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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 PMA COMPANIES,

12 Plaintiff,

13 v.

14 GENOX TRANSPORTATION, INC;  
15 APPLIED LNG TECHNOLOGIES, LLC;  
16 LAIRD TRANSPORTATION, LLC and  
DOES 1 through 20, inclusive,

17 Defendants.

Case No.: 20-cv-2540-GPC

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
APPLIED LNG TECHNOLOGIES,  
LLC’S MOTION TO DISMISS  
CROSSCLAIMS OF CLEANCOR  
LNG**

**[ECF NO. 54]**

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19 On September 22, 2021, Defendant Applied LNG Technologies, LLC (“Applied”)  
20 filed the instant Motion to Dismiss Crossclaims of Cleancor LNG, LLC (“Cleancor”).  
21 ECF No. 54. On October 20, 2021, Cleancor responded in opposition. ECF No. 56. On  
22 October 25, 2021, Applied replied. ECF No. 57. Having considered the parties’ filings,  
23 the Court finds this matter suitable for disposition on the papers and therefore VACATES  
24 the hearing previously set for December 3, 2021. For the reasons discussed below, the  
25 Court HEREBY GRANTS IN PART AND DENIES IN PART the Motion to Dismiss.  
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1     **I. BACKGROUND**

2             The underlying action arises from a fire that occurred on or around May 25, 2019,  
3 on the premises of the Phillips Cattle Company, Inc (“Phillips”). ECF No. 56 at 6. The  
4 fire began during the transfer of liquid nitrogen gas (“LNG”) from an LNG tank trailer to  
5 an above-ground stationary storage tank on the premises. *Id.* Cleancor owned the above-  
6 ground tank. ECF No. 54-1; *see* ECF No. 50 at 9. Applied provided the tank trailer filled  
7 with LNG which was to fill Cleancor’s tank. *Id.* at 10. Applied also contracted with  
8 Genox Transportation, Inc. (“Genox”) to transport the trailer and to effectuate the transfer  
9 of LNG to the above-ground tank provided by Cleancor. *Id.* at 9. Genox then  
10 subcontracted the transportation to Laird Transportation, LLC. *Id.*

11             Plaintiff PMA Companies (“PMA”) insured Phillips and filed suit against  
12 Defendants Genox, Applied, and Laird Transportation, LLC (“Laird”) seeking to recover  
13 amounts that PMA paid to Phillips. ECF No. 56 at 7. Applied filed a third-party  
14 complaint adding Cleancor and Jason Laird, an individual, into the action. ECF No. 13.  
15 Cleancor then filed a crosscomplaint against Genox, Laird, and Jason Laird. ECF No. 38.  
16 Cleancor also filed a third-party complaint against Phillips. ECF No. 46. Genox answered  
17 Cleancor’s crosscomplaint and filed a counterclaim against Cleancor for indemnity,  
18 contribution, and declaratory relief. ECF No. 42. After Genox’s counterclaim against  
19 Cleancor, Cleancor crossclaimed against Applied on the bases of express contractual  
20 indemnity, equitable indemnity, negligence, and a claim for declaratory relief. ECF No.  
21 50. Cleancor’s crossclaims against Applied expressly incorporate by reference the  
22 allegations of the underlying Complaint by PMA against Defendants Genox, Applied,  
23 and Laird. *Id.* at 9. Applied now seeks to dismiss Cleancor’s crossclaim pursuant to  
24 Federal Rule of Civil Procedure (“Rule”) 12(b)(6). ECF No. 54.

1 **II. LEGAL STANDARD**

2 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint, i.e.  
3 whether the complaint lacks either a cognizable legal theory or facts sufficient to support  
4 such a theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citations omitted).  
5 For a complaint to survive a Rule 12(b)(6) motion to dismiss, it must contain “sufficient  
6 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550  
8 U.S. 544, 570 (2007)). In reviewing the motion, the Court accepts the allegations in the  
9 complaint as true and construes the pleadings in the light most favorable to the non-  
10 moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th  
11 Cir. 2008). However, threadbare recitals of the elements of a cause of action, supported  
12 by mere conclusory statements, do not suffice. *Iqbal*, 556 U.S. at 678 (citing *Twombly*,  
13 550 U.S. at 555). The court is also not required to accept as true mere legal conclusions.  
14 *Id.* Determination of whether a complaint states a plausible claim is “context specific,  
15 requiring the reviewing court to draw on its experience and common sense.” *Id.* at 663-  
16 64. Dismissal without leave to amend is improper unless it is clear that amendment would  
17 be futile. *Id.*

18 **III. CLEANCOR’S CROSS-CLAIMS**

19 **A. Express Contractual Indemnity Against Applied**

20 Cleancor’s Answer to Genox’s Counterclaim includes a crossclaim against Applied  
21 for express contractual indemnity. ECF No. 50 at 10. Cleancor alleges that it entered a  
22 contract with Applied requiring Applied to transport the LNG, and that the contract  
23 further requires “both parties to indemnify and defend the other to the extent and in  
24 proportion to the negligent acts or omissions of the other party and its contractors and  
25 agents . . .” *Id.* Cleancor further asserts that “it was Applied or Applied’s agents who  
26 caused all the damage in this claim and as such, it is Applied who should be providing a  
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1 defense and indemnity to Cleancor.” *Id.* The contract is attached to Cleancor’s Answer  
2 and Cross-Claim as Exhibit A. ECF No. 50-1. Paragraph 15 of the contract states: “Each  
3 Party shall defend and indemnify the other Party against any claim, demand, cause of  
4 action, suit, judgment, lien, damages, fines, penalties, and expenses . . . asserted by any  
5 third party . . . arising out of . . . the performance or nonperformance of this Agreement . .  
6 .” *Id.* at 6.

7 In the instant Motion to Dismiss, Applied argues that Cleancor has failed to state a  
8 claim for express contractual indemnity because, *inter alia*, Cleancor does not allege facts  
9 showing negligence by Applied or a defect in Applied’s equipment, nor does Cleancor  
10 sufficiently allege facts showing that the driver who delivered the LNG was an agent of  
11 Applied. ECF No. 54-1 at 8, 9. In essence, Applied argues that Cleancor has not shown  
12 facts supporting underlying liability to which indemnity would attach.

13 Applied’s argument, however, misapprehends what is required of Cleancor at this  
14 early stage in the litigation. Under Applied’s argument, Cleancor would need to  
15 essentially argue and prove the underlying merits of the dispute for its indemnity claim to  
16 survive a motion to dismiss—i.e., Cleancor would need to plausibly show that Applied  
17 was actually negligent. This is not the case. When a party asserts a basis for indemnity at  
18 the motion to dismiss stage, that party need only plausibly assert that a basis for the  
19 indemnity relationship itself exists, regardless of whether or not the party will actually  
20 later rely on that indemnity relationship once liability has been determined and allocated.  
21 *Garot v. Cnty. of San Diego*, No. 19-cv-1650, 2021 WL 51415, at \*4 (S.D.Cal. Jan. 5,  
22 2021) (“Under Rule 13(g), a crossclaim for indemnification or contribution need not be  
23 mature at the time of pleading . . . Rather, a crossclaim can be contingent upon the  
24 ultimate adjudication of the crossclaimant’s liability to plaintiff.”). In other words,  
25 Cleancor need not allege that it will actually be indemnified in the future, only that  
26 Applied might theoretically be held liable for indemnifying Cleancor. Here, Cleancor has  
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1 attached the contract between Cleancor and Applied, which, taken as true, provides a  
2 basis for potential future indemnity. Cleancor has therefore sufficiently alleged a claim  
3 for express contractual indemnity that is plausible on its face. Therefore, Applied’s  
4 Motion to Dismiss is DENIED as to Cleancor’s crossclaim for express contractual  
5 indemnity.

