UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In the Matter
of Case No.
04-13638
RCN Corporation,
Debtors.
----------x
October 27, 2004
United States Custom House
One Bowling Green
New York, New York 10004

Motion to Allow Late Filed Claim; Motion to Authorize Settlement of Partial Assignment of Lease And Assignment of Sublease Agreement; Motion to Authorize Settlement of Lease Termination and Recognition Agreement; Debtors' Objection to Motion for Leave to File Proof of Claim.

B E F O R E:

HON. ROBERT D. DRAIN,

U.S. Bankruptcy Judge.

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P R O C E E D I N G S:

THE COURT: Okay, RCN.

MR. MATZ: Good morning, your Honor. Thomas J. Matz of Skadden Arps, counsel for the RCN debtors. I would like to introduce my colleague, Mark McDermott of Skadden Arps.

We filed a pro hac vice motion yesterday afternoon, and the order in that regard was both entered and docketed, I believe, last evening.

THE COURT: Okay.

MR. MATZ: Having said that, I would like to turn this matter over to Mr. McDermott.

THE COURT: Okay.

MR. McDERMOTT: Good morning, your Honor. Mark McDermott on behalf of RCN Corporation and its affiliated debtors. Your Honor, there are five matters on the court's docket today; one of them is to be continued. Three are uncontested, and one matter is contested, that being the motion by Debra Craig to file a late proof of claim. With the court's permission, I would like run through briefly the adjourned and the three uncontested matters before we deal with the contested matter.

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THE COURT: Okay.

MR. McDERMOTT: The first item to be adjourned can be found at docket number 276. It is a motion by Debra Craig, unrelated to the contested matter, to lift the automatic stay to allow a lawsuit to proceed against RCN under Title 7 of the Civil Rights Act.

Your Honor, we are close to an agreement with Ms. Craig's counsel, separate from the counsel that's here today on the other matter. So I would like this matter ought to be withdrawn with prejudice, pursuant to her agreement to withdraw RCN as a defendant in that action. We've agreed, subject to the court's calendar, to continue the matter to the 3rd at 10 o'clock, at which time we hope to have the agreement finalized and the motion would be withdrawn.

THE COURT: Okay.

MR. McDERMOTT: Thank you, your Honor.

The next item I would like to take up is the motion by which the debtors' have sought to have certain orders entered in the initial debtors' cases be deemed applicable to the

subsequent debtors' cases. This is docket item number 174. To date, all relief that we've asked for in that motion has already been entered, except with respect to the subsequent debtors' retention of Blackstone as financial advisers, any of these services as is crisis managers. We do have interim orders entered on August 26th, and those two forms of relief who were just here today for final relief with respect to those matters.

No objections were filed by the deadline of October 22.

THE COURT: This was noticed to everybody, correct?

MR. McDERMOTT: That is correct.

THE COURT: Given the wide notice that the U.S. Trustee sought.

MR. McDERMOTT: That is correct, your Honor.

THE COURT: Okay. I didn't see any objections either. And in light of that fact and of the wide notice and my review of the two applications, I'll grant them.

MR. McDERMOTT: Thank you, your Honor. We did submit an order to chambers

yesterday.

THE COURT: All right.

MR. McDERMOTT: The third item I would like to take up is a motion to approve a partial assignment of lease and assignment of subleases agreement, which is at docket number 258. This is a really key motion for the estate, so I would like to put a paragraph or two on the record.

The bottom line is that if granted, that this motion would remove from the estate a contingent liable in the neighborhood of approximately 60 million dollars in exchange for payment of approximately 1.9 million dollars, so this is a really important deal for RCN and its subsidiaries. Just briefly for the record, we have a non debtor affiliate, RCN Telecom, that is the actual tenant of some leases here, but RCN Corporation, as debtor, is a guarantor on these leases, and the leases run to 2015.

While RCN Telecom has subleased the lease to a number of sub tenants, the spread between what it gets on those subleases and what it pays to the landlord is significant; again, present valued at around 60 million dollars. We have

basically reached an agreement, subject to the court's approval, whereby the landlord, Advanced Magazine Publishers, will effectively step in and assume RCN Telecom's role as landlord and completely release RCN Corporation from the guarantee, and also non debtor subsidiary with respect to all going forward obligation, in exchange for which the estate will agree that Advanced Magazine Publishers can keep a letter of credit in the amount of 1.7 million dollars, and also in exchange for an additional payment in the amount of 179 thousand 13 dollars.

