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.	)	

DEBTOR'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTOR'S FIRST AMENDED AND RESTATED PLAN OF REORGANIZATION DATED NOVEMBER 5, 2012, AS MODIFIED (REGARDING SPIRIT'S ATTORNEYS' FEES)

Dickinson Theatres, Inc., debtor and debtor-in-possession (collectively, "Debtor"), pursuant to the confirmation hearing before this Court on November 28, 2012 (the "Hearing"), submits this memorandum of law regarding the request by Spirit Master Funding, LLP ("Spirit") to be paid $155,729.11[1] in attorneys' fees and expenses ("Fees") allegedly incurred by Spirit to Latham & Watkins, LLP ("Latham") and Baker Sterchi Cowden and Rice, L.L.C. ("Baker Sterchi") as part of its "cure" claim under Section 365(b)(1) of the United States Code (11 U.S.C. §§ 101 *et seq*., the "Bankruptcy Code") in connection with confirmation of Debtor's First Amended and Restated Plan of Reorganization Dated November 5, 2012 [Docket No. 194][2], as modified through the confirmation hearing (the "Plan"), pursuant to Section 1129 of the Bankruptcy Code. In opposition to the payment of the Fees in full, and in support of the Memorandum of Law in Support of Confirmation of Debtor's Plan [Docket No. 256] previously filed, Debtor respectfully states as follows:

[1] Exhibit G (Latham) appears to consist of $147,404.50 in fees and $1,709.35 in expenses, for a total of $149,113.85, and Exhibit H (Baker Sterchi) appears to consist of fees of $6,575.00 in fees and $40.26 in expenses, for a total of $6,615.26.
[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan, in the Disclosure Statement and in the Approval Order.

PRELIMINARY STATEMENT

As explained in the next section below, almost all of the Fees requested by Spirit at the Hearing involve Spirit's opposition to Debtor's efforts to treat the Master Lease as "divisible." That issue is on appeal. If Debtor prevails on that issue, then any attorneys fees incurred by Spirit on that issue will only be part of Spirit's *unsecured claim* arising from rejection of one of the four leases within the scope of the Master Lease. On the other hand, if Debtor does not prevail on that issue, then the "indivisible" Master Lease will be assumed, and Spirit may have a claim for Fees determined by this Court to be appropriate under the relevant facts and law. Accordingly, the *most* that this Court should do regarding Spirit's Fees is to require Debtor to (a) pay modest Fees to Spirit for addressing the alleged "deferred maintenance" default under the three leases Debtor unequivocally assumed as part of the Plan, and (b) fund an escrow account for the amount of Fees determined by this Court to be appropriate under the relevant facts and law, pending the outcome of the appeal.

As to the *amount* of Fees to pay and put in the escrow account, as noted at the Hearing, Debtor generally defers to this Court to determine what Fees are "reasonable" under the circumstances. This Court has many years of private practice experience and routinely reviews and determines attorneys' fees. Accordingly, Debtor believes that adjustments for such items as travel time, inappropriate "lumping" of time, inappropriate description of time, excessive time spent on particular matters, and the like are best left to the discretion of the Court. *See In re Chance Industries, Inc.*, 2002 WL 32653679 (Bankr. D. Kan. 2002) (Section 506(b) case awarding about 50% of the requested fees and indicating the Section 506(b) applicant bears the burden of showing the reasonableness of its requested fees, and the factors examined by the court in awarding fees); and *In re American Freight System, Inc.* 1997 WL 309123 (D. Kan. 1997) (in

relevant part, affirmed bankruptcy court order awarding about 19% of requested fees because the requested fees were "excessive"). This memo will focus on adjusting the amount of the Fees to an appropriate "local rate" in accordance with relevant Tenth Circuit authority.

THE PENDING APPEAL'S EFFECT ON SPIRIT'S ATTORNEYS FEES CLAIM

As this Court knows, the sole contested issue with Spirit is whether the Amended and Restated Master Lease Agreement ("Master Lease"), Debtor's Exhibit 1 at the Hearing, is a single lease covering four properties, or four separate leases. Debtor asserts the latter, and moved on the Petition Date to reject the Master Lease to the extent it applies to the Palm Valley location in Arizona. If that motion had been granted, nobody disputes that Spirit would have an unsecured claim under Section 365(g)(1) which is limited by Section 502(b)(6). *Moreover, if that motion had been granted, Spirit's attorneys fees in opposing that motion would only be part of Spirit's unsecured claim.*

However, this Court ruled that the Master Lease is a single lease, not four separate leases. Debtor has appealed that ruling. If Debtor prevails in that appeal, then Spirit should have an unsecured claim for rejection of the Palm Valley location, *and any attorneys fees over such rejected lease also should be part of Spirit's unsecured claim.*

In the Plan presented at the Hearing, Debtor seeks to address all four locations covered by the Master Lease. Specifically, the Plan assumes the Master Lease to the extent it relates to three of the four locations covered by the Master Lease (Eastglen, Northglen, and Starworld), and preserves Debtor's decision to reject the Master Lease to the extent it relates to the Palm Valley location. However, based on this Court's ruling that the Master Lease is not divisible, the Plan assumes the "indivisible" Master Lease, subject to pursuing the appeal on whether the Master Lease is "divisible."

As noted by Debtor at the Hearing, nothing in the Plan violates Section 365(d)(4). Either the Master Lease is "divisible" and Debtor has assumed it as to three locations (in the Plan) and rejected it as to one location (in the Motion filed on the Petition Date), or the Master Lease is not "divisible" and Debtor has assumed the "indivisible" lease as to all four locations in the Plan. Thus, any deadline to assume or reject the Master Lease has been satisfied in the Plan.

Spirit has not objected to Debtor assuming the Master Lease to the extent that it relates to the Eastglen, Northglen, and Starworld locations, except as to certain "cure" issues for "deferred maintenance" which were resolved by agreement between Debtor and Spirit at the Hearing. Accordingly, Spirit should only be entitled to nominal attorneys fees in connection with assumption of the Master Lease to the extent it relates to the Eastglen, Northglen, and Starworld locations.

The vast majority of Spirit's Fees involve the issues on appeal. If Debtor prevails in the appeal, then the Plan provides for Spirit to get the unsecured claim that Spirit would have received if Debtor's original motion had been granted, *and any attorneys fees over such rejected lease also should be part of Spirit's unsecured claim.* If Debtor does not prevail in the appeal, then the "indivisible" Master Lease will be assumed and Spirit will be entitled to recover its attorneys fees as part of Debtor's obligation to "cure" defaults under the "indivisible" Master Lease pursuant to Section 365(b)(1).

Accordingly, the *most* that this Court should do regarding Spirit's Fees is to require Debtor to (a) pay modest Fees to Spirit for addressing the alleged "deferred maintenance" default under the three leases Debtor unequivocally assumed as part of the Plan, and (b) fund an escrow account for the amount of Fees determined by this Court to be appropriate under the relevant facts and law, pending the outcome of the appeal. The escrow account should be released to

Debtor if Debtor prevails in the appeal. And the escrow account should be released to Spirit if Debtor does not prevail in the appeal.

At the Hearing, this Court inquired whether the Plan triggers Section 365(g)(2). Both Debtor and Spirit respectfully suggested the Plan does not trigger Section 365(g)(2), albeit for different reasons. Debtor asserted Section 365(g)(2) is not triggered because the "rejection" asserted in this case *arose on the Petition Date when Debtor moved to reject the Master Lease to the extent it relates to the Palm Valley location*, not after the Master Lease had been assumed in any way. Spirit asserted that Section 365(g)(2) is not triggered because Section 365(d)(4) somehow prevents Debtor from pursuing the appeal and therefore the Master Lease is assumed and no subsequent rejection is possible. The parties then presented arguments and evidence about the potential effect of the potential application of Section 503(b)(7) *if* this Court subsequently determined that Section 365(g)(2) somehow is triggered by the Plan. However, Debtor respectfully submits that all of this argument and evidence is not applicable to this case and does not merit further discussion.

SPIRIT'S FEES SHOULD BE REDUCED TO "LOCAL RATES"

Debtor respectfully submits that this Court should follow substantial precedent in the Tenth Circuit which has consistently determined "reasonableness" of fees based on "local rates" absent unusual circumstances. The leading Tenth Circuit bankruptcy case on this point appears to be *In re Southwest Food Distributors, LLC*, 561 F.3d 1106 (10th Cir. 2009), which affirmed a bankruptcy court's denial of an Unsecured Creditors' Committee's application to employ Chicago counsel, and only approved local Tulsa counsel. In that case, the debtor listed assets of $1.1 million and liabilities of $12.2 million in its Schedules. *Id*. at 1107. A bank objected to the

Committee's proposed retention of "'national' counsel at rates twice the rates of highly competent local, state and regional counsel." *Id.* at 1108.

After a contested hearing, the bankruptcy court denied the application to employ Chicago counsel, and granted the application to retain Tulsa counsel, stating "at this juncture there is no evidence that this Chapter 11 case is complex or difficult or national in scope and no compelling evidence was presented that counsel in this locale lacks the necessary expertise that this case requires or is not available to capably represent the… Committee." *Id*. at 1110. The District Court and Tenth Circuit affirmed.

The same approach to "local fees" was followed in the Tenth Circuit in determining "reasonable fees" for a civil rights case under 42 U.S.C. §1988. *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006). In *Lippoldt*, the district court reduced the requested hourly rate by about 50% to reflect the "prevailing market rate" for comparable litigation in Wichita, Kansas. The Tenth Circuit affirmed this ruling.

One of the arguments on appeal in *Lippoldt* was that one of the plaintiffs' attorneys "is a national expert in civil rights cases, and that his hourly rate should be a reasonable national rate instead of the rate of the relevant community of Wichita, Kansas." *Id.* at 1225. In response, the Tenth Circuit wrote:

> Unless the subject of the litigation is "so unusual or requires such special skills" that only an out-of-state attorney possesses, the fee rates of the local area should be applied even when the lawyers seeking fees are from another area. [cits. omit]. Plaintiffs failed to establish that the subject of the litigation was so unusual that only an out-of-state attorney could present the case.

Id.

Perhaps most directly on point are the reported cases addressing fees payable to over-secured creditors under Section 506(b) of the Bankruptcy Code. In those cases, this Court has

consistently limited fees to "local fees" unless the applicant proves the necessary expertise or skills were not available in the local area. Two cases appear particularly relevant on this point.

The first case on point is *In re American Freight System, Inc.*, *supra*, in which Judge Rogers, in relevant part, affirmed the bankruptcy court's decision to substantially reduce the requested fees for New York counsel based on "local" rates, except for one issue that New York counsel had shown a "special expertise" to handle. Judge Rogers stated:

> After review of this matter, we find that the Bankruptcy Court did not abuse its discretion by limiting reimbursement in this case to local rates of compensation. We do not believe that national rates or the customary rates of counsel (if greater than the local rates) must be used if the bankruptcy is "national" in scope. Unless the work done by counsel is atypically complex, efficient, or precocious for the relevant local market for attorneys, or the pool of qualified attorneys has been exhausted by the size of the bankruptcy, we believe local rates may be employed in calculating an appropriate fee. This holding is consistent with many holdings or discussion in many of the cases cited by the Secured Banks. [cit. omit] our holding is consistent with the holdings of other bankruptcy courts. [cits omit].

1997 WL 309123 at 8.

Judge Nugent used the same reasoning in *Chance Industries, supra*, to reduce a 506(b) award by over 50%, stating:

> While it is unquestioned that lead counsel for [the secured creditor] has developed a considerable regional, and even national, reputation in the area of bankruptcy practice, this Court is hard pressed to see that the work required to protect and realize upon the [secured creditor's] liens was of a nature or complexity to implicate "national rates." The Court should base its hourly rate award on what the evidence shows the market commands for analogous work. [cit. omit]. In determining whether [the secured creditor's] fees are reasonable, the Court is guided by the comparison of the fees requested by debtor's and other creditor's counsel in the matter. [cit. omit]

Id. at 5. In so holding, Judge Nugent noted:

> 'One purpose of § 506(b) is to ensure that estate assets are not squandered by over-secured creditors … who fail to exercise restraint in the attorneys' fees and expenses they incur, perhaps exhibiting excessive caution, overzealous advocacy and hyperactive legal efforts.' [cit. omit]

Id. at 7.

This "local rates" requirement is not unique to the Tenth Circuit. Bankruptcy courts in South Dakota, Texas, Montana, and Missouri also have followed this approach. *Collier on Bankruptcy* ¶330.03[10][b] fn 77 (2012).

Debtor respectfully submits that the Fees for Spirit should be limited to "local rates" for most of the reasons noted above. Debtor's case is not a "large" or "national" case. Debtor's Summary of Schedules [Docket No. 1, page 164] list assets of $2.1 million and liabilities of $7.6 million. The "divisibility" issue was not unique or complex, with three reported cases on point, and the entire contested hearing completed in one day. Spirit arranged to engage local area counsel, Mr. Brinkman, and there was no evidence at the Hearing that Mr. Brinkman had no ability to adequately represent Spirit in this case.

To be clear, Debtor is not suggesting that Spirit should not have hired the Latham firm. On the contrary, Spirit is entitled to hire counsel of its choice for the reasons noted by Spirit at the Hearing. The issue is how much Spirit is entitled to be reimbursed by Debtor as a "cure" of its lease under Section 365(b)(1). As noted by Judge Nugent in the *Chance Industries* case, Spirit's *reimbursable* fees must be limited by considerations of reasonableness to ensure estate assets are not squandered.[3]

DETERMINATION OF "LOCAL RATES"

Spirit did not present any evidence of "local rates." However, this Court can readily determine "local rates." *See Chance Industries, supra* at 7 ("These observations are based on the Court's experience not only as a judge, but also as a recent commercial bankruptcy practitioner for over twenty years in this market. [cits. omit]"). Debtor merely offers the following comments to assist this Court in making its determination.

[3] In addition, the fees awarded by this Court to Spirit may affect the "Excess Cash Distribution" to the Class 5a and Class 5b creditors under the Plan. Plan, § 5.5.

First, Spirit's own area counsel, Scott Brinkman, according to his law firm's website "has over 20 years of experience in complex business litigation and is experienced in all phases of litigation." Exhibit H at the Hearing shows his hourly rate is $250. Applying that to the hours charged by Mr. Bacon and Mr. Buday for the Latham Fees would reduce the amount sought from $74,455.50 to $19,025.00. Mr. Brinkman's statement did not include any associate or paralegal entries, so hourly rates for those services by his firm are not known, but presumably would be at lower rates.

Second, as noted at the Hearing, this Court can compare Debtor's counsel's fees for the exact same litigation with Spirit in this case, at least through October 31. Debtor's counsel's Monthly Statements for September [Docket No. 191] and October [Docket No. 236] include separate statements for "Litigation" which so far has been limited to the Spirit matters. Those separate statements show Debtor incurred total fees of $26,351.00 on the Spirit contested hearing and appeal. This does not include the Plan issues addressed at the Hearing. For comparison, the Latham Fees through October 31st appear to be $107,401.00 (some of which involve litigation surrounding the Plan).

Third, this Court can consider using Debtor's counsel's rates for the Spirit Fees. As noted in the above Monthly Statements, Mr. Hoffmann's rate in September and October was $485, Ms. Stolte's rate was $340, Tim Swanson (a third year associate like Alicia Davis of Latham) had a rate of $215, and Mary Azeltine (a paralegal) had a rate of $185. Applying these rates to Exhibit G from Latham, with Mr. Hoffmann's rates used for Mr. Bacon, Ms. Stolte's rate used for Mr. Buday, Mr. Swanson's rate used for Alicia Davis and the "law clerk", and Ms. Azeltine's rate used for Latham's paralegal (and otherwise ignoring the "professional staff" entries on the Latham statement), would reduce the amount sought for Latham Fees from $146,899.50 to

$65,792.00.[4] In this regard, Debtor notes that Debtor's counsel's rates were approved by Judge Nugent in *In re Boot Hill Biofuels, LLC*, 2009 WL 3053730 at 4 fn. 21 (Bankr. D. Kan. 2009), citing both *Lippoldt, supra*, and *Southwest Food Distributors*, *supra*.

RESERVATION OF RIGHTS

Finally, Debtor reserves the right to seek an offset against any legal fees awarded to Spirit, or a reimbursement from Spirit, to the extent permitted pursuant to A.R.S. Section 12-341.01 as noted at the Hearing.

CONCLUSION

After resolving the Fees issues in the manner suggested herein, Debtor respectfully submits that the Plan complies with and satisfies all of the requirements of Section 1129 of the Bankruptcy Code. Accordingly, Debtor respectfully requests entry of an order, in substantially the form of the proposed Confirmation Order filed with the Bankruptcy Court, confirming the Plan.

Dated: December 3, 2012.

STINSON MORRISON HECKER LLP

By: s/Paul M. Hoffmann

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
phoffmann@stinson.com
tswanson@stinson.com

[4] Before applying any other adjustments for such things as "lumping", excessive fees, etc.