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

In the Matter of the Accusation Against: MAURICIO ALBERTO AVENDANO, Owner, dba MA AUTO & TIRES Automotive Repair Dealer Registration No. ARD 258839 and In the Matter of the Citation Against: MAURICIO ALBERTO AVENDANO, Owner, dba MA AUTO & TIRES Automotive Repair Dealer Registration No. ARD 258839 Respondent.	Case No. 77/15-56 OAH No. 2015060860 Citation No. U2014-10199 OAH No. 2015030415

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.

This Decision shall become effective September 21, 2015.

DATED: August 17th, 2015

TAMARA COLSON
Assistant General Counsel
Department of Consumer Affairs

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

In the Matter of the Accusation Against:	
MAURICIO ALBERTO AVENDANO, Owner, dba MA AUTO & TIRES Automotive Repair Dealer Registration No. ARD 258839	Case No. 77/15-56 OAH No. 2015060860
and	
In the Matter of the Citation Against:	Citation No. U2014-10199
MAURICIO ALBERTO AVENDANO, Owner, dba MA AUTO & TIRES Automotive Repair Dealer Registration No. ARD 258839 Respondent.	OAH No. 2015030415

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on July 13, 2015, in Oakland, California.

Deputy Attorney General Kim M. Settles represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair.

Respondent Maurcio Alberto Avendano represented himself and was present throughout the proceeding.

The record was left open for receipt of additional evidence from respondent and a response from complainant. The additional evidence was timely filed, marked as Exhibit A, and received in evidence. Complainant's response was timely received and marked as Exhibit 7.

The matter was submitted for decision on July 14, 2015.

PRELIMINARY MATTER

1. These matters were consolidated for hearing; only one proposed decision was requested by the Bureau of Automotive Repair.

FACTUAL FINDINGS

Introduction

2. On July 21, 2009, the Bureau of Automotive Repair (bureau) issued Automotive Repair Dealer Registration No. 258839 to Mauricio Alberto Avendano, doing business as MA Auto & Tires (respondent), located in Hayward, California. On September 16, 2014, the bureau issued Automotive Repair Dealer Registration No. 277885 to respondent doing business as Wreckommended Collision, in Hayward, California.

3. Respondent is not licensed as a smog check technician and MA Auto & Tires is not licensed as a smog check station.

May 22, 2014 Undercover Run

4. In April 2014, a bureau representative documented that a bureau vehicle, a 1996 Honda Accord, had a defective fuel evaporative canister. The fuel evaporative canister is a required component of the emission control system. The 1996 Honda Accord could not pass a smog check inspection with the defective fuel evaporative canister.

5. On May 22, 2014, an undercover operator employed by the bureau was directed to drive the 1996 Honda Accord to ISMOG station in Hayward to request a smog check inspection. The 1996 Honda Accord still had a defective fuel evaporative canister on May 22, 2014. When the undercover operator arrived at ISMOG it was closed. An unidentified individual suggested that she go to MA Auto & Tires, which was located across the street.

When the undercover operator arrived at MA Auto & Tires, she requested a smog check inspection. Respondent wrote up an estimate of $60 and took the vehicle to a licensed smog check station nearby, Quik Smog, where he paid $40 for a smog inspection on the vehicle. Quik Smog improperly certified that the vehicle passed the smog inspection and issued a certificate of compliance. Respondent then returned with the vehicle, provided the undercover operator with an invoice and certificate of compliance, and charged her $60 for the smog check inspection. On the invoice it states that the smog inspection was "sublet."

6. Bureau representatives confirmed that following the inspection the 1996 Honda Accord had a defective fuel evaporative canister and should not have passed inspection.

June 16, 2014 Undercover Run

7. On June 9 and 10, 2014, a bureau representative installed a defective EVAP canister on the bureau's 1997 Honda Accord SE. The EVAP canister is a required component of the vehicle's emission control system. The 1997 Honda Accord SE could not pass a smog inspection with the defective EVAP canister.

