

**BEFORE THE DIRECTOR  
DEPARTMENT OF CONSUMER AFFAIRS  
BUREAU OF AUTOMOTIVE REPAIR  
STATE OF CALIFORNIA**

In the Matter of the First Amended Accusation Against:

**E R SMOGS**  
**EDWARD DEREBENSKIY, Owner**  
4235 Power Inn Rd., Unit C  
Sacramento, CA 95826  
Automotive Repair Dealer Reg. No. ARD 241005  
Smog Check Station License No. RC 241005  
Lamp Station License No. LS 241005  
Brake Station License No. BS 241005

Case No. 79/12-143

OAH No. 2012070936

and

**JOSE ANTONIO TEJEDA GUDINO**  
4235 Power Inn Rd., Unit C  
Sacramento, CA 95826  
Smog Check Inspector License No. EO 632708  
Smog Check Repair Technician License No.  
EI 632708 (formerly Advanced Emission  
Specialist Technician No. EA 632708)

Respondents.

**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517(c)(2)(C), the typographical errors in the case caption at the top of page 1 of the Proposed Decision are corrected as follows:

1. "Lamp Station License No. LS 2411005" is corrected to read "Lamp Station License No. LS 241005."
2. "Brake Station License No. BS 2411005" is corrected to read "Brake Station License No. BS 241005."
3. "Smog Check Inspector License No. E0632708" is corrected to read "Smog Check Inspector License No. EO632708."

This Decision shall become effective January 23, 2014.

DATED: December 4, 2013

  
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DONALD CHANG  
Assistant Chief Counsel  
Department of Consumer Affairs

BEFORE THE  
DEPARTMENT OF CONSUMER AFFAIRS  
FOR THE BUREAU OF AUTOMOTIVE REPAIR  
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation  
Against:

E R SMOGS  
EDWARD DEREBENSKIY, Owner  
4235 Power Inn Rd., Unit C  
Sacramento, CA 95826  
Automotive Repair Dealer Reg. No. ARD 241005  
Smog Check Station License No. RC 241005  
Lamp Station License No. LS 2411005  
Brake Station License No. BS 2411005

and

JOSE ANTONIO TEJEDA GUDINO  
4235 Power Inn Rd., Unit C  
Sacramento, CA 95826  
Smog Check Inspector License No. E0632708  
Smog Check Repair Technician License No. EI  
632708 (formerly Advanced Emission Specialist  
Technician No. EA632708)

Respondents.

Case No. 79/12-143

OAH No. 2012070936

**PROPOSED DECISION**

This matter was heard before Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 16, 2013, in Sacramento, California.

Brian S. Turner, Deputy Attorney General, represented complainant.

Edward Derebenskiy appeared and represented himself and respondent E R Smogs.

Jose Antonio Tejada Gudino appeared and represented himself.

Evidence was received, the record was closed, and the matter was initially submitted on October 16, 2012. On October 23, 2013, Deputy Attorney General Turner sent a letter to the Office of Administrative Hearings seeking to further amend the First Amended Accusation, striking the Fourth Cause for Discipline and the Fifth Cause for Discipline, paragraphs 23 and 24 found on page 7 of the First Amended Accusation. No prejudice is apparent to either respondent by striking these two causes for discipline against respondent Gudino and the amendment is granted. The matter was resubmitted on October 23, 2013.

## FACTUAL FINDINGS

1. Complainant Patrick Dorais, Acting Chief, Bureau of Automotive Repair (Bureau), Department of Consumer Affairs, State of California, brought the First Amended Accusation solely in his official capacity. During the course of the administrative hearing, complainant dismissed the Fourteenth through the Eighteenth Causes for Discipline, paragraphs 34 through 39, against respondent E R Smogs. These allegations all related to an alleged undercover operation involving a 2006 Chevrolet Silverado for which no evidence was produced by complainant.

2. The Bureau issued Automotive Repair Dealer Registration Number ARD 241005 (registration) to Edward Derebenskiy, doing business as E R Smogs. The Bureau issued Smog Check Station License Number RC 241005 (station license) to respondent E R Smogs. The Bureau issued Lamp Station License Number LS 241005 to respondent E R Smogs. The Bureau issued Brake Station License Number BS 241005 to respondent E R Smogs. These registrations were in full force and effect at all times relevant to the charges brought in the First Amended Accusation.

3. On December 1, 2005, the Bureau issued Advanced Emission Specialist Technician License Number EA 632708 to respondent Jose Antonio Tejada Gudino (respondent Gudino). The license was renewed as Smog Check Inspector License Number E0632708 and Smog Check Repair Technician License Number E1632708. These licenses were in full force and effect at the times relevant to charges brought in the First Amended Accusation.

4. There are three parts to a California Emissions Inspection Test (also called a smog inspection, smog check or smog test): (1) a tailpipe emissions test to ensure that the vehicle's emissions are reading at or below acceptable levels; (2) a visual inspection of the vehicle's emission control components to ensure that they are present, properly connected, and in good working condition; and (3) a functional test of each component that is required to be functionally tested, depending on the make and model of the vehicle. A vehicle must pass all three parts of the California Emissions Inspection Test before an Emission Inspection Certificate of Compliance may be issued.

### ***Undercover Operation Number One: 1998 Ford Explorer***

5. On March 3, 2011, an undercover operator drove a Bureau documented 1998 Ford Explorer to respondent E R Smogs and requested a smog inspection. A Bureau employee had previously unfastened the vehicle's instrument panel cluster and removed the Malfunction Indicator Lamp (MIL) and the bulb's housing. The MIL is the light commonly known as the "Check Engine Light," and is designed to alert the driver or a mechanic that one or more components of the emission system are not functioning properly. It is part of the emissions monitoring system known as OBD II. The smog inspection was performed by respondent Gudino. A proper functional test of the MIL involves turning the ignition key to the "on" position and checking to see that the MIL comes on for several seconds and then goes off. Although the vehicle could not possibly pass this test because of the missing MIL light bulb, respondent Gudino recorded a "pass" on the Smog Check Vehicle Inspection Report (VIR) for this item. However, respondent Gudino failed the vehicle based on what he reported was a failed functional Exhaust Gas Recirculation (EGR) test. The EGR functional test was not required for this vehicle and was not generally required for vehicles manufactured after 1995. The operator paid respondent E R Smogs \$59.75 and received a copy of the invoice and the failed VIR. The Bureau later confirmed that the bulb was still missing and tamper indicators attached to screws holding the instrument panel cluster were still intact, establishing that the cluster had not been removed.

6. Respondent's "pass" entry for the MIL functional test and his "fail" entry for an inapplicable functional EGR test constitute making statements in the VIR that he knew were untrue and misleading. Respondent Gudino failed to conduct the proper test of the MIL in accordance with the Department of Consumer Affairs and Bureau procedures and specifications.

7. Respondent Gudino testified at the administrative hearing. He said that he performed the functional test of the MIL and observed that the "check engine" light did not come on. He said that he did not perform a functional test for the EGR valve. He explained that he inadvertently entered a failure for the EGR in the computer program instead of the MIL, and because he did not know how to correct his error, he decided to fail the vehicle for the wrong reason on the VIR. He was unable to explain why he did not void the test and start over. His actions resulted in two untrue and "misleading" entries in the VIR. Respondent Gudino's explanation was inherently incredible, particularly when coupled with his clearly false testimony regarding the second undercover vehicle described below.

### ***Undercover Operation Two: 1990 Plymouth Sundance***

8. On September 9, 2011, an undercover operator drove a Bureau documented 1990 Plymouth Sundance to respondent E R Smogs and requested a smog inspection. A smog check had been previously performed at the Bureau's laboratory and the vehicle passed the three parts of a conventional smog inspection. The functional portion of the smog test for

this vehicle included checking the timing setting for the distributor. The manufacturer's specification for timing for the vehicle was 12 degrees before top dead center (BTDC), with latitude of plus or minus two degrees (thus acceptable from 10 degrees BTDC to 14 degrees BTDC). A Bureau representative set the timing to the exact manufacturer's specification of 12 degrees BTDC, and placed tamper indicators on the distributor housing bolt and the distributor hold down bolt. Respondent Gudino performed the smog inspection. He failed the vehicle based on what he recorded as "Ignition Timing (14 BTDC) ... Defective" in the VIR. The operator paid respondent E R Smogs \$39.75 and received a copy of the invoice and the failed VIR. After the undercover operation at respondent E R Smogs, the vehicle was returned to the Bureau's laboratory and checked by the same Bureau representative, a licensed smog technician with many years of experience as an automobile mechanic. The timing was still set at 12 degrees BTDC. The distributor housing bolt was still tight, as was the distributor hold down bolt. The tampering indicator for the distributor housing was intact, but the indicator placed on the hold down bolt was missing suggesting that respondent Gudino had placed a socket or other wrench on the bolt.

9. Respondent Gudino testified at the administrative hearing that he checked the timing for the Plymouth and the timing light was "jumpy" during the test, thus preventing him from obtaining a reliable reading. He said that the timing was close to 14 degrees which respondent Gudino said he knew was within the manufacturer's tolerance of plus or minus two degrees from 12 degrees BTDC. He nonetheless failed the vehicle and entered "defective" because of what he described as the unreliable timing reading. The Bureau's representative who initially set the timing and checked it upon return from the undercover run to respondent ER Smogs had performed timing tests on this vehicle many times previously with no difficulty. As noted above, he checked the timing after the undercover run and it was exactly 12 degrees BTDC. Respondent's "explanation" for failing the vehicle for timing problems was not credible. Respondent's failure of the vehicle based on a "defective" timing reading constituted statements which he knew were untrue and misleading. Respondent failed to perform the smog inspection on this vehicle in accordance with Department of Consumer Affairs and Bureau procedures and specifications. Respondent Gudino failed the vehicle when he should have passed it and issued a certificate of compliance to the undercover operator.

#### ***Complainant's Allegations of Dishonesty, Fraud, and Deceit***

10. The First Amended Accusation alleged that respondent Gudino and respondent E R Smogs were guilty of dishonesty, fraud and deceit injurious to another in connection with the smog inspection of the 1990 Plymouth Sundance. More specifically, complainant alleged that respondent E R Smogs obtained payment for a bona fide smog inspection and represented that one had been performed when, in fact, a bona fide inspection had not been performed. The vehicle failed when it should have passed. Complainant alleged that respondent Gudino committed dishonesty, fraud or deceit to the injury of another by representing that a bona fide smog test had been performed when it had not.

11. In addition to the evidence supporting the factual findings relating to the Plymouth Sundance recited above, complainant offered the testimony of a Bureau representative about a list of vehicles used by the Bureau in undercover operations. The representative was teaching a course at a Sacramento-area community college and was approached by a man who introduced himself as a licensed smog technician. The unidentified man told the Bureau representative that there was a web site that posted a list of Bureau undercover vehicles. He gave the Bureau representative a copy of the list and told him that several smog inspection businesses were using the list, including respondent E R Smogs. The conversation took place after the undercover run of March 3, 2011, involving the 1998 Ford Explorer. The Bureau representative noticed that the Ford Explorer was listed twice on the list, and other undercover vehicles that he recognized were also listed. There were also vehicles listed that were not undercover vehicles. The listed Bureau induced defect for the 1998 Ford Explorer in both entries was "pcv tamper."

12. After seeing the list, the Bureau representative determined to run another vehicle through E R Smogs to see if the facility was relying on the list in the performance of smog tests. He chose the 1990 Plymouth Sundance because it was on the list. The list described the Bureau induced defect for the 1990 Plymouth Sundance as "Timing off."

13. Respondent Gudino and Edward Derebenskiy, owner of E R Smogs, each denied any knowledge of the list and consideration of it in smog inspections in their testimony at the administrative hearing.

14. The totality of the evidence established that respondents Gudino and E R Smogs were guilty of dishonesty, fraud and deceit in that they represented that they had performed a bona fide smog inspection on the Plymouth Sundance whereas the evidence established that respondent Gudino did not test the vehicle's timing. The fact that the Plymouth Sundance appeared on the list with a listed defect of "timing off," certainly suggests that respondents were using the list to identify undercover vehicles, but even disregarding the existence of the list, the remaining evidence established that respondent Gudino did not perform the timing test required as part of bona fide smog inspection and that respondent Gudino and respondent E R Smogs were guilty of dishonesty, fraud and deceit for failure to do so.

### ***Prior Citations***

15. On or about January 7, 2007, the Bureau issued Citation number C07-0430 against respondent E R Smogs' registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the Bureau), and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested.) The Bureau assessed civil penalties totaling \$500 against respondent E R Smogs for the violations.

16. On or about March 17, 2011, the Bureau issued Citation number C2011-1087 against respondent E R Smogs' registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the Bureau), and California Code of Regulations, title 16, section 3340.42, (failure to follow Smog Check emissions test methods and standards), for failure to discover a non- functional MIL. The Bureau assessed civil penalties totaling \$1,000 against respondent E R Smogs for the violations.

### ***Other Findings***

17. The day before the administrative hearing, Edward Derebenskiy requested the Bureau cancel all of his licenses. He explained at the administrative hearing that he has been in business for eight years, has a family including five children, and he feels that the Bureau has no tolerance for mistakes. Mr. Derebenskiy felt that he could not exist under what he described as a "cloud," with three undercover runs to his facility in seven months. His brother Roman Derebenskiy is running the business which Edward Derebenskiy said he gave to his brother at no cost. Regarding his ability to pay any enforcement costs, Edward Derebenskiy's only source of income was his business. There was no evidence presented regarding respondent Gudino's financial situation, but it may be reasonably inferred that his occupation as a smog technician does not generated a large income.

