

1 4. Ms. Tichi mostly worked in the office. She also has an applicator's license in general
2 pest control.

3 5. In 2001, Ms. Tichi and Mr. Barnes agreed to purchase Adams Exterminating from Mr.
4 Palmer.

5 6. On November 27, 2002, the SPCC received Ms. Tichi's and Mr. Barnes' applications
6 to activate their qualifying party licenses and for a new business license for K & S Exterminating,
7 Inc. dba Adams Exterminating ("K & S Exterminating, Inc."). Mr. Barnes was listed as the
8 President of the business and Ms. Tichi was listed as the vice president. Each owned 50% of
9 the business. No other persons were listed on the application.

10 7. The license application included the following description of the business licensee's
11 compliance with financial responsibility requirements:

12 We deal directly with all financial situations within company. Our
13 current liability insurance is carried by Weisenberger. A limit
14 \$1,000,000.00.

15 8. At the SPCC's December 20, 2002 meeting, it granted the application and eventually
16 issued Business License No. 8189 to K & S Exterminating, Inc. Mr. Barnes was the qualifying
17 party on the business license for fumigation, inspection, and application of termiticide to prevent
18 or treat infestation of wood-destroying organisms. Ms. Tichi was the qualifying party on the
19 business license for general pest control.

20 9. In early 2004, the SPCC received a complaint against K & S Exterminating, Inc. from
21 a resident of Sedona about misapplication of a pesticide. The SPCC opened an investigation.

22 10. The SPCC's investigation of K & S Exterminating, Inc.'s business practices was
23 assigned to Projects Program Specialist Alan Pugh, who is in charge of companies in Arizona
24 who are licensed to perform termite work. Mr. Pugh found no evidence of misapplication to
25 support the complaint.

 11. As a result of the complaint, however, the SPCC inspected K & S Exterminating,
Inc.'s business premises and noted improper storage of Vicane pesticide and the presence of
herbicides, which K & S Exterminating, Inc. was not licensed to apply.

 12. On February 24, 2004, the SPCC held a meeting at its offices in Phoenix among its
Executive Director Lisa Gervase, K & S Exterminating, Inc.'s attorney, Mr. Barnes, Ms. Tichi, and
possibly another SPCC employee. At the meeting, Mr. Barnes disclosed that he had not

1 purchased sufficient termiticide to perform the pretreatments that K & S Exterminating, Inc. had
2 performed since licensure so that it could submit the low bid to obtain contracts. Mr. Barnes
3 described the competition in the industry “cut-throat competition.” Mr. Barnes admitted that,
4 despite knowing that insufficient termiticide had been applied, on behalf of K & S Exterminating,
5 Inc. he issued warranties for the pretreatments. He also admitted that he knew his misconduct

6 13. Ms. Tichi did not know about her partner Mr. Barnes’ fraud in applying insufficient
7 termiticide to the pretreatments until shortly before the February 24, 2004 meeting, when he told
8 her about it.

9 14. K & S Exterminating, Inc.’s attorney asked Ms. Gervase what she thought would be
10 a reasonable penalty for K & S Exterminating, Inc.’s president Mr. Barnes’ admitted fraud. Ms.
11 Gervase said she would have to gather records to gauge the extent of the fraud before she
12 suggested an appropriate penalty.

13 15. K & S Exterminating, Inc. cooperated fully in the SPCC’s subsequent investigation.
14 K & S Exterminating, Inc. provided 183 pages of Bate-stamped records about the various
15 inspections and treatments it had performed since it started its business in late 2002.

16 16. Included among the records that K & S Exterminating, Inc. voluntarily produced to
17 the SPCC were 537 completed Termite Action Registration Reports (“TARFs”). These TARFs
18 showed the square footage and linear feet of the treated area, as well as the brand name,
19 concentration, and amount of termiticide used. The TARFs also showed the name of the
20 applicator who had performed the treatment.

21 17. Of the 537 TARFs that K & S Exterminating, Inc. produced, 413 involved the
22 application of termiticide between December 20, 2003 and April 28, 2004.

23 18. The TARFs that showed use of restricted-use termiticides did not record the federal
24 Environmental Protection Agency (“EPA”) registration number for the termiticide. K & S
25 Exterminating, Inc. did not keep any other treatment records.

19. The SPCC also subpoenaed the records of K & S Exterminating, Inc.’s chemical
supplier for the amount of concentrated liquid termiticides that it had purchased during the time
period under investigation. Mr. Pugh testified that the records from the supplier documented
more available concentrated termiticide than K & S Exterminating, Inc.’s records.

20. Mr. Pugh created a database of the termiticide that would have been needed for the treatments on the 413 TARFs involving application of termiticide between December 2002 and April 2004 and compared it with the amount of concentrated termiticide that K & S Exterminating, Inc. had available. Mr. Pugh calculated the available termiticide by multiplying the gallons purchased by 100. He testified that this calculation was conservative because, although many concentrated termiticides require one gallon to produce 100 gallons of finished product, some require 1¼ gallons of concentrate for 100 gallons of finished product.

21. Mr. Pugh compared the amount of termiticide that K & S Exterminating, Inc.'s supplier's records showed were available and the amount of termiticide that its TARFs showed should have been used, as follows:

Year	Gallons Purchased	Finished Available	Pre, Final Grade & Post Treat (Gallons reported on TARFs 12-20-02 through 4-28-04)
2002	0	0	0
2003	86.75	8675	60088
2004 (to 4-28-04)	81.75	8175	33171
TOTAL	168.50	16850	93259

Based on this comparison, Mr. Pugh calculated that K & S Exterminating, Inc. had a 76,409-gallon deficit between the amount termiticide that it should have applied and the amount of termiticide that its supplier's records showed it had available to apply (93,259 gallons minus 16,850 gallons).

22. Mr. Pugh also requested the previous five years' records from K & S Exterminating, Inc.'s predecessor, Adams Exterminating, Business License No. 2133, because K & S Exterminating had not been in business five years and sometimes the sale of a business involves transfer of assets, such as pesticides. Mr. Pugh did not find and K & S Exterminating, Inc. did not claim at hearing that Adams Exterminating had transferred termiticide as part of the sale, or offer any other evidence of any available termiticide to reduce the deficit that Mr. Pugh calculated.

1 23. Mr. Pugh testified that most of the properties at which the TARFs showed that K & S
2 Exterminating, Inc. had applied termiticide were individual residential properties rather than large
3 commercial properties of large multi-unit residential properties, such as apartments or
4 condominiums. There was no large application that could account for the bulk of the calculated
5 deficiency.

6 24. Mr. Pugh also required K & S Exterminating, Inc. to provide information on
7 warranties that had been issued. He testified that K & S Exterminating, Inc. had provided more
8 than 400 warranties. All but one had been signed by Mr. Barnes or Ms. Tichi.

9 25. On August 25, 2004, Mr. Barnes responded to the SPCC's investigation, in relevant
10 part as follows:

11 On Tuesday, February 24, 2004 at approximately 8:45 A.M., I, Ken
12 Barnes met with Director Lisa Gervase to discuss a records request
13 by Alan Pugh. It was at this time I admitted that the chemical would
14 be short for soil treatments and opened an investigation upon myself.
15 I went to Mrs. Gervase on my own free will to basically admit my
16 wrong doing and hope to save my company and business partners
17 license. I would also like to say that my business partner, Shiloh
18 Tichi was not aware of this at all.

19 I know what I did was very wrong and unethical. I would like to say
20 on my behalf that there are a lot of other companies doing this very
21 same violation. How else can competing companies do soil
22 treatments for \$0.14 per square foot?

23 I can only hope with myself coming forward on my own will, that this
24 will have some sort of impact upon my sentencing. Again, I know
25 what I did was wrong, otherwise I wouldn't have went to Lisa
Gervase to begin with. I understand the severity of this complaint, I
am willing to do what it takes to fix this wrong doing. I have been
doing soil treatments since the meeting with Lisa Gervase and have
been doing them correctly to the label. I have found out since this
that by ordering my termiticide in bulk, it only cost me \$28.00 versus
\$65.00 per gallon which I had been paying previously. I also raised
my soil treatment prices.

26 26. The SPCC did not summarily suspend K & S Exterminating, Inc.'s business or Mr.
Barnes' qualifying party or applicator licenses after he admitted his fraud. Ms. Gervase testified
that she was not sure that the SPCC had the resources to monitor K & S Exterminating, Inc.'s
operations. Ms. Gervase testified K & S Exterminating, Inc. was not considered to be a danger

1 to consumers or the public because, once such misconduct comes out, the SPCC “expects the
2 company to mend its ways.”

3 27. K & S Exterminating, Inc. continued to perform termite pretreatments during the
4 pendency of the SPCC’s investigation and the hearing process. Mr. Barnes began purchasing
5 termiticide in bulk, purchased proper equipment, which allows him to apply termiticide more
6 efficiently, and raised his prices. He testified that he used the appropriate amount of termiticide
7 in the pretreatments that K & S Exterminating, Inc. has performed since he admitted his
8 misconduct to Ms. Gervase.

9 28. No complaints have been made to the SPCC about K & S Exterminating, Inc.’s
10 pretreatments. No consumers have requested that it perform warranty work for pretreatments
11 previously performed, including those at issue from 2003 and 2004.

12 29. On March 26, 2004, K & S Exterminating, Inc. and Mr. Barnes entered into a
13 Consent Decree with the SPCC in Case No. 2003-148, in which they admitted to having allowed
14 termiticide to drift to a neighboring property while performing a pretreatment, in violation of
15 A.R.S. § 32-2321(A) (violation of rule adopted by the SPCC) and A.A.C. R4-29-301(A) (misuse
16 of any pesticide) and A.A.C. R4-29-304(C) (protection against contamination). In the Consent
17 Decree, Mr. Barnes agreed to pay a total fine of \$400 (\$200 against his qualifying party license
18 and \$200 against his applicator license), to be issued an administrative warning, and to be
19 placed on pretreatment pre-reporting probation, which required him to report to the SPCC each
20 day the pretreatments scheduled for the next business day and to report weekly to the SPCC the
21 pretreatments performed for a period of six months.

22 30. The Consent Decree also required Mr. Barnes and K & S Exterminating, Inc. to
23 maintain and make available to the SPCC a log book for each vehicle used for termite
24 pretreatments that contained the following information:

- 25 1. The approximate gallons of chemical on the truck at the beginning of
each seven (7) day period.
2. The approximate addition of chemical remaining on the truck at the
expiration of each seven (7) day period.
3. The approximate gallons of chemical remaining on the truck at the
expiration of each seven (7) day period.

1 **K & S EXTERMINATING, INC.'S STATUTORY VIOLATIONS**

2 3. K & S Exterminating, Inc. mostly does not dispute the charged violations. With
3 respect to the undisputed violations, the SPCC has established grounds for disciplinary action
4 against all K & S Exterminating, Inc.'s business license under A.R.S. § 32-2321(B)(1) (prior to
5 September 1, 2003, A.R.S. § 32-2321(B)(2)).³ The SPCC has established that K & S
6 Exterminating, Inc. violated the following administrative rules:

7 3.1 A.A.C. R4-29-307(A), which requires business licensees to “make and preserve
8 true and accurate records of treatments performed, including those performed under warranty
9 or guarantee, for a period of not less than three years from the date of a treatment.” K & S
10 Exterminating, Inc. does not dispute that the TARFs that Mr. Barnes prepared before the
11 February 24, 2006 meeting were inaccurate in that they showed more termiticide than had
12 actually been applied.

13 3.2 A.A.C. R4-29-308(B)(3), which requires business licensees to include on restricted-
14 use pesticide application records the EPA registration number of material used. The TARFs
15 were the only records prepared and did not include this information for restricted-use
16 termiticides.

17 3.3 A.A.C. R4-29-417(F)(5), which requires a business licensee to include on TARFs
18 “the chemical used, strength of chemical used as represented by the percentage of active
19 ingredient, [and] amount of chemical used.” K & S Exterminating, Inc. admitted that Mr. Barnes
20 misrepresented this information on the TARFs.

21 4. K & S Exterminating disputed the charged violation of A.A.C. R4-29-407(F), which
22 provides:

23 A business licensee shall not issue a termite soil treatment
24 guarantee for a site where a cement slab was poured and the soil
25 thereunder was not pretreated until a complete post-construction
treatment in accordance with R4-29-410 is rendered.

