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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: CHC GROUP LTD., *et al.* Debtors,	**Chapter 11** **Case No. 16-31854(BJH)** **(Jointly Administered)**
ECN CAPITAL (AVIATION) CORP., Plaintiff, v. AIRBUS HELICOPTER (SAS) Defendant	**Adv. No. 16-03151-bjh** **Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss**

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Plaintiff ECN Capital (Aviation) Corp. (f/k/a Element Capital Corp.) ("ECN Capital"), by its undersigned attorneys, files this Supplemental Memorandum of Law in Opposition to Defendant Airbus Helicopters S.A.S.'s ("Airbus") Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction and *Forum non Conveniens* ("Motion to Dismiss"), at the direction of the Court.

PRELIMINARY STATEMENT

This Court has jurisdiction over this Adversary Proceeding and is authorized to enter an order denying Airbus's Motion to Dismiss. The Adversary Proceeding is a non-core matter in which the parties have not consented to final orders by the Bankruptcy Court, and the Court therefore is not authorized to enter a final order in the matter. In precisely these circumstances, however, courts in the Fifth Circuit and elsewhere have held that the bankruptcy court has jurisdiction to deny a defendant's motion to dismiss the complaint, as the denial of a dispositive motion does not constitute a final order.

This Court, however, is not authorized to enter an order granting Airbus's Motion to Dismiss, as such a judgment would constitute a final order in a non-core matter in which the parties have not consented to entry of final orders by the bankruptcy court. Thus, if this Court were to rule that the Motion to Dismiss should be granted, such a ruling would have to be submitted as a proposed finding of fact and conclusion of law to the District Court.

The Complaint and the Motion to Dismiss raise issues regarding the facts underlying the Bankruptcy Cases to which this Adversary Proceeding is related, as well as questions regarding the extent of this Court's subject matter and personal jurisdiction. Airbus sought to have the reference of this Adversary Proceeding withdrawn immediately, such that Airbus could present these questions in the first instance to the District Court. The District Court, of course, is not as

familiar with the parties, the Bankruptcy Cases, and the facts underlying both the Bankruptcy Cases and this Adversary Proceeding—which is exactly why Airbus wants the District Court to rule on its Motion to Dismiss in the first instance.

As ECN Capital has maintained in its briefing and argument before the Court, the reference should stay with this Court, at the very least for purposes of hearing the Motion to Dismiss. This Court should exercise its jurisdiction and enter an order denying Airbus's Motion to Dismiss.

BACKGROUND

The facts underlying ECN Capital's claims are set forth in the Complaint by ECN Capital (Aviation) Corp. against Airbus Helicopters (SAS) [Docket. No. 1] (the "Complaint") and in ECN Capital's Opposition to Defendant's Motion to Dismiss [Docket No. 63] (the "MTD Opposition").[1] ECN Capital sets forth here the salient facts relating to this Supplemental Memorandum of Law.

ECN Capital filed the Complaint against Airbus in this Adversary Proceeding on November 17, 2016. The Complaint asserts, among other things, claims against Airbus for defective design and breach of implied warranty of merchantability regarding Airbus's manufacturing, marketing, and sale of the EC225 and the AS332 L2 helicopters. *See* ¶¶ 46–111. The allegations in the Complaint demonstrate that ECN Capital's claims would likely have an impact on the rights, liabilities, and/or property of the Debtors' estates (and, at the very least, "could conceivably have an effect" on the Debtors' estates), and thus are related to the Bankruptcy Cases. *See, e.g.*, ¶¶ 8, 43.[2] The Complaint also states that the Adversary Proceeding

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the MTD Opposition. All references herein to "¶ __" are to the Complaint.

[2] As this Court recognized, for purposes of deciding Airbus's Motion to Dismiss, the factual allegations in the Complaint must be taken as true. *See* Transcript of 2/6/2017 H'r'g on Withdrawal Mot. ("Tr.") 56:3-7; *see also*

is a "non-core proceeding," and that ECN Capital "does not consent to entry of final orders or judgment by this Court at this time." ¶ 13.

On January 3, 2017, Airbus filed its Motion to Dismiss [Docket No. 24], asking this Court to find that it lacked subject matter jurisdiction over ECN Capital's claims or personal jurisdiction over Airbus. In the alternative, the Motion to Dismiss requested that the Court abstain from exercising its jurisdiction, or dismiss the Complaint on grounds of *forum non conveniens*.

Also on January 3, 2017, Airbus filed its Motion for Withdrawal of Reference of Adversary Proceeding, and Brief in Support [Docket No. 23] (the "Withdrawal Motion"), requesting that this Court "issue a report and recommendation to the District Court recommending immediate withdrawal of the reference." Withdrawal Mot. p. 9. Airbus argued in the Withdrawal Motion that "[i]t also makes the most sense for the District Court to resolve the initial procedural matters raised by [Airbus's] Motion to Dismiss because their facts bear on the ultimate issues in the case." *Id.*

On January 27, 2017, ECN Capital filed its MTD Opposition, demonstrating that this Court has subject matter jurisdiction to hear ECN Capital's claims against Airbus in the Adversary Proceeding, which are related to the Bankruptcy Cases. Among other things, ECN Capital argued in the MTD Opposition that Airbus should not be permitted to avoid this Court's jurisdiction and benefit from blatant forum-shopping merely on account of its refusal to consent to entry of final orders by the Bankruptcy Court. *See* MTD Opposition pp. 15–16 & nn.26–27.

In re Wilborn, 401 B.R. 872, 877 (Bankr. S.D. Tex. 2009) ("[W]hen deciding whether to grant a 12(b)(1) motion, the Court 'must accept all factual allegations in the plaintiffs complaint as true.'") (quoting *Ramming* v. *United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Seghers* v. *El Bizri*, 513 F. Supp. 2d 694, 703 (N.D. Tex. 2007) ("In determining whether a prima facie case for personal jurisdiction exists on a [12(b)(2)] motion to dismiss, uncontroverted factual allegations in the plaintiff's complaint must be taken as true.").

On February 2, 2017, ECN Capital filed its Opposition to Airbus's Withdrawal Motion ("Withdrawal Motion Opposition") [Docket No. 65]. In the Withdrawal Motion Opposition, ECN Capital explained that this Court is better positioned that any other forum to adjudicate ECN Capital's claims against Airbus in the Adversary Proceeding, which are related to the Bankruptcy Cases. *See* Withdrawal Mot. Opp'n 5, 17. Again, ECN Capital argued that Airbus should not be permitted to benefit from its attempt at forum-shopping, and that the reference should remain with this Court at this time. *Id.* 16–18.

On February 2, 2017, Airbus filed a Reply in Further Support of Its Withdrawal Motion ("Withdrawal Motion Reply") [Docket No. 67-1].[3] Airbus again contended that the reference should be withdrawn immediately, on the purported grounds that "it is more efficient for the District Court to become familiar with the case earlier rather than later, particularly because the District Court will need to rule on dispositive motions." Withdrawal Mot. Reply 4.

On February 6, 2017, the Court held a hearing on Airbus's Withdrawal Motion. The Court recognized that the Motion to Dismiss raised issues that were intertwined with the Bankruptcy Cases, making it appropriate for the Court to retain the reference at least through the adjudication of the Motion to Dismiss. Tr. 7:5-24; 19:4-9. Ultimately, the Court requested supplemental briefing from the parties on the issue whether the Court has authority to finally adjudicate the Motion to Dismiss, or is required to submit its ruling as a proposed recommendation to the District Court. Tr. 36:4-13. ECN Capital respectfully submits this Supplemental Memorandum of Law to demonstrate, as explained below, that this Court is authorized to enter an order denying Airbus's Motion to Dismiss.

[3] The Withdrawal Motion Reply was attached as Exhibit A to Airbus's motion for leave to file the Withdrawal Motion Reply [Docket No. 67].

ARGUMENT

I. This Court Is Authorized To Enter an Order Denying Airbus's Motion To Dismiss.

Airbus relies on 28 U.S.C. § 157(c), and cases interpreting the statute, as the basis for concluding that "the District Court will need to rule on dispositive motions." Withdrawal Mot. Reply 3–4 & n.4; *see also* Withdrawal Mot. 5–6.

28 U.S.C. § 157(c) provides that the bankruptcy court may hear non-core proceedings that are related to a bankruptcy case, but that the bankruptcy court may not enter final orders in such proceedings without the consent of all parties. *Id.*; *see also, e.g.*, *In re Blackwell ex rel. Estate of I.G. Services, Ltd.*, 279 B.R. 818, 822–24 (Bankr. W.D. Tex. 2002) ("Non-core matters . . . can be heard by the bankruptcy court, but [28 U.S.C. § 157(c)] says that only the district court can enter 'final judgments and orders,' absent consent of the parties."). This provision does not limit the bankruptcy court's ability to enter *interlocutory* orders in "related to" non-core matters. *See, e.g.*, *In re Almasri*, 378 B.R. 550, 553 (Bankr. N.D. Ohio 2007) ("Because 28 U.S.C. § 157(c)(1) speaks only to 'final' orders or judgments, the plain language of that provision dictates that this Court has the authority to enter interlocutory orders in non-core proceedings and courts have consistently held such to be within the power of the bankruptcy court.").

An order denying Airbus's Motion to Dismiss the Complaint in the Adversary Proceeding would be an interlocutory order, not a final order. In the Fifth Circuit, "numerous courts have held that a bankruptcy court's denial of a motion to dismiss is not a final order." *Smith* v. *AET Inc., Ltd.*, 2007 WL 1644060, at *3–4 (S.D. Tex. June 4, 2007) (collecting cases and concluding that "a denial of a motion to dismiss is an interlocutory, not a final order"); *see also In re Smith*, 514 B.R. 838, 842 (Bankr. S.D. Tex. 2014) ("[D]enying the [motion to dismiss] does not end the litigation on the merits; therefore, there is no final order to be entered at this

time."). "In general, an order denying a motion to dismiss is considered a nonappealable interlocutory order. The same rule applies in bankruptcy appeals. A bankruptcy court's order denying a motion to dismiss generally is not a 'final' order." *In re Pickle*, 149 F.3d 1174, 1998 WL 413023, at *2 (5th Cir. 1998); *see Kelley* v. *Cypress Financial Trading Co.*, 518 B.R. 373, 377 (N.D. Tex. July 30, 2014) (citing *In re Pickle* and holding that a bankruptcy court's order denying a motion to dismiss is not a final order); *In re Ted A. Petras Furs, Inc.*, 100 F.3d 943, 1996 WL 49255, at *2 (2d Cir. 1996) (holding that bankruptcy court order denying defendants' motion to dismiss adversary proceeding was an interlocutory order).

Bankruptcy courts have exercised the authority to enter an order denying a dispositive motion in a non-core proceeding, rather than submitting such a ruling to the district court as a report and recommendation. *See, e.g.*, *In re Holloway*, 538 B.R. 137, 140, 145 (Bankr. M.D. Ala. 2015) (holding that "[a] denial of a motion to dismiss is not a final order" and denying 12(b)(6) motion to dismiss adversary complaint including non-core claims); *In re Freeway Foods of Greensboro, Inc.*, 467 B.R. 853, 868 & n.7 (Bankr. M.D.N.C. 2012) (denying motion to dismiss non-core claims in adversary proceeding).

In re Freeway Foods is an instructive example. There, the bankruptcy court considered a motion for judgment on the pleadings with regard to eight non-core claims brought in an adversary proceeding. The bankruptcy court entered an order denying the motion with respect to seven of the claims, explaining that it had the power to do so because "denial of a dispositive motion does not constitute a final order." *In re Freeway Foods*, 467 B.R. at 868 & n.7 (citing *Bryan* v. *BellSouth Commc'ns, Inc.*, 492 F.3d 231, 240 (4th Cir. 2007)). The court ruled that the motion to dismiss should be granted with respect to one of the non-core claims, but clarified that

"the Court's ruling as to this cause of action is a proposed finding of fact and conclusion of law [to the District Court], and not a final judgment." *Id.* at n.6.

This Court is authorized under 28 U.S.C. § 157(c) and well-settled case law to enter an order denying Airbus's Motion to Dismiss. Airbus's claim that "the District Court will need to rule on dispositive motions" therefore is not accurate, and does not justify withdrawal of the reference in this Adversary Proceeding. As this Court has acknowledged, the claims asserted in ECN Capital's Complaint against Airbus and the issues raised by Airbus in the Motion to Dismiss are intertwined with the Bankruptcy Cases (*see* Tr. 7:5-24; 19:4-9), and an adjudication of the Motion to Dismiss would benefit from this Court's familiarity with the facts underlying the Bankruptcy Cases. Accordingly, this Court should exercise its jurisdiction and authority to enter an order denying Airbus's Motion to Dismiss.

II. If This Court Does Not Deny Airbus's Motion To Dismiss, It Must Submit Its Ruling to the District Court As a Proposed Finding of Fact and Conclusion of Law.

Unlike an order denying a dispositive motion, an order granting a dispositive motion is a "final order" for purposes of 28 U.S.C. § 157(c). In non-core adversary proceedings, such orders may not be entered by a bankruptcy court without consent of all parties. *See, e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 475 (2011) (holding that under 28 U.S.C. § 157(c) only the district court may enter a final judgment in a non-core proceeding); *In re Blackwell*, 279 B.R. at 822 ("[O]nly the district court can enter 'final judgments and orders,' [in non-core matters] absent consent of the parties."). Since all parties do not consent at this time to the entry of final orders by this Court with respect to the Adversary Proceeding (*see, e.g.*, Am. Br. in Supp. of Mot. to Dismiss 2 & n.1), this Court is not authorized to enter a final order granting Airbus's Motion to Dismiss. If the Court does not deny the Motion to Dismiss, its ruling must be submitted to the District Court

as "a proposed finding of fact and conclusion of law, and not a final judgment." *In re Freeway Foods*, 467 B.R. at 868 & n.6.

CONCLUSION

For the foregoing reasons, this Court is authorized to enter an order denying Defendant's Motion to Dismiss the Complaint.

Dated: February 20, 2017
Dallas, Texas

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 20, 2017, I caused the foregoing Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss to be filed with the Court via CM/ECF and served on all parties requesting electronic notification, including the following counsel of record for the Defendant:

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