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

In the Matter of the Accusation Against: **ELENA GOMEZ, OWNER, DOING BUSINESS AS E & S SMOG** **1046 South Brampton Avenue** **Rialto, CA 92376** **5310 Mission Boulevard, Unit D** **Jurupa Valley, CA 92509** **Automotive Repair Dealer Registration No. ARD 272951** **Smog Check-Test Only Station License No. TC 272951** **MARVIN CRUZ** **12075 Bayless Street** **Moreno Valley, CA 92557** **Smog Check Inspector License No. EO 635840** **HANI NGUYEN** **8753 Tourmaline Court** **Riverside, CA 92509** **Smog Check Inspector License No. EO 635606** Respondents.	Case No. 79/15-50 **ACCUSATION** (SMOG CHECK)

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Complainant alleges:

PARTIES

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

2. On or about May 8, 2013, the Bureau of Automotive Repair issued Automotive Repair Dealer Registration Number ARD 272951 (Registration) to Elena Gomez, Owner, doing business as E & S Smog (Respondent Gomez). The Registration was in full force and effect at all times relevant to the charges brought herein and will expire on May 31, 2015, unless renewed.

3. On or about June 12, 2013, the Bureau of Automotive Repair issued Smog Check-Test Only Station License Number TC 272951 (Station License) to Respondent Gomez. The Station License was in full force and effect at all times relevant to the charges brought herein and will expire on May 31, 2015, unless renewed.

4. On or about August 5, 2013, the Bureau issued Smog Check Inspector License No. EO 635840 (Inspector License) to Marvin Cruz (Respondent Cruz). Respondent Cruz's Inspector License was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2015, unless renewed.

5. On or about June 10, 2013, the Bureau issued Smog Check Inspector License No. EO 635606 (Inspector License) to Hani Nguyen (Respondent Nguyen). Respondent Nguyen's Inspector License was in full force and effect at all times relevant to the charges brought herein and will expire on April 30, 2015, unless renewed.

JURISDICTION

6. This Accusation is brought before the Director of Consumer Affairs (Director) for the Bureau of Automotive Repair, under the authority of the following laws.

7. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender, cancellation of a license shall not deprive the Director of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

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

9. Section 9884.20 of the Code states:

"All accusations against automotive repair dealers shall be filed within three years after the performance of the act or omission alleged as the ground for disciplinary action, except that with respect to an accusation alleging fraud or misrepresentation as a ground for disciplinary action, the accusation may be filed within two years after the discovery, by the bureau, of the alleged facts constituting the fraud or misrepresentation."

10. Section 9884.22 of the Code states:

"(a) Notwithstanding any other provision of law, the director may revoke, suspend, or deny at any time any registration required by this article on any of the grounds for disciplinary action provided in this article. The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have all the powers granted therein.

". . . ."

11. 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.

12. Section 44072 of the Health and Safety Code states:

"Any license issued under this chapter and the regulations adopted pursuant to it may be suspended or revoked by the director. The director may refuse to issue a license to any applicant for the reasons set forth in Section 44072.1. The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have all the powers granted therein."

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13. Section 44072.4 of the Health and Safety Code states:

"The director may take disciplinary action against any licensee after a hearing as provided in this article by any of the following:

"(a) Imposing probation upon terms and conditions to be set forth by the director.

"(b) Suspending the license.

"(c) Revoking the license."

14. 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 of Consumer Affairs, or a court of law, or the voluntary surrender of the license shall not deprive the Director of jurisdiction to proceed with disciplinary action.

15. Section 44072.7 of the Health and Safety Code states:

"All accusations against licensees shall be filed within three years after the act or omission alleged as the ground for disciplinary action, except that with respect to an accusation alleging a violation of subdivision (d) of Section 44072.2, the accusation may be filed within two years after the discovery by the bureau of the alleged facts constituting the fraud or misrepresentation prohibited by that section."

16. 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."

STATUTORY PROVISIONS

17. 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.'"

18. Section 23.7 of the Code states:

"Unless otherwise expressly provided, 'license' means license, certificate, registration, or other means to engage in a business or profession regulated by this code or referred to in Section 1000 or 3600."

19. 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."

20. 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 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.

". . . ."

21. Section 44072.10 of the Health and Safety Code states:

". . .

"(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:

"(1) Clean piping, as defined by the department.

"(2) Tampering with a vehicle emission control system or test analyzer system.

"(3) Tampering with a vehicle in a manner that would cause the vehicle to falsely pass or falsely fail an inspection.

