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7

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

11 In the Matter of the Accusation Against:

Case No. 79/14-27

12 **ERNEST AUTO REPAIR,**
ERNEST W. SIMON, Owner
13 4600 S. Western Avenue
Los Angeles, CA 90062
14 **Automotive Repair Dealer Registration No.**
ARD 165173
15 **Smog Check Station License No. RC 165173,**

ACCUSATION

(SMOG CHECK)

16 and

17 **ANDRE A. FRANCOIS**
1408 S. Manhattan Place
18 Los Angeles, CA 90019
Smog Check Inspector License No. EO
19 **154572 and Smog Check Repair Technician**
License No. EI 154572 (both previously
20 designated as Advanced Emission Specialist
Technician License No. EA 154572),
21

Respondents.
22

23 Complainant alleges:

24 **PARTIES**

25 1. Patrick Dorais (Complainant) brings this Accusation solely in his official capacity as
26 the Acting Chief of the Bureau of Automotive Repair, Department of Consumer Affairs.

27 **Ernest Auto Repair**

28 2. On March 9, 1992, the Director of Consumer Affairs ("Director") issued Automotive

1 Repair Dealer Registration (“registration”) No. ARD 165173 to Ernest W. Simon, doing business
2 as Ernest Auto Repair (Respondent Ernest Auto). The registration was in full force and effect at
3 all times relevant to the charges brought herein and expires on February 28, 2014, unless
4 renewed.

5 3. On or about February 13, 2008, the Director issued Smog Check Station License
6 (“station license”) No. RC 165173 to Respondent Ernest Auto. The station license was in full
7 force and effect at all times relevant to the charges brought herein and expires on February 28,
8 2014, unless renewed.

9 **Andre A. Francois**

10 4. On a date uncertain in 2007, the Director issued Advanced Emission Specialist
11 Technician License No. EA 154572 to Andre A. Francois (“Respondent Francois”). Upon timely
12 renewal of the license, the license was redesignated as Smog Check Inspector License No. EO
13 154572 and Smog Check Repair Technician License No. EI 154572 (“smog check licenses”).¹
14 Both licenses will expire on June 30, 2015, unless renewed.

15 **JURISDICTION**

16 5. Business and Professions Code (“Code”) section 9884.7 provides that the Director
17 may revoke an automotive repair dealer registration.

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

22 7. Section 44002 of the Health and Safety Code provides, in pertinent part, that the
23 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
24 the Motor Vehicle Inspection Program.

25 8. California Code of Regulations, title 16, section 3340.28, subdivision (e), states that

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

1 [u]pon renewal of an unexpired Basic Area Technician license or an Advanced Emission
2 Specialist Technician license issued prior to the effective date of this regulation, the licensee may
3 apply to renew as a Smog Check Inspector, Smog Check Repair Technician, or both.

4 STATUTORY PROVISIONS

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

7 (a) The director, where the automotive repair dealer cannot show there was a bona fide
8 error, may refuse to validate, or may invalidate temporarily or permanently, the registration of an
9 automotive repair dealer for any of the following acts or omissions related to the conduct of the
10 business of the automotive repair dealer, which are done by the automotive repair dealer or any
11 automotive technician, employee, partner, officer, or member of the automotive repair dealer.

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

15 (4) Any other conduct which constitutes fraud.

16 (6) Failure in any material respect to comply with the provisions of this chapter [the
17 Automotive Repair Act (Bus. & Prof. Code, § 9880, et seq.)] or regulations adopted
18 pursuant to it.

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

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

10. Section 477 of the Code provides, in pertinent part, that "Board" includes "bureau,"
"commission," "committee," "department," "division," "examining committee," "program,"
and "agency." "License" includes certificate, registration or other means to engage in a
business or profession regulated by the Code.

11. Section 118(b) of the Code states:

The suspension, expiration, or forfeiture by operation of law of a license issued
by a board in the department, or its suspension, forfeiture, or cancellation by order of

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

7 12. Section 44072.2 of the Health and Safety Code states, in pertinent part:

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

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

14 (c) Violates any of the regulations adopted by the director pursuant to this chapter.

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

17 13. Section 44072.6 of the Health and Safety Code provides, in pertinent part, that the
18 expiration or suspension of a license by operation of law, or by order or decision of the
19 Director of Consumer Affairs, or a court of law, or the voluntary surrender of the license
20 shall not deprive the Director of jurisdiction to proceed with disciplinary action.

21 14. Section 44072.8 of the Health and Safety Code states:

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

25 REGULATORY PROVISIONS

26 15. Section 3340.24 of the California Code of Regulations states, in pertinent part:

27 (c) The bureau may suspend or revoke the license of or pursue other legal
28 action against a licensee, if the licensee falsely or fraudulently issues or obtains a
certificate of compliance or a certificate of noncompliance.

16. Section 3340.30 of the California Code of Regulations, states, in pertinent part:

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.

17. Section 3340.35 of the California Code of Regulations, states, in pertinent part:

1 (c) A licensed station shall issue a certificate of compliance or noncompliance
2 to the owner or operator of any vehicle that has been inspected in accordance with the
3 procedures specified in section 3340.42 of this article and has all the required
4 emission control equipment and devices installed and functioning correctly.

5 18. Section 3340.41 of the California Code of Regulations, states, in pertinent part:

6 (c) No person shall enter into the emissions inspection system any vehicle
7 identification information or emission control system identification data for any
8 vehicle other than the one being tested. Nor shall any person knowingly enter into the
9 emissions inspection system any false information about the vehicle being tested.

10 19. Section 3340.42 of the California Code of Regulations, states, in pertinent part
11 that licensed smog check stations and technicians shall conduct tests and inspections in
12 accordance with smog check emissions test methods and standards.

13 COST RECOVERY

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

18 VID DATA REVIEW

19 21. Beginning in December of 2012, the Bureau conducted a detailed review of its
20 Vehicle Information Database ("VID") and examined data for all smog inspections performed at
21 Respondent Simon's automotive repair dealership for the month of September 2012. The review
22 of the OBD II functional tests² showed a pattern of the same OBD II diagnostic trouble codes
23 (P0171 and P0742) stored in the memory of the power train control module (PCM) on seventeen
24 different vehicles that received smog certificates in the one month period. The Bureau specifically
25 examined the VID data, in detail, for five of the vehicles that were certified in September 2012,
26 and it was determined that none of the vehicles support the P0742 diagnostic trouble code.

27 ² The On Board Diagnostic, generation II ("OBD II"), functional test is an automated function of
28 the BAR-97 Emissions Inspection System analyzer ("EIS"). The EIS includes a computer based,
five-gas analyzer that tests vehicles under simulated driving conditions to detect oxides of
nitrogen, hydrocarbons, and carbon monoxide emissions. During the OBD II functional test, the
technician is required to connect an interface cable from the EIS to a Diagnostic Link Connector
(DLC) which is located inside the vehicle. Through the DLC, the EIS automatically retrieves
information from the vehicle's on-board computer about the status of the readiness indicators,
trouble codes, and the MIL (malfunction indicator light). If the vehicle fails the OBD II functional
test, it will fail the overall inspection.

Vehicles 1 through 5, set forth in Table 1 below, were all certified with a pending P0742 diagnostic trouble code stored in the PCM memory while the original equipment manufacturer (OEM) service information shows these vehicles do not support a P0742 diagnostic trouble code.

22. The VID data also showed that all the inspections on these vehicles were performed under the technician license of Respondent Francois. The Bureau concluded that Respondent Francois performed the smog inspections on the vehicles using different vehicle(s) during the OBD II tests, a method known as “clean plugging,”³ resulting in the issuance of fraudulent certificates of compliance for the vehicles that were tested as outlined in Table 1 below.

OBDI Clean Plug Table 1

OBDI Clean Plug Table 1								
Vehicle Certified								
#	Test Date Start-End	Year	Make	Model	License #	Unsupported Code	Certificate #	Tech. Id. #
1	9/10/2012 18:14 -18:26	2004	Nissan	Altima	None	P0742	XL218797C	EA154572
2	9/14/2012 14:27 -14:45	1997	Infinity	QX4	3XDL459	P0742	XL416669C	EA154572
3	9/15/2012 10:18 -10:47	2000	Honda	Accord	6HMY145	P0742	XL416674C	EA154572
4	9/21/2012 14:49 -15:12	1999	Toyota	Sienna	6MSZ804	P0742	XL416696C	EA154572
5	9/28/2012 13:35 -14:09	1999	Plymouth	Voyager	4HHM164	P0742	XL609479C	EA154572

FIELD VISIT TO ERNEST AUTO REPAIR – MARCH 1, 2013

23. On or about March 1, 2013, Bureau personnel visited the subject facility to request records and interview Andre Francois. When interviewed Francois admitted to clean plugging

^{3 2} Clean plugging is the use of the OBD II readiness monitor status and stored code status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that is not in compliance due to the noncompliant vehicle’s failure to complete the minimum number of self tests, known as monitors, or due to the presence of a stored fault code that indicates an emission control system or component failure. Clean plugging occurs during the inspection of a vehicle that has an OBD II system. To clean plug a vehicle, the smog technician enters information into the EIS for the vehicle the technician wishes to certify and then plugs the OBD II system connector from the EIS into another vehicle that has a properly functioning OBD II system for the purpose of obtaining a “Passing” OBD II functional test result.

1 vehicles 1 through 5, identified in Table 1 of paragraph 22 above.

2 **FIRST CAUSE FOR DISCIPLINE**

3 **(Untrue or Misleading Statements)**

4 24. Respondent Ernest Auto's registration is subject to disciplinary action pursuant to Code
5 section 9884.7, subdivision (a)(1), in that it made or authorized statements which he knew, or in the
6 exercise of reasonable care should have known to be untrue or misleading as follows: Respondent
7 Ernest Auto certified that vehicles 1 through 5, identified in Table 1 of paragraph 22 above, had
8 passed inspection and were in compliance with applicable laws and regulations when in fact,
9 Respondent Ernest Auto conducted the inspections on the vehicles using clean-plugging methods in
10 that, a different vehicle(s) was substituted during the OBD II functional tests in order to issue smog
11 certificates of compliance for the vehicles, and the vehicles were not tested or inspected, as required
12 by Health and Safety Code section 44012.

13 **SECOND CAUSE FOR DISCIPLINE**

14 **(Fraud)**

15 25. Respondent Ernest Auto's registration is subject to disciplinary action pursuant to
16 Code section 9884.7, subdivision (a)(4), in that it committed acts that constitute fraud by issuing
17 electronic smog certificates of compliance for the vehicles 1 through 5, identified in Table 1 of
18 paragraph 22 above, without performing bona fide inspections of the emission control devices
19 and systems on the vehicles, thereby depriving the People of the State of California of the
20 protection afforded by the Motor Vehicle Inspection Program.

21 **THIRD CAUSE FOR DISCIPLINE**

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

23 26. Respondent Ernest Auto's station license is subject to disciplinary action pursuant to
24 Health & Safety Code section 44072.2, subdivision (a), in that it failed to comply with the
25 following sections of that Code:

26 **a. Section 44012:** Respondent Ernest Auto failed to ensure that all emission control
27 devices and systems required by law for vehicles 1 through 5, identified in Table 1 of paragraph
28 22 above, were installed and functioning correctly in accordance with test procedures.

1 Health & Safety Code section 44072.2, subdivision (d), in that it committed dishonest,
2 fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of
3 compliance for the vehicles 1 through 5, identified in Table 1 of paragraph 22 above, without
4 performing bona fide inspections of the emission control devices and systems on the vehicles,
5 thereby depriving the People of the State of California of the protection afforded by the Motor
6 Vehicle Inspection Program.

7 **SIXTH CAUSE FOR DISCIPLINE**

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

9 29. Respondent Francois' smog check licenses are subject to disciplinary action pursuant
10 to Health & Safety Code section 44072.2, subdivision (a), in that he failed to comply with the
11 following sections of that Code:

12 **a. Section 44012, subdivision (a):** Respondent Francois failed to ensure that all
13 emission control devices and systems required by law for vehicles 1 through 5, identified in Table
14 1 of paragraph 22 above, were installed and functioning correctly in accordance with test
15 procedures.

16 **b. Section 44012, subdivision (f):** Respondent Francois failed to perform the emission
17 control tests on vehicles 1 through 5, identified in Table 1 of paragraph 22 above, in accordance
18 with procedures prescribed by the department.

19 **c. Section 44059:** Respondent Francois willfully made false entries for electronic
20 certificates of compliance for vehicles 1 through 5, identified in Table 1 of paragraph 22 above,
21 by certifying that the vehicles had been inspected as required when, in fact, they had not.

22 **SEVENTH CAUSE FOR DISCIPLINE**

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

24 30. Respondent Francois' smog check licenses are subject to disciplinary action pursuant
25 to Health & Safety Code section 44072.2, subdivision (c), in that he failed to comply with
26 provisions of California Code of Regulations, title 16, as follows:

27 **a. Section 3340.24, subdivision (c):** Respondent Francois falsely or fraudulently issued
28 electronic smog certificates of compliance for vehicles 1 through 5, identified in Table 1 of

1 paragraph 22 above.

2 **b. Section 3340.30, subdivision (a):** Respondent Francois failed to inspect vehicles 1
3 through 5, identified in Table 1 of paragraph 22 above, in accordance with Health & Safety Code
4 sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

5 **c. Section 3340.41, subdivision (c):** Respondent Francois entered into the emissions
6 inspection system vehicle identification information or emission control system identification
7 data for a vehicle other than the one being tested for vehicles 1 through 5, identified in Table 1 of
8 paragraph 22 above.

9 **d. Section 3340.42:** Respondent Francois failed to conduct the required smog tests on
10 vehicles 1 through 5, identified in Table 1 of paragraph 22 above, in accordance with the
11 Bureau's specifications.

12 **EIGHTH CAUSE FOR DISCIPLINE**

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

14 31. Respondent Francois' smog check licenses are subject to disciplinary action pursuant
15 to Health & Safety Code section 44072.2, subdivision (d), in that he committed dishonest,
16 fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of
17 compliance for the vehicles 1 through 5, identified in Table 1 of paragraph 22 above, without
18 performing bona fide inspections of the emission control devices and systems on the vehicles,
19 thereby depriving the People of the State of California of the protection afforded by the Motor
20 Vehicle Inspection Program.

21 **OTHER MATTERS**

22 32. Pursuant to Bus. & Prof. Code section 9884.7, subdivision (c), the Director may
23 suspend, revoke or place on probation the registration for all places of business operated in this
24 state by Ernest W. Simon, upon a finding that he has, or is, engaged in a course of repeated and
25 willful violations of the laws and regulations pertaining to an automotive repair dealer.

26 33. Pursuant to Health & Safety Code section 44072.8, if Smog Check Station License
27 Number RC 165173, issued Ernest W. Simon, doing business as Ernest Auto Repair, is revoked
28 or suspended, any additional license issued under the same chapter in the name of said licensee

1 may be likewise revoked or suspended by the Director.

2 34. Pursuant to Health & Safety Code section 44072.8, if Respondent Andre A. Francois'
3 Smog Check Inspector License No. EO 154572 and Smog Check Repair Technician License No.
4 EI 154572 (both previously designated as Advanced Emission Specialist Technician License No.
5 EA 154572) are revoked or suspended, any additional license issued under this chapter in the
6 name of said licensee may be likewise revoked or suspended by the Director.

7 **PRAYER**

8 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein
9 alleged, and that following the hearing, the Director issue a decision:

10 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
11 165173, issued to Ernest W. Simon, doing business as Ernest Auto Repair;

12 2. Revoking or suspending Smog Check Station License Number RC 165173, issued to
13 Ernest W. Simon, doing business as Ernest Auto Repair;

14 3. Revoking or suspending any additional license issued under Chapter 5 of the Health
15 and Safety Code in the name of Ernest W. Simon;

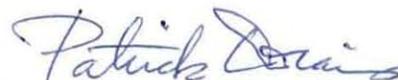
16 4. Revoking or suspending Andre A. Francois' Smog Check Inspector License No.
17 EO 154572 and Smog Check Repair Technician License No. EI 154572;

18 5. Revoking or suspending any additional license issued under Chapter 5 of the Health
19 and Safety Code in the name of Andre A. Francois;

20 6. Ordering Ernest W. Simon and Andre A. Francois to pay the Director the reasonable
21 costs of the investigation and enforcement of this case, pursuant to Business and Professions
22 Code section 125.3; and

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

24
25 DATED: September 23, 2013



26 PATRICK DORAIS
27 Acting Chief, Bureau of Automotive Repair
28 Department of Consumer Affairs
State of California
Complainant