

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

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

Case No. 79/15-98.

OAH No. 2017071177

EAST BAY SMOG, ERIC MOISES  
GARCIA, PARTNER, DANIEL GARCIA,  
PARTNER, DANIEL GARCIA, ALSO  
KNOWN AS DANIEL GARCIA TORRES,  
PARTNER  
Automotive Repair Dealer Registration No.  
ARD 252615; Smog Check, Test Only,  
Station License No. TC 252615,

and

ERIC MOISES GARCIA  
Smog Check Inspector License No.  
EO 153742; Smog Check Repair Technician  
License No. EI 153742,

Respondents.

**PROPOSED DECISION**

Administrative Law Judge Adrienne J. Miller, State of California, Office of  
Administrative Hearings, heard this matter on December 5, 2017, in Oakland, California.

Deputy Attorney General Maretta Ward represented the complainant, Patrick Dorais,  
Chief of the Bureau of Automotive Repair.

William D. Ferreira, Attorney at Law, represented respondent East Bay Smog and  
respondent Eric Moises Garcia. Partners Eric Moises Garcia and Daniel Garcia were  
present; Daniel Garcia aka Daniel Garcia Torres was not present. The record was left open  
until December 18, 2017, for complainant to submit a letter regarding the disposition  
requested of the Bureau for respondent Hugo Camacho. The respondents were allowed until  
January 12, 2018, to submit a response to complainant's letter regarding the Bureau's

disposition request for respondent Hugo Camacho. On December 18, 2017, the complainant submitted its letter requesting that Hugo Camacho be stricken from the prayer of the Accusation and Petition to Revoke Probation. The respondents did not submit any opposition to complainant's request to strike Camacho from the Accusation and Petition to Revoke Probation. Therefore, Camacho is removed as a respondent in this matter. The matter was submitted on January 12, 2018.

## FACTUAL FINDINGS

### *East Bay Smog*

1. Respondents Eric Moises Garcia, Partner, Daniel Garcia, Partner, and Daniel Garcia, aka Daniel Garcia Torres, Partner are the owners of East Bay Smog, located in Brentwood, California. As owners of the facility, respondents hold Automotive Repair License Registration Number ARD 252615. The facility has been licensed since November 21, 2007. The license expired on October 31, 2017.

2. On December 19, 2007, the Bureau issued Smog Check, Test Only, Station License Number TC 252615 to Respondent East Bay Smog. Respondent's Smog Check License was in full force and effect at all times relevant to the charges brought herein and expired on October 31, 2017.

3. On May 31, 2013, the Bureau issued a STAR Station Certification to Respondent East Bay Smog. The STAR Station Certification was in full force and effect at all times relevant to the charges brought herein. However, the STAR Certification was invalidated on August 26, 2016, as a result of the final decision in case number 79/11-89.

### *Eric Moises Garcia*

4. In 2006, respondent Eric Moises Garcia was issued Advanced Emission Specialist Technician License Number EO 153742. Respondent's Advanced Emission Specialist Technician License was due to expire on April 30, 2014. Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (3)<sup>1</sup>, the license was renewed, pursuant to respondent's election, as Smog Check Inspector License Number EI 153742 and Smog Check Repair Technician License Number EO 153742, effective April 30, 2014. The licenses expired on April 30, 2016.

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

*Decision and Order in Case No. 79/11-89*

5. On June 13, 2014, respondent East Bay Smog and respondent Eric Moises Garcia signed a stipulated settlement and disciplinary order effective July 23, 2014, in case number 79/11-89. In this stipulated settlement agreement, respondent East Bay Smog and respondent Eric Moises Garcia agreed to the factual allegations, summarized as follows: On May 28, 2010, an undercover operator with the Bureau took the Bureau's 2001 Chrysler 300M to respondent East Bay Smog and requested a smog inspection. The positive crankcase ventilation (PCV) valve had been removed from the vehicle and the PCV hose was disconnected. Respondent Eric Moises Garcia had the operator sign and fill in the customer information on a work order, but did not provide her with a copy or a written estimate for the inspection. After the inspection was completed, the operator paid respondent Eric Moises Garcia \$67 and received copies of an invoice and a vehicle inspection report (VIR). The VIR indicated that respondent Eric Moises Garcia had performed the smog inspection on the vehicle. An electronic smog Certificate of Compliance No. NU233674C was issued for the vehicle. On June 7, 2010, the Bureau inspected the vehicle and found that the PCV valve was still missing and the PCV hose was still disconnected.

