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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
In re : Chapter 11
RCN CORPORATION, et al., : Case No. 04-13638 (RDD)
Debtors. : (Jointly Administered)
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**MOTION FOR ORDER UNDER 11 U.S.C. §§ 105(a)
AND 363(b)(1) AUTHORIZING THE CONTINUATION OF AN
EXISTING EMPLOYEE RETENTION AND SEVERANCE BENEFITS PLAN**

RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), hereby submit this motion for entry of an order under 11 U.S.C. §§ 105(a) and 363(b)(1) authorizing the continuation of an existing employee retention and severance benefits plan. In support of this motion, the Debtors respectfully represent as follows:

BACKGROUND

A. The Chapter 11 Filings

1. On May 27, 2004 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended, the "Bankruptcy Code"). The Debtors continue to manage and operate their business as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

2. No trustee or examiner has been appointed in these chapter 11 cases, and no official committees have yet been appointed or designated.

3. 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).

4. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 105 and 363.

B. Business Operations

5. RCN is a holding company for certain direct and indirect subsidiaries (collectively, the "RCN Companies") that deliver bundled communications services, including local and long distance telephone, video programming (including digital cable television and high definition television) and data services (including cable modem, high speed Internet access and dial-up Internet) to custom-

ers over their predominantly owned network. Substantially all of RCN's operating subsidiaries are not debtors in these cases. The RCN Companies provide services in Boston and 18 surrounding communities, New York City, the suburbs of Philadelphia, the Lehigh Valley in Pennsylvania, Chicago, San Francisco and several of its suburbs, and two communities in the Los Angeles area.

6. The RCN Companies also entered into strategic joint venture relationships to achieve early penetration of certain telecommunications services markets to reduce their cost of entry. In particular, the RCN Companies acquired a 50% equity interest in Starpower Communications, LLC, which provides telecommunications services in the Washington, D.C. metropolitan area, including parts of Virginia and Maryland, under the brand name "Starpower." The RCN Companies also hold an approximate 49% equity interest in Megacable, S.A. de C.V., Megacable Telecomunicaciones, S.A. de C.V. and MCM Holdings, S.A. de C.V., collectively the largest cable television provider in Mexico and owner of 27 wireline cable systems.

7. The RCN Companies are telecommunications providers, and for the most part, compete against incumbent service providers. The telecommunications business is highly competitive and requires large capital outlays for network and equipment. Returns on investment depend on the quality, innovation and pricing of the services. The RCN Companies offer cutting edge services at prices that take

into consideration the number and types of services in the bundle a customer purchases. The RCN Companies currently have in excess of one million service connections and employ approximately 2,400 employees and independent contractors.

8. RCN's directly and indirectly owned Debtor subsidiaries are Hot Spots Productions, Inc., RLH Property Corporation ("RLH"), RCN Finance, LLC ("RCN Finance"), and TEC Air, Inc. (collectively, the "Subsidiary Debtors"). None of the Subsidiary Debtors have significant operations. None of RCN's other subsidiaries or affiliates (collectively, the "Non-Debtor Affiliates") are Debtors in these cases.

C. Capital Structure and History

9. RCN was formed on September 30, 1997 when its predecessor company, C-TEC Corporation ("C-TEC"), spun-off RCN to C-TEC shareholders. Since its inception, the RCN Companies have relied extensively on access to the capital markets to finance the development of a high-speed, high-capacity, fiber-optic broadband network. In addition, the RCN Companies have accessed the capital markets to finance their strategy of expanding into new geographic areas by acquiring existing businesses. Thus, the RCN Companies have financed a significant portion of their growth, including corporate acquisitions and purchases of fixed

assets, through access to secured credit facilities and the issuance of debt securities and preferred and common stock.

