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

In re:	Chapter 11
ZACHRY HOLDINGS, INC., *et al.*[1]	
Debtors.	Case No. 24-90377
ZACHRY HOLDINGS, INC., *et al.*	
Plaintiffs,	
v.	Adv. Pro. No. 25-03025 (MI)
OMAHA PUBLIC POWER DISTRICT	
Defendant.	

THE REORGANIZED DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Zachry Holdings, Inc. ("ZHI"), Zachry Industrial, Inc. ("Zachry" or "Contractor"), and their reorganized debtor affiliates (collectively with ZHI and Zachry, the "Reorganized Debtors"), the reorganized debtors in the above-captioned chapter 11 cases, respectfully submit this memorandum of law in opposition to *Defendant Omaha Public Power District's Motion and Brief in Support to Dismiss Complaint* ("Motion") filed on behalf of defendant Omaha Public Power District, a Nebraska public electric utility ("OPPD," or "Owner," and together with Zachry, the "Parties"). [Docket No. 11].

[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 Reorganized Debtors' service address in these chapter 11 cases is P.O. Box 240130, San Antonio, Texas 78224.

I. PRELIMINARY STATEMENT

OPPD's Motion should be denied. Since OPPD filed its Motion, the Reorganized Debtors have amended their original complaint, including removing and adding actions for declaratory judgment and adding affirmative actions for breach of contract and breach of the implied covenant of good faith. Thus, the Motion is now moot.

II. BACKGROUND

On February 5, 2025, the Reorganized Debtors began this adversary proceeding arising in and relating to the Reorganized Debtors' cases pending before this Court under title 11 of the United States Code for declaratory judgment. *The Debtors' Adversary Complaint for Declaratory Relief* ("Complaint") [Docket No. 1]. The Reorganized Debtors solely requested declaratory judgment that as of February 5, 2025:

(a) The Reorganized Debtors are not liable for breach of the *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* dated September 21, 2021 (as further amended in October 2023, and August 2024) (the "Second Amended EPC");

(b) The liquidated damages provision (Article XI) of the Second Amended EPC is unenforceable as a matter of law and public policy; and

(c) Any administrative claim asserted by the Owner is valued at $0 as of the Effective Date or at such reduced amount that reflects the actual damages incurred by the Owner from delays solely caused by Reorganized Debtors.

Id. at 22.

As expected, on February 14, 2025, OPPD filed the *Omaha Public Power District's Application for Allowance of Administrative Expense Claim* [Bankr. Docket No. 2176] (the "Application") seeking entry of an order allowing an administrative expense claim totaling at least $38 million as of the date of the Application pursuant to "section 503(b)(1)(A) of the Bankruptcy Code for any and all damages (whether liquidated, actual, or otherwise) due and owing to OPPD arising from any and all breaches by the Reorganized Debtors under the terms of the EPC, as

amended, occurring after the Petition Date and prior to the Plan's Effective Date." Application, at 11 ¶¶ 19-20. OPPD claims that Zachry will have to pay 15% of the total EPC contract price. *See id*. ¶ 20.

The Reorganized Debtors filed the *Debtors' Objection to Omaha Public Power District's Application for Allowance of Administrative Expense Claim* [Bankr. Docket No. 2500] (the "Objection") on March 10, 2025, requesting that the Court deny OPPD's Application. Among other grounds, the Reorganized Debtors noted that administrative expense claim status is only awarded to liabilities that are for the "the actual, necessary costs and expenses of preserving the estate"; here, the purported liquidated damages do not meet that requirement. 11 U.S.C. § 503(b)(1)(A). Moreover, there has been no finding that any debtor breached the EPC or that OPPD is entitled to such damages.

Subsequently, OPPD and the Reorganized Debtors agreed that the Application is abated until Zachry's liability, if any, to OPPD is determined on a final basis in this adversary proceeding. *Stipulation and Agreed Order Regarding Omaha Public Power District's Application for Allowance of Administrative Expense Claim the Debtor's Related Adversary Proceeding* [Bankr. Docket No. 2685].

On March 21, OPPD moved to dismiss the Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Mot.

Contemporaneously herewith, the Reorganized Debtors are filing the *Reorganized Debtors' First Amended Adversary Complaint* (the "Amended Complaint"). The Reorganized Debtors seek damages for OPPD's breach of sections 2, 10, 21, 22, 23, 24, and 29 and Article IV of the EPC and breach of the implied covenant of good faith and fair dealing, and seek declaratory judgment that (i) the guaranteed substantial completion dates defined in the Second Amended EPC

("GSCDs") are no longer operative in light of OPPD Contractor and Owner-caused delays and have not yet occurred, (ii) the liquidated damages provision is unenforceable, and (iii) The administrative claim asserted by OPPD is valued at $0 as of the effective date, or in the alternative, the administrative claim is valued at such reduced amount that reflects the actual damages incurred by OPPD from delays caused solely by the Reorganized Debtors and as further offset by (i) amounts Zachry would be entitled to under EPC GC Sections 22 and 23 and (ii) damages for breach of the Second Amended EPC and the implied covenant of good faith and fair dealing.

III. ARGUMENT

Pursuant to Federal Rules of Civil Procedure Rule 15, a party may amend its pleading once *as a matter* of course within 21 days after service of a motion under Rule 12(b). In federal courts, filing an amended complaint renders a pending motion to dismiss the original complaint moot, as the amended pleading nullifies the original pleading. *See Haberer v. Prudential Ins. of Am.*, No. 4:23-cv-3306, 2024 U.S. Dist. LEXIS 124166 n. 2 (S.D. Tex. June 21, 2024) (finding a motion to dismiss moot after an amended complaint superseded the original complaint); *Schmidt v. Villarreal* (OGA Charters, LLC) 569 B.R. 105 (Bankr. S.D. Tex. 2017) n.4 (describing a motion to dismiss responding to an original complaint instead of the amended complaint as moot); *Ashley Elizabeth Scianna Arora Inv. Tr. v. Amegy Bank Nat'l Ass'n (In re Bigler LP)*, 2010 Bankr. LEXIS 1596, *21 (Bankr. S.D. Tex. May 18, 2010) (denying a motion to dismiss as moot because the amended complaint was the "live" pleading).

Here, the Amended Complaint complies with Federal Rules of Civil Procedure Rule 15 as it is the first amendment to the complaint, and it has been filed within 21 days of a motion to dismiss. There is no undue delay. Nor is there any prejudice to OPPD "as it can certainly file a motion to dismiss the Amended Complaint." *Ashley Elizabeth Scianna Arora Inv. Tr.*, 2010 Bankr.

LEXIS 1596 at *14.

The amendment to the Complaint is significant. Even if there were deficiencies with the Complaint (there were none), they have now been resolved with the Amended Complaint. Among other changes, the Amended Complaint:

(a) Documents new facts, including current events occurring in the six weeks since the Complaint like OPPD's Application demanding the liquidated damages and OPPD and third-party contractors' refusal to perform work or modify the Second Amended EPC. Amended Compl. ¶¶ 70-111;

(b) Expands upon previous factual background, including the amendments of the EPC and the OPPD and third-party contractor caused delays. Amended Compl. ¶¶ 37-69;

(c) States the Sections 2, 10, 21, 22, 23, 24, and 29 and Article IV of the Second Amended EPC of which OPPD has breached. Amended Compl. ¶¶ 21-36;

(d) Brings forth new actions of breach of contract and breach of the implied covenant of good faith. Amended Compl. ¶¶ 131-151;

(e) Removes one action for declaratory judgment (First Claim in the Complaint) and adds another (Second Claim in the Amended Complaint). Amended Compl. ¶¶ 119-125; and

(f) Requests different and separate relief. Amended Compl. ¶ 152.

OPPD argues in its Motion that (i) Nebraska law governs the Contract and the venue is improper; (ii) the liquidated damages provision in the Second Amended EPC is enforceable; and (iii) even pursuant to Texas law, Zachry's Complaint should be dismissed as unripe.[2] As detailed above, the Amended Complaint addresses all allegations in the Motion, regardless of how weak those

[2] OPPD's entire argument for lack of ripeness relies on the nature of the Complaint's actions being declaratory judgment. Mot. at 12-17. With the addition of two new affirmative actions, removal of one declaratory action, and the addition of a different one, this argument fails.

allegations are. All actions in the Amended Complaint are ripe and procedurally proper.

CONCLUSION

For all the reasons set forth above, the Reorganized Debtors respectfully request that the Court deny OPPD's Motion as being moot.

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RESPECTFULLY SUBMITTED this 11th day of April, 2025 in 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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