Docket #0039 Date Filed: 10/18/2024

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

IN RE: ZACHRY INDUSTRIAL, INC., Debtor.	§ § § §	Case No. 24-90377 (MI) Chapter 11

FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC, Plaintiffs, v. CB&I INC.; ZACHRY INDUSTRIAL, INC.; and CHIYODA INTERNATIONAL CORPORATION, Defendants.	§ § § § § § § § § § § § § §	Adversary No. 24-03195

ZACHRY INDUSTRIAL, INC.'S RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' CLAIM FOR CONSEQUENTIAL DAMAGES

Defendant Zachry Industrial, Inc., ("Zachry Industrial") files this Motion to Dismiss Plaintiffs' Claim for Consequential Damages pursuant to Federal Rule of Civil Procedure 12(b)(6) (as incorporated by Federal Rule of Bankruptcy Procedure 7012). Zachry Industrial respectfully shows the Court as follows:

I.
EXECUTIVE SUMMARY

Plaintiffs operate a liquified natural gas ("LNG") facility. Plaintiffs negotiated and entered into contracts with Zachry Industrial and the other Defendants (the "EPC

Contracts") under which Defendants provided certain work for the facility. In Section 20.5 of the EPC Contracts, the parties (all highly sophisticated entities represented by experienced attorneys) agreed to an enforceable waiver and release of all "CONSEQUENTIAL LOSSES OR DAMAGES, INCLUDING LOSS OF PROFITS, USE," and damages for "BUSINESS INTERRUPTIONS" (capitalization in original). Under governing Texas law, Section 20.5's waiver and release of any and all consequential damages is valid and enforceable. *See* Tex. Bus. & Com. Code § 2.719(c).

In their Petition, Plaintiffs allege that they "have recently discovered significant defects in the performance of Defendants' work" under the EPC Contracts that has "caused major damage to key equipment at the LNG facility resulting in substantial repair costs, the shut down of operations, and other damages. Plaintiffs file this action to recover all damages caused by Defendants[']' failure to comply with their contractual obligations." Pl.'s Orig. Pet. [Adv. P. Doc. No. 1-2] ("Pet.") at ¶ 1. Plaintiffs further allege that "because Defendants' acts and omissions constitute gross negligence, Plaintiffs are entitled to recover their lost profits." *Id.* at ¶ 64.

Zachry Industrial moves to dismiss Plaintiffs' claim for lost profits and other consequential damages because the claim is barred as a matter of law by Section 20.5 of the EPC Contracts.

II.
BACKGROUND

Freeport LNG Development, L.P. ("Freeport LNG") owns and operates an LNG facility located near Freeport, Texas (the "Facility"). Pet. at ¶ 13.[1] The Facility has three separate turnkey natural gas liquefaction facilities referred to as the Train 1 Expansion, Train Expansion 2, and Train 3 Expansion, along with common infrastructure and control systems. *See id.* at ¶ 17. Plaintiffs are affiliates of Freeport LNG. *Id.* at ¶ 19.

Plaintiffs (as "Owner") negotiated and entered into the EPC Contracts[2] with Defendants Zachry Industrial, CB&I LLC ("CB&I"), and Chiyoda Internal Corporation ("CIC") (as "Contractor"), for Defendants to provide engineering, procurement, and construction services for the Train 1 Expansion, Train Expansion 2, and Train 3 Expansion through a joint venture arrangement. *See id.* at ¶¶ 20–26. The parties agreed in the EPC Contracts to a detailed, comprehensive structure and extensive set of provisions governing the scope of liability and damages between and among them for claims and losses. *See* EPC Contract. The EPC Contracts exclusively define the relationship between Owner and Contractor.

Article 20 of the EPC Contracts addresses "LIMITATION OF LIABILITY." *See* EPC Contract, Art. 20, In Section 20.5, the parties agreed that neither Owner nor

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[1] The capitalized terms not otherwise defined in this Motion to Dismiss have the same meaning as in the EPC Contract.

[2] The parties negotiated three contracts covering the three trains. *See* Pet. at ¶¶ 21–25. The pertinent provisions—including Section 20.5—are "virtually identical," *Id.* at ¶ 26. Because the first alleged defect occurred in Train 3 (*see id.* at ¶ 46), Zachry Industrial references the Fixed Price Separated Turnkey Agreement for the Engineering, Procurement and Construction of the Freeport Train 3 Liquefaction Project, dated as of the 24th Day of March, 2015 (without the voluminous attachments), which was previously filed in the record Adv. Pro. No. 24-03189 [Dkt. No. 13-1], and Adv. Pro. No. 24-03190 [Dkt. No. 13-1] (the "EPC Contract").

Contractor shall be liable to each other under the EPC Contracts or under any cause of action related to the subject matter of the EPC Contracts for any incidental or consequential losses or damages, including for "LOSS OF PROFITS, USE, OPPORTUNITY, REVENUES, … OR BUSINESS INTERRUPTIONS," and Owner and Contractor "WAIVE AND RELEASE EACH OTHER FROM ALL SUCH LOSSES AND DAMAGES":

> 20.5 **Consequential Damages**. NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS AGREEMENT TO THE CONTRARY, NEITHER OWNER NOR CONTRACTOR SHALL BE LIABLE TO EACH OTHER UNDER THIS AGREEMENT OR UNDER ANY CAUSE OF ACTION RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, PRODUCTS LIABILITY, INDEMNITY, CONTRIBUTION, OR ANY OTHER CAUSE OF ACTION FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES, INCLUDING LOSS OF PROFITS, USE, OPPORTUNITY, REVENUES, FINANCING, BONDING CAPACITY, OR BUSINESS INTERRUPTIONS … AND OWNER AND CONTRACTOR ON BEHALF OF THEMSELVES HEREBY WAIVE AND RELEASE EACH OTHER FROM ALL SUCH LOSSES AND DAMAGES.

Id. § 20.5 (emphasis and capitalization in original).

In this lawsuit, Plaintiffs allege a single cause of action against Zachry Industrial and the other Defendants: "**Breach of the EPC Contracts**." Pet. at § VII.A (emphasis in original). Plaintiffs seek to recover "all amounts caused by Defendants' breaches of the EPC Contracts," including "lost profits." *Id.* at ¶¶ 63–64; *see id.* at ¶ 2 ("Plaintiffs file this action to recover all damages caused by Defendants[']failure to comply with their contractual obligations.").

III.
LEGAL STANDARD

To survive a motion to dismiss, a complaint "must include 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Lewis v. Danos*, 83 F.4th 948, 953 (5th Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts are "required to dismiss, pursuant to [Rule 12(b)(6)], claims based on invalid legal theories, even though they may be otherwise well-pleaded." *Flynn v. State Farm Fire & Cas. Ins. Co. (Tex.)*, 605 F. Supp. 2d 811, 820 (W.D. Tex. 2009) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

"Under Rule 12(b)(6), a court may dismiss part of a complaint (*e.g.*, a claim for a particular category of damages), rather than the complaint in its entirety." *Seno Med. Instruments, Inc. v. Biomedical Sys. Corp.*, No. SA-18-CV-0190-FB, 2018 WL 5811497, at *3 (W.D. Tex. Nov. 6, 2018) (citing *Collins v. Easynews, Inc.*, No. A-06-CA-451 LY, 2008 WL 11406004, at *3 (W.D. Tex. Feb. 20, 2008); *Rascon v. Austin I.S.D.*, No. A-05-CA-1072 LY, 2006 WL 2045733, at *3 (W.D. Tex. July 18, 2006), *report and recommendation adopted*, No. A-05-CA-1072-LY, 2006 WL 8432651 (W.D. Tex. Sept. 5, 2006)).

A court's review of a Rule 12(b)(6) motion to dismiss "is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V*

(U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010). The EPC Contracts are central to Plaintiffs' claim and referenced by Plaintiffs' Petition—indeed, Plaintiffs extensively quote various provisions of the EPC Contracts in the Petition. *See* Pet. at ¶¶ 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 62. Thus, the Court may properly consider the EPC Contracts in reviewing this Motion.

IV.
ARGUMENT AND AUTHORITIES

"Texas law explicitly blesses the existence of consequential damages waivers." *Safety Vision LLC v. LEI Tech. Canada*, __ F. Supp. 3d __, No. 4:21-CV-03306, 2024 WL 3094649, at *6 (S.D. Tex. June 20, 2024) (noting that "such waivers are common between commercial parties"). Section 2.719(c) of the Texas Business & Commerce Code expressly provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is ***not***.

Tex. Bus. & Com. Code § 2.719(c) (emphasis added).

"Accordingly, the ***sole*** way to avoid enforcement of an agreement to limit or exclude consequential damages is to show that the waiver was unconscionable." *Id.* (citing § 2.719(c); emphasis added); *see Bray Int'l, Inc. v. Computer Assocs. Int'l, Inc.*, No. CIV H-02-0098, 2005 WL 3371875, at *4 (S.D. Tex. Dec. 12, 2005) ("The Texas UCC could not be clearer that the only exception to the enforcement of [a consequential damages waiver] comes into play if the clause or contract is unconscionable.").

Plaintiffs admit that the EPC Contracts—in their entirety—"constitute valid and enforceable contracts." Pet. at ¶ 60 ("Plaintiffs entered into the EPC Contracts with Defendants, which constitute valid and enforceable contracts."). Plaintiffs further admit that the alleged loss at issue is commercial. *See id.* at ¶ 45 (alleging that "the defects in Defendants' work" were discovered "after Trains 1, 2, and 3 began commercial operations"). Accordingly, Section 20.5's waiver and release of consequential damages is ***not*** prima facie unconscionable under § 2.719(c).

Nor is there any other basis to render Section 20.5 unconscionable. "'Generally, contracts are rendered unconscionable by procedural abuse arising in contract formation, such as the inability of one party to bargain; and by abuse concerning substantive contract terms, such as whether printed terms of a form contract are so one-sided as to be unreasonable.'" *Safety Vision*, 2024 WL 3094649, at *5 (quoting *Lindemann v. Eli Lilly & Co.*, 816 F.2d 199, 203 (5th Cir. 1987)). "Notably, 'the principle of unconscionability is one of preventing oppression and unfair surprise, *not* the disturbance of allocation of risks because of superior bargaining power.'" *Id.* (quoting *Lindemann*, 816 F.2d at 204) (italics in original).

The principle of unconscionability has no application to the EPC Contracts, which were heavily negotiated by highly sophisticated commercial entities and their able lawyers. *See id.* at *6 (finding that "a contract for a custom designed commercial product where both parties are sophisticated business entities" was not unconscionable). The EPC Contracts are "not the sort of 'contract for consumer goods entered into by a naïve and

credulous member of the public' that tends to lead to unconscionable terms.'" *Id.* (quoting *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 719 (S.D. Tex. 2000)).

Thus, Section 20.5 is not unconscionable—to the contrary, it is "exactly the sort of risk allocation provision that is common in commercial contracts." *Safety Vision*, 2024 WL 3094649, at *6. Consequently, Section 20.5 is valid and enforceable under Texas Business & Commerce Code § 2.719(c), and bars Plaintiffs' claim for consequential damages. Because Plaintiffs' claim rests on a legally invalid theory, it must be dismissed. *See Flynn*, 605 F. Supp. 2d at 820; *see also Seno Med. Instruments*, 2018 WL 5811497, at *4 (recommending dismissal under Rule 12(b)(6) of counterclaim for consequential damages because the parties' agreement included a consequential damage waiver).

V.
CONCLUSION

For these reasons, Zachry Industrial requests dismissal of Plaintiffs' claim for consequential damages, including lost profits, and that Zachry Industrial be awarded all further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 18th day of October, 2024, a copy of the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ Charles R. Koster
Charles R. Koster

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	§	Case No. 24-90377 (MI)
Debtor.	§	Chapter 11

FLNG LIQUEFACTION, LLC; FLNG LIQUEFACTION 2, LLC; and FLNG LIQUEFACTION 3, LLC,	§	
Plaintiffs,	§	
v.	§	Adversary No. 24-03195
CB&I INC.; ZACHRY INDUSTRIAL, INC.; and CHIYODA INTERNATIONAL CORPORATION,	§	
Defendants.	§	

ORDER GRANTING ZACHRY INDUSTRIAL, INC.'S RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' CLAIM FOR CONSEQUENTIAL DAMAGES

On this day the Court considered Defendant Zachry Industrial, Inc.'s Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claim for Consequential Damages (the "Motion"), any responses and replies thereto, and the arguments of counsel. The Court finds that the Motion should be GRANTED, and it is therefore

ORDERED that the Motion is hereby GRANTED. Plaintiffs' claim for consequential damages, including lost profits, is dismissed.

SIGNED this _____ day of _____, 2024.

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JUDGE PRESIDING