

Hearing Date: November 16, 2004 at 10:00 a.m. (Eastern)
Responses Due: October 28, 2004 at 4:00 p.m. (Eastern)

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Attorneys for Debtors and
Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	-----X	
	:	
In re	:	Chapter 11
	:	
RCN CORPORATION, <u>et al.</u> ,	:	Case No. 04-13638 (RDD)
	:	
Debtors.	:	(Jointly Administered)
	:	
	-----X	

**NOTICE OF DEBTORS' OBJECTION UNDER 11 U.S.C. §§ 105(a), 502(b),
503 AND 507, FED. R. BANKR. P. 3007 AND THE BAR DATE ORDER TO
PROOFS OF CLAIM FILED BY KEMPER INSURANCE COMPANIES**

PLEASE TAKE NOTICE that on September 28, 2004, RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"),

filed their Objection under 11 U.S.C. §§ 105(a), 502(b), 503 and 507, Fed. R. Bankr. P. 3007 and the Bar Date Order to Proofs of Claim Filed by Kemper Insurance Companies (the "Objection").

PLEASE TAKE FURTHER NOTICE that responses to the Objection, if any, must be in writing, must conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, and must be (i) filed with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") in accordance with General Order M-242 (as amended) – registered users of the Bankruptcy Court's case filing system must file electronically, and all other parties in interest must file on a 3.5 inch disk (preferably in Portable Document Format (PDF)), WordPerfect or any other Windows-based word processing format); submitted in hard-copy form directly to the chambers of the Honorable Robert D. Drain, United States Bankruptcy Judge; and served upon (i) RCN Corporation, 105 Carnegie Center, Princeton, NJ 08540, Attention: General Counsel; (ii) Skadden, Arps, Slate, Meagher & Flom LLP, counsel to the RCN Debtors, 4 Times Square, New York, NY, 10036-6522, Attention: D. J. Baker, Esq. and Frederick D. Morris, Esq.; (iii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st floor, New York, NY 10004, Attention: Paul K. Schwartzberg, Esq.; (iv) Milbank, Tweed, Hadley & McCloy, counsel to the Official Committee of Unsecured Creditors, 1 Chase

Manhattan Plaza, New York, NY 10005, Attention: Dennis F. Dunne, Esq. and Deirdre A. Sullivan, Esq.; (v) Simpson Thacher & Bartlett, counsel to the agent for the RCN Debtors' prepetition credit facility, 425 Lexington Avenue, New York, NY 10017-3954, Attention: Peter V. Pantaleo, Esq.; and (vi) HSBC Bank USA, the indenture trustee for the RCN Debtors' outstanding debt securities, 452 Fifth Avenue, New York, NY 10001, Attention: Issuer Services, in each case so as to be **received no later than 4:00 p.m. prevailing Eastern time on October 28, 2004** (the "Response Deadline").

PLEASE TAKE FURTHER NOTICE that if a response is received by the Response Deadline in accordance with the above notice procedures, a hearing (the "Hearing") will be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, in the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, One Bowling Green, New York, NY 10004 on **November 16, 2004 at 10:00 a.m. prevailing Eastern time.**

PLEASE TAKE FURTHER NOTICE that only those responses made in writing and timely filed and received by the Response Deadline will be considered by the Bankruptcy Court at the Hearing and that if no responses to the Objection are

timely filed and served in accordance with the procedures set forth herein, the
Bankruptcy Court may enter an order granting the relief requested in the Objection
without further notice or a hearing.

Dated: New York, New York
September 28, 2004

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

/s/ D.J. Baker
D. J. Baker (DB 0085)
(Member of the Firm)
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(212) 735-3000

Attorneys for Debtors and
Debtors-in-Possession

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UNITED STATES BANKRUPTCY COURT
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**DEBTORS' OBJECTION UNDER 11 U.S.C. §§ 105(a), 502(b), 503 AND 507,
FED. R. BANKR. P. 3007 AND THE BAR DATE ORDER TO PROOFS OF
CLAIM FILED BY KEMPER INSURANCE COMPANIES**

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 object (the "Kemper Objection") under 11 U.S.C.

§§ 105(a), 502(b), 503 and 507, Fed. R. Bankr. P. 3007 and the Order under 11 U.S.C. § 105 and Fed. R. Bankr. P. 2002(a)(7) and 3003(c)(3) (I) Setting Bar Dates for Filing Certain Proofs of Claim, (II) Approving Procedures for Filing Such Proofs of Claim, and (III) Approving Form, Manner, and Sufficiency of Notice Thereof (Docket No. 73), entered on June 23, 2004, to proof of claim numbers 1025 through and including 1029 (the "Kemper Proofs of Claim"), filed by Kemper Insurance Companies ("Kemper").¹ In support of this Objection, the Debtors respectfully state as follows:

FACTUAL BACKGROUND

General Background

1. On May 27, 2004 (the "Petition Date"), certain of the Debtors filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, as amended (the "Bankruptcy Code").² RCN

¹ The Kemper Insurance Companies are, as defined in the Kemper Proofs of Claim, American Motorists Insurance Company, Lumbermens Mutual Casualty Company, American Protection Insurance Company, and American Manufacturing Mutual Company.

