

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

In the Matter of the Accusation Against:

JENNIFER RENEE FONSECA, doing business as 323 SMOG,

Automotive Repair Dealer Registration No. ARD 294721

Smog Check, Test Only, Station License No. TC 294721

and

EZEQUIEL MARTINEZ,

Smog Check Inspector License No. EO642048

Respondents.

Agency Case No. 79/22-2929

OAH No. 2024060952

PROPOSED DECISION

Chris Ruiz, Administrative Law Judge, Office of Administrative Hearings (OAH),
State of California, heard this matter on October 14, 2024, via ZOOM videoconference.

Kevin J. Schettig, Deputy Attorney General, represented Patrick Dorais (complainant), Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (DCA).

Jennifer Fonseca (Fonseca), who does business as 323 Smog (Respondent 323), was present. Fonseca represented herself and Respondent 323.

Ezequiel Martinez (Martinez) was present and represented himself.

Testimony and documents were received as evidence. The record closed and the matter was submitted for decision on October 14, 2024.

FACTUAL FINDINGS

Licenses Held by Respondents

LICENSES HELD BY FONSECA AND RESPONDENT 323

1. On June 27, 2019, the Bureau issued Automotive Repair Dealer (ARD) Registration Number ARD 294721 to Fonseca, doing business as 323 Smog. The Automotive Repair Dealer Registration was always active relevant to the charges brought in the Accusation and is scheduled to expire on June 30, 2025, unless renewed.

2. On October 11, 2019, the Bureau issued Smog Check, Test Only, Station License Number TC 294721 (Smog Station License) to Fonseca, doing business as Respondent 323. The Smog Check, Test Only, Station License was always active relevant to the charges brought in the Accusation and is scheduled to expire on June 30, 2025, unless renewed.

3. Respondent 323 is also certified as a STAR station. A STAR station has qualified, based on meeting certain standards, to perform smog tests on vehicles which the Bureau believes are more difficult to test. On November 4, 2021, the Bureau issued a STAR Station Certification to Respondent 323, which will remain active unless Fonseca's ARD registration, or Respondent 323's Smog Station License, is revoked, cancelled, becomes delinquent, or the STAR certification is suspended. The Accusation does not seek any discipline against Respondent 323's STAR certification.

LICENSE HELD BY MARTINEZ

4. On June 20, 2019, the Bureau issued Smog Check Inspector License number EO 642048 (Inspector License) to Martinez. The Inspector License is scheduled to expire on December 31, 2024, unless renewed.

Jurisdiction

5. The term "respondents," as used in this Proposed Decision, references Fonseca, Respondent 323, and Martinez, collectively.

6. On May 31, 2024, complainant filed an Accusation, in his official capacity, against respondents.

7. On June 21, 2024, respondents filed a Notice of Defense, which requested an administrative hearing to challenge the allegations stated in the Accusation.

8. All jurisdictional requirements have been met.

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The Bureau's Smog Check Program

TYPES OF SMOG CHECK TESTING

9. California's Smog Check Program requires the owners of most motor vehicles to have their vehicles inspected and tested at a licensed smog check station every two years. If a vehicle passes the inspection and test, a Certificate of Compliance is issued. The Smog Check Program is designed and intended to reduce air pollution by identifying and requiring the repair of polluting motor vehicles.

10. For older vehicles, a smog inspection generally required a probe being inserted into the tailpipe to test the emissions. Beginning on March 9, 2015, California's Smog Check Program was updated to require the use of an On-Board Diagnostic Inspection System (OIS). OIS is the smog check equipment required when inspecting most model-year 2000 and newer gasoline and hybrid vehicles and most 1998 and newer diesel vehicles. The system consists of a certified Data Acquisition Device (DAD), computer, bar code scanner, and printer. The DAD is an On-Board Diagnostic (OBD) scan tool that, when requested by the OIS software, retrieves OBD data from the vehicle. All OBD data that the vehicle indicates it supports is requested by the OIS software and will be retrieved. The DAD connects between the OIS computer and the vehicle's Data Link Connector (DLC). The OIS software requires a continuous internet connection when performing a smog check inspection and the OIS software communicates with the Bureau's central database via the internet. The bar code scanner is used to input the technician's information, the vehicle's identification number (VIN), and Department of Motor Vehicles (DMV) renewal information. After the smog check, a Vehicle Inspection Report (VIR), which contains the inspection results, is printed for the customer, along with a Smog Check Certificate of Compliance number for passing vehicles.

11. The data retrieved and recorded during an OIS smog check includes: the eVIN, which is the digitally stored VIN programmed into the vehicle's Powertrain Control Module (PCM); the communication protocol, which is the vehicle's specific language the PCM uses to relay information; and the number of Parameter Identifications (PIDs), which is the number of specific data values each PCM uses related to emissions controls.

12. During an OIS inspection, engine operating parameters are retrieved from the vehicle's OBD system and recorded to the Vehicle Inspection Data (VID). This is accomplished during the functional portion of the OIS smog check inspection by plugging the DAD into the vehicle's DLC when prompted by the OIS analyzer screen prompt. Some of the parameters recorded are: (1) engine speed in revolutions per minute (RPM); (2) throttle position as measured by a throttle position sensor (TPS) mounted onto the throttle shaft (measured from zero to 100 percent at full throttle); (3) manifold absolute pressure as measured by a manifold absolute pressure sensor (MAP) connected to an intake manifold source, measured in kilo pascals (kpa).

13. During normal engine operation at idle, engine speed is relatively steady around its target idle speed. With the engine idling, the TPS is steady and at or near zero percent. The MAP and Mass Air Flow (MAF) readings are also steady. For the engine speed to increase, the throttle would have to be opened. The engine's management systems supply fuel and spark timing appropriate to any changes in throttle position and engine speed. An increase in throttle, measured by the TPS, which increases engine RPM, would result in corresponding increases in MAF, as well as a change in MAP. Any movement of the throttle from the idle position will result in an increase the RPM and MAF and will create changes in MAP.

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14. During an OIS Smog Check inspection, along with other visual and functional inspections, there is an OBD query portion of the inspection. The OBD query is performed with the engine idling and, when requested by the OIS analyzer, at an increased engine speed. The increase in engine speed is performed by the inspector by stepping on the throttle pedal, or manually opening the throttle, resulting in a corresponding increase in engine RPMs.

15. If the vehicle passes the visual, functional and related tests, it passes the overall inspection, and a Certificate of Compliance is issued and transmitted electronically to the VID. Each Certificate of Compliance has a unique control number so that it can be tracked to determine which Smog Check Station purchased the Certificate of Compliance and to which vehicle it was issued.

16. The VID contains registration data from DMV, plus emission standards, vehicle smog check inspections, smog check stations and technicians, and Certificates of Compliance. The VID receives the passing smog check results immediately following the inspection. During the vehicle registration process, the DMV accesses the VID to verify that the vehicle has been tested and certified. The Bureau can also access the VID to view test data on smog check inspections performed at any Smog Check Station, or search for, retrieve, and print a test record for a particular vehicle which has been tested. The EIS or OIS, depending on the test type, also prints a VIR, which is a physical record of the test results and shows the Certificate of Compliance number that was issued if the vehicle passed the smog inspection.

17. The smog check technician must sign the VIR under penalty of perjury to indicate that the inspection was done within Bureau guidelines. Smog Check Stations are required by law to maintain a copy of the VIR along with a copy of the repair invoice for three years. Licensed Smog Check Technicians are the only persons authorized by

the Bureau to perform official inspections. They are issued a personal access code and a license, which are used to gain access to the EIS and OIS to perform smog check inspections. Unauthorized use of another technician's access code or license is prohibited.

18. Some Smog Check stations, and Smog Check inspectors, use various methods to fraudulently issue smog certificates to vehicles that will not pass a Smog Check test on their own, or in some instances, are not even present during the time the test is performed. One method is known as "clean plugging." "Clean plugging" is a method by which another vehicle's properly functioning OBD system, or another source such as defeat devices, are used to generate passing data readings or diagnostic information for the purpose of fraudulently issuing smog certificates to vehicles that are not in smog compliance or are not present for testing. Another method is known as "clean piping," which is the act of using the emission sample of a known clean vehicle to substitute for the emissions of a vehicle that will not pass a smog inspection or is not present at the time of the test. Defeat devices attempt to simulate engine operation during a smog check inspection by transmitting OBD data to the VID which has been modified or replaced entirely for the purportedly inspected vehicle during the functional portion of the OIS inspection. The use of a defeat device during a smog check inspection is illegal.

The Bureau's Investigation Regarding Respondents

19. Between February 2022 and January 2023, a Bureau representative observed and investigated the smog check activities and OIS test data for the smog check inspections performed at Respondent 323. The investigator found that Martinez's license was used to enter false information into the state-owned computer database

through the EIS and OIS to issue six fraudulent Smog Certificates of Compliance. The six vehicles were certified by using "clean piping" and "clean plugging."

VEHICLE 1

20. On February 2, 2022, a 1999 Jambo motor home, without a license plate, VIN IFDXE40S6XHB55930, was tested and issued Certificate of Compliance number SM630317C by respondents. During the time the 1999 Jambo motor home was purportedly certified, it was not present at the Respondent 323's station. Instead, a 2008 Chevrolet Silverado C1500 pickup, CA license number LABAEO8, was driven into the test bay by Martinez while the test was in progress. Martinez clean piped this vehicle to issue a fraudulent Certificate of Compliance.

VEHICLE 2

21. On February 17, 2022, a 1978 Chevrolet LUV, without a license plate, VIN CLN1438269335, was tested and issued Certificate of Compliance number SM835719 by respondents. During the time the 1978 Chevrolet LUV was certified, it was not present at Respondent 323's station. The only vehicles present inside of the station during the smog inspection were a Honda Civic and a Chevrolet Caprice. Martinez clean piped this vehicle to issue a fraudulent Certificate of Compliance.

VEHICLE 3

22. On August 4, 2022, Martinez performed a proper smog inspection on a 2004 Yukon (specifically identified in Factual Finding 23), which resulted in a failed test. During this test, The Dynamic PID Chart showed the expected change in the throttle, MAP, MAF, and ignition timing advance parameters characteristic of normal engine operation.

23. On August 6, 2022, Martinez re-tested the 2004 GMC Yukon XL C1500 (2004 Yukon), License SJAT465. Thereafter, respondent's issued Certificate of Compliance number SU674226C for that vehicle.

24. The Dynamic PID Chart for the 2004 Yukon shows between time stamp 88 and 20632, engine speed is steady at approximately 550 RPM. During this time, the throttle is fixed at nine percent open, the MAP is fixed at 38kPa, the MAF is fixed at 6.09 gps, and the ignition timing advance for #1 cylinder is fixed at 16.5 degrees BTDC. After time stamp 20632, the engine speed begins to accelerate. Between time stamp 21326 and 37807 the engine speed is held at an increased level of approximately 1700 RPM. From the time the engine RPM increases off idle to the higher RPMs, the throttle is fixed at the same nine percent opening, the MAP is fixed at 38kPa, the MAF is fixed at the same 6.09 gps, and the ignition timing advance for #1 cylinder is also still fixed at the same 16.5 degrees BTDC.

25. During the entire period the dynamic data was collected, the only parameter that changed was engine RPM. The throttle position, MAP, MAF, and ignition timing advance readings remained unchanged even though the engine speed was increased. These readings are virtually impossible during normal engine operation. The discrepancies in the OIS Test Data established the OIS DAD was not connected to the 2004 Yukon being certified and respondents issued that vehicle a fraudulent Smog Certificate of Compliance.

VEHICLE 4

26. On August 6, 2022, Martinez performed a proper smog inspection on a 2004 Mercedes-Benz C230K (specifically identified in Factual Finding 27), which resulted in a failed test. During this test, The Dynamic PID Chart showed the expected change in

the throttle, MAP, MAF, and ignition timing advance parameters characteristic of normal engine operation.

27. On August 10, 2022, Martinez re-tested the 2004 Mercedes-Benz C 230K Sport Coupe, license number 7FAH060. Thereafter, respondents issued Certificate of Compliance number SU674245C for that vehicle.

28. Similar to Vehicle 3, the Dynamic PID Chart on August 10, 2022, showed that the throttle position, MAP, MAF, and ignition timing advance readings remained unchanged even though the engine speed was increased, which is not characteristic of normal engine operation. It was established that the OIS DAD was not connected to the 2004 C230K being certified, and respondents issued a fraudulent Smog Certificate of Compliance.

VEHICLE 5 AND 6

29. On November 5, 2022, a 2004 Toyota Tacoma Xtracab (2004 Tacoma), License number 39699U2, was tested by respondents and Certificate of Compliance number IR643690C was issued for that vehicle.

30. On January 27, 2023, a 2005 Toyota Highlander Limited (2005 Highlander), license number 5MLU460 was tested by respondents and Certificate of Compliance number IR809209C was issued for that vehicle.

31. Martinez performed a proper smog inspection on Vehicles 5 and 6 a few days before the inspections discussed in Factual Findings 29 and 30. During those prior inspections, Vehicles 5 and 6 failed their properly performed smog check inspection. When Martinez re-tested those vehicles, as discussed in Factual Findings 29 and 30, the Dynamic PID Charts showed that the throttle position, MAP, MAF, and ignition timing

advance readings remained unchanged even though the engine speed was increased, which is not characteristic of normal engine operation. It was established that the OIS DAD was not connected to these two vehicles when they were being certified and that respondents issued a fraudulent Smog Certificate of Compliance for each vehicle.

Respondents' Other Conduct

32. It was established that when respondents tested Vehicles 3 through 6, they used an electric device or software capable of simulating the OBD data stream from a vehicle or of manipulating OBD information.

33. On multiple occasions, the Bureau's investigator requested records regarding the testing and inspection of vehicles. Martinez was unable to provide any of the records requested. Therefore, it was established that respondents failed to maintain all records associated with the testing and inspection of vehicles.

Respondents' Testimony and Evidence

34. Fonseca testified she has nothing to do with the operations of Respondent 322. She is the owner in name only. Fonseca testified she does not receive any money from Respondent 323, she has no idea of what happens at Respondent 323, and she has no idea how Martinez is paid.

35. Fonseca testified that Jose Martinez was the prior owner of this station. When his license was "suspended," he asked Fonseca to apply for a license as "a favor" to him.

36. Martinez testified that Jose Martinez is his brother. Martinez was recruited by his brother to become a smog technician. Martinez pays himself from the money

collected by Respondent 323. Martinez did not initially dispute any of the allegations involving the six vehicles at issue in this case. However, he later changed his testimony and admitted to clean-piping Vehicle 1 and 2, but he denied any wrongdoing with respect to Vehicles 3 through 6. However, other than his denial, Martinez did not offer any evidence or explanation to corroborate his testimony.

Costs of Enforcement and Investigation

37. The reasonable costs of investigation and enforcement in this matter are \$8,208.45 and \$8,505.50, respectfully. The total reasonable costs are \$16,713.95.

LEGAL CONCLUSIONS

General Statutory Authority

1. This Accusation in this matter was brought before the Director of the Department of Consumer Affairs (Director), on behalf of the Bureau.

2. Business and Professions Code (Code) section 9884.7 authorizes the Director to revoke an ARD registration.

3. Code section 9884.22, subdivision (a), authorizes the Director to revoke or suspend any license based on any ground for discipline set forth in Code sections 9884 through 9884.22.

4. Health and Safety Code section 44002 provides, in pertinent part, that the Director holds all power and authority granted under the Automotive Repair Act (Code § 9880 - § 9889.53) for enforcing the Motor Vehicle Inspection Program (Health & Saf. Code § 44000 - § 44127).

5. Health and Safety Code section 44012 provides detailed specifications and requirements which must be met by smog check stations and technicians.

6. Health and Safety Code section 44072.2 provides authority for the Director to suspend, revoke, or take other disciplinary action against a license if the licensee violates any of the regulations adopted by the Director (subdivision (c)) or commits any act involving dishonesty, fraud, or deceit whereby another is injured (subdivision (d).)

7. Health and Safety Code section 44072.10, subdivision (c), states the Director "shall revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles." The statute further defines clean-piping as fraudulent.

8. California Code of Regulations (CCR), title 16, section 3340.24, subdivision (c), authorizes the Bureau to suspend or revoke the license of a licensee, if the licensee falsely or fraudulently issues a certificate of compliance. All further references are to title 16 of the CCR.

9. CCR section 3340.41, subdivision (c), provides "no person shall enter any vehicle identification information or emission control system identification data for any vehicle other than the one being tested."

10. CCR section 3340.42, sets forth specific emissions test methods and procedures which must be complied with during a smog check inspection.

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First Cause for Discipline (Untrue or Misleading Statements - Respondent 323)

11. Cause exists to suspend or revoke Respondent 323's ARD Registration pursuant to Code section 9884.7, subdivision (a)(1), because respondents made statements which they knew, or should have known, were untrue or misleading. Respondents certified that Vehicles 1 through 6 had passed a smog inspection and that respondents had performed the smog inspections in compliance with applicable laws and regulations. However, in fact, Respondent 323 permitted Martinez to use the clean-piping and clean-plugging methods to obtain fraudulent certificates of compliance for the six vehicles.

Second Cause for Discipline (Fraud – Respondent 323)

12. Cause exists to suspend or revoke Respondent 323's ARD registration under Code section 9884.7, subdivision (a)(4), because Respondent 323 failed to ensure Martinez was performing bona fide inspections and was not fraudulently issuing smog certificates of compliance, which Martinez did for Vehicles 1 through 6.

Third Cause for Discipline (Material Violation of Automotive Repair Act – Respondent 323)

13. Cause exists to suspend or revoke Respondent 323's ARD registration under Code section 9884.7, subdivision (a)(4), because Respondent 323 failed to ensure Martinez was performing bona fide smog inspections on Vehicles 1 through 6.

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Fourth Cause for Discipline (Violations of the Motor Vehicle Inspection Program – Respondent 323)

14. Cause exists to suspend or revoke Respondent 323's Smog Station License pursuant to Health and Safety Code section 44072.2, subdivision (a), because Respondent 323 failed to ensure Martinez complied with Health and Safety Code sections 44012, 44015, subdivision (b), and 44059, during his smog inspections of Vehicles 1 through 6.

Fifth Cause for Discipline (Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program – Respondent 323)

15. Cause exists to suspend or revoke Respondent 323's Smog Station License under Health and Safety Code section 44072.2, subdivision (c), because Respondent 323 failed to comply with CCR sections 3340.24, subdivision (c), 3340.35, subdivision (c), 3340.41, subdivision (c), 3340.42, 3358, and 3373, during the smog inspections of Vehicles 1 through 6.

Sixth Cause for Discipline (Dishonesty, Fraud, or Deceit – Respondent 323)

16. Cause exists to suspend or revoke Respondent 323's Smog Station License pursuant to Health and Safety Code section 44072.2, subdivision (d), in conjunction with Health and Safety Code section 44072.10, subdivision (c), because Respondent 323 Smog committed dishonest, fraudulent, or deceitful acts whereby another was injured by issuing electronic smog certificates of compliance for Vehicles 1 through 6 without performing bona fide inspections of the emission control devices and systems. The failure to perform a bona fide smog inspection injures the public at large by allowing a vehicle to pollute the air of California.

Seventh Cause for Discipline (Unlawful Software or Simulation Device – Respondent 323)

17. Cause exists to suspend or revoke Respondent 323's Smog Station License under Health and Safety Code section 44072.2, subdivision (c), in conjunction with CCR section 3340.41, subdivision (h), because Respondent 323 allowed Martinez to use an electric device, or software, capable of simulating the OBD data stream from a vehicle, which manipulated the OBD information for Vehicles 3 through 6.

Eight Cause for Discipline (Maintenance of Records – Respondent 323)

18. Cause exists to suspend or revoke Respondent 323's ARD registration under Code section 9884.11, in conjunction with CCR, section 3358, because Respondent 323 Smog failed to maintain all records associated with the smog testing and inspection of vehicles.

Nineth Cause for Discipline (Violations of the Motor Vehicle Inspection Program – Martinez)

19. Cause exists to suspend or revoke Martinez's Inspector License pursuant to Health and Safety Code section 44072.2, subdivision (a), because Martinez violated Health and Safety Code sections 44012, subdivisions (a) and (f), 44032, 44059, and 44072.10, subdivision (c), when Martinez fraudulently performed smog inspections on Vehicles 1 through 6.

Tenth Cause for Discipline (Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program – Martinez)

20. Cause exists to suspend or revoke Martinez's Inspector License pursuant to Health and Safety Code section 44072.2, subdivision (c), because Martinez failed to

comply with CCR sections 3340.24, subdivision (c), 3340.30, subdivision (a), 3340.41, subdivision (c), and 3340.42, during his smog inspections of Vehicles 1 through 6.

Eleventh Cause for Discipline (Dishonesty, Fraud, or Deceit – Martinez)

21. Cause exists to suspend or revoke Martinez's Inspector License pursuant to Health and Safety Code section 44072.2, subdivision (d), in conjunction with Health and Safety Code section 44072.10, subdivision (c), because Martienz acted dishonestly and deceitfully while performing smog inspections of Vehicles 1 through 6.

Other Matters

22. Pursuant to Code section 9884.7, subdivision (c), the Director may suspend, revoke, or place on probation the ARD registration for all places of business operated in this state by Fonseca because she allowed Martinez to commit repeated and willful violations of the laws and regulations pertaining to an ARD.

23. Pursuant to Health and Safety Code section 44072.8, if Fonseca and Respondent 323's Smog Station License is revoked or suspended, any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in Fonseca or Respondent 323's name, may be likewise revoked or suspended by the Director.

24. Pursuant to Health and Safety Code section 44072.8, if Martinez's Inspector License is revoked or suspended, any additional license issued under Chapter 5 of Part 5 of Division of the Health and Safety Code in Martinez's name may be likewise revoked or suspended by the Director.

The Costs of Enforcement and Investigation

25. Code section 125.3 provides, in pertinent part, that the Bureau may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

26. In this case, the total reasonable combined costs of enforcement and investigation is \$16,713.95. Fonseca and Martinez will each be responsible for 50 percent of these costs. Since all of respondents' licenses and registrations are being revoked, requiring respondents to pay costs would be punitive. Therefore, respondents will only be required to pay their share of the costs if they apply to reinstate any of the licenses at issue in this matter or if they apply for a new license in the future.

ORDER

1. Automotive Repair Dealer Registration Number ARD 294721, issued to
Jenifer Renee Fonseca, doing business as 323 Smog, is hereby revoked.

2. Smog Check, Test Only, Station License Number TC 294721, issued to
Jenifer Renee Fonseca, doing business as 323 Smog, is hereby revoked.

3. Smog Check Inspector License Number EO642048, issued to
Ezequiel
Martinez, is hereby revoked.

4. Any other automotive repair dealer registration, issued to Jenifer
Renee

Fonseca, is hereby revoked.

5. Any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code, in the name of Jenifer Renee Fonseca, is hereby revoked.

6. Any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name of Ezequiel Martinez, is hereby revoked.

7. Jenifer Renee Fonseca and Ezequiel Martinez are ordered to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, which total \$16,713.95, pursuant to Business and Professions Code section 125.3. These costs are to be equally divided between the parties. However, Jennifer Renee Fonseca and Ezequiel Martinez will only be required to pay their half of these costs if they apply to the Bureau of Automotive Repair for reinstatement of any license or registration, or if they file any future application for


licensure with the Bureau.

Administrative Law Judge

Office of Administrative Hearings

DATE:

11/12/2024


Christopher Ruiz (Nov 12, 2024 14:25
PST)

CHRIS RUIZ