BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Complainant,	)	
	)	PCB 04-16
	)	(Enforcement)
v.	)	
	)	
PACKAGING PERSONIFIED, INC., an Illinois Corporation	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on July 3, 2013, Respondent's Reply To Complainant's Response To Respondent's Post-Hearing Reply Memorandum was filed. A copy of the document so filed is attached hereto.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

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One of Its Attorneys

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RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENT'S POST-HEARING REPLY MEMORANDUM

Packaging Personified, Inc. ("Respondent" or "Packaging"), by and through its attorneys, Drinker Biddle & Reath LLP, hereby files it's Reply to Complainant's Response to Respondent's Post-Hearing Memorandum ("Reply") as required by the Hearing Officer Order dated May 22, 2013.

INTRODUCTION

Respondent is very much aware of the frustration of the Illinois Pollution Control Board ("Board") with the amount and length of time that this case has taken to get it to this point in time where it is soon going to be ready for decision regarding whether the appropriate penalty was imposed in its September 8, 2011 Opinion and Order ("Order"). As cited by the Board, Respondent has admitted that it was in violation of many of the regulations that applicable to the flexographic printing portion of its operations and did not have the required permits. Order at 11. Mr. Dominic Imburgia testified that Packaging was not aware of the regulations until it was first inspected on October 5, 2001. Tr.1 at 186-187[1]. Because of general widespread failure of

[1] The following are the citations to the various hearing transcript used in this Reply:
June 29, 2009 ... Tr.1
June 30, 2009 ... Tr.2
May 21, 2013 ... Tr.3
May 21, 2013 Confidential ... Tr.4

flexographic printing industry to comply with the regulations despite the fact that the regulations had been adopted three years prior, the Illinois Environmental Protection Agency ("IEPA") initiated outreach effort an on July 2, 1997 by mailing a letter to those whom it believed were subject to the regulations. Mr. Dominic Imburgia testified that Packaging did not receive any such notice. Order at 10 and Tr. at 183-85. He further testified that had he received such notice he most certainly would have responded by hiring a lawyer and consultant and participating to come into compliance. Tr.1 at 184-185. Respondent believes, despite the attempted effort throughout Complainant's Response to paint Packaging as ignoring the regulatory requirements and choosing to delay compliance efforts, the following time line taken in large part from the findings in the Order shows that immediately upon learning of the regulations, Packaging without waiting for any violation notice from the IEPA began its efforts to come into compliance with the substantive and permitting requirements applicable to its operations.

COMPLIANCE TIME LINE

1. February 4, 1994 notice of the adoption of the Flexographic Printing Regulations adopted by Board (35 Ill. Adm. Code 218.401) published. (Order at 21).

2. July 2, 1997 IEPA Outreach Letter mailed to the Flexographic Printing Industry. (Order at 10).

3. October 5, 2001 IEPA Inspection of Packaging's facility. (Id.).

4. November 2001 Mr. Trzupek was hired and began his efforts to assist Packaging to come into compliance with Flexographic Printing Regulations. (Order at 10-11).

5. December 12, 2001 Mr. Trzupek conducted engineering test of emissions from Press 5. (Order at 6-7).

6. January 25, 2002 IEPA mailed violation notice to Packaging. (Order at 11).

7. March 19, 2002 Packaging responded in writing to the violation notice. (Id.).

8. July 2, 2002 CAAPP Application filed by Packaging which was later found to be administratively complete by IEPA. (Order at 9 and Tr.1 at 202).

9. August 7, 2002 Annual Air Emission Reports submitted by Packaging for years 1995 through 2001. (Order at 10).

10. September 2002 meeting with IEPA to discuss violation notice at which time Respondent requested that IEPA agree that it be allowed the same type of adjusted standard and variance that other Flexographic Printers were provided to which IEPA refused. (Order at 11, Tr.1 at 62 and 202 and Tr.2 at 24-26).

11. December 2002 Press 4 shut down and its production shifted to Press 5 after Packaging considered and reviewed various compliance options following meeting with IEPA. (Order at 32 and Tr.1 at 204-206).

12. March 4, 2003 Packaging filed a Construction Permit Application for Press 6 and RTO. (Order at 7).

13. August 5, 2003 Original Complaint filed.

14. August, 13, 2003 Construction Permit for Press 6 and RTO issued. (Order at 7).

15. June 12, 2003 Seasonal Emissions Reports for 2000, 2001 and 2003 submitted and SER Application filed by Packaging. (Order at 20).

16. February 26, 2004 Formal Stack test conducted on RTO demonstrating compliance for controlled emissions from Press 5 and Press 6. (Order at 9).

17. August 30, 2004 FESOP Application filed by Packaging with IEPA to replace the previous CAAPP Application. (Order at 9).

18. 2006 revised FESOP Application filed by Packaging with IEPA. (Id.).

19. April 14, 2009 IEPA requested additional information on FESOP application. (Id.).

20. May 13, 2009 Packaging submitted additional information submitted. (Id.).

Respondent is very much aware that the March 1, 2012 decision in response to Respondent's Motion for Reconsideration ("Reconsideration Decision") was not a unanimous decision and that there has existed a split in decision thereafter. Respondent is also very much aware of the changes that have occurred in Board membership since that decision was rendered. Respondent is hopeful that the majority decision to grant reconsideration will be given full consideration by the entire Board based upon the record that has been developed in this case. Despite all of the name calling, finger pointing and level of personal and professional attacks now clearly evident by Complainant's Response, it should be very obvious to the entire Board if it steps back and evaluates the time line that is set out above it will recognize the level of effort and diligence that Packaging carried out to comply upon first becoming aware of the Flexographic Printing Regulations. Respondent does not contend in any manner that Packaging was not legally responsible for compliance with environmental regulations even though it lacked specific personal knowledge of such adoption. Since the inception of the case starting with the first IEPA inspection of its plant, Packaging has proceeded in good faith to bring its operations into compliance with the regulations while remaining in business at its existing location and attempting to respond to its customer's needs. Packaging has responded to business demand and improved its operations to the point where only one of the original water based Press 1 and 2 are ever operated, Press 4 has not been used in Illinois since 2002 and Press 5 has been removed from operation after Press 7 was installed. Tr.3 at 68. What remains to be determined is what

the appropriate penalty the Board should assess upon Packaging following the hearing ordered in the Reconsideration Decision and submission of the parties post-hearing memorandums.

