

CAUSE NO. \_\_\_\_\_

<p><b>PERFORMANCE CONTRACTORS, INC.</b></p> <p><b>Plaintiff,</b></p> <p><b>V.</b></p> <p><b>EQUISTAR CHEMICALS, LP.</b></p> <p><b>Defendant.</b></p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p><b>IN THE DISTRICT COURT OF</b></p> <p>_____ <b>JUDICIAL DISTRICT</b></p> <p><b>HARRIS COUNTY, TEXAS</b></p>
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**PERFORMANCE CONTRACTORS, INC.’S ORIGINAL PETITION, JURY DEMAND,  
AND REQUEST FOR DISCLOSURE**

COMES NOW PERFORMANCE CONSTRACTORS, INC. (“Plaintiff” or “Performance”), and files this its Original Petition, Jury Demand, and Request for Disclosure against Equistar Chemicals, LP (“Defendant” or “Equistar”), and, in support thereof, respectfully shows the Court the following:

**I. RELIEF SOUGHT**

1. Pursuant to Rule 47 of the Texas Rules of Civil Procedure, Plaintiff seeks monetary relief over \$1,000,000.00 as well as all other relief to which it is justly entitled.

**II. DISCOVERY CONTROL PLAN**

2. Plaintiff requests that discovery in this action occur under a Level 3 discovery plan pursuant to Texas Rule of Civil Procedure 190.4

**III. PARTIES**

3. Performance is a Louisiana corporation with its principle office located at 9901 Performance Way, Baton Rouge, LA 70810.

4. Equistar is a Delaware limited partnership with its principle office located at 1221 McKinney Street, Suite 300, Houston, Texas 77010. Equistar may be served through its Texas

registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, TX, 75201. Equistar regularly does business as Lyondell Chemical Company (“LYB”).

**IV. JURISDICTION AND VENUE**

5. Jurisdiction is proper in this Court because the amount in controversy is in excess of the jurisdictional limits of this Court.

6. Venue is proper in Harris County, Texas pursuant to Sections 15.002 and 15.035 of the Texas Civil Practice & Remedies Code because Defendant maintains its principal Texas office in Harris County. Venue is also proper in Harris County, Texas pursuant to Section 15.020 of the Texas Civil Practice & Remedies Code because the parties expressly agreed in writing to venue in Harris County, Texas.

**V. CONDITIONS PRECEDENT**

7. All conditions precedent to the commencement of this action have been performed, have occurred, or have been waived.

**VI. JURY DEMAND**

8. Plaintiff demands a trial by jury and will tender the appropriate fee in conjunction with this demand. Plaintiff respectfully requests that when the parties are called before the Court at the time of trial, all genuine issues in this case are tried before a jury.

**VII. REQUEST FOR DISCLOSURE**

9. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Plaintiff requests that Defendant disclose all information and documents identified in Rule 194.2 of the Texas Rules of Civil Procedure.

**VIII. BACKGROUND FACTS**

10. Performance and Equistar entered into a Construction Services Agreement on or about May 9, 2017 (“Contract”).

11. Pursuant to the Contract, Performance would serve as the general contractor for the construction of a new polyethylene unit at Equistar’s La Porte, Texas facility (“Project”). Equistar was responsible for the engineering and procurement of engineering tagged items required for the Project.

12. The Contract incorporated 10 Exhibits which are as follows:

- a. Exhibit A – Scope of Work;
- b. Exhibit B – Compensation;
- c. Exhibit C – Project Management Overview;
- d. Exhibit D – Project Controls;
- e. Exhibit E – Procurement;
- f. Exhibit F – Health Safety and Environmental;
- g. Exhibit G – Quality Requirements;
- h. Exhibit H – Construction;
- i. Exhibit I – Project Completion; and
- j. Exhibit J – Insurance Requirements.

13. Between 2017 and 2019 the contract was amended on five occasions via Amendment No. 1 through Amendment No. 5.

14. Amendment No. 5 extended the Mechanical Completion Date from March 29, 2019, to June 8, 2019, and increased the Fixed Sum for Indirect Costs from the sum provided in Exhibit B to the Contract.

15. As the Project approached completion, on May 15, 2019, Performance requested an equitable adjustment to the Fixed Fee portion of the Contract as the completion date was expected to exceed the date anticipated by Amendment 5 due to factors beyond Performance's control. Performance made it clear that it was "committed to successful completion of the Project" and that it would "continue to work . . . to mitigate all impacts and obstacles and drive toward a quality and safe completion at the earliest possible date." 1

16. The basis for the extension was due to factors beyond the control of Performance. Nonetheless, Equistar attempted to allege the Project was behind schedule due to the actions of Performance. In doing so, Equistar completely ignored its responsibility for the delays and resulting productivity impacts (caused by increase in RFIs, late completion of the main power source – ABB Substation 30, increase in approved extra work, scaffolding access delays which were controlled by Equistar's consultant, daily action items preventing completion, delays by Equistar subcontractors) and other delays beyond the control of Performance (ITC Fire, abnormal weather events). Pursuant to the Contract and Amendment 5, Performance provided ample notice on each of these delays and they were the subject of regular meetings between Performance and Equistar. Because the delays resulting in an extended duration were caused by Equistar and others beyond Performance's control, Performance was entitled to an equitable adjustment of the Fixed Price portions of the Contract.

17. Then, in June 2019, Equistar requested that Performance turn over certain remaining services within Performance's scope to Equistar so that Equistar could manage these services in conjunction with commissioning activities in an effort to reduce Equistar's costs.

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1 See Letter from Jacob Traylor to Pat McFall dated May 15, 2019, regarding a Request for Fixed Fee Adjustment." ORIGINAL PETITION..... PAGE 4

Equistar planned to either retain third party contractors or contract directly with Performance's subcontractors to complete or conduct certain remaining site services.

18. While the Contract did not permit Equistar to take such action unilaterally, Performance agreed to accommodate the site transition request via the agreed change clause in the contract "conditioned upon LYB/Equistar assuming all responsibility for . . . work on the project beginning July 15, 2019 and going forward."<sup>2</sup> It was explicitly clear to both parties that as part of the site transition, all costs incurred by Equistar for the services of third parties under its control would be Equistar's sole responsibility.

19. Equistar agreed with this condition and Performance presented a letter agreement for a subcontractor (ISC) whose scope of work would now fall under Equistar. Equistar agreed to assume responsibility and signed the letter agreement documenting this understanding.<sup>3</sup> Specifically, Equistar agreed to assume responsibility for payments to ISC and to release Performance from all responsibility for ISC's unfinished scope of work as of July 15, 2019.<sup>4</sup>

20. This same understanding was to be extended to additional contractors who would now be working directly under Equistar. However, before the transition was complete, Equistar began to suggest Performance's work was defective and that it planned to conduct the work and backcharge Performance for any costs incurred for site services, even if the expense to do so was far greater than what Performance could accomplish the work for.<sup>5</sup> Equistar attempted to use the site transition as an opportunity to pass costs to Performance, even if the cost bore no relationship to the services de-scoped. Essentially, Equistar was attempting to backcharge Performance for

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<sup>2</sup> July 19, 2019 Letter from Jacob Taylor to Pat McFall re: Transfer of Responsibility for ISC Remaining Work to LYB/Equistar.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Equistar requested \$1,150,000.00 to distribute water for the period of work remaining which is far greater than the \$67,500.00 estimated by Performance.

claimed rework that was performed at Equistar's direction and without providing notice to Performance or an opportunity to complete the rework on a cost reimbursable basis as is called for in the Contract.

21. For example, Equistar authorized its welding contractor, WHM, to conduct remediation efforts on Coperion piping without providing Performance an opportunity to remedy the issue per the Contract. The services sought by Equistar should have been handled via a change order or as reimbursable work under the Contract. While Performance maintains that this work was not defective to begin with, even if it was, the actions by Equistar subject Equistar to any costs and damages associated with the remediation.

22. Likewise, Equistar (without any credible evidence) alleged Performance re-used gaskets on the Project. Performance provided documentation that the gasket installation process was proper and even replaced gaskets requested by Equistar per the reimbursable process set forth in the Contract. Nonetheless, Equistar maintained that it planned to permit a third party contractor to replace additional gaskets at the Project and would seek to backcharge Performance for this work without even notifying Performance of the replacement scope and work taking place which was reimbursable under the Contract.

23. Equistar also elected to directly retain the painter for the Project. Equistar contends that Performance is somehow responsible for perceived excess touch up paint on pipe installed at the Project despite the fact the pipe showed minimal, if any, damage and the Contract in no way states a threshold of painting that cannot be exceeded. Contrary to the terms of the Contract, Equistar failed to provide proper notice and an opportunity to cure on a cost reimbursable basis. On information and belief, Performance also contends the claimed excess damages were based on erroneous calculations by Equistar and others for whom it was responsible.

24. Equistar used its (1) unsubstantiated allegations of defective work and (2) improper set-offs for cost incurred following the transition as the basis to withhold payments (including sums based on invoices that had previously been approved for services rendered) to Performance that were due and owing. On both accounts, Equistar failed to comply with the remedies and options set forth in the Contract. Specifically, Equistar did not pursue any of the contractual avenues for a reduction in scope and ignored the contractual methods for calculating adjustments to the Fixed Price as set out in the Contract. To the contrary, Equistar attempts to apply adjustments as an overstated credit and improper set-offs to sums that were, in many cases, previously approved and owed to Performance.

25. To complicate matters further, Equistar alleged it conducted an after the fact audit of Performance's reimbursable charges resulting in the allegation Performance overcharged it by \$2,173,000.00. During the audit (and contrary to industry standards), Equistar did not reach out to Performance to gain an explanation or obtain clarification regarding potential non-compliant items in the invoicing. Despite the fact the auditor has acknowledged erroneous findings in the audit, Equistar continues to rely on this basis to withhold funds. Performance has diligently requested supporting documents to address issues raised by the auditor but all documents necessary for evaluation of the audit have not been produced. Once again, this allegation is without merit and has resulted in Equistar withholding over \$2,000,000.00 from Performance without providing supporting documentation necessary for Performance to evaluate the claim.

26. In sum, Performance has completed its scope of work and is entitled to recoup its outstanding balance and interest from Equistar which is in excess of \$30,000,000.00 and will surpass \$40,000,000.00 in the immediate future as well as an equitable adjustment of the Fixed Price components due to the delay and associated labor productivity impacts beyond

Performance's control. Additionally, Equistar's actions prevented Performance from obtaining incentives pursuant to Amendment 5 and the base Contract for which it should be compensated. While Performance made numerous attempts to resolve this matter with Equistar, those efforts were not successful. Accordingly, Performance was left with no choice but to file this lawsuit seeking the relief set forth below.

**IX. CAUSES OF ACTION**

**A. Breach of Contract**

27. Performance incorporates the facts set forth above as if fully set forth in this section.

28. As stated above, Performance and Equistar entered a valid and enforceable contract.

Performance performed under the Contract and provided services in accordance with the Contract. Nonetheless, Defendant breached the terms of the Contract.

29. Equistar ignored the contractual methods for calculating adjustments to the Fixed Sum for Indirect Cost and Fixed Fee as set out in the Contract, ignored the change order and reimbursable work provisions of the Contract, improperly withheld amounts, and failed to timely and fully pay Performance pursuant to the Contract and Amendments. Further, Equistar's conduct prohibited Performance from obtaining payment for contractual incentives. While the site transition provided a proposed agreed reduction in scope, it in no way alleviated Equistar from its obligation to timely pay Performance or to provide Performance an opportunity to cure any perceived issues pursuant to the Contract.

30. Performance has been damaged by Defendant's breach. As is detailed below, Performance is entitled to recover its reasonable and necessary attorney's fees and interest under Texas law.

31. Performance seeks judgment against Defendants for the foregoing.



**B. Violation of Prompt Pay Act**

32. Performance incorporates the facts set forth above as if fully set forth in this section.

33. Performance invoiced Defendant for work completed pursuant to the Contract. Equistar has failed to pay Performance. The Prompt Payment Act as set forth in Section 28.002(a) or the Texas Property Code, requires an owner to pay a contractor within 35 days after receiving a written request (invoice) for payment.

34. Because Equistar failed to do so, Performance seeks payment and the statutory penalties including interest as provided in the Texas Property Code.

**X. ATTORNEYS FEES**

35. As a result of Defendant's conduct, Performance was required to retain the services of the undersigned attorneys. Performance has agreed to pay reasonable and necessary fees in connection with prosecution of this action. Performance seeks to recover its attorneys' fees and costs pursuant to Chapter 38 of the Texas Civil Practice & Remedies Code and any other avenue permitted by law.

36. Performance further seeks judgment for pre- and post-judgment interest at the maximum legal rates or as otherwise authorized by law.

**XI. PRAYER**

WHEREFORE, PREMISES CONSIDERED Plaintiff prays that Defendant be cited to appear herein, and that Plaintiff be awarded its actual damages, pre- and post-judgment interest at the maximum legal rates, attorney's fees, costs of court and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

COKINOS | YOUNG

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Unofficial Copy Office of Marilyn Burges District Clerk