

Hearing Date: October 27, 2004 at 10:00 AM
Objections Due: October 22, 2004 by 4:00 PM

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	
RCN CORPORATION, et al.,	:	Case No. 04-13638 (RDD)
	:	
	:	(Jointly Administered)
	:	

MOTION FOR LEAVE TO FILE PROOF OF CLAIM

Debra K. Craig, on behalf of the RCN Savings and Stock Ownership Plan (the “Savings Plan”), for the benefit of herself and all other similarly situated participants and beneficiaries, hereby seeks leave of this Court to file a proof of claim after the claims bar date of August 11, 2004 pursuant to Fed.R.Bankr.P. 3003(c)(3) and 9006(b)(1), as follows:

I. INTRODUCTION

1. Debra Craig is a participant in the Savings Plan. Debtor RCN Corp. (“RCN”) is a Savings Plan fiduciary under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001, *et seq.* Craig seeks to make a claim against the Debtor RCN for breaches of ERISA fiduciary duties that resulted in losses to the Savings Plan of approximately \$26 million. *See* proposed Proof of Claim (attached hereto as Exhibit 1). The breaches of fiduciary duty pertain to RCN’s failure to take appropriate steps with respect to Plan investments in RCN stock once that stock ceased to become a prudent retirement investment because of RCN’s mounting debt and other financial problems that eventually led to its filing for Chapter 11 bankruptcy protection in this Court on May 27, 2004. *See* Ex. 1.

2. Under ERISA, an individual participant (as well as the United States Department of Labor (“DOL”)) may sue to recover, on behalf of the pension plan, the losses to the plan resulting from a breach of fiduciary duty. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-44 (1985) (interpreting ERISA 29 U.S.C. §§1109 & 1132(a)(2)). The Debtor, RCN, was a named fiduciary of the RCN Savings and Stock Ownership Plan (“Savings Plan”) for the benefit of Savings Plan participants (“participants” in this document includes beneficiaries) and herself. As such, RCN not only had a duty to act prudently with respect to the Savings Plan and its participants in the years preceding this bankruptcy case, but also, to protect the interests of the Savings Plan participants in these bankruptcy proceedings.

3. On May 27, 2004 (the “Petition Date”), the above-captioned debtors commenced this bankruptcy proceeding and filed voluntary petitions under Chapter 11 of the Bankruptcy Code. Since the Petition date, the Debtors have continued to operate their businesses and manage their

properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. No trustee, examiner, or committee has been appointed in these Chapter 11 cases.

4. This Court set August 11, 2004, as the deadline as the general bar date for filing proofs of claim (“Claims Bar Date”). The date by which governmental entities may bring claims is until November 24, 2004, and the bar date for claims against affiliated entities in the administratively consolidated cases is October 1, 2004.

5. The Debtor, although a fiduciary of the Savings Plan, has filed no claim on its own behalf by the Claims Bar Date, and in fact, has proposed no relief under the proposed Plan of Reorganization (“POR”) for losses to the Savings Plan or its participants resulting from pre-petition (or post-petition) breaches of fiduciary duties. Accordingly, Debra Craig, by this motion, seeks leave to file a claim on behalf of the Savings Plan for the benefit of its participants.

II. LEGAL BACKGROUND

6. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The predicate for the relief sought herein is 11 U.S.C. § 105 and Bankruptcy Rules 1009, 2002, 3003 and 9006 of the Federal Rules of Bankruptcy Procedure.

7. Bankruptcy Rules 3003(c) and 9006(b)(1) govern requests for extensions of time for filing proofs of claim. Rule 3003(c)(3) requires the court to “fix *and for cause shown* [] *extend the time within which proofs of claim or interest may be filed.*” (Emphasis added). Rule 9006(b)(1) governs extensions of time for acts required to be done within a specified time and provides that if the period has expired, the act may nevertheless be permitted “where the failure to act was the result of excusable neglect.” *See Fed.R.Bankr.P9006(b)(1).*

8. “Excusable neglect” is not defined in the Bankruptcy Code or the Bankruptcy Rules. However, the Supreme Court has indicated that the determination of whether any neglect is “excusable” in filing a late proof of claim is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer Investment Serv. Co. v. Brunswick Assoc's Ltd. Partnership*, 507 U.S. 380, 395 (1993).

