AMERICAN ARBITRATION ASSOCIATION
HOUSTON DIVISION
(COMMERCIAL ARBITRATION RULES)

CHEVRON PHILLIPS CHEMICAL COMPANY LP, **Claimant**	§	
vs.	§	**CASE NO. 70 I98 Y 00359 06**
PREMCOR REFINING GROUP, INC., **Respondent**	§	

PREMCOR'S MEMORANDUM OF LAW ON BURDEN OF PROOF AND CONTRACT DAMAGES

Respondent Premcor Refining Group, Inc. files this Memorandum of Law addressing Chevron Phillips Chemical Company's failure, as Claimant, to carry its burden to prove its contract damages with reasonable certainty. Premcor first sets forth the legal requirements provided in Texas law for a party claiming contract damages. Thereafter, in the section discussing the contract itself, we detail the requirements that are specific to the parties' agreement. Neither Texas law nor the parties' agreement will support recovery of the damages sought by CPChem. Nor will the record as it exists now support those damages. Because CPChem chose to go forward now—with an incomplete and underdeveloped record regarding steam consumption—it is foreclosed from recovery of damages and should take nothing on this record.

ARGUMENT

I. Under Texas Law, CPChem Has Failed to Carry Its Burden of Proof to Establish Its Damages.

"It is a well accepted postulate of the common law that a civil litigant who asserts an affirmative claim for relief has the burden to persuade the finder of fact of the existence of each element of his cause of action." *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984). When CPChem alleged facts "entitling [it] to recover . . . and [its] allegations were denied, [CPChem] was placed in the position of having to prove every fact essential to [its] case." *Id.* at 482; *see also Shell Chemical Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex.1973). CPChem has the burden to prove damages as an element of its breach-of-contract claim. Because CPChem has not carried its burden, its claims should be rejected. *Coalition of Cities for Affordable Utility Rates v. Public Utility Com'n of Texas*, 798 S.W.2d 560, 563-64 (Tex. 1990) ("A party who fails to meet its burden of proof loses.").

A. Contract claims require proof of the damages sustained.

A plaintiff in a contract case must prove four elements: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Renteria v. Trevino*, 79 S.W.3d 240, 242 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *LaVilla Ind. Sch. Dist. v. Gomez Garza Design, Inc.*, 79 S.W.3d 217, 225 (Tex. App.—Corpus Christi 2002, pet. denied).

Quite simply, "the burden is on the complaining party to establish his right to recover compensatory damages . . . ." *Taub v. Houston Pipeline* Co, 75 S.W.3d 606, 617 (Tex. App.—Texarkana 2002, pet. denied); *Copenhaver v. Berryman*, 602 S.W.2d 540, 543 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); *Wade v. Southwestern Bell Tel. Co.*, 352 S.W.2d 460, 462 (Tex. Civ. App.—Austin 1961, no writ) ("[damages] must be established with a reasonable degree of certainty and cannot be left to speculation."). Damages proof must be shown in every contract case, which looks to "*the loss actually sustained.*" *Stamp-Ad, Inc. v. Barton Raben, Inc.*, 915 S.W.2d 932, 936 (Tex. App.—Houston [1st Dist.] 1996, no writ) (emphasis in original). Moreover, "the amount of damages must be demonstrated by competent evidence." *City of Beaumont v. Excavators & Constrs., Inc.*, 870 S.W.2d 123, 131 (Tex. App.—Beaumont 1993, writ denied). When a party alleges that it has sustained an actual loss, but does not offer sufficient evidence to prove the value of that loss, recovery of damages is barred. *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 566-67 (Tex. 2002).

B. CPChem's burden is not excused when the damages are difficult to prove.

Even though it will contend the volume of steam generated by the Port Arthur refinery is difficult to prove, CPChem is nonetheless held to its burden of proof. The difficulty in proving damages does not relieve the plaintiff of its obligation to do so. *See Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 937 (Tex. 1998); *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 205 (Tex.

1980); *Wal-Mart Stores, Inc. v. Diaz*, 109 S.W.3d 584, 589 (Tex. App.—Fort Worth 2003, no pet.). "[T]he harsh reality is that if the plaintiff cannot prove facts to support [its] cause of action, there is simply no recovery. This is true not only in slip and fall cases, but in all cases." *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d at 937.