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

REGULATORY PROVISIONS

22. California Code of Regulations, title 16, section 3340.28, subdivision (e), states that "[u]pon renewal of an unexpired Basic Area Technician license or an Advanced Emission Specialist Technician license issued prior to the effective date of this regulation, the licensee may apply to renew as a Smog Check Inspector, Smog Check Repair Technician, or both."

23. California Code of Regulations, title 16, section 3340.45 states:

"(a) All Smog Check inspections shall be performed in accordance with requirements and procedures prescribed in the following:

"(1) Smog Check Inspection Procedures Manual, dated August 2009, which is hereby incorporated by reference. This manual shall be in effect until subparagraph (2) is implemented.

"(2) Smog Check Manual, dated 2013, which is hereby incorporated by reference. This manual shall become effective on or after January 1, 2013."

COSTS

24. Section 125.3 of the Code provides, in pertinent part, that the Bureau 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, with failure of the licentiate to comply subjecting the license to not being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

FIRST UNDERCOVER RUN

25. At all times alleged in this Accusation, Respondents Cruz and Nguyen were acting in the course and within the scope of a technician, employee, partner, officer, or member of Respondent Gomez.

26. On October 11, 2013 a Bureau undercover operator (the Operator) received custody of a Bureau-documented 1999 Dodge. In its documented condition, the 1999 Dodge had a modified heated oxygen sensor circuit that would cause the vehicle to fail the tailpipe emissions test for high Nitrogen Oxide (NOx) emissions. At 1200 hours, the Operator was instructed to go to a smog station in Riverside called JR Smog Check Only and request a smog inspection.

27. At 1210 hours that day, the Operator arrived at JR Smog Check Only. He spoke with Edgar Chavez, an employee and technician at JR Smog Check Only. The Operator told Chavez that he had a vehicle that needed to pass its smog inspection. Chavez told the Operator that the vehicle needed to be tested at a STAR certified smog station and that it could not be tested at JR Smog Check Only. The Operator asked Chavez if he could "take care of it" and told Chavez that he knew the vehicle would not pass the smog inspection. Chavez told the Operator that it would cost $230.00 to "take care of it." The Operator later paid $230.00 and gave the keys to a male named Esteban who was at the smog station. Esteban left JR Smog Check Only with the vehicle.

28. Unbeknownst to the Operator, the vehicle was taken from JR Smog Check Only to a different smog station: Respondent Gomez's smog station, E & S Smog. There, Respondent Cruz

performed the smog inspection on the Bureau-documented 1999 Dodge. A certificate of compliance was issued for this inspection.

29. At 1410 hours, Esteban returned to JR Smog Check Only with the vehicle. He told the Operator that the test was completed, the vehicle passed inspection, and the paperwork was in the vehicle. The Operator then left JR Smog Check Only and returned custody of the vehicle to a Bureau representative.

30. A Bureau representative re-inspected the 1999 Dodge and found that the oxygen sensor modification that was previously documented was still intact. The vehicle continued to fail inspection because it had high NOx emissions.

SECOND UNDERCOVER RUN

31. On December 12, 2013, the Operator received custody of a Bureau-documented 1992 Plymouth. In its documented condition, the 1992 Plymouth had the internal material from the catalytic converter removed; this would cause it to fail the tailpipe emissions test for excessive levels of exhaust emissions. At 1320 hours, the Operator was instructed to take the vehicle to Respondent Gomez's smog station, E & S Smog, and tell the employees there that the Operator had a vehicle that needed to pass a smog inspection.

32. At 1339 hours, the Operator arrived at E & S Smog. A male employee of Respondent Gomez approached the Operator. The Operator told the male employee that he brought in a vehicle to pass inspection. The male employee asked the Operator if the Operator had received a quote for the smog inspection. The Operator said he was quoted $200.00 for the inspection. The Operator told the employee that the vehicle would not pass its inspection. The Operator gave the employee the keys and the vehicle was driven into the testing bay.

33. Respondent Cruz, using the licensure and access code of Nguyen, performed the inspection on the Bureau-documented 1992 Plymouth. As a result of this inspection, a certificate of compliance was issued.

34. An employee told the Operator that he owed $200.00 for the inspection. The Operator paid the $200.00 and received an unsigned copy of the estimate and final invoice that

listed the inspection cost at $40.00. The Operator left the smog station with the vehicle and returned custody of it to a Bureau representative.

35. A Bureau representative later re-inspected the vehicle. The condition of the catalytic converter was the same as previously documented. The vehicle was still in a condition that would fail a proper smog inspection because of excessive exhaust emissions.

THIRD UNDERCOVER RUN

36. On February 10, 2014, the Operator received custody of a Bureau-documented 2002 Chrysler. In its documented condition, the 2002 Chrysler had the wires leading to the number 1 and 6 fuel injectors cut. This would cause the vehicle to fail the functional test because of an illuminated malfunction indicator lamp. At 1345 hours, the Operator was instructed to take the vehicle to Respondent Gomez's smog station, E & S Smog, and tell the employees that the Operator had a vehicle that needed to pass a smog inspection.

37. At 1400 hours, the Operator arrived at E & S Smog and an employee from the previous undercover run approached. The Operator told the employee that he had another vehicle that needed to pass its smog inspection. The employee asked the Operator if the Operator wanted the vehicle to be tested to see if it would pass or to just pass it. The Operator told the employee that the Operator needed the vehicle to pass. The employee spoke with Respondent Cruz. The employee then quoted the Operator $250.00 for the smog inspection. The Operator agreed and gave the keys to the employee. The employee drove the vehicle into the testing bay.

38. Respondent Cruz, using the licensure and access code of Nguyen, performed the inspection on the Bureau-documented 2002 Chrysler. As a result of the smog inspection, a certificate of compliance was issued.

39. Respondent Cruz told the Operator that the smog inspection was done. The Operator paid Respondent Cruz $250.00.

40. Respondent Cruz signed the Vehicle Inspection Report. The Operator was asked to sign the estimate and invoice listing the smog inspection cost at $40.00.

41. Respondent Cruz handed the estimate, invoice, and Vehicle Inspection Report to the Operator. The Operator left the smog station with the vehicle and returned custody of it to a Bureau representative.

42. A Bureau representative later re-inspected the vehicle. The vehicle was still in a condition that would fail a proper smog inspection.

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

43. Respondent Gomez's Registration is subject to disciplinary action under section 9884.7, subdivision (a)(1), in that Respondent Gomez made or authorized statements which Respondent Gomez knew or in the exercise of reasonable care should have known to be untrue or misleading as follows: Respondent Gomez certified that the three vehicles described in paragraphs 25-42 were properly inspected and passed their smog inspections, when in fact and in truth those vehicles were not properly inspected and could not pass a bona fide smog inspection.

SECOND CAUSE FOR DISCIPLINE

(Violations of Motor Vehicle Inspection Program)

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

a. **Section 44012**: Respondent Gomez failed to perform the tests of the emission control systems and devices on the vehicles described in paragraphs 25-42 in accordance with procedures prescribed by the Department.

b. **Section 44015**: Respondent Gomez issued certificates of compliance for the vehicles described in paragraphs 25-42 without properly testing and inspecting them to determine if they were in compliance with Health & Safety Code section 44012.

c. **Section 44035**: Respondent Gomez failed to meet or maintain the standards prescribed for qualification, equipment, performance, or conduct by failing to properly perform smog inspections on the vehicles described in paragraphs 25-42 or certifying that such tests had been properly performed, when in fact they were not properly performed.

THIRD CAUSE FOR DISCIPLINE

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

45. Respondent Gomez's Station License is subject to disciplinary action under Health and Safety Code sections 44072.10, subdivision(c) and 44072.2, subdivision (a), in that Respondent Gomez failed to comply with the following sections of California Code of Regulations, title 16:

a. **Section 3340.35, subdivision (c)**: Respondent Gomez failed to inspect and test the vehicles described in paragraphs 25-42 in accordance with the procedures specified in section 3340.42 of the Regulations and failed to ensure that these vehicles had all the required emission control equipment and devices installed and functioning correctly.

b. **Section 3340.41, subdivision (c)**: Respondent Gomez knowingly entered into the Emissions Inspection System false information about the vehicles described in paragraphs 25-42, providing results for smog inspections which were not properly performed.

c. **Section 3340.42**: Respondent Gomez failed to conduct the required smog tests on the vehicles described in paragraphs 25-42 in accordance with the Bureau's specifications.

FOURTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud, or Deceit)

46. Respondent Gomez's Registration is subject to disciplinary action under Code section 9884.7, subdivision (a)(4), and Respondent Gomez's Station License is subject to disciplinary action under Health and Safety Code sections 44072.10, subdivision (c) and 44072.2, subdivision (d), in that Respondent Gomez committed dishonest, fraudulent, or deceitful acts whereby another is injured by issuing smog inspection certificates for the vehicles described in paragraphs 25-42 without performing bona fide inspections of the emission control devices and systems on them, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

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FIFTH CAUSE FOR DISCIPLINE

(Violation of Motor Vehicle Inspection Program)

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

a. **Section 44012**: Respondent Cruz failed to perform the tests of the emission control systems and devices on the vehicles described in paragraphs 25-42 in accordance with procedures prescribed by the Department.

b. **Section 44015**: Respondent Cruz issued certificates of compliance for the vehicles described in paragraphs 25-42 without properly testing and inspecting them to determine if they were in compliance with Health & Safety Code section 44012.

c. **Section 44035**: Respondent Cruz failed to meet or maintain the standards prescribed for qualification, equipment, performance, or conduct by failing to properly perform smog inspections on the vehicles described in paragraphs 25-42 or certifying that such tests had been properly performed, when in fact they were not properly performed.

SIXTH CAUSE FOR DISCIPLINE

(Failure to Comply with Regulations Under Motor Vehicle Inspection Program)

48. Respondent Cruz's Inspector License is subject to disciplinary action under Health and Safety Code sections 44072.10, subdivision (c) and 44072.2, subdivision (a) in that Respondent Cruz failed to comply with the following sections of California Code of Regulations, title 16:

a. **Section 3340.35, subdivision (c)**: Respondent Cruz failed to inspect and test the vehicles described in paragraphs 25-42 in accordance with the procedures specified in section 3340.42 of the Regulations and failed to ensure that these vehicles had all the required emission control equipment and devices installed and functioning correctly.

b. **Section 3340.41, subdivision (c)**: Respondent Cruz knowingly entered into the Emissions Inspection System false information about the vehicles described in paragraphs 25-42 providing results for smog inspections which were not properly performed.

c. **Section 3340.42**: Respondent Cruz failed to conduct the required smog tests on all the vehicles in paragraphs 25-42 in accordance with the Bureau's specifications.

SEVENTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud, or Deceit)

49. Respondent Cruz's Inspector License is subject to disciplinary action under Health and Safety Code sections 44072.10, subdivision (c) and 44072.2, subdivision (d), in that Respondent Cruz committed dishonest, fraudulent, or deceitful acts whereby another is injured by issuing smog inspection certificates for the vehicles described in paragraphs 25-42 without performing bona fide inspections of the emission control devices and systems on them, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

EIGHTH CAUSE FOR DISCIPLINE

(Violation of Motor Vehicle Inspection Program)

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

a. **Section 44035**: Respondent Nguyen failed to meet or maintain the standards prescribed for qualification, equipment, performance, or conduct for the inspections described in paragraphs 31-42. Respondent Nguyen failed to maintain the security of Respondent Nguyen's access code, disclosed Respondent Nguyen's access code to Respondent Cruz, and allowed Respondent Cruz to use Respondent Nguyen's access code and licensure for inspections during which Respondent Nguyen was not present.

NINTH CAUSE FOR DISCIPLINE

(Failure to Comply with Regulations Under Motor Vehicle Inspection Program)

51. Respondent Nguyen's Inspector License is subject to disciplinary action under Health and Safety Code sections 44072.10, subdivision (c) and 44072.2, subdivision (a) in that Respondent Nguyen failed to comply with sections 3340.42 and 3340.45 of California Code of Regulations, title 16. Respondent Nguyen failed to maintain the security of Respondent

Nguyen's access code, disclosed Respondent Nguyen's access code to Respondent Cruz, and allowed Respondent Cruz to use Respondent Nguyen's access code and licensure for the inspections described in paragraphs 31-42 during which Respondent Nguyen was not present.

OTHER MATTERS

52. Under 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 Gomez upon a finding that Respondent Gomez has, or is, engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

53. Under Health & Safety Code section 44072.8, if Respondent Gomez's 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 Gomez.

54. Under Health & Safety Code section 44072.8, if Respondent Cruz's Inspector 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 Cruz.

55. Under Health & Safety Code section 44072.8, if Respondent Nguyen's Inspector 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 Nguyen.

PRAYER

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

1. Revoking or suspending Automotive Repair Dealer Registration Number ARD 272951, issued to Elena Gomez, Owner, doing business as E & S Smog;

2. Revoking or suspending Smog Check-Test Only Station License Number TC 272951, issued to Elena Gomez, Owner, doing business as E & S Smog;

3. Revoking or suspending Smog Check Inspector License No. EO 635840 issued to Marvin Cruz;

4. Revoking or suspending Smog Check Inspector License No. EO 635606 issued to Hani Nguyen;

5. Revoking or suspending the registration for all places of business operated in this state by Elena Gomez, Owner, doing business as E & S Smog;

6. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Elena Gomez, Owner, doing business as E & S Smog;

7. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Marvin Cruz;

8. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Hani Nguyen;

9. Ordering Elena Gomez, Owner, doing business as E & S Smog; Marvin Cruz; and Hani Nguyen to pay the Bureau of Automotive Repair 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: October 7, 2014

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

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