

("Tejas") to cover the out-of-pocket costs and expenses incurred by Tejas in connection with its potential purchase of Convertible Second-Lien Notes (as defined below) to be issued by reorganized RCN as part of its exit financing upon confirmation of its joint plan of reorganization. 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

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.

York appointed the Committee of Unsecured Creditors. No other official committees have been appointed or designated in these chapter 11 cases.

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 sections 105(a) and 363(b) and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure.

RELIEF REQUESTED

6. By this motion, the Debtors request entry of an order authorizing the Debtors to pay \$200,000 to Tejas to cover the out-of-pocket costs and expenses reasonably expected to be incurred by Tejas in connection with its potential purchase of Convertible Second-Lien Notes.

BASIS FOR RELIEF

A. The Deutsche Bank Exit Facility

7. Prior to commencement of these chapter 11 cases, during the course of negotiations among the Debtors and their various creditor constituencies, the Debtors and their advisors determined that a new financing facility, designed to replace the Debtors' existing senior secured financing facility, afforded one of the most viable means for a successful restructuring. The additional working capital the

Debtors would seek in such new funding also would be critical to stabilizing and maintaining the Debtors' operations upon emergence from the restructuring process.

8. In furtherance of that goal, prior to commencing these chapter 11 cases, the Debtors' financial advisors approached numerous financial institutions, including traditional asset-based lenders, investment banks, and commercial banks, regarding the furnishing of a commitment letter to the Debtors to replace the existing senior credit facility. The Debtors and their investment bankers received proposals from four financial institutions, including a proposal from Deutsche Bank Securities, Inc. and Deutsche Bank AG Cayman Islands Branch (together, "Deutsche Bank").

9. Those negotiations resulted in the execution on May 24, 2004 of a commitment letter and related documents that set forth Deutsche Bank's commitment to provide a new senior exit financing facility to the Debtors (the "Deutsche Bank Commitment Letter"). Pursuant to the Deutsche Bank Commitment Letter, Deutsche Bank would provide an exit facility (the "Exit Facility") comprised of two components: (i) a senior first-lien secured credit facility in the principal amount of \$285 million plus a \$25 million letter of credit facility (the "Senior First-Lien Financing") and (ii) second-lien floating rate notes in the principal amount of \$150 million (the "Second-Lien Notes"). Shortly after commencement of these chapter 11

cases, this Court entered an order authorizing, approving, and ratifying the Deutsche Bank Commitment Letter and the Debtors' payment of the related fees and expenses.³

B. Alternative Exit Financing

10. On October 13, 2004, this Court entered an order approving the Debtors' disclosure statement with respect to their proposed joint plan of reorganization (the "Disclosure Statement"). In the Disclosure Statement, the Debtors stated that they were considering alternative exit financing structures which, if implemented, would alter certain terms of the Exit Facility. One alternative exit financing scenario, described in the Disclosure Statement, that the Debtors have explored since August 2004 entails the issuance of second-lien notes that are convertible into common stock of reorganized RCN in lieu of the Second-Lien Notes contemplated by the Exit Facility (the "Convertible Second-Lien Notes").

11. Up to \$150 million principal amount of Convertible Second-Lien Notes would be issued to a financial institution acceptable to the Debtors and the Creditors' Committee, who would serve as initial purchaser and/or placement agent with respect to the Convertible Second-Lien Notes. The Debtors contemplated that the Convertible Second-Lien Notes would be offered by the placement agent to "accredited investors," as that term is defined pursuant to the Securities Act of 1933,

³ The Debtors have filed a motion requesting authority to increase the total amount of the Senior First-Lien Financing from \$285 million to \$305 million, with the additional financing to be utilized by the Debtors to purchase certain membership interests in Starpower Communications, LLC.

in a transaction intended to qualify as a private placement under section 4(2) of the Securities Act.

12. This alternative was first brought to the Debtors' attention during late July 2004 in the form of a proposal from D.E. Shaw Laminar Lending 2, Inc. ("Laminar"), a significant financial institution who is not a creditor of these estates. The proposal contemplated Laminar's acquisition of a majority of the Convertible Second-Lien Notes, with the balance to be purchased by other investors. In the following weeks, the Debtors had discussions with Laminar about its proposal, and also with members of the Creditors' Committee about the possibility of their agreeing to purchase Convertible Second-Lien Notes offered to, and not purchased by, other creditors of the Debtors.

13. In late October, Tejas contacted the Debtors and also expressed significant interest in serving as placement agent with respect to, and purchasing, the Convertible Second-Lien Notes. Tejas submitted a preliminary indication of interest based on the terms of the Notes outlined in the Disclosure Statement. Thereafter, the Debtors, with significant assistance from their financial advisors, engaged in a series of intense negotiations with representatives of Laminar and Tejas in an effort to obtain the best terms practicable for the Convertible Second-Lien Notes.

14. Ultimately, the Debtors determined that the commitment provided by Laminar, in conjunction with certain members of the Creditors' Commit-

tee, constituted the best proposal for the Convertible Second-Lien Notes under the circumstances. Accordingly, the Debtors filed a motion with this Court requesting approval of such commitments on an expedited basis. However, the Debtors understand that Tejas is continuing its efforts to provide a higher and better proposal for purchase of the Convertible Second-Lien Notes. Consistent with their fiduciary duties to maximize value for the benefit of all constituencies, the Debtors will consider any such proposal up to and including the hearing on the motion to approve the Laminar and Committee commitments.

15. In order to ensure Tejas's participation in this process, Tejas requested payment of its out-of-pocket costs and expenses, including with respect to its outside counsel, in an amount up to \$200,000. The Debtors have concluded that this request is customary and reasonable in relation to the amount of financing involved and other comparable financing situations. Moreover, without an agreement by the Debtors to assist in defraying Tejas's expenses, Tejas likely would decide to remove itself from the process, thereby reducing, if not eliminating, the level of competition for the Convertible Second-Lien Notes to the potential disadvantage of these estates. Based on the foregoing, the Debtors remitted \$200,000 to Tejas's counsel to be held pending approval by this Court, absent which such amount will be returned to the Debtors. The Debtors have been advised that the Creditors' Committee supports payment of this amount.

APPLICABLE AUTHORITY

16. Bankruptcy Code section 363(c)(1) authorizes a debtor-in-possession to use property of the estate in the ordinary course of business without court approval. Bankruptcy Code section 363(b) permits a debtor-in-possession to use property of the estate "other than in the ordinary course of business" after notice and a hearing. Additionally, Bankruptcy Code section 105(a) allows a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

17. Court's in this district and elsewhere consistently have held that transactions pursuant to 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). 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)).

18. As noted by this Court, the business judgment standard under Bankruptcy Code section 363(b), at least in the Second Circuit, differs slightly from

the standard in other contexts because "it is the bankruptcy judge's business judgment that is supposed to be applied." In re RCN Corp., Case No. 04-13638 (RDD), June 22, 2004 Hr'g Tr. ¶¶ 50:24–50:2, at 46. But this Court also noted that in certain circumstances, the bankruptcy judge will give significant deference to a debtor's business judgment:

[B]ankruptcy judges and district judges in this district have been quick to, in the proper circumstances, defer in large part to the debtors' business judgment, particularly where the creditors' committee and the majority of the parties in interest support that judgment . . . particularly . . . where the action that's being proposed to be taken by the debtor was the result of a competitive market-driven bidding process.

In re RCN Corp., June 22, 2004 Hr'g Tr. ¶¶ 51:3–12, at 46.

19. Finally, under section 105(a) of the Bankruptcy Code, the Court has broad authority under its equitable powers to fashion any order or decree that would preserve or protect the value of the debtor's assets. See, e.g., Adelphia Communs. Corp. v. Rigas, 2003 U.S. Dist. LEXIS 9349, at *12 (S.D.N.Y. 2003) ("Section 105 of Title 11 provides the bankruptcy courts with a broad range of equitable powers over cases within its jurisdiction"); Griffin v. Bonapfel (In re All American of Ashburn, Inc.), 805 F.2d 1515, 1517 (11th Cir. 1986) (per curiam) (noting that section 105(a) provides authority for bankruptcy courts to protect estate property).

20. In sum, there is ample authority to support the payment of the \$200,000 to Tejas here. There is value to the Debtors in ensuring that Tejas continues to participate in the process of formulating the terms for the Convertible Second-Lien Notes. The Debtors have determined, in their business judgment, that the amount to be paid is reasonable under all the circumstances and is in the best interests of all creditors. Accordingly, the Debtors request that the Tejas be authorized to apply the \$200,000, currently being held by its counsel, against its reasonable out-of-pocket costs and expenses, including the fees and expenses of counsel.

21. 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 the Debtors to pay up to \$200,000 to Tejas as provided for herein and
(ii) granting such other and further relief as is just and proper.

Dated: New York, New York
November 10, 2004

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