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July 28, 2004

Hon. Robert D. Drain, U.S.B.J.
United States Bankruptcy Court,
Southern District of New York
One Bowling Green
New York, NY 10004-1408

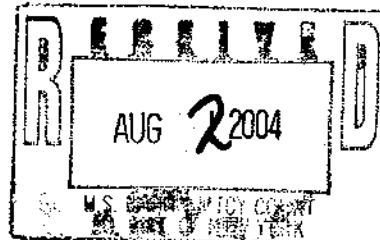
Re: In re RCN Corporation
Case No. 04-13638 (RDD)

Dear Judge Drain,

Please accept this correspondence in lieu of a more formal brief in support of creditor, Marie DeWees' motion for an order to lift the automatic stay pursuant to 11 U.S.C. 362 (d) so that the value of Ms. DeWees' employment discrimination claims can be determined in State Court and for an extension of the August 28, 2004 deadline for filing an adversarial complaint seeking non-dischargeability status for her state court employment discrimination claims pursuant to 11 U.S.C. 523(a)(6). For the reasons set forth below, Ms. DeWees' motion should be granted.

STATEMENT OF FACTS

The pertinent facts are set forth in the accompanying certification of Jon W. Green, Esq. dated July 28, 2004. In brief, they are as follows.



Ms DeWees filed a complaint in *Marie DeWees v. RCN Corporation, et al.*, Docket Number MID-L-3645-02, in the Law Division, State of New Jersey, County of Mercer on or about January 12, 2000. The filed complaint alleges that Ms. DeWees was terminated from her employment on January 13, 1998 because of illegal gender and age discrimination which, if proven to be true, violates the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1, et. seq. (See, Green Cert. ¶ 2.) The state court case was litigated up to the time that trial was to commence. However, on February 5, 2003, the trial court granted summary judgment to the defendants RCN Corporation, David McCourt and Michael Mahoney and dismissed Ms. DeWees's state court complaint with prejudice. (Id. at ¶3). Ms. DeWees filed a Notice of Appeal on February 14, 2003. Briefs were filed by all parties to the action and oral argument was heard before the Appellate Division on December 17, 2003. To date, the New Jersey Appellate Division has not decided the appeal on the merits.

However, upon notification through RCN's employment counsel that defendant RCN Corporation had filed Chapter 11 bankruptcy on May 27, 2004, the Appellate Division dismissed the appeal without prejudice pending the lifting of the automatic stay by this Court. The Appellate Division has agreed to decide the merits of the appeal once this Court lifts the stay. (Id. at ¶ 4).

Ms. DeWees filed her Proof of Claim on or about July 27, 2004.

LEGAL ARGUMENT

POINT ONE

**THIS COURT SHOULD LIFT THE AUTOMATIC STAY
BECAUSE NEW JERSEY'S COURTS ARE IN THE BEST
POSITION TO DETERMINE THE VALUE OF THE
CREDITOR'S CLAIM**

Creditor, Marie DeWees, seeks a lifting of the stay that is automatically imposed under 11 U.S.C. 362 A. The lifting of that stay for purposes of determining the value of Ms. DeWees's employment discrimination claims against RNC Corporation will not undermine the two policy goals that Congress contemplated when enacting the automatic stay provision: (1) to prevent the dissipation of the bankrupt's assets during the pendency of the bankruptcy proceeding; and (2) to avoid the multiplicity of claims in different forms against the bankrupt estate. See .e.g. *In Re Larkham*, 31 B.R. 273, 276 (Bkrpky. D. Vt. 1983) and cases cited therein. As pointed out by the bankruptcy court in *In Re Larkham, supra*, "permitting the liability issues to be decided in another tribunal would not dismember the bankruptcy estate. It appears to be both consistent both with the Congressional intent underlying the bankruptcy act of 1978.... and with the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 459 U.S. 813, W.3 S.Ct. 199, 74 L.Ed. 2d 160 (1982)." *Id.* at 276. In other words, it is "in the best interest of the efficient administration of the [bankruptcy] case" to allow the New Jersey courts to determine the merits of Ms. DeWees's discrimination claims. *Ibid.* citing to *In Re Rouseville*, 20 B.R. 892, 893 (Bkrpky., D.R.I. 1982).

Here, if the New Jersey Appellate Division affirms the grant of summary judgment and is ultimately affirmed by the New Jersey Supreme Court, the assets of

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RCN's estate will not be affected. Conversely, if the Appellate Division reverses and remands for trial and if the judgment is entered on behalf of Ms. DeWees, the judgment by the state court will of course be subject to the terms of the reorganization plan approved by this Court. And as pointed out in the accompanying certification of Jon W. Green, Esq. and below, the debt by RCN Corporation may not ultimately be dischargeable and/or the debt may be covered by insurance proceeds. Thus, since the assets of RCN's estate will not be affected by proceeding in state court, relief from this automatic stay should be granted for the limited purpose of determining the value of Ms. DeWees's employment discrimination against the Debtor.

POINT TWO

**THIS COURT SHOULD EXTEND THE DEADLINE FOR
FILING A NON-DISCHARGEABILITY COMPLAINT
UNDER 11 U.S.C. SECTION 523 (A)(6)**

Plaintiff's discrimination Complaint that was that filed in state court not only alleges intentional discrimination when she was terminated from RCN's employment on January 13, 1998, but also alleges that RCN's conduct was egregious and/or malicious and/or willfully indifferent which may warrant punitive damages under New Jersey law. See e.g. *Rendine v. Panzer*, 141 N.J. 292, 313-316, 661 A.2d 1202, 1215-1216 (1995). Under 11 U.S.C. Section 523 (a)(6), employment discrimination claims may, under appropriate circumstances, warrant a declaration that may be non-dischargeable from bankruptcy. See e.g., *In Re Larkham, supra* at 275.

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However, Ms. DeWees asserts that it may be premature to file an adversarial complaint seeking non-dischargeability. First, if the New Jersey Appellate Division affirms the granting of summary judgment, whether her claim is non-dischargeable becomes moot. Second, as discussed in the accompanying certification of Jon W. Green, there may be insurance policies that cover the debt. Thus, it would make sense not only for the efficient administration of justice for the Debtor but also for the creditor not to be forced to file a non-dischargeability complaint by August 28, 2004. Under these circumstances, Ms. DeWees would request the Court allow Ms. DeWees to file a non-dischargeability complaint within 30 days of the final decision of the New Jersey appellate courts. By that time, either the claim will be dismissed in state court or there may be a determination whether insurance proceeds will cover the value of Ms. DeWees's claim.

CONCLUSION

For the reasons set forth above, this Court should grant creditor Marie DeWees application for relief from the automatic stay pursuant to 11 U.S.C. Section 362 (d) so that her employment discrimination claims can be valued in state court and for an extension of the filing deadline for an adversarial complaint in determining the non-dischargeability of Ms. DeWees's estate claims under 11 U.S.C. 523 (a) (6) until 30 days after the New Jersey appellate courts' determination of the merits of Ms. DeWees's appeal seeking reversal of summary judgment.

Respectfully submitted,

GREEN & SAVITS, LLC
Attorneys for Creditor, Marie DeWees

By: 

JON W. GREEN (JWG-2308)

JWG:lp

cc: Debtor's Counsel
Clerk, Bankruptcy Court
Creditor's Counsel