

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

In the Matter of the Accusation Against:

SMOG MAN, LLC
dba SMOG MAN
BRIAN ANDREW CARLSEN, Member
JENNIFER LYNN ALLEN, Member
LINDSIE CARLSEN, Member
El Sobrante, CA

Automotive Repair Dealer Registration
No. ARD 256719
Smog Check, Test Only, Station License
No. TC 256719

and

JORGE LUIS CRUZ-JIMENEZ

Advanced Emission Specialist Technician
License No. EA 150956

Respondents.

Case No. 79/11-08

OAH No. 2011070145

DECISION

Without thereby concurring in Legal Conclusion 1, 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 error on page 7, paragraph 2, 4th line, of the Factual Findings of the Proposed Decision is corrected as follows:

The phrase "maintained by the bureau in a such manner" is corrected to read "maintained by the bureau in such a manner."

This Decision shall become effective 3/6/12.

DATED: December 29, 2011


DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

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PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, State of California, Office of Administrative Hearings, heard this matter on November 8, 2011, at Oakland, California.

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

Brian Andrew Carlsen represented Smog Man LLC, himself as well as the other members of the limited liability company.

Jorge Luis Cruz-Jimenez was present at the hearing of this matter, but he was not otherwise represented.

On November 8, 2011, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

Licenses

SMOG MAN LLC

1. On November 19, 2008, the Bureau of Automotive Repair (the bureau) issued Automotive Repair Dealer Registration Number ARD 256719 to respondent Smog Man LLC, with Brian Andrew Carlsen, Jennifer Lynn Allen and Lindsie Carlsen as members of the limited liability company, doing business as Smog Man. At the hearing, evidence showed that the registration expiration date is November 30, 2011. As of the hearing date, the business was located at 3753 San Pablo Dam Road in El Sobrante, California. And the business mailing address was 3650 Maple Avenue, Oakland, CA 94605.

2. On December 23, 2008, the bureau issued Smog Check, Test Only, Station License Number TC 256719 to Smog Man. As of the hearing date, the license expiration date was November 30, 2011, and the station was located at 3753 San Pablo Dam Road in El Sobrante, California.

JORGE LUIS CRUZ-JIMENEZ

3. In 2006, the bureau issued Advanced Emission Specialist (EA) Technician License No. EA 150956 to Jorge Luis Cruz-Jimenez (respondent Cruz-Jimenez). The license expired on October 31, 2011.

VID Data Review – Clean-Plugging

PROGRAM REPRESENTATIVE MATTHEW RODRIGUEZ

4. Bureau Program Representative II(S) Matthew Rodriguez (PR Rodriguez) offered persuasive and credible testimonial evidence at the hearing of this matter.

5. PR Rodriguez provided a detailed and comprehensive overview of several aspects of the bureau's Smog Check Program. And he described in vivid terms the nature and circumstances of the illegal activity known as "clean plugging."

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 Diagnostic, 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 Emissions Inspection System (EIS) automatically retrieves information from the vehicle's on-board computer to determine if the

vehicle's OBD II system is functioning properly. If the vehicle fails the OBD II test, the vehicle 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 monitoring operation, a diagnostic trouble code will be stored in the PCM memory. Through the DLC, the EIS determines if any codes are present in the PCM memory.

There are two types of codes, Type A codes and Type B codes. A Type A code ("hard code") indicates a significant malfunction that will likely lead to elevated emissions. Such a malfunction causes the illumination of the Malfunction Indicator Lamp (MIL), i.e., the "check engine" light comes on. A Type A code results in the vehicle failing the smog check inspection.

Type B codes ("soft codes" or "pending codes") are usually for malfunctions that must be detected during two consecutive monitor cycles before the MIL illuminates. 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 stored and the MIL is illuminated. A pending code for a vehicle is transmitted to the Vehicle Information Database (VID); but, the EIS does not reveal the code to the smog check technician. (A pending code does not necessarily mean there is a problem with the vehicle, and it could be misleading to a technician.)

All OBD II diagnostic trouble codes are five digits long, with one letter followed by four numbers. PCM codes start with the letter P. Most codes are specific to certain manufacturers and vehicle models. 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. (Alldata and Mitchell guides acquire information from vehicle manufacturers.)

6. Following receipt of confidential information that a particular technician's identification number was associated with a pattern of apparent improper smog check servicing of vehicles at the business premises of respondent Smog Man, PR Rodriguez commenced an investigation. In March 2010, bureau PR Rodriguez initiated the investigation of respondent Smog Man after he had personally studied and reviewed information from the bureau's VID. (Information on each smog check inspection performed by a smog check station is transmitted electronically to the VID from the station's BAR97 EIS), a computer-based analyzer.)

During the course of his investigation, PR Rodriguez performed an inspection of records that were generated through smog check operations by personnel associated with

respondent Smog Man. He obtained copies of the smog check vehicle inspection reports for vehicles 1 through 4. The vehicle inspection reports, which include the smog check certificate of compliance, contain the following certification above respondent Cruz-Jimenez's signature: "I certify, under penalty of perjury, under the laws of the State of California, that I performed the inspection in accordance with all bureau requirements, and that the information listed on this vehicle inspection report is true and accurate."