D. Secured Credit Facilities

10. In June 1999, the Debtors (except for RLH and RCN Finance) and certain of the Non-Debtor Affiliates, each either as a borrower or guarantor, entered into a \$1 billion senior secured credit facility (the "Senior Credit Facility") with J.P. Morgan Chase Bank ("JPMorgan Chase") as administrative agent and collateral agent and certain other lender parties (collectively the "Senior Lenders"). The Senior Credit Facility is comprised of a \$250 million seven-year revolving credit facility, a \$250 million seven-year multi-draw term loan facility and a \$500 million eight-year term loan facility, each of which is secured by a senior lien on substantially all of the RCN Companies' assets. The Senior Credit Facility is governed by a single credit agreement dated as of June 3, 1999 (as amended, the "Senior Credit Agreement"). As of April 30, 2004, approximately \$432.5 million was outstanding under the Senior Credit Facility.

11. In June 2003, RCN entered into a \$41.5 million Commercial Term Loan and Credit Agreement (the "Junior Credit Facility") with Evergreen Investment Management Company, LLC and certain of its affiliates (collectively, "Evergreen"). As of April 30, 2004, approximately \$27.5 million was outstanding under the Junior Credit Facility. The Junior Credit Facility is secured by a junior lien

on substantially all of the assets of RCN (excluding cash), including the equity of its directly owned subsidiaries (except for RLH). Pursuant to an intercreditor agreement between the Senior Lenders and Evergreen, the liens securing the Junior Credit Facility are contractually subordinated to the liens securing the Senior Credit Facility.

E. Senior Unsecured Notes

12. Between 1997 and 2000, RCN issued the following senior notes: (i) the 10% Senior Notes due October 15, 2007, issued under the Indenture dated October 17, 1997, as amended, (ii) the 11 1/8% Senior Discount Notes due October 15, 2007, issued under the Indenture dated October 17, 1997, as amended, (iii) the 9.8% Senior Discount Notes due February 15, 2008 issued under the Indenture dated February 6, 1998, as amended, (iv) the 11% Senior Notes due July 1, 2008, issued under the Indenture dated June 24, 1998, as amended, and (v) the 10 1/8% Senior Notes due January 15, 2010, issued under the Indenture dated December 22, 1999, as amended (collectively, the "Senior Notes"). The Senior Notes are unsecured obligations of RCN only, and none of the other Debtors or Non-Debtor Affiliates have any obligations thereunder. RCN's obligations under the Senior Notes were approximately \$1.1 billion as of December 31, 2003.

F. Preferred and Common Stock

13. RCN issued two series of preferred stock (the Preferred Stock). On April 7, 1999, Hicks, Muse, Tate & Furst ("Hicks Muse") purchased

250,000 shares of Series A Preferred Stock of RCN for gross proceeds of \$250 million. As a result of the payment of dividends in kind, Hicks Muse holds 353,289 shares of Series A Preferred Stock as of March 31, 2004. On February 28, 2000, Vulcan Ventures Inc. ("Vulcan"), an investment organization of Paul G. Allen, purchased 1.65 million shares of mandatorily convertible cumulative preferred stock (the "Series B Preferred Stock") of RCN for gross proceeds of \$1.65 billion. As a result of dividends and subsequent transactions, Vulcan holds 1,222,250 shares of Series B Preferred Stock and Wells Fargo & Company, the only other holder of Series B Preferred Stock, holds 251,332 shares of Series B Preferred Stock as of March 31, 2004.

14. Shares of RCN's Class A Common Stock (the "Common Stock") were listed on the NASDAQ stock exchange under the symbol RCNC. On May 12, 2004, RCN's Common Stock was delisted from the NASDAQ stock exchange and is now quoted on the OTC Bulletin Board with its present symbol of RCNC. As of December 31, 2003, there were approximately 101 million shares of

Common Stock¹ issued and outstanding and 11,424,810 shares of Class B Common Stock issued and outstanding.