### ***Costs of Investigation and Prosecution***

18. The actual costs of investigation by the Bureau in this matter were \$10,852.34. The actual costs of prosecution by the Office of the Attorney General were \$12, 340, for a total of \$23, 192.34. The reasonableness of such costs is addressed in the Legal Conclusions below.

## LEGAL CONCLUSIONS

### ***Applicable Law***

1. Business and Professions Code section 9884.7, subdivision (a)(1) and (a)(4), reads:

(a) The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employec, partner, officer, or member of the automotive repair dealer.

(1) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or

misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

(4) Any other conduct that constitutes fraud.

2. Health and Safety Code section 44072.2, subdivisions (a), (c), and (f), reads:

The director may suspend, revoke, or take other disciplinary action against a license as provided in this article if the licensee, or any partner, officer, or director thereof, does any of the following:

(a) Violates any section of this chapter and the regulations adopted pursuant to it, which related to the licensed activities.

(c) Violates any of the regulations adopted by the director pursuant to this chapter.

(f) A visual or functional check is made of emission control devices specified by the department, including the catalytic converter in those instances in which the department determines it to be necessary to meet the findings of Section 44001. The visual or functional check shall be performed in accordance with procedures prescribed by the department

3. Health and Safety Code section 44032 provides, in relevant part, that “[q]ualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012.” Health and Safety Code section 44012 provides, in relevant part, that smog tests “shall be performed in accordance with procedures prescribed by the department.” Subdivision (f) of section 44012 provides that as part of a smog inspection, a “visual or functional check” shall be “made of emission control devices specified by the department....”

4. Health and Safety Code section 44015, subdivision (b), reads:

(b) If a vehicle meets the requirements of Section 44012, a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance.

5. California Code of Regulations, title 16, section 3340.30, subdivision (a) reads:

A licensed smog check inspector and/or repair technician shall comply with the following requirements at all times while licensed:

a. Inspect, test and repair vehicles, as applicable, in accordance with section 44012 of the Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this article.

6. California Code of Regulations, title 16, section 3340.41, subdivision (c), reads:

(c) No person shall enter into the emissions inspection system any vehicle identification information or emission control system identification data for any vehicle other than the one being tested. Nor shall any person knowingly enter into the emissions inspection system any false information about the vehicle being tested.

7. California Code of Regulations, title 16, section 3340.42, subdivisions (a) and (b), reads:

Smog check inspection methods are prescribed in the Smog Check Manual, referenced by section 3340.45.

(a) All vehicles subject to a smog check inspection, shall receive one of the following test methods:

(1) A loaded-mode test shall be the test method used to inspect 1976 - 1999 model-year vehicle, except diesel-powered, registered in the enhanced program areas of the state. The loaded-mode test shall measure hydrocarbon, carbon monoxide, carbon dioxide and oxides of nitrogen emissions, as contained in the bureau's specifications referenced in subsection (a) of Section 3340.17 of this article. The loaded-mode test shall use Acceleration Simulation Mode (ASM) test equipment, including a chassis dynamometer, certified by the bureau.

On and after March 31, 2010, exhaust emissions from a vehicle subject to this inspection shall be measured and compared to the emissions standards shown in the Vehicle Look-up Table (VLT) Row Specific Emissions Standards (Cutpoints) Table, dated March 2010, which is hereby incorporated by reference. If the emissions standards for a specific vehicle are not included in

this table then the exhaust emissions shall be compared to the emissions standards set forth in TABLE I or TABLE II, as applicable. A vehicle passes the loaded-mode test if all of its measured emissions are less than or equal to the applicable emission standards specified in the applicable table.

(2) A two-speed idle mode test shall be the test method used to inspect 1976 - 1999 model-year vehicles, except diesel-powered, registered in all program areas of the state, except in those areas of the state where the enhanced program has been implemented. The two-speed idle mode test shall measure hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and again at idle RPM, as contained in the bureau's specifications referenced in subsection (a) of Section 3340.17 of this article. Exhaust emissions from a vehicle subject to this inspection shall be measured and compared to the emission standards set forth in this section and as shown in TABLE III. A vehicle passes the two-speed idle mode test if all of its measured emissions are less than or equal to the applicable emissions standards specified in Table III.

(3) An OBD-focused test, shall be the test method used to inspect gasoline-powered vehicles 2000 model-year and newer, and diesel-powered vehicles 1998 model-year and newer. The OBD test failure criteria are specified in section 3340.42.2.

(b) In addition to subsection (a), all vehicles subject to the smog check program shall receive the following:

(1) A visual inspection of emission control components and systems to verify the vehicle's emission control systems are properly installed.

(2) A functional inspection of emission control systems as specified in the Smog Check Manual, referenced by section 3340.45, which may include an OBD test, to verify their proper operation.

### ***Violations Committed by Respondent E R Smogs Relating to 1998 Ford Explorer***

8. Respondent E R Smogs is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), by reason of Factual Findings 5 through 7, in that respondent E R Smogs' employee and agent respondent Gudino made statements that he knew were untrue and misleading .

9. Respondent E R Smogs is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivisions (a) and (c), Health and Safety Code section 44012, subdivision (f), and California Code of Regulations, title 16, section 3340.42, by reason of Factual Findings 5 through 7, in that respondent's agent and smog technician respondent Gudino failed to perform an emission control inspection on the 1998 Ford Explorer in accordance with procedures and specifications prescribed by the Bureau and Director of the Department of Consumer Affairs.

***Violations Committed by Respondent E R Smogs Relating to 1990 Plymouth Sundance***

10. Respondent E R Smogs is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), by reason of Factual Findings 8 through 14, in that respondent E R Smogs' employee and agent respondent Gudino made statements that he knew were untrue and misleading .

11. Respondent E R Smogs is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), by reason of Factual Findings 8 through 14, in that respondent E R Smogs' employee and agent respondent Gudino fraudulently represented that he had performed a bona fide smog inspection and failed the vehicle even though it should have passed the smog inspection.

12. Respondent E R Smogs is subject to discipline pursuant to Health and Safety Code sections 44072.2, subdivision (a); 44012, subdivision (f); and 44015, subdivision (b), by reason of Factual Findings 8 through 14, in that respondent E R Smogs' agent and smog technician respondent Gudino did not perform the smog inspection in accordance with the Department of Consumer Affairs' procedures and specifications and failed to issue a certificate of compliance for the vehicle.

13. Respondent E R Smogs is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (c), in conjunction with California Code of Regulations, title 16, section 3340.42, by reason of Factual Findings 8 through 14 in that respondent E R Smogs' agent and smog technician respondent Gudino did not perform the smog inspection in accordance with the Bureau's procedures and specifications.

