Hearing Date: October 27, 2004 at 10:00 a.m.

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Debtors and Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' OBJECTION TO MOTION FOR LEAVE TO FILE PROOF OF CLAIM OF DEBRA CRAIG

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 file their Objection to Motion For Leave To File Proof Of Claim filed by Debra Craig on September 22, 2004 (the "Motion"), and respectfully represent as follows:

PRELIMINARY STATEMENT

1. This Court established August 11, 2004 (the "Bar Date") as the deadline for filing proofs of claim against RCN. There is no question that Debra Craig received proper notice of the Bar Date: the Debtors' claims agent sent her notice of the Bar Date in accordance with this Court's orders, and Ms. Craig timely filed a proof of claim in these cases unrelated to the claim that forms the basis of her Motion. A copy of that claim is attached as Exhibit A, and an affidavit of the Debtors' claims agent with respect to service of the Bar Date notice is attached as Exhibit B.

2. Ms. Craig now wants to file another claim against RCN, albeit several weeks after the Bar Date. Ms. Craig, however, utterly fails to establish "excusable neglect" for her untimely claim as required by the Federal Rules of Bankruptcy Procedure ("the Bankruptcy Rules"). As an initial matter, she does not assert - nor can she - that she never received proper notice of the Bar Date. Moreover, she fails to concede "neglect" of any sort, which is a condition to successfully establishing the "excusable neglect" defense. Finally, she fails to establish any legally cognizable excuse for not asserting her claim by the Bar Date.

3. Indeed, Ms. Craig's theory is that she needed to wait until after the Bar Date to see if RCN or some other person would file a claim on her behalf by the Bar Date before she could determine whether she needed to file such a claim

herself. The case law is precisely to the contrary: a creditor cannot stand back, sit on its rights, then attempt to enter the chapter 11 process at an untimely date. If Ms. Craig's theory were adopted, a perverse incentive would be created for creditors not to abide by bar dates so they could, according to Ms. Craig, wait and see if some other creditor by chance filed a similar claim so they didn't have to. That cannot be - nor is it - the law. Ms. Craig's motion should be denied.

ARGUMENT

4. Bankruptcy Rule 9006(b)(1) permits a claimant to seek authority to file an untimely proof of claim, but only where the claimant's failure to timely file a proof of claim was due to "excusable neglect." The Supreme Court has established a two-step test for determining whether there is excusable neglect under Bankruptcy Rule 9006(b)(1) so as to permit a claimant to file an untimely proof of claim. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993).

5. Under this test, the movant first must show that its actions constituted neglect, which can be the movant's inadvertence, mistake or carelessness. Id. at 387-88. However, "ignorance of the rules, a mistake in construing the rules, or a conscious disregard of the rules . . . would not be 'neglect' even under the liberal Pioneer standard." In re Agway, Inc., 313 B.R. 31 (N.D.N.Y. 2004); In re Springfield Contracting Corporation, 156 B.R. 761, 765 (Bankr. E.D. Va. 1993).

6. Once neglect is shown, then the movant must prove by a preponderance of the evidence that the neglect was "excusable." This entails a balancing test, which includes review of the following factors: (i) the danger of prejudice to the debtor, (ii) the length of the delay and its potential impact on judicial proceedings, (iii) the reason for the delay, including whether it was within the reasonable control of the movant, and (iv) whether the movant acted in good faith. Pioneer, 507 U.S. at 395.

7. As an initial matter, Ms. Craig fails to concede that there was any neglect in failing to file her proof of claim prior to the Bar Date. If Ms. Craig wants to take advantage of the "excusable neglect" defense, she must concede that someone was neglectful as contemplated by Pioneer. To the contrary, Ms. Craig's theory - that she had to wait until after the Bar Date to determine whether to seek permission to file her claim - actually evidences a "conscious disregard" of the Bar Date rather than neglect.

8. At best, Ms. Craig's theory constitutes a "mistake in construing the rules." Rule 3004 affords a debtor, not a creditor, 30 days after expiration of a bar date to file a claim. Moreover, Rule 3004 clarifies that Ms. Craig's theory is the precise opposite of the law: her theory is that if a debtor does not file a claim by the bar date, then a creditor may do so thereafter. Rule 3004, on the other hand, specifies that if a creditor does not file a claim by the bar date, then the debtor may do so

within 30 days thereafter. Whether Ms. Craig's course of conduct here was conscious or a mistake in construing the Rules, her actions clearly are not "neglect" as contemplated by Pioneer.

9. Even assuming that Ms. Craig somehow were to establish neglect, she fails to establish that such neglect was "excusable" as contemplated by the Pioneer standards. For instance, Ms. Craig fails to establish any excusable reason for her delay in bringing her claim; that is, she fails to specify how her failure to timely file her claim was "beyond her reasonable control." In re Agway, Inc., 313 B.R. at 44; In re DDi Corp. 304 B.R. 626 (Bankr. S.D.N.Y. 2004). Ms. Craig's theory that she needed to wait to see if RCN filed a claim fails, by its own terms, to establish that the timely filing of her own claim was somehow beyond her control.

10. In fact, Ms. Craig's theory is contrary to case law. Courts have specifically held that a creditor must act diligently to protect its interests in bankruptcy; indeed, even creditors who do not get notice of a bar date but who otherwise know of the pendency of the case are charged with responsibility for protecting their rights and timely filing claims: "a creditor with knowledge of the existence of the bankruptcy case must take action to ensure that its claim is timely filed " In re P & L Credit and Collection Services, Inc., 248 B.R. 32, 36 (W.D.N.Y. 2000); "a party with actual notice of a bankruptcy case must act diligently to protect its interest, *despite the lack of formal notice*." In re Marino, 195 B.R. 886, 893 (Bankr. N.D.Ill. 1996).

> a creditor, who knows of the proceeding but has not received formal notice, should be prevented from standing back and allowing the bankruptcy action to proceed. The whole process of creating a feasible reorganization plan under Chapter 11 of the Bankruptcy Code is undermined by a creditor that bypasses the bankruptcy court or enters the proceeding at a late date.

Marino. at 893; see also In re Toth, 61 B.R. 160, 166 (Bankr. N.D.Ill. 1986).

11. Thus, even if this Court were to assume that RCN did in fact have some sort of legal right to file a claim against itself in connection with Ms. Craig's asserted breach of fiduciary duty claim, Ms. Craig had her own independent right to do so, a right that she should have acted upon by the Bar Date. Stated another way, the fact that no claim was filed by RCN simply is no excuse, under Pioneer, for Ms. Craig having failed to do so.

12. Indeed, Ms. Craig fails to allege whether she ascertained from RCN whether it believed that a breach of fiduciary claim needed to be filed.[1] She fails to allege that she ever had an agreement with RCN under which RCN assumed responsibility for filing a claim for her. She fails to allege whether she contacted RCN about her claim in advance of the Bar Date or otherwise alerted RCN to her complaints. She also fails to allege whether the Department of Labor or any other government agency has made any sort of inquiry of RCN with respect to her claim (to RCN's knowledge, none has).

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[1] RCN strongly contests any assertion that it or any of the plan fiduciaries failed to observe their duties in accordance with the law.

13. Based upon the foregoing, Ms. Craig has completely failed to satisfy her burden of establishing that her failure to timely file a claim was due to circumstances beyond her control. For similar reasons, she has failed to satisfy her burden to prove that she acted in good faith as required by Pioneer. She clearly was aware of the Bar Date, having timely filed an unrelated claim through different counsel. Yet she fails to allege that she undertook any effort to protect her rights or otherwise inquire of RCN about the status of her complaint. Instead, she has offered a somewhat bizarre theory of how creditors should treat bar dates in an effort to absolve herself of any responsibility for having failed to file her claim by a deadline of which she was fully aware.

14. There is a related question of credibility here. Ms. Craig understood the significance of the Bar Date. Ms. Craig is represented by able counsel with respect to her current claim who have asserted substantially identical claims in other large chapter 11 cases. Clearly, they appreciate the significance of bar dates in bankruptcy cases, and it seems most unlikely that they would advise Ms. Craig not to file a claim by the Bar Date. Yet that is what their theory suggests.

15. Finally, Ms. Craig fails to satisfy her burden of proving that RCN will not be prejudiced by her claim. Ms. Craig has asserted a not-insignificant claim, alleging damages on behalf of a purported class in the amount of $26 million. If that claim is as important to Ms. Craig as she would have this Court believe, she

would, and should, have timely filed it rather than waiting until after the Bar Date and approval of RCN's disclosure statement to present her motion.[2]

16. Ms. Craig nonetheless suggests that since the governmental unit bar date is November 24, 2004, and since it is possible that the Department of Labor may file a claim in this case substantially identical to Ms. Craig's, then there is no prejudice to these estates in allowing Ms. Craig's claim at this time. That argument, however, suffers from the same defects as does Ms. Craig's other burden-shifting argument summarized above. Ms. Craig is not the government, and she cannot excuse her own failure here by trying to piggy-back onto deadlines applicable to others.