9. Under *Pioneer Investment*, relevant factors to this determination include: (a) the reason for the delay; (b) prejudice to the debtor; (c) the length of the creditor’s delay and that delay’s potential impact on judicial proceedings; and, (d) whether the movant acted in good faith. *Id.*

III. ARGUMENT

This Court Should Permit Debra Craig To File A Claim

A. Background: The Reason for the Delay

10. The standard of care owed by ERISA fiduciaries to plan participants has been described as “the highest known to law.” *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982) (Friendly, J.). ERISA requires that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants, and with the care skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. *See* 29 U.S.C. §1104(a)(1). ERISA also imposes upon fiduciaries a “duty to inform,” which “entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.” *Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 548 (6th Cir. 1999) (quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir.

1993)).

11. Because of these extraordinary duties required of ERISA fiduciaries toward plan participants, plan participants have a right to expect that their fiduciaries will take appropriate steps to protect plan assets, and plan fiduciaries have a legal obligation to take such steps. These steps include taking actions to see that claims the plan may have against its own fiduciaries are preserved from legal peril. *System 99 Minority Shareholder v. Robison*, 953 F.2d 1388 (Table), 1992 WL 16801, *6 (9th Cir. 1992) (attached hereto as Exhibit 2) (plan fiduciaries had duty to bring suit against themselves to protect plan assets and prevent claim from being barred by the statute of limitations).

12. Accordingly, in this bankruptcy proceeding, Savings Plan fiduciaries, including RCN, had an obligation to take steps to protect any claims the Plan might have against RCN in its capacity as Savings Plan fiduciary. However, no such steps have been taken. No proof of claim was filed by RCN or other fiduciaries of the Savings Plan. (And, in fact, plan participants would be within their rights to file an administrative claim in this proceeding for the failure of RCN, as a Savings Plan fiduciary, to file a proof of claim on this matter and otherwise protect the rights of the Savings Plan and its participants.)

13. Thus, Debra Craig and all other Savings Plan participants had a right to expect that plan fiduciaries will take appropriate steps and file such a claim. She could only know that she would need to act once the bar date had passed.

B. No Prejudice By Late Filing

14. Prejudice occurs when allowance of a late claim would injure or damage the debtor. *See In re O'Brien Environmental Energy, Inc.*, 188 F.3d 116, 126 (3d Cir. 1999). There is no

prejudice to the Debtors if Debra Craig's claim is allowed. This is sufficiently demonstrated by the fact that a claim for breach of fiduciary duty may be brought by the U.S. Secretary of Labor as well as a plan participant on behalf of the plan. *See* 29 U.S.C. §1132(a)(2). And the claims bar date for governmental units set by this Court is November 23, 2004. (Dkt.# 73 at 2). Thus, the claim schedule announced by this Court provides that this claim may be timely filed, by a governmental entity, at this time. Moreover, no plan of reorganization has been approved and no distribution to creditors has been made.

C. Length of Delay Will Not Disrupt the Judicial Process

15. The length of delay prong of the Pioneer test “analyzes the length of the delay and the impact on the judicial proceedings that a late claim would have.” *In re Tannen Towers Acquisition Corp.*, 235 B.R. 748, 755 (D.N.J. 1999) (citations omitted). The length of delay is “significant primarily insofar as it may disrupt the judicial administration of the case or show lack of good faith on the part of the movant.” *In re Infiltrator Sys.*, 241 B.R. 278, 281 (Bankr. D. Conn. 1999).

16. The proposed claim will not disrupt the judicial process. This motion is filed slightly more than a month past the bar date. And, as has already been mentioned, no plan of reorganization has been approved and no distribution to creditors has been made. Indeed, claims against affiliated debtors are not due as of the time of filing this motion (the bar date for them is October 1, 2004). Moreover, an essentially identical claim could still be filed, until November 24, 2004, by the Secretary of Labor.

D. Good Faith of the Claimant

17. Debra Craig has acted in good faith in making this claim. She acted promptly once

the Savings Plan fiduciaries failed to fulfill their obligations to protect plan assets and failed to file their own proof of claim regarding the same subject matter.

III. CONCLUSION

18. Based on the foregoing, Debra Craig submits that her failure to file a proof of claim prior to the Claims Bar Date was a result of excusable neglect, and she should therefore be granted leave to file this proof of claim late.

WHEREFORE, Debra Craig respectfully requests that this Court enter the [Proposed] Order granting her leave to file a proof of claim pursuant to Fed.R..Bankr.P. 3003(c)(3) and 9006(b)(1), and deeming the attached proof of claim filed.

Dated: New York, New York
September 22, 2004

Respectfully submitted,

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