JACKSON WALKER LLP
Monica S. Blacker
State Bar No. 00796534
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6000 – Telephone
(214) 953-5822 – Fax
mblacker@jw.com
ATTORNEY FOR SPAREBANK 1 SR-FINANS AS AND
SPAREBANKEN FINANS NORD-NORGE AS

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**CHAPTER 11**
CHC GROUP LTD., *ET. AL*,	§	
	§	**CASE NO. 16-31854-BJH-11**
DEBTORS.	§	**JOINTLY ADMINISTERED**
	§	
SPAREBANK 1 SR-FINANS AS & SPAREBANKEN FINANS NORD-NORGE AS,	§	
PLAINTIFFS,	§	
	§	**ADV. PRO. NO. 16-03121-BJH**
V.	§	
	§	
DEBTOR HELI-ONE LEASING (NORWAY) AS, CHC HELICOPTER S.A. AND IRONSHORE SPECIALTY INSURANCE COMPANY,	§	
DEFENDANTS.	§	

SPAREBANK 1 SR-FINANS AS'S AND SPAREBANKEN FINANS NORD-NORGE AS'S RESPONSE AND BRIEF OPPOSING (I) IRONSHORE SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS ADVERSARY COMPLAINT AND (II) HELI-ONE LEASING (NORWAY) AS AND CHC HELICOPTER S.A.'S LIMITED JOINDER TO IRONSHORE SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS ADVERSARY COMPLAINT AND MOTION TO ABSTAIN

1631854170105000000000032

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statute

Treatise

TO THE HONORABLE BARBARA J. HOUSER, UNITED STATES BANKRUPTCY JUDGE:

COME NOW Sparebank 1 SR-Finans AS ("Sparebank 1") and Sparebanken Finans Nord-Norge AS ("Sparebanken N-N," and together with Sparebank 1, "Sparebank" or the "Plaintiffs") and file their *Response and Brief Opposing (I) Ironshore Specialty Insurance Company's Motion to Dismiss Adversary Complaint and (II) Heli-One Leasing (Norway) AS and CHC Helicopter S.A.'s Limited Joinder to Ironshore Specialty Insurance Company's Motion to Dismiss Adversary Complaint and Motion to Abstain* (the "Opposition"), and in support thereof, Sparebank respectfully states as follows:

I. PRELIMINARY STATEMENT

1. By the *Complaint* [Docket No. 1] (the "Complaint")[1], the plaintiffs merely seek to enforce their rights under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") by exposing the significant involvement of two of the above-captioned debtors in the RVI Polices and the Leases. This determination affects the plaintiffs' rights in the debtors' bankruptcy cases, the debtors' property rights in their bankruptcy cases, and the obligations of a contract counterparty who has used the bankruptcy cases as an excuse to shirk contractual duties. Without a speedy resolution to the issues presented in the Complaint, these bankruptcy cases cannot proceed down a path to confirmation of a chapter 11 plan. Nonetheless, the non-debtor defendant moved to dismiss the Complaint. In so doing, this defendant ignores the terms of and goals underlying the Bankruptcy Code.

II. FACTUAL AND PROCEDURAL BACKGROUND

2. On May 5, 2016, Heli-One Leasing (Norway) AS ("Heli-One") and CHC Helicopter S.A. ("CHC," and together with Heli-One, the "Debtor Defendants") and several of

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Complaint.

their affiliates (collectively, with the Debtor Defendants, the "Debtors"), filed voluntary petitions for relief pursuant to chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On August 17, 2016, Sparebank filed the Complaint in this Court initiating this adversary proceeding and seeking a judgment against the Debtor Defendants and Ironshore Specialty Insurance Company ("Ironshore," and together with the Debtor Defendants, the "Defendants," and collectively, with Sparebank and the Debtor Defendants, the "Parties") and (i) a declaration that Ironshore may not take any action to modify, cancel, or otherwise terminate the RVI Policies in any way based upon the Debtors' commencement of their chapter 11 cases; (ii) a declaration that the Leases and the RVI Policies are interests of the Debtors in their bankruptcy cases; and (iii) a grant of any other relief, whether legal or equitable, to which Sparebank may be entitled.[2]

4. On September 15, 2016, Ironshore filed *Ironshore Specialty Insurance Company's Motion to Dismiss Adversary Complaint* and a brief in support thereof [Docket Nos. 8 and 9] (collectively, the "Motion to Dismiss").[3]

5. On September 26, 2016, the Debtor Defendants filed *Heli-One Leasing (Norway) AS and CHC Helicopters S.A.'s Limited Joinder to Ironshore Specialty Insurance Company's Motion to Dismiss Adversary Complaint and Motion to Abstain* [Docket No. 12] (the "Joinder"). By the Joinder, the Debtor Defendants joined the Motion to Dismiss solely with respect to the

[2] Compl. ¶ 44.

[3] On September 15, 2016, Ironshore also filed *Ironshore Special Insurance Company's Motion to Abstain* and a brief in support thereof [Docket Nos. 10 and 11] (collectively, the "Motion to Abstain"). Contemporaneously with the filing of the Opposition, the Plaintiffs have submitted a separate response and objection to the Motion to Abstain. Accordingly, the Opposition does not address the Motion to Abstain.

argument that this Court lacks jurisdiction to adjudicate the Complaint.[4]

6. The relevant facts, as set forth in the Complaint, are not in dispute and are fully incorporated herein by reference.[5]

7. By the Motion to Dismiss, Ironshore attempts to portray the RVI Policies as isolated documents unrelated to and distant from the Debtor Defendants and the Leases. The Debtor Defendants and the Leases, however, permeate the pages of the RVI Policies. While the Debtor Defendants may not have physically signed the RVI Policies, the Debtor Defendants are integral parties to those contracts, and the RVI Policies designate benefits for and place obligations on the Debtor Defendants. Similarly, while Ironshore may not be a signatory to the Leases, Ironshore plays a key role in those transactions and reaps the benefits of such. Regardless of any party's characterization of the relationship between Sparebank, the Debtors, and Ironshore, the Parties are intertwined and entrenched in the transactions documented as the RVI Policies and the Leases.

8. This interconnectedness, in turn, makes this Court the most appropriate forum to untangle the obligations of and responsibilities borne by each of the Parties, while also ensuring the Debtors' bankruptcy cases press forward. At the bottom of this dispute lies an obligation to pay Sparebank the amounts owed pursuant to the RVI Policies and the Leases. That obligation lies, in the first instance, with Ironshore; however, in the event Ironshore fails to satisfy its contractual duty, the Leases require that the Debtor Defendants pay such amounts. Accordingly, consistent with the established purposes of the Bankruptcy Code and policy of the bankruptcy courts, this Court must and should rule on this dispute. Accordingly, the Motion to Dismiss should be denied in its entirety.

[4] Joinder ¶ 1.

III. ARGUMENTS AND AUTHORITIES

9. Under Federal Rule of Civil Procedure 8(a), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" and "does not require detailed factual allegations."[6] To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."[7] A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[8]

10. By the Motion to Dismiss, Ironshore ignores the undisputed facts and (i) re-characterizes case law concerning *ipso facto* clauses; (ii) redefines terms in the Bankruptcy Code; (iii) employs ill-fit analogies to show how the well-established, bright lines of case law concerning letters of credit applies to the unique facts of this case; (iv) disregards the ultimate obligation of the Debtor Defendants to indemnify Sparebank for amounts otherwise covered by the RVI Policies and payable by Ironshore; (v) conflates the issues by asking this Court to determine whether the Debtors own the insurance proceeds when Sparebank clearly owns such; and (vi) advocates for a foreign tribunal to decide this dispute and consequently, put the Debtors' bankruptcy cases on hold for an indefinite amount of time. Accordingly, the Motion to Dismiss should be denied.

A. Bankruptcy Code Section 365(e)(1) Applies to the RVI Policies Because the Debtor Defendants are Integral Parties and Entangled in the Related Transactions.

11. Most commonly, debtor contract counterparties have used section 365(e)(1) to invalidate *ipso facto* clauses; however, contrary to Ironshore's proclamation otherwise, courts

---

[5] *See* Mot. Dismiss [Docket No. 9] ¶ 1.

[6] *Ashcroft v. Iqbal*, 556 U.S. 662, 688-78 (2009).

[7] *Id.* at 678.

[8] *Id.*

have allowed other parties to use this section and recognized that section 365(e)(1) does not apply exclusively to the contracts of a debtor. In support of its narrow interpretation of who can use section 365(e)(1) to invalidate an *ipso facto* clause (exclusively debtors), Ironshore relies principally on three cases: two opinions from the *In re Lehman Brothers Holdings, Inc.* bankruptcy cases[9] and *Liberty Mutual Insurance Co. v. Greenwich Insurance Co.*[10] These three cases, however, weigh in favor of Sparebank's ability to use section 365(e)(1) to invalidate the *ipso facto* provision, Clause 6.3(j), of the RVI Policies.

1. *Lehman I and Lehman II Support the Conclusion that Sparebank Can Use Section 365(e)(1) to Invalidate the* Ipso Facto *Clauses in the RVI Policies.*

12. In *Lehman I*, the bankruptcy court explained that "[t]he description of the kind of relationship that is sufficient to trigger [*ipso facto*] protections affecting the rights of contracting parties is best left to a case-by-case determination."[11] With that flexible standard as its guide, the bankruptcy court held that:

> [debtor Lehman Brothers Holdings Inc.] commenced a case that entitled [then non-debtor Lehman Brothers Special Financing Inc.], consistent with statutory language, fairly read, to claim the protections of the *ipso facto* provisions of the Bankruptcy Code because its ultimate corporate parent, and credit support provider, at a time of extraordinary panic in the global markets, had filed a case under the Bankruptcy Code.[12]

Accordingly, the bankruptcy court allowed a non-debtor entity, related to but separated by numerous levels of intermediary entities and corporate formalities, to utilize the protections of section 365(e)(1).[13] In so holding, the bankruptcy court underscored the "integrated" nature of the relationship between and business operations of the debtor and the non-debtor entity.[14]

---

[9] 422 B.R. 407 (Bankr. S.D.N.Y. 2010) (Judge Peck) [hereinafter *Lehman I*]; *In re Lehman Bros. Holdings, Inc.*, 553 B.R. 476 (Bankr. S.D.N.Y. 2016) (Judge Chapman) [hereinafter *Lehman II*].

[10] 417 F.3d 193 (1st Cir. 2005) [hereinafter *Liberty Mutual*].

[11] 422 B.R. at 420-21.

[12] *Id.* at 421.

[13] *See id.*; s*ee also* Lehman Brothers Holdings Inc. (Form 8-K, Ex. 99.2) (Apr. 14, 2010) (providing a condensed

13. Using the flexible, fact-based standard from *Lehman I* leads to the conclusion that Sparebank can utilize the protections of section 365(e)(1). While Sparebank and the Debtor Defendants are not corporate affiliates, Sparebank and the Debtor Defendants have an integrated relationship with respect to the transactions documented as the RVI Policies, so much so that their separate identities are even disregarded by certain provisions. For example, pursuant to Clause 4.6 of each RVI Policy, Ironshore deems actions taken by the applicable Debtor Defendant in connection with Sparebank's obligations under the RVI Policies to be actions taken by Sparebank.[15] Similarly, Clause 4.1 of the RVI Policies dictates to whom Sparebank may disclose certain information relating to Ironshore.[16] That section limits disclosures to Sparebank, a formal contract counterparty, and the Debtors.[17] Hence, despite Ironshore's description to the contrary in the Motion to Dismiss, the Debtor Defendants are not outsiders in connection with the RVI Policies but instead, key parties to whom the RVI Policies provide rights and distribute obligations.

14. In an effort to dismiss the bankruptcy court's unfavorable holding in *Lehman I*, Ironshore alleges that "the exact issues discussed in *Lehman I* were recently rejected [in *Lehman II*]."[18] That allegation, however, is not accurate. In *Lehman II*, Judge Shelley C. Chapman explained the holding in *Lehman I* as "the priority provisions contained [in the transaction documents at issue] modified '[then non-debtor Lehman Brothers Special Financing Inc.]'s right to a priority distribution solely as a result of a chapter 11 filing' and were therefore

---

organization chart for Lehman Brothers Holdings Inc.).

[14] 422 B.R. at 421.

[15] Compl., Exs. B2, B3, p. 12.

[16] Compl., Exs. B2, B3, p. 11.

[17] Compl., Exs. B2, B3, p. 11.

[18] Mot. Dismiss [Docket No. 9] ¶ 30.

unenforceable *ipso facto* clauses."[19] Thereafter, Judge Chapman described the bankruptcy court's holding in *Lehman II* as "consistent with Judge Peck's conclusion in [*Lehman I*]."

15. Next, Ironshore alleges that *Lehman II* deemed the portion of *Lehman I* discussing section 365(e)(1) and third parties "dicta." That allegation is also not accurate. In *Lehman II*, Judge Chapman explained that Judge Peck observed in "dicta" several points relating to the timing of the debtor's bankruptcy filing in connection with the non-debtor's use of the *ipso facto* provisions in the Bankruptcy Code.[20] That timing issue does not exist in this adversary proceeding. Therefore, both *Lehman I* and *Lehman II* support the requested relief in the Complaint.

2. Liberty Mutual Does Not Affect Sparebank's Ability to Use the Protections Set Forth in Section 365(e)(1).

16. Ironshore mischaracterizes the First Circuit's view on section 365(e)(1) in *Liberty Mutual*, and regardless of such, *Liberty Mutual* serves as a poor analogy for this adversary proceeding. Ironshore incorrectly interprets *Liberty Mutual* as standing for the proposition that "section 365(e)(1) is designed solely to protect the debtor."[21] In *Liberty Mutual*, the First Circuit expressly refrained from making such a holding and instead, explains, "[w]e do not . . . say that a third party can never rely on the section [365(e)(1)]."[22] The First Circuit also noted that "section 365(e)(1) does not by its terms say that only a bankrupt can invoke it."[23] Accordingly, *Liberty Mutual* does not hold that only a debtor can utilize the protections of section 365(e)(1).

---

[19] 553 B.R. at 488.

[20] *Id.*

[21] Mot. Dismiss [Docket No. 9] ¶ 32.

[22] 417 F.3d at 199.

[23] *Id.* at 198.

17. Additionally, Ironshore emphasizes that, in *Liberty Mutual*, the First Circuit's holding was not affected by the fact that the debtor had indemnification obligations similar to those of the Debtor Defendants here. In *Liberty Mutual*, the non-debtor contract counterparty (Greenwich Insurance Company) and the debtor (American Tissue, Inc.) were jointly and severally liable to Liberty Mutual Insurance for the obligations in the contract, but the First Circuit held that the non-debtor contract counterparty could not use the protections set forth in section 365(e)(1). In so ruling, the First Circuit explained that:

> as a result of paying Liberty the full amount of the bond, Greenwich will have an enlarged claim against the American Tissue estate under its indemnity agreement with American Tissue. ***But every increase in the estate's debt to Greenwich will likely be offset by a reduced debt of the estate to Liberty***. . . . [therefore, such] does not appear to have a visible effect on the estate's net obligations.[24]

Accordingly, the First Circuit expressly acknowledged the debtor's indemnification obligations and dismissed such because the debtor was responsible for paying the contractual obligations in the first instance or for indemnifying a contractual counterparty in the second instance. Thus the debtor's indemnification obligations had no effect on the estate's net obligations. In the present case, if Ironshore refuses to pay Sparebank pursuant to the RVI Policies, then the Debtor Defendants' indemnification obligations will have a net negative effect on the estates. Accordingly, Ironshore's argument dismissing this case as "an even easier call"[25] than *Liberty Mutual* ignores the key factual difference between the present case and *Liberty Mutual*: here, the Debtor Defendants' indemnification obligations will have a net negative effect on their estates, while the debtor's indemnification obligations in *Liberty Mutual* had no net effect because the debtor was already obligated to pay in the first instance.

[24] 417 F.3d at 199 (emphasis added).

[25] Mot. Dismiss [Docket No. 9] ¶ 34.

B. By Denying Liability under the RVI Policies Because of the Commencement of the Chapter 11 Cases, Ironshore is Unquestionably "Modifying" the RVI Policies.

18. Ironshore incorrectly argues that a default under the RVI Policies triggered solely by the Debtor Defendants' insolvency relieves it of liability to pay Sparebank but, at the same time, does not "modify" the RVI Policies in contravention of section 365(e)(1) of the Bankruptcy Code. Bankruptcy Code section 365(e)(1) provides:

> (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case; [or]
>
> (B) the commencement of a case under this title . . . .[26]

Pursuant to Clause 6.1 of each of the RVI Policies, the "Insurer" (Ironshore) agreed to pay the "Insured" (Sparebank) a defined amount based on the status of the helicopter leased by the applicable Debtor Defendant from Sparebank on the defined "Termination Date."[27] Clause 6.3(j) of the RVI Policies, however, relieves Ironshore of its payment obligation if "an Insolvency Event occurs in relation to [the applicable Debtor Defendants]."[28] Clause 1.2 of the RVI Policies defines "Insolvency Event" as "any corporate action, legal proceedings or other procedure or step is taken in relation to: the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation . . . ."[29] Thus, by denying liability under the RVI Policies based on the corporate action and legal proceedings relating to the Debtor

[26] 11 U.S.C. § 365.

[27] Compl., Exs. B2, B3, p. 14.

[28] Compl., Exs. B2, B3, p. 17.

[29] Compl. Exs. B2, B3, p. 4.

Defendants' efforts to reorganize, Ironshore is unequivocally modifying its obligations under the RVI Policies because of the commencement of the Debtor Defendants' chapter 11 cases.

19. Despite this obvious violation of section 365(e)(1), Ironshore tries to argue that by denying coverage based on the commencement of the Debtor Defendants' reorganization attempt, Ironshore is "simply enforcing the terms" of the RVI Policies and not modifying the those terms.[30] This argument, however, is unavailing as the term "modify" cannot have one meaning when a debtor alleges a violation of section 365(e) and another meaning when a non-debtor contract counterparty so alleges. Unquestionably, if the Debtor Defendants physically signed the RVI Policies, then any attempt to enforce Clause 6.3(j) of the RVI Policies would modify the parties' obligations under the RVI Policies and violate section 365(e)(1). Accordingly, when a less conventional party (a party other than a debtor) uses section 365(e)(1) to invalidate an *ipso facto* clause, the term "modify" has the same meaning and the *ipso facto* clause likewise violates section 365(e)(1).

C. <u>Standards Announced by Case Law on Letters of Credit are not Applicable to the Fact-Sensitive Standard Used for Decisions on Section 365(e)(1).</u>

20. In support of its arguments in the Motion to Dismiss, Ironshore relies on several cases concerning letters of credit, but such reliance is misplaced because the confines of case law on letters of credit is clearly defined and supports different policies than the amorphous case law concerning section 365(e)(1). First, a strong policy in favor of maintaining the independence of letters of credit exists.[31] No such policy exists with respect to section 365(e)(1). Instead, case law suggests other policy goals for section 365(e)(1): (i) "[the] purpose

[30] Mot. Dismiss [Docket No. 9] ¶¶ 23-24.

[31] *See* 1 COLLIER ON BANKRUPTCY ¶ 105.4[2][a] n.57 (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).

avowed in both legislative history and case law is to protect the bankruptcy estate"[32] and (ii) "the bars to enforcement of *ipso facto* clauses . . . are intended to prevent a party to a contract from opting out of bankruptcy through the use of such clauses."[33] By the adversary proceeding, Sparebank has attempted to further the announced policy goals of section 365(e)(1). Sparebank has asked Ironshore to fulfill its contractual obligations and pay the amounts owed so that the Debtors' indemnification obligations are not triggered. Further, as the Debtor Defendants are clearly integral parties to the RVI Policies, Sparebank has attempted to prevent Ironshore from opting out of the bankruptcy and shirking its duties under the RVI Policies.

21. Second, the analysis of a debtor's obligation with respect to a letter of credit is rigid and more clear cut than the flexible analysis used to decide issues concerning section 365(e)(1). Case law plainly establishes that a letter of credit represents an obligation of the issuer, not the debtor.[34] On non-debtor use of section 365(e)(1), however, "[t]here is a surprising paucity of precedent,"[35] and "[t]he description of the kind of relationship that is sufficient to trigger [*ipso facto*] protections affecting the rights of contracting parties is best left to a case-by-case determination."[36] Accordingly, case law concerning letters of credit serves as a poor guide for deciding the issues presented by this adversary proceeding.

[32] 417 F.3d at 198-99.

[33] *See* 3 COLLIER ON BANKRUPTCY ¶ 365.06[4] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).

[34] *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03[b] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).

[35] 417 B.R. at 198.

[36] 422 B.R. at 420-21.

D. *In re Schwinn Bicycle Company* is Readily Distinguishable from the Facts and Circumstances at Issue in this Adversary Proceeding.

22. Ironshore's reliance on *In re Schwinn Bicycle Company*[37] to show that this Court lacks jurisdiction over the issues set forth in the Complaint is misplaced because the facts that persuaded the court in the *Schwinn* case do not exist in the present matter. In the *Schwinn* case, the non-debtor plaintiffs sought to impose against a third party the terms of a sale agreement (the "Sale Agreement") and confirmation order entered by the bankruptcy court.[38] The bankruptcy court began its discussion of jurisdiction by explaining that "the jurisdictional authority of a bankruptcy judge is sharply reduced following confirmation."[39] In its decision, the bankruptcy court underscored several key facts. First, the non-debtor plaintiffs argued that "related to" jurisdiction existed because the reorganized debtors may be liable, based on "some [unclear] theory" for the non-debtor plaintiffs' fees, costs, and expenses incurred in defending the parallel state-court action.[40] Second, at the time of the bankruptcy court's ruling, the bankruptcy court had entered the confirmation order more than three years ago.[41] Third, at the time of the bankruptcy court's ruling, distribution of the debtors' assets had begun more than two years ago.[42] These three key facts led the bankruptcy court to dismiss the adversary proceeding. The bankruptcy court did not, as alleged by Ironshore, determine that a "potential indemnification obligation that may arise following a dispute between two non-debtor parties

[37] 210 B.R. 747 (N.D. Ill. 1997) [hereinafter the *Schwinn* case].

[38] *Id.* at 755.

[39] *Id.* at 754.

[40] *Id.* at 755.

[41] *Id.* at 756.

[42] *Id.*

was not even sufficient to give the bankruptcy court subject matter jurisdiction."[43] The bankruptcy court did not directly make a ruling on jurisdiction.[44]

23. Nonetheless, the key factors that influenced the bankruptcy court's decision to dismiss the adversary proceeding are not present in this case. First, the Debtor Defendants' indemnification obligations are not tenuous but derive directly from a specific and precise provision in each of the Leases, Section 18, and have been triggered by the rejection of the Leases. Second, this Court has not entered a confirmation order in the Debtors' cases, as neither the Debtors nor any other party has proposed a chapter 11 plan. Third, as no party has even offered a plan, no distributions of the Debtors' assets have been made. Accordingly, the key factors swaying the bankruptcy court's decision in the *Schwinn* case are not present here and, as such, that case is clearly distinguishable from the present matter.

E. <u>The Complaint Does Not Ask For a Determination Regarding Ownership of the Liability Proceeds Because Sparebank Clearly Owns Such.</u>

24. In the Motion to Dismiss, Ironshore goes to great lengths to distinguish between ownership of the RVI Policies and ownership of the proceeds flowing from the RVI Policies.[45] The thrust of Ironshore's argument is that, by the Complaint, Sparebank's request for a declaratory judgment as to whether the RVI Policies are property of the Debtors' estates is a waste of judicial resources because the real issue is ownership of the liability proceeds.[46] The issue of ownership of the liability proceeds, however, is not an issue at all because the case law establishes that Sparebank owns the liability proceeds.

[43] Mot. Dismiss [Docket No. 9] ¶ 38.

[44] 210 B.R. at 763 (making a general and not specific ruling that "whether for the latter reason or on jurisdictional grounds, the Adversary Complaint and the Adversary Proceeding must be dismissed").

[45] *See* Mot. Dismiss [Docket No. 9] ¶¶ 40-42.

[46] *See* Mot. Dismiss [Docket No. 9] ¶¶ 40-42.

25. In *Louisiana World Exposition, Inc. v. Federal Insurance Company* (a case cited by Ironshore throughout the Motion to Dismiss), a statutory committee argued that certain liability insurance proceeds were property of the debtor's estate.[47] The underlying insurance policies provided coverage for the debtor's directors and officers for liabilities and related legal expenses that they personally might incur in connection with their positions as directors and officers.[48] The Fifth Circuit explored existing case law regarding insurance policies and the distinction between policy ownership and proceeds ownership and concluded that the case law favored the view that "the directors and officers to whom the liability proceeds are payable . . . have the property interest in such proceeds . . . ."[49] Consequently, the Fifth Circuit held that the debtor had no ownership interest in the proceeds from the liability coverage because the obligation of the insurance companies in connection with the proceeds was to the directors and officers, the insureds.[50] Like the directors and officers in the *LWI* case, Sparebank is the party to whom the liability proceeds are payable under the RVI Policies. Therefore, like the directors and officers in the *LWI* case, Sparebank holds the property interest in the liability proceeds.

F. <u>The Declaratory Judgment Act Supports the Relief Sought by Sparebank.</u>

26. In the Motion to Dismiss, Ironshore attempts to downplay the importance of this adversary proceeding to the Debtors' bankruptcy cases and argue that this Court should exercise discretion and forgo ruling on the issues presented by the Complaint.[51] As part of its strategy, Ironshore "assumes" the existence of subject matter jurisdiction and proceeds to cite to a group of cases where courts granted the defendants' motions to dismiss allegedly on the grounds that a

[47] 832 F.2d 1391, 1394 (5th Cir. 1987) [hereinafter the *LWI* case].

[48] *Id.* at 1393.

[49] *Id.* at 1400.

[50] *Id.* at 1399.

[51] Mot. Dismiss [Docket No. 9] ¶ 43.

declaratory judgment in each case would not completely resolve the issues among the parties.[52] These cases, however, focus primarily on jurisdictional issues and are not instructive as the facts and circumstances vary greatly from those in the present matter. Next, Ironshore lists five factors that courts have used when determining whether to entertain a declaratory judgment action and summarily concludes the Court should not rule on this adversary proceeding.[53] In its application, Ironshore neglects to consider (i) the importance of resolving these issues in a timely fashion such that the Debtors' bankruptcy cases can proceed and (ii) the impact of these issues on the Debtors' estates in connection with the Debtor Defendants' indemnification obligations. Accordingly, once fully explored, the factors direct the Court to consider and resolve the issues set forth in the Complaint.

1. *Ironshore Highlighted Cases that Fail to Contribute to a Determination of Whether the Court Should Entertain the Complaint.*

27. Ironshore relies on several cases for the proposition that courts have exercised their discretion not to grant relief based on a determination that a declaratory judgment would not completely resolve the issues among the parties.[54] Ironshore's reliance is misplaced as the cited cases focus on jurisdictional issues and other factors unrelated to the present matter.

28. In the *In re Old Carco LLC* case, the bankruptcy court held that the plaintiff failed to meet its burden of proving the existence of an actual controversy and thus the court lacked subject matter jurisdiction over the declaratory judgment action.[55] Additionally, the bankruptcy court suggested that the case be consolidated with the related litigation pending in another

[52] Mot. Dismiss [Docket No. 9] ¶¶ 43-44.

[53] Mot. Dismiss [Docket No. 9] ¶¶ 43, 45.

[54] Mot. Dismiss [Docket No. 9] ¶ 44.

[55] *FTE Automotive USA, Inc. v. Old Carco LLC* (*In re Old Carco LLC*), 530 B.R. 614, 619 (Bankr. S.D.N.Y. 2015).

court.[56] In the present matter, an actual controversy exists and no related litigation is pending in another court.

29. In the *In re IPDN Corporation* case, the bankruptcy court held that no actual controversy existed and underscored that the "requested declaratory judgment would have no legal effect other than to reiterate a point upon which all parties to the Adversary Proceeding agree."[57] Again, in the present matter, an actual controversy exists and the parties do not agree on the issues set forth in the Complaint.

30. In the *In re Mirant Corporation* case, the bankruptcy court explained that Bankruptcy Code section 105, through which bankruptcy courts obtain equitable authority (to provide declaratory relief), permits exercise of that authority only in furtherance of a specific provision of the Bankruptcy Code.[58] The bankruptcy court found that the issue on which the plaintiffs sought declaratory relief did not serve to enforce any specific provision of the Bankruptcy Code.[59] In the present matter, as clearly set forth in the Complaint, Sparebank seeks a declaratory judgment in furtherance of and to enforce Bankruptcy Code sections 365(e)(1) and 541.

31. In the *In re Enron Corporation* case, the bankruptcy court recognized that the Declaratory Judgment Act is designed to enable parties to determine their rights before the accrual of damages and thus allow parties to avoid engaging in conduct that will result in liability.[60] The plaintiffs, however, had already engaged in the actions for which liability could

---

[56] *Id.* at 621.

[57] *IPDN Corp. v Hsiao-Shih Chang* (*In re IPDN Corp.*), 352 B.R. 870, 875-76 (Bankr. E.D. Mo. 2006).

[58] *Mirant Corp. v. Morgantown OL$_1$ LLC* (*In re Mirant Corp.*), 327 B.R. 262, 268 (Bankr. N.D. Tex. 2005).

[59] *Id.* at 269.

[60] *Enron Corp. v. Official Employment-Related Issues Committee* (*In re Enron Corp.*), 297 B.R. 382, 386 (Bankr. S.D.N.Y. 2003).

result—they received bonuses that a statutory committee had the authority to investigate as avoidable until the expiration of the related bar date.[61] The bankruptcy court viewed the plaintiffs' request for declaratory relief as an assertion of general, unsubstantiated allegations regarding the difficulties imposed by the uncertainty of a potential lawsuit and without any time-sensitivity.[62] In the present matter, by the Complaint, Sparebank provides (i) Ironshore an opportunity to avoid additional liability for breach of its contractual duties and (ii) the Debtor Defendants the ability to avoid indemnification obligations. Furthermore, with respect to a ruling on the issues set forth in the Complaint, time is of the essence as the Debtors' bankruptcy cases cannot proceed without a decision regarding their indemnification liability under the Leases—Sparebank's claim against the Debtors must be liquidated in order to determine voting rights under a proposed chapter 11 plan and the amount of the related distribution to which Sparebank is entitled.

32. In the *In re Rickel & Associates, Inc.* case, the plaintiffs brought a declaratory judgment action and a direct action involving the same issues and evidence.[63] The bankruptcy court found that a decision on the direct claims would render the request for declaratory judgment moot and, accordingly, declined to entertain the plaintiffs' request for declaratory relief.[64] In the present matter, no related direct action is pending before this Court or any other court. Therefore, the basis for declining to rule on the declaratory judgment action set forth in the *In re Rickel & Associates, Inc.* case does not exist here.

---

[61] *Id.* at 387.

[62] *Id.* at 388-89.

[63] *Rickel & Assocs., Inc. v. Greg Smith* (*In re Rickel & Assocs., Inc.*), 274 B.R. 74, 99 (Bankr. S.D.N.Y. 2002).

[64] *Id.*

33. In the *In re Busy Beaver Building Centers, Inc.* case, the adversary proceeding raised the issue of "whether the court may decide by way of complaint for declaratory judgment the applicable statute of limitations on a prospective, unfiled fraudulent conveyance action."[65] The bankruptcy court focused on the existence (or lack of existence) of an actual controversy.[66] The bankruptcy court emphasized that the statute of limitations serves as an affirmative defense and the difficulty of, in advance of actual litigation, ruling on the validity of a particular defense.[67] Accordingly, the bankruptcy court denied the request for declaratory relief, finding that the declaration sought would not minimize the expense to the estate, end the investigation, or conclusively determine the rights by and between the parties.[68] In contrast, Sparebank has not used the Complaint as an opportunity to raise defenses but to parse out the affirmative legal obligations of the Defendants. Additionally, resolution of the issues in the Complaint will minimize the expense to the Debtors' estates by (i) defining the relationship between the Parties, (ii) allocating responsibility for the underlying obligation to pay Sparebank amounts owed, and (iii) eliminating a necessary obstacle to the Debtors' ability to propose and confirm a chapter 11 plan.

2. The Five Factors Courts Use to Determine Whether to Entertain a Declaratory Judgment Action Weigh in Favor of Considering the Present Matter

34. Courts have recognized five factors that guide their determination of whether to entertain a declaratory judgment action:

> (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved;

[65] *Maryland Nat'l Bank v. Busy Beaver Bldg. Ctrs., Inc.* (*In re Busy Beaver Bldg. Ctrs., Inc.*), 127 B.R. 343 (Bankr. W.D. Pa. 1991).

[66] *Id.* at 344.

[67] *Id.* at 345.

[68] *Id.* at 354-46.

(2) whether a judgment would finalize the controversy and offer relief from uncertainty;

(3) whether the proposed remedy is being used merely for procedural fencing or a race to res judicata;

(4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or encroach on the domain of a state or foreign court; and

(5) whether there is a better or more effective remedy.[69]

Consideration of these five factors weighs in favor of the Court entertaining this adversary proceeding.

35. First, as set forth in greater detail above, the judgement will clarify the obligations of each of the Parties with respect to the RVI Policies and the Leases. These obligations must be clarified in order for the Debtors' bankruptcy cases to move forward. In the Motion to Dismiss,[70] Ironshore summarily concludes that the plain language of the section 365(e)(1) establishes that the statute does not apply to third parties and in so concluding, neglects to consider the case law to the contrary.

36. Second, contrary to Ironshore's assertion in the Motion to Dismiss,[71] the judgment will finalize the controversy with respect to the Debtors' indemnification obligations as a result of the commencement of their chapter 11 cases and serves as the first and necessary steps for establishing the relationship of the Debtors to the RVI Policies and the Debtor Defendants' related obligations.

37. Third, the proposed remedy does not serve the purpose of procedural fencing or a race to res judicata. Sparebank's rights as a creditor in these bankruptcy cases and the Debtors' ability to proceed towards plan proposal and confirmation requires the resolution of the issues

[69] *See, e.g., In re Old Carco LLC*, 530 B.R. 614, 620 (Bankr. S.D.N.Y. 2016).

[70] Mot. Dismiss [Docket No. 9] ¶ 45.

[71] Mot. Dismiss [Docket No. 9] ¶ 45.

presented by the adversary proceeding. Relatedly, given the time sensitivities associated with the bankruptcy cases, no more effective or better remedy exists. No related action on these issues is pending in any other court. As set forth in greater detail above, the Debtor Defendants are key parties to the RVI Policies and the Leases and the resolution of the related issues requires their participation. The unavoidable urgencies associated with bankruptcy cases and Sparebank's right to protect itself require a decision on these issues by this Court and in an expedited fashion.

G. Promotion of Fundamental Bankruptcy Goals Trumps the Arbitration Provisions.

38. Case law establishes that the goals of the Bankruptcy Code can override arbitration provisions like those in the RVI Policies.[72] The Fifth Circuit has announced broad principles underlying the Bankruptcy Code: "centralized resolution of purely bankruptcy issues," and "the need to protect creditors and reorganizing debtors from piecemeal litigation"[73] By deciding the issues in the Complaint, this Court would further the goals of the Bankruptcy Code. First, outside of the bankruptcy context, sections 365(e)(1) and 541 do not exist. The interpretation and application of those provisions, however, is key to the resolution of the issues set forth in the Complaint and thus pure bankruptcy issues. Additionally, commencing an arbitration proceeding in London on these issues would set off an extremely long and costly process for the Debtors, the Debtors' creditors, and Sparebank. Issues imperative to the Debtors' cases would be decided in a piecemeal fashion and such would prevent Sparebank from enforcing its rights against the Debtors and the Debtors from proceeding with their

[72] *See, e.g. Gandy v. Gandy* (*In re Gandy*), 299 F.3d 489, 495 (5th Cir. 2002); *Insurance Co. of N. America v. NGC Settlement Trust & Asbestos Mgmt. Corp.* (*In re Nat'l Gypsum Co.*), 118 F.3d 1056, 1069 (5th Cir. 1997); *In re Chorus Data Sys.*, 122 B.R. 845, 851 (Bankr. D.N.H. 1990).

[73] *In re Nat'l Gypsum Co.*, 118 F.3d at 1069.

bankruptcy cases. Accordingly, in this instance, promotion of the fundamental goals of the Bankruptcy Code renders arbitration in London inappropriate.

IV. CONCLUSION

39. As set forth herein, the Motion to Dismiss should be denied. First, despite Ironshore's assertion to the contrary, case law shows that non-debtor parties can use section 365(e)(1) to invalidate *ipso facto* provisions. Second, Ironshore's attempt to redefine the term "modify" in section 365(e)(1) proves unavailing. Modify has the same meaning regardless of the identity of the party asserting a contract modification and resulting violation of section 365(e)(1). Third, the case law on letters of credit that Ironshore relies on in the Motion to Dismiss fails to shed light on the outcome of this adversary proceeding because courts employ different standards in letter of credit cases and in cases interpreting the application of section 365(e)(1). Fourth, Ironshore's arguments in the Motion to Dismiss fail to grasp the ultimate issue: if Ironshore does not pay Sparebank then the Debtor Defendants are required to pay. This fact clearly impacts the Debtors and their estates and illuminates the immediacy with which these issues need to be decided. Fifth, in the Motion to Dismiss, Ironshore's emphasis on policy ownership as compared to proceeds ownership is a distraction from the actual issues in dispute. Sparebank does not argue that the Debtors own the proceeds because case law establishes that Sparebank owns the proceeds. Finally, given the tangible impact of the issues presented by the Complaint on the Debtors' estates, Ironshore's advocacy for delay by moving this matter to a non-existent foreign arbitration proceeding is inappropriate. Accordingly, the Motion should be denied.

WHEREFORE, PREMISES CONSIDERED the Plaintiffs respectfully request that the Motion to Dismiss be denied in its entirety and that the Plaintiffs be granted such other relief as is just.

Dated: November 2, 2016

Respectfully submitted,

JACKSON WALKER LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6000 – Main Telephone
(214) 953-6647 – Main Facsimile
www.jw.com

By: */s/ Monica S. Blacker*
Monica S. Blacker
State Bar No. 00796534
(214) 953-5824 – Direct Phone
(214) 661-6647 – Direct Fax
Email address: mblacker@jw.com

Matthew D. Cavenaugh
State Bar No. 24062656
(713) 752-4200 – Direct Phone
(713) 752-4221 – Direct Fax
Email address: mcavenaugh@jw.com

ATTORNEYS FOR SPAREBANK 1 SR-FINANS AS and SPAREBANKEN FINANS NORD-NORGE AS

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 2016, a true and correct copy of the foregoing has been served electronically, via United States mail, postage prepaid, or via facsimile to the following:

Stephen A. Youngman
Weil Gotschal & Manges LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201-6950
stephen.youngman@weil.com

Gary T. Holtzer
Kelli DiBlasi
Weil Gotschal & Manges LLP
767 Fifth Avenue
New York, New York 10153-0119
gary.holtzer@weil.com
kelly.diblasi@weil.com

Jasmine Ball
Richard F. Hahn
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
jball@debevoise.com
rfhahn@debevoise.com

Joseph M. Coleman
Jason B. Binford
Kane Russell Coleman & Logan PC
1601 Elm Street
Dallas, Texas 75201
jcoleman@krcl.com
jbinford@krcl.com

/s/ Monica S. Blacker
Monica S. Blacker