

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

In the Matter of the Accusation/Petition to Revoke
Probation Against:

Case No. 79/14-73

**SMOG MAN, LLC, BRIAN CARLSEN;
LINDSIE CARLSEN, AND
JENNIFER ALLEN, MEMBERS**
3753 San Pablo Dam Rd.
El Sobrante, CA 94803

Mailing Address:
3650 Maple Avenue
Oakland, CA 94602

Automotive Repair Dealer Registration
Number ARD 256719
Smog Check-Test Only Station License
Number TC 256719

BENJAMIN ALBERTO RODRIGUEZ
452 Sheryl Drive
San Pablo, CA 94806

Smog Check Inspector License Number
EO 632641
Smog Check Repair Technician License
Number EI 632641 (formerly Advanced
Emissions Technician License Number
EA 632641)

Respondents.

DECISION

The attached Stipulated Revocation of License and Order as to Respondent Smog Man Only is hereby accepted and adopted as the Decision of the Director of the Department of Consumer Affairs in the above-entitled matter only as to respondent Smog Man, Automotive Repair Dealer Registration Number ARD 256719, and Smog Check Test Only Station License Number TC 256719.

This Decision shall become effective

July 17, 2014

DATED: June 26, 2014



DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

1 KAMALA D. HARRIS
Attorney General of California
2 DIANN SOKOLOFF
Supervising Deputy Attorney General
3 SHANA A. BAGLEY
Deputy Attorney General
4 State Bar No. 169423
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2129
Facsimile: (510) 622-2270
7 *Attorneys for Complainant*

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

11 In the Matter of the Accusation/Petition to
12 Revoke Probation Against:

Case No. 79/14-73

13 **SMOG MAN, LLC, BRIAN CARLSEN;**
14 **LINDSIE CARLSEN, AND JENNIFER**
ALLEN, MEMBERS
15 **3753 SAN PABLO DAM RD.**
EL SOBRANTE, CA 94803

STIPULATED REVOCATION OF
LICENSE AND ORDER AS TO
RESPONDENT SMOG MAN ONLY

16 **MAILING ADDRESS:**
17 **3650 MAPLE AVENUE**
18 **OAKLAND, CA 94602**

19 **AUTOMOTIVE REPAIR DEALER**
20 **REGISTRATION NUMBER ARD256719**
21 **SMOG CHECK-TEST ONLY STATION LICENSE**
NUMBER TC256719

22 **BENJAMIN ALBERTO RODRIGUEZ**
23 **452 SHERYL DRIVE**
SAN PABLO, CA 94806

24 **SMOG CHECK INSPECTOR LICENSE NUMBER**
25 **EO632641**
26 **SMOG CHECK REPAIR TECHNICIAN LICENSE**
27 **NUMBER EI632641**
(FORMERLY ADVANCED EMISSIONS
TECHNICIAN LICENSE NUMBER EA632641)

28 Respondents.

1
2 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
3 entitled proceedings that the following matters are true:

4 **PARTIES**

5 1. Patrick Dorais (Complainant) is the Chief of the Bureau of Automotive Repair. He
6 brought this action solely in his official capacity and is represented in this matter by Kamala D.
7 Harris, Attorney General of the State of California, by Shana A. Bagley, Deputy Attorney
8 General.

9 2. Respondent Smog Man LLC, Brian Andrew Carlsen, Jennifer Lynn Allen, and
10 Lindsie Carlsen, Members, doing business as Smog Man (Respondent Smog Man) is representing
11 itself in this proceeding and has chosen not to exercise its right to be represented by counsel.

12 **Automotive Repair Dealer Registration ARD256719**

13 3. On or about November 19, 2008, the Bureau issued Automotive Repair Dealer
14 Registration Number ARD256719 (registration) to Smog Man LLC, Brian Andrew Carlsen,
15 Jennifer Lynn Allen, and Lindsie Carlsen, Members, doing business as Smog Man (Respondent
16 Smog Man). The registration expired on November 30, 2013, and has not been renewed.

17 **Smog Check Station License Number TC256719**

18 4. On or about December 23, 2008, the Bureau issued Smog Check Station License
19 Number TC256719, to Respondent Smog Man. The license expired on November 30, 2013, and
20 has not been renewed.

21 **Advanced Emissions Specialist License Number EA632641**

22 5. On or about November 3, 2010, the Bureau issued Advanced Emission Specialist
23 Technician License Number EA632641 (technician license) to Benjamin Alberto Rodriguez
24 (Respondent Rodriguez). The technician license was in full force and effect at all times relevant
25 to the charges brought in this Accusation and Petition. Respondent Rodriguez's technician
26 license expired on January 31, 2013. Respondent timely renewed the license and under
27 California Code of Regulations, Title 16, section 3340.28, subdivision (e), the original license
28 became Smog Check Inspector license number EO632641 and Smog Check Repair Technician

1 license number EI632641, effective January 31, 2013. Unless renewed, these licenses will expire
2 January 31, 2015.¹

3 **Advanced Emissions Specialist License Number EA633102**

4 6. On or about May 9, 2011 the Bureau issued Advanced Emission Specialist
5 Technician License Number EA633102 to Jose Luis Bernales (Respondent Bernales). The
6 technician license was in full force and effect at all times relevant to the charges brought in this
7 Accusation and Petition. Respondent Bernales' technician license expired on May 31, 2013.
8 Respondent timely renewed the license and under California Code of Regulations, Title 16,
9 section 3340.28, subdivision (e), the original license became Smog Check Inspector license
10 number EO633102 and Smog Check Repair Technician license number EI633102, effective May
11 31, 2013. Unless renewed, these licenses will expire May 31, 2015.

