

Obj. Due: September 3, 2004 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11
	:	
RCN CORPORATION, <u>et al.</u> ,	:	Case No. 04-13638 (RDD)
	:	
Debtors.	:	(Jointly Administered)
	:	
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**DEBTORS' MOTION FOR ORDER UNDER 11 U.S.C. § § 105
AND 363(b) AUTHORIZING THE RETENTION OF SPENCER STUART AS
EXECUTIVE SEARCH CONSULTANTS FOR RCN CORPORATION**

RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors") hereby apply for entry of an order under 11 U.S.C. §§ 105 and 363(b) authorizing the Debtors to retain Spencer Stuart as executive search consultants for RCN. In support of this motion, the Debtors rely on the Declaration of

David Rasmussen (the "Rasmussen Declaration").¹ In further support of this motion, the Debtors respectfully represent as follows:

BACKGROUND

1. On May 27, 2004 (the "Petition Date"), RCN Corporation ("RCN"), TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc., the debtors and debtors-in-possession in case number 04-13638 (collectively, the "Initial Debtors") filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On August 8, 2004, RCN Cable TV of Chicago (the "Affiliate Debtor" and, collectively with the Initial Debtors, the "Debtors"), the debtor and debtor-in-possession in case number 04-15120 filed a voluntary petition in this Court for reorganization relief under chapter 11 of the Bankruptcy Code. The Debtors' bankruptcy cases are administratively consolidated as case number 04-13638. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

2. No trustee, examiner or official committee has been appointed in the Affiliate Debtor's chapter 11 case. On June 10, 2004, the Committee of Unsecured Creditors (the "Creditors' Committee") was appointed by the United

¹ The Debtors incorporate by reference the facts set forth in the Rasmussen Declaration. Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Rasmussen Declaration.

States Trustee for the Southern District of New York (the "United States Trustee") for the Initial Debtors; no other official committees have been appointed or designated for the Initial Debtors.

3. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief sought herein are Bankruptcy Code sections 105 and 363(b) and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

5. By this motion, the Debtors seek entry of an order, pursuant to Bankruptcy Code sections 105 and 363(b), authorizing the Debtors to (i) retain Spencer Stuart as executive search consultants to assist RCN in its efforts to recruit a new Chief Executive Officer ("CEO"), on the terms set forth herein and in the engagement letter, dated August 3, 2004, between RCN and Spencer Stuart (the "Engagement Letter")² and (ii) utilize estate funds outside the ordinary course of business to pay the fees and expenses of Spencer Stuart in accordance with the Engagement Letter.

² A copy of the Engagement Letter is attached as Exhibit A to the Rasmussen Declaration and is incorporated herein by reference.

BASIS FOR RELIEF

6. Pursuant to the Engagement Letter and subject to the approval of this Court, Spencer Stuart will be retained as executive search consultants to assist RCN, on an exclusive basis, in its efforts to recruit a new CEO to succeed RCN's current CEO, David C. McCourt, who plans to step down upon RCN's retention of a new Chief Executive Officer. RCN shall select and retain such successor CEO only after consulting with, and obtaining the consent of, the Debtors' Official Committee of Unsecured Creditors.

7. Spencer Stuart is well-suited to provide the executive search services required by the Debtors. Spencer Stuart is a global executive search firm that identifies, interviews and evaluates potential executive and board candidates for corporations seeking to hire such candidates. Spencer Stuart has nearly 50 years of industry experience and employs nearly 300 consultants and operates a cohesive network of more than 50 offices in 25 countries. Spencer Stuart has developed an international network of professionals experienced in both local and multi-national businesses, conducting more than 4,000 executive searches annually. Spencer Stuart's clients range from small, emerging companies to Fortune 500 companies and it is the undisputed leader in CEO and Board recruitment, with a 60% market share in CEO Recruitment for Fortune 500 companies.

8. Spencer Stuart has vast experience in and an international reputation for successfully assisting companies in locating high-level executives. Additionally, Spencer Stuart provides extensive services to its clients, including defining profiles of ideal candidates, selecting potential candidates and facilitating the hiring of such candidates.

PROPOSED COMPENSATION

9. Spencer Stuart and RCN have entered into the Engagement Letter to govern their relationship. The Debtors request authorization to use estate funds to pay the fees and expenses of Spencer Stuart in accordance with the terms of the Engagement Letter, pursuant to which Spencer Stuart would be compensated as follows:

- a. RCN agrees to pay Spencer Stuart a professional fee (the "Professional Fee") equal to the greater of \$150,000 or one-third of the actual first year's total cash compensation, including any potential bonus.
- b. RCN agrees to pay to Spencer Stuart a retainer of \$150,000 (the "Retainer") to be applied towards the Professional Fee in 3 monthly installments. Each installment will include a \$5,000 overhead fee to cover the average cost, on a typical assignment, of office telephone, postage, computer communication, reprographics and contracted research. The retainer and overhead fee is to be paid in 3 installments of \$55,000, as follows: (i) upon the entry of an order granting the relief requested in this motion; (ii) August 31, 2004, and (iii) September 30, 2004. If applicable, there will be a final professional fee installment in order to adjust the retainer to one-third of the agreed upon compensation of the executive hired. In addition,

RCN further agrees to reimburse Spencer Stuart for any applicable state and city service taxes.

- c. If RCN terminates Spencer Stuart's retention for any reason within the first month, the Professional Fee will be equal to the first retainer installment plus any associated overhead and expenses it has incurred as described in "d." below. If RCN terminates Spencer Stuart's retention for any reason after the first month, the Professional Fee, associated overhead, and expenses will be prorated on a 90-day basis.
- d. RCN agrees to reimburse Spencer Stuart for (i) the actual out-of-pocket expenses of consultants and candidates' interview and travel-related expenses such as videoconferencing costs, airfare, car rental/taxi fares, parking, meals, and lodging, and costs of any special report generated, and expedited delivery costs,(ii) the prorated portion of any out-of-office communications expenses, including cellular phone charges, and (iii) the cost of any supplemental background checks requested by RCN.
- e. RCN agrees that if it hires any person that has been presented or identified to RCN other than for the position of CEO, within one year from the completion or termination of the search assignment, it will pay Spencer Stuart a fee equal to 1/3 of the first year total cash compensation for each such person, including any potential first year bonus.

10. All amounts to be paid by RCN to Spencer Stuart under the Engagement Letter are due as billed and are not contingent upon RCN actually hiring a candidate presented by Spencer Stuart. Spencer Stuart will be deemed to have completed the search assignment successfully regardless of whether the candidate was recruited internally or introduced by another source. If RCN's Chief Executive Officer position has not been filled within 6 months, Spencer Stuart will conduct a

detailed review of the engagement with RCN, after which it may terminate the engagement or submit a supplementary proposal letter, which may incorporate additional fees.

11. Spencer Stuart agrees that if a person is hired as Chief Executive Officer of RCN and is subsequently terminated for cause within one year, for reasons that Spencer Stuart should have identified, then it will conduct a replacement search for no additional fee except that RCN agrees to reimburse Spencer Stuart for any expenses incurred in conducting any such replacement search.

APPLICABLE AUTHORITY

12. Section 105(a) of the Bankruptcy Code authorizes the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." An order authorizing the Debtors to retain Spencer Stuart as executive search consultants to assist RCN in its search for a new Chief Executive Officer is appropriate and necessary in order to ensure the Debtors' successful reorganization and emergence from chapter 11. An executive search consultant such as Spencer Stuart, by drawing on its nationwide contacts and substantial expertise, is able to identify those individuals who are best suited for a particular executive position. By helping RCN to identify and recruit the most talented and capable individuals possible to fill its Chief Executive Officer position,

Spencer Stuart's efforts will enhance the Debtors' ability to reorganize in an efficient and effective manner.

13. Section 363(c) of the Bankruptcy Code authorizes the Debtors to enter into certain transactions and use property of their estates in the ordinary course of business. A Debtor's entering into contractual arrangements for executive search consulting services is arguably within the ordinary course of business as contemplated by the Bankruptcy Code. Corporations routinely hire executive search consultants to identify and recruit senior executive officers, including chief executive officers.

14. Even if RCN's retention of Spencer Stuart is not considered to be within the ordinary course of its business, Bankruptcy Code section 363(b) could be used to authorize the Debtors' retention of Spencer Stuart. Bankruptcy Code section 363(b)(1) permits a debtor-in-possession to use property of the estate "other than in the ordinary course of business" after notice and a hearing.

15. The Debtors request that this Court authorize RCN's retention of Spencer Stuart pursuant to Bankruptcy Code sections 105(a) and 363(b), as a use of estate property "other than in the ordinary course of business." Such authorization is appropriate if the Debtors demonstrate a sound business justification for doing so. See In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983); In re Delaware Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. D. Del. 1991).

16. Once the Debtors articulate a valid business justification, "the business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.'" In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992)(quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

17. The business judgment rule has vitality in chapter 11 cases and shields the Debtors' management from judicial second-guessing. See In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992)(quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)); In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("The Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtors' management decisions.").

18. Spencer Stuart is clearly qualified for the role for which it is being retained. The Debtors have determined that the terms of the Engagement Letter are within the range of those for executive search consultants employed by companies of comparable size, value and reputation. Accordingly, the Debtors' decision to enter into the Engagement Letter reflects an exercise of the Debtors' sound business judgment, and their retention of Spencer Stuart should be approved.

19. For all the foregoing reasons, the Debtors believe that the retention of Spencer Stuart to provide executive search consulting services with respect to RCN's efforts to recruit and retain a new Chief Executive Officer is appropriate and in the best interests of the Debtors and their estates and creditors.

20. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein. Because the relevant authorities in support of the requested relief are cited in this application, the Debtors request that the requirement of the service and filing of a separate memorandum of law under Local Bankr. R. 9013-1(b) be deemed satisfied.

WHEREFORE, the Debtors respectfully request that the Court enter an order (i) authorizing the retention of Spencer Stuart as executive search consultants to assist RCN in its efforts to recruit a new Chief Executive Officer, (ii) authorizing the Debtors to utilize estate funds outside the ordinary course of business to pay the fees and expenses of Spencer Stuart in accordance with the Engagement Letter, and (iii) granting such other and further relief as is just and proper.

Dated: New York, New York
August 19, 2004

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