



# State Office of Administrative Hearings

Kristofer Monson  
Chief Administrative Law Judge

September 20, 2019

Sid Miller  
Commissioner of Agriculture  
Texas Department of Agriculture  
1700 North Congress  
Stephen F. Austin Bldg., 11<sup>th</sup> Floor  
Austin, Texas 78701

**INTERAGENCY MAIL**

**RE: Docket No. 551-19-3397; TEXAS DEPARTMENT OF AGRICULTURE v.  
INSPECTORS SERVICE GROUP, LLC.**

Dear Commissioner Miller:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the Proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Board according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in cursive script that reads "Sarah Starnes".

Sarah Starnes  
Administrative Law Judge

SS/db  
Enclosure

xc: Morris A. Karam, TDA, 1700 N. Congress, Stephen F. Austin Bldg., 11<sup>th</sup> Floor, Austin, TX 78701], - **VIA INTER-AGENCY**  
Carlos Samudio, Hearings Clerk, TDA, 1700 N. Congress, Stephen F. Austin Bldg., 11<sup>th</sup> Floor, Austin, TX 78701 - **VIA INTER-AGENCY (with 1 Hearing CD)**  
Sherilyn Goldman, Inspectors Service Group, LLC., 14833 Granada, Unit #8, Corpus Christi, TX 78418 - **VIA REGULAR MAIL**

SOAH DOCKET NO. 551-19-3397  
TDA NO. 02-19-SPCS

TEXAS DEPARTMENT OF AGRICULTURE  
v.  
INSPECTORS SERVICE GROUP, LLC,  
Respondent

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BEFORE THE STATE OFFICE OF  
  
OF  
  
ADMINISTRATIVE HEARINGS

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**TDA NO. 02-19-SPCS**

<b>TEXAS DEPARTMENT OF AGRICULTURE</b>	§	<b>BEFORE THE STATE OFFICE OF</b>
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	§	
v.	§	<b>OF</b>
	§	
<b>INSPECTORS SERVICE GROUP, LLC,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff (Staff) of the Texas Department of Agriculture (Department) seeks to impose administrative penalties totaling \$3,800 against branch offices of Inspectors Service Group, LLC (ISG), a structural pest control business. Staff alleges that three of ISG's locations violated regulations that required ISG to do the following: maintain verifiable training records; register its employees; maintain pesticide use records; provide records during a Department investigation; refrain from false or misleading advertising; and accurately complete wood destroying insect reports (WDIRs). The Administrative Law Judge (ALJ) finds that only some of the alleged violations were established by a preponderance of the evidence. For the violations established, the ALJ recommends that the Department issue a warning to ISG-Austin for an error on some training records, and recommends that ISG-Austin, ISG-Dallas, and ISG-Houston be fined \$100 each, for a total administrative penalty of \$300 for errors in some of their WDIRs.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion.

ALJ Sarah Starnes convened the hearing on the merits on July 25, 2019, in Austin, Texas. Staff appeared and was represented by Assistant General Counsel Morris Karam. Respondent appeared through its General Manager, Trace Pharis. The hearing concluded and the record closed on that day.

## II. APPLICABLE LAW

The Texas Structural Pest Control Act (the Act)<sup>1</sup> authorizes the Department, through its Structural Pest Control Service, to regulate and license persons engaged in the business of structural pest control.<sup>2</sup> The Structural Pest Control Service's advisory committee is authorized to enact rules for the Department that set standards on technical issues related to structural pest control, and that relate to enforcement of those standards.<sup>3</sup>

In this case, Staff alleges that ISG violated the following Department rules:

- Rule 7.133,<sup>4</sup> which requires a licensee's responsible certified applicator<sup>5</sup> to maintain complete and verifiable training records for an apprentice for at least two years from the date of the training. The records must be kept on a form prescribed by the Department and must include (a) the date the training records were received; (b) the number of hours of training; (c) the subject of the training; (d) the trainer's printed name, signature and license number; (e) a designation indicating whether the training was on-the-job or classroom training; (f) a competency evaluation by the certified applicator; and (g) the evaluator's printed name, signature and license number.<sup>6</sup>
- Rule 7.142, which requires a licensee to inform the Department of the employment or termination of all licensees and apprentices. Notice must be provided in writing, on a form prescribed by the Department, within 10 days of the date of employment or termination.<sup>7</sup>
- Rule 7.144, which requires the responsible certified applicator to ensure that correct and accurate records of all uses of pesticides are maintained for a period of two years. The records must be kept on the premise of the business licensee, and must be made available to the Department or its authorized agents upon written or verbal request.<sup>8</sup>

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<sup>1</sup> Tex. Occ. Code ch. 1951.

<sup>2</sup> Tex. Occ. Code § 1951.0021.

<sup>3</sup> Tex. Occ. Code § 1951.104.

<sup>4</sup> The rules of the Department's Structural Pest Control Service are found in Texas Administrative Code title 4, part 1, chapter 7, subchapter H. For ease of reference, they are referred to in this Proposal for Decision (PFD) as Rule \_\_\_\_\_. Effective January 9, 2018, the Department repealed and replaced each of the rules at issue in this case. The prior version of the rules (that is, the version in effect when the underlying events occurred) is cited in this PFD.

<sup>5</sup> A "responsible certified applicator" is the person designated by a licensed entity to be responsible for training and supervision of all pest control operations of the business. 4 Tex. Admin. Code § 7.121(b).

<sup>6</sup> 4 Tex. Admin. Code § 7.133(i).

<sup>7</sup> 4 Tex. Admin. Code § 7.142.

<sup>8</sup> 4 Tex. Admin. Code § 7.144(a), (c).



- Rule 7.152, which prohibits a licensee from engaging in “false, misleading or deceptive advertising,” including advertising that makes “a false or misleading statement concerning the effectiveness of a product as a pesticide or device.”<sup>9</sup>
- Rule 7.156, which authorizes Department employees to conduct investigations and inspections of structural pest control activities, and provides that a licensee can be sanctioned for interfering with a Department employee who is attempting to access property or obtain records for purposes of such an investigation or inspection.<sup>10</sup>
- Rules 7.175 and 7.176, which specify procedures for inspections made for the purpose of issuing a WDIR and require that WDIRs be made on a form prescribed by the Department.<sup>11</sup> The Department’s WDIR form includes, *inter alia*, blanks for the name and signature of the inspector, the date of the inspection, and the name of the inspector’s purchaser.<sup>12</sup>
- Rule 7.177, which requires an inspector to post an inspection sticker upon completion of an inspection for the purposes of completing a WDIR that contains, *inter alia*, the inspector’s name and license number and the date of the inspection.<sup>13</sup>

When a person has violated the Act or a rule enacted pursuant to the Act, the Department is authorized to impose an administrative penalty of up to \$5,000.<sup>14</sup> In determining the amount of the penalty, the Department must consider (1) the seriousness of the violation; (2) the damage to property or the environment caused by the violation; (3) the history of previous violations; (4) the amount necessary to deter future violations; (5) efforts to correct the violation; and (6) any other matter that justice may require.<sup>15</sup>

The Department has adopted a Structural Pest Control Penalty and Sanction Matrix (Penalty Matrix) that recommends penalty ranges for various violations of the Act and Department

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<sup>9</sup> 4 Tex. Admin. Code § 7.152(a)(2).

<sup>10</sup> 4 Tex. Admin. Code § 7.156.

<sup>11</sup> 4 Tex. Admin. Code §§ 7.175(a), .176(a).

<sup>12</sup> The Department’s WDIR form has been amended since the violations alleged in this case. The prior version of the form was admitted into evidence as TDA Ex. A9.

<sup>13</sup> 4 Tex. Admin. Code § 7.177(a).

<sup>14</sup> Tex. Agric. Code § 12.020(a), (c).

<sup>15</sup> Tex. Agric. Code § 12.020(d).

rules.<sup>16</sup> The Penalty Matrix categorizes violations as having a low, moderate, or high hazard potential. Within each of those categories, violations may be deemed a minor, moderate, or major violation, and then a penalty is recommended based on whether it was a person's first, second, or third or more violation.<sup>17</sup>

### III. DISCUSSION

#### A. Background

ISG is a structural pest control business with locations operating in several Texas cities, each with its own business license.<sup>18</sup> Mr. Pharis is a certified commercial applicator and is general manager of the ISG entities. At issue in this case are violations alleged at ISG's locations in Austin (ISG-Austin),<sup>19</sup> Dallas (ISG-Dallas), and Houston (ISG-Houston). ISG also operates a San Antonio location (ISG-San Antonio).

After receiving an anonymous complaint in July 2016,<sup>20</sup> the Department initiated inspections of ISG's businesses. Inspector Joseph Mallon performed a compliance inspection at the ISG-Austin office on August 3, 2016, then followed up with a visit to ISG-San Antonio on August 26, 2016.<sup>21</sup> Inspector Marvin Lopez performed a compliance inspection at ISG-Houston on August 5, 2016, and August 24, 2016.<sup>22</sup> And Inspector Darin McDaniel performed a compliance inspection at ISG-Dallas on August 17, 2016, and again on November 16, 2016.<sup>23</sup> Subsequently, ISG-Austin, ISG-Dallas, and ISG-Houston each received a Notice of Violation

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<sup>16</sup> The Penalty Matrix has been amended since the violations alleged in this case occurred. Staff agrees that the prior Penalty Matrix applies, and it was introduced into evidence as TDA Ex. A7.

<sup>17</sup> 38 Tex. Reg. 3826-28 (June 14, 2013).

<sup>18</sup> TDA Exs. A2a-A2c.

<sup>19</sup> After the inspections at issue in this case, ISG-Austin moved and is now based Round Rock, Texas.

<sup>20</sup> TDA Ex. A8. ISG disputed that the complaint was anonymous. According to Mr. Pharis, the complaint was made by a disgruntled former employee who was "trying to create a smokescreen so she wouldn't be prosecuted for theft."

<sup>21</sup> TDA Ex. B1.

<sup>22</sup> TDA Exs. D1, D6.

<sup>23</sup> TDA Exs. C1, C6, C11, C13-C15.



dated May 30, 2017.<sup>24</sup> ISG made a timely request for hearing on behalf of each entity,<sup>25</sup> and this proceeding ensued.

