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

Objection Deadline:
November 30, 2004 at 4:00 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF MERRILL LYNCH TRUST COMPANY FSB TO THE CONFIRMATION OF THE JOINT PLAN OF REORGANIZATION OF RCN CORPORATION AND CERTAIN SUBSIDIARIES

Merrill Lynch Trust Company FSB ("Merrill Lynch"), by and through its attorneys, hereby files this objection (the "Objection") to the Joint Plan of Reorganization of RCN Corporation and Certain Subsidiaries (the "Plan"), filed by RCN Corporation ("RCN") and its affiliated debtors and debtors in possession (collectively, the "Debtors"). In support of this Objection, Merrill Lynch respectfully represents as follows:

PRELIMINARY STATEMENT

1. By way of the Plan, the Debtors ask this Court to approve a non-consensual release by holders of claims against the Debtors in favor of the Debtors' directors and officers. This broad general release apparently would bar Merrill Lynch from asserting its potential

equitable indemnification or contribution rights against certain of the Debtors' officers and directors.

2. The Debtors invite this Court to grant them this extraordinary relief, despite the fact that the Second Circuit and other courts have made clear that a non-consensual third party release cannot be approved unless unusual circumstances exist that make such a release necessary to the reorganization and fair to parties in interest. Because the Debtors have failed to demonstrate that the release is necessary to their reorganization or that the release is fair to the parties in interest, this Court should deny confirmation of the Plan as it is currently proposed.

BACKGROUND

I. The Pension Plan and the ERISA Lawsuits

3. Merrill Lynch acted as trustee with respect to the RCN Savings and Stock Ownership Plan (the "Pension Plan"). The assets of the Pension Plan included RCN common stock.

4. Very recently, certain identified and unidentified directors and officers of RCN Corporation (the "D&O Defendants") and Merrill Lynch were named as defendants in four separate federal lawsuits (the "ERISA Lawsuits") in two different districts—the District of New Jersey and the Southern District of New York.[1] On November 22, 2004 Judge Rakoff of the Southern District of New York indicated from the bench that he would transfer the two ERISA Lawsuits that were commenced in the Southern District of New York to the District of New Jersey. The caption, docket number and court in which the complaint was filed is set forth in the table below for each ERISA Lawsuit.

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[1] Additional lawsuits may be filed in the future.

Caption	Docket Number	Court
Craig v. Filipowicz, et al.	1:04-CV-07875 (JSR)	Southern District of New York
Thomas v. McCourt, et al.	3:04-CV-05068 (SRC)	District of New Jersey
Maguire v. Filipowicz, et al.	1:04-CV-08454 (JSR)	Southern District of New York
Hill v. McCourt, et al.	3:04-CV-05368 (SRC)	District of New Jersey

5. All four ERISA Lawsuits contain the same core allegations. The named plaintiff in each case seeks to represent a putative class of participants in and beneficiaries of the Pension Plan. The complaints purport to describe RCN's business strategy and financial condition, ultimately concluding in its bankruptcy, and assert that the Pension Plan's fiduciaries acted imprudently with respect to the Pension Plan's investment in RCN stock in light of these alleged facts. Among other things, all four complaints allege that, in breach of their fiduciary obligations, some or all of the D&O Defendants and/or Merrill Lynch:

- maintained investments in RCN common stock under circumstances in which they allegedly knew or should have known that such investment was not prudent;
- failed to monitor other alleged Pension Plan fiduciaries;
- failed to provide complete and accurate information to Pension Plan participants; and
- failed to avoid conflicts of interest.

The plaintiffs seek, among other things, equitable relief and unspecified monetary damages from Merrill Lynch and the D&O Defendants.

6. Depending on the outcome of the ERISA Lawsuits, Merrill Lynch may assert equitable indemnification or contribution claims against the D&O Defendants in connection with the ERISA Lawsuits. Pursuant to applicable law, Merrill Lynch's liability to the plaintiffs should be reduced by the proportionate share of the responsibility of the other defendants in the ERISA

Lawsuits. In the event that the court orders Merrill Lynch to pay the plaintiffs more than its own proportionate share of the liability, Merrill Lynch may seek equitable indemnification or contribution from the D&O Defendants in the amount of their respective proportionate shares of the liability.

II. The Plan and the Release Provision

7. On May 27, 2004, RCN and certain other Debtors filed voluntary petitions in this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). RCN Cable TV of Chicago, Inc. commenced its chapter 11 case on August 5, 2004 and certain additional Debtors commenced their chapter 11 cases on August 20, 2004. The Debtors have proposed the Plan, and the hearing to consider confirmation of the Plan is currently scheduled to be held on December 8, 2004.

8. Article XIV.H. of the Plan (the "D&O Release") provides a broad release, by all holders of claims against or interests in the Debtors, of the directors and officers of the Debtors who are serving in those capacities as of the date the Plan is confirmed with respect to claims relating to both prepetition and postpetition actions and events. Article XIV.H. provides as follows:

> 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.

Plan, Article XIV.H., at 29 (emphasis in original).

9. According to the Disclosure Statement with Respect to the Joint Plan of Reorganization of RCN Corporation and Certain Subsidiaries (the "Disclosure Statement"), RCN's current management includes David C. McCourt and Deborah M. Royster. *See* Disclosure Statement, at 33. Mr. McCourt is named as a D&O Defendant in two of the ERISA Lawsuits (the *Thomas* and *Hill* lawsuits), and Ms. Royster is named as a D&O Defendant in all four ERISA Lawsuits. Accordingly, the D&O Release appears to bar Merrill Lynch from asserting its equitable indemnification or contribution rights against Mr. McCourt and Ms. Royster. In addition, the *Thomas* and *Hill* lawsuits name the "compensation committee" (presumably, the members of the compensation committee of RCN's Board of Directors) as a defendant, and all four ERISA Lawsuits name "John Doe" or "Unknown" defendants. Thus, the D&O Release could ultimately bar Merrill Lynch from asserting its rights against other directors and officers of the Debtors as well.

MERRILL LYNCH'S STANDING TO OBJECT TO CONFIRMATION OF THE PLAN

10. As a preliminary matter, Merrill Lynch notes that it did not receive notice of the bar date established in these chapter 11 cases, and did not file a proof of claim against RCN on account of RCN's indemnification or contribution obligations before the bar date.[2] Merrill Lynch may seek this Court's permission to file a proof of claim on account of RCN's indemnification or contribution obligations.

11. While Merrill Lynch has not yet filed a proof of claim in these chapter 11 cases, it has standing to object to the confirmation of the Plan because it is a party in interest. Section 1109(b) of the Bankruptcy Code provides as follows:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b) (2004). In addition, section 1128(b) of the Bankruptcy Code provides that a party in interest may object to confirmation of a plan. *See* 11 U.S.C. § 1128(b) (2004).

12. The term "party in interest" is not limited to the list of examples set forth in section 1109(b). *See In re Amatex Corp.,* 755 F.2d 1034, 1042 (3d Cir. 1985). Rather, "the concept of 'party in interest' is an elastic and broad one designed to give the Court great latitude to ensure fair representation of all constituencies impacted in any significant way by a chapter 11 case." *In re Johns-Manville Corp.,* 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984); *see also In re Texaco, Inc.,* 81 B.R. 820, 828 (Bankr. S.D.N.Y. 1988) (stating that section 1109(b) of the

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[2] Merrill Lynch, Pierce, Fenner & Smith Incorporated (an affiliate of Merrill Lynch), did file proofs of claim against RCN and nine other Debtors, on account of unpaid fees and other claims in connection with the prepetition services it rendered to the Debtors as their financial advisor.

Bankruptcy Code must be construed broadly to permit parties affected by a proceeding to appear and be heard). Parties in interest include not only creditors, but "any entity whose pecuniary interests might be directly and adversely affected by the proposed action." *See In re Savage Industries, Inc.*, 43 F.3d 714, 720 (1st Cir. 1994).

13. Here, it is clear that Merrill Lynch is a party in interest in these chapter 11 cases, and thus has standing to object to confirmation of the Plan pursuant to sections 1109(b) and 1128(b) of the Bankruptcy Code. Merrill Lynch, by way of its contractual and equitable indemnification or contribution rights against RCN, is a creditor of RCN. This is true even though Merrill Lynch did not file a proof of claim against RCN with regard to those indemnification or contribution rights. *See In re B. Cohen & Sons Caterers, Inc.*, 124 B.R. 642, 645 n.2 (E.D. Pa. 1991), citing *Gaudio v. Stamford Color Photo, Inc. (In re Stamford Color Photo, Inc.),* 105 B.R. 204, 207 (Bankr. D. Conn. 1989) (stating that a creditor's "failure to file a proof of claim in this proceeding does not extinguish its status as a creditor"). Even if Merrill Lynch were not a creditor, it is still a party in interest because if the Plan is confirmed as it is currently proposed, the D&O Release would purportedly prevent it from pursuing its potential equitable indemnification or contribution claims against some or all of the D&O Defendants. Because the Plan adversely affects Merrill Lynch's rights, it has standing to object to the confirmation of the Plan. *See, e.g., Bankvest Capital Corp. v. Fleet Boston (In re Bankvest Capital Corp.),* 276 B.R. 12, 24-25 (Bankr. D. Mass. 2002), rev'd on other grounds, *Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.),* Case No. 02-40100, 2003 WL 1700978 (D. Mass. March 28, 2003), aff'd, 375 F.3d 51 (1st Cir. 2004) (holding that a party whose potential lien would be extinguished by a plan has standing to object to the plan); *In re Keck, Mahin & Cate,*

241 B.R. 583, 596 (Bankr. N.D. Ill. 1999) (holding that a third party indemnitor has standing to object to plan provisions that affect its rights).

OBJECTION

14. As discussed below, courts will only grant a non-consensual release of non-debtor parties in cases where unusual circumstances exist in which the release both is essential to the debtor's reorganization and is fair to the parties in interest. Here, the D&O Release should not be granted because the Debtors have failed to demonstrate that unusual circumstances exist to warrant the D&O Release.

15. Section 524(e) of the Bankruptcy Code provides: "[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) (2004). A considerable number of courts have held that section 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. *See, e.g., Resorts Int'l v. Lowenschuss (In re Lowenschuss),* 67 F.3d 1394, 1401 (9th Cir. 1995); *Landsing Diversified Properties-II v. First National Bank and Trust Company of Tulsa (In re Western Real Estate Fund, Inc.),* 922 F.2d 592, 601 (10th Cir. 1990); *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods Inc.),* 885 F.2d 621, 626 (9th Cir. 1989). Other courts have held that section 524(e) does not *per se* preclude courts from discharging the liabilities of non-debtors.

I. The Authority This Court May Have to Grant Non-Consensual Third Party Releases is Limited

16. Though courts in the Second Circuit have held that they have authority to grant non-consensual third party releases in limited circumstances pursuant to section 105(a) of the

Bankruptcy Code,[3] section 105(a) "does not give a bankruptcy court unfettered discretion to discharge a non-debtor from liability." *See LTV Corp. v. Aetna Casualty and Surety Co. (In re Chateaugay Corp.),* 167 B.R. 776, 780 (S.D.N.Y. 1994); *see also In re Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002) ("enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances.'"). Moreover, one court has noted that "requests seeking [non-debtor releases] to insulate the debtor's officers and directors should not be routinely included in every Chapter 11 plan of reorganization filed by a corporation." *In re Transit Group, Inc.,* 286 B.R. 811, 820 (Bankr. M.D. Fla. 2002). Courts have engaged in a fact specific review in determining whether to grant a third party release, weighing the equities of each case. *See In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994).

17. Consistent with the principle that courts may grant non-consensual releases to non-debtors in unusual or extraordinary cases, the Second Circuit has endorsed third party releases only when such releases were necessary to the debtor's reorganization. *See In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 293 (2d Cir. 1992) (affirming the approval of a settlement agreement enjoining a class of creditors from bringing future actions against the debtor's directors and officers, because the settlement agreement was an essential element of the debtor's reorganization and the injunction was a key component of the settlement agreement); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 837 F.2d 89, 93 (2d Cir.

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[3] Section 105(a) of the Bankruptcy Code provides: "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a) (2004).

1998) (affirming an injunction of future asbestos lawsuits against the debtor's insurers, because the injunction was essential to the debtor's reorganization).

18. Courts have held that in addition to being necessary to the debtor's reorganization, a non-consensual third party release must be fair to the releasing parties. *See, e.g., In re Continental Airlines,* 203 F.3d 203, 214 (3d Cir. 2000) (noting that the "hallmarks of permissible non-consensual releases" are "fairness, necessity to the reorganization and specific factual findings to support these conclusions"). Courts have considered the following factors in determining whether granting a third party release is equitable:

- Whether the debtor and the third party share an identity of interest, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
- Whether the non-debtor has contributed substantial assets to the reorganization;
- Whether the impacted class, or classes, has overwhelmingly voted to accept the plan;
- Whether the plan provides a mechanism to pay for all, or substantially all, of the class, or classes, affected by the injunction;
- Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full; and
- Whether the bankruptcy court made a record of specific factual findings that support its conclusions.

See, e.g., In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); *Transit Group,* 286 B.R. at 817; *Master Mortgage Inv. Fund,* 168 B.R. at 935.

19. A debtor has the burden of establishing facts necessary to support a finding by the bankruptcy court that the non-consensual third party release is necessary to its reorganization. In *Chateaugay,* the district court in this district vacated the bankruptcy court's order approving a settlement agreement containing a third party release because the bankruptcy court failed to make a finding that the release was necessary to the debtor's reorganization. *Chateaugay,* 167

B.R. at 780-81. Moreover, in *Dow Corning*, the Sixth Circuit held that the bankruptcy court did not make clear findings to support its conclusions that the proposed third party release was necessary to the debtors' reorganization and that "unusual circumstances" existed to warrant the release. The Sixth Circuit remanded the case to the bankruptcy court to make those findings. *See Dow Corning*, 280 F.3d at 659. Finally, in *Continental Airlines*, the Third Circuit reversed the order approving a non-consensual third party release, noting that the bankruptcy court made no findings that the release was necessary to the debtors' reorganization and that it was fair to the debtors' shareholders. *See Continental Airlines*, 203 F.3d at 214-15.

II. The Debtors Have Failed to Demonstrate that the D&O Release Should Be Granted

A. No Facts Have Been Asserted that Demonstrate the Necessity of the D&O Release to the Debtors' Reorganization

20. The D&O Release cannot be granted in this case, because the Debtors have not established that the D&O Release is necessary to their reorganization. For example, the Disclosure Statement and Plan do not describe what contributions, if any, the Debtors' directors and officers have made to their reorganization, and whether the directors and officers would have provided such contributions absent the D&O Release. The Disclosure Statement and Plan also do not demonstrate that the success of the Debtors' reorganization depends upon the their being free from indirect suits against parties who would have indemnity or contribution claims against them. As such, the Debtors have failed to establish that this is one of those extraordinary cases in which a non-consensual third party release is essential to the Plan.

21. The mere fact that the released parties are directors and officers of the Debtors, and the Debtors may risk being liable for indemnification obligations alone does not warrant a non-consensual third party release. In *Transit Group*, the debtor asserted that its proposed release of two officers was appropriate to avoid the officers' assertion of indemnification claims

for liabilities arising prior to the effective date of the plan. The bankruptcy court refused to grant the release, stating:

> While the possibility that such indemnification claims conceivably may exist, the debtor has failed to establish that any are imminent or likely. Because there is no imminent threat of any such indemnification claims, there is no real risk that the reorganized debtor will have to pay any indemnity claims made by these officers. Nor is there any evidence regarding the estimated amounts of such claims that [the debtor] could be required to pay. Thus, the debtor's reorganization efforts do not appear impacted. Rather, the request for a non-debtor release appears prophylactic in nature and designed to insure no such indemnification claims are ever asserted, regardless of whether any exist or not or the amount of any potential liability to the reorganized debtor.

Transit Group, 286 B.R. at 819-20. Moreover, in *Continental Airlines*, the Third Circuit criticized the district court's conclusion that the debtors' obligation to indemnify its directors and officers made the release of those directors and officers an essential element of the reorganization. *See Continental Airlines*, 203 F.3d at 215-16 (stating that the fact that the debtors "might face an indemnity claim sometime in the future, in some unspecified amount, does not make the release and permanent injunction of Plaintiffs' claims 'necessary' to ensure the success of the . . . reorganization"). If the Debtors here plan to assert that the D&O Release is necessary in this case because of their indemnification or contribution obligations to the directors and officers, they have not set forth any facts to support that argument.

22. In contrast to these chapter 11 cases, *Drexel* and *Manville* were extraordinary cases in which a central focus of the reorganizations was the global settlement of massive liabilities against the debtors and the released third parties, and the released third parties provided compensation to claimants in exchange for the release. *See Chateaugay*, 167 B.R. at 781 (noting that the released insurers in the *Manville* case "contributed $770 million to the debtor" and that the release of directors and officers in the *Drexel* case "enabled hundreds of millions of dollars to be channeled into a pool to benefit creditors"). In those cases, the courts

found that the unless the third party releases were given, the released parties would not have made their important financial and other contributions, which would have jeopardized the success of the debtors' reorganization efforts. This is not the case here.

B. The D&O Release is Inequitable

23. The Debtors have not established that the D&O Release is fair to parties in interest such as Merrill Lynch. Four facts are relevant to the analysis of the fairness of the D&O Release, all of which point to the conclusion that it is inequitable. First, it appears that the directors and officers have not contributed substantial assets to the Plan. The fact that the officers and directors of the Debtors may have made some contributions to the reorganization does not favor the granting of a release in connection with prepetition conduct, such as the D&O Release. Courts have noted that officers, directors and employees have been otherwise compensated for their postpetition contributions to the Debtors' reorganization, and the management functions they performed do not constitute contributions of "assets" to the reorganization. *See, e.g., In re Exide Technologies,* 303 B.R. 48, 73-74 (Bankr. D. Del. 2003); *In re Genesis Health Ventures, Inc.,* 266 B.R. 591, 606-07 (Bankr. D. Del. 2001). Additionally, the fact that the Debtors may wish to retain current management and seek to avoid potential distractions to directors and officers that litigation against them might create does not support the release of the Debtors' management for prepetition conduct. *See Genesis Health Ventures,* 266 B.R. at 607.

24. Second, parties whose claims would be released pursuant to the D&O Release receive no compensation beyond the distribution they would receive from the Debtors under the Plan. In other words, parties receive no compensation from the directors and officers (or any party other than the Debtors) in exchange for the D&O Release. In light of the fact that

unsecured creditors will receive a distribution from the Debtors under the Plan equal to only a fraction of the amount of their claims, the lack of additional compensation in consideration for the D&O Release supports the conclusion that the D&O Release is inequitable. *See Continental Airlines*, 203 F.3d at 215 (stating that releases must be given in exchange for reasonable consideration); *United Artists Theatre Co. v. Walton (In re United Artists Theatre Co.)*, 315 F.3d 217, 227 (3d Cir. 2003) (same).

25. Third, the Plan does not provide for an alternative mechanism for obtaining recovery on account of their claims against the Debtors' directors and officers. In this regard, these chapter 11 cases are distinguishable from *Drexel* and *Manville*. In those cases, while the third party release permanently enjoined lawsuits against the released third parties, the plans channeled the creditors' claims to allow recovery from separate assets. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760-61 (5th Cir. 1995) (discussing the *Drexel* and *Manville* cases).

26. Fourth, the D&O Release presents serious constitutional questions. The equitable indemnity or contribution claims of Merrill Lynch are property that may not be taken by governmental action without the payment of just compensation. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982), citing *Martinez v. California*, 444 U.S. 277, 281-282, 100 S.Ct. 553, 556-557, 62 L. Ed. 2d 481 (1980). If this Court were to approve the Plan as proposed, the D&O Release could operate as an uncompensated taking of Merrill Lynch's property, in violation of the Takings Clause. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 452, 66 L. Ed. 2d 358 (1980) (noting that the prohibitions of the Fifth Amendment apply to judicial takings no less than to legislative or executive takings). Moreover, Merrill Lynch has a constitutional

right under the Due Process Clause to an adjudication on the merits of its claims against the directors and officers. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L. Ed. 2d 1255 (1958) (noting that due process limits the ability of courts "even in aid of their own valid processes, to dismiss an action without affording a party the opportunity to a hearing on the merits of his cause"). The D&O Release would appear to violate this right by effectively adjudicating these claims without affording Merrill Lynch the opportunity to be heard on the merits.

27. Taken together, these facts demonstrate that the D&O Release is inequitable to Merrill Lynch and other parties in interest. Accordingly, this Court should not grant the D&O Release.

WHEREFORE, for the foregoing reasons, Merrill Lynch respectfully requests that this Court (i) deny confirmation of the Plan unless the D&O Release is deleted or modified so that Merrill Lynch is not barred from pursuing any claim in connection with the ERISA Lawsuits against parties other than the Debtors, and (ii) grant Merrill Lynch such other and further relief as this Court deems just and proper.

Dated: November 30, 2004
New York, New York

Respectfully submitted,

/s/ Michael J. Riela

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