

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

v.

SIX M. CORPORATION INC., an Illinois corporation, WILLIAM MAXWELL, and MARILYN MAXWELL,

Respondents,

and

JAMES McILVAINE,

Necessary Party-Respondent.

PCB NO. 12-35
(Enforcement-Water)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on December 7, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a RESPONSE TO AFFIRMATIVE DEFENSE, a copy of which is attached hereto and herewith served upon you.


Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

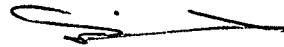
BY: _____


Thomas Davis, Chief
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031

CERTIFICATE OF SERVICE

I hereby certify that I did on December 7, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and RESPONSE TO AFFIRMATIVE DEFENSE upon the persons listed on the Service List.



Thomas Davis, Chief
Environmental Bureau
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

Carol Webb
Hearing Officer
Illinois PCB
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Mr. Patrick Shaw
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Mr. Phillip Van Ness
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1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
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SIX M. CORPORATION INC., an Illinois)
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RESPONSE TO AFFIRMATIVE DEFENSE

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and respectfully objects and responds to the affirmative defense pleaded in the Answer to the Complaint, and states as follows:

Objections

An affirmative defense admits all the elements necessary to establish a claim, while asserting new matter by which the apparent right to relief could be defeated. Such a defense does not deny the allegations of the complaint or petition, but seeks to avoid such allegations by setting up new affirmative matter. See, e.g., *Baylor v. Thiess*, 2 Ill. App. 3d 582 (2nd Dist. 1971). It is well settled that the facts of an affirmative defense must be alleged with particularity. Whether a defense is an affirmative defense turns on whether the defense “gives color to the opposing party’s claim and thus asserts a new matter by which the apparent right is defeated.”

See, e.g., *Ferris Elevator Co. v. Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (3rd Dist. 1996). An affirmative defense that lacks a factual basis is inadequately pled. See, e.g., *Estate of Wrage v. Tracey*, 194 Ill. App. 3d 117, 122 (1st Dist. 1990). The facts establishing the defense must be pleaded by the defendant with the same degree of specificity as is required of a plaintiff alleging the essential elements of a cause of action. See, e.g., *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1st Dist. 1993), appeal denied 152 Ill.2d 558 (1993). An exception to this rule applies where the facts constituting the defense are already pleaded in the complaint. The burden of proof as to any particular affirmative defense is upon the party asserting the defense. See, e.g., *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54 (1965). What must be proven must first be pleaded.

The People object to the affirmative defense of “impossibility” being asserted in this enforcement matter. Impossibility derives from common-law doctrines of contract law and has no application to the enforcement of statutory violations. In particular, the impossibility of performance is an affirmative defense to a breach of contract claim. See, e.g., *Radkiewicz v. Radkiewicz*, 353 Ill. App. 3d 251, 260 (2nd Dist. 2004). It is well settled that the doctrine of impossibility of performance will be applied if there is an unanticipated circumstance that has made the performance of the promise vitally different from what should reasonably have been within the contemplation of the parties when the contract was entered. The doctrine requires that the circumstances creating the impossibility were not and could not have been anticipated by the parties, that the party asserting the doctrine did not contribute to the circumstances, and that the party demonstrate that it has tried all practical alternatives available to permit performance. See, e.g., *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (3rd Dist. 2002).

Answer to Allegations

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.
6. Admit.
7. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.
8. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.
9. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.
10. Admit as to the first sentence. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of the second sentence of this paragraph.
11. Denied.
12. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

13. Admit.

14. Admit.

15. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

16. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

17. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

18. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

19. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

20. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

21. Admit.

22. Admit.

23. Admit.

24. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

25. The Complainant lacks knowledge sufficient to form a belief as to the truth of the

allegations and so denies the substance of this paragraph.

26. The Complainant lacks knowledge sufficient to form a belief as to the truth of the allegations and so denies the substance of this paragraph.

27. Denied.

28. Since this paragraph provides a conclusion of law, not an allegation of fact, no response is required.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 

THOMAS DAVIS, Chief
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Assistant Attorney General

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Dated: 12/07/11