Hearing Date: December 8, 2004 at 10:00 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION TO PLAN CONFIRMATION BY CREDITOR DEBRA K. CRAIG ON BEHALF OF THE RCN SAVINGS AND STOCK OWNERSHIP PLAN AND ITS PARTICIPANTS AND BENEFICIARIES

Creditor Debra K. Craig, on behalf of the RCN Savings and Stock Ownership Plan (the "Savings Plan") and its participants and beneficiaries (collectively, the "participants"), objects to the confirmation of Debtors' Joint Plan of Reorganization (the "POR") for the following reasons:

I. BACKGROUND

1. Debra K. Craig ("Craig") is a Savings Plan participant. Debtor RCN Corporation ("RCN") and others are fiduciaries of the Savings Plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, *et seq.* Craig filed, on behalf of the Savings Plan and its participants, a complaint on October 5, 2004 in the United States District Court for the Southern District of New York against Savings Plan fiduciaries other than RCN for breaches of ERISA fiduciary duties that resulted in losses to the Savings Plan. *See* Complaint, attached as Exhibit 1. Three similar additional suits have also been filed.[1] The breaches of fiduciary duty pertain to Savings Plan fiduciaries' alleged failure to take appropriate steps with respect to the Savings Plan investments in RCN stock once that stock ceased to become a prudent retirement investment because of RCN's mounting debt and other financial problems that led to its filing for Chapter 11 bankruptcy protection in this Court on May 27, 2004. Craig's Complaint includes claims against Savings Plan fiduciaries for both their pre-petition conduct relating to Savings Plan administration and their post-petition conduct in failing to protect the Savings Plan's claims in this bankruptcy.

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[1] Under ERISA, an individual plan participant (as well as the U. S. Secretary of Labor) may sue to recover, on behalf of the pension plan, the losses to the plan resulting from a breach of fiduciary duty. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-44 (1985) (interpreting ERISA 29 U.S.C. §§1109 & 1132(a)(2)). Craig's District Court action is being transferred to the District of New Jersey where it will be consolidated with other pending actions.

The precise amount of losses to the Savings Plan cannot presently be determined absent discovery and pending class certification. Craig's proof of claim filed in this Court estimated losses of $26 million, but this amount was calculated on a conservative basis on limited information and is likely to increase.

2. Craig also sought to file, on behalf of the Savings Plan and its participants, a proof of claim in these proceedings against RCN relating to the same matters set forth in her Complaint. On September 22, 2004 Craig filed a "Motion for Leave to File Proof of Claim" in this Court. That motion was denied by Order of this Court, dated November 3, 2004. Craig's appeal of this Order is currently pending before the District Court.

II. OBJECTION TO SCOPE OF INVOLUNTARY RELEASE OF CREDITORS' CLAIMS AGAINST NON-DEBTOR THIRD PARTIES

3. With respect to release of, and anti-suit injunction against, non-debtor third parties for pre-petition conduct, the POR states, in pertinent part:[2]

> H. Director, Officer, Employee and Other Third Party Releases
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> As of the Effective Date [of the POR] . . . all holders of Claims against...the Debtors shall be deemed to forever release . . . all claims . . . that are based...on any act...taking place on or prior to the Effective Date . . . relating to the Debtors, the Chapter 11 Cases, the Plan, or the Disclosure Statement against (i) the Debtors, (ii) the Reorganized Debtors and (iii) the directors, officers, agents, financial advisors, . . . employees . . . serving in such capacity as of the Confirmation Date, *provided, however*, that no Person shall be released from any claim arising from such Person's willful misconduct, intentional breach of fiduciary duty, or fraud.
>
> . . . . [A]ll holders of Claims against . . . the Debtors shall be permanently enjoined from bringing any action against the Debtors, the Reorganized Debtors, and their respective officers, directors, agents, financial advisors, . . . employees, . . . serving in such capacity as of the Confirmation Date, and their respective property, in respect of any Claims . . . related in any way to the Debtors, the Chapter 11 Cases, the Plan, or the Disclosure Statement.

