

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
-vs-)	No. 05-181
)	
PATTISON ASSOCIATES LLC, an)	(Enforcement - Air)
Illinois limited liability company,)	
and 5701 SOUTH CALUMET LLC, an)	
Illinois limited liability company,)	
)	
Respondents.)	

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

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following Motion to Dismiss Affirmative Defenses, a copy of which is attached and hereby served upon you.

Respectfully submitted,

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

BY:

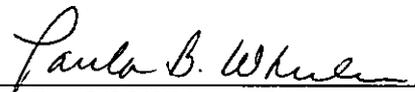

 PAULA BEOKER WHEELER
 Assistant Attorney General
 Environmental Bureau
 188 W. Randolph St., 20th Flr.
 Chicago, IL 60601
 (312) 814-1511

Date: November 16, 2005

THIS DOCUMENT IS PRINTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, PAULA BECKER WHEELER, an Assistant Attorney General in the case of People v. Pattison Associates et al., PCB 05-181, do certify that I caused to be served this 16th day of November, 2005, the foregoing Motion to Dismiss Affirmative Defenses upon the persons listed on said Notice by depositing same in an envelope, by first class postage prepaid, with the United States Postal Service at 188 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.


PAULA BECKER WHEELER

November 16, 2005

SERVICE LIST

Mr. Neal Weinfield/Ms. Allyson L. Wilcox
Bell Boyd & Lloyd
70 West Madison
Suite 3100
Chicago, IL 60602

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601

STANDARD

Pursuant to Illinois case law, the test for whether a defense is affirmative and must be pled by the defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Ferris Elevator Company, Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996); *Condon v. American Telephone and Telegraph Company, Inc.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991). *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635-636 (4th Dist. 1984). In other words, an affirmative defense confesses or admits the cause of action alleged by the complainant, then seeks to avoid it by asserting new matter 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 by a motion to dismiss. *Corbett v. Devon Bank*, 12 Ill. App. 3d. 559, 569-570, 299 N.E.2d 521, 527 (1st Dist. 1973).

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. Further, the facts constituting any affirmative defense must be plainly set forth in the answer. Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2004). Finally, the facts establishing an affirmative defense must be pled with the same degree of specificity required by a complainant 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).

ARGUMENT

General Affirmative Defense No. 1 - Failure to State a Claim

Respondents raise a first affirmative defense of 'failure to state a claim on which relief

can be granted'. The Respondents make no further allegations supporting this affirmative defense. It is the also the same pleading that they made earlier in their Motion to Dismiss the Complaint, previously denied by the Board. In the document at hand, it is not a proper affirmative defense. It fails to assume the facts in the Complaint to be true, it fails to allege any matter that would negate the facts of the Complaint, and it fails to raise any facts outside the four corners of the Complaint. Furthermore, it is not pled with any specificity; in fact, it is a bald statement with no facts alleged at all. Respondents' affirmative defense number one should be stricken, and dismissed with prejudice, as a matter of law.

General Affirmative Defense No. 2 - Failure to Follow Proper Testing Procedures

Respondents raise as a second affirmative defense that the People failed to follow proper testing procedures and/or utilized an inappropriate testing method. This allegation is not a proper affirmative defense. It is basically disputing the facts as alleged in the Complaint. Even if any evidence of such an allegation could be presented, it would only go to the weight of the evidence, and, as such, is a matter for the trier of fact. It is not arising outside the four corners of the Complaint, and is not properly before the Board as an affirmative defense. This second purported affirmative defense should also be stricken, and dismissed with prejudice, as a matter of law.

CONCLUSION

For the foregoing reasons, the Complainant respectfully requests that Respondents',
PATTISON ASSOCIATES LLC and 5701 SOUTH CALUMET LLC, affirmative defenses be
dismissed, with prejudice.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General
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