Roger R. Crane (RC 0469)
Richard J. Bernard (RB 6371)
NIXON PEABODY LLP
437 Madison Avenue
New York, New York 10022-7001
Telephone: (212) 940-3000
Attorneys for Edward T. Joyce, Individually and as
21st Century Telecom Group, Inc. Shareholder Representative

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)

OBJECTION OF EDWARD T. JOYCE TO CONFIRMATION OF JOINT PLAN OF REORGANIZATION OF RCN CORPORATION AND CERTAIN SUBSIDIARIES

Edward T. Joyce ("Joyce"), individually and as 21st Century Telecom Group, Inc. ("21st Century") Shareholder Representative, by its counsel, Nixon Peabody LLP, hereby objects to the confirmation of the Joint Plan of Reorganization of RCN Corporation and Certain Subsidiaries (the "Plan") proposed by the above-captioned debtors and debtors in possession (the "Debtors") and the Official Committee of Unsecured Creditors (the "Committee") appointed in these chapter 11 cases and, in support, respectfully states as follows:

PRELIMINARY STATEMENT

1. Joyce objects to confirmation of the Plan because the Plan impermissibly provides for (a) releases of third parties in contravention of section 524(e) of title 11 of the United States Code (the "Bankruptcy Code") and (b) disparate treatment of common stock equity interests and

subordinated claims based on common stock in violation of section 510(b) of the Bankruptcy Code.[1]

BACKGROUND

2. On May 27, August 5, and August 20, 2004, the Debtors filed their petitions for relief under chapter 11 of the Bankruptcy Code.

3. On September 30, 2004, the Debtors filed their Debtors' Motion for an Order Under 11 U.S.C. §§ 105 and 363 Authorizing the Purchase of Renewal and Extended Reporting Director & Officer Liability Insurance Coverage (the "Insurance Motion"), seeking authority to purchase director and officer insurance coverage to maintain the current level of coverage through April 15, 2004 and thereafter to purchase a 6-year tail on such policies at a reduced coverage level. By Order dated October 15, 2004, the Court approved the Insurance Motion in all respects.

4. On October 12, 2004, the Debtors and the Committee filed the final version of the Plan.

5. The Plan provides for the following discharges, releases, waivers and injunctions:

> **F. Discharge of the Debtors and Injunction**
>
> All consideration distributed under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims against and Interests in the Debtors of any nature whatsoever 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, liens on, and Interests in each of the Debtors, the Debtors' assets and their properties, arising at any time before the Effective Date, regardless of whether a proof of Claim or proof of Interest therefor was filed, whether the Claim or Interest is Allowed, or whether the holder thereof votes to accept the Plan or is entitled to receive a

[1] Joyce has requested and the Debtors have agreed to provide certain information concerning the Plan's liquidation analysis. Joyce hereby reserves his right to assert that the Plan fails to satisfy the "best interest of creditors test" set forth in section 1129(a)(7) rendering the Plan unconfirmable under section 1129(a)(1) of the Bankruptcy Code, pending review of such information.

distribution thereunder, subject to the occurrence of the Effective Date. Any holder of such discharged Claim or Interest shall be precluded from asserting against the Debtors or any of their assets or properties any other or further Claim or Interest based upon any document, instrument, act, omission, transaction, or other activity of any kind or nature 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, employment of process, or act to collect, offset, or recover the Claims and Interests discharged hereby. Except as otherwise expressly provided in the Plan or the Confirmation Order, all Persons who have held, hold, or may hold Claims against, or Interests in, 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.

G. Debtors' Releases

On the Effective Date, the Debtors shall release and be permanently enjoined from any prosecution or attempted prosecution of any and all claims and causes of action which they have or may have against any director, officer, or employee of the Debtors serving in such capacity as of the Confirmation Date, provided, however, that the foregoing shall not operate as a waiver of or release from any causes of action arising out of the willful misconduct, intentional breach of fiduciary duty, or fraud of such director, officer, or employee.

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, the Debtors, the Reorganized Debtors, and any Person seeking to exercise the rights of the Debtors' estates, shall be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action (including claims or causes of action arising under Chapter 5 of the Bankruptcy Code), and liabilities whatsoever (other than for willful misconduct, intentional breach of fiduciary duty, or fraud) in connection with or related to the Debtors, the Chapter 11 Cases, or the Plan, whether liquidated or unliquidated, fixed or contingent, matured or

unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise, that are base in whole or part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Chapter 11 Cases, or the Plan, and that may be asserted by or on behalf of the Debtors, the Estates, or Reorganized Debtors, against the Administrative Agent, the Senior Secured Lenders and the Indenture Trustees.

H. Director, Officer, Employee and Other Third Party Releases

As of the Effective Date, in consideration for the obligations of the Debtors and the Reorganized Debtors under the Plan and the distributions to be delivered in connection with the Plan, all holders of Claims against or Interests in the Debtors shall be deemed to forever release, waive and discharge all claims, demands, debts, rights, causes of action, or liabilities (other than the right to enforce the Debtors' or the Reorganized Debtors' obligations under the Plan, and the contracts, instruments, releases, agreements, and documents delivered under the Plan), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise that are based in whole or in part on any act or omission, transaction, event, or other occurrence taking place on or prior to the Effective Date in any way 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, attorneys, employees, equity holders, partners, members, subsidiaries, managers, affiliates and representatives of the Debtors 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.

On the Effective Date, in consideration for the obligations of the Debtors and the Reorganized Debtors and the distributions to be delivered in connection with the Plan, all holders of Claims against and Interests in the Debtors shall be permanently enjoined from bringing any action against the Debtors, the Reorganized Debtors, and their respective officers, directors, agents, financial advisors, attorneys, employees, equity holders, partners, members, subsidiaries, managers, affiliates and representatives serving in such capacity as of the Confirmation Date, and their respective property, in respect of any Claims, obligations, rights, causes of action, demands, suits, proceedings, and liabilities related in any way to the Debtors, the Chapter 11 Cases, the Plan, or the Disclosure Statement.

I. Exculpation and Limitation of Liability

The Debtors, Reorganized Debtors, the Indenture Trustees, the Creditors' Committee, the Administrative Agent, the Senior Secured Lenders, the Ad Hoc Committee of RCN Noteholders and any and all of their respective present or

> former officers, directors, employees, equity holders, partners, members, subsidiaries, managers, affiliates, advisors, attorneys, or agents, or any of their successors or assigns, shall not have or incur any liability to any holder of a Claim or an Interest, or any other party in interest, or any of their respective agents, employees, equity holders, partners, members, representatives, financial advisors, attorneys, or affiliates, or any of their successors or assigns, for any and all acts or omissions in connection with, relating to, or arising out of, 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 or Interest, no other party in interest, none of their respective agents, employees, equity holders, partners, members, representatives, financial advisors, attorneys, or affiliates, and no successors or assigns of the foregoing, shall have any right of action against the Reorganized Debtors, the Estates, the Indenture Trustees, the Creditors' Committee, the Administrative Agent, the Senior Secured Lenders, any holder of Preferred Stock, any holder of Senior Notes, or any of their respective present or former members, officers, directors, employees, equity holders, partners, or affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of, 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 and limitation on liability shall not, however, limit, abridge, or otherwise affect the rights, if any, of the Reorganized Debtors to enforce, sue on, settle, or compromise the claims, rights or causes of action, suits, or proceedings retained in the Plan.

Plan at XIV, pp. 27-28.

6. The Plan also classifies common stock in Class 8 and subordinated claims based upon common stock in Class 9 and provides for the following disparate treatment of such classes:

> Class 8 - Equity Interests

a. Interests in Class: Class 8 consists of all Equity Interests and any Claims directly or indirectly arising from or under, or relating in any way to, Common Stock, other than Class 9 Subordinated Claims.

b. Treatment: The holders of Class 8 Equity Interests shall not be entitled to, and shall not receive or retain, any property or interest in property on account of such Class 8 Equity Interest. On the Effective Date, all Common Stock shall be deemed cancelled and extinguished. If, however, Class 5 RCN General Unsecured Claims has voted to accept the Plan, the holders of Class 8 Equity Interests shall receive their Pro Rata share of New Warrants in an amount equal to .25% of the New Common Stock, subject to dilution by exercise of the Management Incentive Options and conversion of any Convertible Second-Lien Notes.

Class 9 - Subordinated Claims

a. Claims in Class: Class 9 consists of separate sub-Classes for all Subordinated Claims against each of the Debtors. Each such sub-Class is deemed to be a separate Class for all purposes under the Bankruptcy Code. A list of the sub-Classes is attached hereto as Exhibit C.

b. Treatment: The holders of Class 9 Subordinated Claims shall not be entitled to, and shall not receive or retain, any property or interest in property on account of such Subordinated Claims. On the Effective Date, all Subordinated Claims shall be cancelled and extinguished. The Debtors do not believe that there are any Subordinated Claims and, therefore, the Plan constitutes an objection to any such Claims which may be asserted.

Plan at III, p. 13.

7. Pursuant to the Plan, equity interests based upon common stock of the Debtors may receive a share of new warrants in an amount equal to .25% of the new common stock to be issued under the Plan while subordinated claims based upon common stock of the Debtor receive nothing.

