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Debtors and Debtors-in-Possession

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)

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE JOINT PLAN OF REORGANIZATION OF RCN CORPORATION AND CERTAIN SUBSIDIARIES

Dated: New York, New York
December 6, 2004

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RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession (collectively, the "Debtors"), submit this memorandum of law in support of confirmation of the Joint Plan of Reorganization of RCN Corporation and Certain Subsidiaries (as it may be further amended, supplemented, or modified, the "Plan")[1] pursuant to section 1129 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code"). In support thereof, the Debtors respectfully represent as follows:

[1] Capitalized terms not otherwise defined herein have the meanings given to them in the Plan.

PRELIMINARY STATEMENT

Beginning on May 27, 2004, the Debtors[2] sought relief under Chapter 11 of the Bankruptcy Code to effectuate the restructuring of their businesses. The Debtors are now poised to seek confirmation of their consensual Plan. The Plan represents the culmination of extraordinary efforts by the Debtors, the Creditors' Committee, and other parties in interest to reach a fair, equitable and value-maximizing restructuring of the Debtors and their non-Debtor subsidiaries. As a result of those efforts, the Debtors are in a position to confirm the Plan and emerge from Chapter 11 by year-end 2004.

The Plan is supported by each of the Debtors' major creditor groups, including the Senior Secured Lenders, Evergreen, and the Creditors' Committee, all of whom had substantial input into the development and negotiation of the Plan. Moreover, the Plan has received overwhelming acceptance measured in both amount and number of Claims and Interests in all voting Classes, with every voting Class casting their Ballots in favor of the Plan. Despite distributing the Plan and other solicitation materials to tens of thousands of parties-in-interest, only six objections to Plan confirmation have been filed.

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[2] On May 27, 2004, RCN Corporation, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc. filed their Chapter 11 Cases. On August 5, 2004 RCN Cable TV of Chicago, Inc., filed its Chapter 11 Case, and on August 20, 2004, 21st Century Telecom Services, Inc., RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc. and ON TV, Inc., filed their Chapter 11 Cases. The bankruptcy cases of the Debtors are jointly administered under case number 04-13638 (RDD).

Three of these objections pertain to contract assumption matters and therefore do not contest confirmation of the Plan. The other three objections have been resolved.[3]

The Debtors submit this memorandum of law in support of confirmation of the Plan. In further support of confirmation, the Debtors rely on the declaration of John Dubel, the Debtors' Chief Restructuring Officer, and the declaration of Timothy Coleman of the Blackstone Group L.P., the Debtors' financial advisors and investment banker (the "Dubel Declaration" and the "Coleman Declaration," respectively). These declarations have been filed concurrently with this memorandum. Additionally, the Debtors rely on the certification and declaration of Jane Sullivan of Financial Balloting Group LLC, the Debtors' solicitation and vote tabulation agent (the "Sullivan Solicitation Certification" and the "Sullivan Tabulation Declaration"), in support of confirmation of the Plan.

This memorandum addresses each of the confirmation requirements contained in sections 1123 and 1129 of the Bankruptcy Code. It also summarizes, where appropriate, certain provisions of the Plan and the declarations. This memorandum of law, however, does not simply repeat all of the provisions of the Plan, the Disclosure Statement, or the declarations. Rather, as each element of sections 1123 and 1129 of the Bankruptcy Code is addressed, the reader is directed to the pertinent provisions of the

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[3] A brief chart summarizing the objections and the Debtors' responses is attached hereto as Exhibit A.

declarations and other materials for relevant factual support. As evidenced by these materials, along with the voting results and the lack of significant objections to the Plan, the Debtors believe that the Plan is in the best interest of the Debtors, their Estates, their creditors, and all parties-in-interest. Accordingly, the Debtors respectfully request that the Plan be confirmed.

OVERVIEW OF THE PLAN

The Debtors formulated the Plan through extensive negotiations with various constituencies both prior to and after the Petition Dates. These negotiations yielded overwhelming support for the Plan. As indicated in the Sullivan Tabulation Declaration, and as noted below, all Classes of Claims and Interests that voted on the Plan voted to accept it. The salient features of the Plan are as follows:

- Holders of Class 1 Other Priority Claims, Class 2 Bank Claims, Class 4 Other Secured Claims, and Class 6 Subsidiary General Unsecured Claims are all Unimpaired under the Plan and will receive distributions equal to 100% of their Allowed Claims.

- Holders of Class 8 Equity Interests, Class 9 Subordinated Claims, and Class 10 Warrant Interests are Impaired and are not entitled to receive any distributions under the Plan on account of their Claims or Interests. However, because holders of Class 5 RCN General Unsecured Claims voted to accept the Plan, the holders of Class 8 Equity Interests will receive their Pro Rata share of New Warrants to purchase .25% of the New Common Stock of Reorganized RCN, subject to dilution by (a) exercise of the Management Incentive Options and (b) conversion of the Convertible Second-Lien Notes.

- Holders of Class 3 Evergreen Claims are Impaired and each holder of an Evergreen Claim will have its Claim reinstated, subject to the modifications set forth in the New Evergreen Credit Agreement. **Creditors holding 100% in number and 100% in amount of Claims in this Class voted to ACCEPT the Plan.**

- Holders of Class 5 RCN General Unsecured Claims are Impaired and will receive Cash equal to no more than $12,500,000 (for those making the Cash Election) and 100% of the New Common Stock of Reorganized RCN, subject to dilution by (a) the exercise of the Management Incentive Options and the New Warrants and (b) the conversion of the Convertible Second-Lien Notes. **Creditors holding 99.72% in number and 99.98% in amount of Claims in this Class voted to ACCEPT the Plan.**

- Holders of Class 7 Preferred Interests are Impaired and are not entitled to receive any property or interests on account of such Interests. However, holders of Preferred Interests that voted to accept the Plan are entitled to receive their Pro Rata share of New Warrants to purchase 1.75% of the New Common Stock of Reorganized RCN, subject to dilution by (a) the exercise of the Management Incentive Options and (b) the conversion of the Convertible Second-Lien Notes, because holders of Class 5 RCN General Unsecured Claims voted to accept the Plan. **Holders of 100% in number of Interests in this Class that voted, voted to ACCEPT the Plan.**

- The Plan also provides for, among other things: (a) the Reorganized Debtors' entry into the Exit Facility, (b) the Reorganized Debtors' issuance of the Convertible Second-Lien Notes, (c) the cancellation of all Existing Securities, (d) assumption or rejection of executory contracts and unexpired leases to which any Debtor is a party based upon the Debtors' business judgment with respect to each executory contract and lease, and (e) receipt of limited releases by various parties who made substantial contributions in connection with the Debtors' reorganization.

