

**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 FOR ENTRY OF AN ORDER
AUTHORIZING THE DEBTOR TO RETAIN AND EMPLOY
PROFESSIONALS USED IN THE ORDINARY COURSE OF
BUSINESS, *NUNC PRO TUNC* TO THE PETITION DATE**

Dickinson Theatres, Inc., debtor and debtor-in-possession in the above-captioned case (the "Debtor"), by and through its undersigned counsel, hereby submits this motion (the "Motion"), for entry of an order, pursuant to Sections 105 and 327 of the title 11 of the United States Code (the "Bankruptcy Code") and Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the Debtor's future retention, employment, compensation, and reimbursement of expenses for certain professionals used in the ordinary course of the Debtor's business, *nunc pro tunc* to the petition date. In support of this Motion, the Debtor respectfully represents 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 basis for the relief requested herein are Sections 105 and 327 of the Bankruptcy Code and Rule 2014 of the Bankruptcy Rules.

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.

RELIEF REQUESTED

8. The Debtor generally employs certain professionals (the "Ordinary Course Professionals") to render services relating to issues that arise in the ordinary course of the Debtor's Business. Although the Debtor is not currently employing any Ordinary Course Professionals as of the date of this Motion, the Debtor envisions that the employment of such Ordinary Course Professionals is necessary, customary and occurs from time to time in the Debtor's Business. Such Ordinary Course Professionals include accountants, consultants, and advisors with respect to the movie theatre and motion picture industries. Without the assistance of the Ordinary Course Professional, the Debtor would have to seek out such services from other sources without the benefit of the experience that the Ordinary Course Professional has with the Debtor. Furthermore, few, if any, Ordinary Course Professionals are likely to continue their vital work for the Debtor without the relief requested in this Motion.

9. Although the Debtor believes that certain of the Ordinary Course Professionals are not "professional persons" as contemplated by Section 327 of the Bankruptcy Code and, thus, that no retention or payment authorization is necessary, out of an abundance of caution the Debtor seeks an order authorizing the retention and payment of all Ordinary Course Professionals. The Debtor desires to continue to employ and retain the Ordinary Course Professionals to render services to its estate that are similar to those rendered before the Petition Date. Although the automatic stay and other issues in this case may decrease the Debtor's need

for certain Ordinary Course Professionals' services, the Debtor cannot now quantify or qualify that need.

10. For the purpose of administrative efficiency, the Debtor seeks to retain and employ, *nunc pro tunc* to the Petition Date, Ordinary Course Professionals that it customarily and generally employs without having to file formal retention or fee applications for each of the Ordinary Course Professionals pursuant to Sections 327, 328, 329 and 330 of the Bankruptcy Code. It would be unduly burdensome to both the Debtor and the Court to require the Debtor to apply separately to this Court for approval of the retention of each Ordinary Course Professional. Similarly, it would be unduly burdensome on the Court for each Ordinary Course Professional to apply separately for compensation and reimbursement of expenses. Moreover, the Ordinary Course Professionals are unfamiliar with the fee application process employed in a bankruptcy case and might be less inclined to work with the Debtor if they were forced to adhere to such requirements in order to be compensated for services rendered.

A. Payment of Fees and Expenses

11. The Debtor proposes that they be permitted to pay, without formal application to the Court, 100% of the fees and disbursements to each of the Ordinary Course Professional upon the submission to the Debtor of an appropriate invoice setting forth in reasonable detail the nature of the services rendered after the Petition Date; provided, however, that if such fees and disbursements for any Ordinary Course Professional exceed \$5,000.00 in any one month or \$50,000.00 for the entire Chapter 11 Case (collectively, the "Ordinary Course Professional Cap") then that Ordinary Course Professional shall submit copies of its monthly invoices summarizing in reasonable detail the services rendered and expenses incurred in connection therewith (the "Monthly Invoices") to (i) the Debtor's Counsel, Stinson Morrison Hecker LLP,

1201 Walnut Street, Suite 2900, Kansas City, Missouri 64106-2150, Attn: Sharon L. Stolte (sstolte@stinson.com) and Timothy M. Swanson (tswanson@stinson.com); (ii) the Office of the United States Trustee, 301 North Main Street, Suite 1150, Wichita, Kansas 67202; and (iii) the Debtor, Dickinson Theatres, Inc. 6801 West 107th Street, Overland Park, Kansas 66212 (collectively, the "Notice Parties"). Any Notice Party may object to the payment of fees and expenses above the Ordinary Course Professional Cap by serving a written objection upon the Ordinary Course Professional, the Debtor, and the other Notice Parties within ten (10) days of receiving the Monthly Invoices. The objection shall state the nature of the objection and identify the amount of the fees or costs to which the objection is made. In the absence of any timely objection, the Debtor would be authorized to pay 100% of the fees and expenses above the Ordinary Course Professional Cap. All objections not resolved by the parties would be preserved and presented to the Court by the objecting party at the next scheduled omnibus hearing.

B. Submission of Bankruptcy Rule 2014 Affidavits

12. Each Ordinary Course Professional that the Debtor is authorized to retain will file with the Court a verified statement made pursuant to Bankruptcy Rule 2014 setting forth the Ordinary Course Professional's connections with the Debtor and important parties in interest in this Chapter 11 Case, including secured lenders, the top 20 unsecured creditors, and counterparties to capital leases. The Rule 2014 Statement shall also be served on the Notice Parties.

13. The Debtor proposes that the Notice Parties shall have twenty (20) days after the filing by an Ordinary Course Professional of a Rule 2014 statement (the "Objection Deadline") to object to the retention of such Ordinary Course Professional. The objecting Notice Party shall

serve any such objections upon the Ordinary Course Professional and the Notice Parties on or before the Objection Deadline. If any such objection cannot be resolved within twenty (20) days, the matter shall be scheduled for hearing before the Court at the next regularly scheduled omnibus hearing or other date otherwise agreeable to the Ordinary Course Professional, the Debtor, and the Notice Parties. If no objection is submitted on or before the Objection Deadline, or if any objection submitted is timely resolved as set forth above, the Debtor requests that, without further order of the Court, the employment, retention, and compensation of the Ordinary Course Professional be deemed approved, and the Debtor shall be authorized to retain such Ordinary Course Professional without further notice or hearing.

BASIS FOR RELIEF

14. The Debtor is authorized to retain the Ordinary Course Professionals under Section 327(a) of the Bankruptcy Code as to accountants and all other professionals, and Section 327(e) of the Bankruptcy Code as to attorneys who have previously represented the Debtor. This Court is authorized to grant the relief requested herein pursuant to Section 105(a) of the Bankruptcy Code.

15. Because the Ordinary Course Professionals will not be involved in the administration of this Chapter 11 Case, the Debtor does not believe that the Ordinary Course Professionals are "professionals," within the meaning of Section 327 of the Bankruptcy Code, whose retention must be approved by the Court. *See In re First Merchants Acceptance Corp.*, 1997 Bankr. LEXIS 2245, 8-9 (Bankr. D. Del. 1997). The First Merchants criteria are consistent with those utilized by other courts when examining the types of duties to be undertaken by a "professional." *See, e.g., Elastead v. Nolden (In re That's Entm't Mktg. Group)*, 168 B.R. 226, 230-31 (N.D. Cal. 1994) (only retention of professionals whose duties are central to

administration of estate requires prior court approval under Section 327); *In re Madison Mgmt. Group, Inc.*, 137 B.R. 275, 283-84 (Bankr. N.D. Ill. 1992) (same); *In re Sieling Assocs. Ltd. P'ship*, 128 B.R. 721, 723 (Bankr. E.D. Va. 1991) (same); *In re Riker Indus., Inc.*, 122 B.R. 964, 973 (Bankr. N.D. Ohio 1990) (no need for Section 327 approval of fees of management and consulting firm that performed only "routine administrative functions" and whose "services were not central to [the] bankruptcy case"); *In re D'Lites of Am., Inc.*, 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989) (Section 327 approval is not necessary for "one who provides services to debtor that are necessary regardless of whether petition was filed"); *In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989) (only those professionals involved in the actual reorganization effort, rather than debtor's ongoing business, require approval under Section 327); *In re Pacific Forest Indus., Inc.*, 95 B.R. 740, 743 (Bankr. C.D. Cal. 1989) (same); *In re Babcock Dairy Co.*, 70 B.R. 691, 692-93 (Bankr. N.D. Ohio 1987) (holding that an expert witness was not a "professional person" under Section 327 because his testimony did not measurably affect the administration of the estate); *In re Johns-Manville Corp.*, 60 B.R. 612, 619 (Bankr. S.D.N.Y. 1989) (only those professionals involved in the actual reorganization effort, rather than debtor's ongoing business, require approval under Section 327).

16. Nevertheless, out of an abundance of caution, the Debtor seeks the relief requested in this Motion to avoid any later controversy about the Debtor's future employment and paying the Ordinary Course Professionals during the pendency of this Chapter 11 Case. The Debtor has sought specific Court authority under Section 327 to employ the professionals involved in the actual administration of this Chapter 11 Case. Courts have granted the same or similar relief to debtors in other large Chapter 11 cases. *See, e.g., In re Gemcraft Homes, Inc., et al.*, Case No. 09-31696 (NVA) (Bankr. D. Md. Dec. 1, 2009); *In re Millcreek Broadcasting*,

Inc., Case Nos. 07-03121 through 07-03123 and 07-03125 (JPC) (Bankr. N.D. Ill. May 15, 2007); *In re McLeodUSA, Inc.*, Case No. 05-63230 (JHS) (N.D. Ill. Oct. 31, 2005); *In re Nat'l Energy and Gas Transmission, Inc., et al.*, Case No. 03-30459 (PM) (Bankr. D. Md. Aug 6, 2003).

17. The Debtor submits that the retention of the Ordinary Course Professionals and the payment of interim compensation on the basis set forth herein is in the best interest of the Debtor's estate. While the Ordinary Course Professionals with whom the Debtor has previously dealt with generally wish to provide services to the Debtor on an ongoing basis, many might be unwilling to do so if they are only able to be paid through a cumbersome, formal application process. Moreover, if the expertise and background knowledge of certain of these Ordinary Course Professionals with respect to the particular areas and matters for which they were responsible prior to the Petition Date are lost, the estate would incur additional and unnecessary expenses because the Debtor will be forced to retain other professionals without such background and expertise. It is therefore in the best interest of the Debtor's estate to avoid any disruption in the professional services required in the day-to-day operation of the Debtor's Business.

WHEREFORE, for the reasons stated above, the Debtor respectfully requests that the Court enter its Order, substantially in the form attached as Exhibit A to the Motion authorizing the Debtor's future retention, employment, compensation and reimbursement of expenses for certain professionals used in the ordinary course of the Debtor's Business, *nunc pro tunc* to the Petition Date and grant to the Debtor such other and further relief as the Court may deem just and proper.

Dated: September 22, 2012.

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