(POR, Art. XIV, § H).

4. Craig objects to this provision because the release is involuntary and without consideration and because it might be interpreted to release the Savings Plan's ERISA fiduciary

[2] All quotations in this document from the POR are from Exhibit "A" to the October 12, 2004 Disclosure Statement (Dkt. No. 300).

breach claims and bar her suit against current RCN directors, officers, and employees. However, as held by the United States Court of Appeals for the Second Circuit, the injunction of suits against third-party non-debtors is only permitted "where such a step [is] essential to confirmation of the Plan." *See LTV Corp. v. Aetna Cas. and Surety Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 780 (S.D.N.Y. 1994) (citing *SEC v. Drexel Burnham Lambert Group, Inc. (In re the Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992)); *see also In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (D. Del. 1999) (involuntary releases of third parties impermissible in plan of reorganization). But there has been no finding or even an argument before this Court that Craig's suit threatens the very viability of the POR; indeed, it is hard to conceive how it might since it is a peripheral matter tangential to RCN's core business operations. Courts have found that vague concerns about avoiding distractions are insufficient to support a finding that an injunction barring suits against third parties is essential to the success of the POR:

> . . . . [T]here can be no conclusion drawn that absent . . . an injunction [barring suits against] debtors' officers, directors and employees, the reorganization has little likelihood of success. It is understood that the debtors wish to retain current management, and seek to avoid potential distractions to management that such litigation might create. However, the rationale offered does not support the release of debtor's management for prepetition conduct.

In re Genesis Health Ventures, Inc., 266 B.R. 591, 607 (D. Del. 2001).

5. Accordingly, Craig requests that the POR be modified to clearly exempt the Savings Plan's claims from the release (the current provision's exemption of claims for "intentional breach of fiduciary duty" is insufficient because a breach of fiduciary duty may be founded upon negligence as well) and her suit from any injunction.

III. OBJECTION TO SCOPE OF EXCULPATION CLAUSE BARRING CLAIMS AGAINST DEBTORS AND NON-DEBTOR THIRD PARTIES FOR ADMINISTERING BANKRUPTCY

6. The "Exculpation and Limitation of Liability" clause in the POR immunizing the Debtors and related parties from liability for conduct in administering this bankruptcy states, in pertinent part:

> I. Exculpation and Limitation of Liability
>
> The Debtors, Reorganized Debtors . . . and any and all of their respective present or former officers, directors, employees, . . . advisors, . . . or agents, . . . shall not have...any liability to any holder of a Claim...for any...acts...relating to . . . the administration of the Chapter 11 Cases, the solicitation of acceptances of the Plan, the negotiation of the Plan (whether occurring before or after the Petition Date), pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for their willful misconduct, intentional breach of fiduciary duty, or fraud, and in all respects shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under the Plan.
>
> Notwithstanding any other provision of the Plan, no holder of a Claim . . . , none of their respective agents, employees . . . , shall have any right of action against the Reorganized Debtors, the Estates . . . , or any of their respective present or former members, officers, directors, employees . . . , for any act . . . relating to . . . the administration of the Chapter 11 Cases, the solicitation of acceptances of the Plan, the pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for their willful misconduct, intentional breach of fiduciary duty, or fraud.
>
> The foregoing exculpation . . . shall not . . . limit . . . the rights . . . of the Reorganized Debtors to enforce, sue on, settle, or compromise the claims . . . retained in the Plan.

(POR, Art. XIV, § I).

