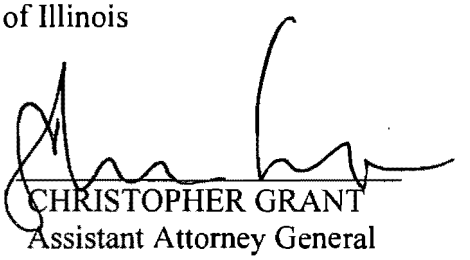
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on June 24, 2013, Complainant filed its Post-Hearing Brief (redacted and unredacted versions) by electronic filing. A copy of the documents so filed is attached hereto.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN
Attorney General of the
State of Illinois

BY: 

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COMPLAINANT'S POST-HEARING BRIEF WITH CONFIDENTIAL INFORMATION REDACTED

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and submits its Post-Hearing response brief.

I. INTRODUCTION

At the direction of the Illinois Pollution Control Board ("Board"), the parties returned to hearing on evidence related to four discrete questions listed by the Board in its March 1, 2012 ruling on Respondent Packaging Personified Inc.'s ("Packaging's") Motion for Reconsideration. These issues are as follows:

1. Did the press 5 tunnel dryer system constitute a "capture system and control device" under 35 Ill. Adm. Code 218.401(c)?

2. Would press 5 and the tunnel dryer system have accommodated the entire production of both press 4 and press 5 from March 15, 1995 to February 26, 2004? What costs, if any, did Packaging avoid or delay by not shifting press 4's production to press 5 until after press 4 ceased operating in December 2002?

3. Would a formal stack test of the press 5 tunnel dryer system have demonstrated compliance with the capture and control requirements of 35 Ill. Adm. Code 218.401(c)? What costs, if any, did Packaging avoid or delay by not building a TTE for press 5 and performing a formal stack test of the tunnel dryer system?

4. Interest due for nonpayment of the economic benefit component of the penalty. [1]

As directed by the Board, this second hearing was solely for the purpose of taking evidence on Packaging's alternative theory of the 'lowest cost alternative for achieving compliance' (the hypothetical "shutdown/shift" theory). Because Packaging is seeking to change the status quo through reconsideration of its novel theory, Complainant believes that Packaging has the burden of proof on this issue. Conversely, Complainant will request an additional civil penalty based on information obtained for this second hearing. Complainant has the burden of proof to justify the additional penalty.

Packaging's theory ignores the actual uncontrolled operation of Press No. 4 from March 15, 1995, through at least the end of November 2002, and also ignores the avoided costs of controlling emissions from this press during this ninety-three month period. Accordingly, Complainant believes that Packaging's alternative theory does not recover the economic benefits actually accrued by Packaging for its noncompliance, and therefore conflicts directly with the provisions of 415 ILCS 5/42 (2012). Complainant provides additional argument in this regard in Section IV.

However, even if Respondent's "shutdown/shift" theory was an acceptable compliance alternative, Packaging is unable to provide any reliable evidence to prove, by a preponderance of the evidence, that it 'could have' shown that the Press No. 5 recirculating tunnel dryer would have met the capture and control requirements of 35 Ill. Adm. Code 218.401, or could have 'hypothetically' run all of Packaging's solvent printing business from March 15, 1995, through February 2003 with only Press No. 5, without a negative financial impact. In fact, the only objective financial evidence regarding operation of this business with only one press, the gross

[1] March 1, 2012 Order, pp. 17-18

profit and total income reported to the Internal Revenue Service for the year 2003, reveals that 'single press operation' had a severe negative impact on Packaging's business results.

The Board has not limited the Parties to the $456,313.57 civil penalty assessed in its September 8, 2011 Final Order, and has requested that the Parties submit new penalty recommendations. Complainant will argue that its original economic benefit of noncompliance estimate of $711, 274.00 was a reliable estimate, and should be used as the basis for any civil penalty. Alternatively, if the Board chooses to retain the economic benefit number used in its September 8, 2011 civil penalty ($356,313.57), Complainant will argue that the deterrence and gravity-based component of any civil penalty should be significantly higher than assessed in the September 8, 2011, decision.

II. PACKAGING CANNOT DEMONSTRATE POSSIBLE COMPLIANCE WITH 218.401(c)

a. Packaging has Previously Misrepresented Press No. 5's Control Efficiency

Before evaluating Mr. Trzupek's claims, the Board should take notice of earlier misrepresentations of VOM control by Packaging. On June 28, 2002, Packaging submitted its initial Clean Air Act Permit Program ("CAAPP") permit application to Illinois EPA.[2] The application was certified as true by Dominick Imburgia, president of Packaging.[3] In its application Packaging claimed that Press No. 5 was 'in compliance', and controlled by an 'internal thermal oxidizer.' Packaging claimed that compliance was demonstrated by a "manufacturers guarantee."[4] Packaging also claimed that the Press No. 5 dryer was "air

[2] Complainant's Exhibit 9. The CAAPP application was submitted 6 years late, a violation found by the Board following the 2009 hearing. *Board Final Order*, 9/8/11, p.15.
[3] Complainant's Exhibit 9, at Bate Stamp No. IEPA0410
[4] Id., Bate Stamp No. IEPA0353. Uteco was the press manufacturer. See: Exhibit 16. Packaging, which is now selling the press, makes no claim of VOM control in the sales information, despite its claims in this case.

pollution control equipment" and stated that "the internal thermal oxidizer destroys 90% of VOM based on the manufacturer's guarantee."[5]

But there never was any "Manufacturer's Guarantee." Complainant sought production of such a 'guarantee' in discovery, but none was ever produced. At hearing, Packaging's General Manager (and shareholder) Joseph Imburgia admitted that no 'manufacturer's guarantee' ever existed.[6] He admitted that the Press No. 5 manufacturer never did represent that the recirculating dryer (which Packaging calls the "internal thermal oxidizer in its CAAPP application) controlled 90% of VOM.[7] The best Joseph Imburgia could come up with was that there was "no guarantee of destruction of VOMs or control of VOMs, just a guarantee that it would burn some VOM's to reduce reliance on natural gas."[8]

Mr. Trzupek, who testified after Joseph Imburgia, attempted to rehabilitate this admission by claiming that "manufacturer's guarantee" meant his 'informal stack test'. This claim is nothing more than obvious attempt to divert the Board's attention from what really happened: Packaging lied on its CAAPP application. Mr. Trzupek surely must have known that his quick and dirty 'informal stack test' would never be approved by Illinois EPA for purposes of issuing a CAAPP, and Packaging needed to claim some other basis for its conclusion that Press No. 5 complied with the VOM control requirements. A mythical "manufacturer's guarantee" was used as substitute.

b. <u>Packaging Repeatedly Failed to Perform a Compliant Stack Test</u>

Packaging's claim that it 'could have' demonstrated Press No. 5's compliance with 218.401(c), had it chosen to actually perform an accurate and compliant VOM stack test, is based

[5] Id. Bate Stamp No. IEPA0367
[6] Tr. 5/21/13, p. 72
[7] Tr. 5/21/13, p.74
[8] Tr. 5/21/13, p.76

entirely on one short evaluation by Mr. Richard Trzupek. Thus Packaging is asking the Board to decide this issue based on a noncompliant, incomplete, one-hour evaluation performed in December 2001. However, the record shows that Packaging knowingly passed up numerous opportunities to perform a valid and compliant test in accordance with 35 Ill. Adm. Code 218.401(c). The record indicates that Packaging could have performed a compliance test on Press No. 5 in 2001 for no more than $11,180, the cost used by Packaging's financial expert for his BEN opinion.[9] However, Packaging does not claim that it was unable to pay for such a test, and the financial results contained in *Complainant's Exhibit 17* show that Packaging could easily have afforded to perform a compliant stack test in 1995, when the regulations took effect; in 2001, after Illinois EPA's violation notice had been issued; in 2003, after the initial complaint in this case was filed; or, in 2004, when it performed a compliance test on the thermal oxidizer connected to Press No.5 and [newly installed] Press No. 6. In fact, a compliance test on Press No. 5 could have been performed in 2004 for a mere $6,000 since a permanent total enclosure had already been installed.[10]

But, despite the relatively small cost involved, Packaging has never performed a stack test in conformance with 218.401(c). It did not take this action before the 2009 hearing, when Press No. 5 was still operating. If they had performed testing and demonstrated compliance, it certainly would have helped Packaging's case at both hearings.

Press No. 5 is now for sale, and can be "seen in running condition."[11] Press No. 5 still has a "gas drying system with recirculation ovens." There was no testimony that Press No. 5

[9] Mr. McClure's opinion used a construction cost of $5,000 for installing *permanent* total enclosure, but Mr. Trzupek testified that the cost of a '*temporary* total enclosure' for performing a formal test ranged from $15,000 to $30,000. Because Mr. McClure acted as Packaging's expert witness for calculating the total economic benefit of noncompliance, Complainant will use McClure's $11,180 estimated cost of a compliant stack test.

[10] Tr. 5/21/13, p. 84

[11] Exhibit 16 is an ad from a used equipment dealer attempting to sell Press No. 5. The press is pictured in its location at Packaging's plant.

could not have been put back into its original [i.e. circa 1995] condition and then been stack tested before the May 21, 2013 hearing. Because Packaging now operates its solvent presses in what it claims as "permanent total enclosure." the cost of the test would have only been approximately $6,000.

Thus, the only reason that the Board is forced to even consider Mr. Trzupek's opinion about whether or not a 'formal stack test *would have* demonstrated compliance" is because Packaging has chosen to put the Board in that position, instead of spending between $6,000 and $11,180 to test Press No. 5. Instead of the reliable evidence of compliance or noncompliance that such a test would have provided, Packaging offers only an unreliable opinion based on a single, flawed emission test.

The "recirculating drying oven" was designed to serve as an ink dryer for Press No. 5. All of Packaging's solvent based presses have ink drying systems.[12] The purpose of these ink drying systems is to be able to operate a flexographic printing press at high speed without smearing the applied printing ink.[13] Press No. 6, which was acquired to replace Press No. 4, not only has an ink dryer but a recirculating system similar to Press No. 5. Similar to Press No. 5, the Press 6 recirculating ink dryer system was never represented as a control device by the seller. The manufacturer only advised Packaging that the recirculating oven on Press No. 6 was an efficient method of recapturing heat.[14] As the record from both hearings show, Presses 5 and 6 were both connected to the RTO control device in early 2004 and operated under RTO control thereafter. The fact that Packaging expended a large sum to purchase the RTO, and has incurred related costs since 2004 should convince the Board that Press No. 5 always required add-on VOM control.

[12] Tr. 5/21/13, p. 77
[13] Tr. 5/21/13, p. 193
[14] Tr. 5/21/13, p.78

Complainant contends that Packaging's failure to perform an inexpensive and compliant stack test on Press No. 5 at any time indicates that Packaging *knew* the tunnel drying system was merely an ink dryer, not a VOM control device, and that performing a stack test on Press No. 5 would have destroyed any hope of prevailing on its shutdown/shift theory.

c. Mr. Trzupek's Evaluation Did Not Use a Reliable Methodology

The testimony and evidence from the two hearings in this matter show that Mr. Trzupek's 'informal stack test,' could not possibly have demonstrated VOM control efficiency in accordance with the Flexographic Rules. This is because the method used by Mr. Trzupek to test VOM control could not produce accurate, statistically valid results.

As Mr. Trzupek himself testified, his evaluation was not intended as a compliance test.[15] As he testified at the first hearing, Mr. Trzupek advised Packaging that he was just "evaluating our compliance options" and that "at some point a formal compliance test...would be necessary."[16] However, no formal compliance test on Press No. 5 was ever conducted, and no stack test at all was performed until after the thermal oxidizer was installed in 2004.[17] Thus, Packaging's entire case rests on a paid expert witness and the results of an engineering evaluation which was not intended to demonstrate compliance with 35 Ill. Adm. Code 218.401(c).

Mr. Trzupek's opinion is unreliable. Press No.5 was required to collect and control VOM by 60% each and every operating day, beginning March 15, 1995. Mr. Trzupek claimed that Press No. 5 was in compliance with 218.401(c) beginning March 15, 1995, despite having

[15] Tr. 5/21/13, p. 203-204
[16] Tr. 6/29/09, p. 26. Though the informal stack test has been called an 'engineering evaluation, Mr. Trzupek is not an engineer.
[17] Id., pp26-27

first visited the Packaging facility in November 2001.[18] His sole basis for this representation is what he was told by Packaging, the shareholders of which are financially interested in the outcome of this hearing.[19] He maintains his position knowing that a complete compliance test was necessary to demonstrate compliance and despite having so advised Packaging sometime in late 2001. He knows of no financial impediment to Packaging's completion of a formal stack test after December 2001.

Complainant's expert, Kevin Mattison, testified as to the unreliability of the 'informal stack test' performed by Mr. Trzupek. Mr. Mattison, who was not being paid an expert fee aside from his normal salary, has impeccable credentials. Mr. Mattison is an engineer, and has worked for Illinois EPA in a technical capacity for 20 years.[20] Mr. Mattison's responsibilities include reviewing proposed emission testing protocols, ensuring that testing is done in accordance with regulatory requirements, and ensuring that tests are performed using accurate methodologies. Mr. Mattison personally attends stack tests and personally evaluates the validity of test results.[21] He is routinely sought out by the United States Environmental Protection Agency for assistance on emission testing matters.[22]

After reviewing the report submitted by Packaging in 2003 regarding the 'informal test,'[23] other information submitted by Packaging regarding VOM and printing ink data,[24] and after reviewing Mr. Trzupek's testimony at both hearings, Mr. Mattison concluded that

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[18] Id, p. 7
[19] The shareholders of Packaging now. [INFORMATION REDACTED]

Tr. 5/21/13, p.134.
[20] Tr. 5/21/13, p. 288
[21] Id, p. 289
[22] Id., p.290
[23] Complainant's Exhibit 8
[24] Complainant's Exhibit 13

Trzupek's did not use an accurate methodology, and that results from the December 2001 'informal stack test' were unreliable and statistically invalid.[25]

Control of VOM released during flexographic printing involves the capture of the volatile materials, and the destruction of those volatile materials, ordinarily through thermal oxidation. At all times relevant to this case, Section 218.401 of the flexographic printing rules specified a minimum overall VOM control of 60%. Control efficiency is calculated by multiplying the VOM capture efficiency times the VOM destruction efficiency. Thus a control system that captures 50% of the VOM emitted but destroys 90% of the VOM captured has a 'control' efficiency of 45% (0.5 X 0.9 = 0.45). If a device has an operating high temperature combustion chamber, or other oxidizing device, and the device is not overloaded with solvent, it would be unsurprising that much of the volatile organic material fed into the oxidizing device would be destroyed (or at least converted to carbon monoxide or carbon dioxide). But if a device does not capture very much of the VOM emitted, it does not matter how efficient the destruction efficiency of the combustion chamber is. Such a device would be a very poor VOM control system.

Mr. Mattison's testimony shows that that Packaging's 'informal stack test' could not have accurately measured VOM capture efficiency. As the Board is aware from testimony in the first hearing, Packaging failed to take advantage of one reliable and accurate method for determining capture efficiency by failing to install a temporary total enclosure prior to the short 'informal stack test'.[26] Instead, the 'informal stack test' purported to measure capture efficiency by using a liquid to mass balance without an enclosure. However, this procedure was done improperly.

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[25] Tr. 5/21/13, p.292

[26] Pursuant to 35 Ill. Adm. Code 218.105(c), either a permanent or temporary total enclosure can be used to accurately demonstrate capture efficiency.

1. Failure to Perform Multiple Tests

First, Mr. Trzupek did not perform three separate one-hour tests. Although Packaging claims to have performed "one one-hour test," the test report shows this to be false. Instead Mr. Trzupek performed a single one-half hour test on the inlet to the Press No. 5 tunnel dryer, and a single half hour test on the outlet.[27] His report suggests that this was done sequentially, not simultaneously. Only one FIA monitor was referenced, and the report states, "[T]esting was conducted for 30 minutes at each location." So while the testing may have spanned one hour total, it did not constitute a 'one-hour test.' This failure is highly significant. Section 218.105 (f)(1) of the Board's emission testing regulations provides, in pertinent part:

> 1) .....the test shall consist of three separate runs, each lasting a minimum of 60 minutes, unless the Agency and the USEPA determine that process variables dictate shorter sampling times

Section 218.105(d) of the Board's emission testing requirements provides, in pertinent part:

> 1) The control device efficiency shall be determined by *simultaneously* measuring the inlet and outlet gas phase VOM concentrations and gas volumetric flow rates in accordance with the gas phase test methods specified in subsection (f) of this Section. (emphasis added)

The regulations require three separate full one hour tests, with the inlet and outlet monitored simultaneously for accurate results. Packaging did a single half hour press test on the inlet and the outlet, and did not even do these abbreviated tests simultaneously, as required. Thus, by doing 'one half of one test' instead of three full runs, Packaging performed only 16.5% of a single compliance run during its 'informal stack test.'

[27] Complainant's Exhibit 8, p.2.

As explained by Mr. Mattison, a single short test will not provide accurate and reliable results.[28] By performing only one noncompliant test run, Mr. Trzupek effectively prevented Illinois EPA from performing a statistical analysis of this test to determine accuracy. Packaging therefore has also prevented the Board from being able to review statistically valid data. Packaging's casual and irresponsible attitude regarding standard test protocols means the Board must now consider a novel, nonstandard engineering evaluation, which did not comply with the minimum requirements, which never intended to act as a compliance test, and which contains no backup data.

There is, in fact, a very good basis for the three-test requirement. In a dynamic system such as an operating printing press, a single 'snapshot' will not suffice for accurately demonstrating VOM capture. As noted by Mr. Mattison, without performing additional test runs, there is no way to conclude that the first test was accurate.[29] Certainly, a single noncompliant test result could be nothing more than an artifact or anomaly, and not represent actual VOM capture efficiency. Three runs are required by the regulations so that a statistical analysis may be applied to the results.[30] The regulatory requirements are not mere technicalities in this regard; three tests are the minimum necessary for generating accurate, reliable data.

Packaging also failed to perform sufficient flow measurements during its 'informal stack test.' Section 218.105(f)(6) of the Board's emission testing regulations requires that inflow and exhaust measurements be performed "at least twice during each test." As shown by its report, Packaging only performed one flow test on the outlet and one on the inlet.[31]

[28] The Board has already found Packaging in violation for failure to follow the testing requirements.
[29] Tr. 5/21/13, p.294
[30] Tr. 5/21/13, p. 294
[31] Complainant's Exhibit 8, p.3

Under the circumstances of this case, Packaging should be held to an even higher standard than the regulations require. Despite the clear dictates of 35 Ill. Adm. Code 218.401(c), Packaging never performed a compliance test on Press No. 5 and knowingly passed up many opportunities to do so, at small cost. If Packaging had intended to convince the Board that Press No. 5 met the control requirements, without performing 'formal' testing, Packaging should have exceeded the minimum testing requirements, in this case by performing more than three test runs. It should have performed multiple flow tests on each run. Packaging should have provided a detailed error analysis and statistical analysis, and backed up its representation with raw test data. But it has done none of these. Instead, Packaging did only 16.5% of the minimum necessary for an adequate capture estimate, did not retain data, and did not follow up the abbreviated engineering analysis with a formal test. As noted by Mr. Mattison, by ignoring the minimum regulatory requirement, Packaging has shown that obtaining accurate test data on control efficiency was not a priority.[32] The Board cannot accept a VOM capture estimate based on this inadequate and unreliable testing. [33]

2. Use of Inaccurate VOM Input Data

Mr. Mattison does not believe that the reported 40 pounds per hour VOM input used in the calculations from the 'informal stack test' is accurate. No backup data was provided along with the report, and Mr. Trzupek has been unable to locate any of the raw data from the 2001 test.[34] However, other data supplied by Packaging, at or around the time the 'informal stack test' report was provided to Illinois EPA, suggests that the 40 pound per hour VOM input figure

[32] Complainant's Exhibit 15, p.3
[33] Even though this hearing is only for the purpose of BEN calculation, the Board must appreciate the negative effect that recognition of this flawed emission test would have on enforcement of the actual emissions testing standards.
[34] Tr. 5/21/13, pp.330-331

is incorrect. [35] For example, information provided by Packaging on ink usage suggests a maximum ink usage rate of 20 pounds per hour at the time.[36]

Accurate VOM data is an absolute prerequisite to a reliable estimate of capture efficiency. Because Packaging's 'informal stack test' was never intended to be a compliance test, and because Packaging chose to only perform 16.5% of what would have been required, it is hard to believe Mr. Trzupek's statement, made 12 years after the fact and based purely on his recollection, that he carefully compared the ink and solvent VOM content to arrive at exactly 40 pounds per hour of VOM.

In defending his numbers, Mr. Trzupek claimed that with any test, whether a "three-page report or as part of 200-page stack test report," the "State ultimately is counting on the integrity, the honesty and the skill of the person who made those measurements to give accurate data."[37] However, that is not the case. Illinois EPA does not simply 'rely' on a consultant's representations regarding an emissions test. The regulations require prior notification to Illinois EPA, submission of test protocols for Agency approval, the opportunity for Illinois EPA to witness the test, and submission of a final report with raw data and calculations backing up the test results. None of these steps were taken in this case. Illinois EPA was not notified of the December 2001 'evaluation of compliance options' (which Packaging now call the "informal stack test"), was not provided with a protocol, and was not invited to witness the evaluation. Mr. Trzupek's recollection of a short, noncompliant test performed 12 years ago are not backed up by any hard data. The reliability of his opinion, which is based solely on this test, is highly questionable.

[35] Id., at 296-297
[36] Id. The information referred to is in evidence as Complainant's Exhibit 13.
[37] Tr. 5/21/13, p.322

No particular printing ink was identified in the 'informal stack test' report. Further, no information was provided to Illinois EPA afterward, either by final report or at the hearings held in this matter, and Mr. Trzupek has no recollection of which ink was used. However the VOM content of the inks that were used by Packaging at the time the test was performed varied significantly. For example, one Sun Chemical Ink used by Packaging had a VOM content of 48.3 %,[38] while another Sun Chemical ink used by Packaging had a VOM content of 76.9%.[39] Packaging's failure to make and keep these records makes Packaging's proposed capture efficiency estimate unreliable. There is no supporting information available for Mr. Trzupek's 40 pounds per hour VOM figure; it is unlikely that the actual VOM usage was an even 40 pounds per hour; and, an 'assumed' VOM content number could not have resulted in an accurate result. . As noted by Mr. Mattison, If the actual ink VOM content is substituted for the 40 pound VOM estimate, Mr. Trzupek 's formula would calculate capture efficiencies of between 107% and 127%, clearly impossible results.[40]

The absence of VOM source information in the report, the lack of any raw data from the 'informal stack test', and the varying VOM content in the inks used by Packaging lead to the inevitable conclusion that the capture efficiency and overall control efficiency results reported by Mr. Trzupek are unreliable. The Board cannot accept such speculative and unreliable estimates as a substitute for statistically valid data.

3. Contradictory Flow Measurements Demonstrate that the Test was Inaccurate

Mr. Mattison's third objection to the reliability of the 'informal stack test' is based on the VOM flow data reported by Packaging. As noted in Packaging's test report "VOM emissions testing was conducted at the inlet to and exhaust from of [sic] the tunnel dryer to determine the

[38] Complainant's Exhibit 13, Bate Stamp p. IEPA 0120
[39] Complainant's Exhibit 13, p. IEPA 0158
[40] See: Complainant's Exhibit 15, p.1

VOM destruction efficiency".[41] However, Mr. Trzupek testified that he did not select the two locations for performing the test. Rather he was shown an input and output sampling location by one of Packaging's maintenance people.[42] There was no testimony demonstrating the qualifications of the 'maintenance people' to select the proper location for an emissions test.

Mr. Mattison testified that the flow data shows that two points where Trzupek sampled Press No. 5 were improper. According to Mr. Mattison, the claim made in the report that the tunnel dryer was under negative pressure (as would be required for an accurate test), could not have been correct because the inlet flow reported was two and one half times greater than the outlet flow. Specifically, the inlet flow was reported as 2,417 dry standard cubic feet per minute ("DSCFM") and the outlet flow as 818 DSCFM. As noted by Mr. Mattison in his report, "[e]ither Mr. Trzupek's statement that the oven was under negative pressure is incorrect, or the inlet flow data is wrong."[43]

Mr. Trzupek testified that the oven could not have been under positive pressure, because the solvent odor would have been overwhelming.[44] However his report, the only measurement data available, shows that the recirculating oven was under positive pressure during the test. If under positive pressure, solvent emissions would have been pushed out of the oven and not be measured. Therefore the reported destruction efficiency would be incorrect.[45] If the oven had been, in fact, under negative pressure, then the flow data reported in Complainant's Exhibit 8 is incorrect. In either event, the results of the 'informal stack test' cannot be used to support any reasonable opinion regarding the VOM capture and destruction efficiency of the recirculating tunnel dryer system on Press No. 5.This can only lead to one conclusion: the capture and

[41] Complainant's Exhibit 8, p.1
[42] Tr., 5/21/13, p. 193
[43] Exhibit 15, p.2
[44] Tr. 5/21/13, p. 328
[45] Id.

destruction efficiency numbers calculated by Mr. Trzupek from the half hour test performed on December 12, 2001 are completely unreliable.

4. Packaging Failed to Calculate and Use a Specific VOM Response Factor

Mr. Mattison's fourth objection is based on Packaging's failure to convert the propane assumption from its calculations to the actual VOM compounds used in the test. No 'propane' was actually collected or destroyed in this test. Rather, the various VOM compounds present and the ink and any VOM from the dilution solvent constituted the VOM component. Organic chemical compounds which differ in structure, oxygen content, chlorine content, and molecular weight will behave differently from propane, and will be measured differently than propane (a 3 carbon aliphatic hydrocarbon) by an FID device. For an accurate calculation, a conversion number, known as a "response factor" should have been used in the calculations to adjust the capture efficiency results.[46] However, no response factor was used in the informal stack test to correct the readings. According to Mr. Mattison, this failure invalidates the VOM capture efficiency results reported by Packaging.[47]

Mr. Trzupek attempted to minimize the damage done by the obvious absence of a response factor by claiming that the inks used by Packaging 'deviate very little', and largely consist of 'a couple of acetates'.[48] But this does not appear to be the case. *Complainant's Exhibit 13*, a report submitted by Packaging in May 2003, contains specific information on the VOM content of the Inks and solvents being used by Packaging at that time. Attachment D to this report lists the inks and solvents used by Packaging.[49] VOM contents for the solvents used are generally 100%, but the VOM percentages from the inks vary considerably. Several of the

[46] Tr. 5/21/13, p.301
[47] Id.
[48] Tr. 5/21/13, p. 170
[49] Complainant's Exhibit 13, Bate Stamp No. IEPA 0170-0172

solvents listed are blends (e.g. Ashland solvent blend, EMCO solvent blends) and do not list their organic components. But the listed organic solvents vary significantly in chemical makeup. Propyl Acetate is a 5 carbon molecule with both an ether group (C-O-C) and a ketone group (C=O). Isopropanol is a 3 carbon molecule with an alcohol group (-OH) off the middle carbon. Heptane is a seven carbon straight chain aliphatic hydrocarbon. These compounds differ significantly in structure and content, and would be expected to have different propane conversion response numbers.

