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 TRANSFER VENUE

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.

Omaha Public Power District ("**OPPD**"), by and through its undersigned counsel, hereby files *Defendant Omaha Public Power District's Motion to Transfer Venue* (the "**Motion**") pursuant to 28 U.S.C. §§ 1404(a) and 1412, and respectfully moves this Court for entry of an order, substantially in the form attached hereto (the "**Proposed Order**"), transferring the above-referenced adversary proceeding (the "**Adversary Proceeding**") to the Federal District Court of Nebraska (the "**Nebraska Court**"). In support of the Motion, OPPD respectfully submits as follows:

I. PRELIMINARY STATEMENT

Transfer of this proceeding to the Nebraska Court is appropriate. *First*, the parties agreed to a valid and enforceable forum selection clause via the Contract (defined below) that provides that any dispute arising under the Contract shall be brought in a Nebraska court. *Second*, considering the relevant factors with respect to enforcing a forum selection clause, all factors weigh in favor of transfer. *Third*, although this proceeding is an Adversary Proceeding filed before the Bankruptcy Court where the Chapter 11 Cases are pending, the fact that the Debtors have now confirmed a Plan is fatal to any presumption that the Adversary Proceeding should remain in this 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), OPPD and Debtor Zachry Industrial, Inc. ("**ZII**", "**Zachry**", or the "**Debtor**") 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" 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.

[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.

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 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**").

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. <u>The Adversary Proceeding and related matters.</u>

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]

III. LEGAL STANDARD

In general, the enforcement of a forum selection clause is properly raised through a 28 U.S.C. § 1404(a) motion to transfer venue. *See Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013). However, with respect to adversary proceedings, a motion to transfer venue pursuant to 28 U.S.C. § 1412, which is made applicable to adversary proceeding pursuant to Bankruptcy Rule 7087,[4] is appropriate. *See Leal v. Bednar*, No. 3:16-CV-3424-G, 2017 WL 565176, at *1 (N.D. Tex. Feb. 13, 2017) (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)). Given that the claims raised in this Adversary Proceeding are predominantly non-core claims with the exception of the declaratory relief regarding the administrative priority claim, the appropriate analysis could fall under either statute. *See, e.g.*, *id.* at *1–*2 (noting that "section 1412 applies to title 11 actions, which are 'core proceedings' that arise in the bankruptcy context," but the Fifth Circuit has not decided whether section 1412 applies to non-core claims).[5] Regardless of which statute applies, the elements of § 1404 and § 1412 largely overlap and transfer to the Nebraska Court is appropriate under either.

Under 28 U.S.C. § 1404(a), a court, for the convenience of the parties and in the interest of justice, "may transfer any civil action to any other district or division where it might have been

[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.

[4] Federal Rule of Bankruptcy Procedure 7087 provides that "[o]n motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412, except as provided in Rule 7019(2)." FED. R. BANK. P. 7087. Rule 7019(2) concerns transfer of venue in the context of joined parties, which is not applicable here. *See* FED. R. BANK. P. 7019(2).

[5] "Section 1404 applies to civil actions generally, and section 1412 specifically addresses bankruptcy proceedings. . . . [T]he Fifth Circuit has yet to answer which of these venue-transfer provisions apply on a motion to transfer a non-core bankruptcy proceeding." *In re Schouten*, 657 B.R. 531, 537 (Bankr. N.D. Tex. 2024).

brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). That is, § 1404(a) "permits transfer to any district where venue is also proper (i.e., 'where [the case] might have been brought') or to any other district to which the parties have agreed by contract or stipulation." *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 59. Likewise, under 28 U.S.C. § 1412, "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. Although there are subtle differences between the two, none of which alter the analysis here, "the party moving for the transfer [under either standard] must show by a preponderance of the evidence that the case should be transferred." *Matter of Commonwealth Oil Refining Co., Inc.*, 596 F.2d 1239, 1241 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). "A motion to transfer venue is addressed to the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (citing *Marbury-Pattillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974)).

IV. ARGUMENT

Pursuant to well-settled Fifth Circuit jurisprudence and the Forum Selection Clause, transfer of this proceeding is not only warranted, but mandatory.

