UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Zachry Holdings, Inc.	)	CASE NO: 25-03025
	)	Houston, Texas
Debtor.	)	
v.	)	
	)	
Omaha Public Power District	)	Wednesday,
	)	July 9, 2025
Defendant.	)	

MOTION HEARING
BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

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Proceedings recorded by electronic sound recording; Transcript produced by transcription service.

HOUSTON, TEXAS; WEDNESDAY, JULY 9, 2025

(Call to Order)

THE COURT: All right. We're here in the Zachry Holdings v. Omaha Power. It is adversary proceeding 25-03025. Let's go ahead and take appearances in court. If you wish to appear on the phone, you'll need to press five-star one time on your phone.

Mr. Koster?

MR. KOSTER: Good afternoon, Your Honor. I'm Charles Koster of White & Case for the Reorganized Debtors, joined by my partners, Laura Gar and Jason Zakia, and John Thomas, Eric Grant, and John Deis from the Hicks Thomas firm.

THE COURT: Thank you, sir.

MR. SCANNELL: Good afternoon, Your Honor. Tom Scannell from Foley & Lardner LLP, for the Defendant, Omaha Public Power District. My partners, Rob Slovak, Michael Thomas, and Zach Zahn are also present in courtroom today. OPPD's General Counsel, Mr. Stephen Bruckner, is also present at counsel's table.

THE COURT: Thank you, Mr. Scannell.

MR. SCANNELL: Thank you.

THE COURT: Do we have anyone on the phone that wishes to make an appearance?

Mr. Koster.

MR. KOSTER: Thank you, Your Honor, and thank you for hearing us today. I certainly hope that you and your staff and your families are as minimally affected as possible by the flooding in the Hill Country, and its effects on the Houston community. It's certainly (indiscernible) for all of us.

THE COURT: Thank you for those thoughts.

MR. KOSTER: Six items on the agenda today. Omaha Public Power District's motion to withdraw the reference, to transfer venue, and to dismiss the adversary complaint, the Reorganized Debtor's motion for partial summary judgment, and the related OPPD motion to seal and motion to strike. We've discussed with OPPD's counsel, and believe it makes sense to start with OPPD's three larger motions, the motions to transfer, the motion to withdraw the reference, and the motion to dismiss. We anticipate that the movants will handle those motions collectively, given the largely overlapping factual content and legal framework, but the parties will, of course, approach them however Your Honor prefers, and Mr. Zakia will respond for the Reorganized Debtors to those motions.

Assuming Your Honor is okay with that sequencing, we would then take up the Reorganized Debtor's motion for partial summary judgment, and Mr. Grant will argue for the Reorganized Debtors on that motion.

THE COURT: So I'll pose to everybody that I think there's a chance I could rule on some stuff from the bench, but there's also a chance that I won't rule on stuff from the bench. And I want to know at some point, on the motions to dismiss, part of the gravamen of the withdrawal of the reference in the adversaries, I'm not going to be ruling on those things. Right? And so I don't know if it's efficient to hear them, or to wait and come back, given -- we can wait and see. I mean, if I grant you the motion to withdraw the reference and the motion to transfer the adversary proceeding, I can't imagine people will want to move forward with it. But if I deny them both, maybe people do.

I just -- I want people to think about that. We don't need to decide that, because I assume that we will certainly start with the withdrawal and the transfer.

But am I hitting that about right?

MR. SCANNELL: Your Honor, we think that makes the most sense, to start with the motion to transfer venue first.

THE COURT: Okay.

MR. SCANNELL: And then, if we have to discuss the other matters along with that larger discussion, that's fine. But we think it's most appropriate to start with deciding which is the proper court before we decide the other motions.

THE COURT: Fine with me. It's an evidentiary hearing on motion to transfer venue. Let's have some of the evidence.

MR. SCANNELL: Your Honor, a bit of housekeeping before we begin with the presentation.

I believe Your Honor has OPPD's exhibit booklet on the bench. Our reporter has been provided a copy as well. From an evidentiary standpoint, OPPD has two exhibits to offer in support of the motion to transfer. Exhibit 1 is Zachry's file marked Live Complaint in this case. Exhibit 5 is the party's EPC contract containing the venue selection clause. At this time, OPPD offers Exhibits 1 and 5 into the record.

THE COURT: Any objection?

MR. KOSTER: No, Your Honor.

THE COURT: One and five are admitted.

MR. SCANNELL: Your Honor, I will turn the podium over to my partner, Rob Slovak, to present the motion to transfer venue.

THE COURT: Thank you.

MR. SCANNELL: Thank you, Judge.

MR. GRANT: Good afternoon, Your Honor. May it please the Court, could we have the presenter privileges provided to Zach Zahn? So we're just going to (indiscernible)

THE COURT: Of course. But are we putting on a witness? What are we doing for evidence?

MR. GRANT: I'm sorry, Your Honor?

THE COURT: Are you putting on a witness?

MR. GRANT: The only evidence that we have offered are the two exhibits that were stipulated, and that Mr. Scannell just offered.

THE COURT: So you will have no other evidence with respect to the motion to transfer?

MR. GRANT: Correct, Your Honor.

THE COURT: Okay.

MR. GRANT: We are just arguing, and would use a demonstrative PowerPoint, if that would please the Court.

THE COURT: Who did you want to have control?

MR. ZAHN: Zach Zahn.

MR. GRANT: Pardon me?

MR. ZAHN: Zachary Zahn.

MR. GRANT: Yes, sir.

THE COURT: I don't see you here. Oh, there you are. Too many Zacharys up on my screen, I'm afraid.

Okay, you're now the presenter, Mr. Zahn.

MR. GRANT: Okay. Well, technical difficulties. We'll see if we can make it work here in a second, Your Honor.

If it pleases the Court --

THE COURT: We can take a minute. Let's -- You had planned to put it on. Let's put it on.

MR. GRANT: The Debtor here is asking you to effectively rewrite the parties' contracts, to write two key provisions out of the agreement. The agreement between the parties is not only negotiated at arm's length between sophisticated parties, but was also twice amended. It was also intentionally and fully assumed by this Court to be enforced in total. And what the Debtors ask you to do in this case, and what we're here to talk about, is to remove effectively the forum selection clause, intentionally negotiated and then later voluntarily assumed, and to write out of it the liquidated damages clause.

We don't believe that the Bankruptcy Court has the power to rewrite the contracts. And what they're asking you to do would indeed contravene Section 365, because these have been fully assumed, and they can't be partially enforced or obeyed by the Debtor in this case.

Under the procedural posture of this case, it's also particularly important for the transfer to take place because the plan has been confirmed and the case has been closed. Quite simply stated, they have not and cannot offer any evidence before this Court to carry the burden here to show that the enforcement of the forum selection clause, which is presumed to be enforceable by the Fifth Circuit and

by the Supreme Court case law that we've cited to the Court, they can't carry that burden simply because there is an abated administrative claim pending before this Court. And so we respectfully suggest that you have to enforce that forum selection clause, and transfer this case to the Bankruptcy Court in Omaha.

So there's two questions before the Court. Can you ignore the forum selection clause? The second is can you ignore the liquidated damages?

THE COURT: So let me just -- This may be very minor by the end of the day, but just so you know, I can't transfer something to the Bankruptcy Court in Nebraska. I simply transfer something to Nebraska, and Nebraska decides how they allocate the case. I don't think that matters for your argument, but I want you to know I think that that may exceed my authority. I don't get to designate how they refer cases over there.

MR. GRANT: Well, Your Honor, I think that under the Manchester case that we'll talk about more in detail here, decided by Judge Houser, that you can indeed follow that case, and transfer it to the Bankruptcy Court, particularly where that's part of the forum selection clause. But Your Honor, certainly I am not here to tell you how (indiscernible)

THE COURT: I don't think that I -- I don't think

I have the authority to do that.

MR. GRANT: Okay. So we think that you never get to the second question, and I think that seems kind of obvious, perhaps, from what we had as a preliminary discussion this morning. If -- We think you can't ignore the forum selection clause, so we probably don't need to have a lot of argument here today about the liquidated damages clause, because we just think that the proper forum to decide those issues, the 12(b)(1) issues, is actually in Nebraska by enforcement of the forum selection clause.

So let's take a look at that forum selection clause. This is Exhibit 5 that's been -- I'm sorry, Your Honor, this is moving too slowly. So that forum selection clause says, I'm just going to read it to you (indiscernible)

THE COURT: Would it be easier if I just turned to it in my notebook? Because I can do that, too.

MR. GRANT: We'll see if we can get there.

The forum selection clause, Your Honor, says that they consent and submit to the exclusive jurisdiction in the District of Douglas County, Nebraska, and the United States District Court for the State of Nebraska. Tellingly, it also says that they waive any objection based on venue or forum non-convenience.

And so as the Court is well aware, we've cited to

the In re Manchester case, which itself cites the Fifth Circuit precedent that derives from a line of cases from the Supreme Court, including one that's Atlantic Marine Construction. And in the Atlantic Marine Construction case, the Court examined the enforcement of a forum selection clause that was mandatory between a contractor and a subcontractor on a mandamus context. And what the Court said in that particular case is effectively that the burden of proof lies on the party that's opposing that forum selection clause to come forward with evidence to show that it's unreasonable in the circumstance and that there is a very heavy burden.

Telling, what the Supreme Court said in that case is that in analyzing one of the factors, which is the choice of the plaintiff itself, the Court said you can discount that, and said under 1404(a), which we're also arguing here, whether a transfer would promote the interests of justice about a forum selection clause has to be given controlling weight in all but the most exceptional circumstances. And the Court there, in analyzing whether the choice of forum selection should be held against the party that chose that forum selection, said not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would encourage gamesmanship, because 1404(a) should not create or multiply opportunities

for forum shopping.

And we would suggest, respectfully to the Court here today, that that's what's happened here. They have filed what are effectively affirmative defenses to a claim that is premature because the contract has not been performed, and taking the position that somehow, that creates a public policy concern that allows you to then ignore the forum selection clause, and then as contrary to the law in this case.

The Fifth Circuit standard set out by the In re Manchester case from Judge Houser is that it's prima facie valid and enforceable unless the opposing party, the opposing party shows that enforcement would be unreasonable. In that case, here it's the Debtor. And tellingly in this case, if you look at the -- go to the next slide, there are three -- I'm sorry, there are four ways in which they could satisfy this opportunity to show that it was unreasonable in the extraordinary circumstances to ignore the forum selection clause. One is to show it's a product of fraud or overreaching. Another is to show that it deprives a party of a day in court. Another is to show that the forum is fundamentally unfair. Or the last one is that it would contravene strong public policy.

Remarkably, in this case, Your Honor, they just ignore this standard altogether. In Docket 24, which is the

omnibus response, they don't offer any evidence of any kind, or any argument as to any of the three factors. And what they argue sort of loosely is that because this is a core proceeding, that it would contravene strong public policy to enforce that forum selection clause.

There are 14 pages, out of the 37 in that response, dedicated to the motion of transfer of venue. Two of them simply say it's core, therefore there is a strong public policy. The other 12 are them arguing a standard that doesn't apply. What they tell you at the beginning of that argument is that in the absence of a forum selection clause, we bear the burden to show that venue transfer is appropriate. So they're asking you, essentially, not to look at the left hand, but to pay attention to the right hand, that somehow it's our burden. And that's false, it's theirs. They have offered no evidence of any kind to satisfy any of the conditions that would be necessary for you to ignore the validly chosen forum selection clause that you have also assumed, and for which they are obligated to enforce.

THE COURT: So I want to characterize what they said somewhat differently so you can deal with it head on.

MR. GRANT: Okay.

THE COURT: I think they said you chose to file an administrative claim here in this Court that exists at this

point because you filed it. And it's the same issues, and it is dependent on the contract, and that by you coming here and seeking an admin claim, they have proven that, is their argument. And I don't think you've dealt at this stage at all with the fact that y'all chose voluntarily to file an admin claim, and we have Supreme Court authority on what occurs when people voluntarily choose admin claims. It's all sorts of things occur. Once you voluntarily file claims, I should say.

MR. GRANT: Sure, Your Honor. Understood.

In the timeline, so Your Honor is clear, we filed the admin claim after plan confirmation, and after they filed the adversary proceeding. We filed it procedurally to preserve our rights. And since that time, if the Court recall, the parties have entered into a stipulation, and that stipulation puts the administrative claim in abatement, and the parties have agreed as part of that stipulation, that the Court of proper jurisdiction can decide that administrative claim.

THE COURT: No, I'm aware of that. This isn't a question of jurisdiction, it's a question of venue. And I want you to confront head-on, and you do a little bit in that answer, their arguments that you chose to file an admin claim. You didn't have to file an admin claim. You chose to file an admin claim. And what does that do with respect

to whether enforcement of the forum selection clause would be unreasonable because it eats up our authority over, our exclusive authority over admin claims.

MR. GRANT: I apologize, Your Honor.

THE COURT: No, you're good. You're good.

MR. GRANT: Two things, Your Honor. First and foremost, it's irrelevant. Their argument as to the admin claim is that somehow it makes this a core proceeding. The In re Manchester case that Judge Houser analyzed, in that particular case, she had already predetermined that the proceeding was core, and then analyzed the factors before her, and whether the Debtor in that case had shown that you can avoid the forum selection clause, she found that the public policy concerns are substantially weakened, if not completely overcome by the fact that the plan had been approved and confirmed and performed.

Those exact same facts and circumstances apply here. The admin claim itself does not give them the -- It does not prove that this is the kind of extraordinary circumstance which warrants the exercise of bankruptcy jurisdiction in order to decide claims that are of state law concern according to all of the claims themselves, and the contract forum that they chose.

So all you need to do is follow the Manchester case, and what happened in that particular circumstance.

But to the extent that that particular circumstance gives you pause, Your Honor, the OPPD party is more than willing to withdraw the admin claim because we believe that this should be tried in Nebraska, it should be decided in Nebraska, and it should be decided between those parties by the chosen forum in their contract.

Does that answer your question, Your Honor.

THE COURT: Well, I'm not sure. I don't know what that means. So I'm not going to require you to do anything like that. I don't know if you're telling me you have now done that, and therefore I shouldn't consider it, or what you're telling me. But I think it would be inappropriate for me to tell you that you can't have an admin claim. That could cost you an awful lot of money, and I don't think that's part of what I ought to be doing. So if you want to tell me that you're withdrawing the admin claim, they may argue you can't. I don't know the effect of all that. But I don't think it's appropriate for me to say you have to drop the admin claim. You have the admin claim right now, there may be consequences of that. I'm not sure. But what I wanted to try and explore with you, and what you've properly explored with me is whether that changes the situation.

MR. GRANT: Well, I don't believe it does, Your Honor. We believe that the Manchester case, and the In re

Frye case, upon which Judge Houser relies, show that that is not the case. It does not allow the parties to overcome the validly selected forum selection clause, because as I mentioned to you, if you go --

Here is the quotable language from In In re Manchester. This is on Slide 11. What Judge Houser cites from In re Frye is that while there's a public policy consideration, that may be impaired when core proceedings are transferred. And we're not conceding that this is a core. It's a mix of core and non-core. But the public policy consideration is only one factor, and it shouldn't be given controlling weight.

Moreover --

THE COURT: Was there an admin claim in that case?

MR. GRANT: There was a proof of claim. That proof of claim had been withdrawn, and the motion to withdraw the reference had been denied before the motion to transfer was decided.

THE COURT: Right. Right.

MR. GRANT: But the Court had already predetermined in that case that all of the issues were core. And still analyzing this case relying on Frye --

THE COURT: But there's a difference between something being core and someone having filed a claim in a case. Those are not the same issue. They are related

issues. So I guess I need to understand, in Manchester, at the time of the decision, was there an admin claim, or even a regular claim pending before the Bankruptcy Court?

MR. GRANT: There was not an admin claim pending before the Bankruptcy Court. There was an adversary proceeding with competing claims that were pending before the Bankruptcy Court, with a motion to transfer venue under the same procedural rubric that we have filed in this case. And Judge Houser, in her analysis, went through each of the four factors, and just like the case here, what she found is that in that case, the trustee had not, and this is at page 387 of the opinion, that the trustee had not offered any evidence of any of the factors. They have not offered any evidence of any of those factors in this case. They cannot at this point because they haven't briefed it.

And she analyzed the public policy consideration, and said, "I clearly believe that because the public policy factor is outweighed in circumstances where the plan has been confirmed," same thing here, "there is no connection to the Bankruptcy Court." And what she said in her holding is that justice requires transfer, and she transferred in that case to the Bankruptcy Court in the district of the chosen forum between the parties.

THE COURT: So if the claims allow this process itself has to occur in the Bankruptcy Court, and that was

not part of what was going to occur in Manchester, I'm having trouble synthesizing in my own mind that the analogy is as tight as what you're arguing. And maybe I'm still missing some of the Manchester facts, but the concern that I walked out with based on their argument is that the claims allowance process, the administrative claims allowance process was invoked here by your client. And if that wasn't the case in Manchester, I'm not saying that the analysis isn't probative, but it seems to me not probably on point.

MR. GRANT: There's two factors that I would point the Court to that are significantly different in this case. The first of which is the parties have stipulated to abate the administrative claim so that the proper forum can decide if there is liability. And if and only if, and this is in the words of the stipulation and order approved by this Court, if and only if Zachry is found to be liable is there an administrative claim to occur at all. The parties expressly contemplated a process by which it would go to another forum, it would be decided --

THE COURT: It does not say go to another forum.

MR. GRANT: I'm sorry, Your Honor?

THE COURT: The stipulation does not say you would go to another forum.

MR. GRANT: It does not expressly say that we have chosen another forum.

THE COURT: Right.

MR. GRANT: It refers to the correct court, and sets up that procedure (indiscernible)

THE COURT: Correct. But that doesn't answer the question of if the claims allowance process has been invoked, and I'm staring at this Supreme Court opinion dealing with the invocation of the claims allowance process, that I should then ignore it. I can't ignore it. I have to deal with it. I think you are dealing with it, but I'm pushing back because I'm hoping that there is a case where we have the claims allowance process that is running directly up against the forum selection clause, because that's the competing issue. I've got the Volkswagen factors, but you're not arguing them.

MR. GRANT: Well, Your Honor, in the Frye case, there was actually a proof of claim proceeding that still existed. Now, I understand that's a Colorado District Court case, but it is also the case that Judge Houser quotes from very vociferously in her opinion, and relies upon. And there was a proof of claim proceeding that was alive and in that Colorado case, so I would respectfully suggest that that is precedent that would support it.

The other thing I would point the Court to is that in the plan itself, in Section, I believe it's Section 64, although I don't have it down as well as Mr. Scannell does,

but in Section 64 of the plan, the reorganized Debtor is responsible for the admin claims. And so I think factually, that's a significant point here as well, because it can be determined somewhere else, and this is a fairly simple issue that doesn't directly affect other estate creditors, because frankly, there's no estate anymore. There is a reorganized Debtor, and the case is closed.

Does that answer your question, Your Honor?

THE COURT: I don't know. I mean, you're being responsive to my question. I don't know if that resolves it. I just -- This is something I did not come out knowing what to do about.

MR. GRANT: I understand.

THE COURT: That's why I'm exploring this with you.

MR. GRANT: I understand, Your Honor. And just to point out another point on -- move to slide 12, what Judge Houser observed in the Manchester case is even in core matters, the bankruptcy jurisdiction is permissive, and it's not mandatory. So it is up to you, Your Honor, to decide. We believe, for the reasons that I've already stated, that justice requires that this case be transferred on the basis of In re Manchester, its reliance on Webster, and the Supreme Court case of Atlantic Marine, and that this case should be transferred to Nebraska.

THE COURT: So before you leave, part of their argument is based on traditional venue transfer issues, where they're saying witnesses are closer here, all of your clients and subcontractors are here, that Texas is in fact the more convenient forum under the statute.

MR. GRANT: That's -- I'm sorry (indiscernible)

THE COURT: Do we have any pushback from you on that (indiscernible)

MR. GRANT: One hundred percent. That's the wrong standard. What the Atlantic Marine case is saying, and what In re Manchester says, and the Kevlin case out of the Fifth Circuit says, is in a circumstance where there is a mandatory forum selection clause, the burden is no longer on the party that is --

THE COURT: No, I agree with that, and so my question may not have been clear.

MR. GRANT: Okay.

THE COURT: I'm worried about a situation where you have the forum selection clause heavily favors you, they have the filing of the admin claim heavily favors them. When I have those kinds of competing interests, I'm asking you, should I then move to the more traditional factors? Because those may compete very heavily with one another.

MR. GRANT: Your Honor, the Atlantic Marine case from the Supreme Court was not analyzing a bankruptcy

situation.

THE COURT: That's right.

MR. GRANT: But the Atlantic Marine case did make very clear that in a circumstance where there is a mandatory forum selection clause, the traditional analysis that is applied by balancing the public and private interest factors goes out the window, effectively. Instead -- And the Supreme Court went through in great detail each of the four factors, and described why, in a circumstance where the forum selection clause applies, that you don't conduct that analysis.

THE COURT: No, and I do understand that, and I do think that's what that case says. And now if I glom onto it, you've got this big weight over here, the forum selection clause, they've got a big weight that isn't taken into account there, of a claim that's filed in the bankruptcy case. Do I still -- Because Atlantic doesn't quite say ignore the other factors. It just says they get overwhelmed by the forum selection clause, I think. More to that tune. Do I continue to disregard them largely, even if I have the competitive weighting of the admin claim?

MR. GRANT: Your Honor, respectfully, I would suggest that the answer is yes. That's not the test. I believe in Manchester --

THE COURT: What is the test? What is the test,

if I have two competing interests, both of which are heavy? What do I then do?

MR. GRANT: I think you exercise your discretion to find that the public policy is no longer a factor significant and substantial enough to ignore the forum selection clause.

THE COURT: Okay. So now I do want you to -- I got it. I understand (indiscernible) Assume that I conclude that I have these two big competing interests here, and I've got to figure out which one is more important. Do I deal with the other factors? Or do I ignore the other factors, and just say I think A is more important than B?

MR. GRANT: I think the case law requires you to ignore the other factors.

THE COURT: Okay.

MR. GRANT: It has created a burden-shifting circumstance where in a traditional forum non-convenience argument, it would be on the party moving to transfer on forum non-convenience.

THE COURT: Well, Volkswagen says forum non-convenience is not the standard in this circuit. It's not forum non-convenience, it is simply convenience.

MR. GRANT: I understand, Your Honor. But as they admit in the footnote to their brief in response at page 25, footnote 13, 1404 analysis and the 1412 analysis are

effectively the same for the purposes of this case.

THE COURT: That's correct.

MR. GRANT: And that transfer -- The argument that they're making to you, that we have a burden to come in and show the forum non-convenience factors, I respectfully suggest is wrong because the standard is different (indiscernible)

THE COURT: You don't have that burden. I'm trying to figure out what I'm supposed to do. What am I supposed to do if I've got two 500-pound weights pulling against one another?

MR. GRANT: Well Your Honor, I would respectfully suggest that they're not two 500-pound weights. I would suggest that the forum selection clause is 1,000 pounds, and the other one is maybe 200 pounds.

THE COURT: I know, but that's -- Assume that you're wrong. Assume you're wrong, assume -- You don't get to change my hypothetical. It's law school. Right? Assume you've got two 500-pound weights. Am I then still supposed to ignore those other factors?

MR. GRANT: I believe that's correct, Your Honor.

THE COURT: So how do I decide between the two 500-pound weights?

MR. GRANT: You follow what the Supreme Court has said about the -- that it's an exceptional circumstance, to

write out of the parties' contracts some contractually bargained for provision between the parties. And you fall back on 365, and the principles behind it that you can't -- that you have to assume all of the obligations under an executory contract, and they all have to be enforced. They cannot be selectively enforced.

THE COURT: I know. That is not up for debate, you're right. That doesn't confront the problem, though.

But I got it. Anything else you want to add to this?

MR. GRANT: Nothing else from our side, Your Honor, unless you have more questions.

THE COURT: No. Thank you.

Mr. Zakia?

MR. ZAKIA: Thank you, Your Honor. I'm going to try and get right to the point of the colloquy you were having with Counsel, because I do think there is an answer.

Ninety percent of what you heard about was based on the Manchester case, which was from 2009. So what I'm going to say is not in any way a criticism of Judge Houser, but because she was writing her opinion in 2009, she did not have the opportunity to take into account the Fifth Circuit's binding decision in Spelman, which didn't come till 2013. Okay? And that is a case in which the Court, the Circuit expressly found that the compelling interest in

uniform resolution of claims in a bankruptcy case justified setting aside, and gave the Bankruptcy Court discretion to set aside and ignore what otherwise would be a binding forum selection clause.

This 365 argument, Your Honor, is a total red herring. We have never argued --

THE COURT: I've already said that. That's --

MR. ZAKIA: Okay. So we'll skip that. But the Fifth Circuit has said that when the conflict comes between the uniform resolution of core matters -- And that's why he says it doesn't matter if it's core or not. We would argue on this issue it is critical whether it is core or not. And I'll even make an admission, if this were entirely non-core, and if we didn't have any bankruptcy claims at issue here, and this were a non-bankruptcy case, and we just wanted to transfer -- We are not making the argument that the other factors would overwhelm or compete with the forum selection clause here. But he's ignoring the critical issue, okay, and the critical issue, which again, the Fifth Circuit specifically spoke to after Judge Houser wrote her opinion. And so if you look at Spelman, it doesn't say a word about this being extraordinary, or us having to prove all of these other things. It simply allows the Court, in your discretion, to weigh the claims resolution process that we're going to do here versus the forum selection clause.

And how does that play into this case? What would happen -- And I'm going to get to the stipulation, which I think they completely mischaracterized, in a second. What would happen if you did send this case to Nebraska? You would be left with dual adjudications. Because this Court has, and its undisputed, exclusive jurisdiction over the administrative claim. And that's going to require the Court to look at the reasonableness of the claim --

THE COURT: So it is disputed, because they have told me that I don't.

MR. ZAKIA: Well, I don't know how they can -- I don't think they did tell you you don't have jurisdiction over the administrative claim.

THE COURT: No, they didn't tell me I didn't have jurisdiction. They told me I don't have exclusive jurisdiction over admin claims.

MR. ZAKIA: I think what they've told --

THE COURT: And that surprises me, but that's what they told me.

MR. ZAKIA: Right. Well, I'm going to, maybe I'll try and do them a favor, and articulate their argument in a way that may make sense, but is legally wrong. I think what they're telling you is you should ignore the administrative claim because the party stipulated to abate it.

Now, let's be real clear. At the time the

stipulation was entered into, we had an adversary proceeding that teed these issues up. In this Court, before Your Honor, we had a contested matter that teed the exact same matters up. So we took the completely unremarkable step of agreeing it was pointless to make Your Honor adjudicate this issue twice. It doesn't say a word about Nebraska, it doesn't say a word about another court. What it says is the litigation, which is this adversary, would be the forum in which we would first deal with these issues.

THE COURT: But the admin claim wasn't filed yet. Right?

MR. ZAKIA: That's -- So a couple of things. At the time the stipulation was entered, and at the time the plan is confirmed, the administrative claim was filed. And in fact, Your Honor, if we could just pull up -- I don't have as many slides as him, but I have one that might clarify the timeline. If you could give my colleague --

What are we called on the computer?

COUNSEL: Zachry Trial Tech.

MR. ZAKIA: Zachry Trial Tech. I just have the one slide, but I think it will clarify some of these issues.

THE COURT: Okay.

MR. ZAKIA: Okay. So these are the dates, Your Honor, and all of these are tied back to allegations in the complaint for things that happened in front of Your Honor.

So with regard to the -- So plan confirmation was the 27th of February. The admin claim was filed on February 14th. So when Counsel said the administrative claim was filed post-confirmation, that was not correct. It wouldn't matter. As Your Honor explained in EP Energy, I think quite articulately, the question is not when that claim was filed, it's what the claim -- when the events that the claim relates to occurred.

And this slide also shows us, and this -- I don't know if we need to get to their ripeness argument on the motion to transfer, but they are all related. Like, we didn't -- The only thing that predated the administrative claim was our original complaint. We didn't make this up. This is not a circumstance in which a party, for procedural advantage, Invented a claim that was not yet ripe. They had asserted that the contract had been breached, and invoiced us for damages arising out of the alleged post-petition breach of the post-petition contract. And they're running around telling people they have this big claim against the Estate.

So we didn't invent the claim. We simply brought the claim to Your Honor. Because if they're going to threaten constituencies with this huge admin claim that they have, we wanted that teed up with the Court. They then chose, I think correctly, because I think the consequences,

if they had chosen not to do it, would have been drastic for them. Again, as Your Honor explained in EPG Energy, if you choose not to file an administrative claim, that can have real consequences. Okay? They chose to file the administrative claim. Nobody forced them to.

THE COURT: So he wants -- He may withdraw it. What does that do?

MR. ZAKIA: Well, Your Honor, I think the law is pretty clear. One cannot divest this Court either of jurisdiction or authority to resolve an issue simply by saying, oops, I changed my mind.

THE COURT: Well, but I'm asking --

MR. ZAKIA: Yeah, if they want to withdraw it with prejudice --

THE COURT: No, if the admin claim is withdrawn, it's withdrawn with prejudice. Your client may be pretty happy with that. Right?

MR. ZAKIA: I have no authority to agree or disagree with what they may or may not want to do, Your Honor. I would have to talk to my client. Yes, I personally, just speaking for myself, think the consequences of that withdrawal would be pretty severe for them. I'm going to suspect we'll be back before Your Honor in no time, fighting about those consequences, if they do that.

THE COURT: Yeah, we might.

MR. ZAKIA: Because this Court would have, again, exclusive jurisdiction to determine the effect of the plan, and the effect of the withdrawal of the administrative claim.

THE COURT: So that you know and they know, I read the admin claim as saying that they are seeking administrative damages for all present and future consequences. It is not limited to damages that have already occurred. The admin claim is all future damages arising out of the delays. I'm not sure what that does, but I want it clear that's what the current admin claim in my mind says, as people think about this.

So again, I'm not so sure they should be doing what they suggested. But if they do, I would think your client deserves a phone call.

MR. ZAKIA: I'm happy to make that call, Your Honor.

So to be clear, the fact that Counsel, in his advocacy, is asking this Court to ignore we would suggest is the critical and dispositive fact, which is the interconnectedness of the administrative claim, the claim for post-petition breach of an assumed post-petition contract. That is inextricably intertwined with each and every count of the adversary complaint.

In fact, I would suggest Defendants have admitted

that. They have accused us of using the adversary complaint to tee up our defenses to their claim. I don't agree with that characterization. But it is a fact that the facts at issue, and the law at issue, and the dispute at issue is the same. And courts have been clear that if the question presented by an adversary is inextricably intertwined with the resolution of an administrative claim, that is the very heart of what courts do, the Bankruptcy Courts do, and that is a court claim.

And again, I hate to keep coming back to this one case, but Your Honor, there are a lot of similarities to EP Energy. And as the Court found, it doesn't matter that the governing law for the administrative claim is provided by state law, and it doesn't matter.

Here -- In EP, the facts were a little more favorable for the claimant than they are here. There, the claim was asserted post-emergence, and the Court was very clear that it didn't matter that the -- Here, the claim was asserted pre-confirmation and pre-emergence. In EP Energy, even when the claim was first asserted post-emergence, the Court correctly recognized that that didn't matter because, one, it entirely turned on when the events that gave rise to the claim occurred. And Your Honor also clarified that the critical date at which the Bankruptcy Court's jurisdiction and adjudicative power is curtailed would be for events and

claims that arose post-emergence, not necessarily post-confirmation, even though courts sometimes colloquially caw to it as post-confirmation.

THE COURT: No, it's post-effective date.

MR. ZAKIA: Correct. And so if we look here, Your Honor, back on my slide, we can see that prior to confirmation, and prior to the effective date, the Defendants took the position the contract was breached, they had been damaged. They invoiced the Debtors for damages. They told us that they were accruing this claim every day, and I won't get into the liquidated damages provision, and the arguments on that, but these are large numbers. This ended up being an administrative claim of over $60 million, which would be super controversial -- or sorry, consequential for this Estate.

And in fact, before confirmation, under their theory, we obviously deny this is the right way to think about it, but we have to deal with what they're alleging, they would have already reached the cap for the liquidated damages of over $60 million, all before the plan was confirmed, but long before the Debtor emerged.

So this clearly goes to the heart of this Court's responsibility to determine what, if any, claim is available for damages that occurred by a Chapter 11 Debtor in the course of their Chapter 11 case. That is clearly core. And

what the Fifth Circuit has told you, and Judge Houser didn't have the opportunity to deal with this because the Fifth Circuit didn't write its opinion for four years after she wrote it, and what they completely ignore is that if you have a core matter, you absolutely have discretion to put aside the forum selection clause and allow the Bankruptcy Court's interest --

THE COURT: So I want to push you back on something.

MR. ZAKIA: Sorry, Your Honor?

THE COURT: And I'll let you come back to this, but I'm concerned that we've left a critical issue not properly argued. They are quoting from Judge Houser, and saying that all of our jurisdiction is permissive, and none is mandatory. You are telling me that the liquidation and enforcement of administrative claims is exclusive.

MR. ZAKIA: Yes.

THE COURT: The opposite of what they are telling me. How do I resolve that?

MR. ZAKIA: Your Honor, I already resolved it in the plan. The plan is clear, this Court has exclusive jurisdiction over administrative claims. That's --

THE COURT: But where does it say that?

MR. ZAKIA: I can pull --

THE COURT: I can pull up the plan myself if

you'll tell me where to look.

And I want to be sure we give you guys a chance to respond to this, because it's important to me.

So it's -- February 17th is the order. Right? February 27th. Yeah.

MR. ZAKIA: Yeah. And I think what Your Honor would find is that if you look --

THE COURT: I'm almost there. Hold on.

MR. ZAKIA: Sorry.

THE COURT: Okay. So here is the plan.

MR. ZAKIA: Is Your Honor racing Mr. Koster? We'll see who wins.

THE COURT: So where do you want me to look? You said the plan gives me exclusive authority over admin plans. Right?

MR. ZAKIA: I believe that is correct.

THE COURT: Where?

MR. ZAKIA: We're going to find it, Your Honor.

THE COURT: Okay.

MR. ZAKIA: So Your Honor, I'm looking at Article -- Is it 60? My Roman numerals aren't great. It's on page 137 --

THE COURT: I'm on page 137, Retention of jurisdiction.

MR. ZAKIA: Yeah.

THE COURT: Okay. That's retained jurisdiction.

MR. ZAKIA: Yeah, no, I know, Your Honor. I'm looking. I know it's in here somewhere. So if this isn't the right spot, I'd like to -- I know it's important, so I'd like to find it.

Could you just give us one second?

THE COURT: Sure.

MR. ZAKIA: Okay, Your Honor, I'm sorry. Sorry for the delay, but I think I found it.

So we were on page 137 of the PDF. If we look at the end of that article, it states, "Unless otherwise specifically provided herein -- "

THE COURT: Here, hold on. I'm going to go there.

MR. ZAKIA: Sorry, Your Honor?

THE COURT: I'm just going, so I can actually read it.

MR. ZAKIA: Okay.

THE COURT: Okay. "So unless otherwise specifically -- "

MR. ZAKIA: 139 of the PDF, 48 is the page on the bottom.

THE COURT: I think it's up on the screen. Right?

MR. ZAKIA: Yes.

THE COURT: Okay.

MR. ZAKIA: Your Honor, we would submit that this

claim fits expressly and completely within that paragraph.

THE COURT: I want to be sure I hear their answer to that. But we'll do that when they get back up.

MR. ZAKIA: Okay.

THE COURT: So --

MR. ZAKIA: And that actually makes sense, Your Honor, because this is the right court to adjudicate core claims concerning the Estate, particularly the largest administrative claim by (indiscernible)

THE COURT: I'm not as confident as you, or even as the case law might suggest, that core is the only thing that we look at. Exclusive jurisdiction over a claim seems pretty damn important.

MR. ZAKIA: Yeah.

THE COURT: Administrative is a separate category of core, and the voluntary filing of an administrative claim is separate even from that. But I don't think that there's much point in me thinking about this under the broader rubric. I should think about it under the more narrow rubric. Because there are plenty of things out there that are core, where jurisdiction is not exclusive, for example, and the answer may be different. So I'm --

MR. ZAKIA: And, Your Honor, if I could, let's think about how this would play out if they did things their way. Let's say we go to Nebraska.

THE COURT: Okay.

MR. ZAKIA: The Nebraska court deals with the Nebraska law issues. We still have to then -- Now, he's right. He's going to tell you, no, no, if I win completely, and the Nebraska court cores them out, they're over.

THE COURT: Correct.

MR. KOSTER: And that's true.

AUTOMATED: Our system will end this conference in five minutes. To extend this call for one hour, please enter the moderator pin now.

THE COURT: That's actually just --

AUTOMATED: Your conference has been extended for 60 minutes.

THE COURT: -- a polite way of telling you to be quiet. But you can go ahead.

MR. ZAKIA: I'm going to try to not take the hint.

So Your Honor, they would be right. If I were to win completely, then there may not be a need to come back to Your Honor. But if they get anything out of that proceeding, we would be required to come back to this Court, and Your Honor would have to decide whether whatever judgment was rendered by the Nebraska court gives rise to an administrative claim. And the overlap between the question that the Court would have to answer in that proceeding and what has already happened in Nebraska would be substantial,

and it would be completely wasteful.

And that's exactly why the Fifth Circuit has said, when you have these core functions, you're allowed to put aside what is otherwise an important factor of the forum selection clause, and have everything centralized here. Because this goes directly to the Bankruptcy Court's job to administer these estates. And because it relates to a conduct that occurred during the course of the Chapter 11 case, it doesn't matter that we're litigating it post-emergence. Your Honor squarely held that in (indiscernible)

THE COURT: This may seem like a rabbit trail to you, but I'm going to go to a different question.

MR. ZAKIA: Sure.

THE COURT: You've opposed delaying all of this until the project is over so that there is then a more known quantity. Why are we deciding today whether to transfer this or to put this decision off until the project is finished so that the parties, as OPPD has argued separately, and I know this is separate from the venue transfer, but we wouldn't be here but that your client is insisting on deciding it now -- tell me why.

MR. ZAKIA: So Your Honor, I think the claims all exist, and are ripe, and are not (indiscernible)

THE COURT: But let me assume they are. We could still put it off. Why are we doing it now?

MR. ZAKIA: Right. Unfortunately, Your Honor, I think the answer is going to be, and I don't know if Mr. Thomas is the right person to speak to this, even if we decide -- I don't think it's going to get us very much time. My understanding is that the projects either are complete, or will be complete within days.

THE COURT: But isn't that good news to allow the parties to then know what their losses are?

MR. ZAKIA: Sure. So Your Honor, it is good news. And I don't want to get into the merits of the case, but someday, when Your Honor is hearing the trial of this case, you'll find out we've been trying to be done for many, many months, and that's --

THE COURT: No, no, but they wanted to put off all of this, and you didn't, and I'm not so sure, as we get into this, that your side is right about that. But let me give you an example.

On the summary judgment motion --

MR. ZAKIA: Sure.

THE COURT: They have made an argument that the damages far exceed the cap. But then again, they want to keep the cap, so there's a bit of inconsistency with that.

MR. ZAKIA: Right.

THE COURT: But you want to take the risk on the cap issue to unlimit the cap, and take your risk solely on

liability. That doesn't make any more sense either.

MR. ZAKIA: Well, it does if you believe that there is no way they would be able to prove that the damages actually get anywhere near what the liquidated damage number is. That's how one would square it. This is not my area of expertise, but I think my colleagues would tell you that.

I think with regard to the delay, Your Honor, I don't know that it's so much about delaying when Your Honor heard it. What we wanted to be clear about, and what we were pushing back on was the argument they were making that the claim was somehow premature because the contract was not complete. And that's not the law, and that's not the fact of these claims.

If you look at the claims asserted in our amended complaint, none of it's hypothetical. It's all based on things that have happened.

THE COURT: Yeah, I got that. I just -- My impression from --

MR. ZAKIA: I fear that even if we --

THE COURT: My impression, from reading both sides, is they wanted to wait until this was over so they could then have meaningful, informed discussions with your client, and y'all wanted to preemptively find that the liquidated damages provision was unenforceable. And since we're now towards the end, why are we doing that now?

MR. ZAKIA: So just to be clear, Your Honor, and I try to never disagree with you, but I do think --

THE COURT: Well, go ahead.

MR. ZAKIA: -- we have to be clear that -- And I'm not saying it's relevant to this motion. We've been trying to talk to them for months. So the idea of we not being the ones that wanted to sit down and have an informed discussion is absolutely false, but neither here nor there. I was going to get yelled at if I didn't make that clarification.

I just don't think, even if we were to -- I think if we decided to put this motion off until the project was complete, we'd be back here on Monday, because -- And maybe, I'm just to ask, is it done?

If I could cede the podium to --

MR. KOSTER: Just quickly, Your Honor, two generating stations, Turtle Creek and Standing Bear Lake, we submitted the notice of substantial completion for Turtle Creek on May 30th, and on June 16th the District accepted it. So that is done, substantially complete. We submitted our notice of substantial completion for Standing Bear Lake on June 4th, a month ago.

There's a little bit of a tit for tat. We don't have a sign off yet. But in Zachry's view, we're substantially complete. This is done. Damages are no longer accruing at all.

THE COURT: Okay.

MR. ZAKIA: Sorry, I needed a pinch hitter. Did that address -- Was that responsive to your question, Your Honor?

THE COURT: It is, but I'm still trying to figure out what to do with (indiscernible)

MR. ZAKIA: Right. So back on the motion to transfer. So to us, this does rise or fall on the question of the core nature of the claims. And to address Your Honor's point, I think the existence of the exclusive jurisdiction, which would, if we followed the path suggested by the parties seeking transfer, run a substantial risk of duplicative and inefficient transfers.

That's to say nothing of the fact that, Your Honor, the benefits to this Court, which has -- and I hate to punish you for all of your good work, but Your Honor has, through the course of these Chapter 11 cases, gotten a lot of familiarity with this company and this business, and courts have recognized there is an inherent benefit to the Bankruptcy Court. And it's not dispositive. And if that's all there was, that might not be enough.

THE COURT: In fairness, I mean, I know a lot about what has happened in the past, and very little about the Omaha situation.

MR. ZAKIA: Sure. But you know much more than the

transferee judge, and Your Honor, most importantly --

THE COURT: I bet he can drive to the units.

MR. ZAKIA: But if the case is tried anywhere else, when we're back here, unless we win completely, we're going to have to repeat a whole bunch of that, and that's not in anybody's interest.

THE COURT: Okay. What else do you want to add?

MR. ZAKIA: Okay, the last point I'll make, Your Honor, and I don't know that it's critical, but I do -- The way the law works, they, as the party seeking transfer, have the burden to support transfer. I do have the burden to deal with the forum selection clause. But what I would suggest is how Your Honor weighs it is if Your Honor finds that there is a basis for you to exercise your discretion and set that clause aside, they would then bear the burden as to the remaining factors, which frankly aren't going to drive this anyway. These are sophisticated parties, and like I said, if with regard to the convenience of the parties, if that's all that this was, probably we could easily do it here. We could also do it --

I'm not saying we can't take flights to Nebraska. That's not the basis of our motion. The basis of our motion is avoiding the -- sorry, our basis of opposition to their motion is the benefit and consistency to administering this Estate in one court, in one place, where we don't have

inconsistent rulings, we don't have duplicative proceedings, and this is the Court that has the last say.

THE COURT: Thank you.

MR. ZAKIA: Thank you. Thank you.

MR. GRANT: You've been very patient, Your Honor, so we will be quick.

THE COURT: No, you don't need to be quick.

MR. GRANT: I think that they are conflating two things when it comes to jurisdiction. The determination of the merits of the lawsuit is not a situation where this Court has exclusive jurisdiction. Administrative priority, once that determination has been made, is in your purview. And our stipulation --

THE COURT: No, it -- .The allowance of an administrative claim is in my exclusive jurisdiction, not its priority.

MR. GRANT: Well, Your Honor, I believe that what we have dealt with, and the way that this is established in the stipulation is to ensure that the admin claim will be automatically denied if there's no liability.

THE COURT: Okay.

MR. GRANT: And then, your only determination, if liability is found, is if it's a determination of admin priority. So I think that they are conflating two issues --

THE COURT: Show me that, then.

MR. GRANT: I think there's two issues. I think the second.

THE COURT: Yeah, can I just -- Let me look at the stipulation, just so I'm looking at it while you're making that argument to me.

MR. GRANT: Sure.

THE COURT: Or if you want to put it up, or I can find it, just tell me.

MR. GRANT: I believe that Zach is trying to pull it up, Your Honor (indiscernible)

THE COURT: Oh. Well, I need to give him back authority to do that, so hold on.

You're now the presenter again.

All right. Let me see the next page, too. Okay. Got it. Thank you.

MR. GRANT: A couple of other points to address, Your Honor. One of the arguments they made is that we had claims pending in this Court before. We invoked the jurisdiction of this Court because we sent demand letters, I think is the argument that they were making. I don't believe that's accurate, Your Honor. The demand letters are not a claim. We're not disputing that we filed an administrative claim. But it was out of abundance of caution in response to their adversary complaint.

To Your Honor's point --

THE COURT: Let me just say, I have always worried about the effect of the Supreme Court's ruling on that, and I don't really think anybody's come up with a good solution to the problem that you're identifying. You're sort of stuck in this world of you might lose -- and I'm not talking the admin claim. You might lose your claim if you don't file it, and if you do file it, you might be stuck in the Bankruptcy Court. And I haven't seen how they have ever resolved that problem, you know, other than they resolved it and said that's the result. But I think it's a big problem that you're identifying, and I don't know what to do with it exactly.

MR. GRANT: Well, Your Honor, I don't know that I have a better argument for you than the one that we have already made, under the circumstance.

But to address the issue about urgency, just to be clear, and I don't think that Counsel was trying to mislead, but the Standing Bear Lake project is not completed, and OPPD has a lot of issues with it, and we're not sure when it will be resolved. And so there is no urgency to deal with this administrative claim, or the underlying merits until all of the elements available -- when the project is completed and we can go out and litigate the issues.

As to the point that you made, and we have countered about where you balance the factors here, I would

still submit to the Court that they're wrong. The burden under the circumstances, what Judge Houser said is that according to the Fifth Circuit, a forum selection provision in a written contract is prima facie valid and enforceable unless the opposing party shows that enforcement would be unreasonable.

There are only four factors which were articulated in the Weber case. A product of fraud or overreaching. They've made no allegation of that, they've offered no evidence of it. That enforcement deprives the party of a day in court. They have made no argument to that effect, they've offered no argument to that effect. That application of the forum law is fundamentally unfair. They've made no argument to that effect, and offered no evidence to that effect. That enforcement contravenes a strong public policy. They haven't offered evidence, but all they suggest to you is that an admin claim is such a strong policy that you can ignore the forum selection clause.

And I would respectfully suggest to this Court that the Manchester case, the Weber case, the Supreme Court case, the Frye case are all to the contrary, and that you should exercise your discretion in this circumstance, and that you should transfer this case (indiscernible)

THE COURT: Do you want to respond to their five-

year-later Fifth Circuit case?

MR. GRANT: I don't think the five-year-later Fifth Circuit case is on all fours either. I don't think it is evaluating a situation where there was a pending admin claim that created an ability for the Court to ignore a forum selection clause. It's just not the same facts.

THE COURT: Okay.

MR. ZAKIA: May I have one second, Your Honor?

THE COURT: Go ahead. Y'all can both keep going until you're done.

MR. ZAKIA: Okay. We'll try not to abuse that.

So first of all, I didn't say he invoked the jurisdiction of the Court by sending the demand letter. I explained that when we filed our initial complaint, the claim was ripe, and existed, and we didn't make it up.

They invoked the jurisdiction of the Court by filing their administrative claim. As Your Honor has made very clear, that has consequences. I actually think if I think if I -- I think they did the -- like, that was a smart move for them. I think the consequences of not filing that claim, they say abundance of caution, could have been dire. But it does come with a cost, which is this is the place where those claims get adjudicated.

I want to get back to this stipulation. There is not one word -- Because they are making this take on far

more than it does. The litigation referred to in this stipulation is defined to be this adversary proceeding pending in this Court. This stipulation was about one thing, we weren't going to make Your Honor adjudicate an adversary proceeding and a contested matter at the same time, on the same issue. We would do it in the adversary proceeding first. That's all. This does not say a word about Nebraska. Okay?

Both are in this Court. There is no needless duplication if Your Honor is hearing a case in the adversary and in the contested matter. That is a totally different thing than what he's trying to argue, that we somehow agreed that the Court was releasing its role as the adjudicator of administrative claims. Of course we were not. The adversary was pending here, and this stip does not say one word about any other court having the ability to deal with that.

And then, Your Honor, finally, I would say the only thing I agree with, with Counsel's suggestion that Your Honor should ignore binding Fifth Circuit precedent, is yes, it did not involve an administrative claim. That's true. If it involved an administrative claim, I would suggest it would make that case more compelling, not less compelling. What the Fifth Circuit said is that the public policy in favor of uniform adjudication is sufficient to set aside an

otherwise binding forum selection clause. That's pretty close to on all fours. If it involved an admin claim, I'd suggest it would be even more compelling. But it was compelling enough for the Fifth Circuit even without it being an administrative claim.

And so, Your Honor, I feel like the argument that Counsel is making asks the Court to ignore the pendency of the administrative claim, ignore binding Fifth Circuit precedent, and there's no reason for Your Honor to do any of those things. You could simply exercise your discretion to resolve the claim in its entirety here, and we only have to do it once. This is the proper court that would be best for everybody, and there is absolutely no reason Your Honor should ignore the facts and the law to send us to Nebraska.

THE COURT: Do you have a business representative here?

MR. ZAKIA: Because of the rescheduling, we didn't. But we can -- they're certainly available to make a phone call.

THE COURT: Okay. Why don't you have him dial in?

COUNSEL: Your Honor, he's watching.

THE COURT: Okay, good.

COUNSEL: It's Mr. Jay Old, general counsel (indiscernible) Zachry.

THE COURT: All right. Do you have any response

you want to give to Mr. Zakia at all? I'm going to let you all continue on this matter until you all have told me everything you want to tell me, so --

MR. GRANT: (indiscernible)

THE COURT: Okay. Can I get Mr. Old to press five-star one time on his phone, please, and maybe turn on this camera? Thank You, Mister (indiscernible)

Can I get general counsel for your client (indiscernible) I can have both pieces at the same time? Do you mind coming forward to the microphone just for a minute? Thank you, sir.

MR. BRUCKNER: (indiscernible) Your Honor.

THE COURT: I'm sorry, tell me your name, please, sir.

MR. BRUCKNER: Stephen Bruckner.

THE COURT: Mr. Bruckner, thank you for coming. Mr. Old, thank you for coming.

I'm not going to decide today. Your lawyers have probably told you, but if they haven't, I will tell you that if I know what I'm going to do at the end of the hearing, I tell people the answer. I don't believe in suspense, so -- I think that's harmful to people. I don't know what I'm going to do yet, and I want you all to know that. Nobody should take what I've done as a signal of anything.

MR. BRUCKNER: Understood.

THE COURT: At the beginning of this case, there was this huge dispute with Qatar and Exxon and Zachry, and I begged the parties to get their non-litigation counsel in a room and settle, and they did. There was lots of going back and forth, and there were arguments along the way. But I'm talking to you and Mr. Old right now to say -- And this isn't artificial, I'm going to have to take some time to decide this. During that time, I'm asking the two of you, I'm not ordering you to, I may not have any authority over you, and I don't want to order anything right now, I'm imploring you to try and meet and resolve this. I think you can. And I would put you and you, and your CEOs, just the four of you, maybe bring along one lawyer and tell him to keep his mouth shut, sit in a room and see if y'all can work this out. I don't want you to work out the venue thing. That's my problem. But see if you can work out the overall deal.

And can I get that done in the next couple of weeks? If you don't want to do it, that's fine. But it just seems this is crying out to stop arguing over how we're going to do it, and the project is -- And I understand there's a dispute, and it may not be 100%, but you're close enough. Everybody knows what the financial losses are at this point. People with good faith ought to be able to sit down and work something out.

So Mr. Old, I'm going to put you on the spot and ask you first, is that something that you will talk to your client about doing? And you don't need to commit to doing it. I just want to know if you'll talk to your CEO about whether that's a good idea for y'all or not.

MR. OLD: Your Honor -- excuse me. I have full authority to tell you we will do it, we're prepared to do it, our CEO is ready to do it. And I'm happy to take you up on your offer, Judge.

THE COURT: And I'm not going to ask you for that decision today. I don't think that's fair. But can I implore you to talk to your CEO about whether this is a good idea?

MR. BRUCKNER: Yes, Your Honor. On behalf of Omaha Public Power District, I will do that with my client. I do believe we would be favorably disposed to engaging in the type of discussion that the Court has suggested here (indiscernible)

THE COURT: I appreciate that very much.

MR. BRUCKNER: I appreciate you raising the issue. Perhaps it would be helpful to even hold some of these proceedings in advance, because certainly that has a bearing on (indiscernible)

THE COURT: I think so. And y'all don't pay me to work, so I can continue to work on the transfer thing, and

we can debate everything. I frankly don't think we ought to go to withdrawal of reference, or a summary judgment or anything else until I decide whether I ought to be hearing the case. And that's primarily not fair to y'all, particularly on the summary judgment issue.

Let me ask you both just to tell me -- I doubt y'all need a third-party mediator. And it's not that I think it's too expensive. I know y'all have plenty of money to pay for a third-party mediator. But do y'all need a third party? Or do you think just putting those five people, the two of you, your two CEOs, and you each bring a lawyer who can't talk, does that really need a mediator?

MR. OLD: Judge, I would prefer to have Steve Nelson there than Mr. Zakia. I don't think he could stay quiet. But I think Mr. Nelson could offer a whole lot of good things to all of the parties. I don't know if you're familiar with Mr. Nelson. But as a spirited lawyer, and a very experienced construction lawyer, I think he could help us.

But I agree with you, we're all adults and professionals, and we should be able to resolve without a third-party mediator.

THE COURT: Would you prefer a third-party mediator?

MR. BRUCKNER: I think we're very open to it.

Like Mr. Old, we already have informed Zachry that OPPD would be amenable to using Mr. Nelson. We also would be amenable to an approach, as suggested by Your Honor, without a mediator.

I think the parties -- I've worked with Mr. Old on other matters in this case, we get along very well, and I'm confident that we could work through those details, Your Honor, either with or without.

THE COURT: I'll stay out of it. I'll stay out of it. I thank you for both considering talking to your CEO -- or Mr. Old for committing, you for committing to talk to your CEO with a favorable recommendation, is what I'm hearing from you.

I'm going to take this under advisement. I don't need any more briefing.

MR. KOSTER: Thank you, Your Honor.

THE COURT: So no more briefing, which I know is part of your (indiscernible) I'll just take this under advisement.

Does anybody object to -- I'm not going to abate them, but just -- I'm not going to take up the other matters until I decide this. Once I decide this, if I transfer venue to Nebraska, the other matters go away. If I keep the venue here, we'll then take up the other matters at that point. But I'm not going to put them on a schedule until I

decide.

I think, I'm not working real hard right now, so I think I can get this done in about 30 days. Do you all think you all can meet and get it resolved in 30 days? Or do y'all need more time than that?

MR. BRUCKNER: I would like to think that 30 days would be enough. I mean, this time of year it's tough. It might be a little bit longer than that, Your Honor.

THE COURT: (indiscernible)

MR. BRUCKNER: But we could certainly have a discussion offline, and get back to the Court on that.

THE COURT: How long do you want? Do you want 50 days?

MR. BRUCKNER: Fifty days would be better.

THE COURT: You okay with going out 'til August 31? Whatever that is -- Mr. Old?

MR. OLD: You know, whatever the Court desires. Either way is fine, 30 or 50, it's going to be -- We'll work within your schedule.

THE COURT: Okay. I will not issue my decision prior to August 29th.

COUNSEL: Very good. Thanks, Your Honor.

THE COURT: Hopefully that will give y'all plenty of time to get it resolved. And we won't issue decisions on any of the other matters.

I just wanted to thank Counsel. All Counsel today was awfully professional in arguing their case, and persuasive in arguing their case. I didn't know what I was going to do before I came out, and now I still don't. So I wish that I could give you a different answer, but I can't. I hope I never have to publish whatever issue, whatever I'm going to work on, but I'll be ready by the 29th. So if y'all have not resolved this by then, just an opinion is going to go ahead and hit the docket on that date.

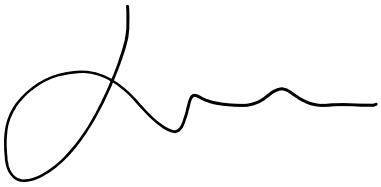
COUNSEL: (indiscernible)

THE COURT: Okay. Thank you all. Y'all have a safe trip home.

(Proceedings adjourned.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



Lindsay Peacock

Veritext Legal Solutions
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Suite 300
Mineola, NY 11501

Date: July 11, 2025

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re:	Zachry Holdings, Inc. and Statutory Unsecured Claimholders' Committee Debtor	Case No.: 24−90377 Chapter: 11

Zachry Holdings, Inc.,
Plaintiff(s),
vs.
Omaha Public Power District,
Defendant(s).

Adversary No.: 25−03025

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

An official transcript has been filed in this case and it may contain information protected under the E-Government Act of 2002, and Fed. R. Bank. P. 9037.

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If redaction is necessary, the parties must file a statement of redaction listing the items to be redacted, citing the transcript's docket number, the item's location by page and line, and including only the following portions of the protected information. This statement must be filed within 21 days of the transcript being filed. A suggested form for the statement of redaction is available at https://www.txs.uscourts.gov/.

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- the year of the individual's birth;
- the minor's initials;
- the last four digits of the financial account number; and
- the city and state of the home address.

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- opening and closing statements made on the party's behalf;
- statements of the party;
- testimony of any witness called by the party; and
- any other portion of the transcript as ordered by the court.

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Nathan Ochsner
Clerk of Court