

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
Complainant,)
v.)
PACKAGING PERSONIFIED, INC., an)
Illinois Corporation,)
Respondent.)

PCB 04-16
(Enforcement - Air)

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APR 16 2012

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: Christopher J. Grant
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on April 16, 2012, we filed the attached RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR RECONSIDERATION OF MARCH 1, 2012 ORDER, RESPONDENT'S MOTION FOR A SCHEDULING ORDER AND SUPPLEMENTAL HEARING DATE, and RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STAY DISCOVERY AND EXTEND RECORD DEADLINE, via hand delivery with the Clerk of the Illinois Pollution Control Board, copies of which are herewith served upon you.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

BY: [Signature]
One of Its Attorneys

Roy M. Harsch, Esq.
John A. Simon, Esq.
Drinker Biddle & Reath LLP
191 N. Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR RECONSIDERATION OF MARCH 1, 2012 ORDER, RESPONDENT'S MOTION FOR A SCHEDULING ORDER AND SUPPLEMENTAL HEARING DATE, and RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STAY DISCOVERY AND EXTEND RECORD DEADLINE were filed via hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties below by U.S. First Class Mail and Electronic Mail on April 16, 2012:

Christopher J. Grant
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

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John A. Simon

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RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION
FOR RECONSIDERATION OF MARCH 1, 2012 ORDER

Respondent, Packaging Personified, Inc. ("Packaging"), by and through its attorneys, Drinker Biddle & Reath LLP, responds in opposition to the Motion for Reconsideration of the March 1, 2012 Order of the Illinois Pollution Control Board ("Board") filed March 28, 2012 by the Complainant, People of the State of Illinois by Lisa Madigan, Attorney General of the State of Illinois ("Complainant") as follows:

1. The Board's March 1, 2012 Order granted Packaging's motion to reconsider its penalty determination in its September 8, 2011 Order. Specifically, the Board agreed to consider whether shutting down Press 4 and shifting production to Press 5 is the lowest cost alternative to achieve compliance for purposes of its economic benefit determination under 42(h)(3). 415 ILCS 5/42(h)(3). On its own motion, the Board invites the parties to submit evidence on four specifically enumerated, narrowly circumscribed factual questions at a supplemental hearing. March 1, 2012 Order at pps. 17-18. Following the supplemental hearing, the Board invites the parties to file post-hearing briefs addressing "any matters" of record "not only to evidence in the supplemental hearing, but also to evidence presently in the record." March 1, 2012 Order, p. 18. The Board ordered that the supplemental hearing and the post-hearing briefing be completed by August 28, 2012. All arguments advanced by Complainant in its

THIS FILING IS SUBMITTED ON RECYCLED PAPER

March 28, 2012 Motion may be included in Complainant's post-hearing briefs and timely considered by the Board following the close of the record on August 28, 2012 as provided in the Board's March 1, 2012 Order. Accordingly, the Board should await consideration of the Complainant's March 28, 2012 Motion for Reconsideration until that time.

2. The Board believed that Complainant was not fully apprised of the relevance of the Trzupke Testimony and the Shutdown/Shift Evidence to Section 42(h)(3) prior to Packaging's Motion for Reconsideration. The Board also acknowledged that Complainant had no opportunity to test the McClure's Supplement, or to offer contrary testimony or documentary evidence. March 1, 2012 Order, p. 16. The supplemental hearing ordered by the Board affords Complainant the opportunity to test and challenge this evidence. If Complainant elects not to accept the opportunity to test Packaging's evidence or offer any contrary evidence of its own at the supplemental hearing provided for by the March 1, 2012 Order, then Packaging requests that the Board accept as true the uncontroverted Trzupke Testimony and the Shutdown/Shift Evidence, as well as the McClure Supplement for purposes of its economic determination.

3. Complainant's objection to the Board's consideration of a compliance scenario which involves the earlier shut down of non-compliant Press 4 for purposes of the Board's economic benefit determination, is not well taken. Complainant incorrectly argues that permanently shutting down Press 4 would not bring Press 4 into compliance. Motion, pps. 3-6. In support of this proposition, Complainant notes that the relevant Board Rule only prohibits *operation* without VOM control. *Id.* at pps. 4-5 citing Rule 218.401(c)(1)(a) ("no owner or operator...shall *operate* the subject printing line..."). Thus, as Complainant concludes, the relevant Board Rule would not apply to a non-operational Press 4. *Id.* at p. 5. Indeed, Complainant acknowledges that a shut down Press 4 would *not* be in "noncompliance" with the Board's Rule. "Nor could it be in 'noncompliance.'" *Id.* at 5. Not surprisingly, Complainant

cites no support for the proposition that permanently shutting down non-compliant equipment or otherwise removing such equipment from the applicability of a rule is not an acceptable method to achieve compliance. There simply does not exist a third category of compliance other than “compliance” or “noncompliance.” As a matter of logic, if a shut down Press 4 were not in noncompliance as Complainant expressly acknowledges, then it would be in compliance. Accordingly, the earlier shut down of Press 4 as one component of a hypothetical compliance scenario for the Board’s economic benefit determination is appropriate.

