

Hearing Date: September 8, 2004 at 10:00 a.m.
Objection Deadline: 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, et al., : Case No. 04-13638 (RDD)
Debtors. : (Jointly Administered)
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**RCN CORPORATION'S MOTION FOR ORDER UNDER 11 U.S.C.
§§ 105 AND 363(b) AUTHORIZING THE RETENTION OF PDA GROUP,
LLC TO PERFORM CONSULTING SERVICES FOR RCN CORPORATION**

RCN Corporation ("RCN") hereby moves for entry of an order under
11 U.S.C. §§ 105 and 363(b) authorizing the retention of PDA Group, LLC ("PDA")

for certain operational consulting services to be performed by its principal, Peter Aquino ("Aquino").¹ In support of this motion, RCN respectfully states as follows:

BACKGROUND

1. On May 27, 2004 (the "Petition Date"), 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 (RDD) (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 5, 2004 RCN Cable TV of Chicago, Inc. (the "Affiliate Debtor"), the debtor and debtor-in-possession in case number 04-15120 (RDD), filed a voluntary petition in this Court for reorganization relief under the Bankruptcy Code. The Initial Debtors and Affiliate Debtor (together, the "Debtors") bankruptcy cases are jointly administered under case number 04-13638 (RDD) (the "Bankruptcy Cases"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

2. On June 10, 2004 the Official Committee of Unsecured Creditors (the "Creditors' Committee") was appointed by the United States Trustee for the Southern District of New York (the "United States Trustee") for the Initial Debtors. No

¹ Unless otherwise approved by RCN, all services described herein shall only be performed by Aquino.

trustee, examiner or official committee has been appointed in the Affiliate Debtor's chapter 11 case.

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, RCN seeks entry of an order authorizing the retention of PDA to provide consulting services relating to RCN's market operations and execution of sales and marketing strategies (the "Services") to RCN, for the benefit of RCN and its subsidiaries, on the terms set forth herein and in the engagement letter between RCN and PDA dated August 19, 2004 (the "Engagement Letter").²

BASIS FOR RELIEF

6. RCN seeks to retain Aquino to provide services as part of an agreement reached with the Creditors' Committee to facilitate RCN's transition into a

² A copy of the Engagement Letter is attached hereto as Exhibit A and incorporated herein by reference. Unless otherwise defined herein, defined terms shall have the meaning ascribed to them in the Engagement Letter.

reorganized company. It is anticipated that Aquino will become an officer of RCN, and ultimately part of reorganized RCN's senior management team.

7. The retention of Aquino to focus on RCN's operations will also greatly benefit RCN's existing management, who can continue to focus on the restructuring and emergence from chapter 11.

8. Aquino is well-suited to provide the Services. Aquino has years of industry experience including managing a cable overbuilder in Latin America and serving in a senior management capacity at Bell Atlantic. He is also very familiar with the Debtors' operations as a result of consulting services he has performed in these Bankruptcy Cases for Capital & Technology Advisors LLC ("CTA"), the operations advisor to the Official Committee of Unsecured Creditors of RCN.³ Accordingly, Aquino additionally enjoys the confidence of the Creditors' Committee, who represent in large part the future owners of RCN.

COMPENSATION TERMS

9. According to the terms of the Engagement Letter, PDA will be compensated as follows:

³ As of the date hereof, Aquino has resigned from his engagement with CTA. Pursuant to the Engagement Letter, neither PDA nor Aquino shall engage in any assignments in connection with, arising from, or otherwise related to RCN, its subsidiaries, and the Bankruptcy Case until the earlier of (i) 6 months following the termination of the Engagement Letter with RCN or (ii) 30 days following the effective date of RCN's plan of reorganization.

- RCN shall pay PDA a monthly fee of forty-five thousand dollars (\$45,000) beginning on the August 19, 2004 (the "Commencement Date") for the Term of the engagement.⁴ All payments contemplated in the Engagement Letter shall be made on or before the first of each month to which such payment relates. A payment amount of ninety thousand dollars (\$90,000) for the months of August and September 2004 shall become payable upon Court approval. Partial months work shall be prorated accordingly. Additional Services performed beyond RCN's standard work-week and on RCN's established holidays shall be billed at \$650.00 per hour.
- RCN shall reimburse PDA for reasonable legal fees associated with drafting and defense of the Engagement Letter up to \$20,000 and all reasonable out-of-pocket travel and business expenses, including voice and data usage, incurred by Aquino in connection with PDA's obligations under the Engagement Letter upon presentation to RCN of appropriate supporting documentation relating to such expenses. From the effective date of the Engagement Letter through September 30, 2004, RCN shall cover all airfare, car rental and lodging directly through RCN's business travel account whereby RCN shall directly pay all expenses. All expense reimbursements shall be paid to PDA within fifteen (15) calendar days of the presentation of such documentation to RCN consistent with RCN's established policies.
- In the event RCN terminates the Engagement Letter for any reason, other than for Cause or non-Renewal, Aquino shall be entitled to a termination fee of ninety thousand dollars (\$90,000).

APPLICABLE AUTHORITY

10. Section 363(c) of the Bankruptcy Code authorizes a debtor to enter into certain transactions and use property of its estate in the ordinary course of

⁴ The initial term shall be in effect for a period of six months from the Commencement Date and shall thereafter continue in effect on a month-to-month basis provided that both parties approve such extension in writing or electronic transmission within seven days prior to the expiration of the term.

business.

11. Arguably, entering into contractual arrangements for consulting services is within the ordinary course of RCN's business as contemplated by the Bankruptcy Code. Corporations routinely hire consultants with operational expertise to help a company enhance its performance.

12. Nevertheless, out of an abundance of caution, and because of Aquino's prior relationship with CTA, RCN is seeking to retain PDA pursuant to section 363(b) of the Bankruptcy Code. 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.

13. RCN requests that this Court authorize it to retain PDA under the terms set forth herein and in the Engagement Letter. Such authorization is appropriate if RCN demonstrates 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).

14. Once RCN articulates 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)).

15. The business judgment rule has vitality in chapter 11 cases and shields RCN's 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.").

16. The Debtors and the Creditors' Committee have reached an agreement that the retention of Aquino will help facilitate RCN's transition out of bankruptcy. Aquino is very familiar with RCN's business and has the confidence of the Creditors' Committee, who represent the future owners of RCN. Indeed, it is expected that Aquino will continue post-emergence as a member of reorganized RCN's senior management team. Moreover, retention of Aquino will allow existing management to continue to focus on restructuring and emerging from bankruptcy.

17. Aquino is clearly qualified for the positions for which he is being employed. Accordingly, RCN's decision to enter into the Engagement Letter reflects an exercise of RCN's sound business judgment.

18. For all the foregoing reasons, RCN believes that the retention of PDA to provide the Services is appropriate and in the best interests of the Debtors and their estates and creditors.

19. RCN submits 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, RCN requests 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, RCN respectfully requests that the Court enter an order (i) authorizing RCN to retain PDA to provide the Services to RCN and (ii) granting such other and further relief as is just and proper.

Dated: New York, New York
August 19, 2004

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EXHIBIT A