

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ADOPTING THE)	RESOLUTION NO. 10-4135
HEARINGS OFFICER'S PROPOSED ORDER)	
REGARDING METRO'S NOTICE OF VIOLATION)	
NOV-193A-09 ISSUED TO KEMPER DRYWALL,)	Introduced by Chief Operating Officer
INC., AND AUTHORIZING THE CHIEF)	Michael J. Jordan, with the concurrence of
OPERATING OFFICER TO ISSUE A FINAL)	Council President David Bragdon
ORDER)	

WHEREAS, on September 30, 2009, the Deputy Chief Operating Officer ("DCOO") issued the attached Notice of Violation Nov-193A-09 (Exhibit A) to Kemper Drywall, Inc. ("KDI"), and

WHEREAS, NOV-193A-09 stated that the DCOO had found that from April 15, 2009 to June 23, 2009, KDI violated Metro Code Sections 5.02.045(b), 5.05.025 and 7.01.020 which required KDI to pay fees, taxes, and penalties owed to Metro; and

WHEREAS, included with NOV-193A-09 was a contested case notice providing KDI with an opportunity to have a hearing regarding the NOV; and

WHEREAS, KDI submitted a timely request for a contested case hearing; and

WHEREAS, a hearing on the matter was held on January 6, 2010, before Metro Hearings Officer Carl D. Cox (the record submitted to Hearings Officer Cox is attached as Exhibit B); and

WHEREAS, pursuant to Metro Code 2.05.035(a), on January 27, 2010, the Hearings Officer issued a proposed order (attached as Exhibit C) upholding Metro's action imposing a civil penalty against KDI in the amount of \$44,369.46 for violation of Metro Code as listed in NOV-193-08; upholding Metro's action imposing a civil penalty of \$3,177.95 for violation of Metro Code as listed in NOV-193A-09; and ruling that KDI did not meet its burden of proof with respect to its assertion of economic and financial hardship as a basis for reducing the civil penalties assessed by Metro; and

WHEREAS, in accordance with Metro Code Section 2.05.035(b), the Chief Operating Officer mailed a copy of the proposed order to KDI and informed Metro and KDI of the deadline for filing written exceptions to the proposed order; and

WHEREAS, KDI filed written exceptions to the Hearings Officer's proposed order (attached as Exhibit D);

WHEREAS, Metro did not file written exceptions to the Hearings Officer's proposed order;

WHEREAS, Metro Code 2.05.045(b) provides that the Metro Council shall (1) adopt the Hearings Officer's proposed order; (2) revise or replace the findings of fact or conclusions of law in the order; or (3) remand the matter to the Hearings Officer; and

WHEREAS, the Metro Council has considered the proposed order and the exceptions of KDI as required by the Metro Code, now therefore

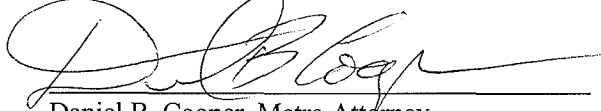
BE IT RESOLVED that the Metro Council adopts the proposed order from Hearing issued by Hearings Officer Carl D. Cox in the Metro Contested Case: Notice of Violation 193A-09 issued to Kemper Drywall, Inc., and directs Chief Operating Officer to issue a final order substantially similar to Exhibit E to this resolution.

ADOPTED by the Metro Council this 18 day of MARCH, 2010.

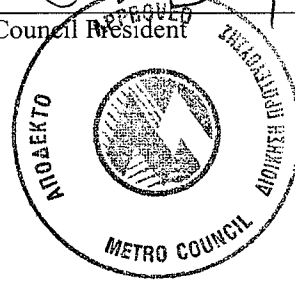


David Bragdon, Council President

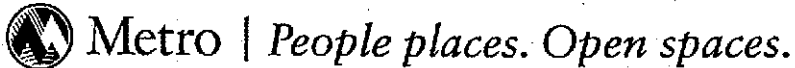
Approved as to Form:



Daniel B. Cooper, Metro Attorney



M:\attorney\confidential\09 Solid Waste\16 Code Enforcement\51kemperdrywall(KDI)\Resolutions Nol\Resolution 10-4135 030810.doc



September 30, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

RE: Notice of Violation and Imposition of Civil Penalties (NOV-193A-09)
Delivery of solid waste to a non-system facility and failure to pay Metro regional system fees and excise taxes

Dear Messrs. Harden:

This letter is to notify you of Kemper Drywall, Inc.'s ("KDI's") violations of Sections 5.02.045(b), 5.05.025 and 7.01.020 of the Metro Code and to require KDI to pay fees, taxes, interest, and penalties owed to Metro. KDI was cited for violations of these same Code sections on March 7, 2008 (Notice of Violation No. NOV-193-08). At that time, Metro determined that KDI had avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro boundary and delivered to the North Marion County Disposal Facility ("NMCDF") during 2007. The 2007 violation was a first offense and an investigation indicated that KDI was unaware of Metro's regulations concerning flow control. Metro's decision regarding the case was that:

Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations.

In April, May, and June of 2009, KDI was found to be violating the same sections of Code in the same manner as before.

Violations

Metro Code Section 5.02.045(b) stipulates that:

Any waste hauler or other person transporting solid waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste.

From April 15, 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons) generated and collected from within the Metro region to the North Marion County Disposal Facility ("NMCDF") for disposal. A summary of these loads is presented in Appendix 1 to this Notice. KDI did not pay Metro regional system fees on this waste. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Metro Code Section 5.05.025(b) stipulates that:

Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the District, any solid waste facility or disposal site without an appropriate license from Metro.

KDI delivered waste generated within the District to NMCDF, a non-system facility, without having applied for or received the required non-system license. KDI is therefore in violation of Metro Code Section 5.02.025(b).

Metro Code Section 7.01.020(a) stipulates that:

For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax ... The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro.

KDI did not pay the Metro tax on the in-Metro generated waste it delivered to NMCDF. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Circumstances of the Violations

Detectives assigned to Metro investigated this matter by surveilling KDI trucks as they collected drywall scrap and delivered it to disposal sites, analyzing transaction data provided by NMCDF, conducting interviews of KDI's owners and production manager, and analyzing GPS data on KDI trucks provided by KDI. Robert and Kemper Harden, the owners of KDI, fully cooperated with the Metro investigation of this matter. These were the key findings of the investigation:

1. KDI's owners stated that, after receiving the first NOV (No. NOV-193-08), they verbally directed their crews to henceforth deliver all drywall scrap either to Knez¹ for recycling, or to a Metro transfer station. The owners maintain that all loads subsequently delivered to NMCDF were delivered there without their knowledge and contrary to their instructions. However, between March 7, 2008, the date that NOV-193-08 was issued, and the end of June 2009, KDI delivered 92 loads to NMCDF. KDI's drivers charging that many loads to KDI's account should not have escaped management's notice. KDI has now closed its account with NMCDF and terminated a driver (name unknown) responsible for many of the deliveries to NMCDF.
2. KDI tracks its trucks using GPS. The GPS information identifies numerous truck trips to NMCDF by address (17899 Whitney Lane, Woodburn) and should not have escaped management's notice.
3. Jose Hernandez, KDI's production manager, directs KDI's drywall scrapping crews. Though Mr. Hernandez was employed by KDI at the time the first NOV was issued and would have been the key person informed by management about any changes in procedures regarding the disposal of drywall scrap, he told the investigators that he had no knowledge of Metro, its boundaries, or any regulations regarding flow control and claimed to be unaware of any directive by the owners not to use NMCDF.
4. NMCDF's rate for KDI waste was \$75.45 per ton as compared with the Metro rate of \$75.75 plus a transaction fee of \$8.50 per load (approximately \$3 per ton for a typical KDI load).
5. NMCDF is located close to KDI's yard and drivers may have used it as a matter of convenience in order to avoid the traffic and waiting lines they would have encountered in using authorized facilities.
6. The number of loads that KDI delivered to NMCDF increased dramatically from January through June, 2009 (see Appendix 2 to this Notice). The increase coincides with KDI's work on the 30-building Creekview Crossing apartment subdivision. Creekview Crossing is located in Sherwood, within the Metro boundary. In a letter delivered to Metro by e-mail on July 21, 2009, Robert Harden stated that KDI's manager and drivers thought that Creekview Crossing was located outside Metro and that the debris could be taken to any disposal facility. However, as stated above, the manager claimed not to know that the location of a job with respect to the Metro boundary was even a factor to be considered in choosing a disposal site.
7. In addition to the 22 loads identified as originating from within Metro between April and July 2009, it is likely that other in-Metro loads were among the loads KDI delivered to

¹ Knez is a drywall supply company that takes back and recycles drywall scrap for a fee.

NMCDF. However, Metro has not been able to substantiate this as KDI's GPS records do not go back farther than April 21, 2009.

8. KDI drivers frequently gave inaccurate information when asked the origin of their loads at NMCDF. Often they gave "Hubbard," KDI's office location as the origin. Many of the loads contained waste from multiple locations yet the drivers always gave a single location, often an inaccurate one. Though a substantial number of loads were generated from the Creekview Crossing project in Sherwood, Sherwood was given as the point of origin of only one load.

KDI has not treated compliance with Metro regulations as an important matter. What emerges from the investigation is that KDI at one time gave verbal instructions to its drivers to take their loads of scrap to Knez or to Metro transfer stations but did little to ensure that such instructions were followed. Management did not reinforce the message with written instructions, reminders, or other follow-up. KDI kept its NMCDF account open and available for drivers to use until the account was closed on July 14, 2009. The lead worker that directs KDI's scrapping crews told investigators he was not aware of Metro regulations or of any KDI management directive not to deliver loads to NMCDF. KDI drivers routinely gave erroneous information when asked the origins of their loads by NMCDF scalehouse staff. The investigation did not prove that drivers were deceptive for the purpose of evading Metro fees and taxes, but clearly this is further evidence of a lack of control over the drivers' actions and negligence on the part of KDI's management. Billings from NMCDF appear not to have alerted KDI management to the fact that its drivers were still using NMCDF.

Civil Penalties

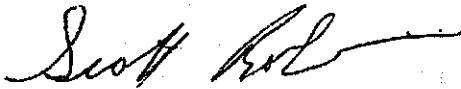
Regional system fees, excise tax, cost recovery, interest, and penalties for the violations that occurred from April 15 to June 23, 2009 amount to \$3,177.95 (see attached Penalty Worksheet for NOV-193A-09). As a result of KDI's continuing failure to comply with the above-cited provisions of the Metro Code, Metro is also seeking to recover fees, taxes, and appropriate penalties for the 2007 violations from Notice of Violation No. NOV-193-08 for an additional \$44,369.46 (see attached Penalty Worksheet for NOV-193A-08). A total of \$47,547.41 for past and current violations is being sought by Metro. An invoice for this amount is enclosed.

Contested Case Notice

Under Metro Code Chapter 2.05, you have the right to request a contested case hearing regarding this Notice. You must make this request in writing and ensure that Metro receives the request within 30 days of the date that the Notice was mailed. Any such request should be directed to the attention of Steven Kraten at Metro. You may retain legal counsel to represent you at the hearing. Article IX, Section 14 of the Oregon Constitution, the Metro Charter, ORS Chapter 268, and Metro Code Chapter 2.05 and 5.02, 5.05, and 7.01 provide Metro's authority and jurisdiction for the hearing.

If you have any questions regarding this matter, please contact Steve Kraten, Solid Waste Enforcement Coordinator, at (503) 797-1678.

Sincerely,



Scott Robinson
Deputy Chief Operating Officer

SK/SR:bj

Attachments

Enclosure

cc: Margo Norton, Finance and Administrative Services Director
Roy Brower, Solid Waste Compliance & Cleanup Manager
Steve Kraten, Solid Waste Enforcement Coordinator
Warren Johnson, Solid Waste Compliance Supervisor

S:\REM\kraten\Enforcement\Flow Control\Kemper\NOV-193A-09.doc
Queue

Appendix 1

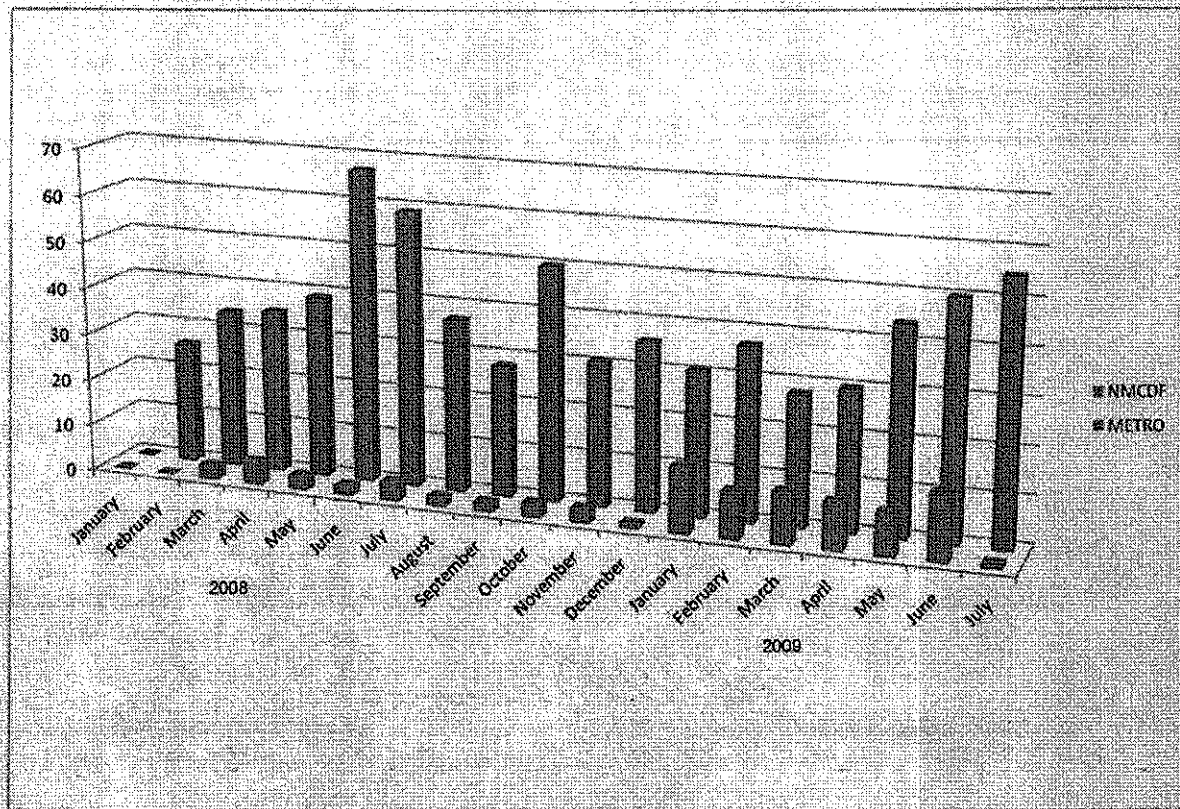
**KDI LOADS WHOLLEY OR PARTLY FROM WITHIN METRO
DELIVERED TO NMCDF FROM
APRIL 15, 2009 TO JULY 14, 2009**

Date	Number of Loads	Followed by Metro detectives	KDI GPS data	Zip Code given by driver at NMCDF	Pounds (from weight tickets)	Tons
7/14/09	1		Yes		3,720	1.86
6/29/09	2		Yes		11,240	5.62
6/27/09	2		Yes		15,460	7.73
6/23/09	1	Yes	See note		4,460	2.23
6/16/09	2	Yes	Yes		13,060	6.53
6/4/09	2		Yes		8,060	4.03
6/2/09	1		Yes		5,240	2.62
5/29/09	1		Yes		4,620	2.31
5/21/09	1		Yes		6,060	3.03
5/13/09	1		Yes		8,800	4.40
5/11/09	1		Yes		6,500	3.25
5/5/09	1		Yes		2,420	1.21
5/1/09	1		Yes		3,900	1.95
4/28/09	2		Yes		12,580	6.29
4/21/09	2		Yes		10,160	5.08
4/15/09	1			Yes	7,060	3.53
TOTAL	22				123,340	61.67

Note: Metro detectives followed this load from Creekview Crossing to NMCDF but, for reasons unknown, there was a gap in the KDI's GPS records for the day and the trip to NMCDF was omitted from the records.

