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JUN 24 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS  
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

-vs-

PATTISON ASSOCIATES LLC, an  
Illinois limited liability company,  
and 5701 SOUTH CALUMET LLC, an  
Illinois limited liability company,

Respondents.

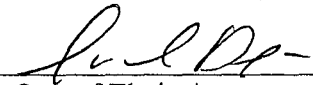
No. PCB 05-181  
(Enforcement – Air)

NOTICE OF FILING

PLEASE TAKE NOTICE that we have today, June 17, 2005, filed with the Office of the Clerk of the Illinois Pollution Control Board an original and fourteen (14) copies of the attached Respondents' Motion to Dismiss Counts I-V of the Complaint Pursuant to Section 2-615 of the Illinois Code of Civil Procedure, a true and correct copy of which is hereby served upon you.

DATED: June 24, 2005

Respectfully submitted,  
PATTISON ASSOCIATES, LLC and  
5701 SOUTH CALUMET, LLC

By:   
One of Their Attorneys

Neal H. Weinfield  
Sonal P. Desai  
Bell, Boyd & Lloyd LLC  
70 West Madison Street  
Suite 3100  
Chicago, IL 60602  
312.372.1121

**CERTIFICATE OF SERVICE**

Sonal Desai, an attorney, hereby certifies that she caused a copy of the attached Respondents' Motion to Dismiss Counts I-V of the Complaint Pursuant to Section 2-615 of the Illinois Code of Civil Procedure to be served upon:

Paula Becker Wheeler Office of the Attorney General 188 West Randolph, 20 <sup>th</sup> Floor Chicago, IL 60601	Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center, Ste. 11-500 100 W. Randolph Street Chicago, Illinois 60601
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Via regular U.S. Mail, postage pre-paid, on June 24, 2005.



Sonal P. Desai

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No. PCB 05-181  
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**RESPONDENTS' MOTION TO DISMISS COUNTS I-V OF  
THE COMPLAINT PURSUANT TO SECTION 2-615 OF  
THE ILLINOIS CODE OF CIVIL PROCEDURE**

Respondents, Pattison Associates, LLC and 5701 South Calumet, LLC

(collectively, "Pattison"), by their attorneys, and pursuant to Section 2-615 of the Illinois Code of Civil Procedure, move to dismiss Counts I through V for failure to state a claim.

In support of their motion, Pattison states as follows:

**I. Legal Standard**

1. When evaluating a motion to dismiss, while the court will accept as true all well-pleaded facts and reasonable inferences therefrom, it need not accept conclusions or inferences unsupported by specific factual allegations. Knox College v. Celotex Corp., 88 Ill.2d 407, 426-7, 430 N.E.2d 976, 986 (1981). Although a court will liberally construe pleadings, the complaint still must allege facts sufficient to state a cause of action. Premier Electrical Construction Co., 159 Ill.App.3d 98, 512 N.E.2d 44, 47 (1<sup>st</sup> Dist. 1987). In order to state a cause of action, a pleading must be both factually and legally sufficient, setting forth a legally cognizable claim, as well as facts bringing the

claim within the cause of action alleged. J. Eck & Sons, Inc., v. Reuben H. Donnelley Corp., 213 Ill.App.3d 510, 572 N.E.2d 1090, 1090-91 (1<sup>st</sup> Dist. 1991).

## II. Argument

### A. Count 1

2. Count I of the Complaint alleges that Pattison violated Section 9(a) of the Illinois Environmental Protection Act (the “Act”) which prohibits a person from “caus[ing] or threaten[ing] or allow[ing] the discharge or emission of any contaminant into the environment...to cause or tend to cause *air pollution*.” See 415 ILCS 5/9(a) (2002); 35 Admin. Code 201.141 (emphasis added). “Air pollution” is defined as the “presence in the *atmosphere* of one or more contaminants *in sufficient quantities* and of *such characteristics and duration as to be injurious....*” See 415 ILCS 5/3.115 (2002) (emphasis added).

3. The State has not pled that Pattison caused air pollution, and indeed no such allegation can be made because none of the tests cited in the Complaint sampled the air. The pre-removal tests cited were of (1) the asbestos material itself, and (2) microvacuum sampling that, under ASTM Standard D5755-03, tests *non-airborne* dust for levels of asbestos structures. See Compl. ¶¶ 8-9, 10. There is no factual allegation that the asbestos entered the “atmosphere,” let alone existed in “sufficient quantities” and of such “characteristics and duration as to be injurious.”

4. Pattison cannot tell from the Complaint if it is alleged to have removed the asbestos, and for that matter from where, and when, and how much. It is the State’s allegation simply that friable asbestos was seen on the Property. See Compl. ¶¶ 7, 12. There are simply no factual allegations that would allow Pattison to determine how

this violated the law. It appears that the State has filed this Complaint more to engage in a discovery fishing expedition than to inform Pattison of its alleged wrongdoing.

**B. Counts II - IV**

5. Counts two through four of the Complaint allege violations of the “Standard for demolition and renovation” as set out in 40 C.F.R. § 61.145. Section 61.145(a)(4) provides that the demolition and renovation standards apply only if certain quantities of regulated asbestos containing material (“RACM”) are “to be *stripped, removed, dislodged, cut, drilled, or similarly disturbed....*” 40 C.F.R. 61.145(a)(4) (emphasis added).

6. The State has alleged no evidence that Pattison stripped, removed, dislodged, cut, drilled, or similarly disturbed asbestos from 5701 South Calumet Avenue. With respect to the basement of the building, the State has not alleged that Pattison conducted stripping, removal, dislodging, cutting drilling, or similar disturbance of the alleged asbestos found in the basement. The Complaint does not even allege that Pattison engaged in any handling of asbestos anywhere in the building. Therefore, the State has not pled sufficient facts that Pattison violated the “Standard for demolition and renovation,” and counts two through four of the Complaint are also deficient.

**C. Count V**

7. Count five of the Complaint alleges a violation of 40 C.F.R. § 61.150(b)(1), titled “Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations.” The waste disposal requirement set forth in § 61.150 applies, however, only to owners or operators covered under the

provisions of §§ 61.144, 61.145, 61.146, and 61.147. None of these sections apply to Pattison. Section 61.145, which applies to demolition and renovation, is inapplicable for the reasons discussed in Paragraph six above. Section 61.144 applies to certain manufacturing operations. Section 61.146 applies to an operation in which asbestos-containing materials are spray applied. Section 61.147 applies to certain fabricating operations. Nowhere in the complaint is it alleged that Pattison engaged in a manufacturing, fabricating, demolition, or spraying operation. There is absolutely no allegation or evidence that Pattison manufactured, spray applied, or fabricated asbestos. Count five, therefore, is deficient as well.

WHEREFORE, respondents Pattison Associates, LLC and 5701 South Calumet, LLC respectfully request that their motion be granted and the Complaint be dismissed.

DATED: June 24, 2005

Respectfully submitted,

PATTISON ASSOCIATES, LLC and  
5701 SOUTH CALUMET, LLC

By:   
One of Their Attorneys

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