

**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)

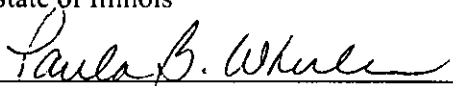
**NOTICE OF FILING**

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 BECKER WHEELER  
Assistant Attorney General  
Environmental Bureau  
188 W. Randolph St., 20<sup>th</sup> 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 16<sup>th</sup> 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  
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Hearing Officer  
Illinois Pollution Control Board  
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Chicago, IL 60601

## BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**MOTION TO DISMISS 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, 35 Ill. Adm. Code 101.506, and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 2-615 (2004), for an order dismissing, with prejudice, Respondents', PATTISON ASSOCIATES LLC and 5701 SOUTH CALUMET LLC, affirmative defenses to the Complaint.

**INTRODUCTION**

On April 4, 2005, Complainant, People of the State of Illinois ("People"), filed a five-count air pollution complaint against Respondents, Pattison Associates LLC, and 5701 South Calumet LLC, ("Respondents") before the Illinois Pollution Control Board, ("Board"). The complaint alleges that the Respondents committed numerous violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2002), and regulations thereunder.

Count I is titled *Air Pollution*, Count II *Failure to Thoroughly Inspect Prior to Renovation*, Count III *Failure to Submit Notification*, Count IV *Failure to Follow Proper Emission Control Procedures*, and Count V *Failure to Follow Proper Disposal Procedures*. On October 14, 2005, Respondents filed their Answer and Affirmative Defenses. Complainant was served with the Answer and Affirmative Defenses on October 17, 2005.

### 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 (2<sup>nd</sup> 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  
State of Illinois

BY:   
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