

Hearing Date: October 27, 2004 at 10:00 a.m.
Objections Due: October 22, 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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**MOTION FOR ORDER UNDER 11 U.S.C. §363(b)
AND BANKRUPTCY RULE 9019 AUTHORIZING AND
APPROVING PARTIAL ASSIGNMENT OF LEASE AND
ASSIGNMENT OF SUBLEASES AGREEMENT**

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 submit this Motion for Entry of an Order Under 11 U.S.C. § 363(b) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") Authorizing and Approving the Partial Assignment of Lease

and Assignment of Subleases Agreement. In support of this motion, the Debtors respectfully represent as follows:

BACKGROUND

1. On May 27, 2004 (the "Petition Date"), RCN and certain other Debtors filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").¹ RCN Cable TV of Chicago, Inc., an affiliate of RCN, commenced its chapter 11 case on August 5, 2004. Certain additional Debtors commenced their chapter 11 cases on August 20, 2004.²

2. The Debtors continue to manage and operate their business 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 United States Trustee for the Southern District of New York appointed the Committee of Unsecured Creditors. No other official committees have been appointed or designated in these chapter 11 cases.

¹ In addition to RCN, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc., all affiliates of RCN, commenced their chapter 11 cases on May 27, 2004.

² RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc., 21st Century Telecom Services, Inc. and ON TV, Inc., all affiliates of RCN, commenced their chapter 11 cases on August 20, 2004.

4. 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).

5. The statutory predicates for the relief requested herein are Bankruptcy Code section 363(b) and Bankruptcy Rule 9019.

RELIEF REQUESTED

6. By this motion, the Debtors seek entry of an order pursuant to 11 U.S.C. § 363(b) and Bankruptcy Rule 9019 authorizing and approving the Partial Assignment of Lease and Assignment of Subleases Agreement (the "Agreement") among RCN, RCN Telecom Services, Inc. ("RCN Telecom")³ and Advance Magazine Publishers Inc. ("Advance Magazine Publishers"). A copy of the Agreement is attached hereto as Exhibit A.

BASIS FOR THE RELIEF REQUESTED

A. The Master Lease Agreement and Guaranty

7. RCN Telecom's predecessor in interest and Advance Magazine Publishers entered into a lease dated May 9, 2000 (the "Master Lease"), whereby Advance Magazine Publishers leased to RCN Telecom nine entire floors and other areas (the "Original Premises") in the building known as 825 Third Avenue, New York, New York (the "Building"). The Master Lease expires on June 30, 2015.

³ RCN Telecom is a non-Debtor, wholly owned subsidiary of RCN.

RCN executed a guaranty (the "Guaranty") in favor of Advance Magazine Publishers of certain of RCN Telecom's obligations under the Master Lease.

8. Shortly after executing the Master Lease, RCN and its affiliates realized that their operations did not require all nine floors of the Building, and subleased a substantial portion of the Original Premises to third parties as described below. RCN Telecom, however, continues to occupy a small portion of the Original Premises, and it anticipates that it will continue to do so for some period in the future.

B. The Subleases

9. RCN Telecom and CDC IXIS Financial Guaranty Services, Inc. ("CDC") entered into an Agreement of Sublease dated March 22, 2001 (the "CDC Sublease"), whereby RCN Telecom subleased a portion of the Original Premises to CDC (the "CDC Premises").

10. RCN Telecom and Morgan Stanley D.W. Inc. ("Morgan") entered into an Agreement of Sublease dated October 4, 2001 (the "Morgan Sublease"), whereby RCN Telecom subleased a portion of the Original Premises to Morgan (the "Morgan Premises").

11. RCN Telecom and Joke Vision, LLC ("Joke Vision") entered into an Agreement of Sublease dated July 24, 2003 (the "Joke Vision Sublease"),

whereby RCN Telecom subleased a portion of the Original Premises to Joke Vision (the "Joke Vision Premises").

C. Partial Assignment of Lease and Assignment of Subleases Agreement

12. As stated above, RCN Telecom currently occupies only a very small portion of the Original Premises. Indeed, RCN and RCN Telecom do not believe that they will have any use for most of the Original Premises as part of their future business plans. Although most of the leased space is currently occupied by subtenants, such subleases expire prior to the expiration of the Master Lease. Accordingly, the Master Lease and Guaranty could give rise to significant contingent liabilities against RCN Telecom and RCN's bankruptcy estate, as the long term real estate market, and the resultant ability to continue to sublease most of the Original Premises through 2015, is highly unpredictable.

13. The Debtors therefore recognized that they would receive a significant benefit if they were able to relieve themselves of these contingent obligations, exit the real property leasing business, and extract themselves from most of their obligations under the Master Lease and Guaranty. To that end, RCN and RCN Telecom commenced negotiations with Advance Magazine Publishers regarding an agreement that would allow RCN and RCN Telecom to achieve these goals. After extensive negotiations, conducted at arms' length and in good faith, RCN, RCN

Telecom and Advance Magazine Publishers executed the Agreement. The Agreement generally provides as follows:⁴

- a. RCN Telecom will assign, transfer and convey to Advance Magazine Publishers (i) all of RCN Telecom's right, title, interest and obligations, as tenant under the Master Lease, with respect to each of the CDC, Morgan and Joke Vision Premises (collectively, the "Assigned Premises"), and (ii) all of RCN Telecom's right, title, interest and obligations, as sublessor in, to and under each of the CDC, Morgan and Joke Vision Subleases (collectively, the "Assigned Subleases") together with the security deposits, if any, held pursuant to the CDC Sublease and the Joke Vision Sublease (RCN Telecom's rights, title, interests and obligations described in clauses (i) and (ii) are referred to, collectively, as the "Assigned Interests").
- b. Advance Magazine Publishers will assume RCN Telecom's obligations under the Assigned Interests.
- c. Advance Magazine Publishers will release RCN and RCN Telecom from certain liabilities and obligations arising from or relating to the Assigned Interests, including RCN's and its estate's obligations with respect to the Guaranty, provided RCN Telecom does not file a bankruptcy petition or similar proceeding within ninety days of final Bankruptcy Court approval of the Agreement.
- d. RCN Telecom will (i) allow Advance Magazine Publishers to retain a letter of credit in the amount of approximately \$1.7 million previously delivered by RCN Telecom to Advance Magazine Publishers as security for performance of RCN Telecom's obligations under the Master Lease and (ii) pay to Advance Magazine Publishers the sum of \$179,013.

The Agreement provides the Debtors with a substantial benefit, as it relieves RCN and RCN Telecom from significant contingent liabilities that could arise from their

⁴ The following summary of the Agreement is given for illustrative purposes only. To the extent this summary and the Agreement are inconsistent, the Agreement shall control.

long term obligations under the Master Lease and Guaranty. The remaining term of the Master Lease calls for rent obligations of more than \$60 million in excess of the anticipated revenue from the Subleases. This contingent liability therefore far exceeds the consideration provided to Advance Magazine Publishers under the Agreement and, in RCN's and RCN Telecom's reasonable business judgment, such consideration constitutes fair, adequate and reasonable equivalent value; is in the best interests of the estate; and should be approved.

APPLICABLE AUTHORITY

14. Bankruptcy Rule 9019 allows for approval by a bankruptcy court of a settlement after notice and a hearing. Settlements and compromises are "a normal part of the process of reorganization," and are strongly encouraged in bankruptcy. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (quoting Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939)). See also, Hicks, Muse & Co. v. Brandt, 136 F.3d 45, 50 n.5 (1st Cir. 1998) ("[c]ompromises are favored in bankruptcy").

15. Trustees and debtors-in-possession may, in the exercise of their business judgment, enter into settlements. In re Int'l Distrib. Ctrs., Inc., 103 B.R. 420, 423 (S.D.N.Y. 1989) ("A court may give weight to the [t]rustee's informed judgment that a compromise is fair and equitable, and consider the competency and experience of counsel who support the compromise") (citations omitted); In re

Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992)

(same).

16. A settlement should be approved unless it "fall[s] below the lowest point in the range of reasonableness." In re Teltronics Servs., Inc., 762 F.2d 185, 189 (2d Cir. 1985). The court need not decide the numerous questions of law and fact raised by the settlement, but rather should "canvass the issues" so that the reasonableness of the settlement may be evaluated. Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972); In re Best Prods. Co., 168 B.R. 35, 51 (Bankr. S.D.N.Y. 1994), *aff'd*, 68 F.3d 26 (2d Cir. 1995).

17. Bankruptcy Code section 363 authorizes a debtor-in-possession to dispose of property of the estate in the ordinary course of business without court approval. Bankruptcy Code section 363(b) permits a debtor-in-possession to dispose of property of the estate "other than in the ordinary course of business" after notice and a hearing. The Agreement relates to property of the estate because, *inter alia*, RCN has obligations under the Guaranty.

18. Courts in this district and elsewhere consistently have held that transactions pursuant to section 363(b) should be approved if the debtor demonstrates a sound business justification for implementing it. *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).

19. Once the debtor articulates a valid business justification, "[t]he 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 taken 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)).

20. The terms of the Agreement are fair and reasonable, were negotiated in good faith and at arms' length, and constitute a sound exercise of RCN Telecom's and the Debtors' business judgment. Assigning the respective Assigned Subleases is an important step in the RCN Telecom's and the Debtors' restructuring process, as it relieves them of a significant contingent liability under the Master Lease and Guaranty, and provides an exit from the real estate leasing business. Moreover, the modifications of the Master Lease and Guaranty provided in the Agreement are integral aspects of RCN Telecom's and RCN's overall restructuring efforts.

21. As noted above, the liabilities related to the Master Lease and Guaranty will greatly exceed the consideration paid to Advance Magazine Publishers under the Agreement. The certainty provided by releasing the long term obligations under the Master Lease and Guaranty is therefore invaluable to RCN Telecom's and the Debtors' restructuring efforts. Indeed, failure to approve the

Agreement would likely impede these efforts to focus on their core businesses and effect a successful restructuring. Additionally, the uncertainty and cost generated by a failure to approve the Agreement will have a negative impact on RCN Telecom's and the Debtors' continued operations.

22. In the exercise of their business judgment, RCN Telecom and the Debtors therefore believe that the terms of the Agreement are reasonable based upon the significant benefits the RCN Telecom and the Debtors will receive, including the extinguishment of at least \$60 million of contingent liabilities under the Master Lease and Guaranty. Based on the benefits to be realized from entering into the Agreement, together with the potential harm to the Debtors' estates if the relief requested herein is not granted, the Debtors respectfully request that the motion be granted.

23. 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 motion, 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, substantially in the form attached hereto, (i) authorizing and approving the Agreement and (ii) granting such other and further relief as is just and proper.

Dated: New York, New York
September 29, 2004

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