This was a very heavily negotiated agreement with this landlord. We received no objections to this motion by the deadline of October 22, and we ask that the order we sent to chambers yesterday be entered.

THE COURT: Okay. This is essentially a settlement of rejection lease of the term, and based on the terms and the fact that it was heavily negotiated, I'll approve it.

MR. McDERMOTT: Thank you, your Honor.

The fourth item is a related or

similar type of motion, it's the motion to approve a lease termination in recognition of the agreement at docket number 274. It's another key real estate motion predominantly designed to get RCN and its non debtor affiliate out of the middle of a similar relationship, and frankly out of the leasing business altogether.

This one the economics are a bit different, while the going forward on obligations of RCN on its guarantee, and it's not a debtor affiliate, total of about 25 million dollars. They do receive substantial rent from their subtenant Jeff Bloom, so that the spread is really only about 1.7 million dollars. Under the proposed settlement, the landlord would keep 1.7 million dollars. But the key thing for RCN and its affiliate is that it gets us out of the leasing business and out of a go forward concern about the credit worthiness of the tenant here, which are valuable to the companies as they finalize this aspect of their operational restructuring.

This agreement was actually more heavily negotiated than the one that I just talked about, and was certainly conducted in good faith.

We did not receive any objections to this motion either, and again, we ask that the order that we submit to chambers be entered.

THE COURT: Okay. There was no collateral for this lease?

MR. McDERMOTT: For the lease? I'm not -- not to my understanding, no, your Honor.

THE COURT: And the million seven, was that a present value calculation?

MR. McDERMOTT: That's my understanding, yes, Judge.

THE COURT: Well, this seemed to me to be a little bit of a closer call. But given the treatment of general unsecured creditors under your plan and the lack of any opposition, I'll approve it.

MR. McDERMOTT: Thank you, your Honor.

This brings us to the last matter on the agenda, the motion by Debra Craig for relief to file a proof of claim. I'll turn the podium over to counsel for Ms. Craig.

MR. FINBERG: Yes.

MR. SARRAF: Your Honor, I'm Ronen

Sarraf. I'm from Sarraf Gentile, counsel for Debra Craig. The motion has been fully briefed. I would just like to introduce Mr. Richard Finberg of Malakoff Doyle and Finberg to speak to the substance of the motion.

THE COURT: Okay.

MR. FINBERG: Thank you, your Honor. We have -- if you'll recall we were here at the disclosure hearing, and we have filed in this court, or we have the motion. We want to file a class proof of claim on behalf of the participants in the RCN savings and stock ownership plan. This is a rather complex claim; it's not a usual claim, it's -- first of all it is filed as a class claim; secondly it involves ERISA. And the nature of the claim is that the debtor was not only this plan sponsor but was a named fiduciary under the terms of the plan. And as fiduciary, under the laws of ERISA, it had duties to act in the interest -- solely in the interest of participant's and beneficiaries. That's in fact the statutory language of ERISA. Courts have described the duties the highest known to law. It's a prudent man standard of conduct.

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Now the claim really relates to the preceding bankruptcy, in that while the debtors was collapsing there were large amounts of stock held -- RCN stock held in the plan, which was essentially retirement funds of the participants. But some debtors, or potential debtors in that situation, because there is an obvious conflict in that the debtor wears two hats, were appointed independent fiduciaries to look at the participants' interest. But in any event that wasn't done. What happened was the stock went down to essentially zero while the debtor headed into bankruptcy and they lost to participants.

During the bankruptcy, the debtor, while the debtor in possession really still wore two hats, it was still a fiduciary, and as such, it had an independent duty under ERISA just like it had certain duties under the Bankruptcy Code, in this case to act for the benefit of the participants. And it chose to maintain those two hats. And one thing that the debtor should have done was file a claim, schedule the debt, done something to protect that interest. Essentially we came in after the bar date, promptly after we got

involved conducted a hasty investigation and got the best information we could, and we filed this claim as soon as practical to do so.

Debra Craig knew of the bankruptcy. Her lawyer in the discrimination case filed a claim. In fact, it seems that the reason for this dismissal, as I understand it, and I'm really not familiar with the discrimination package. She was actually employed as a supervisor in the telesales department for a subsidiary of the debtor. In fact, I think I problem with the other claim is that it shouldn't have been a claim against RCN, because it's a claim against its subsidiary; however, the ERISA claim is a claim against RCN because RCN is a named fiduciary of the plan. And it's a significant claim. It's a claim that may be insured in part or in full. There is a disclosure statement that acknowledges possible insurance. But it's a claim that has not been protected in the plan and will not be protected unless this claim is allowed.

Now, what happens is -- the ERISA case is inherently complex, we not only have the laws of ERISA, you effectively have to bring these

class actions, and on top of it we have to deal with a bankruptcy proceeding. And when you say you have rights under ERISA to a individual their eyes glaze over; it's simply a complicated matter. Yes, you know the bankruptcy. Do you know by that that you have a claim against the debtor because of a breach of fiduciary duties and it wasn't going to protect those in the bankruptcy?

Now we've argued that, you know, until the bar date, we certainly rely on the debtor to do that. I think every plan participant can expect, under ERISA statute, the debtor will act solely if the debtor still keeps its fiduciary hat and does not get another fiduciary to protect them, and we can assume that the debtor will act with prudent man standard solely in the interest of the participants of beneficiaries. It's failed to do so. We are here, by necessity, to protect that claim.

Now I would take it one step further. They have said, oh, the fact that the government has -- this is a fast track bankruptcy, your Honor, so fast that even though they have a early bar date, and they moved the case quickly,

and I certainly give the debtor credit. It's a fast track and that's fine; but it's so fast that in fact the 180 days by statute that the Secretary of Labor has to file a claim hasn't even expired. It won't expire until November 24th. And that's important, your Honor, because the statute that authorizes Debra Craig or other participants to bring a suit says -- this is a civil action, obviously weighing their contacts with some proof of claim to the debtor, that that is a civil action may be brought by the secretary, that's the Secretary of Labor, or by a participant beneficiary or fiduciary for appropriate relief under Section 1109. And Section 1109 is a section that says fiduciaries have to make good on the losses of the plan satisfied by the breaches of duty.

So what we have a debtor with two hats that didn't protect the plan. We have -- the government has an absolute right to file a claim until November 24th, and we claim the same right under the same statute. And I'm saying frankly, your Honor, as a matter of law we didn't consciously ignore the bar date. We acted as fast as we could. But as a matter of law, you cannot

bar this claim because of the statute. It's the same claim the government would bring, and the code provides -- the Bankruptcy Code provides 180 days to bring that.

THE COURT: When you say we did not consciously ignore the bar date, who are you referring to when you say we?

MR. FINBERG: Well, your Honor, I think Debra Craig -- I wasn't there, but I think she did not understand the ERISA claim until her discrimination lawyer brought it to her attention.

THE COURT: But did she get notice of the bar date?

MR. FINBERG: Yes. Sure she had notice of the bar date, that certainly her lawyer found out about it, so either directly or indirectly, we don't dispute that she had notice.

THE COURT: Was any class action litigation commenced or even threatened before the bar date?

MR. FINBERG: Your Honor, we are -- what's happened is the first thing we did was we started this proceeding and the bar date, and our first action was we investigated it enough to do

it, was to file the claim here. And then on -- shortly thereafter, I believe it was October 5th, we commenced a class action case in front of Judge Rakoff in this court. And in fact one possible proceeding where this goes is ultimately that the references would be withdrawn at 157(D) and in any event the debt would be consolidated. But in any event that action would transpire and the first order of business was to meet the claim.

THE COURT: Wait a second. That action was commenced after the bar date?

MR. FINBERG: Yes. We obviously considered both at the same time and we filed this as soon as we could.

THE COURT: And has he certified a class?

MR. FINBERG: It's a brand new stage, your Honor.

THE COURT: Okay.

MR. FINBERG: We also know -- we became aware two or three days ago that there's been another class action suit commenced, again after the filing of this claim. This is the first raising of this claim in this proceeding.

THE COURT: And obviously those two suits are not against the debtor, they are against individuals.

MR. FINBERG: Right, they are against individuals. And they are against individuals who -- first of all it's a Merrill Lynch subsidiary, it was a corporate fiduciary, and then there are various individuals who would have been, in some manner, employed by the company, but they also had the fiduciary hat be on separate as to the plan where they had a separate duty. And frankly, they would presumably be insured by the same policy, assuming there's policies and the like.

