

**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.	)	

**DEBTOR'S MOTION FOR AN ORDER: (A) AUTHORIZING, BUT NOT DIRECTING, DICKSON THEATRES, INC., TO (1) PAY CERTAIN ACCRUED PRE-PETITION WAGES, SALARIES AND EMPLOYEE BENEFITS, (2) PAY EMPLOYEES' PRE-PETITION REIMBURSABLE BUSINESS EXPENSES, (3) CONTINUE EMPLOYEE BENEFIT PLANS, AND (4) 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 WITHHOLDING TAXES AND EMPLOYEE CONTRIBUTIONS**

Dickinson Theatres, Inc., debtor and debtor-in-possession in the above-captioned proceedings ("Debtor"), through its undersigned counsel, hereby files this Motion requesting this Court to enter its order: (a) authorizing, but not directing, Debtor to (1) pay certain accrued pre-petition wages, salaries and employee benefits, (2) pay employees' pre-petition reimbursable business expenses, (3) continue certain employee benefit and insurance plans post-petition; (b) authorizing related relief; and (c) directing all banks to honor pre-petition checks for payment of pre-petition employee obligations (the "Motion"). In further support of the Motion, Debtor respectfully requests 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, 363(b), 507(a)(4), 507(a)(5) and 1114(e) 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. All of these Employees are on payroll of, and paid by, the Debtor.

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.

### **Relief Requested**

#### **I. AUTHORITY TO PAY CERTAIN EMPLOYEE RELATED CLAIMS AND EXPENSES**

8. By this Motion, the Debtor requests that this court enter an order, pursuant to Sections 105, 363(b), 507(a)(4), 507(a)(5) and 1114(e) of the Bankruptcy Code, authorizing the Debtor to pay various employee-related pre-petition obligations of the Debtor as described below. To minimize the Employees' personal hardships and to enhance the Debtor's ability to retain such Employees in this uncertain time, the Debtor seeks authority to pay certain pre-petition claims arising on account of the Employees for, *inter alia*, wages (including but not limited to salaries, commissions, bonuses and other compensation), vacation and other paid leave, federal and state withholding taxes, payroll taxes, contribution to employee benefit plans, health claims, the Reimbursable Expenses (as defined below), and all other employee benefits which Debtor pays in the ordinary course of business (collectively, the "Pre-Petition Employee Compensation Claims"), including, as defined herein, the Unpaid Compensation, the Employee Deductions, the Employee Benefits, the Health Benefits, the Employee Insurance Benefits, and the Other Benefits (collectively the "Pre-Petition Employee Benefit Claims," the Pre-petition Employee Benefit Claims and the Pre-Petition Employee Compensation Claims are, collectively, the "Pre-Petition Employee Claims").

9. As set forth in greater detail below, the Debtor requests authority: (a) to pay to Employees, in its discretion, outstanding wages, salaries, commission and accrued bonuses

(approximately between \$40,000 - \$60,000 per week); (b) to pay reimbursable employee expenses (approximately \$500.00); and (c) to maintain certain benefit programs in the ordinary course of the Debtor's business.

**A. The Debtor's Pre-Petition Employee Claims**

10. Pre-Petition Employee Compensation Claims. In its ordinary course of business, the Debtor: (a) issues payroll checks to its salaried, hourly and temporary Employees; and (b) pays contract labor pursuant to invoices received in the ordinary course of its business.

11. The Debtor's current work force consists of approximately 680 Employees, approximately 650 of whom are part-time Employees. Most of the Employees are paid hourly on a bi-weekly basis, for a two-week pay period. The Debtor also has approximately 30 salaried Employees. All of the Debtor's non-salaried Employees were last paid on September 21, 2012, for the period ending September 13, 2012. The Debtor's total estimated gross payroll for all Employees is approximately \$80,000 for each pay period. Thus, assuming all payroll checks issued on September 7, 2012, have cleared, the Debtor estimates that the total accrued non-salaried Employees pre-petition wages claim is approximately \$40,000 as of the Petition Date. The Debtor must also pay certain payroll taxes including FICA, FUTA, SUTA and withholding taxes as required by federal, state and/or local authorities.

12. Items of unpaid compensation were due and owing on the Petition Date because, among other things:

- a. the Chapter 11 petition was filed during Debtor's regular and customary salary and hourly wage payroll periods and temporary and contract worker invoice periods;
- b. some payroll checks issued to Employees and checks issue to or for the benefit of other Employees prior to the Petition Date may not have been presented for payment or cleared the banking system and, accordingly, have not been honored and paid as of the Petition Date; and

- c. Employees have not yet been paid all their salaries and wages for services performed prior to the Petition Date on behalf of Debtor because payroll checks are issues in arrears.

13. Debtor estimates the total amount owed to Employees, on account of items of Unpaid Compensation, as of the Petition Date will be approximately \$40,000 plus the accrued wages for salaried employees.

14. Failure to pay the Pre-Petition Employee Compensation Claims would cause the Employees extreme personal hardship which, in many cases will leave certain Employees unable to pay their basic living expenses. Such a result would obviously destroy their morale and result in unmanageable Employee turnover. The Debtor submits that any significant deterioration in morale at this time will substantially and adversely impact the Debtor and its ability to reorganize, thereby resulting in immediate and irreparable harm to the Debtor.

#### **B. Employee Benefits**

15. The Debtor has established various plans and policies to provides its Employees with insurance programs and workers' compensation coverage (collectively, the "Employee Benefits"). These Employee Benefits are described below.

16. Failure to pay the pre-petition Employee Benefits claims would cause the Employees extreme personal hardship which, in many cases will leave certain Employees unable to pay their basic living expenses. Such a result would obviously destroy their morale and result in unmanageable Employee turnover. The Debtor submits that any significant deterioration in morale at this time will substantially and adversely impact the Debtor and its ability to reorganize, thereby resulting in immediate and irreparable harm to the Debtor.

17. Debtor requests that the Court enter an order authorizing, but not directing, Debtor, pursuant to Debtor's business judgment and its determination of appropriate claims of Employees, to pay Employee Benefits in the ordinary course of its business, and to maintain

such ordinary course of business with respect to those Employees employed by Debtor as of the Petition Date.

**C. Employee Insurance Programs**

18. The Debtor pays workers' compensation premiums to third-party carriers for the benefit of Employees. The Debtor is current on its premium payments for these programs as of the Petition Date. The Debtor seeks the authority, but not be directed, to pay the workers' compensation premiums in the ordinary course of business.

**D. Reimbursable Business Expenses**

19. Prior to the Petition Date and in the ordinary course of its business, Debtor reimbursed Employees and officers for certain expenses incurred in the scope of their employment. As of the Petition Date, Debtor estimates that it owes approximately \$500 consisting of Debtor's expenses relating to, among other things, business-related travel expenses, business meals, car expenses, mileage reimbursements, and miscellaneous business expenses (collectively, the "Reimbursable Expenses"). All of the Reimbursable Expenses were incurred by the Employees on Debtor's behalf and with the understanding that they would be reimbursed. Accordingly, to avoid harm to such individuals, Debtor seeks to be authorized but not required, to pay the Reimbursable Expenses in the ordinary course of business.

20. In addition, the Debtor believes that most, if not all, of the Pre-Petition Employee Claims will be entitled to priority status. Except for a few key executives and managers and possibly other Employees with higher than usual medical claims, the Debtor believes no single employee is owed more than \$500 in total Pre-Petition Employee Claims. Thus, these Employees will most likely be entitled to seek priority status for their claims under Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. With respect to those Employees with unusually high medical claims or those with high amounts of wages owed that may exceed the

\$11,725.00 prior cap, the Debtor does not believe that the total amount of excess priority claims will be material.

21. Payment of the excess priority claims is amply justified.

22. The Debtor submits that the amounts to be paid to Employees pursuant to this Motion are reasonable, compared with the importance and necessities of the services of the employees and the losses the debtor will likely suffer if those amounts are not paid.

23. The requested relief also will reduce significantly the administrative burden which otherwise might be imposed in the Chapter 11 Case. For the Debtor to identify whether and to what extent individual Employees hold priority or general unsecured claims for employee benefits, and to modify benefit policies to enforce these distinctions, would impose additional burdens of administration and expense which seem unwarranted under the circumstances of this case.

24. The Debtor seeks to pay the above-described compensation, benefit and reimbursement obligations (or to maintain accrued levels of benefits and continue such accrual where payment is not yet due) in accordance with policies, plans and programs that were in place prior to the Petition Date. If such payment is authorized, but not required, pursuant to this Motion, such authorization should not be deemed automatically to continue post-petition assumption or adoption of any policy, plan or program and the Debtor reserves all of its rights under the Bankruptcy Code with respect thereto.

**E. Banks Honor Pre-Petition Checks of the Debtor**

25. In the event that an employee, after the Petition Date, attempts to cash a check issued by the Debtor pre-petition and satisfaction of a Employee Obligations, the Debtor seeks an order directing all banks to honor pre-petition checks of payment of such employee claims.

## II. AUTHORITY TO RELEASE WITHHELD TAXES AND EMPLOYEE CONTRIBUTIONS

26. Debtor deducts from its Employees' paychecks, among other items: (a) payroll taxes and the Employees' portions of FICA and statutory unemployment taxes; and (b) legally-ordered deductions such as wage garnishments, child support, and tax levies (collectively, the "Employee Deductions"). Debtor forwards the amounts equal to the Employee Deductions from its general operating accounts to appropriate third-party recipients. These funds were deducted from Employee paychecks but, due to the commencement of the Chapter 11 Case, may not have been forwarded to appropriate third-party recipients. By this Motion, Debtor seeks authority to forward the Employee Deductions to the appropriate parties.

27. With respect to all Pre-Petition Employee Claims that Debtor seeks authority to pay herein, Debtor requests that it be authorized, but not directed, to make such payments in order to enable Debtor to cease making payments depending upon the cost of this decision. Finally, Debtor requests that if Pre-Petition Employee Claims are paid after the Petition Date by Debtor, and such payments are on account of claims which arose prior to the Petition Date, and if the Employee or former employee subsequently has a claim arising after the Petition Date which, for any reason whatsoever, is not paid, the post-Petition Date Employee Claims or Employee Deductions made on account of pre-petition claims shall be deemed credited against Debtor's liability for such employee's post-petition claims.

### **ARGUMENT AND BASES FOR RELIEF REQUESTED**

28. Under section 507(a)(4) of the Bankruptcy Code, an employee may be granted a priority claim for:

allowed unsecured claims, but only to the extent of \$11,725 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for –



- (A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or
- (B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor

11 U.S.C. § 507(a)(4). Likewise, under Section 507(a)(5) of the Bankruptcy Code, employees ultimately may be granted a priority claim for:

- allowed unsecured claims for contributions to an employee benefit plan –
  - (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
  - (B) for each such plan, to the extent of –
    - (i) the number of employees covered by each such plan multiplied by \$11,725; less
    - (ii) the aggregate amount paid to such Employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5).

29. Debtor's books and records indicate that in almost all instances the amount of wages, salaries, and contractual compensation owing to an Employee will not exceed the sum of \$11,725.00 allowable as a priority claim under Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. Moreover, Debtor only seeks authority to make Pre-Petition Employee Claims up to the statutory maximums of \$11,725.00 under Section 507(a)(4) of the Bankruptcy Code and under Section 507(a)(5) of the Bankruptcy Code.

30. Numerous courts have recognized the validity of the foregoing justifications for allowing debtors to pay pre-petition compensation, deductions, and benefits and, as a result, routinely have granted relief similar to that requested herein. *See In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987) (approving bankruptcy court order authorizing debtor to pay certain

pre-bankruptcy wages, salaries, employee reimbursement expenses and benefits, including payment on worker's compensation claims); *In re Gulf Air, Inc.* 112 B.R. 152 (Bankr. W. D. La. 1989) (authorizing debtor in possession to pay pre-petition employee wages and benefits and health, life and workers' compensation insurance premiums); *See In re UNR Industries*, 143 B.R. 506 (Bankr. N.D. Ill. 1992); *In re Crescent Oil, Co.*, Case No. 09-20258 (RDB) (Bankr. D. Kan., Docket No. 40, February 11, 2009).

31. Retaining the Employees is critical in this case. In *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989), the Court permitted Eastern Airlines to pay its current employees pre-bankruptcy wages, salaries, medical benefits and business expense claims. The Court relied on its equitable powers under Section 105(a) to effectuate a restructuring of Eastern Airlines' finances to provide jobs for its employees. *Id.* at 177.

32. The relief requested in this Motion also is supported by the well-established "necessity of payment" doctrine.<sup>1</sup> Under the doctrine, a bankruptcy court will permit a reorganizing debtor to make post bankruptcy payments on pre-bankruptcy claims when payment is necessary to effectuate a successful reorganization. *See In re Adams Apple, Inc.*, 829 F.2d 1484, 1490 (9th Cir. 1987) (noting case law permits unequal treatment of pre-petition debts when necessary for debtor rehabilitation, including payment of pre-petition wages). Finally, Debtor's concurrently filed debtor-in-possession financing and cash collateral motion includes a budget (the "Budget") that contemplates the payments herein requested.<sup>2</sup>

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<sup>1</sup> The doctrine was first articulated by the Supreme Court in railroad reorganization cases, *See Miltenberger v. Logansport, C. & S.W. R. Co.*, 106 U.S. 286 (1882), and it has been held to be equally applicable to non-railroad debtor cases. *See, e.g., Dudley v. Mealy*, 147 F.2d 268, 271 (2d Cir. 1945); *In re Gulf Air, Inc.*, 112 BR. 152, 153 (Bank. W.D. La. 1989).

<sup>2</sup> The Bankruptcy Code contemplates post-petition payments of pre-petition claims in some circumstances. Section 549(a), which deals with post-petition transfers, provides that "the trustee may avoid a transfer of property of the estate . . . that occurs after the commencement of the case . . . that is not authorized . . . by the court." Thus, by necessary implication, a bankruptcy court may authorize limited post-petition payments to satisfy pre-petition obligations. *See In re Isis Foods, Inc.*, 37 B.R. 334, 336 (Bankr. W.D. Mo. 1984) (noting that "proposed transfers [to pay pre-petition claims may] be presented in advance to a bankruptcy court for its approval and would thereafter be

33. Pursuant to Sections 363(b) and 105(a) of the Bankruptcy Code and the "necessity of payment" doctrine, Debtor seeks authority to pay its outstanding Pre-Petition Employee Claims and Employee Benefits, up to the amounts in which those claims can be considered priority claims under Section 507 of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to use property of the estate other than in the ordinary course of business after notice and a hearing. The Bankruptcy Code further provides, in pertinent part, that: "the Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Thus, granting this motion is consistent with the policies of the Bankruptcy Code, and therefore is authorized by Section 105 of the Bankruptcy Code.

34. The payment of Pre-Petition Employee Claims will not prejudice the other creditors in these proceedings. The substantial majority of the Pre-Petition Employee Claims are priority claims. Thus, the distribution of assets of the Debtor's estate to general unsecured creditors will not be effected by the payment made pursuant to the terms of this Motion as this Motion affects only the timing of such payments.

35. It is essential to Debtor that it retains Employees to continue operations pending the Chapter 11 Case. Many Employees live from paycheck to paycheck and rely exclusively on receiving their full compensation or reimbursement of their expenses in order to continue to pay their daily living expenses. These Employees will be exposed to significant financial problems if Debtor is not permitted to pay certain of the Employee Obligations and Employee Payments. Moreover, Debtor believes that if it is not granted the relief requested herein, Employee morale and loyalty will be jeopardized at a time when Employee support is critical, and likely waning.

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insulated from attack" under section 549(a)); *see also* 11 U.S.C. § 363(b)(1) (allowing the trustee, after notice and hearing, to "Use, sell, or lease, other than in the ordinary course of business, property of the estate").

Debtor believes such uncertainty will cause significant anxiety at precisely the time that Debtor needs its Employees to perform their jobs at peak efficiency.

36. The Employee Deductions principally represent Employee earnings which Employees or, in the case of garnishments, judicial authorities have designated for deduction from Employee paychecks and payment accordingly. The failure to pay these benefits could result in hardship to certain Employees. Debtor expects inquiries from garnishors regarding Debtor's failure to submit, among other things, child support and alimony payments, which are not Debtor's property but rather have been withheld from Employee paychecks. Moreover, if Debtor cannot remit these amounts, its Employees may face legal action due to Debtor's failure to submit these payments.

37. Debtor's Employees are valuable assets. Deterioration in Employee morale and welfare at this critical time undoubtedly would adversely impact Debtor, the value of its assets and businesses, and its ability to reorganize under Chapter 11 of the Bankruptcy Code.

38. In conclusion, the Debtor seeks to pay the Pre-Petition Employee Claims and to continue post-petition the employee benefit plans and programs in effect immediately prior to the Petition Date. However, if authorized, such action should not be deemed to be an assumption or adoption of any agreement or policy providing such coverage. The Debtor is currently reviewing these matters and reserves the rights with respect to succession or continuation of these programs in the future. And, if applicable the assumption or rejection of the any executory contracts.

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

Dated: September 21, 2012.

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