and its own,[13] resources arguing over a frivolous bankruptcy that accomplished nothing, but delaying administration of the District Court case for *no reason*.

The real reason for RaPower-3's bankruptcy is likely that it wanted to use receivership assets to *fund* its appeal, which is an entirely different matter than its *right* to appeal. RaPower-3 and its co-defendants have inserted language into a proposed stipulated order freezing assets and appointing a receiver that they "may use Receivership Assets to fund a trust (the "Appellate Trust") sufficient to pay the reasonable costs and attorney's fees [ ] of prosecuting and defending any appeal.[14] But RaPower-3 has never had any inherent right to use its ill-gotten gains to fund its defense.[15] Nonetheless, the United States' proposed receivership order provided a mechanism for RaPower-3, and its co-defendants, to request the use of receivership assets either to the Court, or through the receiver.[16] Again, if RaPower-3 had an argument to make about funding its appeal, it should have made that argument to Judge Nuffer, not file a frivolous bankruptcy petition.

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[13] The money RaPower-3 spent paying bankruptcy attorneys, at least $39,500, should have funded the eventual receivership, not Snell & Wilmer, LLP. See Bankr. Doc. No. 40, p. 81. Presumably this money was paid from the $100,000 retainer Snell & Wilmer received. Bannkr. ECF Doc. No. 9, p. 4. It is now apparent that RaPower-3 began consulting Snell & Wilmer in February 2018, Bankr. ECF Doc. No. 11, p. 5, ¶ 11.1, suggesting that bankruptcy was always the plan when RaPower-3 inevitably lost the District Court case.

[14] Bankr. ECF Doc. No. 30, p. 39, ¶ 11(e). The United States will not summarily agree to permit receivership assets to fund an appeal, but this issue is ultimately for Judge Nuffer to decide.

[15] *SEC v. Traffic Monsoon*, LLC, 245 F. Supp. 3d 1275, 1303 (D. Utah 2017) (citing *SEC v. Marino*, 29 Fed. Appx. 538, 541–42 (10th Cir. 2002) (unpublished)). RaPower-3 and its co-defendants appear to have walked back this language in a more recent proposed stipulated order they sent to counsel for the United States. For various reasons not relevant to this reply on the motion to dismiss, the United States cannot agree to Defendants' proposed order.

[16] *United States v. RaPower-3, et al*., Case No. 15-cv-828 (D. Utah), ECF Doc. No. 414-4, p. 22, ¶ 9.

II. The Court should make a finding that the petition was filed in bad faith, and dismiss it with prejudice.

11 U.S.C. § 349(a) provides that "unless the court, for cause, orders otherwise . . . the dismissal of a case under this title [does not] prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in [11 U.S.C. § 109(g)]." The Court should not permit RaPower-3 to dismiss its bankruptcy case without prejudice. With RaPower-3's history of fraud, along with its co-defendants, there is no reason to believe that RaPower-3 will not engage in further gamesmanship and file another bankruptcy petition when it thinks Judge Nuffer is about to enter an order it may not like. Instead, the Court should dismiss the case with a finding that it was filed in bad faith, and enter an injunction that RaPower-3 may not file another bankruptcy petition for at least 180 days.[17]

III. Conclusion

For the foregoing reasons, creditor, the United States, requests that the Court grant its motion to dismiss RaPower-3's bankruptcy petition for bad faith.

[17] The United States suggests 180 days because of the Tenth Circuit's ruling in *Frieouf v. United States*, 938 F.2d 1099, 1105 (10th Cir. 1991), which only permits the Court to bar a debtor from bankruptcy relief for 180 days because that is the extent the Congress provided for in § 109(g) and to permit otherwise would violate due process and equal protection. Nonetheless, *Frieouf* is distinguishable because § 109(g) only applies to "individuals" and "family farmers" and RaPower-3 is neither. Thus, the United States contends that it would not be error for the Court to bar RaPower-3 from filing a bankruptcy petition for longer than 180 days, perhaps indefinitely, as a sanction for the bad faith filing. However, RaPower-3 will likely be in a District Court appointed receivership within 180 days, and the issue will be moot.

Dated: August 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018, I electronically filed the foregoing CREDITOR UNITED STATES' REPLY TO DEBTOR'S RESPONSE TO MOTION TO DISMISS BANKRUPTCY PETITION, OR IN THE ALTERNATIVE, CONVERT TO CHAPTER 7, OR APPOINT CHAPTER 11 TRUSTEE, with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system.

I further certify that the parties in interest in this matter, as identified below, are registered CM/ECF users.

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I further certify that I will serve the following individuals, who objected to the United States' Motion To Dismiss Bankruptcy Petition, or in the Alternative, Convert To Chapter 7, Or Appoint Chapter 11 Trustee (Bankr. ECF Doc. No. 13), with a copy of the foregoing document via first class US Mail, postage prepaid, at the following addresses:

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Dated: August 17, 2018

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