G. Events Leading to Chapter 11 Filings

15. Due to the confluence of a series of events, including the continued severe slowdown in the telecommunications industry and continued limited access to the capital markets, the RCN Companies revised their growth plan during 2002. Under the revised growth plan, the RCN Companies decided to substantially curtail future capital spending and geographic expansion of their network in all existing markets to focus on customer growth in existing markets and to reduce operating expenses.

16. Despite these and other cost-savings measures, the RCN Companies determined that their projected revenues and available cash-on-hand may be insufficient to meet their working capital, debt service, capital expenditure and other requirements (including interest payments on Senior Notes) in 2004 and

¹ This amount does not include the 11,597,193 shares of Common Stock held of record by NSTAR Communications Securities Corporation ("NSTAR Communications"). In a letter dated December 24, 2003 to Mellon Investor Services, the transfer agent for the Common Stock, NSTAR Communications purported to abandon its entire interest in such shares. This transaction is also described in Amendment No. 1 to Schedule 13D, filed with the SEC on December 24, 2003 by NSTAR, an affiliate of NSTAR Communications. RCN reserves all of its rights in respect of this transaction.

beyond. Accordingly, the RCN Companies began exploring alternatives to refinance or restructure their indebtedness.

17. In October 2003, the RCN Companies began preliminary discussions with an ad hoc committee of certain holders of Senior Notes (the "Noteholders' Committee") and JPMorgan Chase as administrative agent for the Senior Lenders concerning a possible restructuring transaction.

18. In connection with ongoing negotiations with the Noteholders' Committee and JPMorgan Chase, RCN chose not to make the interest payment scheduled for January 15, 2004 with respect to its 10 1/8% Senior Notes due 2010, and additionally chose not to make the interest payment scheduled for February 15, 2004 on the 9.8% Senior Discount Notes due 2008, the interest payment scheduled for April 15, 2004 on the 10% Senior Notes due 2007 and the interest payment scheduled for April 15, 2004 on the 11 1/8% Senior Discount Notes due 2007. The RCN Companies entered into forbearance agreements with the Senior Lenders, Evergreen and the Noteholders' Committee in which each agreed not to declare an event of default as a result of RCN's failure to make the interest payments. The parties to the forbearance agreements subsequently extended the forbearance period to facilitate additional negotiations.

19. The forbearance agreements allowed the RCN Companies to continue negotiating a financial restructuring with the Noteholders' Committee and

JPMorgan Chase, notwithstanding the expiration of the grace period associated with the missed interest payments in respect of the aforementioned Senior Notes. During the forbearance period, the RCN Companies sought to negotiate a comprehensive restructuring proposal in which the RCN Companies would undergo a financial restructuring through reorganization under chapter 11. Those negotiations included discussions with various entities on a possible new credit facility to replace the existing Senior Credit Facility, and such efforts resulted in the agreement described below.

20. Prior to the Petition Date, the Debtors entered into a commitment letter with Deutsche Bank AG Cayman Island Branch and Deutsche Bank Securities Inc. (collectively, "Deutsche Bank") pursuant to which Deutsche Bank has committed to provide the Debtors with new financing upon the consummation of a plan of reorganization. The new financing will consist of (i) a \$310 million first lien facility, including a \$285 million term loan facility and a \$25 million letter of credit facility and (ii) a \$150 million second lien facility. Each of the facilities will be guaranteed by all of RCN's wholly owned domestic subsidiaries and secured by substantially all the assets of RCN and its wholly owned domestic subsidiaries. Each of the facilities will contain prepayment provisions, covenants (including financial covenants) and events of default customary for facilities of this nature. Closing and

funding for each of the facilities is subject to satisfaction of customary conditions precedent for facilities of this nature.

21. In addition, the Debtors, the Senior Lenders and the Noteholders' Committee have agreed to support a financial restructuring on the terms set forth below:²

(a) On the effective date of a plan of reorganization or sooner, the existing holders of claims under the Senior Credit Facility will have such claims repaid in full in cash, unless any existing Senior Lender elects to roll its outstanding claim into the new facility. All undrawn letters of credit will be either replaced on the effective date of a plan of reorganization or cash collateralized on terms agreed by the issuing bank.