Appendix 2

**KDI LOADS DELIVERED TO NMCDP and METRO TRANSFER STATIONS
2009 AND JANUARY - JULY, 2009**



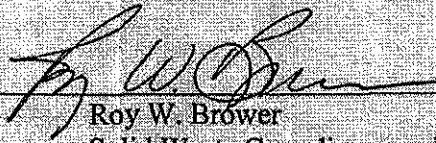
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing CONTESTED CASE NOTICE, with the Director's Notice of Violation, on the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

Hendricks Law Firm, P.C., Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

On Sept 30, 2009, said individuals were served with a complete and correct copy thereof via regular mail and certified mail, return receipt requested, contained in a sealed envelope, with postage prepaid, and deposited in the U.S. Post Office at Portland, Oregon.



Roy W. Brower
Solid Waste Compliance and Cleanup Manager



Metro

Penalty Worksheet

Licensee/Hauler Name

License Number

Kemper Drywall, Inc.

None

Brief Description

In 2009, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. The violations appear to be the result of negligence rather than a deliberate attempt to evade fees and taxes. This is the second incident of such violations.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units involved
NOV-193A-09	4/15/09 to 6/23/09	62	2	tons

Direct Cost/Revenue Loss

1 Administrative cost		\$500.00
2 Unpaid Regional System Fees:	61.67 tons at \$16.04	\$989.19
3 Unpaid Excise Taxes:	61.67 tons at \$8.97	\$553.18
4 Metro disposal costs (disposal contract)		\$0.00
5 Std <500 tons) Non-System License fee		\$500.00
6 Specify other direct cost/revenue loss		
7 Add lines 1 through 6.....	Equals Direct Recovery	\$2,542.37

Indirect Cost/Revenue Loss

1 Interest on RSF, ET, & penalty from April 2009 (1.5%/mo.)	\$65.13
2 Specify other indirect cost/revenue loss	
3 Specify other indirect cost/revenue loss	
4 Specify other indirect cost/revenue loss	
5 Add lines 1 through 4.....	Equals Indirect Recovery \$65.13

Compliance Component

1 Base penalty per unit	\$1.00
2 Additional penalty at \$1 per incident	\$2.00
3 Add lines 1 and 2	\$3.00
4 25% penalty on unpaid Regional System Fees	\$4.01
5 25% penalty on unpaid Excise Taxes	\$2.24
6 Specify other aggravating/mitigating compliance factors	
7 Specify other aggravating/mitigating compliance factors	
8 Sum lines 3 through 7	\$9.25
9 Total tons involved in current incident	61.67
10 Multiply lines 8 and 9.....	Equals Compliance Component \$570.45

Total Penalty \$3,177.95

Worksheet prepared by

Date

Steven Kraten

September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$51.26.



Metro

Penalty Worksheet

Licensee Name

License Number

Kemper Drywall, Inc.

None

Brief Description

Through most of 2007, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. At the time, Metro agreed not to recover fees, taxes, and penalties subject to KDI not re-offending.

NOV Number
NOV-193-08

Date(s) of Violation(s)
1/1/07 to 11/30/07

Violations
1,469

Incidences*
1

Units involved
tons

Direct Cost/Revenue Loss

1 Administrative cost

2 Unpaid Regional System Fees (9/1/06 - 8/31/07): 1,104 tons at \$13.57

\$14,975.72

3 Unpaid Excise Taxes (9/1/06 - 8/31/07): 1,104 tons at \$8.35

\$9,218.40

2 Unpaid Regional System Fees (9/1/07 - 8/31/08): 365 tons at \$14.08

\$5,139.20

3 Unpaid Excise Taxes (9/1/07 - 8/31/08): 365 tons at \$8.23

\$3,003.95

6 Std. (>500 tons) Non-System License fee

1,000.00

7 Add lines 1 through 6.....

Equals Direct Recovery

\$33,337.27

Indirect Cost/Revenue Loss

1 Specify other indirect cost/revenue loss

2 Specify other indirect cost/revenue loss

3 Specify other indirect cost/revenue loss

4 Specify other indirect cost/revenue loss

5 Add lines 1 through 4.....Equals Indirect Recovery

Compliance Component

1 Base penalty per unit

\$1.00

2 Additional penalty at \$1 per incident

\$1.00

3 Add lines 1 and 2

\$2.00

4 Penalty on unpaid Regional System Fees (see supplemental table on reverse)

\$3.43

5 Penalty on unpaid Excise Tax (see supplemental table on reverse)

\$2.08

6 Specify other aggravating/mitigating compliance factors

7 Specify other aggravating/mitigating compliance factors

8 Sum lines 3 through 7

\$7.51

9 Total tons involved in current incident

1,469.00

10 Multiply lines 8 and 9.....Equals Compliance Component

\$11,032.19

Total Penalty

\$44,369.46

Worksheet prepared by

Date

Steven Kraten

September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$30.2.

Exhibit A - Page 10 of 12



Metro

Penalty Worksheet

Licensee Name

Kemper Drywall, Inc.

License Number

None

Supplemental Table

Unpaid Regional System Fees

<u>Period</u>	<u>Rate</u>	<u>Tons</u>	<u>Total</u>
1/1/07 - 8/31/07	\$13.57	1,103.59	\$14,975.72
9/1/07 - 11/30/07	\$14.08	364.60	\$5,133.57
		1,468.19	\$20,109.29
Average rate per ton			\$13.70
25% penalty			\$3.43

Unpaid Excise Tax

<u>Period</u>	<u>Rate</u>	<u>Tons</u>	<u>Total</u>
9/1/06 - 8/31/07	\$8.35	1,103.59	\$9,214.98
9/1/07 - 8/31/08	\$8.23	364.60	\$3,000.66
		1,468.19	\$12,215.64
Average rate per ton			\$8.32
25% penalty			\$2.08

Please Remit To:

Metro
Accounts Receivable
600 NE Grand Avenue
Portland OR 97232-2736

INVOICE



Page:

1

Invoice No:

REM-01085

Invoice Date:

09/30/2009

Customer Number:

REM1442

Payment Terms:

Net 30

Due Date:

10/30/2009

Bill To:

Kemper Drywall Inc
Accounts Payable
4084 Pacific Highway 99E
Hubbard OR 97032

AMOUNT DUE: 47,547.41 USD

Amount Remitted



For billing questions, please call 503-797-1620

Line	Adj	Identifier	Description	Quantity	Unit Amt	Net Amount
		Violation #NOV-193-C8				
		Violation #NOV-193A-08				
1		Violation NOV193-C8/193A-08		1.00	47,547.41	47,547.41
SUBTOTAL:						47,547.41
TOTAL AMOUNT DUE :						47,547.41

STANDARD

Original



Metro | *People places. Open spaces.*

December 2, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 626
Hubbard, OR 97032

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, OR 97201

Dear Messrs. Harden:

You have requested a hearing in order to explain the circumstances behind the alleged violation.

Your hearing is scheduled for January 6, 2010 at 10:00 AM in the Council Chambers at Metro Center, 600 NE Grand Avenue, Portland, Oregon 97232.

If an emergency prevents you from being present at the scheduled time, please call (503) 797-1835.

Violation #	NOV-193A-09
Hearing Date	January 6, 2010
Hearing Time	10:00 AM
Location:	Metro Center 600 NE Grand Avenue Portland, Oregon 97232 COUNCIL CHAMBERS

Enclosed with this notice are the following documents, which the Agency will rely on in your case and be offered to the Hearings Officer at the Hearing:

- (a) Copy of NOV-193A-09
- (b) Copy of NOV-193-08

Sincerely,

Steve Kraten
Solid Waste Enforcement Coordinator

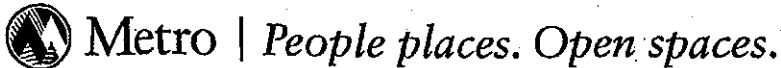
SK:W
M:\enviro\regaff\projects\Regulatory Data\Enforcement\Hearing Stuff\Flow Control\Hearing Notice.doc

5.09.100 Representation at Hearing

(a) A cited person may be represented by a retained attorney provided that written notice of such representation is received by the Metro Attorney five working days in advance of the hearing. The hearings officer may waive this notice requirement in individual cases or reset the hearing for a later date.

(b) When a cited person is not represented by legal counsel at the hearing, then Metro shall not be represented by legal counsel at the hearing. In such case, Metro legal counsel may advise Metro staff in preparation of the case and may be present at the hearing for the purpose of consulting with and advising Metro staff.

(Ordinance No. 94-557. Amended by Ordinance No. 06-1107.)



September 30, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

RE: Notice of Violation and Imposition of Civil Penalties (NOV-193A-09)
Delivery of solid waste to a non-system facility and failure to pay Metro regional system fees and excise taxes

Dear Messrs. Harden:

This letter is to notify you of Kemper Drywall, Inc.'s ("KDI's") violations of Sections 5.02.045(b), 5.05.025 and 7.01.020 of the Metro Code and to require KDI to pay fees, taxes, interest, and penalties owed to Metro. KDI was cited for violations of these same Code sections on March 7, 2008 (Notice of Violation No. NOV-193-08). At that time, Metro determined that KDI had avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro boundary and delivered to the North Marion County Disposal Facility ("NMCDF") during 2007. The 2007 violation was a first offense and an investigation indicated that KDI was unaware of Metro's regulations concerning flow control. Metro's decision regarding the case was that:

Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations.

In April, May, and June of 2009, KDI was found to be violating the same sections of Code in the same manner as before.

Violations

Metro Code Section 5.02.045(b) stipulates that:

Any waste hauler or other person transporting solid waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste.

From April 15, 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons) generated and collected from within the Metro region to the North Marion County Disposal Facility ("NMCDF") for disposal. A summary of these loads is presented in Appendix 1 to this Notice. KDI did not pay Metro regional system fees on this waste. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Metro Code Section 5.05.025(b) stipulates that:

Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the District, any solid waste facility or disposal site without an appropriate license from Metro.

KDI delivered waste generated within the District to NMCDF, a non-system facility, without having applied for or received the required non-system license. KDI is therefore in violation of Metro Code Section 5.02.025(b).

Metro Code Section 7.01.020(a) stipulates that:

For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax ... The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro.

KDI did not pay the Metro tax on the in-Metro generated waste it delivered to NMCDF. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Circumstances of the Violations

Detectives assigned to Metro investigated this matter by surveilling KDI trucks as they collected drywall scrap and delivered it to disposal sites, analyzing transaction data provided by NMCDF, conducting interviews of KDI's owners and production manager, and analyzing GPS data on KDI trucks provided by KDI. Robert and Kemper Harden, the owners of KDI, fully cooperated with the Metro investigation of this matter. These were the key findings of the investigation:

1. KDI's owners stated that, after receiving the first NOV (No. NOV-193-08), they verbally directed their crews to henceforth deliver all drywall scrap either to Knez¹ for recycling, or to a Metro transfer station. The owners maintain that all loads subsequently delivered to NMCDF were delivered there without their knowledge and contrary to their instructions. However, between March 7, 2008, the date that NOV-193-08 was issued, and the end of June 2009, KDI delivered 92 loads to NMCDF. KDI's drivers charging that many loads to KDI's account should not have escaped management's notice. KDI has now closed its account with NMCDF and terminated a driver (name unknown) responsible for many of the deliveries to NMCDF.
2. KDI tracks its trucks using GPS. The GPS information identifies numerous truck trips to NMCDF by address (17899 Whitney Lane, Woodburn) and should not have escaped management's notice.
3. Jose Hernandez, KDI's production manager, directs KDI's drywall scrapping crews. Though Mr. Hernandez was employed by KDI at the time the first NOV was issued and would have been the key person informed by management about any changes in procedures regarding the disposal of drywall scrap, he told the investigators that he had no knowledge of Metro, its boundaries, or any regulations regarding flow control and claimed to be unaware of any directive by the owners not to use NMCDF.
4. NMCDF's rate for KDI waste was \$75.45 per ton as compared with the Metro rate of \$75.75 plus a transaction fee of \$8.50 per load (approximately \$3 per ton for a typical KDI load).
5. NMCDF is located close to KDI's yard and drivers may have used it as a matter of convenience in order to avoid the traffic and waiting lines they would have encountered in using authorized facilities.
6. The number of loads that KDI delivered to NMCDF increased dramatically from January through June, 2009 (see Appendix 2 to this Notice). The increase coincides with KDI's work on the 30-building Creekview Crossing apartment subdivision. Creekview Crossing is located in Sherwood, within the Metro boundary. In a letter delivered to Metro by e-mail on July 21, 2009, Robert Harden stated that KDI's manager and drivers thought that Creekview Crossing was located outside Metro and that the debris could be taken to any disposal facility. However, as stated above, the manager claimed not to know that the location of a job with respect to the Metro boundary was even a factor to be considered in choosing a disposal site.
7. In addition to the 22 loads identified as originating from within Metro between April and July 2009, it is likely that other in-Metro loads were among the loads KDI delivered to

¹ Knez is a drywall supply company that takes back and recycles drywall scrap for a fee.

NMCDF. However, Metro has not been able to substantiate this as KDI's GPS records do not go back farther than April 21, 2009.

8. KDI drivers frequently gave inaccurate information when asked the origin of their loads at NMCDF. Often they gave "Hubbard," KDI's office location as the origin. Many of the loads contained waste from multiple locations yet the drivers always gave a single location, often an inaccurate one. Though a substantial number of loads were generated from the Creekview Crossing project in Sherwood, Sherwood was given as the point of origin of only one load.

KDI has not treated compliance with Metro regulations as an important matter. What emerges from the investigation is that KDI at one time gave verbal instructions to its drivers to take their loads of scrap to Knez or to Metro transfer stations but did little to ensure that such instructions were followed. Management did not reinforce the message with written instructions, reminders, or other follow-up. KDI kept its NMCDF account open and available for drivers to use until the account was closed on July 14, 2009. The lead worker that directs KDI's scrapping crews told investigators he was not aware of Metro regulations or of any KDI management directive not to deliver loads to NMCDF. KDI drivers routinely gave erroneous information when asked the origins of their loads by NMCDF scalehouse staff. The investigation did not prove that drivers were deceptive for the purpose of evading Metro fees and taxes, but clearly this is further evidence of a lack of control over the drivers' actions and negligence on the part of KDI's management. Billings from NMCDF appear not to have alerted KDI management to the fact that its drivers were still using NMCDF.

Civil Penalties

Regional system fees, excise tax, cost recovery, interest, and penalties for the violations that occurred from April 15 to June 23, 2009 amount to \$3,177.95 (see attached Penalty Worksheet for NOV-193A-09). As a result of KDI's continuing failure to comply with the above-cited provisions of the Metro Code, Metro is also seeking to recover fees, taxes, and appropriate penalties for the 2007 violations from Notice of Violation No. NOV-193-08 for an additional \$44,369.46 (see attached Penalty Worksheet for NOV-193A-08). A total of \$47,547.41 for past and current violations is being sought by Metro. An invoice for this amount is enclosed.

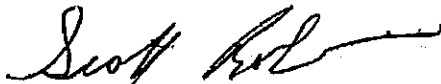
Contested Case Notice

Under Metro Code Chapter 2.05, you have the right to request a contested case hearing regarding this Notice. You must make this request in writing and ensure that Metro receives the request within 30 days of the date that the Notice was mailed. Any such request should be directed to the attention of Steven Kraten at Metro. You may retain legal counsel to represent you at the hearing. Article IX, Section 14 of the Oregon Constitution, the Metro Charter, ORS Chapter 268, and Metro Code Chapter 2.05 and 5.02, 5.05, and 7.01 provide Metro's authority and jurisdiction for the hearing.

NOV-193A-09
September 30, 2009
Page 5

If you have any questions regarding this matter, please contact Steve Kraten, Solid Waste Enforcement Coordinator, at (503) 797-1678.

Sincerely,



Scott Robinson
Deputy Chief Operating Officer

SK/SRL:bj

Attachments

Enclosure

cc: Margo Norton, Finance and Administrative Services Director
Roy Brower, Solid Waste Compliance & Cleanup Manager
Steve Kraten, Solid Waste Enforcement Coordinator
Warren Johnson, Solid Waste Compliance Supervisor

S:\REM\Kraten\Enforcement\Flow Control\Kemper\NOV-193A-09.doc
Quene

Appendix 1

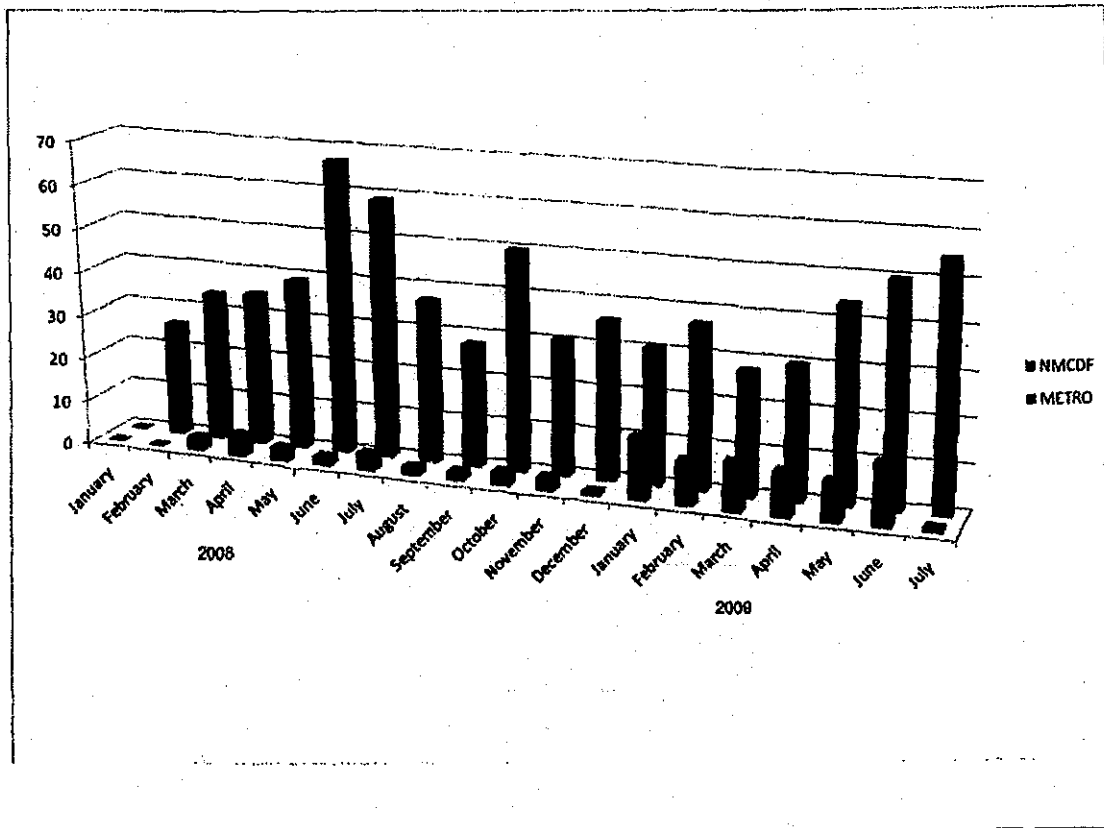
**KDI LOADS WHOLLEY OR PARTLY FROM WITHIN METRO
DELIVERED TO NMCDF FROM
APRIL 15, 2009 TO JULY 14, 2009**

Date	Number of Loads	Followed by Metro detectives	KDI GPS data	Zip Code given by driver at NMCDF	Pounds (from weight tickets)	Tons
7/14/09	1		Yes		3,720	1.86
6/29/09	2		Yes		11,240	5.62
6/27/09	2		Yes		15,460	7.73
6/23/09	1	Yes	See note		4,460	2.23
6/16/09	2	Yes	Yes		13,060	6.53
6/4/09	2		Yes		8,060	4.03
6/2/09	1		Yes		5,240	2.62
5/29/09	1		Yes		4,620	2.31
5/21/09	1		Yes		6,060	3.03
5/13/09	1		Yes		8,800	4.40
5/11/09	1		Yes		6,500	3.25
5/5/09	1		Yes		2,420	1.21
5/1/09	1		Yes		3,900	1.95
4/28/09	2		Yes		12,580	6.29
4/21/09	2		Yes		10,160	5.08
4/15/09	1			Yes	7,060	3.53
TOTAL	22				123,340	61.67

Note: Metro detectives followed this load from Creekview Crossing to NMCDF but, for reasons unknown, there was a gap in the KDI's GPS records for the day and the trip to NMCDF was omitted from the records.

Appendix 2

**KDI LOADS DELIVERED TO NMCDF and METRO TRANSFER STATIONS
2009 AND JANUARY – JULY, 2009**



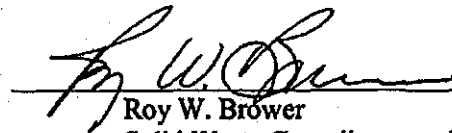
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing CONTESTED CASE NOTICE, with the Director's Notice of Violation, on the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

Hendricks Law Firm, P.C., Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

On Sept 30, 2009, said individuals were served with a complete and correct copy thereof via regular mail and certified mail, return receipt requested, contained in a sealed envelope, with postage prepaid, and deposited in the U.S. Post Office at Portland, Oregon.



Roy W. Brower
Solid Waste Compliance and Cleanup Manager

S:\REM\ursten\Enforcement\Flow Control\Kemper\NOV-193A-09.doc



Metro

Penalty Worksheet

Licensee/Hauler Name

License Number

Kemper Drywall, Inc.

None

Brief Description

In 2009, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. The violations appear to be the result of negligence rather than a deliberate attempt to evade fees and taxes. This is the second incident of such violations.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units Involved
NOV-193A-09	4/15/09 to 6/23/09	62	2	tons

Direct Cost/Revenue Loss

1 Administrative cost		\$500.00
2 Unpaid Regional System Fees:	61.67 tons at \$16.04	\$989.19
3 Unpaid Excise Taxes:	61.67 tons at \$8.97	\$553.18
4 Metro disposal costs (disposal contract)		\$0.00
5 Std <500 tons) Non-System License fee		\$500.00
6 Specify other direct cost/revenue loss		
7 Add lines 1 through 6.....	Equals Direct Recovery	\$2,542.37

Indirect Cost/Revenue Loss

1 Interest on RSF, ET, & penalty from April 2009 (1.5%/mo.)	\$65.13
2 Specify other indirect cost/revenue loss	
3 Specify other indirect cost/revenue loss	
4 Specify other indirect cost/revenue loss	
5 Add lines 1 through 4.....	Equals Indirect Recovery \$65.13

Compliance Component

1 Base penalty per unit	\$1.00
2 Additional penalty at \$1 per incident	\$2.00
3 Add lines 1 and 2	\$3.00
4 25% penalty on unpaid Regional System Fees	\$4.01
5 25% penalty on unpaid Excise Taxes	\$2.24
6 Specify other aggravating/mitigating compliance factors	
7 Specify other aggravating/mitigating compliance factors	
8 Sum lines 3 through 7	\$9.25
9 Total tons involved in current incident	61.67
10 Multiply lines 8 and 9.....	Equals Compliance Component \$570.45

Total Penalty \$3,177.95

Worksheet prepared by

Date

Steven Kraten

September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$51.26.

S:\REM\kraten\Enforcement\Flow Control\Kemper\Pen\Wkst\NOV-193A-09



Metro

Penalty Worksheet

Licensee Name	License Number
Kemper Drywall, Inc.	None

Brief Description

Through most of 2007, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. At the time, Metro agreed not to recover fees, taxes, and penalties subject to KDI not re-offending.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units involved tons
NOV-193-08	1/1/07 to 11/30/07	1,469	1	

Direct Cost/Revenue Loss

1 Administrative cost				
2 Unpaid Regional System Fees (9/1/06 - 8/31/07):	1,104 tons at \$13.57	\$14,975.72		
3 Unpaid Excise Taxes (9/1/06 - 8/31/07):	1,104 tons at \$8.35	\$9,218.40		
2 Unpaid Regional System Fees (9/1/07 - 8/31/08):	365 tons at \$14.08	\$5,139.20		
3 Unpaid Excise Taxes (9/1/07 - 8/31/08):	365 tons at \$8.23	\$3,003.95		
6 Std. (>500 tons) Non-System License fee		1,000.00		
7 Add lines 1 through 6.....			Equals Direct Recovery	\$33,337.27

Indirect Cost/Revenue Loss

1 Specify other indirect cost/revenue loss	
2 Specify other indirect cost/revenue loss	
3 Specify other indirect cost/revenue loss	
4 Specify other indirect cost/revenue loss	
5 Add lines 1 through 4.....	Equals Indirect Recovery

Compliance Component

1 Base penalty per unit	\$1.00
2 Additional penalty at \$1 per incident	\$1.00
3 Add lines 1 and 2	\$2.00
4 Penalty on unpaid Regional System Fees (see supplemental table on reverse)	\$3.43
5 Penalty on unpaid Excise Tax (see supplemental table on reverse)	\$2.08
6 Specify other aggravating/mitigating compliance factors	
7 Specify other aggravating/mitigating compliance factors	
8 Sum lines 3 through 7	\$7.51
9 Total tons involved in current incident	1,469.00
10 Multiply lines 8 and 9.....	Equals Compliance Component

Total Penalty **\$44,369.46**

Worksheet prepared by

Steven Kraten

Date

September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$30.2.



Metro

Penalty Worksheet

Licensee Name

Kemper Drywall, Inc.

License Number

None

Supplemental Table

Unpaid Regional System Fees

<u>Period</u>	<u>Rate</u>	<u>Tons</u>	<u>Total</u>
1/1/07 - 8/31/07	\$13.57	1,103.59	\$14,975.72
9/1/07 - 11/30/07	\$14.08	364.60	\$5,133.57
		1,468.19	\$20,109.29
Average rate per ton			\$13.70
25% penalty			\$3.43

Unpaid Excise Tax

<u>Period</u>	<u>Rate</u>	<u>Tons</u>	<u>Total</u>
9/1/06 - 8/31/07	\$8.35	1,103.69	\$9,214.98
9/1/07 - 8/31/08	\$8.23	364.60	\$3,000.66
		1,468.19	\$12,215.64
Average rate per ton			\$8.32
25% penalty			\$2.08

Please Remit To:

Metro
Accounts Receivable
600 NE Grand Avenue
Portland OR 97232-2736

INVOICE

Page: 1
Invoice No: REM-01085
Invoice Date: 09/30/2009
Customer Number: REM1442
Payment Terms: Net 30
Due Date: 10/30/2009

Bill To:

Kemper Drywall Inc
Accounts Payable
4084 Pacific Highway 99E
Hubbard OR 97032

AMOUNT DUE: 47,547.41 USD

Amount Remitted



For billing questions, please call 503-797-1620

Line	Adj	Identifier	Description	Quantity	Unit Amt	Net Amount
			Violation #NOV-193-08			
			Violation #NOV-193A-08			
1			Violation Nov193-08/193A-08	1.00	47,547.41	47,547.41
SUBTOTAL:						47,547.41
TOTAL AMOUNT DUE :						47,547.41

STANDARD

Original



METRO

March 7, 2008

**CERTIFIED MAIL
 RETURN RECEIPT REQUESTED**
 Kemper Harden, President
 Robert Harden, Secretary
 Kemper Drywall, Inc.
 PO Box 2235
 Tualatin, OR 97062

**CERTIFIED MAIL
 RETURN RECEIPT REQUESTED**
 Hendricks Law Firm, P.C.
 Registered Agent for Kemper Drywall, Inc.
 1425 SW 20th Ave., Suite 201
 Portland, Oregon 97201

RE: Notice of Violation (NOV-193-08)
Delivery of solid waste to a non-system facility and failure to pay Metro regional system fees and excise taxes

Dear Messrs. Harden:

The purpose of this letter is to notify you of Kemper Drywall, Inc.'s ("KDI's") violations of Sections 5.02.045(b), 5.05.025 and 7.01.020 of the Metro Code and to require KDI to immediately come into compliance with these provisions.

Violations

Metro Code Section 5.02.045(b) stipulates that:

Any waste hauler or other person transporting solid waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste.

Over a period of several years, including all of 2006 and 2007, KDI transported waste drywall scrap generated and collected from its drywall installation projects within the Metro region to the North Marion County Disposal Facility ("NMCDF") for disposal. KDI did not pay Metro regional system fees on this waste. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Metro Code Section 5.05.025(b) stipulates that:

Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the

District, any solid waste facility or disposal site without an appropriate license from Metro.

KDI delivered waste generated within the District to NMCDF, a non-system facility, without having applied for or received the required non-system license. KDI is therefore in violation of Metro Code Section 5.02.025(b).

Metro Code Section 7.01.020(a) stipulates that:

For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax of 7.5 percent of the payment charged by the operator or Metro for such use unless a lower rate has been established as provided in subsection 7.01.020(b). The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro.

KDI did not pay the Metro tax on the in-Metro generated waste it delivered to NMCDF. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Opportunity to Come into Compliance without Penalty or Payment of Back Fees and Taxes

The results of Metro's investigation indicate that KDI was unaware of Metro's flow control ordinance during the time it delivered waste to NMCDF and did not knowingly violate Metro's flow control ordinance. Unlike other flow control violators Metro has prosecuted, KDI does not appear to have committed fraud or made false representations regarding the origin of its waste. Further, KDI paid \$75.63 per ton for disposal at NMCDF. This is more than it would have paid at many system facilities, even with Metro fees and taxes included. Thus, KDI does not appear to have utilized a non-system facility where Metro fees and taxes were not collected, for the purpose of paying a lower disposal rate than competitors utilizing designated disposal facilities. KDI ceased delivering drywall scrap to NMCDF after Kemper and Robert Harden were contacted by Metro detectives regarding this matter. Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations.

Under Metro Code Chapter 2.05, you have the right to request a contested case hearing regarding this Notice. You must make this request in writing and ensure that Metro receives the request within 30 days of the date that the Notice was mailed. Any such request should be directed to the attention of Steven Kraten at Metro. You may retain legal counsel to represent you at the hearing. Article IX, Section 14 of the Oregon Constitution, the Metro Charter, ORS Chapter

Messrs. Harden
March 7, 2008
Page 3

268, and Metro Code Chapter 2.05 and 5.02, 5.05, and 7.01 provide Metro's authority and jurisdiction for the hearing.

If you have any questions regarding this matter, please contact Steve Kraten, Solid Waste Enforcement Coordinator, at (503) 797-1678.

Sincerely,



Michael G. Hoglund
Metro Solid Waste and Recycling Department Director

SK:bjl

cc: Roy Brower, Regulatory Affairs Manager
Steven Kraten, Solid Waste Enforcement Coordinator
Michelle Bellia, Assistant Metro Attorney

S:\REM\Enforcement\Flow Control\KDM-adviser\011008.doc
Queue

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing **CONTESTED CASE NOTICE**, with the Director's Notice of Violation, on the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 2235
Tualatin, OR 97062

Hendricks Law Firm, P.C., Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

on March 7, 2008 by mailing to said individuals a complete and correct copy thereof via certified mail, return receipt requested and regular mail, contained in a sealed envelopes, with postage prepaid, and deposited in the U.S. post office at Portland, Oregon.



Roy W. Brower
Regulatory Affairs Manager
Metro

Exhibit

Borrowers NOA Letter

Page 1 of 1



JPMorgan Chase Bank
Phone 866-343-4079 Fax
Portfolio Management Center
AZ1-1004
201 North Central Avenue, Floor 17
Phoenix, AZ 85004

November 14, 2009

KEMPER DRYWALL INC
PO BOX 626
HUBBARD, OR 97032-0626

Re: Account Number: XXXXX0814206800
Final Demand Notice \$107,230.64 Plus Fees, Interest, and Attorney Fees

Dear Sir or Madam :

This letter is sent to you by JP Morgan Chase Bank, NA ("Chase"), the owner and holder of the Note for the account referenced above who is attempting to collect indebtedness.

THIS LETTER IS NOTICE OF THE ACCELERATION OF THE NOTE

You have failed to make payments as required under the terms of the Note. This letter is notice that we have accelerated the note and the unpaid principal and lawfully accrued unpaid interest and charge, if any, is now due.

For payoff information, please contact me at the number listed below.

All of the bank's claims, demands and accruals regarding the above described indebtedness, whenever made, and whether for principal, interest or otherwise, are intended to comply in all respects, both independently and collectively, with applicable usury laws, and are accordingly limited so that applicable usury laws are not violated.

Additionally, please be advised that we may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

Sincerely,

Katherine Monk

KATHERINE MONK

AVP

Portfolio Management Center

866-343-4079 Ext. 7810

E-Mail:

katherine.k.monk@chase.com

cc: file

Kathy Monk
602-221-7810

Debt Schedule

Debtor	Amount Due
Ames	\$2,477.00
Amex	\$16,630.00
AmFam	\$10,500.00
Aramark	\$45.00
Employee's	\$57,920.00
Far West	\$1,496.00
HardenHines Ins.	\$516.12
Home Depot	\$4,666.80
Integra- Phone/Internet	\$698.00
Knez	\$645,000.00
Les Schwab	\$488.22
Masco	\$7,062.00
Med. Ins.	\$3,234.02
Metro	\$8,320.87
Multi Fab	\$13,056.00
Northwest Spray	\$99.29
PGE	\$450.00
Prinical Financial	\$352.66
Steeler	\$6,086.00
Subcontractors	\$55,000.00
United Equipment	\$505.91
United Rentals	\$1,064.77
Vehicle Payments and Credit Cards	\$14,500.00
Wave Broadband	\$221.86
Workers Comp.	\$4,316.83
KDI Facility	\$4,342.00
Storage Unit	\$141.00
Bank of America 0% 0290 Rob	\$16,457.37
Capital One- 7.71% 4665 Kemper	\$20,003.62
Chase 13.24% 8177 Robert	\$13,575.91
Capital One-12.4% 1713 Robert	\$5,826.51
T&K- Line of Credit 5%	\$53,000.00
Bank of America 7.99% 9342 Kemper	\$9,505.46
Chase 9.24% 7714 Kemper	\$13,411.35
Coldwater 9.24% 5341 Terry	\$10,433.50
Rob Line of Credit 4.75%	\$106,473.90
Chase 13.24% 4604 Kemper	\$32,093.40
Bank of America 10.99% 4907 Kemper	\$33,521.00
CitiCards 0% for 6 mo. Terry	\$6,770.64
Amazon 12.24% 5573 Rob	\$2,238.57
Chase 13.24% 2284 Rob	\$2,814.52
Chase 9.24% 1620 Rob	\$7,087.83
Chase 8.99% 7022 Rob	\$26,827.02
CitiCards 0% for 6 mo. Terry	\$23,989.17
Sears 17.99% 6075 Terry	\$15,373.40
Washington Mutual 2.5%	\$107,987.13
Key Bank 5.75%	\$17,760.28
Amex- 13.24% 81001 Terry	\$14,091.90
HSBC 19.24% 2589 Robert	\$4,367.08
Chase- 7.24% 1655 Kemper	\$8,395.65
Sears- 23.24% 9690 Robert	\$12,250.56
Amex-27.24% 81006 Robert	\$2,396.69
Citcards- 1761 Robert	\$4,328.52
Discover- Terry	\$13,000.00
Total:	\$1,443,171.33



Metro | *People places. Open spaces.*

January 12, 2010

Carl D. Cox, Attorney at Law
PMB #401
14845 SW Murray Scholls Drive, Ste110
Beaverton, OR 97007

RE: Metro Case No. 09-0109 (Kemper Drywall)

Dear Mr. Cox:

At the January 6, 2010, Kemper Drywall hearing, you decided to hold the record open for an additional ten days in order to provide Metro opportunity to review and comment on two documents introduced into evidence by the Respondents at the hearing. One document is a Final Demand Notice from JP Morgan Chase Bank dated November 14, 2009. The other document appears to be a list of Kemper Drywall's debts. Metro specifically objects to the introduction of this second document into evidence as it is unsubstantiated by any primary sources. Neither document provides contextual value in understanding the company's full financial picture.

Should you disagree with our objection or be inclined to modify Kemper's penalty, Metro would urge you to focus such consideration only on the compliance component of the penalty. It is Metro's practice to recover full payment of regional system fees and excise tax as a primary objective of our enforcement effort. Should you have additional questions or wish to modify the penalty, we suggest that a conference call among the parties be scheduled.

Thank you for the opportunity to comment.

Sincerely,

Steven Kraten
Solid Waste Enforcement Coordinator

SK:kjl

Cc:

Kemper Drywall
Margo Norton, Metro
Roy Brower, Metro
Michelle Bellia, Office of Metro Attorney
S:\REM\kraten\Contracts\Cox\Kemper011110.docx
Queue

RECEIVED

JAN 28 2010

OFFICE OF METRO ATTORNEY

IN THE MATTER OF THE CONTESTED CASE HEARING OF

Kemper Drywall, Inc.,

Case No:

Appellant

NOV-193A-09

v.

METRO,

PROPOSED FINAL ORDER

Respondent

I. STATEMENT OF THE CASE

Appellant Kemper Drywall, Inc., ("Appellant" or "KDI") requested a hearing to contest a notice of violation issued to KDI by Respondent Metropolitan Service District ("Respondent" or "Metro"). A Hearings Officer held the requested contested case hearing on January 6, 2010 at approximately 10:00 am at Metro's offices located at 600 NE Grand Ave., Portland, Oregon. Kemper Harden and Robert Harden, principal officers of KDI, appeared on behalf of Appellant. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, appeared on behalf of Respondent. The hearings officer did not receive any written or oral ex parte communication on a fact in issue during the pendency of the proceedings, and made a statement to that effect on the record, together with a description of the hearing procedure. All witnesses providing testimony provided an oath or affirmation concerning the truthfulness of their testimony. Metro made an audio recording of the hearing. Metro maintains the record of the proceedings.

II. EVIDENTIARY MATTERS

Appellant provided witness testimony and oral argument by Kemper Harden and Robert Harden in support of KDI's request to vacate or reduce the civil penalties issued by Metro. Respondent provided witness testimony and oral argument by Mr. Kraten, and Exhibits A-D, in support of its request to uphold the fines assessed by Metro. Appellant brought two documents (Exhibit 1) to the hearing in support of KDI's assertion that financial hardship warrants vacating or reducing the civil penalties issued by Metro. The hearings officer ordered the record kept open until January 19, 2010 in order to permit Metro to review and respond to the documents Appellant brought to the hearing. Metro provided a timely written response, objecting to consideration of the second of the two documents comprising Exhibit 1, as unsubstantiated by any primary sources. Metro also asserted that neither document provided contextual value in understanding KDI's full financial picture. The hearings officer reviewed Appellant's Exhibit 1 in light of Metro's objection, determined that the offered Exhibit 1 is material to Appellant's assertion of financial hardship, and

declined to exclude the offered evidence. There were no other objections, and the hearing officer received and considered the offered evidence.¹

III. ISSUES PRESENTED

1. Whether Metro's action in assessing a \$44,369.46 civil penalty against Appellant KDI for the violations described in NOV-193-08 (assessed in NOV-193A-09) is appropriate.
2. Whether Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI for the violations described in NOV-193A-09 is appropriate.
3. Whether financial hardship alleged by KDI as a basis for reducing the civil penalties assessed by Metro warrants such relief.

IV. STIPULATIONS AND FINDINGS OF FACT

1. Appellant KDI is a construction company that disposes of a significant amount of scrap drywall as part of its business operations. KDI does not have a license to dispose of waste generated within the Metro region to a non-system facility.
2. On March 7, 2008, Metro issued NOV-193-08 to KDI asserting violations of Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro regional boundary and delivered to the North Marion County Disposal Facility ("NMCDF"). Metro determined that this was a first time offense for KDI, and Metro's investigation found that KDI was unaware of Metro's regulations concerning solid waste flow control. Metro also determined that KDI did not commit fraud, or make any false representations regarding the origin of the waste. Metro further determined that KDI did not receive a financial benefit from the violation because it actually paid more for disposal of its waste on the non-system facility than KDI would have paid at many Metro system facilities. Metro suspended its enforcement action with respect to the violations, stating:

"Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations." [Metro Exhibit D]

⁴ Metro Code Section 2.05.030(b) provides that: "Irrelevant, immaterial or unduly repetitious evidence shall be excluded." Metro Code Section 2.05.030(c) provides that: "All offered evidence, not objected to, will be received by the hearings officer subject to his/her power to exclude irrelevant, immaterial or unduly repetitious matter."

3. Mr. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, testified that in the spring of 2009 Metro found that KDI again violated the Metro code by delivering waste generated within the Metro region to the NMCDF waste facility. Mr. Kraten testified that Metro used GPS records of the activities of KDI trucks to determine that, from April 15, 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons) generated and collected from within the Metro region, to NMCDF for disposal, without a license from Metro, and without paying the required Metro Regional System Fees and Excise Taxes. Mr. Kraten asserted that KDI likely transported more loads of its waste drywall scrap to NMCDF for disposal before April 15, 2009, but there were no GPS records available to track the earlier loads. [Testimony Mr. Kraten]
4. Mr. Kraten testified that, after the March 2008 NOV, KDI asserted to Metro that it would no longer use the NMCDF waste facility. Mr. Kraten noted, however, that Metro's investigation found that KDI in fact continued to utilize the NMCDF facility. Mr. Kraten further noted that, although KDI's principal operators (Kemper Harden and Robert Harden) utilized GPS to track their trucks and should have been aware of the numerous trips their trucks made to the NMCDF waste facility. Mr. Kraten also noted that KDI's principal operators should have noticed the charges to KDI's account at NMCDF. Further, Mr. Kraten noted that although the drivers interviewed denied knowing about the Metro boundary or its regulations, they gave inaccurate information to the NMCDF waste facility concerning the origin of the drywall scrap. Metro's investigation revealed that KDI paid NMCDF \$75.45 per ton as compared with the Metro rate of \$75.75 per ton with a transaction fee of \$8.50 per load, or approximately \$78.75 per ton. Metro's investigation also revealed that the NMCDF waste facility is located close to KDI's yard and likely more convenient for KDI's drivers. KDI provided Metro a July 21, 2009 letter stating that KDI's manager and drivers thought that the Sherwood construction site was located outside Metro and therefore the solid waste could be delivered to any disposal facility. Mr. Kraten testified that KDI fully cooperated in Metro's investigation, and finally closed its account with NMCDF after Metro's second investigation. [Testimony Mr. Kraten; Metro Exhibit B]
5. On September 30, 2009, Metro issued NOV-193A-09 to KDI, again asserting violations of Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided payment of \$989.19 in Metro Regional System Fees and \$553.18 in Metro Excise Taxes on 61.67 tons of waste generated within the Metro regional boundary and delivered to NMCDF. Metro's investigation found that KDI drivers frequently gave inaccurate information when asked the origin of their loads at NMCDF, often stating Hubbard (the location of KDI's offices) as the origin, and stated Sherwood as the location of only one load, although Metro determined that much of the drywall waste was generated at a KDI construction site in Sherwood. [Metro Exhibit B]
6. Metro assessed a total civil penalty of \$47,547.41 for the two incidents, combined in NOV-193A-09. Metro imposed a civil penalty of \$44,369.46 for the 2007

- violation, seeking recovery of \$32,337.27 in unpaid Metro Regional System Fees and Excise Taxes, a \$1,000 Non-System License fee (required to transport more than 500 tons to a non-system facility). In addition, the civil penalty included a compliance component totaling \$11,032.19, calculating the penalty portion as follows: \$1.00 per unit (ton), plus an additional penalty of \$1.00 per unit (ton) calculated at \$1.00 per incident (one incident), plus a 25% penalty on unpaid Regional System Fees (\$3.43 per ton for 1,469 tons) and a 25% penalty on unpaid Excise Taxes (\$2.08 per ton for 1,469 tons). [Metro Exhibits B and C; Penalty Worksheet NOV-193A-08]
7. Metro imposed a civil penalty of \$3,177.95 for the 2009 violation, seeking recovery of \$1,542.37 in unpaid Metro Regional System Fees and Excise Taxes, a \$500 administrative cost, a \$500 Non-System License fee (required to transport less than 500 tons to a non-system facility), and \$65.13 in unpaid interest from April 2009 through September 23, 2009. In addition, the civil penalty included a compliance component totaling \$570.45, calculating the penalty portion as follows: \$1.00 per unit (ton), plus an additional penalty of \$2.00 per unit (ton) calculated at \$1.00 per incident (two incidents), plus a 25% penalty on unpaid Regional System Fees (\$4.01 per ton for 61.67 tons) and a 25% penalty on unpaid Excise Taxes (\$2.24 per ton for 61.67 tons). [Metro Exhibits B and C; Penalty Worksheet NOV-193A-09]
 8. Mr. Kemper Harden, and Mr. Robert Harden, principal operators of KDI, testified that they do not disagree with the assertions of violations by Metro, or Mr. Kraten's testimony concerning the violations. Rather, they agree that KDI did not maintain adequate supervision of its scrappers, reporting that problems started in January 2009 after they moved their offices from Tigard to their current Hubbard location. Messrs. Harden testified that the current economic downturn has negatively affected KDI. Messrs. Harden testified that two years ago their business was debt-free, and now they are not sure if their business will make it. Messrs. Harden request consideration of their current financial circumstances, requesting an order vacating or reducing the civil penalties issued by Metro. [Testimony Kemper Harden; Testimony Robert Harden]
 9. Messrs. Harden introduced two items at the conclusion of the hearing in support of their request to vacate or reduce the civil penalties issued by Metro in this matter. These items include a November 14, 2009 letter from a bank giving KDI a final demand notice of acceleration on a note with principal of \$107,230.64, plus fees, interest, and attorney fees, and an undated debt schedule for \$1,443,171.33 of various debts owed by KDI, and Messrs. Harden. [Exhibit 1]
 10. Mr. Kraten provided a January 12, 2010 response to consideration of Exhibit 1. Mr. Kraten pointed out that the debt schedule submitted by Appellant is unsubstantiated by any primary sources. Mr. Kraten also pointed out that neither document submitted by Appellant provides contextual value in understanding KDI's financial picture. Mr. Kraten further asserted that consideration of vacating

or reducing any of the civil penalties assessed by Metro should focus only on the compliance component of the penalty, and not upon the portion of the civil penalties seeking recovery of unpaid regional system fees and unpaid excise taxes.

V. CONCLUSIONS OF LAW

The evidence presented is reliable, probative, and substantial evidence upon which to base a determination in this matter. The burden of presenting evidence to support a fact or position rests on the proponent of the fact or position. Respondent Metro must prove the validity of the civil penalties imposed on Appellant by a preponderance of the substantial evidence in the whole record.² Appellant KDI bears the burden of proof and the burden of coming forward with evidence regarding economic and financial hardship, or any other factor urged in mitigation, as a basis for vacating or reducing the civil penalties issued by Respondent Metro in this matter.

A. Metro Code Violations

Metro Code Section 5.02.045(b) provides that: "Any waste hauler or other person transporting waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste." Metro Code Section 5.05.025(b) provides that: "Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the District, any solid waste facility or disposal site without an appropriate license from Metro." Metro Code Section 7.01.020(a) provides that: "For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax of 7.5% of the payment charged by the operator or Metro for such use unless a lower rate has been established as provided in subsection 7.01.020(b). The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro."

The facts in this matter with respect to the violations by KDI identified in NOV-193-08 and NOV-193A-09 are not actually in dispute. As stated in NOV-193-08, Appellant KDI delivered 1,469 tons of solid waste generated within the Metro boundary to NMCDF, a non-system facility, without a non-system license from Metro, and without paying \$32,324.99 in Metro Regional System Fees and Excise Taxes. As stated in NOV-193-09, Appellant delivered 61.67 tons of solid waste generated within the Metro boundary to NMCDF, without a non-system license from Metro, and without paying \$1,542.37 in Metro Regional System Fees and Excise Taxes. I conclude based on the preponderance of the substantial evidence presented that KDI violated Metro Code Section 5.02.045(b), Metro Code Section 5.05.025(b), and Section 7.01.020(a), as stated by Respondent Metro in NOV-193-08 and NOV-193A-09.

² Metro Code Section 2.05.030.

B. Economic and Financial Condition as Factor

Appellant KDI asserts that its current economic and financial condition warrants vacating or reducing the civil penalties issued by Metro in this matter. Metro Code Section 2.03.050 provides for consideration of mitigating and aggravating factors in assessing a civil penalty. Metro Code Section 2.03.050 (a) provides that: "In establishing the amount of a civil penalty to be assessed, the Director of the Council shall consider the following factors:

- (1) Whether the respondent has committed any prior violation, regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefore;
- (2) The history of the respondent in taking all feasible steps or procedures necessary or appropriate to correct any violation;
- (3) The economic and financial conditions of the respondent."

Metro Code Section 2.03.050(b) provides for consideration of various mitigating factors warranting a remitted or reduced civil penalty, stating: "In establishing whether a civil penalty should be remitted or mitigated, the Director or the Council may consider the following factors:

- (1) The gravity and magnitude of the violation;
- (2) Whether the violation was repeated or continuous;
- (3) Whether a cause of the violation was an unavoidable accident, or negligence, or an intentional act of the respondent;
- (4) The opportunity and degree of difficulty to correct the violation;
- (5) The Respondent's cooperativeness and efforts to correct the violation for which the penalty is to be assessed;
- (6) The cost to Metro of investigation and correction of the cited violation prior to the time Metro receives respondent's answer to the written notice of assessment of civil penalty; or
- (7) Any other relevant factor."

Metro Code Section 2.03.050(c) provides further that: "Unless the issue is raised in respondent's answer to the written notice of assessment of civil penalty, the Council may presume that the economic and financial conditions of respondent would allow imposition of the penalty assessed by the Director. At the hearing, the burden of proof and the burden of coming forward with evidence regarding the respondent's economic and financial condition or regarding any factor urged in mitigation shall be upon the respondent."

Appellant KDI provided testimony by Messrs. Harden their business has suffered financially due to the current economic downturn, and that they now have substantial debt and are not sure whether their business will make it, whereas two years ago they were debt-free. Messrs. Harden provided copies of two documents at the hearing in support of their assertion that the financial condition of KDI warrants reducing the civil penalties assessed by Metro. Respondent Metro points out that the November 14, 2009 demand letter for \$107,230.64 and the debt schedule for \$1,443,171.33, do not provide evidence concerning KDI's actual financial picture or ability to pay the civil penalties assessed here. I found the testimony by Messrs.

Harden credible regarding their concern for the future of their business, and concluded from their demeanor that Messrs. Harden consider the civil penalties assessed by Metro in this matter a significant burden. Upon careful review of the record in this matter, I conclude that Appellant KDI failed to provide any substantial evidence of financial hardship warranting waiving or reducing civil penalties in this matter. A civil penalty is, by its nature, a financial burden upon the party who has to pay it. I find that the letters provided by Appellant KDI only provide a report of other financial burdens KDI and Messrs. Harden face, without providing evidence of specific undue economic or financial hardship. Therefore, I conclude that Appellant KDI failed to meet its burden of persuasion on this issue.

Further, I note in reviewing the civil penalties assessed by Metro in NOV-193-08 and NOV-193A-09 that the substantial majority is actually related to the unpaid Metro Regional System Fees and Excise Taxes (\$32,324.99 and \$1,542.37, respectively). I also note that \$1,500 of the civil penalties were related to the fees for non-system licenses KDI should have paid for the privilege of using non-system facilities, \$500 was an administrative fee for the cost imposed on Metro, and \$65.13 was for interest. The actual civil penalties from the compliance component assessed by Metro in NOV-193-08 and NOV-193A-09 were \$11,032.19 and \$570.45, respectively.


Here, Metro considered direct costs and revenue loss imposed on Metro ratepayers by the violations, with the majority of the civil penalties directly related to obtaining reimbursement to Metro for unpaid fees and taxes. I also find consideration of the administrative cost imposed on Metro by the violation a relevant factor, and find the estimated cost of \$500 reasonable. Metro's also provided a compliance component to the civil penalties, assessing a base penalty of \$1 per ton of solid waste delivered in violation of the regulations, together with an additional \$1 per ton for the tons involved in the second incident. I find consideration of prior violations a relevant factor to consider in assessing an appropriate fine. I note that while the civil penalty assessed by Metro's did not reduce the civil penalty for mitigating factors present in this matter (cooperation by Messrs. Harden in Metro's investigations), Metro also did not increase the civil penalties it assessed based upon the several aggravating factors present in this matter (inaccurate information provided to NMCDF by KDI drivers, prior statement by KDI that it would cease using the NMCDF facility, and the relative ease for KDI to track its drivers through its GPS system and account charges to prevent the violations). The civil penalty structure is reasonably designed to recover the costs of the violation and achieve compliance, and is within the range of fines permitted under the ordinance. Therefore, the hearings officer concludes that the assessed fines are within the ordinance, are reasonable, and should not be vacated or reduced.

\\
\\

VI. PROPOSED ORDER

1. Metro's action in assessing a \$44,369.46 civil penalty against Appellant KDI for the violations described in NOV-193-08, imposed by Metro in NOV-193A-09, is appropriate and is upheld.
2. Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI for the violations described in NOV-193A-09 is appropriate and is upheld.
3. Appellant KDI did not meet its burden of proof with respect to its assertion that economic and financial hardship alleged by KDI as a basis for reducing the civil penalties assessed by Metro warrants such relief

Respectfully Submitted:


Carl D. Cox, Esq.
Hearings Officer

DATED: 01/27/10


CERTIFICATE OF SERVICE

I, Carl D. Cox, certify that on this day I submitted the original PROPOSED FINAL ORDER, together with the record compiled in the hearing, to the Metro Council, Attn: Michelle Bellia at 600 Northeast Grand Avenue, Portland, Oregon 97232-2736, and sent an original copy of the foregoing PROPOSED FINAL ORDER by US Mail, first class postage pre-paid, in a properly addressed and sealed envelope, to the following person(s) at the address shown, and via electronic transmission to the following person(s) at the address shown:

Metro
Michelle Bellia, Esq.
600 Northeast Grand Avenue
Portland, Oregon 97232-2736
michelle.bellia@oregonmetro.gov

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 626
Hubbard, OR 97032

Dated: 01/27/10



Carl D. Cox, Esq.



Kemper Drywall Inc.
4084 Pacific Hwy 99E
PO BOX 626
Hubbard, OR 97032

Ph. 503.692.2838
Fax. 1-800-414-4553
CCB# 110440
UBI# 601948242
WA# KEMPEDI016JR
www.kemperdrywall.com

Metro
600 NE Grand Avenue
Portland, OR 97232

RE: Kemper Drywall Inc.

Attention: Chief Operating Officer

As per Metro Code we are submitting a written exception.

Kemper Drywall Inc. (KDI) was not sure of what evidence was needed to prove our financial hardship. We offered two documents at the hearing. We thought that the documents, with our testimony would be enough evidence to meet the requirements. Based upon the proposed final order, we did not provide enough information regarding our evidence to prove our financial hardship.

We are offering the following evidence:

P&L 2009: See attachment: In 2009, Kemper Drywall Inc. lost \$22,845.93.

Knez Building Materials: Trust Deed & Promissory Note in the amount of \$625,041.00. See attachment.

Debt Schedule: See attachment.

Knez Building Materials Statement dated 1/31/10.

Conclusion

In 2009, KDI lost \$22,845.93. KDI owes their material supplier, Knez Building Materials over \$600,000.00. KDI has steadily gotten behind with Knez over the course of 2009. If KDI was current with Knez in 2009, we would have lost over \$400,000 in 2009. In addition to the debt KDI owes Knez, KDI has multiple revolving credit/credit card accounts. See attached Debt Schedule.

KDI is struggling to service the debt that it has incurred. Currently in 2010, the market is very slow and prices are still depressed. The forecast for 2010 does not look good. At best, we will break even this year. More than likely we will have a small loss.

If KDI stays in business, it will take many years to repay the debt it owes. KDI is requesting a substantial reduction in the penalty assessed. KDI is struggling to service the current debt. If KDI is unable to service the current debt, we will be forced to close the business. If KDI closes its doors, Metro will not be able to collect any fees.

Sincerely,

Robert Harden

1
2/24/2010

Kemper Drywall Inc.
Profit & Loss
January through December 2009

	<u>Jan - Dec 09</u>
Ordinary Income/Expense	
Income	
Lien Fee's	26,203.53
Construction	3,129,789.01
Late Fee	50.00
NSF Checks	-31,798.84
Remodel	3,130,752.76
Repair	409,545.45
Bad Debt Recovery	5,160.00
Refunds and Adjustments	46,495.94
Total Income	<u>6,716,197.85</u>
Cost of Goods Sold	
Subcontractor Framing	-3,625.00
Cost of Goods Sold	0.00
Dump Fees	95,162.76
Equipment Rental	44,332.86
Job Labor	
Crew Wages	939,526.65
Payroll Tax Expense	155,609.72
Workman's Compensation	63,227.32
Job Labor - Other	0.00
Total Job Labor	<u>1,158,363.69</u>
Material Jobs	2,491,496.99
Nailing	648,664.73
Paint/ Primer	62.84
Scrap	1,328.00
Subcontractors Jobs	80,197.41
Taping	666,135.87
Total COGS	<u>5,182,120.15</u>
Gross Profit	1,534,077.70
Expense	
Angie's List Coupon	100.00
Fines/Fees	100.00
Reconveyance Services	-252.00
Recording Charges	-188.00
Escrow Charges	-350.00
Cleaning Service	3,394.98
Ask Accountant	195,640.17
Hubbard Property	
Trim	1,694.00
Architectural Services	360.00
Office Furniture Hubbard	437.80
Portable Toilets	153.00
Engineering	469.68
Constriction Testing	0.00
Pavement	1,250.00

Kemper Drywall Inc.
Profit & Loss
January through December 2009

	<u>Jan - Dec 09</u>
heating & Cooling	403.00
Electrical	8,512.50
Hubbard Property - Other	17,466.50
Total Hubbard Property	<u>30,746.48</u>
Internet Web Address	103.65
Lien Fee	310.00
Title Fee	-562.00
Safety Supplies	0.00
Intent to Lien	23,686.00
Membership Fee's	3,299.26
Software	1,300.00
Collection Company	0.00
Property Taxes	5,521.35
Corporation Filing Fee	10.00
Late Fee's	156.00
Parking Pass	848.06
Parking Violation	1,331.00
Loan Fees	-4,900.00
Advertising	11,454.52
Automobile Expense	27,368.59
Back Charge	14,149.99
Bank Service Charges	4,305.96
Computer Expense	2,535.44
discount	125,445.11
Fuel	133,219.94
Gift	1,720.62
Insurance	
Automobile	28,143.74
Health & Dental	4,243.26
Liability Insurance	152,835.35
Total Insurance	<u>185,222.35</u>
Licenses and Permits	15,405.15
Meetings	2,399.75
Office Supplies	11,466.29
Payroll Expenses	
Administrative Wages	120,310.49
Officer Salaries	59,973.88
Payroll Expenses - Other	458,293.50
Total Payroll Expenses	<u>638,577.87</u>
Pension Contributions	1,860.00
Postage and Delivery	4,867.65
Professional Fees	
Accounting	4,184.00
Legal Fees	24,755.22
Total Professional Fees	<u>28,939.22</u>
Recording for Liens	735.25

Kemper Drywall Inc.
Profit & Loss
January through December 2009

	<u>Jan - Dec 09</u>
Rent	5,350.00
Repairs and Maintenance	
Building Repairs	4,108.50
Equipment Repairs	4,182.50
Total Repairs and Maintenance	<u>8,291.00</u>
Small Tools	2,291.90
Telephone	
Internet	2,102.71
Cell Phone	30,104.49
Telephone - Other	10,182.84
Total Telephone	<u>42,390.04</u>
Travel	
Lodging	336.77
Meals	471.74
Total Travel	<u>808.51</u>
Uniforms	210.44
Utilities	
Gas and Electric	9,932.99
Water	1,298.70
Utilities - Other	92.00
Total Utilities	<u>11,323.69</u>
Total Expense	<u>1,540,634.23</u>
Net Ordinary Income	-6,556.53
Other Income/Expense	
Other Income	
Finance Charge	7,517.04
Total Other Income	<u>7,517.04</u>
Other Expense	
Donation	100.00
Interest Expense	23,706.44
Total Other Expense	<u>23,806.44</u>
Net Other Income	<u>-16,289.40</u>
Net Income	<u><u>-22,845.93</u></u>

Grantor

Robert Harden & Kemper Harden
4034 Pacific Hwy 99e
Hubbard, OR 97032

Beneficiary

Knez Building Materials Co.
12301 SE Hwy 212
Clackamas, OR 97015
After Recording Return to:
Mark O. Cottle
PO Box 1124
Sherwood, OR 97140

TRUST DEED

THIS TRUST DEED, made this 16TH day of FEBRUARY, 2010, between Robert Harden and Kemper Harden as Grantors, Mark O. Cottle as Trustee, and Knez Building Materials Co. as Beneficiary.

WITNESSETH:

Grantor irrevocably grants, bargains, sells, and conveys to trustee in trust, with power of sale, the property in Marion County, Oregon, described fully on Exhibit A and also known as:

Parcel Number R11696, R11695, R11697, in Marion County, State of Oregon,

together with all and singular the tenements, hereditaments and appurtenances and all other rights thereunto belonging or in anywise now or hereafter appertaining, and the rents, issues and profits thereof and all fixtures now or hereafter attached to or used in connection with the property.

The purpose of this Trust Deed is to secure performance of the promissory note in the amount of \$625,041.00 and due and payable on September 1, 2011 together with interest from January 28, 2010 at the rate of 12% per annum and for purposes of securing a promissory note dated the same as this deed of trust". A breach of the promissory note or the Kemper Agreement shall be deemed a breach of this Trust Deed.

The date of maturity of the debt secured by this instrument is the date on which the final installment of the Judgment becomes due and payable.

To protect the security of this trust deed, grantor agrees:

1. To protect, preserve and maintain the property in good condition and repair; not to remove or demolish any building or improvement thereon; not to commit or permit any waste of the property.
2. To complete or restore promptly and in good and habitable condition any building or improvement which may be constructed, damaged or destroyed thereon, and pay when due all costs incurred therefore.

NOTE: The Trust Deed Act provides that the trustee hereunder must be either an attorney, who is an active member of the Oregon State Bar, a bank, trust company or savings and loan association authorized to do business under the laws of Oregon or the United States, a title insurance company authorized to insure title to real property of this state, its subsidiaries, affiliates, agents or branches, the United States or any agency thereof, or an escrow agent licensed under ORS 696.505 to 696.585.

3. To provide and continuously maintain insurance on the buildings now or hereafter erected on the property against loss or damage by fire and such other hazards as the beneficiary may from time to time require, in an amount not less than full replacement value, with loss payable to the beneficiary. The amount collected under any fire or other insurance policy may be applied by beneficiary upon any indebtedness secured hereby and in such order as beneficiary may determine, or at option of beneficiary the entire amount so collected, or any part thereof, may be released to grantor. Such application or release shall not cure or waive any default or notice of default hereunder to invalidate any act done pursuant to such notice. The following disclaimer is made pursuant to ORS 746.201: WARNING: Unless Grantor provides Beneficiary with evidence of the insurance coverage as required by the Note or Trust Deed, Beneficiary may purchase insurance at Grantor=s expense to protect Beneficiary=s interest. This insurance may, but need not, also protect Grantor=s interest. If the collateral becomes damaged, the coverage Beneficiary purchases may not pay any claim Grantor make or any claim made against Grantor. Grantor may later cancel this coverage by providing evidence that Grantor has obtained property coverage elsewhere. Grantor is responsible for the costs of any insurance purchased by Beneficiary. The cost of this insurance may be added to Grantor=s loan balance. If the cost is added to Grantor=s loan balance, the interest rate on the underlying loan will apply to this added amount. The effective date of coverage may be the date Grantor=s prior coverage lapsed or the date Grantor failed to provide proof of coverage. The coverage Beneficiary purchases may be considerably more expensive than insurance Grantor can obtain on its own and may not satisfy any need for property damage coverage or any mandatory liability insurance requirement imposed by applicable law.

4. To keep the property free from construction liens and to pay all taxes, assessments and other charges that may be levied or assessed upon or against the property before any part of such taxes, assessments and other charges become past due or delinquent and promptly deliver receipts therefore to beneficiary; should the grantor fail to make payment of any taxes, assessments, insurance premiums, liens or other charges payable by grantor, either by direct payment or by providing beneficiary with funds with which to make such payment beneficiary may, at its option, make payment thereof, and the amount so paid, with interest at the rate set forth in the note secured hereby, together with the obligations described in paragraphs 5 and 6 of this trust deed, shall be added to and become a part of the debt secured by this trust deed, without waiver of any rights arising from breach of any of the covenants hereof and for such payments, with interest as aforesaid, the property hereinbefore described, as well as the grantor, shall be bound to the same extent that they are bound for the payment of the obligation herein described, and all such payments shall be immediately due and payable without notice, and the nonpayment thereof shall, at the option of the beneficiary, render all sums secured by this trust deed immediately due and payable and constitute a breach of this trust deed.

5. To pay all costs, fees and expenses of this trust including the cost of title search as well as the other costs and expenses of the trustee incurred in enforcing this obligation and trustee's and attorney's fees actually incurred.

6. To appear in and defend any action or proceeding purporting to affect the security rights or powers of beneficiary or trustee; and in any suit, action or proceeding in which the beneficiary or trustee may appear, including any suit for the foreclosure of this deed, to pay all costs and expenses, including evidence of title and the beneficiary's or trustee's attorney's fees; the amount of attorney's fees mentioned in this paragraph 6 in all cases shall be fixed by the trial court and in the event of an appeal from any judgment or decree of the trial court, grantor further agrees to pay such sum as the appellate court shall adjudge reasonable as the beneficiary's or trustee's attorney's fees on such appeal.

It is mutually agreed that:

7. At any time upon written request of beneficiary, payment of its fees and presentation of this deed and the note for endorsement (in case of full reconveyances, for cancellation), without affecting the liability of any person for the payment of the indebtedness, trustee may (a) consent to the making of any map or plat of the property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement

affecting this deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of the property. The grantee in any reconveyance may be described as the "person or persons legally entitled thereto," and the recitals therein shall be conclusive proof of the truthfulness thereof. Trustee's fees for any of the services mentioned in this paragraph shall be not less than \$50.

8. Grantor shall not be deemed in default for failure to perform any covenant or condition of this agreement until notice of said default has been given by beneficiary to grantor and grantor shall have failed to remedy said default within 10 days after the giving of the notice. Upon default by grantor in payment of any indebtedness secured hereby or in grantor's performance of any agreement hereunder, time being of the essence with respect to such payment and/or performance, the beneficiary may declare all sums secured hereby immediately due and payable. In such an event the beneficiary may elect to proceed to foreclose this trust deed in equity as a mortgage or direct the trustee to foreclose this trust deed by advertisement and sale, or may direct the trustee to pursue any other right or remedy, either at law or in equity, which the beneficiary may have. In the event the beneficiary elects to foreclose by advertisement and sale, the beneficiary or the trustee shall execute and cause to be recorded a written notice of default and election to sell the property to satisfy the obligation secured hereby whereupon the trustee shall fix the time and place of sale, give notice thereof as then required by law and proceed to foreclose this trust deed in the manner provided in ORS 86.735 to 86.795.

9. After the trustee has commenced foreclosure by advertisement and sale, and at any time prior to 5 days before the date the trustee conducts the sale, the grantor or any other person so privileged by ORS 86.753, may cure the default or defaults. If the default consists of a failure to pay, when due, sums secured by the trust deed, the default may be cured by paying the entire amount due at the time of the cure other than such portion as would not then be due had no default occurred. Any other default that is capable of being cured may be cured by tendering the performance required under the obligation or trust deed. In any case, in addition to curing the default or defaults, the person effecting the cure shall pay to the beneficiary all costs and expenses actually incurred in enforcing the obligation of the trust deed together with trustee's and attorney's fees not exceeding the amounts provided by law.

10. Otherwise, the sale shall be held on the date and at the time and place designated in the notice of sale or the time to which the sale may be postponed as provided by law. The trustee may sell the property either in one parcel or in separate parcels and shall sell the parcel or parcels at auction to the highest bidder for cash, payable at the time of sale. Trustee shall deliver to the purchaser its deed in form as required by law conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters of fact shall be conclusive proof of the truthfulness thereof. Any person, excluding the trustee, but including the grantor and beneficiary, may purchase at the sale.

11. When trustee sells pursuant to the powers provided herein, trustee shall apply the proceeds of sale to payment of (1) the expenses of sale, including the compensation of the trustee and a reasonable charge by trustee's attorney, (2) to the obligation secured by the trust deed, (3) to all persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear in the order of their priority and (4) the surplus, if any, to the grantor or to any successor in interest entitled to such surplus.

12. Beneficiary may from time to time appoint a successor or successors to any trustee named herein or to any successor trustee appointed hereunder. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all title, powers and duties conferred upon any trustee herein named or appointed. Each such appointment and substitution shall be made by written instrument executed by beneficiary, which, when recorded in the mortgage records of the county in which the property is situated, shall be conclusive proof of proper appointment.

13. Trustee accepts this trust when this deed is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other deed of trust or of any action or proceeding in which grantor, beneficiary or trustee shall be a party unless such action or proceeding is brought by trustee.

The grantor covenants and agrees to and with the beneficiary and the beneficiary's successor in interest that the grantor is lawfully seized in fee simple of the real property and has a valid, unencumbered title thereto and that the grantor will warrant and forever defend the same against all persons whomsoever.


The grantor warrants that the proceeds of the loan represented by the above described note and this trust deed are:

(a)*primarily for grantor's personal, family or household purposes


This deed applies to, inures to the benefit of and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, personal representatives, successors and assigns. The term beneficiary shall mean the holder and owner, including pledgee, of the contract secured hereby, whether or not named as a beneficiary herein.

IN WITNESS WHEREOF, the grantor has executed this instrument the day and year first above written.

***Important Notice:** If (a) is applicable and the beneficiary is a creditor as such word is defined in the Truth-in-Lending Act and Regulation Z, the beneficiary must comply with the Act and the regulation by making required disclosures. If compliance with the Act is not required, disregard this notice.



Robert Harden



Kemper Harden

STATE OF OREGON)

County of WASHINGTON ss.

Robert Harden and Kemper Harden did appear before me and signed their names and this instrument was acknowledged before me on this 16th day of FEBRUARY, ~~2009~~ 2010





NOTARY PUBLIC FOR OREGON

PAYMENT AGREEMENT

Kemper Drywall Inc, the debtor, owes to Knez Building Materials Co., the creditor, the sum of \$816,986.02. The parties do hereby enter into this payment agreement.

1. Kemper executed a promissory note and trust deed in the favor of Knez in the amount of \$300,000.00 which secured a portion of the money owed to Knez by Kemper.

2. Kemper on the "Woodhaven" crossing project, a project the Knez also filed a lien upon is to be paid approximately \$200,000.00.

3. Knez also filed a lien and commenced foreclosure upon said lien, there is due and owing \$84,199.55 in principal and \$8,055.17 in attorney fees. The parties hereto agree that all the money Kemper is paid on the Woodhaven project will be paid over to Knez. The money shall be apportioned as follows:


a. \$191,944.83 shall be applied against Kemper's debt to Knez. After the payment of said money, Kemper's debt will stand at \$625,041. (This does not include any purchases which occurred after January 24, 2010.)

b. The remaining \$8,055.17 is paid to Knez to cover attorney fees relating to its lien and its foreclosure proceedings related to the Woodhaven project and all agreements contemplated herein.

4. Knez agrees to dismiss with prejudice, its complaint relating to the Woodhaven project. Kemper agrees to sign a new promissory note that will be secured by the same property as is currently secured by the current trust deed, reflecting the total amount owed, \$625,041. The now existing promissory note shall be marked "null and void" once the new promissory note is signed. The now existing trust deed and the "Kemper Agreement" shall all be marked "null and void" and replace with new agreements.

Dated: Feb 16th, 2010.

Joann Knez for Knez Building Materials Co.


Name Robert Harder for Kemper Drywall Inc.

KEMPER AGREEMENT

PARTIES:

KNEZ BUILDING MATERIALS CO., ("Knez")

KEMPER DRYWALL INC.

ROBERT HARDEN

KEMPER HARDEN Collectively Kemper Drywall Inc., Robert Harden and
Kemper Harden shall be known as ("Kemper")

PREMISE:

WHEREAS: Knez Building Material Co., operates a building material wholesale and retail distribution outlets in which they deliver, for its customers, to building sites building material. Its customers sign credit applications from time to time obligating itself to pay for the supplies Knez delivers.

WHEREAS: Kemper has, from time to time, ordered had delivered to sites it was performing work upon building materials by Knez. Currently, it owes Knez over \$816,986.02 for building materials. The amount changes regularly.

NOW THEREFORE, FOR AND IN CONSIDERATION, the sufficiency of which has been negotiated and deemed sufficient, the parties agree as follows:

1. Knez will forego the right to sue, in Circuit Court in the State of Oregon, Kemper for all sums due provided that Kemper duly executes this Agreement, a trust deed and promissory note in Knez's favor.
2. The amount of the promissory note shall be for \$625,041.00 plus interest at 12% per annum and the real property which shall secure the promissory note are commonly known as 4084, 4024, and 4074 Pacific Highway, 99E, Hubbard, Oregon
3. Kemper shall keep all other sums due and owing Knez, as stated by Knez via its billing each month to Kemper, current. The term Current shall be defined as all sums due and owing shall be paid within sixty (60) days from the date they are delivered to a site as specified by Kemper or removed by Kemper or its employees, agents or authorized representatives from a Knez facility. Kemper keeping its obligations Current is a material part of this agreement and any violation by Kemper shall be deemed a material breach of this agreement and the identified companion agreements.
4. Nothing herein shall prevent Knez from filing liens and/or foreclosing said liens to protect its interest on any real property that it delivers its product for and in


behalf of Kemper.

5. Nothing herein shall prevent Kemper from pay all sums due and owing to Knez early.
6. Knez is not obligated to continue to supply Kemper or sell product to Kemper in the event Kemper fails to fulfill all terms and conditions of this Agreement. Additionally, Knez, using its reasonable business judgment believes Kemper lacks the ability to pay for any building materials shall not be obligated to continue to supply Kemper.
7. This agreement has companion agreements which are incorporated herein specifically a Deed of Trust and a Promissory Note from Kemper to Knez. Other than those agreements, all terms and conditions of the parties agreement are integrated into this Agreement, the Trust Deed and Promissory note and there are no other oral or written terms and conditions between the parties as to the money currently owed.
8. Any modification of this Agreement or its companion agreements must be made in writing signed by the parties.
9. If a party breaches this Agreement or its companion agreements the breaching party shall pay all reasonable attorney fees and costs associated with any legal action, collection effort whether in equity or at law of the other party.


Dated: Feb 16th, 2010



Robert Harden



Kemper Harden



Kemper Drywall Inc., by Robert Harden
its Officer

Knez Drywall Co. By Joann Knez
Its Officer

PROMISSORY NOTE

\$625,041.00

Clackamas, Oregon
_____, 2010


FOR VALUE RECEIVED, the undersigned promises to pay, on or before the sooner of when the undersigned are paid on the Keys Sherwood "99W" project or September 1, 2011 in lawful money of the United States to the order of Knez Building Materials Co., the principal sum of Six Hundred twenty-five Thousand forty-one Dollars (\$625,041.00) together with interest in the amount of twelve percent per year.

If any payment due pursuant to this note is not made when due, then at the option of the holder of this note the entire indebtedness represented by this note becomes due and owing. Failure or delay of the holder to exercise this option shall not constitute a waiver of the right to exercise the option in the event of a subsequent default or a continuance of any existing default.


This note may be paid in full without penalty at any time. This Promissory Note is a companion agreement to a Trust Deed and the Kemper Agreement, a breach of this Promissory Note shall be deemed a breach of the Trust Deed and Kemper Agreement.

The undersigned shall pay upon demand any and all expenses, including reasonable attorney fees, incurred or paid by the holder of this note without suit or action in attempting to collect funds due under this note. In the event an action is instituted for the collection of this note, the prevailing party shall be entitled to recover, at trial or on appeal, such sums as the court may adjudge reasonable as attorney fees, in addition to costs and necessary disbursements.

The undersigned and its successors and assigns hereby waives presentment for payment, notice of dishonor, protest, notice of protest, and diligence in collection, and consent that the time of payment on any part of this note may be extended by the holder without otherwise modifying, altering, releasing, affecting, or limiting their liability.



Robert Harden

Kemper Harden

Kemper Drywall Inc.
By: Robert Harden

Knez

Building Materials Co., Inc.

12301 SE HWY. 212
CLACKAMAS, OR 97015
(503) 655-5690

STATEMENT DATE: 01/31/2010
TERMS: NET 10TH

KEMPER DRYWALL
PO BOX 626
HUBBARD, OR 97032

CUSTOMER #: 01-KEM

Date	Reference	Description	Charge	Credit	Balance
01/29/2010	062705T-IN		1,111.92		1,111.92
01/29/2010	062706T-IN		993.84		993.84
01/29/2010	062707T-IN		36.80		36.80
01/29/2010	062708T-IN		69.12		69.12
01/29/2010	062714T-IN		1,111.92		484.50

Total: 623,293.82

Current	December	November	October	120 Days	Balance Due
107,146.66	135,094.46	101,052.80	0.00	279,999.90	623,293.82

**** REMIT TO: KNEZ BUILDING MATERIALS CO. *****

***** 12301 SE HWY 212 - CLACKAMAS, OR 97015 *****

YOUR ACCOUNT WITH US IS SERIOUSLY PAST DUE.

REMIT TODAY SO THAT WE MAY CONTINUE TO SERVE YOU.

Debt Schedule

Debtor	Amount Due
Ames	\$2,477.00
Amex	\$16,630.00
AmFam	\$10,500.00
Aramark	\$45.00
Employee's	\$57,920.00
Far West	\$1,496.00
HardenHines Ins.	\$516.12
Home Depot	\$4,666.80
Integra- Phone/Internet	\$698.00
Knez	\$645,000.00
Les Schwab	\$488.22
Masco	\$7,062.00
Med. Ins.	\$3,234.02
Metro	\$8,320.87
Multi Fab	\$13,056.00
Northwest Spray	\$99.29
PGE	\$450.00
Prinical Financial	\$352.66
Steeler	\$6,086.00
Subcontractors	\$55,000.00
United Equipment	\$505.91
United Rentals	\$1,064.77
Vehicle Payments and Credit Cards	\$14,500.00
Wave Broadband	\$221.86
Workers Comp.	\$4,316.83
KDI Facility	\$4,342.00
Storage Unit	\$141.00
Bank of America 0% 0290 Rob	\$16,457.37
Capital One- 7.71% 4665 Kemper	\$20,003.62
Chase 13.24% 8177 Robert	\$13,575.91
Capital One-12.4% 1713 Robert	\$5,826.51
T&K- Line of Credit 5%	\$53,000.00
Bank of America 7.99% 9342 Kemper	\$9,505.46
Chase 9.24% 7714 Kemper	\$13,411.35
Coldwater 9.24% 5341 Terry	\$10,433.50
Rob Line of Credit 4.75%	\$106,473.90
Chase 13.24% 4604 Kemper	\$32,093.40
Bank of America 10.99% 4907 Kemper	\$33,521.00
CitiCards 0% for 6 mo. Terry	\$6,770.64
Amazon 12.24% 5573 Rob	\$2,238.57
Chase 13.24% 2284 Rob	\$2,814.52
Chase 9.24% 1620 Rob	\$7,087.83
Chase 8.99% 7022 Rob	\$26,827.02
CitiCards 0% for 6 mo. Terry	\$23,989.17
Sears 17.99% 6075 Terry	\$15,373.40
Washington Mutual 2.5%	\$107,987.13
Key Bank 5.75%	\$17,760.28
Amex- 13.24% 81001 Terry	\$14,091.90
HSBC 19.24% 2589 Robert	\$4,367.08
Chase- 7.24% 1655 Kemper	\$8,395.65
Sears- 23.24% 9690 Robert	\$12,250.56
Amex-27.24% 81006 Robert	\$2,396.69
Citicards- 1761 Robert	\$4,328.52
Discover- Terry	\$13,000.00
Total:	\$1,443,171.33



BEFORE THE METRO REGIONAL GOVERNMENT

In The Matter of Notice of Violations and
Imposition of Civil Penalty NOV-193A-09

Issued to

FINAL ORDER

KEMPER DRYWALL, INC.,

Respondent

Appellant Kemper Drywall, Inc., (“Appellant” or “KDI”) requested a hearing to contest a notice of violation issued to KDI by Respondent Metropolitan Service District (“Respondent” or “Metro”). A Hearings Officer held the requested contested case hearing on January 6, 2010 at approximately 10:00 am at Metro’s offices located at 600 NE Grand Ave., Portland, Oregon. Kemper Harden and Robert Harden, principal officers of KDI, appeared on behalf of Appellant. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, appeared on behalf of Respondent. The hearings officer did not receive any written or oral ex parte communication on a fact in issue during the pendency of the proceedings, and made a statement to that effect on the record, together with a description of the hearing procedure. All witnesses providing testimony provided an oath or affirmation concerning the truthfulness of their testimony. Metro made an audio recording of the hearing. Metro maintains the record of the proceedings.

EVIDENTIARY MATTERS

Appellant provided witness testimony and oral argument by Kemper Harden and Robert Harden in support of KDI’s request to vacate or reduce the civil penalties issued by Metro.

1 Respondent provided witness testimony and oral argument by Mr. Kraten, and Exhibits A-D, in
2 support of its request to uphold the fines assessed by Metro. Appellant brought two documents
3 (Exhibit 1) to the hearing in support of KDI's assertion that financial hardship warrants vacating
4 or reducing the civil penalties issued by Metro. The hearings officer ordered the record kept
5 open until January 19, 2010 in order to permit Metro to review and respond to the documents
6 Appellant brought to the hearing. Metro provided a timely written response, objecting to
7 consideration of the second of the two documents comprising Exhibit 1, as unsubstantiated by
8 any primary sources. Metro also asserted that neither document provided contextual value in
9 understanding KDI's full financial picture. The hearings officer reviewed Appellant's Exhibit 1
10 in light of Metro's objection, determined that the offered Exhibit 1 is material to Appellant's
11 assertion of financial hardship, and declined to exclude the offered evidence. There were no
12 other objections, and the hearing officer received and considered the offered evidence.¹
13

14 ISSUES PRESENTED

- 15 1. Whether Metro's action in assessing a \$44,369.46 civil penalty against Appellant
16 KDI for the violations described in NOV-193-08 (assessed in NOV-193A-09) is
17 appropriate.
18
- 19 2. Whether Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI
20 for the violations described in NOV-193A-09 is appropriate.
21
- 22 3. Whether financial hardship alleged by KDI as a basis for reducing the civil penalties
23 assessed by Metro warrants such relief.
24

25
26 ¹ Metro Code Section 2.05.030(b) provides that: "Irrelevant, immaterial or unduly repetitious evidence shall be excluded." Metro Code Section 2.05.030(c) provides that: "All offered evidence, not objected to, will be received by the hearings officer subject to his/her power to exclude irrelevant, immaterial or unduly repetitious matter."

STIPULATIONS AND FINDINGS OF FACT

1. Appellant KDI is a construction company that disposes of a significant amount of scrap drywall as part of its business operations. KDI does not have a license to dispose of waste generated within the Metro region to a non-system facility.
2. On March 7, 2008, Metro issued NOV-193-08 to KDI asserting violations of Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro regional boundary and delivered to the North Marion County Disposal Facility ("NMCDF"). Metro determined that this was a first time offense for KDI, and Metro's investigation found that KDI was unaware of Metro's regulations concerning solid waste flow control. Metro also determined that KDI did not commit fraud, or make any false representations regarding the origin of the waste. Metro further determined that KDI did not receive a financial benefit from the violation because it actually paid more for disposal of its waste on the non-system facility than KDI would have paid at many Metro system facilities. Metro suspended its enforcement action with respect to the violations, stating:

"Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations." [Metro Exhibit D]
3. Mr. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, testified that in the spring of 2009 Metro found that KDI again violated the Metro code by delivering waste

1 generated within the Metro region to the NMCDF waste facility. Mr. Kraten testified that
2 Metro used GPS records of the activities of KDI trucks to determine that, from April 15,
3 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons)
4 generated and collected from within the Metro region, to NMCDF for disposal, without a
5 license from Metro, and without paying the required Metro Regional System Fees and
6 Excise Taxes. Mr. Kraten asserted that KDI likely transported more loads of its waste
7 drywall scrap to NMCDF for disposal before April 15, 2009, but there were no GPS
8 records available to track the earlier loads. [Testimony Mr. Kraten]
9

- 10 4. Mr. Kraten testified that, after the March 2008 NOV, KDI asserted to Metro that it would
11 no longer use the NMCDF waste facility. Mr. Kraten noted, however, that Metro's
12 investigation found that KDI in fact continued to utilize to NMCDF facility. Mr. Kraten
13 further noted that, although KDI's principal operators (Kemper Harden and Robert Harden)
14 utilized GPS to track their trucks and should have been aware of the numerous trips their
15 trucks made to the NMCDF waste facility. Mr. Kraten also noted that KDI's principal
16 operators should have noticed the charges to KDI's account at NMCDF. Further, Mr.
17 Kraten noted that although the drivers interviewed denied knowing about the Metro
18 boundary or its regulations, they gave inaccurate information to the NMCDF waste facility
19 concerning the origin of the drywall scrap. Metro's investigation revealed that KDI paid
20 NMCDF \$75.45 per ton as compared with the Metro rate of \$75.75 per ton with a
21 transaction fee of \$8.50 per load, or approximately \$78.75 per ton. Metro's investigation
22 also revealed that the NMCDF waste facility is located close to KDI's yard and likely more
23 convenient for KDI's drivers. KDI provided Metro a July 21, 2009 letter stating that KDI's
24 manager and drivers thought that the Sherwood construction site was located outside Metro
25
26

1 and therefore the solid waste could be delivered to any disposal facility. Mr. Kraten
2 testified that KDI fully cooperated in Metro's investigation, and finally closed its account
3 with NMCDF after Metro's second investigation. [Testimony Mr. Kraten; Metro Exhibit
4 B]

- 5 5. On September 30, 2009, Metro issued NOV-193A-09 to KDI, again asserting violations of
6 Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided
7 payment of \$989.19 in Metro Regional System Fees and \$553.18 in Metro Excise Taxes on
8 61.67 tons of waste generated within the Metro regional boundary and delivered to
9 NMCDF. Metro's investigation found that KDI drivers frequently gave inaccurate
10 information when asked the origin of their loads at NMCDF, often stating Hubbard (the
11 location of KDI's offices) as the origin, and stated Sherwood as the location of only one
12 load, although Metro determined that much of the drywall waste was generated at a KDI
13 construction site in Sherwood. [Metro Exhibit B]
- 14 6. Metro assessed a total civil penalty of \$47,547.41 for the two incidents, combined in NOV-
15 193A-09. Metro imposed a civil penalty of \$44,369.46 for the 2007 violation, seeking
16 recovery of \$32,337.27 in unpaid Metro Regional System Fees and Excise Taxes, a \$1,000
17 Non-System License fee (required to transport more than 500 tons to a non-system
18 facility). In addition, the civil penalty included a compliance component totaling
19 \$11,032.19, calculating the penalty portion as follows: \$1.00 per unit (ton), plus an
20 additional penalty of \$1.00 per unit (ton) calculated at \$1.00 per incident (one incident),
21 plus a 25% penalty on unpaid Regional System Fees (\$3.43 per ton for 1,469 tons) and a
22 25% penalty on unpaid Excise Taxes (\$2.08 per ton for 1,469 tons). [Metro Exhibits B
23 and C; Penalty Worksheet NOV-193A-08]
- 24
25
26

1 7. Metro imposed a civil penalty of \$3,177.95 for the 2009 violation, seeking recovery of
2 \$1,542.37 in unpaid Metro Regional System Fees and Excise Taxes, a \$500 administrative
3 cost, a \$500 Non-System License fee (required to transport less than 500 tons to a non-
4 system facility), and \$65.13 in unpaid interest from April 2009 through September 23,
5 2009. In addition, the civil penalty included a compliance component totaling \$570.45,
6 calculating the penalty portion as follows: \$1.00 per unit (ton), plus an additional penalty
7 of \$2.00 per unit (ton) calculated at \$1.00 per incident (two incidents), plus a 25% penalty
8 on unpaid Regional System Fees (\$4.01 per ton for 61.67 tons) and a 25% penalty on
9 unpaid Excise Taxes (\$2.24 per ton for 61.67 tons). [Metro Exhibits B and C; Penalty
10 Worksheet NOV-193A-09]

12 8. Mr. Kemper Harden, and Mr. Robert Harden, principal operators of KDI, testified that they
13 do not disagree with the assertions of violations by Metro, or Mr. Kraten's testimony
14 concerning the violations. Rather, they agree that KDI did not maintain adequate
15 supervision of its scrappers, reporting that problems started in January 2009 after they
16 moved their offices from Tigard to their current Hubbard location. Messrs. Harden
17 testified that the current economic downturn has negatively affected KDI. Messrs. Harden
18 testified that two years ago their business was debt-free, and now they are not sure if their
19 business will make it. Messrs. Harden request consideration of their current financial
20 circumstances, requesting an order vacating or reducing the civil penalties issued by Metro.
21 [Testimony Kemper Harden; Testimony Robert Harden]

22
23
24 9. Messrs. Harden introduced two items at the conclusion of the hearing in support of their
25 request to vacate or reduce the civil penalties issued by Metro in this matter. These items
26 include a November 14, 2009 letter from a bank giving KDI a final demand notice of

1 acceleration on a note with principal of \$107,230.64, plus fees, interest, and attorney fees,
2 and an undated debt schedule for \$1,443,171.33 of various debts owed by KDI, and
3 Messrs. Harden. [Exhibit 1]

- 4 10. Mr. Kraten provided a January 12, 2010 response to consideration of Exhibit 1. Mr. Kraten
5 pointed out that the debt schedule submitted by Appellant is unsubstantiated by any
6 primary sources. Mr. Kraten also pointed out that neither document submitted by
7 Appellant provides contextual value in understanding KDI's financial picture. Mr. Kraten
8 further asserted that consideration of vacating or reducing any of the civil penalties
9 assessed by Metro should focus only on the compliance component of the penalty, and not
10 upon the portion of the civil penalties seeking recovery of unpaid regional system fees and
11 unpaid excise taxes.
12

13 CONCLUSIONS OF LAW

14 The evidence presented is reliable, probative, and substantial evidence upon which to
15 base a determination in this matter. The burden of presenting evidence to support a fact or
16 position rests on the proponent of the fact or position. Respondent Metro must prove the validity
17 of the civil penalties imposed on Appellant by a preponderance of the substantial evidence in the
18 whole record.² Appellant KDI bears the burden of proof and the burden of coming forward with
19 evidence regarding economic and financial hardship, or any other factor urged in mitigation, as a
20 basis for vacating or reducing the civil penalties issued by Respondent Metro in this matter.
21

22 A. Metro Code Violations

23 Metro Code Section 5.02.045(b) provides that: ""Any waste hauler or other person
24 transporting waste generated, originating, or collected form inside the Metro region shall pay
25

26 _____
² Metro Code Section 2.05.030.

1 Regional System Fees to Metro for the disposal of such solid waste.” Metro Code Section
2 5.05.025(b) provides that: “Except as otherwise provided in this chapter, it shall be unlawful for
3 any waste hauler or other person to transport solid waste generated within Metro to, or to utilize
4 or cause to be utilized for the disposal or other processing of any solid waste generated within
5 the District, any solid waste facility or disposal site without an appropriate license from Metro.”
6 Metro Code Section 7.01.020(a) provides that: “For the privilege of the use of the facilities,
7 equipment, systems, functions, services, or improvements owned, operated, certified, licensed,
8 franchised, or provided by Metro, each user except users of solid waste system facilities shall
9 pay a tax of 7.5% of the payment charged by the operator or Metro for such use unless a lower
10 rate has been established as provided in subsection 7.01.020(b). The tax constitutes a debt owed
11 by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the
12 operator to Metro.”
13

14 The facts in this matter with respect to the violations by KDI identified in NOV-193-08
15 and NOV-193A-09 are not actually in dispute. As stated in NOV-193-08, Appellant KDI
16 delivered 1,469 tons of solid waste generated within the Metro boundary to NMCDF, a non-
17 system facility, without a non-system license from Metro, and without paying \$32,324.99 in
18 Metro Regional System Fees and Excise Taxes. As stated in NOV-193-09, Appellant delivered
19 61.67 tons of solid waste generated within the Metro boundary to NMCDF, without a non-
20 system license from Metro, and without paying \$1,542.37 in Metro Regional System Fees and
21 Excise Taxes. I conclude based on the preponderance of the substantial evidence presented that
22 KDI violated Metro Code Section 5.02.045(b), Metro Code Section 5.05.025(b), and Section
23 7.01.020(a), as stated by Respondent Metro in NOV-193-08 and NOV-193A-09.
24
25
26

1 B. Economic and Financial Condition as Factor

2 Appellant KDI asserts that its current economic and financial condition warrants vacating
3 or reducing the civil penalties issued by Metro in this matter. Metro Code Section 2.03.050
4 provides for consideration of mitigating and aggravating factors in assessing a civil penalty.
5 Metro Code Section 2.03.050 (a) provides that: "In establishing the amount of a civil penalty to
6 be assessed, the Director of the Council shall consider the following factors:
7

- 8 (1) Whether the respondent has committed any prior violation, regardless of whether or
not any administrative, civil, or criminal proceeding was commenced therefore;
- 9 (2) The history of the respondent in taking all feasible steps or procedures necessary or
appropriate to correct any violation;
- 10 (3) The economic and financial conditions of the respondent."

11 Metro Code Section 2.03.050(b) provides for consideration of various mitigating factors
12 warranting a remitted or reduced civil penalty, stating: "In establishing whether a civil penalty
13 should be remitted or mitigated, the Director or the Council may consider the following factors:
14

- 15 (1) The gravity and magnitude of the violation;
- 16 (2) Whether the violation was repeated or continuous;
- 17 (3) Whether a cause of the violation was an unavoidable accident, or negligence, or an
intentional act of the respondent;
- 18 (4) The opportunity and degree of difficult to correct the violation;
- 19 (5) The Respondent's cooperativeness and efforts to correct the violation for which the
penalty is to be assessed;
- 20 (6) The cost to Metro of investigation and correction of the cited violation prior to the
time Metro receives respondent's answer to the written notice of assessment of civil
penalty; or
- 21 (7) Any other relevant factor."

22 Metro Code Section 2.03.050(c) provides further that: "Unless the issue is raised in
23 respondent's answer to the written notice of assessment of civil penalty, the Council may
24 presume that the economic and financial conditions of respondent would allow imposition of the
25 penalty assessed by the Director. At the hearing, the burden of proof and the burden of coming
26

1 forward with evidence regarding the respondent's economic and financial condition or regarding
2 any factor urged in mitigation shall be upon the respondent."

3 Appellant KDI provided testimony by Messrs. Harden their business has suffered
4 financially due to the current economic downturn, and that they now have substantial debt and
5 are not sure whether their business will make it, whereas two years ago they were debt-free.
6 Messrs. Harden provided copies of two documents at the hearing in support of their assertion that
7 the financial condition of KDI warrants reducing the civil penalties assessed by Metro.
8 Respondent Metro points out that the November 14, 2009 demand letter for \$107,230.64 and the
9 debt schedule for \$1,443,171.33, do not provide evidence concerning KDI's actual financial
10 picture or ability to pay the civil penalties assessed here. I found the testimony by Messrs.
11 Harden credible regarding their concern for the future of their business, and concluded from their
12 demeanor that Messrs. Harden consider the civil penalties assessed by Metro in this matter a
13 significant burden. Upon careful review of the record in this matter, I conclude that Appellant
14 KDI failed to provide any substantial evidence of financial hardship warranting waiving or
15 reducing civil penalties in this matter. A civil penalty is, by its nature, a financial burden upon
16 the party who has to pay it. I find that the letters provided by Appellant KDI only provide a
17 report of other financial burdens KDI and Messrs. Harden face, without providing evidence of
18 specific undue economic or financial hardship. Therefore, I conclude that Appellant KDI failed
19 to meet its burden of persuasion on this issue.
20
21
22

23 Further, I note in reviewing the civil penalties assessed by Metro in NOV-193-08 and
24 NOV-193A-09 that the substantial majority is actually related to the unpaid Metro Regional
25 System Fees and Excise Taxes (\$32,324.99 and \$1,542.37, respectively). I also note that \$1,500
26 of the civil penalties were related to the fees for non-system licenses KDI should have paid for

1 the privilege of using non-system facilities, \$500 was an administrative fee for the cost imposed
2 on Metro, and \$65.13 was for interest. The actual civil penalties from the compliance
3 component assessed by Metro in NOV-193-08 and NOV-193A-09 were \$11,032.19 and
4 \$570.45, respectively.

5 Here, Metro considered direct costs and revenue loss imposed on Metro ratepayers by the
6 violations, with the majority of the civil penalties directly related to obtaining reimbursement to
7 Metro for unpaid fees and taxes. I also find consideration of the administrative cost imposed on
8 Metro by the violation a relevant factor, and find the estimated cost of \$500 reasonable. Metro's
9 also provided a compliance component to the civil penalties, assessing a base penalty of \$1 per
10 ton of solid waste delivered in violation of the regulations, together with an additional \$1 per ton
11 for the tons involved in the second incident. I find consideration of prior violations a relevant
12 factor to consider in assessing an appropriate fine. I note that while the civil penalty assessed by
13 Metro's did not reduce the civil penalty for mitigating factors present in this matter (cooperation
14 by Messrs. Harden in Metro's investigations), Metro also did not increase the civil penalties it
15 assessed based upon the several aggravating factors present in this matter (inaccurate information
16 provided to NMCDF by KDI drivers, prior statement by KDI that it would cease using the
17 NMCDF facility, and the relative ease for KDI to track its drivers through its GPS system and
18 account charges to prevent the violations). The civil penalty structure is reasonably designed to
19 recover the costs of the violation and achieve compliance, and is within the range of fines
20 permitted under the ordinance. Therefore, the hearings officer concludes that the assessed fines
21 are within the ordinance, are reasonable, and should not be vacated or reduced.

22 ///

23 ///

1 FINAL ORDER

- 2 1. Metro's action in assessing a \$44,369.46 civil penalty against Appellant KDI for the
3 violations described in NOV-193-08, imposed by Metro in NOV-193A-09, is
4 appropriate and is upheld.
- 5 2. Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI for the
6 violations described in NOV-193A-09 is appropriate and is upheld.
- 7 3. Appellant KDI did not meet its burden of proof with respect to its assertion that
8 economic and financial hardship alleged by KDI as a basis for reducing the civil
9 penalties assessed by Metro warrants such relief.
- 10 4. Pursuant to ORS 34.010 to 34.102, appeal of the Final Order may be initiated by
11 filing a petition for writ of review with the Circuit Court of the State of Oregon for
12 Multnomah County within 60 days of the date of this Final Order.
13
14

15 METRO REGIONAL GOVERNMENT

16
17 Dated: March 18, 2010

18 Michael Jordan
19 Chief Operating Officer
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESOLUTION NO. 10-4135 with Exhibits A, B, C, D and E to the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 626
Hubbard, OR 97032

Carl D. Cox
Attorney at Law
14845 SW Murray Scholls Drive, #110
Beaverton, OR 97007

Hearings Officer
E-Mail Address: cd.cox@verizon.net

Michelle A. Bellia, Senior Attorney
Metro
600 NE Grand Avenue
Portland, OR 97232-2736

Attorney for Respondent Metro
E-Mail Address:
michelle.bellia@oregonmetro.gov

by mailing via first class mail to those persons a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth, and deposited in the United States Post Office at Portland, Oregon, on March 8, 2010, with the postage prepaid.


Lisa M. Hefty
Legal Secretary

M:\attorney\confidential\09 Solid Waste\16 Code Enforcement\51kemperdrywall(KDI)\Resolutions No\COS Resolution 10-4135 .doc