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)

ORIGINAL

NOTICE OF FILING

TO:

Paula Wheeler
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

L. Nichole Cunningham
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

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

PLEASE TAKE NOTICE that on **Tuesday, November 15, 2011,** we filed the attached **Motion for Leave to File Reply in Support of Motion for Reconsideration with the proposed Reply in Support of Motion for Reconsideration** attached thereto, via hand delivery with the Clerk of the Illinois Pollution Control Board, copies of which are hereby served upon you.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

BY: _____
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
(312) 569-1000

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ORIGINAL

MOTION FOR LEAVE TO FILE
REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Respondent, Packaging Personified, Inc. ("Packaging"), by and through its counsel, Drinker Biddle & Reath LLP, pursuant to Board Rule 101.500(e), moves for leave to Reply in Support of Motion for Reconsideration, as follows:

1. The State acknowledges that it is proper on a motion to reconsider to raise "errors in the [Board's] previous application of existing law." Response at 2, quoting *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1 Dist. 1992). Packaging's Motion for Reconsideration raises the Board's error in the application of existing law, both with regard to the lowest cost alternative for achieving compliance in the calculation of economic benefit (415 ILCS 5/42(h)(2)(2010)), as well as with regard to the approved use of formulation data for inks in lieu of actual testing. Thus, there is no procedural defect in Packaging's Motion for Reconsideration.

2. Further, Packaging did not have a prior opportunity to address the Board's economic benefit analysis (as opposed to the State's economic benefit analysis). At the hearing, Packaging focused upon elucidating the errors in Mr. Styzen's economic benefit analysis offered by the State. The Board, in fact rejected Mr. Styzen's economic benefit analysis – as well as that offered by Packaging. Instead the Board presented its own economic benefit analysis in its

September 8, 2011 Final Order. The Motion to Reconsider was Packaging's first opportunity to address the error in the Board's economic benefit analysis identified by Packaging.

3. Further, the State mischaracterized Packaging's Motion to Reconsider. Thus, Packaging seeks leave to file this Reply to clarify what aspects of the Final Order Packaging seeks the Board to reconsider and why.

Packaging tenders its proposed Reply in Support of Motion for Reconsideration as Exhibit A attached hereto.

WHEREFORE, for all the foregoing reasons, as well as for the reasons set forth in the attached proposed Reply, Packaging respectfully requests leave to file the attached Reply in Support of Motion for Reconsideration.

PACKAGING PERSONIFIED, INC.

BY: _____
One of Its Attorneys

Roy M. Harsch
John A. Simon
Drinker Biddle & Reath LLP
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698
(312) 569-1392

CH01/ 25845211.1

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)

ORIGINAL

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Respondent, Packaging Personified, Inc. ("Packaging"), by and through its counsel, Drinker Biddle & Reath LLP, replies in support of its Motion for Reconsideration of the September 8, 2011 Board Order imposing a $456,313.57 civil penalty upon Respondent as follows:

1. The State mischaracterizes Packaging's Motion to Reconsider as seeking reconsideration of the Boards determination that press #5 was out of compliance. Packaging actually requests that the Board reconsider the $356,313.57 economic benefit component of its penalty because the "lowest cost alternative for achieving compliance" for both press #4 and press #5 based upon the evidence presented at hearing is $12,077.00. 415 ILCS 5/42(h)(3)(2010). Similarly, the State mischaracterizes Packaging's motion to reconsider the recordkeeping violations as limited to its determination that Packaging failed to satisfy the permit conditions alleged in Count XII. Packaging seeks reconsideration of the recordkeeping violation determinations of the Board in Count VII (Rule 218.401(a)), Count VIII (Rule 218.404), as well as Count XII (Permit Conditions 15 and 16.)

2. The Board rejected the economic benefit opinion testimony of both the State's financial expert, Gary Styzens as well as the economic benefit opinion testimony of Packaging's

financial expert Christopher McClure in its September 8, 2011 Final Order ("Final Order). Final Order at pp. 38-39. The Board performed its own different economic benefit analysis for a different non-compliance period. Obviously, Packaging had no opportunity to evaluate or respond to the Board's (as opposed to the State's) economic benefit analysis at the hearing. Packaging's first opportunity to respond to the Board's economic benefit analysis, was this Motion for Reconsideration.

3. The Board rejected Packaging's economic benefit scenario of moving press #4 to Michigan because it failed to address press #5's non-compliance. Final Order at p. 37. Also, the Board notes that Packaging did not own the Michigan property in 1995 when the violations began, and further, that moving the press into another state may not necessarily bring it into compliance. *Id.*

4. Packaging agrees that moving press #4 to Michigan is not a part of achieving compliance, and addresses press #5's non-compliance in its Motion for Reconsideration. Packaging relies upon Mr. Trzupek's undisputed testimony that it would have cost Packaging $15-30 thousand dollars to build a Temporary Total Exclosure ("TTE") which would have allowed Packaging to verify compliance of the VOM capture and control efficiency of press #5's recirculating oven to IEPA's satisfaction. Tr. 2 at 18-22.

5. Decommissioning press #4 in 1995 and shifting all press #4 production to press #5, as it ultimately did in 2002, would have brought press #4 into compliance without regard to any ownership of land in Michigan. A fully decommissioned press is not an emission unit. Further, the record evidence demonstrated that Packaging actually saved money when it decommissioned press #4 in 2002 and shifted all press #4 production to press #5 by adding a second shirt to press #5's operation. Tr. 1 at 205-206. Thus, the record evidence is that bringing

press #4 into compliance by shutting it down and shifting all press #4 production to press #5 involved no cost. Packaging accrued no economic benefit as a result of the seven year delay in implementing this press #4 compliance from 1995 to 2012.

6. The delayed cost component of demonstrating press #5 compliance as well as the other aspects of a proper economic benefit determination involves expert analysis of inflation rates and interest rates for the relevant non-compliance period as well as post-compliance interest calculations. Such an analysis should be performed by a qualified financial expert. For this reason, Packaging requested that Christopher McClure supplement his economic benefit opinion testimony offered in this case to address the economic benefit calculation for the non compliance of press #5 going back to 1995 and adding post compliance interest, based upon the parameters set out in the Board's Final Order. Exhibit A to Motion to Reconsider.

7. In its Response to Packaging's Motion to Reconsider, the State does not suggest any error in Mr. McClure's supplemental calculation of the economic benefit to Packaging of $12,077.00 as a result of Packaging's delay in demonstrating compliance of press #5 from 1995 to 2004. Nor is the State's assertion that the Board adopted Packaging's economic benefit analysis correct. Response, p. 4. In fact, the Board rejected both the State's and Packaging's economic benefit analysis, and performed its own economic benefit analysis which was not previously presented to Packaging. Accordingly, it is appropriate for Packaging to respond to the Board's new and different economic analysis by means of this Motion to Reconsider and Mr. McClure's supplement to his previous economic benefit opinion. Exhibit A to Motion to Reconsideration.

8. The Board's finding that Packaging violated Section 218.401(a) of the flexographic printing rule (Count VII), by failing to demonstrate compliance through required

testing and recordkeeping (Final Order at 23) is based upon the erroneous view that actual ink testing is the only alternative allowed by the Board Rule. To the contrary, Section 218.105(a)(2)(B) authorizes use of formulation data that are equivalent to Method 24 test results in lieu of actual ink testing analysis. 35 Ill. Admin. Code 218.105(a)(2)(B). Indeed, this is how virtually all printers in this State comply with Section 218.401(a). Mr. Tzrupek testified that the MSDS sheets and daily production records (i.e. job tickets) contained all the required recordkeeping information to demonstrate compliance using the authorized alternative formulation data without actual ink testing. Tr. 1 at 195-198.

9. Similarly, the Board's further finding that by not complying with recordkeeping requirements, Packaging violated Section 218.404(c) (Count VII), is likewise based upon its erroneous view that there was no alternative means to comply with the recordkeeping requirement except by means of actual ink testing. This type of error of law is a particularly appropriate subject for a motion for reconsideration.

10. Finally, the Board's finding that Packaging violated conditions 15 and 16 of the construction permit because it did not maintain records of VOM content of inks used or VOM and HAP content of solvents (Count XII), is based upon the erroneous view that actual ink testing analysis is the only means of compliance. Analysis based upon formulation data authorized by Board Rule 218.501(a)(2)(B), however, provides an alternative means of compliance. Packaging's MSDS sheets and job tickets were sufficient for this analysis. Tr. 1 at 195-198.

WHEREFORE, for all the foregoing reasons, Packaging respectfully requests that the Board grant this Motion and reconsider its September 8, 2011 Final Order, to reduce the economic benefit component of the penalty to $12,077.00 as the lowest cost alternative for

achieving compliance for press #4 and press #5, and further, reduce the gravity component of the penalty to account for the fact that Packaging's records, including MSDS sheets and job tickets satisfied both the recordkeeping requirements of the Board Rules and Packaging permit.

Respectfully submitted

PACKAGING PERSONIFIED, INC.

BY: _____
One of Its Attorneys

Roy M. Harsch
John A. Simon
Drinker Biddle & Reath LLP
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698
(312) 569-1392

CH01/ 25845073.1

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Motion for Leave to File Reply in Support of Motion for Reconsideration with the proposed Reply in Support of Motion for Reconsideration** was 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 on **Tuesday, November 15, 2011.**

ORIGINAL

Paula Wheeler
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

L. Nichole Cunningham
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
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