8. On June 16, 2014, an undercover operator working for the bureau took the 1997 Honda Accord SE to MA Auto & Tires and requested a smog check inspection. Respondent provided her with an estimate and then took the vehicle to Quik Smog, where he paid $40 for a smog inspection on the vehicle. Quik Smog improperly certified that the vehicle passed inspection and issued a certificate of compliance. Respondent returned to MA Auto & Tires with the vehicle and charged the undercover operator $60 for the inspection. MA Auto & Tires gave the undercover operator the certificate of compliance and an invoice which states that the smog inspection was "sublet."

Advertisement & Signage

9. On August 6, 2014, a bureau representative conducted internet research and located an advertisement from MA Auto & Tires. The advertisement describes the business as an automobile repair facility and also states that it is a licensed smog test and repair station. On the same date, the bureau representative went to MA Auto & Tires and took photographs of the business, which had the official smog check sign posted on the southeast side of the building.

Disciplinary Action

10. On October 1, 2014, Harold Jennings, a bureau representative, visited MA Auto & Tires and spoke with respondent. He asked to review the station's service records. Respondent was unable to produce the service records requested. On October 7, 2014, Jennings visited Quik Smog and reviewed its smog check inspection records. There were 17 invoices for vehicles respondent brought to Quik Smog for smog inspections. On October 9, 2014, Jennings and another bureau representative issued a citation to respondent for operating as a smog inspector and/or smog technician without a valid license, in violation of Health and Safety Code section 44032. The citation assessed a civil penalty in the amount of $5,000 and issued an order of abatement. They spoke with respondent about the citation and the official smog check sign that was posted at the station. Respondent advised them that he had recently moved into the facility and the owner refused to allow him to remove the sign. The bureau representatives instructed him to cover the sign.

11. Bureau representative Harold Jennings testified at hearing that smog check inspections may not be sublet. Automotive repair dealers may only sublet repairs that do not require a specific license to perform.

12. The bureau later determined that respondent's conduct was serious enough to warrant the issuance of an accusation. On May 8, 2015, the bureau issued the accusation, which is based on the same factual allegations. Complainant recommends that respondent's registration be placed on probation.

Costs

13. The bureau has incurred $1,411.14 in investigative costs in this matter. The bureau has incurred $5,227 in costs of enforcement.

Respondent's Evidence

14. Respondent testified with candor at hearing. Respondent has been in business for seven years and has never before had any disciplinary issues or problems with the bureau. He has worked in the automobile industry for over 15 years. Respondent worked for California Fleet Maintenance as a mechanic from 2001 to 2005. He worked at Bay Counties Diesel as a mechanic from 2005 until opening his own business. Respondent is working toward obtaining ASE certification at Chabot College.

15. MA Auto & Tires is an automobile repair and tire sales business. Eight months ago respondent opened a second location, focused on auto body work.

16. In late 2013, respondent moved MA Auto & Tire to a new location. The building had previously been used as a Mitsubishi Dealership. Respondent rents half of the building. He made many changes to the site to accommodate his business. Respondent noticed the official smog check station sign on the side of the building and asked the landlord to take it down. His landlord refused to allow the sign to be removed. After the citation was issued, respondent's landlord agreed to allow him to remove the sign. Respondent provided a photo of the building which shows the sign has been removed.

17. Respondent hired an independent contractor to create his website. The website had several mistakes and was poorly done. One of the mistakes was that it stated that the station performed smog check inspections. Respondent has now had the website re-done and it no longer states that MA Auto & Tires performs smog check inspections or is a licensed smog check station.

18. Respondent sends his invoices out to a bookkeeper every month. When the inspectors visited his shop on October 7, 2014, the invoices they sought were with the bookkeeper. Respondent presented the invoices for the two undercover runs involved here. The invoices were signed by the undercover operator and stated that the inspections were sublet.

19. Respondent regularly sublets some of the work he performs on vehicles to specialists, which is common in the industry. He had an arrangement with Quik Smog to take his customers' vehicles to Quik Smog when his customers needed a smog check

inspection. Respondent did not realize that it violated the law to sublet smog check inspections. Respondent immediately stopped subletting smog check inspections when he learned it was illegal.

20. Respondent is experiencing financial hardship because of a disagreement with an employee he terminated, and other expenses. He is unable to pay the costs and civil penalty, but could make monthly payments toward a reduced amount.

LEGAL CONCLUSIONS

1. The standard of proof applied in this proceeding is preponderance of the evidence. (*Imports Performance et al., v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 915-916.)

Cause for Discipline

2. Health and Safety Code section 44050, subdivision (a), provides that the bureau may issue a citation to a licensee that has violated the provisions of the Motor Vehicle Inspection Act (Health & Saf. Code, § 44000 et seq.).

3. Health and Safety Code section 44014 requires that smog check inspections be performed only by licensed smog check stations. Health and Safety Code section 44032 states that no person shall perform, for compensation, tests of repairs of emission control devices or systems of motor vehicles unless the person performing the test or repair is a qualified smog check technician and the test or repair is performed at a licensed smog check station.

In this matter, although the smog inspections were performed at a licensed facility, MA Auto & Tire, which is not a licensed smog check station, was compensated in the amount of $20 for each inspection. (Factual Findings 5 through 8, 11 and 19.) Cause for issuance of a citation against respondent's registration exists pursuant to Health and Safety Code sections 44014 and 44032.

4. Business and Professions Code section 9884.7, subdivision (a)(1),[1] provides that the bureau may impose discipline on an automotive repair dealer who has made or authorized any untrue or misleading statement, which through the exercise of reasonable care should be known as untrue or misleading. As set forth in Factual Finding 3, 9 and 17, respondent's online advertising stated that MA Auto & Tires was a licensed smog check station. In addition, an official smog check station sign was posted at the business. (Factual Findings 3, 9 and 16.) Cause for discipline exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(1).

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[1] The accusation inaccurately cites Business and Professions Code section 9884.1; the correct citation is Business and Professions Code section 9884.7.

5. Pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), where the automotive repair dealer cannot show that there was a "bona fide error," an automotive repair dealer registration may be disciplined when the automotive repair dealer has engaged in conduct that constitutes fraud. Neither the Automotive Repair Act nor the regulations promulgated under it include a definition of "fraud." In general, fraud will be found when an individual "intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him." (*Wayne v. Bureau of Private Investigators & Adjusters* (1962) 201 Cal.App.2d 427, 438; see Civ. Code, § 1572.) Based on the matters set forth in Factual Findings 16 and 17, the evidence did not establish that respondent engaged in fraud. Accordingly, cause does not exist to discipline respondent's registration under Business and Professions Code section 9884.7, subdivision (a)(4).

6. Business and Professions Code section 9884.7, subdivision (a)(6), the bureau may impose discipline on respondent's registration if he is found to have failed in any material respect to comply with the regulations promulgated under the Automotive Repair Act (Bus. & Prof. Code, § 9880 et seq). Complainant alleges that respondent has violated California Code of Regulations, title 16, section 3340.10, which prohibits a person from operating a smog check station without a license. In this matter, respondent was not operating a smog check station without a license. Therefore, cause does not exist to impose discipline pursuant to this allegation.

Complainant also alleges that respondent violated California Code of Regulations, title 16, section 3771, which prohibits an automotive repair dealer publishing or making 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 to be false or misleading. As set forth in Factual Findings 3, 9, 16 and 17, respondent published advertisements that were false and misleading. Cause for discipline therefore exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(6).

Costs of Investigation and Enforcement

7. Pursuant to Business and Professions Code section 125.3, the bureau may request the administrative law judge to direct a licensee found to have violated the licensing act to pay a sum not to exceed the reasonable costs of investigation and prosecution. The bureau incurred investigative costs in the amount of $1,411.14, and enforcement costs of $5,227 in regard to the accusation. (Factual Finding 13.)

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Supreme Court enumerated several factors that a licensing agency must consider in assessing costs. It must not assess the full costs of investigation and enforcement when to do so would unfairly penalize a respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The agency must also consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge to

the discipline or is unable to pay. In this matter, respondent immediately changed his business practice, took down the improper signage and misleading advertising prior to the filing of the accusation in this matter. In addition, he explained credibly that he was unaware that it was illegal to sublet a smog check inspection. Finally, respondent is undergoing financial hardship at present. Under these circumstances, the costs reimbursement will be reduced from a total of $6,638.14 to a total of $3,000. The costs may be paid over time.

Disciplinary Considerations

ACCUSATION

8. It is not uncommon for repair facilities to sublet certain repairs; respondent was unaware that smog check inspections could not be sublet. He immediately stopped this practice when he learned it was prohibited. Respondent has removed the misleading advertising as well as the official smog check station sign. Respondent's registration has not been disciplined before. No customer was harmed by his actions. However, respondent was careless in allowing inappropriate signage to be left on the building and a misleading advertisement to be posted on the internet. The bureau's guidelines for disciplinary penalties and terms of probation[2] have been considered. A probationary period of two years with appropriate conditions is warranted to ensure that respondent maintains compliance with the Automotive Repair Act.

CITATION

9. In Citation U2014-10199, the bureau assessed a civil penalty of $5,000 (the maximum permitted under Health and Safety Code section 44050), and issued an order of abatement. After issuing the citation, the bureau chose to file an accusation concerning the same factual allegations. Here, respondent's registration will be placed on probation for two years, with conditions requiring him to comply with applicable statutes and regulations, and he will be ordered to pay costs in the amount of $3,000. The imposition of a civil penalty and order of abatement on top of probation is punitive and unwarranted, and would appear on his record that he was the subject of two separate disciplinary actions. Therefore, the citation will be dismissed.

ORDER

1. Citation No. U2014-10199, issued to respondent Mauricio Alberto Avendano, owner, doing business as MA Auto & Tires, Automotive Repair Dealer Registration No. ARD 258839, is dismissed.

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[2] California Code of Regulations, title 16, section 3395.4.

2. Pursuant to the accusation against respondent Mauricio Alberto Avendano, owner, doing business as MA Auto & Tires, Automotive Repair Dealer Registration No. ARD 258839, is invalidated. However, the invalidation is stayed, and respondent's registration is placed on probation for two years, subject to the following terms and conditions:

A. Respondent shall comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.

B. Respondent or respondent's authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

C. Within 30 days of the effective date of this action, respondent shall report any financial interest which any partners, officers, or owners of the respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

D. Respondent shall provide bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.

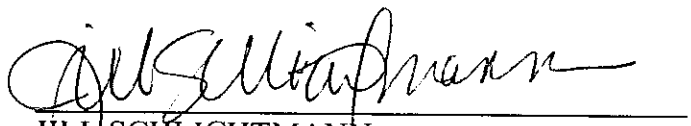
E. Respondent shall pay costs, in the amount of $3,000, according to a payment schedule promulgated by the bureau, to be completed no later than 30 days prior to the expiration of probation.

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

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

H. During the period of probation, respondent shall submit any proposed advertising copy, whether revised or new, to the bureau at least 30 days prior to its use.

DATED: July 29, 2015



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

In the Matter of the Accusation Against: **MAURICIO ALBERTO AVENDANO, owner, dba MA AUTO & TIRES** **21994 Mission Blvd.** **Hayward, CA 94541** **Automotive Repair Dealer Registration No. ARD 258839** Respondent.	Case No. 77/15-56 ACCUSATION

Complainant alleges:

PARTIES

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

2. On or about July 21, 2009, the Bureau of Automotive Repair issued License Number ARD 258839 to MA Auto & Tires; Mauricio Alberto Avendano, (Respondent). The Automotive Repair Dealer Registration was in full force and effect at all times relevant to the charges brought in this Accusation and will expire on July 31, 2015, unless renewed.

JURISDICTION

3. This Accusation is brought before the Director of the Department of Consumer Affairs (Director) for the Bureau of Automotive Repair, under the authority of the following laws.

is a qualified smog check technician and the test or repair is performed at a licensed smog check station. Qualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012."

8. California Code of Regulations, title 16, section 3340.10, subdivision (f) states:

"A registered automotive repair dealer may be licensed as a smog check station in accordance with the following:

. . .

"(f) No person shall operate a smog check station unless a license to do so has been issued by the department."

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

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

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

FACTUAL SUMMARY

10. Respondent does not have a Smog Check Station license. However, Respondent advertises as a licensed smog check station on the internet, posts an official "Smog Check" sign at the entrance to the facility, and offers Smog Check Inspections to the public.

A. On May 22, 2014, Respondent sublet a Bureau undercover vehicle for a smog check inspection without the knowledge or consent of the undercover operator. The sublet smog check station issued a certificate of compliance to the undercover vehicle and charged the undercover operator $60.00 for the smog check inspection. The undercover vehicle was not in compliance

and should not have passed the smog test.

B. On June 16, 2014, Respondent sublet a second Bureau undercover vehicle for a smog check inspection without the knowledge or consent of the undercover operator. The sublet smog check station issued a certificate of compliance to the undercover vehicle and charged the undercover operator $60.00 for the smog check inspection. The undercover vehicle was not in compliance and should not have passed the smog test.

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statement)

11. Respondent's automotive repair dealer registration is subject to disciplinary action under section 9884.1, subdivision (a)(1) of the Code in that it advertised as a licensed smog check station, as set forth in paragraph 10, above, when Respondent knew, or should have known that the advertisement was untrue or misleading.

SECOND CAUSE FOR DISCIPLINE

(Fraud)

12. Respondent's automotive repair dealer registration is subject to disciplinary action under section 9884.1, subdivision (a)(4) of the Code in that it sublet two undercover vehicles for smog check inspection, as set forth in paragraph 10, above, and thereby fraudulently claimed and received payment for smog checks.

THIRD CAUSE FOR DISCIPLINE

(Failure to Comply)

13. Respondent's automotive repair dealer registration is subject to disciplinary action under section 9884.1, subdivision (6) of the Code in that Respondent violated the following sections of title 16, California Code of Regulations:

a. **Section 3340.10, subdivision (f):** Operated as a smog check station without a license to do so, as set forth in paragraph 10, above.

b. **Section 3771:** Engaged in false or misleading advertising, as set forth in paragraph 10, above.

All section references are to the Business and Professions Code ("Code") unless otherwise indicated.

4. Section 9884.7 of the Code states, in pertinent part:

"(a) The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, 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 conduct which constitutes fraud.

. . .

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

5. Section 118, subdivision (b), of the Code provides that the expiration of a license shall not deprive the Director of the Department of Consumer Affairs ("Director"), jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY/REGULATORY PROVISIONS

6. Section 44014 of the Health and Safety Code states, in pertinent part :

"(a) Except as otherwise provided in this chapter, the testing and repair portion of the program shall be conducted by smog check stations licensed by the department, and by smog check

7. Section 44032 of the Health and Safety Code states:

"No person shall perform, for compensation, tests or repairs of emission control devices or systems of motor vehicles required by this chapter unless the person performing the test or repair

PRAYER

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

1. Revoking or suspending Automotive Repair Dealer Registration Number ARD 258839, issued to MA Auto & Tires; Mauricio Alberto Avendano, owner;

2. Ordering Mauricio Alberto Avendano to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: May 8, 2015

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

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