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 REPLY TO ZACHRY'S OMNIBUS OBJECTION TO OMAHA PUBLIC POWER DISTRICT'S (I) MOTION TO WITHDRAW THE REFERENCE AND (II) MOTION TO TRANSFER VENUE
[Related Docket Nos. 12, 13, and 24]

Omaha Public Power District ("**OPPD**"), by and through its undersigned counsel, hereby files *Defendant Omaha Public Power District's Reply* (this "**Reply**") *to Zachry's Omnibus Objection to Omaha Public District's (I) Motion to Withdraw the Reference and (II) Motion to Transfer Venue* [Docket No. 24] (the "**Response**"). In support of the Reply, OPPD respectfully submits as follows:

[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.

I. ARGUMENT

A. Withdrawal of the reference and transfer of venue is appropriate.

i. Consistent with In re Wood*, the only remaining matters in this litigation are non-bankruptcy issues.*

1. On April 1, 2025, this Court entered the *Stipulation and Agreed Order regarding Omaha Public Power District's Application for Allowance of Administrative Expense Claim and the Debtors' Related Adversary Proceeding* [Docket No. 2685 (Case No. 24-90377)] (the "**Stipulation Order**"). The Stipulation Order accomplishes two things: it (i) abates the Admin Claim in its entirety "until such time as the Debtors' liability, if any, to OPPD in connection with the EPC Contract is determined on a final basis"; and (ii) sets forth the procedure for determining the allowance or disallowance of the Admin Claim.

2. More specifically, the Parties agreed to, and this Court approved of, a procedure that bifurcates the Admin Claim allowance proceeding from the liability and liquidation proceeding by establishing the procedural steps that will follow a final judgment on the state-law claims:

- To the extent it is determined on a final basis in the Litigation . . . that the Debtors have no liability to OPPD in connection with the EPC Contract, ***the Application shall automatically be deemed denied in its entirety without the need for any further action by the Court or any of the Parties***. [Docket No. 2685 (Case No. 24-90377), at ¶ 2 (emphasis added)].

- To the extent it is determined on a final basis in the Litigation . . . that the Debtors have any net liquidated, non-contingent monetary liability to OPPD in connection with the EPC Contract, ***the contested matter proceeding in respect of the Application shall resume in the Chapter 11 Cases*** before the Court for the ***sole purpose of determining whether such liability shall be treated under the Debtors' confirmed Plan as an administrative expense*** claim under section 503(b) of the Bankruptcy Code. [Docket No. 2685 (Case No. 24-90377), at ¶ 3 (emphasis added)

3. That is, if Zachry wins on the issue of liability, the allowance process automatically terminates and there is nothing for this Court to do with respect to the Admin Claim. [*See* Docket

No. 2685 (Case No. 24-90377), at ¶ 2]. Alternatively, if Zachry is found to be liable for any amount, the claims allowance process will initiate "in the Chapter 11 Cases" and only to determine "whether such liability shall be treated under the Debtors' confirmed Plan as an administrative expense." [*See* Docket No. 2685 (Case No. 24-90377), at ¶ 3].

4. Through *The Reorganized Debtors' First Amended Adversary Complaint* [Docket No. 22] (the "**Amended Complaint**")—which was filed after the Stipulation Order—Zachry attempts to camouflage this litigation as a core matter. Zachry asserts, repeatedly, in its Response that the existence of the Admin Claim (which has been abated) and its request for declaratory judgment regarding the allowance of the Admin Claim (which has been procedurally displaced) makes this a core proceeding. Yet, the Amended Complaint adds two new claims, which are governed by Nebraska law—a breach of contract and breach of the duty of good faith and fair dealing against OPPD—neither of which are the basis of the Admin Claim that Zachry argues makes this a core proceeding. [*See* Docket No. 22, at ¶¶ 131–51].

5. As this Court's Stipulation Order provides, however, the allowance or disallowance of the Admin Claim will not be heard in this proceeding. Instead, the claims allowance proceeding will be considered (i) only if Zachry is found to be monetarily liable to any extent, (ii) only after a final determination of liability is made, (iii) only for the purpose of determining the priority status of the Admin Claim, and (iv) importantly, will proceed only in the Chapter 11 Cases.

6. The reality is that Zachry's request for declaratory relief regarding the Admin Claim directly conflicts with the Stipulation Order's bifurcation of the underlying litigation and the claims allowance proceeding. As set forth in the Stipulation Order, whether the Admin Claim proceeding advances depends entirely on the final judgment regarding liability under the Contract—a future contingent event that may not occur at all. That is, further factual development

is necessary to determine whether the Admin Claim proceeding will proceed or automatically cease to exist. Accordingly, the adjudication of Zachry's request for declaratory relief regarding the Admin Claim may later turn out to be unnecessary and any adjudication of such claim prior to a final judgment of liability would necessitate a premature examination of the merits in direct contradiction to the procedure set forth in this Court's Stipulation Order. As such, Zachry's request for declaratory judgment regarding the status of the Admin Claim should not proceed in this litigation nor impact the analysis of whether this is a core or non-core proceeding—that determination is reserved for a later date (if necessary), leaving only *state-law* issues to be adjudicated in this proceeding (subject to the pending Motions to Dismiss, to Transfer Venue, and to Withdraw the Reference).

ii. The Adversary Proceeding exclusively implicates non-core issues.

7. Fifth Circuit jurisprudence mandates that "controversies that do not depend on the bankruptcy laws for their existence—[*i.e.*,] suits that could proceed in another court even in the absence of bankruptcy—are not core proceedings." *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987). Based on this clear precedent, this Court should decline to accept Zachary's unwarranted and overly broad reading of subsection 157(b)—"otherwise, the entire range of proceedings under bankruptcy jurisdiction would fall within the scope of core proceedings." *Id.* at 95; *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90, 96 (Bankr. S.D. Tex. 2009) ("Almost all debtor claims may affect the estate in that they could lead to a judgment increasing or decreasing the estate assets. If the Court accepted Longhorn's contention, then virtually all 'related to' proceedings would be considered core[,] Section 157 would serve no purpose.").

8. As the Debtors' correctly note, "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only

in the context of a bankruptcy case." *In re Wood*, 825 F.2d at 97; *see also* 11 U.S.C. § 157. Indeed, subsection 157(b)(2) provides a nonexclusive list of core proceedings, which includes the "allowance or disallowance of claims against the estate." *See* 11 U.S.C. § 157(b)(2)(B). However, because this Court has already bifurcated and abated the allowance proceedings from the underlying liquidation determination, the underlying litigation only concerns the state-law contract claims—not the allowance or disallowance of claims against the estate.

9. Notably, the Fifth Circuit makes clear that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, *must be distinguished* from the adjudication of state-created private rights." *In re Wood*, 825 F.2d at 95 (quoting *Northern Pipeline v. Marathon*, 458 U.S. 50, 71 (1982)) (emphasis added). If a party "would be able to proceed against the defendant on the state-law contractual claims" in a different court—as Zachry is required to do under the EPC Contract disputes clause—then the proceeding is non-core. *Id.* at 96. Stated differently, "[i]f the proceeding involves a right created by the federal bankruptcy law" or "is one that would arise only in bankruptcy," it is a core proceeding. *Id.* at 97. But, "[i]f the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding." *Id.* at 96–97. Instead, "it may be related to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an 'otherwise related' or non-core proceeding." *Id.* ("[A] 'traditonal' [*sic*] state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court.'" (quoting *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting)).

10. Applying *In re Wood*, "[i]n determining the nature of a proceeding for purposes of determining core status, the court must look to both the form and the substance of the proceeding."

Id. at 97. "The Court's task is to assess each claim independently and decide whether it is core or non-core." *In re Casetex Energy Partners, LP*, 584 B.R. 150, 157 (Bankr. S.D. Tex. 2018). "The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes 'core.'" *Id.* (quoting *In re Exide Tech.*, 544 F.3d 196, 206 (3d Cir. 2008)). And although "[t]he core versus non-core factor is an important factor within the permissive withdrawal analysis," it "is not alone determinative." *In re Morrison*, 409 B.R. 384, 392 (S.D. Tex. 2009). Instead, "[i]f the majority of claims are non-core, then withdrawal of the reference is favored." *In re Royce Homes, L.P.*, No. 09-32467-H4-7, 2011 WL 13340482, at *2 (Bankr. S.D. Tex. Oct. 13, 2011); *see also In re Casetex Energy Partners, LP*, 584 B.R. at 157 ("With core claims, the Court has authority to resolve them through final orders; however, for non-core claims, the court must remand absent consent of the parties.").

