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 TO WITHDRAW THE REFERENCE

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/ZHI. 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 to Withdraw the Reference* (the "**Motion**") and respectfully moves this Court for entry of an order, substantially in the form attached hereto (the "**Proposed Order**"), requesting that the Court recommend that the District Court grant this Motion to withdraw the reference for the above-referenced adversary proceeding (the "**Adversary Proceeding**"). In support of the Motion, OPPD respectfully submits as follows:

I. PRELIMINARY STATEMENT

Withdrawal of the reference of this Adversary Proceeding is appropriate for several reasons. First, this dispute is premised on and primarily involved non-core, state contract law, issues. Second, the district court's adjudication of the claims asserted herein in would foster economical use of Debtors' and creditors' resources. Third, uniformity in administration is served by withdrawal, especially considering the significant predominance of non-core issues. Fourth, withdrawal is not sought for purposes of forum shopping, but is being pursed as the parties contractually agreed that Nebraska would be the venue of choice. Finally, withdrawal of the reference will expedite the bankruptcy process as the Bankruptcy Court lacks authority to render a final judgment over non-core issues.

II. ISSUES PRESENTED

OPPD has filed a Motion to Withdraw the Reference requesting that the District Court withdraw the reference and transfer the Adversary Proceeding to the Federal District Court of Nebraska "for cause shown" pursuant to 28 U.S.C. §157(d).

III. 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), OPPD and Debtor Zachry Industrial, Inc. ("**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 "**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 power plant sites: (i) the Standing Bear Lake Station ("**SBLS**"); and (ii) the Turtle Creek Generating Station ("**TCS**", and together with SBLS, the "**Projects**"). SBLS and TCS are both located in the Omaha metropolitan area.

The Contract was first amended in October 2023 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 Contract, herein the "**Second Amendment**" or "**Second Amended Contract**").

Notably, OPPD provided voluntary aid to Zachry as it attempted to work through its financial distress. Specifically, OPPD released $20,220,446.00 in retainage that it was not obligated to release, and OPPD modified payment terms on a "Net 15" basis versus a "Net 30"

[2] The Contract is voluminous. A true and correct copy of the Contract 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 Contract remain confidential.

basis. Both voluntary actions were gratuitously provided by OPPD to support Zachry's timely completion of the Projects.

Relevant here is the Contract's (i) forum selection clause; and (ii) the liquidated damages clause.

Pursuant to Article XIII of the Contract, the parties agreed that the laws of the State of Nebraska would govern the Contract and any disputes arising thereunder. Further, Zachry, as Contractor, expressly agreed that any dispute would be brought in Nebraska and waived any objection based on venue (the "**Forum Selection Clause**"):

> This EPC Contract shall be governed by the laws of the State of Nebraska without reference to, or application of, its conflict of laws principles. Contractor 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 (or, if such courts do not have subject matter jurisdiction over such dispute, in any other state or federal court located in 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. WAIVER OF JURY TRIAL: THE PARTIES TO THIS CONTRACT, INCLUDING BUT NOT LIMITED TO, OPPD, CONTRACTOR AND THE INDEMNIFIED PARTIES, EXPRESSLY WAIVE ANY AND ALL RIGHTS TO A TRIAL BY JURY OF ANY CLAIMS DIRECTLY OR INDIRECTLY ARISING OUT OF THIS CONTRACT.

Further, pursuant to the Second Amendment, Zachry also agreed to be bound by and subject to certain liquidated damages (the "**Liquidated Damages Clause**").

5. Amendment of Article XI – Liquidated Damages. Article XI Section (f) of Amendment No. 1 to the EPC Contract is hereby deleted in its entirety, such that Article XI, Section (f) now provides in its entirety, the following:

(f) Payments for Early Completion. Provided that Zachry has successfully completed commissioning requirements per the EPC Contract, as determined by OPPD, Zachry shall be entitled to receive the following payments, to be paid within fifteen (15) days of receipt of an invoice:

(1) For SBLS, $193,548.00 per day for each calendar day before the Guaranteed Substantial Completion Date that the Work is completed. There shall be an overall cap on this compensation of $5,999,988, reflecting up to 31 calendar days.

(2) For TCS, $352,941.00 per day for each calendar day before the Guaranteed Substantial Completion Date that the Work is completed. There shall be an overall cap on this compensation of $5,999,997, reflecting up to 17 calendar days.

Throughout the relevant time frame, the parties met (and continue to meet) onsite weekly to discuss scheduling updates on the status of the Projects. At these weekly meetings, the parties reviewed completed, active, and upcoming activities that support the completion of the Project prior to the respective Guaranteed Substantial Completion Dates. When the Substantial Completion dates did not timely meet the Guaranteed Substantial Completion Dates, the weekly meetings continued with intention to keep operations on track so that Substantial Completion of the Projects could be achieved at the earliest possible date. OPPD's participation in these weekly meetings clearly signals OPPD's good faith intentions to keep the Projects moving forward as close to schedule as possible, which serves as the primary purpose for executing the amendments to the EPC.

Moreover, the Second Amendment reflects that the parties agreed that:

(i) If the Contractor fails to complete the Work on or before the Guaranteed Substantial Completion Date, for SBLS, as a predetermined reasonable and sole and exclusive remedy for such delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed Substantial Completion Date for SBLS that the Work is not completed, $350,000 per calendar day through January 29, 2025, and $500,000 per calendar day until the Work is accepted as complete. There shall be an overall sub-cap on

this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 28, 2025, then on March 1, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to SBLS.

(ii) If the Contractor fails to complete the Work on or before the Guaranteed Substantial Completion Date, for TCS, as a predetermined reasonable and sole and exclusive remedy for such delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed Substantial Completion Date for TCS that the Work is not completed, $250,000 per calendar day, through January 15, 2025, and $400,000 per calendar day until the Work is accepted as complete. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 14, 2025, then on February 15, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to TCS.

Notably, although the Second Amendment amended certain portions of the Liquidated Damages Clause in the original Contract, it did not amend Article XI(a). Instead, the Second Amendment states that "[e]xcept as provided in Amendment No. 1 and this Amendment No. 2, all other terms and conditions of the EPC Contract shall remain the same and in full force and effect." *See* Second Amendment, at ¶ 12. Indeed, the first amendment to the Contract likewise did not alter Article XI(a).

That said, Article XI(a) of the Contract provides that "[t]he 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." *See* Contract, at art. XI(a) (emphasis added).

B. <u>The Debtors' Bankruptcy Cases.</u>

On May 21, 2024 (the "**Petition Date**"), the above-captioned debtors (each, a "**Debtor**" and collectively, the "**Debtors**") each 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 Bankruptcy 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 (Case No. 24-90377-MI)] (the "**Assumption Order**"), whereby the Debtors assumed the Second Amended Contract and the terms thereof were approved by the Court. *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**"). On February 26, 2025, the Debtors filed their *Notice of Filing of the Fifth Plan Supplement* [Docket No. 2417] (the "**Plan Supplement**").

During the Plan confirmation hearing held on February 26, 2025 (the "**Confirmation Hearing**"), the Bankruptcy Court confirmed the Plan and subsequently entered its *Findings of Fact, Conclusions of Law, and Order (I) Approving the Debtors' Disclosure Statement on a Final Basis and (II) Confirming the Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* [Docket No. 2431] on February

27, 2025 (the "**Confirmation Order**").

C. Zachry breaches the Contract.

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

Despite the Breaches, OPPD has not taken any action to formally declare a breach and pursue its right to terminate the Contract as a result of Zachry's Breaches. In fact, OPPD did quite the opposite, taking significant steps to encourage and support Zachry's completion of the Projects. As such, Zachry remains in place as the Contractor (as defined in the Contract).

OPPD believes that there are additional breaches by Zachry under the Contract aside from the Breaches of the Guaranteed Substantial Complete Dates. Accordingly, OPPD reserves the right to assert any such additional breaches at a later date and nothing herein shall constitute a waiver of such right.

To date, Zachry's Breaches remain uncured, and liquidated damages pursuant to the terms of the Second Amended Contract are accruing daily.

D. The Adversary Proceeding and related matters.

On February 5, 2025, 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 asserts three claims for declaratory relief. First, Zachry seeks a declaratory judgment that they are "not liable for breach of the [Contract]." Second, Zachry asserts that the "liquidated damages provision of the Second Amended [Contract] is unenforceable."

Importantly, both of these claims are premised solely on Nebraska contract law and have nothing to do with nor arise under the Bankruptcy Cases. As for third and final claim, Zachry asserts that, in the event a court finds for OPPD on Zachry's first and second claims, OPPD's "claim for liquidated damages should not be given administrative priority in the full amount." Importantly, this claim, which is brought in the alternative, is solely contingent on a final judgment regarding the first two claims. To date, Zachry has not asserted any additional claims.

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 Zachry under the terms of the Second Amended Contract occurring after the Petition Date and prior to the Plan's Effective Date.[3]

IV. LEGAL STANDARD

Pursuant to 28 U.S.C. § 157(d), "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. § 157(d). The decision to grant or deny a motion to withdraw the reference "is committed to the discretion of the district court." *Veldekens v. GE HFS Holdings, Inc.*, 362 B.R. 762, 765 (S.D. Tex. 2007). The party seeking withdrawal under the permissive standards bears the burden of showing cause for withdrawal. *In re Morrison*, 409 B.R. 384, 389–90 (S.D. Tex. 2009).

[3] The Debtors have since filed the *Debtors' Objection to Omaha Public Power District's Application for Allowance of Administrative Expense Claim* [Docket No. 2176] and recently served discovery regarding the Admin Claim.

Although "cause" is not defined under the Bankruptcy Code, the Fifth Circuit generally considers the following *Holland American*[4] factors to determine whether permissive withdrawal is appropriate:

> (1) whether the issues are core or non-core; (2) whether withdrawal would foster a more economical use of the parties' resources; (3) whether withdrawal would expedite the bankruptcy process; (4) whether withdrawal reduces forum shopping and confusion; (5) whether jury demands have been made; and (6) whether withdrawal would promote uniformity in bankruptcy administration.

Id. at 386–87 (citing *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985)).

These factors, however, are not exclusive—they are "only 'general principles that should guide the district court in determining whether to refer or withdraw the reference.'" *Veldekens*, 362 B.R. at 765 (quoting *Holland Am. Ins. Co.*, 777 F.2d at 998). Thus, considering this principle, a decision to withdraw the reference is appropriate so long as it is "based on a sound, articulated foundation." *Holland*, 777 F.2d at 998; *accord Morrison*, 409 B.R. at 389–90 (citations omitted); *Veldekens*, 362 B.R. at 765 (citations omitted).

V. ARGUMENT

Sufficient cause exists for withdrawal of the reference of this Adversary Proceeding under the *Holland American* factors. However, before addressing each of the *Holland* factors, it is imperative to note one crucial procedural distinction that must be considered with respect to this Adversary Proceeding. OPPD acknowledges that there is typically "a presumption in favor of maintaining venue of an adversary proceeding in the forum where the bankruptcy case is pending." *Mirant Corp. v. The Southern Co. (In re Mirant)*, 337 B.R. 107, 124 (N.D. Tex. 2006), *aff'd sub nom.*, *Mirant Corp.*, 197 Fed. App'x. 285. However, this presumption is "*significantly weakened, if not entirely destroyed*," once a plan is confirmed. *Id.* (emphasis added).

[4] *See generally Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985).

Here, the Debtors have not only filed the Plan, but it has already been confirmed by this Court. While the resolution of the claims asserted in the Adversary Proceeding may affect the size of the available funds, such resolution—including withdrawal of the reference—will not delay the implementation of the Plan and any presumption favoring retaining this Adversary Proceeding is entirely extinguished as a result of the Debtors' confirmed Plan.

Accordingly, this Court cannot favor retaining this Adversary Proceeding for such reasons and should instead, focus the inquiry on the factors discussed below.

A. <u>The Adversary Proceeding involves primarily—if not exclusively—non-core issues.</u>

Evaluating a request to withdraw the reference begins with the determination of whether the proceeding is core or non-core. *Veldekens*, 362 B.R. at 767; *see also In re Mirant*, 337 B.R. at 115–16 (granting motion for withdrawal). However, although "[t]he core versus non-core factor is an important factor within the permissive withdrawal analysis," it "is not alone determinative." *In re Morrison*, 409 B.R. at 392.

As noted above, the determination of whether these disputes involve core issues is key in determining whether the reference should be withdrawn; if the dispute involves non-core issues, withdrawal of the reference is strongly favored. *See In re EbaseOne Corp.*, No. 01–31527–H4–7, 2006 WL 2405732, at *2 (Bankr. S.D. Tex. June 14, 2006). This is because the bankruptcy court lacks constitutional authority to issue a final judgment over non-core claims. *See Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 34–35 (2014) (citing *Stern v. Marshall*, 131 S.Ct. 2594, 2611 (2011)). Instead, the bankruptcy court can only hear the proceeding and submit findings of facts and conclusions of law, which are reviewed *de novo* by the district court. *See id.* In short, if a matter is core, then the bankruptcy court has the authority to render final judgment on the claim, subject to district court review; if the matter is non-core, the bankruptcy court cannot do so. *See id.* Moreover, where the bankruptcy court lacks constitutional authority to render final

judgment—such as a state law claim that is related to the bankruptcy case—the parties cannot consent to the bankruptcy court issuing final orders. *See BP PE LP v. RML Waxahachie Dodge LLC (In re BP RE LP)*, 735 F.3d 279, 287–88 (5th Cir. 2013). OPPD does not consent to the bankruptcy court rendering final judgment.

"The Fifth Circuit has defined core versus non-core matters consistent with § 1334(b)'s jurisdictional grants of authority." *In re Morrison*, 409 B.R. at 390 (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987)). "When determining whether a proceeding is core, a court must consider both the form as well as the substance of the proceeding." *In re Doctors Hops. 1997, L.P.*, 351 B.R. 813, 865 (Bankr. S.D. Tex. 2006) (citing *In re Wood*, 825 F.2d at 97). "Core proceedings concern matters that arise under title 11 or arise in a bankruptcy case under title 11." *In re Morrison*, 409 B.R. at 390 (citing *In re Wood*, 825 F.2d at 96–97). "A case arises under title 11 '[i]f the proceeding involves a right created by the federal bankruptcy law,'" or "'[i]f the proceeding is one that would arise only in bankruptcy.'" *Id.* (quoting *In re Wood*, 825 F.2d at 97). Thus, "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987).

However, "[i]f the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding . . . under § 157(c)(1) it is an 'otherwise related' or non-core proceeding." *In re Morrison*, 409 B.R. at 390. For example, in *In re Wood*, the Fifth Circuit held that a suit for damages and declaratory relief based on a breach of an agreement between claimants and debtors was a non-core proceeding because it was purely a contract action under state law, which, but for the debtors' bankruptcy petition, could proceed on its own in state court. *See In re Wood*, 825 F.2d at 97–98. There, the

Fifth Circuit explained that the "essential issue in the proceeding [was] whether the defendants [were] liable to the plaintiff under state law" and any connection between the state law contract claim and the bankruptcy proceedings was "speculative and insubstantial" to the suit. *Id.* at 98. Accordingly, the court, in holding that the suit was non-core, explained that such a connection would arise only after a final judgment was rendered and proceedings to allow the claim were initiated. *See id.*

Importantly, "[i]f the majority of claims are non-core, then withdrawal of the reference is favored." *In re Royce Homes, L.P.*, No. 09-32467-H4-7, 2011 WL 13340482, at *2 (Bankr. S.D. Tex. Oct. 13, 2011). In *In re Royce Homes, L.P.*, this Court held that the reference should be withdrawn where the majority of claims asserted are non-core. *Id.* at *2. There, the Court first noted that breach of contract claims, which are based on state law, "are non-core proceedings." *Id.* at *2. Looking to the complaint, the Court then observed that "[a]ll of the[] causes of action, except the fraudulent transfer claims brought under 11 U.S.C. § 548, [were] based upon state law." *Id.* Consequently, the Court held that because "the majority of claims are non-core," the first of the *Holland American* factors "weigh[ed] in favor of withdrawal of the reference." *Id.*

Here, Zachry alleges three claims—all in the form of declaratory relief—against OPPD via the Complaint. Specifically, regarding the first two claims, Zachry seeks a declaratory judgment that: (i) they are "not liable for breach of the [Contract]" (undeniably a state law contract claim); and (ii) the "liquidated damages provision of the Second Amended [Contract] is unenforceable" (also a contract claim that undeniably implicates state contract law principles). These claims are, and can only be, non-core. None of these claims arise under the Bankruptcy Code nor could these claims only arise in a bankruptcy case. They are premised solely on state contract law principles and the contract in question here—matters that can and do arise outside of bankruptcy. That is, the

claims at issue in the Adversary Proceeding are primarily, if not exclusively, related to and merely arise from the Contract. Such claims do not "invoke a substantive right created by the federal bankruptcy law," but instead can be brought independently of bankruptcy law. *See In re Morrison*, 409 B.R. at 389 (finding claims to be non-core); *In re Wood*, 825 F.2d at 97 (same).

To be clear, the procedural posture of this dispute must be separated. On the one hand, in the Bankruptcy Court, the allowance and treatment of any potential claim is a core bankruptcy matter. Conversely, the substantive determination and related liquidation of that potential claim, which is grounded completely in non-bankruptcy law, is a separate non-core proceeding. In this case, Zachry's causes of action are all predicated on the alleged breach of contract claims governed exclusively by Nebraska state law. The procedural declaratory relief is likewise entirely non-bankruptcy related. It must be noted that the declaratory relief sought is equally available under Nebraska's comparable declaratory judgment statute. *See* NEB. REV. STAT. §§ 25-21,149–25-21,164 *et. seq*.

Indeed, numerous courts in the Fifth Circuit have held that state law contract claims are non-core claims. *See, e.g.*, *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90, 96 (Bankr. S.D. Tex. 2009) ("Longhorn's complaint asserts contract claims. None arise under the Bankruptcy Code or could only arise in a bankruptcy case. All are state law causes of action that can arise outside of bankruptcy. The claims are non-core.")[5]; *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp.2d 596, 609 (S.D. Tex. 1999) ("[A] state law contract or tort action that is not based on any right created by the federal bankruptcy

[5] *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90, 96 (Bankr. S.D. Tex. 2009) (noting that not all claims that fall within § 175's literal language constitute core claims and recognizing that "[a]lmost all debtor claims may affect the estate in that they could lead to a judgment increasing or decreasing the estate assets. If the Court accepted Longhorn's contention, then virtually all 'related to' proceedings would be considered core[,] Section 157 would serve no purpose.").

law, and that could arise outside the context of bankruptcy, is not a core proceeding."); *In re Wood*, 825 F.2d at 96 (holding that contract dispute did not constitute a core matter and stating that "controversies that do not depend on the bankruptcy laws for their existence—suits that could proceed in another court even in the absence of bankruptcy—are not core proceedings"); *In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La. 2007) ("[T]he doctors' claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims."); *In re Castex Energy Partners, LP*, 584 B.R. 150, 155 (Bankr. S.D. Tex. 2018) ("Had Castex not filed for bankruptcy, these suits would have proceeded to the merits of the claims in state court. Accordingly, under the Fifth Circuit's standard, they are quintessential non-core claims . . . ."); *In re Legal Xtranet, Inc.*, 453 B.R. 699, 709 (Bankr. W.D. Tex. 2011) ("LXI's contract claims against AT & T are non-core."); *In re BP RE, L.P.*, 735 F.3d 279, 282 (5th Cir. 2013) (finding that claims for monetary damages for breach of contract, among others, "is a non-core proceeding but is related to the bankruptcy in that any recovery on the claims brought by the debtor will go directly to the estate"); *In re Encompass Services Corp.*, 337 B.R. 864, 871–72 (Bankr. S.D. Tex. 2006) (holding that breach of contract claim was non-core and that the "Court's determination will not have a substantial impact on [the reorganized debtors'] plan").

Moreover, the fact that the Debtors' breaches occurred post-petition do not alter this determination. For instance, in *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, the Southern District of Texas held that claims for breach of contract, the damages from which accrued post-petition, where non-core. *WRT Creditors Liquidation Trust*, 75 F. Supp. 2d at 613. There, the alleged causes of action for breaches of pre-petition contracts included an element of post-petition damages. *Id.* at 610. The court, recognizing that "post-petition contract disputes are often appropriately treated as core proceedings," ultimately held that the alleged causes of action

were non-core. *Id.* at 611. In reaching this conclusion, the court explained that not "every cause of action a 'core' proceeding" if it implicates post-petition conduct approved by the bankruptcy court because the test is "not merely whether a bankruptcy court allowed or authorized the prosecution of the claim," but rather, "is *whether the claim would stand alone from the bankruptcy case*." *See id.* at 610–12 (emphasis added).

Again, here, the first two claims asserted by the Debtors can only be non-core. None of these claims arise under the Bankruptcy Code. They are premised solely on state contract law principles and the contract in question. Such claims can and do arise outside of bankruptcy.

Additionally, "[t]he mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes 'core.'" *In re Castex Energy Partners, LP*, 584 B.R. at 157 (quoting *In re Exide Tech.*, 544 F.3d 196, 206 (3d Cir. 2008)). Moreover, "a post-petition damages element does not make the cause of action a core proceeding." *WRT Creditors Liquidation Trust*, 75 F.Supp.2d at 610. "The word 'proceedings' as used in § 157 *refers to specific claims, causes of action, or grounds for relief, and not to the entire action*." *In re Mirant*, 337 B.R. at 116 (emphasis added). That is, "a proceeding, as a whole, is determined to be core or non-core; however, in reaching this determination, each cause of action and each cause of action asserted against each defendant, is separately examined." *WRT Creditors Liquidation Trust*, 75 F.Supp.2d at 607 (quoting *In re Hughes–Bechtol, Inc.*, 141 B.R. 946, 949 (Bankr. S.D. Ohio. 1992)); *see also Acolyte Elec. Corp. v. City of N.Y.*, 69 B.R. 155, 175 (Bankr. E.D.N.Y. 1986) ("An action is not a core proceeding simply because the outcome of a state law type action can result in funds being brought into an estate; but rather, that connection makes it a 'related proceeding.'").

Indeed, the third and final claim raised by the Debtors is brought as an alternative claim for declaratory relief in the event a court finds for OPPD on the Debtors first and second claims.

More specifically, the Debtors seek a declaration that OPPD's "claim for liquidated damages should not be given administrative priority in the full amount." In the event this third claim is even considered—which, again, would require an unfavorable ruling for the Debtors on their first two claims—it still does not merit treatment of this Adversary Proceeding as a core proceeding.

Simply put, Zachry's artifice pleadings—whether intentional or not—should not turn this non-core proceeding into a core proceeding solely on the declaratory relief sought regarding the amount of an administrative expense claim. *See Texas Capital Bank N.A. v. Dallas Roadster Ltd. (In re Dallas Roadster Ltd.)*, Nos. 11–43725, 11–43726, 2013 WL 5758632, at *2 (Bankr. E.D. Tex. Sept. 27, 2013) (citing *In re Mirant Corp.*, 337 B.R. at 122) ("When core and non-core matters are raised in an adversary proceeding, withdrawal of the reference promotes the most efficient use of judicial resources."). In effect, by filing this Adversary Proceeding prior to the Admin Claim, Zachry's has attempted to avoid the agreed upon Forum Selection Clause and disregard the parties' intent to litigate such disputes in Nebraska—a critical basis of the parties' bargain to which Zachry assented to in 2021.

Accordingly, the claims raised in this Adversary Proceeding are non-core claims and as such this favors withdrawal of the reference.[6]

B. Adjudicating the parties' claims in district court fosters economical use of the Debtors' and creditors' resources.

Indeed, "[w]hen a bankruptcy court is intimately familiar with the underlying facts, parties, and issues, a withdrawal of reference would only 'further delay final resolution of th[e] [suit].'" *In re Doctors Hops. 1997, L.P.*, 351 B.R. 813, 869 (Bankr. S.D. Tex. 2006). However, where "the parties have simply not invested significant resources in th[e] proceeding before th[e] [c]ourt,"

[6] Even if the Adversary Proceeding is deemed to be a core proceeding, this alone does not defeat withdrawal of the reference. *See In re Morrison*, 409 B.R. at 392.

withdrawal of the reference "will not cause either party to 'lose' *any amount* of resources that were spent in th[e] [bankruptcy] [c]ourt." *Johnson v. Williamson (In re British Am. Props. III)*, 369 B.R. 322, 328 (Bankr. S.D. Tex. 2007) (emphasis added). In *In re British American Properties III, Ltd.*, this Court held that where "the parties have not spent any significant time briefing this Court on the underlying merits of the dispute," and the "Motion to Dismiss or Withdraw was filed less than 30 days after the filing of the Complaint," the district court "would be in no better or worse position to expeditiously rule on this suit than this Court." *Id.* at 328. This Court further explained that because of the suit's procedural infancy, the "expense to the parties would not be increased by the [d]istrict [c]ourt adjudicating th[e] suit instead of this Court." *Id.* (recognizing, however, that withdrawal would possibly increase costs "due to the use of a jury instead of a bench trial, but that consideration is not relevant under this factor").

Further, this Court has previously acknowledged that, in the presence of non-core proceedings, "[i]t would certainly be more efficient and less costly for the District Court to adjudicate the dispute once and for all rather than for th[e] Bankruptcy Court to hold a trial and then for the District Court to review the findings and conclusions on a *de novo* basis." *In re EbaseOne Corp.*, 2006 WL 2405732, at *4. That is, "withdrawal of the reference will foster the economical use of the resources of the litigants" because, as a non-core matter, withdrawal would "dispense[] with the need for the district court to conduct a *de novo* review of proposed findings and conclusions of the bankruptcy judge after a trial in the bankruptcy court as to non-core claims." *In re Mirant*, 337 B.R. at 122–23 (holding that where both the core and non-core claims were significant, judicial economy would be served by adjudicating all the claims in the district court because, in part, "adjudicating all of the claims, both core and non-core, in the district court eliminates the prospect of an appeal from the bankruptcy judge's adjudications of core claims").

Here, the Debtors' Complaint in this Adversary Proceeding was filed on February 5, 2025—less than forty-five days ago. There have been no other pleadings filed prior to this Motion, no discovery has been conducted, no hearings, and this Court or the parties have not invested significant resources or time into this Adversary Proceeding. Accordingly, withdrawing the reference will not cause this Court or either party to lose any amount of resources that have been spent—which is minimal at best—in the Bankruptcy Court. *See In re British Am. Props. III*, 369 B.R. at 328. Further, because this Adversary Proceeding involves primarily non-core issues, withdrawal of the reference will foster the economical use of the parties resources because as a non-core matter, withdrawal will "dispense[] with the need for the district court to conduct a *de novo* review of proposed findings and conclusions of the bankruptcy judge after a trial in the bankruptcy court as to non-core claims." *See In re Mirant*, 337 B.R. at 122.

Accordingly, this factor weighs heavily in favor of withdrawing of the reference.

C. Withdrawal will result in administrative uniformity.

"When considering a motion to withdraw, the district court should seek to promote efficiency and economy while reducing potential confusion." *Veldekens*, 362 B.R. at 768 (citing *Holland Am. Ins. Co.*, 777 F.2d at 999). Indeed, "[i]f a bankruptcy court is already familiar with the facts of the underlying action, then allowing that court to adjudicate the proceeding will promote uniformity in the bankruptcy administration." *In re British Am. Props. III*, 369 B.R. at 327. However, where the bankruptcy court is not "intimately familiar" or lacks "resident expertise" to resolve the underlying claims, withdrawal is appropriate and will not affect administrative uniformity. *See In re Hargis*, 146 B.R. 173, 176 (N.D. Tex. 1992).

For instance, in *In re EbaseOne Corp.*, this Court held that because the Court had "not focused on any procedural or substantive issues" except for the motion to withdraw, which came shortly after filing the adversary complaint and because the Court had not "reviewed the entire

record of [the] case and [was not] intimately familiar with the underlying facts, the parties, and the remaining issue[s]," withdrawing the reference would result in "no disruption in the uniformity of the bankruptcy administration." *In re EbaseOne Corp.*, 2006 WL 2405732, at *4. Accordingly, this Court held that the "absence of disruption . . . favor[s] . . . withdrawing the reference." *Id.*

Here, given the current stage of the Adversary Proceeding, the Bankruptcy Court's familiarity with the substantive issues in question is nominal at best, if not non-existent. The Complaint was filed on February 5, 2025, and no other pleadings, motions, or other substantive matters have been filed or otherwise considered by the Court. Accordingly, this Court has not reached a significant level of familiarity with the Adversary Proceeding that would cut against withdrawal of the reference. Moreover, withdrawal of the reference would not result in any delay and would instead promote judicial economy by ultimately bringing the cases before a judge who is intimately familiar with the applicable state law.

Because this Court, or even the parties, have not invested large amounts of time and resources into this Adversary Proceeding, this factor favors withdrawal of the reference.