14. Respondent E R Smogs is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), by reason of Factual Findings 8 through 14, in that respondent E R Smogs was guilty of dishonesty, fraud and deceit.

***Violations Committed by Respondent Gudino Relating to 1990 Plymouth Sundance***

15. Respondent Gudino is subject to discipline pursuant to Health and Safety Code sections 44072.2, subdivision (a); section 44012, subdivision (f); and 44032; by reason of Factual Findings 8 through 14 in that respondent Gudino failed to perform a

smog inspection for the vehicle in accordance with Department of Consumer Affairs' procedures and specifications.

16. Respondent Gudino is subject to discipline pursuant to Health and Safety Code sections 44072.2, subdivision (c), in conjunction with California Code of Regulations, title 16, sections 3340.30, 3340.41, and 3340.42 by reason of Factual Findings 8 through 14 in that respondent Gudino failed to perform a proper smog inspection for the vehicle including the timing setting, falsely entered "defective" into the EIS, and failed to perform the test in accordance with the Bureau's procedures and specifications.

17. Respondent Gudino is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), by reason of Factual Findings 8 through 14 in that respondent Gudino committed dishonest, fraudulent and deceitful acts.

### *Appropriate Discipline*

18. As noted above, respondents engaged in dishonest, fraudulent and deceitful conduct relating to the 1990 Plymouth smog inspection. At the very least, the inspection of the 1998 Ford Explorer reflected gross negligence or incompetence. Moreover, at hearing, respondents engaged in a fairly obvious and concerted effort to defend founded on respondent Gudino's false testimony regarding the inspections he should have performed on the two vehicles. By doing so, respondents demonstrated that are not fit to engage in the smog inspection program which necessarily depends upon the honesty and integrity of the licensed facility owners and smog technicians.

### *Costs*

19. Business and Professions Code section 125.3 reads, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

(b) In the case of a disciplined licentiate that is a corporation or a partnership, the order may be made against the licensed corporate entity or licensed partnership.

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the board to increase the cost award. The board may reduce or eliminate the cost award, or remand to the administrative law judge if the proposed decision fails to make a finding on costs requested pursuant to subdivision (a).

20. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court decided that in order to determine whether the actual costs of investigation and prosecution sought by a regulatory board under a statute substantially identical to Business and Professions Code 125.3 are "reasonable," the Administrative Law Judge must consider: (a) Whether the licensee has been successful at hearing in getting charges dismissed or reduced; (b) the licensee's subjective good faith belief in the merits of his or her position; (c) whether the licensee has raised a colorable challenge to the proposed discipline; (d) the financial ability of the licensee to pay; and (e) whether the scope of the investigation was appropriate to the alleged misconduct.

21. The costs sought in this matter must be substantially reduced to a "reasonable" amount. First, no evidence was presented on a third vehicle listed in the Accusation which obviously accounted for a significant portion of the investigation and prosecution hours. After the hearing had been completed, complainant struck all of the allegations against respondent Gudino relating to the 1998 Ford Explorer which also had to have accounted for substantial investigation and prosecution hours. At hearing, respondents were unsuccessful in defending against the remaining charges. As to those charges, they did not present a good faith defense colorable challenge to allegations or the proposed revocation of their licenses. Respondent E R Smogs' ability to pay is an open question because Edward Derebenskiy's claim of having transferred his business to his brother for no compensation warrants skepticism. The scope of the investigation, as noted, was not appropriate to the final allegations in the accusation. All things considered, the cost award is reduced to \$5,000 and shall be imposed exclusively against respondent Edward Derebenskiy.

ORDER

1. Automotive Repair Dealer Registration number ARD 241005 issued to Edward Derebenskiy, doing business as E R Smogs, is revoked.<sup>1</sup>

2. Smog Check Station License number RC 241005, issued to Edward Derebenskiy, doing business as E R Smogs, is revoked.<sup>2</sup>

3. Lamp Station License number LS 241005, issued to Edward Derebenskiy, doing business as E R Smogs, is revoked.

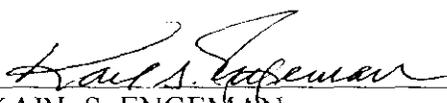
4. Brake Station License number BS 241005, issued to Edward Derebenskiy, doing business as E R Smogs, is revoked.

5. Smog Check Inspector License number EO 632708 issued to Jose Antonio Tejada Gudino is revoked.

7. Smog Check Repair Technician License number EI 632708 issued to Jose Antonio Tejada Gudino is revoked.

6. Edward Derebenskiy shall pay the amount of \$5,000 to the Director of the Department of Consumer Affairs for the reasonable costs of investigation and prosecution of this matter. No costs are imposed on Jose Antonio Tejada Gudino.

DATED: November 19, 2013

  
KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>1</sup> The voluntary surrender of a license does not deprive the Director of the Department of Consumer Affairs of jurisdiction to discipline the license pursuant to Business and Professions Code section 9889.7.

<sup>2</sup> When any license has been revoked, any additional licenses in the name of the licensee may be likewise revoked pursuant to Business and Professions Code section 9889.9



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7 *Attorneys for Complainant*

8  
9 **BEFORE THE**  
**DEPARTMENT OF CONSUMER AFFAIRS**  
10 **FOR THE BUREAU OF AUTOMOTIVE REPAIR**  
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

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**FIRST AMENDED  
ACCUSATION**

19 **and**

20 **JOSE ANTONIO TEJEDA GUDINO**  
21 4235 Power Inn Rd., Unit C  
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22 **Smog Check Inspector license number EO632708**  
**Smog Check Repair Technician license number EI632708**  
23 **(formerly Advanced Emission Specialist Technician**  
**No. EA632708)**

24  
25 **Respondents.**

26  
27 **///**

1 Patrick Dorais ("Complainant") alleges:

2 **PARTIES**

3 1. Complainant brings this Accusation solely in his official capacity as the Acting Chief  
4 of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

5 **E R Smogs**

6 2. In or about 2005, the Bureau issued Automotive Repair Dealer Registration  
7 Number ARD 241005 ("registration") to Edward Dercbenskiy, doing business as E R Smogs  
8 ("Respondent E R"). The registration was in full force and effect at all times relevant to the  
9 charges brought herein and will expire on August 31, 2013, unless renewed.

10 3. On or about October 24, 2005, the Bureau issued Smog Check Station Number  
11 RC 241005 ("station license") to Respondent E R. The station license was in full force and effect  
12 at all times relevant to the charges brought herein and will expire on August 31, 2013, unless  
13 renewed.

14 4. On or about October 27, 2005, the Bureau issued Lamp Station License Number  
15 LS 241005 to Respondent E R. The lamp station license was in full force and effect at all times  
16 relevant to the charges brought herein and will expire on August 31, 2013, unless renewed.

17 5. On or about October 27, 2005, the Bureau issued Brake Station License Number  
18 BS 241005 to Respondent E R. The brake station license was in full force and effect at all times  
19 relevant to the charges brought herein and will expire on August 31, 2013, unless renewed.

20 **Jose Antonio Tejada Gudino**

21 6. On or about December 1, 2010, the Director issued Advanced Emission Specialist  
22 Technician License Number EA632708 ("technician license") to Jose Antonio Tejada Gudino  
23 ("Respondent Gudino"). Respondent Gudino's Advanced Technician license was due to expire  
24 on November 30, 2012. Pursuant to California Code of Regulations, Title 16, Section 3340.28(e),  
25 the license was renewed, pursuant to Respondent Gudino's election, as Smog Check Inspector

26 ///

27 ///

28 ///

1 License number EO632708 and Smog Check Repair Technician license number EI632708<sup>1</sup>. The  
2 Smog Check Inspector and Smog Check Repair Technician licenses will expire on November 30,  
3 2014 unless renewed.

#### 4 STATUTORY PROVISIONS

5 7. Section 9884.7 of the Business and Professions Code ("Code") states, in pertinent  
6 part:

7 (a) The director, where the automotive repair dealer cannot show there  
8 was a bona fide error, may deny, suspend, revoke, or place on probation the  
9 registration of an automotive repair dealer for any of the following acts or omissions  
10 related to the conduct of the business of the automotive repair dealer, which are done  
11 by the automotive repair dealer or any automotive technician, employee, partner,  
12 officer, or member of the automotive repair dealer.

13 (1) Making or authorizing in any manner or by any means whatever any  
14 statement written or oral which is untrue or misleading, and which is known, or which  
15 by the exercise of reasonable care should be known, to be untrue or misleading.

16 (4) Any other conduct which constitutes fraud.

17 (b) Except as provided for in subdivision (c), if an automotive repair  
18 dealer operates more than one place of business in this state, the director pursuant to  
19 subdivision (a) shall only suspend, revoke, or place on probation the registration of  
20 the specific place of business which has violated any of the provisions of this chapter.  
21 This violation, or action by the director, shall not affect in any manner the right of the  
22 automotive repair dealer to operate his or her other places of business.

23 (c) Notwithstanding subdivision (b), the director may suspend, revoke, or  
24 place on probation the registration for all places of business operated in this state by  
25 an automotive repair dealer upon a finding that the automotive repair dealer has, or is,  
26 engaged in a course of repeated and willful violations of this chapter, or regulations  
27 adopted pursuant to it.

28 8. Section 9889.3 of the Code states, in pertinent part:

The director may suspend, revoke, or take other disciplinary action  
against a license as provided in this article if the licensee or any partner, officer, or  
director thereof:

(a) Violates any section of the Business and Professions Code that relates  
to his or her licensed activities.

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<sup>1</sup> Effective August 1, 2012, California Code of Regulations, title 16, sections 3340.28,  
3340.29 and 3340.30 were amended to implement a license restructure from the Advanced  
Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog  
Check Inspector (EO) license and/or Smog Check Repair Technician (EI) licenses

1 (c) Violates any of the regulations promulgated by the director pursuant  
to this chapter.

2 (d) Commits any act involving dishonesty, fraud, or deceit whereby  
3 another is injured.

4 9. Section 9889.1 of the Code states:

5 Any license issued pursuant to Articles 5 and 6, may be suspended or  
6 revoked by the director. The director may refuse to issue a license to any applicant  
7 for the reasons set forth in Section 9889.2. The proceedings under this article shall be  
8 conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1  
of Division 3 of Title 2 of the Government Code, and the director shall have all the  
powers granted therein.

9 10. Section 9889.9 of the Code states:

10 When any license has been revoked or suspended following a hearing  
11 under the provisions of this article, any additional license issued under Articles 5 and  
6 of this chapter in the name of the licensee may be likewise revoked or suspended by  
the director.

12 11. Section 9889.7 of the Code states:

13 The expiration or suspension of a license by operation of law or by order  
14 or decision of the director or a court of law, or the voluntary surrender of a license by  
15 a licensee shall not deprive the director of jurisdiction to proceed with any  
16 investigation of or action or disciplinary proceedings against such licensee, or to  
render a decision suspending or revoking such license.

17 12. Section 9884.13 of the Code provides, in pertinent part, that the expiration of a  
18 valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary  
19 proceeding against an automotive repair dealer or to render a decision invalidating a registration  
temporarily or permanently.

20 13. Section 44002 of the Health and Safety Code provides, in pertinent part, that the  
21 Director has all the powers and authority granted under the Automotive Repair Act for enforcing  
22 the Motor Vehicle Inspection Program.

23 14. Section 44072.2 of the Health and Safety Code states, in pertinent part:

24 The director may suspend, revoke, or take other disciplinary action  
25 against a license as provided in this article if the licensee, or any partner, officer, or  
26 director thereof, does any of the following:

27 (a) Violates any section of this chapter [the Motor Vehicle Inspection  
28 Program (Health and Safety Code, § 44000, et seq.)] and the regulations adopted  
pursuant to it, which related to the licensed activities.

1 (c) Violates any of the regulations adopted by the director pursuant to  
2 this chapter.

3 (d) Commits any act involving dishonesty, fraud, or deceit whereby  
4 another is injured.

5 15. Section 44072.6 of the Health and Safety Code provides, in pertinent part, that the  
6 expiration or suspension of a license by operation of law, or by order or decision of the  
7 Director of Consumer Affairs, or a court of law, or the voluntary surrender of the license shall not  
8 deprive the Director of jurisdiction to proceed with disciplinary action.

9 16. Section 44072.8 of the Health and Safety Code states:

10 "When a license has been revoked or suspended following a hearing  
11 under this article, any additional license issued under this chapter in the name of the  
12 licensee may be likewise revoked or suspended by the director."

13 17. California Code of Regulations, Title 16, Section 3340.28(e) states that "[U]pon  
14 renewal of an unexpired Basic Area Technician license of an Advanced Emission Specialist  
15 Technician license issued prior to the effective date of this regulation, the licensee may apply to  
16 renew as a Smog Check Inspector, Smog Check Repair Technician, or both."

#### 17 COST RECOVERY

18 18. Code section 125.3 provides, in pertinent part, that a Board may request the  
19 administrative law judge to direct a licentiate found to have committed a violation or violations of  
20 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and  
21 enforcement of the case.

