IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC,	§	
Plaintiffs,	§	
v.	§	Case No. 3:24-cv-00209
ZACHRY INDUSTRIAL, INC.; ZACHRY INDUSTRIES, INC.; JVIC DEMERGER FABRICATION, INC.; ZACHRY ENTERPRISE SOLUTIONS DEMERGER, INC.; CB&I LLC n/k/a; MCDERMOTT INTERNATIONAL LTD.; CHIYODA INTERNATIONAL CORPORATION; and PSRG, INC.,	§	
Defendants.	§	

REPLY IN SUPPORT OF CB&I LLC'S RULE 12(B)(6) MOTION TO DISMISS

CB&I LLC ("CB&I") files this Reply in Support of its Motion to Dismiss this action brought by FLNG LIQUEFACTION, LLC ("FLNG"), FLNG LIQUEFACTION 2, LLC ("FLNG 2") and FLNG LIQUEFACTION 3, LLC ("FLNG 3," and together with FLNG and FLNG 2, "FLNG"), replying to FLNG's Response in Opposition to the Motion [ECF No. 19] (the "Response").

INTRODUCTION

FLNG's efforts to manufacture a negligence claim out of a purely contractual dispute are unavailing, and the Court should dismiss the claim. Here, sophisticated parties allocated the risks related to a major construction project in a detailed contract. The

economic loss rule exists for exactly this situation. As the Texas Supreme Court stated: "We think it ***beyond argument*** that one participant on a construction project cannot recover from another . . . for economic loss caused by negligence." *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 246 (Tex. 2014) (quoting the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM: '"There is no liability in tort . . . when the owner of a construction project sues a subcontractor for negligence resulting in economic loss.'").

Despite this black letter law, FLNG sued CB&I for negligence in a bid to run from the parties' contracted allocation of risk. The bid should fail. As the *Restatement* explains, the application of tort theory to economic loss invites "indeterminate and disproportionate liability" and eschews the advantages of contract, which is why "[a] contract that settles responsibility for such a risk will therefore be preferable in most cases to a judicial assignment of liability after the harm is done. The contract will better reflect the preferences of the parties and help prevent the need for speculation and litigation later." *LAN/STV*, 435 S.W.3d at 241 (quoting the *Restatement* at length).

Here, FLNG tries conjuring a tort claim from behind the curtain of implied common law duties. The real duties between the parties, however, are laid out in far greater specificity and comprehensiveness in their contract, which should govern the controversy.

Finally, FLNG makes much of the proposition that the HAZOP analysis and Alarm Rationalization review at issue were conducted pursuant to a contract of which FLNG was not a party. But that HAZOP and Alarm Rationalization were expressly part

of the Scope of Work defined in the parties' EPC Contract, and the EPC Contract's risk allocation provisions expressly govern any liability stemming from it or related subcontracts. FLNG seems to argue that where its general contractor subcontracts for services pursuant to the EPC Contract without FLNG as a party, a dispute arising from such a subcontract is not subject to the terms of the overarching EPC Contract—such an approach wholly defeats the purpose of the EPC Contract, of course, and cannot be right.

The liability that FLNG alleges arose from the HAZOP and alarm process conducted by Contractors and subcontractors under the terms of the EPC Contract and is governed by the risk allocation provisions that FLNG negotiated and signed.

For these reasons, FLNG's negligence claim should be dismissed.

ARGUMENT

I. All CB&I duties arise under the EPC Contract.

As discussed in the Motion, FLNG failed to allege any duty arising outside of the EPC Contract, and their Response again fails to do so.

A. CB&I's actions were entirely within the EPC Contract's defined Scope of Work.

FLNG's allegations that the HAZOP study and the Alarm Rationalization review are outside of the EPC Contract are unpersuasive and inaccurate. Every action that CB&I took at the Project occurred within the "Scope of Work" set out in the EPC Contract. The parties defined that term to include, basically, everything:

> Subject to Section 3.1B, the Work shall be performed on a turnkey basis and shall include ***all engineering, procurement, construction, precommissioning, commissioning, start-up and testing of the Train 3 Expansion***, all Equipment,

> construction equipment (including materials, apparatus, structures, supplies, tools, machinery, equipment and scaffolding), spare parts, labor, workmanship, inspection, manufacture, fabrication, installation, design, delivery, transportation, storage, training of Owner's operations and maintenance personnel and all other items or tasks that are set forth in Attachment A . . . .

Motion, Ex. A, § 3.1 (filed under seal). But, more specifically, the HAZOP study and Alarm Rationalization are specifically identified as part of CB&I's Scope of Work.

This broad definition incorporates Attachment A, a 155-page schedule of CB&I's specific work obligations that specifically addresses both tasks. It states, in relevant part:

- "Contractor shall provide studies and reports for the Train 3 Expansion, and will ***participate in HAZOP*** . . . ." Ex. 1 hereto, § 4.8.6 (emphasis added).[1]
- "The Scope of Work of Contractor's services shall include . . . ***HAZOP review*** of all P&ID's and electrical Drawings . . . and HAZOP review of Fire & Gas and Cause & Effects diagrams." *Id.* § 5.1 (emphasis added).
- "Contractor shall arrange and participate in a HAZOP during detailed engineering. Contractor shall ***subcontract*** to a qualified third party to facilitate the HAZOP of unique items of the Train 3 Expansion . . . ." *Id.* § 5.4.8 (emphasis added).

[1] Attachment A to the EPC Contract is attached hereto as Exhibit 1, filed under seal. CB&I files it to present a complete picture of the contractual arrangements between the parties, and in particular to rebut FLNG's contentions about the extra-contractual nature of the HAZOP and Alarm Rationalization work. The Attachment is properly before the Court to address material factual omissions relevant to the adjudication of the dispute. Accordingly, the Court should consider the EPC Contract and Attachment A in deciding CB&I's 12(b)(6) motion and to rebut FLNG's spurious positions.

- "Contractor shall perform ***alarm rationalization reviews*** and implementation in accordance with EEMUA publication 191 for the Train 3 Expansion." *Id.* § 4.8.7 (emphasis added).

For FLNG to argue that HAZOP, Alarm Rationalization, or any part of CB&I's Scope of Work is somehow outside the EPC Contract is simply incorrect. Further, the fact that this work may have been performed by CB&I subcontractors is irrelevant.[2] Under Section 2.3 of the EPC Contract, FLNG acknowledged and agreed that Contractor could engage subcontractors on the Project. Motion, Ex. A, § 2.3. Further, "Contractor shall be fully responsible to Owner for the acts and omissions of Subcontractors and Sub-subcontractors and of Persons directly or indirectly used by any of them, as Contractor is for the acts or omissions of Persons directly employed by Contractor in the performance of the Work." *Id.* Again, the parties entered the EPC Contract to set forth the terms of their entire relationship in respect to the Project—the fact subcontractors may have done some of the work is of no consequence.

Finally, FLNG provides a laundry list of alleged "breaches of duties" that justify its negligence claim. Response, p. 9-10. Even a cursory review of these allegations shows that the "duties" arise, not from the common law, but in reference to the detailed technical requirements of the EPC Contract. FLNG complains of the "failure to design Line 185185," "failing to evaluate or consider hazards," "failing to make the piping instrumentation, process data trending, process pressure alarms for Line 185185 visible

[2] FLNG sued PRSG, the company that allegedly conducted the HAZOP review in this case. FLNG alleges "Honeywell" performed the Alarm Rationalization Review, but it has not sued that entity.

and audible," and other similar obligations. These obligations arise from the EPC Contract only and, if there was a "failure," it is a breach and not negligence.

All work performed at the Project, by Contractor or subcontractors, was done pursuant to the EPC Contract, and any obligations owed between the parties was under the terms of the EPC Contract.

B. *Chapman* is inapplicable to these facts.

FLNG's reliance on *Chapman* is misplaced. In that case, a homeowner was allowed to recover in negligence against the subcontractor of the general contractor for faulty plumbing. *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014). That situation is easily distinguishable from the instant case wherein the owner (FLNG) and the contractor (CB&I) are in direct contractual privity. The Response characterizes *Chapman* as standing for the proposition that a contractual performance may create "duties owed to the general public." Response, p. 9. Even if true, FLNG is not the "general public," but a sophisticated commercial entity represented by able lawyers, and the only duties that exist between CB&I and FLNG are encompassed in the EPC Contract that those lawyers negotiated.

Again, FLNG clings to the fact that the HAZOP study and Alarm Rationalization review were performed by third parties. Even if true, *Chapman* only stands for the proposition that FLNG may be able to pursue the subcontractors in negligence, not that it has a negligence claim against CB&I, with whom it is in contractual privity.[3]

[3] *Chapman* and *LAN/STV* were decided at essentially the same time by the Texas Supreme Court. The distinguishing factor between the two decisions was contractual privity. *LAN/STV* explains the distinction by quoting the

II. The damages were specifically identified in the EPC Contract.

In a similarly faulty argument, FLNG argues that because Trains 1 and 2 suffered damages in addition to Train 3, the economic loss rule does not apply. But the parties in the EPC Contract specifically accounted for and allocated this potential risk.

Section 20.2 is titled "**Damage to the Existing Facility, the Train 1 Expansion After Substantial Completion Under the Train 1 EPC Agreement, the Train 2 Expansion After Substantial Completion Under the Train 2 EPC Agreement and the Train 3 Expansion After Substantial Completion.**" Motion, Ex. A, § 20.2. In this section, the parties allocated the risk for damage to ***any part*** of the facility during Train 3 work, not just for damage to Train 3 or its surrounding areas, and specifically addressed the risk of damage attributable to the negligence of subcontractors or sub-subcontractors. The key provision reads:

> Subject to the limitations and exceptions set forth in this Section 20.2, Contractor shall be liable to Owner (or Owner's Affiliates, with respect to damage to the Existing Facility, the Train 1 Expansion or the Train 2 Expansion) for any damages, losses, costs and expenses arising from or related to damage to or destruction of (i) any portion of the Train 3 Expansion occurring after the Train 3 Expansion has achieved Substantial Completion (or after risk of loss transfers to Owner under Section ll.7 for buildings), (ii) of the Existing Facility, (iii) the Train I Expansion after its substantial completion under the Train 1 EPC Agreement, or (iv) the Train 2 Expansion after its substantial completion under the Train 2 EPC Agreement, to the extent such damage or

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Restatement: "The *Restatement* now concludes generally that 'there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties.' It was less clear twenty years ago, and still is today, the extent to which Texas precludes recovery of economic damages in a negligence suit between contractual strangers . . . ." *LAN/STV*, 435 S.W.3d at 243. The settled law is there is no negligence claim for economic loss between parties to a contract.

> destruction arises directly or indirectly out of or results from or relates to the 'Work, including if due to the breach of this Agreement or the sole or joint negligence or fault of any Contractor Indemnified Party or Contractor's Subcontractors or Sub-subcontractors.

Importantly, the parties also set damage caps on Contractor's potential liability, both here and in Section 20.1. It is precisely these agreed-upon damages caps that FLNG tries to evade by proceeding in tort. The economic loss rule, however, prevents artful pleading and requires sophisticated parties to adhere to their contracts.

III. CB&I's other grounds for dismissal are meritorious as well.

A. FLNG admits its negligence claim is barred by limitations.

FLNG's entire Response is premised on CB&I's alleged negligence in performing the HAZOP study and Alarm Rationalization Review, which it admits occurred ***in 2019***. Response, p. 3-4. FLNG's states:

> 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.

Id. at 4. Taken as true, the alleged negligence occurred ***in 2019***, well before suit was filed in 2024, and well outside the statute of limitations. FLNG does not plead or argue the discovery rule, because it cannot do so. The negligence claim is barred by limitations.

B. FLNG fails to plead with specificity.

Finally, the Motion to Dismiss must be granted based on Rule 8(a). FLNG argues that CB&I, Chiyoda, and Zachry were operating as a joint venture, so it does not need to allege particular facts. It fails to acknowledge, however, that the EPC Contract is not with any joint venture entity and is, instead, with the three individual entities. Motion, Ex. A. Further, as FLNG is ignoring the EPC Contract, it must plead with specificity the alleged acts and the specific entity that committed the alleged negligence. Otherwise, its claim should be dismissed.

CONCLUSION

FLNG is trying desperately to avoid the EPC Contract. The Court should ignore these efforts and dismiss the negligence claim.

For all of the reasons stated above, the Court should grant CB&I's Motion to Dismiss and dismiss FLNG's negligence action in its entirety, along with any other relief that is just and appropriate.

Dated: September 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of September, 2024, a true and correct copy of the foregoing document was served electronically through the Court's ECF system on parties registered to receive electronic filings in the above-captioned case.

/s/ Jack W. Massey
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EXHIBIT 1

FILED UNDER SEAL