

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

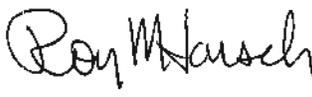
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| PEOPLE OF THE STATE OF ILLINOIS | ) |               |
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| Complainant,                    | ) |               |
|                                 | ) | PCB 04-16     |
|                         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

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that on June 12, 2013, Respondent filed its Post-Hearing Memorandum. A copy of the document so filed is attached hereto.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

BY: 

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One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT’S POST-HEARING MEMORANDUM

Packaging Personified, Inc. (“Respondent”), by and through its attorneys, Drinker Biddle & Reath LLP, hereby files its Post-Hearing Memorandum as required by the Hearing Officer Order dated May 22, 2013.

PROCEDURAL HISTORY

This action was initiated on August 5, 2003 with the filing of the Complaint which was later amended on August 18, 2005, alleging violations at Respondent’s polyethylene and polypropylene film processing and printing company. The Board issued its final opinion and order on September 8, 2011, finding Respondent violated numerous air pollution control requirements and imposing a \$456,313.57 civil penalty.

The Board imposes a \$456,313.57 civil penalty on Packaging based upon the Section 42(h) factors of the Act (415 ILCS 5/42(h) (2010)). The Board imposes a \$456,313.57 civil penalty on Packaging based upon the Section 42(h) factors of the Act (415 ILCS 5/42(h) (2010)). Specifically, the following factors support this substantial penalty: the many years of Packaging’s numerous and grave violations in a severe ozone nonattainment area, resulting in actual excess VOM emissions to the environment and a hindrance to IEPA carrying out its duties; the company’s lack of due diligence in making itself aware of its air pollution control obligations; the \$356,313.57 economic benefit accrued by Packaging from noncompliance, which is the statutory minimum penalty amount; the need to deter future violations by Packaging and aid in voluntary compliance by Packaging and companies similarly situated; and Packaging’s failure to self-disclose its violations. The civil penalty would be higher if Packaging had prior adjudicated violations of the Act or if the company had not initiated compliance measures

once made aware of its violations and taken the steps necessary to come into compliance.

People v. Packaging Personified, Inc., PCB 04-16 (Sept. 8, 2011) at p. 43.

Packaging timely filed a motion for reconsideration on October 19, 2011 that sought changes to both the \$100,000.00 civil penalty which was imposed pursuant to 415 ILCS 5/42(h)(1) (2010) for the “gravity penalty” portion as well as the \$356,313.57 civil penalty which was imposed pursuant to 415 ILCS 5/42(h)(3) (2010) for the economic benefit portion of this total civil penalty amount of \$456,313.57 (“Motion”). The People filed a response in opposition to the motion for reconsideration on November 2, 2011. On November 15, 2011, Packaging filed a motion for leave to reply, attaching a reply which was accepted by the Board.

In an order dated March 1, 2012 (“Reconsideration Decision”), the Board denied in part and granted in part Respondent’s Motion for Reconsideration of its September 8, 2011 decision and, at the same time, directed the parties to return to hearing on the issue of a discrete “economic benefit” matter related to the calculation of the penalty, to be followed by briefing Reconsideration Decision at p. 18. The Board stated that following the hearing and briefing, the Board would issue a supplemental opinion and order setting forth the final penalty to be imposed on Respondent. *Id.* Complainant filed a Motion for Reconsideration of the Board’s March 1, 2012 order, which was denied by the Board in an order dated June 7, 2012 (“Denial of Reconsideration Decision”). Denial of Reconsideration Decision, at p. 10.

## DISCUSSION

### Lowest Cost Alternative

Section 42(h) of the Illinois Environmental Protection Act (“Act”) provides that in determining the appropriate civil penalty to be imposed, the Board is authorized to consider matters in the record in mitigation or aggravation of penalty, including “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).

In considering Respondent’s Motion for Reconsideration of the Board’s September 8, 2011 order, the Board acknowledged that “for purposes of calculating a civil penalty, any economic benefits accrued by Packaging from its noncompliance must be determined by the ‘lowest cost alternative for achieving compliance.’” Reconsideration Decision, p. 10.

In reaching this conclusion, the Board considered whether Respondent had forfeited the right to argue for the lowest cost alternative and to present the evidence to support that argument, and concluded that the Board “has the discretion to address new issue presented for the first time in a motion to reconsider ‘where there is a reasonable explanation for why the additional issues were not raised at the original hearing.’” Reconsideration Decision, p. 12. The “reasonable explanation” was found by the Board to be the fact that Respondent did, in fact, raise the argument that the lowest cost alternative would be to shut down press 4 and shift production to press 5, and that compliance could have been demonstrated by subjecting the tunnel dryer to a formal stack test. The Board found this was sufficient basis to allow Respondent to present its new, refined theory of what constitutes the lowest cost alternative, along with the calculations and evidence in support thereof. Therefore, the Board ruled that Respondent had not forfeited these issues. Reconsideration Decision, p. 14.

The Board found that several other considerations weighed in favor of the Board exercising its discretion in taking up this issue:

First, Packaging’s claim concerns the only Section 42(h) penalty factor for which the General Assembly has specified the Board’s calculation method: “the economic benefits shall be determined by the lowest cost alternative for achieving compliance.” 415 ILCS 5/42(h)(3) (2010) (emphasis added). [footnote omitted].

Second, Packaging's new economic benefit claim is not, on its face, plainly devoid of merit. Third, the 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. Finally, Packaging's new claim is a natural outgrowth of the Trzupek Testimony and the Shutdown/Shift Evidence. The Board would not be inclined to entertain a new matter that lacked a significant basis in the existing record.

Reconsideration Decision, p. 15.

The Board further found that the testimony of Mr. Trzupek regarding the fact that the tunnel dryer would have passed a formal stack test, and the evidence that press 5 was able to absorb the work of press 4, were considered in a compliance context, but were not considered in the context of calculating the lowest cost alternative, even though that evidence, at least in part, supports a different lowest cost compliance alternative finding. Finding that it would be an error in applying the law to find anything other than the lowest cost compliance alternative required by Section 42(h)(3), the Board ruled that "the Trzupek Testimony and the Shutdown/Shift Evidence establish a colorable claim for a smaller, albeit unspecified, economic benefit from noncompliance than the one determined by the Board. Because this record evidence was overlooked with respect to Section 42(h)(3), the Board granted Packaging's motion to reconsider economic benefit." Reconsideration Decision, p. 16.

The Board affirmed this decision in its June 7, 2012 Order which denied Complainant's Motion to Reconsider the Board's March 1, 2012 Order. The Board found no merit in Complainant's argument that shutting down press 4 was not a means of achieving compliance and declined to find "that if two printing lines at a facility are operating in violation of the flexographic printing rule, then shutting down one line and shifting its production to the other cannot be considered part of any 'alternative for achieving compliance' with the rule." June 7, 2012 Order, p. 6.

The Board also rejected Complainant's argument that by allowing Respondent to present evidence about whether press 5 would have passed the formal stack test, the Board was deeming press 5 to be retroactively compliant. As the Board pointed out, evidence of whether press 5 would have passed the formal stack test goes to the lowest cost compliance alternative, which is a matter of penalty, not violation. June 7, 2012 Order, pp. 7-8. The Board found that the Complainant did not establish any error by the Board in applying the law in its Reconsideration Decision, and denied Complainant's Motion for Reconsideration of that Order.

The Board's Four Issues

In granting reconsideration of its September 8, 2011 penalty determination, the Board determined that a supplemental hearing and briefing on penalty amount were required. In particular, the Board directed the parties to 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.

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) (issue number 1) is established through the testimony of Richard Trzupsek and Joseph Imburgia. Mr. Imburgia stated that he purchased press 5 based on the vendor’s representations of energy savings created by the burning of spent solvent in a recirculating oven to produce heat. Tr. at 43-44.<sup>1</sup> The press has always been operated with this recirculating oven. Id. at 44. Respondent does not claim that press 5 with its recirculating oven was represented by the manufacturer to be a capture and control device to achieve compliance with the regulatory requirements because at the time it was purchased Mr. Imburgia was not aware of the environmental regulations. Tr. at 43. When Mr. Imburgia purchased press 5, he was told by the manufacturer’s representative that it was energy efficient because it recirculated the exhaust gas stream from the drier section as combustion air and burned some of the VOC content, solvent, to produce heat used in the drying process. Tr. at 82 and 138. Mr. Trzupsek testified that he was familiar with the definitions and requirements contained in the air pollution regulations with respect to control device, capture system and afterburner which are defined terms in 35 IAC 211. Tr. at 151. He explained the purpose of a capture system and control device. Tr. at 151-152. He testified that in his opinion press 5 recirculating oven meets the definitions. Tr. at 151. He explained that the recirculating press 5 was built and operated to capture the exhaust gases leaving the oven section and send a portion to the combustion chamber for use as combustion air where they would be burned to produce heat that was then sent back to