Complainant has a differing view of what the language from Section 42(h)(3) of the Act means from what Respondent believes is the plain reading of the language and what the Board has determined it means. The Reconsideration Decision directed the parties to proceed to hearing in order to provide Complainant the opportunity to respond to the cost of the stack test and calculated economic benefit that Respondent based its request for reconsideration on regarding the "lowest cost compliance option" of shutting down Press 4 and shifting its production to Press 5 and conducting a formal stack test on Press 5 to demonstrate formal compliance. Reconsideration Decision at 16. In determining to grant reconsideration on its own motion, the Board noted that the "ARI invoice for the February 2004 formal stack test of the RTO ($6,180) was not introduced at hearing and neither economic expert addressed any economic benefit concerning a formal stack test, either for the RTO or the tunnel dryer. Nor did either economic expert calculate any economic benefit from not shutting down press 4 and shifting its production to press 5 by the compliance deadline." Reconsideration Decision at 15. Perhaps in recognition that they would not be able to present evidence to refute that which they knew Respondent would show at hearing concerning the lowest cost compliance option, Complainant has labored mightily to convert what the Board envisioned and what should have been a relatively straight forward hearing into another apparent full blown attempt to brand Packaging as a terrible violator by resorting to personal attacks on Respondent and on the professional consultants that Respondent employed to assist in its defense of this enforcement action. The Board should recognize these red herrings for what they are-attempts to keep the

Board from finding that the penalty based upon avoided cost should be much, much lower than that found in the Order.

This effort has led to their filing their Post Hearing Response Brief ("Complainant's Response") which is filled with untruths, half-truths and misdirection, not the least of which is Complainant's opening salvo asking the Board to increase the economic penalty assessed against Packaging. A review of Complainant's Response shows that it primarily focused on attempting to support its claim that the Board should impose even greater penalties on Packaging for the violations that were found in the original Order and that it has attempted to direct this proceeding accordingly. Unfortunately, this has required Respondent to include more in this Reply than is normal which in turn has contributed to its unfortunate length. Respondent will reply to Complainant's Response by again presenting what the Board actually determined when it granted in part Respondent's Motion for Reconsideration and when it denied Complainant's Motion to Reconsider. Next we will reply to what Complainant would have the Board believe were abuses by Respondent in the discovery process. Then given the misleading and fundamentally wrong conclusions regarding Complainant's reliance upon Total Income and Gross Profits values they chose to use from three lines from the copies of Packaging's Federal Income Taxes, Respondent will explain why the Board should accept Respondent's offer of proof and admit Respondent Exhibit 63. Respondent will then respond to the personal attacks regarding Mr. Trzupek and Mr. McCord. Respondent will then reply to points that Complainant actually spent time in their brief concerning the four issues that the Board requested the parties address at hearing. Finally, Respondent will respond to their request that the Board revisit the penalty assessed and increase it dramatically.

BOARD ORDERED RECONSIDERATION

The Board's September 8, 2011 Opinion and Order ("Order") finding Packaging in violation imposed a $456,313.57 penalty after rejecting the higher figure proposed by Complainant based on many of the same grounds again raised in Complainant's Response. $356,313.57 of the total amount reflected the economic benefit portion of the penalty for not having timely installed a control device on Presses 4 and 5 to comply with the flexographic printing rule. The Board found that the amount of the economic benefit penalty was sufficient to recoup the entire benefit to Packaging. Order at 41. The Board further stated that the penalty amount was not higher because Packaging did not have prior adjudicated violations and also initiated compliance measures once made aware of its violations and took steps necessary to come into compliance. Order at 43. These statements by the Board regarding its penalty decision clearly indicate the Board's belief that the penalty should certainly be no higher than what was originally assessed. More recently, as will be seen below, the Board has come to possibly believe that the penalty should actually be lower.

In its March 1, 2012 decision in response to Respondent's Motion for Reconsideration ("Reconsideration Decision"), the Board decided that the penalty should be assessed based on the lowest cost alternative for achieving compliance Reconsideration Order at 10. The supplemental penalty hearing and the briefing process in which we are currently involved was ordered by the Board because of its concern that the proper penalty amount might actually be *lower* than the original penalty, stating, "[T]he Board is reluctant to ignore the prospect that the actual economic benefit enjoyed by Packaging from noncompliance might have been some $344,000 *less than* the economic benefit component of the penalty imposed." Reconsideration Decision at 15 (emphasis added).

In order to properly consider factors related to its reconsideration of the economic benefit penalty, the Board directed the parties to proceed to a supplemental hearing to solely address four very specific issues. Under the guise of responding to those questions, in addition to its repeated efforts to attack Packaging and those who provide professional assistance to Packaging, Complainant raises many theories that, in some cases, have already been adjudicated, and in other cases, are not relevant to the four issues at hand. Apparently, Complainant has subscribed to the age old tactic when faced with no real evidence to support your case—throw enough "excrement" and some is bound to stick.

TAX RETURNS

Since entry of the Reconsideration Decision, Complainant has attempted at great length to try and convince the Board not have a hearing by first filing what amounts to an unprecedented reconsideration of a reconsideration which was denied by the Board. Then claiming that the issues were very complex, Complainant first requested documents in discovery that it knew were not available from the previous hearing and then object at great length because Respondent could not now produce them. Complainant also took the very uncommon road to seek ten years of federal tax returns claiming that the use of total annual sales amounts in the Mr. Trzupek Supplemental Expert Report included in support of the Motion for Reconsideration raised the issue and because the tax returns might lead to disclosure of relevant informatiou. Complainant knew full well that this would be met with strenuous opposition by Respondent. It freely admitted at hearing that "it's very rare to get tax information in discovery" and tax returns are "not usually relevant, and they are often prejudicial". Tr.4 at 95. The Hearing Officer rejected Respondent's anticipated objections and ordered on November 15, 2002 that the requested tax returns be produced because they might be relevant or lead to the disclosure of

relevant information.[2] When the tax returns were produced, Complainant determined after inspecting them that it only needed the information from three lines from each return and did not take possession of the actual returns. This information from his notes was thereafter converted to what is contained in Complainant's Exhibit 17. Tr.4 at 93-96.[3] On cross examination, Mr. Joseph Imburgia testified that the information contained in Complainant Exhibit 17 did not portray what Complainant was attempting to show using the Gross Profit and Total Income values listed in Exhibit 17 as they were "not an indicator of net income". Tr.4. at 93. Mr. Joseph Imburgia testified in response to redirect questions concerning that the Gross Profit and Total Income values in Complainant Exhibit 17 are adjusted by the subtraction of many amounts for the cost of doing business and the result would be the actual taxable income. Tr.4 at 102-104, 109-112 and 115-118. Mr. Joseph Imburgia testified that just the differences in depreciation and inventory amounts for 2002 and 2003 was enough to account for any difference in Gross Profit and Total Income values listed in Complainant Exhibit 17 for these two years. Tr.4 at 104-105 and 118. In response to Complainant's continued objections and statements to Respondent's questions concerning normal routine cost of business deductions from the Gross Profit and Total Income lines in Federal Income Tax Returns, Respondent moved to introduce the first two pages of the returns for the years 2002 and 2003 as Trade Secret Nondiscloseable Information and to

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[2] At hearing Complainant castigated Respondent's delay in producing the tax returns despite knowing that production of tax returns is seldom required due to their confidential and prejudicial nature and the negotiation of an agreement on how the actual produced returns would be handled by their office. As explained at hearing production of the returns was delayed after convincing Mr. Dominic Imburgia that they could be adequately protected and that he should agree to produce them. Mr. Dominic Imburgia had them under lock and key with no one else having access and he was in Florida taking care of two very sick brothers which delayed his return to Chicago to produce the returns. Since the tax returns unquestionably contain sensitive and confidential information, Packaging had concerns over how disclosure would occur and how Complainant would hold these documents. An agreement was reached by which Respondent would first produce the tax returns to Complainant marked as confidential Trade Secret Non-Disclosable for their review. If after their review Complaint continued to believe that they contained information that it believed that they needed the actual returns they would be produced and held by Complainant as confidential Trade Secret Non-Disclosable documents subject to restrictions on use and procession. While this agreement was never finalized, it was clearly accepted by both parties as being final in the event Complainant took possession of the tax returns.

[3] Respondent was first apprised of the intended use of this information to alleged show that Respondent was significantly economically impacted by the shutdown of Press 4 and use of only Press 5 in 2003 on the Thursday before the hearing. Upon gaining the approval of its client to introduce the actual complete Tax Returns, Respondent informed Complainant that it would seek to introduce the returns at hearings to his intended respond to this use by Complainant. On Monday May 20th, the Hearing Officer granted Complainants objection to the introduction of the complete returns and directed Respondent to instead have their witness review the tax returns and to generally respond to questioning regarding the numbers. Tr.4 at 105-108. Complaint stated that they would have no objection to using the information from the tax returns to prepare witnesses for testimony. Tr.4 at 13...

provide a redacted copy as Respondent Exhibit 63. Tr.4 at 119-120. Upon objection the request was denied and Respondent Exhibit 63 was accepted pursuant to an offer of proof to allow the Board to determine whether to accept it into evidence. Id.

Complainant relies upon the misleading Gross Profit and Total Income values taken from Packaging's tax returns that it chose to present notwithstanding that it admits that "there are limitations on the use of just these numbers". Complainant's Response at p. 33. It maintains that Packaging would have earned millions of dollars less than it actually received based upon the difference in Gross Profits between 2002 and 2003. Id. 44. It should simply be inconceivable that anyone who has ever filled out a Federal Tax return would utilize Gross Profit and Total Income figures in this manner. How Complainant can make such arguments is amazing given that they had actual tax returns available to them which show the actual income figures for the two years after the proper and normal business cost are subtracted. For this reason alone the Board should accept Respondent's offer of proof and admit Respondent Exhibit 63 into evidence as it would provide a more complete record upon which to rule on Complainant's arguments . In further support of its request for higher penalties, Complainant argues that total ten year value of the Gross Profit values take from Complainant Exhibit 17 support the assessment of a $711,274.00 economic benefit penalty. Complainant's Response at p. 36. This use of the information from Packaging's tax returns was never disclosed and is extremely prejudicial. While this may be the mathematical total of the values listed in Complainant Exhibit 17, it is simply not the total of actual profit available to Packaging for these years. Complainant's use of this number from Packaging's tax information is a striking example of what Complainant admitted regarding the use of tax returns: "it's often prejudicial". Tr.4 at 95. Mr. Joseph Imburgia testified to the difference between total income and ordinary income and that for the

years listed in Complainant Exhibit 17 there has never been a year where they approach the same number. Tr.4 at 111-112. Accepting Respondent Exhibit 63 into evidence will allow the Board to see what subtracting normal business expenses does in terms of reducing the Gross Profit and Total Income figures to the actual taxable income value reported on Packaging's Federal Tax returns and allow a summation of these values to counter Complainant's prejudicial allegations.[4]

CREDIBILITY AND ADMISSIBILITY

Complainant has unfortunately chose to resort to what amounts to be attacks on the credibility of the witnesses that the undersigned counsel presented both in the original hearings and again in the most recent hearing. In addition, on many occasions Complainant states that Packaging has lied or submitted false statements in various submittals. The undersigned throughout his thirty-seven plus years of either serving as a Board Assistant or practicing before the Board has not had his witnesses or client so attacked and feels compelled to state that Complainant's allegations are taken as a direct attack on his professional and personal integrity whether intended or unintended. There is a proper place for such allegations. Statements at Board hearing or in briefs filed with the Board is not that venue. Accordingly, Respondent is compelled to respond to these unfounded attacks not withstanding that all three witnesses who testified at the May 21, 2013 hearings testified at the previous hearing and as noted by the Board were found by the Hearing Officer to be credible witnesses. Order at 5 and Tr.2 at 163. All three witnesses essentially testified to the same subject matter in this hearing as in the previous hearings and there is no conflict or inconsistency in their testimony cited by Complainant. The various documents submitted to Complainant or to IEPA which Complainant labels as untrue or false are the same documents that were the subject of protracted examination and accepted into

[4] In evaluating these returns it must be remembered that printing operations account for only about one third of Respondent's sales and the values in Complaint Exhibit 17 as well as Respondent Exhibit 63 are total numbers not just numbers for the printing operations. Tr.4 at 104

evidence in the prior hearing with certain limited exceptions that will be described below. The Board should dismiss this effort by Complainant as unfounded, waived, previously determined, highly prejudicial and untrue. In support Respondent presents the following response to some of these baseless allegations.

Standards for Admission of Scientific Opinion Evidence in Illinois

Complainant correctly states that scientific opinion evidence in Illinois is governed by the standard established in *Frye v. United States,* 293 F. 1013 (D.C. Circuit 1923), requiring that a novel scientific methodology or principle be generally accepted in the field in which it is offered. Complainant's subsequent application of *Frye* to the facts of this case, however, is completely flawed. Complainant would have the Board believe that Mr. Trzupek admitted that he used the informal stack test to demonstrate compliance, and that this was a novel application of the test. Complainant's Response at 18-19. The actual testimony reads as follows:

> Q. Yeah. I understand that – you know, there's a reason for you doing what you are doing, but as a method of demonstrating this compliance with 218.401, is this a novel method?
>
> A. Well -- and again, it wasn't intended to be a compliance test. So we are using it as evidence after the fact to determine whether the press was compliant, I don't think that's novel. Using it as – calling a non-compliance test a compliance test, yeah, that would be novel.
>
> Tr.3 at 203.

Although the Complainant tried to put words in Mr. Trzupek's mouth, he plainly stated that the informal stack test was never intended to demonstrate compliance. He did state that such a use of the test would be novel, but that is not how the test was used in this instance. It is merely being used after the fact to determine whether the press would have demonstrated compliance had a formal stack test been conducted, which is in response to the Board's third issue. Mr. Trzupek further clearly states that this is not a novel application of this scientific

methodology. That being the case, the *Frye* standard does not apply to Mr. Trzupek's testimony about this test. Complainant's recasting of Mr. Trzupek's testimony to support his claim that his testimony is by law undeniably is wrong. The Board should reject this claim and continue to accept Mr. Trzupek's expert opinion and testimony.

Complainant's Motion in Limine to Disqualify Mr. Truzpek's Testimony as Biased

Complainant's Motion in Limine attacks Respondent's expert witness, Mr. Richard Trzupek, in an effort to discredit him because he wrote and published a book after the date of the Order that is critical of certain aspects of regulatory agencies' handling of environmental matters. Complainant alleges that because of the comments he wrote in one of the chapters of his book about this case, his opinion is biased. Tr.3 at 228. Complainant Exhibit 18 contains excerpts they took from his book which Complainant presented at hearing and used to question Mr. Trzupek. Tr.3 at 217-228. While Respondent is hopeful that each Board member will take the time to read the entirety of Mr. Trzupek's testimony concerning this issue, the following two examples clearly show his reasoned response to Complainant's concerns.

> Q. Mr. Trzupek, in 2011 you published a book called, "Regulators Gone Wild: How the EPA is Ruining American Industry;" isn't that correct?
>
> A. That is correct.
>
> Q And it was largely critical of—it wasn't specific to Illinois, but it w critical of regulators and regulations; isn't that correct?"
>
> A. It was--I think that's too broad a description. It was critical of specific actions by Environmental Protection Agencies.
>
> See Tr.3. at 215.

Mr. Trzupek responded to Mr. Grant's question regarding the significance of Mr. Trzupek including the Respondent among the many companies and individuals listed in the

Acknowledgement section of his book by reading the actual language from that section. The following question was asked and answered;

> Q. Sure. I understand that you have a right to write the book. You have a right to your opinion. My concern is with respect to what you have put in here, that it could bias your opinion that you are giving today?
>
> A. And Mr. Grant, as a scientist--and I understand a lawyer is an advocate, and you are advocating your side, and I understand why you are doing what you are doing, and I respect that. As a scientist, and in particular as a scientist trained by the Jesuits, science is sacred, and to suggest that anything about the technical details of my testimony would be affected by my bias or my personal opinions is offensive to me, and absolutely incorrect. I would never compromise science. I love science. I love the scientific method, and anything technically I do, I stand behind 100 percent."
>
> See Tr.3 at 228-229.

On redirect Mr. Trzupek read the entire list of people from the acknowledgements set forth in his book that is only summarized in Complainant Exhibit 18. Tr.3 at 232-233. This list of Mr. Trzupek's clients and the attorneys and consultants he has worked with which is included in the Acknowledgement section of his book is far more extensive than listing Packaging's owners alone, as Complainant attempts to portray. Many of the names on this list should be familiar from cases that they have been involved with before the Board. Complainant would have the Board incorrectly understand that only Packaging's owners are referenced by name. See Complainant's Response at 20.

While it is true that the book in question does have a chapter that contains Mr. Trzupek's expressed opinion regarding this case, the book was published over two years after he first testified and following the adoption of the Board Order. Mr. Trzupek explained the rationale why he wrote what he believed to be the reasons for the manner in which this case preceded and why he believed it was wrong in his opinion. Tr.3 at 215-228 and 245-248. This included the expressed opinion which takes issue with the original penalty the Board assessed in this case.

Tr.3 at 226. As evident by the number of publications that Mr. Trzupek has written which are listed in Respondent Exhibit 66, he is a frequent author who often takes exception with a number of actions taken by environmental regulators. He has been asked to serve as a volunteer environmental advisor to the Heartland Institute which is a conservative think tank. Tr.3. at 243 and 244. He has been invited to testify before Congress on two occasions. Tr.3. at 244-246. He has testified in a number of proceedings and has never been accused of being biased. Tr.3. at 246. The first hearings in this case were conducted on June 29 and 30, 2009 which was two years before the publication of the Mr. Trzupek's book. At those hearings, Mr. Trzupek's testimony was substantially the same as his testimony in the May 21, 2013 hearing and is referenced throughout the Order and in the Reconsideration Decision with regard to the various documents he prepared for Packaging as part of its efforts to comply with the regulations and the informal engineering stack test of Press 5. This testimony was found to be credible. Order at 5 and Tr.2 at 163.

As Respondent has previously noted, Mr. Trzupek is entitled to express a point of view that is different than Complainant's. Indeed this would be expected given that he is an expert witness for Packaging in this case and routinely works for businesses in dealing with environmental agencies. The fact that Mr. Trzupek actively expresses his point of view does not mean that he is untrustworthy in his professional work or would present biased testimony. The Board should reject this attempt to disqualify Mr. Trzupek and continue to accept his expert opinion and testimony.

Reliability of the Testimony and Opinion of Mr. McClure

Complainant argues that because Mr. McClure relied only upon information provided by Respondent's attorneys in developing his opinion, it is unreliable. Complainant's Response at

35. Mr. McClure clearly identifies in Respondent Exhibit 65 the cost variables that he used for input into the BEN Model to calculate an economic penalty for Press 5 using the cost of the February 2004 stack test conducted by ARI and the high end of the $15,000 to $30,000 range of the costs for a temporary total enclosure and testified to the same. Tr.3 at 254-255. Likewise, Respondent Exhibit 64 had input costs using the same ARI stack test invoice and a cost estimate of $5000 for constructing a permanent total enclosure. Tr.3 at 256-257. Mr. Joseph Imburgia testified that the ARI invoice given to Mr. McClure by Respondent that he used in Respondent Exhibits 64 and 65 was a true and accurate copy. Tr.3 at 47. Mr. Joseph Imburgia testified regarding the total cost of the 2004 test being $11,180 for testing and Permanent Total Enclosure. Tr.3 at 83-84. Mr. Trzupek testified as to differences between a Temporary Total Enclosure and Permanent Total Enclosure and their differences in costs. Tr.3 at 204-205. He testified that the Temporary Total Enclosure cost range of $15,000 to $30,000 would include the cost of the construction of the enclosure and the required capture test runs. Id.

Accordingly, while the input costs may have been originally provided to Mr. McClure by Respondent's attorneys, the record contains the basis for the reasonableness of these costs which have not ever been at issue in this proceeding. Mr. McClure's opinion uses these documented costs to calculate the economic benefit of not conducting a formal stack test on Press 5. Complainant's argument concerning the reliability of Mr. McClure's testimony and opinions are unsubstantiated and the Board should accept Mr. McClure's testimony and opinions as fully credible.

