

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**


PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
) No. PCB 2011-024  
v. )  
)  
U.S. CHROME CORPORATION OF )  
ILLINOIS, INC., a Connecticut corporation, )  
)  
Respondent. )

**NOTICE OF FILING**

To: See Attached Service List.  
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Complainant's MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, a copy of which is herewith served upon you.

Respectfully submitted,



George D. Theophilos  
Assistant Attorney General

Office of the Illinois Attorney General  
Environmental Bureau  
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(312) 814-6986

Date: February 15, 2012

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

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**MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES**

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), and respectfully requests that Respondent U.S. CHROME CORPORATION OF ILLINOIS INC.'s Affirmative Defenses to the Complaint be stricken. In support thereof, Complainant states as follows:

**I. INTRODUCTION**

On December 1, 2010, Complainant, People of the State of Illinois ("People"), filed a six-count Complaint against U.S. Chrome Corporation of Illinois, Inc. ("U.S. Chrome" or "Respondent") alleging violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act") and the Illinois Pollution Control Board's ("Board") regulations thereunder arising out of Respondent's construction or operation of chromium electroplating tanks at its facility at 305 Herbert Road, Herbert, Boone County, Illinois. On July 28, 2011, U.S. Chrome filed its Answer and Affirmative Defenses to the Complaint ("Answer").

**I. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES**

An affirmative defense is "*A Defendant's assertion raising new facts and arguments that,*

if true will defeat the Plaintiff's or prosecution's claim, even if all allegations in the complaint are true." BLACK'S LAW DICTIONARY (7th edition, 1999). Under Illinois case law, the test for whether a defense is affirmative and must be pled by the defendant is whether it gives color to the opposing party's claim and then asserts a new matter by which the apparent right is defeated. *Ferris Elevator Co., Inc. v. Neffco, Inc.*, 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996). In other words, a valid affirmative defense acknowledges the validity of plaintiff's claim, then seeks to defeat this claim by asserting a new legal theory not contained in the complaint and answer. Where the defect complained about appears from the allegations of the complaint, it is not an affirmative defense and would be properly raised in a motion to dismiss. *Corbett v. Devon Bank*, 12 Ill.App.3d 559, 569-570, 299 N.E.2d 521, 527 (1st Dist. 1973). Accordingly, an affirmative defense confesses or admits the cause of action alleged by the Plaintiff, and then seeks to avoid it by asserting new matter not contained in the complaint and answer. Worner Agency, Inc. v. Doyle, 121 Ill. App.3d 219, 222, 459 N.E.2d 633, 635-636 (4th Dist. 1984); see also People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. Pryweller v. Cohen, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1<sup>st</sup> Dist. 1996), appeal denied, 169 Ill.2d 588 (1996); Heller Equity Capital Corp. v. Clem Environmental Corp., 272 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1<sup>st</sup> Dist. 1993); People v. Wood River Refining Company, PCB 99-120 at 6 (August 8, 2002); Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim).

The facts establishing an affirmative defense must be pled with the same degree of

specificity required by a Plaintiff to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993).

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. The Board rule regarding affirmative defenses provides, in pertinent part, that:

Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

35 Ill. Adm. Code 103.204(d). In addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2010), is instructive, providing that “[t]he facts constituting any affirmative defense...must be plainly set forth in the answer or reply.” The facts establishing an affirmative defense must be pled with the same degree of specificity required by a Plaintiff to establish a cause of action, International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993); Community Landfill Co. at 4.

Affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. People v. Texaco Refining and Marketing, Inc. PCB 02-3, slip op. at 5 (Nov. 6, 2003)(citing People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997) and People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997)).

### **III. RESPONDENT’S AFFIRMATIVE DEFENSES ARE FACTUALLY AND LEGALLY INSUFFICIENT**

#### **A. Respondent’s First Affirmative Defense Should Be Stricken Because it is Factually and Legally Insufficient.**

Respondent’s First Affirmative Defense provides, as follows:

1. U.S. Chrome asserts for its affirmative defense that at all times relevant to this Complaint, it had obtained and was operating pursuant to valid operating permits, including Lifetime Operating Permit 75040121, and was in compliance with all permit conditions and applicable emissions limitations.

Respondent's first purported affirmative defense is a denial rather than an affirmative defense. The Respondent does not recognize the legal validity of the People's complaint, but instead denies legal responsibility for the violations alleged in the complaint. By denying factual and legal responsibility for alleged statutory violations, Respondent does not confess or admit the allegations, or assert a new legal theory defeating the People's claims. A valid affirmative defense must give color to the opposing parties claim, and assert a new legal matter defeating this claim. *Ferris Elevator Co., supra*. Defendant's first purported affirmative defense is not an affirmative defense, and should therefore be stricken.

**B. Respondent's Second Affirmative Defense Should Be Stricken Because it is Factually and Legally Insufficient.**

Respondent's Second Affirmative Defense provides, as follows:

2. U.S. Chrome asserts for its affirmative defense that at all times relevant to this Complaint, any work performed on the chromium electroplating tanks at the facility was performed either pursuant to a valid construction permit or was considered routine maintenance and/or work that would not require a construction permit.

Once again, Respondent's Second Affirmative Defense merely denies that it violated its permit or that a permit was required as alleged by the People. The Respondent's second affirmative defense does not recognize the legal validity of the People's complaint, but instead denies legal responsibility for the violations alleged in the complaint. By denying factual and legal responsibility for alleged statutory violations, Respondent does not confess or admit the allegations, or assert a new legal theory defeating the People's claims. For the same reasons stated above with regard to the first affirmative defense, Respondent's second affirmative defense is not an affirmative defense, and should therefore be stricken.

**C. Respondents' Third Affirmative Defense Should Be Stricken Because It is Factually and Legally Insufficient.**

Respondent's Third Affirmative Defense provides, as follows:

3. U.S. Chrome asserts for its affirmative defense that, to the extent, U.S. Chrome may be shown to have been in temporary violation of any applicable law, regulation, or permit condition, U.S. Chrome would be subjected to an arbitrary and unreasonable hardship if required to pay a penalty. The reasons supporting this include, without limitation: the economic condition of the facility, the small size and limited operations of the facility (the facility only has five employees), that U.S. Chrome was either under the good faith belief that it was in compliance with all applicable laws, regulations, and permit conditions, or upon learning that Illinois EPA believed it was not in compliance, U.S. Chrome proactively took steps to address the concerns of the Illinois EPA, and there was no environmental harm caused by any of the alleged activities..

While Respondent's Third Affirmative Defense comes closer to admitting the violations alleged in the complaint, this affirmative defense merely amounts to an argument concerning possible factors in mitigation of the amount of civil penalty. As this Board has previously held, factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. *People v. Texaco Refining and Marketing, Inc., supra*, and *People v. Midwest Grain Products of Illinois, Inc., supra*. Accordingly, Respondent's third affirmative defense is not a valid affirmative defense, and therefore should be stricken.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this court enter an order striking and dismissing all of Respondent's, U.S. CHROME, INC., Affirmative Defenses, with prejudice.

PEOPLE OF THE STATE OF ILLINOIS, LISA  
MADIGAN

Attorney General of the State of Illinois

By: 

George D. Theophilos

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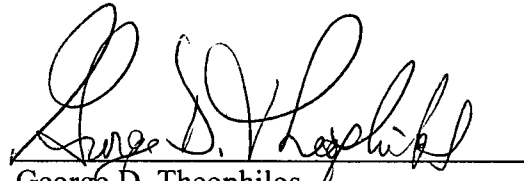


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**CERTIFICATE OF SERVICE**

I, George Theophilos, an Assistant Attorney General, hereby certify that on February 15, 2012, I served true and correct copies of Complainant's MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES upon the persons listed on the Notice of Filing Service List via electronic mail and via First Class Mail.

  
George D. Theophilos  
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