UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	Case No. 24-90377
	Chapter 11
ZACHRY HOLDINGS, INC.,	
Debtor.	
	Adv. No. 24-03195
FLNG LIQUEFACTION LLC, et al.,	
Plaintiffs,	
v.	515 Rusk Street
	Houston, TX 77002
CB&I INC., et al.,	
	Wed., February 19, 2025
Defendants.	2:27 p.m.

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT [90]
BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY COURT JUDGE

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(Proceedings commence at 2:28 p.m.)

THE COURT: All right. We're here in the FLNG adversary proceeding, 24-03195. Let's go ahead and take appearances in court. If you wish to appear on the phone, please press "five star" on your phone.

MR. THOMAS: Good afternoon, Your Honor. John Thomas from Hicks Thomas, LLP, here for Zachry Industrial.

THE COURT: Thank you, Mr. Thomas.

MR. JONES: Good afternoon, Your Honor. Charlie Jones, Haynes and Boone, on behalf of Defendant Chiyoda International Corporation.

THE COURT: Thank you, Mr. Jones.

MR. JONES: Yes, sir.

MR. MASSEY: Good afternoon, Your Honor. Jack Massey from Baker & McKenzie on behalf of CB&I, defendant.

THE COURT: Thank you, Mr. Massey.

MR. TAYLOR: Good afternoon, Your Honor. Chris Taylor and Hale Neilson from King & Spalding on behalf of the plaintiffs.

THE COURT: Thank you, Mr. Taylor.

Anybody on the phone who wishes to appear, please press "five star."

Mr. Koster?

MR. KOSTER: Good afternoon, Your Honor. Charles Koster, White & Case, for the debtors. I'd like to begin with

a brief status update before turning it back to Mr. Thomas for the summary general hearing.

THE COURT: All right.

MR. KOSTER: Our confirmation hearing is scheduled for February 26th, which is exactly one week from today. I believe this is the last time we are before Your Honor until that confirmation hearing, and I'm pleased to announce that as of today, we expect to proceed on a substantially consensual basis. With respect to our senior lenders, earlier this afternoon, we filed a third plan supplement that is at Docket Number 2316, and it includes a modified exit facility term sheet. The exit facility terms are now agreed among the debtors and the steering committee of holders of pre-petition credit facility claims. Ms. Liggins, on behalf of the bank group and her team, sent that term sheet to the broader bank group and recommended approval. We have agreed with the banks to the following changes to our schedule to allow the full bank group ample time to consider the latest terms and run their internal approval processes. We have agreed to extend the voting and objection deadline for the banks until Monday, February 24th, at noon, provided that the bank's advisors will inform the debtors by this Friday if they will be objecting to the plan, and given the steering committee's approval, there should not be a full bank group objection.

We will file our confirmation brief on Sunday,

February 23rd, as contemplated by the current confirmation schedule. That will be subject to the right to supplement that brief on Tuesday, February 25th, in order to address the final Class 3 vote and any bank group objection. In other words, the only papers that we would file after the current deadlines is a response to a bank group objection, and again, there should be no bank group objection. We'll file our vote in report as soon as possible after the claims agent is able to tabulate the Class 3 votes, which will be no later than February 25th, which is the same deadline as currently contemplated in our confirmation schedule, and the confirmation hearing will proceed on February 26th as currently scheduled.

We hope these changes, which are modest, are acceptable to Your Honor, and to the extent they are, please let me know if we should file a revised scheduling order.

THE COURT: So I'm taking this as an announcement, not as a motion. I'm not going to rule on an oral motion if that's what it is. I'm not going to tell you if it's a good idea or a bad idea. If you think you can do that, do it. If you think you can't do that, you need a motion to file it. But with no notice, I'm not going to express any views on the merits of it.

MR. KOSTER: Understood, Your Honor. With respect to our general unsecured creditors, last week, we filed an amended GUC note term sheet. That's at Docket Number 2122. And that

term sheet reflects changes agreed to with the committee, and the committee filed a statement in support, which included its letter to creditors. That is at Docket Number 2123. The committee's recommendation to creditors appears to be well received, and with just two days remaining until the voting deadline, we have already received overwhelming support from holders of claims in Class 6. We've been working with several other parties to resolve potential objections through agreed language in our confirmation order, and we expect to resolve the vast majority of potential plan objections in that manner, and we anticipate filing a post-confirmation order with our brief in support of confirmation this weekend.

So Your Honor, what does that leave? We expect the United States Trustee will continue to prosecute its objection with respect to plan releases and the opt-out mechanic under our plan. We'll respond to that objection in our confirmation brief and take up the issue at the hearing next week. We expect that our former joint venture partners on the Golden Pass project may object to the plan, which incorporates the stipulation filed in our second plan supplement related to the GPX claims reconciliation. These objections would not be on account of preserving any rights against the debtors or claims that these parties have, but rather on account of their rights against each other and against Golden Pass. Neither Chiyoda nor CB&I are party to the stipulation that was filed last week,

and it should not, in the debtor's view, have any preclusive effect on their claims against each other or against Golden Pass. We have offered the parties confirmation language to make that abundantly clear, and we've also agreed to extend their plan objection deadlines until Friday to facilitate their conversations with Golden Pass, and we await their response, but do not anticipate that their issues, whatever they may be, will prevent or delay confirmation.

We expect that certain creditors may pursue objections to preserve their claims against third parties, including sureties. We'll also address those issues in our confirmation brief and take them up at the hearing to the extent necessary. One party filed a plan objection earlier today seeking to preserve its late filed claim. We will address that issue in our brief as well and our forthcoming response to the emergency motion to allow the late filed claim. That motion is also set for February 26th at the same time as the confirmation hearing, when we can address both the objection and the motion.

We don't anticipate any other objections, including from OPPD, related to the administrative claim dispute, and we will provide Your Honor with further update on that issue as soon as possible next week, nor do we expect any plan objections from FLNG or its insurers related to the dispute set for today or the previously dismissed subrogation claims.

So in sum, Your Honor, we expect to resolve all material confirmation issues prior to the hearing, and absent unforeseen circumstances, we'll be back before Your Honor next week to seek confirmation of a plan supported by all voting classes. Unless Your Honor has any questions, I'll cede the podium to any other party to --

THE COURT: So Mr. Koster, you've been talking to the parties of interest that might be here listening, not to me. I'm not going to do anything about it. I'm so old I'm not going to remember what you told me by next Tuesday so it -- it's done you no good if you're trying to influence me, but I -- I'm glad that you gave other people a roadmap to where you're going. But I'm basically going to ignore what you told me. Sorry, but that's what's going to happen.

MR. KOSTER: Fair enough, Your Honor.

THE COURT: Thank you. Mr. Fox?

MR. FOX: Yes, Your Honor. Shawn Fox at McGuire Woods representing the bank group. With what you said to Mr. Koster, you can ignore my hand. Thank you, Your Honor.

THE COURT: Thank you, sir. So I would like you all to address whatever it is you want to address, but add in, if you have -- if you're already not planning to address it, two issues that I would like specifically to be lectured on. The first is on the pleading requirement of identifying and preserving the discovery rule. I'm unable to locate, although

it may be somewhere, a Fifth Circuit rule as to what to do if somebody doesn't meet the pleading requirement. Normally in the Fifth Circuit, we just let people replead, and you see if they can then make it over that hurdle. If the hurdle is saying, we want the discovery rule to apply, I think we're all wasting our time here on that, because we now know that. I want to know what's the remedy if they haven't plead properly. Is the remedy under Fifth Circuit law to then give people an opportunity to replead, and if so, then why are we wasting our time?

Second, on a more substantive basis, I'm really confused as I read the case law as to what discoverable means. I think it means discoverable with reasonable diligence, with the exercise of reasonable diligence. But then as I read the law, it says it's a question of law. Well, if it's a question of law, and the question is, did somebody do reasonable diligence, I got to tell you, I wasn't born knowing what you ought to be doing, if you own the largest machine ever made. And so I don't know how I decide as a matter of law whether reasonable diligence has been exercised without determining the facts as to what would a reasonable owner of a facility like this do. And I can think of logical answers to that, but I can't find the law that tells me how do I rule as a matter of law without figuring out some facts. And so I would like you all to just explain that to me, both sides, what I'm supposed

to do on that issue. If you're already talking about those things, that's fine. If not, try and weave it in, because I walk out with those two things, which I'm unable to absorb from the cases and the briefs. They may be there and I may need to go reread them another time, but they're tough for me to figure those things out.

MR. THOMAS: Yes, Your Honor. And I sure understand where the Court's coming from, having dealt with the discovery rule for now almost three decades. The early cases, especially the Courts of Appeals, have struggled a little bit with the concept. Even the threads of the Supreme Court cases have meandered through the years starting with Judge Owens' opinion -- Justice Owens' opinion and HECI v. Neel, which required royalty owners to due diligence and exercise due diligence to go look at the property records.

THE COURT: I know, and they go into these things and say, well, you could have inquired about this and done this and done that even if you don't have a direct right to do it. How do I decide that that's reasonable diligence in this case? I mean --

MR. THOMAS: Right.

THE COURT: -- the Court, I think in those cases, is willing to say -- to sort of say, hypothetically, if you had done this, it would've worked, and we think that it was reasonable to ask you to do that. That seems different when

what I have is a hugely complex machine.

MR. THOMAS: Well --

THE COURT: -- and outside of my judicial knowledge as to what to do if you own a great big engine.

MR. THOMAS: Yeah, and the starting point of what I had prepared in the deck, which I'll just cut right to the chase here, is obviously this is the third time we've been down here. The first was on gross negligence where we pled that they failed to satisfy the standard. The judge agreed to give them a chance to replead. They did replead, and they doubled down on gross negligence, so to speak. They said that these defects were so obvious that a reasonable inspection would've identified not only in the design phase, but in the manufacturing phase as well --

THE COURT: I don't -- the fact that they said that these things, had you done them, would have uncovered them, I do think means anyone that would've done that would've uncovered them. But I don't know if a reasonable person in this industry owning a giant machine would do more than hire GE to say, come do annual maintenance and monitoring of what we're doing. That's what they're telling me that they did in general to discharge that duty. How am I supposed to know if that's sufficient as reasonable diligence? Are they required to go take off the external plates on the engine and look at the internal mechanics of it? What are they required to do, and

how -- more importantly, how do I figure out what they're required to do?

MR. THOMAS: I don't think it's a subjective inquiry here. In other words, what they or -- did or didn't do is not the inquiry. The inquiry is, were that -- was the problem inherently undiscoverable? That's number one.

THE COURT: No. That's not what the circuit has told me to do.

MR. THOMAS: But in the --

THE COURT: I think they told me to do, is it not discoverable with the exercise of reasonable diligence?

MR. THOMAS: Well, I was going to come to the second point there, Your Honor. So is it inherently undiscoverable? So if I start with the pleading that says, it's obvious, it's -- can be identified easily by just looking at the design, by just looking at and opening the hood, I would say that looking inside, that it's akin to lifting the hood and not seeing a bunch of spark plugs there. It's not the cases that are latent-defect cases, Your Honor, like a foundation where somebody didn't follow the design, where you really can't find that out.

But secondly, as it relates to the reasonable diligence, that qualifies the objective thing as to whether or not it's objectively -- whether or not it is inherently undiscoverable. So were the defects, could they be identified

through extraordinary measures? Well, that's not the test. Could they be examined through reasonable measures, which, as you know, by going to the --

THE COURT: That's not the --

MR. THOMAS: -- real property records.

THE COURT: -- that's not the test either.

MR. THOMAS: Well, the test is --

THE COURT: It's not reasonable measures, it's reasonable --

MR. THOMAS: Diligence.

THE COURT: -- diligence.

MR. THOMAS: I'm sorry. I --

THE COURT: Well, no, but, I mean, it matters to me because I mean, I bet you that if I went and opened the shields on that engine, I wouldn't be able to know, right? So it's going to be some expert opening the shields on there, that knows what they're looking at.

MR. THOMAS: But one of the things we also know from the first amended complaint, Your Honor, is the monitoring that they did identified an abnormality, that when they inspected it, they identified it via visual inspection.

That's in their complaint. That's in the first amended complaint. I -- to me, I would suggest to you that that would satisfy the requirement. And I think if you look at the Sheet Pile --

THE COURT: Well, see I don't -- I'm actually -- so I have this impression, that may be wrong, that this engine wouldn't fit in this courtroom, right?

MR. THOMAS: Well, I mean, it's pretty big.

THE COURT: I don't know what it means to do a visual inspection of that, and whether it is reason or diligence for who to do that? The president of the company? No. For an engineer to be retained? They did.

How do I determine in the context of what I have, because it -- it's clear that it varies from case to case when you read these cases, how do I determine that without holding a mini trial on this, reserving it for trial?

You're asking me to decide on summary judgment, which means that there has to be case law that gives me guidance, which I'm not finding, on how to decide what reasonable diligence is.

MR. THOMAS: Well, I would say that Sheet Pile gives you guidance. Judge Willett, who was one of the judges in one of the cases we cited, says that the contracting parties needed to use due diligence to protect their interests.

For example, in that case, asking the counterparty, did you do what you said you did? So there's no evidence here that they didn't ask us.

THE COURT: You said that you did what you intended -- what you were supposed to do. You all filed a certificate

with them that says --

MR. THOMAS: We did.

THE COURT: -- we've completed all the work.

MR. THOMAS: We did.

THE COURT: Do they then need to go back to you and say, did you lie about that?

MR. THOMAS: Well, but I think --

THE COURT: I mean, I don't -- maybe --

MR. THOMAS: -- I --

THE COURT: -- they do under that -- because I read that. I said --

MR. THOMAS: Yep.

THE COURT: -- how are they supposed to know to ask in this context?

MR. THOMAS: But I think that it -- Your Honor, I -- I'll just kind of sort of cut to the chase. If you believe that it is a subjective standard, and not something objective that the Court decides as a matter of law maybe you're going to deny the motion, but I think that --

THE COURT: Well, no. I really want to -- the reason I'm asking the question, I really do want to follow the law.

MR. THOMAS: Yes.

THE COURT: And I'm told by the opinions, it is a question of law.

MR. THOMAS: Yes.

THE COURT: And my question to you is, how do I answer this as a law question without a fact basis? And, I mean, my speculation is that I should hear enough evidence to know what occurred, and then decide as a matter of law whether that was adequate.

I should know what normally occurs, and then what did occur, and then determine, was that reasonable diligence? But if I don't know what normally occurs in these situations, does inquiry normally occur? Do you normally hire somebody to take the engine apart, do a visual inspection of it?

I mean, but I'm guessing this isn't -- I can't even take apart my Equinox anymore, you know, right? I used to be able to change out the timing belt, right? I'm not taking apart an engine today. I bet these are more complicated than my Equinox.

MR. THOMAS: Well, and let's say also, Your Honor, that this isn't necessarily the normal situation, given the fact of the uniqueness of the project. But I think what you can take as a matter of law, based on their pleading, the fact that these defects, the problem associated with the -- that's underpins the breach-of-contract action, was not undiscoverable, okay?

THE COURT: I -- first of all, I -- if that's the question, unless they persuade me otherwise, your briefing and their briefing convinces me that it would've been discoverable

if that were the test. That's not the test.

Virtually everything in the world is discoverable at some point. The question is, is it discoverable with the exercise of --

MR. THOMAS: Reasonable diligence.

THE COURT: -- reasonable diligence, which means I need to understand, in the industry, I think, what is reasonable diligence when you have one of the largest engines known to man?

MR. THOMAS: One of the things we do have in the summary judgment record is that they did hire Baker Hughes to do monitoring. That's the kind of monitoring that defects -- that identifies abnormalities. We know from their pleading that their monitoring did identify abnormalities, which they identified upon visual inspection.

And so Your Honor, I think that given the summary judgment record, and given the state of the pleadings, you can make that determination on this record, but --

THE COURT: You're telling me it was actually discovered?

MR. THOMAS: It's in their pleading. I'll tell you what paragraph.

THE COURT: No, but that -- that's not -- that is one test, but that's not the test I'm asking about. The test I'm asking about is, what's reasonable diligence? If you're

telling me they actually discovered it, I don't worry about what's reasonable diligence, because once they actually know about it, we then know that at a minimum, that starts the car, right?

MR. THOMAS: Well, if they -- but the thing is, if they identified the problem after limitations, that means that they could have identified it before. And we know that, for example, the test is, could it have been identified?

THE COURT: No, that's not the test. That's what -- you keep --

MR. THOMAS: Wagner and --

THE COURT: -- wanting that to be the test. The test isn't, could it have been identified? I --

MR. THOMAS: Through reasonable diligence.

THE COURT: Yeah. Through reasonable diligence.

MR. THOMAS: Yeah.

THE COURT: And don't forget, I think they ran some of those tests after engine 3 failed, and they could then run tests on 1 and 2, so it may have been reasonable to do something after engine 1 failed -- after engine 3 failed, which would not have been reasonable diligence before it failed. All that that is proving to -- if I'm -- if I have my chronology right --

MR. THOMAS: You do, Your Honor. You've got the record and the pleadings right on.

THE COURT: Okay. So if that's right, that doesn't tell me what the reasonable diligence needed to have been during the period before the statute ran, because that's your argument. And how -- I'm asking you, how do I figure that out under the law?

MR. THOMAS: And I understand your struggle, Your Honor, but I -- at the same time, these determinations are made categorically. None of the cases that I'm familiar with actually had that preliminary fact-finding available.

THE COURT: I know.

MR. THOMAS: It's on the record.

THE COURT: So how do I figure it out? Because I don't know. I mean, I'm telling -- if this was something I knew about, I could say, well, no, that's not reasonable diligence, or, that is reasonable diligence. What's a judge to do when he doesn't know?

MR. THOMAS: Well, of course, Judge Owen knew quite a bit about the oil and gas area, and royalties, but not every judge does put in that position. And all --

THE COURT: I bet that there are very few of us that understand these engines.

MR. THOMAS: I wouldn't disagree in this courtroom, probably, Your Honor.

THE COURT: So what are we supposed to do?

MR. THOMAS: Well, you sort of put me on my heels

here, because I understand exactly what you're talking about. So let's explore that a little bit. Would the Court -- what would the Court feel that would in -- what information would the Court want to hear --

THE COURT: So --

MR. THOMAS: -- that would help you --

THE COURT: -- I think that's a fair question --

MR. THOMAS: -- define -- determine --

THE COURT: -- but what --

MR. THOMAS: -- the question of law?

THE COURT: Yeah. But here's what I don't know, is whether that fits within the law determination the Fifth Circuit is making me do. This is why I'm so puzzled, is I don't know, literally, how I do it.

I think if I had experts up here saying that when you have extremely large machines that are involved, this is the kind of diligence that an owner should be undertaking on a regular basis, and if I had that, I could then determine, as a matter of law, whether they exercised reasonable diligence.

But if I don't have that expert telling me what that reasonable diligence was, that I actually haven't figured out anything else that would work for me.

MR. THOMAS: I'm just pushing back just a little --

THE COURT: No, go right ahead.

MR. THOMAS: -- because, you know, Judge Willett, in

Sheet Pile, was writing about whether or not a counterparty could determine whether a vendor of steel products, who had an agreement not to sell to somebody else, actually did it.

THE COURT: And they said, well, why didn't you just ask your counterparty to the contract, right?

MR. THOMAS: That was one thing, Your Honor, yes.

THE COURT: Mm-hmm.

MR. THOMAS: But it -- he also said that you've got to exercise diligence to protect your interests.

THE COURT: Right.

MR. THOMAS: And one of the things we know from the summary judgment record is that they did hire somebody to look out to determine whether there's a problem, and whether they found it or not is not the inquiry. It was whether it is discoverable through reasonable diligence.

THE COURT: Well, there's -- I understand what you're telling me, but they hired someone who didn't discover it with whatever diligence they exercised. So maybe that's proof it is not discoverable with reasonable diligence, because at least one person, GE, not just anybody off the street, didn't discover it, but I don't think I should make that decision without context.

MR. THOMAS: I will just say, it's not --

THE COURT: Because I think an expert would tell me, when you hire someone to do this, here's what you want to hire

them to do, and I don't know what GE was hired to do compared to with what GE should've been hired to do.

MR. THOMAS: I will say this, Your Honor. Objectively, it doesn't matter whether they didn't find it before limitations ran or after. The real issue is, it was identified, and that is in the pleading.

THE COURT: No, was -- it was not identified until after motor 3 goes bad. All you're telling me is, it's possible to find it, but without the context, I know I keep saying the same thing over and over --

MR. THOMAS: Yeah. I --

THE COURT: -- and you're being very responsive to my question, and I think you're hearing my frustration, not at you, but I think at what a -- I think the instruction I have to follow, I don't understand.

MR. THOMAS: Well, and I'll be candid with you, Your Honor. I don't have a silver-bullet case that you can follow in that regard. I have the general principles, which I think Your Honor has nailed down pretty well.

THE COURT: I will say one of the nice things is, I got to read something written by Judge Willett, which is always a pleasure, right? But no.

MR. THOMAS: Well, and I would just say, Your Honor, that I think that gives the guidance to be able to answer the question in our favor, with regard to the statute of

limitations, that it could've been discovered. It wasn't inherently undiscoverable, and it could've been --

THE COURT: Yeah. I actually -- I've been -- I'm just -- as I've said --

MR. THOMAS: -- discovered through the exercise of reasonable diligence --

THE COURT: -- and I'll repeat it unless they can really --

MR. THOMAS: -- yeah.

THE COURT: -- persuade me otherwise. I don't think it's inherently undiscoverable, from what I've read.

MR. THOMAS: Right.

THE COURT: The question is, is it discoverable with reasonable diligence, which I don't know. I've spent enough time interrupting what you wanted to do, so why don't you do what you wanted to do --

MR. THOMAS: Well, Your Honor, with that said, I mean I've got a presentation, but we've cut to the chase here.

THE COURT: That's up to you.

MR. THOMAS: So I would submit to you that I would be interested in the Court's guidance further on what would inform you on reasonable diligence.

THE COURT: So well, I mean, I'll just ask you. If what I were to order would be a mini trial where each side can have up to two experts to tell me what reasonable diligence is,

give each side three hours just on that question, we don't do anything else, what would you think of that?

MR. THOMAS: Your Honor, standing right here, right now, without conferring with my colleagues or the other side, in light of where the Court is, I -- I'd be inclined to take you up on it.

THE COURT: Do you think that's -- is that consistent with my duties under Fifth Circuit law?

MR. THOMAS: As I've said, I think your duties under Fifth Circuit law have -- can be discharged by ruling right now.

THE COURT: I understand that you think that would be one way to discharge my duties under Fifth Circuit law.

MR. THOMAS: As it relates to the answer to your question, I really don't have any guidance on this issue. As it relates to the second prong of the inquiry, and what facts, in what is supposed to be an objective test that's decided categorically, whether you go beyond that by actually getting involved in taking evidence. But I'm -- I -- I'm hearing you loud and clear, Your Honor, as to where -- what you're struggling with.

THE COURT: So you're not going to -- and this is okay. I just -- I'm going to make you play the game with me. You're not going to -- you're not going to tell me whether you think that if I do that, that's consistent with Fifth Circuit

law?

MR. THOMAS: Well, I will tell you, Your Honor, I don't know of any Fifth Circuit law that would say that it's inconsistent.

THE COURT: Fair enough. At least I wouldn't blatantly violate Fifth Circuit law, right? Okay. Well, if -- again, you make what presentation you want. We've had a good discussion. You've answered what I came out here needing to know, but I want to hear anything else that you might have to tell me.

MR. THOMAS: Well, Your Honor, I -- I'll just be candid with you. I don't think there's anything in what I have planned to present to you that's going to move the needle on the discussion.

THE COURT: Okay.

MR. THOMAS: We've honed in right on the issue. I think it would be worthwhile to have some discussion with my colleagues and co-defense counsel on the Court's concerns --

THE COURT: What about the --

MR. THOMAS: -- and question.

THE COURT: -- what about the re-pleading question?

MR. THOMAS: Oh. I will answer that --

THE COURT: Okay.

MR. THOMAS: -- because I do have an opinion. You know, of course, I do recognize that this circuit standard,

that it's a low bar. But we do have a circumstance where they did have an opportunity to re-plead, and they're -- no doubt, they're well familiar with the requirements to put you on notice. Of course, in Texas, it has to be affirmatively pled in your petition.

But let's imagine when we were here arguing the case on gross negligence, and at the same time that they were saying we were -- the defendants were grossly negligent because they failed to identify these obvious defects, obvious in design, obvious in manufacture, that all you had to do is lift the hood and you'd see it, you would see the problem. I will tell you, Your Honor, I will go to -- could you permit Zachry trial team to put up my deck?

THE COURT: Sure. All right. You should have the control.

MR. THOMAS: Is it up? Okay. I -- I'm going to skip the pretty graphic, Your Honor. We've already talked about the certificate. This is an image that one of the -- one side of the bolt is gone. And of course, tying back to a simple review of the design would've identified that design defect.

And of course, when we were here, arguing, Mr. Taylor said, because these are detailed designs, they look at the design, and you see a locking nut on one side, and not a locking nut on the other side.

That, we believe, should have clued them in. That's

one of those issues about, it doesn't take an expert to say that all you have to do is look at the design and you would have identified the problem. I mean --

THE COURT: So -- but there are -- how many? Seven million parts in one of these engines.

MR. THOMAS: And these --

THE COURT: Is it reasonable diligence for the owner, who contracts with a contractor, to look at each of the seven million parts and see if they're properly designed? Maybe?

MR. THOMAS: And maybe they --

THE COURT: But maybe not.

MR. THOMAS: -- should have identified the missing bolts.

THE COURT: Yeah. No. That makes it discoverable.

MR. THOMAS: Yeah.

THE COURT: I don't know that it makes it discoverable with reasonable diligence.

MR. THOMAS: We're back to that inquiry. But now, I'm staying on the point of re-pleading and --

THE COURT: Okay.

MR. THOMAS: -- and the issue on the pleading issue.

THE COURT: Okay.

MR. THOMAS: So imagine that I'm here, arguing the gross negligence, and at the same time, they've said that these things are easily-identified, obvious defects. They pled that

it was inherently undiscoverable and that they could not have identified it through the exercise of reasonable diligence.

We wouldn't have had to go through all of this stuff on gross negligence, and it sure would've been pretty obvious that you can't have your cake and eat it, too. So they did get a chance to re-plead, and they made a choice because they were swinging for the fences on the $400 million consequential damage claim.

So I think that under those circumstances, the Court would have discretion in not allowing a re-pleading because they had an opportunity to do so. They should and are charged with the knowledge that that law is what it is, and had they wanted to do so, they could and should have done it.

So I think it's different than a lot of cases because of the circumstances, and the circumstances are, number one, they had a chance to re-plead, and two, there's a pretty objective reason why they may have gone one direction versus another.

THE COURT: Okay.

MR. THOMAS: Yeah. That's my --

THE COURT: Thank you. That's a fair answer.

MR. THOMAS: So with that said, Your Honor, I guess I'll yield the floor. I guess one thing that counsel and I have stipulated on is, you may consider the declarations of both sides without receiving live testimony for purposes of

proving out the admissibility of what's contained therein.

THE COURT: Thank you.

MR. THOMAS: And with that, Your Honor, I guess before we leave today, I'd like an opportunity to recess and discuss with our colleagues the Court's questions and potential game plan.

THE COURT: Well, let's see what Mr. Taylor says. But what I would suggest that we do is just have a phone call tomorrow afternoon so you're not having to rush through that --

MR. THOMAS: Sure.

THE COURT: -- and we'll set up a call at -- we'll do four o'clock or something.

MR. THOMAS: Right. We'll be available at the Court's convenience.

THE COURT: Well, let's see what Mr. Taylor wants to do. But for now, I'll set up call for a -- you're welcome to come over here to the courthouse, but I think for this kind of a question, it's inefficient. Do what you want.

But then we'll do an audio-video, as well as in-person, hearing for anybody that wants to come at four o'clock tomorrow to see what your answer is on my query.

MR. THOMAS: Okay. Thank you, Your Honor.

THE COURT: Thank you.

Anybody else from the right side of the room want to try and take away something that Mr. Thomas said, laugh at him,

or anything?

Okay. Mr. Taylor?

MR. TAYLOR: Thank you, Your Honor. I'll address the two questions that you had first before I'll jump into it with my planned presentation. The first is pleading requirement, what it the recourse if you find that the pleading requirement is not met.

One point, the threshold issue, the pleading requirement is exceedingly low. We're not talking about (indiscernible), we're talking about Rule 8. And the case that they cited for the position, and I'll get into it in a minute, that you don't have to even plead discovery rule of Federal Court, you just have to plead facts that would put them on notice that we might assert discovery rule, those facts, we greatly exceed those. So I think that we've met pleading standard.

THE COURT: Yeah. Just in fairness to you, so you know why I'm asking the question, I decided that it was so irrelevant and I wasn't going to worry about it because you could re-plead. But if I'm wrong about that, then I'll make it relevant, and I'll look at whether you pled accurately.

But I -- if it was just going to be, all -- okay, so I'm going to make them go back and file a statement that says they're -- then I'm going to just make him not make you do that.

MR. TAYLOR: Right. Understood.

THE COURT: But --

MR. TAYLOR: But --

THE COURT: -- if that's not the rule, then it's -- then I need to go back, and I need to worry about the careful analysis.

MR. TAYLOR: So in the 15 minutes or so that we've been able to look at this issue while we've been sitting in here without, obviously, full research, we did not find, did not identify, a Fifth Circuit case that really spoke to the issue of re-pleading as to the discovery rule.

THE COURT: Okay.

MR. TAYLOR: However, there were cases from other jurisdictions in which the Court had the discretion to allow re-pleading in response to discovery in (indiscernible) --

THE COURT: Is it a standard -- and I know you've only had 15 minutes. Is it a standard Rule 15 kind of analysis on leave-to-amend-should-be-freely-granted kind of thing?

MR. TAYLOR: I think so. It's -- yeah. It's essentially that, yeah, that the Court has discretion to allow the pleadings.

THE COURT: And I think that's the same thing that Mr. Thomas is telling me. And then it's just a question of whether I'll -- I think that you'd put yourself in any box where you shouldn't be granted that discretion. So okay. So

let's go to the big question.

MR. TAYLOR: As to the discoverable issue, you -- I think Your Honor is lasered in on the issue. It's not, could this potentially have been discoverable?

And they say in their reply multiple times, was there information available?

Your Honor nailed it that that's not the test. It's, through the exercise of reasonable diligence, could it have been discovered? And again, could it have been discovered by the plaintiffs and not the parties, the three largest EPC contractors in the world, who we hired and paid billions of dollars to construct these projects, could us, the owner, in the exercise of reasonable diligence, had discovered these defects?

THE COURT: Yeah. When -- and where this gets tough is, I don't think you get to shift the burden to them under the law.

It's really -- and he sort of quoted it out of the Judge Willett opinion, where he says, if you're going to be in a contract, you're taking it upon yourself to monitor the other side's performance of the contract.

That was a telling kind of comment for -- and a surprising comment for me to --

MR. TAYLOR: Right. Which is exactly what we did. We -- the contract laid out, as to the contract between the

contractors and the owners, who had responsible for what -- responsibility for which activities and which tasks.

And as Your Honor pointed out in connection with the certificate -- certificates of final completion, we did ask them but we have required them to certify that they fully and finally performed all of the contract requirements in accordance with the agreement.

So that was Mr. -- as Judge Willett set out, that was at least one act of reasonableness on our behalf to ensure that these contracts were complied with. But I think that the bigger issue --

THE COURT: But that opinion goes on and it says, and then if somebody lies to you, then fraud will extend the discovery rule.

You know, they didn't lie to you, right? They thought they had finished. No one intended for these engines to blow up or the -- for the bolts to not be in there, right, or for any of these other things. So I don't really have the fraud issue that Judge Willett was going for.

MR. TAYLOR: I think what this -- frankly, what this boils down to, Your Honor, is, they're the movant here. They filed their motion for summary judgment on affirmative defense. They had -- they have an obligation to -- the standard is, they have to conclusively prove their affirmative defense.

And when we're talking about limitations, as they

have to go a step farther, and they have to prove when the cause of action accrued --

THE COURT: Wait. It's your affirmative defense, right?

MR. TAYLOR: No. It -- that -- we're the plaintiffs --

THE COURT: They're saying statute of limitations, you're saying discovery exemption.

MR. TAYLOR: Right. Right. But when you -- when you -- when you are moving for summary judgment on limitations, you have the --

THE COURT: Right. But you have -- they have the affirmative burden of proof on saying it was more than four years ago. You then have the affirmative burden of proof of saying discovery rule.

MR. TAYLOR: No, Your Honor.

THE COURT: No?

MR. TAYLOR: That --

THE COURT: Okay.

MR. TAYLOR: -- the case law is abundantly clear that they have the -- they have the obligation to conclusively prove limitations, and conclusively prove, disprove, the discovery rule. That's their obligation under the clear applicable authorities.

The fact that you're even struggling with the fact of

whether or not reasonable diligence -- whether reasonable diligence is met, that proves that they have not conclusively proven limitations defense and conclusively disproven discovery rule.

Now, Your Honor's -- I know Your Honor entertains or -- a possibility of having sort of a mini trial with experts down the road, but I don't -- I mean, I'm not aware of any Fifth Circuit authority that allows that. We're here on their motion for summary judgment right now. They have the burden. We've responded. If they haven't met their burden, I submit that Your Honor's recourse is to deny their motion.

THE COURT: But if I deny the motion, I then have case-management responsibilities. And it would seem very wasteful to proceed with a full trial when I have an issue that is so undecided, like a full defense, and I could resolve that in just a very short hearing.

So it actually doesn't completely answer the question, because on my own case management motion, I'm going to come back to you and say, let's get this done first.

MR. TAYLOR: That -- that's fine. I -- I'm just saying, in connection with their motion for summary judgment, if they haven't met their burden today, then I don't think they get -- they get another bite of the apple. They don't get a second swing down the road --

THE COURT: But then --

MR. TAYLOR: -- on summary --

THE COURT: -- how do I -- how does this decision get made, as a matter of law, so that we're not wasting all the money on a trial, and, you know, I can't imagine how expensive this trial is going to be, and instead first take up the discovery issue?

MR. TAYLOR: I don't know that this issue necessarily is decided as a matter of law. I think when you're talking about reasonable acts, it -- it's almost always a fact issue for the fact-finder.

THE COURT: Well, yeah. But the Fifth Circuit says you decide the discovery defense, the discovery rule, as a matter of law.

MR. TAYLOR: Whether it applies as a matter of law. And -- but as far as --

THE COURT: Yet how do I decide if it applies without knowing what reasonable diligence is?

MR. TAYLOR: And again, that goes back to the, well, whose burden is it to prove, to disprove, reasonable diligence at this hearing? And it's the movants.

THE COURT: Well, and I appreciate we're here on the summary judgment. And you're right, that I maybe should just think about that in isolation. But even if I do, then the very next thing I should think about is, how do I have an efficient trial? And at that, do I then take evidence on what the

reasonable diligence is, or do I somehow just define that without any background of somebody telling me what reasonable diligence is?

MR. TAYLOR: I don't have an answer for you today. I suspect that the facts related to reasonable diligence are going to be intertwined with, what were the defects? Could they have -- could they have been discovered? So all of that's going to come out at the ultimate trial of the case.

THE COURT: Well, why wouldn't we separate that out? Because we wouldn't need -- if you lose this issue, we don't need the rest of the trial.

MR. TAYLOR: Correct. But I don't know that you can -- I don't think you can separate out reasonable -- what did -- we -- what we did was reasonable was -- that reasonable diligence, how you could separate that out from the merit --

THE COURT: I'm supposed to decide as a matter of law. I'm asking you for guidance. How do I decide that as a matter of law?

MR. TAYLOR: I think in the summary judgment phase, if you can't decide as a matter of law in favor of the defendants, then you have to deny the motion for summary judgment.

THE COURT: And what about after summary judgment? How do I decide it as a matter of law?

MR. TAYLOR: I -- we -- I haven't researched that

issue, so I'm not -- actually not prepared to address how procedurally that would be raised. So I've got a PowerPoint presentation. And if you could allow Mr. Neilson (phonetic) to --

THE COURT: Sure. Yeah. You should have it now, Mr. Neilson.

MR. TAYLOR: Sorry, Your Honor.

THE COURT: It's okay. Do I need to send it back to you?

MR. TAYLOR: I can do it. Your Honor, if we -- in addition to the discovery rule, you know, we have asserted in response -- our response that there are two independent bases and independent bases to deny the Zachry's motion for summary judgment. The first one is that we have -- we filed this action within four years of when the defendants completed their work under all three EPC contracts within four years. And therefore the action was timely. In addition to that, we believe that with the exercise of reasonable diligence, we could not have discovered these defects until we actually did in January of 2024. Obviously the lawsuit was filed within the four-year limitation.

THE COURT: So where, in anything, do you or they tell me what is the exercise of reasonable diligence in misconduct?

MR. TAYLOR: Let's --

THE COURT: Because I will tell you, on the former argument, I'm pretty persuaded by the case law that says that when the breach occurs is when the statute starts, not when the contract is completed.

MR. TAYLOR: Okay.

THE COURT: You know, I may be proven wrong on that, but for now that's where I'm on that issue.

MR. TAYLOR: Okay. Why don't we jump to -- jump to Slide 19? Do -- so this is -- this is a declaration -- we going to put it in presentation mode? Is it doable or not?

MR. NEILSON: It'll jump, but it'll create a new window and --

MR. TAYLOR: Okay. So this is the declaration from our -- he is the VP of projects and LNG technology for Freeport. And in addition to asking the contractors to confirm that the action applied to the contract that we talked about earlier in the certificate of final completion, Mr. Vara says in this declaration that because Freeport lacked the technical ability to inspect and then maintain the motors, we entered into the contract with -- a service contract with GE, now known -- and now with Baker Hughes, that businesses has spun off in Baker Hughes, but then entered into the contract with GE to service it.

And so we contend that it's reasonable that these are, again, the largest of their kind of motors ever

constructed at the time. No one had constructed a motor like this. So we entered into a contract with the manufacturer of that motor. They had a service schedule that's set out in Exhibit A to our agreement. And we complied with that service schedule. And if that's not reasonable diligence, because the party who should know the most about these motors and how they should be inspected and maintained and followed their recommendations and hired them to actually perform the service, then I don't know what reasonable diligence is. Mr. Rivera also says that --

THE COURT: So how do I know, from the summary judgment record, whether the contract that you signed with them had the provisions to invoke reasonably diligent inspections? You may have been diligent in picking GE as a matter of law, but then you all, presumably, and I don't have this in the record, negotiated what you wanted GE to do. Maybe there was no negotiation, and GE only told you, here's what we demand to do. But I don't have that in the record.

And so if there's a contract negotiation -- and for example, if you decided, and I -- I'm making this up because, I don't know how this contract comes about, to delete the provision of the contract that said that there'll be a visual inspection of the internals of the motor at least every 18 months or every 10,000 hours of runtime, and you all deleted that thinking it wasn't necessary, then maybe this was or

wasn't reasonable.

How do I decide that question?

MR. TAYLOR: These were the maintenance recommendations from the manufacturer.

THE COURT: How do I know that?

MR. TAYLOR: Because it was in -- it's in their contract that we signed with them.

THE COURT: Oh, it's in the contract that's attached to Exhibit A?

MR. TAYLOR: It is Exhibit A. It's --

THE COURT: Right. And it says -- you're telling me it says, these are the recommendations we make as to what we should do, or this is what you're hiring us to do?

MR. TAYLOR: These are -- it -- I believe it says in there that these is the service recommendations. We can certainly find a pincite on that.

THE COURT: Okay.

MR. TAYLOR: So I think that the -- Mr. Rivera's declaration establishes at a very minimum, a fact issue that we exercised reasonable diligence in and -- just kind of discover what needs to be back. I know Your Honor said that you're -- you seem to be persuaded on when the contract is breached as far as -- and I agree. But what is the -- I think the -- there's a question of what is when it was breached?

And if we can jump to Slide 3 real quick.

So I don't think there's any dispute that the standard is a contract -- that a breach of contract claim accrues when it's breached. But what does -- what does that mean, breach? So these contracts, the train 1 and train 2 EPC contracts were entered into in December of 2023. The final completion of both of those contracts did not occur until May and June of 2020 respectively. So we're talking about six- to seven-year period in which the contractors were performing work on these -- on these expansion computers.

If -- so they -- if the turnkey EPC, engineering procurement construction contract, if they engineered something wrong in year one, technically that would be a violation of their obligations under the contract. So how -- if our cause of action accrues on day one, then we don't even have a functioning plan for years later. It makes no sense that that's the date on which the cause of action accrued.

And they -- I mean, they don't even take that admission. They take a -- they take this arbitrary milestone of "ready for load first cargo" as a date on which they say that the cause of action should accrue. As the -- got the cases cited here. You've got a continuing obligation. You've got multiple milestones. You've got multiple progress payments, can't just take a snapshot in time. The cause of action accrues once the work is completed.

And we -- we've cited a bunch of cases here. They've

tried to distinguish those or as many of the claims are -- were for payment by the contractor. Not all of them were, but all of the cases that we cited in support of our discovery rule argument, the baseline date on which the Court started its analysis of when the cause of action accrued is when all the work was completed. And --

THE COURT: And so if it was a design defect, we'll take that to start, and you had the opportunity, and a reasonably diligent person would have, thoroughly reviewed the design, then why wouldn't it accrue at the time of the design? It would make more sense to be able to begin the breach at the time of the design. So you didn't build it wrong. And so I don't know that it necessarily follows what you're telling me now.

If it is the design isn't completed properly and that doesn't occur until the final day of the contract, then I do understand your argument. But then there was in fact a breach towards the end of the contract. But from the specifics of your pleading, where part of this is very early on, and you certainly could have discovered, maybe not with reasonable diligence, but you could have discovered a design defect -- let's take the two lug nut washers. That's an easy one. Tell me logically why you would wait.

MR. TAYLOR: Why? Because we didn't --

THE COURT: Why would the law say that we would go

until the end when the Supreme Court has clearly said that it's the date of the breach that accrues the contract claim?

MR. TAYLOR: We weren't injured at that point. We weren't injured at the point of the -- of -- in this hypothetical -- the design defect. It --

THE COURT: Wasn't this -- isn't -- this is the design defect we're talking about, right? It's not hypothetical.

MR. TAYLOR: Right. But there's -- there -- it's not even their allegation that the breach occurred at the day of the design defect. They don't try to even take it that far back.

THE COURT: No. Actually, I think what they say is the latest it could possibly be would have been the April 10th date, and their position is that it accrued each time that you said that they misperformed.

MR. TAYLOR: Right.

THE COURT: They don't give a date for each date of misperformance.

MR. TAYLOR: And the final misperformance was the date of the final completion, when they signed their certificate saying that they fully and finally performed all of the allegations in that agreement.

THE COURT: And is that a breach? It turned out to be wrong, but is that a breach of the contract?

MR. TAYLOR: I think it is. They had an obligation to submit a certificate saying They fully implied to the contract.

THE COURT: They did that.

MR. TAYLOR: And that is false. Then --

THE COURT: It's not knowingly false. It's incorrect.

MR. TAYLOR: Correct. We're not -- we haven't alleged --

THE COURT: No. I'm just saying -- I just want -- I'm not sure there's a breach. Maybe there's a breach.

MR. TAYLOR: I would submit that there would be a breach if they had an allegation to confirm that they complied with the contract.

THE COURT: So that's April 10th when they did that?

MR. TAYLOR: No, no. The dates of the final completion.

THE COURT: Well, they signed that certificate that you're describing April 10th, right? And then there's another one later?

MR. TAYLOR: No, no. The -- what the date that they're talking about this -- again, there's a milestone in between. The date that they're talking about is this date that the --

THE COURT: The CFP --

MR. TAYLOR: Yeah. Ready for cargo in or what whatever the dates --

THE COURT: Right.

MR. TAYLOR: -- whatever the date is. But the dates of final completion, as shown in Exhibits B, C, and D to our response, the earliest one is May 8th, 2020, which is more than -- which is less than four years after we filed our lawsuit in April of 2020. But that -- that's the argument on the accrual of the breach.

I want to briefly touch on the pleading standard that I don't think you have to get into the weeds. We can go to Slide 7.

So this Brandau case is the case from the Fifth Circuit that they cite. And when they agreed that we don't have to plead the discovery rule to Federal Court. All we have to do is plead facts that put the defense on notice of the theories on this -- on the facts. So this Brandau case, it was a products liability case. The plaintiff sued the manufacturer of her knee replacement joint. She had the surgery in October of 2007. She began to experience pain three months later in January 2008. And then she had an X-ray that confirmed basically that the bolt was loose in September of 2008.

And this is a -- the text is quoted. I've just excerpted out what the parties are. But the Fifth Circuit found that the facts pleaded by the plaintiff that she did not

start to experience pain until three months after the surgery, did not receive a tentative diagnosis until September 2008, gave the defendant sufficient notice that the plaintiff might assert the discovery rule. And therefore the Court reversed the dismissal of the case. So if that's all that's required to put the defendant on notice that, I didn't have pain right away. I know, by the way, I had an X-ray, you know, some months later. And that -- that's when I finally identified that I -- that I had this injury, we have gone way beyond those allegations. So we think that the repleting analysis is moved. We believe that we have to plead the stand here.

Just to address Mr. Thomas's point about what, I guess, he perceived some tension between our gross negligence claim or the discovery rule claim, we absolutely allege that they had an opportunity to discover these defects both in the design phase, the manufacturer -- our allegations are that that was their obligation to do so. Again, we hired them. We paid them millions of dollars to perform these tasks. It's not reasonable for the owner of the construction project to essentially be charged with doing all of the tasks that had paid the contractors when they haven't cited a single case that essentially says that we have to do everything that we paid someone else to do to try to discover these defects.

Unless Your Honor has any questions, I'll conclude my remarks.

THE COURT: Thank you. Mr. Thomas?

MR. THOMAS: Yes, Your Honor. A couple of points. I would like to go back to -- I confess, I was all geared up to go with a nice presentation, and I wanted to go right to your points, and so I forgot to address something.

THE COURT: Go ahead.

MR. THOMAS: And that is I think we -- we've got the question whether the discovery rule is even applicable to this type of breach of contract case. We know this Texas Supreme Court says that -- that's an extremely limited circumstance to apply in a situation where you have a relatively long statute of limitations period of four years and that it's an extremely high ball.

And so I would -- I would submit to the Court that something to think about is that before you even get to the reasonable diligence inquiry, right, with the exercise of reasonable diligence that's troubling the Court, I guess we have to answer the question, is this the type of case in which the Supreme Court would apply this very extremely limited exception to the statute of limitations? Of course, one of the panel decisions per (indiscernible), I think, said the Supreme Court has never applied discovery rule to breach of contract and --

THE COURT: Nor have they declined to do so.

MR. THOMAS: Pardon? And they --

THE COURT: Nor have they declined to do so, I think.

MR. THOMAS: Well, I will tell you there is a case you could read, as the Archer (phonetic) case, I think, is one where you could read it as a contract case. It's a -- they applied discovery rule to exercise -- failure to exercise right of first refusal. We view that as more real property, a straight up, arm's length bargaining contract between two extremely sophisticated parties involving the construction of a multi-billion dollar project. And under the circumstances were this set of pleadings says on its face that the problem -- the breach was obvious and easily discoverable.

I think that what I would assert to Your Honor is this is not the type of case that the Texas Supreme Court confronted with this type of pleading, this type of situation with an arm's length transaction, with very sophisticated parties, would not apply the discovery rules.

THE COURT: So do I -- I've never done it. Do I have the authority of a bankruptcy judge to ask the Texas Supreme Court?

MR. THOMAS: Well, I.

THE COURT: I don't know if a bankruptcy judge can do that or not.

MR. THOMAS: I think, Your Honor, I think you -- you're in inner position sitting in the Federal Court of making it Erie guess as to what the Court would do, subject to being

tested on appeal. I think it's the Fifth Circuit. We would certify the question to the Texas Supreme Court for an answer. But I think in your role, sitting here to make an Erie guess as to what the Court would do. And I would submit to Your Honor, is that the extremely limited search situation where the other side -- and no, it can't cite a Supreme Court case where they've applied it in a straight up breach of contract case.

I would submit to Your Honor that it doesn't apply in the first instance. So we don't have to get to this issue about reasonable inquiry in the -- in the industry, et cetera. And by the way, I will mention, it's not the plaintiff's reasonable diligence. It's a generic. It's in the abstract. One other thing, Your Honor, of course, I will concede on motion for summary judgment.

But the case law is pretty clear that we bear the burden of negating discovery rule. I would submit to Your Honor that we've negated it in the sense that it wouldn't be applicable to this breach of contract case. And I think that you can end the inquiry there. If you are inclined not to end the inquiry there, I agree with Your Honor that doing discovery over the course of multiple years on the merits of damages is not really the way to go.

We're in cases all the time where we bifurcate them for statute of limitations purposes, for causation and product ID purposes and toxic tort. That is commonplace, as the Court

probably knows. But I would conclude, Your Honor, by saying, you knocked me off the beam when we started, but hopefully I came back. This is not the kind of case that the Supreme Court would apply the discovery rule to, and we would ask the Court to grant summary judgment on that basis, making it a very educated Erie guess.

THE COURT: All right. I'm not going to decide today. And I'm not going to do a phone call tomorrow. I want to think about, largely, the argument that Mr. Taylor has made and the argument that you have made. They go opposite directions. His argument being, if we have to get down to whether there was an exercise of reasonable diligence, I don't think you've met your burden here by having the expert that I could then rely on. And I don't think there's a way that I can determine, as a judge without more. What the answer is, I want to think about it. And I want to focus on your argument on the Supreme Court, whether I should step out and take an Erie guess in your favor.

So I'm just going to take this all under advisement. I think the waste it would waste everybody's time tomorrow, given where I'm leaning on his argument.

MR. TAYLOR: Understood.

THE COURT: So I'll think about this. I'll get you on a written decision.

MR. THOMAS: It's -- you know, Your Honor, from the

brief, there's about eight Supreme Court cases that are key that are cited. And they're informative with regard to their approach to the discovery rule as you probably know, in addition to Justice Judge Willett's conclusion, which in that case, it's not the kind of case that the Supreme Court would apply the discovery rule to making the Fifth Circuit Erie guess.

THE COURT: Thank you.

MR. THOMAS: Thank you.

THE COURT: Go ahead.

MR. TAYLOR: Yeah. Can I just address that last point about --

THE COURT: Go ahead.

MR. TAYLOR: -- the Supreme Court? Judge, can you pass presenter --

THE COURT: All right. He's the presenter.

MR. TAYLOR: I -- with respect to whether or not the Supreme Court has applied the discovery rule to a breach of contract or breach of warranty, which we've alleged both -- you can go to Slide 11. You know, we made that argument. We pointed out in our response that there were there was a breach of contract base and a breach of warranty case in which Supreme Court applied the Supreme -- the discovery rule.

And on the left, you see exactly what applied. It said that the Archer case, which is a breach of contract case,

involved not a breach of contract, but rather a breach of recorded right of first refusal to purchase mineral interest. Now, you don't have a right of first refusal generally in the law. It necessarily springs from a contract. And the Court -- the Supreme Court is on the right, their quote, down at the bottom, they agreed. "The grantor's sale of burden property to a third party without first offering it to the right holder on the same terms, constitutes a breach of contract."

So in this case, they did -- we can go to the next slide. In this Archer case, they did apply the federal rule to a breach of contract case. Again, it was a right of first refusal. The conveyance of the property, as you can imagine, was publicly recorded. So certainly the plaintiff had the opportunity to discover that through the -- through reasonable diligence. But the plaintiffs had no reason to believe that the rights were repaired -- or were impaired. And therefore the Court extended the discovery to apply the discovery rule, extended the limitations period to -- not to begin until the plaintiff actually was notified of that -- of the transfer.

Now, the PPG case, while not, quote, "a breach of contract claim case," it was a breach of warranty case in connection with windows that were provided for a skyscraper, skyscraper work. And the Court applied the discovery rule and found that the limitations period did not begin until the owner learned of the breach, because the contract replaced a fourth

of the windows because these windows and deteriorated -- deteriorating reflective coatings, where this was something like the motor defect, a latent defect that you couldn't look -- you couldn't see just by looking at it.

And then so the next couple slides, while the -- they're right. We couldn't find a Texas Supreme Court case in which they applied the discovery rule in connection with an EPC contract. There are an abundance of courts of appeals opinions that apply the discovery rule when you've got a defect, you can't -- you can't tell just by looking at it.

And again, I know Mr. Thomas said that you could essentially lift the hood. It's not like lifting the hood of bigger car. We're talking about, you have to shut down complete operations. You've got to -- you know, you take complete -- take the complete casing off. And like you said, it's a piece of machinery about the size of this room. So it's not an exercise that it's easy to take apart. So I just wanted to point those out that --

THE COURT: Thank you.

MR. TAYLOR: -- the discovery rule has been applied in some instances.

THE COURT: Go ahead. You all can keep talking, and then we'll go back and forth until you can't talk anymore.

MR. THOMAS: I -- just quickly, Your Honor, I -- of course I mentioned Archer to you, and PPG is a -- Judge Brister

wrote the opinion when he was on the Court. It's a -- it's an express warranty case with a five-year warranty, and the breach occurred within that five-year period, which extended it beyond. It has nothing to do with this warranty claim here. And it's not -- it has -- it's a unique situation because it's a five-year, extended --

THE COURT: What about his right of first refusal argument, that was the right of first refusal that arose under a contract?

MR. THOMAS: He did. That's what I mentioned to you when I was up here, Your Honor. And I have a hard time reconciling that case with HECI v. Neel, which required the Court -- which required the royalty owner to go look at the records at the railroad commission. So that's a difficult one to reconcile. But it's not an EPC case. It's a unique situation, I think, from a real property situation. It's not sophisticated businesses in a $10 billion arm's length transaction. I would say that's the difference.

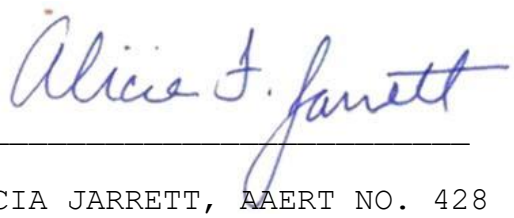
THE COURT: Thank you. Okay. Thank you both. Really appreciate the argument. You know, I'm not running behind right now. So I would guess three weeks or so, maybe six weeks, we'll get you out a decision on this, something like that. Thank you all.

(Proceedings concluded at 3:40 p.m.)

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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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ALICIA JARRETT, AAERT NO. 428 DATE: February 26, 2025

ACCESS TRANSCRIPTS, LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re:	Zachry Holdings, Inc. and Madison Industrial Services Team, LLC Debtor	Case No.: 24−90377 Chapter: 11

FLNG Liquefaction LLC,
Plaintiff(s),
vs.
CB&I Inc,
Defendant(s).

Adversary No.: 24−03195

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

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Nathan Ochsner
Clerk of Court