

**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 FOR AN ORDER UNDER, SECTIONS 105(a), AND
365(a) OF THE BANKRUPTCY CODE, AUTHORIZING THE
DEBTOR-IN- POSSESSION TO REJECT MISCELLANEOUS
EXECUTORY CONTRACTS WITH AN EFFECTIVE DATE
FOURTEEN (14) DAYS AFTER THE ENTRY OF AN
ORDER GRANTING THE RELIEF REQUESTED**

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 miscellaneous executory contracts (the "Rejected Contracts") 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"), effective within fourteen (14) days after the entry of an order granting the relief requested in this Motion. 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 105(a) and 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 the Bankruptcy Code, commencing the Debtor's Chapter 11 case (the "Chapter 11 Case"). (See Docket No. 1.) 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. 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 680 salaried and hourly employees (collectively, the "Employees"), the vast majority of whom work part-time.

5. The factual background relating to the Debtor's commencement of this Chapter 11 Case is set forth in detail in the *Declaration of Ronald J. Horton, President and CEO of the Debtor, in Support of First Day Pleadings* (the "Horton Declaration") [Docket No. 19] filed on the Petition Date and incorporated herein by reference.

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. (See Docket Nos. 25, 26 and 29.) 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. By this Motion, the Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto, (a) authorizing the Debtor to reject those certain Rejected Contracts set forth on **Exhibit 1** attached to **Exhibit A** of the Proposed Order, effective within fourteen (14) days after the Court enters its order granting the relief requested in this Motion

BASIS FOR RELIEF REQUESTED

9. 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)).

10. The standard applied to determine whether the rejection of an executory contract or unexpired lease should be authorized is the "business judgment" standard. *Johnson v. Fairco Corp.*, 61 B.R. 317, 320 (N.D. Ill. 1986); *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 Dep't Stores, Inc.*, 131 B.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."'). 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).

11. 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").

12. Upon finding that the Debtor has exercised its sound business judgment in determining that rejection of the Rejected Contracts 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 Rejected Contracts 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.

13. 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).

14. The Debtor is attempting to reorganize its Business under Chapter 11 of the Bankruptcy Code. In determining a successful path towards its emergence from Chapter 11, and sustainability thereafter, the Debtor believes that the Rejected Contracts constitute an unnecessary drain on its Business and, thus, provide no benefit to the Debtor, its creditors or its estate. Additionally, performance under the Rejected Contracts is costly and unnecessary to the Debtor's on-going operation and Business. Moreover, the Rejected Contracts are not a source of potential value for the Debtor's estate, creditors and interestholders through assumption and assignment to possible third parties. Accordingly, the Debtor has determined, in its exercise of sound business judgment, that the Rejected Contracts are burdensome to its reorganization efforts under Chapter 11. The Debtor seeks rejection of the Rejected Contracts to be effective as of fourteen (14) days after an order granting this Motion is entered. The Debtor shall provide written notice to each counterparty to the Rejected Contracts promptly upon the occurrence of such effective date.

15. The Debtor further requests that the Court require that counterparties to the Rejected Contracts must submit any claim from the rejection of the Rejected Contracts within thirty (30) days after the entry of an order granting the relief requested in this Motion, 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. Further, the Debtor agrees that it shall promptly surrender to the counterparties to the Rejected Contracts any of their property that may be subject to the Rejected Contracts.

16. The Debtor may have claims against counterparties to the Rejected Contracts arising under, or independent of, the Rejected Contracts. The Debtor does not waive such claims by the filing of this Motion or the rejection of the Rejected Contracts. The Debtor reserves all of its rights with respect to the Rejected Contracts, 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 Contracts as set forth on **Exhibit 1** to **Exhibit A** as effective within fourteen (14) days after the entry of an order granting the relief requested in this Motion, and (iii) granting such other and further relief as may be just and equitable under the circumstances.

Dated: September 24, 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*