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Majority Shareholders of Mega Cable and MCM

Hearing Date: December 6, 2005
at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION BY MEGA CABLE, S.A. DE C.V., MCM HOLDING, S.A. DE C.V. AND MAJORITY SHAREHOLDERS TO RCN's MOTION FOR AN ORDER (A) CLARIFYING CERTAIN TERMS OF PLAN OF REORGANIZATION AND CONFIRMATION ORDER, OR (B) IN THE ALTERNATIVE, MODIFYING CERTAIN TERMS OF PLAN OF REORGANIZATION AND CONFIRMATION ORDER PURSUANT TO FED. R. CIV. P. 60(B) AND FED. R. CIV. P. 9024

Mega Cable, S.A. de C.V. ("Mega Cable"), MCM Holding, S.A. de C.V. ("MCM") and the majority shareholders[1] of Mega Cable and MCM (the "Shareholders" and collectively with Mega Cable and MCM, "Megacable"), by Morgan, Lewis & Bockius LLP, their attorneys, for their objection to the motion by RCN Corporation ("RCN") for an order "(a) clarifying certain

[1] The Shareholders are Ildefonso Fernández Salido, Julián Aguilera Campoy, Julián Aguilera Urrea, Ángel Ramón de Jesús Robinson Bours Urrea, Marina Guadalupe Robinsón Bours Ruy Sánchez de Alvarado, Martha Guadalupe Robinsón Bours Ruy Sánchez de Larrubiel, Lucia Margarita Bours Ruy Sánchez de Valenzuela, Beatriz Marina Bours Muñoz, Rossana Robinson Bours Muñoz, Anabella Robinson Bours Muñoz, Jesús Rodolfo Robinson Bours Muñoz, Mónica Robinson Bours Muñoz, Jesús Enrique Robinson Bours Muñoz, Manuel Urquijo Beltrán, Gloria Grifith Anduro, Javier R. Bours Almada , Francisco Javier R. Bours Castelo, Juan R. Bours Almada, Ernesto F. Echavarria Salazar, Trigio Cañedo Urías, Daniel Fernando Ramos Cabello, Enrique Yamuni Robles, Scotiabank Inverlat, S.A., Institución de Banca Múltiple, Grupo Financiero Scotiabank, Inverlat, División Fiduciaria, Jose Garado Robinson Bours Castelo and Jose Gabriel Urquijo Beltran.

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" (the "Motion"), respectfully submit this objection, the exhibits hereto and the accompanying memorandum of law and allege:

PRELIMINARY STATEMENT

The Joint Plan of Reorganization, dated October 12, 2004 (the "Plan") (Docket No. 293)[2] was confirmed by order dated December 8, 2004 (the "Confirmation Order") (Docket No. 483) and became effective on December 21, 2004.[3] In the nearly one year since confirmation, the Plan has been fully implemented and substantially consummated. The Plan and Confirmation order explicitly provide that, as of the Effective Date, executory contracts not affirmatively assumed or the subject of a motion to assume are deemed rejected and all other pre-petition claims, not otherwise preserved, are discharged. (Plan Art. VII.A and XIV). RCN has not identified a single sentence in the Plan or Confirmation Order which is ambiguous, unclear or in need of interpretation or enforcement. RCN simply wants to modify the Plan and Confirmation Order because it is unhappy with the effect of the Plan and Confirmation Order on the Support and Guaranty Agreement, dated as of January 19, 1995, among Mega Cable, the Shareholders and C-TEC Corporation ("C-TEC") as predecessor to RCN (the "S&G Agreement," a copy of which is annexed hereto as Exhibit A), even though such modification "**will have absolutely no impact on the administration of these cases**." (Motion ¶37) (Emphasis added).

Since the Plan did not "address any of the Megacable Agreements, including the Guaranty Agreement, in any way,"[4] the S&G Agreement was either rejected pursuant to Article VII.A of the Plan and paragraph 35 of the Confirmation Order or Mega Cable's claims arising

[2] Reference to "Docket No. __" is a reference to specific entries of the official electronic docket maintained by this Court for the bankruptcy case No. 04-13638.

[3] RCN asserted in a September 2005 Form 10Q filing that the Effective Date occurred on December 21, 2004.

[4] Motion ¶6.

from the S&G Agreement were discharged pursuant to Article XIV of the Plan and paragraphs 38-40 of the Confirmation Order. Accordingly, RCN seeks to modify the Plan and Confirmation Order to resurrect the S&G Agreement solely for the benefit of its non-debtor subsidiary, RCN International Holdings, Inc. ("RCN Int'l") in connection with a pending arbitration between two non-debtors, RCN Int'l and Megacable. As discussed below and in the accompanying memorandum of law, the Motion is procedurally and substantively deficient and should be denied:

(i) RCN cannot, as a matter of law, rely upon Bankruptcy Code §105(a), Fed. R. Civ. P. 60(b) or Bankr. R. 9024 to override the specific substantive provisions of Bankruptcy Code §1127(b), which prohibit plan modifications after substantial consummation. Thus, RCN cannot amend or modify the Plan to either assume the S&G Agreement or to provide that the S&G Agreement is excepted from the discharge provisions of the Plan and Bankruptcy Code §1141.

(ii) Notwithstanding RCN's specious conclusory statements to the contrary, RCN knew or should have known that it was a party to the S&G Agreement. RCN, as a matter of law, cannot demonstrate excusable neglect to be relieved of its failure to address the S&G Agreement in the Plan.

(iii) The Motion, which seeks an advisory opinion for the benefit of a non-debtor in a pending arbitration, does not present a justiciable controversy under Article III of the Constitution.

(iv) RCN admits that the Motion will have absolutely no impact upon the administration of the estates. (Motion ¶37). The Plan has been implemented and all property has been distributed pursuant to the Plan. Except for the resolution of a few disputed claims, there is

no estate for this Court to administer pursuant to the Plan. As such, this Court does not have subject matter jurisdiction over this dispute under 28 U.S.C. § 1334.

