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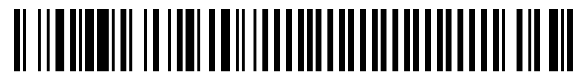
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: **WESTINGHOUSE ELECTRIC COMPANY,** ***et al*** **Debtors.**[1]	**Chapter 11** **Case No. 17-10751 (MEW)** **(Jointly Administered)**

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Westinghouse Electric Company LLC (0933), CE Nuclear Power International, Inc. (8833), Fauske and Associates LLC (8538), Field Services, LLC (2550), Nuclear Technology Solutions LLC (1921), PaR Nuclear Holding Co., Inc. (7944), PaR Nuclear, Inc. (6586), PCI Energy Services LLC (9100), Shaw Global Services, LLC (0436), Shaw Nuclear Services, Inc. (6250), Stone & Webster Asia Inc. (1348), Stone & Webster Construction Inc. (1673), Stone & Webster International Inc. (1586), Stone & Webster Services LLC (5448), Toshiba Nuclear Energy Holdings (UK) Limited (N/A), TSB Nuclear Energy Services Inc. (2348), WEC Carolina Energy Solutions, Inc. (8735), WEC Carolina Energy Solutions, LLC (2002), WEC Engineering Services Inc. (6759), WEC Equipment & Machining Solutions, LLC (3135), WEC Specialty LLC (N/A), WEC Welding and Machining, LLC (8771), WECTEC Contractors Inc. (4168), WECTEC Global Project Services Inc. (8572), WECTEC LLC (6222), WECTEC Staffing Services LLC (4135), Westinghouse Energy Systems LLC (0328), Westinghouse Industry Products International Company LLC (3909), Westinghouse International Technology LLC (N/A), and Westinghouse Technology Licensing Company LLC (5961). The Debtors' principal offices are located at 1000 Westinghouse Drive, Cranberry Township, Pennsylvania 16066.



AZZ, INC. and **THE CALVERT COMPANY, INC.,** **Plaintiffs,** **v.** **SOUTHERN NUCLEAR OPERATING COMPANY, INC., GEORGIA POWER COMPANY, OGLETHORPE POWER CORPORATION, MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA, THE CITY OF DALTON, GEORGIA, and WECTEC GLOBAL PROJECT SERVICES, INC., N/K/A STONE & WEBSTER, INC.,** **Defendants.**	**Adv. No. 18-01016 (MEW)**

DEFENDANTS' MOTION FOR WITHDRAWAL OF THE REFERENCE OF CERTAIN CLAIMS IN THE ADVERSARY PROCEEDING

The above-captioned defendants (collectively, the "Defendants") hereby jointly move this Court, pursuant to 28 U.S.C. § 157(d) and Rule 5011 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for the entry of an order withdrawing the reference of Counts I, II, V, and VI of the Plaintiffs' Complaint[2] and the Vogtle Defendants' Counterclaims, both filed in the adversary proceeding captioned AZZ, Inc. and The Calvert Company, Inc., v. Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, The City of Dalton, Georgia, and WECTEC Global Project Services, Inc., n/k/a Stone & Webster, Inc., Adv. Proc. No. 18-01016 (the "Adversary Proceeding"), from the United States Bankruptcy Court for the

2 Capitalized terms not otherwise defined herein have the meanings given to them in the accompanying Memorandum of Law in Support of Defendants' Motion for Withdrawal of the Reference of Certain Claims in the Adversary Proceeding (the "Memorandum of Law").

Southern District of New York (the "Bankruptcy Court"). In support of this Motion, the Defendants respectfully represent as follows:

1. The Defendants submit that, for the reasons explained in the Memorandum of Law, there is cause for this Court to withdraw the reference of the claims in Counts I, II, V, and VI of the Complaint and the Counterclaims asserted by the Vogtle Defendants in the Adversary Proceeding from the Bankruptcy Court.

2. The Defendants are not, however, seeking to have those claims and counterclaims litigated in this Court. Rather, because the interest of justice and the convenience of parties and witnesses strongly militate that these claims be tried in Georgia, (a) where the disputed services were performed, (b) where the vast majority of witnesses and evidentiary proof reside, (c) whose law applies to many of the claims and (d) which has the most substantial interest in the resolution of the claims, pursuant to 28 U.S.C. §§ 1404 and 1412, the Defendants will request that this Court transfer these claims and counterclaims to the United States District Court for the Southern District of Georgia.

3. The Defendants have made no prior request for the relief sought in this Motion to this or any other court.

WHEREFORE, the Defendants respectfully request the Court enter an order (i) withdrawing the reference of Counts I, II, V, and VI of the Complaint and the Counterclaims from the Bankruptcy Court and (ii) granting the Defendants such other relief as the Court may deems proper.

Dated: May 1, 2018
New York, New York

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AZZ, INC. and THE CALVERT COMPANY, INC., **Plaintiffs,** **v.** **SOUTHERN NUCLEAR OPERATING COMPANY, INC., GEORGIA POWER COMPANY, OGLETHORPE POWER CORPORATION, MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA, THE CITY OF DALTON, GEORGIA, and WECTEC GLOBAL PROJECT SERVICES, INC., N/K/A STONE & WEBSTER, INC.,** **Defendants.**	**Adv. No. 18-01016 (MEW)**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR WITHDRAWAL OF THE REFERENCE OF CERTAIN CLAIMS IN THE ADVERSARY PROCEEDING

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Defendants Southern Nuclear Operating Company, Inc. ("SNC"), Georgia Power Company ("GPC"), Oglethorpe Power Corporation ("Oglethorpe"), Municipal Electric Authority of Georgia ("MEAG"), the City of Dalton, Georgia (together with MEAG, Oglethorpe and GPC, the "Owners" and, collectively with SNC and the Owners, the "Vogtle Defendants") and WECTEC Global Project Services n/k/a Stone & Webster, Inc. ("WECTEC" and, collectively with the Vogtle Defendants, the "Defendants") file this Memorandum of Law in Support of Defendants' Motion for Withdrawal of the Reference of Certain Claims in the Adversary Proceeding, and respectfully state as follows:

Preliminary Statement

Plaintiffs AZZ, Inc. ("AZZ") and the Calvert Company, Inc. ("Calvert" and, together with AZZ, the "Plaintiffs") filed a complaint (the "Complaint") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), which, among other things, seeks (a) in Counts V and VI payment from the Vogtle Defendants for certain services performed by the Plaintiffs for Units 3 & 4 at the Allen W. Vogtle Electric Generating Plant (the "Georgia Project") located in Waynesboro, Georgia, (b) in Count II payment from WECTEC for certain services performed by the Plaintiffs for the Georgia Project, and (c) in Count I a declaratory judgment that the claim asserted against WECTEC constitutes an administrative expense in WECTEC's chapter 11 case (collectively, the "Vogtle Claims").

Although the Plaintiffs have alleged certain of the Vogtle Claims (in Counts I and II) against WECTEC, WECTEC ultimately has no financial stake with respect to such claims because the Vogtle Defendants are obligated to pay or reimburse WECTEC for, and defend WECTEC against, the claims. In addition, the Bankruptcy Court likely lacks jurisdiction over the Vogtle Claims in Counts V and VI and, with respect to those claims and the Vogtle Defendants' counterclaims, the Vogtle Defendants are entitled to, and will seek, a trial by jury.

The Vogtle Defendants do not consent to the Bankruptcy Court entering a final order or judgment in any non-core proceeding or conducting a jury trial. Because of the likely lack of Bankruptcy Court jurisdiction over certain of the Vogtle Claims and the fact that WECTEC or its bankruptcy estate ultimately have no financial stake in the outcome of the Vogtle Claims, this Court should withdraw the reference as to Counts I, II, V and VI.

In the end, however, the Defendants are not seeking to have the Vogtle Claims and the counterclaims resolved in this Court. The location of the operative facts and central witnesses regarding these claims is in Georgia: (a) the underlying services were performed there; (b) the vast majority of witnesses and evidentiary proof reside there; (c) Georgia law applies to many of the claims; and (d) Georgia has the most substantial interest in the resolution of the claims. Accordingly, because the interests of justice and the convenience of the parties and witnesses strongly militate that these claims be adjudicated in Georgia, pursuant to 28 U.S.C. §§ 1404 and 1412, the Defendants will request that this Court transfer the Vogtle Claims and the counterclaims to the United States District Court for the Southern District of Georgia (the "Georgia District Court").

Background

1. In 2008, GPC, for itself and as agent for the other Owners, entered into an Engineering, Procurement and Construction Agreement (as amended from time to time, the "EPC Agreement") with Westinghouse Electric Company, LLC ("WEC") and WECTEC (formerly CB&I Stone & Webster Construction, Inc.) for, among other things, the engineering, procurement, construction, commissioning, and startup of two new AP1000 nuclear units at the Georgia Project.

2. On December 10, 2015, AZZ, Inc. and CB&I Stone & Webster Construction, Inc. ("CB&I") entered into that certain Subcontract No. 1321752004-1613 (the "Vogtle Subcontract")

related to the construction of the Georgia Project. On January 4, 2016, WECTEC acquired CB&I. On March 29, 2017 (the "Petition Date"), each of the above-captioned debtors (collectively, the "Debtors") filed a voluntary petition under chapter 11 of the Bankruptcy Code in the Bankruptcy Court.

3. On the Petition Date, the Owners, WECTEC, WEC and WECTEC Staffing Services LLC entered into the Interim Assessment Agreement dated March 29, 2017 (the "IAA"), under which the Owners agreed to pay all administrative expenses accrued by the Debtors during the Interim Assessment Period (as defined in the IAA) for services performed and goods provided for the Georgia Project.

4. On June 9, 2017, the Owners, WECTEC and WEC entered into that certain Services Agreement, pursuant to which WECTEC and WEC transferred control of the construction of the Georgia Project to the Owners and will provide engineering and technical support and staff augmentation services through completion of construction and startup.

5. On July 27, 2017, (i) the EPC Agreement was rejected, (ii) the IAA expired, (iii) the Services Agreement went into effect and (iv) SNC, acting for itself and as agent for the Owners, entered into that certain Subcontractor Bridge Agreement (the "Bridge Agreement") with Calvert. Pursuant to the Bridge Agreement, Calvert agreed to provide certain labor, materials, equipment and services related to the construction of the Georgia Project. The Bridge Agreement was terminated by SNC, effective November 6, 2017. WECTEC was not a party to the Bridge Agreement.

6. On April 30, 2018, the Bankruptcy Court entered the Stipulation, Agreement and Order Between Debtors and Vogtle Owners Regarding Defense of Adversary Complaint (the "Stipulation"), pursuant to which the Owners have agreed to defend and indemnify

WECTEC against the Vogtle Claims asserted against WECTEC, and be fully liable and obligated to make any payments required in connection with any settlement of such claims. In addition, pursuant to the Stipulation, WECTEC assigned: (i) claims against the Plaintiffs related to services performed or goods provided for the Georgia Project on or after the Petition Date; and (ii) warranties related to services performed or goods provided by the Plaintiffs for the Georgia Project.

7. The Complaint includes claims related to the Georgia Project, but also unrelated claims concerning a separate nuclear plant in South Carolina. By the motion to withdraw, the Defendants are seeking to withdraw only the Vogtle Claims and are not seeking any relief with respect to any other claims in the Complaint. The Vogtle Claims comprise the following:

- Count I is an action against WECTEC for a declaratory judgment that the alleged damages in Count II constitute administrative expenses in WECTEC's chapter 11 case.
- Count II is an action against WECTEC for damages of no less than $678,861.43 resulting from an alleged breach of the Vogtle Subcontract.
- Count V is an action against the Vogtle Defendants for damages of no less than $678,861.43 resulting from an alleged breach of the IAA, under the theory that the Plaintiffs are third-party beneficiaries of such contract.
- Count VI is an action against the Vogtle Defendants for damages of no less than $2,978,890.70 resulting from an alleged breach of the Bridge Agreement.

8. In the Vogtle Defendants' answer to the Complaint, the Vogtle Defendants are raising the following counterclaims and warranty claims (collectively, the "Counterclaims"):

- Count I is as action against the Plaintiffs for breach of the Vogtle Subcontract as to the Owners in an amount to be determined by a jury at trial.
- Count II is as action against the Plaintiffs for breach of the Vogtle Subcontract as to WECTEC in an amount to be determined by a jury at trial.
- Count III is an action against the Plaintiffs for breach of the Bridge Agreement in an amount to be determined by a jury at trial.

- Count IV is an action against the Plaintiffs for negligent construction in an amount to be determined by a jury at trial.
- Count V is an action against the Plaintiffs for negligent design in an amount to be determined by a jury at trial.
- Count VI is an action against the Plaintiffs for attorneys' fees and expenses as they relate to Counts VI and V in an amount to be determined by a jury at trial.

Related Motion to Transfer

9. The Defendants plan to shortly file a motion to transfer the Vogtle Claims and the Counterclaims. While the decision to transfer an action under sections 1404 and 1412 is vested within the sound discretion of the court, both in the interests of justice and for the convenience of the parties and witnesses, transfer of the Vogtle Claims and the Counterclaims to the Georgia District Court is warranted. See 28 U.S.C. § 1412 ("A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties").[2]

10. Courts in the Southern District of New York look to section 1404(a) when transferring non-core claims, and examine the following nine factors:

(1) the convenience of the witnesses;
(2) the convenience of the parties;
(3) the location of relevant documents and the relative ease of access to sources of proof;
(4) the locus of operative facts;
(5) the availability of process to compel the attendance of unwilling witnesses;
(6) the relative means of the parties;
(7) the forum's familiarity with the governing law;
(8) the weight accorded the plaintiff's choice of forum; and
(9) trial efficiency and the interests of justice.

[2] The factors courts consider in determining a motion under section 1404(a) are substantially the same as those considered in deciding a motion under section 1412. In re Spillane, 884, F.2d 642, 645 n.4 (1st Cir. 1989) (stating that there is "little reason for distinguishing between the two statutes."); JCC Capital Corp. v. Fisher (In re JCC Capital Corp.), 147 B.R. 349, 356-57 (Bankr. S.D.N.Y. 1992) (noting that factors courts considered are same under both statutes).

Dickerson v. Novartis Corp., 315 F.R.D. 18, 27 (S.D.N.Y. 2016).

11. When transferring core claims, however, courts in the Southern District of New York employ section 1412. In looking at the appropriate factors regarding the interest of justice under this statute, courts in the Southern District of New York consider the following six factors:

(1) whether transfer would promote the economic and efficient administration of the bankruptcy estate;
(2) whether the interests of judicial economy would be served by the transfer;
(3) whether the parties would be able to receive a fair trial in each of the possible venues;
(4) whether either forum has an interest in having the controversy decided within its borders;
(5) whether the enforceability of any judgment would be affected by the transfer; and
(6) whether the plaintiff's original choice of forum should be disturbed.

Enron Corp. v. Arora (In re Enron Corp.), 317 B.R. 629, 639 (Bankr. S.D.N.Y. 2004). Further, courts look to five factors concerning the convenience of the parties:

(1) the location of the plaintiff and the defendant;
(2) the ease of access to the necessary proof;
(3) the convenience of the witnesses and the parties and their relative physical and financial condition;
(4) the availability of the subpoena power for unwilling witnesses; and
(5) the expense of obtaining unwilling witnesses.

Id.

12. As the motion to transfer will demonstrate, the transfer of the Vogtle Claims and Counterclaims is in the interest of justice. The Georgia District Court is most familiar with applicable Georgia law. As the litigation concerns construction disputes in Georgia, is primarily between non-debtor parties, and was filed in the Bankruptcy Court due only to the Debtors' chapter 11 cases, the interests of justice clearly favor the transfer of these actions.

13. In addition, the Georgia District Court is the most convenient forum for the parties. The convenience of the witnesses is often regarded as the most important factor to be

considered in deciding a motion to transfer venue. Herbert Ltd. P'ship v. Elec. Arts Inc., 325 F. Supp. 2d 282, 286 (S.D.N.Y. 2004). "Generally, the convenience of non-party witnesses is accorded more weight than that of party witnesses." AIG Fin. Prods. Corp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 675 F. Supp. 2d 354, 369 (S.D.N.Y. 2009) (citation and internal quotation marks omitted). The majority of the witnesses, both party and non-party, are located in Georgia and Mississippi, and the expenses associated with producing these witnesses will be greater in the Southern District of New York than the Southern District of Georgia. Further, the majority of the operative facts in this case took place in the Southern District of Georgia. Therefore, transfer to the Georgia District Court is appropriate and necessary.

14. Although the Bankruptcy Court, pursuant to Bankruptcy Rule 7087, has the power to transfer all or part of an adversary proceeding to another bankruptcy court pursuant to 28 U.S.C. § 1412, it is unclear whether that court, an Article I court, may transfer the case to a federal district court, or whether any such transfer would be automatically referred to a bankruptcy court. See, e.g., Nw. Airlines, Inc. v. City of Los Angeles (In re City of Los Angeles), 384 B.R. 51, 59 (S.D.N.Y. 2008) (finding that transfer from bankruptcy court would be automatically referred to another bankruptcy court, and so withdrawal to district court was appropriate where movant wished to have proceedings transferred to district court); but see Trusky v. Gen. Motors Company, (In re Gen. Motors Company), No. 09-50026 REG, 2013 WL 620281, at *12 (Bankr. S.D.N.Y. Feb. 19, 2013); (transferring adversary proceeding directly to a district court without discussing whether bankruptcy court had power to do so); In re Enron Corp. v. Dynegy Inc. (In re Enron Corp.), No. 01-16034, 2002 WL 32153911, at *9 (Bankr. S.D.N.Y. Apr. 12, 2002) (same); Couri v. Fisher (In re Fisher), 147 B.R. 349, 356 (Bankr. S.D.N.Y. 1992) (same). Further, because the Bankruptcy Court does not have jurisdiction over

some of the claims asserted in the Adversary Proceeding, it may not have the ability to transfer such claims. See In re IMMC Liquidating Estate, No. 10-53063, 2012 WL 523632, *3 (Bkrtcy. D. Del. Feb. 14, 2012) (noting that 28 U.S.C. § 1631, which governs transfers without jurisdiction, does not apply to bankruptcy courts, and therefore finding that bankruptcy court had no ability to transfer claims over which it did not have jurisdiction). As a consequence, the Defendants have moved to withdraw the reference before seeking to transfer the Vogtle Claims and the Counterclaims to the Georgia District Court.

Request to Withdraw the Reference

15. In order to transfer the Vogtle Claims and the Counterclaims, at the outset, the Defendants request that the reference of such claims be withdrawn. Pursuant to 28 U.S.C. § 157(d), a district court may for cause shown withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or timely motion of any party. In deciding whether there is "cause" to withdraw the reference, a court should weigh several factors, including "(1) whether the claim is core or non-core, (2) what is the most efficient use of judicial resources, (3) what is the delay and what are the costs to the parties, (4) what will promote uniformity of bankruptcy administration, (5) what will prevent forum shopping, and (6) other related factors." In re Burger Boys, Inc., 94 F.3d 755, 762 (2d Cir. 1996) (citing In re Orion Pictures Corp., 4 F.3d 1095, 1101 (2d Cir. 1993)). Although the core/non-core distinction carries the most weight, no one factor is determinative. See, e.g., id. (stating that courts do not need to examine all Orion factors). Indeed, a court may withdraw the reference even if a proceeding falls within a bankruptcy court's core jurisdiction. See, e.g., LTV Steel Co., Inc. v. The City of Buffalo, New York (In re Chateaugay Corp.), No. 00-9429, 2002 U.S. Dist. LEXIS 5318, at *20 (S.D.N.Y. Mar. 29, 2002) (noting court can withdraw the reference of core proceedings); see also Dwyer v. First Nat. Bank, et al. (In re O'Brien), 414 B.R. 92, 98

(Bankr. S.D. W. Va. 2009) ("It is within the Court's discretion to withdraw the reference even when core proceedings are involved."). When each of these factors is considered, it is evident that the reference of the Vogtle Claims and the Counterclaims should be withdrawn.

I. An Analysis of Each of the Vogtle Claims and Counterclaims Supports Withdrawal of the Reference.

16. As an initial matter, the Bankruptcy Court likely does not have jurisdiction over the primary claims asserted in the Complaint—Counts V and VI—which are solely against the Vogtle Defendants and are an action between non-debtor parties that will have no impact or effect on WECTEC. In addition, although Counts I and II of the Complaint may be considered core claims, the Owners have agreed to defend and fully indemnify WECTEC against such claims. Thus, the outcome of those claims will ultimately have no impact on WECTEC or the administration of its chapter 11 case. Finally, the Bankruptcy Court cannot enter a final judgment on the Counterclaims asserted by the Owners and likely lacks jurisdiction over them.

A. The Claims Against the Vogtle Defendants Are Not Core Claims.

17. A proceeding is core only if it "invokes a substantive right under title 11, or could only arise in the context of a bankruptcy case." In re New 118th LLC, 396 B.R. 885, 890 (Bankr. S.D.N.Y. 2008); In re FMI Forwarding Co., Inc., No. 00 B 41815 (CB), 2004 WL 1348956, at *4 (S.D.N.Y. June 16, 2004) (same); see also Weschler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP, 201 B.R. 635, 639 (S.D.N.Y. 1996) (finding that chapter 11 trustee's malpractice, breach of fiduciary duty and breach of contract claims against law firm that represented debtor in course of allegedly fraudulent business activity were not core proceedings). 28 U.S.C. § 157(b)(2) provides a "non-exhaustive" list of core proceedings. In re Complete Mgmt., Inc., No. 01-03459, 2002 WL 31163878, at *2 (S.D.N.Y. Sept. 27, 2002). Because some of the provisions of section 157 could be broadly interpreted, "the Second Circuit has insisted

that a determination of whether a matter is core requires a further examination into 'the nature of the proceedings.'" Id. (citations omitted). "Such analysis considers whether the claim arose before or after the reorganization petition and the degree to which the claim arose independent of the bankruptcy reorganization." Id.

18. The claims against the Vogtle Defendants clearly are not core claims. Counts V and VI of the Complaint assert breach of contract claims against the Vogtle Defendants, which are non-debtor third parties. These breach of contract actions between non-debtor parties do not "invoke a substantial right under Chapter 11" or "only arise in the context of a bankruptcy case." See In re New 118th LLC, 396 B.R. at 890; see also In re Scott, 572 B.R. 492, 521 (Bankr. S.D.N.Y. 2017) (finding that claims against non-debtors are non-core); Lead I JV, LP v. North Fork Bank, 401 B.R. 571, 581–82 (Bankr. E.D.N.Y. 2009) (finding purely state law claims between non-debtors sounding in tort and contract law at best are related to, non-core matters); Joremi Enter., Inc. v. Hershkowitz (In re New 118th LLC), 396 B.R. 885, 890 (Bankr. S.D.N.Y. 2008) (finding that garden-variety state court claims between non-debtor parties not within the court's core jurisdiction); In re Exide Techs., 544 F.3d 196, 218 (3d Cir. 2008) (stating that claims against non-debtors are by nature non-core). In fact, WECTEC is not even a party to the contract the Vogtle Defendants are alleged to have breached.

19. More fundamental, the Bankruptcy Court likely lacks jurisdiction over Counts V and VI of the Complaint. A bankruptcy court has "related-to" jurisdiction where the outcome "might have any 'conceivable effect' on the bankrupt estate." Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 114 (2d Cir. 1992). If a bankruptcy court lacks related-to jurisdiction, a minority of courts have found that a court can exercise "supplemental" jurisdiction when the applicable claims form part of the "same case or

controversy" as other jurisdictionally-proper claims. See In re Cavalry Const., Inc., 496 B.R. 106, 115 (S.D.N.Y. 2013). Here, the Bankruptcy Court clearly lacks related-to jurisdiction and likely has no supplemental jurisdiction over actions asserted in Count V and VI of the Complaint, because they are claims by the Plaintiffs—non-debtor parties—against the Vogtle Defendants—non-debtor parties—that will have no effect upon WECTEC or its estate. As such, the claims cannot be part of the "same case or controversy" as the claims asserted in the Complaint against WECTEC or have any "conceivable effect" on WECTEC's bankruptcy case. The Bankruptcy Court's lack of jurisdiction over these claims strongly supports withdrawal of the reference. See Schuller v. Ocwen Loan Servicing, LLC, No. 14-0005-WS-M, 2014 WL 722048, at *4 (S.D. Ala. Feb. 26, 2014) (finding that "the bankruptcy court's lack of jurisdiction would qualify as cause for withdrawing the reference under permissive withdrawal of the reference"); In re Bennett, No. ADV 10-05137, 2011 WL 5546955, at *5 (Bankr. W.D. Tex. Oct. 7, 2011) (finding lack of jurisdiction a factor in favor of withdrawal of reference).

20. Because (a) the Complaint clearly contains substantial actions that are not core claims and (b) the Bankruptcy Court likely lacks jurisdiction over certain of the claims, it would be far more efficient for a district court, in this case, after transfer, the Georgia District Court, to decide all of the causes of actions rather than having the Bankruptcy Court issue a decision on potential core issues in which WECTEC has no ultimate financial interest, while the remaining claims that are decidedly not core and over which the Bankruptcy Court likely has no jurisdiction are adjudicated elsewhere.

B. The Claims Against WECTEC Will Ultimately Not Affect WECTEC or Its Estate.

21. Although Counts I and II of the Complaint may be core proceedings, this Court should withdraw the reference of such claims. Count II of the Complaint asserts a breach of

contract claim against WECTEC, and Count I of the Complaint requests a declaratory judgment that such alleged damages constitute administrative expenses in WECTEC's chapter 11 case. Neither of these actions will ultimately have any effect on WECTEC or its chapter 11 case because the Owners have agreed to defend and indemnify WECTEC with respect to these claims. Therefore, any potential concerns with the withdrawal of possible core matters simply do not exist in this case.

C. The Bankruptcy Court Likely Lacks Jurisdiction Over the Counterclaims.

22. As an initial matter, the Bankruptcy Court lacks jurisdiction over Counts I, III, IV, V and VI of the Counterclaims. Because these claims are brought by the Vogtle Defendants against the Plaintiffs, they are not part of the "same case or controversy" as the claims asserted in the Complaint against WECTEC and cannot have any "conceivable effect" on WECTEC's bankruptcy case. These Counterclaims are unrelated to WECTEC or its bankruptcy case; they simply involve construction disputes among non-debtor third parties. Therefore, the Bankruptcy Court likely lacks jurisdiction over these claims. In a similar way, the Bankruptcy Court likely lacks jurisdiction over Count II of the Counterclaims, which has been assigned to the Owners and, as a result, its resolution will ultimately have no effect on WECTEC or its bankruptcy case.[3]

II. The Defendants are Entitled To, and Will Seek, a Trial by Jury.

23. The Vogtle Defendants are entitled to, and will seek, a trial by jury on certain of the causes of action contained in the Complaint and the Counterclaims. The test set forth by the United States Supreme Court to determine whether a party is entitled to a jury trial is first to

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[3] Further, even if this Court were to find that this Counterclaim is "core," the Supreme Court's ruling in Stern v. Marshall has made it clear that, absent consent, a bankruptcy court cannot enter a final judgment on a state law counterclaim such as Count II of the Counterclaims. See Stern v. Marshall, 564 U.S. 462, 503 (2011) ("The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."). The Vogtle Defendants do not consent to the Bankruptcy Court entering a final order on any of the Counterclaims.

determine whether the action would have been deemed legal or equitable in 18th century England, and second, whether the remedy sought is legal or equitable in nature. A court must balance the two, giving greater weight to the latter. See Granfinanciera v. Nordberg, 492 U.S. 33, 42 (1989); see also Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.") (citations omitted). If these two factors indicate that the party is entitled to a jury trial, then the court must decide whether "Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder." Id. Elaborating on the last step, the Supreme Court explained that Congress may assign resolution of a claim to a non-Article III body that does not use a jury as a factfinder only if the claim is based on a public, rather than a private, right. Id. at 51. A claim is a matter of public right only when it arises "as part of the process of allowance and disallowance of claims." Id. at 58 (quoting Katchen v. Landy, 382 U.S. 323, 336 (1996)).

24. The Vogtle Defendants are entitled to a jury trial on Count VI of the Complaint and the Counterclaims. Longstanding Supreme Court rulings have made it clear that a person is entitled to a jury trial with respect to claims based on a breach of contract. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962) (finding that a petitioner had a right to a trial by jury regarding breach of contract). Therefore, the Vogtle Defendants have a right to a jury regarding the breach of contract claims asserted in Count VI of the Complaint, and in Counts I through III of the Counterclaims. Likewise, the Vogtle Defendants are also entitled to a jury trial for negligent construction and negligent design, as raised in Counts IV, V and VI of the Counterclaims. See DiMeo v. Minster Mach. Co., 388 F.2d 18, 20 (2d Cir. 1968) (questions of negligent design

are properly submitted to a jury); Julander v. Ford Motor Co., 488 F.2d 839, 843 (10th Cir. 1973) (same); St. Claire Townhome Ass'n, Inc. v. D.R. Horton, Inc., No. 1:07-CV-2712-TCB, 2009 WL 10183621, at *5 (N.D. Ga. Apr. 15, 2009) (noting that a jury can award damages on negligent construction claims).

III. The Defendants Are Not Forum Shopping.

25. The motion to withdraw is not, as the Plaintiffs may claim, an exercise in forum shopping. The Defendants are not seeking to avoid the Bankruptcy Court. Rather, their aim is to have the Vogtle Claims and the Counterclaims tried in Georgia District Court. Georgia law applies to many of the claims, the underlying transactions occurred in Georgia, and the vast majority of witnesses and evidentiary proof reside in Georgia. These considerations are particularly relevant where, as here, the adversary case involves matters that are not core and over which the Bankruptcy Court likely lacks jurisdiction. See Petition of McMahon, 222 B.R. 205, 208 (S.D.N.Y. 1998) ("Forum shopping would not be encouraged by granting the Defendant's motion as this case involves a non-core proceeding that could have and probably should have been brought in a district court originally.").

IV. The Other Factors Do Not Counsel Against Withdrawing the Reference.

26. As to the remaining factors—considerations of efficiency, delay, costs to the parties and uniformity in the administration of bankruptcy law—it is significant that, because the Owners have agreed to defend and indemnify WECTEC, litigation of the Vogtle Claims will occur between the Plaintiffs and the Vogtle Defendants, not WECTEC. The Vogtle Claims will ultimately have no impact whatsoever on the administration of WECTEC's bankruptcy estate. In addition, the adversary proceeding is in its infancy, and no major discovery or motion practice has taken place. See, e.g., Dynegy Danskammer, L.L.C. v. Peabody COALTRADE Int'l Ltd., 905 F. Supp. 2d 526, 533 (S.D.N.Y. 2012) (judicial economy favored withdrawal where

"Defendant's Motion was filed shortly after the Complaint was filed, and no discovery or extensive motion practice has come before the bankruptcy court."); Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457, 472 (S.D.N.Y. 2011) ("as no discovery has taken place, and no case management plan or other course of proceeding has been agreed on, bringing the actions before this Court will not cause undue delay or require any duplication of effort"). Therefore, particularly when viewed in conjunction with the Bankruptcy Court's lack of jurisdiction over certain of the claims and the Counterclaims, the remaining withdrawal of the reference factors simply are not applicable or, at most, provide additional support for the motion to withdraw. See e.g., In re WorldCom, Inc., No. 07-9590-DC, 2008 WL 2441062, at *3 (S.D.N.Y. June 18, 2008) ("as a bankruptcy court's ruling on a non-core matter is subject to *de novo* review, a district court may conclude that its adjudication of the matter in the first instance would be more efficient").

WHEREFORE, the Defendants respectfully request that the Court enter an order (i) withdrawing the reference of the Counterclaims and Counts I, II, V and VI of the Complaint and (ii) granting the Defendants such other and further relief as the Court may deem just and proper.

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New York, New York

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