

Hearing Date: April 18, 2005 at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In Re

RCN CORPORATION, *et al.*,

Debtors.

: Chapter 11 Case No.  
: 04-13638 (RDD)

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:  
: Jointly Administered  
:  
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**MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a)  
AND 107(b) AND BANKRUPTCY RULE 9018 FOR AN ORDER AUTHORIZING  
WINSTON & STRAWN LLP TO FILE UNDER SEAL ITS RESPONSE  
TO THE OBJECTIONS OF THE COMMITTEE AND U.S. TRUSTEE TO THE  
FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF  
EXPENSES OF WINSTON & STRAWN LLP AND DIRECTING THAT ALL  
PROCEEDINGS WITH RESPECT THERETO BE CONDUCTED *IN CAMERA***

Winston & Strawn LLP (“Winston”), counsel to the Board of Directors (the “Board”) of RCN Corporation (“RCN”) and its affiliated debtors and debtors in possession (collectively, the “Debtors”), hereby submits this motion for entry of an order under 11 U.S.C. §§ 105(a) and 107(b) and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”): (1) authorizing Winston to file, under seal, its Response to the Objections of the Committee and Trustee (“Response”) to the Final Application of Winston & Strawn, LLP, Counsel to the Board of Directors of RCN Corporation, *et al.*, For Compensation and Reimbursement of Expenses, dated February 4, 2005 (the “Final Application”); and (2) directing that any and all proceedings in connection with said Final Application, including the hearing before this Court presently scheduled for Monday, April 18, 2005, at 10:00 a.m., shall be conducted *in camera*. In support of this motion, Winston respectfully represents as follows:

## **BACKGROUND**

1. On May 27, 2004, RCN and four of its subsidiaries filed petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). Five other RCN subsidiaries commenced Chapter 11 cases during August 2004.

2. On December 8, 2004, this Court approved Debtors’ Plan of Reorganization and on December 21, 2004, Debtors’ Plan became effective. During this period, the Debtors operated their businesses and managed their properties as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 cases. The Committee was formed by order of this Court, dated June 10, 2004.

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 105(a) and 107(b).

5. In June 2004, Winston was retained to provide advice to the Board and perform legal services in connection with these Chapter 11 cases. In its Final Application, Winston seeks an award of \$1,143,388.20, for work performed on behalf of the Board from June 7, 2004 through December 16, 2004. This figure represents fees of \$1,111,789.75 and expenses of \$31,598.45.

6. The Committee and Trustee have filed objections to Winston’s Final Application.

## RELIEF REQUESTED

9. Winston requests entry of an order, pursuant to sections 105(a) and 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, authorizing the Debtors to file pleadings and exhibits and present evidence in support of its Final Application (the “Confidential Materials”) under seal so as to maintain the confidentiality of the information contained in those materials.

10. The Confidential Materials contain, among other things, highly sensitive, confidential communications between the Board and its counsel protected by the attorney-client privilege. In addition, the Confidential Materials contain information related to various defenses and positions considered by the Board and its counsel with respect to ongoing litigation against certain Board members. *See, e.g., Thomas v. McCourt, et al.*, No. 04-5068 (D.N.J.) and related cases. Disclosure of this information would be highly prejudicial to the Debtors.

11. In addition, the Confidential Materials disclose the substance of negotiations between and among representatives of the Debtors, the Board, the senior secured lenders and the Committee, their counsel and other professional advisors. This information is highly sensitive and confidential, as it relates to efforts undertaken to resolve demands made upon the Board by the Committee that could impact the Debtors and Board members in ongoing litigation and potentially harm Debtors’ ongoing business.

12. Finally, disclosure of the Confidential Materials is not necessary for the protection of the public, creditors of the Debtors or third parties because (a) the documents containing such materials are subject to this Court’s approval in any case, (b) Winston proposes to provide copies of the Confidential Materials to the certain parties in interest in these cases as described herein, and (c) Winston’s Final Application describes the relevant fees in appropriate and sufficient detail.

13. Winston proposes that the Confidential Materials (and any confidential information derived from the Confidential Materials) remain confidential, be filed under seal and be served on and made available only to (i) the United States Trustee for the Southern District of New York, (ii) the Official Committee of Unsecured Creditors, and its counsel, and (iii) such other parties as ordered by the Court or agreed to by Winston.

#### **BASIS FOR RELIEF**

14. Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the power to issue orders that will protect entities from potential harm that may result from the disclosure of certain confidential information. This section provides, in relevant part:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may –

- (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
- (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

15. Bankruptcy Rule 9018 defines the procedures by which a party may move for relief under the section 107(b) of the Bankruptcy Code, and provides that “[o]n motion, or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information [or] (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code.” Fed. R. Bankr. P. 9018.

16. This Court has wide discretion to allow Confidential Materials, such as those at issue here, to be filed under seal. *See Geller v. Branick Int’l Realty Corp.*, 212 F.3d 734, 738 (2nd Cir. 2000). The Second Circuit has held that section 107(b) and Bankruptcy Rule 9018 do “not

require that commercial information be the equivalent of a trade secret before protecting such information.” Video Software Dealers Assoc. v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 28 (2d Cir. 1994). This Court has stated that it “is required to grant that relief upon the motion of a party in interest, assuming the information is of the type listed in section 107(b).” In re Global Crossing Ltd., 295 B.R. 720, 723 (Bankr. S.D.N.Y. 2003). In addition, the Second Circuit has held that a party seeking the sealing of information is only required to show that the information is confidential and commercial, and no showing of “good cause” is necessary. Video Software Dealers Assoc., 21 F.3d at 28.

17. Documents containing information covered by the attorney-client privilege or the attorney work product doctrine are routinely protected from disclosure to the public. *See, e.g., Fisher v. United States*, 425 U.S.391 (1976). *Hickman v. Taylor*, 329 U.S. 495 (1947). Accordingly, a motion to seal records containing such information, particularly in light of ongoing litigation concerning the matters at issue, should be granted. In addition, an order directing that all proceedings in this Court, including, in particular, the hearing presently scheduled for Monday, April 18, 2005, is entirely appropriate.

19. Winston submits that no new or novel issue of law is presented with respect to the matters contained herein. Because the relevant authorities in support of the requested relief are cited in this motion, Winston requests that the requirement of the service and filing of a separate memorandum of law under Local Bankr. R. 90 13-1(b) be deemed satisfied.

20. Pursuant to Bankruptcy Rule 9018, the Debtors submit no notice of this motion need be provided other than to (i) the United States Trustee for the Southern District of New York, and (ii) the Official Committee of Unsecured Creditors, and its counsel.

**CONCLUSION**

**WHEREFORE**, Winston & Strawn LLP respectfully requests that the Court enter an order authorizing Winston to file its Response under seal and directing that all further pleadings relating thereto be filed under seal and all proceedings to be held in connection therewith, including the hearing presently scheduled for Monday, April 18, 2005, be conducted *in camera*, and granting such other and further relief as the Court deems just and proper.

Dated: April 14, 2005

WINSTON & STRAWN LLP

/s/ David Neier

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