(v) Not only does this Court not have subject matter jurisdiction to consider the Motion, but any consideration of the Motion is prohibited by the Federal Arbitration Act, both in connection with the pending arbitration between Megacable and RCN Int'l and in connection with any consideration of whether the S&G Agreement has been breached or terminated, which, pursuant to the terms of the S&G Agreement, must be the subject of an arbitration pursuant to the rules of the International Chamber of Commerce.

(vi) The Motion is patently frivolous and should be dismissed. The Plan and Confirmation Order unequivocally provide that any executory contract not assumed pursuant to the Plan or the subject of a motion to assume filed before the voting deadline for the Plan was deemed rejected (Plan Art. VII.A, Confirmation Order p¶6 and 37) and any pre-petition claim or interest not specifically identified to survive confirmation was discharged (Plan Art. XIV, Confirmation Order ¶38). Since RCN admits that it did not address the S&G Agreement in the Plan and there is no dispute that Mega Cable did not file a claim as required by the procedures established pursuant to orders of this Court, there are only two alternatives with the same result. The Court may determine that the S&G Agreement was an executory contract which was not explicitly assumed and thus rejected, or that Mega Cable's unfiled claims arising from a non-executory contract were not specifically excepted from the discharge and injunction provisions of the Plan. RCN's attempt to fabricate a dispute by asserting that it failed to provide adequate due process to Mega Cable and therefore should be relieved of any perceived injury resulting from its own decisions and conduct is not only disingenuous, but entirely without merit. Megacable had actual knowledge of the bankruptcy cases and, pursuant to RCN's own notice

procedures, as approved by this Court, Mega Cable was provided with notice of the bar date and confirmation hearing date. Mega Cable did not file a claim. Neither the facts nor the law permit RCN to assert Megacable's due process rights as a sword for its benefit or for the benefit of its non-debtor subsidiary RCN Int'l.

(vii) The Motion is not properly before this Court as a contested matter. To the extent RCN is seeking a declaratory judgment as to (x) the validity and extent of its continuing interest in the S&G Agreement, or (y) whether its obligations under the S&G Agreement have been discharged pursuant to the Plan and Confirmation Order, Bankruptcy Rules 7001(2), (6) and (9) require that the Motion be dismissed and that RCN commence an adversary proceeding. In all events, the Motion is predicated upon allegations of mistake and excusable neglect which are inherently factual and are disputed by Megacable. As such, the Motion cannot be granted without affording Megacable the procedural protections of an adversary proceeding, including the ability to conduct discovery and make dispositive motions.

Accordingly, not only are the terms of the substantially consummated Plan set in stone pursuant to the Bankruptcy Code, there is no jurisdictional predicate for this Court to even consider the Motion.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

a) The Agreements

1. In 1995, C-TEC International, Inc. ("C-TEC Int'l") acquired approximately a 40% stake in Mega Cable and MCM. This transaction was evidenced by three related agreements: (i) Shareholder Agreement dated January 1995 among Megacable and C-TEC Int'l (the "Shareholder Agreement") (a copy of the relevant portions of the Shareholder Agreement is annexed hereto as Exhibit B), (ii) Subscription Agreement dated January 19, 1995 among Megacable and C-TEC Int'l (the "Subscription Agreement") (a copy of the relevant portions of

the Subscription Agreement is annexed hereto as Exhibit C) and (iii) the S&G Agreement (the "S&G Agreement, together with the Subscription Agreement and the Shareholder Agreement, the "Agreements").[5]

2. Megacable does not dispute that, as a result of the 1997 corporate restructuring of C-TEC, RCN Int'l became the successor to C-TEC Int'l under the Subscription and Shareholder Agreements, and that RCN became the successor to C-TEC under the S&G Agreement and during such time all parties acted as such.[6]

3. The S&G Agreement provides that it was entered into "in order to induce [Mega Cable] to enter into the Subscription Agreement and [Mega Cable and the Shareholders] to enter into the Shareholder Agreement" (Exhibit A at p. 1). Further, the S&G Agreement and the Shareholder Agreement were each annexed as exhibits to the Subscription Agreement. The S&G Agreement provides that all capitalized terms not otherwise defined shall have the meaning given in the Subscription or Shareholder Agreement. (Exhibit A at Art. 1.1). The S&G Agreement provides that RCN guarantees obligations under the "Transaction Documents" (Exhibit A at Arts. 3.1 and 3.2).[7]

4. David C. McCourt, as Chairman and Chief Executive Officer of C-TEC and C-TEC Int'l, negotiated and was familiar with the principal terms of the Agreements. Further, Mr. McCourt executed each of the Agreements as Chairman and Chief Executive Officer of the respective C-TEC entities. (Exhibits A, B and C hereto).

[5] Subsequently, C-TEC acquired an additional 9% stake in Mega Cable and MCM.

[6] For ease of reference, Megacable will refer only to RCN and RCN Int'l as their respective interests may appear.

[7] "Transaction Documents" is defined in the Subscription Agreement as each of the Subscription Agreement, the Shareholder Agreement and the S&G Agreement. (Exhibit C at Art. 1).

5. As of May 27, 2004 (the "Petition Date"), Mega Cable, the Shareholders and RCN, the parties to the S&G Agreement, had continuing material obligations and rights upon which Megacable relied. The S&G Agreement provides, in pertinent part:

(i) Section 2.1 obligated RCN not to divest itself of its interest in RCN Int'l as long as RCN Int'l was a minority shareholder of Mega Cable and MCM.

(ii) Section 2.2 obligated RCN to maintain at least an 80% ownership interest in RCN Int'l.

(iii) Section 2.3 obligated RCN to ensure that neither RCN nor its affiliates would acquire additional stock of Mega Cable and MCM.

(iv) Section 2.4 obligated RCN (a) to ensure that neither RCN nor its affiliates would compete with Mega Cable and MCM in any cable business in Mexico and (b) grant Mega Cable and MCM a right of first refusal to enter into a competing business opportunity made available to RCN or any affiliate.

(v) Section 2.4 obligated Mega Cable and MCM to respond to the right of first refusal within 30 days of being presented with the business opportunity or to permit RCN or its affiliate to engage in the business opportunity.

6. Since the Shareholder Agreement granted RCN Int'l various rights with respect to Mega Cable's business, including the right to appoint board and management committee members (Exhibit B, Art. 3.1 and 4.1) and the right to receive confidential information and affect certain business decisions involving Mega Cable through its board and management committee nominees (Id. Arts. 3.2 and 4.2), it was fundamental to the entire transaction that Mega Cable at all times know who its minority shareholders were. In this regard, the Shareholder Agreement

also obligated any shareholder who wished to sell any of its Mega Cable stock to first offer the stock to the other shareholders. (Id. at Art. 5.2).

7. In addition, pursuant to applicable Mexican Law and the bylaws of each of Mega Cable and MCM, RCN Int'l was prohibited from transferring ownership of more than 10% of the Mega Cable or MCM stock, without prior approval of the Mexican Department of Communications and Transportation. Neither Mexican law nor the bylaws, however, expressly prohibit RCN from disposing of the stock of its wholly-owned subsidiary (RCN Int'l) and thereby effectively transferring the ownership of the assets of such subsidiary – to wit, the Mega Cable stock. The S&G Agreement foreclosed RCN from effectively selling the Mega Cable stock by a divestiture of its interest in RCN Int'l. Thus, it is clear that the obligations under the S&G Agreement remained particularly material following the transfer of the Mega Cable stock to RCN Int'l.

b) **The RCN Bankruptcy**

8. RCN commenced its bankruptcy cases on May 27, 2004.

9. Mega Cable had actual knowledge of the RCN Bankruptcy Cases. In addition, Megacable was provided with Court-approved notice of the bar date and confirmation hearings:

(i) Prior to the Petition Date, the Shareholders and representatives of RCN and RCN Int'l regularly communicated and the Shareholders were made aware of RCN's financial situation and the need for a bankruptcy filing.

(ii) In addition, RCN's public filings put the Shareholders and the world on notice of its bankruptcy. In a December 31, 2003 Form 10-K filed with the Securities and Exchange Commission (the "SEC"), RCN disclosed that it was negotiating a financial restructuring with its senior secured lenders which it intended to implement through a Chapter 11 reorganization proceeding. Thereafter, RCN filed numerous Form 8-K reports detailing the status of its

negotiations and the intention to file a Chapter 11 proceeding. In a Form 8-K, dated June 1, 2004, RCN announced the commencement of its bankruptcy cases. Between June 2004 and confirmation of the Plan, RCN made numerous public filings with the SEC disclosing the status of its bankruptcy cases. (Copies of these SEC filings are available on RCN's website, www.rcn.com at the Investor Relations tab).

(iii) By motion dated June 4, 2004, RCN sought an order establishing a bar date and notice procedures (the "Bar Date Motion") (Docket No. 21) with respect to "all Claims of whatever character against the Debtors or their property, whether such Claims are secured or unsecured, entitled or not entitled to priority, liquidated or unliquidated, or fixed or contingent." (Bar Date Motion ¶17). Pursuant to order of this Court, dated June 23, 2004 (the "Bar Date Order") (Docket No. 73), RCN was authorized to provide notice of the bar date by publication in The Wall Street Journal, which was deemed "good, adequate and sufficient publication notice of the General Bar Date." (Bar Date Order ¶14.) RCN filed an affidavit of publication on November 23, 2004 (Docket No. 414). The Bar Order further provides:

> 11. Any holder of a Claim against the Debtors who is required, but fails, to file a proof of claim on account of such Claim in accordance with this Order on or before the General Bar Date shall (i) be forever barred, estopped, and permanently enjoined from asserting such Claim against the Debtors, their successors, or their property (or filing a proof of claim with respect thereto), (ii) not be treated as a Creditor (as defined in 11 U.S.C. § 101(10)) for purposes of voting on, and distribution under, any plan in these chapter 11 cases with respect to such Claim, and (iii) not be entitled to receive further notices regarding such Claim.

(iv) Further, by order dated October 13, 2004 (the "Confirmation Hearing Notice Order") (Docket No. 297), RCN was "authorized to publish the Confirmation Hearing Notice . . . in The Wall Street Journal . . . such publication is deemed to be sufficient notice to persons who do not otherwise receive the Confirmation Hearing Notice by mail." (Confirmation Hearing

Notice Order ¶29.) On November 23, 2004, RCN filed an affidavit that such publication was made (Docket No. 417). The Court, at paragraphs F and 8 of the Confirmation Order, found that the Notice of Confirmation was published and that RCN complied with all orders of this Court in connection with, among other things, notice.[8]

(v) By letter dated September 23, 2004 from Mr. Javier Bours to Mr. McCourt (a copy of which is annexed hereto as Exhibit D, Mr. Bours states:

> I am writing on behalf of the Mexican shareholders (the "Controlling Shareholders") of Megacable, S.A. de C.V., and MCM Holdings S.A. (collectively, "*Megacable*"). As you know, during the past year we have watched the events that have affected RCN. Throughout this period, we have wanted to be as supportive as possible to your efforts to turn things around.
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> For this reason, in light of our historically very cordial relationship with RCN, I have been authorized by the Controlling Shareholders to express their interest in purchasing 100% of RCN's equity stake in Megacable in an all cash transaction for an aggregate price of US$125 million.…

10. RCN contends that it did not know that it was a party to the S&G Agreement. (Motion ¶6). This is simply not credible. It cannot be reasonably disputed that RCN knew or should have known about the S&G Agreement:

(i) RCN knew it was the successor by corporate restructuring to C-TEC. (Motion ¶3). RCN had continuing and extensive contact with Megacable.

