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September 21, 2005

Hon. Robert D. Drain, U.S.B.J.
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004-1408

Re: In re RCN Corporation
Case No. 04-13638 (RDD)

Dear Judge Drain:

Please accept this correspondence in lieu of a more formal brief in support of creditor, Marie DeWees' motion for an order to vacate an order expunging her claim and to lift the automatic stay pursuant to 11 U.S.C. 362 (d) so that the value of Ms. DeWees' employment discrimination claims can be determined in state court. For the reasons set forth below, Ms. DeWees' motion should be granted.

STATEMENT OF FACTS

The pertinent facts are set forth in the accompanying certification of Jon W. Green, Esq. dated September 20, 2005. In brief, they are as follows:

Ms. DeWees filed a complaint in *Marie DeWees v. RCN Corporation, et al.*, Docket Number MID-L-3645-02, in the Law Division, State of New Jersey, County of Mercer on or



about January 12, 2000. The filed complaint alleges that Ms. DeWees was terminated from her employment on January 13, 1998 because of illegal gender and age discrimination which, if proven to be true, violates the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1, *et. seq.* (See, **Green Cert. ¶ 2.**) The state court case was litigated up to the time that trial was to commence. However, on February 5, 2003, the trial court granted summary judgment to the defendants RCN Corporation, David McCourt and Michael Mahoney and dismissed Ms. DeWees's state court complaint with prejudice. (**Id. at ¶ 3.**) Ms. DeWees filed a Notice of Appeal on February 14, 2003. Briefs were filed by all parties to the action and oral argument was heard before the Appellate Division. (**Id. at ¶¶ 3-4.**)

Defendant RCN Corporation had filed Chapter 11 bankruptcy on May 27, 2004, and Ms. DeWees filed her Proof of Claim on or about July 27, 2004. (**Id. at ¶¶ 4-5.**)

On or about August 2, 2004, Ms. DeWees filed a motion with this Court seeking an Order of this Court to lift the automatic stay so that this Court may abstain in favor of the New Jersey courts to determine the value of the debt that the debtor RCN Corporation may owe to Ms. DeWees and for a bridge order to extend the filing deadline for Ms. DeWees to file an adversarial complaint. (See **Docket entry #137**). Counsel for the debtor and the undersigned had telephone consultations and agreed to enter into a consent order to lift the automatic stay to allow the New Jersey Superior Court, Appellate Division to go forward and decide creditor's appeal. Ms. DeWees agreed to withdraw her motion for a bridge order and a Consent Order was executed and filed with this Court on October 12, 2004. (See **Green Cert., Ex. 2** attached thereto and **Docket entry # 295**).

The debtor, RCN Corp. filed its motion to expunge Ms. DeWees claim on October 7, 2004. (See **Docket Entry # 281**). After receipt of the paper Notice, Ms. DeWees' employment

counsel telephoned debtor's counsel, specifically Grenville Day, Esq. of Skadden Arps, who had the undersigned had previously dealt with on the consent order to lift the automatic stay, asking RCN to hold in abeyance its motion to expunge Ms. DeWees' claim since RCN had previously agreed to lift the automatic stay by consent order to allow Ms. DeWees to go forward with her New Jersey appeal. Mr. Day, after checking with someone, presumably his client, agreed and he said that he would call in the adjournment of the motion to the Court. The undersigned followed up with a call to the law clerk before the return date of the motion, i.e. November 16, 2004. The law clerk said he would take care of it and put off the motion as to Ms. DeWees. He also said that follow-up correspondence was not necessary. (**Green Cert.**, ¶ 7.)

On July 15, 2005, the New Jersey Appellate Division reversed the entry of summary judgment in favor of RCN finding there was sufficient evidence submitted that if believed by a jury could hold RCN Corp. and individual defendants, David McCourt and Michael Mahoney liable under the New Jersey Law Against Discrimination and remanded the case for trial. (See **Green Cert.**, Ex. 3 attached thereto.)

On September 14, 2005, in preparation for a scheduled settlement telephone conference that day with RCN's General Counsel, Steve Bogiages, the undersigned spent several hours going over the PACER filings with regard to this case and discovered that this Court had expunged Ms. DeWees' claim on November 16, 2004 which was entered on the docket. (See **Docket Entry # 391** and related **Docket entry # 281**). Ms. DeWees' claim is contained in Exhibit E of **Docket entry # 281**.) At no time, did Ms. DeWees or her counsel ever receive a copy of this Order expunging her claim. (**Green Cert.**, ¶ 11).

DeWees' state discrimination claims are meritorious. Third, there is no prejudice since her claim is ultimately subject to the confirmation's plan's payout scheme for general unsecured creditors.

POINT TWO

NEW JERSEY'S COURTS ARE IN THE BEST POSITION TO DETERMINE THE VALUE OF THE CREDITOR'S CLAIM.

Creditor, Marie DeWees, seeks a lifting of the stay that is automatically imposed under 11 U.S.C. 362(A). The lifting of that stay for purposes of determining the value of Ms. DeWees's employment discrimination claims against RNC Corporation will not undermine the two policy goals that Congress contemplated when enacting the automatic stay provision: (1) to prevent the dissipation of the bankrupt's assets during the pendency of the bankruptcy proceeding; and (2) to avoid the multiplicity of claims in different forms against the bankrupt estate. See .e.g. *In Re Larkham*, 31 B.R. 273, 276 (Bkrpky. D. Vt. 1983) and cases cited therein. As pointed out by the bankruptcy court in *In Re Larkham, supra*, "permitting the liability issues to be decided in another tribunal would not dismember the bankruptcy estate. It appears to be both consistent both with the Congressional intent underlying the bankruptcy act of 1978.... and with the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 459 U.S. 813, W.3 S.Ct. 199, 74 L.Ed. 2d 160 (1982)." *Id.* at 276. In other words, it is "in the best interest of the efficient administration of the [bankruptcy] case" to allow the New Jersey courts to determine the merits of Ms. DeWees's discrimination claims. *Ibid.* citing to *In Re Rouseville*, 20 B.R. 892, 893 (Bkrpky., D.R.I. 1982).

A New Jersey state court trial and the judgment entered on behalf of Ms. DeWees, will of course be subject to the terms of the reorganization plan approved by this Court. Thus, since

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the assets of RCN's estate will not be affected by proceeding in state court, relief from this automatic stay should be granted for the limited purpose of determining the value of Ms. DeWees's employment discrimination against the Debtor.

CONCLUSION

For the reasons set forth above, this Court should grant creditor Marie DeWees' application for relief from the Court's expungement order of November 17, 2004 and from the automatic stay pursuant to 11 U.S.C. Section 362 (d) so that her employment discrimination claims can be valued in state court.

Respectfully submitted,

GREEN & SAVITS, LLC
Attorneys for Creditor, Marie DeWees

By: 

JON W. GREEN (JWG-2308)

JWG:lp
cc: Debtor's Counsel
Clerk, Bankruptcy Court