

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
)	
)	Case No. 12-22602
DICKINSON THEATRES, INC.)	
a Kansas corporation,)	Chapter 11
)	
Debtor.)	

**MOTION OF DEBTOR DICKINSON THEATRES, INC. FOR AN ORDER: (A)
AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO PAY
PREPETITION TAXES AND REGULATORY FEES; AND (B) DIRECTING
FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS
RELATED TO PREPETITION TAXES AND REGULATORY FEES**

Dickinson Theatres, Inc., the debtor and debtor-in-possession ("Debtor"), by and through its undersigned counsel, hereby moves (the "Motion") the Court for entry of an order, authorizing, but not directing, the Debtor to pay, in the ordinary course of the Debtor's business, prepetition sales, gross receipts, utility-users, goods and services taxes, federal excise and use taxes, and certain other taxes (the "Sales and Use Taxes"), including, but not limited to, real estate, property taxes, state business taxes, state head-count taxes and employee withholding taxes¹ (the "Other Taxes," and together with the Sales and Use Taxes, the "Taxes") and regulatory fees, including, but not limited to, environmental impact fees and business license fees (the "Regulatory Fees" and, together with the Taxes, the "Taxes and Regulatory Fees") to the respective federal, state and local taxing authorities and other governmental agencies (the

¹ With respect to taxes relating to employee wages and benefits, such amounts are included in the total Tax and Regulatory Fee amount listed in paragraph 9 of this Motion, but such Taxes and Regulatory Fees are explained more fully in the Debtor's *Motion for Entry of An Order (a) Authorizing, but not Directing Debtor Dickinson Theatres, Inc. to (1) Pay Certain Accrued Prepetition Wages, Salaries, and Employee Benefits, (2) Permit Employees to Use Accrued Prepetition Vacation Time, (3) Pay Employees' Prepetition Reimbursable Business Expenses, (4) Continue Employee Benefit Plans, and (5) Directing All Banks to Honor Pre-Petition Checks for Payment of Pre-Petition Obligations; (b) Authorizing Related Relief; and (c) Authorizing, but not Directing, the Release of Withheld Taxes and Employee Contributions* filed contemporaneously herewith.

"Taxing Authorities"), and (B) directing financial institutions to honor and process checks and transfers related to the Taxes and Regulatory Fees. In further support of this Motion, the Debtor respectfully states as follows:

JURISDICTION

1. The Court has jurisdiction over the Motion under 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this Chapter 11 case in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are Sections 105(a), 363(b), 507(a)(8)(A) and 541 of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq.*, as amended, the "Bankruptcy Code").

BACKGROUND

3. On September 21, 2012 (the "Petition Date"), the Debtor filed its voluntary petition in this Court for reorganization relief under Chapter 11 of the Bankruptcy Code, commencing the Debtor's chapter 11 case (the "Chapter 11 Case"). The Debtor continues to operate its business and manage its properties as debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in this Chapter 11 Case and, as of the date of the filing of this Motion, no official committees have been appointed or designated.

4. With its voluntary petition, the Debtor contemporaneously filed this Motion and an Emergency Motion for Expedited Hearings on Certain Motions and Applications (the "Hearing Motion"), wherein the Debtor requests an expedited hearing on, *inter alia*, this Motion.

5. The Debtor operates 18 movie theatres with 210 screens in seven states (the "Business"). All theatres are operated from leased facilities with the Debtor not operating any

theatres from owned locations. The Business employs approximately 36 full-time employees, and approximately 650 part-time employees (collectively, the "Employees"), at the various theatres.

6. Contemporaneously with the filing of its Chapter 11 petition, the Debtor filed a plan of reorganization (the "Plan") and disclosure statement ("Disclosure Statement") and requested the Court to schedule hearings on the adequacy of the Disclosure Statement and confirmation of the Plan. The proposed Plan provides for payment of all allowed claims in full with interest over five years.

7. Upon emergence and consummation of the Plan, Debtor will be significantly stronger and better able to compete and thrive in the highly competitive theatre/entertainment market.

Prepetition Taxes

8. The Debtor, in the ordinary course of its business, incurs various Other Taxes. The process by which the Debtor remits the Other Taxes varies, depending on the nature of the tax at issue and Taxing Authority to which the relevant tax is paid.

9. In connection with the normal operation of its business, the Debtor is sometimes required to collect certain Sales and Use Taxes and must remit these taxes to various governmental entities of the jurisdictions in which the Debtor conducts business. The process by which the Debtor remits Sales and Use Taxes varies, depending on the nature of the tax at issue and Taxing Authority to which the relevant tax is paid.

10. The Debtor also is required by certain regulatory authorities to pay certain Regulatory Fees. The process by which the Debtor remits such Regulatory Fees varies, depending on the nature of the fee at issue and the regulatory authority to which the relevant Regulatory Fee is paid.

11. As of the Petition Date, the Debtor was generally current on all of its Taxes and Regulatory Fees. Over the past twelve (12) months, the Debtor has paid approximately \$1,180,000 in Taxes, and \$107,000 in Regulatory Fees. Prior to the Petition Date, the Debtor paid, on an estimated basis, some but not all of the prepetition accrued and unpaid amounts outstanding on account of the Taxes and Regulatory Fees. The Debtor estimates a prepetition outstanding balance of approximately \$215,000 related to current Taxes and Regulatory Fees.

12. The Debtor pays the Taxes and Regulatory Fees to the Taxing Authorities on a periodic basis with funds drawn by checks (the "Checks") or by means of electronic fund transfers (the "Electronic Transfers") whether sent directly to the Taxing Authorities or sent to a third party administrator who pays the appropriate Taxing Authorities. Prior to the Petition Date, certain Taxing Authorities were sent Checks or Electronic Transfers in respect of such obligations that may not have cleared the Debtor's banks or other financial institutions (together, the "Banks") as of the Petition Date. The Debtor has also not received certain bills from certain Taxing Authorities for taxes owed pre-petition.

Relief Requested

13. The Debtor hereby seeks authority to pay, in its sole discretion, in the ordinary course of its business and on their normal due dates, all undisputed prepetition Taxes and Regulatory Fees owed to the Taxing Authorities, including all Taxes and Regulatory Fees subsequently determined upon audit to be owed for periods prior to the Petition Date. To the extent any Check or Electronic Transfer has not cleared the Banks as of the Petition Date, the Debtor requests the Court to authorize and direct the Banks, when requested by the Debtor in its sole discretion, to clear the Checks or Electronic Transfers. To the extent the Taxing Authorities have not otherwise received payment for all prepetition Taxes and Regulatory Fees owed, the Debtor seeks authorization to issue replacement checks, or to provide for other means of

payment to the Taxing Authorities, to the extent necessary to pay all outstanding Taxes and Regulatory Fees owing for periods prior to the Petition Date.

14. The Debtor further requests that all applicable Banks be authorized and directed, when requested by the Debtor in its sole discretion, to receive, process, honor, and pay any and all Checks or Electronic Transfers drawn on the Debtor's accounts to pay all prepetition Taxes and Regulatory Fees owed to the Taxing Authorities, whether those Checks were presented prior to or after the Petition Date, and to make other transfers provided that sufficient funds are available in the applicable accounts to make such payments. The Debtor represents that each of these Checks or Electronic Transfers can be readily identified as relating directly to the authorized payment of prepetition Taxes and Regulatory Fees. Accordingly, the Debtor believes that Checks and Electronic Transfers other than those relating to authorized payments will not be inadvertently honored.

Basis for Relief

15. Pursuant to sections 105(a), 363(b), 507(a)(8) and 541 of the Bankruptcy Code, the Debtor requests: (a) that the Debtor be, and hereby is, authorized, but not directed, to pay, in the ordinary course of the Debtor's business, all prepetition Taxes and Regulatory Fees owed to the Taxing Authorities, including all Taxes and Regulatory Fees subsequently determined upon audit to be owed for periods prior to the Petition Date, and (b) that the Court direct the Debtor's Banks to honor and process checks and transfers related to such relief.

16. The Court has several legal bases upon which to grant the requested relief. Section 105 (a) of the Bankruptcy Code provides in part: "[t]he Court may issue any order, process of judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 essentially codifies the Bankruptcy Court's inherent equitable

powers. *See In re Just for Feet, Inc.*, 242 B.R. 821 (D. Del. 1999); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 302 (Bankr. W.D. Pa. 1990) (court's equitable power derived from section 105 constitutes "extremely broad grant of authority"); *Browning v. Navarro*, 37 B.R. 201, 208 (N.D. Tex. 1983) (through section 105(a), "Congress grants the bankruptcy court sweeping authority to tailor its orders to meet the needs of bankruptcy proceedings."), *rev'd on other grounds*, 743 F.2d 1069, 1084 (5th Cir. 1984).

17. First, section 507(a)(8) of the Bankruptcy Code gives priority to the Taxing Authorities' claims for certain taxes. Certain of the prepetition obligations owed to the Taxing Authorities, therefore, are entitled to priority status and, as such, must be paid in full under any plan. *See* 11 U.S.C. § 1129(a)(9)(C). Thus, the payment of certain of the prepetition Taxes at this time would not prejudice the rights of other creditors, but merely would accelerate payments that otherwise would become due as part of the Debtor's reorganization. At the same time, payment likely would avoid conflict and administrative problems arising from actions Taxing Authorities would take against the Debtor to collect due and owing Taxes.

18. Second, the Court may authorize the Debtor to pay the Taxes to the Taxing Authorities under section 363(b) of the Bankruptcy Code. That section provides that the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to pay certain prepetition claims. *See Just for Feet*, 242 B.R. at 826 (finding that the bankruptcy court could authorize payment of pre-petition claims where such payment was necessary for the debtor's survival during Chapter 11); *In re Ionosphere Clubs*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (authorizing payment of prepetition claims pursuant to section

363 of the Bankruptcy Code where the debtor articulates "some business justification, other than the mere appeasement of major creditors").

19. Third, certain Taxing Authorities may assert that the Taxes are so-called "trust fund" taxes that the Debtor is required to collect from third parties and hold in trust for the benefit of such Taxing Authorities. To the extent that the Debtor collects sales, use and other Taxes from its customers on behalf of the Taxing Authorities, such Taxes may not constitute property of the Debtor's estate. *See Begier v. Internal Revenue Service*, 496 U.S. 53, 57-60 (1990) (holding that any prepetition payment of the trust fund taxes is not an avoidable preference because such bonds are not property of the debtor's estate); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994); *In re Shank*, 792 F.2d 829, 830 (9th Cir. 1986) (sales taxes required by state law to be collected by sellers from their customers are "trust fund" taxes); *DeChiaro v. New York State Tax Comm.*, 760 F.2d 432, 433 (2d Cir. 1985) (sales taxes are "trust fund" taxes); *In re American International Airways, Inc.*, 70 B.R. 102, 103-104 (Bankr E.D. Pa. 1987) (excise and withholding taxes). As a consequence, the Debtor would not have an equitable interest in such Taxes and, assuming they could be adequately identified and traced, such Taxes would not constitute property of the Debtor's estate and would not be subject to the automatic stay. *See City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994); *see also* 11 U.S.C. § 541(d). Further, because the Taxes may not be property of the Debtor's estate, these funds may not be available for the satisfaction of creditors' claims. Accordingly, the Debtor should be able to pay any Taxes that constitute trust fund taxes as they come due.

20. Furthermore, even if some of the Taxes would not ordinarily be considered "trust fund" taxes in a particular jurisdiction, payment of such Taxes should nevertheless be authorized because some Taxing Authorities may audit the Debtor if such Taxes are not timely

paid. Such audits would needlessly divert the Debtor's attention from its restructuring efforts. In addition, some Taxing Authorities may also seek to impose liens on the Debtor's assets on account of unpaid Taxes, which liens would require time, effort and expense for the Debtor to challenge and remove. An improper lien or the failure to pay certain Taxes might also affect the Debtor's good standing in a particular state, potentially affecting the Debtor's ability to engage in certain transactions. Timely payment of the Taxes is necessary to avoid such distractions and is thus in the best interests of the Debtor and its estates.

21. Finally, many federal and state statutes hold officers, certain employees and directors of collecting entities personally liable for certain taxes owed by those entities. To the extent that any Taxes remain unpaid by the Debtor, the Debtor's directors and officers may be subject to lawsuits or criminal prosecution during the pendency of this Chapter 11 Case. Any such lawsuit or criminal prosecution (and the ensuing potential liability) would distract the Debtor and its officers, certain employees and directors from their attempt to maximize recovery for their creditors, to the detriment of all parties in interest to this Chapter 11 Case.

22. Nothing in this Motion should be construed as impairing, or should be deemed to impair, the Debtor's right to contest the validity, priority or amount of any Taxes that may be owed to any Taxing Authority, and the Debtor expressly reserves all of its rights with respect thereto.

23. Any delay in paying the obligations relating to the Taxes and Regulatory Fees could be detrimental to the Debtor, its creditors and its estate. Indeed, the Debtor's ability to manage and run its business operations with as little disruption as possible requires, in part, that it remains in good standing with the relevant Taxing Authorities. Accordingly, and to successfully implement the foregoing, the Debtor seeks a waiver of the fourteen (14) day stay of

the order authorizing the use, sale or lease of property under Rule 6004(h) of the Federal Rules of Bankruptcy Procedure, to the extent such provision may be applicable.

24. Bankruptcy Rule 6003 provides that to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may approve a motion to "pay all or part of a claim that arose before the filing of the petition" prior to twenty-one (21) days after the Petition Date. Fed. R. Bankr. P. 6003. The Debtor submits that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor, as described herein, and that cause exists under Bankruptcy Rule 6003 for immediate authority to continue to pay the Taxes and Regulatory Fees.

25. Based on the foregoing, the Debtor submits that the relief requested is necessary and appropriate, is in the best interests of its estates and creditors, and should be granted in all respects.

WHEREFORE, the Debtor respectfully requests the Court grant the relief requested herein and grant such further relief as is just and proper.

Dated: September 21, 2012.

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