

**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.: 79/17-11610

**EMISSION TEST CENTERS, Inc.**  
**SPENCER GRAND BROD, Pres./Sec./Treas.**  
**dba, ACCURATE SMOG**  
1617 W. Sepulveda Blvd., #5  
Torrance, CA 90501

OAH No.: 2018031096

3817 Shad PL (Mailing)  
San Pedro, CA 90732

Automotive Repair Dealer Registration No.:  
ARD 282125  
Smog Check Station License No.: TC 282125

and

**CARLOS C. TORRES**  
247.S. Pacific Coast Hwy.  
Redondo Beach, CA 90277

Smog Check Inspector License No.: EO 146175  
Smog Check Repair Technician License No.:  
EI146175

Respondents.

**DECISION AFTER RECONSIDERATION**

On December 21, 2018, effective January 29, 2019, the Director (Director) of the Department of Consumer Affairs adopted the Proposed Decision of Administrative Law Judge James Michael Davis dated October 29, 2018 as the Decision in the above-entitled matter. On January 10, 2019, Complainant timely submitted a Petition for Reconsideration, which was granted on January 17, 2019. The same day, Respondent submitted an Opposition to Petition for Reconsideration.

On May 8, 2019, the Director issued an Order Fixing Date for Submission of Written Argument ordering the parties to submit written argument on or before June 24, 2019. Neither party submitted additional written argument.

After review of the entire administrative record, including the transcript and written arguments from both parties, the Director, pursuant to subdivision (b) of section 11521 of the Government Code, hereby accepts and adopts the attached Proposed Decision of the

Administrative Law as the Decision in the above-entitled matter, with the following modifications:

1. Page 2, first paragraph is modified to read:

Spencer Grant Brod, President, Secretary and Treasurer of Emission Test Centers, Inc. (respondent ETC) doing business as Accurate Smog, was present on behalf of respondent ETC.<sup>1</sup>

2. Page 12, Order, first paragraph is modified to read:

Automotive Repair Dealer Registration Number ARD 282125 and Smog Check, Test Only Station License Number TC 282125 issued to respondent Emission Test Centers, Inc., Spencer Grant Brod, President, Secretary, Treasurer, doing business as Accurate Smog, and any and all other places of business operated in California by respondent with registrations issued pursuant the Automotive Repair Act, and any and all additional licenses issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code are hereby revoked; however, said revocations are stayed and placed on probation for a period of two years on the terms and conditions set forth herein.

The remainder of the Decision remains unchanged.

This Decision shall be effective on at 5:00 p.m. on August 13, 2019

IT IS SO ORDERED this 28 day of June, 2019.

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

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<sup>1</sup> Carlos C. Torres (respondent Torres) did not file a Notice of Defense or appear at hearing. On August 16, 2018, the Bureau found him to be in default and revoked his licenses. (See Exhibit 1, 044-067.) Accordingly, the causes for discipline against respondent Torres (Claims 7 through 9) are not at issue and will not be addressed herein.

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

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146175  
Smog Check Repair Technician License No.:  
EI 146175

Respondents.

Case No.: 79/17-11610

OAH No.: 2018031096

**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 January 29, 2019

DATED: December 21, 2018

Signature on File

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

BEFORE THE  
DEPARTMENT OF CONSUMER AFFAIRS.  
FOR THE BUREAU OF AUTOMOTIVE REPAIR  
STAIB OF CALIFORNIA

In the Matter of the Accusation Against:

EMISSION TEST CENTERS, INC.  
(SPENCER GRAND BROD-PRESIDENT,  
SECRETARY, TREASURER) DBA  
ACCURAJE SMOG

Automotive Repair Dealer Registration No.  
ARD 282125  
Smog Check, Test Only, Station License  
No. TC 282125

and

CARLOS C. TORRES

Smog Check Inspector License No. EO  
146175  
Smog Check Repair Technician License No.  
EI 146175

Respondents.

Case No. 79/17-11610

OAH No. 2018031096

**PROPOSED DECISION**

James Michael Davis, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on September 27, 2018, in Los Angeles, California.

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

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Spencer Grant Brod, President, Secretary and Treasurer of Emission Test Centers, Inc, doing business as Accurate Smog (respondent ETC), was present on behalf of respondent ETC.<sup>1</sup>

Oral and documentary evidence was received and argument was heard. At the hearing, complainant's counsel corrected two typographical errors within complainant's exhibits. First, in the Index of Complainant's Exhibits, under Exhibit 1 "Adopted Default Decision and Order as to Respondent Carlos Torres" the pages referenced "043 - 067" should read "044 - 067." Second, in Exhibit 10 - 007, the date within the text box labeled "Fraudulent Passing Inspection" should be changed from "September 18, 2017" to "September 18, 2016." The ALJ made these changes by interlineation at the hearing.

The record was closed and the matter submitted for decision at the conclusion of the hearing.

## SUMMARY

Complainant alleges that respondent ETC, through its former employee, respondent Torres, engaged in clean plugging<sup>2</sup> of five vehicles, which violates the Automotive Repair Act (Business and Professions Code, section 9880, et seq.). Complainant prays that respondent ETC's Automotive Repair Dealer Registration license, Smog Check, Test Only, Station license, and any other licenses issued to respondent ETC under the Motor Vehicle Inspection Program (Health and Safety Code section 44000, et seq.)<sup>3</sup> (Program), be suspended or revoked. Respondent ETC admits that the five vehicles were intentionally clean plugged by respondent Torres, but contends that based on the exceptional circumstances surrounding Torres's acts, respondent ETC's liability should be minimized. As discussed below, cause exists to discipline respondent ETC but, based on the evidence presented, a two-year probation period will adequately protect the public, and is ordered.

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<sup>1</sup> Carlos C. Torres (respondent Torres) did not file a Notice of Defense or appear at hearing. On August 16, 2018, the Bureau found him to be in default and revoked his' licenses. (See Exhibit 1, 044- 067.) Accordingly, the causes for discipline against respondent Torres (claims 7 - 9) are not at issue and will not be addressed herein.

<sup>2</sup> "Clean plugging" is a process for issuing fraudulent certificates of compliance whereby a smog technician uses data obtained from another vehicle's functioning On-Board Diagnostic Generation II system, or from another source, to generate passing diagnostic readings for the vehicle which is the actual subject of the smog inspection.

<sup>3</sup> All further statutory references will be to the Health and Safety Code unless otherwise noted.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. Complainant brings this Accusation solely in his official capacity.
2. On December 1, 2015, the Bureau issued an Automotive Repair Dealer Registration (ARD 282125) to respondent ETC. On December 9, 2015, the Bureau issued a Smog Check, Test Only Station License Number (TC 282125) to respondent ETC. Both respondent ETC's Automotive Repair Dealer (ARD) Registration and Smog Check Test Only Station License Number were in full force and effect at all times relevant to the acts giving rise to the Accusation. Both the ARD registration and the Smog Check Station License are scheduled to expire on December 31, 2018. On January 21, 2016, the Bureau certified Accurate Smog as a STAR Station. This certification will remain active unless the ARD registration or Smog Check Test Only Station License is revoked, canceled, becomes delinquent or the certification is invalidated.
3. In addition to Accurate Smog, respondent ETC operates five other Test Only smog stations in Los Angeles County. Mr. Brod holds an MBA, has an extensive background in small business, and has been in the smog inspection business since 2010. Respondent ETC performs approximately 35,000 inspections per year, exceeding 130,000 inspections over the life of the business. Respondent ETC has seven full-time and two part-time employees for all operations, and has suffered no previous or subsequent license discipline. Respondent ETC's staffing level at its six locations is not sufficient to allow for direct supervision of all of its technicians. Instead, respondent ETC relies on surveillance cameras and random spot checks to oversee its employees' work.
4. On November 27, 2017, complainant filed the Accusation. Respondent ETC timely filed a Notice of Defense and this matter ensued.

### *California's Smog Check Program*

5. California's Smog Check Program is designed and intended to reduce air pollution by identifying and requiring the repair of polluting motor vehicles. Smog checks require a visual, functional, and computer-based inspection. Effective March 9, 2015, California's Smog Check Program requires the use of an On Board Diagnostic Inspection System (OIS) when inspecting most model-year 2000 and newer gasoline vehicles. The OIS is comprised of a Data Acquisition Device (DAD), computer, bar code scanner, and printer. The printer provides a Vehicle Inspection Report (VIR). The DAD connects between the OIS computer and the vehicle's Diagnostic Link Connector (DLC). The bar code scanner is used to input technician, vehicle identification number (VIN), and DMV renewal information. Data retrieved, captured, and recorded to the Bureau's Vehicle Information Database (VID) during an OIS smog check inspection includes the eVIN (digitally stored

VIN programmed into the vehicle's Powertrain Control Module (PCM)), communication protocol, and the number of PID counts.<sup>4</sup>

6. If the vehicle passes the visual, functional, and computer-based tests, it passes the overall inspection and a certificate of compliance is issued and transmitted electronically to the Bureau's VID. Each certificate of compliance has a unique control number so that it can be tracked to determine which Smog Check Station purchased the certificate of compliance and to which vehicle it was issued. The smog check technician must sign the VIR under penalty of perjury to affirm the inspection was done within the Bureau guidelines. Licensed Smog Check Technicians are the only persons authorized by the Bureau to perform official inspections. They are issued a personal access code (PAC) and a license number, which are used to gain access to the OIS to perform smog check inspections.

### *Respondents' Violations*

7A. Between September 18, 2016 and March 12, 2017, respondent Torres used another vehicle's properly functioning OIS, or another source, to generate passing diagnostic readings in the Bureau's VID for five vehicles. Torres then issued fraudulent smog certificates of compliance to these vehicles, though they were not in compliance with smog requirements or were not present for testing (clean-plugging). Bureau representative, Marc Ortega,<sup>5</sup> discovered these fraudulent tests and certifications when he investigated and reviewed specific OIS Test Data for respondent ETC. Mr. Ortega compared the data received from these certified vehicles to data from vehicles of the same year, make, and model. (See Exhibit 4.) The OIS Test Data contained a pattern of discrepancies between the information transmitted to the Bureau's VID during the inspections and documented information known about the subject vehicles, wherein four of the five vehicles<sup>6</sup> transmitted the incorrect vehicle communication protocols and all five vehicles transmitted incorrect PID counts. Mr. Ortega did not personally observe respondent Torres clean plug any of the five vehicles, but the VIR and OIS testing data showed respondent Torres's license and PAC numbers entered for all five vehicles.

### *III*

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<sup>4</sup> A "vehicle communication protocol" is the specific language the vehicle's PCM uses to relay information to scan tools and other computers or devices, such as the Bureau's VID, and is programmed into the vehicle's on-board computer during manufacture and does not change. A "PID count" is the number of specific data values each vehicle's PCM reports related to emission controls, e.g., engine revolutions per minute and engine temperature, to name a few.

<sup>5</sup> Mr. Ortega, a Program Representative III, works at the Bureau's Southern Headquarters Office. He has 13 years of experience with the Bureau and is an Automotive Service Excellence-Certified Master Technician.

<sup>6</sup> Vehicle 4, a 2010 Chevrolet Malibu LS, transmitted the proper communication protocol, but still transmitted an incorrect PID count. (See Vehicle Inspection Chart.)

7B. At the hearing, respondent ETC did not contest the factual allegations in the Accusation and folly admits that the invalid smog inspections occurred at Accurate Smog in Torrance, California. But respondent ETC insisted that respondent Torres clean plugged the five vehicles in question without respondent ETC's knowledge or consent. Some inspections, for example, took place while Mr. Brod and his wife,<sup>7</sup> who assists with the technical aspects of the business, were on vacation. Mr. Brod's testimony in this regard was credible, convincing, and uncontradicted.

8. This Vehicle Inspection Chart shows the protocol and PID counts respondent ETC reported, and the expected protocol and PID counts, which are emboldened, for the five vehicles for which respondent Torres issued fraudulent certificates of compliance,

Vehicle Inspection Chart

Vehicle		Certificate#	eVIN	Protocol	PID Count
1	2004 Kia Optima LX/EX	QE173157C	ITNBK3EK2A 3047654 (incorrect)	Fraudulent Passing Inspection 09/18/16	
				ICAN11bt5	47/17
				Expected OBDII Value.	
				<b>KWPF</b>	<b>21/1</b>
2	2001 Chevrolet Silverado C1500	QG978976C	JTDKB20U787 707763 (incorrect)	Fraudulent Passing Inspection 11/20/16	
				ICAN11bt5	38/21/17
				Expected OBDII Value	
				<b>JVPW</b>	<b>22 or 23 or 24</b>
3	2002 Mazda MPV Wagon	ZR057299C	Not transmitted	Fraudulent Passing Inspection 03/07/2017	
				<b>NPW</b>	<b>20</b>
				Expected OBDII	

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<sup>7</sup> Mr. Brod's wife is a licensed smog technician who holds several advanced engineering degrees.



				Value	
				<b>1914</b>	<b>22/6</b>
4	2010 Chevrolet Malibu LS	ZR172431C	IGIPA5SGSE 7178965 (incorrect)	Fraudulent Passing Inspection 03/10/2017	
				ICAN11bt5	44/4/5
				Expected OBDII Value	
				<b>ICAN11bt5.</b>	<b>39/7</b>
5	2001 Volkswagen, JettaGLS	ZR363155C	Not transmitted	Fraudulent Passing Inspection 03/12/2017	
				JVPW	17
				Expected OBDII Value	
				<b>1914</b>	<b>16 or 16/5</b>

### *Respondent ETC's Defense*

9A. Prior to respondent Torres's clean plugging, respondent ETC had systems in place to prevent employees' fraudulent or negligent acts. Specifically, respondent ETC installed continuously-running surveillance cameras in the smog test work area, used computerized invoicing which assisted with auditing, and Mr. Brod's wife conducted random spot checks of employees.

9B. Respondent ETC exercised due diligence in hiring respondent Torres, who had over a decade of smog testing experience. Steps respondent ETC took in the hiring process included reviewing Torres's work history, star rating and Bureau record of discipline. Respondent Torres also underwent a second interview from a trusted employee before respondent Torres was hired.

9C. Respondent Torres was trained and observed by an experienced technician for several days before he was permitted to work by himself. Once he started working on his weekly Sunday schedule, he was subject to random inspections and weekly invoice audits, all of which he passed. In May 2017, respondent Torres was fired for work-related issues. His firing occurred prior to respondent ETC learning of his clean plugging activity.

### *III*

10, Respondent Torres's five instances of dean plugging were the solitary acts of a terminated former employee. No evidence was presented to suggest that the acts were part of any pattern or practice on respondent ETC's part.

11 No evidence was presented to suggest any consumer experienced any loss or damage as a result of respondent Torres's acts.

12 Respondent ETC presented evidence of new, more stringent business practices and processes now in place, designed to prevent the reoccurrence of dean plugging. Specifically, respondent ETC requests detailed reports monthly from SGS Testcom (see exhibit F), and respondent ETC has initiated additional internal accountability checks into its smog inspection protocols. (See exhibit A, p. 4.)

13. Respondent ETC contends that respondent Torres's actions are isolated and occurred in spite of, not because of, respondent ETC's efforts. Accordingly, respondent ETC argues it should not be penalized based on a lone worker's willful wrongdoing.

14, Respondent ETC further contends there is controlling legal precedent for holding that in a case against a licensee/owner, revocation or stringent discipline should not be imposed when the wrongdoing arises from the isolated acts of the licensee's employee and the owner had no notice of the employee's unlawful behavior and had taken reasonable and proactive steps to safeguard against unlawful actions. As discussed below, respondent ETC's cited legal authority is not binding precedent.

### *Costs of Enforcement*

15. Under Business and Professions Code section 125.3, complainant requested costs of investigation and enforcement in the amount of \$10,205.60. This amount consists of costs incurred by Bureau investigators and by the Office of the Attorney General for which the Bureau has been, or will be, billed.

16. At the hearing, complainant introduced documentation to support its investigation and prosecution costs. (See exhibit 2.) Specifically, complainant produced a document titled "Investigative and Other Costs," which shows investigation costs totaling \$760.60, and a Certification of Prosecution Costs: Declaration of Vivian Cho, which requests costs in the amount of \$9,445.00. Attached to that certification is a printout of a Matter Time Activity by Professional Type, which describes tasks performed by the Office of the Attorney General through September 26, 2018, and for which the Bureau will be billed \$9,445. Respondent ETC offered no evidence to refute the cost recovery sought by the Bureau. Costs of investigation and enforcement in the total amount of \$10,205.60 are reasonable in light of the issues involved in this matter.

*II*

*II*

*I*

## LEGAL CONCLUSIONS

1. The Bureau's highest priority in exercising its licensing, regulatory, and disciplinary functions is protection of the public. (Bus. & Prof. Code, § 9880.3.)
2. Complainant has the burden of proving the allegations in the Accusation by a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) As discussed below, complainant has met his burden.
3. The Clean Air Act (Act), 42 U.S.C. § 7401, et seq., provides air quality standards for the nation and requires state compliance. (42 U.S.C. §§ 7410, 7413.) To control and eliminate air pollutants, the California Legislature established uniform procedures for compliance with standards which control or eliminate pollution. (§ 43000, subd. (c).) The Bureau must adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and sources of air pollution. (§ 43013, subd. (a).) As of January 1, 2006, the Bureau has been charged with implementing regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions. (§ 43018.5, subd. (a).)
4. When an automotive repair dealer cannot show there was a bona fide error, the Director of Consumer Affairs (Director) may revoke the automotive repair dealer's ARD registration if any of the following occur: the dealer *or any employee* makes or authorizes any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; conducts an act that constitutes fraud; or fails to materially comply with the Program or its regulations. (Bus. & Prof. Code, § 9884.7, subds. (a)(1), (4), & (6), italics added.)
5. Smog check inspectors must perform smog check tests in accordance with the Program, which includes ensuring the control tests are performed on any tested vehicle. (§ 44012.)
6. A licensed smog check inspector must inspect, test and repair vehicles in accordance with sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42. (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).)
7. A licensee "may not insulate himself from regulation by electing to function through employees or independent contractors." (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Thus, respondent ETC is vicariously liable for the acts or omissions of its employees, including respondent Torres. (Factual Findings 7 and 8.)
8. A smog check station may issue certificates of compliance if a vehicle meets the requirements of Section 44012. (§ 44015, subd. (b).)

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9. Complainant established by a preponderance of the evidence that all five vehicles in question reported incorrect communication protocols or incorrect PID counts. Complainant's evidence further established that for all five vehicles in question respondent Torres, at the time he was respondent ETC's employee, used his personally-issued license and PAC to gain access to the OIS to clean plug and report false information to the Bureau and issue false certificates of compliance. Reporting false information to the Bureau and, on that basis, issuing false certificates of compliance, constitutes fraud. These acts are injurious to the public health, because these five vehicles' emissions systems have not been shown to meet established air quality standards intended and designed to control air contaminants and sources of air pollution. (Factual Findings 5-8.)

10. As set forth in Factual Findings 9 -13, respondent ETC failed to establish that a bona fide error occurred regarding the five anomalous readings. (See Legal Conclusion 4.)

11. The Director may revoke a license if the licensee violates any section of the Program or its regulations related to the licensed activities, any regulations adopted by the Director, or commits any act involving dishonesty, fraud, or deceit whereby another is injured. (§ 44072.2, subds. (a), (c), &(d).)

12. The Bureau may revoke the license, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a certificate of noncompliance. (Cal. Code Regs., tit. 16, § 3340.24, subd.(c).)

13. A licensed station must issue a certificate of compliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in California Code of Regulations, title 16, section 3340.42, and has all the required emission control equipment and devices installed and functioning correctly. (Cal. Code Regs., tit. 16, § 3340.35, subd. (c).)

14. No person may enter into the OIS any vehicle identification information or emission control system identification data for any vehicle other than the one being tested, or any false information about the vehicle being tested. (Cal. Code Regs., tit. 16, § 3340.41, subd. (c).)

15. The Director may revoke 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. (Bus. & Prof. Code, § 9884.7, subd. (c).)

16. When the Director revokes a license under the Program, the Director may revoke any additional license in the name of the licensee issued under the Program. (§ 44072. 8.)

### *Respondent ETC's Precedent Argument*

17A. As set forth in Factual Finding 11, respondent ETC cites *Lucy Ventures, dba Smog Repair and Lube*, Case No. 79/16-13904, OAH No. 2017080930, as legal precedent which is either controlling or persuasive regarding the question of respondent ETC's liability. However, since *Lucy Ventures* has not been adopted as precedent by the Bureau, it cannot serve as binding legal precedent. (See Govt. Code, §11425.60.) Therefore, at most, it is persuasive. But, for the reasons set forth below, *Lucy Ventures* is of limited usefulness.

17B. *Lucy Ventures* holds that "unusual circumstances" may negate the doctrine of strict liability of a licensee for the acts of its employees. *Lucy Ventures* reaches this conclusion by relying on dictum<sup>8</sup> of the California Supreme Court. (See *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347.) In *Ford Dealers Assn.*, the Supreme Court stated that "[t]he imputation of liability to the employer is based on the assumption that a licensed dealer is in a position to control the actions of salespeople. Consequently, it is held to be fair to impute to the employer liability for the violations of employees. [Citation.] However, where a dealer is able to demonstrate unusual circumstances that negate the presumption of control, it might be unfair to hold that dealer liable for the misrepresentations of salespeople. Mere lack of knowledge would not suffice, where a dealer appeared to have tolerated misleading statements in the past or created a climate in which such misstatements were likely to occur." (*Id.* at p. 361.) 'the Supreme Court concluded its inquiry into "exceptional circumstances" by noting that "[i]n the absence of a specific factual setting raising the question, the court need not decide the exact dimensions of a possible exception to that general rule." (*Ibid.*) Thus, *Ford Dealers Assn.* does not define what constitutes "unusual circumstances" making both it and *Lucy Ventures* insufficient guidance for this case.

17C. However, the existing law does provide clear guidance: As the employer/licensee, respondent ETC is responsible for respondent Torres's conduct. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295-297; *Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793; *Camacho v. Youde* (1979) 95 Cal.App.3d 161.) But the courts have recognized that the relative culpability of the licensee is a factor to be considered. (*Rob Mac-Inc. v. Department of Motor Vehicles, supra*, 148 Cal.App.3d 793, 799.)

17D. Here, respondent ETC is liable, but only to a minor degree. Respondent ETC benefitted financially from owning multiple businesses. Accordingly, it would subvert the Bureau's goal of protecting the public to allow respondent ETC to shield itself from liability by claiming, as set forth in Factual Finding 3, that in conducting over 35,000 smog

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<sup>8</sup> "Dictum" is a judicial opinion on a point other than the precise issue involved in determining a case. (Webster's New Collegiate Dict. (1974) p. 317, col. 1.) Dictum is not controlling legal precedent. However, Supreme Court dicta is persuasive and afforded serious consideration. (*Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212.)

inspections per year, it is impracticable for it to detect and stop the acts of a rogue employee. As set forth in Factual Finding 3, respondent ETC assumes the risk when it chose to run its operations without on-site supervision.

*Claims 1-3 (Claims Against Respondent ETC's ARD Registration)*

18. Cause exists under Business and Professions Code, section 9884.7, subdivisions (a)(1), (4), and (6), to revoke respondent ETC's ARD registration because respondent's employee made untrue statements, committed fraud, and failed to materially comply with the Program or its regulations. Specifically, respondent Torres failed to inspect the five identified vehicles as required by section 44012, but utilized clean plugging to generate passing diagnostic readings in the Bureau's VID for these five vehicles, and then issued fraudulent smog certificates of compliance to these vehicles, though they were not in compliance or were not present for testing (in violation of section 44015). (Factual Findings 7 and 8.)

*Claims 4-6 (Claims Against Respondent ETC's Smog Check, Test Only Station License)*

19. Cause exists under section 44072.2, subdivisions (a), (c), and (cl), to revoke respondent's licenses because respondent ETC failed to comply with sections 44012 and 44015, and California Code of Regulation, title 16, sections 3340.24, subdivision (c), 3340.35, subdivision (c), 3340.41, subdivision (c), and 3340.42, when respondent's employee, respondent Torres, failed to perform the required smog check tests, clean plugged five vehicles, entered false information into the Bureau's OIS, and then issued fraudulent certificates of compliance for the five vehicles in question. (Factual Findings 7 and 8.)

20. When legal cause exists for complainant to discipline respondent's licenses, as is the case here, the burden shifts to respondent to demonstrate mitigation or rehabilitation in order to show that a lesser penalty is warranted. (See *In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309, 315.)

21. As set forth in Factual Findings 9 • 12, respondent ETC established that license revocation would be an overly harsh result. Nevertheless, some measure of license discipline is warranted. (See Legal Conclusion 17D.)

22. Under the Bureau's Guidelines for Disciplinary Orders and Terms of Probation, revised March 2016, in mitigation, respondent ETC's acts were not part of a pattern or practice, but the solitary acts of a terminated former employee. (Factual Finding 10.) As set forth in Factual Finding 11, no consumer experienced any loss or damage as an outgrowth of respondent's acts. And respondent ETC presented evidence of new, more stringent business practices and processes now in place designed to prevent reoccurrence of clean plugging. (Factual Finding 12.)

### *Award of Costs*

23. In any order issued in resolution of a disciplinary proceeding, at the request of the Bureau, the administrative law judge may direct a licentiate found to have committed a violation to pay a sum not to exceed the reasonable costs of investigation and enforcement. A certified copy of the actual costs signed by the Bureau or its designated representative is prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General. (Bus. and Prof. Code, § 125.3, subds. (a) & (c); see Cal. Code Regs., tit. 1, § 1042, subd. (b).)

24. Factors to be considered in determining the reasonableness of the costs sought pursuant to Business and Professions Code, section 125.3 include: the licentiate's success in getting the charges dismissed or reduced; the licentiate's subjective good faith belief in the merits of his or her position; whether the licentiate raised a colorable challenge to the proposed discipline; the licentiate's financial ability to pay; and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.)

25. As set forth in Factual Finding 16, the \$10,205.60 cost of investigation and prosecution are reasonable. However, respondent ETC has asserted potentially meritorious defenses, and has provided evidence that resulted in a significant reduction in the severity of discipline imposed. Accordingly, the cost amount shall be reduced by 70 percent, to \$3,061.68, as set forth in the Order below.

### ORDER

Automotive Repair Dealer Registration Number ARD 282125 and Smog Check, Test Only Station License Number TG 282125, issued to Emission Test Centers, Inc. dba Accurate Smog, Spencer Grant Brod, President, Secretary, Treasurer, and any other automotive repair dealer registration issued to, or any additional licenses issued under Chapter 5 of the Health and Safety Code in the name of respondent Emission Test Centers, Inc. dba Accurate Smog are hereby revoked; provided however, said revocation is stayed and the ARD Registration and Smog Check, Test Only Station License are placed on probation for a period of two years under the terms and conditions set forth below.

### *Terms and Conditions of Probation*

#### **I. Obey All Laws**

During the period of probation, respondent shall comply with all federal and state statutes, regulations and rules governing all BAR 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 BAR on a schedule set by BAR, 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 BAR 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 BAR 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 BAR representatives unrestricted access to all records pursuant to BAR 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 BAR 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.

*III*



## **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 BAR'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/or license(s) with BAR, including any period during which suspension or probation is tolled. If respondent's registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by respondent within 30 days of that date. If respondent's registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal respondent's registration 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 of Automotive Repair \$3,061.68 as its portion of the Bureau's costs of the investigation and enforcement in case No. 79/17-11610. Respondent shall make such payment as directed by the Bureau. 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 case No. 79/17-11610. 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. BAR 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.

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## **9. Completion of Probation**

Upon successful completion of probation, respondent's affected registration and/or 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 BAR.

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## **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 BAR. The Director and the BAR 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 BAR at any time before the date of the originally scheduled completion of probation. If respondent applies to BAR 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 BAR and left outstanding at the time of surrender.

## **11. Supervision Requirements**

Respondent's president shall not delegate supervisory duties, as they relate to the business activities relevant to the probationary registration and/or 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's president from exercising direct supervision over employees, notice and medical substantiation of the condition shall be submitted to BAR within ten (10) days of the medical affirmation of the condition.

DAIBD: October 29, 2018

Signed Copy on File

JAMES MICHAEL DAVIS  
Administrative Law Judge  
Office of Administrative Hearings