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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: : Case No. 04-13638
:
RCN CORPORATION, et al, :
:
: One Bowling Green
:
: New York, NY
Reorganized Debtors. : December 16, 2005
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TRANSCRIPT OF MOTION FOR ENTRY
OF ORDER (a) CLARIFYING CERTAIN TERMS
OF CONFIRMATION ORDER OR, (b) IN THE
ALTERNATIVE, MODIFYING CERTAIN TERMS
OF CONFIRMATION ORDER PURSUANT TO
FED. R. Civ. P. 60(b) AND FED. R. BANKR. P. 9024
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Reorganized Debtors: SUSHEEL KIRPALANI, ESQ.
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1 THE COURT: Where are you all on this matter? The
2 last time we were set, it looked like it might be resolved.

3 MR. KIRPALANI: Yes, Your Honor. Susheel Kirpalani
4 from Milbank Tweed on behalf reorganized RCN Corp.

5 I know the last time we were here, my partner, Dennis
6 Dunne reported to the Court that they believed there was an
7 agreement in principle and the parties were working towards
8 finalizing that, and as a placeholder, they would set to date
9 as -- in the next hearing to resolve threshold issues to the
10 extent necessary.

11 A couple of days ago, my colleague, Lena Mandel here
12 had a call with chambers along with Mr. Teitelbaum to discuss
13 whether an adjournment might be warranted because the parties
14 continue to discuss. I understand Mega Cable's position as of
15 right now is that they are not discussing continuing
16 settlements, but you know, there is just something still being
17 discussed, but in terms of Mega Cable's agreement to adjourn as
18 opposed to go forward, I think the preference is that they
19 would go forward.

20 So that's where we are.

21 THE COURT: Is that right?

22 MR. TEITELBAUM: Your Honor, as far as --

23 THE COURT: You've got to state just for the record,
24 because we're on the --

25 MR. TEITELBAUM: I'm sorry --

1 THE COURT: -- recording system.

2 MR. TEITELBAUM: Jay Teitelbaum, Morgan, Lewis &
3 Bockius. I'm here with my partner, Wendy Walker on behalf of
4 Mega Cable, MCM Holding and the majority shareholders.

5 Your Honor, without getting into the substance of any
6 settlement discussions which I don't believe would be
7 appropriate --

8 THE COURT: No, I don't want to hear those.

9 MR. TEITELBAUM: -- I think it's fair to say that
10 unfortunately discussions broke down to the point that the
11 parties don't have an agreement.

12 THE COURT: Okay. All right. So I think Mr.
13 Kirpalani is right. The way I had left it is there were
14 threshold jurisdictional and abstention issues that Mega Cable
15 had raised, and before going into discovery, it seemed to me to
16 deal with those.

17 MR. TEITELBAUM: Yeah, I think that's absolutely
18 right, Your Honor. We had requested that that be the approach
19 that Your Honor take, and I believe that's why we're here
20 today.

21 THE COURT: Okay. All right.

22 MR. KIRPALANI: Thank you, Your Honor.

23 As noted, we are here today on reorganized RCN
24 Corporation's motion for entry of an order clarifying certain
25 terms of the confirmation order, or in the alternative,

1 modifying certain terms of the confirmation order pursuant to
2 Rule 60(b).

3 This is the second court date on our motion at the
4 first hearing, which was in the nature of a status conference.
5 As we just covered, the parties indicated that we would use
6 today as the holdover date for threshold issues.

7 The two threshold issues that we understand the Court
8 asked us to address were, one, whether the dispute was ripe
9 because it appeared initially premised upon mere concerns by
10 RCN rather than a concrete dispute that had arisen, and second,
11 whether the Court had subject matter jurisdiction over the
12 motion.

13 And let me address those in turn. First, Your Honor,
14 when a hint of the dispute first arose earlier this year, even
15 we were unclear that it was something ripe to bring to your
16 attention. At first, it appeared that Mega Cable was genuinely
17 confused as to whether RCN Corp.'s bankruptcy had any impact on
18 RCN's indirect investment in the Mexican cable company.

19 After discussions among the principles in June 2005,
20 Mega Cable's Mexican counsel wrote to me asking for
21 clarification because, in his words, "Mega Cable has been under
22 the assumption that RCN assumed the support and guarantee
23 agreement without ever having been guided otherwise."

24 This was after confirmation of RCN's plan and Mega
25 Cable's assumption was the same as RCN's. RCN was standing by

1 its agreements whatever they may be, and Mega Cable never
2 received notice that anything else was happening. That is
3 because nothing else did happen.

4 Fast forward --

5 THE COURT: Can I interrupt you for a second?

6 MR. KIRPALANI: Yes.

7 THE COURT: RCN's papers kind of go back and forth,
8 but I did read the one submitted yesterday. Is there an actual
9 agreement that RCN is a party to or is that a fact that still
10 has to be established?

11 MR. KIRPALANI: I think it is a fact that has to be
12 established. These are the facts as I know them to the best of
13 my knowledge, Your Honor.

14 There was a written agreement between a corporation
15 called C-Tech Corp. back in 1997. It was required to get Mega
16 Cable's consent when C-Tech was going to spin off its interests
17 in Mega Cable to RCN's shareholders. As part of those
18 discussions, Mega Cable said we would agree to the spinoff when
19 they signed something so they do, in fact, agree to the spinoff
20 provided that RCN be bound to continue performing the support
21 and guarantee agreement.

22 After that, no document has been located where RCN
23 actually did this. This is back in --

24 THE COURT: Where RCN had actually signed saying we
25 were bound by --

1 MR. KIRPALANI: Actually, with the documents that
2 were tendered for signature, whether it was ever prepared,
3 nothing.

4 THE COURT: All right.

5 MR. KIRPALANI: So, when we went back, talked to
6 Skadden Arps, who was debtors' counsel as the Court knows, went
7 back, looked through the debtors' records, this document just
8 doesn't exist, but we had not known for sure whether Mega Cable
9 actually had the document and just was asking in kind of an
10 obtuse way whatever happened to RCN's obligations.

11 All we would say is nothing happened to them, what
12 obligations do you mean, whatever they were. RCN International
13 didn't file for bankruptcy, Mega Cable was untouched, and they
14 said, no, that in fact, there was some obligation. We said,
15 fine, if there is some obligation, we'll reaffirm it. There is
16 absolutely no intent, never was, to do anything to Mega Cable.

17 Some time went by, and at some point between June of
18 '05 and the late summer, it appears to us that Mega Cable
19 crafted a new strategy. They didn't assert any longer that it
20 was their assumption that RCN was bound by obligations to Mega
21 Cable because it had never been guided otherwise.

22 They wrote a letter that says, we've consulted with
23 U.S. bankruptcy counsel, and we now believe that the Chapter 11
24 plan and the confirmation order in this Court import RCN's
25 obligations because there is an executory contract between RCN

1 Corp. and Mega Cable, and because the plan was drafted to
2 assume only those contracts that are specifically identified
3 and enumerated, and this one wasn't one of them, even though no
4 one could find it, it must be that it was rejected.

5 Later in the summer, Your Honor, we went back and
6 explained orally and in writing that this is a misreading of
7 what happened in the bankruptcy case and a misunderstanding if
8 anything at all that RCN Corp. clearly did not impair any
9 obligations it may have in respect of its indirect investment
10 in Mega Cable.

11 As to the executory contract issue, we explained that
12 as I just told the Court, we didn't believe RCN was party to
13 any executory contract with Mega Cable that was even capable of
14 being assumed or rejected. No one at RCN could locate such a
15 document, and our understanding today is nobody at Mega Cable
16 can either because we think they would have attached it to
17 their papers, but it hasn't been stated affirmatively.

18 In any event, we did explain that RCN Corp. would
19 gladly affirm its obligations that Mega Cable believed it still
20 had because it wanted to continue to protect its investment.
21 It was always that intention. It was a keep part of the asset
22 base of RCN.

23 Then, on September 2nd, 2005, following a series of
24 discussions between RCN's chairman of the board, Jim Mooney and
25 the chairman of Mega Cable, we received a formal letter from

1 the same Mexican counsel that had written to me in June saying
2 that they had assumed RCN was still bound by its obligations
3 having never been guided otherwise, but now he said that after
4 consulting with U.S. bankruptcy counsel, Mega Cable and the
5 majority stockholders concluded that RCN Corp. was a party to
6 executory contract with Mega Cable. That's the contract that
7 no one could locate, and in any event, RCN Corp.'s bankruptcy
8 discharge must have created some legal fiat breach, thereby
9 giving rise to a variety of adverse consequences to RCN.

10 Specifically, Your Honor, we attached this because
11 it's really an important document for the Court to consider as
12 Exhibit C to our motion. Mega Cable wrote:

13 "Moreover, whether or not the S&G agreement was
14 executory is ultimately of little consequence to the conclusion
15 reached by Mega Cable and the private shareholders based on the
16 advice of U.S. counsel that RCN terminated its obligations
17 under the agreement in connection with its Chapter 11
18 proceeding."

19 He then went on to say:

20 "Whatever one's analysis of the character of the S&G
21 agreement, the confirmation of RCN's plan of reorganization
22 terminated RCN's obligations under the agreement."

23 I think the Court understands why at least in our
24 view there was a sudden change of heart. From our perspective,
25 it didn't make sense that there would be a desire to be

1 negatively impacted by a bankruptcy case when the debtor and
2 its creditors never attempted to do that, but the answer I
3 think to that puzzle was stated in the very same letter where
4 counsel to Mega Cable went on to say:

5 "Based on the foregoing and the advice of U.S.
6 counsel, Mega Cable and the private shareholders have concluded
7 that RCN has terminated its obligations, and as a result of
8 that, RCN will be left only with residual rights contained in
9 the by-laws of Mega Cable."

10 So, in other words, Your Honor, Mega Cable said what
11 we would call, "gotcha."

12 For years and throughout the Chapter 11 case, the
13 majority shareholders of Mega Cable were to put it mildly
14 uncooperative joint venturers for RCN. During the Chapter 11
15 case, they persistently refused to provide financial
16 information to RCN.

17 So RCN could not communicate to its creditors exactly
18 how valuable it believed the investment in Mega Cable was. It
19 couldn't properly value it because it didn't have that type of
20 cooperation from the majority stockholders, but that is the
21 nature of doing business, and those issues would never be
22 brought before this Court.

23 But the dispute that is brought before this Court,
24 Your Honor, I'll get to the heart to it, it is ripe for
25 adjudication. This is an actual case or controversy. The

1 proper parties are before you, and the arguments center around
2 the two things Mega Cable said in its September 2nd letter:
3 One, did "RCN terminate its obligations under the agreement in
4 connection with its Chapter 11 proceeding?" And, second, is it
5 true that "confirmation of RCN's plan of reorganization
6 terminated RCN's obligations under the agreement."

7 That's a ripe dispute. Unless the Court have any
8 lingering doubt about ripeness, upon seeing that we finally had
9 enough of the letter-writing campaign and that we were going to
10 go to court and ask Your Honor to clarify what happened in this
11 bankruptcy case last year, Mega Cable immediately commenced
12 arbitration proceedings in Paris against RCN's non-debtor
13 subsidiary.

14 It should come as no surprise that the entire
15 predicate of that arbitration dispute is an allegation that the
16 confirmation order of this Court in respect of the debtor, RCN
17 Corp. terminated RCN Corp.'s obligation to Mega Cable allegedly
18 allowing Mega Cable to strip RCN International of minority
19 shareholder protections and compelling RCN International to
20 sell its stake in Mega Cable to the majority shareholders at
21 book value.

22 All the while, Mega Cable has been continuing to
23 offer to buy out RCN International's investment at less than
24 fair-market value. Mega Cable's motives here are transparent,
25 Your Honor.

1 This dispute is the highest priority for the board of
2 RCN to resolve and to resolve quickly. We are no longer in the
3 level -- no longer in the realm of wondering if this has risen
4 to the level of an actual controversy. The clock is now
5 ticking on this arbitration against its non-debtor, but here
6 before the Court, we are not asking Your Honor to deal with any
7 aspect of the arbitration.

8 RCN Corp., the debtor before the Court last year and
9 the reorganized debtor today was not even named in the
10 arbitration, Your Honor. This is a dispute between RCN Corp.
11 and a party that allegedly was party to a contract that it
12 believes was impaired and RCN's desire to have this Court
13 clarify that.

14 The next issue, Your Honor, is the subject matter
15 jurisdiction issue. In my mind, I just keep thinking this is
16 all about bankruptcy, but in order to put it in a little more
17 elegant terms, I'd like to address the concerns that you had
18 about subject matter jurisdiction, the statutory foundations
19 and where that brings us today.

20 In this regard, it is very important to focus on
21 exactly what RCN Corp., the reorganized debtor is and is not
22 requesting. RCN Corp. is not asking the Court to adjudicate
23 any rights between non-debtor parties. For example, we are not
24 asking the Court to determine whether RCN's subsidiary, RCN
25 International is entitled to minority shareholder protection

1 regardless of whether RCN Corp. impaired obligations to Mega
2 Cable.

3 We are not asking the Court to adjudicate whether
4 Mega Cable has the right to arbitrate the dispute with RCN
5 International. Frankly, as I just said, Your Honor, the
6 arbitration is a complete red herring. RCN Corp., the debtor
7 entity is not even a party to the arbitration. Mega Cable
8 wants this Court to be the first in the land to say that it has
9 no jurisdiction to interpret its own orders if the debtors'
10 subsidiary is party to an arbitration agreement.

11 The reason I wanted to walk the Court through the
12 history of the controversy, and I do appreciate the Court's
13 indulgence in that regard, is just to highlight by Mega Cable's
14 own admission what this particular dispute is about. It is
15 entirely about bankruptcy and, more specifically, about what
16 happened in this Court last year.

17 That brings us to the question of whether it's a core
18 proceeding. It is black-letter law that bankruptcy courts are
19 courts of limited jurisdiction governed by 28 U.S.C. 157, but
20 Mega Cable suggests that the confirmation order motion that we
21 filed is somehow not a core proceeding because its outcome will
22 have no effect on the estate.

23 This is a nice theory, Your Honor, what the law might
24 be if Mega Cable could have written it to fit the facts as
25 they happen to appear today, but it's not the law that this

1 Court should follow.

2 Section 157(b)(2) provides a non-exclusive list of
3 core proceedings. Our motion seeks a determination that no
4 obligations to Mega Cable were discharged. This issue, as is
5 clear even from Mega Cable's own letters and its arbitration
6 demand, does not even exist outside of bankruptcy, and
7 therefore, "by its nature could only arise in the context of
8 the bankruptcy case." That's In Re Wood, a 5th Circuit case
9 from 1987 that we cited. It makes it core.

10 In addition, given that Section 157 is merely an
11 illustrative, non-exclusive list, we must fall back to the
12 basics of a court's inherent power. Bankruptcy courts "have
13 core jurisdiction to interpret and enforce their own orders."
14 The cite for that is Cox against Zale Delaware, a 7th Circuit
15 case, and a 2nd Circuit case, In Re Petrie Retail.

16 The 7th Circuit case, Your Honor, in Cox against Zale
17 is very instructive on the issue of jurisdiction. There, a
18 former debtor sought to sue Zale Jewelers not one, but several
19 years after confirmation of his plan on the grounds that post-
20 consummation, the reorganized debtor kept paying Zale under a
21 reaffirmation agreement that was never filed with the
22 Bankruptcy Court. He wanted to keep this ring, and he wanted
23 to continue paying for it, but the reaffirmation agreement was
24 never filed and the bankruptcy confirmation order said if it's
25 not excluded, it is a discharged obligation.

1 The reorganized debtor several years later said hey,
2 that debt was discharged by the confirmation order so it should
3 not have kept paying, and Zale should not have kept being asked
4 to be paid.

5 The 7th Circuit said more than anything, this is a
6 core bankruptcy matter. It made no difference that years had
7 elapsed and that the estate was fully administered. It made no
8 difference that the amount involved was about \$200 and would
9 have no impact on administering any estate.

10 The Court's focus was simple and clear and stems from
11 the statute: Does this dispute arise from the Bankruptcy
12 Court's confirmation order discharging debts? Is there an
13 issue of whether this debt was discharged or not?

14 That was enough for the 7th Circuit, and we submit it
15 is enough for this matter as well.

16 Even the 2nd Circuit has had occasion to hold, Your
17 Honor, that proceedings can be core if one of two things exist:
18 One, the cause of action is "uniquely affected by the
19 bankruptcy proceedings, or two, it directly affects a core
20 bankruptcy function." That's the Petrie Retail case.

21 In Petrie, Your Honor, Judge Gonzales exercised post-
22 confirmation jurisdiction and this was affirmed all the way up
23 to the 2nd Circuit. The facts were as simple as they are here.
24 The respondent was a landlord who sought rent payments in the
25 bankruptcy and then sought its debts to be considered,

1 "excluded liabilities" in the Bankruptcy Court sale order.

2 The dispute was clearly between only the landlord and
3 the purchaser. The debtor didn't have any role in the dispute.

4 The respondent said the Court lacked subject matter
5 jurisdiction because this was a dispute for another court, it
6 having no bearing on the administration of the estate, but the
7 second circuit thought about these issues quite differently in
8 a quite similar way to the 7th Circuit. It held:

9 "A bankruptcy court retains post-confirmation
10 jurisdiction to interpret and enforce its own orders,
11 particularly when disputes arise over a bankruptcy plan of
12 reorganization."

13 Under this authority, Your Honor, and the numerous
14 other cases cited in our reply, RCN submits that this Court
15 absolutely has subject matter jurisdiction to interpret and
16 enforce and perhaps clarify its own confirmation order. This
17 is true regardless of whether the dispute centers upon whether
18 the S&G agreement was an executory contract that was rejected
19 or assumed, or as Mega Cable puts it, even if the agreement was
20 not executory, did the confirmation order discharge obligations
21 to Mega Cable.

22 This is at the heart of the dispute which for today's
23 purposes subject matter jurisdiction is the most important
24 thing to keep in mind. What is at issue? Executory contract,
25 rejection and discharge. There are no other issues. Those are

1 core issues. How can they not be, Your Honor.

2 The final issue that I wanted to just address was an
3 issue raised in the papers relating to Section 1127(b). It
4 appears that Mega Cable has taken the position that Section
5 117(b) occupies the field of how and when a debtor can seek
6 relief from a confirmation order.

7 What does the statute say? The statute says that the
8 debtor can modify a plan at any time after confirmation and
9 before substantial consummation, but the modified plan only
10 becomes the plan if circumstances warrant and the Court holds
11 another confirmation hearing. By its terms, this statute has
12 nothing to do with the Rule 60(b) relief sought here.

13 We are not seeking a modification of the plan that
14 creditors voted on. We are seeking to uphold it. We would
15 like an opportunity to present evidence that that's the case.

16 Even if Your Honor were to accept Mega Cable's
17 position that the plan clearly rejected or clearly discharged
18 obligations owing to Mega Cable, we think, Your Honor, that the
19 only issues that relate to Mega Cable are not issues that
20 relate at all to the plan's core distribution functions, and
21 the case law is clear that 1127(b) to the extent it occupies
22 the field, it occupies the field of distributions to creditors
23 upsetting the debtor/creditor restructuring that was at the
24 heart of a plan not, Your Honor, in a situation where taking
25 the first example about the executory contract or not, it was a

1 mere permissive use of 1123(b)(2) that the plan is what
2 affected the assumption and rejection of contracts.

3 As the Court well knows, Section 365 is what operates
4 in that world, and even 1123(b)(2) makes reference to Section
5 365. It says subject to Section 365. Subject to what, the
6 requirements or also the privileges and the benefits including
7 the right to invoke 60(b). We think it's everything, Your
8 Honor.

9 Numerous cases exist allowing 60(b) relief in the
10 context of Section 365 orders. Just to give a few, Your Honor,
11 In Re Muma Services, which is 279 BR 478. It's a bankruptcy
12 case from the District of Delaware, and even right here in New
13 York, In Re Wills Motors, 133 BR. 303.

14 The issue, Your Honor, is does Rule 60(b) provide an
15 avenue of relief when there is something that requires
16 clarification, something that perhaps didn't go as planned. We
17 don't believe 1127(b) forecloses that, Your Honor, and we
18 believe there are cases to support that position.

19 For example, in 401 East 89th Street, it's a Judge
20 Brozman decision here in the Southern District from 1998, the
21 creditor successfully moved under Rule 60(b) to modify a
22 confirmed and consummated plan, and there, it was much more
23 earthshattering in terms of what happened to the plan.

24 There, a creditor, I believe it was actually a
25 shareholder, indicated in the coop that he failed to redeem his

1 shares and tender the required consideration. As a result, the
2 plan canceled those equity interests, and the purchaser or the
3 sponsor of the plan had to provide additional consideration and
4 buy up those interests.

5 That equity holder came back and said under Rule
6 60(b), I made a mistake, I didn't understand something, I
7 didn't see something, can we have that clarified. It was
8 clearly substantially consummated, but Judge Brozman said Rule
9 60(b) notwithstanding the finality of an order of confirmation
10 can be invoked, especially, Your Honor, where the equities
11 support that.

12 In that case, Judge Brozman noted that if she didn't
13 grant the 60(b) relief, the equity holder would have forfeited
14 the value of his shares. It's a very similar situation here,
15 Your Honor.

16 There are other cases, but I think, Your Honor, I
17 would save the rest of my remarks for reply.

18 THE COURT: Okay.

19 MR. TEITELBAUM: Where to start. Perhaps maybe I'll
20 -- I have prepared remarks, Your Honor, but let me perhaps
21 while these citations are a little bit fresh in your mind
22 address a couple of them because I think it does go to the
23 heart of why we're here.

24 Many of Mr. Kirpalani's preliminary remarks regarding
25 motives and "gotcha," quite frankly, they're irrelevant. What

1 we have here today is this Court is faced with a plan which was
2 confirmed a year ago which by the debtors' admissions has been
3 substantially consummated. All of the stock has been
4 distributed. All of the claims, all of the distributions and
5 claims have been made save approximately one percent -- there's
6 some claims objections. There's nothing left to implement in
7 connection with this plan.

8 So let me just jump ahead a little bit. So how is it
9 possible that this Court has jurisdiction over a dispute
10 between two non-debtors involving a contract between those non-
11 debtors involving an arbitration between those non-debtors
12 where my clients don't have a claim in this -- never filed a
13 claim in the bankruptcy case, never appeared in the bankruptcy
14 case, never a participant in the bankruptcy case.

15 Now, Mr. Kirpalani's thesis here is basically that
16 anytime this Court issues an order in a core proceeding, any
17 followup to that order has got to be necessarily core, and he
18 cited a few cases to Your Honor both in his brief and today for
19 that -- for that proposition. There's a problem with that,
20 however. It's not the case. It's not the law.

21 This Court is not -- and I don't think it would want
22 to be -- the perpetual guardian of every debtor that ever
23 leaves its court to protect and preserve that debtor in the
24 day-to-day business affairs that it must engage once
25 confirmation has taken plan.

1 Now let me just by way of example talk about a couple
2 of the cases and then I'll come back to some other remarks.

3 With respect to Judge Brozman's decision in 401 East
4 89th, that's a good example of perhaps reading too much into a
5 case and perhaps bad cases making not terrific law which is
6 there was nothing in that case that reflected the plan was
7 substantially consummated. Absolutely nothing.

8 More importantly, in that case, the reason Judge
9 Brozman reached out was not because of some potential default
10 or forfeiture by a creditor. What happened in that case was
11 the judge found that the debtors on at least three or four
12 separate occasions failed to provide notice to that creditor of
13 notice of a bar date, notice of a termination of its interests
14 and notice of another hearing.

15 That debtor by virtue of its own conduct was going to
16 create the default on behalf of that creditor. That creditor
17 came in and said, Your Honor, this isn't right. I didn't get
18 notice, how can I be bound by this?

19 THE COURT: Aren't only debtors held to that
20 standard?

21 MR. TEITELBAUM: Well, but -- but no, Your Honor.
22 But the point is here, it's different. Here, the debtors made
23 some very affirmative decisions in their case, and they want to
24 be relieved of that.

25 THE COURT: Well, what does the disclosure say about

1 this relationship?

2 MR. TEITELBAUM: The disclosure statement says only
3 that there is an interest in Mega Cable of approximately 49
4 percent and that that -- in the valuation, there's a reference
5 to the fact that the debtors have included that in their -- in
6 their valuation, but there is no attribution of dollar amount,
7 and that's it. And that's, by the way, in footnotes, Your
8 Honor.

9 But, more importantly, what does the disclosure
10 statement say about the relationship between my client, Mega
11 Cable and RCN? Nothing.

12 THE COURT: What is their relationship?

13 MR. TEITELBAUM: Well, Your Honor --

14 THE COURT: Isn't it time to actually say whether
15 there's a contract or not?

16 MR. TEITELBAUM: We don't -- you know, we were --

17 THE COURT: I want to know that question. I don't
18 want to spend a lot of time on this if there's no agreement
19 because that would be just ridiculous.

20 MR. TEITELBAUM: Your Honor, I --

21 THE COURT: Is there an agreement?

22 MR. TEITELBAUM: Your Honor, I came in here to ask a
23 question of Mr. Kirpalani, because I was confused by his
24 papers, because it flip-flopped.

25 THE COURT: Well, I know.

1 MR. TEITELBAUM: We don't have a written agreement.
2 We do not have a written agreement.

3 THE COURT: Okay.

4 MR. TEITELBAUM: We're perfectly happy to say we
5 don't have an agreement, and therefore, we should not even be
6 here. I am perfectly happy to deal with that and let the
7 arbitrators figure out what all that means.

8 THE COURT: Well, wait a minute. There's no written
9 agreement and you're asserting in an arbitration that there was
10 a breach of this agreement?

11 MR. TEITELBAUM: What we're saying, Your Honor --
12 what we are currently saying in our arbitration because of the
13 representations made to us previously by -- by the debtors that
14 there was some -- there was some agreement. We didn't have a
15 writing. We asked -- we had asked RCN to confirm in writing
16 this assumption. It was never done.

17 They have now taken the position --

18 THE COURT: Wait, wait, wait. You asked them to
19 confirm in writing what?

20 MR. TEITELBAUM: That the corporate reorganization
21 from C-Tech where -- to RCN --

22 THE COURT: Right.

23 MR. TEITELBAUM: -- resulted in an assumption of the
24 underlying obligations in connection with the support and
25 guarantee agreement was between Mega Cable and C-Tech.

1 THE COURT: And is that -- is that the correspondence
2 that's attached as exhibit to the RCN motion?

3 MR. TEITELBAUM: No, I don't believe that is the --
4 that is that correspondence. That -- but that agreement was
5 never executed, Your Honor.

6 THE COURT: So there's no agreement.

7 MR. TEITELBAUM: There is no agreement.

8 THE COURT: So how -- so how can -- how can the
9 provision of the plan providing for rejection of executory
10 contracts be at all pertinent?

11 MR. TEITELBAUM: How can the bankruptcy be at all
12 relevant to a -- to a relationship that doesn't exist is our
13 question.

14 THE COURT: Well, no, wait a minute. You're -- I
15 assume, I don't have the pleadings, but I assume your client
16 not -- yes, I assume your client has commenced an arbitration
17 in Paris asserting that the rejection under the confirmation
18 order of an agreement between RCN and your client has resulted
19 in a breach of the agreement between your client and the RCN
20 entity, non-debtor entity that's a part of that arbitration.

21 Isn't that what the arbitration complaint says?

22 MR. TEITELBAUM: Your Honor, that is one of the
23 claims --

24 THE COURT: Well, how can you say that?

25 MR. TEITELBAUM: Well, Your Honor, that is -- that

1 was one of the claims because we were under the impression that
2 the debtors were operating under the support and guarantee
3 agreement. The debtors have said we don't have an agreement
4 with you, and so therefore, Your Honor, we're going -- we can
5 very readily say in front of the arbitrators you need to assess
6 under the separate shareholder and subscription agreements that
7 are between the non-debtor parties --

8 THE COURT: Well, so wait, wait. So do you concede
9 that? I mean, it sounds to me that what you're saying is that
10 the reason there's no jurisdiction here is that the plan
11 confirmation order, which provides for rejection of contracts,
12 is wholly irrelevant because there was no rejection of a
13 contract.

14 MR. TEITELBAUM: We are saying that and, Your Honor,
15 when we were -- when we read the initial pleading from RCN in
16 which they purported that there was -- they alleged that there
17 was an agreement.

18 THE COURT: Well no, they didn't say that.

19 MR. TEITELBAUM: Well Your Honor --

20 THE COURT: They said that you have alleged that
21 there was an agreement.

22 MR. TEITELBAUM: Actually --

23 THE COURT: That's why I thought -- that's one of the
24 reasons I wondered whether this was ripe is because someone was
25 hiding the ball.

1 MR. TEITELBAUM: Well no, actually, Your Honor, in
2 Paragraph 5 of the initial motion, RCN alleges in any case RCN
3 --

4 THE COURT: Yes, in any case. In any case. Even if
5 there is such an agreement, in any case, this is X, Y and Z.

6 MR. TEITELBAUM: Well, they alleged that they had
7 been performing their obligations.

8 THE COURT: Well, that's the next part I have for
9 you, which is you say -- first you say there's no agreement,
10 then you say that they've breached whatever agreement there is,
11 and they say, no, we're performing this non-agreement.

12 MR. TEITELBAUM: Your Honor, I'm not sure that, first
13 of all, that it really matters because under either scenario,
14 if we assume there is agreement or isn't an agreement, there
15 still is no jurisdiction as we've addressed in our papers and -
16 -

17 THE COURT: Well, there's clearly no jurisdiction if
18 the -- if the alleged harm that -- or the alleged controversy
19 that RCN is trying to have determined doesn't exist because the
20 whole thing is made out of whole cloth. I understand that
21 point, but you're saying there's no jurisdiction for me to even
22 -- you're just saying I shouldn't even opine on that, that
23 basically the arbitrators can figure that out on their own and
24 that this whole thing has been a colossal waste of money and
25 they probably have enormous shareholder rights against you,

1 your client for raising this whole thing in the first place
2 over a non-existent agreement.

3 MR. TEITELBAUM: No, Your Honor --

4 THE COURT: I mean, I've never heard of such a thing.
5 That's outrageous.

6 MR. TEITELBAUM: We're not saying that at all, Your
7 Honor.

8 THE COURT: Well, I hope not. What are you saying?

9 MR. TEITELBAUM: We're not saying that at all.

10 THE COURT: Okay.

11 MR. TEITELBAUM: Your Honor, the parties were
12 proceeding up until we received the reply last night on the
13 assumption that the restructuring from C-Tech to RCN resulted
14 in a transfer of the obligations that C-Tech had under the
15 support and guarantee agreement to RCN.

16 The parties were proceeding along those lines until
17 we received papers yesterday that said, essentially, we don't
18 have an agreement, we can't find the writing; we're not bound.

19 THE COURT: Well, when you say "the parties were
20 proceeding that way," isn't that all initiated by the fact of
21 your client saying there was an agreement?

22 MR. TEITELBAUM: We --

23 THE COURT: Isn't that just a fraud to say that?

24 MR. TEITELBAUM: No, it -- I don't believe it is,
25 Your Honor, at all --

1 THE COURT: Why not? Why not?

2 MR. TEITELBAUM: Because -- because by --

3 THE COURT: I mean, they should know what their
4 agreements are before they say we have an agreement.

5 MR. TEITELBAUM: As a matter of --

6 THE COURT: I'm going to take a recess. I'd like to
7 think about this before you proceed. I'm shocked by this.

8 MR. TEITELBAUM: Your Honor --

9 THE COURT: I'm going to adjourn this hearing for --
10 until the 22nd of December, and I'd like you to reflect on your
11 client's position in this matter. I'll give you my preliminary
12 ruling on jurisdiction, but I think this goes way beyond that.
13 I think this goes to Rule 11.

14 I'm shocked by this, that you would -- you would put
15 me and this Court to deciding an issue when the underlying
16 facts as asserted to your client are made up out of whole
17 cloth.

18 MR. TEITELBAUM: Your Honor --

19 THE COURT: To assert that there was an agreement
20 because the parties were thinking there was agreement when the
21 basis of one party thinking that is your client's assertion
22 that there was one. I can't believe that.

23 And I'll tell you one thing, if I have core
24 jurisdiction, one of the things that I have core jurisdiction
25 on is to decide whether there's an executory contract or not

1 covered by my order, and I have a good idea how I'm going to
2 decide that issue.

3 So I'm going to adjourn this until the 22nd at ten
4 o'clock.

5 MR. TEITELBAUM: Your Honor --

6 THE COURT: I don't want to hear anymore. I'm just
7 amazed that the responsible corporation with responsible
8 counsel would take this position.

9 MR. TEITELBAUM: Your Honor --

10 THE COURT: That's it. Think about it.

11 MR. TEITELBAUM: Thank you.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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Kathleen Price, CET

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Dated: December 20, 2005

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