Now there may be a claim frankly that exceeds policy, or excess claim, or indemnification claim or the like that doesn't effect the debtor. When we get to the factors, your Honor, the Supreme Court case cited the Pioneer Investors. And it ultimately says that the bottom line, you know, it's an equitable decision. Obviously the reason for delay, that it's excusable or it's inexcusable neglect, and I say it's excusable as a matter of law, since there's a

statutory right that this claim; this fund can't be barred short of 180 days. But if you look at prejudice, there's no prejudice. We've gotten it in time to make our position known for confirmation and disclosure statement. The length of the delay is five or six weeks in a fast moving bankruptcy, and prior to the government bar date. And there's nothing that indicates that the claimant acted in bad faith; and in fact, the claimant is doing what the debtor should be doing, which is protecting the rights. There is no basis -- it's a case that screams for an exception, your Honor, because by not allowing the claim, in essence you are really saying participants in the plan aren't going to have a remedy against the debtor even though the debtor is wearing two hats and didn't protect them. That's the equity of it.

THE COURT: Okay.

MR. McDERMOTT: Your Honor, I will not repeat everything that was filed in our papers, but I do want to highlight three or perhaps four points very briefly. What I didn't really hear a lot of in counsel's argument just now in the order that I really find it much in their motion was a

deep analysis, or really any analyses of the Pioneer factors here. We hear a lot of about ERISA, but under the law of Pioneer I just don't think that the standards are met here. And I do think that when you have a claimant that was obviously aware of a bar date filed a claim in time and then tries to file another one afterwards, that really sort of fails all the different factors you are supposed to consider under Pioneer.

There is one aspect of the argument that I purposely didn't address in my objection that I kind of wish I are would have, and I want to take a minute to do it now because I think it's important. The whole underpinning to their theory is that the debtor wore two hats and effectively had a duty to sue itself or file a proof of claim. Now I don't I'm not an ERISA aspect, and I don't want to become one, and I'm certainly not asking the court to become one. But I just wanted to point out that the only thing cited in their papers that supported their proposition was an unpublished 9th Circuit decision from 1992 that they did attach to their motion and that I skimmed briefly before, and read it in a little more detail last night.

Judge, that case does not stand for the proposition that a plan fiduciary has a sue itself or file a claim on its own bankruptcy. That case involved facts and circumstances completely different from what's involved here. You had a plan fiduciary on a company that induced its employees to buy stock, and then it turned around and looted that plan and its own assets. And what the court actually said in that case was that the other planned fiduciaries had an obligation to sue the company to stop the looting. So one co-fiduciary has a duty to sue another co-fiduciary. It says absolutely nothing about what they say here, that there is some statute that you would say in the statutes about whether or not a fiduciaries has a duty to sue itself or otherwise assert a claim in its bankruptcy, not to mention the fact that here the company doesn't believe there was any claim to be had. It's heard nothing from the Department of Labor, it's heard nothing from the Securities and Exchange Commission or any other government authority with respect to its public reporting, its public accounting, or any other handling of its business, including the stock option plan.

So for that reason alone, again I'm not asking that the court delve deep into the intricacies of ERISA, but if we just take their papers at face value, and this being the only case that they cite in support of their theory, their theory really falls down. And even if there is merit to it, there was nothing under Pioneer that served as "a some sort of circumstances beyond this claimant's reasonable control pursuant to which she couldn't file a claim;" she could have and she should have.

MS. SULLIVAN: Your Honor, Deirdre Sullivan from Milbank, Tweed a behalf of the official committee. We would like to say a couple of words about this particular motion.

Your Honor, I think that there are several opportunities for creditors in bankruptcy cases, besides the bar date motion, to understand what claims the debtors believe exist in their particular case. In this particular case the RCN Corp. petition was filed at the end of May. Those schedules did not list this claim, the company was not aware of this claim; obviously no lawsuit had been filed, as Ms. Craig's counsel had mentioned

that it was filed after the proof of claim bar date. Again, the debtor then sent out notices of the bar date to the particular creditors. Ms. Craig was a party who was noticed as the affidavit of the service company indicates, there was no return of that notice. Ms. Craig did file a proof of claim timely with respect to her employment discrimination case. There is no -- the bar date notices are designed to give that particular notice to creditors, that if they have a claim that's not on the schedules, that the debtor has not indicated is a claim in their case in some fashion, that it's then their burden to file that proof of claim.

Ms. Craig obviously understood the necessity of that with respect to her employment discrimination claim. And if she believed that she had an additional claim, we believe that she should have contacted RCN to see if they were going to file some type of claim or contact the Department of Labor if that is where she felt the claim should be filed from, and it does not appear that any of those activities took place between May and the filing of this particular motion. Although Ms. Craig argues that the debtors have a duty to file

the claims to preserve them, it's the debtor's duties under the Code are required to file the schedules and then give notices of the bar date, and the debtor satisfied those conditions.

Obviously this is a large claim. The debtors have already filed their plan and disclosure statement. The official committee does not believe that it is appropriate at this time to permit this late filed claim, given that this particular creditor had ample notice and obviously had counsel's assistance to assist her in filing the proof of claim prior to the original bar date.

Thank you.

MR. FINBERG: Your Honor, we don't have anything new to add. I think it's clear, regardless of -- it does seem, I guess, ironic for the trustee to sue itself. There are many trustees, for example, in the US Air bankruptcy, where I shepherded a similar claim which we happened to get notice of a couple of days before the bar date when we found out, and subject to the bankruptcy, they had actually appointed AON fiduciary counselors as an independent about six weeks before bankruptcy, which is very late in the

process; but the point is that there's a duty to protect participants.

And the code, you know -- I guess from a standpoint of debtor in general, if the code doesn't list -- if the debtor doesn't list a debt, it doesn't file a claim for a debt, from a bankruptcy perspective, maybe it doesn't have to do that, it just has the risk of it not being discharged. That's their business decision. But they wore another hat. They took on a hat of fiduciary. They didn't pass that hat to somebody else and the claim wasn't filed, and it's simply an equitable matter.

And obviously, you know, that yes, Debra Craig's discrimination lawyer understood he needed to file a claim. In fact he was wrong and he filed in the wrong case. And perhaps they were a defendant in the other case, I really don't know the facts of that, but I know that that case will be proceeding against other parties, and that she was actually appointed by a subsidiary in that action. But the knowledge and existence and ability to file this claim, and there is -- frankly, there is a very small number of law firms

to who can really deal with this, both with the intersection of ERISA and bankruptcy and the like.

And frankly, Mr. Sarraf came to me and we quickly worked it out. And we investigated. We pulled 11-Ks off the net and we found out everything that we could. We still had to guess at certain facts, but we found enough to determine, in our opinion, that a claim should have been filed and did it as quickly as we could. And no one is prejudiced by this. The hallmark is what is the -- if you file a claim late that is going to change the whole plan. All I ask from the plan is that it allow to go forward against other folks who may be insured and that we've been put in the right basket so that we can participate in whichever basket that is. In fact, I wouldn't dream of voting against the plan if they were having a vote, because peoples' jobs are at stake and we to organize the debtor. But the point is that the employee should get their share.

We, in fact, are doing the company a favor. We are probably going to get some other funds, hopefully, if we are successful, that will go back into the RCN employees' account, and

hopefully that will be paid by choice stocks. But to the extent that there's a liability to the debtor, they are entitled to their share along with the others. The committee of creditors obviously speaks as a body and not for individual creditors, but this is a substantial claim. And, you know, whether the claim will get allowed and the amount will be allowed which we can prove the liability, that's for another day, which can either be decided by your Honor, although I think technically it really should be decided in district court so that it can be consolidated in the other case. So there's no prejudice, and I just simply appeal to the court's equity.

And I the really think there's a problem of whether this claim could be legally barred when the statute that authorizes the suit is in the same sentence as the D.O.F. whether it's the secretary or the claimant or whoever brings on an such an action. So obviously if you deny the claim, we will try to get the D.O.F. involved, but that's -- it may or may not do that. The government is busy, and most of these enforcements of rights happen by private actions by private

lawyers. And that's where we are.

THE COURT: Okay. All right. I have in front of me a motion by Deborah Craig through her counsel for permission to have her admittedly late filed claim deemed filed timely on the basis of excusable neglect.

The facts are essentially agreed, Ms. Craig, as well as, I assume, the other potential members of the class which the claim would seek to be on behalf of, received actual notice of the bar date. As far as Ms. Craig is concerned, this is established not only by the certificate filed by the noticing agent, but also by the fact that she did file a proof of claim through her employment counsel in the case in a timely manner a different proof of claim.

The Second Circuit is has made clear that, "bar orders are not to be disregarded lightly. The bar order serves the important purpose of notifying the parties to the bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims, a necessary step in achieving the goal of

successful reorganization. Thus a bar order does not function merely as a procedural gauntlet, but as an integral part of the reorganization process." That's a quote from First Fidelity Bank in Annie versus Hooper Investment. In re Hooper Investment, Inc. 937 F2'd 833 at 840, Second Circuit 1991. The Supreme Court, in Pioneer Business Services Company versus Brunswick Associates under partnership 507 US 380 1993 has described generally the basis for permitting relief from a bar date when filing due to excusable neglect. Essentially it is an equitable analysis weighing several factors, including the danger of prejudice to the debtor, the length of the delay, and its potential impact on judicial proceedings; the reason for the delay including whether it was in the reasonable control of the movant and whether the movant acted in good faith.

Some courts describe this analysis as a two step approach, the first step being to determine whether there was an in fact a type of neglect that the rule contemplates. And secondly the application of the foreknown factors, although frankly the Pioneer factors specifying the reason

for the delay and whether it was within their reasonable control of the movant somewhat obviates the need to make that two step analyses. In any event, I find here that the filing of a timely proof of claim was with in the control of Ms. Craig, who had actual notice, and in fact was represented by employment counsel before the bar date, and in fact filed a different proof of claim before the bar date, and that therefore this is not the type of neglect that the rule contemplates as being excusable.

This is particularly the case given the fact that the proof of claim here sought to be filed late is a class proof of claim. The courts have made it clear that the application of excusable neglect analyses to late class claims raises particular concerns. And under these facts where class not only had not been certified but had not even identified itself in the form of litigation or otherwise, even as a putative class, before the bar date, the courts have pretty consistently refused to permit the filing of a late class proof of claim, given, among other things, the inequity of the late filing as to the members

of the class in general.

In this regard, there is a good discussion by Chief Judge Bernstein of this court in in re DDI Corp., 304 B.R. 626 Bankruptcy Southern District of New York 2004, as well as by Chief Judge Gangredella in the New Jersey Bankruptcy Court in in re First Interregional Equity Corp. 227 B.R. 358 at 371 Bankruptcy Court New Jersey 1998; and in re Sacred Heart of Norristown, 177 B.R. 161 Bankruptcy Court Eastern District of Pennsylvania in 1995.

The movant here acknowledges, as she must, in her pleading that under ERISA an individual participant, as well as the Department of Labor, may sue to recover on behalf of the pension plan if the losses to the plan resulted from breach of fiduciary duty under 29 USC Sections 1109 and 1132(a)(2). Therefore, despite the fact that the debtor may have had a duty to file such a claim, Ms. Craig also had the right to do so. And I do not believe that any failure, if there was a failure about by the debtor to do so, would excuse her from filing a claim on a timely basis. Moreover, I do not believe that the Department of

Labor's right to file a claim as a governmental agency later this year absolves Ms. Craig of her failure to file a claim within the bar date as it applied to her.

Congress obviously gave the Department of Labor a separate right to do so for separate reasons, and it may well still choose to do so, but that again does not absolve Ms. Craig from having failed to do so when it was clearly within her power, and she is has offered no other excuse beyond the fact that she hoped someone else might do it. I also agree with counsel for the debtor that the unpublished 9th Circuit decision cited by Ms. Craig, System 99 Minority Shareholders, does not alter this analyses as it does not pertain to a bar date in a bankruptcy case, and the considerations that I have described earlier.

Therefore, I will deny the motion.

MR. McDERMOTT: Thank you, your Honor. That concludes the matters we had on today's agenda.

THE COURT: You should just submit an order before you give a copy to Mr. Finberg.

MR. McDERMOTT: We will do so.

MS. SULLIVAN: Thank you very much.

MR. McDERMOTT: Thank you, your Honor.

MR. FINBERG: Thank you, your Honor.

C E R T I F I C A T E

STATE OF NEW YORK }
} ss.:
COUNTY OF WESTCHESTER }

I, Denise Nowak, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That I reported the proceedings in the within entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, 2004.

_____

DENISE NOWAK