6. Pursuant to the stipulated settlement and disciplinary order, respondent East Bay Smog's ARD Registration and Smog Check Station License and Eric Garcia's Smog Inspector and Smog Check Technician licenses were revoked, stayed with three years probation, on terms and conditions, which included a 15-day suspension and payment of \$7,000 in cost recovery. The disciplinary order also imposed the following conditions:

2. **Obey All Laws.** Comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.
3. **Post Sign.** Post a prominent sign, provided by the Bureau, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign shall be conspicuously displayed in a location open to and frequented by customers and shall remain posted during the entire period of actual suspension.
4. **Reporting.** Respondent or Respondent's authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the Bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.
5. **Report Financial Interest.** Within 30 days of the effective date of this action, report any financial interest which

any partners, officers, or owners of the Respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

**6. Random Inspections.** Provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.

**7. Jurisdiction.** If an accusation is filed against Respondent during the term of probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter until final decision on the accusation, and the period of probation shall be extended until such decision.

**8. Violation of Probation.** Should the Director of Consumer Affairs determine that Respondents have failed to comply with the terms and conditions of probation, the Department may, after giving notice and opportunity to be heard, temporarily or permanently invalidate the registration of Respondent(s) and/or suspend or revoke Respondent(s) license(s).

**9. False and Misleading Advertising.** If the accusation involves false and misleading advertising, during the period of probation, Respondent shall submit any proposed advertising copy, whether revised or new, to the Bureau at least thirty (30) days prior to its use.

**10. Continuing Education Courses.** During the period of probation, Respondent Eric Moises Garcia shall attend and successfully complete a Bureau Certified Licensed Inspector Training Course (Level II). Said course shall be completed and proof of completion submitted to the Bureau within 180 days of the effective date of this decision and order. If proof of completion of the course is not furnished to the Bureau within 180-day period, Respondent's license shall be immediately suspended until such proof is received.

**11. Restrictions.** During the period of probation, Respondents shall not perform any form of smog inspection, or emission system diagnosis or report, until Respondents have purchased, installed, and maintained the diagnostic and repair equipment prescribed by BAR necessary to properly perform such work, and BAR has been given 10 days notice of the

availability of the equipment for inspection by a BAR representative.

**12. Cost Recovery.** Respondents shall be jointly and severally liable for costs in the amount of \$7,000.00. Payment shall be made in 24 equal installments. Payment to the Bureau of the full amount of cost recovery shall be received no later than 12 months before probation terminates. Failure to complete payment of cost recovery within this time frame shall constitute a violation of probation which may subject Respondents to outright revocation; however, the Director or the Director's Bureau of Automotive Repair designee may elect to continue probation until such time as reimbursement of the entire cost recovery amount has been made to the Bureau.

7. Respondent East Bay Smog and respondent Eric Moises Garcia attended the first probation conference on July 24, 2014, to discuss the methods by which respondent East Bay Smog and respondent Eric Moises Garcia planned to achieve and maintain compliance with the terms and conditions of probation. The plan and compliance requirements were discussed and the following recommendations were made by the Bureau.

1. The order for the ownership of East Bay Smog and/or Licensed Smog Inspector/Smog Check Repair Technician, Eric Moises Garcia to pay jointly or severally the Director of the Department of Consumer Affairs \$7,000.00 for investigative recovery costs. This is to be paid in 24 monthly installments of \$291.66 with full payment to be received no later than 12 months before probation terminates. The first payment was due 7/23/14. Bureau records show no payments have been received as of today's date.

2. The order for Eric Moises Garcia to attend and successfully complete a Bureau Certified Training Course (Level II) with proof of completion submitted to the Bureau within 180 days of the effective date of the decision and order. Bureau records show that proof of completion has not been received as of the date of this conference.

3. William Ferreira was advised that failure of East Bay Smog to comply with the Automotive Repair Act, Smog Check Program, terms and conditions of probation, and other applicable laws and regulations may result in disciplinary action which could jeopardize the Automotive Repair Dealer's registration and Smog Check Station License.

[¶] ... [¶]

8. Respondent East Bay Smog and respondent Eric Moises Garcia attended a second probation conference on November 13, 2014, to discuss the methods by which respondent East Bay Smog and respondent Eric Moises Garcia had achieved or planned to achieve and maintain compliance with the terms and conditions of probation. Respondent Eric Moises Garcia advised the Bureau that he had taken the required Smog Check technician training and he would supervise the facility. The Bureau also discussed in detail the following items:

1. The order for the ownership of East Bay Smog and/or Licensed Smog Inspector/Smog Check Repair Technician, Eric Moises Garcia to pay jointly or severally the Director of the Department of Consumer Affairs \$7,000.00 for investigative recovery costs. This is to be paid in 24 monthly equal installments of \$291.66 with full payment to be received no later than 12 months before probation terminates. The first payment was due 7/23/14. As of 11/13/14, East Bay Smog should have made a total of four payments equaling \$1166.64. As of 11/13/14, BAR records show one payment of \$700.00 was received on 9/9/14. East Bay Smog is delinquent \$466.64. Not complying with the payment schedule is considered a violation of the terms and conditions of East Bay Smog's probation and is cause for temporary or permanent invalidation of East Bay Smog's registration and/or suspension or revocation of East Bay Smog's Station license.

2. The probation compliance inspection on 10/22/14 and follow-up inspection conducted on 11/6/14 were discussed.

The inspection on 10/22/14 found East Bay Smog had the following alleged deficiencies:

- East Bay Smog appeared to not be providing customers with written estimates
- East Bay Smog did not have the required LPFET operator manual
- Automotive related business cards displayed

The follow-up inspection on 11/6/14 found East Bay Smog had corrected most, but not all noted deficiencies. The following deficiency remained:

- East Bay Smog failed to obtain a copy of the LPFET operator manual

Eric Garcia and William Ferreira were advised the deficiencies noted during these inspection[s] are considered a violation of the terms and conditions of East Bay Smog's probation.

3. Eric Moises Garcia and William Ferreira were advised that failure of East Bay Smog to comply with the Automotive Repair Act, Smog Check Program, terms and conditions of probation, and other applicable laws and regulations may result in disciplinary action which could jeopardize the Automotive Repair Dealer's registration and Smog Check Station License.

#### *New Violation - June 8, 2015*

9. On June 8, 2015, an undercover operator (operator) for the Bureau drove a 1984 Chevrolet Motor Home (Motor Home) to respondent East Bay Smog and requested a smog inspection. The operator signed a work order and received a written estimate. The odometer reading was not listed on the written estimate. A smog technician, Hugo Camacho (Camacho), who was employed by respondent, conducted a smog inspection on the Motor Home. Camacho informed the operator that he did not have the tools necessary to remove the engine cover to perform the inspection. Camacho advised the operator that if the operator removed the engine cover then he could perform the inspection. The operator left respondent's facility and returned after removing the engine cover from the Motor Home. The operator observed Camacho perform the smog inspection.

10. Prior to the time that the Motor Home was used in the operation, Bureau personnel had the ignition timing adjusted ten degrees further advanced from the factory specification of six degrees Before Top Dead Center (BTDC).

11. Camacho informed the operator of the Motor Home that it had failed the smog inspection because the exhaust gas recirculation (EGR) did not work and the EVAP system failed to pass the test. Camacho informed the operator that the Motor Home probably had a leak in the fuel tank. The operator paid Camacho \$96.75 and received a copy of Invoice No. 034686 and a Vehicle Inspection Report (VIR).

12. Upon re-inspection by the Bureau it was verified that the Motor Home remained in the same condition and still failed a smog inspection due to the Motor Home's ignition timing being adjusted beyond specifications. During the re-inspection by the Bureau it was found that Camacho had failed to remove the Low Pressure Fuel Evaporative Tester (LPFET) fuel filter neck adaptor from the fuel filler neck and reinstall the fuel cap of the Motor Home.

13. The VIR provided by respondent's facility and the BAR97 Test Detail retrieved from the BAR's Vehicle Information Database (VID) show that although no Smog Certificate of Compliance was issued, Camacho performed an improper smog inspection. The VIR and BAR97 Test Detail show that Camacho entered "Pass" at 6 degrees BTDC into the Emission Inspection System (EIS) for the functional check of the ignition timing, when the ignition timing was adjusted to 16 degrees BTDC.

14. The VIR and BAR97 Test Detail also show that Camacho entered "Fail" into the EIS for the functional check of the EGR system, when the EGR system was operating correctly as verified by the Bureau's documentation of the Motor Home.

*New Violation – June 11, 2015*

15. On June 11, 2015, an undercover operator (operator) for the Bureau drove a 1992 Toyota Pickup to respondent's facility and requested a smog inspection. Smog technician Camacho told the operator that the facility's EIS was not working but if the operator could return at 1:30 PM the EIS would be repaired by then. The operator returned later, signed a work order and received a written estimate. Smog technician Camacho conducted a smog inspection on the 1992 Toyota Pickup. The operator paid Camacho \$77 and received a copy of Invoice [REDACTED] and a VIR.

16. Prior to the time that the 1992 Toyota Pickup was used in the operation, Bureau personnel had removed the PAIR/Air Suction System Reed Valve, Air Intake Hose and Exhaust Pipe Tube.

17. Upon re-inspection the Bureau verified that the 1992 Toyota Pickup remained in the same condition that existed prior to the smog inspection. The 1992 Toyota still failed a proper smog inspection due to the 1992 Toyota Pickup's missing PAIR/Air Suction System Reed Valve Assembly.

18. The VIR and BAR97 Test Detail showed that Camacho provided Smog Certificate of Compliance [REDACTED] for the 1992 Toyota Pickup.

*New Violation – June 23, 2015*

19. As of March 9, 2015, smog check stations are required to use an OBD Inspection System (OIS) to perform smog inspections of all 2000 model year and newer gas powered vehicles with a gross vehicle weight of 14,000 pounds and under and 1998 and newer diesel powered vehicles 14,000 pounds and under. The BAR97 must not be used to inspect these vehicles. The Bureau sent "ET Blasts," which are electronic messages sent directly to the smog inspection equipment, on January 7, 2015, February 6, 2015, and March 4, 2015. The ET Blasts were addressed to "All licensed stations" and notified them of the policy.



20. The OIS equipment will not work on vehicles that are older than model year 2000. The BAR97 equipment, however, will enable a smog technician to perform an inspection on a model year 2000 or newer vehicle, even though such an inspection is no longer allowed.

21. The BAR's VID shows that respondent East Bay Smog registered an OIS on September 24, 2014. The BAR's VID shows that on June 23, 2015, respondent's facility and smog technician Camacho performed an improper smog inspection and issued Smog Certificate of Compliance #PS479291C to a 1999 Ford Diesel, utilizing an Emissions Inspection System (EIS)/BAR97 when the Ford Diesel should have been tested and certified utilizing an OIS.

22. Bureau records show that certificate numbers PS479258C and PS479291 were purchased and issued by respondent East Bay Smog.

#### *Respondents' Evidence*

23. Respondent East Bay Smog and respondent Eric Moises Garcia paid the \$7,000 for investigative recovery costs; however, they did not pay the \$7,000 in 24 monthly equal installments of \$291.66. The total amount was not paid in full until two months after the balance was due, which was 12 months before the end of the respondent East Bay Smog's and respondent Eric Moises Garcia's probation on July 23, 2016.

24. Respondent East Bay Smog has been in business for ten years, but currently is not in operation due to the pending revocation of probation. Respondent East Bay Smog closed its facility in August 2016 when it lost its STAR Certification.

25. Daniel Garcia has been a licensed technician for over ten years and has had no citations as a smog technician.

26. Daniel Garcia hired Camacho and watched him for two weeks to evaluate his skills then allowed him to perform smog inspections on his own. Daniel Garcia reviewed Camacho's license history to determine that he had no prior disciplinary actions when he was hired. Camacho appeared to be competent and Daniel Garcia never saw any signs of problems with his skills and knowledge. Daniel Garcia reviewed Camacho's invoices every day to be sure that they were correct.

