

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

In the Matter of the Accusation Against:

HOLIDAY SMOG

1671 Capitola Road
Santa Cruz, CA 95062

Mailing Address:

P.O. Box 3524
Santa Cruz, CA 95063

SHERRY FOSTER, PARTNER
MIKE FOSTER, PARTNER

Automotive Repair Dealer Registration No.
ARD 237873
Smog Check, Test Only, Station License No.
TC 237873

Case No. 79/12-160

Respondents.

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby accepted and adopted as the Decision of the Director of the Department of Consumer Affairs in the above-entitled matter.

The suspension of Automotive Repair Dealer Registration No. ARD 237873 and Smog Check, Test Only, Station License No. TC 237873 shall commence on the effective date of this decision.

This Decision shall become effective 6/24/13.

DATED: May 31, 2013



DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

1 KAMALA D. HARRIS
Attorney General of California
2 DIANN SOKOLOFF
Supervising Deputy Attorney General
3 SHANA A. BAGLEY
Deputy Attorney General
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7 *Attorneys for Complainant*

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

12 In the Matter of the Accusation Against:

Case No. 79/12-160

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14 **Mailing Address:**
P.O. Box 3524
15 Santa Cruz, California 95063
16 **SHERRY FOSTER, PARTNER**
MIKE FOSTER, PARTNER

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

17 **Automotive Repair Dealer Registration No.**
ARD 237873
18 **Smog Check Test Only Station License No.**
TC 237873,
19

20 Respondents.

21
22 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
23 entitled proceedings that the following matters are true:

24 **PARTIES**

25 1. John Wallauch (Complainant) is the Chief of the Bureau of Automotive Repair. He
26 brought this action solely in his official capacity and is represented in this matter by Kamala D.
27 Harris, Attorney General of the State of California, by Shana A. Bagley, Deputy Attorney
28 General.

1 to present evidence and to testify on their own behalf; the right to the issuance of subpoenas to
2 compel the attendance of witnesses and the production of documents; the right to reconsideration
3 and court review of an adverse decision; and all other rights accorded by the California
4 Administrative Procedure Act and other applicable laws.

5 9. Respondents voluntarily, knowingly, and intelligently waive and give up each and
6 every right set forth above.

7 CULPABILITY

8 10. The admissions made by Respondents herein are only for the purposes of this
9 proceeding, or any other proceedings in which the Director of Consumer Affairs, Bureau of
10 Automotive Repair, or other professional licensing agency is involved, and shall not be
11 admissible in any other criminal or civil proceeding.

12 11. For the purpose of resolving the Accusation without the expense and uncertainty of
13 further proceedings, Respondents agree that, at a hearing, Complainant could establish a factual
14 basis for the charges in Accusation No. 79/12-160, and that Respondents hereby give up their
15 right to contest those charges.

16 12. Respondents agree that their Automotive Repair Dealer Registration is subject to
17 discipline and they agree to be bound by the Director's probationary terms as set forth in the
18 Disciplinary Order below.

19 CIRCUMSTANCES IN MITIGATION

20 13. Respondents have never been the subject of any disciplinary action. They are
21 admitting responsibility at an early stage in the proceedings.

22 CONTINGENCY

23 14. This stipulation shall be subject to approval by the Director of Consumer Affairs or
24 the Director's designee. Respondents understand and agree that counsel for Complainant and the
25 staff of the Bureau of Automotive Repair may communicate directly with the Director and staff of
26 the Department of Consumer Affairs regarding this stipulation and settlement, without notice to
27 or participation by Respondents or their counsel. By signing the stipulation, Respondents
28 understand and agree that they may not withdraw their agreement or seek to rescind the

1 stipulation prior to the time the Director considers and acts upon it. If the Director fails to adopt
2 this stipulation as the Decision and Order, the Stipulated Settlement and Disciplinary Order shall
3 be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action
4 between the parties, and the Director shall not be disqualified from further action by having
5 considered this matter.

6 15. The parties understand and agree that facsimile copies of this Stipulated Settlement
7 and Disciplinary Order, including facsimile signatures thereto, shall have the same force and
8 effect as the originals.

9 16. This Stipulated Settlement and Disciplinary Order is intended by the parties to be an
10 integrated writing representing the complete, final, and exclusive embodiment of their agreement.
11 It supersedes any and all prior or contemporaneous agreements, understandings, discussions,
12 negotiations, and commitments (written or oral). This Stipulated Settlement and Disciplinary
13 Order may not be altered, amended, modified, supplemented, or otherwise changed except by a
14 writing executed by an authorized representative of each of the parties.

15 17. In consideration of the foregoing admissions and stipulations, the parties agree that
16 the Director may, without further notice or formal proceeding, issue and enter the following
17 Disciplinary Order:

18 **DISCIPLINARY ORDER**

19 IT IS HEREBY ORDERED that Automotive Repair Dealer Registration No. ARD 237873
20 and Smog Check, Test Only, Station License No. TC 237873 issued to Respondents Holiday
21 Smog, with Sherry Foster and Mike Foster as partners, are revoked. However, the revocations are
22 stayed and Respondents are placed on probation for three (3) years on the following terms and
23 conditions.

24 1. **Actual Suspension.** Automotive Repair Dealer Registration No. ARD 237873 and
25 Smog Check, Test Only, Station License No. TC 237873 issued to Respondents Holiday Smog,
26 with Sherry Foster and Mike Foster as partners, are suspended for 5 days.

27 2. **Obey All Laws.** Comply with all statutes, regulations and rules governing
28 automotive inspections, estimates and repairs.

1 3. **Post Sign.** Post a prominent sign, provided by the Bureau, indicating the beginning
2 and ending dates of the suspension and indicating the reason for the suspension. The sign shall be
3 conspicuously displayed in a location open to and frequented by customers and shall remain
4 posted during the entire period of actual suspension.

5 4. **Reporting.** Respondents or Respondents' authorized representative must report in
6 person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the
7 Bureau, but no more frequently than each quarter, on the methods used and success achieved in
8 maintaining compliance with the terms and conditions of probation.

9 5. **Report Financial Interest.** Within 30 days of the effective date of this action, report
10 any financial interest which any partners, officers, or owners of the Respondents' facility may
11 have in any other business required to be registered pursuant to Section 9884.6 of the Business
12 and Professions Code.

13 6. **Random Inspections.** Provide Bureau representatives unrestricted access to inspect
14 all vehicles (including parts) undergoing repairs, up to and including the point of completion.

15 7. **Jurisdiction.** If an accusation is filed against Respondents during the term of
16 probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter
17 until the final decision on the accusation, and the period of probation shall be extended until such
18 decision.

19 8. **Violation of Probation.** Should the Director of Consumer Affairs determine that
20 Respondents have failed to comply with the terms and conditions of probation, the Department
21 may, after giving notice and opportunity to be heard, temporarily or permanently invalidate the
22 Automotive Repair Dealer Registration and/or suspend or revoke the Smog Check, Test Only,
23 Station License.

24 9. **Cost Recovery.** Respondents shall pay to the Bureau, pursuant to Business and
25 Professions Code section 125.3, the costs of investigation and enforcement in this matter in the
26 amount of \$5,000.00. Payment to the Bureau shall be made in 24 installments, beginning the
27 effective date of the decision with the final payment due no later than 12 months before probation
28 terminates. Failure to complete payment of cost recovery within this time frame shall constitute a

1 violation of probation which may subject Respondents' Automotive Repair Dealer Registration,
2 and Smog Check, Test Only, Station License to outright revocation; however, the Director or the
3 Director's Bureau of Automotive Repair designee may elect to continue probation until such time
4 as reimbursement of the entire cost recovery amount has been made to the Bureau.

5 ACCEPTANCE

6 I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully
7 discussed it with my attorney, William Dean Ferreira, Esq. I understand the stipulation and the
8 effect it will have on my Automotive Repair Dealer Registration, and Smog Check, Test Only,
9 Station License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily,
10 knowingly, and intelligently, and agree to be bound by the Decision and Order of the Director of
11 Consumer Affairs.

12 DATED: 5-13-13 Sherry Taylor Foster
13 MIKE FOSTER, PARTNER
14 HOLIDAY SMOG
15 Respondents

16 I have read and fully discussed with Respondents Holiday Smog, with Sherry Foster and
17 Mike Foster as partners, the terms and conditions and other matters contained in the above
18 Stipulated Settlement and Disciplinary Order. I approve its form and content.

19 DATED: 5/13/13 William Dean Ferreira, Esq.
20 Attorney for Respondents

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ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Director of Consumer Affairs.

Dated:

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DIANN BOKOLOFF
Supervising Deputy Attorney General

SHANA A. BAGLEY
Deputy Attorney General
Attorneys for Complainant

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14 **Mailing Address:**
P.O. Box 3524
15 **Santa Cruz, California 95063**
16 **SHERRY FOSTER, PARTNER**
MIKE FOSTER, PARTNER
17 **Automotive Repair Dealer Registration No.**
ARD 237873
18 **Smog Check Test Only Station License No.**
TC 237873,
19 Respondent.

Case No. 79/12-160

ACCUSATION
SMOG CHECK

20
21 Complainant alleges:

22 **PARTIES**

23 1. John Wallauch ("Complainant") brings this Accusation solely in his official capacity
24 as the Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

25 **Automotive Repair Dealer Registration**

26 2. On a date uncertain in 2005, the Bureau issued Automotive Repair Dealer
27 Registration Number ARD 237873 ("registration") to Holiday Smog ("Respondent") with Sherry

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1 Foster and Mike Foster as partners. The registration was in full force and effect at all times
2 relevant to the charges brought herein and will expire on February 28, 2013, unless renewed.

3 **Smog Check Test Only Station License**

4 3. On or about April 12, 2005, the Bureau issued Smog Check Test Only Station
5 License Number TC 237873 ("station license") to Respondent. The station license was in full
6 force and effect at all times relevant to the charges brought herein and will expire on February 28,
7 2013, unless renewed.

8 **STATUTORY PROVISIONS**

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

11 (a) The director, where the automotive repair dealer cannot show there
12 was a bona fide error, may deny, suspend, revoke, or place on probation the
13 registration of an automotive repair dealer for any of the following acts or omissions
14 related to the conduct of the business of the automotive repair dealer, which are done
15 by the automotive repair dealer or any automotive technician, employee, partner,
16 officer, or member of the automotive repair dealer.

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

20 (4) Any other conduct that constitutes fraud.

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

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

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1 5. Code section 118, subdivision (b) states:

2 The suspension, expiration, or forfeiture by operation of law of a license
3 issued by a board in the department, or its suspension, forfeiture, or cancellation by
4 order of the board or by order of a court of law, or its surrender without the written
5 consent of the board, shall not, during any period in which it may be renewed,
6 restored, reissued, or reinstated, deprive the board of its authority to institute or
7 continue a disciplinary proceeding against the licensee upon any ground provided by
8 law or to enter an order suspending or revoking the license or otherwise taking
9 disciplinary action against the licensee on any such ground.

10 6. Code section 9884.13 provides, in pertinent part, that the expiration of a valid
11 registration shall not deprive the director or chief of jurisdiction to proceed with a disciplinary
12 proceeding against an automotive repair dealer or to render a decision invalidating a registration
13 temporarily or permanently.

14 7. Code section 477 provides, in pertinent part, that "Board" includes "bureau,"
15 "commission," "committee," "department," "division," "examining committee," "program," and
16 "agency." "License" includes certificate, registration or other means to engage in a business or
17 profession regulated by the Code.

18 8. Section 44002 of the Health and Safety Code provides, in pertinent part, that the
19 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
20 the Motor Vehicle Inspection Program.

21 9. Section 44072.2 of the Health and Safety Code states, in pertinent part:

22 The director may suspend, revoke, or take other disciplinary action
23 against a license as provided in this article if the licensee, or any partner, officer, or
24 director thereof, does any of the following:

25 (a) Violates any section of this chapter [the Motor Vehicle Inspection
26 Program (Health and Saf. Code, § 44000, et seq.)] and the regulations adopted
27 pursuant to it, which related to the licensed activities.

28 (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.

10. Section 44072.6 of the Health and Safety Code provides, in pertinent part, that the
expiration or suspension of a license by operation of law, or by order or decision of the Director

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

3 11. Section 44072.8 of the Health and Safety Code states:

4 When a license has been revoked or suspended following a hearing under
5 this article, any additional license issued under this chapter in the name of the
6 licensee may be likewise revoked or suspended by the director.

6 **COST RECOVERY**

7 12. Code section 125.3 provides, in pertinent part, that a Board may request the
8 administrative law judge to direct a licentiate found to have committed a violation or violations of
9 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
10 enforcement of the case.

11 **UNDERCOVER OPERATION – NOVEMBER 3, 2011**

12 13. On or about November 3, 2011, a Bureau undercover operator drove a Bureau-
13 documented 1999 Mazda B3000 truck to Respondent's facility and requested a smog inspection.
14 The vehicle could not pass the visual portion of a smog inspection because the vehicle's positive
15 crankcase ventilation valve (PCV) was missing. The operator signed a work order and was
16 provided with a copy of the document prior to the smog inspection. Vincent Malone, a licensed
17 smog technician, performed the smog inspection and issued electronic Certificate of Compliance
18 No. [REDACTED] for that vehicle. The operator paid Respondent \$50 for the smog inspection and
19 received a copy of Invoice No. [REDACTED] and the Vehicle Inspection Report.

20 **FIRST CAUSE FOR DISCIPLINE**

21 **(Misleading Statements)**

22 14. Respondent has subjected its registration to discipline under Code section 9884.7,
23 subdivision (a)(1), in that on or about November 3, 2011, it made statements which it knew or
24 which by exercise of reasonable care it should have known were untrue or misleading when it
25 issued electronic Certificate of Compliance No. [REDACTED] for the 1999 Mazda B3000 truck,
26 certifying that the vehicle was in compliance with applicable laws and regulations when, in fact,
27 the vehicle's PCV was missing.

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1 a. Section 3340.35, subdivision (c): Respondent issued electronic Certificate of
2 Compliance No. [REDACTED] even though that vehicle had not been inspected in accordance with
3 section 3340.42 of that Code.

4 b. Section 3340.42: Respondent failed to conduct the required smog tests and
5 inspections on that vehicle in accordance with the Bureau's specifications.

6 **FIFTH CAUSE FOR DISCIPLINE**

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

8 18. Respondent subjected its station license to discipline under Health and Safety Code
9 section 44072.2, subdivision (d), in that on or about November 3, 2011, regarding the 1999
10 Mazda B3000 truck, it committed acts involving dishonesty, fraud or deceit whereby another was
11 injured by issuing electronic Certificate of Compliance No. [REDACTED] to that vehicle without
12 performing a bona fide inspection of the emission control devices and systems on the vehicle,
13 thereby depriving the People of the State of California of the protection afforded by the Motor
14 Vehicle Inspection Program.

15 **PRIOR CITATIONS**

16 19. To determine the degree of penalty, if any, to be imposed upon Respondent
17 Complainant alleges as follows:

18 a. On April 23, 2007, the Bureau issued Citation No. C07-0776 to Respondent against
19 its registration and station licenses for violations of Health and Safety Code section 44012,
20 subdivision (f) (failure to perform a visual/functional check of emission control devices) and
21 California Code of Regulations, title 16, ("Regulation"), section 3340.35, subdivision (c) (issuing
22 a certificate of compliance to a vehicle improperly tested). Respondent issued a certificate of
23 compliance to a Bureau vehicle with a missing evaporative emissions charcoal canister. The
24 Bureau assessed a civil penalty of \$500. Respondent appealed this citation on May 29, 2007, and
25 paid the citation on August 16, 2007.

26 b. On July 29, 2008, the Bureau issued Citation No. C09-0097 to Respondent against its
27 registration and station licenses for violations of Health and Safety Code section 44012,
28 subdivision (f) (failure to perform a visual/functional check of emission control devices) and

1 Regulation, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle
2 improperly tested). Respondent issued a certificate of compliance to a Bureau vehicle with a
3 missing pulse air reed valve assembly. The Bureau assessed a civil penalty of \$500. Respondent
4 appealed this citation on August 18, 2008, and paid the citation on January 14, 2009.

5 c. On November 18, 2008, the Bureau issued Citation No. C09-0620 to Respondent
6 against its registration and station licenses for violations of Health and Safety Code section
7 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices)
8 and Regulation, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle
9 improperly tested). Respondent issued a certificate of compliance to a Bureau vehicle with a non-
10 functional linear EGR valve. The Bureau assessed a civil penalty of \$1,000. Respondent
11 complied with this citation on January 14, 2009.

12 d. On July 7, 2011, the Bureau issued Citation No. C2012-0012 to Respondent against
13 its registration and station licenses for violations of Health and Safety Code section 44012,
14 subdivision (f) (failure to perform a visual/functional check of emission control devices).
15 Respondent issued a certificate of compliance to a Bureau vehicle with a missing fuel evaporative
16 canister. The Bureau assessed a civil penalty of \$1,500. Respondent appealed this citation on
17 August 18, 2011, and paid the citation on August 22, 2011; however, the appeal is still pending.

18 OTHER MATTERS

19 20. Under Code section 9884.7, subdivision (c), the director may invalidate temporarily
20 or permanently or refuse to validate, the registrations for all places of business operated in this
21 state by to Holiday Smog, upon a finding that it has, or is, engaged in a course of repeated and
22 willful violations of the laws and regulations pertaining to an automotive repair dealer.

23 21. Under Health and Safety Code section 44072.8, if Smog Check Test Only Station
24 License Number TC 237873, issued to Holiday Smog, is revoked or suspended, any additional
25 license issued under this chapter in the name of said licensee may be likewise revoked or
26 suspended by the director.

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PRAYER

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

1. Revoking, suspending or placing on probation Automotive Repair Dealer Registration Number ARD 237873, issued to Holiday Smog;
2. Revoking, suspending or placing on probation any other automotive repair dealer registration issued to Holiday Smog;
3. Revoking or suspending Smog Check Test Only Station License Number TC 237873, issued to Holiday Smog;
4. Revoking or suspending any additional license issued under Chapter 5 of the Health & Safety Code in the name of Holiday Smog;
5. Ordering Holiday Smog to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and,
6. Taking such other and further action as deemed necessary and proper.

DATED: June 5 2012


JOHN WALLAUCH
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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