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ATTORNEYS FOR IRONSHORE SPECIALTY INSURANCE COMPANY

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

IN RE:	§	
	§	**CASE NO. 16-31854-BJH-11**
CHC GROUP, LTD., *ET AL.*,	§	
	§	**CHAPTER 11**
DEBTORS.	§	**JOINTLY ADMINISTERED**
	§	

SPAREBANK 1 SR-FINANS AS & SPAREBANKEN FINANS NORD-NORGE AS,	§	
PLAINTIFFS,	§	
v.	§	**Adversary No. 16-03121-BJH**
DEBTOR HELI-ONE LEASING (NORWAY) AS, CHC HELICOPTER S.A. AND IRONSHORE SPECIALTY INSURANCE COMPANY	§	
DEFENDANTS.	§	

IRONSHORE SPECIALTY INSURANCE COMPANY'S BRIEF IN REPLY TO SPAREBANK 1 SR-FINANS AS'S AND SPAREBANK 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

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

Ironshore Specialty Insurance Company (the "Ironshore") files this brief (the "Reply Brief") in reply to the Response Brief (as defined below) filed by Sparebank 1 SR-Finans AS and Sparebanken Finans Nord-Norge AS (collectively, "Sparebank"), and respectfully states as follows:

I. SUPPLEMENTAL FACTS

1. On September 15, 2016, Ironshore filed its "Motion to Dismiss Brief" [Doc. No. 9].[1] On September 26, 2016, the Debtors filed their "Joinder" [Doc. No. 12].

2. On November 2, 2016, Sparebank filed its "Response Brief" [Doc. No. 16].[2]

3. By the Response Brief, Sparebank argues, in summary, that its Complaint should not be dismissed for the following reasons: (i) Bankruptcy Code section 365(e)(1) applies to non-debtor Ironshore because of the importance of this adversary proceeding to the Debtors' bankruptcy case; (ii) Ownership of the RVI Policy proceeds is irrelevant; and (iii) the Declaratory Judgment Act supports the relief sought by Sparebank, and the RVI Policy arbitration provisions should not be enforced, because of the fundamental goals of bankruptcy at issue in this matter.

4. Ironshore replies to each of these points as follows.

II. REPLY

A. Bankruptcy Code Section 365(e)(1) Does Not Apply and Sparebank Has Failed to Show Otherwise

[1] Capitalized terms not otherwise defined in this Reply Brief have the meanings ascribed to them in the Motion to Dismiss Brief.

[2] Also on November 2, 2016 Sparebank filed a response brief to the Motion to Abstain. Contemporaneously with the filing of this Reply Brief, Ironshore has filed a separate brief in reply to Sparebank's Motion to Abstain response brief.

(1) Any Relationship Between This Adversary Proceeding and the Debtors' Bankruptcy Cases is Remote and Tenuous

5. Each of the arguments asserted by Sparebank are based in varying degrees on Sparebank's assertion that resolving the RVI Policy dispute between non-debtors Sparebank and Ironshore is somehow critical to the Debtors' bankruptcy cases.[3] Sparebank argues that section 365(e)(1) should apply to the RVI Policy, notwithstanding the fact that the Debtors are not a party to the RVI policy, because the Debtors and Sparebank are "integral parties" who are "entangled in the related transactions." That is not what the statute says. As set forth in the Motion to Dismiss Brief, the plain language of section 365(e)(1) states that it applies to executory contracts or leases "of the debtor."[4]

6. The statute is designed to protect a debtor yet the Debtors, represented by sophisticated Chapter 11 counsel, argue that this Court lacks subject matter jurisdiction over the dispute and join the dismissal or abstention relief sought by Ironshore.[5] If it truly were the case that resolving this matter is necessary for the Chapter 11 case to move forward, and for the

[3] *See, e.g.* Response Brief at ¶ 1 ("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."); ¶ 8 (resolving the dispute is necessary to "ensuring the Debtors' bankruptcy cases press forward."); ¶ 17 (the alleged (and unproven) indemnification liability would have a "net negative effect" on the Debtors' bankruptcy estates); ¶ 26 (resolving this dispute is important so "that the Debtors' bankruptcy cases can proceed"); ¶ 31 ("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 distribution to which Sparebank is entitled."); ¶ 33 (resolution will "minimize the expense to the Debtors' estates"); ¶ 35 ("obligations must be clarified in order for the Debtors' bankruptcy cases to move forward"); ¶ 37 ("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 presented by the adversary proceeding.").

[4] Motion to Dismiss Brief at ¶ 27; *see also id.* at ¶ 23 ("The proper place to begin any analysis of the applicability of a statute is the language of the statute itself." (citing *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

[5] Joinder at ¶ 3 ("Certainly here, where the Debtors are not a party to the RVI Policies, the Court should enforce the forum selection clause in the RVI Policies and the Complaint should be dismissed due to a lack of jurisdiction.").

Debtors to propose and confirm a plan, as Sparebank contends, then the Debtors would make that argument. To the contrary, the Debtors have joined in the dismissal sought by Ironshore. The Debtors' position in this adversary proceeding is yet further evidence that Sparebank is self-servingly hiding behind the Debtors' bankruptcy in an effort to avoid contractual obligations between two non-debtors. Furthermore, the Debtors' position demonstrates how many steps removed this matter is from the true purpose of section 365(e)(1). A non-debtor party is seeking the protection of section 365(e)(1) regarding leases the Debtors have rejected despite the fact that the plain language of the statute applies only to contracts of the Debtors and over the objection of the Debtors who seek no such protection from a dispute between two non-debtor parties and who do not support Sparebank's attempt to benefit from such protection.

7. In addition, even if the Debtors had not joined in Ironshore's relief, the undisputed facts of the case show that the entry of a declaratory judgment on the applicability of section 365(e)(1) would not resolve the dispute between Ironshore and Sparebank. Rather, such a determination would merely be the very first step in litigation that would then move forward on the merits of whether the RVI Policy is otherwise enforceable. As noted in Ironshore's Motion to Dismiss Brief, Sparebank in its Complaint has acknowledged that "Ironshore sent multiple correspondence to Sparebank . . . indicating that it was no longer liable under the RVI Policies because of, *among other reasons*, the insolvency of CHC . . . ."[6] Therefore, if the Court were to move forward on a declaratory judgment determination, such a determination would at best be the proverbial tip of the iceberg, not substantively resolving anything between Ironshore and Sparebank. The Court would necessarily move forward on making determinations on a wide

[6] Complaint at ¶ 14 (emphasis added); see also Motion to Dismiss Brief at ¶ 15 (quoting the Complaint) and ¶ 45 ("the Court need not review additional facts to entertain the prospect that the parties may raise issues other than Clause 6.3 regarding the enforceability of the RVI Policies.").

variety of additional issues, to be determined under English law,[7] involving two non-debtor parties under a non-debtor agreement. Given these facts, it is difficult to understand how Sparebank can realistically characterize any declaratory judgment entered in this adversary proceeding as a method for resolving an issue of any importance to the Debtors, much less timely resolving such an issue.

(2) Case Law Cited in the Motion to Dismiss Brief Supports Ironshore's 365(e)(1) Argument

8. Sparebank also attempts to distinguish the case law cited by Ironshore in its Motion to Dismiss Brief. Ironshore does not believe that it is necessary to catalogue and counter Sparebank's analysis of each case. Ironshore rests on the case law cited in the Motion to Dismiss Brief as applicable and persuasive for the various points in favor of dismissing this adversary proceeding. That said, Ironshore will briefly address a handful of the most glaring mischaracterizations of applicable case law in Sparebank's Response Brief.

9. As set forth in Ironshore's Motion to Dismiss Brief, Judge Chapman in *Lehman II*[8] made a number of findings supporting Ironshore's position that Judge Peck's decision in *Lehman I* is inapplicable to the facts of this adversary proceeding.[9] In response, Sparebank asserts that Ironshore's allegations are "not accurate" with respect to whether Judge Chapman

[7] *See* RVI Policies at section 16(a).

[8] The *Lehman II* decision is cited in the Motion to Dismiss Brief at 2016 WL 3621180. The decision has since been assigned to the Bankruptcy Reporter at 553 B.R. 476.

