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 REPLY IN SUPPORT OF RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' CLAIM FOR CONSEQUENTIAL DAMAGES

Defendant Zachry Industrial, Inc. ("Zachry Industrial") files this reply in support of its Motion to Dismiss Plaintiffs' Claim for Consequential Damages, Adv. P. Doc. No. 39 ("Motion"). Zachry Industrial respectfully shows the Court as follows:

I.
ARGUMENTS AND AUTHORITIES

Paragraph 64 of Plaintiffs' petition seeks "lost profits." Adv. P. Doc. No. 1-2, at Page 25 of 86 ("Petition"). Zachry Industrial moved to dismiss Plaintiffs' claim for lost profits and other consequential damages because recovery of those damages is barred as a

matter of law by Section 20.5 of the EPC Contracts.[*] Section 20.5 provides that "notwithstanding any other provisions of this agreement to the contrary," neither party shall be liable to the other for "consequential losses or damages, **including loss of profits**." Motion at 4 (emphasis added and capitalization altered). Accordingly, "the **sole** way to avoid enforcement of an agreement to limit or exclude consequential damages" such as Section 20.5 "is to show that the waiver was unconscionable." *Id.* at 6. But as contracts "heavily negotiated by highly sophisticated commercial entities and their able lawyers," the EPC Contracts are not unconscionable as a matter of law. *Id.* at 7.

In their response, Adv. P. Doc. No. 42 ("Response"), Plaintiffs do not deny the plain meaning of Section 20.5 or its obvious application to Plaintiffs' claim for lost profits. Nor do they even attempt to argue that Section 20.5 is unconscionable. Quite the opposite: Plaintiffs contend that they "are not required to allege unconscionability to recover consequential damages." Response at 8.

Instead, Plaintiffs proffer two reasons why the Court should ignore the clear-cut waiver of lost profits in Section 20.5. Neither has merit.

A. Section 20.5's waiver governs regardless of the UCC's applicability.

Plaintiffs first contend that "Zachry's argument hinges on the application of the UCC to the EPC Contracts," but "the UCC does not govern the EPC Contracts." Response at 3. The first half of this contention is erroneous, rendering the second half irrelevant.

[*] *See* Motion at 2 n.2 (noting that the parties negotiated three virtually identical agreements covering three trains and referring to those agreements as the "EPC Contracts").

To be sure, in sales of goods to which the UCC applies, Tex. Bus. & Com. Code § 2.719(c) **confirms** that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." Motion at 6. But even apart from the UCC, Texas law upholds contractual limitations of damages. As the Texas Supreme Court has held, "[l]imitation-of-liability clauses . . . are generally valid and enforceable." *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 231 (Tex. 2019) (enforcing contract's waiver of punitive damages). That precept derives not narrowly from § 2.719(c) but instead broadly from Texas law's "strongly held principles of freedom to contract." *Id.* at 233; *accord, e.g., James Construction Group, LLC v. Westlake Chemical Corp.*, 650 S.W.3d 392, 403 (Tex. 2022) ("Texas has a strong public policy favoring freedom of contract.").

Accordingly, it is no surprise that courts applying Texas law routinely enforce waivers of consequential damages **even in cases not governed by the UCC**. *See, e.g., Aries Building Systems, LLC v. Vanguard University of Southern California*, 2021 WL 5155667, at *2–3 (S.D. Tex. July 14, 2021) (enforcing waiver of consequential damages in contract for purchase, installation, and setup of modular office building); *McKinney/ Pearl Restaurant Partners, L.P. v. Metropolitan Life Insurance Co.*, 241 F. Supp. 3d 737, 754–56 (N.D. Tex. 2017) (enforcing waiver of consequential damages in restaurant lease); *City of Waco v. Kleinfelder Central, Inc.*, 2016 WL 5854290, at *6–7 (W.D. Tex. Oct. 6, 2016) (enforcing waiver of consequential damages in contract for remediation of property, albeit denying summary judgment regarding "whether the damages sought by the City are consequential damages"); *BCC Merchant Solutions, Inc. v. Jet Pay, LLC*, 129 F. Supp. 3d

440, 479 (N.D. Tex. 2015) (enforcing waiver of consequential damages in contract for credit card processing services). Plaintiffs have cited no authority to the contrary.

The validity and enforceability of Section 20.5 of the EPC Contracts does **not** turn on whether the UCC applies to that contract, and so Plaintiffs' first argument fails.

B. Plaintiffs have not sufficiently pled any exception for gross negligence.

Plaintiffs also contend that "[p]re-injury waivers of consequential damages" like Section 20.5 "are void in instances of gross negligence," and that "Plaintiffs have alleged gross negligence." Response at 6, 7. Whether or not Plaintiffs are right on the law, Plaintiffs have **not** properly pled gross negligence, and so this argument fails as well.

The EPC Contracts define "Gross Negligence or Willful Misconduct" to "have the meanings determined under the governing law of this Agreement," which is Texas law. EPC Contracts at 19. Tex. Civ. Prac. & Rem. Code § 41.001(11) provides:

> (11) "Gross negligence" means an act or omission:
>
> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Plaintiffs' petition states in conclusory fashion that "Defendants' acts and omissions constitute gross negligence." Petition at Page 25 of 86, ¶ 64. What were these acts or omissions? Plaintiffs pled three:

> a. Contractor's deficient bolt/washer/nut retention assembly design and its inadequate quality assurance/quality control during assembly,

b. Contractor's excessive cable length and increased bend radius of cabling resulting in significant partial discharge on the cable bundles, and

c. Contractor's deficient bolt assemblies, causing the bolts to become dislodged from the micarta panels and separation of the micarta panels themselves.

Id. at 23–24 of 86, ¶ 61.

None of these acts or omissions satisfies either prong of the statutory definition of gross negligence. First, none of them implicates — on its face or by implication — an "extreme degree of risk" vis-à-vis "potential harm" to human beings, as required by § 41.001(11)(A). Second, none of them suggests — and Plaintiffs nowhere else plead — any "actual, subjective awareness of the risk" on the part of Defendants' agents, let alone any "conscious indifference to the rights, safety, or welfare" of human beings, as required by § 41.001(11)(B).

In asserting that "Defendants' acts and omissions constitute gross negligence," Plaintiffs have merely mouthed "labels and conclusions" of the kind condemned by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007), *cited in* Response at 3. But Plaintiffs' "obligation to provide the 'grounds' of [their] 'entitle[ment] to relief' requires more than" that. *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). Plaintiffs have failed to provide any grounds for concluding that they have pled gross negligence as defined by Texas law. As a matter of law, therefore, Plaintiffs may not avail themselves of any rule that pre-injury waivers of consequential damages are void in instances of gross negligence.

C. Plaintiffs should not be given an opportunity to replead.

Plaintiffs state that in "the event the Court believes that Plaintiffs have failed to sufficiently allege facts supporting their claim for consequential damages, Plaintiffs request an opportunity to replead." Response at 7–8. As this Court has opined, trial courts "often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, **unless it is clear that the defects are incurable**." *In re Saenz*, 516 B.R. 423, 433 (Bankr. S.D. Tex. 2014) (emphasis added) (quoting *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002)). In other words, "futility of the amendment" is a long-recognized basis for denying leave to amend. *Edionwe v. Bailey*, 860 F.3d 287, 295 (5th Cir. 2017) (indirectly quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Moreover, leave to amend is not required where, as here, a plaintiff "fail[s] to apprise the district court of the facts that he would plead in an amended complaint, if necessary, to cure any deficiencies." *Id.* at 294 (quoting *Gentilello v. Rege*, 627 F.3d 540, 546 (5th Cir. 2010)).

Plaintiffs failed to apprise this Court of the facts that they would plead in an amended complaint and should therefore be denied leave to amend. The Fifth Circuit has "little difficulty affirming [a trial] court's denial of leave of leave to amend" in that circumstance. *Id.* (so holding where the plaintiff merely stated that if "the Court is inclined to dismiss any portion of Plaintiff's complaint for failure to state a claim, Plaintiff requests leave of court to amend his complaint to cure the alleged pleading deficiencies identified by Defendants").

In addition, it would be futile for Plaintiffs to replead, because their failure properly to allege gross negligence is uncurable if they plead truthfully. The alleged defects quoted above all concern what Plaintiffs call "three General Electric 75 MW motors that power three propane and mixed-refrigerant compressors." Petition at Page 15 of 86, ¶ 18. But Plaintiffs had these (defective) General Electric motors only because Plaintiffs **rejected** Defendants' recommendation to install alternative motors manufactured by Siemens. In particular, in a letter dated February 14, 2014, Plaintiffs "chose to override [Defendants'] recommendation and instructed [Defendants] to proceed with the GE motors" instead. *See* Declaration of Ralph Biediger in Support of the Debtors' Objections to the FLNG Contract Claims, Case No. 24-90377, Doc. No. 1187-1, at 4, ¶ 10; *see also id.* ¶¶ 8–9.

Plaintiffs should not be permitted to replead.

II.
CONCLUSION

For these reasons and those stated in the Motion, 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 12th day of November, 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/ John B. Thomas
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