

Hearing Date: November 16, 2004 at 10:00 a.m
Objection Deadline: November 3, 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., :
Debtors. : Case No. 04-13638 RDD
: (Jointly Administered)
: :
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**RESPONSE TO DEBTOR’S SECOND OMNIBUS
OBJECTION TO CLAIM NO. 1096 SUBMITTED BY
OLD DOMINION FREIGHT LINE, INC.**

Claimant Old Dominion Freight Line, Inc. (“Old Dominion”) hereby responds to the Objection by debtor RCN Corporation to the claim it has filed in this action, which claim is listed as Claim No. 1096 in Exhibit A to the Debtor’s Second Omnibus Objection.

The Court Should Deny the Objection and Issue and Order Allowing Old Dominion's Claim

Old Dominion requests that the Court both overrule debtor's objection on the grounds that it is without any basis in fact and allow the claim on the grounds that the debtor has admitted its liability.

The debtor has objected to Old Dominion's claim on the grounds that, based upon review of its books and records, "it is possible that the [claim] represent[s] potential liabilities of non-Debtor subsidiaries of RCN corporation or unrelated entities." Debtor has also filed a declaration by Mr. Anthony M. Horvat, based solely upon information and belief, in which he asserts that the debtor "has no business relationship with Old Dominion Freight Line, Inc.," and that "rather, RCN Telecom Services, Inc. engaged Old Dominion through a freight broker."

The Court cannot give any credence whatsoever to this testimony. In the first place, Mr. Horvat admits in his declaration that he was hired after the fact to "reconcile" claims with RCN's records. Thus, Mr. Horvat clearly has no personal knowledge whatsoever concerning the existence or non-existence of a "business relationship" between the debtor and Old Dominion, nor does he have any personal knowledge that RCN Telecom Services, Inc., a non-bankrupt entity which is apparently a subsidiary of the debtor, "engaged" Old Dominion. Mr. Horvat's testimony on both of these matters constitutes inadmissible hearsay.

Moreover, Mr. Horvat does not make any effort whatsoever to describe, authenticate or establish the admissibility of any sort of "business records" which might be admissible under an exception to the hearsay rule. Indeed, if the "arrangement" to

hire the broker involved was made with “RCN Telecom Services, Inc.” as Mr. Horvat claims, that fact could only be established, if at all, through the introduction of testimony from someone qualified to testify regarding the business records of “RCN Telecom Services, Inc.” not Mr. Horvat. In other words, assuming Mr. Horvat’s testimony is something other than a guess, his testimony is almost certainly based upon something said or shown to him double hearsay.

Finally, even if it were true that RCN Telecom Services, Inc. “engaged” Old Dominion, this would not be dispositive of the issues presented, which is whether or not Old Dominion has a claim which may be properly asserted against the debtor. As a matter of fact and law, the debtor could be held liable for the claim, even if RCN Telecom Services, Inc. “engaged” Old Dominion, on the grounds that (1) the debtor made the arrangements for the shipments through the broker and benefitted from them, either directly or through its subsidiaries, (2) the debtor explicitly assumed liability for the amounts owed for the shipments, and/or (3) the debtor implicitly assumed liability for the amounts owed by paying the third party broker by paying invoices submitted by the broker. In other words, whether admissible or not, Mr. Horvat’s testimony provides no basis whatsoever for denying Old Dominion’s claim.

Furthermore, prior to the filing of its Objection, the debtor implicitly admitted that it was liable for Old Dominion’s claim. The debtor was informed of Old Dominion’s claim on or about March 24, 2004, when the undersigned, acting as counsel for Old Dominion, sent a demand letter to the Chief Financial Officer of RCN Corporation, a copy of which is attached hereto as Exhibit A. Daley dec., ¶ 3 and Ex. A thereto. In his demand letter, counsel for Old Dominion explained the underlying facts

and provided citations to authority which showed that RCN Corporation was liable for the amount demanded because of its status as the actual shipper of the goods for the shipments in issue.

On May 5, 2004, by which time RCN Corporation had still not responded to Old Dominion's demand, Old Dominion filed a lawsuit entitled *Old Dominion Freight Line, Inc. v. JJ's Mae, Inc., et al.*, Case No. C 04-01781 FMS, United States District Court for the Northern District of California (hereinafter the "California action"), in which debtor RCN Corporation was named as one of the two principal defendants, which Complaint was duly served on defendant. Daley dec., ¶ 4 and Ex. B thereto. The Summons and Complaint were immediately served on RCN Corporation.

After receipt of the Summons and Complaint, debtor RCN Corporation contacted counsel for Old Dominion and offered to settle the claim for "\$.30 on the dollar," explaining that, if the offer was not settled, Old Dominion "may wind up being an unsecured creditor in RCN's bankruptcy proceeding." Daley dec., ¶ 5 and Ex. C thereto (e-mail from David F. Kunz).

Counsel for Old Dominion responded to the offer with a series of questions, including (1) whether the "\$.30 on dollar" referred to the amount shown in the Complaint or some other amount, (2) why Old Dominion should accept only "\$.30 on the dollar," when the information on RCN's web site apparently indicated that RCN Corporation would pay pre-petition creditors 100 cents on the dollar, and (3) in light of the imminent filing of a petition in bankruptcy, how would the payment be handled, since it would be considered a preference. Daley dec., ¶ 6 and Ex. D thereto (e-mail from John M. Daley to David F. Kunz).

Counsel for debtor RCN Corporation did not respond to Old Dominion's questions. Instead, on June 9, 2004, counsel for RCN Corporation sent an e-mail advising that a petition in bankruptcy had been filed on behalf of the debtor. Daley dec., ¶ 7 and Ex. E thereto.

By offering to settle the claim and asserting that Old Dominion should settle for a reduced amount in light of the imminent filing of a petition in bankruptcy, the debtor implicitly admitted that it was liable for the debt in issue. Moreover, Old Dominion relied upon this admission in not pursuing inquiry concerning the potential liability of any other RCN entity and in filing its claim. Daley dec., ¶ 8.

Accordingly, Old Dominion respectfully requests that debtor's objection to Old Dominion's claim be overruled, and that Old Dominion's claim be allowed, subject to reduction for any amounts actually received from other parties for the same shipments.¹

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As Old Dominion explained at the time it filed the claim, the original amount claimed included amounts for shipments made under the name of "Star Power Communications" as the "shipper," but with respect to which Old Dominion asserts that RCN Corporation was the actual shipper. Since "Star Power" was listed as the "shipper" on the bills of lading, however, Old Dominion had also demanded payment for these shipments from Star Power. Shortly after debtor filed its Omnibus Objection, Old Dominion finally received a check from Star Power for these shipments. If the check clears, as Old Dominion expects, it will reduce the amount of its claim by the full amount claimed for these shipments, which was \$5,361.84, and which would reduce Old Dominion's claim to **\$16,191.19**. Daley dec., ¶ 9.

If the Court Does Not Issue an Order Allowing Old Dominion’s Claim, It Should Either Permit the Matter to Proceed as an Adversary Proceeding or Grant Leave to Permit Old Dominion to Proceed with its Claim in the Existing Lawsuit

If the Court does not issue an order allowing Old Dominion’s claim, it should at least overrule debtor’s objection and either grant Old Dominion leave to proceed with its claim against RCN Corporation in the existing California lawsuit or permit the matter to proceed as an adversary proceeding in this Court.

As the debtor concedes in the declaration of Mr. Horvat, the arrangements for the shipments in issue were made by a third party that was acting as a “property broker” in arranging for the shipments. A “property broker” is defined in 49 CFR 371.2(a) as “a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.” In this case, the property broker shall be referred to herein as “Great Northwest.”²

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As is explained in the Exhibit B, the shipping arrangements in issue were made by individuals by the name of Mike Paradee and Sam Caberos, who conducted business out of Morgan Hill, California under the name “Great Northwestern, Inc.” At the request of RCN and these individuals, Old Dominion sent its invoices to this address. However, it received payments, at least for the most part, from a company in Oregon which went by the name of “Great Northwest Transport & Logistics, Inc. Old Dominion has since discovered that the Oregon company which was sending payments to Old Dominion, which is apparently known only as “Great Northwest Transport, Inc.” to the Oregon Secretary of State, that Messrs. Paradee and Caberos were not employees of this company, and that Messrs. Paradee and Caberos were not licensed to act as “property brokers.” For convenience, however, both the individuals and the Oregon company will collectively be referred to herein as “Great Northwest.” Daley dec., ¶ 10.

Since the transportation arrangements were made by Great Northwest, and since Great Northwest billed RCN directly,³ the only information Old Dominion had with respect to the “arrangement” between RCN and Great Northwest at the time it filed its lawsuit is the bills of lading which were issued for the shipments itemized in its claim.

Since the filing of the lawsuit, however, Old Dominion has served discovery both in the California action and in a separate action it filed against the property brokers involved entitled *Old Dominion Freight Line, Inc. v. Great Northwest Transport, Inc., et al.*, Case No. 04-CV-179-KI, which action is pending before the United States District Court for the District of Oregon. Daley dec., ¶ 12 and Ex. G thereto.

The discovery served in these two lawsuits should soon provide information which is directly relevant to Old Dominion’s claim and to any objection which the debtor might assert to its claim. Among other things, Old Dominion has (1) served a request for production which seeks billing records, checks and customer lists maintained by Great Northwest, the response to which is due by mid-November 2004, and (2) noticed the depositions of Messrs. Mike Paradee (November 30, 2004) and Sam Cabrerros (December 1, 2004). Through this discovery, Old Dominion expects to learn the identity of the companies and individuals with whom the broker dealt in

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In the document attached hereto as Exhibit F, Great Northwest claimed that shippers who dealt with it could save “time and money” by taking advantage of the strengths of several different motor carriers. Daley dec., ¶ 11 and Ex. F thereto.

arranging for shipments made for any “RCN” entity or entities, which RCN entity or entities assumed liability for the shipments, and which RCN entity or entities actually paid for the “RCN” shipments. Thus, these factual issues should all be resolved within a relatively short time frame.

At this point, Old Dominion does not know whether the debtor or any other RCN entity intends to assert a defense to the claim other than the defense the debtor has asserted in the form of an objection, i.e., the defense that it is not responsible the debt at all, and that the debt is solely the responsibility of RCN Telecom Services, Inc. If the debtor does have other defenses to the claim, however, those objections could be most efficiently resolved by granting Old Dominion leave to proceed against the debtor in the California action, where other shipper defendants (and particularly JJ’s Mae, Inc., the largest shipper involved) will undoubtedly assert the same defenses as will be asserted by the debtor.

Accordingly, if the Court does not issue an order allowing Old Dominion’s claim, it should overrule debtor’s objection and either grant Old Dominion leave to proceed with its claim against RCN Corporation in the existing California lawsuit or permit the matter to proceed as an adversary proceeding in this Court.

Dated: November 1, 2004.

LAW OFFICES OF JOHN M. DALEY

By _____
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