4. Complainant’s position that only the more expensive alternative of achieving compliance for Press 5 by connecting it to an RTO, as was done by Packaging in 2004, may be considered for purposes of the Board’s economic benefit determination, is incorrect. In the first place, the statutory command that “the economic benefits shall be determined by the lowest cost alternative for achieving compliance[,]” does not allow for the disregard of a lower cost alternative because such a lower cost alternative would lack the same deterrent effect as an economic benefit determination based upon the alternative actually pursued by the respondent to achieve compliance. 415 ILCS 5/42(h)(3). In the second place, whether or not the non-compliant Press 5 could have been brought into compliance by means of a stack test conforming to the Board’s stack test protocol is an evidentiary question. In this case, Complainant may challenge Packaging’s evidence at the supplemental hearing regarding the earlier demonstration of Press 5 compliance by means of a stack test as well as Packaging’s evidence regarding the cost savings from shutting down Press 4 and shifting production to Press 5. Complainant may present its own testimony or documentary evidence on these factual questions, as well. As the Board correctly perceived, the lowest cost alternative for purposes of the economic benefit determination is an evidentiary question rather than a legal question.

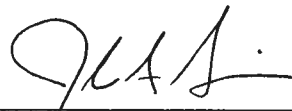
5. Complainant confuses the Board's *violation* determination with the Board's *economic benefit* determination in arguing that "a hearing on the issue of whether Press 5 'would have' demonstrated compliance can serve no purpose." Motion, p. 9. An economic benefit determination is different from a violation determination precisely because the economic benefit determination is based upon costs respondent "would have" incurred in a "hypothetical" scenario in which respondent timely complied with the Board Rules. The economic benefit determination is a part of the Board's penalty determination, which is separate and distinct from the violation determination. Further, consideration of "hypothetical" compliance scenarios for purposes of the Board's economic benefit determination is mandated by the statutory language that "the economic benefit shall be determined by the lowest cost alternative for achieving compliance." 415 ILCS 5/42(h). The legislature's use of the word "alternative" necessarily contemplates that more than one scenario to achieve compliance may be considered.¹

WHEREFORE, for all the foregoing reasons, Packaging respectfully requests that the Board defer consideration of the Complainant's Motion for Reconsideration until after the supplemental evidentiary hearing on damages ordered by the Board is completed, or in the alternative, that the Board deny the Complainant's Motion for Reconsideration.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

By: _____



One of Its Attorneys

¹ Packaging did argue that the Board should not find a violation in the case of Press 5 because a stack test would have demonstrated compliance. The Board did not accept this argument by Packaging for purposes of its violation determination. Further, the Board did not agree to reconsider its violation determination in its March 1, 2008 Order. Rather, the Board recognized the relevance of this evidence of a lower cost hypothetical compliance scenario for purposes of its economic benefit determination pursuant to 42(h)(3).

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RESPONDENT'S MOTION FOR A SCHEDULING ORDER
AND SUPPLEMENTAL HEARING DATE

Respondent, Packaging Personified, Inc. ("Packaging"), by and through its attorneys, Drinker Biddle & Reath LLP, and pursuant to Rule 101.612 requests that the Hearing Officer establish a schedule to complete the record. The schedule should provide dates and deadlines for prehearing conferences, discovery completion, the supplemental hearing and post-hearing submissions. The schedule should follow and comply with the Board's March 1, 2012 Order in all respects, including the requirement that the Hearing Officer close the record by August 28, 2012. Packaging proposes the following dates and deadlines:

Simultaneous Disclosure of Expert Opinions	June 5, 2012
Completion of Expert Depositions and Close of Discovery	June 26, 2012
Exchange of Exhibits and Witness Lists	July 10, 2012
Supplemental Hearing	July 17, 2012
Simultaneous Closing Briefs	August 7, 2012
Simultaneous Reply Briefs	August 21, 2012
Record Close	August 28, 2012

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

By: 
One of Its Attorneys

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RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STAY DISCOVERY AND EXTEND RECORD DEADLINE

Respondent, Packaging Personified, Inc. ("Packaging"), by and through its attorneys, Drinker Biddle & Reath LLP, responds in opposition to the Motion to Stay Discovery and Extend Record Deadline, filed April 13, 2012 by the Complainant, People of the State of Illinois by Lisa Madigan, Attorney General of the State of Illinois ("Complainant"), as follows:

1. Complainant's proposal that the Board reach a decision on the motion for reconsideration prior to the supplemental hearing ordered by the Board is not well taken. The Board solicited the additional evidence to be presented at the supplementary hearing precisely for the purpose of considering such evidence and briefing in order to reach its decision on reconsideration.

2. Respondent files simultaneously with this Response, Respondent's Motion for a Scheduling Order and Hearing Date, proposing a July 17, 2012 date for the supplemental hearing. Under Respondent's proposed schedule, Complainant would have an additional two months to prepare for the supplementary hearing. Given the limited nature of the evidentiary hearing, this proposed schedule allows sufficient time for the parties to prepare. Respondent incorporates, by reference, its Motion For a Scheduling Order and Supplemental Hearing Date to this Response.

3. Respondent's Response in Opposition to Complainant's Motion for Reconsideration of the March 1, 2012 Board Order, also being filed simultaneously with this Response, demonstrates the infirmities of the Complainant's arguments set forth in its March 28, 2012 Motion for Reconsideration. Given the low probability of success of Complainant's Motion for Reconsideration, the Board should deny Complainant's Motion for Stay.

WHEREFORE, based upon the absence of any demonstrated harm to Complainant as a result of complying with the Board's March 1, 2012 Order, and the low probability of success of Complainant's Motion for Reconsideration, Respondent respectfully requests that the Board deny the Complainant's Motion to Stay Discovery and Extend Record Deadline.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

By:  _____
One of Its Attorneys

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