Hearing Date: December 6, 2005 at 10:00 a.m. (EDT)
Objection Deadline: December 2, 2005 at 4:00 p.m. (EDT)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	
RCN CORPORATION, et al.,	:	Case No. 04-13638 (RDD)
	:	
Reorganized Debtors.	:	Jointly Administered

MOTION OF RCN CORPORATION FOR ENTRY OF ORDER (a) CLARIFYING CERTAIN TERMS OF CONFIRMATION ORDER OR, (b) IN THE ALTERNATIVE, MODIFYING CERTAIN TERMS OF CONFIRMATION ORDER PURSUANT TO FED. R. Civ. P. 60(b) AND FED. R. BANKR. P. 9024

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

RCN Corporation, one of the reorganized debtors in the above-captioned cases ("RCN"), hereby moves the Court (the "Motion") for entry of an order, pursuant to section 105(a) of title 11 of the United States Code (as amended, the "Bankruptcy Code") and Federal Rule of Civil Procedure 60(b) ("FRCP 60(b)") as made applicable by Federal Rule of Bankruptcy Procedure 9024 ("Bankruptcy Rule 9024"), (a) clarifying the effect of the Order of this Court (the "Confirmation Order") [Docket No. 483], confirming the plan of reorganization for the above-captioned debtors (collectively, the "Debtors"), or (b) in the alternative, modifying certain provisions of the Confirmation Order, and represents as follows:

BACKGROUND

1. RCN filed its petition for relief under chapter 11 of the Bankruptcy Code on May 27, 2004 (the "Petition Date"). The Court entered the Confirmation Order with respect to the Debtors' Joint Plan of Reorganization (the "Plan") on December 8, 2004. No final decree closing the cases has yet been entered.

2. Pursuant to Article XII of the Plan, this Court has retained jurisdiction to, *inter alia*, "[h]ear and determine disputes arising in connection with the interpretation, implementation, consummation, or enforcement of the Plan."

3. In 1995, almost ten years prior to the Petition Date, C-TEC Corp. ("C-TEC"), RCN's former corporate parent, through a wholly-owned subsidiary, C-TEC International, Inc. (now known as RCN International Holdings, Inc. ("RCN International")), purchased a substantial equity interest (which currently represents an approximately 49% interest) in Megacable, S.A. de C.V. ("Megacable"), a privately held company, and one of the largest cable television providers in Mexico. In connection with its investment in Megacable, RCN International entered into a Shareholders Agreement and a Subscription Agreement with Megacable and its non-RCN shareholders, and C-TEC entered into a Support and Guaranty Agreement with Megacable and its non-RCN shareholders attached hereto as Exhibit A (as amended or supplemented from time to time, the "Guaranty Agreement," and collectively with the Subscription Agreement and the Shareholders Agreement, the "Megacable Agreements").

4. Pursuant to the Subscription Agreement, RCN International agreed to purchase 37 million shares of Megacable, a private company, for approximately $84 million. Under the Guaranty Agreement, C-TEC guarantied RCN International's

obligation to pay the purchase price at closing, as well as its other obligations that had to be performed for the closing to occur. The Shareholders Agreement sets forth the particulars of the parties' mutual rights and obligations as majority and minority shareholders of Megacable going forward. C-TEC's primary obligations under the Guaranty Agreement were fully executed at the closing, leaving only some negative covenants described in greater detail below. However, the Subscription and Shareholders Agreements continue to provide RCN International with numerous important protections of its minority ownership interest in Megacable, including the right to nominate directors to Megacable's board, consent rights with respect to various corporate governance and business matters, the right to receive periodic financial reporting, and prescribed means for resolving disputes. Each of these rights is very important to RCN and serves to protect the value of its investment in Megacable and, in the case of the financial reporting covenants, facilitates RCN's compliance with its own public reporting obligations under the securities laws.

5. As a result of a corporate reorganization in 1997, (a) C-TEC transferred the shares of RCN International to RCN, and (b) RCN was spun-off to C-TEC's shareholders. Megacable and its non-RCN shareholders consented both to the spin-off of RCN and to the assumption by RCN of C-TEC's obligations under the Guaranty Agreement (the "Guaranty Obligations"). See Consent and Waiver dated as of September 12, 1997 attached hereto as Exhibit B. The Consent and Waiver apparently required RCN to execute a document expressly assuming such Guaranty Obligations (the "Assumption") . RCN has no evidence of ever actually executing the Assumption. In any case, RCN and its subsidiaries have performed and continue to perform their

obligations, and Megacable and its non-RCN shareholders have always accepted RCN's performance thereunder. RCN International, which was never a debtor in these cases, continued to be a party to the Subscription and Shareholders Agreements.

6. When RCN was preparing for its bankruptcy filing, its legal personnel reviewed its legal files but, since such files did not contain the Assumption or any evidence that RCN ever executed such document, RCN concluded that none of the Debtors was a party to any of the Megacable Agreements. Accordingly, none of such agreements, including the Guaranty Agreement, was listed in the Debtors' schedules of assets and liabilities filed in accordance with section 521(1), nor did the Plan or the Confirmation Order address any of the Megacable Agreements, including the Guaranty Agreement, in any way.

7. On or about June 22, 2005, Megacable contacted RCN seeking an explanation of the effect, if any, of RCN's bankruptcy filing on the continued effectiveness of the Megacable Agreements. When RCN responded that its bankruptcy could not have had any effect on the Megacable Agreements because only its non-debtor subsidiaries were parties to such agreements, Megacable expressed its belief that the Guaranty Agreement had been, in fact, assumed by RCN, rather than by one of its non-debtor affiliates.

8. Upon further investigation, RCN has come to the conclusion that even if it has not executed the Assumption, it either ratified its obligations under the Guaranty Agreement through performance or Megacable has waived this condition through acceptance of such performance. In any case, RCN has assured Megacable that

it never intended to impair its obligations, if any, under the Guaranty Agreement.[1] RCN further assured Megacable that it was willing to give Megacable and its non-RCN shareholders any assurances they desired that RCN and its affiliates fully intended to continue to perform under all of the Megacable Agreements, including the Guaranty Agreement.

9. Nevertheless, despite these assurances, Megacable, in a letter dated September 2, 2005, attached hereto as Exhibit C (the "9/2 Letter"), expressed its belief that, as a result of RCN's bankruptcy, either RCN has rejected the Guaranty Agreement or the Guaranty Obligations have been discharged. In either case, Megacable has taken the position that such purported rejection and/or discharge would result in a breach of the Guaranty Agreement.

10. One plausible reading of the 9/2 Letter is that Megacable will next assert that a breach of the Guaranty Agreement would permit Megacable to terminate the Subscription Agreement and the Shareholders Agreement, thus denying RCN International certain valuable bargained-for protections as a minority shareholder of Megacable.[2] In addition, the Shareholders Agreement grants RCN International the right of first offer. RCN certainly did not intend to impair its rights under the Megacable Agreements and the Court should grant it relief to avoid any doubt.

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[1] In fact, the Disclosure Statement filed in connection with the confirmation of the Plan contains multiple references to RCN's indirect interest in Megacable and its value to the Debtors' estates. Clearly, if the Debtors believed that they were impairing (or even risking an impairment of) this investment in any way by the confirmation of the Plan they would have discussed such risk of impairment and its impact on the estates in the Disclosure Statement.

[2] RCN does not concede that, even were it found to be in breach of the Guaranty Agreement, any of the following consequences will ensue.

RELIEF REQUESTED

11. RCN has tried for months to resolve these matters consensually with Megacable and its non-RCN shareholders without resort to the Court. Such efforts bore no frut. Accordingly, RCN requests that this Court enter an Order either (a) in accordance with Article XII of the Plan, confirming RCN's interpretation of the Plan to the effect that the Guaranty Agreement was never rejected, nor the Guaranty Obligations were ever discharged, or (b) granting a modification of the Confirmation Order pursuant to section 105(a) of the Bankruptcy Code, FRCP 60(b) and Bankruptcy Rule 9024 to explicitly provide for same.

ARGUMENT

I. Guaranty Agreement Was Not Rejected Because It Was Not Executory

12. Article VII of the Plan provides, in relevant parts, that (a) as of the effective date of the Plan, all executory contracts to which any of the Debtors was a party were rejected, unless they were listed in Exhibit D to the Plan, and (b) the Confirmation Order constitutes an order under section 365 of the Bankruptcy Code approving such rejection. The Guaranty Agreement was not listed on Exhibit D.

13. By its explicit terms, the rejection provided for in Article VII of the Plan and effected by the Confirmation Order applies only to executory contracts. There are two generally accepted tests to determine whether a particular contract is executory, both of which are utilized by the courts in this Circuit. The so-called Countryman test provides that an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach

excusing the performance of the other." South Chicago Disposal, Inc. v. LTV Steel Co. (In re Chateaugay Corp.), 130 B.R. 162, 164 (S.D.N.Y. 1991) (citing Countryman, Executory Contracts in Bankruptcy, Part I, 57 Minn. L. Rev. 439, 460 (1973)); In re Penn Traffic Co., 322 B.R. 63, 69 (Bankr. S.D.N.Y. 2005), aff'd in relevant part, 45 Bankr. Ct. Dec. 101 (S.D.N.Y. 2005).

14. Neither Megacable nor its majority shareholders have any material obligations under the Guaranty Agreement. Their only obligation is to submit disputes to arbitration in accordance with certain rules.[3] Accordingly, the Guaranty Agreement is not an executory contract. In addition, all of the guarantor's affirmative obligations under the Guaranty Agreement that constituted the substance of such agreement (indeed, the only obligations within the definition of the "Guaranteed Obligations" as that term is used in the Guaranty Agreement) were satisfied in 1995, at the time of the closing of the Megacable investment. As of the Petition Date, the only obligations under the Guaranty Agreement (and therefore the only obligations that could have been imposed on RCN) were (a) to keep RCN International its wholly-owned subsidiary, (b) to prevent RCN International or any intervening subsidiary from issuing and from purchasing certain securities, (c) not to compete, and not to allow any of its affiliates to compete, directly or indirectly, with Megacable or any of its subsidiaries, and (d) not to enter, and not allow any of its affiliates to enter, into "Conflicting Agreements," except in compliance with certain procedures.

[3] Megacable's reference, in the 9/2 Letter, to Megacable's **right** to consent (or withhold consent) to Conflicting Agreements is irrelevant, since it is **obligations**, not rights, that are capable of rendering a contract executory.

15. Clearly, Megacable's or its non-RCN shareholders' failure to follow the prescribed arbitration procedures would not, under New York law,[4] constitute a material breach that would excuse the counterparty's performance under its remaining obligations under the Guaranty Agreement. Under New York law, a breach of contract is material if it is so substantial as to defeat the purpose of the transaction or so severe as to justify the other party's suspension of performance. See Shoppers World Cmty. Ctr. v. Bradlees Stores, Inc. (In re Bradlees Stores, Inc.), No. 00-16033, 2001 WL 1112308, at *7 (S.D.N.Y. Sept. 20, 2001) (citing Lipsky v. Commonwealth United Corp., 551 F.2d 887, 895 (2d Cir. 1976)).

16. However, even the seemingly more substantial obligations of the counterparty under the restrictive covenants would not, as a matter of law, be sufficient to render the Guaranty Agreement executory. See, e.g., Laughlin v. Nickless, 190 B.R. 719, 723 (D. Mass. 1996) (when the primary objective of the agreement at issue has been achieved, any remaining obligations that were merely "ancillary to the bargained-for agreement," were not sufficient "to rise to the level of material future performance" necessary to render the agreement executory); In re Spectrum Info. Techs., Inc., 190 B.R. 741, 750 (Bankr. E.D.N.Y. 1996) (where the continuing restrictive covenants were merely "ancillary to the purpose" of the contract in question, their "breach would not defeat the purpose of [the] transaction. As such, [these obligations] do not rise to a level of material future performance" that would render the contract executory).

17. Neither is the Guaranty Agreement an executory contract under the alternative, so called "functional," test. This test was developed by the 6th Circuit in Chattanooga Mem'l Park v. Still (In re Jolly), 574 F.2d 349 (6th Cir. 1978), and it requires

[4] The Guaranty Agreement, by its own terms, is governed by New York law.

the Court to determine the executoriness of a given contract based on the goals the rejection of a contract is expected to accomplish. Id. at 351. Such goals are, primarily, allowing the estate to take advantage of beneficial contracts, while relieving it of burdensome obligations. See, e.g., Laughlin, 190 B.R. at 723. Clearly, rejecting the Guaranty Agreement, under which virtually all substantive obligations have long been performed, while exposing it to potential economic loss as a result, flies in the face of the goals of the Bankruptcy Code. Accordingly, the Guaranty Agreement is not an executory contract under the functional test.

