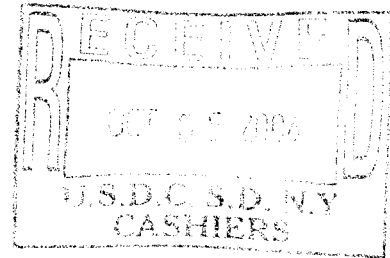


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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK JUDGE RAKOFF

DEBRA K. CRAIG, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

JOHN D. FILIPOWICZ, DEBORAH M.  
ROYSTER, WILLIAM TERRELL WINFIELD,  
JR., MERRILL LYNCH TRUST COMPANY,  
FSB, and JOHN DOES 1-10.

Defendants.

04 CV 07875

CLASS ACTION COMPLAINT

## TABLE OF CONTENTS

I.	NATURE OF THE ACTION .....	4
II.	JURISDICTION AND VENUE .....	6
III.	THE PARTIES .....	7
	Plaintiff .....	7
	Defendants .....	7
	Non-Party RCN Corp. ....	9
IV.	FACTUAL BACKGROUND .....	10
	A. Plan Structure and Organization .....	10
	B. RCN in Financial Crisis .....	11
	C. RCN Stock Became an Imprudent Plan Investment on and after April 1, 2000 .....	20
	D. RCN and defendants Filipowicz and Winfield Knew or Should have Known that RCN Stock was no longer a Prudent Investment for the Plan, but Failed to Take Appropriate Steps to Protect the Plan and Its Participants .....	22
	E. Plan Trustee Merrill Lynch Trust Also Knew or Should Have Known That RCN Stock Had Become an Imprudent Investment but Failed to Take Appropriate Steps to Protect the Plan and its Participants .....	24
	F. The Fiduciary Breaches in RCN's Bankruptcy Proceedings .....	25
	G. The Fiduciary Breaches Caused Substantial Plan Losses .....	26
V.	CLASS ACTION ALLEGATIONS .....	28
COUNT I	Breach of ERISA Fiduciary Duties In Administration of the RCN Plan Prior to the RCN Bankruptcy against Defendants Filipowicz and Winfield .....	32
COUNT II	Breach of ERISA Fiduciary Duties In Administration of the RCN Plan Prior to the RCN Bankruptcy against Defendant Merrill Lynch Trust .....	34

COUNT III Breach of ERISA Fiduciary Duties In Administration of the RCN Plan  
After the RCN Bankruptcy against Defendants Merrill Lynch Trust  
and Royster ..... 35

COUNT IV Liability for Breach of Fiduciary Duty by Co-Fiduciaries In Violation of  
ERISA 29 U.S.C. §1105, against All Defendants ..... 37

REQUESTED RELIEF ..... 38

## **CLASS ACTION COMPLAINT**

Plaintiff, by her undersigned attorneys and on behalf of herself and all others similarly situated, alleges as follows<sup>1</sup>:

### **I. NATURE OF THE ACTION**

1. This is a class action for breach of fiduciary duty brought pursuant to § 502 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132, to recover losses to the RCN Savings & Stock Ownership Plan (the “Plan”) during the period April 1, 2000 through RCN’s bankruptcy on May 27, 2004 and for other fiduciary breaches continuing to the Present (the “Class Period”).

2. Plaintiff’s claims arise from the failure of, among others, RCN Corporation (“RCN” or the “Company”), John D. Filipowicz, Deborah M. Royster, William Terrell Winfield, Jr., and other Plan fiduciaries to act solely in the interest of the Plan’s participants and beneficiaries (hereinafter “participants” also refers to beneficiaries) and to exercise the required care, skill, prudence, and diligence in the administration of the Plan’s assets. As further alleged herein, each of the Plan’s fiduciaries violated their fiduciary obligations under ERISA, 29 U.S.C. §§1104 and 1105 in one or more of the following ways:

- (a) by failing to prudently manage Plan assets, in that they maintained investments in RCN common stock under circumstances in which the fiduciaries knew or should have known that continued investment in such stock was not prudent;

---

<sup>1</sup> Plaintiff submits these allegations upon personal knowledge as to herself and her own acts, and upon information and belief (based upon the investigation of her counsel) as to all other matters. It is expected that substantial evidentiary support will be found for the allegations regarding these and other matters after a reasonable opportunity for further investigation and discovery.

- (b) by failing to properly monitor the Plan's fiduciaries to ensure that they were prudently and loyally serving the interests of Plan participants and, in connection therewith, failing to remove and replace fiduciaries whom they knew or should have known were acting disloyally and imprudently with respect to the Plan and its assets;
- (c) by failing to provide complete and accurate information to Plan participants;
- (d) by failing to avoid conflicts of interest and resolve them promptly in that they continued to allow RCN common stock as an investment for the Plan during the Class Period and failed to notify the U.S. Department of Labor about the information which made RCN stock an unsuitable Plan investment; and/or
- (e) by failing to protect the interests of the Plan and its participants in the RCN bankruptcy proceedings.

3. Merrill Lynch Trust Company, FSB ("Merrill Lynch Trust") was a Plan fiduciary and the Plan Trustee and also served as an Investment Manager for the Plan. In its capacities as Trustee and Investment Manager, Merrill Lynch Trust exercised discretionary authority over the investment of Plan assets including the investment of Plan assets in RCN stock. Merrill Lynch Trust purchased and held RCN common stock when it knew or should have known that investment in such stock was not prudent. Merrill Lynch Trust also accepted directions to purchase and hold RCN common stock when it knew that investment in such stock was not prudent and not in the Plan participants' best interest.

4. These breaches of fiduciary duty by the Plan's fiduciaries with respect to the Plan's holding and acquisition of RCN common stock resulted in losses to the Plan which the fiduciaries are personally liable to make good to the Plan pursuant to ERISA, 29 U.S.C. §§ 1109 and 1132(a)(2).

5. Because Plaintiff's claims apply to the Plan's participants as a whole, and because ERISA authorizes Plan participants such as Craig to sue for plan-wide relief for breaches of fiduciary duty, Plaintiff bring this action on behalf of herself and all Plan participants during the

Class Period.

6. Because most of the information and documents on which Plaintiff's claims are based is in the exclusive possession and control of Defendants, RCN, or others and is not available to Plaintiff without discovery, many of Plaintiff's allegations are by necessity upon information and belief. At such time as Plaintiff has had the opportunity to conduct discovery, Plaintiff will, to the extent necessary and appropriate, seek leave to amend the Complaint.

## II. JURISDICTION AND VENUE

7. **Subject Matter Jurisdiction.** This is a civil enforcement action for breach of fiduciary duty brought pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a). This Court has original and exclusive subject matter jurisdiction over this action pursuant to ERISA 502(e)(1), 29 U.S.C. § 1132(e)(1).

8. The Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1334(b), in that this action is "related to" a bankruptcy case under Title 11, namely *In re RCN Corp., et al.*, 04-13638 (RDD) (Bankr. S.D.N.Y. May 27, 2004). Such bankruptcy proceedings, insofar as it relates to a claim under ERISA should be heard by the District Court pursuant to 28 U.S.C. § 157(d).

