Docket #0011 Date Filed: 3/21/2025

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 11
ZACHRY HOLDINGS, INC., *et al*[1]	§	Case No. 24-90377 (MI)
Debtor.	§	(Jointly Administered)
ZACHRY HOLDINGS, INC.,	§	
Plaintiff,	§	Adversary No.: 25-03025 (MI)
v.	§	
OMAHA PUBLIC POWER DISTRICT,	§	
Defendant.	§	

DEFENDANT OMAHA PUBLIC POWER DISTRICT'S
MOTION AND BRIEF IN SUPPORT TO DISMISS COMPLAINT

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.veritaglobal.net/ZII. The location of the Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

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Omaha Public Power District ("**OPPD**"), by and through its undersigned counsel, hereby files *Defendant Omaha Public Power District's Motion and Brief in Support to Dismiss Complaint* (the "**Motion**") and respectfully moves this Court for entry of an order, substantially in the form attached hereto (the "**Proposed Order**"): (i) dismissing, with prejudice, Plaintiff Zachry Holdings, Inc.'s ("**Zachry**") claims asserted in the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6); and (ii) granting OPPD such other and further relief as this Court finds just and proper. In support of the Motion, OPPD respectfully states as follows:

I. INTRODUCTION

Zachry's Complaint should be dismissed for failure to state a claim. Zachry is seeking declaratory relief from this Court concerning the liquidated damages provision of a Contract it negotiated at arms-length and agreed to on multiple occasions. Zachry's Complaint wholly ignores the plain language of the Contract's forum selection clause that specifies Nebraska courts and instead asserts postpetition and post confirmation claims prematurely, and in the wrong court.

II. BACKGROUND

A. Undisputed facts.

OPPD is a public corporation and political subdivision of the State of Nebraska that provides electricity to the Omaha, Nebraska metropolitan area and other areas in eastern Nebraska. OPPD's revenues are reinvested back into the utility and its electric system. OPPD serves approximately 1 million people in Omaha and 13 surrounding counties in southeastern Nebraska.

Prior to the Petition Date (defined below), Zachry entered into that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle*

Creek Generating Stations (Contract No. 263406) dated September 21, 2021 (together with all exhibits, schedules, and ancillary agreements and documents thereto, the "**EPC**" or "**Contract**").[2]

Under the terms of the Contract, OPPD contracted with Zachry to provide services for all activities associated with designing, procuring, installing, starting up, and testing two (2) power plant sites: (i) the Standing Bear Lake Station ("**SBLS**"); and (ii) the Turtle Creek Station ("**TCS**", and together with SBLS, the "**Projects**"). SBLS and TCS are located in the Omaha metropolitan area.

The Contract was first amended in October 2023, with a First Amendment, and further amended in August 2024 pursuant to the terms of that certain *Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated August 13, 2024 (together with the original and continuing binding terms of the EPC, herein the "**Second Amendment**").

Since the date of the Assumption Order, Zachry has materially breached the terms of the Second Amendment due to its multiple failures to achieve (i) the "Guaranteed Substantial Complete Date" (as defined in the Second Amendment) of December 16, 2024, for the TCS; and (ii) the Guaranteed Substantial Complete Date of December 30, 2024, for the SBLS (collectively, the "**Breaches**").[3]

To date, Zachry's Breaches of the Guaranteed Substantial Completion Dates remain uncured, and liquidated damages pursuant to the terms of the Second Amendment are accruing daily.

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[2] The EPC is voluminous. A true and correct copy of the EPC will be made available upon any reasonable and appropriate request, subject to OPPD's rights to redact any terms therein and/or rights to seek a protective order and/or nondisclosure agreement to ensure any proprietary terms of the EPC remain confidential.

[3] There may be additional breaches by the Debtors under the terms of the Second Amendment. OPPD reserves all rights and does not waive any breaches by not explicitly referencing the same in this Objection.

