Docket #0038 Date Filed: 10/23/2024

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF TEXAS**

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| **IN RE: ZACHARY INDUSTRIAL, INC.,** | § | |
| | § | **Case No. 24-90377 (MI)** |
| **Debtor.** | § | **Chapter 11** |
| **FLNG LIQUEFACTION, LLC, et al.** | § | |
| | § | |
| | § | |
| | § | **(Jointly Administered)** |
| | § | |
| | § | **Adversary No. 24-03189** |
| ***Plaintiffs,*** | § | |
| | § | |
| **v.** | § | |
| | § | |
| **Zachry Industrial, Inc., et al.** | § | |
| | § | **Ref. Adv. P. Docket Nos. 13, 20, 31, 33** |
| ***Defendants.*** | § | |

**PLAINTIFFS' RESPONSE TO DEFENDANT ZACHRY INDUSTRIAL INC.'S RULE 12(B)(6) MOTION TO DISMISS AND INCORPORATION OF RESPONSE TO CB&I LLC'S 12(B)(6) MOTION TO DISMISS**

Plaintiffs, certain of the Subrogated Insurers [1] for *FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3 LLC* (collectively, "Plaintiffs") by and through their undersigned counsel, file this Response to Defendant Zachry Industrial, Inc.'s Rule 12(B)(6) Motion to Dismiss and Joinder. [Adv. P. Doc. No. 33].

[1] The subset of Insurers represented in this filing by Zabel Freeman are AIG, AEGIS, Starr Tech, Swiss Re, Liberty, Validus, Canopius (Samsung), SCOR, Helvetia, Convex, Sompo, Markel and Inigo. The other property Insurers not listed are represented by other legal counsel and are not part of this filing.

## I. INTRODUCTION

Defendant Zachry filed its instant motion to dismiss as an incorporation of the arguments brought forth in CB&I's Motion to dismiss [Adv. P. Doc. No. 13]. To save judicial resources, Plaintiffs incorporate all of the statements, responses, exhibits, and defenses raised in its previously filed Response to CB&I's Motion [Adv. P. Doc. No. 20] into this response. Both Motions are premised on application of the Economic Loss Rule to the facts at hand. Zachry's instant motion should be denied for the same reasons previously outlined, and Zachry's Motion adds one additional ground for dismissal: waiver of subrogation. That issue will be addressed in this response.

## II. BACKGROUND FACTS

Plaintiffs incorporate the facts as laid out in their previous Response [Adv. P. Doc. No. 19]. Additional background facts relating to the waiver argument are as follows:

The FLNG facility has three separate turnkey natural gas liquefaction facilities known as Train 1, Train 2, and Train 3. The substantial completion date for Train 1was November 23, 2019, Train 2 was January 14, 2020, and Train 3 was May 1, 2020. Ex. 1, the affidavit of Christopher Clayton. Under ¶2.A.4 of the EPC, FLNG is required to provide insurance from the date of "Substantial Completion" until the end of the "Defect Correction Period." Ex. 2, Att. O, ¶2.A.4 at pg. O-9. FLNG's obligation to provide property insurance and a subrogation waiver expired at the end of the Defect Correction Period. *Id.*

The "Defect Correction Period" begins on Substantial Completion and ends eighteen months thereafter. Ex. 3, EPC, ¶1.1 Definitions. With May 1, 2020, being the latest date of Substantial Completion, the obligations under ¶2.A.4 ended on November 1, 2021. The explosion at the FLNG facility occurred on June 8, 2022, well outside of the Defect Correction Period.

## III. ARGUMENT

### A. Plaintiffs Incorporation of Prior Responsive Arguments

Plaintiffs incorporate the responsive arguments as laid out in their previous Response [Adv. P. Doc. No. 19]. In addition, Defendant Zachry adds one element to its motion, a waiver of subrogation. However, that waiver is inapplicable to this loss, as outlined herein.

### B. The EPC Waiver Provision is Inapplicable to the Loss

The EPC speaks for itself regarding certain provisions requiring FLNG to maintain property damage insurance and any waivers of subrogation. Zachry's position on waiver may be potentially plausible if there were no time limitations contained in ¶2.A.4. However, there are express limitations, and any applicable insurance/waiver requirements ended seven months prior to the date of loss on June 8, 2022.

The EPC requires FLNG to "provide coverage for loss to Existing Facilities and portions of the Expansion Facility **after they have achieved Substantial Completion**" Ex. 2, Att. O, ¶2.A.4, 2.G(emphasis added). The coverage must also contain a waiver of subrogation in favor of the Contractor. *Id.* However, these obligations **"shall expire upon expiration of the Defect Correction Period."**[2] *Id.* Under the terms of the EPC, the Defect Correction Period commences upon the Substantial Completion and ends eighteen months thereafter." Ex. 3, Art. 1, §1.1 Definitions.[3]

Substantial Completion for Train 3 was on May 1, 2020,[4] which means the Defect Correction Period ended on November 1, 2021. This also means that FLNG's obligation to

[2] This is the last sentence in Section 2.A.4, which Zachry conveniently omits from its quote and Motion.

[3] There are provisions in §1.1 that may extend the Defect Correction Period; however, Zachry has not alleged or provided any evidence of any extension past the 18 month period.

[4] Ex. 1.

provide property damage insurance containing a contractual subrogation waiver also ended on November 1, 2021.

The loss in this case occurred on June 8, 2022, over seven months after the end of the Defect Correction Period. Based on the temporal limitations and correlating expiration of the contractual insurance and waiver obligations under 2.A.4, neither Zachry,nor any other contractors or their subcontractors are entitled to enforce the waiver provision of 2.A.4.

Attachment O, ¶2.G, extends the subrogation waiver to Contractor's Indemnified Parties, Subcontractors, and Sub-subcontractors to the extent of the Agreement under ¶2.A.4. Ex.2, Att. O, ¶2.G. In other words, ¶2.G is subject to the same time limitation as ¶2.A.4, and is similarly inapplicable to this loss.

Zachry has failed to establish that the waiver provisions of ¶2.A.4 and 2.G apply to the FLNG explosion and loss on June 8, 2022. As such, its Motion to Dismiss based on this argument should be denied with prejudice.

## IV. CONCLUSION

The arguments advanced by Defendants collectively in their various motions and joinders are not appropriate for a pleadings-based attack. At a minimum, discovery is needed on at least one issue of the ELR, and many issues are not appropriate statements of Texas law applied to the facts of the instant case, as plead. Furthermore, the waiver of subrogation argument is completely baseless. In short, Plaintiffs have stated a valid cause of action under Texas law, within the applicable statute of limitations, and request this Court DENY Defendants' instant motion in its entirety.

However, in the alternative, even if this Court determines that Plaintiffs have not properly plead a cause of action to satisfy Rule 12(b)(6) on the face of their pleading, Plaintiffs respectfully

request leave to file an Amended Complaint to more specifically plead (above what is required under pleading standards) the damage to other property and duties owed.

Dated: October 23, 2024

Respectfully submitted,

*/s/ Ken Green*

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COUNSEL FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that on October 23, 2024, I caused a copy of the foregoing document to be served by electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case.

/s/ Ken Green
Ken Green

# Exhibit 1

STATE OF TEXAS §

COUNTY OF HARRIS §

AFFIDAVIT OF CHRISTOPHER CLAYTON

Before me, the undersigned notary, on this day appeared, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified.

My name is Christopher Clayton. I am over nineteen years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I am the Vice President of Engineering for Freeport LNG and its designated corporate representative. I have personal knowledge of the substance herein or in my capacity as corporate representative have gained that knowledge.

Freeport LNG has three separate turnkey natural gas liquefaction facilities known as Train 1, Train 2, and Train 3. The substantial completion date for Train 1was November 23, 2019, Train 2 was January 14, 2020, and Train 3 was May 1, 2020.

Further affiant sayeth not.

Christopher Clayton, as Corporate Representative of Freeport LNG.

Sworn to and subscribed before me by Christopher Clayton on October 23rd, 2024.

DAWN M GOURLEY
Notary ID #124671248
My Commission Expires
October 23, 2024

Notary Public in and for the

State of Texas, Harris County

# Exhibit 2
# Filed Under Seal

# Exhibit 3
# Filed Under Seal