(b) On the effective date of a plan of reorganization, each holder of an allowed general unsecured claim will receive, in exchange for its total claim (including principal and interest in the case of a claim under the Senior Notes), its pro rata portion of 100% of the fully diluted new common stock of reorganized RCN, before

² The understanding reached between the Debtors and certain of its creditors covers the broad economic terms of the financial restructuring and not all material terms expected to be contained in a plan of reorganization. The understanding is not binding on the Debtors or the creditors with whom it was negotiated and not all of the Debtors' stakeholders are party to this understanding or participated in its negotiations.

giving effect to (i) any management incentive plan and (ii) the exercise of the equity warrants described below, if any.

(c) On the effective date of a plan of reorganization, all obligations under the Junior Credit Facility will either (i) remain outstanding on terms agreed upon between the Debtors and Evergreen or as otherwise permitted by the Bankruptcy Code or (ii) be refinanced in whole or in part.

(d) Holders of RCN's existing Preferred Stock and Common Stock will receive, on a basis to be determined, equity warrants that are exercisable into two percent of reorganized RCN's common stock (before giving effect to any management incentive plan), with a two-year term beginning on the consummation of a plan of reorganization, and set at a strike price equivalent to an enterprise valuation of \$1.66 billion. Holders of existing warrants and options will not be entitled to receive a distribution under the plan of reorganization on account of such interests.

(e) On the effective date of a plan of reorganization, the sole equity interests in reorganized RCN will consist of new common stock, the equity warrants described above and equity interests to be issued in any management incentive plan.

(f) On the effective date of a plan of reorganization, there will be no debt, security or other material obligation of reorganized RCN other than indebtedness or securities described above and obligations arising in the ordinary course of reorganized RCN's business.

RELIEF REQUESTED

22. By this motion, the Debtors seek authority under 11 U.S.C. §§ 105(a) and 363(b)(1) to continue an existing employee retention and severance benefits plan that provides retention bonuses and severance payments to the RCN Companies' key eligible management employees who are essential to the operation of the chapter 11 cases (the "Key Employee Retention and Severance Plan").

BASIS FOR RELIEF

Adoption of the Key Employee Retention and Severance Plan

23. Prior to the Petition Date, in anticipation of their restructuring and potential bankruptcy cases, the RCN Companies adopted the Key Employee Retention and Severance Plan in an effort to stabilize and maintain their operations through the restructuring process. RCN is jointly liable for all obligations under this plan. The Key Employee Retention and Severance Plan was approved by RCN's Board of Directors (the "Board") at a meeting held on January 12, 2004, became effective on February 10, 2004 (the "Effective Date") and was further modified by the Board on May 26, 2004. A copy of the Key Employee Retention and Severance Plan (excluding the Participant's list) is attached to the proposed order as Exhibit A.

24. The Debtors believe that both the retention and severance components of the Key Employee Retention and Severance Plan are essential aspects of their reorganization strategy. Turnover of experienced management personnel

during these chapter 11 cases would severely disrupt the operation of the RCN Companies' businesses. The Debtors believe that the Key Employee Retention and Severance Plan not only will ensure the continued loyalty of certain key management personnel (the "Participants"), but also will incentivize the Participants, thereby enabling the Debtors to meet certain operational goals to further enhance the going concern value of their businesses.

Summary of the Key Employee Retention and Severance Plan

25. In addition to the Chief Executive Officer³, the Key Employee Retention and Severance Plan divides Participants into three organizational tiers (collectively, the "Tiers"):⁴

- (a) Tier 1 Participants consist of seven senior executives.
- (b) Tier 2 Participants consist of eight vice-president level employees.
- (c) Tier 3 Participants consist of 60 employees at the management level or above.

³ Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Key Employee Retention and Severance Plan.