(ii) In October 2004, RCN filed its Plan and the accompanying disclosure statement, dated October 12, 2004 (the "Disclosure Statement") (Docket No. 293). The Plan was signed by Mr. McCourt as Chairman and Chief Executive Officer of RCN. The same Mr. McCourt who

[8] RCN alleges at p25 of the Motion that it did not know that it was a party to any agreement with Megacable. By RCN's own admission, Megacable was an unknown creditor specifically for which such publication notice was required.

negotiated and executed the S&G Agreement and the other Agreements on behalf of the C-TEC entities.

(iii) Prior to the voting deadline of November 30, 2004, RCN filed a motion for an order approving the assumption of certain executory contracts (the "Assumption Motion") (Docket No. 442). In support of the Assumption Motion, RCN alleged:

> Some or all of the Contracts, including the insurance policies, may not be "executory contracts" under Bankruptcy Code section 365. The Debtors' proposed plan of reorganization provides that all executory contracts not expressly assumed or subject to a motion to assume shall be rejected. **The Debtors are therefore, out of an abundance of caution, listing any agreements beneficial to the estates that are arguably executory as Contracts to be assumed, without conceding that such agreements are executory**. (Emphasis added.)

(iv) In connection with at least one of RCN's exit financing facilities, dated as of December 21, 2004 (the "Deutsche Bank Facility"), RCN specifically agreed with its various lenders and Deutsche Bank, as Agent, that it would, among other things, (a) at all times continue to own RCN Int'l which in turn owned the equity interests in Mega Cable (First Lien Credit Agreement §§8.19 and 9.16(b)) and (b) pledge, as collateral, 100% of the stock of RCN Int'l, but would not pledge the assets of RCN Int'l, to wit, the stock of Mega Cable and MCM, for so long as RCN Int'l was prohibited from doing so. (Pledge Agreement dated as of December 21, 2004 at §3.1) (Copies of these agreements are voluminous and are also available on RCN's website, www.rcn.com under the Investor Relations tab).

(v) RCN's interest in Mega Cable was significant and could hardly be overlooked by RCN. The Disclosure Statement specifically refers to RCN's 49% interest in Mega Cable, "the largest cable television provider in Mexico." (Disclosure Statement pp. 12-13.) Further, at pages 77-78 of the Disclosure Statement, RCN states that the value of its interest in Mega Cable was included in the $1.2 billion reorganization value established by RCN. Although RCN does

not attribute a particular value to its interest in Mega Cable, either the "book value" of $130 million, as reflected on RCN's December 31, 2003 financial statements,[9] or the $125 million cash offer made by Mega Cable, reflects that RCN's interest in Mega Cable comprised a significant part of its $1.2 billion reorganization value.

11. Pursuant to the Plan and Confirmation Order, any executory contract which was not specifically assumed by RCN was deemed rejected as of the Effective Date of the Plan. Article VII.A of the Plan provides:

> Except as otherwise ordered by the Bankruptcy Court or provided in the Plan, or in any contract, instrument, release, indenture, or other agreement or document entered into in connection with the Plan, as of the Effective Date each Debtor shall be deemed to have rejected each executory contract and unexpired lease to which it is a party, unless such contract or lease (i) was previously assumed or rejected by the Debtor, (ii) previously expired or terminated pursuant to its own terms, (iii) is listed on the schedule of contracts to be assumed attached hereto as Exhibit D or (iv) is the subject of a motion to assume filed on or before the deadline for voting to accept or reject the Plan.

12. Exhibit D to the Plan is an 11-page spreadsheet reflecting several hundred agreements, including agreements identified as guaranty agreements, which RCN intended to assume under the Plan.

13. None of the Agreements, including the S&G Agreement, were included in Exhibit D to the Plan or in the Assumption Motion.

14. In an affidavit, dated December 5, 2004, submitted in support of confirmation of the Plan, RCN's Chief Restructuring Officer asserted:

> 20. **The Debtors, with significant input and assistance from the Creditors' Committee and its advisors, have engaged in an exhaustive and thorough review of their executory contracts**

[9] In its December 31, 2003 Form 10-K, RCN disclosed that its approximately 49% interest in Mega Cable, "the largest cable television provider in Mexico" was carried at a book value, as of December 31, 2003, of $130.5 million. Prior and subsequent filings contain similar references to the 49% interest in Mega Cable.

> **and unexpired leases**. This review was undertaken by numerous employees of the Debtors under the supervision of temporary employees of the Debtors provided by AlixPartners. This review entailed not only analysis of each contract and lease, but also numerous meetings and discussions about such contracts and leases and whether each one fit into the Debtors' restructuring strategy. The Creditors' Committee's financial advisor, Capital & Technology Advisors LLC, was intimately involved in the review of these matters.
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> 21. As a general matter, the Plan provides for the rejection of all executory contracts and unexpired leases not otherwise identified for assumption in Exhibit D to the Plan. **Exhibit D identifies numerous contracts and unexpired leases that the Debtors have determined to assume. The Debtors engaged in a lengthy process of reviewing each executory contract and unexpired lease to determine which contracts and leases are desirable and beneficial going forward and which are not. In particular, the Debtors considered which executory contracts and unexpired leases were consistent with their business plan and necessary for the operations of the Reorganized Debtors. . . .**

(Emphasis added). [Docket No. 468]

15. At a January 5, 2005 hearing held before the Bankruptcy Court with respect to a contract listed in the Assumption Motion, RCN's counsel stated:

> MR. MATZ: With respect to the motion to assume the executory contract itself, that motion was filed on November 30th. And as you may recall, the plan provided that all executory contracts that weren't expressly assumed were deemed to be rejected on the date of confirmation . . . .

January 5 Transcript at p.6 (Docket No. 612).

