STATE OF ALABAMA BOARD OF LICENSURE
FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

IN THE MATTER OF:

Omni Fire & Safety LLC dba Holt Fire & Safety
1201 1st Avenue
Opelika, AL 36801-5604

Respondent

Case No. 2012-19-C

FINAL ORDER

On March 11, 2014 the Alabama Board of Licensure for Professional Engineers and Land Surveyors convened for a hearing concerning the allegations filed against Respondent, Omni Fire & Safety, LLC d/b/a Holt Fire & Safety ("Omni"). The Board was represented by Mr. Benjamin Albritton, Board Counsel. Administrative Law Judge Dana A. Billingsley presided over the Hearing.

After hearing the testimony of all the witnesses presented by the Board Investigative Committee and after considering all the evidence presented in the above-referenced case, Administrative Law Judge Dana H. Billingsley proposed the following Findings of Fact, Conclusions of Law, and Conclusion and Recommendation.

PROPOSED FINDINGS OF FACT

1. Respondent Omni Fire & Safety, LLC is a limited liability company located at 1208 First Avenue in Opelika, Alabama. Omni is a non-licensee and has at no time been issued a valid Certificate of Authorization from the Board to practice or offer to practice engineering in the State of Alabama, nor does it employ an Alabama licensed professional engineer. (Tr. 29-31);

(BE #1).

2. On April 30, 2012, the Board received a Complaint from Mr. Jerry Williams ("Mr. Williams"), Fire Inspector for the City of Auburn, regarding Omni's installation of a fire alarm system at the Thermofisher Scientific project located at 2039 McMillan Street, Auburn, Alabama, without having first submitted engineer-stamped drawings of the fire alarm system to the City of Auburn's Code Division for review. (Tr. 206-07, 209); (BE #J-1). The Complaint was assigned Case No. 2012-19-C by the Board.

3. By Notice dated January 7, 2014, Respondent was notified via Certified and First Class Mail of the place, date and time of a public hearing to be held concerning its alleged violations of ALA. CODE § 34-11-15(a) (1975 as amended), practicing, offering to practice or holding oneself out as qualified to practice engineering in the state of Alabama without being licensed or exempted from licensure in accordance with state law; and ALA. CODE § 34-11-16(a)(1) (1975 as amended), permitting the assessment of a civil penalty against any non-licensed person, corporation or other entity found guilty by the Board of engaging in the practice of, or offer to practice, engineering without first obtaining a license from the Board, which allegations were specified in detail in the Board's Charges accompanying the Notice. (BE #1).

4. The Board's Charges included three (3) counts of violation of ALA. CODE §§ 34-11-15(a) and -16(a)(1), alleging that Respondent provided the design and installation of a fire alarm system in 2011 for the Daewon America Warehouse ("Daewon") project located at 215 Orr Avenue, Opelika, Alabama; provided the design and installation of a fire alarm system in 2012 for the LCYD Transitional Living Fire Alarm System ("LCYD") project located at 1215 Grand National Parkway, Opelika, Alabama; and provided the design and began the installation of a fire alarm system in 2012 for the Thermofisher Scientific ("Thermofisher") project located at 2039 McMillan Street, Auburn, Alabama, all without employing an Alabama licensed professional engineer and obtaining a Certificate of Authorization for engineering. (BE #1).

5. The undersigned finds that the Notice and Board's Charges complied in all respects with the requirements of ALA. CODE§§ 41-22-12 and 34-11-11(e), (h) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.03 (2013), and sufficiently apprised Respondent of the nature of the charges against it and of the date, time and place of the hearing. Service of the Notice and Board's Charges on Respondent was made by Certified Mail to Respondent's counsel in Opelika, Alabama. (BE #1).

6. This matter was previously set for hearing on October 10, 2013, and was continued by agreement of the parties to March 11, 2014.

7. The undersigned conducted the hearing on the day set and at the time and place appointed in the presence of a quorum of the Board membership. Respondent was represented by Mr. Bobby Poole, Esq. and Mr. Jonathan Corley, Esq. The Board was represented by Assistant Attorney General Benjamin Albritton. Appearing and testifying on behalf of the Board were: Executive Director Regina Dinger; Mr. Robert Herbert, Board Investigator; Mr. Gary Hood, Estimator for East Alabama Electric Company, Inc. of Auburn, Alabama; Mr. Mike Carter, agent for Porter Properties, Inc. in Auburn, Alabama; Mr. David Adair, a former Omni employee; Mr. Jeff Thompson, former Assistant State Fire Marshal; Captain Scott McBurney, Fire Inspector for the Opelika Fire Department; Mr. Jerry Williams; Mr. Ed Paulk, Alabama State Fire Marshal; and Mr. Richard Stehr, a licensed professional fire protection engineer, serving as the Board's Technical Advisor and an expert witness."1" The Board introduced sixteen (16) exhibits at the

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"1" The parties stipulated to the testimony of Mr. Rick Huett, the Board's Assistant Executive Director and Chief Investigator, as follows: in his capacity as Assistant Executive Director and Chief Investigator, all complaints come to Mr. Huett, and he received a complaint against Omni. Pursuant to procedure, he assigned that complaint to Special Investigator Bob Herbert for investigation, and Mr. Herbert took the investigation from that point forward until a report was given to the Board's Investigative Committee. (Tr. 69-70). The Board also called Mr. Kevin Marlin, who was listed as a witness for Omni; however, Mr. Marlin invoked the protection of the Fifth Amendment to the U.S. Constitution against self-incrimination in response to the Board's questions. (Tr. 75-78).

hearing, which were admitted into evidence. Respondent introduced ten (10) exhibits, which were also admitted into evidence.

8. Ms. Dinger testified that, in her capacity as the Board's Executive Director, she prepared the January 7, 2014 notice of hearing and Board Charges in this matter and confirmed that Omni does not hold a Certificate of Authorization from the Board to provide engineering services, nor does it have an affiliated, licensed professional engineer. (Tr. 26-27, 29-31); (BE #1). She stated that the design of fire alarm systems without Board licensure is a violation of the Board's law. (Tr. 29). She also stated that Omni's predecessor entity, Holt Fire & Safety Consulting Engineers, then managed by member Mr. Kevin Marlin, entered into a Consent Order with the Board on December 10, 2008, regarding its submission of fire alarm design documents to Auburn University relative to an Auburn fraternity house, bearing the image of a professional engineer's seal and signature without having first obtained the engineer's permission, and submission of design documents to Auburn University, identifying itself as "Consulting Engineers," without employing a licensed professional engineer or having a Certificate of Authorization for engineering issued by the Board. (Tr. 34-40, 57-59); (BE #B-57). Pursuant to the Consent Order, Holt Fire & Safety Consulting Engineers changed its name, agreed to cease and desist offering to practice or practicing engineering and paid a civil penalty of $2,000.00 and costs for that action to the Board. (Tr. 40-41); (BE #B-57).

9. On cross-examination, Ms. Dinger clarified that the business of installing fire alarm systems is regulated under ALA. CODE § 34-33A-1, *et seq.* (1975 as amended). (Tr. 43-44); (DE #4). Ms. Dinger confirmed that on May 16, 2013, the Board sent correspondence to Omni's counsel referencing ALA. CODE § 34-33A-10,"2" regarding the requirements for submission of fire alarm system plans to municipal, county or state agencies or departments, and the Board's acknowledgment that Omni received Permit #A-0287 from the State Fire Marshal on October 15,

2010, with an expiration date of September 30, 2011; the permit was renewed on November 1, 2011, with an expiration date of September 30, 2012. (Tr. 45-48); (DE #1). The plans for Daewon's fire alarm system were submitted by Omni on September 11, 2011; the plans for the Thermofisher fire alarm system were submitted on April 28, 2012; and the plans for the LCYD fire alarm system were submitted on September 20, 2012. (Tr. 46-47);

(DE #1). In accordance with ALA. CODE§ 34-33A-10, Ms. Dinger testified that fire alarm system drawings or plans may be submitted by a certified fire alarm contractor. (Tr. 50-51). 10. On further examination, Ms. Dinger testified that the Board's May 13, 2013 correspondence was based on consultation with the State Fire Marshal's Office and that it further referenced the definition of a "certified fire alarm contractor" in ALA. CODE § 34-33A-1 (2), as a fire alarm contractor "who has qualified and received a permit from the State Fire Marshal, with a NICET Level Ill on staff." (Tr. 53-55); (DE #1). The Board's correspondence also stated, "'The permit identified Mr. Kevin Marlin as the certification holder and licensed as a NICET II.'" (Tr. 55-56);

"2" ALA. CODE§ 34-33A-10 (1975 as amended) provides:

> Nothing in this chapter limits the power of a municipality, county, or the state to regulate the quality and character of work performed by contractors, through a system of permits, fees, and inspections which are designed to assure compliance with, and aid in the implementation of, state and local building laws or to enforce other local laws for the protection of the public health and safety. Nothing in this chapter limits the power of a municipality, county, or the state to adopt any system of permits requiring submission to and approval by the municipality, county, or the state, of plans and specifications for work to be performed by contractors before commencement of the work. If the plans for a fire alarm system are required to be submitted to and approved by any municipality, county, or the state, or any departments or agencies thereof, the plans shall bear the seal of a professional engineer licensed in the State of Alabama or be submitted by a certified fire alarm contractor. The official authorized to issue building or other related permits shall ascertain that the fire alarm contractor is duly certified by requiring evidence of a valid State Fire Marshal's permit.

(DE #4).

(DE #1). Ms. Dinger admitted that she is not vested with the authority to interpret Alabama law

outside the purview of ALA. CODE§ 34-11-1, *et seq.* or ALA. ADMIN. CODE r. 330-X-1-.01, *et seq.* (Tr. 59-61, 65); (DE #5, 6). ALA. CODE§ 34-33A-1, *et seq.* became effective August 1, 2009, and the chapter states that it is to be administered by the State Fire Marshal. (Tr. 62-63, 65); (DE #4).

11. Mr. Gary Hood testified that he contacted Omni about installing a fire alarm system for the LCYD project, which was a design and build project. He stated that Omni conducted a field coordination study and submitted drawings for the first phase to East Alabama Electric Company, Inc., on September 20, 2012, that were sent to the project's architect for review; however, the drawings contained insufficient information, and were returned to Omni for some further corrections after October 1, 2012. The project was eventually completed by another contractor. (Tr. 80-90); (BE #B-34).

12. Mr. Mike Carter testified that Porter Properties contracted with Omni to install pull stations required by the City of Opelika for Daewon's fire alarm system. Mr. Carter stated that Omni designed the improvements, but it never submitted plans to Porter Properties for the project. (Tr. 92-95).

13. Mr. Herbert stated that he is tasked with investigating Board complaints referred to him by Mr. Huett and that he interviews witnesses, gathers documentation and provides a written report of his findings to the Board's Investigative Committee. Mr. Herbert referred "sanitized" versions of the documents gathered during the investigation to Mr. Richard Stehr, who served as the Board's Technical Advisor in this matter, so they could not be identified as having been generated by Omni. (Tr. 97-98, 101). The Technical Advisor then provided a report of his findings following his review of these documents, which was included with Mr. Herbert's report to the Investigative Committee. (Tr. 101).

14. As part of the investigation in this matter, Mr. Herbert testified that he interviewed Mr.

Marlin, who told him that Omni designed the fire alarm systems for the Daewon, LCYD and Thermofisher projects. (Tr. 98-99). He determined that Mr. Marlin was certified as a NICET II technician and became certified as a Level Ill in October 2012. (Tr. 99-100).

15. On cross-examination, Mr. Herbert clarified that Mr. Marlin alternatively stated that he "designed" the plans or "did the drawings" for each project and confirmed that Omni did not physically perform any installations for the LCYD project. (Tr. 102-05). He confirmed that Omni was a certified fire alarm contractor from October 15, 2010 to September 30,2011, and from November 1, 2011 to September 30,2012, when the drawings for the Daewon project (September 11, 2011), LCYD project (September 20, 2012) and Thermofisher project (on or about April 28, 2012) were submitted by Omni. (Tr. 105-11, 122-23, 145); (BE #B-31, B-34, B-42). Mr. Herbert testified that Exhibit B-1, which purports to be a shop drawing of the Thermofisher project, was generated by Thermofisher, but the design aspect of the fire alarm system was produced by Omni, even though the document does not bear Omni's name, unlike Exhibits B-31, B-34 and B-42. (Tr. 111-12, 134). He agreed that a certified fire alarm contractor in the state can submit plans for fire alarm systems pursuant to ALA. CODE § 34-33A-10 (1975 as amended). (Tr. 118-19).

16. Based on his research, Mr. Herbert opined on re-examination that NICET's rules permit Level II and Level III technicians to perform different work. (Tr. 123-26). He stated further that Mr. Marlin informed him that he was qualified to design projects at his NICET level, that he did not need an engineer and had not employed an engineer for the last five to six years. (Tr. 132). For the period November 1, 2011 to September 30, 2012, Mr. Marlin was licensed by NICET as a Level II technician. (Tr. 132); (BE #B-9). Mr. Marlin also advised Mr. Herbert that he had passed testing for NICET III, and possibly NICET IV, certification in December 2010. (Tr. 136); (BE #B-9). NICET confirmed that Mr. Marlin "passed his exam requirements" for Levels Ill and IV in an e-mail to Mrs. Heidi Marlin on February 21, 2014, but the e-mail communication does

not confirm at what level Mr. Marlin was actually certified. (Tr. 136-38); (DE #3). Mr. Herbert stated that his research showed that Mr. Marlin was first certified to a Level III in October 2012. (Tr. 137 -38).

17. In response to questions from the Board members, Mr. Herbert testified that it is reasonable to assume that ALA. CODE § 34-33A-1 (2) could be interpreted as requiring a licensed professional engineer to do the design work of a fire alarm system if the certified fire alarm contractor did not have a NICET Level Ill technician on staff. (Tr. 139-41). He opined that the name "FIKE," which appears on the drawings, is the name of the manufacturer of the fire alarm products utilized by Omni. */d.*

18. Under further examination, Mr. Herbert acknowledged that ALA. CODE§ 34-33A-5(b)(1) provides that individuals with a NICET Level II certification may only engage in certain activities."3" (Tr. 148-49); (DE #4). In addition, individuals or businesses already engaging in the business of a fire alarm contractor were required to become compliant with the NICET Level III certification requirement by August 1, 2012, pursuant to ALA. CODE§ 34-33A-5(b)(2) (1975 as amended). (Tr. 149); (DE #4).

19. Mr. David Adair testified that he was a former employee of Omni, that Mr. Marlin designed the fire alarm systems for the Thermofisher and Daewon projects and that Mr. Marlin's signature appeared on the Thermofisher drawings. (Tr. 152-53).

20. Mr. Jeff Thompson testified that he acted as the Code Compliance Officer for the State Fire Marshal's Office until 2013. He stated that certified fire alarm contractors are licensed to service, maintain and install fire sprinkler systems and fire protection systems. If an existing fire alarm

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"3" ALA. CODE § 34-33A-5(b)(1) provides that "Any individual desiring to engage in the programming, maintenance, testing, inspection, certification or modification of fire alarm systems shall provide current written proof that he or she has passed a competency test administered by the NICET as a Fire Alarm System Technician -- Level II or any other acceptable nationally recognized fire alarm technician certification requiring continuing education that is deemed equivalent by the State Fire Marshal." (DE #4).

contractor did not have a NICET Level III on staff, "but [] fell under the clause of the 36-month rule" *(see* ALA. CODE § 34-33A-5(b)(2)), it could still function as a fire-alarm contractor, but was limited to the servicing, maintaining and layout of fire alarm systems. NICET Level II technicians are allowed to work for companies licensed by the State Fire Marshal, with a Level III technician on staff. (Tr. 158-62). Mr. Thompson stated his understanding that a certified fire alarm contractor "can actually do a layout drawing that has to be designed and organized through a licensed [professional engineer] who approves that particular layout drawing, and then they can perform the work thereafter as far as the install. .. " Design of a fire alarm system must be done by a licensed professional engineer. (Tr. 162-63).

21. Under cross-examination, Mr. Thompson acknowledged that Certified Fire Alarm Contractor Permit #A-0287, issued by the State Fire Marshal to Omni on October 15, 2010, stated as follows: "This is to certify that the applicant named KEVIN MARLIN, MANAGING MEMBER, has met minimum experience requirements and/or completed and passed the NICET Level III Competency Test approved by the State Fire Marshal in accordance with Title 34-33A-5 of the laws of Alabama. By so doing, the above named applicant has qualified to engage in the installation, repair, alteration, addition, maintenance or inspection of fire alarm systems in the State of Alabama." (Tr. 165-66, 179); (DE #9).

22. Mr. Thompson stated that the State Fire Marshal, who is vested with the authority to enforce and interpret this section of the Alabama Code, interpreted Alabama law as limiting the design of fire alarm systems to professional engineers. (Tr. 170-74). In a September 12, 2012 e-mail to Mr. Jerry Williams regarding Omni's installation of a fire sprinkler system at the O'Brien dental office in Auburn, Mr. Thompson wrote, "Jerry, if they are doing work, they have to do like anyone else. Fire sprinkler and fire alarm have to be designed by an engineer of record, and then if they obtain a license from our office, then they must have a layout approved by the engineer

of record with or without comments." (Tr. 175-76); (BE #B-32). He stated that a company must have a NICET III on staff to obtain a license to do contracting work in the state. (Tr. 178); (DE #4). Mr. Thompson agreed that the determination of what constitutes the practice of engineering is delegated solely to the Board (Tr. 178-80); ALA. CODE § 34-33A-1 0 permits a fire alarm contractor certified by the State Fire Marshal to submit fire alarm system plans to a municipality (Tr. 181-83); (DE #4).

23. Capt. McBurney stated that he oversees fire protection in his capacity as Fire Inspector for the Opelika Fire Department. He testified that he reviewed plans for the fire alarm system for the LCYD project that were prepared, sealed and submitted to him by Omni, but he rejected those plans because they did not bear the seal of a licensed professional engineer, who must "approve[] the design and make[] sure that it fits the structure." (Tr. 187-90, 193-94). In particular, Capt. McBurney stated that the engineer "designs it to make sure that the structure that it's being installed in will meet all the life safety to get the occupants out, make sure all the visuals, the horn strobes, the notification devices are working properly and are -- have the proper backup system properly with the hydraulic calculations and ... [b]attery calculations and the voltage calculations." (Tr. 193). Capt. McBurney clarified further that he requires all fire alarm system plans submitted to his office to be designed by a professional engineer, in accordance with a 2009 directive of the State Fire Marshal. (Tr. 195-96, 198, 200-03).

24. Mr. Jerry Williams testified that he filed a Complaint with the Board regarding Omni's installation of a fire alarm system for Thermofisher without having submitted engineer-stamped plans to the City of Auburn. (Tr. 206-09); (BE #J-1). He stopped work on the installation until engineer-stamped plans could be submitted, in accordance with a letter and position statement issued through the State Fire Marshal's Office. (Tr. 211, 213-14, 217-18); (BE #B-1). He stated that the City of Auburn requires all plans and designs for fire sprinkler systems to be signed by a

professional engineer. He confirmed that he is required to enforce the law as instructed by the State Fire Marshal and does not attempt to interpret the law himself. (Tr. 217-18).

25. In response to questions from the Board members, Mr. Williams clarified that no plans for the Thermofisher project were ever submitted to his office, as required by city ordinance, and that any such plans were required to be stamped by a professional engineer. (Tr. 219, 221).

26. Marshal Ed Paulk testified that he is charged with the enforcement and interpretation of Alabama law governing fire alarm systems and is the top official in the State Fire Marshal's Office, which is under the Alabama Department of Insurance. (Tr. 224-25). Marshal Paulk stated that his office had issued certified fire alarm contractor permits for Omni from 2010 to date;"4" a certified fire alarm contractor may "lay out" a system under the permit, but the design of such systems must be done by a professional engineer under the state's engineering laws. (Tr. 226-28, 230-32); (DE #10). The Marshal stated that entities conducting business at the time the law was passed were allowed three years under the new law to become compliant with the requirement to have a NICET III technician on staff. (Tr. 231). With regard to Exhibit B-1 for the Thermofisher project, Marshal Paulk opined that the drawing was not a "design" drawing and would be unacceptable if submitted for a fire alarm system by a certified fire alarm contractor. (Tr. 229-30).

27. Under cross-examination, Marshal Paulk clarified further that, based on the engineering laws, he does not interpret ALA. CODE § 34-33A-1 0 to allow a fire alarm contractor to design plans for a fire alarm system; neither is a NICET technician permitted to design such a system. (Tr. 234-35). He stated that Title 36 of the Code of Alabama requires his office to ensure the proper design of any fire alarm or sprinkler system installed in the state; although Chapter 33A does not

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"4" Copies of Certified Fire Alarm Contractor Permits issued to Omni Fire & Safety LLC for October 23, 2012 to September 30, 2013, and October 1, 2013 to September 30, 2014, are included in the record and were produced in response to a subpoena issued to the State Fire Marshal's Office, but were not introduced as exhibits.

include the word "design," Marshal Paulk stated that the "quality and care of work performed by contractors" may be regulated pursuant to ALA. CODE§ 34-33A-10, and "Quality and care starts with a proper design." (Tr. 235, 242-43). He stated that the engineering law "allows a professional engineer to properly design a system and stamp his design." Fire sprinkler contractors may submit shop drawings, but they must first be reviewed "by the designing engineer to ensure that they are of the design that he created." (Tr. 236-37, 239). The State Fire Marshal's Office has "the specific duty of enforcing laws, regulations, and ordinances of the state and provisions of [Title 36, Chapter19, Article 1] in the State in matters relating to ... (3) Installation and maintenance of automatic or other fire alarm systems ... " ALA. CODE§ 36-19-2 (1975 as amended). (Tr. 240); (DE #7).

28. Under further examination, Marshal Paulk stated the permits his office issued to Omni qualified it to "engage in the installation, repair, alteration, addition, maintenance or inspection of fire alarm systems in the State of Alabama," but did not authorize the design of such systems. (Tr. 246); (DE #9, 1 0). He stated that ALA. CODE § 34-33A-5(b) permits a NICET Level II technician to engage in the "programming, maintenance, testing, inspection, certification, modification of fire alarm systems." Certified fire alarm contractors can also do shop drawings. (Tr. 247-48); (DE #4).

Marshal Paulk opined:

> My opinion of this is, is that the law would allow a fire-alarm contractor to submit the plans because the law would expect that contractor to comply with the laws and have a proper design, a design designed by an engineer.
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> Now, the double stamping is not double stamping. An engineer cannot stamp someone else's plans. An engineer cannot stamp the shop drawings of a fire-alarm contractor. The engineer can review and accept or reject or amend those shop drawings saying they are his design, or he can change his design if he sees something he likes there better.
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> But he is not stamping those plans. He is reviewing and accepting and approving those as meeting his design. The design is the plan that the engineer stamps.

