Docket #0019 Date Filed: 8/30/2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

FLNG LIQUEFACTION, LLC, et al.	§	
	§	
	§	
	§	**Case Number: 3:24-cv-00209**
Plaintiffs,	§	
	§	
v.	§	
	§	
Zachry Industrial, Inc., et al.	§	
	§	
Defendants.	§	
	§	
	§	

PLAINTIFFS' RESPONSE TO DEFENDANT CB&I LLC'S RULE 12(B)(6) MOTION TO DISMISS

Plaintiffs, the Subrogated Insurers[1] for *FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3 LLC* (collectively, "Plaintiffs") by and through their undersigned counsel, file this Response to Defendant CB&I LLC's Rule 12(B)(6) Motion to Dismiss.[2]

I. INTRODUCTION

Defendant's Rule 12(b)(6) Motion, premised on the Economic Loss Rule ("ELR"), should be denied. Defendants argue that damage arising out of a contractual relationship cannot be recoverable in tort. However, the Texas Supreme Court recognizes that "a common law duty to perform with care and skill accompanies every contract and ... the failure to meet this implied

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

[2] There is a companion case to this matter, 3:23-cv-00208, that has not been consolidated into one matter yet. Nonetheless, this same response will be filed in both matters, and the parties request a joint hearing/ruling on the overlapping issue.

standard might provide a basis for recovery in tort, contract, or both under appropriate circumstances." *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3D, 716, 718 (Tex. 2014). Those "appropriate circumstances" include existence of a tort duty and other property damage, both of which have been alleged by Plaintiffs. See Compl. at ¶46-52. Furthermore, the EPC contract (relied upon by Defendant in its motion) does not form the basis of many of Plaintiffs allegations. Defendants ignore that Plaintiffs allege the violation of a HAZOP analysis under a contract to which the Insured was not a party to but was harmed by the parties of that contract. Plaintiffs surely can present a claim for such damages arising out of this work. For these reasons and more, as articulated below, Defendant's motion should be denied.

II. BACKGROUND FACTS

Plaintiffs' Insured, FLNG, operates a facility that liquifies and exports natural gas (the "Facility"). On June 8, 2022, a pipe serving Train 3 of the Facility catastrophically exploded, causing extensive damage to the pipe and surrounding Facility property. FLNG named Zachry Industrial, Inc., Zachry Industries, Inc., JVIC Demerger Fabrication, Inc., Zachry Enterprise Solutions Demerger, Inc. (collectively "Zachry" herein), CB&I, LLC ("CB&I") f/k/a CBI, Inc., Chiyoda International Corporation, ("Chiyoda") (Zachry, CB&I, and Chiyoda are hereinafter jointly referred to as the "Joint Venture" or "Joint Venture Defendants"), and PSRG Inc. ("PSRG") collectively as Defendants.

The Facility was previously a liquid natural gas ("LNG")[3] import and regasification facility that was constructed between 2005-2008. In 2010, FLNG decided to convert the Facility from an import to an export facility. To facilitate the transition, FLNG contracted with CB&I and Zachry,

[3] LNG is natural gas that is super-cooled to transform it from a gaseous state into a liquid for ease and safety of non-pressurized storage and transport. This is often referred to as the "liquification." The liquification process takes place in processing units often referred to as "Trains." On the date of the explosion, the Facility was operating three separate Trains ("Train 1," Train 2," and "Train 3"). The explosion necessitating this lawsuit occurred in Train 3.

operating as a Joint Venture, for the Engineering, Procurement, and Construction ("EPC") of Train 1 and 2, via two separate contracts entered into in 2013. In 2016, FLNG separately contracted with CB&I, Zachry, and Chiyoda, also operating as a Joint Venture, to construct Train 3.[4]

The explosion subject to this lawsuit involved an 18" diameter pipe in Train 3 (the "Pipe")[5], with two valves located on either end that, if closed simultaneously, isolates the LNG contained in the Pipe and would subject the LNG to overheating. On June 8, 2022, this isolation event happened, causing overheating and expansion of the LNG, resulting in a catastrophic failure of the Pipe and damage to the surrounding Facility.