16. RCN admits that it did not assume the S&G Agreement (Motion ¶ 6). Contrary to RCN's assertion that it did not know that it was a party to the S&G Agreement, there is no credible basis for RCN to assert that its failure to deal with the S&G Agreement constitutes excusable neglect. (Motion ¶¶ 6 and 33). Given the totality of the circumstances, RCN knew or should have known about the S&G Agreement. Among other things, (i) Mr. McCourt, former Chairman and Chief Executive Officer of the various C-TEC entities party to the Agreements,

continued as Chairman and Chief Executive Officer of RCN during its bankruptcy; (ii) the September 23, 2004 letter from Mega Cable offering $125 million to repurchase the Mega Cable stock clearly put RCN on notice of the Agreements; (iii) RCN asserts that it made an "exhaustive and thorough review" to identify any agreement of value and which fit into the restructuring strategy (including agreements identified as guaranty agreements) and should have uncovered the Agreements; (iv) RCN's exit financing, which specifically recognized the restrictions set forth in the Shareholder and Subscription Agreements on the ability of RCN Int'l to transfer its interest in Mega Cable and MCM, irrefutably demonstrates that the Agreements were reviewed; and (v) even if the S&G Agreement was not specifically located, each of the Subscription and Shareholder Agreements specifically refer to and incorporate the S&G Agreement. There may be many explanations as to RCN's treatment (or lack thereof) of the S&G Agreement in the Plan – none of which include mistake, inadvertence or excusable neglect

17. The Plan and Confirmation Order discharged RCN from all prepetition claims and obligations, whether or not claims were filed, and enjoined all parties from enforcing any prepetition claims or obligations against any of the reorganized debtors. Article XIV of the Plan provides:

> All consideration distributed under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims against and Interests in the Debtors of any nature whatsoever or against any of the Debtors' assets or properties. **Except as otherwise expressly provided in the Plan, the Confirmation Order acts as a discharge of all Claims against, liens on, and Interests in each of the Debtors, the Debtors' assets and their properties, arising at any time before the Effective Date, regardless of whether a proof of Claim or proof of Interest therefor was filed**, whether the Claim or Interest is Allowed, or whether the holder thereof votes to accept the Plan or is entitled to receive a distribution thereunder, subject to the occurrence of the Effective Date. Any holder of such discharged Claim or Interest shall be precluded from asserting against the

> Debtors or any of their assets or properties any other or further Claim or Interest based upon any document, instrument, act, omission, transaction, or other activity of any kind or nature that occurred before the Effective Date. The Confirmation Order shall be a judicial determination of discharge of all liabilities of the Debtors, subject to the occurrence of the Effective Date. (Emphasis added).

18. RCN admits that neither the Plan nor the Confirmation Order provide for the S&G Agreement to survive confirmation. (Motion ¶ 6). Again, there may be many explanations for this omission – none of which include mistake, inadvertence or neglect.

19. The Plan expressly provides, consistent with Bankruptcy Code §1127(b), that it cannot be modified after substantial consummation has occurred. Article XI of the Plan provides, in pertinent part:

> The Debtors may alter, amend, or modify the Plan, any exhibits hereto or any document filed as part of the Plan Supplement under section 1127(a) of the Bankruptcy Code at any time prior to the Confirmation Date; . . . **After the Confirmation Date and prior to substantial consummation of the Plan**, **as defined in section 1101(2) of the Bankruptcy Code**, **the Debtors may**, under section 1127(b) of the Bankruptcy Code, **institute proceedings in the Bankruptcy Court to remedy any defect or omission or reconcile any inconsistencies in the Plan, the Disclosure Statement**, or the Confirmation Order, and to accomplish such matters as may be necessary to carry out the purposes and effects of the Plan so long as such proceedings do not materially adversely affect the treatment of holders of Claims or Interests under the Plan. . . . (Emphasis added).

20. The Plan was confirmed on December 8, 2004 and became effective on December 21, 2004.

21. There can be no dispute that substantial consummation has occurred:

(i) RCN admits that the Motion will not impact the administration of the cases. (Motion ¶37).

(ii) Immediately prior to the filing of the Motion, on November 18, 2005, during a telephonic hearing with this Court on RCN's unsuccessful effort to seal these proceedings, counsel for RCN stated that 99% of all distributions contemplated under the Plan have been made.

(iii) In a Form 10-Q filing made by RCN for the period ended September 30, 2005, RCN states:

> On December 21, 2004 (the "Effective Date"), the RCN Debtors' joint plan of reorganization (the "Plan") became effective and the RCN Debtors emerged from Chapter 11. Pursuant to the Plan, RCN's consolidated indebtedness and its debt service requirements were reduced substantially, its capital structure was realigned and substantially all of the new equity of RCN was issued to certain of its former creditors.
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> This resulted in a new reporting entity under a new basis of accounting (the Successor as of December 21, 2004). Following the emergence on December 21, 2004, the Successor commenced operations and thus experienced an eleven-day operating period at the end of 2004. The results for the period January 1, 2004 through December 20, 2004 represent the Predecessor's operations.
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> In conjunction with the reorganization, RCN entered into three new debt-financing arrangements – a $355.0 million First-Lien Credit Facility, $125.0 million of Second-Lien Convertible Notes and a $34.5 million Third-Lien Term Loan.

22. There can be no dispute that, based upon RCN's own statement at paragraph 37 of the Motion, the Motion "will have absolutely no impact on the administration of these cases." Simply, there is nothing left to administer.

23. On November 14, 2005, Megacable commenced an arbitration proceeding against RCN Int'l by filing an arbitration petition with the International Chamber of Commerce in Paris,

France (the "Arbitration"). Pursuant to the arbitration petition, Megacable is seeking to enforce its rights under the Subscription and Shareholder Agreements. Pursuant to each of the S&G Agreement, the Subscription Agreement and the Shareholder Agreement, Megacable, RCN and RCN Int'l expressly agreed that:

> any dispute, controversy or claim arising out of or relating to [such] Agreement or the breach, validity or termination thereof shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce in effect on the date hereof, except as modified herein or by mutual agreement of the parties.