#### 22 UNDERCOVER OPERATION NO. 1: 1998 FORD EXPLORER

23 19. On or about March 3, 2011, an undercover Bureau operator ("operator") drove a  
24 Bureau documented 1998 Ford Explorer to Respondent E R's facility and requested a smog  
25 inspection. The vehicle could not pass a smog inspection because the vehicle's Malfunction  
26 Indicator Lamp ("MIL") was not functional. The operator signed a work order and received a  
27 copy. Respondent Gudino performed the smog inspection. Respondent Gudino entered "pass"  
28 into the Emissions Inspection System ("EIS") for the visual inspection when, in fact, the vehicle  
could not have passed the visual inspection due to the missing MIL bulb and socket. In addition,

1 Respondent Gudino entered "fail" into the EIS for the functional portion of the test for the  
2 exhaust Gas Recirculation ("EGR") when, in fact, that test did not apply to this vehicle<sup>2</sup>. The  
3 operator paid Respondent E R \$59.75 and received a copy of Invoice No [REDACTED] and a Vehicle  
4 Inspection Report ("VIR").

5 **FIRST CAUSE FOR DISCIPLINE**

6 **(Untrue or Misleading Statements)**

7 20. Respondent E R's registration is subject to discipline pursuant to Code section  
8 9884.7(a)(1), in that on or about March 3, 2011, Respondent made or authorized statements  
9 which he knew or in the exercise of reasonable care he should have known to be untrue or  
10 misleading by generating an untrue or misleading VIR by entering "pass" into the EIS for the  
11 visual inspection when, in fact, the vehicle could not have passed the visual inspection due to the  
12 non-functional MIL. In addition, Respondent Gudino entered "fail" into the EIS for the  
13 functional portion of the test for the EGR when, in fact, that test did not apply to this vehicle.

14 **SECOND CAUSE FOR DISCIPLINE**

15 **(Violations of the Motor Vehicle Inspection Program)**

16 21. Respondent E R's station license is subject to discipline pursuant to Health &  
17 Safety Code section 44072.2(a), in that on or about March 3, 2011, Respondent failed to comply  
18 with Health and Safety Code section 44012(f), by failing to perform an emission control  
19 inspection on the vehicle in accordance with procedures prescribed by the department.

20 **THIRD CAUSE FOR DISCIPLINE**

21 **(Failure to Comply with Regulations)**

22 22. Respondent E R's station license is subject to discipline pursuant to Health &  
23 Safety Code section 44072.2(c), in that on or about March 3, 2011, Respondent failed to comply  
24 with California Code of Regulations, title 16, section 3340.42, by failing to conduct the required  
25 smog tests on the vehicle in accordance with the Bureau's specifications.

26 ///

27 <sup>2</sup> The EGR functional test only applies to 1995 model-year and older vehicles undergoing  
28 a two-speed idle test when equipped with EGR.

1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Failure to Comply with Provisions of the Motor Vehicle Inspection Program)**

3 23. Respondent Gudino's technician license is subject to discipline under Health and  
4 Safety Code section 44072.2(a), in that on or about March 3, 2011, regarding the 1998 Ford  
5 Explorer, he failed to comply with the following sections of that Code:

6 a. ~~Section 44012(f):~~ Respondent Gudino failed to properly perform a smog inspection  
7 of the vehicle in accordance with procedures prescribed by the department.

8 b. ~~Section 44032:~~ Respondent Gudino failed to properly perform a smog inspection of  
9 the vehicle in accordance with section 44012 of the Health and Safety Code.

10 **FIFTH CAUSE FOR DISCIPLINE**

11 **(Failure to Comply with Regulations)**

12 24. Respondent Gudino's technician license is subject to discipline under Health and  
13 Safety Code section 44072.2(c), in that on or about March 3, 2011, regarding the 1998 Ford  
14 Explorer, he failed to comply with the following sections of the California Code of Regulations,  
15 title 16:

16 a. ~~Section 3340.30(n):~~ Respondent Gudino failed to inspect and test the vehicle in  
17 accordance with Health and Safety Code sections 44012 and 44035, and California Code of  
18 Regulations, title 16, section 3340.42.

19 b. ~~Section 3340.41(e):~~ Respondent Gudino entered false information into the EIS by  
20 entering "pass" for the visual portion of the smog inspection when, in fact, the vehicle could not  
21 have passed the visual portion of the inspection because the vehicle's MIL bulb and socket were  
22 missing. In addition, Respondent entered "fail" for the EGR functional test when, in fact, that test  
23 did not apply to this vehicle.

24 c. ~~Section 3340.42:~~ Respondent Gudino failed to properly conduct the required smog  
25 tests and inspections on the vehicle in accordance with the Bureau's specifications.

26 **UNDERCOVER OPERATION NO. 2: 1990 PLYMOUTH SUNDANCE**

27 25. On or about September 9, 2011, an undercover Bureau operator ("operator") drove  
28 a Bureau documented 1990 Plymouth Sundance to Respondent E R's facility and requested a

1 smog inspection. The vehicle was capable of passing all portions of both California Emissions  
2 Inspection Tests. The operator signed a work order and received a copy. Respondent Gudino  
3 performed the smog inspection. Respondent Gudino entered "defective" into the EIS when, in  
4 fact, it was not, and the vehicle was capable of passing all portions of both California Emissions  
5 Inspection Tests. The operator paid Respondent E R \$39.75. The operator received a copy of  
6 Invoice No [REDACTED] and VIR.

7 **SIXTH CAUSE FOR DISCIPLINE**

8 **(Untrue or Misleading Statements)**

9 26. Respondent E R's registration is subject to discipline pursuant to Code section  
10 9884.7(a)(1), in that on or about September 9, 2011, Respondent made or authorized statements  
11 which he knew or in the exercise of reasonable care he should have known to be untrue or  
12 misleading by generating an untrue or misleading VIR by entering "defective" into the EIS for the  
13 functional inspection when, in fact, it was not, and the vehicle was capable of passing all portions  
14 of both California Emissions Inspection Tests.

15 **SEVENTH CAUSE FOR DISCIPLINE**

16 **(Fraud)**

17 27. Respondent E R's registration is subject to discipline pursuant to Code section  
18 9884.7(a)(4), in that on or about September 9, 2011, Respondent committed acts which constitute  
19 fraud, in that Respondent obtained payment for a bona fide smog inspection, represented that he  
20 had performed a bona fide inspection when, in fact, he had not. Respondent ER failed the vehicle  
21 for the functional inspection when, in fact, the vehicle was capable of passing all portions of both  
22 California Emissions Inspection Tests.

23 **EIGHTH CAUSE FOR DISCIPLINE**

24 **(Violations of the Motor Vehicle Inspection Program)**

25 28. Respondent E R's station license is subject to discipline pursuant to Health &  
26 Safety Code section 44072.2(a), in that on or about September 9, 2011, Respondent failed to  
27 comply with the following sections of that Code:

28 ///

1 a. **44012, subdivision (f):** Respondent failed to perform emission control tests on  
2 the vehicle in accordance with procedures prescribed by the department.

3 b. **44015, subdivision (b):** Respondent failed to issue a certificate of compliance to  
4 a vehicle that was capable of passing all portions of both California Emissions Inspection Tests.

5 **NINTH CAUSE FOR DISCIPLINE**

6 **(Failure to Comply with Regulations)**

7 29. Respondent E R's station license is subject to discipline pursuant to Health &  
8 Safety Code section 44072.2(c), in that on or about September 9, 2011, Respondent failed to  
9 comply with California Code of Regulations, title 16, section 3340.42, in that Respondent failed  
10 to conduct the required smog tests on the vehicle in accordance with the Bureau's specifications.

11 **TENTH CAUSE FOR DISCIPLINE**

12 **(Dishonesty, Fraud or Deceit)**

13 30. Respondent E R's station license is subject to discipline under Health & Safety Code  
14 section 44072.2(d), in that on or about September 9, 2011, Respondent committed dishonest,  
15 fraudulent or deceitful acts whereby another was injured, in that Respondent obtained payment  
16 for a bona fide smog inspection, represented that he had performed a bona fide inspection when,  
17 in fact, he had not. In addition, Respondent failed the vehicle for the functional inspection when  
18 the vehicle was capable of passing all portions of both California Emissions Inspection Tests.

19 **ELEVENTH CAUSE FOR DISCIPLINE**

20 **(Failure to Comply with Provisions of the Motor Vehicle Inspection Program)**

21 31. Respondent Gudino's technician license is subject to discipline under Health and  
22 Safety Code section 44072.2(a), in that on or about September 9, 2011, regarding the 1990  
23 Plymouth Sundance, Respondent failed to comply with the following sections of that Code:

24 a. **Section 44012(f):** Respondent Gudino failed to properly perform a smog inspection  
25 of the vehicle in accordance with procedures prescribed by the department.

26 b. **Section 44032:** Respondent Gudino failed to properly perform a smog inspection of  
27 the vehicle in accordance with section 44012 of the Health and Safety Code.

28 ///

1 **TWELFTH CAUSE FOR DISCIPLINE**

2 **(Failure to Comply with Regulations)**

3 32. Respondent Gudino's technician license is subject to discipline under Health and  
4 Safety Code section 44072.2(c), in that on or about September 9, 2011, regarding the 1990  
5 Plymouth Sundance, Respondent failed to comply with the following sections of the California  
6 Code of Regulations, title 16:

7 a. **Section 3340.30(a):** Respondent Gudino failed to inspect and test the vehicle in  
8 accordance with Health and Safety Code sections 44012 and 44035, and California Code of  
9 Regulations, title 16, section 3340.42.

10 b. **Section 3340.41(c):** Respondent Gudino entered false information into the EIS by  
11 entering "defective" for the functional inspection when, in fact, the vehicle was capable of  
12 passing all portions of both California Emissions Inspection Tests.

13 c. **Section 3340.42:** Respondent Gudino failed to properly conduct the required smog  
14 tests and inspections on the vehicle in accordance with the Bureau's specifications.

15 **THIRTEENTH CAUSE FOR DISCIPLINE**

16 **(Dishonesty, Fraud or Deceit)**

17 33. Respondent Gudino's technician license is subject to discipline under Health & Safety  
18 Code section 44072.2(d), in that on or about September 9, 2011, he committed dishonest,  
19 fraudulent or deceitful acts whereby another was injured by representing that he had performed a  
20 bona fide smog inspection when, in fact, he did not. In addition, Respondent Gudino failed the  
21 vehicle for the functional inspection when the vehicle was capable of passing all portions of both  
22 California Emissions Inspection Tests.

23 **UNDERCOVER OPERATION NO. 3: 2006 CHEVROLET SILVERADO**

24 34. On or about September 28, 2011, an undercover Bureau operator ("operator")  
25 drove a Bureau documented 2006 Chevrolet Silverado to Respondent E R's facility and requested  
26 a smog inspection. The vehicle could not pass the visual portion of the smog inspection because  
27 the vehicle's EGR system was missing. The operator signed a work order and received a copy.  
28 A licensed Advanced Emission Specialist Technician, Roman Derebenskiy, performed the smog

1 inspection and issued electronic Certificate of Compliance No. [REDACTED], certifying that he  
2 had tested and inspected the vehicle and that the vehicle was in compliance with applicable laws  
3 and regulations. In fact, the vehicle could not have passed the visual portion of the smog  
4 inspection because the vehicle's EGR system was missing. The operator paid Respondent E R  
5 \$88.00 and received a copy of Invoice No. [REDACTED] and a VIR.

6 **FOURTEENTH CAUSE FOR DISCIPLINE**

7 **(Untrue or Misleading Statements)**

8 35. Respondent E R's registration is subject to discipline pursuant to Code section  
9 9884.7(a)(1), in that on or about September 28, 2011, Respondent made or authorized statements  
10 which he knew or in the exercise of reasonable care he should have known to be untrue or  
11 misleading by issuing electronic Certificate of Compliance No. [REDACTED] for the 2006  
12 Chevrolet Silverado, certifying that the vehicle was in compliance with applicable laws and  
13 regulations. In fact, the vehicle could not have passed the visual portion of the smog inspection  
14 because the vehicle's EGR system was missing.

15 **FIFTEENTH CAUSE FOR DISCIPLINE**

16 **(Fraud)**

17 36. Respondent E R's registration is subject to discipline pursuant to Code section  
18 9884.7(a)(4), in that on or about September 28, 2011, Respondent committed acts which  
19 constitute fraud by issuing electronic Certificate of Compliance No. [REDACTED] for the 2006  
20 Chevrolet Silverado without performing a bona fide inspection of the emission control devices  
21 and systems on the vehicle, thereby depriving the People of the State of California of the  
22 protection afforded by the Motor Vehicle Inspection Program.

23 **SIXTEENTH CAUSE FOR DISCIPLINE**

24 **(Violations of the Motor Vehicle Inspection Program)**

25 37. Respondent E R's station license is subject to discipline pursuant to Health &  
26 Safety Code section 44072.2(a), in that on or about September 28, 2011, regarding the 2006  
27 Chevrolet Silverado, Respondent failed to comply with the following sections of that Code:

28 ///

1 a. **Section 44012, subdivision (a):** Respondent E R failed to determine that all  
2 emission control devices and systems required by law were installed and functioning correctly in  
3 accordance with test procedures.

4 b. **Section 44012, subdivision (f):** Respondent E R failed to perform emission  
5 control tests on the vehicle in accordance with procedures prescribed by the department.

6 c. **Section 44015, subdivision (b):** Respondent E R issued electronic Certificate of  
7 Compliance No. [REDACTED] for the vehicle without properly testing and inspecting the vehicle  
8 to determine if it was in compliance with Health & Safety Code section 44012.

9 **SEVENTEENTH CAUSE FOR DISCIPLINE**

10 **(Failure to Comply with Regulations)**

11 38. Respondent E R's station license is subject to discipline pursuant to Health &  
12 Safety Code section 44072.2(c), in that on or about September 28, 2011, regarding the 2006  
13 Chevrolet Silverado, Respondent failed to comply with provisions of California Code of  
14 Regulations, title 16, as follows:

15 a. **Section 3340.35, subdivision (c):** Respondent E R issued electronic Certificate of  
16 Compliance No. [REDACTED] for the vehicle even though the vehicle had not been inspected in  
17 accordance with section 3340.42.

18 b. **Section 3340.42:** Respondent E R failed to conduct the required smog tests on the  
19 vehicle in accordance with the Bureau's specifications.

20 **EIGHTEENTH CAUSE FOR DISCIPLINE**

21 **(Dishonesty, Fraud or Deceit)**

22 39. Respondent E R's station license is subject to discipline pursuant to Health &  
23 Safety Code section 44072.2(d), in that on or about September 28, 2011, Respondent committed  
24 dishonest, fraudulent or deceitful acts whereby another is injured by issuing electronic Certificate  
25 of Compliance No. [REDACTED] for the 2006 Chevrolet Silverado without performing a bona fide  
26 inspection of the emission control devices and systems on the vehicle, thereby depriving the  
27 People of the State of California of the protection afforded by the Motor Vehicle Inspection  
28 Program.

1 **NINETEENTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty, Fraud, or Deceit)**

3 40. Respondent E R's brake and lamp station licenses are subject to discipline pursuant  
4 to Code section 9889.3(d), in that between March 3, 2011, and September 28, 2011, Respondent  
5 committed acts involving dishonesty, fraud, or deceit whereby another was injured, as more  
6 particularly set forth above in paragraphs 26, 29, 35, and 38.

7 **PRIOR CITATIONS**

8 41. To determine the degree of discipline, if any, Complainant alleges the following:

9 a. On or about January 3, 2007, the Bureau issued Citation No. C07-0430 against  
10 Respondent E R's registration and station licenses for violations of Health and Safety Code  
11 section 44012(f) (failure to perform a visual/functional check of emission control devices  
12 according to procedures prescribed by the department), and California Code of Regulations, title  
13 16, section 3340.35(c) (issuing a certificate of compliance to a vehicle that was improperly  
14 tested), for issuing a certificate of compliance to a Bureau undercover vehicle that was missing an  
15 air injection system recd valve. The Bureau assessed civil penalties totaling \$500 against  
16 Respondent for the violations.

17 b. On or about March 17, 2011, the Bureau issued Citation No. C2011-1087  
18 against Respondent E R's registration and station licenses for violations of Health and Safety  
19 Code section 44012(f) (failure to perform a visual/functional check of emission control devices  
20 according to procedures prescribed by the department), and California Code of Regulations, title  
21 16, section 3340.42 (failure to follow Smog Check emissions test methods and standards), for  
22 failing to perform a proper inspection on the Bureau undercover vehicle, in that it had a non-  
23 functional Malfunction Indicator Lamp system. The Bureau assessed civil penalties totaling  
24 \$1000 against Respondent for the violations.

25 **OTHER MATTERS**

26 42. Pursuant to Code section 9884.7(c), the director may suspend, revoke, or place on  
27 probation the registrations for all places of business operated in this state by Edward Derebenskiy,  
28

1 doing business as E R Smogs, upon a finding that he has, or is, engaged in a course of repeated  
2 and willful violation of the laws and regulations pertaining to an automotive repair dealer.

3 43. Pursuant to Health and Safety Code section 44072.8, if Smog Check Station  
4 License Number RC 241005, issued to Edward Derebenskiy, doing business as E R Smogs, is  
5 revoked or suspended, any additional license issued under this chapter in the name of said  
6 licensee may be likewise revoked or suspended by the director.

7 44. Pursuant to Code section 9889.9, if Lamp Station License Number LS 241005,  
8 issued to Edward Derebenskiy, doing business as E R Smogs, is revoked or suspended, any  
9 additional license issued under Articles 5 and 6 of Chapter 20.3 of the Business and Professions  
10 Code in the name of said licensee may be likewise revoked or suspended by the director.

11 45. Pursuant to Code section 9889.9, if Brake Station License Number BS 241005,  
12 issued to Edward Derebenskiy, doing business as E R Smogs, is revoked or suspended, any  
13 additional license issued under Articles 5 and 6 of Chapter 20.3 of the Business and Professions  
14 Code in the name of said licensee may be likewise revoked or suspended by the director.

15 46. Pursuant to Health and Safety Code section 44072.8, if Smog Check Inspector  
16 license number EO 632708 or Smog Check Repair Technician License number EI 632708,  
17 issued to Jose Antonio Tejada-Gudino, are revoked or suspended, any additional license issued  
18 under this chapter in the name of said licensee may be likewise revoked or suspended by the  
19 director.

20 **PRAYER**

21 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein  
22 alleged, and that following the hearing, the Director of Consumer Affairs issue a decision:

23 1. Revoking, suspending, or placing on probation Automotive Repair Dealer  
24 Registration No. ARD 241005, issued to Edward Derebenskiy, doing business as E R Smogs;

25 2. Revoking, suspending, or placing on probation any other automotive repair dealer  
26 registration issued to Edward Derebenskiy;

27 3. Revoking or suspending Smog Check Station License Number RC 241005, issued  
28 to Edward Derebenskiy, doing business as E R Smogs;

- 1           4.     Revoking or suspending any additional license issued under chapter 5, of the
- 2 Health and Safety Code in the name of Edward Derebenskiy;
- 3           5.     Revoking or suspending Lamp Station License Number LS 241005, issued to
- 4 Edward Derebenskiy, doing business as E R Smogs;
- 5           6.     Revoking or suspending Brake Station License Number BS 241005, issued to
- 6 Edward Derebenskiy, doing business as E R Smogs;
- 7           7.     Revoking or suspending any additional license issued under Articles 5 and 6 of
- 8 Chapter 20.3 of the Business and Professions Code in the name of Edward Derebenskiy;
- 9           8.     Revoking or suspending Smog Check Inspector License Number EO 632708, and
- 10 Smog Check Repair Technician License Number EI 632708 issued to Jose Antonio Tejada
- 11 Gudino;
- 12           9.     Revoking or suspending any additional license issued under Chapter 5 of the
- 13 Health and Safety Code in the name of Jose Antonio Tejada Gudino;
- 14           10.    Ordering Edward Derebenskiy and Jose Antonio Tejada Gudino, to pay the
- 15 Director of Consumer Affairs the reasonable costs of the investigation and enforcement of this
- 16 case, pursuant to Code section 125.3; and,
- 17           11.    Taking such other and further action as deemed necessary and proper.

18  
19  
20 DATED: \_\_\_\_\_  
21 Patrick Dorais  
22 Acting Chief  
23 Bureau of Automotive Repair  
24 Department of Consumer Affairs  
25 State of California  
26 *Complainant*

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