> The point is, the plans, the construction documents, are the design. That design must be done by an architect or an engineer working in his field. Now, the shop drawings are working drawings to put that plan into construction. They may be done by the NICET. The shop drawings are then reviewed by the engineer for making the determination if that shop drawing reflects his design.
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> If it does, he doesn't seal those, but he does approve them and say yes, it meets my design, because that's his obligation as the designing member of this portion of that building. And then construction proceeds. (Tr. 249-52).

29. Marshal Paulk stated that the Fire Protection Position Statement jointly issued by him and the Board on December 20, 2009, was issued to prevent a misinterpretation of the fire alarm system statute. (Tr. 252); (DE #11, BE #B-23). He opined that Exhibit B-1 is a shop drawing for the Thermofisher project and does not constitute a design. Likewise, he stated that Exhibits B-42 and B-34, for the Daewon and LCYD projects, respectively, could be considered as fire alarm system shop drawings (Tr. 254-56);"5" however, had they been submitted as the design for such systems, they would have been rejected by his office because they do not bear the seal of a professional engineer (Tr. 256).

30. In response to questions from the Board members, Marshal Paulk testified that the State Fire Marshal's Office enforces ALA. CODE§ 34-33A-1(4) (1975 as amended), which requires any fire alarm system to follow the installation standards set forth by the National Fire Protection Association 72 National Fire Alarm Code, by requiring engineer-stamped designs. (Tr. 257-58); (DE #4). He clarified under further examination that the joint Position Statement was needful because, prior to the passage of the chapter, fire alarm systems were being installed by unqualified persons, using equipment taken out of car trunks and other unregulated places. He stated that the engineer licensure code requires the design of fire alarm systems to be done by a professional engineer. (Tr. 259-67, 271-72).

"5" Marshal Paulk stated that Exhibit B-42 meets only the bare essentials of a shop drawing, lacks detail and

31. Marshal Paulk agreed that ALA. ADMIN. CODE. 482-2-101-.04(2) provides that if any fire or building code adopted by the State Fire Marshal's Office conflicts with Alabama law, Alabama law will prevail, and the code will be interpreted accordingly. (Tr. 267); (DE #8). When his office encounters individuals not complying with the fire alarm system statute, they are referred to the Professional Engineers Board. (Tr. 272). is not drawn to scale. (Tr. 254-55).

The Marshal also stated that the "plans and specifications" referenced in ALA. CODE § 34-33A-10 refer to construction documents that emanate from an architect or engineer and are used by various trades to create shop drawings that bring the plans to life. This comports with the reference in ALA. CODE§ 34-33A-11(b) to "architects and engineers preparing plans and specifications for work involving fire alarm systems." (Tr. 272-73); (DE #4). He stated that the fire alarm system is itself comprised of parts that are assembled to detect heat, smoke or light, which communicate with a panel and trigger horns, strobes or other warning devices. The parts must meet listing and labeling requirements and be assembled according to manuals and regulations; once properly designed, the system can be installed by the certified fire alarm contractor. (Tr. 27 4-76).

32. Marshal Paulk clarified that if shop drawings are done from an architect's or an engineer's design, the design does not have to be submitted with the shop drawings, but the shop drawings must be signed off on by the designing engineer, so the reviewing municipality, county or state agency knows "whether or not the design that the engineer created is, in fact, what's being installed." (Tr. 278-79). If the design drawings are sufficiently detailed, they can go directly to the construction process; if they are not, shop drawings are created to implement the design for the building's systems, including its plumbing, air conditioning, electrical and mechanical systems. (Tr. 279-80).

33. Mr. Stehr testified that he has been a fire protection engineer since 2003, has been working in

the fire protection industry since 1986, and is certified as a NICET Level Ill technician in automatic sprinkler system layouts. (Tr. 283, 285-86). He stated that the National Institute of Certification and Engineering Technologies ("NICET") was formed by the National Society for Professional Engineers ("NSPE") and other professions to provide a means for certification in fire protection systems. (Tr. 287). In serving as a Technical Advisor, Mr. Stehr testified that he is to give clarification on matters involving the practice of engineering in his particular field; the documents he was provided to review were "sanitized" by removing Omni's name and could not otherwise be identified as belonging to Omni. (Tr. 286, 292).

34. Mr. Stehr opined in his review of Exhibits B-1 and B-3 for the Thermofisher project that the information in these documents was incomplete and did not include a review stamp by an engineer or other jurisdictional authority. (Tr. 293, 296); (BE #B-22). He stated that fire protection system design is considered to constitute the practice of engineering in Alabama and must be done under the supervision of, or reviewed by, an engineer. In a design-bid-build project, an architect hires an engineer, and together, they create contract documents for bid that define the scope of the project. Installation shop drawings are prepared by the winning contractor by a Level III or higher NICET technician and are sent back for review to the designing engineer for compliance with the contract documents and all applicable codes. Under a design-build project, the contractor hires the architect and engineers, who are still ultimately responsible for the project's design. (Tr. 295-96).

35. In particular, Mr. Stehr stated that Exhibits B-1 and B-3 lacked sufficient detail as required by the International Fire Code regarding wiring and adequate device placement, as well as a reviewing stamp. (Tr. 297 -98); (BE #B-22). "[G]enerally speaking, ... the NICET certification covers the ability of a designer to meet their requirements within that [NFPA] 72 standard, that code, of how to lay things out, mounting heights, wiring types, protection of wiring, that sort of

thing. . .. [but] there are broader considerations with regard to fire-alarm design overall that need to be considered by the engineer." (Tr. 299-300).

36. The July 28, 2008 Position Statement of the Society of Fire Protection Engineers ("SFPE"), NSPE and NICET states that the design of fire alarm and fire protection systems falls within the practice of engineering and plays an important part in protecting the public health, safety and welfare. (Tr. 301, 303-04); (BE #B-22, B-23). With regard to the Thermofisher project, Mr. Stehr stated that the project design should have been supervised by an engineer. (Tr. 307); (BE #B-1, B-3, B-31). In reviewing Exhibits B-42 and B-43 for the Daewon project, Mr. Stehr opined that the design of that project fell "within the practice of engineering, and it should have been reviewed by an engineer and stamped accordingly." (Tr. 310-11); (BE #B-42, B-46). Likewise, the drawings reviewed for the LCYD project fell within the practice of engineering. (Tr. 311-12); (BE #B-34, B-48).

37. Under cross-examination, Mr. Stehr agreed with the State Fire Marshal that Exhibits B-1, B-34 and B-42 could qualify as shop drawings. (Tr. 315-16). The production of shop drawings by technicians does not constitute the practice of engineering. (Tr. 316, 344). He agreed further that ALA. ADMIN. CODE r. 482-2-101-.04(2) provides that in the event of a conflict between International Fire Code Section 907.1 and Alabama law, state law takes precedence. (Tr. 319-20); (DE #8). Mr. Stehr testified that local or state authorities who have reviewed submitted drawings may stamp them as approved before issuing a permit, but that practice may vary by jurisdiction. (Tr. 321-22). He stated that the SFPE Position Statement provides that the design of a fire protection system is within the practice of engineering and may be performed by someone else, including a technician, so long as that occurs under the supervision of a registered, professional engineer, who reviews and stamps the plans and accepts responsibility for the project's ultimate design. (Tr. 324-26); (BE #B-22).

38. Mr. Stehr stated further that technicians may make rudimentary calculations for fire protection systems, which fall within the practice of engineering, under the supervision or review of a professional engineer. (Tr. 327 -30); (BE #B-22). With respect to the Daewon and LCYD projects, Mr. Stehr stated that the same grounds set forth in his July 30, 2010"6" letter regarding his review of the Thermofisher project (BE #B-22) apply. (Tr. 332); (BE #B-46, B-48). Mr. Stehr clarified that under a design-bid-build scenario, shop drawings and calculations submitted to the contractor should be provided to the engineer of record for review for conformity with code and contract requirements. Even if they have already been reviewed and stamped by another engineer, the engineer of record should still review those contract drawings, and in those instances, double-stamping may occur. (Tr. 341-42). According to Mr. Stehr, a certified fire alarm contractor can thus submit shop drawings to a reviewing authority, such as the Opelika fire inspector. (Tr. 343, 375). In support of his review letters submitted to the Board (BE #B-22, B-46, B-48), Mr. Stehr referenced the 2008 SFPE Position Statement, the Board's Position Statement dated June 17, 2005, and the December 20, 2009 letter and Position Statement jointly issued by the State Fire Marshal and the Board. (Tr. 343-44); (BE #B-23, DE #11).

39. On further examination, Mr. Stehr clarified that it would not be proper for a contractor to submit shop drawings to a jurisdictional authority without an engineer's seal. (Tr. 348). Technician work still needs to be reviewed and approved by a licensed, professional engineer to ensure that the work is done properly and in accordance with the standards and practice of engineering. (Tr. 349-50, 375-76). Mr. Stehr stated that the production of shop drawings and calculations is rudimentary level engineering work that ultimately becomes part of the engineering design, regardless of whether the shop drawings are ever submitted to an engineer or

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"6" This letter references Case No. 2012-19-C and a June 28, 2012 letter from the Board and should reflect a date of July 30, 2012. Likewise page two of the document is dated July 12, 2012. (BE #B-22).

a jurisdictional authority for review. (Tr. 350-51, 357).

40. In response to questions from the Board, Mr. Stehr responded that in the absence of separate design documents prepared and sealed by an engineer, submitted shop drawings become design documents, which should be sealed by an engineer. As applied to this case, the documents that he reviewed as prepared by Omni likewise became the design documents, which should bear the seal of a licensed engineer in the absence of any other supporting documents. (Tr. 361-69). If an engineer seal is not affixed to the shop drawings, a separate letter of review from the engineer should be attached to the shop drawings. (Tr. 368-69). The engineer's review of the documents is intended to cover technical accuracy, as well as liability. (Tr. 369).

41. Mr. Stehr agreed that the purpose of a shop drawing is to physically support or interpret the engineer's concept of the fire alarm system for a particular facility and thus requires a professional engineer's stamp. (Tr. 376). He also agreed that ALA. CODE § 34-33A-1 0 could be interpreted as providing that a licensed fire protection engineer could submit stamped drawings, including shop drawings, to a jurisdictional authority, or they may be submitted by a certified fire alarm contractor, who has engaged an engineer to review and stamp those drawings. (Tr. 377). Mr. Stehr opined that if an engineering technician produces shop drawings that are not reviewed and/or supervised by a professional engineer and submits them to an authority or a customer, such actions constitute the practice of engineering without a license. (Tr. 377-78).

PROPOSED CONCLUSIONS OF LAW

1. The Alabama Legislature created the State Board of Licensure for Professional Engineers and Land Surveyors for the purpose of safeguarding life, health and property and promoting the public welfare with regard to the practice of engineering in this state. ALA. CODE§ 34-11-2(b) (1975 as amended). It is unlawful for any individual, corporation or other entity to practice or

offer to practice engineering in this state unless he/it has first been duly licensed by this Board or is specifically exempted from licensure under Alabama law. ALA. CODE§§ 34-11-2(a) and (brand -15(a) (1975 as amended).

2. The "practice of engineering" is defined under ALA. CODE§ 34-11-1(7) (1975 as amended), as

> Any professional service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, design and design coordination of engineering works and systems, planning the use of land and water, performing engineering surveys and studies, and the review of construction or other design products for the purpose of monitoring compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products; equipment of a control, communications, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and including other professional services necessary to the planning, progress, and completion of any engineering services.

"Any person shall be construed to practice or offer to practice engineering ... , within the meaning of this chapter, who . . . does perform any engineering . . . service or work or any other service designated by the practitioner which is recognized as engineering .... ALA. CODE§ 34-11-1 (6) (1975 as amended).

3. As evidence of licensure, each professional engineer obtains a seal from the Board bearing the licensee's name, licensure number and the words, "licensed professional engineer," to be used to certify engineering drawings, plans, specifications, plats and reports issued by the licensee or qualified persons under the licensee's direction and control. ALA. CODE§ 34-11-7(c) (1975 as amended).

4. In addition to any other provisions of law, the Board is empowered to enter an order assessing a civil penalty against any non-licensed person, corporation or other entity for engaging in the

practice of, or offer to practice, engineering in Alabama without having first obtained a license from the Board. ALA. CODE § 34-11-16(a)(1) (1975 as amended).

5. It is undisputed that Omni does not employ an Alabama licensed professional engineer and has not obtained a Certificate of Authorization for engineering issued by the Board. Neither is Mr. Kevin Marlin a licensed professional engineer. The central issue in this case is whether Omni designed and installed a fire alarm system for the Daewon America Warehouse project in Opelika, Alabama, in 2011, designed and installed a fire alarm system for the LCYD project in Opelika, Alabama, in 2012, and designed and began the installation of a fire alarm system in 2012 for the Thermofisher Scientific project in Auburn, Alabama, in violation of ALA. CODE§ 34-11-15(a) (1975 as amended). From the testimony in the case, the exhibits, and judging the demeanor, expertise and experience of the witnesses presented, the undersigned has rendered these Findings of Fact and Conclusions of Law.

6. ALA. CODE§ 34-33A-1, *et seq.* (1975 as amended), effective August 1, 2009, sets forth provisions governing individuals and entities engaged in the business of a fire alarm contractor. In particular, a "fire alarm contractor" is defined as an individual or business entity "engaged in the business of installation, repair, alteration, addition, maintenance, or inspection of fire alarm systems." ALA. CODE§ 34-33A-1(3). A "certified fire alarm contractor" is defined as "A fire alarm contractor who has qualified and received a permit from the State Fire Marshal, with a NICET Level III on staff." ALA. CODE§ 34-33A-1(2). A "fire alarm system" is itself defined as:

> A system or portion of a combination system that consists of components and circuits arranged to monitor and annunciate the status of fire alarm or supervisory signal-initiating devices and to initiate the appropriate response to those signals. Any system installed after August 1, 2009, shall follow the installation standard set forth by the latest edition of the National Fire Protection Association 72 National Fire Alarm Code. The system shall meet the requirements of all locally adopted codes and standards of the local municipality into which the system is installed and shall be acceptable to the local authority having jurisdiction.

ALA. CODE§ 34-33A-1(4). Before any contract can be awarded to a fire alarm contractor by any

municipal, county or state authority for the "installation, repair, alteration, addition, or inspection of a fire alarm system," the authority is required to first determine whether the contractor is properly permitted, as required under this chapter. ALA. CODE § 34-33A-11. (DE #4).

7. The State Fire Marshal is charged with the administration of chapter 33A, pursuant to ALA. CODE§ 34-33A-2, and is likewise charged under ALA. CODE§ 36-19-2(3) with "the specific duty of enforcing the laws, regulations and ordinances of the state and the provisions of this article throughout the state in matters relating to: ... (3) Installation and maintenance of automatic and other fire alarm systems and fire extinguishing equipment." (DE #4, 7).

8. It is undisputed that the State Fire Marshal's Office issued Certified Fire Alarm Contractor Permit #A-0287 to Omni Fire & Safety, LLC, on October 15, 2010, which states:

> This is to certify that the applicant named KEVIN MARLIN, MANAGING MEMBER, has met minimum experience requirements and/or completed and passed the NICET Level III competency test approved by the State Fire Marshal in accordance with Title 34-33A-5 of the laws of Alabama. By so doing, the above named applicant has qualified to engage in the installation, repair, alteration, addition, maintenance or inspection of fire alarm systems in the State of Alabama.

(DE #9, 10). The permit was valid through September 30, 2011, and was renewed on November 1, 2011, with an expiration date of September 30, 2012. (DE #1, 9, 1 0). The plans for Daewon's fire alarm system were submitted by Omni on September 11, 2011; the plans for the Thermofisher fire alarm system were submitted on April 28, 2012; and the plans for the LCYD fire alarm system were submitted on September 20, 2012. (DE #1). At the time of each submission, Omni was, therefore, duly licensed as a fire alarm contractor by the State of Alabama.

9. Omni contends that it may install fire alarm systems and submit its own plans/drawings for fire alarm systems to any authority having jurisdiction pursuant to its Certified Fire Alarm Contractor Permit and ALA. CODE§ 34-33A-10 (1975 as amended), which provides, in pertinent part, "If

the plans for a fire alarm system are required to be submitted to and approved by any municipality, county, or the state, or any departments or agencies thereof, the plans shall bear the seal of a professional engineer licensed in the State of Alabama or be submitted by a certified fire alarm contractor." (Emphasis added); (DE #4). The Board contends that plans/drawings for a fire alarm system must be designed by a licensed professional engineer or, if created by a qualified technician, must be submitted to an engineer for review and approval; the submittal of fire alarm system plans/drawings without the approval of a professional engineer constitutes the practice of engineering under ALA. CODE § 34-11-1, *et seq.*

10. The State Fire Marshal and the Board jointly issued a letter and Position Statement on December 20, 2009, to all "Code Officials" in the state "to promulgate the Board of Licensure's position statement on the designing of fire protection systems." (DE #11, BE #B-23). The letter states, in pertinent part:

> The efforts begin with professional engineers designing the system. Certified installers are needed to ensure that the systems are installed as called for in those designs. Competent maintenance technicians are needed to ensure the good working order of those installed systems.

NICET has adopted a policy which specifically delineates the difference between NICET certification and the practice of engineering.

> "Policy 32. The NICET certification programs are intended to award certification to individuals who have demonstrated appropriate and adequate engineering technician or technologist work experience. The NICET certification programs are not designed or intended to award certification to any individual to perform engineering services as defined under any state law or regulation as the "practice of
> engineering." NICET is opposed to any effort by any individual or group to misrepresent the NICET certification program as a program designed or intended to demonstrate qualifications to practice engineering as defined under state law or regulations."

While NICET certification meets a requirement it does not replace the requirement for professional licensure. <u>The designing of fire protection systems is engineering and as such must be designed by or under the direct supervision of professional engineers qualified to design fire protection systems. Only fire protection designs that have been</u>

signed and sealed by a qualified Alabama licensed professional engineer should be approved for construction.

(DE #11). (Emphasis added). A similar position statement was adopted by the Board in 2005, and included in the December 20, 2009 letter issued by the Board and the State Fire Marshal to Code Officials in the state. (BE #B-22, B-23, DE #11). The Fire Protection Position Statement adopted by the Board on June 17, 2005, states:

> The Alabama Board of Licensure for Professional Engineers and Land Surveyors recognizes the importance of all Fire Protection Systems, including fire detection, alarm, and suppression systems, for the life safety and protection of the public and property. The Licensing Board also recognizes the design and calculation of fire protection systems to be the practice of engineering.
>
> As mandated by the provisions of Chapter 11, Title 34, Code of Alabama, 1975, the practice of engineering includes the design of mechanical and hydraulic systems insofar as they involve the safeguarding life, health, or property. The licensure provisions identify that only those individuals licensed as professional engineers or are exempt from the licensure law can practice or offer to practice engineering.
>
> The Alabama Board of Licensure for Professional Engineers and Land Surveyors recognizes that the State Fire Marshal is responsible for the oversight of the requirements for the installation, repair, alteration, maintenance or inspection of fire protection sprinkler systems by fire protection sprinkler contractors. Nothing in this position statement deletes the requirements as identified in Chapter 33, Title 34, Code of Alabama 1975.
>
> It is the position of the Alabama Board of Licensure for Professional Engineers and Land Surveyors that:
>
> - Contract drawings should include a set of fire protection drawings that are sealed by a licensed professional engineer;
> - Fire protection drawings must meet as a minimum the standards as identified in the current editions of the adopted building codes and the National Fire Protection Association standards;
> - Supervision by a licensed professional engineer is required relative to the review of fire protection installation shop drawings for compliance with engineer's design and specifications; and
> - Field observations by a licensed professional engineer is required relative to the installation of original permitted design. (BE #B-23).

11. In accordance with this statement, the State Fire Marshal testified that construction documents embody the design of a fire alarm system and must be done by a qualified architect or

engineer. Working drawings, often denoted as shop drawings, put the plan into effect and may be produced by a qualified technician, but must be reviewed by the engineer to ensure that the drawings reflect his design. The design is sealed by the engineer; the working drawings are not sealed, but are reviewed and approved by the engineer. (Tr. 236-37, 239, 249-52, 278-79). The Marshal does not interpret ALA. CODE § 34-33A-1 0 to allow a fire alarm contractor to design plans for a fire alarm system; neither is a NICET technician permitted to design such a system. (Tr. 243-35).

12. Likewise, former Assistant State Fire Marshal Jeff Thompson, Captain Scott McBurney, Fire Inspector for the Opelika Fire Department, and Mr. Jerry Williams, City of Auburn Fire Inspector, testified to the same interpretation of the law. (Tr. 170-83, 187-90, 193-94, 217-19, 221). In particular, Capt. McBurney stated that an engineer's design ensures that all of the working parts of a fire alarm system are functioning properly and that the hydraulic, battery and voltage calculations have been properly calculated. (Tr. 193). (See *also* Marshal Paulk's testimony at Tr. 274-76.) This is illustrated further in e-mail correspondence between Mr. Thompson and Mr. Williams regarding Omni's installation of a fire alarm system for the Thermofisher project (BE #J-4, J-9, J-10) and the O'Brien Dental office building in Auburn in September 2012 (BE#B-32). While Mr. Thompson admitted that ALA. CODE§ 34-33A-10 permits a fire alarm contractor certified by the State Fire Marshal to submit fire alarm system plans to a municipality, the layout "must be approved by the engineer of record with or without comments." (Tr. 175-76, 181-83). The cities of Opelika and Auburn require plans for fire protection systems submitted to their offices to be signed off on by a professional engineer. (Tr. 200, 217).

13. The Technical Advisor's testimony comports with that of the state and city fire officials. The undersigned finds that Mr. Stehr was well-qualified as an expert to opine regarding fire

protection systems, including fire alarm systems, NICET certification and engineering."7" *See also* ALA. CoDE§ 34-11-1(7) (1975 as amended) (providing that " ... in qualifying a witness to offer expert testimony on the practice of engineering, [a] court shall consider as evidence of his or her expertise whether the proposed witness holds a valid Alabama license for the practice of engineering"). Mr. Stehr stated that fire protection system design is considered to constitute the practice of engineering in Alabama and must be done under the supervision of, or reviewed by, an engineer. According to Mr. Stehr, design documents are prepared by an engineer and define the scope of the project for the contactor; installation shop drawings are prepared by a contractor or a Level II or higher NICET technician and are sent back for review to the designing engineer for compliance with the contract documents and all applicable codes. (Tr. 295-96, 307, 310-12, 324-30, 348-50, 368-69, 375-76). In response to Mr. Herbert's question as to whether "shop drawings are within the practice of engineering in the State of Alabama," Mr. Stehr's letter of July 30, 2012, reviewing Omni's submitted documents for the Thermofisher project, stated:

> As indicated in the July 28, 2008 SFPE position statement jointly approved by NSPE and NICET (attached), the design of fire protection systems is within the practice of engineering and the design should be performed under the supervision of a registered professional engineer.
> Ideally, the Engineer should be involved from the conceptual stages of the project and provide initial design documents indicating the scope of work, general arrangement, applicable codes/standards and any special situations. Such documents should be signed/sealed by the Engineer responsible for the design (Engineer of Record). Where the design-build construction approach is employed, this is often not the case. However, at the very least, technician prepared shop drawings and calculations should be reviewed and approved by a registered engineer willing to accept responsibility for the fire protection design for the project.
> As also indicated in the position statement, the Engineer should sign/seal only those documents under their direct supervision and control. The contractor prepared shop drawings need not be stamped with a P.E. stamp/seal if the work was not done under the Engineer's direct control or authority but should receive a review stamp and/or have a review letter from the Engineer of Record attached.
>
> Going forward, fire protection contractors and their technicians should be aware

"7" The undersigned notes Omni's counsel's objection for the record to Mr. Stehr's qualification as an expert in this matter. (Tr. 290-91).

> that an Engineer of Record is required for all fire protection work performed in the State.

(BE #B-22). These same conclusions are referenced in Mr. Stehr's review of the Omni documents submitted for both the Daewon fire alarm system project (BE #B-46) and the LCYD project (BE #B-48).

14. This testimony comports with ALA. CODE§ 34-33A-11(b), ALA. ADMIN. CODE r. 330-X-11-.03, the SFPE, NSPE and NICET Position Statement, issued on July 28, 2008, just prior to the adoption of Chapter 33A in the 2009 Alabama legislative session, and the Board and State Fire Marshal's joint 2009 Position Statement, as discussed above. (DE #4, 11, BE #B-23).

15. The 2008 SFPE Position Statement was issued to "develop a unified position statement regarding the reasonable and prudent roles and responsibilities of Licensed Professional Engineers and Certified Engineering Technicians when designing fire protection systems for installation in the United States." (BE #B-23 at 3).

In particular, the licensed professional engineer must prepare design documents for fire protection systems, including fire alarm systems, which includes conceptual and detailed engineering documents; hazard and risk analysis; performance-based design analysis; integrated building system analyses; layout fire protection systems; perform necessary calculations for all fire protection systems; and "[a]ffix a professional stamp or seal with signature and date to documents prepared under the Engineer's direct supervision and control." The professional engineer should also be responsible to review all work by engineering technicians and installation shop drawings and submittals for conformance and compliance with the engineer's design. (BE #B-23 at 6-7, 9-10, 13-14). Fire protection engineering technicians are defined as persons with a NICET Level Ill or IV certification. Technicians are qualified to perform the system layout in accordance with the engineer's design; prepare shop drawings and material

submittals in accordance with the engineer's design for review and approval by the engineer; and perform supplemental calculations and other functions based on the engineer's design, for review and approval by the engineer."8" */d.* "Layout/Shop Drawings shall not be stamped or sealed by and Engineer unless the work is performed under their direct supervision and control." In such cases, a review letter or stamp from the designing engineer should accompany the shop drawings. */d.* at 9-11.

16. ALA. ADMIN. CODE r. 330-X-11-.03 governs the use of the licensed professional engineer's stamp or seal.

> (1) The seal, signature, and date of signature on a document signify that the document was prepared by the licensee or under his or her responsible charge, or that the licensee has reviewed the document in sufficient depth to fully coordinate and assume responsibility for documents prepared by another licensed professional engineer or licensed professional land surveyor.
>
> (4) Plans, plats, specifications, drawings, reports, or other documents will be deemed to have been prepared under the responsible charge of a licensee only when all of the following conditions have been met and documented:

"8" Design documents are further defined on pages 7-8, to include, for fire alarm systems:

> a) Selection of type of system and components, b) identification of fire alarm panel location, c) creation of system concept riser diagram(s), d) identification of interface(s) required with fire safety functions, other fire alarm systems and other building systems, e) determine average ambient sound level, f) determine minimum candela ratings and placement of strobes, and g) identification of all initiating device and notification appliance locations.

(BE #B-23 at 8). Shop drawings for fire alarm systems are defined as including

> a) The layout, the circuiting and placement of initiating devices, notification appliances, and other system components, b) preparation of riser diagram(s), c) inclusion of notification appliance circuit voltage drop calculations d) battery calculations for secondary power and e) technical data sheets and details for the specific equipment being furnished for installation.

(BE #B-23 at 9). The undersigned notes that that these definitions are encompassed in the "practice of engineering, as defined by ALA. CODE§ 34-11-1-(7), particularly with regard to the "application of special knowledge of the mathematical, physical, and engineering sciences," "equipment of a control, communications, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property," and

"the review of construction or other design products for the purpose of monitoring compliance with drawings and specifications."

> a. The client requesting preparation of such plans, plats, specifications, drawings, reports, or other documents makes the request directly to the licensee, or a member or employee of the licensee's firm;
> b. The licensee supervises the preparation of the plans, plats, specifications, drawings, reports, or other documents and has input into their preparation prior to their completion;
> c. The licensee reviews the final plans, plats, specifications, drawings, reports, or other documents; and
> d. The licensee has the authority to, and does, make any necessary and appropriate changes to the final plans, plats, specifications, drawings, reports, or other documents.
>
> (5) Additions, deletions, or other revisions affecting public health and safety or State and local codes shall not be made unless signed, sealed, and dated by the licensee who made the revisions or under whose responsible charge said revisions were made.
>
> (6) The seal, signature, and date of signing shall be placed on all final specifications, land surveys, reports, plats, drawings, plans, design information, and calculations whenever presented to a client or any public or governmental agency. All work products presented which are not final
> shall be so identified. Working drawings or documents are unfinished, in progress drawings or documents that may or may not have a seal and signature. A working drawing or document must, however, contain a statement to the effect "PRELIMINARY, NOT FOR CONSTRUCTION,
> RECORDING PURPOSES OR IMPLEMENTATION."
>
> (7) Working drawings consisting of sketches, reports, or otherwise a work product which is in whole or part intended to communicate work to be performed or for use in specific proposals and/or becomes a part of defining the scope of a contract for work, must be sealed, signed, and dated by the licensee who prepared these documents or under whose direct control and personal supervision they were prepared.
>
> (9) In circumstances where a licensee in responsible charge of the work is unavailable to complete the work, or the work is a site adaptation of a standard design plan, or the work is a design plan signed and sealed by an out-of-jurisdiction licensee, a successor licensee may take responsible charge by performing all professional services to include developing a complete design file with work or design criteria, calculations, code research, and any necessary and appropriate changes to the work ....

Marshal Paulk's and Mr. Stehr's testimony regarding the use and limitations on use of the engineer's seal, as applied to chapter 33A, is consistent with this rule.

17. Plans and specifications for fire alarm systems are specifically addressed in ALA. CODE §§ 34-33A-1 0 and -11 (b). Although not expressly defined therein, ALA. CODE § 34-33A-11 (b) states that "plans and specifications for work involving fire alarm systems" are prepared by architects and engineers:

> All architects and engineers preparing plans and specifications for work involving fire alarm systems to be contracted in the State of Alabama shall include in their invitation to bidders and their specifications a copy of this chapter or portions as are deemed necessary to convey to the invited bidder that it will be necessary for the bidder to show evidence of licensure before a bid is considered whether the bidder is a resident or nonresident of this state and whether a license has been issued to the bidder or not.

(DE #4). ALA. CODE§ 34-33A-10 states further that "plans and specifications for work to be performed by contractors," when submitted for approval to an authority having jurisdiction, must be sealed by a professional engineer or be submitted by a certified fire alarm contractor. (DE #4) (emphasis added). *See also* Marshal Paulk's testimony at 249-52. The testimony also supported an interpretation that in the absence of the submission of design (contract) documents to an authority having jurisdiction with shop drawings prepared by a licensed technician, the shop drawings become the design documents, which are required to be sealed by the professional engineer. (Tr. 362-69).

18. The certified fire alarm contractor's scope of work under chapter 33A is strictly limited to the "installation, repair, alteration, addition, maintenance, or inspection of fire alarm systems." ALA. CODE§§ 34-33A-1(3), -3(a), -8 and -11(a) (1975 as amended). ALA. CODE § 34-33A-5(b)(1) provides that fire alarm contractors may "engage in the programming, maintenance, testing, inspection, certification, or modification of fire alarm systems." (DE #4). The word "design" occurs only once in chapter 33A, relating to the definition of a "licensed electrical contractor" under ALA. CODE § 34-33A-1(5), as "An individual, partnership, corporation, association, or joint venture which is licensed as an electrical contractor engaged in the business of installation

of conduit, wire, and fire alarm associated equipment, but does not design, program, certify, inspect, or test fire alarm systems. A licensed electrical contractor is not a fire alarm contractor for the purpose of this chapter." (DE #4).

19. Had the legislature intended to include the word "design" in the definition of the fire alarm contractor's scope of work, it clearly could have chosen to do so, as it did in ALA. CODE§§ 34-33A-1(5) and 34-11-1(7).

> "The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. *Gholston v. State,* 620 So. 2d 719 (Ala. 1993)." *Ex parte State Dep't of Revenue,* 683 So. 2d 980, 983 (Ala. 1996). In determining legislative intent, "the entire Act must be examined and construed as a whole, and, if possible, every word in it given effect."

State v. American Tobacco Company, 772 So. 2d 417, 431 (Ala. 2000). Further, if the legislature thought chapter 33A ambiguous, it could have chosen to amend or replace the ambiguous section(s) with succeeding legislation. It did not do so.

20. The State Fire Marshal's Office has "the specific duty of enforcing laws, regulations, and ordinances of the state and provisions of this article in the State in matters relating to ... (3) Installation and maintenance of automatic or other fire alarm systems ... " ALA. CODE§ 36-19-2 (1975 as amended). (DE #7). He is also empowered to administer ALA. CODE § 34-33A-1, *et seq.* (DE #4). In like manner, the Board is charged with the enforcement of its enabling law and its own rules and regulations. ALA. CODE§ 34-11-35 (1975 as amended). The undersigned finds Marshal Paulk's and the Board's interpretations of their respective statutes, as limiting the design of fire alarm systems to licensed professional engineers, to be reasonable and consistent with the plain language of the statutes. These interpretations are further supported by the testimony and review letters provided by the Board's expert witness, the SFPE, NSPE and NICET 2008 Position Statement, and the 2009 Position Statement jointly issued by the Board and the State Fire Marshal, and have been consistently applied by the Board since the issuance of its first

Position Statement in 2005 regarding this matter. (BE #B-22, B-23, B-46, B-48, DE #11).

21. "In construing the meaning of a statute, interpretations of the statute by the administrative agency charged with the enforcement of said statute are to weigh heavily with the court." *Hutchenson v. Daniel,* 53 So. 3d 909, 914-15 (Ala. Civ. App. 2009), citing *Alabama Dep't of Revenue v. Jim Beam Brands* Co., 11 So. 3d 858 (Ala. Civ. App. 2008); *Yelverton's, Inc. v. Jefferson County,* 742 So. 2d 1216, 1221 (Ala. Civ. App. 1997) (holding that unless an agency's interpretation of the regulations and statutes it is charged with enforcing are contrary to their plain wording, that interpretation is due great weight and deference).

22. Mr. Herbert's testimony regarding Mr. Marlin's admission to designing the fire alarm systems for the Daewon, LCYD and Thermofisher projects was unrefuted by Omni. (Tr. 98-99). Omni does not employ an Alabama licensed professional engineer and has not obtained a Certificate of Authorization for engineering issued by the Board. Neither is Mr. Kevin Marlin a licensed professional engineer with this Board. Accordingly, in the absence of said licensure, the undersigned finds that Omni's actions in designing the fire alarm systems for the Daewon, LCYD and Thermofisher projects were in violation of ALA. CODE§§ 34-11-15(a) and -16(a)(1) (1975 as amended). The undersigned does not find Omni in violation of ALA. CODE§§ 34-11-15(a) and -16(a)(1) for the installation of fire alarm systems for said projects.

CONCLUSION AND RECOMMENDATION

1. The responsibility for safeguarding the life, health and property of the citizens of this state from the illegitimate practice of the profession of engineering has been delegated by the Alabama Legislature to the State of Alabama Board of Licensure for Professional Engineers and Land Surveyors. Any individual or entity may be construed to practice or offer to practice engineering when designing fire alarm systems without employing an Alabama licensed professional engineer or obtaining a Certificate of Authorization for engineering issued by the Board. ALA. CODE§ 34-11-1(7) (1975 as amended).

2. As shown above, on the basis of the evidence of record and the testimony presented, it is hereby concluded that Omni's designs of the fire alarm systems for the Daewon, LCYD and Thermofisher projects constitute violations of ALA. CODE§§ 34-11-15(a) and -16(a)(1) (1975 as amended).

3. Accordingly, it is hereby recommended that Omni Fire & Safety, LLC d/b/a Holt Fire & Safety be ordered to cease and desist any and all acts constituting the practice of or offer to practice engineering in the State of Alabama and that it be assessed a civil penalty in the amount of Two Thousand Five Hundred Dollars ($2,500.00) for each of the three project violations, for a total of Seven Thousand Five Hundred Dollars ($7,500.00), together with the cost to the Board for these proceedings, in accordance with ALA. CODE§§ 34-11-16(a)(1), (b) and (g) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.06(1) (2013). Said penalties and costs are to be paid to the Board within thirty (30) days of the date of a Final Order issued by the Board.

ORDER

The Board, after deliberation and review, agrees with and adopts as final the Findings of Facts, Conclusions of Law and Conclusion and Recommendation proposed by Administrative Law Judge, Dana H. Billingsley.

The Board hereby finds Respondent ***GUILTY*** of the allegations made against him and hereby ***ORDERS*** as follows:

1. Respondent shall immediately ***cease and desist*** any and all acts constituting the practice of, or offer to practice of engineering in the State of Alabama.

2. Respondent shall submit to the Board a civil penalty of Two Thousand Five Hundred Dollars ($2,500.00) for each of the three project violations, for a total of Seven Thousand Five Hundred Dollars ($7,500.00), made payable to the General Fund of the State of Alabama within thirty (30) days of the date of the Final Order.

3. Respondent shall submit a check or money order made payable to PE & LS Fund to the Board in the amount of $7,940.00 (Seven Thousand Nine Hundred & Forty dollars) for the cost of hearing within thirty (30) days of date of Final Order.

ENTERED this the 18th day of June, 2014

Phillip E. Santora

DID NOT ATTEND
Earl R. Foust

Marc S. Barter

Charles P. Willis

RECUSED
Frazier Christy

Liz Hyde

Daniel S. Turner