

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

In the Matter of the Accusation Against:

BLANCA LILIAN RIVAS, OWNER, dba DTLA SMOG CHECK

210 E. 16th Street

Los Angeles, CA 90015

Mailing Address:

10711 S. Hoover St.

Los Angeles, CA 90044

Automotive Repair Dealer Registration No. ARD 288784

Smog Check Test Only Station License No. TC 288784

DARIO ALEXANDER RAMIREZ

21161 Nandina Rd.

Apple Valley, CA 92308

Smog Check Inspector License No. EO 636074

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JOSSUE BALTAZAR RAMIREZ

807 E. 95th Street

Los Angeles, CA 90002

Smog Check Inspector License No. EO 640836

Respondents.

Case No. 79/20-13442

OAH No. 2021100788

DECISION

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

This Decision shall be effective on MAR 23 2023.

IT IS SO ORDERED this 8 day of February, 2023.



GRACE ARUPO RODRIGUEZ
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs

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PROPOSED DECISION

Administrative Law Judge (ALJ) Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter by videoconference on December 13 and 14, 2022.

Deputy Attorney General Christina M. Thomas appeared by teleconference and represented Patrick Dorais, complainant, Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department).

Attorney at Law William D. Ferreira, Automotive Defense Specialists, appeared by video and represented Blanca Lilian Rivas, Owner, doing business as DTLA Smog Check (respondent Rivas) and Dario Alexander Ramirez (respondent Ramirez) (collectively respondents). Respondents did not appear.

Jossue Baltazar Ramirez (respondent Baltazar) signed a Stipulated Settlement and Discipline Order (settlement) on September 28, 2021, and did not appear at hearing. The settlement resolved Causes for Discipline numbers 15 through 18 which are not, accordingly, addressed in this decision.

The Accusation was amended on the record without objection. In paragraph 45, on page 16, line 27, the "2" of "Vehicle 2" was amended to read "4," or "Vehicle 4."

Witness testimony and documents were received in evidence. The record was closed and the matter was submitted for decision on December 14, 2022.

SUMMARY

On August 10, 2021, complainant issued the Accusation against respondents alleging violations of the Automotive Repair Act (Repair Act) (Bus. & Prof. Code, §§ 9880 et seq.) and the Motor Vehicle Inspection Program (Inspection Program) (Health and Saf. Code, §§ 44000 et seq.). (Undesignated statutory references are to the Business and Professions Code.) Complainant alleged (1) respondent Rivas knowingly provided a Bureau undercover operator with a fraudulent smog Certificate of Compliance (Certificate) without performing a bona fide smog inspection on the undercover vehicle; and (2) between September 2018 and January 2021 respondents and respondent Baltazar performed "clean gassing" on five vehicles, a method of fraudulently passing the tailpipe portion of smog inspections performed at DTLA Smog Check (DTLA Smog). Complainant requests respondents' respective registration and licenses be suspended or revoked, and respondents be ordered to pay reasonable costs.

Complainant established, by a preponderance of the evidence, respondent Rivas fraudulently issued a Certificate to an undercover vehicle. The underlying facts revealed an arrangement between respondent Rivas and other licensees to intentionally defraud the Bureau at a profit to herself. Complainant failed to establish the causes for discipline against respondents associated with the alleged clean gassing. The expert's opinion was excluded because there was too great an analytical gap between the data and the opinion proffered, and because the information relied on by the expert did not adequately support the expert's conclusion. Respondents did not present evidence on their behalf.

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The allegations of clean gassing against respondents are dismissed. Accordingly, no cause exists for discipline against respondent Ramirez's license. However, based on respondent Rivas's conduct in connection with the fraudulent issuance of a Certificate to the undercover vehicle, protection of the public requires respondent Rivas's registration and license be revoked. Respondent Rivas is ordered to pay reasonable costs of \$6,481.76.

FACTUAL FINDINGS

Jurisdiction

1. On August 10, 2021, complainant, acting in his official capacity, issued the Accusation. Respondents timely filed Notices of Defense.

RESPONDENT RIVAS

2. On October 23, 2017, the Bureau issued respondent Rivas Automotive Repair Dealer (ARD) Registration Number ARD 288784. On November 7, 2017, the Bureau issued respondent Rivas Smog Check, Test Only, Station License Number TC 288784. The ARD registration and TC license were in full force and effect at all times relevant to the charges brought in the Accusation and are scheduled to expire on October 31, 2023.

3. On February 14, 2018, the Bureau certified respondent Rivas as a STAR Station. Respondent Rivas's STAR certification will remain active unless the ARD registration or TC license is revoked, canceled, becomes delinquent or the certification is otherwise invalidated.

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4. The Bureau has not previously disciplined respondent Rivas's registration or license.

RESPONDENT RAMIREZ

5. On September 25, 2013, the Bureau issued Smog Check Inspector License Number EO 636074 to respondent Ramirez. The EO license was in full force and effect at all times relevant to the charges brought in the Accusation and is scheduled to expire on May 31, 2023.

6. On July 7, 2015, the Bureau issued Citation and Order of Abatement (Citation) number M2015-1741 to respondent Ramirez based on his issuance of Certificate number PS507409 to an undercover vehicle with a missing Air Injection System, in violation of Health and Safety Code section 44032. The Citation became effective June 14, 2019, and required respondent Ramirez to complete an eight-hour Bureau certified training course. Respondent Ramirez completed the course on August 26, 2019.

RESPONDENT BALTAZAR

7. On January 5, 2018, the Bureau issued Smog Check Inspector License Number EO 640836 to respondent Baltazar. The EO license was in full force and effect at all times relevant to the charges brought in the Accusation and is scheduled to expire on September 30, 2023.

8. On September 28, 2021, respondent Baltazar, represented by Frank C. Burcculeri, Attorney at Law, entered into a stipulated settlement with the Bureau. He stipulated to revocation of his license with the revocation stayed and his license placed on probation for five years and subject to terms and conditions, including a 30-day

license suspension and payment of costs totaling \$1996.75. The settlement was effective November 19, 2021.

SMOG CHECK PROGRAM BACKGROUND

9. Program Representative (PR) II Ian Evans wrote the Investigation Report in this matter (Exh. 4). The report provides the following relevant information regarding the Bureau's smog check program.

10. California's Smog Check Program requires the owners of most motor vehicles in the Enhanced and Basic areas of the State, subject their vehicles to and pass a Smog Check inspection and receive a Certificate every two years when renewing their registration and also when the vehicle's title is transferred. These inspections are performed by Smog Check inspectors at Smog Check Stations, both of which are licensed by the Bureau. The Smog Check Program is designed and intended to reduce air pollution by identifying and requiring the repair of polluting motor vehicles.

11. The Smog Check inspection in certain Enhanced areas of the State is an Acceleration Simulation Mode (ASM) test performed using an Emission Inspection System (EIS), also known as a BAR 97. This is a computer based five-gas analyzer that measures Hydrocarbons (HC), Carbon Monoxide (CO), Oxides of Nitrogen (NOx), Carbon Dioxide (CO₂) and Oxygen (O₂). The first part of the test is a loaded mode test of the vehicle's tailpipe emissions on a dynamometer. This puts the vehicle's drive wheels on rollers and the vehicle is driven at speeds of 15 and 25 miles per hour to simulate driving conditions while the emissions are sampled by the EIS.

12. The inspector also performs visual and functional tests on the vehicle as outlined in the Smog Check Manual. The visual inspection of the emission control components verifies the required emission control devices are present and properly

connected. Functional tests are also performed which, depending on the vehicle, may include checking the ignition timing, malfunction indicator light, Exhaust Gas Recirculation system, a low-pressure test of the evaporative emissions controls, a visible smoke test, and a pressure test of the gas cap.

13. The inspector enters the results of the visual and functional inspections into the EIS. The EIS unit makes the determination whether or not the vehicle passes the inspection based on the results of the tailpipe, visual, and functional tests. The EIS is connected via internet to the Bureau's Vehicle Information Database (VID), which is maintained by a state contractor. If the vehicle passes the visual, functional, and tailpipe tests, it passes the overall inspection, and a Certificate is issued and transmitted electronically to the VID. Additionally, all data gathered during a Smog Check inspection, regardless of the type of inspection, is transmitted to and retained in the VID.

Undercover Vehicle Operation

14. PR Evans and PR Marc Ortega testified at hearing. PR Evans' duties include reviewing data transmitted from smog check facilities to the Bureau's VID and to assess whether any smog check facilities are transmitting unexpected data or anomalies. If he finds such data or anomalies, he will investigate the cause. PR Ortega's duties include reviewing smog check data as transmitted to the Bureau's VID, conducting investigations and surveillances, and writing respective investigative reports, and addressing complex consumer complaints.

POLICE DEPARTMENT REFERRAL

15. In September 2020, PR Evans' received a referral from the Seal Beach (SB) Police Department that implicated respondents in violations of the Repair Act and

Inspection Program. The referral related to a modified exhaust system found in the vehicle of James Ferguson, as documented in a September 12, 2020 SB Police Department incident report (Exh. 5). The incident report was entered pursuant to *Lake v. Reed* (1997) 16 Cal.4th 448. Included with the incident report was a Certificate issued by respondents certifying Mr. Ferguson's vehicle as smog compliant.

16. Complainant did not allege facts related to the incident report in the Accusation and did not allege respondents were subject to related criminal charges or criminal convictions. Accordingly, this evidence presented relating to the incident report is not considered as cause for discipline or as aggravating factors. Rather, the information is considered solely as the basis of PR Evan's subsequent investigation of respondents.

VIOLATIONS OF THE REPAIR ACT AND INSPECTION PROGRAM

17. Based on the SB Police Department referral, PRs Evans and Ortega conducted an undercover run of DTLA Smog. On October 20, 2020, Tom Najjar, Bureau Program Representative I, prepared a 2002 Honda Civic EX (undercover vehicle) from the Bureau's documentation laboratory for the undercover vehicle operation.

18. PR Najjar inspected the undercover vehicle and determined the required emission controls were present. He performed an On-Board Diagnostic Inspection System (OIS) inspection on the undercover vehicle, and it passed. PR Najjar then made the following modifications to the undercover vehicle: he removed the vehicle's PCV breather pipe on the valve cover; he installed a non-approved open breather filter where the PCV breather belongs; he removed the OEM exhaust header and installed a non-approved exhaust header; he installed the primary heated oxygen sensor on the non-approved exhaust header; and he installed and photographed tamper indicators

to detect removal of the non-approved aftermarket parts he installed. After making these modifications, PR Najjar performed an OIS inspection of the undercover vehicle, and it failed based on the modifications.

19. On October 23, 2020, PR Najjar released the undercover vehicle to PR Edward Young who released it to PR Evans. On October 23, 2020, PR Evans documented the emission control deficiencies in the undercover vehicle. On October 29, 2020, PR Evans conducted an undercover vehicle operation with PR Ortega, who acted as the undercover vehicle operator. PRs Evans and Ortega drove to DTLA Smog, located at 210 East 16th Street, in Los Angeles. Before beginning the operation, PR Evans again documented the vehicle's deficiencies. PR Ortega, assuming the name "Marcos," entered DTLA Smog and was greeted by respondent Ramirez.

20. Respondent Ramirez used a scan tool to check the vehicle and told PR Ortega he could get the vehicle a passing Certificate, but respondent Ramirez would need "Blanca" to make a phone call to confirm they would be able to help PR Ortega. A female at the facility made a phone call and gave a hand signal to respondent Ramirez, who then told PR Ortega the cost of the Certificate would be \$300. Respondent Ramirez explained to PR Ortega the vehicle would be tested at another location and he would receive a Certificate in approximately two weeks, and that he, respondent Ramirez, would call PR Ortega when it was ready. Upon request, PR Ortega provided his phone number and \$300 in cash to respondent Ramirez, after which respondent Ramirez gave PR Ortega a business card. The front of the business card lists DTLA Smog Check, Blanca Rivas, Owner, with the 16th Street address, and the back of the card provides an address of 3154 East Olympic Boulevard, Los Angeles. Respondent Ramirez instructed PR Ortega to drive to the listed address and to say

"Blanca" had sent him. PR Ortega was not provided with any paperwork such as an estimate or invoice.

21. PRs Evans and Ortega drove to the Olympic Boulevard location and saw a smog inspection facility with no signage. PR Evans again checked the vehicle and confirmed the documented deficiencies. PR Ortega then met with an individual who asked PR Ortega who sent him, to which he replied "Blanca." The unidentified individual then moved the vehicle into the test bay and asked for the Department of Motor Vehicle paperwork. PR Ortega was then directed to wait outside. However, while waiting, PR Ortega approached the individual and asked to get a water bottle out of his vehicle. While retrieving his water bottle, PR Ortega observed a cable was connected to the undercover vehicle's diagnostic link connector (DLC), which led into the facility office. At the conclusion of the test, the individual backed the undercover vehicle out of the test bay and asked PR Ortega if he knew the price, which PR Ortega acknowledged he did. No money or paperwork was exchanged at the second facility.

22. Immediately after the inspection, at a nearby location PR Evans photographed the vehicle, again verifying the documented deficiencies. Later that day, PR Ortega released custody of the vehicle to PR Evans, who secured the vehicle in the Bureau's offsite storage location. On October 30, 2020, PR Evans returned custody of the vehicle to PR Najjar.

23. PR Evans researched the address where the undercover vehicle was tested and found the registered facility at the Olympic Boulevard location was "Dennis Smog," ARD registration and TC license numbers 296264. PR Evans further confirmed Dennis Smog employs J. J. William Aguirre, EO license number 642574. Soon after, PR Evans provided PR Ortega a photograph of Mr. Aguirre and confirmed this was the technician who performed the smog check inspection of the undercover vehicle.

24. On November 5, 2020, PR Ortega received a phone call from an individual who identified herself as "Blanca" and asked for "Marco." Blanca told PR Ortega the paperwork was ready, and he could pick it up any time before 4:00 p.m. Soon after, PR Ortega arrived at DTLA Smog. He was greeted by respondent Ramirez, and he then met with respondent Rivas. PR Ortega identified himself as "Marco" and stated he was there to pick up paperwork. Respondent Rivas reached into the top right desk drawer and removed several pieces of paper, each of which had a post-it note fastened to it. Respondent Rivas sorted through the documents and presented a photocopy of a VIR with a pink post-it stapled to the top left corner.

25. The VIR indicated the undercover vehicle had passed the smog inspection and was issued Certificate number IJ168682C. The VIR copy referenced the undercover vehicle, including year, make, model, Vehicle Identification Number (VIN), and license number of the undercover vehicle, and read "Marco 626-315-4800 [the number PR Ortega provided to respondents] ISO 4279 Honda / Dario." No paperwork was provided to PR Ortega other than the fraudulent VIR copy with the affixed post-it note. Later that day, PR Evans examined the copy of the VIR and noted the area directly under "Smog Check Inspection Station Information" (the area of the VIR that identifies both the smog check facility that conducted the inspection as well as the smog check technician who performed the test), had been manipulated in order to obscure this identifying information.

26. PR Evans used the Bureau's VID to obtain a copy of the OIS Test details and a copy of the VIR from the Bureau's database. VID records showed that the fraudulent certification of the undercover vehicle was actually issued by Smog Del Rio (ARD registration and TC license number 284320) under the license of Erik Herrera (EO license number 639169). The VIR shows the test was allegedly conducted on

November 3, 2020, though at that time undercover vehicle was in the custody of the Bureau Documentation Lab and could not have been undergoing a legitimate smog check inspection. PR Evans concluded, and the evidence established, the VIR generated was falsified in at least two respects: (1) the information entered in the VID to obtain the resulting VIR and Certificate was entered for a vehicle that was not present for testing; and (2) the station and smog technician information was deleted.

27. PR Evans added that both Smog Del Rio and Erik Herrera have subjected their licenses to administrative discipline and have had their licenses revoked for actions outside of the investigation related to respondents. Both revocations were finalized after the events in this investigation.

Clean Gassing

28. PR Evans also investigated data DTLA Smog transmitted to the Bureau's VID. Based on the review of this data, complainant alleged that between September 10, 2018, and January 20, 2021, five vehicles were clean gassed by DTLA Smog, two by respondent Baltazar and three by respondent Ramirez. In support of these allegations, complainant relied on the testimony of PR Evans and Bureau Air Quality Engineer (AQE) II Francis Di Genova; BAR 97 Test Details of the five vehicles; PR Evans' Investigation Report; two affidavits of AQE Di Genova; and Certificate purchase receipts showing the Certificates for each of the vehicles was purchased by DTLA Smog.

29. AQE Di Genova established himself as an expert in vehicular emissions, emission controls, and their measurements and analysis. His credentials include, but are not limited to, the following: a Bachelor of Science in Physics and a Master of Science in Environmental Science; work in the air quality field for more than 45 years,

and specifically with automotive emissions for over 41 years; employment with the Bureau for almost nine years as an AQE; 24 years of experience setting up and operating vehicle emission test laboratories in Sacramento, California, and in Fairbanks, Alaska, for Sierra Research, Inc.; and 13 years with the California Air Resources Board, most often serving as Chief of the Research and Economic Studies Branch. His duties as an AQE for the Bureau include program evaluation and support, analysis of Smog Check data and related data, laboratory testing, and serving as the lead over fraud analysis and support for BAR Enforcement cases requiring Engineering support.

DEFINITIONS

30. "Clean gassing" is a method by which surrogate gases are introduced into a Smog Check analyzer, or EIS, in order to dilute the exhaust of pollution-causing emissions. This alters the vehicle exhaust samples and causes the EIS to issue a passing test result based on a fraudulent reading of exhaust emissions rather than the actual vehicle emissions. Unlike clean piping or clean plugging, where another car is substituted for the failing car, another car is not involved in clean gassing.

31. Second-by-second (SBS) data refers to vehicle emissions and speed data recorded on a SBS basis throughout the smog check ASM tests.

DOCUMENTS IN SUPPORT OF CLEAN GASSING ALLEGATIONS

32. PR Evans reviewed VID data transmitted by DTLA Smog for Vehicles 1 through 5. PR Evans provided in his report, and consistently testified at hearing, that for each of the vehicles' data reviewed, he observed sharp drops and rises in the concentrations of NO_x, CO, and/or HC. He also identified the respective second counts, i.e., all three pollutants beginning to drop at second 29 of the test, during each

smog test when the notable changes occurred. However, PR Evans did not provide any data other than the information included in the BAR 97 Test Details and the Bureau's computer-generated graphs to support his claims of the significant changes in the levels of the measured gases.

BAR 97 Test Details

33. The relevant portion of the BAR 97 Test Detail is contained in its "Tailpipe (Final)" section. This section contains summarized results for the HC, CO, and NOx concentrations, which are reported for both portions of the ASM, the ASM5015 and ASM2525. In addition, any factor of correction the Bureau's VID makes to offset humidity or unintended dilution (caused, for instance, by a tailpipe probe slipping from the tailpipe) are also included in the Detail. However, the BAR 97 Detail does not include the raw data values accumulated during the tailpipe test which would support a claim of a precipitous change in gas emission values.

Figures

34. In addition to the BAR 97 Details contained in the Investigation Report, the report also contains Figures for each smog check inspection, each of which includes charts depicting the concentration values of the measured gases for each vehicle's smog inspection, as well as the summary data information also contained in the BAR 97 Test Details. The data is obtained by use of the BAR-97 analyzer which has three sensors that measure the emission levels of relevant gases and has an air pump that draws a sample through a sample line into the analyzer. The SBS data is introduced by the BAR-97 analyzer as a result of measurements during the BAR-97 test. The charts can then be created by the Bureau's Information Technology branch's

use of a software program. The scale of each chart is determined by the program and are chosen to display the full range of gas concentration values.

35. AQE Di Genova provided a detailed explanation of the Figures contained in the Investigation Report. For each chart in each Figure, the title of the quantity measured is shown along the vertical (Y) axis and the time in seconds from start of test is shown along the horizontal (X) axis. For example, in Figure 1 contained in his May 2022 affidavit (Exh. 23, p. A195) the chart in the upper left shows the HC volume concentration measured in the exhaust in units of parts per million (ppm) over the duration of both modes of the ASM test. This is shown as a dark blue line for each second of the test. The emissions test begins at time increment 0 when the wheel speed shown by the stair-step shaped purple line, first reaches a speed above 0 miles per hour (mph). Mode 1 of the test, indicated by the duration of the first horizontal red line, begins a short time after the speed stabilizes at 15 mph, and Mode 2 (the second horizontal red line) begins when speed stabilizes at 25 mph.

36. Below the HC chart are charts for the other two measured pollutants: CO, expressed as a percentage, and NO_x, expressed in ppm. For each of the three pollutants and two test modes, the horizontal red line is plotted at the allowable emission level or "Cutpoint."

37. The three charts on the right-hand side of the Figure show other key information that indicates the conditions and integrity of the test. The upper chart shows all three pollutants, HC, CO, and NO_x, each normalized on a scale from 0 to 1, using lines in dark blue, red, and green, corresponding to their individual charts on the left. This multipollutant chart is intended to show when all three pollutant gasses sharply drop or rise at the same time. Following the multipollutant chart, the next chart below shows both the concentration of CO₂ (carbon dioxide) in yellow and wheel

speed in miles per hour 19 (mph). The third chart shows O₂ (oxygen) in magenta, measured in the exhaust, along with the same stair step purple curve of relative wheel speed.

VEHICLES

Vehicle 1

38. Vehicle 1 is a 1995 Honda Civic, tested on September 10, 2018, by respondent Baltazar at DTLA Smog. The data reported in the BAR 97 Test Detail shows the vehicle passed the tailpipe portion of the smog inspection and DTLA Smog issued the vehicle Certificate number QO337704C.

39. When analyzing the SBS data, PR Evans observed two or more sharp, simultaneous drops and at least one sharp, simultaneous rise in the concentrations of NO_x, CO, and/or HC. He observed all three pollutants began to drop at or about second 27, which was during a period of steady state vehicle speed; and began to rise toward prior levels at or about second 43. A second drop occurred at or about second 60 and remained low to the end of the test at or about second 71. PR Evans concluded there was no plausible explanation for this pattern other than clean gassing. He also determined the same vehicle failed a smog check performed at DTLA Smog just three days earlier and the data transmitted did not show the same irregular patterns.

Vehicle 2

40. Vehicle 2 is a 1990 Toyota Corolla, tested on September 21, 2018, by respondent Baltazar at DTLA Smog. The data reported in the BAR 97 Test Detail shows the vehicle passed the tailpipe portion of the smog inspection and DTLA Smog issued the vehicle Certificate number QO337723C.

41. When analyzing the SBS data, PR Evans observed two or more sharp, simultaneous drops and at least one sharp, simultaneous rise in the concentrations of NO_x, CO and/or HC. He observed all three pollutants began to drop at or about second 29, which was during a period of steady state vehicle speed; and began to rise toward prior levels at or about second 46. A second drop occurred at or about second 65 and remained low to the end of the test at or about second 75. PR Evans concluded there was no plausible explanation for this pattern other than clean gassing. He also determined the same vehicle failed a smog check performed at DTLA Smog just four days earlier and the data transmitted did not show the same irregular patterns.

Vehicle 3

42. Vehicle 3 is a 1995 Ford Explorer, tested on September 11, 2019, by respondent Ramirez at DTLA Smog. The data reported in the BAR 97 Test Detail shows the vehicle passed the tailpipe portion of the smog inspection and DTLA Smog issued the vehicle Certificate number QW340193C.

43. When analyzing the SBS data, PR Evans observed two or more sharp, simultaneous drops and at least one sharp, simultaneous rise in the concentrations of NO_x, CO and/or HC. He observed all three pollutants began to drop at or about second 36, which was during a period of steady state vehicle speed; and began to rise toward prior levels at or about second 63. A second drop occurred at or about second 81 and remained low to the end of the test at or about second 100. PR Evans concluded there was no plausible explanation for this pattern other than clean gassing. He also determined the same vehicle failed a smog check performed at a different smog check facility just eight days earlier and the data transmitted did not show the same irregular patterns.

Vehicle 4

44. Vehicle 4 is a 1995 Ford F250 Pickup, tested on May 29, 2020, by respondent Ramirez at DTLA Smog. The data reported in the BAR 97 Test Detail shows the vehicle passed the tailpipe portion of the smog inspection and DTLA Smog issued the vehicle Certificate number RG454394C.

45. When analyzing the SBS data, PR Evans observed two or more sharp, simultaneous drops and at least one sharp, simultaneous rise in the concentrations of NO_x, CO and/or HC. He observed all three pollutants began to drop at or about second 58, which was during a period of steady state vehicle speed; and began to rise toward prior levels at or about second 80. A second drop occurred at or about second 95 and remained low to the end of the test at or about second 112. PR Evans concluded there was no plausible explanation for this pattern other than clean gassing. He also determined the same vehicle failed a smog check performed at a different smog check facility just three days earlier and the data transmitted did not show the same irregular patterns.

Vehicle 5

46. Vehicle 5 is a 1995 Ford F150 Super Cab Short, tested on January 20, 2021, by respondent Ramirez at DTLA Smog. The data reported in the BAR 97 Test Detail shows the vehicle passed the tailpipe portion of the smog inspection and DTLA Smog issued the vehicle Certificate number IJ236532C.

47. When analyzing the SBS data, PR Evans observed two or more sharp, simultaneous drops and at least one sharp, simultaneous rise in the concentrations of NO_x, CO and/or HC. He observed all three pollutants began to drop at or about second 30, which was during a period of steady state vehicle speed; and began to rise

toward prior levels at or about second 56. A second drop occurred at or about second 75 and remained low to the end of the test at or about second 88. PR Evans concluded there was no plausible explanation for this pattern other than clean gassing.

AQE DI GENOVA'S EXPERT OPINION

48. AQE Di Genova reviewed the Bureau's raw data for each of the five vehicles but asserted the data was not submitted into evidence because respondents did not request it. He affirmed that he and PR Evans conducted a detailed review of the SBS data for the smog check inspections performed at DTLA Smog Check and found that they revealed a pattern of readings consistent with clean gassing.

49. AQE Di Genova further asserted that his conclusion that clean gassing occurred in all five vehicle instances accounted for several uncontrolled factors that occur during tailpipe tests such as the following: HC and CO emissions trending downward after the initial transient acceleration and as the engine and emission control system warm up; when CO₂ values are below the normal range, possibly due to the vehicle not running properly; spikes for several of the emission constituents at the start or partway through the test that coincide with brief speed and load transition before the start of the ASM5015 or ASM2525; elevated NO_x levels possibly due to a lean air-to-fuel ratio; or if vehicle does not maintain the target speed for too many seconds, in which case the test will restart, or if the concentration of CO₂ becomes too low, the test will abort. He further explained that while all three pollutants might be simultaneously reduced due to a catalytic converter light-off (the point at which the vehicle's catalytic converter reaches an efficient operating temperature), which can cause all three pollutants to drop, this would not result in a subsequent sharp rise of the pollutants because once lit-off, catalytic converters do not "un-light."

50. AQE Di Genova concluded that based on his experience, “[t]hese types of sharp, coordinated changes following the previous simultaneous drop to near zero of all three pollutants do not occur in valid Smog Check tests.” (Exh. 23, p. A201.) He reiterated throughout his testimony that he knew respondents had used clean gassing because of the precipitous drops in the polluting gases, the determinative factor when assessing for clean gassing, and because he could not replicate any other cause for the precipitous drops in his laboratory. AQE Di Genova’s amended affidavit, signed December 10, 2022, reiterated these conclusions.

51. AQE Di Genova acknowledged that on all the charts depicting the alleged clean gassing, the vertical axis had different high values for each gas for each vehicle. He further acknowledged that the visual depiction of the sharpness of any drop or rise is dependent on the vertical axis high value. For example, a change in value of 1 would appear as a sharper change if the vertical axis had a high value of 2, than it would if the vertical axis had a high value of 4.

52. The evidence presented by complainant that was relied on by AQE Di Genova in forming his expert opinion did not adequately support his conclusion. The Figures and charts do not reliably depict the alleged precipitous changes in values, leaving too great an analytical gap between the data and the opinion proffered.

53. While the transmitted concentration values of each gas could generally be estimated by review of the charts, the Figures do not include actual gas concentration values, or raw data, to compare against the Bureau’s computer-generated charts, preventing any assessment of their accuracy or the alleged “sharpness” of the change in gas concentrations. Further, the vertical axis value for each chart for each vehicle, as well as the intervals on the vertical axes within each chart, are different across each chart and across all vehicles. The differing high values

of the vertical axes, and the differing intervals within the vertical axes, necessarily affect how "sharp" a change in concentration appears in a chart. Based on these variants, the Figures do not reliably depict the alleged precipitous change in values alleged.

54. The lack of reliability of the charts absent the data, though present throughout, is highlighted when considering the vertical axes values for the charts depicting tailpipe tests of Vehicles 1 through 4 and comparing these values to those in the charts for these vehicles' previously failed tailpipe tests. In some instances, the vertical axes values in the failed test charts are nearly double that of the vertical axes high values in the alleged clean gas charts. Such discrepancies can be seen when comparing, for instance, the Figures for Vehicle 3: Figure 3 (alleged clean gas) has an HC vertical axis high value of 295 and a CO high value of .7, and Figure 3a (failed smog test) has a vertical axis high value of 670 and CO high value of 1.6. The vertical axes high values for HC and CO in Figure 3a are more than double the high values in Figure 3. Though AQE Di Genova used these two Figures as a basis of comparison, to emphasize the precipitous drop in Figure 3 in comparison to Figure 3a, the sharpness in the change in values, the very bases on which AQE Di Genova concludes clean gassing occurred, cannot be reliably compared using the charts absent raw data. Without a consistent vertical axis value, the "sharpness" of the change in gas concentrations cannot be determined or compared, but rather is subjective.

Costs of Investigation and Enforcement

55. Pursuant to section 125.3, complainant requests costs of investigation and enforcement in the total amount of \$27,923.78. This amount consists of costs incurred directly by the Bureau (\$6,256.78), as well as costs incurred by the Office of the Attorney General (AG) and for which the Bureau has been billed (\$21,467).

56. In support of the costs directly incurred by the Bureau, complainant introduced an April 6, 2021 Declaration of PR Evans, an April 2, 2021 Declaration of PR Mark Casillas, and their respective Case Hours and Costs Spreadsheets. These documents showed that PR Evans performed 63 hours of investigative work on this matter at a rate of pay of \$89.37 per hour (\$5,630.31), and PR Casillas performed six and one-half hours of supervisory work on this matter at a rate of pay of \$96.38 per hour (\$626.47), amounting to total investigative costs of \$6,256.78.

57. In support of the AG costs for which the Bureau has been billed, complainant introduced a December 1, 2022 Certification of Prosecution Costs: Declaration of Christina Thomas, which requests costs incurred and anticipated through December 1, 2022. Attached to Ms. Thomas's Certification is a printout of a Matter Time Activity by Professional Type, which describes tasks performed by the Office of the Attorney General on this matter through December 1, 2022, and for which the Bureau has been billed the total sum of \$21,467.

58. Costs of investigation and enforcement in the total amount of \$27,923.78 are reasonable in light of the issues and evidence involved in this matter.

LEGAL CONCLUSIONS

Authority

1. The Director of the Department of Consumer Affairs (Director) is authorized under the Repair Act to revoke any license issued under the Repair Act. (§ 9889.1.)

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2. The Bureau is within the Department, and under the supervision and control of the Director, the Bureau has the duty of enforcing and administering the Repair Act. (§ 9882.) Similarly, the duty of enforcing and administering the Inspection Program is vested in the Chief of the Bureau who is responsible to the Director. (Health & Saf. Code, § 44001.5.)

3. The Department has the sole and exclusive authority within the state for developing and implementing the Inspection Program. For the purposes of administration and enforcement of the Inspection Program, the Department has all the powers and authority granted under the Inspection Program, the Repair Act, and the California Code of Regulations, title 16 (Regulations), commencing with section 3300, and all inspections and repairs performed pursuant to the Inspection Program must meet the requirements of the relevant statutes and regulations. (Health & Saf. Code, § 44002.)

4. The Bureau's highest priority in exercising its licensing, regulatory, and disciplinary functions is protection of the public. (§ 9880.3.)

5. The Clean Air Act (42 U.S.C. §§ 7401 et seq.) provides air quality standards for the nation and requires states to comply with those standards. (42 U.S.C. §§ 7410, 7413.) The California Legislature established uniform procedures for compliance with standards which control or eliminate pollution. (Health and Saf. Code, § 43000, subd. (c).)

6. The Bureau is vested with the duty of enforcing and administering the Clean Air Act. (Health & Saf. Code, §§ 44000, 44001.5, subd. (a).) The Bureau must adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and

sources of air pollution. (Health and Saf. Code, § 43013, subd. (a).) As of January 1, 2006, the Bureau has been charged with implementing regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions. (Health and Saf. Code, § 43018.5, subd. (a).)

Burden and Standard of Proof

7. Complainant has the burden of proving the allegations in the Accusation by a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.)

8. Rehabilitation is akin to an affirmative defense, and respondents bear the burden of proof by a preponderance of the evidence to establish they have been rehabilitated. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App.156, 164; Evid. Code, § 115.)

Statutory Law

9. When an automotive repair dealer cannot show there was a bona fide error, the Director may discipline the automotive repair dealer's ARD registration if any of the following occur: the dealer or any employee makes or authorizes any statement 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; conducts an act that constitutes fraud; or makes a false statement or entry on a Certificate. (§ 9884.7, subd. (a)(1), (4), & (6).)

10. Smog check tests must be performed in accordance with the smog check procedures prescribed by the Department. (Health & Safe. Code, § 44012.)

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11. A smog check station may issue Certificates only if a vehicle meets the requirements of the Program. (Health & Safe. Code, § 44015, subd. (b).)

12. Qualified smog check technicians must comply with the smog check procedures in Health and Safety Code section 44012. (Health & Saf. Code, § 44032.)

13. The willful making of any false statement or entry with regard to a material matter in any Certificate of Compliance constitutes perjury and is punishable as provided in the Penal Code. (Health & Saf. Code, § 44059.)

14. Health and Safety Code section 44072.2 provides the Director may discipline a Bureau-issued license if the licensee violates any section of the Act or its regulations related to the licensed activities (subd. (a)); violates any regulations adopted by the Director (subd. (c)); or commits any act involving dishonesty, fraud, or deceit whereby another is injured (subd. (d)).

15. A fraudulent inspection includes, but is not limited to, tampering with a vehicle emission control system or test analyzer, tampering with a vehicle in a manner that would cause the vehicle to falsely pass an inspection, or an intentional or willful violation of the Program or any regulation, standard, or procedure of the Department in implementing the Inspection Program. (Health & Saf. Code, § 44072.10, subd. (c)(2)-(4)).

Regulatory Law

16. A "Smog Check Inspector" or "Inspector" is an individual licensed by the Bureau to inspect and certify the emissions control systems on vehicles subject to the Smog Check Program in all areas of the state. (Regulations, § 3340.1.)

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17. The Bureau may discipline a Bureau-issued license if the licensee falsely or fraudulently issues a Certificate of Compliance. (Regulations, § 3340.24, subd. (c).)

18. A licensed smog check inspector must inspect, test, and repair vehicles in accordance with sections 44012 and 44035, and Regulations, section 3340.42. (Regulations, § 3340.30, subd. (a).)

19. A licensed smog check station must issue a Certificate of Compliance to the owner or operator of any vehicle that has been inspected in accordance with the Program and the procedures specified in Regulations, section 3340.42, and that has all the required emission control equipment and devices installed and functioning correctly. (Regulations, § 3340.35, subd. (c).)

20. No person may enter into an emission inspection system any VIN or emission control system identification data for any vehicle other than the vehicle being tested. (Regulations, § 3340.41, subd. (c).)

21. Smog check inspectors must comply with the Bureau's specifications provided in Regulations, section 3340.42, when performing smog check inspections. (Regulations, § 3340.42.)

22. All Smog Check inspections must be performed in accordance with requirements and procedures prescribed in the Smog Check Manual, dated January 2021, which is incorporated by reference in Regulation, section 3340.45. (Regulations, § 3340.45.)

Respondents' Additional Registration and Licenses

23. The Director may revoke the ARD registration for all places of business operated in this state by an ARD upon a finding that the ARD has, or is, engaged in a

course of repeated and willful violations of this chapter, or regulations adopted pursuant to it. (§ 9884.7, subd. (c).)

24. When the Director revokes a license under the Program, the Director may revoke any additional license in the name of the licensee issued under the Program. (Health & Saf. Code, § 44072.8.)

Cause for Discipline – Undercover Run

25. Complainant established by preponderance of the evidence cause to discipline respondent Rivas's ARD registration and TC license based on her participation in the issuance of a Certificate to the undercover vehicle, a 2002 Honda Civic EX. The undercover vehicle had a modified emissions system, as set forth in Factual Finding 18. Respondent Rivas's conduct, including approving her employee, respondent Ramirez's, referral of PR Ortega to Dennis Smog for an illegal smog inspection in exchange for a \$300 cash, and personally issuing a fraudulent Certificate of Compliance number J168682C to PR Ortega, was intentional, fraudulent, repeated over at least two days, and resulted in her own monetary gain. (Factual Findings 17 through 27.)

26. First and Second Causes for Discipline. Respondent Rivas's ARD registration is subject to discipline because her conduct was in violation of section 9884.7, subdivision (a)(4) and (a)(6), in that she knowingly provided PR Ortega with a fraudulent Certificate without performing a bona fide inspection of the emission control devices and systems on the undercover vehicle, and, in so doing, failed in a material respect to comply with the Repair Act. (Legal Conclusion 25.)

27. Third and Fourth Causes for Discipline. Respondent Rivas's TC license is subject to discipline because her conduct was in violation of Health and Safety Code

section 44072.2, subdivisions (c) and (d), which require TC licensees to comply with the Regulations pursuant to the Inspection Program and prohibit a licensee from committing dishonest and fraudulent acts. Respondent Rivas's dishonest and fraudulent issuance of a Certificate to a vehicle that had not been inspected in accordance with Regulations, section 3340.42, and which her facility failed to inspect in compliance with the Smog Check Manual, and her failure to provide PR Ortega with the invoice with the copy of the report, was in violation of Regulations, section 3340.24, subdivision (c), 3340.35, subdivision (c), 3340.41, subdivision (a), 3340.42, and 3340.45. (Legal Conclusion 25.)

Cause for Discipline – Clean Gassing

28. Complainant did not establish by a preponderance of the evidence that respondents engaged in clean gassing.

29. The court in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*) considered the court's role as gatekeeper to expert testimony. "[U]nder Evidence Code sections 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. (*Sargon, supra*, 55 Cal.4th at pp. 770.) "This means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.' [Citation.]" (*Id.* at p. 771.)

30. In summary, the goal of trial court gatekeeping is to make certain that an expert, "whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. [Citation.]" (*Sargon, supra*, 55 Cal.4th at p.

772.) "[T]he court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." (*Ibid.*)

31. AQE Di Genova established himself as an expert in vehicular emissions, emission controls, and their measurements and analysis. However, the information relied on in this matter as presented at hearing in the form of charts and information contained in each Figure and BAR 97 Test Details for each smog inspection did not provide a reasonable basis for the opinion provided. (Factual Findings 28 through 54.)

32. Though AQE Di Genova reviewed the raw data transmitted to the Bureau's VID, it was not presented at hearing. AQE Di Genova concluded the precipitous changes in gas concentrations depicted in the charts was determinative clean gassing occurred. However, he acknowledged the value of the vertical axis changed in all circumstances, for each vehicle and each gas tested. The material relied on did not include any raw data or a standard vertical axis for any of the tests by which to determine if the charts accurately captured the raw data or accurately depicted a "precipitous" change in concentration values, or whether the change was, for example, unremarkable or common. (Factual Finding— 34-37, 48-54.)

33. Complainant failed to establish by a preponderance of the evidence causes for discipline 5 through 14. In this case, there is too great an analytical gap between the data presented and the opinion proffered. The material on which AQE Di Genova relied on does not provide a reasonable basis for his opinion. Accordingly, the expert opinion upon which the allegations of clean gassing were based is excluded. Similarly, PR Evans conclusion was based on the same data presented at hearing and does not provide a reasonable basis for PR Evans' opinion. (Legal Conclusions 28 through 47.)

Disciplinary Considerations

34. Health and Safety Code section 44072.10, subdivision (c), requires the Department to revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles.

35. The Bureau's Guidelines for Disciplinary Orders and Terms of Probation (Guidelines) (Rev. June 2021) provide ranges of discipline for violations of the Program, Act, and Regulations, as well as factors in aggravation and in mitigation to consider when determining registration and license discipline.

36. The Guidelines provide revocation as the maximum order for Respondent Rivas's violations contained in Causes for Discipline 1 through 4. The Guidelines direct that after consideration of aggravating and mitigating factors, a lesser discipline may be considered, i.e., staying the revocation and imposing probation ranging from three to five years, and imposition of standard and specified optional terms and conditions of probation. However, when the evidence establishes a smog check technician or station licensee has fraudulently certified vehicles or participated in a fraudulent smog inspection as defined in Health and Safety Code section 44072.10, subdivision (c), the Guidelines only provide for, and the statute requires, license revocation. (Guidelines, pp. 1-3.)

37. The Guidelines' applicable factor in aggravation include the evidence that the unlawful act was part of a pattern or practice. (Guidelines, p. 6.) The Guidelines' factors in mitigation are not applicable to the facts established in this matter.

38. Complainant established by a preponderance of the evidence respondent Rivas's conduct was part of a pattern or practice. Respondent Rivas was present when

respondent Ramirez referred PR Ortega to the Olympic Boulevard location for the fraudulent smog inspection and when he accepted \$300 in cash for the inspection. Mr. Aguirre was familiar with such smog referrals from respondent Rivas and asked PR Ortega if he understood the terms of the inspection. Respondent Rivas then personally called PR Ortega to retrieve the fraudulent Certificate and then personally handed said Certificate to PR Ortega, after rifling through a set of documents similar to the Certificate with attached post-it she handed to PR Ortega. Respondent Rivas did not appear at hearing and offered no evidence of rehabilitation, remorse, or changed practices. Based on respondent Rivas's repeated intentional and fraudulent acts in violation of the Repair Act and the Inspection Program protection of the public requires revocation of Respondent Rivas's ARD registration and TC license. (Factual Findings 20-37.)

39. Pursuant to section 9884.7, subdivision (c), and Health and Safety Code section 44072.8, any additional ARD registrations for all places of business operated in this state by respondent Rivas, and any additional licenses issued under the Inspection Program to respondent Rivas. are revoked.

Award of Costs

40. In any order issued in resolution of a disciplinary proceeding, at the request of the Bureau, the Administrative Law Judge may direct the licentiate found to have committed a violation to pay a sum not to exceed the reasonable costs of investigation and enforcement. A certified copy of the actual costs signed by the Bureau or its designated representative is prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not

limited to, charges imposed by the Attorney General. (§ 125.3, subds. (a), (c); see Cal. Code Regs., tit. 1, § 1042, subd. (b).)

41. The Bureau must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure registrants and licentiates with potentially meritorious claims or defenses are not deterred from exercising their right to a hearing, and must not assess the full costs of investigation and prosecution when to do so would unfairly penalize the licensee who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. (See *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) Factors to be considered in determining costs sought pursuant to section 125.3 include: the licentiate's success in getting the charges dismissed or reduced; the licentiate's subjective good faith belief in the merits of his or her position; whether the licentiate raised a colorable challenge to the proposed discipline; the licentiate's financial ability to pay; and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*)

42. The declarations signed by Ms. Thomas and PRs Evans and Ortega constitute prima facie evidence of the reasonableness of the total costs incurred by the Bureau in the amount of \$27,923.78. (§ 125.3, subd. (c).) (Factual Findings 54-57.) Respondents failed to rebut the reasonableness of the costs. However, through the presentation of evidence respondents raised colorable challenges to the allegations, respondents successfully established cause to dismiss Causes for Discipline 5 through 14 against respondents. Based on the evidence and the causes for discipline established, respondent Ramirez is not ordered to pay costs, and respondent Rivas is ordered to pay one-quarter of the costs remaining after subtracting the costs to be

paid by respondent Baltazar (\$1996.75). Accordingly, respondent Rivas is ordered to pay reasonable costs in the total amount of \$6,481.76 as set forth in the Order below.

ORDER

1. Automotive Repair Dealer Registration number ARD 288784, issued to respondent Blanca Lilian Rivas, doing business as DTLA Smog Check Test Only, and all other ARD registrations issued to respondent Blanca Lilian Rivas are revoked.

2. Smog Check, Test Only, Station License number TC 288784, issued to respondent Blanca Lilian Rivas, doing business as DTLA Smog Check Test Only, and all other smog check, test only, station licenses, issued to respondent Blanca Lilian Rivas are revoked.

3. Smog Check Inspector license number EO 636074, and all other smog check inspector licenses, issued to respondent Dario Alexander Ramirez, are not disciplined and remain in full force and effect.

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4. Respondent Blanca Lilian Rivas is ordered to pay to the Bureau of Automotive Repair investigation and enforcement costs in the sum of \$6,481.76, within 30 days of the effective date of the decision. Respondent Blanca Lilian Rivas, doing business as DTLA Smog Check, may pay these costs according to a payment plan approved by the Bureau, or its designee.

DATE: **01/12/2023**


Chantal Sampogna (Jan 12, 2023 18:29 PST)

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings