UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
	§	Chapter 11
BRAZOS ELECTRIC POWER COOPERATIVE, INC.,	§	
	§	Case No. 21-30725 (DRJ)
	§	
Debtor.[1]	§	

MOTION OF SANDY CREEK ENERGY ASSOCIATES, L.P. FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 362(d) AUTHORIZING RELIEF FROM THE AUTOMATIC STAY TO COMMENCE ARBITRATION AGAINST THE DEBTOR

THIS IS A MOTION FOR RELIEF FROM THE AUTOMATIC STAY. IF IT IS GRANTED, THE MOVANT MAY ACT OUTSIDE OF THE BANKRUPTCY PROCESS. IF YOU DO NOT WANT THE STAY LIFTED, IMMEDIATELY CONTACT THE MOVING PARTY TO SETTLE. IF YOU CANNOT SETTLE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY AT LEAST 7 DAYS BEFORE THE HEARING. IF YOU CANNOT SETTLE, YOU MUST ATTEND THE HEARING. EVIDENCE MAY BE OFFERED AT THE HEARING AND THE COURT MAY RULE.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE ELECTRONICALLY AT HTTPS://ECF.TXSB.USCOURTS.GOV/ AT LEAST 7 DAYS BEFORE THE HEARING. IF YOU DO NOT HAVE ELECTRONIC FILING PRIVILEGES, YOU MUST FILE A WRITTEN OBJECTION THAT IS ACTUALLY RECEIVED BY THE CLERK WITHIN AT LEAST 7 DAYS BEFORE THE HEARING. OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

[1] The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number, is: Brazos Electric Power Cooperative, Inc. (4729). Additional information regarding this case may be obtained on the website of Brazos's claims and noticing agent at http://cases.stretto.com/Brazos. The Debtor's address is 7616 Bagby Avenue, Waco, TX 76712.

A HEARING WILL BE CONDUCTED ON THIS MATTER ON JUNE 15TH AT 10:00 AM IN COURTROOM 400, 4TH FLOOR, 515 RUSK, HOUSTON, TX 77010. YOU MAY PARTICIPATE IN THE HEARING EITHER IN PERSON OR BY AN AUDIO AND VIDEO CONNECTION.

AUDIO COMMUNICATION WILL BE BY USE OF THE COURT'S DIAL-IN FACILITY. YOU MAY ACCESS THE FACILITY AT 832-917-1510. ONCE CONNECTED, YOU WILL BE ASKED TO ENTER THE CONFERENCE ROOM NUMBER. JUDGE JONES'S CONFERENCE ROOM NUMBER IS 205691. VIDEO COMMUNICATION WILL BE BY USE OF THE GOTOMEETING PLATFORM. CONNECT VIA THE FREE GOTOMEETING APPLICATION OR CLICK THE LINK ON JUDGE JONES'S HOME PAGE. THE MEETING CODE IS "JUDGEJONES". CLICK THE SETTINGS ICON IN THE UPPER RIGHT CORNER AND ENTER YOUR NAME UNDER THE PERSONAL INFORMATION SETTING.

HEARING APPEARANCES MUST BE MADE ELECTRONICALLY IN ADVANCE OF BOTH ELECTRONIC AND IN-PERSON HEARINGS. TO MAKE YOUR APPEARANCE, CLICK THE "ELECTRONIC APPEARANCE" LINK ON JUDGE JONES'S HOME PAGE. SELECT THE CASE NAME, COMPLETE THE REQUIRED FIELDS AND CLICK "SUBMIT" TO COMPLETE YOUR APPEARANCE.

Sandy Creek Energy Associates, L.P. ("SCEA"), by and through its undersigned counsel, hereby submits this motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to 11 U.S.C. §§ 105(a) and 362, Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Rule 4001-1 of the Bankruptcy Local Rules of the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Local Rules"), and Section 3 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3, granting relief from the automatic stay to allow SCEA to commence and proceed with an arbitration proceeding to resolve a dispute with its contractual counterparty, Brazos Electric Power Cooperative, Inc. ("Brazos", or the "Debtor"). In support of this Motion, SCEA respectfully submits the *Declaration of Kenneth Pasquale in Support of the Motion* (the "Pasquale Decl.") attached hereto as **Exhibit B**, and states as follows:

PRELIMINARY STATEMENT[1]

1. In 2007, the Debtor and SCEA entered into the SCEA PPA -- a contract which, among other things, set forth SCEA's commitment to sell, and the Debtor's obligation to purchase, a specified percentage of the energy generated from SCEA's ownership interest in the Sandy Creek Station. The Debtor moved to reject the SCEA PPA, relief to which SCEA did not object in recognition of the Debtor's exercise of its business judgment to do so. (*See* Rejection Stipulation at 2-3.) However, as the U.S. Supreme Court recently held, a contract rejection in bankruptcy does not terminate the contract, and, here, the Debtor's rejection of the SCEA PPA did not terminate the SCEA PPA, nor did it excuse the Debtor from its obligations thereunder. Among those obligations is the Debtor's agreement to arbitrate "any dispute arising under" the SCEA PPA. As a matter of bankruptcy law,

[1] Capitalized terms used in this Preliminary Statement but not herein defined shall have the meaning ascribed to them later in the Motion.

the Debtor's rejection of the SCEA PPA is a breach of that contract, and the resulting dispute to be determined between the parties is the amount of damages sustained by SCEA resulting from such breach (the "Damages Claim"). That dispute clearly arises under the SCEA PPA and, therefore, as agreed by the parties to the contract, the disputed matter should be resolved through arbitration. Accordingly, SCEA respectfully requests that this Court lift the automatic stay so that SCEA may arbitrate with the Debtor to resolve the Damages Claim.

2. The question before this Court is a narrow one. The Federal Arbitration Act creates a "strong presumption" in favor of the arbitration of disputes subject to valid arbitration clauses. Under longstanding Fifth Circuit precedent, bankruptcy courts can decline to enforce a valid arbitration agreement only when two requirements are met. *First*, the proceeding must adjudicate statutory rights conferred by the Bankruptcy Code. *Second*, even then, enforcement of an arbitration provision is mandatory unless requiring arbitration would *inherently conflict* with the purposes of the Bankruptcy Code. The damages resulting from the Debtor's breach of contract -- the sole issue SCEA seeks to arbitrate -- is the archetypal arbitrable dispute. Resolution of the Damages Claim dispute does not involve any bankruptcy issues and is simply a matter of contract. Nor does an individual breach of contract claim -- like SCEA's Damages Claim -- implicate this Court's orders or risk piecemeal litigation. In short, determining the amount of contractual damages sustained by SCEA does not, and cannot, inherently conflict with the Bankruptcy Code. To that end, as set forth below, numerous bankruptcy courts have allowed arbitration to move forward where, as here, the underlying dispute simply involves liquidating a damages claim. The result should be no different here.

3. The Debtor and SCEA negotiated for the right to arbitrate the determination of damages flowing from a breach of the SCEA PPA and their agreement should be enforced. To the extent that the Debtor continues to assert the position that it should be able to ignore its negotiated

arbitration obligation, SCEA respectfully submits that it cannot overcome the strong presumption in favor of arbitration acknowledged by the U.S. Supreme Court. Accordingly, the Court should grant SCEA's motion and allow the parties to proceed to arbitration.

BACKGROUND

A. Case Background

4. On March 1, 2021, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Court"). The Debtor has continued to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On March 15, 2021, the Office of the United States Trustee (the "U.S. Trustee") appointed an Official Committee of Unsecured Creditors (the "Committee") in the Debtor's chapter 11 case. (*See* [Docket No. 216].) The Committee was reconstituted by the U.S. Trustee on March 24, 2021. (*See* [Docket No. 285].)

B. The Sandy Creek Station and the SCEA PPA

6. SCEA, along with the Debtor and the Lower Colorado River Authority ("LCRA"), are joint-owners of the 940 MW coal-fired electricity generation facility located near Riesel, Texas, commonly known as the Sandy Creek Energy Station (the "Sandy Creek Station"). (*See Emergency Motion for an Order (I) Authorizing the Debtor to Reject Certain Power Purchase Agreements and (II) Granting Related Relief* [Docket No. 1622] (the "Rejection Motion"), at ¶ 11.) Beginning in June 2007, Brazos and SCEA entered into a series of interrelated transactions and agreements in furtherance of their shared objective of constructing, co-owning and engaging in power sale transactions from the Sandy Creek Station. (*Id.*)

7. The Debtor's purpose in jointly constructing and owning the Sandy Creek Station was to reliably and cost-effectively secure a portion of the monumental amount of energy consumed by the approximately 750,000 retail customers served by the Debtor's 16 member cooperatives. To that end, on July 10, 2007, the Debtor and SCEA entered into that certain Power Purchase Agreement (the "SCEA PPA")[2] to purchase up to 155 MWh of energy capacity (including ancillary services) related to SCEA's ownership interest in the Sandy Creek Station. (*Id.*) The initial term of the SCEA PPA was 30 years after the Sandy Creek Station became commercially operable (*i.e.*, June 2013). (*Id.* ¶ 17.) A copy of the sealed SCEA PPA is annexed as Exhibit A to the Pasquale Decl.

8. The SCEA PPA is a highly complex and carefully-negotiated, arm's-length contract among two sophisticated parties, which meticulously specifies and governs the relationship between SCEA and the Debtor. Critically, the SCEA PPA also details what occurs in the event of a breach of the agreement by either party. Specifically, Article XVIII describes what constitutes an event of default, the remedies for any such default, and the parties' duties upon a default, while Article XIX generally, and Section 19.3 specifically, sets forth what damages may or may not be sought for any alleged breach. (*See* SCEA PPA at §§ 18.1-18.5, 19.1-19.3.)

9. The SCEA PPA further provides in Article XX for arbitration of any disputes between the parties, and dictates how disputes under the SCEA PPA should be resolved. Pursuant to Section 20.1 of the SCEA PPA, the first step in any dispute among the parties is that each of SCEA and Brazos "shall designate in writing to the other Party a representative who shall be authorized to resolve ***any dispute*** arising under this Agreement." (*Id.* at § 20.1(a) (emphasis added).) Assuming a resolution among the parties' designated representatives is not possible, upon five days' notice, the dispute shall

[2] SCEA filed the SCEA PPA under seal pursuant to that certain Motion to Seal file contemporaneously with the filing of this Motion. The sealed SCEA PPA is also attached to the Pasquale Decl. as Exhibit A.

be referred by each party's representatives, respectively, to a senior officer designated by each party, who shall attempt to resolve the dispute "equitably and in a good faith manner." (*Id.* at §§ 20.1(b), (c).) If such dispute is not resolved within 30 days of that notice, and, unless the dispute is a Specified Technical Dispute (as defined in the SCEA PPA and not relevant here), "then upon written notice of either Party such dispute ***shall be*** submitted to arbitration as set forth herein." (*Id.* at § 20.2(a) (emphasis added).) Thus, through Sections 20.1 and 20.2 of the SCEA PPA, both SCEA and the Debtor agreed that for ***any*** dispute "arising under" the SCEA PPA -- including a dispute regarding damages in the event of a breach -- the parties would (a) first try to consensually resolve such dispute, and (b) in the absence of any such resolution, upon notice of either party, submit such dispute to mandatory arbitration (collectively, the "Arbitration Provision").

10. The SCEA PPA then delineates the procedures and timeline for arbitrating any dispute, which is to be conducted in Dallas, Texas. (*See id.* at §§ 20.2(c) through (j).) Specifically:

- Within 30 days of receipt of notice of arbitration, the parties shall select three independent arbitrators "in accordance with the listing, striking and ranking procedure in the AAA Commercial Arbitration Rules" to preside over the dispute;
- After commencement of the arbitration, the parties shall have 90 days to conduct "reasonable discovery as promptly and expeditiously as possible";
- "[A]s promptly and expeditiously as possible . . . and, in no event more than thirty (30) Days after the conclusion of the discovery period" there shall be a hearing on the dispute, with written testimony being due 10 days prior to commencement of the hearing;
- "The arbitrators shall conclude the hearing within thirty (30) Days of its commencement";
- Following conclusion of the hearing, the parties may submit briefing on the issues, provided that such initial briefing shall be due no later than 15 days after the hearing, with reply papers due 10 days later; and
- The arbitrators' decision shall be made no later than 30 days after completion of the briefing.

Thus, the SCEA PPA provides that any arbitration shall be conducted efficiently and expeditiously. (*Id.*)

C. The Rejection Motion and Damages Claim

11. On March 16, 2022, more than one year after commencing its bankruptcy case, the Debtor filed the Rejection Motion, seeking to reject the SCEA PPA. Through the Rejection Motion, the Debtor suggested that rejection of the SCEA PPA is beneficial to its estate because the monthly payments it is contractually obligated to make to SCEA under the SCEA PPA are "above market" as compared to current electricity prices, and that it "has obtained replacement contracts that will ensure the Debtor and its Members have access to up to 333 MW of reliable capacity at lower prices well before the peak summer season begins." (Rejection Motion at ¶ ¶ 35, 37.)

12. The Debtor further acknowledged (as it must) that any rejection of the SCEA PPA would result in a damages claim by SCEA against the Debtor -- which the Debtor implied would be at least $540 million, the amount that the Debtor believes it would save from rejecting the SCEA PPA -- and that its rejection of the SCEA PPA "constitutes a ***breach*** of the contract." (*Id.* at ¶¶ 23-25 (emphasis added).)

13. On April 13, 2022, SCEA and the Debtor entered into the *Amended Stipulation and Agreed Order Regarding Rejection of Certain Power Purchase Agreement* [Docket No. 1695] (the "Rejection Stipulation"), whereby SCEA conditionally consented to the Debtor's rejection of the SCEA PPA. On April 14, 2022, the Rejection Stipulation became effective upon being "so ordered" by the Court. (*See Agreed Order Regarding Rejection of Certain Power Purchase Agreement* [Docket No. 1700].) The Rejection Stipulation sets May 27, 2022 as the deadline by which SCEA must file any claims based on the rejection of the SCEA PPA.[3] (Rejection Stipulation at ¶ 3.) The

[3] Given that the hearing on this Motion will not occur prior to May 27, 2022, SCEA intends to file a proof of claim solely to preserve all rights with respect to the Damages Claim. As will be further set forth in the proof of claim, notwithstanding the filing of the proof of claim, SCEA will expressly invoke, and will not waive, any of its rights under Article XX of the SCEA PPA to arbitrate the Damages Claim. *See In re The Consol. FGH Liquidating Tr.*, 419 B.R. 636, 644 (Bankr. S.D. Miss. 2009) (compiling authority and recognizing that "numerous courts have concluded that a creditor who files a proof of claim does not, by that act alone, waive its contractual right to arbitrate a dispute");

Rejection Stipulation further preserves each party's rights with respect to the Debtor's request for *nunc pro tunc* relief included in the Rejection Motion and SCEA's right to assert a priority claim or an administrative expense claim under section 503 or any other provision of the Bankruptcy Code related to the rejection. (*Id.* at ¶¶ 6-7.)[4]

14. On May 18, 2022, counsel to SCEA contacted counsel to the Debtor to request that the Debtor agree to consensually lift the stay to allow the arbitration to proceed. (*See* Pasquale Decl. ¶ 5.) On May 18, 2022, Debtor's counsel informed SCEA that the Debtor does not consent to lift the stay to proceed with the arbitration. (*Id.* at ¶ 6).

JURISDICTION AND VENUE

15. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This Motion is a core proceeding within the meaning of 28 U.S.C. § 157(b).

16. Venue for this Motion is proper under 28 U.S.C. §§ 1408 and 1409.

17. The statutory bases for the relief requested in this Motion are sections 105(a) and 362 of the Bankruptcy Code, Bankruptcy Rule 4001, Bankruptcy Local Rule 4001-1, and the FAA.

RELIEF REQUESTED

18. By this Motion, SCEA requests that the Court lift the automatic stay so that it may commence and proceed with arbitration against the Debtor in order to resolve the amount of SCEA's Damages Claim.

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cf Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd., 999 F.3d 257, 266 (5th Cir. 2021) (noting that "waiver of arbitration is a disfavored finding.").

[4] For the avoidance of doubt, SCEA is not seeking to arbitrate any issues related to the Debtor's request for *nunc pro tunc* relief in the Rejection Motion or SCEA's rights to any priority or administrative claim under the Bankruptcy Code. Once the Damages Claim is adjudicated via binding arbitration, SCEA will determine whether to separately move before this Court for a determination as to the priority or administrative expense status of any portion of its claim and whether to challenge the *nunc pro tunc* nature of the relief sought by the Debtor.

ARGUMENT

I. Cause Exists To Lift The Automatic Stay Pursuant To Section 362(d) Of The Bankruptcy Code To Allow SCEA To Arbitrate The Damages Claim

19. Section 362(d)(1) of the Bankruptcy Code provides, in pertinent part, that "the court shall grant relief from the stay . . . for cause." 11 U.S.C. § 362(d)(1). "The term 'cause' is not defined by statute to provide flexibility for the bankruptcy courts." *In re Albert Morris 54 The Oval Sugar Land, TX 77479*, No. 4:14-CV-1427, 2015 WL 12551487, at *9 (S.D. Tex. Sept. 2, 2015). "Whether cause exists must be determined on a case by case basis based on an examination of the totality of circumstances." *In re WGMJR, Inc.*, 435 B.R. 423, 432 (Bankr. S.D. Tex. 2010) (*citing In re Reitnauer,* 152 F.3d 341, 343 n. 4 (5th Cir.1998); *In re Mendoza*, 111 F.3d 1264 (5th Cir.1997)).

20. Given the "strong presumption" in favor of the arbitration of disputes pursuant to the FAA, a party wishing to defeat application of the FAA "bears the heavy burden of showing a clearly expressed congressional intention" that the FAA does not apply. *Matter of Henry*, 944 F.3d 587, 590-91 (5th Cir. 2019) (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889 (2018)); *see also In re Trevino*, 599 B.R. 526, 545-46 (Bankr. S.D. Tex. 2019) (noting that the burden is a heavy one to show that arbitration of a proceeding would conflict with the purposes of the Bankruptcy Code); *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 724-25 (S.D. Tex. 2013), *aff'd,* 559 F. App'x 417 (5th Cir. 2014) ("Because of the strong presumption in favor of arbitration, 'a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity'") (quoting *Carter v. Countrywide Credit Indus., Inc.,* 362 F.3d 294, 297 (5th Cir. 2004)).

21. As set forth below, the Debtor cannot meet its burden to establish why the Arbitration Provision should not be enforced. Cause therefore exists to lift the stay and allow SCEA to proceed with arbitration of the Damages Claim.

a. The SCEA PPA Contains a Valid Mandatory Arbitration Provision

22. As a threshold matter, the Court must determine whether the SCEA PPA contains an agreement among the parties to arbitrate and whether such agreement governs the Damages Claim.

23. "Under the Federal Arbitration Act . . . an arbitration agreement in a contract evidencing a transaction involving interstate commerce is 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. H-14-2086, 2015 WL 9302843, at *3 (S.D. Tex. Dec. 18, 2015) (quoting 9 U.S.C. § 2)). To determine whether a dispute is subject to arbitration, courts in the Fifth Circuit first look to whether "the parties entered into a binding agreement to arbitrate the dispute." *Vallejo*, 948 F. Supp. 2d at 724. That determination requires courts "to consider two issues: (1) validity—*i.e.*, whether there is a valid agreement to arbitrate between the parties—and (2) scope—*i.e.*, whether the dispute in question falls within the scope of that arbitration agreement." *Id.* (internal quotations marks and citations omitted). "Because of the presumption of arbitrability where a contract contains an arbitration clause, any ambiguities concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Elite Precision Fabricators, Inc.*, 2015 WL 9302843, at *6 (*citing Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir. 2006)). "The weight of this presumption is heavy: arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.'" *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 636 (5th Cir. 1985).

24. Initially, there can be no dispute that the SCEA PPA, which includes the Arbitration Provision, is valid and binding. Indeed, the Rejection Motion presupposes the SCEA PPA's validity -- otherwise, the Debtor would have had no reason to reject it.

25. Likewise, the scope of the Arbitration Provision plainly covers any dispute over the quantum of damages resulting from the Debtor's rejection and breach of the SCEA PPA. As set forth

above, the Arbitration Provision applies to any disputes "arising under" the SCEA PPA. (*Supra* ¶ 10.) "A dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract." *Omni Pinnacle, LLC v. ECC Operating Services. Inc.*, 255 F. App'x 24, 25-26 (5th Cir. 2007) (quoting *Tittle*, 463 F.3d at 422). It is axiomatic that the Damages Claim -- which results from the Debtor's breach of the SCEA PPA -- could not be maintained outside reference to the parties' rights and obligations under the SCEA PPA. Nor could the proper measure of damages resulting from a breach of the SCEA PPA be determined devoid from Article X, which governs the fees that the Debtor owes SCEA under the SCEA PPA, or Articles XVIII and XIX of the SCEA PPA, which govern what constitutes an event of default, the parties' duties upon a default, the remedies for any such default, and what damages, if any, may be sought upon a breach of the agreement. (SCEA PPA at §§ 10.1-10.9, 18.1-18.5, 19.1-19.3.) Accordingly, the Damages Claim falls within the scope of the Arbitration Provision. *See Elite Precision Fabricators, Inc.*, 2015 WL 9302843, at *5 (holding that arbitration clause applying to all issues "arising out of, or relating to, this Contract" governed the at-issue dispute) (emphasis in original); *see also Yanez v. Conficasa Holdings, Inc.,* No. H-06-1239, 2006 WL 1734012, at *3 (S.D. Tex. June 23, 2006) (holding that plaintiff's claim was subject to arbitration where applicable contract provided that any unresolved dispute arising under the contract would be settled exclusively by arbitration).

b. There is no Basis to Deny SCEA its Right to Enforce the Arbitration Provision

26. Where, as here, there is a valid agreement to arbitrate a dispute, "'[t]he Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms.'" *Matter of Henry*, 944 F.3d at 590-91 (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019)). Thus, unless the Debtor can establish that arbitration of the Damages Claim falls within the "***somewhat*** of a bankruptcy exception" to this rule, cause exists to lift the stay and the Court must permit arbitration to proceed. *See* Aug. 24, 2021 H'rg Tr., *In re Fieldwood Energy LLC,* Case No.

20-33948 (MI) [Docket No. 2006] (Bankr. S.D. Tex. Aug. 24, 2021), annexed as Ex. B to Pasquale Decl. (hereinafter "Fieldwood Tr.") at 4:19 (emphasis added).

27. Under longstanding Fifth Circuit precedent, bankruptcy courts have discretion to decline to enforce arbitration provisions only when two requirements are met. First, a bankruptcy court may decline to permit an arbitration to proceed when a party is seeking to "adjudicate statutory rights conferred by the Bankruptcy Code and not the debtor's prepetition legal or equitable rights." *Matter of Henry*, 944 F.3d 587, 590-91 (5th Cir. 2019) (citing *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1069 (5th Cir. 1997); 10 Collier on Bankruptcy ¶ 9019.05 (16th ed. 2019)). Second, "bankruptcy courts may decline enforcement of arbitration agreements ***only if requiring arbitration would conflict with the purposes of the Bankruptcy Code***." *Id* at 591 (emphasis added); *see Nat'l Gypsum Co.*, 118 F.3d at 1068 (recognizing that "[a]rguably" these type of actions -- the adjudication of federal bankruptcy rights that are separate and apart from contractual claims -- "are simply beyond the coverage of most, if not all, arbitration provisions"); *see also In re Trevino*, 599 B.R. at 549 (holding that "in light of the Supreme Court's *Epic* decision, a party must do more than simply show that referring a matter to arbitration would conflict with the purposes of the Bankruptcy Code . . . [rather, the party has a] heavy burden of showing a *clear* and *manifest* expression of congressional intention" that the Bankruptcy Code displaces the FAA) (emphasis in original). In making the latter determination, courts assess whether arbitration would conflict with the "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Nat'l Gypsum Co.*, 118 F.3d at 1068-69 (further recognizing that "[i]n those cases permitting arbitration, courts have typically found little difficulty with arbitration of disputes where resolution would not involve matters of federal bankruptcy law").

28. Put simply, inasmuch as the Damages Claim clearly falls within the scope of the Arbitration Provision, this Court should lift the stay to allow SCEA to arbitrate with the Debtor unless it determines both (x) that the Damages Claim derives exclusively from the provisions of the Bankruptcy Code and (y) that arbitration thereof would inherently conflict with the purposes of the Bankruptcy Code. Neither prong of this test can be satisfied here.

29. At bottom, this is a breach of contract dispute. The dispute requiring resolution is the quantum of damages that SCEA sustained because of the Debtor's breach of the SCEA PPA. Other issues, such as the treatment of the Damages Claim in a plan of reorganization, will be determined by this Court. Thus, this is a "two-party dispute" and there are no "centralized proceedings" of purely bankruptcy issues implicated by arbitrating the Damages Claim. *In re CIT Grp. Inc.*, No. 09-16565 (ALG), 2012 WL 831095, at *3 (Bankr. S.D.N.Y. Mar. 9, 2012); *see also Elite Precision Fabricators, Inc., 2*015 WL 9302843, at *8 (finding that the prior complaint, like here, implicates, among other things "nonbankruptcy contractual . . . claims in more than a peripheral manner . . . derive[s] from [Plaintiff's] pre-petition legal rights rather than entirely from federal rights conferred by the Bankruptcy Code").

30. Nor would arbitrating the Damages Claim result in piecemeal litigation or disrupt the Court's ability to enforce its orders. The Debtor's rejection of the SCEA PPA -- a statutory bankruptcy entitlement -- was stipulated to and ordered by this Court, and an arbitrated determination of damages resulting from such rejection does not constitute a collateral attack on the SCEA PPA's rejection. *See In re Statewide Realty Co.,* 159 B.R. 719, 724 (Bankr. D.N.J. 1993) (holding that where, as here, "issues as to whether rejection . . . was a proper exercise of the Debtor's business judgment already have been determined . . . [a]ssessment of the allowable amount of damages which result from the rejection requires merely the application of contract law—a matter in which the

arbitrator has equal, or perhaps greater, expertise than the bankruptcy court"; cited favorably by *Nat'l Gypsum Co.*, 118 F.3d at 1068-69).

31. Likewise, the arbitration will fully resolve the amount of damages SCEA is entitled to from the Debtor, eliminating any risk of piecemeal litigation. It is therefore unsurprising that courts routinely find that arbitration provisions should be respected in bankruptcy, where, as here, the question is simply one of damages from a breach of contract. *See* Fieldwood Tr. at 5:15-18; *see also In re Touchstone Home Health LLC,* 572 B.R. 255, 277 (Bankr. D. Colo. 2017) (citing *Nat'l Gypsum* and holding that "[t]he lack of inherent conflict between arbitration and the Bankruptcy Code is demonstrated by ***many*** bankruptcy decisions approving liquidation of claims through arbitration") (emphasis added); *In re CIT Grp. Inc.*, 2012 WL 831095, at *3 (granting claimant's motion to compel arbitration and holding that, like here, "liquidating the [rejection damages] claim through arbitration would not conflict with, much less 'necessarily jeopardize,' the goals of the Bankruptcy Code."); *In re Elec. Mach. Enters., Inc*., 479 F.3d 791, 795, 799 (11th Cir. 2007) (citing *National Gypsum* and finding that action to determine "hotly disputed" factual issue regarding the amount of money due and owing between contractor and subcontractor would not "inherently conflict with the Bankruptcy Code" and so is subject to arbitration); *accord In re Singer Co. N.V.*, No. 00 Civ. 6793 LTS, 2001 WL 984678, at *6 (S.D.N.Y. Aug. 27, 2001) ("While a creditor must generally file a proof of claim to be eligible to receive payment and the Bankruptcy Code imposes an automatic stay on creditors' collection efforts in non-bankruptcy fora, there is no Code requirement that all issues relating to a debtor's activities be adjudicated in the Bankruptcy Court. The risk of inconsistent adjudications is not unique to bankruptcy and does not frame an inherent conflict between Bankruptcy Code and FAA policy.") (citations omitted).

32. Although the treatment of the Damages Claim is ultimately part of the Debtor's plan process, that fact does not create a conflict precluding arbitration. Indeed, whether determined in this Court or by an arbitration panel, the amount of the Damages Claim may have some impact on the plan process, but that impact is "too tangential" a relationship to disregard the contractual right to arbitrate. *See In re Shores of Panama, Inc.,* 387 B.R. 864, 867 (Bankr. N.D. Fla. 2008); *In re Farmland Indus., Inc.*, 309 B.R. 14, 21 (Bankr. W.D. Mo. 2004) (citing *National Gypsum* and holding that "the need to promote centralized resolution of bankruptcy claims . . . are simply insufficient to create an inherent conflict between the Bankruptcy Code and the Arbitration Act"). Likewise, no material delay will result from arbitration of the Damages Claim. Arbitration would proceed imminently and on a schedule designed for a prompt resolution, as specified by the SCEA PPA. *See, e.g.*, *In re Farmland Indus., Inc.*, 309 B.R. at 20 (recognizing that determining claimant's claim in bankruptcy is not "any more efficient than the parties' agreement to have binding arbitration").

33. Finally, any argument by the Debtor that its rejection of the SCEA PPA somehow terminated the Arbitration Provision would fail as a matter of law. As the Debtor acknowledged in paragraph 23 of the Rejection Motion, and as recently confirmed by the Fifth Circuit, "[t]he rejection of an executory contract is a breach of contract, with 'the same effect as a breach outside bankruptcy.'" *In re Ultra Petroleum Corp.,* 28 F.4th 629, 636 (5th Cir. 2022) (citing *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1666 (2019)). As explained by the U.S. Supreme Court:

> Section 365 reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy. As one bankruptcy scholar has put the point: Whatever limitations on the debtor's property apply outside of bankruptcy apply inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either. So if the not-yet debtor was subject to a counterparty's contractual right (say, to retain a copier or use a trademark), so too is the trustee or debtor

> once the bankruptcy petition has been filed. The rejection-as-breach rule . . . ensures that result. By insisting that the same counterparty rights survive rejection as survive breach, the rule prevents a debtor in bankruptcy from recapturing interests it had given up.

Mission Prod. Holdings, Inc., 139 S. Ct. at 1662-63 (internal citations and quotations omitted). The "rejection-as-breach" rule thus ensures that any contractual rights that existed prior to rejection -- including, as is the case here, the right to arbitrate damages due for a breach of that rejected contract -- remain binding on all parties after rejection. Put simply, "[a] rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement." *Id.* at 1662. To that end, numerous courts have held that rejection of a contract does not vitiate arbitration rights. *See In re Paragon Offshore PLC*, 588 B.R. 735, 749 (Bankr. D. Del. 2018) (rejecting argument "that the Arbitration Provision was extinguished as part of the rejection of the MSA in the bankruptcy proceedings"); *In re Fleming Cos. Inc.*, 325 B.R. 687, 693-94 (Bankr D. Del. 2005) (finding that the "rejection of a contract, or even breach of it, will not void an arbitration clause"); *see also* George R. Calhoun, *Arbitration Clauses Not Invalidated by Rejection*, Am. Bankr. Inst. J., July/August 2007, at 36 (2007) (compiling authority and concluding that "[t]he existing authorities universally indicate that bankruptcy does not allow a debtor to escape an agreement to arbitrate through rejection").[5]

---

[5] SCEA is aware of the recent decision by the Northern District of Texas Bankruptcy Court (which has since been appealed) to the contrary. *See In re Highland Cap. Mgmt., L.P.*, No. 19-34054, 2021 WL 5769320 (Bankr. N.D. Tex. Dec. 3, 2021). SCEA submits that the ruling by the *Highland Cap. Mgmt.* was improperly decided and should not be followed by this Court. The *Highland* court relied on a single District Court case, in the receivership context, that the Fifth Circuit declined to follow (*see generally Janvey v. Alguire,* 847 F.3d 231, 243 (5th Cir. 2017) (affirming on other grounds)) and failed to acknowledge the U.S. Supreme Court's *Mission Prods.* decision. Instead, the *Highland* court held that because "the [limited partnership agreement] was an executory contract duly rejected pursuant to Bankruptcy Code section 365, . . . the Arbitration Clause should likewise be considered a separate executory agreement that was rejected" and that the only remedy for the rejection of the arbitration clause would be money damages and not specific performance of the arbitration clause. *Id.* at 7. The *Highland* court's decision is in direct conflict with the U.S. Supreme Court's ruling in *Mission Prods.* In *Mission Prods.,* the U.S. Supreme Court held that following rejection, other than the ability to demand continued performance, a non-debtor contract counterparty retains ***all*** rights related

34. In sum, the Arbitration Provision (x) is valid, enforceable and covers arbitration of the Damages Claim and (y) does not conflict with the underlying purposes of the Bankruptcy Code. Thus, under binding Fifth Circuit precedent, cause exists to lift the automatic stay to allow SCEA to commence arbitration against the Debtor.

II. Waiver of the 14-Day Stay Under Bankruptcy Rule 4001(a)(3) Is Appropriate

35. Bankruptcy Rule 4001(a)(3) provides that an order granting a motion for relief from the automatic stay is stayed for 14 days "unless the court orders otherwise." FED. R. BANKR. P. 4001(a)(3). SCEA submits that the protection of Bankruptcy Rule 4001(a)(3) is not necessary in these circumstances, and, respectfully requests that the 14-day stay be waived, so that, should the relief requested herein be granted, SCEA may immediately commence arbitration against the Debtor. Accordingly, SCEA respectfully requests that the Court waive the stay imposed by Bankruptcy Rule 4001(a)(3).

NOTICE

36. Notice of this Motion will be served on any party entitled to notice pursuant to Bankruptcy Rules 4001 and 9014 and Bankruptcy Local Rule 4004-1(a)(4) and 9013-1(e), including (a) the Debtor, (b) Debtor's counsel, (c) the U.S. Trustee, (d) counsel for the Official Committee of Unsecured Creditors, and (e) any party requesting notice pursuant to Bankruptcy Rule 2002.

---

to the contract it held under applicable non-bankruptcy law. *Mission Prods. Holdings, Inc.,* 139 S. Ct. at 1666 ("a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted."). In the instant situation, those contractual rights include SCEA's right to compel arbitration. There is no reason why certain rights -- such as, as Justice Kagan described in *Mission Prods.*, the right to continue to pay for and retain a leased copier -- would apply post-rejection, but a contractual right to commence arbitration would not. Accordingly, SCEA submits that this Court should ignore the *Highland* decision and follow U.S. Supreme Court precedent.

NO PRIOR REQUEST

37. No prior request for the relief sought in the Motion has been made by SCEA or any other party in these proceedings.

RESERVATION OF RIGHTS

38. SCEA hereby reserves all rights to amend and/or supplement this Motion and to make arguments as may be applicable, including, but not limited to, as a result of information learned subsequent to the filing of this Motion. SCEA also hereby reserves all rights with respect to the amount, priority and treatment of any and all claims resulting from or related to rejection of the SCEA PPA, and to pursue any other remedies it may have under the SCEA PPA and applicable law.

CONCLUSION

WHEREFORE, for the reasons stated herein, SCEA respectfully requests that the Court grant the Motion and enter an order, substantially in the form attached hereto as **Exhibit A**, (a) granting SCEA relief from the automatic stay for the purpose of allowing SCEA to commence arbitration against the Debtor relating to the Damages Claim, (b) waiving the 14-day stay of Bankruptcy Rule 4001(a)(3), and (c) granting to SCEA such other and further relief as this Court may deem just and proper.

[Signature Page Follows]

Dated: May 19, 2022

PAUL HASTINGS LLP

/s/ *Kenneth Pasquale*

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Jonathan D. Canfield*
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* *Admitted Pro Hac Vice*
+ *Pro Hac Application Pending*

-and-

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Co-Counsel to Sandy Creek Energy Associates, L.P.

CERTIFICATE OF CONFERENCE

Pursuant to Bankruptcy Local Rule 4001-1(A), SCEA reached out to the Debtor to meet and confer in an attempt to consensually resolve the dispute on May 18, 2022. (*See* Pasquale Decl. at ¶ 5.) To date, the parties were unable to reach an agreement on the requested relief. (*See id.* at ¶ 6.)

/s/ Demetra Liggins
Demetra Liggins

CERTIFICATE OF SERVICE

On May 19, 2022, the undersigned caused a copy of this Motion to be served on (a) all parties eligible to receive service through the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas by electronic mail, (b) the Debtor, (c) Debtor's counsel, (d) the U.S. Trustee, and (e) counsel for the Official Committee of Unsecured Creditors by electronic mail.

/s/ Demetra Liggins
Demetra Liggins

EXHIBIT A

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

In re:	§	
	§	
	§	Chapter 11
BRAZOS ELECTRIC POWER COOPERATIVE, INC.,	§	
	§	Case No. 21-30725 (DRJ)
	§	
Debtor.[1]	§	

ORDER GRANTING MOTION OF SANDY CREEK ENERGY ASSOCIATES, L.P., PURSUANT TO 11 U.S.C. § 362(d) AUTHORIZING RELIEF FROM THE AUTOMATIC STAY TO COMMENCE ARBITRATION AGAINST THE DEBTOR

Upon the motion (the "Motion")[2] of Sandy Creek Energy Associates, L.P. ("SCEA") for entry of an order pursuant to 11 U.S.C. § 362(d) authorizing relief from the automatic stay to commence and proceed with arbitration against the Debtor; it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; it appearing that venue of this chapter 11 case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); it appearing that notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and after due deliberation thereon and this Court having concluded that upon the legal and factual bases set forth in the Motion, SCEA has established good and sufficient cause for the relief granted herein, now, it is hereby **ORDERED** that:

[1] The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number, is: Brazos Electric Power Cooperative, Inc. (4729). Additional information regarding this case may be obtained on the website of Brazos's claims and noticing agent at http://cases.stretto.com/Brazos. The Debtor's address is 7616 Bagby Avenue, Waco, TX 76712.

[2] Capitalized terms used but not otherwise defined herein shall have the same meanings as ascribed to them in the Motion.

1. The Motion is **GRANTED** as set forth herein.

2. The automatic stay under 11 U.S.C. § 362(a) is hereby modified to permit SCEA to submit the Damages Claim to arbitration (the "Arbitration"), in accordance with the terms of the SCEA PPA, and SCEA is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion and the SCEA PPA.

3. Upon commencement of the Arbitration, the parties are compelled to arbitrate the Damages Claim and to comply with all orders issued in the Arbitration.

4. Upon completion of the Arbitration, the parties shall file a notice of the outcome thereof with this Court, after which this Court or another court of competent jurisdiction shall enter such orders as necessary and appropriate to enforce the findings and conclusions issued in the Arbitration.

5. The fourteen-day stay provided under Bankruptcy Rule 4001(a)(3) shall not apply to the terms of this Order.

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

7. This Order is a final order within the meaning of 28 U.S.C. § 158(a)(1) and is effective immediately upon entry.

Dated _____, 2022.

SO ORDERED.

_____
Hon. David R. Jones
United States Bankruptcy Judge

EXHIBIT B

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

In re:	§	
	§	
	§	Chapter 11
BRAZOS ELECTRIC POWER COOPERATIVE, INC.,	§	
	§	Case No. 21-30725 (DRJ)
	§	
Debtor.[1]	§	

DECLARATION OF KENNETH PASQUALE IN SUPPORT OF MOTION OF SANDY CREEK ENERGY ASSOCIATES, L.P., FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 362(d) AUTHORIZING RELIEF FROM THE AUTOMATIC STAY TO COMMENCE ARBITRATION AGAINST THE DEBTOR

I, Kenneth Pasquale, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a partner with Paul Hastings LLP, which maintains an office for the practice of law at 200 Park Ave, New York, New York 10166. I am an attorney at law, duly admitted and in good standing to practice in the State of New York, and numerous courts including the United States Court of Appeals for the Second Circuit, and the United States District Courts for the Southern and Eastern District of New York. I am admitted *pro hac vice* in the above-captioned chapter 11 case to represent Sandy Creek Energy Associates, L.P. ("SCEA").[2]

2. I submit this Declaration in support of the *Motion of Sandy Creek Energy Associates, L.P., for Entry of an Order Pursuant to 11 U.S.C. § 362(d) Authorizing Relief from the*

[1] The Debtor in this Chapter 11 case, along with the last four digits of its federal tax identification number, is: Brazos Electric Power Cooperative, Inc. (4729). Additional information regarding this case may be obtained on the website of Brazos's claims and noticing agent at http://cases.stretto.com/Brazos. The Debtor's address is 7616 Bagby Avenue, Waco, TX 76712.

[2] Capitalized terms used herein, but not otherwise defined herein, shall have the meanings ascribed to them in the Motion to Lift Stay.

Automatic Stay to Commence Arbitration Against the Debtor (the "Motion to Lift Stay"), which is being filed concurrently herewith in the above-captioned case.

3. Attached hereto as **Exhibit A** is a copy of the Power Purchase Agreement, dated as of July 10, 2007, between the Debtor and SCEA, (the "SCEA PPA"), which is being filed under seal.

4. Attached hereto as **Exhibit B** is a true and correct copy of the August, 24, 2021 Hearing Transcript in the bankruptcy cases styled as *In re Fieldwood Energy LLC*, Case No. 20-33948 (Bankr. S.D. Tex.).

5. On the morning of May 18, 2022, I spoke with Holland N. O'Neil, special counsel to the Debtor, and requested that the Debtor agree to consensually lift the stay to allow for the arbitration of the Damages Claim to proceed.

6. On the afternoon of May 18, 2022, Ms. O'Neil informed me that the Debtor did not consent to lift the stay to proceed with arbitration. I then informed Ms. O'Neil that SCEA intended to file the Motion to Lift Stay.

7. I hereby declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Date: May 19, 2022

/s/ Kenneth Pasquale
Kenneth Pasquale

EXHIBIT A

FILED UNDER SEAL

POWER PURCHASE AGREEMENT

EXHIBIT B

FIELDWOOD ENERGY TRANSCRIPT

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§	CASE NO. 20-33948-11
	§	HOUSTON, TEXAS
FIELDWOOD ENERGY, LLC, AND	§	
THE OFFICIAL COMMITTEE OF	§	
UNSECURED CREDITORS,	§	TUESDAY,
	§	AUGUST 24, 2021
DEBTORS.	§	8:58 A.M. TO 9:11 A.M.

COURT'S RULING (VIA ZOOM)

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

RECORDED VIA COURTSPEAK; NO LOG NOTES

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APPEARANCES (VIA ZOOM):

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Craig Duewall, Esq.
300 West 6th Street
Suite 2050
Austin, TX 78701
512-320-7210

(Please also see Electronic Appearances.)

HOUSTON, TEXAS; TUESDAY, AUGUST 24, 2021; 8:58 A.M.

THE COURT: If I can go ahead and get the parties that are intending to speak today to go ahead and press five star, we'll get your line enabled.

(Pause in the proceedings.)

THE COURT: From 214-746-2503, I don't have a name associated with that number.

MR. GENENDER: Your Honor, it's Paul Genender of Weil. Good morning.

THE COURT: Good morning.

All right. So we're going to call the Fieldwood Energy case. It's 20-33948.

We have Mr. Duewall, Mr. Genender, Mr. Manns, and Mr. Perez who have asked for the ability to go ahead and address the Court today.

Are there any preliminary announcements? Are we ready to move right into the hearing?

MR. GENENDER: I think from the Debtor's perspective, we're ready, Judge.

THE COURT: All right. Anyone else?

(No audible response.)

THE COURT: So the parties had asked for the Court if you-all hadn't resolved matters by today to announce its decision on whether to lift the stay and allow the arbitration to proceed.

I am going to lift the stay to allow the arbitration to proceed. The Court has jurisdiction over this matter pursuant to 20 USC Section 1334. This was a core matter when it was filed under 20 USC Section 157 and although the dispute arose pre-confirmation, the core -- the nature of the dispute did not change with confirmation of the Plan.

Pursuant to Rule 7052(a)(1), as incorporated into the 9000 series, I make these oral Findings of Fact and Conclusions of Law and a separate Order will be issued.

Under the Federal Arbitration Act, there is a strong presumption in favor of arbitration and a party seeking not to enforce an Arbitration Agreement bears the burden of establishing the reasons why. When there is a valid agreement to arbitrate, as here, -- and no one argues that it's not a valid agreement -- the Federal Arbitration Act leaves no place for the exercise of discretion as to whether to mandate the arbitration.

There is somewhat of a bankruptcy exception, but arbitration generally applies in bankruptcy cases, unless there's something unique about the dispute such that it must be resolved as part of the bankruptcy process itself.

The Fifth Circuit has explicitly held since 1997 that arbitration clauses apply in bankruptcy, and I refer to the *National Gypsum* case at 118 F.3d 1056.

In those cases permitting arbitration, courts have typically found little difficulty with arbitration of disputes where resolution would not involve matters of Federal Bankruptcy law.

The Fifth Circuit in 2019 in *In Re: Henry*, at 944 F.3d 587 clarified when you would make this exception. We have held that Bankruptcy Courts may decline to enforce arbitration clauses when two requirements are met: First, the proceeding must adjudicate statutory rights conferred by the Bankruptcy Code, and not the Debtors' pre-petition legal or equitable rights citing back to *National Gypsum*.

A trustee in bankruptcy has two kinds of causes of action: Those inherited from the Debtor and those granted by statute.

Second, Bankruptcy Courts may decline to enforce arbitration provisions only if requiring arbitration would conflict with the purposes of the Bankruptcy Code, referring back to *Gandy* at 299 F.3d 489, a 2002 Fifth Circuit case.

Those purposes would include the goal of centralized resolution of purely bankruptcy issues, they need to protect creditors from reorganizing Debtors from piecemeal litigation and the undisputed power of a Bankruptcy Court to enforce its own Order.

So without more in this case, arbitration would apply. The argument, of course, is -- that we have to focus

on, is whether there has been any sort of a waiver or lack of enforcement of the arbitration provision.

It's interesting that on the same day this motion was filed, May 28th, the Fifth Circuit came out with its most recent pronouncement in this area. So the parties filing the motion weren't aware of it, but it literally occurred on the same day, and that's the *International Energy Ventures Management* case at 999 F.3d 257, 2021 Fifth Circuit case.

In that case they found that there had, in fact, been a waiver, but they also established the principles. Waiver of arbitration is a disfavored finding, according to the Fifth Circuit, but we will find it when the parties seeking arbitration substantially invokes the judicial process to the detriment or the prejudice of the other party.

Substantial invocation and prejudice are questions of Federal law in every case where the FAA applies. There are Federal questions in this case. The substantial invocation analysis in this case is straightforward. Substantial invocation occurs when a party performs an overt act in court that advances a desire to resolve the arbitral dispute through litigation, rather than arbitration, referring back to *Nicholas* at 565 F.3d 907.

It is difficult to see, held the Fifth Circuit in

that case, how a party could more clearly event such a desire than by filing a lawsuit, go into the merits of an otherwise arbitral dispute.

So outside of the rare case in which initiating litigation, quote:

> "Would not be inconsistent with seeking arbitration, the act of a Plaintiff filing suit without asserting an arbitration clause, constitutes substantial invocation of the judicial process."

The principle argument against enforcing the Arbitration Agreement arises out of the earlier motion filed by the Debtor seeking to compel performance by its counterparty.

For several reasons, I reject that argument. First, and perhaps most importantly, I find that either the Debtors breached the Arbitration Agreement by coming to me and seeking that earlier relief, or alternatively sought preliminary relief in aid of arbitration.

There really isn't any other way to look at this in my mind. The parties' agreement contains an arbitration clause that I want to read into the Record:

> "The arbitration process is binding on the parties and this arbitration is intended to be a final resolution of any dispute between the parties as described above, to the same extent as a Final Judgment of a Court of

competent jurisdiction."

And then the critical sentence:

"Each party hereby expressly covenants that it shall not resort to court remedies, except as provided for herein, and for preliminary relief in aid of arbitration."

Fieldwood resorted to court remedies. Now maybe they did so in breach of the agreement, and maybe they did so because they were seeking preliminary relief in arbitration.

In the end I conclude that this was preliminary relief in arbitration, but largely it won't matter in terms of the outcome of the decision. It would surely be totally inconsistent with the Federal policy of enforcing arbitration clauses to say that there was somehow a waiver when the counterparty breaches the Arbitration Agreement and then the responding party comes in and defends itself in light of the breach.

It was not up to Mr. Duewall's client to come in and to say, "Wait, we're invoking arbitration." It was up to Fieldwood not to come to court in the first place; or Fieldwood had the right to come and seek preliminary relief in aid of arbitration.

Although Fieldwood sought a form of affirmative relief, I nevertheless find that it was preliminary relief

in aid of arbitration. Fieldwood was trying to avoid the loss of valuable rights. They had the right to try and avoid that and they needed to come to court to lose the avoidance of those rights without then having the -- and then retain the ability to go to arbitration later.

I will acknowledge I think that's a pretty close call. But it is not a close call that Fieldwood either breached or came in aid of arbitration. My call is Fieldwood did not breach, but instead, came in preliminary aid of arbitration.

Second, I find that BP did not seek any affirmative relief from the Court and they stated this earlier at a preliminary hearing. I think seeking to minimize preliminary relief against BP is nowhere near the equivalent of what occurs when BP would have initiated its own lawsuit.

In these cases, the waiver of a party -- cases where that's been found -- is when that party initiates a proceeding to obtain affirmative relief.

For BP to come in and say, "Don’t do this to us," or "If you're going to do it to us, do it in this less harmful way to us," is not invoking the aid of the Court, it's trying to get the Court to do less, not to do more. I just don't think there is any way that that is a waiver of a substantial right.

Because I am lifting the stay in favor of arbitration, I decline to rule on the Motions to Quash. They'll be up to the arbitration process. I will issue a separate Order that grants relief from the stay to allow the parties to proceed in arbitration.

I think that terminates everything we had scheduled for today, but you-all let me know if I've missed something here.

MR. GENENDER: Your Honor, Paul Genender for the Debtors. Thank you for going through that.

May I ask a clarification question?

THE COURT: Of course.

MR. GENENDER: So your ruling in declining to address the Motions to Quash, my question relates to the fact that the 2004 discovery sought did not relate to agreements that have arbitration clauses in them; namely, the Debtor's position is it relates to the PSA that does not have arbitration clause in it. And for that reason, wouldn't be subject to your lift stay ruling.

THE COURT: Well, I understand that position that you-all have taken, but I don't think that you have supported it with the request that you have made in light of what the PSA says with respect to waivers.

I get it, and if you want to file a motion for me to reconsider this, I'm not going to at all be offended on

that, but if you look at the PSA itself, I'm not sure what damages you're actually seeking to prove up by doing the discovery, if this is solely under the PSA.

And I think it is more likely to be discovery that is related to the termination dispute.

So I'll let you file a Motion for Reconsideration on that issue. I did not address it fully in my Findings of Fact and Conclusions of Law. I did think about it, but because of that, I'm going to go ahead and deny them now. But I -- you know, it took me a long time to make this ruling. That's because the lawyering has been so good, so I'm not going to be upset if you file a Motion to Reconsider. I'll let them respond to it.

But for now I think that that discovery in large part is going to go to the termination question.

MR. GENENDER: Okay. Thank you, Judge. We'll huddle on our end and decide how we want to proceed, and obviously I have some points that I was prepared to make on -- in response to the Motion to Quash, but in light of your ruling --

THE COURT: Right.

MR. GENENDER: -- I'm not going to do it today.

THE COURT: I think that's fair and, you know, I'm not sure why the parties wanted me to wait this long to rule, but you-all asked me to rule today and that's what I

wanted to do. And I think it does moot other things that you-all might have prepared to do.

All right. Thank you very much.

We're in adjournment.

(The parties thank the Court.)

(Hearing adjourned at 9:11 a.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability from the electronic sound recording of the ZOOM/telephonic proceedings in the above-entitled matter.

/S/ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

JUDICIAL TRANSCRIBERS OF TEXAS, LLC

JTT TRANSCRIPT #64419

DATE FILED: AUGUST 24, 2021