

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

In re:	)	
	)	Chapter 11
ZACHRY HOLDINGS, INC., <i>et al.</i> <sup>1</sup>	)	
	)	Case No. 24-90377 (MI)
Debtors.	)	(Jointly Administered)
	)	<b>Re: Docket No. 2953</b>

**REORGANIZED DEBTORS' RESPONSE  
IN OPPOSITION TO COMMONWEALTH ELECTRIC  
COMPANY OF THE MIDWEST'S MOTION FOR SUMMARY JUDGMENT**

Zachry Holdings, Inc. and its affiliates in the above-captioned proceeding (collectively, the "Reorganized Debtors") hereby file this Response in Opposition ("Response") to *Commonwealth Electric Company of the Midwest's Motion for Summary Judgment with Respect to Debtors' Objection to the Claim of Commonwealth Electric Company of the Midwest* (the "Motion") [Docket No. 2953] and respectfully show the Court as follows:

**INTRODUCTION AND SUMMARY OF ARGUMENT**

Under Nebraska law, when a contract is written in clear and unambiguous language, the contract is not subject to interpretation or construction and must be enforced according to its plain terms. *Ruble v. Reich*, 611 N.W.2d 844, 849 (Neb. 2000). In its Motion for Summary Judgment, Commonwealth Electric Company of the Midwest ("Commonwealth") seeks to preclude Reorganized Debtors' right to assert an offset against the Claim<sup>2</sup> for work that was discovered to

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

<sup>2</sup> Commonwealth asserts \$1,038,339.54 of its Claim is entitled to administrative expense priority pursuant to section 503(b)(9) of the Bankruptcy Code. In their objection to the Claim, Reorganized Debtors argue that only a fraction of



be defective after Zachry's Service Agreement with Commonwealth was terminated for convenience. Commonwealth does not argue that the Service Agreement is ambiguous. Instead, Commonwealth intentionally ignores the plain language of the Service Agreement to argue that, when Zachry terminated for convenience, Zachry relinquished its right to setoff amounts owed to Commonwealth for costs incurred to identify and rectify Commonwealth's duplicative and defective work. Motion, ¶ 34. The Service Agreement expressly permits Zachry to terminate the contract—for convenience or for cause—without prejudice to any other rights or remedies under the agreement or at law, which includes Zachry's right to withhold payment to protect itself from loss arising from Commonwealth's failure to comply with the Service Agreement. Commonwealth's Motion for Summary Commonwealth's Motion should be denied because (1) Zachry is contractually entitled to withhold payment for Commonwealth's defective and noncompliant work under the Service Agreement, (2) Zachry terminating the Service Agreement for convenience does not waive its right to a setoff or other legal remedies, and (3) there is no common law right to cure. For these reasons, and as further discussed below, Commonwealth's Motion should be denied.

### **FACTUAL BACKGROUND**

1. On September 21, 2021, Zachry Industrial Inc. ("Zachry") entered into a contract with the Omaha Public Power District to design and construct electrical generation facilities at two locations, the Standing Bear Lake Station and Turtle Creek Station. Zachry hired Commonwealth Electric Company of the Midwest ("Commonwealth") as a subcontractor to assist Zachry in the

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that sum was actually for goods delivered to Reorganized Debtors in the 20 days prior to the Petition Date. In its Motion, Commonwealth does not address or raise any issue with Reorganized Debtors' request to the Court to reclassify Commonwealth's claim. Therefore, summary judgment on this objection is "premature and wholly improvident." See *Evans v. United Air Lines, Inc.*, 986 F.2d 942, 944-45 (5th Cir. 1993) (reversing summary judgment on claims for which defendant failed to raise issue in motion for summary judgment and thus failed to provide plaintiff with adequate notice and opportunity to respond)

construction of both projects. For Commonwealth's work on Standing Bear Lake Station (the "Project"), Zachry and Commonwealth entered into a service agreement No. 115001 605028 on November 14, 2023 (the "Service Agreement").

2. Under the Service Agreement, Commonwealth agreed to perform electrical work on the Project subject to specific deliverables, deadlines, and standards of work. The Service Agreement provides that Zachry would be able to offset any costs due to Commonwealth's defective or unnecessary work against Commonwealth's billed invoices.

3. Commonwealth began work under the Service Agreement shortly after it was executed, but Zachry terminated the Service Agreement by letter dated May 15, 2024 (the "Termination Letter"). Reorganized Debtors filed for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Proceeding") on May 21, 2024 (the "Petition Date").

4. After Reorganized Debtors initiated the Bankruptcy Proceeding, Commonwealth filed a proof of claim (Claim No. 1003) asserting an unsecured claim of \$5,359,030.62 (the "Claim"). The majority of the Claim relates to outstanding invoices for work performed under the Service Agreement. Because the work Commonwealth performed under the Service Agreement was defective, and in some cases duplicative, Reorganized Debtors filed *Debtors' Objection to the Claim of Commonwealth Electric Company of the Midwest (Claim No. 1003)* (the "Claim Objection") [Docket No. 2336] asserting that Zachry is entitled to an offset of \$2,651,982 against Commonwealth's invoices. Zachry revised the amount of the offset to \$2,594,743.86.

5. On November 14, 2023, Zachry entered into the Service Agreement under which Commonwealth was to perform certain electrical work in support of the Standing Bear Lake Station electric generation facility that Zachry was building for the Omaha Public Power District,

referenced as ZII Job number 115001. *Declaration of Raymond Boldt in Support of the Debtors' Objection to the Claim of Commonwealth Electric Company of the Midwest (Claim No. 1003)* (the "Bolt Declaration") ¶ 4.

6. Commonwealth's scope of work on the Project included installation and testing of various switchgear, circuits, panels, and instrument and power cables needed on the Project, including associated hardware, junctions, penetration seals, conduit, cable trays, supports, and terminations. Boldt Decl. ¶ 4.

7. Commonwealth began work pursuant to the Service Agreement shortly after it was executed, and continued working on the Project until Zachry terminated the Service Agreement on May 15, 2024. Boldt Decl. ¶ 4. However, after terminating the Service Agreement, Zachry determined that Commonwealth's work was defective, duplicative and required corrective action. Boldt Decl. ¶¶ 4-6. The majority of this duplicative and/or defective work includes, but is not limited to, the following:

- a. the absence of floor plates in multiple areas, resulting in the need to remove and reinstall cables in accordance with site requirements;
- b. various cables were found to be damaged, and there were issues with the formation of cables on the trays and panels;
- c. certain installations were found to be lacking Roxtec;
- d. multiple discrepancies in various panels upon final testing procedures; and
- e. missing circuits and other components.

Boldt Decl. ¶ 6.

8. Consequently, Zachry utilized its own direct labor and subcontractors under Zachry's direction promptly to inspect, phone, re-terminate, and test affected cables, and to install necessary missing or incorrectly installed components such as floor plates, circuits, panels, and Roxtec. Boldt Decl. ¶ 6.

9. Moreover, Zachry discovered that Commonwealth unnecessarily installed redundant cabling (known as “cable pulling”) at the Project inconsistent with its assigned scope of work under the Service Agreement. Boldt Decl. ¶ 9. This problem was exasperated by Commonwealth’s failure to adequately document its cable pulling and as a result, Zachry not only paid for Commonwealth’s redundant cable pulling work but also incurred costs for identifying and resolving issues caused by the redundant cabling. Boldt Decl. ¶¶ 10-11.

10. In total, Zachry incurred \$2,594,743.86 in costs or overbilling because of Commonwealth’s defective, and/or duplicative work outside the scope of the Service Agreement, including costs for (1) labor; (2) technical and engineering support; (3) field construction support; (4) materials; (5) rental, erection, and removal of scaffolding to address work that was located at elevation; (6) overbilling for duplicative cabling; and (7) billing for smoke breaks on a tobacco free jobsite. Boldt Decl. ¶¶ 8, 10, 12, 14, 16; Exhibit 1, *Reorganized Debtors Initial Disclosures Pursuant to Fed. R. Civ. 26(A)(1)*.

11. On August 27, 2024, Commonwealth filed the Claim asserting an unsecured claim in the total amount of \$5,359,030.62, including \$1,038,339.54 as an administrative claim pursuant to section 503(b)(9) of the Bankruptcy Code. *See* Claim No. 1003. Out of the \$5,359,030.62 asserted in the Claim, approximately \$5,000,000 relates to work done on the Project under the Service Agreement. *Id.*

12. Reorganized Debtors filed their objection to Commonwealth’s Claim on February 20, 2025, requesting the Court to reduce the Claim because Commonwealth performed incomplete, defective, and/or unnecessary duplicative work not in accordance with the Service Agreement. *See* Claim Objection ¶¶ 22, 31. Moreover, Reorganized Debtors asserted that only \$110,275.93 was invoiced for goods delivered to the Reorganized Debtors within 20 days of the Petition Date and

requested the Court to reclassify the Claim such that only \$110,275.93 is entitled to 503(b)(9) administrative expense priority. *See id.* ¶¶ 26, 31.

## **ARGUMENTS AND AUTHORITIES**

### **A. Legal Standard**

13. Rule 56 of the Federal Rules of Civil Procedure permits a party to move for summary judgment, “identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a). Rules 9014(c) and 7056 of the Federal Rules of Bankruptcy Procedure make Rule 56 applicable to this contested matter. Fed. R. Bankr. P. 9014(c), 7056. Commonwealth, as the movant, bears the burden to show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Sossamon v. Lone Star State*, 560 F.3d 316, 326 (5th Cir. 2009) (citing *Condrey v. SunTrust Bank*, 429 F.3d 556, 562 (5th Cir. 2005)). “A material fact is one that might affect the outcome of the suit under governing law.” *Renwick v. PNK Lake Charles, LLC*, 901 F.3d 605, 611 (5th Cir. 2018). A genuine dispute of fact exists when evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment evidence is viewed in light most favorable to the non-moving party. *First Am. Title Ins. Co. v. Cont’l Cas. Co.*, 709 F.3d 1170, 1173 (5th Cir. 2013).

14. It is only if Commonwealth successfully shows the lack of a genuine dispute of a material fact that entitles it to judgment as a matter of law that the burden shifts to Reorganized Debtors to then identify specific facts showing that there is a genuine issue for trial. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). Commonwealth failed to meet its burden.

**B. The Service Agreement allows Zachry to withhold payment.**

15. There is no dispute that the Service Agreement is governed by Nebraska law. *See* Motion ¶ 19; Service Agreement § 20.4. Under Nebraska law, a contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms—the intentions of the parties must be determined from the contract itself. *Ruble v. Reich*, 611 N.W.2d 844, 849 (Neb. 2000). Nebraska courts are required to construe a contract as a whole, and if possible, give effect to every part of the contract. *Johnson Lakes Dev., Inc. v. Cent. Nebraska Pub. Power & Irrigation Dist.*, 576 N.W.2d 806, 814 (Neb. 1998). The terms of a contract are to be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Id.* As such, Commonwealth cannot read any one provision in isolation. Yet, Commonwealth does exactly that and ignores critical language of the Service Agreement to argue that Zachry is not entitled to a setoff. *See* Motion ¶¶ 23-33.

16. Although Commonwealth agrees that the Service Agreement is unambiguous, Commonwealth spends most of its Motion distinguishing termination for cause and termination for convenience—disregarding the fact that Zachry’s rights and remedies for contractual breaches are the same whether it elected to terminate the Service Agreement for cause or for convenience. Motion, ¶ 21; Service Agreement § 16.3. Section 16.3 preserves Zachry’s rights and remedies available under the Agreement Documents,<sup>3</sup> at law, and in equity.<sup>4</sup> *See* Service Agreement § 16.3 (providing Commonwealth has certain responsibilities “[w]ithout prejudice to any other rights or remedies available under the Agreement Documents or at law or in equity” regardless of whether

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<sup>3</sup> Capitalized terms used but not defined in this Response shall have the meanings ascribed to such terms in the Service Agreement.

<sup>4</sup> Moreover, Zachry specifically reserved all its rights under the Service Agreement when it notified Commonwealth that it was terminating the subcontract. *See* Terminating Letter (“Notwithstanding the foregoing, Zachry does not waive but rather maintains all of its rights under the [Service] Agreement.”).

Zachry elects to terminate Commonwealth's right to perform "for cause or for convenience") (emphasis added).

17. "Without prejudice to any other rights or remedies" means that Zachry's decision to terminate the Service Agreement was made without affecting any *existing* legal rights or remedies and Zachry retains the ability to assert those rights or remedies in the future. *See, e.g., Without Prejudice*, Black's Law Dictionary (12th ed. 2024) ("Without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party.").

18. Yet, Commonwealth's motion fails to address section 16.3 or the applicable language under section 10.1.3 and section 20. Commonwealth asserts that section 10.1.3 of the Service Agreement "*only* permits Zachry to withhold payment 'on an invoice or a portion thereof in an amount and to such extent as may be reasonably necessary to protect Zachry from loss because of ... Defective Work not remedied by Seller ....'" *See* Motion ¶ 29 (emphasis added); Service Agreement § 10.3.1(a). But section 10.1.3 in fact provides **three** separate reasons to withhold payment to protect Zachry from loss, including "[Commonwealth's] failure to perform the Work in accordance with the Agreement Documents." Service Agreement § 10.1.3(b). As such, this provision does not, as Commonwealth argues, "clearly contemplates that Zachry's right to withhold payment is limited to the amount that may be necessary to address defective work performed by Commonwealth, but only in the event that Commonwealth fails to remedy the alleged defective work." *See* Motion ¶ 29.

19. Moreover, Zachry terminating the Service Agreement did not affect its right to withhold payment under section 10.1.3, even if Article 10 does not explicitly survive termination of the Service Agreement. Section 20.11 catalogues the Service Agreement provisions that survive termination "in addition[] to any other provisions providing for indemnification of either Party or

*which by their nature, or by their express terms do survive or extend beyond termination or expiration of this Agreement.*” Service Agreement § 20.11 (emphasis added). Because section 10.1.3(b) provides Zachry with a right to withhold payment to protect itself from loss caused by Commonwealth’s failure to perform its work “in accordance with the Agreement Documents,” and Zachry reserved all rights and remedies available under the Agreement Documents, *by its nature*, section 10.1.3(b) survived termination of the Service Agreement. *See* Service Agreement ¶¶ 10.1.3(b), 16.3, 20.11.

20. To the extent Commonwealth argues that the rights and remedies Zachry reserved under section 16.3 conflict with the survival clause under section 20.11, the Service Agreement would be ambiguous, and summary judgment would be inappropriate. *See Brush & Co. v. W. O. Zangger & Son, Inc.*, 991 N.W.2d 294, 296 (Neb. 2023) (“The interpretation of an ambiguous contract presents an issue of fact not appropriate for determination on summary judgment.”).

21. Lastly, Commonwealth’s argument implying that the remedy provision under Article 12 is the exclusive remedy for a breach of warranty is incompatible with longstanding Nebraska law. *See Reichert v. Rubloff Hammond, L.L.C.*, 645 N.W.2d 519, 526 (Neb. 2002) (“A contract will not be construed to limit the remedial rights of the parties unless that intention is clearly expressed.”) (citing *In re Roberts Const. Co.*, 111 N.W.2d 767, 770-71 (Neb. 1961)). There is no provision under Article 12 (or anywhere else in the Service Agreement) that clearly expresses that the remedy provided under section 12.2 is the exclusive remedy for a breach of warranty. *See* Service Agreement § 12.2.

**C. Zachry terminating the Service Agreement does not waive its right to a setoff for past breaches.**

22. “Termination of a contract generally applies prospectively to eliminate future obligations, not retroactively to cure past breaches.” *Lake Serv. Shipping Co. v. Grand River*

*Navigation Co., Inc.*, No. 356073, 2022 WL 17073099, at \*9 (Mich. Ct. App. Nov. 17, 2022) (citing *Armour & Co. v. Nard*, 463 F.2d 8, 11 (8th Cir. 1972)). In addition to being contrary to the express contract language, as discussed above, Commonwealth’s blanket assertion that terminating a contract for convenience precludes the terminating party from later seeking an offset for pre-termination breaches is unsupported by case law. “As a matter of law, ‘for convenience’ termination does not necessarily foreclose suit.” *Copart, Inc. v. Sparta Consulting, Inc.*, 277 F. Supp. 3d 1127, 1142 (E.D. Cal. 2017).

23. In *Armour & Co. v. Nard*, a building owner sued its contractor for delay damages caused by the contractor’s alleged breach in the performance of the building construction contract. *Armour & Co. v. Nard*, 463 F.2d 8, 9 (8th Cir. 1972). Similarly to Commonwealth here, the contractor asserted that the building owner was not entitled to damages for delay when it terminated the contractor under a provision of the contract which provided for termination without cause. *Id.* at 10. (“In essence [contractor] claims that since [building owner] chose to terminate under the ‘without cause’ provisions [building owner] elected to pursue that exclusive remedy and thereby waived any other remedy it may have had, including damages for delay.”). The contract also included a waiver clause that provided that a “[d]elay or failure by building owner to exercise any right under the [c]ontract [d]ocuments shall not constitute a waiver of that or any other right or subsequent right hereunder.” *Id.* The Eighth Circuit noted “that generally, the exercise of a power of termination will have prospective operation only; discharging both parties from their contractual duty to perform promises that are still wholly executory, but *not discharging liability for breaches that have already occurred.*” *Id.* at 11 (emphasis added). Accordingly, the court determined that the parties did not intend to eliminate damages for delay in the event the contract was terminated under the “without cause” provision. *Id.*; see also *Chinese Hosp. Ass’n v. Jacobs*

*Eng'g Group, Inc.*, No. 18-CV-05403-JSC, 2019 WL 4168949, at \*2 (N.D. Cal. Sept. 3, 2019) (where engineering firm failed to identify anything in contract “that clearly indicates an intent to make the for cause termination provision the exclusive remedy of termination for obtaining a remedy ... [or] that the for cause termination provision even contains a remedy ... the [c]ourt cannot hold as a matter of law that the absence of language preserving a remedy under the convenience termination provision means [plaintiff] waived its right to seek a remedy”).

24. Further, there is no contract language that forecloses Zachry’s ability to sue or assert affirmative defenses after terminating the Service Agreement for convenience and there is no basis for such a restriction. *See Copart, Inc. v. Sparta Consulting, Inc.*, 277 F. Supp. 3d 1127, 1142 (E.D. Cal. 2017) (“If the parties intended to foreclose [plaintiff’s] suing after termination ‘for convenience,’ they could have done so but did not.”). There is a plethora of provisions throughout the Service Agreement concerning waiver, but there is not a single provision among them that waives Zachry’s right to a setoff for past breaches. *See, e.g.*, Service Agreement § 5.1 (Zachry’s failure to object to any insurance policies is not a waiver of insurance requirements); *id.* § 10.1.2 (payment to Commonwealth is not a waiver of any of Zachry’s claims or rights); *id.* § 11.7 (waiver of damages for delay); *id.* § 16.7 (waiver of consequential damages); *id.* § 20.6 (no waiver for failure to insist upon the performance of any terms, covenants, or conditions). It is clear that the parties contemplated waivers of certain rights and remedies. Yet, there is no waiver of Zachry’s right to seek a setoff for Commonwealth’s breaches that occurred before Zachry terminated for convenience.

25. Instead of asking this Court to read and apply the terms of the Service Agreement as written (which Commonwealth agrees is not ambiguous), Commonwealth relies on cases interpreting wholly unrelated termination provisions. This is a matter of contract interpretation of

the actual Service Agreement, which clearly provides Zachry the right to terminate the contract—for convenience or for cause—without prejudice to any other rights or remedies under the agreement or at law. Thus, the cases on which Commonwealth relies in support of its arguments are easily distinguishable. *Shelter Products, Inc. v. Steelwood Construction, Inc.*, 307 P.3d 449 (Or. App. 2013), was a narrow holding and has no bearing on the interpretation of the Service Agreement. (“we agree with the trial court that . . . the text of the termination for convenience clause, *in context*, does not *under the circumstances of this case* permit [the contractor] to both terminate [the subcontractor] without cause and subsequently proceed against [the subcontractor] as if it had terminated the agreement for cause”) (emphasis added); *see also Johnson Lakes Dev., Inc. v. Central Nebraska Public Power & Irrigation District*, 568 N.W.2d 573, 583 (Neb. 1997) (“The extent of a reserved power . . . is determined wholly by interpretation of the terms of the contract.”) (quoting 6 Arthur L. Corbin, *Corbin on Contracts* § 1266, 54-67 (1962)).

26. The court in *Shelter Products* concluded that the terminating general contractor failed to identify any generally applicable legal rule or provision of the contract that would permit the general contractor to both terminate the contract for convenience, fail to provide an opportunity to cure, and at the same time, proceed against the subcontractor as if it had terminated the contract for cause and given an opportunity to cure. *Shelter Products*, 307 P.3d at 459. Unlike the Service Agreement in the instant case, the contract at issue in *Shelter Products* allowed the general contractor to withhold payment under the subcontract only “pending satisfactory correction, repair, replacement, and/or restoration of deficient work, materials, supplies, machinery . . . or of any work rejected as not conforming with” the subcontract. *Id.* at 461; *see* Service Agreement § 10.3.1(b) (“Zachry may withhold payment on an invoice . . . to protect Zachry from loss because

of . . . [Commonwealth's] failure to perform the Work in accordance with the Agreement Documents.").

27. *Freedom Specialty Contracting Inc. v. Nichol Flats, LLC*, 950 N.W.2d 109 (Neb. Ct. App. 2020) is also inapposite. The court held that the project owner there wrongfully terminated the contract *for cause* and breached the contract by doing so. *Id.* at 122-23. The project owner later argued that "even if it was not permitted to terminate [the contractor] for cause, it was permitted to terminate the contract for 'convenience.'" *Id.* at 122. However, the project owner failed to provide written notice required for termination for convenience, and communications evinced its intention to terminate the contractor for cause. *Id.* at 122-23. Here, Commonwealth is not alleging that Zachry wrongfully terminated the contract. Zachry is asserting its rights expressly provided under the Service Agreement, including withholding payment to protect itself from loss.<sup>5</sup>

**D. There is no right to cure under Nebraska common law.**

28. Zachry could not identify (and Commonwealth did not cite) a single Nebraska case that held there is an implied right to cure in construction contracts. Still, the cases on which Commonwealth relies are contrary to its own argument. *See* Motion ¶ 47 (highlighted below).

47. However, setting aside the express notice and cure rights in the Service Agreement, CECM was also entitled to notice and the right to cure any deficiencies at common law. Every contract contains an implied right to cure. *Centerplan Constr. Co. v. City of Hartford*, 274 A.3d 51, 78 (Conn. 2022) ("Under our common law, when a contract is silent as to notice and cure rights, the right to cure is implied in every contract as a matter of law unless expressly waived."). *Accord*, e.g., *McClain v. Kimbrough Constr. Co.*, 806 S.W.2d 194, 198 (Tenn. Ct. App. 1990).

<sup>5</sup> Commonwealth also relies on two New York cases: *Paragon Restoration Group, Inc. v. Cambridge Square Condominiums*, 42 A.D.3d 905, 906 (N.Y. Sup. Ct. 2007) and *Tishman Const. Corp., Inc. v. City of New York*, 228 A.D.2d 292, 293 (N.Y. App. Div. 1996). The courts in those cases neither analyze the respective contracts nor cite to relevant case law in support of their holdings.

29. In a single paragraph, Commonwealth acknowledges that the Service Agreement contains “express notice and cure rights” and that the right to cure is implied under common law *only* “when a contract is silent as to notice and cure rights,” yet it argues that it is “entitled to notice and the right to cure any deficiencies at common law.” Motion ¶ 47. Commonwealth’s argument fails as a matter of law.

**E. Commonwealth fails to meet its burden for a spoliation sanction.**

30. Commonwealth’s final argument is essentially a request for sanctions for spoliation of evidence. *See* Motion ¶ 61 (“Commonwealth has been prejudiced by Zachry’s failure to preserve relevant evidence, and Zachry should be estopped from now attempting to claim defective or incomplete work to reduce its liability to Commonwealth in the Bankruptcy Proceeding.”). The issue of spoliation is controlled by federal law, but federal courts will supplement this analysis by applying elements from state case law. *In re Advanced Modular Power Sys., Inc.*, 413 B.R. 643, 663 (Bankr. S.D. Tex. 2009), *aff’d sub nom. Hsu v. West*, No. ADV 08-03177, 2009 WL 7760300 (S.D. Tex. Dec. 30, 2009). Under Texas law, there are three elements to determine if spoliation of evidence has occurred: “(1) whether the accused party had a duty to preserve the evidence; (2) whether accused party negligently or intentionally spoliated evidence; and (3) whether the spoliation prejudiced the other party’s ability to present its case or defense.” *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666 (Tex. App.-Houston [1st Dist.] 1998, no pet.) (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954–55 (Tex. 1998)). Moreover, to impose sanctions for spoliation of evidence, the Court must find that the accused party acted in bad faith. *In re Advanced Modular Power Sys., Inc.*, 413 B.R. at 663 (citing *Smith v. Am. Founders Fin. Corp.*, 365 B.R. 647, 681 (S.D. Tex. 2007)).

31. Commonwealth has known for approximately nine months that Zachry found defects in Commonwealth's work, intended to assert a backcharge for deficient work, and was actively investigating additional backcharges. *See, e.g.*, Exhibit 2 (correspondence from counsel Stephen Loftin: "I am told the back charge investigation is a work in progress, but the attached provides some information gathered to date. I understand that additional issues are being uncovered and it is likely this will be updated."). However, Commonwealth never raised any concerns about Zachry's correction of Commonwealth's defective work until Commonwealth filed its Motion for Summary Judgment.

32. Even assuming every assertion Commonwealth makes is true (and as noted above, it is not), Commonwealth still fails to meet its burden for a spoliation sanction. First, Commonwealth does not address how "the spoliation prejudiced its ability to present its case or defense." *Offshore Pipelines*, 984 S.W.2d at 666. Second, Commonwealth does not even assert that Zachry acted in bad faith. For these reasons, Commonwealth has not demonstrated that a spoliation sanction is warranted.

### **CONCLUSION**

For the foregoing reasons, Reorganized Debtors respectfully request that the Court deny Commonwealth's Motion and grant Reorganized Debtors such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ John J. Deis

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*Counsel for Reorganized Debtors*

### **Certificate of Service**

I certify that on June 13, 2025 I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas and via email on counsel of record for Commonwealth.

/s/ John J. Deis

John J. Deis

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

In re:	)	
	)	Chapter 11
ZACHRY HOLDINGS, INC., <i>et al.</i> <sup>1</sup>	)	
	)	Case No. 24-90377 (MI)
Debtors.	)	(Jointly Administered)
	)	<b>Re: Claim No. 1003</b>

**REORGANIZED DEBTORS INITIAL DISCLOSURES PURSUANT TO FED R. CIV. 26  
(A)(1)**

Reorganized Debtors (“Zachry”) through their undersigned counsel, Hicks Thomas LLP, hereby submit their initial disclosure statement pursuant to Fed. R. Civ. P. 26(a)(1).

**A. INDIVIDUALS LIKELY TO HAVE DISCOVERABLE INFORMATION REGARDING CLAIMS AND DEFENSES**

Without waiving Zachry’s right to supplement this list of individuals likely to have discoverable information that Zachry’s may use to support their claims or defenses, Zachry’s list the following individuals:

Name	Address/Telephone No.	Discoverable Information
Shannon Farr	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry superintendent who may have knowledge of his communications regarding Commonwealth work progress and scheduling.

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

Larry Shofner	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry subcontract manager for OPPD Standing Bear Lake (SBLS) project, who may have knowledge of his communications with Commonwealth concerning its scope of work, work progress, work scheduling, invoicing and incident reporting.
Severo Hernandez Jr.	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry quality control manager who may have knowledge of inspections of Commonwealth work.
Raymond Boldt	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry project estimator, who may have knowledge of Commonwealth's work progress and cost estimates attributable to Commonwealth's defective performance of work.
Matthew J. Rachau	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry construction superintendent who may have knowledge of circuit work packages assigned to Commonwealth, Commonwealth's progress, non-conformance reports for Commonwealth's work, and ISC's inspection and rectification of Commonwealth work.
Gil Craft, Jr.	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry employee with knowledge of the progressing of Commonwealth's work on the OPPD SBLS project.

Lyle Fouts	Zachry Industrial, Inc. (May be contacted through counsel) Hicks Thomas LLP 700 Louisiana, Suite 200 Houston, Texas 77002 Telephone: 713-547-9100	Zachry project manager for OPPD sites, who may have knowledge of correspondence that he signed terminating Commonwealth from the SBLs project.
Noah Thornton	Commonwealth Electric Company of the Midwest	Commonwealth Senior Project Manager may have knowledge of Commonwealth's work on the SBLs project.
Scott Logan	Commonwealth Electric Company of the Midwest	Commonwealth general foreman may have knowledge of Commonwealth's work on the SBLs project.
William Patterson	ISC Constructors, LLC 20480 Highland Road Baton Rouge, LA 70817 Telephone: 225-756-8001	ISC Project Manager responsible for ISC site forces who may have detail knowledge of CECM craftsmanship and installation deficiencies.
Craig Hazlett	ISC Constructors, LLC 20480 Highland Road Baton Rouge, LA 70817 Telephone: 225-756-8001	ISC Foremen identified in ISC Extra Work Order who may have knowledge of inspections conducted by ISC.
Jesus Cantu	ISC Constructors, LLC 20480 Highland Road Baton Rouge, LA 70817 Telephone: 225-756-8001	ISC Foremen identified in ISC Extra Work Order who may have knowledge of inspections conducted by ISC.
Rolando Alor	ISC Constructors, LLC 20480 Highland Road Baton Rouge, LA 70817 Telephone: 225-756-8001	ISC Foremen identified in ISC Extra Work Order who may have knowledge of inspections conducted by ISC.
Craig Guilbeau	ISC Constructors, LLC 20480 Highland Road Baton Rouge, LA 70817 Telephone: 225-756-8001	ISC Foremen identified in ISC Extra Work Order who may have knowledge of inspections conducted by ISC.

**B. DOCUMENTS ZACHRY MAY USE TO SUPPORT ITS CLAIMS OR DEFENSES**

- Documents attached in support of Raymond Boldt's February 20, 2025 Declaration in support of The Debtors' Objection to the Claim of Commonwealth Electric Company of the Midwest (Claim No. 1003) [Doc 2339; 2239-1 – 2239-10];
- Zachry's documents produced April 4, 2025 as Bates ZII\_CW00000001 – ZII\_CW00000472; See documents produced here with Bates ZII\_CW00000473 – ZII\_CW000008157;
- Zachry project correspondence and documents, including SBLS project monthly reports, Electrical and Instrumentation Construction Coordination Meeting records, and Electrical circuit assignment and progress tracking documentation. Located in Zachry electronic files and emails; See documents produced here with Bates ZII\_CW00000473 – ZII\_CW000008157;
- Emails and communications between and among Zachry and Commonwealth regarding Commonwealth scopes of work, circuit assignments, progress reporting, invoicing and incident reporting. Located in Zachry electronic email boxes;
- Non-conformance reports and inspection and rectification documentation. Located in Zachry electronic files and emails; See documents produced here with Bates ZII\_CW00000473 – ZII\_CW000008157;
- Contracts and Amendments between Zachry and Commonwealth. Located in Zachry electronic files; See documents produced here with ZII\_CW00000473 – ZII\_CW000008157;

**C. DESCRIPTION AND COMPUTATION OF DAMAGES**

Zachry terminated Commonwealth's work under the Service Agreement #115001-605028 (the "Service Agreement") on May 15, 2024. From May through October 2024, Zachry and its subcontractor ISC Constructors, LLC inspected work that Commonwealth was assigned and obligated to perform in accordance with the terms of the Service Agreement. As a result of the inspections, Zachry determined that Commonwealth had either not completed work within their work scope, or Commonwealth's work was defective and required corrective work. Zachry has incurred costs for self-performed work, subcontractor work and third party supplied materials to complete and correct Commonwealth's defective work (hereinafter "Corrective Work"). The methodology for calculating these costs is set forth in the Declaration of Raymond Boldt in support of Zachry's Objection to Commonwealth's proof of claim [Doc. 2339], which is incorporated as

if set forth fully herein. Since the filing of the declaration, calculations for the Additional Materials and Redundant Cable Pull charges reflected in the Boldt Declaration have been revised according to a file labeled SBLS CW installation issues BCN - r10 rcb 250429 r2 w scaffold rate (002).xls in the document production accompanying these disclosures. The totals of each category of damages are summarized in the following table:

Incurred Cost Category	Description	Cost Incurred by Zachry
Costs to rectify BCN Identified Incomplete and Defective Work	Costs to rectify incomplete and/or defective work identified through Back Charge Notifications (BCNs) including (1) third party labor charges; (2) estimated Zachry technical and engineering support and field construction support costs based on historical standards developed by Zachry; and (3) third party construction material costs, including a markup on third party construction material based on Zachry's contracts with Commonwealth Electric. Boldt Decl. ¶ 8.	\$1,009,015
Labor costs due to Other Incomplete and Defective Work	Indirect labor costs to takeover and effectuate the completion and correction of Commonwealth Electric's work and third-party labor charges for Zachry's subcontractor to complete smaller tasks not otherwise captured by a specific Extra Work Order. Boldt Decl. ¶ 16.	\$348,000
Material due to Other Incomplete and Defective Work	In order to rectify the Other Incomplete and Defective Work, Zachry had to purchase additional materials and supplies not reflected in the back charge notifications, including additional cable, conduit, cable terminations and cable trays. Boldt Decl. ¶ 14.	\$221,329
Scaffolding costs	Portions of Commonwealth's defective work were located at elevation. Accordingly, Zachry was required to rent and erect scaffolding and then remove that scaffolding. Costs include Zachry labor costs to erect and remove the scaffolding and third party scaffolding rental charges. Boldt Decl. ¶ 12.	\$195,806
Costs and overbilling due to Duplicative Cabling	Commonwealth Electric installed duplicate cables unnecessarily and billed Zachry. Zachry not only paid for Commonwealth Electric's redundant cable pulling work, Zachry also incurred costs for identifying and resolving issues caused by the redundant cabling. Boldt Decl. ¶ 10.	\$780,592.86

Paid smoke breaks	Commonwealth Electric billed Zachry for smoke breaks taken on a tobacco free jobsite. <sup>2</sup> Boldt Decl. 16a.	\$40,000
	<b>Total:</b>	<b>\$2,594,743.86</b>

**D. INSURANCE AGREEMENTS.**

Not applicable.

Respectfully submitted,

/s/ John J. Deis

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*Counsel for Reorganized Debtors*

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<sup>2</sup> See Service Agreement Art. 9.3.

**Certificate of Service**

I certify that on May 19, 2025 I caused a copy of the foregoing document to be served via email on counsel of record for Commonwealth.

/s/ John J. Deis  
John J. Deis

---

**From:** Joel D. Heusinger <[JHEUSINGER@woodsaitken.com](mailto:JHEUSINGER@woodsaitken.com)>  
**Sent:** Tuesday, August 27, 2024 12:23 PM  
**To:** Stephen Loftin <[sloftin@hicks-thomas.com](mailto:sloftin@hicks-thomas.com)>  
**Subject:** RE: Zachry - Rule 408 Settlement Communication

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Stephen,

I talked with the COO for Commonwealth and they are forwarding me their draft response to the B/C's today. I will review and we should have the response to you before the COB on Thursday.

Joel

---

**Joel D. Heusinger**

Denver 303-606-6717

Lincoln 402-437-8517

Omaha 402-898-7404

[woodsaitken.com](http://woodsaitken.com)

Download vCard



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**From:** Stephen Loftin <[sloftin@hicks-thomas.com](mailto:sloftin@hicks-thomas.com)>  
**Sent:** Tuesday, August 27, 2024 9:54 AM  
**To:** Joel D. Heusinger <[JHEUSINGER@woodsaitken.com](mailto:JHEUSINGER@woodsaitken.com)>  
**Subject:** RE: Zachry - Rule 408 Settlement Communication

Joel,

Do you have an update? Again, time is really of the essence on my end. They need a response/counter as soon as possible or they will likely need to file something.

Stephen



**Stephen Loftin**  
Partner  
700 Louisiana, Suite 2300  
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[www.hicks-thomas.com](http://www.hicks-thomas.com)  
[Bio](#) | [vCard](#) | [LinkedIn](#) | [Map](#)

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**From:** Joel D. Heusinger <[JHEUSINGER@woodsaitken.com](mailto:JHEUSINGER@woodsaitken.com)>  
**Sent:** Wednesday, August 21, 2024 1:45 PM  
**To:** Stephen Loftin <[sloftin@hicks-thomas.com](mailto:sloftin@hicks-thomas.com)>  
**Subject:** RE: Zachry - Rule 408 Settlement Communication

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Stephen,

Good afternoon. I am back in the office and have sent the information to the Commonwealth team for review. I will let you know their position on the b/c's and response to the offer.

Joel

---

**Joel D. Heusinger**

Denver 303-606-6717  
Lincoln 402-437-8517  
Omaha 402-898-7404

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**From:** Stephen Loftin <[sloftin@hicks-thomas.com](mailto:sloftin@hicks-thomas.com)>  
**Sent:** Monday, August 19, 2024 8:20 AM  
**To:** Joel D. Heusinger <[JHEUSINGER@woodsaitken.com](mailto:JHEUSINGER@woodsaitken.com)>  
**Subject:** RE: Zachry - Rule 408 Settlement Communication

Joel,

I am told the back charge investigation is a work in progress, but the attached provides some information gathered to date. I understand that additional issues are being uncovered and it is likely this will be updated. For now, please treat this as governed by Rule 408. I

understand your schedule, but hope you understand that Zachry needs to either get an agreement on a resolution soon or it will need to file something with the bankruptcy court.

I look forward to your client's response. Let me know if you have any questions.

Stephen



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---

**From:** Joel D. Heusinger <[JHEUSINGER@woodsaitken.com](mailto:JHEUSINGER@woodsaitken.com)>  
**Sent:** Thursday, August 15, 2024 8:26 AM  
**To:** Stephen Loftin <[sloftin@hicks-thomas.com](mailto:sloftin@hicks-thomas.com)>  
**Subject:** RE: Zachry

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Stephen,

Good morning. Thank you for your email and the general details of the proposal. I will send this to the client and will set up a time to follow up with them in the next week or so. I have depositions early in the week, so it will be after that. If you could forward the backcharges for the referenced contract, that would be helpful in our evaluation as well. Thanks.

Joel

---

**Joel D. Heusinger**

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Lincoln 402-437-8517  
Omaha 402-898-7404

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---

**From:** Stephen Loftin <[sloftin@hicks-thomas.com](mailto:sloftin@hicks-thomas.com)>  
**Sent:** Wednesday, August 14, 2024 11:31 AM

To: Joel D. Heusinger <[JHEUSINGER@woodsaitken.com](mailto:JHEUSINGER@woodsaitken.com)>

Subject: Zachry

Joel,

Thank you for your time earlier this week. As we discussed, Zachry is interested in exploring the resolution of Commonwealth's claims without the necessity of litigation in bankruptcy court and the attendant delay. While I focused on the amount due under the terminated contract, I think it probably makes sense to throw in all of the claims on all of the contracts to resolve everything. My understanding is that the total amount that Commonwealth claims is due under all 5 agreements for pre-petition work is \$5,145,659.78. As I discussed, Zachry believes that it has available back charges related to Commonwealth's work under the 115001-605028 Contract in the amount of up to \$300,000. Factoring in those back charges would make the total for the alleged amount due \$4,845,659.78. In return for critical vendor designation and the resultant prompt payment from the limited availability of critical vendor dollars, Zachry requests that Commonwealth agree to the same 25% discount that other contractors have been providing (\$1,162,212.42), which would result in a total payment of \$3,486,637.26 (along with full releases of course). As I mentioned, absent some agreement on the back charges and a discount for quicker payment, Zachry intends to prepare and file an adversary proceeding regarding the back charges and the proper amount due under the "028" contract.

Please inform you client of this offer and let me know their response. It should be obvious, but the sooner we can resolve this claim the better.

I look for forward to hearing from you.

Stephen



**Stephen Loftin**  
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