The Joint Venture (including Defendant CB&I) designed and installed the piping instrumentation, process data trending and process alarms to warn the operators if the Pipe's pressure and pressure trending was reaching an unsafe temperature and, thereby, avoiding any hazardous conditions. However, it was discovered that after commissioning., i.e. startup, the Joint Venture (including CB&I), and its subcontractor, PSRG, determined the described instrumentation was no longer needed and eliminated noticeable and audible alarm(s) and data trending, etc., which were designed to warn the operators and allow them to address what could be and ultimately was a dangerous situation. There were no temperature trending or alarms available outside of initial commissioning as there should have been. This failure caused the explosion and Insured's losses. Simply put, if CB&I and the JV had simply left the alarms in place, this loss would have never occurred.

This was not CB&I's nor the JV's last opportunity to correct this potentially dangerous condition. In 2019, a review of the Train 3 process was conducted to determine the effect and

[4] The Train 3 EPC contract is attached to Movant's Motion to Dismiss as Exhibit A.
[5] The Pipe was initially designed (for import operations) as a 26" diameter pipe, and was modified as part of the EPC contract for Train 3 to an 18" vacuum insulated pipe.

safety of downsizing the Pipe from a 26" to an 18" diameter. The Joint Venture (including Defendant CB&I), as part of a Management of Change, performed a HAZOP[6] Study and Alarm Rationalization Review. The Joint Venture subcontracted the HAZOP review to PRSG and the alarm rationalization review to Honeywell. Both reviews approved the downsizing of the Pipe. In doing so, the HAZOP Study failed to evaluate the impact of operating modes and potential consequences caused by the intentional or accidental closure of the two valves that could isolate the LNG in the Pipe. Defendants did not recognize that removing the audible alarm(s) left the operators blind to the potential over pressurization of the Pipe. This failure directly caused the condition that led to the explosion and Plaintiffs' damages.[7]

The devastating failure of the Pipe caused massive property damage to Train 3, as well as massive damage to Trains 1, 2, and the rest of the Facility, including piping, instrumentation, electrical systems, structural supports, concrete contamination channels, as well as shrapnel damage to cable trays and other items outside of Train 3.

III. STANDARD OF REVIEW

In deciding whether to grant a motion to dismiss under Rule 12(b)(6), the court must accept all well-pleaded facts as true and must view those facts in the light most favorable to the nonmoving party. *Morris v. Livingston*, 739 F. 3d 740, 745 (5th Cir. 2014). Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter…to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, a complaint will have facial plausibility when "the plaintiff pleads factual content that allows the

[6] A Hazard and Operability (HAZOP) study is a structured examination of a planned or existing process or operation in order to identify and evaluate problems (including human factors) that may represent risks to personnel or equipment or prevent efficient operation.
[7] All of this is further laid out in Plaintiffs Original Petition and properly incorporated certificate of merit of Quentin Baker.

court to draw the reasonable inference that the defendant is liable…." *Id*. In determining whether the plaintiffs have stated a plausible claim for relief, the court will have "a context-specific task that require[s] the…court to draw on its judicial experience and common sense." *Id*. at 679.

Rather than granting a motion to dismiss, allowing the plaintiffs leave to amend is a more favorable approach. *Marucci Sports, L.L.C. v. NCAA*, 751 F. 3d 368, 378 (5th Cir. 2014). In fact, Rule 15(a) "direct[s] courts to freely give a party leave to amend its pleadings when justice so requires." *Tow v. Bulmahn (In re ATP Oil & Gas Corp.)*, 711 F. Ap'x 216, 220 (5th Cir. 2017). Moreover, to deny the plaintiffs leave to amend the court must have a "substantial reason" in denying such request. *Marucci Sports, L.L.C.*, 751 F. 3d at 378.

IV. ARGUMENT

a. The Economic Loss Rule Generally

Defendants base the instant motion on the Economic Loss Rule ("ELR"). In Texas, the ELR prevents recovery in tort for *purely* economic damage unaccompanied by injury to persons or property. However, where a defective product or contract breach causes damages to the surrounding property that is not part of the product or contract's scope, the damages to the product (or service or subject of contract) itself can be recovered in tort along with the damage to the surrounding property. *Signal Oil and Gas Co. v. Universal Oil Products*, 572 S.W.2d 320 (Tex. 1978). Although many courts have stated in overly broad terms that the ELR means that "purely economic losses cannot be recovered in tort", such broad statements are only half-true. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011). As the Texas Supreme Court has said, "a party [cannot] avoid tort liability to the world simply by entering into a contract with one party [otherwise the] economic loss rule [would] swallow all claims between contractual and commercial strangers." *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*,

445 S.W.3D, 716, 718 (Tex. 2014) (quoting *Sharyland*, 354 S.W.3d at 419). A party states a noncontractual claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit. *Id.*

b. The ELR Does Not Bar Plaintiffs' Negligence Claims

As Defendant articulates in its motion, a negligence claim can survive dismissal under the ELR if a Plaintiffs allege (1) the duty allegedly breached is independent of the contractual undertaking (i.e. the duty imposed by law and not created by contract); and (2) the harm suffered is not merely the economic loss of a contractual benefit or the subject of the contract itself. *Bernal,* 2015 U.S. Dist. LEXIS 163810, at *3 (quotations and citations omitted) (analyzing whether a tort claim is merely a "repackaged breach of contract claim").

Plaintiffs allege both components. In Plaintiffs' Original Petition, Plaintiffs plausibly allege both a duty independent of the contractual undertaking as well as damages encompassing "other property damage." See Compl. at ¶ 1, 2, 34, 44, 46-54.

In addition, even if this Court disagrees with the pleading as it stands, Plaintiffs should be granted leave to amend the Complaint to further articulate these damages. Regardless, the facts and circumstances giving rise to this lawsuit render the ELR wholly inapplicable.

i. Defendants owe an independent tort duty to Plaintiffs.

Defendants owed a tort duty to Plaintiffs (and the world) in performing the work that gave rise to the instant litigation. Plaintiffs have properly plead the existence of this duty, which is independent of any contractual obligation, and is imposed upon Defendants in carrying out any work. Therefore, the first prong of negating application of the ELR, as argued in Defendant's motion, has been met.

In Texas, even if parties are brought together by virtue of contract, the courts impose

common law duties in carrying out the contract. *See Chapman, supra.* Texas recognizes a general duty owed to prevent injury to others if it reasonably appears or should appear that others in the exercise of their lawful rights may be injured by a dangerous condition created by an individual. *Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942); *San Benito Bank & Trust Co. v. Landair Travels*, 31 S.W.3d 312, 319-20 (Tex. App. 2000, no pet.); See *Murray v. Nabors Well Serv.*, 622 S.W.3d 43, 52 (Tex. App. 2020). This duty requires individuals to exercise reasonable care to avoid a foreseeable risk of injury to others, and otherwise take affirmative action to control or avoid increasing the danger of a condition that has been created by an individual's conduct. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987) (*superseded by statute on another issue*).

"In deciding whether there is a common law duty, courts apply the risk-utility test. *Midwest Emp. Cas. Co. v. Harpole*, 293 S.W.3d 770, 779 (Tex. App. 2009). The factors the Court used when applying the risk-utility test are the risk, foreseeability, and likelihood of injury balanced against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the Defendant. *Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 145 (Tex. 2022). The most important factor to consider is the foreseeability of the risk. *City of Waco v. Kirwan*, 298 S.W3d 618, 624 (Tex. 2009).

Foreseeability only requires that the general danger, not the exact sequence of events that produced the harm, be foreseeable. *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999). The test for foreseeability is whether: "(1) the injury [is] of a general character that might reasonably have been anticipated; and (2) the injured party [is] situated in relation to the wrongful act so that injury to him or to one similarly situated might reasonably have been foreseen." *Id.*at 655. Courts will often consider if one party had superior knowledge of the risk. *See Elephant Ins.,* 644 S.W.3d at 45.

Plaintiffs allege the elements of this independent duty throughout the original Petition, and when those elements are taken as true (as they must in this context), the Plaintiffs have stated a valid claim for which relief can be granted under Texas law.

ii. Contractual relationships can be the basis for tort duties

"The mere fact that an act is done pursuant to a contract does not shield it from the general rules of tort liability. Depending on the circumstances, a party's acts may breach duties in tort or contract alone or simultaneously in both." *Thomson v. Espey Huston & Assocs.*, 899 S.W.2d 415, 417 (Tex. App. 1995), citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). A contract can be the basis for imposing a duty recognized in tort. *J.P. Morgan Chase Bank, N.A. v. Tex. Contract Carpet, Inc.*, 302 S.W.3d 515, 530 (Tex. App. 2009). Texas recognizes four duties imposed by law that arise from contractual relationships. (1) duty to perform contract with care; (2) duty of good faith and fair dealing; (3) duty to perform undertaking with care; and (4) duty to cooperate. *Id.* For purposes of this motion response, we focus attention to the duty to perform contract with care.

In *Chapman Custom Homes*, the Texas Supreme Court recognized that "a common law duty to perform with care and skill accompanies every contract and ... the failure to meet this implied standard might provide a basis for recovery in tort, contract, or both under appropriate circumstances." *Id.*, 445 S.W.3d at 718 (citing *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 204 S.W.2d 508, 510 (1947)). A party must act with reasonable skill and diligence in performing a contract so not to injure a person or property in its performance. *Southwestern Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991). Furthermore, "[a] contract for professional services gives rise to a duty by the professional to exercise the degree of care, skill, and competence that reasonably competent members of the profession would exercise under similar

circumstances." *Dukes v. Philip Johnson/Alan Ritchie, Architects, P.C.*, 252 S.W.3d 586, 589 (Tex. App. 2008).

In *Chapman*, a homeowner was permitted to recover in tort for damage to a new construction home arising out of a plumber's contract with the general contractor for construction of the home. The Texas Supreme Court held that claim was valid, and further case law, *supra*, expands upon the duties owed to the general public. In the instant lawsuit, Plaintiffs complain of tort duties (during the HAZOP analysis) that Defendants owed to Plaintiffs to prevent damage to property and prevent foreseeable risks as required by Texas law, specifically addressed below. Therefore, this claim is appropriately stated.

iii. Plaintiffs have pled existence of tort duties in their Petition.

In the present Petition/Complaint, Plaintiffs properly allege the existence of duties, and go as far as to plead those duties in light of the foreseeability analysis as articulated in Texas common law. See Compl. at ¶ 49 ("the Defendants owed the Insured (and Plaintiff Insurers) a duty to design a facility and implement all PHA and MOC as to prevent reasonably foreseeable damage to the facility, including damage due to explosion and/or fire, such as the Incident").[8] Plaintiffs then appropriately plead the breaches of these duties causing damages as follows:

a. Failing to design Line 185185 to have a pressure relief valve or some other mode of failure prevention in line with industry standards that would have prevented the Incident;

b. Failing to evaluate or consider the hazard associated with warming LNG in Line 185185 during any Process Hazard Analysis (PHA) or Management of Change (MOC) implemented and overseen by the Defendants during the changeover of Line 185185 from 36" conventional to 18" VIPS;

c. Making the piping instrumentation, process data trending, process pressure and alarms for Line 185185 hidden, inaudible and unavailable to the plant

[8] Attached to Plaintiffs Petition is a certificate of Merit prepared by Quentin Baker which outlines the negligent acts in detail as performed by Defendants collectively. That certificate of merit is properly incorporated into the allegations of the Petition.

operations;

d. Failing to make the piping instrumentation, process data trending, process pressure and alarms for Line 185185 visible and audible to the plant operations;

e. Failing to conduct studies of the FLNG systems to identify this obvious potentially hazardous condition;

f. Failing to provide recommendations to eliminate this hazard or at least warn against it;

g. Otherwise failing to use due care under the circumstances;

The pleading by Plaintiffs is appropriate and states a claim for which relief can be granted. It is not appropriate for the Court, at this stage, to litigate whether the risk-utility test is met, or whether foreseeability is present, or whether the Defendants were negligent in failing to adhere to the duty owed. The motion to dismiss is solely based on Plaintiffs properly alleging existence of the duty as recognized in Texas (see *Elephant Ins., supra*), taking the pleading as true on its face. Under these criteria, Plaintiffs have appropriately stated a cause of action. Therefore, this court should Deny Defendant's Motion to Dismiss.

c. Defendant has not cited a case to support application of the ELR to the facts of this litigation.

Plaintiffs will concede that the ELR does bar some negligence claims. However, it does not bar this negligence claim, or the type of loss Plaintiffs seek to recover. In fact, none of the cases cited by Defendant outlining its ELR arguments involve facts or circumstances analogous to the matter at hand. No cases even approach the general fact pattern of instances of subsequent property damage due to explosion. *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014) involves increased pricing (subject of the bargain) that a general contractor sought to recover against a project owner. *Bernal v. The Bank of New York Mellon*, No. 4:14-cv-03436, 2015 U.S. Dist. LEXIS 163810, at *7-8 (S.D. Tex. Dec. 7, 2015) (citation omitted), involved a loan receipt

and default in granting an unopposed summary judgment motion. *AXA Art Ams. Corp. v. Pub. Storage*, 208 F. Supp. 3d 820 (S.D. Tex. 2016) involves stolen paintings from a storage facility (the contract that was bargained for centered around safe storage of paintings). *Hous. Metro Ortho & Spine Surgery, LLC v. Juansrich, Ltd.*, No. 14-19-00732-CV, 2021 Tex. App. LEXIS 5350, at *1 (Tex. App. July 6, 2021) involved termination of a surgeon and alleged receipt of contractual benefit. *Exxon Mobil Corp. v. Kinder Morgan Operating Ltd. P'ship*, 192 S.W.3d 120, 122 (Tex. App. 2006) involved failure to supply propane as part of an agreement. *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991) involves failure to publish an advertisement in a phone directory contrary to contractual obligations. While these cases articulate facets of the ELR, they do not articulate a way to apply it to the facts at hand, because that way does not exist.

d. The explosion caused damage to Plaintiffs' "other property", further negating the ELR.

Aside from the duty arguments advanced above, Defendant also properly concedes, in line with Texas law, that the ELR does not apply when there is damage to other property. "The economic loss rule applies only when the damages are the subject matter of the contract. *Pugh v. General Terrazzo Sups.*, 243 S.W.3d 84, 90-91 (Tex.App.—Houston [1st Dist.] 2007, pet. denied) (emphasis ours). Any broader statements precluding tort actions are improper. See *Giles v. GMAC*, 494 F.3d 865, 874 (9th Cir. 2007). The principal reasoning behind the ELR is to allow parties to allocate risks subject to their contracts. By definition, parties cannot allocate risks outside the subject of their contracts, and therefore the ELR is moot when there is damage to property outside the contract.

The damages complained of by Plaintiffs, as pled in the instant lawsuit, are related to tortious damage to property based on failures of duties owed to Plaintiffs from multiple sources. Defendant complains that the litigation is subject to an EPC agreement alone. This is simply not

the case.

The matters complained of by Plaintiffs, among other things, involve a HAZOP study and Alarm Rationalization review performed under separate third-party contracts between the JV and PSRG and Honeywell, respectively, and a failure to act with due care under the circumstances in reviewing and implementing the HAZOP/PHA/MOC. See Compl. at ¶46-52. Based on the Texas Supreme Court decision in *Chapman*, Plaintiffs can bring an independent tort action against the Defendants for the negligent HAZOP analysis that directly damaged the Insured's property that was not in any way subject to this contract.

Even if this court disagrees that the actions subject to this lawsuit fall within the EPC agreement as cited and attached to Defendant CB&I's motion, the damage Plaintiffs suffered was not solely to Train 3 (the subject of the EPC agreement). As a result of the explosion, Plaintiffs suffered damages to Trains 1 and 2 and Tanks 1 and 2, which are not part of the Train 3 contract, and were in operation prior to any thought, let alone signature, of the Train 3 EPC contract. Furthermore, there was damage to non-train, existing structures, including a fire watch guard shack and transformer room, both of which were not subject to any EPC contracts. In addition, there was damage to existing facilities on various LNG Trains, also not part of the 2015 modification work, none of which was the subject of the Train 3 contract, PHA, HAZOP, or modifications of line 185185. Each of these separately damaged items appropriately circumvents the application of the ELR because they constitute items of other property damage not subject to either the Train 3 contract or the PHA/HAZOP/MOC agreements or work in reviewing those structures. At a minimum, it creates a factual issue regarding damages that the parties need to explore via discovery in litigation.

The fact that two of three Defendants were the vendor on each of the train builds does not make the property one whole unit for application of the ELR. The Train 1 and 2 JV do not contain defendant Chiyoda whereas the Train 3 contract also contains Chiyoda as part of the JV. In fact, Texas Courts determine whether items were bargained for via separate contracts when determining if they are integrated for purpose of the ELR. *See* Pugh*, 243 S.W.3d at 92.* (Using in its principal analysis of the ELR whether the parties bargained separately for a component structure). The damages to existing structures, separate structures, and other trains outside of the contract constitutes "other property" damage as contemplated by the ELR.

Plaintiffs have properly plead this damage, and do not need to specifically plead the damage to other structures to state a valid claim for relief under FRCP 12(b). However, if this Court disagrees, it should grant leave to Plaintiffs to amend their pleading to specifically allege these damages, which taken as true, will negate the ELR.

e. This Action is Not Barred by the Statute of Limitations

Movant bases its statute of limitation argument on its interpretation that FLNG's cause of action accrued when the Joint Venture and its subcontractor signed off on the last alarm rationalization review in October of 2019 (citing *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004). See Movant's Brief at pg. 18. This is an incorrect recitation of Texas law.

Texas follows the "legal injury" test, under which a cause of action accrues when a wrongful act causes an injury. See *Id.*at 410-411; *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998*); Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). See also *Thomson v. Espey Huston & Assocs.*, 899 S.W.2d 415, 423 (Tex. App. 1995) ("We believe that an action for negligence in the performance of engineering services qualifies for application of the discovery rule"). In the present case, the act of signing off on the alarm rationalization report did not cause

an injury to the facility. FLNG does not contend the Movant's actions in October of 2019 constitute an injury and Movant has not put forth any argument or evidence that the mere act of signing a report is an actionable injury that would begin the two-year statute of limitations.

It is hornbook law that the injury occurred when the FLNG facility exploded on June 8, 2022. FLNG filed its petition in state court on June 7, 2024, which is within the two-year statute of limitations. Movant's discussion of the discovery rule is inapplicable to the facts of the case as there was no legal injury until the devastating loss of June 8th.

f. Plaintiffs' Pleadings are Sufficient Under the Requirements of Rule 8(a)

Rule 8(a) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has held that a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss, but the pleader's obligation to state the grounds of entitlement to relief requires "more than labels and conclusions." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In the Fifth Circuit, motions to dismiss under Rule 12(b)(6) are viewed with disfavor and rarely granted. *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir.2009).

Movant admits that CB&I, Zachry, and Chiyoda were operating as a Joint Venture with regard to the FLNG Plant. See CB&I's Motion to Dismiss at pg. 3, ¶ 1. Joint enterprise liability makes each party an agent of the enterprise, and thus each party is liable for the negligent acts of the other enterprise members. *Tex. Dep't of Transp. v. Able,* 35 S.W.3d 608, 613 (Tex.2000). Therefore, the allegations against one Joint Venture participant applies equally to every other member of the Joint Venture and Movants "grouping" argument is inapplicable.

FLNG also alleges that PSRG was a third-party contractor hired by the Joint Enterprise to conduct studies of the Plant. It, along with the Joint Venture, failed to identify a hazardous

condition, failed to warn against it, and failed to provide recommendations to eliminate the condition. See, Compl, ¶ 40-41 Therefore, the JV, including Defendant CB&I, has liability to Plaintiffs, in the instant litigation.

V. Conclusion

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

However, in the alternative, even if this Court determines that Plaintiffs have not properly plead a cause of action to satisfy Rule 12(b)(6) on the face of their pleading, Plaintiffs respectfully request leave to file an Amended Complaint to more specifically plead (above what is required under pleading standards) the damage to other property and duties owed to circumvent the ELR.

Dated: August 30, 2024

Respectfully submitted,

/s/ Ken Green

Ken Green (Texas Bar No. 24050698)
Bonds Ellis Eppich Schafer Jones LLP
950 Echo Lane, Suite 120
Houston, Texas 77024
(713) 335-4990 telephone
(713) 335-4991 facsimile
Email: ken.green@bondsellis.com

-and-

Brook Minx (Texas State Bar No. 00789905)
Zabel Freeman
1135 Heights Blvd.
Houston, Texas 77008
(713) 802-9117 telephone
(713) 802-9114 facsimile
Email: bminx@zflawfirm.com
COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I caused a copy of the foregoing document to be served by electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case.

/s/ Ken Green
Ken Green