

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

In the Matter of the of the Petition for the Issuance of an  
Interim Suspension Order:

John Wallauch, Chief, Bureau of Automotive Repair,  
Department of Consumer Affairs, State of California,

Petitioner,

vs.

NEWPORT MESA AUTO SERVICE & SMOG, INC.,  
JEFFREY CARL BLUM, PRESIDENT/TREASURER;  
PAMELA J. BLUM, SECRETARY,

Automotive Repair Dealer Registration No. ARD 231018

Smog Check Station License No. RC 231018

Lamp Station License No. LS 231018, Class A

Brake Station License No. BS 231018, Class C,

and

RONALD MALLEOLO, Advanced Emission Specialist  
Technician,

Smog Check Repair Technician License No. EI 149877

Smog Check Inspector License No. EQ 149877

Brake Adjuster License No. BA 149877, Class C

Lamp Adjuster License No. LA 149877, Class A

Respondents.

OAH No. 2012120348

Date: January 8, 2013

## DECISION

Agustin F. Lopez II, Administrative Law Judge, Office of Administrative Hearings, State of California, heard the Petition for Interim Suspension Order on January 8, 2013, in San Diego, California.

Adrian R. Contreras, Deputy Attorney General, Department of Justice, State of California, appeared on behalf of petitioner John Wallauch, Chief, Bureau of Automotive Repair (BAR), Department of Consumer Affairs, State of California.

John D. Bishop, Attorney at Law, appeared on behalf of respondents Newport Mesa Auto Service Inc., Jeffrey C. Blum, and Pamela J. Blum (hereinafter Newport Mesa). Jeffrey C. Bloom and Pamela J. Blum are husband and wife and own and operate Newport Mesa as President and Secretary, respectively.

No appearance was made by or on behalf of co-respondent Ronald Malleolo. Mr. Malleolo is one of two individuals formerly employed by Newport Mesa working on August 31, 2012 as a technician. Mr. Malleolo's employment with Newport Mesa has been terminated.

The matter was submitted for decision on January 8, 2013.

## FACTUAL FINDINGS

### *License Histories*

1. On January 21, 2004, the BAR issued Automotive Repair Dealer Registration No. ARD 231018 to respondent Newport Mesa, which expires December 31, 2012, unless renewed.
2. On May 3, 2004, the BAR issued Smog Check Station License No. RC 231018 to respondent Newport Mesa, which expired December 31, 2012, unless renewed.
3. On February 20, 2004, the BAR issued Lamp Station License No. LS 231018 to respondent Newport Mesa, which expired December 31, 2012, unless renewed.
4. On February 20, 2004, the BAR issued Brake Station License No. BS 231018 to respondent Newport Mesa, which expired December 31, 2012, unless renewed.
5. All licenses issued to Newport Mesa were in full force and effect at all times relevant to the charges alleged by the BAR. No evidence was presented that the Newport Mesa licenses were renewed after December 31, 2012.

6. In 2004, the BAR issued Smog Check Repair Technician License No. EI 149877 to Mr. Malleolo, which expires on August 31, 2014, unless renewed.

7. In 2004, the BAR issued Smog Check Inspector License No. EO 149877 to Mr. Malleolo, which expires on August 31, 2014, unless renewed.

8. In 2004, the BAR issued Brake Adjuster License No. BA 149877 to Mr. Malleolo, which expired on August 31, 2012. As of September 13, 2012, this license had not been renewed.

9. In 2004, the BAR issued Lamp Adjuster License No. AA 149877 to Mr. Malleolo, which expired on August 31, 2012. As of September 13, 2012, this license had not been renewed.

10. All licenses issued to Mr. Malleolo were in full force and effect at all times relevant to the charges alleged by the BAR.

#### *Notice of Petition for Interim Suspension Order (ISO)*

11. On December 11, 2012, the Office of the Attorney General served the respondents at their addresses of record on file with the BAR.

12. Newport Mesa, Mr. Blum, and Mrs. Blum appeared and made no objection to the notice of hearing for this proceeding.

13. The address listed for Mr. Malleolo in the notice of hearing is the same address listed on Mr. Malleolo's licensing documentation.

