

NICHOLS, CHOI & LEE, PLLC

ATTORNEYS AT LAW

M. Jackson Nichols
Anna Baird Choi
Catherine E. Lee
Thomas E. Kelly
A. Grant Simpkins

Nonprofit
Employment
Administrative
Occupational Licensing

October 13, 2020

Jason Lee Atkins
Natural Choice Contracting, LLC
f/k/a A.L.M. Contracting, LLC
3725 NC Highway 98W
Youngsville, North Carolina 27596

Re: In re: Jason Lee Atkins and Natural Choice Contracting, LLC (f/k/a A.L.M. Contracting, LLC)
Board File nos. 18.68.S and 18.70.S; OAH File no. 20 BLC 366

Mr. Atkins:

Enclosed is a Final Agency Decision issued by the N.C. Landscape Contractors Licensing Board in the above-referenced matter. Also enclosed is a courtesy copy of the ALJ's Proposal for Decision which was previously served on you on September 28, 2020.

Regards,

NICHOLS, CHOI & LEE, PLLC



Anna Baird Choi

Enclosure

Cc: Calvin Kirven, Executive Administrator
NCLCLB

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 BLC 00366

NORTH CAROLINA LANDSCAPE)
CONTRACTORS LICENSING BOARD)
Petitioner,)
)
v.)
JASON LEE ATKINS and NATURAL CHOICE)
CONTRACTING LLC f/k/a ALM)
CONTRACTING LLC,)
Respondents,)

**FINAL AGENCY DECISION BY THE NORTH CAROLINA LANDSCAPE
CONTRACTORS’ LICENSING BOARD**

The North Carolina Landscape Contractors’ Licensing Board (the “Board”) hereby issues the Final Agency Decision in the above-captioned matter, as set forth below.

PROCEDURAL HISTORY

1. This contested case was heard in the Office of Administrative Hearings (“OAH”) before Administrative Law Judge J. Randolph Ward (“ALJ” or “ALJ Ward”) in Raleigh, North Carolina on June 25, 2020. The hearing was conducted on the Microsoft Teams virtual meeting platform due to the COVID-19 pandemic.
2. This contested case was properly before ALJ Ward pursuant to N.C. Gen. Stat. § 150B-40(e). Appearances for the parties were as follows:

Petitioner: Anna Baird Choi, Esq.
 Nichols, Choi & Lee, PLLC
 Raleigh, North Carolina

Respondents: Respondents failed to appear

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 BLC 00366

<p>North Carolina Landscape Contractors Licensing Board Petitioner,</p> <p>v.</p> <p>Jason Lee Atkins and Natural Choice Contracting LLC f/k/a ALM Contracting LLC Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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THIS MATTER came on for hearing on June 25, 2020 before Administrative Law Judge J. Randolph Ward, on the Raleigh docket, upon Respondent's request pursuant to N.C. Gen. Stat. § 150B-40(e) for the designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes. The contested case hearing was conducted "remotely" (online) due to the Covid-19 pandemic. Following preparation of a transcript and an opportunity for the parties to submit proposed decisions or other written arguments, this Proposed Decision was prepared.

APPEARANCES

Petitioner: Anna Baird Choi, Esq.
Nichols, Choi & Lee, PLLC
Raleigh, North Carolina

Respondents: Respondents failed appear at the Hearing.

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 89D-15(8); 89D-22(2) & (3); 150B-2(8c); 150B-3(b); 150B-23(c); 150B-38; 150B-40(a); 150B-40(e); 150B-41; 150B-42(a); 26 NCAC 03 .0120(g).

PETITIONER'S EXHIBITS

1. Affidavit of Service
2. Board Complaint filed by Todd Laakso
3. Civil Complaint filed by Southern Garden
4. Default Judgment
5. Board Complaint filed by Elkins Sawmill
6. Respondents' license file maintained by the Board

WITNESSES

Petitioner: Todd Laakso
 Kristen Lagenor
 Bob Peter

ISSUES

Whether Respondents violated N.C. Gen. Stat. § 89D-22(2) and (3), and if so, should the North Carolina Landscape Contractors Licensing Board take action against their licenses and / or

UPON DUE CONSIDERATION of the arguments and stipulations of the parties; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have in the outcome of the case, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. Respondents Jason Lee Atkins and Natural Choice Contracting LLC, formerly A.L.M. Contracting LLC, failed to appear at the hearing, in person or by any representative, after receiving due notice of hearing from the Office of Administrative Hearings (hereinafter, "OAH") by certified mail, return receipt requested. Mr. Atkins was personally served with the Petition at his Youngsville address listed in the Certificate of Service below on February 23, 2020. See Petitioner's Exhibit (hereinafter, "P Ex 1").

2. The Petitioner North Carolina Landscape Contractors Licensing Board ("Petitioner" or "Board") issued a landscape contractor's License (No. 1882) to Respondent Jason Lee Atkins on August 1, 2015. It was renewed on December 4, 2019, and remained active on the date of the hearing. Respondent A.L.M. Contracting, LLC ("A.L.M.") also received its corporate license (No. CL0576) on August 1, 2015, with Mr. Atkins signing as the licensed landscape contractor member qualifying A.L.M. for that license.

3. In April, May and June of 2016, A.L.M. ordered mulch on multiple occasions from Elkins Sawmill, Inc. ("Elkins") in Moncure. As a byproduct of its lumber business, Elkins processes some wood into mulch. Elkins allowed A.L.M. to order and pick up the mulch prior to being invoiced. Ms. Kristen Lagenor, Elkins' office manager, identified the invoices to A.L.M. for the mulch it had obtained. She testified that, initially, Respondents paid for the mulch, but then stopped responding to the invoices, leaving a debt of \$15,800.00. (P Ex 5, p. 2) Ms. Lagenor testified that Mr. Atkins made no response to inquiries about the debt. See Transcript of the Administrative Hearing, pg. 26, line 14 through pg. 27, line 25 ("Tr 26:14-27:25"). As of the date of the hearing, the Respondents had made no further payment against their debt to Elkins.

4. In December 2016 and January 2017, Southern Garden in Cary delivered tree grindings for mulch to Respondents under an agreement to provide the mulch at Respondents

chosen location for the cost of hauling it, being about \$55 per load. Respondents received 7020 cubic yards mulch, but failed to pay any of the hauling costs, which amounted to \$17,517.50. (P Ex 3, pgs. 2-3) Mr. Todd Laakso, vice president of operations at Southern Garden, testified that he became aware of the Respondents while handling the billables and receivables for that firm. He stated that after Respondents were invoiced for hauling the mulch, Mr. Atkins "ceased communication with us and failed to respond to any form of communication." (Tr 14:16-20)

5. On July 27, 2017, Respondent Atkins, as Member of the LLC, filed an Amendment of Articles of Incorporation with the N.C. Secretary of State changing the corporate name of A.L.M. to "Natural Choice Contracting, LLC" ("Natural Choice"). Mr. Atkins remained the LLC's managing member, registered agent, and qualifier. (P Ex 6, p. 5)

6. On November 29, 2017, Southern Garden filed a civil complaint against Jason Atkins and Natural Choice Contracting, LLC for failure to pay for the hauling of wood grindings as described above. (Wake Co. 17 CVD 14533) On July 23, 2018, a Default Judgment was entered against Respondent Atkins and Natural Choice in the amount of \$17,517.50. (P Ex 4) As of the date of the hearing, Respondents have failed or refused to pay their debt to Southern Garden.

7. On March 20, 2018, Mr. Laakso filed a complaint against Respondents Atkins and Natural Choice (formerly A.L.M.), alleging fraudulent misconduct in obtaining mulch from Southern Garden and avoiding their creditors. Based on these allegations, the Board opened an investigation of the Respondents. (P Ex 2)

8. Mr. Bob Peter investigated the Respondents on behalf of the Board following Mr. Laasko's complaint. In addition to his work with the Board, Mr. Peter has been a licensed landscape architect since 1986. He testified that getting Mr. Atkins on the phone "wasn't an easy task," but when he did find a working phone number and left a voicemail message, Mr. Atkins did call the investigator back. In their conversation, Respondent Atkins claimed to be unaware of unpaid invoices from Southern Garden but said he would be willing to "discuss" it with them. (Tr 37:14-38:14)

