

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

In the Matter of the Accusation Against:

EATON AUTO DIAGNOSTICS, INC.
dba HIGH ST SMOG CHECK
NICHOLAS YAKOUBOVSKY, President
And Secretary
ELENA YAKOUBOVSKY, Treasurer
Automotive Repair Dealer Registration
No. ARD 261712
Smog Check, Test Only, Station License
No. TC 261712

and

SALOKHIDDIN FAKHRIEV
Advanced Emission Specialist Technician
License No. EA 630209

Respondents.

Case No. 79/12-50


OAH No. 2012020466

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.

This Decision shall become effective 12/6/12.

DATED: October 24, 2012



DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

BEFORE THE
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FOR THE BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

EATON AUTO DIAGNOSTICS, INC.,
dba HIGH ST SMOG CHECK
NICHOLAS YAKOUBOVSKY, President
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Automotive Repair Dealer
Registration No. ARD 261712
Smog Check Test Only Station
License No. TC 261712,

and

SALOKHIDDIN FAKHRIEV
Advanced Emission Specialist Technician
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PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on September 4, 2012, in Oakland, California.

Deputy Attorney General Shana A. Bagley represented complainant Sherry Mehl, Chief of the Bureau of Automotive Repair.

William Ferreira, Attorney at Law, represented respondents. Nicholas Yakoubovsky and Salokhiddin Fakhriev were present throughout the administrative hearing.

The matter was submitted for decision on September 4, 2012.

FACTUAL FINDINGS

1. Sherry Mehl brought the accusation solely in her official capacity as the Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs.

2. Eaton Auto Diagnostics, Inc., doing business as High St Smog Check (High St Smog Check) was registered as an automotive repair dealer (Reg. No. ARD 261712), on April 23, 2010. Respondent Nicholas Yakoubovsky (Yakoubovsky) is the president and secretary, and Elena Yakoubovsky is its treasurer. The registration is scheduled to expire on March 31, 2013, unless renewed.

3. High St Smog Check was licensed as a smog check/test only station (Lic. No. TC 261712) on April 26, 2010. The station license is scheduled to expire on March 31, 2013, unless renewed.

4. The Bureau issued Fakhriev an advanced emissions specialist license (Lic. No. EA 630209) on May 19, 2008. Fakhriev's license will expire on November 30, 2013, unless renewed.

Bureau Evidence

5. On November 30, 2010, a Bureau representative initiated an investigation of High St Smog Check and Fakhriev based on a review of information from the Bureau's Vehicle Information Database (VID). Information on each smog check inspection performed by a smog check station is transmitted electronically to the VID from the station's BAR-97 computer-based emissions system analyzer.

6. A properly performed smog check inspection has three parts: 1) a tailpipe emissions test; 2) a visual inspection of the emission control components; and 3) a functional test of certain components of the emissions system.

The functional test includes testing the On Board Diagnostics, generation II (OBD II) system on vehicles manufactured in 1996 or later. The technician is required to connect an interface cable from the BAR-97 analyzer to a Diagnostic Link Connector (DLC) located inside the vehicle. Through the DLC, the analyzer automatically retrieves information from the vehicle's onboard computer to determine if the vehicle's OBD II system is functioning properly. If the vehicle fails the OBD II test, it will fail the overall inspection.

The OBD II system continuously performs self-diagnostic tests on the vehicle's Power Train Control Module (PCM) and related sensors and actuators, to confirm that the PCM is able to properly control the operation of the engine and emissions control devices. These self-diagnostic tests are referred to as readiness monitors (monitors). Each monitor is designed to diagnose a specific system within the electronic engine and emission controls. If a malfunction is detected during the monitor operation, a diagnostic trouble code will be

stored in the PCM memory. Through the DLC, the analyzer determines if any diagnostic trouble codes are present in the PCM memory.

There are two types of diagnostic trouble codes, Type A codes and Type B codes. Type A codes indicate a significant malfunction that will illuminate the Malfunction Indicator Lamp (MIL), often referred to as the "check engine" light. The presence of a Type A code results in the vehicle failing the smog check inspection.

Type B codes ("pending codes") are for malfunctions that must be detected during at least two consecutive monitor cycles before the MIL will be illuminated. The first time the computer detects signals outside the expected parameters, a pending code is stored in the PCM memory. If this happens a second time, a hard code is generally stored and the MIL is illuminated. Pending codes for a vehicle are transmitted to the VID, but the analyzer does not reveal them to the smog check technician.

7. All OBD II diagnostic trouble codes are five digits long, with one letter followed by four numbers. PCM codes start with the letter P. Some codes are manufacturer specific, and other codes are generic. Codes for specific makes and models of vehicles are listed in the original equipment manufacturer's (OEM) service information and in the Alldata and Mitchell reference guides.

8. A Bureau representative conducted a detailed review of VID data for all smog inspections performed at High St Smog Check between May 2010 and June 30, 2011. The representative found that the 12 vehicles identified in the Table 1, all of which were tested by respondent Fakhriev, recorded diagnostic trouble codes during the OBD II tests which were not applicable to the vehicles being inspected. The Bureau representative concluded that Fakhriev performed the smog inspections on the vehicles using a different vehicle during the OBD II tests, a method known as "clean-plugging,"¹ resulting in the issuance of fraudulent certificates of compliance for the vehicles.

¹ Clean-plugging is the use of the OBD II readiness monitor status and stored trouble code status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that is not in compliance due to the presence of a stored diagnostic trouble code that indicates an emission control system or component failure. It is accomplished by connecting the interface cable from the BAR-97 analyzer to the DLC of another vehicle, to retrieve information from the passing vehicle. After entering vehicle information into the analyzer for the vehicle he wishes to certify, the technician can clean-plug by either performing a complete smog inspection on a different vehicle, or performing an incomplete smog inspection on the vehicle he wishes to certify and then plugging the interface cable from the BAR-97 analyzer into the DLC of a vehicle believed to have a properly functioning OBD II system.

TABLE 1

Vehicle No.	Date and Time of Inspection	Vehicle Certified & Vehicle Tested	Certificate No.	Unsupported Pending Code
1.	6/03/2010 17:32 to 17:40 hours	2002 Chevrolet Venture Lic. No. 5VEZ178	NU346373C	P1780
2.	6/12/2010 10:50 to 10:56 hours	1999 Suzuki Esteem Lic. No. 6GMT520	NU398749C	P0325
3.	7/15/2010 15:46 to 15:51 hours	2000 Daewoo Lanos Lic. No. 5DDC564	NU898206C	P1298
4.	7/15/2010 18:32 to 18:39 hours	1998 Nissan Maxima Lic. No. 4ACH930	NU898214C	P1298
5.	7/15/2010 18:45 to 18:51 hours	1997 Buick LaSabre Lic. No. ABM0470	NU898215C	P1298
6.	7/19/2010 19:09 to 19:15 hours	1996 Ford Thunderbird Lic. No. 5WVP857	NU930238C	P1298
7.	8/23/2010 12:25 to 12:30 hours	1996 Mitsubishi Eclipse No plates	NW380986C	P1768
8.	8/28/2010 10:59 to 11:06 hours	1997 GMC Suburban Lic. No. 5JJT644	NW448598C	P1738
9.	8/30/2010 17:05 to 17:13 hours	2001 Dodge Stratus Lic. No. 4SVX210	NW489982C	P1298
10.	10/07/2010 17:54 to 18:20 hours	1997 Ford F150 Lic. No. 5K50471	NY033482C	P0650
11.	12/30/2010 14:39 to 14:46 hours	2003 Ford Windstar Lic. No. 5ANE584	WR203843C	P0150
12.	4/05/2011 17:13 to 17:18 hours	2000 Hyundai Accent Lic. No. 6ESH595	OC357043C	P0305

9. The three vehicles tested on July 15, 2010, and those tested on July 19, 2010, and August 30, 2010, all had the same inapplicable diagnostic trouble code.

10. On June 12, 2010, the Suzuki Esteem was inspected between 10:50 and 10:56 a.m., and a pending trouble code was recorded (P0325) which is not supported by that vehicle. The VID also reported that a 1999 Mercury automobile, which was inspected by Fakhriev at High St Smog Check at 10:58 a.m. on the same day, had the same diagnostic trouble code (P0325) stored in its onboard computer. The code was applicable to the Mercury automobile.

11. On August 28, 2010, a 2001 Honda was inspected by Fakhriev at 11:09 a.m., and a pending trouble code (P1738), which is applicable to the vehicle, was recorded. Vehicle No. 8, the GMC Suburban, was inspected between 10:59 and 11:06 a.m., and the same pending trouble code was recorded (P1738), however, that trouble code was not

supported by a GMC Suburban. The onboard computer for each vehicle reportedly inspected also had the same incomplete readiness monitors.

12. On December 30, 2010, Fakhriev performed a smog inspection on the Ford F150 at 2:39 p.m. Pending trouble codes of P0150 and P0300 were recorded during the inspection. Only the P0300 was supported by this Ford. At 2:50 p.m., on the same day, Fakhriev performed a smog inspection of a Mazda Minivan. The same pending trouble codes (P0300 and P0150) were recorded for the Mazda Minivan. Those trouble codes are both supported by the Mazda Minivan.

13. On April 5, 2011, when Fakhriev performed a smog inspection on the Hyundai Accent, a pending trouble code of (P0305) was recorded. Pending code P0305 indicates that a misfire has occurred on cylinder number five on the vehicle. However, a Hyundai Accent does not have five cylinders; it is a four-cylinder automobile.

14. David Lewis, a Senior Engineer who has worked for the Bureau for 28 years, testified at the hearing. He wrote the original electronic specifications and some code for the BAR-97 analyzer, and he is in charge of the unit that develops the technology for new smog check equipment. Lewis serves on the statewide network database committee, and develops new methods for smog check analyzers. Lewis manages the statewide network databases to ensure compliance with the air pollution standards in the state.

Lewis explained how the BAR-97 analyzer captures the OBD II fault codes and transmits that information to the VID. There is error checking between the analyzer and the vehicle's computer and error checking between the analyzer and the VID. Lewis stated that it is not possible for the analyzer to transmit a fault code for a different vehicle than the vehicle to which it is connected. If an error occurs, the analyzer will indicate that it cannot communicate with the vehicle's computer. If there is a problem with the onboard diagnostic system of the vehicle, it will not communicate with the BAR-97 analyzer and the vehicle will fail the test.

Lewis is very familiar with the system of OBD II diagnostic trouble codes. If a pending code is in a vehicle's computer, it will be in the OEM for the vehicle. The only way a code could be transmitted to the VID for a vehicle whose manufacturer has not listed the code in the OEM is by clean-plugging.

Bureau analysts and engineers search for anomalies in the VID data using automated data checks. If, for example, only one Honda automobile, of the millions tested, reports a particular diagnostic trouble code, the computer identifies that result as out of the ordinary and triggers an investigation. Lewis is aware of only a few instances in which there has been a software glitch in the smog check reporting system. The engineering team is constantly looking for glitches and they are fixed immediately when discovered.

Since a diagnostic trouble code reporting problem was discovered and corrected by the Bureau in 2004, the information obtained by the VID from the OBD II monitors and analyzers has been reliable. On occasion no code will be reported, but the Bureau has not seen any reports of a trouble code being reported on a vehicle that does not support that code. The analyzers are designed to shut down if there is an equipment failure of some sort; in that case, no certificate will be issued.

15. Lewis reviewed the investigation report prepared in this matter and determined that the 12 vehicles identified in Table 1 were clean-plugged. Lewis's opinions were credible and undisputed.

16. The evidence established that the 12 vehicles identified in the Table 1 were clean-plugged.

17. In order to protect against fraudulent smog inspections, some station owners conduct video surveillance of their employees. Other owners regularly review data for abnormalities. Some owners train their employees against committing fraudulent inspections. Once a technician is accused of fraudulent inspections, some owners immediately fire the technician and cooperate fully with the Bureau.

Costs

18. The Bureau has incurred \$12,754.76 in investigative costs, and \$7,540 in legal costs, for a total of \$20,294.76 in costs of investigation and enforcement. There was no challenge to the reasonableness of these costs.

Respondents' Evidence

19. Respondent Fakhriev testified at hearing. He denies having clean-plugged the 12 vehicles identified in Table 1, or any vehicles. Fakhriev has worked at High St Smog Check since 2008. His technician license has never been disciplined in the past, and he has never had consumer complaints filed against him.

20. Respondent Nicholas Yakoubovsky testified at hearing. Yakoubovsky purchased High St Smog Check in 2010. In February 2010, Yakoubovsky incorporated the business as Eaton Auto Diagnostics, Inc. He is the president and secretary of the corporation, which is in good standing.

21. In February 2011, Yakoubovsky obtained his smog technician license, after completing a six-month training course. Yakoubovsky's license has not been disciplined.

22. On a typical day, Fakhriev opens the business at 8:30 a.m. Yakoubovsky generally arrives at approximately 10:00 a.m. He completes paperwork and then leaves at about 2:00 p.m. Yakoubovsky performs smog check inspections when Fakhriev is at lunch or ill.

23. When Yakoubovsky first took over the business, he noticed that Fakhriev was warming up older cars extensively. He admonished him not to do so. He observed Fakhriev do it a few more times, but after further counseling, the conduct stopped. Yakoubovsky also observed that at times Fakhriev did not perform the visual portion of the smog inspection. Yakoubovsky counseled Fakhriev on this issue as well. Fakhriev has improved, but still sometimes forgets to perform the visual inspection.

24. Yakoubovsky states that he reviewed his calendar and emails to verify whether he was present at the station when any of the cars identified in Table 1 were inspected, but as far as he can determine, he was not present during those inspections. He normally does not work on Saturdays or late in the afternoon, when most of the inspections occurred.

25. Yakoubovsky had known Fakhriev for eight months when the accusation was filed. He had found him to be reliable and trustworthy with the business receipts. Yakoubovsky had heard that the prior owners of High St Smog Check would charge \$200 for a fraudulent smog check. Yakoubovsky states that Fakhriev never gave him an indication that he would cheat the system. If Yakoubovsky found out that the Bureau's data were correct, he would consider fining Fakhriev to be a just penalty.

LEGAL CONCLUSIONS

Cause for Discipline of Respondent High St Smog Check's License and Registration

1. It is the smog check station, not the technician, that issues a smog certificate. (Health & Saf. Code, § 44010.) The law is clear that as the licensee, respondent Eaton Auto Diagnostics, Inc., dba High St Smog Check, is responsible for any misconduct committed by its employee, Salokhiddin Fakhriev. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295-297 [licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct in the exercise of his license.] See also, *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360; *Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793; *Camacho v. Youde* (1979) 95 Cal.App.3d 161.)

Causes for Discipline

HIGH ST SMOG'S ARD REGISTRATION

2. First Cause for Discipline (Untrue or Misleading Statements): Cause for discipline of the automotive repair dealer registration issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check, exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), for untrue or misleading statements made in the issuance of the electronic certificates of compliance nos. NU346373C, NU398749C, NU898206C, NU898214C, NU898215C, NU930238C, NW380986C, NW448598C, NW489982C, NY033482C, WR203843C, and OC357043C, certifying the certified vehicles were in compliance with

applicable laws and regulations, when in fact, the smog inspections was performed by using the clean-plugging method.

3. Second Cause for Discipline (Fraud): Cause for discipline of the automotive repair dealer registration issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check, exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), for fraud associated with its inspections and the issuance of the electronic certificates of compliance nos. NU346373C, NU398749C, NU898206C, NU898214C, NU898215C, NU930238C, NW380986C, NW448598C, NW489982C, NY033482C, WR203843C, and OC357043C, without the performance of a bona fide smog inspection.

EATON AUTO DIAGNOSTICS' SMOG CHECK TEST ONLY STATION LICENSE

4. Third Cause for Discipline (Violations of the Motor Vehicle Inspection Program): Cause for discipline of the smog check test only station license issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check exists pursuant to Health and Safety Code section 44072.2, subdivision (a), in that in connection with its inspections and the issuance of the electronic certificates of compliance nos. NU346373C, NU398749C, NU898206C, NU898214C, NU898215C, NU930238C, NW380986C, NW448598C, NW489982C, NY033482C, WR203843C, and OC357043C, it violated the following provisions of the Health and Safety Code pertaining to the Motor Vehicle Inspection Program by:

- a. Section 44012: failing to ensure that all emission control tests on the 12 vehicles identified in Table 1 were performed in accordance with Bureau procedures.
- b. Section 44015: issuing electronic certificates of compliance for the 12 vehicles identified in Table 1, without ensuring that the vehicles were properly tested and inspected to determine if they were in compliance with Health and Safety Code section 44012.

5. Fourth Cause for Discipline (Failure to Comply with Motor Vehicle Inspection Program Regulations): Cause for discipline of the smog check test only station license issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check exists pursuant to Health and Safety Code section 44072.2, subdivision (c), in that in connection with its inspections and the issuance of the electronic certificates of compliance nos. NU346373C, NU398749C, NU898206C, NU898214C, NU898215C, NU930238C, NW380986C, NW448598C, NW489982C, NY033482C, WR203843C, and OC357043C, it violated the following provisions of California Code of Regulations, title 16, pertaining to the Motor Vehicle Inspection Program by:

- a. Section 3340.35, subdivision (c): issuing electronic certificates of compliance for the 12 vehicles identified in Table 1 although the vehicles had not been inspected in accordance with section 3340.42.

- b. Section 3340.42: failing to conduct required smog tests on the 12 vehicles identified in Table 1, in accordance with the Bureau's specifications.

6. Fifth Cause for Discipline (Dishonesty, Fraud or Deceit): Cause for discipline of the smog check test only station license issued to Eaton Auto Diagnostics, Inc., dba High St Smog exists pursuant to Health and Safety Code section 44072.2, subdivision (d), for dishonesty, fraud or deceit because it inspected and issued the electronic certificates of compliance nos. NU346373C, NU398749C, NU898206C, NU898214C, NU898215C, NU930238C, NW380986C, NW448598C, NW489982C, NY033482C, WR203843C, and OC357043C in connection with the 12 vehicles identified in Table 1, without performing bona fide inspections of the emission control devices and systems on the vehicles.

ADVANCED EMISSION SPECIALIST TECHNICIAN FAKHRIEV'S LICENSE

7. Sixth Cause for Discipline (Violation of Motor Vehicle Inspection Program): Cause for discipline of the technician license issued to respondent Fakhriev exists pursuant to Health and Safety Code section 44072.2, subdivision (a), in that Fakhriev failed to comply with section 44012 of the Health and Safety Code in a material respect, in that he failed to perform the emission control tests on the 12 vehicles identified in Table 1 in accordance with Bureau procedures.

8. Seventh Cause for Discipline (Failure to Comply with Motor Vehicle Inspection Program Regulations): Cause for discipline of the technician license issued to Fakhriev exists pursuant to Health and Safety Code section 44072.2, subdivision (c), in that he failed to comply with provisions of California Code of Regulations, title 16, as follows:

- a. Section 3340.30, subdivision (a): Fakhriev failed to inspect and test the 12 vehicles identified in Table 1, in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.
- b. Section 3340.42: Fakhriev failed to inspect and test the 12 vehicles identified in Table 1 in accordance with Health and Safety Code section 44012.
- c. Section 3340.42: Fakhriev failed to conduct the required smog tests on the 12 vehicles identified in Table 1, in accordance with the Bureau's specifications.

9. Eighth Cause for Discipline (Dishonesty, Fraud or Deceit): Cause for discipline of the technician license issued to Fakhriev exists pursuant to Health and Safety Code section 44072.2, subdivision (d), in that Fakhriev committed dishonest, fraudulent or deceitful acts whereby another is injured, in connection with the issuance of the certificates

of compliance for the 12 vehicles identified in Table 1 without performing bona fide inspections of the emission control devices and systems on the vehicles.

Penalty

10. The Bureau's guidelines for disciplinary penalties (Cal. Code Regs., tit. 16, § 3395.4) have been considered in reaching the determination of the appropriate penalty.

11. In light of the numerous acts of clean-plugging, protection of the public mandates the revocation of Fakhriev's advanced emission specialist technician license.

12. High St Smog Check's automotive repair dealer registration (No. ARD 261712) and its smog check, test only, station license (No. TC 261712) are also subject to discipline due to the misconduct by Fakhriev. Yakoubovsky's testimony that he was not present when the fraudulent certificates were issued does not relieve him from responsibility for the misconduct. During the months that the clean-plugging occurred, Yakoubovsky was attending a six-month training course to become a smog technician. He therefore was aware of the proper method of performing smog check inspections. At a minimum, as the new owner of a business, Yakoubovsky, should have been more vigilant in managing his employee. He did not know Fakhriev prior to taking over the business, but was aware that the previous owners of the business had sold fraudulent smog certificates to customers for \$200. Moreover, Yakoubovsky admits that Fakhriev often failed to conduct the visual portion of the inspection despite his counseling. In spite of the seriousness of the allegations, Yakoubovsky did not take immediate action to suspend or fire Fakhriev when he received the accusation. Instead, he allowed Fakhriev to continue working at High St Smog Check, challenged the Bureau's findings and supported Fakhriev's testimony that he did not clean-plug the vehicles. (Findings 17, 19 to 25.)

In the highly regulated field of smog inspections, a licensee must be watchful over his or her employees, and ready to discipline employees who are not following the rules. Yakoubovsky was aware that Fakhriev was employed by High St Smog Check while fraudulent smog checks occurred. In light of this knowledge, Yakoubovsky was not as vigilant as he should have been. Nor has he taken responsibility for the misconduct.

13. Given the egregious and repeated nature of the misconduct, revocation of the ARD registration and smog check, test only, station license issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check, is warranted.

Costs

14. Pursuant to Business and Professions Code section 125.3, the Bureau may request an administrative law judge to order a licensee found to have violated the licensing act to pay an amount that does not exceed the reasonable costs of investigation and enforcement. There was no objection to the reasonableness of the Bureau's costs of


\$20,294.76. The investigation required a detailed review of many records and references. The enforcement of the matter was complex. The costs are reasonable. (Finding 18.)

15. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether costs should be assessed in the particular circumstances of each case. The Bureau must consider whether to do so will unfairly penalize the licensee who has committed misconduct, but who has used the hearing process to obtain a dismissal or a reduction in the severity of the discipline imposed, as well as whether the licensee will be financially able to pay the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.*, at pp. 44-45.) Here, the misconduct committed was egregious and repetitive and the hearing process was not used to obtain a dismissal or reduction in the severity of the discipline imposed. No evidence of an inability to pay was submitted by respondents. There is no basis upon which to reduce the costs of investigation and enforcement of this matter.

ORDER

1. Advanced Emission Specialist Technician License No. EA 630209 issued to Salokhiddin Fakhriev is revoked.
2. Automotive Repair Dealer Registration No. ARD 261712 issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check, is revoked.
3. Smog Check Test Only Station License No. TC 261712 issued to Eaton Auto Diagnostics, Inc., dba High St Smog Check, is revoked.
4. Respondents Eaton Auto Diagnostics, Inc., dba High St Smog Check, and Salokhiddin Fakhriev, are jointly and severally liable, and ordered to pay the Director of Consumer Affairs the sum of \$20,294.76 as reimbursement for the reasonable costs of investigation and enforcement if this case, pursuant to Business and Professions Code section 125.3.

DATED: 9.24.12


JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the First Amended Accusation
Against:

Case No. 79/12-50

13 **EATON AUTO DIAGNOSTICS, INC.,**
14 **dba HIGH ST SMOG CHECK**
15 **NICHOLAS YAKOUBOVSKY, PRESIDENT**
16 **and SECRETARY**
17 **ELENA YAKOUBOVSKY, TREASURER**
18 **4321 San Leandro Street**
19 **Oakland, CA 94601**
20 **Mailing Address:**
21 **71 Wild Oak Lane**
22 **Danville, CA 94506**

FIRST AMENDED ACCUSATION
(Smog Check)

23 **Automotive Repair Dealer Reg. No. ARD 261712**
24 **Smog Check, Test Only, Station License No. TC**
25 **261712**

26 **and**

27 **SALOKHIDDIN FAKHRIEV**
28 **375 Colusa Avenue, #2**
Kensington, CA 94707

Advanced Emission Specialist Technician
License No. EA 630209

Respondents.

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1 Complainant alleges:

2 **PARTIES**

3 1. Sherry Mehl ("Complainant") brings this First Amended Accusation solely in her
4 official capacity as the Chief of the Bureau of Automotive Repair ("Bureau"), Department of
5 Consumer Affairs.

6 **Eaton Auto Diagnostics, Inc. dba High St. Smog Check**

7 2. On or about April 23, 2010, the Director of Consumer Affairs ("Director") issued
8 Automotive Repair Dealer Registration Number ARD 261712 (hereinafter "registration") to
9 Eaton Auto Diagnostics, Inc. ("Respondent Eaton"), doing business as High St Smog Check, with
10 Nicholas Yakoubovsky as president and secretary and Elena Yakoubovsky as treasurer.
11 Respondent's registration was in full force and effect at all times relevant to the charges brought
12 herein and will expire on March 31, 2012, unless renewed.

13 3. On or about April 26, 2010, the Director issued Smog Check, Test Only, Station
14 License Number TC 261712 (hereinafter "smog check station license") to Respondent Eaton.
15 Respondent's smog check station license was in full force and effect at all times relevant to the
16 charges brought herein and will expire on March 31, 2012, unless renewed.

17 **Salokhiddin Fakhriev**

18 4. On or about May 19, 2008, the Director issued Advanced Emissions Specialist
19 Technician License Number EA 630209 (hereinafter "technician license") to Salokhiddin
20 Fakhriev ("Respondent Fakhriev"). Respondent's technician license was in full force and effect at
21 all times relevant to the charges brought herein and will expire on November 30, 2013, unless
22 renewed.

23 **JURISDICTION**

24 5. Business and Professions Code ("Bus. & Prof. Code") section 9884.7 provides that
25 the Director may revoke an automotive repair dealer registration.

26 6. Bus. & Prof. Code section 9884.13 provides, in pertinent part, that the expiration of a
27 valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary
28

1 proceeding against an automotive repair dealer or to render a decision temporarily or permanently
2 invalidating (revoking or suspending) a registration.

3 7. Health and Safety Code ("Health & Saf. Code") section 44002 provides, in pertinent
4 part, that the Director has all the powers and authority granted under the Automotive Repair Act
5 for enforcing the Motor Vehicle Inspection Program.

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

10 STATUTORY PROVISIONS

11 9. Bus. & Prof. Code section 9884.7 states, in pertinent part:

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

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

21
22 (4) Any other conduct that constitutes fraud.
23

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

29 10. Bus. & Prof. Code section 477 provides, in pertinent part, that "Board" includes
30 "bureau," "commission," "committee," "department," "division," "examining committee,"
31 "program," and "agency." "License" includes certificate, registration or other means to engage
32 in a business or profession regulated by the Bus. & Prof. Code.

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11. Health & Saf. Code section 44072.2 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, does any of the following:

(a) Violates any section of this chapter [the Motor Vehicle Inspection Program (Health and Saf. Code § 44000, et seq.)] 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.

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

12. Health & Saf. Code section 44072.8 states that when a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director.

COST RECOVERY

13. Bus. & Prof. Code section 125.3 provides, in pertinent part, that a Board may request the administrative law judge to 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.

VID DATA REVIEW

14. On November 30, 2010, a representative of the Bureau initiated an investigation against Respondents Eaton and Fakhriev based on a review of information from the Bureau's Vehicle Information Database ("VID"), which indicated that Respondents may be engaging in fraudulent smog check activities. On November 30, 2010, and June 30, 2011, the representative conducted detailed reviews of VID data for all smog inspections performed at Respondent Eaton's facility for the period of May 2010 through June 30, 2011. The representative found that vehicles 1 through 12 identified below, all of which were tested by Respondent Fakhriev, recorded certain

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diagnostic trouble codes (hereinafter "code") during the OBD II tests¹. The representative obtained information indicating that the codes were not applicable to the vehicles. The Bureau concluded that Respondent Fakhriev performed the smog inspections on the vehicles using a different vehicle during the OBD II tests, a method known as "clean plugging",² resulting in the issuance of fraudulent certificates of compliance for the vehicles.

Date & Time of Inspection	Vehicle Certified	Certificate No.
1. 06/03/2010 17:32 – 17:40	2002 Chevrolet Venture FWD; License No. 5VEZ178	NU346373C
2. 06/12/2010 10:50 – 10:56	1999 Suzuki Esteem; License No. 6GMT520	NU398749C
3. 07/15/2010 15:46 – 15:51	2000 Daewoo Lanos; License No. 5DDC564	NU898206C
4. 07/15/2010 18:32- 18:39	1998 Nissan Maxima; License No. 4ACH930	NU898214C
5. 07/15/2010 18:45 – 18:51	1997 Buick LaSabre; License No. ABM0470	NU898215C
6. 07/19/2010 19:09 – 19:15	1996 Ford Thunderbird; License No. 5WVP857	NU930238C
7. 08/23/2010 12:25 – 12:30	1996 Mitsubishi Eclipse; no plates	NW380986C
8. 08/28/2010 10:59 – 11:06	1997 GMC Suburban; License No. 5JIT644	NW448598C
9. 08/30/2010 17:05 – 17:13	2001 Dodge Stratus 4-DR; License No. 4SVX210	NW489982C
10. 10/07/2010 17:54 – 18:20	1997 Ford F150 regular cab short; License No. 5K50471	NY033482C
11. 12/30/2010 14:39 – 14:46	2003 Ford Windstar wagon; License No. 5ANE584	WR203843C

¹ The On Board Diagnostics (OBD II) functional test is an automated function of the BAR-97 analyzer. During the OBD II functional test, the technician is required to connect an interface cable from the BAR-97 analyzer to a Diagnostic Link Connector (DLC) which is located inside the vehicle. Through the DLC, the BAR-97 analyzer automatically retrieves information from the vehicle's on-board computer about the status of the readiness indicators, trouble codes, and the MIL (malfunction indicator light). If the vehicle fails the OBD II functional test, it will fail the overall inspection.

² Clean-plugging is the use of the OBD II readiness monitor status and stored fault code (trouble code) status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that is not in compliance due to a failure to complete the minimum number of self tests, known as monitors, or due to the presence of a stored fault code that indicates an emission control system or component failure.

Date & Time of Inspection	Vehicle Certified	Certificate No.
12. 04/05/2011 17:13 – 17:18	2000 Hyundai Accent/Brio; License No. 6ESH595	OC357043C

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

15. Respondent Eaton's registration is subject to disciplinary action pursuant to Bus. & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized statements which it knew or in the exercise of reasonable care should have known to be untrue or misleading, as follows:

a. Respondent Eaton's technician, Respondent Fakhriev, certified under penalty of perjury on the vehicle inspection reports for vehicles 1 through 10, identified in paragraph 14 above³, that he performed the smog inspections on the vehicles in accordance with all Bureau requirements and that the vehicles had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent conducted the inspections on the vehicles using clean-plugging methods in that he substituted or used a different vehicle(s) during the OBD II functional tests in order to issue smog certificates of compliance for the vehicles, and did not test or inspect the vehicles as required by Health & Saf. Code section 44012.

b. Respondent Eaton's technician, Respondent Fakhriev, certified that vehicles 11 and 12, identified in paragraph 14 above, had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent conducted the inspections on the vehicles using clean-plugging methods in that he substituted or used a different vehicle(s) during the OBD II functional tests in order to issue smog certificates of compliance for the vehicles, and did not test or inspect the vehicles as required by Health & Saf. Code section 44012.

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³ On June 3, 2011, the representative made a field visit at Respondent Eaton's facility and obtained copies of invoices and vehicle inspection reports for vehicles 1 through 10.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Failure to Comply with Regulations Pursuant**
3 **to the Motor Vehicle Inspection Program)**

4 18. Respondent Eaton's smog check station license is subject to disciplinary action
5 pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to
6 comply with provisions of California Code of Regulations, title 16, as follows:

7 a. **Section 3340.35, subdivision (c):** Respondent issued electronic smog certificates of
8 compliance for vehicles 1 through 12, identified in paragraph 14 above, even though the vehicles
9 had not been inspected in accordance with section 3340.42.

10 b. **Section 3340.42:** Respondent failed to conduct the required smog tests on vehicles 1
11 through 12, identified in paragraph 14 above, in accordance with the Bureau's specifications.

12 **FIFTH CAUSE FOR DISCIPLINE**

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

14 19. Respondent Eaton's smog check station license is subject to disciplinary action
15 pursuant to Health & Saf. Code section 44072.2, subdivision (d), in that Respondent committed
16 dishonest, fraudulent or deceitful acts whereby another is injured by issuing electronic smog
17 certificates of compliance for vehicles 1 through 12, identified in paragraph 14 above, without
18 performing bona fide inspections of the emission control devices and systems on the vehicles,
19 thereby depriving the People of the State of California of the protection afforded by the Motor
20 Vehicle Inspection Program.

21 **SIXTH CAUSE FOR DISCIPLINE**

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

23 20. Respondent Fakhriev's technician license is subject to disciplinary action pursuant to
24 Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with
25 section 44012 of that Code, as follows: Respondent failed to perform the emission control tests
26 on vehicles 1 through 12, identified in paragraph 14 above, in accordance with procedures
27 prescribed by the department.

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1 as High St Smog Check. is revoked or suspended, any additional license issued under this chapter
2 in the name of said licensee may be likewise revoked or suspended by the director.

3 25. Pursuant to Health & Saf. Code section 44072.8, if Advanced Emission Specialist
4 Technician License Number EA 630209, issued to Salokhiddin Fakhriev, is revoked or
5 suspended, any additional license issued under this chapter in the name of said licensee may be
6 likewise revoked or suspended by the director.

7 **PRAYER**

8 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged.
9 and that following the hearing, the Director of Consumer Affairs issue a decision:

10 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
11 261712, issued to Eaton Auto Diagnostics, Inc., doing business as High St Smog Check;

12 2. Revoking or suspending any other automotive repair dealer registration issued to
13 Eaton Auto Diagnostics, Inc;

14 3. Revoking or suspending Smog Check, Test Only, Station License Number TC
15 261712, issued to Eaton Auto Diagnostics, Inc., doing business as High St Smog Check;

16 4. Revoking or suspending any additional license issued under Chapter 5 of the Health
17 and Safety Code in the name of Eaton Auto Diagnostics, Inc;

18 5. Revoking or suspending Advanced Emissions Specialist Technician License Number
19 EA 630209, issued to Salokhiddin Fakhriev;

20 6. Revoking or suspending any additional license issued under Chapter 5 of the Health
21 and Safety Code in the name of Salokhiddin Fakhriev;

22 7. Ordering Respondents Eaton Auto Diagnostics, Inc., doing business as High St Smog
23 Check, and Salokhiddin Fakhriev to pay the Director of Consumer Affairs the reasonable costs of
24 the investigation and enforcement of this case, pursuant to Business and Professions Code section
25 125.3;

26 ///

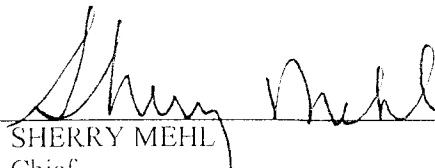
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8. Taking such other and further action as deemed necessary and proper.

DATED:

1/13/12



SHERRY MEHL

Chief

Bureau of Automotive Repair

Department of Consumer Affairs

State of California

Complainant

SF2011202651