At hearing, Staff offered 64 exhibits, all of which were admitted into evidence, and presented testimony from two witnesses. Staff's first witness was Mr. Mallon, who has been an inspector with the Department's consumer protection services for eleven years and assists the Department with enforcing pest control laws. He conducted the inspection of ISG-Austin and wrote a report that summarized his investigation and made preliminary findings.<sup>26</sup> However, Mr. Mallon testified that he was not involved in the Department's determination of what violations had been found, and he offered no opinions or testimony regarding the specific violations alleged against ISG.

Staff's second witness was Allison Cuellar, who has worked for the Department's Structural Pest Control Service for almost 11 years and has been its Coordinator for a little over a year. Her job duties include reviewing and approving inspections. She testified regarding the violations the Department contends were committed by the ISG entities.

Mr. Pharis testified at the hearing on behalf of ISG, but did not offer any exhibits into evidence. His testimony and the testimony of Staff's witnesses is summarized in more detail below, in the discussion of each of Staff's claims.

#### **B. Accuracy of Training Records (Rule 7.133)**

Staff alleges that ISG-Austin failed to maintain accurate training records for three apprentices because the training records indicate that Mr. Pharis provided them training on dates when he also claimed to be teaching courses in other cities. Staff further alleges that the training records were inaccurate because they are missing the employees' license numbers, and because

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<sup>24</sup> TDA Exs. B1, C1, D1.

<sup>25</sup> TDA Exs. A4a-A4c.

<sup>26</sup> TDA Ex. B3.



Mr. Pharis signed in a space where ISG-Austin's responsible certified applicator should have signed. Staff seeks a \$300 administrative penalty for these violations

### 1. Staff's Evidence

The Department prescribes a form, called a verified training record (VTR), that registered businesses must use to record the training provided to its employees. Staff's evidence included VTRs for apprentices Christopher Russo,<sup>27</sup> Bradley White,<sup>28</sup> and Daniel Windler<sup>29</sup> that listed the training they received in 2016. At issue here are the following training entries:

- Mr. Russo's VTR shows that he received eight hours of on-the-job (OTJ) training from Mr. Pharis on April 26, 2016;
- Mr. Russo's VTR shows that he received 8 hours of OTJ training from Mr. Pharis on April 27, 2016;
- Mr. White's VTR shows that he received 10 hours of classroom training from Mr. Pharis on February 22, 2016; and
- Mr. Windler's VTR shows that he also received 8 hours of classroom training from Mr. Pharis on February 22, 2016.

Ms. Cuellar testified that Mr. Russo, Mr. White, and Mr. Windler are all San Antonio residents.<sup>30</sup> She disputed that they could have received training from Mr. Pharis on the dates listed above because Mr. Pharis was scheduled to teach classes in other cities on the same dates.

According to Ms. Cuellar, training can be provided by a business's licensed employees, but it can also be provided by third-party trainers whose courses have been approved by the Department. To get the Department's approval, a trainer submits his course materials and other details to the Department, and the Department will approve the course and speaker for a specified

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<sup>27</sup> TDA Ex. B17.

<sup>28</sup> TDA Ex. B20.

<sup>29</sup> TDA Ex. B21.

<sup>30</sup> At the time, Mr. Pharis said, a number of ISG-Austin's employees lived and worked in San Antonio.

number of hours. Mr. Pharis regularly teaches such courses through a business called PestPro Solutions, and he had obtained the Department's approval to teach courses on several dates the VTRs claim he was giving OTJ or classroom instruction to ISG-Austin's employees. Specifically:

- Mr. Pharis was approved to teach a 6-hour class on April 26, 2016, in Austin for PestPro;
- Mr. Pharis was approved to teach a 6-hour class on April 27, 2016, in Dallas for PestPro; and
- Mr. Pharis was approved to teach a 6-hour class on February 22, 2016, in San Antonio for PestPro.<sup>31</sup>

Ms. Cuellar asserted that Mr. Pharis could not teach classes in Austin, Dallas, and/or San Antonio at the same time he was giving OTJ or classroom training to ISG-Austin's apprentices. However, she admitted that the Department has no record of whether those PestPro classes were actually held, only that they were scheduled and approved. There is no penalty for cancelling a pre-approved class, according to Ms. Cuellar, and there is no rule that requires notification to the Department when a class has been cancelled. Ms. Cuellar said that Mr. Pharis would "ideally" have let the Department know if he had cancelled any of PestPro's courses, but she admitted that he was not required to do so.

Staff also disputed that Mr. Pharis could have given classroom training to both Mr. White and Mr. Windler on February 22, 2016. Ms. Cuellar testified that classroom training covers any training that is not on-the-job. A business has the flexibility to give classroom training in person, on line, using videos, or using written course materials; essentially any method of "classroom" training is acceptable, provided the responsible certified applicator can certify that the trainee has covered and learned the necessary materials. Ms. Cuellar conceded that an apprentice can often do classroom training at home, and that the trainer does not have to be in the classroom with the trainee for the duration of the classroom hours.

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<sup>31</sup> TDA Exs. B18a-B18d. The classroom training that Mr. White and Mr. Windler recorded on February 22, 2016, was not the PestPro course.



Mr. Cuellar also testified that the VTRs were inaccurate or incomplete because the license numbers for Mr. Russo, Mr. White, and Mr. Windler were missing from their VTRs, and because Mr. Pharis signed each form as the “evaluator” when the Department’s rules provide that only an entity’s responsible certified applicator can be the evaluator. Though he is a certified applicator, Mr. Pharis has never been designated the *responsible* certified applicator for ISG-Austin.<sup>32</sup>

On cross-examination, Ms. Cuellar agreed that businesses may start training new apprentices before they have received a license number from the Department. Businesses have 10 days to register new employees, and Ms. Cuellar said that it may take up to fifteen days to process a registration; all told, then, an apprentice could be working for up to a month before receiving a license number from the Department. Ms. Cuellar conceded that it would be possible for a newly-hired apprentice to complete all of the training necessary to become a technician during the month he was awaiting a registration number from the Department, and in that circumstance there would be no apprentice license number to write in on the apprentice’s VTR. When a person’s license status changes—as when an apprentice moves up to hold a technician license—Ms. Cuellar said the business is expected to start a new VTR with a different license number for that employee. The business should retain the prior VTR used while the employee was an apprentice, but the record should not be changed or added to once the employee became a technician, according to Ms. Cuellar.

## 2. ISG’s Evidence

Mr. Pharis argued the Department has no evidence that he actually taught PestPro classes on the dates in February and April 2016 when he signed off on training for Mr. Russo, Mr. White, and Mr. Windler in San Antonio. Mr. Pharis said he offers about 100 classes a year through PestPro. Though he could not recall any specific PestPro course from two years ago, Mr. Pharis said he commonly cancels pre-approved courses when they are under-enrolled or his schedule changes. He would not have told the Department about a cancellation because there is no requirement for him to do so, and no one at the Department ever asked him for that information.

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<sup>32</sup> TDA Ex. B19.



Mr. Pharis also argued that, even if he had taught a PestPro class on February 22, 2016, that would not be inconsistent with approving other classroom training for Mr. White and Mr. Windler on the same date, because the instructor is not required to be in the room with the trainee while they are completing classroom training. For the same reason, Mr. Pharis asserted, it was possible for both Mr. White and Mr. Windler to complete separate classroom trainings on the same date, both overseen by Mr. Pharis.

### 3. Analysis

The evidence failed to establish that Mr. Pharis misrepresented the classroom and OTJ training hours he approved for Mr. Russo, Mr. White, and Mr. Windler in February and April 2016. While the Department's records show that Mr. Pharis anticipated teaching courses for PestPro on those dates, there is no evidence that those courses actually went forward. Moreover, Mr. Pharis did not need to be physically present with his trainees to approve their classroom training.

The evidence also failed to establish that the VTRs for Mr. Russo, Mr. White, and Mr. Windler were incomplete due to the absence of their license numbers. Mr. Russo became a registered apprentice with ISG-Austin on April 18, 2016, and all of the training hours on his VTR were completed in a ten-day period between April 18 and April 27, 2016.<sup>33</sup> Likewise, Mr. White and Mr. Windler became registered apprentices with ISG-Austin on February 22 and February 19, 2016, respectively, and the training hours on their VTRs were all completed in a 10-day period between February 22 and March 2, 2016.<sup>34</sup> Ms. Cuellar testified that it could take up to a month for an apprentice to receive a license number from the Department, and that no license number could be written on a VTR during that time. Therefore, Staff's evidence failed to establish that any of these apprentices had a license number that could have been included on their VTR when the training at issue occurred. Moreover, Rule 7.133(i) lists a number of items the

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<sup>33</sup> TDA Exs. B17, B19.

<sup>34</sup> TDA Exs. B20, B21. February 2016 was a leap year with 29 days in the month.

VTR must include. While the name, signature, and license number of the *trainer* and *evaluator* are required, the license number of the *trainee* is not specifically required by Rule 7.133.<sup>35</sup>

Finally, the VTRs that ISG-Austin maintained for Mr. Russo, Mr. White, and Mr. Windler are all signed by Mr. Pharis as the “Evaluator (R.C.A.) [responsible certified applicator],” and he listed his own commercial applicator number on the line reserved for the license number of the responsible certified applicator. The Department’s records indicate that Mr. Pharis was not the responsible certified applicator for ISG-Austin at that time.<sup>36</sup> Therefore, by having Mr. Pharis sign the VTRs, ISG-Austin violated Rule 7.133, which provides that an entity’s apprentice training “is the responsibility of the responsible certified applicator”; that the responsible certified applicator “must certify in the training records . . . that the apprentice has completed the required training . . .”; and that the responsible certified applicator is responsible for maintaining the VTRs for each apprentice.<sup>37</sup>

The Department’s Penalty Matrix does not specifically categorize the hazard potential for this violation, although a refusal to release training records upon an employment change (also a violation of Rule 7.133) is categorized as a penalty level S1, the level for violations with a low hazard potential.<sup>38</sup> The penalty for a first-time S1 violation ranges from a warning for “minor” violations to a \$300 penalty for “major” violations. There is no evidence of prior violations by ISG-Austin, and no evidence that anyone was harmed or confused by having the wrong signature on otherwise-accurate VTRs. The ALJ finds that having an apprentice’s VTR signed by an entity’s general manager—who is both a licensed commercial applicator and the person who actually provided all of the apprentice’s training—instead of being signed by the entity’s responsible certified applicator is also a low-hazard S1 violation. Under the circumstances, the ALJ finds that this violation was a minor violation with a low hazard potential, and recommends that ISG-Austin receive a warning for failing to have three VTRs signed by the appropriate person.

