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

In the Matter of the Accusation Against: **GV SMOG** **GREGORY STEVEN FERGUSON** **aka GREGORY S. FERGUSON, OWNER** 1641 East Main Street, #B Grass Valley, CA 95945 Automotive Repair Dealer Reg. No. ARD 251208 Smog Check, Test Only, Station License No. TC 251208, **GREGORY S. FERGUSON** Advanced Emission Specialist Technician License No. EA 146059 Respondents.	No. 79/12-78 OAH No. 2012030854

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 errors on page 1, in the case caption, and on page 22, line 3, of the Order, of the Proposed Decision are corrected as follows:

"Advanced Emission Specialist Technician License No. EA 146069" is corrected to read "Advanced Emission Specialist Technician License No. EA 146059".

This Decision shall become effective 5/10/13.

DATED: April 4, 2013

DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

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PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in Sacramento, California, on September 26 and 27, 2012, and on January 9, 2013.

Deputy Attorney General Patrick M. Kenady, represented complainant Sherry Mehl, in her official capacity as Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs, on September 26 and 27, 2012.[1] On January 9, 2013, Deputy Attorney General Kent D. Harris represented complainant.

Respondent Gregory Steven Ferguson (respondent), owner of respondent GV Smog (GV Smog or respondent's station), appeared on his own behalf and on behalf of GV Smog.

[1] John Wallauch is the Bureau's current Chief.

Oral and documentary evidence was presented and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on January 9, 2013.

FACTUAL FINDINGS

1. On a date not established by the evidence, the Bureau issued a Smog Check Technician license to respondent. In 2003, the Bureau issued Advanced Emission Specialist (EA) Technician License No. EA 146059 to respondent. This license is current and will expire on September 30, 2013, unless renewed or revoked.

2. On August 31, 2007, the Bureau issued Smog Check, Test Only, Station License No. 251208 to respondent, owner, doing business as GV Smog in Grass Valley, California. This license is current and will expire on June 30, 2013, unless renewed or revoked.

3. On August 21, 2008, the Bureau issued Automotive Repair Dealer Registration No. ARD 251208 to respondent/GV Smog. This registration is current and will expire on June 30, 2013, unless renewed or revoked.

4. *Accusation:* On February 9, 2012, complainant signed the Accusation, seeking to suspend or revoke respondent's licenses described above and any additional licenses in respondent's name. Complainant requested that respondent, individually and as owner of GV Smog, be ordered to pay the reasonable costs of investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3.[2]

The factual basis for the Accusation arose from two Bureau undercover operations run at respondent's station on June 21, 2011, involving a 1998 Ford Explorer, and on June 23, 2011, involving a 1990 Plymouth Sundance. As to each of these operations, respondent allegedly performed a smog inspection and failed the vehicles, when each should have passed the inspection. Complainant alleged:

> (1) that GV Smog violated requirements of its ARD Registration by making or authorizing untrue or misleading statements which it should have known to be untrue or misleading in the Vehicle Inspection Reports (VIRs) it issued to each of these vehicles following smog inspection, within

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[2] Unless otherwise indicated, all undesignated statutory references are to the California Business and Professions Code. As indicated in section 477, subdivision (b), the term "license" includes "certificate, registration or other means to engage in a business or profession regulated by this code."

the meaning of section 9884.7, subdivision (a)(1);

(2) that respondent's Smog, Test Only, Station license failed to comply with Health and Safety Code section 44072.2, subdivisions (a) and (c), by not conducting the visual and functional inspections of the vehicles' emission control systems and devices in accordance with procedures described by the department and Bureau specifications as required by Health and Safety Code section 44012, subdivision (f), and California Code of Regulations, title 16 (16 CCR), section 3340.42; and

(3) that respondent, as a smog technician, failed to comply with Health and Safety Code section 44072.2, subdivisions (a) and (c), by not conducting the visual and functional inspections of the emission control systems and devices of each vehicle in accordance with procedures described by the department and Bureau specifications as required by Health and Safety Code sections 44012, subdivision (f), and 44035, and with 16 CCR sections 3340.30, subdivision (a), and 3340.42.

In addition to the violations alleged in the course of these undercover operations, as matters in aggravation, complainant alleged that it had issued six previous citations against respondent's licenses.

5. *Notices of Defense*: On February 12, 2012, responded filed a 37-page Notice of Defense to the Accusation. Respondent generally denied the allegations in the Accusation, asserted it was vague, alleged that the Bureau had acted maliciously and fraudulently in making these allegations and had destroyed any evidence contrary to its allegations, and raised defenses of discrimination, harassment, and violation of constitutional rights. Respondent alleged that the Bureau acted in a fraudulent, malicious, illegal, discriminatory and harassing manner toward smog check stations and technicians, particularly in respondent's locality.

On March 10, 2012, respondent signed a second Notice of Defense and requested a hearing on the Accusation. This hearing followed.

Statutory Scheme

6. *Motor Vehicle Inspection Program*: The Legislature has declared that California's Motor Vehicle Inspection Program (Program), also known as the Smog Check Program, requires an "enforcement program which is vigorous and effective and includes monitoring of the performance of the smog check test or repair stations and technicians, as well as the monitoring of vehicle emissions as vehicles are being driven." (Health & Saf. Code § 44001, subd. (b)(5)(E).) The Director of Consumer Affairs has all of the powers and authority granted under state law for enforcing the Program, which is enforced and administered by the chief of the Bureau of Automotive Repairs. (Health & Saf. Code §§ 44001.5, 44002.) The Program

provides for privately operated Smog Check Stations which issue certificates of compliance or noncompliance to vehicles which meet the requirements of this chapter. (Health & Saf. Code, § 44010.)

7. *Automotive Repair Act*: The Automotive Repair Act (Act) governs the registration, licensing and discipline of Automotive Repair Dealers (ARDs), Lamp Stations and Brake Stations. The Legislature has expressly declared that protection of the public "shall be the highest priority" of the Bureau exercising these functions and that, "whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (§ 9880.3.)

Section 9884.7, subdivision (a) provides that, where an ARD cannot show there was a "bona fide error," the Bureau may suspend, revoke or place an ARD registration on probation for acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer. These acts include: "(1) making or authorizing any statement written or oral which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading..."

8. *Smog Check Stations:* The director may suspend, revoke, or take other disciplinary action against a license if the licensee "violates any section of this chapter and the regulations adopted pursuant to it, which relate to the licensed activities," or "violates any of the regulations adopted by the director pursuant to this chapter." (Health & Saf. Code, § 44072.2, subds. (a) and (c).)

9. Both licensed repair stations and qualified mechanics "shall perform all repairs in accordance with specifications and procedures so established" under the Program. (Health & Saf. Code, § 44016.) Implementing regulations provide that the specifications and procedures required by Health and Safety Code section 44016 "shall be the vehicle manufacturer's recommended procedures for emission problem diagnosis and repair or the emission diagnosis and repair procedures found in industry-standard reference manuals and periodicals published by nationally recognized repair information providers. Smog check stations and smog check technicians shall, at a minimum, follow the applicable specifications and procedures when diagnosing defects or performing repairs for vehicles that fail a smog check test." A smog check station "shall give a copy of the test report printed from the emissions inspection system to the customer. The report shall be attached to the customer's invoice." (16 CCR § 3340.41, subd. (a).)

10. The California Emissions Inspection Test requires the licensed smog technician to: (1) visually inspect the vehicle's emission components to ensure that they are present, properly connected, and in good working condition; (2) functionally test or inspect the vehicle's gas cap, the malfunction indicator light (MIL) if

equipped, the ignition timing if adjustable and, depending on the test required, the exhaust gas recirculation (EGR) system; and (3) conduct a tailpipe emissions test.

A smog technician performing a visual inspection typically reviews the engine's under-hood emissions control label which indicates the location and routing of its major components. Secondary sources, such as the factory service manuals for the vehicle or industry manuals (Mitchell), can be accessed if necessary. If the smog technician cannot determine what is required for a particular vehicle's emission control system, the technician cannot conduct the smog inspection.

