

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

In re:

Dickinson Theatres, Inc.

Debtor.

Chapter 11

Case No. 12-22602 (DLS)

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF DICKINSON THEATRES, INC. FOR AN ORDER DETERMINING THAT
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IS NOT
REQUIRED TO PROVIDE ACCESS TO CONFIDENTIAL OR PRIVILEGED
INFORMATION OF THE DEBTOR**

The Official Committee of Unsecured Creditors (the “Committee”) of Dickinson Theatres, Inc., the above-captioned debtor and debtor-in-possession (the “Debtor”), by and through its proposed counsel, Kelley Drye & Warren LLP and Grimes & Rebein, L.C.,¹ hereby moves (the “Motion”) for entry of an order pursuant to sections 105(a), 107(b), and 1102(b)(3)(A) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), determining that the Committee is not required to provide any non-Committee creditors with access to the Debtor’s Confidential Information (as defined below) or Privileged Information (as defined below). In support of this Motion, the Committee respectfully states as follows:

¹ An application to retain Grimes & Rebein, L.C. as local counsel to the Committee was filed on October 10, 2012. Docket No. 113. An application to retain Kelley Drye & Warren LLP as lead counsel to the Committee will be filed contemporaneously herewith.

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this 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), 107(b), and 1102(b)(3)(A) of the Bankruptcy Code, as supplemented by Bankruptcy Rule 9018.

BACKGROUND

3. On September 21, 2012 (the “Petition Date”), the Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

4. Since the Petition Date, the Debtor has continued in possession of its properties and has continued to operate and manage its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case.

5. On October 2, 3 and 4, 2012, the Office of the United States Trustee for the District of Kansas (the “U.S. Trustee”) appointed the Committee consisting of: The Coca-Cola Company, The Hartley’s Executive Cleaning Company, Cinedigm Digital Cinema Corp., GG&A Central Mall Partners, L.P., IMAX Corporation, and Prize Properties, LLC.² On October 4, 2012, the Committee selected Kelley Drye to serve as lead counsel to the Committee. The Committee also selected Grimes & Rebein to serve as local counsel to the Committee.

6. No other official committees have been appointed or designated in this chapter 11 case.

² Docket Nos. 79, 87, and 92.

7. The Committee members adopted bylaws governing the Committee that contain a confidentiality provision (the “Confidentiality Provision”) regarding Confidential Information³ provided by, or on behalf of, the Debtor. The Confidentiality Provision requires that, except as provided therein, the Committee members keep confidential and do not disclose any Confidential Information that has been, or will be, supplied to them throughout this case.

RELIEF REQUESTED

8. By this Motion, the Committee seeks entry of an order of the Court: (a) confirming that section 1102(b)(3)(A) of the Bankruptcy Code does not require the Committee to provide anyone other than its members, counsel, and advisors with access to the Debtor’s Confidential Information; and (b) clarifying that the Committee is not required to provide anyone other than its members, its counsel, and advisors access to Privileged Information (as defined below).

9. The relief requested herein will help ensure that confidential, privileged, proprietary, and/or material non-public information will not be disseminated to the detriment of the Debtor’s estate, and will aid the Committee in performing its statutory functions under the

³ For purposes of this Motion, the term “Confidential Information” shall mean all communications and information received from the Debtor or its professionals, including without limitation, as to operations, financial conditions, plans, projections or results of operations of the Debtor, and any and all correspondence, reports and memoranda prepared by the Committee’s retained professionals for the benefit of the Committee as well as all communications, including reports disseminated by Committee members among themselves and/or their retained professionals, received by any of the Committee members, in any form including via any electronic media

Notwithstanding the foregoing, Confidential Information shall not include any information (i) that is available to or was in the possession of a Committee member (or any of its affiliates) on a non-confidential basis prior to the receipt of the information in its capacity as a Committee member; (ii) that is or becomes available to the public generally other than as a result of a breach of any of the provisions of the Confidentiality Provision; or (iii) that becomes independently available to a Committee member (or any of its affiliates) by a means other than service on or in connection with its membership on the Committee so long as the Committee member’s (or its affiliates’) receipt of the information is not governed by any other confidentiality provisions or agreements; provided that, the information became available to the public or was obtained from a source that the Committee member believes was not prohibited from disclosing the information publicly or to the Committee member by a contractual, legal, or fiduciary obligation.

Bankruptcy Code. In addition, the relief requested is consistent with the Committee members' obligations under the Confidentiality Provision.

DISCUSSION

10. Section 1102(b)(3)(A), provides, in pertinent part, that a committee appointed under section 1102(a) of the Bankruptcy Code shall “provide access to information for creditors who— (i) hold claims of the kind represented by that committee; and (ii) are not appointed to the committee[.]” 11 U.S.C. § 1102(b)(3)(A). The statute, however, does not indicate the nature, scope, or extent of the “information” that must be provided to such creditors or how a committee should provide “access to information.”

11. This lack of specificity in section 1102(b)(3)(A) creates significant issues for debtors and creditors' committees. Typically, a debtor will share confidential and other non-public proprietary information with a committee. A committee uses this information to, among other things, assess a debtor's prospects for reorganization and analyze the propriety of relief being sought by the debtor. In addition, as here, committee members often adopt committee bylaws containing confidentiality provisions or enter into a confidentiality agreement with a debtor. Through such committee bylaw provisions or confidentiality agreements, a debtor can ensure that the members of a committee will keep its proprietary information confidential and will not use the debtor's confidential and other non-public proprietary information except in connection with the chapter 11 case and on terms acceptable to the debtor. In this case, pursuant to the Confidentiality Provision, the Committee members are required to keep confidential and not disclose Confidential Information except as may be otherwise provided in the Confidentiality Provision.

12. Because of its silence on the issue, section 1102(b)(3)(A) raises a question as to whether the Committee could be required to share the Debtor's Confidential Information

with any creditor that the Committee represents. Nothing in the plain language of section 1102(b)(3)(A) nor its legislative history requires such a result. Nevertheless, as a precautionary measure, the Committee hereby seeks an order of the Court confirming that section 1102(b)(3)(A) does not require it to provide access to Confidential Information to the Debtor's creditors that are not members of the Committee.

13. Public dissemination of the Confidential Information likely would cause serious harm to the Debtor's estate by, among other things, providing access to otherwise protected information to the Debtor's competitors and litigation adversaries who could use it to the detriment of the Debtor's estate. Moreover, the Committee will likely receive other Confidential Information of the Debtor, such as compensation levels or other employee information, that should be kept private. Public disclosure of such information is unnecessary and could jeopardize morale and harm the Debtor.

14. If there is a risk that Confidential Information given by the Debtor to the Committee will be shared with any creditor, the Debtor would be discouraged from giving Confidential Information to the Committee, which in turn, could limit the Committee's ability to fulfill its statutory obligations under the Bankruptcy Code.

15. Section 1102(b)(3)(A) also raises a question as to whether a committee could be required to share a debtor's information that is subject to the attorney-client or some other state, federal, or other jurisdictional law privilege, whether such privilege is solely controlled by the committee or is a joint privilege with the debtor or a third party (collectively, "Privileged Information"), with any creditor who is not a constituent of the committee. Compelling the Debtor and the Committee to provide non-Committee creditors with access to Privileged Information creates obvious concerns. If Privileged Information must be turned over

to such creditors, the relevant privilege would likely be lost. The Debtor and the Committee, therefore, would be limited in their ability to obtain the independent advice and consultation that such privileges are designed to support. As with Confidential Information, the plain language of section 1102(b)(3)(A) and its legislative history do not require this result. Again, as a precautionary measure, the Committee seeks an order confirming that section 1102(b)(3)(A) does not require it to provide access to Privileged Information to unsecured creditors generally.

16. Importantly, courts have clarified that committees are not required to provide access to confidential or privileged information. *See, e.g., In re Refco*, 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (holding that a committee is not required to disclose information that is confidential, or if the disclosure would result in the waiver of the attorney-client privilege or the violation of an agreement, order, or law, unless the court orders otherwise on request of a creditor seeking such information); *see also, In re Global Home Products LLC, et al.*, Case No. 06-10340 (KG) (Bankr. D. Del. May 5, 2006) (stating that a committee is not authorized or required to provide access to confidential or privileged information).

17. Section 107(b)(1) of the Bankruptcy Code requires that “[o]n request of a party in interest, the bankruptcy court shall ... protect an entity with respect to a trade secret or confidential research, development, or commercial information[.]” 11 U.S.C. § 107(b)(1). Section 107(b)(1) of the Bankruptcy Code is mandatory. *See Video Software Dealers Ass’n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994) (providing that the protections of section 107(b)(1) are mandatory upon request; a court has no discretion to deny the application as to information that fits any of the specified categories). Accordingly, section 107(b)(1), as supplemented by Bankruptcy Rule 9018,⁴ provides this Court with an independent basis to

⁴ Bankruptcy Rule 9018 provides, in pertinent part:

protect Confidential Information and Privileged Information from disclosure to creditors who are not members of the Committee.

18. The disclosure of non-public or privileged information to such creditors would likely cause serious harm to the Debtor's estate, as discussed above. In the interest of avoiding any such harm, and to maximize the value of these estates, the Committee respectfully requests entry of an order of this Court, substantially in the form attached hereto as Exhibit A, pursuant to sections 105(a), 107(b)(1), and 1102(b)(3)(A) of the Bankruptcy Code confirming that the Committee is not required to provide access to Confidential Information or Privileged Information.⁵

19. Under the Committee's proposed procedures, the Committee would be permitted, but not required, to provide access to information, including Privileged Information, to any party so long as (a) such information does not otherwise constitute Confidential Information, and (b) any privilege is held and controlled solely by the Committee. The Committee proposes that the Committee and its individual members and their respective representatives, advisors, and counsel shall be deemed to be in compliance with sections 1102(b)(3) and 1103(c) of the Bankruptcy Code by implementing either of the following procedures (the "Procedures"):

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information....

Fed. R. Bankr. P. 9018.

⁵ In addition, the existing rights or obligation of the Committee as to the Debtor's information will not be impacted by this Motion, as the proposed order provides, "Nothing in this Order expands, restricts, affirms, or denies the right or obligation, if any, of the Committee to provide access, or not to provide access, to any information of the Debtor or the Committee to any party except as explicitly provided herein." As a result, the relief requested herein is limited solely to the potential impact of section 1102(b)(3)(A) and does not attempt to adjudicate the rights or obligations of the Committee.

- (a) authorizing, but not requiring, establishment of a website (the “Website”) to make general information about this case available to creditors;⁶ or
- (b) establishing an email address (the “E-mail Address”) to allow unsecured creditors to send questions and comments to the Committee’s counsel in connection with this case and authorizing the Committee and its counsel, in their reasonable discretion, to review and/or respond to correspondence sent to the E-mail Address.

Notice

20. Notice of this Motion has been provided to: (i) counsel to the Debtor; (ii) the U.S. Trustee; (iii) all parties holding secured claims against the Debtor; and (iv) all parties requesting notice pursuant to Bankruptcy Rule 2002. Because of the nature of the relief requested, the Committee respectfully submits that no further notice of this Motion is necessary or required under the circumstances.

⁶ On the Website, the Committee may make available information regarding the Debtor’s case, including: (i) the Petition Date; (ii) the case number; (iii) the contact information for the Debtor (and any information hotlines or informational email addresses (as discussed below) that they establish), the Debtor’s counsel, and the Committee’s counsel; (iv) the voting deadline with respect to any plan filed in this case; (v) information regarding any claims bar date; (vi) access to any claims docket established by any claims and noticing agent retained in this case; (vii) a general overview of the chapter 11 process; (viii) press releases (if any) issued by the Committee or by the Debtor; (ix) links to other relevant websites (e.g., the Debtor’s corporate website, the Bankruptcy Court website, and the website of the Office of the United States Trustee); and (x) any other information that the Committee and/or its counsel, in their sole discretion, deems appropriate subject to the restrictions and limitations herein.

WHEREFORE, the Committee respectfully requests that this Court enter an order, substantially in the form attached hereto as Exhibit: (i) granting this Motion; and (ii) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 17, 2012

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Proposed Counsel to the Official Committee
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EXHIBIT A
PROPOSED FORM OF ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

Dickinson Theatres, Inc.

Debtor.

Chapter 11

Case No. 12-22602 (DLS)

**ORDER DETERMINING THAT THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF DICKINSON THEATRES, INC. IS NOT
REQUIRED TO PROVIDE ACCESS TO CONFIDENTIAL
OR PRIVILEGED INFORMATION OF THE DEBTOR**

Upon the motion (the “Motion”)¹ of the Official Committee of Unsecured Creditors (the “Committee”) of Dickinson Theatres, Inc., the above-captioned debtor and debtor-in-possession (the “Debtor”), for entry of an order pursuant to sections 105(a), 107(b), and 1102(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9018 determining that the Committee is not required to provide access to the Confidential Information or Privileged Information to any creditor of the Debtor who is not a member of the Committee; and it appearing that the relief requested in the Motion is in the best interests of the Debtor’s estate, its creditors, and other parties in interest; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and notice of the Motion and the opportunity for a hearing on the Motion being appropriate under the circumstances such that no other or further notice need be given; upon the record herein, after due deliberation thereon, good and sufficient cause exists for the granting of the relief as set forth herein,

¹ Capitalized terms used but not defined in this order shall have the respective meanings ascribed to them in the Motion.

IT IS HEREBY ORDERED THAT:

1. The Committee and its individual members and their respective representatives, agents, advisors, and counsel (each a “Committee Party” and collectively, the “Committee Parties”) are not required to provide access to any Confidential Information concerning the Debtor, including (without limitation) with respect to the acts, conduct, assets, liabilities, and financial condition of the Debtor, the operation of the Debtor’s business and the desirability of the continuance of such business, or any other matter relevant to this case or to the formulation of a plan, whether provided by or on behalf of the Debtor or by any third party, to any creditor who is not a member of the Committee.

2. Committee Parties shall not be required, without an order of this Court or consent of the Debtor, to provide access to any Privileged Information concerning the Debtor to any creditor who is not a member of the Committee. The Committee is authorized, but not required, to provide access to Privileged Information to creditors who are not members of the Committee so long as (a) such Privileged Information is not Confidential Information; and (b) the relevant privilege is held and controlled solely by the Committee.

3. None of the Committee Parties shall have or incur any liability to any entity (including the Debtor) for acts taken or omitted to be taken as long as the Committee Parties have acted in compliance with the Procedures, the Confidentiality Provision, or any other provisions of this Order; provided, however, that the foregoing shall not preclude or abridge the right of any creditor to move the Court for an order requiring the production of other or further information.

4. Nothing in this Order shall diminish the qualified immunity under applicable law of any Committee Party, or shall require the Committee to provide access to

information or solicit comments from any entity that has not demonstrated to the satisfaction of the Committee that it holds claims of the kind described in section 1102(b)(3)(A) of the Bankruptcy Code.

5. Nothing in this Order expands, restricts, affirms, or denies the right or obligation, if any, of the Committee to provide access, or not to provide access, to any information of the Debtor or the Committee to any party except as explicitly provided herein.

6. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

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Order prepared by:

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