Similarly, the VOM components of the inks differ substantially. For example, the VOM content of the ink listed on *Complainant's Exhibit 13*, Bate Stamp IEPA0120, includes 9.6% isopropyl alcohol, 4.2% n-propyl alcohol, 6.5% heptane, 16.8% ethyl alcohol, 9.4% n-propyl acetate, 1.4% isopropyl acetate and 0.4% naptha. However, the ink listed on Bate Stamp IEPA1034 contains 2.3 % isopropyl alcohol, 4.2% n-propyl alcohol, 25.4% ethyl alcohol, 1.3% n-proply acetate, and 16.4% heptane.

Despite Mr. Trzupek's representations, these VOM mixtures are not 'similar'. They represent entirely different blends of aliphatic and oxygen-containing compounds. They each contain unique levels of alcohols, acetate's and straight-chain aliphatic compounds. It must be presumed that they would have quite different listed propane conversion response numbers.

We do not know what the proper response number for the inks and solvents used in the 'informal stack test', because records of these inks and solvents were not made or retained. But, as noted by Mr. Mattison, without the use of a response number for the VOM's actually used during the informal stack test, the capture efficiency estimates resulting from the informal stack test are invalid.

Mr. Mattison's conclusions regarding the invalidity of the data reported from the 'informal stack test' are reasonable, and based on his years of experience reviewing test protocols, stack tests, and emission testing results. However, they are not an attack on Mr. Trzupek's abilities as a chemist and consultant. The 'informal stack test' was never intended to demonstrate VOM control compliance.[50] Mr. Trzupek advised Packaging that a 'formal' test would need to be performed. But he was not in control of this decision. As stated by Mr. Trzupek, it was not his position to compel Packaging to perform a compliance test.[51] It was Packaging's decision, not his, to avoid performing an actual compliance test on Press No. 5. The 'informal stack test' was, as characterized by Mr. Mattison, merely "a quick and dirty way of looking at potentially what's there".[52] However, as evidence demonstrating VOM control on December 12, 2001, it is completely unreliable. As evidence of VOM control beginning March 15, 1995 (i.e. 6 ½ years prior to the performance of the 'informal stack test'), the 'informal stack test' is worthless.

Packaging knowingly passed up numerous opportunities to correctly demonstrate the compliance of the recirculating tunnel dryer system on Press No. 5. The Board cannot now accept as substitute, even solely for the purpose of BEN, statistically invalid data from a flawed, informal, engineering evaluation.

d. Mr. Trzupek's Opinion Does not Satisfy the Standards for Admission of Scientific Opinion Evidence in Illinois

In Illinois, scientific opinion evidence is governed by the standard set down in *Frye v. United States*, 293 F. 1013 (D.C. Circuit 1923).[53] Under the *Frye* standard, where a scientific method is "novel", it may be considered only if it meets the "general acceptance test," i.e. it is

[50] Tr. 5/21/13, p. 203-204
[51] Tr. 5/21/13, p. 210
[52] Tr., 5/21/13, p. 293
[53] *In re Commitment of Simons*, 213 Ill.2d 523 (2004)

reasonably relied upon by experts in a particular field. The proponent of the evidence (in this case, Packaging), has the burden of establishing that the evidence meets the *Frye* standard, while the court's (or Board's) responsibility is to determine the existence or nonexistence of general consensus in the scientific community regarding the reliability of the particular method used.[54]

In this case, Packaging attempts to enter scientific evidence that the 'informal stack test' could demonstrate specific VOM control. Mr. Trzupek admits that this method of demonstrating control is 'novel'.[55] Mr. Mattison, clearly an expert on emission testing, also testified that this method is novel and further states that he deems it unreliable and unacceptable.[56] Mr. Trzupek could not give any specific instances of the 'informal stack test' being used to demonstrate compliance with a specific VOM control requirement. In fact, Packaging presented no evidence whatsoever to show any general consensus in the scientific or regulatory community that the informal stack test was reliable, accurate, or a legitimate method of measuring VOM control.

Although experts are frequently hired by parties to establish a particular position, expert testimony is not allowed simply because it might benefit a client. Expert and opinion testimony is allowed only where reliable and where the information will assist the trier of fact.[57] In Illinois, the *Frye* test is intended to impose the minimum threshold standard of reliability.[58] However, with the exception of Mr. Trzupek's own testimony, Packaging has not established the reliability of the 'informal stack test' as a recognized method of measuring VOM control. "General acceptance in the scientific community" is required in Illinois, not merely the opinion of a single paid expert witness. Accordingly, the Board should give no weight to Mr. Trzupek's

[54] Id., p. 532. *See also*, Illinois Rule of Evidence 702
[55] Tr., 5/21/13, p. 203
[56] Tr. 5/21/13, p.307
[57] Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence, Section 702.4 (9th Edition 2009)
[58] Id., Section 702.10.

testimony that the 'informal stack test' controlled VOM to any specific degree.[59] Rather, because of Packaging's failure to demonstrate 'general acceptance,' the Board should find that his opinion is unreliable as a matter of law.

e. Mr. Trzupek's Demonstrated Bias

After testifying in the 2009 hearing in this case, Mr. Trzupek authored a book highly critical of the State's environmental regulatory and enforcement efforts related to the case against Packaging. Because Mr. Trzupek's opinion testimony, based on one brief evaluation of Press No. 5, and without support of backup raw data, provides the sole support for Packaging's theory, Complainant entered excerpts of the book into evidence to demonstrate the bias affecting Mr. Trzupek's opinion.[60]

Mr. Trzupek's book is titled *Regulators Gone Wild: How the EPA is Ruining American Industry*, and was published in 2011. Chapter 7 of Regulators Gone Wild is titled *Jobs v. Retribution: the Price of Punishment*, and deals specifically with the State's enforcement efforts against Packaging.

In the introductory section of *Regulators gone Wild,* Mr. Trzupek claims that environmental regulators have *"extended their reach into virtually every facet of our economy....These invasions have little to do with protecting the environment and much to do with preserving the atmosphere of fear that ensures that everyone with a 'green job' remains employed".*[61] In the conclusion to his book, he thanks the owners of Packaging by name, and states that *"my job has been to keep the EPA off of their backs...."*[62]

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[59] There are no express provisions in the Act or the Board regulations calling for a *Frye* hearing. Therefore, Complaint did not move to exclude Mr. Trzupek's testimony. However, Complainant wishes to point out that Packaging's failure to meet the *Frye* standard renders Mr. Trzupek's opinion on VOM control unreliable.
[60] Complainant's Exhibit 18
[61] Complaint's Exhibit 18, p.1
[62] Id., p.9

With respect to the enforcement case against Packaging, Mr. Trzupek asserts that Illinois EPA's position on civil penalty was motivated by former Governor Rod Blagojevich's free spending habits, which resulted in a desperate need for money from companies like Packaging. [63] Despite not having been involved with settlement discussions in any way, he claims that the State's position was stubbornly unreasonable, characterizing Illinois EPA's position toward Packaging as "bureaucratic bungling".[64] Mr. Trzupek affirmed these opinions at hearing, along with his belief that the $456,000 civil penalty assessed by the Board was inappropriate and excessive. Mr. Trzupek stated that "the process itself, especially in this case, is a huge penalty".[65]

Mr. Trzupek is certainly entitled to his opinions about the overall environmental regulation. These are legitimate subjects for public discourse. But his testimony in this case is being offered to the Board to assist it as the trier of fact on scientific matters. His opinions also represent the sole support for Packaging's novel theory. But his written comments demonstrate a strong bias against environmental regulators and in favor of his clients. Bias would certainly explain inconsistencies in his prior testimony. For example, in the Vonco, Bema, and Formel adjusted standard proceedings, Mr. Trzupek testified that the cost of thermal oxidizer-based VOM control for flexographic printing operations would range from $10,911.00 per ton[66] to $34,156.00 per ton[67]. In those cases the high cost of VOM control was used as justification to avoid the requirements of the regulation. However, in his 2009 testimony in this case, where VOM control costs were used to calculate avoided control expenditures for the purpose of

[63] Id., p.5
[64] Id., p.8
[65] Tr. 5/21/13, p. 226. Mr. Trzupek apparently believes that expert witness and legal fees expended are an adequate substitute for a penalty based on recovery of BEN.
[66] Formel, AS 00-13 (11/14/00, p.35)
[67] Vonco, AS 00-12 (11/15/00, p.37)

recovering the economic benefit of noncompliance, he estimated the annual VOM control cost for Packaging at only about $1,000 per ton[68]. These vastly differing cost estimates conveniently fit into the ends being sought by his clients: in one case unreasonably high costs as the basis for obtaining an adjusted standard, and in the other extremely low costs to minimize civil penalty.

Mr. Trzupek's apparent bias against the State may also explain some of the more tenuous opinions from the 2013 hearing. He did not visit Packaging's facility until 2001, yet opines that Press No. 5 was in compliance all the way back to March 15, 1995. Regarding the CAAPP permit applications submitted to Illinois EPA (which falsely claims that Press No. 5 has an "internal thermal oxidizer " covered by a "manufacturer's guarantee" of 90% VOM control), he testified that "manufacturer's guarantee" was meant to mean the 'informal stack test'. Finally, despite the lack of compliance with testing regulations, the casualness with which the test was performed, the faulty assumptions made, the complete lack of backup raw data, the obviously flawed flow data in the report, the avoided opportunities to accurately and cheaply stack test the system, and the twelve year period since his 2001 one-hour evaluation, he testifies that the Press No. 5 recirculating ink dryer had a specific VOM capture efficiency of 86.2% and a specific destruction efficiency of 93.6%. Mr. Trzupek's published comments about this enforcement case demonstrate a strong bias against State regulators and regulations and a bias in favor of his client. Mr. Trzupek's bias indicates that his conclusions regarding the VOM control capabilities of the recirculating tunnel dryer on Press No. 5 are unreliable, and should not be considered by the Board.

Mr. Trzupek also crossed the line between independent expert and zealous advocate for his client's financial interests. His comments regarding the 'excessive civil penalty' ignore the

[68] Tr.6/30/09 pp.53-62

fact that the complained-of litigation expenses are partially the result of Packaging's aggressive litigation strategy. Certainly, all of the expenses since Packaging filed its Motion for Reconsideration were incurred because Packaging wanted to continue to litigate. While Packaging's owners have a direct financial interest in avoiding payment of any civil penalty, Mr. Trzupek's role should have been limited to scientific evidence. However, Mr. Trzupek goes well outside his area of expertise. His opinion includes the misleading sales numbers from the tax returns, and his conclusion that these support Packaging's shutdown/shift theory. The specific references to the Packaging case from his book, and his testimony at hearing regarding an appropriate civil penalty, demonstrate a bias against the actual recovery of the economic benefit of noncompliance realized by Packaging, and therefore a tendency to misrepresent the findings from the 'informal stack test'.

II. PACKAGING CANNOT RELIABLY DEMONSTRATE THAT IT COULD HAVE OPERATED WITHOUT PRESS NO. 5 WITHOUT NEGATIVE FINANCIAL IMPACT

a. Excepting 2003, Packaging Always Operated with Two Solvent Presses

The VOM control issues in this case involve only a portion of Packaging's overall business, specifically the portion that involved flexographic printing using solvent based inks. Packaging's business at the Carol Stream facility include extruding film, converting (which involves cutting, sealing and shaping plastic bags), and water based ink printing. Packaging estimates that two-thirds of its sales involved non-printed product.[69]

Packaging ran Press No. 4 until December 2002, at which time it claimed to have transferred Press No. 4's printing business to Press No. 5.[70] However, during 2002, Packaging

[69] Tr. 5/21/13, p.18
[70] Id.

actually used Press No. 4 more than Press No.5.[71] Packaging learned that Press No. 4 was operating in violation of the law *prior to* Mr. Trzupek's December 12, 2001 'informal stack test'.[72] Despite this knowledge, Packaging continued to operate Press No. 4, without VOM control, for another year.[73] In fact, Packaging *increased* its usage of Press No. 4 versus Press No. 5 significantly. As shown in *Respondent's Exhibit 12*, during 1999, Press No. 4 ran 38.2% of the solvent printing business. In 2000, and 2001, Press No. 4 handled about 43% of the solvent printing business. But after learning of Press 4's noncompliance, it increased Press No. 4's share of the solvent printing business to 50.1%. Packaging did not shut down Press No. 4 and operate Press No. 5 at a higher rate, which it now claims it could have easily done[74]. Packaging ran Press No. 4 until December 2002. Coincidently, the owners of Packaging acquired their new Michigan flexographic printing facility in November 2002, and thereby increased production capacity, around that same time[75].

With the sole exception of 2003, during the period from March 15, 1995 to the present, Packaging has always operated with two solvent presses at the Carol Stream facility[76]. Although the solvent ink presses have been replaced from time to time, each time Packaging has taken a press out of commission, it intended to replace that press with another[77]. After Packaging received its violation notice from Illinois EPA, it advised the Agency that it would withdraw Press No. 4 from service and have it "....replaced with a new press that would be

[71] Respondent's Exhibit 12, P. 4. Year to date December, 2002, Press No. 4 handled 50.1% of the solvent printing business, with Press No. 5 handing 49.9%
[72] Tr. 5/21/13, p.180
[73] Packaging's continued operation also strongly counters its claim that Press No. 5 'could have handled' all the business. By continuing operations, Packaging risked $10,000 daily penalties.
[74] One of the issues for hearing is "*Would press 5 and the tunnel dryer system have accommodated the entire production of both press 4 and press 5 from March 15, 1995 to February 26,2004?*
[75] Tr. 6/29/09, p. 128
[76] Tr. 5/21/13, P. 68
[77] Id.

controlled by a thermal oxidizer".[78] Packaging applied for a construction permit for that replacement press on June 5, 2003.[79] Illinois EPA issued a construction permit for the RTO and new press on June 5, 2003. The permit allowed construction of "one flexographic printing press (Comexi press) as replacement of existing Press #4".[80]

Clearly, from 1995 to the present, Packaging's solvent printing operations required the operation of two solvent based printing presses. Also, it is clear that the RTO installed by Packaging in 2004 was intended to cover only these two solvent presses. Although the Board credited Packaging for buying an 'oversized' RTO, in its September 8, 2011 decision, and thereby reduced the estimated avoided control costs, it is now clear that Packaging bought the RTO to control only two presses. Packaging is still operating the same RTO installed in 2004, and it still controls only two solvent presses. Complainant continues to believe that it original 2009 estimate of Packaging's economic benefit of noncompliance, which used costs from the equipment actually installed, accurately reflects Packaging's avoided compliance costs. In considering Complainant's original BEN estimate, the Board should revisit the relevant guidance from USEPA: "The best evidence of what the violator should have done to prevent the violations is what it eventually did (or will do) to achieve compliance".[81]

b. Reports from Packaging for the Relevant Period Show Press No. 4 was Heavily Used In Packaging's Business

On May 2, 2003, Packaging submitted a report on its VOM emissions, which included VOM content of inks, operating hours, and other information requested by Illinois EPA. In "Attachment D" to this report, Packaging reports hours of operation for Presses 1-5.[82] Annual

[78] Complainant's Exhibit 13, p.2
[79] Complainant's Exhibit 3, p.1
[80] Id.
[81] Respondent's Exhibit 4, *BEN Users Manual*, p. 3-9.
[82] Complainant's Exhibit 13, Bate Stamp numbers IEPA 0168-0169

operating hours are reported on both *maximum* possible hours of 8760 (24 X 365=8760), and *average* actual hours of operation. Packaging reports the same actual operating hours for both Press No. 4 and Press No. 5: 6,000 hours.[83]

Packaging's operating hours report is significant for two reasons. First the report shows that Packaging relied equally on Press Nos. 4 and 5. However, it also indicates that Packaging could not possibly have run its business in 2002 with only Press No. 5. Packaging ran its two solvent presses for a total of 12,000 hours in 2002, but there are only 8,760 hours in a year. Packaging has represented that Press No. 5 ran at a 'higher rate' and therefore hypothetically could have handled all the business. But a difference of 3,240 hours (12,000 minus 8,760) is simply too much to 'hypothetically' argue away.

Also, Packaging had already submitted more specific operational information on these presses. On December 16, 2002, Packaging submitted a supplemental report in response to the violation notice issued by Illinois EPA. In its report, it provided specific information on the distribution of business between Press Nos. 4 and 5 for the years 1999-2002 (year to date, December)[84]. The following information was included:

YEAR	PRODUCTION (feet)		DISTRIBUTION (%)	
	Press 4	Press 5	Press 4	Press 5%
1999	26,578,001	42,991,757	38.2%	61.8%
2000	72,640,365	93,580,880	43.7%	56.3%
2001	102,981,855	136,569,654	43.0%	57.0%
2002 (YTD)	97,138,382	96,697,328	50.1%	49.9%

[83] Because Packaging shut down Press No. 4 at the end of 2002, it is clear that these hours are for 2002, not 2003.
[84] Respondent's Exhibit 12, Bate Stamp IEPA 0897.

Complainant asserts that this information, prepared in response to a violation notice, at a time when production records were readily available, before a complaint was filed, and before the Board assessed a civil penalty, is reliable. Certainly, Respondent cannot question the credibility of this production information. It constitutes an admission by Packaging, and is contained in an exhibit that Packaging itself entered into evidence at the 2009 hearing.

This production information shows that Press No. 4 was critical to Packaging's solvent printing business, at least during this four year period. Complainant asserts that it probably represents the distribution of business printed on Press No. 4 for the years 1995 to 1998 as well, and that Press No. 4's utilization ranged from 38% to 50% of the total solvent printing business. This information, provided by Packaging to Illinois EPA in 2003, is certainly more reliable than Mr. Imburgia's 2013 calculations, which were prepared based on assumptions and without production records, and prepared by a financially interested witness for the purpose of litigation.

The production information for the years 1999 to 2002, when compared to Packaging's financial results for the same period, also shows that Packaging's profits were tied to the maximum operation of Press No. 4. In 2002, when Press No. 4's utilization was at its highest, Packaging showed the highest Gross Profit and highest Total Income of the entire period of noncompliance, 1995-2004.[85]

c. <u>The Operating Reports Prepared by Packaging for Trial are Unreliable</u>

As admitted by Packaging, it did not retain records of production, ink usage, monthly operation of Press No.'s 4 and 5, or other data which might show that Press No. 5 could have handled all the solvent printing production beginning on March 15, 1995.[86] However,

[85] *See:* Complainant's Exhibit 17.

[86] In its Response to the Complainant's original Motion to Compel, Packaging states "Packaging simply does not have these 13-17 year old records any longer, and therefore cannot produce them." 9/12/12, p. 4

Packaging attempted to recreate production records in late 2012 solely for the purpose of this hearing. The calculations were generated by Joseph Imburgia, Packaging's General Manager and a shareholder of Packaging.

Mr. Imburgia stated that he used VOM information from a 2009 FESOP application as a basis for the calculations[87]. This VOM information had been calculated by Mr. Trzupek, based on historical ink purchase information, not from actual VOM records.[88] Mr. Imburgia compared this estimate to "pounds" of production, records of which were available only beginning in 2000.[89] Using 2009 emission estimates, he calculated a relationship between pounds and VOM. He then used a document containing records beginning only in 2005 (i.e. outside the relevant period) for additional information. Because his calculations directly conflict with information previously reported by Packaging to Illinois EPA, he claimed that Tim Piper (who did not testify at hearing) had believed that previous information was "less than accurate" .[90] Based on the estimates used in Packaging's 2009 FESOP information, records made beginning in 2005, hearsay evidence from Tim Piper, and by making all assumptions if favor of Packaging's theory of the case, Mr. Imburgia generated operating information going back to March 15, 2005. The result is completely unreliable.

At hearing, Packaging only entered the cover sheet of Mr. Imburgia's report, and not the backup data. However, the full report had been used at Mr. Imburgia's May 1, 2013 deposition, and the raw data used in his calculations was shown to be seriously flawed[91]. At *hearing*, Mr. Imburgia admitted that "there were some differences identified at that point in time, but without

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[87] Tr., 5/21/13, p. 21
[88] Id.
[89] Id., p. 22
[90] Id. p.25
[91] Complainant suggests that, in his Reply, opposing counsel explain why he held back this information from the Board, and did not include the data behind Mr. Imburgia's calculations at hearing.

that information [the raw data Packaging had removed from the report for trial] I can't speak to exactly what those differences were." With respect to his sworn depositions testimony, he admitted agreeing to the following at his deposition:

> "And you would agree that the numbers that you reported in a good faith effort to provide information, regardless of that the numbers that you have differed pretty substantially from the numbers that were reported in 2002"

Specifically, at hearing Mr. Imburgia stated:

> "Yes. I recall the conversation. I don't recall exactly which numbers we were referring to at the time. I do recall the additional charts that you are referring to at the time. I do recall the additional charges that you are referring to that back this up, and the part that was not estimated was the VOM. The VOMs were taken from this first chart. The part that was estimated was the pounds produced of ...production pounds produces. ink was used on one or the other of the two presses.[92]

Obviously, Packaging's removal of the raw backup data from the report was intended to prevent the testing of Mr. Imburgia's report at hearing. But Mr. Imburgia conceded that it was calculated within six months of hearing, for the purpose of this litigation.[93] And he conceded that it based on his assumptions, and not on records.[94]

Mr. Imburgia's report also conflicted with *Complainant's Exhibit 21*. *Complainant's Exhibit 21* is Packaging's annual emissions report for the year 2003. It was signed by Joseph Imburgia (the witness) in 2004. By 2004 Packaging, which had not previously submitted annual emissions reports, was aware of the requirement and had begun submitting annual emissions reports. The 2003 annual emissions report, made at or around the time when the emissions were being calculated based on current information, conflicts directly with the report Mr. Imburgia prepared for this hearing. Specifically, in 2004, Mr. Imburgia and Packaging reported total source VOM emissions of 50.69 tons. In his 2012-2013 back-calculated report

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[92] Tr., 5/21/13, p. 57
[93] Is, pp. 57-58.
[94] The Board should recall that it has found Packaging in violation for failure to keep ink usage and VOM records through 2004.

based on assumptions, he reports 2003 VOM emissions of 59.84 tons from just Press No. 5, a deviation of more than 18%[95]. Clearly, Mr. Imburgia did not compare 2012-2013 results with reports Packaging had certified and provided to Illinois EPA in 2004, a time when the information was much more reliable.

The Board must find that Mr. Imburgia's report, and his conclusions based thereon, are completely unreliable. This 'evidence' is nothing more than speculation by a financially interested witness subject to a large civil penalty. Because Mr. Imburgia's 2013 report directly conflicts with Packaging's annual emissions reports and other VOM emission information, it should be considered biased and unreliable.

Packaging does not have any records to support its claim that Press No. 5 could have absorbed the production of Press No. 4. It cannot, for example, support a finding that in November 1998, its business did not require the full production of both presses. It cannot prove that it could have handled the business it did, in fact, handle.

Packaging actually operated two solvent based presses continuously from March 15, 1995 to December 2002. Press No. 4 did, in fact, run throughout that period as an important part of Packaging's overall business. Press No. 4 supported Packaging's growth as a company. Also Press No. 4 (and Press No. 5), continuously emitted uncontrolled VOM, into the atmosphere in a severe ozone nonattainment zone during this period. During this same period, Packaging realized a significant economic benefit from its failure to control VOM from both Press No. 4 and Press No. 5. The Board must not give any weight to Mr. Imburgia's self-serving report on Packaging's operations during the period of violation.

[95] Tr. 5/21/13, p.62

d. Packaging's Financial Results Show that the Operation of Press No. 4 was Critical to its Business[96]

When it sought reconsideration of the Board's September 8, 2011 decision, Packaging claimed that it "saved money" by not operating Press No. 4.[97] Packaging's experts have attached redacted copies of its tax returns, showing an increase in sales for 2003, as evidence of this cost saving. Packaging represented the facts as follows:

> *Moreover, the annual sales records which Packaging has produced to Complainant for those years shows that Packaging's printing business in 2003,performed entirely on Press 5 (after Press 4 was shut down) was greater than all of Packaging's printing business in any of the preceding years, and twice the printing production of some of those years.*[98]

Plainly, Packaging, in seeking yet another hearing, and for the purpose of delaying payment of civil penalty, was representing to the Board that its financial results in 2003, the only year that it operated only one solvent printing press, proved that Press No. 4's operations were unnecessary to its business. This turned out to be false.

[INFORMATION REDACTED]

Complainant believes that the financial results from the years 2001-2004 are the most significant. In October 2001, Packaging was inspected by Illinois EPA for the first time, and was issued a violation notice for numerous violations, including the failure to control VOM from Presses No. 4 and 5. At that time, Packaging learned that Press No. 4 was operating illegally. However, in 2002 Packaging operated Press No. 4 at its highest rate (at least of the period 1999-

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[96] In its Response to the Complainant's original Motion to Compel, Packaging states "Packaging simply does not have these 13-17 year old records any longer, and therefore cannot produce them." 9/12/12, p. 4

[97] Respondent's Motion for Reconsideration, 11/19/11, p. 5-6

[98] Response in opposition to Motion to Compel, 9/13/12,

2002). In November 2002, Packaging's owners acquired the Michigan flexographic printing company.[99] Press No. 4 was shut down at the end of 2002, and Packaging operated only Press No. 5 during 2003. Press No. 6 was connected to the RTO along with Press No. 5, and was tested in February 2004. In 2004, Packaging operated both 5 and 6, and has operated with two solvent presses ever since.

Packaging's financial results for this period are as follows:

YEAR	SALES	GROSS PROFIT	TOTAL INCOME

[INFORMATION REDACTED]

This financial information proves that operation of Press No. 4 (or more than one press) was critical to Packaging's overall business results. In 2002, when Packaging operated Press No 4 at its highest rate (50.1% v. 43% in 2001), its gross profits were at their highest. Gross profit increased by more than $[INFORMATION REDACTED]

in 2002. Similarly, in 2003, when Press No. 4 was shut down and only Press No. 5 operated, gross profits dropped more than[INFORMATION REDACTED]

. But once Press No. 6 began operating in 2004, gross profit and total income rebounded. Gross profit increased by [INFORMATION REDACTED]

This tax information proves that 'hypothetical' non-operation of Press No. 4 would have had a serious negative impact on Packaging's profits from 1995 through 2002. If 2003 is used as a basis, Packaging would have earned[INFORMATION REDACTED]

than it actually received.

[99] This company is separate from Packaging Personified Inc., but owned by Packaging's shareholders.

Complainant understands the limitations of using just these numbers. Packaging estimates its solvent printing business at approximately one third of sales. And, of course, corporate income taxes are complicated, and year to year variations in depreciation, raw material cost, and other factors would be expected to affect reported gross income and total income. But as circumstantial evidence, the income tax information is overwhelming, and devastating to Packaging's shutdown/shift theory.

Packaging brought the income tax information into this case by using reported sales dollars to support its claim that Press No. 4 was not necessary to its business. Complainant first sought the full tax return information in its June 28, 2012 discovery request, and the reason for Complainant's request was quite clear. As noted in Complainant's Second Motion to Compel:

> *PPI has conceded to disclosure the tax returns if redacted to include a single number, gross revenues. However, that information is not enough. The complete tax returns contain additional, highly relevant information related to sales, profits...*[100]

The Hearing Officer ordered Packaging to produce the returns on November 15, 2012. However, the tax returns were not made available to Complainant until early March, 2013. After viewing the returns, counsel for Complainant and Respondent agreed to stipulate to the information contained in *Complainant's Exhibit 17*, which expressly compares sales to profits and income[101]. On May 10, 2013, Complainant responded to Packaging's Motion in Limine, and advised that it intended to use the stipulated information to counter Packaging's theory, noting that "the information reported to the IRS directly contradicts Packaging's claims".[102] Thus, Packaging has been on notice since at least October 2012 as to why Complainant thought the profit information was relevant. But it was also quite obvious. The year 2003 was the

[100] Complainant's Amended Motion to Compel, 10/19/11

[101] Packaging had objected to the production of "personal financial information". The purpose of the stipulation was to eliminate reference to owners compensation and officer salaries, which were used in the calculation of 'net income'.

[102] Response to Motion in Limine, 5/10/13, p. 1

significant year, and the dramatic drop in gross profits simply jumps out of *Complainant's Exhibit 17.*

If previously disclosed, Packaging certainly could have used other information from the tax returns for the purpose of countering the obvious harm to its theory. But Packaging never indicated that it would seek to do so until a day before the May 21, 2013 hearing. Complainant had served discovery in 2012 that required production of documents to be used at hearing. Witness disclosure had been extended several times, and deposition schedules were extended by the Board to accommodate Packaging's witnesses. In addition, Packaging had made no expert disclosure related to the tax returns. Expert testimony would certainly have been required to explain the intricacies of a corporate tax return (as opposed to facts, such as the reported sales and profit numbers in the Stipulation). Packaging's failure to disclose use of the full tax returns (for the purpose of pointing to 'Schedule Z' or some other detail), resulted in Complainant's objection to direct entry of the tax returns at hearing.

Complainant did not object to testimony about difference in depreciation, or higher resin costs, which came in through the testimony of Joseph Imburgia. But the Hearing Officer properly refused to admit the returns, either as an exhibit or by being read into the record. Packaging's late attempt to include this information was nothing more than an attempt to ambush Complainant with undisclosed exhibits and expert testimony.[103]

Packaging's earnings information directly addresses the economic impact of the hypothetical non-operation of Press No. 4. The evidence shows that the economic impact from

[103] The Board should be aware that, by agreement and again to protect personal information, the parties stipulated only to the numbers in Complainant's Exhibit 17. Complainant was able to review the returns at the offices of opposing counsel, but was never provided with full copies of the tax returns. While, on May 20th, Packaging offered to produce them at hearing, Complainant would have been required to seek a continuance and retain a financial expert to review them in detail.

such non-operation, a key to Packaging's 'shutdown/shift' theory, would have been severely negative.[104]

e. Mr. McClure's Opinion is Unreliable

Complainant does not believe that the testimony of Christopher McClure has any bearing on the Board's decision in this case. As shown from his expert report, Mr. McClure only performed an arithmetical calculation of the interest from the deferred cost of avoiding stack test expenditures. All of his information was provided to him by Packaging's attorneys. Noteably, his opinion does not include any information about most of violations found by the Board.[105] His opinion ignores Press No. 4's uncontrolled emissions, ERMS violations, permit violations, recordkeeping violations, CAAPP violations, and all of the regulatory violations. His $3,000.00 estimate for the total economic benefit of noncompliance for twenty-one violations is so obviously inadequate as to be meaningless. The fact that he simply developed an opinion based on facts given to him by Packaging's attorneys renders his opinion unreliable.

III. CIVIL PENALTY

Complainant continues to believe that its original civil penalty was appropriate. Although the Board reduced the economic benefit of noncompliance portion of the civil penalty to reflect an 'oversized' control device, Packaging continues to operate the device it purchased to control VOM from Presses 5 and 6. It has never operated three solvent presses at the Carol Stream facility. Packaging bought the control device it wanted to buy, and the device it should have installed before March 15, 1995. It operated no control device until February 2004.

[104] Packaging's BEN expert did not testify to Packaging's financial information, and his testimony was based solely on information provided to him by opposing counsel.
[105] In its September 8, 2011 Final Order, the Board found 21 separate violations.

Packaging's financial results show that easily could have afforded these expenses at any point during the period of noncompliance[106].

During the period of violation [1995-2003], Packaging was profitable every year. During this period, it reported a combined gross profit of. [INFORMATION REDACTED]

It would not be unreasonable to recover the economic benefit of noncompliance based on Complainant's estimate of $711,274.00

However, if the Board continues to believe that its $356,313.57 estimate of the economic benefit of noncompliance fairly represents the actual economic benefit realized by Packaging, then Complainant believes that an additional civil penalty be imposed to address knowing violations related to the operation of Press No. 4 in 2002.

At the first hearing in this matter, issues related to the relative operation of Presses No. 4 and 5 were not as significant. Neither press was controlled, both operated for years in noncompliance, and no compliance testing was ever performed on the presses themselves. In addition, there were numerous other violations to address, including failure to keep records, failure to report emissions, lack of CAAPP, construction, and operating permits, and (once permits were obtained) permit violations from a subsequent inspection[107].

However, in this hearing, the comparison of Presses No. 4 and 5 was completely relevant. Also, whereas no company financial information was used at the first hearing, it was a major part of this second hearing. The newly discovered evidence should be especially troubling to the Board. The evidence shows that Packaging, despite having been advised of the obvious noncompliance of Press No. 4 in 2001, knowingly continued to operate Press No. 4, in violations

[106] In 1995, Packaging reported. [INFORMATION REDACTED]

[107] The construction and operating permit violations were added in the Amended Complaint filed on July 1, 2005.

of the Act. Not only did Packaging continue to operate for another year, it actually increased production on Press No. 4. In 2001, Press No. 4 only represented 43% of Packaging's solvent printing production. However, YTD December, 2002, Press 4 had printed more than half of their solvent printing business. It was not shut down until around the time the owners of Packaging acquired their Michigan facility. It was eventually moved to this new plant, and one of Packaging's BEN theories involved 'pretending' it was moved there earlier.

The evidence shows that the increase in Press No. 4's production coincided with a year of record profits for Packaging [INFORMATION REDACTED]

At the first hearing, Packaging claimed that it knew nothing of the regulations affecting its business, and did not receive the outreach letter sent by Illinois EPA regarding the flexographic printing rules. But it certainly knew by the end of 2001 that Press No. 4 was noncompliant. In response it *increased production on Press No. 4.* The shutdown of Press No. 4 coincides with the acquisition of a new plant, suggesting that Packaging's business interests trumped environmental compliance. If Packaging wanted to continue to operate Press No. 4 in 2002, it should have connected the press to VOM control. At the first hearing, it claimed that a control device for No. 4 would have cost very little.[108]

Complainant requests the Board to assess an additional civil penalty of $100,000 against Packaging for the violations related to operation of Press No. 4 in 2002. Complainant believes that an additional civil penalty is necessary to accomplish the purpose of civil penalties, and is in accordance with the penalty factors of the Act.

Complainant believes that 415 ILCS 5/33(c)1a) and (c)(4) are particularly relevant to the Board in a decision on an additional penalty.

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[108] In Packaging's post-hearing brief from the 2009 hearing, Packaging claims that a small control device for Press No. 4 would have cost $75,000. Respondent's Post-Hearing Brief, 11/6/09, p.43

415 ILCS 5/33(c)(1) provides:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

Packaging knowingly and intentionally continued to operate Press No. 4 for one year after being advised it was noncompliant, and operated the uncontrolled press at a higher rate, in a severe ozone nonattainment area. This interfered with the health and general welfare of persons.

415 ILCS 5/33(c)(4) provides:

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

Control of VOM through thermal destruction was common by 2001, and Packaging had been advised by its consultant that the Press was noncompliant. This same consultant eventually assisted in the VOM control of Presses 5 and 6, and could have arranged for control of Press No. 4 in late 2001. Packaging's financial information shows that it could easily have afforded a small VOM control device in 2001.

Complainant believes that the Section 33(c) factors indicate that an additional civil penalty is appropriate. Complainant also asserts that a review of 415 ILCS 5/42(h)(1), (2), (3), and (4) suggests that the additional $100,000 civil penalty is appropriate:

415 ILCS 5/42(h) (2012), provides as follows:

1. The duration and gravity of the violation;

Packaging knowingly continued to operate in violation, at an increased production level, for at least one year.

2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief there from as provided by this Act;

Packaging showed absolutely no diligence in attempting to comply with the VOM control requirements for Press No. 4. Packaging chose to ignore the requirements while apparently making plans for its new facility. Packaging also failed to perform compliance testing on Press No. 5 at any time, despite the fact that its own expert witness testified that this could have been done for $6,000-$11,500. The Parties and the Board have now had two hearings in this case, both of which involved whether the 'informal stack test' on Press No. 5 could have proved compliance. If Packaging actually believed that the recirculating ink dryer adequately controlled VOM emissions, it could have easily been demonstrated this properly, with Illinois EPA oversight and at small cost. Packaging's complete lack of diligence in this regard should be considered in aggravation of penalty.

3. *any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;*

Packaging certainly benefitted economically from continued operations of Press No. 4, but aside from its greatly increased profits during 2002, there is no specific evidence on the amount of the profits derived from continued operation. However, the circumstantial evidence suggests that such a benefit was enjoyed.

4. *the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;*

Complainant believes that deterrence is the strongest argument for an increased civil penalty. The evidence indicates that Packaging put its business interests and future expansion plans well above environmental compliance. Packaging's sole defense at the first hearing was a total ignorance of the VOM control regulations (as well as numerous recordkeeping, permit and reporting requirements). The fact that Packaging kept operating Press No. 4 shows that

knowledge of these regulations probably wouldn't have made much difference. They would have operated in violation, as before, until they were 'caught' by Illinois EPA. Knowing violations, such as the continued, uncontrolled operation of Press No. 4, must be deterred by an appropriately large civil penalty to prevent others from choosing to act similarly.

Complainant's Penalty Recommendation

Complainant requests that the Board recognize Complainant's original economic benefit of noncompliance estimate of $711,248 as part of a civil penalty calculation. However, if the Board chooses to retain its initial estimate of $356, 313.57, Complainant requests that the gravity and deterrence portion of the overall civil penalty be increased from $100,000 to $200,000, and that the Board assess a total civil penalty of $556,313.57 against Packaging for the multiple violations found by the Board.

IV. THE SHUTDOWN/SHIFT THEORY DOES NOT COMPLY WITH 415 ILCS 5/42(h)

Complainant requests that the Board consider one final argument regarding the Board's implied recognition of the shutdown/shift theory as a 'lowest cost compliance option". Complainant believes that recognition of this theory conflicts with the directives of Section 42(h) of the Act, 415 ILCS 5/42(h) (2012).

Section 42(h)(d) of the Act directs the Board to review the economic benefit of noncompliance as part of its civil penalty calculations. This Section provides for recovery of economic benefit as follows:

> 3. *any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;*

However Section 42(h) also contains the following dictate:

> *In determining the appropriate civil penalty to be imposed...the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship.*

Thus, the General Assembly's direction that a civil penalty must, at minimum, recover economic benefit is only conditioned on two additional requirements. First the economic benefit recovery is not mandatory if there is a finding that it would be unreasonable. Second, the calculation of economic benefit should be based on the "lowest cost alternative for achieving compliance".

Complainant has already argued unsuccessfully that 'hypothetical non-violation' is not compliance. But the problem inherent to the shutdown/shift theory is that it completely ignores the obvious, admitted economic benefit stemming from the operation of Press No. 4[109]. The seven years of noncompliance related to uncontrolled VOM emissions on Press No. 4 are the violation at issue. In other words, the issue is not whether Packaging's *overall printing business* was noncompliant, it is whether Press No. 4 was noncompliant. Clearly it was. Press No. 4's noncompliance was the violation alleged by the State, and found by the Board. How Packaging could have brought its overall business into compliance (by hypothetically using other presses, moving to Michigan, etc.) has no relevance to the seven year Press No. 4 violation. The lowest cost alternative for achieving compliance for Press No. 4 was the lowest cost of VOM control.

Ignoring the VOM violations from the uncontrolled emissions of Press No. 4 conflicts with the requirement that the economic benefit of noncompliance for the Press No. 4 violation be recovered, and therefore violates the Act. Complainant believes that *lowest cost alternative for achieving compliance* must be read in harmony with the dictate that all economic benefit be

[109] Complainant obviously believes that Press no. 5 was noncompliant as well, and for eight years. However for the purpose of this argument, Complainant addresses Press No. 4's noncompliance only.

removed through penalty. When interpreting potentially ambiguous statutory provisions, a court (or the Board) should consider the purpose of the law, and presume that statutory sections relating to the same subject are governed by one spirit and a single policy.[110] The policy behind recovery of economic benefit is to prevent a company from retaining monies obtained from violations. Packaging violated the Act by failing to control VOM emissions from Press No. 4 for seven years. The cost of the failure to control emissions from Press No. 4 can only be recovered by looking to the avoided control costs of Press No. 4.

The shutdown/shift theory totally ignores these avoided costs, and therefore would violate Section 42 of the Act.

V. CONCLUSION

Packaging cannot meet its burden of proving that the hypothetical shutdown of Press No. 4, and the shift of its solvent ink printing business to Press No. 5 would have been the 'lowest cost alternative for achieving compliance'. To prove its case, Packaging would have had to produce reliable evidence that each month from March 15, 1995 until February 26, 2004, it would have been able to meet its customer printing demands, including emergency orders, increases in monthly volume, continue business as usual despite unexpected equipment shutdowns, and that necessary shift changes and labor requirements could have been accomplished without disruption to its business. It would need to prove this with evidence besides the testimony of financial interested stockholders, who were currently facing the loss of $456,000.00, and who's testimony is therefore unreliable.

Packaging cannot do so. It maintained no records to back up such a claim. And the information provided to Illinois EPA from 2002 on indicates that they could not have so operated. In fact, the information from the relevant period shows that Packaging's operation of

[110] See: e.g. People v. Hawkins, 2011 IL 110792, par 24. (2011)

Press No. 4 was critical to its business. Records just for the period 1999-2002 indicate that Press No. 4 always handled between 38% and 50.1% of its solvent printing business. And, with the exception of 2003, Packaging always operated with two solvent printing presses. Even in 2003, Packaging was diligently attempting to get the replacement press (No. 6) permitted and running as soon as possible. Obviously, in the normal course of its business, Packaging requires two solvent printing presses to succeed.

To prevail on its theory, Packaging would also have to prove that Press No. 5 'would have' demonstrated compliance IF Packaging had gotten around to performing a compliance test. However, it has not put forth any reliable evidence to prove that this is more likely than not. The 'informal stack test', is the sole basis for Packaging's assertion that a compliant stack test would have shown 60% VOM control. But, as shown by the testimony of Kevin Mattison, the test was done improperly, could not have resulted in accurate measurements, and is completely invalid and unreliable. No valid results could have come from this test, and no reliable opinion could result from this test. Packaging's strained and continued efforts to argue about a test that only constituted 16% of what was required, and at that performed incorrectly, is futile.

Moreover, Packaging's repeated failures to actually perform a compliance test speaks volumes. If Packaging could have performed a stack test (and the evidence shows it could have at any time up to the May 21, 2013 hearing), and actually demonstrated 60% VOM control to Illinois EPA, it would have saved hundreds of thousands of dollars in attorney and expert witness fees. The fact that Packaging deferred a $6,000 expense, but has litigated this case for 10 years, is strong evidence that Packaging knew that a test, witnessed by Illinois EPA, would fail. The evidence indicates that Packaging knew that the 'recirculating tunnel dryer' is just an ink dryer, not a control device.

To prevail on its novel theory, Packaging also would need to prove that operation of its business without Press No. 4 would have not had a negative financial impact. If it cannot do so, then Packaging's shutdown/shift theory fails. The negative economic impact would render the theory absurd. Alternatively, the amount of the hypothetical negative economic impact would have to recovered as the economic benefit of noncompliance. If compliance would have meant millions less in income, and that income actually was received, it should be recovered as part of a civil penalty. Based on a the 2003 financial results, this BEN would be more than [INFORMATION REDACTED]

Based on the income tax information (which Complainant fought nine months to obtain), Packaging cannot prevail. Its financial results clearly show that, without two solvent printing presses in operation, it profits and income drops substantially. The tax information from 2002 and 2003 alone is conclusive. With Press No. 4 at maximum operation, Packaging made record profits. Without Press No. 4, profits drop [INFORMATION REDACTED]

Based on the information produced at hearing, the Board should assess an additional civil penalty of at least $100,000. Packaging knowingly and willfully operated Press No. 4 at an increased production level, after learning that it was unquestionably noncompliant. Based on evidence Packaging argued at the first hearing, a small control device for Press No. 4 would have been inexpensive to acquire and operate. But Packaging took no steps to control VOM from Press No. 4 while increasing its operation, thereby increasing the uncontrolled emission of VOM. While doing so, it maximized profits. An additional penalty of at least $100,000 is necessary to deter Packaging, and others, from similar intentional and knowing violations of the Act.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney general of the State of Illinois, respectfully requests that the Board enter an order:

1. Finding that Respondent has failed to prove that the Shutdown/Shift theory constitutes the lowest cost alternative for achieving compliance in this matter;

2. Finding that the Shutdown/Shift theory cannot constitute a lowest cost alternative for achieving compliance in accordance with 415 ILCS 5/42(h) (2012);

3. Assessing against Respondent a civil penalty of at least $556,313.57; and

4. Ordering such other relief as the Board deems appropriate.

RESPECTFULLY SUBMITTED

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN,
Attorney General of the State of Illinois

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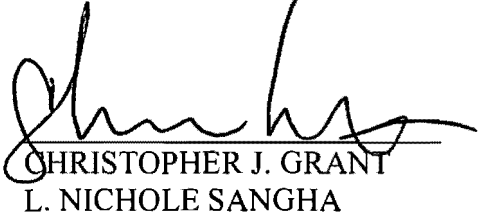
BY: 

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 24th day of June, 2013, the foregoing COMPLAINANT'S POST-HEARING BRIEF upon the persons listed below, by electronic transmission and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago Illinois.

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