12 **JURISDICTION**

13 7. Accusation/Petition to Revoke Probation No. 79/14-73 was filed before the Director
14 of Consumer Affairs (Director), for the Bureau of Automotive Repair (Bureau), and is currently
15 pending against Respondent. The Accusation/Petition to Revoke Probation and all other
16 statutorily required documents were properly served on Respondent on December 26, 2013.
17 Respondent timely filed its Notice of Defense contesting the Accusation/Petition to Revoke
18 Probation. A copy of Accusation/Petition to Revoke Probation No. 79/14-73 is attached as
19 exhibit A and incorporated by reference.

20 **ADVISEMENT AND WAIVERS**

21 8. Respondent has carefully read, and understands the charges and allegations in
22 Accusation/Petition to Revoke Probation No. 79/14-73. Respondent also has carefully read, and
23 understands the effects of this Stipulated Revocation of License and Order.

24 9. Respondent is fully aware of its legal rights in this matter, including the right to a
25 hearing on the charges and allegations in the Accusation/Petition to Revoke Probation; the right

26
27 ¹ Effective August 1, 2012, California Code of Regulations title 16, sections 3340.28,
28 3340.29 and 3340.30 were amended to implement a license restructure from the Advanced
Emissions Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog
Check Inspector (EO license and/or Smog Check Repair Technician (EI) license.

1 to be represented by counsel, at its own expense; the right to confront and cross-examine the
2 witnesses against them; the right to present evidence and to testify on its own behalf; the right to
3 the issuance of subpoenas to compel the attendance of witnesses and the production of
4 documents; the right to reconsideration and court review of an adverse decision; and all other
5 rights accorded by the California Administrative Procedure Act and other applicable laws.

6 10. Respondent voluntarily, knowingly, and intelligently waives and gives up each and
7 every right set forth above.

8 CULPABILITY

9 11. The admissions made by Respondent Smog Man are only for the purposes of this
10 proceeding, or any other proceedings in which the Director of Consumer Affairs, Bureau of
11 Automotive Repair, or other professional licensing agency is involved, and shall not be
12 admissible in any other criminal or civil proceeding. For the purpose of resolving the Accusation
13 without the expense and uncertainty of further proceedings, Respondent agrees that, at a hearing,
14 Complainant could establish a factual basis for the charges in the Accusation, and that
15 Respondent hereby gives up its right to contest those charges. Respondent Smog Man agrees to
16 the revocation of its Automotive Repair Dealer Registration No. ARD 256719 and Smog Check
17 Station License Number TC256719.

18 12. Respondent understands that by signing this stipulation Entity enables the Director to
19 issue his order accepting the revocation of its Automotive Repair Dealer Registration and Smog
20 Check Station License without further process.

21 CONTINGENCY

22 13. This stipulation shall be subject to approval by the Director or the Director's designee.
23 Respondent understands and agrees that counsel for Complainant and the staff of the Bureau of
24 Automotive Repair may communicate directly with the Director and staff regarding this
25 stipulated revocation, without notice to or participation by Respondent. By signing the
26 stipulation, Respondent understands and agrees that it may not withdraw its agreement or seek to
27 rescind the stipulation prior to the time the Director considers and acts upon it. If the Director
28 fails to adopt this stipulation as the Decision and Order, the Stipulated Revocation and

1 Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible
2 in any legal action between the parties, and the Director shall not be disqualified from further
3 action by having considered this matter.

4 14. The parties understand and agree that Portable Document Format (PDF) and facsimile
5 copies of this Stipulated Revocation of License and Order, including Portable Document Format
6 (PDF) and facsimile signatures thereto, shall have the same force and effect as the originals.

7 15. This Stipulated Revocation of License and Order is intended by the parties to be an
8 integrated writing representing the complete, final, and exclusive embodiment of their agreement.
9 It supersedes any and all prior or contemporaneous agreements, understandings, discussions,
10 negotiations, and commitments (written or oral). This Stipulated Revocation of License and
11 Order may not be altered, amended, modified, supplemented, or otherwise changed except by a
12 writing executed by an authorized representative of each of the parties.

13 16. In consideration of the foregoing admissions and stipulations, the parties agree that
14 the Director may, without further notice or formal proceeding, issue and enter the following
15 Order:

16 **ORDER**

17 IT IS HEREBY ORDERED that Automotive Repair Dealer Registration No. ARD 256719
18 and Smog Check-Test Only Station License No. TC256719 issued to Respondent Smog Man
19 LLC, Brian Andrew Carlsen, Jennifer Lynn Allen, and Lindsie Carlsen, Members, doing business
20 as Smog Man, are revoked by the Director of Consumer Affairs.

21 1. The Bureau's revocation of Respondent's Automotive Repair Dealer Registration and
22 Smog Check-Test Only Station License shall constitute the imposition of discipline against
23 Respondent. This stipulation constitutes a record of the discipline and shall become a part of
24 Respondent's license history with the Bureau of Automotive Repair.

25 2. Respondent shall lose all rights and privileges as an Automotive Repair Dealer and
26 Smog Check Station in California as of the effective date of the Director's Decision and Order.

27 3. Respondent shall cause to be delivered to the Bureau its pocket licenses and, if one
28 was issued, its wall certificates on or before the effective date of the Decision and Order.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

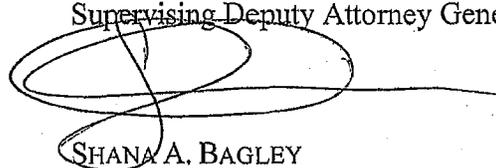
ENDORSEMENT

The foregoing Stipulated Revocation of License and Order is hereby respectfully submitted for consideration by the Director of Consumer Affairs.

