STATE OF NORTH CAROLINA
COUNTY OF DUPLIN

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 06-CVS-563

ZERO INTERNATIONAL, INC. and ADVANTAGE LITES & LOUVERS, LLC, Plaintiffs, vs. THE FINISHING ADVANTAGE, INC., Defendant.	**ARBITRATION BRIEF OF DEFENDANT THE FINISHING ADVANTAGE, INC.**

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The parties in this case are plaintiffs Zero International, Inc. and Advantage Lites and Louvers, LLC (hereinafter "Plaintiffs") and The Finishing Advantage, Inc., a company that designs and sells powder coat paint systems. After extensive negotiations, the parties executed a contract for the sale and installation of a powder coat paint system (hereinafter "the system") in March, 2005. The agreement provided that The Finishing Advantage was to design, manufacture, and install a powder coat paint system for use in plaintiffs' Wallace facility. Plaintiffs, in turn, were responsible or preparing their plant to accommodate the system. Plaintiffs were to procure the necessary permits from local officials, establish appropriate gas and electrical feeds for the system, and prepare the gas vent piping. The system was installed at plaintiffs' Wallace plant in May, 2005.

Thereafter, a series of problems relating to the electrical feed and gas hookup led to delays in getting the system tested and operational. Once the system began running, subsequent problems with the electrical feed and gas hookup caused numerous shutdowns. User error and improper maintenance caused additional problems.

The Finishing Advantage sent personnel from Lavonia, Georgia, to plaintiffs' Wallace plant approximately eleven times to respond to various reports of problems with the system, and in each instance, left plaintiffs with a fully functioning system that worked without any problems. After each visit, plaintiffs would shortly thereafter call to report yet another self-created problem, to which The Finishing Advantage would respond by sending personnel again, at its own expense, to Wallace, a distance of over 300 miles. Each time, The Finishing Advantage would discover that once again, plaintiffs had either failed to clean an air filter, or were hanging parts incorrectly, or plaintiffs' electrical contractor had still not set up the electrical feed to the system correctly, or that the gas company had still not fixed plaintiffs' ongoing problems with gas fluctuation. Despite this, plaintiffs maintain that the problems it experienced were not their fault, nor that of their electricians or others working at the plant. The instant case was filed on July 11, 2006.

ARGUMENT

A. Plaintiffs Cannot Prevail on Any Breach of Warranty Theory Because Problems With the System are Due to Their Own Failure to Properly Operate and Maintain the System.

Plaintiffs' first four claims for relief allege breaches of various warranties. *See* Compl, paras. 16-36. It has been said that the modern law of warranty is "a curious hybrid , born of illicit intercourse of tort and contract, unique in the law." *Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494 (1979), *quoting* WM. PROSSER, HANDBOOK OF THE LAW OF TORTS, at 634 (4th ed. 1971). One aspect of tort law that carries over into North Carolina's warranty law is the notion that the buyer's misuse or mishandling of the goods after the sale is a defense for the seller.

The North Carolina Uniform Commercial Code provides that a seller may defend itself by showing that a buyer's losses resulted from some act that occurred after the sale. N.C.G.S. § 25-2-314, official comment 13.[1] *See also* HUTSON & MISKIMON, NORTH CAROLINA CONTRACT LAW, § 16-3 (2001 and 2008 update). Accordingly, in this case the misuse of goods by the buyer following the sale of the system is available as a defense to plaintiffs' warranty claims.

A1. Plaintiffs Cannot Recover on any Breach of Warranty Because Their Own Acts After the Sale Were the Proximate Cause of Plaintiffs' Losses.

A1a. The Electrical Feed to the System was Set up Improperly, Causing Delays and Loss of Use of the System.

Under the contract, it was plaintiffs' responsibility to ensure that an appropriate electrical feed was installed to accommodate the system. *See* Ex. 6, Revised Proposal, at pg. 3 ("Customer to bring gas, water, and electrical service to panels and gas trains for final connections."). Unfortunately, the electrician retained by plaintiffs failed to complete the required connections in a timely fashion.

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[1] The full text of U.C.C. official comment 13 is as follows: "In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that ***the loss resulted from some action or event following his own delivery of the goods can operate as a defense***. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury." (emphasis added).

Indeed, it is undisputed that as late as July, 2005, ***two months after The Finishing Advantage installed the system, plaintiffs' electrician had yet to complete the required electrical connections***. In an Email dated Saturday, July 23, 2005, Greg Neal from The Finishing Advantage wrote:

> When I spoke to [plaintiffs' employee] Edward [Jordan] earlier in the week, it was understood that the electrician would be there on Thursday to complete the electrical connections. We were on site Thursday afternoon to start up the system. As of Friday afternoon, the electrician has not made any efforts to connect the equipment, and without a transformer being set to change the existing voltage, we cannot hook up temporary lines to test the system.... I have the chemicals for the washer along with hooks and fixtures waiting [to] start and run the system, but absent the electrical I am at a stand still.

See Ex. 8, Email from G. Neal to E. Wexler, July 23, 2005. Plaintiffs replied to this communication by admitting the electrician's fault:

> Sorry for the delay, the electrician was more reliable at first.

See Ex. 9, Email from E. Wexler to G. Neal, July 23, 2005. These problems were again discussed in an Email exchange in September, 2005:

> Elias, this project certainly has taken longer than I ever imagined. The delays with the electrical, gas, venting, etc have caused numerous additional trips (at our added expense) to get to the point of running and testing the system as a whole.

Ex. 10, Email from G. Neal to E. Wexler, Sept. 7, 2005. Plaintiffs, in their correspondence with The Finishing Advantage, did not dispute this claim. These problems were again discussed four months later:

> After we completed the ***installation it took your electrician weeks and weeks to finally get power to the system***. We were given dates when it would be done, made trips there and still no electrical. Same with the venting. I even searched and found the proper piping to install because the venting guys were clueless (to be kind). Then it took weeks and weeks for the sprinkler guys to do their part.

Ex. 16. Email from E. Wexler to G. Neal, Jan. 11, 2006 (emphasis added, quoting earlier Email response from G. Neal). Again, plaintiffs did not dispute that the electrician was at fault for causing delays in getting the system operational. In fact, in his reply, Elias Wexler stated:

> ... ***this is not the point anymore***. The point is that I still cannot paint.

Id. (emphasis added). Later that month, on or about January 26, 2006, Scott Neal, who holds a master electrical license in the state of Georgia, traveled to Wallace to respond to yet another of plaintiffs' complaints about the system. Upon his arrival, there was no electrical power to the system at all. After several hours, power was restored. Once power was restored, the system was out of phase and had to be corrected. When Scott Neal reported this to Greg Neal, Greg Neal advised plaintiffs further regarding the electrical situation at plaintiffs' plant:

> I would suggest you find a new electrician before the one you have burns down the building. The high voltage electrical that is installed there would not pass NFPA code or OSHA regulations.

Ex. 19, Letter from G. Neal to E. Wexler, Jan. 26, 2006. At no time, in any exchange of correspondence, did plaintiffs or their representatives dispute these claims.

The failures of plaintiffs and their hired contractors caused significant delays in getting the system operational. When the electrician finally did get around to setting up the electrical feed, the work was done incorrectly. This improper electrical work, in turn, caused the system to operate incorrectly and led to numerous problems with the system over a long period of time.

A1b. Subsequent Problems With the System Were Caused By Plaintiffs' Faulty Electrical Feed

Later attempts to get the electrical feed at plaintiffs' plant set up correctly caused the system to rephase, leading to shutdowns of the system. By January, 2006, ten months after the system was ordered, plaintiffs, their employees, and their electrical contractors, continued failing in their attempts to establish a proper electrical feed at the plant to accommodate the system. See Ex. 16, Email from G. Neal to E. Wexler, Jan. 20, 2006 (item #1, explaining that "the power phasing to the system had been altered, causing the motors to run in reverse."); Ex. 17, Email from E. Wexler to G. Neal, Jan. 20, 2006 ("there are constant electrical problems"); Ex. 19, Email from G. Neal to E. Wexler, Jan. 26, 2006 (stating that when Scott Neal arrived at plaintiffs' plant that morning in response to a request for assistance, the power was off, and "being worked on again" when he arrived and that when restored,

"the power was again out of phase and had to be corrected" and "the reason the system failed this time was from a damaged printed circuit board in the flame safety control. I would speculate that the electricians you have working there have caused fluctuations with regard to the current, cycle and phasing of the systems electrical [sic] causing damage to the circuit board" and describing a trip to plaintiffs' plant two weeks prior: "when I attempted to start the system it was apparent that something was not right with the electrical. [Plaintiffs' employee] Edward [Jordan] said he had noticed the air from the exhaust fans were blowing down and not up, but failed to relay that bit of information. Making the correction to the electrical phasing was all the "repair work" that was needed to place the system back into operation.").

When rephasing of an electrical system occurs, equipment linked to that system will run in the opposite direction than the intended direction. If, for example, an exhaust fan is designed to rotate clockwise, it will run counterclockwise after rephasing occurs. It is this phenomenon that plaintiffs were complaining of, and to which Greg Neal was responding, throughout much of the course of their correspondence. Plaintiffs' employees seemed to not understand this – something that The Finishing Advantage would expect employees operating industrial equipment to know.

This should have been something that plaintiffs, as operators of an industrial plant in Wallace, as well as in many other locations, should easily have been able to diagnose and fix. It was not a problem with the system, but something that would have happened to anything at all hooked to an improperly installed electrical feed.

It was the plaintiffs' responsibility to obtain the proper permits for installing the system. *See* Ex. 5, Proposal, March 14, 2005 at FA 000011 ("No taxes or permits of any kind are included in this proposal."). Plaintiffs were also responsible for ensuring that the proper electrical connections were in place to accommodate the system. *Id.* ("5. All services connections and gas vent piping to be made by Customer. Customer to bring gas, water, and electrical service to panels and gas trains for final connections. Customer to provide electrical disconnects as needed."). See also id. at FA000012 ("9.

This proposal does not include any exhaust stacks, venting, and curbs. Roof penetrations are the responsibility of others" and Ex. 7 (in which G. Neal rejects plaintiff's suggestion to delete this provision.)

Plaintiffs' failure to provide the correct electrical feed is a breach of their contract with The Finishing Advantage. Most importantly, the improper electrical feed set the stage for the problems plaintiffs reported with the system, in particular, the delays in getting it operational, and for some of the "malfunctions" that they claim occurred. Because these problems were caused by plaintiffs, and not by breach of any warranty, they are not the fault of The Finishing Advantage.

A2. Subsequent Problems With the System Were Caused By Plaintiffs' Faulty Gas Hookup

In addition to providing an appropriate electrical feed, plaintiffs were also supposed to ensure that a proper gas hookup was in place for use with the system. *See* Ex. 6 ("Customer to bring gas, water, and electrical service to panels and gas trains for final connections."). This was not the responsibility of The Finishing Advantage. See *id.* ("No taxes or permits of any kind are included in this proposal.").

Problems with the gas hookup, causing gas fluctuations in the system, were being heavily reported in January, 2006. On January 11 of that year, following another trip to plaintiffs' plant, Greg Neal wrote:

> As I have stated on many occasions, you have a gas pressure fluctuation problem. Yes, I am aware that the gas company set 2 other tanks, but more volume did not solve your gas pressure problem. Propane is a liquid which has to atomize into a gas when it leaves the tank. In the connection between the tank and the system gas train, the line changes from 3/8" inch into the 1st regulator ½" inch copper line leaving the regulator, underground to a 1 ¼" inch black pipe up and along the wall to a second regulator at ¾" inch then increases to 2" inch entering the building. This 2" inch line is connected to your systems gas train, which has a regulator to reduce the "Pounds per Square Inch" pressure in the line to "Inches of Water Column" pressure. This regulator is set to where it needs to be to maintain an adequate flow of gas to maintain fire in the burner. An[y] drop causes the low gas pressure switch to drop out. When the lines

> coming from the tank cool down due to the vaporizing gas it causes a pressure fluctuation in the line. This is worsened when the temperature outside is colder. When the regulators have been adjusted to over come the pressure drop, as when Edward made the change at the tank, the remaining gas in the line when the system is off, not calling for gas, expands in the line between where the line comes into the building and the system, where it is warmer. This increase in pressure causes the high gas pressure switch to drop out.

To this, Elias Wexler replied simply:

> I will have the gas company reviewing your notes and we will either correct the condition or formulate a response.

Id. It was clear from this exchange, that The Finishing Advantage has a better understanding of plaintiffs' facility than plaintiffs do themselves. It is little wonder then, that plaintiffs had so much difficulty operating their system. In any event, of importance here is that Mr. Wexler does not dispute Mr. Neal's assertions; in particular, he does not state that these problems are the fault of The Finishing Advantage. Rather, Mr. Wexler simply states that the gas company will have a look at the problem.

Later in the correspondence, Greg Neal adds:

> As for your gas pressure fluctuation problem, either you can complain to the gas company until they do something about the 2 regulators, or put on a vaporizing unit at the tank or [plaintiffs' employee] Edward [Jordan] can continue adjusting the regulators as he operates.

Id. In February, 2006, problems with the gas hookup were still ongoing. As plaintiffs' employee Edward Jordan reported to Mr. Wexler:

> Gas company installed a bigger regulator to paint booth… I need to know if the natural gas regulator at the paint booth is operating like it should. ***We need to get this on going problem resolved…***

Ex. 21, Email from G. Neal to E. Wexler, Feb. 1, 2006 (quoting Email from E. Jordan to E. Wexler, Feb. 1, 2006) (emphasis added). Again, at no point did plaintiffs dispute that the responsibility for ensuring an appropriate gas hookup for the system was theirs. Plaintiffs worked with their local gas company to resolve the ongoing gas fluctuation problem. There is nothing in the correspondence to indicate that plaintiffs blame The Finishing Advantage for this problem.

A3. Subsequent Problems With the System Were Caused By Plaintiffs' Failure to Properly Use and Maintain the System

Plaintiffs well understood that they were responsible for ensuring that they learned how to use and maintain the system properly, and, as with any new system a business installs, that this would take some time. For example, after the system was running, Greg Neal wrote the following to Elias Wexler:

> The system is ready to run, but it will take time for [plaintiffs'] Wallace crew to operate the system at it's full potential. The system may still require changes and/or adjustment as different product is being processed. Trial and practice will be needed to learn the best ways to fixture and hang the parts, along with finding the best method of applying powder to the part uniformly.

Ex. 10, Email from G. Neal to E. Wexler, Sept. 7, 2005.

In another exchange, Elias Wexler made no attempt to rebut the following claim from The Finishing Advantage:

> And again I am here on site for "problems" with [the] system, only to find that your onsite management has failed to moniter [sic], maintain and service the equipment.

Ex. 16, Email from Elias Wexler to G. Neal, Jan. 11, 2006 (at FA 000068, *quoting* Email from G. Neal to E. Wexler, Jan. 11, 2006.). Indeed, Elias Wexler's reply to this included the following:

> ***we had no reason for maintaining and servicing the equipment*** because the system was yet to run. Ex. 16, Email from Elias Wexler to G. Neal, Jan. 11, 2006

Maintenance was a problem for plaintiffs throughout. Greg Webb's report sheds additional light on this problem:

> The plant does not appear to have anyone dedicated to maintenance duties or a program of preventive maintenance as far as the powder system is concerned.

Ex. 28, Report of Greg Webb, Sept. 9, 2006 (emphasis added).

The report continues:

> This [powder] booth will require a ***regular maintenance schedule*** to keep it functioning properly and this ***does not appear to be taking place***. … Zero needs to have a regular maintenance program for this paint line. Items such as the leaking pump, conveyer

> lubricator maintenance and powder escaping the powder booth ***need to be taken care of by plant personnel*** before major down time issues occur.

Id. (emphasis added).

The report clearly puts the onus on plaintiffs to maintain the equipment they purchased. It also shows very clearly that, more than a year after purchasing the system, plaintiffs still had not so much as put together a regular schedule for cleaning air filters – a process that is common sense - and requires no particular expertise - for anyone owning any type of device through which air flows and in which air filters are installed.

Remarkably, this report was written *eight months after* Greg Neal expressly informed plaintiffs that indeed, air filters do not stay clean forever. As they fulfill their "*filtering*" function, any debris taken from the air, thusly having been *filtered*, collects upon the *filter*, necessitating the occasional cleaning or replacing thereof. Or as Greg Neal put it:

> The collector for the booth has never had the primary filters cleaned, which had stopped all air flow. Just like a vacuum cleaner ***it has to be cleaned and maintained to work properly***.

Ex. 16, Email from Elias Wexler to G. Neal, Jan. 11, 2006 (at FA 000068, *quoting* Email from G. Neal to E. Wexler, Jan. 11, 2006.) (emphasis added). To which Elias Wexler replied:

> Has any one from your organization showed us what to do? Have we received any manuals or specification or any info that will tell us how and when to clean the main filters? ***We do not even know what the "main" filters are all about nor did we know that they existed***.

Id. (emphasis added). Aside from the fact that The Finishing Advantage sent personnel to plaintiffs' plant on numerous occasions to conduct training, this astonishing reply reveals the depths of plaintiffs' incompetence with respect to operating the system. How any company that purports to be in the business of industrial manufacturing could pretend that it does not know what filters are, or needs someone to tell them to clean them, is absurd. That plaintiffs could not even think to look at a filter when air flow became compromised is shocking. That they would blame The Finishing Advantage for this is even more so.

A4. Plaintiffs Are Barred From Recovery on any Warranty Theory Because They Continued to Use the System For Many Months After Discovering Alleged Defects

The North Carolina Uniform Commercial Code provides a second warranty remedy for a seller. A seller may defend itself by showing that a the buyer continued to use the goods after he discovers a defect. N.C.G.S. § 25-2-314, official comment 13. *See also* HUTSON & MISKIMON, NORTH CAROLINA CONTRACT LAW, § 16-3 (2001 and 2008 update). As Official Comment 8 to section 2-316 states, "[o]f course, if the buyer ***discovers the defect and uses the goods anyway***.... resulting injuries may be found to result from his own action rather than proximately from a breach of warranty." (emphasis added). As the evidence in this case does and will show, the buyers here used the system for quite some time after reporting these alleged defects, complaining about them, and even after filing this suit.

Most notably, even as late as September 2006, two months after this suit was filed, and more than a year after plaintiffs first complained to The Finishing Advantage, the system was still being used by plaintiffs. According to Greg Webb, an inspector sent to plaintiffs' plant to assess the system, nearly a year and a half after it was installed:

> On Friday, September 8, 2006, I examined the Zero International paint line installed by The Finishing Advantage... ***I found the paint line to be operational and that parts were being washed, dried, powder painted and cured***.

Ex. 28, Report of Greg Webb, Sept. 9, 2006.

Even if it were true that the system contained a defect of some kind, the fact is that plaintiffs continued to use it well after the discovery, and this use acts as a bar to recovery on a warranty.

A5. Section Conclusion.

The foregoing shows a pattern of incompetence and mismanagement on the part of plaintiffs. Moreover, these problems were discussed in correspondence between the parties for many months. At no point in that correspondence did plaintiffs dispute what The Finishing Advantage had said. That they might now appear and testify otherwise is hollow, to say the least. On numerous occasions, The

Finishing Advantage discussed with plaintiffs the electrician's role in delaying operation of the system. Had plaintiffs disagreed with The Finishing Advantage's assessment, they had ample opportunities during the course of that correspondence, to rebut these claims. But the plaintiffs did not rebut these claims at the time they were made. Their attempts to do so now should carry little weight.

As stated at the outset, North Carolina's warranty law is clear: if a purchaser, after the sale, performs actions that injure the goods sold; or which cause the goods to malfunction, it is the fault of the buyer, not the seller. Even if a warranty would otherwise have applied, the buyer's actions will bar the application of a warranty. In this case, there is ample evidence to show that plaintiffs' incompetence, and that of the electricians and gas technicians they brought in to help them, was the cause of plaintiffs' problems in this case.

B. There is No Implied Warranty of Fitness for Particular Purpose At Issue

Under N.C.G.S. § 25-2-315, for an implied warranty of fitness for a particular purpose to apply, the buyer must be actually relying on the seller in selecting the goods. *See* U.C.C. official comment 1 to this section. The seller must also be aware of the "particular purpose" to which the buyer intends to put the goods.

While it is true that The Finishing Advantage knew the plaintiffs were using the system to powder coat the parts it sells, such use is not a "particular purpose" within the meaning of N.C.G.S. § 25-2-315. Rather, the system is generally used for powder coating, and was so used in this instance. In fact, there is very little else such a system can be used for other than powder coating.

The example given in the official U.C.C. comment is that of purchasing shoes. Shoes are generally used for walking. However, a seller may not know that a particular pair is being selected for the purpose of climbing a mountain. Walking would be an ordinary use; climbing a mountain would be a particular use. In order for the implied warranty of fitness for a particular purpose to apply, the

seller would have to know that the buyer was intending not merely to walk in the shoes, but to climb a mountain in them. *See* official U.C.C. comment 2, N.C.G.S. § 25-2-315

In this case, there is no use comparable to mountain-climbing. The system was designed for powder coating, and that is what the plaintiffs used it for. Accordingly, there cannot be an implied warranty of fitness for particular purpose in this case.

C. Plaintiffs' Attempted Revocation Was Untimely and Therefore Ineffective

Under N.C.G.S. § 25-2-608, revocation of acceptance is possible only "within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." It is undisputed that the System was installed in May, 2005. See Compl. para. 8. Plaintiffs did not make any attempt to revoke acceptance of the System until filing their complaint, on July 11, 2006.

There is a mountain of evidence in this case that the problems Plaintiffs complain of in this case were known to Plaintiffs as early as July, 2005. While The Finishing Advantage maintains that these problems were caused by others, particularly plaintiffs and their contractors, the fact is that regardless of who caused the problems, plaintiffs waited more than a year to attempt revocation of acceptance, and that within the context of a Complaint which simultaneously alleges other theories, such as lack of acceptance of goods (paras. 37-41), and a demand for specific performance (paras. 59-63). To put it squarely, plaintiffs' putative revocation notice – the Complaint – is ambiguous because in it, plaintiffs alternately state that they did not accept the goods in the first place (paras. 37-41) and so there would be no "acceptance" for them to now revoke.

A separate issue is that a "buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects." N.C.G.S. § 25-2-608, Official Comment 6. There appears to be little to no evidence that can reliably show that the system, by July 11, 2006, more than a year after its installation, had deteriorated due to inherent defects, or due to other causes, such as

improper maintenance, misuse, or normal wear and tear. Accordingly, plaintiffs cannot claim to have effectively revoked their acceptance of the system.

D. Plaintiff is Not Entitled to Damages During the Periods in Which its Own Actions, or Those of Its Contractors, Caused Delays and Problems With the System.

The Plaintiffs' chart of expenses paid to other vendors (Ex. 34) purports to itemize incidental and consequential damages to which they claim entitlement. Remarkably, listed among those expenses are invoices from Security Plus Electrical – who The Finishing Advantage believes to be the very same electricians who, according to Elias Wexler, were not reliable (see Ex. 9) – and whose mistakes led to repeated setbacks as The Finishing Advantage was trying to set up the system for plaintiffs. Exhibit 34 contains twenty four entries from March 16, 2005 through July 19, 2005, showing more than $80,000.00 worth of expenses plaintiffs claim to have incurred, and no doubt seek to recover in this action. All this, even though the unrebutted correspondence in evidence (*See* Exs. 8, 9, 10, 16, and discussion at § A *supra*.) clearly shows that operation of the system was delayed due to the failures of the electricians and other third parties – none of whom are parties to this action – and that at no point in that correspondence does Elias Wexler or anyone else acting on behalf of plaintiffs rebut The Finishing Advantage's repeated assertions that, as late as July 23, 2005, it could not properly test the system until plaintiffs installed the appropriate electrical systems and other preparations they had agreed to set up. Incredibly, plaintiffs are now seeking damages from The Finishing Advantage for expenses related to the period of time prior to The Finishing Advantage even being able to test the system – a delay which was caused by both plaintiffs' electrician and plaintiffs' own inability to properly outfit their Wallace facility to accommodate the system.

Exhibit 34 then continues to list more expenses through the end of 2005. This even though there is undisputed evidence in the record that in January 2006, plaintiffs still had not resolved their ongoing gas and electrical problems at their Wallace plant. The gas and electrical feeds were supposed to have been in place at the time of installation of the system, yet nearly a year after the parties

contracted, the gas and electrical problems persisted. These problems were not caused by The Finishing Advantage, nor was resolving them their responsibility. These were conditions for which plaintiffs were responsible. This is made clear in the contract, and plaintiffs never stated otherwise during their correspondence with The Finishing Advantage.

Finally, Exhibit 34 lists additional expenses from December 2006 through August 2007, – nearly $7,000.00 - incurred in using who The Finishing Advantage believes to be the same electrical contractor, Security Plus Electrical, that had been at fault in causing the delays and rephasing problems as far back as the spring of 2005, and which have been discussed at length §A1a *supra* and elsewhere. This is, on information and belief, the same electrical contractor that Greg Neal warned plaintiffs about potentially "burn[ing] down the building" (Ex. 19, Letter from G. Neal to E. Wexler, Jan. 26, 2006). That plaintiffs continued to hire this same contractor, despite the problems it has caused, is nothing short of staggering. That plaintiffs seek to ask this tribunal to order The Finishing Advantage to pay for their incompetent electrician beggars belief.

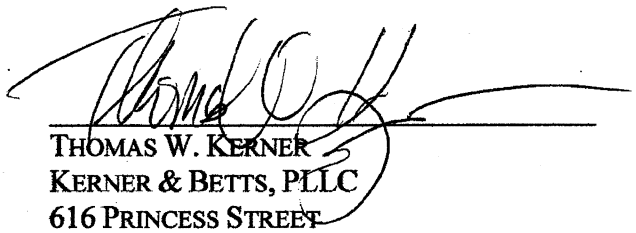
CONCLUSION

There is ample evidence to show that plaintiffs were largely, if not entirely, responsible for the problems with the system of which they now complain. In addition to the foregoing, the testimony in this case will show that plaintiffs (a) failed to provide the correct electrical feed at their plant to accommodate the system, (b) failed to provide the correct gas hookup for the system, (c) failed to properly clean, service, and maintain key parts of the system, and (d) did not properly operate the system, leading to system downtime, breakdowns, and lost use. Any other damages that might have flowed from these events were proximately caused by plaintiffs' failures. As the testimony will show, and the evidence herein cited also shows, the system, when not subject to electrical and gas fluctuations, ran just fine. When the air filters weren't caked with powder, the system ran fine. When personnel hung the parts correctly, the system didn't leak, and ran fine. In September 2006, Greg Webb reported that the system was running fine. And as Greg Neal states in his correspondence with

Elias Wexler, the system would always run after someone from the Finishing Advantage traveled to Wallace to explain basic concepts to plaintiffs' personnel, concepts The Finishing Advantage reasonably believed to be familiar to anyone purchasing a system of the kind it sells.

For the foregoing reasons, The Finishing Advantage respectfully requests that Plaintiffs' claims in this matter be DENIED in their entirety, and judgment entered in favor of The Finishing Advantage.

Respectfully submitted,



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