

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

IN RE:)
) Case No. 12-22602
Dickinson Theatres, Inc.,)
) Chapter 11
Debtor.)

**HAWTHORN BANK’S LIMITED OBJECTION TO
MOTION OF DEBTOR FOR ENTRY OF INTERIM AND FINAL ORDERS:
(A) AUTHORIZING DEBTOR TO OBTAIN POST-PETITION FINANCING FROM
6801 WEST 107th, LLC; (B) GRANTING LIENS AND SUPERPRIORITY CLAIMS IN
FAVOR OF 6801 WEST 107th, LLC; AND (C) SCHEDULING A FINAL HEARING**

Hawthorn Bank (“Hawthorn”), by and through its undersigned counsel of record, hereby submits the following limited objection to the Motion of Debtor for Entry of Interim and Final Orders: (a) Authorizing Debtor to Obtain Post-Petition Financing From 6801 West 107th, LLC; (b) Granting Liens and Superpriority Claims in Favor of 6801 West 107th, LLC; and (c) Scheduling a Final Hearing (hereinafter “6801 West DIP Financing Motion”) (Doc. No. 13):

1. Dickinson Theatres, Inc. (“Debtor”) is a Kansas corporation.
2. On June 6, 2012, the Debtor executed a Promissory Note payable to Hawthorn for a principal loan amount of \$750,000. A copy of the Promissory Note is attached as Exhibit 1.
3. That same day (June 6, 2012), the Debtor also executed a Commercial Security Agreement which secured its debt obligations to Hawthorn. A copy of the Commercial Security Agreement is attached as Exhibit 2.
4. Pursuant to the terms of the Commercial Security Agreement, Hawthorn took a security interest in the Debtor’s following collateral: accounts and other rights to payment, inventory, equipment, instruments and chattel paper, general intangibles, documents, government payments and programs, investment property, deposit accounts and all equipment then owned or thereafter acquired located at 1935 S. Signal Butte, Mesa, Arizona 85209.

5. Two days later on June 8, 2012, Hawthorn filed a UCC-1 financing statement with the Kansas Secretary of State (Filing No. 99272171) thereby perfecting its security interest in the Debtor's assets. A copy of the Kansas Secretary of State's Acknowledgment of Filing for Hawthorn is attached hereto as Exhibit 3.

6. Thereafter, on June 29, 2012, People's Bank (hereinafter "People's") filed its UCC-1 financing statement with the Kansas Secretary of State (Filing No. 99305972) as part of its perfection of its security interest in the Debtor's assets. A copy of the Kansas Secretary of State's Acknowledgment of Filing for People's is attached hereto as Exhibit 4. As noted on Exhibit 4, People's purportedly took a security interest in the Debtor's inventory, chattel paper, accounts, equipment and general intangibles.

7. According to Schedule D, the Debtor only had three secured creditors as of the bankruptcy petition date: Hawthorn, People's and First Community Bank. *See* Docket No. 1, pp. 89-90. Moreover, Schedule D reveals that First Community Bank's collateral was limited to real estate. *Id.* In contrast, 6801 West 107th, LLC ("6801 West") was not a secured creditor of the Debtor.

8. Pursuant to K.S.A. § 84-9- 322 Hawthorn has priority perfected security interest in its collateral which is superior to that of People's given that Hawthorn's UCC-1 financing was filed before People's UCC-1 financing statement was filed.

9. As indicated on the Debtor's Schedule D (Docket No. 1, p. 90) and Hawthorn's proof of claim (Claim No. 2 filed on October 2, 2012), the Debtor owes Hawthorn in excess of \$700,000. Moreover, Debtor's Schedule D (p. 90) further reveals that the Debtor does not know the value of Hawthorn's collateral.

10. Pursuant to the 6801 West DIP Financing Motion, the Debtor seeks authority to grant non-priming liens to secure the 6801 West DIP Facility.

11. It is unclear from the 6801 West DIP Financing Motion whether the Debtor contemplates that it will make any post-petition payments to 6801 West in connection with the proposed 6801 West DIP Facility.

12. Hawthorn does not have any objection to the Debtor's granting of additional liens to 6801 West which are subordinate to the interests of Hawthorn or which liens are imposed on unencumbered property where such liens are being granted as collateral for the funds that 6801 West is extending to the Debtor on a post-petition basis.

13. Hawthorn does object, however, to the 6801 West DIP Financing Motion to the extent that it seeks to only pay on-going adequate protection payments to People's without also paying adequate protection payments to Hawthorn. Hawthorn further objects to the 6801 West DIP Financing Motion to the extent that it does not seek to provide Hawthorn with replacement liens on the Debtor's post-petition assets to the same extent as Hawthorn's pre-petition security interest.

14. As a practical matter, Hawthorn has a priority security interest to that of People's and it is only through the continued use of the collateral in which Hawthorn has its priority security interest that the Debtor is able to maintain its on-going operations and thereby generate revenue to pay its obligations.

15. Section 363(e) of the Bankruptcy Code provides in relevant part that "at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."

11 U.S.C. § 363(e). What constitutes adequate protection is decided on a case-by case basis. *See In re O'Connor*, 808 F.2d 1393, 1396-1397 (10th Cir. 1987); *In re Martin*, 761 F.2d 472, 474 (8th Cir. 1985).

16. Section 361 of the Bankruptcy Code provides that adequate protection may be provided in the form of periodic cash payments or the granting of additional or replacement liens to the extent that the continued use of the property results in a decrease in value of the entity's interest in the property.

17. Adequate protection is designed to prevent the diminution in the value of the secured creditors' collateral while the bankruptcy reorganization process is on-going. *See e.g. Delbridge v. Production Credit Ass'n & Federal Land Bank*, 104 B.R. 824, 827-828 (E.D. Mich. 1989).

18. Hawthorn is entitled to adequate protection to protect against the diminution of its collateral during the pendency of this bankruptcy proceeding. If the Debtor desires to pay adequate protection payments to a subordinate secured lender (People's) and grant replacement liens to People's as well as granting additional liens to 6801 West, then the Debtor should also pay adequate protection payments to Hawthorn and grant Hawthorn replacement liens to protect against the diminution in value of its collateral during the pendency of these bankruptcy proceedings.

19. Given that the Debtor has not identified the value of the Hawthorn collateral and given that the Debtor is proposing to pay all creditors in full through its proposed plan of reorganization, Hawthorn asserts that the appropriate adequate protection payment in this instance should be the amount of monthly loan payments that the Debtor would have continued

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2012, a true and correct copy of the above and foregoing was served by the method or methods specified below:

 X by **electronically** filing with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

s/ Michael D. Fielding
Attorney