

**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’S RESPONSE TO THE
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)**

SPIRIT MASTER FUNDING, LLC (“Spirit”) responds to the *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)* (the “Fee Objection”)¹ as follows:

1. The Debtor acknowledges that Spirit is entitled to recover its attorneys’ fees. See Fee Objection, at 4. Spirit acknowledges that this Court has a good deal of discretion in determining the “reasonableness” of Spirit’s attorneys’ fees. Therefore, in the interest of not incurring substantially more fees and because this Court afforded Spirit ample opportunity to be heard on November 28th, Spirit will keep this response brief.

2. The Debtor launched this dispute against its most important landlord on the first day the case by filing a motion to partially reject the master lease with Spirit and sought to have that motion heard on an emergency basis a mere six days later. See Docket Nos. 15 & 28. The

¹ Based on the November 28th hearing, Spirit does not believe that the fees of Spirit’s local counsel, Baker Sterchi Cowden & Rice LLC, are in dispute. In the event that the Debtor seeks to challenge such fees, Spirit would like an opportunity to supplement this response. The fees of Baker Sterchi Cowden & Rice LLC were estimated at approximately \$6,165.26 as of November 27, 2012 and have continued to accrue since that date and will continue to accrue until final resolution of all disputes regarding the Spirit master lease.

Debtor then agreed to a one week extension, with the motion ultimately being heard on the thirteenth day of the case. If Spirit's counsel's memory serves, less than 24 hours before the October 4th hearing, the Debtor identified two witnesses and fifteen exhibits to Spirit's counsel.

3. The Debtor's assault on the fundamental structure of the Spirit master lease was, as the Debtor was well aware, of critical importance to Spirit. As reflected on its website, Spirit Realty Capital is a public company whose core business involves sale/leaseback real estate financing. See <http://www.spiritrealty.com/>. A determination that a central feature of the Spirit master lease was unenforceable would have threatened key aspects of Spirit's contractual relationships with nearly all of its tenants. Spirit took this challenge very seriously and responded accordingly, just as the Debtor should have anticipated.

4. Remarkably, the Debtor says in the Fee Objection that "[t]he 'divisibility' issue was not unique or complex, with three reported cases on point." See Fee Objection, at 8. This statement is galling, because the Debtor failed to cite to the Court one of those three reported cases, In re Buffets Holdings, which was nearly on all fours in favor of Spirit. See Debtor's Motion for Order Rejecting, in Part, the Amended and Restated Master Lease Agreement with Spirit Master Funding LLC, Docket No. 15 (failing to mention In re Buffets Holdings, Inc., 387 B.R. 115 (Bankr. D. Del. 2008)). Instead, the Debtor simply filed an incomplete motion, ignoring its obligation to call contrary authority to the attention of the Court, and is now challenging the fees Spirit incurred identifying the applicable case law and distinguishing the cases relied on by the Debtor.

5. On October 12, 2012, this Court issued an order denying the motion to reject the master lease [Docket No. 29], but the Debtor's Hail Mary passes did not stop there. Instead, the Debtor launched an appeal and tried to confirm a plan of reorganization that sought to preserve

that appeal in disregard of Section 365(d) of the Bankruptcy Code. Yesterday, the Court issued an order denying confirmation of the Debtor's plan [Docket No. 274].

6. At the November 28th hearing, Spirit introduced an exhibit (the "**L&W Pro Forma**") that reflected fees and expenses totaling \$149,113.85 as of November 27, 2012. Of that total, approximately \$93,000 was incurred through the date of this Court's October 12 ruling. The bulk of the fees and expenses incurred thereafter are a direct function of the Debtor's unorthodox and unsuccessful effort to try to preserve the appeal. As counsel for Spirit stated on November 28th, it is less expensive to launch an ill-considered assault than it is to deflect one.

7. The L&W Pro Forma included detailed descriptions for all of the hours charged by Latham & Watkins. Debtor's counsel had an opportunity on November 28th to cross-examine the undersigned partner in charge of Spirit's representation in this matter and chose not to do so. Further, the Debtor has not identified any time entries that it believes are problematic, nor has the Debtor challenged the aggregate number of hours charged. Accordingly, Spirit does not believe that the number of hours charged by Latham & Watkins or the billing descriptions thereof are at issue.

8. Spirit does not dispute that the hourly rates charged by Latham & Watkins, a global law firm with over 2,000 attorneys in 31 offices around the world, are higher than rates generally charged in Kansas City. Furthermore, neither Spirit nor Latham & Watkins would have the audacity to suggest that there are not capable bankruptcy lawyers in Kansas City who could have effectively represented Spirit. However, as the Debtor acknowledges in the Fee Objection, "Spirit is entitled to hire counsel of its choice for the reasons noted by Spirit at the Hearing." Fee Objection, at 8. Under the circumstances, particularly the significance of the issue at hand and the bum's rush approach taken by the Debtor, Spirit could not reasonably have

been expected to review and assess law firms in Kansas City in the twelve days it had to file a response to the motion to reject.² Instead, Spirit opted to engage a law firm with which it has substantial and extensive experience.

9. The cases cited in the Fee Objection are, on their face, distinguishable, and Spirit's counsel will not run up the bill with further legal analysis. This situation is easily distinguishable from circumstances where, for example, a committee might hire a national firm to represent it throughout a lengthy local case.

10. As stated in Spirit's objection to the Debtor's plan of reorganization [Docket No. 243] and at the hearing, the L&W Pro Forma was not an exhaustive listing of fees and expenses incurred, which have continued to accrue through the present day and will continue to accrue until this dispute is finally resolved. Latham & Watkins estimates that the aggregate fees incurred from the date of the last entry on the L&W Pro Forma (November 21, 2012), which were incurred primarily in connection with preparation for and participation in the November 28 hearing, will be an additional approximately \$50,000.³ Accordingly, Spirit requests that any ruling issued provide for Spirit's recovery of all fees and expenses incurred through a final determination of any and all disputes relating to the Spirit master lease as a condition to assumption of the master lease.⁴

11. The suggestion by the Debtor that Spirit should wait to recover the fees to which the Debtor admits it is entitled under the present circumstances is unreasonable. As mentioned

² The Debtor suggests that perhaps Mr. Brinkman, Spirit's local counsel, should have represented Spirit without Latham & Watkins' involvement. See Fee Objection, at 8. While Latham & Watkins has found Mr. Brinkman to be an outstanding co-counsel, and grossly underpriced at \$250 per hour (which is discounted from his usual rate of \$325), he had no prior experience with Spirit and is not a bankruptcy specialist.

³ Spirit intends to provide the Debtor with an updated Latham & Watkins pro forma within two business days.

⁴ Spirit is entirely willing to submit to this Court and the Debtor detailed records for any fees and expenses sought that are not reflected in the L&W Pro Forma and have such records subject to Court review.

above, Spirit is a public company of significant magnitude. Spirit acknowledges that it remains subject to this Court's jurisdiction for any future retroactive adjustment to fees approved in the extraordinarily unlikely event that this Court's October 12 ruling is successfully challenged on appeal. Spirit further agrees that the Debtor may offset against its rent obligations to Spirit any fees or fee refunds to which the Debtor may become entitled pursuant to a final order.

WHEREFORE, Spirit respectfully requests that the Fee Objection be overruled and that the Debtor be required to pay Spirit all of its fees and expenses incurred through a final determination of any and all disputes relating to the Spirit master lease as a condition to assumption of the lease.

Respectfully submitted,

By: s/Scott M. Brinkman
Scott M. Brinkman
BAKER STERCHI COWDEN & RICE LLC
2400 Pershing Road, Suite 500
Kansas City, MO 64108
Telephone: (816) 471-2121
Facsimilie: (816) 855-2061

- and -

Douglas Bacon
Alicia C. Davis
LATHAM & WATKINS LLP
Suite 5800
233 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 876-7700
Facsimile: (312) 993-9767

ATTORNEYS FOR SPIRIT MASTER
FUNDING, LLC AND SPIRIT MASTER
FUNDING IV, LLC

CERTIFICATE OF SERVICE

Spirit Master Funding, LLC's Response to the 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) was electronically filed and served on December 6, 2012 to all interested parties requesting electronic notification.

s/Scott Brinkman

4841-9643-3682, v. 1