

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 October 27, 2004

11 United States Custom House

One Bowling Green

12 New York, New York 10004

13
14 Motion to Allow Late Filed Claim; Motion to
15 Authorize Settlement of Partial Assignment of Lease
16 And Assignment of Sublease Agreement; Motion to
17 Authorize Settlement of Lease Termination and
18 Recognition Agreement; Debtors' Objection to Motion
19 for Leave to File Proof of Claim.
20

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: RONEN SARRAF, ESQ.

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

3 THE COURT: Okay, RCN.

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

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

12 THE COURT: Okay.

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

15 THE COURT: Okay.

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

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2 THE COURT: Okay.

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

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12 So I would like this matter ought to be withdrawn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18 and the motion would be withdrawn.

19 THE COURT: Okay.

20 MR. McDERMOTT: Thank you, your
21 Honor.

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

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

11 No objections were filed by the
12 deadline of October 22.

13 THE COURT: This was noticed to
14 everybody, correct?

15 MR. McDERMOTT: That is correct.

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

18 MR. McDERMOTT: That is correct,
19 your Honor.

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

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

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2 yesterday.

3 THE COURT: All right.

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

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

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

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

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

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

23 MR. McDERMOTT: Thank you, your
24 Honor.

25 The fourth item is a related or

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

9 This one the economics are a bit
10 different, while the going forward on obligations
11 of RCN on its guarantee, and it's not a debtor
12 affiliate, total of about 25 million dollars. They
13 do receive substantial rent from their subtenant
14 Jeff Bloom, so that the spread is really only about
15 1.7 million dollars. Under the proposed
16 settlement, the landlord would keep 1.7 million
17 dollars. But the key thing for RCN and its
18 affiliate is that it gets us out of the leasing
19 business and out of a go forward concern about the
20 credit worthiness of the tenant here, which are
21 valuable to the companies as they finalize this
22 aspect of their operational restructuring.

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

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

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

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

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

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

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

18 MR. McDERMOTT: Thank you, your
19 Honor.

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

24 MR. FINBERG: Yes.

25 MR. SARRAF: Your Honor, I'm Ronen

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

7 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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2 and I certainly give the debtor credit. It's a
3 fast track and that's fine; but it's so fast that
4 in fact the 180 days by statute that the Secretary
5 of Labor has to file a claim hasn't even expired.
6 It won't expire until November 24th. And that's
7 important, your Honor, because the statute that
8 authorizes Debra Craig or other participants to
9 bring a suit says -- this is a civil action,
10 obviously weighing their contacts with some proof
11 of claim to the debtor, that that is a civil action
12 may be brought by the secretary, that's the
13 Secretary of Labor, or by a participant beneficiary
14 or fiduciary for appropriate relief under Section
15 1109. And Section 1109 is a section that says
16 fiduciaries have to make good on the losses of the
17 plan satisfied by the breaches of duty.

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: And has he certified a
17 class?

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

20 THE COURT: Okay.

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

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

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

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

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

19 THE COURT: Okay.

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

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

11 There is one aspect of the argument
12 that I purposely didn't address in my objection
13 that I kind of wish I are would have, and I want to
14 take a minute to do it now because I think it's
15 important. The whole underpinning to their theory
16 is that the debtor wore two hats and effectively
17 had a duty to sue itself or file a proof of claim.
18 Now I don't I'm not an ERISA aspect, and I don't
19 want to become one, and I'm certainly not asking
20 the court to become one. But I just wanted to
21 point out that the only thing cited in their papers
22 that supported their proposition was an unpublished
23 9th Circuit decision from 1992 that they did attach
24 to their motion and that I skimmed briefly before,
25 and read it in a little more detail last night.

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

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

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

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

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

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

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

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

14 Thank you.

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

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

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

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

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

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

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

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

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

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2 lawyers. And that's where we are.

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

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

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

RCN Corporation

1
2 successful reorganization. Thus a bar order does
3 not function merely as a procedural gauntlet, but
4 as an integral part of the reorganization process."
5 That's a quote from First Fidelity Bank in Annie
6 versus Hooper Investment. In re Hooper Investment,
7 Inc. 937 F2'd 833 at 840, Second Circuit 1991. The
8 Supreme Court, in Pioneer Business Services Company
9 versus Brunswick Associates under partnership 507
10 US 380 1993 has described generally the basis for
11 permitting relief from a bar date when filing due
12 to excusable neglect. Essentially it is an
13 equitable analysis weighing several factors,
14 including the danger of prejudice to the debtor,
15 the length of the delay, and its potential impact
16 on judicial proceedings; the reason for the delay
17 including whether it was in the reasonable control
18 of the movant and whether the movant acted in good
19 faith.

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

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1
2 for the delay and whether it was within their
3 reasonable control of the movant somewhat obviates
4 the need to make that two step analyses. In any
5 event, I find here that the filing of a timely
6 proof of claim was with in the control of Ms.
7 Craig, who had actual notice, and in fact was
8 represented by employment counsel before the bar
9 date, and in fact filed a different proof of claim
10 before the bar date, and that therefore this is not
11 the type of neglect that the rule contemplates as
12 being excusable.

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

1 RCN Corporation
2 of the class in general.

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

13 The movant here acknowledges, as she
14 must, in her pleading that under ERISA an
15 individual participant, as well as the Department
16 of Labor, may sue to recover on behalf of the
17 pension plan if the losses to the plan resulted
18 from breach of fiduciary duty under 29 USC Sections
19 1109 and 1132(a)(2). Therefore, despite the fact
20 that the debtor may have had a duty to file such a
21 claim, Ms. Craig also had the right to do so. And
22 I do not believe that any failure, if there was a
23 failure about by the debtor to do so, would excuse
24 her from filing a claim on a timely basis.
25 Moreover, I do not believe that the Department of

1 RCN Corporation

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

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

20 Therefore, I will deny the motion.

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

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

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RCN Corporation

MR. McDERMOTT: We will do so.

MS. SULLIVAN: Thank you very much.

MR. McDERMOTT: Thank you, your
Honor.

MR. FINBERG: Thank you, your Honor.

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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

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