Docket #0051 Date Filed: 11/13/2024

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

IN RE: ZACHARY INDUSTRIAL, INC.,	§	
	§	**Case No. 24-90377 (MI)**
Debtor.	§	**Chapter 11**
Allianz Global Risks US Insurance Co., et al.	§	
	§	**(Jointly Administered)**
	§	**Adversary No. 24-03190**
Plaintiffs,	§	
v.	§	
Zachry Industrial, Inc., et al.	§	
Defendants.	§	

PLAINTIFFS' SUR-REPLY TO CHIYODA INTERNATIONAL CORPORATION'S RULE 12(b)(6) MOTION TO DISMISS

Plaintiffs, 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* (collectively, "Plaintiff Insurers") by and through their undersigned counsel, file this Sur-Reply to Defendant Chiyoda International Corporation's Rule 12(b)(6) Motion to Dismiss.

I. Incorporation of Other Briefs Filed in this Case

In Defendant Chiyoda's Reply, there are three delineated arguments: "(1) Plaintiffs failed to state a claim for damages in excess of the limitation-of-liability clauses, requiring partial dismissal; (2) As CB&I explained in its briefing, the Court must apply the economic loss rule to dismiss Plaintiffs' negligence claim; and (3) The Court should further dismiss Plaintiffs' claim as untimely under the statute of limitations and because Plaintiffs failed to plead with the necessary specificity." As it relates to arguments (2) and (3), Chiyoda uses its reply to incorporate arguments made by other counsel in motion to dismiss briefing. In response to that incorporation, Plaintiffs incorporate their responses previously filed on the issue.

II. Plaintiffs Improperly Package Rule 56 Arguments Into Their Rule 12(b)(6) Motion

Defendant Chiyoda represented to this Court that it can dismiss claims in excess of contractual limitations. On its face, Plaintiffs maintain and continue to argue that these limitations do not apply to the negligence claims plead in the instant lawsuit before this Court. However, even if the Court disagrees with this analysis, Defendant Chiyoda is asking the Court to issue a ruling that inherently requires taking evidence, wholly improper at the 12(b)(6) stage. *See* C*&C Inv. Props., L.L.C. v. Trustmark Nat'l Bank*, 838 F.3d 655, 660 (5th Cir. 2016). ("A Rule 12(b)(6) motion typically cannot rely on evidence outside the complaint").

First, Defendant cannot even articulate the relief it is requesting of the Court, necessitating denial of the "request" on its face. Defendant Chiyoda argues that damages are limited to $1,000,000; while at the same time arguing that damages are limited to $216,000,000; while at the same time arguing that damages are limited to $430,000,000. Chiyoda admits in its reply that "Each limitation applies in a different situation." By this very admission, it is asking this Court, at a motion to dismiss stage, to apply evidence to determine both (a) if a limitation in a contract

applies, and (b) which limitations of at least three cited, applies to the facts at hand. This is wholly improper and should be disregarded.

Second, Defendant represents to this Court that there is a limitation of liability, while wholly leaving out the exceptions to the limitation in its brief. The full text of Defendant's citation is as follows, where the underlined text is cited in Chiyoda's reply, and the bolded text is a clear limitation to the underlined text:

> 20.2 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. 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 11.7 for buildings), (ii) of the Existing Facility, (iii) the Train 1 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 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. Subject 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; **provided, however, such limitation shall not apply to the extent that (1) the damage or destruction directly or indirectly arises out of or results from or relates to the Gross Negligence or Willful Misconduct of any Senior Supervisory Personnel or (2) the damage is incurred by Equipment that is mechanically or structurally coupled to Defective Work and such damage is caused by, or is the result of, such Defective Work**; . . .

(emphasis added) Even if this limitation applied, it would be based on any determination of whether the exceptions are met. Whether the damage is connected to Defective Work is a core

question before this Court to resolve in litigation. It would be improper for the Court to dismiss at this pleading stage, where Plaintiffs have appropriately stated a claim for which relief can be granted.

III. Conclusion

Plaintiffs continue to request that this Court DENY Defendant Chiyoda's Motion to Dismiss and allow the properly stated claim to proceed through litigation on its merits. In the alternative, Plaintiffs continue to request this Court allow leave to restate any claims as allowed by the Federal Rules of Civil Procedure.

Dated: November 13, 2024

Respectfully submitted,

/s/ Ken Green

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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/ Ken Green
Ken Green