24. RCN is not a party to the Subscription or Shareholder Agreements. RCN is not a party to the Arbitration and Megacable has not commenced any proceedings against RCN or any other former debtor in any other court or tribunal.

25. The Motion is seeking an advisory opinion as to the effect of the Plan upon the S&G Agreement, and ultimately the Subscription and Shareholder Agreements. However, the panel assigned to the Arbitration must be the sole arbiter of whether there has been a breach of the Subscription and Shareholder Agreements for, among other reasons, a breach or termination of the S&G Agreement. To the extent the Motion is seeking a determination as to whether the S&G Agreement has been breached or terminated by virtue of the Plan and Confirmation Order, such a dispute must also be resolved pursuant to the arbitration provisions of the S&G Agreement.

ARGUMENT

POINT I

BANKRUPTCY CODE §1127(b) PRECLUDES MODIFICATION OF THE SUBSTANTIALLY CONSUMMATED PLAN

26. The Plan and Confirmation Order explicitly provide that, as of the Effective Date, executory contracts not affirmatively assumed or the subject of a motion to assume are deemed

rejected and all other pre-petition claims, not otherwise treated, are discharged. There is nothing ambiguous, unclear or in need of interpretation as to what these words mean or how they affect executory contracts and other pre-petition claims.

27. Indeed, RCN does not identify a single ambiguity in the Plan or Confirmation Order which requires this Court's interpretation. To the contrary, RCN understands all too well the effect of the Plan on the S&G Agreement and is unhappy with the result. Thus, RCN's only recourse is to seek a modification of the Plan and Confirmation Order to resurrect the S&G Agreement, even though RCN admits that there is no jurisdiction for this Court to now modify the Plan or Confirmation Order.

28. Nevertheless, RCN cannot escape the fact that Bankruptcy Code §1127(b) provides that a confirmed plan may be modified only prior to substantial consummation. In addition, Article XI of the Plan specifically refers to §1127 and provides that the Plan cannot be modified after substantial consummation.

29. As discussed in the accompanying memorandum of law, RCN cannot rely upon procedural rules, including Fed. R. Civ. P. 60(b), to modify a final order of a bankruptcy court confirming a substantially consummated plan. RCN fails to acknowledge that the Plan has been substantially consummated (although they admit that the Motion can have no impact on the administration of the cases) or to cite a case which permits modification of a substantially consummated plan pursuant to Fed. R. Civ. P. 60(b) or Bankruptcy Code §105(a).

30. It is axiomatic that rules of procedure cannot modify substantive law. 28 U.S.C. §2075. Thus, the sole basis to modify a confirmed plan is set forth in 11 U.S.C. §1127, not Fed. R. Civ. P. 60(b), and not Bankruptcy Rule 9024. It is similarly settled that Bankruptcy Code §105(a) cannot be used to override or expand specific provisions of the Bankruptcy Code.

31. Further, there is no equitable reason to relieve RCN from the explicit provisions of the Plan, the Confirmation Order and Bankruptcy Code §1127(b). RCN's specious allegations of mistake or excusable neglect are neither admissible nor relevant to contradict the unambiguous provisions of the Plan and Confirmation Order. There is no equitable or legal basis to grant RCN any relief.

32. RCN knew or should have known about the S&G Agreement. RCN's Chairman and Chief Executive Officer was responsible for negotiating and executing the S&G Agreement, the Shareholder Agreement and the Subscription Agreement as Chairman and Chief Executive Officer of the C-TEC entities; RCN knew that it was the successor to C-TEC; RCN knew that its interest in Mega Cable was material; RCN made numerous public filings with the SEC describing its investment in Mega Cable as a $130 million investment in one of the largest cable providers in Mexico; RCN's investment in Mega Cable represented a significant portion of its reorganization value and was described in the Disclosure Statement; prior to filing its Plan and Disclosure Statement, RCN received an offer from the Shareholders to repurchase the 49% stake in Mega Cable and MCM for $125 million; RCN claims it conducted an exhaustive review of all of its contracts and identified all contracts which were even arguable executory and listed all those it intended to assume; RCN knew enough about the terms of the Agreements to pledge only its interest in RCN Int'l to Deutsche Bank, but to specifically carve out of its loan agreements with Deutsche Bank any direct pledge of the Mega Cable and MCM stock; even if RCN did not find the S&G Agreement, the S&G Agreement is an exhibit to the Subscription Agreement and each of the Subscription and Shareholder Agreements, which limit the ability of RCN Int'l to transfer the Mega Cable stock, specifically refer to and identify the S&G Agreement.

33. There is no basis for RCN to request this Court to engage in speculation about what RCN would have done if it had known about the S&G Agreement. RCN knew or should have known about the S&G Agreement, and it has no legal or equitable basis to seek a modification of the Plan.

POINT II

THE MOTION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY OVER WHICH THIS COURT HAS JURISDICTION

a) The Plan Cannot Create or Expand This Court's Subject Matter Jurisdiction

34. Bankruptcy Courts are courts of limited jurisdiction defined by the parameters of 28 U.S.C. §1334. Debtors cannot rewrite the scope of a court's jurisdiction in a plan of reorganization and parties cannot confer jurisdiction upon a court where none exists.[10]

35. RCN alleges that this Court has jurisdiction over the Motion pursuant to Article XII of the Plan which provides that the Court retains jurisdiction to "hear and determine all disputes in connection with the interpretation, implementation, consummation or enforcement of the Plan". While a plan may properly preserve post-confirmation jurisdiction for such purposes, RCN admits that the Motion cannot fit within the scope of this Court's post-confirmation jurisdiction since the Motion will have no impact on the administration of the cases.

36. RCN also admits that, in the nearly one year since confirmation, the Plan has been implemented and substantially consummated. According to RCN's counsel and its public filings, 99% of distributions have been made, 100% of the new equity has been distributed to Classes 5, 6, 7 and 8 pursuant to the Plan, new credit facilities contemplated under the Plan have closed and the funds have been used, all property of the former debtors vested in the reorganized

[10] In the alternative, this Court should abstain from hearing this matter pursuant to 28 U.S.C. § 1334(c)(1).