D. Withdrawal with not promote forum shopping—it will actually prevent it.

OPPD is not seeking to avoid this Court in an effort to forum shop. Instead, OPPD simply seeks to enforce the Forum Selection Clause that the parties agreed to pursuant to the Second Amended Contract. As such, withdrawal of the reference is appropriate.

Because this Adversary Proceeding primarily involved non-core issues, "if this Bankruptcy Court were to adjudicate the suit, this Court would simply submit recommended findings of fact and conclusions of law to the District Court, and the District Court would then enter its final judgment after a *de novo* review." *In re EbaseOne Corp.*, 2006 WL 2405732, at *4. This Court has previously held that in such circumstances, a movant's motion to withdraw the reference "does not constitute forum shopping." *Id.* In fact, withdrawal in these instances suggest "a reasonable effort

to have a non-core proceeding litigated with a minimum of time and expense." *Id.* ("[T]his dispute is a non-core proceeding, [and] if this Bankruptcy Court were to adjudicate the suit, this Court would simply submit recommended findings of fact and conclusions of law to the District Court, and the District Court would then enter its final judgment after a *de novo* review . . . [the Motion] does not constitute forum shopping. Indeed, [the Motion] appears to be nothing more than a reasonable effort to have a non-core proceeding litigated with a minimum of time and expense.").

Considering the significant predominance of non-core issues in this matter, the Bankruptcy Court's lack of authority to issue final orders on these non-core issues, and the parties agreement to litigate disputes arising under the Contract in Nebraska, trying these claims in one forum and expediting the district court's consideration of the issues in this Adversary Proceeding is not only logically appropriate, but a reinforcement of long-standing jurisprudence regarding freedom of contract and the parties' right to contractually designate the forum in which disputes are to be resolved.

Accordingly, there are no indicia of forum shopping present; therefore, this factor favors withdrawal of the reference.

E. Considering the Court's confirmation of the Debtors' Plan and the limitations regarding issuing a final judgment, withdrawal will expedite the Chapter 11 Cases.

Notably, because this Adversary Proceeding involves primarily non-core issues, "having the suit remain in the Bankruptcy Court and then facing *de novo* review by the District Court would delay the final resolution of this dispute." *In re British Am. Props. III*, 369 B.R. at 328; *In re EbaseOne Corp.*, 2006 WL 2405732, at *2 ("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."). In turn, this "will delay the distribution to creditors in the

main bankruptcy case." *In re British Am. Props. III*, 369 B.R. at 328. However, because a district court would be able to immediately enter a final judgment if the reference is withdrawn, withdrawing the reference is favored because it will "encourage[e] a more expeditious adjudication of this suit by the District Court, which will then decrease the time it takes for creditors to receive distributions." *Id.*

Because this Adversary Proceeding is a non-core proceeding, which consequently results in a two-step judgment process, "the *de novo* review will delay the resolution of the contractual dispute and, consequently, the final administration of the bankruptcy estate." *See In re EbaseOne Corp.*, 2006 WL 2405732, at *5. Further, as explained at the outset of this Motion, the Debtors' Plan has been confirmed by this Court. Any presumption favoring retention of this Adversary Proceeding no longer exists. *See In re Mirant*, 337 B.R. at 124 (noting that the "presumption in favor of maintaining venue of an adversary proceeding in the forum where the bankruptcy case is pending" is "significantly weakened, if not entirely destroyed," once a plan is confirmed). The resolution of the claims asserted in the Adversary Proceeding can only affect the size of the available funds to creditors. Regardless, the district court's decision regarding the merits of the non-core claims asserted herein will have no impact on or otherwise delay the implementation of the Plan.

Accordingly, this factor weighs in favor of withdrawing the reference.

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VI. CONCLUSION

For the foregoing reasons, OPPD respectfully requests the Bankruptcy Court recommend that the District Court enter the Proposed Order (a) withdrawing the reference, and (b) 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 WITHDRAW THE REFERENCE

On this day the Court considered *Defendant Omaha Public Power District's* ("**OPPD**") *Motion to Withdraw the Reference* (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.

[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.

2. The reference to the Bankruptcy Court is withdrawn regarding this action, styled *Zachry Holdings, Inc. v. Omaha Public Power District*, Adv. Pro. No. 25-03025 (MI) and all issues related thereto are withdrawn.

Dated: _____

HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE