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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)
	:	

**OBJECTIONS OF DEBRA CRAIG TO DISCLOSURE STATEMENT
FOR HERSELF AND AS REPRESENTATIVE OF RCN SAVINGS
AND STOCK OWNERSHIP PLAN AND SIMILARLY
SITUATED PARTICIPANTS AND BENEFICIARIES OF SAVINGS PLAN**

Objector Debra Craig, individually and as a participant representative of the RCN Savings and Stock Ownership Plan (“Savings Plan”), and all similarly situated participants and beneficiaries, objects to the Debtor RCN Corporation’s Disclosure Statement, as follows:

The Objector

1. Debra K. Craig brings this objection for herself and as a representative (as a participant) of the RCN Savings and Stock Ownership Plan (“Savings Plan”).

2. The Objector Debra Craig is a participant in the Savings Plan, which is sponsored by the Debtor, RCN Corporation (“RCN”). RCN was also the Savings Plan administrator and a designated fiduciary of the Savings Plan.

3. Among the investment options offered by the Savings Plan was the RCN Common Stock Fund (the “Stock Fund”), which invested principally in RCN Common Stock. In addition, nearly all of RCN’s matching contributions to the Savings Plan were in RCN Common Stock.

4. Contemporaneously with this objection, Objector is filing a motion for leave to file a Proof of Claim with respect to the losses to the Savings Plan resulting from the Debtor RCN’s alleged breaches of fiduciary duties imposed by the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001, *et seq.* As set forth in Objector’s Proof of Claim, the alleged breaches of fiduciary duty pertain to the failure of RCN and other fiduciaries to take appropriate steps to protect the assets of Savings Plan participants when its mounting debt and other financial problems, that led to its filing for Chapter 11 bankruptcy protection, made RCN stock an imprudent retirement investment.

Objections To The Disclosure Statement

5. The Disclosure Statement fails to provide “adequate information” because it does not enable Objector and others similarly situated to make informed judgments about the plan of reorganization (“POR”) in compliance with 11 U.S.C. § 1125. The Disclosure Statement fails to disclose, *inter alia*,

(a) the existence of claims or potential claims against the Debtor by the Savings Plan and its participants and beneficiaries;

(b) that no steps have been taken by the Debtor, as a fiduciary of the Savings Plan, to protect and provide for the payment of such claims under the POR;

(c) whether the Objector's claim is covered by fiduciary insurance, the amounts of any such insurance coverage, and whether the POR is intended to adversely affect claims against any such insurance coverage;

(d) whether the POR will release or bar Objector's ERISA breach of fiduciary duty claims against non-debtors, including present or former RCN employees who performed fiduciary functions with respect to the Savings Plan;

(e) whether RCN has already or intends to engage in transactions prohibited by ERISA and is conflicted in doing so in causing the discharge and/or release of such claims; and

(f) other material information about the bar date and the POR,

These and other deficiencies in the Disclosure Statement are addressed in the following sections.

Failure To Disclose Breach of Fiduciary Duty Claims and Availability (if any) of Fiduciary Insurance Coverage

6. Neither the Disclosure Statement, nor the POR, disclose the existence of claims or potential claims against RCN for violation of fiduciary duties under ERISA, or of possible claims against other non-debtor fiduciaries of the Savings Plan. Nor does the Disclosure Statement (or POR) disclose whether such claims against RCN or non-debtor ERISA fiduciaries are covered by fiduciary insurance policies, and whether the POR would extinguish rights to recover under any such insurance policies. These documents also fail to disclose the identities of other Savings Plan fiduciaries, including those persons who actually performed fiduciary functions during the relevant period. Accordingly, Objector is unable to "make an informed judgment" with respect to the proposed treatment of her claim (and the Savings Plan's claim) absent this information. *See also Green v. Welsh*, 956 F.2d 30, 35 (2d Cir. 1992) (Section 524 injunction does not bar suit to recover solely from debtor's liability insurer).

Failure To Disclose Whether RCN Intends To Discharge Non-Debtors

7. “Adequate information” also requires the disclosure of facts sufficient to enable Objector to ascertain whether RCN intends to discharge, release or bar her claims against non-debtor fiduciaries. Here, there is no acknowledgment of such claims, or potential claims, against the Debtor for breach of fiduciary duties owed to the Savings Plan and its participants. Nor, is there any recognition or acknowledgment of the inherent conflict of interest of the Debtor (and affiliated individual fiduciaries), as proponents of the POR, with their obligations under ERISA to protect the Savings Plan and its participants.

8. Moreover, while it *appears* that the Debtor intends (by omission) that the POR will discharge and release any and all such claims for breaches of fiduciary duties, whether brought against the Debtor or against others, it does not expressly discuss ERISA claims. Accordingly, the Disclosure Statement fails to provide adequate information. For example, the broad discharge and injunctive provisions of the POR, see e.g., Article XIV at F (Discharge of Debtors and Injunction), G (Debtors’ Release), and H (Director, Officer, Employee and Other Third Party Releases), neither the Disclosure Statement nor the POR discuss or refer to ERISA claims despite the significance of these violations to thousands of Savings Plan participants and beneficiaries.

9. In any event, all attempts of the POR to discharge, release or enjoin such fiduciary claims are unlawful under 11 U.S.C. § 524(e) to the extent they purport to release and discharge Objector’s ERISA claims against others. *See In re Zenith Electronics Corporation*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (release by debtor of third parties only permitted under limited circumstances, factors to be considered including (1) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will

deplete assets of the estate; (2) substantial contribution by the non-debtor of assets to the reorganization; (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success; (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes “overwhelmingly” vote to accept the plan; and (5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction); *In re Exide Technologies*, 303 B.R. 48, 71-72 (Bankr. Del. 2003) citing *Zenith* factors; *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212 (3d Cir.2000) (reorganization plan releasing and permanently enjoining shareholder suits against debtor’s non-debtor officers and directors violated Section 524(e)). *See also Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995); *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985); *Resorts International v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995); and *Landsing Diversified Properties - - II v. First Nat'l Bank & Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990).¹

**Failure To Disclose RCN’s Self-Dealing Transactions In
Discharging Or Releasing Breach of Fiduciary Duty
Claims Against Itself and Its Affiliates Are Prohibited By ERISA**

10. The Disclosure Statement does not disclose that RCN has violated and intends to further violate ERISA’s fiduciary and prohibited transaction provisions if it purports to discharge and/or release itself and the Savings Plan’s non-debtor fiduciaries from liability for ERISA fiduciary

¹ The Third Circuit also noted in *Continental Airlines* that those circuits employing a more flexible approach generally did so only under exceptional circumstances. *See, e.g., A.H. Robins Company, Incorporated*, 880 F.2d 694 (4th Cir. 1989) (recognizing Section 524(e) prohibits bankruptcy courts from enjoining suits against non-debtors absent exceptional circumstances).

claims including Objector's. *See* ERISA Section 406(a), 29 U.S.C. § 1106(a), applicable to RCN as a named fiduciary, which "categorically bar[s] . . . transactions deemed 'likely to injure the pension plan'." *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-242 (2000). *See also* ERISA Section 410, 29 U.S.C. § 1110, barring exculpatory provisions purporting to relieve fiduciaries of liability for ERISA violations.

11. Section 406(a)(1)(A) provides that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . exchange . . . of any property between the plan and a party in interest." *Harris Trust*, 530 U.S. at 242. The term "party in interest" includes fiduciaries of employee benefit plans. 29 U.S.C. § 1002(14). In addition, ERISA Section 406(b)(1) provides that a plan fiduciary "shall not deal with the assets of the plan in his own interest or for his own account . . ." 29 U.S.C. § 1106(b)(1).