It is well-settled that a forum selection clause is mandatory if it contains clear language "affirmatively require[ing] that litigation arising from the contract be carried out in a given forum" and no exception exists. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768 (5th Cir. 2016). Thus, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 62. That is, a forum selection clause "should be given controlling weight in all but the most exceptional cases." *Id.* at 63–64. "Only under extraordinary circumstances *unrelated to the*

convenience of the parties" should a motion to transfer based on a forum selection clause be denied. *Id.* at 62 (emphasis added).

A. <u>The Forum Selection Clause is valid and enforceable, and enforcement is not unreasonable under the circumstances.</u>

The enforceability of a forum selection clause centers on whether "enforcement would contravene a strong public policy of the forum in which suit is brought." *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15 (1972); *see also In re Bailey*, 217 B.R. 523, 527 (Bankr. E.D. Tex. 1997). The Fifth Circuit has addressed this issue and has held that a contractual choice of forum clause is presumed valid and enforceable. *Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir. 1995) ("A forum selection provision in a written contract is *prima facie* valid and enforceable unless the opposing party shows that enforcement would be unreasonable."). In line with Supreme Court precedent, courts in the Fifth Circuit apply "a strong presumption in favor of the enforcement of mandatory [forum selection clauses]." *Weber*, 811 F.3d at 773. To overcome this presumption, the party seeking to avoid the forum selection clause must make "a clear showing that the clause is 'unreasonable' under the circumstances." *Id.* (quoting *Haynsworth v. The Corporation*, 121 F.3d 956, 962–63 (5th Cir. 1997)). Notably, "the party arguing against enforcement of a forum selection clause 'bears a heavy burden of proof.'" *NavSav Holdings, LLC v. Beber*, 724 F. Supp. 3d 615, 632 (E.D. Tex. 2024) (quoting *Weber*, 811 F.3d at 773).

For the enforcement of a forum selection clause to be even potentially unreasonable, one of the following factors must be established: (1) the incorporation of the clause "was the product of fraud or overreaching;" (2) the party seeking to avoid the clause "'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum;" (3) "fundamental unfairness of the chosen law will deprive the plaintiff of a remedy;" or

(4) enforcement of the clause "would contravene a strong public policy of the forum state." *Weber*, 811 F.3d at 773.

Here, enforcement of the Forum Selection Clause would not—and cannot—be unreasonable under the circumstances. *First*, the incorporation of the Forum Selection Clause into the EPC was not the product of fraud or overreaching. The parties negotiated the contract, and more specifically the Forum Selection Clause, at arms' length and, despite having subsequently amended the Contract twice, the Forum Selection Clause has remained in place since the date of the Contract's inception. *See Mendoza v. Microsoft, Inc.*, 1 F. Supp. 3d 533, 543–44 (W.D. Tex. 2014) (noting that "the inclusion of [the] clause in the contract [must be] the product of fraud or coercion" and must be "aimed straight at the [forum-selection] clause"); *Davis v. Valsamis, Inc.*, 181 F. Supp. 3d 420, 426 (S.D. Tex. 2016) ("[T]he proper inquiry is whether the forum-selection clause is the result of fraud in the inducement of the forum-selection clause itself.").

Second, Zachry will not be deprived of its day in court should the Adversary Proceeding be transferred. As set forth in more detail below, there is no grave inconvenience or unfairness that would be imposed on Zachry by having this suit heard by the Nebraska Court. Indeed, "to invalidate a forum-selection clause predicated on the 'grave inconvenience' or 'fundamental unfairness' of a preselected forum, Plaintiffs must demonstrate they will 'for all practical purposes be deprived of [their] day in court.'" *Mendoza*, 1 F. Supp. 3d at 545. The fact that the selected forum may be merely inconvenient for one party is not enough. *See, e.g.*, *M/S Bremen*, 407 U.S. at 17–18 ("Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical

purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."). That is, "*the hardship must be significant for the enforcement of the clause to be unjust*. 'Mere inconvenience or additional expense' will not suffice since these are burdens which were allocated by the parties' private bargain." *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 549 (N.D. Tex. 1982) (emphasis added).

Third, and relatedly, Zachry will not be deprived of the relief sought in this proceeding if this case is transferred to Nebraska. From a purely procedural standpoint, Nebraska's declaratory judgment statute is comparable to the federal declaratory judgment statute Zachry claims in its Complaint. *See* NEB. REV. STAT. §§ 25-21,149–25-21,164 *et. seq*. In fact, if anything, it would be advantageous for all parties to have this case transferred to the Nebraska Court because the relief Zachry seeks with respect to its two, primary contract claims are premised entirely on Nebraska state law contract principles. *See, e.g.*, *In re Think3, Inc.*, 529 B.R. 147, 210 (W.D. Tex. 2015) (noting that a relevant consideration regarding transfer is "a state's interest in having local controversies decided within its border" and that there is "a preference that local courts preside over disputes that involve their laws or disputes that occurred in their jurisdiction").

Finally, enforcement of the Forum Selection Clause will not contravene a strong public policy of the forum state. An important consideration in this respect is whether the forum has "a strong local interest in this dispute." *See Mendoza*, 1 F. Supp. 3d at 547. It is logically inconceivable that any Texas court would have a strong local interest in this Adversary Proceeding that transcends that of the Nebraska Court. The Projects are not only located in Nebraska, but the development and completion thereof directly effects the public power market of the City of Omaha and the hundreds of thousands of citizens living in the surrounding areas—there could be a no more direct and formidable local interest in favor of a transfer than the situation presented here.

Accordingly, because of the strong presumption in favor of the enforcement of mandatory forum selection clauses such as the one here and the complete absence of any unreasonable circumstances that would otherwise preclude its enforcement, transfer is not only appropriate, but mandatory under applicable Fifth Circuit precedent. *See Weber*, 811 F.3d at 768.

B. Public interest factors weigh in favor of transfer and no extraordinary circumstances exist.

"[C]ourts engage in a factor-driven analysis in assessing which venue is most convenient and which best serves the interest of justice." *In re Schouten*, 657 B.R. 531, 537 (Bankr. N.D. Tex. 2024). Notably, in evaluating transfer pursuant to a valid forum selection clause, courts (i) need not give the plaintiff's choice of forum any weight;[6] and (ii) and may "consider arguments about public-interest factors only," though "those factors will rarely defeat a motion to transfer," such that "the practical result is that forum-selection clauses should control except in unusual cases." *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 63–64.

In determining "whether 'extraordinary circumstances' warrant the denial of transfer, the Court considers public-interest factors such as "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *Davis*, 1811 F. Supp. 3d at 428. Relatedly, courts also "consider the availability of witnesses, the convenience for the parties, the location of counsel, the location of books and records, the cost of obtaining attendance of witnesses and other trial expenses, the place of the alleged wrong, the possibility of delay and

[6] *See also Bruckner Truck Sales, Inc. v. Hoist Liftruck Mfg., LLC*, 501 F. Supp. 3d 409, 418 (N.D. Tex. 2020) ("[W]hen examining a motion to transfer in light of a valid and enforceable forum-selection clause . . . the plaintiff's choice of forum merits no weight . . . ." (quoting *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 63–64)).

prejudice, and the plaintiff's choice of forum." *In re FoxMeyer Corp.*, 217 B.R. 511, 514–15 (Bankr. N.D. Tex. 1997).

Here, nearly all of the relevant factors—notwithstanding the fact that parties agreed to litigation in Nebraska—weigh heavily in favor of transfer. As noted above, the Nebraska Court's local interest in having localized dispute decided at home is extraordinary—especially considering that the underlying dispute is highly centralized to the City of Omaha and encompasses an even larger portion of eastern Nebraska. Further, the familiarity of the forum with the law that will govern the case weighs heavily in favor of transfer to the Nebraska Court. The issues central to the Adversary Proceeding are premised solely on and will be determined exclusively by Nebraska contract jurisprudence. Finally, given these considerations and the claims asserted herein, unnecessary problems of conflict of laws of the application of foreign law would be avoided if this case is transferred to the Nebraska Court as that court has the relevant knowledge of the legal principles governing the claims asserted by Zachry.

Moreover, the witnesses likely to be deposed or called to testify at trial are located in Nebraska where the Projects are located. The same can be said regarding the location of the books and records relevant to the dispute and the place of the alleged wrong, which goes without saying. Further, OPPD has retained local Nebraska counsel throughout the entirety of the Bankruptcy Cases and the early stages of this Adversary Proceeding. Moreover, the costs of obtaining attendance of witnesses and other trial expenses would be reduced if this case were transferred to Nebraska, as the witnesses likely with the most knowledge to testify are located in Nebraska. *See, e.g.*, *In re Texaco Inc.*, 89 B.R. 382, 388 (Bankr. S.D.N.Y. 1988) (transferring proceedings where records, documents, and witnesses). Additionally, because this Adversary Proceeding implicates non-core issues, which requires district court *de novo* review in order to obtain a final judgement,

the possibility of delay and prejudice weighs in favor of transfer to the Nebraska Court,[7] which has the power to issue a final judgment more expeditiously. As for the remaining factor, the plaintiff's choice of forum, it is clear that but for the Bankruptcy Cases, this case would not be before the Bankruptcy Court. Without the Bankruptcy Cases, venue would be improper pursuant to the Contract's Forum Selection Clause. Even so, the "plaintiff's choice of forum merits no weight" when the parties have agreed to a forum selection clause. *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 64.

To be sure, Zachry explicitly waived any and all objections it may have based on venue or forum non conveniens pursuant to the Contract's Forum Selection Clause. As such, any objections on such grounds that Zachry may raise should be given no weight.

Ultimately, "[w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations," and by enforcing the forum selection clause in cases such as this one, the "'interest of justice' is served by holding parties to their bargain." *Id.* at 66. Accordingly, for the reasons set forth above, transfer is appropriate.

C. The Debtors' confirmed Plan destroys any presumption of maintaining this suit in the Bankruptcy Court.

OPPD anticipates that Zachry will argue that the Bankruptcy Cases constitute an exceptional circumstance that will defeat transfer in this Adversary Proceeding. However, the mere fact that the Zachry "is in bankruptcy is not sufficient to prevent enforcement of a contractual

[7] 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." *Johnson v. Williamson (In re British Am. Props. III)*, 369 B.R. 322, 328 (Bankr. S.D. Tex. 2007); *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.").

forum selection clause." *In re Bailey*, 217 B.R. at 527 (dismissing adversary proceeding due to forum selection clause, despite debtor's bankruptcy).

More importantly, there is crucial procedural distinction that must be considered with respect to this Adversary Proceeding. OPPD acknowledges the "strong presumption of maintaining venue where the bankruptcy case is pending" with respect to adversary proceedings. *Matter of Continental Airlines, Inc.*, 133 B.R. 585, 587 (Bankr. D. Del. 1991). OPPD further recognizes that "the party seeking a change of venue bears the burden of proof to overcome this presumption." *Id.*

Nevertheless, this presumption is "*significantly weakened, if not entirely destroyed*," once a plan is confirmed. *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 (emphasis added); *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, No. 11 Civ. 7511, 2012 WL 698134, at *4 (S.D.N.Y. Mar. 5, 2012) ("In evaluating whether the economic and efficient administration of the bankruptcy estate will be promoted by a transfer, it must be noted that after a 'plan has been confirmed by the Bankruptcy Court, any presumption in favor of maintaining the venue . . . before the Bankruptcy Court is substantially weakened.'" (quoting *In re Northwest Airlines Corp.*, 384 B.R. 51, 61–62 (S.D.N.Y. 2008))); *In re Manchester, Inc.*, 417 B.R. 377, 387 n.8 (Bankr. N.D. Tex. 2009) ("Furthermore, any '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, by the circumstance that this is now post-confirmation litigation.'" (quoting *In re Mirant*, 337 B.R. at 124)).

Here, the Debtors have not only filed the Plan, but the Plan has already been confirmed by this Court pursuant to the Confirmation Order. [*See* Docket No. 2431 (Case No. 24-90377-MI)]. While the resolution of the claims asserted in the Adversary Proceeding may affect the size of the

available funds, such resolution—even including a transfer of this case—will not delay the implementation of the Plan and any presumption favoring the retention of this Adversary Proceeding in this Court is entirely extinguished as a result of the Debtors' confirmed Plan.

V. CONCLUSION

For the foregoing reasons, OPPD respectfully requests that the District Court enter the Proposed Order (a) transferring this proceeding to the Federal District Court for Nebraska in accordance with the parties' agreement, 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 TRANSFER VENUE

On this day the Court considered *Defendant Omaha Public Power District's* ("**OPPD**") *Motion to Transfer Venue* (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. The Adversary Proceeding is hereby transferred to the Federal District Court of Nebraska.

[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