14. Sufficient notice was provided to both Newport Mesa and Mr. Malleolo.

#### *BAR's Petition and Allegations of Wrongdoing*

15. On December 10, 2012, counsel for the BAR executed a petition requesting an interim suspension order (ISO) of respondents' licenses from practice in any form until such time as an accusation hearing could be held and a decision issued by the Director of the Department of Consumer Affairs. The petition was served upon the respondents along with the notice of hearing for this proceeding.

16. The petition alleged nine specific instances of wrongdoing regarding improper testing or fraudulent testing by respondents through Mr. Malleolo's actions on August 31, 2012. The BAR further alleged, among other things, that: (1) respondents misrepresented that at least seven vehicles were properly tested, when in fact they were not; (2) that there is no way a technician can clean pipe a vehicle during a smog test without knowing it is happening; and (3) that the motive for clean piping was that respondents intended to defraud the system and profit by way of a clandestine agreement with Certified Auto and Premium

Finance (internet auto dealers) to ensure the vehicles could be sold as complying with the smog check system.

With respect to the fraudulent testing the petition specifically alleged as follows.

Respondent Newport Mesa and Co-Respondent Malleolo engaged in multiple acts of fraudulent conduct to generate passing vehicle inspection reports (VIR) and issued certificates of compliance for the smog checks of at least seven vehicles. Their unlawful conduct involved a testing method known as clean piping to fraudulently certify a vehicle that will not pass a smog inspection on its own, or in some instances, is not even present during the time the smog test is performed. To "clean pipe," a smog technician uses an exhaust emission sample from a vehicle that is known to be clean in place of the exhaust emission sample from a vehicle that may not pass a legitimate smog check inspection or uses an exhaust emission sample from a vehicle that is not physically present at the smog station when the purported inspection occurs. This causes the Emissions Inspection System (EIS) to issue a certificate of compliance for the test vehicle. (See Cal.Code Regs. Tit. 16 § 3340.1[defining "Emissions Inspection System" and "clean piping"].)

17. The petition further alleges that the nine specific instances of wrongdoing have seriously endangered the public health, safety, and welfare, and if permitted to persist, will continue to do so to the detriment of California's air quality and health of its citizens. The BAR provided the declaration of Barbara L. Weller, Ph.D., wherein Dr. Weller explained the nature of the threat to the public health, safety, and welfare posed by air pollution from vehicles.

18. On August 31, 2012, BAR representatives conducted surveillance of respondents. BAR representatives observed Mr. Malleolo use a black Nissan Maxima, with California license plate number 5EEW153 (the Maxima), in place of the cars he claimed to have smog tested and passed in the seven clean piping instances. BAR representatives first observed the Maxima at about 0801 hours at the Newport Mesa facility. The following are the specific observations of the BAR staff during the surveillance.

1. Improper Inspection No. 1—2002 Ford Ranger: Between 1013 and 1019 hours, Newport Mesa, through the acts of Mr. Malleolo, inspected and passed a 2002 Ford Ranger, CA license No. 1101593 using the Two-Speed Idle (TSI) test. This test is a type of vehicle emissions test conducted with the vehicle transmission in neutral or park while the engine is run at two different engine speeds. During the surveillance, BAR staff saw the Maxima back out of the smog station driveway as the Ford Ranger entered the driveway. The Ford Ranger was parked at the entrance of the test bay area while the Maxima was parked on the street. At 1011 hours, Mr. Malleolo sat in the front left seat of the Maxima.

Then, he got out of the Maxima and entered the test bay. At 1016 hours, he removed a sample probe from the left side test bay wall and walked to the back of the Ford Ranger in a motion consistent with inserting the exhaust sample probe into the tailpipe. At 1019 hours, he walked to the back of the Ford Ranger, bent over in a motion consistent with removing the exhaust sample probe, and walked back into the left side test bay area. At 1023 hours, the Ford Ranger drove out of the smog station driveway. At no point was it operated on the dynamometer rollers. The required test type for this make and model was a test called the ASM procedure, not the TSI test.

2. Clean Pipe No. 1—2004 Ford Excursion: Between 1034 hours and 1039 hours, Newport Mesa, through the acts of Mr. Malleolo, inspected and issued certificate of compliance #XJ983688C to a 2004 Ford Excursion, VIN IFTPX12584NC51530. During the surveillance, however, BAR staff observed Mr. Malleolo get into the Maxima parked on the street and drive away at 1030 hours. The Maxima entered the smog station driveway and parked in the test bay area over the dynamometer. Mr. Malleolo got out of the Maxima and entered the left side test bay area. At 1037 hours, Mr. Malleolo inserted into the Maxima's tailpipe a sample probe hanging on the left side test bay wall. He then got into the Maxima through the left front door. At 1038 hours, he got out of the car, went to the rear, and removed the sample probe. At 1039 hours, the sample probe hung on the left side test bay wall. At 1040 hours, Co-Respondent Mr. Malleolo was inside of the left side test area.

Days later, Bureau staff reviewed the testing history for the 2004 Ford Excursion. According to the VID, in 2008, the vehicle was tested and certified as a 2004 Ford F-150. Neither a 2004 Ford Excursion nor a 2004 Ford F-150 was in the test bay or at the facility during the time of certification. Newport Mesa and Mr. Malleolo clean piped the 2004 Ford Excursion or the 2004 Ford F-150 using the exhaust sample of the Maxima.

Also, Bureau staff performed an Internet used vehicle search, using the same VIN number for the 2004 Ford Excursion. They found that as of September 12, 2012, a company called Certified Auto advertised it for sale on the Internet, but it was listed as a Ford F-150.

3. Clean Pipe No. 3—2002 Mercedes Benz E320: Between 1045 hours and 1052 hours, Newport Mesa through the acts of Mr. Malleolo inspected and issued certificate of compliance No. X1983689C to a 2002 Mercedes Benz E320, VIN WDB1F82192X0632S7. During the surveillance, however, BAR staff observed that at 1045 hours, the Maxima had not moved since the previous inspection. At 1048 hours, Mr. Malleolo took the sample probe from the left side wall, walked to the back of the Maxima, and inserted the sample probe into the Maxima's tailpipe. At 1050 hours, he got out of the Maxima, went to the back of the Maxima, and removed the sample probe. At 1052 hours, the test finished, the Maxima was still in the test bay area, and Mr. Malleolo walked out of the left side test area. The 2002 Mercedes Benz E320 was not in the test bay or at the facility during the time of certification. Newport Mesa and Mr. Malleolo clean piped the car using the exhaust sample of the Maxima.

Days later, Bureau staff performed an Internet used vehicle search, using the same VIN number for the 2002 Mercedes Benz E320. They found that as of September 12, 2012, a company called Certified Auto advertised it for sale on the Internet.

4. Clean Pipe No. 3—2005 Toyota Tundra: Between 1057 hours and 1103 hours, Newport Mesa through the acts of Mr. Malleolo inspected and issued certificate of compliance No. XJ983690C to a 2005 Toyota Tundra, VIN 5TBRT341X5S469435. During the surveillance, however, BAR staff observed at 1052 hours that the Maxima had not moved since the previous inspection. At 1100 hours, Mr. Malleolo took the sample probe from the left side wall, walked to the rear of the Maxima, bent over, and then stood up without the sample probe in an action consistent with inserting the sample probe into the Maxima's tailpipe. Mr. Malleolo got into the Maxima through the left front door. At 1103 hours, the sample probe was seen in the Maxima's tailpipe and Mr. Malleolo removed the probe. The sample probe hung on the left side wall, and Mr. Malleolo was in the left side test area. The 2005 Toyota Tundra was not in the test bay or at the facility during the time of certification. Newport Mesa and co-respondent Mr. Malleolo clean piped the car using the exhaust sample of the Maxima.

Days later, BAR staff performed an Internet used vehicle search, using the same VIN number for the 2005 Toyota Tundra. They found that as of September 12, 2012, a company called Certified Auto advertised it for sale on the Internet.

5. Improper Inspection No. 2—2004 Toyota Highlander: Between 1131 hours and 1138 hours, Newport Mesa through the acts of Mr. Malleolo inspected and issued certificate of compliance No. XJ983693C to a 2004 Toyota Highlander, CA License No. 5JVM544 using a test called a Two-Speed Idle (TSI) procedure. During the surveillance, however, BAR staff observed the Toyota Highlander at 1117 hours drive into the smog station driveway. At 1136 hours, it was in the test bay area. At 1137 hours, Mr. Malleolo removed a sample probe from the Toyota Highlander. The required test type for this make and model was a test called an ASM procedure, not the TSI test.

6. Clean pipe No. 4—2004 Ford Mustang: Between 1143 hours and 1148 hours, Newport Mesa through the acts of Mr. Malleolo inspected and issued certificate of compliance No. XJ983694C to a 2004 Ford Mustang, VIN 1 F AFP44614F 197569. During surveillance, however, BAR staff observed Mr. Malleolo get into the Maxima at 1139 hours, drive into the test bay area, get out of the car, and enter the left side test area. At 1147 hours, Mr. Malleolo was in the left side test bay area and the sample probe was not hanging on the wall. At 1148 hours, he walked to the back of Maxima, bent down in an action consistent with removing a sample probe from a tailpipe, returned to the left side test area, and hung the sample probe on the left side wall. The 2004 Ford Mustang was not in the test bay or at the facility during the time of certification. Newport Mesa and Mr. Malleolo clean piped the 2004 Ford Mustang using the exhaust sample of the Maxima.

Days later, BAR staff performed an Internet used vehicle search, using the same VIN number for the 2004 Ford Mustang. They found that as of September 12, 2012, a company called Certified Auto advertised it for sale on the Internet.

7. Clean pipe No. 5—2006 Honda Ridgeline: Between 1154 hours and 1159 hours, Newport Mesa through the acts of Mr. Malleolo inspected and issued certificate of compliance No. XJ983695C to a 2006 Honda Ridgeline, VIN 2HJYK16526H548152. During surveillance, however, BAR staff saw that at 1154 hours the Maxima was still in the test bay and the sample probe hung on the left side wall. At 1155 hours, Mr. Malleolo entered the left side test bay area. At 1157 hours, he took the sample probe from the wall, walked to the back of the Maxima, bent over, stood up without the sample probe in an action consistent with inserting the sample probe into the Maxima's tailpipe, and got into the Maxima through the left front door. At 1158 hours, he got out of the car and moved to the left side test area. At 1200 hours, he walked to the back of the Maxima, bent down in an action consistent with removing a sample probe from the tailpipe, returned to the left side test area, and hung the sample probe on the left side wall. He got back into the car and drove forward into the shop area. The 2006 Honda Ridgeline was not in the test bay or at the facility during the time of certification. Newport Mesa and Mr. Malleolo clean piped the 2006 Honda Ridgeline using the exhaust sample from the Maxima.

Days later, BAR staff performed an Internet used vehicle search, using the same VIN number for the 2006 Honda Ridgeline. They found that as of September 12, 2012, a company called Certified Auto advertised it for sale on the Internet.

8. Clean pipe No. 6—2002 Mercedes Benz S500: Between 1310 hours and 1315 hours, Newport Mesa through Mr. Malleolo inspected and issued certificate of compliance No. XJ983696C to a 2002 Mercedes Benz S500, VIN WDBNG 7SJ82A242171. During surveillance, however, BAR staff observed the Maxima back out of the driveway and leave the smog station at 1247 hours. At 1302 hours, the Maxima entered the driveway and moved into position in the test bay area over the dynamometer. At 1312 hours, Mr. Malleolo went to the back of the Maxima, bent down in an action consistent with inserting or removing a sample probe into or out of the tailpipe, and returned to the left side test area. At 1315 hours, the Maxima was in the test bay. The Mercedes Benz S500 was not in the test bay or at the facility during the time of certification. Newport Mesa and Mr. Malleolo clean piped the Mercedes Benz S500 using the exhaust sample of the Maxima.

Days later, BAR staff performed an Internet used vehicle search, using the same VIN number for the Mercedes Benz S500. They found that as of September 12, 2012, a company called Premium Finance advertised it for sale on the Internet.

9. Clean pipe No. 7—1993 BMW 3-series: Between 1321 hours and 1328 hours, Newport Mesa through the acts of Mr. Malleolo inspected and issued certificate of compliance No. XJ983697C to a 1993 BMW 3-Series, VIN WBABF4313PEK080IS. During surveillance, however, BAR staff observed that the Maxima was still in the test bay at 1321 hours. At 1325 hours, someone moved to the back of the Maxima, bent down in an action

consistent with inserting a sample probe into the tailpipe, and returned to the left side test area. At 1327 hours, Mr. Malleolo moved toward the back of the Maxima, bent down in an action consistent with removing a sample probe from a tailpipe, and hung the sample probe on the left side bay wall. At 1328 hours, the Maxima was still in the test bay. The BMW 3-Series was not in the test bay or at the facility during the time of the certification. Newport Mesa and Mr. Malleolo clean piped the BMW-3 Series using the exhaust sample of the Maxima.

Days later, BAR staff performed an Internet used vehicle search, using the same VIN number for the BMW-3 Series. They found that as of September 12, 2012, a company called Premium Finance advertised it for sale on the Internet.

#### *Evidence in Defense and in Mitigation*

19. Newport Mesa did not dispute the allegations relating to Mr. Malleolo.

20. Newport Mesa argued that the allegations made arose from the activities of a rogue agent—Mr. Malleolo—and were not due to any wrongdoing associated with any other agent of Newport Mesa. It further argued that an ISO was not appropriate because permitting Newport Mesa to continue to engage in smog checks would not endanger the public health, safety or welfare because Mr. Malleolo had been terminated. In support of these arguments, it presented declarations reflecting the following evidence.

Jeffrey Carl Blum, the president of Newport Mesa was hospitalized for approximately six weeks between August 21, 2012 and September 29, 2012, and was not personally present to supervise Mr. Malleolo. According to his declaration, Mr. Blum “first became aware of the possibility that Ronald Mr. Malleolo had performed fraudulent smog checks sometime after [he] returned to Newport Mesa.” Mr. Blum terminated Mr. Malleolo’s employment after he observed Mr. Malleolo being unresponsive and evasive with a BAR investigator. He has since hired a technician, Ryan M. Hemming, who holds a Smog Check Repair Technician License NO. EA 630719. Mr. Blum characterized Mr. Hemming as “trustworthy.” Newport Mesa, through Mr. Blum, implemented remedial measures after terminating Mr. Malleolo. Mr. Blum now personally supervises the work of Newport Mesa staff, including Mr. Hemming. He reviews all vehicle records relating to smog checks to ensure against inaccuracies and discrepancies, and he has instructed Newport Mesa staff about “clean piping” and the importance of “the integrity of our work and the public trust.”

Newport Mesa argued that Mr. Blum is qualified and trustworthy enough to implement and supervise its remedial measures. Mr. Blum has approximately forty years experience in the auto repair business. He has never been disciplined by the BAR and has never engaged in or supervised any fraudulent vehicle inspections. Newport has not had any instances of wrongdoing since August 31, 2012.

21. Mr. Blum stated that an ISO against Newport Mesa would cause an undue economic hardship because “Smog testing and repair operations related to smog testing

comprise approximately 50% of [its] business. My wife, three adult children, and two grandchildren derive their income from or are supported by Newport Mesa Auto Service.”

22. Newport Mesa argued other less onerous restrictions—other than a complete cessation of smog check/repair activities—are more appropriate given the fact that the rogue agent, Mr. Malleolo, had been terminated.

23. Mr. Malleolo failed to appear or present a defense to the allegations despite proper service of the petition and notice of hearing.

### LEGAL CONCLUSIONS

1. Business and Professions Code section 9884.7 provided in part:

(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 . . . 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. . . .

2. The owner of a license is obligated to see that the license is not used in violation of the law. If a licensee elects to operate his business through employees, he must be responsible to the licensing authority for their conduct in the exercise of his license and he is responsible for the acts of his agents or employees done in the course of his business in the operation of the license. A licensee “may not insulate himself from regulation by electing to function through employees or independent contractors.” (*Rob-Mac, Inc v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797.)

3. Health and Safety Code section 44072.10 provided in part:

(a) Notwithstanding Sections 44072 and 44072.4, the director, or the director’s designee, pending a hearing conducted pursuant to subdivision (e), may temporarily

suspend any smog check station or technician's license issued under this chapter, for a period not to exceed 60 days, if the department determines that the licensee's conduct would endanger the public health, safety, or welfare before the matter could be heard pursuant to subdivision (e), based upon reasonable evidence of any of the following:

(1) Fraud.

...

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

(4) A pattern or regular practice of violating this chapter or any regulation, standard, or procedure of the department implementing this chapter.

...

(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.

...

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

...

(e) The hearing 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, or by court order. . . .