12. Thus, under ERISA Section 406(a), a plan is prohibited from engaging in an exchange of property between the sponsor or the fiduciaries of the plan. *Donovan v. Cunningham*, 716 F.2d 1455, 1465 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). Here, RCN purports to discharge itself (and apparently non-debtor fiduciaries) without providing *any* consideration, since the proposed POR would extinguish these claims. This violates ERISA sections 406(a)(1)(A) and (b)(1). *See, e.g., Henry v. Champlain Enterprises, Inc.*, 288 F. Supp. 2d 202, 225-226 (N.D.N.Y. 2003) (under 29 U.S.C. § 1106(a), a fiduciary may not cause an ERISA plan to engage in a transaction with a "party in interest" which involves a direct or indirect sale or exchange of plan property, the lending of money or an extension of credit, or the transfer or use of plan assets absent adequate consideration); *Lowen v. Tower Asset Management*, 829 F.2d 1209, 1214 (2d Cir. 1987)

(investment of plan assets in companies in which fiduciaries have equity interests violates Section 406(b)(1)); *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984) (investment of plan assets to assist plan sponsor in takeover activities violated Section 406(b)(1)).²

13. Moreover, here, to Objecter's knowledge, no fiduciary independent of RCN has been appointed to represent the Savings Plan and its participants.

**Misleading Disclosure As To Bar Date and
Consequent Ability To Pursue ERISA Claims**

14. The Disclosure Statement is also misleading in that it states, at page 35, that the bar date for filing claims was August 11, 2004. This is misleading insofar as it relates to the Savings Plan because governmental agencies have until November 24, 2004 to file a claim (180 days after the petition date). Under ERISA, the U.S. Secretary of Labor could file a claim on behalf of the Savings Plan (for the benefit of participants and beneficiaries) similar to Objecter's pending claim – a fact that is not disclosed.

Post-Bankruptcy Breaches of Fiduciary Duty

15. In addition, the Debtor has failed to perform its fiduciary duties under ERISA in that it has failed to protect the Savings Plan and its participants *in these bankruptcy proceedings*. This is an administrative claim that should be provided for in the POR. However, the Disclosure Statement is silent on this subject. The Debtor, although it is a fiduciary of the Savings Plan, has not, for example, appointed an independent fiduciary to protect the Savings Plan or its participants, has not filed a proof of claim for the Savings Plan, has not negotiated an appropriate treatment of the Savings Plan under the POR, and rather than preserve Savings Plan and participant rights against

² Nor has RCN disclosed whether it sought an exemption from the Secretary of Labor under ERISA Section 408, 29 U.S.C. § 1108, respecting the prohibited transactions.

insurance and other fiduciaries (and RCN itself), the Debtor was sought to discharge and release such claims without consideration under the POR or even a right to vote on the POR. However, none of these matters are disclosed in the Disclosure Statement or POR.

Failure To Disclose That the POR Is Not Confirmable

16. Many of the deficiencies in the Disclosure Statement outlined above render the POR non-confirmable because the POR, for example, attempts to release claims against non-parties, attempts to impair potential recoveries against fiduciary insurance coverage (if such coverage exists), and fails to classify and provide appropriate classification and treatment of claims under ERISA or provide voting rights for holders of such claims. There are no disclosures of these deficiencies.

Conclusion

WHEREFORE, Objector Debra Craig requests that this Court **DENY** approval of the Disclosure Statement unless and until the above deficiencies in the Disclosure Statement are remedied.

Dated: New York, New York
September 22, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September 2004, true and exact copies of the foregoing *Objections of Debra Craig to Disclosure Statement for Herself and as Representative of Rcn Savings and Stock Ownership Plan and Similarly Situated Participants and Beneficiaries of Savings Plan* were served by first class U.S. mail to the following:

Skadden, Arps, Slate, Meagher & Flom LLP Four Times Square New York, NY 10036-6522 (Attn: Jay M. Goffman, Esq., J. Gregory St. Clair, Esq., Frederick D. Morris, Esq., Jan Baker, Esq.) Counsel for RCN Corporation, et al.	Simpson, Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017-3954 (Attn: Peter V. Pantaleo, Esq. and Elisha Graff, Esq.) Counsel to the agent for the Debtors' pre- petition credit facility
Milbank, Tweed, Hadley & McCloy LLP One Chase Manhattan Plaza New York, NY 10005 (Attn: Dennis F. Dunne, Esq. and Deirdre A. Sullivan, Esq.) Counsel for the Creditors' Committee	Office of the United States Trustee 33 Whitehall Street New York, NY 10004 (Attn: Paul K. Schwartzberg, Esq.)

/s/ Ronen Sarraf