Docket #0111 Date Filed: 2/20/2025

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: ZACHRY HOLDINGS, INC., *et al.*,[1] *Debtors*.	Chapter 11 Case No. 24-90377 (MI) (Jointly Administered)
FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC, *Plaintiffs,* v. CB&I INC.; ZACHRY INDUSTRIAL, INC.; and CHIYODA INTERNATIONAL CORPORATION, *Defendants.*	Adv. No. 24-03195

NOTICE OF FILING OF SUMMARY JUDGMENT MOTION HEARING PRESENTATION

PLEASE TAKE NOTICE THAT attached hereto as **Exhibit A** is a copy of the presentation that was presented by FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC, and FLNG Liquefaction 3, LLC at the hearing on February 19, 2025 at 2:30 P.M. (Central Standard Time) in the above-captioned adversary proceeding.

[1] The debtors in these chapter 11 cases (the "**Debtors**"), along with the last four digits of each Debtor's federal tax identification number, may be obtained on the website of the Debtors' claims and noticing agent at https://veritaglobal.net/zhi. The Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

24903772502200000000000020

Date: February 20, 2025

Respectfully Submitted,

KING & SPALDING, LLP

/s/ R. Hale Neilson

Michael Stenglein
Texas Bar No. 00791729
Christopher Taylor
Texas Bar No. 24013606
500 West 2nd Street, Suite 1800
Austin, Texas 78701
Telephone: (512) 457-2000
Email: mstenglein@kslaw.com
ctaylor@kslaw.com

-AND-

Michael Fishel
Texas Bar No. 24082998
Hale Neilson
Texas Bar No. 241116820
1100 Louisiana St., Suite 4100
Houston, TX 77002
Telephone: (713) 751-3200
Email: mfishel@kslaw.com
hneilson@kslaw.com

Counsel to FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC, and FLNG Liquefaction 3, LLC

CERTIFICATE OF SERVICE

I certify that on February 20, 2025, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ R. Hale Neilson
Hale Neilson

EXHIBIT A

Hearing on Zachry's Motion for Summary Judgment
The Discovery Rule and the Statute of Limitations

February 19, 2025

Summary Judgment Standard

- A defendant moving for summary judgment on an affirmative defense must prove that no reasonable trier of fact could find other than for the defendant; otherwise, there is a genuine issue of fact and summary judgment cannot be granted.

  Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)

- In ruling on such a motion, the Court must draw all reasonable inferences in favor of the nonmovant.

  Martin v. Alamo Cmty. Coll. Dist., 353 F.3d 409, 412 (5th Cir. 2003); *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002); *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir. 2001)

- A defendant moving for summary judgment on limitations bears the burdens of:
  (1) Conclusively establishing the elements of that defense;
  (2) Conclusively establishing when the claim accrued; and
  (3) Negating the discovery rule when pleaded by the plaintiffs.

  Schlumberger Tech. Corp. v. Pasko, 544 S.W.3d 830, 833-34 (Tex. 2018)

Accrual: Breach of Contract

- A breach of contract claim accrues when the contract is breached.
  - *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006)
- A construction contract is generally a continuing contract under which "the contemplated performance and payment is divided into several parts or, where the work is continuous and indivisible, the payment for work is made in installments as the work is completed."
  - *Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 381–82 (Tex. App.—Fort Worth 1994, writ denied) (*citing Godde v. Wood*, 509 S.W.2d 435, 441 (Tex. Civ. App—Corpus Christi 1974, writ ref'd n.r.e.)
- "Where a continuing contract is contemplated, the cause of action for the breach thereof ***does not accrue until final completion thereof***."
  - *Alexander & Polley Const. Co. v. Spain*, 477 S.W.2d 301, 303 (Tex. App.—Tyler 1972, no writ)
  - *B. Mahler Ints., L.P. v. DMAC Constr., Inc.*, 503 S.W.3d 43, 50 (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.")
  - *El Paso Cnty. v. Sunlight Enters. Co.*, 504 S.W.3d 922, 926–30 (Tex. App.—El Paso 2016, no pet.) (noting "a claim for breach of a construction contract ***does not normally accrue until the work is completed*** or the contract is terminated according to its terms, whichever occurs first")

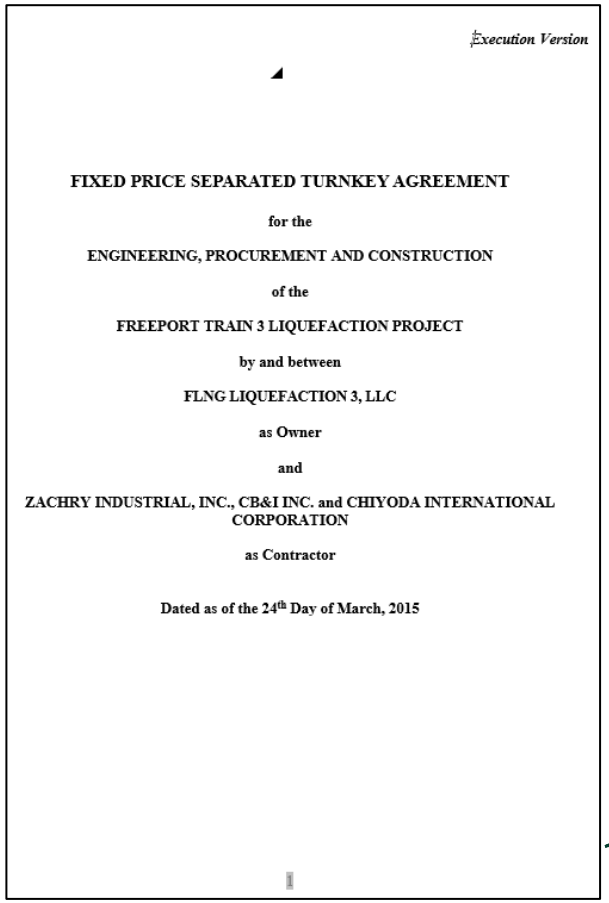
Accrual: Breach of Contract

- None of Zachry's cases involve construction contracts.

- *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002)
  - Breach of agreement incident to divorce related to sale of property
  - Cause of action accrued when the property was sold
- *Archer v. Tregellas*, 566 S.W.3d 281, 288 (Tex. 2018)
  - Breach of oil and gas lease, action accrued, for purposes of four-year limitations period, when vendors sold interest without notifying holders
  - Importantly, the Texas Supreme Court applied the discovery rule to this contract claim
- *Sheet Pile, L.L.C. v. Plymouth Tube Co., USA*, 98 F.4th 161, 166 (5th Cir. 2024)
  - Breach of exclusive agreement to manufacture steel pile connectors
  - Cause of action accrued when defendant sold products to a third party
- *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014)
  - Breach of insurance agreement
  - Case did not involve limitations

Accrual: Breach of Contract

Final Completion:



Execution Version

FIXED PRICE SEPARATED TURNKEY AGREEMENT

for the

ENGINEERING, PROCUREMENT AND CONSTRUCTION

of the

FREEPORT TRAIN 3 LIQUEFACTION PROJECT

by and between

FLNG LIQUEFACTION 3, LLC

as Owner

and

ZACHRY INDUSTRIAL, INC., CB&I INC. and CHIYODA INTERNATIONAL CORPORATION

as Contractor

Dated as of the 24th Day of March, 2015

"***Final Completion***" means that all Work and all other obligations under the Agreement (except for those obligations that survive the termination or expiration of this Agreement, including obligations for Warranties, correction of Defective Work and those covered, without limitation, by Section 11.10), are fully and completely performed in accordance with the terms of this Agreement, including: (i) the successful achievement of RLFC and Substantial Completion; (ii) the successful achievement of the MCHE Power Performance Guarantee or, if the MCHE Power Performance Guarantee was not achieved but the Total Gas Horsepower (as determined in accordance with Attachments S and T) was equal to or less than 105% of the MCHE Power Performance Guarantee, the MCHE Power Performance Guarantee Liquidated Damages in accordance with Attachment T have been paid (directly, by offset, or by collection on the Letter of Credit, at Owner's discretion); (iii) the completion of all Punchlist items; (iv) delivery by Contractor to Owner of fully executed Final Lien and Claim Waivers in the forms of Schedules K-5 and K-6; (v) delivery by Contractor to Owner of all remaining documentation required to be delivered under this Agreement, including Owner's Confidential Information, test reports, and the documentation required under Attachment B and Attachment EE; (vi) removal from the Site of all of Contractor's, Subcontractors' and Sub-subcontractor's personnel, supplies, waste, materials, equipment (except Equipment), rubbish, Hazardous Materials, and temporary facilities; (vii) delivery by Contractor to Owner of fully executed Final Lien and Claim Waivers from all Major Subcontractors in the forms in Schedules K-7 and K-8; (viii) if requested by Owner, fully executed Final Lien and Claim Waivers from Major Sub-subcontractors in a forms substantially similar to the forms in Schedule K-7 and K-8; and (ix) delivery by Contractor to Owner of a Final Completion Certificate in the form of Attachment N and as required under Section 11.6, which Owner has accepted by signing such certificate.

Accrual: Breach of Contract

Defendants achieved Final Completion as follows:

Train 1 (Ex. B)

Owner Acceptance or Rejection of Final Completion Certificate

Pursuant to Section 11.6 of the Agreement, Owner ✓ accepts or _____ rejects (check one) the Final Completion Certificate.

If Final Completion was achieved, Final Completion was achieved on May 8, 2020.

Train 2 (Ex. C)

Owner Acceptance or Rejection of Final Completion Certificate

Pursuant to Section 11.6 of the Agreement, Owner ✓ accepts or _____ rejects (check one) the Final Completion Certificate.

If Final Completion was achieved, Final Completion was achieved on June 16, 2020.

Train 3 (Ex. D)

Owner Acceptance or Rejection of Final Completion Certificate

Pursuant to Section 11.6 of the Agreement, Owner ✓ accepts or _____ rejects (check one) the Final Completion Certificate.

If Final Completion was achieved, Final Completion was achieved on October 16, 2020.

Plaintiffs' claims are timely because Final Completion for Trains 1, 2, and 3 were achieved ***less than 4 years before Plaintiffs filed suit on April 23, 2024***.

Plaintiffs Sufficiently Raised the Discovery Rule

- Zachry concedes the discovery rule "need not be specifically pleaded in federal court."

  Motion p. 8, citing *Brandau*

- "It is enough that the plaintiff plead sufficient facts to put the defense on notice of the theories on which the complaint is based."

  Brandau v. Howmedica Osteonics Corp., 439 Fed. Appx. 317, 320 (5th Cir. 2011)

  - Products liability case alleging a defective knee replacement
  - Plaintiff had surgery in October 2007, began to experience pain in January 2008, and had an x-ray in September 2008 showing the stem came loose
  - "The facts pleaded by [plaintiff]—that ***she did not start to experience pain until three months after her surgery and did not receive a tentative diagnosis until September 2008***—gave [defendant] sufficient notice that [plaintiff] might assert that the discovery rule applies."
  - Fifth Circuit reversed dismissal based on limitations

Plaintiffs Sufficiently Raised the Discovery Rule

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
ZACHRY HOLDINGS, INC., *et al.*,	Case No. 24-90377 (MI)
Debtors.	

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.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT

FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3, LLC file this First Amended Complaint against CB&I Inc.; Zachry Industrial, Inc.; and Chiyoda International Corporation, respectfully showing as follows.

I. PRELIMINARY STATEMENT

1. Plaintiffs contracted with Defendants under fixed price, turnkey, engineering, procurement, and construction agreements for the construction of a natural gas liquefaction and liquified natural gas ("LNG") export facility, the details of which are discussed below. Plaintiffs have recently discovered significant defects in the performance of Defendants' work that has caused major damage to key equipment at the LNG facility resulting in substantial repair costs,

Plaintiffs have recently discovered significant defects in the performance of Defendants' work that has caused major damage to key equipment at the LNG facility resulting in substantial repair costs ….

Doc. 60 ¶ 1

On ***January 17, 2024***, the Train 3 Propane Compressor 75 MW Motor ("75 MW Motor") tripped and remained offline, despite several attempts to restart it.

Doc. 60 ¶ 45

As a result, Plaintiffs ***implemented enhanced monitoring*** of Trains 1 and 2 …. [T]he ***enhanced monitoring performed*** on the Train 1 and 2 motors ***identified*** an increase in partial discharge and current ***abnormalities*** in one of the Train 2 motors.

Doc. 60 ¶ 50

Plaintiffs Sufficiently Raised the Discovery Rule

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
ZACHRY HOLDINGS, INC., *et al.*,	Case No. 24-90377 (MI)
Debtors.	

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.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT

FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3, LLC file this First Amended Complaint against CB&I Inc.; Zachry Industrial, Inc.; and Chiyoda International Corporation, respectfully showing as follows.

I. PRELIMINARY STATEMENT

1. Plaintiffs contracted with Defendants under fixed price, turnkey, engineering, procurement, and construction agreements for the construction of a natural gas liquefaction and liquified natural gas ("LNG") export facility, the details of which are discussed below. Plaintiffs have recently discovered significant defects in the performance of Defendants' work that has caused major damage to key equipment at the LNG facility resulting in substantial repair costs,

Inspections of the **Train 2 motors revealed *additional workmanship issues, even moreso* than those found in the inspections of the Train 3 motors**…. The inspection of the Train 2 motor **also identified substantial damage to the insulation** on the motor's stator."

Doc. 60 ¶¶ 51-52

"Given the extent of the faulty workmanship and poor condition of the bolt assemblies and cabling supports identified in Train 2, **Plaintiffs made the decision to take Train 1 offline immediately to mitigate any possibility of damage to the Train 1 motors**."

Doc. 60 ¶ 53

The motors were fabricated off-site and delivered to the Project site as intact units. The **motor casings** were **not scheduled to be opened** for the motors to be serviced **until approximately nine years after installation**. As a result, **adequate shop inspections *by Defendants* represented the *only opportunity to discover and correct these defects* before the motors were put into service**….

Doc. 60 ¶ 64

Discovery Rule

- The discovery rule defers accrual of a claim until an injured party learns of, or in the ***exercise of reasonable diligence should have learned*** of, the wrongful act causing the injury.

  Cosgrove v. Cade, 468 S.W.3d 32, 36 (Tex. 2015).

- Accrual for breach of contract and warranty claims may be deferred by the discovery rule if "the nature of the injury incurred is ***inherently undiscoverable*** and the evidence of injury is ***objectively verifiable***."

  Via Net v. TIG Ins. Co., 211 S.W.3d 310, 314 (Tex. 2006) (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996)); *see also Archer v. Tregellas*, 566 S.W.3d 281, 290–92 (Tex. 2019) (breach of contract); *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93 (Tex. 2004) (breach of warranty)

- An injury is inherently undiscoverable when it ***could not be discovered*** through the exercise of ***reasonable diligence***.

  BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 66 (Tex. 2011)

Discovery Rule – Texas Supreme Court

"*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.'"

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

IN RE: ZACHRY INDUSTRIAL, INC., Debtor.	§ § § §	Case No. 24-90377 (MI) Chapter 11
FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC, Plaintiffs, v. CB&I INC.; ZACHRY INDUSTRIAL, INC.; and CHIYODA INTERNATIONAL CORPORATION, Defendants.	§ § § § § § § § § § § § § § § §	Adversary No. 24-03195

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.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Berry v. Berry, Tex., May 13, 2022

566 S.W.3d 281
Supreme Court of Texas.

Carl M. ARCHER Trust No. Three, Mary Frances G. Archer Trust No. Three, and Mary Archer Dixon and Carla Archer Johnson, Trustees, Petitioners,
v.
Ronald Ralph TREGELLAS and Donnita Tregellas, Respondents

Carl M. Archer Trust No. Three, Mary Frances G. Archer Trust No. Three, and Mary Archer Dixon and Carla Archer Johnson, Trustees, Petitioners,
v.
Ronald Ralph Tregellas and Donnita Tregellas, Respondents

No. 17-0093 consolidated for oral argument with, No. 17-0094
|
Argued September 13, 2018
|
OPINION DELIVERED: November 16, 2018
|
Rehearing Denied March 1, 2019

Synopsis
Background: Holders of right of first refusal to purchase mineral interest brought action against purchasers of mineral interest, claiming breach of contract and seeking specific performance. After a bench trial, the 84th District Court, Hansford County, William D. Smith, J., rendered judgment for holders and granted specific performance and attorney's fees. Purchasers appealed. The Amarillo Court of Appeals, 507 S.W.3d 423, reversed and severed the issues of entitlement to attorney's fees. Holders petitioned for review, and the petitions were consolidated for oral argument.

Holdings: The Supreme Court, Lehrmann, J., held that:

[1] action accrued, for purposes of four-year limitations period, when vendors sold interest without notifying holders, and

[2] discovery rule applied to defer start of four-year limitations period.

Judgment of the Court of Appeals reversed in part, and the District Court's judgment reinstated.

Procedural Posture(s): Petition for Discretionary Review On Appeal; Judgment; Motion for Attorney's Fees.

West Headnotes (27)

[1] **Contracts** Options; rights of first refusal
A "right of first refusal," also known as a "preemptive or preferential right," empowers its holder with a preferential right to purchase the subject property on the same terms offered by or to a bona fide purchaser.
6 Cases that cite this headnote

[2] **Contracts** Options; rights of first refusal
Generally, a right of first refusal requires the grantor to notify the holder of his intent to sell and to first offer the property to the holder on the same terms and conditions offered by a third party.
4 Cases that cite this headnote

[3] **Contracts** Options; rights of first refusal
When the grantor of a right of first refusal communicates to the holder the terms and conditions of a sale, as offered by a third party, the holder's right of first refusal ripens into an enforceable option.
6 Cases that cite this headnote

[4] **Contracts** Options; rights of first refusal
After a right of first refusal ripens into an enforceable option, the holder of the right may then elect to purchase the property according to the terms of the instrument granting the first-refusal right and the third party's offer, or decline to purchase it and allow the owner to sell to the third party.

"A grantor's sale of the burdened property to a third party without first offering it to the rightholder on the same terms ***constitutes a breach of contract***." *Id.* at 287.

Discovery Rule – Texas Supreme Court

- *Archer v. Tregellas*, 566 S.W.3d 281 (Tex. 2019)
  - Discovery rule deferred start of four-year limitations period until holders of right of first refusal to purchase mineral interest were advised of vendors' conveyance of interest to purchasers
  - Conveyance of property was reflected in a publicly-recorded instrument
  - But plaintiff had no reason to believe his rights were impaired

- *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79 (Tex. 2004)
  - Four-year limitations period for breach of warranty against seller of exterior windows used in construction of skyscraper began to run when a reasonable buyer should have discovered any defects
  - Plaintiff discovered its claim for breach of warranty when seller of windows replaced one-fourth of the windows, in response to complaint about deterioration of reflective coating