[9] Motion to Dismiss Brief at ¶ 30 ("In *Lehman II*, Judge Chapman noted that: (i) the portion of Judge Peck's opinion discussing section 365(c)(1) and third parties is dicta; (ii) the referenced sub-section at 365(c)(1)(B) merely refers to what renders a provision to be an ipso facto provision, rather than governing the overall applicability of the statute; and (iii) Judge Peck himself in the 2010 decision recognized that the case was decided on the basis of complicated derivatives during the height of a uniquely serious financial crisis and that even Judge Peck has refused to extend the reasoning in subsequent cases.").

rejected the *Lehman I* decision[10] and with respect to whether the relevant section 365(e)(1) determinations in *Lehman I* were dicta.[11] It is important to recall, however, that it was Sparebank that initially relied upon *Lehman I* by quoting the case in the Complaint. Ironshore acknowledges that *Lehman I* deals in large part on the timing of debtor filings and that such timing issues are not present in this adversary proceeding. It would follow, therefore, that *Lehman I* does not apply to this matter at all. However, Sparebank wants it both ways by arguing that (i) Judge Chapman was referring to irrelevant timing issues, but that (ii) *Lehman I* (dealing primarily with such irrelevant timing issues) remains persuasive for Sparebank's section 365(e)(1) arguments. The *Lehman I* opinion isn't relevant to this case, was rejected by Judge Chapman in *Lehman II* and the plain text of Judge Chapman's *Lehman II* decision cautions against relying on the *Lehman I* opinion, due to the "genuine emergency" occurring in the national economy when *Lehman I* was decided.[12]

10. Sparebank goes on to attack the *Liberty Mutual* case on equally specious grounds. As Ironshore set forth in the Motion to Dismiss Brief, the *Liberty Mutual* decision provides critical guidance to this Court because it is a circuit-level decision discussing whether section

[10] Response Brief at ¶ 14.

[11] *Id.* at ¶ 15.

[12] *In re Lehman Bros. Holdings, Inc.*, 553 B.R. 476, 497 (Bankr. S.D.N.Y. 2016); *see also id.* at 498 (noting that "Judge Peck himself" later declined to extend the "controversial" *Lehman I* holding for the same reasons). Ironshore further notes that the *Lehman II* decision (which has been generally ignored by Sparebank) supports Ironshore's argument that enforcing an agreement by its terms is not a "modification" of the agreement. See In re Lehman Brothers Holdings, Inc., 553 B.R. 476, 495 (Bankr. S.D.N.Y. 2016) (holding that the "Type 2 Transactions" at issue did not violate section 365(e)(1) in part because the "enforcement of the Priority Provisions in Type 2 Transactions did not modify [the applicable] rights" (emphasis added)). In further response to Sparebank's arguments on this point (see Response Brief at ¶¶ 18-19), Ironshore once again points to the text of section 365(e)(1) which addresses the termination or modification of an agreement. In this matter Ironshore has not sought to terminate or modify the RVI Policy.

365(e)(1) applies to third parties.[13] Sparebank asserts that *Liberty Mutual* does not apply to this case because the indemnification rights at issue would "likely" have no net negative effect on the estate in that case.[14] That is allegedly in contrast to this adversary proceeding where Sparebank states that "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 estate."[15]

11. However, *Liberty Mutual* did not turn on the issue of the ultimate effect on the estate. In fact, the court began the analysis where it should begin: the language of the statute.[16] The court pointed out that section 365(e)(1)

> says that what may not be terminated or modified by bankruptcy is 'an executory contract or unexpired lease *of the debtor*' or 'any right or obligation under such contract or lease.' This is strong linguistic evidence that Congress was concerned with clauses diluting the bankrupt's interests – not interests of a third party.[17]

Moreover, Ironshore cites in its Motion to Dismiss Brief several cases making clear that an unproven indemnification right is not sufficient to properly place a non-debtor dispute before a bankruptcy court.[18] An example is the *In re Schwinn Bicycle* case where the court rightfully points out that mere allegations of indemnification rights do not somehow convert a non-debtor

[13] *See* Motion to Dismiss Brief at ¶ 32 (noting the "surprising paucity of precedent" from other courts on this topic).

[14] Response Brief at ¶ 17 (quoting *Liberty Mutual Ins. Co. v. Greenwich Ins. Co.*, 417 F.3d 193, 199 (1st Cir. 2005)).

[15] *Id.*

[16] *Liberty Mutual*, 417 F.3d at 198 ("We being with statutory language, as is normally proper.").

[17] *Id.* (underlined emphasis added).

[18] *See, e.g.*, Motion to Dismiss Brief at ¶ 35 and footnote 39 (citing case law demonstrating that bankruptcy courts have "refused to enjoin a payment of letters of credit by the issuer, even where the payment may directly result in a corresponding claim against the bankruptcy estate or create a secured obligation where only an unsecured obligation previously existed.").

dispute into a debtor dispute.[19] In addition to the applicability of the cases cited by Ironshore in its Motion to Dismiss Brief which deal with letters of credit, the issue is even clearer with respect to section 365(e)(1) which provides statutory language instructing that section 365(e)(1) is designed to address contracts "of the debtor", not contracts which may remotely someday have some indirect impact on the debtor.

(3) Additional Recent Case Law Supports Ironshore's 365(e)(1) Argument

12. In addition to the case law cited by Ironshore in its Motion to Dismiss Brief, a recent case decided by the Bankruptcy Court for the Western District of Pennsylvania supports Ironshore's dismissal arguments. In *In re Pompelia*, 2016 WL 6246578 (Bankr. W.D. Pa. Oct. 25, 2016), the court considered an adversary proceeding brought by insurer Casualty Insurance Guaranty Association (the "Insurer") against defendants Larry Pompelia and Brendan Pompelia (the "Pompelias") and the company they controlled, BLP, LLC ("BLP"). BLP operated a bar and BLP and the Pompelias were sued in state court by the estates of minor individuals (the "State Court Plaintiffs") who were served alcohol and then died in a car accident. BLP and the Pompelias were insured under a policy (the "Policy") issued by the Insurer. The Pompelias filed bankruptcy and the State Court Plaintiffs later obtained stay relief to move forward.

13. The Insurer's adversary proceeding sought a declaratory judgment that the Insurer was not liable under the Policy because of a liquor liability exclusion. The Pompelias sought dismissal of the adversary proceeding on the grounds that the bankruptcy court lacked subject matter jurisdiction because the adversary proceeding could have no conceivable effect on the Pompelias' bankruptcy estate. The Insurer responded that the estate was implicated because (i) the Policy belonged to the estate and (ii) "in the event the Policy coverage is limited in this

[19] *Id.* at ¶ 38 (citing *In re Schwinn Bicycle Co.*, 210 B.R. 747, 756 (Bankr. N.D. Ill. 1997)).

action, the estate's ability to satisfy the claims of creditors will be greatly affected, particularly the claims of [the State Court Plaintiffs]."[20]

14. The court addressed both of the Insurer's arguments directly.[21] As to the potential effect on the estate relating to the Insured's failure to pay under the Policy, the court stated:

> [The Insured's] argument is premised on the occurrence of two events: that the State Court enter judgment in favor of the [State Court Plaintiffs] against the Pompelias and that [the Insured] prevails in its declaratory judgment action in this Court. The second argument further presumes that, after the above two contingent events occur, the [State Court Plaintiffs] will seek recovery from the Pompelias and such action will greatly affect the bankruptcy estate. That this adversary proceeding may affect the bankruptcy estate at some point in the future only where two interceding events occur is not sufficient to have a conceivable effect on the bankruptcy estate. This connection to the bankruptcy estate is simply too tenuous to constitute related-to jurisdiction and the adversary proceeding must be dismissed.[22]

15. In this adversary proceeding, Sparebank has argued that it somehow differs from other parties with asserted (but as yet unproven) indemnification rights because "the Debtor Defendants' indemnification obligations are not tenuous but derive directly from a specific and precise provision in each of the Leases . . . ."[23] However, in the *Pompelia* , *Schwinn*, and other cases cited by Ironshore, the indemnification obligations were set forth in written agreements. What made the matter tenuous was that actually obtaining relief under those written agreements was at least several litigation steps away. That is precisely the situation in this adversary proceeding and is why this Court should not expand section 365(e)(1) beyond its plain language.

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[20] *In re Pompelia*, 2016 WL 6246578, at *3 (Bankr. W.D. Pa. Oct. 25, 2016).

[21] The policy vs. proceeds issue is discussed below.

[22] *Pompelia*, 2016 WL 6246578, at *3 (emphasis added).

[23] Response Brief at ¶ 23 (discussing the *Schwinn* case).

B. Sparebank's Insurance Policy vs. Proceeds Arguments Miss the Property of the Estate Point

16. In its Complaint Sparebank contended that the Debtors' interests in the RVI Policies constitute property of the estate. In its Reply Brief, Sparebank now asserts that the RVI Policy proceeds belong to Sparebank because Sparebank, rather than the Debtors, has the ownership interest in such proceeds.[24] Ironshore completely agrees that the Debtors lack an ownership interest in the RVI Policies or its proceeds.[25] Consequently neither the RVI Policies nor their proceeds constitute property of the estate, as required by the Fifth Circuit in *Louisiana World*.

17. Among the declaratory judgments sought by Sparebank is a determination that the RVI Policies "are interests of the Debtors in their bankruptcy cases."[26] That, presumably, according to Sparebank, would then bring disputes relating to the RVI Policies within the purview of this Court. The Debtors are not parties to the RVI Policies so RVI Policies cannot be property of the estate.[27] However, even assuming that the RVI Policies are property of the estate, that "does not end the inquiry."[28] *Louisiana World* instructs that the Court should thereafter conduct an analysis of whether the proceeds of an insurance policy are property of the estate. Sparebank has acknowledged that the proceeds do not belong to the Debtors. Neither the

[24] Response Brief at ¶ 24.

[25] Motion to Dismiss Brief at ¶ 42.

[26] Complaint at p. 11.

[27] Motion to Dismiss Brief at ¶ 40 ("If, as here, the debtor is not even a party to the policy, the property of the estate analysis ends.").

[28] *In re La. World Exposition, Inc.*, 832 F.2d 1391, 1399 (5th Cir. 1997).

Policies nor their proceeds are property of the Debtors' estates which means that the dispute between Ironshore and Sparebank should be settled in another forum.

C. There Are No Fundamental Bankruptcy Issues or Goals At Stake in This Matter

18. Sparebank's response to Ironshore's argument that the Declaratory Judgment Act does not apply essentially comes down to Sparebank's assertion that this adversary proceeding is critical to the Debtors' bankruptcy cases.[29] In addition to being flat wrong, Sparebank's requests require this Court to ignore the arbitration provision in the RVI Policy for essentially the same reason.[30]

19. Ironshore substantively discussed these issues above, but they bear repeating and summarizing in response to these arguments as well. The Debtors are more than capable of handling their bankruptcy case and they join Ironshore in seeking dismissal of this matter. The unproven indemnification obligations of the Debtors do not create a sufficient "impact" on the Debtors' case to properly bring this non-debtor dispute before this Court. Furthermore, a declaratory judgment completely in favor of Sparebank in this matter would finally resolve nothing. The parties would simply move forward with the other substantive issues under the RVI Policies that Sparebank acknowledges exist. For these reasons, and the reasons set forth in the Motion to Dismiss Brief, this Court should dismiss the adversary proceeding and permit the parties to arbitrate this English law matter in London, as per their contractual agreement.

WHEREFORE Ironshore respectfully requests the Court to grant the Motion to Dismiss and grant such other and further relief to which Ironshore may be justly entitled.

[29] *See, e.g.*, Response Brief at ¶ 26 (discussing the "importance of resolving these issues in a timely fashion such that the Debtors' bankruptcy cases can proceed" and "the impact of these issues on the Debtors' estates in connection with the Debtor Defendants' indemnification obligations.").

[30] *Id.* at ¶ 38 ("By deciding the issues in the Complaint, this Court would further goals of the Bankruptcy Code.").

Dated: December 12, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that service of the foregoing document was served through Electronic Notice for Registered Participants and, unless an alternative means of service is set forth below, has been sent to all other parties listed below by e-mail and by United States Mail, first class postage prepaid, on the 12th day of December, 2016.

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