Dated: *21 May 2014*

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DIANN SOKOLOFF
Supervising Deputy Attorney General



SHANA A. BAGLEY
Deputy Attorney General
Attorneys for Complainant

SF2013901699/ 90391241.doc

Exhibit A

Accusation/Petition to Revoke Probation No. 79/14-73

1 KAMALA D. HARRIS
Attorney General of California
2 DIANN SOKOLOFF
Supervising Deputy Attorney General
3 SHANA A. BAGLEY
Deputy Attorney General
4 State Bar No. 169423
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2129
Fax: (510) 622-2270
7 E-mail: Shana.Bagley@doj.ca.gov
Attorneys for Complainant

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

11
12 In the Matter of the Accusation and Petition to
13 Revoke Probation Against:

Case No. **79/14-73**

**ACCUSATION AND PETITION TO
REVOKE PROBATION**

14 **SMOG MAN, LLC, BRIAN CARLSEN;**
15 **LINDSIE CARLSEN, AND JENNIFER**
ALLEN, MEMBERS
16 **3753 SAN PABLO DAM RD.**
EL SOBRANTE, CA 94803

17 MAILING ADDRESS:
18 **3650 MAPLE AVENUE**
OAKLAND, CA 94602

19
20 **AUTOMOTIVE REPAIR DEALER**
REGISTRATION NUMBER ARD256719
21 **SMOG CHECK-TEST ONLY STATION LICENSE**
NUMBER TC256719

22 **BENJAMIN ALBERTO RODRIGUEZ**
23 **452 SHERYL DRIVE**
24 **SAN PABLO, CA 94806**

25 **SMOG CHECK INSPECTOR LICENSE NUMBER**
EO632641

26 **SMOG CHECK REPAIR TECHNICIAN LICENSE**
NUMBER EI632641

27 **(FORMERLY ADVANCED EMISSIONS**
28 **TECHNICIAN LICENSE NUMBER EA632641)**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AND

JOSE LUIS BERNALES
6015 SUTTER AVE
RICHMOND, CA 94804

SMOG CHECK INSPECTOR LICENSE NUMBER
EO633102
SMOG CHECK REPAIR TECHNICIAN LICENSE
NUMBER EI633102
(FORMERLY ADVANCED EMISSIONS
TECHNICIAN LICENSE NUMBER EA633102)

Respondents.

Complainant alleges:

PARTIES

1. Patrick Dorais (Complainant) brings this Accusation and Petition to Revoke Probation solely in his official capacity as the Chief of the Bureau of Automotive Repair, Department of Consumer Affairs.

Automotive Repair Dealer Registration ARD256719

2. On or about November 19, 2008, the Bureau issued Automotive Repair Dealer Registration Number ARD256719 (registration) to Smog Man LLC, Brian Andrew Carlsen, Jennifer Lynn Allen, and Lindsie Carlsen, Members, doing business as Smog Man (Respondent Smog Man). The registration was in full force and effect at all times relevant to the charges brought in this Accusation and Petition and expired on November 30, 2013, and has not been renewed.

Smog Check Station License Number TC256719

3. On or about December 23, 2008, the Bureau issued Smog Check Station License Number TC256719, to Respondent Smog Man. The license was in full force and effect at all

1 times relevant to the charges brought in this Accusation and Petition and expired on November
2 30, 2013, and has not been renewed.

3 **Advanced Emissions Specialist License Number EA632641**

4 4. On or about November 3, 2010, the Bureau issued Advanced Emission Specialist
5 Technician License Number EA632641 (technician license) to Benjamin Alberto Rodriguez
6 (Respondent Rodriguez). The technician license was in full force and effect at all times relevant
7 to the charges brought in this Accusation and Petition. Respondent Rodriguez's technician
8 license expired on January 31, 2013. Respondent timely renewed the license and under
9 California Code of Regulations, Title 16, section 3340.28, subdivision (e), the original license
10 became Smog Check Inspector license number EO632641 and Smog Check Repair Technician
11 license number EI632641, effective January 31, 2013. These licenses will expire January 31,
12 2015.¹

13
14
15 **Advanced Emissions Specialist License Number EA633102**

16 5. On or about May 9, 2011 the Bureau issued Advanced Emission Specialist
17 Technician License Number EA633102 to Jose Luis Bernales (Respondent Bernales). The
18 technician license was in full force and effect at all times relevant to the charges brought in this
19 Accusation and Petition. Respondent Bernales' technician license expired on May 31, 2013.
20 Respondent timely renewed the license and under California Code of Regulations, Title 16,
21 section 3340.28, subdivision (e), the original license became Smog Check Inspector license
22 number EO633102 and Smog Check Repair Technician license number EI633102, effective May
23 31, 2013. These licenses will expire May 31, 2015.

24
25
26 ¹ Effective August 1, 2012, California Code of Regulations title 16, sections 3340.28,
27 3340.29 and 3340.30 were amended to implement a license restructure from the Advanced
28 Emissions Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog
Check Inspector (EO license and/or Smog Check Repair Technician (EI) license.

1 11. Health and Safety Code section 44002, provides, in part, that the Director has all of
2 the powers and authority granted under the Automotive Repair Act for enforcing the Motor
3 Vehicle Inspection Program.

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

8
9 STATUTORY PROVISIONS

10 13. Code Section 9884.7 states, in part:

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

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

20 ...

21 (4) Any other conduct that constitutes fraud.

22 ...

23 (6) Failure in any material respect to comply with the provisions of this chapter
24 [the Automotive Repair Act (Bus. & Prof. Code, § 9880, et seq.)] or regulations
25 adopted pursuant to it.

26 14. Code section 9884.9, subdivision (a), states, in part:

27 The automotive repair dealer shall give to the customer a written estimated
28 price for labor and parts necessary for a specific job. No work shall be done and no
charges shall accrue before authorization to proceed is obtained from the customer.
No charge shall be made for work done or parts supplied in excess of the estimated
price without the oral or written consent of the customer that shall be obtained at
some time after it is determined that the estimated price is insufficient and before the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

work not estimated is done or the parts not estimated are supplied. Written consent or authorization for an increase in the original estimated price may be provided by electronic mail or facsimile transmission from the customer. The bureau may specify in regulation the procedures to be followed by an automotive repair dealer when an authorization or consent for an increase in the original estimated price is provided by electronic mail or facsimile transmission. If that consent is oral, the dealer shall make a notation on the work order of the date, time, name of person authorizing the additional repairs and telephone number called, if any, together with a specification of the additional parts and labor and the total additional cost

15. Health and Safety Code section 44072.2 states, in 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.

...

(h) Violates or attempts to violate the provisions of this chapter relating to the particular activity for which he or she is licensed.

16. Health and Safety Code Section 44072.8 states:

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.

///
///
///
///
///

1 REGULATORY PROVISIONS

2 17. California Code of Regulations, title 16, section 3373, states:

3 No automotive repair dealer or individual in charge shall, in filling out an estimate,
4 invoice, or work order or record required to be maintained under section 3340.15(f)
5 of this chapter, withhold therefrom or insert therein any statement or information
6 which will cause any such document to be false or misleading, or where the tendency
or effect thereby would be to mislead or deceive customers, prospective customers, or
the public.

7 18. California Code of Regulations, title 16, section 3340.28, subdivision (e), states:

8 Upon renewal of an unexpired Basic Area Technician license or an Advanced
9 Emission Specialist Technician license issued prior to the effective date of this
10 regulation, the licensee may apply to renew as a Smog Check Inspector, Smog Check
Repair Technician, or both.

11 COST RECOVERY

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

16 UNDERCOVER OPERATION # 1: OCTOBER 18, 2012

17 20. On or about October 18, 2012, a Bureau undercover operator drove a Bureau-
18 documented 1990 Mercury to Respondent Smog Man's facility. The vehicle could not pass a
19 properly performed smog inspection because the ignition timing was set beyond manufacturer's
20 specifications.

21 21. Prior to the smog inspection, no one at Respondent Smog Man asked the operator to
22 sign any paperwork or provided the operator with a written estimate.

23 22. Respondent Rodriguez performed the inspection. He did not perform the ignition
24 timing check, low pressure fuel evaporative test (LPFET), and tire pressure check. Respondent
25 Rodriguez issued electronic Certificate of Compliance Number [REDACTED] for the vehicle even
26 though it could not have passed the functional portion of the smog inspection. The operator paid
27
28

1 \$74.00 for the smog inspection and received a copy of Invoice Number [REDACTED] and the Vehicle
2 Inspection Report (VIR).

3 23. Invoice Number [REDACTED] stated that an "evap" test and tire pressure test were performed
4 and the operator was charged \$15.00 for the "evap" test.

5
6 **FIRST CAUSE FOR DISCIPLINE**

7 **(Untrue and Misleading Statements)**

8 24. Respondent Smog Man subjected its registration to discipline by making untrue or
9 misleading statements. (Code section 9884.7, subd. (a)(1).) Specifically, on or about October
10 18, 2012, Respondent made or authorized statements which he knew, or in the exercise of
11 reasonable care should have known, to be untrue or misleading by issuing a certificate of
12 compliance for the 1990 Mercury. It certified that the vehicle was in compliance with applicable
13 laws and regulations when, in fact, it could not have passed the functional ignition timing portion
14 of the smog inspection because the vehicle's ignition timing was set beyond manufacturer's
15 specification. The circumstances are more particularly set forth in paragraphs 20 through 23,
16 above.
17

18 **SECOND CAUSE FOR DISCIPLINE**

19 **(Fraud)**

20 25. Respondent Smog Man subjected its registration to discipline by committing acts
21 of fraud. (Code § 9884.7, subd. (a)(4).) Specifically, on or about October 18, 2012, Respondent
22 charged a customer for an LPFET when it did not perform the test and Respondent issued a
23 certificate of compliance for the 1990 Mercury without performing a bona fide inspection of the
24 emission control devices and systems on the vehicle, thereby depriving the People of the State of
25 California of the protection afforded by the Motor Vehicle Inspection Program. The
26 circumstances are more particularly set forth in paragraphs 20 through 23, above.
27
28

1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Failure to Provide Written Estimate)**

3 26. Respondent Smog Man subjected its registration to discipline by failing to provide
4 a written estimate for parts and labor for a specific job. (Code § 9884.9, subd. (a).) Specifically,
5 on or about October 18, 2012, Respondent did not provide a customer with an estimate for the
6 smog inspection and the LPFET. The circumstances are more particularly set forth in paragraphs
7 20 through 23, above.
8

9 **FOURTH CAUSE FOR DISCIPLINE**

10 **(Violation of the Motor Vehicle Inspection Program)**

11 27. Respondent Smog Man subjected its station license to discipline by failing to
12 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (a).)
13 Specifically, as more particularly set forth in paragraphs 20 through 23, above, on or about
14 October 18, 2012, Respondent failed to comply with the following Health and Safety Code
15 sections:
16

17 a. 44012: Respondent failed to ensure that the emission control tests on the 1990
18 Mercury were performed in accordance with procedures prescribed by the Department.

19 b. 44015, subdivision (b): Respondent issued a certificate of compliance for the
20 1990 Mercury without properly testing and inspecting the vehicle to determine if it was in
21 compliance with Health and Safety Code section 44012.
22

23 **FIFTH CAUSE FOR DISCIPLINE**

24 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

25 28. Respondent Smog Man subjected its station license to discipline by failing to
26 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (c).)
27 Specifically, as more particularly set forth in paragraphs 20 through 23, above, on or about
28

1 October 18, 2012, Respondent failed to comply with the following California Code of
2 Regulations, title 16, sections:

3 a. 3340.35, subdivision (c): Respondent issued a certificate of compliance for the
4 1990 Mercury even though the vehicle had not been inspected in accordance with California
5 Code of Regulations, title 16, section 3340.42.

6
7 b. 3340.42: Respondent failed to ensure the required emission control tests were
8 conducted on the 1990 Mercury in accordance with Bureau specifications.

9 c. 3373: Respondent created a false and misleading record by stating on the invoice
10 that the "evap" test and the tire pressures tests were performed, when in fact, they were not.

11 **SIXTH CAUSE FOR DISCIPLINE**

12 (Dishonesty, Fraud or Deceit)

13
14 29. Respondent Sinog Man subjected its station license to discipline by committing acts
15 of dishonesty, fraud, or deceit whereby another was injured. (Health & Saf. Code § 44072.2,
16 subd. (d).) Specifically, on or about October 18, 2012, Respondent issued a certificate of
17 compliance for the 1990 Mercury without performing a bona fide inspection of the emission
18 control devices and systems on the vehicle, thereby depriving the People of the State of California
19 of the protection afforded by the Motor Vehicle Inspection Program. The circumstances are more
20 particularly set forth in paragraphs 20 through 23, above.

21
22 **SEVENTH CAUSE FOR DISCIPLINE**

23 (Violations of the Motor Vehicle Inspection Program)

24 30. Respondent Rodriguez subjected his technician licenses to discipline by violating the
25 Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (a).) Specifically, as
26 more particularly set forth in paragraphs 20 through 23, above, on or about October 18, 2012,
27 Respondent Rodriguez failed to comply with the following Health and Safety Code sections:
28

1 a. 44012: Respondent Rodriguez failed to perform the required emission control tests
2 on the 1990 Mercury in accordance with procedures prescribed by the Department.

3 b. 44032: Respondent Rodriguez failed to perform tests of the emission control
4 devices and systems on the 1990 Mercury in accordance with Health and Safety Code section
5 44012.
6

7 **EIGHTH CAUSE FOR DISCIPLINE**

8 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

9 31. Respondent Rodriguez subjected his technician licenses to discipline by failing to
10 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (c).)
11 Specifically, as more particularly set forth in paragraphs 20 through 23, above, on or about
12 October 18, 2012, he failed to comply with the following California Code of Regulations, title 16,
13 sections:
14

15 a. 3340.30, subdivision (a): Respondent Rodriguez failed to inspect and test the
16 1990 Mercury in accordance with Health and Safety Code sections 44012 and 44035, and
17 California Code of Regulations, title 16, section 3340.42.

18 b. 3340.41, subdivision (c): Respondent Rodriguez entered false information into
19 the Emission Inspection System for the 1990 Mercury by entering "Pass" for the functional
20 portion of the smog inspection when, in fact, the vehicle could not pass the functional portion of
21 the inspection because the vehicle's ignition timing was set beyond manufacturer's specifications
22 and for entering "Pass" for the LPFET when in fact, he never performed this inspection on the
23 undercover vehicle.
24

25 c. 3340.42: Respondent Rodriguez failed to conduct the required smog tests and
26 inspections on the 1990 Mercury in accordance with the Bureau's specifications.
27
28

1 NINTH CAUSE FOR DISCIPLINE

2 (Dishonesty, Fraud or Deceit)

3 32. Respondent Rodriguez subjected his technician licenses to discipline by committing
4 acts involving dishonesty, fraud or deceit whereby another was injured. (Health & Saf. Code §
5 section 44072.2, subd. (d).) Specifically, on or about October 18, 2012, Respondent Rodriguez
6 issued a certificate of compliance for the 1990 Mercury without performing a bona fide
7 inspection of the emission control devices and systems on the vehicle, thereby depriving the
8 People of the State of California of the protection afforded by the Motor Vehicle Inspection
9 Program. The circumstances are more particularly set forth in paragraphs 20 through 23, above.
10

11 UNDERCOVER OPERATION #2: NOVEMBER 9, 2012

12 33. On or about November 9, 2012, a Bureau undercover operator drove the Bureau's
13 1994 Toyota to Respondent Smog Man's facility. The vehicle could not pass a properly
14 performed smog inspection because it was missing the required Pulse Air Injection Reactor
15 (PAIR) system.
16

17 34. Prior to the smog inspection, no one at Respondent Smog Man asked the operator
18 to sign any paperwork or provided the operator with a written estimate.
19

20 35. Respondent Bernales performed the inspection. He did not perform the ignition
21 timing check and tire pressure check. Respondent Bernales issued electronic Certificate of
22 Compliance Number OQ815166 for the vehicle even though it could not have passed the smog
23 inspection. The operator paid \$59.00 for the smog inspection and received a copy of Invoice
24 Number [REDACTED] and the VIR.

25 ///

26 ///

1 **THIRTEENTH CAUSE FOR DISCIPLINE**

2 **(Violation of the Motor Vehicle Inspection Program)**

3 39. Respondent Smog Man subjected its station license to discipline by failing to
4 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (a).)
5 Specifically, on or about November 9, 2012, as more particularly set forth in paragraphs 33
6 through 35, above, Respondent Smog Man failed to comply with the following Health and Safety
7 Code sections:
8

9 a. 44012: Respondent Smog Man failed to ensure that the emission control tests on
10 the 1994 Toyota were performed in accordance with procedures prescribed by the Department.

11 b. 44015, subdivision (b): Respondent Smog Man issued a certificate of compliance
12 for the 1994 Toyota without properly testing and inspecting the vehicle to determine if it was in
13 compliance with Health and Safety Code section 44012.
14

15 **FOURTEENTH CAUSE FOR DISCIPLINE**

16 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

17 40. Respondent Smog Man subjected its station license to discipline by failing to comply
18 with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (c).)
19 Specifically, on or about November 9, 2012, as more particularly set forth in paragraphs 33
20 through 35, above, Respondent Smog Man failed to comply with the following California Code
21 of Regulations, title 16, sections:
22

23 a. 3340.35, subdivision (c): Respondent Smog Man issued a certificate of
24 compliance for the 1994 Toyota even though the vehicle had not been inspected in accordance
25 with California Code of Regulations, title 16, section 3340.42.

26 b. 3340.42: Respondent Smog Man failed to ensure the required emission control
27 tests were conducted on the 1994 Toyota in accordance with Bureau specifications.
28

1 **FIFTEENTH CAUSE FOR DISCIPLINE**

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

3 41. Respondent Smog Man subjected its station license to discipline by committing acts
4 involving dishonesty, fraud or deceit whereby another was injured. (Health & Saf. Code §
5 44072.2, subd. (d).) Specifically, on or about November 9, 2012, Respondent Smog Man issued a
6 certificate of compliance for the 1994 Toyota without performing a bona fide inspection of the
7 emission control devices and systems on the vehicle, thereby depriving the People of the State of
8 California of the protection afforded by the Motor Vehicle Inspection Program. The
9 circumstances are more particularly set forth in paragraphs 33 through 35, above.
10

11 **SIXTEENTH CAUSE FOR DISCIPLINE**

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

13 42. Respondent Bernales subjected his technician licenses to discipline by failing to
14 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (a).)
15 Specifically, on or about November 9, 2012, as more particularly set forth in paragraphs 33
16 through 35, above, he failed to comply with the following Health and Safety Code sections:
17

18 a. 44012: Respondent Bernales failed to perform the required emission control tests
19 on the 1994 Toyota in accordance with procedures prescribed by the Department.
20

21 b. 44032: Respondent Bernales failed to perform tests of the emission control devices
22 and systems on the 1994 Toyota in accordance with Health and Safety Code section 44012.

23 **SEVENTEENTH CAUSE FOR DISCIPLINE**

24 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

25 43. Respondent Bernales subjected his technician licenses to discipline by failing to
26 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (c).)
27 Specifically, on or about November 9, 2012, as more particularly set forth in paragraphs 33
28

1 through 35, above, he failed to comply with the following California Code of Regulations, title
2 16, sections:

3 a. 3340.30, subdivision (a): Respondent Bernales failed to inspect and test the 1994
4 Toyota in accordance with Health and Safety Code sections 44012 and 44035, and California
5 Code of Regulations, title 16, section 3340.42.

6 b. 3340.41, subdivision (c): Respondent Bernales entered false information into the
7 Emission Inspection System for the 1994 Toyota by entering "Pass" for the visual portion of the
8 smog inspection when in fact, the vehicle could not pass the visual portion of the inspection
9 because the vehicle's PAIR system was missing.

10 c. 3340.42: Respondent Bernales failed to conduct the required smog tests and
11 inspections on the 1994 Toyota in accordance with the Bureau's specifications.
12

13 **EIGHTEENTH CAUSE FOR DISCIPLINE**

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

15 44. Respondent Bernales subjected his technician licenses to discipline by committing
16 acts involving dishonesty, fraud or deceit whereby another was injured. (Health & Saf. Code §
17 44072.2, subd. (d).) Specifically, on or about November 9, 2012, Respondent issued a certificate
18 of compliance for the 1994 Toyota without performing a bona fide inspection of the emission
19 control devices and systems on the vehicle, thereby depriving the People of the State of California
20 of the protection afforded by the Motor Vehicle Inspection Program. The circumstances are more
21 particularly set forth in paragraphs 33 through 35, above.
22

23 **UNDERCOVER OPERATION #3: DECEMBER 4, 2012**

24 45. On or about December 4, 2012, a Bureau undercover operator drove the Bureau's
25 1991 Ford to the Respondent Smog Man's facility and requested a smog inspection. The vehicle
26
27

1 could not pass a properly performed smog inspection because the ignition timing was set beyond
2 manufacturer's specifications.

3 46. Prior to the smog inspection, no one at Respondent Smog Man asked the operator to
4 sign any paperwork nor did anyone provide the operator with a written estimate.

5 47. Respondent Rodriguez performed the inspection. He did not perform the ignition
6 timing check, fuel cap test, and tire pressure check. Respondent Rodriguez issued electronic
7 Certificate of Compliance Number [REDACTED] for the vehicle even though it could not have
8 passed the smog inspection. The operator paid \$74.00 for the smog inspection and received a
9 copy of Invoice Number [REDACTED] and the VIR.

10
11 **NINETEENTH CAUSE FOR DISCIPLINE**

12 (Untrue and Misleading Statements)

13 48. Respondent Smog Man subjected its registration to discipline by making or
14 authorizing statements which he knew, or in the exercise of reasonable care should have known,
15 to be untrue or misleading. (Code § 9884.7, subd. (a)(1).) Specifically, on or about December 4,
16 2012, Respondent issued a certificate of compliance for the 1991 Ford, certifying that the vehicle
17 was in compliance with applicable laws and regulations when in fact, the ignition timing was set
18 beyond manufacturer's specification. The circumstances are more particularly set forth in
19 paragraphs 45 through 47, above.

20
21 **TWENTIETH CAUSE FOR DISCIPLINE**

22 (Fraud)

23 49. Respondent Smog Man subjected its registration to discipline by committing acts of
24 fraud. (Code § 9884.7, subd. (a)(4).) Specifically, on or about December 4, 2012, Respondent
25 Smog Man issued a certificate of compliance for the 1991 Ford without performing a bona fide
26 inspection of the emission control devices and systems on the vehicle, thereby depriving the
27
28

1 People of the State of California of the protection afforded by the Motor Vehicle Inspection
2 Program. The circumstances are more particularly set forth in paragraphs 45 through 47, above.

3 **TWENTY FIRST CAUSE FOR DISCIPLINE**

4 **(Failure to Provide Written Estimate)**

5
6 50. Respondent Smog Man subjected its registration to discipline by failing to provide
7 the operator with a written estimated price for parts and labor for a specific job. (Code § 9884.9,
8 subd. (a).) Specifically, on or about December 4, 2012, Respondent did not provide the operator
9 with an estimate for the smog inspection. The circumstances are more particularly set forth in
10 paragraphs 45 through 47, above.

11 **TWENTY SECOND CAUSE FOR DISCIPLINE**

12 **(Violation of the Motor Vehicle Inspection Program)**

13
14 51. Respondent Smog Man subjected its station license to discipline by failing to
15 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (a).)
16 Specifically, on or about December 4, 2012, as more particularly set forth in paragraphs 45
17 through 47, above, Respondent failed to comply with the following Health and Safety Code
18 sections:

19 a. 44012: Respondent failed to ensure that the emission control tests on the 1991
20 Ford were performed in accordance with procedures prescribed by the Department.

21 b. 44015, subdivision (b): Respondent issued a certificate of compliance for the
22 1991 Ford without properly testing and inspecting the vehicle to determine if it was in compliance
23 with section 44012 of that Code.
24

25 ///
26 ///
27

28

1 **TWENTY FIFTH CAUSE FOR DISCIPLINE**

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

3 54. Respondent Rodriguez subjected his technician licenses to discipline by failing to
4 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (a).)
5 Specifically, on or about December 4, 2012, as more particularly set forth in paragraphs 45
6 through 47, above, he failed to comply with the following sections of the Health and Safety Code:

7
8 a. 44012: Respondent Rodriguez failed to perform the required emission control
9 tests on the 1991 Ford in accordance with procedures prescribed by the department.

10 b. 44032: Respondent Rodriguez failed to perform tests of the emission control
11 devices and systems on the 1991 Ford in accordance with section 44012 of that Code.

12 **TWENTY SIXTH CAUSE FOR DISCIPLINE**

13 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

14
15 55. Respondent Rodriguez subjected his technician licenses to discipline by failing to
16 comply with the Motor Vehicle Inspection Program. (Health & Saf. Code § 44072.2, subd. (c).)
17 Specifically, on or about December 4, 2012, as more particularly set forth in paragraphs 45
18 through 47, above, he failed to comply the following sections of California Code of Regulations,
19 title 16:

20
21 a. 3340.30, subdivision (a): Respondent Rodriguez failed to inspect and test the
22 1991 Ford in accordance with Health and Safety Code sections 44012 and 44035, and the
23 California Code of Regulations, title 16, section 3340.42.

24 b. 3340.41, subdivision (c): Respondent Rodriguez entered false information into
25 the Emission Inspection System for the 1991 Ford by entering "Pass" for the functional portion of
26 the smog inspection when in fact, the vehicle could not pass the functional portion of the
27 inspection because the vehicle's ignition timing was set beyond manufacturer's specifications.
28

1 c. 3340.42: Respondent Rodriguez failed to conduct the required smog tests and
2 inspections on the 1991 Ford in accordance with the Bureau's specifications.

3 **TWENTY SEVENTH CAUSE FOR DISCIPLINE**

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

5
6 56. Respondent Rodriguez has subjected his technician licenses to discipline by
7 committing acts involving dishonesty, fraud or deceit whereby another was injured. (Health &
8 Saf. Code § 44072.2, subd. (d).) Specifically, on or about December 4, 2012, Respondent issued
9 a certificate of compliance for the 1991 Ford without performing a bona fide inspection of the
10 emission control devices and systems on the vehicle, thereby depriving the People of the State of
11 California of the protection afforded by the Motor Vehicle Inspection Program. The
12 circumstances are more particularly set forth in paragraphs 45 through 47, above.

13 **JURISDICTION FOR PETITION TO REVOKE PROBATION**

14
15 57. This Petition to Revoke Probation is brought before the Director for the Bureau of
16 Automotive Repair under Probation Term and Condition Number G of the Decision and Order in
17 *the Matter of the Accusation Against Smog Man LLC*, Case Number 79/11-08. Condition G of
18 the Decision states:

19
20 Should the Director of Consumer Affairs determine that Respondent has failed
21 to comply with the terms and conditions of probation, the Department may, after
22 giving notice and opportunity to be heard, permanently invalidate the registration
23 and/or suspend or revoke the license.

24 58. At all times after the effective date of Respondent Smog Man's probation, Term A of
25 the Decision stated that "Respondent shall comply with all statutes, regulations and rules
26 governing automotive inspections, estimates and repairs."

27 ///

28 ///

1 CAUSE TO REVOKE PROBATION

2 (Failure to Comply With All Statutes, Regulations, and Rules)

3 59. Respondent Smog Man's probation is subject to revocation because it failed to
4 comply with all of the Bureau's statutes, regulations and rules as required. (Probation Term A.)
5 The circumstances are more particularly set forth in paragraphs 6, 20 through 29, 33 through 41,
6 and 45 through 53, and their subparts, above.
7

8 OTHER MATTERS

9 60. Under Business and Professions Code section 9884.7, subdivision (c), the director
10 may invalidate temporarily or permanently or refuse to validate, the registrations for all places of
11 business operated in this state by Smog Man LLC, and Brian Andrew Carlsen, Jennifer Lynn
12 Allen, and Lindsie Carlsen, Members, doing business as Smog Man upon a finding that they,
13 have, or are engaged in a course of repeated and willful violations of the laws and regulations
14 pertaining to an automotive repair dealer.

15 61. Pursuant to Health and Safety Code section 44072.8, if Smog Check Test Only
16 Station License Number TC256719, issued to Smog Man LLC, Brian Andrew Carlsen, Jennifer
17 Lynn Allen and Lindsie Carlsen, Members, doing business as Smog Man, is revoked or
18 suspended, any additional license issued under this chapter in the name of the licensee may be
19 likewise revoked or suspended by the director.

20 62. Pursuant to Health and Safety Code section 44072.8, if Respondent Rodriguez's
21 technician license(s), EO632641 and/or EI632641, is/are revoked or suspended, any additional
22 license issued under this chapter in the name of said licensee may be likewise revoked or
23 suspended by the Director.

24 63. Pursuant to Health and Safety Code section 44072.8, if Respondent Bernales'
25 technician license(s), EO633102 and EI633102, is/are revoked or suspended, any additional
26 license issued under this chapter in the name of said licensee may be likewise revoked or
27 suspended by the Director.
28

1 PRAYER

2 WHEREFORE, Complainant requests that a hearing be held on the matters alleged in this
3 Accusation and Petition to Revoke Probation, and that following the hearing, the Director of
4 Consumer Affairs issue a decision:

5 1. Vacating the stay and re-imposing the order of invalidation of the Automotive Repair
6 Dealer Registration Number ARD256719 issued to Smog Man LLC, and Brian Andrew Carlsen,
7 Jennifer Lynn Allen, and Lindsie Carlsen, Members, doing business as Smog Man;

8 2. Revoking, suspending, or placing on probation any other Automotive Repair
9 Dealer registration issued to Smog Man LLC, Brian Andrew Carlsen, Jennifer Lynn Allen, and/or
10 Lindsie Carlsen;

11 3. Vacating the stay and re-imposing the order of revocation of the Smog Check Test
12 Only Station License Number TC256719 issued to Smog Man LLC and Brian Andrew Carlsen,
13 Jennifer Lynn Allen, and Lindsie Carlsen, Members, doing business as, Smog Man;

14 4. Revoking or suspending any additional license issued under Chapter 5 of the Health
15 and Safety Code in the name of Smog Man LLC, Brian Andrew Carlsen, Jennifer Lynn Allen,
16 and/or Lindsie Carlsen;

17 5. Revoking or suspending Benjamin Alberto Rodriguez's smog technician license(s),
18 EO632641 and/or E1632641;

19 6. Revoking or suspending any additional license issued under Chapter 5 of the Health
20 and Safety Code in the name of Benjamin Alberto Rodriguez;

21 7. Revoking or suspending Jose Luis Bernales' smog technician license(s), EO633102
22 and E1633102;

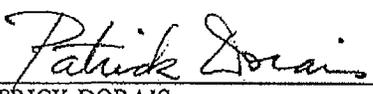
23 8. Revoking or suspending any additional license issued under Chapter 5 of the Health
24 and Safety Code in the name of Jose Luis Bernales;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

9. Ordering Smog Man LLC, and Brian Andrew Carlsen, Jennifer Lynn Allen and Lindsie Carlsen, Members, doing business as Smog Man; Benjamin Alberto Rodriguez; and Jose Luis Bernales to pay the Director the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and

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

DATED: December 20, 2013



PATRICK DORAIS
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

SF2013901699/90364385.doc

EXHIBIT A

DECISION AND ORDER CASE NO. 79/11-08

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

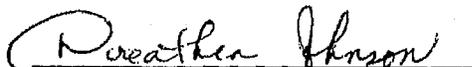
DECISION

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

BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE 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. ARD256719
Smog Check, Test Only, Station License
No. TC256719

and

JORGE LUIS CRUZ-JIMENEZ
Advanced Emission Specialist Technician
License No. EA150956

Respondents.

Case No. 79/11-08

OAH No. 2011070145

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 licensee, 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:

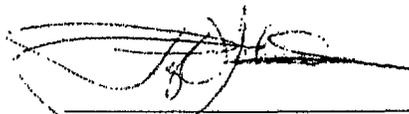
- A. Respondent shall comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.
- B. Respondent or respondent's authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the bureau, 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