CONCLUSION

17. In sum, Ms. Craig's theory that she needed to let the Bar Date pass to see whether RCN or other creditors had filed any claims would incentivize creditors to purposefully ignore bar dates. Such an approach would render meaningless the very notion of bar dates, and cannot be accepted as the law. In re Hooker Invs., 937 F.2d 833, 840 (2d Cir. 1991) ("strong policy" exists in favor of the

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[2] As noted, Ms. Craig purports to file her claim as a class claim. The Debtors have not chosen to contest her claim as a class claim in this objection, and reserve all of their rights to do so if the claim is deemed timely filed. The Debtors emphasize, however, that Ms. Craig has in no way complied with Rules 2019, 7023, 9014 or any of the case law respecting the proper procedure for asserting class proofs of claim.

integrity of the bar date); In re SC Corp., 265 B.R. 600, 662 (Bankr. D. Conn. 2001) (describing the importance and essential function of a bar date); see also In re Keene Corp., 188 B.R. 903 (Bankr. S.D.N.Y. 1995).

WHEREFORE, the Debtors respectfully request (i) that Ms. Craig's motion be denied and (ii) that this Court grant such other and further relief as is just and proper.

Dated: New York, New York
October 22, 2004

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

/s/ D.J. Baker
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Attorneys for Debtors and
Debtors-in-Possession

EXHIBIT A

FORM B10 (Official Form 10) (04/04)

UNITED STATES BANKRUPTCY COURT Southern DISTRICT OF New York

PROOF OF CLAIM

Name of Debtor: RCN Corporation, et al

Case Number: 04-13638 (RDD)

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503

Filed: USBC - Southern District of New York
RCN Corporation, Et Al.
04-13638 (RDD) 0000000009

Name of Creditor (The person or other entity to whom the debtor owes money or property):
Debra Craig

Name and address where notices should be sent:
c/o David L. Deratzian, Esq.
Hahalis & Kounoupis, PC
20 East Broad Street
Bethlehem, PA 18018
Telephone number: (610) 865-2608

☐ Check box if you a anyone else has file claim relating to you copy of statement gi particulars.
☐ Check box if you ha received any notices bankruptcy court in this case.
☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

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

1. Basis for Claim

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☒ Other Employment Discrimination

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Last four digits of SS #: _____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. Date debt was incurred: February 21, 2002

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 425,000 (unsecured) _____ (secured) _____ (priority) _____ (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ 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.

5. Secured Claim.

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

Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle
☐ Other _____

Value of Collateral: $_____

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

6. Unsecured Nonpriority Claim $_____

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,925),* 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 $2,225* 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)(____).

Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

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

9. 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.

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

THIS SPACE IS FOR COURT USE ONLY

RECEIVED
JUL - 2 2004
CLAIMS PROCESSING CENTER
USBC, SDNY

Date: June 8, 2004

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):

Debra K Craig

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.

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

AFFIDAVIT OF KATHY GERBER IN SUPPORT OF DEBTORS' OBJECTION TO MOTION TO LEAVE TO FILE PROOF OF CLAIM OF DEBRA CRAIG

I, Kathy Gerber, hereby declare that the following is true to the best of my knowledge, information and belief:

1. I am a Senior Vice President at Bankruptcy Services LLC ("Bankruptcy Services") which has been hired by the Debtors to serve as their claims and noticing agent in these Chapter 11 cases.

2. This affidavit is submitted in connection with the Debtors' Objection to Motion for Leave to File Proof of Claim of Debra Craig dated October 22, 2004.

3. On June 25, 2004, Bankruptcy Services sent notice of these Chapter 11 cases, notice of the August 11, 2004 deadline by which claimants were to file proofs of claim (the "Bar Date"), and a proof of claim form via U.S. first class mail, postage prepaid, to Debra Craig at 2925 Little Gap Road, Palmerton, Pennsylvania 18071. This mailing was not returned to Bankruptcy Services as "undeliverable".

4. All of the above-mentioned facts were documented in Bankruptcy Services's records which were kept in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of October 2004.

/s/ Kathy Gerber
Kathy Gerber