4. In this matter, petitioner elected to proceed under the provisions of Business and Professions Code section 494. At all times relevant to this matter, Business and Professions Code section 494 provided in part:

(a) A board or an administrative law judge sitting alone, as provided in subdivision (h), may, upon petition, issue an interim order suspending any licentiate or imposing license restrictions . . . The petition shall include affidavits that demonstrate, to the satisfaction of the board, both of the following:

(1) The licentiate has engaged in acts or omissions constituting a violation of this code or has been convicted of a crime substantially related to the licensed activity.

(2) Permitting the licentiate to continue to engage in the licensed activity, or permitting the licentiate to continue in the licensed activity without restrictions, would endanger the public health, safety, or welfare.

(b) No interim order provided for in this section shall be issued without notice to the licentiate unless it appears from the petition and supporting documents that serious injury would result to the public before the matter could be heard on notice.

(c) Except as provided in subdivision (b), the licentiate shall be given at least 15 days' notice of the hearing on the petition for an interim order. The notice shall include documents submitted to the board in support of the petition. If the order was initially issued without notice as provided in subdivision (b), the licentiate shall be entitled to a hearing on the petition within 20 days of the issuance of the interim order without notice. The licentiate shall be given notice of the hearing within two days after issuance of the initial interim order, and shall receive all documents in support of the petition. The failure of the board to provide a hearing within 20 days following the issuance of the interim order without notice, unless the licentiate waives his or her right to the hearing, shall result in the dissolution of the interim order by operation of law.

(d) At the hearing on the petition for an interim order, the licentiate may:

(1) Be represented by counsel.

(2) Have a record made of the proceedings, copies of which shall be available to the licentiate upon payment of costs computed in accordance with the provisions for transcript costs for judicial review contained in Section 11523 of the Government Code.

(3) Present affidavits and other documentary evidence.

(4) Present oral argument.

(e) The board, or an administrative law judge sitting alone . . . shall issue a decision on the petition for interim order within five business days following submission of the matter. The standard of proof required to obtain an interim order pursuant to this section shall be a preponderance of the evidence standard. . .

(f) The board shall file an accusation within 15 days of the issuance of an interim order. In the case of an interim order issued without notice, the time shall run from the date of the order issued after the noticed hearing. If the licentiate files a Notice of Defense, the hearing shall be held within 30 days of the agency's receipt of the Notice of Defense. A decision shall be rendered on the accusation no later than 30 days after submission of the matter. Failure to comply with any of the requirements in this subdivision shall dissolve the interim order by operation of law.

(g) Interim orders shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure and shall be heard only in the superior court in and for the Counties of Sacramento, San Francisco, Los Angeles, or San Diego. The review of an interim order shall be limited to a determination of whether the board abused its discretion in the issuance of the interim order. Abuse of discretion is established if the respondent board has not proceeded in the manner required by law, or if the court determines that the interim order is not supported by substantial evidence in light of the whole record.

(h) The board may, in its sole discretion, delegate the hearing on any petition for an interim order to an administrative law judge in the Office of Administrative Hearings . . . When the petition has been delegated to an administrative law judge, he or

she shall sit alone and exercise all of the powers of the board relating to the conduct of the hearing. A decision issued by an administrative law judge sitting alone shall be final when it is filed with the board . . . The decision of the administrative law judge sitting alone on the petition for an interim order is final, subject only to judicial review in accordance with subdivision (g).

(i) Failure to comply with an interim order issued pursuant to subdivision (a) or (b) shall constitute a separate cause for disciplinary action against any licentiate, and may be heard at, and as a part of, the noticed hearing provided for in subdivision (f). Allegations of noncompliance with the interim order may be filed at any time prior to the rendering of a decision on the accusation. Violation of the interim order is established upon proof that the licentiate was on notice of the interim order and its terms, and that the order was in effect at the time of the violation. The finding of a violation of an interim order made at the hearing on the accusation shall be reviewed as a part of any review of a final decision of the agency. . .

...

(k) The interim orders provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided in any other provision of law.

(l) In the case of a board, a petition for an interim order may be filed by the executive officer. In the case of a bureau or program, a petition may be filed by the chief or program administrator, as the case may be. . . .

5. Expiration of a license does not deprive a licensing agency of jurisdiction to institute disciplinary proceedings against the holder of an expired license. (Bus. & Prof. Code § 118, subd. (b).)

#### *Evaluation*

6. No evidence was presented in defense or mitigation of the allegations against Mr. Malleolo. A preponderance of the evidence established that Mr. Malleolo engaged in acts or omissions constituting violations of the Business and Professions Code and that permitting Mr. Malleolo to continue to engage in any activity for which he is licensed under the BAR would endanger the public health, safety, or welfare. An interim order suspending

all of Mr. Malleolo's licenses issued by the BAR is warranted to ensure the public health, safety and welfare is protected during the pendency of this action.

7. Newport Mesa did not deny that Mr. Malleolo engaged in the misconduct in his conducting and reporting of smog tests. Newport Mesa had a responsibility to properly supervise Mr. Malleolo and failed to do so, regardless of the mitigating evidence that Mr. Blum was hospitalized at the time of Mr. Malleolo's wrongdoing. As Mr. Malleolo's employer, Newport Mesa is responsible for its employee's violations of law. The preponderance of the evidence established that by virtue of Mr. Malleolo's misconduct, Newport Mesa engaged in acts or omissions constituting violations of the Business and Professions Code.

8. There is a question about whether permitting Newport Mesa to continue to engage in the licensed activity, or permitting Newport Mesa to continue to engage in the licensed activity without restrictions pending the resolution of this matter would endanger the public health, safety, or welfare.

A preponderance of the evidence established that a danger to the public exists if Newport Mesa were permitted to continue to engage in smog check activity. Mr. Blum's proposed remedial measures are insufficient to protect the public with respect to Newport Mesa's smog check license. This is because the nature of the clean piping activity involved serious fraud—with serious environmental consequences—and was significantly egregious. Furthermore, Newport Mesa demonstrated a complete failure in its ability to supervise its technicians with respect to smog check activities. An interim order suspending Newport Mesa's smog check license issued by the BAR is warranted to ensure the public health, safety and welfare is protected during the pendency of this action.

9. Insufficient evidence was presented to establish, by a preponderance of the evidence, that Newport Mesa was engaged in a conspiracy with respondent Mr. Malleolo or any other entity to violate the law.

10. Insufficient evidence was presented to establish, by a preponderance of the evidence, that Newport Mesa's non-smog check licenses or registrations should be suspended (Automotive Repair Dealer Registration No. ARD 231018, Lamp Station License No. LS 231018, Brake Station License No. BS 231018). The nature of the wrongdoing did not involve activities or fraud relating to those licenses. Also, Mr. Malleolo no longer works for Newport Mesa and no other Newport Mesa agent was implicated in Mr. Malleolo's wrongdoing. The absence of evidence connecting Newport Mesa to a conspiracy with Malleolo and Certified Auto and Premium Finance further undermines the case against Newport Mesa's non-smog check licenses.

ORDERS

1. The following licenses and registrations issued to Ronald Mr. Malleolo shall be and are hereby immediately suspended during the pendency of this action. Ronald Malleolo is restrained and prohibited from practicing or attempting to practice or continuing to engage in the licensed activity for the following licenses.

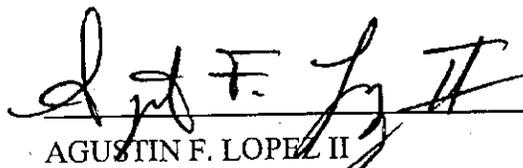
- a. Smog Check Repair Technician License No. EI 149877 issued to Ronald Malleolo.
- b. Smog Check Inspector License No. EO 149877 issued to Ronald Malleolo.
- c. Brake Adjuster License No. BA 149877 issued to Ronald Malleolo.
- d. Lamp Adjuster License NO. LA 149877 issued to Ronald Malleolo.

Petitioner shall file an accusation in the matter not later than the close of business within 15 days from the issuance of this interim order. This order is issued in accordance with the provisions of Business and Professions Code section 494.

2. Smog Check Station License No. RC 231018 issued to Newport Mesa Auto Service & Smog, Inc., is hereby immediately suspended during the pendency of this action. Newport Mesa Auto Service & Smog, Inc., is restrained and prohibited from practicing or attempting to practice or continuing to engage in the licensed activity related to Smog Check Station License No. RC 231018.

Petitioner shall file an accusation in the matter not later than the close of business within 15 days from the issuance of this interim order. This order is issued in accordance with the provisions of Business and Professions Code section 494.

DATED: January 15, 2013



AGUSTIN F. LOPEZ II  
Administrative Law Judge  
Office of Administrative Hearings