² RCN Corporation, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc. (collectively, the "Initial Debtors") commenced their chapter 11 cases on May 27, 2004.

Cable TV of Chicago commenced its chapter 11 case on August 5, 2004. Certain other affiliated Debtors commenced their chapter 11 cases on August 20, 2004.³

2. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

3. No trustee or examiner has been appointed in these chapter 11 cases. On June 10, 2004, the 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"). No other official committees have been appointed or designated in these chapter 11 cases.

4. On June 4, 2004, certain of the Debtors filed the Motion For Order under 11 U.S.C. Section 105 and Fed. R. Bankr. P. 2002(a)(7) And 3003(c)(3) (I) Setting Bar Dates for Filing Certain Proofs of Claim, (II) Approving Procedures for Filing Such Proofs of Claim, and (III) Approving Form, Manner, and Sufficiency of Notice Thereof (Docket No. 21) (the "Bar Date Motion"). On June 23, 2004, the Court entered the Bar Date Order, approving the Bar Date Motion and establishing August 11, 2004 (the "Bar Date") as the deadline for filing proofs of claim.

³ RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc., 21st Century Telecom Services, Inc. and ON TV, Inc. commenced their chapter 11 cases on August 20, 2004.

Jurisdiction and Venue

5. 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).

6. The statutory predicates for the relief requested herein are sections 502(b), 503 and 507 of the Bankruptcy Code, and Rule 3007 of the Federal Rules of Bankruptcy Procedure.

The Kemper Proofs of Claim

7. On or about August 9, 2004, Kemper filed the Kemper Proofs of Claim. In the Kemper Proofs of Claim, Kemper asserted an unliquidated claim against any debtors who are identified as insureds or additional insureds under certain policies (the "Policies") issued by Kemper for general liability insurance, automobile liability insurance, and workers compensation insurance. Specifically, Kemper filed proofs of claim against the following debtors:

- TEC Air, Inc. (Case Number 04-13641), proof of claim number 1025;
- RCN Finance, LLC (Case Number 04-13640), proof of claim number 1026;
- RLH Property Corporation (Case Number 04-13639), proof of claim number 1027;
- Hot Spots Production, Inc. (Case Number 04-13637), proof of claim number 1028; and
- RCN Corporation (Case Number 04-13638), proof of claim number 1029.

8. As set forth in the Kemper Proofs of Claim, Kemper asserted claims for "all premiums, loss reimbursement, claims handling charges, and other sums now or hereafter owing under the Policies, Agreements and/or insurance program" as well as certain "claims handling charges" arising from work performed by Kemper under certain third party administrator agreements. See, e.g., Proof of Claim Number 1029 (the "Proof of Claim"), filed in case number 04-13638 against RCN, a true and correct copy of which is annexed hereto as Exhibit A.

9. Kemper did not attach copies of the Policies or the Agreements to any of the Kemper Proofs of Claim. See id. Moreover, Kemper did not attach any type of schedule or table that would quantify its claims against the Debtors.

10. Kemper also alleges that certain of the Policies have premiums that are subject to adjustment periodically based upon certain changes to underwriting characteristics or ongoing loss experience. Id. Kemper, though, does not specify in the Kemper Proofs of Claim which policies are subject to such adjustment or what amounts are owed by any of the Debtors because of any such adjustment. Id.

11. Finally, Kemper, without any further support, asserts administrative expense priority for certain charges under Bankruptcy Code section 507. Kemper, however, does not identify the amount or nature of any such charges in the

Kemper Proofs of Claim or how its purported administrative expense claims benefited the Debtors' estates.

RELIEF REQUESTED

12. By this Objection, the Debtors seek entry of an order under Bankruptcy Code section 502(b) and Bankruptcy Rule 3007 disallowing and expunging the Kemper Proofs of Claim because (i) such claims are not reflected in the Debtors' books and records or (ii) Kemper, despite the requirements of Bankruptcy Rules 3001(c) and 3001 (d), has failed to provide sufficient supporting documentation to permit the Debtors to properly evaluate such claims as valid claims against the Debtors' estates.

13. Alternatively, and only to the extent Kemper can somehow demonstrate there is any liability under the Policies or the Agreements, the Debtors seek to disallow and expunge proofs of claim 1025, 1026, 1027, and 1028 because such claims are claims against additional insureds that did not have obligations to pay under the Agreements and/or the Policies.

14. Finally, the Debtors seek to disallow any administrative expense claims asserted by Kemper as Kemper has not demonstrated, nor can it, that it has provided a postpetition benefit to these Debtors' estates compensable under Bankruptcy Code section 507.

BASIS FOR RELIEF AND APPLICABLE LAW

a. The Debtors Do Not Owe Kemper Under the Agreements or the Policies.

15. The Debtors maintain, in the ordinary course of business, books and records (the "Books and Records"), that reflect, among other things, the Debtors' liabilities and the amounts thereof owed to their creditors.

16. The Debtors and their advisers have reviewed the Kemper Proofs of Claim and their Books and Records and have determined that these claims are claims asserted against the Debtors for which the Books and Records do not indicate any corresponding liability. Specifically, the Debtors believe and their Books and Records reflect that all payments due under the Policies and/or the Agreements have been paid.

b. Kemper Has Failed to Provide Sufficient Information to Support its Claims.