9. On or about April 3, 2018, Ms. Lagenor filed a complaint with the Board recounting that the Respondents obtained \$15,800.00 worth of mulch without paying for it and had avoided contact about the debt. (P Ex 5) Mr. Peters attempted to contact Respondent Atkins about these allegations, but he testified that despite calling him "many times," he was never able to have a second conversation with Mr. Atkins. (Tr 38:18-40:25)

10. Based on the credible testimony cited above and the documents admitted into evidence, the undersigned finds by this clear and convincing evidence that the Respondents committed acts for which the Petitioner Board may impose fines and take action against the Respondents' licenses.

11. There is no direct evidence in the record of the Respondents' actual ability to pay their debts to Southern Garden and Elkins Sawmill, Inc. However, it can reasonably be inferred that Mr. Atkins fraudulently misrepresented to Southern Garden his willingness and / or ability to pay for all of the mulch he and A.L.M. received from that company because of the pre-existing large debt to Elkins, his refusal to communicate with the creditors, his misrepresentation to Mr.

Peter that he was unaware of any claim by Southern Gardens after he had a judgment entered against Respondents due to that debt, and his refusal to respond to Mr. Peter's later attempts to contact him.

12. Due to its financial dereliction, by reason of its insolvency and / or malfeasance of its leadership, Natural Choice Contracting, LLC, formerly A.L.M. Contracting, LLC, acted with gross incompetence in dealing with its creditors Southern Garden and Elkins Sawmill, Inc.

13. Respondents actions are aggravated by their apparent willfulness, persistence and repetitive nature, and the significant sums of money involved.

14. To better serve the convenience and health of the participants during the pandemic, this hearing was conducted remotely.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following,

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. N.C. Gen. Stat. §§ 89D-15(8); 150B-40(e); 150B-23(c). If a party fails to appear in a contested case after given proper notice, the hearing may proceed to decision the absence of that party. N.C. Gen. Stat. § 150B-40(a).

2. The Petitioner North Carolina Landscape Contractors Licensing Board has the authority and duty granted under Chapter 89D of the North Carolina General Statutes and Title 21 of the North Carolina Administrative Code, Chapter 28B, to issue, renew, deny, restrict, suspend, or revoke licenses.

3. For the convenience of parties and witnesses, an administrative law judge may exercise discretion in designating the venue and allow remote participation in the hearing by video conference. N.C. Gen. Stat. §§ 150B-38(e); 26 NCAC 03 .0120(g).

4. Under the circumstances of this case, the Petitioner's Petition and Prehearing Statement fulfilled its duty to afford the Respondents an opportunity to show compliance with all lawful requirements for retention of their licenses. N.C. Gen. Stat. § 150B-3(b).

5. In a contested case subject to Article 3A of the Administrative Procedure Act, the decision must be supported by substantial evidence admissible pursuant to N.C. Gen. Stat. § 150B-41. N.C. Gen. Stat. §§ 150B-2(8c); 150B-42(a).

6. Before imposing and assessing a civil penalty and fixing the amount of the penalty, the finder of fact must take into consideration the nature, gravity, and persistence of the particular violation, the appropriateness of the penalty when considered alone or in combination with other punishment, whether the violation was willful and malicious, and factors that would tend to mitigate or aggravate the violation(s) found. N.C. Gen. Stat. § 89D-23(b).

7. No matter how informal, “[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.” *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985).

8. The Respondent Jason Lee Atkins used fraudulent misrepresentation in the practice of landscape contracting within the meaning of N.C. Gen. Stat. § 89D-22(2).

9. The Respondent Natural Choice Contracting, LLC, formerly A.L.M. Contracting, LLC, acted with gross incompetence within the meaning of N.C. Gen. Stat. § 89D-22(3).

10. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012); *In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011).

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned respectfully makes the following

PROPOSAL FOR DECISION

The North Carolina Landscape Contractors Licensing Board should **REVOKE** the Landscape Contracting licenses of Jason Lee Atkins and Natural Choice Contracting LLC, formerly A.L.M. Contracting LLC; and **FINE** each of these licensees Two Thousand Dollars (\$2,000.00).

NOTICE

The North Carolina Landscape Contractors Licensing Board will make the Final Decision in this contested case.

The agency making the final decision is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

IT IS SO ORDERED.

This the 28th day of September, 2020.

A handwritten signature in black ink, appearing to read "J Randolph Ward", is positioned above a solid horizontal line.

J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Christina D Cress
Nichols, Choi & Lee, PLLC
christina@ncl-law.com
Attorney For Petitioner

Anna Baird Choi
Nichols, Choi & Lee, PLLC
anna@ncl-law.com
Attorney For Petitioner

Jason Lee Atkins
Natural Choice Contracting LLC f/k/a A.L.M. Contracting LLC
3725 NC Highway 98 West
Youngsville NC 27596
Respondent

This the 28th day of September, 2020.



Daniel Chunko
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000

3. Witnesses for the parties were as follows:

Petitioner: Todd Laakso
Kristen Lagenor
Bob Peter

Respondent: None

4. Exhibits for the parties were as follows:

Petitioner: 1. Affidavit of Service
2. Board Complaint filed by Todd Laakso
3. Civil Complaint filed by Southern Garden
4. Default Judgment
5. Board Complaint filed by Elkins Sawmill
6. Respondents' license file maintained by the Board

Respondent: None

5. All in attendance participated remotely via the Microsoft Teams virtual meeting platform.

A camera was activated in the OAH courtroom. At the commencement and conclusion of the hearing, ALJ Ward asked if Respondents were present in the OAH courtroom; there was no response. ALJ Ward did not observe anyone enter the OAH courtroom during the duration of the hearing. *T. pp 5, 45.*

6. On September 28, 2020, ALJ Ward filed a Proposal for Decision, attached hereto as Exhibit A. ALJ Ward's Proposal for Decision contained Findings of Fact and Conclusions of Law.

7. The Proposal for Decision was properly served upon the parties pursuant to N.C. Gen. Stat. § 150B-40(e).

8. By letter dated October 1, 2020, Respondents were informed of their opportunity to file exceptions and present written arguments to the Board at a Board meeting scheduled for October 13, 2020.

9. Counsel for the Board provided a draft Final Agency Decision for the Board's consideration and made an appearance at the October 13, 2020 meeting.
10. Respondents did not file exceptions, written arguments, and did not appear at the October 13, 2020 Board meeting.
11. At the start of the public Board meeting held on October 13, 2020, a quorum of the Board was present.

FINAL AGENCY DECISION

Having considered documents comprising the official record, including ALJ Ward's Proposal for Decision, the pleadings and orders of record, the hearing transcript, and the parties' presentation to the Board on October 13, 2020, the Board issues this Final Agency Decision pursuant to N.C. Gen. Stat. § 150B-42.

I. Issues and Applicable Statutes and Rules

1. Whether Petitioner Board has a sufficient factual basis under N.C. Gen. Stat. §§ 150B-38, 89D-22, 89D-23 and the attendant rules to suspend, revoke, issue a civil penalty or otherwise discipline Respondents?
2. If Petitioner Board has a sufficient factual basis to suspend, revoke, issue a civil penalty or otherwise discipline Respondents, is revocation the appropriate discipline to be imposed? Further, what is the appropriate civil penalty to be imposed?

II. Findings of Fact

With regard to the Findings of Fact, the Board hereby adopts Findings of Fact 1-13 proposed by ALJ Ward as set forth in the Proposal for Decision.

The Board hereby adopts an additional Finding of Fact as follows:

When Respondent Atkins filed for renewal of his individual license on July 6, 2018, he notified the Board that he had changed the name of the corporate license from ALM to Natural Choice. However, the Board informed Respondent Atkins by email dated July 9, 2018 that the surety bond was still in the name of ALM. The Board did not receive notification of the updated bond until August 2, 2018 even though Respondent Atkins changed the corporate name in July of 2017. Respondent Natural Choice is a corporation organized under North Carolina law; Respondent Atkins is the managing member, registered agent, and qualifier. *T. pp 35-36; Hearing Ex. 6.*

III. Conclusions of Law

With regard to the Conclusions of Law, the Board hereby adopts Conclusions of Law 1-10 proposed by ALJ Ward as set forth in the Proposal for Decision, with the following modification:

Conclusion of Law 1: The citation to N.C. Gen. Stat. § 150B-23(c) shall be removed.

IV. Final Agency Decision

The Board hereby accepts, adopts and affirms the Proposal for Decision recommended by ALJ Ward, without amendment or modification. As such, the Board's Final Agency Decision is as follows:

1. The landscape contractors' license issued to Respondent Atkins, license no. 1882, is hereby REVOKED.
2. The landscape contractors' license issued to Respondent Natural Choice Contracting, LLC (formerly known as A.L.M. Contracting, LLC) license no. CL0576 is hereby REVOKED.
3. A civil penalty in the amount of \$2,000 is imposed against Respondent Atkins.
4. A civil penalty in the amount of \$2,000 is imposed against Respondent Natural Choice.

NOTICE

This Final Agency Decision is issued under the authority of N.C. Gen. Stat. §150B-42. Pursuant to N.C. Gen. Stat. §150B-45, any party wishing to appeal this Final Agency Decision may commence such appeal by filing a Petition for Judicial Review in the superior court of the county in which the party resides. The party seeking review must file the Petition within 30 days after being served with a written copy of this Final Agency Decision.

This the 13th day of October, 2020.

A handwritten signature in black ink, appearing to read "Chris Mitchell", written over a horizontal line.

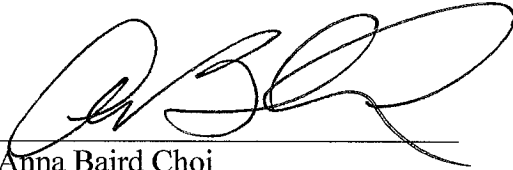
Chris Mitchell, Chairman
NC Landscape Contractors Licensing Board

CERTIFICATE OF SERVICE

This is to certify that the undersigned has, this date, served the foregoing **FINAL AGENCY DECISION** upon the following named persons by depositing a copy of the foregoing document in the United States Mail as follow:

Jason Lee Atkins
Natural Choice Contracting, LLC
f/k/a A.L.M. Contracting, LLC
3725 NC Highway 98W
Youngsville, NC 27596
Respondents

This the 13th day of October, 2020.



Anna Baird Choi

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 BLC 00366

<p>North Carolina Landscape Contractors Licensing Board Petitioner,</p> <p>v.</p> <p>Jason Lee Atkins and Natural Choice Contracting LLC f/k/a ALM Contracting LLC Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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THIS MATTER came on for hearing on June 25, 2020 before Administrative Law Judge J. Randolph Ward, on the Raleigh docket, upon Respondent's request pursuant to N.C. Gen. Stat. § 150B-40(e) for the designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes. The contested case hearing was conducted "remotely" (online) due to the Covid-19 pandemic. Following preparation of a transcript and an opportunity for the parties to submit proposed decisions or other written arguments, this Proposed Decision was prepared.

APPEARANCES

Petitioner: Anna Baird Choi, Esq.
Nichols, Choi & Lee, PLLC
Raleigh, North Carolina

Respondents: Respondents failed appear at the Hearing.

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 89D-15(8); 89D-22(2) & (3); 150B-2(8c); 150B-3(b); 150B-23(c); 150B-38; 150B-40(a); 150B-40(e); 150B-41; 150B-42(a); 26 NCAC 03 .0120(g).

PETITIONER'S EXHIBITS

1. Affidavit of Service
2. Board Complaint filed by Todd Laakso
3. Civil Complaint filed by Southern Garden
4. Default Judgment
5. Board Complaint filed by Elkins Sawmill
6. Respondents' license file maintained by the Board

WITNESSES

Petitioner: Todd Laakso
 Kristen Lagenor
 Bob Peter

ISSUES

Whether Respondents violated N.C. Gen. Stat. § 89D-22(2) and (3), and if so, should the North Carolina Landscape Contractors Licensing Board take action against their licenses and / or

UPON DUE CONSIDERATION of the arguments and stipulations of the parties; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have in the outcome of the case, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. Respondents Jason Lee Atkins and Natural Choice Contracting LLC, formerly A.L.M. Contracting LLC, failed to appear at the hearing, in person or by any representative, after receiving due notice of hearing from the Office of Administrative Hearings (hereinafter, "OAH") by certified mail, return receipt requested. Mr. Atkins was personally served with the Petition at his Youngsville address listed in the Certificate of Service below on February 23, 2020. See Petitioner's Exhibit (hereinafter, "P Ex 1").

2. The Petitioner North Carolina Landscape Contractors Licensing Board ("Petitioner" or "Board") issued a landscape contractor's License (No. 1882) to Respondent Jason Lee Atkins on August 1, 2015. It was renewed on December 4, 2019, and remained active on the date of the hearing. Respondent A.L.M. Contracting, LLC ("A.L.M.") also received its corporate license (No. CL0576) on August 1, 2015, with Mr. Atkins signing as the licensed landscape contractor member qualifying A.L.M. for that license.

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4. In December 2016 and January 2017, Southern Garden in Cary delivered tree grindings for mulch to Respondents under an agreement to provide the mulch at Respondents

chosen location for the cost of hauling it, being about \$55 per load. Respondents received 7020 cubic yards mulch, but failed to pay any of the hauling costs, which amounted to \$17,517.50. (P Ex 3, pgs. 2-3) Mr. Todd Laakso, vice president of operations at Southern Garden, testified that he became aware of the Respondents while handling the billables and receivables for that firm. He stated that after Respondents were invoiced for hauling the mulch, Mr. Atkins "ceased communication with us and failed to respond to any form of communication." (Tr 14:16-20)

5. On July 27, 2017, Respondent Atkins, as Member of the LLC, filed an Amendment of Articles of Incorporation with the N.C. Secretary of State changing the corporate name of A.L.M. to "Natural Choice Contracting, LLC" ("Natural Choice"). Mr. Atkins remained the LLC's managing member, registered agent, and qualifier. (P Ex 6, p. 5)

6. On November 29, 2017, Southern Garden filed a civil complaint against Jason Atkins and Natural Choice Contracting, LLC for failure to pay for the hauling of wood grindings as described above. (Wake Co. 17 CVD 14533) On July 23, 2018, a Default Judgment was entered against Respondent Atkins and Natural Choice in the amount of \$17,517.50. (P Ex 4) As of the date of the hearing, Respondents have failed or refused to pay their debt to Southern Garden.

7. On March 20, 2018, Mr. Laakso filed a complaint against Respondents Atkins and Natural Choice (formerly A.L.M.), alleging fraudulent misconduct in obtaining mulch from Southern Garden and avoiding their creditors. Based on these allegations, the Board opened an investigation of the Respondents. (P Ex 2)

8. Mr. Bob Peter investigated the Respondents on behalf of the Board following Mr. Laasko's complaint. In addition to his work with the Board, Mr. Peter has been a licensed landscape architect since 1986. He testified that getting Mr. Atkins on the phone "wasn't an easy task," but when he did find a working phone number and left a voicemail message, Mr. Atkins did call the investigator back. In their conversation, Respondent Atkins claimed to be unaware of unpaid invoices from Southern Garden but said he would be willing to "discuss" it with them. (Tr 37:14-38:14)

9. On or about April 3, 2018, Ms. Lagenor filed a complaint with the Board recounting that the Respondents obtained \$15,800.00 worth of mulch without paying for it and had avoided contact about the debt. (P Ex 5) Mr. Peters attempted to contact Respondent Atkins about these allegations, but he testified that despite calling him "many times," he was never able to have a second conversation with Mr. Atkins. (Tr 38:18-40:25)

10. Based on the credible testimony cited above and the documents admitted into evidence, the undersigned finds by this clear and convincing evidence that the Respondents committed acts for which the Petitioner Board may impose fines and take action against the Respondents' licenses.

11. There is no direct evidence in the record of the Respondents' actual ability to pay their debts to Southern Garden and Elkins Sawmill, Inc. However, it can reasonably be inferred that Mr. Atkins fraudulently misrepresented to Southern Garden his willingness and / or ability to pay for all of the mulch he and A.L.M. received from that company because of the pre-existing large debt to Elkins, his refusal to communicate with the creditors, his misrepresentation to Mr.

Peter that he was unaware of any claim by Southern Gardens after he had a judgment entered against Respondents due to that debt, and his refusal to respond to Mr. Peter's later attempts to contact him.

12. Due to its financial dereliction, by reason of its insolvency and / or malfeasance of its leadership, Natural Choice Contracting, LLC, formerly A.L.M. Contracting, LLC, acted with gross incompetence in dealing with its creditors Southern Garden and Elkins Sawmill, Inc.

13. Respondents actions are aggravated by their apparent willfulness, persistence and repetitive nature, and the significant sums of money involved.

14. To better serve the convenience and health of the participants during the pandemic, this hearing was conducted remotely.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following,

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. N.C. Gen. Stat. §§ 89D-15(8); 150B-40(e); 150B-23(c). If a party fails to appear in a contested case after given proper notice, the hearing may proceed to decision the absence of that party. N.C. Gen. Stat. § 150B-40(a).

2. The Petitioner North Carolina Landscape Contractors Licensing Board has the authority and duty granted under Chapter 89D of the North Carolina General Statutes and Title 21 of the North Carolina Administrative Code, Chapter 28B, to issue, renew, deny, restrict, suspend, or revoke licenses.

3. For the convenience of parties and witnesses, an administrative law judge may exercise discretion in designating the venue and allow remote participation in the hearing by video conference. N.C. Gen. Stat. §§ 150B-38(e); 26 NCAC 03 .0120(g).

4. Under the circumstances of this case, the Petitioner's Petition and Prehearing Statement fulfilled its duty to afford the Respondents an opportunity to show compliance with all lawful requirements for retention of their licenses. N.C. Gen. Stat. § 150B-3(b).

5. In a contested case subject to Article 3A of the Administrative Procedure Act, the decision must be supported by substantial evidence admissible pursuant to N.C. Gen. Stat. § 150B-41. N.C. Gen. Stat. §§ 150B-2(8c); 150B-42(a).

6. Before imposing and assessing a civil penalty and fixing the amount of the penalty, the finder of fact must take into consideration the nature, gravity, and persistence of the particular violation, the appropriateness of the penalty when considered alone or in combination with other punishment, whether the violation was willful and malicious, and factors that would tend to mitigate or aggravate the violation(s) found. N.C. Gen. Stat. § 89D-23(b).

7. No matter how informal, “[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.” *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985).

8. The Respondent Jason Lee Atkins used fraudulent misrepresentation in the practice of landscape contracting within the meaning of N.C. Gen. Stat. § 89D-22(2).

9. The Respondent Natural Choice Contracting, LLC, formerly A.L.M. Contracting, LLC, acted with gross incompetence within the meaning of N.C. Gen. Stat. § 89D-22(3).

10. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012); *In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011).

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned respectfully makes the following

PROPOSAL FOR DECISION

The North Carolina Landscape Contractors Licensing Board should **REVOKE** the Landscape Contracting licenses of Jason Lee Atkins and Natural Choice Contracting LLC, formerly A.L.M. Contracting LLC; and **FINE** each of these licensees Two Thousand Dollars (\$2,000.00).

NOTICE

The North Carolina Landscape Contractors Licensing Board will make the Final Decision in this contested case.

The agency making the final decision is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

IT IS SO ORDERED.

This the 28th day of September, 2020.

A handwritten signature in black ink, appearing to read "J Randolph Ward", is positioned above a solid horizontal line.

J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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Jason Lee Atkins
Natural Choice Contracting LLC f/k/a A.L.M. Contracting LLC
3725 NC Highway 98 West
Youngsville NC 27596
Respondent

This the 28th day of September, 2020.



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