9. **Personal Jurisdiction.** ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are residents of the United States. Accordingly, this Court has personal jurisdiction over them.

10. **Venue.** Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because some of the fiduciary breaches for which relief is sought occurred in this District. Defendant Merrill Lynch Trust can be found here. Additionally, RCN's Title 11 proceeding is in this District.

### III. THE PARTIES

#### *Plaintiff*

11. Plaintiff Debra K. Craig (“Craig”) is a citizen of the Commonwealth of Pennsylvania residing at 2925 Little Gap Road, Palmerton, PA. Craig was an employee of RCN between 1998 and 2002 and worked as a Telesales Supervisor. Craig is a “participant” in the Plan pursuant to ERISA §3(7), 29 U.S.C. §1102(7). Craig brings this action to recover losses to the Plan. The fiduciaries of the Plan acquired and held shares of RCN stock for the benefit of Craig and other participants during the Class Period.

#### *Defendants*

12. Defendant John D. Filipowicz (“Filipowicz”) is identified as the Plan Administrator in the Plan’s Form 5500 for the year 2001, and signed the Plan’s Form 5500 as the Plan Administrator on October 15, 2002.

13. Defendant William Terrell Winfield, Jr. (“Winfield”) is identified as the Plan Administrator in the Plan’s Form 5500 for the year 2002, and signed the Plan’s Form 5500 as the Plan Administrator on October 13, 2003.

14. Defendant Deborah M. Royster (“Royster”) is identified in the Plan’s 11-K for the year ended December 31, 2003 as the Plan Administrator, and RCN's General Counsel and Corporate Secretary as of the date of RCN filed for Chapter 11. Defendant Royster should have but did not file in RCN's bankruptcy proceedings a Proof of Claim for the Plan for the claims stated herein and failed to take any other action to protect the Plan's claims against RCN and the other fiduciaries. Instead, Defendant Royster acted to discharge and release the Plan's claims against RCN and other fiduciaries, including RCN officers and employees, without any disclosure to the participants of the claims or the

attempts to release and discharge them without any consideration.

15. Defendant Merrill Lynch Trust Company, FSB (“Merrill Lynch Trust” or the “Trustee”) is a federally chartered savings bank with its principal executive offices located at 300 Merrill Lynch Drive, Pennington, New Jersey. As a federal savings bank, Merrill Lynch is subject to regulation by the Office of Thrift Supervision. Merrill Lynch Trust is also an investment adviser subject to SEC regulation.

16. Merrill Lynch Trust is a subsidiary of Merrill Lynch Group, Inc., which itself is a subsidiary of Merrill Lynch & Co., Inc. (“Merrill Lynch & Co.”). Merrill Lynch & Co. directly or indirectly, owns at least 99% of the voting securities of Merrill Lynch Trust.

17. On October 7, 2003, RCN hired Merrill Lynch, Pierce, Fenner & Smith Inc. (“MLPF&S”) as a financial advisor to review RCN's financial alternatives and capital structure, and explore possible capital raising opportunities. MLPF&S is a subsidiary of Merrill Lynch & Co., and conducts business as Merrill Lynch & Co. on March 11, 2004, the Company replaced MLPF&S with Blackstone Group as financial advisor in connection with its continuing negotiations toward a financial restructuring.

18. Merrill Lynch Trust, its corporate parents and affiliates, is one the world's leading financial management and advisory companies, with offices in 35 countries and private client assets of approximately \$1.5 trillion. As an investment bank, it is a leading global underwriter of debt and equity securities and strategic advisor to corporations, governments, institutions and individuals worldwide.

19. Among the services provided by Merrill Lynch & Co., as detailed in its Form 10-K for the fiscal year ended December 26, 2003, are “Trust Activities.” The material under this heading



reads:

[Merrill Lynch & Co.] provides personal trust, employee benefit trust and custodial services. Trust services in the United States are provided by Merrill Lynch Trust Company, FSB, a federally chartered savings bank...

20. Prior to 2002, Merrill Lynch & Co. provided personal trust, employee benefit trust, and custodial services through four state-chartered trust institutions and a federally chartered savings bank. In December 2001, Merrill Lynch & Co., streamlined the delivery of these services in the United States by merging its four state-chartered trust institutions into Merrill Lynch Trust.

21. Merrill Lynch Trust was the Plan Trustee within the meaning of ERISA §403(a), 29 U.S.C. §1103(a), and was identified as the Trustee by the Plan.

22. Defendants John Does 1-10 are other persons or entities, currently unknown, who served as Plan fiduciaries during the Class Period. After Plaintiff has had a reasonable opportunity to conduct discovery and at such time as their identities are revealed, Plaintiff will seek leave to amend the Complaint to appropriately name these additional fiduciary defendants.

***Non-Party RCN Corp.***

23. RCN Corporation ("RCN" or the "Company") is a Delaware corporation with its principal executive offices located at 105 Carnegie Center, Princeton, New Jersey. RCN and its subsidiaries deliver bundled communication services, including local and long distance telephone, video programming (including digital cable and high definition television), and data services (including cable modem, high speed and dial-up Internet access) primarily to residential customers over a broadband network predominantly owned by RCN. RCN became a publicly traded company on May 26, 1999.

24. RCN is the Plan's sponsor and named fiduciary. It is also a fiduciary within the

meaning of ERISA §3(21)(A)(i), 29 U.S.C. §1002(21)(A)(i), in that it possessed and exercised discretionary authority and control with respect to the management and administration of the Plan and authority and control with respect to management or disposition of the Plan's assets.

25. RCN is not named as a defendant in this action because it has filed for bankruptcy protection. As a result, any action against RCN is stayed pursuant to the bankruptcy court's automatic stay. 11 U.S.C. §362. Plaintiff is asserting her claims against RCN in the bankruptcy proceeding and may seek to lift the bankruptcy stay so that RCN can be named as a defendant here. If that occurs, Plaintiff may seek leave to amend this Complaint accordingly.

#### **IV. FACTUAL BACKGROUND**

##### **A. Plan Structure and Organization**

26. The Plan was established on October 1, 1997, as a defined contribution plan covering substantially all employees of RCN and its subsidiaries who have attained the age of eighteen and have one month of enlisted service.

27. The Plan is an employee benefit plan within the meaning of ERISA §§3(3), and 3(2)(A), 29 U.S.C. §§1002(3) and 1002(2)(A).

28. The Plan is a "defined contribution" or "individual account" Plan within the meaning of ERISA §3(34), 29 U.S.C. §1002(34).

29. Prior to January 1, 2002, Plan participants could contribute between 1 and 15 percent of their annual compensation. Effective January 1, 2002, Plan participants could contribute between 1 and 50 percent of their annual compensation. Participants may also contribute amounts representing rollover distributions from other qualified defined benefit or contribution plans. Participants direct the investment of their contributions into various investment options selected by the Plan's fiduciaries.

30. During the Class Period, the Plan's fiduciaries, including RCN, Filipowicz, and Winfield selected numerous investment options for employee investments including various mutual funds and the RCN Common Stock Fund (the "Stock Fund") which invests primarily in RCN common stock ("RCN stock").

31. Both RCN and the employees made contributions to the Plan. RCN contributed on behalf of each participant an amount not to exceed 100 percent of the first 3.5 percent of the participant's 401(k) deferral contribution. All Company contributions were applied to the Stock Fund and used to purchase RCN stock in the Stock Fund from the inception of the Plan until January 16, 2004. Contributions are subject to certain limitations. Participants may change salary deferral elections at each bi-weekly pay period. Participants may change investment elections on a daily basis for all participant contributions, subject to restrictions on the transferability of investments in the Stock Fund.

32. Effective January 16, 2004, Company match contributions were no longer applied to the Stock Fund. Beginning that date, all such contributions were applied to the participants' elected investment elections.

33. Defendants Filipowicz, Royster, and Winfield were each, at different times during the Class Period, the Plan Administrator and a named fiduciary of the Plan.

#### **B. RCN in Financial Crisis**

34. Prior to the Class Period, RCN was a high-flying telecommunications start-up that had gone public during the early days of the telecom/Internet bubble. From the beginning, it was highly leveraged and had inadequate cash flow. Like other Competitive Local Exchange Carriers ("CLEC's"), RCN was started to compete with the "baby bells" that

were created when AT&T was split.

35. RCN bet its viability and possible future success on high-speed Internet access generally, and by providing Internet, Cable television and telephone services in a single bundled package. Like other CLEC's, RCN had to invest large amounts of capital into building its wired infrastructure and took on tremendous debt to do so.

36. Thus, RCN, like other CLEC's, labored under enormous debt from its inception and continued to labor under this debt throughout the Class Period.

37. During the Class Period RCN never turned a profit.

38. On February 10, 2000, RCN announced its 1999 year-end results. Those results showed EBITDA ("earnings before interest taxes depreciation and amortization") *losses of \$133.1 million for the year*, including *\$54.3 million in the fourth quarter*, as compared to a loss of \$48.5 million in 1998. Those results showed that not only was RCN a speculative and risky investment, but that it had serious financial problems including enormous indebtedness, that it had not been able to overcome. From that date forward, as RCN continued to report losses and no profits, the value of RCN stock declined until RCN's bankruptcy.

39. On May 5, 2000, RCN announced its first quarter results. RCN's Pro Forma Total consolidated quarterly EBITDA was a loss of *\$69.9 million* as compared to a loss of *\$54.3 million in the previous quarter*. RCN reported a first quarter net loss to common shareholders of \$153.6 million, or \$(1.95) per common share, compared to a loss of \$67.7 million or \$(1.03) in the previous quarter.

40. On October 31, 2000 RCN's reported its results for the quarter ended September 30, 2000. RCN's Pro Forma Total consolidated quarterly EBITDA in for that quarter was *a*

*loss of \$85.8 million*, compared to a loss of \$75.8 million in the previous quarter. RCN reported a second quarter net loss to common shareholders of \$233.8 million, or \$(2.70) per common share, compared to a loss of \$208 million or \$(2.45) in the previous quarter.

41. On or about December 15, 2000 RCN announced that in order to conserve cash it had terminated its ambitious plans to develop new markets for its broadband network and would instead focus on existing cities. The *Wall Street Journal* commented "[t]he move marks a setback for RCN, which had promised to make its MeganBand broadband network available to 15 million homes by 2008".

42. On December 22, 2000, RCN announced wider losses than expected, and Merrill Lynch and SG Cowen lowered their ratings on RCN stock.

43. As is discussed further *infra*, despite RCN's enormous losses, the then fiduciaries of the Plan continued to offer the Stock Fund as an investment option and to invest Plan assets in RCN stock. This is despite the fact that by April or May of 2000, if not before, the offering of the Stock Fund and the continued investment of Plan assets in RCN stock was imprudent.

44. On February 8, 2001, RCN reported its results for the year and quarter ended December 31, 2000. For the quarter ended December 31, 2000, Pro Forma Total consolidated EBITDA for the quarter was a *loss of \$112.9 million*. RCN posted a *net loss of \$296 million* in the fourth quarter of 2000, or \$(3.42) per average common share.

45. For the year ended Dec. 31, 2000, Pro Forma Total RCN revenues were \$405.4 million, a 21 percent increase from \$335.7 million in the previous year. RCN's Pro Forma Total consolidated EBITDA for the year ended Dec. 31 was a *loss of \$343.8 million*,

compared to a loss of \$133.1 million in 1999. RCN reported an annual net loss to common shareholders of \$891 million, or \$(10.59) per average common share, compared to a loss of \$368.6 million or \$(5.12) a year ago.

46. For the quarter ended March 31, 2001, Pro Forma Total RCN revenues were \$125.2 million. RCN's Pro Forma Total consolidated EBITDA for the quarter was *a loss of \$89.6 million*. RCN posted a net loss of \$257.9 million in the first quarter of 2001, or \$(2.95) per average common share. RCN's stock price dropped 12% to \$5.12 per share on news of wider first-quarter net losses.

47. On August 2, 2001, RCN announced results for the second quarter of 2001. For the quarter ended June 30, 2001, pro forma total RCN revenues were \$131.4 million, a 37% increase from \$96.2 million in the same quarter last year. RCN's pro forma total consolidated EBITDA was *a loss of \$63.9 million*. Excluding **special charges of \$466 million**, RCN posted a *net loss of \$211 million*, or \$(2.30) per average common share, for the quarter. Including special charges, **RCN's net loss was \$677 million**, or \$(7.38) per average common share.

48. For the quarter ended June 30, 2001, RCN recorded **special charges of \$466 million**, the majority of which were related to the write-off of goodwill and other intangible assets associated with the purchase of 21st Century Telecom and various Internet operations.

49. On November 7, 2001, RCN announced its third quarter results. RCN's pro forma total consolidated EBITDA for the quarter was *a loss of \$44.2 million*.

50. On February 8, 2002, RCN announced its fourth quarter and year-end 2001 financial results. For the quarter ended December 31, 2001, Pro Forma Total consolidated

EBITDA for the quarter was **a loss of \$34.6 million**. Excluding an extraordinary gain of \$408.5 million from the early retirement of debt, RCN posted **a loss of \$198.5 million**, or (\$2.03) per common share.

51. For the year ended December 31, 2001, Pro Forma Total RCN revenues were \$536.2 million, a 32 % increase from \$405.4 million in the previous year. RCN's Pro Forma Total consolidated EBITDA for the year ended December 31, 2001, was **a loss of \$232.3 million**, compared to a loss of \$343.8 million in 2000. RCN **reported an annual net loss to common shareholders of \$836.5 million**, or (\$8.89) per average common share, compared to a loss of \$891.5 million, or \$(10.59) per common share a year ago.

52. In a January 3, 2002 article in the *Wall Street Journal* one of the founders of RCN admitted that RCN had made a mistake taking on so much debt without the cash flow to pay for it.

53. On May 7, 2002, RCN announced its first quarter 2002 results. For the quarter ended March 31, 2002, Pro Forma Total RCN revenues were \$145.1 million, compared to \$125.2 million for the first quarter 2001. RCN's Pro Forma Total consolidated EBITDA for the quarter was **a loss of \$22.3 million**. RCN posted a net loss before extraordinary items of \$161.7 million in the first quarter of 2002, or \$(1.59) per average common share. RCN reported a net loss to common shareholders of \$148.7 million, or \$(1.46) per average common share in the first quarter 2002, compared to a loss of \$257.9 million, or \$(2.95) in the first quarter a year ago.

54. On June 12, 2002, RCN stock ceased trading on the National Market, and began trading on the Nasdaq SmallCap Market.

55. On August 7, 2002, RCN announced its second quarter 2002 results. RCN Pro Forma Total revenues were \$148.9 million consolidated EBITDA for the quarter was *a loss of \$18.4 million.*

56. RCN recorded \$892.3 million in impairment charges in that quarter. These non-cash charges were related to non-recoverable amounts from assets on its balance sheet including underutilized network-related assets, goodwill, inventory and exit costs for excess facilities.

57. Also at this time, there was a severe slowdown in the economy and the telecommunications industry specifically. In response, RCN substantially curtailed its growth plans. RCN also completed its assessment of the Amendment to the Company's Credit Agreement with its Senior Lenders and completed its revised plan to sell its services only in current markets. The revised business plan curtailed future capital spending and expansion in all existing markets and focused on customer acquisition growth.

58. It was as a result of the weakening economy that on or about August 7, 2003, RCN announced that it would write down nearly a billion dollars in assets.

59. RCN's third quarter 2002 results continued to show losses. For the third quarter ended September 30, 2002, Pro Forma Total RCN revenues were \$148.9 million. RCN's Pro Forma Total consolidated EBITDA for the quarter was *a loss of \$15.1 million.*

60. On March 13, 2003, RCN announced its fourth quarter and year-end 2002 results. For the year ended December 31, 2002, RCN reported *an annual net loss to common shareholders of \$1,570.3 million*, or \$14.78 per average common share, compared to a loss of \$836.5 million, or \$8.89 per common share a year ago. Excluding the effect of discontinued



operations and extraordinary items, the annual net loss to common shareholders was \$1,594.2 million, or \$15.00 per average common share, compared to a loss of \$1,326.4 million, or \$14.09 per common share the previous year.

61. For the quarter ended December 31, 2002, revenues were \$117.2 million. RCN reported a net loss to shareholders of \$158.1 million, or \$1.44 per common share, as compared to a net gain of \$210.0 million, or \$2.15 per common share for the fourth quarter of 2001, which included gains from discontinued operations and extraordinary items. Excluding the effect of discontinued operations and extraordinary items, the quarterly net loss to common shareholders was \$163.7 million, or \$1.49 per average common share, compared to a loss of \$199.9 million, or \$2.04 per common share in the fourth quarter of 2001.

62. On a pro forma basis, revenues for the year ended December 31, 2002 were \$542.0 million. Consolidated adjusted EBITDA was *a loss of \$83.2 million*. For the quarter ended December 31, 2002, consolidated adjusted EBITDA was *a loss of \$15.1 million*.

63. On May 14, 2003, RCN announced its first quarter 2003 results. For the quarter ended March 31, 2003, revenues were \$124.5 million. Included in net income was a \$165.1 million gain on the sale of assets. The quarterly *net loss to common shareholders from continuing operations was \$135.6 million*, or \$(1.23) per average common share.

64. On August 11, 2003, RCN announced its second quarter 2003 results. For the quarter ended June 30, 2003, revenues were \$121.6 million. RCN reported a net loss to common shareholders of \$126.4 million, or \$1.15 loss per average common share, before an **impairment charge of \$892.3 million** taken in that quarter which had raised second quarter 2002 losses to \$1,094.4 million, or \$10.46 loss per average common share.

65. On October 7, 2003, RCN announced that it retained MLPF&S as a financial advisor to review its financial alternatives and capital structure and to explore possible capital raising opportunities. On August 18, 2003 RCN repurchased \$75 million in principal amount of its publicly held senior notes for a price of \$28 million pursuant to a cash tender offer for such notes. As part of its efforts to improve its capital structure and reduce the amount of its debt, RCN began discussions with certain holders of its publicly held senior notes and the holders of its preferred stock concerning a possible repurchase, exchange or retirement of the securities held by such holders.

66. On November 11, 2003, RCN reported its third quarter 2003 results. For the quarter ended September 30, 2003, revenues were \$115.0 million, a 6.1% increase from \$108.4 million a year ago. RCN announced a net loss to common shareholders of \$110.5 million, or \$1.00 loss per average common share, compared to a loss of \$169.2 million, or \$1.54 loss per average common share in the third quarter of 2002, including income from discontinued operations.

67. On January 15, 2004, RCN announced that it was in default on a \$10.3 million payment on its 10 1/8% Senior Notes due 2010. RCN stated that its decision not to pay was made as part of the ongoing negotiations with its lenders.

68. On February 14, 2004, RCN announced that it would not be making its debt repayment of \$14.2 million on the 9.80% Senior Discount Notes and that it was in continued negotiations with its lenders regarding repayment on payment on its 10 1/8 % Senior Notes

69. RCN further announced that the restructuring of its debt may require bankruptcy filing.

70. On March 1, 2004, RCN announced its continued talks with its lenders and reiterated the likelihood of a financial restructuring to be implemented through a reorganization under Chapter 11.

71. On March 12, 2004, RCN announced that it had replaced MLPF&S with Blackstone Group as financial advisor in connection with its continuing negotiations with its lenders

72. On March 30, 2004, RCN announced its full year 2003 results. For 2003, revenues were \$484.8 million, an 11.8% increase from \$433.5 million a year ago. The net loss to common shareholders for the year ended December 31, 2003 was ***\$499.1 million***, or \$4.50 loss per average common share, compared to a loss of \$1,570.3 million, or \$14.78 loss per average common share for the year ended December 31, 2002. RCN reiterated the likelihood of a bankruptcy filing.

73. RCN's press release stated:

[T]he restructuring as currently contemplated will likely result in a conversion of a substantial portion of the Company's outstanding Senior Notes into equity and an extremely significant, if not complete, ***dilution of current equity***. Accordingly, the value of the Company's securities is highly speculative. The Company urges that appropriate caution be exercised with respect to existing and future investments in any of the Company's debt obligations and/or its Common stock.

(Emphasis added)

74. On March 29, 2004, the NASDAQ Stock Market notified the Company that because the bid price of RCN stock had closed below the minimum of \$1.00 per share for the last 30 consecutive business days, the Company did not meet the NASDAQ SmallCap rules for continued inclusion. RCN failed to provide assurances that it would become compliant

with the NASDAQ SmallCap rules for inclusion.

