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

In re:	§	Chapter 11
ZACHRY HOLDINGS, INC., *et al*[1]	§	Case No. 24-90377 (MI)
Debtor.	§	(Jointly Administered)
ZACHRY HOLDINGS, INC.,	§	
Plaintiff,	§	Adversary No.: 25-03025 (MI)
v.	§	
OMAHA PUBLIC POWER DISTRICT,	§	
Defendant.	§	

DEFENDANT OMAHA PUBLIC POWER DISTRICT'S MOTION AND SUPPORTING BRIEF TO DISMISS FIRST AMENDED ADVERSARY COMPLAINT

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.veritaglobal.net/ZII. The location of the Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

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Omaha Public Power District ("**OPPD**"), by and through its undersigned counsel, hereby files *Defendant Omaha Public Power District's Motion and Supporting Brief to Dismiss First Amended Adversary Complaint* (the "**Motion**") and respectfully moves this Court for entry of an order, substantially in the form attached hereto (the "**Proposed Order**"): (i) dismissing, with prejudice, Plaintiff Zachry Holdings, Inc.'s ("**Zachry**") claims asserted in *The Reorganized Debtors' First Amended Adversary Complaint* [Docket No. 22] (the "**Amended Complaint**") pursuant to Federal Rule of Civil Procedure 12(b)(1) and (3) or alternatively transferring this case to the proper venue in Nebraska; and (ii) granting OPPD such other and further relief as this Court finds just and proper. In support of the Motion, OPPD respectfully states as follows:

I. INTRODUCTION

Zachry's Amended Complaint should be dismissed or alternatively transferred as this Court is not the proper venue for two simple reasons. *First*, the Amended Complaint wholly ignores the plain language of the Contract's Forum Selection Clause (defined below) that expressly designates Nebraska as the exclusive venue—a provision which Zachry agreed to be bound by and that this Court affirmatively approved in the Assumption Order (defined below). *Second*, this Court lacks subject matter jurisdiction over Zachry's declaratory relief and breach of contract claims because such claims are not ripe—the Contract at issue remains incomplete, and construction of the two power plants is still ongoing. Thus, OPPD's obligations under the agreements have not yet become due or enforceable and these claims should be dismissed for lack of subject matter jurisdiction.

II. BACKGROUND

A. Undisputed facts.

OPPD is a public corporation and political subdivision of the State of Nebraska that provides electricity to the Omaha, Nebraska metropolitan area and other areas in eastern Nebraska.

OPPD's revenues are reinvested back into the utility and its electric system. OPPD serves approximately 1 million people in Omaha and 13 surrounding counties in southeastern Nebraska.

Prior to the Petition Date (defined below), OPPD and Debtor Zachry Industrial, Inc. ("**ZII**", "**Zachry**", or the "**Debtor**") entered into that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated September 21, 2021 (together with all exhibits, schedules, and ancillary agreements and documents thereto, the "**Contract**").[2]

Under the terms of the Contract, OPPD contracted with Zachry to provide services for all activities associated with designing, procuring, installing, starting up, and testing two power plant sites: (i) the Standing Bear Lake Station ("**SBLS**"); and (ii) the Turtle Creek Generating Station ("**TCS**", and together with SBLS, the "**Projects**"). SBLS and TCS are both located in the Omaha metropolitan area.

The Contract was first amended in October 2023 and further amended in August 2024 pursuant to the terms of that certain *Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated August 13, 2024 (together with the original and continuing binding terms of the Contract, herein the "**Second Amendment**" or "**Second Amended Contract**").

Pursuant to Article XI of the Contract, the parties agreed to liquidated damages. Moreover, pursuant to Article XIII of the Contract, the parties also agreed that the laws of the State of Nebraska would govern the Contract and any disputes arising thereunder. Further, Zachry, as

[2] The Contract is voluminous. A true and correct copy of the Contract will be made available upon any reasonable and appropriate request, subject to OPPD's rights to redact any terms therein and/or rights to seek a protective order and/or nondisclosure agreement to ensure any proprietary terms of the Contract remain confidential.

Contractor, expressly agreed that any dispute would be brought in Nebraska and waived any objection based on venue (the "**Forum Selection Clause**"):

> This EPC Contract shall be governed by the laws of the State of Nebraska without reference to, or application of, its conflict of laws principles. Contractor hereby consents and submits to the exclusive jurisdiction of the District Court of Douglas County, Nebraska and the United States District Court for the State of Nebraska (or, if such courts do not have subject matter jurisdiction over such dispute, in any other state or federal court located in the State of Nebraska), and hereby waives any objection based on venue or forum non conveniens with respect to any legal action or proceeding instituted in connection with or related to this Agreement. WAIVER OF JURY TRIAL: THE PARTIES TO THIS CONTRACT, INCLUDING BUT NOT LIMITED TO, OPPD, CONTRACTOR AND THE INDEMNIFIED PARTIES, EXPRESSLY WAIVE ANY AND ALL RIGHTS TO A TRIAL BY JURY OF ANY CLAIMS DIRECTLY OR INDIRECTLY ARISING OUT OF THIS CONTRACT.

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

B. <u>The Chapter 11 Cases.</u>

On May 21, 2024 (the "**Petition Date**"), the above-captioned debtors (each, a "**Debtor**" and collectively, the "**Debtors**") each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "**Bankruptcy Cases**"). Additional information regarding the Debtors' business, capital structure, and the circumstances leading to the commencement of the Bankruptcy Cases is set forth in the *Declaration of Mohsin Y. Meghji in Support of the Debtors' Petitions and*

Requests for First Day Relief [Docket No. 7 (Case No. 24-90377-MI)] (the "**First Day Declaration**").

The Projects continued notwithstanding Zachry's Chapter 11 Cases. Almost three years after the Contract was signed, and approximately a year after the original GSCDs had passed, the Contract was amended again on August 13, 2024. This was memorialized as *Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) (together with the original and continuing binding terms of the EPC, herein the "**Second Amendment**").

On September 17, 2024, the Court entered its *Order (I) Approving Settlement by and Among the Debtors and Omaha Public Power District, (II) Authorizing the Debtors to Amend and Assume (As Amended) the Omaha Public Power District Contract, and (III) Granting Related Relief*, whereby the Debtors assumed the Second Amendment and the terms thereof were approved by the Court as a post-petition contract (the "**Assumption Order**"). [*See* Docket No. 961 (Case No. 24-90377), at p. 3, ¶ 6].

The Second Amendment changed the GSCDs for SBLS to December 30, 2024, and for TCS to December 16, 2024. This meant that from the date the Contract was signed, Zachry had 39 months (3 years, 3 months) to substantially complete SBLS and had 38 months (3 years, 2 months) to substantially complete TCS. Select sections of the Liquidated Damages provision were amended, including Article XI, Section (f), which provides a financial incentive for timely compliance with the new GSCDs and was offered by OPPD to motivate Zachry to finally achieve completion of the Projects considering the critical need to have the stations operating to meet the needs of OPPD's growing customer load. [*See* Docket No. 961 (Case No. 24-90377), at pp. 8–9; *see also* Docket No. 2176 (Case No. 24-90377), at ¶ 13]. All other terms and conditions of the

Contract not amended in the Second Amendment, including other sections of liquidated damages clause in Article XI and the Forum Selection Clause, remain in full force and effect. [*See* Docket No. 961 (Case No. 24-90377), at p. 10].

C. Zachry has emerged from bankruptcy.

On January 23, 2025, the Debtors filed their (1) *Disclosure Statement for the Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* (the "**Disclosure Statement**") and (2) *Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* (as amended, supplemented, or otherwise modified from time to time, the "**Plan**"). [*See* Docket Nos. 1986 and 1978 (Case No. 24-90377)].

On February 14, 2025, OPPD filed its *Application for Allowance of Administrative Expense Claim* (the "**Admin Claim**") pursuant to section 503(b)(1)(A) of the Bankruptcy Code for any and all damages (whether liquidated, actual or otherwise) due and owing to OPPD arising from any and all breaches by the Debtors under the terms of the Second Amendment occurring after the Petition Date and prior to the Plan's Effective Date. [*See* Docket No. 2176 (Case No. 24-90377)].

The Debtors' Plan was confirmed on February 26, 2025. [*See* Docket No. 2431 (Case No. 24-90377) (the "**Confirmation Order**")]. The Effective Date of the Plan occurred on April 10, 2025 [*See* Docket No. 2731 (Case No. 24-90377)].

D. The Adversary Proceeding.

On February 5, 2025, Debtor, and Plaintiff here, Zachry, filed the *Debtors' Adversary Complaint for Declaratory Relief* [Docket No. 1] against OPPD in the above-captioned proceeding. OPPD moved to dismiss [Docket No. 11], but before the Court could issue a ruling, Zachry filed the Amended Complaint [*See* Docket No. 22].

In the Amended Complaint, Zachry has transformed this alleged adversary bankruptcy

proceeding into full blown commercial litigation. Zachry seeks declaratory judgment on three issues: (i) that the liquidated damages provision of the Contract and Second Amendment are unenforceable, (ii) that the GSCDs have not yet occurred, and (iii) the reduction of any administrative claim filed by OPPD in the bankruptcy. Additionally, Zachry wants this Court to prematurely find that OPPD breached the Contract and Second Amendment as well as its duty of good faith and fair dealing well prior to the accrual of any obligation or performance owed by OPPD.

III. LEGAL STANDARD

A. Federal Rule 12(b)(3) – dismissal for improver venue.

Pursuant to Federal Rule of Civil Procedure 12(b)(3), a party may move to dismiss and action for improper venue. FED. R. CIV. P. 12(b)(3). "Once a defendant raises improper venue by motion, the burden of sustaining venue will be on [the] Plaintiff." *Turner v. Harvard MedTech of Nevada, LLC*, 620 F. Supp. 3d 569, 573 (W.D. Tex. 2022) (quotations omitted). "If venue is improper, the Court must dismiss, 'or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.'" *Id.* at 573–74 (quoting 28 U.S.C. § 1406(a); FED. R. CIV. P. 12(b)(3)).

B. Federal Rule 12(b)(1) – lack of subject matter jurisdiction.

Pursuant to Federal Rule of Civil Procedure 12(b)(1), dismissal of a complaint is proper if there is a "lack of subject-matter jurisdiction." FED. R. CIV. P. 12(b)(1). Subject-matter jurisdiction is the courts' statutory or constitutional power to adjudicate the case. *United States v. Cotton*, 535 U.S. 625, 630 (2002). It involves a court's power to hear a case so it can never be forfeited or waived. *Id.* It "should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (internal citation omitted). It should be "presume[d] that federal courts lack jurisdiction

unless 'the contrary appears affirmatively from the record.'" *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986)).

Article III of the Constitution limits federal court jurisdiction to the adjudication of "legal disputes only in the context of [c]ases or [c]ontroversies." *Camreta v. Greene*, 563 U.S. 692, 701 (2011). In light of the limitation, federal courts "demand that litigants demonstrate a personal stake in the suit." *Id*. Put simply, the dispute evinced in a complaint must be justiciable. Justiciability "[goes] to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Geary*, 501 U.S. at 316. Justiciability requires that a plaintiff have standing to bring a claim, that their claim is ripe, and that their claim is not moot. "Ripeness is a justiciability doctrine . . . 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction[.]'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (internal citations omitted).

IV. ARGUMENT

A. This litigation should be dismissed under Rule 12(b)(3) or alternatively transferred to the parties agreed-upon venue in Nebraska—a provision the Debtors explicitly assumed in the Chapter 11 Cases.

The Amended Complaint should be dismissed, or this Court should alternatively transfer this litigation to the Nebraska Court, because venue in this Court is not proper.

As discussed further in OPPD's *Motion to Withdraw the Reference* [Docket No. 12] and *Motion to Transfer Venue* [Docket No. 13] (collectively, the "**Transfer Motions**"), both of which are fully incorporated herein by reference pursuant to Federal Rule of Civil Procedure 10(c),[3] the parties agreed that any disputes arising under the Contract are governed by the laws of the State of Nebraska and that the ***exclusive*** venue for any disputes arising under the Contract was either the

[3] The Transfer Motions remain pending as of the date of this filing and the significant gate-keeping issues addressed therein (*i.e.*, core v. non-core status) should be resolved prior to a ruling on this Motion.

Federal District Court of Nebraska or District Court of Douglas County, Nebraska (the "**Nebraska Court**"). Further, the Forum Selection Clause contained in Article XIII of the Contract explicitly provides, in relevant part, that Zachry "hereby waives any objection based on venue or forum non conveniens with respect to any legal action or proceeding instituted in connection with or related to this Agreement."

It is well-settled that a forum selection clause is mandatory if it contains clear language "affirmatively require[ing] that litigation arising from the contract be carried out in a given forum" and no exception exists. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768 (5th Cir. 2016). Thus, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 (2013). That is, a forum selection clause "should be given controlling weight in all but the most exceptional cases." *Id.* at 63–64.

Indeed, as further detailed in the Transfer Motions, 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). "If 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.

Here, Zachry attempts to camouflage this litigation solely for the purpose of evading the mandatory Forum Selection Clause—a provision that should be enforced due to the non-core nature of this litigation. Indeed, Zachry asserts that the existence of the Admin Claim and its request for declaratory judgment regarding the allowance of the Admin Claim makes this a core proceeding. Yet, the declaratory relief requested by Zachry implicates—and is entirely premised

on—substantive state-law. Even so, 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]. For the reasons stated in the Transfer Motions and above, this pending litigation involves, "under the Fifth Circuit's standard, . . . quintessential non-core claims." *In re Castex Energy Partners, LP*, 584 B.R. 150, 155 (Bankr. S.D. Tex. 2018).

To be sure, the mere fact that the Zachry "is in bankruptcy is not sufficient to prevent enforcement of a contractual forum selection clause." *In re Bailey*, 217 B.R. 523, 527 (Bankr. E.D. Tex. 1997) (dismissing adversary proceeding due to forum selection clause, despite debtor's bankruptcy). And in fact, 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. The Fifth Circuit has "been clear that it's all or nothing: 'An executory contract must be assumed or rejected in its entirety.'" *Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th 321, 325 (5th Cir. 2023) (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)). Zachry is attempting to "evade [the] requirement that it take any retained executory contracts '*cum onere*,' with all their benefits and burdens." *Id.* at 326. By filing this litigation in this Court and now opposing the enforcement of the parties' agreed-to Forum Selection Clause, Zachry ultimately seeks to keep the benefits of the Contract for Zachry but reject other terms it deems unfavorable.

In short, this litigation should proceed only in the Nebraska Court as required by the parties Contract and as assumed by the Debtors. *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"). In due order of pleadings, the Transfer Motions must be heard and decided on a final basis before the substantive grounds in the Amended Complaint are ripe for consideration. Accordingly, this Court should dismiss the Amended Complaint or alternatively transfer this case to the proper venue—the Nebraska Court.

B. Zachry's requests for declaratory judgment are unripe, fail to state a claim under the Declaratory Judgment Act, and are not automatically entitled to be heard by this Court.

Zachry's claims for declaratory judgment are not ripe for adjudication and should be dismissed for lack of subject-matter jurisdiction. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Id.*

"In the declaratory judgment context, whether a particular dispute is ripe for adjudication turns on whether a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Lower Colorado River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 924 (5th Cir. 2017) (quoting *Venator Grp. Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003)). "A declaratory judgment action is ripe for adjudication only where an 'actual controversy' exists." *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 896 (5th

Cir. 2000); 28 U.S.C. § 2201(a). In this case, Zachry prematurely seeks declaratory relief as an end-run to cut off action that OPPD has not yet taken. Zachry is attempting to predict what OPPD may (or may not) do in response to Zachry's breaches under the Contract. OPPD has not yet filed any cause of action for breach of contract against Zachry. The Projects are still not complete, meaning the facts underlying this case or any future one that may be filed by OPPD are still changing and developing. As such, the declaratory judgment claims are not ripe for adjudication and should be dismissed for lack of subject-matter jurisdiction.

Even if jurisdiction exists, this Court is under no compulsion to exercise that jurisdiction. *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942). The Declaratory Judgment Act ("**DJA**") is an enabling act—it does not confer an absolute right on a litigant but rather unique and substantial discretion on federal courts in deciding whether to declare the rights of litigants. *Sherwin–Williams Co. v. Holmes County*, 343 F.3d 383, 389 (5th Cir. 2003). In *St. Paul Insurance Co. v. Trejo*, the Fifth Circuit set forth seven factors for determining whether a declaratory judgment action should be dismissed:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
> (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
> (3) whether the plaintiff engaged in forum shopping in bringing the suit;
> (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
> (5) whether the federal court is a convenient forum for the parties and witnesses;
> (6) whether retaining the lawsuit would serve the purposes of judicial economy; and
> (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

St. Paul Insurance Co. v. Trejo, 39 F.3d 585, 590–91 (5th Cir. 1994). These factors demonstrate that Counts I, II, and III in the Amended Complaint seeking declaratory relief are premature at best and spurious at worst, as they were brought to evade Zachry's contractual obligations with OPPD.

Zachry's requests for declaratory judgment are an ill-disguised effort to preempt a potential breach of contract claim by OPPD filed in Nebraska for Zachry's failures (including but not limited to its inability to meet the GSCDs) and to avoid liability under the liquidated damages provision agreed to by Zachry. Such procedural fencing should not be allowed. *See Great Am. Assur. Co. v. Waterhill Companies Ltd.*, No. CIV.A H-09-3196, 2010 WL 518760, at *3-4 (S.D. Tex. Feb. 4, 2010) (courts should look to see whether the plaintiff used the DJA to gain access to a federal forum on improper or unfair grounds by engaging in procedural fencing, i.e., filing for declaratory action before the other party brings suit). Counts I – III are Zachry's effort to beat OPPD in a race to the courthouse of its choice—the bankruptcy court—despite (1) the Forum Selection Clause in the Contract, (2) the fact that the Contract was assumed post-petition, (3) that Zachry's plan was confirmed, and (4) that OPPD has yet to file a breach of contract claim against Zachry. These reasons demonstrate why this Court should dismiss the Counts I, II, and III of the Amended Complaint.

C. <u>In the alternative, this Court lacks jurisdiction over the breach of contract claims in the fourth and fifth causes of action in the Amended Complaint.</u>

Zachry's claims for breach of the Contract should both be dismissed for lack of subject matter jurisdiction because the claims are not ripe.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807–08 (2003) (citation omitted). Because ripeness "is a component of subject matter jurisdiction," courts "should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Lopez v. City of Houston*, 617 F.3d

336, 341 (5th Cir. 2010) (quoting *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)). Notably, "[i]f the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Id.* at 342 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

"[T]o recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty." *Phipps v. Skyview Farms, Inc.*, 610 N.W.2d 723, 730 (Neb. 2000). Under Nebraska law, which applies here,[4] "there is no breach until the time for performance" has occurred. *TNT Cattle Co., Inc. v. Fife*, 937 N.W.2d 811, 830 (Neb. 2020). That is, "[a] 'breach' is *a nonperformance of a duty*." *Phipps*, 610 N.W.2d at 730 (citing *Cavanaugh v. City of Omaha*, 580 N.W.2d 541 (Neb. 1998)) (emphasis added). Thus, where no performance is owed or the time for performance has not accrued, there is no breach. *See Fife*, 937 N.W.2d at 830.

Zachry's breach of contract claims are based on alleged nonperformance, even though the deadline for that performance has not yet passed. More specifically, Zachry alleges that "OPPD breached the Second Amended EPC under Article VI, and GC Sections 2, 10, 21, 22, 23, 24, and 29 by its unjustified and unexcused failure to perform all obligations thereunder." *See* Complaint, at ¶ 134. For example, Zachry asserts that OPPD has breached Section 22 of the Contract "by demanding changes in the Work specifications leading to additional time and costs without additional compensation.," or has "refus[ed] to grant requested Change Orders or Directives." Complaint, at ¶¶ 135–36.

However, the obligations under these provisions are contingent on either the completion of the Project—which is still in progress—or subject to other conditions precedent that have yet to

[4] *See* Contract, at art. XIII.

occur. For instance, Section 21 addresses "Substantial Completion" and "Final Payment," expressly states that "[f]inal payment will not be made to the Contractor until Contractor has achieved Final Completion"—a milestone that has not yet been reached. *See* Contract, at General Conditions § 21. This provision, and final payment, is further subject to a litany of additional conditions precedent that have yet to occur:

> (b) Final Payment. Final payment will not be made to the Contractor until Contractor has achieved Final Completion including completion of all Punch List items and has furnished the District with all maintenance and operating manuals, system turnover packages, for record Drawings and other documents required by the Contract Documents; evidence satisfactory to the District concerning Contractor's payment or provision for payment of all bills for material, labor, services, and other costs incurred in connection with the performance of the Work; a written clearance from the Commissioner of the Unemployment Compensation Fund of the State of Nebraska certifying compliance by the Contractor and all of its Subcontractors with unemployment contribution and related requirements of Applicable Law; and the written consent of the Contractor's surety to the release of such final payment.

Further, Section 22, which addresses change orders, provides that OPPD "***may*** issue a written order to the Contractor to proceed with [a] change, and the Contractor shall do so, without regard to whether agreement has been reached as to the amount of the equitable price or time adjustment to which the Contractor is entitled on account thereof; provided that, if there is no agreement between the parties regarding any equitable price or time adjustment, the parties agree to work in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment for such change." Contract, at General Conditions § 22(a) (emphasis added). Importantly, however, Section 22(a) concludes with the condition that "[t]he parties' decision shall be formalized in a writing signed by both parties." *Id.*

In both examples, like the other provisions that Zachry alleges OPPD has breached, performance has yet to accrue or is conditioned on future events that may or may not occur as anticipated. *See, e.g.*, *Lopez*, 617 F.3d at 342 ("If the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for

adjudication." (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985))). That is, Zachry's breach-of-contract and failure-of-good-faith claims are not ripe for adjudication because the time for OPPD's performance under the contract has not yet elapsed. The obligations Zachry claims were breached are expressly conditioned on events that have not yet occurred, including Final Completion of the Project and the satisfaction of multiple conditions precedent.

Moreover, because OPPD's performance that Zachry complains of has not yet come due under the Contract, there can be no breach of good faith and fair dealing at this juncture. *See Spanish Oaks v. Hy-Vee*, 655 N.W.2d 390, 400 (Neb. 2003). Under Nebraska law, "[t]he implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract." *Spanish Oaks*, 655 N.W.2d at 400 (citing *Reichert v. Rubloff Hammond, L.L.C.*, 645 N.W.2d 519 (Neb. 2002). Importantly, "[a] violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract." *Id.*

As explained above, OPPD has not breached the Contract because the time for OPPD's performance of the obligations Zachry complains of has not yet accrued and OPPD has not significantly impaired Zachry of the benefits of the Contract. Instead, OPPD has acted in accordance with its rights and obligations under the Contract's express terms and continues to do so. Indeed, Zachry's breach of good faith and fair dealing claim is simply another meritless attempt to keep this adversary proceeding in this Court and disregard the Contract's Forum Selection Clause.

As such, OPPD's alleged purported failure to perform cannot constitute a breach at this stage because the time for OPPD's performance has not come due. Because there is no present, justiciable controversy, Zachry's claims are premature and must be dismissed for lack of subject matter jurisdiction.

V. CONCLUSION

For the foregoing reasons, OPPD respectfully requests that this Court enter the Proposed Order: (i) dismissing, with prejudice, Plaintiff's claims asserted in the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (3) or alternatively transferring this litigation to the proper venue in Nebraska under 12(b)(3); and (ii) granting OPPD such other and further relief as this Court finds just and proper.

Dated: April 25, 2025

Respectfully submitted by:

/s/ Thomas C. Scannell

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ATTORNEYS FOR OMAHA PUBLIC POWER DISTRICT

CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on April 25, 2025, using the Court's CM/ECF System which caused it to be served upon those parties registered in the system to receive such service.

/s/ Zachary C. Zahn
Zachary C. Zahn

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

In re:	§	Chapter 11
ZACHRY HOLDINGS, INC., *et al*[1]	§	Case No. 24-90377 (MI)
Debtor.	§	(Jointly Administered)
ZACHRY HOLDINGS, INC.,	§	
Plaintiff,	§	Adversary No.: 25-03025 (MI)
v.	§	
OMAHA PUBLIC POWER DISTRICT,	§	
Defendant.	§	

ORDER GRANTING DEFENDANT OMAHA PUBLIC POWER DISTRICT'S MOTION AND SUPPORTING BREIF TO DISMISS FIRST AMENDED ADVERSARY COMPLAINT

On this day the Court considered *Defendant Omaha Public Power District's* ("**OPPD**") *Motion and Supporting Brief to Dismiss First Amended Adversary Complaint* (the "**Motion**"). After considering the Motion, the Court is of the opinion that the Motion should be GRANTED.

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED.

2. Plaintiff Zachry Holdings, Inc.'s *First Amended Adversary Complaint* [Docket No. 22], including all claims asserted therein, is hereby dismissed with prejudice.

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.veritaglobal.net/ZHI. The location of the Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

Dated: _____

HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE