Docket #0061 Date Filed: 12/4/2024

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

Defendant Zachry Industrial, Inc. ("Zachry") files this Supplement Brief in Support of its Motion to Dismiss Plaintiffs' Claim for Consequential Damages [Adv. P. Doc. Nos. 39, 44]. In support, Zachry respectfully shows the Court as follows:

I. INTRODUCTION

Plaintiffs' attempt to re-package their breach of contract claim into a claim for gross negligence has proven futile. Plaintiffs' First Amended Complaint makes clear that it was the negligence of **General Electric** — not Zachry or other Defendants — that was the root

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cause of the motor defects that Plaintiffs seek to ascribe to Defendants through the EPC Contracts. To be sure, Plaintiffs allege that Defendants should have caught GE's mistakes, despite GE's status as a world-class manufacturer of electric motors and more than 125 years of engineering experience, despite GE's fabricating the motors off-site, and despite GE's delivering the motors to the project site as "intact units" with casings that were not scheduled to be opened for service until nine years after installation.

But in so alleging, Plaintiffs do not plausibly plead gross negligence by **Defendants**. Further, Plaintiffs' attempt to impute GE's alleged gross negligence to Defendants fails as a matter of law. Therefore, Plaintiffs' claim for gross negligence (and the associated claim for consequential and lost profit damages) should be dismissed with prejudice.

II.
BACKGROUND

Plaintiffs' Original Petition sought consequential damages arising from Defendants' allegedly defective work under contracts ("EPC Contracts") to build a LNG Facility in Freeport, Texas for Plaintiffs. Adv. P. Doc. No. 1-2 ("Pet.") at 1.[1] Plaintiffs' claims for consequential damages represent the lion's share of their alleged damages.

After the case was removed, Zachry filed a Motion to Dismiss under Rule 12(b)(6), arguing that Plaintiffs agreed to an enforceable waiver and release of all consequential damages in the EPC Contracts. Adv. P. Doc. No. 39.

[1] The parties negotiated three contracts covering the three trains of the LNG Facility. *See* Compl. at ¶¶ 17-24. The pertinent provisions are "virtually identical." *Id.* at ¶ 24. Zachry 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 Contracts").

In response, Plaintiffs did not deny the existence of the waiver but argued that the waiver was unenforceable in instances of "gross negligence," and that Plaintiffs had properly alleged gross negligence. Adv. P. Doc. No. 42 at 7. Alternatively, in lieu of dismissal, Plaintiffs requested leave to re-plead. *Id.*

In reply, Zachry argued that Plaintiffs' pleadings did not sufficiently state a claim for gross negligence under applicable Texas law, and that any amendment would be futile. Specifically, the alleged acts or omissions that Plaintiffs claim as the basis of gross negligence concerned defects discovered in three General Electric ("GE") 75 MW motors, which Plaintiffs insisted on using despite Defendants' recommendation to use alternative motors manufactured by Siemens. Adv. P. Doc. No. 44.

The Court heard oral argument on Zachry's Motion to Dismiss on November 18, 2024. Adv. P. Doc. No. 1453. The Court took the Motion under advisement and set a status conference for November 25, 2024. *Id.* On that date, the Court ruled that Plaintiffs' Original Petition failed to state a claim for gross negligence and ordered Plaintiffs to re-plead by December 3, 2024. Adv. P. Doc. No. 1490. As a result, Plaintiffs have now filed their First Amended Complaint. Adv. P. Doc. No. 60 ("Compl.").

Thus, the specific issue before the Court is whether Plaintiffs' First Amended Complaint properly states a claim for gross negligence under Texas law. As Zachry demonstrates below, it does **not**.[2]

[2] The Parties agreed in the EPC Contracts that the terms "Gross Negligence or Willful Misconduct" "have the meanings determined under the governing law of this Agreement," which is Texas law. EPC Contracts at 19.

III.
GROSS NEGLIGENCE STANDARD

Tex. Civ. Prac. & Rem. Code § 41.001(11) defines gross negligence:

> (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.

Under the first, objective element, an extreme risk is "not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Medina v. Zuniga*, 593 S.W.3d 238, 247–48 (Tex. 2019) (citing *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998)). An act or omission that is merely thoughtless, careless, or not inordinately risky does not rise to an extreme degree of risk; the threshold is significantly higher than the test for ordinary negligence. *See Medina*, 593 S.W.3d at 249.

To establish the second, subjective component, "the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care." *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 173 (Tex. 2005). The risk should be "examined prospectively from the perspective of the actor, not in hindsight." *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 248 (Tex. 2008). To prove the defendant had actual, subjective awareness of the risk but proceeded with conscious indifference, the plaintiff must show the defendant knew about the risk in question — not just **any** risk — but

acted anyway. *See Medina*, 593 S.W.3d at 248 (plaintiff must demonstrate that defendant knew of the peril but demonstrated through its acts or omissions that it did not care).

In the case of a corporation, the plaintiff must show that the gross negligence was due to actions or inactions of a vice principal or were otherwise ratified by the corporation. *See, e.g.*, *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 138 (Tex. 2012); *accord* [EPC CONTRACT] at p.130, ¶ 20.2 (excluding from the limitation of Contractor's liability any damage or destruction that results from "the Gross Negligence . . . of any **Senior Supervisory Personnel**" (emphasis added)).

IV.
ARGUMENTS AND AUTHORITIES

Plaintiffs' attempt to plead gross negligence fails in two respects: (1) the allegations against Defendants fail to satisfy the demanding standards imposed by Texas law; and (2) Plaintiffs' attempts to attribute to Defendants the (alleged) gross negligence of GE fails as matter of law. We address these two points in turn.

A. As a matter of law, Plaintiffs' allegations do not rise to the level of gross negligence.

1. Plaintiffs fail to effectively plead the objective and subjective prongs of gross negligence.

First, as to the objective prong, Plaintiffs allege:

> Each of the three trains uses three 75 MW motors, and each motor in turn powers three propane and mixed-refrigerant compressors. The motors are **massive** and, as Defendants acknowledged, were among the **largest to ever be built**. As a result, defects in the motors like those experienced at the LNG Facility **necessarily involved an extreme degree of risk**, considering the probability and magnitude of the **potential harm to others** who would be working at the LNG Facility.

Compl. at ¶ 56 (emphasis added).

Thus, the entire notion of an **extreme** degree of risk of potential harm to others rests on the mere fact that the motors were "massive," i.e., "among the largest ever to be built." That connection is factually unsupported and legally unjustified: nothing in law or logic (or elsewhere in the complaint) compels the conclusion that a **large** motor is, by its very nature, likely to involve an extreme degree of risk. Indeed, as quoted earlier in the complaint, Defendants observed — and Plaintiffs do not now contradict — that the size of the motors heralded "**some possibility** that **problems** will occur during manufacturing or testing." Compl. at ¶ 54 (emphasis altered). But "some possibility [of] problems" stands in fatal contrast to the "extreme degree of risk" of "likelihood of serious injury" to others required by Texas law. *Medina*, 593 S.W.3d at 247.

It is questionable, moreover, whether there was even a risk (however small) of "serious injury" as that phrase is used in Texas law. In contrast to the risk of a driver being blindsided by a speeding truck, *see id.* at 242, or the risk of an employee dying from leukemia though occupational exposure to benzene, *see Mobil Oil*, 968 S.W.2d at 920, the damage caused by the motor defect was not some catastrophic failure resulting in loss of life or limb. Instead, the damage ensured when loose hardware fell into motor windings, causing an electric short, and causing the motor to "trip" and go offline, *see* Compl. at ¶¶ 45-53, the garden-variety kind of economic loss that these sophisticated parties allocated in the EPC Contract. In short, Plaintiffs have not sufficiently pled the objective element of gross negligence.

Second, as to the subjective element, Plaintiffs allege:

> Defendants had the subjective awareness of the **potential for problems** during the manufacture of the motors due to their massively large size well before the manufacturing process even began. Defendants were also subjectively aware that the size and complexity of the drive equipment presented "first-of-a-kind" **challenges** that must be "carefully managed in an aggressive and disciplined way."

Compl. at ¶ 57 (emphasis added); *accord id.* at ¶ 54 (alleging that "Defendants acknowledged awareness of the **possibility of problems**" (emphasis added)); *id.* at ¶ 55 (alleging that Defendants "recognized the **serious challenges** presented by the complexity of the drive equipment and that Defendants must actively manage those risks").

This allegation is likewise fatally flawed. By definition, an awareness of the "potential for problems" and various associated "challenges" does not equate to an "actual, subjective awareness of the risk" of serious injury. Moreover, the only "challenges" referenced in the pleading are challenges associated with ensuring that the motors themselves worked and with adhering to the project schedule, not protecting against the potential serious injury to human beings. For example, Defendants stated that "[a]lthough it is believed such problems can ultimately be solved, they could affect the **schedule**." December 19, 2013 Engineering Evaluation Letter at 23 (emphasis added), filed as Doc. 1187-1 in No. 24-90377, Pages 9-35 of 40 ("Evaluation Letter").[3] Defendants also stated that the "risks could result in Supplier **delays** and/or **equipment performance issues**." *Id.* (emphasis added). Plaintiffs identify no

[3] A court may consider "documents incorporated into the complaint by reference or integral to the claim" in consideration of a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Plaintiffs expressly reference and quote the above-cited December 19, 2013 Engineering Evaluation Letter and the below-cited February 14, 2014 letter in their First Amended Complaint; thus, the Court may consider those documents in deciding this Motion to Dismiss.

awareness by Defendants of potential serious injury to others arising from the motors. Rather, at most, Plaintiffs identify potential problems with the operation of the motors themselves and any resulting delay.

Therefore, Plaintiffs fail to sufficiently plead either prong of gross negligence.

2. Plaintiffs fail to tie Defendants' alleged omissions to the objective and subjective prongs of gross negligence.

Plaintiffs identify the following acts or omissions of Defendants as grossly negligent:

- failure to "implement adequate inspections, quality assurance and quality control procedures pursuant to Good Engineering and Construction Practices to safeguard against [certain risks]." Compl. at ¶ 58;
- failure to "adequately review the design for the motors and identify the bolt assembly design defect," *id.* at ¶ 59;
- failure to "implement adequate quality assurance and quality control procedures to identify and prevent poor workmanship during the manufacture of the motors," *id.* at ¶ 62; and
- failure to perform "shop inspections during fabrication, *id.*.

However, gross negligence is established only when an "act or omission" satisfies the objective and subjective prongs "**at the time of its occurrence**." Tex. Civ. Prac. & Rem. Code § 41.001(11) (emphasis added); *Columbia Med. Ctr.,* 271 S.W.3d at 248 (risk must be "examined prospectively from the perspective of the actor, not in hindsight."); *Cano v. State Farm Mut. Auto. Ins. Co.*, 425 F. Supp. 3d 779, 791 (W.D. Tex. 2019) (act or omission must be viewed objectively from the defendant's standpoint "at the time of the event").

Plaintiffs entirely fail to plead that, **at the time** of any of the alleged failures or omissions, that failure or omission satisfied either the objective or subjective prongs of gross negligence. Plaintiffs' allegations of Defendants' negligent failures are just as vague as

Plaintiffs' allegations as to objective or subjective awareness of any particular risk, and nowhere are the two linked.

3. Plaintiffs fatally fail to allege gross negligence by **vice principals** of Defendants.

As noted above, to establish the gross negligence of a corporation, Texas law requires the plaintiff to prove that the relevant acts or omissions were those of a vice principal or were otherwise ratified by the corporation. *See U-Haul Intern.*, 380 S.W.3d at 138 (Tex. 2012). That is to say, the relevant act or omission must be "that of the corporation, not its ordinary agents or servants." *McDaniel v. Dindy*, 673 S.W.3d 24, 32 (Tex. App.—Fort Worth 2023, no pet.). Thus, when an employee is an "ordinary servant" — i.e., not a "vice principal" — "his conduct could not form the basis for a gross negligence claim against [his corporate employer]." *Id.* at 33. As further noted above, the EPC Contracts confirm this precept, demanding that Plaintiffs establish the gross negligence of Defendants' "Senior Supervisory Personnel." EPC Contracts, at p. 130, Art. 20.2.

Here, Plaintiffs have failed to allege acts or omissions by vice principals, or Senior Supervisory Personnel, of Defendants. That failure supplies an independent basis for concluding that Plaintiffs have not properly pled a claim for gross negligence.

4. The documents referenced in Plaintiffs' complaint undercut gross negligence.

Plaintiffs' references to communications in 2013 and 2014 omit statements that cut against the alleged gross negligence.

Plaintiffs first allege that Defendants "acknowledged awareness of the possibility of problems during manufacturing due to the motors' size." Compl. at ¶ 54. Plaintiffs'

allegation is misleading. Plaintiffs cite a December 19, 2013 Engineering Evaluation Letter, to establish Defendants' acknowledgment that "there is some possibility that problems will occur during manufacturing," because the motors "will be among the largest ever built for these services." But Plaintiffs omit Defendants' statement to Plaintiffs that the risk "can be reduced via selection of the Siemens LCI offering, which has superior references in terms of quantity and similar size." Evaluation Letter at 23.

Plaintiffs next allege that Defendants "recognized the serious challenges presented by the complexity of the drive equipment and that Defendants must actively manage those risks." Compl. at ¶ 55. Here, too, Plaintiffs omit critical portions of the letter. Defendants indeed acknowledge the "complexity and 'first-of-a-kind' challenges" that must be "executed carefully" and "carefully managed in an aggressive and disciplined way." *Id.*; *see also* Evaluation Letter at 24. But Plaintiffs ignore the next section of the letter, entitled "Summary / Recommendations," whereby Defendants recommend the Siemens motor for reasons including "superior references for Variable Speed Drives of this size and architecture," "superior references for Motors of this size and architecture," and "lower risks / unknowns associated with LCI Drive architecture." *Id.*

Finally, Plaintiffs admit that Defendants "recommended Siemens" for the Motors in a February 14, 2024 letter, arguing that Defendants did so due to "Siemens' lower total cost and improved annual electrical usage." Compl. at ¶ 59; *see also* February 14, 2014 letter, filed as Doc. 1187-1 in No. 24-90377, Pages 36-40 of 40. Again, Plaintiffs omit that Defendants also recommended Siemens due to its "[e]xperience in the production of the electric motor drive train in the 75MW size for LNG projects." Plaintiffs skip over the

undisputed fact that Plaintiffs **rejected** Defendants' recommendation to use the Siemens motor, and instead ordered Zachry to use the GE motor. *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.

Plaintiffs cannot plausibly allege that Defendants ignored extreme risks and proceeded with conscious indifference, when the documents on which Plaintiffs rely make clear that Plaintiffs themselves rejected Defendants' suggestion to use a different motor.

B. Plaintiffs' attempts to impute the hypothetical gross negligence of GE to Defendants fail as a matter of law.

Plaintiffs allege that Defendants are responsible for the allegedly grossly negligent acts and omissions of its subcontractors. *Id.* at ¶ 66. Specifically, Plaintiffs allege that "General Electric designed and manufactured the motors" with "gross indifference," "particularly as to the defective nut-bolt assemblies, lack of proper torquing, the improper use of unspecified materials . . . , the improper use of dissimilar metals . . . , and the excessive cable lengths and bend radii are all clear indications of the **grossly negligent acts of General Electric**, which are contractually imputed to the Defendants." *Id* (emphasis added).

Plaintiffs' attempt to impute tort liability fails as a matter of law.

First, alleging that "as agreed upon in Section 2.3 of the EPC Contracts, Defendants are fully responsible for the acts and omissions of their subcontractors" is to allege merely **contractual** liability on the part of Defendants, rather than **tort** liability. *See id.* at ¶ 26. Section 2.3 cannot act to impute tort liability.

Second, under Texas law, a defendant in a negligence claim must owe an independent duty to the plaintiff to be liable. In a general contractor / subcontractor relationship like the one alleged by Plaintiffs, as a general rule, a general contractor has no duty to ensure that the subcontractor safely performs its work. *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864–65 (Tex. 2021) (citing *AEP Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 295 (Tex. 2020)). The only exception, not present here, is when the general contractor "retains some control over the manner in which the contractor performs the work that causes the damage." *JLB Builders, L.L.C.*, 622 S.W.3d at 864–65 (quoting *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791 (Tex. 2006)); *see also Lee Lewis Const., Inc. v. Harrison,* 70 S.W.3d 778, 783 (Tex. 2001). Here, Plaintiffs do not allege that Defendants had some level of control over GE's design and manufacture of the motors. Plaintiffs instead allege that Defendants should have caught these alleged issues afterwards. *See Columbia Med. Ctr.*, 271 S.W.3d at 248 (risk should be "examined prospectively from the perspective of the actor, not in hindsight"). Because Plaintiffs do not allege that Defendants exerted control over GE's manufacture of the motors, they allege no duty, without which there can be no negligence by Defendants.

Third, Plaintiffs do not allege that Defendants had any objective or subjective awareness of any allegedly negligent acts or omissions **by GE**. *See Diamond Shamrock*. 168 S.W.3d at 173 ("the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care"); *Lee Lewis Const.,* 70 S.W.3d at 786 (finding gross negligence in part because the defendant's employee "admitted that even after observing [the subcontractor's] ineffective fall-protection system, he did nothing

to remedy it"). Moreover, Plaintiffs again fail to allege that **vice principals, or Senior Supervisory Personnel**, of Defendants had any subjective awareness of acts or omissions by GE. *See McDaniel*, 673 S.W.3d at 32-33.

Therefore, Plaintiffs' imputation argument fails to state a claim for gross negligence.

IV.
CONCLUSION

For these reasons, and for the reasons stated in Zachry's Motion to Dismiss [Adv. P. Doc. No. 39], Zachry requests dismissal of Plaintiffs' claim for consequential damages, including lost profits, and that Zachry be awarded all further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 4th day of December, 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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