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.	:	

MEMORANDUM OF LAW IN SUPPORT OF 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

MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Mega Cable, S.A. de C.V.,
MCM Holdings, S.A. de C.V. and Certain
Majority Shareholders of Mega Cable and MCM

101 Park Avenue
New York, New York 10178
Tel: (212) 309-6000
Fax: (212) 309-6001

Richard S. Toder (RT-3917)
Wendy S. Walker (WSW-1967)
Jay Teitelbaum (JT-4619)

PRELIMINARY STATEMENT

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 together with Mega Cable and MCM, "Megacable"), by their attorneys, Morgan, Lewis & Bockius LLP, submit this memorandum of law in support of their objection to the motion by RCN Corporation ("RCN") for an order (a) clarifying certain terms of the Plan of Reorganization and Confirmation Order, or (b) in the alternative modifying certain terms of the Plan of Reorganization and Confirmation Order pursuant to Fed. R. Civ. P. 60(b), Fed. R. Bankr. P. 9024 and Bankruptcy Code §105(a) (the "Motion").

The Motion is procedurally and substantively deficient. Bankruptcy Code §1127(b) absolutely precludes any modification of the substantially consummated Joint Plan of Reorganization, dated October 12, 2005 (the "Plan"). Moreover, there is no jurisdictional basis for the Motion. This Court may only address actual cases and controversies effecting the Plan and any estate being administered by the Court under the Bankruptcy Code. The Plan has been substantially consummated and, indeed, fully implemented. There is no estate left to administer and no Plan to implement. RCN admits that the Motion "**will have absolutely no impact on the administration of the cases**". (Motion ¶37). To the contrary, RCN seeks a purely advisory opinion which can only effect the rights of two non-debtors in a pending commercial arbitration concerning agreements to which RCN is not a party. Further, there is no post-confirmation

[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.

jurisdiction to interpret the Plan as it may effect the rights of non-debtors, in a pending arbitration between such non-debtors or effect the agreement to arbitration under the S&G Agreement.[2]

Similarly, there is no basis for the Court to look beyond the plain and unambiguous provisions of the Plan or to consider RCN's specious allegations. Either the S&G Agreement[3] was an executory contract rejected under the Plan, or it was a non-executory contract subject to the discharge and injunction provisions of the Plan.

Finally, under no circumstances may the Motion be granted in this contested matter. Even if the Court were to consider the inherently incredible factual claims made by RCN in an attempt to overcome the clear and unambiguous provisions of the Plan, Megacable must be afforded an opportunity through an adversary proceeding to refute such claims and to demonstrate that there is no factual basis for RCN's request for a declaratory judgment as to its continued interest in the S&G Agreement.

STATEMENT OF RELEVANT FACTS

The Court is respectfully referred to the Objection by Megacable accompanying this memorandum of law for a statement of the relevant facts.

[2] As discussed, infra, this Court should either dismiss the Motion for lack of jurisdiction or abstain in deference to the Arbitration and the arbitration provisions of the S&G Agreement.

[3] Capitalized terms not otherwise defined herein shall have the meaning set forth in the Objection.

ARGUMENT

POINT I

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

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. There is nothing ambiguous, unclear or in need of interpretation as to what these words mean or how they effect executory contracts and other pre-petition claims. Indeed, RCN does not identify a single ambiguity in the Plan or Confirmation Order which requires this Court to interpret any extraneous allegations of intent, mistake or inadvertence. In re Victory Mkts., Inc., 221 B.R. 298, 303 (B.A.P. 2d Cir. 1998) (unless some ambiguity is to be found within the plan itself, the court has no basis to look beyond its text).

To the contrary, RCN understands all too well the effect of the Plan on the S&G Agreement and is unhappy with the result. Either the S&G Agreement was an executory contract which was rejected pursuant to the Plan, or it was a non-executory agreement and Mega Cable's claims thereunder were discharged and enjoined pursuant to the Plan. Since RCN is not satisfied with either result, it seeks a modification of the Plan and Confirmation Order in the guise of "interpretation" to resurrect the S&G Agreement, either as an executory contract which is retroactively assumed, or as a non-executory contract which passed through confirmation, even though such a modification "will have absolutely no impact upon the administration of the cases." (Motion ¶37).

RCN's reliance upon Fed. R. Civ. P. 60(b), Bankruptcy Rule 9024 and Bankruptcy Code §105(a) to obtain this relief is, as a matter of law, entirely without merit.[4] Bankruptcy Code §1127(b), as RCN recognized in Article XI of the Plan, prohibits any modifications of the Plan after it has been substantially consummated.

Substantial consummation is defined in the Bankruptcy Code as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

11 U.S.C. §1101(2).

As discussed in the Objection, there can be no dispute that the Plan has been substantially consummated. As such, Bankruptcy Code §1127(b) provides:

> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. §1127(b). Article XI of the Plan contains a similar prohibition against post-consummation modifications.