RCN and reorganized RCN has been operating its business outside of bankruptcy. Other than resolving the remaining disputed claims (less than 1% of all claims), there is nothing about the Plan which requires interpretation, implementation, consummation or enforcement.

37. Nevertheless, RCN disingenuously claims that this Court should clarify the effect of the Plan and Confirmation Order with respect to the S&G Agreement. RCN does not identify a single sentence in the Plan or Confirmation Order for which there is any question as to the effect of the Plan and Confirmation Order. To the contrary, the Plan and Confirmation Order are crystal clear. All executory contracts not assumed are deemed rejected (Plan Art. VII.A). All other pre-petition claims not excepted from discharge are discharged and released and parties are enjoined from pursuing such claims against the reorganized RCN (Plan Art. XIV). There is no dispute that the S&G Agreement was neither assumed nor excepted from the discharge provisions of the Plan.

38. There is nothing to clarify and there can be no impact upon the cases. There is therefore no jurisdiction.

b) **There Is No Justiciable Controversy Concerning The Plan or the Former Chapter 11 Estate**

39. It is beyond cavil that the Motion can have no impact upon a Plan which has been implemented and consummated and can have no impact upon an estate which has not existed for nearly a year. RCN indeed admits this to be the case.

40. Megacable has not asserted any claim against any reorganized debtor in connection with the S&G Agreement. The only pending dispute affecting RCN's indirect interest in Mega Cable and MCM is the Arbitration between Megacable and RCN Int'l, two non-debtors, commenced pursuant to the terms of the Subscription and Shareholder Agreements.

41. Whether or not the S&G Agreement is relevant to the outcome of the Arbitration is for the arbitrators to determine based upon the arguments presented to them by the non-debtor parties to such Arbitration. RCN is impermissibly seeking an advisory opinion to influence the Arbitration rather than to interpret, administer or implement the Plan. There is no Constitutional jurisdiction for this Court to render such an advisory opinion.

42. Similarly, RCN's specious attempts to raise its alleged violation of Mega Cable's due process rights as a sword to relieve itself of alleged injury resulting from its own conduct does not present a dispute between adverse litigants. Mega Cable is not asserting any due process violation claims. Any ruling on RCN's fabricated dispute is purely advisory and is the essence of what is prohibited by Art. III of the Constitution.

c) **This Court Cannot Interfere With The Arbitration**

43. Megacable's right to have disputes arising from or related to the Subscription Agreement, the Shareholder Agreement and the S&G Agreement determined by arbitration pursuant to the rules of the Federal Arbitration Act and the International Chamber of Commerce is absolute.

44. It is clear that the arbitration provisions of the S&G Agreement are sufficiently broad to require arbitration of a dispute arising from or related to the S&G Agreement, including whether the S&G Agreement has been breached or terminated.

45. It is further clear that federal policy favoring arbitration, as reflected in the Federal Arbitration Act, requires arbitration of any such dispute concerning the S&G Agreement or the Agreements. The Motion is not based upon any substantive right created by the Bankruptcy Code and RCN admits that the Motion will have no impact upon the administration of the cases. Reorganized RCN has been in existence for nearly a year by virtue of its

confirmed, implemented and substantially consummated Plan. There is no estate left to administer.

POINT III

THE MOTION IS PATENTLY FRIVOLOUS AND SHOULD BE DISMISSED

46. Even assuming *arguendo* that the Court entertains the Motion, there is no basis to grant RCN any relief and the Motion should be dismissed.

47. There are essentially only two logical results based upon the explicit language of the Plan – both of which require dismissal of the Motion. If the S&G Agreement was an executory contract, it was rejected pursuant to the Plan. Alternatively, if the S&G Agreement was a non-executory contract, Mega Cable's claims thereunder were discharged pursuant to the Plan and Mega Cable was permanently enjoined from pursuing its remedies against RCN.

48. The S&G Agreement contained material obligations outstanding as of the Petition Date. For example, (i) the obligation of RCN to retain its ownership of RCN Int'l precluded RCN from affecting a transfer of the 49% stake in Mega Cable which would have involuntarily forced Mega Cable to engage in business with entities not of its choosing and subjected Mega Cable to a stranger having rights to appoint board and management committee members who then had access to confidential information and the right to affect RCN's business; (ii) the obligations arising in connection with RCN's agreement not to compete and the obligation of Mega Cable to exercise or waive its right of first refusal with respect to competing businesses were material to preserve confidential and proprietary information which Mega Cable was required to share with its minority shareholders. Further, RCN admits that assumption or rejection would have benefitted the estate. Accordingly, the S&G Agreement was executory.

49. Since the S&G Agreement was not specifically assumed pursuant to the Plan or the Assumption Motion, it was rejected. As discussed above, the Plan can no longer be modified to retroactively assume the S&G Agreement.

50. Alternatively, if the S&G Agreement was not an executory contract, then Mega Cable's unfiled claims arising thereunder were discharged and Mega Cable's right to enforce its claims against RCN were permanently enjoined. Further, under applicable New York law, Mega Cable's remedies for breach of obligations under the S&G Agreement included a claim for damages and/or specific performance. RCN's restrictive definition of claim ignores the express provisions of Bankruptcy Code §§ 101(5) and 502(c) and the fact that contingent and unliquidated claims are "Claims" under the Bankruptcy Code. Under RCN's analysis, debtors could never get a fresh start out of bankruptcy. Indeed, even the Bar Order Motion purports to apply to "all Claims of whatever character against the Debtors or their property, whether such Claims are secured or unsecured, entitled or not entitled to priority, liquidated or unliquidated or fixed or contingent." (Bar Order Motion ¶17).