23 ² See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249
24 P.2d 837 (1952).

25 ³ This statute includes among the grounds for disciplinary action against a license the licensee “violating this
chapter [or] rules adopted pursuant to this chapter”

1 K & S Exterminating, Inc. argued at the hearing that it did not violate this administrative rule
2 because a pretreatment was performed, even if the full amount of termiticide required was not
3 used, before it issued a warranty.

4 5. A.A.C. R4-29-410(A) requires post-construction application to “be made in accordance
5 with the specifications of the label of the termiticide used.” A.A.C. R4-29-402 requires in general
6 that “[a]pplications of termiticide . . . be made only in the specific quantities, strengths and
7 dosages as recommended on the product label unless otherwise prescribed by Commission rule
8 or order.” Because K & S Exterminating, Inc.’s admitted deficient application of termiticide
9 precluded issuance of warranties, the warranties issued violated A.A.C. R4-29-407(F).

10 6. The SPCC also has established grounds for disciplinary action against K & S
11 Exterminating, Inc.’s business license under A.R.S. § 32-2321(B)(2) (prior to September 1, 2003,
12 A.R.S. § 32-2321(B)(3)) because it admitted that it “[made] false or fraudulent records or
13 reports.”

14 7. The SPCC also has established grounds for disciplinary action against K & S
15 Exterminating, Inc.’s business license under A.R.S. § 32-2321(B)(15) because it admitted that it
16 “[f]ail[ed] to make and maintain true and accurate records of treatments performed, including
17 those performed under warranty or guarantee”

18 **MR. BARNES’ STATUTORY VIOLATIONS AS QUALIFYING PARTY**

19 8. The SPCC also has established grounds for disciplinary action against Mr. Barnes’
20 qualifying party license under A.R.S. § 32-2321(B)(2) (prior to September 1, 2003, A.R.S. § 32-
21 2321(B)(3)) because he admitted that that he “[made] false or fraudulent records or reports.”

22 9. The SPCC also has established grounds for disciplinary action against Mr. Barnes
23 applicator license under A.R.S. § 32-2321(B)(1) (prior to September 1, 2003, A.R.S. § 32-
24 2321(B)(2)). The SPCC has established that Mr. Barnes violated the following administrative
25 rules:

9.1 A.A.C. R4-29-402, which as noted above provides that “[a]pplications of termiticide
shall be made only in the specific quantities, strengths and dosages as recommended on the
product label unless otherwise prescribed by Commission rule or order.”

9.2 A.A.C. R4-29-301(B), which provides that “[n]o person shall falsify a record used or
maintained in connection with the use, including application, storage and disposal, of pesticides.”

1 **FACTORS IN AGGRAVATION AND MITIGATION**

2 10. The SPCC has established cause to penalize K & S Exterminating, Inc.'s business
3 license, Mr. Barnes' qualifying party license, and Mr. Barnes' applicator license under A.R.S. §
4 32-2321(A)⁴ and (C)(5).⁵

5 11. The gravamen of Mr. Barnes' and K & S Exterminating, Inc.'s statutory violations in
6 Case No. 2003-148 was their failure to control the drift of airborne termiticide onto an adjacent
7 property. The violations in Case No. 2003-148 did not involve fraud or misrepresentation and
8 the SPCC apparently only required that K & S Exterminating, Inc. account for termiticide
9 because it had investigating this matter following Mr. Barnes admission of fraud. The gravamen
10 of their statutory violations in this case was their failure to apply termiticide in the specific
11 quantities, strengths and dosages as recommended on the product label and fraudulent
12 misrepresentations on the TARFs to the SPCC and to the property owners about their
13 applications. Because these are two different types of violations, A.R.S. § 32-2321(C)(1)⁶ does
14 not allow the SPCC to consider the prior violation as a factor in aggravation of the penalty to be
15 assessed for K & S Exterminating, Inc.'s admitted and proven violations in this case.

16 12. Mr. Barnes credibly testified that K & S Exterminating, Inc. stopped knowingly
17 applying termiticide in insufficient quantities after Mr. Barnes, Ms. Tichi, and K & S
18 Exterminating, Inc.'s attorney met with the SPCC's Executive Director Ms. Gervase on February
19 24, 2004. Mr. Pugh's analysis, which shows a much greater deficit in 2003, does not contradict
20 this testimony. The record in this matter does not disclose how many of the 413 TARFs at issue
21 were for applications performed between February 24, 2004 and April 28, 2004.

22 13. Mr. Barnes credibly testified to his remorse at the hearing. He also credibly testified
23 that he spontaneously admitted his fraud after the SPCC opened an investigation into an
24 unrelated complaint.

25 14. Ms. Tichi credibly testified that she was ignorant of Mr. Barnes' misconduct.

22 ⁴ This statute empowers the SPCC to penalize a license after hearing.

23 ⁵ This statutory subsection requires that the SPCC first determine that a licensee has committed a violation in
24 connection with a treatment before or during construction before it can penalize its license.

25 ⁶ This statute allows the SPCC to sanction a license after a formal hearing if "[t]he business licensee has
committed a prior violation of the same type including any violation by any employee of the business licensee."

1 15. The Administrative Law Judge agrees with the SPCC's Executive Director Ms.
2 Gervase testimony at the hearing that these licensees are unlikely again to violate the SPCC's
3 statutes and regulations intentionally. At this time, these licensees do not present a danger to
4 the public.

5 16. But the licensees admitted to repeatedly defrauding hundreds of property owners of
6 the termite protection that they paid K & S Exterminating, Inc. to deliver. These violations are
7 very serious and undermine the SPCC's mission.⁷ Although the property owners will not have
8 any licensed company to honor K & S Exterminating, Inc.'s warranties if its business license is
9 revoked, that harm must be balanced against the SPCC's purpose and the impact that leniency
10 in this case would have on future licensees and property owners.

11 17. Moreover, Ms. Tichi benefited from her partner Mr. Barnes' fraud because the profits
12 from that fraud accrued to the partnership of K & S Exterminating. As a matter of law, therefore,
13 Ms. Tichi is legally responsible for the fraud, even though she was ignorant of it.⁸ As one of the
14 qualifying parties of K & S Exterminating, Inc., Ms. Tichi was required to "[b]e active in the
15 management of the business licensee."⁹ Her ignorance of her partner Mr. Barnes' fraudulent
16 scheme belies her active involvement in the management of K & S Exterminating, Inc.

17 ORDER

18 Based upon the foregoing considerations:

19 1. **IT IS ORDERED** that Kenneth Barnes' Qualifying Party License No. 8154 B2 B4
20 B8, and Applicator License No. 940884 B1 B2 B4 B8, shall be revoked in 60 days from the
21 date of this order.

22 ⁷ "The goals and objectives of the structural pest control board are to protect the public from chemical harm and
23 harm resulting from inadequate or improper structural pest control. The board accomplishes these goals and
24 objectives by . . . disciplining licensees and certificate holders . . ." Laws 1984, Ch. 312, § 1.

25 ⁸ See, e.g., *Donald v. Reynolds*, 228 Ala. 513, 517, 154 So. 530, 532 (1934).

⁹ A.R.S. § 32-2314(H)(1).

1 Structural Pest Control Commission
2 Lisa C. Gervase, Executive Director
3 9535 E. Doubletree Ranch Road
4 Scottsdale, AZ 85258

5 Copy of the foregoing mailed
6 Certified return receipt requested
7 this _____ day of _____
8 2006, to:

9 K & S Exterminating, Inc. dba Adams Exterminating, (BL)
10 Kenneth Barnes, President
11 2582 Union Drive
12 Cottonwood, AZ 86326
13 **CERTIFIED MAIL: 7005 3110 0001 9113 9122**

14 Kenneth Barnes, (QP & APP)
15 2291 S. Puma Circle
16 Cottonwood, Arizona 86326
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18 Scott Richardson, Esq.
19 Jaburg & Wilk
20 3200 North Central Avenue, Suite 2000
21 Phoenix, AZ 85012
22 Attorney for K & S Exterminating, Inc. dba Adams Exterminating, Business Licensee
23 **CERTIFIED MAIL: 7005 3110 0001 9113 9115**

24 Copies of the foregoing mailed
25 by regular mail this _____ day of _____
2006, to:

Shiloh K. Tichi
1966 Bonita Dr.
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4

5

6 By _____

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