"Section 1127(b) provides the sole means for modifying a confirmed plan." In re Rickel & Assocs., Inc., 260 B.R. 673, 677 (Bankr. S.D.N.Y. 2001) (citations omitted). After

[4] Not only is RCN's reliance upon Rule 60(b) misplaced, but, even under Rule 60(b), the Motion is untimely. Any motion under Bankruptcy Rule 9024 and Rule 60(b) for relief from an order confirming a Chapter 11 plan must be made within the 180 days of confirmation as required by Bankruptcy Code § 1144, not the one-year period of Rule 60(b). In re Diamond Mortgage Corp. of Ill., 105 B.R. 876, 882 (Bankr. N.D. Ill. 1989) (citations omitted); accord BFP Invs., Inc. v. BFP Invs. Ltd., 2005 WL 2596878, at *2 (11th Cir. October 14, 2005).

confirmation, a plan of reorganization may only be modified "before substantial consummation of such plan." 11 U.S.C. §1127(b); Holstein v. Brill, 987 F.2d 1268, 1270 (7th Cir. 1993) ("Modification of a confirmed and substantially consummated plan is forbidden except to the limited extent 11 U.S.C. §1127 permits."). Thus, "[c]onfirmation of a plan in effect sets the plan in stone unless the proponent chooses to alter it before it is substantially consummated." In re Diamond Mortgage Corp. of Ill., 105 B.R. 876, 880 (Bankr. N.D. Ill. 1989).

It is axiomatic that rules of procedure cannot override substantive provisions of the Bankruptcy Code. 28 U.S.C. §2075.[5] In In re Rickel, Chief Judge Bernstein flatly rejected an attempt to use Fed. R. Civ. P. 60(b) to circumvent Bankruptcy Code §1127, stating:

> While a court can modify a confirmation order under Rule 60(b), the Rules cannot provide a remedy that the Bankruptcy Code has substantively foreclosed. Hence, Rule 60(b) cannot be invoked to bypass § 1127(b).

Rickel, 260 B.R. at 678 (citations omitted). Judge Bernstein further observed that "no court has ever relied on Rule 60(b) to modify a plan after substantial consummation." Id. at 680 (citations omitted). Courts that have faced similar arguments have likewise rejected them. See, e.g., In re Planet Hollywood Int'l, 274 B.R. 391, 399 (Bankr. D. Del. 2001) (creditor could not circumvent §1127(b) by styling its motion as one for reconsideration under Fed. R. Bankr. P. 9023).[6]

---

[5] In the Motion, RCN states that it is moving pursuant to §105 of the Bankruptcy Code. (Motion ¶29). Although RCN never elaborates on this point, it is clear that "[a] bankruptcy court cannot exercise its equitable powers outside of the confines of the Bankruptcy Code, or disregard its specific commands. Consequently, it cannot modify a plan under §105(a), and produce a result at odds with the specific provisions of §1127(b)." In re Rickel, 260 B.R. at 678 (citations omitted).

[6] While a confirmation order is a final order or judgment and Fed. R. Civ. P. 60 may be used in bankruptcy cases to modify certain final orders, the cases relied upon by RCN are not relevant to this dispute. None of the cases cited by RCN rely upon Fed. R. Civ. P. 60(b) to modify a confirmation order for a substantially consummated plan. Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986) (non-bankruptcy case involving stipulation of dismissal); Falk v. Allen, 739 F.2d 461 (9th Cir. 1984) (non-bankruptcy landlord/tenant case involving default judgment); DiVito v. Fid. & Deposit Co. of Md., 361 F.2d 936 (7th Cir. 1966) (non-bankruptcy case involving stipulation; modification is extraordinary equitable remedy); Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983) (modification of order approving consent decree regarding prisoner treatment); In re RVP, Inc., 269 B.R. 851 (Bankr. D. Idaho 2001) (order to assume contract); Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993)

Further, there is no equitable reason to relieve RCN from the provisions of the Plan and Confirmation Order. As the Court, in In re Victory Markets, supra, observed, a confirmed plan is a binding contract to be interpreted pursuant to state law. Applicable New York law does not permit a court to look to extraneous evidence to interpret or modify an agreement if the agreement does not contain an ambiguity. 221 B.R. at 303. The Plan could not be more clear in its treatment of executory contracts and other pre-petition claims. RCN's contentions are therefore not only specious, but irrelevant.

Moreover, even if considered, RCN's allegations of mistake or excusable neglect are simply not credible. RCN wants a "do over" of a plan which is firmly set in stone. There is no equitable or legal basis to grant RCN such relief. In re Lynch, 2005 WL 3150609, at *2-3 (2d Cir. Nov. 28, 2005) (failure to follow clear dictates of a statute or court rule does not constitute excusable neglect); Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986) ("since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances"); In re N.Y. Seven-Up Bottling Co., 153 B.R. 21, 23 (Bankr. S.D.N.Y. 1993) (excusable neglect may be based upon unique or extraordinary circumstances beyond the reasonable control of the delinquent party). The legal consequences of a chosen course of action or improper assumptions cannot form the basis for excusable neglect. Nemaizer, 793 F.2d at 62; In re N.Y. Seven-Up Bottling Co., 153 B.R. at 23 (failure to file a proof of claim based upon the assumption that the claim was scheduled and not disputed).

RCN cannot demonstrate extraordinary circumstances beyond its control as an excuse for failing to address the S&G Agreement in the Plan. RCN knew or should have known about the S&G Agreement. RCN's Chairman and Chief Executive Officer was responsible for negotiating

---

(amendment of a bar order); In re UAL Corp., 411 F.3d 818 (7th Cir. 2005) (lease rejection order); In re Casual Male Corp., 120 B.R. 256 (Bankr. D. Mass. 1990) (lease rejection order).

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 arguably executory and listed all those it intended to assume; RCN knew enough about the terms of the Shareholder and Subscription Agreement 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 the S&G Agreement was not located, the S&G Agreement is an exhibit to the Subscription Agreement and is specifically identified and referenced in each of the Subscription and Shareholder Agreements.

Similarly, RCN's assertion that it believed that the S&G Agreement had been assumed is not credible. RCN was represented by expert bankruptcy counsel in these cases. RCN knew or should have known that a contract cannot be assumed based upon the intentions or belief of the parties. Pursuant to Bankruptcy Code §365, a contract can only be assumed pursuant to an order of the Bankruptcy Court. 11 U.S.C. §365. In re Victory Mkts., Inc., 221 B.R. at 303 (assumption under §365 must be accomplished pursuant to court order); In re Univ. Med. Ctr., 973 F.2d 1065, 1077 (3d Cir. 1992); In re IT Group, Inc., 331 B.R. 597, 603 (Bankr. D. Del. 2005). RCN never sought, much less obtained, an order assuming the S&G Agreement.

Patently baseless assumptions and the failure to comply with explicit rules and statutes do not constitute excusable neglect. In re Lynch, supra.

RCN consciously chose its strategy as evidenced by its statements repeatedly made through filings with this Court regarding its exhaustive review of all of its contracts. RCN has now decided to try to reverse its conscious decision or rectify its inexcusable neglect of the S&G Agreement. There is simply no basis for the Court to provide RCN with the relief it seeks.

POINT II

THE MOTION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY

Article III of the Constitution confines a federal court's jurisdiction to "cases" and "controversies." U.S. Const. Art. III, §2 cl. 1. Bankruptcy Courts, though not Article III courts, are bound by Article III and cannot issue advisory opinions. In re Adelphia Commc'ns Corp., 307 B.R. 432, 436-437 n.5 (Bankr. S.D.N.Y. 2004); In re Nunez, 2000 WL 655983 at *6 (E.D.N.Y. March 17, 2000).

Thus, this Court has no jurisdiction to decide questions that cannot effect the rights of litigants in the case before it either because the dispute is too contingent and may not occur (i.e., not ripe); is based on a hypothetical set of facts, or because the matter is moot. North Carolina v. Rice, 404 U.S. 244, 246 (1971); Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); In re Adelphia, 307 B.R. at 437-439; In re Nunez, 2000 WL 655983 at *6; In re Kurtzman, 194 F.3d 54, 58 (2d Cir. 1999).[7]

At best, RCN is seeking a decision which can only effect a pending arbitration between two non-debtors, Megacable and RCN Int'l. By definition, and by RCN's admissions, the

[7] As discussed infra, the fact that RCN has resorted to asserting Mega Cable's due process rights further demonstrates that the Motion is the equivalent of a one-handed clap – there is no actual dispute between adverse parties to be resolved.

Motion can have no effect on the Plan, or the administration of the former Chapter 11 estate. The Plan has been implemented and substantially consummated. All of the equity of the reorganized RCN has been distributed, creditor distributions have been virtually completed, all property of the former debtors vested in the reorganized RCN, all contemplated post-confirmation financing has closed and funded and RCN has been operating its businesses without the protections and assistance of the Bankruptcy Code or this Court. Indeed, following confirmation, and certainly following substantial consummation, RCN's bankruptcy estate ceased to exist and therefore decisions of this Court cannot effect the administration of an estate. See In re Resorts Int'l, Inc., 372 F.3d 154, 165 (3d Cir. 2004); In re NTL Inc., 295 B.R. 706, 718 (Bankr. S.D.N.Y. 2003); In re Pan Am. Sch. of Travel, Inc., 47 B.R. 242, 244-45 (Bankr. S.D.N.Y. 1985); In re Sunbrite Cleaners, Inc., 284 B.R. 336, 340 (N.D.N.Y. 2002); In re Nunez, 2000 WL 655983, at *7 (district court held that the bankruptcy court did not have jurisdiction to render an advisory opinion concerning a dispute raised subsequent to the resolution of the bankruptcy case as the issue could have no effect on the parties or the bankruptcy and was moot).

It is therefore clear that any dispute about the Plan is moot as it may effect the former estate and that the Motion is predicated upon obtaining an advisory opinion to effect a third-party dispute. There is no jurisdiction to render such an opinion under Article III of the Constitution.

POINT III

THERE IS NO POST-CONSUMMATION JURISDICTION TO DETERMINE THE MOTION

In addition to Article III limitations, Bankruptcy courts are courts of limited jurisdiction, determined by Congress. Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995). The source of a bankruptcy court's jurisdiction and its power to exercise that jurisdiction are contained in 28 U.S.C. §§1334 and 157(a) which provide:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) . . . [N]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. §§1334(a) & (b). In re Sunbrite Cleaners, 284 B.R. at 339.

Further, Bankruptcy Courts are statutorily designated as a unit of the district court pursuant to 28 U.S.C. §157(a), which provides:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Accordingly, a matter must be either a "core" proceeding or "related to" a bankruptcy case for the bankruptcy court to exercise jurisdiction. In In re PSI Net, Inc., 271 B.R. 1, 16 (Bankr. S.D.N.Y. 2001), following a long line of Second Circuit precedent including In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990); In re Orion Pictures Corp., 4 F.3d 1095 (2d Cir. 1993); and In re Best Products, Inc., 68 F.3d 26 (2d Cir. 1995), the bankruptcy court detailed the basis for bankruptcy jurisdiction. Clearly, where a matter arises pursuant to a substantive right created by title 11, it is core. In re PSI Net, 271 B.R. at 12. Where a matter is not predicated

upon a substantive right created by title 11, it may be a core proceeding, provided that the resolution of the dispute is integral to the functions of the bankruptcy court administering the estate. Id. at 25. A proceeding which is not core is "related to" a bankruptcy case if it may have an impact upon the administration of the estate. Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). Proceedings based on state law claims which may augment the estate, but are not integral to the administration of the estate, are not core, but may be related to the bankruptcy cases. In re Orion, 4 F.3d at 1102. *A fortiori*, proceedings which can have "absolutely no impact upon the administration of the case" (Motion ¶37) are neither core nor "related to" a bankruptcy case.

If a matter, such as the Motion, is neither core, nor "related to" a bankruptcy case, the bankruptcy court lacks jurisdiction to adjudicate the matter. In re Pan Am. Sch., 47 B.R. at 244-45 (a post-confirmation infringement and unfair competition claim "by a debtor whose plan had been confirmed and who thus joined the real world of post-reorganization life" was not properly brought before the bankruptcy court, as it could have no impact upon the handling and administration of the estate).

Post-confirmation jurisdiction is not explicitly addressed by Congress. However, it is clear that neither the agreement of the parties, nor a plan of reorganization, nor a confirmation order, can confer subject matter jurisdiction upon a bankruptcy court where such jurisdiction does not exist by statute. In re U.S.H. Corp. of N.Y., 280 B.R. 330, 334 (Bankr. S.D.N.Y. 2002); In re Resorts, 372 F.3d at 161; In re Insilco Techs., Inc., 330 B.R. 512, 519 (Bankr. D. Del. 2005). Thus, the matter must still be either a core matter, such as the enforcement of a plan provision which is integral to the administration of the plan (In re Best Prods., Inc., supra), or a

"related to" matter such that it has a sufficiently close nexus to the plan that it impacts the implementation of the plan (In re Insilco, supra).

Given the purpose and effect of a confirmation order, post-confirmation jurisdiction is necessarily more narrowly construed than pre-confirmation jurisdiction. 4 Norton Bankruptcy Law & Practice, 2d § 95:6 (2002). In re Johns-Manville Corp., 7 F.3d 32, 35 (2d Cir. 1993) (post-confirmation jurisdiction cannot be broader than what is specifically preserved in the Plan); In re Sunbrite Cleaners, 284 B.R. at 339-340 (post-confirmation jurisdiction should be limited to matters pertaining to the implementation or execution of the plan); In re Pan Am. Sch., supra; In re Resorts Int'l, 372 F.3d at 168-69 (post-confirmation jurisdiction may exist for the limited purpose of determining whether a post-confirmation dispute alleges claims with a sufficient nexus to the interpretation, implementation, consummation, execution or administration of a confirmed plan); In re Insilco, 330 B.R. at 524 (even though certain causes of action brought by liquidating trustee appointed pursuant to a plan could result in additional asset distributions under the plan, without more, causes of action which did not arise under title 11 of the Code did not have a sufficient nexus to the implementation of the plan to sustain even related-to jurisdiction).

Assuming *arguendo* that this Court determines that the Motion seeks more than a mere advisory opinion which is prohibited by Article III of the Constitution, by RCN's own admission, there is no jurisdiction to determine the Motion. The Motion is not predicated upon any substantive right created by title 11. RCN admits that the Motion can have no impact upon the implementation of the substantially consummated Plan and has no nexus to the administration of an estate which has been fully administered. Accordingly, the Motion is neither core nor related to RCN's former bankruptcy case and must be dismissed.

Dismissal of the Motion will simply allow the non-debtor parties to the pending Arbitration to argue the effect, if any, of the Plan upon their respective rights under the Subscription and Shareholder Agreements. See In re Victory Mkts., 221 B.R. at 303 (confirmed plan of reorganization holds the status of a binding contract which can be interpreted by any court or tribunal); Fallick v. Kehr, 369 F.2d 899, 902 (2d Cir. 1966) (nonbankruptcy courts frequently determine the defense of discharge through bankruptcy); In re Sunbrite Cleaners, Inc., 284 B.R. at 342; In re NTL, Inc., 295 B.R. 706, 717-18 (Bankr. S.D.N.Y. 2003).

In In re NTL, Inc., supra, where the dispute may have arguably effected the administration of the cases, the bankruptcy court abstained from hearing a dispute between non-debtor parties which involved the effect of a confirmation order upon a state law dispute between such parties. The court stated:

> This Court's order . . . is one event that gave rise to the litigation, but the real issues today do not involve the interpretation of the order, but rather its effect on the rights of parties to private contracts. Those issues are sufficiently distinct from the bankruptcy case that they can and should be decided in the State Court under applicable law.

295 B.R. at 717 (citation omitted). Further, the court noted that there would be little impact on the efficient administration of the bankruptcy estate by virtue of abstention, since the plan had been confirmed and the parties to the state court action were non-debtors. Id. at 718. Accordingly, in the alternative, in the event this Court should decide not to reach the jurisdictional issue, Megacable requests that this Court abstain from hearing the Motion pursuant to 28 U.S.C. §1334(c).

RCN claims that this Court has jurisdiction pursuant to Article XII of the Plan, which provides that this Court retained jurisdiction to "hear and determine disputes arising in connection with the interpretation, implementation, consummation or enforcement of the Plan".

(Motion ¶2). However, RCN claims that it is seeking a clarification of the effect of the Plan on the S&G Agreement which, in any case, cannot effect the administration of the bankruptcy cases. Thus, as the court in In re NTL, 295 B.R. at 717, held, it is clear that RCN is not seeking an interpretation of the Plan which may effect the estate, but an interpretation of how the Plan may effect a dispute between two non-debtors.

By RCN's own admissions, in the nearly one year since confirmation, the Plan has been implemented and substantially consummated. The Motion will not impact the estate. According to RCN's counsel and its public filings, 99% of distributions have been made, 100% of the new equity has been distributed pursuant to the Plan, the 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 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. Further, the Plan is clear – executory contracts not expressly assumed are rejected and other pre-petition claims and obligations not specifically exempted from the discharge and injunction provisions are discharged and enjoined. RCN's contentions regarding intent, mistake or excusable neglect are neither admissible nor relevant. In re Victory Mkts., Inc., 221 B.R. at 303.

There is therefore no basis for this Court to exercise post-confirmation jurisdiction over the Motion. In the alternative, this Court should abstain from considering the Motion, which can only implicate the rights of non-debtors.

POINT IV

THE BANKRUPTCY COURT CANNOT EXERCISE JURISDICTION WHICH INTERFERES WITH THE ARBITRATION PROVISIONS OF THE AGREEMENTS

The Federal Arbitration Act, 9 U.S.C. §2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Further, the Federal Arbitration Act defines "commerce" as:

> commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

9 U.S.C. §1.

The Federal Arbitration Act applies to private commercial arbitration conducted in this country and in certain foreign countries (including Mexico) by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbital Awards. Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 187 (2d Cir. 1999). The Federal Arbitration Act further requires a federal court to enforce an arbitration agreement and to stay any litigation that contravenes it. In re Hagerstown Fiber Ltd. P'ship, 277 B.R. 181, 196 (Bankr. S.D.N.Y. 2002). Federal law leaves no room for discretion. 9 U.S.C. §§3 and 4 provide, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such

> suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3.

> [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. §4.

Where arbitration and bankruptcy collide, the bankruptcy court cannot interfere with an arbitration involving a non-core matter. In re Hagerstown, 277 B.R. at 198-200 (citing Hays & Co. v. Merrill Lynch Pierce Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989) (given the strong federal policy favoring arbitration, a court must enforce an agreement to arbitrate non-core claims). In In re Durso Supermarkets, Inc., 170 B.R. 211, 215 (Bankr. S.D.N.Y. 1994), the court found that state law breach of contract and fraud claims brought as an adversary proceeding were non-core matters and were properly the subject of an arbitration agreement. The court abstained from hearing the matter and directed the parties to proceed with arbitration. In deciding that the claims were the subject of an arbitration agreement, the court stated:

> The Court of Appeals has stated that "'unless it can be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the dispute should be submitted to arbitration.'" (citations omitted).

Indeed, even core matters must yield to arbitration unless doing so would seriously jeopardize the objectives of the Bankruptcy Code. In re U.S. Lines, Inc., 197 F.3d 631, 640 (2d Cir. 1999), cert. denied, 529 U.S. 1038 (2000). In In re Singer Co. N.V., 2001 WL 984678, at *7 (S.D.N.Y. August 27, 2001), the district court reversed the bankruptcy court's denial of a motion

to compel arbitration of an adversary proceeding seeking rescission of a contract which was the subject of a duly filed proof of claim. Even though the adversary proceeding was predicated upon the court's core jurisdiction to determine claims, the district court held that the resolution of the adversary proceeding would not effect the allocation of assets or the ability to reorganize, since the plan had been confirmed. Id. at *6. Similarly, the district court, in In re Winimo Realty Corp., 270 B.R. 108, 126 (S.D.N.Y. 2001), held that the bankruptcy court lacked discretion to refuse arbitration of core proceedings which would not have an impact upon the administration of the estate.

The S&G Agreement and each of the Agreements contain a broad arbitration clause which provides: "Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, validity or termination thereof shall be finally settled by an arbitration under the Rules of Arbitration of the International Chamber of Commerce. . . ." In Newbridge Acquisition LLC v. Grupo Corvi, S.A. de D.V., 2003 WL 42007, at *3 (S.D.N.Y. January 6, 2003), an identical arbitration clause in various shareholder and subscription agreements compelled the district court, pursuant to the Federal Arbitration Act and the Inter-American Convention on International Commercial Arbitration, to enforce the arbitration agreement by enjoining the prosecution of a civil action commenced in Mexico and directing the parties to arbitration. There can be no dispute that any matter relating to an alleged breach or termination of any of the Agreements would be subject to the arbitration provisions of the Agreements.

Thus, the Motion is an impermissible attempt at an end run around mandatory arbitration. Not only is RCN seeking an advisory opinion as to the effect of the Plan on the pending arbitration between two non-debtors predicated upon the Subscription and Shareholder Agreements – to which RCN is not even a party -- but RCN is seeking an advisory opinion of

this Court as to whether the S&G Agreement has been breached or terminated, rather than having any such dispute resolved pursuant to arbitration as required in the S&G Agreement.

There is no argument which supports this Court's exercise of jurisdiction in derogation of the Federal Arbitration Act. The Motion is not based upon any substantive right created by the Bankruptcy Code. RCN admits that the Arbitration cannot interfere or conflict with RCN's ability to be rehabilitated through confirmation of a plan which has already been consummated. At best, as held in In re NTL, Inc., supra, the Motion implicates the effect of the Plan on the parties to a private dispute which is distinct from any impact on the bankruptcy cases.

Accordingly, this Court does not have the discretion to override the contractual arbitration provisions of the S&G Agreement and the other Agreements. Thus, the Motion should be dismissed or this Court should abstain from determining the Motion in deference to the Federal Arbitration Act and the arbitration provisions of the Agreements.

POINT V

THE MOTION IS PATENTLY FRIVOLOUS AND SHOULD BE DISMISSED

Even assuming *arguendo* that the Court entertains the Motion, there is no basis to grant RCN any relief and the Motion should be dismissed. There are essentially two logical results based upon the explicit language of the Plan – both of which require dismissal of the Motion. First, 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.

a) **The S&G Agreement Was An Executory Agreement**

The Second Circuit, in In re Ionosphere Clubs, Inc., 85 F.3d 992, 998-99 (2d Cir. 1996) referred to an executory contract as a "contract in which performance remains due to some extent on both sides." While the Second Circuit did not refer to materiality as part of the test, the district court in In re Penn Traffic Co., 2005 WL 2276879, at *2 (S.D.N.Y. September 16, 2005), acknowledged that most courts have adopted the Countryman definition, which includes an element of materiality. The district court in In re Bradlees Stores, Inc., 2001 WL 1112308, at *7 (S.D.N.Y. September 20, 2001), recognized that courts have tested executoriness under both the Countryman test and the more flexible Functional approach. Under either approach, whether a contract is executory is determined as of the petition date. In re Penn Traffic, 2005 WL 2276879, at *4.

Under the Countryman test, the S&G Agreement was executory. The S&G Agreement became most relevant after RCN Int'l acquired the Mega Cable stock and, as of the Petition Date, there remained material obligations due on both sides. RCN was obligated to, among other things, abide by negative covenants restricting its ability to dispose of its interest in RCN Int'l or to reduce its stake in RCN Int'l to less than 80%. These negative covenants protected Mega Cable against a transfer of the 49% stake in its business, which RCN Int'l had acquired, without prior compliance with Mexican law.[8] In addition, the obligations of RCN to retain its ownership of RCN Int'l precluded RCN from effecting a transfer of the 49% stake in Mega Cable which

[8] Pursuant to Mexican law, RCN Int'l could not directly sell more than 10% of the stock of MegaCable without prior approval by the Mexican Department of Communications and Transportation. Absent the negative covenant, RCN could have attempted to circumvent this regulatory scheme by disposing of its interest in RCN Int'l. By so doing, RCN Int'l would remain the owner of record of the stock, but the beneficial or true owners of the Mega Cable stock would have changed.

RCN Int'l had acquired (without actually selling the Mega Cable stock) which would have involuntarily forced Mega Cable to engage in business with entities not of its choosing. Given that the owner of this 49% stake had rights to appoint board and management committee members and through such members had access to confidential information and the right to effect Mega Cable's business, it cannot be reasonably argued that the negative covenants were not material. Similarly, 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. Clearly, a principal purpose of the S&G Agreement was to protect Mega Cable from transfers of the minority interest.

These extant obligations were material and demonstrate that the S&G Agreement was executory. In re Bradlees Stores, 2001 WL 1112308, at *8 (negative covenant limiting assignment of lease is a material obligation); In re Kellstrom Indus., Inc., 286 B.R. 833, 835 (Bankr. D. Del. 2002) (right of first refusal constitutes an executory contract); In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) (keeping a stock option open and exercising the option are mutual material obligations).[9]

Further, the S&G Agreement would be an executory contract under the Functional test since assumption or rejection of the contract would have provided a benefit to the estate. In re Riodizio, 204 B.R. at 422; In re Bradlees Stores, 2001 WL 1112308, at *6. Certainly, by RCN's own admission, assumption of the S&G Agreement would have provided a benefit to the estate. Alternatively, it is reasonable to conclude that following its extensive due diligence, RCN

[9] RCN's assertion that negative covenants do not create a material obligation is predicated upon the assumption that the principal purpose of the agreement has been achieved or that the covenants were ancillary to the principal purpose. (Motion ¶16). As discussed above, that is not the case.

actually determined that rejection would have benefitted the estate by relieving it of negative covenants which limited its ability to realize upon its investment in RCN Int'l. The fact that RCN may have been incorrect in its assumption does not alter the analysis.

Similarly irrelevant is what Megacable and RCN thought or believed about whether the S&G Agreement was assumed. Bankruptcy Code §365 requires an order of the bankruptcy court authorizing a debtor to assume a contract. In re Victory Mkts., 221 B.R. at 302. There is no dispute that no such order was ever sought, much less obtained.

Thus, under either the Countryman test or the Functional test, the S&G Agreement was an executory contract which RCN failed to assume pursuant to the Plan or the Assumption Motion. Pursuant to the express provisions of the Plan and the Confirmation Order, the S&G Agreement was rejected. As discussed above, the Plan can no longer be modified to retroactively assume the S&G Agreement.

b) **The Obligations Under The S&G Agreement Were Discharged Pursuant To The Plan**

Alternatively, if the S&G Agreement was not an executory contract, it is no different from any other pre-petition contract which results in a claim against the estate. In re Riodizio, 204 B.R. at 424; In re Resource Tech. Corp., 254 B.R. 215, 223 (Bankr. N.D. Ill. 2000). As of the Petition Date, Mega Cable had the right to enforce, by specific performance, or other equitable remedies, or a claim for damages, the negative covenants restricting RCN from disposing of more than 20% of its interest in RCN Int'l or from engaging in a competing business without first offering such opportunity to Mega Cable.

RCN contends that these rights to enforce the S&G Agreement do not constitute a claim which can be discharged pursuant to the Plan because there was no breach and no right to

payment. There is simply no support for RCN's restrictive definition of a claim.[10] RCN's approach ignores the entire concept of contingent claims and would frustrate the fundamental purpose of bankruptcy – to give debtors a fresh start. RCN's argument is also at odds with its position taken in the bankruptcy cases. RCN sought to bar "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).

Further, Bankruptcy Code §101(5)(B) defines a claim to include:

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

This broad definition of claim was intended by Congress to encompass all legal obligations of the debtor, no matter how remote or contingent, in order for the debtor to obtain the broadest possible relief from its obligations. H.R. Rep. No. 95-595, at 309 (1977); In re Berkelhammer, 279 B.R. 660, 669 (Bankr. S.D.N.Y. 2002) ("Congress adopted 'the broadest possible definition of claim . . .' so that a claim is 'nothing more or less than an enforceable obligation . . . .'" (quoting Pa. Dep't of Public Welfare v. Davenport, 495 U.S. 552, 558, 559 n.4, 564 (1990)).

In furtherance of this goal, Bankruptcy Code §502(c) provides that claims based upon equitable remedies shall be reduced to a monetary amount through the estimation process. 11 U.S.C. §502(c). H.R. Rep. No. 95-595, at 354 (1977) ("subsection (c) requires the estimation of any claim liquidation of which would unduly delay the closing of the estate, such as a contingent

[10] RCN's "no breach no claim" argument ignores the fact that contingent claims are predicated upon events yet to occur. Further, RCN exclusively relies upon cases where, as a matter of state law, certain transfers of marital property in compliance with a prior divorce decree were not transfers on account of an antecedent debt and could therefore never give rise to a claim. Such cases are patently inapplicable. (Motion ¶21).

claim, or any claim for which applicable law provides only an equitable remedy, such as specific performance"). In re Nickels Midway Pier, LLC, 332 B.R. 262, 275-76 (Bankr. D.N.J. 2005) (right to seek specific performance for breach of contract is a claim). Similarly, where a party may seek redress for a breach by alternative remedies including monetary damages or specific performance, the fact that the party as a right to equitable relief does not deprive it of its claim. In re Adelphia Commc'ns Corp., 291 B.R. 283, 301 (Bankr. S.D.N.Y. 2003).

Under applicable New York law, Mega Cable could seek specific performance or payment to redress a breach of covenants in the S&G Agreement. Macklowe v. 42nd St. Dev. Corp., 566 N.Y.S.2d 606, 607 (N.Y. App. Div. 1991) (breach of a covenant against assignment gives rise to a claim of damages against the assignor); Earth Alterations, LLC v. Farrell, 800 N.Y.S.2d 744, 745 (N.Y. App. Div. 2005) (breach of a covenant not to compete gives rise to a claim for damages for lost profits); Alford v. Estate of Wrench, 568 N.Y.S.2d 483, 484-85 (N.Y. App. Div. 1991) (breach of right of first refusal gives rise to damage claim).

Thus, as of the Petition Date, Mega Cable's right to enforce the S&G Agreement by, among other things, compelling RCN's specific performance of the negative covenants and/or seeking damages constituted a claim, albeit a contingent and unliquidated claim. Being susceptible of two alternative remedies, damages or specific performance, Mega Cable had the right to file a proof of claim in an unliquidated amount and such claim could have been liquidated pursuant to the estimation process contemplated under Bankruptcy Code §502(c). In re Hemingway Transp., Inc., 954 F.2d 1, 8-9 (1st Cir. 1992) (a contingent future right under an indemnity obligation was a claim which had to be estimated to effectuate the purposes of the bankruptcy code of granting the broadest possible relief); In re Ward, 194 B.R. 703, 714-15 (Bankr. D. Mass. 1996) (breach of covenant not to compete could be liquidated). Mega Cable's

unfiled claims were not excepted from the discharge and injunction provisions of the Plan and were therefore discharged. In re Manville Forest Prods. Corp., 225 B.R. 862, 865 (Bankr. S.D.N.Y. 1998).

Indeed, this treatment is entirely consistent with RCN's Plan. Pursuant to the Plan and Confirmation Order, RCN sought as clean a fresh start as possible with broad discharge and injunction provisions. Article XIV(F) of the Plan explicitly provides that, as of the Effective Date, RCN received a discharge with respect to "all Claims against and Interests in the Debtors of any nature whatsoever . . . regardless of whether a proof of Claim . . . was filed." Further, pursuant to the Plan, "all Persons who have held, hold or may hold Claims against . . . the Debtors shall be permanently enjoined . . . from (i) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim. . . ." (emphasis added). See also Confirmation Order ¶38.

There is nothing in the Plan or Confirmation Order which excepts the claims arising under the S&G Agreement from the discharge provisions. Recognizing what is obvious, RCN attempts to assert that since **it** failed to provide actual notice to Mega Cable of the obligation to file a claim, it would be a violation of Mega Cable's due process rights to now discharge its claim. RCN does not have standing to assert Mega Cable's due process rights. The Second Circuit, in Kane v. Johns-Manville Corp., 843 F.2d 636, 643-44 (2d Cir. 1988) (citations omitted), held that "litigants in federal court are barred from asserting the constitutional and statutory rights of others in an effort to obtain relief for injury to themselves." Indeed, the Supreme Court articulated two important policy reasons for preventing such volunteerism. In Singleton v. Wuff, 428 U.S. 106, 113-14 (1976) (citations omitted), the Supreme Court stated:

> First, the courts should not adjudicate [third-party] rights unnecessarily, and it may be that in fact the holders of those rights

> either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights.

Indeed, in the context of bankruptcy cases, the Second Circuit expressed particular skepticism where one party is asserting the notice and due process rights in connection with plan voting procedures of others who did not object to the notice or treatment under the plan. Kane, 843 F.2d at 644-45. See also In re Evans Prods. Co., 65 B.R. 870, 875 (S.D. Fla. 1986) (debtors lack standing to raise the rights of wrongly classified creditors as a means to attack the overall reorganization plan); In re Snyder, 56 B.R. 1007, 1010-11 (N.D. Ind. 1986) (debtor may not challenge plan on ground that disclosure statement was misleading to creditors).[11]

There is also no factual or legal basis for RCN to claim that Mega Cable did not receive appropriate notice. 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. Cf., In re XO Commc'ns, 301 B.R. 782, 792-93 (Bankr. S.D.N.Y. 2003) (creditors whose interests were either conjectural, future or speculative entitled to only publication notice).

RCN attempts to use Mega Cable's due process rights as a sword to benefit from its own neglect or willful conduct. This position perverts the meaning of due process. RCN was relieved of all obligations pursuant to a broad bar order, discharge and injunction for all claims, even if not filed. RCN want to resurrect the S& G Agreement even though Mega Cable did not file a claim pursuant to the procedures established by orders of this Court and does not assert that

[11] RCN's reliance upon cases where the injured creditor asserted that it was deprived of adequate notice are simply inapposite. (Motion ¶26).

its rights were violated. RCN's attempt to create an actual controversy also highlights the advisory nature of the relief sought in the Motion. RCN is the only party to a dispute which it has fabricated. Megacable neither wants nor needs RCN to assert its due process rights. The treatment of the S&G Agreement pursuant to the Plan is.

POINT VI

THE MOTION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED

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(d);
>
> * * *
>
> (6) a proceeding to determine the dischargeability of a debt;
>
> * * *
>
> (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing. . . .

RCN purportedly seeks an order clarifying or interpreting the Plan, but as discussed above, does not identify a single sentence in the Plan in need of clarification or interpretation. At best, RCN seeks a declaratory judgment as to its continuing interest in the S&G Agreement following confirmation and the discharge of Mega Cable's claim. In re Resource Tech. Corp., 254 B.R. at 220 (property interest includes contract rights). Bankruptcy Rule 7001 requires that such a dispute be commenced as an adversary proceeding rather than a contested matter.

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.[12] 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.

This is not a matter of form over substance. The Motion is predicated upon RCN asking this Court to disregard fundamental jurisdictional predicates, basic rules of contract interpretation, which prohibit a court from turning to extrinsic evidence where the contract is clear and unambiguous (In re Victory Mkts., supra) and Megacable's right to test by discovery RCN's specious claims that it did not know about the S&G Agreement or that it was a party to such agreement or what RCN would have done had it known about the S&G Agreement. The rules governing adversary proceedings are designed so that bankruptcy courts are careful to consider threshold issues, such as the basis for jurisdiction and how that jurisdiction may be exercised. In re Haber Oil Co., Inc., 12 F.3d 426, 440 (5th Cir. 1984); see also Bankr. Rule 7008. Further, adversary proceedings are particularly suited to addressing issues of discovery which will necessarily arise. In re Colombraro, 230 B.R. 673, 675 n.2 (Bankr. D.N.J. 1999).

[12] As set forth in the Objection, pursuant to Local Bankruptcy Rule 9014-2, an evidentiary hearing on the Motion is not permitted. Further, as set forth above, there is no basis for this Court to even consider evidence extraneous to the Plan since the Plan is unambiguous – not to mention that there is no jurisdiction to even hear the Motion.

As such, the Court should deny the Motion.

CONCLUSION

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,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Jay Teitelbaum
Richard S. Toder (RT-3917)
Wendy S. Walker (WSW- 1967)
Jay Teitelbaum (JT-4619)

101 Park Avenue
New York, New York 10178
(212) 309-6000

Attorneys for Mega Cable, S.A. de C.V.,
MCM Holdings, S.A. de C.V. and Certain
Majority Shareholders of Mega Cable and MCM