11. Here, looking to both the form and the substance of the proceeding, the answer is apparent—the heart of this proceeding is non-core.

12. As to form, this Court, pursuant to the Stipulation Order, has bifurcated the claims allowance process and abated such determination until the final liability of the underlying merits is adjudicated. [*See* Docket No. 2685 (Case No. 24-90377)]. Procedurally, no determination of the Admin Claim's allowance or disallowance will be made until all underlying issues of liability in this litigation reach finality. [*See* Docket No. 2685 (Case No. 24-90377), at ¶¶ 1–3]. Indeed, "a final judgment in this proceeding in [OPPD's] favor may lead to proceedings to allow the claim." *In re Wood*, 825 F.2d at 98. However, such concerns "are speculative and insubstantial issues in the [existing] proceeding." *Id.* Thus, the form of this proceeding does not invoke "a substantive right provided by title 11."

13. As to substance, there can be no dispute that the claims asserted by Zachry in the Amended Complaint are exclusively state-created private rights.[2] That is, the entirety of the currently pending litigation is related only peripherally to Zachry's Chapter 11 Cases and is one that undeniably could exist outside of bankruptcy. *See In re Wood*, 825 F.2d at 96. As in *In re Wood*, the "essential issue in th[is] proceeding [is] whether the defendants [are] liable to the plaintiff under state law." *Id.* at 98 (holding such claims to be non-core). Moreover, Zachry's breach of contract and breach of the duty of good faith and fair dealing claims in the Amended Complaint further support the treatment of this litigation as non-core under both *In re Wood* and *In re Casetex Energy Partners, LP*. *See, e.g.*, *In re Wood*, 825 F.2d at 97 ("The essential issue in the proceeding is whether the defendants are liable to the plaintiff under state law. The suit does not raise as primary issues such matters as dischargeability, allowance of the claim, or other bankruptcy matters."); *In re Casetex Energy Partners, LP*, 584 B.R. at 157 (noting that the bankruptcy lacked authority to adjudicate additional state-law counterclaims, which were not the basis of the proof of claim filed, without consent of the parties and holding that "the non-core matters dominate[d]

[2] Numerous courts in the Fifth Circuit have held that state law contract claims are non-core claims. *See, e.g.*, *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90, 96 (Bankr. S.D. Tex. 2009) ("Longhorn's complaint asserts contract claims. None arise under the Bankruptcy Code or could only arise in a bankruptcy case. All are state law causes of action that can arise outside of bankruptcy. The claims are non-core."); *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp.2d 596, 609 (S.D. Tex. 1999) ("[A] state law contract or tort action that is not based on any right created by the federal bankruptcy law, and that could arise outside the context of bankruptcy, is not a core proceeding."); *In re Wood*, 825 F.2d at 96 (holding that contract dispute did not constitute a core matter and stating that "controversies that do not depend on the bankruptcy laws for their existence—suits that could proceed in another court even in the absence of bankruptcy—are not core proceedings"); *In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La. 2007) ("[T]he doctors' claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims."); *In re Castex Energy Partners, LP*, 584 B.R. at 155 ("Had Castex not filed for bankruptcy, these suits would have proceeded to the merits of the claims in state court. Accordingly, under the Fifth Circuit's standard, they are quintessential non-core claims . . . ."); *In re Legal Xtranet, Inc.*, 453 B.R. 699, 709 (Bankr. W.D. Tex. 2011) ("LXI's contract claims against AT & T are non-core."); *In re BP RE, L.P.*, 735 F.3d 279, 282 (5th Cir. 2013) (finding that claims for monetary damages for breach of contract, among others, "is a non-core proceeding but is related to the bankruptcy in that any recovery on the claims brought by the debtor will go directly to the estate"); *In re Encompass Services Corp.*, 337 B.R. 864, 871–72 (Bankr. S.D. Tex. 2006) (holding that breach of contract claim was non-core and that the "Court's determination will not have a substantial impact on [the reorganized debtors'] plan").

in size and complexity over the core matters in [the] case"). And, most importantly, the parties agreed by contract that such state-created rights must be adjudicated in the Nebraska Court.

