

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

In the Matter of the First Amended Accusation
Against:

4 LESS SMOG CHECK
TOYLI HOJAGULIYEV, OWNER
630 East Blithedale Avenue
Mill Valley, CA 94941
Automotive Repair Dealer Registration No.
ARD 257509
Smog Check, Test Only, Station License No.
TC 257509

and

RAMIN ALIYEV
Advanced Emission Specialist Technician
License No. EA 147215,

Respondents

4 LESS SMOG CHECK LLC
RAMIN ALIYEV, MEMBER
630 East Blithedale Avenue
Mill Valley, CA 94941
Automotive Repair Dealer Registration No.
ARD 265747
Smog Check, Test Only, Station License No.
TC 265747,

Affiliated Licensees/Respondents

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted
and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective

February 28, 2014

DATED: February 27, 2014


DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

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Case No. 79/12-146

OAH No. 2012080396

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PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, State of California, Office of Administrative Hearings, heard this matter on November 20 and 21, 2013, at Oakland, California.

Deputy Attorney General Nicholas Tsukamaki represented complainant John Wallauch, Chief, Bureau of Automotive Repair, Department of Consumer Affairs.

Attorney at Law Kathleen Morgan, 788a Ulloa Street, San Francisco, California 94127, represented respondent Toyli Hojagulihev, owner of 4 Less Smog Check, as located at 630 Blithedale Avenue, Mill Valley, CA 94941.

Attorney at Law Jeffrey S. Kravitz, 6747 Fair Oaks Boulevard, Carmichael, California 95608, represented respondent Ramin Aliyew and respondent 4 Less Smog Check LLC.

At the hearing of this matter, complainant's motion, in accordance with Government Code section 11507, was granted to amend the First Amended Accusation. The amendment altered the pleading as follows: at page 6, line 8, delete "Mill Valley ('Mill Valley facility')," and replaced with "Oakland"; and, at page 6, line 21, delete "the" that appears before "Mill Valley" and replace with "a 4 Less Smog Check located in Mill Valley, California ('Mill Valley')."

On November 21, 2013, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

Licenses

TOYLI HOJAGULIYEV, OWNER OF AND DOING BUSINESS AS 4 LESS SMOG CHECK (EAST BLITHEDALE AVENUE, MILL VALLEY, MARIN COUNTY, CALIFORNIA)

1. On March 12, 2009, the Director (director) of the Department of Consumer Affairs (department), for the Bureau of Automotive Repairs (the bureau), issued Automotive Repair Dealer Registration Number ARD 257509 to respondent Toyli Hojagulihev (respondent Hojagulihev), owner of and doing business as 4 Less Smog Check. At the time of the matters that are the subject of this accusation, the business operations were located at 630 Blithedale Avenue, Mill Valley, CA 94941. The registration expiration date was February 29, 2012.

2. On March 17, 2009, the director issued Smog Check, Test Only, Station License Number TC 257509 to respondent Hojagulihev. The smog check station license for

the 4 Less Smog Check facility, which is located on East Blithedale Avenue in Mill Valley, expired on February 29, 2012.

RAMIN ALIYEV

3. In approximately 2003, the director issued Advanced Emission Specialist Technician (EA) License No. EA 147215 (technician license) to Ramin Aliyev (respondent Aliyev). Effective May 1, 2013, and pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), upon respondent Aliyev's election, the EA license was conferred to Smog Check Inspector (EO) License No. EO 147215 and Smog Check Repair Technician (EI) License No. EI 147215. The revised license designations will expire on April 30, 2015.

AFFILIATED LICENSES

4 LESS SMOG CHECK LLC

4. On July 6, 2011, the director issued Automotive Repair Dealer Registration Number ARD 265747 to respondent Aliyev, a member of 4 Less Smog Check LLC, doing business as DMV Star Smog Check (respondent 4 Less Smog Check LLC). The registration will expire on July 31, 2014.

5. On December 23, 2011, the director issued Smog Check, Test Only, Station License Number TC 265747 to respondent 4 Less Smog Check LLC. The smog station license will expire July 31, 2014.

Non-Licensure Certificate

6. Complainant presented the certificate of the bureau's Licensing Unit's Staff Service Manager I F. Mayugba that establishes Mr. Samin Aliyev has never been licensed under the Smog Check Program.

The Bureau's Surveillance Operation – November 9, 2011

PROGRAM REPRESENTATIVE BRUCE SAUGEZ

7. Bureau Program Representative II(S) Bruce Saugez (PR Saugez) offered persuasive testimonial evidence at the hearing of this matter. By way of the consistency and character of his testimony, his demeanor while testifying, his attitude towards the proceedings, and his objective and comprehensive capacity to have perceived the matters for which he provided testimonial evidence at the hearing of this matter, PR Saugez demonstrated that he is a credible¹ and trustworthy witness in this matter.

¹ California Government Code section 11425.50, subdivision (b), third sentence.

8. On November 9, 2011, at approximately 8:15 a.m., PR Saugez received an assignment from Program Representative III Fidel Reyes III, supervisor of the BAR's South San Francisco field office (field office), to investigate the underlying particulars relating to a telephonic anonymous tip that an unlicensed person had conducted smog check inspections at a smog inspection facility called 4 Less Smog Check.

Upon researching the agency's Electronic Transmission Management Information System (ETMIS) computerized records, PR Saugez detected that approximately five facilities used the business name of "4 Less Smog Check" in the San Francisco Bay area. PR Saugez, however, detected that within the scope of the regulatory and investigative monitoring area of the field office there was only one facility having that business name, which was located on South El Camino Real in the City of San Mateo

At approximately 9:00 a.m. on November 9, 2011, PR Saugez left the bureau's office to drive to the 4 Less Smog Check on East El Camino Real in the City of San Mateo. At approximately 9:25 a.m., he arrived in the vicinity of the subject 4 Less Smog Check facility. In a concealed location, PR Saugez parked the bureau car, which had transported him to the location of 4 Less Smog Check in San Mateo. From the parked and concealed car, PR Saugez observed two men walk around the parking lot in the front of the San Mateo 4 Less Smog Check. Beginning at approximately 9:45 a.m., PR Saugez used the bureau-issued digital camera to take approximately five photographs of the men and especially a bald-headed man, who was known by program representative to be respondent Aliyev. That morning, PR Saugez took approximately five digital images that featured respondent Aliyev.

9. After taking the digital images of respondent Aliyev at the 4 Less Smog Check in San Mateo, PR Saugez used his cellular phone to telephone the bureau's field office. He reached PR Harold Jennings and asked that other program representative to access the ETMIS for the purpose of making a computerized search of all BAR 97 Test smog tests performed on November 9, 2011, through use of the smog check technician access code assigned to respondent Aliyev. During the telephonic exchange and after he had accessed the ETMIS, PR Jennings informed PR Saugez that between 9:26 a.m. and 9:42 a.m. on November 9, 2011, at the 4 Less Smog Check on East Blithedale in Mill Valley (Marin County) through the access code for EA 147215 that was issued to respondent Aliyev, a smog test had been performed and finalized on a 1997 Toyota truck, whose owner received a certificate of compliance in that the vehicle was found to pass the smog test inspection.

10. From the parked bureau vehicle, until after 9:55 a.m. on November 9, 2011, PR Saugez continued to effect surveillance of two men, including respondent Aliyev, as they walked around the parking lot for 4 Less Smog Check on El Camino Real in San Mateo. At approximately 10:00 a.m., PR Saugez drove the bureau vehicle from its concealed location to travel onto the premises of 4 Less Smog Check in San Mateo.

Although the other man, who was identified as smog check technician Trong Nguyen, told PR Saugez that respondent was not present at San Mateo 4 Less Smog Check, respondent Aliyev exited the facility's building to greet the bureau's employee. Initially PR Saugez stated that he was present to conduct a station inspection of the San Mateo facility. PR Saugez performed the station inspection, found violations of bureau regulations at the licensed facility and prepared a Station Inspection Report, which respondent Aliyev signed to indicate his receipt of the bureau's document.

After presenting respondent Aliyev with the completed Station Inspection Report,² for the San Mateo 4 Less Smog Check facility, PR Saugez made a remark to respondent Aliyev that it was the bureau representative's impression that the smog technician worked at the 4 Less Smog Check in Mill Valley. In response to the comment made by PR Saugez, respondent Aliyev replied that he did work at the facility in Mill Valley and that he had performed a smog test at Mill Valley 4 Less Smog Check at 9:30 a.m. that date. Then PR Saugez explained that the bureau's inspector had been parked in a concealed car at a location across the street from the San Matco facility since 9:25 a.m., and he had observed respondent Aliyev since that time. PR Saugez voiced his conclusion that it was impossible for the smog technician at 9:30 a.m. to have been present both in the City of San Mateo and at the 4 Less Smog Check in Mill Valley, which is more than 30 miles away from the 4 Less Smog Check San Mateo location. Further, the bureau program representative informed respondent Aliyev that the San Francisco field office had data from the bureau's field office showing that between 9:26 a.m. and 9:42 a.m. on that day, the access code assigned to respondent Aliyev had been used to perform a smog check inspection upon a 1997 Toyota truck.

11. On November 9, 2011, after 10:00 a.m., in the presence of PR Saugez, respondent Aliyev made an admission that his brother had memorized, or otherwise had possessed, the subject smog technician's access code. Respondent Aliyev intimated that his brother had performed a 1997 Toyota truck's smog check inspection, which began at 9:26 a.m., and that that unlicensed person had issued a smog check certificate of compliance around 9:42 a.m., at the Mill Valley location of 4 Less Smog Check on that date. Respondent Aliyev further asserted that, under his tutorage, his brother was training to become a smog check technician.

12. While at the San Mateo 4 Less Smog Check facility on the morning of November 9, 2011, PR Saugez prepared a handwritten document, which was titled "declaration," that was intended for the signature of respondent Aliyev. PR Saugez read to respondent Aliyev the contents of the draft document; however, respondent Aliyev stated that he wished to "think about" the language before signing the declaration.

² The Station Inspection Report, dated November 9, 2011, as issued to 4 Less Smog Check on El Camino Real, San Matco, noted the licensee's deficiencies to be a failure for "posting ARD sign, station license, [and] price sign." PR Saugez "informed [respondent Aliyev] about advertising, including 'ETF' and the 'Evap Test' in price of smog."

13. Respondent Aliyev heard PR Saugez state that he would return to the bureau's field office to report the events of the morning and that he would be available at the office to facilitate at respondent Aliyev's request a change of the access code issued to respondent Aliyev.

14. At approximately 2:00 p.m. on November 9, 2011, respondent Aliyev entered the bureau's field office. Along with the field office's supervisor, PR III Reyes, PR Saugez commenced a formal interview of respondent Aliyev. While present at the bureau's field office, respondent Aliyev completed entries onto, and signed, the bureau's form titled, "Technician Access Code Change Request." By his own volition, respondent Aliyev wrote "compromised" onto the document as the "reason for change" of the access code.

During the interview, the declaration,³ which had been first read to respondent Aliyev at the San Mateo facility, was again read aloud. Respondent Aliyev refused to sign the document. PR III Reyes wrote upon the document: "refuses to sign."

15. During the field office interview, after he was asked by PR III Reyes whether he had intentionally allowed an unlicensed person to use his previously issued access code, respondent Aliyev was evasive and non-responsive despite having made an admission on the issue earlier in the day to PR Saugez at the San Mateo facility of 4 Less Smog Check.

PROGRAM REPRESENTATIVE HAROLD S. JENNINGS

16. Bureau Program Representative I Harold S. Jennings (PR Jennings) offered credible testimonial evidence at the hearing of this matter.

³ The text of the document that included a declaration included the following written by PR Saugez:

I informed Ramin Aliyev [that] a smog check inspection had been perform[ed] at 4 Less Smog in Mill Valley (ARD257509) on 11/9/11 using his Tech License (EA147215).

I, RAMIN ALIYEA, declare the following: Bruce Saugez, of the Bureau of Automotive Repair, asked me who had performed a smog check inspection on the morning of 11/9/11 at the Mill Valley location of 4 Less Smog. I told him my brother had performed the test. I was at the San Mateo location of 4 Less Smog at the time. I told Bruce [Saugez] that my brother knew my access code. I was training him how to perform the inspection. I realize now it is wrong to allow an unlicensed person to perform smog check inspection and will change my access code immediately. I will not share this code in the future. I promise this will never happen again. I declare this to be true and correct.

17. PR Jennings described in detail the capacity and features of the bureau's ETMIS database. And in particular, he noted the ability of the ETMIS to retrieve information previously inputted by any particular smog technician, while using a specific access code. Also the ETMIS provides data regarding the number of smog tests, length of time taken to perform the smog tests, and other information relating to the vehicles tested on any given date for any particular smog check technician.

18. PR Jennings credibly described that on November 9, 2011, at approximately 9:45 a.m., he received a telephone call from PR Saugez, who was on a bureau investigative assignment. During the telephone call, PR Saugez asked PR Jennings to access the ETMIS to ascertain whether the smog check technician access code assigned to respondent Aliyev had been used to conduct a smog inspection on that date. Within seconds of typing the name of respondent Aliyev into the bureau's software program, the ETMIS showed all of the smog checks performed with the access code assigned to respondent Aliyev. PR Jennings conveyed to PR Saugez his findings that a smog test of a 1997 Toyota truck had been performed and finalized between 9:26 a.m. and 9:42 a.m. on November 9, 2011, at the 4 Less Smog Check on East Blithedale in Mill Valley (Marin County) through the access code for EA 147215 that has been issued to respondent Aliyev.

Later that morning, Mr. Jennings printed a page from the ETMIS program that showed all tests performed on both November 8 and November 9, 2011, associated with the access code issued to respondent Aliyev. On November 8, 2011, respondent Aliyev's access code (147215) was associated with 10 separate smog check tests. But, on November 9, 2011, there had been only a single smog check test associated with the access code assigned to respondent Aliyev; and that test was upon a 1997 Toyota truck, whose owner was presented with a certificate of compliance indicating that vehicle had passed the smog check inspection.

PROGRAM REPRESENTATIVE FIDEL REYES III

19. Program Representative III Fidel Reyes III (PR Reyes) offered credible and persuasive evidence at the hearing of this matter.

20. PR Reyes is the supervising program representative and manager of the bureau's field office in South San Francisco. The scope of influence for the field office's regulatory operations includes the area where the San Mateo 4 Less Smog Check is located.

21. On the morning of November 9, 2011, PR Reyes received an anonymous telephonic tip that an unlicensed person was performing smog check tests at a smog check station called 4 Less Smog Check. Upon receiving the information, PR Reyes appointed PR Saugez to investigate the matter.

22. Later during that afternoon at approximately 2:00 p.m. on November 9, 2011, PR Reyes participated in an interview of respondent Aliyev, who voluntarily came into the bureau's subject field office in order to file a bureau form that would enable the change of

the access code, which is necessary for a smog check technician to operate the bureau's BAR 97 testing equipment.

23. Without any demand or direction from either PR Saugez or PR Reyes, respondent Aliyev completed the bureau's form number BAR STD 9 titled, "Technician Access Code Change Request." During the interview on November 9, 2011, respondent Aliyev wrote the word "compromised" upon the form as the reason for the change of the smog check technician access code that had been assigned to him.

24. Also during the interview at the bureau's field office on November 9, 2011, PR Reyes observed respondent Aliyev listen to the reading of the language, which had been written by PR Saugez at the San Mateo 4 Less Smog Check station. The text appeared on the bureau's form titled "Station Inspection Report (Supplemental Page)." Respondent Aliyev refused to sign the document, and he rejected any assent to the language in the document. When PR Saugez and PR Reyes asked respondent Aliyev whether he had allowed this technician's access code to be used by an unlicensed person, respondent "refused to answer." PR Reyes heard respondent Aliyev state that the refusal to sign the document was due to "potential repercussions." Respondent Aliyev asserted to PR Reyes that the supervising program representative "had the choice to issue [respondent] a citation or not." Further respondent Aliyev asked PR Reyes not to pursue the "unlicensed issue;" yet respondent Aliyev "was apologetic" regarding the question of misuse of the smog check technician access code as issued to respondent Aliyev. PR Reyes informed respondent Aliyev that any action regarding the suspicion of the unlawful use of the access card would rest with the bureau's headquarters in Sacramento.

Based upon respondent Aliyev's equivocation and evasiveness with his responses to questions by the bureau's program representatives, and in light of never voicing a clear denial of acts or omissions that aided and abetted unlicensed smog check activities, respondent Aliyev's verbal conduct constituted admissions of wrongdoing.

Evidence by Respondent Aliyev

25. Respondent Aliyev's testimonial evidence consisted only of testimony himself. More important, respondent Aliyev offered no competent documentary evidence that diminished, or refuted, the evidence presented by complainant in support of the allegations set forth in the accusation in this matter.

26. Respondent Aliyev was not believable when he asserted at the hearing that he was the only user of his smog check technician access code on the morning of November 9, 2011.

Respondent was not truthful when he testified that he performed the smog check at the Mill Valley 4 Less Smog Check Station facility between 9:26 a.m. and 9:44 a.m. on November 9, 2011.

27. Respondent Aliyev's evidence was not compelling with regard to an argument pertaining to the inaccurate time imprint⁴ on the digital images as captured by the camera used by PR Saugez to photograph respondent Aliyev. Rather, the weight of the evidence establishes that respondent Aliyev was present at the 4 Less Smog Check Station in San Mateo at 9:26 a.m. Pacific Standard Time, on November 9, 2011, when he was observed and photographed by PR Saugez.

28. Official notice is taken of the fact that more than 30 miles separate the Mill Valley 4 Less Smog Check facility and the San Mateo Smog Check facility. It was impossible for respondent Aliyev to have used the bureau assigned smog test access code in Mill Valley between 9:26 a.m. and 9:44 a.m., when he was observed being present in San Mateo from approximately 9:25 a.m. until 10:00 a.m., which was the time before the program representative drove upon the subject smog check station's premises from a concealed place for surveillance of the facility.

Matters in Mitigation regarding Respondent Aliyev

29. Since 2003, respondent Aliyev has been licensed as a smog check technician. Over the 10 years of his licensure, no disciplinary action has been sustained against the licenses held by, or associated with, respondent Aliyev.

30. Under the bureau's new licensing structure, effective May 1, 2013, respondent Aliyev was issued a Smog Check Inspector license (EO 147215) and a Smog Check Repair Technician license (EI 147215).

Respondent Aliyev holds an ARD registration as well as a smog check, test only, station license for a business operated in Greenbrae, California, known as DMV Star Smog Check. That business is owned by a limited liability company named 4 Less Smog Check LLC, of which respondent Aliyev is a member. That smog check station has been designated as a Star Certified Station because it generally exceeds the bureau's performance standards for inspecting "directed" vehicles.

⁴ Respondent Aliyev argued that from a copy of the digital images, which was produced during discovery, as taken on November 9, 2011, a digital image expert had detected the time reflected for taking the images began at the time of "10:46:08" on "2011:11:09." However, based on complainant's motion, official notice was taken that on Sunday, November 6, 2011, clocks lost an hour when the time went from Daylight Savings Time to Standard Time. And PR Saugez gave detailed testimony regarding his reliance for the time on the morning of November 9, 2011, when he first observed respondent Aliyev as being dependent upon, among other things: the time he arrived at the field office for work in relationship to when he received the investigation assignment and when he exited the field office to travel to 4 Less Smog Check in San Mateo; the drive time well known by him for traveling from the South San Francisco field office to the City of San Mateo; the clock radio in the bureau's car; and his personal time piece.

31. Although respondent Aliyev is listed as a smog technician working at the smog station on East Blithedale Avenue in Mill Valley, he has not been active with performing smog checks at that location since November 2011.

32. Approximately in October or November 2013, a smog check station, which is licensed in the name of the wife of respondent Aliyev, began to operate in Palo Alto, California. Respondent Aliyev has a member's interest in the limited liability company, which has his wife as the majority member.

Matter in Aggravation regarding Respondent Aliyev

33. PR Ruben Ortiz (PR Ortiz) offered credible and persuasive testimonial evidence at the hearing of this matter.

PR Ortiz established that on December 2, 2010, while performing inspections of licensed facilities in Oakland, California, he went to the 4 Less Smog Check on Broadway in Oakland. PR Ortiz set out to inspect facility based upon an anonymous tip that an unlicensed smog technician was performing smog inspections at the facility.

As PR Ortiz approached the structure where smog inspections were performed, the program representative observed an unlicensed person, Samin Aliyev, engaged in the ignition timing check of a vehicle undergoing a smog inspection. PR Ortiz admonished and warned respondent Aliyev that "only licensed smog technicians are allowed to perform the visual and functional inspections pertaining to the smog inspection." Respondent Aliyev made an admission to PR Ortiz that he was unaware of the law that forbade his unlicensed brother and employee, Samin Aliyev, to perform visual inspections, to check ignition timing or to perform a Low Pressure Fuel Evaporative test on a vehicle undergoing a smog inspection.

PR Ortiz caused his findings on December 2, 2010, to be typed onto the bureau's form titled Inspection Report. The last sentence of the two-page form reads, "I also informed [respondent Aliyev] that his smog technician access code should not be shared with others to prevent unauthorized and illegal smog inspections to be conducted."

Although PR Ortiz presented the typed Inspection Report to respondent Aliyev and his brother, Samin Aliyev, and asked them to sign the document to verify their receipt of the document, both individuals refused to affix their respective signatures upon the Inspection Report. PR Ortiz, however, wrote on the document: "Did Not Want To Sign" at lines intended for the signatures of respondent Aliyev and Samin Aliyev.

34. Based upon his refusal to sign the form prepared by PR Ortiz in December 2010, as well as his refusal to sign the form prepared by PR Saugez in November 2011, respondent Aliyev demonstrated a disposition or character for non-cooperation with the bureau's regulatory and investigatory authority.

35. Respondent Aliyev was deliberately untruthful while testifying at the hearing of this matter. He was not credible when he testified that he was present to personally perform on November 9, 2011, beginning at 9:26 a.m., the smog check inspection of a Toyota truck at the 4 Less Smog Check Station located on East Blithesdale Avenue in Mill Valley, Marin County, California. Respondent Aliyev was not at that location in Mill Valley because he was observed, by a bureau program representative on that date and at that time, standing and walking on the premises of the 4 Less Smog Check Station located on South El Camino Real in the City of San Mateo, San Mateo County, California.

36. From past admissions made by him along with his correspondence to the bureau, respondent Aliyev was aware of the fact that the smog check technician access code had been used by someone, who was probably respondent's brother Samin Aliyev, on the morning of November 9, 2011. And respondent Aliyev was not credible when he claimed that bureau PR Saugez arrived at the 4 Less Smog Check station in San Mateo at approximately 11:30 a.m.

Respondent Aliyev was not believable in his description of the manner of the investigative interviews performed by PR Saugez and PR Reyes as being coercive, abusive and hostile. Respondent Aliyev was not persuasive in asserting that PR Reyes exhibited an aggressive manner during the field office interview on November 9, 2011, that was intended to intimidate respondent Aliyev.

Respondent Aliyev's claim was not believable that during the November 9, 2011 interview, the bureau's program representatives said to him that upon him signing the bureau's form called Change of Access Code he would be "let go." And he was not truthful when he stated that it was PR Saugez who told him to write "compromised" upon the Change of Access Code form because the program representative supposedly said that word would not "incriminate" respondent Aliyev in wrongdoing.

37. Respondent Aliyev failed to produce any corroborating witness testimony, especially from Mr. Samin Aliyev, to support the claims made that Samin Aliyev had not used the smog check technician access code that had been issued to respondent Aliyev. Nor did respondent Aliyev call as a witness smog check technician Trong Nguyen to endorse respondents' version of events occurring on November 9, 2011, at the San Mateo 4 Less Smog Check facility.

Unavailability of Respondent Hojaguliiev

38. Respondent Hojaguliiev was unavailable to offer testimonial evidence at the hearing of this matter.

During July 2013, respondent Hojaguliiev traveled to Turkmenistan to assist his mother and attend to the estate of his father, who had died on July 17, 2013. According to representations in a declaration filed during the hearing of this matter, respondent Hojaguliiev has been unable to leave that country. Also respondent Aliyev testified at the

hearing of this matter that in days immediately before the beginning of the hearing he spoke by telephone to respondent Hojagulihev who relayed his plight of being unable to leave Turkmenistan.

Matters in Mitigation regarding Respondent Hojagulihev

39. On November 1, 2011, respondent Hojagulihev sold to respondent Aliyev all property, including furniture, fixtures, equipment of the business known as 4 Less Smog Check located on East Blithedale Avenue in Mill Valley. However, the sales transaction excluded the transfer of “ARD business license #257509.”

The document titled “Bill of Sale” notes that the agreement between respondent Aliyev and respondent Hojagulihev “ends the use” of the automotive motive repair business by respondent Hojagulihev at the location in Mill Valley as of November 1, 2011. And by the agreement, respondent Aliyev made a covenant “to notify” the bureau of the contract and he agreed “to take full responsibility for obtaining a new ARD business license” and that respondent Hojagulihev was “in no way obligated to be part of [the] process” of prompting the bureau to alter the licensure records for the ARD in Mill Valley.

40. On approximately November 1, 2011, respondent Hojagulihev learned that the property, upon which 4 Less Smog Check in Mill Valley conducted business, was subject to foreclosure and the lease with the former landowner was rendered void. And on approximately November 1, 2011, respondent Hojagulihev received a letter from the lawyers for the new landowner, who had acquired the land. The lawyer’s letter informed respondent Hojagulihev and his assignee to any existing leasehold interests that the lease for the building at the subject site on East Blithedale Avenue in Mill Valley was terminated.

41. Respondent Hojagulihev offered a declaration under penalty of perjury that sets out, in part, that after the sale of the business equipment and operations to respondent Aliyev on November 1, 2011, he had no contacts or relations with the licensed activities, including smog check inspections, at the premises known as 4 Less Smog Check on East Blithedale Avenue in Mill Valley. After November 1, 2011, respondent Hojagulihev acted upon a belief that respondent Aliyev would “obtain all proper licenses” from the bureau that confirmed respondent Aliyev’s assumption of full responsibilities for all acts and omission of personnel associated with 4 Less Smog Check.

42. From September 2010 through June 2012, respondent Hojagulihev has been a student at UC San Diego. He earned a bachelors of arts degree from the university in Political Science in June 2012. He took several courses in the study of finance.

43. Respondent Hojagulihev worked his way through college by earning money as a licensed smog check technician.

44. In June 2012, respondent Hojagulihev secured employment as an investment associate with Fisher Investments.

Failure of Proof on the Part of Respondent Hojaguliyev

45. Despite the bill of sale document, dated November 1, 2011, as presented at the hearing of this matter, respondent offered no evidence regarding the actual termination of respondent Hojaguliyev's association with the smog check business conducted at 4 Less Smog Check station in Mill Valley on November 9, 2011. And respondent Hojaguliyev offered no competent proof that before November 9, 2011, he received no income or monetary benefit from the smog check station's operations associated with Mill Valley 4 Less Smog Check.

46. The Bill of Sale, which has a date printed at the top of the page, was not sealed by a notary public or signed by an independent witness so as to corroborate that respondent signed the document before November 9, 2011.

47. Respondent Hojaguliyev provided no evidence to establish that before November 9, 2011, the bureau had sufficient proof that respondent Hojaguliyev was in no way affiliated with licensing activities performed by personnel associated with 4 Less Smog Check on East Blithedale Avenue in Mill Valley.

Costs of Investigation and Prosecution

48. Complainant seeks recovery of the costs of investigation and prosecution. The recovery of costs sought is argued to be reasonable in an aggregate amount of \$14,395.21.

49. Bureau Program Manager I William D. Thomas prepared a declaration, dated June 7, 2013. The costs of investigation involved two program representatives, which included PR Saugez, who devoted more than 28 hours gathering data and analyzing the materials relating to investigation of respondents. The total cost of investigation is \$2,167.71. That amount is reasonable and may be recovered from respondents by the bureau.

50. Complainant seeks recovery of fees paid for attorney services through the Department of Justice as costs of prosecution that are set at \$12,227.50.

The Department of Justice, through Deputy Attorney General (DAG) Tsukamaki, submitted not only a three-page declaration but also an eight-page print-out of activities by all prosecuting lawyers as well as the work of the two paralegals (Legal Analysts) involved in the preparation of the case for hearing. Although DAG Tsukamaki bore the primary responsibility for the prosecution of the matter, four other lawyers were involved, namely DAG Justin R. Surber, DAG Jonathan D. Cooper, DAG Char Sachson and Supervising DAG Frank H. Pacoe. Moreover, this matter involved two respondents who were represented by legal counsel, in fact respondent Aliyev hired two lawyers over distinct periods of time during the course of his defense. Further there were no less than three requests for continuance of the hearing, which had to be responded to by the assigned deputy attorney general. The time billed by the Department of Justice spanned from May 2012 until November 18, 2013, which covered portions of three fiscal years. The total billable attorney time of 74.50 hours at a billable rate

not exceeding \$170 per hour is justified. Hence, recovery by the director of the department, on behalf of the bureau, of prosecution costs in the amount of \$12,227.50 is reasonable.

51. Respondent Hojaguliyev, respondent Aliyev or respondent 4 Less Smog Check LLC, did not offer evidence that any respondent has such financial hardship that such party cannot contribute to paying the reasonable amount of the costs of investigation and prosecution.

52. In light of factual findings above, the reasonable cost of investigation and prosecution, which respondents, jointly and severally, are obligated to pay, is set at \$14,395.21.

LEGAL CONCLUSIONS

Standard of Proof

1. "Preponderance of the evidence" is the standard of proof to be applied as to facts in dispute under the Accusation from which disciplinary action may result against the registrations and licenses held by respondents. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repairs* (2011) 201 Cal.App.4th 911, 916-918.)

The Factual Findings and Order, herein, rest upon a preponderance of evidence that establishes respondents' unprofessional and unlawful acts and omissions in the matters recorded herein.

Respondent Aliyev's Admissions

2. On November 9, 2011, and thereafter in several circumstances, the culpability impacting respondents flows from the admissions made by respondent Aliyev.

Admissions are, of course, the words or acts of a party that are offered as evidence against the party (McCormick's Handbook of the Law of Evidence, (2d ed., 1972), pp. 628-662.) And admissions of a party constitute substantive evidence of the facts admitted. (*People v. Graham* (1969) 71 Cal.2d 303, 322-324.)

On the day that he was observed at 4 Less Smog Check in San Mateo and upon being confronted by the investigating program representative PR Saugez, respondent Aliyev asserted that his brother had knowledge of the smog technician access code and that Samin Aliyev was present at the Mill Valley 4 Less Smog Check facility.

Also admissions in this matter came from respondent Aliyev beyond the only words spoken by him to PR Saugez during the morning of November 9, 2011. Through the evidence, respondent Aliyev made admissions by conduct. First, such conduct included his equivocal or evasive responses during the interview during the afternoon on November 11, 2011, as conducted by PR Saugez and supervising PR Reyes. When asked whether he had "shared" his access card with another person, namely his brother, Samin Aliyev, respondent

did not absolutely or assuredly deny that misconduct. Rather, respondent Aliyev made an equivocal response in an effort to outsmart the bureau's investigators. (*People v. Tolbert* (1969) 70 Cal.2d 790.) He, thus, made an implied admission that he had engaged in the illegal act of enabling, or aiding and abetting, his brother to conduct unlicensed smog check inspections. Despite respondent Aliyev's claim that he was fearful when he went into the field office interview with PR Saugez and PR Reyes, a reasonable person, absent any concern of guilt under the circumstances, would have denied the verbalized accusations with answers not lending themselves to equivocation. Second, respondent Aliyev's admissions by conduct were shown through his written communication to the bureau's chief executive officer. (*People v. Simmons* (1946) 28 Cal.2d 699; *People v. Zavala* (1966) 239 Cal.App.2d 732, 740.)

Failure to call witnesses often leads to the inference of an admission by conduct. Samin Aliyev has been identified not only in November 2011, but also in December 2010 aiding respondent Aliyev in conduct constituting unlicensed smog inspections. Hence, Samin Aliyev must be viewed as a witness who had special information relevant to the instant controversy. Testimony from Samin Aliyev would not have been cumulative, but rather his relationship to respondents in light of the allegations in the accusation might have rendered his testimony as being favorable to respondents. So the failure to produce Samin to offer testimony at the hearing of this matter leads to an inference that is unfavorable to respondent Aliyev.

3. Further to respondent Aliyev's admissions that lead to unfavorable conclusions against respondents, complainant's case is supported by the credible and compelling testimony from three individual program representatives, Bruce Saugez, Harold Jennings and Fidel Reyes III. Their testimony provides substantial evidence establishing the misconduct committed by respondent Aliyev. And such misconduct must be imputed to all other related respondents.

4. Based upon his refusal to sign the form prepared by PR Ortiz in December 2010 as well as the form prepared by PR Saugez in November 2011, respondent Aliyev demonstrated a disposition or character for non-cooperation with the bureau's regulatory and investigatory authority. Such conduct reflects a common plan or scheme that suggests respondent's disposition for unprofessional conduct.

Respondent Hojaguliyev is Subject to Agency Action

5. In light of the well-established rule of nondelegable duties of a licensee, respondent Hojaguliyev must be held responsible for the acts and omissions of respondent Aliyev, and respondent owner is subject to the causes for discipline, which results from the serious misconduct associated with the premises formerly owned by respondent Hojaguliyev.

The rule of nondelegable duties, which is similar to the doctrine of *respondeat superior*, advances that a "licensee, if he elects to operate his business through employees or agents, must be responsible to the licensing authority for [the employees' or agents'] 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.)

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* *supr*, 16 Cal.4th 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 Hojagulihev, were not liable for the acts and omissions of his 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.)

Until the date upon which the bureau received competent documentary proof that he had relinquished licensing rights, responsibilities and benefits, respondent Hojagulihev was obligated to supervise and control the activities and functions of the smog check technicians, including respondent Aliyev and his brother Samin, who were associated with the 4 Less Smog Check’s licensed smog check station’s facilities on East Blithedale Avenue in Mill Valley, California. Respondent Hojagulihev must bear full responsibility for the acts and omissions of the business’s employees and associates, including respondent Aliyev.

Respondent Toyli Hojagulihev doing business as 4 Less Smog Check

FIRST CAUSE FOR DISCIPLINE: UNTRUE OR MISLEADING STATEMENTS

6. Cause exists for discipline of the automotive repair dealer registration issued to respondent Hojagulihev, pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that respondent Hojagulihev, through the 4 Less Smog Check employee respondent Aliyev, made knowingly untrue or misleading statements by respondent Aliyev that he had properly inspected and found a 1997 Toyota truck to be in compliance with applicable laws and regulations. In fact, respondent Aliyev never performed the smog check

inspection of the Toyota truck on November 9, 2011, at the Mill Valley 4 Less Smog Check facility.

SECOND CAUSE FOR DISCIPLINE: FRAUD

7. Cause exists for discipline of the automotive repair dealer registration issued to respondent Hojagulihev, pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), in that respondent Hojagulihev doing business as 4 Less Smog Check in Mill Valley, through its employee respondent Aliyev, engaged in fraudulent conduct by allowing an unlicensed person to issue an electronic certificate of compliance for the single vehicle 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

8. Cause exists for discipline of the smog check station license issued to respondent Hojagulihev 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 ensure that emission control tests were performed on a 1997 Toyota truck in accordance with bureau procedures.
- b. Section 44014, subdivision (a): authorized or permitted respondent Aliyev's brother, Samin Aliyev, to perform or conduct the smog inspection of the 1997 Toyota truck, when, in fact, Samin Aliyev was not licensed as a smog check technician.
- c. Section 44015: issuing electronic certificates of compliance for the 1997 Toyota truck without ensuring that the subject vehicle was properly tested and inspected to determine if the vehicle's testing was in compliance with Health and Safety Code section 44012.

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

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

- a. Section 3340.35, subdivision (c): Respondent Hojagulihev, through his employee and associate respondent Aliyev's misconduct by allowing an unlicensed person to issue the electronic smog certificates of compliance for

the 1997 Toyota truck without a licensed technician actually inspecting the vehicle in accordance with section 3340.42.

- b. Section 3340.41, subdivision (b): Respondent Hojagulihev failed to ensure that the required smog tests were conducted on the 1997 Toyota truck in accordance with the bureau's specifications, when he enabled respondent Aliyev's misconduct of allowing an unlicensed person to perform acts reserved for licensed smog check technicians.
- c. Section 3340.42: Respondent Hojagulihev failed to ensure that the required smog tests were conducted upon the 1997 Toyota truck in accordance with the bureau's specifications.

FIFTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT

10. Cause exists for discipline of the smog check station license issued to respondent Hojagulihev, doing business as 4 Less Smog Check in Mill Valley, pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent Hojagulihev, through his associate and employee respondent Aliyev, engaged in acts of dishonesty, fraud or deceit by permitting or authorizing an unlicensed person to issue the electronic certificate of compliance for the 1997 Toyota truck without a licensed technician having performed a bona fide smog inspection. Such acts were to the detriment of the people of the State of California, and in particular the Motor Vehicle Inspection Program.

SIXTH CAUSE FOR DISCIPLINE: AIDING AND ABETTING AN UNLICENSED PERSON

11. Cause exists for discipline of the smog check station license issued to respondent Hojagulihev, doing business as 4 Less Smog Check in Mill Valley, pursuant to Health and Safety Code section 44072.2, subdivision (f), in that respondent Hojagulihev aided and abetted respondent Aliyev's brother, Samin Aliyev, who is not licensed as a smog technician, to evade the provisions of the Motor Vehicle Inspection Program as described in the Factual Findings and Legal Conclusions, above.

Respondent Ramin Aliyev

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

12. Cause exists for discipline of the smog check technician license issued to respondent Aliyev pursuant to Health and Safety Code section 44072.2, subdivision (a), in that he failed to comply with Health and Safety Code section 44072.2, subdivision (a). In particular, respondent Aliyev authorized, enabled or facilitated the unlawful acts of his brother Samin to conduct the smog inspection of the 1997 Toyota truck, at a time when Samin Aliyev was not licensed as a smog check technician as required by the Motor Vehicle Inspection Program.

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

13. Cause exists for discipline of the smog check technician license issued to respondent Aliyev pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent Aliyev failed to comply with provisions of California Code of Regulations, title 16, section 3340.41, subdivision (b). In particular, respondent Aliyev authorized, permitted, enabled or permitted his brother, Samin Aliyev, to access the bureau's Emission Inspection System (EIS) by using the smog check technician confidential access code and related smog check technician license to enter false information into the EIS unit with regard to the identity of the technician performing the smog test on the 1997 Toyota truck.

NINTH CAUSE FOR DISCIPLINE: AIDING AND ABETTING AN UNLICENSED PERSON

14. Cause exists for discipline of the smog check technician license issued to respondent Aliyev, pursuant to Health and Safety Code section 44072.2, subdivision (f), in that he aided and abetted his brother, Samin Aliyev, an unlicensed technician, to evade the provisions of the Motor Vehicle Inspection Program.

Discipline of Other Licenses

15. 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 licenses held by the disciplined licensee.

16. 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

17. Respondent Aliyev's misconduct in this matter 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 retain the licenses issued to him.

Although it was not established that respondent Hojaguliyev actually directed the misconduct or possessed actual knowledge regarding the unlawful acts permitted and effected by respondent Aliyev, the fact that the employees and associates of respondent Hojaguliyev, doing business as Mill Valley 4 Less Smog Check, were able to commit serious misconduct, such violations indicate a lack of requisite oversight and appropriate procedural safeguards required to be exhibited by respondent Hojaguliyev in the business's functions as a smog check station licensee.

Costs of Investigation and Enforcement

18. Complainant has requested that respondents be ordered to pay the bureau the costs of investigation and enforcement (prosecution) 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.

In this matter, respondent Aliyev did not advance a meritorious defense in the exercise of his rights to a hearing in this matter. No evidence was developed to establish that the imposition upon respondents of the costs of investigation and prosecution will unfairly penalize respondents as measured against the obligation of the bureau to have spent its finite resources to investigate and prosecute this matter that involves the clear and convincing evidence of respondent Aliyev’s misconduct and neglect on the part of respondent Hojaguliyev.

Respondents cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct. The hearing did not result in respondents obtaining a dismissal of charges, or a reduction in the severity of the discipline sought by complainant. The weight of the evidence did not demonstrate that respondents reasonably had “subjective good faith in the merits of [their] position,” respondent did not raise a “colorable challenge” to complainant’s Accusation.

Neither respondent offered an accountant’s report or a net worth statement to suggest such paucity of financial resources renders such respondent unable to reimburse the agency the costs of investigation and prosecution. There are no known current deficits in either respondent’s finances.

Respondent Aliyev did not engage in relatively innocuous misconduct in this case, but rather respondent Aliyev engaged in behavior that negatively impacts the integrity of the licensing system.

In this matter, respondents’ payment of the costs will not work as an abridgement of respondents’ constitutional rights.

Complainant’s costs result from the reasonable fees charged by the Department of Justice for services of the deputy attorneys general and paraprofessional assistants.

Complainant's attorney described adequately in his declaration sufficient detail of the deputy attorney general's work product, and attendant time for such legal services, so as to properly prosecute this matter.

In the exercise of the department's discretion, insubstantial basis exists to warrant an elimination of a substantial assessment against respondents of the complainant's cost of prosecution.

And, the department, on behalf of the bureau, will be harmed and respondents will gain undue enrichment by reducing the cost incurred in the investigation and prosecution of this matter. Hence, the reasonable cost recoverable from respondents stands at \$14,395.21.

ORDER

Respondent Toyli Hojaguliyev

1. Automotive Repair Dealer Registration Number ARD 257509 issued to respondent Toyli Hojaguliyev, owner of and doing as 4 Less Smog Check of Mill Valley, is permanently invalidated, pursuant to Legal Conclusions 5, 6 and 7, separately and for all of them.

2. Smog Check, Test Only, Station License Number TC 257509 issued to respondent Toyli Hojaguliyev as owner of, and doing business as, 4 Less Smog Check, is revoked, pursuant to Legal Conclusions 5, and 8 through 11, separately and for all of them.

3. Any other automotive repair dealer registration issued to respondent Toyli Hojaguliyev is revoked, pursuant to Legal Conclusions 5, 8 through 11, 15 and 16, separately and for all of them.

4. Any additional license issued, under Chapter 5 of the Health and Safety Code, in the name of respondent Toyli Hojaguliyev, is revoked, pursuant to Legal Conclusions 5, 8 through 11, 15 and 16, separately and for all of them.

Respondent Ramin Aliyev

5. Advanced Emission Specialist (EA) Technician License No. EA 147215 issued to respondent Ramin Aliyev, is revoked, pursuant to Legal Conclusions 12 through 14, separately and for all of them. Also, Smog Check Inspector License EO 147215, and Smog Check Repair Technician License No. EI 147215, which were issued to respondent Ramin Aliyev effective May 1, 2013, are revoked.

6. Smog Check, Test Only, Station License Number TC 265747 issued to respondent Ramin Aliyev, a member or 4 Less Smog Check LLC, is revoked, pursuant to Legal Conclusions 12 through 14, 15, and 16, separately and for all of them.

7. Automotive Repair Dealer Registration Number ARD 265747 issued to respondent Ramin Aliyev, a member of 4 Less Smog Check LLC, is permanently invalidated, is revoked, pursuant to Legal Conclusions 12 through 14, 15 and 16, separately and for all of them.

8. Any other automotive repair dealer registration issued to respondent Ramin Aliyev is revoked, pursuant to Legal Conclusions 12 through 14, 15 and 16, separately and for all of them.

9. Any additional license issued, under Chapter 5 of the Health and Safety Code, in the name of respondent Ramin Aliyev, is revoked, pursuant to Legal Conclusions 12 through 14, 15 and 16, separately and for all of them.

Other Matters Applicable to Respondents

10. Within 30 days of the effective date of this decision, both respondent Aliyev and respondent Hojaguliyev shall report any financial interest that either individual or his respective spouse owns or have an entitlement in any other business required to be registered pursuant to Business and Professions Code section 9884.6.

11. Respondents shall provide bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion, as well as all records relating to the consumers' vehicles that remain in the possession of respondents after the effective date of this decision.

Recovery of Costs of Investigation and Prosecution

12. Respondent Toyli Hojaguliyev and Respondent Ramin Aliyev, jointly and severally, are liable to pay the Director of the Department of Consumer Affairs, State of California, the bureau's actual and reasonable costs of prosecution of this matter in the amount of \$14,395.21. This amount shall be paid to the director within 60 days of the effective date of this Decision, unless the director, upon a request from either respondent, consents to payment of the costs to be made through installments.

DATED: December 20, 2013



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the First Amended Accusation
Against:

Case No. 79/12-146

4 LESS SMOG CHECK
TOYLI HOJAGULIYEV, OWNER
630 East Blithedale
Mill Valley, CA 94941
Automotive Repair Dealer Reg. No. ARD
257509
Smog Check, Test Only, Station License No. TC
257509

FIRST AMENDED ACCUSATION
(Smog Check)

and
RAMIN ALIYEV
2957 Broadway
Oakland, CA 94611
Advanced Emission Specialist Technician
License No. EA 147215

Respondents.

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4 LESS SMOG CHECK LLC
RAMIN ALIYEV, MEMBER
630 East Blithedale Ave.
Mill Valley, CA 94941
Automotive Repair Dealer Reg. No. ARD
265747
Smog Check Test Only Station License No. TC
265747

Affiliated Licenses

Complainant alleges:

PARTIES

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

4 Less Smog Check

2. On or about March 12, 2009, the Director of Consumer Affairs ("Director") issued Automotive Repair Dealer Registration Number ARD 257509 to Toyli Hojaguliyev ("Respondent Hojaguliyev"), owner of 4 Less Smog Check. Respondent's ARD 257509 registration expired on February 29, 2012.

3. On or about March 17, 2009, the Director issued Smog Check, Test Only, Station License Number TC 257509 to Respondent Hojaguliyev. Respondent's TC 257509 smog check station license expired on February 29, 2012.

Ramin Aliyev

4. In or about 2003, the Director issued Advanced Emission Specialist Technician License Number EA 147215 ("technician license") to Ramin Aliyev ("Respondent Aliyev" or "Aliyev"). Respondent's technician license will expire on April 30, 2013, unless renewed.

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1 **Affiliated Licenses:**

2 **4 Less Smog Check LLC**

3 5. On or about July 6, 2011, the Director issued Automotive Repair Dealer Registration
4 Number ARD 265747 to Ramin Aliyev, member of 4 Less Smog Check LLC ("Respondent 4
5 Less Smog Check LLC"). Respondent 4 Less Smog Check LLC's ARD 265747 registration will
6 expire on July 31, 2013, unless renewed.

7 6. On or about December 23, 2011, the Director issued Smog Check, Test Only, Station
8 License Number TC 265747 to Respondent 4 Less Smog Check LLC. Respondent 4 Less Smog
9 Check LLC's TC 265747 smog station license will expire on July 31, 2013, unless renewed.

10 **JURISDICTION**

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

13 8. Bus. & Prof. Code section 9884.13 provides, in pertinent part, that the expiration of a
14 valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary
15 proceeding against an automotive repair dealer or to render a decision temporarily or permanently
16 invalidating (suspending or revoking) a registration.

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

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

24 **STATUTORY AND REGULATORY PROVISIONS**

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

26 (a) The director, where the automotive repair dealer cannot show there
27 was a bona fide error, may deny, suspend, revoke or place on probation the
28 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.

12. Code section 22, subdivision (a), states:

“Board” as used in any provision 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.”

13. Code section 477, subdivision (b), states, in pertinent part, that a "license" includes
14 "registration" and "certificate."

14. Health & Saf. Code section 44072.2 states, in pertinent part:

The director may suspend, revoke, or take other disciplinary action against a license as provided in this article if the licensee, or any partner, officer, or director thereof, does any of the following:

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

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

(f) Aids or abets unlicensed persons to evade the provisions of this chapter.

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

4 16. Health & Saf. Code section 44014, subdivision (a), states:

5 Except as otherwise provided in this chapter, the testing and repair
6 portion of the program shall be conducted by smog check stations licensed by the
7 department, and by smog check technicians who have qualified pursuant to this
8 chapter.

9 17. Health & Saf. Code section 44032 states, in pertinent part, that "[n]o person shall
10 perform, for compensation, tests or repairs of emission control devices or systems of motor
11 vehicles required by this chapter unless the person performing the test or repair is a qualified
12 smog check technician . . ."

13 18. California Code of Regulations, title 16, section ("Regulation") 3340.41, subdivision
14 (b), states that "[n]o person shall enter into the emissions inspection system any access or
15 qualification number other than as authorized by the bureau, nor in any way tamper with the
16 emissions inspection system."

17 19. Regulation 3340.45 states:

18 All vehicle emission tests, visual inspections of the emissions control
19 systems, functional inspections of the emissions control systems, liquid fuel leak
20 inspections, and visible smoke tests shall be conducted at licensed smog check
21 stations by licensed smog check technicians. The inspections shall be performed in
22 accordance with the Emissions Inspection System test prompts and the inspection
23 requirements and procedures prescribed in the Bureau's Smog Check Inspection
24 Procedures Manual, dated August 2009, which is hereby incorporated by reference.

25 20. Section 1.1.0 of the Bureau's Smog Check Inspection Procedures Manual states, in
26 pertinent part:

27 The individual technician license number and access code together
28 provide access into the Emissions Inspection System (EIS) Smog Check inspection
mode . . .

29 The access code is assigned by BAR and is unique to each technician.
30 Each technician must maintain the security of his or her access code. Disclosure of
31 one's access code or use of another technician's access code or license information is
32 prohibited. If the security of your access code has been compromised, or you suspect
33 another person is using your access code, you must contact your local BAR field
34 office immediately to have the access code changed.

COST RECOVERY

2 21. Bus. & Prof. Code section 125.3 provides, in pertinent part, that a Board may request
3 the administrative law judge to direct a licensee found to have committed a violation or
4 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
5 and enforcement of the case.

SURVEILLANCE OPERATION OF NOVEMBER 9, 2011

7 22. On December 2, 2010, a representative of the Bureau made a field visit at Respondent
8 Hojaguliyev's facility, 4 Less Smog Check located in Mill Valley ("Mill Valley facility"), after
9 the Bureau received an anonymous tip that an unlicensed technician was performing smog
10 inspections. The representative observed an employee, Samin Aliyev ("Samin"), later identified
11 as Respondent Aliyev's brother, performing a functional ignition timing check on a vehicle during
12 a smog inspection. The representative informed Aliyev and Samin that only licensed smog
13 technicians were allowed to perform smog inspections, including the visual and functional
14 portions of the inspection, to enter test data into the Emissions Inspection System ("EIS"), and to
15 issue smog certificates. The representative also told Aliyev that he was prohibited from sharing
16 his confidential access code with anyone.

17 23. On November 9, 2011, the Bureau received an anonymous tip that an unlicensed
18 technician was performing smog inspections at a 4 Less Smog Check facility. A Bureau
19 representative accessed the State's Electronic Transmission Management Information System
20 ("ETMIS") and found that there were five "4 Less Smog Check" facilities located in the San
21 Francisco Bay Area. The representative knew that Aliyev worked at the Mill Valley facility as
22 well as 4 Less Smog Check located in San Mateo ("San Mateo facility"). The ETMIS showed
23 that Aliyev worked primarily at the Mill Valley facility. At approximately 0925 hours that same
24 day, the representative conducted a surveillance operation of the San Mateo facility and observed
25 Aliyev and another male in the parking area. The representative called the Bureau's San
26 Francisco field office and received information that between 0926 and 0942 hours, a smog
27 inspection had been performed on a 1997 Toyota RAV 4, License No. 3UAA991, on behalf of
28 Respondent Hojaguliyev at the Mill Valley facility, using Aliyev's confidential access code,

1 resulting in the issuance of electronic smog Certificate of Compliance No. OI314955C. At
2 approximately 1000 hours, the representative drove into the parking lot of the San Mateo facility.
3 The representative went to the testing bay and was greeted by Aliyev. The representative told
4 Aliyev that he thought Aliyev was working at the Mill Valley facility. Aliyev stated that he was
5 working at the Mill Valley facility, but had just arrived in San Mateo from Mill Valley. The
6 representative asked Aliyev if he had performed any smog inspections that day. Aliyev stated
7 that he had conducted an inspection at the Mill Valley facility around 0930 hours. The
8 representative told Aliyev that he had been observing the San Mateo facility between 0925 and
9 0955 hours and had taken photographs of Aliyev in front of the shop. Aliyev admitted that his
10 brother had his confidential access code and had performed the smog inspection that morning at
11 the Mill Valley facility.

12 **FIRST CAUSE FOR DISCIPLINE**

13 **(Untrue or Misleading Statements)**

14 24. Respondent Hojagulihev's ARD registration is subject to disciplinary action pursuant
15 to Bus. & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent Hojagulihev made or
16 authorized a statement which he knew or in the exercise of reasonable care should have known to
17 be untrue or misleading, as follows: Respondent Hojagulihev's unlicensed technician, Samin,
18 certified that Respondent Aliyev had performed the smog inspection on the 1997 Toyota RAV 4.
19 In fact, Samin accessed the EIS using Aliyev's confidential access code, with Aliyev's knowledge
20 and permission, and conducted the smog inspection on the vehicle.

21 **SECOND CAUSE FOR DISCIPLINE**

22 **(Fraud)**

23 25. Respondent Hojagulihev's ARD registration is subject to disciplinary action pursuant
24 to Bus. & Prof. Code section 9884.7, subdivision (a)(4), in that Respondent Hojagulihev
25 committed an act that constitutes fraud by issuing an electronic smog certificate of compliance for
26 the 1997 Toyota RAV 4 without ensuring that a bona fide inspection was performed of the
27 emission control devices and systems on the vehicle, thereby depriving the People of the State of
28 California of the protection afforded by the Motor Vehicle Inspection Program.

THIRD CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

26. Respondent Hojaguliyev's smog check station license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent Hojaguliyev failed to comply with the following sections of that Code:

a. **Section 44012:** Respondent Hojaguliyev failed to ensure that the emission control tests were performed on the 1997 Toyota RAV 4 in accordance with procedures prescribed by the department.

b. Section 44014, subdivision (a): Respondent Hojaguliyev authorized or permitted Respondent Aliyev's brother, Samin, to conduct the smog inspection on the 1997 Toyota RAV 4 when, in fact, Samin was not licensed as a smog check technician.

c. Section 44015: Respondent Hojaguliyev issued an electronic smog certificate of compliance for the 1997 Toyota RAV 4 without ensuring that the vehicle was properly tested and inspected to determine if it was in compliance with Health & Saf. Code section 44012.

FOURTH CAUSE FOR DISCIPLINE

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

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

a. Section 3340.35, subdivision (c): Respondent Hojaguliyev issued an electronic smog certificate of compliance for the 1997 Toyota RAV 4 even though the vehicle had not been inspected in accordance with section 3340.42.

b. Section 3340.41, subdivision (b): Respondent Hojaguliyev authorized or permitted Respondent Aliyev's brother, Samin, to access the EIS using Aliyev's technician license and confidential access code and to enter false information into the unit concerning the identity of the technician performing the smog test on the 1997 Toyota RAV 4.

1 c. Section 3340.42: Respondent Hojaguliyev failed to ensure that the required smog
2 tests were conducted on the 1997 Toyota RAV 4 in accordance with the Bureau's specifications.

FIFTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud or Deceit)

5 28. Respondent Hojagulihev's smog check station license is subject to disciplinary action
6 pursuant to Health & Saf. Code section 44072.2, subdivision (d), in that Respondent Hojagulihev
7 committed a dishonest, fraudulent or deceitful act whereby another is injured by issuing an
8 electronic smog certificate of compliance for the 1997 Toyota RAV 4 without ensuring that a
9 bona fide inspection was performed of the emission control devices and systems on the vehicle,
10 thereby depriving the People of the State of California of the protection afforded by the Motor
11 Vehicle Inspection Program.

SIXTH CAUSE FOR DISCIPLINE

(Aiding or Abetting Unlicensed Persons)

14 29. Respondent Hojagulihev's smog check station license is subject to disciplinary action
15 pursuant to Health & Saf. Code section 44072.2, subdivision (f), in that Respondent Hojagulihev
16 aided and abetted Respondent Aliyev's brother, Samin, an unlicensed technician, to evade the
17 provisions of the Motor Vehicle Inspection Program, as set forth above.

SEVENTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

20 30. Respondent Aliyev's technician license is subject to disciplinary action pursuant to
21 Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with
22 section 44014, subdivision (a), of that Code, as follows: Respondent authorized or permitted his
23 brother, Samin, to conduct the smog inspection on the 1997 Toyota RAV 4 when, in fact, Samin
24 was not licensed as a smog check technician.

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EIGHTH CAUSE FOR DISCIPLINE
(Failure to Comply with Regulations Pursuant
to the Motor Vehicle Inspection Program)

4 31. Respondent Aliyev's technician license is subject to disciplinary action pursuant to
5 Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to comply with
6 provisions of California Code of Regulations, title 16, Section 3340.41, subdivision (b), as
7 follows: Respondent authorized or permitted his brother, Samin, to access the EIS using
8 Respondent's technician license and confidential access code and to enter false information into
9 the unit concerning the identity of the technician performing the smog test on the 1997 Toyota
10 RAV 4.

NINTH CAUSE FOR DISCIPLINE

32. Respondent Aliyev's technician license is subject to disciplinary action pursuant to
Health & Saf. Code section 44072.2, subdivision (f), in that Respondent aided and abetted his
brother, Samin, an unlicensed technician, to evade the provisions of the Motor Vehicle Inspection
Program, as set forth above.

OTHER MATTERS

18 33. Pursuant to Bus. & Prof. Code section 9884.7, subdivision (c), the Director may
19 suspend, revoke, or place on probation the registration for all places of business operated in this
20 state by Respondent Toyli Hojaguliyev, owner of 4 Less Smog Check, upon a finding that
21 Respondent Hojaguliyev has, or was, engaged in a course of repeated and willful violations of the
22 laws and regulations pertaining to an automotive repair dealer.

34. Pursuant to Bus. & Prof. Code section 9884.7, subdivision (c), the Director may
35 suspend, revoke, or place on probation the registration for all places of business operated in this
36 state by Respondent Ramin Aliyev, member of 4 Less Smog Check LLC, including, but not
37 limited to, Automotive Repair Dealer Reg. No. ARD 265747, upon a finding that Respondent
38 Aliyev has, or was, engaged in a course of repeated and willful violations of the laws and
39 regulations pertaining to an automotive repair dealer.

1 35. Pursuant to Health & Saf. Code section 44072.8, if Smog Check, Test Only, Station
2 License Number TC 257509 issued to Respondent Toyli Hojaguliyev is revoked or suspended,
3 any additional license issued under this chapter in the name of said licensee may be likewise
4 revoked or suspended by the director.

5 36. Pursuant to Health & Saf. Code section 44072.8, if Advanced Emission Specialist
6 Technician License Number EA 147215 issued to Ramin Aliyev, is revoked or suspended, any
7 additional license issued under this chapter in the name of said licensee, including, but not limited
8 to, Smog Check Test Only Station License No. TC 265747 may be likewise revoked or suspended
9 by the director.

PRAYER

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

13 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
14 257509 issued to Toyli Hojaguliyev, owner of 4 Less Smog Check;

15 2. Revoking or suspending any other automotive repair dealer registration issued to
16 Toyli Hojaguliyev;

17 3. Revoking or suspending Automotive Repair Dealer Registration Number ARD
18 265747 issued to Ramin Alivey, member of 4 Less Smog Check LLC;

19 4. Revoking or suspending any other automotive repair dealer registration issued to
20 Ramin Alivey;

21 5. Revoking or suspending Smog Check, Test Only, Station License Number TC
22 257509 issued to Toyli Hojagulivey, owner of 4 Less Smog Check:

23 6. Revoking or suspending any additional license issued under Chapter 5 of the Health
24 and Safety Code in the name of Toyli Hojagulivey;

25 7. Revoking or suspending Smog Check, Test Only, Station License Number TC
26 265747 issued to Ramin Alivey, member of 4 Less Smog Check LLC;

27 8. Revoking or suspending any additional license issued under Chapter 5 of the Health
28 and Safety Code in the name of Ramin Aliyev;

1 9. Revoking or suspending Advanced Emission Specialist Technician License Number
2 EA 147215, issued to Ramin Aliyev;

3 10. Ordering Ramin Aliyev and Toyli Hojaguliyev to pay the Director of Consumer
4 Affairs the reasonable costs of the investigation and enforcement of this case pursuant to Business
5 and Professions Code section 125.3;

6 11. Taking such other and further action as deemed necessary and proper.

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9 DATED: November 16, 2012

10 John Wallauch by Doug B.
11 JOHN WALLAUCH
12 Chief
13 Bureau of Automotive Repair
14 Department of Consumer Affairs
15 State of California
16 *Complainant*

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