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 December 3, 2009, Complainant filed its Reply brief with the Office of the Clerk of the Illinois Pollution Control Board, by electronic filing. A copy of Complainant's Reply 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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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
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Complainant,	)	
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v.	)	PCB 04-16
	)	(Enforcement - Air)
PACKAGING PERSONIFIED, INC., an Illinois corporation,	)	
	)	
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COMPLAINANT'S REPLY

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby presents its Reply Brief.

I. INTRODUCTION

Complainant has requested that the Board find the violations alleged in Counts I through X, and Count XII of the Amended Complaint, and dismiss Count XI. Complainant has also requested a civil penalty in the amount of $861,274.00. The State's request is based on recovery of $711,274.00, representing the economic benefit of noncompliance accruing to Respondent Packaging Personified, Inc. ("Packaging").

In this case, disgorgement of all economic benefit is reasonable and appropriate. There is no evidence in the record to suggest that recovery of all the economic benefit of noncompliance would create an unreasonable financial hardship. Packaging did not present any financial information at hearing, and does not argue in its Response that it cannot afford to pay this penalty. Therefore full recovery is appropriate pursuant to 415 ILCS 5/42(h) (3), and 5/42(h) (7) (2008).

Complainant also requests an additional gravity component of $150,000.00, and believes that is request is also reasonable and appropriate, given the number and duration of Packaging's multiple violations.

In response, Packaging improperly claims that the State took unreasonable position in supposed "settlement discussions", an issue which Board should not consider. Packaging also presents economic benefit 'evidence' which conflicts directly with its own expert's sworn testimony in previous Board proceedings. Packaging's arguments cannot excuse its failure to comply with the Act and Flexographic Printing regulations. The Board should assess a civil penalty at least as large as that requested by Complainant.

II. THE BOARD SHOULD STRIKE PACKAGING'S REFERENCES TO "SETTLEMENT"

In an attempt to distract the Board from the relevant penalty factors, Packaging argues that the State has been "unwilling to accept a settlement offer that is appropriate based on the circumstances and similar caselaw...." (*Response*, p. 2). This argument is irrelevant and improper.

At this point in the case, the Board will determine whether the violations have been established and, if so, will apply the Act's penalty factors in calculation of an appropriate civil penalty, if any. While the Board has acknowledged that settlement discussions could *possibly* be relevant if they represent a Respondent's good faith efforts toward compliance with technical requirements[1], that is not present in this case-Complainant is only seeking an appropriate civil penalty. Packaging is simply attempting to prejudice the State's case by claiming that the State was unreasonable in settlement discussions. Such a claim has no relevance to the Section 33(c)

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[1] *People v. Wayne Berger et al*, PCB 94-373 (May 6, 1999, slip op., at 5).

and 42(h) factors. The Board should strike the improper references to settlement on pages 2, 33, 37, and 41 of Packaging's Response.

III. THE CASES CITED BY RESPONDENT DO NOT SUPPORT ITS CLAIM OF AN "UNREASONABLE" PENALTY

Packaging repeatedly refers to the settlements in four Board enforcement cases involving printing companies[2]. This reference is surprising because these cases do not support Packaging's arguments. In fact, the settlements reinforce the appropriateness of the penalty sought by Complainant. Significantly, in all four cases the State ensured that the requirements of 415 ILCS 5/42(h) were satisfied by recovering all of the economic benefit of the Respondents' noncompliance. The penalty sought by the State in this case does the same: almost 83% of the requested civil penalty is directed toward recovery of the proven economic benefit.

In the *Golden Bag* case, only $3,200.00 of the $20,000.00 civil penalty represented recovery of the economic benefit of noncompliance. Unlike our case, the financial benefit recovered was derived from avoided permit fees, not from failure to operate a required control device. The Stipulation accepted by the Board also noted that the Company's ability to pay a penalty was considered[3]. In our case, there is no evidence of an inability to pay the requested penalty.

Similarly, in *Bag Makers* there is no reference to the need for control of volatile organic material ("VOM") or avoided costs for failure to install a control device. Rather, the economic benefit of $700.00 was for unpaid permit fees, and represented only one (1) percent of the $62,700.00 civil penalty. Unpaid permit fees were also the sole economic benefit in the

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[2]The cases are *People v. Golden Bag Company*, PCB 06-144; *People v. Bag Makers, Inc.*, PCB 05-192; *People v. Aargus Plastics, Inc.*, PCB 04-09; *People v. Fellowes Manufacturing Company a/k/a Fellowes Inc.*, PCB 04-193

[3] PCB 06-144, Stipulation filed 8/21/09, p.7

Fellowes case, where economic benefit of $10,750.00 represented no more than six (6) percent of the $189,250.00 penalty. There is no reference to avoided VOM control expenditures. Respondent's claim that the *Aargus* case was settled "on the basis that they had moved their facility to a new facility..." (*Response*, p.14) also ignores the fact that the case was resolved only upon the recovery of all of the economic benefit of noncompliance through civil penalty[4].

This case is more analogous to *People v. Ferrara Pan Candy Company, Inc.*, PCB 02-185. In that case, the Parties stipulated to economic benefit of $371,688.00 from failure to install and operate a VOM control device[5]. All of this economic benefit was recovered through civil penalty.

Respondent maintains that "....it is up to the Board to ensure that the law is applied consistently amongst the regulated entities" (*Response*, p.22). Complainant is in full agreement. To do so the Board must ensure that, at a minimum, all of the economic benefit of noncompliance is recovered: in this case at least $711,274.00. In accordance with the cases cited by Respondent, the Board should also recover an additional component for the duration and gravity of the multiple violations.

IV. PACKAGING DID NOT KEEP THE REQUIRED RECORDS

Packaging admits its failure to produce requested records to Illinois EPA inspectors[6]. However, it claims that the 'information' was available in "MSDS [Material Safety Data Sheets] sheets and its daily production records (i.e., job tickets) that track the output of sold products to

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[4]The A*argus* matter did not go to hearing, and therefore there is no evidence in the record about the source of the economic benefit or whether avoided VOM control costs were included. However, the Stipulation filed in settlement provides that "..the [$125,000.00] penalty obtained negates the economic benefit accrued". Stipulation and Proposal for Settlement, p.8, PCB 04-9, accepted by the Board June 15, 2006.

[5]See: Stipulation and Settlement Agreement filed in PCB 02-185 on 9/12/02, p.7

customers..."[7]. It weakly attempts to shift the blame to the Agency, stating that the 'records' were "not in the form Illinois EPA would have preferred". In other words, Packaging asserts that 'records' would be compliant if it was possible for an Illinois EPA inspector to:

1) Search for MSDS records at a regulated facility, and then search through the MSDS sheets for VOM content information;

2) Cross-reference the MSDS information to daily "job tickets";

3) Identify from each ticket the VOM content of each ink used for each particular run each day;

4) Identify and compile the VOM content of each printing job each day; and

5) Assemble the daily, monthly and annual reports that Packaging had failed to compile.

Packaging's interpretation of the term "records" is unreasonable and overbroad. Clearly, the term "records" as used in the Flexographic Printing Regulations means new records compiled from the raw information, not the information itself[8]. The fact that the information was available to Packaging from daily job tickets made and kept for business purposes, simply shows that the raw information was available to it, and that Packaging's failure to comply with the report and recordkeeping requirements (and its construction permit) was either an intentional violation, or grossly negligent.

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[6]Complainant's Exhibit 5, Requests No. 60 & 62.

[7]Packaging Response, p. 17

[8]As admitted by Packaging witness Tim Piper, manufacturers were required to keep MSDS sheets well before the promulgation of the Flexographic Printing Rules in 1993. *Tr.* 6/30/09, p. 257. The fact that 35 Ill. Adm. Code 218.404 makes no reference to MSDS sheets clearly indicates that newly compiled records were required after the effective date.

V. THE ADJUSTED STANDARDS GRANTED TO FORMEL, BEMA AND VONCO DO NOT PROVIDE A DEFENSE TO PACKAGING

Packaging admits it failure to comply with the Flexographic printing regulations and related sections of the Act (*Response*, p.2). However, it represents that this failure was "inadvertent", and the result of ignorance[9]. Packaging also tries to blame Illinois EPA for Packaging's own noncompliance by attacking Illinois EPA's 1997 outreach to the regulated community. Packaging claims that the Agency "...never followed up with a phone call to Packaging to confirm whether it had received the notice and information packet" (*Response*, p. 5). These claims misrepresent the record, and demonstrate a continued refusal to accept responsibility.

The VOM control, record keeping, and reporting requirements of the Flexographic Printing Rules were adopted by the Board on September 9, 1993, with a compliance date of March 15, 1995[10]. Packaging had more than eighteen (18) months to learn of the compliance deadline, evaluate its emissions, and determine its compliance status. Instead it did nothing. Beginning March 15, 1995, Packaging was operating in violation of the Board rules and the Act.

Other regulated printers were not so negligent. Mr. David Bloomberg, Illinois EPA Bureau of Air Compliance Unit Manager, testified that Illinois EPA was contacted by affected flexographic printing companies regarding problems they were having coming into compliance

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[9] Packaging repeatedly refers to itself as a "small family-owned company", but the evidence shows that it is neither "small" nor "family owned". Packaging has 100 employees at its Du Page County facility alone, while Formel Industries, Inc., which was fully aware of the Flexographic Printing Rules and worked with Illinois EPA toward compliance, had only 20-25 employees. *Petition of Formel Industries, Inc.*, AS-13 (January 18, 2001, slip op., at 3.). As acknowledged by co-owner Dominick Imburgia, Packaging is not solely family owned. *Tr.*, 6/29/09, p.190.

[10] 35 Ill. Adm. Code 218.106(c)

with the rules[11]. The Agency decided to determine the scope of the problem within the printing industry, assembled a list of printers, and mailed a letter offering assistance to the affected companies. Packaging was one of the affected companies, and was sent a copy of the letter[12].

Packaging's claim that Illinois EPA was required to go further and perform telephone follow up on non-responders is absurd, and ignores an important underlying fact: Illinois EPA was under no obligation to perform its outreach. The Agency was going 'above and beyond' its duties in an effort to encourage voluntary compliance. However, Packaging had an independent, affirmative duty to learn of the regulations affecting its business, and comply with the law.

Mr. Bloomberg testified that three of the flexographic printing companies who were working with Illinois EPA subsequently obtained adjusted standards from the Board, although all have been subsequently withdrawn[13]. He also confirmed that Packaging eventually discussed an adjusted standard with Illinois EPA. However, Packaging was seeking a retroactive adjusted standard at that time, which would have extinguished seven years of violations[14]. The Agency should not, and in Mr. Bloomberg's experience does not support such requests[15].

Finally, nothing prevented Packaging from seeking an adjusted standard without the Agency's support. In its discretion, the Board will grant or deny an adjusted standard petition

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[11] *Tr.* 6/29/09, p.47.

[12] Tr. 6/29/09, pp. 48-49. See also: Complainant's Exhibit 4

[13] *Tr.*, 6/29/09, p.50. The three printing companies were Formel Industries, Inc., Vonco Products, Inc., and Bema Film Systems, Inc. All three companies have since installed VOM control equipment. *Id.*

[14] *Tr.*, 6/29/09, p. 93

[15] *Id.* Even the adjusted standards granted to the *cooperating* printers did not extinguish liability. Formel Industries, Inc. was subsequently assessed a penalty by USEPA for its prior noncompliance. *Tr.*, 6/29/09, p. 96.

with our without the support of Illinois EPA[16]. If it believed that it could have met its burden, Packaging could have requested an adjusted standard without the Agency's agreement. Instead, it decided on the easiest and most practical solution: the long-delayed installation of a thermal oxidizer.

VI. PRESS NUMBER 5 WAS NOT COMPLIANT UNTIL CONNECTED TO THE THERMAL OXIDIZER IN 2004

Packaging repeatedly argues that Press No. 5 at its facility was in compliance with the VOM control requirements of the Flexographic Printing Rules[17]. The evidence at hearing showed the opposite. The evidence showed that Packaging knew that it had to demonstrate compliance in accordance with the regulations, and made a decision not to perform compliance testing. The evidence also shows that, once it installed its thermal oxidizer, this 'compliant' press was immediately connected to the control system. Control of Press 5's VOM emissions was only demonstrated once its emissions were vented through the newly-purchased regenerative thermal oxidizer ("RTO").

To verify 'compliance', Packaging was required by 35 Ill. Adm. Code 218.404(e)(1) to perform testing according to 35 Ill. Adm. Code 218.105(c)-(h). As described by David Bloomberg, this included strictly following the listed test methods, prior submission of a protocol to Illinois EPA, notice to the Agency to allow it to witness the tests, and submission of an appropriate test report[18]. Packaging did none of these. After performing what it referred to as an 'informal emissions test' on Press No. 5, Packaging submitted a letter regarding the 'test'

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[16]*See*, e.g. *Petition of Citgo Petroleum Corp. et al.*, AS 08-8 (December 18, 2008).

[17]Packaging applies the term: 'substantive compliance'.

[18]Tr., 6/29/09, p. 45

to the Attorney General[19], not to Illinois EPA. As described by Mr. Bloomberg, the testing described in the letter was "not even close" to being an acceptable verification of compliance[20]. Neither was Packaging's prior claim (from its CAAPP Permit application) that Press 5 was in compliance from a "manufacturer's warranty", nor Mr. Trzupek's "engineers estimate"[21].

Packaging now claims that a 'drying oven' on Press 5, which was designed to quickly dry off volatile material for faster printing[22], could also act as a control device and would sufficiently control VOM emissions to comply with the regulations. However, having made the decision not to perform compliance testing until after the emissions were routed to the RTO, its claims cannot be accepted as valid. The Board should find that Press 5 was noncompliant throughout the relevant period.

VII. PACKAGING REALIZED AN ECONOMIC BENEFIT OF AT LEAST $711, 274.00 FROM ITS VIOLATIONS

In its economic benefit of noncompliance calculations, Complainant has focused exclusively on the delayed and avoided expenditures realized from the late installation of the RTO. Clearly, Packaging also realized a benefit from its failure to obtain construction and operating permits, from its failure to make and keep records, and from other violations. However, Complainant believes that recovery of the requested civil penalty, which includes the $711,274.00 economic benefit from failure to control VOM emissions, will sufficiently address all of the violations.

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[19]Complainant's Exhibit 8

[20]Tr., 6/29/09, pp. 45-46

[21]*Id.*, at 46

[22]Tr., 6/29/09, p. 25

Complainant has also limited the economic benefit recovery to the period 1997 through December 5, 2003 (plus interest), despite the fact that Packaging was required to control its VOM emissions beginning March 15, 1995. Complainant's estimate is therefore conservative.

A. Complainant's Estimate Is an Accurate Representation of the Avoided Costs

Complainant' s expert Gary Styzens applied a methodology used to estimate BEN in several other Board cases, notably the *Panhandle Eastern* case. His calculations are based on initial capital cost, annual operating costs, and an appropriate interest rate. There is no dispute regarding the capital cost of the installed RTO ($250,000.00), nor any valid objection to Mr. Styzens' use of the prime interest rate. The only dispute regarding the economic benefit estimate relates to the annual operating cost of the RTO.

Mr. Styzens is highly qualified to render an accurate opinion in this matter. He obtained a Masters in Business Administration in 1983, and became a Certified Internal Auditor in 1988. His is intimately familiar with the financial analysis involved in evaluating the economic benefit of noncompliance. In the past 10 years, he performed this analysis in at least 25 cases[23]. He is also very familiar with the litigated economic benefit cases and the federal guidance materials. He has provided expert testimony in four Board hearings, and one circuit court matter. Finally, Mr. Styzens is not a paid expert: he performed his analysis as part of his regular position as Economic Benefit Analyst and Manager.

Mr. Styzens developed his operating cost analysis in consultation with Illinois EPA Bureau of Air Compliance Unit Manager David Bloomberg, who was uniquely qualified to provide accurate information. Mr. Bloomberg is an engineer who supervises other Bureau of Air

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[23]Tr., 6/29/09, p. 129

engineers, and had dealt with the regulated community on compliance and VOM control issues affecting the flexographic printing industry since at least 1997[24].

Between 1997 and 2000, Mr. Bloomberg worked with the flexographic printers who had come to Illinois EPA for assistance. As part of this outreach effort, he reviewed VOM control cost information submitted by technical consultants working for the printers seeking assistance. One of these consultants was Rich Trzupek, who had been working on compliance issues with Formel Industries, Inc. since 1997[25]. Mr. Trzupek prepared RTO operating cost information on behalf of Formel, and provided the information to Mr. Bloomberg for review[26]. Mr. Bloomberg understood the information to represent an accurate estimate of actual operating costs[27]. A summary of the cost information submitted to the Agency is found in *Respondent's Exhibit 57.*

Mr. Trzupek's calculations indicated that the annual operating costs for an RTO at Formel (excluding recovery of the RTO capital cost) would be $147,429.00. Taxes, insurance and administration costs are included in this annual cost estimate. But even if these 'accounting' costs are excluded, Mr. Trzupek's estimate shows that the 'real' annual operating cost for an RTO would still be $91,520.00. Mr. Styzens reduced this even further, and used an average annual operating cost of $86,000.00 for Packaging's avoided annual RTO operation cost. Mr. Styzens' annual cost estimate is based on cost information submitted to Illinois EPA and reviewed by the Agency's senior technical staff. Mr. Styzens' estimate also conforms to

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[24]Tr., 6/29/09, p.43

[25]*Tr.*, 6/29/09, p. 32

[26]*Tr.*, 6/30/09, p.158

[27]*Id.*

USEPA guidance in this area, which provides: "*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*"[28]. By using the actual cost of the RTO that Packaging used for compliance, and operating costs developed in consultation with David Bloomberg, Mr. Styzens' estimate is reasonable, conservative, and accurate.

B. Packaging Grossly Understates Operating Costs

Packaging's estimate of RTO annual operating costs is inadequate and self-serving. Mr. Trzupek's testimony completely and utterly conflicts with his prior sworn testimony and must be deemed unreliable. Because the avoided annual operating costs constitute the largest segment of the economic benefit to be recovered, Packaging's motives in trying to minimize these costs are obvious. But to state, as Mr. Trzupek did at hearing, that RTO operating costs are only 10% of the amount claimed in his prior sworn testimony, is to insult the intelligence of Illinois EPA and the Board[29].

Mr. Trzupek contradicted his prior sworn testimony in many regards. For example, at hearing in this case, he testified that an RTO control unit is "not a significant electrical user"[30]. However, in the cost information provided to Illinois EPA, and used as the basis of his testimony in seeking an adjusted standard for Formel, he indicated that an RTO's electrical cost would

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[28] Respondent's Exhibit 4, *BEN Users Manual*, p. 3-9.

[29] The testimony at hearing focused mostly on Mr. Trzupek's testimony in the Formel Industries, Inc. adjusted standard petition, because those operating cost numbers were used in Complainant's economic benefit calculations. However, Mr. Trzupek also provided sworn testimony in the Vonco Products, Inc., and Bema Film Systems, Inc. adjusted standard hearings. In Vonco, he testified that an RTO would be the least costly control system, with an annual cost of $34,156.00 per ton of controlled VOM . AS 00-12, (11/15/00, p.37). In the Bema hearing, he again testified that an RTO would be the least expensive, with an annual cost of $15,233.00 per ton of controlled VOM. AS 00-11 (11/13/00, p. 35) . At the Formel hearing, he testified that the RTO would be least expensive, with an annual cost of $10,911.00 per ton of controlled VOM. AS 00-13 (11/14/00, p. 35). Complainant used the operating cost information from Formel because, as the least expensive estimate of the three, it resulted in the most conservative estimate of economic benefit.

[30] Tr., 6/30/09, p. 41

amount to $41,061.00 per year[31]. Thus, the electrical cost alone represented 28% of the total annual operating cost, and almost 45% of the annual operating cost once "taxes, insurance, administrative" costs were subtracted. Obviously, electrical costs for the RTO are not 'insignificant'.

