Docket #0104 Date Filed: 2/17/2025

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

IN RE: ZACHRY INDUSTRIAL, INC.,	§	
	§	Case No. 24-90377 (MI)
Debtor.	§	Chapter 11
	§	

FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC,	§	
Plaintiffs,	§	
v.	§	Adversary No. 24-03195
CB&I INC.; ZACHRY INDUSTRIAL, INC.; and CHIYODA INTERNATIONAL CORPORATION,	§	
Defendants.	§	

ZACHRY INDUSTRIAL, INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIMITATIONS

Defendant Zachry Industrial, Inc. ("Zachry Industrial") files this reply in support of its for summary judgment on limitations. Zachry Industrial respectfully shows the Court as follows:

I. ARGUMENT AND AUTHORITIES

As explained in its Motion and as elaborated below, Zachry can (1) conclusively prove that Plaintiffs' cause of action accrued more than four years before Plaintiffs filed suit; and (2) negate the discovery rule or show that it does not apply.

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A. Plaintiffs' breach of contract claim accrued more than four years before Plaintiffs filed suit on April 23, 2024.

According to the Texas Supreme Court, "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *Archer v. Tregellas*, 566 S.W.3d 281, 288 (Tex. 2018) (internal quotation marks omitted). Under this long-standing rule, "a cause of action for breach of contract accrues **at the moment the contract is breached**." *Id.* (emphasis added), *quoted in Sheet Pile, L.L.C. v. Plymouth Tube Co., USA*, 98 F.4th 161, 166 (5th Cir. 2024).

Plaintiffs proffer a contrary rule that where "a continuing contract is contemplated, the cause of action for the breach thereof does not accrue until final completion thereof." Response at 12 (quoting *Alexander & Polley Const. Co. v. Spain*, 477 S.W.2d 301, 303 (Tex. App.—Tyler 1972, no writ)). As between a Texas Court of Appeals decision from 1972 and a Texas Supreme Court decision from 2018 (as endorsed by the Fifth Circuit in 2024), the latter obviously controls.[1]

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[1] In any event, the cases cited by Plaintiffs are readily distinguishable. In most of them, the alleged breach of contract was a simple **failure to pay**. *See Alexander & Polley*, 477 S.W.2d at 303 (right to "full payment under the contract"); *Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 381–82 (Tex. App.—Fort Worth 1994, writ denied) ("action on a debt"); *Godde v. Wood*, 509 S.W.2d 435, 441 (Tex. App.—Corpus Christi 1974, writ ref'd n.r.e.) ("action for debt under an oral contract"). It is no surprise that, absent any provision for progress payments, a breach of the obligation to pay for contracted good or services cannot occur until "final completion" of the contact. Another of the cases cited by Plaintiffs simply does not stand for the cited proposition, Plaintiffs having omitted key words. *See B. Mahler Interests, L.P. v. DMAC Construction, Inc.*, 503 S.W.3d 43, 49 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("It is **undisputed** that the alleged breaches occurred **at the latest** by January 2008 when all construction was completed and final payment was made."). Plaintiffs' final case did not even involve a breach of contract. *See El Paso County. v. Sunlight Enterprises Co., Inc.*, 504 S.W.3d 922, 929 (Tex. App.—El Paso 2016, no pet.) ("This case involves only the initial step on the way to a possible cause of action for breach of contract, *i.e.*, the notice of an event possibly supporting additional compensation or time that could possibly lead to a claim for damages.").

Because "all of Defendants' alleged failures to perform occurred on or before April 10, 2020," Motion at 7 — a factual point that Plaintiffs do not dispute — Plaintiffs' claim for breach of contract accrued no later than that date. Because that date was more than four years before Plaintiffs filed suit on April 23, 2024, Plaintiffs' claim is facially barred by the statute of limitations.

B. Plaintiffs' allegations in the Amended Complaint negate the discovery rule.

Plaintiffs seek refuge from that conclusion in the "discovery rule." The parties dispute whether (1) whether the Amended Complaint properly raised the discovery rule; (2) whether the rule applies to contracts like the EPC Contracts here; and (3) whether Plaintiffs' alleged injury was "inherently undiscoverable."

