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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 ABSTAIN 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 Abstain Brief" [Doc. No. 11].[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. 18].[2]

3. By the Response Brief, Sparebank argues, in summary, that this Court should not abstain from hearing this adversary proceeding for the following reasons: (i) the adversary proceeding is a core matter because substantive bankruptcy law matters are at issue and because the Debtors and Ironshore effectively have no separate identities; (ii) mandatory abstention does not apply because there are bases for subject matter jurisdiction independent of 28 U.S.C. § 1334; and (iii) permissive abstention does not apply for a number of different reasons, including an analysis of the applicable elements for making such a determination.

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

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

[2] Also on November 2, 2016 Sparebank filed a response brief [Doc. No. 16] to Ironshore's motion to dismiss. Contemporaneously with the filing of this Reply Brief, Ironshore has filed a separate brief in reply to Sparebank's motion to dismiss response brief.

II. REPLY

A. The Facts Support a Finding That This is a Non-Core Matter

(1) The Accepted Legal Standard is Met Under These Facts

5. Ironshore and Sparebank agree that a matter will be considered core "if it involves a substantive right provided by title 11 or is a proceeding that, by its nature, could only arise in the context of a bankruptcy case."[3] The parties clearly differ, however, on the application of the standard. Sparebank argues that because it is seeking a determination under section 365(e)(1), that fact alone establishes that this adversary proceeding involves a substantive title 11 right.[4]

6. Sparebank's circular logic assumes a conclusion that is very much in dispute in this case, which is actually a breach of contract dispute between non-debtors. A determination of whether non-debtor Sparebank is entitled to take advantage of section 365(e)(1) in relation to a non-debtor agreement is so inconsequential that the Debtors themselves have asserted (via their Joinder) that any connections to its bankruptcy case are so tenuous that this Court does not even have jurisdiction.[5] In addition, even if this Court were to rule completely in favor of Sparebank by granting the declaratory judgment, that would not come close to ending the dispute between

[3] Motion to Abstain Brief at ¶ 19 (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 2005)); Response Brief at ¶ 9 (citing *In re Wood*).

[4] Response Brief at ¶ 10 ("The rights afforded to Sparebank pursuant to Bankruptcy Code section 365(e)(1) are created by and exist only in federal bankruptcy law and arise only in bankruptcy.").

[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."); *see also In re Pompelia*, 2016 WL 6246578, at *3 (Bankr. W.D. Pa. Oct. 25, 2016) ("That this adversary proceeding may affect the bankruptcy case at some point in the future only where two interceding events occur is not sufficient to have a conceivable effect on the bankruptcy case.").

Sparebank and Ironshore.[6] Instead, Ironshore and Sparebank would continue to dispute whether a breach of contract has occurred of a non-debtor agreement governed by English law.

7. These facts lay bare that Sparebank is attempting to dress up a clearly non-core dispute between two non-debtor parties by seeking a declaratory judgment under a bankruptcy statute that, by its own terms, does not apply to these facts.[7] The disconnect with matters "critical" to the pending bankruptcy case is further illustrated by the Debtors' Joinder to the relief sought by Ironshore.

(2) Sparebank and the Debtors Have Clear, Distinct, and Separate Identities

8. Sparebank also argues that this matter should be considered core because "Sparebank and the Debtor Defendants have an entwined relationship with respect to the transactions documented as the RVI Policies, so much that their separate identities are disregarded by certain provisions."[8] One of the alleged bases for Sparebank and the Debtors essentially being the same party (according to Sparebank) is that, under the policies, "Ironshore deems actions taken by the applicable Debtor Defendant in connection with Sparebank's obligations under the applicable RVI Policies to be actions taken by Sparebank."[9] However, this language does not demonstrate anything other than the common sense fact that the Debtors were in possession of the insured helicopters under the Policies. Sparebank chose to lease its property

[6] Motion to Abstain Brief at ¶ 29 ("It is undisputed that the alleged ipso facto clause issue raised by Sparebank in its Complaint is not the only substantive dispute between Sparebank and Ironshore regarding policy coverage" and quoting the Complaint at ¶ 14).

[7] Ironshore cites, once again, to the text of section 365(e)(1) applying to contracts "of the debtor." 11 U.S.C. § 365(e)(1).

[8] Motion to Abstain Brief at ¶ 8 (citing to Clauses 4.1 and 4.6 of the RVI Policies).

[9] *Id.*

to the Debtors and, given that dynamic, Ironshore negotiated the term that Sparebank can be held responsible for the Debtors' actions in relation to that property.

9. Next, Sparebank points out that the RVI Policies dictate to whom Sparebank may disclose certain information relating to Ironshore, suggesting that such restrictions support Sparebank's "same party" arguments.[10] Ironshore states in response that restrictions on the flow of sensitive information is common in all types of contractual arrangements and has nothing to do with whether parties have independent identities.

B. Sparebank's Arguments Against Mandatory Abstention Are Contrary to Well-Accepted Law

10. As set forth in the Motion to Abstain Brief, an important element in the Court's determination of whether mandatory abstention applies is whether there is a basis for subject matter jurisdiction, independent of 28 U.S.C. § 1334(b).[11] Sparebank attempts to counter this element by alleging that the Declaratory Relief Act and the Bankruptcy Code each provide independent federal subject matter jurisdictional bases. For example, Sparebank states that this adversary proceeding "is not based upon a state law claim or state law cause of action but instead on the Declaratory Judgment Act and Bankruptcy Code sections 365(e)(1) and 541."[12]

11. Sparebank appears to be arguing that both the Declaratory Judgment Act and specific provisions of the Bankruptcy Code independently provide federal question subject matter jurisdiction. Case law makes clear that such a position is legally indefensible. The

[10] Response Brief at ¶ 8 ("Clause 4.1 of the RVI Policies dictates to whom Sparebank may disclose certain information relating to Ironshore.").

[11] See Motion to Abstain Brief at ¶ 22.

[12] Response Brief at ¶ 12. Sparebank further states: "[F]or reasons unrelated to [28 U.S.C. §] 1334(b), the causes of action in the Complaint could be brought before a federal court. . . For example, federal question jurisdiction exists as the Complaint invokes federal bankruptcy laws to seek relief under a federal statute, the Declaratory Judgment Act." *Id.*

Supreme Court has recognized that "[t]he Declaratory Judgment Act, although it is federal law, does not confer jurisdiction on the federal courts."[13] In addition, the Fifth Circuit In *In re U.S. Brass Corp.* has made perfectly clear that "the Bankruptcy Code dos not confer jurisdiction." Rather, "28 U.S.C. § 1334 remains" the jurisdictional source.[14] Section 1334 is the jurisdiction provision for the Bankruptcy Code. The independent federal jurisdiction must be something other than the Bankruptcy Code.

12. Therefore, because Sparebank cannot independently rely upon the Declaratory Judgment Act or the Bankruptcy Code, the "related to" jurisdictional source in section 1334(b)) is the sole source of federal question subject matter jurisdiction in this adversary proceeding. For that reason, the fourth mandatory abstention element has been met.[15] As to the remaining four elements,[16] Sparebank acknowledges that the first element is met. As for the second element, Sparebank repeats its argument that this is a core proceeding, which Ironshore has responded to above.

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[13] *Ultraflow Corp. v. Pelican Tank Parts, Inc.*, 823 F.Supp.2d 578, 584 (S.D. Tex. 2011) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) and quoting the *Aetna* case as follows: '[T]he operation of the Declaratory Judgment Act is procedural only.'"); *see also Metropolitan Life Ins. Co. v. Price*, 501 F.3d 271, 277 n.4 (3d Cir. 2007) (stating that the Declaratory Judgment Act is "purely procedural" and does not "enlarge[] the subject-matter jurisdiction of federal courts.").

[14] *In re U.S. Brass Corp.*, 301 F.32d 296, 305 n.29 (5th Cir. 2002) (noting that a party "miss[es] the point" by citing the Bankruptcy Code as a basis for federal question subject matter jurisdiction); *see also In re J&B Halderman Holdings*, LLC, 517 B.R. 910, 914-15 (Bankr. W.D. Wisc. 2014) ("Regardless of the terms of the Plan or the provisions of the Bankruptcy Code, the source of jurisdiction in cases under title 11 is 28 U.S.C. §§ 1334 and 157.").

[15] *See* Motion to Abstain Brief at ¶ 22 (setting forth the five mandatory abstention elements).

[16] The five elements are: (1) a party to the proceeding files a timely motion to abstain; (2) the proceeding is based upon a state law claim or state law cause of action; (3) the proceed is a related (non-core) proceeding; (4) absent section 1334(b), the cause of action (one "related to" the bankruptcy case) could not have been commenced in a federal court; and (5) the proceeding is commenced and can be timely adjudicated in a state court. Motion to Abstain Brief at ¶ 22.

13. As to the fifth and final element, Sparebank states that arbitrating in England (which Sparebank agreed to do in the RVI Policies) "would be followed by a lengthy court tenure" and "would significantly prolong the Debtors' estates." Sparebank provides no basis for stating that arbitration in an established and sophisticated legal system would be a lengthy process or would be followed by any time in court at all.[17] Courts analyzing this element typically review whether the alternative forum is more properly suited for analyzing the substantive legal issues at hand.[18] The RVI Policies are clearly governed by English law. This Court may take judicial notice of the fact that courts in England are more properly suited for analyzing what ultimately is an English law breach of contract matter between two non-debtor parties.

14. Moreover, the proper analysis of this element does not require delving into the inner workings and timeliness of United Kingdom arbitration and court proceedings. Rather, courts interpreting whether a matter may be timely adjudicated "have focused on whether allowing the action to proceed in [the non-bankruptcy forum] will have any unfavorable effect on the administration of a bankruptcy case."[19] Ironshore repeats that the Debtors themselves do not support that argument. Moreover, there is no other evidence to support a finding that the

[17] *See* Drew Gulley, *The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996*, 15-FALL PIABA B.J. 27, 34 (2008) (noting that "English courts are controlled by section 69 of the Arbitration Act of 1996" and quoting drafters of the act stating that "[w]e have very severely limited the right to appeal from an arbitration award . . . .") (emphasis added); *see also* Nino D. Dievi, *Waiving the Action for Annulment: Pro-Arbitration a Bridge Too Far?*, 16 Villanova Journal of Int'l Com. Law & Arbitration 237, 245 (2012) ("The scope of appeal [under the Arbitration Act of 1996] is restricted since it is limited to questions of English law and moreover, leave to the court must be sought.").

[18] *See, e.g., In re Hursa*, 87 B.R. 313, 323 (Bankr. D.N.J. 1988) (finding that mandatory abstention applies, in part, because the matter dealt with "complex issues of New Jersey" law and "that the expertise required to decide [such issues] are best possessed by judges sitting in the state courts of New Jersey."); *In re U.S. Brass Corp.*, 173 B.R. 1000, 1005 (Bankr. E.D. Tex. 1994 (finding cause to abstain based on the ability of the state court to handle the particular state law litigation at issue).

[19] *In re Midgard Corp.*, 204 B.R. 764, 778 (B.A.P. 10th Cir. 1997) (citing cases).

Debtors' bankruptcy case will in any way be delayed as a result of a contractual dispute between two non-debtor parties relating to a non-debtor agreement.

C. Sparebank's Various Arguments Against Permissive Abstention Do Not Match the Facts of This Adversary Proceeding

15. Ironshore need only point to uncontested facts in this adversary proceeding to counter Sparebank's arguments that permissive abstention is not appropriate. First, Sparebank in its Reply Brief makes clear that it (not the Debtors) owns the RVI Policy proceeds.[20] Ironshore does not contest that fact. Sparebank fails, however, to recognize the implication of this undisputed fact. If the Debtors are not a party to the RVI Polices and the Debtors have no right to the proceeds, then it follows that any RVI Policy dispute cannot be "fundamental" to the Debtors' bankruptcy case, thus weighing in favor of abstention. Again, the Debtors appear to agree with this, given the filing of their Joinder.

16. Next, Sparebank attempts to distinguish the letter of credit case law cited by Ironshore in its Motion to Abstain Brief on the grounds that letters of credit differ from insurance. Sparebank also argues that it is "imperative to the administration of [the Debtors'] bankrupt cases" that this Court confirm the Debtors' property interest in the RVI Policies. The undisputed fact is that the Debtors are not parties to the RVI Policies and have no insurable interest under such policies. Moreover, letters of credit are merely a type of insurance (i.e., a methodology put into place to hedge against a possible loss).[21] Letter of credit case law is directly analogous to this matter.

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[20] Reply Brief at ¶ 7.

[21] *See In re Condor Systems, Inc.*, 296 B.R. 5, 15 (B.A.P. 9th Cir. 2003) (noting that letters of credit are a "form of creditor insurance . . . ."); *see also* Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons*, 74 Wash. U. L.Q. 1061, 1072 n.49 (1996) (noting that letters of credit "essentially serve the same function as insurance.").

17. Finally, Sparebank addresses the various elements for determining whether permissive abstention applies. Sparebank's arguments are based one way or another in repeating the assertion that this adversary proceeding is critical to the Debtors' bankruptcy case. For a final time, Ironshore repeats that the Debtors do not believe the matter is critical (or even that this Court has jurisdiction) and that the dispute between Sparebank and Ironshore under the RVI Polices can proceed in England without any meaningful effect on the progression of the Debtors' bankruptcy cases.

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

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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