⁴ The Debtors reserve the right to replace ineligible Participants, or otherwise add Participants in the Key Employee Retention and Severance Plan in the Debtor's sole discretion, so long as such additions or deletions do not result in an increase above the total dollar amounts approved for this Key Employee Retention and Severance Plan.

26. The Key Employee Retention and Severance Plan consists of two components: the Retention Bonuses and the Severance Benefits. Each of these components is described below.

27. To participate in the Key Employee Retention and Severance Plan, any Participant who is also a participant under the RCN Companies' Chairman's Performance and Retention Plan (the "Chairman's Plan") must execute a release and waiver relinquishing all rights under the Chairman's Plan and releasing the RCN Companies from any obligations under the Chairman's Plan. Benefits under the Key Employee Retention and Severance Plan are therefore intended to be in lieu of any benefits otherwise accruing to Participants under the Chairman's Plan.

Payment of the Retention Bonuses

28. Under the Key Employee Retention and Severance Plan, the General Retention Bonuses will be payable to eligible Participants upon the Debtors' reaching certain milestones in these chapter 11 cases, and, upon the achievement of certain performance goals, certain Participants will be eligible to receive the Performance Component of the Retention Bonus.

29. General Retention Bonus. The General Retention Bonus is payable to eligible Participants in two installments. The first installment ("First Installment") was paid prepetition, in May 2004. The second installment of the General Retention Bonus ("Second Installment" and, together with the First Install-

ment, the "Installments") will be payable to each eligible Participant when the order confirming the Debtors' plan of reorganization in these chapter 11 cases (the "Plan") becomes a final order. The First Installment was paid prepetition, and the Second Installment will be paid, as follows:

(a) The Chief Executive Officer did not receive any payment in the First Installment, but will receive 75% of his Retention Bonus in the Second Installment.

(b) The Tier 1 Participants and the Tier 2 Participants received 25% of their Retention Bonus for the First Installment, and will receive another 50% of their Retention Bonus for the Second Installment.

(c) Tier 3 Participants received 50% of their Retention Bonus for the First Installment, and will receive the remaining 50% of their Retention Bonus for the Second Installment.

30. Performance Component. The Chief Executive Officer and each eligible Tier 1 Participant and Tier 2 Participant will receive 25% of his or her Retention Bonus as a Performance Bonus payable with the Second Installment if the Chief Executive Officer or such Tier 1 Participant or Tier 2 Participant has met certain operational targets established by the RCN Companies for the Participant. There is no Performance Component of the Retention Bonus for Tier 3 Participants. If the operational targets are not met, the Performance Component will not be paid.

31. To the extent that all milestones are reached with respect to both the General Retention Bonuses and the Performance Component, the total

amount of Retention Bonuses each Participant is eligible to receive will be as follows:

- (a) with respect to the Chief Executive Officer, an aggregate amount equal to 120% of his Base Salary;
- (b) with respect to the Tier 1 Participants, an aggregate amount equal to 80% of each such Participant's Base Salary;
- (c) with respect to Tier 2 Participants, an aggregate amount equal to 50% of each such Participant's Base Salary; and
- (d) with respect to Tier 3 Participants, an aggregate amount determined by the Chief Executive Officer and communicated to such Participant which shall be between 10% and 20% of such Participant's Base Salary.

The total authorized amount of the Retention Component is estimated to be approximately \$3.45 million.

32. To be eligible to receive the Second Installment of the Retention Bonus, a Participant must be continuously employed by the Debtors when the order confirming the Debtors' Plan becomes a final order.

33. Notwithstanding the foregoing, in the event that a Tier 1, Tier 2, or Tier 3 Participant's employment is terminated by the Debtors without Cause, by the Participant due to a material reduction in Base Salary, or if any Participant is terminated on account of his or her death or Disability, in each case prior to payment of the Second Installment but following the Effective Date, such Participant (or, in the case of death, his or her estate) will be entitled to receive, at the time such

amount would have been paid if the Participant's employment had not terminated, the full amount of the Second Installment of the General Retention Bonus payable to him or her, but not the Performance Component, if applicable.