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<sup>35</sup> 4 Tex. Admin. Code § 7.133(i)(2)(D), (G).

<sup>36</sup> TDA Ex. B19.

<sup>37</sup> 4 Tex. Admin. Code § 7.133(a), (h)(2), (i)(1).

<sup>38</sup> Staff Ex. A7.



### C. Failure to Register Employees (Rule 7.142)

Staff alleges that ISG-Austin failed to register three of its employees with the Department within ten days of the employees' hiring. Staff cites some of ISG-Austin's WDIRs that indicate those employees were performing inspections for ISG-Austin but were not registered to that entity. For this violation, Staff seeks to impose a \$300 administrative penalty.

#### 1. Staff's Evidence

Staff's exhibits show that on April 7, 2016, and August 17, 2016, inspector Joe Rea performed inspections and issued WDIRs for two different San Antonio properties. On both WDIRs, Mr. Rea listed the name and license number of ISG-Austin as the inspection company.<sup>39</sup> In the Department's online records, which list ISG-Austin's registered employees between approximately 2010 and April 2019, Mr. Rea is not listed as a registered employee of ISG-Austin at any time.<sup>40</sup> The Department's online records show that Mr. Rea was registered as a technician with a San Antonio business called Bugstop from August 22, 2011, to January 22, 2016.<sup>41</sup> According to Ms. Cuellar, Mr. Rea was not registered with either ISG-Austin or Bugstop at the time he performed the April and August 2016 inspections.

Staff's exhibits also show that on April 16, 2016, and June 14, 2016, inspector Greg Luna performed inspections and issued WDIRs for two other San Antonio properties. Mr. Luna listed the name and license number of ISG-Austin as the inspection company.<sup>42</sup> In the Department's online records, Mr. Luna is not listed as a registered employee of ISG-Austin at any time.<sup>43</sup> The Department's online records show that Mr. Luna was registered with Bugstop as an apprentice and

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<sup>39</sup> TDA Exs. B6, B7.

<sup>40</sup> TDA Ex. B19.

<sup>41</sup> TDA Ex. 12. The Department's records list the business license holder as "Sherilyn Goldman," but the parties agreed that Bugstop was a d/b/a for Ms. Goldman.

<sup>42</sup> TDA Exs. B8, B9.

<sup>43</sup> TDA Ex. B19.



then a technician from February 5, 2011, to January 22, 2016.<sup>44</sup> According to Ms. Cuellar, Mr. Luna was not registered with either ISG-Austin or Bugstop at the time he performed the April and June 2016 inspections.

Additionally, Staff's exhibits show that on March 1, 2016, and March 29, 2016, inspector David Williams performed inspections and issued WDIRs for two San Antonio properties. Mr. Williams also listed the name and license number of ISG-Austin as the inspection company.<sup>45</sup> In the Department's online records, Mr. Williams is not listed as a registered employee of ISG-Austin at any time.<sup>46</sup> The Department's online records show that Mr. Williams was registered with Bugstop as an apprentice and then a technician from April 7, 2014, to January 22, 2016.<sup>47</sup> According to Ms. Cuellar, Mr. Williams was not registered with either ISG-Austin or Bugstop at the time he performed the two inspections in March 2016.

In her testimony, Ms. Cuellar asserted these records establish that Mr. Rea, Mr. Luna, and Mr. Williams were employees of ISG-Austin, and that ISG-Austin failed to register them with the Department within 10 days of their employment as required by Rule 7.142.<sup>48</sup>

As described in more detail below, Bugstop was a San Antonio entity that ISG acquired. ISG terminated Bugstop when that entity's business license expired in 2016 and moved to register Bugstop's employees with the newly-formed ISG-San Antonio. In addition, some ISG-Austin employees who resided in the San Antonio area were also shifted from ISG-Austin to ISG-San Antonio. Ms. Cuellar testified that she was generally aware that, in or about 2016, Bugstop had been shut down, but she was not familiar with how Bugstop's business related to ISG's branch offices and was not aware any particular employees who may have moved from Bugstop or ISG-Austin to ISG-San Antonio. Ms. Cuellar also testified that, because she works in

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<sup>44</sup> TDA Ex. 12.

<sup>45</sup> TDA Exs. B10, B11.

<sup>46</sup> TDA Ex. B19.

<sup>47</sup> TDA Ex. 12.

<sup>48</sup> 4 Tex. Admin. Code § 7.142.

enforcement, she was unaware of any problems or delays experienced in the Department's licensing division in 2016, when Bugstop and ISG were in the midst of this transition.

On cross-examination, Ms. Cuellar explained that when multiple offices share a common tax ID number, they are considered branch offices of the parent company. Each branch office is required to hold a separate license from the Department, but a technician registered at one branch office can work for any other branch that uses the same tax ID number. In ISG's case, this meant that any licensed technician who was registered with one branch could work for any other ISG branch office. However, Bugstop had a distinct tax ID number, so its employees could not work for any ISG branch without registering with ISG first.

## **2. ISG's Evidence**

Mr. Pharis testified that the gap in registrations for Mr. Rea, Mr. Luna, and Mr. Williams stemmed from Bugstop's transition to a new ISG-San Antonio office and the Department's delay in processing the associated registrations. Mr. Rea, Mr. Luna, and Mr. Williams were all San Antonio-area employees of Bugstop who moved to ISG-San Antonio.

Mr. Pharis's former wife owned Bugstop, and they planned to close that business and convert it to a new ISG office in San Antonio in February 2016, when Bugstop's business license was due to expire. In anticipation of that transfer, Mr. Pharis said they applied to the Department in December 2015 for a business license for the new ISG-San Antonio. At the same time, ISG filed the necessary paperwork to register Bugstop's employees with ISG-San Antonio and to transfer registration for those ISG-Austin employees who wanted to move to the new entity. ISG also paid all associated fees for the applications and transfers. Based on ISG's previous experiences with the Department, Mr. Pharis said, they were expecting "a nice, smooth transition." Instead, he discovered that 2016 was the "absolute worst year" for dealing with the Department's licensing division, and it was taking applicants up to six months to have a license processed.



ISG had planned on making a seamless transition for its employees moving to the new San Antonio branch. Instead, the Department had still not acted on their applications when Bugstop's business license expired in early 2016. That is why the Department's records show that Mr. Rea, Mr. Luna, and Mr. Williams all terminated their employment with Bugstop on the same date, January 22, 2016, which is the date that Bugstop's license expired, according to Mr. Pharis. Because the Department had not yet granted ISG-San Antonio's application for a business license, those employees could not be registered with the new entity when their registration with Bugstop expired. This left those employees "without a home, waiting for their licenses," according to Mr. Pharis. He said the Department's licensing division kept assuring him that the licenses and registrations were coming and that because the applications had been submitted and fees were paid, it was fine for ISG to continue operating and its technicians to keep working. During this period of limbo after Bugstop was terminated but before ISG-San Antonio's business license was issued, ISG's inspectors used ISG-Austin's business license number on the WDIRs.

ISG-San Antonio's licenses and employee registrations were finally processed in April 2016, approximately five months after ISG applied for them, according to Mr. Pharis. And despite the licensing division's assurances, the enforcement division is now seeking to penalize ISG for continuing to perform inspections during that time. Mr. Pharis asserted that "enforcement is not on the same page as licensing at all." He denied that ISG had violated the rule requiring registration of technicians within ten days of an employment change; instead, he asserted, ISG had submitted the transfer forms to the Department months in advance, providing far more than the 10 days' notice required by Rule 7.142.

Mr. Pharis testified that, because the Department's rules only require licensees to retain records for two years, ISG no longer has the records to prove that it submitted the necessary applications, transfer documents, and fees to the Department in December 2015. He noted that the Department did not provide records from ISG-San Antonio to show what employees were registered with that entity when its license was finally issued in April 2016, but asserted that Mr. Rea, Mr. Luna, and Mr. Williams would all have been registered with ISG-San Antonio from the inception of that branch.



### 3. Analysis

Rule 7.142 requires a business licensee to give the Department notice of employment of all licensees and apprentices within ten days of the date of employment.<sup>49</sup> Staff's only evidence that ISG-Austin violated this rule is that three licensed inspectors were not included on the Department's list of ISG-Austin's registered employees on dates those inspectors issued WDIRs with ISG-Austin's license number. However, ISG's evidence showed that none of the inspectors was ever employed by ISG-Austin. The evidence also strongly suggests that the inspectors were not registered with another entity at the time because of delays in how the Department processed and maintained its records, not because ISG failed to give timely notice of the inspectors' employment changes.

The Department's records shed no light on the question of when it actually received notice from ISG, but Mr. Pharis testified credibly that ISG gave the Department notice in December 2015 that Bugstop's employees—including Mr. Rea, Mr. Luna, and Mr. Williams—would be employed by ISG-San Antonio when that new branch office received its license. According to Mr. Pharis, none of these inspectors ever intended to be registered with ISG-Austin, which is why they do not appear in registration records for that branch office. ISG had no control over when or how the Department processed the employees' transfer of registration from Bugstop to ISG-San Antonio, but the preponderance of the credible evidence demonstrates that the Department received notice that Mr. Rea, Mr. Luna, and Mr. Williams would cease working for Bugstop and transfer registration to ISG-San Antonio far more than ten days before their change of employment actually occurred. Therefore, Staff failed to meet its burden of proving ISG-Austin violated Rule 7.142.

#### **D. Maintenance of Correct and Accurate Records (Rule 7.144) and Interference with Investigation (Rule 7.156)**

Staff contends that ISG-Dallas failed to properly maintain pesticide records and failed to cooperate with the Department's investigation because its business records were maintained in electronic format, rather than paper stored on the premises, and because it took ISG-Dallas several

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<sup>49</sup> 4 Tex. Admin. Code § 7.142.

days to produce its records to the Department's inspector.<sup>50</sup> Staff seeks to impose a \$300 penalty against ISG-Dallas for violating Rule 7.144, and a \$500 penalty for violating Rule 7.156.

### **1. Staff's Evidence**

Staff presented no witness testimony in support of this claim, but its exhibits included documents related to the Department's inspection of ISG-Dallas.

An unsigned Establishment Inspection Report states that inspector Darin McDaniel inspected ISG-Dallas on November 16, 2016. He checked a box answering "no" in a field that asked "Were Use Records available for review for all categories in which the Establishment conducts Business," and in the "Remarks" field, he typed "NO TRAINING RECORDS OR ANY USE RECORDS WERE AVAILABLE FOR INSPECTOR MCDANIEL OR WEISER TO REVIEW."<sup>51</sup> The same remark is found on a Pesticide Inspection Findings form, also dated November 16, 2016.<sup>52</sup>

The Pesticide Inspection Findings form and a Request for Records form (also unsigned) indicate that, on the same day, Mr. McDaniel requested "VTR FOR ALL APPRENTICES & TECHNICIANS, ALL USE RECORDS FOR PESTICIDE APPLICATIONS, INCLUDING WDI SUPPRESS, AND ALL WDI REPORTS" from January 1 to November 16, 2016. ISG-Dallas was directed to produce the documents to Mr. McDaniel by 5:00 p.m. on November 29, 2016.<sup>53</sup>

An Incident Investigation Report Addendum Request summarizes some of the Department's investigation of ISG-Dallas, but it is not clear from the document who wrote the

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<sup>50</sup> At the hearing, there was a lot of discussion regarding Mr. Mallon's testimony that Mr. Pharis had cut short his inspection of ISG-Austin and that Mr. Pharis had been unable to produce any paper records during his inspection of that entity. Staff's pleadings do not allege any violation of Rules 7.144 or 7.156 by ISG-Austin, and at the hearing Staff re-affirmed that these violations are asserted only against ISG-Dallas. Therefore, Mr. Mallon's testimony on this topic is not discussed.

<sup>51</sup> TDA Ex. C13 at 251, 254.

<sup>52</sup> TDA Ex. C15.

<sup>53</sup> TDA Exs. C14, C15.



report.<sup>54</sup> The report states that on November 16, 2016, “Inspector McDaniel and R.E.S. Paul Weiser met with Trace Pharis at [ISG-Dallas] to request additional records,” but that “Mr. Pharis did not have any records at this business location.” The report goes on to state that Mr. Pharis was instructed to provide VTRs for all apprentices and technicians; use records for all pesticide applications performed by any ISG employees; and all WDIRs to Mr. McDaniel by no later than November 29, 2016.<sup>55</sup> The report also states that, on August 16, 2016, Mr. Pharis told an inspector that all of IGS’s records were maintained “at the corporate office in San Antonio and on the cloud.”<sup>56</sup> The inspector made a preliminary finding that ISG-Dallas failed to keep all records on the premises of the business licensee.<sup>57</sup>

## 2. ISG’s Evidence

In his testimony, Mr. Pharis denied that ISG-Dallas failed to properly maintain or promptly produce its business records to the Department. He testified that the Department’s investigators insisted on seeing “physical records” and seemed confused when he told them that ISG’s records were maintained electronically and stored in the cloud.

According to Mr. Pharis, the Department’s inspectors “came into my office like storm troopers twice in the summer of 2016 and demanded to see everything.” In both cases, according to Mr. Pharis, the inspectors demanded “physical records” despite being told that ISG’s records were stored on laptops and in the cloud. During the inspection of ISG-Houston, according to Mr. Pharis, the Houston inspector seemed to mock him for referring to “the cloud” and told him, “I don’t understand what you mean.”

Mr. Pharis said he and other ISG employees spent over forty hours in four separate meetings with the inspectors who came to San Antonio, Austin, Dallas, and Houston, and tried to

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<sup>54</sup> TDA Ex. C11.

<sup>55</sup> TDA Ex. C11 at 246.

<sup>56</sup> TDA Ex. C11 at 247.

<sup>57</sup> TDA Ex. C11 at 247.

answer their questions and provide the information they sought. Dissatisfied, the inspectors came back for a second round of inspections. Mr. Pharis testified that Staff's exhibits pertain to the second inspection of the Dallas office, and that inspector McDaniel is "out-and-out lying" if he claimed that ISG-Dallas refused to cooperate with him. According to Mr. Pharis, he explained to Mr. McDaniel how voluminous the records he was requesting would be. There were probably over 1000 reports prepared during the eleven months at issue in the Department's record request, in addition to the other records the inspector was seeking. The inspector's demand that all of those records be produced "right then and there, in paper form" was unreasonable and impossible for ISG-Dallas to comply with, according to Mr. McDaniel. He recalled that the inspection took place on a Friday, and by the following Wednesday he had delivered all of the requested records to the Department on a zip drive. He said ISG-Dallas went to great time and expense to promptly produce the records, and its business ground to a halt while it complied with the inspector's request.

### 3. Analysis

Rule 7.144 requires a responsible certified applicator to ensure that "correct and accurate records of all uses of pesticides" are maintained for a period of two years, and that the records "must be kept on the premises of the business licensee."<sup>58</sup> The rule also provides that the records "shall be made available to the [D]epartment or its authorized agents upon written or verbal request."<sup>59</sup> Mr. Pharis repeatedly told the inspectors that ISG's business records were created and stored electronically and could not be provided on paper. Nothing in Rule 7.144 specifies that a business licensee's records must be maintained or provided in paper form, and Staff presented no evidence that those records were not electronically available to Mr. McDaniel during his inspection of ISG-Dallas. Therefore, the evidence failed to establish a violation of Rule 7.144.

Rule 7.156 authorizes Department employees to conduct investigations and inspections of structural pest control companies, and provides that "[a]ny licensee who interferes with an employee of the [D]epartment attempting to enter or access . . . records" shall be subject to

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<sup>58</sup> 4 Tex. Admin. Code § 7.144(a).

<sup>59</sup> 4 Tex. Admin. Code § 7.144(c).



disciplinary action.<sup>60</sup> Staff's evidence did not establish that ISG-Dallas tried to prevent Mr. McDaniel from accessing its records during his inspection. Instead, the evidence showed only that Mr. McDaniel was dissatisfied because he expected to see paper records instead of the electronic records maintained by ISG-Dallas. The preponderance of the evidence also showed that ISG-Dallas promptly produced the records in electronic format, on a zip drive, within a few days of the November 16, 2016 inspection, and well before the November 29, 2019 deadline set by the Department's request for records.<sup>61</sup> Given the breadth of the document requests and the number of responsive documents, ISG-Dallas's document production was reasonable under the circumstances. The evidence failed to establish that ISG-Dallas interfered with the investigator's access to its records in violation of Rule 7.156.

**E. False, Misleading, Or Deceptive Advertising (Rule 7.152)**

Staff contends that ISG-Houston and ISG-Dallas made false, misleading, or deceptive statements in advertisements for a wood destroying insect (WDI) treatment service. For this violation, Staff seeks to impose an administrative penalty of \$300 against each entity.

**1. Staff's Evidence**

Staff presented no witness testimony in support its false advertising claim, but its exhibits included documents that ISG-Dallas and ISG-Houston provided related to their WDI suppression service.<sup>62</sup>

**a. Records Relating to ISG-Dallas**

At issue with respect to ISG-Dallas is a one-page flyer on ISG letterhead that reads, in relevant part:

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<sup>60</sup> 4 Tex. Admin. Code § 7.156(a), (c).

<sup>61</sup> TDA Ex. C14.

<sup>62</sup> TDA Ex. C5-C10, D4, D6-D8.

Homes that receive a treatment recommendation based solely on Conductive Conditions are eligible for a WDI Suppression Treatment that includes a 1 year transferrable warranty for Subterranean Termites & Carpenter Ants for only \$299.00. This treatment eliminates the need to correct conducive conditions and includes a new clear WDI report.<sup>63</sup>

In an email to the Department addressing the treatments, Mr. Pharis explained that the suppression treatments referenced in the flyer are “typically Termidor treatments on the perimeter base and eaves” to address conditions conducive to carpenter ants, wood-destroying beetles, bees, and other insects. Mr. Pharis added, “They are not traditional termite treatments nor are they stated to be[,] however they do come with a sub[terranean] termite warranty.”<sup>64</sup>

ISG-Dallas provided the inspector with an information sheet on ISG letterhead titled “An Explanation of the WDI Suppression Treatment Process.”<sup>65</sup> It explained that when a home has received an inspection report that recommends addressing conducive conditions, “most buyers and lenders want some form of treatment and a warranty in addition to correcting the conducive conditions.” The WDI suppression treatment was designed to address that need. The treatment entails the application of products called Termidor SC and Temprid SC, and the information sheet asserted that “[t]his combined treatment effectively suppresses a variety of WDI . . . .” The information sheet also stated that customers were given a written warranty for one year.

The product labels for Termidor SC and Temprid SC do not expressly refer to suppression treatments. The Termidor SC label says the product is for “prevention and/or control of above ground termites and carpenter ants in localized areas” and “prevention and/or control of existing or future infestations of termites or carpenter ants” in trees, nonstructural wood, or wood-to-soil

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<sup>63</sup> TDA Ex. C6.

<sup>64</sup> TDA Ex. C5.

<sup>65</sup> TDA Ex. C7.



contacts, among other uses.<sup>66</sup> The Temprid SC label says that product is used for controlling indoor or general household pests; outdoor/perimeter pests; and wood-infesting pests.<sup>67</sup>

**b. Records Relating to ISG-Houston**

ISG-Houston provided its inspector with the same “Explanation of the WDI Suppression Treatment Process” that was also produced by ISG-Dallas.<sup>68</sup> In its Second Amended Complaint, Staff emphasized the language in this information sheet that claimed “[t]he Termidor label states that the 0.06% rate provides for ONE YEAR OF PREVENTION AND CONTROL.”<sup>69</sup> ISG-Houston also sent the inspector a copy of a supplemental label for Termidor SC, one of the pesticides used in the suppression treatment.<sup>70</sup> Staff contends that nothing in the supplemental label supports ISG-Houston’s claim of “one year of prevention and control.”

**2. ISG’s Evidence**

Consistent with the information sheet that ISG-Houston and ISG-Dallas provided to the inspectors, Mr. Pharis testified that the WDI suppression treatment was developed to address the needs of customers who had difficulty closing real-estate transactions after receiving an inspection that found conducive conditions for WDIs. He said the treatment has never been offered to customers who currently have, or have ever had, termites or other WDI infestations.

The WDI suppression treatment offers assurance to lenders (like the Veterans Administration) who may balk at going forward after conducive conditions have been discovered. ISG will perform a treatment to help prevent WDI problems from developing at the property, then guarantees its treatment for one year. ISG also re-inspects the home and issues a new WDIR

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<sup>66</sup> TDA Ex. C8 at 214-15, TDA Ex. C9.

<sup>67</sup> TDA Ex. C10.

<sup>68</sup> TDA Ex. D7.

<sup>69</sup> Second Amended Complaint at 23. Staff did not challenge this language in its claim against ISG-Dallas. *Id.* at 17-18.

<sup>70</sup> TDA Ex. D8.

indicating that there are no longer conducive conditions and no treatment is recommended. According to Mr. Pharis, the one-year warranty is not tied to any assurance that the chemicals used will work for a year. Instead, the warranty is limited to one year because the product labels do not recommend using those product more frequently than once a year. If additional treatment is needed during the year, ISG would have to switch chemicals. Mr. Pharis testified that the WDI suppression treatment is a very popular service for ISG, and that none of the branches have ever had a customer complaint about its advertising for the service. Mr. Pharis also noted that the word “suppression” is not defined or prohibited in the Department’s advertising rules.

### 3. Analysis

Rule 7.152 prohibits a licensee from making a “false or misleading statement concerning the effectiveness of a product as a pesticide or device.”<sup>71</sup>

Staff contends that ISG-Dallas’s flyer misrepresented the effectiveness of Termidor SC and Temprid SC because the labels for those products do not refer to suppression treatments, which is the service ISG-Dallas was advertising. Staff cited no rule or Department policy establishing that “suppression treatment” is a term of art that holds a specific meaning in the field of structural pest control. Therefore, the plain meaning of the term applies.<sup>72</sup> The Termidor SC label says the product is intended, *inter alia*, to prevent termites and carpenter ants from infesting specified areas and to control existing infestations. These uses are consistent with the plain meaning of “suppression,” which is defined as the act of repressing, stopping, or arresting something.<sup>73</sup>

Staff also contends that the product labels do not support ISG-Dallas’s claim that the suppression treatment “eliminates the need to correct conducive conditions,” as asserted in the flyer. However, Mr. Pharis explained that this claim was related to the one-year warranty ISG provided. The flyer did not claim that Termidor SC or Temprid SC was guaranteed to eliminate

<sup>71</sup> 4 Tex. Admin. Code § 7.152(a)(2).

<sup>72</sup> *Texas Lottery Com’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

<sup>73</sup> “Suppression” and “Suppress” definitions, <https://www.dictionary.com> (last accessed September 13, 2019).



conducive conditions for a year, only that ISG-Dallas was warranting that there would not be any conducive conditions during the warranty period. The ALJ finds that the challenged statements in the ISG-Dallas flyer were not false or deceptive.

Finally, Staff contends that ISG-Houston's information sheet titled Explanation of the WDI Suppression Treatment Process contained a false or misleading statement about Termidor SC insofar as the information sheet claimed that "[t]he Termidor label states that the 0.06% rate provides for ONE YEAR OF PREVENTION AND CONTROL." There was no testimony addressing when or to whom the information sheet was distributed, and the record contains no evidence that the information sheet was provided to anyone other than the Department's investigators.<sup>74</sup> Therefore, the evidence failed to establish that the challenged statement was included in any advertisement.

For the foregoing reasons, the preponderance of the evidence failed to establish that ISG-Dallas or ISG-Houston violated Rule 7.152.

#### **F. Errors in WDIRs (Rules 7.175-.177)**

Staff contends that there were one or more errors or omissions found in thirteen WDIRs issued by ISG-Austin, two WDIRs issued by ISG-Dallas, and fifteen WDIRs issued by ISG-Dallas. Staff seeks to impose a \$750 administrative penalty against ISG-Austin and ISG-Dallas for their failures to properly complete WDIRs, and a \$300 administrative penalty against ISG-Dallas for the same violation.

At issue are the Department rules that require inspectors to follow certain procedures in performing an inspection (Rule 7.175), use a form prescribed by the department for WDIRs (Rule 7.176), and post a sticker upon completion of an inspection (Rule 7.177).<sup>75</sup>

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<sup>74</sup> In his email forwarding materials to the Department, Mr. Pharis said he was enclosing "the coversheet we use indicating the suppression treatments." Ex. C5 at 209. The email appears to be referring to the ISG-Dallas flyer, not the information sheet.

<sup>75</sup> 5 Tex. Admin. Code §§ 7.175-.177.

### 1. Failure to Identify the Department as the Responsible Agency

Ms. Cuellar testified that the Department's rules require WDIRs to be made on a form prescribed by the Department<sup>76</sup> and that any deviation from the form is regarded as a violation. ISG did not specifically address this allegation in Mr. Pharis's testimony.

The Department form in use in 2016 contained a line stating that "The structure(s) listed below were inspected in accordance with the official inspection procedures adopted by the Texas Department of Agriculture Structural Pest Control Service."<sup>77</sup> Staff identified two WDIRs issued by ISG-Austin<sup>78</sup> and one WDIR issued by ISG-Dallas<sup>79</sup> that state only that the inspection was conducted according to procedures adopted by the "Texas Structural Pest Control Service," omitting the reference to the Department. However, consistent with the Department's form, all of the WDIRs state in bold type at the bottom of the page of that the entity is "Licensed and Regulated by the Texas Department of Agriculture."

Staff has correctly identified a minor, non-substantive deviation from the Department's form on three WDIRs issued by ISG branches. However, the information omitted from the form was stated elsewhere on the same page, and more prominently. ISG's deviation from the Department's form, though technically a violation of Rule 7.176, was not deceptive and was unlikely to confuse any consumer.

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<sup>76</sup> 4 Tex. Admin. Code § 7.176(a).

<sup>77</sup> TDA Ex. 19.

<sup>78</sup> TDA Exs. B8, B9.

<sup>79</sup> TDA Ex. C16.



## 2. Use of Wrong Technician License Number

Ms. Cuellar identified two WDIRs issued by ISG-Austin<sup>80</sup> in which technician Greg Luna used another technician's license number on the form. Mr. Luna put "Lic # 602835" next to his name when the Department's records show that Mr. Luna's technician license number is 592006.<sup>81</sup> License number 602835 belongs to another ISG-Austin technician, Bobby Brown.<sup>82</sup> ISG did not address this allegation in Mr. Pharis's testimony.

In addition, Staff's exhibits included a WDIR from ISG-Dallas<sup>83</sup> with the name and license numbers for two inspectors in the space where the inspector was supposed to sign the report. Though both inspectors were registered with ISG-Dallas,<sup>84</sup> neither held the license number listed with his name on the WDIR. Staff contends that this WDIR fails to correctly reflect who performed the inspection. Neither party addressed this WDIR at the hearing.

Staff has correctly identified two WDIRs issued by ISG-Austin and one WDIR issued by ISG-Dallas that listed the wrong license number for the inspector. However, Staff has not shown how these paperwork errors constitute a violation. Rule 7.175 describes the procedures that must be followed when conducting an inspection for purposes of issuing a WDIR, but the inspector's license number is not among the items that Rule 7.175 specifies must be included in the report.<sup>85</sup> Staff has not shown that ISG-Austin or ISG-Dallas failed to follow any specific procedure described in Rule 7.175 when they erroneously recorded a technician's license number.

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<sup>80</sup> TDA Exs. B8, B9.

<sup>81</sup> TDA Ex. B12 at 126.

<sup>82</sup> TDA Ex. B12 at 126.

<sup>83</sup> TDA Ex. C17 at 264.

<sup>84</sup> TDA Ex. C18.

<sup>85</sup> 4 Tex. Admin. Code § 7.175.

### 3. Failure to Refer to Structural Pest Control Service

Staff identified nine WDIRs issued by ISG-Austin,<sup>86</sup> one WDIR issued by ISG-Dallas,<sup>87</sup> and twelve WDIRs issued by ISG-Houston<sup>88</sup> that referred to the “Structural Pest Control Board” instead of the “Structural Pest Control Service” in one or two places on the forms. According to Ms. Cuellar, the Structural Pest Control Board was the regulatory entity responsible for the enforcement of the Act until it was dissolved effective August 31, 2007. The functions of that Board were moved to the Department’s Structural Pest Control Service effective September 1, 2007.

Mr. Pharis testified that ISG has almost 200 inspectors in the field, and occasionally they discover one is using outdated software. That is what he believes happened here—outdated software caused a few inspectors to use forms that were not adequately updated when the industry’s regulatory body changed. He admitted that several WDIRs still contained reference to the Structural Pest Control Board. Given that ISG branches issue between 10,000 and 12,000 WDIRs a year, Mr. Pharis argued that having a few forms with an insignificant error should be considered a very minor violation.

Staff is correct—and ISG does not dispute—that several WDIRs contained references to a defunct regulatory body, and therefore deviated from the Department’s approved form. However, each of the forms contained references to the correct regulatory body in other places on the form, and the references to the Structural Pest Control Service are usually more prominent than the mentions of the Structural Pest Control Board. Almost every one of the WDIRs from ISG-Houston and ISG-Austin that contained one or two passing references to Structural Pest Control Board also contained bold type on the bottom of every page stating “**Licensed and Regulated by the Texas Department of Agriculture, Structural Pet Control Service.**” Therefore, while Staff has

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<sup>86</sup> TDA Exs. B10, B11, B23, B25-30.

<sup>87</sup> TDA Ex. C17.

<sup>88</sup> TDA Exs. D15-D22, D24-D27.



established a technical violation of Rule 7.176, the ALJ finds that the deviation from the Department's form WDIR was minor and unlikely to confuse any consumer.

#### 4. Addition of ISG's Address or Logo

Staff identified two WDIRs issued by ISG-Austin<sup>89</sup> and eleven WDIRs issued by ISG Houston<sup>90</sup> that included ISG's logo on one or more pages and added a block to the last page of the WDIR with ISG's mailing addresses and other contact information. This information is not contained on the Department's WDIR form,<sup>91</sup> and Ms. Cuellar testified that any deviation from the form is considered a violation.

In his testimony at the hearing, Mr. Mallon, ISG-Austin's inspector, agreed that ISG's WDIRs "appear to be" on the Department-issued form, but he pointed out that ISG's business name and contact information were not included on the Department-approved WDIR form that companies are required to use.

According to Mr. Mallon, the Department's approved form is on legal size paper, and it includes a graph area or "cage" in the section for drawing a structure diagram. He acknowledged that most structural pest control companies today electronically prepare WDIRs using software that omits the cage and prints the report on letter size paper, not legal. Neither of these deviations from the Department's form are considered a violation, according to Mr. Mallon. Ms. Cuellar also testified that the Department does not consider it a violation to change the format of the WDIR from legal size to letter size, saying "we care about the content of the WDIR, not the format."

ISG did not offer evidence addressing this violation, other than Mr. Pharis's cross-examination of Staff's witnesses.

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<sup>89</sup> TDA Ex. B10, B11.

<sup>90</sup> TDA Ex. D15-D22, D24-27.

<sup>91</sup> TDA Ex. A9.

The evidence did not show that ISG-Austin and ISG-Houston failed to use the WDIR form prescribed by the Department. Rule 7.176 says WDIRs must be made on the Department's form, but the rule does not say nothing can be added them. The WDIRs at issue did not omit or change any of the information required by the form. ISG merely added its logo and contact information in unobtrusive locations. The name, address, and phone number of the inspection company is required elsewhere on the form, so ISG's additions were largely cumulative of information already included. There is no claim that a consumer would be somehow confused by the addition of this information.

Further, Staff's witnesses acknowledged that the Department tolerates other minor, non-substantive changes to the WDIR form. The challenged WDIRs had all of the content required by the Department's form. ISG's addition of its logo and contact information was merely a formatting change that is not prohibited by Rule 7.176. Staff failed to prove this violation.

#### **5. Use of Wrong Entity's License Number**

Staff contends that one WDIR produced by ISG-Austin<sup>92</sup> erroneously or improperly lists the address and business license number for ISG-Dallas. At the hearing, no witness directly addressed this alleged violation. The inspector who performed the inspection, Rigoberto Hurtado, was registered at the time with ISG-Austin.<sup>93</sup> At the hearing, Ms. Cuellar testified that, because the ISG branches share a common tax ID number, a licensed technician registered with one ISG branch was permitted to work for any other ISG branch.

It is not clear why Staff believes Dallas-ISG should not have been listed on this WDIR. The property inspected was in McKinney, Texas, which is significantly closer to Dallas than to Austin. And, according to Ms. Cuellar, a technician registered to ISG-Austin would be permitted to perform inspections on behalf of ISG-Dallas. The evidence failed to establish that this WDIR violated Rule 7.175 or 7.176.

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<sup>92</sup> TDA Ex. B23.

<sup>93</sup> TDA Ex. B19 at 141.



## 6. Omission of Required Information and Other Errors

Staff asserts that two WDIRs issued by ISG-Austin<sup>94</sup> and nine WDIRs issued by ISG-Houston<sup>95</sup> contained errors, left blanks, or otherwise omitted information from the forms.

The WDIR form has a section titled “Diagram of Structure(s) Inspected,” and the instructions say that “[t]he inspector must draw a diagram including approximate perimeter measurements . . . .”<sup>96</sup> Likewise, Rule 7.175(c)(2)(A) says the diagram on a WDIR must include “approximate perimeter measurements of the structure as accurately as practical.” In the records from ISG-Houston, Staff alleges that three WDIRs are missing the approximate perimeter measurements of the structure.<sup>97</sup> All three WDIRs contain a sketch of the perimeter with measurements for only one or two sides. Because these three WDIRs do not include perimeter measurements, they violated Rule 7.175.

Staff has identified four WDIRs issued by ISG-Houston<sup>98</sup> that do not contain a jurisdiction statement. Specifically, unlike all of the other WDIRs in the case (and the Department’s form), these four WDIR are missing the bold-type statement at the bottom of each page that reads “Licensed and Regulated by the Texas Department of Agriculture, Structural Pest Control Service.” Because they deviate materially from the Department’s required form, these four WDIRs violated Rule 7.176.

Staff has identified two WDIRs issued by ISG-Houston<sup>99</sup> that omitted an explanation for why a preventative treatment and/or correction of conducive conditions was recommended. In the

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<sup>94</sup> TDA Ex. B22, B27.

<sup>95</sup> TDA Ex. D12-14, D17, D20-D22, D24-D25.

<sup>96</sup> TDA Ex. A9

<sup>97</sup> Second Amended Complaint at 24.

<sup>98</sup> TDA Ex. D17, D21, D22, D24.

<sup>99</sup> TDA Exs. D20, D25.

designated field, both WDIRs say that a WDI Suppression treatment may be offered, but they do not provide a reason for recommending the treatment. Rule 7.175(a) states that WDIRs “should provide the basis for recommendations of preventative or remedial actions.” Therefore, Staff has proved that ISG-Houston failed to correctly complete these two WDIRs, in violation of Rule 7.175.

Staff contends that one of Houston-ISG’s WDIRs<sup>100</sup> incorrectly lists the address of the inspected property. The WDIR lists the inspected address as 1662 Cecina St. in Humble, Texas. Nothing else in the evidence shows a conflicting address for the inspection or otherwise indicates an error.<sup>101</sup> Staff failed to prove this violation.

And finally, in the records from ISG-Austin, a WDIR for a property at 26135 Lookout Falls has no information filled in on the lines for the inspector’s name or purchaser’s name, and no date is given for the inspection. It is also not signed by the inspector, and no date is provided on the blank where the inspector should have indicated the date the inspection sticker was posted.<sup>102</sup> A WDIR for a property located at 109 Brandon Lane also does not have the inspection date filled in and, unlike all of the other WDIRs in evidence, this form was mostly filled out by hand.<sup>103</sup>

Mr. Pharis testified that these two WDIRs were clearly drafts, not final reports that were issued to a customer. He said ISG extensively trains its apprentices and technicians in how to properly fill out the industry’s paperwork, and they practice preparing WDIRs as part of that training. That is why handwritten and otherwise incomplete drafts can occasionally be found in ISG’s records. Ms. Cuellar agreed the Department had no evidence that these WDIRs were ever actually issued to a customer by ISG-Austin. While there is no rule against maintaining drafts or other extraneous documents, Ms. Cuellar said it would be “odd” to find incomplete reports maintained with an entity’s records or produced during an inspection. On their face, these two

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<sup>100</sup> TDA Ex. D22.

<sup>101</sup> The Second Amended Complaint asserts that TDA Exhibit D23 would contradict the address in this WDIR. However, that exhibit was not offered into evidence at the hearing.

<sup>102</sup> TDA Ex. B22.

<sup>103</sup> TDA Ex. B27.



WDIRs appear to be drafts, not final and complete reports. Because Staff has no evidence that ISG-Austin ever issued either of these documents to a customer, Staff failed to prove this violation.

#### **7. Discrepancy in Name of Inspector and Date of Inspection**

Staff asserts that one of ISG-Austin's WDIRs<sup>104</sup> names Richard Hurtado as the inspector on the first page, but the form is signed by a different inspector, Kris Svenden. Also, the WDIR appears to list two different dates for the inspection. Mr. Hurtado listed March 24, 2016, as the inspection date, but Mr. Svenden posted the inspection sticker on March 3, 2016.

Two other ISG-Austin WDIRs also list an inspection date that is later than the date the reports says the inspection sticker was posted. One showed an inspection date of March 15, 2016, with the inspection sticker posted on March 8, 2016.<sup>105</sup> The other shows the inspection was on March 6, 2016, but says the sticker was posted on March 5, 2016.

Staff contends that these three WDIRs violate Rule 7.177(a), which requires the inspection sticker to be posted on the same date as the inspection. Staff also contends that the discrepancy in the name of the inspector on one WDIR is an error that violates Rule 7.176.

Mr. Pharis explained that many lenders require a "clear" WDIR before they will close a real-estate transaction, referring to a report that finds no conducive conditions and makes no treatment recommendations. If an initial WDIR recommends some kind of treatment, the real estate agent will often require a secondary inspection after the treatment so that a clear WDIR can be issued. According to Mr. Pharis, when a WDIRs shows an inspection date that is slightly later than the date the inspection sticker was posted, that WDIR is most likely from a follow-up inspection done after the primary inspection revealed some issue that needed to be addressed. For example, Mr. Svenden performed a WDI inspection on March 3, 2016, posted his sticker at the conclusion of the inspection, and most likely made some recommendations for the property. That

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<sup>104</sup> TDA Ex. B23.

<sup>105</sup> TDA Ex. 24.

would have prompted Mr. Hurtado to return for a secondary inspection on March 24, 2016, the date provided on his WDIR. According to Mr. Pharis, the Department probably did not see Mr. Hurtado's inspection sticker because it was posted in a different spot than Mr. Svenden's.

The ALJ finds that Mr. Pharis has credibly explained alleged discrepancies in these three WDIRs. The evidence did not show that ISG-Austin failed to post any inspection sticker on the date of the inspection in violation of Rule 7.177, or that an inspector was erroneously named in violation of Rule 7.176.

## **8. Recommended Penalty**

In summary, Staff's evidence established that:

- two WDIRs issued by ISG-Austin and one WDIR issued by ISG-Dallas failed to mention the Department in one place on the form in violation of 7.176, although the Department was prominently referenced in other places on the same reports;
- nine WDIRs issued by ISG-Austin, one WDIR issued by ISG-Dallas, and twelve WDIRs issued by ISG-Houston referred to the "Structural Pest Control Board" instead of the "Structural Pest Control Service" in one or two places on the forms in violation of 7.176, although the correct regulatory body was also prominently referenced elsewhere in each of those reports;
- three WDIRs issued by ISG-Houston are missing the approximate perimeter measurements of each side of the structure in violation of Rule 7.175;
- four WDIRs issued by ISG-Houston are missing a jurisdiction statement specifying that the inspector and business are Licensed and Regulated by the Texas Department of Agriculture, a violation of Rule 7.176; and
- two WDIRs issued by ISG-Houston omitted an explanation for why a preventative treatment and/or correction of conducive conditions was recommended, a violation of Rule 7.175.

Because several of the WDIRs at issue contained multiple errors or omissions, the violations listed above involved a total of 27 WDIRs, out of the 10,000 to 12,000 WDIRs that Mr. Pharis estimates are issued by ISG in a year.



The Department's Penalty Matrix categorizes a failure provide an accurate or complete WDIR inspection as a category S2 violation, the level designated for violations with a "moderate hazard potential."<sup>106</sup> The penalty range for a first-time S2 violation is \$300 for a minor violation to \$1500 for a major violation. Given that ISG has no enforcement history; there was no evidence that anyone was harmed by the violations or confused by the errors on the WDIRs; several of the violations were essentially immaterial, because correct information was provided elsewhere on the forms; and errors were found on only a fraction of ISG's WDIRs, despite a wide-ranging investigation, the ALJ concludes that these violations were minor.<sup>107</sup> Therefore, consistent with the Penalty Matrix, the ALJ recommends that a total penalty of \$300 be imposed for the errors found on the ISG entities' WDIRs, with the penalty divided evenly between the three licensees who issued the deficient reports.

#### **G. Conclusion**

The evidence established that ISG-Austin violated Rule 7.133 by having Mr. Pharis sign the VTRs for three apprentices when the forms should have been signed by ISG-Austin's responsible certified applicator. For this minor, low-hazard violation, the ALJ recommends that ISG-Austin receive a warning. The evidence also established that ISG-Austin, ISG-Dallas, and ISG-Houston each issued several WDIRs in 2016 that contained minor errors and omissions, in violation of Rules 7.175 and 7.176. For those minor, low-hazard violations, the ALJ recommends that those entities each be fined \$100, for a total administrative penalty of \$300.

Staff failed to meet its burden of proving ISG-Austin violated Rule 7.142, or that ISG-Dallas violated Rules 7.144 or 7.156.

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<sup>106</sup> TDA Ex. A7.

<sup>107</sup> See Tex. Agric. Code § 12.020(d).

#### IV. FINDINGS OF FACT

1. Inspectors Service Group, LLC (ISG) is a structural pest control business with locations operating in several Texas cities.
2. ISG's location in Austin, Texas (ISG-Austin) holds Texas Pest Control License (TPCL) No. 0730861, issued by the Texas Department of Agriculture (Department) on January 22, 2016.
3. ISG's location in Dallas, Texas (ISG-Dallas) holds TPCL License No. 0730856, issued January 22, 2016.
4. ISG's location in Houston, Texas (ISG-Houston) holds TPCL License No. 0730859, issued January 22, 2016.
5. Trace Pharis is the general manager for all of the ISG entities. He is also a certified commercial applicator.
6. After receiving a complaint in July 2016, the Department initiated inspections of ISG's businesses.
7. Inspector Joseph Mallon performed a compliance inspection at ISG-Austin on August 3, 2016, and a follow-up inspection on August 26, 2016.
8. Inspector Marvin Lopez performed a compliance inspection at ISG-Houston on August 5, 2016, and a follow-up inspection on August 24, 2016.
9. Inspector Darin McDaniel performed a compliance inspection at ISG-Dallas on August 17, 2016, and a follow-up inspection on November 16, 2016.
10. Subsequently, ISG-Austin, ISG-Dallas, and ISG-Houston each received a Notice of Violation dated May 30, 2017.
11. On June 13, 2017, ISG requested hearings on each Notice of Violation.
12. The violations alleged against ISG-Austin, ISG-Dallas, and ISG-Houston were consolidated into one proceeding at the State Office of Administrative Hearings (SOAH).
13. On July 11, 2019, the staff (Staff) of the Department mailed a Notices of Hearing to ISG-Austin, ISG-Dallas, and ISG-Houston at their last known address of record on file with the Department.
14. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain



statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.

15. Administrative Law Judge Sarah Starnes convened the hearing on the merits on July 25, 2019, at SOAH in Austin, Texas. Staff appeared and was represented by Assistant General Counsel Morris Karam. Respondent appeared through its General Manager, Trace Pharis. The hearing concluded and the record closed on that day.

*Accuracy of Training Records (Rule 7.133)*

16. The Department prescribes a form, called a verified training record (VTR), that registered businesses must use to record the training provided to its employees.
17. ISG-Austin's VTR for apprentice Christopher Russo shows that he received eight hours of on-the-job (OTJ) training from Mr. Pharis on April 26, 2016, and another 8 hours of OTJ training from Mr. Pharis on April 27, 2016.
18. ISG-Austin's VTR for apprentice Bradley White shows that he received 10 hours of classroom training from Mr. Pharis on February 22, 2016.
19. ISG-Austin's VTR for apprentice Daniel Windler shows that he also received 8 hours of classroom training from Mr. Pharis on February 22, 2016.
20. Mr. Russo, Mr. White, and Mr. Windler were all based in San Antonio.
21. Mr. Pharis was approved by the Department to teach a 6-hour class on April 26, 2016, in Austin for PestPro Solutions.
22. Mr. Pharis was approved by the Department to teach a 6-hour class On April 27, 2016, in Dallas for PestPro Solutions.
23. Mr. Pharis was approved by the Department to teach a 6-hour class on February 22, 2016, in San Antonio for PestPro Solutions. This was not the classroom training that Mr. White or Mr. Windler claimed to have received in San Antonio on the same date.
24. The Department has no record of whether those PestPro classes were actually held, only that they were scheduled and approved.
25. Mr. Pharis commonly cancels classes that have been pre-approved, particularly when enrollment is low or his schedule has changed.
26. There is no penalty for cancelling a pre-approved class, and instructors are not required to notify the Department of a cancellation.
27. Classroom training covers any training that is not on-the-job, and it can be completed in person, on line, using videos, or using written course materials.

28. The trainer does not have to be present with a trainee who is earning classroom hours.
29. It was possible for both Mr. White and Mr. Windler to complete different classroom trainings on the same date, both overseen by Mr. Pharis.
30. The VTRs did not list license numbers for Mr. Russo, Mr. White, or Mr. Windler.
31. Businesses may start training new apprentices before they have received a license number from the Department.
32. An apprentice could be working for up to a month before receiving a license number from the Department.
33. Mr. Russo became a registered apprentice with ISG-Austin on April 18, 2016, and all of the training hours on his VTR were completed in a ten-day period between April 18 and April 27, 2016.
34. Mr. White and Mr. Windler became registered apprentices with ISG-Austin on February 22 and February 19, 2016, respectively, and the training hours on their VTRs were all completed in a 10-day period between February 22 and March 2, 2016.
35. It is possible for a newly-hired apprentice to complete all of the training necessary to become a technician before he receives a license number from the Department.
36. The evidence failed to establish that Mr. Russo, Mr. White, or Mr. Windler had a license number that could have been included on a VTR when the training at issue occurred.
37. When a person's license status changes—as when an apprentice moves up to hold a technician license—the business is supposed to start a new VTR with a different license number for that employee.
38. Mr. Pharis signed the VTRs for Mr. Russo, Mr. White, and Mr. Windler as the evaluator and responsible certified applicator.
39. Mr. Pharis was not designated as the responsible certified applicator for ISG-Austin when he signed the VTRs.
40. ISG-Austin does not have a history of prior violations.
41. There was no evidence that anyone was harmed or confused by having the wrong signature on otherwise-accurate VTRs.

***Failure to Register Employees (Rule 7.142)***

42. On April 7, 2016, and August 17, 2016, inspector Joe Rea performed inspections and issued Wood Destroying Insect Reports (WDIRs) for two different San Antonio properties.



On both WDIRs, Mr. Rea listed the name and license number of ISG-Austin as the inspection company.

43. Mr. Rea was not listed as a registered employee of ISG-Austin at any time.
44. Mr. Rea was registered as a technician with a San Antonio business called Bugstop from August 22, 2011, to January 22, 2016.
45. Mr. Rea was not registered with either ISG-Austin or Bugstop at the time he performed the April and August 2016 inspections.
46. On April 16, 2016 and June 14, 2016, inspector Greg Luna performed inspections and issued WDIRs for two other San Antonio properties. Mr. Luna listed the name and license number of ISG-Austin as the inspection company.
47. Mr. Luna was not listed as a registered employee of ISG-Austin at any time.
48. Mr. Luna was registered with Bugstop as an apprentice and then a technician from February 5, 2011, to January 22, 2016.
49. Mr. Luna was not registered with either ISG-Austin or Bugstop at the time he performed the April and June 2016 inspections.
50. On March 1, 2016, and March 29, 2016, inspector David Williams performed inspections and issued WDIRs for two additional San Antonio properties. Mr. Williams also listed the name and license number of ISG-Austin as the inspection company.
51. Mr. Williams was not listed as a registered employee of ISG-Austin at any time.
52. Mr. Williams was registered with Bugstop as an apprentice and then a technician from April 7, 2014, to January 22, 2016.
53. Mr. Williams was not registered with either ISG-Austin or Bugstop at the time he performed the two inspections in March 2016.
54. Mr. Rea, Mr. Luna, and Mr. Williams never intended to be employed by or registered with ISG-Austin.
55. When multiple offices share a common tax ID number, they are considered branch offices of the parent company. Each branch office is required to hold a separate license from the Department, but a technician registered at one branch office can work for any other branch that uses the same tax ID number.
56. Mr. Pharis's former wife owned Bugstop, and they planned to close that business and convert it to a new ISG office in San Antonio (ISG-San Antonio) in February 2016, when Bugstop's business license was due to expire.

57. In anticipation of the transfer, ISG applied to the Department in December 2015 for a business license for the new ISG-San Antonio. At the same time, ISG filed the necessary paperwork to register Bugstop's employees with ISG-San Antonio and paid all associated fees for the applications and transfers.
58. ISG had no control over when or how the Department processed the employees' transfer of registration from Bugstop to ISG-San Antonio.
59. The Department had not acted on the applications when Bugstop's business license expired in early 2016. Because ISG-San Antonio had not yet received a business license, Bugstop's employees were not yet registered with the new entity when their registration with Bugstop expired.
60. Mr. Pharis received assurances from the Department's licensing division that ISG-San Antonio's licenses and registrations were coming and that because the applications had been submitted and fees were paid, it was fine for ISG to continue operating and its technicians to keep working.
61. During the period of limbo after Bugstop was terminated but before ISG-San Antonio's business license was issued, ISG's inspectors used ISG-Austin's business license number on the WDIRs.
62. ISG-San Antonio's licenses and employee registrations were not processed until April 2016, approximately five months after ISG applied for them.
63. ISG gave the Department notice in December 2015 that Mr. Rea, Mr. Luna, and Mr. Williams would be employed by ISG-San Antonio when Bugstop ceased operations. This notice was given far more than ten days before their change of employment actually occurred.

***Maintenance of Correct and Accurate Records (Rule 7.144) and Interference with Investigation (Rule 7.156)***

64. Department inspector Darin McDaniel inspected ISG-Dallas on November 16, 2016.
65. Mr. McDaniel claimed that ISG-Dallas did not have records available for his review during the inspection.
66. The records sought by the inspector were voluminous and included over 1000 reports and other records.
67. Though Mr. Pharis repeatedly told the inspectors that ISG's business records were created and stored electronically, the inspector demanded physical records from ISG-Dallas.
68. The inspector's demand that all of the records be produced immediately and in paper form was unreasonable and impossible for ISG-Dallas to comply with.



69. There was no evidence that records were not electronically available during the inspection of ISG-Dallas.
70. At the inspection, the Department issued a request for records that instructed ISG-Dallas to produce, for a period from January 1 to November 16, 2016: VTRs for all apprentices and technicians; all use records for pesticide applications, including wood-destroying insect (WDI) suppression; and all WDIRs. ISG-Dallas was directed to produce the documents to Mr. McDaniel by 5:00 p.m. on November 29, 2016.
71. Within a few days, ISG-Dallas delivered a zip drive to Mr. McDaniel that contained all of the requested records.
72. ISG-Dallas went to great time and expense to promptly produce the records.
73. Given the breadth of the document requests and the number of responsive documents, ISG-Dallas's document production was reasonable.
74. The evidence did not establish that ISG-Dallas tried to prevent Mr. McDaniel from accessing its records during his inspection.

***False, Misleading, Or Deceptive Advertising (Rule 7.152)***

75. ISG-Dallas advertised with a one-page flyer on ISG letterhead that stated, in relevant part:

Homes that receive a treatment recommendation based solely on Conducive Conditions are eligible for a WDI Suppression Treatment that includes a 1 year transferrable warranty for Subterranean Termites & Carpenter Ants for only \$299.00. This treatment eliminates the need to correct conducive conditions and includes a new clear WDI report.
76. ISG-Dallas provided the Department with an information sheet that elaborated on what the treatment entailed. The information sheet was titled "An Explanation of the WDI Suppression Treatment Process."
77. ISG-Houston provided its inspector with the same "Explanation of the WDI Suppression Treatment Process."
78. The suppression treatment entails the application of products called Termidor SC and Temprid SC.
79. The suppression treatment was developed to address the needs of customers who had difficulty closing real-estate transactions after receiving an inspection that found conducive conditions for WDIs. ISG will perform a treatment to help prevent WDI problems from developing at the property, then guarantees its treatment for one year.

80. ISG-Dallas's flyer did not claim that Termidor SC or Temprid SC was guaranteed to eliminate conducive conditions, only that ISG-Dallas was warranting that there would not be any conducive conditions during the warranty period.
81. The product labels for Termidor SC and Temprid SC do not expressly refer to suppression treatments.
82. The word "suppression" is not defined or prohibited in the Department's advertising rules.
83. The Termidor SC label says the product is intended to, *inter alia*, prevent termites and carpenter ants from infesting specified areas and to control existing infestations. These uses are consistent with the plain meaning of "suppression."
84. There was no evidence that an information sheet that claimed "[t]he Termidor label states that the 0.06% rate provides for ONE YEAR OF PREVENTION AND CONTROL" was provided to anyone other than the Department's inspectors.
85. The information sheet was not an advertisement.

***Errors in WDIRs (Rules 7.175-.177)***

86. Two WDIRs issued by ISG-Austin and one WDIR issued by ISG-Dallas failed to mention the Department in one place on the report, although the Department was prominently referenced in other places on the same reports.
87. The failure to mention the Department in one place on the WDIRs was not deceptive and was unlikely to confuse any consumer.
88. Nine WDIRs issued by ISG-Austin, one WDIR issued by ISG-Dallas, and twelve WDIRs issued by ISG-Houston referred to the "Structural Pest Control Board" instead of the "Structural Pest Control Service" in one or two places on the forms, although the correct regulatory body was also prominently referenced elsewhere in each of those reports.
89. The erroneous references to the Structural Pest Control Board on some WDIRs were not deceptive and were unlikely to confuse any consumer.
90. Two WDIRs issued by ISG-Austin and eleven WDIRs issued by ISG Houston included ISG's logo on one or more pages and added a block to the last page of the WDIR with ISG's mailing addresses and other contact information.
91. The WDIRs with ISG's logo and address block did not omit or change any of the information required by the Department's standard form, and these additions were largely cumulative of information already included on the form.
92. The inclusion of ISG's logo and address block was not deceptive and was unlikely to confuse any consumer.



93. The Department tolerates other minor, non-substantive changes to the WDIR form and does not treat them as violations.
94. The evidence failed to establish that the wrong business address and business license number were listed on a WDIR produced by ISG-Austin for a property at 4509 Cedar Crest Drive in McKinney, Texas.
95. Three WDIRs issued by ISG-Houston are missing the approximate perimeter measurements of the structure that was inspected.
96. Four WDIRs issued by ISG-Houston do not contain a jurisdiction statement specifying that the inspector and business are "Licensed and Regulated by the Texas Department of Agriculture, Structural Pest Control Service."
97. Two WDIRs issued by ISG-Houston omitted an explanation for why a preventative treatment and/or correction of conducive conditions was recommended.
98. The evidence failed to establish that the wrong address was listed on a WDIR produced by ISG-Houston for a property at 1662 Cecina St. in Humble, Texas.
99. The evidence failed to establish that ISG-Austin ever issued a WDIR for a property at 26135 Lookout Falls or a WDIR for a property located at 109 Brandon Lane.
100. The WDIR for a property at 26135 Lookout Falls and the WDIR for a property located at 109 Brandon Lane that were found in ISG-Austin's records are incomplete drafts that were not issued to any customer.
101. Three ISG-Austin WDIRs list one date for the inspection, but indicate that the inspection sticker was posted on an earlier date. One of these WDIRs also names different inspectors on the two dates. The evidence did not show that ISG-Austin failed to post any inspection sticker on the date of the inspection or that an inspector was erroneously named in any of these WDIRs.
102. If an initial WDIR recommends some kind of treatment, a real estate agent will often require a secondary inspection after the treatment so that a clear WDIR can be issued. The WDIRs that appear to have two inspection dates are from follow-up inspections done after the primary inspection revealed some issue that needed to be addressed.
103. ISG branches issue between 10,000 and 12,000 WDIRs a year. Of the WDIRs issued in 2016, violations were found in only 27 of them.

## V. CONCLUSIONS OF LAW

1. The Department has jurisdiction and authority to regulate structural pest control businesses through its Structural Pest Control Service. Tex. Occ. Code ch. 1951.

2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't. Code ch. 2003.
3. ISG received proper and timely notice of the hearing. Tex. Gov't Code ch. 2001.
4. The Department has the burden of proving the violations alleged. 1 Tex. Admin. Code § 155.427.
5. The Structural Pest Control Service is authorized to enact rules that set standards on technical issues related to structural pest control, and that relate to enforcement of those standards. Tex. Occ. Code § 1951.104.
6. The Department's rule found at 4 Texas Administrative Code § 7.133 (Rule 7.133) requires a business licensee's responsible certified applicator to maintain complete and verifiable training records for an apprentice for at least two years from the date of the training.
7. The evidence failed to establish that ISG-Austin violated Rule 7.133 by misrepresenting the classroom and OTJ training hours that Mr. Pharis approved for Mr. Russo, Mr. White, and Mr. Windler in February and April 2016.
8. The evidence failed to establish that ISG-Austin violated Rule 7.133 by omitting license numbers for Mr. Russo, Mr. White, and Mr. Windler on their VTRs.
9. ISG-Austin violated Rule 7.133 by having Mr. Pharis sign the VTRs for Mr. Russo, Mr. White, and Mr. Windler when he was not the responsible certified applicator for ISG-Austin.
10. The Department's rule found at 4 Texas Administrative Code § 7.142 (Rule 7.142) requires a licensee to inform the Department of the employment or termination of all licensees and apprentices within 10 days of the date of employment or termination.
11. The evidence failed to establish that ISG-Austin violated Rule 7.142.
12. The Department's rule found at 4 Texas Administrative Code § 7.144 (Rule 7.144) requires the responsible certified applicator to ensure that correct and accurate records of all uses of pesticides are maintained for a period of two years. The records must be kept on the premise of the business licensee, and must be made available to the Department or its authorized agents upon written or verbal request.
13. Rule 7.144 does not require that a business licensee's records must be maintained or provided in paper form.
14. The Department's rule found at 4 Texas Administrative Code § 7.156 (Rule 7.156) authorizes Department employees to conduct investigations and inspections of structural pest control activities, and provides that a licensee can be sanctioned for interfering with a



Department employee who is attempting to access property or obtain records for purposes of such an investigation or inspection.

15. The evidence failed to establish that ISG-Dallas violated Rule 7.144.
16. The evidence failed to establish that ISG-Dallas violated Rule 7.156.
17. The Department's rule found at 4 Texas Administrative Code § 7.152 (Rule 7.152) prohibits a licensee from engaging in false, misleading or deceptive advertising, including advertising that makes a false or misleading statement concerning the effectiveness of a product as a pesticide or device.
18. The evidence failed to establish that ISG-Dallas or ISG-Houston violated Rule 7.152
19. The Department's rules found at 4 Texas Administrative Code § 7.175-.177 (Rules 7.175, 7.176, 7.177) specify procedures for inspections made for the purpose of issuing a WDIR, require that WDIRs be made on a form prescribed by the Department, and require an inspector to post an inspection sticker upon completion of an inspection.
20. ISG-Austin, ISG-Dallas, and ISG-Houston each violated Rules 7.175 and 7.176 by issuing several WDIRs that contained errors or omissions.
21. The evidence failed to establish that ISG-Austin, ISG-Dallas, or ISG-Houston violated Rule 7.177.
22. The Department has adopted a Structural Pest Control Penalty and Sanction Matrix (Penalty Matrix) that recommends penalty ranges for various violations of the Act and Department rules. 38 Tex. Reg. 3826-28 (June 14, 2013) (since amended).
23. The Penalty Matrix categorizes violations as having a low, moderate, or high hazard potential. Within each of those categories, violations may be deemed a minor, moderate, or major violation, and then a penalty is recommended based on whether it was a person's first, second, or third or more violation.
24. Pursuant to the Penalty Matrix, ISG-Austin's violation of Rule 7.133 was a minor violation with a low hazard potential that warrants a penalty of a warning. 38 Tex. Reg. 3826-28 (June 14, 2013).

25. Pursuant to the Penalty Matrix, the violations of Rules 7.175 and 7.176 by ISG-Austin, ISG-Dallas, and ISG-Houston were a moderate hazard potential. For the violations, ISG-Austin, ISG-Dallas, and ISG-Houston should each be fined \$100, for a total administrative penalty of \$300. 38 Tex. Reg. 3826-28 (June 14, 2013).

**SIGNED September 20, 2019.**

*Sarah Starnes*

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**SARAH STARNES  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**