27. Camacho was respondent East Bay Smog's only employee and he performed all the smog checks that are the subject of the Accusation and Petition to Revoke Probation. Camacho was first licensed on April 21, 2014, and was a licensed smog technician for only just over a year when he performed all the incorrect smog inspections. Camacho received a citation for his violations and was ordered to take a level one class and pay a fine.

28. Daniel Garcia was not present at respondent East Bay Smog's facility when Camacho performed the three smog inspections.

29. Respondent East Bay Smog, through Daniel Garcia, fired Camacho immediately upon learning that he had performed the three incorrect smog inspections. The respondent East Bay Smog and Daniel Garcia would not have allowed Camacho to perform smog inspections if they had known that he was not properly trained.

30. Daniel Garcia attempted to fix all the issues regarding the facility and in particular he tried to obtain the LPFET Operator Manual. He asked three or four different shops for a copy of the manual. Daniel Garcia finally obtained the manual and had it copied and placed in respondent East Bay Smog's facility two days after the second inspection by the Bureau.

31. Daniel Garcia will be the only one working at the respondent facility if the facility is allowed to stay in business. Currently respondent East Bay Smog is not leasing any premises for its business, and all its equipment is at its old leased premises.

32. Respondent East Bay Smog does not believe that it should be held responsible for the acts of its employee, Camacho, and they should not be held liable for his violations. Furthermore, respondents believe their actions were only negligent and that neither their acts, nor their employee's acts were performed with any intent to commit fraud.

33. Daniel Garcia is not working as a smog technician currently but would like to continue to be a smog technician in the future. Currently Daniel Garcia is working part-time at his parents' restaurant in Brentwood, California.

34. Respondent Eric Moises Garcia was working part-time for the respondent East Bay Smog facility as the person in charge of financial matters. He made sure that the respondent East Bay Smog paid the investigative costs in the amount of \$7,000 due to the Bureau.

#### *Costs*

35. In connection with the prosecution of this accusation and petition to revoke probation, the Department of Justice billed the Bureau \$10,712.50 for legal services. These charges are supported by a declaration that complies with the requirements of California Code of Regulations, title 1, section 1042. This amount is deemed to be reasonable.

### LEGAL CONCLUSIONS

#### *First Cause for Discipline (False and Misleading Statements)*

1. Business and Professions Code section 9884.7, subdivision (a)(1), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for 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. Respondent East Bay Smog entered "pass" at 6 degrees BTDC into the Emission Inspection System (EIS) for the functional check of the ignition timing of the Bureau's 1984 Chevrolet Motor Home when the ignition timing was adjusted to 16 degrees BTDC. Cause for discipline of respondent's ARD Registration was established by the matters set forth in Factual Findings 9 through 14.

*Second Cause for Discipline (Failure to Record Odometer)*

2. Business and Professions Code section 9884.7, subdivision (a)(2), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for causing or allowing a customer to sign any work order that does not state the odometer reading at the time of repair. Cause for discipline was established by the matters set forth in Factual Finding 9.

*Third Cause for Discipline (Fraud)*

3. Business and Professions Code section 9884.7, subdivision (a)(4), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for any conduct which constitutes fraud. Respondent East Bay Smog entered "pass" at 6 degrees BTDC into the Emission Inspection System (EIS) for the functional check of the ignition timing on the Bureau's 1984 Chevrolet Motor Home when the ignition timing was adjusted to 16 degrees BTDC. Cause for discipline was established by the matters set forth in Factual Findings 10, 12, and 13.

*Fourth Cause for Discipline (Violations of Motor Vehicle Inspection Program)*

4. Health and Safety Code section 44072.2, subdivision (a), provides that the Bureau may suspend or revoke the Smog Check Station license if the licensee, or any partner, officer, or director thereof, violates any section of the Motor Vehicle Inspection Program. During the smog check for the 1984 Chevrolet Motor Home, respondent's technician failed to comply with Health and Safety Code sections 44012, subdivision (f). The smog technician failed to properly perform a visual or functional inspection of the emission control devices as prescribed by the department. Although no Certificate of Compliance was issued, the smog technician performed an improper smog inspection that did not meet the requirements of section 44012, subdivision (f), as prescribed by the Bureau. Cause for discipline was established by the matters set forth in Factual Findings 10, 12, 13, and 14.

*Fifth Cause for Discipline (Failure to Comply with Regulation of Motor Vehicle Inspection Program)*

5. Health and Safety Code section 44072.2, subdivision (c), and California Code of Regulations, title 16, sections 3340.35, subdivision (c), 3340.42, subdivision (b)(1), 3340.45, and 3373, provide that the Bureau may suspend or revoke the Smog Check Station License of a facility that issued a certificate of compliance to a vehicle that has not been

properly inspected or does not have properly functioning emissions control devices, or that failed to perform a visual inspection of the emissions control systems on the vehicle as specified in the department's Smog Check Manual, or that provided false and misleading records regarding a smog check. Cause for discipline of respondent East Bay Smog's ARD Registration and Smog Check Station License exists by the matters set forth in Factual Findings 9 through 14.

*Sixth Cause for Discipline (False and Misleading Statements)*

6. Business and Professions Code section 9884.7, subdivision (a)(1), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for 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. Respondent East Bay Smog certified under penalty of perjury on the vehicle inspection report that the Bureau's 1992 Toyota Pickup had passed the inspection and was in compliance with applicable laws and regulations. However, the PAIR/Air suction System Reed Valve Air Intake Hose and Exhaust Pipe Tube were missing and the vehicle should not have passed a proper California Smog Inspection. Cause for discipline of respondent East Bay Smog's ARD Registration exists by the matters set forth in Factual Findings 15 through 18.

*Seventh Cause for Discipline (Fraud)*

7. Business and Professions Code section 9884.7, subdivision (a)(4), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for any other conduct which constitutes fraud. Respondent East Bay Smog committed an act that constituted fraud by issuing a VIR that indicated the Bureau's 1992 Toyota Pickup had passed the inspection and was in compliance with applicable laws and regulations. (Health & Saf. Code, §44012.) Cause for discipline of respondent East Bay Smog's ARD Registration exists by the matters set forth in Factual Findings 15 through 18.

*Eighth Cause for Discipline (Violations of Motor Vehicle Inspection Program)*

8. Health and Safety Code sections 44012, subdivision (f), and 44072.2, subdivision (a), provide that the Bureau may suspend or revoke the Smog Check Station License of a facility for failing to perform a visual inspection of a vehicle's emission control devices pursuant to the Bureau's procedures. Health and Safety Code section 44015, subdivision (b), provides that if a vehicle meets the requirements of section 44012, a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance. Respondent East Bay Smog's technician failed to comply with these sections when he issued a smog certificate on the Bureau's 1992 Toyota Pickup. Cause for discipline of respondent East Bay Smog's Smog Check Station License exists by the matters set forth in Factual Findings 15 through 18.

*Ninth Cause for Discipline (Failure to Comply with Regulations of Motor Vehicle Inspection Program)*

9. Health and Safety Code section 44072.2, subdivision (c), and California Code of Regulations, title 16, sections 3340.35, subdivision (c), 3340.45, and 3373, provide that the Bureau may suspend or revoke the Smog Check Station License of a facility that issued a certificate of compliance to a vehicle that has not been properly inspected or does not have properly functioning emissions control devices; or that failed to perform a visual inspection of the emissions control systems on the vehicle as specified in the Smog Check Manual; or that provided false and misleading records regarding a smog check inspection. Cause for discipline of respondent East Bay Smog's Smog Check Station License in relation to the inspection of the 1992 Toyota Pickup exists by the matters set forth in Factual Findings 15 through 18.

*Tenth Cause for Discipline (False and Misleading Statements)*

10. Business and Professions Code section 9884.7, subdivision (a)(1), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for 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. Respondent East Bay Smog certified under penalty of perjury on the vehicle inspection report that the Bureau's 1999 Ford Diesel had passed the smog inspection and was in compliance with applicable laws and regulations. However, said smog inspection was conducted utilizing an EIS machine when the 1999 Ford Diesel should have been tested and certified utilizing an OIS machine. Cause for discipline of respondent East Bay Smog's ARD Registration exists by the matters set forth in Factual Findings 19 through 22.

*Eleventh Cause for Discipline (Fraud)*

11. Business and Professions Code section 9884.7, subdivision (a)(4), provides that the Bureau may suspend or revoke the registration of an automotive repair dealer for any other conduct which constitutes fraud. Respondent East Bay Smog committed an act that constituted fraud by issuing a VIR that indicated the Bureau's 1999 Ford Diesel passed a smog inspection and was in compliance with applicable laws and regulations. (Health & Saf. Code, § 44012.) Cause for discipline of respondent East Bay Smog's ARD Registration exists by the matters set forth in Factual Findings 19 through 22.

*First Cause to Revoke Probation (Violation of Condition 2)*

12. Condition 2 of the terms of probation for respondent East Bay Smog's ARD Registration, Smog Check Station License, and respondent Eric Moises Garcia's Smog Check Inspector License and Smog Technician License required them to comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs. As set forth in Factual Findings 9 through 22 and Legal Conclusions 1 through 11, respondent

East Bay Smog violated this term by performing improper smog inspections on June 8, 2015, June 11, 2015, and June 23, 2015.

*Second Cause to Revoke Probation (Violation of Condition 8)*

13. Condition 8 of the terms of probation of respondent East Bay Smog's ARD Registration, and respondent Eric Moises Garcia's Smog Check Station License, Smog Check Inspector License and Smog Technician License provides that should the Director of Consumer Affairs determine that respondents have failed to comply with the terms and conditions of probation, the Bureau may, after giving notice and opportunity to be heard, temporarily or permanently invalidate the registration of respondents licenses. As set forth in Factual Findings 9 through 22, respondent East Bay Smog violated this term by performing improper smog inspections on June 8, 2015, June 11, 2015, and June 23, 2015, and the Bureau may temporarily or permanently invalidate the registration of respondents' licenses.

*Third Cause to Revoke Probation (Violation of Condition 12)*

14. Condition 12 of the terms of probation for respondent East Bay Smog's ARD Registration, and respondent Eric Moises Garcia's Smog Check Station License, Smog Check Inspector License and Smog Technician License required respondent East Bay Smog and respondent Eric Moises Garcia to jointly and severally be liable for costs in the amount of \$7,000. Payments were to be made in 24 monthly equal installments and payment to the Bureau of the full month of the cost recovery had to be received no later than 12 months before probation terminated. As set forth in Factual Findings 7, 8, and 23, respondent East Bay Smog and respondent Eric Moises Garcia violated this term by not making timely payments of costs, pursuant to the requirements of probation and became delinquent as set forth in Factual Findings 23. However, respondent East Bay Smog and respondent Eric Moises Garcia did make the full payment two months after the required due date.

15. The terms of probation for respondent East Bay Smog's ARD Registration, Smog Check Station License, and respondent Eric Moises Garcia's Smog Check Inspector License and Smog Technician License required them to comply with all statutes, regulations, and rules governing automotive inspections, estimates and repairs. The respondent East Bay Smog violated conditions 2, 8, and 12, and respondent Eric Moises Garcia violated condition number 12 of the Decision and Order on Accusation Against East Bay Smog and Eric Moises Garcia, Case No. 79/11-89.

16. The Bureau does not seek discipline against the Smog Check Inspector and Smog Check Repair Technician licenses of respondent Eric Moises Garcia. Respondent Eric Moises Garcia was on probation; however, there is insufficient cause to revoke his Inspector and Smog Check Repair Technician licenses for his only violation, failing to timely pay costs. Respondent Eric Moises Garcia did not perform any of the smog inspections subject to this accusation and petition to revoke probation.