18. Based on all of the foregoing, it is clear that the Guaranty Agreement is not an executory contract under either of the accepted tests, and, accordingly, could not have been rejected by RCN under the Plan and/or the Confirmation Order, regardless of whether it was or was not listed on Exhibit D to the Plan.

II. **Guaranty Obligations Were Not Discharged**.

19. Megacable has also asserted that, to the extent the Guaranty Agreement was not rejected because it is not an executory contract, it could not have been assumed either, and, accordingly, the Guaranty Obligations were discharged by the Confirmation Order. That is not the case.

A. Megacable Did Not Have a Claim

20. In order to have been discharged, the Guaranty Obligations must constitute "claims" within the contemplation of section 1141(d)(1) of the Bankruptcy Code. The only part of the definition of "claim" contained in the Bankruptcy Code that the Guaranty Obligations can conceivably fit into, is section 101(5)(B) that encompasses

"right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5)(B).

21. There is no doubt (and even Megacable has not asserted otherwise) that RCN was not in breach of the Guaranty Agreement as of the Petition Date or any time thereafter. Obviously, where there is no breach, there is no "claim." See, e.g., Roost v. Wilber (In re Parker), 241 B.R. 722, 726 (Bankr. D. Or. 1999) (where there was no indication in the record that there was a breach of performance by the debtor under the terms of the relevant agreement, there was no "claim" in favor of the debtor's counterparty under such agreement); Raleigh v. Haskell (In re Haskell), No. 96 B 14602 1998 WL 809520, at *11 (Bankr. N.D. Ill. Nov. 19, 1998) (same); Barnhill v. Vaudreuil (In re Busconi), 177 B.R. 153, 159-60 (Bankr. D. Mass. 1995) (same).

22. Furthermore, even if Megacable asserted (which it does not) that RCN breached its performance under the Guaranty Agreement at any time before or during the pendency of its bankruptcy case, such breach would not "give rise to payment." As described in paragraph 10 above, the parties have contractually agreed what consequences may flow from a breach under the Guaranty Agreement would have. Such consequences are not a "right to payment," but rather RCN International's potential loss of valuable rights under the other Megacable Agreements.

23. Based on the foregoing, Megacable did not have a "claim," that could have been discharged in RCN's bankruptcy.

B. If Megacable Had a Claim, It Was Not Discharged

24. Even assuming, for the sake of argument, that the Guaranty Obligations are "claims" against RCN and were susceptible of being discharged in RCN's bankruptcy, they were not, in fact, discharged.

25. Based on the Debtors' mistaken assumption that only non-debtor affiliates of the Debtors were parties to any of the Megacable Agreements, neither Megacable nor any of its non-RCN shareholders were given notice of either the Debtors' bankruptcy filing, the bar date established in these cases, or the confirmation of the Plan.

26. Case law makes it clear that no claim can be discharged under section 1141(d) of the Bankruptcy Code unless the holder of such claim gets specific statutory notice of its rights and responsibilities as they relate to the possibility of its claim being extinguished, i.e. notice of the bar date and of the consequences of non-compliance with the bar date order. The actual knowledge of such creditor is irrelevant.[5] See, e.g., City of N.Y. v. N.Y., N.H. & H.R. Co., 344 U.S. 293, 297 (1953) (the Supreme Court rejected the argument that actual knowledge of bankruptcy had to be taken into consideration and noted that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred"); Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.), 863 F.2d 832, 834 (11th Cir. 1989) ("due process prevents Section 1141 from being read to extinguish [a creditor's] claims" when the creditor did not get specific notice of the bar date); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620, 622-23 (10th Cir. 1984) (creditor not bound by reorganization plan without statutory notice of

[5] Megacable's majority shareholders certainly were aware of RCN's bankruptcy. However, they never asserted any claims nor voiced any concerns in connection therewith during the pendency on the bankruptcy cases.

confirmation hearing); Adam Glass Serv., Inc. v. Federated Dep't Stores, Inc., 173 B.R. 840, 843 (E.D.N.Y. 1994) ("It is a violation of constitutional due process to discharge a debt when no notice of the bar date for filing a proof of claim has been sent to a creditor pursuant to Rule 2002(a)(8)."); Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.), 157 B.R. 220, 221-22 (S.D.N.Y. 1993) (creditor with no notice of confirmation hearing is not bound by the terms of reorganization plan).

27. Accordingly, the Guaranty Obligations were clearly not discharged by the confirmation of the Plan or otherwise.

28. Based on all of the foregoing, RCN respectfully requests the Court's confirmation, in accordance with Article XII of the Plan, that (a) the Guaranty Agreement was not rejected under the Plan and/or the Confirmation Order, and (b) the Guaranty Obligations were not discharged under the Plan and/or the Confirmation Order.

III. **Alternatively, Confirmation Order Should Be Modified**.

29. Alternatively, if the Court does not agree with RCN's interpretation of the Plan and the Confirmation Order set forth above, RCN respectfully submits that cause exists for the Court to modify the Confirmation Order, pursuant to section 105 of the Bankruptcy Code and FRCP 60(b), made applicable to this case by Bankruptcy Rule 9024, to explicitly provide that the Guaranty Agreement (as modified by the Assumption) was assumed by RCN under the Plan (and that no cure payments were due thereunder to effectuate such assumption).

30. It is an established principle that confirmation of a plan of reorganization has the effect of a judgment of the court. See, e.g., Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 463 (6th Cir. 1991); In re

401 East 89th St. Owners, Inc., 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998); In re Emergency Beacon Corp., 48 B.R. 356, 359 (S.D.N.Y. 1985). Accordingly, FRCP 60(b), made applicable to bankruptcy cases through Bankruptcy Rule 9024, applies to this matter. "Equitable relief from a confirmed plan is appropriate . . . if the same circumstances would warrant relief from a judgment." 401 East 89th St., 223 B.R. at 79 (citations omitted).

31. According to FRCP 60(b)(1), "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . ." A motion for relief under FRCP 60(b) "is addressed to the sound discretion of the . . . court," Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986), and, being remedial in nature, "must be liberally applied." Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). Moreover, "Rule 60(b) is equitable in character and [must] be administered upon equitable principles." DiVito v. Fid. & Deposit Co. of Md., 361 F.2d 936, 939 (7th Cir. 1966).

32. As a threshold matter, a motion for relief from a final order or judgment under FRCP 60(b)(1) and Bankruptcy Rule 9024 must be brought not more than one year after the judgment was entered. What constitutes a reasonable time depends on the facts of each case. See Washington v. Penwell, 700 F.2d 570, 572-73 (9th Cir. 1983). As stated above, the Confirmation Order was entered on December 8, 2004, i.e. less than one year ago. Moreover, RCN has only become aware that any problem may exist with respect to the Guaranty Agreement on July 22, 2005, when the issue was brought to the attention of its counsel by Megacable and, since then, has used every effort to resolve these issues with Megacable consensually, without resorting to the Court's

equitable powers. See, e.g., In re RVP, Inc., 269 B.R. 851, 855 (Bankr. D. Idaho 2001) (delay in seeking modification of judgment under FRCP 60(b) due to negotiations between the parties was not a bar to relief). As soon as RCN established that any further attempts to resolve this matter out of court would be futile, it filed this Motion. RCN respectfully submits that the Motion was filed within a reasonable time under the circumstances.

33. RCN further respectfully submits that, to the extent the Guaranty Obligations were in any way impaired by the Confirmation Order, such impairment was due to a mistake, inadvertence or excusable neglect within the meaning of FRCP 60(b)(1). Based on the fact that the Assumption was not in RCN's files, RCN believed in good faith that none of the Debtors was a party to any of the Megacable Agreements, including the Guaranty Agreement, and thus did not anticipate that the entry of the Confirmation Order could conceivably have any impact on the Guaranty Obligations. If it turns out that RCN was mistaken, RCN's conduct, at worst, constitutes excusable neglect. The Confirmation Order should be amended to correct this oversight.

34. In Pioneer Inv. Servs. Co. V. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 394-95 (1993), the Supreme Court has established the criteria for distinguishing excusable conduct from inexcusable:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . 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 within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer, 507 U.S. at 395 (footnote omitted).

35. An additional, similarly equitable, criterion was recently added by the Seventh Circuit, namely, detrimental reliance by the party affected by the mistake or inadvertence that had led to the entry of the order or judgment in question. See In re UAL Corp., 411 F.3d 818 (7th Cir. 2005). The circumstances in this matter clearly warrant relief under this equitably and liberally applied excusable neglect standard. The balance of the equities weighs heavily in RCN's favor.

