Docket #0044 Date Filed: 5/16/2025

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 No. 34**
v.	)	
OMAHA PUBLIC POWER DISTRICT,	)	
Defendant.	)	

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

[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.

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TABLE OF CONTENTS

Preliminary Statement 1

Background 2

Argument 7

I. This is the Proper Venue to Adjudicate the Claims in the Amended Complaint 7

II. This Court Has Subject-Matter Jurisdiction Over the Claims. 12

A. The Reorganized Debtors' Contract Claims Are Justiciable 13

B. The Declaratory Judgment Claims Are Ripe 20

C. The Reorganized Debtors Face Hardship Absent Adjudication of the Claims 23

III. This Court Should Exercise Its Discretion to Hear and Determine the Declaratory Judgment Claims. 24

Conclusion 26

TABLE OF AUTHORITIES

Page(s)

CASES

Appeal of Roadmix Constr. Corp.,
9 N.W.2d 741 (Neb. 1943)..... 11

AptusTech LLC v. Trimfoot Co., LLC,
No. 4:19-CV-00133-ALM, 2020 WL 1190070, (E.D. Tex. Mar. 12, 2020) 8

Astria Health v. Cerner Corp. (In re Astria Health),
640 B.R. 758 (Bankr. E.D. Wash. 2022) 12

Atl. Cas. Ins. Co. v. Ramirez,
651 F. Supp. 2d 669 (N.D. Tex. 2009) 25

Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas,
571 U.S. 49 (2013)..... 7, 8

Berens & Tate, P.C. v. Iron Mountain Information Mgmt., Inc.,
747 N.W.2d 383 (Neb. 2008)..... 21

Braidwood Mgmt., Inc. v. E.E.O.C.,
70 F.4th 914 (5th Cir. 2023) 13

Burns Motors, Ltd. v. FCA USA LLC,
No. 7:17-CV-421, 2018 WL 461079 (S.D. Tex. Jan. 18, 2018)..... 13

Centurion Stone of Neb. v. Trombino,
812 N.W.2d 303 (Neb. App. 2012)..... 15

Chadd v. Midwest Franchise Corp.,
412 N.W.2d 453 (Neb. 1987)..... 16, 17, 18

City of Omaha v. City of Elkhorn,
752 N.W.2d 137 (2008) 23

In re Cook & Sons Mining, Inc.,
No. CIV.A. 05-19, 2005 WL 2386238 (E.D. Ky. Sept. 28, 2005) 21

Cruson v. Jackson Nat'l Life Ins.,
954 F.3d 240 (5th Cir. 2020) 8

Cunningham v. Nationwide Sec. Sols., Inc.,
3:17-CV-337-S-BN, No. 2018 WL 4568803 (N.D. Tex. Sept. 24, 2018) 9

Danco, Inc. v. Fluidmaster, Inc.,
No. 5:16-CV-0073-JRG-CMC, 2017 WL 4812456 (E.D. Tex. Oct. 25, 2017) 9

DeSoto Plaza Assocs., LLC v. 4 Star General Contracts Inc.,
No. 5:23-01191, 2023 WL 9120723 (W.D. La. Dec. 8, 2023) 21

Entergy Arkansas, Inc. v. Nebraska,
226 F. Supp. 2d 1047 (D. Neb. 2002) 18, 19

Entergy Arkansas, Inc. v. Nebraska,
358 F.3d 528 (8th Cir. 2004) 18

In re EP Energy E&P Co., L.P.,
No. 19-35647 (MI), 2021 Bankr. LEXIS 3430 (Bankr. S.D. Tex. Dec. 14, 2021) 11

FDIC v. Majestic Energy Corp. (In re Majestic Energy Corp.),
835 F.2d 87 (5th Cir. 1988) 13

Fredericks v. Ameriflight, LLC,
No. 3:23-CV-1757-X, 2024 WL 1183075 (N.D. Tex. Mar. 19, 2024) 22, 23

Freedom Specialty Contracting, Inc. v. Nichol Flats, LLC,
950 N.W.2d 109 (Neb. App. 2020) 15, 17

Gilmore v. Shearson/Am. Express, Inc.,
811 F.2d 108 (2d Cir. 1987) 9

In re Harpole Constr., Inc.,
No. 15-12630, 2016 WL 7373780 (Bankr. D.N.M. Nov. 23, 2016) 11

Jobst v. Harden Bros.,
121 N.W. 957 (Neb. 1909) 12

Knight v. City of Fort Calhoun,
No. A-08-1101, 2009 Neb. App. LEXIS 128 (Ct. App. July 14, 2009) 16

In re LaRoche Indus., Inc.,
312 B.R. 249 (Bankr. D. Del. 2004) 11

Larsen v. First Bank,
515 N.W.2d 804 (Neb. 1994) 15

Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC,
No. 8:19CV550, 2021 WL 6202667 (D. Neb. Nov. 3, 2021) 21

Mantissa Corp. v. Ondot Sys., Inc.,
267 F. Supp. 3d 918 (S.D. Tex. 2017) 8

McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.,
849 F.2d 761 (2d Cir. 1988) 9

Neb. Pub. Power Dist. v. MidAmerican Energy Co.,
234 F.3d 1032 (8th Cir. 2000) 23

Phipps v. Skyview Farms, Inc.,
610 N.W.2d 723 (Neb. 2000) 15

Pruco Life Ins. v. Wilmington Tr. Co.,
616 F. Supp. 2d 210 (D.R.I. 2009) 9

Rickertsen v. Carskadon,
108 N.W.2d 392 (Neb. 1961) 12

RM Campbell Indus. v. Midwest Renewable Energy,
886 N.W.2d 240 (Neb. 2016) 16

In re Roberts Constr. Co.,
111 N.W.2d 767 (Neb. 1961) 16

Rowley v. McMillan,
502 F.2d 1326 (4th Cir. 1974) 9

Sherwin-Williams Co. v. Holmes Cnty.,
343 F.3d 383 (5th Cir. 2003) 24, 25

Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.),
163 F.3d 925 (5th Cir. 1999) 11

Spanish Oaks v. Hy-Vee,
655 N.W.2d 390 (Neb. 2003) 18, 19, 20

In re Spillman Dev. Grp., Ltd.,
710 F.3d 299 (5th Cir. 2013) 13

Stromquist v. Progressive Universal Ins.,
No. 8:22-CV-332, 2023 WL 2537838 (D. Neb. Mar. 16, 2023) 20

TNT Cattle Co. v. Fife,
937 N.W.2d 811 (Neb. 2020) 17

In re U.S. Brass Corp.,
301 F.3d 296 (5th Cir. 2002) 13

In re Whistler Energy II, L.L.C.,
931 F.3d 432 (5th Cir. 2019) 21

YETI Coolers, LLC v. Walmart Inc., No. A-,
17-CV-1145-RP, 2018 WL 5304119 (W.D. Tex. Oct. 25, 2018) 9, 10

FEDERAL STATUTES

11 U.S.C. § 365 12

11 U.S.C. § 503 ..... 21, 23

28 U.S.C. § 157 13

28 U.S.C. § 1334 12

28 U.S.C. § 1391 8

28 U.S.C. § 1406 7

28 U.S.C. § 1408 8

28 U.S.C. § 1409 8

FEDERAL RULES

Fed. R. Bankr. P. 7012 7

Fed. R. Civ. P. 12 ..... *passim*

Fed. R. Civ. P. 56 7

Zachry Holdings, Inc. ("**ZHI**"), Zachry Industrial, Inc. ("**Zachry**"), and their debtor affiliates (collectively with ZHI and Zachry, the "**Reorganized Debtors**")[1] file this opposition (this "**Objection**") to *Defendant Omaha Public Power District's Motion and Supporting Brief to Dismiss First Amended Adversary Complaint* (the "**Motion to Dismiss**") [Docket No. 34] seeking entry of an order dismissing, with prejudice, Plaintiffs' claims asserted in *The Reorganized Debtors' First Amended Adversary Complaint* (the "**Amended Complaint**") [Docket No. 22].

Preliminary Statement

1. Defendant OPPD raises two bases for dismissal of the Amended Complaint: first, dismissal under Rule 12(b)(3) based on the forum selection clause in the *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (the "**EPC**"),[2] and second, dismissal under Rule 12(b)(1) based on this Court's purported lack of subject-matter jurisdiction. Both arguments fail.

2. Dismissal under Rule 12(b)(3) fails for three independent reasons, each of which is fatal to the Motion to Dismiss. First, a case cannot be dismissed under Rule 12(b)(3) based on a forum selection provision. Second, even if Rule 12(b)(3) were available to OPPD (it is not), OPPD waived the defense under Rule 12(h)(1) when it failed to raise it in its motion to dismiss Zachry's original complaint. Third, this Court is not bound by the forum selection clause where, as here, the Amended Complaint relates to OPPD's asserted administrative claim and is central to the efficient resolution of the Reorganized Debtors' chapter 11 cases.

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[1] The "**Effective Date**" of the *Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates* (the "**Plan**") [Bankr. Docket No. 2362] occurred on April 10, 2025, as described in the *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].

[2] Capitalized terms used but not defined herein have the same meaning ascribed to such terms in *The Reorganized Debtors' First Amended Adversary Complaint* (the "**Amended Complaint**") [Docket No. 22].

3. Nor is there any basis to dismiss this proceeding under Rule 12(b)(1). Sections 1334 and 157(b) of the Judiciary and Judicial Procedures give this Court subject matter jurisdiction over Zachry's breach of contract and declaratory judgment claims—core claims that arise from post-petition and pre-emergence conduct. The claims are also ripe for adjudication: the time for substantial completion of the projects has passed, OPPD's breaches and delays have caused Zachry harm, OPPD has asserted an administrative claim in these proceedings based on the same set of operative facts as the Amended Complaint, and that claim is for the full amount of liquidated damages available under the contract. Because resolving these core claims is essential for determining the assets and liabilities of Zachry's estate, this Court has jurisdiction and is the only appropriate forum.

Background

4. The EPC is the contract through which OPPD hired Zachry in September 2021 to construct two electrical generating stations and associated substations near Omaha, Nebraska: (a) the Standing Bear Lake Station ("**SBLS**") and (b) the Turtle Creek Station ("**TCS**" and, together with SBLS, the "**Projects**"). *See* Amended Compl. ¶¶ 1, 18. The EPC was amended twice, with the latest amendment occurring on August 13, 2024 (the "**Second Amended EPC**") during the pendency of these chapter 11 cases. *See id*. ¶¶ 38-39. At the time of the Second Amended EPC, the Projects were over 90% complete. *See id.* The Second Amended EPC extended the Substantial Completion dates for SBLS and TCS to December 16 and 30, 2024, respectively (collectively, the "**GSCDs**") and amended portions of the liquidated damages provision (the "**Liquidated Damages Provision**") to impose an oppressive and drastically higher daily liquidated damages amount (rather

than to reflect the anticipated or actual harm caused) if the new GSCDs were not met.[3] *See id.* ¶¶ 21, 23, 39-41, 44-45, 113-118. The Liquidated Damages Provision also stated that Zachry would be entitled to bonus payments if the Projects were completed early in accordance with the Second Amended EPC's terms (collectively, the "**Milestones**"). *See id.* ¶ 41. Zachry assumed the Second Amended EPC on September 17, 2024. *See id.* ¶ 48.

5. Zachry did all that it could to achieve Substantial Completion of the Projects by the GSCDs. *See id.* ¶¶ 2, 47, 49, 146. By November 2024, Zachry had completed all construction on the Projects and the sites had been turned over for commissioning—final testing necessary for Substantial Completion which must be performed by OPPD and its third-party contractors, Wartsila North America, Inc. ("**Wartsila**") and Siemens Energy, Inc. ("**Siemens**" and, together with Wartsila, the "**OPPD Contractors**"). But after the Projects were turned over for commissioning, OPPD and the OPPD Contractors breached their obligations under the Second Amended EPC that caused extensive delays. These delays prevented the Projects from achieving Substantial Completion before the GSCDs. *See id.* ¶¶ 2, 50, 132-151.

6. OPPD refused to acknowledge, address, or correct the delays that it and its contractors caused. Nor did OPPD meet its contractual obligation to provide Zachry with Directives or Contract Change Requests necessary to support Change Orders to address delays outside of Zachry's control. OPPD has also refused to comply with the Second Amended EPC's dispute resolution procedures. *See id.* ¶¶ 27, 28, 30, 57.

7. Rather than cooperate with Zachry on developing a schedule and plan to obtain

[3] The EPC contained language that the Liquidated Damages Provision reflected the Parties' agreement "that actual damages incurred by [OPPD] as a result of the [Zachry]'s failure to meet the [GSCDs] and Performance Guarantees would be difficult to determine" and "that both parties agree that the liquidated damages provisions in this Article XI are reasonable and appropriate measures of the damages for such completion and performance shortfalls." *See id.* ¶ 43. The Second Amended EPC did not include this language. *See id.*

Substantial Completion, OPPD asserted anticipatory breach in December 2024 and started sending invoices in January 2025 for liquidated damages that OPPD alleged were owed by Zachry. *See id.* ¶¶ 58-65.

8. The Reorganized Debtors filed a complaint (the "**Original Complaint**") commencing this Adversary Proceeding on February 5, 2025.

9. On February 13, 2025, OPPD and Wartsila halted all testing and commissioning work at SBLS based on alleged electromagnetic interference ("**EMI**") issues known to it since December 16, 2024, and OPPD and Wartsila failed to provide critical information to Zachry that would help determine the cause, significance of, and mitigate the alleged EMI issues. *See id.* ¶¶ 87-102. Although Zachry's work did not violate any specification relative to the EMI issue and the presence of the static EMI is not a violation of any specification under the Second Amended EPC, OPPD insisted that Zachry reroute control cables without any indication whether doing so will resolve the issue, without any Directive or Contract Change Request (despite Zachry's repeated requests). OPPD insisted that Zachry do this at its own expense, which was estimated to exceed $3 million. *See id.* Although rigorous destructive testing on April 8 and 9 supported Zachry claims that there are no EMI issues, OPPD continued to direct Wartsila not to proceed with the necessary testing at SBLS, ensuring substantial completion would not be achieved.[4]

10. On February 14, 2025, OPPD filed *Omaha Public Power District's Application for Allowance of Administrative Expense Claim* (the "**Application**") [Bankr. Docket No. 2176],

[4] Since the Amended Complaint was filed, Zachry's experts Exponent concluded that "whatever problem existed to cause the transient EMI problem experienced on December 16, 2024 has been resolved" and "[t]he subsequent delays and expenses have been completely unnecessary, as would any new effort to re-route the cable." However, OPPD shared on April 29, 2025, that the results of the EMI testing have not changed its position that Zachry has to reroute the cables solely because "the driver behind the re-routing of the cables is that Wartsila refuses to honor its warranty if this work is not done." A similar position was stated in correspondence sent May 9, 2025, again pointing to Wartsila's statement that it would not honor warranty claims associated with EMI issues. It was not until May 13, 2025—days before the filing of this reply—that OPPD indicated it will direct Wartsila to resume commissioning and testing.

asserting at least $38 million in liquidated, actual, and other damages arising from Zachry's alleged breach of the Second Amended, including not achieving the GSCDs, and claimed that Zachry will be obligated to pay the cap under the Liquidated Damages Provision (the "**Administrative Expense Claim**"). *See id*. ¶¶ 3, 66, 113. The Reorganized Debtors filed the *Debtors' Objection to Omaha Public Power District's Application for Allowance of Administrative Expense Claim* (the "**Claim Objection**") [Bankr. Docket No. 2500] requesting that the Court deny OPPD's Application. *See id*. ¶ 67. Shortly thereafter, the Parties agreed to abate the Application until Zachry's liability, if any, to OPPD is determined on a final basis in the above-captioned proceeding (the "**Adversary Proceeding**"). *See id*. ¶ 68.

11. By February 14 and 28, 2025, for TCS and SBLS, respectively, OPPD alleged Zachry had hit the cap on the Liquidated Damages, amounting to $64.3 million.

12. OPPD filed the *Defendant Omaha Public Power District's Motion and Brief In Support to Dismiss Complaint* ("**Original Motion to Dismiss**") [Docket No. 11] on March 21, 2025, asserting only that the claims should be dismissed under rule 12(b)(6) of the Federal Rules of Civil Procedure. The Reorganized Debtors filed *The Reorganized Debtors' Memorandum of Law in Opposition to Defendant's Motion to Dismiss* [Docket No. 23] deeming the Original Motion to Dismiss moot due to the Amended Complaint.

13. On March 21, 2025, OPPD also filed the *Defendant Omaha Public Power District's Motion to Withdraw the Reference* (the "**Motion to Withdraw the Reference**") [Docket No. 12] and *Defendant Omaha Public Power District's Motion to Transfer Venue* (the "**Motion to Transfer Venue**") [Docket No. 13]. Both the Motion to Withdraw the Reference and Motion to Transfer Venue argued that this litigation should be heard in the Nebraska federal district court. OPPD argued that this Court must enforce the forum selection clause (the "**Forum Selection Clause**") in

the Second Amended EPC that provides for resolution of disputes in Nebraska and that the Claims are non-core. The Reorganized Debtors filed *Zachry's Omnibus Objection to Omaha Public Power District's (I) Motion to Withdraw the Reference and (II) Motion to Transfer Venue* (the "**Omnibus Objection**") [Docket No. 24] refuting those arguments.

14. Zachry served OPPD with notice of Substantial Completion for both Projects on March 24, 2025. Amended Compl. ¶ 106.

15. On April 10, 2025, the Reorganized Debtors emerged from bankruptcy and their plan became effective. *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].

16. The Reorganized Debtors filed the Amended Complaint on April 11, 2025. *See id.* at 1 n.2. Causes of action one through three seek declaratory relief that the Liquidated Damages Provision is unenforceable, that the GSCDs are no longer operative in light of OPPD and OPPD Contractor-caused delays, and that the Administrative Expense Claim is valued at $0 or, alternatively, if liquidated or other damages are deemed owed by Zachry, at no greater a value than the actual damages OPPD incurred from delays caused solely by Zachry, offset by amounts Zachry would be entitled to under EPC GC Sections 22 and 23 and damages for breach of the Second Amended EPC (collectively, the "**Declaratory Judgment Claims**"). *See id.* ¶¶ 3, 112-130. The remaining two causes of action against OPPD are for breach of contract and breach of the implied covenant of good faith and fair dealing under the Second Amended EPC (collectively, the "**Contract Claims**" and, together with the Declaratory Judgment Claims, the "**Claims**"). *See id.* ¶¶ 3, 131-151.

17. At a status conference held on April 12, 2025, this Court invited the Reorganized Debtors to file *The Reorganized Debtors' Motion for Partial Summary Judgment Re Liquidated Damages* (the "**Motion for Partial Summary Judgment**") [Docket No. 35], which argues that the Liquidated Damages Provision is an unenforceable penalty.

18. The Motion to Dismiss, Motion to Withdraw the Reference, Motion to Transfer, and Motion for Partial Summary Judgment are set to be heard on June 2, 2025.[5]

Argument

19. This Court should deny the Motion to Dismiss. This Court has jurisdiction to decide the Claims. In fact, it is the only Court that can provide complete relief.

I. This is the Proper Venue to Adjudicate the Claims in the Amended Complaint.

20. OPPD seeks to dismiss the Amended Complaint under Rule 12(b)(3) on grounds that venue is improper based on the Forum Selection Clause in the EPC Contract.[6] *See* Mot. to Dismiss at 8-11. This argument fails. In *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*—a case on which OPPD relies—the Supreme Court made clear that a forum selection clause cannot serve as a basis for dismissal under Rule 12(b)(3) or section 1406(a) of the Judiciary and Judicial Procedures.[7] 571 U.S. 49, 62 (2013). Those provisions "allow dismissal only when venue is 'wrong' or 'improper,'" which "depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws," such as sections 1391, 1408, and 1409 of the Judiciary and Judicial Procedures. *Id.* A forum selection clause "has no bearing on whether a

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[5] The Court denied the *Defendant Omaha Public Power District's Verified Emergency Motion for Continuance of the Reorganized Debtors' Motion for Partial Summary Judgment Re Liquidated Damages* [Docket No. 39] that sought to continue the June 2, 2025 hearing on the Motion for Partial Summary Judgment pursuant to Rule 56(d) and on grounds that such Motion was premature.

[6] Rules 12(b) though (i) apply in adversary proceedings. *See* Fed. R. Bankr. P. 7012(b).

[7] Section 1406(a) states that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall 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." 28 U.S.C. § 1406(a).

case falls into one of the categories of cases" listed under those sections and therefore cannot serve as a basis to dismiss a case under section 1406 when the case was properly filed in the district. *Id.* at 56.

21. OPPD does not (and cannot) argue that venue in this Court does not meet the requirements of sections 1391, 1408, and 1409 of the Judiciary and Judicial Procedures.[8] The Motion to Dismiss based on Rule 12(b)(3) must be denied on this ground alone.

22. In addition, OPPD waived the Rule 12(b)(3) defense of improper venue when it failed to raise this defense in its Original Motion to Dismiss. Fed. R. Civ. P. 12(h)(1)(A); Fed. R. Civ. P. 12(g)(2); *Cruson v. Jackson Nat'l Life Ins.*, 954 F.3d 240, 249 (5th Cir. 2020). Under Rule 12(h)(1) and 12(g)(2), a party is required to raise any improper venue defense in the party's first Rule 12 motion to dismiss unless the defense was not "available" to the party at the time that motion was filed. Otherwise, the defense is "forever waived." *See AptusTech LLC v. Trimfoot Co., LLC*, No. 4:19-CV-00133-ALM, 2020 WL 1190070, at *2 (E.D. Tex. Mar. 12, 2020) ("[A] party must assert any Rule 12(b)(3) motion that is available at the time it files any Rule 12 motion."); *see also Mantissa Corp. v. Ondot Sys., Inc.*, 267 F. Supp. 3d 918, 921 (S.D. Tex. 2017) ("Rules 12(h)(1)(A) and 12(g)(2) prohibit a party who makes one Rule 12 motion from later making another Rule 12 motion 'raising a defense or objection' based on improper venue, provided that such defense or objection 'was available to the party but omitted from its earlier motion.'").

23. OPPD did not raise ***any*** Rule 12(b)(3) defense in its Original Motion to Dismiss even though this purported defense was available to OPPD at that time. The Adversary Proceeding was filed in this Court in February 2025. OPPD filed the Motion to Withdraw the Reference and

[8] Venue in this Court is proper under 28 U.S.C. §§ 1408, 1409, and 1391 for the reasons set forth in Zachry's Amended Complaint. Amended Compl. ¶¶ 13–14.

the Motion to Transfer Venue the same day it filed the Original Motion to Dismiss and raised substantially similar arguments concerning the Forum Selection Clause in those motions. But OPPD did not raise those arguments in the Original Motion to Dismiss and therefore waived them under Rules 12(h)(1)(A) and 12(g)(2).

24. The mere fact that Zachry filed the Amended Complaint does not change this outcome. A subsequent amended complaint generally cannot revive a Rule 12(b)(3) defense once waived. *See, e.g.*, *Cunningham v. Nationwide Sec. Sols., Inc.*, No. 3:17-CV-337-S-BN, 2018 WL 4575005, at *8 (N.D. Tex. Aug. 31, 2018), *report and recommendation adopted*, No. 3:17-CV-337-S-BN, 2018 WL 4568803 (N.D. Tex. Sept. 24, 2018) ("[Plaintiff's] filing a Second Amended Complaint does not afford [the defendant] the opportunity to contest venue when [the defendant] should have done so previously."); *YETI Coolers, LLC v. Walmart Inc.*, No. A-17-CV-1145-RP, 2018 WL 5304119, at *2 (W.D. Tex. Oct. 25, 2018) ("The filing of an amended complaint will not revive the right to present by motion defenses that were available but were not asserted in timely fashion prior to the amendment of the pleading."); *Pruco Life Ins. v. Wilmington Tr. Co.*, 616 F. Supp. 2d 210, 214 (D.R.I. 2009) (discussing waiver in the context of another personal defense and citing cases); *see also Gilmore v. Shearson/Am. Express, Inc.*, 811 F.2d 108, 112 (2d Cir. 1987) (holding that an amended complaint is not sufficient to override a party's earlier waiver), *overruled on other grounds, McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988). An amendment to the complaint "permits the responding pleader to assert only such of those defenses which may be presented in a motion under Rule 12 as were not available at the time of his response to the initial pleading." *Rowley v. McMillan*, 502 F.2d 1326, 1333 (4th Cir. 1974); *see also Danco, Inc. v. Fluidmaster, Inc.*, No. 5:16-CV-0073-JRG-CMC, 2017 WL 4812456, at *3 (E.D. Tex. Oct. 25, 2017) (a waived defense "may not be resurrected by a motion to dismiss an

amended complaint or by a responsive pleading unless the amended complaint adds new allegations that in effect make the defense available"). Consequently, OPPD's argument that venue is improper under Rule 12(b)(3) based on the Forum Selection Clause has not been revived and cannot be raised for the first time now. *See, e.g.*, *YETI Coolers*, 2018 WL 5304119, at *2 (holding that because a party's personal defense under Rule 12 was available to it at the time it filed its original motion to dismiss, the party waived that defense and could not assert it in a responsive motion to an amended complaint).

25. But even if OPPD did not waive its improper venue defense (it did), enforcement of the Forum Selection Clause is not mandatory. OPPD repeats the same arguments it made in its Motion to Withdraw the Reference and Motion to Transfer Venue to argue otherwise.[9] OPPD's argument for application of the Forum Selection Clause is almost entirely based on the false premise that the Claims in the Amended Complaint are non-core. As more fully explained in the Reorganized Debtors' Omnibus Objection, all of the Claims are core because they are based on breaches of the Second Amended EPC that occurred after its assumption date and prior to the Effective Date of the Plan. *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**") ¶ 6; *see also* Omnibus Obj. ¶ 24 (citing cases holding that actions stemming from post-petition contracts with a debtor-in-possession are core proceedings). OPPD continues to ignore this fatal flaw and the legion of cases where courts have refused to enforce forum selection clauses in post-petition contracts, including court-approved contracts, because those clauses must "give way to the [c]ourt's obligations" to "administer the bankruptcy case." *See,*

[9] The Reorganized Debtors incorporate by reference arguments made in their Omnibus Objection.

e.g., *In re Harpole Constr., Inc.*, No. 15-12630, 2016 WL 7373780 (Bankr. D.N.M. Nov. 23, 2016); *In re LaRoche Indus., Inc.*, 312 B.R. 249, 257 (Bankr. D. Del. 2004) (refusing to enforce a forum selection clause notwithstanding that the court previously approved the debtor's entry into the relevant contract).

26. OPPD also ignores the fact that it filed an Administrative Expense Claim against the Reorganized Debtors, based on the same factual and legal issues as the Amended Complaint. Because the Adversary Proceeding and the Administrative Expense Claim involve the same issues, both disputes must be resolved in this Court. *See, e.g.*, *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 932 (5th Cir. 1999) (holding that because the defendant in a civil action filed an administrative expense claim against the debtor-plaintiff in the bankruptcy court, the debtor-plaintiff's civil action was akin to a counterclaim against the defendant within the bankruptcy court's core jurisdiction); *In re EP Energy E&P Co., L.P.*, No. 19-35647 (MI), 2021 Bankr. LEXIS 3430, at *31 (Bankr. S.D. Tex. Dec. 14, 2021) (holding that when an administrative expense application is filed, the court must assess the underlying merits of the asserted claim).

27. The fact that the Claims arise under state law does not render the claims non-core. *See* Omnibus Obj. ¶ 31 & n.7 (citing cases and distinguishing cases OPPD cited). Indeed, even if the Claims at issue had been originally non-core (they were not), OPPD's filing of the Application would have been sufficient to make them core, just like the filing of a proof of claim makes a determination of the underlying merits of that claim a core proceeding. *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). This includes the affirmative claims for breaches because this Court must resolve those claims to determine Zachry's liability, if any, to OPPD. *See, e.g.*, *Appeal of Roadmix Constr. Corp.*, 9 N.W.2d 741, 748 (Neb. 1943) ("[I]f a contractor agrees

to do certain work within a specified time, and he is prevented from performing the contract by the act or default of the other party . . . the delay thus occasioned is excused, and the contractor may not be held liable, under a provision for liquidated damages or otherwise, for his noncompliance with the terms of the contract."); *Jobst v. Harden Bros.*, 121 N.W. 957, 960 (Neb. 1909) (reversing a district court's decision awarding damages under a construction contract and requiring the court to deduct, with respect to any potential liquidated damages arising out of the contractor's alleged delay, "such delays as were properly chargeable to [the owner]'s action or failure to act, and that the judgment be modified if such findings render it necessary"); *see also Rickertsen v. Carskadon*, 108 N.W.2d 392, 396 (Neb. 1961) (holding that the damages for breach of contract to which a plaintiff is entitled depend on the plaintiff's own performance of the contract).

28. Zachry's assumption of the EPC Contract under section 365 of the Bankruptcy Code does not change the analysis. A court's approval of a contract assumption is a "summary proceeding" under section 365 of the Bankruptcy Code and "does not dispose" of fundamental questions related to the parties' rights, such as the validity or legality of the contract or the enforceability of its provisions but rather "leaves all existing rights intact for full plenary litigation on the merits." *Astria Health v. Cerner Corp. (In re Astria Health)*, 640 B.R. 758, 768 (Bankr. E.D. Wash. 2022). In any event, the enforceability of the Forum Selection Clause was not at issue when the EPC Contract was assumed, and the Assumption Order is clear that Zachry's ability to argue that the Forum Selection Clause is unenforceable was preserved. *See* Assumption Order ¶ 7 (containing Zachry's reservation of rights).

II. This Court Has Subject-Matter Jurisdiction Over the Claims.

29. OPPD's argument for dismissal under Rule 12(b)(1) is also meritless. This Court has subject matter jurisdiction under sections 1334 and 157(b) to hear the Reorganized Debtors' Contract Claims and Declaratory Judgment Claims. 28 U.S.C. § 1334 (granting jurisdiction over

"civil proceedings arising under title 11 or arising in or related to a case under title 11"); 28 U.S.C. § 157(b)(1) (providing that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11"). As detailed above, and in the Reorganized Debtors' Omnibus Objection, this Adversary Proceeding is a core proceeding under section 157(b)(2)(A), (B), and (C) of title 28 U.S.C. because it "arise[s] in" a case under title 11 U.S.C. *See In re U.S. Brass Corp.*, 301 F.3d 296, 304 (5th Cir. 2002) ("core" proceedings invoke a substantive right provided by title 11 U.S.C. or, by their nature, can arise only in the context of a bankruptcy case).[10]

30. Each of the Contract Claims and Declaratory Judgment Claims are also ripe for adjudication. Ripeness turns on (a) the fitness of the issues for judicial decision and (b) the hardship to the parties of withholding adjudication. *Burns Motors, Ltd. v. FCA USA LLC*, No. 7:17-CV-421, 2018 WL 461079, at *2 (S.D. Tex. Jan. 18, 2018); *Braidwood Mgmt., Inc. v. E.E.O.C.*, 70 F.4th 914, 930 (5th Cir. 2023). A claim is ripe when it is not "abstract or hypothetical." *Burns Motors, Ltd.* 2018 WL 461079, at *2. Where, as here, OPPD's breaches have occurred and OPPD has filed an administrative claim against the estates—one that it agreed would be resolved by this Adversary Proceeding—the claims are far from hypothetical.

A. The Reorganized Debtors' Contract Claims Are Justiciable

31. OPPD contends that the Reorganized Debtors' breach of contract claim should be dismissed because ***every*** one of OPPD's obligations under the Second Amended EPC that Zachry asserted were breached (Article VI and GC Sections 2, 10, 21, 22, 23, 24, and 29) are "contingent

[10] The Adversary Proceeding is also "related to" the Reorganized Debtors' chapter 11 cases. Proceedings are "related to" bankruptcy cases if their outcome "could conceivably have any effect on the estate being administered in bankruptcy." *In re Spillman Dev. Grp., Ltd.*, 710 F.3d 299, 304 (5th Cir. 2013). A conceivable effect in this context is any that "***could*** alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which ***in any way*** impacts upon the handling and administration of the bankrupt estate." *See id.* (quoting *FDIC v. Majestic Energy Corp. (In re Majestic Energy Corp.)*, 835 F.2d 87, 90 (5th Cir. 1988)).

on either the completion of the Project—which is still in progress—or subject to other conditions precedent that have yet to occur." Mot. to Dismiss at 14-15. This is absurd on its face. The Adversary Proceeding is necessary precisely because OPPD for months refused to allow the testing necessary for completion of the Projects.

32. There can be no dispute that the EPC sets forth numerous obligations owed by OPPD—obligations that Zachry alleges OPPD has breached. And OPPD's obligation to act in good faith, one implied in every contract, does not begin upon completion of the Projects. No construction company would enter a multi-year contract with an owner who does not owe ***any*** obligations to the contractor until the project is completed and final payment is owed.

1. The Breach of Contract Claims Are Fit for Judicial Review.

33. The issues are fit for decision for three main reasons.

34. *First*, the Amended Complaint's allegations clearly lay out that OPPD obligations are past due and that the conduct violating the contract has ***already*** occurred. The obligations that have been breached, among others, are:

- OPPD's obligation to grant Change Requests triggered by OPPD and OPPD Contractor-caused delays under Section 2 and 10(b);[11]
- OPPD's obligation to take steps "to correct or cause the separate contractor or the [Owner] to remedy" OPPD or OPPD Contractor-caused delays under Section 2 triggered by Zachry's reports documenting how the OPPD Contractors impacted its own work and timeline;[12]
- OPPD's obligation to notify Zachry in writing the reasons it does not consider the Work substantially complete under Section 21 triggered by Zachry's Notices of Substantial Completion;[13]
- OPPD's obligation to "work in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment" for unanticipated OPPD

[11] Amended Compl. ¶ 24.

[12] *Id.* ¶ 25.

[13] *Id.* ¶ 138.

changes under Section 22[14] triggered by Zachry submitting an estimate of costs for the new request;

- OPPD's obligation to provide Directives[15] and "work in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment" under Section 23 triggered by Zachry providing notice of OPPD instructions that contain discrepancies, inconsistencies, omissions, or ambiguities or involve extra costs; and

- OPPD's obligation to provide a written decision and work through two rounds of good faith dispute resolution efforts under Article VI triggered by Zachry submitting written disputes to OPPD's Project Manager.

The Motion to Dismiss fails to address seven of the eight contract provisions underlying Zachry's breach of contract claim.[16] Mot. at 15.

35. Like the defendant in *Phipps v. Skyview Farms, Inc.*, a case on which OPPD relies, OPPD has demonstrated "nonperformance of a duty." 610 N.W.2d 723, 730 (Neb. 2000) (affirming a judgment finding a breach of contract action for the plaintiff); *see also Centurion Stone of Neb. v. Trombino*, 812 N.W.2d 303, 312 (Neb. App. 2012) (quoting *Larsen v. First Bank*, 515 N.W.2d 804 (Neb. 1994)) (describing that, in regard to a construction contract, the "ultimate objective of damages award is to put injured party in same position that injured party would have occupied if contract had been performed, that is, to make injured party whole").

36. *Second*, it is well-settled that a breach of contract action in the construction industry is not limited to final nonpayment or issues arising after the project's completion. *See Freedom*

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[14] As OPPD points outs, Section 22 states that if (a) OPPD requests a change, (b) Zachry submits a Change Request, and (c) the parties cannot agree on price change or time, "the parties agree to work in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment." All three conditions have been met here. On the issues of fuel additive at TCS and electromagnetic and related noise interference at SBLS, OPPD has requested changes, Zachry has submitted Change Requests, and the parties have disagreed. Amended Compl. ¶¶ 73-78, 97-99. Under this provision, OPPD's obligation to work in good faith toward a modification of GSCD and price is due. And yet every part of OPPD's conduct has been far from it. *Id.* ¶¶ 59-60, 92, 110-111.

[15] Zachry has been awaiting Directives from OPPD on the EMI issue at SBLS for ***three*** months.

[16] OPPD wrongly summarizes that Zachry is alleging breach under GC Section 21. Mot. to Dismiss at 15. To the contrary, the final payment provision is not mentioned in the Amended Complaint.

Specialty Contracting, Inc. v. Nichol Flats, LLC, 950 N.W.2d 109 (Neb. App. 2020) (holding that an owner breached a construction contract before project completion or final payment)*; RM Campbell Indus. v. Midwest Renewable Energy*, 886 N.W.2d 240 (Neb. 2016) (affirming that the contract counterparty had proven that there was a breach of contract when it had stopped providing goods and services after the defendant ceased paying); *Chadd v. Midwest Franchise Corp.*, 412 N.W.2d 453, 458 (Neb. 1987) (finding that "the questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury"). OPPD's insistence that a ripe breach claim can only occur after completing the Project and once final payment is owed is patently wrong. A party to a contract can claim breach of contract for delays caused by another party and for damages for costs incurred. *See, e.g., Knight v. City of Fort Calhoun*, No. A-08-1101, 2009 Neb. App. LEXIS 128, at *8 (Ct. App. July 14, 2009) (citing *In re Roberts Constr. Co.*, 111 N.W.2d 767 (Neb. 1961)) (stating that "where there is a breach of the contract by the owner or other party, and the breach of contract results in delay in the work of the contractor, and the delay in the work causes damage to the contractor, the contractor has a right of recovery . . . even though the contract contains a provision for an extension of time").

37. Here, Zachry alleges that the Projects have reached substantial completion.[17] Amended Compl. ¶ 104. It is undisputed that the Projects are more than 99% completed and "are all but now generating." *See* Amended Compl. ¶¶ 39, 107-108, 114, 125, 127.[18] The final

[17] At both locations, Zachry has completed all work required for Substantial Completion that Zachry is capable of performing without OPPD or the OPPD-Contractors.

[18] *See* Omaha Public Power District, *February 2025 OPPD Committee Meeting*, YouTube (Feb. 19, 2025), https://youtu.be/vNs5AQrfy38?si=Mikge_7ZfRsfYBPc&t=3892, at 1:04:38–1:04:55. The results of the April 8 and 9, 2025, tests as well as generator black start testing conducted at the end of April 2025, prove that SBLS is mechanically and electrically sound and Zachry has completed its Work sufficiently to allow safe operation of the generating station. If OPPD allowed Zachry to perform the remaining Balance of Plant Thermal Performance and Noise Emissions tests per Exhibits A and F of the Second Amended EPC, Zachry could achieve technical "substantial completion and turn the facility over to OPPD."

commissioning work that remains to be completed for substantial and final completion would have been done long ago but for the OPPD and OPPD Contractor-caused delays and OPPD allowing its contractors to stop all testing in February. *See e.g.*, *id.* ¶ 123 ("There have been at least four months of delays caused by OPPD and OPPD Contractors since the Second Amended EPC was executed…"). Moreover, OPPD's Administrative Expense Claim would not exist but for OPPD's refusal to engage in the agreed-upon processes to correct their mistakes and amend the schedule. *See id*. ¶¶ 110-11, 124; *Freedom Specialty Contracting, Inc.*, 950 N.W.2d at 120 (describing how the delays of other contractors and owner entitled the defendant contractor to an amended schedule).

38. The Reorganized Debtors' harm is not speculative. They have sufficiently alleged that Zachry has incurred expenses for third-party testing, labor costs, insurance costs, legal costs, and more because of OPPD's refusal to perform in accordance with the Second Amended EPC. *Id.* ¶¶ 55, 74, 93, 110.

39. *Third*, even if the Court were to find that OPPD's performance was not yet due, Zachry has alleged sufficient facts for an anticipatory breach of contract claim that need not be separately alleged. *See TNT Cattle Co. v. Fife*, 937 N.W.2d 811 (Neb. 2020) (showing in Nebraska that a party does not need to bring a separate action for anticipatory breach of contract and for breach of contract). An anticipatory breach of contract claim is ripe when a party has made it clear it will not perform, and the non-breaching party has suffered or will imminently suffer damages as a result. *Chadd*, 412 N.W.2d 453, 458 (Neb. 1987) ("An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future.").

40. The Amended Complaint plainly alleges that OPPD has unequivocally shown that it will not perform its future obligations to, among other obligations, grant Change Requests, issue

Directives, direct performance by the OPPD-Contractors, or provide necessary information. Amended Compl. ¶¶ 41, 103, 122. OPPD has admitted that "OPPD will not direct work" or force its contractors to perform their testing, allowing work to be paused for months. *Id.* ¶ 100.[19] And no matter the delay that it or its contractors create, OPPD refuses to extend the GSCDs. OPPD's misconduct continues to violate the Second Amended EPC and sends a clear message that it will not perform. And Zachry is suffering and will continue to suffer as a result. *Supra* ¶ 38. The breach of contract action is ripe, and this Court has subject-matter jurisdiction to adjudicate it.

2. Zachry's Breach of Covenant of Good Faith Is Similarly Ready for Judicial Review.

41. OPPD claims that there can be no breach of the good faith and fair dealing covenant because OPPD's performance "has not yet come due" and OPPD has "not significantly impaired Zachry of the benefits" of the Second Amended EPC. Mot. to Dismiss at 16. OPPD is wrong on the law and the facts.

42. OPPD argues that it need not act in good faith until the Projects are completed. While this view is consistent with OPPD's conduct, it is not the law. Each party has an obligation perform a contract in good faith at all times. *Entergy Arkansas, Inc. v. Nebraska*, 226 F. Supp. 2d 1047 (D. Neb. 2002), *aff'd*, 358 F.3d 528 (8th Cir. 2004) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.") (quoting *Restatement (Second) of Contracts* (1981) § 205); Amended Compl. ¶142. The sole case OPPD relies on to support its novel proposition that this obligation "becomes due" at contract completion, *Spanish Oaks v. Hy-Vee*, explains that the covenant is implied to protect all parties to a contract. 655 N.W.2d

[19] Zachry correctly predicted that OPPD would continue to refuse to provide Directives, Change Orders, extension of GSCDs, and permission to continue with necessary testing since the Amended Complaint was filed. *Supra* ¶ 9.

390, 400 (Neb. 2003);[20] *see also Entergy Arkansas*, 226 F. Supp. 2d at 1146 (finding that the covenant of good faith was violated when a party did not work diligently to ensure process was fair and reasonable or act fairly and reasonably itself and holding that the "obligation of good faith was continuous from the start of the process until the end of it").

43. The Reorganized Debtors have adequately alleged that OPPD violated and significantly impaired Zachry's benefits under the Second Amended EPC by its ***past*** conduct. Amended Compl. ¶¶ 141-151; *supra* ¶ 34. "[T]he nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party." *Spanish Oaks*, 655 N.W.2d at 400. As explained in the Amended Complaint, when entering the Second Amended EPC, Zachry had justifiable expectations that the following would occur:

- OPPD would abide by the provisions of the original and incorporated EPC as OPPD had done consistently with prior performance for the three years prior when it agreed to amend the GSCDs and issue Directives and Change Requests at least twice;[21]
- OPPD would perform its oversight and control duties over OPPD Contractors in good faith and in a manner consistent with the Second Amended EPC;[22]
- OPPD would act in the best interests of the Projects by timely providing Change Requests and Directives after it requested new work or OPPD or OPPD-Contractors caused delays so that the Projects could be completed as soon as possible;[23]
- OPPD would not obstruct Zachry's ability to achieve its early completion

[20] However, *Spanish Oaks* is factually unanalogous as it centers on a dispute whether a sublet contract's use restriction provision violated public policy.

[21] Amended Compl. ¶¶ 37-39.

[22] *Id.* ¶¶ 144-46.

[23] *Id.* ¶ 148.

Milestones;[24]

- OPPD would provide critical information essential to determine the cause of the EMI issue and the most efficient and effective means for resolving it;[25] and
- OPPD would cooperate in good faith with Zachry, including meeting with Zachry and engaging in mediation, pursuant to Article VI.[26]

But OPPD has acted arbitrarily, capriciously, and unreasonably and with gross disregard for its impact on the Projects and Zachry such that it has defied those expectations. *Id.* ¶¶ 141-151; *see also Stromquist v. Progressive Universal Ins.*, No. 8:22-CV-332, 2023 WL 2537838, at *7 (D. Neb. Mar. 16, 2023) (holding that the plaintiff had sufficiently stated a claim for breach of the implied covenant of good faith and fair dealing because she plausibly plead her justifiable expectations, regardless of whether the defendant relied on third parties). There is nothing "hypothetical" about these allegations. They happened. Mot. to Dismiss at 13.

B. The Declaratory Judgment Claims Are Ripe

44. OPPD asserts that the Declaratory Judgment Claims are not ripe because OPPD has not brought a breach of contract claim against Zachry and the Projects are not complete. *See* Mot. to Dismiss at 12. This argument fails for two reasons.

45. *First*, all three of the Declaratory Judgment Claims raise a legal question that is justiciable now: (a) whether the Liquidated Damages Provision is enforceable under Nebraska law—a legal issue that is determined based on facts at the time of the Second Amended EPC; (b) whether the GSCDs of December 16 and 30, 2024 are operative given the owner-caused delays alleged; and (c) in the event that the Liquidated Damages Provision is enforceable, a determination

[24] *Id.* ¶ 145.

[25] *Id.* ¶ 149.

[26] *Id.* ¶ 150.

that the value of the Administrative Expense Claim—a claim already filed by OPPD—is $0 or will not be valued at an amount greater than the actual damages minus amounts owed to Zachry for its Contract Claims as there is no benefit to the estate. 11 U.S.C. § 503(b)(1)(A); *In re Whistler Energy II, L.L.C.*, 931 F.3d 432, 443 (5th Cir. 2019); *In re Cook & Sons Mining, Inc.*, No. CIV.A. 05-19, 2005 WL 2386238, at *11-12 (E.D. Ky. Sept. 28, 2005).

46. The fact that Projects have not been completed and the contractual relationship between Zachry and OPPD remains ongoing is of no consequence because all the relevant facts related to the Declaratory Judgment Claims have occurred. *See DeSoto Plaza Assocs., LLC v. 4 Star General Contracts Inc.*, No. 5:23-01191, 2023 WL 9120723, at *6 (W.D. La. Dec. 8, 2023) ("While there is need for additional facts to resolve this question (i.e., discovery), there is no need for further factual ***development*** as the relevant facts are not contingent upon future events." (emphasis added)).

47. Whether the Liquidated Damages Provision is enforceable turns on the facts that existed at the time the Second Amended EPC was executed, which have been set forth in the Amended Complaint (*see* Amended Compl. ¶¶ 40-47). *See Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC*, No. 8:19CV550, 2021 WL 6202667, at *4 (D. Neb. Nov. 3, 2021) (stating that "the question whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law") (quoting *Berens & Tate, P.C. v. Iron Mountain Information Mgmt., Inc.*, 747 N.W.2d 383, 387 (Neb. 2008)). Indeed, the Reorganized Debtors filed a Motion for Partial Summary Judgment on this issue demonstrating how, as of the date of the Second Amended Complaint, actual damages were not impossible to calculate on Projects that were over 90% complete and how Liquidated Damages sought were not a reasonable calculation of damages.

48. The facts concerning whether the GDSCs defined in the Second Amended

Complaint are operative are based on the alleged delays in advance of those GSCDs and are otherwise confined to the events that occurred through the date of the Amended Complaint, *i.e.*, April 11, 2025. The Amended Complaint alleges a plethora of ways in which OPPD, Siemens, and Wartsila have caused delays that made achieving Substantial Completion on or before the GDSCs impossible for Zachry. *See* Amended Compl. ¶¶ 50-65, 132-151. All of this was in spite of Zachry's good faith efforts to achieve Substantial Completion as early as possible. *See id*. ¶¶ 41, 47, 49, 145. And the obstructionist conduct has continued (*see id*. ¶¶ 50-65, 143-151) with OPPD stopping all commissioning efforts after Zachry filed the original complaint and the day before it filed its Administrative Expense Claim. Zachry sent notices of Substantial Completion for the Projects after it performed all contractual duties that were within its control on March 24, 2025—prior to the filing of the Amended Complaint. *See id*. ¶ 106.

49. The same is true with respect to the Declaratory Judgment Claim that seeks determination as to the amount of the Administrative Expense Claim should the Liquidation Damages Provision be declared enforceable. This declaratory relief presupposes the validity of the Liquidated Damages Provisions and the cap for such damages under the Second Amended EPC was reached in February 2024, according to OPPD's own Application. *See id*. ¶¶ 3, 66, 113.

50. That OPPD has not filed a breach of contract claim against Zachry is irrelevant to the justiciability of the claim. *See Fredericks v. Ameriflight, LLC*, No. 3:23-CV-1757-X, 2024 WL 1183075, at *2-3 (N.D. Tex. Mar. 19, 2024) (rejecting a defendant's argument that the plaintiff's claim that a repayment provision in a contract was an unenforceable penalty was unripe because it, among other things, had not sued the plaintiff yet; ruling that "the declaratory judgment acts allow her to race to the courthouse to sue first to declare the parties' rights and duties"). OPPD ignores the Administrative Expense Claim that it has filed against the Reorganized Debtors seeking

liquidated damages for breach of the Second Amended EPC making each of the Declaratory Action Claims presently justiciable. *See id.* Only this Court has authority to hear and determine administrative expense claims, and the Reorganized Debtors and OPPD contemplated this Court doing so when they agreed to abate the Claim Objection and resolve the Administrative Expense Claim in this Adversary Proceeding. *See id.* ¶ 68. This Court has the authority, and obligation under section 503(b)(1) of the Bankruptcy Code, to determine whether and to what extent the Administrative Expense Claim is a benefit to the estate—a determination that does not require facts that have not yet occurred.

C. The Reorganized Debtors Face Hardship Absent Adjudication of the Claims

51. OPPD did not argue, nor could it, that the Reorganized Debtors would not experience hardship if this Court withheld adjudication. Both the Reorganized Debtors and OPPD agreed to abate the objection process with respect to the Administrative Expense Claim in favor of the Adversary Proceeding. This Court is the only forum with authority to adjudicate OPPD's Administrative Expense Claim. Failure to do so would result in significant harm to the Reorganized Debtors. Moreover, Zachry has faced and continues to incur substantial financial harm from OPPD's breach of its express and implied contractual obligations. Indeed, OPPD has prevented the achievable completion of the Projects seemingly as a litigation strategy, compounding OPPD's harm and further emphasizing the need for this Court's immediate involvement. *See City of Omaha v. City of Elkhorn*, 752 N.W.2d 137, 146 (2008) ("'Harm' includes both the traditional concept of actual damages--pecuniary or otherwise--and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution.") (citing *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000)).

III. This Court Should Exercise Its Discretion to Hear and Determine the Declaratory Judgment Claims.

52. OPPD also argues that this Court should decline to exercise its discretion to hear the Declaratory Judgment Claims even if this Court has subject-matter jurisdiction over them. The Fifth Circuit's seven-factor test weighs in favor of this Court exercising its discretion to decide such Claims. *Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 390 (5th Cir. 2003) ("The Fifth Circuit uses the *Trejo* factors to guide a district court's exercise of discretion to accept or decline jurisdiction over a declaratory judgment suit.") Those factors consist of (a) whether declaratory relief will serve a useful purpose in clarifying and settling the legal relations at issue, (b) whether declaratory relief will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding, (c) whether the state has a strong interest in having the issues decided in its courts, (d) whether the state courts could resolve the issues more efficiently than the federal courts, (e) whether the presence of "overlapping issues of fact or law" might create unnecessary "entanglement" between state and federal courts, (f) whether the federal action is mere "procedural fencing" in the sense that the action is merely the product of forum-shopping, and (g) the existence of a parallel state court proceeding.

53. OPPD's only argument as to why this Court should not decide the Declaratory Judgment Claims is based on procedural fencing. *See* Mot. to Dismiss, at 13. But this cannot be the case when (a) these Chapter 11 Cases have been pending for over one year (and prior to the execution of the Second Amended EPC), (b) OPPD filed the Administrative Expense Claim in this Court, essentially choosing this Court as the forum to determine the merits of that claim, (c) this Court has ***exclusive*** jurisdiction under both federal law and Article XI of the Plan to hear and determine the Administrative Expense Claim brought against the Reorganized Debtors, (d) the Declaratory Judgment Claims seeks to address core issues that could dispose of the Administrative

Expense Claim on the merits, and (d) this Court is not required to enforce the Forum Selection Clause for the reasons stated above. Even if the Declaratory Judgment Claims were sought in anticipation of the Administrative Expense Claim or any other suit by OPPD does not mean this Court to decline to hear these Claims when the facts and circumstances described above and below justify otherwise. *See Sherwin-Williams Co.*, 343 F.3d at 397. ("The mere fact that a declaratory judgment action is brought in anticipation of other suits does not require dismissal of the declaratory judgment action by the federal court."); *Atl. Cas. Ins. Co. v. Ramirez*, 651 F. Supp. 2d 669, 685 (N.D. Tex. 2009) (quoting *Sherwin-Williams Co.*, 343 F.3d at 397)("A proper purpose of section 2201(a) is to allow potential defendants to resolve a dispute without waiting to be sued or until the statute of limitations expires.").

54. The remaining *Trejo* factors (which OPPD did not analyze in its Motion to Dismiss) also weigh in favor this Court deciding the Declaratory Judgment Claims:

- declaratory relief will serve a useful purpose in clarifying and settling the legal relations at issue because the declarations requested all relate to and will resolve the Administrative Expense Claim, as demonstrated by the Motion for Partial Summary Judgment that is set to be heard on June 2, 2025, and could dispense with such Claim altogether;
- declaratory relief will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding, considering that OPPD has been unwilling to engage in any settlement, mediation, or other alternative process to resolve the issues under the Second Amended EPC, despite Zachry's attempts to reach a resolution for months;
- there is no proceeding related to the issues raised in the Amended Complaint pending in the Nebraska courts, so there is no risk of overlapping issues of fact or law or parallel proceedings; and
- this Adversary Proceeding has been pending since February 5, 2025.

55. This Court has subject-matter jurisdiction over the Declaratory Judgment Claims and should exercise its discretion to adjudicate these Claims.

Conclusion

56. The Reorganized Debtors request that the Court deny the Motion to Dismiss.

Dated: May 16, 2025
Houston, Texas

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Certificate of Service

I certify that on May 16, 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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