

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENVIROGEN TECHNOLOGIES, INC.,

Plaintiff,

v.

**MAXIM CONSTRUCTION
CORPORATION, INC. and CITY OF
CRYSTAL LAKE,**

Defendants.

Civil Action No. 1:14-cv-02090

Honorable James B. Zagel

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

Plaintiff, Envirogen Technologies, Inc. (“Envirogen”), by its attorneys, as and for its Second Amended Complaint against Defendants Maxim Construction Corporation, Inc. (“Maxim”) and City of Crystal Lake (“Crystal Lake”), alleges as follows:

Nature Of Action

1. This case involves the actions of Envirogen for breach of contract under the laws of the State of Texas and declaratory judgment regarding the scope of such contract.
2. A true and correct copy of the Purchase Order is attached as Exhibit A.
3. A true and correct copy of a Change Order altering some of the provisions of the Purchase Order is attached as Exhibit B.

The Parties

4. Plaintiff Envirogen, a Delaware corporation having its principal place of business at Two Kingwood Place, 700 Rockmead Drive, Suite 105, Kingwood, Texas, is a world leader in designing and manufacturing water purification systems and processes for, just to name a few,

the treatment of groundwater, wastewater, process improvement, resource recovery and odor control.

5. On information and belief, Defendant Maxim Construction Corporation, Inc. is an Illinois corporation with its principal place of business at 31632 North Ellis Drive, Unit 111, Volo, Illinois 60073.

6. Defendant City of Crystal Lake is an Illinois municipality located in McHenry County, Illinois.

Jurisdiction and Venue

7. This Court has original jurisdiction over the subject matter of this case under 28 U.S.C. § 1332 (diversity) because:

- a. Plaintiff Envirogen is a citizen of the States of Delaware and Texas,
- b. On information and belief, Defendant Maxim is a citizen of the State of Illinois,
- c. Defendant Crystal Lake is a citizen of the State of Illinois, and
- d. The amount in controversy exceeds \$75,000.

8. This Court has subject matter jurisdiction under the 28 U.S.C. 2201 and 2202.

9. This Court has personal jurisdiction over Maxim inasmuch as Maxim resides in this District and conducts business within the State of Illinois.

10. This Court has personal jurisdiction over Crystal Lake inasmuch as Crystal Lake is a municipality within the State of Illinois.

11. Venue is proper in this District under 28 U.S.C. § 1391(a) and (b). Namely, and among other things, this case arises from breach of contract entered into in this District, Maxim and Crystal Lake reside in this District, and a substantial part of the events or omissions giving rise to the claims occurred in this District or a substantial part of property that is the subject of the action is situated in this District.

Pertinent Facts

12. On information and belief, in November 2009, Crystal Lake, through the proceedings of the City Council, retained Trotter & Associates (“Trotter”) to design and prepare bid documents for the renovation project known as the Water Treatment Plant #1 Softener Replacement and Modification project (“WTP #1 Project”).

13. On information and belief, in July 2010, Crystal Lake issued a request for proposals (“RFP”) for the WTP #1 Project, which included an ion exchange water treatment system to be installed at Water Plant #1, to general contractors.

14. On August 17, 2010, Crystal Lake awarded the WTP #1 Project to Maxim.

15. Soon thereafter, Maxim hired Envirogen as a subcontractor to supply the ion exchange water treatment system as set forth in section 11560 of the specification for the WTP #1 Project.

16. On August 29, 2010, Envirogen and Maxim signed a Purchase Order (“the Order”) whereby Envirogen would supply its patented ion exchange water treatment system for Maxim to be installed at the Water Plant #1 at the City of Crystal Lake. *See Exhibit A.*

17. The Order requires that the standard specification for the ion exchange water treatment system meet the requirements set forth under section 11560 of the specification in the WTP #1 Project.

18. The Order specifically states the parties intent that Envirogen be an independent contractor and that there are no intended third party beneficiaries and that no person other than Envirogen or Maxim is entitled to any claim, cause of action, remedy, or right of any kind under the Order. *See Exhibit A, Appendix B ¶14.2.*

19. Subject to the obligations for payment under the Order, Envirogen supplied to

Maxim its patented ion exchange water treatment system meeting the requirements set forth under section 11560 of the specification in the WTP #1 Project.

20. Pursuant to the Order, Maxim promised to pay Envirogen a total sum of \$948,565 for supplying the patented ion exchange water treatment system.

21. Beginning in or about January 2011, Maxim began making payments pursuant to the Order for the installation, sale, and continued use of Envirogen's patented ion exchange water treatment system.

22. Thereafter, on April 9, 2012, Maxim and Envirogen entered into a Change Order (Exhibit B) that amended and modified certain provisions of the Order.

23. The Change Order did not supersede the Order and provisions of the Order not specifically modified, amended, altered, changed or deleted by the Change Order remained the same. *See* Exhibit B, Par. 1.

24. The Change Order released Envirogen of all liabilities for delays or expenses resulting from any performance problems with the ion exchange water treatment system supplied by Envirogen with regard to the WTP #1 Project.

25. The Change Order did not modify, amend, alter, change or delete Paragraph 14.2 of Appendix B to the Order.

26. Pursuant to the Change Order, Maxim was to "rehabilitate" or "retrofit" the ion exchange water treatment system supplied by Envirogen.

27. Following the retrofit, the ion exchange water treatment system was to be restarted and a performance test was to be conducted.

28. Maxim also agreed to pay Envirogen \$8,370 to satisfy a claim for additional services provided at the request of Crystal Lake and Trotter.

29. The Change Order also recognized and acknowledged a sum of unpaid invoices on the Order according to which Maxim owed Envirogen the sum of \$180,227.35 and acknowledged a per diem interest rate accruing from July 1, 2012 forward at a rate of 12% per annum.

30. Envirogen has satisfied all of its obligations under the Order and the Change Order.

31. Maxim has failed to make payments under the Order as modified by the Change Order.

32. Maxim is in material breach of the Order as modified by the Change Order.

33. Crystal Lake is not an intended beneficiary of the Order as modified by the Change Order.

34. Crystal Lake has no claims, causes of action, remedies, or rights of any kind under the Order as modified by the Change Order.

Count I
Breach of Contract
(Against Maxim)

35. Plaintiff Envirogen incorporates by reference paragraphs 1 through 33 above as if restated herein in their entirety.

36. The Order as modified by the Change Order is a valid and subsisting agreement under Texas law between Envirogen and Maxim.

37. The Order and Change Order were supported by adequate consideration.

38. Neither Envirogen nor Maxim has terminated the Order as modified by the Change Order.

39. Maxim has materially breached the Order by failing to pay the total sum of \$948,565 for their use and sale of the patented ion exchange water treatment system.

40. Maxim has materially breached the Order in other ways, the details of which are unknown at this time.

41. In view of Maxim's breach of the Order, Envirogen is entitled to receive the balance owed.

42. Envirogen is also entitled to per diem interest, accruing at the rate of 12% per annum, or the maximum amount permitted by applicable law, whichever is lower, on all unpaid balances under the Order accruing from July 1, 2012 forward.

43. Envirogen has suffered monetary and other damages, in an as-yet-undetermined amount, as the direct and proximate result of Maxim's material breach of the Order.

Count II
Declaratory Judgment of No Third Party Beneficiary Rights
(Against the City of Crystal Lake)

44. Plaintiff Envirogen incorporates by reference paragraphs 1 through 43 above as if restated herein in their entirety.

45. The Order as modified by the Change Order specifically excludes any third party beneficiaries or other non-parties from asserting any claim, cause of action, remedy, or right of any kind under the Order as modified by the Change Order.

46. Defendant Crystal Lake is not a party to the Order as modified by the Change Order.

47. Notwithstanding its third party status, Crystal Lake has asserted that it has enforceable rights under the Order as modified by the Change Order. Among other things, Crystal Lake decided to file suit against Envirogen, in June 25, 2015, in the Circuit Court of the

22nd Judicial Circuit, McHenry County in Illinois (*City of Crystal Lake v. Maxim Construction Corporation, Inc. and Envirogen Technologies, Inc.*, Case No. 15LA199).

48. No such rights exist.

49. Envirogen is entitled to a declaratory judgment holding that Crystal Lake has no claim, cause of action, remedy, or right of any kind under the Order as modified by the Change Order.

50. Alternatively, in view of Maxim's breach of the Order as modified by the Change Order, any obligation to Crystal Lake is negated.

51. Alternatively, in view of Crystal Lakes' actions, any breach by Envirogen (which is specifically denied) is excusable.

Prayer for Relief

Wherefore, Envirogen requests that this Court enter judgment in its favor on each and every claim for relief set forth above and award it relief, including but not limited to a judgment and order as follows:

- A. holding Defendant Maxim Construction Corp., Inc. liable for breach of contract;
- B. directing Maxim to provide an accounting and to pay to Envirogen its actual damages for Maxim's breach of contract;
- C. directing Maxim to pay the unpaid balance under the Order for the ion exchange water treatment system that Maxim used, offered to sell, or sold to the City of Crystal Lake;
- D. directing Maxim to pay interest on all unpaid balance, including attorneys' fees and costs, owed under the Order;
- E. directing Maxim to pay prejudgment and post-judgment interest;

- F. holding that Defendant City of Crystal Lake has no claim, cause of action, remedy, or right of any kind under the Order as modified by the Change Order; and
- G. providing such other and further relief as this Court deems just and appropriate.

Jury Trial

Envirogen demands a jury trial on all claims set forth in this Second Amended Complaint.

DATED: August 17, 2015

Respectfully submitted by,

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*Attorneys for Plaintiff Envirogen
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system this August 17, 2015. Any other counsel of record will be served by electronic mail and/or first class mail.

/s/ Nicholas S. Lee
Nicholas S. Lee