The vehicle must pass all visual and functional tests, as well as the tailpipe emissions test, before an Emission Inspection Certificate of Compliance (Certificate of Compliance) can be issued by the technician to verify that the vehicle passed the smog inspection.

11. A Vehicle Inspection Report (VIR) is the official smog check inspection report which is printed from an emissions inspection system and given to the registered vehicle owner(s) or their legal representative. (Cal. Code of Regs., tit. 16, § 3340.1, subd. (bb).) "Emissions inspection system" or "EIS" refers to a "tamper-resistant instrument which meets the requirements of subdivision (b) of section 44036 of the Health and Safety Code and which is certified by the bureau for use in the California Smog Check program." (Cal. Code of Regs., tit. 16, § 3340.1, subd. (g).) The EIS system is designed to provide a "consumer protection-oriented quality assurance portion of the motor vehicle inspection program" by ensuring uniform and consistent tests and repairs by all qualified smog check technicians and licensed smog check stations throughout the state. (Health & Safety Code § 44036, subd. (a).)

Undercover Operation

12. Bureau Program Representative I Tim Schaumburg received information from a confidential informant at American River College that resulted in the undercover operations at issue. The informant, who is a smog technician, told Mr. Schaumburg he found a website that listed Bureau undercover sting operation vehicles. The informant thought it was wrong for smog shops to be using this list as a way to identify vehicles that should fail smog inspections. The website was identified as Smogtechnews.Com, further described as "Home of the California Association of Smog Technicians."

Mr. Schaumburg received a two-page vehicle list from this website entitled "BAR Car List Updated 12/28" which provided the vehicles' year, make, model, vehicle identification number (VIN), and a brief description of what had been found wrong with the vehicle's smog system. Mr. Schaumburg testified that this list was a way for smog technicians/stations to fail a vehicle based upon the listed defect, instead of doing a proper smog inspection. In addition, Mr. Schaumburg found that

some of the vehicles on the list were not and had never been BAR undercover vehicles. As a result, he was concerned that consumers would have their vehicles inappropriately failed in smog inspections. Based upon this information, an undercover operation was begun that involved several smog shops in the Grass Valley area, including respondent's station.

Three of the Bureau's undercover vehicles listed on Smogtechnews.Com were presented to respondent for a smog inspection: a 1998 Ford Explorer, a 1990 Plymouth Sundance, and a 2001 Chevrolet Tahoe. Respondent performed a smog inspection on these three vehicles and determined that the first two did not pass smog inspection.[3]

I. *June 21, 2011 Undercover Run: 1998 Ford Explorer Sport Utility Vehicle, California License plate* [redacted], *VIN* [redacted] *(Ford Explorer)*

13. The Ford Explorer is a light-duty truck equipped with a fuel injected 3.0 liter six-cylinder engine and an automatic transmission. Smogtechnews.Com listed the Ford Explorer as having "pcv [positive crankcase ventilation] tamper."

14. Bureau Program Representative I Eric Schulte works in the Bureau's Sacramento Documentation Lab. Mr. Schulte was an automotive repair technician and a smog technician for over 13 years before being hired by the Bureau. He has a degree in automotive technology and is a certified by the National Institute for Automotive Service Excellence as a master automobile technician and advanced level specialist. He currently holds a valid smog technician license. His testimony and declaration are summarized in relevant part below.

From June 1 through 2, 2011, Mr. Schulte documented the Ford Explorer, using the following primary sources: the under-hood emission control information label, the 2011 Mitchell Emission Control Application Guide, the 2011 edition Motor Emission Control Systems Application book and the Alldata computer information database. Because the Ford Explorer has full-time all-wheel-drive, Mr. Schulte

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[3] Respondent called Gregory Allen Marx, a retired police officer and investigator, as a witness to testify about the Bureau's investigative practices and its alleged attempts to hack into the Smogchecknews.com website. Mr. Marx's testimony on this subject, as well as testimony that certain public documents had, in his opinion, been "tampered with" by the Bureau, was excluded as irrelevant to the specific allegations in the Accusation. (See Footnote 4, infra.) Mr. Marx subsequently filed an "Amicus Brief" offering similar information, but did not file a motion requesting permission to file such a brief as required by California Code of Regulations, title 1, section 1046. The Amicus Brief, which covered matters previously determined not to be relevant, was not helpful to the trier of fact and was not considered. (*Ibid.*)

performed a Two Speed Idle (TSI) California Emissions Test. Mr. Schulte performed each of the three components of the California Emissions Inspection Test. In particular, during the visual inspection, Mr. Schulte inspected and verified that all required emission control equipment was present and properly connected, including the PCV system.

The Ford Explorer passed all aspects of the test, with "Overall Test Results: PASS." As part of his documentation, Mr. Schulte photographed the "evap" or evaporative emissions hoses and their connections, the oxygen sensors and the catalytic converters as they were properly installed and in good condition. He did not photograph the evap canister because it was obscured and he did not dismantle the vehicle to take a photograph. He photographed the PCV hose, which had a Ford factory insignia, properly connected to the PCV valve. Mr. Schulte then performed a road test to verify proper functioning. Unlike many undercover operations, Mr. Schulte did not add an "inducement" (i.e., a defect designed to ensure that the vehicle should fail a subsequent smog inspection) to the Ford Explorer. On June 2, 2011, Mr. Schulte transferred the Ford Explorer to Program Representative II Joe Gibson with an odometer reading of 96,935 miles.

15. On June 21, 2011, Mr. Gibson transferred custody of the Ford Explorer to Mr. Schraumburg, with an odometer reading of 96,935 miles, who then released the Ford Explorer to Bureau Program Representative I Jeff Hammer. Mr. Hammer was instructed to take the Ford Explorer to respondent's station in Grass Valley and request a smog inspection. Mr. Hammer presented the Ford Explorer to respondent, signed a work order and received an estimate from GV Smog indicating that the smog inspection would cost $70.00. After inspection, respondent told Mr. Hammer that the Ford Explorer failed inspection.

Mr. Hammer testified that respondent told him there was a hole in the Ford Explorer's exhaust, but he did not recall that respondent told him where the hole was. Respondent told him that there was a wrong PVC hose that needed to be fuel rated. Mr. Hammer testified that, although he was not involved in the technical aspects of the operation, if the PCV line was not a proper line, it would probably be a cause for a failure. Mr. Hammer also testified that an open hole in the exhaust that was placed after the oxygen sensor but before the catalytic converter would be a reason to fail the vehicle "if the machine picked up the dilution, exhaust dilution." He clarified that he did not see the hole, did not know the size of the hole and did not know the amount of air, if any, being drawn. If there was an exhaust dilution while a smog check was being performed, "the machine is going to tell you."

16. The VIR provided to Mr. Hammer by respondent following inspection indicated the Ford Explorer's overall test results were: "Comprehensive Visual Inspection: **TAMPERED**; Functional Check: PASS; Emissions Test: PASS." Under the VIR section entitled "Emission Control Systems [ECS] Visual Inspection/ Functional Check Results," the ECS results for both the PCV and the Catalytic

Converter were described as "**Modified.**" (Bolding and capitalization in original.) A handwritten note at the bottom of the VIR provided:

1. Wrong PCV line – (Must be fuel rated)

2. Open hole in Exhaust (looks like drilled to test CAT. Must be sealed)

After the failed inspection, respondent reduced the charge to $60.00 which Mr. Hammer paid. Mr. Hammer returned the Ford Explorer with all documentation received from respondent to Mr. Schraumburg and the Ford Explorer was returned to the Sacramento Documentation Lab that day, with an odometer reading of 97,047.

17. Mr. Gibson is a Program Representative II who works in the Bureau's Sacramento Documentation Lab. Mr. Gibson has been employed by the Bureau for 20 years and he previously worked in the automotive industry for 20 years as an automotive repair technician and a smog technician. Mr. Gibson has a master mechanic certification from the Institute of Automotive Service Excellence. He has continuously held and currently holds valid smog technician, brake and lamp adjustor licenses. His testimony and declaration are summarized in relevant part below.

On June 21, 2011, Mr. Gibson received the Ford Explorer with an odometer reading of 97,047 along with the smog inspection documentation from GV Smog from Mr. Schaumburg. He performed the Two Speed Idle test using the following primary sources: the under-hood emission control information label, the factory 1998 Ford Repair Manual, Mitchell OnDemand computerized information database, the 2011 edition Motor Emission Control Systems Application book and the 2011 Mitchell Emission Control Application Guide. Following inspection, the Ford Explorer passed all aspects of the TSI test, with "Overall Test Results: PASS." Based upon his examination and these test results, Mr. Gibson concluded that, with a properly performed smog inspection, the Ford Explorer met all requirements for receiving a passing Certificate of Compliance, and GV Smog had improperly failed the PCV system and the catalytic converter in the visual inspection portion of the Smog Check inspection. During the testing process, Mr. Gibson moved the Ford Explorer with the result that the odometer reading advanced one mile to 97,048 miles.[4]

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[4] Respondent argued that the Bureau's Monthly Travel Log for the Ford Explorer in June 2010 demonstrated that the Bureau was falsifying evidence, by indicating that the vehicle had only moved one mile when it had actually been moved over 1,000 miles. This document lists, *inter alia*, the date of the month, the start and end odometer reading for each trip date, and the trip miles. The entry for June 21 shows a beginning odometer reading of 96,935 and an ending odometer reading of 97,047, for a total of 112 trip miles. The entry for June 22 shows a beginning odometer reading of 96,047 and an ending odometer reading of 97,048, for a total of

18. Mr. Gibson reviewed respondent's notes on the Ford Explorer's VIR which indicated a failing result. Regarding respondent's notation "wrong PCV line – (Must be fuel rated)," Mr. Gibson determined that the PCV hose was not defective in any manner. He removed the Ford Explorer's valve and the PCV hose which connects to the engine's intake manifold, and placed them into the Bureau's evidence storage. These parts were offered into evidence as Exhibit 11. As indicated in Mr. Gibson's testimony:

> The PCV system on this vehicle consists of a PCV valve mounted in the left engine valve cover, a hose connecting the PCV valve to a vacuum source at the engine intake manifold, and a tube connecting the engine crankcase to filtered fresh air. The PCV system controls engine crankcase vapor emissions by using engine vacuum to pull fresh air through the engine crankcase, picking up engine vapors, through the PCV valve into the intake manifold to be burned in the engine with the air/fuel mixture. I examined the vehicle's PCV hose. The hose is a pre-formed rubber hose marked with the FORD oval logo and a part number. It is not collapsed, split, cut, or damaged in any way. It is, in fact, identical in all respects to a new hose obtained from a Ford dealer parts department. The PCV hose is correct for this vehicle, is not modified or damaged, and should not have failed a properly performed Smog Check visual inspection. . .

The PCV hose and value were identical to the parts required for this vehicle. Regarding respondent's notation that the hose "must be fuel rated," Mr. Gibson testified that, because the PCV hose was factory provided, he assumed that Ford Motor Company had determined that this was the proper material used. In Mr. Gibson's opinion, there was no "tampering" of the Ford Explorer's PCV.

19. Regarding respondent's notation that there was an "open hole in exhaust" to test the catalytic converter which must be sealed, Mr. Gibson indicated that, during his inspection:

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one trip mile. Mr. Gibson's notation next to this entry is "Advanced during smog test." This is consistent with Mr. Gibson's declaration that the Explorer's odometer increased one mile during his inspection. The starting odometer reading on June 22, of 96,047 rather than 97,047, appears to have been a transcription error by Mr. Gibson. This conclusion is reinforced by Mr. Gibson's June 29, 2011 photographs of the Ford Explorer's vacuum hose routing which shows an odometer reading of 97,048.

> [he] found one hole approximately 3/16 inch diameter in the exhaust down pipe, prior to the flange that mounts to the catalytic converter. Small exhaust leaks are not a reason to fail a vehicle during a Smog Check visual inspection. Exhaust leaks are required to be repaired only if they create "sample dilution", a condition detected by the Smog Check test analyzer. If a sample dilution condition exists, the Smog Check test analyzer will not continue the emissions measurement portion of the inspection and the Smog Check must be aborted. The remainder of the exhaust pipes, the muffler, and tail pipe were intact and undamaged. The catalytic converter was properly installed. There were no holes drilled in any portion of the catalytic converter structure or converter mounting flanges. The converter heat shields were intact, undamaged and properly attached. The converter shell was not damaged. The converter did not rattle (an indicator of broken internal structure) when struck with a hammer...The catalytic converter is correct for this vehicle, is not modified or damaged, and should not have failed a properly performed Smog Check visual inspection.

Mr. Gibson testified that this was "a very small hole" and that the inspection machinery is calibrated to allow for a very small amount of air getting into the system. As long as the amount of air does not exceed the amount that causes the machine to stop testing, then it is acceptable and it has a negligible effect on exhaust measurements. In addition, if it was more than a small amount, the vehicle would have failed the tail pipe emissions test. In Mr. Gibson's opinion, there was no "tampering" of the Ford Explorer's catalytic converter. There was nothing on the VIR issued by respondent/GV Smog to indicate that there was an unacceptable dilution of the exhaust stream for the tailpipe emissions test.

On cross-examination, Mr. Gibson testified that he had no idea who had drilled the hole before the catalytic converter, and that the purpose of a hole drilled before the catalytic converter is to access exhaust gases before they are modified by the catalytic converter. It is a good idea to seal such holes or other exhaust leaks to avoid exhaust and noise in the cab, and also any sample dilution that might cause the vehicle not to be tested. If enough oxygen from a hole drilled before a catalytic converter is admitted to the catalytic converter, it may increase the heat in the catalytic converter and make it work more efficiently. Mr. Gibson did not know whether it would create NOx (oxides of nitrogren). Such a hole may cause the temperature in the converter to increase "a bit," but the converter operates the same as it always does. A hole in front of the converter does change the gases that enter the converter, but in Mr. Gibson's opinion, the catalytic converter operates in the same

manner as it did before, the only variable being the amount of gases entering the front of the catalytic converter.

20. Respondent testified that when he saw the PCV line in the Ford Explorer he knew right away that something was wrong. Respondent squeezed the hose and it was soft. He then did a thorough inspection and then found a hole in the exhaust. Respondent testified that a hole in the exhaust drilled before the catalytic converter "is the oldest trick in the book to get a vehicle to pass a test." A modification is "anything other than the thing rolling off the factory." A hole drilled in the exhaust is a modification to the exhaust. This has nothing to do with sample dilution. In respondent's view, this hole was a modification to the catalytic converter because it makes the converter run hotter than it is supposed to, and constitutes "cheating." Respondent could not legally pass the Ford Explorer because the hole was after the oxygen sensor and because the PCV was collapsing every time he hit the accelerator.

He testified that he brought Mr. Hammer into the shop and showed him the Ford Explorer's PCV. Mr. Hammer denied this. There was no writing on the PCV hose. Respondent asserted that the photographs of the PCV line provided by the Bureau did not accurately depict the PCV line he saw when he inspected the Ford Explorer on June 21, 2011.

21. Respondent attempted to demonstrate that the Bureau ran the Ford Explorer in identical condition for a smog inspection through Arch's Automotive (Arch's) in Grass Valley and that it had falsified evidence. Kevin Marc Maltese, the owner of Arch's, testified that he is familiar with respondent, refers customers to him for smog inspections, and that Arch's was part of the same undercover operation with the Bureau. Mr. Maltese testified that his smog technicians inspected the Ford Explorer, the Plymouth Sundance and the Chevy Tahoe within "about a week" of the time they were inspected at GV Smog. Mr. Maltese acknowledged seeing the Smogtechnews.Com website, did not believe it was illegal, and noted that the Bureau currently has a case against him as a result of Arch's smog inspections during this undercover operation.

Mr. Maltese's smog technician failed the Ford Explorer because the PCV hose looked suspicious, was soft to the touch and would collapse when squeezed. When the engine was "revved up," the PCV hose would collapse. This was the reason Arch's gave the Ford Explorer a failed smog inspection. Mr. Maltese looked at the Bureau's photograph of the Ford Explorer's PCV valve and hose provided in respondent's case. He testified that that PCV hose appeared to be a factory hose, but that the PCV hose on the same vehicle he looked at the following week did not have any lettering on it and was simply a "black shiny hose," not a factory hose.

Mr. Maltese provided a document he had received from the Bureau regarding the Ford Explorer in the Bureau's case against Arch's, entitled "Items Available for

Discovery." Under "Parts Retained as Evidence," this document lists "2-PCV Valves; 2-PCV Hoses." By contrast, a similar document given to respondent regarding the Ford Explorer lists: "PCV Hose; PCV Valve." Mr. Maltese knew of no reason why the Ford Explorer would have two PCV hoses and valves.

22. Mr. Maltese's testimony is not relevant to the Accusation against respondent. As can be seen from the "Items Available for Discovery" sheet provided to Mr. Maltese by the Bureau in his own case, the "Run Date" of the Ford Explorer through Arch's Automotive was July 13, 2011. This was several weeks after Mr. Gibson had inspected the Ford Explorer after it failed smog inspection by respondent. Mr. Gibson accepted custody of the Ford Explorer on June 21, 2011 and photographed the PCV valve and hose in respondent's case on June 29, 2011. He removed these parts and placed them in the Bureau's evidence locker. There was no evidence of what the condition of the Ford Explorer or its PCV hose was when it was released for the July 13, 2011 undercover run at Arch's Automotive. Consequently, Mr. Maltese's observations about the Ford Explorer run through respondent's station have no probative value.

23. Respondent testimony that he was required to fail the Ford Explorer for "tamper" because the exhaust system was "modified" by the 3/16 inch hole he discovered before the catalytic converter is not persuasive.

Health and Safety Code section 44015, subdivision (a), prohibits a licensed smog check station from issuing a certificate of compliance, except as otherwise authorized, to ... "(1) A vehicle that has been tampered with..." Visual Inspection Definition 1.4.0 of the Bureau's Smog Check Inspection Procedures Manual (August 2009) (Manual), defines "tampered" as "an emissions control system or component that is **missing, modified or disconnected**." (Bold in original.) Visual Inspection Definition 1.4.2 of the Manual provides that an "emission control system or component has been modified if: It has been disabled even though it is present and properly connected to the engine and/or vehicle; It has been replaced with a component not marketed by its manufacturer for street use on the vehicle; [and/or] An emissions related component of the system has been changed such that there is no capacity for connection with or operation of other emissions control components or systems."[5]

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[5] 16 CCR section 3340.45 provides that: "All vehicle emission tests, visual inspections of the emissions control systems, functional inspections of the emissions control systems, liquid fuel leak inspections, and visible smoke tests shall be conducted at licensed smog check stations by licensed smog check technicians. The inspections shall be performed in accordance with the Emissions Inspection System test prompts and the inspection requirements and procedures prescribed in the Bureau's Smog Check Inspection Procedures Manual, dated August 2009, which is hereby incorporated by reference."

As indicated in Mr. Gibson's declaration and testimony, the Ford Explorer's catalytic converter was in no way damaged, disabled or replaced. If the hole created an exhaust leak, it would need to be repaired only if it caused "sample dilution." This condition would have been detected by the Smog Check test analyzer, which would have shut the machine down, or resulted in a failed tailpipe emissions test. Neither of these events occurred. The catalytic converter was not tampered or modified.

24. Even assuming that respondent made a "bona fide error" by failing the Ford Explorer due to a Modified Catalytic Converter, there was no persuasive evidence that the Ford Explorer's PCV value and hose had been modified, or why respondent reported that the line "must be fuel rated." Given the Bureau's intervening inspection and documentation of the vehicle between June 21 and June 29, 2011, there is no logical connection between the condition in which respondent found the PCV valve and hose on his inspection and the conditions observed at Arch's on July 13, 2011. Mr. Gibson's testimony and declaration identifying the PCV hose with the Ford insignia and describing its condition as "not collapsed, split, cut, or damaged in any way" as of June 22, 2011, after respondent's inspection, was persuasive.

II. *June 23, 2011, involving a 1990 Plymouth Sundance, California License plate [redacted], VIN [redacted] (Plymouth Sundance)*

25. The Plymouth Sundance is equipped with a fuel injected 2.2 liter four-cylinder engine and automatic transmission. Smogtechnews.Com listed the Plymouth Sundance as having "Timing off."

26. Michael C. Roberts is a Program Representative I employed at the Sacramento Documentation Lab. Mr. Roberts has worked with the Bureau for eight years. Prior to this position, Mr. Roberts had 20 years experience in the automotive industry, primarily at independent repair facilities. Mr. Roberts holds a master automobile technician certification from the National Institute of Automotive Service Excellence. He has held a smog license since the early 1980s and is also licensed as a brake and lamp technician. His testimony and declaration are summarized in relevant part below.

27. On May 26, 2011, Mr. Roberts received the Plymouth Sundance with an odometer reading of 151,658 miles. He documented the Plymouth Sundance, using the following primary sources: the vehicle's under-hood emission control information label, the 2011 Mitchell and Motors Emission Control Application Guide and the Chrysler Factory 1990 Service Manual. Mr. Roberts used these resources to inspect the vehicle's required emission control devices, all of which he found to be present, properly connected and in good working condition. Mr. Roberts functionally tested the malfunction indicator light (MIL) and the gas cap and each passed the test.

Mr. Roberts then "performed a low pressure evaporative test and found the vehicle to pass this test. Two Speed Idle (TSI) and Acceleration Simulation Mode (ASM) California Emission Inspection tests were performed and printouts were obtained indicating the vehicle passed these tests." During the emission test, the odometer advanced one mile to a reading of 151,659. Mr. Roberts then photographed emission components and secured the Plymouth Sundance in the Lab. At that point, the Plymouth Sundance was a non-induced vehicle designed to pass a properly conducted smog inspection.

On May 31, 2011, Mr. Roberts released the Plymouth Sundance to Mr. Schraumburg, with an odometer reading of 151,659.

28. Mike Sacco is a Program Representative I who has worked with the Bureau for approximately two years. On June 23, 2011, Mr. Sacco received the Plymouth Sundance from Mr. Schraumburg, at an odometer reading of 151,659. He was instructed to drive to Grass Valley where he requested a smog inspection at GV Smog. Mr. Sacco presented the Plymouth Sundance to respondent, signed a work order and received an estimate from GV Smog indicating that the smog inspection would cost $70.00. After the failed inspection, respondent charged $60.00 which Mr. Sacco paid. He received an invoice and VIR from respondent, which provided an odometer reading of 151,715. Mr. Sacco then returned the documents he received from respondent to Mr. Schraumburg and drove the Plymouth Sundance back to the Sacramento Documentation Lab that day, returning with an odometer reading of 151,783.

29. The VIR provided to Mr. Sacco by respondent following inspection indicated the Plymouth Sundance's overall test results were: "Comprehensive Visual Inspection: PASS; Functional Check: **FAIL**; Emissions Test: PASS." The VIR's "Emission Control Systems [ECS] Visual Inspection/ Functional Check Results," indicate that the ECS result for ignition timing was "**Fail**." (Bolding in original.)

30. On June 24, 2011, Mr. Roberts performed the TSI and ASM California Emissions Inspections Tests on the Plymouth Sundance. He did not have the VIR from respondent, but was aware it had failed for timing. The vehicle passed both emissions tests. As part of this re-inspection, Mr. Roberts:

> photographed the Underhood Emissions Label, the General Underhood View, and underhood view of the emission components found there. I also photographed the timing indicator location, the Engine Coolant Temperature (ECT) Sensor used to put vehicle into "Base Timing Mode" and the timing marks and indicator with the engine off and indexed to a point that you can see what the mark looks like. I also photographed the

mark using a timing light/strobe with the engine running
to show how the mark looks during a timing check.

Mr. Roberts testified that to determine what the timing is supposed to be, it is necessary to refer to the under-hood label, as well as the factory service manual and EC application guides. In this case, the timing should have been 12 degrees before top dead center. Mr. Robert's conclusion was that the Plymouth Sundance had passed the California Emissions Inspection Test on both May 26, 2011 and on June 24, 2011.

On cross-examination, Mr. Roberts testified that did not use ALLDATA as a reference to document the Plymouth Sundance's timing and indicated he "wouldn't be surprised" if ALLDATA had a different procedure for testing timing.

31. Mr. Maltese testified that two of Arch's technicians failed the Plymouth Sundance because the timing was off. Mr. Maltese did not witness this inspection and there was no evidence of when the Plymouth Sundance inspected at Arch's.

32. Respondent testified that he had tested the same Plymouth Sundance eight or nine years ago and its timing was wrong then as well. In that case, he felt pressured and ending up passing the car against his better judgment. This resulted in a citation.

Regarding the June 23, 2011 run, respondent testified that he followed the ALLDATA Online guide to determine the ignition timing on the Plymouth Sundance and determined that it was not right. Respondent was taught that as long as he followed these procedures, he would be fine. In his view, the smog technician must use the books and manuals they are required to have and do what seems to be best and right with those tools. He could not pass the Plymouth Sundance due to timing problems, which both he and the technicians at Arch's Automotive found. He noted that Mr. Roberts had described a different procedure to check timing and testified he would not be surprised if ALLDATA had a different procedure. Respondent provided a three-page ALLDATA Online printout, dated September 27, 2012 for the Plymouth Sundance on Ignition Timing.

33. Respondent's testimony that the Plymouth Sundance had to fail the functional check due to timing was not persuasive. Mr. Robert's testimony and his re-inspection of the Plymouth Sundance on June 24, 2011 with both the TSI and ASM California Emissions Inspections Tests establish that the timing on the Plymouth Sundance was such that it should have passed inspection at GV Smog.

Evidence in Aggravation and Mitigation

34. In order to determine whether and to what extent it is appropriate to discipline respondents' licenses, it is necessary to weigh and balance respondents'

conduct in light of any factors in aggravation and mitigation. (Cal. Code of Regs., tit. 16, § 3395.4.).

35. Matters in aggravation include respondents' previous history of citations by the Bureau. Certified records describing respondent's previous disciplinary history indicate the following:

A. *Citations against Respondent's Technician's License*: Citations were issued against respondent's technician license on four occasions from 2005 through 2008: Each of the citations found that respondent had violated section 44032 (requiring technicians to perform tests of emission control systems and devices in accordance with section 44012) and related regulations.

i. On December 1, 2005, respondent was issued Citation No. M06-0277, after he issued a certificate of compliance to a Bureau undercover vehicle with a missing air injections system, on November 22, 2005. The citation alleged respondent violated of section 44032/44012 and 16 CCR 3340.42. Respondent was ordered to complete an eight-hour training course. Respondent timely complied with this order.

ii. On May 9, 2006, respondent was issued Citation No. M06-0712, after he issued a certificate of compliance to a Bureau undercover vehicle with a missing PCV system on March 9, 2006. The citation alleged respondent violated section 44032/44012 and 16 CCR 3340.30, subdivision (a). Respondent was ordered to complete a 16-hour training course and provide proof of completion within 30 days of receipt of the citation. Respondent completed training on July 27, 2006.

iii. On December 21, 2007, respondent was issued Citation No. M08-0580, after he issued a certificate of compliance to a Bureau undercover vehicle with a missing pulse air injection (PAIR) system on December 18, 2007. The citation alleged respondent violated section 44032/44012 and 16 CCR 3340.30, subdivision (a). Respondent was ordered to complete an eight-hour training course and provide proof of completion within 30 days of receipt of the citation. Respondent completed training on February 27, 2008.

iv. On June 18, 2008, respondent was issued Citation No. M08-1104, after he issued a certificate of compliance to a Bureau undercover vehicle with a "missing ACL" on June 3, 2008. The citation alleged respondent violated section 44032/44012 and 16 CCR 3340.30, subdivision (a). Respondent was ordered to complete a 16-hour training course and provide proof of completion within 30 days of receipt of the citation. Respondent completed training on August 19, 2008.

B. *Citations against Respondent, as Owner of GV Smog:* The Bureau issued two citations against respondent/GV Smog between December 2007 and June 2008:

i. On December 21, 2007, Citation No. C08-0579 was issued against GV Smog, based upon respondent's conduct of issuing a certificate of compliance to a vehicle with a missing pulse air injection (PAIR) system on December 18, 2007. This is the same conduct for which respondent's technician's license received Citation No. M08-0580, as indicated in A(iii) above. The citation alleged respondent, as ARD, violated section 44012 and 16 CCR 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). The Bureau assessed respondent a $500 civil penalty, which respondent paid on February 21, 2008.

ii. On June 18, 2008, Citation No. C08-1103 was issued against GV Smog, based upon respondent's conduct of issuing a certificate of compliance to a Bureau undercover vehicle with a "missing ACL" on June 3, 2008. This is the same conduct for which respondent's technician's license received Citation No. M08-1104, as indicated in A(iv) above. The citation alleged respondent, as ARD, violated section 44012 and 16 CCR 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). The Bureau assessed respondent a $1,000 civil penalty, which respondent paid on August 21, 2008.

These six citations arise from four smog inspections conducted from November 2005 through August 2008.

36. Factors in mitigation include the fact that over three years have elapsed between the most recent citation and the smog inspections at issue in this Accusation. Other factors are as follows.

37. The premise of the Bureau's undercover operation was that respondent was among a group of smog technicians who were using the Smogtechnews.Com list as a basis for failing suspected Bureau undercover vehicles for the reasons identified on the list, rather than performing a "proper smog inspection" and passing them. There was no direct evidence that respondent had actually seen this list before the undercover runs.

Mr. Schaumburg testified that, in addition to the vehicles at issue in the Accusation, he had an undercover agent bring a 2001Chevy Tahoe, identified on the Smogtechnews.Com list as having its "electric air pump missing," to respondent's station. Despite its presence on the list, the Chevy Tahoe was inspected by respondent and properly certified as passing the smog inspection. The fact that respondent did not fail each of the three undercover vehicles on the list is a mitigating factor because it demonstrates that he was not failing vehicles that should have passed

based simply upon their presence on the list. In addition, while the listing for the Ford Explorer indicated a "PCV tamper," respondent located a small drilled hole that had not previously been documented by Mr. Schulte, which he then determined was an independent basis to fail the Ford Explorer on visual inspection. While it is determined that the presence of this hole did not constitute a "modification" that justified failing the vehicle, respondent's inspection was thorough enough to locate this condition.

38. *Respondent's Additional Testimony*: Respondent testified that he is a second generation smog technician who learned the smog business from his father, and who performs "a couple hundred" smog inspections a month. He is an Army veteran and has been a smog technician for approximately 10 years.

Respondent cares deeply about his smog business and his customers. He lives in a small town, so he sees these customers in his daily life. He tries to be honest and to work with members of the community who are having a hard time financially. He prides himself on explaining car problems to his customers and on giving them refunds when appropriate. Respondent feels passionately that the Bureau is "setting up" smog technicians and shops in his community. He denies that he tested any cars, including Bureau cars, any differently or off a list. He tests each car as it is presented and he considers it his responsibility to fail vehicles, not to pass them, when there is a doubt. Even though it was on the Smogtechnews.Com list, respondent passed the Chevy Tahoe because there was nothing wrong with it.

Regarding his previous citations, respondent accepted responsibility for those cases and completed the required education or paid the fine. He disputes the Accusation because he believes he did nothing wrong in his inspection of either the Ford Explorer or the Plymouth Sundance. Respondent wishes to keep his licenses and believes he was not wrong in issuing failing smog inspections to these vehicles.

39. *Discussion*: The Bureau met its burden of establishing that respondent failed to conduct the visual and functional inspections of the Ford Explorer's and Plymouth Sundance's emission control systems in accordance with proper procedures and erroneously issued failing VIRs to these vehicles, when they should have passed inspection. Respondent did not establish that the Bureau engaged in illegal, fraudulent, or discriminatory activity in the course of this specific undercover operation. The Bureau's undercover operations are an important part of the Program's focus on vigorous enforcement, which is designed to ensure that smog inspections are conducted properly and to thereby protect the public health. Respondent's belief that, when there is doubt, his job is to fail rather than to pass a vehicle can be seen as consistent with this goal. Respondent's anger and mistrust of Bureau employees is concerning, particularly to the extent that it allows him to place blame on a governmental bureaucracy rather than learning how to improve his skills and services in the smog industry. In the past, however, respondent has fully cooperated with the fines and training required by his citations. The violations found

in this matter are not sufficient in themselves to justify an outright revocation of respondent's licenses. Considering the record as a whole, it would not be contrary to the public interest to place respondent's licenses on probation as set forth in the order below.

Costs

40. In his August 21, 2012 Declaration in support of complainant's motion for costs, William D. Thomas, Enforcement Program Manager I, declared that the Bureau incurred a total of $8,247.52 in costs during the fiscal years (FY) of 2010 through 2011, and 2011 through 2012, relating to GV Smog. The costs incurred were itemized in an attachment entitled "Investigative and Other Costs." This attachment reflects that, with the exception of $160 attributable to undercover ("u/c") runs, these expenses were for 21 hours of Program Representative I Investigator Costs during FY 2010 through 2011 and 91 hours of Program Representative I Investigator Costs in FY 2011 through 2012.

41. There is insufficient evidence to award the full amount of Investigator Costs reflected in the attachment to Mr. Thomas' Declaration. The evidence and declarations from the Program Representatives I in this case who documented the two vehicles at issue was substantially completed by June 30, 2011. Mr. Thomas' Declaration provides no explanation for the 91 hours of Investigator Costs billed in FY 2011 – 2012. This unexplained number also raises concern that costs pertaining to the undercover run of the third vehicle, which did not result in the filing of any charges against respondent, may be included in this summary. In the absence of such explanation, the FY 2011-2012 hours are reduced to $2,000. As adjusted, the total of reasonable investigative costs is $3,776.41 ($1,616.41 for FY 10/11; $2,000 for FY 11/12; and $160 in cost of u/c runs).

42. Complainant also submitted the August 30, 2012 Declaration Deputy Attorney General Patrick M. Kenady, who was assigned to this matter on October 5, 2011. Mr. Kenady submitted the Department of Justice's (DOJ's) Costs of Suit Summary and Matter Time Activity by Professional Type printouts itemizing legal costs. This declaration establishes that DOJ has billed the Bureau a total of $5,227.50 for legal services on this case through August 28, 2012. These costs are reasonable.

43. As adjusted, the reasonable costs of the Bureau's investigation and enforcement in this matter are $9,003.91.

44. Regarding the Bureau's request for costs, respondent noted that he is a Test Only Station and is not rich. He does enough work to pay his bills and to keep afloat. Respondent gives discounts to people and, if they cannot afford to pay, he lets them pay on time. He cannot afford the amount of costs the Bureau is asking.

LEGAL CONCLUSIONS

1. In revocation proceedings, the Bureau must prove that charges in the Accusation are true and it must do so using the preponderance of the evidence standard. (*Imports Performance et al. v. Department of Consumer Affairs, Bureau of Automotive Repair* (2nd Dist. 2011) 201 Cal.App.4th 911, 916-918.) Respondent has the burden of establishing any affirmative defenses.

2. Business and Professions Code section 9884.7, subdivision (a), provides that, where the automotive repair dealer cannot show there was a bona fide error, the director may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer: "(1) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading...."

3. The director may suspend, revoke, or take other disciplinary action against a license if the licensee "violates any section of this chapter and the regulations adopted pursuant to it, which relate to the licensed activities," or "violates any of the regulations adopted by the director pursuant to this chapter." (Health & Saf. Code, § 44072.2, subds. (a) and (c).) Disciplinary actions include imposing probation upon terms and conditions to be set forth by the director. (Health & Saf. Code, § 44072.4.)

4. Qualified smog check technicians shall perform tests of emission control devices and systems in accordance with section 44012. (§ 44032.) Pursuant to section 44012, subdivision (f), the test at the smog check stations "shall be performed in accordance with procedures prescribed by the department," which shall ensure, *inter alia*, that "a visual or functional check is made of emission control devices specified by the department, including the catalytic converter in those instances in which the department determines it to be necessary to meet the findings of section 44001. The visual or functional check shall be performed in accordance with procedures prescribed by the department."

5. Health and Safety Code section 44035, subdivision (a), provides that "a smog check station's license or a qualified smog check technician's qualification may be suspended or revoked by the department, after a hearing, for failure to meet or maintain the standards prescribed for qualification, equipment, performance, or conduct..." Smog check stations and smog check technicians are required to conduct tests and inspections in accordance with the Bureau's emissions inspections specifications. (Cal. Code Regs., tit. 16, § 3340.42.) A smog check technician shall inspect, test and repair vehicles in accordance with Health and Safety Code sections

44012 and 44035, and with 16 CCR section 3340.42. (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).)

6. As set forth in the Factual Findings and Legal Conclusions as a whole, cause exists to discipline respondent's Automotive Repair Dealer Registration ARD No. 251208 for G V Smog, based upon respondents' violation of Business and Professions Code section 9884.7, subdivision (a)(1), by issuing a failing Certificate of Compliance/VIR to the Ford Explorer on June 21, 2011 and to the Plymouth Sundance on June 23, 2011.

7. As set forth in the Factual Findings and Legal Conclusions as a whole, cause exists to discipline respondent's Smog Check Station License No. 251208, based upon respondents' failure to comply with Health and Safety Code section 44072.2, subdivisions (a) and (c), by not conducting the visual and functional inspections of the emission control systems and devices of the Ford Explorer and the Plymouth Sundance in accordance with procedures described by the department and Bureau specifications as required by Health and Safety Code section 44012, subdivision (f), and 16 CCR, section 3340.42.

8. As set forth in the Factual Findings and Legal Conclusions as a whole, cause exists to discipline respondent Gregory Ferguson's Advanced Emission Specialist Technician License No. EA 146069, based upon his failure to comply with Health and Safety Code section 44072.2, subdivisions (a) and (c), by not conducting the visual and functional inspections of the emission control systems and devices of the Ford Explorer and the Plymouth Sundance in accordance with procedures described by the department and Bureau specifications as required by Health and Safety Code sections 44012, subdivision (f), and 44035, and with 16 CCR sections 3340.30, subdivision (a), and 3340.42.

9. Pursuant to Business and Professions Code section 125.3, respondent may be directed to pay the reasonable costs of investigation and enforcement of the action against his licenses. As set forth in Factual Finding 40 through 43, the reasonable costs of the Bureau's investigation and prosecution of this case against respondent's licenses is $9,003.91.

Factors considered in determining the reasonableness of costs include: whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. *(Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32.)

Respondent's testimony and presentation of his case have been considered in determining appropriate costs. Respondent shall be ordered to pay to the Bureau a

total of $9,003.91, pursuant to a reasonable payment plan over the course of his probation.

ORDER

The Automotive Repair Dealer Registration Number ARD 251208, the Smog Check, Test Only, Station License Number TC 251208, and the Advanced Emission Specialist Technician License Number EA 146069 issued to respondent Gregory Steven Ferguson, aka Gregory S. Ferguson, Owner, GV SMOG, are hereby REVOKED. Revocation is STAYED, and respondent's licenses are placed on a two (2) year probation, subject to the following terms and conditions:

1. During the period of probation, respondent shall:

   a. 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, report any financial interest which any partners, officers, or owners of the respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

   d. Provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs or smog inspections, 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.

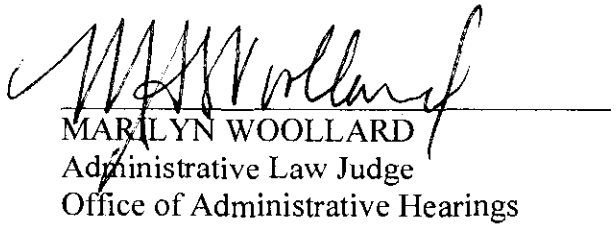
2. During the period of probation, respondent shall attend and successfully complete a Bureau certified training course in diagnosis and repair of emission systems failures and engine performance, applicable to the class of license held by the respondent. Said course

shall be completed and proof of completion submitted to the Bureau within 60 days of the effective date of this decision and order, or within other time period as agreed by the Bureau. If proof of completion of the course is not furnished to the Bureau within this time period, respondent's license shall be immediately suspended until such proof is received.

3. Respondent shall pay $9,003.91 to the Bureau pursuant to a reasonable payment plan. Payment must be completed prior to completion of probation.

4. Upon successful completion of probation, respondent's licenses shall be restored without condition.

DATED: March 7, 2013



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

In the Matter of the Accusation Against: **G V SMOG** **GREGORY STEVEN FERGUSON,** **aka GREGORY S. FERGUSON, OWNER** **1641 East Main Street, #B** **Grass Valley, CA 95945** **Automotive Repair Dealer Reg. No. ARD 251208** **Smog Check, Test Only, Station License No. TC 251208** **and** **GREGORY S. FERGUSON** **140 Manor Drive** **Grass Valley, CA 95945** **Advanced Emission Specialist Technician License No. EA 146059** Respondents.	Case No. 79/12-78 **ACCUSATION** **(Smog Check)**

Complainant alleges:

PARTIES

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

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G V Smog; Gregory Steven Ferguson aka Gregory S. Ferguson, Owner

2. In or about 2007, the Director of Consumer Affairs ("Director") issued Automotive Repair Dealer Registration Number ARD 251208 ("registration") to Gregory Steven Ferguson, also known as Gregory S. Ferguson ("Respondent"), owner of G V Smog. Respondent's registration was in full force and effect at all times relevant to the charges brought herein and will expire on June 30, 2012, unless renewed.

3. On or about August 31, 2007, the Director issued Smog Check, Test Only, Station License Number TC 251208 ("smog check station license") to Respondent. Respondent's smog check station license was in full force and effect at all times relevant to the charges brought herein and will expire on June 30, 2012, unless renewed.

Gregory S. Ferguson

4. In or about 2003, the Director issued Advanced Emission Specialist Technician License Number EA 146059 ("technician license") to Respondent. Respondent's technician license was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2013, unless renewed.

JURISDICTION

5. Business and Professions Code ("Bus. & Prof. Code") section 9884.7 provides that the Director may revoke an automotive repair dealer registration.

6. Bus. & Prof. Code section 9884.13 provides, in pertinent part, that the expiration of a valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary proceeding against an automotive repair dealer or to render a decision temporarily or permanently invalidating (suspending or revoking) a registration.

7. Health and Safety Code ("Health & Saf. Code") section 44002 provides, in pertinent part, that the Director has all the powers and authority granted under the Automotive Repair Act for enforcing the Motor Vehicle Inspection Program.

8. Health & Saf. Code section 44072.6 provides, in pertinent part, that the expiration or suspension of a license by operation of law, or by order or decision of the Director of Consumer

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Affairs, or a court of law, or the voluntary surrender of the license shall not deprive the Director of jurisdiction to proceed with disciplinary action.

STATUTORY PROVISIONS

9. Bus. & Prof. Code section 9884.7 states, in pertinent part:

> (a) The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer.
>
> (1) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.
>
> . . . .
>
> (c) Notwithstanding subdivision (b), the director may suspend, revoke, or place on probation 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.

10. Bus. & Prof. Code section 22, subdivision (a), states:

> "Board" as used in any provision of this Code, refers to the board in which the administration of the provision is vested, and unless otherwise expressly provided, shall include "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency."

11. Bus. & Prof. Code section 477, subdivision (b), states, in pertinent part, that a "license" includes "registration" and "certificate."

12. Health & Saf. Code section 44072.2 states, in pertinent part:

> The director may suspend, revoke, or take other disciplinary action against a license as provided in this article if the licensee, or any partner, officer, or director thereof, does any of the following:
>
> (a) Violates any section of this chapter [the Motor Vehicle Inspection Program (Health and Saf. Code § 44000, et seq.)] and the regulations adopted pursuant to it, which related to the licensed activities.
>
> . . . .
>
> (c) Violates any of the regulations adopted by the director pursuant to this chapter . . .

13. Health & Saf. Code section 44072.8 states that when a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director.

COST RECOVERY

14. Bus. & Prof. Code section 125.3 provides, in pertinent part, that a Board may request the administrative law judge to direct a licentiate 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.

UNDERCOVER OPERATION #1: 1998 FORD EXPLORER

15. On June 21, 2011, a representative of the Bureau, acting in an undercover capacity ("operator"), took the Bureau's 1998 Ford Explorer to Respondent's facility and requested a smog inspection. All of the required emission control devices and systems on the Bureau-documented vehicle were present and properly connected. The operator signed and received a copy of a written estimate. After the inspection was completed, the operator paid the facility $60 and received copies of an invoice and a vehicle inspection report ("VIR"). The VIR indicated that the PCV (positive crankcase ventilation) system and catalytic converter were both modified and had failed the visual inspection, resulting in the vehicle's failure of the overall inspection.

16. On June 22, 2011, the Bureau performed a Two Speed Idle ("TSI") California Emission Inpection test on the vehicle. The vehicle passed all portions of the test, including the visual inspection. The Bureau found that the facility had improperly failed the PCV system and catalytic converter, as set forth below.

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

17. Respondent's registration is subject to disciplinary action pursuant to Bus. & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized statements which he knew or in the exercise of reasonable care should have known to be untrue or misleading, as follows: Respondent certified under penalty of perjury on the VIR that the information listed on the VIR was true and correct, and that the PCV system and catalytic converter on the Bureau's

1998 Ford Explorer were modified and had failed the visual inspection. In fact, the PCV system and catalytic converter were fitted with the correct parts, were not damaged or modified, were properly installed on the vehicle, and should have passed the visual inspection.

SECOND CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

18. Respondent's smog check station license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with section 44012, subdivision (f), of that Code, as follows: Respondent failed to perform the visual inspection of the emission control systems and devices on the Bureau's 1998 Ford Explorer in accordance with procedures prescribed by the department.

THIRD CAUSE FOR DISCIPLINE

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

19. Respondent's smog check station license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to comply with provisions of California Code of Regulations, title 16, section 3340.42, as follows: Respondent failed to conduct the required smog tests on the Bureau's 1998 Ford Explorer in accordance with the Bureau's specifications.

FOURTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

20. Respondent's technician license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with section 44012, subdivision (f), of that Code, as follows: Respondent failed to perform the visual inspection of the emission control systems and devices on the Bureau's 1998 Ford Explorer in accordance with procedures prescribed by the department.

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FIFTH CAUSE FOR DISCIPLINE

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

21. Respondent's technician license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test the Bureau's 1998 Ford Explorer in accordance with Health & Saf. Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

b. **Section 3340.42:** Respondent failed to conduct the required smog tests on the Bureau's 1998 Ford Explorer in accordance with the Bureau's specifications.

UNDERCOVER OPERATION #2: 1990 PLYMOUTH SUNDANCE

22. On June 23, 2011, a representative of the Bureau, acting in an undercover capacity ("operator"), took the Bureau's 1990 Plymouth Sundance to Respondent's facility and requested a smog inspection. All of the required emission control devices and systems on the Bureau-documented vehicle were present, properly connected, and in good working condition. The operator signed and received a copy of a written estimate. After the inspection was completed, the operator paid the facility $60 and received copies of an invoice and VIR. The VIR indicated that the vehicle's ignition timing had failed the functional check, resulting in the vehicle's failure of the overall inspection.

23. On June 24, 2011, the Bureau performed Acceleration Simulation Mode and TSI California Emission Inspection tests on the vehicle. The vehicle passed all portions of both tests, including the functional check. The Bureau found that the facility had improperly failed the ignition system, as set forth below.

SIXTH CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

24. Respondent's registration is subject to disciplinary action pursuant to Bus. & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized statements which

he knew or in the exercise of reasonable care should have known to be untrue or misleading, as follows: Respondent certified under penalty of perjury on the VIR that the information listed on the VIR was true and correct and that the Bureau's 1990 Plymouth Sundance had failed the functional ignition timing test. In fact, all of the required emission control devices and systems on the vehicle were present, properly connected, and in good working condition, and the vehicle should have passed all portions of the smog inspection, including the functional check.

SEVENTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

25. Respondent's smog check station license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with section 44012, subdivision (f), of that Code, as follows: Respondent failed to perform the functional check of the emission control systems and devices on the Bureau's 1990 Plymouth Sundance in accordance with procedures prescribed by the department.

EIGHTH CAUSE FOR DISCIPLINE

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

26. Respondent's smog check station license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to comply with provisions of California Code of Regulations, title 16, section 3340.42, as follows: Respondent failed to conduct the required smog tests on the Bureau's 1990 Plymouth Sundance in accordance with the Bureau's specifications.

NINTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

27. Respondent's technician license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with section 44012, subdivision (f), of that Code, as follows: Respondent failed to perform the functional check of the emission control systems and devices on the Bureau's 1990 Plymouth Sundance in accordance with procedures prescribed by the department.

TENTH CAUSE FOR DISCIPLINE

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

28. Respondent's technician license is subject to disciplinary action pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.30, subdivision (a)**: Respondent failed to inspect and test the Bureau's 1990 Plymouth Sundance in accordance with Health & Saf. Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

b. **Section 3340.42**: Respondent failed to conduct the required smog tests on the Bureau's 1990 Plymouth Sundance in accordance with the Bureau's specifications.

MATTERS IN AGGRAVATION

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

a. On or about December 21, 2007, the Bureau issued Citation No. C08-0579 against Respondent, in his capacity as owner of G V Smog, for violations of Health & Saf. 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 ("Regulation") 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). On December 18, 2007, Respondent issued a certificate of compliance to a Bureau undercover vehicle with a missing pulse air injection ("PAIR") system. The Bureau assessed civil penalties totaling $500 against Respondent for the violations. Respondent paid the fine on February 21, 2008.

b. On or about June 18, 2008, the Bureau issued Citation No. C08-1103 against Respondent, in his capacity as owner of G V Smog, for violations of Health & Saf. Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the department); and Regulation 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). On June 3, 2008,

Respondent issued a certificate of compliance to a Bureau undercover vehicle with a missing thermostatic air cleaner hot air tube ("ACL"). The Bureau assessed civil penalties totaling $1,000 against Respondent for the violations. Respondent paid the fine on August 21, 2008.

c. On or about December 1, 2005, the Bureau issued Citation No. M06-0277 against Respondent's technician license for violations of Health & Saf. Code section 44032 (qualified technicians shall perform tests of emission control systems and devices in accordance with Health & Saf. Code section 44012); and Regulation 3340.30, subdivision (a) (qualified technicians shall inspect, test and repair vehicles in accordance with Health & Saf. Code sections 44012 and 44035 and Regulation 3340.42). On or about November 22, 2005, Respondent issued a certificate of compliance to a Bureau undercover vehicle with a missing air injection system. Respondent was directed to complete an 8 hour training course and to submit proof of completion to the Bureau within 30 days from receipt of the citation. Respondent completed the training on January 20, 2006.

d. On or about May 9, 2006, the Bureau issued Citation No. M06-0712 against Respondent's technician license for violations of Health & Saf. Code section 44032 (qualified technicians shall perform tests of emission control systems and devices in accordance with Health & Saf. Code section 44012); and Regulation 3340.30, subdivision (a) (qualified technicians shall inspect, test and repair vehicles in accordance with Health & Saf. Code sections 44012 and 44035 and Regulation 3340.42). On or about March 9, 2006, Respondent issued a certificate of compliance to a Bureau undercover vehicle with a missing PCV system. Respondent was directed to complete a 16 hour training course and to submit proof of completion to the Bureau within 30 days from receipt of the citation. Respondent completed the training on July 27, 2006.

e. On or about December 21, 2007, the Bureau issued Citation No. M08-0580 against Respondent's technician license for violations of Health & Saf. Code section 44032 (qualified technicians shall perform tests of emission control systems and devices in accordance with Health & Saf. Code section 44012); and Regulation 3340.30, subdivision (a) (qualified technicians shall inspect, test and repair vehicles in accordance with Health & Saf. Code sections 44012 and 44035 and Regulation 3340.42). On or about December 18, 2007, Respondent issued a certificate of

compliance to a Bureau undercover vehicle with a missing PAIR system. Respondent was directed to complete an 8 hour training course and to submit proof of completion to the Bureau within 30 days from receipt of the citation. Respondent completed the training on February 27, 2008.

f. On or about June 18, 2008, the Bureau issued Citation No. M08-1104 against Respondent's technician license for violations of Health & Saf. Code section 44032 (qualified technicians shall perform tests of emission control systems and devices in accordance with Health & Saf. Code section 44012); and Regulation 3340.30, subdivision (a) (qualified technicians shall inspect, test and repair vehicles in accordance with Health & Saf. Code sections 44012 and 44035 and Regulation 3340.42). On or about June 3, 2008, Respondent issued a certificate of compliance to a Bureau undercover vehicle with a missing ACL. Respondent was directed to complete a 16 hour training course and to submit proof of completion to the Bureau within 30 days from receipt of the citation. Respondent completed the training on August 19, 2008.

OTHER MATTERS

30. Pursuant to Bus. & Prof. Code section 9884.7, subdivision (c), the Director may suspend, revoke, or place on probation the registration for all places of business operated in this state by Respondent Gregory Steven Ferguson, also known as Gregory S. Ferguson, owner of G V Smog, upon a finding that Respondent has, or is, engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

31. Pursuant to Health & Saf. Code section 44072.8, if Smog Check Test Only, Station License Number TC 251208, issued to Respondent Gregory Steven Ferguson, also known as Gregory S. Ferguson, owner of G V Smog, is revoked or suspended, any additional license issued under this chapter in the name of said licensee may be likewise revoked or suspended by the Director.

32. Pursuant to Health & Saf. Code section 44072.8, if Advanced Emission Specialist Technician License Number EA 146059, issued to Gregory S. Ferguson, is revoked or suspended, any additional license issued under this chapter in the name of said licensee may be likewise revoked or suspended by the Director.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Director of Consumer Affairs issue a decision:

1. Revoking or suspending Automotive Repair Dealer Registration Number ARD 251208, issued to Gregory Steven Ferguson, also known as Gregory S. Ferguson, owner of G V Smog;

2. Revoking or suspending any other automotive repair dealer registration issued to Gregory Steven Ferguson, also known as Gregory S. Ferguson;

3. Revoking or suspending Smog Check, Test Only, Station License Number TC 251208, issued to Gregory Steven Ferguson, also known as Gregory S. Ferguson, owner of G V Smog;

4. Revoking or suspending Advanced Emission Specialist Technician License Number EA 146059, issued to Gregory S. Ferguson;

5. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Gregory Steven Ferguson, also known as Gregory S. Ferguson;

6. Ordering Gregory Steven Ferguson, also known as Gregory S. Ferguson, individually, and as owner of G V Smog, to pay the Director of Consumer Affairs the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

7. Taking such other and further action as deemed necessary and proper.

DATED: 2/9/12

Sherry Mehl by Doug Bala
SHERRY MEHL
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

DOUG BALA
Assist Chief

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