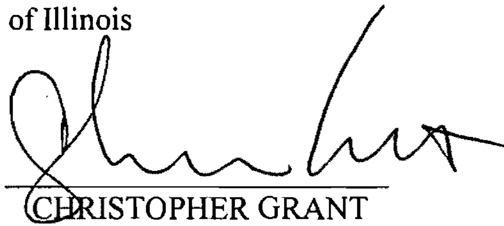
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that on March 28 , 2012, Complainant filed its Motion for Reconsideration of the Board's March 1, 2012 Order, by electronic filing. A copy of Complainant's Motion is attached hereto and herewith served upon you.

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, Complainant, v. PACKAGING PERSONIFIED, INC., an Illinois corporation, Respondent.	))))))))))	PCB 04-16 (Enforcement - Air)

MOTION FOR RECONSIDERATION
OF THE BOARD'S MARCH 1, 2012 ORDER

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and respectfully requests that the Illinois Pollution Control Board ("Board") reconsider its March 1, 2012 decision on Respondent's Motion for Reconsideration ("March 1, 2012 Order").

I. REQUEST FOR RECONSIDERATION

Complainant requests that the Board reconsider and reverse its March 1, 2012 Order. A motion to reconsider may be brought to raise the possibility of errors in the Board's previous application of existing law. [1]

Section 101.520 of the Board's procedural rules provides for motions for reconsideration or modification of "final Board orders". While Complainant does not claim that the March 1, 2012 Order is a "final order" as that term is defined in 35 Ill. Adm. Code 101.202, Complainant notes that the Board's procedural rules do not expressly bar requests for reconsideration of other post-judgment orders. Also, Complainant notes that the Board has granted reconsideration of

[1] *T-Town Drive Thru, Inc. v. Illinois EPA*, PCB 07-85, June 19, 2008 (slip op. at 1)

non-final orders in other cases.[2] Moreover, Complainant did not seek reconsideration of the September 8, 2011 Board decision, and therefore is not seeking a 'second bite of the apple' by requesting reconsideration of the March 1, 2012 Order.

II. MARCH 1, 2012 BOARD ORDER

The Board has erred by directing a hearing on issues which cannot support a legitimate 'lowest cost estimate for compliance'. In its March 1, 2012 Order, the Board directed the parties back to hearing to evaluate whether Respondent could establish a new 'lowest cost alternative for achieving compliance', based on a theory raised in Respondent's Motion for Reconsideration ("Shutdown/Shift Theory"). Essentially, Respondent asserts that it *could have* shut down Press No. 4, which was indisputably noncompliant with the Flexographic Printing Rules; *could have* run all printing jobs for both presses on Press No. 5 (which the Board found to be noncompliant); and *could have* demonstrated compliance on Press No. 5. Respondent argues that the possibility that it could have *not operated* Press No. 4 makes that option the 'lowest cost alternative' for achieving compliance. We disagree.

In deciding that the Shutdown/Shift Theory, if proved, could represented a lowest cost alternative, the Board misapplied the term "compliance" by allowing argument on the hypothetical non-operation of Press No. 4. In addition, the Board erred by implicitly finding that Press No. 5 could be deemed compliant, despite the absence of the compliance demonstration required by the Board regulations. Also, by allowing extensive consideration of hypothetical compliance options, the Board's ruling conflicts with its findings in earlier Board cases.

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[2] For example, *in E.R. 1, LLC v. Erma I Seiber*, PCB 08-30 (April 21, 2011) the Board ruled on Respondent's request for reconsideration of the Board's denial of Motions to Dismiss and for Summary Judgment, which are not generally considered final and appealable.

III. THE BOARD ERRED IN FINDING THAT NON-OPERATION OF PRESS NO. 4 COULD REPRESENT THE 'LOWEST COST ALTERNATIVE' FOR COMPLIANCE

a. "Compliance" Required Control of VOM Emissions

Respondent's Shutdown/Shift Theory of economic benefit is based entirely on the assumption that hypothetical non-operation of Press No. 4 would constitute "compliance"[3]. However, this theory is legally and factually incorrect, and cannot support a reduced lowest cost alternative estimate.

Because Press No. 4 operated after March 15, 1995, it was subject to the volatile organic material ("VOM") control requirements of the Flexographic Printing Rules. Section 218.401 of these Rules, 35 Ill. Adm. Code 218.401, provides, in pertinent part:

* * *

c) Capture System and Control Device Requirements

1) Prior to August 1, 2010, *no owner or operator* of a subject flexographic or rotogravure printing line equipped with a capture system and control device *shall operate the subject printing line* unless the owner or operator meets the requirements in subsection (c)(1)(A)(i), (c)(1)(A)(ii), or (c)(1)(A)(iii), as well as subsections (c)(1)(D), (c)(5), and (c)(6). (emphasis added)

A One of:

i) A carbon adsorption system is used that reduces the captured VOM emissions by at least 90 percent by weight; or

ii) An incineration system is used that reduces the captured VOM emissions by at least 90 percent by weight; or

iii) An alternative VOM emission reduction system is used that is demonstrated to have at least a 90 percent control device efficiency, approved by the Agency and approved by

[3] Respondent made similar arguments related to a hypothetical adjusted standard petition as a possible "lowest cost of compliance", which were rejected by the Board. September 8, 2011 Order, pp. 36-7

USEPA as a SIP revision; and

B) The printing line is equipped with a capture system and control device that provides an overall reduction in VOM emissions of at least:

i) 75 percent where a publication rotogravure printing line is employed; or

ii) 65 percent where a packaging rotogravure printing line is employed; or

iii) 60 percent where a flexographic printing line is employed;

Section 218.401(c) prohibits *operation* without VOM control. But Respondent freely, voluntarily, and willfully operated Press No. 4 from at least March 15, 1995 until the end of 2002, without any control whatsoever.

'Compliance' with 35 Ill. Adm. Code 218.401 required installation and operation of one of the control devices described in 35 Ill. Adm. Code 218.401(c)(1)(a) during the period of operation.[4] 'Compliance' also required that capture and control be demonstrated by the Respondent. Therefore, any "lowest cost alternative for achieving compliance" used in an economic benefit estimate *must* be based on a VOM capture and control device for an operating Press No. 4.

b. Non-Operation Cannot be "Compliance"

Clearly, the hypothetical *non*-operation of Press No. 4 cannot be "compliance", and therefore cannot legitimately be used to calculate the lowest cost option. Because Press No. 4 actually operated, only demonstrated VOM control would constitute compliance. And, if Press No. 4 had *not* operated, it would never have been subject to the VOM control requirements in the

[4] The other compliance options provided in 218.401 are not relevant to this case.

first place. The Part 218 regulations only apply to *actual* VOM emissions from operating sources. Section 218.100 of the Board regulations provides, in pertinent part, as follows:

> **Section 218.100 Introduction**
>
> a) This Part contains standards and limitations for emissions of organic material and volatile organic material from stationary sources located in the Chicago area, which is comprised of Cook, DuPage, Kane, Lake, McHenry and Will Counties and Aux Sable Township and Goose Lake Township in Grundy County and Oswego Township in Kendall County.

If Press No. 4 did not operate (or was in Michigan, or never existed), it would not be emitting VOM in the Chicago area, and would not be regulated under Part 218. The Flexographic Printing Rules would not apply.

Section 218.402 of the Board regulations provide, in pertinent part, as follows:

> **Section 218.402 Applicability**
>
> a) Except as otherwise provided in Section 218.401, the limitations of Section 218.401 of this Subpart apply to all flexographic and rotogravure printing lines at a subject source. Sources with flexographic and/or rotogravure printing lines are subject sources ....

If Press No. 4 was not operating, it would not be a 'flexographic printing line' regulated under these rules. An emission unit cannot be in 'compliance' with a regulation that does not apply to it. Nor could it be in 'noncompliance'. It would be absurd to interpret non-operation of Press No. 4 as "compliance" with a regulation that does not even bind it. Therefore, it would be error to accept any 'lowest cost alternative' estimate that relies entirely on such a hypothetical assumption. Because non-operation cannot constitute 'compliance', a second hearing based on Respondent's Shutdown/Shift Theory is unnecessary.

In conclusion, as a matter of law, the lowest cost to comply *cannot* be "we could have shut down that equipment and thereby never violated in the first place." Respondent did in fact

operate in violation of the Act. The lowest cost to comply *assumes* that operation occurred. The relevant inquiry in this case, since Respondent did operate Press No. 4, is: what costs did Respondent avoid and what economic benefit did it receive by operating without investing in control equipment? That value is the illegal benefit that Respondent obtained over its competitors who followed the law. The Act and Board regulations do not allow for argument that the lowest cost to comply was not operating in violation from the beginning.

IV. THE BOARD ERRED IN FINDING THAT PRESS NO. 5 COULD BE DEEMED COMPLIANT IN THE ABSENCE OF COMPLIANCE TESTING

In addition to non-operation of Press No. 4, Respondent's Shutdown/Shift Theory relies *entirely* on proof that Press No. 5, which would hypothetically take over the production from the hypothetically shut down Press No. 4, could be deemed a compliant control device. By sending the parties to a second hearing on this issue, the Board implies that a compliance demonstration can be satisfactorily made without testing in accordance with the Part 218 regulations. However, such a finding would violate the Board regulations, and the Board's acceptance of this theory of compliance is in error.

a. Compliance can only be Demonstrated in Accordance with 35 Ill. Adm. Code 218.105

The Record shows that on December 12, 2001, Respondent's expert Richard Trzupek performed an evaluation of Press No. 5 without notice to Illinois EPA. Mr. Trzupek did not perform a capture efficiency test at the time.[5] He advised the Respondent that a full test would be required before Press No. 5 could be deemed compliant.[6] However, Respondent never performed a compliance test on Press No.5. Instead, it installed a regenerative thermal oxidizer ("RTO") VOM control device, connected Presses 5 and 6 to the new device, and performed a

[5] Id., p.7
[6] Id.

compliance test on the emissions coming from the RTO; this was done three years later, on February 26, 2004.[7]

As a matter of law, the compliance of Press No. 5 cannot be deemed to have taken place any earlier than February 26, 2004, because the Board's rules require compliance testing to demonstrate compliance with the Flexographic Printing Rules.

The Board has already found that Press No. 5 was noncompliant during the period between March 15, 1995 and February 26, 2004, and required control. [8] Consistent with the Board's own regulations, the Board should also find that the testing requirements are the *sole method* for demonstrating compliance.

Section 218.401(c)(6) of the Board's flexographic printing rules, 35 Ill. Adm. Code 218.401(c)(6), provides, in pertinent part, as follows:

> c) Any owner or operator of a printing line subject to the limitations of Section 218.401 of this Part and complying by means of Section 218.401(a) of this Part *shall* comply with the following:
>
> * * *
>
> 6) The capture system and control device are operated at all times when the subject printing line is in operation. The owner or operator *shall* demonstrate compliance with this subsection by using the applicable capture system and control device test methods and procedures specified in Section 218.105(c) through Section 218.105(f) of this Part and by complying with the recordkeeping and reporting requirements specified in Section 218.404(e) of this Part.... (emphasis added)

Section 218.105 of the Board regulations, 35 Ill. Adm. Code 218.105, provides, in pertinent part, as follows:

Section 218.105 Test Methods and Procedures

[7] September 8, 2011 Final Order, p. 9
[8] Id., p.37

*   *   *

c) Capture System Efficiency Test Protocols

1) Applicability

The requirements of subsection (c)(2) of this Section *shall apply to all VOM emitting process emission units* employing capture equipment (e.g., hoods, ducts), except those cases noted in this subsection (c)(1). (emphasis added)

*   *   *

2) Capture Efficiency Protocols

The capture efficiency of an emission unit *shall* be measured using one of the protocols given below. (emphasis added)

The Board's Flexographic Printing Rules allow for only *one* method for demonstrating compliance with VOM capture and control requirements: testing performed in accordance with 35 Ill. Adm. Code 218.105. There are no provisions allowing for the demonstration of compliance through opinions or expert testimony, eleven years after the fact.

b. A Hearing on a "Hypothetical Stack Test" Cannot Prove Compliance

The Board has directed the parties to hearing on the question:

> *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)?*[9]

Clearly, this issue cannot be resolved through a second hearing. As noted, the sole method for demonstrating compliance is through the test methods contained in 35 Ill. Adm. Code Sections 218.105 and 218.401(c). Demonstration of VOM control of Press No. 5 was due March 15, 1995. But testing was *never* performed on Press No. 5. Compliance testing was only performed on the RTO collecting emissions from Presses No. 5 and 6.

[9] March 1, 2012 Order, p.17

It is not possible to go back to the year 1995 and perform compliance testing on Press No. 5. Therefore, there is no way to demonstrate the compliance of Press No. 5 in 1995. The same is true for the entire period from March 15, 1995 through February 26, 2004[10].

Respondent repeatedly uses the (invented) term 'informal stack test' in its briefs. The Board seems to have accepted this concept, as it has directed a hearing on a 'formal stack test'. But these characterizations are unnecessary. There are not two types of compliance tests, only one. A regulated entity is required to test and demonstrate compliance in accordance with the Flexographic Printing Rules and 35 Ill. Adm. Code 218.105. Respondent did not perform this testing until after installation of the RTO. Only then could Press No. 5 be deemed compliant, and not individually, but only as controlled by the RTO. Also, because the test was not performed until February 26, 2004, Press No.5, controlled or uncontrolled, could not have been deemed "retroactively" compliant.

Therefore, a hearing on the issue of whether Press No. 5 "would have" demonstrated compliance can serve no purpose. And, because Respondent's Shutdown/Shift Theory relies on retroactively demonstrating the compliance of Press No. 5, beginning in 1995, its position on the "lowest cost alternative for achieving compliance" *cannot* succeed. The Board should reconsider its March 1, 2012 Order and reinstate its September 8, 2011 Final Order.

c. The Dissent Correctly Found that Reconsideration of Press No. 5's Compliance Status is Improper

Complainant agrees with the Dissent that, because Press No. 5 has already been found to be noncompliant, a second hearing on Press No. 5's 'possible compliance' is not appropriate.

[10] The Board should also note that the operating conditions of Press No. 5 have been completely altered. Press No. 5, which operated uncontrolled from 1995 through 2003, has been reengineered and connected to the RTO. Competent and reliable evidence regarding the operating conditions in 1995 would be almost impossible to obtain. Respondent's engineering witness did not even visit the facility until 2001.

The Dissent noted that Respondent's failure to perform a compliance test was sufficient proof, and therefore termed Respondent's Shutdown/Shift Theory "meritless".[11] The Dissent also found that Respondent's theory did not rely on newly discovered evidence.

The Dissent is correct in finding that no new evidence was presented in Respondent's Motion for Reconsideration. Throughout two days of hearing, Respondent entered evidence about its 'informal' stack test, in an attempt to prove that Press No. 5 was in 'substantive compliance'[12]. However, Respondent used this 'evidence' primarily in support of its claim that only Press No. 4 required control and a smaller device could have been used.[13] Respondent also entered 'evidence' regarding the hypothetical non-operation of Press No. 4, which was used in support of its arguments regarding a hypothetical 'could have moved to Michigan' compliance option[14]. Respondent also used this same 'evidence' in the November, 2009 version of its Shutdown/Shift argument. After the Board rejected these options in its September 8, 2011 Final Order, the Respondent slightly modified the Shutdown/Shift theory, and called it 'new evidence'. In reality, Respondent presented no new evidence at all.[15] The Shutdown/Shift theory is nothing more than a slight re-characterization of its prior 'compliance' options.

IV. THE BOARD'S MARCH 1, 2012 ORDER CONFLICTS WITH PRIOR BOARD DECISIONS

By accepting a "lowest cost alternative" option that relies entirely on two hypothetical assumptions, the Board has created an irreconcilable conflict with its earlier decisions. Complainant requests that the Board reconsider the March 1, 2012 Order in light of its prior

[11] *People v. Packaging Personified, Inc.*, PCB 04-16, March 1, 2012 (Dissenting Opinion, p.3)
[12] The Board rejected this argument. September 8, 2011 Final Order, p. 37
[13] See: Respondent's Post Hearing Brief, filed November 6, 2009, p.43.
[14] Id., p. 44
[15] Id. Respondent's prior arguments regarding Press 5's hypothetical compliance and its ability to hypothetically 'absorb' Press No.4's business are nearly identical to those raised in its Motion to Reconsider. But the Board has already rejected these arguments.

holding in *People v. Panhandle Eastern Pipe Line Company.* [16]

The *Panhandle* case involved excessive NO_X emissions at Panhandle Eastern Pipe Line Company's ("Panhandle's") Glenarm, Illinois compressor station. Panhandle violated emission limits from 1989 to 1998 by failing to install NOx control equipment. However, Panhandle argued that it *could have* installed control equipment at a much lower cost during a 1988 maintenance shutdown, and therefore realized no economic benefit whatsoever from avoiding NOx control for nine years. [17] In essence, Panhandle was arguing that hypothetical compliance ten years prior to the filing of the enforcement case should be considered as the 'lowest cost alternative for achieving compliance'.

The Board summarily rejected Panhandle's 'hypothetical compliance' argument. In its opinion, the Board found:

> Applying the [hypothetical retrofit] argument could encourage companies to put off compliance or at least not be as diligent as they should be in monitoring compliance—any penalty that a company might face if it gets caught in violation could be diminished because the company did *not* spend money to comply when it should have. The deterrent effect of civil penalties is compromised if the violator gets "credit" for ignoring its legal obligations. Panhandle's argument turns one of the primary purposes served by civil penalties on its head and the Board rejects it.[18]

Here, as in the *Panhandle* case, Respondent Packaging Personified is attempting to nullify the actual cost savings realized from its failure to operate a required control device. Where Panhandle argued that it 'could have installed' control equipment earlier, Packaging Personified is arguing that it 'could have not operated Press No. 4', and 'could have demonstrated compliance on Press No.5'. But Panhandle did *not* install control equipment in 1988. And in our case, Packaging Personified *did* operate Press No. 4 from 1995 until 2002, and

[16] PCB 99-191 (Nov. 15, 2001)

[17] Id., slip op. at 32

[18] Id.

did *not* demonstrate compliance on Press No. 5.

The Board's refusal to allow hypothetical compliance as a 'low cost alternative' in the *Panhandle* case was sound. The Board should not now reverse this position. Just as in the *Panhandle* case, the Board should find that allowing a 'hypothetical non-operation' theory to virtually eliminate Packaging Personified's economic benefit would compromise the deterrent effect of civil penalties. In our case, there is no dispute that the non-compliant press did operate, uncontrolled, for at least seven years. There is no dispute that Packaging Personified installed a control device costing $250,000.00 to return its facility to compliance. There is no question that annual operating costs for this control device were avoided for at least seven years. At bottom, Packaging Personified's Shutdown/Shift Theory says nothing more than 'if we had not violated the law, we would not have benefitted financially from violating the law'. But, of course, it did violate the Act and the Flexographic printing rules. And, by avoiding control costs for two presses, it enjoyed substantial economic benefit.

The Board cannot allow the Respondent to argue 'hypothetical non-operation' (meaning 'hypothetical non-violation') as a compliance alternative. If Respondent's argument is accepted by the Board, recovery of economic benefit from violations of the Act will become impossible. Any Respondent caught operating in violation will argue that they *could have* shut down noncompliant equipment, and therefore they realized no economic benefit.

The Board should follow the rationale in its *Panhandle* decision, and reject absurd hypothetical arguments related to 'lowest cost alternative for achieving compliance'. The Board should reconsider its March 1, 2012 Order, and reinstate the September 8, 2011 Final Order.

V. CONCLUSION

The General Assembly has provided for the mandatory recovery of the economic

benefit of noncompliance derived from violations of the Act. Recovery of this illegal benefit has proved to be an important enforcement tool. Among other things, recovery through civil penalty ensures that a noncompliant entity will not gain an unfair competitive advantage from avoided compliance expenditures. However, violators frequently attempt to confuse the genuine issues in an attempt to nullify demonstrable economic benefit.[19]

In its March 1, 2012 Order, the Board directs the parties to hearing on issues that are *completely irrelevant* to an assessment of Respondent's economic benefit of noncompliance. The hypothetical shutdown of Press No. 4 in 1995 would have absolutely no bearing on Respondent's compliance status, because a nonexistent or inoperable press would not be regulated. And an *operating* press No. 4 could only comply through VOM control operated in the manner specified in the Flexographic Printing Rules. Respondent's "shutdown equals compliance" argument is therefore irrational and internally inconsistent.

Continued argument regarding the 'compliance' of Press No. 5 would be similarly useless. The Board has already determined that Press No. 5 required control, and was noncompliant. Any attempt to prove the compliance of Press No. 5 through expert testimony would be futile. The Board's own regulations require compliance testing in accordance with 35 Ill. Adm. Code 218.105. Therefore, a hearing *cannot* result in a finding that Press No. 5 could have been in compliance during the relevant period. For the reasons expressed by the Dissent, the Board should ratify its September 8, 2011 Final Order, and reject continued arguments about 'retroactive compliance' of Press No. 5.

Finally, acceptance of the Shutdown/Shift theory would destroy the deterrent effect of

[19] See: e.g. *U.S. v. Smithfield Foods, Inc.* 191 F.3d 516 (4th Cir. 1999) (attempt to offset capital expenses unrelated to compliance rejected); *People v. Toyal America, Inc.*, PCB 00-211 (July 15, 2010), aff'd 2012 WL 372960 (3d Dist. 2012) (attempt to offset 'foregone benefit' of increased solvent recovery rejected).

recovery of economic benefit. If 'hypothetical non-operation' (i.e. 'hypothetical non-violation') is accepted by the Board as a compliance alternative, future Respondents will be able to completely nullify recovery of real, demonstrable, avoided compliance expenditures. The Board must not allow this to occur. The Board should follow its decision in *Panhandle, and* reject any compliance argument that requires it to ignore both a Respondent's operating violations and the cost saving resulting from these violations.

This case has been pending before the Board for eight years. Respondent has retained its avoided compliance expenditures throughout this period. A second hearing dedicated to Respondent's Shutdown/Shift Theory cannot provide any competent evidence relevant to civil penalty, and will only delay a final resolution.

Complainant respectfully requests that the Board reconsider and reverse its March 1, 2012 Order, and reinstate its September 8, 2011 decision.

RESPECTFULLY SUBMITTED

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Attorney General of the State of Illinois

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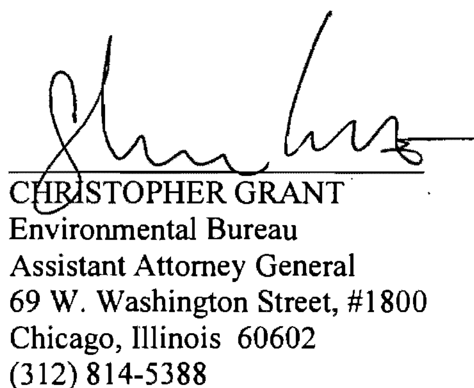

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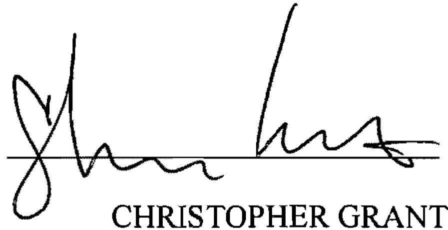
Respondent.	)	

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 28th day of March, 2012, the foregoing Motion for Reconsideration of the Board's March 1, 2012 Order, 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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