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<sup>1</sup> Citations to the May 21, 2013 hearing transcript will be set forth as Tr. at --. Citations to the May 21, 2013 closed hearing transcript will be set forth as Closed Tr. at --. Citations to the original June 29, 2009 hearing transcript will be set forth as June 29, 2009Tr. at --. Citations to the original June 30, 2009 hearing transcript will be set forth as June 30, 2009Tr. at --.

the oven to assist in the drying of the ink. Tr. at 153 and 234. The record is clear that the first issue has been affirmatively answered. Responded has not presented anything to refute this showing.

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?

With regard to the first question presented in issue number 2, 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 is that cited by Mr. Imburgia when he testified that Packaging produced all of their solvent-based printing using only press 5 in calendar 2003 after they shut down press 4 at the end of 2002 and that they printed more in 2003 than they had printed in any previous year. Tr. at 27 and 40. Mr. Imburgia's testimony referred to Respondent Exhibits 59 and 60 showing the yearly VOC emissions for 1995 through 2003 for total production and annual weight of printed production for 2000 onward to support his conclusion that Packaging could have produced all of the production by only using press 5 and not using press 4 during the time period in question. Tr. at 28. Exhibit 59 has two tables. The bottom table shows the monthly and annual production printed on the solvent-based presses using actual company records of the weight of the printed rolls for 2000 through 2003. Tr. at 22-27. The upper table, which was taken from the prior FESOP application, shows the amount of VOC emissions per year taken from the actual solvent and ink purchase records maintained by Packaging film printed from 1995 through 2003. Tr. at 19-22. Mr. Imburgia testified that 6,024,683 pounds produced in 2003 using only press 5 exceeds the pounds produced in any previous year. Tr. at 27-28. These records show that the actual weight

of printed materials in 2003 exceeds that printed in 2000 through 2002 when both press 4 and 5 were used, based upon existing records from weighing the printed materials. Tr. at 28. Packaging currently does not have records of the actual weight of printed material prior to 2000. Tr. at 22. The estimated amount weight of product printed that Mr. Imburgia calculated using the amount of VOC emissions from 1995 through 2002 when printing using both presses 4 and 5 is also less than the weight of product printed in 2003 only using press 5. Tr. at 28. This is consistent with the annual gross sales figures that were provided to Mr. Trzupsek and are set forth in his supplemental expert report which is found as Respondent Exhibit 62 and as Mr. Imburgia testified that they had a gross sales increase of approximately \$1,300,000 in 2003 over that of 2002. Closed Tr. at 103. He also testified that Packaging also ended 2003 with a significantly higher inventory of unsold product over that in 2002 which would not be included in the gross sales figures. Closed Tr. at 118.

Mr. Imburgia testified at length about how press 4 and press 5 were operated at Packaging. Tr. at 28-40. He explained that their production was made up of relatively short run jobs lasting from an hour to a day. Tr. at 30. This involved a lot of time for set up and shut down including needed time for clean up between each job. He explained the work that was done at the end of a shift to shut down and clean a press so that it would not be damaged by dried ink when that press would not be operated during the following shift. Tr. at 33-34. He also explained the cleanup and maintenance work at the end of a work week that is performed on a press. Tr. at 34. He explained how all of the above limits the amount of the time that a press is actually available to be used to print. He also presented the differences between the two presses. Press 4 could print four colors and had a run speed of 600 feet per minute. Tr. at 32 and 42. Press 5 could print five colors and had a run speed of 900 feet per minute. Id. Press 5 was also

equipped with more modern features of automatic grafting and preregistration that reduced set up time to 15 minutes per color as compared to 45 minutes per color required on press 4. Tr. at 31. He explained how he had prepared Respondent Exhibit 61 and the assumptions he made while preparing it. Respondent Exhibit 61 shows that press 4 had the potential capacity to print each month 47,983 pounds on a one shift operation, 121,431 pounds on a two shift operation and 220,492 pounds on a three shift operation. Respondent Exhibit 61 shows that press 5 had the potential capacity to print each month 96,785 pounds on a one shift, 234,273 pounds on a two shift, 412,524 pounds on a three shift operation and 577,534 pounds on a four shift basis. Mr. Imburgia testified that potential printing capacity he set forth in Exhibit 61 for press 5 on a four shift basis is a conservative number. Tr. at 40. Multiplying the monthly production capacity by 12 shows that the annual potential capacity for press five operating for a year is 6,930,408 pounds which is more than ever produced using both press 4 and press 5 in any year they both were operated. The potential capacity of 6,930,408 pounds available by running press 5 on a four shift basis set forth is more than adequate to accommodate all of the potential production that could be produced by press 4 running two shifts (121,431 pounds times 12= 1,457,172 pounds), which was what it was running at the time it was shut down in 2002, and even adding in the total actual production of 5,340,066 pounds for 2002 which is double counting. This is consistent with the amount of production that was printed only on press 5 in 2003 which was more than in any other year before using both press 4 and press 5. Tr. at. 26-27; 39-40. Given this fact, it is clear press 5 could have handled the production from press 4 and its own production going back in time because production demand was lower in previous years. Tr. at 27. Thus the first question in Issue 2 is answered in the affirmative.

The answer to the second question in Issue 2 is that operating only press 5 and not operating press 4 did not result in any added or delayed costs. Mr. Imburgia testified at the first hearing that he found that Packaging actually saved costs when they shut down press 4 and used only press 5. June 29, 2009 Tr. at 205-206. In this hearing he explained some of the reasons for this savings. Press 5 had a faster run time that was fifty percent greater than that of press 4. Tr. at 42. Mr. Imburgia explained that press 5 was more efficient than press 4 because it had more automated features than press 4. These features on press 5 cut down on start-up and clean-up procedures that previously had to be done by hand on press 4. Tr. at 29-31. Because press 5 was more efficient than press 4 the production formerly produced on both press 4 and press 5 could be produced with fewer people using only press 5 and shutting down press 4. Tr. at 46-47. Using press 5 only saved energy costs because it burned solvent emissions to provide heat in the dryer as compared to press 4 which used only natural gas to produce the required heat for its dryer. Tr. at 46. Packaging thus saved labor and energy costs by switching production to press 5 from press 4. There were no delayed or avoided costs by not doing so earlier than it did at the end of 2002.

Respondent has not presented any evidence to refute these showings. Thus, Issue 2 has been addressed affirmatively.

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?

In the third issue, the Board first asks whether press 5 would have passed a formal stack test to demonstrate compliance. As noted by the Board in the Reconsideration Decision, Mr. Trzupsek 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 35Ill Part 218.401(c). Mr. Trzupsek 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. Trzupsek currently is employed at Trinity Consultants, Inc. specializing in “air quality issues relate to environmental regulations including permitting, record keeping, reporting, litigation support and stack testing managing.” Tr. at 144. Attached to his Supplemental Expert Opinion, which is Respondent Exhibit 62, is an up-to-date copy of his Curriculum Vitae. Tr. at 145. Mr. Trzupsek testified that earlier in his career he performed hundreds of stack tests with approximately one out of four witnessed by agency personnel. Tr. at 164. This included stack tests he conducted in Illinois which were witnessed by IEPA personnel including Mr. Mattison beginning about eight years ago and he never has had the Agency object to the manner in which he conducted a test. Tr. at 165.

Mr. Trzupsek is a frequent published writer on environmental topics. Tr. at 237. A list of his recent publications is set forth in Respondent Exhibit 66. He has written three books and has contributed to a fourth. Tr. at 237. He was invited to serve as a policy advisor to the Heartland Institute, which is a conservative think tank that does research on various issues including environmental issues. Tr. at 243-244. He has testified by invitation before the Environmental Subcommittee of the Science, Space and Technology Committee of the United States House of Representatives Committee. Tr. at 244. Respondent Exhibit 66 contains copies of his congressional testimony.

Mr. Trzupsek testified regarding the capture and control requirements that apply to press 5 in 35 IAC 218.401(c). Tr. at 135. After explaining the general requirements that would be

required when a formal stack test is performed for destruction purposes, he testified as to how the informal stack test he performed on press 5 differed from the formal requirements. Tr. 159-161. He used Methods 1, 2, 3 and 25(a). Id. He used an assumed moisture content of the air and did not use Method 4 to measure moisture content of the air to correct the air flow from wet to dry standard cubic feet because of the cost and because, based upon his experience, 3 percent is very close to what moisture content would be measured as actual using Method 4. Tr. at 160. He did not conduct three one-hour runs because, based upon his experience conducting stack tests on flexographic printing systems, they are steady state constant operations with little deviation. Tr. at 160-161. He used the same instrument and calibrations as in a formal test. Tr. at 161. He explained that as an experienced stack tester he measured the concentration of hydrocarbons until he had a flat-line constant readout at operating conditions. Id. He measured for approximately an hour rather than conducting three one hour runs. Tr. at 160-161. On the capture side, instead of constructing a Temporary Total Enclosure or TTE, he used a liquid gas mass balance to determine the amount of VOC input by measuring the actual amount of solvent and the solvent content of the inks applied. Tr. at 161-162. He compared this number with the Method 25(a) concentration measurement of the inlet to the recirculation to determine a reasonably conservative estimate of capture efficiency. Tr. at 162. His informal stack test results were 82.6% capture efficiency, 93.6% destruction efficiency and an overall capture destruction efficiency of 77.3% efficiency. Tr. at 162-163. The regulation requires a minimum of 90% destruction and an overall reduction of 60% VOM emissions. 35 IAC 218.401(c). Mr. Trzupsek testified that, based upon this informal stack test, it was his opinion that press 5 was in compliance with the regulatory requirement and that he used the results of this test in all of his submittals to the Agency on behalf of Packaging including annual emission reports, permit

applications and ERMS applications. Tr. at 163-164. Mr. Trzupsek 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. Although Mr. Trzupsek's test was not a final stack test, he is an established stack tester, and he performed his testing to give Respondent an indication of where they stood.

Mr. Trzupsek testified that he was familiar with Complainant Exhibit 15 which had been available prior to the hearing and which was represented to be the objections that Mr. Kevin Mattison had with respect to the informal stack test that Mr. Trzupsek performed. Tr. at 166. He explained in detail why he felt that Mr. Mattison's conclusions and criticisms were not correct on direct examination. Tr. at 166 -172. After Mr. Mattison's direct testimony on behalf of Complainant was completed, Mr. Trzupsek testified at length in redirect as to why he believed that Mr. Mattison's testimony was in error. Tr. at 319-330.

Mr. Mattison, who is the Agency expert observer of stack tests, has never actually performed a stack test himself. Tr. at 308. Mr. Mattison admitted that he did not prepare Complaint Exhibit 15 which was prepared by Complainant's attorney as a summary of their notes taken during what he testified was a deposition. Tr. at 310-311. Counsel for Complainant admitted that they had grilled him regarding his comments on the informal test. Tr. at 312. Mr. Mattison admitted that all of his criticism was that the test by Mr. Trzupsek was not statistically proper to determine compliance with the regulation. Tr. at 309-310. Mr. Mattison's stated objections to the informal stack test can be summarized as the test did not follow the prescribed requirements applicable to formal stack tests that are required to be performed to demonstrate

compliance with applicable rules. This is true and freely admitted by Respondent and as testified by Mr. Trzupsek. Tr. at 201. It was a diagnostic test of the type that is routinely performed by experienced stack testers.

However, the validity of the informal test as to whether it meets the regulatory requirements applicable to formal compliance testing is not the question presented by the Board in this issue. The proper question is whether based upon this diagnostic test, is Mr. Trzupsek 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 the regulatory requirements? The record supports Mr. Trzupsek'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. Trzupsek's informal test results clearly show press 5 would have passed. Thus, the first question in Issue 3 has been answered affirmatively.

The second question presented in Issue 3 concerns the avoided costs for not originally performing a formal stack test on press 5. There is really not any dispute regarding this question. The cost of the formal destruction portion of the stack test would be similar to that of the test performed by ARI in 2004 on the new control device following installation of press 6 which cost \$6,180.00 dollars. Tr. at 355 and Respondent Exhibits 64 and 65. The capture portion of the test depends, in fact, upon whether you assume the use of a Permanent Total Enclosure or PTE, as was done during the 2004 tests, which would involve a one-time certification that the PTE met the requirements at a cost of approximately \$5,000.00. Tr. at 204 and 355 and Respondent Exhibit 64. If you assume the use of a Temporary Total Enclosure or TTE, the cost would be between \$15,000 and \$30,000 because this is a more extensive effort over two days. Tr. at 204- 205 and

355 and Respondent Exhibit 65. The Board specifically asks for the TTE avoided costs in the second question in Issue 3. In summary, the record shows that the avoided costs would have been between \$15,000 to \$30,000 for the TTE test that included the consultant and building of the TTE, and the cost of the test would have been approximately \$6,000 which total between \$21,000 and \$36,000.

Interest due for nonpayment of the economic benefit component of the penalty.

The fourth question raised by the Board is the interest due for nonpayment of the economic benefit. Mr. Chris McClure, who is now employed at Crowe Horwath, again testified regarding the economic benefit issue. He prepared Respondent Exhibit 65, which is his Expert Opinion in which he calculated an economic benefit penalty of \$12,057 based upon the inputs of the avoided costs presented above for a test using TTE. Tr. at 255. He also prepared Respondent Exhibit 64, which is also his expert opinion in which he calculated an economic penalty of \$3,662 based upon the input of the avoided costs presented above for a test using PPE. Tr. at 257. He prepared both Respondent Exhibits 64 and 65 which contain his input variables and his calculations and done in a manner that is consistent with USEPA policy, the BEN Model and the Illinois statutory lowest cost language as he previously testified to. Tr. at 257. The calculation of the interest on nonpayment of the economic benefit penalty is based on the economic penalty amount, the time period specified and the applicable interest rate. Tr. at 258. The Board in the original order applied the bank prime rate. The calculation depends upon what input is put in for the avoided costs. Here Respondent has presented an economic benefit of \$12,057 based upon the inputs of the avoided costs presented above for a test using TTE. Mr. McClure also testified that if the Board does not find that press 5 would have complied when a formal stack was performed, that the Board should look at the low cost of installing a properly sized refurbished

control device which he presented in the original hearing. Tr. at 261-262. In the Opinion the Board appears to have used these numbers but added them together for two presses. People v. Packaging Personified, Inc., PCB 04-16 (Sept. 8, 2011) at p. 40 If the Board accepts the testimony that there was no cost to shut down press 4 and shift production to press 5, the lower cost option that the Board believes is justified should only be applied just one time. This would result in a substantial lower calculated total economic benefit penalty when that avoided cost is determined and the bank prime rate is applied as the Board previously did.

RESPONSE TO COMPLAINANT'S CHALLENGES TO RESPONDENT'S WITNESSES

Apparently because Complainant has no legitimate challenge to Respondent's basis for determining the lowest cost economic benefit claim, Complainant resorted to attacking Respondent's witnesses. They first attacked Mr. Richard Trzupsek in their Motion in Limine and again at hearing. Mr. Trzupsek has written a book that, in part, discusses this matter in a critical manner and, on this basis, Complainant alleges he is biased. Such an accusation is absurd. Mr. Trzupsek is entitled to express a point of view that is different than the Agency's; indeed, this would be expected given that he is an expert witness for Respondent in this case and routinely works for businesses. The fact that Mr. Trzupsek actively expresses his point of view does not mean that he is untrustworthy in his professional work or would present biased testimony. The record is clear that, acting in a professional manner, he consulted with Respondent and advised them as to what they needed to do to comply with the applicable regulations. They immediately started doing it based on his advice, and this fact was cited by the Board as a reason why the gravity portion of the penalty was determined. At hearing, they essentially attacked the testimony of Mr. Christopher McClure because he allegedly did not respond to their questions regarding what they believed to be missing from his analysis of the lowest cost alternative

regarding switching press 4 production to press 5 and conducting a formal stack test. They therefore moved to strike Mr. McClure's testimony. Tr. at 279. This motion was properly denied. It is clear that Complainant had no information and resorted to argumentative questioning of Mr. McClure that was basically a rehash of their arguments presented in their previously-denied motion to reconsider. The Board should accept both of these attacks for what they really are and base its ruling on the record.

CONCLUSION

The record clearly establishes that Respondent has responded to the Board's four issues, and has demonstrated that the lowest cost alternative for achieving compliance is the shutdown of press 4 and shifting of its production to press 5, which had the capacity to produce all of the printing done on press 4 from 1995 through its shut-down at the end of 2002 with no additional cost to Packaging, and the conducting of a formal stack test on press 5 that would have demonstrated compliance for press 5. 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.

Respectfully submitted,  
PACKAGING PERSONIFIED, INC.

BY: 

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One of Its Attorneys

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| Respondent.                     | ) |               |

**CERTIFICATE OF SERVICE**

I, ROY M. HARSCH, an attorney, do certify that I caused to be served this 12th day of June, 2013, the foregoing **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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