Allegations that Packaging and Mr. Trzupek lied in the CAPP Application and that their testimony is Unreliable

Unfortunately, Complainant has chosen to call into question the truthfulness of a number of actions taken by Packaging or by their representatives to which Respondent must spend time

refuting in this reply. Complainant first alleges that Packaging "lied on its CAAP application" concerning what was included regarding the description of Press 5 and "falsely claims that Press 5 has an "internal thermal oxidizer". See Complainant's Response pages 3-4 and 22. The CAAP application is Complainant Exhibit 9 and was the subject of extensive testimony in the original hearings. Tr.3 at 71. This application was prepared by Mr. Trzupek for Packaging and certified by them and submitted. Tr.3 at 76. There is no misrepresentation. Mr. Joseph Imburgia clearly explained that when he bought Press 5 there was "(n)o guarantee of destruction of VOC's or control of VOC's, just a guarantee that it would burn some VOCs to reduce reliance on natural gas." Tr.3 at 76. He testified that he told Mr. Trzupek that "the manufacturer told me that this press will burn VOCs in place of burning gas or to reduce the gas consumption." Id. Packaging relied upon Mr. Trzupek to fill out the CAAP form. Tr.3 at 75. Mr. Trzupek testified that he was told by both Mr. Dominic Imburgia and Mr. Joseph Imburgia about the manufacturer's statements about the design of Press 5 to recirculate a portion of the exhaust and use it as combustion air for the burners that heated the dryer and that type of recirculation would destroy some or all of the VOC contained in the air that was recirculated. Tr.2 at 16 and Tr.3 at 153. Mr. Trzupek explained that "a manufacturer's guarantee for people in my business and for people in the permit section is shorthand for, this is what we believe the performance to be based upon the design." Tr.3 at 156. Accordingly, he used the term in describing the capture efficiency and control efficiency and that for overall capture and control efficiency he listed Engineer's calculation referring to the engineering informal stack test he had done. Tr.3 at 156-157 and 186. Mr. Trzupek explained that, in preparing a permit application, it is typical to use the regulatory required minimum destruction rate when information like he had from his informal engineering stack test demonstrated that the actual destruction rate exceeded that

requirement and therefore he used the regulatory minimum destruction efficiency stated in the rule of 90 percent. Tr.3 at 190. Mr. Trzupek explained that he was referencing the internal thermal oxidizer that Press 5 was designed and built with as the listed control device in the CAAPP application. Tr.3 at 189. Complainant referenced the 2009 testimony about this issue in questioning Mr. Trzupek. Tr.3 at 186. Complainant has again chosen not to present anyone from the permit section of the IEPA to testify. Mr. Trzupek's testimony regarding the use of manufacturer's guarantee, the design of the burner system destroying the VOCs in the recirculated air stream and the referenced 90 percent destruction rate in the permit application is a reasonable explanation that stands unchallenged. Complainant's allegations are without merit and are in fact groundless.

Complainant has attempted to use the differing costs of control per ton of emission reduction included in exhibits and testimony that Mr. Trzupek provided in hearings for requested adjusted standards that were supported by the IEPA for three other flexographic printers as compared to the costs of control per ton of emission reduction he provided in this case as inconsistencies that prove his bias. See Complainant's Response at 21. This issue was raised in the prior hearings were Mr. Trzupek testified that he prepared the cost per ton documents used in the three adjusted standard proceeding by using a United States Environmental Protection Agency spreadsheet that was in use at the time to calculate control costs for purposes of determining Reasonably Available Control Technology and Best Available Control Technology; that Mr. Bloomberg and he discussed the use of the USEPA spreadsheet; and Mr. Bloomberg approved his calculation of estimated control costs using the spreadsheet. Tr.2. at 56-57. Mr. Trzupek testified that the resulting numbers calculated by using the spreadsheet were not real world numbers and greatly exceeded the actual costs. Tr.2 at 57. Mr. Trzupek in fact explained

that Exhibit 67, which Mr. Bloomberg testified he gave Mr. Styzens as the actual costs of a RTO control device allegedly installed by Formel for his use in determining the economic benefit penalty in this case, was a copy of his calculations using the USEPA spreadsheet for Formel and that Formel had never installed a RTO system choosing instead another type of device. Tr.2 at 54-67. The record is clear that no bias on the part of Mr. Trzupek is evident from the cited testimony that Complainant alleges proves Mr. Trzupek is biased. This is a groundless allegation that conveniently ignores the actual testimony in the record and should be ignored by the Board.

Finally, Respondent must respond to the allegations that the testimony of Mr. Joseph Imburgia is completely unreliable arguing that it is "self-serving"...because he is a "financially interested witness"... "a stockholder"...with..."direct financial interest". See Complainant's Response at 7, 19, 28 and 30. If this is going to be the basis for excluding testimony then there will never be any contested cases presented to the Board, as testimony necessarily normally involves someone from a Petitioner or Respondent who has some level of a direct financial interest in the outcome. Acceptance of this theory along with Complainant's argument that a consultant's use of information provided by the company subject to the enforcement is not reliable because it comes from someone with a financial interest would greatly impact the ability of any company doing business in the state of Illinois to ever participate in a proceeding before the Board. Coupling these positions with references to the use of paid experts and the costs of such experts to allege that Packaging should have settled and not proceeded to litigate shows the extent to which Complainant will apparently go to try and prevent any person from having the ability to challenge Complainant's demands or defend themselves in any enforcement action.

ISSUES TO BE ADDRESSED AT RECONSIDERATION HEARING

As explained above the Board directed the parties to address four specific issues in the Remand Decision. Respondent's Post-Hearing Memorandum provides its detailed response for the Board's consideration with respect to each of the four issues following the direction provided by the Board in the Reconsideration Order to specifically address the following four issues:

1. Did the press 5 tunnel dryer system constitute a "capture system and control device" under 35 Ill. Adm. Code 218.401(c)?
2. Would press 5 and the tunnel dryer system have accommodated the entire production of both press 4 and press 5 from March 15, 1995 to February 26, 2004? What costs if any, did Packaging avoid or delay by not shifting press 4's production to press 5 until after press 4 ceased operating in December 2002?
3. Would a formal stack test of the press 5 tunnel dryer system have demonstrated compliance with the capture and control requirements of 35 Ill. Adm. Code 218.401(c)? What costs, if any, did Packaging avoid or delay by not building a TTE for press 5 and performing a formal stack test of the tunnel dryer system?
4. Interest due for nonpayment of the economic benefit component of the penalty.

Unfortunately, Complaint has chosen to attempt to divert the Board's attention away from considering these four issues by resorting to the tactics discussed addressed above. Complainant's Response does not specifically address these issues but rather has attempted reframe them into ones to which they apparently can respond. Respondent will attempt to respond to the contentions set forth throughout Complainant's Response under each specific issue the parties were directed to address regardless of where and under what heading was used.

1. Did the press 5 tunnel dryer system constitute a "capture system and control device" under 35 Ill. Adm. Code 218.401(c)?

Whether the Press 5 tunnel dryer system constitutes a "capture system and control device" to satisfy 35 Ill. Adm. Code 218.401(c) is basically not addressed anywhere in Complainant's Response nor did it present any testimony at hearing regarding this issue. Complainant's Response does raise the lack of a manufacturer's guarantee when it attempted to call into question the truthfulness of Packaging's CAAPP application on pages 3 and 4. This attempt is addressed above on Pages 4-19. Complainant's Response also comes close to addressing this issue on page 6 when it discusses Press 6 and claims it has a recirculating system similar to Press 5. Complainant's contentions simply continue to show that it does not understand the fundamental differences that have been testified to in both the initial and current hearings. Press 5 was designed and manufactured to be an energy efficient press because it recirculates dryer exhaust which contains the solvents that are volatilized in the heated drier and directs it to the oven for use as combustion air for the burners that heat the oven and that the solvents in the recirculated dryer exhaust are burned to replace natural gas to provide heat for the drying. Tr.2 at 16 and 102, Tr.3 at 43-46, 82,139,153 and 234. Press 6 on the other hand was designed to recirculate hot air and recycle it back and does not destroy any solvent in the oven. Tr.3 at 140 and 194-195. This stands in sharp contrast to describing that the recirculating oven design was to serve as an ink dryer for Press 5. Complainant's Response at 6. Raising unfounded allegations and conclusions concerning Packaging's decision to install the RTO which was sized to control new Press 6, have capacity for a new future press and control the emissions from Press 5 after it was modified by removing the recirculating oven exhaust duct work to the burners, and Packaging's failure to have performed a formal stack test on Press 5 prior to this modification do

not refute the evidence in the record concerning this issue. The Record as shown by Respondent clearly establishes that answer is affirmative to this first issue.

2. Would press 5 and the tunnel dryer system have accommodated the entire production of both press 4 and press 5 from March 15, 1995 to February 26, 2004? What costs if any, did Packaging avoid or delay by not shifting press 4's production to press 5 until after press 4 ceased operating in December 2002?

Complainant challenges the contention that Press 5 was able to absorb the printing produced on Press 4 and, in doing so, introduces some ideas designed to divert the Board's attention from the true facts. Respondent explained in its Post-Hearing Memorandum, the record clearly establishes that press 5 had the capacity to absorb all of the solvent-based printing produced on Press 4 and Press 5 from March 15. 1995 to February 26, 2004. The best evidence of this is the fact that that is precisely what occurred in 2003 when, using only Press 5, Packaging printed more than they had printed in any previous year. Mr. Joseph Imburgia testified that production in 2003 using only Press 5 exceeded the pounds produced in any previous year using both Press 4 and Press 5. Tr.3 at. 26-27; 39-40. He also testified concerning what Respondent Exhibits 59, 60 and 61 show. Id. Complainant attempts to refute this by presenting arguments based upon Complainant Exhibit 13 and Respondent Exhibit 12. They completely ignore the testimony in the record concerning these exhibits. Complainant's reliance upon Respondent Exhibit 12 to show that Press 4 produced more product in 2002 than did Press 5 is incorrect as the production listed clearly "as to date" would only be for approximately one half of 2002 when the total feet for both presses is compared with available total plant production records. Tr.3 at 136. Frankly an examination of the actual distribution difference that is set forth from this exhibit on page 26 of Complainant's Response will show it is only 0.2%.

Complainant's claim that Packaging used Press 4 more than Press 5 in 2002 is also refuted by Complainant Exhibit 22 which contains the Process Weight Rate for 2002 listed as 14.99 for Press 4 and 34.97 for Press 5 which Mr. Trzupek testifies are the "best indicator of relative utilization of those presses that year". Tr.3 at 184. Complainant also raises issues with respect to certain calculations that Mr. Joseph Imburgia did to develop the ratios or relationships he included in the bottom column in Respondent Exhibit 59 because they differ by approximately 9 tons per year when compared with previously reported emissions. Complainant's Response at 22 and 23. Complaint finally references the use of 2000 hours per shift in calculating tbe available hours of operation for botb presses operating for three shifts in 2002 as showing Press 5 did not have the capacity to produce all of that produced on Press 4. Complainant's Response at 26. These alleged inconsistencies fail to refute the fact that in Packaging in fact produced more printing in 2003 using only Press 5.

The following is not challenged by Complainant: Respondent Exhibit 59 contains the actual weight of solvent-based printing produced on Presses 4 and 5 going back to 2000 and it clearly shows that the amount is greater in 2003 than in the previous three years. Respondent Exhibit 59 also contains the annual VOC emissions reported to IEPA and included in the issued FESOP application. Respondent Exhibit 60 contains the printout of Packaging's computer records that show the pounds of printed production going back to 2000 and the records of measured feet of printing since 2005. In addition, to these records the Gross Sales for all of Packaging and the Annual VOM Usage for 1995 through 2004 are included in Respondent Exhibit 62 which is Mr. Trzupek's Supplemental Expert Report in which he presents his expert opinion that based upon the annual sales figures for the ten years beginning in 1995 through 2004 that Press 5 had the capacity to accommodate all to the production during that time period

is Packaging had shut down Press 4 in early 1995. Tr.3 at 174. Mr. Trzupek states in Respondent Exhibit 61 that "Historical material use data and surrogate parameters such as sales data is commonly used in situations like this when attempting to recreate an emissions history after the fact. I have used this method to recreate an emissions history on several occasions during my career as a consultant and these analyses have routinely been accepted by state and federal authorities, including the Illinois Environmental Protection Agency.''. Id at 4.

In addition to above, Complainant's Response does not in any meaningful way attempt to respond to the testimony by Mr. Joseph Imburgia that was summarized in the Respondent's Post Hearing Memorandum. Finally, Respondent Exhibit 61 clearly sets forth the relative printing capacity for Press 4 and Press 5 operating on a number of different total shifts per week based upon the differences in the design and age of the two presses.

Complainant's Response only raises the issue that because of their misinformed use of Gross Profit and Total Income values from Packaging's tax returns they maintain that the reduction in these number in 2003 over those in 2002 shows that Packaging suffered a severe economic impact from shutting down Press 4 and only operating Press 5 in 2003 and that this is confirmed because the values rose in 2004 which was when they returned to a two press operation. Complainant's Response at 31 to 34. This tax issue has been addressed above on pages 8. Packaging did not suffer any such economic impact and in fact the opposite was true they saved money as it produced more with a $1,700 increase in labor costs and substantial energy savings. Tr.1. at 205-206 and Tr.3 at 46-47. The record is clear that the first question in Issue 2 is answered affirmatively.

In response to the second question in Issue 2, Respondent presented in its Post- Hearing Memorandum the reasons why Packaging did not avoid or delay any costs by not shifting press

4's production to press 5 until after press 4 ceased operating in December 2002. Apart from the tax issues discussed above, Complainant did not address this issue. For the reasons Respondent cited in its initial memorandum and the response to the Tax issue, the answer to the second question in Issue 2 is answered affirmatively.

3. Would a formal stack test of the press 5 tunnel dryer system have demonstrated compliance with the capture and control requirements of 35 Ill. Adm. Code 218.401(c)? What costs, if any, did Packaging avoid or delay by not building a TTE for press 5 and performing a formal stack test of the tunnel dryer system?

Although Mr. Trzupek's test was not a formal stack test, he is an established stack tester, and is thoroughly knowledgeable on the subject. Mr. Trzupek's credentials were fully set forth in Respondent's Post-Hearing Memorandum, including his employment experience as well as his publishing and speaking engagements. Earlier in his career he performed hundreds of stack tests with approximately one out of four witnessed by agency personnel, including stack tests he conducted in Illinois which were witnessed by IEPA personnel including Mr. Mattison. The Agency has never objected to the manner in which he conducted a test.

By contrast, Mr. Mattison, who is the Agency expert observer of stack tests and touted by Complainant as "clearly an expert on emission testing", has never actually performed a stack test himself. The Board should consider this difference, which is analogous to that between an umpire and a player in baseball. Each is an expert in his own right, but the umpire's thorough understanding of the rulebook does not mean he can execute the footwork necessary to turn a double play. Nevertheless, Mr. Mattison has objected to the informal stack test because it did not follow the requirements prescribed by the rules for formal stack tests. This is true and freely admitted by Respondent and as testified by Mr. Trzupek. As noted in Respondent's Post-

Hearing Memorandum, Mr. Trzupek has testified in detail why he felt that Mr. Mattison's conclusions and criticisms were not correct.

As noted above, the question presented by the Board is not whether the informal engineering test meets the regulatory requirements applicable to formal compliance; the proper question is whether, based upon this diagnostic test, is Mr. Trzupek correct in his opinion that if a formal test were to have been conducted on press 5 as operated in 1999, would it have demonstrated compliance with applicable regulatory requirements? Respondent has clearly shown that the record supports Mr. Trzupek's opinion that it would. The flexographic printing rule at 35 IAC Section 218.401(c) has the lowest overall capture and control efficiency requirement of all the rules applicable to printing operations, and is easiest to comply with, and Mr. Trzupek's informal test results clearly show press 5 would have passed the test.

Complainant continues to harp on the fact that Mr. Trzupek's engineering test was not a formal stack test. The true issue is not whether that engineering test satisfied the formal stack test requirements of the flexographic printing rule at 35 IAC Section 218.401(c), but whether it was reasonable to infer from the results of that test that the unit would have passed a formal stack test had one been performed. This is the question that was framed by the Board when it ordered the supplementary penalty hearing. Mr. Trzupek's testimony in both hearings clearly indicated that press 5 would have passed a formal stack test to demonstrate compliance.

As noted in Respondent's Post-Hearing Memorandum, Mr. Trzupek originally testified in the first hearing that he had conducted an engineering test on press 5 and he determined based upon this testing that press 5 achieved more than 90% destruction of the VOM captured and more than the required overall capture and destruction efficiency and, therefore, that it was in compliance with the flexographic printing regulation found at 35 Ill Part 218.401(c). Mr.

Trzupek again testified in the supplemental penalty hearing regarding his opinion set forth in his Supplemental Expert Opinion regarding whether press 5 would pass a formal compliance stack test. Mr. Trzupek's testimony on this topic has been set forth with great specificity in Respondent's Post-Hearing Memorandum.

Mr. Trzupek also testified regarding the capture and control requirements that apply to press 5 in 35 IAC 218.401(c). As has already been discussed in detail in Respondent's Post-Hearing Memorandum, Mr. Trzupek explained how the informal stack test he performed on press 5 differed from the formal requirements. His informal stack test results were 82.6% capture efficiency, 93.6% destruction efficiency and an overall capture destruction efficiency of 77.3% efficiency. The regulation requires a minimum of 90% destruction and an overall reduction of 60% VOM emissions. 35 IAC 218.401(c). As Respondent has previously described, Mr. Trzupek testified that, based upon this informal stack test, it was his opinion that press 5 was in compliance with the regulatory requirement. Mr. Trzupek concluded: "It wasn't a formal stack test. We have admitted that. As a scientist can I say with certainty, with technical certainty, that that met more than 90 percent destruction and more than 65 percent capture? I can. I understand that it's not formal, and I understand that EPA would want a formal compliance test to demonstrate compliance, but did that unit meet the numbers? Yes, it did." Tr. at 201.

Complainant's Response relies in part upon the failure of Packaging to perform a formal stack test on Press 5, the relatively low cost of such a formal stack test, Packaging' s ability to afford a formal stack test, Packaging's not putting Press 5 back into its original configuration and testing it again prior to the hearings in the case, its mistaken assumptions concerning the supposed limited design of the recirculating drying oven to serve solely as an ink drier and the

Packaging's decision to modify Press 5 and duct it to the new RTO system in 2004 as support for why Press 5 would not pass a formal stack test in responding to the first question in Issue 3. Complaint's Response at 4-8. These arguments do not address the issue and should be rejected by the Board. Beginning on page 8 through page 17 of Complainant's Response, Complainant presents a summary of the points raised in Complaint Exhibit 15 which Mr. Mattison testified was a summary of his evaluation of the informal test and Mr. Mattison's direct testimony at hearing. Tr.3 at 292-307. On cross examination Mr. Mattison admitted that he had not written Respondent Exhibit 15 and that he had not been asked to prepare an expert report. Tr.3 at 310. He testified that he was not told why the Attorney General's Office prepared a summary of his evaluation and presented it as Complainant Exhibit 15. Tr.3 at 311. He testified that he was given the document after his deposition in November of 2012. Id. After he testified that he could not remember the date, location or who took the deposition, Complainant clarified that "He has not been deposed. We had – it probably felt like a deposition, as we grilled him about his thoughts and opinions and then had him provide to us something better than our scrawled notes. That's the time that he referencing." Tr.3 at 312. Respondent Exhibit 15 was not admitted as an expert report but rather as demonstrative evidence to help explain the witnesses testimony. Tr.3 at 316.

Mr. Mattison also admitted that he has never performed a stack test. Tr.3 at 308. He testified that he had observed stack tests personally conducted by Mr. Trzupek and stack tests oversaw or arranged for his client. Tr.3 at 308 and 309. He testified that he has never had reason to question any of the testing Mr. Trzupek had done or overseen. Tr.3 at 309. He testified that all of his criticisms that he had testified to regarding the informal test were based

upon its use to demonstrate compliance. Tr.3 at 310. He understood that Mr. Trzupek had testified that demonstrating compliance was not the purpose of the informal test. Id.

Mr. Trzupek testified in redirect following Mr. Mattison's testimony and addressed the points raised by Mr. Mattison when he testified and those summarized in Complainant Exhibit 15 as to the issues he had with his informal test that were in his mind being used to demonstrate compliance. Tr.319-330. Failure to conduct a formal stack test and the other reasons presented by Complainant's Response which are referenced above and observed failures to comply with the requirements that are applicable when conducting a formal stack test to demonstrate compliance are not really relevant to the issue of whether Press 5 would have demonstrated compliance if a formal stack test was conducted. Mr. Trzupek testifies that he bases his opinion that Press 5 would pass a formal stack test on the informal stack test results. All of the technical points raised in Complainant's Response are ones that are applicable to formal stack tests conducted to demonstrate compliance or have been thoroughly responded to in Mr. Trzupek's testimony.

There is nothing that refutes Mr. Trzupek's opinion and testimony that Press 5 tunnel dryer system would not pass a formal stack test. The first question in Issue 5 is answered affirmatively.

The second question in Issue 3 concerns the avoided costs for not building a TTE on Press 5 and not conducting a formal stack test on the tunnel dryer system. There is no controversy over the estimated cost for either constructing a TTE or the cost of a stack test. The ARI invoice cost for a stack test has been placed into evidence as part of Mr. McClure's expert reports and is found in Respondent Exhibits 64 and 65. The testimony regarding the costs for both the TTE and PTE and the ARI stack test invoice are presented above on Page 16. Mr.

McClure testified that the economic benefit calculated in the same manner as he previously testified to at the original hearing was $12,077 using the dates of March 15, 1995, stack test cost of $6,180 and TTE cost of $30,000. Tr.3 at 255. He further testified that this calculation is set out in Respondent Exhibit 65. He also testified that using a cost of $5,000 for a PTE and the same other variables produces a calculated economic benefit of $3,662 and the calculations are found in Respondent Exhibit 64. Both exhibits were accepted without objection. Either is substantially less than the penalty imposed in the Order.

Complainant chose not to present any testimony concerning this Issue. Apart from the allegations addressed above of Page 16, Complainant objects to Mr. McClure's failure to calculate any economic penalty for any of the other violations found by the Board in the Order and claims that there should be some economic penalty accessed because of Packaging's Operation of Press 4 until it was shut down. On redirect Mr. McClure again explained that under the BEN policy manual there is a distinction between economic benefit and gravity components of a penalty. Tr.3. at 280-281. He testified that an economic benefit penalty is not always required. Tr.3 at 283. He also explained that for violations for failure to get a permit, if the company subsequently applied for the permit the economic penalty would be the time value of the delayed costs.

Mr. McClure further testified to the alternative calculation of an economic benefit penalty if the Board were to find that Issue 3 regarding whether a formal stack test on Press 5 and the tunnel dryer had not been shown. He explained that the lower cost alternative would be the economic benefit calculated using an RTO sized for one press. Tr.3 at 261. In his opinion that would be the economic benefit that he previously calculated and testified too using the $75,000 cost for the RTO. Tr.3 at 261-262.

The second question in Issue 3 has been answered depending of what findings the Board determines are appropriate regarding the Issues it has set forth.

4. Interest due for nonpayment of the economic benefit

Issue 4 regarding calculation of interest due for nonpayment of economic benefit had not been specifically calculated and presented by Respondent. Rather the testimony of Mr. McClure is that once the dollar amount due is determined the appropriate interest rate is applied for the time period at issue. Tr.3 at 258. Complainant has not addressed this issue.

RESPONSE TO COMPLAINT'S LARGER PENALTY ARGUMENTS

In its desire to convince the Board to increase the penalty against Respondent, Complainant completely misinterprets Section 42(h) of the Act. As Complainant correctly states, Section 42(h) directs the Board to make the penalty "at least as great as the economic benefits" (415 ILCS 5/42(h)(2012)). Complainant presents a theory that this language creates an ambiguity with respect to the determination of the amount of the penalty and, further, that it forms the basis for adding on to the penalty amount. On the contrary, the statutory language is crystal clear regarding how economic benefits are to be determined:

> any economic benefits accrued by the respondent *because of delay in compliance with requirements*, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance.

415 ILCS 5/42(h)(3)(2012)) (emphasis added).

Section 42(h)(3) unambiguously defines economic benefits as the lowest cost alternative for achieving compliance. Moreover, the italicized language of Section 42(h)(3) makes it plain that any delay by Respondent in complying with requirements is already taken into consideration by this definition, and so no adding on or piling on to the penalty amount is necessary to fulfill the mandate of Section 42(h). Therefore, all of the arguments about Respondent's period of non-

compliance that Complainant raises in support of an increased penalty amount are irrelevant. Complainant's allegations regarding Packaging's increased use and knowingly continued to operate Press 4 in in 2002 fail when the facts and circumstances are actually considered. The Time Line put forth above clearly shows that Packaging had undertaken considerable compliance activities in response to the inspection and the initial evaluation conducted by Mr. Trzupek. These efforts were noted by the Board in the Order as reasons to support the $100,000 penalty it imposed for the violations it found. The first meeting with the IEPA with respect to the violation notice occurred in September of 2002 at which time Packaging's attorney and consultant requested that IEPA agree to Packaging pursuing an adjusted standard and or variance as had been agreed to with three other companies. Order at 11, Tr.1 at 62 and 202 and Tr.2 at 24-26. After several additional calls it became certain that the IEPA would not agree to such relief and Mr. Trzupek advised Packaging that it would not have any chance for obtaining such relief without the IEPA support. Tr.2 at 24-26. Packaging reviewed all of its compliance options and made the decision to shut down Press 4 and shift production to Press 5 which it had been told by Mr. Trzupek complied with the rule. Tr.1 at 202 and Tr.2 at 24-26. Workers were trained on Press 5 operation and Packaging stopped printing on Press 4 by the end of 2002 which is less than three months after first meeting with IEPA regarding the violation notice. Tr.3. at 42. This simply does not constitute actions that rise to knowing violations as Complainant well knows. The allegation concerning increase percentage usage for Press 4 in 2002 is factually wrong and relies upon a table that represents the data from approximately one half of the year. Clearly allegations that Respondent substantially operated Press 4 more than Press 5 are incorrect as well since the total difference is only 0.2 %. Complainant's use of the total amount of Gross Profit and Total Income for the years in question is fundamentally wrong and admitted prejudicial to

Packaging. The total the amount of these values can never support imposition of an economic penalty of the type calculated by Complainant which is based upon fundamentally flawed input variables. Complainant apparently believes that because Packaging would not agree to a penalty demand that was based in large part upon what were clearly misrepresented as actual operating costs for an installed RTO, and felt forced to proceed to hearing it has somehow acted bad faith. Complainant's attempted justifications to provide a rationale to have the Board increase the penalty amount assessed against Packaging should be rejected.

CONCLUSION

Therefore, Respondent respectfully requests that the Board reduce the penalty amount from $356,313.57 to $12,077, which is the amount, calculated using the avoided cost for constructing a TTE and conducting a formal stack test or the lower amount of $3,662 using the avoided cost for constructing a PTE and conducting a formal stack test.

Respectfully submitted,
PACKAGING PERSONIFIED, INC.

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One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Complainant,	)	
	)	PCB 04-16
	)	(Enforcement)
v.	)	
	)	
PACKAGING PERSONIFIED, INC., an Illinois Corporation	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, ROY M. HARSCH, an attorney, do certify that I caused to be served this 3rd day of July, 2013, the foregoing **Respondent's Reply To Complainant's Response To Respondent's Post-Hearing Memorandum** upon the persons listed below, by electronic transmission and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 191 N Wacker Drive, Chicago, Illinois 60606.

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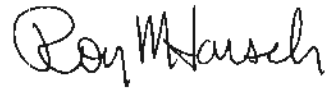

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