Docket #0027 Date Filed: 9/24/2024

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

In re: **ZACHRY HOLDINGS, INC., *et al.*,[1]** ***Debtors.***	**Chapter 11** **Case No. 24-90377** **(Jointly Administered)**
ALLIANZ GLOBAL RISKS US INSURANCE CO.; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. B0180ME2219036; GREAT LAKES INSURANCE SE; GUIDEONE NATIONAL INSURANCE COMPANY; and TOKIO MARINE AMERICA INSURANCE COMPANY, as subrogees of FLNG Policy Procurement, LLC; FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3, LLC, ***Plaintiffs,*** **v.** **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.***	**Adv. P. No. 24-03190** **Ref. Adv. P. Docket No. 13**

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

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CHIYODA INTERNATIONAL CORPORATION'S RULE 12(b)(6) MOTION TO DISMISS AND JOINDER TO CB&I LLC's RULE 12(b)(6) MOTION TO DISMISS

Defendant Chiyoda International Corporation ("CIC") files this motion (this "Motion"), pursuant to Federal Rule of Civil Procedure 12(b)(6) (as incorporated by Federal Rule of Bankruptcy Procedure 7012), to join and adopt the arguments in *CB&I LLC's Rule 12(b)(6) Motion to Dismiss* [Adv. P. Doc. No. 13] (the "Motion to Dismiss") and to independently move to dismiss the above-captioned adversary proceeding (the "Adversary Proceeding"). In support of this Motion, CIC respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. The Motion to Dismiss explains the situation well. FLNG, CB&I, Zachry, and CIC negotiated and entered into an EPC Contract that runs 146 pages, without its extensive attachments or amendments.[3] The EPC Contract details the parties' responsibilities, obligations, and limitations on their liability in great detail. The parties intended for the EPC Contract to govern and control their relationships. The plaintiffs' allegations arise directly from work performed pursuant to the EPC Contract.

2. Faced with significant contractual bars to recovery of damages, however, the plaintiffs framed their sole cause of action as one for negligence. But Texas law bars this sleight-of-hand attempt to sidestep the EPC Contract. Specifically, the economic-loss rule prevents plaintiffs from recasting true breach-of-contract claims as tort claims. Moreover, assuming the

[2] The capitalized terms not otherwise defined in this Motion has the same meaning as in the Motion to Dismiss.

[3] As defined in the Motion to Dismiss, the EPC Contract referred to governed Train 3.

plaintiffs could properly allege negligence, they missed the applicable two-year statute of limitations. And if that were not enough, the plaintiffs impermissibly lump Zachry, CB&I, CIC, and the other defendants into a single group of "Defendants," violating Federal Rule of Civil Procedure 8(a)'s pleading requirements, which apply here via Federal Rule of Bankruptcy Procedure 7008.

3. Federal Rule of Civil Procedure 12(b), applicable here via Federal Rule of Bankruptcy Procedure 7012(b), is designed to handle this type of case because the plaintiffs failed to state a viable claim. Additionally, assuming the plaintiffs amend their pleadings, the Motion to Dismiss raises legal issues that will affect discovery, case development, and potential damages. An early decision on these issues will make this litigation more efficient and assist the parties in reaching a resolution.

JURISDICTION AND VENUE

4. The United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Court") has jurisdiction to consider this Motion under 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b). CIC confirms its consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Rule 7008-1 of the Bankruptcy Local Rules for the Southern District of Texas (the "Local Rules"), to the entry of a final order by the Court in connection with this Motion, to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

5. Venue of this Adversary Proceeding and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

6. The bases for the relief requested herein is Federal Rule of Civil Procedure 12(b)(6) and Bankruptcy Rule 7012.

BACKGROUND

7. On May 21, 2024 (the "Petition Date"), defendant Zachry Industrial Inc. ("Zachry") and several related entities commenced their chapter 11 cases by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in this Court. The cases are jointly administered under case number 24-90377 and are currently pending before the Honorable United States Bankruptcy Judge Marvin Isgur.

8. On June 7, 2024, the plaintiffs filed their lawsuit in the 239th Judicial District Court of Brazoria County, Texas (the "State Court"). [Adv. P. Doc. No. 1-2.] Before Zachry removed the state-court action, on July 5, 2024, CIC filed its *Original Answer and General Denial* in the lawsuit in State Court (the "Original Answer"). [Adv. P. Doc. No. 17-1.] Because CIC filed the Original Answer *before* Zachry removed the lawsuit to federal court, CIC is not required to replead absent further order of the Court. Fed. R. Civ. P. 81(c).[4]

9. Shortly *after* CIC filed the Original Answer, on July 5, 2024, Zachry removed the lawsuit to the United States District Court for the Southern District of Texas, Galveston Division (the "District Court"). [Adv. P. Doc. No. 1.] Zachry's removal is based on 28 U.S.C. § 1452(a), which states that federal courts have jurisdiction over the claims asserted in the lawsuit under 28 U.S.C. § 1334. [Adv. P. Doc. No. 1, ¶ 4].

[4] This Motion is timely under Federal Rule of Civil Procedure 12(b)(6). *Matthews v. Tidewater Crewing, Ltd.*, 658 F. Supp. 3d 332, 344 (E.D. La. 2023) (finding that defendant who filed a state-court answer before removal did not waive right to file subsequent Rule 12(b)(6) motion following removal). Alternatively, the Court may analyze the Motion under Federal Rule of Civil Procedure 12(c), pursuant to which the Fifth Circuit applies the same standard as a Rule 12(b)(6) motion. *Smith v. Bank of Am. Corp.*, Case A-13-CV-193 LY, 2013 WL 12033215, at *3–4 (W.D. Tex. May 1, 2013) (refusing to strike as untimely the motion to dismiss of defendant who filed a state-court answer prior to removal but analyzing motion under Rule 12(c)) (collecting cases); *see also Puckett v. U.S.*, 82 F. Supp. 2d 660, 663 (S.D. Tex. 1999).

10. On July 29, 2024, CB&I filed its Motion to Dismiss. [Adv. P. Doc. No. 13.] The plaintiffs responded [Adv. P. Doc. No. 20], and CB&I filed a reply [Adv. P. Doc. No. 22] (the "Reply"). The Motion to Dismiss is now ripe for review.[5]

11. On September 16, 2024, the plaintiffs filed proofs of claim asserting claims against the Zachry Industrial, Inc. (Case No. 24-90385) arising out of the facts and circumstances alleged in their lawsuit. [Claim Nos. 85, 87, and 88.] Each proof of claim seeks to recover $1,324,631,602.00.

RELIEF REQUESTED

12. CIC requests entry of an order, substantially in the form attached to this Motion, dismissing the plaintiffs' negligence action in its entirety in accordance with Federal Rule of Civil Procedure 12(b)(6), as made applicable to this Adversary Proceeding in Federal Rule of Bankruptcy Procedure 7012(b), and granting CIC such other relief that is just and proper.

BASIS FOR RELIEF REQUESTED

13. CIC adopts and incorporates the Motion to Dismiss's factual background and legal arguments and authorities. [Adv. P. Doc. No. 13.] CIC supplements a few additional facts that support CIC's entitlement to the same relief sought in the Motion to Dismiss.

14. Like defendant CB&I, CIC was a party to the extensive, detailed EPC Contract attached to the Motion to Dismiss as Exhibit A. [Adv. P. Doc. No. 13-1.] CIC agrees with CB&I that the plaintiffs' Petition incorporates by reference the EPC Contract because it is integral to the plaintiffs' claims. [Mot. Dismiss at 5.] The Court may therefore consider the EPC Contract in deciding the Motion to Dismiss and this Motion. [*Id.*]

[5] On September 13, 2024, the District Court granted an agreed motion to transfer venue and ordered the action transferred to this Court. [Adv. P. Doc. No. 25.] The next business day, the clerk of court opened this Adversary Proceeding.

15. Under the terms of the EPC Contract, CIC—together with defendants CB&I and Zachry—provided various engineering, procurement, and construction services to FLNG to construct the Plant. The EPC Contract alone governs any CIC work that the plaintiffs now assert was deficient or improper. [Mot. Dismiss at 9.] The EPC Contract is incredibly detailed and sets forth the applicable standards of performance, allocation of risks, and the obligations of the parties. *Id.*

16. Like CB&I's relationship with FLNG, the EPC Contract exclusively defined CIC's relationship with FLNG. [Mot. Dismiss at 9.] The plaintiffs have not alleged, described, or explained any independent tort duty that CIC owed to the plaintiffs. Nor can they.

17. Moreover, the EPC Contract limits liability in relevant ways.[6] *First*, the EPC Contract contains an enforceable waiver on consequential and lost-profits damages. [Adv. P. Doc. No. 13-1, § 20.5.] *Second*, the EPC Contract places a cap on CIC's liability. [*Id.* §§ 20.1, 20.2.] *Last*, the EPC Contract waives any right to trial by jury. [*Id.* § 18.3.] Thus, the EPC Contract, among other things, explicitly bars the plaintiffs' claims for more than $1 billion in business-interruption damages.

18. Plaintiffs have not and cannot allege any special relationship between CIC and the plaintiffs arising outside the EPC Contract or any injury independent of that contract. The EPC Contract provides the only basis for any obligations between CIC and Plaintiffs.

19. CIC adopts all of the remaining factual and legal arguments asserted in the Motion to Dismiss as the grounds for dismissing the plaintiffs' negligence action in its entirety.

[6] The EPC Contract's limitations on liability are enforceable under Texas law, which governs the EPC Contract [EPC Contract, § 21.9]. *E.g.*, *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2019) (holding that limitation-of-liability clauses are enforceable).

Dated: September 24, 2024

Respectfully submitted,

/s/ Charles M. Jones II

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 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/ Charles M. Jones II
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