B. The Chapter 11 Cases

On May 21, 2024 (the "**Petition Date**"), the above-captioned debtors (each, a "**Debtor**" and collectively, the "**Debtors**") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "**Bankruptcy Cases**"). Additional information regarding the Debtors' business, capital structure, and the circumstances leading to the commencement of the chapter 11 cases (the "**Chapter 11 Cases**") is set forth in the *Declaration of Mohsin Y. Meghji in Support of the Debtors' Petitions and Requests for First Day Relief* [Docket No. 7 (Case No. 24-90377-MI)] (the "**First Day Declaration**")

On September 17, 2024, the Court entered its *Order (I) Approving Settlement by and Among the Debtors and Omaha Public Power District, (II) Authorizing the Debtors to Amend and Assume (As Amended) the Omaha Public Power District Contract, and (III) Granting Related Relief* [Docket No. 961] (the "**Assumption Order**"), whereby the Debtors assumed the Second Amendment and the terms thereof were approved by the Court as a postpetition contract. *See* Assumption Order at ¶ 6, p. 3.

On January 23, 2025, the Debtors filed their (1) *Disclosure Statement for the Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* [Docket No. 1986] (the "**Disclosure Statement**") and (2) *Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* [Docket No. 1978] (as amended, supplemented, or otherwise modified from time to time, the "**Plan**"). The Debtors filed their *Notice of Filing of the Plan Supplement* [Docket No. 2080] on February 5, 2025, and the *Notice of Filing of the Second Plan Supplement* [Docket No. 2150] on February 13, 2025 (the "**Plan Supplement**").

On February 14, 2025, OPPD filed its *Application for Allowance of Administrative Expense Claim* [Docket No. 2176] (the "**Admin Claim**"), seeking allowance of certain contractual

damages, discussed in more detail below, as an administrative expense claim pursuant to section 503(b)(1)(A) of the Bankruptcy Code for any and all damages (whether liquidated, actual or otherwise) due and owing to OPPD arising from any and all breaches by the Debtors under the terms of the Second Amendment occurring after the Petition Date and prior to the Plan's Effective Date.

A hearing to confirm the Debtors' Plan took place on February 26, 2025 (the "**Confirmation Hearing**") and the Plan was confirmed.

C. The Adversary Proceeding.

On February 5, 2025, Debtor, and Plaintiff here, Zachry**,** filed the *Debtors' Adversary Complaint for Declaratory Relief* [Docket No. 1] (the "**Complaint**") against OPPD in the above-captioned adversary proceeding (the "**Adversary Proceeding**").

Via the Complaint, Zachry seeks declaratory relief that no liquidated damages are due from the Debtors under the Second Amendment to the EPC. More specifically, Zachry claim that the liquidated damages triggered by Zachry's default—damages that Zachry explicitly agreed to and are explicitly approved by the Court's Assumption Order—are not legitimate.

OPPD's responsive pleading deadline in the Adversary Proceeding is March 21, 2025. As such, this Motion is timely.

III. LEGAL STANDARD

A. Federal Rule 12(b)(6)—Failure to State a Claim.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint is proper if it "fail[s] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

To survive dismissal, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A well-pleaded complaint must

contain allegations sufficient "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007); *Mitchell v. Am. Paint Horse Ass'n*, No. 4:18-CV-886-A, 2019 WL 130447, at *2 (N.D. Tex. Jan. 8, 2019) (citing *Twombly*, 550 U.S. at 556–59) ("To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient.").

Fundamentally, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. And, "[a]lthough detailed factual allegations are not required, a plaintiff must show they are entitled to relief using 'more than labels and conclusions.'" *In re Legend Energy Servs., LLC*, No. 21-60451, 2023 WL 3055613, at *3 (Bankr. E.D. Tex. Apr. 13, 2023) (quoting *Twombly*, 550 U.S. at 555). The Supreme Court has articulated that when it comes to a motion to dismiss "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Accordingly, courts are not required to accept "legal conclusion[s] couched as [] factual allegations." *In re Ondova Ltd.*, 914 F.3d 990, 993 (5th Cir. 2019) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Further, a complaint is insufficient "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 577). Moreover, "the mere possibility of misconduct" is simply not enough to demonstrate that the plaintiff is entitled to relief. *Id.* at 679.

IV. ARGUMENT

A. The Complaint should be dismissed for failure to state a claim.

1. Nebraska law governs the Contract

As discussed further in OPPD's Motion to Transfer Venue, filed contemporaneously herewith, the parties agreed that the Contract is subject to the laws of the State of Nebraska. Article XIII of the Contract explicitly provides, in relevant part:

> [The Contract] shall be governed by the laws of the State of Nebraska…[Zachry] hereby consents and submits to the exclusive jurisdiction of the District Court of Douglas County, Nebraska and the United States District Court for the State of Nebraska…and hereby waives any objection based on venue or forum non conveniens with respect to any legal action or proceeding instituted in connection with or related to this Agreement.

(the "**Forum Selection Clause**"). Moreover, as shown in the contemporaneously filed Motion to Transfer Venue, this Adversary Proceeding involves non-core issues that do not require adjudication in this Bankruptcy Court.[4] Therefore, Nebraska law controls the Contract, including any dispute over liquidated damages, and Zachry's Complaint should be dismissed for failure to state a claim.

2. The liquidated damages provision in the Contract is enforceable

"Generally, the question whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court." *Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 747 N.W.2d 383, 387 (Neb. 2008). Under Nebraska law, to determine whether a liquidated damages provision of a contract constitutes a penalty, as alleged by Zachry, courts consider whether the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or

[4] *In re EbaseOne Corp.*, No. 01–31527–H4–7, 2006 WL 2405732, at *2 (Bankr. S.D. Tex. June 14, 2006) ("Only if an adversary proceeding is a core proceeding may a bankruptcy court enter final orders and judgments; if the proceeding is non-core, then a bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court for that court's de novo review.").

uncertainty and whether the amount of liquidated damages is a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach. *Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 275 Neb. 425, 430, 747 N.W.2d 383, 387 (2008).

> [W]here the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the **parties surveyed the whole situation at the time of contract**, and **agreed upon the amount of damages**, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty.

Abel Const. Co. v. Sch. Dist. of Seward, Seward Cnty., 188 Neb. 166, 170, 195 N.W.2d 744, 747 (1972) (internal citations omitted) (emphasis added). "Nebraska courts have consistently upheld the right of contracting parties to privately bargain for both the type and 'the amount of damages to be paid in the event of a breach of contract,' as long as their agreement is reasonable under the circumstances." *Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC*, No. 8:19CV550, 2021 WL 6202667, at *4 (D. Neb. Nov. 3, 2021) (quoting *U.S. Pipeline, Inc. v. N. Nat. Gas Co.*, 930 N.W.2d 460, 475 (Neb. 2019); *see also Kozlik v. Emelco, Inc.*, 483 N.W.2d 114, 121 (Neb. 1992) (explaining "reasonableness of the stipulated damages can be judged as of the time the contract was formed")). "Indeed, when 'the parties **are experienced in business**, the damages are economic, and the parties had **fair opportunity to consider the agreement**,' Nebraska courts 'have been **reluctant to' let them off the hook**." *Lund-Ross*, 2021 WL 6202667 at *5 (quoting *Reichert v. Rubloff Hammond, L.L.C.*, 645 N.W.2d 519, 527 (Neb. 2002) (emphasis added); *Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 747 N.W.2d 383, 387 (Neb. 2008)); *accord Parsons Constr. Co. v. Metro. Utils. Dist. of Omaha*, 104 N.W.2d 272, 278 (Neb. 1960) (noting the contractor was very "**familiar with this type of construction**")) (emphasis added).

In accordance with settled Nebraska case law, a party challenging the enforceability of a liquidated damages provision has the burden to prove the provision constitutes a penalty.

"[Though] it does not appear the Nebraska Supreme Court has specifically addressed which party bears the burden of proof on this affirmative defense[,]. . . the Nebraska Supreme Court would likely place the burden on the party seeking to invalidate the liquidated damages provision." *Lund-Ross*, 2021 WL 6202667, at *5. In other words, the party challenging the liquidated damages provision has the burden to prove the provision is an unenforceable penalty. *See id*. at *6. To meet this burden, the challenging party must "adduce sufficient evidence to show the type of inherent unreasonableness or obvious overcompensation the Nebraska Supreme Court has said evinces a penalty." *Id*. (citing *Abel Constr. Co. v. Sch. Dist. of Seward*, 195 N.W.2d 744, 747-48 (Neb. 1972); *Parsons Constr. Co. v. Metro. Utils. Dist. of Omaha*, 104 N.W.2d 272, 275 (Neb. 1960)).

