IN THE 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)
Reorganized Debtors.	(Jointly Administered)
ZACHRY HOLDINGS, INC., *et al.*,	
Plaintiffs,	Adv. Pro. No. 25-03025 (MI)
	Re: Docket Nos. 12, 13
v.	
OMAHA PUBLIC POWER DISTRICT,	
Defendant.	

ZACHRY'S OMNIBUS OBJECTION
TO OMAHA PUBLIC POWER DISTRICT'S (I) MOTION
TO WITHDRAW THE REFERENCE AND (II) MOTION TO TRANSFER VENUE

The above-captioned plaintiffs (collectively, "**Zachry**") file this omnibus objection (the "**Objection**") to (i) *Defendant Omaha Public Power District's Motion to Withdraw the Reference* (the "**Motion to Withdraw**") [Docket No. 12] and (ii) *Defendant Omaha Public Power District's Motion to Transfer Venue* (the "**Motion to Transfer Venue**") [Docket No. 13] and respectfully state as follows:[2]

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Reorganized 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 Reorganized Debtors' 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] Contemporaneously herewith, Zachry is filing an amended complaint (the "**Complaint**"), which moots *Defendant Omaha Public Power District's Motion and Brief in Support to Dismiss Complaint* (the "**Motion to Dismiss**") [Docket No. 11].

Preliminary Statement[3]

1. Both the Motion to Withdraw and the Motion to Transfer Venue suffer from the same incorrect assumption that the claims asserted in the Adversary Proceeding are non-core. But the claims are statutorily core claims, and the Court has constitutional authority to issue final orders with respect to them, for at least two reasons. *First*, the claims are matters stemming from Zachry's bankruptcy cases and the administration of Zachry's estates because they arise from the EPC Contract, which Zachry assumed during the Chapter 11 Cases. Numerous courts have held that such disputes are core matters that can be heard and decided by a bankruptcy judge under 28 U.S.C. § 157(b)(2)(A). *Second*, the claims, including the affirmative relief Zachry seeks against OPPD in the amended Complaint, concern issues of allowance or disallowance of the administrative expense claim OPPD asserted by filing its Administrative Expense Application. The merits of those claims must be determined in order for the Court to decide whether OPPD holds an administrative expense claim in the Chapter 11 Cases, making them core claims under 28 U.S.C. § 157(b)(2)(B) and (C) within this Court's constitutional authority.

2. The core versus non-core nature of the claims is the most significant factor in the analysis of any motion to withdraw the reference for cause. This factor supports denial of the Motion to Withdraw because the Adversary Proceeding claims are core. The other five applicable factors similarly favor denial of the Motion to Withdraw. Withdrawal of the reference would not impact the parties' jury trial rights because any such rights have been waived. It would also lead to duplication and waste of resources, negatively impact administrative uniformity, and substantially delay the resolution of the Chapter 11 Cases because it would result in piecemeal litigation in at least two different courts of the same or heavily interrelated legal and factual issues.

[3] Capitalized terms used but not otherwise defined in the Preliminary Statement shall have the meanings ascribed to such terms elsewhere in this Objection.

It would also permit OPPD to avoid this Court's jurisdiction, to which it submitted when it filed the Administrative Expense Application, if not earlier.

3. The Adversary Proceeding does not belong in the Nebraska Court. Because the claims asserted in the Complaint are core and their resolution implicates a strong public-policy interest, the Court has discretion to deny enforcement of the Forum Selection Clause even if it were enforceable under state law. The Court should exercise its discretion here because enforcement of the Forum Selection Clause would conflict with the essential purposes of the Bankruptcy Code—resolution of issues arising from administration of the bankruptcy cases and determination of validity and allowance of administrative expense claims. And OPPD failed to meet its burden of proving that transferring the Adversary Proceeding to the Nebraska Court would be in the interest of justice or for the convenience of the parties and witnesses.

4. The Adversary Proceeding should remain in this Court, which is already (and will become increasingly) familiar with the parties and the underlying facts, is the only court that can resolve ***all*** issues pertaining to the parties' dispute, and has both statutory and constitutional authority to do so. The Court should recommend denial of the Motion to Withdraw and should deny the Motion to Transfer Venue.

Background

A. Zachry's Chapter 11 Cases

5. On May 21, 2024 (the "**Petition Date**"), each of the above-captioned reorganized debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in this court (the "**Court**") commencing the above-captioned chapter 11 cases (the "**Chapter 11 Cases**").

6. On February 27, 2025, the Court entered the *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 (the "**Confirmation Order**") [Bankr. Docket No. 2431], which confirmed the *Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates* [Bankr. Docket No. 2362] (the "**Plan**"). The Confirmation Order and the Plan provide that this Court shall retain jurisdiction over various enumerated matters arising out of, or relating to, the Chapter 11 Cases, the Confirmation Order, and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code and "shall have exclusive jurisdiction to hear and determine disputes" concerning claims against Zachry that arose prior to the Plan's effective date. Plan, Art. XI; *see also* Confirmation Order ¶ 174.

7. The Plan became effective on April 10, 2025. *See Notice of (I) Entry of Order Approving the Debtors' Disclosure Statement on a Final Basis and Confirming the Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates and (II) Occurrence of the Effective Date* [Bankr. Docket No. 2731].

B. ZII's Prepetition EPC Contract with OPPD and Its Postpetition Assumption

8. On September 21, 2021, Zachry Industrial, Inc. ("**ZII**") and Omaha Public Power District ("**OPPD**") entered into an *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (as amended, the "**EPC Contract**") for ZII to engineer, procure, and construct two electric generating stations and associated substations, the Standing Bear Lake Station ("**SBLS**") and the Turtle Creek Station ("**TCS**," and together with SBLS, the "**Projects**"). Among other things, the EPC Contract sets forth schedules for completing the Projects, including Guaranteed Substantial Completion Dates ("**GSCDs**"), scope of work, certain deadlines, payments owed to ZII upon completion of performance, and remedies for OPPD upon non-performance by ZII. The EPC Contract is governed by Nebraska law.

9. The EPC Contract was first amended in October 2023 to revise the GSCDs for SBLS from May 1, 2023 to August 8, 2024 and TCS from August 18, 2023 to August 30, 2024.

10. The EPC Contract was amended for the second time in August 2024 (the "**Second Amendment**"). The parties again revised the GSCDs for SBLS and TCS to December 30, 2024 and December 16, 2024, respectively. The Second Amendment also contained a new liquidated damages provision that would be applicable if the new GSCDs were not met.

11. On September 17, 2024, ZII assumed the EPC Contract, as amended by the Second Amendment, with the Court's approval. *See 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* [Bankr. Docket No. 961] (the "**Assumption Order**"). The Assumption Order provides that upon assumption, the EPC Contract "shall be a postpetition contract of ZII, and all obligations thereunder shall be postpetition obligations of ZII." Assumption Order ¶ 6. The Court retained exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of the Assumption Order. *Id.* ¶ 10.

C. The Parties' Post-Assumption Dispute in Connection with the EPC Contract

12. Following the Second Amendment and assumption of the EPC Contract, a dispute arose between OPPD and ZII regarding certain delays in achieving the GSCDs, the cause of those delays, and the parties' respective remedies. Despite ZII's diligent performance of its obligations under the EPC Contract, the Projects were not finished by the GSCDs and substantial completion has been delayed by months. This has largely been the result of failure by OPPD and its contractors, Siemens Energy Inc. and Wartsila North American Inc. (collectively, "**OPPD's Contractors**"), to timely conduct testing and other work necessary to complete the startup and commissioning of engines and generation equipment supplied by OPPD's Contractors—work for

which ZII was not responsible. OPPD's Contractors failed to meet the projected timelines for conducting their work, had inadequate staff to complete the work within the projected timelines, made last minute changes to startup and commissioning activities that impacted ZII's schedule, and took extensive and unplanned time off from November 2024 through February 2025.

13. OPPD has also impeded ZII's progress in addressing fuel contamination issues resulting from degraded gaskets in diesel fuel tanks, resulting in additional delays. In addition, OPPD has halted commissioning work on Wartsila-supplied equipment at SBLS based on alleged Electro Magnetic Interference (EMI) issues and failed to provide critical information from Wartsila that would help determine the cause and significance of and mitigate the alleged EMI issues.

14. In response to these developments, ZII sought to modify the GSCDs, as the parties had previously done twice in similar circumstances and as expressly contemplated by the EPC Contract, but OPPD refused to extend the GSCDs ZII is entitled to under the EPC Contract. Instead, OPPD began assessing liquidated damages against ZII and sent ZII an invoice requesting payment for the assessed damages.

D. Zachry's Adversary Proceeding Against OPPD and OPPD's Related Administrative Expense Application

15. Zachry commenced this adversary proceeding (the "**Adversary Proceeding**") on February 5, 2025 by filing a complaint against OPPD (the "**Original Complaint**") seeking an order declaring that: (i) Zachry is not liable for failing to meet the applicable GSCDs resulting in a breach of the EPC Contract, as amended; (ii) the liquidated damages provision is unenforceable as a penalty, regardless of Zachry's alleged breach of the EPC Contract; and (iii) any administrative claim asserted by OPPD should be valued at $0 as of the effective date of Zachry's Plan or at such

reduced amount that reflects the actual damages incurred by OPPD from delays solely caused by Zachry [Docket No. 1].

16. On February 14, 2025, OPPD filed an application in the Chapter 11 Cases (the "**Administrative Expense Application**") requesting that the Court allow it an administrative expense claim under section 503(b)(1)(A) of the Bankruptcy Code, with a section 507(a)(2) priority, 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 EPC Contract, as amended, occurring after the Petition Date and prior to the effective date of Zachry' Plan [Bankr. Docket No. 2176]. Zachry opposed the Administrative Expense Application, and the parties agreed to abate the Administrative Expense Application, including related discovery, until the underlying dispute that is the subject of the Adversary Proceeding is resolved. *See Stipulation and Agreed Order Regarding Omaha Public Power District's Application for Allowance of Administrative Expense Claim and the Debtors' Related Adversary Proceeding* (the "**Stipulation and Agreed Order to Abate**") [Bankr. Docket No. 2685].

17. Zachry is filing an amended Complaint to amend the claims asserted in the Original Complaint and assert additional claims against OPPD for breaches of the EPC Contract.

E. OPPD's Motions in the Adversary Proceeding

18. On March 21, 2025, OPPD filed the Motion to Dismiss the Original Complaint, as well as the Motion to Withdraw and the Motion to Transfer Venue [Docket Nos. 11, 12, 13].

Argument

I. THE COURT SHOULD RECOMMEND DENIAL OF THE MOTION TO WITHDRAW

19. In determining whether to exercise discretion to withdraw the bankruptcy reference "for cause" under 28 U.S.C. § 157(d), district courts in this Circuit consider six factors articulated

in *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992 (5th Cir. 1985): (1) whether the issues are core or non-core; (2) whether jury demands have been made; (3) whether withdrawal would foster a more economical use of the parties' resources; (4) whether withdrawal would promote uniformity in bankruptcy administration; (5) whether withdrawal would expedite the bankruptcy process; and (6) whether withdrawal reduces forum shopping and confusion. *See, e.g.*, *In re Morrison*, 409 B.R. 384, 385 (S.D. Tex. 2009) (considering the *Holland American* factors and accepting the bankruptcy court's recommendation to deny a motion to withdraw the reference); *In re BJ Servs., LLC*, No. 20-33627 (MI), 2023 WL 2395749, at *2 (Bankr. S.D. Tex. Mar. 6, 2023) (considering the *Holland American* factors and recommending that the district court deny the motion to withdraw the reference). OPPD bears the burden of showing "cause" under 28 U.S.C. § 157(d). *Holland Am.*, 777 F.2d at 998.

20. While no single factor is dispositive, courts in this District have held the most significant factor is whether the issues are core or non-core. *See, e.g.*, *In re BJ Servs.*, 2023 WL 2395749, at *2 ("The most important factor is whether the matters referred are core or non-core."); *Beta Operating Co., LLC v. Aera Energy LLC (In re Mem'l Prod. Partners LP)*, No. 17-30262 (MI), 2018 WL 1807056, at *4 (Bankr. S.D. Tex. Feb. 9, 2018) ("The majority of courts evaluating a request to withdraw the reference place paramount importance on whether the claims at issue are core or non-core.") (quoting *In re Quality Lease & Rental Holdings, LLC*, No. 14-60074 (DRJ), 2016 WL 416961, at *5 (Bankr. S.D. Tex. Feb. 1, 2016)). As OPPD itself recognizes, a matter's core or non-core nature is "key" to the analysis of the remaining *Holland American* factors. Mot. to Withdraw at 11; *see also generally id.* (discussing the purported non-core nature of the claims in connection with the various *Holland American* factors).

21. Each of the *Holland American* factors weighs against withdrawal of the reference.

(a) The Adversary Proceeding Involves Solely Core Claims

22. A proceeding is "core" within the meaning of 28 U.S.C. § 157(b)(2) 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." *In re U.S. Brass Corp.*, 301 F.3d 296, 304 (5th Cir. 2002). Proceedings initiated by filing a claim against a bankruptcy estate are "core" because such proceedings invoke the "special rules of bankruptcy" concerning claim allowance. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96-97 (5th Cir. 1987). Bankruptcy courts have both statutory (core) and constitutional authority to issue final orders to adjudicate the underlying merits of claims against the estates, as well as any counterclaims that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *In re EP Energy E&P Co., L.P.*, No. 19-35647 (MI), 2021 Bankr. LEXIS 3430, at *28, *31 (Bankr. S.D. Tex. Dec. 14, 2021) (quoting *Stern v. Marshall*, 564 U.S. 462, 499 (2011)).

23. The Adversary Proceeding involves core claims because they relate to the EPC Contract, which was assumed during Zachry's Chapter 11 Cases, and because the Adversary Proceeding must be resolved in order for the Court to determine whether OPPD's administrative expense claim should be allowed. The conclusion does not change simply because Zachry's Plan is now effective.

(i) Claims Asserted in the Adversary Proceeding Are Core Because They Arise Directly from the Postpetition EPC Contract that Was Assumed During the Administration of the Chapter 11 Cases

24. The majority of courts have held that actions stemming from postpetition contracts with a debtor-in possession, such as the Adversary Proceeding, are core proceedings. *See, e.g.*, *WRT Creditors Liquidation Tr. v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 610 (S.D. Tex. 1999) (citing cases) ("[C]ourts have held that post-petition contract disputes are often appropriately treated as core proceedings."); *Keener v. BMC Software, Inc. (In re Keener)*, Nos.

03-44804 (WWS), 07-3494 (WWS), 2008 Bankr. LEXIS 4176, at *5 (Bankr. S.D. Tex. Apr. 2, 2008) ("[P]ost-petition contract disputes are treated as core proceedings when they can be characterized as matters arising from the administration of the bankruptcy estate."); *Premiere Network Servs. v. Sw. Bell Tel. L.P. (In re Premiere Network Servs.)*, Nos. 04-33402 (HDH), 04-03687 (HDH), 2005 Bankr. LEXIS 3245, at *19 (Bankr. N.D. Tex. Oct. 19, 2005) (holding that a dispute based on a postpetition breach of a postpetition contract was a core proceeding under section 157(b)(2)(A)); *LaRoche Indus. v. Orica Nitrogen LLC (In re LaRoche Indus.)*, 312 B.R. 249, 253 (Bankr. D. Del. 2004) (stating that the "majority of courts addressing this issue" have held that matters relating to postpetition contracts are core and thus holding that the matter before it was core but abstaining from hearing it on permissive abstention grounds because, *inter alia*, the main bankruptcy case had been closed for over a year); *Bennett Three Leasing Servs. v. Consol. Med. Transp., Inc. (In re Consol. Med. Transp., Inc.)*, 300 B.R. 435, 444 (Bankr. N.D. Ill. 2003) (holding that a breach of contract action arising out of a post-petition contract approved in the debtor's bankruptcy case was a core matter "that can be heard and decided by a bankruptcy judge pursuant to 28 U.S.C. § 157(b)(2)(A)").

25. ZII assumed the EPC Contract (as amended by the Second Amendment), and the EPC Contract is thus a postpetition contract of ZII. Assumption Order ¶ 6. Every claim Zachry asserts in the Adversary Proceeding arises out of the EPC Contract.

26. That means that these claims arise from Zachry's bankruptcy and the administration of Zachry's bankruptcy estates and are thus core. *See, e.g.*, *In re Juvennelliano*, 464 B.R. 651, 653 (Bankr. D. Del. 2011) ("The assumption of an executory contract by a [d]ebtor-in-[p]ossession is an act of administration creating an obligation of the estate which is legally distinct from the obligations that existed prior to an assumption of the contract.") (internal citation omitted). But

for Zachry's bankruptcy filing and its assumption of the EPC Contract during the Chapter 11 Cases, OPPD could not assert an administrative expense claim.

27. OPPD's reliance on *WRT* is misplaced. *See* Mot. to Withdraw at 15. In fact, *WRT* supports denial of the Motion to Withdraw. The contract at issue in *WRT* was a prepetition contract, and all the events and transactions giving rise to the asserted claims occurred prepetition, even though some of the alleged damages accrued postpetition. *WRT*, 75 F. Supp. 2d at 609. That is why the court held those claims were non-core. *Id.* at 613. In contrast, the Adversary Proceeding involves solely issues concerning purported postpetition breaches of the EPC Contract. As the *WRT* court recognized, that distinction leads to a different result. *Id.* at 610. ("[C]ourts have held that post-petition contract disputes are often appropriately treated as core proceedings.").

(ii) Claims Asserted in the Adversary Proceeding Are Core Because They Would Necessarily Be Resolved As Part of the Administrative Expense Claims Allowance Process

28. OPPD's filing of the Administrative Expense Application initiated a bankruptcy claims allowance process. The Adversary Proceeding arises out of the same facts and legal issues. As the parties recognized in entering into the Stipulation and Agreed Order to Abate, the Adversary Proceeding must be resolved in order to adjudicate OPPD's administrative expense claim.[4] This makes the claims in the Adversary Proceeding core claims.

29. This Court has previously held that because section 503 of the Bankruptcy Code "plainly requires" the court to determine whether an asserted administrative expense claim should be "allowed," its resolution is "patently 'core'" because a request for an administrative expense to be paid from a bankruptcy estate "could not exist outside of bankruptcy." *In re EP Energy E&P*

[4] The Stipulation and Agreed Order to Abate provides that to the extent it is determined on a final basis in the Adversary Proceeding that Zachry has no liability to OPPD in connection with the EPC Contract, the Administrative Expense Application "shall ***automatically*** be deemed denied in its entirety[.]" Stipulation and Agreed Order to Abate ¶ 2 (emphasis added).

Co., L.P., No. 19-35647 (MI), 2021 Bankr. LEXIS 3430, at *25–26 (Bankr. S.D. Tex. Dec. 14, 2021). OPPD appears to agree with that premise. *See* Mot. to Withdraw at 14 (acknowledging that "allowance and treatment of any potential claim is a core bankruptcy matter").[5] The Court cannot perform one of its "essential" duties of determining whether an administrative expense claim should be "allowed" until it assesses whether the claim is valid. *EP Energy*, 2021 Bankr. LEXIS 3430, at *31 (holding that when an administrative expense application is filed, the court must assess whether the claim is "meritorious").[6]

30. OPPD argues that "the procedural posture of [this Adversary Proceeding] must be separated" from the proceeding concerning allowance and treatment of OPPD's purported claim in the Chapter 11 Cases. Mot. to Withdraw at 14. But OPPD ignores the fact that it is impossible to separate the two issues. That is why the law recognizes that the claims at issue in the Adversary Proceeding are core even if they were initially non-core state-law claims. For example, in *Lightsway Litig. Servs., LLC v. Yung (In re Tropicana Entm't, LLC)*, a trustee of a post-confirmation litigation trust filed an adversary proceeding asserting state-law claims for breach of contract and breach of the covenant of good faith and fair dealing against two parties who had filed administrative and priority claims against the debtor's estate. 520 B.R. 455, 462 (Bankr. D. Del. 2014). The court held that the trustee's claims were core because determination of the asserted claims was necessary to a determination on the allowance of the defendants' claims. *Id.* (citing 28 U.S.C. § 157(b)(2)(B) and *Stern*); *cf. Regal Row Fina, Inc. v. Washington Mutual Bank, FA*, No.

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[5] OPPD does not appear to dispute that Count III in the Original Complaint seeking reduction of any administrative expense claim of OPPD is a core claim. *See* Mot. to Withdraw at 16-17.

[6] In that respect, allowance of prepetition claims under section 502(b) of the Bankruptcy Code and allowance of administrative expense claims under section 503(b) of the Bankruptcy Code are substantially similar, as both proceedings bring the merits of an asserted claim into the bankruptcy claims allowance process—a core matter with respect to which bankruptcy courts have both statutory and constitutional authority. *EP Energy*, 2021 Bankr. LEXIS 3430, at *25 (analogizing the process of allowance of proofs of claim and the process of allowance of administrative expense claims).

3:04-cv-1033, 2004 WL 2826817, at *6 (N.D. Tex. Dec. 9, 2004) (holding that the debtor-plaintiff's state court petition, even if not initially a core proceeding, converted into a core proceeding when the defendant filed a postpetition proof of claim against the debtor-plaintiff); *In re GYPC, Inc.*, No. 17-31030 (GRH), 2021 Bankr. LEXIS 3013, at *11 (Bankr. S.D. Ohio Oct. 25, 2021) (holding that a claimant who filed a proof of claim after an adversary proceeding was commenced "impliedly consented to [the] court making a final determination as to the avoidance actions the trustee is prosecuting against him . . . [because t]he [t]rustee's action cannot be separated from the claims allowance process"). The same result should follow here.

31. That the adjudication of the claims asserted in the Adversary Proceeding will involve determination of state law issues does not make those claims non-core. *See, e.g., In re Mem'l Prod. Partners*, 2018 WL 1807056, at *5 (citing 28 U.S.C. § 157(b)(3)) (holding that the fact that the parties' dispute may ultimately require the interpretation of state contract law "does not by itself affect [the] determination of core status"). As the Fifth Circuit recognized, "many truly bankruptcy issues, like the determination of the basis for creditors' claims, turn on state law." *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 930 (5th Cir. 1999) (holding that the fact that the claims at issue arose under state law does not prevent them from invoking core jurisdiction). The question is not whether the dispute turns on state law but rather "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499. The answer here is a decisive yes. None of the cases OPPD cites for its contrary argument involve resolution of an administrative expense claim or a proof of claim asserted against a debtor arising out of the estate administration process.[7]

[7] *See Veldekens v. GE HFS Holdings, Inc.*, 362 B.R. 762, 765 (S.D. Tex. 2007) (an action between non-debtors that arose out of a prepetition dispute and did not concern a claims allowance process); *Mirant Corp. v. Southern*

32. In that respect, *Southmark* is on point. Years after Southmark's plan was confirmed, Southmark brought a state-court action against an accountant to the court-appointed examiner for breaches of the contract that had been approved by the bankruptcy court. *Southmark*, 163 F.3d at 931. The accountant, in turn, filed an administrative expense claim and removed Southmark's action to the bankruptcy court. *Id.* at 930-31. Southmark moved for abstention or remand, arguing that its claims were not core because they arose under state law and involved "private rights" against the accountant and the proceeding could not arise only in the context of the bankruptcy case. *Id.* at 930. The Fifth Circuit rejected this argument, holding that the claims were core because they were inseparable from the bankruptcy case. *Id.* at 931. The Fifth Circuit also held that, because the accountant filed an administrative expense claim in the bankruptcy

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Co., 337 B.R. 107, 121 (N.D. Tex. 2006) (an action in which the debtors and the creditors' committee asserted claims that arose prepetition, would not directly affect the liability or priority of the defendant's proofs of claim in the bankruptcy cases, and did not arise as part of the claims allowance process); *Waldon v. Nat'l Fire Ins. Co. (In re EbaseOne Corp.)*, Nos. 01-31527 (JB), 06-3197 (JB), 2006 Bankr. LEXIS 1861, at *21-22 (Bankr. S.D. Tex. June 14, 2006) (an action by a chapter 7 trustee seeking recovery based on prepetition events from a defendant who did not assert a claim against the estates); *Wood*, 825 F.2d at 97-98 (noting that no proof of claim was filed and stating that "the nature of the state proceeding would be different from the nature of the proceeding following the filing of a proof of claim"); *In re Morrison*, 409 B.R. 384, 386 (S.D. Tex. 2009) (defendants filed no proof of claim, and their potential counterclaims against the estates that could be core were only "hypothetical"); *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90 (Bankr. S.D. Tex. 2009) (a prepetition action by chapter 11 debtors seeking affirmative recovery from a defendant who, at the time of the cited June 30, 2009 decision, had not filed a proof of claim against the debtors, as reflected in *In re Flying J Inc.*, Case No. 08-13384 (MFW) (Bankr. D. Del. 2008), Docket No. 2527 (defendant's response to the plaintiff's claim objection stating that the proof of claim was filed on September 23, 2009)); *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp.2d 596 (S.D. Tex. 1999) (no discussion of a proof of claim having been filed, and the lawsuit involved claims against directors and officers alleging prepetition breaches); *In re OCA, Inc.*, 410 B.R. 443, 452 (E.D. La. 2007) (adversary involved prepetition breach of contract dispute, and while a few of the defendants filed a proof of claim, the plan treated all defendants the same way and the court did not see a reason to only hold certain plaintiffs subject to the bankruptcy court's jurisdiction and not others); *In re Castex Energy Partners, LP*, 584 B.R. 150, 156 (Bankr. S.D. Tex. 2018) (while a proof of claim was filed, the court noted that the bulk of the debtor-plaintiff's counterclaims would remain pending even if the proof of claim was resolved, thus not passing the *Stern* muster); *In re Legal Xtranet, Inc.*, 453 B.R. 699, 710-11 (Bankr. W.D. Tex. 2011) (finding that the claims were non-core because they arose from prepetition conduct and were asserted by the plaintiffs before the bankruptcy filing, and the plaintiff did not even intend to file a proof of claim); *In re BP RE, L.P.*, 735 F.3d 279, 282, 291 (5th Cir. 2013) (plaintiff asserted a prepetition breach of contract action and the parties did not dispute the non-core nature of the claims); *In re Encompass Services Corp.*, 337 B.R. 864, 871 (Bankr. S.D. Tex. 2006) (breach of contract suit unrelated to the claim allowance process asserting prepetition breaches of a prepetition contract brought by a non-debtor against a non-debtor purchaser of the estate's assets).

court, Southmark's action was akin to a counterclaim against the accountant, which invoked the bankruptcy court's core jurisdiction under 28 U.S.C. § 157(b)(2)(B). *Id.* at 932.

(iii) Confirmation of Zachry's Plan Does Not Make the Claims in the Adversary Proceeding Non-Core

33. The fact that the Plan is now effective does not change the conclusion that the claims in the Adversary Proceeding are core claims.[8] For example, in *In re Energy Partners, Ltd.*, the court held that an application for an administrative expense claim was a core matter under 28 U.S.C. § 157(b)(2)(A) and (B) notwithstanding that the estate assets had revested in the reorganized debtor and there was no more estate to administer. 422 B.R. 68, 78 & n.7 (Bankr. S.D. Tex. 2009). The court reached this conclusion because the claimant rendered the services for which it was seeking reimbursement when "the estate did exist," making it a matter concerning the administration of the estate. *Id.* at 78 n.7. Other courts have reached similar conclusions. *See, e.g.*, *In re LaRoche Indus., Inc.*, 312 B.R. at 253 (holding, over a year after the plan was confirmed, that a dispute involving a postpetition breach of a postpetition asset purchase agreement was a core matter); *Perry v. One Sugar Lakes Prof'l Ctr. Partners, L.P. (In re Perry)*, 411 B.R. 368, 372 (Bankr. S.D. Tex. 2009) (citing, among other cases, *Enron*, 535 F.3d at 335-36) (stating that proceedings initiated before confirmation of the plan are core under § 157(b)(2)(A) and (O)); *Bennett Three Leasing Servs. v. Consol. Med. Transp., Inc. (In re Consol. Med. Transp., Inc.)*, 300

[8] In its Motion to Withdraw and Motion to Transfer Venue, OPPD does not assert that the Court lacks post-effective date jurisdiction over the Adversary Proceeding. To the extent OPPD challenges this Court's jurisdiction, this Court continues to have post-effective date jurisdiction over this Adversary Proceeding because it "arises in" Zachry's cases pending before this Court under chapter 11 of the Bankruptcy Code and, to the extent it "relates to" those cases, it concerns a dispute between OPPD and Zachry that arose from the parties' pre-effective date relations and the asserted claims were raised pre-effective date. *See Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 535 F.3d 325, 336 (5th Cir. 2008) (holding that the court had bankruptcy jurisdiction over pre-confirmation claims based on pre-confirmation activities that properly had been removed pursuant to "related to" jurisdiction); *see also, e.g.*, *In re EP Energy E&P Co., L.P.*, No. 19-35647 (MI), 2021 Bankr. LEXIS 3430, at *23 (Bankr. S.D. Tex. Dec. 14, 2021) (holding that a claim based on the debtor's postpetition, pre-effective date conduct fell within the court's "broad 'pre-confirmation' jurisdiction"); *cf. In re Tyson*, No. 03-41900 (ALG), 2007 WL 2379624, at *3 (Bankr. S.D.N.Y. Aug. 17, 2007) ("Bankruptcy courts clearly have core jurisdiction to enforce a debtor's post-petition contracts.").

B.R. 435, 444 (Bankr. N.D. Ill. 2003) (holding, post-confirmation, that a breach of contract action arising out of a postpetition contract approved in bankruptcy was a "core matter[] that can be heard and decided by a bankruptcy judge pursuant to 28 U.S.C. § 157(b)(2)(A)"); *EP Energy*, 2021 Bankr. LEXIS 3430, at *27 (holding that a post-effective date determination of the validity and allowance of an administrative expense claim is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B)).

34. The claims asserted in the Adversary Proceeding arise out of a postpetition, pre-effective date dispute based on purported breaches that occurred during the administration of Zachry's estates. The claims are also central to the resolution of the issue of allowance of OPPD's asserted administrative expense claim—an issue that is within this Court's exclusive jurisdiction. *See* Plan, Art. XI; *see also* Stipulation and Agreed Order to Abate ¶¶ 2-3. The occurrence of the effective date under the Plan, therefore, does not affect the core nature of the claims raised in the Adversary Proceeding. *See supra* ¶ 32.

35. The claims asserted in the Adversary Proceeding are core claims. This factor weighs against withdrawal of the reference.[9]

(b) The Parties Do Not Have Jury Trial Rights

36. Many courts recognize the "jury trial right" factor as "crucial" to the withdrawal of the reference analysis. *See, e.g.*, *Tow v. Speer (In re Royce Homes, L.P.)*, No. 09-32467-H4-7 (JB), 2011 WL 13340482, at *5 (Bankr. S.D. Tex. Oct. 13, 2011) (stating that this factor is "a

[9] Even if any claims in the Adversary Proceeding are non-core, they are inextricably intertwined with the resolution of the core issues of the validity and allowance of OPPD's administrative expense claim. *See, e.g.*, *In re Fire Eagle L.L.C. v. Bischoff (In re Spillman Dev. Group)*, 710 F.3d 299, 306 (5th Cir. 2013) (holding that creditor's state contract-law claims were "inextricably intertwined" with the interpretation of a right created by federal bankruptcy law); *Curtis v. Awbrey (In re Longhorn Paving & Oilfield Servs.)*, 648 B.R. 300, 305 (Bankr. S.D. Tex. 2023) ("Regarding any non-core claims involved, this [c]ourt finds that resolution of such claims is inextricably intertwined with resolution of the core claims. As such this [c]ourt can enter final orders and judgments."). This Court, therefore, can enter final orders and judgments with respect to all claims asserted in the Adversary Proceeding.

crucial factor in any motion to withdraw the reference"); *Johnson v. Williamson (In re British Am. Props. III)*, 369 B.R. 322, 326 (Bankr. S.D. Tex. 2007) ("[T]he one decisive issue is whether or not the [d]efendant has waived her right to a jury trial. The importance of this fundamental right carries such weight that the collective effect of the remaining five factors should not alter the final determination."). This is so because a bankruptcy court cannot conduct a jury trial without the consent of all parties. *See* 28 U.S.C. § 157(e).

37. OPPD and ZII have contractually waived their jury trial rights with respect to any claims directly or indirectly arising out of the EPC Contract. EPC Contract, Art. XIII. No party has challenged this waiver or its applicability to the claims asserted in the Adversary Proceeding. This factor, therefore, weighs against withdrawal of the reference. *See Cirillo v. Valley Baptist Health Sys. (In re Cirillo)*, No. 09-10324 (MI), 2014 WL 1347362, at *9 (Bankr. S.D. Tex. Apr. 3, 2014) ("There is no jury demand, which weighs against withdrawal.").

(c) Withdrawal of the Reference Would Lead to Unnecessary Duplication and Waste of the Parties' and Judicial Resources

38. OPPD argues that adjudicating the parties' claims in the district court would foster economical use of the parties' resources because: (i) the Adversary Proceeding involves non-core claims, and having those claims decided by a district court in the first instance would dispense with the need for a district court to conduct *de novo* review of the Court's findings of fact and conclusions of law; and (ii) neither the parties nor the Court have spent any significant resources or developed familiarity with the Adversary Proceeding, which has been pending since February 5, 2025 without any discovery or substantive proceedings. Mot. to Withdraw at 19. The Court should reject both arguments.

39. *First*, as discussed above, the Adversary Proceeding involves core claims. *See supra* ¶¶ 22-35. *Mirant* and *EbaseOne* are inapplicable because all or most of the claims at issue

there were non-core. *See* Mot. to Withdraw at 18 (discussing *Mirant*, 337 B.R. 107, and *EbaseOne*, 2006 Bankr. LEXIS 1861); *see also supra* footnote 7.

40. *Second*, OPPD ignores substantial activities relevant to the parties' dispute that have and will transpire in the Chapter 11 Cases and the Court's familiarity with the relevant facts and issues. In analyzing this factor, courts consider not only the procedural posture of the adversary proceeding, as OPPD suggests, but also the bankruptcy court's familiarity with the parties and issues arising in the main bankruptcy case. *See, e.g.*, *In re BJ Servs.*, 2023 WL 2395749, at *3 (finding that this factor weighed against withdrawing the reference where the court was intimately familiar with both the "adversary proceeding and the main bankruptcy case").

41. In the more than 10 months the Chapter 11 Cases have been pending, this Court became intimately familiar with Zachry, the nature of its business, the various types of issues and disputes prevalent in Zachry's industry, and the proceedings in Zachry's Chapter 11 Cases that culminated in the confirmation of Zachry's Plan. During the Chapter 11 Cases, the Court also had the opportunity to become familiar with some of the facts concerning the EPC Contract and Zachry's business relationship with OPPD, which were relevant to Zachry's motion to approve the Second Amendment and assumption of the EPC Contract. Because the Adversary Proceeding is not stayed pending the outcome of OPPD's Motion to Withdraw and Motion to Transfer Venue, the Court will continue to become increasingly familiar with the underlying legal issues and factual allegations during the pre-trial proceedings, including the April 14, 2025 status conference. Zachry also has a pending dispute with Commonwealth Electric Company of the Midwest, a subcontractor who performed certain electrical work at SBLS, which dispute is pending before this Court and during which the Court will learn even more facts regarding one of the Projects that

may be relevant to the claims in the Adversary Proceeding. This Court is also familiar with the purely bankruptcy issues concerning allowance of administrative expense claims.

42. Under these circumstances, "no efficiency or consistency would be gained in withdrawing this [Adversary Proceeding], which involves issues arising directly in [Zachry's] bankruptcy case[s] administered by this Court, to a district court unfamiliar with the dispute." *In re Mem'l Prod. Partners*, 2018 WL 1807056, at *6; *see also In re Cirillo*, 2014 WL 1347362, at *9 (finding that the bankruptcy court was in the "best position to efficiently dispose" of the adversary proceeding before it because of the bankruptcy court's specialty, experience, and familiarity with the underlying facts and the straightforward nature of the dispute involving core claims). To the contrary, adjudicating the parties' claims in a district court would not only ***not*** foster economical use of the parties' resources but would lead to unnecessary duplication and waste of the parties' and judicial resources and would delay the final resolution of the parties' dispute. Because OPPD's Administrative Expense Application will remain pending before this Court even if the Adversary Proceeding does not, the parties would have to engage in litigation before two different courts based on many of the same facts and similar issues. This will require not only a Texas (or Nebraska) district court to become familiar with the issues in the Adversary Proceeding, but also this Court to become familiar with that district court litigation upon its conclusion, to the extent OPPD prevails. Moreover, any familiarity with the dispute the district court will gain in reviewing this Court's recommendation in connection with the Motion to Withdraw will be of no use if the Adversary Proceeding is subsequently transferred to the United States District Court for the District of Nebraska (the "**Nebraska Court**") (as OPPD seeks), where

yet another court unfamiliar with the dispute would have to learn the facts and issues underlying the Adversary Proceeding.[10]

(d) Administrative Uniformity Would Be Better Served by Denial of the Motion to Withdraw the Reference

43. For most of the same reasons, the "administrative uniformity" factor weighs against withdrawal of the reference. *See, e.g.*, *In re BJ Servs.*, 2023 WL 2395749, at *3 ("The [c]ourt's familiarity with the main bankruptcy case and its underlying facts suggests that the [c]ourt's retention of this proceeding will promote uniformity in bankruptcy administration."); *In re Mem'l Prod. Partners*, 2018 WL 1807056, at *6 (holding that the "administrative uniformity" factor weighed against withdrawal of the reference with respect to a core proceeding arising directly in the debtor's bankruptcy case to a district court unfamiliar with the dispute).

44. The subject of the Adversary Proceeding is validity of an asserted claim against Zachry's estates. This Court is a centralized forum for resolving such claims. It has jurisdiction and the necessary authority to do so and has proven it is able to efficiently resolve complex issues, let alone straightforward state law claims. Administrative uniformity is, therefore, better served if all claims against Zachry's estates are resolved by the one court that is deeply familiar with the issues—this Court—rather than by multiple courts.[11]

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[10] OPPD relies on *British American Properties* in support of its argument that withdrawal of the reference would promote economical use of resources. Mot. to Withdraw at 18 (citing *In re British Am. Props. III*, 369 B.R. at 328). But that case is distinguishable because the adversary proceeding there involved recovery of a fraudulent transfer from a "non-debtor/non-creditor third party" in a chapter 7 case where the underlying facts or issues had not previously come up in the main case. *See generally British Am. Props.*, 369 B.R. 322 (Bankr. S.D. Tex. 2007). Here, the Adversary Proceeding involves claims against a party that is no stranger to Zachry's Chapter 11 Cases, and the parties and the Court are already familiar with many of the factual and legal issues relevant to the dispute.

[11] OPPD relies on *EbaseOne*. Mot. to Withdraw at 19-20. But that case is distinguishable because the adversary proceeding there involved a chapter 7 trustee's effort to augment the estate by bringing a claim against a non-creditor based on an insurance dispute that arose "independently of the [d]ebtor's bankruptcy." *EbaseOne*, 2006 WL 2405732, at *3. The Adversary Proceeding here implicates the bankruptcy claims allowance process and concerns asserted claims against Zachry's estates that arose in the course of the administration of Zachry's Chapter 11 Cases.

(e) Withdrawal of the Reference Would Substantially Delay the Bankruptcy Process

45. OPPD argues that withdrawal of the reference will expedite the Chapter 11 Cases because: (i) the claims in the Adversary Proceeding are non-core and their resolution by this Court would result in a two-step judgment process; and (ii) the Court already confirmed Zachry's Plan. Contrary to OPPD's assertions, withdrawal of the reference would substantially delay rather than expedite the resolution of the Chapter 11 Cases.

46. As discussed at length above, the Adversary Proceeding involves core claims. *See supra* ¶¶ 22-35. And it is withdrawal of the reference that would result in a "two-step judgment process" delaying the Chapter 11 Cases' resolution. Mot. to Withdraw at 22. If the Adversary Proceeding is adjudicated by a district court in OPPD's favor, the parties would then still have to return to this Court and litigate issues concerning allowance of OPPD's claim as an administrative expense claim under section 503(b) of the Bankruptcy Code. *See* Stipulation and Agreed Order to Abate ¶ 3; *see also In re WorldCom, Inc.*, No. 02-13533 (AJG), 2009 WL 2959457, at *5 (Bankr. S.D.N.Y. May 19, 2009) ("Thus, the parties must come before this [c]ourt to adjudicate the administrative expense status of any judgment obtained in the avoidance actions because it is a claim against an estate that [c]ourt is administering."). Litigating all disputes between the parties once, in this Court, is clearly the most efficient path.

47. The "confirmation of a plan does not magically end the administration of a bankruptcy case." *In re Genon Energy, Inc.*, No. 17-33695 (DRJ), 2019 WL 13192461, at *2 (Bankr. S.D. Tex. Aug. 14, 2019); *see also In re WorldCom*, 2009 WL 2959457, at *5 ("[W]hether or not the assets of the estate vested in a reorganized entity at the time an administrative expense request is made is irrelevant to a [section] 503 determination."). Contrary to OPPD's assertion, the issues underlying the Adversary Proceeding impact allowance of OPPD's administrative

expense claim, which, in turn, affects implementation and full consummation of Zachry's Plan. Thus, "this matter must be determined before the bankruptcy process can terminate." *In re BJ Servs.*, 2023 WL 2395749, at *3 (recommending denial of a motion to withdraw the reference even though the debtors' chapter 11 plan had been confirmed 3 years ago).

(f) Denial of the Motion to Withdraw the Reference Would Prevent Forum Shopping

48. OPPD appears to suggest that Zachry engaged in forum shopping by filing the Adversary Proceeding in this Court rather than in Nebraska. Mot. to Withdraw at 17, 20. Not so. OPPD does not dispute that venue of Zachry's Chapter 11 Cases is proper in this District and that, putting aside the forum selection clause in the EPC Contract (the "**Forum Selection Clause**"), venue is also proper here with respect to the Adversary Proceeding. And, as discussed in more detail below, the EPC Contract's Forum Selection Clause should not be enforced on public policy grounds because the claims asserted in the Adversary Proceeding are core claims. *See infra* ¶¶ 51-55.

49. OPPD agreed to Zachry's assumption of the EPC Contract, thereby submitting itself to this Court's jurisdiction and the consequences that flow from it, including any impact it may have on the Forum Selection Clause. *See In re Arnold Print Works, Inc.*, 815 F.2d 165, 170 (1st Cir. 1987) ("[I]t is difficult to see any unfair surprise in bringing a post-petition contract action before a bankruptcy court. Parties who contract with a bankrupt company's trustee or a debtor in possession know that they are dealing with an agent responsible to a bankruptcy court; that the bankruptcy court would resolve subsequent disputes should therefore come as no surprise."). By seeking to withdraw the reference, OPPD is seeking to impermissibly avoid those consequences. It should not be allowed to do so. The Motion to Withdraw should be denied.

II. THE COURT SHOULD DENY THE MOTION TO TRANSFER VENUE

50. The Court should exercise its discretion and not enforce the Forum Selection Clause with respect to the Adversary Proceeding because it involves solely core claims. In addition, transferring the Adversary Proceeding to the Nebraska Court would not be in the interest of justice or for the convenience of the parties. The Motion to Transfer Venue should be denied.

(a) The Court Should Exercise Discretion and Not Enforce the Forum Selection Clause Because the Adversary Proceeding Involves Solely Core Claims

51. OPPD asserts that the Court is required to transfer the Adversary Proceeding to the Nebraska Court because of the Forum Selection Clause in the EPC Contract. In doing so, OPPD relies heavily on the false premise that the Adversary Proceeding is not a core matter.

52. As discussed above, the Adversary Proceeding involves entirely core claims. *See supra* ¶¶ 22-35. The Fifth Circuit has held that "the ability of a bankruptcy court to resolve certain statutorily core proceedings implicates a strong public-policy interest" and, therefore, bankruptcy courts have discretion not to enforce a forum selection clause with respect to such proceedings. *In re Spillman Dev. Grp., Ltd.*, 710 F.3d 299, 306 (5th Cir. 2013). Other courts agree. *See, e.g.*, *In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008) ("Whether claims are considered core or non-core proceedings dictates . . . the enforcement of forum selection clauses."); *CapRock Milling & Crushing, LLC v. Perdue Agribusiness LLC*, No. 2:24-CV-G38-Z, 2024 WL 4582903, at *6 (N.D. Tex. Oct. 25, 2024) ("*Core* proceedings should often be centralized with the underlying bankruptcy because 'the public interest in centralizing bankruptcy proceedings generally outweighs the public and private interests in enforcing a forum selection clause.'") (citations omitted); *see also* Daniel W. Morton-Bentley, Annotation, *Enforceability of Forum Selection Clauses in Bankruptcy Proceedings*, 17 A.L.R. Fed. 3d Art. 7 (2016) ("Generally, courts have

enforced forum selection clauses in noncore proceedings but denied enforcement within core proceedings.").[12]

53. The Court should exercise its discretion and decline to enforce the Forum Selection Clause. Enforcement of the Forum Selection Clause would conflict with some of the essential purposes of the Bankruptcy Code, including to provide one centralized forum to determine all issues regarding administration of the bankruptcy cases and determination of validity and allowance of claims against the estates. Enforcement of the Forum Selection Clause would result in piecemeal litigation of the closely intertwined issues implicated by the Adversary Proceeding and the Administrative Expense Application and would not provide finality, as the parties would still be required to return to this Court in the event OPPD prevails in the dispute. Stipulation to Abate ¶ 3.

54. That the Court approved the Second Amendment and assumption of the EPC Contract does not change the analysis. At the time of the approval, OPPD had not initiated the bankruptcy claims allowance process or sought allowance of a priority administrative claim because it did not yet have that purported right under section 503(b) of the Bankruptcy Code. The strong public policy making enforcement of the Forum Selection Clause discretionary was not yet implicated. It would not be unfair to have OPPD litigate before this Court when it knowingly agreed to ZII's assumption of the EPC Contract. *See Arnold Print Works*, 815 F.2d at 170 (there is "no unfair surprise" in bringing a post-petition contract action before a bankruptcy court because the non-debtor party knows that it is dealing with an agent responsible to a bankruptcy court).

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[12] All but one case on which OPPD relies in support of its argument that the Forum Selection Clause must be enforced involved transfers of non-bankruptcy-related civil actions, which is not the case here. The only case OPPD cites that did involve a bankruptcy-related matter concerned a debtor's cause of action based on a pre-petition legal right that the court held was "not derived from any federal right conferred by the Bankruptcy Code and thus [did] not conflict with the purpose or provision of the Bankruptcy Code." *In re Bailey*, 217 B.R. 523, 526 (Bankr. E.D. Tex. 1997).

55. Because the Adversary Proceeding involves solely core claims, the Court should decline to enforce the Forum Selection Clause.

(b) The Relevant Factors Do Not Support the Motion to Transfer Venue

56. In the absence of an enforceable forum selection clause, OPPD bears the burden of showing that venue transfer is appropriate. *In re Commonwealth Oil Refining Co., Inc.*, 596 F.2d 1239, 1241 (5th Cir. 1979) ("[T]he party moving for the transfer must show by a preponderance of the evidence that the case should be transferred.").

57. Courts in this Circuit are split as to whether 28 U.S.C. § 1404(a) or 28 U.S.C. § 1412 applies to transfers of venue of adversary proceedings. This Court has held that section 1412 applies to transfers of venue of core adversary proceedings. *Longhorn Partners*, 408 B.R. at 97 (holding that "[s]ection 1412 is the change of venue provision specific to bankruptcy cases and adversary proceedings" but is limited to core matters); *but see In re Directory Distrib. Assocs., Inc.*, 566 B.R. 869, 877 (Bankr. S.D. Tex. 2017) (disagreeing with *Longhorn* and holding that "the controlling precedent in the Southern District of Texas is that § 1412 applies to requests for transfer of core and non-core (related to) bankruptcy proceedings while § 1404(a) applies to general civil actions—i.e., non-bankruptcy actions").

58. Because Zachry asserts core claims in the Adversary Proceeding, the applicable venue transfer statute is 28 U.S.C. § 1412 and not 28 U.S.C. § 1404(a) as OPPD asserts.[13] Section 1412 provides that "[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.

[13] To the extent this Court holds that 28 U.S.C. § 1404(a) applies to any of the claims asserted in the Adversary Proceeding, the analysis under the two statutes is the same. *See In re Directory Distrib. Assocs., Inc.*, 566 B.R. 869, 877–78 (Bankr. S.D. Tex. 2017) (stating that courts apply the same factors in analyzing transfers under both provisions).

59. Transferring the Adversary Proceeding to the Nebraska Court would be neither in the interest of justice nor for the convenience of the parties.

(i) Transfer of the Adversary Proceeding Is Not in the Interest of Justice

60. To determine whether the venue transfer under 28 U.S.C. § 1412 is in the interest of justice, courts consider: (a) economics of estate administration; (b) presumption in favor of the "home court"; (c) judicial efficiency; (d) ability to receive a fair trial; (e) the state's interest in having local controversies decided within its borders by those familiar with its laws; (f) enforceability of any judgment rendered; and (g) plaintiff's original choice of forum. *In re Directory Distrib. Assocs.*, 566 B.R. at 877.[14] These factors do not support transferring venue to the Nebraska Court.

(A) The Economics of Estate Administration Do Not Support Venue Transfer

61. Zachry's bankruptcy estates no longer exist since the Plan went effective. The economics of the estate factor is not affected one way or another and is, therefore, neutral.

(B) There Is a Presumption in Favor of the "Home Court"

62. As OPPD recognized, courts have held that there is a presumption that the "district in which the underlying bankruptcy case is pending is the appropriate district for determination of an adversary proceeding." *Think3 Litig. Trust v. Zuccarello (In re Think3, Inc.)*, 529 B.R. 147, 208 (Bank. W.D. Tex. 2015); *Campbell v. Williams*, No. 1:14-CV-097, 2015 WL 3657627, at *4 (S.D. Tex. June 12, 2015) (holding that because the debtor's bankruptcy case was filed in South Carolina, transfer was warranted to the South Carolina court because there is a strong presumption

[14] The applicable public interest factors under 28 U.S.C. § 1404(a) significantly overlap. Those factors are: (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 or in the application of foreign law. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008).

of transferring the dispute to where the bankruptcy case is pending); *In re Avado Brands, Inc.*, No. 04-31555-RCM-11, 2006 WL 8437389, at *7 (Bankr. N.D. Tex. Apr. 21, 2006), *report and recommendation adopted*, No. 04-31555, 2006 WL 8436979 (N.D. Tex. July 3, 2006) ("Generally, bankruptcy proceedings related to a bankruptcy should be litigated in the judicial district which presided over the underlying bankruptcy."); *Orthodontic Centers of Texas, Inc. v. Corwin*, No. CIV.A.H-06-2595, 2007 WL 173220, at *1 (S.D. Tex. Jan. 18, 2007) (same); *see also* Mot. to Transfer Venue at 17. The presumption of maintaining venue in the bankruptcy case forum "is bolstered when, as here, the outcome of the proceeding will have a substantial impact on the administration of the bankruptcy case." *In re Bavaria Yachts USA, LLLP*, 575 B.R. 540, 558 (Bankr. N.D. Ga. 2017) (quoting *Prithvi Catalytic, Inc. v. Microsoft Corp. (In re Prithvi Catalytic, Inc.)*, No. 14-02176-GLT, 2015 WL 1651433, at *14 (Bankr. W.D. Penn. Apr. 8, 2015)).

63. OPPD alleges that ZII breached the EPC Contract and is liable for liquidated damages of over $38 million as of February 14, 2025, which, according to OPPD, continue to increase day by day. Administrative Expense Application ¶ 17. OPPD also seeks allowance of that claim as an administrative expense claim, which, if allowed, would have to be paid in full and in cash under Zachry's Plan. Plan, Art. II.A. The outcome of the Adversary Proceeding, in which Zachry brought claims challenging the validity of OPPD's claim, thus presents an important issue in these Chapter 11 Cases that must be resolved for the cases to be fully administered. This Court has jurisdiction to resolve the asserted claims and has exclusive jurisdiction to resolve OPPD's claim against Zachry. Plan, Art. XI. The Adversary Proceeding should remain in Zachry's "home court."

64. That the Plan is already confirmed does not change this conclusion. For example, in *Avado Brands*, the court recommended denial of a motion to transfer venue with respect to an

adversary proceeding brought post-confirmation against former directors of the debtors. 2006 WL 8437389, at *2-3. The court held that the plaintiff's choice of forum had to be afforded substantial weight and that the court had continuing responsibilities with respect to the asserted claims and related litigation because of the provisions in the confirmed plan preserving the claims and because four of the eight defendants filed claims against the debtors that directly related to the dispute. *Id.*, at *8-9. The same is true here, as OPPD asserted an administrative expense claim against Zachry that is entirely related to the claims in the Adversary Proceeding, and this Court continues to be the appropriate venue for the resolution of such interrelated core claims.

65. OPPD cites *Mirant* for the proposition that there is no presumption in favor of this Court. 337 B.R. at 124. However, the *Mirant* court did not cite any case law in support of this statement and granted the motion to transfer venue because neither the parties nor the facts from which the dispute arose had ***any*** connection to Texas other than that Mirant's bankruptcy case was pending in Texas. *Id.* That is not the case here because, as discussed below, Zachry and many non-party key witnesses are located in Texas.[15]

[15] The other two cases OPPD cites in support of this argument both relied on the unsupported statement in *Mirant* and are also distinguishable on their facts. In *In re Manchester, Inc.*, "the heart" of the adversary proceeding were claims arising out of a prepetition agreement that were not derived from any federal right conferred by the Bankruptcy Code. 417 B.R. 377, 386 (Bankr. N.D. Tex. 2009). Moreover, the debtors filed the adversary proceeding post-confirmation, after having "strategically dismissed" an action that was pending in the transferee jurisdiction where they asserted most of the same claims. *Id.* at 383 n.3, 387. The *Manchester* court relied on another decision in which the "the debtor was able to obtain confirmation of its reorganization plan long before the contract claims covered by the forum selection clause were tried to the court[.]" *Id.* at 385 (quoting *In re D.E. Frey Group, Inc.*, 387 B.R. 799, 807 (D. Colo. 2008)). And in *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, the proceeding was initiated after the debtors had already exited chapter 11. No. 11 Civ. 7511, 2012 WL 698134, at *4 (S.D.N.Y. Mar. 5, 2012). None of that is the case here: the claims in the Adversary Proceeding arise out of the EPC Contract, which was assumed during the Chapter 11 Cases and became a postpetition contract, were brought during the pendency of the Chapter 11 Cases prior to the Plan confirmation, and directly relate to the claim allowance process OPPD commenced by filing the Administrative Expense Application.

(C) Denial of the Motion to Transfer Venue Would Promote Judicial Efficiency

66. Judicial efficiency concerns numerous issues, some of which overlap with the other venue transfer factors, including: the home court's familiarity with the substantive issues and familiarity with the law to be applied in the proceeding; the caseload of the respective courts and thus whether the time to trial is shorter or substantially longer in one forum as opposed to the other; and the respective availability of the courts for resolving discovery disputes and for moving the case toward trial at a reasonable pace given the issues involved. *In re Parson*, No. 21-30982, 2021 WL 4206462, at *3 (Bankr. N.D. Tex. Sept. 15, 2021).

67. This factor weighs against transferring venue. While the underlying claims arise under Nebraska law, this Court has become familiar with the relevant facts concerning the bankruptcy cases and the parties' dispute, unlike the Nebraska Court which is not at all familiar with the parties or any of the issues. Moreover, because the Adversary Proceeding and the Administrative Expense Application (which will remain pending before this Court) implicate the same issues of liability for the purported breaches of the EPC Contract, judicial efficiency will be promoted if this Court, which is intimately familiar with the relevant facts, considers all those issues and claims. *Cf. Leal v. Bednar*, No. 3:16-cv-3424-G, 2017 WL 565176, at *4 (N.D. Tex. Feb. 23, 2017) (finding that because the same facts were in dispute in a breach of contract case and proof of claim in a bankruptcy proceeding, transfer to the bankruptcy court was in the interest of justice to diminish the possibility of inconsistent judgments and to promote the efficient administration of justice); *Quick v. Viziqor Sols., Inc.*, No. 406CV637SNL, 2007 WL 494924, at *4 (E.D. Mo. Feb. 12, 2007) ("Since the plaintiffs have filed proofs of claims based upon the allegations that they have set forth in their complaint here, it appears to this [c]ourt that one consolidated proceeding in Delaware would be more judicially efficient that having two separate

courts in two separate venues looking at the same claims."). Resolving all disputes between the parties concerning the EPC Contract in one forum—this Court—would be more efficient than having various issues concerning the same overall dispute being decided in different proceedings scattered around the country.

68. Further, the "learning curve" with respect to Nebraska law is not steep, considering that the Complaint asserts "run of the mill" state law claims and bankruptcy courts are "regularly called upon to decide issues" of state law. *In re Think3*, 529 B.R. at 209-10 (holding that because the transferee court would not be familiar with the debtor's bankruptcy case and the learning curve of the applicable state law for the transferor court was not significant, the benefit of transferring venue based on judicial economy and efficiency would be negligible); *In re Avado Brands*, 2006 WL 8437389, at *10 ("Even if Georgia law does apply to this proceeding, this factor too should be given little weight in the analysis because the action does not present questions of Georgia law too complex for this court to apply."); *In re Schouten*, 657 B.R. 531, 539 (Bankr. N.D. Tex. 2024) (denying a motion to transfer venue and noting that "federal courts routinely construe the laws of states other than the state where the court is located"). The Adversary Proceeding can proceed in this Court much more efficiently and without substantial delay compared to the Nebraska Court. This Court has demonstrated its ability to resolve disputes, no matter how trivial or complicated, quickly and efficiently.

(D) Fairness and Ability to Receive a Fair Trial Does Not Favor Venue Transfer

69. This factor requires the transferor court to consider whether the transferee court would provide a fairer trial, and parties seeking transfer must produce evidence showing that the transferor court has a predisposition to rule in favor of one party or another. *In re Deeproot Cap. Mgmt., LLC*, No. 21-51523-MMP, 2024 WL 2703951, at *15 (Bankr. W.D. Tex. May 24, 2024).

Because OPPD failed to articulate any concern over the ability to receive a fair trial in this Court, this factor does not favor venue transfer.

(E) The State's Interest In Having Local Controversies Decided Within Its Borders Does Not Favor Venue Transfer

70. The fifth factor—a state's interest in having local controversies decided within its border—provides a preference that local courts preside over disputes that involve their laws or disputes that occurred in their jurisdiction. *In re Think3*, 529 B.R. at 210. While the substantive claims in the Adversary Proceeding will be resolved under Nebraska law, the Adversary Proceeding also involves Bankruptcy Code issues and could affect Zachry's liability under the Plan. *Id.* at 147 (noting the fact that the laws of another state are implicated is not enough to warrant transfer of venue to that state when the proceeding also involves Bankruptcy Code claims); *see also Clear Glass Mobile Serv., Inc. v. Old Republic Sur. Co.*, No. CV H-17-2791, 2017 WL 10295924, at *3 (S.D. Tex. Dec. 11, 2017) (holding that this factor was neutral in analyzing a motion to transfer venue from Texas to Florida because, while Texas law applied, the relevant project was located in Texas, and one of the parties was a Texas corporation, the debtor was a Florida corporation and its bankruptcy case and a related adversary proceeding were pending in Florida). Moreover, OPPD's allegations that prompted the Adversary Proceeding call into question the reputation of Zachry and its employees. *In re Directory Distrib. Assocs.*, 566 B.R. at 881 (citation and internal quotation marks omitted) (finding that a local interest "also arises when a district is home to a party because the suit may call into question the reputation of individuals that work in the community"). This factor, therefore, does not favor venue transfer.

(F) Enforceability of Any Judgment Rendered Weighs Against Venue Transfer

71. Because any OPPD claim would have to be treated in accordance with the Plan, the interpretation and enforcement of which is within the Court's exclusive jurisdiction, OPPD will

have to return to this Court to have its claim allowed as an administrative expense claim and enforce any judgment it obtains. *See In re WorldCom*, 2009 WL 2959457, at *5 ("[T]he parties must come before this [c]ourt to adjudicate the administrative expense status of any judgment obtained in the avoidance actions because it is a claim against an estate that [c]ourt is administering."); *see also* Stipulation to Abate ¶ 3. This factor, therefore, weighs against transferring venue.

(G) Plaintiffs' Original Choice of Forum Weighs Against Venue Transfer

72. Zachry is the plaintiff in the Adversary Proceeding, and its original choice of forum is entitled to some weight and deference. *In re Think3*, 529 B.R. at 210. Zachry initiated the Adversary Proceeding in this Court, and OPPD does not dispute that, putting the Forum Selection Clause aside, venue in this Court is proper. This factor weighs against the venue transfer.

(ii) Transfer of the Adversary Proceeding Would Not Result in Convenience of the Parties

73. To determine whether a venue transfer is for the convenience of parties under 28 U.S.C. § 1412, courts consider: (a) location of the plaintiff and defendant; (b) ease of access to necessary proof; (c) convenience of witnesses; (d) availability of subpoena power for the unwilling witnesses; (e) expense related to obtaining witnesses. *In re Directory Distrib. Assocs.*, 566 B.R. at 878.[16] These factors do not support venue transfer.

[16] The applicable private interest factors under 28 U.S.C. § 1404(a) significantly overlap. Those factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *In re Volkswagen of Am.*, 545 F.3d at 315.

(A) The Location of the Plaintiffs and Defendant Does Not Favor Venue Transfer

74. Zachry's principal place of business is in Texas, Zachry is reorganizing under the Plan confirmed by this Court, and most of its principals and employees are located in Texas. *In re Think3*, 529 B.R. at 211 (holding that this factor did not weight in favor of transfer where the plaintiff was located in Texas); *see also In re Directory Distrib. Assocs.*, 566 B.R. at 882 (holding that the factor weighed in favor of transferring venue to the court where the main bankruptcy case was pending because it was where the debtor and many of its principals resided).

75. Further, OPPD consented to the Second Amendment and assumption of the EPC Contract during the Chapter 11 Cases and filed an administrative expense claim in this Court, therefore availing itself of this forum and submitting to this Court's jurisdiction. OPPD cannot now complain that litigating in Texas would be inconvenient for it. *See In re Avado Brands*, 2006 WL 8437389, at *9 (holding that because the movants, as parties, filed proofs of claim in the transferor court, the convenience of the parties factor weighed against transfer of the claims against them to a different court); *cf. Longhorn Partners*, 408 B.R. at 102 ("Congress enacted § 1412 and § 1404 to preclude parties from using the broad venue statutes to inconvenience or harm creditors and defendants involuntarily brought into the case.").

(B) The "Ease of Access to Necessary Proof" Factor Does Not Favor Venue Transfer

76. This factor requires evidence from the moving party that the "material or necessary proof" will be in the sought-after venue. *In re Think3*, 529 B.R. at 211. OPPD has made no showing that the material or necessary proof is easier to access if this Adversary Proceeding was transferred to the Nebraska Court. In any event, even though the sites of the Projects are (and OPPD's books and records may be) located in Nebraska, the parties will likely rely heavily on electronically stored documentary evidence, which can be as easily produced in this Court as in

the Nebraska Court. *See In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 630 (5th Cir. 2022) (agreeing with a district court that concluded that this factor is neutral because electronic evidence is equally accessible in either forum). Moreover, Zachry's books and records containing relevant information as well as its data servers storing communications between the parties relevant to the dispute are all located in Texas. Both Zachry's and OPPD's counsel representing the parties in the Adversary Proceeding have offices in Texas.[17] OPPD's Contractors have no offices in Nebraska but have offices in Texas, which would likely make it easier to access the necessary proof in Texas than in Nebraska.[18] On the balance, this factor does not favor the venue transfer and is, at best, neutral.

(C) Convenience of the Witnesses Weighs Against Venue Transfer

77. The third factor—the convenience of the witnesses—allows the court to take into consideration the travel requirements and burden imposed on witnesses that would have to travel to a further location. *In re Think3*, 529 B.R. at 211. The Fifth Circuit states that if the distance to travel is more than 100 miles, the inconvenience for witnesses increases. *In re Volkswagen of Am.*, 545 F.3d at 317 (stating that "the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled") (internal citation omitted).

78. "A party moving for a transfer of venue is required to present 'a realistic and comprehensive summary of the testimony' so that it may be possible 'for the [c]ourt to determine

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[17] OPPD argues that it retained "local Nebraska counsel throughout the entirety of the Bankruptcy Cases and the early stages of this Adversary Proceeding." Mot. to Transfer Venue at 15. But in connection with the Adversary Proceeding (including the three motions OPPD filed on March 21, 2025) and the related Administrative Expense Application, OPPD has been represented by Foley & Lardner LLP with offices in Dallas, Texas. *See, e.g.*, Mot. to Withdraw at 23 (the signature block showing only Foley & Lardner LLP as OPPD's counsel); Mot. to Transfer Venue at 18 (same); Mot. to Dismiss at 18 (same).

[18] *See Wartsila in the USA*, Wartsila, https://www.wartsila.com/usa (last visited April 11, 2025) (showing location of Wartsila U.S. office in Houston, Texas); *see also Siemens in the U.S.*, Siemens, https://preview.thenewsmarket.com/Previews/SIMS/DocumentAssets/428421.pdf (last visited April 11, 2025) (showing Houston, Texas as one of "Siemens' Major U.S. Employment Hubs" and showing no offices in Nebraska).

if a witness' appearance is cumulative or unnecessary for trial.'" *In re Avado Brands*, 2006 WL 8437389, at *9 (citations omitted). "Normal justifications" are not adequate. *Id.* OPPD's motion provides only a vague assertion that "the witnesses likely to be deposed or called to testify at trial are located in Nebraska where the Projects are located." *See* Mot. to Transfer Venue at 15. For that reason alone, this and the rest of the witnesses-related factors weigh against the venue transfer.

79. Moreover, the crux of the dispute between the parties is whether Zachry was precluded from performing under the EPC Contract due to delays outside of Zachry's control, including delays caused by OPPD's Contractors. Most of Zachry's key personnel who worked on the Projects and will likely be called to testify reside in Texas, notwithstanding that the Projects are located in Nebraska. Furthermore, OPPD's Contractors, whose testimony may be required, have no offices in Nebraska but have offices in Texas, which will make travel to Houston, Texas cheaper and easier than travel to Omaha, Nebraska. And to the extent any key witnesses are located in Nebraska and would be inconvenienced by having to travel to Texas, depositions and, in compelling circumstances, trial testimony can be taken remotely. *In re Avado Brands*, 2006 WL 8437389, at *10 ("Movants . . . have failed to offer satisfactory explanation of the need at trial for live testimony of each of these witnesses or why deposition testimony of these persons preserved on videotape would not suffice.").

80. Because most of the key witnesses are located in Texas, this factor weighs against venue transfer.

(D) The "Availability of Subpoena Power for the Unwilling Witnesses" Factor Does Not Favor Venue Transfer

81. The fourth factor—the availability of subpoena power for unwilling witnesses—allows a court to consider its power to compel certain witnesses to testify. *In re Think3*, 529 B.R. at 212. Federal Rule of Civil Procedure 45(c) restricts federal courts' powers to compel testimony

from a witness in civil litigation to locations: (1) "within 100 miles of where the person resides, is employed, or regularly transacts business in person;" or (2) within the state of residence, employment, or regularly transacted business if the person is a party or party's officer and compliance would not incur substantial expense. Fed. R. Civ. P. 45(c) (as made applicable by Fed. R. Bankr. P. 9016).

82. OPPD failed to identify any witness who would be unwilling to testify. *See In re Planned Parenthood Fed'n of Am.*, 52 F.4th at 630-31 (quoting *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d at 488, 499 (6th Cir. 2016)) (holding that "the availability of compulsory process 'receives less weight when it has not been alleged or shown that any witness would be unwilling to testify'"). In any event, because most of the key non-party witnesses reside, work, or regularly transact business in or near Houston, Texas, this Court will likely have the power to subpoena any unwilling non-party witnesses. This factor, therefore, does not favor the venue transfer.

(E) The Expenses Related to Obtaining Witnesses Weigh Against Venue Transfer

83. The fifth factor—the expenses related to obtaining witnesses—allows a court to consider the cost of having witnesses travel to testify for trial. *In re Think3*, 529 B.R. at 212. As mentioned above, most of the key witnesses are located in Texas. Therefore, there will be a significant cost to all parties if the Adversary Proceeding were to be transferred to the Nebraska Court.

84. In sum, the Forum Selection Clause should not be enforced, and OPPD failed to meet its burden of proof that the venue transfer would be in the interest of justice or for the convenience of the parties. The Court should deny the Motion to Transfer Venue.

Conclusion

85. For the foregoing reasons, Zachry respectfully requests that the Court (i) recommend denial of the Motion to Withdraw, (ii) deny the Motion to Transfer Venue, and (iii) grant Zachry such other and further relief as the Court deems just and proper.

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Dated: April 11, 2025
Houston, Texas

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Certificate of Service

I certify that on April 11, 2025, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles R. Koster
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