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 THE DEBTOR PURSUANT TO 11 U.S.C. §§ 105(a) AND 363(b) FOR AUTHORIZATION TO PAY CLAIMS OF CRITICAL TRADE VENDORS

Dickinson Theatres, Inc., debtor and debtor-in-possession in the above-captioned proceedings (the "Debtor"), by and through it undersigned counsel, hereby moves this Court to grant Debtor's Motion pursuant to 11 U.S.C. Sections 105(a) and 363(b) for Authorization to Pay the Claims of Debtor's Critical Trade Vendors (the "Motion"). In support of the Motion, the Debtor 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 and 363 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. A list of the Critical Trade Vendors is attached and incorporated into the Motion as Exhibit A.

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.

Requested Relief

I. PAYMENT OF THE PRE-PETITION CLAIMS OF CRITICAL TRADE VENDORS IS WARRANTED AND IN THE BEST INTEREST OF THE DEBTOR AND ITS ESTATE AND CREDITORS

8. In order to obtain and facilitate essential post-petition vendor support on acceptable terms so that the Debtor may continue to sell concessions and maintain its point-of-sale information system and motion picture exhibition equipment, the Debtor seeks authorization to satisfy the claims of certain highly specialized vendors who are critical to the reorganization effort (the "Critical Trade Vendors"). A list of the Critical Trade Vendors is attached and incorporated into the Motion as Exhibit A.

9. The Debtor operates 18 movie theaters predominantly in small communities. Many of the Critical Trade Vendors, with whom the Debtor has long-standing relationships, represent the Debtor's only viable source of critical goods and services in such communities. Failure to satisfy the Critical Trade Vendors' claims may render the Debtor unable to obtain necessary concession inventory, information on ticket and concession sales, and equipment repair services at certain of its theatres. Delay or interruption and the Debtor's ability to obtain these critical goods and services would have a significant adverse effect on its estate. Thus, the ability to ensure a continuous and uninterrupted supply of goods and services provided by the Critical Trade Vendors will increase the likelihood of a successful reorganization.

10. The Debtor proposes to pay the pre-petition claims (the "Critical Vendor Claims") of the Critical Trade Vendors that agree to supply the Debtor with inventory or services on credit terms that are the same or better than those provided to the Debtor during the first quarter of 2012 (the "Acceptable Credit Terms"). The Debtor reserves the right to obtain

written confirmation of the Acceptable Credit Terms prior to paying any Critical Trade Vendors' claims.

11. The Critical Trade Vendors fall into three categories: (1) Co-op advertisers; (2) servicers and suppliers of movie exhibition material (notably film); and (3) vendors of concessions inventory.

12. The Critical Trade Vendors' claims, estimated to be approximately $214,616.20, are not substantial in comparison with (i) the value that the Debtor's estate will receive from the uninterrupted supply of goods and services to the Debtor's theatres and (ii) the approximately $11.2 million in pre-petition claims against the Debtor as of the Petition Date.

A. Servicers and Suppliers of Movie Exhibition Material

13. The Debtor has contracted with various parties that provide movies, posters, and related materials. Pursuant to copyright laws, many of these parties are the only provider of this type of material in the locations in which the Debtor operates. The Debtor believes that this material is essential for their business operations and likely will move to assume the contracts.

B. Concessions

14. Concession sales, including the sale of high margin items such as popcorn, candy and soft drinks, are the Debtor's second largest revenue source. If the Debtor is unable to sell concessions at its theatres, not only would they forego significant revenue generated from those sales, but the Debtor's ability to draw audiences would be severely impacted. The Debtor cannot find suitable replacement vendors capable of servicing the markets in which the Debtor operates its theatres.

15. An interruption in the supply of concessions inventory from any of the Critical Trade Vendors would impair the Debtor's ability to rehabilitate and reorganize. If the flow of

concessions inventory into the Debtor's theatres was disrupted and the Debtor was unable to sell concessions at its theatres, its estate would suffer substantial harm by reason of the associated reduction in concessions revenues and likely reduction in ticket sales. The interest of the Debtor and all parties in interest will be best served if the Debtor is authorized to pay the Critical Trade Vendors' claims.

Basis for Requested Relief

16. Section 105(a) of the Bankruptcy Code provides:

> The court may issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent the abuse of process.

11 U.S.C. § 105(a). Section 105(a) of the Bankruptcy Code grants bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutory or under equitable common law principles.

17. "The ability of a bankruptcy court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs, Inc.*, 96 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). This equitable common law principle "was first articulated by the United States Supreme Court in *Miltenberger v. Logansport, C & Swr Co.*, 106 U.S. 286, 1 S. Ct. 140, 27 L. Ed. 117 (1882), and is commonly referred to as either the doctrine of necessity or the necessity of payment rule." *In re Ionosphere Clubs, Inc.*, 98 B.R. at 178. The Supreme Court, the Third Circuit and the District of Delaware all recognize "the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor's survival during Chapter 11." *In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999). "The necessity of payment doctrine recognizes

that paying certain pre-petition claims may be necessary to realize the goal of Chapter 11 a successful reorganization." *Id.* at 825-26.

18. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay certain critical pre-petition claims, even though such payment is not explicitly authorized under the bankruptcy code. *See In re Columbia Gas System*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing *In re Leigh & New England Rwy. Co.*, 657 F.2d 570, 581 (3rd Cir. 1981) (recognizing that "if payment of a pre-petition claim is essential to the continued operation of [the debtor], payments may be authorized.").

19. Courts have also authorized payment of pre-petition obligations under Section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. at 175 (finding that a sound business justification existed to justify payment of pre-petition wages); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on Section 363 to allow contractor to pay pre-petition claims of suppliers who were potential lien claimants because the payments were necessary for general contractors to release funds owed to debtors).

20. The failure to grant the relief requested in this Motion may subject the Debtor to numerous reclamation demands, claims and actions under Section 546(c) of the Bankruptcy Code and the Uniform Commercial Code from Critical Trade Vendors, which would result in an unnecessary expenditure of time, effort and money by the Debtor in responding thereto, diverting management from the paramount task of reorganizing and rehabilitating the Debtor's business.

A. The Overlap Between Critical Vendors and Section 503(b)(9) Claimants

21. All of the Critical Vendors delivered goods in the ordinary course of business within the 20-day period prior to the Petition Date (in such capacity, collectively, the "Section 503(b)(9) Claimants"). More specifically, the Debtor estimates that of the $807,291.56 of Critical Vendor Claims, a significant portion of the Critical Vendor Claims are likely claims entitled to Section 503(b)(9) status (collectively, the "Section 503(b)(9) Claims"). Because of the priority status accorded to the claims held by the Section 503(b)(9) Claimants, they would have been paid upon confirmation of a Chapter 11 plan of reorganization, absent payment as a Critical Vendor. As a result, for this large subset of the Critical Vendor Claims, the relief sought will affect only the timing, but not the amount, of payment.

B. Waiver of Bankruptcy Rules 6003 and 6004(h)

22. Pursuant to the recently revised Rule 6003 of the Bankruptcy Rules, the Court may grant relief regarding a motion to pay all or part of a pre-petition claim within 21 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm.

23. The Debtor's failure to pay Critical Vendor Claims pursuant to the terms and conditions set forth in this Motion would result in immediate and irreparable harm. The refusal of any one of the Critical Vendors to continue transacting with the Debtor could halt the Debtor's movie theatre operations, prevent the Debtor from being able to carry on their day-to-day business and, thus, severely impair the Debtor's business. As a result, the Debtor would fail to operate a competitive movie theatre, and they would surely lose their customers to other competing theatres. Accordingly, the Debtor submits it has satisfied the requirements of Bankruptcy Rule 6003 to support immediate payment of pre-petition obligations related to the Critical Vendor Claims.

24. The Debtor further seeks a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Rule 6004(h) of the Bankruptcy Rules, "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise." As set forth above, the payments proposed herein are essential to prevent potentially irreparable damage to the Debtor's operations, value and ability to reorganize. Accordingly, the Debtor submits that ample cause exists to justify a waiver of the 14 day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

25. The relief requested herein is essential, appropriate and in the best interest of the Debtor's estate and all parties in interest.

26. Notice of this Motion has been provided to the U.S. Trustee, the Debtor's secured creditors and the twenty largest unsecured creditors. The Debtor submits that no other or further notice need be provided.

27. No previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests entry of an Order granting the relief requested herein and such other and further relief as is just.

Dated: September 21, 2012

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