> It also makes sense. Not only did the challenging party **willingly and knowingly agree to the provision** when it signed the contract, it understood that the whole purpose of including a liquidated-damages provision was "to obviate the need for the nonbreaching party to prove actual damages."

Id. at *5 (internal citations omitted) (emphasis added).

Here, Zachry not only entered into the original Contract containing the liquidated damages provision with OPPD, it also entered into two subsequent amendments to the Contract agreeing to liquidated damages, specifically picked the dates for substantial completion of the Projects, and engaged in arms-length negotiations with OPPD for increased liquidated damages amounts if it missed those dates. Indeed, OPPD and Zachry negotiated multi-million-dollar incentive payments into the Second Amendment to encourage completion of the Projects ahead of the Guaranteed Substantial Completion Dates, but Zachry failed to meet those dates.

Zachry is a sophisticated contractor with capable legal counsel. Indeed, on its website, Zachry touts its 100 years of experience as an EPC contractor, having completed tens of thousands of projects across the US and the world.[5] Zachry claims to pride itself on having a very

[5] *See* https://zachrygroup.com/epc, accessed March 20, 2025.

experienced workforce able to deliver EPC best practices, stating "Zachry sets the standard for excellence and outcome predictability in executing EPC capital projects."[6] Specifically, as it relates to OPPD's two power plants at issue in this case, Zachry advertises itself as having more than five decades of experience, designing and constructing over 100 such facilities.[7] In short, Zachry is a sophisticated, experienced party to EPC agreements like the Contract here and was well aware of the risks and benefits of entering into such an agreement with a liquidated damages clause.

When Zachry negotiated the original Contract, the First Amendment, and the Second Amendment, it "willingly and knowingly agree[d] to the provision…[and] understood that the whole purpose of including a liquidated-damages provision was to obviate the need for [OPPD] to prove actual damages." *Id.* While the two amendments to the Contract created new substantial completion deadlines and increased liquidated damages amounts, the amendments did not alter Article XI (a) of the Contract, in which Zachry expressly acknowledged, with language that reflects Nebraska law, that the actual damages incurred by OPPD due to Zachry's failure to meet the Guaranteed Substantial Completion Dates would be difficult to determine, and the liquidated damages amounts are reasonable:

> ARTICLE XI - LIQUIDATED DAMAGES.
>
> (a) The Contractor and the District acknowledge that actual damages incurred by the District as a result of the Contractor's failure to meet the Guaranteed Substantial Completion Dates and Performance Guarantees would be difficult to determine and that both parties agree that the liquidated damages provisions in this Article XI are reasonable and appropriate measures of the damages for such completion and performance shortfalls, and are not a penalty. Total liquidated damages in the aggregate for both sites shall not exceed Fifteen percent (15%) of the Contract Price.

[6] *Id.*

[7] *See* https://zachrygroup.com/power, accessed March 20, 2025.

As stated in *Lund-Ross*, Zachy should not be "let off the hook" by this Court by its attempt to ignore the explicit provisions it agreed to be bound by in the Contract, including the Second Amendment. This Court should reject Zachry's arguments that the liquidated damages provision is a penalty or that it is not subject to liquidated damages, as a matter of law. Zachry's argument essentially asks the Court to bypass the parties' agreement on the uncertainty of damages when they executed the Contract and only consider the Second Amendment. However, there are no allegations in Zachry's Complaint which allege that the liquidated damages provision is invalid because actual damages could have been ascertained at the time the Contract was executed. The Second Amendment did not supersede Article XI (a) of the Contract, as shown above, but instead explicitly retained it.[8]

Moreover, Zachry fails to inform the Court that the original Guaranteed Substantial Completion Dates for the Projects were nearly two years prior to the filing of Zachry's Complaint, and the Projects are still unfinished due to Zachry's Breaches. OPPD has incurred and will continue to incur significant losses as a result of those Breaches. OPPD has been forced to purchase power from the market, continue to pay exorbitant operational costs through two years of delays, and pay additional equipment suppliers for ZII's failures. OPPD's damages are enormous, as Zachry knew they would be when Zachry entered into the Contract and the amendments to the Contract that increased the liquidated damages amounts as Zachry continued to fail in achieving completion of Projects that were supposed to come online in May and August of 2023. When executing the Contract, Zachry "understood that the whole purpose of including a liquidated-damages provision was to obviate the need for [OPPD] to prove actual damages," as they were and remain difficult to ascertain. *Lund-Ross*, 2021 WL 6202667, at *5. Zachry agreed

[8] *See* Second Amendment, ¶ 12.

to the liquidated damages provision as a negotiated amount that weighed the risk to each of the parties of a breach and the consequences thereof. *See Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 542 (Fla. Dist. Ct. App. 2007) (finding that a liquidated damages provision permits parties to agree at the outset on the amount of damages resulting from nonperformance to avoid extensive litigation if and when a breach occurs). OPPD is entitled to obtain the benefit of its bargain with Zachry and Zachry is required to abide by the terms of the Contract.

Under Nebraska law, Zachry has no colorable argument that the liquidated damages provision in the Contract or its amendments are unenforceable. The parties agreed that the amount of actual damages was difficult to ascertain and that the specified liquidated damages amounts were not a penalty. This provision in Article XI(a) of the original Contract remained in place through two subsequent amendments, including the Second Amendment. There is no legal basis for Zachry's Complaint and the Court should dismiss it for failure to state a claim.

3. <u>Even pursuant to Texas law, Zachry's Complaint should be dismissed as unripe.</u>

The Court should dismiss Zachry's Adversary Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) as it "fail[s] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Zachry's Complaint was not ripe for adjudication at the time of its filing. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir.1987)). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Id.* "In the declaratory judgment context, whether a particular dispute is ripe for adjudication turns on whether a substantial controversy of sufficient

immediacy and reality exists between parties having adverse legal interests." *Lower Colorado River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 924 (5th Cir. 2017) (quoting *Venator Grp. Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003)). "A declaratory judgment action is ripe for adjudication only where an "actual controversy" exists." *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000); 28 U.S.C. § 2201(a).

The Declaratory Judgment Act ("**DJA**") "is an enabling act, which confers discretion on the courts rather than an absolute right on a litigant." *Sherwin–Williams Co. v. Holmes County*, 343 F.3d 383, 389 (5th Cir.2003). "The Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Id.* "The purpose of the Declaratory Judgments Act is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]'" *Nexstar Broad., Inc. v. Gray*, No. 09-07-364CV, 2008 WL 2521967, at *2 (Tex. App.—Beaumont June 26, 2008, no pet.) (quoting Tex. Civ. Prac. & Rem. Code § 37.002(b)).

In *St. Paul Insurance Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994), the Fifth Circuit set forth seven factors for determining whether a declaratory judgment action should be dismissed:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
>
> (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
>
> (3) whether the plaintiff engaged in forum shopping in bringing the suit;
>
> (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
>
> (5) whether the federal court is a convenient forum for the parties and witnesses;
>
> (6) whether retaining the lawsuit would serve the purposes of judicial economy; and

> (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Id.

In the case at bar, Zachry's Complaint seeking declaratory relief is premature at best and spurious at worst, as it was solely filed to evade Zachry's contractual obligations in the Contract with OPPD. Zachry's declaratory judgment claim is an ill-disguised effort to preempt a potential breach of contract claim by OPPD and to avoid liability under the liquidated damages provision agreed to by Zachry. However, OPPD has yet to file any breach of contract action against Zachry for its failure to meet the Guaranteed Substantial Completion dates that it explicitly agreed to.

(i) Zachry's Complaint is "procedural fencing" that is prohibited by applicable law.

The second, third, and fourth of the aforementioned *Trejo* factors address "fairness concerns—whether the plaintiff is using the declaratory judgment process to gain access to a federal forum on improper or unfair grounds." *Great Am. Assur. Co. v. Waterhill Companies Ltd.*, No. CIV.A H-09-3196, 2010 WL 518760, at *3 (S.D. Tex. Feb. 4, 2010) (citing *Sherwin–Williams Co. v. Holmes County*, 343 F.3d 383, 391 (5th Cir. 2003)). "[I]n determining whether the plaintiff used the Declaratory Judgment Act to gain access to a federal forum on improper or unfair grounds, courts look to factors such as whether the plaintiff has engaged in 'procedural fencing,' i.e., filing the declaratory action before the other party is legally able to bring a state action, or is seeking to change the law that would apply to the matter." *Great Am. Assur. Co.*, 2010 WL 518760 at *4.

Here, Zachry's request for declaratory relief is undoubtedly an exercise in procedural fencing as an attempt to usurp a Nebraska court of its jurisdiction. Zachry's declaratory action is nothing more than Zachry's effort to beat OPPD in a race to the courthouse of its choice—the Bankruptcy Court—despite (1) the forum selection clause in the Contract, (2) the fact that the

Contract was assumed postpetition, (3) that Zachry's Plan was confirmed, and (4) that OPPD has yet to file a breach of contract claim against Zachry. As stated in *Great Am. Assur. Co.*, Zachry is employing the declaratory relief procedure on "unfair grounds" and "engaged in procedural fencing" by "filing the declaratory action before [OPPD] was able to bring a state action" and is "seeking to change the law that would apply to the matter." *Id.*

(ii) Zachry's Adversary Complaint is an affirmative defense.

Through elegant pleading, Zachry's Complaint seeks to preempt OPPD asserting its rights pursuant to the Contract by filing a putative breach of contract claim against Zachry for its failure to meet the Guaranteed Substantial Completion Dates. However, it is well settled federal law and Texas law that Zachry's allegations regarding the enforceability of the liquidated damages provision of the Contract are inappropriate for a declaratory action. Moreover, OPPD has not yet filed any cause of action for breach of contract against Zachry, and Zachry does not assert any breach of contract claims against OPPD. Instead, Zachry's Complaint prematurely seeks declaratory relief as an end-run to cutoff action that OPPD has not yet taken. Zachry is attempting to predict what OPPD may (or may not) do in response to Zachry's breaches under the Contract. The federal declaratory relief statute was not intended for this form of litigation gamesmanship.

Zachry's allegations are actually potential affirmative defenses dressed up as claims for declaratory relief. "An assertion that a liquidated damages provision is a penalty is an affirmative defense that the defendant has the burden of pleading and proving." *Urb. Television Network Corp. v. Liquidity Sols., L.P.*, 277 S.W.3d 917, 919 (Tex. App.—Dallas 2009, no pet.) (citing *Murphy v. Cintas Corp.,* 923 S.W.2d 663, 665–66 (Tex. App.—Tyler 1996, writ denied); *see* TEX. R. CIV. P. 94; *see also Fluid Concepts, Inc. v. DA Apartments Ltd. P'ship*, 159 S.W.3d 226, 231 (Tex. App.—Dallas 2005, no pet.)). "Whether a contractual provision is an unenforceable penalty and not a

liquidated damage clause is an affirmative defense." *GPA Holding, Inc. v. Baylor Health Care Sys.*, 344 S.W.3d 467, 471 (Tex. App.—Dallas 2011, pet. denied) (citing TEX. R. CIV. P. 94; *Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991)); *Khan v. Meknojiya*, No. 03-11-00580-CV, 2013 WL 3336874, *2 (Tex. App.—Austin June 28, 2013, no pet.). "A defendant may not use a declaratory judgment **to prematurely adjudicate defenses to liability that may not yet exist**." *Transcon. Realty Invs., Inc. v. Orix Cap. Markets, LLC*, 353 S.W.3d 241, 245 (Tex. App.—Dallas 2011, pet. denied); *cf. Calderon v. Ashmus*, 523 U.S. 740, (1998) (under the federal Constitution, a party may not use a declaratory judgment to get advance ruling on an affirmative defense); *see also Cohen v. Orthalliance New Image, Inc.*, 252 F. Supp. 2d 761, 766 (N.D. Ind. 2003) (assessing the success of a defense to a potential claim (breach-of-contract or otherwise) is generally the type of hypothetical question federal courts endeavor to avoid)).

In *Transcon Realty*, Orix sought a declaratory judgment regarding the validity of an indemnity claim and lack of viable defenses for the opposing party. *Transcon*, 353 S.W.3d at 245. The court found that Orix's declaratory relief action was improper, as such action was premature: "Orix's attempt to 'extinguish' any defenses to the Guaranty and get a declaration that no defenses existed was not proper. According to Orix's rationale, Transcontinental **should be forced to litigate any potential defenses it might have to liability before liability has even been established**." *Id.* (emphasis added).

Similarly, in *Nexstar Broad., Inc. v. Gray*, No. 09-07-00364-CV, 2008 WL 2521967, *2 (Tex. App.—Beaumont June 26, 2008, no pet.), the court held that it was an improper use of the DJA for a party with potential liability under a contract to seek a declaration that simply restated the "penalty" affirmative defense and sought no relief beyond what that defense would afford (i.e., avoidance of liquidated damages). *Id.*

Zachry's Complaint seeking declaratory relief that it is not obligated to pay liquidated damages or that the liquidated damages provision is unenforceable should be pleaded as an affirmative defense to a OPPD breach of contract claim. But because OPPD has yet to file any such cause of action, Zachry is trying to force OPPD to argue its position that the provision is enforceable before litigation even begins. This is precisely what Texas courts have cautioned against. *See Transcon*, 353 S.W.3d at 245. If OPPD ultimately does file a breach of contract action, Zachry will be able to make its arguments concerning the liquidated damages provision of the Contract, but not until such filing by OPPD occurs.

Finally, while OPPD did ultimately file its Admin Claim [Docket No. 2176] after Zachry's Complaint was filed, it only did so to preserve its rights under the Contract with Zachry. Zachry has yet to complete the Projects pursuant to the Contract, yet it confirmed its Chapter 11 Plan on February 26, 2025. OPPD necessarily had to take action to ensure that its rights were protected and preserved, even though it had yet to file a breach of contract claim. Zachry's attempts to circumvent procedural requirements and its obligations under the Contract itself left OPPD no choice but to file its Admin Claim out of an abundance of caution to preserve OPPD's rights under the Debtors' confirmed Plan.

This Court should dismiss Zachry's Complaint for declaratory relief as it is unripe and procedurally improper.

V. CONCLUSION

For the foregoing reasons, OPPD respectfully requests that this Court enter the Proposed Order: (i) dismissing, with prejudice, Plaintiff's claims asserted in the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6); and (ii) granting OPPD such other and further relief as this Court finds just and proper.

Dated: March 21, 2025

Respectfully submitted by:

/s/ Thomas C. Scannell

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ATTORNEYS FOR OMAHA PUBLIC POWER DISTRICT

CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on March 21, 2025, using the Court's CM/ECF System which caused it to be served upon those parties registered in the system to receive such service.

/s/ Zachary C. Zahn
Zachary C. Zahn

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 11
ZACHRY HOLDINGS, INC., *et al*[1]	§	Case No. 24-90377 (MI)
Debtor.	§	(Jointly Administered)
ZACHRY HOLDINGS, INC.,	§	
Plaintiff,	§	Adversary No.: 25-03025 (MI)
v.	§	
OMAHA PUBLIC POWER DISTRICT,	§	
Defendant.	§	

ORDER GRANTING DEFENDANT OMAHA PUBLIC POWER DISTRICT'S MOTION TO DISMISS COMPLAINT

On this day the Court considered *Defendant Omaha Public Power District's* ("**OPPD**") *Motion and Brief in Support to Dismiss Complaint* (the "**Motion**"). After considering the Motion, the Court is of the opinion that the Motion should be GRANTED.

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED.

2. Plaintiff Zachry Holdings, Inc.'s *Adversary Complaint for Declaratory Relief* [Docket No. 1], including all claims asserted therein, is hereby dismissed with prejudice.

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.veritaglobal.net/ZHI. The location of the Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

Dated: _____

HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE