

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

In the Matter of the Second Amended Accusation
Against:

KEARNY MESA SMOG CHECK

4191 Convoy Street, Suite A
San Diego, CA 92111

THAO VAN NGUYEN, OWNER

Automotive Repair Dealer Registration
No. ARD 240219
Smog Check Test Only Station No. TC 240219

and

THAO VAN NGUYEN

3651 Hondo Street
San Diego, CA 92105
Smog Check Repair Technician License
No. EI 151145
Smog Check Inspector License No.
EO 151145 (Formerly Advanced Emission
Specialist Technician License No. EA 151145)

and

THOMAS NGUYEN

4757 Clairemont Mesa Blvd. #304
San Diego, CA 92117
Smog Check Repair Technician License No.
EI 146585
Smog Check Inspector License No,
EO 146585 (Formerly Advanced Emission
Specialist Technician License No. EA 146585)

Respondents.

Case No. 79/12-169

OAH No. 2013030111

DECISION


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

1. Page 1, caption, Thao Van Nguyen: The street name "Honda" is corrected to read "Hondo."
2. Page 1, caption, Thomas Nguyen: The suite number "#394" is corrected to read "#304."
3. Page 1, caption, Thomas Nguyen: The zip code "82117" is corrected to read "92117."
4. Page 2, paragraph #1, line 2, under Jurisdictional Matters under Factual Findings: The Accusation No. "7912-169" is corrected to read "79/12-169."

This Decision shall become effective

MARCH 21, 2014.

DATED: FEB 13 2014



DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

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FOR THE BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

In the Matter of the Second Amended Accusation
Against:

Case No. 79/12-169

KEARNY MESA SMOG CHECK
4191 Convoy Street, Suite A
San Diego, CA 92111

OAH No. 2013030111

THAO VAN NGUYEN, OWNER
Automotive Repair Dealer Registration No.
ARD 240219
Smog Check Test Only Station No. TC
240219

and

THAO VAN NGUYEN
3651 Honda Street
San Diego, CA 92105
Smog Check Repair Technician License No.
EI 151145
Smog Check Inspector License No.
EO 151145
(Formerly Advanced Emission Specialist
Technician License No. EA 151145)

and

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4757 Clairemont Mesa Blvd. #394
San Diego, CA 82117
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EI 146585
Smog Check Inspector License No.
EO 146585
(Formerly Advanced Emission Specialist
Technician License No. EA 146585)

Respondents.

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on October 7, 2013.

G. Michael German, Deputy Attorney General, Department of Justice, State of California, represented complainant Patrick Dorais, Acting Chief, Bureau of Automotive Repair (the Bureau), Department of Consumer Affairs, State of California.

William D. Ferreira, Attorney at Law, represented respondents Thao Van Nguyen and Thomas Nguyen, who were present throughout the disciplinary proceeding.

On October 7, 2013, the record in the disciplinary proceeding was opened; jurisdictional documents were presented; a stipulation was recited; and opening statements were given. At the close of the hearing, the record was left open to give complainant the opportunity to submit a response to respondents' trial brief and to give respondents the opportunity to submit a reply brief. Both parties submitted briefs. On October 24, 2013, the record was closed, and the matter was submitted.

FACTUAL FINDINGS

Stipulation Dismissing Thomas Nguyen from the Second Amended Accusation

At the time of hearing, complainant dismissed all causes of action in the amended accusation against Thomas Nguyen. In return, Thomas Nguyen agreed to accept and be bound by a citation the Board will issue with the same violations contained in the citation that had been withdrawn and incorporated into the second amended accusation. Thomas Nguyen further agreed to complete an 8-hour training course and submit proof of the completion of the training course within 30 days from receipt of the citation.

Jurisdictional Matters

1. On September 20, 2013, complainant signed the Second Amended Accusation in his official capacity as the Bureau's Chief. Second Amended Accusation No. 7912-169 sought the revocation, suspension or placement on probation of Thao Van Nguyen's automotive repair dealer's registration, his smog station license, and his smog technician license as a result of Thomas Nguyen's and technician Alex Yeargen's inspections of a 2001 Honda Prelude on January 30, 2012 and the inspection of a 1986 Chevrolet on September 23, 2010. The second amended accusation alleges that Thao Van Nguyen (respondent or respondent Nguyen) made misleading statements; committed acts that constitute fraud; violated sections of the Health and Safety Code and applicable regulations; and failed to include required information in an invoice. Complainant sought an order directing respondent to pay reasonable costs of investigation and prosecution.

Respondent timely filed a Notice of Defense.

Respondent's Defenses and Arguments

2. Respondent raised a number of defenses to the allegations contained in the second amended accusation. Respondent asserted that the Bureau improperly circumvented its established four-step disciplinary process by attempting to revoke respondent's Advanced Emission Specialist Technician license and that the Bureau improperly seeks to hold respondent Kearny Mesa Smog strictly liable for the misconduct of its technicians. In addition, respondent affirmatively asserted the defense of impossibility because, respondent argued, the Bureau altered the vehicle's diagnostic system in order to prevent respondent from detecting the missing evaporative emission (EVAP) control system canister. Further, respondent claimed as affirmative defenses that the Bureau had "unclean hands"; that the Bureau intentionally frustrated respondent's ability to perform the smog check inspection; that the Bureau intentionally and knowingly created an impossible scenario that a technician was tasked to perform; and that respondent's performance was excused under the present circumstances.

In addition to these affirmative defenses, during the hearing respondent argued that his technician license was immune to discipline because, effective August 1, 2012, the Bureau reclassified respondent's Advanced Emission Specialist Technician (EA) license to a Smog Check Inspector (EO) license and/or Smog Check Inspector (EI) license. During the time period relevant to this matter, respondent held an EA license.

License History

3. On July 13, 2005, the Bureau issued Automotive Repair Dealer Registration No. ARD 240219 to respondent, the owner of Kearny Mesa Smog Check (Kearny Mesa). The registration is current and is in full force and effect. On July 22, 2005, the Bureau issued Smog Check Test Only Station License Number TC 240219 to respondent. In 2005, EA Technician License No. 151145 was issued to respondent. EA License No. 151145 expired on December 31, 2012. Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), EA License No. 151145 was reclassified as EO License No. 151145 and EI License No. 151145, effective January 7, 2013. This license will expire on December 31, 2014.

4. In 2003, EA Technician License No. 146585 was issued to Thomas Nguyen. EA License No. 146585 expired on October 15, 2012. Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), EA License 146585 was reclassified as EO License No. 146585 and EI License No. 146585, effective October 15, 2012. This license will expire on October 31, 2014.

Prior Citations

5. On June 1, 2007, the Bureau issued citations C07-0967 and M07-0968 against respondent's technician and smog station licenses for passing a vehicle with a missing air suction valve. On January 29, 2010, the Bureau issued citations C10-0758 and M10-0759 against respondent's technician and smog station licenses for passing a vehicle with the ignition timing adjusted beyond the manufacturer's specifications. On June 24, 2010, the Bureau issued citations C10-1353 and M10-1354 against respondent's technician and smog station licenses for passing a vehicle with a missing fuel evaporative canister. Respondent complied with each of these citations by paying fines and taking the required courses.

On October 20, 2010, the Bureau issued Citations C-2011-0494 and M2011-0495 against respondent and Thomas Nguyen for passing a vehicle with the ignition timing sequence set beyond manufacturer's specifications. Respondent and Thomas Nguyen appealed this citation.

On September 27, 2012, the Bureau withdrew without prejudice Citations C-2011-0495 and M-2011-0495 dated October 20, 2010, and filed against respondent and Thomas Nguyen. A hearing scheduled for October 8, 2012, was taken off calendar at complainant's request. The Bureau then incorporated the allegations contained in these citations into the sixth through twelfth causes of action of the second amended accusation.

The September 23, 2010 Undercover Operation

6. On September 23, 2010, Fernando Figueroa, an undercover operative of the Bureau, participated in a Bureau undercover operation at respondent's licensed establishment in San Diego, using a 1986 Chevrolet Monte Carlo, license number # [REDACTED]. Previously, Bureau staff tampered with the Monte Carlo's emissions control system by advancing the engine's ignition timing 10 degrees before top dead center (BTDC), a setting beyond the manufacturer's specification.¹ Figueroa drove the vehicle to the facility and requested a smog inspection. He received a written estimate.

Thomas Nguyen performed the test. After he completed the test, Thomas Nguyen gave Figueroa an invoice and a VIR that indicated the vehicle had passed the inspection. Thomas Nguyen wrote in the note section of the invoice the following:

Timing about 3 degrees (beyond manufacturer's specification).
Very hard to see. Parallax error – see on an angle. Anywhere
between 3 to 6 degrees (beyond specifications). 25 degrees

¹ A vehicle's ignition timing sequence is the angle relative to piston position and crankshaft angular velocity where a spark will occur in the combustion chamber near the end of the compression stroke. A vehicle that does not have a timing sequence performing according to manufacturer's specifications will not operate efficiently.

beyond specification without. Disconnect 4 wires. Rule in favor of consumer-passed. We cannot be exact.

The information relating to the test and the test result was transmitted by modem from respondent's Emission Inspection System (EIS) to the Bureau's database and to the Department of Motor Vehicles (DMV).

After the operation, Figueroa delivered the Monte Carlo to Program Representative Robert A. Dearie. Dearie took photos of the vehicle, received the invoice Figueroa obtained, and noted the vehicle mileage. Dearie also logged the vehicle into a Bureau storage unit. Program Representative Dearie subsequently released the vehicle to the Bureau's Oceanside facility on October 26, 2010.

7. Daniel Woods is a Program Representative with the Bureau assigned to the Bureau's documentation lab in Fontana.

Prior to the undercover operation, Woods adjusted the ignition timing from the correct ignition base timing of 0 degrees top dead center (TDC) to the incorrect timing of 10 degrees before top dead center (BTDC). He performed two smog inspections on the Monte Carlo and issued two Vehicle Inspection Reports (VIR) dated September 3, 2010, and October 26, 2010. In both VIR reports, Woods failed the Monte Carlo and documented the ignition timing sequence as 10 degrees BTDC.

The ignition timing sequence on the Monte Carlo is identified on the vehicle's underhood label. The correct timing sequence is also readily available to technicians through the Emission Control Application Guide (Mitchell Guide). Woods installed a tamper indicator on the distributor housing to detect distributor rotation that would be required to adjust the timing. After the vehicle was returned from the undercover operation at respondent's station and delivered to the Oceanside facility on October 26, 2010, Woods confirmed that the sequence was 10 degrees BTDC. The tamper indicator remained intact after the undercover operation.

The January 30, 2012 Undercover Operation

8. On January 30, 2012, Atsumi Flores, an undercover operative of the Bureau, participated in a Bureau undercover operation at respondent's licensed establishment in San Diego, using a 2001 Honda Prelude, license number # [REDACTED]. Previously, Bureau staff removed the Prelude's fuel evaporative canister.² Flores drove the vehicle to the facility and requested a smog inspection. She received a written estimate.

² An evaporative canister is part of the evaporative system that is within the emission system. While fuel is stored inside the tank, hydrocarbon pollutants build up and are retained inside this canister. The canister contains charcoal that absorbs the hydrocarbons. When the engine is started, a valve opens that allows fresh air to come in and purge the hydrocarbons into the air intake and then into the combustion chamber for burning.

Alex Yeargen³ performed the test. After he completed the test, Yeargen gave Flores an invoice and a VIR that indicated the vehicle had passed the inspection.

The information relating to the test and the test result was transmitted by modem from respondent's EIS to the Bureau's database and to the DMV.

After the operation, Figueroa delivered the Monte Carlo to Program Representative Kevin McKee. McKee took photos of the vehicle, received the invoice Flores obtained, and noted the vehicle mileage. McKee also logged the vehicle into a Bureau storage unit. The Prelude was subsequently released to the Bureau's Fontana Documentation facility on February 3, 2010.

9. Paul Hsu is a Program Representative with the Bureau assigned to the Bureau's documentation lab in Fontana.

Prior to the undercover operation, Hsu removed the fuel evaporative canister (canister) and performed two smog inspections on the Prelude on January 5, 2012. Hsu took photos of the Prelude with the canister installed and with the canister missing. In both VIR reports, Hsu failed the Prelude. He issued two VIR reports before the undercover operation. In these reports, he noted that the fuel evaporative controls were "missing." On February 8, 2012, after the vehicle was returned from the undercover operation, Hsu performed two additional smog inspections and prepared two more VIR reports. Again, in both of these VIR reports, Hsu failed the Prelude. He again noted that the fuel evaporative controls were missing.

10. In instructions he prepared for the undercover operator, Hsu wrote the following in the vehicle's transition log:

When the vehicle is cold, start vehicle, and let it idle for 10 minutes to warm it up. Shut off ignition, and restart, drive normally. This will prevent [illegible] from running and causing MIL (Malfunction Indicator Lamp).

11. The canister was identified by a schematic on the Prelude's under-hood label as part of the Prelude's fuel evaporative emission controls. The manufacturer's manual also identifies the canister. The missing canister was noticeable upon a thorough inspection. But, the missing canister was difficult to notice, as the Bureau's photos show. The canister was behind a number of wires and hoses that made its absence hard to note.

³ Yeargen was a licensed smog check technician at Kearny Mesa Smog. The Bureau was unable to determine his whereabouts.

Respondent's Evidence

12. Thomas Nguyen testified regarding his inspection of the Monte Carlo. He found it very difficult to see the Monte Carlo's ignition timing sequence. To see the timing sequence, he stood on the vehicle's bumper. After engaging in some effort to see the timing sequence, he measured three degrees and passed the vehicle knowing that the Bureau accepted a three degree margin of error. He notated his efforts in the invoice in case the Bureau questioned his inspection.

13. Respondent also testified. He has a background as a mechanical engineer prior to purchasing Kearny Smog. He has owned Kearny Mesa Smog since 2005.

14. After the 2007 and 2010 citations, respondent created procedures for his employees to follow when performing smog inspections. He modified the station's invoice to include the systems and devices on vehicles the technicians must inspect. The technicians were instructed to document their inspections in the note section of the invoices. Respondent provided them with all necessary reference materials. He also investigated the background, education, training and experience of technicians who applied to work for him.

The Disciplinary Guidelines

15. The BAR's disciplinary guidelines provide in part:

Accusations are filed by the Bureau only in cases it deems serious. The Bureau's emphasis is on disciplining licensees who show a pattern of abuse or willful misconduct in dealing with the public. The following guidelines were formulated for licensees who are found to have committed substantial violations. . . .

16. The BAR's disciplinary guidelines provide in part:

To foster uniformity of penalties and to make sure our licensees and registrants understand the consequences of violations of the Automotive Repair Act . . . , the Bureau of Automotive Repair has established these guidelines. The guidelines provide a range of penalties for each section of law found to have been violated. The Bureau requests that Administrative Law Judges take into account the "Factors in Aggravation and in Mitigation" listed below, when deciding the severity of the penalty within the range.

[¶] . . . [¶]

1. FACTORS IN AGGRAVATION

[¶] . . . [¶]

l. Evidence that the unlawful act was part of a pattern of practice.

[¶] . . . [¶]

n. Currently on probation for improper acts.

[¶] . . . [¶]

r. Any other conduct which constitutes fraud or gross negligence.

2. FACTORS IN MITIGATION

a. Evidence that respondent accepted BAR's suggested resolution to consumer complaint.

b. Evidence of voluntary participation in retraining for self or employees.

c. Evidence of voluntary purchase of proper diagnostic equipment and manuals.

d. Evidence of temporary medical condition that prevented respondent from exercising supervision and control over employees or others, which led to wrongdoing.

e. No loss to consumer and no damage to consumer's property . . .

f. Evidence that shop has taken specific steps for retraining and has initiated steps to minimize recurrence.

g. Evidence of resolution of all consumer complaints with a subsequent change in business practice.

h. Evidence of internal control or audit designed to eliminate errors.

The absence of any new allegations or amendments to the accusation as originally filed, during the period between the filing of the accusation and the date the matter comes to hearing, in itself, shall not be regarded as evidence of mitigation.

17. The recommended range of discipline for fraud is as follows:

Conduct Constituting Fraud: Minimum:
Revocation, stayed, 30 day suspension, 5 year
probation; Maximum: Revocation.

18. The recommended range of discipline for improper inspection and improper issuance of Certificate of compliance is as follows:

Minimum: Revocation of ARD & Station license, stayed
30 day suspension of Station license
2 year probation; Maximum: Revocation of ARD & Station
License

Affirmative Defenses

19. Contention Improper Application of Strict Liability to Kearny Mesa Smog: Respondent's assertion that the Bureau improperly seeks to impose strict liability upon respondent is rejected. Respondent elected to have his employees perform smog inspections. Any violations of California's clean air legislation that these technicians committed occurred in the course of the performance of their duties and are attributable to respondent, dba Kearny Mesa Smog. [*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192 ("If a licensee elects to operate his business through employees he must be responsible to the licensing authority for their conduct in the exercise of his license and he is responsible for the acts of his agents or employees done in the course of his business in the operation of the license.")] Regulation of smog check station licenses would be impossible if smog check station owners could simply avoid their duty to comply with California's clear air legislation by hiring employees to perform the smog checks.

20. Contention that Complainant Did Not Follow The Four-Step Disciplinary Process. Respondent argues that, because the Bureau initially elected to cite respondent under his EA license, the Bureau "can hardly change their [sic] tune based on alleged improper inspections . . . by two other technicians," withdraw the citations and incorporate the allegations from the citation into the amended accusation. Respondent cited the Bureau's four-step disciplinary process as the basis of his argument. But, during the hearing, respondent did not offer evidence concerning this process or why this process would bar complainant from bringing this action against respondent. Respondent also did not cite any

statutory or other authority to support this assertion.⁴ As a result, respondent's argument that the Bureau may not pursue this action against respondent is not convincing and is not accepted.⁵

21. Contention Regarding Agency Misconduct; Impossibility of Performance; Frustration of Purpose. Respondent also argues that the Bureau intentionally altered the Prelude's diagnostic system to prevent respondent from detecting the missing EVAP control system canister. As a result, the Bureau has "unclean hands"; respondent's ability to perform the smog check inspection was frustrated; and the ability to perform the smog check inspection was, in fact made impossible. Under the circumstances, respondent argues, any violations should be excused. These arguments are also rejected.⁶

According to respondent, Hsu prevented respondent from performing an adequate inspection of the Prelude's EVAP system because Hsu ensured that the MIL did not become illuminated and, because the MIL was not illuminated, respondent reasonably assumed that the canister was by the fuel tank or hidden underneath a fender or firewall. Respondent's assertions are without merit.

Respondent's duty to ensure that the Prelude's fuel evaporative emission controls were installed in the Prelude did not depend on whether the Malfunction Indicator Lamp was lit, as respondent suggests. Respondent was required to verify that the fuel evaporative emission controls system was installed, whether the Malfunction Indicator Lamp was lit or not, and the Bureau did not prevent respondent from discovering that this canister was missing. The canister was part of the Prelude's emission controls system, and it was not installed in the Prelude. The canister's location was not a secret. It was identified on the

⁴ According to the Bureau's disciplinary guidelines, the Bureau files accusations only for serious misconduct involving licensees who show a pattern of abuse or willful misconduct. By this measure, the Bureau was amply justified in filing the accusation against respondent. Respondent has had a pattern of improperly issuing certificates of compliance. The Bureau cited respondent in 2007 and 2010 for improperly issuing certificates of compliance. Likewise, in this matter, both citations concerned the improper issuance of certificates of compliance on two separate occasions.

⁵ The Bureau may discipline respondent's EO license *if* his dealer registration and/or smog check station license is revoked or suspended under Health and Safety Code section 44078.8.

⁶ Respondent commented that it was "absolutely impractical for the technician to verify all (EVAP) components (were) present," and that the technician "has to make assumptions based on the information obtained through his smog check inspection." Here, respondent argues that because the canister's absence was difficult to detect he should not be liable. The difficulty detecting the missing canister concerns whether or not respondent made a bona fide mistake and not whether he should be liable for not detecting the missing canister.

under-hood label and was further identified in the manufacturer's manual. Respondent's argument is not accepted.

22. Contention that Complainant Cannot Proceed Against Respondent's EA License Because He Now Holds EI/EO Licenses. At the hearing respondent asserted that, because he now holds EO and EI technician licenses and no longer holds an EA license, the second amended accusation should be dismissed. This argument is also rejected. The Bureau may suspend or revoke any additional license issued by the Bureau when the Bureau suspends or revokes a license under Health and Safety Code section 44072.8. This means that if respondent's station license is revoked or suspended, his Smog Inspector and Smog Repair Technician licenses could also be revoked or suspended as "additional" licenses the Bureau issued to respondent.⁷

LEGAL CONCLUSIONS

Purpose of Administrative Disciplinary Proceedings

1. Administrative proceedings to revoke, suspend, or impose discipline on a licensee are noncriminal and nonpenal; they are not intended to punish the licensee, but to protect the public. (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1206.)

Burden and Standard of Proof

2. In revocation proceedings, the Bureau must prove that charges in the Accusation are true and 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.) Respondents have the burden of establishing any affirmative defenses.

3. The preponderance of the evidence standard applies in this disciplinary proceeding.

Disciplinary Statutes

4. Business and Professions Code section 9884.7 provides:

(a) The director, where the automotive repair dealer cannot show there was a bona fide error, may . . .

⁷ Since Health and Safety Code section 44072.8 applies to any additional licenses the Bureau issued respondent, it is not necessary to discuss the Bureau's reclassification of respondent's EA technician license as EI and EO licenses pursuant to California Code of Regulation, title 16, sections 3340.28 and 3340.29.

suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer.

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

[¶] . . . [¶]

(4) Any other conduct that constitutes fraud.

[¶] . . . [¶]

(6) Failure in any material respect to comply with the provisions of this chapter or regulations adopted pursuant to it. . . .

5. Health and Safety Code section 44072.2 provides:

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 and the regulations adopted pursuant to it, which related to the licensed activities.

(b) Is convicted of any crime substantially related to the qualifications, functions, or duties of the license holder in question.

(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.

(e) Has misrepresented a material fact in obtaining a license.

(f) Aids or abets unlicensed persons to evade the provisions of this chapter.

(g) Fails to make and keep records showing his or her transactions as a licensee, or fails to have those records available for inspection by the director or his or her duly authorized representative for a period of not less than three years after completion of any transaction to which the records refer, or refuses to comply with a written request of the director to make the records available for inspection.

(h) Violates or attempts to violate the provisions of this chapter relating to the particular activity for which he or she is licensed.

6. Health and Safety Code section 44072.8 provides:

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

Smog Check Inspections

7. Health and Safety Code section 44032 provides:

No person shall perform . . . tests . . . of emission control devices or systems of motor vehicles required by this chapter unless the person performing the test . . . is a qualified smog check technician and the test . . . is performed at a licensed smog check station. Qualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012.

8. Health and Safety Code section 44012 provides:

The test at the smog check stations shall be performed in accordance with procedures prescribed by the department . . . The department shall ensure, as appropriate to the test method, the following:

[¶] . . . [¶]

(f) A visual or functional check is made of emission control devices . . . The visual or functional check shall be performed in accordance with procedures prescribed by the department. . . .

9. Health and Safety Code section 44015, subdivision (b), requires smog check stations to issue certificates of compliance only when vehicles meet the requirements set forth under Health and Safety Code section 44012.

10. California Code of Regulations, title 16, section 3340.30, provides:

A smog check technician shall comply with the following requirements at all times while licensed.

(a) A licensed technician shall inspect, test and repair vehicles in accordance with section 44012 of the Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this article. . . .

11. California Code of Regulation, title 16, section 3340.35, provides:

(c) 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 . . .

12. California Code of Regulations, title 16, section 3340.42, subdivision (e)(1), provides:

(e) In addition to the test methods prescribed in this section, the following tests shall apply to all vehicles, except diesel-powered vehicles, during the Smog Check inspection:

(1) A visual inspection of the vehicle's emissions control systems. During the visual inspection, the technician shall verify that the following emission control devices, as applicable, are properly installed on the vehicle:

[¶] . . . [¶]

(F) fuel evaporative emission controls,

[¶] . . . [¶]

(H) ignition spark controls and

(I) any emission control systems that are not otherwise prompted by the (EIS), but listed as a requirement by the vehicle manufacturer.

13. California Code of Regulations, title 16, section 3340.45 provides:

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

False or Misleading Documents

14. California Code of Regulations, title 16, section 3373 provides:

No automotive repair dealer or individual in charge shall, in filling out an estimate, invoice, or work order, or record required to be maintained by section 3340.15(f) of this chapter, withhold therefrom or insert therein any statement or information which will cause any such document to be false or misleading, or where the tendency or effect thereby would be to mislead or deceive customers, prospective customers, or the public.

Costs of Enforcement

15. Business and Professions Code section 125.3 provides:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department . . . the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to

pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] . . . [¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be 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.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a)

16. California Administrative Code, title 1, section 1042, provides:

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

[¶] . . . [¶]

(4) The ALJ may permit a party to present testimony relevant to the amount and reasonableness of costs.

(c) The proposed decision shall include a factual finding and legal conclusion on the request for costs and shall state the reasons for denying a request or awarding less

than the amount requested. Any award of costs shall be specified in the order.

CAUSES FOR DISCIPLINE

First Cause for Discipline

17. Cause does not exist to discipline respondent's Automobile Repair Dealer registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(1). Section 9884.7 authorizes the discipline of an ARD registration for a false and misleading statement, except where the dealer can show there was bona fide error. Yeargen should not have issued the certificate of compliance for the Prelude since the EVAP canister was missing. But, Yeargen made a bona fide mistake when he missed the canister because the missing canister was difficult to detect, as the photos taken of the Prelude before the undercover operation show. Except for his error in failing to observe the missing canister, Yeargen carefully documented his inspection of the Prelude in the invoice he gave to the undercover operator. In the invoice note sections, he referenced the applicable Mitchel Guide section; he documented the integrity of the fuel cap and marked his note with a check mark; and he documented the Prelude's timing sequence. His care in inspecting the systems and devices on the Prelude sharply contrasts with his failure to discover the missing canister. Considering both the difficulty finding the missing canister and Yeargen's efforts to inspect other systems and devices on the Prelude, it is concluded that Yeargen made a bona fide error when he issued the certificate of compliance for the Prelude with the missing canister. This cause for discipline is dismissed.

Second Cause for Discipline

18. Cause does not exist to discipline respondent's registration under Business and Professions Code section 9884.7, subdivision (a)(4), for fraud. A preponderance of the evidence established that Yeargen made a bona fide error when he issued the certificate of compliance with the Prelude's EVAP canister missing. This cause of action is dismissed.

Third and Fourth Causes for Discipline

19. Cause exists to impose discipline against respondent Kearny Mesa's license pursuant to Health and Safety Code sections 44012, subdivisions (a) and (f), and 44012, subdivision (b), and California Code of Regulations, title 16, section 3340.42, subdivision (e)(1). Respondent failed to determine that all emission control devices and systems were installed and functioning correctly on the Prelude, and respondent incorrectly issued a certificate of compliance on January 30, 2012, for the Prelude with the EVAP canister missing.

Fifth Cause for Discipline

20. Cause does not exist to discipline respondent Kearny Mesa's station license pursuant to Health and Safety Code section 44072.2, subdivision (d). It cannot be concluded that Yeargen committed a dishonest, fraudulent or deceitful act when he issued the certificate of compliance for the Prelude. Yeargen made a bona fide error when he issued the certificate of compliance for the Prelude and did not commit a dishonest, fraudulent or deceitful act.

Sixth Cause for Discipline

21. Cause does not exist to discipline respondent Kearny Mesa's dealer registration pursuant to Business and Professions Code section 9884.2. This section does not concern the documentation a dealer must include in an estimate or invoice for work to be done on a vehicle, and it cannot be a basis for discipline here. As possible authority for discipline under this cause of action, complainant cites, in the second amended accusation's legal authorities section but not in the sixth cause of discipline, California Code of Regulation, title 16, section 3373. This rule prohibits dealers from withholding information on an invoice or estimate that will cause any document to be false or misleading or that will have the "tendency or effect" to mislead or deceive consumers. It cannot be concluded that respondent's failure to include the odometer reading on the Monte Carlos's estimate and invoice was false or misleading. It also cannot be concluded that the failure to include the odometer reading on the estimate or invoice had the tendency or effect to deceive the consumer. This cause of action is dismissed.

Seventh Cause for Discipline

22. Cause does not exist to discipline respondent Kearny Mesa pursuant to Health and Safety Code section 44072.2, subdivision (d). The preponderance of the evidence does not establish that respondent committed an act involving dishonesty, fraud or deceit that injured another on September 23, 2010 when Thomas Nguyen issued a certificate of compliance for the Monte Carlo with the ignition timing sequence not set according to manufacturer's specifications.

Thomas Nguyen struggled to determine the correct timing sequence for the Monte Carlo as his notes in the invoice show and as he testified. He wrote that the timing was "about (three degrees before top dead center)," and the timing sequence was "very hard to see." He also wrote that there appeared to be a parallax error "anywhere between (three to six degrees before top dead center)." He noted further that the timing sequence was 25 degrees before top dead center with the four wires disconnected. Thomas Nguyen then wrote that he ruled in favor of the consumer and passed the vehicle. He qualified his ruling with the comment that he could not be "exact."

Thomas Nguyen made serious efforts to determine the correct ignition timing sequence. His efforts show that he did not commit a fraudulent, dishonest or deceitful act

when he issued the certificate of compliance for the Monte Carlo. He made a simple mistake.

The Bureau appears to share this conclusion. During the hearing, the Bureau elected to dismiss the amended accusation charges against Thomas Nguyen and to cite him instead for his error in passing the Monte Carlo. The Bureau's decision to cite him for passing the Monte Carlo suggests that the Bureau believes he made a mistake and did not commit a dishonest, fraudulent or deceitful act. For these reasons, the seventh cause of action is dismissed.

Eighth and Ninth Causes for Discipline

23. Cause exists to discipline respondent's smog check station license pursuant to Health and Safety Code sections 44072.2, subdivision (a), 44012, subdivision (f), and 44015, subdivision (b), in addition to California Code of Regulations, title 16, sections 3340.35, subdivision (c), and 3340.42. Respondent issued a certificate of compliance on September 23, 2010 for the Monte Carlo with the ignition timing sequence set beyond manufacturer's specifications.

The Measure of Discipline

24. As an aggravating factor under the Bureau's disciplinary guidelines, the Bureau previously disciplined respondent in 2007 and 2010 for issuing certificates of compliance to three vehicles that should not have passed inspection. In mitigation, respondent developed internal controls to avoid these kinds of mistakes from happening again. Respondent required technicians to document their inspections in writing in a detailed check list he provided them.

Consistent, then, with the Bureau's disciplinary guidelines, a minimum period of probation would adequately protect the public. According to the Bureau's guidelines, the minimum recommended discipline is revocation stayed with a 30-day suspension period. Since respondent has taken good faith, meaningful, and specific steps before this action was initiated to prevent improper smog inspections, a departure from the recommendation of an actual period of suspension is warranted, and an actual suspension will not be imposed.

Reimbursement of the Costs for Investigation and Enforcement

25. Complainant seeks reimbursement of investigation and prosecution costs of \$22,177.40. Respondents objected to this amount. In support of complainant's request for costs, complainant produced a declaration from William D. Thomas dated September 11, 2013, that certified he had approved various investigative and enforcement costs attached to the declaration. The attachment did not describe the general tasks performed. This attachment was insufficient to support an award of costs under California Code of Regulations, title 1, section 1042.

26. Complainant also supplied a certification of costs signed by the deputy attorney general who prosecuted this disciplinary action. A schedule was attached to that declaration that described the dates legal services were provided, the types of task involved, the hours of work that was performed on that date, the professional's hourly rate, and a statement date for the services provided, all of which was consistent with California Code of Regulations, title 1, section 1042. But, many of the costs were incurred before the citations were withdrawn on September 27, 2012. Costs relating to the issuance of citations are not allowed under Business and Professions Code section 125.3. The costs incurred after September 27, 2012 total \$3,520. Of these, five billing instances inadequately describe the legal services rendered as "case management" for a total of \$850. This sum is deducted from \$3,520.

27. Consistent with the factors outlined by the Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 reasonable costs of enforcement and prosecution total \$2,670.

ORDERS

Smog Check Test Only Station License Number TC 240219 issued to respondent Thao Van Nguyen, dba Kearny Mesa Smog Check, is revoked. However, the revocation is stayed and the registration placed on probation for a period of two years, subject to the following terms and conditions:

a. During the period of probation, respondent Thao Nguyen, individually and dba Kearny Mesa Smog Check, shall

i. Comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.

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

iii. Report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the Bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

iv. Report any financial interest which any partners, officers, or owners of Kearny Mesa Smog may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code within 30 days of the effective date of this Decision.

v. Provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.

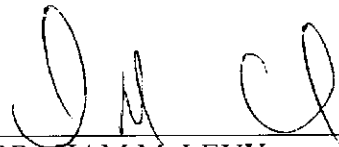
vi. If an accusation is filed against respondent individually or dba Kearny Mesa Smog during the term of probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter until the final decision on the accusation, and the period of probation shall be extended until such decision.

vii. Should the Director of Consumer Affairs determine that respondent has failed to comply with the terms and conditions of probation, the Department may, after giving notice and opportunity to be heard temporarily or permanently invalidate the registration and/or suspend or revoke any of the licenses.

viii. During the period of probation, respondent Thao Van Nguyen shall attend and successfully complete a Bureau certified training course in diagnosis and repair of emission systems failures and engine performance, applicable to the class of license held by the respondent. Said course shall be completed and proof of completion submitted to the Bureau within 60 days of the effective date of this decision and order. If proof of completion of the course is not furnished to the Bureau within the 60-day period, respondent's licenses shall be immediately suspended until such proof is received.

b. Respondent Nguyen, individually and dba Kearny Mesa Smog Check shall reimburse the Bureau the sum of \$2,670 for costs incurred while investigating and prosecuting this matter. The costs shall be paid over a 12-month period commencing on the effective date of this Decision and costs may be paid in accordance with any other payment plan approved by the Bureau or its designee.

DATED: November 26, 2013



ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:

Case No. 79/12-169

12 **THAO VAN NGUYEN – OWNER, DBA**
13 **KEARNY MESA SMOG CHECK**
14 **4191 Convoy Street, Suite A**
15 **San Diego, CA 92111**
16 **Automotive Repair Dealer Registration No.**
17 **ARD 240219**
18 **Smog Check Test Only Station No. TC**
19 **240219**

OAH Case No. 2013030111

S E C O N D A M E N D E D

A C C U S A T I O N

(SMOG CHECK)

and

17 **THAO VAN NGUYEN**
18 **3651 Hondo Street**
19 **San Diego, CA 92105**
20 **Smog Check Repair Technician License No.**
21 **EI 151145**
22 **Smog Check Inspector License No.**
23 **EO 151145**
24 **(Formerly Advanced Emission Specialist**
25 **Technician License No. EA 151145)**

and

22 **THOMAS NGUYEN**
23 **4757 Clairemont Mesa Blvd. #304**
24 **San Diego, CA 92117**
25 **Smog Check Repair Technician License No.**
26 **EI 146585**
27 **Smog Check Inspector License No.**
28 **EO 146585**
29 **(Formerly Advanced Emission Specialist**
30 **Technician License No. EA 146585)**

Respondents.

Complainant alleges:

1 **PARTIES**

2 1. Complainant Patrick Dorais brings this First Amended Accusation solely in his
3 official capacity as the Acting Chief of the Bureau of Automotive Repair (Bureau), Department of
4 Consumer Affairs.

5 **Automotive Repair Dealer Registration**

6 2. On July 13, 2005, the Bureau issued Automotive Repair Dealer Registration Number
7 ARD 240219 (registration) to Thao Van Nguyen – Owner, DBA Kearny Mesa Smog Check
8 (Respondent Kearny Mesa). The registration was in full force and effect at all times relevant to
9 the charges brought herein and will expire on June 30, 2014, unless renewed.

10 **Smog Check Test Only Station License**

11 3. On July 22, 2005, the Bureau issued Smog Check Test Only Station Number TC
12 240219 (station license) to Respondent Kearny Mesa. The station license was in full force and
13 effect at all times relevant to the charges brought herein and will expire on June 30, 2014, unless
14 renewed.

15 **Smog Check Inspector & Smog Check Repair Technician Licenses**

16 4. On a date uncertain in 2005, the Bureau issued Advanced Emission Specialist
17 Technician License Number EA 151145 (technician license) to Thao Van Nguyen (Respondent
18 Thao Nguyen). Respondent Thao Nguyen's technician license expired on December 31, 2012.
19 Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), Respondent
20 Nguyen's technician license was renewed pursuant to Respondent Thao Nguyen's election as
21 Smog Check Inspector License No. EO 151145 (inspector license) and Smog Check Repair
22 Technician License No. EI 151145 (technician license), effective January 7, 2013.¹ Respondent
23 Thao Nguyen's inspector and technician licenses were in full force and effect at all times relevant
24 to the charges brought herein and will expire on December 31, 2014, unless renewed.

25
26 ¹ Effective August 1, 2012, California Code of Regulations, title 16, sections 3340.28,
27 3340.29, and 3340.30 were amended to implement a license restructure from the Advanced
28 Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog
Check Inspector (EO) license and/or Smog Check Repair Technician (EI) license.

1 5. On a date uncertain in 2003, the Bureau issued Advanced Emission Specialist
2 Technician License Number EA 146585 (technician license) to Thomas Nguyen (Respondent
3 Thomas Nguyen). Respondent Thomas Nguyen's technician license was due to expire on
4 October 31, 2012. Pursuant to California Code of Regulations, title 16, section 3340.28,
5 subdivision (e), Respondent Thomas Nguyen's technician license was renewed pursuant to
6 Respondent Nguyen's election as Smog Check Inspector License No. EO 146585 (inspector
7 license) and Smog Check Repair Technician License No. EI 146585 (technician license),
8 effective October 15, 2012. Respondent Thomas Nguyen's inspector and technician licenses
9 were in full force and effect at all times relevant to the charges brought herein and will expire on
10 October 31, 2014, unless renewed.

11 **JURISDICTION**

12 6. Business & Professions Code (Code) section 477 provides, in pertinent part, that
13 "Board" includes "bureau," "commission," "committee," "department," "division," "examining
14 committee," "program," and "agency." "License" includes certificate, registration or other means
15 to engage in a business or profession regulated by the Code.

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

19 8. H&S Code section 44035 states

20 (a) A smog check station's license or a qualified smog check technician's
21 qualification may be suspended or revoked by the department, after a hearing, for
22 failure to meet or maintain the standards prescribed for qualification, equipment,
23 performance, or conduct. The department shall adopt rules and regulations
24 governing the suspension, revocation, and reinstatement of licenses and
25 qualifications and the conduct of the hearings.

26 (b) The department or its representatives, including quality assurance
27 inspectors, shall be provided access to licensed stations for the purpose of
28 examining property, station equipment, repair orders, emissions equipment
29 maintenance records, and any emission inspection items, as defined by the
30 department.

31 9. California Code of Regulations, title 16 (CCR), section 3340.28, subdivision (e),
32 states that "[u]pon renewal of an unexpired Basic Area Technician license or an Advanced

1 Emission Specialist Technician license issued prior to the effective date of this regulation, the
2 licensee may apply to renew as a Smog Check Inspector, Smog Check Repair Technician, or
3 both.

4 STATUTORY PROVISIONS

5 10. Code section 9884.7 states, in pertinent part:

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

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

15 (2) Causing or allowing a customer to sign any work order that does not
16 state the repairs requested by the customer or the automobile's odometer reading at
17 the time of repair.

18

19 (4) Any other conduct that constitutes fraud.

20

21 (6) Failure in any material respect to comply with the provisions of this
22 chapter or regulations adopted pursuant to it.

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

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

11. H&S Code section 44012 states:

The test at the smog check stations shall be performed in accordance with
procedures prescribed by the department and may require loaded mode dynamometer
testing in enhanced areas, two-speed idle testing, testing utilizing a vehicle's onboard
diagnostic system, or other appropriate test procedures as determined by the
department in consultation with the state board. The department shall implement

1 testing using onboard diagnostic systems, in lieu of loaded mode dynamometer or
2 two-speed idle testing, on model year 2000 and newer vehicles only, beginning no
3 earlier than January 1, 2013. However, the department, in consultation with the state
4 board, may prescribe alternative test procedures that include loaded mode
5 dynamometer or two-speed idle testing for vehicles with onboard diagnostic systems
6 that the department and the state board determine exhibit operational problems. The
7 department shall ensure, as appropriate to the test method, the following:

8 (a) Emission control systems required by state and federal law are reducing
9 excess emissions in accordance with the standards adopted pursuant to subdivisions
10 (a) and (c) of Section 44013.

11

12 (f) A visual or functional check is made of emission control devices
13 specified by the department, including the catalytic converter in those instances in
14 which the department determines it to be necessary to meet the findings of Section
15 44001. The visual or functional check shall be performed in accordance with
16 procedures prescribed by the department.

17

18 12. H&S Code section 44015 states in pertinent part:

19

20 (b) If a vehicle meets the requirements of Section 44012, a smog check
21 station licensed to issue certificates shall issue a certificate of compliance or a
22 certificate of noncompliance.

23

24 13. H&S Code section 44032 states:

25 No person shall perform, for compensation, tests or repairs of emission
26 control devices or systems of motor vehicles required by this chapter unless the
27 person performing the test or repair is a qualified smog check technician and the test
28 or repair is performed at a licensed smog check station. Qualified technicians shall
perform tests of emission control devices and systems in accordance with Section
44012.

14. H&S Code section 44072.2 states, in pertinent part:

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

(a) Violates any section of this chapter 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.

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

2 15. H&S Code, section 44072.8 of the H&S Code states:

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

5 **REGULATORY PROVISIONS**

6 16. CCR section 3340.30 states in pertinent part:

7 A licensed smog check inspector and/or repair technician shall comply with
8 the following requirements at all times while licensed:

9 (a) Inspect, test and repair vehicles, as applicable, in accordance with
10 section 44012 of the Health and Safety Code, section 44035 of the Health and Safety
Code, and section 3340.42 of this article.

11 17. CCR section 3340.35 states in pertinent part:

12 (c) A licensed station shall issue a certificate of compliance or
13 noncompliance to the owner or operator of any vehicle that has been inspected in
14 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
15 correctly.

16 18. CCR section 3340.42 states:

17 With the exception of diesel-powered vehicles addressed in subsection (f) of
18 this section, the following emissions test methods and standards apply to all vehicles:

19 (a) A loaded-mode test, except as otherwise specified, shall be the test
method used to inspect vehicles registered in the enhanced program areas of the state.
20 The loaded-mode test shall measure hydrocarbon, carbon monoxide, carbon dioxide
and oxides of nitrogen emissions, as contained in the bureau's specifications
21 referenced in subsection (b) of Section 3340.17 of this article. The loaded-mode test
shall use Acceleration Simulation Mode (ASM) test equipment, including a chassis
22 dynamometer, certified by the bureau.

23 On and after March 31, 2010, exhaust emissions from a vehicle subject to
this inspection shall be measured and compared to the emissions standards shown in
24 the VLT Row Specific Emissions Standards (Cutpoints) Table, dated March 2010,
which is hereby incorporated by reference. If the emissions standards for a specific
25 vehicle is not included in this table then the exhaust emissions shall be compared to
the emissions standards set forth in TABLE I or TABLE II, as applicable. A vehicle
26 passes the loaded-mode test if all of its measured emissions are less than or equal to
the applicable emission standards specified in the applicable table.

27 (b) A two-speed idle mode test, unless a different test is otherwise specified
28 in this article, shall be the test method used to inspect vehicles registered in all
program areas of the state, except in those areas of the state where the enhanced

1 program has been implemented. The two-speed idle mode test shall measure
2 hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and again
3 at idle RPM, as contained in the bureau's specifications referenced in subsection (b)
4 of Section 3340.17 of this article. Exhaust emissions from a vehicle subject to this
5 inspection shall be measured and compared to the emission standards set forth in this
6 section and as shown in TABLE III. A vehicle passes the two-speed idle mode test if
7 all of its measured emissions are less than or equal to the applicable emissions
8 standards specified in Table III.

9

10 (e) In addition to the test methods prescribed in this section, the following
11 tests shall apply to all vehicles, except diesel-powered vehicles, during the Smog
12 Check inspection:

13 (1) A visual inspection of the vehicle's emissions control systems. During
14 the visual inspection, the technician shall verify that the following emission control
15 devices, as applicable, are properly installed on the vehicle:

16 (A) air injection systems,

17 (B) computer(s) and related sensors and switches,

18 (C) crankcase emissions controls, including positive crankcase ventilation,

19 (D) exhaust gas after treatment systems, including catalytic converters,

20 (E) exhaust gas recirculation (EGR) systems,

21 (F) fuel evaporative emission controls,

22 (G) fuel metering systems, including carburetors and fuel injection,

23 (H) ignition spark controls, and

24 (I) any emissions control systems that are not otherwise prompted by the
25 Emissions Inspection System, but listed as a requirement by the vehicle manufacturer.

26

27 19. CCR section 3373 states:

28 No automotive repair dealer or individual in charge shall, in filling out an
estimate, invoice, or work order, or record required to be maintained by section
3340.15(f) of this chapter, withhold therefrom or insert therein any statement or
information which will cause any such document to be false or misleading, or where
the tendency or effect thereby would be to mislead or deceive customers, prospective
customers, or the public.

29 COST RECOVERY

30 20. Code section 125.3 provides, in pertinent part, that a Bureau may request the
31 administrative law judge to direct a licentiate found to have committed a violation or violations of

1 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
2 enforcement of the case.

3 **UNDERCOVER OPERATION – JANUARY 30, 2012**

4 21. On or about January 30, 2012, a Bureau undercover operator drove a Bureau-
5 documented 2001 Honda Prelude to Respondent's facility and requested a smog inspection. The
6 vehicle could not pass the visual portion of a smog inspection because the vehicle's fuel
7 evaporative canister (EVAP canister) was missing. The operator signed a work order and
8 received an estimate prior to the smog inspection. Alex Yeargan, a licensed smog check
9 inspector and smog check repair technician employed by Respondent Kearny Mesa, performed
10 the smog inspection and issued electronic Certificate of Compliance No. [REDACTED] for that
11 vehicle. The operator paid \$51 for the smog inspection and received a copy of Invoice No. [REDACTED]
12 and the Vehicle Inspection Report.

13 **FIRST CAUSE FOR DISCIPLINE**

14 **(Misleading Statements)**

15 22. Respondent Kearny Mesa has subjected its registration to discipline under Code
16 section 9884.7, subdivision (a)(1), in that on or about January 30, 2012, its employee Alex
17 Yeargan made statements which he knew or which by exercise of reasonable care he should have
18 known were untrue or misleading when he issued electronic Certificate of Compliance No.
19 [REDACTED] for the 2001 Honda Prelude certifying that the vehicle was in compliance with
20 applicable laws and regulations when, in fact, the vehicle's EVAP canister was missing.

21 **SECOND CAUSE FOR DISCIPLINE**

22 **(Fraud)**

23 23. Respondent Kearny Mesa has subjected its registration to discipline under Code
24 section 9884.7, subdivision (a)(4), in that on or about January 30, 2012, its employee Alex
25 Yeargan committed acts which constitute fraud by issuing electronic Certificate of Compliance
26 No. [REDACTED] for the 2001 Honda Prelude without performing a bona fide inspection of the
27 emission control devices and systems on that vehicle, thereby depriving the People of the State of
28 California of the protection afforded by the Motor Vehicle Inspection Program.

1 THIRD CAUSE FOR DISCIPLINE

2 (Violation of the Motor Vehicle Inspection Program)

3 24. Respondent Kearny Mesa has subjected its station license to discipline under H&S
4 Code section 44072.2, subdivision (a), in that on or about January 30, 2012, regarding the 2001
5 Honda Prelude, its employee Alex Yeargan violated sections of that Code, as follows:

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

9 b. **Section 44012, subdivision (f):** Respondent failed to perform emission control tests
10 on that vehicle in accordance with procedures prescribed by the department.

11 c. **Section 44015, subdivision (b):** Respondent issued electronic Certificate of
12 Compliance No. [REDACTED] without properly testing and inspecting the vehicle to determine if
13 it was in compliance with section 44012 of that Code.

14 FOURTH CAUSE FOR DISCIPLINE

15 (Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)

16 25. Respondent Kearny Mesa has subjected its station license to discipline under H&S
17 Code section 44072.2, subdivision (c), in that on or about January 30, 2012, regarding the 2001
18 Honda Prelude, its employee Alex Yeargan violated sections of the California Code of
19 Regulations, title 16, as follows:

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

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

25 FIFTH CAUSE FOR DISCIPLINE

26 (Dishonesty, Fraud or Deceit)

27 26. Respondent Kearny Mesa subjected its station license to discipline under H&S Code
28 section 44072.2, subdivision (d), in that on or about January 30, 2012, regarding the 2001 Honda

1 Prelude. its employee Alex Yeargan committed acts involving dishonesty, fraud or deceit
2 whereby another was injured by issuing electronic Certificate of Compliance No. [REDACTED] for
3 that vehicle without performing a bona fide inspection of the emission control devices and
4 systems on the vehicle, thereby depriving the People of the State of California of the protection
5 afforded by the Motor Vehicle Inspection Program.

6 **SEPTEMBER 23, 2010 UNDERCOVER OPERATION**

7 27. On September 23, 2010, a Bureau undercover operator received custody of a 1986
8 Chevrolet from Bureau personnel with its ignition timing adjusted beyond specifications so that it
9 could not a pass a smog inspection. Bureau personnel had also installed a tamper seal on the
10 vehicle to show whether any inspection done would have been properly performed. The operator
11 drove the vehicle to Respondents' facility and requested a smog inspection. The operator signed
12 work order no. [REDACTED] and received an estimate copy prepared for the inspection by Respondent
13 Thomas Nguyen, but it did not contain the vehicle's odometer reading. Respondent Thomas
14 Nguyen, a licensed smog check inspector and smog check repair technician employed by
15 Respondent Kearny Mesa, performed the inspection and issued electronic smog certificate of
16 compliance no. [REDACTED] as indicated by the Vehicle Inspection Report (VIR) he gave the
17 operator, and the information he input into the Vehicle Information Database (VID) for the 1986
18 Chevrolet. The operator paid Respondent Thomas Nguyen \$53.00 for the inspection and received
19 invoice no. [REDACTED] from Respondent Thomas Nguyen, which also did not contain the vehicle's
20 odometer reading. The operator returned the vehicle to Bureau personnel, who examined the
21 tamper seal and determined that it had not been disturbed.

22 **SIXTH CAUSE FOR DISCIPLINE**

23 **(Failure to Comply with Invoice Requirements)**

24 27. Respondent Kearny Mesa's registration is subject to disciplinary action pursuant to
25 Code section 9884.2, in that Respondent failed to include the 1986 Chevrolet's odometer reading
26 on the estimate and invoice for the smog inspection performed on it on September 23, 2010.
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SEVENTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud or Deceit)

28. Respondent Kearny Mesa subjected its station license to discipline under H&S Code section 44072.2, subdivision (d), in that on September 23, 2010, regarding the 1986 Chevrolet, its owner, Respondent Nguyen committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic Certificate of Compliance No. [REDACTED] for that vehicle without performing a bona fide inspection of the emission control devices and systems on the vehicle, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

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EIGHTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

29. Respondent Kearny Mesa's smog check station license is subject to disciplinary action pursuant to H&S Code section 44072.2, subdivision (a), in that Respondent failed to comply with the following sections of that Code:

15 a. Section 44012, subdivision (f): Respondent failed to ensure that a visual/functional check of emission control devices was performed on the 1986 Chevrolet in accordance with procedures prescribed by the department.

18 b. Section 44015, subdivision (b): Respondent issued an electronic smog certificate of compliance for the 1986 Chevrolet without ensuring that the vehicle was properly inspected in accordance with H&S Code section 44012.

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NINTH CAUSE FOR DISCIPLINE

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

30. Respondent Kearny Mesa's smog check station license is subject to disciplinary action pursuant to Code section 9884.7, subdivision (a)(6) and H&S Code section 44072.2, subdivision (c), in that Respondent failed to comply with the provisions of the CCR, as follows:

26 a. Section 3340.35, subdivision (c): Respondent issued an electronic smog certificate of compliance for the 1986 Chevrolet even though the vehicle had not been inspected in accordance with section 3340.42.

1 b. Section 3340.42: Respondent failed to ensure that the required smog tests were
2 conducted on the 1986 Chevrolet in accordance with Bureau specifications.

3 **TENTH CAUSE FOR DISCIPLINE**

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

5 31. Respondent Thomas Nguyen's inspector and technician licenses are subject to
6 disciplinary action pursuant to H&S Code section 44072.2, subdivision (a), in that he failed to
7 comply with the following sections of that Code:

8 a. Section 44012, subdivision (f): Respondent failed to ensure that a visual/functional
9 check of emission control devices was performed on the 1986 Chevrolet in accordance with
10 procedures prescribed by the department.

11 b. Section 44032: Respondent failed to perform tests of emission control devices and
12 systems in accordance with H&S Code section 44012.

13 c. Section 44035: Respondent failed to meet or maintain the standards prescribed for
14 qualification, equipment, performance, or conduct of a smog technician.

15 **ELEVENTH CAUSE FOR DISCIPLINE**

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

17 32. Respondent Thomas Nguyen's inspector and technician licenses are subject to
18 disciplinary action pursuant to H&S Code section 44072.2, subdivision (c), in that he failed to
19 comply with the provisions of the CCR as follows:

20 a. Section 3340.30, subdivision (a): Respondent failed to inspect and test the 1986
21 Chevrolet in accordance with H&S Code sections 44012 and 3340.42..

22 b. Section 3340.42: Respondent failed to ensure that the required smog tests were
23 conducted on the 1986 Chevrolet in accordance with Bureau specifications.

24 **TWELFTH CAUSE FOR DISCIPLINE**

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

26 33. Respondent Thomas Nguyen's inspector and technician licenses are subject to
27 discipline under H&S Code section 44072.2, subdivision (d), in that on September 23, 2010, he
28 committed acts involving dishonesty, fraud, or deceit, by issuing electronic Certificate of

1 Compliance No. [REDACTED] for the 1986 Chevrolet vehicle without performing a bona fide
2 inspection of the emission control devices and systems on the vehicle, thereby depriving the
3 People of the State of California of the protection afforded by the Motor Vehicle Inspection
4 Program.

5 PRIOR CITATIONS

6 34. To determine the degree of penalty, if any, to be imposed upon Respondents,
7 Complainant alleges as follows:

8 a. On June 1, 2007, the Bureau issued Citation No. C07-0967 to Respondent Thao
9 Nguyen against his station license for violations of H&S Code section 44012, subdivision (f)
10 (failure to perform a visual/functional check of emission control devices) and CCR, section
11 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle improperly tested).
12 Respondent issued a certificate of compliance to a Bureau vehicle with a missing air suction
13 valve. The Bureau assessed a civil penalty of \$500. Respondent complied with this citation on
14 July 16, 2007.

15 b. On June 1, 2007, the Bureau issued Citation No. M2007-0968 to Respondent Thao
16 Nguyen against his technician license for violations of H&S Code section 44032, (qualified
17 technicians shall perform tests of emission control systems and devices in accordance with
18 section 44012 of that Code) and CCR, section 3340.30, subdivision (a) (qualified technicians
19 shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of the H&S
20 Code, and CCR, section 3340.42). Respondent issued a certificate of compliance to a Bureau
21 vehicle with a missing air suction valve. Respondent was required to attend an 8-hour training
22 course. Respondent complied with this citation on July 16, 2007.

23 c. On January 29, 2010, the Bureau issued Citation No. C2010-0758 to Respondent
24 Thao Nguyen against his station license for violations of H&S Code section 44012, subdivision
25 (f) (failure to perform a visual/functional check of emission control devices) and CCR, section
26 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle improperly tested).
27 Respondent issued a certificate of compliance to a Bureau vehicle with the ignition timing
28 adjusted beyond the manufacturer's specifications. The Bureau assessed a civil penalty of \$500.

1 Respondent complied with this citation on March 8, 2010.

2 d. On January 29, 2010, the Bureau issued Citation No. M2010-0759 to Respondent
3 Thao Nguyen against his technician license for violations of H&S Code section 44032, (qualified
4 technicians shall perform tests of emission control systems and devices in accordance with
5 section 44012 of that Code) and CCR, section 3340.30, subdivision (a) (qualified technicians
6 shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of the H&S
7 Code, and CCR, section 3340.42). Respondent issued a certificate of compliance to a Bureau
8 vehicle with the ignition timing adjusted beyond the manufacturer's specifications. Respondent
9 was required to attend an 8-hour training course. Respondent complied with this citation on
10 March 17, 2010.

11 e. On June 24, 2010, the Bureau issued Citation No. C2010-1353 to Respondent Thao
12 Nguyen against his station license for violations of H&S Code section 44012, subdivision (f)
13 (failure to perform a visual/functional check of emission control devices) and CCR, section
14 3340.35, subdivision (e) (issuing a certificate of compliance to a vehicle improperly tested).
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 complied with this citation
17 on August 16, 2010.

18 f. On June 24, 2010, the Bureau issued Citation No. M2010-1354 to Respondent Thao
19 Nguyen against his technician license for violations of H&S Code section 44032, (qualified
20 technicians shall perform tests of emission control systems and devices in accordance with
21 section 44012 of that Code) and CCR, section 3340.30, subdivision (a) (qualified technicians shall
22 inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of the H&S Code,
23 and CCR, section 3340.42). Respondent issued a certificate of compliance to a Bureau vehicle
24 with a missing fuel evaporative canister. Respondent was required to attend a 16-hour training
25 course. Respondent complied with this citation on August 31, 2010.

26 g. On October 20, 2010, the Bureau issued Citation No. C2011-0494 to Respondent
27 Thao Nguyen against his station license for violations of H&S Code section 44012, subdivision
28 (f) (failure to perform a visual/functional check of emission control devices) and CCR, section

1 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle improperly tested).
2 Respondent Kearny Mesa's employee, Respondent Thomas Nguyen, issued a certificate of
3 compliance to a Bureau vehicle with the ignition timing adjusted beyond the manufacturer's
4 specifications. The Bureau assessed a civil penalty of \$2,500. Respondent appealed this citation
5 on November 22, 2010. The Bureau withdrew this citation without prejudice on September 28,
6 2012, and its allegations are incorporated into this Second Amended Accusation, in the Sixth
7 through Ninth Causes for Discipline.

8 h. On October 20, 2010, the Bureau issued Citation No. M2011-0495 to Respondent
9 Thomas Nguyen against his smog technician license for violations of H&S Code section 44032,
10 (qualified technicians shall perform tests of emission control systems and devices in accordance
11 with section 44012 of that Code) and CCR, section 3340.30, subdivision (a) (qualified technicians
12 shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of the H&S
13 Code, and CCR, section 3340.42). Respondent issued a certificate of compliance to a Bureau
14 vehicle with the ignition timing adjusted beyond the manufacturer's specifications. The Bureau
15 directed Respondent Thomas Nguyen to complete an eight-hour training course. Respondent
16 appealed this citation on November 22, 2010. The Bureau withdrew this citation without
17 prejudice on September 28, 2012, and its allegations are incorporated into this Second Amended
18 Accusation, in the Tenth through Twelfth Causes for Discipline.

19 OTHER MATTERS

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

24 36. Under H&S Code section 44072.8, if Smog Check Test Only Station License Number
25 TC 240219, issued to Thao Van Nguyen, doing business as Kearny Mesa Smog Check, is
26 revoked or suspended, any additional license issued under this chapter in the name of said
27 licensee may be likewise revoked or suspended by the director.

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1 7. Revoking, suspending, or placing on probation Smog Check Repair Technician
2 License No. EI 146585 and Smog Check Inspector License No. EO 146585 (formerly Advanced
3 Emission Specialist Technician License No. EA 146585), issued to Thomas Nguyen;

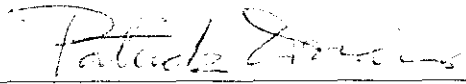
4 8. Revoking, suspending or placing on probation any additional license issued under
5 Chapter 5 of the Health and Safety Code in the name of Thomas Nguyen;

6 9. Ordering Thao Van Nguyen and Thomas Nguyen, jointly and severally, to pay the
7 Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this
8 case, pursuant to Business and Professions Code section 125.3; and,

9 10. Taking such other and further action as deemed necessary and proper.

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DATED: September 2, 2013



PATRICK DORAIS
Acting Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

SD2012703091