

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 In the Matter

6 of

Case No.

04-13638

7 RCN CORPORATION,

8 Debtors.

9 -----x

10 November 23, 2004

11 United States Custom House

One Bowling Green

12 New York, New York 10004

13
14 Debtors' Objection to Proofs of Claim filed
15 by Kemper Insurance Companies and IBM; Debtors'
16 Second Omnibus Objection to Claims; Motion to Allow
17 Claims of IBM; Motion Authorizing Amendment to
18 Terms of Employment and Retention of CTA LLC;
19 Motion of Unsecured Creditors Committee to Join
20 Debtors' Objection to the Claim of IBM; Notice of
21 Agenda of Matters Scheduled for Hearing on November
22 23, 2004.

21 B E F O R E:

22 HON. ROBERT D. DRAIN,

23 U.S. Bankruptcy Judge.
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A P P E A R A N C E S:

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A P P E A R A N C E S (Continued):

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BY: STEVEN MEYER, ESQ.

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

THE COURT: RCN. I gather we have someone on the telephone?

MR. MEYER: Yes, your Honor. My name is Stephen Meyer of Oppenheimer Wolf & Donneley. I'm here for International Business Machines Corporation.

THE COURT: Okay.

MR. MATZ: Good morning, your Honor. Thomas Matz of Skadden Arps on behalf of the RCN debtors.

Your Honor, there are three matters to be spoken on this morning, the Kemper and IBM claims, and then there's a committees' motion with respect to one of their advisers and the expanded role there, that's CTA. First with respect to the Kemper Insurance claim, you may recall that a week ago we spoke to this matter and we announced that the hearing of the debtors then and counsel for Kemper had settled the matter and were working on appropriate documentation to put before the court. We were a little optimistic in anticipating that that would be completed as quickly as we hoped; nevertheless, the agreement remains, the parties

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2 are working on the documentation, and I'm here to
3 request on behalf of both sides that that matter
4 can be adjourned to your next hearing date of
5 December 2nd at 10:00 a.m. and we anticipate being
6 able to put the stipulation before you at that
7 time.

8 THE COURT: That's fine.

9 MR. MATZ: The IBM matter, I'd like
10 to introduce David McGrail of Dechert LLP, special
11 conflicts counsel to the debtors, who will address
12 this matter to the court.

13 THE COURT: Okay.

14 MR. McGRAIL: Good morning, your
15 Honor.

16 As your Honor is aware, IBM filed
17 proofs of claims against the debtors seeking
18 recovery for alleged patent infringement. The
19 proof of claim against RCN Corporation came out to
20 37.6 million dollars and the claims against the
21 debtors' subsidiaries are liquidated. I'm pleased
22 to report to the court that the parties have
23 reached a resolution with respect to IBM's claims.
24 This resolution memorialized in the form of a
25 proposed stipulation order, a copy of which

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2 hopefully if your Honor received yesterday. The
3 committee has indicated that it has no objection to
4 the proposed stipulation order. Under the terms of
5 the stipulation, IBM would have a Class 5 general
6 unsecured claim against the parent RCN Corporation
7 in the amount of 3 million dollars, and it would
8 have no patent infringement claims against any of
9 the debtors' subsidiaries. The stipulation also
10 incorporates an agreement containing additional
11 terms and conditions, and this agreement was the
12 subject of a motion that was filed by IBM to have
13 the motion filed under seal, and the debtors did
14 not oppose that motion. Under the circumstances,
15 the debtors believe that the resolution represents
16 a fair and reasonable resolution of the claims that
17 IBM has and is of great benefit to the debtors and
18 the estate, and respectfully request that the court
19 so order the stipulation.

20 THE COURT: Okay. I was a little
21 confused just procedurally, given the motion to
22 file under seal. Are you looking for approval
23 today, or are you looking just to have it be
24 announced today and have it be approved on further
25 notice.

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2 MR. McGRAIL: I think IBM's counsel
3 may want to speak to the issue, but I believe that
4 we are looking for approval of that motion today,
5 your Honor.

6 THE COURT: All right.

7 MR. MEYER: Your Honor, that's
8 correct, we would hope to have approval today.

9 THE COURT: All right. So really
10 the under seal motion was just to attach an exhibit
11 in effect to the stipulation?

12 MR. MEYER: That's correct, your
13 Honor.

14 THE COURT: Okay. Well, given the
15 committee's signoff and my own familiarity with the
16 underpinnings of the claim objection, I conclude
17 that this as reasonable resolution of the claim
18 objection, which potentially could have required
19 quite extensive litigation. And certainly, as far
20 as the addendum clause was concerned, the debtor is
21 getting a reasonable result here. So I will
22 approve the settlement.

23 MR. McGRAIL: Thank you, your Honor.
24 May I hand up a copy of the stipulation on the
25 disk?

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2 THE COURT: Yes.

3 MR. McGRAIL: Thank you, your Honor.

4 MR. TECCE: Good morning, your
5 Honor. James Tecce of Milbank Tweed on behalf of
6 the official committee.

7 Before your Honor is the committee's
8 motion to amend in terms of the retention of its
9 industry and technological advisers Capital
10 Technologists Advisors or CTA --

11 MR. MEYER: Your Honor, I'm sorry to
12 interrupt. May I just ask about the motion to
13 order the documents be filed under seal?

14 THE COURT: I think I actually
15 signed that yesterday.

16 MR. MEYER: Thank you, your Honor.
17 I apologize.

18 THE COURT: If not, I approved it
19 yesterday.

20 MR. MEYER: Okay. Thank you, sir.

21 THE COURT: All right.

22 MR. TECCE: As your Honor may be
23 aware, on July 26, 2004, CTA was originally
24 retained by the creditors' committee under Section
25 328(a) of the Bankruptcy Code to, as I said, act as

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2 industry and technology advisers to the committee.
3 And its original retention, the understanding of
4 what CTA would do is, among other things, examine
5 the telecommunications operations of RCN, examine
6 the technological capabilities, its business plan,
7 its capital program, and evaluate its proposed plan
8 of reorganization. And CTA has done those things.
9 Generally speaking, CTA has looked at RCN's network
10 and its ability to accommodate the business plan
11 that's put forth before the court and the creditors
12 and the current reorganization plan on file by RCN.

13 It seeks to expand that retention,
14 however, with respect to an area which it did not
15 look at originally, and that, generally speaking,
16 was programming and product development. As set
17 forth in the application, it's contemplated that
18 CTA will now review and analyze subscription,
19 television programming, agreements and rights,
20 channel lineups and tiers, and assists the
21 committee in making recommendations to the debtors
22 with respect subscription and programming. And
23 generally speaking what that means is that CTA will
24 now take an active role in programming, product
25 development, examining markets and the debtor's

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2 channel lineup on each of those markets, and
3 generally assisting in the companies' programming
4 efforts. And for those increased activities, CTA
5 seeks an increase in its month fee from 150
6 thousand dollars a month to 180 thousand dollars a
7 month. That is the first form of amendment to the
8 retention that the committee seeks.

9 The second is a success fee payable
10 to CTA which is in the range of 1.25 million and
11 1.75 million, which would be payable on the
12 consummation of a Chapter 11 plan in this case.
13 The committee has not finalized its negotiations
14 with CTA with respect to the number of the actual
15 success fee. It would be within that range, but no
16 event will it be less than 1.25 million, and
17 obviously it's also subject to additional court
18 approval and CTA's final fee application.

19 THE COURT: So the success fee is
20 not being sought under 328(a) at this point?

21 MR. McGRAIL: Excuse me?

22 THE COURT: You are not seeking
23 approval under 328(a), you are basically alerting
24 us that that's the number that's been negotiated or
25 the range that's been negotiated, subject to

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2 subsequent application.

3 MR. TECCE: I would say that we are
4 seeking approval in the sense that we are seeking
5 approval of the amendment of the terms of their
6 retention to accommodate a success fee. As
7 originally retained, the terms of that engagement
8 contemplate --

9 THE COURT: Well, I'm asking a
10 fairly technical question, which is are you seeking
11 to bind the court and the other parties to the
12 standard that most people think 328(a) imposes or
13 the limitations that it imposes to on Section 330,
14 which is that you can only deviate from it if it
15 was improvident at the time it was entered into.

16 MR. TECCE: We are, your Honor, we
17 are seeking approval of the fee under 328(a).

18 THE COURT: Okay. I will not
19 approve that at this point. I will approve it as
20 an amendment to the engagement letter, but I don't
21 believe there's been sufficient notice, if that's
22 what you are seeking, since I didn't know that's
23 what you were seeking. I don't think the U.S.
24 Trustee would have either, because their practice
25 is to require notice to all creditors for 328(a)

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2 retention and a carveout for themselves.

3 MR. McGRAIL: Well, I'll speak to
4 that, your Honor. Apart from the fact that
5 obviously that application was served, the
6 disclosure statement --

7 THE COURT: Was it served on all
8 creditors?

9 MR. TECCE: No, your Honor, but the
10 disclosure statement was served is on all
11 creditors.

12 THE COURT: But you are seeking this
13 approval now as opposed to at confirmation. I
14 don't think you should pursue this.

15 MR. TECCE: Okay. Just so I'm
16 clear, if with come back to the court after the
17 confirmation of the Chapter 11 plan.

18 THE COURT: It's likely I will
19 approve something, particularly given the terms of
20 the plan, which is that only your creditors are
21 affected, so it's really your creditors' money.
22 But I'm not prepared to approve it now.

23 MR. TECCE: Okay. Well, at that
24 point we'll, on behalf of the --

25 THE COURT: I'll approve -- well,

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2 actually let me ask you about the other aspect of
3 it, the bump up, because I was only the asking the
4 debtor about the success fee.

5 MR. TECCE: Correct.

6 THE COURT: The other change from --

7 MR. TECCE: 150 to 180.

8 THE COURT: -- 150 to 180, is this
9 the committee's view that they are really doing new
10 work? You can read the engagement B and F, which
11 talks about a comprehensive and detailed review of
12 the business plan and marketing, and F talks about
13 advising the committee in connection with the
14 debtors' current contract to suggest that they in
15 fact were retained to do this type of work, which
16 as described in the application, it says review and
17 analyses of subscription of television agreements
18 and the like, but are they really doing new work?

19 MR. TECCE: Well, your Honor,
20 actually Wayne Barr of CTA is here. If your Honor
21 has specific questions, he might be able to speak
22 better to the specifics of the additional work that
23 is being done. My understanding is that it is new.

24 THE COURT: That it is really new?

25 MR. TECCE: That it is new

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2 additional work.

3 THE COURT: And expanded?

4 MR. TECCE: Yes, sir.

5 THE COURT: Okay. On that basis, I
6 will approve the expanded engagement with the 30
7 thousand dollar a month increase.

8 MR. TECCE: Okay. But just so I'm
9 clear, your Honor, does your Honor have a way that
10 CTA could come back to the court?

11 THE COURT: Sure. The success fee
12 as -- you can amend the proposed order to say that
13 the success fee will be subject to review under
14 Section 330 of the Bankruptcy Code at the time of
15 the final fee application, and I hope Mr. Barr
16 heard me, I'm likely to approve that, particularly
17 since I view the constituency that's asking for
18 this is also the constituency that in effect is
19 going to be paying for it. But just procedurally
20 this wasn't set up in a way that I think gave
21 people sufficient notice that it was being sought
22 under the improvident standard.

23 MR. TECCE: Your Honor, thank you
24 very much.

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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

A	<p>12:13 approve 7:22 11:19 11:19 12:19,22,25 14:6,16 approved 6:24 8:18 area 9:14 Arps 2:5 4:11 asking 11:9 13:3 14:17 aspect 13:2 assisting 10:3 assists 9:20 attach 7:10 Attorneys 2:6,12 3:6 Authorizing 1:15 aware 5:16 8:23 a.m 5:5</p>	<p>case 1:6 10:12 certainly 7:19 certify 15:7,12 change 13:6 channel 9:20 10:2 Chapter 10:12 12:17 Chase 2:13 circumstances 6:14 claim 1:14,17 4:18 5:19 6:6 7:16,17 claims 1:15,15 4:15 5:17,20,23 6:8,16 Class 6:5 clause 7:20 clear 12:16 14:9 Code 8:25 14:14 come 12:16 14:10 committee 1:16 2:12 6:3 8:6,24 9:2,21 10:8,13 13:13 committees 4:15 committee's 7:15 8:7 13:9 companies 1:14 10:3 completed 4:24 comprehensive 13:11 concerned 7:20 conclude 7:16 conditions 6:11 confirmation 12:13 12:17 conflicts 2:18 5:11 confused 6:21 connection 13:13 constituency 14:17 14:18 consummation 10:12 containing 6:10 contemplate 11:8 contemplated 9:17 Continued 3:2 contract 13:14 copy 5:25 7:24</p>	<p>Corporation 1:7 4:1 4:8 5:1,19 6:1,6 7:1 8:1 9:1 10:1 11:1 12:1 13:1 14:1 correct 7:8,12 13:5 counsel 2:18 4:20 5:11 7:2 COUNTY 15:4 court 1:2 4:3,9,22 5:8,12,13,22 6:18 6:20 7:6,9,14 8:2 8:14,18,21 9:11 10:17,19,22 11:9 11:11,18 12:7,12 12:16,18,25 13:6,8 13:24 14:3,5,10,11 creditors 1:16 2:12 8:24 9:11 11:25 12:8,11,20,21 CTA 1:16 4:17 8:10 8:23 9:4,8,9,18,23 10:4,10,14 13:20 14:10 CTA's 10:18 current 9:12 13:14 Custom 1:11</p>
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