Docket #0050 Date Filed: 11/6/2024

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)**
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. 24-03189** **Ref. Adv. P. Docket Nos. 13, 19, 20, 31, 33, 38, & 39**

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

[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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Defendant Chiyoda International Corporation ("CIC") files this Reply in support of its *Rule 12(b)(6) Motion to Dismiss and Joinder to CB&I's Rule 12(b)(6) Motion to Dismiss* [Adv. P. Doc. No. 31] (the "CIC Motion") and respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. This dispute arises from a June 2022 pipe explosion—a pipe designed and constructed pursuant to the EPC Contract. The EPC Contract's bargained-for and agreed-upon balancing of risk exclusively governs this dispute, as explained in the CIC Motion, the CB&I Motion to Dismiss,[3] and the CB&I Reply.[4]

2. As part of that risk balancing, the sophisticated parties contractually agreed to limit damages in three ways. *First*, for damage occurring after Substantial Completion—which Plaintiffs admit is the case—the EPC Contract limits damages to $1 million per occurrence. *Second*, the parties agreed to waive claims for consequential damages, including business-interruption damages, meaning Plaintiffs cannot recover in excess of their alleged direct damages of $216 million. *Last*, as an absolute limit, the EPC Contract caps damages at $430 million of aggregate liability. The Court must enforce these limitations.

3. As explained in the CB&I Motion to Dismiss and the CIC Motion, the economic loss rule bars Plaintiffs' negligence cause of action. But also, under *any* circumstance, the Court must dismiss portions of Plaintiffs' claim that exceed the contractual limitations on liability. Accordingly, Plaintiffs' maximum damages are limited to $1 million per occurrence or, alternatively, the pleaded $216 million in direct damages. And in no case may Plaintiffs recover more than the maximum limitation of liability under the EPC Contract, $430 million.

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[2] Capitalized terms not otherwise defined in this Motion have the same meaning as in the CIC Motion.

[3] *CB&I LLC's Rule 12(b)(6) Motion to Dismiss* [Adv. P. No. 13] (the "CB&I Motion to Dismiss").

[4] *Reply in Support of CB&I LLC's Rule 12(b)(6) Motion to Dismiss* [Adv. P. Doc. No. 20] (the "CB&I Reply").

REPLY

I. Plaintiffs failed to state a claim for damages in excess of the limitation-of-liability clauses, requiring partial dismissal.

4. CIC requests that the Court dismiss Plaintiffs' claims to the extent they seek damages above the EPC Contract's agreed-upon limits. [CIC Motion ¶ 17.] The parties agreed to these limits in a detailed and heavily negotiated written contract. Texas has "long recognized the strongly embedded public policy favoring freedom of contract." *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2019). "[A]bsent a compelling reason, courts must respect and enforce the terms of a contract that the parties have freely and voluntarily made." *Id.* Accordingly, "[l]imitation-of-liability clauses . . . are generally valid and enforceable." *Id.*

5. Courts enforce limitation-of-liability clauses by dismissing claims for damages in excess of contractual limitations. *Curtis v. Cerner Corp.*, 621 B.R. 141, 187 (S.D. Tex. 2020) (granting a "motion to dismiss to the extent it seeks to dismiss Plaintiff's claim[s]" that assert damages in excess of the contractual limits) (applying Texas law); *Moon Soo Kim v. Stanley Convergent Sec. Sols., Inc.*, No. 3:12-CV-4445-M, 2013 WL 1715789, at *2 (N.D. Tex. Apr. 19, 2013) (granting a motion to dismiss "portions of the Complaint seeking in excess of the contractual limit, which dismissal simply caps Plaintiff's recovery, if any, at $1,380") (applying Texas law); *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) ("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.") (applying Texas law). Here too, the result must be partial dismissal.

6. Importantly, although Plaintiffs assert only negligence claims, courts enforce limitation-of-liability clauses to limit tort claims. *El Paso Mktg., L.P. v. Wolf Hollow I, L.P.*, 383

S.W.3d 138, 144 (Tex. 2012) (enforcing contractual waiver of consequential damages against a tort); *Allright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974) (holding that "parties may agree to limit the liability of one for future negligence"); *Fox Elec. Co., Inc. v. Tone Guard Sec., Inc.*, 861 S.W.2d 79, 83 (Tex. App.—Fort Worth 1993, no writ) (holding that a "limitation of liability clause in the contract in question is enforceable, and it is irrelevant that [the plaintiffs'] cause of action was based upon negligence because the clause specifically took into account loss through negligence, and no disparity of bargaining power is at issue"); *Curtis*, 621 B.R. at 187 (enforcing limitation-of-liability clause against tort claim).

7. Indeed, the EPC Contract clearly reflects the parties' intention that the limitation-of-liability clauses to apply to negligence claims:

> [T]he waivers and disclaimers of liability, releases from liability, limitations and apportionments of liability and indemnities expressed throughout this Agreement ***shall apply*** even in the event of the fault, ***negligence*** (in whole or in part), strict liability, breach of contract or otherwise of the Person released or whose liability is waived, disclaimed, limited, fixed or indemnified.

[Adv. P. Doc. No. 38-1, EPC Contract § 20.8.A (emphasis added).] The EPC Contract is clear, and the Court must enforce the parties' expressed intent. *Matter of Marriage of I.C. & Q.C.*, 551 S.W.3d 119, 122 (Tex. 2018) (holding that a court's "primary objective is to ascertain and give effect to the parties' intent as expressed in the instrument"). Thus, the Court must disallow any damages above the EPC Contract's agreed-upon limitations.

8. The EPC Contract limits damages in at least three relevant sections.[5] Each limitation applies in a different situation. This Reply discusses them from the most significant

[5] Plaintiffs expressly incorporated the EPC Contract into their pleadings. [Adv. P. Doc. No. 38, 38-1.] As a result, the Court may consider the EPC Contract when deciding the pending motions to dismiss.

limitation (barring damages over $1 million per occurrence) to the least (stipulating maximum damages of $430 million). All three apply, and CIC argues them in the alternative.

9. *First*, Section 20.2 limits damages after Substantial Completion to $1 million per occurrence:

> ***Contractor shall be liable to Owner . . . 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*** . . . . [But s]ubject to, and without in any way limiting, any of Contractor's other obligations under this Agreement, including its obligation to fully complete the Work under this Agreement and to perform Corrective Work under Section 12.3, ***Contractor's liability set forth in the foregoing sentence shall be limited to One Million U.S. Dollars (U.S.$1,000,000) per occurrence***.

[EPC Contract § 20.2, p. 136 (emphasis added).][6] In their response to Zachry's motion to dismiss [Adv. P. Doc. No. 38], Plaintiffs confirmed that the explosion occurred *after* the Train 3 Expansion achieved Substantial Completion: "***The substantial competition date for . . . Train 3 was May 1, 2020.***" [FLNG Rep. C. Clayton Aff., Adv. P. Doc. No. 38-1 (emphasis added) (the "Clayton Aff.").] It is undisputed that the explosion giving rise to this litigation occurred June 8, 2022—more than two years later. [The Clayton Aff.; Petition ¶ 27 (both claiming damages occurred in June 2022).] Thus, Plaintiffs admit this limitation-of-liability clause's predicate. Plaintiffs cannot state any claim for more than $1 million per occurrence.

10. *Second*, EPC Contract Section 20.5 waives consequential and lost-profit damages. This waiver is valid and enforceable. *El Paso Mktg., L.P.*, 383 S.W.3d at 144 (enforcing contractual waiver of consequential damages). Dismissal of consequential damages reduces Plaintiffs claims to direct damages of $216 million. [Petition ¶ 36.]

[6] The EPC Contract further clarifies that—after Substantial Completion—the risk of loss shifted to the Owners. "As between Owner and Contractor, Owner shall bear the risk of physical loss and damage to the Train 3 Expansion and each component thereof after Substantial Completion of the Train 3 Expansion is achieved." (EPC Contract § 8.2.B.)

11. *Third*, EPC Contract Section 20.1 absolutely caps damages at $430 million. "Contractor shall not be liable to Owner under this Agreement for cumulative aggregate amounts in excess of Four Hundred and Thirty Million U.S. Dollars ($430,000,00) in the aggregate." [EPC Contract § 20.1.]

12. For these reasons, the Court must dismiss Plaintiffs' claims that are in excess of contractual limitations.

II. As CB&I explained in its briefing, the Court must apply the economic loss rule to dismiss Plaintiffs' negligence claim.

13. CIC adopts and incorporates the legal arguments in the CB&I Motion to Dismiss and CB&I Reply. As CB&I shows, the proper application of the economic loss rule requires dismissal.

14. To shield themselves from the economic loss rule, Plaintiffs invoke *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716 (Tex. 2014). But *Chapman* is distinguishable. There, the defendant, a plumber, entered into a contract with a homebuilder, who in turn had a separate contract with the homeowner–plaintiff. The homeowner alleged the plumber's negligent work damaged the home. The Texas Supreme Court held that the "negligent performance of a contract that proximately injures a ***non-contracting party's property*** or person states a negligence claim . . . ." *Id.* at 717 (emphasis added). The homeowner alleged both a duty independent of the plumbing contract (the plumber did not owe the homeowner any contractual duties) and damages independent of the contract (the plaintiff's damages extended beyond plumbing contract's anticipated benefits). *Id.* 718–19. Not so here. Plaintiffs and Defendants are in privity of contact. The EPC Contract created Defendants' duty to design Line 185185, evaluate piping instrumentation, and identify risks. And the EPC Contract fully anticipates claims like

Plaintiffs', meaning Plaintiffs' damages fall within the contractual expectations. Thus, *Chapman* does not control, and the economic loss rule applies.

15. The economic loss rule's rationale rule bolsters this conclusion. The Texas Supreme Court observed that "the application of the [economic loss] rule depends on an analysis of its rationales in a particular situation." *LAN/STV v. Martin K. Eby Const. Co.*, 435 S.W.3d 234, 245–46 (Tex. 2014). The Court provided two rationales: (1) indeterminate and disproportionate liability, and (2) deference to contract. *Id.* at 240. It is this second rationale that urges the application of the economic loss rule here because the EPC Contract represents the parties' bargained-for balancing of risks.

16. "[C]onstruction disputes are good candidates for precluding recovery under the 'economic loss' rule, because the parties are in a position to protect themselves through bargaining." *Id.* 248. Construction parties allocate the risk of loss by contract or cover risk through insurance, thus "[i]t makes sense to let the parties bargain about this rather than impose a 'legal' solution." *Id.* The EPC Contract parties extensively negotiated and balanced risks, resulting in the EPC Contract. Imposing unexpected tort liability disrupts this balance. In such situations, the Texas Supreme Court directs courts to defer to the parties' bargained-for contract.

17. Application of the economic loss rule is straightforward on Plaintiffs' allegations, and the Court should dismiss Plaintiffs' negligence claim.

III. The Court should further dismiss Plaintiffs' claim as untimely under the statute of limitations and because Plaintiffs failed to plead with the necessary specificity.

18. CIC adopts and incorporates the arguments in CB&I's Motion to Dismiss and the CB&I Reply concerning the statute of limitations and Federal Rule of Civil Procedure 8 and agrees that these grounds require dismissal.

For these reasons and the reasons in the CIC Motion, CIC asks that the Court grant the CIC Motion and dismiss Plaintiffs' negligence claim in its entirety. Additionally, CIC asks that the Court dismiss Plaintiffs' claims in excess of the limitation-of-liability contractual cap.

Dated: November 6, 2024

Respectfully submitted,

/s/ Charles M. Jones II

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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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