OBJECTION

8. The Plan provides for third-party releases which are prohibited by section 524(e) of the Bankruptcy Code. The Plan also provides disparate treatment of Class 8 (common stock) and Class 9 (subordinated claims based upon common stock) in contravention with section 510(b) of the Bankruptcy Code.

A. The Plan Includes Impermissible Release and Exculpation Provisions in Violation of Sections 105(a), 524(e) and 1129(a)(1) of the Bankruptcy Code.

9. The Plan impermissibly provides for a broad release, discharge and exculpation to many third parties. Plan at XIV, pp. 27-28.

10. The Debtors and the Committee fail to provide any support for why such third-party releases are necessary to the Debtors' reorganization. The Debtors and the Committee also fail to describe what investigation was made as to whether the Debtors' estate has claims against the released parties before the they determined that the proposed releases of its directors, officers, among others, are consistent with the Debtors' duties as fiduciaries.

11. Section 105 of the Bankruptcy Code provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). However, Section 105 does not operate in a vacuum, and it must be read in conjunction with other express provisions of the Bankruptcy Code. It is well established that section 105 does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." 2 Lawrence P. King, Collier on Bankruptcy, ¶ 105.01[2] (15th Edition Revised 2003); (quoting United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986)). Thus, it is clear that "Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." Id., ¶ 105.01[2] (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code")). "[T]he broad grant of power given to a court under Code section 105(a) does not permit it to use its equitable powers to achieve a result not contemplated by the Code, particularly where a specific section of the Code squarely

addresses the issue before the court." In re David H. Pincus, 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002) (citing In re Fesco Plastics Corp., 996 F.2d 152, 154 (7th Cir. 1993)).

12. Section 524(e) of the Bankruptcy Code specifically states that: "[e]xcept as provided in subsection (a)(3) of this section, 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." 11 U.S.C. § 524(e). Congress enacted section 524(e) intending to prohibit strictly the release of nondebtors from their liability upon the debts they share with the debtor. See Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 211 (3d Cir. 2000); In re Sure-Snap Corp., 983 F.2d 1015, 1019 (11th Cir. 1993); Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985).

13. While courts in the Second Circuit that have reviewed the relationship between sections 105 and 524(e) have, on occasion, granted releases to certain third-parties, such releases have generally been granted only when "essential to confirmation of debtor's plan." See In re Chateaugay Corp. v. Aetna Casualty and Surety Comp., 167 B.R. 776, 780 (S.D.N.Y. 1994). Such courts have also recognized that the language of section 105(a) "does not give a bankruptcy court unfettered discretion to discharge a non-debtor from liability . . . [section 105(a)] limits the bankruptcy court's discretion to acts necessary or appropriate to carry out the purposes of the Bankruptcy Code, which intended to provide protection to debtors, not to non-debtors." See id. at 780 (quoting Ahlers, 485 U.S. at 206).

14. Certain courts, both inside and outside of the Second Circuit, that have considered the issue of whether third-party releases are appropriate, have granted third-party, non-debtor releases only in "unusual circumstances." See, e.g., In re Transit Group, Inc., 286 B.R. 811, 817 (Bankr. M.D. Fla. 2002) ("Routine inclusion [of release provisions] is not appropriate."). In determining what constitutes "unusual circumstances" the majority of courts have relied upon

whether the third parties have provided a "substantial contribution" or consideration in exchange for the release. See In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002) (granting a release to debtors' insurer where such insurer supplied $2.35 billion to a fund from which product liability claimants were to be paid under the debtors' plan). In In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2nd Cir. 1992), the United States Court of Appeals for the Second Circuit granted debtors' management a release in return for management's payment of a large settlement to the United States Securities and Exchange Commission. In In re A.H. Robins Co., 880 F.2d 694, 702 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit followed suit in allowing a release of debtors' insurer in consideration of its supplying $350 million to a fund from which product liability claimants were to be paid under the debtors' plan. Finally, the United States Bankruptcy Court for the District of Delaware has noted that in order to release a third party as part of a chapter 11 plan, a court must consider, among other things, the substantial contribution by such a third-party of assets to the debtors' estate. In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999).

15. The Debtors and the Committee have not provided, and cannot provide, any basis sufficient to allow this Court to approve under section 105(a) of the Bankruptcy Code the overly broad third-party release and exculpation provisions set forth in the Plan. Such provisions are directly contrary to section 524(e) of the Bankruptcy Code. Furthermore, the proposed release and exculpation provisions are by no means "essential to confirmation of debtor's plan" as required for approval pursuant to the limited equitable powers available under section 105(a) of the Bankruptcy Code. Chateaugay at 780. See also In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992) (holding that a non-debtor that provides funding for a reorganization plan may be released from liability to a third-party if such release "plays an

important part in the debtor's reorganization plan"); MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93 (2d Cir. 1988), cert. denied, 488 U.S. 868 (1988) (affirming a bankruptcy court's injunction of future asbestos-related lawsuits against non-debtor insurers only after having found that "the insurance settlement injunction arrangement was essential . . . to a workable reorganization").

16. The Plan provides releases to non-debtor insiders without a "substantial contribution" from such released parties, as the Sixth Circuit required in Dow Corning, 280 F.3d at 658, and as released parties provided in A.H. Robins, 880 F.2d at 702, and Drexel, 960 F.2d at 293. In fact, the released parties are giving no consideration whatsoever for the releases and exculpation being granted them in the Plan, let alone consideration bargained for at arms-length.

17. Even if this Court has the power to issue the proposed third-party releases and exculpation under section 105(a) of the Bankruptcy Code, the equities weigh heavily against granting any such release or exculpation for several reasons. The proposed third-party releases would bar claims against the Debtors' directors and officers despite the payment of the Debtors' estates to maintain insurance coverage for them through April 2011. There is also no information in the record suggesting whether any investigation was even done – let alone done by a disinterested person – into the nature and magnitude of the claims the Debtors would release.

18. Specifically, Joyce and his constituents have claims against, among others, the Debtors, certain of the Debtors' officers and directors, and certain financial advisors and/or investment bankers involved in that certain prepetition merger transaction between 21st Century and the Debtors and thereafter. Joyce's claims arise prepetition, and the Debtors have objected to them seeking to subordinate his claims totaling $58 million pursuant to section 510(b) of the

Bankruptcy Code. Despite the existence of significant insurance coverage, the releases and exculpation under the Plan appear to limit the parties against whom Joyce has the right to commence litigation. A broad reading and application of Section XIV.G. (Debtors' Releases) may also prevent Joyce and his constituents from commencing any actions that are covered under the Debtors' insurance policies. The purpose of maintaining such claims made policies during and after these chapter 11 cases was clearly to provide aggrieved parties, such as Joyce, with an asset to pursue for their legitimate damage claims. The Plan, however, appears to circumvent this purpose.

19. Section 1129(a)(1) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if its terms comply with all applicable provisions of the Bankruptcy Code. As set forth above, the releases and exculpation provisions proposed in the Plan are not permissible under the Bankruptcy Code and applicable case law, rendering the Plan unconfirmable.

B. The Plan Impermissibly Provides for Disparate Treatment of Classes 8 and 9 in Contravention of Sections 510(b) and 1129(a)(1) of the Bankruptcy Code.

20. Pursuant to the Plan, equity interests based upon common stock of the Debtors may receive a share of new warrants in an amount equal to .25% of the new common stock to be issued under the Plan while subordinated claims based upon common stock of the Debtor receive nothing. The Plan attempts to avoid applicability of section 510(b) of the Bankruptcy Code by passing the distribution of the warrants through Class 5 general unsecured claims; however, the Plan facilitates and provides for the disparate treatment by separately classifying interests and subordinated claims based on common stock.

21. The substance of the Plan clearly violates section 510(b) of the Bankruptcy Code, which provides:

> For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

22. Here, the security in question is common stock of RCN Corporation ("RCN"). The Plan separate classifies the claims subject to subordination under section 510(b) of the Bankruptcy Code) in Class 9, subordinated to equity interests also based upon RCN's common stock in Class 8.

23. In Lernout & Hauspie Speech Products, N.V. v. Baker (In the Matter of Lernout & Hauspie Speech Products, N.V.), 264 B.R. 336, 344 (Bankr. D. Del. 2001), the court held that the investors held stock in an affiliate of the parent and that application of section 510(b) required the subordination of the investors' claims to those of the affiliate's general unsecured creditors, "but may be treated pari passu for distribution purposes with other equity security holders of [the affiliate]." The Lernout & Hauspie court denied the debtors' request to subordinate the investors' claims to the level of the equity interests in the parent. Lernout & Hauspie, 264 B.R. at 343-44.

24. Section 1129(a)(1) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if its terms comply with all applicable provisions of the Bankruptcy Code. As set forth above, the disparate treatment of Classes 8 and 9 proposed in the Plan is not permissible under the Bankruptcy Code and applicable case law, rendering the Plan unconfirmable.

WHEREFORE, Joyce respectfully requests the Court to enter an order sustaining the Objection, denying confirmation to the extent sought herein and granting Joyce any further and additional relief the Court deems just and proper.

Dated: New York, New York
November 30, 2004

NIXON PEABODY LLP
Attorneys for Edward T. Joyce, Individually and as 21st Century Telecom Group, Inc. Shareholder Representative

/s/ Richard J. Bernard
Roger R. Crane (RC 0469)
Richard J. Bernard (RB 6371)
437 Madison Avenue
New York, New York 10022-7001
Telephone: (212) 940-3000