17. Moreover, the Kemper Proofs of Claim do not provide sufficient information for the Debtors to determine the basis and/or the amount of the Kemper Proofs of Claim. Although Bankruptcy Rule 3001(f) provides that a proof of claim is "prima facie evidence of the validity and amount of the claim," Kemper is required to allege facts sufficient to support its claim in the Kemper Proofs of Claim in order to be entitled to this presumption of validity. See In re Hongisto, 293 B.R. 45, 50 (N.D. Cal. 2003); In re Henry, 311 B.R. 813, 818 (Bankr. W.D. Wash. 2004); In re Marino, 90 B.R. 25, 28 (Bankr. D. Conn. 1988). Accordingly, because Kemper

has not provided even the most basic information in support of the Kemper Proofs of Claim, including the identity of the agreements pursuant to which such claims arise, the amount of such claims, the circumstances under which such claims arose and the date on which such claims arose, the Kemper Proofs of Claim do not meet the minimum requirements imposed by Bankruptcy Rule 3001 and should be disallowed in their entirety and expunged.

c. To the Extent There Is Liability, Such Liability Would Only Extend to RCN.

18. In addition, Kemper states without offering any factual or legal support that its claims are appropriate not only against RCN, a signatory to the Policies and Agreements, but also against any of the Debtors identified as an insured or additional insured under the Policies. The law and the plain language of the Policies does not support Kemper's claims.

19. Under New York law (the law that RCN and Kemper agreed would apply to the Insurance Program Agreement (the "IPA"),⁴ this Court must look to the clear language of the contract to determine which entities are liable for any payments due under the Policies and/or Agreements. See, e.g., Kula v. State Farm Fire & Casualty Co., 628 N.Y.S.2d 988, 990 (N.Y. App. Div. 1995) ("Where the language of a contract is clear and unambiguous, interpretation of that contract and

⁴ True and correct copies of relevant portions of the IPA are attached hereto as Exhibit B.

construction of its provisions are questions of law. The court must ascertain the intent of the parties from the plain meaning of the language employed, giving terms their plain, ordinary, popular and non-technical meanings.").

20. Here, the IPA sets forth the various payment and security obligations of RCN. See IPA Art. X.A. The IPA expressly provides that RCN alone is responsible for making any payments due under any of the Policies. Specifically, the relevant portion of the IPA reads: "The **Insured** agrees on behalf of itself and all insureds named on any **Policy** to make the . . . payments [due under the Policies]." IPA Art. II.A. Thus, only RCN, and no other insureds, is responsible for making the payments due on the Policies. Accordingly, the claims filed by Kemper seeking payment from any Debtor other than RCN should be disallowed and expunged because none of the Debtors except RCN, the "Insured" undertook any payment obligations with respect to the Policies and/or the Agreements. Moreover, Kemper should be required to specify the amount, nature of and basis for its remaining claim against RCN, i.e., claim number 1029.

d. Kemper Is Not Entitled to an Administrative Expense Claim.

21. Kemper asserts in the Kemper Proofs of Claim that "[t]o the extent the amounts claimed hereunder accrue or arise subsequent to the commencement of this case, such amounts are entitled administrative expense priority" Proof of Claim n.6. Kemper apparently believes that all or a portion of its claim

against certain of the Debtors should be treated as administrative expenses under Bankruptcy Code section 503(b).

22. However, Bankruptcy Code section 503(b) requires that the claims represent "actual and necessary costs and expenses of preserving the estate," i.e., that the services for which compensation is sought provided a benefit to the estate. Moreover, under the Bankruptcy Code, as the party filing an administrative claim, Kemper bears the burden of proving that its claim is entitled to administrative priority under Bankruptcy Code sections 503 and 507. See, e.g., In re Globe Metallurgical, Inc., 312 B.R. 34, 37 (Bankr. S.D.N.Y. 2004) (claimant has heavy burden of demonstrating that claim was an actual and necessary expense and therefore entitled to administrative expense priority); In re Chateaugay Corp., 102 B.R. 335, 353-54 (Bankr. S.D.N.Y. 1989); see also In re Smith Corona Corp., 210 B.R. 243, 245 (Bankr. D. Del. 1997) (burden of proof is on the claimant to show its entitlement to administrative expense priority); In re Grand Union Co., 266 B.R. 621, 628-29 (Bankr. D.N.J. 2001) (disallowing administrative claim where claimant did not meet burden of proving its claim).

23. Kemper has failed entirely to meet this burden, not even stating that such a benefit was provided, let alone setting forth facts sufficient to support this assertion. Accordingly, Kemper's request for administrative expense treatment for

all or any portion of the claims set forth in the Kemper Proofs of Claim should be denied.

24. Kemper further notes that "[t]o the extent the amounts claimed hereunder relate to amounts owed in connection with workers compensation insurance provided within 180 days of the commencement of the case, and the other elements of 11 U.S.C. § 507(a)(4) have been met, such amounts are entitled to a priority." Proof of Claim n.6. However, prepetition workers' compensation claims are not expenses of administration. See In re Rea Express, Inc., 442 F. Supp. 71, 72 (S.D.N.Y. 1977) aff'd 591 F.2d 1331, 1332 (2d Cir.1978). Indeed, in In re Arrow Carrier Corp., 154 B.R. 642 (Bankr. D. N.J. 1993), the bankruptcy court specifically held that unpaid prepetition workers' compensation premiums are not entitled to administrative priority under the Bankruptcy Code and that such claims should be treated as general unsecured claims. Id. at 646. Likewise, in In re Allentown Moving & Storage, Inc., 214 B.R. 761 (E.D. Pa. 1997), the district court held that "[a] plain reading of Section 507(a)(4) suggests and an examination of its legislative history confirms that Congress did not intend to grant priority to a claim for unpaid pre-petition workers' compensation insurance premiums." Id. at 767.

25. For these additional reasons, Kemper's request for administrative expense treatment under Bankruptcy Code section 507(a)(4) for all or a portion of its claims in the Kemper Proofs of Claim must be denied.

RESPONSES TO OBJECTIONS

26. The Debtors request that any response from Kemper to this Objection (a) be in writing, (b) comply with the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York (the "Local Bankruptcy Rules"), and (c) be filed with the Court in accordance with the Court's general order number 182 as modified by orders 193 and 206 adopting electronic filing procedures (with an additional copy to the chambers of the Honorable Robert D. Drain), together with proof of service, and served by personal service, overnight delivery, or first class mail, so as to be received no later than 4:00 p.m. (prevailing Eastern time) on October 28, 2004, upon the following:

Counsel for the Debtors

Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, New York 10036
Attention: Frederick D. Morris, Esq.

Counsel for the Senior Lenders

Simpson, Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3954
Attention: Peter V. Pantaleo, Esq.
Elisha Graff, Esq.

Counsel for the Creditors' Committee

Milbank, Tweed, Hadley & McCloy LLP
One Chase Manhattan Plaza
New York, NY 10005
Attention: Dennis F. Dunne, Esq.
Deirdre Ann Sullivan, Esq.

United States Trustee

The Office of the United States Trustee
Southern District of New York
33 Whitehall Street
21st Floor
New York, New York 10004
Attention: Paul K. Schwartzberg, Esq.

United States Bankruptcy Court

United States Bankruptcy Court for the
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York, New York 10004
Attention: Chambers of The Honorable Robert D. Drain

27. **Contents Of Response.** The Debtors request that at a minimum any Response must contain the following:

- (a) a caption setting forth the name of the Bankruptcy Court, the name of the case, the case number, and the title of the Objection;
- (b) a description of the basis for the amount of the Kemper Proofs of Claim;
- (c) a concise statement setting forth the reasons why the relief requested by the Objection with respect to each of the Kemper Proofs of Claim should not be granted

by the Bankruptcy Court, including, but not limited to, the specific factual and legal bases upon which Kemper will rely in opposing the Objection;

- (d) all documentation or other evidence of the Kemper Proofs of Claim, to the extent not included with the Kemper Proofs of Claim previously filed with the Bankruptcy Court, upon which Kemper will rely in opposing the Objection at the hearing;
- (e) the address(es) to which a reply, if any, to the Response should be sent, if different from that presented in the proof of claim (If a Response contains an address for the creditor different from that stated on the objected to proof of claim, the address in the Response shall control and shall constitute the service address for other future service of papers upon that creditor); and
- (f) the name, address, and telephone number of the person (which may be the creditor or his/her/its legal representative) possessing ultimate authority to reconcile, settle, or otherwise resolve the claim on behalf of Kemper.

28. If a Response is properly filed and served in accordance with the above procedures, the Debtors will endeavor to reach a consensual resolution with Kemper. If no consensual resolution is reached with Kemper, the Debtors request that the Bankruptcy Court conduct a hearing with respect to the Objection and the Response on **November 16, 2004, at 10:00 a.m. prevailing Eastern time.**

29. If no response is filed and served in accordance with the above procedures, the Debtors will present to the Court an appropriate order with respect to the Kemper Proofs of Claim **without further notice to the creditor.**

**NOTICE AND WAIVER
OF MEMORANDUM REQUIREMENT**

30. Notice of this Objection has been given to the United States Trustee, Kemper, and those persons who filed a notice of appearance in this case. The Debtors respectfully submit that such notice is sufficient under the circumstances and requests that the Court find that no further notice of the relief requested herein is required.

31. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein, and respectfully requests that because the relevant statutory authorities are already cited in this Objection, the requirement of a separate memorandum of law under Local Bankruptcy Rule 9013-1(b) be waived.

RESERVATION OF RIGHTS

28. The Debtors reserve the right to object further to each of the Kemper Proofs of Claim on any and all additional factual or legal grounds. Without limiting the generality of the foregoing, the Debtors specifically reserve the right to amend this Objection, file additional papers in support of this Objection or take other appropriate actions to (a) respond to any allegation or defense that may be raised in

any response filed by or on behalf of Kemper or other interested parties, (b) further object to any of the Kemper Proofs of Claim for which Kemper provides (or attempts to provide) additional documentation or substantiation or (c) further object to any of the Kemper Proofs of Claim based on additional information that may be discovered upon further review by the Debtors or through discovery pursuant to the applicable provisions of Part VII of the Bankruptcy Rules.

WHEREFORE, the Debtors respectfully request that the Bankruptcy Court enter an order (i) disallowing and expunging the Kemper Proofs of Claim or (ii) disallowing proofs of claim 1025, 1026, 1027 and 1028 and requiring Kemper to specify the amount and nature of its claims against RCN as set forth in proof of

claim number 1029, and (iii) granting the Debtors such other and further relief as is just.

Dated: New York, New York
September 28, 2004

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

/s/ D.J. Baker
D. J. Baker (DB 0085)
(Member of the Firm)
Frederick D. Morris (FM 6564)
Four Times Square
New York, New York 10036-6522
(212) 735-3000

Attorneys for Debtors and
Debtors-in-Possession

EXHIBIT A

PROOF OF CLAIM

Case Number
04-13638 (RDD)

Kemper Insurance Companies (2)

Filed: USBC - Southern District of New York
RCN Corporation, Et Al.
04-13638 (RDD)

0000001029

David J. Fischer
Joel C. Paschke
Wildman, Harrold, Allen & Dixon LLP
225 West Wacker Drive
Chicago, IL 60606

☐ Check box if you received any not bankruptcy court

☐ Check box if the business was sent from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Check here ☐ replaces
if this claim ☐ amends a previously filed claim, dated: _____

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury / wrongful death
☐ Taxes
☒ Other (3)

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)

Your SS #: _____

Unpaid compensation for services performed

from _____ to _____
(date) (date)

3. If court judgment, date obtained:

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

☒ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle

☒ Other (5)

Value of Collateral: \$_____

Amount of arrearage and other charges at time case filed included in secured claim, in any: \$ _____

☒ Check this box if you have an unsecured priority claim
Amount entitled to priority \$ unliquidated (6)

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to \$4,650),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).

☒ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).

☐ Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).

☒ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(1).

* Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.*

9. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): The Kemper Insurance Companies, by their attorney:

THIS SPACE IS FOR COURT USE ONLY

RECEIVED
JUN 9 2004
U.S. BANKRUPTCY COURT
SO. DIST. OF NEW YORK

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Proof of Claim

1

This claim is filed against the bankruptcy estates of RCN Corporation and any other Debtor (collectively, the "Debtor") constituting an insured or additional insured under the Policies (as hereinafter defined). Accordingly, this claim should be deemed filed in each of those cases to the extent appropriate.

2

This claim is filed by American Motorists Insurance Company, Lumbermens Mutual Casualty Company, American Protection Insurance Company, and American Manufacturing Mutual Company (individually or collectively, together with their affiliates, the "Kemper Insurance Companies" or "Kemper").

3

This claim arises from a complex insurance program maintained by Kemper for the benefit of the Debtor and any work Kemper performed as a third party administrator ("TPA"). Specifically, Kemper issued numerous policies of insurance for general liability, automobile liability, and workers compensation coverage for the Debtor (together with related endorsements, schedules and agreements, the "Policies"). The Policies, together with claims service agreements, deferral agreements, applicable finance agreements, deductible reimbursement agreements, and other undertakings between the parties shall be referred to hereinafter, collectively, as the "Agreements." Copies of the proposals, Policies and Agreements are too voluminous to attach hereto, but will be furnished upon reasonable request.

Pursuant to the Agreements, and subject to the terms and conditions thereof, Kemper agreed to provide insurance coverage and claims handling services to the Debtor, including workers compensation, general liability, automobile liability, and other specified coverage to Debtor for a period certain. Also pursuant to the Agreements, the Debtor agreed to pay specified premiums, loss reimbursement, claims handling charges and other sums. Some of the Policies are auditable, meaning premium is subject to periodic adjustment based upon changes to underwriting factors like number of employees, payroll and the like. Some of the Policies are loss sensitive, meaning that the amounts owed thereunder are subject to periodic redetermination based upon ongoing loss experience. That is to say, if losses are heavier than projected, additional premium, loss reimbursement, dividend recall or other charges may be owed by the Debtor. If losses are lighter than projected, then premium refund, dividend or other credits may be owed to the Debtor.

Kemper asserts this claim for all premiums, loss reimbursement, claims handling charges and other sums now or hereafter owing under the Policies, Agreements and/or insurance program. As stated above, Kemper also asserts this claim for reimbursement of all claims paid pursuant to any TPA work performed.

4

The debt underlying this claim is incurred as and when liabilities arise under the Policies and other Agreements.

5

As of the present date, this claim is subject to further revision as losses continue to develop under the policies. Accordingly, Kemper has filed this claim as unliquidated. However, Kemper directs your attention to any maximum premium formulae contained in the Policies. Kemper reserves the right to amend this proof of claim at any time hereafter, either to state a liquidated balance, or to update such liquidated balance to reflect the most current figures. Finally, Kemper reserves the right, at any time hereafter, to seek a judicial estimation of this claim pursuant to 11 U.S.C. § 502(c).

This claim is secured to the extent of (i) any collateral held by Kemper, (ii) any loss funds furnished in connection with the credits serving as Kemper's collateral, and (iii) any credits now or hereafter owing to the Debtors. Kemper reserves all rights of setoff and/or recoupment to the fullest extent possible. Kemper asserts a secured claim to the extent referenced above.

6

To the extent the amounts claimed hereunder accrue or arise subsequent to the commencement of this case, such amounts are entitled to administrative expense priority pursuant to 11 U.S.C. § 507(a)(1). In particular, Kemper asserts administrative priority for any amounts owing under the Agreements in connection with post-petition claims-handling services or premium arising post-petition.

To the extent the amounts claimed hereunder relate to amounts owed in connection with workers compensation insurance provided within 180 days of the commencement of the case, and the other elements of 11 U.S.C. § 507(a)(4) have been met, such amounts are entitled to a priority.

To the extent this claim is neither secured nor entitled to priority status, Kemper asserts this claim as general unsecured.

EXHIBIT B

INSURANCE PROGRAM AGREEMENT

This Insurance Program Agreement ("Agreement"), effective March 1, 2002 between RCN Corporation, a Delaware corporation, ("Insured") and the following insurance companies as shown in the Specifications for each Policy:

Lumbermens Mutual Casualty Company

Kemper Casualty Insurance Company

American Motorists Insurance Company

American Manufacturers Mutual Insurance Company

American Protection Insurance Company

(all collectively and individually referred to as: "Kemper").

WHEREAS, the Insured has applied for insurance programs as described in a Schedule "Plan Specifications" for each Program Period subject to this Agreement ("Specification");

WHEREAS, Kemper has agreed to issue Policies during the term of this Agreement as described in Specifications attached as a Schedule to this Agreement;

WHEREAS, the Insured and Kemper intend to outline the scope, description and structure for each Program Period, and to set forth the Insured's obligations to Kemper to make payments and provide security for its obligations.

NOW THEREFORE, in consideration for the issuance of the Policies by Kemper, the Insured and Kemper agree as follows:

ARTICLE I. DEFINITIONS

- A. "Allocated Loss Adjustment Expenses" "ALAE" - Expenses incurred in connection with adjusting, investigating, recording and defending claims or in seeking contribution, subrogation or other recovery directly allocated to a particular claim, in accordance with Kemper's normal accounting practices and procedures applicable to the Policies. Allocated Loss Adjustment Expenses shall not include any Unallocated Loss Adjustment Expense.
- B. "Assessment" - amounts assessed against Kemper for residual market charges, secondary injury funds, guaranty funds and other charges imposed upon Kemper in whole or in part attributable to premium or losses arising under Policies, or arising out of a fine or penalty caused by the Insured's failure to make filings or provide Kemper with information not otherwise available in Kemper's records required by administrative rule or order.
- C. "Claims Service Agreement" - An agreement providing for claims and related services.
- D. "Claims Service Company" - A provider of claims adjustment, administration, loss information and other services designated or approved by Kemper.

- E. **"Claims Service Fees"** – Fees and charges of the Claims Service Company, but not including Allocated Loss Adjustment Expenses.
- F. **"Dividend Plan"** – The Large Risk Contributory Dividend Plan (LRDP) declared by Kemper's Board of Directors in its sole discretion for those Policies described as LRDP in the Plan Type in the Specifications.
- G. **"Insured"** – The entity applying for insurance and entering into this Agreement on behalf of all insureds named under any Policy and with the authority to bind any and all such named insureds to all of the Insured's Obligations in accordance with the terms of this Agreement.
- H. **"Insured's Obligations"** - Payments the Insured is or as estimated by Kemper will be required to pay under this Agreement including all Schedules attached to this Agreement or the Policies whether now existing or hereafter arising. Insured's Obligations include, but are not limited to:
 - 1. **Paid Losses;**
 - 2. **Allocated Loss Adjustment Expenses;**
 - 3. **all reserves as established by Kemper for:**
 - a. **unpaid or outstanding Paid Losses (including actuarial development thereof for expected losses and losses incurred but not reported); and**
 - b. **expected payments for costs to be incurred in connection with the adjustment of losses subject to any "Insured's Retention (ALAE)" as set forth in the Specifications applicable to the Policies under which losses are payable;**
 - 4. **Claims Service Fees to the extent permitted under the Policies;**
 - 5. **Unallocated Loss Adjustment Expenses as set forth in the Specifications;**
 - 6. **expenses incurred in seeking recovery of Paid Losses from a third party;**
 - 7. **all premiums under the Policies and, to the extent permitted under the Policies, Premium Taxes, Surcharges and Assessments attributable to Policies;**
 - 8. **all other amounts the Insured has agreed to pay or to indemnify Kemper under this Agreement or any other agreement between the Insured and Kemper including any affiliated company. Such amounts shall include, but not be limited to:**
 - a. **accrued interest on any unpaid balances,**
 - b. **the costs Kemper incurs in enforcing any of its rights, and**
 - c. **any amounts imposed by a regulatory agency or court as a fine or penalty related to the Policies or claims made under Policies, and arising out of or caused by the Insured's failure to provide information requested by Kemper or to make a report required by law or administrative rule or regulation.**

Insured's Obligations shall be reduced by reimbursements and other payments made by the Insured, and reduced by salvage and subrogation actually recovered.

- I. **"Paid Losses"** - Amounts paid as benefits or damages arising under the Policies. Paid Losses shall be limited to the "Insured's Retention- Losses" set forth in the Specification applicable to the Policy under which such amounts are payable.

- J. **"Policies"** - The policies issued by Kemper to the Insured together with all endorsements, certificates, extensions or renewals thereof and replacements and additions thereto as listed on each **Specification Schedule** attached to this **Agreement**. Policies shall also include any policy issued or assumed by Kemper prior to the effective date of this **Agreement** and listed on Exhibit A to this **Agreement**. The term **Policies** shall also include any policy issued by any unaffiliated insurer to the **Insured** at the request of Kemper.
- K. **"Premium Tax"** - any federal, state or local tax based on premium including any increase based on audit.
- L. **"Program Period"** - The period of time described in each **Specification** attached to this **Agreement** as an exhibit including any extension or cancellation of a policy included within a **Specification**.
- M. **"Reimbursement Factor"** - The factor to be used in determining the amount required to be held in the **Loss Deposit Account** based on the following reimbursement schedule:
- | | | |
|----|-----------|------|
| 1. | Daily | 0.25 |
| 2. | Weekly | 0.5 |
| 3. | Monthly | 2.0 |
| 4. | Quarterly | 4.0 |
- N. **"Surcharge"** - Any charge, other than a **Premium Tax** imposed by a governmental agency and identified as a separate charge not included as premium.
- O. **"Unallocated Loss Adjustment Expenses"** - Expenses incurred in connection with adjusting, investigating, recording and defending claims under the **Policies** for or incurred by Kemper's salaried employees.
- P. **Other Terms:** - Unless otherwise provided in this **Agreement** or unless the context requires otherwise, terms used in this **Agreement** shall have the meanings attributed to them in the **Policies** or Kemper's applicable statistical or rating plans.

ARTICLE II. PAYMENTS BY INSURED

- A. The **Insured** agrees on behalf of itself and all insureds named on any **Policy** to make the following payments:
1. Premium Payments as specified in the **Specifications** and the **Policies**, including any premiums payable under any Coinsurance Endorsement, Combined Program Plan Maximum, or as dividend-recall under a **Dividend Plan**.
 2. Premium Taxes, Surcharges and Assessments attributable to the **Policies** (including any additional amounts which may become due because of a recalculation of the amount attributable to the **Policies** or state reinterpretation of the applicable law or regulation) not included as premium under Kemper's filed rating plan.
 3. Security for Insured's Obligations as provided for in ARTICLE V below
 4. Funding for Paid Losses and Allocated Loss Adjustment Expenses subject to the Insured's Retention set forth in the **Specification** applicable to the

Policy under which such amounts are payable in accordance with ARTICLE III of this Agreement.

5. **Unallocated Loss Adjustment Expenses** as set forth in the **Specifications**.
 6. **Claims Service Fees**, to the extent permitted under the **Policies**.
 7. **Loss Retrospective Premium Payments** for those **Policies** shown in the **Specification** applicable to the **Policy** as "Retro," or "LRDP." **Kemper** and the **Insured** have agreed to use **Incurred Losses** to adjust the premiums and have agreed that **Kemper** shall bill the **Insured** and adjust premiums based on **Paid Losses** for the number of annual premium adjustments as shown in the **Specifications**. **Incurred Losses** shall be used for all subsequent annual premium adjustments.
- B. **Payment Due Dates**: - All payments are due within fifteen (15) days from the date billed, or when otherwise scheduled under the **Policies**, this **Agreement**, any invoice issued by **Kemper**, or under the terms of a pre-arranged electronic fund transfer.
- C. **Remittances**: - All payments to **Kemper** shall be by wire transfer to:
Bank of America Illinois Chicago
Federal Routing #0710 0003 9
Lumbermens Mutual Casualty Company – Account #81887-04036
Re: RCN Corporation
- D. **Interest**: - Any payments not made on or before the due date shall accrue interest at the rate of one and one-half percent (1.5%) per month on the unpaid balance or the maximum permitted by law whichever is less.
- E. **Application of Payments**: - Payments received by **Kemper** shall be applied by category as follows:
1. First against any security deficiencies arising under ARTICLE V.A;
 2. Second against any amounts due for **Paid Losses** under ARTICLE III
 3. Third against any interest accrued under ARTICLE II.D;
 4. Forth against any amounts due for **Taxes, Surcharges or Assessments** under ARTICLE II.A.2;
 5. Last against amounts due as premium under ARTICLE II.A, above.

ARTICLE III. FUNDING FOR PAID LOSSES

- A. **Establishment of Loss Deposit Account**: - On or before the effective date of this **Agreement**, and at the inception of each **Program Period**, the **Insured** shall deposit into an account designated by **Kemper** in the name of or in trust for **Kemper** funds to establish or maintain an account for payment of losses (the "**Loss Deposit Account**"). The amount of the **Loss Deposit Account** shall be as set forth in the **Specifications** as **Loss Deposit Account "Initial Funding"**. **Kemper** or its designee shall draw on the **Loss Deposit Account** for **Paid Losses**. The initial deposit for each **Program Period** represents an estimate of the anticipated monthly **Paid Losses** under the **Policies** multiplied by the appropriate **Reimbursement Factor**. **Kemper** shall determine the amount required to be on deposit in the **Loss Deposit Account** quarterly commencing the first business day of the third quarter after the effective date of this **Agreement**. The amount required to be maintained on deposit in the **Loss Deposit**

- J. Arbitration Expense: - Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceedings or any other costs relating to the arbitration may be allocated by the board.
- K. Law: - The Arbitration shall be governed by the United States Arbitration Act, Title 9 U.S.C. §1, et seq.
- L. Survival: - This Article shall survive the termination of this Agreement.

ARTICLE IX. TERM AND TERMINATION

- A. Term: - This Agreement shall continue in force until terminated in accordance with paragraph C below.
- B. ~~Cancellation of Policies: - The expiration, or cancellation by either the Insured or Kemper, of the Policies will not terminate this Agreement.~~ In the event of cancellation of any of the Policies, the premium for such Policies shall be determined in accordance with those provisions of the Policies relating to cancellation. All other provisions of this Agreement shall apply until the Agreement terminates.
- C. Conditions for Termination: - This Agreement will terminate:
 - 1. when Kemper notifies the Insured that the Insured's Obligations have been discharged; or
 - 2. by written mutual agreement of the Insured and Kemper.
- D. Return of Collateral: - Upon termination of this Agreement, Kemper shall return to the Insured the remaining Collateral, or proceeds if any, securing obligations under this Agreement.

ARTICLE X. MISCELLANEOUS TERMS

- A. APPLICABLE LAW: THE RIGHTS OF THE PARTIES TO THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO NEW YORK'S RULES ON CONFLICT OF LAWS.
- B. Time is of the Essence: - Time is of the essence of this Agreement, and the timely performance of the various matters specified herein is a material inducement and consideration for each party entering into this Agreement.
- C. Counterparts: - This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same Agreement.
- D. Successors and Assigns, No Assignment: - This Agreement shall inure to the benefit of, and shall be binding on, the parties and their successors and assigns. Kemper may assign or delegate all or part of its rights and obligations under this Agreement to an affiliate without prior notice, action or consent of the Insured. This Agreement shall not, however, be assigned and the obligations hereunder shall not be delegated by the Insured without the prior express written consent of Kemper.



IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Agreement:

Insured:

RCN Corporation

By:

Melissa Sheehan

Title:

Sr. Risk Manager

Date:

July 31, 2002

Witness:

[Signature]

Kemper:

Lumbermens Mutual Casualty
Company
(and its affiliates)

By:

[Signature]

Title:

Underwriting Consultant

Date:

3-12-02

Witness:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
	:
In re	:
	:
RCN CORPORATION, <u>et al.</u> ,	:
	:
Debtors.	:
	:
-----X	

	Chapter 11
	Case No. 04-13638 (RDD)
	(Jointly Administered)

**ORDER DISALLOWING AND EXPUNGING PROOFS
OF CLAIM FILED BY KEMPER INSURANCE COMPANIES**

Upon the Debtors' Objection under 11 U.S.C. §§ 105(a), 502(b), 503 and 507, Fed. R. Bankr. P. 3007 and the Bar Date Order to Proofs of Claim Filed by Kemper Insurance Companies (the "Objection"),¹ filed by RCN Corporation and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors") on September 28, 2004; and after due deliberation thereon; and based upon the record in this case; and proper and adequate notice of the Objection having been given; and no other or further notice being necessary; and the Court having considered the Objection, the Kemper Proofs of Claim, and the responses, if any, to the Objection; and the responses, if any, to the Objection in respect of the claims addressed herein having

¹ Unless otherwise defined, capitalized terms used herein shall have the meanings ascribed to them in the Objection.

been resolved or overruled; and after due deliberation thereon; and good cause appearing therefore; it is hereby

FOUND THAT:

- A. Kemper was properly and timely served with a copy of the Objection and the notice of the response deadline thereto; and
- B. The Objection is a core proceeding under 28 U.S.C. § 157(b)(2); and
- C. The Kemper Proofs of Claim are claims which do not reflect obligations of the Debtors and do not provide sufficient supporting documentation to permit the Debtors to evaluate such claims; and
- D. The relief requested in the Objection is in the best interests of the Debtors, the Debtors' estates, and their creditors.

NOW, THEREFORE, IT IS ORDERED, DECREED, AND ADJUDGED THAT:

- 1. Each of the Kemper Proofs of Claim (proof of claim numbers 1025, 1026, 1027, 1028, and 1029) is disallowed and expunged.
- 2. The Bankruptcy Court shall retain jurisdiction over the Debtors and Kemper with respect to any matters relating to or arising from the Objection or the implementation of this Order.
- 3. Each of the Kemper Proofs of Claim and the objections by the Debtors to each of the Kemper Proofs of Claim as set forth in the Objection consti-

tutes a separate contested matter as contemplated by Fed. R. Bankr. P. 9014. This Order shall be deemed a separate Order with respect to each such claim. Any stay of this Order shall apply only to the contested matter which involves such claim and shall not act to stay the applicability or finality of this Order with respect to any other contested matter covered hereby.

4. The requirement of Local Bankr. R. 9013-1(b) that any motion filed shall be accompanied by a separate memorandum of law is satisfied by the Objection.

Dated: New York, New York
November __, 2004

Honorable Robert D. Drain
United States Bankruptcy Judge