

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

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|---------------------------|---|-------------------|
| In re: |) | |
| |) | |
| |) | Case No. 12-22602 |
| DICKINSON THEATRES, INC., |) | |
| a Kansas corporation, |) | Chapter 11 |
| |) | |
| Debtor. |) | |

**MOTION FOR ORDER UNDER SECTIONS 105(a) AND 365(a)
AUTHORIZING THE DEBTOR-IN-POSSESSION TO REJECT CERTAIN
UNEXPIRED LEASES OF REAL PROPERTY LOCATED IN (I) PORT
ARTHUR, TEXAS; (II) HUTCHINSON, KANSAS; (III) MESA, ARIZONA;
(IV) AND MUSKOGEE OKLAHOMA**

Dickinson Theatres, Inc., debtor and debtor-in-possession in the above-captioned proceedings (the "Debtor"), through its undersigned counsel, hereby files this Motion requesting this Court enter its order authorizing the rejection of certain unexpired leases pursuant to Sections 105(a) and 365(a) of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq.*, as amended, the "Bankruptcy Code"), and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this 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)(A), (D) and (M). 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 365(a) of the Bankruptcy Code and Rule 6006 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 is a party to four separate unexpired leases of non-residential real property whereupon five separate movie theatres are operated. The first lease pertains to an operating movie theatre located at 3100 Highway 365 Space 25, Port Arthur, Texas 77642, commonly known as the Port Arthur Central Mall 10 Theatre (the "Port Arthur Lease"). The second lease pertains to an operating movie theatre located 1500 East 11th Street, Hutchinson, Kansas 67504, commonly known as the Mall 8 Hutchinson Theatre (the "Hutchinson Lease"). The third lease pertains to an operating movie theatre located at 501 North Main #102, Muskogee, Oklahoma 74401, commonly known as the Arrowhead Mall 10 Theatre (the "Arrowhead Lease"). The final lease pertains to an operating movie theatre located at 1935 North Signal Butte, Mesa, Arizona 85209, commonly known as the Gateway 12 IMAX Theatre (the "Gateway Lease") (the Port Arthur Lease, Hutchinson Lease, Arrowhead Lease and Gateway Lease are, collectively, the "Leases"). Due to the voluminous nature of each of the Leases, parties seeking a copy of any of the Leases may request such Lease directly from Counsel for the Debtor.

9. By this Motion, Debtor requests permission, pursuant to Sections 105(a) and 365(a) of the Bankruptcy Code, to reject the Leases because continued performance thereunder is burdensome and fails to provide any tangible benefit to the Debtor, its estate, creditors or interest holders.

10. The Debtor has determined rejecting the Leases is beneficial to the estate in that it will eliminate an unnecessary drain on estate resources. Additionally, rejecting the Leases will permit the Debtor and counterparties to better realize the economic value of each Lease without the Debtor being a tenant. The Debtor has concluded that the Leases have no value through assumption and assignment to a third-party purchaser and that the Leases no longer provide any

benefit to the Debtor. In an effort to minimize post-petition administrative costs, and in the exercise of the Debtor's sound business judgment, the Debtor has determined that it is in its best interests and in the best interests of the estate, creditors and interest holders to reject the Leases.

11. In the event a potential assignee emerges for the Leases, or if other good reason arises, Debtor reserves the right to withdraw any of the Leases from rejection, prior to the hearing and/or entry of an order on this Motion, and *inter alia*, to seek to assume and assign the Lease, or Leases, to any third-party assignees.

BASIS FOR RELIEF REQUESTED

12. Section 365(a) of the Bankruptcy Code provides that a debtor in possession "subject to the court's approval, may . . . reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a); *see also In re Kmart Corp.*, No. 02-02474, 2007 WL 4556991, at *7 (Bankr. N.D. Ill. Nov. 20, 2007); *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1075 (3rd Cir 1992). "This provision allows a [debtor in possession] to relieve the bankruptcy estate of burdensome agreements which have not been completely performed." *Stewart Title Guar. Co. v. Old Republic Nat'l Title Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (*citing In re Muerexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994)).

13. Section 365(a) of the Bankruptcy Code, which has been interpreted as incorporating the "business judgment" standard, authorizes Debtor's rejection of the Leases. *See, Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 550, 63 S.Ct. 727, 742 (1943) ("the question whether a lease should be rejected . . . is one of business judgment"); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984); *In re Federated Department Stores, Inc.*, 131 P.R. 808, 811 (S.D. Ohio 1991) ("courts traditionally have applied the business

judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases").

14. The business judgment standard is satisfied when a debtor determines that rejection will benefit the estate. *In re Chi-Feng Huang*, 23 B.R. 798, 800-801 (B.A.P. 9th Cir. 1982) (primary issue is whether rejection would benefit the general unsecured creditors); and *Commercial Financial Limited v. Hawaii Dimensions, Inc.*, 47 B.R. 425, 427 (D.Haw. 1985) ("under the business judgment test, a court should approve a debtor's proposed rejection if such rejection will benefit the estate").

15. Upon finding that the Debtor has exercised their sound business judgment in determining that rejection of the Leases is in the best interests of the Debtor, its creditors and other parties in interest in the Chapter 11 Case, the Court should approve rejection of the Leases pursuant to section 365(a) of the Bankruptcy Code. *See, e.g., In re Bradlees Stores, Inc.*, 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (holding that, absent extraordinary circumstances, court approval of a debtor's decision to assume or reject an executory contract "should be granted as a matter of course"). If a debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an executory contract or unexpired lease. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. at 523; *In re Sharon Steel Corp.*, 872 F.2d at 39-40.

16. Rejection of an unexpired contract is appropriate where such rejection would benefit the estate. *See Sharon Steel Corp.*, 872 F.2d at 39 (citing *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987)). The business judgment standard requires that the Court approve the debtor's business decision unless it is the product of bad faith, whim or caprice. *See In re Trans*

World Airlines, Inc., 261 B.R. 103, 121 (Bankr. D. Del. 2001); *see also Lubrizol Enter., Inc. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986).

17. The Debtor submits that it has satisfied the business judgment standard for rejecting the Leases. As explained in detail above, performance under the Leases is costly and unnecessary to the Debtor's on-going operation and Business. Moreover, the Leases are not a source of potential value for the Debtor's estate, creditors and interest holders through assumption and assignment to possible third parties. Accordingly, the Debtor has determined that the Leases constitute an unnecessary drain on its cash flow, and, therefore, rejection of the Leases reflects the Debtor's exercise of sound business judgment. The Debtor seeks rejection of the Leases to be effective as of the effective date of the confirmed Plan, or within thirty (30) days after the entry of an order granting this Motion, whichever is earlier. The Debtor shall provide written notice to each counterparty to the Rejected Leases promptly upon the occurrence of such effective date.

18. The Debtor further requests that the Court require that counterparties to the Leases must submit any claim from the rejection of the Leases within thirty (30) days after the date of the effective date of the Plan, which will require the use of the Leases and that the failure of such counterparties to timely file claims shall bar such parties from receiving any distribution or dividend from the Debtor's estate..

19. The Debtor may have claims against counterparties to the Leases arising under, or independent of, the Leases. The Debtor does not waive such claims by the filing of this Motion or the rejection of the Leases. The Debtor reserves all of its rights with respect to the Leases, including, but not limited to, the right to contest any claims that arise out of their rejection.

Nothing contained herein is intended or shall be construed as: (a) an admission as to the validity of any claim against the Debtor, (b) a waiver of the Debtor's rights to dispute any claim or (c) an approval or assumption of any agreement, contract, program, policy or lease under section 365 of the Bankruptcy Code.

WHEREFORE, the Debtor requests the Court enter an order (i) granting this Motion, (ii) authorizing the Debtor to reject the Rejected Leases as of the effective date of the Plan, or thirty (30) days after the entry of an order granting the relief requested in this Motion, whichever is sooner, and (iii) granting such other and further relief as may be just and equitable under the circumstances.

Dated: September 22, 2012.

STINSON MORRISON HECKER LLP

By: s/Sharon L. Stolte
Sharon L. Stolte, KS #14302
Paul M. Hoffmann, KS Fed.Bar No. 70170
Timothy M. Swanson, KS #24516
1201 Walnut, Ste. 2900
Kansas City, MO 64106
Tel: (816) 691-2456
Fax: (816) 412-9325
sstolte@stinson.com
phoffmann@stinson.com
tswanson@stinson.com

*Proposed Reorganization Counsel for
the Debtor and Debtor-in-Possession*

- and -

ROBERT J. RAYBURN, III,
ATTORNEY AT LAW

Robert J. Rayburn, III, KS #17102
7400 W. 110th Street, Ste. 600
Overland Park, KS 66210
Tel: (816) 215-5567
Fax: (888) 685-2224
robert@rayburngrp.com

*Proposed General Corporate and
Conflicts Counsel for the Debtor and
Debtor-in-Possession*