Docket #0046 Date Filed: 5/19/2025

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 RESPONSE TO THE REORGANIZED DEBTORS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE LIQUIDATED DAMAGES

[Related Docket Nos. 35, 37]

[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.

24903772505200000000000002

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. FACTUAL BACKGROUND 5

A. The Omaha Public Power District and the Original Contract with Zachry. 5

B. Zachry reaffirms the reasonableness of the Liquidated Damages Clause in the First Amendment. 7

C. Zachry's assumption and the Second Amendment of the Contract. 7

D. Zachry breaches the Contract. 12

III. LEGAL STANDARD 13

IV. ARGUMENT AND AUTHORITIES 14

A. Zachry has forfeited the right to challenge the enforceability of the Liquidated Damages Clause. 14

i. The Contract must be enforced as written. 14

ii. Zachry waived its right to challenge the Liquidated Damages Clause. 17

iii. Zachry is estopped from challenging the Liquidated Damages Clause via its assumption and compromise in the Chapter 11 Cases. 19

B. Whether the Liquidated Damages Clause is reasonable requires resolution of material fact questions that preclude summary judgment. 24

i. Zachry bears the burden of invalidating the Liquidated Damages Clause. 24

ii. The damages arising from Zachry's breach of the Contract were—and still are—difficult to ascertain and measure. 25

iii. Zachry fails to meet its burden of proving that the Liquidated Damages Clause does not provide for reasonably estimated and proportionate damages. 32

C. Summary judgment should not be granted as discovery has not opened, dispositive motions remain pending, OPPD has not answered, and the actual damages continue to accrue. 42

D. Summary judgment should be denied with prejudice—Zachry should not have a second chance to relitigate the issue raised in its Motion. 43

V. CONCLUSION 44

TABLE OF AUTHORITIES

Cases ***Page(s)***

Abel Constr. Co. v. Sch. Dist. of Seward,
195 N.W.2d 744 (Neb. 1972) 26, 27, 37

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)..... 13, 42

Aramark Unif. Servs. v. Meylan Enters., Inc.,
No. A-05-771, 2007 WL 1532329 (Neb. Ct. App. May 29, 2007) ..... *passim*

Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.,
747 N.W.2d 383 (Neb. 2008) 14, 16, 18, 25

Brandon v. Interfirst Corp.,
858 F.2d 266 (5th Cir. 1988) 19

Browning Ferris Industriesof Nebraska, Inc. v. Eating Establishment-90th & Fort, Inc.,
575 N.W.2d 885 (Neb. 1998) 28

Burns v. Nielsen,
732 N.W.2d 640 (Neb. 2007) 19, 22

Calhoun v. O'Neill Veterinary Clinic, P.C.,
No. 20441, 1999 WL 33548934 (Neb. Dist. Ct. June 10, 1999) 30

Christiansen v. Cnty. Of Douglas,
849 N.W.2d 493 (Neb. 2014) 19, 22

City Bank & Tr. Co. v. VanAndel,
368 N.W.2d 789 (Neb. 1985) 17, 18, 19, 23

Cnty. of Sarpy v. City of Gretna,
960 N.W.2d 272 (Neb. 2021) 39

Data General Corp. v. Johnson,
78 F.3d 1556 (Fed. Cir. 1996) 19

Eagle Partners, L.L.C. v. Rook,
921 N.W.2d 98 (Neb. 2018) 17

Farmington Woods Homeowners Ass'n, Inc. v. Wolf,
817 N.W.2d 758 (Neb. 2012) 17, 19

First National Bank of Arizona v. Cities Service Co.,
391 U.S. 253 (1968) 13

Funk v. Lincoln-Lancaster Cnty. Crime Stoppers, Inc.,
885 N.W.2d 1 (Neb. 2016) 13

Guanaca v. State of Tex.,
65 F.3d 467 (5th Cir. 1995) 13

Henderson v. Wal-Mart Stores, Inc.,
No. 1:14-CV-224, 2015 WL 3901755 (E.D. Tex. June 23, 2015) 43

In re Air Safety Int'l, L.C.,
336 B.R. 843 (S.D. Fla. 2005) 23

In re Coastal Plains, Inc.,
179 F.3d 197 (5th Cir. 1999) 19, 22, 23

In re Crescent Trading LLC,
654 B.R. 246 (Bankr. S.D. Tex. 2023) 43

In re Endeavour Highrise, L.P.,
432 B.R. 583 (Bankr. S.D. Tex. 2010) 24

In re MPF Holding U.S. LLS,
No. 08–36084, 2013 WL 3197658 (Bankr. S.D. Tex. 2013) 20

In re Nat'l Gypsum Co.,
208 F.3d 498 (5th Cir. 2000) 20, 21

In re Papio Keno Club, Inc.,
247 B.R. 453 (B.A.P. 8th Cir. 2000) 28

Kozlik v. Emelco, Inc.,
483 N.W.2d 114 (Neb. 1992) 25, 32

Kunin v. Feofanov,
69 F.3d 59 (5th Cir. 1995) 13

Lexington Ins. Co. v. Entrex Comm. Servs.,
749 N.W.2d 124 (Neb. 2008) 15, 16

Linscott v. Shasteen,
847 N.W.2d 283 (Neb. 2014) 13

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

Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC,
No. 8:19CV550, 2023 WL 5607563 (D. Neb. Aug. 30, 2023) 13, 24

Matter of Provider Meds, LLC,
907 F.3d 845 (5th Cir. 2018) 20

Matter of Thornhill Brothers Fitness, L.L.C.,
85 F.4th 321 (5th Cir. 2023) 20, 21

Murphy v. City of Lincoln,
515 N.W.2d 413 (Neb. 1994) 16

Parsons Const. Co. v. Metro. Utilities Dist. of Omaha,
104 N.W.2d 272 (Neb. 1960) 16, 25, 31

Priebe & Sons v. United States,
332 U.S. 407 (1947) 24

Reichert v. Rubloff Hammond, L.L.C.,
645 N.W.2d 519 (Neb. 2002) 14, 16, 18, 32

Richmond Leasing Co. v. Capital Bank, N.A.,
762 F.2d 1303 (5th Cir. 1985) 23

Rivera v. PNS Stores, Inc.,
647 F.3d 188 (5th Cir. 2011) 43

Sanitary & Improvement Dist. No. 196 of Douglas Cnty. v. City of Valley,
858 N.W.2d 553 (Neb. 2015) 39

Shriner v. Friedman L. Offs., P.C., L.L.O.,
877 N.W.2d 272 (Neb. Ct. App. 2016) 39

Stuart Inv. Co. v. Westinghouse Elec. Corp.,
11 F.R.D. 277 (D. Neb. 1951) 42

Sun Printing & Publishing Ass'n v. Moore,
183 U.S. 642 (1902) 35

U.S. Pipeline, Inc. v. N. Nat. Gas Co.,
930 N.W.2d 460 (Neb. 2019) 14, 17, 18, 24

Watkins v. Monroe,
No. 6:18CV347, 2019 WL 1869864 (E.D. Tex. Mar. 27, 2019) 42

Williams v. Williams,
294 N.W.2d 357 (Neb. 1980) 19, 23

Yant Const. Co. v. Vill. of Campbell,
243 N.W. 77 (Neb. 1932) 14

Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge,LLC (Lund-Ross), No. 8:19CV550,
2021 WL 6202667 (D. Neb. Nov. 3, 2021) 14

Young v. Govier & Milone,
835 N.W.2d 684 (Neb. 2013) 39

Statutes

11 U.S.C. § 365(b) 22

Rules

FED. R. CIV. P. 56 ..... 13, 42

INDEX OF EXHIBITS[2]

Exhibit A: Declaration of Matthew R. Eibes In Support of Defendant Omaha Public Power District's Opposition to Zachry's Motion for Partial Summary Judgment Re Liquidated Damages (the "**Eibes Declaration**"), including all Exhibits attached thereto:

Ex. A-1: *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 (hereinafter the "**Original Contract**");[3]

Ex. A-2: *Amendment No. 1 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) (hereinafter the "**First Amendment**");

Ex. A-3: *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) (hereinafter the "**Second Amendment**" and together with the First Amendment and Original Contract, the "**Contract**");

Ex. A-4: Letter from OPPD to Zachry dated May 30, 2024, re: Adequate Assurance of Performance;

Ex. A-5: Letter from Zachry to OPPD dated June 6, 2024, re: OPPD's Adequate Assurance Letter; and

Ex. A-6: Letter from Zachry to OPPD dated June 6, 2024, re: Proposed Draft Second Amendment.

Exhibit B: Expert Report of Kimberly Reome dated May 19, 2025 (the "**Reome Expert Report**").

Exhibit C: Declaration of Joseph Lang In Support of Defendant Omaha Public Power District's Opposition to Zachry's Motion for Partial Summary Judgment Re Liquidated Damages (the "**Lang Declaration**").

[2] The Exhibits are fully incorporated herein by reference and are being filed under seal.

[3] Because the Original Contract is voluminous, OPPD is not including the exhibits, addendums, and change orders to the Contract, except to the extent those exhibits are specifically referenced herein. A true and correct copy of the Original Contract's exhibits, addendums and schedules will be made available upon request.

Omaha Public Power District ("**OPPD**"), by and through its undersigned counsel, hereby files *Defendant Omaha Public Power District's Response* (the "**Response**") to *The Reorganized Debtors' Motion for Partial Summary Judgment Re Liquidated Damages* [Docket Nos. 35, 37] (the "**Motion**").[4] In support of the Response, OPPD respectfully submits as follows:

I. PRELIMINARY STATEMENT

Zachry Industrial, Inc. ("**Zachry**") breached the parties' Contract by failing to deliver two power plants to OPPD by the respective Guaranteed Substantial Completion Dates.[5] From the outset, Zachry agreed that if it failed to meet its ***guaranteed*** completion deadlines, it would be liable for daily liquidated damages up to a certain damages cap.[6] The parties—both highly sophisticated in power construction projects—amended the Contract twice,[7] and each time, including after filing for Chapter 11 protection, Zachry reaffirmed both its obligation to timely deliver the power plants and the reasonableness of the liquidated damages clause. Zachry asked the Court to allow it to assume the Contract with OPPD and negotiated significant concessions from OPPD in the process, including: an immediate $20 million payment, revised guaranteed completion deadlines to avoid impending Zachry breaches, and the opportunity to earn millions in incentive payments for early delivery. Despite these material benefits, Zachry failed to deliver the Projects on time and, as of this filing, has not completed the Projects.

Zachry now asks this Court to strike the very clause it stipulated to be a reasonable measure of damages. In doing so, Zachry requests that this case proceed in reverse. Specifically, Zachry asks the Court to determine the extent of its liability before the Court has determined whether it is

[4] The Motion filed at Docket No. 37 is indicated as a corrective filing of Docket No. 35.

[5] As defined in the Second Amendment to the Contract.

[6] *See generally* Ex. A-1 (Contract).

[7] *See generally* Ex. A-2 (First Amendment); Ex. A-3 (Second Amendment).

the proper forum for this dispute, before OPPD has answered the complaint, before the full scope of Zachry's harm is known, before OPPD has filed any counterclaim to recover for that harm, and before the parties have conducted any formal discovery on their respective claims and defenses. Zachry's request for relief is not only premature, but also procedurally improper and is a transparent attempt to circumvent its clear, unambiguous contractual obligations—obligations it knowingly reaffirmed in exchange for substantial financial benefit. Accordingly, Zachry's Motion fails for three reasons.

First, Zachry is barred from challenging the Liquidated Damages Clause. The parties—both of whom are sophisticated and represented by counsel—initially stipulated that the Liquidated Damages Clause in the Original Contract was "reasonable and appropriate measures of the damages," and that actual damages "would be difficult to determine."[8] The parties reaffirmed the Liquidated Damages Clause in two subsequent amendments, expressly stipulating on both occasions that the damages were a "predetermined reasonable" measure of damages.[9] During the bankruptcy, Zachry did not reject the Contract containing the Liquidated Damages Clause. Instead, Zachry negotiated and secured multiple amendments to the Contract, obtaining meaningful concessions from OPPD in exchange for a revised Liquidated Damages Clause.[10]

At that time, Zachry affirmatively represented that assuming the Contract—including the very clause it now challenges—was in the best interest of the estate and a fair and equitable compromise.[11] Eight months later—after reaping the benefits of the deal but failing to meet its end

[8] *See* Ex. A-1 (Contract), at art. XI(a).

[9] *See* Ex. A-2 (First Amendment), at § 5(1); Ex. A-3 (Second Amendment), at § 7(1) (same).

[10] As noted in the Eibes Declaration, numerous conversations between Zachry and OPPD took place regarding the Contract's assumption and amendment. *See* Ex. A (Eibes Declaration), at ¶¶ 9–24.

[11] *See generally* Docket No. 809 (Case No. 24-90377-MI) (requesting authority to assume Second Amendment, including revised Liquidated Damages Clause).

of the bargain—Zachry seeks to disavow terms it knowingly and strategically accepted.[12] Zachry's consistent pattern of conduct constitutes a waiver and estops Zachry from now disputing the clause's reasonableness. Zachry's decisive and unequivocal actions demonstrates the hypocrisy of its position and precludes Zachry from establishing—as a matter of law—that the Liquidated Damages Clause is now somehow unreasonable.

Second, this Court cannot simply ignore the plain language of the parties' express stipulation to the reasonableness of the Liquidated Damages Clause. If it wishes to look beyond the plain language of the Contract to determine reasonableness, such analysis involves substantial disputed factual issues requiring full examination after fulsome discovery. A single, retrospective calculation of so-called "actual damages" from a hired expert, Tanya Bodell, is insufficient for summary judgment. Worse, Ms. Bodell's analysis encompasses a flawed approach that was outdated the day she submitted her report. Nebraska courts evaluate the reasonableness of a liquidated damages clause based on the circumstances at contract formation, not based on post-hoc damage estimates. In contrast, OPPD's expert report establishes that Zachry's delays caused damages that exceed the liquidated damages cap and will continue to accrue until the projects are completed.[13]

Summary judgment is further precluded by unresolved fact questions, including (i) whether damages were difficult to ascertain with reasonable certainty at the time of Contract formation, (ii) whether the clause reflected a reasonable forecast of anticipated harm at Contract formation, and (iii) whether it is reasonably proportionate to the actual damages incurred. Zachry's expert fails to analyze the circumstances surrounding the Second Amendment, when both parties clearly

[12] *See* Ex. A-1 (Contract), at art. XI(a); Ex. A-2 (First Amendment), at § 5(1)(i)–(ii); Ex. A-3 (Second Amendment), at § 7(1)(i)–(ii).

[13] *See* Ex. B (Reome Expert Report), at § 1.2.1(d).

considered more than just economic damages in setting the amount. More critically, the Projects remain incomplete and damages are still accruing. As a result, the Bodell Report is outdated and cannot serve as a valid benchmark for assessing proportionality. The full extent of OPPD's harm remains unknown, making summary judgment premature. Thus, there are material unresolved fact issues that preclude summary judgment in Zachry's favor.

Third, in the alternative, if the Court determines that the Liquidated Damages Clause is an unenforceable penalty under Nebraska law, then the Second Amendment is void for lack of consideration. As a result, all benefits Zachry received under that amendment must be unwound—including repayment of the approximately $20 million it received—and the breach date must revert to the Guaranteed Completion Deadlines provided in the First Amendment. Under both contract law and basic fairness, Zachry cannot reject the burdens of the Second Amendment while retaining its benefits.

Finally, granting summary judgment would constitute a serious procedural error that prejudices OPPD's fundamental rights. The Court did not open this case for discovery because of OPPD's pending motions.[14] OPPD has not filed an answer, no formal discovery has occurred, the Projects remain on-going at this time, and the true extent of OPPD's actual damages remain abstract and hypothetical, which would be an improper, premature ruling on the Liquidated Damages Clause's enforceability under Nebraska law. Zachry is attempting to circumvent established litigation procedures to force a premature resolution without a developed factual record, which, in the end, undermines judicial economy and deprives OPPD of its right to fully present its case.

[14] *See* Docket Nos. 12, 13, 34.

Accordingly, OPPD requests that this Court deny Zachry's Motion in its entirety, with prejudice.

II. FACTUAL BACKGROUND

A. The Omaha Public Power District and the Original Contract with Zachry.

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.[15] OPPD serves approximately 1 million people in Omaha and 13 surrounding counties in southeastern Nebraska.[16]

Prior to the Petition Date (defined below), OPPD and Zachry entered into the Original Contract.[17] Under the terms of the Original Contract, Zachry contracted with OPPD to provide construction 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**").[18] SBLS and TCS are both located in the Omaha metropolitan area.

The Projects are substantial in both size and complexity, representing large-scale, multifaceted undertakings that demand significant resources, expertise, and money to construct.[19] Zachry has noted that it has "utilized more than 1,000 subcontractors, vendors, and suppliers" throughout the construction of the Projects and that these Projects are "one of the Debtors' largest

[15] *See* Ex. A (Eibes Declaration), at ¶ 2.

[16] *See id.*

[17] *See* Ex. A-1 (Contract).

[18] *See* Ex. A (Eibes Declaration), at ¶ 6.

[19] *See, e.g.*, Docket No. 809 (Case No. 24-90377-MI), at ¶¶ 8, 23.

ongoing projects."[20] With a current price tag of approximately $428.7 million,[21] these Projects not only serve the purpose of meeting increasing energy demands in Nebraska but are also a significant upgrade to OPPD's existing infrastructure and, upon completion, will permit OPPD to retire other units within its system.[22]

Considering their importance to the Omaha, Nebraska region, the parties agreed that the Projects must be delivered by a guaranteed date.[23] Given the Projects' magnitude and complexity, both parties further recognized and agreed that if Zachry failed to deliver the Projects by the specified deadlines, actual damages would be difficult, if not impossible, to calculate with reasonable certainty.[24] As such, the parties included in the Original Contract a provision for liquidated damages (the "**Liquidated Damages Clause**") and expressly stipulated that:

> [Zachry] and [OPPD] acknowledge that ***actual damages incurred*** by [OPPD] as a result of [Zachry's] failure to meet the Guaranteed Substantial Completion Dates 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, ***and are not a penalty***.[25]

[20] *Id.*

[21] *See* Mot. for Summ. J., at 9; Ex. A (Eibes Declaration), at ¶ 9(a).

[22] Ex. A (Eibes Declaration), at ¶ 6 ("Once construction is complete and the Projects come online, OPPD will submit to retire other units currently operating within its system.").

[23] *See id.* (noting that the Projects are "intended to meet increasing energy demand in Omaha and the surrounding areas").

[24] *See* Ex. A-1 (Contract), at art. XI(a).

[25] *See id.* (emphasis added). As described below, this clause has been slightly amended twice. Still, certain portions of the clause have not been altered, and Article XI(a), which was in the Original Contract, has remained intact throughout all amendments. Zachry's prior pleadings have suggested that the absence of this language in the Second Amendment has some significance. However, this is factually incorrect. Although the Second Amendment amended certain portions of the Liquidated Damages Clause in the Original Contract, it did not amend Article XI(a). Instead, the Second Amendment states that "[e]xcept as provided in Amendment No. 1 and this Amendment No. 2, all other terms and conditions of the EPC Contract shall remain the same and in full force and effect." *See* Ex. A-3 (Second Amendment), at § 12. The First Amendment to the Original Contract likewise did not alter Article XI(a). *See* Ex. A-2 (First Amendment), at § 8.

B. Zachry reaffirms the reasonableness of the Liquidated Damages Clause in the First Amendment.

The Original Contract was first amended on November 9, 2023 as a result of Zachry's failure to meet the deadlines under the Original Contract.[26] In the First Amendment, the parties further negotiated the Liquidated Damages Clause at arm's length, ultimately increasing the daily damages from the Original Contract and once more expressly stipulating that the stated damages were "***a predetermined reasonable***" remedy for any such delay.[27] Zachry did not contend that the Liquidated Damages Clause was unreasonable or otherwise refuse to enter the First Amendment because it contained such a clause.

C. Zachry's assumption and the Second Amendment of the Contract.

On May 21, 2024 (the "**Petition Date**"), Zachry filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "**Bankruptcy**").[28] As part of its Bankruptcy, Zachry had to determine what contracts it would assume and what contracts it would reject.

In late-Spring of 2024, it became increasingly apparent that Zachry would complete the Projects by the First Amendment's deadlines.[29] Concerned that Zachry's Bankruptcy would result in additional delays to the Projects, OPPD sent Zachry a letter requesting adequate assurance of performance at the end of May 2024.[30] In response, Zachry sent a letter to OPPD, stating that it "is under no obligation to make [a] decision to assume or reject the EPC Contract until

[26] *See* Ex. A (Eibes Declaration), at ¶ 9.

[27] *See* Ex. A-2 (First Amendment) at § 5(1)(i)–(ii) (emphasis added); Ex. A (Eibes Declaration), at ¶ 9 (noting that the increase in liquidated damages were a result of Zachry's delays and "increased costs that OPPD continued to incur while the Projects were being completed").

[28] The Debtors' Plan was confirmed on February 26, 2025 and went effective on April 10, 2025. *See* Docket Nos. 2431, 2731 (Case No. 24-90377-MI).

[29] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 9 (noting that the Projects' Guaranteed Substantial Completion Dates under the First Amendment became untenable as a result of certain set backs).

[30] *See* Ex. A-4 (Adequate Assurance Letter).

confirmation" of its plan, but noted it was open to assuming the Contract so long as OPPD provided financial concessions.[31] Critically, Zachry attempted to leverage the bankruptcy proceeding to coerce OPPD into eliminating the Liquidated Damages Clause, but OPPD rejected Zachry's demands.[32]

On June 20, 2024, Zachry sent OPPD the first draft of the highly negotiated second amendment, which included the Liquidated Damages Clause.[33] Notably, Zachry's initial draft retained the Liquidated Damages Clause.[34] Thereafter, the parties met on several occasions, both virtually and in person, to discuss amending and assuming the Contract.[35] Through these discussions, the parties acknowledged that without a modification to the Contract, Zachry's inability to meet the deadlines under the First Amended Contract would trigger a post-petition default of the Contract and the Liquidated Damages Clause, resulting in daily accruing liquidated damages for Zachry's delays while its Bankruptcy remained pending.[36] Zachry therefore recognized it needed to once again extend the existing Guaranteed Substantial Completion Dates.[37] OPPD agreed to defer the liquidated damages that would soon begin accruing under the First Amended Contract as negotiations regarding the Second Amendment and the amended Liquidated Damages Clause continued.[38]

---

[31] Ex. A-5 (Zachry's Response to Adequate Assurance), at ¶ 2.

[32] *Id.*

[33] *See* Ex. A-6 (Draft Second Amendment), at § 5.

[34] *Compare id.* (setting liquidated damages at $125,000 per day, increasing to $250,000 after thirty days for SBLS, and $50,000 per day, increasing to $100,000 after thirty days for TCS), *with*, Ex. A-1 (Contract), at art. XI(c)(1)(i)–(ii) (same).

[35] *See* Ex. A (Eibes Declaration), at ¶¶ 11–22.

[36] *See id.* at ¶ 19; Docket No. 809 (Case No. 24-90377-MI), at ¶ 8 (noting that "certain milestones for completing the [P]roject[s] have not been achieved, leading to a dispute between the Parties regarding potential liquidated damages").

[37] Ex. A (Eibes Declaration), at ¶ 14.

[38] *Id.* at ¶ 24.

On numerous occasions, the parties discussed the amendment to the Liquidated Damages Clause, including the appropriate value of stipulated damages.[39] Throughout these conversations, the parties discussed various issues such as extending the Project deadlines, the immediate release of certain funds to Zachry to support their efforts, among others.[40] Notably, the parties also discussed in detail OPPD's concerns that its damages were accumulating daily as a result of the continued delays and that other factors, such as "lost revenue," "purchased capacity losses," and other delay-driven costs, necessitated the need for increased daily liquidated damage amounts.[41]

After months of negotiations,[42] Zachry and OPPD entered the Second Amendment on August 13, 2024.[43] Through the Second Amendment, OPPD provided Zachry with the following concessions as part of the assumption process:

(a) Extension of the substantial completion date for SBLS from August 8, 2024 to December 30, 2024, "***thereby resetting substantial alleged liquidated damages against [Zachry] under the OPPD Contract***;"

(b) Extension of the substantial completion date for the TCS from August 30, 2024 to December 16, 2024, "***thereby resetting substantial alleged liquidated damages against [Zachry]under the OPPD Contract***;"

(c) ***Funding from OPPD of $20,424,641.83 from the retainage*** provided under the OPPD Contract (*i.e.*, amounts that Zachry would not be able to receive under the Initial Contract until completion);

(d) ***Incremental incentive payments to Zachry, up to approximately $6 million,*** if it achieved substantial completion of SBLS on or before November 29, 2024;

[39] *See id.* at ¶¶ 11, 14, 15(a), 20(c); *see also* Docket No. 809 (Case No. 24-90377-MI), at ¶ 9 (noting that Zachry "engaged OPPD in arm's length, good faith negotiations" regarding the Second Amendment).

[40] *See generally* Ex. A (Eibes Declaration), at ¶¶ 11, 14, 15(a), 20(c).

[41] *Id.* at ¶¶ 15(b), 20.

[42] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 9 (explaining that "the Debtors engaged OPPD in arm's length, good faith negotiations to works toward an amendment to the OPPD Contract that would help right-size the project so that the Debtors could continue to perform work on and finish the [P]roject[s] on an agreed-upon time frame, for the benefit of both Parties, and release certain funds for the immediate payment of OPPD Vendors" as well as "settle the alleged liquidated damages").

[43] *See generally* Ex. A-3 (Second Amendment).

(e) ***Incremental incentive payments to Zachry, up to approximately $6 million,*** if it achieved substantial completion of TCS on or before November 29, 2024;

(f) ***Increase in the milestone final completion payment for SBLS*** from $1 million to $3 million if final work is completed by March 30, 2025; and

(g) ***Increase in the milestone final completion payment for TCS*** from $1 million to $3 million if final work is completed by March 16, 2025.[44]

In exchange for these concessions, Zachry agreed to a revised Liquidated Damages Clause that provided for increased daily damages should Zachry not complete the Projects by the respective deadlines.[45] More specifically, the parties agreed that "[i]f [Zachry] fails to complete the Work on or before the Guaranteed Substantial Completion Date . . . , ***as a predetermined reasonable and sole and exclusive remedy*** for such delay, [Zachry] shall be subject to liquidated damages as follows:

(i) For each calendar day beyond the Guaranteed Substantial Completion Date for SBLS that the Work is not completed***, $350,000 per calendar day through January 29, 2025, and $500,000 per calendar day until the Work is accepted as complete***. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 28, 2025, then on March 1, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to SBLS.

(ii) For each calendar day beyond the Guaranteed Substantial Completion Date for TCS that the Work is not completed, ***$250,000 per calendar day, through January 15, 2025, and $400,000 per calendar day until the Work is accepted as complete***. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 14, 2025, then on February 15, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to TCS.[46]

On August 24, 2024, Zachry filed its Assumption Motion seeking Court approval of the 9019 compromise and authorization to assume the Second Amended Contract, including the

[44] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 10 (emphasis added).

[45] *See* Ex. A-3 (Second Amendment), at § 7(1)(i)–(ii).

[46] *See id.* (emphasis added).

revised Liquidated Damages Clause.[47] In the Assumption Motion, Zachry represented to the Court that the parties engaged "in arm's length, good faith negotiations,"[48] the settlement was "fair, reasonable, and appropriate,"[49] and that assumption of the Second Amended Contract was beneficial to the estate.[50]

On September 17, 2024, the Court entered its Assumption Order,[51] whereby the Debtors assumed the Second Amended Contract, and the settlement terms were approved by the Court.[52] Through the Second Amendment, OPPD ultimately provided an abundance of voluntary aid to Zachry as it attempted to work through its financial distress, including: (i) providing Zachry with additional time to reach final completion of the Projects, (ii) immediately paying $20,424,641.83 of retainage for Zachry to pay its subcontractors; (iii) providing $12,000,000 in increased incentive payments to Zachry for early completion; (iv) increasing final milestone payments approximately $4,000,000, and (v) giving Zachry more favorable payment terms.[53] In return, OPPD did not receive any cure amount or other concessions from Zachry—the only consideration OPPD received was an amended Liquidated Damages Clause and Zachry's assurance of future performance and representation that "it has the necessary work force and resources to complete

[47] *The Debtors' Motion for Entry of an 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* [Docket No. 809 (Case No. 24-90377-MI)] (the "**Assumption Motion**").

[48] *Id.* at ¶ 9.

[49] *Id.* at ¶ 19.

[50] *See id.* at ¶¶ 21, 23, 26. Zachry also represented that the revised Guaranteed Substantial Completion Dates were "achievable based on the current state of progress on the OPPD Project" and that assumption would "positively impact[] the Debtors' cashflow and reduc[e] claims against their estates." *Id.* at ¶¶ 17, 23.

[51] *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* [Docket No. 961] (the "**Assumption Order**").

[52] *See* Docket No. 961 (Case No. 24-90377-MI), at ¶¶ 1, 3.

[53] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 10.

the Work, including the Guaranteed Substantial Completion Dates."[54]

D. Zachry breaches the Contract.

Following the Assumption Order, Zachry breached the Contract by failing to achieve the Guaranteed Substantial Completion Dates of (i) December 16, 2024, for the TCS; and (ii) December 30, 2024, for the SBLS.[55] As a result, OPPD's liquidated damages began accruing daily.[56] However, because the Liquidated Damages Clause also provides that the "[t]otal liquidated damages in the aggregate for both sites shall not exceed Fifteen percent (15%) of the Contract Price" (the "**Damages Cap**"), the liquidated damages are no longer accruing daily.[57] With a current Contract price of approximately $428.7 million, the total liquidated damages recoverable by OPPD as a result of the Damages Cap are limited to approximately $64.3 million.[58]

Despite Zachry's repeated assurances to the contrary,[59] the Projects are still not complete.[60] Given Zachry's prior delays and the uncertainty as to when the Projects will be completed, the total actual damages that OPPD has and will continue to incur remain uncertain until the Projects are completed and the full extent of OPPD's actual harm is known.[61]

---

[54] *See* Docket No. 961 (Case No. 24-90377-MI), at ¶¶ 4–5; Ex. A-3 (Second Amendment), at § 3(i).

[55] *See* Ex. A (Eibes Declaration), at ¶ 26 (noting that the Projects have not reached substantial completion). OPPD believes there are additional breaches by Zachry under the Contract aside from the breaches of the Guaranteed Substantial Completion Dates. Accordingly, OPPD reserves the right to assert any such additional breaches at a later date and nothing herein shall constitute a waiver of such right.

[56] *See* Ex. B (Reome Expert Report), at § 1.2.1(d) (noting that the Projects are ongoing and "OPPD's damages are expected to continue through at least December 2025").

[57] *See* Ex. A-1 (Contract), at art. XI(a) (limiting liquidated damages at 15% of total Contract price).

[58] *See* Mot. for Summ. J., at p. 9; Ex. B (Reome Expert Report), at § 5.1.7.

[59] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 17 ("The Debtors believe that the extended Target Dates contemplated in the [Second] Amendment are achievable based on the current state of progress of the OPPD Project."); Docket No. 7 (Case No. 24-90377-MI), at ¶ 37 ("Major construction on the OPPD Project began in the first quarter of 2022 and is scheduled to be completed in the third quarter of 2024.").

[60] Ex. A (Eibes Declaration), at ¶ 26.

[61] *See id.*; Ex. B (Reome Expert Report), at § 6.1.1.

III. LEGAL STANDARD

"Summary judgment is proper under Rule 56 of the Federal Rules of Civil Procedure when all the evidence viewed in the light most favorable to the non-movant shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Guanaca v. State of Tex.*, 65 F.3d 467, 469 (5th Cir. 1995) (quoting FED. R. CIV. P. 56(c)). Moreover, "a court has discretion to deny a motion for summary judgment if it believes that 'a better course would be to proceed to a full trial.'" *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986)).

A dispute of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To establish a genuine dispute as to a material fact, "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 249 (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288–89 (1968)). Indeed, "the *judge's function is not himself to weigh the evidence* and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* (emphasis added).

A challenge that a liquidated damages provision is an unenforceable penalty is a quintessential affirmative defense. *Linscott v. Shasteen*, 847 N.W.2d 283, 292 (Neb. 2014) ("Matters which seek to avoid a valid contract are affirmative defenses."); *Funk v. Lincoln-Lancaster Cnty. Crime Stoppers, Inc.*, 885 N.W.2d 1, 11 (Neb. 2016) ("The burden of both pleading and proving affirmative defenses is upon the defendants . . . ."). The party challenging the enforceability of a liquidated damages clause carries the burden to "adduce sufficient evidence to show the type of inherent unreasonableness or obvious overcompensation the Nebraska Supreme Court has said evinces a penalty." *Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC*, No.

8:19CV550, 2023 WL 5607563, at *6 (D. Neb. Aug. 30, 2023).[62]

IV. ARGUMENT AND AUTHORITIES

A. Zachry has forfeited the right to challenge the enforceability of the Liquidated Damages Clause.

Summary judgment should be denied because Zachry has stipulated that the Liquidated Damages Clause is reasonable and has waived and/or is otherwise estopped from raising any objection it may have had to the enforceability of the Liquidated Damages Clause.

i. The Contract must be enforced as written.

Whether a liquidated damages clause is reasonable is "dependent on the construction of the contract by the court." *Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 747 N.W.2d 383, 387 (Neb. 2008). "'Nebraska courts have consistently upheld the right of contracting parties to privately bargain for' both the type and 'the amount of damages to be paid in the event of a breach of contract,' as long as their agreement is reasonable under the circumstances." *Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC (Lund-Ross)*, No. 8:19CV550, 2021 WL 6202667, at *4 (D. Neb. Nov. 3, 2021) (quoting *U.S. Pipeline, Inc. v. N. Nat. Gas Co.*, 930 N.W.2d 460, 475 (Neb. 2019)). "Indeed, when 'the parties are experienced in business, the damages are economic, and the parties had fair opportunity to consider the agreement,' Nebraska courts 'have been reluctant to' let them off the hook.'" *Id.* at *5 (quoting *Reichert v. Rubloff Hammond, L.L.C.*, 645 N.W.2d 519, 527 (Neb. 2002); *Berens & Tate*, 747 N.W.2d at 389). "In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum, in case of default by one of the parties, is to be considered as a penalty or liquidated damages, the court will consider the subject–matter, the language employed, and the intention of the parties." *Yant Const. Co. v.*

[62] Nebraska law governs the interpretation of the Contract and Zachry does not dispute this. *See* Ex. A-1 (Contract), at art. XII ("The EPC Contract shall be governed by the laws of the State of Nebraska . . . ."); Mot. for Summ. J., at 10–11 ("The parties agree that Nebraska law applies to this dispute . . . .").

Vill. of Campbell, 243 N.W. 77, 79 (Neb. 1932). And in Nebraska, "a contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms." *Lexington Ins. Co. v. Entrex Comm. Servs.*, 749 N.W.2d 124, 132 (Neb. 2008).

Lund-Ross is instructive. There, the court held that a liquidated damages provision was not an unenforceable penalty, emphasizing the circumstances surrounding, and construction of, the contract as well as the sophistication of the parties. *Lund-Ross*, 2021 WL 6202667, at **5–7. The court noted that "[n]ot only did the challenging party ***willingly and knowingly agree to the provision*** when it signed the contract, ***it understood that the whole purpose*** of including a liquidated-damages provision was to obviate the need for the nonbreaching party to prove actual damages." *Id.* (internal quotations omitted, emphasis added). Bearing in mind the parties' agreement, the court explained that if the challenging party disagreed with the provision, it "should have addressed any such issues . . . ***before it signed the contract***." *Id.* at *7 (emphasis added).

The same critique can be applied to Zachry's conduct here. On three separate occasions, Zachry "willingly and knowingly" agreed to the Liquidated Damages Clause and "understood [its] whole purpose":

> "[A]ctual damages incurred by [OPPD] as a result of [Zachry's] failure to meet the Guaranteed Substantial Completion Dates 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, and are not a penalty."[63]

Both at the time of the Original Contract's formation as well as the First and Second

[63] Ex. A-1 (Contract), at art. XI(a) (emphasis added). The Contract also provides that it represented and "constitute[d] the entire understanding" of the parties' agreement. *See id.* at art. XV. Notably, Article XI, Section (a) of the Contract has not subsequently been amended and remains in full force and effect. *See* Ex. A-3 (Second Amendment), at § 12 (noting that "[e]xcept as provided in Amendment No. and this Amendment No. 2, all other terms and conditions of the EPC Contract shall remain the same and in full force and effect.").

Amendments,[64] the parties stipulated and agreed that (i) delay damages "*would be difficult to determine*" and (ii) that the liquidated damages as set forth therein "*are reasonable and appropriate measures of the damages*."[65] Thus, as reflected by the plain language of the Liquidated Damages Clause, the parties' intent regarding the enforcement of the provision is unmistakably clear—both agreed at the time of formation that the liquidated damages were a reasonable forecast of the anticipated harm.

The time for Zachry to raise issues concerning the Liquidated Damages Clause was "before it signed the contract." *See Lund-Ross*, 2021 WL 6202667, at *7. Although Zachry "may in retrospect be dissatisfied with this bargained-for provision," courts "will not rewrite a contract to provide terms contrary to those which are expressed." *Reichert v. Rubloff Hammond, L.L.C.*, 645 N.W.2d 519, 527 (Neb. 2002); *see also Parsons Const. Co. v. Metro. Utilities Dist. of Omaha*, 104 N.W.2d 272, 276 (Neb. 1960) (upholding liquidated damages clause and noting that "courts cannot alter [the terms a contract] because they work a hardship. The rights of the parties must be measured by the contract which they themselves made."). "Nor is it the province of a court to rewrite a contract to reflect the court's view of a fair bargain." *Berens & Tate, P.C.*, 747 N.W.2d at 389. Instead, Nebraska courts enforce "a strong presumption that a written instrument correctly expresses the intention of the parties to it." *Murphy v. City of Lincoln*, 515 N.W.2d 413, 416 (Neb. 1994). Having stipulated to the reasonableness of the liquidated damages at least in three separate instances, Zachry cannot now retract, repudiate, or escape the consequences of its breach or bargain. *See, e.g.*, *Lexington Ins. Co.*, 749 N.W.2d at 132 ("[A] contract written in clear and

[64] Like the Second Amendment, the First Amendment also embodies the parties' express stipulation that the liquidated damages were a "***predetermined reasonable***" calculation of delay damages. *See* Ex. A-2 (First Amendment), at § 5(1)(i)–(ii) (emphasis added); Ex. A-3 (Second Amendment), at § 7(1)(i)–(ii).

[65] *See* Ex. A-1 (Contract), at art. XI(a) (emphasis added).

unambiguous language is not subject to interpretation or construction and must be enforced according to its terms."); *Lund-Ross*, 2021 WL 6202667, at *5.

Accordingly, the Liquidated Damages Clause is enforceable because it meets the two foundational requirements required under Nebraska law: (1) acknowledgment that the actual damages were difficult to estimate at the time of contracting, and (2) an agreement that the amount specified was a reasonable forecast of anticipated harm. *See Lund-Ross*, 2021 WL 6202667, at *4. This Court cannot Zachry to escape its own stipulation as to the reasonableness of the Liquidated Damages Clause and disregard the parties' express contractual intent.

ii. Zachry waived its right to challenge the Liquidated Damages Clause.

Summary judgment should be denied because Zachry waived its challenge to the enforceability of the Liquidated Damages Clause. *See, e.g.*, *City Bank & Tr. Co. v. VanAndel*, 368 N.W.2d 789, 794 (Neb. 1985); *see also Farmington Woods Homeowners Ass'n, Inc. v. Wolf*, 817 N.W.2d 758, 766 (Neb. 2012). "Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right." *U.S. Pipeline, Inc. v. N. Nat. Gas Co.*, 930 N.W.2d 460, 480 (Neb. 2019). "A party may prove waiver by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive." *Eagle Partners, L.L.C. v. Rook*, 921 N.W.2d 98, 108 (Neb. 2018). Notably, whether a waiver has occurred "is a factual determination." *U.S. Pipeline, Inc.*, 930 N.W.2d at 480.

Here, Zachry is a sophisticated, global enterprise with ample resources and experience, fully capable of raising objections to the Liquidated Damages Clause (a) at the time of the Original Contract formation, (b) when the First and Second Amendments were negotiated, and (c) when the

Contract was assumed.[66] Zachry heavily negotiated the Liquidated Damages Clause on three separate occasions[67] and ultimately reaffirmed its acceptance of the liquidated damages as part of a negotiated and reasonable commercial exchange.[68] Now, facing the consequences of its bargain, Zachry seeks to undo the parties' intent by arguing—post-hoc—that the very provision it previously embraced is somehow unenforceable. Such revisionist tactics should not be condoned.

In the Second Amendment, Zachry eagerly accepted the influx of additional liquidity and a cure amount of $0 in exchange for increased liquidated damages and a promise to see the Projects through to timely completion.[69] Zachry had every opportunity to argue against the reasonableness of the Liquidated Damages Clause, yet took no such action and instead intentionally and unequivocally reaffirmed the Liquidated Damages Clause under the Second Amendment.[70] By accepting and later reaping the benefits of the Second Amended Contract without objection, Zachry has waived any challenge to the enforceability of the Liquidated Damages Clause. *See U.S. Pipeline, Inc.*, 930 N.W.2d at 480. At a minimum, waiver is an issue a factfinder must resolve, and for this reason alone, Zachry's Motion should be denied. *See City Bank & Tr. Co.*, 368 N.W.2d at

---

[66] *See, e.g.*, *Lund-Ross*, 2021 WL 6202667, at *5 (noting that "when 'the parties are experienced in business, the damages are economic, and the parties had fair opportunity to consider the agreement,' Nebraska courts 'have been reluctant to' let them off the hook" (quoting *Reichert*, 645 N.W.2d at 527; *Berens & Tate*, 747 N.W.2d at 389)).

[67] The Liquidated Damages Clause was first included in the original Contract. *See* Ex. A-1 (Contract), at art. XI(a). The First Amendment, like the Second Amendment, altered primarily the amount of such damages. *See* Ex. A-2 (First Amendment), at § 5(1)(i)–(ii); Ex. A-3 (Second Amendment), at § 7(1)(i)–(ii). Despite three distinct opportunities to raise these issues with OPPD, Zachry only now complains of this issue post hoc. *See, e.g.*, Ex. A (Eibes Declaration), at ¶ 24 ("Despite all of this attention being given to liquidated damages, nobody from Zachry [mentioned] that the damages were unreasonable or that Zachry perceived the liquidated damages as a penalty.").

[68] *See* Ex. A (Eibes Declaration), at ¶ 20(c) ("Zachry agreed to higher liquidated damages, and OPPD agreed to extended the period of damages accruing at the lower dollar amount from a 15-day limit to a 30-day limit. At no time during this meeting or after did anyone from Zachry state that the numbers agreed to for liquidated damages were unreasonable or a penalty.").

[69] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 10 (listing the substantial benefits Zachry derived from the Second Amendment); *id.* at ¶¶ 17, 23 (representing that the revised deadlines were "achievable"); Ex. A-3 (Second Amendment), at § 3(i) (warranting that "it has the necessary work force and resources to complete the Work, including achieving the Guaranteed Substantial Completion Dates").

[70] *See* Ex. A (Eibes Declaration), at ¶¶ 15, 20(c), 22, 24.

794; *Farmington Woods Homeowners Ass'n, Inc.*, 817 N.W.2d at 766 (denying summary judgment, stating that "we cannot conclude as a matter of law that waiver did not occur").

iii. Zachry is estopped from challenging the Liquidated Damages Clause via its assumption and compromise in the Chapter 11 Cases.

Summary judgment should be denied because the doctrines of equitable estoppel, promissory estoppel, and judicial estoppel each independently preclude summary judgment in favor of Zachry. *See, e.g.*, *City Bank & Tr. Co.*, 368 N.W.2d at 794 (denying summary judgment because evidence raised the possibility of estoppel); *Williams v. Williams*, 294 N.W.2d 357, 363 (Neb. 1980) (denying summary judgment due to "a genuine issue of fact with regard to whether the requisite elements necessary to invoke the doctrine of equitable estoppel exist[ed]").

Under Nebraska law, "[t]he doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed." *Christiansen v. Cnty. Of Douglas*, 849 N.W.2d 493, 506 (Neb. 2014). Promissory estoppel "is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance." *Burns v. Nielsen*, 732 N.W.2d 640, 649–50 (Neb. 2007). And "[j]udicial estoppel is 'a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position.'" *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)); *see also Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) ("The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have

changed."). Here, these doctrines preclude Zachry's requested relief and offer independent reasons to deny summary judgment.

Bankruptcy law imposes strict obligations when a debtor assumes an executory contract. 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)). The same principle applies to contracts that are modified and assumed. *See In re MPF Holding U.S. LLS*, No. 08–36084, 2013 WL 3197658, at *12 (Bankr. S.D. Tex. 2013) ("[M]odifications to an executory contract are permissible as long as the debtor does not merely accept the benefits of the contract and reject the burdens to the detriment of the other party."). Notably, "*it is the debtor* who decides whether to maintain [a] contract" or reject it. *In re Nat'l Gypsum Co.*, 208 F.3d 498, 505 (5th Cir. 2000) (emphasis added). Once the debtor decides to assume a contract, "the act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services." *Id.* (internal quotations omitted).

Here, Zachry voluntarily assumed the parties' Contract as modified by the Second Amendment—an amendment that openly and expressly increased the liquidated damages as a "predetermined reasonable" measure of damages.[71] This decision was not accidental or obscure: Zachry negotiated and received over $20 million in immediate liquidity, deferred performance deadlines, and additional incentive opportunities in exchange.[72] Now that it faces liability under the very clause it assumed, Zachry seeks to repudiate it and in doing so is attempting to "evade

[71] Ex. A-3 (Second Amendment), at § 7(1)(i)–(ii).

[72] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 10.

[the] requirement that it take any retained executory contracts '*cum onere*,' with all their benefits and burdens,"[73] notwithstanding the fact that Zachry represented to this Court that the Second Amendment, including the amended Liquidated Damages Clause, was fair, reasonable, and beneficial to the estate.[74] Such conduct offends the fundamental tenants of Section 365.

Significantly, the decision to assume the Contract as amended by the Second Amendment was—and could only be—Zachry's decision. *See In re Nat'l Gypsum Co.*, 208 F.3d at 505. In so deciding, Zachry was required to (and did) represent that the assumption of the modified Contract, which includes the Liquidated Damages Clause, was more beneficial to the estate than the alternative. *Id.*[75] Zachry now requests that this Court contravene the fundamental principles of assumption under Section 365 and let it cherry-pick the provisions it wishes to keep (*i.e.*, the nearly $36 million in cash and incentive payments) while avoiding the obligations it wishes to discard (the Liquidated Damage Clause). Zachry improperly requests this Court to strip OPPD of its adequate assurance and only consideration under the 9019 compromise.

Zachry's conduct throughout the multiple amendments to the Liquidated Damages Clause and representations to OPPD and this Court in the Bankruptcy has confirmed its position that the Liquidated Damages Clause is enforceable, as well as "fair, reasonable, and appropriate."[76] As a consequence of such representations and conduct by Zachry, OPPD relied in good faith on these affirmations and assurances throughout the entire near-five-year lifespan of the Contract and the Projects' existence.[77] Because Zachry did not raise questions as to the enforceability of the

[73] *See Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th at 326.

[74] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 19.

[75] *Id.* at ¶ 20.

[76] *See id.* at ¶ 19.

[77] *See* Ex. A (Eibes Declaration), at ¶ 24 (noting that OPPD offered to defer liquidated damages under the First Amendment so that the parties could reach an agreement on the Second Amendment); *see also* Docket No. 809 (Case

Liquidated Damages Clause until ***after it breached the Contract*** and ***after OPPD relied in good faith***[78] on Zachry's assurances to the validity of the Liquidated Damages Clause, Zachry is equitably estopped from doing so now. *See Christiansen*, 849 N.W.2d at 506.

Relatedly, Zachry induced OPPD to agree to over $20 million in immediate payments, millions of dollars in incentive payments, and a cure amount of $0 in exchange for the Liquidated Damages Clause that Zachry now challenges. Zachry knew at the time that OPPD would rely on its representations of future performance and the enforceability of the revised Liquidated Damages Clause and took advantage of such reliance to secure significant concessions from OPPD.[79] Such reliance was not only foreseeable—it was intended. OPPD reasonably relied on Zachry's representations.[80] Zachry is therefore promissorily estopped from disavowing the Liquidated Damages Clause now. *See Burns*, 732 N.W.2d at 649–50.

Judicial estoppel further bars Zachry's argument. *See, e.g.*, *In re Coastal Plains, Inc.*, 179 F.3d at 206. In *In re Air Safety Int'l, L.C.*, the court explained that (i) the party's attempt to undo the stipulation as unenforceable was clearly inconsistent with its prior position in the stipulation and the motion to approve compromise, (ii) the challenging party has "successfully convinced the Bankruptcy Court of the Stipulation's viability because the Bankruptcy Court ultimately authorized" it, and (iii) if the court upheld the argument that the stipulation was unenforceable, the challenging party "would derive an unfair benefit to the detriment of his fellow settling Parties."

No. 24-90377-MI), at ¶ 10 (noting that the "OPPD settlement" will settle the alleged liquidated damages"); Docket No. 961 (Case No. 24-90377-MI), at ¶¶ 4–5 (noting that OPPD's cure amount is $0, but that "[a]dequate assurance of future performance under the OPPD Contract to the extent required pursuant to section 365(b) of the Bankruptcy Code has been provided.").

[78] *See* Ex. A (Eibes Declaration), at ¶ 23.

[79] Ex. A-5 (Zachry's Response to Adequate Assurance) (noting that Zachry "is under no obligation" to make a decision to assume or reject the Contract until plan confirmation, in response to OPPD's request for adequate assurance).

[80] *See, e.g.*, *supra* note 77 and accompanying text; Ex. A (Eibes Declaration), at ¶ 23.

In re Air Safety Int'l, L.C., 336 B.R. 843, 863–64 (S.D. Fla. 2005). Noting that the challenging party "cannot resist the bargain it struck through settlement," the Court held that the challenging party was judicially estopped, "regardless of the Stipulation's enforceability," from arguing against its enforcement "because it previously touted the Stipulation's enforceability to the Bankruptcy Court." *Id.* at 864.

The same rationale applies here. Zachry represented to this Court and all interested parties in the Bankruptcy that the Second Amendment was fair and equitable and in the best interest of the estate.[81] Importantly, ***Zachry—not OPPD—was the party that had the burden of convincing this Court to accept its previous position at the time of assumption***. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985). And relying on Zachry's representations, this Court, via the Assumption Order, "approved in all respects" the Second Amendment and ruled that the Contract—which includes the Liquidated Damages Clause—is "binding and enforceable in accordance with its terms on the Debtors."[82] Zachry's position now directly contradicts its prior representations that the Second Amendment is "fair and equitable" and "beneficial to the estate."[83] Judicial estoppel prohibits such gamesmanship. *See In re Coastal Plains, Inc.*, 179 F.3d at 206; *In re Air Safety Int'l, L.C.*, 336 B.R. at 863–64.

In summary, Zachry is barred from challenging the enforceability of the Liquidated Damages Clause on three independent grounds. Accordingly, summary judgment should be denied. *See, e.g.*, *City Bank & Tr. Co.*, 368 N.W.2d at 794 (denying summary judgment because certain evidence present could have been found to result in waiver or estoppel); *Williams*, 294 N.W.2d at 363 (denying summary judgment due to "a genuine issue of fact with regard to whether

[81] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶¶ 11–19.

[82] *See* Docket No. 961 (Case No. 24-90377-MI), at ¶ 1.

[83] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶¶ 11–19.

the requisite elements necessary to invoke the doctrine of equitable estoppel exist[ed]").

B. Whether the Liquidated Damages Clause is reasonable requires resolution of material fact questions that preclude summary judgment.

Summary judgment should also be denied because there are issues of material fact regarding the reasonableness, and consequently the enforceability, of the Liquidated Damages Clause.

i. Zachry bears the burden of invalidating the Liquidated Damages Clause.

A liquidated damages provision is enforceable if (i) the "damages arising from the breach are difficult to ascertain or measure," and (ii) the stipulated damages are either "a reasonable estimate of the damages that might result from a breach" or "reasonably proportional to the actual damages caused by the breach." *Lund-Ross*, 2021 WL 6202667, at *4.[84] A party seeking to challenge the enforceability of a facially valid liquidated damages clause carries the heavy burden to "adduce sufficient evidence to show the type of inherent unreasonableness or obvious overcompensation the Nebraska Supreme Court has said evinces a penalty." *Lund-Ross Constructors, Inc.*, 2023 WL 5607563, at *6.

Here, Zachry has not carried its burden. The plain language of the Contract clearly reflects the parties' intent at the time of formation as to the reasonableness of the Liquidated Damages Clause.[85] Zachry has neither demonstrated, nor can it demonstrate, that the Liquidated Damages Clause is so "inherently unreasonable" as to eliminate any genuine issue of material fact. Further, Zachry has not met its burden to provide sufficient, competent evidence that the Liquidated

[84] As this Court has previously noted, "[t]he United States Supreme Court has traditionally upheld liquidated damages provisions, noting several decades ago that 'the law does not look with disfavor upon liquidated damages provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced.'" *In re Endeavour Highrise, L.P.*, 432 B.R. 583, 642 (Bankr. S.D. Tex. 2010) (quoting *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947)). Nebraska courts have likewise consistently upheld liquidated damages provisions. *See, e.g.*, *U.S. Pipeline, Inc.*, 930 N.W.2d at 475.

[85] *See supra* Section V.A(i).

Damages Clause is an "obvious overcompensation." For these reasons, summary judgment should be denied.

ii. The damages arising from Zachry's breach of the Contract were—and still are—difficult to ascertain and measure.

The first factor in evaluating reasonableness is whether the damages arising from the breach are difficult to ascertain or measure. *See Lund-Ross*, 2021 WL 6202667, at *4; *Aramark Unif. Servs. v. Meylan Enters., Inc.*, No. A-05-771, 2007 WL 1532329, at *3 (Neb. Ct. App. May 29, 2007) (stating that damages must be "difficult to ascertain due to indefiniteness or uncertainty"). Courts in Nebraska regularly enforce liquidated damages provisions "where the damages are uncertain," or "not readily capable of exact ascertainment," and "the parties surveyed the whole situation at the time of contract." *See, e.g.*, *Parsons Const. Co.*, 104 N.W.2d at 275.

In determining whether measuring damages would be difficult, the Court must look to whether, ***at the time of contracting***, the parties "reasonably anticipate[d]" that it would be difficult to ascertain damages. *See Berens & Tate, P.C.*, 747 N.W.2d at 387; *Kozlik v. Emelco, Inc.*, 483 N.W.2d 114, 121 (Neb. 1992) (noting that the appropriate test looks to whether the stipulated damages are "reasonable in light of the circumstances" at "the time the contract was formed" (emphasis added)). Zachary offers no evidence of the parties' intent at the time of contracting. Without it, this Court cannot grant Zachary's requested summary judgment.

With respect to construction contracts, the Nebraska Supreme Court has stated that:

> [W]here the *damages are uncertain*, and *not readily capable of exact ascertainment by any known rule*, and the *parties surveyed the whole situation* at the time of contract, and *agreed upon the amount of damages*, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recover[y] and is liquidated damages and not a penalty.

Parsons Constr. Co., 104 N.W.2d at 275 (emphasis added); *see also Lund-Ross*, 2021 WL 6202667, at *5. Moreover, Nebraska law is clear that in the context of construction contracts, daily

accrual damages are inherently difficult to ascertain because "each day's delay, while unquestionably injurious, is injurious frequently in ways that are difficult to estimate." *Lund-Ross*, 2021 WL 6202667, at *5 (quoting *Abel Constr. Co. v. Sch. Dist. of Seward*, 195 N.W.2d 744, 747–48 (Neb. 1972)). Additionally, courts have also explained that "[d]amages for lost profits, missed opportunities, and reputational harm are hard to quantify." *Id.* at *6.

Now, improperly employing a hindsight argument, Zachry suggests that the "delay-related damages with respect to power plants are not difficult to ascertain."[86] Zachry now suggests that "it is fairly easy to estimate OPPD's higher purchase costs using two simple inputs."[87] For example, supporting its theory that Actual Purchase Costs are readily ascertainable, Zachry postulates, without support, that things like whether "out-of-pocket costs were incurred pursuant to one or more contracts entered into before the Second Amended EPC was executed (as alleged in ¶ 44 of the Complaint), or rather simply involved spot purchases, *does not matter for present purposes*."[88] Instead, it suggests that the calculation simply involves "the amount that OPPD paid to suppliers of peak load power that it could not cover with its own generation."[89] With respect to Zachry's analysis of "estimated Generation Costs," it suggests that such damages are not difficult to measure because they are simply the total that "it would have cost OPPD to operate Turtle Creek Station and Standing Bear Lake Station during the relevant periods."[90] Notably, though it comments on other forms of damages, such as lost profits, missed opportunities, and reputational harm, Zachry ultimately disregards these damages in the total damages calculation without any justification or

[86] Mot. for Summ. J., at 1.

[87] *Id.* at 6.

[88] *Id.* at 13 (emphasis added).

[89] *Id.*

[90] *Id.*

support.[91] Zachry's dismissiveness proves the point: these forms of damages are not readily ascertainable and are ultimately difficult to measure at the time of contract formation, the very reason for the thrice-agreed Liquidated Damages Clause in the Contract.[92]

The Contract at issue is not one for a small commercial project or residential home. This Contract has a current price of $428.7 million,[93] concerns the construction of two major power plants that have the potential to serve a 5,000-square-mile area and half a million customers,[94] involves numerous contractors and suppliers,[95] and is subject to accreditation and regulatory requirements.[96] The complexity of these Projects alone made it especially difficult to measure at time of contracting the scope of the anticipated damages that would result from Zachry's breaches.[97] Both parties "surveyed the whole situation" at the time of Contract, understood that any damages arising out of the Contract would likely be difficult to measure, and were fully informed—in each instance—of the Projects' scope, challenges, and risks.[98]

Notwithstanding the Project's size and complexity, Zachry cites several inapposite cases to support its assertion that the damages were readily ascertainable. For example, in *In re Papio Keno Club, Inc.*, the court held that "[i]t would not be difficult to ascertain the actual damages for any

---

[91] *See id.* at 14.

[92] *Id.*

[93] *See id.* at 9.

[94] *See id.* at Ex. I, p. 8, ¶ 24.

[95] *See, e.g.*, Docket No. 809 (Case No. 24-90377-MI), at ¶¶ 8, 23 (noting that Zachry has "utilized more than 1,000 subcontractors, vendors, and suppliers" throughout the construction of the Projects and that these Projects are "one of the Debtors' largest ongoing projects").

[96] *See* Ex. B (Reome Expert Report), at § 6.2.1.

[97] As the court in *Lund-Ross* and *Abel Constr. Co.* noted, construction contracts involve damages "that are difficult to estimate." *See Lund-Ross*, 2021 WL 6202667, at *5; *Abel Constr. Co.*, 195 N.W.2d at 747–48. This is especially true here—the Projects involve the construction of two major power plants, with a price tag of nearly half a billion.

[98] *See, e.g.*, Ex. A (Eibes Declaration), at ¶ 14 (noting that Zachry accepted the inclusion of the Liquidated Damages Clause after OPPD informed it of the costs OPPD was incurring).

of the[] material breaches" arising out of a five-year contract for the operation of a certain type of lottery system. *In re Papio Keno Club, Inc.*, 247 B.R. 453, 456 (B.A.P. 8th Cir. 2000), *aff'd*, 262 F.3d 725 (8th Cir. 2001). In reaching its conclusion, the court analyzed the various breaches and stated that:

> The damages incurred by the City for the Debtor's failure to maintain liability insurance would be, at most, the difference between the amount of insurance the Debtor actually maintained and the amount it was required to maintain. Similarly, the damages sustained by the City for the Debtor's failure to maintain a $250,000 letter of credit would be, at most, the difference between the amount available under the letter of credit and $250,000. Furthermore, the damages incurred by the City for the Debtor's failure to timely apply to renew its license easily could be calculated based on the City's average daily share of the gross proceeds for each day that the Debtor was unable to operate because it was without a license. Accordingly, the first requirement for enforcing a liquidated damages provision, that the damages would be difficult to ascertain, is not present.

Id. at 461. Unlike the situation here, the damages discussed in *In re Papio* were indeed ascertainable. Further, in *Browning Ferris Industries of Nebraska, Inc. v. Eating Establishment-90th & Fort, Inc.*, the contract in question was one for restaurant waste disposal services. 575 N.W.2d 885, 887 (Neb. 1998). Noting that the disposal service was a "straightforward" waste collection business where the party "place[s] a container at a business, periodically empt[ies] it into a garbage truck, and haul[s] it away in exchange for a fee," the court held that "the actual damages would not be overly difficult to ascertain with some precision." *Id.* at 889.

Zachry's oversimplification of the Projects and the calculation of damages resulting from the breaches should be rejected on its face. Unlike *In re Papio*, which dealt with straightforward damages for failure to carry the required insurance, obtain necessary permits and a letter of credit, the damages that flow from Zachry's breaches are far more substantial and difficult to ascertain with reasonable certainty.[99] Moreover, these Projects involve over a thousand subcontractors,

[99] *See, e.g.*, Ex. B (Reome Expert Report), at § 4.1.14 ("[T]he volatility of the capacity market makes it difficult to measure damages in advance of the Substantial Completion date . . . ."); *see also id.* at § 6.1.2.

suppliers, and vendors, and other variable factors, not to mention the retention or hiring of additional employees, all of which are damages that would be difficult to ascertain with precision at any point during the Projects' construction.[100]

Illustrating the complexity here, one of the cases Zachry cites in fact supports the view that damages were difficult to estimate at the time of contracting. In *Aramark Uniform Services v. Meylan Enterprises, Inc.*, the contract in question was one for the delivery of uniforms to a company for approximately two and a half years. No. A–05–771, 2007 WL 1532329, at *1 (Neb. Ct. App. May 29, 2007). There, the court held that "there [was] sufficient evidence that reasonably anticipated damages were difficult to ascertain when [the parties] entered into the contract." *Id.* at *4. In reaching this conclusion, the court stated that the contract involved "fluctuating long-term fuel and cloth costs," "variables such as [the company's] employee base," and other numerous variables that made it difficult to ascertain the damages that would result from a breach. *Id.* Notably, the court rejected the moving party's contention that damages were not difficult to estimate on grounds that the counter party "knew the initial cost of the merchandise it supplied to [the company] at the outset of the contract." *Id.* In doing so, the court explained that "[a]lthough the cost of the merchandise was known, . . . there are also several variable factors that prevent [the parties'] *overall* damages from being easily ascertained." *Id.* (emphasis in original).

Like *Aramark Uniform Services*, there are significant variables here that Zachry either overlooks or simply disregards in its determination that the damages are readily ascertainable.[101] For instance, as indicated in the Reome Expert Report, "[t]he new MISO auction results show the

[100] *See, e.g.*, *id.* at §§ 4.1.14, 5.1.10, 6.1.2; Ex. A (Eibes Declaration), at ¶ 20(b) (noting OPPD experienced increased costs regarding paroll as a result of the delays); Docket No. 809 (Case No. 24-90377-MI), at ¶¶ 8, 23.

[101] *See* Ex. E (Reome Expert Report), at §§ 4.1.2, 4.1.8–4.1.9, 4.1.11–4.1.14 (discussing factors not considered in the Bodell Report).

extreme volatility in the [capacity] market pricing," a factor that the Bodell Report fails to consider.[102] Further, in calculating damages relating to projects such as these, there are various input assumptions that must be made at the time of forecasting, which may later "turn[] out to be higher or lower depending on actual market conditions."[103] Indeed, these market fluctuations make it difficult to ascertain with reasonable certainty the anticipated damages at the time of formation[104] and, at a minimum, create a fact question. *Calhoun v. O'Neill Veterinary Clinic, P.C.*, No. 20441, 1999 WL 33548934, at *3 (Neb. Dist. Ct. June 10, 1999) (finding that because "[a]t the time of the contract formation, the damages for one party for a breach by the other party could have been greater than ultimately contracted for," the anticipated damages "were difficult to ascertain because of their indefiniteness or uncertainty.").

The construction of two major power plants indisputably includes variable delay-related costs, capacity costs, missed opportunities, and other unknowns such as firm natural gas transport costs, which, as is the case here, was an increased cost as a result of Zachry's delays.[105] Such factors make it difficult—if not impossible—to ascertain potential damages with reasonable certainty at the time of contract formation. *See Aramark Uniform Servs.*, 2007 WL 1532329, at *4.[106] As indicated above and further reflected in the Reome Expert Report, "the evidence discloses many elements of damages suffered by [OPPD] which are uncertain in nature and amount

[102] *Id.* at § 4.1.14.

[103] *Id.* at § 5.1.10.

[104] *See, e.g.*, *id.* at § 4.1.14.

[105] *See, e.g.*, *id.* at § 6.4.3 (noting that "OPPD has incurred the cost of having firm natural gas transport for Turtle Creek even though it is not operating" as a result of delays).

[106] *See also id.* at § 5.1.10 ("The damages inputs the parties considered at the time of contract negotiations necessarily included various assumptions about inputs . . . .").

and difficult of ascertainment." *See Parsons Const. Co.*, 104 N.W.2d at 278. Such variables create fact issues that cannot be resolved on summary judgment.

Even Zachry's own Expert Report reflects the potential complexity involved with any damages resulting from a breach of the Contract. As the Bodell Report opines: "I estimate that the project economic damages for energy during the period from December 17 through April 15, 2025 would have been $6.7 million to $17.0 million, depending on the assumed price shapes."[107] Even assuming that the formula used for calculating the actual damages incurred is proper (it is not), a $10.3 million spread in Bodell's opinion—calculated with the benefit of hindsight—is clearly indicative of a difficulty in estimating what the actual damages are.[108] The expansive range of potential damages and their inherent uncertainty, at a minimum, raises a fact question that precludes summary judgment.

The anticipated damages here are subject to numerous variables and can be calculated in multiple ways, resulting in varying end results.[109] More importantly, Zachary's post-hoc analysis bears no relationship to the parties' contracting intent at the time of the Contract's execution. As such, Zachry has not met its burden, and genuine issues of material fact remain as to whether the damages resulting from Zachry's breach of the Contract were difficult to ascertain and measure for purposes of construing the Liquidated Damages Clause. Accordingly, summary judgment should be denied.

---

[107] *See* Mot. for Summ. J., at Ex. I, ¶ 90.

[108] *See id.*

[109] *Compare id.* at Ex. I, ¶ 91 (acknowledging the volatility in capacity and ancillary service pricing as well as energy pricing), *with*, Ex. B (Reome Expert Report), at § 5.1.10 (noting that the damages considered at the time of formation "included various assumptions about inputs (for example, capacity prices, energy prices, natural gas prices)," which "may have later turned out to be higher or lower depending on actual market conditions").

iii. Zachry fails to meet its burden of proving that the Liquidated Damages Clause does not provide for reasonably estimated and proportionate damages.

a. Zachry has not established that the Liquidated Damages Clause fails to reflect a reasonable estimate of the damages at the time of contracting.

"The question of the reasonableness of a remedy generally addresses whether a liquidated damages clause is so great as to constitute a penalty." *Reichert*, 645 N.W.2d at 527. That is, in the context of construction contracts, "unless the sum fixed in the contract *is* ***very*** *unreasonable* [based on the circumstances at the time of contract formation] the provision is treated as one for liquidated damages." *Lund-Ross*, 2021 WL 6202667, at *5 (quoting *Abel Constr. Co.*, 195 N.W.2d at 747–48) (emphasis added); *Kozlik*, 483 N.W.2d at 122. Zachry has not shown that the Liquidated Damages Clause was unreasonable at the time the contract was formed. At the very least, this presents an open question of fact.

Here, the facts and circumstances leading up to the Second Amendment reinforce the reasonableness of the Liquidated Damages Clause. Zachry had failed to meet "certain milestones for completing the project," which necessitated the need for the parties to reach a compromise.[110] Without the Second Amendment, Zachry could have been forced to "engage in potentially costly litigation related to the quantum of liquidated damages and further damages resulting from the rejection of the OPPD Contract."[111]

The Second Amendment followed "months of negotiation" and "periodic in-person meetings in Omaha."[112] Throughout these discussions, the parties thoroughly negotiated four critical Contract terms: (i) invoice payment; (ii) substantial completion dates; (iii) liquidated

[110] Docket No. 809 (Case No. 24-90377-MI), at ¶ 8.

[111] *Id.* at ¶ 18.

[112] *See id.* at ¶ 10.

damages; and (iv) retainage/incentive payments.[113] Zachry needed immediate liquidity to exit bankruptcy and was concerned that the existing liquidated damages under the First Amendment (*i.e.*, the cure amount payable upon assumption) would significantly hinder its ability to confirm a plan.[114] In response, OPPD agreed to advance nearly $20 million in payments not yet due, extend the Guaranteed Completion Deadline, and increase incentive payments.[115] At bottom, the Second Amendment was the result of detailed, arms-length negotiations between sophisticated parties addressing critical financial and performance concerns.

At the time of contracting, the Parties recognized that if Zachry failed to reach the extended Guaranteed Substantial Completion Dates, OPPD would be forced to expend significant resources on securing extensions to equipment agreements, purchasing market capacity, retaining employees, etc.[116] Such delays would cause OPPD to miss out on other income-driven opportunities with existing and potential new customers and lose revenue due to generation capacity shortfalls.[117] These issues were taken into account when the Parties negotiated the Second Amendment.[118]

Zachry and the Bodell Report disregard the key facts underlying the Second Amendment and the increase in liquidated damages, opting instead to rely solely on a post-hoc damages model to argue that the liquidated damages were not a reasonable forecast. This approach directly contradicts Nebraska law. *See, e.g.*, *Aramark Unif. Servs.*, 2007 WL 1532329, at **3–4. Neither

[113] *See generally* Ex. A (Eibes Declaration).

[114] *See id.* at ¶ 11 (noting that Zachry expressed concerns regarding its reputation and impact on its Bankruptcy if it were required to pay the liquidated damages under the First Amendment).

[115] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 10.

[116] *See* Ex. A (Eibes Declaration), at ¶¶ 15(b), 20(b).

[117] *See, e.g.*, *id.* at ¶¶ 15(b), 20(b).

[118] *Id.* at ¶¶ 9–24.

the Bodell Report nor Zachry's Motion meaningfully addresses the circumstances surrounding the Second Amendment. Instead, they simply assert—without proper context—that the increase in liquidated damages was unreasonable at the time of contracting.

Ultimately, the Liquidated Damages Clause reflected a reasonable measure of anticipated damages at the time of the Second Amendment. OPPD "was dealing with mounting costs" some of which "commonly exceed $1 million per month."[119] Further, additional delays would cause OPPD's payroll costs to continue to increase, preclude OPPD from working on other planned projects, and would (and did) force OPPD to secure the purchase of market capacity (necessary to maintain resource adequacy requirements).[120] And with each day's delay, these costs were accumulating and continued to increase given that the Projects' delays were reaching in excess of 14 months.[121] Considering the circumstances at the time of the Second Amendment, the mounting daily accruals of additional delay-driven costs, and the volatility in the energy market, the stipulated damages were and are a reasonable measure of the anticipated damages.[122] At a minimum, fact issues on these issues preclude summary judgment.

Zachry's remaining arguments fare no better. Its claim that there is no indication the liquidated damages are an estimate wrongly suggests that Nebraska law requires parties to explicitly "show their math" in the contract. But that is not the law. Zachry's reliance on *Kealy v. Harter* for the proposition that parties must "make a good faith attempt to predict damages" is

[119] *Id.* at ¶ 20(b).

[120] *Id.*

[121] *Id.*

[122] As indicated in the Reome Expert Report, "OPPD's Liquidated Damages due to Zachry's delay . . . are approximately $ 64.3 million," and because the Projects are still ongoing, "those damages are excepted to ultimately exceed $ 64.3 million, and may be much higher." Ex. B (Reome Expert Report), at § 1.2.1(d).

simply misplaced.[123] That language is dicta and itself cites a case from over a century ago, which merely stated that the parties must "consider" the stipulated damages as liquidated damages and not a penalty. As the Supreme Court explained in *Sun Printing & Publishing Ass'n v. Moore*, whether a stipulated amount is a penalty or enforceable liquidated damages turns on the contract itself—specifically, the parties' intent and the language used—particularly where damages are uncertain. *See* 183 U.S. 642, 662 (1902). That is precisely what happened here. The parties engaged in months of negotiations over the Second Amendment, including extensive discussions about the Liquidated Damages Clause. The final agreed-upon amount was the product of careful deliberation and compromise.[124] Once settled, the parties expressly confirmed that the liquidated damages were a "predetermined reasonable" measure of damages, reflecting a clear mutual understanding and reasonable estimation of potential harm.[125] Zachry's criticism does not establish that the Liquidated Damages Provision is unenforceable as a matter of law.

Zachry also takes issue with the overall increase in the liquidated damages from the First Amendment to the Second Amendment, but its selective memory is telling. It conveniently overlooks the substantial benefits it received under the Second Amendment—namely, a $20 million equity infusion, $16 million in increased incentive payments, a $0 cure amount for an imminent breach, and an extension of the Guaranteed Substantial Completion Dates—and ignores that OPPD incurred additional delay costs between the First and Second Amendments and would continue to incur such costs with each days' delay.[126] More importantly, in exchange for the increased liquidated damages, OPPD agreed to amend the original 15-day increase as provided by

[123] Mot. for Summ. J. at 16–17.

[124] *See generally* Ex. A (Eibes Declaration), at ¶¶ 11–24.

[125] *See* Ex. A-3 (Second Amendment), at § 7(1)(i)–(ii). The parties also agreed that the liquidated damages "are reasonable and appropriate measures of the damages." Ex. A-1 (Contract), at art. XI(a).

[126] *See* Docket No. 809 (Case No. 24-90377-MI), at ¶ 10; Ex. A (Eibes Declaration), at ¶ 19.

the Original Contract to a 30-day increase in the Second Amendment.[127] All of this came at a time when Zachry was insolvent and in desperate need of cash. Now, having emerged from its Bankruptcy—thanks in large part to OPPD's contributions—Zachry has the audacity to claim that the increased liquidated damages are somehow unjust. That claim is not just wrong—it is absurd. By the time of the Second Amendment, OPPD already had sustained costs in the tens of millions of dollars as a result of Zachry's delays,[128] and the parties recognized that OPPD would incur millions more in additional delay costs if the Projects were not completed by the new Guaranteed Substantial Completion Dates.[129] Zachry's argument fails when viewed in light of the circumstances at the time of contracting. At the very least, the presence of substantial factual disputes renders summary judgment improper.

Zachry next baldly asserts that the increase in the liquidated damages after 30 days of default makes the Liquidated Damages Clause unreasonable on its face.[130] Without the benefit of any discovery on the point, the Bodell Report assumes that the increase in the liquidated damages after one month "disconnects the Liquidated Damages [Clause] from economic harm actually incurred by OPPD."[131] However, this increase is supported by the substantial consideration OPPD provided to Zachry during its insolvency, as well as the risks OPPD was taking with respect to impending cost accruals if the Projects were not completed on time, or shortly thereafter.[132] That Zachry even raises this as an issue patently disregards the fact that even the draft Second

[127] Ex. A (Eibes Declaration), at ¶ 20(c) (noting that "Zachry agreed to higher liquidated damages, and OPPD agreed to extend[] the period of damages accruing at the lower dollar amount from a 15-day limit to a 30-day limit.").

[128] *Id.*

[129] *Id.*

[130] *See* Mot. for Summ. J., at 18.

[131] *See id.* at Ex. I, ¶ 35.

[132] *See* Ex. A (Eibes Declaration), at ¶ 20(c).

Amendment that Zachry sent to OPPD included this flat increase in the proposed Liquidated Damages Clause.[133] Even so, as reflected in *Abel Construction Co. v. School District of Seward*, Nebraska courts have recognized that it is common in construction contracts to include liquidated damages of "a fixed sum for each day's delay" and that it is not abnormal for such damages to "increase[e] proportionately with each day's delay." *Abel Constr. Co. v. Sch. Dist. of Seward*, 195 N.W.2d 744, 747–48 (Neb. 1972) (upholding liquidated damages clause). Again, given the circumstances at the time of contracting, Zachry's argument does not hold. At a minimum, material fact issues remain that preclude summary judgment.

Finally, the reasonableness of the Liquidated Damages Clause cannot be undermined simply because Zachry's consultant applied cherry-picked, publicly available data to arrive at an arbitrary and divergent damages figure. The fact that Zachry's consultant produced a range of estimated damages—from $6.7 million to $17.0 million—demonstrates that damages were difficult to determine, not that they are unreasonable.[134] Zachry's after-the-fact damages analysis is irrelevant to this determination. *See Aramark Unif. Servs.*, 2007 WL 1532329, at **3–4. Even if it were considered, the reliance on forward-looking, publicly available data—highly sensitive to market fluctuations, supply and demand, and other unpredictable variables—only further highlights how difficult it was to project damages at the time of contracting.[135] This inherent uncertainty underscores why a precise or fixed damages calculation was not feasible, further validating the parties' decision to stipulate to a reasonable liquidated amount in advance.

Accordingly, there are genuine issues of material fact as to whether the stipulated damages in the Liquidated Damages Clause are, in light of the circumstances at the time of the Second

[133] *See* Ex. A-6 (Zachry's Draft Second Amendment), at § 5(1).

[134] *See* Mot. for Summ. J., at 18.

[135] *See, e.g.*, Ex. B (Reome Expert Report), at §§ 4.1.14, 5.1.10, 6.3.2.

Amendment, a reasonable estimate of the damages. As such, summary judgment on this issue should be denied.

b. There are fact issues as to whether the stipulated damages are reasonably proportionate to OPPD's actual damages—OPPD's actual damages are still accruing daily due to the Projects not yet being complete.

The third and final factor considered is whether the actual damages incurred as a result of the breach are reasonably proportionate to the stipulated damages. *Lund-Ross*, 2021 WL 6202667, at *4.

Summary judgment should be denied on this point alone—the Projects are still not complete and OPPD's actual damages are continuing to accrue.[136] Despite the ongoing nature of these damages, the Bodell Report measures proportionality based on a damages calculation that extends only through April 15, 2025.[137] The Bodell Report becomes more and more outdated every day that passes, and the Projects are not complete. Yet this increasingly outdated report is the sole evidence Zachry relies on to determine whether the actual damages incurred are reasonably proportionate to the liquidated damages the parties agreed to in the Second Amendment. Comparing actual harm to the stipulated damages at this stage is not only premature but also fundamentally improper. Therefore, there is a genuine issue of material fact as to the full extent of OPPD's damages and the total measure of damages will remain a disputed fact until the Projects are completed and OPPD does not incur additional harm.[138]

Setting the foregoing aside, summary judgment should be denied for the additional reason that there are fact issues as to the total amount of actual damages incurred by OPPD. Indeed, "[a]

[136] *See id.* at §§ 6.1.1–6.1.2.

[137] *See* Mot. for Summ. J., at Ex. I, ¶ 96 (noting that the damages calculated are through April 15, 2025).

[138] *See* Ex. B (Reome Expert Report), at § 6.1.2 ("OPPD incurred costs and will continue to incur costs for capacity purchases, missed market energy revenue, firm natural gas transport, lost retail revenue and extended construction costs.").

conflict of expert testimony regarding an issue of fact ***establishes a genuine issue of material fact which precludes summary judgment***." *Sanitary & Improvement Dist. No. 196 of Douglas Cnty. v. City of Valley*, 858 N.W.2d 553, 560 (Neb. 2015) (citing *Young v. Govier & Milone*, 835 N.W.2d 684 (Neb. 2013)) (emphasis added); *Cnty. of Sarpy v. City of Gretna*, 960 N.W.2d 272, 279 (Neb. 2021) (same); *Shriner v. Friedman L. Offs., P.C., L.L.O.*, 877 N.W.2d 272, 289 (Neb. Ct. App. 2016) (same).

A simple comparison of the Bodell Report and the Reome Expert Report unveils numerous examples of conflicting testimony that precludes summary judgment. The Bodell Report "greatly underestimate[s] OPPD's actual damages."[139] The Bodell Report "only estimated certain categories of actual damages," while ignoring other categories of damages that should be included in the damages calculation.[140] Reome opines that "OPPD's actual damages are greater" than estimated in the Bodell Report and includes categories of actual damages not addressed by Bodell (*i.e.*, firm natural gas transport, lost retail capacity, and extended project costs).[141] The Bodell Report also only considered damages from December 17, 2024, through April 15, 2025, instead of considering the ongoing nature of damages like Reome does.[142] Further, the Bodell Report "used capacity pricing from a different location," which is not only the wrong market, but has now been rendered outdated as of the date of her opinion.[143] Relatedly, the Bodell Report also "fail[s] to consider the volatility in capacity prices," which, according to the new capacity pricing forecasts,

[139] *Id.* at § 4.1.9.

[140] *Id.* at § 4.1.8.

[141] *Id.*

[142] *Id.* at § 4.1.9 ("The amounts presented for OPPD's actual damages . . . are subject to change because the Projects themselves are not complete.").

[143] *Id.* at §§ 4.1.11–4.1.13 (noting that "OPPD operates in the SPP market, not the MISO market that Ms. Bodell used," which reflects a dramatic increase in new capacity pricing).

reflects "extreme volatility in the market pricing" that the Bodell Report used as proxy.[144] The Bodell Report ignores the fact that OPPD is constructing these Projects not merely for energy but also to meet "Resource Adequacy" requirements of the Southwest Power Pool.[145]

Notably, the Bodell Report estimates a mere $8.7 million[146] for damages while the Reome Expert Report explains that the actual damages "are substantial and ongoing" and "are expected to ultimately exceed $64.3 million," as illustrated in Table 2 from Reome's Report:[147]

Table 2: Summary of OPPD Actual Damages[59]

Damages Period	Capacity Purchases	Missed Market Energy Net Revenue	Natural Gas Damages	Lost Retail Capacity Revenue	Extended Project Costs	Total
May 2023 - Aug. 2024	$ 13,058,000	$ 5,140,000	$ 1,685,000	$ 76,686,000	*N/A*	**$ 96,569,000**
Sep. 2024 - Dec. 2024	6,226,000	115,000	3,217,000	16,036,000	*N/A*	**25,594,000**
Jan. 2025 - Dec. 2025	20,481,000	5,870,000	11,771,000	14,479,000	18,096,000	**70,697,000**
	$ 39,765,000	**$ 11,125,000**	**$ 16,673,000**	**$ 107,201,000**	**$ 18,096,000**	**$ 192,860,000**

These, among other discrepancies in the experts' respective analyses, create a factual question.

Further, like Zachry's Motion,[148] Bodell makes numerous unsupported assumptions and consistently identifies areas where additional information is needed. For example, throughout the report, Bodell notes areas in her analysis where missing information may be necessary or would otherwise be helpful information to provide a more accurate opinion:

- FN 54: "I understand from Counsel that OPPD has claimed to have entered into capacity contracts with third parties in anticipation of the delay. ***To the extent those bilateral contract details are provided, a more direct comparison could be made as to how the Liquidated Damages provisions compare to the costs estimated to be incurred by OPPD to replace the lost capacity of the Facilities***."

[144] *Id.* at §§ 4.1.2, 4.1.12–4.1.14.

[145] *See* Ex. C (Lang Declaration), at ¶ 6.

[146] Mot. for Summ. J. at Ex. I, ¶ 21(6); *see also id.* at ¶ 90 (noting that "projected economic damages for energy during the period from December 17 through April 15, 2025 would have been $6.7 million to $17.0 million).

[147] Ex. B (Reome Expert Report), at §§ 6.1.1, 6.1.4.

[148] For instance, Zachry's Motion is replete with assumption-based statements such as "in lieu of the ***(presumed)*** lower-cost electricity products that would have been generated by the two Stations since December 2024," and "[OPPD] may have needed to acquire ***(presumed)*** higher-cost capacity and ancillary services." Mot. for Summ. J., at 5 (emphasis added).

- Paragraph 52: "In calculating the actual cost of OPPD's purchases of replacement power, actual trade information from OPPD regarding its purchases and sales during the damages period could serve as the basis for damages. ***Such information would be particularly useful to the extent the incremental purchases or lost opportunities can be clearly delineated as being related to the failure to achieve Substantial Completion***."

- Paragraph 53: "If OPPD entered into capacity contracts in anticipation of the delayed operations of the plants, the cost of such contracts could be considered in a damages calculation once they are provided. However, ***I have not yet been provided such information to incorporate into a calculation of economic damages that OPPD estimated to be incurred***."

- Paragraph 60: "***If there are specific purchases and sales that OPPD entered into in anticipation of or because of the delayed Guaranteed Substantial Completion Date (i.e., to mitigate damages), I can incorporate those trades into the calculation once they become available***."

- Paragraph 68: "***Ideally, I would be able to review the projections that OPPD performed to understand the anticipated net revenues for ancillary services that the Facilities were expected to generate***."

- Paragraph 72: "***In the absence of access to OPPD's tradebook***, capacity value can be estimated using SPP estimates of its reserves and a nearby market price for capacity."

- Paragraph 86: "Furthermore, ***OPPD would have had more detailed information regarding the trades and contracts, if any, that had been entered into to mitigate damages. Such trades can be incorporated into the estimated damages calculation when made available***."

One particular assumption Ms. Bodell makes is critically problematic. For instance, Ms. Bodell bases her calculations on the assumption that OPPD expects the Projects to operate only 15 percent of the time based on a public statement taken out of context.[149] Although OPPD's statement is accurate with respect to electric energy production, the Projects provide more than just energy.[150] For instance, Southwest Power Pool requires load-serving entities such as OPPD to have the capacity available to meet peak demand at any time, plus a margin above that demand.[151]

[149] Mot. for Summ. J. at Ex. I, ¶ 62; *see also id.* at ¶ 16, n.10.

[150] *See* Ex. C (Lang Declaration), at ¶¶ 4–6.

[151] *Id.* at ¶ 4.

This assumption, which results in a flawed damages calculation, undercuts the central foundation of Ms. Bodell's opinion and methodology, and is another example of the many flawed assumptions used to suggest non-proportionality between OPPD's actual damages and the liquidated damages provided in the Second Amendment.

Ultimately, Zachry's suggestion that the actual damages are not reasonably proportionate to the stipulated liquidated damages is based on the flimsiest of foundations. There are significant disputes of material facts regarding the actual damages incurred by OPPD. As such, summary judgment should be denied.

C. Summary judgment should not be granted as discovery has not opened, dispositive motions remain pending, OPPD has not answered, and the actual damages continue to accrue.

Federal Rule of Civil Procedure 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." FED. R. CIV. P. 56(d).[152] As explained in detail in OPPD's Motion for Continuance,[153] which is incorporated fully herein by reference, written discovery related to several topics must be conducted prior to a ruling on the Motion. This is especially true with respect to Zachry's internal analyses and communications

[152] As the Supreme Court has stated: "[S]ummary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250. The same holds true where the nonmovant has yet to file or serve its answer. *See, e.g.*, *Watkins v. Monroe*, No. 6:18CV347, 2019 WL 1869864, at *1 (E.D. Tex. Mar. 27, 2019) ("A court '. . . must not grant a summary judgment upon motion therefor[e] tendered before the service of an answer, unless in the situation presented, it appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact.'" (quoting *Stuart Inv. Co. v. Westinghouse Elec. Corp.*, 11 F.R.D. 277, 280 (D. Neb. 1951)). That is, "deferring the ruling on a motion for summary judgment filed before parties have answered is appropriate where the federal court finds that the motion is premature." *Id.*

[153] *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] (the "**Continuance**"). On May 12, 2025, the Court denied the Continuance on grounds that no emergency existed. However, the Court did not deny the Continuance on the basis that the factual record remains undeveloped.

regarding (a) the likelihood, scope, or consequences of delays in the Projects; (b) estimates or forecasts of OPPD's potential damages from delays in the Projects; (c) negotiations of the Second Amended Contract, including any opposition or concerns raised about the increase in the liquidated damages amounts; and (d) project schedules, risk assessments, or delay analyses from 2023–2025 as well as the parties communications surrounding the Second Amendment and assumption of the Contract. Accordingly, summary judgment is not appropriate because discovery is not open, Zachry's summary judgment evidence relies solely on a single, previously undisclosed expert's testimony, and whether the actual damages are reasonably proportionate to the stipulated damages can only be determined once the Projects are complete. Additional time is thus necessary to permit a full factual record to develop and respond to Zachry's Motion, and OPPD should be provided the opportunity to investigate and challenge Zachry's expert's opinion on the issue.

D. Summary judgment should be denied with prejudice—Zachry should not have a second chance to relitigate the issue raised in its Motion.

Summary judgment "is the procedural equivalent of a trial and is an adjudication of the claim on the merits." *Rivera v. PNS Stores, Inc.*, 647 F.3d 188, 194 (5th Cir. 2011) (quotations and citations omitted). "Thus, to grant summary judgment without prejudice is to say that although there has been an adjudication on the merits, it is not conclusive as to the rights of the parties." *Id.* Accordingly, courts have "no discretion to grant summary judgment without prejudice." *Id.* at 195. Although bankruptcy courts "may reconsider prior summary judgment denials," they "also have considerable discretion in controlling their dockets, which 'includes determining whether to allow successive or multiple motions for summary judgment.'" *In re Crescent Trading LLC*, 654 B.R. 246, 253 (Bankr. S.D. Tex. 2023) (quoting *Henderson v. Wal-Mart Stores, Inc.*, No. 1:14-CV-224, 2015 WL 3901755, at *3 (E.D. Tex. June 23, 2015)).

Here, Zachry has chosen its fate by deciding to move for summary judgment on the issue of enforceability of the Liquidated Damages Clause before the opening of discovery, before OPPD has filed its answer, and, importantly, before the Projects are completed and damages are no longer accruing. Zachry should not be permitted to have a second bite at the apple. That is, this Court should deny the Motion, with prejudice, and preclude Zachry from refiling its Motion at a later date on the same issue.

V. CONCLUSION

For the foregoing reasons, OPPD respectfully requests that this Court enter an order (a) denying Zachry's Motion with prejudice, and (b) granting OPPD such other and further relief as this Court finds just and proper.

Dated: May 19, 2025

Respectfully submitted by:

/s/ J. Michael Thomas

J. Michael Thomas (TX 24066812)
Thomas C. Scannell (TX 24070559)
Robert T. Slovak (TX 24013523)
Zachary C. Zahn (TX 24137675)
FOLEY & LARDNER LLP
2021 McKinney Avenue, Ste. 1600
Dallas, Texas 75201
Telephone: (214) 999.3000
Facsimile: (214) 999.4667
tscannell@foley.com
rslovak@foley.com
jmthomas@foley.com
zzahn@foley.com

ATTORNEYS FOR OMAHA PUBLIC POWER DISTRICT

CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on May 19, 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 DENYING REORGANIZED DEBTORS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE LIQUIDATED DAMAGES

Before the Court is Plaintiff Zachry Holdings, Inc., Zachry Industrial, Inc.'s ("**Zachry**"), Motion for Partial Summary Judgment Re Liquidated Damages (the "**Motion**"). After considering the arguments of counsel and the Response to the Motion, and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Motion is DENIED, 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.

2. This Court shall retain exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: _____

HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

(Filed Separately Under Seal)

Exhibit A-1

(Filed Separately Under Seal)

Exhibit A-2

(Filed Separately Under Seal)

Exhibit A-3

(Filed Separately Under Seal)

Exhibit A-4

(Filed Separately Under Seal)

Exhibit A-5

(Filed Separately Under Seal)

Exhibit A-6

(Filed Separately Under Seal)

Exhibit B

(Filed Separately Under Seal)

Exhibit C

(Filed Separately Under Seal)