1. Plaintiffs have not properly raised the discovery rule.

The parties agree that a plaintiff must "plead sufficient facts to put the defense on notice that it might assert that the discovery rule applies." Response at 7 (quoting *Brandau v. Howmedica Osteonics Corp.*, 439 Fed. Appx. 317, 320 (5th Cir. 2011)). Plaintiffs cite two paragraphs of their Amended Complaint as satisfying this requirement. Neither does.

First, Plaintiffs quote their allegation in ¶ 60 that "adequate shop inspections [of the motors] by Defendants represented **the only opportunity to discover and correct these defects** before the motors were put into service. Due to the **conscious indifference** of Defendants, the motor defects were not identified before the motors were installed at the LNG Project." Response at 7 (emphasis altered). Presumably, it is the word "discover" on which Plaintiffs pin their hopes. But as used here, that word is part of an allegation

that Defendants were grossly negligent, not an allegation that Plaintiffs suffered an injury that was "inherently undiscoverable."

Second, Plaintiffs cite — but do not quote — ¶ 44 as having alleged that "Plaintiffs were not able to **discover** the motor defects until January 2024 when the Train 3 motor tripped and remained offline." Response at 8 (emphasis added). Use here of the word "discover" is contrived; that paragraph actually alleges:

> Section 12.3 of the EPC Contracts establishes Contractor's obligation to perform Corrective Work during the Defect Correction Period, which is defined as the 18-month period following Substantial Completion. However, Section 12.3D of the EPC Contracts makes clear that Contractor remains responsible to Owner for failures to comply with its Warranties under the EPC Contracts: [quoting paragraph regarding "Defect Correction Period"].

Amended Complaint at 10, ¶ 44. One searches this paragraph in vain for anything that would reasonably "put the defense on notice" that Plaintiffs will invoke the discovery rule.

Consequently, Plaintiffs did not properly raise the discovery rule in their Amended Complaint, and their reliance on the rule should be rejected for that reason alone.

2. The Texas Supreme Court has never held that the discovery rule applies to contracts like the EPC Contracts.

Just last year, the Fifth Circuit observed that "the Texas Supreme Court has yet to apply the discovery rule to a breach of contract." *Sheet Pile*, 98 F.4th at 167 n.21. To be sure, the court "has not foreclosed that possibility." *Id.* But as Zachry has demonstrated, the court has steadfastly and consistently "refused to apply the discovery rule to toll the statute of limitations until a breach of contract was discovered." Motion at 9–10 (discussing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886–88 (Tex. 1998); *Wagner*

& Brown, Ltd. v. Horwood, 58 S.W.3d 732, 737 (Tex. 2001); *Via Net v. TIG Insurance Co.*, 211 S.W.3d 310, 314–15 (Tex. 2006)).

Because "the Texas Supreme Court 'ha[s] restricted the discovery rule to exceptional cases,'" *Sheet Pile*, 98 F.4th at 166 (quoting *Via Net*, 211 S.W.3d at 313), there is no reason to think that the court would suddenly begin applying the rule in the context of EPC Contracts that are "comprehensive arm's length agreements closely negotiated between highly sophisticated contracting parties represented by experienced counsel." Motion at 10. That possibility is especially unlikely in the category of cases where, as here, the plaintiff pleads "obvious defects" that could have been identified by a "simple review." Amended Complaint at 14–15, ¶¶ 61, 63.[2]

3. Plaintiffs' injury was <u>not</u> inherently undiscoverable.

The parties agree that the discovery rule applies **only when** "the injury is inherently undiscoverable." Response at 5 (citing *Archer*, 566 S.W.3d 281). The allegations made by Plaintiffs in their Amended Complaint conclusively demonstrate that Plaintiffs' alleged injury does not qualify as inherently undiscoverable. Consider some of those allegations:

- "Plaintiffs implemented **enhanced monitoring** of Trains 1 and 2 . . . after the repairs to Train 3 were completed," and that monitoring "identified an increase in partial discharge and current abnormalities in one of the Train 2 motors." Amended Complaint at 11, ¶ 50 (emphasis added).

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[2] The two Texas Supreme Court decisions cited by Plaintiffs, *see* Response at 5, are not to the contrary. *Archer*, 566 S.W.3d at 284, involved not a breach of contract but rather a "breach of a recorded right of first refusal to purchase a mineral interest." And *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79 (Tex. 2004), involved a claim governed by the UCC's rule that a "breach of warranty occurs when tender of delivery is made, **except that** where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." *Id.* at 93 (quoting Tex. Bus. & Com. Code § 2.725(b)).

- Of course, the subsequent visual "**[i]nspections** of the Train 2 motors revealed additional workmanship issue" the specifics of which are set forth in detail in Paragraph 51 of the Amended Complaint. *Id.* at 11, ¶ 51 (emphasis added)

- "A **simple review** of the design [for the motors] would have identified [the bolt assembly] design defect." *Id.* at 14, ¶ 61 (emphasis added).

- "If Defendants had performed shop inspections during fabrication [of the motors], these **obvious defects** could and would have been identified and corrected." *Id.* at 15, ¶ 63 (emphasis added).

These allegations demonstrate that "enhanced monitoring" or "inspection" of the motors — indeed, just a "simple review" — would have identified or revealed the defects, abnormalities, and workmanship issues in the motors, all of which were "obvious." By definition, defects that are obvious and therefore discoverable by monitoring or inspection or simple review are **not** inherently undiscoverable. In *BP America Production Co. v. Marshall*, 342 S.W.3d 59, 66–68 (Tex. 2011), the Texas Supreme Court reiterated — no fewer than twelve times — that an injury is not inherently undiscoverable if information about that injury is "available." Information is available if it could be obtained, as here, by monitoring or inspections or a simple review.

Plaintiffs do not (and cannot) deny their own allegations. Rather, they attempt to deflect the inquiry from whether their injury was discover**able** to whether Defendants (as opposed to Plaintiffs) "had the . . . duty to discover the defects." Response at 8. That is to say, Plaintiffs contend that monitoring, inspections, and review "were all undisputedly **Defendants'** obligations under the EPC Contracts." *Id.* (emphasis added); *accord, e.g., id.* at 9 (referring to the "complexity and challenges that **they** [i.e., Defendants] — not FLNG — were required to monitor." *Id.* (emphasis in original).

This attempted deflection fails as a matter of law. Whether an injury is inherently undiscover**able** does not depend on which party might have the duty under the governing contract to engage in monitoring or inspections or review. For purposes of the discovery rule, the crucial question is not whether a plaintiff **had the duty** to discover the relevant information but instead whether the plaintiff "could have" discovered that information. *BP America*, 342 S.W.3d at 67; *accord, e.g., Shell Oil Co. v. Ross*, 356 S.W.3d 924, 928 (Tex. 2011) (reiterating the "could have discovered" formulation of the discovery rule). The invocation of "reasonable diligence," Response at 9 (citing *BP America*, 342 S.W.3d at 66), does not excuse Plaintiffs from these precepts. As *BP America* itself makes clear, such diligence is lacking when the requisite information is "available." And information is available when — **as Plaintiffs themselves allege** — it could have been discovered by monitoring, inspections, or simple review.[3]

Thus, the discovery rule does not apply to defer accrual or toll limitations because Plaintiffs' injury was not inherently undiscoverable.

II.
CONCLUSION

For these reasons, Zachry Industrial requests that the Court grant this Motion for Summary Judgment, dismiss Plaintiffs' claim for breach of the EPC Contracts because it

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[3] The Texas Court of Appeals cases cited by Plaintiffs, *see* Response at 9–11, do not contradict this point. All but two of them involved claims **other than** breach of contract, i.e., DTPA, negligence, breach of implied warranty, premises liability, or fraud. *Beltway Park Baptist Church, Inc. v. Bolton*, 2020 WL 868069 (Tex. App.—Eastland Feb. 21, 2020, no pet.), does not assist Plaintiffs because the court ruled that "the summary judgment evidence **conclusively negates** the discovery rule." *Id.* at *3 (emphasis added). Finally, although the "exercise of reasonable diligence under the discovery rule will **generally** fall into [the] category" of issues not amenable to summary judgment, *El Paso Associates, Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 21 (Tex. App.—El Paso 1990, no writ) (emphasis added), the Fifth Circuit has made clear that a defendant may "negate the discovery rule" on summary judgment with an appropriate showing, *Sheet Pile*, 98 F.4th at 166.

is barred by the four-year statute of limitations, and award Zachry Industrial all further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 17th day of February, 2025, a copy of the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ John B. Thomas
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