

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

In the Matter of the Accusation Against:

Case No.: 79/18-2714

SMOG TECH PROS
SHAHNAWAZ KHAN, Owner
10751 Folsom Blvd., Unit B
Rancho Cordova, CA 95670

OAH No.: 2018100780

Automotive Repair Dealer Registration No.:
ARD 272701
Smog Check Station License No.: TC 272701,

and

KEVIN HUMBERTO CRUZ
4220 Melisa Court
Carmichael, CA 95608

Smog Check Inspector License No.: EO
152826
Smog Check Repair Technician License No.:
EI 152826

OTHER RELATED LICENSES

SMOG TECH PROS
SHAHNAWAZ KHAN, Owner
2411 Howe Avenue
Sacramento, CA 95825

Automotive Repair Dealer Registration No.:
ARD 277349
Smog Check Station License No.: TC 277349
and

SMOG TECH PROS
SHAHNAWAZ KHAN, Owner
2701 Riverside Blvd., Unit A
Sacramento, CA 95818

Mailing Address:

946 S. Central Avenue
Lodi, CA 95240

Automotive Repair Dealer Registration No.:
ARD 271346
Smog Check Station License No.: TC 271346

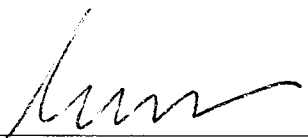
Respondents.

DECISION

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

This Decision shall become effective at 5:00 PM on July 30, 2019.

DATED: June 25, 2019



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

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STATE OF CALIFORNIA

In the Matter of the Accusation Against:

SMOG TECH PROS
SHAHNAWAZ KHAN, OWNER
10751 Folsom Blvd., #B
Rancho Cordova, CA 95670

Automotive Repair Dealer Registration
No. 272701: Smog Check, Test Only, Station
License No. TC 272701¹

and

KEVIN HUMBERTO CRUZ
Smog Check Inspector License No. EO
152826: Smog Check Repair Technician
License No. EI 152826²

Respondents.

Case No. 79/18-2714

OAH No. 2018100780

PROPOSED DECISION

This matter was heard before Marcie Larson, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 9, 2019, in Sacramento, California.

Kristina Jarvis, Deputy Attorney General, represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department).

¹ Respondent holds additional Automotive Repair Dealer registrations and Station licenses listed in Factual Findings 2 and 3.

² Effective on January 10, 2019, respondent Humberto Cruz entered into a Stipulated Revocation of his license. As of the hearing, he was no longer party to the action.

William Ferreira, Attorney at Law, represented respondent Shahnawaz Khan, owner of Smog Tech Pros, who was present at the hearing.

Evidence was received, the record was closed, and the matter was submitted on April 9, 2019.

FACTUAL FINDINGS

Background and Jurisdiction

1. Respondent is the owner Smog Tech Pros, with one location in Rancho Cordova and two locations in Sacramento. The facilities are smog check, test only. Respondent holds Automotive Repair Dealer registrations and Station licenses for each facility. Specifically, on April 26, 2013, the Bureau issued respondent, owner of Smog Tech Pros located at 10751 Folsom Blvd. #B, Rancho Cordova, California 95670 (Rancho facility) Automotive Repair Dealer Registration No. ARD 272701 (Rancho registration). The Rancho registration was in full force and effect at all times relevant to the proceedings. The Rancho registration will expire on April 30, 2020, unless renewed or revoked. The Rancho facility received STAR Station certification on July 12, 2013.

On May 13, 2013, the Bureau issued respondent Smog Check, Test Only, Station License No. TC 272701, for the Rancho facility (Rancho license.) The Rancho license was in full force and effect at all times relevant to the proceedings. The Rancho license will expire on April 30, 2020, unless renewed or revoked. All of the allegations in the Accusation arose out of events that took place at the Rancho facility, involving respondent Cruz.

2. On July 25, 2014, the Bureau issued respondent, owner of Smog Tech Pros located at 2411 Howe Avenue, Sacramento, California 95825 (Howe facility) Automotive Repair Dealer Registration No. ARD 277349 (Howe registration). The Howe registration was in full force and effect at all times relevant to the proceedings. The registration will expire on July 31, 2019, unless renewed or revoked. The facility received STAR Station certification on January 23, 2015.

On September 10, 2014, the Bureau issued respondent Smog Check, Test Only, Station License No. TC 277349, for the Howe facility (Howe license.) The Howe license was in full force and effect at all times relevant to the proceedings. The Howe license will expire on July 31, 2019, unless renewed or revoked.

3. On January 4, 2013, the Bureau issued respondent, owner of Smog Tech Pros located at 2701 Riverside Blvd. #A, Sacramento, California, 95818 (Riverside facility) Automotive Repair Dealer Registration No. ARD 271346 (Riverside registration). The Riverside registration was in full force and effect at all times relevant to the proceedings.

The registration will expire on January 31, 2020, unless renewed or revoked. The facility received STAR Station certification on April 12, 2013.

On January 14 2013, the Bureau issued respondent Smog Check, Test Only, Station License No. TC 271346, for the Riverside facility (Riverside license.) The Riverside license was in full force and effect at all times relevant to the proceedings. The Station license will expire on January 31, 2020, unless renewed or revoked.

4. In 2006, the Bureau issued Humberto Cruz, Advanced Emission Specialist Technician License No. EA 152826. Effective on September 20, 2013, respondent Cruz's Advanced Emission Specialist Technician License was renewed as Smog Check Inspector License No. EO 152826 (EO license) and Smog Check Repair Technician License No. EI 152826, which expired on October 31, 2015. Mr. Cruz's EO license was in full force and effect at all times relevant to the proceedings. Effective on January 10, 2019, Mr. Cruz surrendered his license.

5. On August 7, 2018, complainant signed and thereafter filed an Accusation against respondent and Mr. Cruz. Complainant alleged that respondent's registrations and licenses are subject to discipline for violating the Bureau's laws and regulations related to the "clean plugging" of 10 vehicles at the Rancho facility. Clean plugging is a process in which a fraudulent smog certificate of compliance is generated by the facility.

6. Respondent timely appealed the Accusation.³ The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

7. On September 30, 2018, Mr. Cruz signed a Stipulated Revocation of License (Stipulated Revocation), in which he admitted to the truth of each and every charge in the Accusation and agreed that causes exist to discipline his licenses. Mr. Cruz agreed to the revocation of his licenses and to be "jointly and severally liable" with respondent for the costs of investigation and enforcement "in the amount of \$3,120.83, which must be paid in full prior to issuance of a new or reinstated license."⁴

Clean Plugging Investigation

8. California's Smog Check Program requires motor vehicle owners to have their vehicles pass a smog inspection and obtain a Certificate of Compliance every two years in

³ The Accusation, page 16, line 2, contained a typographical error: the "6" on the "106" was stricken.

⁴ The "Sixth" through "Eighth" Causes for Discipline are only pled against Mr. Cruz. As a result of the Stipulated Revocation, these causes for discipline are not addressed in the Proposed Decision.

order to renew their vehicle registration and when a vehicle's title is transferred. The purpose of the Smog Check Program is to reduce air pollution by identifying and requiring the repair of polluting motor vehicles. The smog inspections are performed by Smog Check inspectors at Smog Check Stations. Both the inspectors and stations are licensed by the Bureau.

9. Nicholas Magana, Program Representative for the Bureau, prepared a report and testified at hearing concerning the Smog Check Program and the role of the Bureau in ensuring the laws and regulations governing the Smog Check Program are correctly implemented by licensees. When performing a smog inspection, the smog inspector performs visual, functional and diagnostic tests of the vehicle, to ensure the emission control components are present and properly functioning.

10. Mr. Magana explained in his report that on March 9, 2015, the Smog Check Program was updated to require the "use of an On-Board Diagnostic Inspection System (BAR-OIS)," which is smog check equipment required when inspecting "most model-year 2000 and newer gasoline and hybrid vehicles and 1998 and newer diesel vehicles." The BAR-OIS "consists of a certified Data Acquisition Device (DAD) computer, bar code scanner, and printer." The "DAD is an On-Board Diagnostic (OBD) scan tool, that when required by the California BAR-OIS software, retrieves OBD data from the vehicle." The BAR-OIS is used to input technician information, the physical Vehicle Identification Number (VIN), and the Department of Motor Vehicles (DMV) renewal information. Once connected, the DAD retrieves an electronic VIN (eVIN) from the OBD.

11. Mr. Magana also explained that the data retrieved, captured and recorded to the Bureau's Vehicle Information Database (VID) during a BAR-OIS Smog Check inspection includes the eVIN, which is preprogrammed by the manufacturer of 2005 and newer vehicles into the vehicle's Powertrain Control Module (PCM). The eVIN should match the VIN located on the vehicle. Data retrieved also includes that "communication protocol, which is the specific 'language' the PCM uses to relay or communicate information to scan tools and other computers or devices such as the BAR-OIS." The "communication protocol is programmed into the vehicle's on-board computer" during the manufacturing process. Additionally, the "number of Parameter Identifications (PIDs), which is the number of specific data values each PCM reports related to emission controls." The "PIDs are data points reported by the vehicle's on-board computer to a scan tool or BAR-OIS."

12. The BAR-OIS software determines whether the vehicle passes the smog inspection, which is based on the visual, functional and OBD tests. Mr. Magana explained that once the smog inspection is completed, the "printer provides a Vehicle Inspection Report (VIR) containing inspection results for motorist and a Smog Check Certificate of Compliance number for passing vehicles." The Smog Check inspector must sign the VIR certifying that the inspection was performed in compliance with the applicable laws and regulations.

The Bureau's VID for a vehicle "contains registration data from DMV plus emission standards, vehicle Smog Check inspections, smog check stations and inspectors, and Certificates of Compliance." The Bureau can retrieve the VID information to review smog check results for a vehicle. Mr. Magana explained the Bureau can use the VID information to investigate methods used by smog check stations and inspectors who fraudulently issue smog certificates, which is referred to as "clean plugging," which refers to a "method by which another vehicle's properly functioning OBD II system, or another source, is used to generate passing data readings or diagnostic information for the purpose of fraudulently issuing smog certificates to vehicles that are not in smog compliance or not present for testing."

13. Mr. Magana conducted a review of the VID data for the Rancho facility. He determined there was a "pattern of vehicles being certified with communication protocols and PID amounts that do not match the expected protocols or PID amounts for the vehicles being certified." Mr. Magana identified 10 vehicles inspected at the Rancho facility by Mr. Cruz, that were clean plugged between June and December 2017.

In determining the vehicles had been clean plugged, Mr. Magana reviewed information about each vehicle and smog inspection, including the VIN, the Smog Check Certificate number issued which is purchased by the facility and contains the facility and technician's information, the eVIN, the communication protocol, the PID count and data for similar or "like" vehicles which is "derived and compiled from tests conducted statewide on vehicles that have certain matching VIN characters." Mr. Magana prepared a declaration and table of information he reviewed for each vehicle that was clean plugged.

VEHICLE NO. 1

14. Vehicle No. 1 is a 2007 Chevrolet Silverado K2500 Heavy Duty (2007 Chevrolet), VIN No. 1GCHK23677F540591. The 2007 Chevrolet was tested at the Rancho facility on June 16, 2017, and was issued smog certificate ZX339053C, under Mr. Cruz's EO license. Statewide, 96.7 percent of the 1,000 comparative 2007 Chevrolet vehicles reported the eVIN, an expected communication protocol of ICAN11bt5, and an expected PID count of 34/8/3 or 34/9/3. However, the OIS test date for the 2007 Chevrolet transmitted on June 16, 2017, shows that the eVIN was not transmitted, the communication protocol transmitted was JPWM and the PID count was 19.

15. The 2007 Chevrolet had a previous smog test performed on November 13, 2014. The test data shows that the eVIN transmitted was 1GCHK23677F540591, the communication protocol was ICAN11bt5, and the PID count was 34/9/3, which are consistent with the expected OIS test data and similar vehicles OIS test data.

16. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2007 Chevrolet being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 2

17. Vehicle No. 2 is a 2013 Chevrolet Cruze LT (2013 Chevrolet), VIN No. 1G1PC5SB3D7204783. The 2013 Chevrolet was tested at the Rancho facility on August 1, 2017, and was issued smog certificate HD064248C, under Mr. Cruz's EO license. Statewide, 99.8 percent of the 1,000 comparative 2013 Chevrolet vehicles reported the eVIN, an expected communication protocol of ICAN11bt5, and an expected PID count of 41/4/5 or 41/7/5. However, the OIS test date for the 2013 Chevrolet transmitted on August 1, 2017, shows that the eVIN transmitted was 1GNEK13T53R173614, the communication protocol transmitted was JPWM and the PID count was 22.

18. Mr. Magana determined that the vehicle used to generate the fraudulent Smog Certificate of Compliance, was a 2003 Chevrolet Tahoe K1500, VIN No. 1GNEK13T53R173614. The 2003 Chevrolet Tahoe was certified on the same day as the 2013 Chevrolet. The OIS Test data for the 2003 Chevrolet Tahoe matches the OIS Test Data for the fraudulent inspection of the 2013 Chevrolet.

19. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2013 Chevrolet being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 3

20. Vehicle No. 3 is a 2007 Dodge Magnum SXT (2007 Dodge), VIN No. 2D4FV47V67H620915. The 2007 Chevrolet was tested at the Rancho facility on October 6, 2017, and issued smog certificate No. HH158309C, under Mr. Cruz's EO license. Statewide, 98.4 percent of the 1,000 comparative 2007 Dodge vehicles reported the eVIN, an expected communication protocol of ICAN11bt5, and an expected PID count of 41, 43/12, or 43/6. However, the OIS test date for the 2007 Dodge transmitted on October 6, 2017, shows that the eVIN was not transmitted, the communication protocol transmitted was 1914 and the PID count was 16.

21. The 2007 Dodge had a previous smog test performed on September 8, 2016. The test data shows that the eVIN transmitted was 2D4FV47V67H620915, the communication protocol was ICAN11bt5, and the PID count was 43/12, which were all consistent with the expected OIS test data and similar vehicles OIS test data.

22. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2007 Dodge being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 4

23. Vehicle No. 4 is a 2005 Chevrolet Corvette (2005 Corvette), VIN No. 1G1YY24U455109214. The 2005 Corvette was tested at the Rancho facility on October 19,

2017, and issued smog certificate No. HHH58339C, under Mr. Cruz's EO license. Statewide, 98.7 percent of the 1,000 comparative 2005 Corvette vehicles reported the eVIN, an expected communication protocol of ICAN11bt5, and an expected PID count of 43, or 43/7. However, the OIS test date for the 2005 Corvette transmitted on October 19, 2017, shows that the eVIN was transmitted as 3GNFK16Z65G251082, the communication protocol transmitted was JVPW and the PID count was 22.

24. Mr. Magana determined that the vehicle used to generate the fraudulent Smog Certificate of Compliance, was a 2005 Chevrolet Suburban K1500, VIN No. 3GNFK16Z65G251082. The 2005 Chevrolet Suburban was certified on the same day as the 2005 Corvette. The OIS Test data for the 2005 Chevrolet Suburban matches the OIS Test Data for the fraudulent inspection of the 2005 Corvette.

25. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2005 Corvette being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 5

26. Vehicle No. 5 is a 2008 Dodge Sprinter 2500 (2008 Dodge), VIN No. WD0PE745385297723. The 2008 Dodge was tested at the Rancho facility on October 23, 2017, and issued smog certificate No. HH619360C, under Mr. Cruz's EO license. Statewide, 98.8 percent of the 424 comparative 2008 Dodge vehicles reported the eVIN, an expected communication protocol of ICAN11bt5, and an expected PID count of 32. However, the OIS test date for the 2008 Dodge transmitted on October 19, 2017, shows that the eVIN was not transmitted, the communication protocol transmitted was 1914 and the PID count was 13.

27. The 2008 Dodge had a previous smog test performed on June 1, 2015. The test data shows that the eVIN transmitted was WD0PE745385297723, the communication protocol was ICAN11bt5, and the PID count was 32, which were all consistent with the expected OIS test data and similar vehicles OIS test data.

28. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2008 Dodge being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 6

29. Vehicle No. 6 is a 2002 Subaru Impreza (2002 Subaru), VIN No. JF1GG29602G811472. The 2002 Subaru was tested at the Rancho facility on November 6, 2017, and issued smog certificate No. HJ071901C, under Mr. Cruz's EO license. Statewide, 96.2 percent of the 687 comparative 2002 Subaru vehicles did not report the eVIN, communicated an expected communication protocol of 1914, and an expected PID count of 18. However, the OIS test date for the 2002 Subaru transmitted on November 6, 2017,

shows that the eVIN transmitted was 4S3BL676066218071, the communication protocol transmitted was KWPF and the PID count was 19.

30. The 2002 Subaru had a previous smog test performed on September 29, 2015. The test data shows that the eVIN was not transmitted. The communication protocol was I914, and the PID count was 18, which were all consistent with the expected OIS test data and similar vehicles OIS test data.

31. Mr. Magana determined that the vehicle used to generate the fraudulent Smog Certificate of Compliance, was a 2006 Subaru Legacy GT Limited, VIN No. 4S3BL676066218071. The 2006 Subaru Legacy was certified on the same day as the 2002 Subaru. The OIS Test data for the 2006 Subaru Legacy matches the OIS Test Data for the fraudulent inspection of the 2002 Subaru.

32. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2002 Subaru being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 7

33. Vehicle No. 7 is a 2005 Chevrolet Trailblazer EXT LS (2005 Trailblazer). VIN No. 1GNET16S756150064. The 2005 Trailblazer was tested at the Rancho facility on November 28, 2017, and issued smog certificate No. HJ473189C, under Mr. Cruz's EO license. Statewide, 98.1 percent of the 683 comparative 2005 Trailblazer vehicles reported the eVIN, an expected communication protocol of JVPW, and an expected PID count of 18. However, the OIS test data for the 2005 Trailblazer transmitted on November 28, 2017, shows that the eVIN was not transmitted, the communication protocol transmitted was 1914 and the PID count was 17.

34. The 2005 Trailblazer had a previous smog test performed on May 15, 2017. The test data shows that the eVIN transmitted was 1GNET16S756150064, the communication protocol was JVPW, and the PID count was 18, which were all consistent with the expected OIS test data and similar vehicles OIS test data.

35. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2005 Trailblazer being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 8

36. Vehicle No. 8 is a 2003 Toyota Tacoma XtraCab (2003 Toyota). VIN No. 5TEVL52N33Z208252. The 2003 Toyota was tested at the Rancho facility on November 28, 2017, and issued smog certificate No. HJ473190C, under Mr. Cruz's EO license. Statewide, 99.6 percent of the 1,000 comparative 2003 Toyota vehicles did not report the eVIN, communicated an expected communication protocol of I914, and an expected PID

count of 17. However, the OIS test date for the 2003 Toyota transmitted on November 28, 2017, shows that the eVIN transmitted was 1G1ZC5E18BF203238, the communication protocol transmitted was ICAN11bt5 and the PID count was 39/7.

37. The 2003 Toyota had a previous smog test performed on May 25, 2015. The test data shows that the eVIN was not transmitted. The communication protocol was I914, and the PID count was 17, which were all consistent with the expected OIS test data and similar vehicles OIS test data.

38. Mr. Magana determined that the vehicle used to generate the fraudulent Smog Certificate of Compliance, was a 2011 Chevrolet Malibu 1LT, VIN No. 1G1ZC5E18BF203238. The 2011 Chevrolet was certified on the same day as the 2003 Toyota. The OIS Test data for the 2011 Chevrolet matches the OIS Test Data for the fraudulent inspection of the 2003 Toyota.

39. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2003 Toyota being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 9

40. Vehicle No. 9 is a 2006 BMW 750 Li (2006 BMW), VIN No. WBAHN83596DT30325. The 2006 BMW was tested at the Rancho facility on December 13, 2017, and issued smog certificate No. HL031032C, under Mr. Cruz's EO license. Statewide, 98.1 percent of the 1,000 comparative 2006 BMW vehicles reported the eVIN, communicated an expected communication protocol of KWPF, and an expected PID count of 21, 21/1, 21/7, 24, or 24/7. However, the OIS test date for the 2006 BMW transmitted on December 13, 2017, shows that the eVIN transmitted was 2T3BF33V79W014826, the communication protocol transmitted was ICAN11bt5 and the PID count was 40.

41. The 2006 BMW had a previous smog test performed on June 16, 2015. The test data shows that the eVIN transmitted was WBAHN83596DT30325. The communication protocol was KWPF, and the PID count was 24/7 which were all consistent with the expected OIS test data and similar vehicles OIS test data.

42. Mr. Magana determined that the vehicle used to generate the fraudulent Smog Certificate of Compliance, was a 2009 Toyota RAV4, VIN No. 2T3BF33V79W014826. The 2009 Toyota was certified on the same day as the 2006 BMW. The OIS Test data for the 2009 Toyota matches the OIS Test Data for the fraudulent inspection of the 2006 BMW.

43. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2006 BMW being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

VEHICLE NO. 10

44. Vehicle No. 10 is a 2002 Toyota Tacoma (2002 Toyota), VIN No. 5TENL42N32Z098201. The 2002 Toyota was tested at the Rancho facility on December 19, 2017, and issued smog certificate No. HL136813C, under respondent Cruz's EO license. Statewide, 99.6 percent of the 1,000 comparative 2002 Toyota vehicles did not report the eVIN, communicated an expected communication protocol of I915, and an expected PID count of 17. However, the OIS test date for the 2002 Toyota transmitted on December 19, 2017, did not transmit an eVIN, the communication protocol transmitted was JVPW and the PID count was 22.

45. The 2002 Toyota had a previous smog test performed on November 27, 2017. The test data shows that an eVIN was not transmitted, the communication protocol was I914, and the PID count was 17, which were all consistent with the expected OIS test data and similar vehicles OIS test data.

46. Mr. Magana determined that the "discrepancies in the OIS Test Data prove" the OIS DAD was not connected to the 2002 Toyota being certified, "causing the issuance of a fraudulent Smog Certificate of Compliance."

Respondent's Evidence

47. Respondent has owned Smog Tech Pros for approximately six years. The Rancho and Riverside facilities are open. The Howe facility is temporarily closed while respondent addresses a lease dispute. After respondent opened his first facility, he obtained his smog technician license. Respondent's brother was a smog technician and respondent worked with him for a period of time before he opened the facilities. Respondent explained that he "loves" his job running the facilities. Respondent believes he is providing a valuable service to the public and supporting his community. He was devastated to learn that his long-time trusted employee Mr. Cruz, was clean plugging vehicles.

48. Mr. Cruz worked for respondent for five years. Mr. Cruz worked at the Rancho facility before respondent purchased it. Mr. Cruz came highly recommended from staff that worked at the facility. Mr. Cruz was licensed for many years. Respondent was aware Mr. Cruz was issued two citations from the Bureau in 2009, related to inspections of two Bureau undercover vehicles. Mr. Cruz had been directed to complete additional training for the violations. However, Mr. Cruz assured respondent he learned from his mistakes. Neither of the citations involved clean plugging.

49. Respondent explained Mr. Cruz was very competent and good with customers. Mr. Cruz managed the Rancho facility and supervised one employee. He had no complaints or issues with Mr. Cruz until he received notification from the Bureau that Mr. Cruz was engaging in clean plugging. Initially, respondent believed the allegations had to be a mistake. Mr. Cruz was a trusted employee. Respondent began looking for invoices for the vehicles the Bureau identified as the clean plugged vehicles. However, he could not find the

invoices for any of the vehicles. Respondent contacted Mr. Cruz and he admitted to clean plugging the vehicles. Mr. Cruz signed a statement admitting to the conduct and stating that respondent was not aware of his conduct. Respondent fired Mr. Cruz on August 13, 2018. Respondent then contacted the Bureau and asked for Mr. Cruz to be removed as a technician from the smog check computers.

50. Respondent explained that after he learned of Mr. Cruz's conduct, he made significant changes to his business operations. Respondent had a compliance officer that was responsible for monitoring the facilities. However, respondent decided he was not doing a thorough job. Respondent began spending more time at each facility. Prior to learning of the clean plugging, he spent approximately two days per week for a total of eight to ten hours at each facility. Afterwards, he began spending 14 to 16 hours per week at each facility reviewing paperwork.

51. Prior to the incident, respondent performed twice a month random audits of invoices. Respondent changed his practice. He conducts a weekly audit at each facility, which consists of matching invoice numbers with Smog Certificate of Compliance numbers to ensure that no certificates are missing. Respondent is confident that if there are any discrepancies he will catch them in his weekly audit. Since respondent started performing weekly audits, he has not identified any discrepancies.

52. Respondent also installed cameras at his facilities which records the activities at the smog bays, including the equipment, vehicle and the technician performing the inspections. Respondent's compliance officer regularly views the surveillance video remotely and if he sees anything suspicious, he alerts respondent. In addition, respondent prepared a "Smog Inspection Audit and Procedures" policy that all of his inspectors signed. The policy explains the procedures and expectations for smog inspections performed at the facilities. The policy also notifies the employees that failure to comply with the procedures and any illegal smog inspections would be reported to the Bureau and police.

53. Respondent understands that if he had the safeguards in place that he implemented after learning of Mr. Cruz's conduct, he would have quickly caught the conduct. Respondent explained that he made the mistake of trusting Mr. Cruz, without verifying he was performing his job honestly. Respondent learned a difficult lesson about the limits of trusting his employees. Respondent's goal is to provide his customer's proper inspections, performed "by the book."

54. Respondent understands the need for the Bureau to ensure that he is following the laws and regulations governing smog checks, despite his assurances that he has implemented changes that will prevent clean plugging from occurring again at his facilities. Respondent explained that his businesses can survive if his Rancho facility is placed on probation. However, if all of his facilities are placed on probation, he will likely go out of business. All of respondent's facilities are Star stations, a status given by the Bureau to high performing stations. The Star status accounts for 40 percent of respondent's business. Respondent anticipates he will lose Star status for any facility placed on probation and as a

result lose at least 40 percent of his business. Respondent is the sole income earner in his family. He has three children. Respondent also supports his parents who do not work.

Discussion

55. There is no dispute that respondent's employee clean plugged 10 vehicles. Mr. Cruz admitted to the conduct and took full responsibility. There is also no dispute that respondent was unaware of Mr. Cruz's conduct. Respondent admitted he was not supervising Mr. Cruz and did not have adequate safeguards in place to ensure such illegal conduct was not occurring at his Rancho facility. While respondent did not commit the clean plugging, as a licensee, if he operates his business through an employee, he must be responsible to the Bureau for the employee's conduct, including acts of fraud. This ensures accountability of licensees and safeguards the public welfare. If a licensee was not liable for the actions of employees, effective regulation would be impossible. The licensee could contract away the daily operations of his business and become immune to disciplinary action by the licensing authority. (See *California Assn. of Health Facilities v. Dep't of Health Servs.* (1997) 16 Cal.4th 284, 295-297.) As a result, discipline must be imposed on respondent's Rancho registration and license, for untrue and misleading statements, fraud, and failure to comply with provisions of the Automotive Repair Act and Motor Vehicle Inspection Program.

56. Complainant did not establish cause to place respondent's registrations and licenses for the Howe and Riverside facilities on probation. No evidence was presented that there were violations at these facilities. Respondent has no history of discipline at any of his facilities. Additionally, respondent has implemented significant changes to his business practices which will help to ensure compliance with the Bureau's rules and regulations. Respondent's testimony was candid and sincere. He learned a valuable lesson as a business owner that he must take full responsibility for the operations of his businesses. The steps he has taken demonstrate the seriousness in which he takes his responsibilities.

57. The Bureau's Disciplinary Guidelines provide for a maximum discipline of revocation and a minimum of three to five years of probation for each of the causes for discipline charged against respondent. When all the evidence is considered, the public will be protected by placing respondent's Rancho registration and license on probation for five years, under terms and conditions which will provide significant oversight by the Bureau.

Cost of Investigation

58. Complainant requested that, pursuant to Business and Professions Code section 125.3, respondent be ordered to reimburse the Bureau for the reasonable costs of investigation and enforcement of this matter in the total amount of \$11,832.62. In support of this total amount, complainant submitted a Certification of Prosecution Costs and Declaration of Kristina Jarvis, Deputy Attorney General, which stated that the Bureau has been billed \$10,292.50 for the time the Attorney General's Office worked on this matter. Attached to the certification of costs prepared by Ms. Jarvis is a computer printout that

described the tasks performed, the amount of time billed, and the billing rate by each professional, which appropriately established the requested enforcement costs. Also included is a declaration signed by Mark Casillas, Program Representative II for the Bureau, with an attached list of hours, work performed, and costs of his review of the investigation totaling \$266.79, and a declaration signed by Mr. Magana, with an attached list of hours, work performed, and costs totaling \$1,273.33.

59. As set forth in Legal Conclusion 16, the scope of the investigation was appropriate in light of the alleged misconduct and the cost of enforcement and investigation are reasonable. Respondent shall be ordered to pay the costs.

LEGAL CONCLUSIONS

Applicable Law

1. The Automotive Repair Act, set forth in Business and Professions Code section 9880, et seq., governs the registration, licensing and discipline of Automotive Repair Dealers. 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." (Bus. & Prof. Code, § 9880.3.)

2. Pursuant to Health and Safety Code section 44002, the Director has all of the powers and authority granted under the Automotive Repair Act for enforcing the Motor Vehicle Inspection Program.

3. Under the Motor Vehicle Inspection Program, set forth in Health and Safety Code, section 44000, et seq., the Legislature has declared that California's Motor Vehicle Inspection 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 program provides for privately operated Smog Check Stations which are authorized "pursuant to Section 44015 to issue certificates of compliance or noncompliance to vehicles meeting the requirements of this chapter." (Health & Saf. Code, § 44010.)

4. 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* (2011) 201 Cal.App.4th 911, 916-918.) Respondent has the burden of establishing any affirmative defenses.

5. A licensed smog check station shall not issue a certificate of compliance to any vehicle except as authorized by the Motor Vehicle Inspection Program. (Health & Saf.

Code, § 44015.) Tests at smog check stations “shall be performed in accordance with procedures prescribed by the department . . .” (Health & Saf. Code, § 44012.) A visual or functional check must be made of the emission control devices specified by the department, and the visual or functional check “shall be performed in accordance with procedures prescribed by the department.” (Health & Saf. Code, § 44012, subd. (f).)

6. Health and Safety Code section 44072.2. provides 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 Safety Code section 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.

(d) commits any act involving dishonesty, fraud, or deceit whereby another is injured.

7. Business and Professions Code section 9884.7, subdivision (a) provides in pertinent part:

The director, where the automotive repair dealer cannot show there was a bona fide error, may . . . invalidate temporarily or permanently, 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 reasonable exercise of reasonable care should be known, to be untrue or misleading.

[¶] . . . [¶]

(4) Any other conduct which constitutes fraud.

[¶] . . . [¶]

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

8. Health and Safety Code section 44072.10 states, in pertinent part:

[¶] . . . [¶]

(c) The Department shall revoke the license of any smog check technician or station license who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:

[¶] . . . [¶]

(4) Intentional or willful violation of this chapter or any regulation, standard, or procedure of the department implementing this chapter. . . .

9. California Code of Regulations, title 16, section 3340.35, subdivision (c), provides in relevant part that “[a] licensed station shall issue a certificate of compliance or noncompliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in section 3340.42 of this article and has all the required emission control equipment and devices installed and functioning correctly.”

10. California Code of Regulations, title 16, section 3340.42, subdivision (c), sets forth the smog check test methods and standard required to be performed on all vehicles subject to smog check inspections. This includes conducting OBD tests on vehicle models 2000 and newer, and diesel-powered vehicles 1998 model-year and newer, and visual inspection of emission control components.

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Causes for Discipline

RESPONDENT'S AUTOMOTIVE REPAIR DEALER REGISTRATION

11. Cause exists to discipline respondent's Rancho registration, pursuant to Business and Professions Code section 9884.7, subdivision (a)(1). As set forth in Factual Findings 14 through 46, complainant established by a preponderance of that evidence that respondent made or authorized statements which it knew, or in the exercise of reasonable care should have known, to be untrue or misleading. Respondent's inspector, Mr. Cruz, certified that Vehicles 1 through 10, passed inspection and were in compliance with applicable laws and regulations. However, Mr. Cruz conducted the inspections on the vehicles using the clean plugging method, in that he substituted or used a different vehicle during the inspections in order to issue smog certificates of compliance for the vehicles and did not test or inspect the vehicles as required by Health and Safety Code section 44012.

12. Cause exists to discipline respondent's Rancho registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(4). As set forth in Factual Findings 14 through 46, complainant established by a preponderance of the evidence that respondent's inspector, Mr. Cruz engaged in fraudulent conduct when he issued electronic smog certificates of compliance for Vehicles 1 through 10, without ensuring that bona fide inspections were performed of the emission control devices and systems on the vehicles, thereby depriving the people of California the protection afforded by the Motor Vehicle Inspection Program.

RESPONDENT'S SMOG CHECK STATION LICENSE

13. Cause exists to discipline respondent's Rancho license, pursuant to Health and Safety Code section 44072.2, subdivision (a), in that respondent failed to comply with Health and Safety Code sections 44012 and 44015. As set forth in the Factual Findings 14 through 46, complainant established by a preponderance of that evidence that respondent failed to ensure that the emissions control tests were performed on Vehicles 1 through 10, and issued electronic Certificates for Vehicles 1 through 10, without ensuring that the vehicles were properly tested and inspected.

14. Cause exists to discipline respondent's Rancho license, pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent violated California Code of Regulations, title 16, sections 3340.35, subdivision (c), and 3340.42. As set forth in the Factual Findings 14 through 46, complainant established by a preponderance of that evidence that respondent issued electronic Certificates for Vehicles 1 through 10 even though the vehicles had not been inspected in accordance with section 3340.42 and failed to ensure that the required tests were conducted on Vehicles 1 through 10.

15. Cause exists to discipline respondent's Rancho license, pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent, through the acts of Mr. Cruz, committed dishonest, fraudulent, or deceitful acts whereby another was injured. As set

forth in the Factual Findings 14 through 46, complainant established by a preponderance of that evidence that respondent issued electronic Certificates for Vehicles 1 through 10, without ensuring bona fide inspections were performed on the emissions systems, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program

Costs of Investigation

16. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated a licensing act may be ordered to pay the reasonable costs of investigation and prosecution of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors 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/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 in light of the alleged misconduct.

Respondent was not successful in getting any charges dismissed. Respondent did not raise a colorable challenge to discipline. He also offered no evidence of an inability to pay costs. Complainant seeks a total of \$11,832.62 in costs. When all the *Zuckerman* factors are considered, respondent must pay the Bureau \$8,711.79, and is jointly and severally liable for the remaining \$3,120.83 with Mr. Cruz.

Conclusion

17. When all of the evidence is considered, to protect the public health, safety, and welfare, respondent's Rancho registration and license must be put on probation for a period of five years to ensure that the safeguards he has implemented prevent violations of the law. As set forth in Factual Finding 56, the evidence does not establish cause to impose discipline on the Howe and Riverside facilities' registrations and licenses.

ORDER

IT IS HEREBY ORDERED that Automotive Repair Dealer Registration No. ARD 272701 and Smog Check, Test Only Station License No. TC 272701 issued to respondent, Shahnawaz Khan, owner of Smog Tech Pros located at 10751 Folsom Blvd. #B, Rancho Cordova, California, 95670, is REVOKED. However, the revocation is stayed and respondent is placed on probation for five (5) years on the following terms and conditions.

1. **Obey All Laws:** During the period of probation, respondent shall comply with all federal and state statutes, regulations and rules governing all Bureau registrations and licenses held by respondent.

2. **Quarterly Reporting:** During the period of probation, respondent shall report either by personal appearance or in writing as determined by the Bureau on a schedule set by the Bureau, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

3. **Report Financial Interests:** Respondent shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by the Bureau during the period of probation, report any financial interest which any respondent or any partners, officers, or owners of any respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

4. **Access to Examine Vehicles and Records:** Respondent shall provide the Bureau representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondent shall also provide Bureau representatives unrestricted access to all records pursuant to Bureau laws and regulations.

5. **Tolling of Probation:** If, during probation, respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, respondent shall notify the Bureau in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

6. **Violation of Probation:** If respondent violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard may set aside the stay order and carry out the disciplinary order provided in the decision. Once respondent is served notice of the Bureau's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

7. Maintain Valid License: Respondent shall, at all times while on probation, maintain a current and active registration and license with the Bureau, including any period during which suspension or probation is tolled. If respondent's registration and/or license is expired at the time the decision becomes effective, the registration and/or license must be renewed by respondent within 30 days of that date. If respondent's registration and/or license expires during a term of probation, by operation of law or otherwise, then upon renewal respondent's registration and/or license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

8. Cost Recovery: Respondent shall pay the Bureau \$8,711.79, and is jointly and severally liable for the remaining \$3,120.83 with Mr. Cruz, for the reasonable costs of the investigation and enforcement of Bureau Case No. 79/18-2714. Respondent shall pay the costs within 90 days of the effective date of the Decision. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for Bureau Case No. No. 79/18-2714. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. The Bureau reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

9. Completion of Probation: Upon successful completion of probation, respondent's affected registration and license will be fully restored or issued without restriction, if respondent meets all current requirements for registration or licensure and has paid all outstanding fees, monetary penalties, or cost recovery owed to the Bureau.

10. License Surrender: Following the effective date of a decision that orders a stay of invalidation or revocation, if respondent ceases business operations or is otherwise unable to satisfy the terms and conditions of probation, respondent may request that the stay be vacated. Such request shall be made in writing to Bureau. The Director and the Bureau Chief reserve the right to evaluate the respondent's request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

Respondent may not petition the Director for reinstatement of the surrendered registration and/or license, or apply for a new registration or license under the jurisdiction of the Bureau at any time before the date of the originally scheduled completion of probation. If respondent applies to the Bureau for a registration or license at any time after that date, respondent must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to the Bureau and left outstanding at the time of surrender.

11. Supervision Requirements: Respondent shall not delegate his supervisory duties, as they relate to the business activities relevant to the probationary registration and license, to another person during the period of probation. Any persons employed by respondent to carry out such business activities shall be directly supervised by respondent. In the event that a bona fide medical condition arises during the period of probation, which temporarily prevents respondent from exercising direct supervision over employees, notice and medical substantiation of the condition shall be submitted to the Bureau within ten (10) days of the medical affirmation of the condition.

DATED: May 6, 2019

DocuSigned by:

Marcie Larson

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MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings