BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DRAIN RITE PLUMBING INC.
P.O. Box 5513
Norco, CA 92860
JOHN CURTIS OPITZ, Responsible Managing Officer, CEO, and President

Contractor's License No. 860503, C-36, B

Respondent.

FULL SERVICE PLUMBING GENERAL CONTRACTING AND RESTORATION SERVICES
P.O. Box 5513
Norco, CA 92860
JOHN CURTIS OPITZ, Sole Owner

Contractor's License No. 990139, C-36, B

Affiliated Party.

CASE NO. N2013-286

OAH NO. 2016010152

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Registrar of Contractors as her Decision in the above-entitled matter.

IT IS FURTHER ORDERED that pursuant to Section 7102 of the Business and Professions Code and Section 870 of the Code of Regulations, Respondent **DRAIN RITE PLUMBING INC.**, License Number **860503**, shall not apply for reissuance or reinstatement of any license for five year(s) from the effective date of this Decision.

IT IS FURTHER ORDERED that pursuant to Section 7102 of the Business and Professions Code and Section 870 of Title 16 of the California Code of Regulations, Respondent **FULL SERVICE PLUMBING GENERAL CONTRACTING AND RESTORATION SERVICES**, License Number **990139**, shall not apply for reissuance or reinstatement of any license for five year(s) from the effective date of this Decision.

IT IS FURTHER ORDERED that Respondent shall pay the investigative costs in the amount of $49,449.16, prior to issuance of a new or reinstated license pursuant to Business and Professions Code section 125.3.

IT IS FURTHER ORDERED that Respondent shall pay restitution in the amount of $3,999.95. This amount is to be paid prior to issuance of a new or reinstated license pursuant to Government Code section 11519, subdivision (d).

IT IS THE responsibility of the Respondent, named in this Decision, to read and follow the Order found in the Proposed Decision.

This Decision shall become effective on October 17, 2016.

IT IS SO ORDERED September 13, 2016.

Cindi A. Christenson
Registrar of Contractors

A2 -5/09

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS' STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS

In the Matter of the Accusation Against: DRAIN RITE PLUMBING, INC., John Curtis Opitz, Responsible Managing Officer, CEO, and President License number 860503, C-36, B Respondent.	Case No. N2013-286 OAH No. 2016010152
FULL SERVICE PLUMBING GENERAL CONTRACTING AND RESTORATION SERVICES, John Curtiss Opitz, Sole Owner Contractor's License Number 990139, C-36, B. Affiliated Party	

PROPOSED DECISION

The hearing in the above-captioned matter took place in Los Angeles, California, on July 25 through 28, 2016, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by Bora S. McCutcheon, Deputy Attorney General. Respondent Drain Rite Plumbing, Inc. (Drain Rite or Respondent) appeared through its Responsible Managing Officer (RMO), John Opitz, who also appeared on behalf of the affiliated party, Full Services Plumbing General Contracting and Restoration Service (Full Service), which is owned by Mr. Opitz. Ronald Grzwinski represented Respondent Drain Rite and the affiliated party.

At the close of Complainant's case, Complainant moved to strike part of the Accusation, specifically, paragraphs 33 through 45, and 46 through 60. There was no objection, and those paragraphs are stricken from the Accusation.

Evidence was received, the case was argued, and the matter submitted for decision on July 28, 2016. The ALJ hereby makes his factual findings,[1] legal conclusions, and orders.

The Parties and Jurisdiction

1. Complainant Wood Robinson filed and maintained the Accusation in this matter while acting in his official capacity as an Enforcement Supervisor I of the Contactors' State License Board (Board), Department of Consumer Affairs.

2. (A) On June 17, 2005, the Registrar of Contractors issued license number 860503 to Respondent Drain Rite. The license was a C-36 specialty license, authorizing Drain Rite to act as a plumbing contractor.

(B) At all times relevant to this case, John Curtis Opitz (Opitz) was the RMO, CEO, and president of Drain Rite.

(C) On August 21, 2012, Drain Rite was issued a general building contractor's license (type B). On February 28, 2013, Drain Rite was issued an ASB certification, allowing it to bid on asbestos-related work, or to subcontract such work to another. However, Drain Rite could not perform asbestos abatement work under the ASB certification.

(D) Drain Rite's license was suspended and reinstated on several occasions, including in 2006, 2008, 2009, 2010, 2011, and on four different dates in 2013. The license expired on March 31, 2011, and was not renewed until August 11 of that year. The license again expired on March 31, 2015, and has not been renewed.

(E) Despite the expiration of Drain Rite's license, the Board retains jurisdiction over it pursuant to Business and Professions Code sections 118, subdivision (b), and 7106.5.[2]

3. On January 27, 2014, the Registrar of Contractors issued license number 990139 to Opitz as sole owner of Full Service. The license was a C-36 and B license. An ASB certification was issued to Opitz on that same day. Full Service's license remained in force through the hearing dates.

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[1] The factual findings were established by clear and convincing evidence.

[2] All further statutory references are to the Business and Professions Code, unless otherwise noted.