6 **B. Equitable Indemnity Against Applied**

7 Cleancor also asserts a crossclaim of equitable indemnity against Applied. ECF  
8 No. 50 at 11. The doctrine of equitable indemnity “permits a concurrent tortfeasor to  
9 obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.”  
10 *Am. Motorcycle Ass’n v. Superior Ct.*, 20 Cal. 3d 578, 598 (1978). To assert equitable  
11 indemnity, there must be a joint legal obligation to the injured party, i.e. “there can be no  
12 indemnity without liability.” *Prince v. Pac. Gas. & Elec. Co.*, 45 Cal. 4th 1151, 1165  
13 (2009). “Where parties expressly contract with respect to the duty to indemnify, the  
14 extent of that duty must be determined from the contract and not by reliance on the  
15 independent doctrine of equitable indemnity.” *Maryland Cas. Co. v. Bailey & Sons, Inc.*,  
16 35 Cal. App. 4th 856, 873 (1995) (internal quotations and citations omitted). “[W]hen  
17 contractual indemnity *is* applicable, the doctrine of equitable indemnity does *not* come  
18 into play.” *C.L. Peck Contractors v. Superior Ct.*, 159 Cal.App.3d 828, 834 (1984)  
19 (emphasis in original); *see also ConocoPhillips Co. v. Pac. Convenience & Fuels, LLC*,  
20 2018 WL 5275494, at \*10 (2018) (noting that the existence of express contractual  
21 indemnification provision bars resort to equitable indemnification relief); *Patton v.*  
22 *Experian Data Corp.*, No. SACV 17-01559-JVS, 2018 WL 6184773, at \*4 (C.D. Cal.  
23 Sept. 12, 2018) (finding that equitable indemnity crossclaim fails because party also pled  
24 express contractual indemnity).

25 In the instant case, Cleancor has made clear that an indemnity relationship exists  
26 between Cleancor and Applied as a result of an express contractual provision. This  
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1 express contractual indemnification provision precludes relief based on equitable  
2 indemnification. Thus, Cleancor has failed to state a claim for equitable indemnification  
3 upon which relief can be granted, as required by Rule 12(b)(6). Applied’s Motion to  
4 Dismiss as to Cleancor’s equitable indemnification crossclaim is therefore GRANTED.  
5 Furthermore, the Court finds that, because of the preemptive effect of the express  
6 contractual provision, amendment of Cleancor’s equitable indemnification crossclaim  
7 would be futile. Amendment is therefore DENIED.

### 8 **C. Negligence**

9 Cleancor’s third crossclaim for relief against Applied asserts negligence. The  
10 elements of a negligence claim under California law are: (1) existence of a duty; (2)  
11 breach of that duty; and (3) the breach as the proximate or legal cause of the resulting  
12 injury. *Beaver v. Tarsadia Hotels*, 29 F.Supp.3d 1294, 1321 (S.D. Cal. 2014). Cleancor  
13 states that Applied had a duty to ensure the agents it hired were properly trained, and that  
14 Applied breached this duty. ECF No. 50 at 11. Cleancor also alleges that the equipment  
15 “owned and negligently maintained by Applied caused the fire and consequence damage  
16 alleged in this action, and Applied is liable for said damage on that basis.” *Id.* at 12. In its  
17 Motion to Dismiss, Applied argues that Cleancor has not supplied any facts to support its  
18 allegations that Applied was negligent, that its equipment was defective, or that Applied  
19 knew or should have known that Genox or Laird Transportation lacked necessary training  
20 and did not meet all requirements of federal law. ECF No. 54-1 at 14. Cleancor counters  
21 that because its claim is derivative of PMA’s Complaint and incorporates the Complaint  
22 by reference, Cleancor’s crossclaims therefore include the claims and allegations set forth  
23 in PMA’s pleading, and that these provide additional sufficient basis for its crossclaim to  
24 survive a motion to dismiss. ECF No. 56 at 10.

25 In ruling on a motion to dismiss, a court may consider: the facts alleged in the  
26 complaint, documents attached to the complaint, documents relied upon but not attached  
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1 to the complaint when authenticity is not contested, and matters of which the court takes  
2 judicial notice. *Toranto v. Jaffurs*, 297 F.Supp.3d 1073, 1084 (S.D. Cal. 2018).

3 Therefore, while Cleancor’s allegations in its crossclaim might be insufficient when taken  
4 alone, the Court is empowered to look to the allegations in PMA’s Complaint which  
5 Cleancor incorporates by reference. Considering both Cleancor’s crossclaim and PMA’s  
6 Complaint, the Court finds that Cleancor has sufficiently pled facts supporting a plausible  
7 claim of negligence. *See* ECF No. 56 at 10-12 (reiterating specific provisions of PMA’s  
8 Complaint upon which Cleancor bases its cross-claim). Therefore, Applied’s Motion to  
9 Dismiss the crossclaim of negligence is DENIED.

10 **D. Declaratory Relief**

11 Cleancor’s fourth crossclaim against Applied is for declaratory relief. Cleancor  
12 asserts that “an actual controversy exists between Cleancor and Applied . . . Cleancor  
13 contends that Applied is obligated to defend and indemnify Cleancor, as expressly  
14 provided in the Purchase Agreement. Cleancor is informed and believes that Applied  
15 disputes its obligation to defend and indemnify Cleancor.” ECF No. 50 at 12.

16 “The fundamental basis of declaratory relief is the existence of an actual, present  
17 controversy over a proper subject.” *Otay Land Co. v. Royal Indemnity Co.*, 169  
18 Cal.App.4th 556, 562 (2008) (collecting cases). A declaratory judgment serves to quiet or  
19 stabilize a potential justiciable dispute. *Osseous Technologies of America, Inc. v.*  
20 *DiscoveryOrtho Partners LLC*, 191 Cal.App.4th 357, 364 (2010). “Another purpose is to  
21 liquidate doubts with respect to uncertainties or controversies which might otherwise  
22 result in subsequent litigation. One test of the right to institute proceedings for  
23 declaratory judgment is the necessity of present adjudication as a guide for plaintiff’s  
24 future conduct in order to preserve his legal rights.” *Id.* (quoting *Meyer v. Sprint*  
25 *Spectrum L.P.*, 45 Cal.4th 634 (2009)).

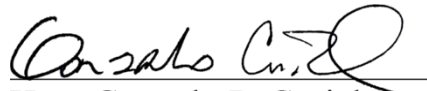
1 Here, Cleancor has alleged a present dispute over whether Applied has an  
2 obligation to defend and indemnify Cleancor in connection with the allegations in the  
3 PMA Complaint, Genox Crosscomplaint, and other claims alleged against Cleancor in  
4 this action. ECF No. 50 at 12. Applied's Motion to Dismiss does not argue that no such  
5 dispute exists; instead, it merely posits that "the dismissal of the other claims . . . resolves  
6 the fourth claim." ECF No. 54-1. The Court finds that Cleancor has sufficiently alleged  
7 an actual controversy between Cleancor and Applied, such that the fourth crossclaim for  
8 declaratory relief can survive a Rule 12(b)(6) motion. As such, Applied's Motion to  
9 Dismiss the claim for declaratory relief is DENIED.

#### 10 **IV. CONCLUSION**

11 Accordingly, the Court GRANTS Applied's motion to dismiss the crossclaim for  
12 equitable indemnity and DENIES Applied's motion to dismiss as to all other crossclaims  
13 against Applied by Cleancor in ECF No. 50. The hearing set for December 3, 2021 shall  
14 be VACATED.

#### 15 **IT IS SO ORDERED.**

16 Dated: December 1, 2021

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18 Hon. Gonzalo P. Curiel  
19 United States District Judge  
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