51. In enacting the Bankruptcy Code, Congress clearly intended that a "claim" would be as broadly construed as possible under the Constitution, no matter how remote or contingent, so that all legal obligations may be dealt with in the bankruptcy case. In furtherance of this objective, Bankruptcy Code § 502(c) was amended to provide for the estimation of any claim, including any claim for which applicable law would provide only an equitable remedy, such as specific performance.

52. Thus, as of the Petition Date, Megacable's right to enforce the S&G Agreement by, among other things, compelling RCN's specific performance of the negative covenants and/or seeking payment, constituted a claim, albeit a contingent and unliquidated claim. This

claim, along with Mega Cable's right to prevent RCN from disposing of its interest in RCN Int'l were discharged and enjoined pursuant to the Plan.

53. RCN is therefore in the unsustainable position of a former debtor trying to preserve Mega Cable's claim by arguing that RCN's failure to provide sufficient notice to Mega Cable relieved Mega Cable of the obligation to file a claim. RCN does not have standing to assert that it should be relieved of its own alleged violation of Mega Cable's due process rights so that it can avoid injury. Also, there is also no factual basis for RCN to make such an assertion. RCN ignores the fact that Megacable, as the holder of a contingent, unliquidated claim, not only had actual notice of the bankruptcy cases, but received such notice of the bar date and confirmation hearing as this Court, upon the applications of RCN, approved as good and sufficient notice – Publication Notice.

54. RCN's attempt to use Mega Cable's due process rights as a sword to benefit RCN perverts the meaning of due process and presents the absurd situation of RCN attempting to forcibly reinstate Mega Cable's claim even though Mega Cable determined not to file a claim in the bankruptcy case.

55. Megacable neither wants nor needs RCN to assert its due process rights. Megacable believes that the treatment of the S&G Agreement pursuant to the Plan is clear and has determined to pursue its remedies against a non-debtor entity in a contractually agreed upon forum.

56. RCN either rejected the S&G Agreement or discharged its obligations thereunder pursuant to the Plan and Confirmation Order. There is simply no basis for RCN to engage this Court to reexamine the implemented and consummated Plan.

POINT IV

THE MOTION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED

57. Bankruptcy Rule 7001 provides in pertinent part:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
>
> * * *
>
> (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under rule 4003(3);
>
> * * *
>
> (6) a proceeding to determine the dischargeability of a debt;
>
> * * *
>
> (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; . . .

58. Bankruptcy Rule 7001 requires that this dispute be commenced as an adversary proceeding rather than a contested matter.

59. Given the numerous unsupported allegations upon which the Motion is based and RCN's apparent intent of proceeding with an evidentiary hearing, a summary proceeding is particularly inappropriate. The Motion is predicated upon RCN asking this Court to disregard the clear and unambiguous words in the Plan and Confirmation Order based upon specious conclusory claims that RCN did not know about the S&G Agreement. RCN then hopes that this Court will engage in speculation about what RCN would have done had it known about the S&G Agreement.

60. As discussed above, on its face, it is simply not credible that RCN did not know about the S&G Agreement. RCN knew that it could not dispose of its interest in RCN Int'l to realize upon the value of the Mega Cable Stock as long as it was bound by the S&G Agreement.

RCN knew enough about the Subscription and Shareholder Agreements to grant its exit lender a lien upon the stock of RCN Int'l but to carve out the Mega Cable stock from the assets pledged. It is beyond belief for RCN to assert that despite its due diligence throughout the bankruptcy cases, it overlooked the S&G Agreement.

61. In the unlikely case that this Court determines that the clear and unambiguous provision of the Plan and Confirmation Order need to be clarified by reference to extraneous evidence, the Motion still must be denied, pending Megacable's right to challenge through discovery of RCN's assertions.[11]

62. It is clear that if considered, the factual allegations raised in the Motion require the time and process of an adversary proceeding, not the eight business days' notice created by RCN's misuse of a contested proceeding.[12]

[11] RCN knew that, under Mexican law, RCN Int'l could not directly sell the stock of Mega Cable without prior Mexican government approval. RCN, in fact, made a conscious decision to either reject the S&G Agreement or obtain a discharge of its obligations thereunder so that RCN would be free from the negative covenants which precluded its disposition of RCN Int'l. Once free of the S&G Agreement, RCN could attempt to realize upon its investment in Mega Cable by selling RCN Int'l rather than the Mega Cable stock.

[12] The Motion was served by electronic mail on Friday, November 18, 2005 at 8:27 p.m. This late service constitutes service on Monday, November 21. Between November 21 and December 2, 2005, the objection deadline, falls the four day Thanksgiving weekend. Further, pursuant to Local Bankruptcy Rule 9014-2, Mega Cable objects to RCN seeking to introduce testimony or other evidence at the hearing on this Motion. As set forth in the Memorandum of Law, there is no basis for the Court to even consider evidence extraneous to the Plan since it is unambiguous – not to mention that there is no jurisdiction to even hear the Motion.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Megacable respectfully requests that the Motion be denied or dismissed and the Court grant such other and further relief as may be appropriate.

Dated: New York, New York
December 2, 2005

Respectfully submitted,

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Majority Shareholders of Mega Cable and MCM

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

CERTIFICATE OF SERVICE

I, Jay Teitelbaum, hereby certify that on the 2nd day of December, 2005, a PDF copy of the Objection By Mega Cable, S.A. De C.V., MCM Holding, S.A. De C.V. And Majority Shareholders To RCN's Motion For An Order (A) Clarifying Certain Terms Of Plan Of Reorganization And Confirmation Order, Or (B) In The Alternative, Modifying Certain Terms Of Plan Of Reorganization And Confirmation Order Pursuant To Fed. R. Civ. P. 60(B) And Fed. R. Civ. P. 9024 together with the Memorandum of Law was served by email and by overnight delivery upon Susheel Kirpalani at Milbank, Tweed, Hadley and McCoy, counsel for the Reorganized Debtors.

/s/
Jay Teitelbaum