In March 2010, PR Rodriguez performed a detailed review of the VID data for all smog check inspections performed at the premises of respondent Smog Man for the period of April 2009 through May 2009. For the four vehicles listed below, the VID showed that Respondent Cruz-Jimenez performed the inspections and issued the certificates of compliance. Each of the vehicles had one or more OBD II diagnostic trouble codes listed in the VID. The trouble codes, however, were not applicable to that vehicle. Those vehicles, which were found by PR Rodriguez to have been smog tested but which had inapplicable or nonexistent trouble codes, were:

Date and Time of Inspection	Vehicle Certified & License No.	Certificate No.
1. 07/19/2009 11:29 to 11:37	2001 Volvo V70 no license plates	NM172414
2. 12/04/2009 10:52 to 11:11	2003 Chevrolet K3500 Silverado License No. 7S84664	NO847673
3. 03/18/2010 16:31 to 16:41	2000 Chevrolet K1500 Silverado 4WD License No. 6F21332	NS213928
4. 04/24/2010 8:30 to 8:41	2000 Ford F250 SRW Super Duty License No. 7T691070	NS661150

7. PR Rodriguez reasonably concluded that respondent Cruz-Jimenez performed at respondent Smog Man's business premises the smog check inspections on each of the four vehicles using a different vehicle during the OBD II test. His acts constituted an unlawful practice known as "clean-plugging."

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 a failure to complete the minimum number of monitoring cycles, or due to the presence of a stored fault code that indicates a failure of an emission control system or component. After entering vehicle information into the EIS 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 BAR97 EIS into the DLC of a vehicle believed to have a properly functioning OBD II system.

8. PR Rodriguez compared necessary data with pending codes in the bureau's records for vehicles that underwent smog checks at respondent Smog Man. He found that the abnormalities regarding inapplicable pending codes for vehicle all came from the smog inspections performed by respondent Cruz-Jimenez.

For vehicles 1 through 4 listed in Finding 6, the VID shows the same diagnostic trouble code (called a "pending code" in the VID). The four vehicles were each certified with various pending codes, which were stored in the subject vehicles' memory of the PCM (the onboard computer for a vehicle, which is titled as the Power Train Control Module) while the OEM service information showed the subject vehicle did not support the pending code that is stored in the PCM memory. From these findings, PR Rodriguez determined that the vehicles that received smog certificates from respondent Smog Man, through the acts of respondent Cruz-Jimenez, were not tested during the OBD II functional test; but, rather another vehicle was used to acquire the clearance for a smog certificate. The determination led PR Rodriguez to the conclusion that respondent Cruz-Jimenez had engaged in clean plugging acts.

In particular, PR Rodriguez established the following as to the four vehicles:

- i. July 19, 2009 Clean Plug- 2001 Volvo V70 automobile

On July 19, 2009, respondent Cruz-Jimenez at the premises of respondent Smog Man tested a 2001 Volvo V70 and issued a smog certificate. The BAR 97 Test Detail record shows code P3637 was stored in the PCM memory at the time of certification. Reference service information shows code P3637 does not apply to a 2001 Volvo V70.

- ii. December 4, 2009 Clean Plug – 2003 Chevrolet K3500 Silverado truck

On December 4, 2009, respondent Cruz-Jimenez at the premises of respondent Smog Man tested a 2003 Chevrolet K3500 Silverado 4WD and issued a smog certificate. The BAR 97 Test Detail record shows code P2801 was stored in the PCM memory at the time of certification. Reference service information shows code P2801 does not apply to a 2003 Chevrolet K3500 Silverado 4WD.

- iii. March 18, 2010 Clean Plug – 2000 Chevrolet K1500 Silverado 4WD pickup truck

On March 18, 2010, respondent Cruz-Jimenez at the premises of respondent Smog Man tested a 2000 Chevrolet K1500 Silverado 4WD and issued a smog certificate. The BAR 97 Test Detail record shows code P1294 was stored in the PCM memory at the time of certification. Reference service information shows code P1294 does not apply to a 2000 Chevrolet K1500 Silverado 4WD.

iv. April 24, 2010 Clean Plug – 2000 Ford F250 SRW Super Duty pickup truck

On April 24, 2010, respondent Cruz-Jimenez at the premises of respondent Smog Man tested a 2000 Ford F250 SRW Super Duty and issued a smog certificate. The BAR 97 Test Detail record shows codes P0300 and P0420 were stored in the PCM memory at the time of certification. Reference service information shows codes P0300 and P0420 do not apply to a 2000 Ford F250 SRW Super Duty.

9. The weight of the evidence establishes that through the premises of respondent Smog Man, respondent Cruz-Jimenez issued four fraudulent smog certificates of compliance by way of clean plugging techniques. The four unlawfully produced certificates pertained to four vehicles that were not tested in accordance with the California Health and Safety Code.

BUREAU SENIOR ENGINEER DAVID LEWIS

10. Mr. David Lewis, a Senior Engineer who has worked for the bureau for 27 years, presented persuasive and compelling evidence at the hearing. Mr. Lewis has written the electronic specifications and some code for the BAR-97 EIS analyzer. He supervises the unit that develops smog check equipment. Mr. Lewis is also the manager of the Next Generation Electronic Transmission system that connects all of the state's smog check analyzers to a central database. And Mr. Lewis is the Chair of the Statewide On Board Diagnostic Committee and the manager in charge of development and implementation of California's future OBD testing systems.

Mr. Lewis explained the process by which 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. Mr. Lewis showed that it is not possible for the analyzer to transmit a fault code for a different vehicle than the vehicle that is plugged in. If the interface cable is pulled out of a vehicle before the test is complete, the fault codes will not carry over to the next vehicle tested. OBD II data from each vehicle tested is stored separately in the analyzer's hard drive until transmitted to the VID. If the interface cable is not plugged in, the analyzer will indicate that it cannot communicate with the vehicle's computer. If there is a problem with the on board diagnostic system of the vehicle, it will not communicate with the BAR97 analyzer and the vehicle will fail the test.

Mr. 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 has a particular diagnostic trouble code, the computer identifies that result as being out of the ordinary and, then, the computer triggers an investigation. Mr. 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.

Mr. Lewis thoroughly refuted respondent Smog Man's assertion that phantom pending codes exist so as to lead to aberrant findings that falsely impute wrong doing to an otherwise conscientious smog check techniques. And he dispelled the notion that a master list of "trouble codes" is maintained by the bureau in a such manner as to distort entries made by a smog check technician.

Mr. Lewis noted the comprehensive nature of the analysis performed by PR Rodriguez. Mr. Lewis confirmed the findings and determinations made by PR Rodriguez.

Evidence by Respondent Smog Man

11. Respondent Smog Man's evidence consisted only of testimony from a business owner and member of the limited liability company in the person of Mr. Brian Andrew Carlsen. However, Mr. Carlsen offered no competent evidence that diminished, or refuted the evidence presented by complainant in support of the allegations set forth in the accusation in this matter.

12. Mr. Carlsen denies any knowledge of the alleged clean-plugging by any smog technician employed by respondent Smog Man. Mr. Carlsen views respondent Cruz-Jimenez as an honest, reliable and devoted smog check technician. He does not think respondent Cruz-Jimenez clean-plugged any vehicles at his shop.

Mr. Carlsen proclaimed that no manager, officer or owner of respondent Smog Man, ever directed or allowed respondent Cruz-Jimenez to clean-plug vehicles during smog inspections.

13. Mr. Carlsen is employed full time for Lockheed Martin in a federal government contract section. He and his family members purchased the smog check station, from which respondent Smog Man is operated, as an investment.

Neither Mr. Carlsen nor any member of the limited liability company, which owns respondent Smog Man, are present full time at the smog check facility. The business owners rely upon the integrity and professionalism of the staff smog technicians to assure that the law and regulations of the bureau are followed.

Matters in Mitigation regarding Respondent Smog Man

14. Mr. Carlsen and his family members purchased the business operations, which is now known as Smog Man, in 2008. His father and wife are integral members in the company's ownership. Mr. Carlsen handles the business aspects of the business, including financial matters, advertising and hiring employees. But he is not present at the smog check station during most times when technicians perform smog check services.

Mr. Carlsen is proud that respondent Smog Man has gained a good reputation in the local community. A local business rating bureau has given a "five-star rating" to respondent Smog Man as an outstanding business operation in El Sobrante, California..

When he and his fellow company members purchased the business in November 2008, the company "inherited" two employees, including respondent Cruz-Jimenez. From the outset of operations for Smog Man, Mr. Carlsen emphasized to employees a requirement that they must adhere to the bureau's regulations and law regarding the provision of smog check services.

Mr. Carlsen has known respondent Cruz-Jimenez over the past three years. Mr. Carlsen has never seen or heard about respondent Cruz-Jimenez engaging in a dishonest activity. He continues to support the smog technician as being a law-abiding individual.

From the inception of the business, Smog Man has had only a single smog technician, namely respondent Cruz-Jimenez. Recently, another technician has been hired to work for Smog Man. Hence at the time of the hearing, Smog Man employed two smog check technicians.

Over the period of April 2009 through May 2010, respondent Smog Man has performed approximately 3,600 smog check inspections.

In light of the matters that were revealed as a result of the accusation in this matter, Mr. Carlsen is willing to assure that the managing members and the employees of Smog Man undergo training in the law and regulations pertaining to smog check inspections.

Declination by Respondent Cruz-Jimenez

15. Respondent Cruz-Jimenez declined to offer testimonial evidence at the hearing of this matter. Due to his refusal to provide testimony under oath, an adverse inference may be made regarding his declination to render testimony at the hearing of this matter.

Matter in Aggravation regarding Respondent Cruz-Jimenez

16. On August 14, 2008, the bureau issued Citation No. M09-0161 against respondent Cruz-Jimenez for violation of Health and Safety Code section 44032 (Directive That a Qualified Technician Perform Tests of Emission Control Systems and Devices in Accordance with Health & Saf. Code, § 44012) and California Code of Regulations, title 16, section 3340.30, subdivision (a) (Directive that a Qualified Technician Inspect, Test and Repair Vehicles in Accordance with Health & Saf. Code, §§ 44012, 44035 as well as Cal. Code of Regs., tit. 16, § 3340.40). The bureau had detected respondent Cruz-Jimenez had issued on August 5, 2008, a certificate of compliance to an undercover vehicle that was maladjusted so as to reflect a missing positive crankcase ventilation system. By reason of the citation, respondent Cruz-Jimenez was required to complete an eight-hour training course

and to submit proof of completion to the bureau within 30 days of his receipt of the citation. Respondent Cruz-Jimenez complied with the citation and completed the training program on October 17, 2008.

Costs of Investigation and Prosecution

17. Complainant seeks recovery of the costs of investigation and prosecution. The recover of costs sought is argued to be reasonable in an amount of \$13,618.97.

18. The costs are divided into the cost of investigation by the bureau and the costs of prosecution by the Attorney General' Office. First, Bureau Program Manager I Timothy Corcoran prepared a declaration, dated October 31, 2011. The costs of investigation involved two program representatives, which included PR Rodriguez, who devoted more than 74 hours gathering data and analyzing the materials. The total cost of investigation is \$6,078.97. That amount is reasonable and may be recovered from respondents by the bureau.

Second, complainant seeks recovery of the costs of attorney services through the Department of Justice as cost of prosecution. A declaration, dated November 3, 2011, by Deputy Attorney General Bagley, is accompanied by a printout of time by various personnel within the Department of Justice for this matter. The sum of prosecution cost as set out on the attachment to the declaration is \$9,052.50. In the declaration, the deputy attorney general represents that \$7,540 has been billed to the bureau. But both amounts regarding fees by deputy attorneys general must be viewed to be excessive and not reasonable. The record shows that for the period of October 27, 2011, through November 2, 2011, Deputy Attorney General Bagley prepared for the hearing of this matter and engaged in settlement negotiations. She amassed 15.75 hours as billable time in this matter. The resultant bill was \$2,677.50. The billable time by Ms. Bagley and resultant cost of prosecution are deemed as reasonable. And respondents are obligated to pay that amount. Another deputy attorney general was assigned to the matter for the period of July 1, 2011, through October 28, 2011. That deputy attorney general generated for Fiscal Year 2011, 19.25 hours for which a cost of \$3,272.50 was billed to complainant. Also during Fiscal Year 2011, that other deputy attorney general attended to the matter from July 19, 2010 through June 30, 2011, so as to record an additional 21.75 hours, which resulted in a bill of \$3,697.50. In that the other deputy attorney general neither made an appearance in this matter nor contributed to the settlement of this matter, the sum of the billings by that other deputy attorney general cannot not be found to be reasonable. The amount of costs of prosecution must be set at \$4,410 as the amount of money that may be recovered as reasonable costs of prosecution. (The enforcement cost includes the entirety of the value of time by Deputy Attorney General Bagley and one-quarter of the value of time billed by the other deputy attorney general.)

19. Respondent Smog Man, through Mr. Carlsen, did not offer evidence that the business has such financial hardship that it cannot pay the reasonable amount of the cost of prosecution.

20. In light of factual findings above, the reasonable costs of investigation and prosecution, which respondents are obligated to pay, is set at \$10,488.97.

LEGAL CONCLUSIONS

Standard of Proof

1. “Clear and convincing proof to a reasonable certainty” is the standard of proof to be applied to facts in dispute under the Accusation from which disciplinary action may result against the registration held by a respondent. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

“Clear and convincing evidence” means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. “Clear and convincing evidence” is a higher standard of proof than proof by “a preponderance of the evidence.” (*CACI*¹ 201.) “Clear and convincing evidence” requires a finding of high probability for the propositions advanced in an accusation against a targeted respondent licensee. It must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700.) And, the standard of proof known as clear and convincing evidence is required where particularly important individual interests or rights are at stake. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.)

The Factual Findings and Order, herein, rest upon proof by clear and convincing evidence to a reasonable certainty that shows respondents’ acts and omissions in the matters recorded herein.

Respondent Smog Man LLC is Subject to Agency Action

2. In light of the well-established rule of nondelegable duties of a licensee, respondent Smog Man must be held responsible for the acts and omissions of respondent Cruz-Jimenez, and the limited liability company is subject to the causes for discipline, which result from the severe misconduct that occurred on the premises of the licensee.

The rule nondelegable duties, which is similar to the doctrine of *respondeat superior*, advances that a “licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for [the employees’] conduct in the exercise of his license.” (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295.) “By virtue of the ownership of a . . . license such owner has a responsibility to see to it that the license is not used in violation of law.” (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 360.)

¹ Judicial Council of California, Civil Jury Instructions.

In citing Civil Code section 2330, the court in the *Ford Dealers Association* case commented that: “The settled rule that licensees can be held liable for the acts of their employees comports with the general rule governing principal-agent liability. ‘An agent represents his principal for all purposes within the scope of his actual or ostensible authority.’ (Civil Code section 2330.)” (*Ford Dealers Assn. v. DMV, supra*, 32 Cal.3d at p. 360.)

The rule of nondelegable duties of licensees is of common law derivation. (*California Assn. of Health Facilities v. Department of Health Services* 16 Cal.4th, *supra*, at p. 296; *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 251.) The essential justification for the rule is to ensure accountability of licensees so as to safeguard the public health, safety or welfare. More importantly, if a license, such as respondent Smog Man LLC, were not liable for the acts and omissions of their agents and independent contractors, “effective regulation would be impossible. [The licensee] could contract away the daily operations of his business to independent contractors and become immune to disciplinary action by the licensing authority.” (*California Assn. of Health Facilities v. Department of Health Services, supra*, 16 Cal.4th at p. 296.) Such result would undermine effective law enforcement and regulatory oversight. And, the concept that a licensee will be held liable for the acts of agents is one that has been applied to situations where the agent is an independent contractor or is an employee. (See *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 713; *Rob-Mac, Inc. v. Dept. of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797-798.)

Respondent Smog Man, through its members, officers and directors, was obligated to supervise and control the activities and functions of the smog check technicians, who were associated with the Smog Check Station. Respondent Smog Man and its members must bear full responsibility for the acts and omissions of the corporation’s employees, especially respondent Cruz-Jimenez.

Respondent Smog Man LLC

FIRST CAUSE FOR DISCIPLINE: UNTRUE OR MISLEADING STATEMENTS

3. Cause for discipline of the automotive repair dealer registration issued to Smog Man LLC exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that respondent Smog Man, through its employee respondent Cruz-Jimenez, made knowingly untrue or misleading statements by certifying that each of the four vehicles listed in Finding 6 had been properly inspected and found to be in compliance with applicable laws and regulations.

SECOND CAUSE FOR DISCIPLINE: FRAUD

4. Cause for discipline of the automotive repair dealer registration issued to Smog Man LLC exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), in that respondent Smog Man, through its employee respondent Cruz-Jimenez, engaged in fraudulent conduct by issuing electronic certificates of compliance for

the four vehicles listed in Finding 6 without performing bona fide smog inspections, to the detriment of the people of the state of California.

THIRD CAUSE FOR DISCIPLINE: VIOLATIONS OF THE MOTOR VEHICLE INSPECTION PROGRAM

5. Cause for discipline of the smog check station license issued to Smog Man LLC exists pursuant to Health and Safety Code section 44072.2, subdivision (a), in that, through its employee respondent Cruz-Jimenez, it failed to comply with the following provisions of the Health and Safety Code pertaining to the Motor Vehicle Inspection Program:

- a. Section 44012: failing to ensure that emission control tests were performed on the four vehicles listed in Finding 6 in accordance with bureau procedures.
- b. Section 44015: issuing electronic certificates of compliance for the four vehicles listed in Finding 6 without proper testing and inspection.

FOURTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS UNDER THE MOTOR VEHICLE INSPECTION PROGRAM

6. Cause for discipline of the smog check station license issued to Smog Man LLC exists pursuant to Health and Safety Code section 44072.2, subdivision (c), in that, through its employee respondent Cruz-Jimenez, it failed to comply with provisions of the California Code of Regulations, title 16, as follows:

- a. Section 3340.24, subdivision (c): Respondent Smog Man through its employee respondent Cruz-Jimenez falsely or fraudulently issued electronic smog certificates of compliance for the four vehicles listed in Finding 6.
- b. Section 3340.35, subdivision (c): Respondent Smog Man through its employee respondent Cruz-Jimenez issued electronic smog certificates of compliance for the four vehicles listed in Finding 6 without inspecting them in accordance with section 3340.42.
- c. Section 3340.42: Respondent Smog Man failed to ensure that the required smog tests were conducted on the four vehicles listed in Finding 6 in accordance with the bureau's specifications.

FIFTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT

7. Cause for discipline of the smog check station license issued to Smog Man LLC exists pursuant to Health and Safety Code section 44072.2, subdivision (d), in that, respondent Smog Man through its employee respondent Cruz-Jimenez, engaged in acts of dishonesty, fraud or deceit by issuing electronic certificates of compliance for the four

vehicles listed in Finding 6 without performing bona fide smog inspections, to the detriment of the people of the state of California.

Respondent Jorge Luis Cruz-Jimenez

SIXTH CAUSE FOR DISCIPLINE: VIOLATIONS OF THE MOTOR VEHICLE INSPECTION PROGRAM

8. Cause for discipline of the technician license issued to respondent Cruz-Jimenez exists pursuant to Health and Safety Code section 44072.2, subdivision (a), in that he failed to comply with the following provisions of the Health and Safety Code pertaining to the Motor Vehicle Inspection Program:

- a. Section 44012: failing to perform emission control tests on the four vehicles listed in Finding 6 in accordance with bureau procedures.
- b. Section 44059: willfully making false entries on the vehicle inspection reports for the four vehicles listed in Finding 6.

SEVENTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS UNDER THE MOTOR VEHICLE INSPECTION PROGRAM

9. Cause for discipline of the technician license issued to respondent Cruz-Jimenez exists pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

- a. Section 3340.24, subdivision (c): respondent falsely or fraudulently issued electronic certificates of compliance for the four vehicles listed in Finding 6.
- b. Section 3340.30, subdivision (a): respondent failed to inspect and test the vehicles listed in Finding 6 in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.
- c. Section 3340.42: respondent failed to conduct the required smog tests and inspections on the four vehicles listed in Finding 6 in accordance with the bureau's specifications.

EIGHTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT

10. Cause for discipline of the technician license issued to respondent Cruz-Jimenez exists pursuant to Health and Safety Code section 44072.2, subdivision (d), in that he engaged in acts of dishonesty, fraud or deceit by issuing electronic certificates of compliance for the four vehicles listed in Finding 6 without performing bona fide smog inspections, to the detriment of the people of the state of California.

Discipline of Other Licenses

11. Under Health and Safety Code section 44072.8, the suspension or revocation of a smog check station license or smog technician license constitutes cause to suspend or revoke other related licenses held by the disciplined licensee. Accordingly, if the smog check station license issued to Smog Man is disciplined, its automotive repair dealer license may also be disciplined.

12. Business and Professions Code section 9884.7, subdivision (c), provides that “the director may suspend, revoke, or place on probation the registration for all places of business operated in this state by an automotive repair dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it.”

Appropriate Discipline

13. Respondent Cruz-Jimenez’s misconduct in clean-plugging four vehicles reflects a fundamental lack of honesty, integrity and commitment to the goals of the smog check program. It would be contrary to the public interest to allow him to keep his technician license.

Although it was not established that any of the limited liability company’s members possessed knowledge regarding the unlawful clean-plugging activity, the fact that respondent Smog Man’s employee was able to repeatedly commit these violations indicates a lack of oversight and appropriate procedural safeguards by Mr. Carlsen and his business associates as the smog check station licensees. But Mr. Carlsen has agreed to implement a plan to prevent future violations by other technicians he may employ. It would not be contrary to the public interest to allow respondent Smog Man to retain its smog check station license on a probationary basis.

And because the violations involved smog check inspections and not general auto repair, and it was not established that Mr. Carlsen or his business associates knew about respondent Cruz-Jimenez’s misconduct, outright revocation of respondent Smog Man’s auto repair dealer registration is not warranted. Hence it would not be contrary to the public interest to allow respondent Smog Man to keep its auto repair dealer registration on a probationary basis.

Because of the lack of knowledge on the part of the members of the limited liability company that comprises respondent Smog Man regarding the unlawful acts on the part of its employee, coupled with the expressed commitment to institute greater controls in the smog check process, along with the fact of the current stagnant economy, a period of actual suspension of the operations of the smog check, test only, station would not meet the ends of justice or public protection. Hence the order below does not include a period of suspension for operations of either the ARD or the smog check, test only, station license.

Costs of Investigation and Enforcement

14. Complainant has requested that respondents be ordered to pay the bureau the costs of investigation and enforcement of the case. Business and Professions Code section 125.3 provides that respondents may be ordered to pay the bureau “a sum not to exceed the reasonable costs of the investigation and enforcement of the case.”

The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be weighed in a licensing agency setting about to recover costs of investigation and prosecution. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee’s subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. As set out in Factual Finding 19, the scope of the prosecution and resultant costs are excessive and unreasonable. Moreover, in that respondent Cruz-Jimenez is no longer to be employed for the immediate future and in that respondent Smog Man is to be a going concern, and as there is no evidence that militates in respondent Smog Man’s favor regarding its financial ability to pay a cost recovery award, the entire sum of the reasonable costs is to be borne by respondent Smog Man. The reasonable cost of investigation and prosecution is set at \$10,488.97. Respondent Smog Man is to pay the entire sum of the costs.

ORDER

1. Advanced Emission Specialist (EA) Technician License No. EA 150956 issued to respondent Jorge Luis Cruz-Jimenez, is revoked pursuant to Legal Conclusions 8, 9 and 10, separately and for all of them.

2. Smog Check, Test Only, Station License Number TC 256719 issued to Smog Man LLC, doing business as Smog Man, with company members being Brian Andrew Carlsen, Jennifer Lynn Allen and Lindsie Carlsen, is revoked pursuant to Legal Conclusions 5, 6 and 7, separately and for all of them. However, the revocation of the Smog Check, Test Only, Station License is stayed for five (5) years, during which time respondent Smog Man LLC and its members shall be subject to the following terms and conditions of probation:

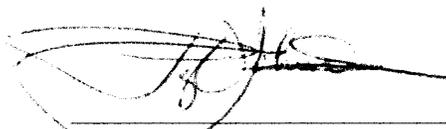
- A. Respondent shall comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.
- B. Respondent or respondent’s authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

- C. Within 30 days of the effective date of this decision, respondent shall report any financial interest which he has in any other business required to be registered pursuant to Business and Professions Code section 9884.6.
- D. Respondent shall pay the bureau's actual and reasonable costs of prosecution of this matter in the amount of \$10,488.97. This amount shall be paid to the bureau within 60 days of the effective date of this decision, unless the bureau, upon a request from respondent, allows payment to be made in installments. If the total amount of \$10,488.97 has not been paid at the end of the five-year term of probation, probation shall be extended until full payment has been made.
- E. Respondent shall provide bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.
- F. If an accusation is filed against respondent during the term of probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter until the final decision on the accusation, and the period of probation shall be extended until said decision.
- G. Should the Director of Consumer Affairs determine that respondent has failed to comply with the terms and conditions of probation, the department may, after giving notice and an opportunity to be heard, suspend or revoke the registration.

3. Automotive Repair Dealer Registration Number ARD 245548 issued to respondent Smog Man LLC, doing business as Smog Man, is permanently invalidated pursuant to Legal Conclusions 3 and 4, separately and for both of them. However, the permanent invalidation is stayed for a five (5) year period, during which time respondent shall be subject to the same terms and conditions of probation set forth in paragraph 2 of this Order.

4. The automotive repair dealer registration of any place of business operated by respondent Smog Man LLC, or Brian Andrew Carlsen, Jennifer Lynn Allen or Lindsie Carlsen, other than Smog Man, shall be subject to the same terms and conditions of probation set forth in paragraph 2 of this Order.

DATED: December 7, 2011



PERRY O. JOHNSON
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 Accusation Against:

Case No. 79/11-08

13 **SMOG MAN LLC,**
14 **dba SMOG MAN**
15 **BRIAN ANDREW CARLSEN, MEMBER**
16 **JENNIFER LYNN ALLEN, MEMBER**
17 **LINDSIE CARLSEN, MEMBER**
3753 San Pablo Dam Road
El Sobrante, CA 94803
Automotive Repair Dealer Reg. No. ARD 256719
Smog Check, Test Only, Station License No. TC
256719

A C C U S A T I O N

SMOG CHECK

18 **and**

19 **JORGE LUIS CRUZ-JIMENEZ**
1485 Frances Road
20 San Pablo, CA 94806
Advanced Emission Specialist Technician
21 License No. EA 150956

22 Respondents.

23
24 Complainant alleges:

25 **PARTIES**

26 1. Sherry Mehl ("Complainant") brings this Accusation solely in her official capacity as
27 the Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

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

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

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

7 **COST RECOVERY**

8 13. Bus. & Prof. Code section 125.3 provides, in pertinent part, that a Board may request
9 the administrative law judge to direct a licentiate found to have committed a violation or
10 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
11 and enforcement of the case.

12 **VID DATA REVIEW**

13 14. In or about March 2010, a representative of the Bureau initiated an investigation
14 against Respondent Smog Man and conducted a detailed review of VID (vehicle information
15 database) data for all smog inspections performed at Respondent's facility for the period of April
16 2009 through May 2010. The representative found that the four vehicles identified below
17 recorded certain diagnostic trouble codes (hereinafter "code") during the OBD II tests¹. The
18 representative obtained information indicating that none of these codes were applicable to the
19 vehicles. The VID data also showed that Respondent Cruz-Jimenez had performed the
20 inspections on the vehicles.

21 15. The Bureau concluded that Respondent Cruz-Jimenez performed the smog
22 inspections on the vehicles using a different vehicle during the OBD II tests, a method known as

23
24 ¹ The On Board Diagnostics (OBD II) functional test is an automated function of the
25 BAR-97 analyzer. During the OBD II functional test, the technician is required to connect an
26 interface cable from the BAR-97 analyzer to a Diagnostic Link Connector (DLC) which is
27 located inside the vehicle. Through the DLC, the BAR-97 analyzer automatically retrieves
28 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.

1 "clean plugging",² resulting in the issuance of fraudulent certificates of compliance for the
2 vehicles.

Date & Time of Inspection	Vehicle Certified & License No.	Certificate No.
1. 07/19/2009 11:29 - 11:37	2001 Volvo V70; no plates	NM172414C
2. 12/04/2009 10:52 - 11:11	2003 Chevrolet K3500 Silverado 4WD; License No. 7S84664	NO847673C
3. 03/18/2010 16:31 - 16:41	2000 Chevrolet K1500 Silverado 4WD; License No. 6F21332	NS213928C
4. 04/24/2010 08:30 - 08:41	2000 Ford F250 SRW Super Duty; License No. 7T69107	NS661150C

9
10 **FIRST CAUSE FOR DISCIPLINE**

11 **(Untrue or Misleading Statements)**

12 16. Respondent Smog Man's registration is subject to disciplinary action pursuant to Bus.
13 & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized
14 statements which it knew or in the exercise of reasonable care should have known to be untrue or
15 misleading, as follows: Respondent Smog Man's technician, Respondent Cruz-Jimenez, certified
16 that vehicles 1 through 4, identified in paragraph 15 above, had passed inspection and were in
17 compliance with applicable laws and regulations. In fact, Respondent Cruz-Jimenez conducted
18 the inspections on the vehicles using clean-plugging methods in that he substituted or used a
19 different vehicle(s) during the OBD II functional tests in order to issue smog certificates of
20 compliance for the vehicles, and did not test or inspect the vehicles as required by Health & Saf.
21 Code section 44012.

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23 ///

24 ///

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

1 **FOURTH CAUSE FOR DISCIPLINE**

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

4 19. Respondent Smog Man'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 3340.24, subdivision (c)**: Respondent falsely or fraudulently issued
8 electronic smog certificates of compliance for vehicles 1 through 4, identified in paragraph 15
9 above.

10 b. **Section 3340.35, subdivision (c)**: Respondent issued electronic smog certificates of
11 compliance for vehicles 1 through 4, identified in paragraph 15 above, even though the vehicles
12 had not been inspected in accordance with section 3340.42.

13 c. **Section 3340.42**: Respondent failed to ensure that the required smog tests were
14 conducted on vehicles 1 through 4, identified in paragraph 15 above, in accordance with the
15 Bureau's specifications.

16 **FIFTH CAUSE FOR DISCIPLINE**

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

18 20. Respondent Smog Man's smog check station license is subject to disciplinary action
19 pursuant to Health & Saf. Code section 44072.2, subdivision (d), in that Respondent committed
20 dishonest, fraudulent or deceitful acts whereby another is injured by issuing electronic smog
21 certificates of compliance for vehicles 1 through 4, identified in paragraph 15 above, without
22 performing bona fide inspections of the emission control devices and systems on the vehicles,
23 thereby depriving the People of the State of California of the protection afforded by the Motor
24 Vehicle Inspection Program.

25 **SIXTH CAUSE FOR DISCIPLINE**

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

27 21. Respondent Cruz-Jimenez's technician license is subject to disciplinary action
28 pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to

1 comply with section 44012 of that Code in a material respect, as follows: Respondent failed to
2 perform the emission control tests on vehicles 1 through 4, identified in paragraph 15 above, in
3 accordance with procedures prescribed by the department.

4 **SEVENTH CAUSE FOR DISCIPLINE**

5 **(Failure to Comply with Regulations Pursuant**
6 **to the Motor Vehicle Inspection Program)**

7 22. Respondent Cruz-Jimenez's technician license is subject to disciplinary action
8 pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to
9 comply with provisions of California Code of Regulations, title 16, as follows:

10 a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued
11 electronic smog certificates of compliance for vehicles 1 through 4, identified in paragraph 15
12 above.

13 b. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test vehicles 1
14 through 4, identified in paragraph 15 above, in accordance with Health & Saf. Code sections
15 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

16 c. **Section 3340.42:** Respondent failed to conduct the required smog tests on vehicles 1
17 through 4, identified in paragraph 15 above, in accordance with the Bureau's specifications.

18 **EIGHTH CAUSE FOR DISCIPLINE**

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

20 23. Respondent Cruz-Jimenez's technician license is subject to disciplinary action
21 pursuant to Health & Saf. Code section 44072.2, subdivision (d), in that Respondent committed
22 dishonest, fraudulent, or deceitful acts whereby another is injured by issuing electronic smog
23 certificates of compliance for vehicles 1 through 4, identified in paragraph 15 above, without
24 performing bona fide inspections of the emission control devices and systems on the vehicles,
25 thereby depriving the People of the State of California of the protection afforded by the Motor
26 Vehicle Inspection Program.

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1 **MATTERS IN AGGRAVATION**

2 24. To determine the degree of discipline, if any, to be imposed on Respondent Cruz-
3 Jimenez, Complainant alleges as follows: On or about August 14, 2008, the Bureau issued
4 Citation No. M09-0161 against Respondent for violations of Health & Saf. Code section 44032
5 (qualified technicians shall perform tests of emission control systems and devices in accordance
6 with Health & Saf. Code section 44012) and California Code of Regulations, title 16, section
7 (hereinafter "Regulation") 3340.30, subdivision (a) (qualified technicians shall inspect, test, and
8 repair vehicles in accordance with Health & Saf. Code sections 44012 and 44035 and Regulation
9 3340.42). On or about August 5, 2008, Respondent issued a certificate of compliance to a Bureau
10 undercover vehicle with a missing positive crankcase ventilation system. Respondent was
11 directed to complete an 8 hour training course, with proof of completion submitted to the Bureau
12 within thirty (30) days from receipt of the citation. Respondent complied with the citation and
13 completed the required training on October 17, 2008.

14 **OTHER MATTERS**

15 25. Pursuant to Bus. & Prof. Code section 9884.7, subdivision (c), the Director may
16 refuse to validate, or may invalidate temporarily or permanently, the registrations for all places of
17 business operated in this state by Respondent Smog Man LLC, doing business as Smog Man,
18 upon a finding that Respondent has, or is, engaged in a course of repeated and willful violations
19 of the laws and regulations pertaining to an automotive repair dealer.

20 26. Pursuant to Health & Saf. Code section 44072.8, if Smog Check, Test Only, Station
21 License Number TC 256719, issued to Respondent Smog Man LLC, doing business as Smog
22 Man, revoked or suspended, any additional license issued under this chapter in the name of said
23 licensee may be likewise revoked or suspended by the director.

24 27. Pursuant to Health & Saf. Code section 44072.8, if Advanced Emission Specialist
25 Technician License Number EA 150956, issued to Jorge Luis Cruz-Jimenez, is revoked or
26 suspended, any additional license issued under this chapter in the name of said licensee may be
27 likewise revoked or suspended by the director.

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PRAYER

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

1. Temporarily or permanently invalidating Automotive Repair Dealer Registration Number ARD 256719, issued to Smog Man LLC, doing business as Smog Man;
2. Temporarily or permanently invalidating any other automotive repair dealer registration issued to Smog Man LLC;
3. Revoking or suspending Smog Check, Test Only, Station License Number TC 256719, issued to Smog Man LLC, doing business as Smog Man;
4. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Smog Man LLC;
5. Revoking or suspending Advanced Emission Specialist Technician License Number EA 150956, issued to Jorge Luis Cruz-Jimenez;
6. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Jorge Luis Cruz-Jimenez;
7. Ordering Respondents Smog Man LLC, doing business as Smog Man, and Jorge Luis Cruz-Jimenez to pay the Director of Consumer Affairs the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
8. Taking such other and further action as deemed necessary and proper.

DATED: 8/10/10



SHERRY MEHL
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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