Discovery Rule – Construction Cases

- *Bayou Bend Towers Council of Co–Owners v. Manhattan Constr. Co.*, 866 S.W.2d 740, (Tex. App.—Houston [14th Dist.] 1993, writ denied)
  - Condominium association brought action against developer, general contractor, and subcontractors to recover for construction defects causing leaks
  - Limitations began to run when plaintiff learned of the window leaks, not when it determined the cause
- *Holiday Inn Club Vacations Inc. v. CBRE, Inc.*, 2025 WL 383161 (Tex. App.—Houston [14th Dist.] Feb. 4, 2025, no pet. h.)
  - Summary judgment was improper because defendants did not conclusively negate the discovery rule
  - "Several courts, including this one, have stated that the discovery rule applies in cases involving claims based on allegedly faulty construction."
  - Fact issues existed showing that plaintiff first learned of the defect when it observed water intrusion
- *Dallas Mkt. Ctr. Hotel Co. v. Beran & Shelmire*, 865 S.W.2d 145 (Tex. App.—Corpus Christi-Edinburg 1993, writ denied)
  - "[W]e affirmatively hold that the discovery rule applies in construction cases in which an aggrieved party could not have known of the wrongful act until after the limitations period has expired."
  - Fact issues existed regarding when plaintiff could have reasonably identified masonry problems

Discovery Rule – Construction Cases

- *Richardson v. Duperier*, 2005 WL 831745 (Tex. App.—Houston [14th Dist.] April 12, 2005, no pet.)
  - Reversing summary judgment on contract claim for defective construction filed 5 years after work was completed
  - Fact issues existed at to when plaintiff should have reasonably learned of defects
- *B. Mahler Ints., L.P. v. DMAC Constr., Inc.*, 503 S.W.3d 43 (Tex. App.—Houston [14th Dist.] 2016, no pet.)
  - Causes of action related to porch roof defects accrued under discovery rule no later than when project owner sent final e-mail to general contractor questioning roofs' integrity
- *J.M. Krupar Constr. Co. v. Rosenberg*, 95 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2002, no pet.)
  - "Generally, in construction-defect cases, limitations begin to run when an owner becomes aware of property damage."

***** Defendants do not attempt to distinguish *any* of these cases *****

Discovery Rule: Inherently Undiscoverable

"An injury is not inherently undiscoverable when it is the type of injury that could be discovered through the exercise of reasonable diligence."

BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 66 (Tex. 2011).

The Motor defect was inherently undiscoverable by Plaintiffs because:

- There is no dispute that the Motors were (i) complex, (ii) the largest ever built, and (iii) delivered to the Project site ***as intact units***, and (iv) were ***not scheduled to be opened and serviced for over nine years***;
- The only reasonable opportunity for the defects to have been uncovered was ***during the construction of the Motors***; and
- The Motors showed ***no signs of the defects until January 2024*** when the Train 3 motor tripped and remained offline, despite several attempts to restart it.

Therefore, the statute of limitations began to run no earlier than January 17, 2024—the date the Train 3 Motor tripped, leading to Plaintiffs' discovery of the injury at issue in this case.

Bayou Bend Towers Council of Co–Owners v. Manhattan Constr. Co., 866 S.W.2d 740, 742-44 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (limitations period began to run when plaintiff learned of the construction defects, not when it determined the cause)

Discovery Rule: Inherently Undiscoverable

- "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).

- 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).

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.

Discovery Rule: Inherently Undiscoverable

"An injury is not inherently undiscoverable when it is the type of injury that could be discovered through the exercise of ***reasonable diligence***."

BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 66 (Tex. 2011).

There is no support for Zachry's position that reasonable diligence required Plaintiffs (the customers) to perform the work they hired Defendants (the EPC Contractors) to perform.

- Under the EPC Contracts, *Defendants*—not Plaintiffs—had obligations to (i) review motor designs, (ii) implement adequate quality assurance and quality control procedures, and (iii) perform shop inspections.

- The December 2013 Engineering Evaluation Letter did not put the onus of monitoring construction of the Motors on Plaintiffs; rather it was an acknowledgement by Defendants of the complexity and challenges to construction of the Motors that *Defendants*—not Plaintiffs—were required to monitor.

Discovery Rule: Reasonable Diligence

Plaintiffs exercised reasonable diligence by requesting information to ***verify Defendants' contractual performance***.

FINAL COMPLETION CERTIFICATE

Date: April 3, 2020

FLNG Liquefaction, LLC
333 Clay Street, Suite 5050
Houston, TX 77002-4173
Attention: Taylor Auburg

Re: Final Completion Certificate – Fixed Price Separated Turnkey Agreement for the Engineering, Procurement and Construction of the Freeport Train 1 Liquefaction Project, dated as of December 10, 2013 (the "***Agreement***"), by and between FLNG Liquefaction, LLC ("***Owner***") and Zachry Industrial, Inc. and CB&I Inc. (collectively, "***Contractor***")

Pursuant to Section 11.6 of the Agreement, Contractor hereby certifies that all Work (including the Work to complete the Expansion Facility Dock) and all other obligations under the Agreement (except for those obligations that survive the termination or expiration of the Agreement, including obligations for Warranties, correction of Defective Work and those covered, without limitation, by Section 11.10 of the Agreement), are fully and completely performed in accordance with the terms of the Agreement, including: (i) the successful achievement of RLFC and Substantial Completion; (ii) the successful achievement of the Minimum Acceptance Criteria for the Expansion Facility Dock; (iii) the successful achievement of the MCHE Power Performance Guarantee or, if the MCHE Power Performance Guarantee was not achieved but the Total Gas Horsepower (as determined in accordance with Attachments S and T of the Agreement) was equal to or less than 105% of the MCHE Power Performance Guarantee, the MCHE Power Performance Guarantee Liquidated Damages in accordance with Attachment T of the Agreement have been paid (directly, by offset, or by collection on the Letter of Credit, at Owner's discretion); (iv) the successful achievement of the Gross Power Output Performance Guarantee and Gross Heat Rate Performance Guarantee (as described in Attachments S and T of the Agreement), or in the case that either such Performance Guarantee has not been achieved, the Gross Power Output Performance Liquidated Damages and Gross Heat Rate Performance Liquidated Damages, as applicable, due and owing as set forth in Attachment T of the Agreement have been paid (directly, by offset, or by collection on the Letter of Credit, at Owner's discretion); (v) the completion of all Punchlist items; (vi) delivery by Contractor to Owner of fully executed Final Lien and Claim Waivers in the forms of Schedules K-5 and K-6 of the Agreement; (vii) delivery by Contractor to Owner of all remaining documentation required to be delivered under the Agreement, including Owner's Confidential Information, test reports and the documentation required under Attachment B and Attachment EE of the Agreement; (viii) removal from the Site of all of Contractor's, Subcontractors' and Sub-subcontractor's personnel, supplies, waste, materials, equipment (except Equipment), rubbish, Hazardous Materials, and temporary facilities (other than those personnel, supplies, waste, materials, equipment, rubbish, Hazardous Materials and temporary facilities associated solely with the Train 2-Specific Work); (ix) delivery by Contractor to Owner of fully executed Final Lien and Claim Waivers from all Major Subcontractors in the forms in Schedules K-7 and K-8 of the Agreement; and (x) if requested by Owner, fully executed Final Lien and Claim Waivers from Major Sub-subcontractors in a forms substantially similar to the forms in Schedule K-7 and K-8 of the Agreement.

Contractor certifies that it achieved Final Completion on April 3, 2020.

Attached is all documentation required to be provided by Contractor under the Agreement to establish that Contractor has achieved all requirements under the Agreement for Final Completion.

IN WITNESS WHEREOF, Contractor has caused this Final Completion Certificate to be duly executed by its authorized representative and delivered as of the date first written above.

ZACHRY INDUSTRIAL, INC. AND CB&I LLC

By: _____
Name: Mark Hunter
Title: Project Executive
Date: April 3, 2020

Defendants certified that "***all Work and all other obligations under the Agreement*** (except for those obligations that survive the termination or expiration of the Agreement, including obligations for Warranties, correction of Defective Work and those covered, without limitation, by Section 11.10 of the Agreement), ***are fully and completely performed in accordance with the terms of the Agreement*** …."

Exhibits B-D (emphases added).

Discovery Rule: Reasonable Diligence

Plaintiffs exercised reasonable diligence by Service Agreement with GE / Baker Hughes.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
ZACHRY HOLDINGS, INC., *et al.*,	Case No. 24-90377 (MI)
Debtors.	(Jointly Administered)
FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC,	
Plaintiffs,	
v.	Adv. No. 24-03195
CB&I INC.; ZACHRY INDUSTRIAL, INC.; and CHIYODA INTERNATIONAL CORPORATION,	
Defendants.	

DECLARATION OF ROBERTO VARA

I, Roberto Vara, make the following declaration pursuant to 28 U.S.C. § 1746:

1. My name is Roberto Vara. I am over twenty-one (21) years of age and am qualified to make this declaration. All of the facts stated in this declaration are based upon and are within my personal knowledge, and each fact stated in this declaration is true and correct.

2. I am Vice President of Projects and LNG Technology of Freeport LNG Development, L.P. ("Freeport LNG"). With its affiliates, Freeport LNG owns and operates a liquified natural gas facility located on Quintana Island near Freeport, Texas (the "LNG Facility").

3. FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3, LLC (collectively, "FLNG") are affiliates of Freeport LNG.

4. FLNG operates the LNG Facility comprising three distinct natural gas liquefaction units known as Train 1, Train 2, and Train 3, each of which uses three General Electric 75 MW motors (the "Motors"). FLNG entered into separate Fixed Price Separated Turnkey Agreements (the "EPC Contracts") with Zachry, Chiyoda International Corporation, and CB&I, Inc. (together,

6. Because FLNG lacked the technical capability to properly inspect and maintain the Motors, FLNG and Baker Hughes entered into a Contractual Service Agreement (the "Service Agreement") dated December 30, 2016 for maintenance of the Motors. A true and correct copy of the Service Agreement is attached as Exhibit A.

7. The Service Agreement was for a term of approximately 20 years and involved scheduled service of the Motors. Notably, the motor casings were not scheduled to be opened for the Motors to be serviced until over nine years after installation.

8. On or about January 17, 2024, the Train 3 Propane Compressor 75 MW Motor tripped and remained offline, despite several attempts to restart it. Initial investigations indicated that the likely cause of the trip was an electrical fault within a non-accessible portion of the motor. That was the first time that FLNG learned of the damage that forms the basis of this lawsuit. FLNG could not have learned of the damage, through the exercise of reasonable diligence, before that date.

9. Until that time, adequate shop inspections by Defendants prior to installation represented the only opportunity to discover and correct these defects before the Motors were put into service.

Discovery Rule: Reasonable Diligence

Plaintiffs exercised reasonable diligence by Service Agreement with GE / Baker Hughes.

- Plaintiffs lacked the technical capability to service the Motors and entered into agreement with manufacturer. (Vara Decl.; Doc. 95-1 ¶¶ 5-6)
- Baker Hughes agreed to perform Planned Maintenance Schedule consisting of Annual Inspections, Minor Inspections, and Major Inspections.
- Major Inspections were scheduled every 82,480-104,000 operating hours and covered ***examination of all rotating internal and stationary components*** of the compressors. Exhibit A, pp. 89, 141 of 314.
- In the normal course, ***Major Inspections were the only opportunity*** for Baker Hughes or Plaintiffs to reasonably uncover the Motor defects.
- Given the maximum of 8,760 operating hours in a year, the ***first Major Inspection was not scheduled to occur for at least 9.4 years*** following entry of the Motors into service. Exhibit A, p. 175 of 314.

At a minimum, disputed facts about exercise of reasonable diligence prevent summary judgment. *El Paso Assocs., Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 21 (Tex. App.—El Paso 1990, no writ) (summary judgment should not be granted on issue of reasonable diligence, which is a jury issue).