

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
LEASE TERMINATION AND RECOGNITION 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 Lease Termination and Recog-

niton Agreement. In support of this motion, the Debtors respectfully represent as follows:

BACKGROUND

1. On May 27, 2004, 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 Lease Termination and Recognition Agreement (the "Agreement") among RCN, RCN Telecom Services, Inc. ("RCN Telecom")³ and Consolidated Edison Co. ("ConEd"). 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 and ConEd executed a lease dated August 23, 2000 (the "Master Lease"), whereby ConEd leased to RCN Telecom six entire floors and other areas (the "Original Premises") in the building known as 118-29 Queens Boulevard, Forest Hills, New York 11375 (the "Building"). The Master Lease expires on September 29, 2012. RCN executed a guaranty (the "Guaranty") in favor of ConEd of certain of RCN Telecom's obligations under the Master Lease.

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

8. After executing the Master Lease, RCN and its affiliates realized that their operations did not require all six floors of the Building, and subleased a substantial portion of the Original Premises to JetBlue Airways Corporation ("JetBlue") pursuant to a sublease (as amended, the "Sublease") initially dated June 10, 2002. The Sublease expires on September 29, 2012.

B. Lease Termination and Recognition Agreement

9. RCN and RCN Telecom do not believe that they will have any use for the Original Premises as part of their future business plans. Additionally, the rent payable to ConEd under the Master Lease is in excess of the rent payable to RCN Telecom under the Sublease. RCN Telecom therefore sustains an operating loss on the Sublease each month. The total projected loss under the Sublease through its current expiration date is approximately \$1.7 million. Moreover, RCN Telecom's total obligations (excluding projected revenue from the Sublease) under the Master Lease through its expiration exceed \$25 million.

10. RCN and RCN Telecom therefore recognized that they would receive an important benefit if they were able to terminate the Master Lease and Guaranty. A termination would release them from the inherent risk of leasing real property, and allow them to exit the leasing business. To that end, RCN, RCN Telecom and ConEd commenced negotiations regarding an agreement that allowed RCN and RCN Telecom to achieve these goals. After extensive negotiations,

conducted at arms' length and in good faith, RCN, RCN Telecom and ConEd

executed the Agreement. The Agreement generally provides as follows:⁴

- a. The Master Lease and Guaranty shall terminate upon the occurrence of certain events described in the Agreement.
- b. ConEd will recognize JetBlue as its direct tenant on the terms set forth in the Sublease.
- c. RCN and RCN Telecom will pay ConEd the aggregate sum of \$1.7 million, subject to certain adjustments.
- d. ConEd will release RCN and RCN Telecom from all liabilities under the Master Lease and Guaranty except for liabilities to third parties arising prior to the effective date of the Agreement.

The Agreement provides the Debtors with a substantial benefit, as it releases RCN and RCN Telecom from future operating losses, as well as the inherent risk associated with subleasing real property. 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

11. 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

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.

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").

12. 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).

13. 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).

14. 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.

15. 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).

16. 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)).

17. The terms of the Agreement are fair and reasonable, were negotiated in good faith and at arms' length, and constitute a sound exercise of the Debtors' business judgment. Terminations of the Master Lease and Guaranty are important steps in the Debtors' restructuring process, as they relieve them of a

significant contingent liability and provide an exit from the real estate leasing business.

18. As noted above, the Debtors' long term liabilities related to the Master Lease and Guaranty are comparable to the consideration paid to ConEd under the Agreement, assuming the status quo is maintained through the Master Leases' expiration. In addition, the certainty provided by releasing these long term obligations under the Master Lease and Guaranty is also very valuable to the Debtors' restructuring efforts, as there is no guaranty that the Debtors would be able to maintain the status quo through 2012. Indeed, failure to approve the Agreement would likely impede the Debtors' efforts to focus on their core businesses and effect a successful restructuring.

19. In the exercise of their business judgment, the Debtors therefore believe that the terms of the Agreement are reasonable based upon the important benefits the Debtors will receive. Based on the benefits to be realized from entering into the Agreement, together with the potential harm to the estates if the relief requested herein is not granted, the Debtors respectfully request that the motion be granted.

20. 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 (i) authorizing and approving the Agreement and (ii) granting such other and further relief as is just and proper.

Dated: New York, New York
October 5, 2004

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Exhibit A