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

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|---|---|
| In the Matter of the Accusation Against:<br><br>**M & C SMOG TEST ONLY**<br>**MOISES ORTIZ FERNANDEZ, OWNER**<br>**6111 Columbus Avenue**<br>**Riverside, CA 92504**<br><br>**Automotive Repair Dealer Registration No. ARD 263478**<br><br>**Smog Check - Test Only Station License No. TC 263478**<br><br>**and**<br><br>**CRYSTIAN DAVID GUERRERO**<br>**18780 Alderbrook Drive**<br>**Riverside, CA 92508**<br><br>**Advanced Emission Specialist Technician License No. EA 632279**<br><br>Respondents. | Case No. 79/12-172<br><br>**DEFAULT DECISION AND ORDER**<br><br>[Gov. Code, §11520] |

FINDINGS OF FACT

1. On or about June 21, 2012, Complainant John Wallauch, in his official capacity as the Chief of the Bureau of Automotive Repair, Department of Consumer Affairs, filed Accusation No. 79/12-172 against Moises Ortiz Fernandez, Owner of M & C Smog Test Only ("Respondent Fernandez") before the Director of Consumer Affairs. (Accusation attached as Exhibit A.)

2. On or about October 14, 2010, the Director of Consumer Affairs ("Director") issued Automotive Repair Dealer Registration Number ARD 263478 ("Registration") to Respondent Fernandez. The Registration was in full force and effect at all times relevant to the charges brought herein and will expire on October 31, 2012, unless renewed.

3. On or about November 5, 2010, the Director issued Smog Check - Test Only Station License Number TC 263478 ("Smog Check Station License") to Respondent Fernandez. The Smog Check Station License was in full force and effect at all times relevant to the charges brought herein and will expire on October 31, 2012, unless renewed.

4. On or about June 28, 2012, Respondent Fernandez was served by Certified and First Class Mail copies of the Accusation No. 79/12-172, Statement to Respondent, Notice of Defense, Request for Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6, and 11507.7) at Respondent Fernandez's address of record which, pursuant to Business and Professions Code section 136 and Title 16, California Code of Regulations, section 3303.3, is required to be reported and maintained with the Bureau. Respondent Fernandez's address of record was and is:

6111 Columbus Avenue
Riverside, CA 92504.

5. Service of the Accusation was effective as a matter of law under the provisions of Government Code section 11505, subdivision (c) and/or Business & Professions Code section 124.

6. Government Code section 11506 states, in pertinent part:

> (c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense, and the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing.

7. Respondent Fernandez failed to file a Notice of Defense within 15 days after service upon him of the Accusation, and therefore waived his right to a hearing on the merits of Accusation No. 79/12-172.

8. California Government Code section 11520 states, in pertinent part:

> (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent.

9. Pursuant to its authority under Government Code section 11520, the Director after having reviewed the proof of service dated June 28, 2012, finds Respondent Fernandez is in default. The Director will take action without further hearing and, based on Accusation No. 79/12-172, proof of service and on the Affidavit of Bureau Representative Robert Snyder, finds that the allegations in Accusation are true.

DETERMINATION OF ISSUES

1. Based on the foregoing findings of fact, Respondent Moises Ortiz Fernandez, Owner of M & C Smog Test Only has subjected his Automotive Repair Dealer Registration No. 263478 and Smog Check - Test Only Station License Number TC 263478 to discipline.

2. The agency has jurisdiction to adjudicate this case by default.

3. The Director of Consumer Affairs is authorized to revoke Respondent's Automotive Repair Dealer Registration and Smog Check Station License based upon the following violations alleged in the Accusation which are supported by the evidence contained in the Affidavit of Bureau Representative Robert Snyder in this case:

a. Respondent Fernandez's Registration is subject to disciplinary action under Code section 9884.7, subdivision (a)(1) in that he made or authorized statements which he knew or in the exercise of reasonable care should have known to be untrue or misleading as follows: Respondent Fernandez's smog check technician, Respondent Guerrero, certified that the vehicles identified in paragraph 18 of the Accusation had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent Guerrero conducted the inspections on the vehicles using clean-plugging methods in that he substituted or used a different vehicle(s) during the OBD II functional tests in order to issue smog certificates of compliance for the vehicles, and did not test or inspect the vehicles as required by Health and Safety Code section 44012.

b. Respondent Fernandez's Registration is subject to disciplinary action under Code section 9884.7, subdivision (a)(4) in that Respondent Fernandez committed acts that constitute fraud by issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 of the Accusation without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

c. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (a), in that Respondent Guerrero failed to comply with the following sections of that Code:

i. **Section 44012**: Failed to ensure that the emission control tests were performed on the vehicles identified in paragraph 18 of the Accusation in accordance with procedures prescribed by the department.

ii. **Section 44015**: Issued electronic smog certificates of compliance for the vehicles identified in paragraph 18 of the Accusation without ensuring that they were properly tested and inspected to determine if they were in compliance with Health and Safety Code section 44012.

d. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (c), in that Respondent Guerrero failed to comply with provisions of California Code of Regulations, title 16, as follows:

i. **Section 3340.35, subdivision (c)**: Issued electronic smog certificates of compliance for the vehicles described in paragraph 18 of the Accusation even though they had not been inspected in accordance with California Code of Regulations, title 16, section 3340.42.

ii. **Section 3340.42**: Failed to ensure that the required smog tests were conducted on the vehicles described in paragraph 18 of the Accusation in accordance with the Bureau's specifications.

e. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that Respondent Fernandez committed dishonest, fraudulent, or deceitful acts whereby another is injured by

issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 of the Accusation without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

ORDER

IT IS SO ORDERED that Automotive Repair Dealer Registration No. ARD 263478, and Smog Check - Test Only Station License Number TC 263478, heretofore issued to Respondent Moises Ortiz Fernandez dba M & C Smog Test Only, are revoked.

IT IS FURTHER ORDERED under Health and Safety Code section 44072.8, any additional license issued under Chapter 5 of the Motor Vehicle Inspection Program in the name of Respondent Moises Ortiz Fernandez is likewise revoked.

Pursuant to Government Code section 11520, subdivision (c), Respondent Fernandez may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The motion should be sent to the Bureau of Automotive Repair, ATTN: William D. Thomas, 10949 North Mather Boulevard, Rancho Cordova, CA 95670. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

This Decision shall become effective on 12/6/12.

It is so ORDERED October 22, 2012

DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Deaprtment of Consumer Affairs

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DOJ Matter ID:SD2012703576

Attachment: Exhibit A: Accusation

# Exhibit A

Accusation

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**BEFORE THE**
**DEPARTMENT OF CONSUMER AFFAIRS**
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| In the Matter of the Accusation Against: | Case No. 79/12-172 |
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| **M & C SMOG TEST ONLY**<br>**MOISES ORTIZ FERNANDEZ, OWNER**<br>**6111 Columbus Avenue**<br>**Riverside, CA 92504**<br><br>**Automotive Repair Dealer Registration No. ARD 263478**<br><br>**Smog Check - Test Only Station License No. TC 263478,**<br><br>**and**<br><br>**CRYSTIAN DAVID GUERRERO**<br>**18780 Alderbrook Drive**<br>**Riverside, CA 92508**<br><br>**Advanced Emission Specialist Technician License No. EA 632279**<br><br>Respondents. | **A C C U S A T I O N**<br><br>SMOG CHECK |

Complainant alleges:

## PARTIES

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

**M & C Smog Test Only; Moises Ortiz Fernandez, Owner**

2. On or about October 14, 2010, the Director of Consumer Affairs ("Director") issued Automotive Repair Dealer Registration Number ARD 263478 ("Registration") to Moises Ortiz Fernandez, Owner of M & C Smog Test Only ("Respondent Fernandez"). The Registration was in full force and effect at all times relevant to the charges brought herein and will expire on October 31, 2012, unless renewed.

3. On or about November 5, 2010, the Director issued Smog Check - Test Only Station License Number TC 263478 ("Smog Check Station License") to Respondent Fernandez. The Smog Check Station License was in full force and effect at all times relevant to the charges brought herein and will expire on October 31, 2012, unless renewed.

**Crystian David Guerrero**

4. On or about July 15, 2010, the Director issued Advanced Emission Specialist Technician License Number EA 632279 ("Technician License") to Crystian David Guerrero ("Respondent Guerrero"). The Technician License was in full force and effect at all times relevant to the charges brought herein and will expire on August 31, 2012, unless renewed.

## JURISDICTION

5. This Accusation is brought before the Director under the authority of the following laws.

6. Section 9884.13 of the Business and Professions Code ("Code") provides, in pertinent part, that the expiration of a valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary proceeding against an automotive repair dealer or to render a decision invalidating a registration temporarily or permanently.

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7. Section 118 of the Code states:

". . .

"(b) The suspension, expiration, or forfeiture by operation of law of a license issued by a board in the department, or its suspension, forfeiture, or cancellation by order of the board or by order of a court of law, or its surrender without the written consent of the board, shall not, during any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground.

". . . ."

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

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

## STATUTORY PROVISIONS

10. Section 22 of the Code states:

"(a) 'Board' as used in any provisions of this Code, refers to the board in which the administration of the provision is vested, and unless otherwise expressly provided, shall include 'bureau,' 'commission,' 'committee,' 'department,' 'division,' 'examining committee,' 'program,' and 'agency.'

"(b) Whenever the regulatory program of a board that is subject to review by the Joint Committee on Boards, Commissions, and Consumer Protection, as provided for in Division 1.2 (commencing with Section 473), is taken over by the department, that program shall be designated as a 'bureau.'"

11. Section 477 of the Code provides, in pertinent part, that "Board" includes "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency." "License" includes certificate, registration or other means to engage in a business or profession regulated by the Code.

12. Section 9884.7 of the Code states:

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

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

". . .

"(4) Any other conduct that constitutes fraud.

". . . ."

"(c) Notwithstanding subdivision (b), 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."

13. Section 44072.2 of the Health and Safety Code states:

"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 Safety 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.

". . . ."

14. Health & Safety Code section 44072.10 states, in pertinent part:

". . .

"(c) The department shall revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:

". . .

"(4) Intentional or willful violation of this chapter or any regulation, standard, or procedure of the department implementing this chapter."

15. Section 44072.8 of the Health and Safety Code 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."

## COSTS

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

## FACTUAL BACKGROUND

17. In or about January 2012, the Bureau initiated an investigation of Respondent Fernandez's smog check station based on a review of information from the Bureau's Vehicle Information Database ("VID"), which indicated that Respondent Fernandez or his employees may have been engaging in fraudulent smog check inspections.

18. On January 19, 2012, a representative of the Bureau conducted a detailed review of the VID data for all smog inspections performed at Respondent Fernandez's facility for the period of July 26, 2011, through October 24, 2011. The representative found that the VID recorded the

same diagnostic trouble code ("code") during the OBD II test[1] of the five vehicles identified below regardless of the make or model of the vehicle. The representative obtained information indicating that the codes were not applicable to these vehicles. The VID data also showed that Respondent Guerrero performed the inspections on the vehicles using a method known as "clean plugging,"[2] resulting in the issuance of fraudulent certificates of compliance for the vehicles.

| Date & Time of Inspection | Vehicle Certified & License or VIN No. | Certificate No. |
|---|---|---|
| 1. 9/13/2011 1645 - 1700 | 2003 Dodge Viper; License No. SSFUNDS | WZ158569C |
| 2. 10/20/2011 1531 - 1544 | 2003 Dodge Durango; License No. 5MWN735 | WZ844014C |
| 3. 10/22/2011 1126 - 1133 | 1996 Honda Accord; VIN No. 1HGCD5691TA214726 | WZ844030C |
| 4. 10/22/2011 1219 – 1224 | 2001 Ford Focus; License No. 5GQK352 | WZ844033C |
| 5. 10/22/2011 1228 - 1241 | 2001 Mitsubishi Eclipse; VIN No. 4A3AC44G71E182873 | WZ844034C |

## FIRST CAUSE FOR DISCIPLINE

**(Untrue or Misleading Statements)**

19. Respondent Fernandez's Registration is subject to disciplinary action under Code section 9884.7, subdivision (a)(1) in that he made or authorized statements which he knew or in

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[1] The On Board Diagnostic, generation II ("OBD II"), functional test is an automated function of the BAR-97 Emissions Inspection System analyzer ("EIS"). The EIS includes a computer based, five-gas analyzer that tests vehicles under simulated driving conditions to detect oxides of nitrogen, hydrocarbons, and carbon monoxide emissions. During the OBD II functional test, the technician is required to connect an interface cable from the EIS to a Diagnostic Link Connector (DLC) which is located inside the vehicle. Through the DLC, the EIS automatically retrieves information from the vehicle's on-board computer about the status of the readiness indicators, trouble codes, and the MIL (malfunction indicator light). If the vehicle fails the OBD II functional test, it will fail the overall inspection.

[2] Clean-plugging is the use of the OBD II readiness monitor status and stored code status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that is not in compliance due to the noncompliant vehicle's failure to complete the minimum number of self tests, known as monitors, or due to the presence of a stored code that indicates an emission control system or component failure. Clean plugging occurs during the inspection of a vehicle that has an OBD II system. To clean plug a vehicle, the smog technician enters information into the EIS for the vehicle the technician wishes to certify and then plugs the OBD II system connection from the EIS into another vehicle that has a properly functioning OBD II system, rather than plugging the connection into the vehicle that was originally identified for testing.

the exercise of reasonable care should have known to be untrue or misleading as follows: Respondent Fernandez's smog check technician, Respondent Guerrero, certified that the vehicles identified in paragraph 18 above, had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent Guerrero conducted the inspections on the vehicles using clean-plugging methods in that he substituted or used a different vehicle(s) during the OBD II functional tests in order to issue smog certificates of compliance for the vehicles, and did not test or inspect the vehicles as required by Health and Safety Code section 44012.

## SECOND CAUSE FOR DISCIPLINE

**(Fraud)**

20. Respondent Fernandez's Registration is subject to disciplinary action under Code section 9884.7, subdivision (a)(4) in that Respondent Fernandez committed acts that constitute fraud by issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 above, without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

## THIRD CAUSE FOR DISCIPLINE

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

21. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (a), in that Respondent Guerrero failed to comply with the following sections of that Code:

a. **Section 44012**: Respondent Fernandez failed to ensure that the emission control tests were performed on the vehicles identified in paragraph 18 above, in accordance with procedures prescribed by the department.

b. **Section 44015**: Respondent Fernandez issued electronic smog certificates of compliance for the vehicles identified in paragraph 18 above, without ensuring that they were properly tested and inspected to determine if they were in compliance with Health and Safety Code section 44012.

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## FOURTH CAUSE FOR DISCIPLINE

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

22. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (c), in that Respondent Fernandez failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.35, subdivision (c)**: Respondent Fernandez issued electronic smog certificates of compliance for the vehicles described in paragraph 18 above, even though they had not been inspected in accordance with California Code of Regulations, title 16, section 3340.42.

b. **Section 3340.42**: Respondent Fernandez failed to ensure that the required smog tests were conducted on the vehicles described in paragraph 18 above, in accordance with the Bureau's specifications.

## FIFTH CAUSE FOR DISCIPLINE

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

23. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that Respondent Fernandez committed dishonest, fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 above without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

## SIXTH CAUSE FOR DISCIPLINE

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

24. Respondent Guerrero's Technician License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (a), in that Respondent Guerrero failed to comply with sections 44012 of that Code as follows: Respondent Guerrero failed to perform the emission control tests on the vehicles described in paragraph 18 above in accordance with procedures prescribed by the department.

## SEVENTH CAUSE FOR DISCIPLINE

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

25. Respondent Guerrero's Technician License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (c), in that Respondent Guerrero failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.30, subdivision (a)**: Respondent Guerrero failed to inspect and test the vehicles described in paragraph 18 above in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

b. **Section 3340.42**: Respondent Guerrero failed to conduct the required smog tests on the vehicles described in paragraph 18 above in accordance with the Bureau's specifications.

## EIGHTH CAUSE FOR DISCIPLINE

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

26. Respondent Guerrero's Technician License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that Respondent committed dishonest, fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 above without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

## OTHER MATTERS

27. Pursuant to Code section 9884.7, subdivision (c), the Director may suspend, revoke or place on probation the registration for all places of business operated in this state by Respondent Fernandez upon a finding that Respondent Fernandez has, or is, engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

28. Pursuant to Health & Safety Code section 44072.8, if Respondent Fernandez's Smog Check Station License is revoked or suspended, the Director may likewise revoke or suspend any additional license issued under Chapter 5 of the Health and Safety Code in the name of Respondent Fernandez.

29. Pursuant to Health & Safety Code section 44072.8, if Respondent Guerrero's Technician License is revoked or suspended, the Director may likewise revoke or suspend any additional license issued under Chapter 5 of the Health and Safety Code in the name of Respondent Guerrero.

## PRAYER

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

1. Revoking or suspending Automotive Repair Dealer Registration Number ARD 263478, issued to Moises Ortiz Fernandez, Owner of M & C Smog Test Only;

2. Revoking or suspending Smog Check - Test Only Station License Number TC 263478, issued to Moises Ortiz Fernandez, Owner of M & C Smog Test Only;

3. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Moises Ortiz Fernandez;

4. Revoking or suspending Advanced Emission Specialist Technician License Number EA 632279, issued to Crystian David Guerrero;

5. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Crystian David Guerrero;

6. Ordering Respondents Moises Ortiz Fernandez, Owner of M & C Smog Test Only, and Crystian David Guerrero 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

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

DATED: June 21 2012

JOHN WALLAUCH
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
*Complainant*

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