36. First, any impairment of the Guaranty Obligations with the resulting cross-defaults to the other Megacable Agreements is manifestly and severely prejudicial to RCN. In contrast, there is no comparable detriment to Megacable. Were Megacable's non-RCN shareholders to argue successfully that they could unilaterally alter their rights vis-a-vis RCN, then they would reap a windfall to which they are not otherwise legally entitled. Loss of a windfall due to the debtor's mistake "is not the kind of harm that a court should endeavor to avert" in the context of a FRCP 60(b)(1) motion. UAL Corp. 411 F.3d at 823-24. The courts agree that FCRP 60(b) relief should be more readily granted when the rights of the non-debtor party affected by the judgment are reinstated, rather than taken away. See, e.g, In re Casual Male Corp., 120 B.R. 256, 264 (Bankr. D. Mass. 1990) (where the sought amendment of an order extending the debtors' time to assume an unexpired lease did not "take" from the counterparty any of its rights, but to the contrary, reinstated its right to have its lease assumed within the statutory period, relief under FRCP 60(b) was warranted).[6]

[6] Similarly, courts have held that demonstrable harm to the movant who stands to forfeit important property rights "outweighs the need for sanctity of the Confirmation Order." 401 East 89th St., 223 B.R. at 82.

37. Second, there was no delay in RCN's attempt to remedy its mistake as soon as it became clear that (a) a mistake has, in fact, been committed and (b) such mistake cannot be remedied by extra-judicial measures. See para. 32 above. To the extent that time has passed since the Confirmation Order was entered, such passage of time has absolutely no impact of the judicial proceedings since the modification of the Confirmation Order sought hereby will have absolutely no impact on the administration of these cases. In fact, any delay is completely irrelevant here since RCN and its non-Debtor subsidiaries continued to fully perform under all Megacable Agreements at all times.

38. Third, there is no indication (nor is it claimed by Megacable) that RCN acted in bad faith. Rather, the omission of any reference to the Guaranty Agreement or the Guaranty Obligations in the Plan or the Confirmation Order was the result of an honest mistake on RCN's part.

39. Finally, Megacable cannot possibly demonstrate any detrimental reliance on RCN's mistake, particularly since, by its own admission, Megacable was under the impression that the Guaranty Obligations had been assumed by RCN under the Plan. See e-mail from Megacable, dated June 22, 2005, attached hereto as Exhibit D ("So far, Megacable has been under the assumption that RCN assumed the [Guaranty Agreement] without ever having been guided otherwise.").[7]

[7] In fact, it was the parties' expressed intention (and, presumably, Megacable's expectation) that RCN's bankruptcy filing will have no effect on its obligations under the Guaranty Agreement. Section 3.2 of the Guaranty Agreement provides that the "obligations of the Guarantor . . . shall remain in full force and effect without regard to, and shall not be released, discharged or in any way affected by . . . bankruptcy, insolvency . . . or similar proceedings with respect to . . . the Guarantor . . .".

40. Accordingly, to the extent the Guaranty Agreement is deemed to be an executory contract, RCN requests that the Confirmation Order be amended, to explicitly provide that the Guaranty Agreement (as modified by the Assumption) was assumed by RCN under the Plan (with no cure payments due).

WAIVER OF MEMORANDUM OF LAW

41. RCN submits that no new or novel issue of law is presented with respect to the matters contained herein and respectfully request that the requirement of a separate memorandum of law under Local Bankruptcy Rule 9013-1(b) be waived.

NOTICE

42. Notice of this Motion has been given to (i) the United States Trustee, (ii) Megacable, and (iii) those entities that have formally requested receipt of pleadings in these cases pursuant to Bankruptcy Rule 2002. In light of the relief requested herein, RCN submits that no other or further notice is required.

NO PRIOR REQUEST

43. No previous request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, RCN respectfully requests that the Court enter an order, (a) interpreting the Plan and the Confirmation Order to not having effected either (i) a rejection of the Guaranty Agreement or (ii) a discharge of the Guaranty Obligations, or (b) in the alternative, modifying the Confirmation Order to provide explicitly that the Guaranty Agreement (as modified by the Assumption) was assumed by RCN under the

Plan (and no cure payments are due therefor), and (c) granting RCN such other and further relief as is just and proper.

Dated: New York, New York
November 18, 2005

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