## Discussion

17. Owners of smog testing stations are held to a high standard under Health and Safety Code section 44012. Even when they undertake to perform every test correctly, they are still liable for the errors of the smog technicians they employ. California courts have upheld enforcement provisions of this type. In *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192, a licensed pharmacy was held liable for the acts of an employee who sold pharmaceuticals without a doctor's authorization. There the court said 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." Similarly, in *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165, the court noted that a licensee "may not insulate himself from regulation by electing to function through employees or independent contractors." There, the court found the holder of an agricultural pest license responsible for his employee's negligent dumping of pesticides. In assigning liability to the licensee, the court noted that it was holding the licensee "to the conduct prescribed by [the] statute for operating his licensed business."

Respondent East Bay Smog and respondent Eric Moises Garcia do not feel they should be responsible for the errors of their technician. The Health and Safety Code, however, expressly states smog station owners have the duty to oversee the issuance of vehicle inspection reports, even though smog technicians are separately licensed and can be separately cited for violations. The statute does not provide any discretion for an administrative law judge to absolve a station owner of liability when the station's technician has, as here, improperly performed smog inspections.

18. Respondent East Bay Smog demonstrated a pattern of failing to properly perform smog inspections. Despite a previous disciplinary action, this conduct has persisted. Although the evidence did not establish that respondent East Bay Smog is willfully violating the Bureau's regulations, it appears unable to comply with them. Protection of the public compels revocation of East Bay Smog's Automotive Repair Dealer Registration and Smog Check Station Licenses. It would be against the public interest to permit respondent East Bay Smog to continue to operate the facility or to perform smog inspections.

## Costs

19. Business and Professions Code section 125.3 authorizes the Bureau to recover its reasonable costs of investigation and enforcement. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court sets forth standards by which a licensing board must exercise its discretion to reduce or eliminate cost awards to ensure that licensees with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards include whether the licensee has been successful at hearing in getting the charges dismissed or reduced, the licensee's 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.

Respondent East Bay Smog has been found to have negligently violated the laws and regulations of the Motor Vehicle Inspection Program. Respondent East Bay Smog violated the terms of probation. Respondent Eric Moises Garcia violated probation but his one violation was minor. Therefore, costs are imposed only against respondent East Bay Smog. Considering that respondent East Bay Smog has substantially completed the terms and conditions of its probation, however, and is no longer open as a facility, there are grounds to reduce the costs in this matter. The costs in this matter are reduced to \$5,356.25.

### ORDER

1. The petition to revoke probation concerning Automotive Repair Dealer Registration No. ARD 252615 and Smog Check Test Only Station License No. TC 252615, issued to respondents Eric Moises Garcia, Partner, Daniel Garcia, Partner, Daniel Garcia, aka Daniel Garcia Torres, Partner, doing business as East Bay Smog, is granted.

2. Automotive Repair Dealer Registration No. ARD 252615, issued to respondent East Bay Smog, Eric Moises Garcia, Partner, Daniel Garcia, Partner, Daniel Garcia, aka Daniel Garcia Torres, Partner, is revoked. Any other ARD Registrations issued to respondent East Bay Smog, Eric Moises Garcia, Partner, Daniel Garcia, aka Daniel Garcia Torres, Partner, is revoked.

3. Smog Check, Test Only, Station License No. TC 252615, issued to respondent East Bay Smog, Eric Moises Garcia, Partner, Daniel Garcia, Partner, Daniel Garcia, aka Daniel Garcia Torres, Partner, is revoked. Any other Smog Station License issued to respondent East Bay Smog, Eric Moises Garcia, Partner, Daniel Garcia, aka Daniel Garcia Torres, Partner, is revoked.

4. The STAR Station Certification issued to respondent East Bay Smog, Eric Moises Garcia, Partner, Daniel Garcia, Partner, Daniel Garcia, aka Daniel Garcia Torres, Partner, is revoked.

5. The Petition to Revoke Probation as to respondent Eric Moises Garcia is denied. Smog Check Inspector License No. EO 153742 and Smog Check Repair Technician License No. EI 153742 issued to Eric Moises Garcia are not revoked.

6. Respondent East Bay Smog shall pay to the Bureau costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3, in the amount of \$5,356.25.

DATED: February 1, 2018

DocuSigned by:  
*Adrienne Miller*  
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ADRIENNE J. MILLER  
Administrative Law Judge  
Office of Administrative Hearings