7. Craig objects to the scope of this Exculpation Clause as stated because it might be interpreted to bar not only claims related to administering this bankruptcy, but also claims related to the failure of certain Savings Plan fiduciaries—which include RCN and certain of its officers and perhaps its directors—to protect and preserve the claims of the Savings Plan and its

participants in this bankruptcy. The general idea behind such exculpation clauses appears to make explicit the immunity from suit, except for fraud and willful misconduct, of those who administer the bankruptcy in fulfillment of their duties under the Bankruptcy Code. *See In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (noting that exculpation provision in POR simply stated immunity implied in Bankruptcy Code). As one court in this District stated with respect to the Creditors Committee:

> Because of its central statutory role in the Chapter 11 process, and to ensure the effective representation of its constituency, an official committee such as the Creditors Committee enjoys a qualified immunity that corresponds to, and is intended to further, the Committee's statutory duties and powers. ***The qualified immunity extends to conduct within the scope of the committee's statutory or court-ordered authority.***

Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 514 (S.D.N.Y. 1994) (emphasis added); *In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (finding same qualified immunity). However, to the extent the exculpation provision may be read as barring claims against RCN and its officers and directors when acting (or failing to act) in their capacity as Savings Plan fiduciaries, it clearly exceeds the scope of the qualified immunity implied under the Bankruptcy Code since, as the quoted passage indicates, that only "extends to conduct within the scope of the [entity's] statutory or court-ordered authority [under the Bankruptcy Code]."

8. However, Courts have explicitly recognized that ERISA creates a system in which ERISA plan fiduciaries, such as corporations and their officers and directors, operate in two distinct legal realms. The U.S. Supreme Court has stated as follows:

> Beyond the threshold statement of responsibility, however, the analogy between ERISA fiduciary and common law trustee becomes problematic. This is so because the trustee at common law characteristically wears only his fiduciary hat when he takes action to affect a beneficiary, whereas the trustee under ERISA may wear different hats . . . .

> . . . Under ERISA . . . a fiduciary may have financial interests adverse to beneficiaries. Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (e.g., modifying the terms of a plan as allowed by ERISA to provide less generous benefits) . . . .
>
> ***ERISA does require, however, that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.***

Pegram v. Herdrich, 530 U.S. 211, 225 (2000) (emphasis added).

9. Accordingly, Craig requests that the POR be modified to clarify that the qualified immunity for certain entities relating to bankruptcy administration does not extend to acts or omissions by those same persons when acting in their role as Savings Plan fiduciaries. Indeed, such an extension of the immunity is arguably impermissible under the Bankruptcy Code. *Cf.*, *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 605-609 (Bankr. D. Del. 2001) (striking statements in Exculpation Provision in part because, *inter alia*, they went beyond what is permitted in Bankruptcy Code).

IV. OBJECTION TO SCOPE OF DISCHARGE OF DEBTOR AND NON-DEBTORS TO THE EXTENT IT MAY PREVENT ACCESS NOT ONLY TO CURRENT ASSETS OF THE BANKRUPTCY ESTATE BUT TO ANY APPLICABLE INSURANCE PROCEEDS

10. The discharge provision in the POR states, in pertinent part:

F. Discharge of the Debtors and Injunction

> All consideration distributed under the Plan shall be in exchange for...release of. . . . all Claims against . . . the Debtors . . . or against any of the Debtors' assets or properties. Except as otherwise expressly provided in the Plan, the Confirmation Order acts as a discharge of all Claims against...each of the Debtors, the Debtors' assets and their properties, arising at any time before the Effective Date . . . . Any holder of such discharged Claim . . . shall be precluded from asserting against the Debtors or any of their assets or properties any . . . Claim . . . based upon any...act...that occurred before the Effective Date. The Confirmation Order shall be a judicial determination of discharge of all liabilities of the Debtors, subject to the occurrence of the Effective Date.

> In accordance with section 524 of the Bankruptcy Code, the discharge provided by this section and section 1141 of the Bankruptcy Code shall act as an injunction against the commencement or continuation of any action . . . to . . . recover the Claims...discharged hereby. Except as otherwise expressly provided in the Plan or the Confirmation Order, all Persons who . . . hold Claims against . . . the Debtors shall be permanently enjoined, on and after the Effective Date, from (i) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim or Interest, (ii) the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree, or order against the Debtors on account of any such Claim or Interest, (iii) creating, perfecting, or enforcing any encumbrance of any kind against the Debtors or against the property or interests in property of the Debtors on account of any such Claim or Interest, and (iv) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from the Debtors or against the property or interests in property of the Debtors on account of any such Claim or Interest. The foregoing injunction shall extend to successors of the Debtors (including the Reorganized Debtors) and their respective properties and interests in property.

(POR, Art. XIV, § F).

11. The Second Circuit has held that discharge of a debtor under the Bankruptcy Code does not prevent a creditor from bringing suit against the debtor as a predicate to recovery from the debtor's insurer. *See Green v. Welsh*, 956 F.2d 30, 33-35 (2d Cir. 1992). The *Green* court noted that the Bankruptcy Code states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Id.* at 33 (quoting 11 U.S.C. §524(e)). Accordingly, the Court concluded that "Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit." *Id.* Thus, the *Green* court clearly viewed preserving a creditor's ability to pursue recovery from other parties, such as insurers, as being entirely consistent with the "fresh start" policy behind the Bankruptcy Code.

12. Craig objects to the language of the POR's discharge provision since it does not clearly preserve her right to bring suit against RCN, its directors, or employees solely for the purpose of establishing the liability that may be necessary to collect from any applicable insurance

proceeds, such as fiduciary liability insurance.

V. PROPOSED CURING LANGUAGE

13. Craig requests that the following provision be added to Article XIV of the POR to address the above objections:

> § __ Preservation of ERISA Claims
>
> Notwithstanding any other provision of this Plan, nothing in this Plan releases, bars or enjoins any action against any person or entity arising under the Employee Retirement Income Security Act of 1974, 28 U.S.C. § 1001 et seq., as amended, for conduct occurring before, during or after the Petition Date and relating to the RCN Savings and Stock Ownership Plan ("Savings Plan"). Nor does anything in this Plan adversely affect the availability of any insurance coverage otherwise available to defend or pay such actions or claims relating to the Savings Plan, and neither the Bankruptcy Code nor the Plan injunction will be deemed to prevent Debra K. Craig or others from suing RCN by name for the purpose of (1) recovering against any such insurance, and (2) (subject to Craig obtaining a reversal on appeal of the November 3, 2004 Order of the Bankruptcy Court denying her Motion For Leave To File Proof of Claim) sharing in the relief provided under the Plan.[3]

[3] Craig notes that in the event her appeal should result in reversal of this Court's November 3, 2004 Order, the most efficient method to adjudicate and liquidate her proof of claim, for purposes of allowance under the POR, would be as part of the related district court litigation against other fiduciaries. This is especially so since relief from the automatic bankruptcy stay and the POR stay is necessary and appropriate as to RCN for purposes of adjudicating and collecting upon the applicable insurance coverage. Moreover, complex ERISA matters such as this would be subject to mandatory (as well as permissive) withdrawal of the reference under 28 U.S.C. § 157(d). *See*, *In re Ionosphere Clubs, Inc.*, 142 B.R. 645 (S.D.N.Y. 1992) (withdrawal of reference mandated where claim required significant interpretation, as opposed to simple application, of ERISA); *In re Chateaugay Corporation (PBGC v. LTV Corporation)*, 86 B.R. 33 (S.D.N.Y. 1988) (ERISA issues difficult and conflict with competing Bankruptcy Code provisions). Nevertheless, while Craig has proposed the language in clause "(2)" as an efficient mechanism to adjudicate the proof of claim (if it survives on appeal), it is not strictly necessary to reach this latter procedural issue at this time for purposes of the POR.

WHEREFORE, Creditor Debra K. Craig, on behalf of the RCN Savings and Stock Ownership Plan and its participants, requests that this Court enter an Order in substantially the form attached herewith, denying confirmation of the POR unless it is modified as discussed above.

Dated: New York, New York
November 29, 2004

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that the foregoing papers were filed on November 29, 2004, and served by means of the Court's Document Filing System (ECF) on all those parties who have registered for receipt of documents through the ECF.

The following persons named below were served on November 29, 2004, in the manner as indicated:

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