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BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
STRUCTURAL PEST CONTROL BOARD
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOSE McDANIEL
4438 Highland Avenue
San Diego, CA 92115

Applicator's License No. RA 46843

Respondent.

Case No. 2012-12

DEFAULT DECISION AND ORDER

[Gov. Code, §11520]

FINDINGS OF FACT

1. On or about August 22, 2011, Complainant William H. Douglas, in his official capacity as the Interim Registrar/Executive Officer of the Structural Pest Control Board, Department of Consumer Affairs, filed Accusation No. 2012-12, against Jose McDaniel (Respondent). (Accusation attached as Exhibit A.)

2. On or about January 17, 2007, the Structural Pest Control Board (Board) issued Applicator's License No. RA 46843 to Respondent. Said license will expire on January 17, 2012, unless renewed.

3. On or August 25, 2011, Respondent was served by First Class Mail and Certified Mail copies of the Accusation No. 2012-12, Statement to Respondent, Notice of Defense, Request for Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6,

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1 and 11507.7) at Respondent's address of record which, pursuant to Business and Professions
2 Code section 136, is required to be reported and maintained with the Board, which was and is:

3 4438 Highland Avenue
4 San Diego, CA 92115.

5 4. Service of the Accusation was effective as a matter of law under the provisions of
6 Government Code section 11505, subdivision (c) and/or Business & Professions Code section
7 124.

8 5. On or about September 7, 2011, the aforementioned documents were returned by the
9 U.S. Postal Service marked "Attempted Not Known."

10 6. Government Code section 11506 states, in pertinent part:

11 (c) The respondent shall be entitled to a hearing on the merits if the respondent
12 files a notice of defense, and the notice shall be deemed a specific denial of all parts
13 of the accusation not expressly admitted. Failure to file a notice of defense shall
14 constitute a waiver of respondent's right to a hearing, but the agency in its discretion
15 may nevertheless grant a hearing.

16 7. Respondent failed to file a Notice of Defense within 15 days after service upon them
17 of the Accusation, and therefore waived their right to a hearing on the merits of Accusation
18 No. 2012-12.

19 8. California Government Code section 11520 states, in pertinent part:

20 (a) If the respondent either fails to file a notice of defense or to appear at the
21 hearing, the agency may take action based upon the respondent's express admissions
22 or upon other evidence and affidavits may be used as evidence without any notice to
23 respondent.

24 9. Pursuant to its authority under Government Code section 11520, the Board finds
25 Respondent is in default. The Board will take action without further hearing and, based on
26 the relevant evidence contained in the Default Decision Evidence Packet in this matter, as well
27 as taking official notice of all the investigatory reports, exhibits and statements contained
28 therein on file at the Board's offices regarding the allegations contained in Accusation
No. 2012-12, finds that the charges and allegations in Accusation No. 2012-12, are separately and
severally, found to be true and correct by clear and convincing evidence.

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1 10. Taking official notice of its own internal records, pursuant to Business and
2 Professions Code section 125.3, it is hereby determined that the reasonable costs for Investigation
3 and Enforcement is \$1,562.50 as of October 14, 2011.

4 DETERMINATION OF ISSUES

5 1. Based on the foregoing findings of fact, Respondent Jose McDaniel has subjected his
6 Applicator's License Number RA 46843 to discipline.

7 2. The agency has jurisdiction to adjudicate this case by default.

8 3. The Structural Pest Control Board is authorized to revoke Respondent's Applicator's
9 License Number RA 46843 based upon the following violations alleged in the Accusation which
10 are supported by the evidence contained in the Default Decision Evidence Packet in this case:

11 a. On February 9, 2011, in a criminal proceeding entitled *The People of the State of*
12 *California v. Jose McDaniel*, in the Orange County Superior Court, Case Number CD229890,
13 Respondent was convicted by his plea of guilty to violating Health and Safety Code section
14 11379(a) (sale of controlled substances), 2 counts, felonies, with special allegations and
15 admissions by Respondent that in the commission of the above offenses, he was personally armed
16 with a firearm, to wit: a rifle, in violation of Penal Code section 12022(c).

17 b. As a result of the above convictions, the Court stayed the following counts pursuant
18 to Penal Code section 654: Violation of Health and Safety Code sections 11378 (possession for
19 sale of a controlled substance, 3 counts), and 11379(a) (sale of controlled substances, 1 count).
20 The Court committed Respondent to the California Department of Corrections and to the custody
21 of the Sheriff for 365 days. Respondent was given 177 days credit for time served and 176 days
22 good time credits per Penal Code section 4019, for a total of 353 days credit. The Court also
23 ordered Respondent to pay \$1,200 in fines, ordered him to register per Penal Code section 11590,
24 and placed on probation for three (3) years.

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1 ORDER

2 IT IS SO ORDERED that Applicator's License Number 2012-12, heretofore issued to
3 Respondent Jose McDaniel, is revoked.

4 Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a
5 written motion requesting that the Decision be vacated and stating the grounds relied on within
6 seven (7) days after service of the Decision on Respondent. The agency in its discretion may
7 vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

8 This Decision shall become effective on December 21, 2011.

9 It is so ORDERED November 21, 2011

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13 FOR THE STRUCTURAL PEST CONTROL
14 BOARD
15 Department of Pesticide Regulation
16 State of California

17 DOJ Matter ID:SD2011800361
18 80561044.docx

19 Attachment:
20 Exhibit A: Accusation

Exhibit A

Accusation

FILED

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Attorneys for Complainant

Date 8/22/11

By *William H. Douglas*

9 **BEFORE THE**
10 **STRUCTURAL PEST CONTROL BOARD**
11 **DEPARTMENT OF PESTICIDE REGULATION**
STATE OF CALIFORNIA

12 In the Matter of the Accusation Against:

Case No. 2012-12

13 **JOSE McDANIEL**
14 **4438 Highland Avenue**
San Diego, CA 92115

ACCUSATION

15 **Applicator's License No. RA 46843**

16 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

21 1. William H. Douglas (Complainant) brings this Accusation solely in her official
22 capacity as the Interim Registrar/Executive Officer of the Structural Pest Control Board,
23 Department of Pesticide Regulation.

24 2. On or about January 17, 2007, the Structural Pest Control Board issued Applicator's
25 License Number RA 46843, Branch 2, to Jose McDaniel (Respondent). The Applicator's License
26 was in full force and effect at all times relevant to the charges brought herein and will expire on
27 January 17, 2013, unless renewed.

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JURISDICTION

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3. This Accusation is brought before the Structural Pest Control Board (Board), Department of Pesticide Regulation, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 118 of the Code provides that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary proceeding against the licensee or to render a decision imposing discipline on the license.

5. Section 8620 of the Business and Professions Code provides that the Board may suspend or revoke a license when it finds that the holder, while a licensee or applicant, has committed any acts or omissions constituting cause for disciplinary action or in lieu of a suspension may assess a civil penalty.

6. Section 8625 of the Code states:

The lapsing or suspension of a license or company registration by operation of law or by order or decision of the board or a court of law, or the voluntary surrender of a license or company registration shall not deprive the board of jurisdiction to proceed with any investigation of or action or disciplinary proceeding against such licensee or company, or to render a decision suspending or revoking such license or registration.

STATUTORY PROVISIONS

7. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

- (a) Considering the denial of a license by the board under Section 480; or
- (b) Considering the suspension or revocation of a license under Section 490. Each

board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

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1 8. Section 490 of the Code states:

2 (a) In addition to any other action that a board is permitted to take against a
3 licensee, a board may suspend or revoke a license on the ground that the licensee has
4 been convicted of a crime, if the crime is substantially related to the qualifications,
5 functions, or duties of the business or profession for which the license was issued.

6 (b) Notwithstanding any other provision of law, a board may exercise any
7 authority to discipline a licensee for conviction of a crime that is independent of the
8 authority granted under subdivision (a) only if the crime is substantially related to the
9 qualifications, functions, or duties of the business or profession for which the
10 licensee's license was issued.

11 (c) A conviction within the meaning of this section means a plea or verdict of
12 guilty or a conviction following a plea of nolo contendere. Any action that a board is
13 permitted to take following the establishment of a conviction may be taken when the
14 time for appeal has elapsed, or the judgment of conviction has been affirmed on
15 appeal, or when an order granting probation is made suspending the imposition of
16 sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of
17 the Penal Code.

18 (d) The Legislature hereby finds and declares that the application of this section
19 has been made unclear by the holding in *Petropoulos v. Department of Real Estate*
20 (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant
21 number of statutes and regulations in question, resulting in potential harm to the
22 consumers of California from licensees who have been convicted of crimes.
23 Therefore, the Legislature finds and declares that this section establishes an
24 independent basis for a board to impose discipline upon a licensee, and that the
25 amendments to this section made by Senate Bill 797 of the 2007-08 Regular Session
26 do not constitute a change to, but rather are declaratory of, existing law.

27 9. Section 493 of the Code states:

28 Notwithstanding any other provision of law, in a proceeding conducted by a
board within the department pursuant to law to deny an application for a license or to
suspend or revoke a license or otherwise take disciplinary action against a person who
holds a license, upon the ground that the applicant or the licensee has been convicted
of a crime substantially related to the qualifications, functions, and duties of the
licensee in question, the record of conviction of the crime shall be conclusive
evidence of the fact that the conviction occurred, but only of that fact, and the board
may inquire into the circumstances surrounding the commission of the crime in order
to fix the degree of discipline or to determine if the conviction is substantially related
to the qualifications, functions, and duties of the licensee in question.

As used in this section, "license" includes "certificate," "permit," "authority,"
and "registration."

10. Section 8649 of the Code states:

Conviction of a crime substantially related to the qualifications, functions, and
duties of a structural pest control operator, field representative, applicator, or
registered company is a ground for disciplinary action. The certified record of
conviction shall be conclusive evidence thereof.

1 11. Section 8655 of the Code states:

2 A plea or verdict of guilty or a conviction following a plea of nolo contendere
3 made to a charge substantially related to the qualifications, functions, and duties of a
4 structural pest control operator, field representative, applicator, or registered company
5 is deemed to be a conviction within the meaning of this article or Section 8568 of this
6 chapter. The board may order the license or registration suspended or revoked, or
7 may decline to issue a license, when the time for appeal has elapsed, or the judgment
8 of conviction has been affirmed on appeal or when an order granting probation is
9 made suspending the imposition of sentence, irrespective of a subsequent order under
10 the provisions of Section 1203.4 of the Penal Code allowing the individual or
11 registered company to withdraw a plea of guilty and to enter a plea of not guilty, or
12 setting aside the verdict of guilty, or dismissing the accusation, information or
13 indictment.

8 REGULATORY PROVISION

9 12. California Code of Regulations, title 16, section 1937.1 states:

10 For the purposes of denial, suspension or revocation of a license or company
11 registration pursuant to Division 1.5 (commencing with Section 475) of the code, a
12 crime or act shall be considered to be substantially related to the qualifications,
13 functions or duties of a licensee or registered company under Chapter 14 of Division
14 3 of the code if to a substantial degree it evidences present or potential unfitness of
15 such licensee or registered company to perform the functions authorized by the
16 license or company registration in a manner consistent with the public health, safety,
17 or welfare. Such crimes or acts shall include, but not be limited to, the following:

15 (a) Any violation of the provisions of Chapter 14 of Division 3 of the code.

16 (b) Commission of any of the following in connection with the practice of
17 structural pest control:

18 (1) Fiscal dishonesty

19 (2) Fraud

20 (3) Theft

21 (4) Violations relating to the misuse of pesticides.

22 13. California Code of Regulations, title 16, section 1937.2 states:

23
24 (b) When considering the suspension or revocation of a structural pest control
25 license or company registration on the grounds that the licensee or registered
26 company has been convicted of a crime, the board, in evaluating the rehabilitation of
27 such person or company and his or her or its present eligibility for a license or
28 company registration will consider the following:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

1 (3) The time that has elapsed since commission of the act(s) or offense(s).

2 (4) Whether the licensee or registered company has complied with any terms of
3 parole, probation, restitution or any other sanctions lawfully imposed against the
4 licensee or registered company.

5 (5) If applicable, evidence of expungement proceedings pursuant to Section
6 1203.4 of the Penal Code.

7 (6) Evidence, if any of rehabilitation submitted by the licensee or registered
8 company.

9 (c) When considering a petition for reinstatement of a structural pest control
10 license or company registration, the board shall evaluate evidence of rehabilitation
11 submitted by the petitioner, considering those criteria specified in subsection (b).

12 COST RECOVERY

13 14. Section 125.3 of the Code provides that a Board may request the administrative law
14 judge to direct a licentiate found to have committed a violation or violations of the licensing act to
15 pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

16 CAUSE FOR DISCIPLINE

17 (February 9, 2011 Conviction for Sale of Controlled Substances 18 on February 22, 2010 and February 25, 2010)

19 15. Respondent is subject to disciplinary action under Code sections 490, and 8649 in that
20 on January 12, 2010, Respondent was convicted of crimes that are substantially related to
21 the qualifications, functions, and duties of an applicator. The circumstances are as follows:

22 a. On February 9, 2011, in a criminal proceeding entitled *The People of the State of*
23 *California v. Jose McDaniel*, in the Orange County Superior Court, Case Number CD229890,
24 Respondent was convicted by his plea of guilty to violating Health and Safety Code section
25 11379(a) (sale of controlled substances), 2 counts, felonies, with special allegations and
26 admissions by Respondent that in the commission of the above offenses, he was personally armed
27 with a firearm, to wit: a rifle, in violation of Penal Code section 12022(c).

28 b. As a result of the above convictions, the Court stayed the following counts pursuant
to Penal Code section 654: Violation of Health and Safety Code sections 11378 (possession for
sale of a controlled substance, 3 counts), and 11379(a) (sale of controlled substances, 1 count).
The Court committed Respondent to the California Department of Corrections and to the custody

1 of the Sheriff for 365 days. Respondent was given 177 days credit for time served and 176 days
2 good time credits per Penal Code section 4019, for a total of 353 days credit. The Court also
3 ordered Respondent to pay \$1,200 in fines, ordered him to register per Penal Code section 11590,
4 and placed on probation for three (3) years.

5 PRAYER

6 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
7 and that following the hearing, the Structural Pest Control Board issue a decision:

- 8 1. Revoking or suspending Applicator's License Number RA 26843, Branches 2, issued
9 to Jose McDaniel;
- 10 2. Ordering Jose McDaniel to pay the Structural Pest Control Board the reasonable costs
11 of the investigation and enforcement of this case, pursuant to Business and Professions Code
12 section 125.3;
- 13 3. Taking such other and further action as deemed necessary and proper.

14
15 DATED: 8/22/11

William H. Douglas
 WILLIAM H. DOUGLAS
 Interim Registrar/Executive Officer
 Structural Pest Control Board
 Department of Pesticide Regulation
 State of California
 Complainant

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