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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 SUPPORT OF MOTION TO DISMISS ADVERSARY COMPLAINT



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

Ironshore Specialty Insurance Company (the "Ironshore") files this brief (the "Brief") in support of Ironshore's Motion to Dismiss Adversary Proceeding (the "Motion to Dismiss"), and respectfully states as follows:

I. RELIEF REQUESTED

1. In its Complaint,[1] Sparebank seeks to use Bankruptcy Code section 365(e)(1) to prevent Ironshore from enforcing its rights under certain insurance agreements (the "RVI Policies") between Sparebank and Ironshore. Neither Sparebank nor Ironshore is a debtor in the subject bankruptcy case. The relevant facts, as set forth in the Complaint and the exhibits thereto[2] and as described in the Procedural Background section below, are not in dispute. Importantly, for example, the parties do not dispute that the Debtors are not parties to the RVI Policies that serve as the foundation for Sparebank's Complaint.

2. By the Motion to Dismiss, Ironshore seeks an order of the Bankruptcy Court, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Bankruptcy Rule 7012, dismissing Sparebank's Complaint on the basis that, even assuming all facts as alleged by Sparebank in its Complaint are true and correct, Sparebank has failed to state a claim against Ironshore. Stated as succinctly as possible: section 365(e)(1) only applies to contracts of the Debtors, not to a contract between Ironshore and Sparebank.

[1] Capitalized terms in this introductory section have the meanings ascribed to them in the Procedural Background section below.

[2] *See e.g. U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 375 (5th Cir. 2004) (stating that in a Rule 12(b)(6) motion to dismiss courts are to consider the complaint and any exhibits attached to it).

II. PROCEDURAL BACKGROUND

A. The Bankruptcy Case

3. On May 5, 2016 (the "Petition Date"), CHC Group Ltd. and its affiliated debtors (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the U.S. Code (the "Bankruptcy Code"). On May 6, 2016, the Court entered an order providing for the joint administration of the Debtors' bankruptcy cases (the "Bankruptcy Case").

4. On May 13, 2016, the U.S. Trustee appointed an official committee of unsecured creditors in the Bankruptcy Case. The Debtors continue to operate the business as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. No trustee or examiner has been appointed.

B. The Motions to Reject and Orders Granting Same

5. On the Petition Date, the Debtors filed their *First Omnibus Motion for Entry of an Order Authorizing the Debtors to Reject Certain Equipment Leases and Subleases Pursuant to Section 365 of the Bankruptcy Code* [Doc. No. 20] (the "First Motion to Reject").

6. By the First Motion to Reject, the Debtors sought to reject a number of leases and executory contracts, including a helicopter lease (the "2594 Lease") between debtor Heli-One Leasing (Norway) AS ("Heli-One") and Sparebank 1 SR-Finans AS ("Sparebank 1").[3] The First Motion to Reject sought to reject the 2594 Lease as of the Petition Date.

7. In support of the First Motion to Reject, the Debtors filed a declaration of Michael B. Cox ("Cox"), the Vice Chairman of Seabury Advisory Group and the Global Head of Seabury's Corporate Advisory Services [Doc. No. 21] (the "First Declaration"). According to the

[3] The 2594 Lease was identified on Schedule 1 to the First Motion to Reject with the helicopter serial number cited as 2594 and the engine serial numbers cited as 3077 and 3180. Schedule 1 further identified the location of the related helicopter and engines as a Norway facility belonging to debtor CHC Helikopter Service AS.

First Declaration, the Debtors were seeking to reject the leases in the First Motion to Reject because the leased equipment was not necessary to the Debtors' continued operations or successful reorganization.

8. On May 27, 2016, the Debtors filed their Second Omnibus Motion for Entry of an Order Authorizing the Debtors to Reject Certain Equipment Leases and Subleases Pursuant to Section 365 of the Bankruptcy Code [Doc. No. 210] (the "Second Motion to Reject"). By the Second Motion to Reject, the Debtors sought to reject additional leases and executory contracts, including the following helicopter leases: (i) a lease (the "2716 Lease") between Heli-One and Sparebank 1; (ii) a lease (the "2692 Lease") between Heli-One and Sparebank 1; and (iii) a lease (the "2907 Lease") between Heli-One and Sparebanken Finans Nord-Norge AS ("Sparebanken Finans").[4] The Second Motion to Reject sought to reject the 2716 Lease, the 2692 Lease, and the 2907 Lease each as of June 7, 2016. The 2594 Lease, the 2692 Lease, and the 2907 Lease shall be collectively referred to herein as the "Leases."[5]

9. On May 27, 2016, Cox filed a declaration [Doc. No. 211] (the "Second Declaration") in support of the Second Motion to Reject. Once again, according to the Second Declaration, the Debtors were seeking to reject the leases in the Second Motion to Reject because the leased equipment was not necessary to the Debtors' continued operations or successful reorganization.

[4] The 2716 Lease was identified on Schedule 1 to the Second Motion to Reject with helicopter serial number cited as 2716 and engine serial numbers cited as 1023 and 13002. The 2692 Lease was identified on Schedule 1 to the Motion to Reject with helicopter serial number cited as 2692 and engine serial numbers cited as 1029 and 1009. The 2907 Lease was identified on Schedule 1 to the Second Motion to Reject with helicopter serial number cited as 2907 and engine serial numbers cited as 13305 and 13103. Schedule 1 further identified the location of each of the related helicopters and engines as a Norway facility belonging to debtor CHC Helikopter Service AS.

[5] Lease 2716 is not included in the definition of Leases because it is not the subject of Sparebank's Complaint (as defined below).

10. On June 20, 2016, Sparebank 1 and Sparebanken Finans (collectively, "Sparebank") filed a limited objection [Doc. No. 379] (the "Objection") to the First Motion to Reject and the Second Motion to Reject. By the Objection, Sparebank did not oppose rejection of the Leases, but sought, *inter alia,* to amend the requested effective date of the rejection and otherwise reserve certain rights related to the lease rejections.

11. On June 24, 2016, the Debtors filed an omnibus reply [Doc. No. 395] (the "Reply") to the objections filed by various parties to the First Motion to Reject and the Second Motion to Reject. The Reply did not specifically address the reservation of rights matters in Sparebank's Objection.

12. On June 30, 2016, the Court entered orders granting the First Motion to Reject [Doc. No. 428] (the "First Motion to Reject Order") and the Second Motion to Reject [Doc. No. 427] (the "Second Motion to Reject Order," collectively, the "Rejection Orders"). As to Sparebank, the Rejection Orders reserved Sparebank's alleged rights "against the Debtors and third-party non-Debtors with respect to any claims, determination of validity and liability related to any residual value insurance policies related to"[6] the equipment underlying the Leases. Further, the Rejection Orders rejected the 2594 Lease as of June 30, 2016 and rejected the 2716 Lease, the 2692 Lease, and the 2907 Lease as of June 27, 2016.

C. The Sparebank Adversary Proceeding

13. On August 17, 2016, Sparebank initiated the instant adversary proceeding by filing a complaint (the "Complaint") against debtors Heli-One and CHC Helicopter S.A. ("CHC"), as well as Ironshore.

[6] Rejection Orders at ¶ 19.

14. The Adversary Proceeding refers to Residual Value Insurance Policies (the "RVI Policies") between Sparebank and Ironshore related to the equipment underlying Lease 2594, Lease 2907, and Lease 2692. According to Sparebank, the RVI Policies "insured the residual value of the helicopters and related equipment."[7] Further, according to Sparebank, each of the Leases (**not the RVI Policies**) "contain[s] an RVI Indemnity clause that provides that the Lessee [certain Debtors] shall agree to pay the Lessor [Sparebank] in the event the residual value insurer does not pay under the RVI Policy."[8]

15. Sparebank further alleges 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…."[9] Sparebank is correct in that Ironshore adamantly asserts, for several reasons, that it does not owe Sparebank any amounts pursuant to the terms of the RVI Policies between Sparebank and Ironshore. In its Complaint, Sparebank contends that Ironshore's refusal to pay under the RVI Polices is due to, among other things, Ironshore's reliance upon Clause 6.3 of the RVI Policy, which according to Sparebank constitutes an *ipso facto* clause.[10] Sparebank concludes that Ironshore's refusal to pay Sparebank, therefore, runs afoul of Bankruptcy Code section 365(e)(1).[11] Sparebank makes this argument despite the fact that the operative agreements, the RVI Policies, are solely between two non-debtors, Sparebank and Ironshore.

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[7] Complaint at ¶ 12.

[8] *Id.* ¶ 13.

[9] *Id.* ¶ 14 (emphasis added).

[10] *Id.*

[11] *Id.*

16. Sparebank attached, among other things, copies of the RVI Policies as exhibits to the Complaint.[12] Ironshore agrees with Sparebank that the RVI Policies attached as Exhibits B1 through B3 to the Complaint are true and correct copies of the RVI Policies**.** Significantly, it is not in dispute that the Debtors are not parties to the RVI Policies. Moreover, it is not disputed that Ironshore is not a party to the Leases between Sparebank and any of the Debtors.[13]

17. In its Complaint, Sparebank seeks a declaratory judgment relating to two very specific requests:

> "(i) declare that Ironshore (the Insurers) may not take any action to modify, cancel or terminate the RVI Policies in any way based upon the Debtors' commencement of the Cases; and
>
> (ii) declare that the Leases and the RVI Policies are interests of the Debtors in their bankruptcy cases . . ."[14]

18. Moreover, Sparebank expressly admits in the Complaint that Ironshore contends that the RVI Policies are unenforceable for reasons other than Clause 6.3, mischaracterized as an *ipso facto* clause.[15]

19. Sparebank further asserts in the Complaint that, because the RVI Policies between non-debtors Sparebank and Ironshore contain a provision detailing their respective rights in the event of the insolvency or bankruptcy of a third party (Sparebank's lessee), that section 365(e)(1)

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[12] *See* footnote 3, *supra*.

[13] See copies of the Leases attached to the Complaint at Exhibits A1 through A3.

[14] Complaint at ¶ 44. Thirdly, Sparebank also seeks the Court to "grant other relief, whether legal or equitable to which Sparebank may be entitled." *Id.*

[15] *See Id.* at ¶ 14 ("Prior to the Petition Date, Ironshore sent multiple correspondence to Sparebank 1 and Sparebanken N-N indicating that it was no longer liable under the RVI Policies because of, among other reasons, the insolvency of CHC." (emphasis added)).

of the Bankruptcy Code prevents Ironshore from exercising its rights related to such clause.[16] Sparebank takes this position notwithstanding the undisputed facts that the Debtors are not parties to the RVI Policies attached to the Complaint[17] and Ironshore is not a party to the Leases.[18]

III. ARGUMENTS AND AUTHORITIES

A. Legal Standard

20. In deciding whether to dismiss the case under Fed. R. Civ. P. 12(b)(6), the Court should consider no facts outside those alleged by the plaintiff, and those facts should be accepted as true.[19] Dismissal is proper for failure to state a claim for which relief can be granted under Rule 12(b)(6) if, even considering the facts as alleged, there is a lack of cognizable legal theory.[20]

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[16] *Id.* at ¶ 32.

[17] *Id.* at Exhibits B1 through B3.

[18] *Id.* at Exhibits A1 through A3.

[19] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[20] *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006). In addition, while Ironshore herein is seeking dismissal for failure to state a claim under Rule 12(b)(6), Ironshore also recognizes that a Court has an independent duty to determine whether subject matter jurisdiction exists and to dismiss the case under Rule 12(b)(1) if there is no subject matter jurisdictional basis. Sparebank has argued that the indemnification provisions in the Leases (not the RVI Policies) potentially would lead to a greater claim by Sparebank against the Debtors' estates and therefore fit within the broad "related to" jurisdiction under 28 U.S.C. § 1334(b). *See In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999) (defining "related to" subject matter jurisdiction to include proceedings that could conceivably have an effect on a bankruptcy case). Ironshore recognizes the Fifth Circuit case law stating that potential indemnification rights against a debtor can be interpreted to have such a "conceivable" effect on an estate, thus permitting litigation between non-debtors to proceed in bankruptcy court. *See, e.g., Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 296 (5th Cir. 2016); *In re El Paso Refinery, LP*, 302 F.3d 343, 349 (5th Cir. 2002). For that reason, Ironshore has limited the relief sought to that under Rule 12(b)(6). Nevertheless, Ironshore notes that the issue would be a much closer call in other jurisdictions, where courts have held that potential (and as yet unproven) rights to indemnification are not sufficient to create bankruptcy subject matter jurisdiction in a dispute between two non-debtor parties. *See In re Schwinn Bicycle Co.*, 210 B.R. 747, 756 (Bankr. N.D. Ill. 1997); *In re Prime Motor Inns, Inc.*, 130 B.R. 610, 613-14 (S.D. Fla. 1991). Ironshore further contends that the "close call" nature of an issue as critical as subject matter jurisdiction is an additional basis for the Court abstaining from this matter, which is relief Ironshore is seeking by separate motion.

21. When considering a Rule 12(b)(6) motion to dismiss, "although the court must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions deductions of fact or inferences."[21] A complaint may be dismissed under Rule 12(b)(6) if the facts pled do not state a claim for relief that is plausible on its face.[22] As instructed by the Supreme Court "only a complaint that states a plausible claim for relief survives a motion to dismiss."[23]

B. The Complaint Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) Because Sparebank Has Failed to State a Claim Upon Which Relief May be Granted

(1) Bankruptcy Code Section 365(e)(1) Does Not Apply to These Facts Because Ironshore is Not Seeking to "Terminate" or "Modify" the RVI Policies

22. Examining solely the four corners of the Complaint, Sparebank admits they are not entitled to the specific relief they have requested. Further, Sparebank's attempts to invoke the Debtors' rights under section 365(c)(1), equating Ironshore's right to deny liability under the terms of the policies with seeking to terminate or modify the RVI Policies.

23. The proper place to begin any analysis of the applicability of a statute is the language of the statute itself.[24] Section 365(e)(1) reads in its entirety as follows:

> 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

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[21] *In re Bender Shipbuilding & Repair Co.*, 2010 WL 749317, 4 and 5 (S.D. AL 2010), citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

[22] *Id*.

[23] *Iqbal*, 129 S. Ct. at 1950; s*ee also Twombly*, 550 U.S. at 557-58 (holding that the "mere possibility" the defendants acted lawfully is insufficient to survive a motion to dismiss and that well-pled allegations must be plausible, rather than merely conceivable).

[24] *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

> 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;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment or taking possession by a trustee in a case under this title or a custodian before such commencement.

11 U.S.C. § 365(e)(1) (emphasis added).

24. On the most fundamental level, Sparebank has failed to state a claim upon which relief can be granted because Sparebank's own characterization of undisputed facts are directly adverse to its express declaratory judgment request. Specifically, Sparebank seeks a declaratory judgment 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 these cases . . . ."[25] In sharp contrast to Sparebank's requested relief, the Complaint itself admits that Ironshore is not attempting to terminate or modify the RVI Policies. Rather, "Ironshore has stated that it will deny liability under the RVI Policies."[26] Denying liability pursuant to the terms of the policy is simply enforcing the terms agreed to by the two non-debtors and certainly is not terminating or modifying the RVI Policies as referenced in section 365(e)(1) and Sparebank's requested declaratory judgment.

25. This distinction is important because it demonstrates what Sparebank is truly attempting to do by its Complaint. Section 365(e)(1) is designed as protection (*i.e.*, as a shield) to guard a debtor from its contractual counterparty's attempt at terminating or modifying a valuable

[25] Complaint at ¶ 43 (emphasis added).

[26] *Id.* at ¶ 25 (emphasis added).

agreement to the detriment of a bankruptcy estate. In contrast, Sparebank is seeking to use section 365(e)(1) offensively (*i.e.*, as a sword) by a non-debtor party to essentially force another non-debtor party to pay it money, notwithstanding the fact that the underlying agreement (to which the Debtor is not a party) has not been terminated or modified and does not require payment.

26. Because the relief sought by Sparebank does not comport with the undisputed facts, namely that Ironshore by denying liability under the terms of the RVI Policies is not and has not attempted to "terminate or modify" the RVI Policies, Sparebank has failed to state a claim upon which relief can be granted.

(2) Bankruptcy Code Section 365(e)(1) Does Not Apply to These Facts Because Section 365(e)(1) Only Applies to Contracts "Of the Debtor"

27. Sparebank also fails to state a claim upon which relief may be granted because section 365(e)(1) only applies to a contract of the debtor. The RVI Policies are not contracts of the Debtors. Again, beginning with the text of the statute, section 365(e)(1) provides in pertinent part:

> 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….

11 U.S.C. § 365(e)(1) (emphasis added). Specifically, the *ipso facto* protections afforded to a debtor, as opposed to third parties, apply only to contracts to which the debtor is a party, namely a contract "of the debtor." The text itself of section 365(e)(1), and the applicable legislative history of the Bankruptcy Code, make clear that in prohibiting the enforcement of *ipso facto* clauses,

"Congress was concerned with clauses diluting the bankrupt's interests – not interests of a third party."[27] In short, Sparebank is misusing section 365(e)(1) and has no rights under that section.

(3) Case Law Supports Ironshore's Interpretation of Section 365(e)(1)

28. In the Complaint, Sparebank cites *In re Lehman Bros. Holdings, Inc.*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010) (Judge Peck) (hereafter, "*Lehman I*") for the broad proposition that section 365(e)(1) prevents the operation of an *ipso facto* clause against a debtor when such would be detrimental to a debtor's estate. The *Lehman Bros.* case, however, simply does not support a non-debtor's use of an *ipso facto* clause against another non-debtor. The debtors in *Lehman I* were parties to the derivative contracts at issue. In contrast, the Debtors in the present case are not parties to the RVI Policies.

29. In addition, *Lehman I* involved multiple filings by debtors co-liable under the applicable agreement. The *Lehman I* court therefore had cause to analyze the meaning of "a" bankruptcy case in section 365(b)(1)(B) and which debtor filing section 365(b)(1)(B) supposedly references. However, none of the Debtors in the present case are a party to the RVI Policies and therefore the *Lehman I* analysis of 365(b)(1)(B) is completely inapplicable and does not support Sparebank's request for a declaratory judgment.

30. Furthermore, Sparebank fails to point out that the exact issues discussed in the *Lehman I* were recently rejected by Judge Shelly Chapman.[28] In *Lehman II*, Judge Chapman

[27] *Liberty Mutual Ins. Co. v. Greenwich Ins. Co.*, 417 F.3d 193, 198 (1st Cir. 2005); *see also In re Siegal*, 190 B.R. 639, 644 (Bankr. D. Ariz. 1996) (quoting the legislative history of section 365(e)(1) that enforcing *ipso facto* clauses in contracts with a debtor would be prohibited because an *ipso facto* clause "frequently hampers rehabilitation efforts" by prohibiting the contract or lease from being "utilized to assist in the debtor's rehabilitation or liquidation." (emphasis added)); *In re Southern Pac. Funding Corp.*, 268 F.3d 712, 716 (9th Cir. 2001) ("In short, the purpose of § 365(e)(1) is to protect the debtor from the enforcement of unfavorable insolvency-triggered clauses in executory contracts." (emphasis added)); *In re Enron Corp.*, 306 B.R. 465, 472 (Bankr. S.D.N.Y. 2004) ("Ipso facto clauses are generally unenforceable pursuant to section 365(e) of the Bankruptcy Code because the automatic termination of a debtor's contractual rights deters rehabilitation and causes a forfeiture of assets.").

noted that: (i) the portion of Judge Peck's opinion discussing section 365(e)(1) and third parties is dicta; (ii) the referenced sub-section at 365(e)(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.[29]

31. In contrast to a case dealing with esoteric synthetic derivatives at the height of a critical financial crisis that was subsequently reformed, the *Liberty Mutual Ins. Co. v. Greenwich Ins. Co.*,[30] decision provides direct guidance under facts relevant to the Sparebank Complaint. The *Liberty Mutual* case involved a debtor (American Tissue) that obtained prepetition liability insurance policies from Liberty Mutual Insurance Company. American Tissue provided Liberty with a surety bond from Greenwich Insurance Company ("Greenwich") to insure premium payments and other reimbursements. American Tissue and Greenwich were both jointly and severally liable to Liberty under the bond agreement.[31] American Tissue also separately agreed to indemnify Greenwich for any amounts paid by Greenwich to Liberty under the bond.[32] The insurance policy between Liberty and American Tissue contained an *ipso facto* clause, which Liberty invoked as the basis for proceeding against Greenwich's bond after American Tissue

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[28] See *In re Lehman Bros. Holdings, Inc.*, 2016 WL 3621180 (Bankr. S.D.N.Y. June 28, 2016) (hereafter, "*Lehman II*").

[29] *Id.* at *14-15.

[30] 417 F.3d 193 (1st Cir. 2005).

[31] *Id.* at 195.

[32] *Id.* at 195-96.

filed bankruptcy.[33] In response, Greenwich sought protection under section 365(e)(1) in response to Liberty's claim upon Greenwich's bond. The district court ruled against Greenwich, which appealed to the First Circuit Court of Appeals.

32. The First Circuit noted that there was a "surprising paucity of precedent" on the issue of whether section 365(e)(1) could be invoked by a third party (Liberty) rather than the debtor.[34] However, after examining the text of the statute and the legislative history, the First Circuit concluded that section 365(e)(1) is designed solely to protect the debtor.[35] Greenwich, therefore, as a non-debtor, could not rely upon section 365(e)(1) to invalidate an *ipso facto* clause in a contract between two non-debtors, Liberty and Greenwich.

33. The *Liberty Mutual C*ourt also directly addressed the fact that American Tissue had indemnification obligations to Greenwich, stating that:

> "[t]he bond is an independent obligation of Greenwich which happens to have been triggered by a third party's non-payments of debts and resort to bankruptcy. It is beside the point that American Tissue may be a co-guarantor under the bond and might have a defense if sued itself."[36]

Accordingly, the fact that Greenwich agreed to pay Liberty under certain circumstances, including upon the insolvency of or bankruptcy filing by American Tissue, did not permit Greenwich to invalidate its contractual obligations to Liberty. Similarly, the fact that two non-debtors, Sparebank and Ironshore, reached an agreement that, among other things, a third-party's insolvency or bankruptcy filing has an impact upon the Sparebank and Ironshore's respective

[33] *Id.* at 196.

[34] *Id.* at 198.

[35] *Id.*

[36] *Id.* at 199.

rights under the RVI Policy does not enable Sparebank to stand in the shoes of the Debtors and invoke the Debtors' rights under Section 365(e)(1).

34. Furthermore, the relationship of the Debtors in this case is even more removed than that of the debtor in the *Liberty Mutual* case because in *Liberty Mutual* both the debtor and Greenwich had contractual obligations flowing directly to Liberty Mutual by virtue of their joint and several liability. In this case, the Debtors have no liability under the RVI Policies. If the First Circuit determined that section 365(e)(1) does not protect a third party even in the presence of debtor joint and several liability obligations under an agreement, it is an even easier call in this case where the Debtors are not a party to the applicable agreement.

(4) Case Law by Analogy Supports Ironshore's Interpretation of Section 365(e)(1)

35. Bankruptcy cases dealing with letters of credit also provide guidance on this issue by analogy. The *In re TIC United* Corp.[37] case decided by this Court provides a useful example. The *TIC* case involved a trucking company debtor that obtained a letter of credit in favor of its insurance company (Kemper) to secure the debtor's reimbursement obligations to Kemper after Kemper paid claims in full that the debtor was partially liable for. The debtor filed bankruptcy and Kemper drew down on the letter of credit. A chapter 7 trustee later sought to recover the funds under Bankruptcy Code section 549 as an unauthorized postpetition transfer. This Court ruled that section 549 did not apply because Kemper did not reimburse itself from property of the debtor's bankruptcy estate when it drew down the letter of credit.[38] This Court also refused to find any "diminution to the estate" based on the drawdown because (again) the drawdown did

[37] 2008 WL 2437868 (Bankr. N.D. Tex. June 17, 2008).

[38] *Id.* at *5 (citing *In re Stonebridge*, 430 F.3d 260, 269 (5th Cir. 2005) in support of the fact that letter of credit proceeds are not property of the estate).

not involve estate property. Other courts have likewise 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.[39]

36. The analogy to the instant case is clear. A debtor, by virtue of filing bankruptcy, cannot prevent a third party from drawing down on a letter of credit because both (i) the letter of credit represents a contract between two non-debtors and (ii) the letter of credit and its proceeds are not property of the estate. The fact that drawing down a letter of credit may have some effect on a debtor's estate in the future is simply not part of the analysis. Likewise, this adversary proceeding involves a contract between two non-debtor parties, neither the contract nor the proceeds thereof are property of the estate.[40] Moreover, any obligations the Debtors may have under the rejected Leases is outside the scope of the matter before this Court.

37. By separate analogy, the relief sought by Sparebank is equivalent to a creditor asking a bankruptcy court to order a guarantor of an obligation of a debtor to pay the creditor in violation of the terms of the guaranty agreement.

38. In addition to letter of credit case law, cases dealing with the issue of a prospective debtor indemnification obligation are instructive. For example, the court in *In re Schwinn Bicycle Co.*[41] determined that a potential indemnification obligation that may arise

[39] *See In re Bender Shipbuilding*, 2010 WL 749317 (S.D. Ala. March 2, 2010); *In re Oakwood Homes Corp.*, 342 B.R. 59, 67 (Bankr. D. Del. 2006); *In re Prime Motor Inns, Inc.*, 130 B.R. 610 (S.D. Fla. 1991); *In re Leisure Dynamics, Inc.*, 33 B.R. 171, 172-3 (Bankr D. Minn. 1983); *In re Page*, 18 B.R. 713, 715-16 (D. D.C. 1982).

[40] The property of estate issue is discussed further *infra*.

[41] 210 B.R. 747, 756 (Bankr. N.D. Ill. 1997).

following a dispute between two non-debtor parties was not even sufficient to give the bankruptcy court subject matter jurisdiction. The court addressed that issue as follows:

> Even if Plaintiffs are successful in their state court action, Defendants do not have an automatic indemnification claim. The bankruptcy estate would not be affected until the third party action was brought and tried. Moreover, even if the third party action is "favorably" resolved, Debtor could still relitigate or adopt any position in response to any subsequent claim. . . Allowing a non-debtor party to litigate its non-debtor dispute involving a purported indemnification claim against the debtor in a bankruptcy forum which may or may not result in a claim against the estate would defeat the very scheme of efficient claims resolution.

39. Just as in the *Schwinn* case, in this case there is nothing more than an allegation that Sparebank potentially has indemnification rights against the Debtors under the Leases (which have been rejected) in the event Ironshore does not pay under the RVI Policy.[42] As in the *Schwinn* case, this Court should not permit potential and unproven indemnification rights to be used as a basis for converting a dispute between two non-debtor parties involving non-estate property into a matter properly before this Court.

(5) *Sparebank's Request for a Declaratory Judgment Related to Whether the RVI Policies are Property of the Estate is a Waste of Judicial Resources Because Such a Determination Does Not Provide Sparebank with Any Relief Under the Law*

40. As set forth above, Sparebank seeks two declaratory judgments. First, a declaratory judgment related to section 365(e)(1), which is addressed above. Second, a declaratory judgment that "the Leases and the RVI Policies are interests of the Debtors in the bankruptcy estates."[43] Ironshore is not a party to the Leases, which have been rejected by orders

[42] Complaint at ¶ 36 ("Moreover, each Lease contains an indemnity provision in favor of the Debtors." (emphasis added)). Significantly, the referenced indemnification obligations in the Leases are between Sparebank and the Debtors, not Ironshore.

[43] Complaint at ¶ 43.

of this Court. While the Leases appear to have once been property of the Debtors' bankruptcy estate because one of the Debtors was a party to such agreements, they have been rejected and are no longer enforceable by the Debtors. This stands in stark contrast to the RVI Policies, to which indisputably none of the Debtors are a party. While Bankruptcy Code section 541 defines property of the estate broadly, it only includes contracts to which the debtor is a party. Even where a debtor is a party to an insurance contract, settled Fifth Circuit law makes clear that there is a distinction between a debtor's insurance policy itself and the proceeds of the policy.[44] But, *Louisiana World* and its progeny start with the basic understanding that the Debtor is a party to the policy before moving on to analyzing whether the policy proceeds are property of the estate. If, as here, the debtor is not even a party to the policy, the property of the estate analysis ends.

41. In addition, even if the Court were to rule that the RVI Policies between Sparebank and Ironshore are property of the estate, that determination would not end the necessary inquiry by the Court. "Acknowledging that the debtor owns the policy, however, does not end the inquiry. 'The question is not who owns the policies, but who owns the liability proceeds.'"[45] Once again, the *Louisiana World* decision is instructive. In *Louisiana World*, a creditors' committee sought to use Bankruptcy Code section 362 to prohibit proceeds from an officer and director policy (to which the debtor was a party) from being paid to the officers and directors. The court noted that, in making a property of the estate determination, "the estate's legal and equitable interests in property rise no higher than those of the debtor" and that the debtor in the case "had no ownership interest whatever in the proceeds from the liability

[44] *See In re La. World Exposition, Inc.*, 832 F.2d 1391, 1399 (5th Cir. 1987).

[45] *In re Edgeworth*, 993 F.2d 51, 55 (5th Cir.1993) (quoting *La. World*, 832 F.2d at 1399)).

coverage."[46] Also importantly, the Fifth Circuit held that alleged indemnification rights under the policy did not cause the insurance proceeds to become property of the estate.[47] Similarly, in the *In re Fort Worth Osteopathic Hospital, Inc.*[48] Judge Lynn held in a similar officer and director insurance dispute that "even if the Trustee may have some entitlement some day to receive proceeds from the Policies, neither he nor Debtors had any 'legal or equitable interest' in the proceeds of the Policies when Debtors' cases were commenced, and so he does not have an interest in the proceeds that falls within section 541(a)(1)."[49]

42. Applying the law to this case, even if the Court were to reject Ironshore's contention and determine that the RVI Policies are somehow property of the estate despite the Debtors not being a party thereto, that would certainly not end the inquiry. The true issue (and Sparebank's specific request for a declaratory judgment) is whether the proceeds of the RVI Policies are property of the estate; thus apparently justifying the Court ruling on whether the proceeds should, or should not, be paid to Sparebank under the terms of the RVI Policies. It is undisputed that if the proceeds were to be paid by Ironshore, they would be paid not to the Debtors, but to Sparebank. In other words, the Debtors have "no ownership interest whatever" in those proceeds. Therefore, the proceeds are not property of the estate and, just as section 362 did not apply to non-estate property in *Louisiana World*, section 365(e)(1) does not apply to non-estate property here. Thus, a ruling by this Court that the RVI Policies, as opposed to the

[46] *La. World*, 832 F.2d at 1399 (quoting *In re Gagnon*, 26 B.R. 926, 928 (Bankr. M.D. Pa. 1983)).

[47] *Id*. at 1398-99.

[48] 387 B. R. 706 (Bankr. N.D. Tex. 2008).

[49] *Id.* at 715.

proceeds thereof, are property of the Debtors bankruptcy case would resolve nothing between the parties and would be a waste of this Court's judicial resources.

(6) *The Declaratory Judgment Act Does Not Support the Relief Sought by Sparebank*

43. Sparebank improperly uses the Declaratory Judgment Act in an effort "shoehorn" a two party dispute between non-debtors into the Debtors' Bankruptcy Case in an attempt to hide behind the Debtors' *ipso facto* clause rights. This incorrect attempt provides a further, and independent, basis to dismiss the Complaint. The text of the Declaratory Judgment Act presumes an underlying case of "actual controversy within its jurisdiction." Even assuming subject matter jurisdiction in this matter,[50] that certainly does not end the analysis with respect to the propriety of a matter under the Declaratory Judgment Act. As recognized by the court in *In re Old Carco LLC,*[51] "[e]ven where subject matter jurisdiction exists, the Court has discretion to decide whether to entertain a declaratory judgment action. . . The factors that guide the exercise of the Court's discretion include:

> (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved;
>
> (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 improperly encroach on the domain of a state or foreign court; and

[50] *See* footnote 20 *supra*.

[51] 530 B.R. 614 (Bankr. S.D.N.Y. 2015).

(5) whether there is a better or more effective remedy."[52]

44. In the *In re Old Carco, LLC* case, the court ultimately determined to exercise its discretion not to grant declaratory relief, and granted the defendant's motion to dismiss for failure to state a claim, partially on the grounds that a declaratory judgment in that case may not have completely resolved the issues among the parties.[53] Other courts have come to similar conclusions in the contexts of disputes that do not resolve a matter and/or otherwise do not need to be decided by the court.[54]

45. More specifically, to varying degrees, each of the elements set forth in the *In re Old Carco* case emphasize the tenuous relationship Sparebank's dispute with Ironshore has upon the Debtors' bankruptcy cases. First, there is no apparent need to settle the legal issue of whether section 365(e)(1) applies to third parties because, as set forth above, the plain language of the statute establishes that it does not. Second, even if this Court were to rule on the section 365(e)(1) issue, there is nothing to suggest that that discrete issue will finally resolve anything between the parties (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).[55] Third, it is not disputed under the plain language of the RVI Policies (attached as exhibits by

[52] *Id.* Ironshore notes the great deal of substantive overlap between these factors and the permissive abstention factors addressed separately by a motion to abstain that will be timely filed by Ironshore. The fact that the law provides this Court with multiple independent avenues to rid itself of this improperly filed adversary proceeding is telling.

[53] *Id.* at 620-21.

[54] *In re IPDN Corp.*, 352 B.R. 870, 878 (Bankr. E.D. Mo. 2006); *In re Mirant Corp.*, 327 B.R. 262, 269 (N.D. Tex. 2005); *In re Enron Corp.*, 297 B.R. 382, 386 (Bankr. S.D.N.Y. 2003); *In re Rickel & Assocs., Inc*., 272 B.R. 74, 98-99 (Bankr. S.D.N.Y. 2002); *In re Busy Beaver Building Ctrs., Inc.*, 127 B.R. 343, 344 (Bankr. W.D. Pa. 1991).

[55] *See supra* at ¶ 18 and footnote 15.

Sparebank to its Complaint) that English law applies.[56] Finally, the blatant venue shopping by Sparebank would result in the "friction" of this Court deciding substantive contractual default provisions under English law when the contract clearly provides for the "better and more effective remedy" of either litigation or arbitration in London.

(7) *The RVI Policy Arbitration Clause Should be Enforced by this Court*

46. A final – and yet another – independent basis for dismissing the Complaint for failing to state a claim is the undisputed fact that the RVI Policy at Exhibit B1, which is attached to the Complaint, states at section 16(b):

> Any dispute arising in connection with this Policy, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration ("LCIA") rules ("Rules"), which Rules serve as expressly amended by this Clause 16 are deemed to be incorporated by reference into this clause.

47. In addition, it follows in section 16(d) that "[t]he seat, or legal place, of arbitration shall be London, England. Accordingly, Sparebank and Ironshore, the only two parties to the RVI Insurance Policy, have already agreed to the applicable law, method and location of resolving their dispute.

48. As this Court has previously recognized, absent extraordinary circumstances, forum selection clauses voluntarily entered into by the parties will be enforced, even if one of the parties is a debtor.[57] Therefore, if a forum selection clause is enforceable against a debtor, there is absolutely no legal reason such a clause would not be enforceable where (as here) a non-

[56] RVI Policies at section 16(a). As set forth in Complaint Exhibits B1 through B3, there are three separate RVI Polices at issue. Each of the three RVI Polices makes clear at section 16 that English law governs. The RVI Policy at Exhibit B1 contains a binding arbitration clause at section 16(b). The other two RVI Polices, at Exhibits B2 and B3, in contrast, provide at section 16(b) that the "exclusive jurisdiction" of any dispute are the "English courts." Note also that while Sparebank has made a claim on the RVI Policy attached to the Complaint as Exhibit B1, it has not made a claim under the other two RVI Policies.

[57] *See In re Manchester*, 417 B.R. 377, 385 (Bankr. N.D. Tex. 2009).

debtor plaintiff is suing a non-debtor defendant on a contract the Debtors are not a party to, that includes a clause mandating a forum of arbitration in London.

49. In addition, also as cited by the Court in *In re Manchester*, Fifth Circuit law provides that arbitration clauses are enforceable unless: (1) the proceeding derives exclusively from the provisions of the Bankruptcy Code; and (2) arbitration of the proceeding would conflict with the purposes of the Bankruptcy Code.[58] Based upon the four-corners of the Complaint, it cannot reasonably be argued that a non-core,[59] non-debtor dispute between non-debtor parties meets either of the above exceptions.[60] Thus, the arbitration clause is enforceable and the Complaint should be dismissed to permit the parties to arbitrate in London (or litigate in English courts as the case may be regarding the remaining two RVI Policies) as per their bargained-for agreement.[61]

IV. PRAYER

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.

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[58] *Id.* (citing *In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002)).

[59] *See In re Nat'l Enters., Inc.* 128 B.R. 956, 961 (E.D. Va. 1991) (holding that a matter between two non-debtor parties to a prepetition contract is non-core and further stating that if it were designated as core, that would expand the bankruptcy court's powers beyond what a non-Article III court is constitutionally permitted to adjudicate); *In re Renaissance Hosp. – Grand Prairie, Inc.*, 2009 WL 398963, at *2 (Bankr. N.D. Tex. Feb. 17, 2009) (holding that, even if non-debtor party disputes are "related to" the bankruptcy case for section 1334(b) subject matter jurisdictional purposes, the fact that the dispute does not involve the debtor makes it a non-core matter).

[60] Other courts have dismissed complaints on the basis that that the underlying agreement is subject to an arbitration clause. *See, e.g., In re Bowler*, 397 B.R. 737 (Bankr. M.D. Pa. 2008); *In re Microbilt Corp*., 484 B.R. 56 (Bankr. D. N.J. 2012); *In re Rushing*, 443 B.R. 85 (Bankr. E.D. Tex. 2010).

[61] Ironshore makes final note that at section 9(a) the RVI Policies require Sparebank to indemnify Ironshore for costs, including legal fees. Ironshore reserves all rights with respect to same either in litigation before this Court or in arbitration in London.

Dated: September 15, 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 15th day of September, 2016.

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