In a weak attempt to explain the gross deviation from his prior testimony, Mr. Trzupek claimed that the information he presented to Illinois EPA for review (and used at hearing before the Board in the adjusted standard hearings), did not represent an " actual cost", and that the "EPA methodology for RACT and BACT purposes is much higher...delivers much higher costs than the real world[32]." However, in his rebuttal testimony, David Bloomberg (who reviewed these same cost estimates on behalf of the Agency), stated that the figures presented by Mr. Trzupek were not represented as a 'fiction', but were approximated accurate operating costs[33]. Mr. Bloomberg also testified that the numbers would not be significantly different if USEPA's RACT analysis was applied[34]. Mr. Trzupek's attempt to explain away his prior testimony was a complete failure.

In fairness to Mr. Trzupek, his estimate of $15,000.00 annual operating cost (or less than $1,000 per ton of controlled VOM) was for Press 4 only, and for operation of a hypothetical, small 'used' control device that was neither purchased nor installed[35]. Obviously, all of Mr.

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[31]Respondent's Exhibit 57

[32]Tr., 6/30/09, pp. 56-17

[33]Tr., 6/30/09, p. 158

[34]Id.

[35]*Tr.*, 6/30/09, p.100

Trzupek's testimony regarding the 'hypothetical' control device is pure speculation, and not entitled to serious consideration by the Board.

No real RTO operating cost data was ever generated by Packaging. As testified by Mr. Styzens, he had sought the information from Packaging on several occasions, but received nothing[36]. Because Complainant's economic benefit estimate is based on information reviewed by Illinois EPA, and submitted under oath in a prior Board proceeding, Complainant's estimate of annual operating costs is conservative and accurate.

C. Packaging's Alternative 'Compliance' Options are Unreasonable

Packaging attempts to turn the established concept of economic benefit of noncompliance on its head by proposing several 'compliance' alternatives, each with its own minimized cost. None of these 'alternative' scenarios would have resulted in actual compliance with the Act and Flexographic Printing regulations, and therefore must be rejected by the Board.

1. Shutting down Press No. 4, or moving it to Michigan

The pertinent regulations apply to emission sources within the Chicago ozone-nonattainment area[37]. Clearly, if Packaging had no emission sources, the regulations would not apply to its operations. However, it did have noncompliant emission units (including both Press No. 4 and Press No. 5) during the relevant period and it did operate in violation of the Flexographic Printing Rules for many years. As shown by Complainant, this resulted in a large economic benefit.

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[36] *Tr.*, 6/29/09, p. 119.

[37] 35 Ill. Adm. Code 218.103

Packaging did not acquire its Michigan facility until late 2002, seven years after it became subject to the Flexographic Printing Rules[38]. Obviously, operating Press 4 in Michigan could not have been the "lowest cost alternative for achieving compliance" during most, or all of the noncompliance period. Also, Packaging's argument is the same as claiming that if a company never operated, it would have spent no money on compliance measures, and therefore realized no economic benefit. That does not mean that the Board should accept 'non-operation' as a compliance alternative. If accepted, this absurd argument would provide a defense to all environmental violations.

2. Adjusted Standard

As previously noted, Packaging never applied to the Board for an adjusted standard, and passed on several opportunities to do so. The Board should find that Packaging waived any right to an adjusted standard by its inaction, and should not consider an unfiled adjusted standard petition as an 'alternative means of compliance'. However, even if Packaging had obtained an adjusted standard, it would not have come into compliance with the Flexographic Printing Rules.....they simply would not apply to Packaging.

An adjusted standard is "... *an alternative standard granted by the Board in an adjudicatory proceeding pursuant to Section 28.1 of the Act and 35 Ill. Adm. Code 104, Subpart D. The adjusted standard applies instead of the rule or regulation of general applicability.* 35 Ill. Adm. Code 101.202. An adjusted standard "...*has the effect of an environmental regulation that would apply to petitioner, if granted, in lieu of the general regulation that would otherwise be applicable to a petitioner and the regulated community.* 35 Ill. Adm. Code 104.400.

[38] Tr., 6/30/09, p. 220

Packaging never applied for or obtained an adjusted standard. Therefore, it was always bound by the 'general regulation', i.e. the control requirements of the Flexographic Printing Rules. If it had been able to meet its burden and obtain an adjusted standard (no sure bet...of all the printers who cooperated with Illinois EPA, only three obtained adjusted standards), it would not have 'complied' with the Flexographic Printing Rules control requirements-those requirements would not apply to them.

3. Installation of a Used RTO

Packaging's argument that it 'could have' installed a used controller for 'Press No. 4 only', is similarly flawed. First, the argument ignores the fact that Press No. 5 was also out of compliance throughout the relevant period, and did not come into compliance until connected to the (new, larger) RTO in late 2003-early 2004. Second, the cost information used in Packaging's calculations is pure speculation. The $75,000.00 'cost' was provided twelve (12) years after the control regulations became applicable to Packaging's business. The sole "evidence" is a one page letter from Ship & Shore Environmental Inc., dated June 15, 2007[39]. The letter refers to a hypothetical purchase in 2003, eight years after Packaging was required to be in compliance. No one from Ship & Shore was named as a witness by Packaging, and none testified at hearing. There is no evidence that such a 'used' device was even available during the period of Packaging's noncompliance.

Finally, it is clear that Packaging had no interest in a 'used' device, and therefore it cannot reasonably be considered as an alternative. Packaging's Plant Manager testified that prior to their eventual purchase of the RTO, a "small used oxidizer" had been proposed, but that

[39] Respondent's Exhibit 44.

he "had no interest in that"[40]. Obviously, Packaging did not believe that a used oxidizer would fit their business. The only logical measure of Packaging's avoided compliance costs are the costs of the RTO installed in late 2003.

VIII. PACKAGING'S CURRENT PERMIT ISSUES ARE IRRELEVANT

Complainant seeks penalties for Packaging's violations during the period described in the Amended Complaint. It does not seek penalties for action or inaction after July 11, 2005. However, Packaging dedicates a significant portion of its Response to permit issues now pending with the Agency. For example, Packaging claims that Illinois EPA's alleged "failure to issue Packaging an operating Permit has frustrated Packaging's ability to fully comply with the regulations"[41]. The "permit" referred to is a FESOP Permit applied for in Packaging's 2006 amended FESOP application, and has absolutely nothing to do with this case. Packaging's admitted noncompliance with the regulations refers to *present* noncompliance, not the noncompliance alleged in the Amended Complaint. It may be that Packaging is attempting to confuse the Board about its past noncompliance, or is seeking to gain sympathy based on its current problems with the Agency. Neither is appropriate. If Packaging believes it is being treated unfairly on current permit issues, it has the option of appealing the Agency's permit decisions to the Board. If it is currently in violation of the ERMS regulations, and such violation results in a second enforcement action, it can raise these defenses at that time.

Packaging has admitted its failure to obtain the construction, operating, and CAAPP permits that are relevant to this case[42]. Packaging's arguments regarding the Agency's current

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[40] *Tr.*, 6/30/09, p. 235
[41] Response, p. 15
[42] See: Complainant's Exhibit No. 5

position on its FESOP application, and its dispute regarding ATU's and the ERMS program are just not relevant, and should not be considered by the Board.

IX. CONCLUSION

For the reasons set forth herein and in Complainant's Post-Hearing Brief, Complaint requests that the Board find the Respondent, Packaging Personified Inc., in violation as alleged in Counts I through X, and Count XII of the Amended Complaint, assess a civil penalty against the Respondent in an amount no less than $861,274.00, and order such other relief as the Board deems appropriate.

RESPECTFULLY SUBMITTED

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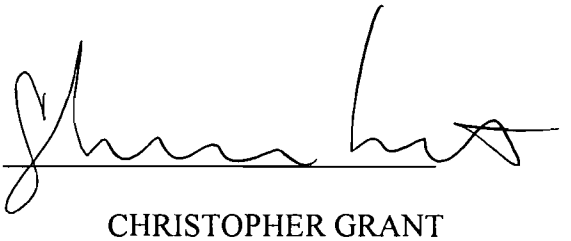
CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 3d day of December, 2009 the foregoing Reply and Notice of filing upon the persons listed below, 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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