4. Neither Drain Rite or Full Service had any registered salespersons during the times relevant to this proceeding. None of the persons who performed the work at the homes described hereafter were licensed as plumbers; only Drain Rite and Opitz as Full Service were so licensed.

5. Respondent and the affiliated party filed a Notice of Defense, and this proceeding ensued. All jurisdictional requirements have been met.

The Loyalton Drive Project[3]

6. On October 19, 2012, one of the owners of a home on Loyalton Drive, in Walnut, California, called Drain Rite because the kitchen sink drain was clogged. The owner, F.I., called some other plumbers, but they could not come until the next day. Since Drain Rite's Pennysaver advertisement offered a two hour response time, she called Respondent. Two plumbers arrived shortly after the call, in a truck that said "Drain Rite" on the side. F.I. told the two men that her kitchen drain was plugged up. One of the plumbers was Craig Johnson.

7. Shortly after arrival, the Drain Rite plumbers asked the owner if she had homeowners insurance, and she said she did. They cleared the drain in about half an hour, and they told her that there had been a leak, and that there was moisture under her tile floor. They used a device that appears to have been a moisture reading device, and they broke out a small piece of tile to ostensibly test the substrate of the floor. They did this work without having obtained a written contract that complied with section 7159.

8. The Drain Rite workers told F.I. that her insurance company would pay for repairs to her floor and kitchen; when she asked for an estimate they told her not to worry about it, that they would call the insurer. When she asked how long it would take, they said about three to four days. They told her that Respondent was licensed as a general contractor, so could do all the work needed to repair the damage they claimed had occurred.

9. The homeowner signed several documents at her home. One is denominated as a "job estimate." (Ex. 50.) It bears number 10025 in the upper right hand corner, and in large print, across the middle, it bears the name "Drain Rite Plumbing Inc." The corporate mailing address is shown as well. Handwritten, in the section marked job estimate, it states: "Customer responsible for deductible. Bill remaining balance to Farmers Ins." (*Id.*)

10. (A) A second contractual form signed by the homeowner authorizes Drain Rite to perform necessary "fire and/or flood damage restoration" to the property. (Ex. 51, p. 189.)[4] The document also acts as an assignment of insurance proceeds to Drain Rite.

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[3] To preserve the privacy of the homeowners, the street addresses of their homes are not set out, and they will be referred to without their full names.

(B) Paragraph B of the assignment document states that the total contract price will be "the entire agreed insurance company structural settlement dollars. DRAIN RITE PLUMBING will not [. . .] more than nor to receive less than the agreed scope of work as approved and/or amended by the Insurance Adjuster and Drain Rite Plumbing. . . ." (*Id.* Emphasis in original; omitted material illegible.)

(C) Paragraph C of the document refers to the description of work. It states, in part, that Drain Rite will repair all damage caused by fire or flood as agreed to by Drain Rite and the insurance company in the agreed upon "scope of damage." It goes on to say that the scope of damage document "will be created by Drain Rite Plumbing and is considered as start date for the work in this agreement and is considered the description of the work."

(D) The document has a signature block for the homeowner under the first three paragraphs. She did not sign it. She did, however, sign a waiver of cancellation right.

11. The document provided, under the heading "right to cancellation," that the homeowner had the right to cancel the contract within seven days. But, it also had a provision for waiver of that right. It states "the 7 day notice to cancel is hereby waived under California Civil Code Section 1689.13 because of emergency due to backed up kitchen drain. I have read this waiver and sign it below with knowledge and understanding." (Ex. 51, p. 189.) The words "backed up kitchen drain" had been written in on a line reserved for such information.

12. (A) Another contractual document generated on October 19, 2012 is identified as "Service Agreement." (Ex. 52.) Above that language is set out "Claim # 8000735803.

(B) The form is designed with various boxes to check off, or blanks to fill in, depending on the nature of the job. Virtually none of the boxes are checked, and most of the blanks are not filled out. The document does state that the homeowner had engaged Drain Rite to perform work, and two boxes for "sewage" and "asbestos" were checked off, though the boxes for the cause of the problem are not filled out.

(C) Bold language at part 4 of the Service Agreement gives notice to any insurance company that the homeowner has transferred and assigned any rights they have in proceeds of all insurance policies which cover the damage to the property that Drain Rite is to repair. The carrier is authorized by the terms of the form to pay Drain Rite directly.

(D) Where there are blanks at part 5 for the approximate start and completion dates, nothing was filled in. Part 6 of the document states that the homeowner acknowledges that they, and not their insurer, hired Drain Rite, but a place where the homeowner was to initial that language was not filled out.

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[4] Citations to page numbers are to the "Bates stamp" numbers that Complainant used to paginate his exhibit book.

(E) The contract was signed by homeowner and Craig Johnson for Drain Rite.

13. (A) A fourth document was signed by the homeowner. Like the Service Agreement, it states at the top "Claim # 8000735803." (Ex. 53.) It quotes, purportedly, Insurance Code sections 570, 571, and 572; that is implied by language at the top of the document. The statute(s) appear to control when payments can be paid to contractors instead of to homeowners by an insurer.

(B) At the bottom, the "loss payee" is identified as Drain Rite Plumbing. The federal tax identification number is not the corporations, but that of Opitz.[5]

14. On approximately October 21, fans were set up in the Loyalton Drive house to, ostensibly, dry it out. One or two days later, men came and they took up the entire tile floor, not just in the kitchen, but in the adjacent living room that the tile floor flowed into. According to the credible testimony of the homeowner, two men did that work in less than a day. Time passed, and nobody came back from Drain Rite, despite the homeowner's understanding that Respondent, being a general contractor, would do the repairs.

15. Although F.I. had been told that Respondent would file the insurance claim—she was led to believe that Opitz knew all about dealing with insurers—she was later informed that she would have to file the claim. She did so. However, her insurer denied the claim.

16. (A) In early November 2012, the homeowner received a "statement," and an invoice, from Drain Rite, dated October 31, 2012. It carried "Claim # 8000735808" at the top of the invoice and on all related documents. (See ex. 55, pp. 199-207.) The invoice portion referenced "emergency services invoice" (*Id.*, p. 223) and was for $5,682.98.

(B) An itemization set out charges for services that cannot be substantiated on this record. Charges were made for items such as personal protective equipment for four "techs" for two full days, along with HEPA cartridges for respirators. Charges were made for containment barriers and airlocks and decontamination chambers. (Ex. 55, p. 202.) These claims not only are contradicted by I.F's description of the work that was performed, they defy credulity given that the two homeowners and their three adult children appear to have remained in the home while the work was done, and given the homeowner's credible testimony that the floor was taken up in less than one day.

17. In late January 2013, Opitz, acting for Drain Rite, caused a Claim of Mechanics Lien to be filed with the county recorder's office against the Loyalton property.[6]

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[5] This was verified by Opitz during the hearing, just before the ALJ redacted his social security number, which was shown as the tax ID number for Drain Rite.

The amount of the lien was the same as in the statement and invoice, $5,682.98. (Ex. 56.) This was more than 90 days after Respondent's work at the property, in violation of Civil Code section 8412.

18. Meanwhile, in approximately December 2012, the homeowners hired other contractors to replace the tile floor, at a cost of $1,499.95.

19. Thereafter, Respondent filed a small claims case against the Loyalton Drive homeowners for the amount claimed in the invoices, despite contract language indicating that at most the homeowners were responsible for only their deductable. On July 18, 2013, the parties met at court, and were sent to a mediator. A settlement was reached, whereby the homeowners would pay a total of $2,500 to Respondent, with $1,000 down and monthly payments of $250. (See ex. 57.)

The Holcroft Drive Project

20. On March 2, 2013, the owner of a house on Holcroft Drive, in Walnut, California, called Respondent to fix a water leak that he had discovered in a first floor bedroom of the house, which room he used as a home office. The owner, "Tony" had called Respondent because he saw its ad in Pennysaver, which ad stated Respondent would provide a free estimate.

21. Respondent's employee Brandon appeared at the home a short time after Tony called Drain Rite. Brandon assessed the situation and said he could fix the leak. To do so, he had to cut away a small section of wallboard, and cut out and replace a piece of pipe surrounding the leak. Brandon stated he could do the work for $400 cash, or $800 if Tony used a credit card. Tony agreed to the former arrangement, and Brandon undertook the repair. At that point, no contracts had been signed by Tony.

22. Brandon told Tony that he could make an insurance claim because of the damage caused by the leak. That damage included damage to some plasterboard, damage to some shelving, and a part of the room's carpet had been soaked. Brandon had Tony contact his insurer, State Farm, and had him get a claim number.

23. (A) Brandon had a series of contractual documents for Tony, of the same type as those used in the Loyalton Drive project. At hearing, Respondent and Opitz asserted that Tony signed the documents, while Tony has long asserted that he did not, and that his signature was forged onto the documents after he refused to sign them without reading them. On balance, Tony's testimony is credited, in part because one exemplar of his true signature does not match those on the contract forms. It should be noted that Drain Rite relied on the contract forms to pursue claims against the homeowner's insurance proceeds, and the homeowner.

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[6] Opitz signed the Claim of Mechanics Lien on January 28, 2013; it appears from the upper right hand corner that it was recorded on February 1, 2013.

(B) A Drain Right Service Agreement was filled out and signed by Brandon. Part 2, the Scope of Work section, describes in handwriting: "fix ½ inch copper line in ceiling, water extraction, remove drywall, base board, carpet padding, set up equipment." (Ex. 63, p. 275.) No contract price is set out in the area of the Service Agreement reserved for such information.

(C) (i) The Drain Rite assignment form was also filled out. As in the prior example (Factual Finding 10), the document purports to authorize Drain Rite to perform services at the Holcroft Drive home. It states that payment will be whatever the insurer and Drain Rite agree to. The "description of work" is to be determined by the insurer and Drain Rite, and the document authorizes the insurer to pay Drain Rite directly. (Ex. 64.)

(ii) In the area that purports to carry Tony's signature, authorizing the work, is also found, in handwriting the words "subject to payment by State Farm." The waiver of cancellation right had been filled out, describing the "emergency" that would allow a waiver as "bursted (sic) water pipe." (Ex. 64.)

(D) The document with the statutory text, titled "California Insurance General Rule Article 5, section 570, 571, 572" was also filled out, and is found at exhibit 65. It has a claim number printed on the top, "Claim # 75257W485," which was also handwritten at the bottom of the form in a place preprinted for such information. It purports to be signed by Tony, but like the assignment form (ex. 64), written next to Tony's signature is the following: "(subject to payment by State Farm)."

(E) A Drain Rite form that appears to be a work proposal (by language near the signature blocks) was filled out by Brandon, and purportedly signed by Tony. The copy that is exhibit 66 has the printed claim number at the top; in a space reserved for insurer information the words State Farm had been written in. In the middle of the document, a box for the job estimate, a description of the work is found in what is inferred to be Brandon's handwriting. It states that the tech found a leaking cold water line in the ceiling, and it describes repairs including removal of wallboard, baseboard, carpet and tack strips. It is further set out in handwriting that the homeowner was only responsible for the deductable, and the rest to be billed to State Farm.[7] (Ex. 66.)

24. Brandon had several large fans installed in the room to dry it out. Tony testified that he shut them off in concern for his electrical bill; he didn't think they were needed. He understood that Drain Rite would send other workers out to repair the damage caused by the leak, i.e., repair the wall, put in new baseboard, etc., but nobody came back, and no efforts were made to move that work forward. Meanwhile, he learned from his insurer that Drain Rite had sent an invoice to State Farm for payment. He obtained a copy from State Farm, and reviewed it.

[7] That is not easily read in the photocopy, in part because it is written where a Drain Rite logo is printed, but the language can be discerned.

25. (A) Tony told the insurer that much of the invoice was fraudulent. In several respects it must be found he was correct. While he denied the work was of an emergency nature because he had shut of the main water supply, that may not be accurate, because his house had no water supply unless he turned the main line back on and caused more leakage.

(B) However, other parts of the bill cannot be justified. Drain Rite billed for two "water extraction & remediation technicians" at $52.35 per hour, and each one for five hours. It is clear from Tony's testimony and his pretrial statements that no such workers ever appeared. Tony noted that there was billing for cleaning up and taking away the drywall, carpet, and other debris, but that he had paid Brandon $400 to repair the pipe, and that Brandon had taken the trash away. He told the insurer he had not signed the service agreement. (Ex. 67, p. 280.)

26. The insurer sent a check for $1,678.07 to Tony rather than to Drain Rite. Drain Rite demanded payment of that amount, invoicing Tony that amount in early 2013. (Ex. 67, pp. 290-291.) Tony sent a check for $700 to Drain Rite, which was not cashed. Opitz then caused a preliminary lien notice to be filed against the Holcroft Drive home; this happened on or after April 4, 2013. Drain Rite then sued Tony in Small Claims court, but lost the case, judgment being entered in Tony's favor on August 13, 2013. (Ex. 70.)

The Jurapa Avenue Project

27. On August 8, 2013, the owner of a house on Jurapa Avenue in Riverside called Respondent regarding a backed up toilet and bathtub. Jason Stalter, one of Drain Rite's employees, was sent to the house.

28. Stalter determined that the main sewer line was clogged. He removed the toilet, and snaked out the line. He did not provide the homeowner with a written estimate before starting that work.

29. Water had spilled out of the toilet, and soaked adjacent flooring. A nearby vanity had become wet as well. Stalter advised the homeowner that the vanity should be replaced, and that repairs should be made due to the water intrusion.

30. Stalter told the homeowner that there would be no charge for clearing the blocked line if the homeowner hired Drain Rite for the insurance claim related to the clean up and repair work. He told her his boss—Opitz—was a general contractor and could put everything back together.

31. Stalter obtained the homeowner's signature on the Drain Rite assignment document. (Ex. 6.) Likewise, he did so on the proposal form. In the area for the job estimate, he wrote: "customer only responsible for remaining deductible. Balance due from Travelers Insurance." (Ex. 7.) The homeowner signed a waiver of the right to cancel.

32. Stalter did some demolition in the bathroom and surrounding area. At the hearing, he testified to removing some drywall, baseboard, the vanity, and some flooring. He hired a friend to help him with that work, and the removed material was taken to the dump. He paid his friend $150 for the help, and sought reimbursement from Drain Rite. He set up some fans to help dry the area out, and he went to his next job. He never returned to the Jurapa Avenue house.

33. Thereafter, Drain Rite submitted a written claim to the homeowner's insurance company. The claim contains false statements. For example, it states that two technicians each worked six hours on the project, billing their time at $60.46 per hour, for just over $725. (Ex. 8.) However, Stalter testified that the work took about three hours. Likewise, Drain Rite claimed the two "techs" each used personal protective equipment, but Stalter and his friend did not use them. The total claim amounted to $2,154.25. (Ex. 8, p. 20.)

34. Opitz later caused a preliminary lien notice against the property on or after September 26, 2013, approximately six weeks after the service call. (Ex. 9.)

35. At some point, Opitz, as president of Drain Rite, submitted a letter to Travelers Insurance, whereby he gave notice that the Jurapa Avenue homeowner had assigned any insurance proceeds to Drain Rite.

The Vista Lane Project

36. On June 20, 2014, one of the owners of a house on Vista Lane in the City of Calimesa noticed evidence of a water leak in the ceiling of his kitchen, in an area under an upstairs bathroom. Approximately one square foot of the ceiling showed indicia of a leak, such as "bubbled" paint. The homeowner, C.H., had seen Drain Rite's ad in the Pennysaver, with the claim of a free estimate. He called Respondent. Within an hour or two, two plumbers came to his house in a truck bearing Drain Rite's name. One of them was Brandon.

37. C.H. showed them the kitchen ceiling, and told them his suspicion that the problem was in the master bathroom, which was above the kitchen. He asked for an estimate. Instead, the two Drain Rite employees began cutting into wallboard so they could look for the leak.

38. Brandon and his associate never gave a written estimate for the repair of whatever leak had damaged the ceiling in C.H.'s kitchen. At one point they showed him the shower valve, asserting that there was a leak where one of the water lines went into the valve. C.H. could not see the leak. The Drain Rite employees purported to fix the leak, although a subsequent contractor was of the opinion that the leak was caused by water getting behind the plate that covered the tile, underneath the valve handle.

39. The two plumbers told C.H. that he could get his insurance company to pay for the repairs that were performed, and implied this included the leak itself.

40. (A) A Drain Rite service agreement was filled out, after work was performed. In the scope of work section it states, in handwriting: "Bursted 90' ½ copper fitting to hot line to upstairs shower valve. Water damage to drywall, ceiling in kitchen and upstairs drywall." (Ex. 16, p. 91.)

(B) Part 3 of the service agreement, pertaining to contract price, set forth a handwritten amount of $3,200, as an estimate. At part 6, the homeowner initialed the section where he acknowledges that the plumber was hired by him, and not the insurance company.

(C) The service agreement, on the back, had provisions that were printed in less than 10 point type, and was illegible.

(D) The service agreement did not contain a statement to the effect that upon satisfactory payment, Drain Rite would furnish a full and unconditional release of any potential lien claim or mechanics lien for that portion of the work for which payment had been made.

(E) Numerous other statutorily-required provisions were omitted from the service agreement. This includes a notice near the signature blocks informing the homeowner of the right to require a performance and payment bond, in violation of section 7159, subdivision (c)(6). No language identifying the contract as a home improvement contract was set out in at least 10 point type, in violation of section 7159, subdivision (d)(3). It did not state, in at least 12 point type, that the homeowner was entitled to a completely filled in, signed, copy of the agreement before any work is started, in violation of section 7159, subdivision (d)(4). There was no description of the work to be done, and materials to be provided, in violation of section 7159, subdivision (d)(7). The service agreement omitted disclosures pertaining to down payments and progress payments, in violation of section 7159, subdivision (d)(8) and (9), respectively.

(F) Other violations of section 7159, and the subdivisions of that statute violated include: omission of a statement describing substantial commencement of work (subd. (d)(10)(A)); omission of disclosures regarding extra work and change orders (subds. (d)(13) & (e)(3)); omission of notices regarding commercial general liability insurance (subd. (d)(13)). The latter omission also violated California Code of Regulations (CCR), title 16, section 872.[8] The service agreement omitted disclosures regarding the Board, in violation of subdivision (e)(5), in that an improper type face was used. The service agreement failed to make disclosures regarding the mechanics liens, in violation of subdivision (e)(4).

(G) The service agreement omitted a list of documents incorporated into the agreement, as required by section 7159, subdivision (d)(12); the other documents signed by the homeowner were not enumerated. The service agreement omitted disclosures regarding the homeowner's three day right to cancel, in violation of section 7159, subdivision (e)(6).

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[8] All further citations to the CCR shall be to title 16 thereof.

41. The homeowner also signed a Drain Rite form that sets out a section for the job estimate. In handwriting it is stated that the tech had performed a visual and physical leak detection to the hotline of shower valve, and that there was damage to upstairs drywall and downstairs ceiling. It also states "rest to be billed to insurance co." (Ex. 16, p. 88.) No price is set out for the job estimate. While this form has language to the effect that homeowner is responsible for paying Drain Rite, at the top is a box where is pre-printed the words "bill to." Handwritten in that box is "Residence Mutual Ins. Co." (*Id.*)

42. The Drain Rite form pertaining to assignment of insurance proceeds was also signed by the homeowner, and at the bottom he signed the waiver of his seven-day cancellation right on the basis of "bursted ½ [inch] 90' line to shower." (Ex. 16, p. 52.) This form uses the language used in the other projects, to the effect that Drain Rite will look to the insurer for payment, taking no more or no less than what the insurer agrees to pay in the scope of work document that was to be negotiated between Respondent and the insurer.

43. The homeowner did not sign any of the forms described in Factual Findings 40 through 42 until after the work was done by the Drain Rite personnel.

44. The homeowner was assured that the insurance company would pay for Drain Rite's work. He contacted his insurer the next day, who advised him to cancel the agreement with Drain Rite, which he did. On June 24, 2014, Drain Rite sent the homeowner an invoice for $2,841.20. This was nearly $1,300 more than the estimate provided by a contractor sent to the home by the insurer. That contractor estimated $1,546.91. (See ex. 21.)

45. On July 11, 2014, Opitz caused a Claim of Mechanic's Lien to be recorded for Drain Rite against the Vista Lane property, in the amount of $2,841.20. On that same day, the homeowner's insurer wrote him and informed him that the carrier had tendered $1,546.91 to Drain Rite, and that it had informed Drain Rite that was all it would pay. This led to the carrier retaining an attorney to represent the interests of the homeowner.

46. On August 7, 2014, Opitz wrote the homeowners. He asserted his company's claim was reasonable and fair, although the insurer took the position that Drain Rite had overbilled the work. Opitz essentially advised the homeowner to find an attorney to sue the insurer for bad faith, he advised them to hire a public adjuster, and to make a complaint to the Department of Insurance. He offered some other suggestions as well.

47. (A) Drain Rite later sued the homeowners and their insurance company. The case was filed in the Superior Court of California, County of Riverside, on November 17, 2014. The case was later dismissed. Then, in December 2014, Full Service sued the homeowners and the insurance company in the Small Claims Court in Riverside County, for work Full Service allegedly performed at the Vista Lane property on "8-21-2014." (Ex. 33, p. 106.) The amount sought was $1,292.97, the difference between what Drain Rite billed and what the homeowners' insurer paid to Drain Rite. The court papers were signed by Opitz. (*Id.*, p. 107.)

(B) The claim that Full Service did the work has to be deemed a false allegation, as all the prior paperwork was in Drain Rite's name.[9]

48. The small claims case was later dismissed by Opitz.

Findings on Other Matters

49. After Drain Rite technicians performed work, they would turn over various documents to Opitz at the firm's offices. Opitz, or an office person would use the documents to generate estimates with a computer program that, according to Opitz, is accepted by insurers. The invoices or full estimates received in the record, were generated with the program, known as "Xactamate."

50. Opitz did not go to any of the four project or job sites that are described in this decision. Thus, he did not directly supervise the work at any of the four homes.

51. (A) Based on the evidence and reasonable inferences from it, it is found that Drain Rite, with the knowledge, direction, and approval of Opitz, engaged in dishonest business practices, and that the two preyed on homeowners who lacked knowledge of plumbing repair, and insurance law.

(B) Based on the evidence and reasonable inferences from that evidence, it is found that there was a pattern and practice that supported the dishonest activities. Drain Rite's business practice was to respond to plumbing problems that might or might not constitute emergencies, which would be denominated by Respondent as emergencies for the purposes of billing, and to goad homeowners into repair work that was not immediately necessary. Hence, in the Loyalton Drive project, the homeowner was convinced to have her tile floor torn up before her insurer could inspect the home, and she was induced to waive her right to cancel that part of the work. However, no "emergency" required the floor to be torn up within two days, even if it should have been replaced. Drain Rite's technicians were trained and instructed to obtain work beyond an immediate remedy for the problem at hand, so as to obtain contracts for repair and remediation of damages (real or imagined) that seemingly flowed from the plumbing problem.

(C) The techs would tell the homeowners that their homeowner's insurance would pay for the work, that Drain Rite as a general contractor could do the work, and that Opitz knew how to deal with insurance carriers. The contract formss, while somewhat convoluted and often carrying contradictory terms, generally indicated that the homeowner's liability was limited, in that Drain Rite would be paid what the insurer agreed to pay; in other

[9] The content of the small claims complaint supports the testimony of Jason Stalter to the effect that Drain Rite and Full Service were the same company.

cases the contracts stated that the homeowner's liability was limited to their deductable.[10] Thereafter, inflated "estimates" were generated by Drain Rite, often by Opitz himself, or at his direction.

(D) If for some reason the insurer would not pay the entire amount claimed, Opitz and Drain Rite would pursue the homeowners, despite contractual language barring such a claim. This is illustrated by the Loyalton Drive and Vista Lane projects, where the contract documents indicate that Drain Rite would be paid no more and no less than what the insurer worked out in the process of generating the "scope of work" document. Respondent and Opitz also used the threat of a mechanics lien as a means to intimidate homeowners.

52. Drain Rite's tactics tended to deprive the insurers of an opportunity to assess and adjust claims. This was especially the case on the Loyalton Drive project, where the tile floor was torn up and removed before the carrier would have had a chance to inspect the floor to determine if removal and replacement was necessary. This was much the situation in the Jurupa Avenue project.

53. There is evidence that Opitz has personally taken on what was a corporation's business, in that he sought to collect personally on Drain Rite's claims arising out of the Vista Lane property. As noted in Factual Finding 13(B), he was using his social security number as Drain Rite's tax ID number on some forms. The tone of his letters to the Vista Lane homeowners and their insurer-retained attorney indicates a self-righteous attitude, and a conceit that he knows more about the law than anyone else involved in the cases.

54. Opitz demonstrated such an attitude when dealing with the Board's investigator. When she contacted him to set up a meeting about some of the complaints the Board had received, he pointed to pending court litigation, telling Ms. Marin that the courts "trumped" the Board. This demonstrates a significant ignorance of the Board's role, and of a licensee's place in the regulatory scheme, along with a belief that by taking the course of litigation against his unhappy customers he could circumvent action by the Board.

55. Opitz was deposed by the insurer of the Vista Lane house, in a lawsuit brought by the insurer against Drain Rite and Opitz.[11] The deposition occurred on December 23, 2015, approximately seven months before the hearing in this matter. When questioned about the requirements of service contracts and home improvement contracts, he stated he didn't practice law, so he did not know the laws that pertained to home improvement contracts and their applicability to Drain Rite's activities. (Ex. 73, at page 26, lines 18-23. See also, p. 27,

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[10] This was even the case with the Vista Lane contracts. While one form set out an estimated cost of $3,200, and stated that the customer was obligated on for the repair costs, the assignment form still provided that Drain Rite would be paid what the insurer and Drain Rite worked out in the "scope of work" document.

[11] The suit was settled that day, on terms and conditions deemed inadmissible in this proceeding.

lines 23-25.) Such proclaimed ignorance by a person licensed to act as a general contractor for more than 10 years raises serious questions about his fitness to act as a contractor.

56. Drain Rite and Opitz harmed the homeowners of the Loyalton Drive house in the amount of $3,999.95 by their actions. After representing that the insurer would pay Drain Rite, and after agreeing in writing to either take what could be agreed upon with the carrier, or an amount over and above the deductable, Drain Rite sued the homeowners and obtained an agreement that they would pay more than their contract obligated, i.e., $2,500. On top of that, Drain Rite never repaired the floor, which cost the homeowner another $1,499.95 to restore. Given the fact that the homeowner called Drain Rite about a backed up sink, the claim that the floor had to be removed right away is not credited.

57. Continued licensure of Drain Rite or Opitz poses a risk of harm to the public. Given Opitz's ignorance of home improvement laws, his attitude toward the Board's authority, and his past dishonest practices, it is likely that other consumers will fall victim to his practices if his firms remain in business.

Costs

58. The Board has incurred costs, in the form of costs of investigation and prosecution of this case, in the sum of $49,449.16, which are reasonable under all of the circumstances.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter was established pursuant to sections 118, subdivision (b), 7076.5, 7090, 7097, 7098, 7121, and 7122.5, based on Factual Finding 1 through 5.

2. It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence", including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

3. The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who

testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

4. Discrepancies in a witness's testimony, or between that witness's testimony and that of others does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal App.3d 865, 879.) It should also be remembered that "on the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted -- but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 Cal.App.3d 865, at 877-878, quoting *Meiner* v. *Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

5. (A) The contracts entered into by the homeowners in the four projects that are the subject of this case were home solicitation contracts within the meaning of Civil Code section 1689.5, based on Factual Findings 6, 7, 9 -13, 17, 20, 21, 23, 27, 28, 31, 32, 35-37, 40-42, and 45.

(B) The contracts entered into in each of the four projects were home improvement contracts within the meaning of section 7151.2. In each of the four projects that are the subject of this matter, Respondent was acting as a home improvement contractor within the meaning of section 7150.1. This Conclusion is based on Factual Findings 6, 7, 9 - 13, 17, 20, 21, 23, 27, 28, 31, 32, 35-37, 40-42, and 45.

(C) The scope of the Civil Code provisions pertaining to home solicitation contracts is broad, and the statutes should be interpreted to carry out their purpose of protecting the consumers of California from improper practices. As noted by the Court of Appeal, "it was undoubtedly the Legislature's purpose in enacting the statute [Civ. Code § 1689.5 et seq.] to protect consumers against the types of pressures that typically can arise when a salesman appears at a buyer's home." (*Weatherall Aluminum Products Co. v. Scott* (1977) 71 Cal.App.3d 245, 248.)

(D) The waiver of the right to cancel the contract to perform work at Loyolton Drive was obtained in violation of Civil Code section 1689.13, in that there was no emergency that required the immediate protection of persons or real or personal property. (*Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 886.) While the homeowner deemed the use of her kitchen as central to her family's life, there was no threat to her health and safety, and her property were not threatened.

(E) Treating the leaking water pipes at the Holcroft Drive and Vista Lane homes as an emergency would be justified, as the leaks could continue to damage real or

personal property. However, the other repairs at those properties, i.e., replacement of wallboard or baseboard, whether proposed or undertaken, were not emergency services. That is, the wallboard at Holcroft Drive did not have to be repaired on an emergency basis, and therefore a waiver of the provisions of Civil Code section 1689.5 et. seq. was obtained in violation of section 1689.13, based on Factual Findings 21, 22, and 24.

6. Cause exists to discipline Respondent's license pursuant to section 7110 for deliberate violations of Civil Code sections 1689.5 to 1689.15, based on Legal Conclusion 5 and its factual predicates.

7. Cause exist to discipline Respondent's license pursuant to section 7161, subdivision (b), for making substantial misrepresentations in the procurement of home improvement contracts, and by making false promises of a character likely to influence, persuade, or induce any person to enter into the contract. The misrepresentations begin with advertisements promising free estimates, but estimates were not provided in at least two of the projects. Further, cause for discipline pursuant to section 7161, subdivision (b) may be based on the misrepresentations contained in the invoices supplied by Respondent, with Opitz's approval, to customers and insurance carriers. Finally, cause for discipline under section 7161, subdivision (b), is based upon the actions used by Drain Rite and Opitz to obtain the contracts on the four projects that are the subject of this case, and is based upon Factual Findings 6-9, 10(B) and 10 (C), 15. 16. 19. 23(A), 24, 25, 27-33. 36-38. 41, 42, 44-47, and 51.

8. Cause exists to discipline Respondent's license pursuant to section 7116, for doing willful or fraudulent acts that substantially injured the owners of the Loyalton Drive home, based on Factual Findings 6-9, 10, 15, 16, 18, 19, 51, and 56.

9. Cause exists to discipline Respondent's license pursuant to section 7154, subdivision (b), for using persons to sell home improvement contracts when they were not registered. This liability does not arise from the repair of leaking pipes, or clearing clogged drains, but does arise from the sale of services to perform other repairs at the four homes that are the subject of this proceeding. This Conclusion is based on Factual Findings 4, 7-13, 21-23, and 27-31.

10. Cause exists to discipline Respondent's license pursuant to section 7068.1, subdivisions (a) and (e), because the Respondent' RMO, Opitz, failed to adequately supervise Respondent's employees in all four projects. This Conclusion is based on Factual Findings 50.

11. Cause exists to discipline Respondent's license pursuant to section 7159, subdivision (a)(5), for failing to provide a contract to the owners of the Vista Lane home that complied with the requirements of home improvement contracts. This Conclusion is based on Factual Finding 40.

12. (A) Cause exists to discipline Respondent's license pursuant to section 7159, subdivision (a)(1)(5), for failing to provide a written contract to homeowners before commencing work, in violation of section 7159, subdivisions (c)(3)(A) and (d), based on Factual Findings 7, 21 and 40(A).

(B) Cause exists to discipline Respondent's license pursuant to section 7159.5, subdivision (a)(1), for failing to provide a written contract to homeowners that had an agreed upon contract amount, in dollars and cents, based on Factual Findings 7, 21-23, and 31.

13. Cause exists to discipline Respondent's license pursuant to section 7095.5, for committing multiple acts of fraud, based upon Legal Conclusions 7 and 8, and their factual predicates.

14. Cause exists to order Respondent to pay the Board's costs of investigation and prosecution, pursuant to section 125.3, based on Legal Conclusions 1 and 5 through 13. The reasonable amount of costs is $49,449.16, based on Factual Finding 58.

15. The purpose of proceedings of this type is to protect the public, and not to punish errant licensees. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) Respondent, under Opitz's direction and control, routinely misled consumers, and attempted to bilk them or their insurers. He used coercive tactics to obtain payment his firm was not entitled to, such as filing for mechanics liens, and filing lawsuits; the most egregious example being his conduct toward the owners of the Loyalton Drive property, where he agreed their liablity was limited, and then sought full payment on fraudulent claims regarding how many hours were worked. Opitz has shown no remorse for any of his wrongdoing. There is no indication that he would change his tactics in the future. Based on the entire record, it is clear that the public can only be protected by an order revoking Respondent's license, and that one now held by Opitz, pursuant to sections 7097 and 7098. Further, he will be barred as acting on behalf of other licensees pursuant to section 7021. Any future relicensing should be conditioned on restitution to the owners of the Loyalton Drive property in the amount of $3,999.95. (See Factual Finding 56.)

ORDER

1. Contractor's license number 860503, type B and type C-36, and certification ASB appended to that license, issued to Drain Rite Plumbing, Inc., is revoked.

2. Contractor's License number 990139, type B and type C-36, issued to John Opitz in the business name Full Service Plumbing General Contracting and Restoration Services, and the certification ASB appended to that license, is revoked.

3. John Opitz is hereby barred, so long as the licenses of Drain Rite Plumbing, Inc. and Full Service Plumbing General Cotracting and Restoration Services remain revoked,

from serving as an officer, director, associate, partner, manager, or qualifying individual of any licensee.

4. Drain Rite shall pay the Board its costs of investigation and prosecution in the sum of $49, 449.16.

August 29, 2016

DocuSigned by:
Joseph D. Montoya
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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings