

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

In the Matter of the Accusation Against:

JM & SONS, INC.
dba BRANHAM ARCO SMOGPROS
1405 Branham Lane
San Jose, CA 95118-2414
JOSEPH HUONG LAI, President

Automotive Repair Dealer Registration
No. ARD 179189
Smog Check Station License No. RC 179189

Respondent.

Case No. 79/09-92

OAH Nos. 2009060198

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517(c)(2)(C), the typographical error on page 5, paragraph 1 of the Order, of the Proposed Decision is corrected as follows:

The Smog Check Station License Number N179189 is corrected to read Smog Check Station License No. RC 179189.

This Decision shall become effective 10/26/09.

IT IS SO ORDERED this 23rd day of September, 2009.



PATRICIA HARRIS
Acting Chief Deputy Director
Department of Consumer Affairs

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FOR THE BUREAU OF AUTOMOTIVE REPAIR
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JM & SONS, INC., dba
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Respondent.

Case No. 79/09-92

OAH No. 2009060198

PROPOSED DECISION

Mary-Margaret Anderson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Oakland, California, on August 13, 2009.

Char Sachson, Deputy Attorney General, represented Complainant Sherry Mehl, Chief of the Bureau of Automotive Repair.

William D. Ferreira, Attorney at Law, represented Respondent JM & Sons, Inc.

The record closed on August 13, 2009.

FACTUAL FINDINGS

1. On June 29, 2004, the Bureau of Automotive Repair issued Automotive Repair Dealer Registration Number ARD 179189 to JM & Sons, Inc., doing business as Branham Arco Smogpros, Joseph Huong Lai, President (Respondent). Unless renewed, the license will expire on June 30, 2010.

On July 13, 1994, the Bureau issued Smog Check Station License Number RC 179189 to Respondent. Unless renewed, the license will expire on June 30, 2010.

2. On October 30, 2007, the Bureau issued Citation No. C08-0431 against Respondent's registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the department) and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested), for issuing a certificate of compliance to a Bureau undercover vehicle with the ignition timing adjusted beyond the manufacturer's specification. The Bureau assessed civil penalties totaling \$500 against Respondent for the violations. Respondent complied with the citation on December 13, 2007.

3. On March 4, 2008, the Bureau issued Citation No. C08-0739 against Respondent's registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the department) and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested), for issuing a certificate of compliance to a Bureau undercover vehicle with a missing positive crankcase ventilation system. The Bureau assessed civil penalties totaling \$1,000 against Respondent for the violations. Respondent complied with the citation on April 4, 2008.

4. On July 23, 2008, the Bureau issued Citation No. C09-0062 against Respondent's registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the department) and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested), for issuing a certificate of compliance to a Bureau undercover vehicle with a missing positive crankcase ventilation system. The Bureau assessed civil penalties totaling \$2,000 against Respondent for the violations. Respondent complied with the citation on August 19, 2008.

5. On November 13, 2008, Bureau staff planned and executed an undercover run to Respondent's facility. An undercover operator using the alias Ray Blanco drove a 1990 Mercury Sable to Respondent's facility and requested a smog inspection.

The ignition timing of the Sable had previously been incorrectly adjusted by Bureau staff to 20 degrees before top dead center at idle. The correct ignition timing according to the manufacturer's specification is 10 degrees before top dead center. In order to pass a California smog check inspection, a vehicle's base ignition timing must be within three degrees of the manufacturer's specification. In addition, Bureau staff installed a tamper indicator on the base of the distributor. Rotation of the distributor housing is necessary to

adjust the vehicle's base ignition timing. In all other respects the Sable was in good condition, "running clean," and able to pass a smog inspection.

6. Blanco was met at Respondent's facility by smog technician Dau Duc Nguyen, who performed a smog inspection. Blanco signed a work order, but he was not provided with a signed copy. Video cameras installed under the hood of the Sable show that Nguyen spent a considerable amount of time working in that location. Nonetheless, he did not adjust the timing to 10 degrees. Nguyen entered into the computer system that the timing was correct. A Vehicle Inspection Report was issued showing that the Sable had passed the inspection, which resulted in the issuance of a certificate of compliance. Blanco paid for the inspection and delivered the Sable back to Bureau staff. The tamper indicator was still intact and the timing was still set at 20 degrees.

7. Joseph Huong Lai was present when the Sable was tested and remembers the vehicle. He testified that Nguyen suspected it was a Bureau undercover vehicle because the address of the customer on the invoice was the same as the address given by the operator in connection with one of the citations the facility had received. In light of this, when Nguyen initially could find nothing wrong, he suggested to Lai that the test be aborted. Lai chose to continue the smog test in order to "show [the Bureau] that it is done right." He was concerned that aborting too many vehicles would "bring [the Bureau] in," which was something he wanted to avoid. Nguyen therefore continued to work on the Sable.

According to Lai, the timing information was very hard to read. Nonetheless, he maintains that after working for 20 or 25 minutes, Nguyen did his best to adjust the timing to 10 degrees before top dead center. Lai was not able to convincingly explain how, if this was done, the tamper indicator was still intact following the inspection.

8. Lai is the president of JM & Sons. The business consists of gasoline sales, a repair shop, and smog checks. He has been licensed as a smog technician for 21 years and has tested thousands of cars. Technician Nguyen has worked at the facility for approximately 21 years.

Lai was the technician in the first citation and believes now that he was supposed to abort the test for that vehicle when he had problems. Instead, he assumed that the timing was correct, and passed the vehicle. The second citation was issued for a test performed by Nguyen. After that, Lai told Nguyen that they needed to be careful because the shop then had two citations. The third citation was issued when Nguyen failed to see that the PCV was missing on an Astrovan. They "missed" the citation conference following that incident.

Costs

9. Complainant submitted a certification of costs showing the Bureau has incurred costs totaling \$9,476.71 for the investigation and enforcement of this case. This includes \$3,680.96 of investigative services by Bureau staff and legal fees of \$5,795.75.

The costs incurred are found to be reasonable given the nature of the case and the lack of evidence to the contrary. It is therefore determined that the claimed costs of \$9,476.71 are reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code section 9884.7 sets forth the grounds for discipline of an automotive repair dealer. The holder of a registration as a repair dealer may be disciplined under subdivision (a)(1) if he or she knowingly makes an untrue or misleading statement; under subdivision (a)(3) if he or she fails to give a customer a copy of a document as soon as it is signed; and under subdivision (a)(4) if he or she commits fraud.

2. Cause for disciplinary action against Respondent's automotive repair dealer registration exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), by reason of the matters set forth in Findings 5, 6, and 7.

3. Cause for disciplinary action against Respondent's automotive repair dealer registration exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(3), by reason of the matters set forth in Finding 6.

4. Cause for disciplinary action against Respondent's automotive repair dealer registration exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), by reason of the matters set forth in Finding 5, 6 and 7.

5. Health and Safety Code section 44072.2 sets forth the grounds for discipline of a smog station license. A license may be disciplined under subdivision (a) if the licensee has violated any provisions of the Motor Vehicle Inspection Program as set forth in Health and Safety Code section 44000 et seq.; under subdivision (c) if the licensee has violated any of the regulations adopted to implement the inspection program as set forth in California Code of Regulations, title 16, section 3300 et seq.; and under subdivision (d) if the licensee has committed any act involving dishonesty, fraud, or deceit whereby another is injured.

6. Health and Safety Code section 44012 sets forth the tests that are to be conducted as part of a smog inspection. Section 44015, subdivision (b), prohibits issuing electronic certificates of compliance without properly testing and inspecting the vehicle. Section 44059 prohibits the willful making of any false statement or entry in a certificate of compliance.

7. California Code of Regulations, title 16, section 3340.24, subdivision (c), prohibits false or fraudulent issuance of a certificate of compliance. Section 3340.42 sets forth the mandatory emissions inspection standards and test procedures.

8. Cause for disciplinary action against Respondent's smog station license exists pursuant to Health and Safety Code section 44072.2, subdivision (a), in that it was

8. Cause for disciplinary action against Respondent's smog station license exists pursuant to Health and Safety Code section 44072.2, subdivision (a), in that it was established that Respondent violated Health and Safety Code sections 44012, subdivisions (a) and (f); 44015, subdivision (b); and 44059. (Findings 5, 6 and 7.)

9. Cause for disciplinary action against Respondent's smog station license exists pursuant to Health and Safety Code section 44072.2, subdivision (c), in that it was established that Respondent violated California Code of Regulations, title 16, sections 3340.24, subdivision (c), 3340.35, subdivision (c); and 3340.42. (Findings 5, 6 and 7.)

10. Cause for disciplinary action against Respondent's smog station license exists pursuant to Health and Safety Code section 44072.2, subdivision (d), in that, by issuing a certificate of compliance Respondent committed an act involving dishonesty, fraud, or deceit that caused injury to the people of California by depriving them of the protections afforded by the Motor Vehicle Inspection Program. (Findings 5, 6 and 7.)

Penalty Determination

11. In a 13-month period Respondent's facility certified that four vehicles passed the California smog test when those vehicles did not comply with test standards. The first and last errors concerned ignition timing. Despite many years of experience, it appears that Respondent is unable to consistently and competently test vehicles as the program requires. In addition, Respondent's failure to follow the suggestion of his technician and abort a test that the technician was unable to correctly complete was very troubling. In his mind, concern about unwanted attention from the Bureau apparently outweighed his responsibility as a licensee to support the Motor Vehicle Inspection Program. In these circumstances, the appropriate penalty is revocation of Respondent's smog check station license. The public interest will be sufficiently protected by a term of probation for Respondent's automotive repair dealer registration.

Cost Recovery

12. Business and Professions Code section 125.3 provides that a licensing agency may order a licensee who has committed a violation of the law to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Subdivision (c) provides that a certified copy of the costs constitutes prima facie evidence of the reasonable costs. By reason of the matters set forth in Finding 9, cause exists to require Respondent to pay investigative and enforcement costs of \$9,476.71.

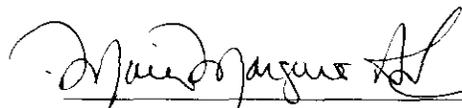
ORDER

1. Smog Check Station License Number N179189, issued to JM & Sons, Inc., dba Branham Arco Smogpros, Joseph Huang Lai, President, is revoked.

2. Automotive Repair Registration Number ARD 179189, issued to JM & Sons, Inc., dba Branham Arco Smogpros, Joseph Huong Lai, President, is invalidated; however, the invalidation is stayed and the registration number is placed on probation for three years pursuant to the following terms and conditions:

- a. Respondent shall comply with all statutes, regulations, and rules governing automotive inspections, estimates, and repairs.
- b. 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.
- c. Within 30 days of the effective date of this action, Respondent shall 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 Business and Professions Code section 9884.6.
- d. Provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.
- e. 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 the final decision on the accusation, and the period of probation shall be extended until such decision.
- f. Should the Director of Consumer Affairs determine that Respondent has failed to comply with the terms and conditions of probation, the Department may, after giving notice and opportunity to be heard permanently invalidate the registration.
- g. Respondent shall pay the sum of \$9,476.71 to the Bureau as reimbursement of the reasonable costs of investigation and enforcement of this case.

DATED: September 3, 2009



MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

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7

8 **BEFORE THE**
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **FOR THE BUREAU OF AUTOMOTIVE REPAIR**
11 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:	Case No. 79/09-92
12 JM & SONS, INC., DBA	ACCUSATION [SMOG CHECK]
13 BRANHAM ARCO SMOGPROS	
14 1405 Branham Lane	
15 San Jose, California 95118-2414	
16 JOSEPH HUONG LAI, PRESIDENT	
17 Automotive Repair Dealer Registration No. ARD 179189	
18 Smog Check Station License No. RC 179189	
19 Respondent.	

19 Sherry Mehl ("Complainant") alleges:

20 **PARTIES**

21 1. Complainant brings this Accusation solely in her official capacity as the
22 Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

23 **Automotive Repair Dealer Registration**

24 2. On or about June 29, 1994, the Bureau issued Automotive Repair Dealer
25 Registration Number ARD 179189 ("registration") to JM & Sons, Inc., doing business as
26 Branham Arco Smogpros ("Respondent"). The registration will expire on June 30, 2009, unless
27 renewed.

28 ///

1 **Smog Check Station License**

2 3. On or about July 13, 1994, the Bureau issued Smog Check Station License
3 Number RC 179189 ("station license") to Respondent. The station license will expire on
4 June 30, 2009, unless renewed.

5 **STATUTORY PROVISIONS**

6 4. Section 9884.7 of the Business and Professions Code ("Code") states, in
7 pertinent part:

8 (a) The director, where the automotive repair dealer cannot show there was
9 a bona fide error, may refuse to validate, or may invalidate temporarily or
10 permanently, the registration of an automotive repair dealer for any of the
11 following acts or omissions related to the conduct of the business of the
12 automotive repair dealer, which are done by the automotive repair dealer or any
13 automotive technician, employee, partner, officer, or member of the automotive
14 repair dealer.

15 (1) Making or authorizing in any manner or by any means whatever any
16 statement written or oral which is untrue or misleading, and which is known, or
17 which by the exercise of reasonable care should be known, to be untrue or
18 misleading.

19 (4) Any other conduct which constitutes fraud.

20 (6) Failure in any material respect to comply with the provisions of this
21 chapter [the Automotive Repair Act (Bus. & Prof. Code, 9880, et seq.)] or
22 regulations adopted pursuant to it.

23 (b) Except as provided for in subdivision (c), if an automotive repair
24 dealer operates more than one place of business in this state, the director pursuant
25 to subdivision (a) shall only invalidate temporarily or permanently the registration
26 of the specific place of business which has violated any of the provisions of this
27 chapter. This violation, or action by the director, shall not affect in any manner
28 the right of the automotive repair dealer to operate his or her other places of
business.

(c) Notwithstanding subdivision (b), the director may invalidate temporarily or permanently, the registration for all places of business operated in this state by an automotive repair dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it.

25 5. Code section 9884.13 provides, in pertinent part, that the expiration of a
26 valid registration shall not deprive the director or chief of jurisdiction to proceed with a
27 disciplinary proceeding against an automotive repair dealer or to render a decision invalidating a
28 registration temporarily or permanently.

1 systems on the vehicle, thereby depriving the People of the State of California of the protection
2 afforded by the Motor Vehicle Inspection Program.

3 **THIRD CAUSE FOR DISCIPLINE**

4 **(Failure to Provide a Copy of a Signed Work Order)**

5 15. Respondent's registration is subject to discipline pursuant to Code section
6 9884.7, subdivision (a)(3), in that on or about November 13, 2008, Respondent failed to provide
7 the operator with a signed copy of the work order as soon as the operator signed the document.

8 **FOURTH CAUSE FOR DISCIPLINE**

9 **(Violations of the Motor Vehicle Inspection Program)**

10 16. Respondent's station license is subject to discipline pursuant to Health &
11 Safety Code section 44072.2, subdivision (a), in that on or about November 13, 2008, regarding
12 the 1990 Mercury Sable, Respondent failed to comply with the following sections of that Code:

13 a. **Section 44012, subdivision (a):** Respondent failed to determine that all
14 emission control devices and systems required by law were installed and functioning correctly in
15 accordance with test procedures.

16 b. **Section 44012, subdivision (f):** Respondent failed to perform emission
17 control tests in accordance with procedures prescribed by the department.

18 c. **Section 44015, subdivision (b):** Respondent issued electronic Certificate
19 of Compliance No. NE791720 without properly testing and inspecting the vehicle to determine if
20 it was in compliance with Health & Safety Code section 44012.

21 d. **Section 44059:** Respondent willfully made false entries for electronic
22 Certificate of Compliance No. NE791720, certifying that the vehicle had been inspected as
23 required when, in fact, it had not.

24 **FIFTH CAUSE FOR DISCIPLINE**

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

27 17. Respondent's station license is subject to discipline pursuant to Health &
28 Safety Code section 44072.2, subdivision (c), in that on or about November 13, 2008, regarding

1 the 1990 Mercury Sable, Respondent failed to comply with provisions of California Code of
2 Regulations, title 16, as follows:

3 a. **Section 3340.24, subdivision (c)**: Respondent falsely or fraudulently
4 issued electronic Certificate of Compliance No. NE791720, in that the vehicle could not pass the
5 functional portion of the smog inspection because the vehicle's ignition timing was adjusted
6 beyond the manufacturer's specifications.

7 b. **Section 3340.35, subdivision (c)**: Respondent issued electronic
8 Certificate of Compliance No. NE791720 even though the vehicle had not been inspected in
9 accordance with section 3340.42.

10 c. **Section 3340.42**: Respondent to conduct the required smog tests on that
11 vehicle in accordance with the Bureau's specifications.

12 **SIXTH CAUSE FOR DISCIPLINE**

13 **(Dishonesty, Fraud or Deceit)**

14 18. Respondent's station license is subject to discipline pursuant to Health &
15 Safety Code section 44072.2, subdivision (d), in that on or about November 13, 2008,
16 Respondent committed dishonest, fraudulent or deceitful acts whereby another is injured by
17 issuing electronic Certificate of Compliance No. NE791720 for the 1990 Mercury Sable without
18 performing a bona fide inspection of the emission control devices and systems on that vehicle,
19 thereby depriving the People of the State of California of the protection afforded by the Motor
20 Vehicle Inspection Program.

21 **PRIOR CITATIONS**

22 19. To determine the degree of discipline, if any, to be imposed on
23 Respondent, Complainant alleges as follows:

24 a. On or about October 30, 2007, the Bureau issued Citation No. C08-0431
25 against Respondent's registration and station licenses for violations of Health & Safety Code
26 section 44012, subdivision (f) (failure to perform a visual/functional check of emission control
27 devices according to procedures prescribed by the department), and California Code of
28 Regulations, title 16, section ("Regulation") 3340.35, subdivision (c) (issuing a certificate of