14. For all these reasons, this pending litigation is must be treated as non-core, which—should proceed only in the Nebraska Court as required by the parties Contract. *See, e.g.*, *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) (noting that a suit based on state created rights is "not a proceeding that could arise only in the context of a bankruptcy. It is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court"). As such, "under the Fifth Circuit's standard, [such claims] are quintessential non-core claims." *In re Castex Energy Partners, LP*, 584 B.R. at 155.

15. Though Zachry incorrectly that this proceeding is entirely core, it is beyond argument that the litigation contains a mixture of core and non-core issues. And, because OPPD does not consent to the entry of a final judgment or order by this Court, the two-step judgment process nevertheless remains in place. *See In re Avado Brands, Inc.*, Case No. 05-3823, 2006 WL 8437389, at * 2 (Bankr. N.D. Tex. 2006) (noting that "for non-core or mixed core and non-core adversary proceedings," consent to the entry of a final judgment or order by the bankruptcy court is required).

16. Accordingly, withdrawal of the reference is appropriate. *See Texas Capital Bank N.A. v. Dallas Roadster Ltd. (In re Dallas Roadster Ltd.)*, Nos. 11–43725, 11–43726, 2013 WL 5758632, at *2 (Bankr. E.D. Tex. Sept. 27, 2013) (citing *In re Mirant Corp.*, 337 B.R. at 122) ("When core and non-core matters are raised in an adversary proceeding, withdrawal of the reference promotes the most efficient use of judicial resources.").

iii. Zachry has failed to show that enforcement of the Forum Selection Clause would be unreasonable.

17. "[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 re Manchaester, Inc.*, 417 B.R. 377, 384 (N.D. Tex. 2009) (quoting *Kevlin Servs. v. Lexington State Bank*, 46 F.3d 13, 14 (5th Cir. 1995)). "Unreasonableness exists where: (1) the agreement to the forum selection clause involved fraud or overreaching; (2) the complaining party will be effectively deprived of its day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) the enforcement would contravene a strong public policy of the forum in which the plaintiff has brought suit." *Id.* "The burden of showing that trial in the selected forum would be inherently unfair is placed on the party bringing suit in a forum other than the one designated in the forum selection clause." *Id.* This burden is a "heavy burden of proof" and requires the party seeking to avoid the forum selection clause to "demonstrate that 'trial in the contractual forum will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of [its] day in court.'" *Id.* (quoting *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 17 (1972)).

18. Indeed, public policy generally "favors the centralization of [core] bankruptcy proceedings in the bankruptcy court where the debtor's bankruptcy case is pending." *In re Manchaester, Inc.*, 417 B.R. 377, 384 (N.D. Tex. 2009). "But, even in 'core' matters, the language of 28 U.S.C. § 1334, which provides for bankruptcy jurisdiction, *is permissive*, not mandatory." *Id.* at 385 (emphasis added). That is, "the public policy consideration is only one factor and should not be given controlling weight in light of the permissive nature of bankruptcy jurisdiction." *Id.* (quoting *In re D.E. Frey Group, Inc.*, 387 B.R. 799, 807 (D. Colo. 2008)); *see also In re D.E. Frey Group, Inc.*, 387 B.R. 799, 805 (D. Colo. 2008) (noting that cases holing that centralization of core

claims overrides valid forum selection clauses are contrary to the Supreme Court's holding in *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10 (1972)).

19. Further, "where the debtor [is] able to obtain confirmation of its reorganization plan long before the contract claims covered by [a] forum selection clause [are] tried to the court—any policy concern 'must be lessened.'" *In re Manchaester, Inc.*, 417 B.R. at 385; *see also In re D.E. Frey Group, Inc.*, 387 B.R. 799, 807 (D. Colo. 2008) (enforcing forum selection clause and transferring core proceeding to selected forum) (internal citations omitted). Thus, the bankruptcy court's focus should be on whether enforcing the forum selection clause would be inherently unfair or unreasonable. *See In re D.E. Frey Group, Inc.*, 387 B.R. at 807.

20. Here, Zachry alleges that the Forum Selection Clause "should not be enforced on public policy grounds because the claims asserted in the Adversary Proceeding are core claims." *See* Response, at ¶ 48. In support of their argument, and without addressing the validity of the Forum Selection Clause, Zachry cites to *In re Arnold Print Works, Inc.*—a First Circuit case that did not involve a forum selection clause. *See* Response, at ¶ 49; *see also In re Arnold Print Works, Inc.*, 815 F.2d 165, 170 (1st Cir. 1987). Under *In re Manchaester, Inc.*, however, even if there may be core claims, Zachrymust show that the enforcement of the Forum Selection Clause would be unreasonable. *In re Manchaester, Inc.*, 417 B.R. at 384; *In re D.E. Frey Group, Inc.*, 387 B.R. at 804 ("Where a forum selection clause agreed to during arms-length negotiations by sophisticated parties—which is not disputed here—specifies venue and jurisdiction with mandatory or obligatory language—which is also not disputed here—the clause is presumptively valid and must be enforced unless the party seeking to avoid the agreed-to forum demonstrates that enforcement would be unreasonable under the circumstances."). Zachry failed to do so.[3]

[3] For reasons explained in Section B, nor can they.

21. Notably, the Contract's Forum Selection Clause provides that Zachry "waives any objection based on venue or forum non convenient with respect to any legal action or proceeding instituted in connection with or related to" the Contract. *See* Contract, at art. XIII. This provision was adopted and incorporated by reference as part of the Assumption Order. [*See* Docket No. 962 (Case No. 24-90377), at Ex. A ¶12 ("Except 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." Thus, by agreeing to and later assuming the Forum Selection Clause , Zachry has agreed that Nebraska is the proper forum and has waived any challenge to venue. Zachry has emerged from bankruptcy. The Chapter 11 Cases and existence of the Admin Claim are the only tenuous legal threads upon which Zachry clings to maintain this case in Texas. Zachry jumped the gun with its initial and premature declaratory judgment Complaint, and denying transfer based solely on this loose connection to the Chapter 11 Cases would run contrary to the Forum Selection Clause and deprive OPPD of its contractual right to adjudication of disputes in a Nebraska Court.

22. Zachry's reliance on the public policy consideration is only one factor in the analysis. *See In re Manchaester, Inc.*, 417 B.R. at 384. And given this Court's permissive, jurisdictional reach pursuant to 28 U.S.C. § 1334, Zachry's public policy consideration should not be given controlling weight. *See id.* In fact, because Zachry's Plan has since been confirmed by this Court and went effective on April 10, 2025, any policy concern "must be lessened." *See id.* Thus, even if core claims are present, this Court should not deny transfer on the basis of public policy considerations. *See id.* at 388 (ordering transfer of adversary proceeding containing core claims where parties' valid forum selection clause indicated a different forum). Instead, this Court should enforce the parties' Contract and transfer this litigation to the Nebraska Court.

B. Zachry seeks to avoid its obligations under the Contract and, in turn, effectively violates 11 U.S.C. § 365.

23. What Zachry is asking this Court to do by not transferring this litigation to the Nebraska Court is for this Court to contravene a principal component of an entirely separate provision of the Bankruptcy Code (*i.e.*, § 365) and ignore this Court's own Assumption Order regarding the Contract.

24. "The Bankruptcy Code gives special attention to a bankrupt debtor's executory contracts." *Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th 321, 325 (5th Cir. 2023). "If the debtor successfully assumes an executory contract, then the contract 'will remain in effect through and then after the completion of the reorganization.'" *Id.* Moreover, regarding assumption under § 365, the Fifth Circuit has "been clear that it's all or nothing: 'An executory contract must be assumed or rejected in its entirety.'" *Id.* (quoting *Matter of Provider Meds, LLC*, 907 F.3d 845, 851 (5th Cir. 2018)). That is, "the debtor may not choose to reject some agreements within the contract and not others." *Id.* (quoting *Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (per curiam)).

25. Here, Zachry is attempting to "evade [the] requirement that it take any retained executory contracts '*cum onere*,' with all their benefits and burdens." *Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th at 326. By filing this litigation in this Court and now opposing the enforcement of the parties' agreed-to Forum Selection Clause, Zachry seeks to keep the benefits of the Contract for Zachry but reject other terms it deems unfavorable.

26. Indeed, this is not a situation where the debtor seeks to avoid the enforcement of a forum selection clause in a contract that is entirely prepetition. Instead, Zachry made the affirmative decision to assume the Contract, as amended, during the pendency of the Chapter 11 Cases. In fact, Zachry and OPPD amended only two portions of the Contract—the GSC Dates and

the Liquidated Damages Provision— but the Forum Selection Clause remained unchanged. To be sure, "modifications to an executory contract are permissible as long as the debtor does not merely accept the benefits of the contract and reject the burdens to the detriment of the other party." *In re MPF Holding U.S. LLS*, Case No. 08–36084, 2013 WL 3197658, at *12 (Bankr. S.D. Tex. 2013). Thus, as the modifications agreed to by OPPD and Zachry are permissible and were approved by this Court, the Forum Selection Clause is an unavoidable obligation that Zachry cannot now seek to circumvent.

27. Zachry's filing of this litigation and its arguments in response to the Motion to Transfer and Motion to Withdraw the Reference are tantamount to a run-around of § 365's mandate that a debtor must assume a contract *cum onere*. *See Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th at 326. Permitting Zachry to avoid the enforcement of the Forum Selection Clause based on a loosely tied administrative claim not only would result in grave inequity, but it also would be a violation of § 365 and well-established jurisprudence, and would ignore this Court's previous Assumption Order.

28. Accordingly, for reasons independent of the core versus non-core argument presented above, this Court should transfer this litigation to the parties agreed and obligatory venue—the Nebraska Court.

C. The locations of the evidence and testimony to be used in this matter supports transfer.

29. Zachry's suggestion that transfer should be denied based on the convenience of parties is illogical and misguided. Zachry asserts that this Court is the most convenient location for this litigation for several naïve reasons, which are easily rebuttable.

30. At the outset, however, it is necessary to reiterate that the Contract was for the construction of two Projects located in the Omaha, Nebraska area; the alleged breaches occurred

there; and—importantly—the parties agreed to litigate any disputes arising under the Contract in Omaha, Nebraska. Notwithstanding the foregoing, Zachry now complains that enforcement of the very clause they agreed to and that this Court approved would be inconvenient merely because Zachry's corporate headquarters is located in Texas. That fact does not overcome the unambiguous agreement of the parties nor the fact that the heart of the dispute occurred in Nebraska.

31. *First*, Zachry suggests that this Court is the more convenient court to hear this dispute based on the fact that its principal place of business and most of its principals and employees are located in Texas and it is reorganizing under the laws of Texas—a process which is not complete. *See* Response, at ¶ 74. Notably, however, as stated in the *Declaration of Mohsin Y. Meghji in Support of Debtors' Petitions and Requests for First Day Relief* [Docket No. 7 (Case No. 24-90377)] (the "**First Day Declaration**"), Zachry is "headquartered in San Antonio, Texas" but also provides services "across North America," as well as internationally. *See* First Day Declaration, at ¶¶ 2, 19 (services performed in Peru), 22 (services performed in Puerto Rico), 25 (services performed in Moscow, Russia), 29 (services performed in the Philippines). Despite all this, Zachry fails to acknowledge that OPPD, the Projects, and essential employees working on the Projects, including the location of where the alleged breaches occurred, are primarily—if not exclusively—located in Omaha, Nebraska.

32. *Second*, Zachry asserts that because "OPPD consented to the Second Amendment and assumption of the EPC Contract" and also filed the Admin Claim, OPPD cannot complain that litigation in Texas would be inconvenient. *See* Response, at ¶ 75. The flip side of this argument reveals its absurdity—Zachry assumed all obligations, benefits, and burdens of the Contract, *including the Forum Selection Clause*.

33. *Third*, Zachry alleges that 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* Response, at ¶ 76. In support of this point, Zachry aptly explains that its own books and records are located in Texas and that counsel for both parties have offices in Texas. *See* Response, at ¶ 76. This argument bears no weight—just as electronically stored documentary evidence can be easily accessible in Texas, the same applies if this case is transferred. Moreover, OPPD's books and records—not to mention the Projects, which are the underlying subject matter of this dispute—are located solely in Nebraska.

34. *Finally*, Zachry suggests that because the majority of the key witnesses *from Zachry* are located in Texas, that critical witnesses would be beyond the subpoena power of the Nebraska Court, and that the expenses that would be incurred if this case were transferred to the Nebraska Court would result in a significant cost to all parties, convenience is best served in this Court. *See* Response, at ¶¶ 77–79. However, Zachry's own Amended Complaint fails to suggest or even imply that any key witnesses are located anywhere but Nebraska. In fact, the Amended Complaint is replete with allegations about parties, including individuals associated with Zachry, who are on-site at the Projects and actions taken at the Projects: "Zachry increased the presence of its project leadership at both Projects";[4] "OPPD Contractors conducting OFE equipment tuning, performance testing and other commissioning and startup work";[5] "Siemens and Wartsila supply the electrical generation equipment for the sites and provide technical advisory services that include (among other things) essential inspection, testing, and calibration work";[6] "Siemens and Wartsila had an

[4] Amended Complaint, at ¶ 49.

[5] *Id.* at ¶ 50.

[6] *Id.* at ¶ 51.

increased role in dictating site activities as the Projects were nearing completion";[7] "[C]ommunications at the worksite between Zachry and the OPPD Contractors began deteriorating";[8] "Zachry contracted with Babcock & Wilcox Enterprises, Inc. to supply fuel oil filtering equipment and Nebraska Iowa Supply Co. to supply tanker trucks to store fuel removed from the tanks";[9] "Zachry also utilized sixteen fuel trucks to store the fuel while the tanks and the fuel could be cleaned";[10] "Zachry, OPPD, and Siemens met to discuss the fuel contamination issue at TCS";[11] "Zachry conducted borescope testing at SBLS";[12] "Wartsila was conducting an electrical load failure test on SBLS' Engine 5";[13] and "[T]he Work performed at both sites".[14] Even then, to determine whether the Projects are completed according to the Contract's terms, both OPPD and Zachry are required to "make an inspection of the specified Work"—an inspection that could only occur on-site. The list goes on.

35. To suggest that any key witnesses with firsthand knowledge of the Projects and its completion do not, at a minimum, exhibit strong ties to Nebraska is wholly irrational, and nothing more than a transparent attempt to circumvent the parties' agreement to resolve any disputes in Nebraska.

36. Regardless of where some witnesses are located, the undeniable truth is that the Contracts were for services performed in Nebraska, the Projects are located in Nebraska, the

[7] *Id.* at ¶ 52.

[8] *Id.* at ¶ 70.

[9] *Id.* at ¶ 73.

[10] *Id.*

[11] *Id.* at ¶ 75.

[12] *Id.* at ¶ 78.

[13] *Id.* at ¶ 87.

[14] *Id.* at ¶ 108.

alleged breaches occurred in Nebraska, and OPPD and Zachry agreed to litigate any disputes arising under the Contract in Nebraska. Indeed, it is nonsensical to suggest, as Zachry does, that Texas has a stronger connection to the underlying litigation because of Zachry's bankruptcy than the situs of the Projects themselves. This would hold true even in the absence of a Forum Selection Clause. However, that is not the case here—the parties agreed to and Zachry assumed the obligation to litigate this dispute in Nebraska. Accordingly transfer of this litigation is appropriate.

II. CONCLUSION

For the foregoing reasons, OPPD respectfully requests the Bankruptcy Court (i) recommend that the District Court enter the Proposed Order (i)(a) withdrawing the reference, and (b) transferring this proceeding to the Federal District Court for Nebraska in accordance with the parties' agreement, and (c) granting OPPD such other and further relief as this Court finds just and proper.

Dated: April 18, 2025

Respectfully submitted by:

/s/ Thomas C. Scannell

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on April 18, 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