

**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.)	

**SPIRIT MASTER FUNDING, LLC AND SPIRIT MASTER FUNDING IV, LLC’S
OBJECTION TO THE DEBTOR’S PROPOSED FIRST AMENDED AND RESTATED
PLAN OF REORGANIZATION AND CURE AMOUNT**

Spirit Master Funding, LLC and Spirit Master Funding IV, LLC (collectively, “Spirit”) object to the Debtor’s proposed First Amended and Restated Plan of Reorganization, filed on November 5, 2012 [Docket No. 194] (the “Plan”)¹ and the cure amount associated with the Master Lease (as defined below), and requests that the Court require the Debtor to make certain modifications to the Plan and unequivocally assume and cure all defaults under the Master Lease, or deny confirmation of the Plan altogether, for the reasons set forth below.

I. BACKGROUND

1. Spirit and the Debtor are parties to an Amended and Restated Master Lease Agreement dated August 1, 2009 (as amended, the “Master Lease”). Through the Master Lease, the Debtor leases from Spirit four properties on which it operates some of its most profitable movie theaters.

2. Additionally, Spirit and the Debtor’s wholly-owned non-debtor subsidiary, Palazzo 16 Theatres, LLC (“Palazzo”), are parties to a Lease Agreement dated March 1, 2012 through which Palazzo leases from Spirit a property on which it operates a movie theater.

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

3. The Debtor also issued a Promissory Note in favor of Spirit dated as of April 11, 2012 (the “Note”), pursuant to which the Debtor owes Spirit \$500,000, which amount was loaned to the Debtor to enable the Debtor to make technological updates to its theaters. On November 16, 2012, Spirit filed a proof of claim with respect to the Note, asserting that as of the Petition Date, Spirit was owed the amount of at least \$486,146.37, plus attorneys’ fees, costs and other charges properly recoverable by Spirit.

4. On September 21, 2012, the Debtor filed a motion to reject, in part, the Master Lease [Docket No. 15] (the “Motion to Reject”), which sought to sever one of the four properties leased under the Master Lease. Spirit objected to the Motion to Reject and an evidentiary hearing was held on October 4, 2012. On October 12, 2012, this Court issued its opinion and judgment denying the Motion to Reject [Docket No. 129].

5. The Debtor filed a notice of appeal (the “Appeal”) of the Court’s judgment on October 26, 2012 [Docket No. 160].² On October 29, 2012, the Bankruptcy Appellate Panel of the Tenth Circuit (the “BAP”) issued an Order to Show Cause Why Appeal Should Not Be Considered for Dismissal as Interlocutory [BAP Docket No. 3], and on November 16, 2012, the Debtor filed its response to the Order to Show Cause [BAP Docket No. 14].

6. Despite this Court’s ruling on the Motion to Reject and the Debtor’s decision to pursue the Appeal, the Debtor has moved forward to seek confirmation of the Plan on an expedited timeframe for no apparent reason. A hearing on Plan confirmation is set for November 28, 2012.

7. On November 16, 2012, the Debtor informed Sprit that the Debtor is going to try to assume the Master Lease and exit bankruptcy while continuing to pursue the Appeal. The

² Spirit reserves all rights with respect to the appeal, including the issue of whether the order denying the Motion to Reject is an interlocutory order.

Debtor also informed Spirit that it intends to amend the Plan (and that Spirit should so assume for purposes of this objection) to create a contingent unsecured claim for Spirit that the Debtor would treat in the same economic manner as General Unsecured Claims if the BAP reverses this Court's ruling—*after confirmation*—on the Motion to Reject. The Debtor's counsel provided Spirit's counsel with proposed language and a payment schedule to effect such modifications, as well as a ballot to permit Spirit to vote on account of the contingent unsecured claim.

8. Solely in an effort to preserve its rights and avoid being disenfranchised, Spirit filed a motion pursuant to Bankruptcy Rule 3018 seeking temporary allowance of the contingent unsecured claim for voting purposes [Docket No. 242]. Spirit also submitted a Class 7b Ballot rejecting the Plan, while simultaneously reserving all of its rights relative to the Debtor including, without limitation, with respect to the Plan, the pending appeal, the methodology for the calculation of any rejection damages claim, and the amount of any rejection damages claim.

II. ARGUMENT

A. The Debtor's Proposed Modifications to the Plan Violate Section 365 of the Bankruptcy Code.

9. The Debtor's proposed extralegal gymnastics should be rejected out of hand. If permitted, they would circumvent two central protections afforded to landlords under the Bankruptcy Code. There is simply no legal basis or precedent to support these modifications and blatantly disregard the express requirements of the Bankruptcy Code concerning real property leases.

10. Section 365(d)(4)(A) of the Bankruptcy Code provides that “an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected . . . if the trustee does not assume or reject the unexpired lease by the earlier of—(i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a

plan.” 11 U.S.C. § 365(d)(4)(A). “The court may extend the period determined under [Section 365(d)(4)(A)], prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.” 11 U.S.C. § 365(d)(4)(B)(i). Accordingly, unless Spirit consents to a further extension, the absolute maximum period of time that the Debtor has to assume or reject the Master Lease is 210 days from the Petition Date (or April 22, 2013).

11. Despite the crystal clear requirements of Section 365(d)(4), the Debtor proposes to modify the Plan and leave Spirit in limbo indefinitely while the Appeal proceeds (and, presumably, throughout what could be further layers of appeal and litigation). This could take months or even years. The Debtor is simply ignoring, or expecting this Court to eviscerate, the requirements of Section 365(d)(4)—without citing a single authority to support its position.

12. Furthermore, the proposed language sent by the Debtor would modify Class 7 (which in the Plan on file encompasses only the Spirit Unsecured Claim) to include two “subclasses” of claims: (1) Class 7a would be comprised of the Spirit Unsecured Claim relating to the Note and (2) Class 7b would be comprised of the proposed contingent unsecured claim relating to the partial rejection of the Master Lease. It is unclear whether the proposed language is intended to create two separate classes, or whether the two claims make up one class. The latter would clearly create an issue under Section 1122 of the Bankruptcy Code, which provides that “a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.” 11 U.S.C. § 1122. Given that the proposed claim relating to the partial rejection of the Master Lease would be a contingent claim, it would not be “substantially similar” to the Spirit Unsecured Claim.

13. Lastly, Spirit disputes the amount of the proposed contingent unsecured claim, which is set forth in a table Debtor's counsel provided on November 20, 2012.³ The table states that the principal amount of the proposed contingent unsecured claim is \$736,998.72. However, Spirit has performed its own calculation in accordance with Section 365(d)(4) of the Bankruptcy Code and applicable case law, and Spirit determined that if the Debtor could reject the Master Lease in part in contravention of this Court's ruling and calculate rent for just the Palm Valley theatre under its proposed approach, the correct rejection damages claim would be at least \$934,585.51.

B. The Debtor Must Cure All Defaults Under the Master Lease Prior to Assumption.

14. The Debtor's Notice of Cure Amount with Respect to Executory Contracts or Unexpired Leases to Be Assumed Pursuant to Amended and Restated Plan of Reorganization lists a proposed cure amount of \$0 with respect to the Master Lease. However, the Debtor is currently in default under the Master Lease due to certain substantial deferred maintenance items.

15. Section 13 of the Master Lease provides that "[t]he Properties shall be kept in good, clean, sanitary and working condition." Master Lease, § 13. Section 13 further provides that "Lessee shall at all times at its own expense maintain, repair and replace, as necessary, the Properties, including all portions of the Properties, whether or not the Properties were in such condition on the Effective Date." Id.

16. Recent inspections conducted by Spirit revealed that all four of the properties leased to the Debtor under the Master Lease clearly fail to meet the requirements of Section 13

³ As argued before this Court previously, Spirit vehemently disputes that any properties under the Master Lease may be severed. Spirit is making the arguments contained herein solely for purposes of the Plan and to preserve all of its rights thereunder. Such arguments in no way constitute an admission that the Master Lease is severable, which the Court has correctly ruled that it is not.

because of substantial and readily apparent deferred maintenance, and therefore the Master Lease is currently in default. The specific maintenance defaults include, without limitation, significantly damaged parking lots, missing or damaged ceiling tiles, crumbling sidewalks and curbs and overgrown landscaping. Pursuant to Section 365(b) of the Bankruptcy Code, the Debtor is required to cure, or provide adequate assurance that the Debtor will promptly cure, such defaults prior to assuming the Master Lease. See 11 U.S.C. § 365(b)(1); see also In re Best Prods. Co., 229 B.R. 673, 679 (Bankr. E.D. Va. 1998).

17. Remediating the deferred maintenance is an issue on which the Debtor and Spirit should be aligned. Bankruptcy is an opportunity for the Debtor to remediate any issues with its business so that it emerges in better shape, both financially and in terms of its business operations, than when it filed its petition. Instead of using this opportunity to ensure that the theatres leased from Spirit are in good condition to improve the likelihood its business will be successful post-emergence, thereby benefitting its creditors in the long run, the Debtor is apparently more concerned with rushing through bankruptcy, undertaking to pay general unsecured creditors in full over four years and leaving its equity interests untouched.

18. Additionally, under the Master Lease, Spirit is entitled to recover attorneys' fees and Costs (as defined in the Master Lease) from the Debtor. See Master Lease, § 34. Spirit's attorneys' fees and Costs are currently estimated to be at least \$100,000. Such attorneys' fees and Costs, as well as any amounts accruing up until the Effective Date, must be paid on or before the Effective Date in order for the Debtor to assume the Master Lease. See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 445 (2007); Centre Ins. Co. v. SNTL Corp. (In re SNTL Corp.), No. 08-60001, 2009 WL 1758759, *13 (9th Cir. June 23, 2009). Furthermore, any order confirming the Plan should be modified to require the Debtor to pay

Spirit's attorneys' fees and Costs related to any efforts to preserve or protect its rights in both the bankruptcy case and the Appeal.

19. Accordingly, Spirit requests that this Court require the Debtor to cure all defaults under the Master Lease, including but not limited to the prompt remediation of all deferred maintenance and payment of attorneys' fees and Costs due under the Master Lease. Furthermore, Spirit requests that any confirmation order provide for the payment of Spirit's attorneys' fees and Costs going forward until all controversies regarding the assumption of the Master Lease are finally resolved.

C. The Debtor Must Cure All Defaults Under the Note Prior to Reinstatement.

20. Under Section 1124 of the Bankruptcy Code, a class of claims is impaired unless the Plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124. The Plan purports to reinstate the Note in accordance with Section 1124. However, in order to do so, Section 1124(2) requires the Debtor to, among other things, (a) cure any default that occurred on or after the commencement of the case, (b) reinstate the maturity of the claim and (c) leave unaltered the legal, equitable, and contractual rights to which the holder of the claim is entitled. *Id.* § 1124(2).

21. The Note requires the Debtor to pay to Spirit "all costs of collecting or attempting to collect [the] Note . . . , including reasonable attorneys' fees and expenses of Lender . . . and court costs." Note, at 3.⁴ Thus, under Section 1124(2), such attorneys' fees and expenses must be paid by the Debtor on or before the Effective Date. *See Travelers Cas. & Sur. Co.*, 549 U.S. at 445; *In re SNTL Corp.*, No. 08-60001, 2009 WL 1758759 at *13.

⁴ Such attorneys' fees and expenses are included in the estimate provided in Part B above.

22. Furthermore, although the Plan states that the Spirit Unsecured Claim is being reinstated, the Plan needs to clearly reflect that Spirit's rights with respect to the Note are not in any way affected by the Plan, as does any order confirming the Plan.

III. CONCLUSION

23. For the foregoing reasons, Spirit respectfully requests that the Court require the Debtor to make the modifications to the Plan described herein and unequivocally assume and cure all defaults under the Master Lease, or deny confirmation of the Plan altogether.

Dated: November 21, 2012

Respectfully submitted,

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ATTORNEYS FOR SPIRIT MASTER
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CERTIFICATE OF SERVICE

Spirit Master Funding, LLC and Spirit Master Funding IV, LLC's Objection to the Debtor's Proposed First Amended and Restated Plan of Reorganization and Cure Amount was electronically filed and served on all interested parties requesting electronic notification. Additionally, a copy was served via overnight delivery on counsel for the Debtor and the Office of the United States Trustee.

/s/ Scott M. Brinkman