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

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

DEFENDANT OMAHA PUBLIC POWER DISTRICT'S REPLY TO ZACHRY'S OPPOSITION TO OMAHA PUBLIC POWER DISTRICT'S MOTION AND SUPPORTING BRIEF TO DISMISS FIRST AMENDED ADVERSARY COMPLAINT
[Related Docket Nos. 34, 44]

Omaha Public Power District ("**OPPD**"), by and through its undersigned counsel, hereby files *Defendant Omaha Public Power District's Reply* (this "**Reply**") *to Zachry's Opposition to Omaha Public Power District's Motion and Supporting Brief to Dismiss First Amended Adversary Complaint* [Docket No. 44] (the "**Response**"). In support of the Reply, OPPD respectfully submits as follows:

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

I. ARGUMENT

A. Zachry's abuse of the bankruptcy process is fundamentally at odds with the equitable nature of the bankruptcy system.

1. Zachry cannot use the bankruptcy process to re-write contractual obligations that it voluntarily assumed. Bankruptcy does not give the debtor or bankruptcy courts authority to void specific contractual provisions of an assumed contract simply because a debtor now finds them burdensome. *See, e.g., 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."). Instead, the Bankruptcy Code provides, and courts have consistently held, that bankruptcy cannot be used to rewrite the economic consequences of an assumed contract. *See Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th 321, 325 (5th Cir. 2023) ("An executory contract must be assumed or rejected in its entirety.").

2. Zachry's procedural manipulation and attempt to secure a premature ruling on disputes that have not yet accrued blur the lines between permissible litigation strategy and deliberate litigious overreach. "The Bankruptcy Code requires that debtors act in good faith in both the commencement and prosecution of bankruptcy proceedings, and good faith is an intrinsic component of the bankruptcy process." *In re Mantachie Apartment Homes, LLC*, 488 B.R. 325, 331 (Bankr. N.D. Miss. 2013). This requirement of good faith "prevents abuse of the bankruptcy process and safeguards the integrity of the courts." *Id.*

3. As Plan confirmation approached, Zachry initiated this proceeding nearly *two weeks before OPPD filed its Admin Claim*, and *just three weeks before the Plan was confirmed*. By filing this suit with Plan confirmation fast approaching, Zachry forced OPPD to file its Admin Claim to preserve its rights under the Plan. Zachry has since emerged from bankruptcy with a

confirmed Plan,[2] yet Zachry claims that this Court must retain this case because of the Admin Claim, which this Court has fully abated until liability is determined.[3] The Court needs to look no further than the Stipulation Order, which intentionally and explicitly provides the appropriate protocol to determine the merits of this dispute and liquidate Zachry's liability in the proper Nebraska forum.[4] If, and only if, Zachry is determined to have liability under the assumed Contract, then, and only then, will the abated Admin Claim resume and only for the limited purpose of deciding administrative priority under 11 U.S.C. § 503(b).[5] The Amended Complaint has no business being considered on the merits unless and until this litigation is placed in the proper Nebraska Court, precisely what this Court's Stipulation Order has already set up.

4. Indeed, Zachry's Plan has gone effective and has been substantially consummated. Considering the importance of this procedural posture, the Bankruptcy Court's ability to retain this case by refusing to enforce the assumed Contract's mandatory, exclusive forum selection clause is "***significantly weakened***." *See In re Manchester, Inc.*, 417 B.R. 377, 385, 387 n.8 (Bankr. N.D. Tex. 2009) (Houser, J.) ("Furthermore, any 'presumption in favor of maintaining venue of an adversary proceeding in the forum where the bankruptcy case is pending . . . . [is] significantly weakened, ***if not entirely destroyed***, by the circumstance that this is now post-confirmation litigation.'" (quoting *In re Mirant*, 337 B.R. 107, 124 (N.D. Tex. 2006) (emphasis added))).

[2] *See* Docket Nos. 2431, 2731 (Case No. 24-90377-MI).

[3] *See* Docket No. 2685 (Case No. 24-90377-MI). Although this Court has bifurcated the claims reconciliation process from the Admin Claim's liability determination and confirmed Zachry's Plan, Zachry insists this case belongs here solely because the Admin Claim makes it a core proceeding. Zachry offers no other justification—and none exists. If the Admin Claim is the only reason to keep this case in Texas, the solution is straightforward: OPPD can simply withdraw it. Zachry's confirmed Plan explicitly preserves all of OPPD's rights and claims related to the Contract, First Amendment, and Second Amendment. *See* Docket No. 2431 (Case No. 24-90377-MI), at ¶ 161.

[4] *See* Docket No. 2685 (Case No. 24-90377-MI), at ¶ 1 ("The Application shall be deemed abated until such time as the Debtors' liability, if any, to OPPD in connection with the EPC Contract is determined on a final basis in the Litigation, whether by settlement, judgment, order, or otherwise").

[5] *See id.* at ¶¶ 2–3.

"Moreover, in a case such as the one at bar—where the debtor was able to obtain confirmation of its reorganization plan long before the contract claims covered by the forum selection clause were tried to the [C]ourt—any policy concern 'must be lessened.'" *Id.* at 385 (quoting *In re D.E. Frey Group, Inc.*, 387 B.R. 799, 807 (D. Colo. 2008) (enforcing forum selection clause and transferring core proceeding to selected forum)). Both *Manchester* and *Frey Group* transferred core proceedings under an enforceable forum selection clause. In due order of pleading, the Amended Complaint should not be addressed on the merits unless and until the Transfer Motions are ruled on, and subsequently, the suit is transferred to the proper Nebraska court.

5. Importantly, however, by filing this suit on the verge of confirmation, Zachry's actions reflect nothing more than a blatant attempt to engage in impermissible forum shopping and keep this dispute—which the parties contractually agreed should be brought exclusively in Nebraska[6]—here in Texas. To get there, Zachry manufactured a premature lawsuit against OPPD after failing to meet the revised Guaranteed Substantial Completion Dates it previously warranted were attainable.[7] Given the then-impending Plan confirmation and knowing that it failed to meet the Guaranteed Substantial Completion Dates, Zachry manipulated the system by filing this action and alleging prototypical affirmative defenses camouflaged as declaratory relief, all in anticipation of OPPD's Admin Claim.[8] Zachry now seeks to selectively void the parties' contractually mandated forum for what it perceives as a more favorable venue—blatant forum shopping. Zachry's antics abuse the bankruptcy process—a system designed to promote equity—and

[6] *See* Docket No. 809 (Case No. 24-90377-MI).

[7] *See* Docket No. 961 (Case No. 24-90377-MI), at Ex. A, §3(i) ("[Zachry] warrants and agrees that it has the necessary work force and resources to complete the Work, including achieving the Guaranteed Substantial Completion Dates.").

[8] *See* Response, at ¶ 53 ("Even if the Declaratory Judgment Claims were sought in anticipation of the Administrative Expense Claim or any other suit by OPPD . . . .").

contravene well-settled provisions of the Bankruptcy Code.[9]

6. Critically, considering that Zachry is a post-confirmation, reorganized debtor, unwinding the Assumption Order may have severe unintended consequences with respect to Zachry's confirmed Plan. By pressuring this Court to allow it to avoid portions of the assumed Second Amended Contract, Zachry's potentially impairs the validity of the Second Amendment and calls into question the enforceability of this Court's Assumption Order. "Although the bankruptcy court is, of course, free to *interpret* and *enforce*" an order approving a settlement, "any modification of that Order" once it becomes final is "an abuse of discretion." *In re Cont'l Airlines Corp.*, 907 F.2d 1500, 1523 (5th Cir. 1990) (emphasis added). Namely, permitting Zachry to avoid the burdens and obligations it voluntarily assumed would strip OPPD of the only consideration it received in the Second Amendment. This, in turn, poses the question of whether the Assumption Order should be unwound in its entirety.

7. An abated administrative claim does not permit Zachry to evade its assumed obligations. Valid forum selection clauses are to be enforced in all but the most exceptional cases,[10] and Zachry's bankruptcy alone does not create an exception,[11] especially where Zachry

[9] *See, e.g., Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th at 325 ("[T]he Fifth Circuit has 'been clear that it's all or nothing: 'An executory contract must be assumed or rejected in its entirety.'" (quoting *Matter of Provider Meds, LLC*, 907 F.3d 845, 851 (5th Cir. 2018)). Further demonstrating Zachry's impermissible abuse of the bankruptcy system, Zachry has moved for partial summary judgment on the issue of whether the Liquidated Damages Clause is enforceable, another provision of the Second Amended Contract, which Zachry assumed through its bankruptcy. Zachry's request to invalidate the Liquidated Damages Clause not only contravenes Section 365 of the Bankruptcy Code but also ignores the fact that such relief will not simplify this case as it suggests and would instead force the parties to argue about the total damages incurred, necessitating the retention of various experts and expensive discovery.

[10] "[A] forum-selection clause [must] be 'given controlling weight in all but the most exceptional cases.'" *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 59–60 (2013) (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

[11] "The mere fact that Debtor/Plaintiff is in bankruptcy is not sufficient to prevent enforcement of a contractual forum selection clause." *In re Bailey*, 217 B.R. 523, 527 (Bankr. E.D. Tex. 1997).

affirmatively assumed the Contract[12] and has since emerged from bankruptcy as a reorganized debtor.[13] For the foregoing reasons, dismissal or transfer of this action is not only appropriate but also equitable and just.

B. Zachry's affirmative defenses masked as declaratory relief claims are not ripe for adjudication.

8. A "declaratory judgment action, like any other action, must be ripe in order to be justiciable." *Wright v. Spindletop Films, L.L.C.*, 830 F. Supp. 2d 280, 284 (S.D. Tex. 2011) (quoting *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000)). The Projects have not reached substantial completion, meaning the facts underlying the case are still developing. As a result, Zachry's request for declaratory relief is not ripe for adjudication.

9. One factor that courts consider in determining whether to hear a request for declaratory relief is "whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata.'" *Bank of Am., N.A. v. Cartwright*, 560 F. Supp. 3d 1210, 1224 (N.D. Ind. 2021) (citing *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 579 (7th Cir. 1994)). Further, if an action filed by the counterparty "would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified." *AmSouth Bank v. Dale*, 386 F.3d 763, 787 (6th Cir. 2004).

[12] Assumption is "all or nothing"—[a]n executory contract must be assumed or rejected in its entirety" and "the debtor may not choose to reject some agreements within the contract and not others." *Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th 321, 325 (5th Cir. 2023).

[13] The presumption that an adversary remains in the court where the bankruptcy is pending is "*significantly weakened, if not entirely destroyed*," once a plan is confirmed. *Mirant Corp. v. The Southern Co. (In re Mirant)*, 337 B.R. 107, 124 (N.D. Tex. 2006), *aff'd sub nom.*, *Mirant Corp.*, 197 Fed. App'x. 285 (emphasis added); *In re Manchester, Inc.*, 417 B.R. 377, 387 n.8 (Bankr. N.D. Tex. 2009) ("Furthermore, any 'presumption in favor of maintaining venue of an adversary proceeding in the forum where the bankruptcy case is pending . . . . [is] significantly weakened, if not entirely destroyed, by the circumstance that this is now post-confirmation litigation.'" (quoting *In re Mirant*, 337 B.R. at 124)).

10. As explained above, Zachry's declaratory relief claims are affirmative defenses to the breach of contract claim OPPD would have brought as a plaintiff in the Nebraska Courts had Zachry not used its bankruptcy to improperly force this litigation in light of its impending Plan confirmation. Zachry filed this suit not long after it failed to achieve the Guaranteed Substantial Completion Dates as provided under the Second Amendment in anticipation of, and with the intention to force OPPD to file, the Admin Claim. Such use of the Declaratory Judgment Act is one factor that courts should consider when deciding whether to hear the request for such relief. *See Bank of Am., N.A.*, 560 F. Supp. 3d at 1224.

11. Additionally, the declarations sought by Zachry in its declaratory relief claims are judicial determinations that ordinarily would be brought as counterclaims to a breach of contract claim. That is, had Zachry not engaged in procedural fencing, any suit that OPPD would have brought on its own accord would encompass the very relief that Zachry seeks here. Such tactics reflect an unjustifiable use of the Declaratory Judgment Act. *See AmSouth Bank v. Dale*, 386 F.3d at 787.

12. Several of the Fifth Circuit's factors for determining whether a declaratory judgment action should be dismissed weigh heavily in favor of dismissal. *See St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590–91 (5th Cir. 1994) (listing factors). As explained above, Zachry's filing of this suit is nothing more than a deliberate and transparent attempt to forum shop and allowing Zachry to proceed with its declaratory claims in an attempt to secure a venue outside of the parties' contractual agreement results in a grave inequity to OPPD. *See id.* (noting that forum shopping and the inequity that would result are relevant to whether a court should hear a declaratory judgment action). Convenience of the parties and witnesses is also another factor that weighs heavily in favor of dismissing these claims. *See id.* The only factor that supports Zachry's

premature filing of this suit is that it anticipated a lawsuit being filed by OPPD. *See id.* But even then, given the factual and procedural predicates here, Zachry's requests for declaratory relief were merely a tool used to gain access to this Court and avoid bringing this suit in Nebraska. *See Great Am. Assur. Co. v. Waterhill Companies Ltd.*, No. CIV.A H-09-3196, 2010 WL 518760, at *3–4 (S.D. Tex. Feb. 4, 2010) (courts should look to see whether the plaintiff used the DJA "to gain access to a federal forum on improper or unfair grounds" by engaging in procedural fencing, *i.e.*, filing for declaratory action before the other party brings suit).

13. Zachry suggests that because "OPPD has filed an administrative claim against the estates," its declaratory relief "claims are far from hypothetical." *See* Response, at ¶ 30. Zachry fails, however, to appreciate the procedural posture of this case. Again, Zachry took the first step by filing this proceeding against OPPD and asserting its affirmative defense, declaratory relief claims.[14] Only after Zachry filed this suit and after it filed its Plan did OPPD file its Admin Claim.[15] There can be nothing further than the truth that Zachry's declaratory relief claims came after OPPD's Admin Claim. This procedural posturing ignores the fact that the Projects have not yet reached substantial completion, which makes Zachry's claims more hypothetical than it suggests.

14. By prematurely filing this suit as a camouflaged assertion of affirmative defenses, prior to OPPD formally claiming a breach and prior to the filing of OPPD's Admin Claim, Zachry's claim for relief is hypothetical, abstract, and not ripe for adjudication. As such, Zachry's declaratory relief claims should be dismissed.

[14] *See* Docket No. 1 (filed on February 5, 2025).

[15] *See* Docket No. 2176 (Case No. 24-90377-MI) (filed on February 14, 2025).

II. CONCLUSION

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

Dated: May 23, 2025

Respectfully submitted by:

/s/ Thomas C. Scannell

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on May 23, 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