75. On March 31, 2004, the NASDAQ Stock Market notified RCN that the market value of RCN stock had closed below the required minimum of \$35 million for the 10 consecutive business days leading up to March 26, 2004. RCN was threatened with its stock being delisted.

76. On April 15, 2004, RCN announced that it would not be making its schedule interest payments of \$8.0 million with respect to its 10% Senior Notes due 2007 and approximately \$17.6 million with respect to its 11.125% Senior Discount Notes due 2007.

77. On May 12, 2004, RCN stock was delisted from the Nasdaq, after which it was eligible for quotation on the OTC Bulletin Board.

78. On May 27, 2004, RCN and several non-operating subsidiaries filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code.

79. Throughout this entire period, the Plan fiduciaries continued to offer the RCN Stock Fund as an investment option and continued to invest Plan assets in RCN stock when they knew or should have known that RCN stock was not a prudent retirement investment.

**C. RCN Stock Became an Imprudent Plan Investment on and after April 1, 2000**

80. The fiduciaries of a 401(k) Plan have a responsibility to prudently select the investment offerings of a retirement plan. From its inception, the RCN Stock Fund was a risky speculative investment because RCN was a start-up company which assumed an enormous amount of debt in order to try to compete in the telecommunications business. Accordingly, continuing and vigilant monitoring, investigation, and review of RCN stock—either by the Plan's fiduciaries or knowledgeable persons advising them— was required to assure that it

remained a prudent retirement investment option for the Plan. In addition, the RCN Stock Fund required active management to assure that RCN stock was a prudent investment for the Stock Fund at all times while the Fund was offered, particularly in light of the concentration of RCN stock ownership in the Stock Fund.

81. RCN stock represented virtually all of the assets of the Stock Fund and a significant percentage of the entire Plan's assets. During the Class Period, the number of RCN shares held in the Stock Fund increased substantially, rising to more than 6.1 million shares in 2002.

82. On and after April 1, 2000 it was no longer prudent to offer the RCN Stock Fund as an investment option for the Plan or to continue to purchase and hold RCN stock for the Stock Fund. By that date it was clear that RCN stock was a highly speculative investment with very uncertain future prospects because of the Company's poor financial condition, enormous indebtedness, lack of cash flow, and competition from others in the telecommunications industry. Nevertheless, the Plan fiduciaries continued to select the RCN Stock Fund as a Plan investment option and continued to purchase and hold RCN stock for the Fund even though continued investment in RCN stock was not prudent.

83. RCN stock traded as high as \$72 dollars per share in early 2000, but had lost more than half of its value by mid-2000. By December 28, 2000, the stock was trading at \$6.78125 per share. In 2000 alone, the Plan lost more than \$17 million from its investment in RCN stock.

84. By January 1, 2001, the stock had lost 80% of its value. RCN had announced that it was ceasing development of new markets. Nevertheless, the then fiduciaries of the Plan,

including RCN, Filipowicz and Winfield continued to offer the Stock Fund as an investment option and continued to invest Plan assets in RCN stock. The Plan's fiduciaries were still purchasing RCN stock when the stock was trading at \$2 per share on January 1, 2002, and at \$0.65 on January 2, 2003.

85. On January 15, 2004 RCN defaulted on its loan payments.

86. It was not until January 16, 2004 that the employer's match of employee contributions into the Stock Fund was terminated. Instead, all such contributions were applied to the other funds offered under the Plan in accordance with the fund selection elections of participants. Nevertheless, the Plan's fiduciaries continued to offer the Stock Fund and to invest in RCN stock.

87. On May 27, 2004, the day RCN filed for bankruptcy, RCN stock was trading at 16 cents with the Plan still holding millions of shares.

**D. RCN and defendants Filipowicz and Winfield Knew or Should have Known that RCN Stock was no longer a Prudent Investment for the Plan, but Failed to Take Appropriate Steps to Protect the Plan and Its Participants**

88. During the Class Period, the Plan fiduciaries, including RCN, defendants Filipowicz and Winfield, and Merrill Lynch Trust, knew or should have known that because of RCN's poor and deteriorating financial condition, RCN stock was not a prudent retirement investment.

89. RCN and defendants Filipowicz and Winfield knew or should have known that RCN labored under enormous debt. RCN and defendants Filipowicz and Winfield knew that RCN would be called on to repay these loans. Yet, even as these liabilities were maturing, RCN and defendants Filipowicz and Winfield continued to invest Plan assets in RCN stock,

an investment that would and did eventually become worthless in bankruptcy.

90. The Plan's fiduciaries, including RCN, defendants Filipowicz and Winfield and Merrill Lynch Trust, breached their ERISA obligations duties by failing to exercise the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use.

91. As the named fiduciaries of the Plan, and with first hand knowledge of RCN's activities and financial condition, RCN and defendants Filipowicz and Winfield had a duty to prudently invest with an "eye single" toward the interests of the Plan's participants or to appoint an independent fiduciary who could do so.

92. RCN and defendants Filipowicz and Winfield failed to utilize proper methods to investigate, evaluate and structure the investment in RCN stock and failed to act in a manner as would others familiar with such matters and failed to exercise independent judgment when making investment decisions. RCN and defendants Filipowicz and Winfield failed to employ the appropriate methods to investigate the merits of the investment in RCN stock, retain an independent fiduciary or financial consultant to provide advice independent from the Company to them, and failed to provide Plan participants with information regarding the Plan's investment in RCN stock, including the specific risks of the concentrated investment of Plan assets in RCN stock. RCN and defendants Filipowicz and Winfield breached their ERISA obligations by putting RCN's business interests ahead of the Plan's participants' interests. RCN and defendants Filipowicz and Winfield did not act prudently when they continued to offer the RCN stock Fund as an investment option and continued to purchase and hold RCN stock in the Plan despite the stock not being of investment quality.

**E. Plan Trustee Merrill Lynch Trust Also Knew or Should Have Known That RCN Stock Had Become an Imprudent Investment but Failed to Take Appropriate Steps to Protect the Plan and Its Participants**

93. Throughout the Class Period, Merrill Lynch Trust was the Plan Trustee. During that time, its corporate affiliates also served as advisor to RCN and as an analyst of the Company and the telecom industry. As a result, Merrill Lynch Trust and its affiliates, corporate parents and employees, were intimately knowledgeable about the affairs of RCN.

94. Merrill Lynch & Co. touts Merrill Lynch Trust as part of the Merrill Lynch family with expertise in the management of trust accounts. Yet during the Class Period, analysts in the Merrill Lynch family covered RCN and issued analyst reports which Merrill Lynch Trust knew or should have known recognized the poor quality of RCN stock as a retirement investment.

95. Until June 15, 2001, Merrill Lynch & Co. purported to use a five-category stock rating system comprised of: “buy,” “accumulate,” “neutral,” “reduce” and “sell.” New York State Attorney General Elliot Spitzer (“Spitzer”) has claimed in an action against Merrill Lynch & Co. that, in fact, it rarely, if ever, used the last two ratings (i.e., “reduce” or “sell”), thereby converting a five category system into a three category system. Accordingly, a rating of “accumulate” would translate into a recommendation to hold, and a rating of “neutral” would translate to sell. Between Spring 1999 until Autumn 2001 the group at Merrill Lynch & Co. that covered the telecommunications industry did not publish a single negative rating for any telecom stock it covered. Thus, the “Neutral” rating was the worst rating a telecom stock could receive from Merrill Lynch & Co. during that period of time.



96. Merrill Lynch & Co. gave rating reports of “Accumulate” to RCN stock on June 30, 2000 and on October 31, 2000. On December 21, 2000 Merrill Lynch & Co. *cut its rating* of RCN stock to “Neutral” and then, without public announcement, *discontinued rating the stock*, which, according to Spitzer, was one way in which Merrill Lynch & Co. could voice a “reduce” or “sell” recommendation without having to publicly say so or explain why. Despite the fact that Merrill Lynch & Co. gave RCN the worst rating it could give – Neutral, i.e., Sell – and then stopped coverage on RCN altogether, Defendant Merrill Lynch Trust continued to purchase and hold RCN stock for the Plan as a retirement investment.

97. Throughout the Class Period, Merrill Lynch Trust’s affiliates recognized the poor quality of RCN as an investment. That information and analysis was available to Merrill Lynch Trust. Merrill Lynch Trust knew or should have known that continued investment in RCN stock was not prudent. It also knew or should have known that the fiduciaries responsible for making investment decisions for the Stock Fund had conflicts of interests with the Plan’s participants.

98. Merrill Lynch Trust failed to carry out its responsibilities and duties as Trustee by continuing to follow Plan fiduciary instructions to invest in RCN stock and failing to take appropriate steps to protect Plan participants with respect to the investment of Plan assets in RCN stock.

#### **F. The Fiduciary Breaches in RCN's Bankruptcy Proceedings**

99. On May 27, 2004, RCN and several of its non-operating subsidiaries filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The cases were assigned to

the Honorable Robert D. Drain, under the case numbers 04-13637 (Hot Spots Productions, Inc.), 04-13638 (RCN Corporation), 04-13639 (RLH Property Corporation), 04-13640 (RCN Finance, LLC), and 04-13640 (TEC Air, Inc.).

100. On August 20, 2004, RCN and its subsidiaries filed a Joint Plan of Reorganization (the “Reorganization Plan”) and Disclosure Statement (the “Disclosure Statement”) with respect to the Reorganization Plan in its bankruptcy proceeding. The Disclosure Statement omitted any mention of any ERISA breach of fiduciary duty claims for recovery of Plan losses arising from RCN's acts and omissions, whether insurance was available to pay any of those losses, and the treatment of such claims under the Reorganization Plan, including specifying that under the Reorganization Plan the claims of the Plan and its participants against RCN and other Plan fiduciaries were to be discharged and/or released. Moreover, the proposed Reorganization Plan would not only bar claims against the Debtor, but also, would release claims against Defendants and others for breaches of fiduciary duties under ERISA.

101. Defendant Royster and Merrill Lynch Trust knew or should have known that it was improper under ERISA for RCN to attempt to release without consideration the claims of the Plan and its participants against RCN and other fiduciaries in the Reorganization Plan, and they failed to take any action, such as filing a Proof of Claim, and causing the Reorganization Plan to appropriately provide for such Proof of Claims to protect the Plan from such improper undisclosed release and proposed discharge.

**G. The Fiduciary Breaches Caused Substantial Plan Losses**

102. The Plan suffered losses and the Plaintiff and the other Plan participants were

harmful because of the fiduciaries' selection and offering of the Stock Fund as an investment alternative and because of the investment of Plan assets in RCN stock which was not a prudent retirement investment during the Class Period.

103. The Defendants and RCN do not have available to them any defense based on ERISA §404(c), 29 U.S.C. §1104(c), and the regulations promulgated under it. RCN and defendants Filipowicz and Winfield selected the Stock Fund as an investment offering for the Plan, for which they are responsible if they breached their fiduciary duties in the selection process they used. In addition, the Plan participants did not exercise effective and informed control over the assets in the Plan within the meaning of ERISA. As a consequence, the Plan fiduciaries remained entirely responsible for ensuring that such investments were and remained prudent. Defendants' liability to the Plan for losses stemming from imprudent investments of the Plan's assets in RCN stock by Defendants and their co-fiduciaries is therefore established upon proof that such investments were or became imprudent and resulted in losses in the value of Plan assets during the Class Period, without regard to whether or not the participants relied upon statements, acts, or omissions of RCN or Defendants.

104. Had defendants Filipowicz and Winfield and Merrill Lynch Trust properly discharged their fiduciary and/or co-fiduciary duties, and taken actions to assure that the Plan was not invested in RCN stock, which they knew or should have known was not a prudent retirement investment, and instead invested Plan assets in alternative prudent investments, and taken other actions to protect the best interests of the Plan and its participants, some or all of the Plan's losses caused by the breaches of fiduciary duty by RCN and the other fiduciaries would have been avoided.

105. RCN and defendants Filipowicz and Winfield and Royster and others further breached their fiduciary obligations to the Plan and its participants by failing to monitor other fiduciaries to ensure that they were prudently and loyally serving the interests of Plan participants throughout the bankruptcy proceedings, including acting to pursue or otherwise preserve and protect claims that the Plan and its participants had against other Plan fiduciaries for their breaches of fiduciary duty. By failing to act at all to raise, pursue or otherwise preserve and protect the claims that the Plan and its participants had against the other Plan fiduciaries, RCN, defendants Filipowicz and Winfield and Royster further breached their fiduciary duties.

106. The Plan also suffered losses, and Plaintiff and the other Class members were harmed during the Class Period because of the imprudent investment in RCN stock by the Plan's fiduciaries and because of materially inaccurate statements, acts and omissions in connection with the prudence of making and maintaining investments in RCN stock and pursuing claims that arose out of those actions by RCN, defendants Filipowicz and Winfield and Royster. Where a breach of fiduciary duty consists of, or includes, misrepresentations and omissions material to a decision by a reasonable participant that results in harm to the participant, the participant is presumed, as a matter of law, to have relied upon such misrepresentations and omissions to his or her detriment. These acts and omissions constituted misrepresentations and omissions that further caused Plaintiff's losses.

## **V. CLASS ACTION ALLEGATIONS**

107. Plaintiff brings this class action pursuant to Rule 23 of the Federal Rules of Civil Procedure in her representative capacity on behalf of herself and a class of all persons

similarly situated, defined as follows:

All participants and beneficiaries in the RCN Savings & Stock Ownership Plan for whose benefit Plan assets were invested in RCN common stock, on and after April 1, 2000 (“Class Period”), excluding the Defendants and their immediate family members.

108. Plaintiff meets the prerequisites of Rule 23(a) to bring this action on behalf of the Class because:

a. **Numerosity.** The Class consists of thousands of individuals and is so numerous that joinder of all members as individual Plaintiff is impracticable.

b. **Commonality.** There are questions of law and fact common to the Class.

Such common questions include, but are not limited to:

- i. Whether RCN, defendants Filipowicz and Winfield and Merrill Lynch Trust are Plan fiduciaries;
- ii. Whether RCN stock was a prudent investment for the Plan at any time during the class period;
- iii. Whether RCN, defendants Filipowicz and Winfield and others breached their fiduciary obligations to the participants of the Plan by failing to prudently manage the assets of the Plan by continuing to hold the assets of the Plan in shares of RCN stock under circumstances in which the Plan fiduciaries could not have reasonably believed that such was in keeping with how a prudent trustee would operate;
- iv. Whether RCN, defendants Filipowicz and Winfield, and others breached their fiduciary obligations to Plan participants by causing the Plan to make and maintain investments in RCN stock, when it was not prudent to do so;
- v. Whether RCN, defendants Filipowicz and Winfield, and others breached their fiduciary obligations to Plan participants by providing incomplete and inaccurate information to participants regarding whether it was prudent to continue investment in RCN stock in light of the concentration of RCN stock in the Plan and the risks related

to continued purchases of RCN stock for the Plan;

- vi. Whether RCN, defendants Filipowicz and Winfield and others breached their fiduciary obligations to the participants of the Plan by failing to prudently monitor the other fiduciaries so that the Plan's and participants' interests were adequately protected and served;
  - vii. Whether RCN, defendants Filipowicz and Winfield and others breached their duty to avoid conflicts of interest and to promptly resolve them when they occurred by continuing to allow RCN stock as an investment for the Plan;
  - viii. Whether Merrill Lynch Trust breached its responsibilities and duties as Trustee in continuing to invest Plan assets in RCN stock when it knew or should have known that such investment was not prudent;
  - ix. Whether any or all Defendants breached their fiduciary duties by failing to assert claims and/or bring lawsuits against some or all of the fiduciaries for the imprudent investment in RCN stock;
  - x. Whether any or all Defendants, by failing to comply with their specific fiduciary responsibilities under ERISA §404(a), 29 U.S.C. §1104(a)(1), enabled co-fiduciaries to commit breaches of their fiduciary duty and whether the defendants made reasonable efforts to remedy the breaches; and,
  - xi. Whether, as a result of defendants' fiduciary breaches, the Plan and its participants suffered losses.
  - xii. Whether defendants breached fiduciary duties by failing to protect the Plan and its participants in the RCN bankruptcy proceedings.
- c. **Typicality.** Plaintiff's claims are typical of the claims of the Class.
  - d. **Adequacy.** Plaintiff will fairly and adequately protect the interests of

the Class. Plaintiff has no interests that are antagonistic to or in conflict with the interests of the Class as a whole, and Plaintiff has engaged competent counsel experienced in class

actions and complex litigation.

109. This action is maintainable as a class action for the following independent reasons:

a. Given ERISA's imposition of a uniform standard of conduct on ERISA fiduciaries, the prosecution of separate actions by individual members of the Class would create the risk of inconsistent adjudications which would establish incompatible standards of conduct for the Defendants with respect to their obligations under the Plan. Fed. R. Civ. P. 23(b)(1)(A).

b. The prosecution of separate actions by members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests. Fed. R. Civ. P. 23(b)(1)(B).

c. The Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole. Fed. R. Civ. P. 23(b)(2).

d. Questions of law and fact common to members of the Class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

## COUNT I

### **(Breach Of ERISA Fiduciary Duties In Administration of the RCN Plan Prior to the RCN Bankruptcy against Defendants Filipowicz and Winfield)**

110. All previous averments are incorporated herein.

111. Defendants Filipowicz and Winfield are liable for investing Plan assets in RCN stock and offering RCN stock as an investment option. Defendants Filipowicz and Winfield are further liable for failing to take *any* actions to protect the Plan and its participants from the catastrophic depletion of Plan assets in RCN stock despite knowledge of the looming bankruptcy and of the other fiduciaries' failures to act. Hence, defendants Filipowicz and Winfield's management of the Plan assets was contrary to ERISA.

112. As of the beginning of the Class period, RCN was in a precarious position; yet, although defendants Filipowicz and Winfield knew or should have known of RCN's financial problems, they *never* did anything to safeguard the interests of the Plan's participants by removing Plan assets from investments in RCN stock or removing the RCN stock as an investment option.

113. Throughout the Class period, defendants Filipowicz and Winfield knew or should have known that RCN had conflicted loyalties in making decisions regarding Plan investments in RCN stock and that it was breaching its fiduciary duty of prudence and loyalty under ERISA.

114. Throughout the Class Period, all orders to buy or hold RCN stock were imprudent and contrary to ERISA and should not have been made by defendants Filipowicz and Winfield.



115. Regardless of the wording of the Plan documents, defendants Filipowicz and Winfield were bound by their duties of prudence and loyalty to disregard the requirements stated in those documents when, under the circumstances here, following those requirements was itself disloyal and imprudent. Regardless of any terms of the Plan documents, defendants Filipowicz and Winfield had a duty under 29 U.S.C. §1104(a)(D) to: (1) cease offering the RCN Stock Fund as an investment alternative for the Plan, (2) cease making purchases of RCN stock in the Plan, and (2) sell all or large portions of the RCN stock that was then in the Plan.

116. Both Filipowicz and Winfield failed to properly monitor each other and the other Plan fiduciaries to ensure that they were prudently and loyally serving the interests of Plan participants.

117. The breaches of fiduciary duty described herein give rise to the presumption that, but for the breaches of fiduciary duty, the Plan's assets would not have been maintained and further invested in RCN stock and would have instead been moved to the most profitable alternative prudent investment available.

118. As a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly the Plaintiff and the Plan's other participants lost millions of dollars.

119. Pursuant to 29 U.S.C. §1132(a)(2) and 29 U.S.C. §1109(a), defendants Filipowicz and Winfield are liable to restore the losses to the Plan and its participants caused by their violation of their fiduciary duties.

## COUNT II

### **(Breach Of ERISA Fiduciary Duties In Administration of the RCN Plan Prior to the RCN Bankruptcy against Defendant Merrill Lynch Trust)**

120. All previous averments are incorporated herein.

121. Merrill Lynch Trust, as Trustee, was required to act in the best interests of participants .

122. To the extent that Merrill Lynch Trust acted pursuant to directions to invest in RCN stock, Merrill Lynch Trust was required to accept such directions only if the directions were proper, in accordance with the Plan, and not contrary to ERISA's fiduciary provisions, 29 U.S.C. §1103(a)(1) & §1104. Merrill Lynch Trust knew or should have known that continued investment in RCN stock was imprudent and not in the best interests of participants, but continued to invest Plan assets in RCN stock, thereby causing losses to the Plan.

123. During the Class Period, Merrill Lynch Trust knew or should have known of RCN's precarious financial condition and that RCN stock was not a prudent retirement investment, but it took no actions to safeguard the interests of the Plan's participants .

124. Throughout the Class period, Merrill Lynch Trust knew or should have known that the other Plan fiduciaries had conflicted loyalties and were breaching their fiduciary duties of prudence and loyalty under ERISA in causing the Plan to continue to invest in RCN stock.

125. Throughout the Class Period, all orders to buy or hold RCN stock were imprudent and contrary to ERISA and Merrill Lynch Trust should not have followed them because it knew or should have known that such investment was not prudent and not in the best interests of the Plan participants.

126. Regardless of the wording of the Plan documents, Merrill Lynch Trust was bound to its duties of prudence and loyalty to disregard the requirements of those documents when, as here, following those requirements was imprudent and not in the best interests of the Plan's participants . Regardless of those requirements, Merrill Lynch Trust had a duty under 29 U.S.C. §1104(a)(D) to: (1) cease making purchases of RCN stock in the Plan, and (2) sell all or large portions of the RCN stock that were then in the Plan when such stock was not a prudent retirement investment.

127. The breaches of fiduciary duty described herein give rise to the presumption that, but for the breaches of fiduciary duty, the Plan's assets would not have been maintained and further invested in RCN stock and would have instead been moved to the most profitable alternative investment available.

128. As a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and Plaintiff and the Plan's other participants on whose behalf the Plan was invested in RCN stock, lost millions of dollars.

129. Pursuant to 29 U.S.C. §1132(a)(2) and 29 U.S.C. §1109(a), Merrill Lynch Trust is liable to restore the losses to the Plan and its participants caused by its violation of their fiduciary duties.

### **COUNT III**

#### **(Breach Of ERISA Fiduciary Duties In Administration of the RCN Plan After the RCN Bankruptcy against Defendants Merrill Lynch Trust and Royster)**

130. All previous averments are incorporated herein.

131. Defendant Royster served as the Plan Administrator, and Merrill Lynch Trust

served as Plan Trustee, prior to and at the filing of RCN's bankruptcy proceedings. Although both Royster and Merrill Lynch Trust knew or should have known that the Plan and its participants had claims against RCN and the other Plan fiduciaries, they took no action to protect those claims, to file a proof of claim prior to the bar date in the Chapter 11 proceedings, to disclose the claims to the participants prior to the bar date, to appoint an independent fiduciary who could act without the conflicting loyalties that Royster had as an officer of RCN and the Plan Administrator at the time of RCN's Chapter 11 proceedings, or to take any other action to protect the Plan and its participants.

132. There may be insurance covering the claims of the Plan and its participants. No information was disclosed to participants concerning their potential claims and the need to file before the bar date because the Plan's fiduciaries were conflicted and were not acting to protect the Plan in the Chapter 11 proceedings. Plan participants were not informed of the potential release and discharge of those claims under the Reorganization Plan or whether any insurance was available for the payment of those claims. Merrill Lynch Trust and Royster and other Plan fiduciaries should have provided such information in order for participants to act to protect themselves when the Plan's fiduciaries had conflicts of interest and were not acting in the participants' best interests.

133. Pursuant to 29 U.S.C. §1132(a)(2) and 29 U.S.C. §1109(a), Royster and Merrill Lynch Trust are liable to restore the losses to the Plan and its participants caused by their violation of their fiduciary duties.

#### **COUNT IV**

##### **(Liability for Breach of Fiduciary Duty by Co-Fiduciaries In Violation of ERISA 29 U.S.C. §1105, against All Defendants)**

134. All previous averments are incorporated herein.

135. Each Defendant was also a co-fiduciary of the other Defendants, RCN, and other Plan fiduciaries, under 29 U.S.C. §1105, with respect to the Plan and its participants. As co-fiduciaries, each of the Defendants is liable for the others' conduct.

136. Merrill Lynch Trust knowingly participated, both before and after RCN's bankruptcy filing, in the above-described fiduciary breaches by its co-fiduciaries, enabled the co-fiduciaries to commit such breaches by its failure to comply with the provisions of 29 U.S.C. §1104(a), and had knowledge of the breaches of the co-fiduciaries and failed to make reasonable efforts to remedy such breaches.

137. Defendants Filipowicz and Winfield knowingly participated in these fiduciary breaches by their co-fiduciaries committed prior to RCN's bankruptcy filing, and enabled the co-fiduciaries to commit such breaches by their failure to comply with the provisions of 29 U.S.C. §1104(a), and had knowledge of the breaches of the co-fiduciaries and failed to make reasonable efforts to remedy such breaches.

138. Defendant Royster knowingly participated in these fiduciary breaches by her co-fiduciaries committed subsequent to RCN's bankruptcy filing, and enabled the co-fiduciaries to commit such breaches by her failure to comply with the provisions of 29 U.S.C. §1104(a), and had knowledge of the breaches of the co-fiduciaries and failed to make reasonable efforts to remedy such breaches.

### **REQUESTED RELIEF**

139. ERISA, 29 U.S.C. §1132(a)(2), authorizes a Plan participant to bring a civil action for appropriate relief under 29 U.S.C. §1109. Section 1109 requires “any person who is a fiduciary . . . who breaches any of the . . . duties imposed upon fiduciaries . . . to make good to such Plan any losses to the Plan . . . .” Section 1109 also authorizes “such other equitable or remedial relief as the court may deem appropriate . . . .”

140. With respect to calculation of Plan losses, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have made or maintained its investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable investment available. In this way, the remedy restores the value of the Plan’s assets to what they would have been if the Plan had been properly and prudently administered.

WHEREFORE, Plaintiff prays for relief as follows:

- A. Certification of this action as a class action pursuant to Fed. R. Civ. P. 23;
- B. An Order appointing Plaintiff as the Representative of the Class and appointing undersigned counsel as Co-Lead Counsel for the Class;
- C. A Declaration that the Defendants breached their ERISA fiduciary duties to the Plan participants;
- D. An Order compelling the Defendants to make good to the Plan all injury to the Plans resulting from these breaches of fiduciary duty, including:
  - (1) restoration to the Plan for losses resulting from imprudent investment

of the Plan's assets;

(2) restoration to the Plan of all profits that the Plan would have made had the Defendants fulfilled their fiduciary obligations; and,

(3) other equitable restitution and appropriate equitable monetary relief.

E. An Order imposing a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

F. An Order enjoining Defendants from any further violations of their ERISA fiduciary obligations;

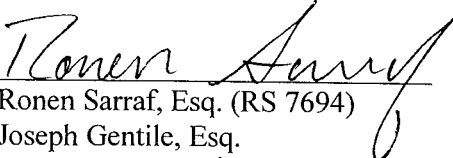
G. An Order awarding costs pursuant to 29 U.S.C. §1132(g);

H. An Order awarding attorneys' fees pursuant to 29 U.S.C. §1132(g) and attorneys' fees and expenses pursuant to the Common Fund Doctrine;

I. An Order awarding such other and further relief as the Court deems equitable and just.

Dated: October 5, 2004  
New York, New York

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