THE PLAN CAN AND SHOULD BE CONFIRMED

To confirm the Plan, the Court must find that both the Plan and the Debtors are in compliance with each of the requirements of section 1129(a) of the Bankruptcy Code. See Kane v. Johns-Manville Corp., 843 F.2d 636, 648 (2d Cir. 1988); WHBA Real Estate Ltd. P'ship v. Lafayette Hotel P'ship (In re Lafayette Hotel P'ship), 227 B.R. 445, 450 (S.D.N.Y. 1998), aff'd, 198 F.3d 234 (2d Cir. 1999). Both the Plan and the Debtors meet all of the requirements of section 1129(a) of the Bankruptcy Code. Accordingly, the Plan should be confirmed.

A. The Plan Complies With The Applicable Provisions Of Title 11 (Section 1129(a)(1))

Section 1129(a)(1) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1); see also In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984); In re Friese, 103 B.R. 90, 91 (Bankr. S.D.N.Y. 1989). The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code,[4] which govern classification of claims and interests and the

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[4] The Plan also complies with section 1145(a)(1) of the Bankruptcy Code, which exempts from federal and state securities laws the offer or sale under a plan of a security of a successor to the debtor principally in exchange for a claim or interest in the debtor. Specifically, pursuant to the Plan, the distribution of the New Common Stock of Reorganized RCN and the New Warrants will be in exchange (continued...)

contents of the plan. See S. Rep. No. 95-989, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6368; see also In re Johns-Manville Corp., 68 B.R. 618, 629-30 (Bankr. S.D.N.Y. 1986), aff'd in relevant part, 78 B.R. 407 (S.D.N.Y. 1987).

1. Classification Of Claims And Interests (Section 1122)

Section 1122 of the Bankruptcy Code provides that: "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122. Although this provision prohibits the inclusion of dissimilar claims in the same class, it does not require that all similar claims necessarily be placed in one class. See In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar classes be grouped together . . . .").

Moreover, courts have repeatedly held that a debtor has enormous flexibility and "considerable discretion to classify claims and interests in a chapter 11 reorganization plan." In re Wabash Valley Power Ass'n., Inc., 72 F.3d 1305, 1321 (7th Cir. 1996), (citing In re Woodbrook Assocs., 19 F.3d 312 (7th Cir. 1994)); see also In re Bloomingdale Partners, 170 B.R. 984, 996 (Bankr. N.D. Ill. 1994) ("If the plan propo-

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[4] (...continued)
for Claims against, and Interests in, the Debtors.

nent can articulate differences among the claims–that is, if the plan proponent can demonstrate the lack of 'substantial similarity' – then separate classification is proper.").

The Plan's classification scheme meets these requirements. In addition to Administrative Claims and Priority Tax Claims, which are not required to be classified, the Plan designates seven Classes of Claims and three Classes of Interests. As explained in the Dubel Declaration, the Plan provides for the separate classification of Claims and Interests with respect to each Debtor based upon differences in their legal nature or priority. See Dubel Declaration at ¶¶ 15-16. Thus, valid factual and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan. Moreover, the Claims or Interests within a particular Class are substantially similar to the other Claims or Interests in that Class. See Dubel Declaration at ¶¶ 15-16. The Plan therefore satisfies section 1122 of the Bankruptcy Code.

2. Mandatory Contents Of The Plan (Section 1123(a))

Section 1123(a) of the Bankruptcy Code identifies the requirements for the contents of a plan of reorganization. The Plan fully complies with each of these requirements.

a. The Plan Properly Designates, Classifies, And Specifies The Treatment Of Claims And Interests (Sections 1123(a)(1), 1123(a)(2), 1123(a)(3), And 1123(a)(4))

The Plan designates Classes of Claims and Interests as required by section 1123(a)(1) of the Bankruptcy Code. The Plan designates which Classes of Claims and

Interests are Unimpaired, as well as the proposed treatment of each Impaired Class, in accordance with sections 1123(a)(2) and 1123(a)(3) of the Bankruptcy Code, respectively. As required by section 1123(a)(4) of the Bankruptcy Code, the Plan treats each Claim or Interest within a Class the same as each other Claim or Interest in that Class. See Plan, Article III.

b. The Plan Provides Adequate Means For Its Implementation (Section 1123(a)(5))

The Plan contains provisions that provide adequate means for its implementation in accordance with section 1123(a)(5) of the Bankruptcy Code. Such provisions relate to, among other things, (a) the continued corporate existence of each of the Debtors; (b) the execution and delivery of the corporate documents that will govern the Debtors, including, but not limited to, the Reorganized RCN Certificate of Incorporation and By-laws; (c) the termination of the current board of directors of RCN and the selection of a new board by the Creditors' Committee and D.E. Shaw Laminar Lending 2, Inc. ("Laminar"); (d) the anticipated entry by Reorganized RCN into the Exit Facility; (e) the issuance and distribution of the New Common Stock, New Warrants, and the Convertible-Second Lien Notes; and (f) the cancellation of the Existing Securities.[5]

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[5] In addition, the Debtors will issue the Convertible Second-Lien Notes pursuant to an indenture that will be subject to, and governed by, the provisions of the Trust Indenture Act. See 15 U.S.C. §§ 77aaa, et al. A copy of the indenture was filed as part of the Plan Supplement. As previously described to this Court, the Convertible Second-Lien Notes also are being offered to "qualified institutional (continued...)

Moreover, as explained in the Dubel Declaration, the anticipated availability of the Exit Facility, including the Convertible Second-Lien Notes, will provide the Debtors with sufficient Cash to make all payments required to be made on the Effective Date pursuant to the terms of the Plan, including the payment in full of the Bank Claims, Administrative Claims, Priority Tax Claims, Other Priority Claims, and Subsidiary Debtor Claims. See Dubel Declaration at ¶¶ 17-19. Accordingly, the Plan contains adequate means for its implementation.

c. The Plan Prohibits The Issuance Of Non-Voting Securities (Section 1123(a)(6))

Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of nonvoting equity securities. In accordance with this requirement, the Plan provides that the certificate of incorporation and the by-laws or similar constituent documents of Reorganized RCN will prohibit the issuance of nonvoting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code. See Plan, Article IV.B.1. The Reorganized RCN Certificate Of Incorporation And By-Laws, filed as part of the Plan Supplement, includes a provision

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[5] (...continued)
buyers" in a "private placement" transaction exempt from registration under the Securities Act pursuant to section 4(2) of the Securities Act. Accordingly, the Convertible Second-Lien Notes will be issued in compliance with applicable law, including, but not limited to, the Trust Indenture Act and section 4(2) of the Securities Act.

prohibiting the issuance of nonvoting equity securities. See Plan Supplement, Exhibit A ¶3.

d. The Selection Of Officers And Directors Is Consistent With The Interests Of Claim And Interest Holders And With Public Policy (Sections 1123(a)(7), 1129(a)(5))

The Bankruptcy Code requires that a plan of reorganization "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan." See 11 U.S.C. § 1123(a)(7). This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which directs the court to scrutinize the methods by which the management of the reorganized corporation is to be chosen to provide adequate representation of those whose investments are involved in the reorganization – i.e., creditors and equity holders. See 7 Collier, Bankruptcy ¶ 1123.01[7], at 1123-15 (15th rev. ed. 2004); see also Acequia Inc. v. Clinton (In re Acequia), 787 F.2d at 1352, 1361-62 (9th Cir. 1986).

The Plan's provisions for selection of the new officers and directors of Reorganized RCN is consistent with the requirements of sections 1123(a)(7) and 1129(a)(5) of the Bankruptcy Code. The initial board of directors of Reorganized RCN will consist of seven members as selected by the Creditors' Committee; *provided*, *however*, that Laminar will have the right, but not the obligation, to nominate one qualified candidate for election as a director of Reorganized RCN so long as Laminar

holds at least $25 million principal amount of Convertible Second-Lien Notes. See Plan, Article IV.E; Plan Supplement, Exhibit G.

Creditors represented by the Creditors' Committee and Laminar collectively will receive under the Plan 100% of the New Common Stock of Reorganized RCN. The board selection process embodied in the Plan, therefore, ensures that creditor interests will be adequately represented and that the members will be independent and highly qualified. Moreover, by vesting the Creditors' Committee and Laminar with the right to appoint the new board of directors, the Plan ensures that the compensation and indemnification arrangements for the board are consistent with the interests of creditors, equity security holders, and public policy. Accordingly, the Plan satisfies the requirements of sections 1123(a)(7) and 1129(a)(5) of the Bankruptcy Code.

3. Discretionary Contents Of The Plan (Section 1123(b))

Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan of reorganization. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. See 11 U.S.C. § 1123(b)(1), (2). A plan also may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any . . . claim or interest." 11 U.S.C. § 1123(b)(3)(A)-(B); see also § 1123(b)(4). Finally, a plan may "modify the rights of holders of secured claims . . . or . . . unsecured

claims, or leave unaffected the rights of holders of any class of claims," and may "include any other appropriate provision not inconsistent with the applicable provisions of [title 11]." 11 U.S.C. § 1123(b)(5)-(6).

The Plan contains a number of these discretionary provisions. Article III of the Plan Impairs certain Classes of Claims and Interests while leaving others Unimpaired. The Plan also provides for the retention and enforcement of Estate Claims and causes of action. See Plan, Article G. Finally, in accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with applicable provisions of the Bankruptcy Code, including provisions for assumption and rejection of executory contracts and unexpired leases. See Plan, Articles IV and VII.

B. Section 1129(a)(2) – The Proponents Of The Plan Have Complied With The Applicable Provisions Of Title 11

Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a plan comply with the applicable provisions of the Bankruptcy Code. The legislative history of section 1129(a)(2) reveals that the principal purpose of this section is to ensure compliance with the disclosure and solicitation requirements set forth in section 1125 of the Bankruptcy Code. See In re Texaco Inc., 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988), appeal dismissed, 82 B.R. 38 (S.D.N.Y. 1988); Toy & Sports Warehouse, 37 B.R. at 149; S. Rep. No. 95-989, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5912 ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with

the applicable provisions of Chapter 11, such as section 1125 regarding disclosure."); H.R. Rep. No. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6368.

By order dated October 12, 2004, the Court approved the Debtors' Disclosure Statement and found that it contained adequate information within the meaning of section 1125 of the Bankruptcy Code. In addition, on October 12, 2004, the Court entered an order (the "Solicitation Procedures Order") approving (a) all materials to be transmitted to those creditors entitled to vote on the Plan, (b) the timing and method of delivery of the solicitation packages and non-voting packages, (c) the rules for tabulating votes to accept or reject the Plan, and (d) the timing and method of publication of a notice of the confirmation hearing and related matters. As described in detail in the Sullivan Solicitation Certification, on October 15, 2004, the Debtors' solicitation agent mailed solicitation materials, including a notice of hearing on confirmation of the Plan and the Disclosure Statement and all the appendices attached thereto, to all parties specified in the Solicitation Procedures Order. See Sullivan Solicitation Certification at ¶6. The Debtors also caused the confirmation hearing notice to be published on October 15, 2004 in the Wall Street Journal, as evidenced by the Certificate of Publication filed by the Debtors on November 23, 2004 (Docket No. 417).

Based upon the foregoing, the Debtors and the Creditors' Committee have complied with the applicable provisions of section 1125 of the Bankruptcy Code. The Plan therefore meets the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. Section 1129(a)(3) – The Plan Has Been Proposed In Good Faith

Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). "Although the term 'good faith' is not further defined in the [Bankruptcy] Code, in the context of a Chapter 11 plan, courts have held a plan is to be considered in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code.'" In re PPI Enters. (U.S.), Inc., 228 B.R. 339, 347 (Bankr. D. Del. 1998) (quoting Toy & Sports Warehouse, 37 B.R. at 149) subsequently aff'd 324 F.3d 197 (3d Cir. 2003); Kane v. Johns-Manville Corp., 843 F.2d 636,649 (2d Cir. 1988); In re Texaco, 84 B.R. at 907; In re Zenith Elecs. Corp., 241 B.R. 92, 107 (Bankr. D. Del. 1999) ("The good faith standard requires that the plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.'") (citations omitted).

As explained in detail in the Dubel Declaration, the Plan has been proposed by the Debtors and the Creditors' Committee in good faith, with the legitimate and honest purpose of reorganizing the Debtors' ongoing businesses as a means of maximizing the value of each of the Debtors and the recoveries to Claim and Interest holders. See Dubel Declaration at ¶¶ 8-13. The development of the Plan involved the active participation of, and arms' length negotiations among, the Debtors, the Senior

Secured Lenders (through the Administrative Agent), the Ad Hoc Committee of Senior Noteholders, and the Creditors' Committee (whose members previously served on the Ad Hoc Committee of Senior Noteholders). See Dubel Declaration ¶¶ 8-13; see also In re Eagle-Picher, Inc., 203 B.R. 256, 274 (S.D. Ohio 1996) (plan proposed in good faith when, among other things, it was based on extensive arms' length negotiations among plan proponents).

Moreover, the estimated recovery for all Classes of Claims and Interests under the Plan is significantly greater than any value that would be distributed following a liquidation of the Debtors' assets. See Disclosure Statement, Exhibit C; Coleman Declaration ¶¶ 15-19. This further evidences the good faith belief of the Debtors that the Plan is being proposed for the honest purpose of reorganizing the Debtors' businesses. Based upon all of the foregoing, the Debtors believe that the good faith requirements of section 1129(a)(3) of the Bankruptcy Code have been fully satisfied.

D. Section 1129(a)(4) – All Payments To Be Made By The Debtors For Services In Connection With These Cases Are Subject To The Approval Of The Court

The Bankruptcy Code requires that any payment made or to be made for services or for costs and expenses in connection with the case has been approved by, or is subject to the approval of, the court as reasonable. See 11 U.S.C. § 1129(a)(4). All payments made or to be made by the Debtors for services or costs in connection with these Chapter 11 Cases, including all Claims for Professionals Fees and expenses, have

been approved by or are subject to approval by this Court pursuant to, among other things, sections 327, 328, 330, 331, 503(b) and 1103 of the Bankruptcy Code. See Plan, Articles II and XIV. Accordingly, the Plan fully complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. Section 1129(a)(5) – The Proponents Will Have Disclosed All Required Information Regarding Postconfirmation Directors, Management And Insiders

Section 1129(a)(5) of the Bankruptcy Code requires the disclosure of the identity of those individuals who will serve as directors and management of the reorganized debtor; the identity of any insider to be employed or retained by the reorganized debtor; and the compensation proposed to be paid to such insider. In addition, the appointment or continuation in office of such persons must be consistent with the interests of creditors, equity security holders, and public policy. See 11 U.S.C. § 1129(a)(5). In determining whether the postconfirmation management of a debtor is consistent with the interests of creditors, equity security holders, and public policy, a court must consider proposed management's competence, discretion, experience, and affiliation with entities having interests adverse to the debtor. See In re Sherwood Square Assocs., 107 B.R. 872, 878 (Bankr. D. Md. 1989); see also In re W.E. Parks Lumber Co., 19 B.R. 285, 292 (Bankr. W.D. La. 1982).

The manner of selection of Reorganized RCN's board is described above and, in the Debtors' view, complies with § 1129(a)(5). The Debtors have been advised

that the individuals to be selected by the Creditors' Committee to serve on the initial board will be disclosed at the Confirmation Hearing. Laminar has selected Daniel Kar Keung Tseung as its nominee to the initial board of Reorganized RCN. As explained above, the appointment of directors and officers by the Creditors' Committee and Laminar is consistent with the interests of all Classes of Claims and Interests and with public policy inasmuch as they are being selected, in accordance with the Plan, by representatives of the constituents who will receive 100% of the New Common Stock of Reorganized RCN and hence should be sufficiently independent and free of conflicts to serve adequately the interests of all parties. Accordingly, the Plan fully satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. Section 1129(a)(6) – The Plan Does Not Provide For Any Rate Change Subject To Regulatory Approval

Section 1129(a)(6) of the Bankruptcy Code requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these cases because the Debtors' Plan does not provide for any rate change that requires regulatory approval.

G. Section 1129(a)(7) – The Plan Is In The Best Interest Of Creditors

The "best interests of creditors" test, set forth in section 1129(a)(7) of the Bankruptcy Code, requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest has accepted the plan or will receive property of a value not less than what such holder would receive if the debtor were liquidated. See Kane v. Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988); In re The Leslie Fay Cos., 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997). In considering whether a plan is in the "best interests" of creditors, a court is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all of the debtor's assets under Chapter 7 of the Bankruptcy Code. See generally In re The Leslie Fay Cos., 207 B.R. at 787; See generally In re Crowthers McCall Pattern, Inc., 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990).

One objector suggested in a footnote in its objection that the Plan may not satisfy the best interests test.[6] While this objection has now been withdrawn, as explained in the Liquidation Analysis attached to the Disclosure Statement as Exhibit C, and as further explained in the Coleman Declaration, the Debtors estimate that creditors would receive the estimated percentage distributions identified in the table below in a Chapter 7 liquidation and under the Plan.

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[6] This objection was filed by Edward T. Joyce (Docket No. 438).

Class	Chapter 7 Estimated Percentage Distribution	Plan Estimated Percentage Distribution
1 - Other Priority Claims	100%	100%
2 - Bank Claims	100%	100%
3 - Evergreen Claims	100%	100%
4 - Other Secured Claims	100%	100%
5 - RCN General Unsecured Claims	**9.4%**	**60.5%**
6 - Subsidiary General Unsecured Claims	**9.4%**	**100%**
7 - Preferred Interests	n.a	n.a.
8 - Equity Interests	n.a.	n.a.
9 - Subordinated Claims	n.a.	n.a.
10 - Warrant Interests	n.a.	n.a.

It is clear from this summary that each holder of a Claim or Interest in an Impaired Class will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would receive in a Chapter 7 liquidation of the Debtors' assets on such date. As a result, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

H. Section 1129(a)(8) – Acceptance By Classes Of Creditors And Interest Holders

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests under a plan has either accepted the plan or is not impaired under the plan. Even if certain impaired classes of claims or interests do not accept a plan, the plan

nevertheless may be confirmed pursuant to the "cramdown" provision of section 1129(b)(1) of the Bankruptcy Code. As a result, the confirmation requirement contained in section 1129(a)(8) is not absolutely necessary for confirmation of a plan of reorganization if the standards set forth in 11 U.S.C. § 1129(b) can be met.

Here, Classes 1, 2, 4 and 6 are Unimpaired under the Plan and therefore are conclusively presumed to have accepted the Plan. See 11 U.S.C. § 1126(f). Holders of Claims and Interests in Classes 8, 9, and 10 are not entitled to receive any distributions under the Plan and therefore are conclusively presumed to have rejected the Plan. See 11 U.S.C. § 1126(g). As discussed below, however, the Plan nonetheless satisfies the cramdown requirements of § 1129(b). The remaining Classes - Classes 3, 5, and 7 - are Impaired under the Plan; were entitled to vote on the Plan; and voted overwhelmingly in favor of the Plan in satisfaction of the acceptance requirements of section 1126 of the Bankruptcy Code. See Sullivan Tabulation Declaration ¶17.

I. Section 1129(a)(9) – The Plan Provides For The Payment Of Priority Claims

Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. In particular, under section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(1) of the Bankruptcy Code – administrative claims allowed under 11 U.S.C. § 503(b) – must receive cash equal to the allowed amount of such claims. Article II.A.1 of

the Plan satisfies this requirement by generally requiring payment of all Administrative Claims in Cash.

Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in sections 507(a)(3) through (7) of the Bankruptcy Code – generally, wage, employee benefit, and deposit claims entitled to priority – must receive deferred cash payments of a value equal to the allowed amount of such claim or cash equal to the allowed amount of such claim on the effective date of the plan, depending upon whether the class has accepted the plan. Article III.c.1 of the Plan satisfies this requirement by generally requiring payment of all Other Priority Claims in Cash.

Finally, section 1129(a)(9)(C) provides that the holder of claims of the kind specified in section 507(a)(8) of the Bankruptcy Code – priority tax claims – must receive deferred cash payments over a period not to exceed six years, the present value of which equals the allowed amount of the claim. Article III.A.2 of the Plan satisfies this requirement by providing for payment of Priority Tax Claims in Cash pursuant to section 1129(a)(9)(C) of the Bankruptcy Code.

J. Section 1129(a)(l0) – The Plan Has Been Accepted By At Least One Impaired, Non-Insider Class

The Bankruptcy Code provides that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

11 U.S.C. § 1129(a)(10). As described above and as indicated in the Sullivan Tabulation Declaration, the Debtors have satisfied this requirement.

K. Section 1129(a)(11) – The Plan Is Feasible

A plan of reorganization may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." See 11 U.S.C. § 1129(a)(11). This section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." 7 Collier, Bankruptcy ¶ 1129.03[11], at 1129-69 (15th rev. ed. 2004); see also In re Cellular Info. Sys., Inc., 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); In re Rivers End Apartments, Ltd., 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994); In re Johns-Manville Corp., 68 B.R. 618, 635 (Bankr. S.D.N.Y. 1986), aff'd in relevant part, 78 B.R. 407 (S.D.N.Y. 1987).

Section 1129(a)(11) does not require a guarantee of the plan's success. Rather, the proper standard is whether the plan offers a "reasonable assurance" of success. See Kane, 843 F.2d at 649 (a plan may be feasible although its success is not guaranteed); Texaco, 84 B.R. at 910 ("All that is required is that there be reasonable assurance of commercial viability."); In re Prudential Energy Co., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11)"); In re Drexel Burnham

Lambert Group, Inc., 138 B.R. at 723, 762 (Bankr. S.D.N.Y. 1992) ("Feasibility does not, nor can it, require the certainty that a reorganized company will succeed") (citation omitted).

The Debtors believe that the Plan is feasible, and that confirmation of the Plan is not likely to be followed by the liquidation or further financial reorganization of the Reorganized Debtors. The Debtors base this conclusion upon the Projections attached to the Disclosure Statement as Exhibit D, the Dubel Declaration, and the Coleman Declaration. The declarations and the Projections contain significant detail concerning the efforts underlying preparation of the Debtors' go-forward business plan, including the Projections, and the reasons for the conclusion of Messrs. Dubel and Coleman that the Plan is feasible and not likely to be followed by another financial restructuring.

While their testimony will not be repeated here, the Debtors emphasize (i) that the Plan will eliminate approximately $2.8 billion in RCN General Unsecured Claims and Preferred Interests, thereby significantly reducing Reorganized RCN's interest and related obligations; (ii) that the Debtors will have ample cash resources to satisfy all Claims under the Plan and projected operating and capital expenditures through the 2009 projection period; and (iii) that the individuals managing the Reorganized Debtors are well qualified to lead them in achieving the estimated financial results

set forth in the Projections because they possess many years of experience in the cable and telecommunications industry.

Based on the foregoing, the Debtors submit that (a) the Plan provides a feasible means of completing a reorganization of the Debtors' businesses and (b) subject to the risks described in the Disclosure Statement, there is reasonable assurance that the Debtors will be able to satisfy all of their obligations under the Plan. As a result, the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. Section 1129(a)(12) – The Plan Provides For The Payment Of Fees

The Bankruptcy Code requires that, as a condition precedent to the confirmation of a plan of reorganization, "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). All fees payable pursuant to 28 U.S.C. § 1930 have been paid or will be paid in Cash on or before the Effective Date.

M. Section 1129(a)(13) – Continuation Of Retiree Benefits

Section 1129(a)(13) of the Bankruptcy Code requires that a plan of reorganization provide for the continuation, after the plan's effective date, of all retiree benefits at the levels established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code for the duration of the period that the debtor has obligated itself

to provide such benefits. The Debtors maintain no retiree benefit plans. Accordingly, section 1129(a)(13) of the Bankruptcy Code is satisfied.

N. Section 1129(b) – The Plan Satisfies The "Cramdown" Requirements

Holders of Class 7 Preferred Interests stand to receive a recovery under the Plan (New Warrants to purchase 1.75% of the New Common Stock of Reorganized RCN) despite the fact that Claim holders of higher priority - Class 5 RCN General Unsecured Claims - will not be paid in full under the Plan. Similarly, holders of Class 8 Equity Interests stand to receive a recovery under the Plan (New Warrants to purchase .25% of the New Common Stock of Reorganized RCN) despite the fact that holders of Class 5 RCN General Unsecured Claims and holders of Class 7 Preferred Interests will not be paid in full under the Plan. Finally, holders of Class 9 Subordinated Claims and Class 10 Warrant Interests will not receive any distributions under the Plan.

Notwithstanding these provisions and the deemed rejection of the Plan by Classes 8, 9, and 10, the Plan nonetheless may be confirmed pursuant to the cramdown provisions of section 1129(b) of the Code. Section 1129(b) provides, in part, that

> the court, on request of the proponent of the plan, shall confirm the plan notwithstanding [the fact that classes have rejected the plan] if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1). As an initial matter, the Plan does not "discriminate unfairly" among holders of Claims and Interests of equal rank and, to the extent holders in lower

priority classes receive distributions, such distributions have been voluntarily allocated to such classes out of the recoveries that creditors of higher rank otherwise would have been entitled to receive. Moreover, the Plan is "fair and equitable" because it satisfies the absolute priority rule of section 1129(b)(2). Each of these points is discussed in turn.

1. Voluntary Reallocation Of Distributions

The Bankruptcy Code provides that "[w]ith respect to a class of unsecured claims. . . the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." See 11 U.S.C. § 1129(b)(2)(B)(ii). Thus, junior claims or interests may not receive any distribution unless and until each class senior in priority receives payment in full of their claims or interests. As indicated above, however, certain junior holders are to receive distributions even though senior classes are receiving only a percentage of their claims. The basis of this treatment in the Debtors' Plan is a voluntary transfer of value by the members of Class 5 RCN General Unsecured Claims to Class 7 Preferred Interests and Class 8 Equity Interests.

Specifically, while holders of RCN General Unsecured Claims are entitled to 100% of the shares of New Common Stock of Reorganized RCN yet are receiving a distribution with an estimated value of only 60.5%, such holders, through their acceptance of the Plan, agreed to a voluntary allocation of a portion of such value (a "gift") to the holders of Class 7 Preferred Interests and Class 8 Equity Interests. Absent

the willingness of such holders to make a voluntary allocation of value in this fashion, the holders of Preferred Interests and Equity Interests would not be entitled to, and would not receive, any distribution from the Debtors under the Plan on account of their Interests in the Debtors.

Similarly, holders of Class 8 Equity Interests will be receiving a distribution under the Plan despite being of lesser priority than holders of Class 7 Preferred Interests. This also does not result in any unfair discrimination against Class 7, and is fair and equitable with respect to such Class, because, as described above, the distribution to Class 8 is based on the agreement of holders of RCN General Unsecured Claims to voluntarily allocate a portion of the value that they would otherwise receive to Class 8.

Finally, the foregoing treatment does not discriminate unfairly, and is fair and equitable, with respect to Class 9 Subordinated Claims, the holders of which will not receive any distributions under the Plan. The separate classification and disparate treatment of such Claims recognizes the difference between Claims based on debt or equity and their respective instruments and those based on the rescission of such instruments. Claims related to the rescission of a purchase or sale of a security are subordinated by virtue of 11 U.S.C. § 510(b). The fact that holders of Class 8 Equity Interests will receive a distribution does not affect this analysis insofar as such distribu-

tion is the result of the voluntary reallocation of a portion of the recovery of Class 5 RCN General Unsecured Claims discussed above.[7]

Courts have held that senior classes may forgo a portion of their allowed recovery to enable junior classes of creditors to receive a distribution from a debtor's estate. Official Unsecured Creditors' Comm. v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305 (1st Cir. 1993). In SPM, the secured creditor possessed liens on all of the debtor's assets. After the debtor's assets were sold, the secured creditor's liens remained unsatisfied. The secured lender nonetheless entered into an agreement with the debtor's unsecured creditors' committee to share the sale proceeds with the unsecured creditors. At the same time, however, the secured lender refused to enter into a similar agreement with the holders of certain priority tax claims. The First Circuit found that although the debtor and the trustee may not violate the distribution scheme developed by the Bankruptcy Code, creditors are free to do whatever they wish with the estate assets they receive, including sharing such assets with other creditors. As a result, the "gift" was allowed and certain junior classes received distributions even though other priority claimants did not.

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[7] Edward T. Joyce filed an objection to these provisions of the Plan, asserting that the disparate treatment of Class 8 Equity Interests and Class 9 Subordinated Claims violates the Bankruptcy Code. (Docket No. 438). This objection has been withdrawn.

Similarly, in In re Genesis Health Ventures, Inc., 266 B.R. 591 (Bankr. D. Del. 2001), the debtor possessed insufficient assets to satisfy the senior lenders in full. Nevertheless, the senior lenders agreed to share a portion of their distributions with certain junior classes of claimants with the exception of a class of punitive damage claimants. The punitive damage claimants objected to confirmation of the plan, alleging that the proposed classification and treatment of those punitive damage claimants violated sections 502 and 510(c) of the Bankruptcy Code. The Genesis court overruled the objection, finding that there was no impediment to the discriminatory sharing agreement proposed in the plan, because creditors are free to do whatever they wish with their dividends, including sharing them in ways that conflict with the distribution and priority scheme established by the Bankruptcy Code.[8]

In sum, because there is a legally acceptable rationale for the difference in treatment between Claims and Interests in the various Classes, there is no showing of unfair discrimination against, or unfair or inequitable treatment of, such Classes. Therefore, the Plan satisfies the provisions of section 1129(b) of the Bankruptcy Code.

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[8] Other courts, including courts in this District, have followed this precedent. See, e.g., In re MCorp Fin., Inc., 160 B.R. 941 (S.D. Tex. 1993) (approving settlement of litigation between secured lender and FDIC enabling FDIC to receive distributions to which it was not otherwise entitled under the absolute priority rule); In re XO Communications, Inc., No. 02-12947 (AJG) (Bankr. S.D.N.Y. Aug. 26, 2002) (confirming plan of reorganization in which senior lenders secured by substantially all of debtor's assets voluntarily gave a portion of their recovery to equity holders).

2. The Plan Otherwise Complies With The Absolute Priority Rule

Classes 9 and 10 will receive no distributions under the Plan. However, the Subordinated Claims and Warrant Interests in these Classes are the lowest priority in the Debtors' capital structure. The treatment of these Classes therefore complies with the absolute priority rule of section 1129(b) of the Bankruptcy Code.

THE RELEASES, INJUNCTIONS, AND EXCULPATIONS IN THE PLAN ARE PROPER

Article XIV of the Plan contains relatively standard provisions with respect to the discharge of the Debtors and an injunction against the assertion of prepetition claims against the Reorganized Debtors, in each case consistent with sections 524 and 1141 of the Bankruptcy Code. Article XIV also contains relatively standard releases by the Debtors of claims against third-parties, including the Debtors' officers, directors, and employees, as well as exculpation, limitation of liability, and indemnification provisions in favor of persons integral to the Plan formulation process. Finally, Article XIV.H of the Plan releases certain non-Debtor third-parties, including the Debtors' directors, officers, and employees, from all other pre-petition claims other than those arising out of willful misconduct, intentional breach of fiduciary duty, or fraud.

There are no known government actions or investigations that would otherwise be affected by the third-party releases. Neither the Securities and Exchange Commission, the Department of Labor, nor any other government agency filed a proof of

claim based on any such actions. Additionally, there are no suits or other claims against board members or officers alleging violations of any federal or state securities laws. The only known suits against such persons recently were filed by several claimants alleging breaches of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), in connection with RCN's 401(k) savings plan.[9]

Representatives of five parties in interest have requested, either formally or informally, modifications to the third-party releases. The Department of Justice informally requested that the third-party releases be modified to exclude any claims of the United States. Newport Associates Development Company ("NADC") informally requested inclusion of language clarifying that certain matters relating to litigation against a non-Debtor subsidiary will not be discharged. And three formal objections were filed to the scope of the third-party releases, one each by (i) Debra Craig, lead plaintiff in one of the ERISA actions; (ii) Merrill Lynch Trust Company FSB, who served as ERISA plan co-fiduciary and wants to preserve possible cross-claims for contribution and indemnity in the ERISA litigation; and (iii) Edward Joyce, who alleges

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[9] A total of four ERISA-related actions have been filed in non-bankruptcy courts, although Debra Craig is the only plaintiff to appear in these Chapter 11 Cases. See Craig v. Filipowicz, et al., Case No. 1:04-CV-07875 (JSR) (S.D.N.Y.); Thomas v. McCourt, et al., Case No. 3:04-CV-05068 (SRC) (D.N.J.); Maguire v. Filipowicz, et al., Case No. 1:04-CV-08454 (JSR) (S.D.N.Y.); Hill v. McCourt, et al., Case No. 3:04-CV-05368 (SRC) (D.N.J.). All such actions are being consolidated in New Jersey.

in a proof of claim, among other things, breach of fiduciary duty on account of RCN's acquisition of 21st Century Telecom Group, Inc.

The Debtors have agreed with each of the foregoing parties to modify the Plan to include requested carve-outs to the third-party releases that preserve each of the parties' claims. Such modification will take the form of a new Article XIV.I, quoted below. The first paragraph of new Article XIV.I resolves the informal objections of the Department of Justice and NADC; the second paragraph resolves the formal objections of Debra Craig, Merrill Lynch,[10] and Edward Joyce:

> **I. Limitations on Scope of Director, Officer, Employee and Other Third Party Releases**
>
> Notwithstanding any provision in the Plan or any provision in any documents incorporating or implementing in any manner the Plan to the contrary, (i) nothing in the Plan and the transactions approved hereby is intended to, or shall release any non-Debtor from any liabilities or obligations to the United States of America or its agencies or subdivisions (the "United States"), nor shall it enjoin or bar any claim by the United States against any non-Debtor, and (ii) solely as to non-Debtors, the Plan shall in no way affect (a) the agreement reached between RCN Telecom Services, Inc. and Newport Associates Development Company in settlement of certain litigation in the New Jersey Superior Court, Hudson County, Law Division, captioned Newport Associates Development Company v. RCN Telecom Services, Inc., et al., Docket No. HUD-L-4407-02, and consolidated with Docket No. HUD-L-4810-02, as such settlement agreement was read into the record of the trial court on July 22, 2004, (b) the License Agreement dated as of July 30, 2004, by and

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[10] As of the filing of this memorandum, the Debtors have not received final confirmation that Merrill agreed to the carve-out. However, Merrill has advised the Debtors that it anticipates that final agreement on the insert will be obtained. In the event Merrill does not accept this language, the Debtors reserve all of their rights. Indeed, the Debtors believe that the proposed language completely addresses all matters raised in Merrill's objection.

between RCN Telecom Services, Inc. and Newport Associates Development Company, and/or (c) the rights and obligations of the parties (other than the Debtors), or any successor parties, to (a) and (b) above.

Notwithstanding any provision in the Plan or any provision in any documents incorporating or implementing in any manner the Plan to the contrary, no current or former directors, officers, employees, partners, members, or managers of the Debtors (collectively, the "Third-Party Releasees") shall be released from, and there shall be no injunction with respect to, (i) any Claim arising from such Third-Party Releasees' alleged breach of fiduciary duty or Claims arising under, or as a consequence of, the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA"), and asserted by the claimants in each of those actions captioned Craig v. Filipowicz, et al., Case No. 1:04-CV-07875 (JSR) (S.D.N.Y.), Thomas v. McCourt, et al., Case No. 3:04-CV-05068 (SRC) (D.N.J.), Maguire v. Filipowicz, et al., Case No. 1:04-CV-08454 (JSR) (S.D.N.Y.), and Hill v. McCourt, et al., Case No. 3:04-CV-05368 (SRC) (D.N.J.), in each case relating to the RCN Savings and Stock Ownership Plan (the "ESOP"); (ii) any Claim asserted by any ERISA fiduciaries of the ESOP for indemnity or contribution, including, but not limited to, Merrill Lynch Trust Company FSB; or (iii) any Claim asserted by Edward T. Joyce relating in any way to the acquisition of 21st Century Telecom Group, Inc. Notwithstanding any provisions of the Plan, nothing in the Plan shall in any way limit or abrogate any available insurance coverage or rights to recover insurance proceeds available to pay any Claims for the settlement or satisfaction of a judgment.

The Debtors believe that the third-party releases, as modified, are proper under the Bankruptcy Code. The Debtors also believe that the releases by the Debtors, the exculpation provisions, the indemnification provisions, and the other limitations on liability contained in Article XIV are proper under the Bankruptcy Code. The Second Circuit has held that bankruptcy courts are empowered under section 105(a) of the Bankruptcy Code to grant releases and issue permanent injunctions where such relief plays an important role in the success of a workable reorganization plan. See SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel

Burnham Lambert Group, Inc.), 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 505 U.S. 1088 (1993); MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89, 93-94 (2d Cir. 1988), cert. denied, 488 U.S. 868 (1988); LTV Corp. v. Aetna Cas. And Surety Co. (In re Chateaugay Corp.), 167 Bankr. 776, 780-781 (S.D.N.Y. 1994).

Releases also are permissible in corporate reorganizations in this Circuit when supported by consideration and if they advance a debtor's successful reorganization. See Drexel Burnham Lambert Group, Inc., 960 F.2d at 293 ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."); Abel v. Shugrue (In re Ionosphere Clubs, Inc.), 184 B.R. 648, 655 (S.D.N.Y. 1995) (bankruptcy courts may issue injunctions enjoining creditors from suing third parties "in order to resolve finally all claims in connection with the estate and to give finality to a reorganization plan"); LTV Corp. v. Miller (In re Chateaugay Corp.), 109 B.R. 613, 621 (S.D.N.Y. 1990), appeal dismissed, 924 F.2d 480 (2d Cir. 1991).

The releases, injunctions, and related relief contained in Article XIV of the Plan are an important part of the restructuring of the RCN corporate family. For example, if the third-party releases are not approved as modified, then the directors, officers, and employees of the Debtors may have indemnification claims against significant non-Debtor operating subsidiaries. A claim against the directors,

officers, and employees of the Debtors therefore will be, in effect, a claim directly against the operating subsidiaries from which the value of the Debtors is derived. This is an example of the "identity of interest" between debtors and non-debtors that Courts have held warrant injunctions against the filing of claims against non-debtors. See, e.g., In re Zenith Electronics Corp., 241 B.R. 92 (Bankr. D. Del. 1999) (identity of interests between debtor and released party exists where suit against released party is in essence a suit against the debtor's estate); see also Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002), cert. denied, 537 U.S. 816 (2002); In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994).

Moreover, courts have held that the potential for indirect indemnity and contribution claims against non-debtor subsidiaries that could undermine the restructuring of the corporate group as a whole warrant releases with respect to such claims. See, e.g., Menard-DSanford v. Mabey (In re A.H. Robins Co., Inc.), 880 F.2d 694 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989) (reorganization depended upon release of all claims, including claims against non-debtors with indemnity or contribution claims); In re Combustion Eng'g, Inc., 295 B.R. 459 (Bankr. D. Del. 2003) (enjoining claims against non-debtor affiliates in order to avoid litigation among corporate entities); see also In re Dow Corning, 280 F.3d at 648 (key aspect

of reorganization was avoidance of suits by non-debtors for indemnity or contribution).

The releases, injunctions, and related relief also are warranted here in light of the overwhelming acceptance of the Plan by Class 5 RCN General Unsecured Creditors, which clearly evidences their endorsement of the Plan as a whole. A total of 711 holders of Claims in this Class voted to accept the Plan, whereas only 2 holders voted against it. The total amount of Claims that voted in favor of the Plan is $661 million; the total amount that voted against is only $115,000. This is clearly the sort of overwhelming acceptance by the class affected by the releases that courts have considered significant in approving third-party releases. See, e.g., In re Dow Corning, 280 F.3d at 648; In re Zenith Electronics Corp., 241 B.R. at 111; In re Master Mortgage Inv. Fund, Inc., 168 B.R. at 930.[11]

Finally, the third-party releases are supported by consideration that is adequate and reasonable under the circumstances. Holders of Class 5 RCN General Unsecured Claims will receive 100% of the New Common Stock in Reorganized RCN in satisfaction of their Claims. The estimated value of this consideration is predicted to afford a recovery to Class 5 Creditors of 60.5%.[12] This consideration

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[11] The overwhelming vote in this case distinguishes this case from others where third-party releases were not approved due to rejections of the plan by affected classes. See, e.g., In re Exide Technologies, 303 B.R. 48 (Bankr. D. Del. 2003); In re Genesis Health Ventures, Inc., 266 B.R. 591 (Bankr. D. Del. 2001).

[12] This consideration is vastly in excess of that afforded to creditors in other cases (continued...)

was negotiated with representatives of the Creditors' Committee, who in turn represented the interests of all holders of Class 5 RCN General Unsecured Claims. Indeed, the Creditors' Committee is a co-proponent of the Plan and supports its confirmation. Accordingly, holders of Class 5 RCN General Unsecured Claims are receiving adequate and reasonable consideration in exchange for the releases. See Dubel Declaration ¶¶ 23-35.

The releases are also justified because the beneficiaries of the releases have contributed substantially to the Debtors' reorganization. Indeed, much of the value to be distributed under the Plan will be the result of their efforts to date. It has required untold hours of hard work by all parties to the releases to reach the point of confirmation of the Debtors' Plan. Many of the Debtors' officers and employees will continue to dedicate their efforts to ensuring the success of the Debtors' Plan. These efforts constitute additional consideration to all constituencies in support of the releases. See Dubel Declaration ¶¶ 23-35.

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[12] (...continued)
where the courts sustained objections to the third-party releases. See, e.g., In re Exide Technologies, 303 B.R. at 71 (recovery of only 1.4%); In re Genesis Health Ventures, 266 B.R. at 608 (recovery of only 7.34%).

For all of the reasons outlined above, the releases, injunctions, and exculpations are fair, reasonable, advance the Plan, and should be approved as modified above.

PLAN MODIFICATIONS

The Debtors intend to make three, non-material modifications to the Plan designed to take into account settlements resolving certain formal and informal objections and to clarify other aspects of the Plan. Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019 together allow plan proponents to make modifications to a plan after solicitation that bind all creditors if the modifications do not adversely affect creditors or interest holders. In accordance with this authority, courts have allowed plan proponents to make non-material changes without any special procedures or vote resolicitation. See, e.g., In re Am. Solar King Corp., 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) ("if a modification does not 'materially' impact a claimant's treatment, the change is not adverse") (citation omitted); In re Mount Vernon Plaza Cmty Urban Redevelopment Corp., 79 B.R. 305, 306 (Bankr. S.D. Ohio 1987) (all creditors were deemed to have accepted plan as modified because "[n]one of the changes negatively affects the repayment of creditors, the length of the Plan, or the protected property interests of parties in interest").

As indicated above, the Debtors intend to make only three changes to the Plan. First, the Debtors propose to modify Article III.F of the Plan to allow the

Debtors, to the extent not already authorized, to set-off Claims among Debtors or between Debtors and non-Debtor affiliates. Second, the Debtors propose to modify Article IV.E of the Plan to clarify that Laminar will have the right to select one board member so long as certain conditions are satisfied. Third, the Debtors propose to add a new Article XIV.I to the Plan, as described above, to modify the scope of certain third-party releases. Each of these three changes is reflected in the proposed confirmation order at paragraph 45. Because none of these changes materially affects the treatment of any holders of Claims or Interests, the Debtors respectfully request that the proposed modifications be approved without requiring the resolicitation of votes.

CONCLUSION

For all of the forgoing reasons, the Plan fully satisfies all applicable requirements of the Bankruptcy Code and the Plan should be confirmed.

WAIVER OF RULE 3020(e)

Rule 3020(e) of the Federal Rules of Bankruptcy Procedure provides that the effectiveness of an order confirming a plan is stayed until 10 days after its entry "unless the court orders otherwise." The Debtors are requesting that the order confirming the Debtors' Plan be deemed effective immediately upon its entry, and that the 10 day stay be deemed waived and inapplicable. The Debtors have an exceptionally short window within which to consummate the Plan. They are

endeavoring to do so on or before December 21, 2004. This date is only three days after expiration of the 10 day period referenced in Rule 3020(e), assuming, of course, that the confirmation order is entered by the Clerk's Office immediately at the conclusion of the confirmation hearing.

The Debtors and their exit lenders need the protection of a final, unstayed order while they undertake the final efforts -- which will be significant in the amount of time and resources that will be required -- to consummate the Plan. The December 21, 2004, date is imperative so that, among other things, funding from syndication lenders under the First-Lien Credit Facility will be consummated by year end, a process that can be fraught with delays during the holiday season and as financial institutions endeavor to close transactions before year end. The Debtors therefore must undertake every effort possible to close on the Plan and fund the

transactions within 13 calendar days after the confirmation hearing. There are no objecting parties that will be prejudiced by the Debtors' request. Accordingly, the Debtors request that the confirmation order provide that the 10 day stay of Rule 3020(e) be deemed inapplicable here.

Dated: New York, New York
December 6, 2004

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

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Exhibit A

SUMMARY OF OBJECTIONS TO JOINT PLAN OF REORGANIZATION OF RCN CORPORATION AND CERTAIN SUBSIDIARIES