

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

In the Matter of the Accusation Against:

**MD AUTO REPAIR AND TIRES INC.,
DBA MD AUTO REPAIR AND TIRES;
MAHMOUD DIBAS, PRESIDENT,**

Automotive Repair Dealer Registration No.
ARD 223519
Smog Check Station License No. RC
223519
Lamp Station License No. LS 223519
Brake Station License No. BS 223519

and

OSCAR MICHEL

Smog Check Inspector License No. EO
144973
Smog Check Repair Technician License
No. EI 144973

Respondents.

Case No. 79/14-127

OAH No. 2014060412

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, case caption: Case No. "79114-127" is corrected to "79/14-127".
2. Page 2, paragraph 1 under Factual Findings, first sentence: Case No. "79114-127" is corrected to "79/14-127".

3. Page 3, paragraph 10 under *The Accusation*: Case No. "79114-127" is corrected to "79/14-127".

This Decision shall become effective March 11, 2016.

DATED: February 5, 2016



TAMARA COLSON
Assistant General Counsel
Department of Consumer Affairs

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PROPOSED DECISION

Beth Faber Jacobs, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in San Diego, California, on October 5, 6, and 16, 2015.

Manny Arambula, Deputy Attorney General, Department of Justice, State of California, represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair, Department of Consumer Affairs.

Respondent, Mahmoud Dibas, President of MD Auto Repair and Tires Inc., dba MD Auto Repair and Tires, represented himself. Respondent Oscar Michel represented himself.

The matter was submitted on October 16, 2015.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 6, 2014, complainant filed accusation number 79114-127 against the respondents Mahmoud Dibas, dba MD Auto Repair and Tires, Inc., (the station) and Oscar Michel, one of the station's technicians. The accusation alleged that respondents engaged in fraud and other misconduct in connection with two bureau undercover operations held in 2013. Respondents filed timely requests for a hearing, and the matter proceeded to hearing.

Respondents and Their License Histories

THE STATION - MD AUTO REPAIR

2. On an unspecified date in 1996, the Director of the Department of Consumer Affairs (the department) issued Automotive Repair Dealer Registration¹ No. AC 187794 to Mahmoud Dibas, owner, doing business as MD Auto Repair and Tires.

3. In March 2001, the chief of the bureau filed accusation number 77/01-88 against Mr. Dibas, doing business as MD Auto Repair and Tires (MD Auto), and alleged that MD Auto engaged in numerous violations of the Automotive Repair Act (the Act.) The matter was resolved by stipulation. As part of the stipulation, Mr. Dibas admitted that on two occasions in 2000, his employees made written or oral statements that were untrue or misleading; that on one occasion his employee failed to provide an undercover operator with a written invoice describing all the service work performed or identifying if the parts supplied were new, used, reconditioned or rebuilt; that an employee failed to record the vehicle's odometer reading when he repaired the vehicle; and that an employee willfully departed from accepted trade standards by machining a right front brake rotor below manufacturer's specifications. By Decision and Order issued June 3, 2002, the bureau imposed a revocation that was stayed, and it placed Mr. Dibas' station on probation for three years with various terms and conditions, including a three day suspension.²

4. On an unspecified date in March 2002, the bureau issued Automotive Repair Dealer registration number ARD 223519 to respondent MD Auto Repair and Tires, Inc., dba MD Auto Repair and Tires, with Mahmoud Dibas serving as President, Secretary, and

¹ References to "registration" include references to a license or certificate. (Bus. & Prof. Code, § 477, subd. (b).)

² The accusation erroneously alleged that the suspension had been for five days.

Treasurer of MD Auto.³ MD Auto's auto repair registration will expire on August 31, 2016, unless it is renewed.

5. The bureau has issued other licenses to MD Auto: On March 10, 2003, it issued Smog Check Station license No. SC 223519; on December 19, 2006, it issued Lamp Station license No. LS 223519; and on December 19, 2006, it issued Brake Station license, No. BS 223519. Each of these licenses held by MD Auto will expire on August 31, 2016, unless they are renewed.

The TECHNICIAN - OSCAR MICHEL

6. On January 16, 2003, the department's director issued Advanced Emission Specialist Technician License EA 144973 to respondent Oscar Michel. Effective August 1, 2012, the bureau's regulations restructured smog technician licenses into two types and licensees. When Mr. Michel's EA license expired on December 31, 2012, he elected to renew with a Smog Check Inspector license (EO License No. 144973) and a Smog Check Repair Technician license (EI License No. 144973.) These licenses will expire on December 31, 2016, unless they are renewed.

7. Mr. Michel was previously licensed as a Brake Adjuster. That license, BA 144973, class A, was issued in 2006 and expired on December 31, 2010.

8. Mr. Michel was also previously licensed as a Lamp Adjuster. That license, LA 144973, class A, was issued in 2006, expired on December 31, 2010, and was cancelled on February 6, 2011.

9. Mr. Michel has no history of license discipline.

The Accusation

10. Accusation No.79114-127, the subject of this hearing, contains eleven causes for discipline that stem from two undercover operations conducted by the bureau at MD Auto in 2013. The first seven causes for discipline involve a 1992 Chevrolet Caprice. Causes for discipline one through five allege that the station engaged in fraud and other violations of the Act by telling the customer the vehicle's catalytic converter required replacement when it did not; replacing the catalytic converter despite it being in good working condition; failing to indicate on the invoice if the catalytic converter was new, used, or rebuilt; billing for a repair of the induced wiring malfunction without completing the repair; and issuing a Certificate of Compliance when the vehicle should not have passed the smog inspection. Causes six and seven are alleged against the technician, Mr. Michel. They allege that he violated the Vehicle Inspection Program by failing to follow approved test procedures when he issued a Certificate of Compliance for the Caprice.

³ Complainant did not explain the change in registration number or provide specific dates on which MD Auto became licensed in 1996 or 2002.

The eighth through eleventh causes for discipline relate to the 2013 undercover operation involving a 2002 Chevrolet Cavalier and MD Auto. They do not involve Mr. Michel. These charges allege that the station made untrue statements, engaged in fraud, and violated the Act when a station representative told a customer that spark plugs needed to be replaced despite being in good serviceable condition and by failing to disclose on the invoice whether the spark plugs and spark plugs wires installed by the station were new, used, rebuilt, or reconditioned. The accusation also alleged that the station charged the customer for performing a drive cycle on the vehicle that was not performed.

Background to the Undercover Operations

11. Respondent Mahmoud Dibas earned his bachelor's degree and a master's degree in civil engineering from the University of Texas. In 2007, after serving as a city traffic engineer for over 17 years, Mr. Dibas retired from that profession.

12. Mr. Dibas started MD Auto in 1996 with his roommate at the time, Nasser Dimenhoury. Mr. Dibas used his savings, and Mr. Dimenhoury provided the knowledge about automotive repair work.

13. Mr. Dibas testified that when he became aware of the bureau's first accusation in 2000, he "freaked out." He "made a decision to plead guilty" to some of the charges and "try to remedy the situation." He saw that his station's poor documentation had "landed" the station "in trouble." He immediately started a computerized invoice system for the station.

14. Mr. Dimenhoury was associated with MD Auto until 2011. In 2011, Mr. Dimenhoury left the station and Mr. Dibas appointed Osama Elhamad, one of his long-term service technicians, to be the station's General Manager. Mr. Elhamad holds numerous bureau licenses and is a qualified technician.

15. MD Auto is a busy repair shop and smog station. It is Star Certified under Health and Safety Code section 44014.2. Since opening, it has serviced approximately 3,000 customers each year. Mr. Dibas took great pride in sharing that over 95 percent are repeat customers.

16. Between 2009 and 2012, the bureau received ten consumer complaints about MD Auto. The bureau conducted a review, and determined that eight had merit. On April 4, 2012, Robert Cassel, a bureau representative, held a conference at the local bureau office with Mr. Elhamad (MD Auto's general manager) and other bureau representatives to discuss the complaints. The bureau representatives made recommendations with the goal of ensuring that smog checks would be performed as required, invoices would be competed properly, statements made by the station would be true and not misleading, and that the station complied with the Act.

17. Mr. Dibas did not attend the conference. Mr. Elhamad reported to him after the meeting, and MD Auto instituted new procedures to make sure the invoices were more

complete and the bureau's recommendations were followed. On several occasions after the meeting, Mr. Elhamad called Mr. Cassel with questions in a sincere effort to comply with the bureau's recommendations and the Act.

18. Following the April 2012 office conference, the bureau decided to conduct undercover operations to determine if MD Auto was in compliance. It conducted three undercover investigations: (1) one using a Chevrolet Caprice; (2) one using a Chevrolet Cavalier; and (3) one using a Mazda Protégé. The bureau found no problems with MD Auto's actions related to the Protégé.⁴ However, it concluded that MD Auto engaged in violations in connection with the undercover operations related to the Chevrolets, and that Mr. Michel, the technician who worked on the Caprice, also engaged in violations.

California's Clean Air Legislation and Smog Check Inspections

19. The California Legislature enacted clean air legislation to reduce toxic emissions resulting from the operation of motor vehicles. This legislation requires every motor vehicle registered in California to pass a smog check inspection upon change of ownership and every two years in areas subject to the biennial smog certification program.

20. A licensed smog check station causes an electronic certificate of compliance to be issued when the vehicle being tested passes a smog check inspection. When the vehicle does not pass an inspection, it must be repaired and retested. A certificate of compliance cannot be issued until a vehicle passes an inspection. Only a licensed smog check technician working at a licensed smog check station may conduct a smog check inspection.

21. A smog check inspection is conducted by using a computer-based device known as an emission inspection system (EIS). Each EIS has a unique identification number. Each EIS is capable of interfacing with a statewide database. Information entered into an EIS concerning a smog check inspection is stored immediately in the EIS and the statewide database.

22. An EIS is activated when a licensed smog check technician enters his or her unique personal identification number. Thereafter, the licensed smog check technician inputs information pertaining to the identity of the vehicle being inspected. After the required vehicle identification information is entered, the EIS prompts the smog check technician to insert a diagnostic probe into the tailpipe of the vehicle being tested. Exhaust emissions are measured while the vehicle is running at different loads.

⁴ According to the documents lodged by the bureau, in September 2013, a bureau representative introduced a malfunction on the Protégé by damaging its catalytic converter, which would cause the vehicle to fail a smog test. MD Auto's smog technician appropriately diagnosed the problem, appropriately recommended that the catalytic converter be replaced, and appropriately replaced the damaged converter with a new catalytic converter.

23. After engine emissions are gathered and analyzed, the EIS leads the technician through a visual inspection in which the technician visually confirms that all required vehicle emission control systems and devices are present. The technician enters his observations about the emission control systems and devices into the EIS through a series of prompts.

24. After the results of the visual inspection are reported, the EIS leads the licensed smog check technician through functional tests of various emission control devices, the results of which are also entered into the EIS.

25. When a smog check inspection is completed, the EIS generates a written vehicle inspection report (VIR). The VIR contains a description of the vehicle and the results of the testing and inspections. If the vehicle passes the smog check inspection, an electronic certificate of compliance is issued automatically to the California Department of Motor Vehicles (DMV). If the vehicle does not pass the smog check inspection, the vehicle must be repaired and retested.

Undercover Investigation No. 1 – 1992 Chevrolet Caprice

26. Richard Losee is a program representative with the bureau assigned to the bureau's forensic documentation lab in Fontana. He has worked in the automotive industry for over 30 years, and has worked for the bureau in its undercover operations for over seven years.

27. On April 9, 2013, Mr. Losee documented the condition of a 1992 Chevrolet Caprice, license number 6JMS820. The odometer read 105,194 miles. Mr. Losee visually inspected the vehicle and observed that all required emission control systems were present. On April 16, 2013, he performed several tests on the vehicle, including a cranking test and an invasive test on the catalytic converter. All the items appeared to be in good working condition. He placed and photographed tamper indicators on the vehicle. On April 17, 2013, he performed an Acceleration Simulation Mode (ASM) Smog Check vehicle inspection using the bureau's EIS and printed the VIR. The overall result was "pass," and the odometer advanced to 105,196 miles.

28. On April 25, 2013, Mr. Losee caused a malfunction in the Caprice's secondary air injection AIR system by "shorting the control wire, to the diverter valve, to the ground wire circuit." According to Mr. Losee, the malfunction would not be seen during the visual inspection portion of the test but would cause the vehicle to fail the emissions portion of the test with high NOx⁵ readings because the ground would inject air into the exhaust stream and cause the catalytic converter to be ineffective at reducing NOx. In Mr. Losee's opinion, the only repair necessary to correct the malfunction would be to repair the control wire associated with the AIR system. Mr. Losee performed a California smog check vehicle inspection. The vehicle failed the emissions portion of the ASM test due to the malfunction. A smog check VIR was printed, and the overall result was "fail."

⁵ NOx ppm refers to "oxides of nitrogen," parts per million.

29. On May 1, 2013, Mr. Losee transported the Caprice by truck and transferred custody of it to Rob Cassel, the bureau representative who conducted the office conference with MD Auto's General Manager, Mr. Elhamad, in April 2012. Mr. Cassel requested the undercover operation to see if the meeting had been helpful in avoiding improper diagnoses or unnecessary repairs.

30. On May 1, 2013, Mr. Cassel released the Caprice to Liliana Aguirre, a bureau clerk, for an undercover operation. Ms. Aguirre had no certifications or experience in automotive repair. Mr. Cassel instructed Ms. Aguirre to drive approximately one mile to MD Auto, use an assigned alias, and request a smog inspection. If it failed, she was to get the vehicle repaired.

31. Ms. Aguirre drove the Caprice to the station. She spoke with Mr. Elhamad and requested a smog inspection. Mr. Elhamad asked Oscar Michel, MD Auto's most senior technician, to perform the smog check. Mr. Michel has worked in the automotive industry for over 20 years, and has been a smog technician for 15 years. He has an electrical engineering degree from ITT, is ASC Certified in six areas, and is an advanced emission technician. Mr. Michel performed the smog check. It passed the visual and functional test but not the emissions portion. The overall result was a fail. Mr. Elhamad advised Ms. Aguirre of the results and offered to have the station conduct a diagnostic to find the cause for the failure. She agreed and left the station.

32. Mr. Michel knew the vehicle failed because the NOx reading was too high.⁶ He conducted the diagnostic to determine the cause of the emissions test failure. As was his practice, he made notes as he progressed through the process, which were produced during the hearing. He checked the engine and temperature. The fuel press was "ok." He found no blown gasket, overheating, or vacuum leaks. He checked the EGR because he thought it might affect the NOx level. It was working "ok." He wrote that the spark plugs, wires, and rotor were "fair." He tested the oxygen sensor and listed the results. He did not think the secondary air injection (AIR) would create NOx, but he tested it. While troubleshooting the AIR, he found the short and traced it. He wrote:

Found 2d Air Inj. Sys. not operating. Reason found. Short/open circuit for diverter valve solenoid. Recommend repair.

The last component he checked was the catalytic converter. He performed the cranking test and the temperature in/temperature out test. During the cranking test, the hydrocarbons (HC) should have been under 500 ppm, but the machine generated test results, which were received in evidence, showing an HC level at 2,000 ppm that lasted for several seconds. In addition, the carbon dioxide (CO2) level was low. The test showed CO2 at 10.3

⁶ During an ASM emission test, the maximum NOx permitted is 524 ppm at 15 miles per hour and 481 ppm at 25 miles per hour. When Mr. Michel conducted the emissions test on May 1, 2013, the NOx reading was 1,087 ppm at 15 miles per hour and 1,006 at 25 miles per hour. With these excessive NOx levels, the vehicle failed.

percent, when it should have been 12.3 percent. Mr. Michel recommended two repairs – fixing the short and replacing the catalytic converter.

33. After the diagnostic, Mr. Elhamad telephoned Ms. Aguirre, the undercover customer. He told her that the diagnostic had been completed, and that it showed the wiring harness short needed to be repaired and the catalytic converter needed to be replaced. He estimated a total cost of \$651.96, including a \$49 discount and waiver of the \$98 diagnostic fee. He mentioned the CAP program that would pay up to \$500 to repair the car if she was qualified, but that it would take two weeks. She voiced concern about the price and said she would get back to him. She called back in 15 minutes and agreed to the recommended repairs. He told her it would be ready for pick up the next day.

34. Mr. Michel removed the catalytic converter and replaced it with a new converter. He repaired a short and believed he successfully completed the repair. After servicing the vehicle, he ran it through the BAR 97 smog test machine. He followed the bureau's requirements for conducting a smog check. The NOx readings during the emission tests at the station were 309 ppm at 15 miles per hour and 285 ppm at 25 miles per hour, well under the maximum permissible NOx level. The vehicle passed the smog check. Mr. Michel issued the VIR and a Certificate of Compliance for the Caprice. The information relating to the test and the test result was transmitted by modem from MD Auto's EIS to the bureau's database and to the DMV.

35. Mr. Elhamad advised Ms. Aguirre that the vehicle was ready. As part of the paperwork she signed, Ms. Aguirre had the opportunity to request return of the catalytic converter. She did not check the box requesting that it be returned to her. When she picked up the vehicle on May 2, 2013, Mr. Elhamad offered to show her the catalytic converter that had been removed from the vehicle. She declined the offer.

36. Ms. Aguirre paid for the repairs and received an invoice, two VIR's (the initial station test that failed and the post-repair/replacement test that passed), and a copy of the warranty for the new catalytic converter. The invoice included Mr. Michel's findings that:

2nd Air Injection System Not Operating. Found Short/open circuit for devertor valve. Rec. [recommend] Repair Circuit. Also found cat. Converter failed the HC/CO2 Cranking Test; HC >2000 ppm CO2 ,10.3%. Rec. Replace Cat. Converter. Rec. Repair 2nd Air Injection Circuit.”

37. The invoice listed the condition of the catalytic converter as “new.”

38. Ms. Aguirre drove the vehicle to Mr. Cassel's location and gave him the vehicle and the documents. Mr. Cassel returned the vehicle to Mr. Losee, and the vehicle was towed back to the lab.

39. Mr. Losee reinspected the vehicle several days later, on May 7, 2013. He did not know the status of the vehicle between May 2 and May 7, 2013. "I can only speak to May 7," he stated during his testimony. He performed another smog check using the bureau's BAR-97 EIS. Based on MD Auto's invoice, which stated that the station had repaired the secondary air injection diverter and replaced the catalytic converter, he expected the vehicle to pass the emissions test. But it did not. The overall test result was "fail," and although the NOx readings were lower than when he induced the malfunction, the NOx readings were still too high to pass.⁷ He took photographs on May 10, 2013.⁸

40. Mr. Losee observed that the catalytic converter had been replaced. He also found that "the wiring had been moved" but he did not consider it repaired; the control wire to the diverter valve was still grounded to the ground wiring circuit. In his opinion, it had not been necessary to replace the catalytic converter in order to repair the NOx failure. He felt that the only repair needed was a repair to correct the AIR system malfunction. MD Auto's invoice showed that the customer was charged \$78.40 for repair of the AIR control wire.

The Different Opinions

MR. LOSEE'S OPINION

41. Mr. Losee opined that the catalytic converter did not need replacement and that the AIR system repair was not done. In Mr. Losee's opinion, a catalytic converter could not become damaged in less than one mile of driving.

42. According to Mr. Losee, the bureau's machines are calibrated daily but service stations are required to calibrate their machines every three days. Although he agreed that it would be reasonably possible to get different results from two different machines if one was out of calibration, if a machine is "grossly out of calibration," the machine would stop itself.

43. Mr. Losee identified three possible explanations for why the emissions test would pass at the station but fail when he tested it at the bureau's lab. Each explanation was based on fraud. He suggested that (1) the station may have dismantled the AIR system and removed the hose so the vehicle would fraudulently pass; (2) the station may have unplugged the diverter valve so the vehicle would fraudulently pass; or (3) the station engaged in clean piping (using a different vehicle) to fraudulently obtain a pass. Mr. Losee readily conceded

⁷ When Mr. Losee induced the malfunction and obtained the failing test results on April 25, 2013, the failing NOx emissions were 1,068 ppm at 15 miles per hour and 1,002 ppm at 25 miles per hour. When he tested it on May 7, 2013, the NOx emissions were significantly lower, but still excessive, with 734 ppm at 15 miles per hour and 661 ppm at 25 miles per hour.

⁸ During his testimony, Mr. Losee did not produce or identify any photographs he took of the Caprice.

that he had no evidence that any of these three scenarios occurred, but they were the only explanations that appeared reasonable to him.

44. During cross-examination, Mr. Losee agreed that temperature is "very important" in conducting a smog test and that one must be aware of the ambient temperature before putting the vehicle on the dynamometer. He agreed that it is important to use a fan to simulate normal operating temperature. The hotter the temperature, the higher the NOx level. He was not aware of whether the bureau had a recommendation for how far away the fan should be. He probably placed the fan six to eight feet from the front of the vehicle when he conducted the smog test after her received the vehicle back following the undercover operation.

45. Paul Hsu, another bureau representative, also testified about the importance of temperature when conducting a smog test. According to Mr. Hsu, if the fan is placed too far away from the vehicle, it can cause the vehicle to fail by having too high a NOx level. He places the fan two feet away from the vehicle. He stated that he would never place a fan eight feet from a 20 year old vehicle.

MR. MICHEL'S OPINION

46. Mr. Michel believed the catalytic converter was not in good working order when he tested it, and that it required replacement. During the hearing, he and Mr. Dibas produced information about what can damage a catalytic converter and how quickly damage can occur. According to the information he produced, "converters can become overheated and destroyed in as little as twelve seconds." An engine operating fault can cause a converter to fail and require replacement. "If the fault is not identified and repaired, the converter can quickly destroy itself. This often happens in less than a week."

47. Mr. Michel reviewed the smog test results Mr. Losee obtained when the car initially passed in April, before Mr. Losee introduced the malfunction. The vehicle tested at the upper limit for hydrocarbons (HC) and "borderline, ready to fail" for NOx. To Mr. Michel, this showed the catalytic converter was already weak. In his opinion, the induced malfunction would have made the converter work even harder and could have caused the converter to become even more inefficient. Mr. Michel testified that he would not have recommended replacing a catalytic converter that was in good working condition.

48. As to the repair, Mr. Michel believed he fixed the wiring problem. He explained that he made the repair over two and one-half years ago, and did not remember the specific details of fixing it, but he would not have recommended repairing the AIR system, received authorization to repair it, and charged the customer without actually repairing it. He emphasized that the bulk of the charged time was spent on diagnosing the problem. He diagnosed the problem, recommended the repair, and sincerely believed he fixed it. When he tested the vehicle, it passed the emissions portion, which was entirely automated. Based on his years of experience as a technician, his strong work ethic, and the vehicle's passage after his repair, he had no reason to question whether his repairs had been complete or effective.

49. Mr. Michel did not know why the vehicle passed for him but failed with Mr. Losee at the lab on May 7, 2013. He had some ideas: In his opinion, a temperature difference could have been the cause. He questioned whether Mr. Losee sufficiently warmed-up the catalytic converter before testing the vehicle; failing to do so could cause the NOx to be too high. He opined that the engine was not at the proper temperature or the fan was placed too far away. He noted that Mr. Losee testified that he positioned the auxiliary fan six to eight feet away; Mr. Michel believed it should have been no further from the vehicle than two to four feet.

50. Mr. Michel appeared candid and sincere. He commented that to become licensed, the bureau requires that individuals obtain a minimum score of 70 to 75 percent on the test, with room for human error. He felt frustrated and upset that the bureau accused him of fraud and that the bureau appeared to suggest that anything less than perfection necessarily involved an intention to deceive a customer. Mr. Michel credibly conveyed his efforts to follow the bureau's required steps, and to work hard to be as thorough as possible. His diagnostic notes and straightforward demeanor corroborated his good faith in conducting the diagnosis and repairs.

MR. DIBAS'S TESTIMONY

51. Mr. Dibas joined in the substantive opinions offered by Mr. Michel. He was angry that the bureau had not saved the evidence (i.e., asked the undercover customer to request the return of the catalytic converter) so he could better refute the charges. When the customer did not request it, the station "got rid" of the parts; Mr. Dibas did not know until the accusation was filed a year later that there was any issue. To him, this did not appear to be fair.

52. Mr. Dibas did not feel the bureau followed its own testing procedures that it requires of technicians; he noted that the cranking test required a recorded, sustained period of at least ten seconds, which Mr. Michel produced. Mr. Losee, however, produced a one second screen shot, which Mr. Gomez and Mr. Michel opined was insufficient.

53. Mr. Dibas took pride in MD Auto's 20 years of service to the community. He felt his station's reputation was its strength, and that the bureau appeared to be more interested in "tricking" its licensees and collecting fines than helping licensees improve.

In emotional testimony, Mr. Dibas conveyed that this process has been the "worst personal experience" of his life. He commented that, with 3,000 customers each year, mistakes can happen. He asked that he and his employees be viewed as human beings, and not as infallible machines. He knows, anecdotally, that a vehicle can pass at one shop, and not another. He trusts his employees, and considers them "decent, honest people." "We give it our best," he said. As to Mr. Elhamad, Mr. Dibas said: "I trust this man with my life" and believe he "takes care of the business like it was his own."

RESPONDENTS' EXPERT, OSCAR GOMEZ

54. Oscar Gomez is a certified smog instructor who teaches Level 1 and Level 2 emissions courses for new technicians and has been authorized by the bureau to provide alternative citation courses for technicians who have received citations from the bureau. He holds certificates as an advanced level specialist and master automotive technician, and numerous other ASE certifications. He is certified to make repairs in both of the undercover vehicles in question and has been performing emissions control work for over ten years. He has taught best practices to approximately 2,000 people. He was qualified as an expert in emission control and smog check procedures. Mr. Gomez reviewed the bureau's documents and declarations regarding the 1996 Caprice, wrote a report, and testified. He did not speak with Mr. Dibas or Mr. Michel about his review before writing his report.

55. Mr. Gomez opined that the induced malfunction could reasonably have affected the catalytic converter's performance. He wrote:

Due to such high amounts of oxygen being pumped into the catalytic converter because of the malfunction created by PR1 Mr. Losee the catalytic converter may have suffered catastrophic internal failure.

The AIR Diverter valve is needed to vent oxygen into the atmosphere during deceleration [sic], when the vehicle was driven to MD Auto Repair stop and go traffic would have needed the AIR Diverter valve to vent oxygen into the atmosphere to prevent backfiring which leads to catalytic converter failure.

While the vehicle was being tested by Oscar Michel ... he would have unknowingly accelerated the 1992 Chevrolet Caprice to speeds between 14-16 miles per hour at a load of 50% and also accelerate to 24-26 miles per hour at loads of 25%. These incredible amounts of load plus the extra amounts of oxygen in the catalytic converter would have caused excessively high temperatures and upon deceleration caused a backfire into the exhaust systems possibly rendering the catalytic converter useless.

56. Mr. Gomez disagreed with Mr. Losee's testimony that Mr. Michel should have stopped the diagnostic after he found the short in the wire. Based on the age and mileage of the vehicle, it was appropriate for Mr. Michel to test the catalytic converter as part of the diagnostic, even after finding the short. The temperature and cranking tests conducted by Mr. Michel are bureau approved tests for catalytic converters and, to Mr. Gomez, appeared to be correctly conducted by Mr. Michel. Mr. Michel documented the ten seconds of failing in the cranking test; in Mr. Gomez' opinion, a one second screenshot of the test, (which Mr.

Losee produced during his testimony) would be insufficient for making a conclusion about the efficiency of the catalytic converter.

57. Mr. Gomez has seen vehicles pass at one station and fail a short time later at another station. Many factors can affect whether a vehicle passes an emissions test, including failing to sufficiently warm the catalytic converter; the ambient temperature; the engine's cooling temperature; and a contaminated bench, hose, or filter. Stations are required to use one of five or six approved analyzer brands, and they must be calibrated every three days; a difference in how recently the machine has been calibrated can affect whether a vehicle passes. The auxiliary fan should be two to three feet from the car to simulate driving conditions; if it is further away, the result could also be affected.

58. According to Mr. Gomez, a new catalytic converter could have been so efficient that it would enable a vehicle to pass even with an unrepaired induced malfunction to the control wire or an insufficiently repaired short. "But the efficiency would be gone within a matter of days."

Evaluation Regarding the Caprice

59. The bureau alleged that MD Auto and Mr. Michel engaged in fraud and numerous violations of the Act based on the manner in which they serviced and passed the Chevrolet Caprice's emissions tests. A preponderance of evidence did not establish these charges, and there was no evidence of fraud.

60. When the station first tested the vehicle, it failed the emissions test because the NOx was too high. The station advised the customer that a diagnostic was necessary and obtained the customer's permission to perform the \$98 diagnostic. Mr. Michel found two problems. He identified a misfiring wire in the secondary AIR injection system and recommended that it be repaired. He tested the catalytic converter using two bureau approved methods. He contemporaneously documented his findings, and his findings were listed on the estimate. Sufficient evidence established that the induced malfunction could have caused the catalytic converter to fail by the time Mr. Michel evaluated it. At the station, the catalytic converter test results, which were received in evidence, showed that it required replacement. Complainant failed to show by a preponderance of the evidence that the catalytic converter was in good working condition when Mr. Michel evaluated it.

The customer approved both repairs. Mr. Michel installed a new catalytic converter, and the invoice clearly stated that it was new.

It is found that Mr. Michel properly determined that the vehicle required a new catalytic converter and appropriately replaced it.

61. Complainant failed to prove by a preponderance of the evidence that Mr. Michel failed to perform the repair to the wire. Although Mr. Michel did not specifically recall fixing the control wire, he convincingly testified that having found a malfunction, he

would have fixed it, or tried to. As he explained it, the work was in finding the problem; the fix would take 20 minutes and there would be no reason to not do the repair, and he believed he fixed the problem he found. Mr. Losee found that the wire had indeed "been moved," which corroborated that Mr. Michel worked on the wire.

Complainant failed to establish that the original malfunction was not addressed by Mr. Michel. Mr. Losee testified that he took before and after pictures of the induced malfunction. But he did not identify any photograph during his testimony, and there were no pictures included in the bureau's investigation report when it was offered into evidence. After respondents presented their defense, Mr. Cassel was recalled. He identified copies of two photographs and stated they were copies of photographs that Mr. Losee gave him, but Mr. Cassel had insufficient personal knowledge to lay an adequate foundation to definitively establish what they showed. The photographs appeared to show the inside of a vehicle with numerous colored wires and a handwritten tag with words. The hearsay words read: "AIR control wire ground to wiring harness," and "May 10, 2013." Mr. Cassel did not take the photo and was not present when the pictures were taken. He was not involved in the lab work, did not personally see the placement of the inducement before the undercover operation, and did not see the state of the wires after it. All witnesses agreed that if the tag was not present in the photographs, one could not identify what the picture showed or the specific part of the vehicle that had been photographed. Mr. Losee testified that wires had been moved between the time he caused the malfunction and when he inspected the vehicle over a week after the undercover operation. There was insufficient evidence provided to establish that the short that Mr. Losee observed on May 10, 2013, was the specific malfunction he induced on April 25, 2013, or that Mr. Michel did not take steps to repair the AIR system problem that he (Mr. Michel) identified during his diagnostic, repaired on May 1, 2013, and charged for on the MD Auto invoice.

When Mr. Michel tested the vehicle after replacing the catalytic converter and performing his repair, the vehicle passed the automated emissions test. Had the vehicle failed the emissions test, Mr. Michel would have had to re-evaluate the problem. But the vehicle passed. Mr. Michel had no reason to know if there was a problem with his repair.

When Mr. Losee reinspected the vehicle a week later, it had a short that caused an excessive NOx level, which resulted in an overall "fail." The short could not have been seen on a visual inspection.

If Mr. Michel made a mistake in completion of the repair, and a preponderance of the evidence did not establish that he did, the mistake would be a bona fide, inadvertent error, which would not be grounds for discipline. (Bus. & Prof. Code, § 9884.7.)

Mr. Losee suggested that, although he had no evidence of fraud, the only reason the Caprice could have passed following the repair had to be one of three reasons, each involving fraud. These suggestions are rejected. A finding cannot be predicated on an inference that is "based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guesswork." (*Traxler v. Thompson* (1970) 4 Cal.App.3d 278, 289.) Moreover, fraud is

never presumed, and the burden of proving it rests on the party who asserts it. (Code Civ.Proc., § 1963; *Dorn v. Pichinino* (1951) 105 Cal.App.2d 796, 801.)

In this case, there were other explanations for the discrepancy that were far more reasonable than the bureau's conclusion of fraud. All witnesses agreed that ambient and engine temperature play important roles in a smog test. The placement of the auxiliary fan is crucial. Mr. Michel and Mr. Gomez stated it should be no more than two to four feet from the vehicle being tested. Even Mr. Hsu, one of the bureau's representatives, stated he would never place the fan more than two feet away from a 20 year old vehicle. Yet Mr. Losee placed it six to eight feet from the 1992 Caprice. This could have reasonably affected the results. Moreover, the evidence also established that a new catalytic converter could have been so efficient that the vehicle could have passed a smog test despite a short still being present.

Mr. Michel has been a licensed technician for over 15 years. He has an unblemished career. During the hearing, he appeared to be a sincere, humble, hardworking technician who took his responsibilities to the bureau and the public seriously. Given the totality of the evidence, it is found that Mr. Michel followed the proper procedures in conducting the emissions test, and he appropriately issued a Certificate of Compliance based on the test results.

Undercover Investigation #2 – The 2002 Chevrolet Cavalier

62. Paul Hsu is a program representative with the bureau assigned to the bureau's forensic documentation lab in Fontana. He has worked in the automotive industry for thirty years, and has worked for the bureau in its undercover operations for almost 20 years. He holds numerous certifications and has been licensed as a smog technician since 1994.

63. On May 30, 2013, Mr. Hsu documented the condition of a 2002 Chevrolet Cavalier, license number 4UNK390. The odometer read 112,143 miles. Mr. Hsu visually inspected the vehicle and observed that all required emission control systems were present. He marked, photographed, and installed new spark plugs and a fuel filter. In his opinion, they were in good condition and did not need replacement. He marked and photographed several other existing parts that also appeared to be in good working order. Mr. Hsu road tested the vehicle for four miles, and it performed normally.

64. On June 5, 2013, Mr. Hsu performed an ASM Smog Check vehicle inspection using the bureau's EIS and printed the VIR. The overall result was "pass," and the odometer was at 112,147 at the end of the test. He then caused a malfunction; he damaged the ignition wire leading to "number two" cylinder, which "killed" it. The vehicle's engine had a noticeable misfire on starting. He concluded that an acceptable repair for the Cavalier would be to replace one or all of the spark plug ignition wires.

65. Mr. Hsu performed a California smog check vehicle inspection. The check engine light was flashing. The vehicle failed the emissions portion of the ASM test due to the malfunction. A smog check VIR was printed, and the overall result was "fail."

66. On June 13, 2013, Mr. Hsu transported the vehicle by truck and transferred custody of it to bureau representative Rob Cassel.

67. Later that day, Cecilia O'Neill, a clerk employed by the bureau, used an alias and participated in an undercover investigation. Mr. Cassel asked her to drive the 2002 Chevy Cavalier to M.D. Auto. He asked her to tell the station that she would like a smog check, that the "check engine" light was on, and the car was "running rough."

68. Ms. O'Neill drove the Cavalier to M.D. Auto, and she spoke with Mr. Elhamad, the general manager. She conveyed the required information. Mr. Elhamad told her the car would probably fail because of the check engine light, and he offered to do a diagnostic for \$98. She agreed.

69. Mr. Elhamad testified that he has known Mr. Dibas for over 22 years. MD Auto repairs about ten cars each day. As general manager, Mr. Elhamad is in charge of MD Auto's day-to-day operations. The station has four mechanics. All are salaried. None have any financial incentive to sell "more or less," and "the amount sold does not affect anyone's paycheck." Mr. Elhamad recalled working on the Cavalier and diagnosing the problem. He found that the spark plug wire to number two was broken. He removed the spark plug, and it was discolored. The car looked old, and he had no idea how long the spark plugs had been in it. They did not look new to him. He never said that the spark plugs were not working. Rather, he recommended that the customer replace all of the spark plugs due to the age of the car, their discoloration, and as part of general maintenance.

70. According to Mr. Elhamad, MD Auto has "never" sold used spark plugs or installed used, rebuilt, or reconditioned spark plug wires. As he explained it, one can rebuild power steering, but one cannot "rebuild or recondition" a spark plug wire, and the station always uses new wires when replacing them in a vehicle.

71. Mr. Elhamad conveyed his recommendations to William, another technician. William advised Ms. O'Neill that the diagnostic had been completed. As she explained when she testified, William told her "something about three cylinders and misfiring" and something about "fuel." She said she did not understand what William told her and did not ask him to explain it. Nevertheless she authorized all recommended repairs.

72. On June 13, 2013, Mr. Elhamad contacted Ms. O'Neill and advised her that the vehicle was ready. He explained that before the station could do a smog test, the vehicle drive cycle would have to be reset. He explained that the station could do it, or he could return the vehicle to her, and once the car was driven 80 miles, the vehicle drive cycle would reset permitting a smog test. Ms. O'Neill opted to take the vehicle. She paid \$324.97 and received the vehicle and the invoice.

73. The invoice indicated that the station had found the following diagnostic codes:

PO302 Cylinder #2 misfire detected
Found Spark plug wire #2 broken
Rec [recommend] spark plug wires and spark plug
Reset MIL and perform drive cycle for smog

The invoice itemized the charges for labor for replacing the spark plugs and the spark plug wires. Under the section related to "parts," two parts were listed: 4 spark plugs at \$7.95 each (for a total of \$31.80) and a "spark plug wire set" for \$42.25. The invoice stated that the spark plug "condition" was "new." No condition was listed under the itemization for the spark plug wire set.

74. Ms. O'Neill returned the vehicle to Mr. Cassel, who returned it to Mr. Hsu. Mr. Hsu reinspected the Cavalier. The ignition wires and spark plugs appeared to be new.

75. Ms. O'Neill signed a declaration that Mr. Cassel wrote after she told him what happened. On cross examination, Ms. O'Neill explained that she had not understood what the technician, William, told her about the problem or the needed repair because it was "too technical" and she has no special knowledge about cars. Her declaration did not include any specific indication of what repairs were recommended – only that she approved them.

76. Mr. Hsu testified about the repairs conducted by MD Auto. He stated that spark plug wires typically come as a set, and that it was appropriate for the station to replace the spark plug wires. However, he criticized the station's replacement of the four spark plugs. They had been in good working condition when he installed them, and in his opinion, it was not necessary for the station to recommend replacing the spark plugs.

On cross examination Mr. Hsu agreed that when a vehicle has a bad spark plug wire, the spark plug could become discolored. It may show arching indicators on the side. But he did not believe the vehicle would have been damaged by the inducement in the few miles Ms. O'Neill drove to the station.

77. According to Mr. Hsu, the determination of whether it is appropriate to recommend new spark plugs all "depends on how it is expressed to the consumer." If the technician stated that the spark plugs were worn and in need of repair when they were not, that would be a violation. However, if the technician said to the customer something to the effect of: "While we are here and replacing the spark plug wires, I'd recommend we replace the spark plugs," and left the decision to the customer, that would be entirely acceptable. But he did not think that the station presented it as a choice for the customer.

78. Mr. Hsu also criticized MD Auto for having charged for a drive cycle that was not completed. On cross-examination and upon further review of the invoice, Mr. Hsu realized that he made a mistake in reading the invoice, and that the station had recommended

but not charged the customer for completing a drive cycle. On re-evaluation, Mr. Hsu had no problem with the way MD Auto handled this issue.

79. Oscar Gomez, respondents' expert, also reviewed the documents regarding the Cavalier. In his opinion, a damaged spark plug wire can damage a spark plug. It can become contaminated with fuel or HC residue, which can prevent ignition. Such residue can call into question when a working spark plug is going to fail.

80. Mr. Gomez's testimony about the standard of practice was consistent with that given by Mr. Hsu. There are situations where a station may advise a customer that when replacing the spark plug wires, the spark plugs should be replaced as well. The "best practice" would be to state whether the spark plugs are working or are worn, whichever the case may be, provide a recommendation, and give the customer enough information to make an informed choice. If the customer chooses to replace them, the recommended replacement would be acceptable.

Evaluation regarding the 2002 Chevrolet Cavalier

81. Complainant failed to meet his burden of demonstrating that the spark plugs were in good working condition when the station received the vehicle. The bureau took "before" pictures, but they were not produced during the hearing. The bureau could have easily asked Ms. O'Neill to request that the station return her "old" spark plugs to her so the bureau could have inspected them for damage. This did not occur.

82. Mr. Elhamad testified that the spark plugs looked bad and he recommended their replacement as a precautionary measure. The customer, Ms. O'Neill, was not a reliable source of what information the shop conveyed; she repeatedly stated that she did not understand what the station (William) was telling her because it was technical. She never asked the station to explain it differently. Both Mr. Hsu and Mr. Gomez emphasized that the determination about whether a recommendation was appropriate would be based on what was told to the customer. Ms. O'Neill did not convey that information. But she authorized the repairs.

83. A preponderance of the evidence did not establish that (1) the spark plugs were in good working condition when they were inspected by the station, or (2) that the station inappropriately recommended that the spark plugs be replaced.

84. Complainant also alleged that MD Auto failed to comply with the Act because it did not identify on the invoice if the spark plugs were new, or if the wires were new. This allegation lacked merit. The invoice clearly stated that the condition of the spark plugs used in the Cavalier was "new."

85. Mr. Elhamad testified that the station's policy is to identify, for every part sold, whether the part is new, used, reconditioned, or rebuilt, and the station only uses new spark plug wires when it replaces spark plug wires. He stated that he had made a mistake,

perhaps a computer-generated error, by not making sure the invoice stated that the spark plug wires were new.

86. Mr. Dibas asserted: “everyone knows we don’t use reconditioned wires. We forgot to write ‘new’ for the spark plug wires.” Mr. Dibas argued that the statute should be reasonably applied, and that it made no sense to apply it to items that could not be reused or rebuilt, such as spark plug wires.

87. Although the station’s policy of always indicating if a part is new, used, reconditioned or rebuilt is good practice, under Business and Professions Code section 9884.8, MD Auto was required to identify only parts that were used, rebuilt, or reconditioned. In this case, the spark plug wires were new, and MD Auto was under no statutory obligation to list the part as “new.” No violation was established.

Costs of Investigation and Prosecution

88. A certification of costs was signed by the deputy attorney general who prosecuted this disciplinary action. A printout called “Matter Time Activity By Professional” was attached to his declaration. It described general legal services provided by different staff, the dates legal services were performed, the amount of work that was performed on specific dates, and the professionals’ hourly rates. The total cost claimed was \$11,067.50. Neither the declaration nor the attached printout identified which respondent the work related to or the undercover vehicle to which it pertained.

89. Both Mr. Michel and Mr. Dibas testified that it would be difficult to pay costs associated with enforcement of this matter. Mr. Michel is married and has four children. He is ill, has not been able to work, and has applied for Social Security Disability. Mr. Dibas is also the sole support for his family. He has four children, two in college. He supports his parents. His wife does not work outside the home. He objected to the costs declaration because it did not identify which case (or vehicle) the billed hours pertained to, and did not differentiate between the two respondents.

LEGAL CONCLUSIONS

Purpose of Administrative Disciplinary Proceedings

1. The purpose of an administrative disciplinary proceeding is not to punish; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. The bureau’s highest priority in exercising its licensing, regulatory, and disciplinary functions is public protection. Whenever the protection of the public is

inconsistent with other interests sought to be promoted, protection of the public is paramount. (Bus. & Prof. Code, § 9880.3.)

The Burden and Standard of Proof

3. The accusation alleges that respondents engaged in misconduct that warrants imposing discipline on each of their licenses. Complainant bears the burden of proof of establishing that the charges in the accusation are true. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175.)

4. In determining the proper standard of proof to apply in disciplinary proceedings, courts have drawn a distinction between professional licenses (such as those held by doctors, lawyers, and real estate brokers) and nonprofessional or occupational licenses that have less onerous requirements for licensure (such as those held by food processors, vehicle salespersons, and smog technicians.)

5. An individual does not need to demonstrate education, training or experience to hold an automotive repair dealer registration. An individual seeking registration simply must complete a form and pay a fee (Bus. & Prof. Code, § 9984), after which the director must issue the registration. (Bus. & Prof. Code, § 9984.2)

6. In proceedings to revoke professional licenses, the clear and convincing evidence standard of proof applies. However, in proceedings to revoke nonprofessional or occupational licenses, such as advanced emission specialist (smog) technicians and automotive repair dealers, the preponderance of the evidence standard applies. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916.)

7. A preponderance of the evidence establishes that the existence of a factual matter is more likely than not. As one court explained:

“Preponderance of the evidence” means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.)

Statutory Provisions

8. Business and Professions Code section 9884.7 addresses some of the grounds for imposing discipline on the registration of an automotive repair dealer. It states, in part:

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

[¶] . . . [¶]

9. The director may also impose discipline if a licensee, or a partner, director or officer of a licensee violates any of the applicable regulations. (Health & Saf. Code, § 44072.2, subs. (a) and (c).)

10. Business and Professions Code section 9884.8 addresses the information that must be recorded on an invoice. It includes requirements about indicating whether used, rebuilt, or reconditioned parts are used. As to this issue, it states:

All work done by an automotive repair dealer . . . shall be recorded on an invoice and shall describe all service work done and parts supplied. Service work and parts shall be listed separately on the invoice, . . . If any used, rebuilt, or reconditioned parts are supplied, the invoice shall clearly state that fact. If a part of a component system is composed of new and used, rebuilt or reconditioned parts, that invoice shall clearly state that fact. The invoice shall include a statement indicating whether any crash parts are original equipment manufacturer crash parts or nonoriginal equipment manufacturer aftermarket crash parts.

11. Smog check station tests shall be performed in accordance with procedures prescribed by the Department of Consumer Affairs. (Health & Saf. Code, § 44012.)

12. A licensed smog check station shall not issue a certificate of compliance unless the vehicle meets at the required criteria. (Health & Saf. Code, § 44015.) If a vehicle meets the requirements of Section 44012, a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance. (Health & Saf. Code, § 44015, subd. (b).)

Applicable Regulations

13. California Code of Regulations, title 16, section 3340.35 requires that a vehicle be inspected using the procedures listed in section 3340.42 before a certificate of compliance may be issued. Under the regulations, a licensed station shall issue a certificate of compliance only when the vehicle "has all required emission control equipment and devices installed and functioning correctly." (Cal. Code Regs., tit. 16, § 3340.42, subd. (c).)

14. Dealers shall not publish or make any false or misleading statement that is known to be or false or misleading, or which by the exercise of reasonable care should be known to be false or misleading. (Cal. Code Regs., tit. 16, § 3371.)

15. Automotive repair dealers or individuals in charge shall not include false or misleading statements on any estimate, invoice, work order, or required record, nor include or withhold any information that would tend to mislead or deceive. (Cal. Code Regs., tit. 16, § 3373.)

16. A licensed smog check inspector and/or repair technician shall inspect, test and repair vehicles in accordance with required procedures (Health and Safety Code sections 44012 and 44035) and the regulations (section 3340.42.) (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).)

A Station's Responsibility for the Actions of its Employees

17. Mr. Dibas and MD Auto would be responsible for any violation committed by an employee operating under the station's license. "A licensee may not insulate himself from regulations by electing to function through employees or independent contractors." (*Eisenberg v. Myers* (1983) 148 Cal.App.3d 814, 824.) "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." (*Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797.)

Evaluation

18. The purpose of a bureau undercover operation is to ensure that licensed facilities and technicians follow the law, and that California's air quality and consumers are protected. The improper issuance of a smog certificate, recommendation of replacement parts that are in good working condition, or billing for repairs intentionally not completed are serious violations. But the evidence in this case did not establish the alleged violations or that respondents engaged in conduct adverse to California's air quality or to consumers.

FIRST CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

19. The First Cause for Discipline alleged that MD Auto violated Business and Professions Code section 9884.7 by making untrue or misleading statements that it knew, or by the exercise of reasonable care should have known to be untrue or misleading regarding the catalytic converter, repair of the AIR system, and the issuance of a Certificate of Compliance. Complainant failed to meet his burden of proof.

A preponderance of the evidence did not establish that the Caprice was in good working condition when it was tested by Mr. Michel or that MD Auto made a misleading or false statement when it stated that the converter needed to be replaced.

A preponderance of the evidence did not establish that the vehicle should have failed the emissions test at the station after Mr. Michel replaced the catalytic converter or that the Certificate of Compliance was improperly issued.

Although the bureau established there was a short when the vehicle was evaluated at the lab a week after Mr. Michel worked on the vehicle, a preponderance of the evidence did not establish that what Mr. Losee observed on May 7, 2013, was the specific malfunction he introduced in April or that Mr. Michel did not repair the AIR system problem he (Mr. Michel) identified.

A preponderance of the evidence did not establish that MD Auto made an untrue or misleading statement, or that with the exercise of reasonable care, MD Auto should have known was untrue or misleading, when the station advised the customer that the secondary AIR system had been repaired.

Moreover, if Mr. Michel made an error in completing the repair of the short, it was a bona fide error. A bona fide error is not a violation of Business and Professions Code section 9884.7, subdivision (a).

A preponderance of the evidence did not establish that MD Auto is subject to discipline under Business and Professions Code section 9884.7.

SECOND CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

20. Cause does not exist to impose discipline on the grounds that MD Auto engaged in fraud under section 9884.7, subdivision (a)(4).

A preponderance of the evidence did not establish that the catalytic converter was in good working condition when the Mr. Michel tested it or that the station improperly accepted payment for replacing it. A preponderance of the evidence did not establish that the vehicle should have failed the emissions test after Mr. Michel replaced the catalytic converter and worked on the secondary AIR system, or that the VIR was improperly issued for the Caprice.

A preponderance of the evidence did not establish that MD Auto engaged in fraud by charging for the repair to the secondary AIR system. Mr. Michel sincerely believed he made the repair, but candidly acknowledged that because it occurred over two years (and many vehicles) ago, he had no specific memory of the repair. He credibly explained, however, that after diagnosing the problem, which takes the bulk of the time, he would have completed the repair. Mr. Losee did not inspect the vehicle for about one week. He agreed that wires had been moved. Complainant did not establish by a preponderance of the evidence exactly what occurred. However, if Mr. Michel made an error in completing the repair to the secondary AIR system (and this was not established by a preponderance of the evidence), it was a bona fide error. Under Business and Professions Code section 9884.7, subdivision (a), a bona fide error is not grounds for discipline.

No violation of Business and Professions Code section 9884.7 was established, and cause for discipline does not exist under this provision.

THIRD CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

21. The third cause for discipline alleges that MD Auto failed to comply with Business and Professions Code section 9884.8 by failing to disclose on the invoice whether the catalytic converter was new, used, rebuilt, or reconditioned. The charge lacked merit; the invoice clearly stated that the "condition" of the catalytic converter was "new."

Furthermore, section 9884.8 did not require MD Auto's invoice to state that the catalytic converter was new. The statute states that "[i]f any used, rebuilt, or reconditioned parts are supplied, the invoice shall clearly state that fact." If "part of a component system is composed of new and used, rebuilt or reconditioned parts . . . that invoice shall clearly state that fact." And, where there has been a crash, the "invoice shall include a statement indicating whether any crash parts are original equipment manufacturer crash parts or nonoriginal." The invoice identified the catalytic converter as "new," but it was not a statutory requirement to do so. Complainant presented no evidence that the catalytic converter MD Auto installed was not in fact new, thus triggering the requirements of section 9884.7.

Complainant failed to establish that MD Auto violated section 9884.7, and grounds for discipline were not established under this provision.

FOURTH CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

22. Cause does not exist to find that MD Auto violated the Motor Vehicle Inspection Program in violation of Health and Safety Code section 44072.2, which prohibits violating the bureau's regulations.

A preponderance of the evidence did not establish that MD Auto improperly signed a VIR or improperly issued a Certificate of Compliance for the 1992 Chevrolet Caprice, in violation of California Code of Regulations, title 16, sections 3340.35, subdivision (c), or 3373.

A preponderance of the evidence did not establish that MD Auto made a false or misleading statement in violation of California Code of Regulations, title 16, section 3371, when it properly recommended replacement of the catalytic converter.

A preponderance of the evidence did not establish that MD Auto's charge for the repair of the secondary AIR injection system was known to be false or misleading, or that with the exercise of reasonable care, the station should have known it was false or misleading. The technician attempted to repair the AIR system. After his repair and the replacement of the catalytic converter, the vehicle passed the emissions test. The vehicle was not evaluated by the lab until several days thereafter, and Mr. Losee did not know about the car's status for five days. Wires had been moved. There was insufficient evidence to establish that Mr. Michel, and by extension, the station, knew that the repair was not successful or that there was another short. As such, there was insufficient evidence to establish a violation of California Code of Regulations, title 16, section 3371 on this issue.

A preponderance of the evidence did not establish that MD Auto made false or misleading statements on an invoice or withheld information that would tend to mislead or deceive, in violation of California Code of Regulations, title 16, section 3373, when it properly recommended replacement of the catalytic converter, which was not in good serviceable condition and required replacement.

FIFTH CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

23. Cause does not exist to find that MD Auto violated Health and Safety Code section 44015, subdivision (a), or that the station is subject to discipline under Health and Safety Code section 44072.2, subdivision (a), on the grounds that MD Auto failed to follow test procedures prescribed by the department when it conducted the smog check on the 1992 Caprice after replacing the catalytic converter. Complainant failed to establish that MD Auto improperly issued the Certificate of Compliance, and the weight of the evidence established that MD Auto properly issued a Certificate of Compliance for the Chevrolet Caprice irrespective of the results obtained days later at the documentation lab.

SIXTH CAUSE FOR DISCIPLINE (AGAINST MR. MICHEL)

24. Cause does not exist to find that Mr. Michel violated Health and Safety Code section 44012 or that he should be subject to discipline under Health and Safety Code section 44072.2, subdivision (a), on the grounds that he failed to follow test procedures prescribed by the department when he conducted the smog check on the 1992 Caprice after replacing the catalytic converter. Complainant failed to establish that Mr. Michel improperly issued the Certificate of Compliance, and the weight of the evidence established that he properly issued a Certificate of Compliance for the Chevrolet Caprice irrespective of the results obtained days later at the documentation lab.

25. Cause does not exist to find that Mr. Michel violated California Code of Regulations, title 16, section 3340.30, subdivision (a), or that he is subject to discipline under Health and Safety Code section 44072.2, subdivision (c) for failing to inspect, test, and repair the 1992 Chevrolet Caprice.

26. Cause does not exist to find that Mr. Michel violated California Code of Regulations, title 16, section 3340.42, subdivision (a), which states that a licensed station shall issue a Certificate of Compliance only when the vehicle "has all required emission control equipment and devices installed and functioning correctly." Although there was evidence that there was a short in the vehicle when Mr. Losee re-examined the vehicle a week after Mr. Michel changed the catalytic converter and worked on the AIR system to repair it, complainant failed to establish, by a preponderance of the evidence, that Mr. Michel failed to follow the bureau's regulations in performing the repairs he performed.

SEVENTH CAUSE FOR DISCIPLINE (AGAINST MR. MICHEL)

27. Cause does not exist to find that Mr. Michel violated Health and Safety Code section 44012 (the required smog check procedures); section 44035 (grounds for discipline) or 44072.2 (violation of the regulations) with respect to his inspection, testing or repairs to the 1992 Chevrolet Caprice.

EIGHTH CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

28. Cause does not exist to find that MD Auto made statements it knew or should have known was misleading when it recommended that the spark plugs in the 2002 Chevrolet Cavalier be replaced. A preponderance of the evidence failed to establish that they were in good serviceable condition or that the station made an inappropriate recommendation to replace the spark plugs. A violation of Business and Professions Code section 9884.7, subdivision (a)(1), was not established.

NINTH CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

29. Cause does not exist to conclude that MD Auto committed fraud or that its employee fraudulently told the undercover customer that the spark plugs needed to be

replaced on the 2002 Cavalier when they were in good serviceable condition. A preponderance of the evidence failed to establish that they were in good serviceable condition when they were examined at the station, or that the station made an inappropriate recommendation to replace the spark plugs. Complainant failed to establish that MD Auto violated Business and Professions Code section 9884.7, subdivision (a)(4).

TENTH CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

30. Cause does not exist to find that MD Auto violated Business and Professions Code section 9884.8 by failing to disclose on the invoice provided to the consumer whether the parts supplied were new, used, rebuilt, or reconditioned parts.

The invoice shows the station charged the customer \$31.80 for four spark plugs and \$41.89 for "spark plug wire set – Mileage Plus." The invoice clearly stated the condition of the spark plugs was "new." No condition was listed for the spark plug wires but it was well-established that spark plug wires are not the kind of part that can be reconditioned or rebuilt, and that MD Auto sells only new spark plug wires. The weight of the evidence established that MD Auto replaced the Cavalier's existing spark plug wires with new spark plug wires. As previously discussed, section 9884.8 did not require the station to specify that the spark plug wires were new as long as all the parts used in the repair were new and the repair was not the result of a crash. No violation was established.

ELEVENTH CAUSE FOR DISCIPLINE (AGAINST MD AUTO)

31. Cause does not exist to establish that MD made false or misleading statements in violation of California Code of Regulations, title 16, section 3371, or that MD Auto withheld or inserted information or created a false document when it wrote on the invoice for the Cavalier that the spark plugs needed replacement. Complainant failed to establish by a preponderance of the evidence that the spark plugs were in good working condition when they were evaluated at the station or that the station inappropriately recommended that the spark plugs be replaced in conjunction with replacing the spark plug wires.

32. Cause does not exist to find that MD Auto violated Health and Safety Code section 44072.2, subdivision (c) for failing to comply with the bureau's regulations.

Conclusion

33. The bureau is charged with protecting the public from unscrupulous or incompetent licensees. Despite the litany of charges mounted against MD Auto and Mr. Michel with respect to Mr. Michel's diagnoses and repair of the 1992 Caprice, most were flatly refuted, and none were established by a preponderance of the evidence. Cause was not established to impose discipline on either MD Auto or Mr. Michel in connection with the 1992 Caprice, and cause was not established to impose discipline MD Auto in connection with its repair of the 2002 Cavalier.

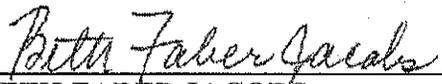
Costs

34. Business and Professions Code section 125.3 authorizes an agency to request the reasonable costs of the investigation and enforcement of a case when violations of the licensing act have been found. Insofar as none of the charges were established, costs are not appropriate in this matter.

ORDER

The charges in Accusation No.79/14-127 filed against respondents, MD Auto Repair and Tires, Inc., Mahmoud Dibas, President, and Oscar Michel, are dismissed.

DATED: October 30, 2015


BETH FABER JACOBS
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 RITA M. LANE
Deputy Attorney General
4 State Bar No. 171352
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2614
7 Facsimile: (619) 645-2061
Attorneys for Complainant

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

12 In the Matter of the Accusation Against:

Case No. **79/14-127**

13 **MD AUTO REPAIR AND TIRES INC.,**
14 **DBA MD AUTO REPAIR AND TIRES;**
15 **MAHMOUD DIBAS, PRESIDENT**
8750 Jamacha Road
Spring Valley, CA 91977

A C C U S A T I O N

16 Automotive Repair Dealer Registration No.
ARD 223519
17 Smog Check Station License No. RC 223519
Lamp Station License No. LS 223519
18 Brake Station License No. BS 223519

19 and

20 **OSCAR MICHEL**
341 Sunrise Drive
21 San Ysidro, CA 92173

22 Smog Check Inspector License No.
EO 144973
23 Smog Check Repair Technician License No.
EI 144973
24

Respondents.

25
26
27
28 Complainant alleges:

1 **PARTIES**

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

4 **MD Auto Repair and Tires Inc.**

5 2. In 2002, the Bureau of Automotive Repair issued Automotive Repair Dealer
6 Registration Number ARD 223519 to MD Auto Repair and Tires Inc., dba MD Auto Repair and
7 Tires, Mahmoud Dibas, President (Respondent MD). The Automotive Repair Dealer Registration
8 was in full force and effect at all times relevant to the charges brought herein and will expire on
9 August 31, 2014, unless renewed.

10 3. On or about March 10, 2003, the Bureau of Automotive Repair issued Smog Check
11 Station License Number RC 223519 to MD Auto Repair and Tires Inc., dba MD Auto Repair and
12 Tires, Mahmoud Dibas, President. The Smog Check Station License was in full force and effect
13 at all times relevant to the charges brought herein and will expire on August 31, 2014, unless
14 renewed.

15 4. On or about December 19, 2006, the Bureau of Automotive Repair issued Lamp
16 Station License Number LS 223519 to MD Auto Repair and Tires Inc., dba MD Auto Repair and
17 Tires, Mahmoud Dibas, President. The Lamp Station License was in full force and effect at all
18 times relevant to the charges brought herein and will expire on August 31, 2014, unless renewed.

19 5. On or about December 19, 2006, the Bureau of Automotive Repair issued Brake
20 Station License Number BS 223519 to MD Auto Repair and Tires Inc., dba MD Auto Repair and
21 Tires, Mahmoud Dibas, President. The Brake Station License was in full force and effect at all
22 times relevant to the charges brought herein and will expire on August 31, 2014, unless renewed.

23 **Oscar Michel**

24 6. On or about January 16, 2003, the Director issued Advanced Emission Specialist
25 Technician License Number EA 144973 ("technician license") to Oscar Michel ("Respondent
26 Michel"). Respondent Michel's technician license was in full force and effect at all times relevant
27 to the charges brought herein and was due to expire on December 31, 2012. Respondent Michel
28 renewed the technician license upon his election, as Smog Check Inspector License Number EO

1 144973 and Smog Check Repair Technician License Number EI 144973.¹ The licenses will
2 expire on December 31, 2014, unless renewed.

3 JURISDICTION

4 7. This Accusation is brought before the Director of Consumer Affairs (Director) for the
5 Bureau of Automotive Repair (Bureau), under the authority of the following laws. All section
6 references are to the Business and Professions Code (Code) unless otherwise indicated.

7 8. Code section 9884.7 provides that the Director may revoke an automotive repair
8 dealer registration.

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

13 10. Code section 9889.1 provides, in pertinent part, that the Director may suspend or
14 revoke any license issued under Articles 5 and 6 (commencing with section 9887.1) of the
15 Automotive Repair Act.

16 11. Code section 9889.7 provides, in pertinent part, that the expiration or suspension of a
17 license by operation of law or by order or decision of the Director or a court of law, or the
18 voluntary surrender of a license shall not deprive the Director of jurisdiction to proceed with any
19 disciplinary proceedings.

20 12. Health and Safety Code section 44002 provides, in pertinent part, that the Director
21 has all the powers and authority granted under the Automotive Repair Act for enforcing the
22 Motor Vehicle Inspection Program.

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

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

3 **STATUTORY PROVISIONS**

4 14. Code section 22, subdivision (a), states:

5 "Board" as used in any provision of this Code, refers to the board in
6 which the administration of the provision is vested, and unless otherwise expressly
7 provided, shall include "bureau," "commission," "committee," "department,"
8 "division," "examining committee," "program," and "agency."

8 15. Code section 477, subdivision (b), states, in pertinent part, that a "license" includes
9 "registration" and "certificate."

10 16. Code section 9884.7 states:

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

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

17 ...

18 (4) Any other conduct that constitutes fraud.

19 ...

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

22 17. Code section 9884.8 states:

23 All work done by an automotive repair dealer, including all warranty work,
24 shall be recorded on an invoice and shall describe all service work done and parts
25 supplied. Service work and parts shall be listed separately on the invoice, which
26 shall also state separately the subtotal prices for service work and for parts, not
27 including sales tax, and shall state separately the sales tax, if any, applicable to
28 each. If any used, rebuilt, or reconditioned parts are supplied, the invoice shall
clearly state that fact. If a part of a component system is composed of new and
used, rebuilt or reconditioned parts, that invoice shall clearly state that fact. The
invoice shall include a statement indicating whether any crash parts are original
equipment manufacturer crash parts or nonoriginal equipment manufacturer

1 aftermarket crash parts. One copy of the invoice shall be given to the customer and
2 one copy shall be retained by the automotive repair dealer.

3 18. Code section 9889.9 states:

4 When any license has been revoked or suspended following a hearing under
5 the provisions of this article [Article 7 (commencing with section 9889.1) of the
6 Automotive Repair Act], any additional license issued under Articles 5 and 6 of
7 this chapter in the name of the licensee may be likewise revoked or suspended by
8 the director.

9 19. Health and Safety Code section 44012 states, in pertinent part:

10 The test at the smog check stations shall be performed in accordance with
11 procedures prescribed by the department and may require loaded mode
12 dynamometer testing in enhanced areas, two-speed idle testing, testing utilizing a
13 vehicle's onboard diagnostic system, or other appropriate test procedures as
14 determined by the department in consultation with the state board. The department
15 shall implement testing using onboard diagnostic systems, in lieu of loaded mode
16 dynamometer or two-speed idle testing, on model year 2000 and newer vehicles
17 only, beginning no earlier than January 1, 2013. However, the department, in
18 consultation with the state board, may prescribe alternative test procedures that
19 include loaded mode dynamometer or two-speed idle testing for vehicles with
20 onboard diagnostic systems that the department and the state board determine
21 exhibit operational problems. The department shall ensure, as appropriate to the
22 test method, the following:

23 (f) A visual or functional check is made of emission control devices
24 specified by the department, including the catalytic converter in those instances in
25 which the department determines it to be necessary to meet the findings of Section
26 44001. The visual or functional check shall be performed in accordance with
27 procedures prescribed by the department.

28 20. Health and Safety Code section 44015 states, in pertinent part:

(a) A licensed smog check station shall not issue a certificate of compliance,
except as authorized by this chapter, to any vehicle that meets the following
criteria:

(1) A vehicle that has been tampered with.

(2) A vehicle identified pursuant to subparagraph (K) of paragraph (3) of
subdivision (b) of Section 44036. A vehicle identified pursuant to subparagraph
(K) of paragraph (3) of subdivision (b) of Section 44036 shall be directed to the
department to determine whether an inadvertent error can explain the irregularity,
or whether the vehicle otherwise meets smog check requirements, allowing the
certificate for compliance to be issued, or the vehicle shall be reinspected by a
referee or another smog check station.

(3) A vehicle that, prior to repairs, has been initially identified by the smog
check station as a gross polluter. Certification of a gross polluting vehicle shall be
conducted by a designated test-only facility, or a test-and-repair station that is both
licensed and certified pursuant to Sections 44014 and 44014.2.

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

4 21. Health and Safety Code section 44032 states:

5 No person shall perform, for compensation, tests or repairs of emission control
6 devices or systems of motor vehicles required by this chapter unless the person
7 performing the test or repair is a qualified smog check technician and the test or
8 repair is performed at a licensed smog check station. Qualified technicians shall
9 perform tests of emission control devices and systems in accordance with Section
10 44012.

11 22. Health and Safety Code section 44035 states:

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

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

22 23. Health and Safety Code section 44072.2 states, in pertinent part:

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

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

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

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

33 24. Health and Safety Code section 44072.8 states that when a license has been revoked
34 or suspended following a hearing under this article, any additional license issued under this
35 chapter in the name of the licensee may be likewise revoked or suspended by the director.

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REGULATIONS

25. California Code of Regulations, title 16, section 3340.30 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 section.

26. California Code of Regulations, title 16, section 3340.35(c), states:

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.

27. California Code of Regulations, title 16, section 3340.42, states:

Smog check stations and smog check technicians shall conduct tests and inspections in accordance with the bureau's BAR-90 Test Analyzer System Specifications referenced in section 3340.17(a) or the BAR-97 Emissions Inspection System Specifications referenced in section 3340.17(a) and (b), whichever is appropriate, and the following:

(a) There shall be two test procedures as follows:

(1) The loaded-mode test method shall be the primary test method used in the enhanced program areas of the state. The loaded-mode test method shall measure hydrocarbon, carbon monoxide, carbon dioxide and oxides of nitrogen emissions. The loaded-mode test equipment shall be Acceleration Simulation Mode (ASM) test equipment, including a chassis dynamometer, certified by the bureau. The loaded-mode test procedures, including the preconditioning procedure, shall only be conducted according to the bureau approved procedures specified in this section and include the following:

...

(2) The two-speed idle mode test method shall be used in all program areas of the state, other than the enhanced program areas. The two-speed idle mode test method shall measure hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and again at idle RPM, as contained in the bureau's specifications referenced in Section 3340.16.7(a). Exhaust emissions from a vehicle subject to inspection shall be tested and compared to the emission standards set forth in this section and as shown in Table III.

28. California Code of Regulations, title 16, section 3371, states:

No dealer shall publish, utter, or make or cause to be published, uttered, or made any false or misleading statement or advertisement which is known to be false or misleading, or which by the exercise of reasonable care should be known

1 to be false or misleading. Advertisements and advertising signs shall clearly show
2 the following:

3 (a) Firm Name and Address. The dealer's firm name and address as they
4 appear on the State registration certificate as an automotive repair dealer; and

5 (b) Telephone Number. If a telephone number appears in an advertisement
6 or on an advertising sign, this number shall be the same number as that listed for
7 the dealer's firm name and address in the telephone directory, or in the telephone
8 company records if such number is assigned to the dealer subsequent to the
9 publication of such telephone directory.

10 29. California Code of Regulations, title 16, section 3373, states:

11 No automotive repair dealer or individual in charge shall, in filling out an
12 estimate, invoice, or work order, or record required to be maintained by section
13 3340.15(f) of this chapter, withhold therefrom or insert therein any statement or
14 information which will cause any such document to be false or misleading, or
15 where the tendency or effect thereby would be to mislead or deceive customers,
16 prospective customers, or the public.

17 COSTS

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

22 UNDERCOVER OPERATION 1 – 1992 CHEVROLET

23 31. Prior to an undercover run at the Respondent MD's facility, Bureau personnel had
24 inspected and documented a 1992 Chevrolet. The only emission repair necessary for the 1992
25 Chevrolet to pass a properly performed Smog Check Inspection was to repair the control wire of
26 the Air Injection Reaction (AIR) system.

27 32. On or about May 1, 2013, a Bureau undercover operator ("operator") drove the
28 Bureau documented 1992 Chevrolet to Respondent MD's facility and requested a Smog Check
Inspection. The operator signed an estimate and was given a copy. Smog test results obtained
from the Bureau's Vehicle Information Database show that Respondent Michel performed a
Smog Check Inspection on the 1992 Chevrolet and the vehicle failed. The operator authorized
Respondent MD to diagnose the cause of the Smog Check Inspection failure. Respondent MD's
employee gave the operator an estimate totaling \$98.00 for the diagnostic. Following the

1 diagnosis Respondent MD's employee called the operator and told her that the 1992 Chevrolet
2 needed to have the wiring harness repaired and the catalytic converter replaced. The operator was
3 given a new estimate of \$651.96 for the repairs, smog check inspection and the diagnostic. The
4 operator authorized the repairs. On or about May 2, 2013, the operator returned to the subject
5 facility to retrieve the 1992 Chevrolet. Respondent MD's employee told the operator that the
6 wiring harness had been repaired and the catalytic converter was replaced. The operator paid
7 \$651.96, received Invoice [REDACTED] and a Vehicle Inspection Report (VIR) that shows the
8 undercover vehicle passed the smog inspection, and Certificate of Compliance number
9 [REDACTED]. The undercover operator was also given a copy of the VIR for the failed smog test
10 conducted on May 1, 2013.

11 33. On or about May 7, 2013, Bureau personnel re-inspected the 1992 Chevrolet and
12 compared the repairs from Respondent MD's Invoice No. [REDACTED]. Bureau personnel found that
13 the catalytic converter had been replaced. The only repair necessary for the 1992 Chevrolet to
14 pass a properly performed Smog Check Inspection was the repair of the wiring problem to the
15 AIR system, which was not performed as invoiced. The replacement of the catalytic converter
16 was unnecessary. Bureau personnel performed another smog check inspection of the 1992
17 Chevrolet and it still failed the tailpipe emission portion of the test for excessive NOx levels.

18 **FIRST CAUSE FOR DISCIPLINE**

19 **(Untrue or Misleading Statements)**

20 34. Respondent MD's registration is subject to discipline pursuant to Code section
21 9884.7(a)(1), in that Respondent MD made statements which it knew or which by exercise of
22 reasonable care should have known to be untrue or misleading as follows:

23 a. On or about May 1, 2013, Respondent MD's employee told the undercover
24 operator that the catalytic converter needed to be replaced in the Bureau's 1992 Chevrolet, when
25 it was in good serviceable condition, and not in need of replacement.

26 b. On or about May 1, 2013, Respondent MD invoiced and charged the operator
27 for the repair of the secondary air injection system for the 1992 Chevrolet, but in fact did not
28 actually perform this repair.

1 c. On May 2, 2013, Respondent MD issued a signed Vehicle Inspection Report
2 indicating that the 1992 Chevrolet had passed the smog inspection and a Certificate of
3 Compliance to a vehicle that should not have passed the smog inspection when it issued a
4 Certificate of Compliance for the 1992 Chevrolet, which had high levels of NOx emissions and
5 failed a smog check both prior to arriving and after leaving Respondent MD's facility.

6 **SECOND CAUSE FOR DISCIPLINE**

7 **(Fraud)**

8 35. Respondent MD's registration is subject to discipline pursuant to Code section
9 9884.7, subdivision(a)(4), in that Respondent MD committed acts constituting fraud as follows:

10 a. On or about May 2, 2013, Respondent MD accepted payment for the
11 replacement of the 1992 Chevrolet's catalytic converter when the replacement was unnecessary.

12 b. On or about May 1, 2013, Respondent MD invoiced and charged the operator
13 for the repair of the secondary air injection system for the 1992 Chevrolet, but in fact did not
14 actually perform this repair.

15 c. On May 2, 2013, Respondent MD issued a signed Vehicle Inspection Report
16 indicating that the 1992 Chevrolet had passed the smog inspection and a Certificate of
17 Compliance to a vehicle that should not have passed the smog inspection when it issued a
18 Certificate of Compliance for the 1992 Chevrolet, which had high levels of NOx emissions and
19 failed a smog check both prior to arriving and after leaving Respondent MD's facility.

20 **THIRD CAUSE FOR DISCIPLINE**

21 **(Failure to Comply with Code)**

22 36. Respondent MD's registration is subject to discipline pursuant to Code section
23 9884.7, subdivision (a)(6), in that Respondent MD failed to comply with Code section 9884.8
24 when on or about May 1, 2013, Respondent failed to disclose new, used, rebuilt, or reconditioned
25 parts supplied to the 1992 Chevrolet on Invoice No. [REDACTED] provided to the operator.

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1 **FOURTH CAUSE FOR DISCIPLINE**

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

3 37. Respondent MD's Smog Check Station license is subject to discipline pursuant to
4 Health and Safety Code section 44072.2, subdivision (c), in that Respondent MD failed to comply
5 with the following sections of the California Code of Regulations, title 16:

6 38. **Section 3340.35(c)** – Respondent MD issued a Certificate of Compliance to a vehicle
7 which had not been inspected in accordance with section 3340.42. On or about May 2, 2013,
8 Respondent MD issued a Certificate of Compliance for the 1992 Chevrolet even though it had
9 high levels of NOx emissions and had failed a smog check prior to arriving at Respondent MD's
10 facility.

11 39. **Section 3371** – Respondent MD made false or misleading statements as follows:

12 a. On or about May 1, 2013, Respondent MD told the operator that the catalytic
13 converter needed to be replaced in the Bureau's 1992 Chevrolet, when it was in good serviceable
14 condition, and not in need of replacement.

15 b. On or about May 1, 2013, Respondent MD invoiced and charged the operator
16 for the repair of the secondary air injection system for the 1992 Chevrolet, but in fact did not
17 actually perform this repair.

18 c. On May 2, 2013, Respondent MD issued a signed Vehicle Inspection Report
19 indicating that the 1992 Chevrolet had passed the smog inspection and a Certificate of
20 Compliance to a vehicle that should not have passed the smog inspection when it issued a
21 Certificate of Compliance for the 1992 Chevrolet, which had high levels of NOx emissions and
22 failed a smog check both prior to arriving and after leaving Respondent MD's facility

23 40. **Section 3373** – Respondent MD withheld or added information to documents which
24 would cause them to be false or misleading as follows:

25 a. On or about May 1, 2013, Respondent MD wrote on Invoice [REDACTED] that the
26 catalytic converter needed to be replaced in the Bureau's 1992 Chevrolet, when it was in good
27 serviceable condition, and not in need of replacement.

28 ///

1 not pass the smog inspection. Respondent Michel issued a Certificate of Compliance to a vehicle
2 that should not have passed the smog inspection.

3 **SEVENTH CAUSE FOR DISCIPLINE**

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

6 43. Respondent Michel's technician licenses are subject to disciplinary action pursuant to
7 Health and Safety Code section 44072.2, subdivision (c), in that Respondent Michel failed to
8 comply with California Code of Regulations, title 16, section 3340.30, subdivision (a), in a
9 material respect, as follows: Respondent Michel failed to inspect, test and repair the 1992
10 Chevrolet in accordance with Health and Safety Code sections 44012, 44035 and California Code
11 of Regulations, title 16, section 3340.42.

12 **UNDERCOVER OPERATION 2 – 2002 CHEVROLET**

13 44. Prior to an undercover run at the Respondent MD's facility, Bureau personnel
14 inspected and documented a 2002 Chevrolet. Bureau personnel had created a malfunction in the
15 2002 Chevrolet's secondary ignition system by damaging the spark plug wire going to the #2
16 cylinder. This caused the Chevrolet's check engine light to flash on and off and to cause high
17 levels of emissions to emit from the Chevrolet's tailpipe, causing it to fail the emissions portion
18 of a smog check inspection.

19 45. On or about June 13, 2013, an operator drove the Bureau documented 2002 Chevrolet
20 to Respondent MD's facility and requested a Smog Check Inspection. The operator told
21 Respondent MD's employee that the check engine light was on. The employee told the operator
22 that the vehicle would fail the smog inspection automatically because the check engine light was
23 on. The employee recommended a diagnostic inspection for \$98.00, which the operator
24 authorized. After the diagnostic was completed, Respondent MD's employee told the operator
25 that the Chevrolet's spark plugs were misfiring and that the voltage for one of the spark plug
26 wires was not going to where it was needed. The employee recommended the replacement of the
27 spark plugs and the spark plug wires for \$324.97, which included the diagnostic. The operator
28 authorized the repairs. Later that day when the operator went back to Respondent MD's facility

1 to pick up the 2002 Chevrolet, she was told that the smog check inspection had not been done
2 because the vehicle needed to reset itself and that she needed to drive the vehicle for 80 miles
3 before it could be smog checked. The vehicle was released to the operator and she was given
4 Invoice [REDACTED]

5 46. On or about June 19, 2013, Bureau personnel re-inspected the 2002 Chevrolet and
6 compared the repairs from Respondent MD's Invoice [REDACTED]. Bureau personnel found that all
7 of the spark plug wires and spark plugs had been replaced. The only repair necessary for the 2002
8 Chevrolet to pass a properly performed Smog Check Inspection were the replacement of the spark
9 plug wires. The replacement of the spark plugs were unnecessary, as Bureau personnel had
10 installed new spark plugs prior to the undercover run. Bureau personnel also determined that the
11 "Perform Drive Cycle" listed on Invoice [REDACTED] had not been performed because three of the
12 OBD II monitors had not run to completion.

13 **EIGHTH CAUSE FOR DISCIPLINE**

14 **(Untrue or Misleading Statements)**

15 50. Respondent MD's registration is subject to discipline pursuant to Code section
16 9884.7(a)(1), in that Respondent MD made statements which he knew or which by exercise of
17 reasonable care should have known to be untrue or misleading when on or about June 13, 2013,
18 Respondent MD's employee told the undercover operator that the spark plugs needed to be
19 replaced in the Bureau's 2002 Chevrolet, when they were in good serviceable condition, and not
20 in need of replacement.

21 **NINTH CAUSE FOR DISCIPLINE**

22 **(Fraud)**

23 47. Respondent MD's registration is subject to discipline pursuant to Code section
24 9884.7, subdivision(a)(4), in that Respondent MD committed acts constituting fraud when on or
25 about June 13, 2013, Respondent MD's employee told the undercover operator that the spark
26 plugs needed to be replaced in the Bureau's 2002 Chevrolet, when they were in good serviceable
27 condition, and not in need of replacement.

28 ///

1 58. Pursuant to Health and Safety Code section 44072.8, if Smog Check Inspector
2 License Number EO 144973 and Smog Check Repair Technician License Number EI 144973,
3 issued to Oscar Michel, is revoked or suspended, any additional license issued under this chapter
4 in the name of said licensee may be likewise revoked or suspended by the director.

5 **PRAYER**

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

- 8 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
9 223519, issued to MD Auto Repair and Tires Inc., Mahmoud Dibas, President, dba MD Auto
10 Repair and Tires;
- 11 2. Revoking or suspending Smog Check Station License Number RC 223519, issued to
12 MD Auto Repair and Tires Inc., Mahmoud Dibas, President, dba MD Auto Repair and Tires;
- 13 3. Revoking or suspending Lamp Station License Number LS 223519, issued to MD
14 Auto Repair and Tires Inc., Mahmoud Dibas, President, dba MD Auto Repair and Tires;
- 15 4. Revoking or suspending Brake Station License Number BS 223519, issued to MD
16 Auto Repair and Tires Inc., Mahmoud Dibas, President, dba MD Auto Repair and Tires;
- 17 7. Revoking or suspending any additional license issued under Articles 5 and 6 of
18 Chapter 20.3 of the Business and Professions Code in the name to MD Auto Repair and Tires
19 Inc., Mahmoud Dibas, President, dba MD Auto Repair and Tires;
- 20 8. Revoking or suspending Oscar Michel's Smog Check Inspector License Number EO
21 144973 and Smog Check Repair Technician License Number EI 144973;
- 22 9. Revoking or suspending any additional license issued under Chapter 5 of the Health
23 and Safety Code in the name of Oscar Michel;
- 24 10. Ordering Mahmoud Dibas and Oscar Michel to pay the Bureau of Automotive Repair
25 the reasonable costs of the investigation and enforcement of this case, pursuant to Business and
26 Professions Code section 125.3; and

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11. Taking such other and further action as deemed necessary and proper.

DATED: May 6, 2014

Patrick Dorais

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

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