34. Unless the Chief Executive Officer is terminated by the RCN Companies for Cause, the Chief Executive Officer will be entitled to receive the full amount of the General Retention Bonus payable to him, but not the Performance Component.

Payment of the Severance Benefits

35. The Severance Benefits provisions of the Key Employee Retention and Severance Plan cover all Participants. Subject to the terms herein, eligible Participants will be entitled to the following Severance Benefits:

(a) Chief Executive Officer and Tier 1 Participant Severance. The Chief Executive Officer or any eligible Tier 1 Participant will receive an amount equal to 12 months⁵ of his/her base salary in effect at the time of termination of his/her employment (payable in accordance with RCN Companies' normal payroll practices) and Health Insurance Benefits.⁶

⁵ The Senior Vice President, Legal Affairs will only be entitled to receive six months of Severance Benefits and Health Insurance Benefits in accordance with the terms herein.

⁶ Health Insurance Benefits means certain health and dental insurance coverage that is no less favorable than that received by the terminated Participant and his or her dependents in effect on the day immediately preceding the date of termination of such Participant's employment. In the event that such Health Insurance Benefits cannot be provided under the benefit programs of the
(continued...)

(b) Tier 2 Participant Severance. An eligible Tier 2 Participant will receive an amount equal to six months of such Participant's base salary in effect at the time of termination of his or her employment (payable in accordance with RCN Companies' normal payroll practices) and Health Insurance Benefits.

(c) Tier 3 Participant Severance. An eligible Tier 3 Participant will receive an amount equal to such Participant's base salary for a period determined by the Chief Executive Officer which shall be from four to six months (payable in accordance with RCN Companies' normal payroll practices).

36. The Chief Executive Officer will be entitled to receive Severance Benefits if the Chief Executive Officer's employment terminates with the RCN Companies (other than a termination by the RCN Companies with Cause) after the Effective Date and on or prior to the date that is six months following the date of consummation of the Debtors' Plan.

37. Tier 1 Participants and Tier 2 Participants will be entitled to receive Severance Benefits in the event that such Participant's employment with the RCN Companies is terminated (i) by the RCN Companies without Cause and not due to such Participant's death or Disability, or (ii) by such Participant for Good Reason,

⁶ (...continued)
Debtors, the Participant will be entitled to receive cash payments, on a monthly basis, in an amount equal to the monthly cost of such Health Insurance Benefits. Such Participant will no longer be entitled to receive any Health Insurance Benefits in the event that such Participant is provided with substantially comparable (with no preexisting condition limitations) insurance benefits coverage by another employer.

in each case on a date that is after the Effective Date and on or prior to the date that is six months following the date of consummation of the Debtors' Plan.

38. The Tier 3 Participants will be entitled to receive Severance Benefits in the event that such Participant's employment is terminated by the RCN Companies other than for Cause and not due to such Participant's death or Disability after the Effective Date and on or prior to the date that is six months following the date of consummation of the Debtors' Plan.

39. Additionally, the Severance Benefits will be reduced by the amount of salary a terminated Participant, other than the Chief Executive Officer, receives from another employer during the period that is (a) six months after the separation date in the case of the Tier 1 Participants, (b) four months after the separation date in the case of Tier 2 Participants, or (c) two months after the separation date in the case of Tier 3 Participants; provided, however, the Severance Benefits will not be reduced below the amount the Participants would have otherwise received under the RCN Companies' standard severance policy.

40. Notwithstanding the foregoing, Participants, including the Chief Executive Officer, will only be entitled to receive Severance Benefits under the Severance Component if such Participant has first executed, and fails to revoke within the statutory revocation period following termination of employment, a release, in form and substance satisfactory to the Debtors, of the RCN Companies

and their successors in interest of any claim or action related directly or indirectly to such Participant's employment by the RCN Companies or the termination thereof.

41. The total amount of Severance Benefits authorized to be paid under the Key Employee Retention and Severance Plan is approximately \$6.1 million. Since the RCN Companies anticipate retaining a substantial number of the employees covered by the Key Employee Retention and Severance Plan to maintain their continuing operations, they do not expect the total authorized payout amount of Severance Benefits will be reached.

Need for the Key Employee Retention and Severance Plan

42. The proposed Key Employee Retention and Severance Plan will enable the Debtors to retain the knowledge, experience and loyalty of the necessary employees who are crucial to their chapter 11 reorganization efforts. An inability to continue the Key Employee Retention and Severance Plan would be detrimental to employee morale, and could affect overall productivity. Moreover, if these key employees were to leave their current jobs at this early stage in the Debtors' chapter 11 cases, it is virtually assured that the Debtors would not be able to attract replacement employees of comparable experience and knowledge, or could do so only at great expense and detriment to their estates. In sum, the Debtors have determined, in the exercise of their business judgment, that their obligations under the Key Employee Retention and Severance Plan should be honored.

APPLICABLE AUTHORITY

43. Bankruptcy Code section 363(c) 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)(1) 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 this Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Although the Debtors believe that implementation of the Key Employee Retention and Severance Plan may be considered a transaction in the ordinary course of business, the Debtors are seeking this Court's approval of the Key Employee Retention and Severance Plan out of an abundance of caution.

44. This Court should approve the Key Employee Retention and Severance Plan if the Debtors demonstrate 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).

45. Once the Debtors articulate 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)).

46. The business judgment rule has vitality in chapter 11 cases and shields a debtor's management from judicial second-guessing. Id.; In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions.").

47. 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 Debtors' 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).

48. Given the importance of these critical Participants to the Debtors' efforts to maximize the value of their estates, this Court should approve the Key Employee Retention and Severance Plan. Courts in this district and others have recognized the needs of chapter 11 debtors to retain employees in order to assure continued business functions in chapter 11 and therefore have approved retention

programs under Bankruptcy Code section 363(b)(1) similar to those proposed herein (each program, of course, being tailored to the needs of particular debtors) as a proper exercise of a debtor's business judgment. See, e.g., In re Genuity Inc., Case No. 02-43558 (PCB) (Bankr. S.D.N.Y. December 30, 2002) (approving modified retention bonus plan and the implementation of severance plan and incentive bonus plan for key employees including senior management); In re Worldcom, Inc., Case No. 02-13533 (AJG) (Bankr. S.D.N.Y. October 29, 2002) (approving \$22.5 million employee retention plan for 329 key employees); In re Global Crossing Ltd., Case No. 02-40188 (REG) (Bankr. S.D.N.Y. May 24, 2002) (approving approximate \$13 million retention and discretionary bonus plan for 417 key employees); In re PSINET Inc., Case No. 01-13213 (REG) (Bankr. S.D.N.Y. June 22, 2001) (approving \$6 million bonus and severance program for 597 key employees including payments to vice-presidents and other management personnel); In re Touch America, Inc., Case No. 03-11915 (KJC) (Bankr. D. Del. September 28, 2003) (approving bonus and incentive plan for key employees including payments to senior executive personnel).

49. The Debtors have determined that the costs associated with adoption of the Key Employee Retention and Severance Plan are reasonable in light of the benefits that such Participants will provide to the Debtors' estates, their creditors and other parties in interest. Additionally the cost of the Key Employee

Retention and Severance Plan represents only a small percentage of the overall value of the Debtors' estates.

50. 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
(i) enter an order authorizing the Debtors to continue the Key Employee Retention
and Severance Plan and (ii) granting such other and further relief as is just and
proper.

Dated: New York, New York
June 11, 2004

SKADDEN, ARPS, SLATE, MEAGHER
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/s/ J. Gregory St. Clair

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