A few cases recognize that a plaintiff may recover *nominal* damages when there is "an invasion that produced no actual loss." *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002) (quoting *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App.—Corpus Christi 1979, no writ)). Similarly, there are instances "in which loss is caused but recovery for that loss is precluded because it cannot be proved with reasonable certainty." RESTATEMENT (SECOND) OF CONTRACTS § 346 cmt. b. (1981). In such cases, nominal damages may be awarded to a plaintiff. *Id.* CPChem, however, does not seek nominal damages. To the contrary, CPChem asserts that it has suffered substantial actual losses amounting to millions of dollars. Consequently, CPChem bears the burden to prove those actual losses and to substantiate its claimed damages with competent, legally-sufficient evidence. *Gulf States*, 79 S.W.3d at 566-67. That burden does not shift to Premcor because the damages are hard to substantiate. *Id.* Because CPChem has not met its burden, it is entitled to no recovery. *Id.*; *Taub*, 75 S.W.3d at 617-18.

C. When the plaintiff fails to prove contract damages with reasonable certainty, the proper result is that the plaintiff takes nothing.

Proving damages in a contract case requires more than guesswork or speculation; the claimant must provide a reasonable basis for determining the loss. *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 484 (Tex. 1984). This requirement is often expressed as the rule of "reasonable certainty." *See e.g. El Paso Natural Gas v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 70-71 (Tex. App.—Amarillo 1997), *rev'd on other grounds*, 8 S.W.3d 309 (Tex. 1999). A plaintiff's difficulty in proving actual damages does not excuse or lessen the plaintiff's burden to prove damages with "reasonable certainty." *See Bildon Farms, Inc. v. Ward County Water Improvement Dist. No. 2*, 415 S.W.2d 890, 897 (Tex. 1967). CPChem's situation has been recognized by the American Law Institute and other commentators:

> Although in principle the injured party is entitled to recover based on the loss in value to him caused by the breach, in practice he may be precluded from recovery on this basis because he cannot show the loss in value to him with sufficient certainty.

RESTATEMENT (SECOND) OF CONTRACTS § 348 cmt. a (1981). "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." *Id.* at § 352. For all the reasons stated in the accompanying motion to delay the close of evidence and for interim relief, CPChem cannot demonstrate its damages with reasonable certainty.

1. CPChem relies on experts whose testimony is unreliable and cannot be considered.

To support its case and meet its burden of proof, CPChem has offered the testimony of two experts: H.G. Nebeker and Stephen L. Becker. However, because those experts fail to meet the standards required of experts under Texas law, their testimony cannot be given any weight.

The most instructive case rejecting damages experts is *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004). In that case, Kerr-McGee challenged "only Helton's evidence of the amount of damages, arguing that [the expert's] testimony [was] unreliable, and therefore no evidence support[ed] the damages awarded by the trial court." *Id.* at 254. The supreme court agreed. Concluding that Riley's expert testimony constituted no evidence, the court rendered judgment for the defendant: "Because Riley's testimony regarding the amount of damages is incompetent, there is no evidence to support the amount of damages awarded by the trial court." *Id.* Consider the reasons why the expert's testimony was "incompetent" in the *Kerr-McGee* case.

Even though Riley had looked at the available data, and "at numerous accepted sources, such as well logs, base maps, production information, Railroad Commission records, and scout cards, to obtain data about the area and the wells surrounding the hypothetical well's location," that supporting data did not matter. *Id.* at 254. The court's task was to look at the underlying analysis to determine its reliability. "Based on this record, there is simply 'too great an analytical gap

between the data and the opinion' to conclude that it is [reliable]. As in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex.1998), the gap in Riley's analysis was his 'failure to show how his observations, assuming they were valid, supported his conclusions.'" *Kerr-McGee Corp. v. Helton*, 133 S.W.3d at 257. "Thus, although Riley examined facts and data that would be appropriate in reaching an opinion as to damages, there is no explanation of how these factors affected his calculations, if at all." *Id.* The plaintiffs lost because they lacked reliable expert testimony proving their damages.

2. The "proof" of damages offered by CPChem lacks any reliable foundational data.

In addition, the plaintiff must avoid "fatal gaps in an expert's analysis or assertions that are simply incorrect." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004). This is true because a fact-finder cannot give weight to "expert opinions that are not reliable or are conclusory on their face." *Id.* Such experts must point to reliable data supporting their conclusions, and that data must "prove[] it is more probable than not" that the expert's statements are correct. *Id.* at 911. The facts must support the expert's opinions. *Id.* When the underlying facts do not support the expert, then his or her testimony cannot be given any weight—it is simply "no evidence." The result in *Volkswagen v. Ramirez* was that the plaintiff did not recover damages at all. In Texas, that harsh result is consistently reached when the plaintiff fails to establish his case with reliable expert proof.

In short, "[t]he underlying data should be independently evaluated in determining if the opinion itself is reliable." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997). "If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded." *Id.* (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 747-48 (3d Cir.1994); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C.Cir.1988); *In re Agent Orange Liab. Litig.*, 611 F.Supp. 1223, 1245 (E.D.N.Y.1985), *aff'd*, 818 F.2d 187 (2d Cir.1987)). Because there are no reliable data on which to base an expert's opinion about steam generated by the boilers, any such testimony must be excluded, and it cannot lend probative force to CPChem's case.

CPChem's proof is far from certain and fails in numerous respects, including (1) its failure to show reasonably certain damages calculations measured at the point of consumption, as required in the parties' contract; (2) its lack of proof that the damages are calculated based on steam "distributed from" the boiler houses; (3) the absence of reliable evidence owing to the use of museum-quality meters; (4) its failure to allocate all costs of radiation and unaccounted for steam; and most importantly, (5) its refusal to allow Premcor to provide measurements of the actual consumption of steam from un-metered lines at the refinery. These are failures in proof that cannot be overcome, and those failures make the damages evidence incapable of reliability or reasonable certainty.

"A party who fails to meet its burden of proof loses. The party who has the burden but fails to persuade the trier of fact is not entitled to a second trial to present more evidence." *Coalition of Cities for Affordable Utility Rates v. Public Utility Com'n of Texas*, 798 S.W.2d 560, 564 (Tex. 1990). Moreover, when a court reviewing the evidence concludes that no evidence exists to support damages, the appropriate result is to "render judgment that [the plaintiff] take nothing . . . ." *Sears, Roebuck & Co. v. Marquez*, 628 S.W.2d 772, 773 (Tex. 1982) (reversing judgment of a court of appeals that had remanded a case to the trial court in the interests of justice, even though the court of appeals concluded "there is no legally sufficient evidence to support the jury's finding as to the amount of damages . . . ."). The same result is appropriate here.

II. Under the Parties' Contract, CPChem Cannot Prove Its Damages Because Its Methodology Departs From the Contract's Express Terms.

In every "breach-of-contract case, [claimants] are required to prove their entitlement to damages by establishing the amount of those damages under the terms of the contract." *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 123 -124 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.). Without proof that meets the express terms of the contract, the plaintiff cannot meet his or her burden of proof. *See, e.g., Park v. Swartz*, 110 Tex. 564, 222 S.W. 156 (1920) (plaintiff is only "entitled to damages [in] the amount which under the contract he would, presumably, have earned ..."); *Consol. Petroleum Partners, I, LLC v. Tindle*, 168 S.W.3d 894, 900 (Tex. App.—Tyler 2005, no pet.) (determining damages based

on "the amount of money to which [plaintiff] was entitled as reimbursement pursuant to the agreement"); *Hagar v. Texas Distrib., Inc.*, 560 S.W.2d 773, 775 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (holding summary-judgment proof sufficient in promissory note case after looking to the "face of the note" and determining the amount that was due thereon).

Unless CPChem can meet its burden to show a calculation of damages based upon the contract, its proof fails. As we develop fully in the accompanying brief on why the evidence should remain open, CPChem will not have the evidence it needs to prove damages until Michael Stansifer is finished with his work and documents the amount of costs.

CONCLUSION

As claimant, CPChem bears a heavy burden to prove its case. Without evidence that proves damages with (a) reasonable certainty and (b) according to the terms of the contract, it cannot recover. Unless CPChem wants to recover nothing, it should allow the work of documenting the steam-consumption numbers to continue. Otherwise, having chosen to proceed with its case, CPChem is left with the choice it made: when asked, CPChem said it was prepared to carry its burden. It has not, as the record stands.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of ***Premcor's Memorandum of Law On Burden of Proof and Contract Damages*** has been forwarded to counsel, David A. Pluchinsky and Mark A. Waite of Beirne, Maynard & Parsons, L.L.P., 1300 Post Oak Blvd., Suite 2500, Houston, Texas 77056, via facsimile on this 1st day of May 2008.

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