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7
8 **BEFORE THE**
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **FOR THE BUREAU OF AUTOMOTIVE REPAIR**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 79/17-229b

13 **MITCHEL SCOTT BORNSTEIN -**
14 **PRESIDENT/SECRETARY/TREASURER,**
15 **REID VENTURES, D.B.A. BERKELEY**
16 **SMOG TEST ONLY CENTER**
1010 Carleton St., #A
Berkeley, CA 94710
Automotive Repair Dealer Registration
ARD No. 269642
Smog Check, Test Only, Station License
No. TC 269642,

ACCUSATION

Smog Check

17 **JESSIE LEWIS KENT**
1010 Cavellon Street, Suite A
Berkeley, CA 94710
Smog Check Inspector License
No. EO 630955
Smog Check Repair Technician
No. EI 630955
(formerly EA 630955),

21 and

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DAMIEN FRANCIS ROCHELLS

2226 San Pablo Ave.
Berkeley, CA 94702

MAILING ADDRESS:

1632 Russell St., #4
Berkeley, CA 94703

**Smog Check Inspector License
No. EO 150861**

**Smog Check Repair Technician
No. EI 150861**

(formerly EA 150861),

Respondents.

Complainant alleges:

PARTIES

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

2. On or about July 22, 2012, the Bureau issued Automotive Repair Dealer Registration Number ARD 269642 to Mitchel Scott Bornstein - President/Secretary/Treasurer, Reid Ventures d.b.a. Berkeley Smog Test Only Center (Respondent Shop). The Automotive Repair Dealer Registration was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2018, unless renewed.

3. On or about July 19, 2012, the Bureau issued Smog Check, Test Only, Station License Number TC 269642 to Respondent Shop. The Smog Check, Test Only, Station License was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2018, unless renewed.

4. On or about April 16, 2009, the Bureau issued Advanced Emission Specialist Technician License No. 630955 to Jessie Lewis Kent (Respondent Kent). Effective February 28, 2013, pursuant to Respondent Kent's election, said license was renewed as Smog Check Inspector License No. EO 630955 and Smog Check Repair Technician License No. EI 630955.¹ The Smog Check Repair Technician License expired on February 28, 2015, and has not been renewed. The

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

1 Smog Check Inspector License was in full force and effect at all times relevant to the charges
2 brought herein and will expire on February 28, 2019, unless renewed.

3 5. In 2005, the Bureau issued Advanced Emission Specialist Technician License No.
4 150861 to Damien Francis Rochells (Respondent Rochells). Effective August 31, 2012, pursuant
5 to Respondent Rochells's election, said license was renewed as Smog Check Inspector License
6 No. EO 150861 and Smog Check Repair Technician License No. EI 150861. The Smog Check
7 Inspector License and Smog Check Repair Technician License were in full force and effect at all
8 times relevant to the charges herein and will expire on August 31, 2018, unless renewed.

9 JURISDICTION

10 6. This Accusation is brought before the Director of the Department of Consumer
11 Affairs (Director) for the Bureau under the authority of the following laws.

12 7. Section 9884.13 of the Business and Professions Code (Code) provides, in pertinent
13 part, that the expiration of a valid registration shall not deprive the Director or Bureau Chief of
14 jurisdiction to proceed with a disciplinary proceeding against an automotive repair dealer or to
15 render a decision invalidating a registration temporarily or permanently.

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

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

23 STATUTORY AND REGULATORY PROVISIONS

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

25 "(a) The director, where the automotive repair dealer cannot show there was a bona fide
26 error, may deny, suspend, revoke, or place on probation the registration of an automotive repair
27 dealer for any of the following acts or omissions related to the conduct of the business of the
28 automotive repair dealer, which are done by the automotive repair dealer or any automotive

1 technician, employee, partner, officer, or member of the automotive repair dealer.

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

5 ". . . .

6 "(4) Any other conduct that constitutes fraud.

7 ". . . ."

8 11. Section 44012 of the Health and Safety Code requires that tests at smog check
9 stations be performed in accordance with procedures prescribed by the department.

10 12. Section 44059 of the Health and Safety Code states, in pertinent part:

11 "The willful making of any false statement or entry with regard to a material matter in any
12 oath, affidavit, certificate of compliance or noncompliance, or application form which is required
13 by this chapter or Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business
14 and Professions Code, constitutes perjury and is punishable as provided in the Penal Code."

15 13. Section 44072.2 of the Health and Safety Code states, in pertinent part:

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

19 "(a) Violates any section of this chapter and the regulations adopted pursuant to it, which
20 related to the licensed activities.

21 ". . . .

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

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

24 14. California Code of Regulations, title 16, section 3340.24(c) states: "The bureau may
25 suspend or revoke the license of or pursue other legal action against a licensee, if the licensee
26 falsely or fraudulently issues or obtains a certificate of compliance or a certificate of
27 noncompliance."

28 15. California Code of Regulations, title 16, section 3340.30 states, in pertinent part:

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

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

6"

7 16. California Code of Regulations, title 16, section 3340.41(c) states: "No person shall
8 enter into the emissions inspection system any vehicle identification information or emission
9 control system identification data for any vehicle other than the one being tested. Nor shall any
10 person knowingly enter into the emissions inspection system any false information about the
11 vehicle being tested."

12 17. California Code of Regulations, title 16, section 3340.42, provides, in pertinent part:

13 "Smog check inspection methods are prescribed in the Smog Check Manual, referenced by
14 section 3340.45.

15 "(a) All vehicles subject to a smog check inspection, shall receive one of the following test
16 methods:

17 . . .

18 "(3) An OBD-focused test, shall be the test method used to inspect gasoline-powered
19 vehicles 2000 model-year and newer, and diesel-powered vehicles 1998 model-year and newer.
20 The OBD test failure criteria are specified in section 3340.42.2.

21 "(b) In addition to subsection (a), all vehicles subject to the smog check program shall
22 receive the following:

23 "(1) A visual inspection of emission control components and systems to verify the vehicle's
24 emission control systems are properly installed.

25 "(2) A functional inspection of emission control systems as specified in the Smog Check
26 Manual, referenced by section 3340.45, which may include an OBD test, to verify their proper
27 operation."

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1 **COSTS**

2 18. Section 125.3 of the Code provides, in pertinent part, that the Bureau may request the
3 administrative law judge to direct a licentiate found to have committed a violation or violations of
4 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
5 enforcement of the case, with failure of the licentiate to comply subjecting the license to not being
6 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be
7 included in a stipulated settlement.

8 **FACTUAL BACKGROUND**

9 19. On March 9, 2015, the Bureau implemented a statewide regulatory change requiring
10 the use of the On Board Diagnostic Inspection System (BAR-OIS) instead of the Emission
11 Inspection System (EIS) for the smog testing of 2000 model year and newer gas powered and
12 hybrid vehicles.

13 20. The new BAR-OIS smog inspection utilizes a Data Acquisition Device (DAD), a
14 computer, a bar code scanner, and printer. The DAD is a scan tool that retrieves data from a
15 vehicle's On Board Diagnostic-generation II (OBD II) computer. The DAD connects the BAR-
16 OIS computer to the vehicle's diagnostic link connector (DLC) to retrieve the data from the
17 vehicle. The bar code scanner is used to input technician information, the vehicle identification
18 number (VIN), and DMV renewal information. The printer is used to print Vehicle Inspection
19 Reports.

20 21. Data retrieved and recorded during an BAR-OIS smog check can include: the eVIN,
21 which is the digitally stored VIN programmed into the vehicle's Powertrain Control Module
22 (PCM); the communication protocol, which is the manufacturer/vehicle's specific "language" that
23 the PCM uses to relay information; and the number of Parameter Identifications (PIDs), which is
24 the number of specific data values that vehicle's PCM provides related to emission controls.

25 22. As part of BAR-OIS smog inspections, the technician also performs a visual and
26 functional test on the vehicle. The BAR-OIS software makes the determination whether or not the
27 vehicle passes the inspection based on the results of the data and the visual and functional tests.
28 If the vehicle passes the inspection, a certificate of compliance is issued. The information from

1 the smog inspection is then transmitted to the Vehicle Information Data (VID). The technician
2 affirms a statement for each inspection that the inspection performed complied with all applicable
3 laws and regulations.

4 23. The Bureau can access the VID to view test data on smog check inspections
5 performed at any Smog Check station. The Bureau can also search for, retrieve, and print the test
6 record for any particular vehicle which has been tested.

7 24. The Bureau has become aware of several methods used by Smog Check stations and
8 Smog Check technicians to issue improper/fraudulent smog certificates of compliance. One
9 method is known as clean plugging. Clean plugging involves using another vehicle's properly
10 functioning OBD II system, or another source, to generate passing diagnostic readings for a
11 vehicle that is not in smog compliance or not even present for testing.

12 25. The Bureau initiated an investigation of Respondents. Between April 2015 and
13 January 2017, Respondent Shop, Respondent Kent, and Respondent Rochells were found to have
14 performed eight fraudulent smog inspections using clean-plugging methods.

15 26. A Bureau representative reviewed data for the eight vehicles at issue. The data
16 revealed that the eight vehicles purportedly tested by Respondent Shop, Respondent Kent, and
17 Respondent Rochells were not and could not have been connected to the DAD when they were
18 being certified because the OBD-II data purportedly transmitted by those vehicles could not have
19 been transmitted by those vehicles.

20 27. Respondents clean plugged and issued fraudulent certificates of compliance to the
21 following eight vehicles:²

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27 ² For PID Count and communication protocol, the "Expected Value" is the value
28 generated by like vehicles.

1	CLEAN	2002 Acura 3.2 TL Type-S, VIN: 19UUA56972A006460		
2	PLUG # 3	Technician: Respondent Kent		
3		<u>Cert. # ZB268618C</u>	<u>eVIN Number</u>	<u>Protocol</u>
4		Fraudulent Inspection	2HNYD18876H501098 ³	19140808
5		(3/29/2016)		25
6		Expected Value	Not Reported.	1914
7		Prior inspection of same	Not Reported.	19140808
8		vehicle (passed)		16
9		(4/30/2014)		

11	CLEAN	2007 Toyota Prius, VIN: JTDKB20UX73249223		
12	PLUG # 4	Technician: Respondent Rochells		
13		<u>Cert. # ZB721858C</u>	<u>eVIN Number</u>	<u>Protocol</u>
14		Fraudulent Inspection	Not Reported.	KWPS**
15		(4/11/2016)		21 11 8 17 10 9
16		Expected Value	JTDKB20UX73249223	ICAN11bt5
17				37 21 17,
18				38 21 17, or
19				38 21 5

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³ Another vehicle, tested at Respondent Shop by Respondent Kent on March 30, 2016, transmitted the same eVIN, communication protocol, and PID count as that transmitted during the fraudulent inspection.

1	CLEAN	2009 BMW 328I, VIN: WBAPH77579NL84048		
2	PLUG # 5	Technician: Respondent Kent		
3		<u>Cert. # QG006680C</u>	<u>eVIN Number</u>	<u>Protocol</u>
4		Fraudulent Inspection	5J6RE3H71AL051058 ⁴	ICAN29bt500
5		(10/10/2016)		37 20
6		Expected Value	WBAPH77579NL84048	ICAN11bt5
7				45 or 45 11

8	CLEAN	2002 Chevrolet Silverado C1500, VIN: 2GCEC19V921359694		
9	PLUG # 6	Technician: Respondent Kent		
10		<u>Cert. # ZL423659C</u>	<u>eVIN Number</u>	<u>Protocol</u>
11		Fraudulent Inspection	Not Reported.	I9140808
12		(12/1/2016)		18 13 1 3
13		Expected Value	2GCEC19V921359694	JVPW
14		Prior inspection of same	2GCEC19V921359694	JVPW1850
15		vehicle (failed)		22
16		(10/21/2016)		

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26 ⁴ Another vehicle, tested at Respondent Shop by Respondent Kent on the same day,
 27 transmitted the same eVIN, communication protocol, and PID count as that transmitted during the
 28 fraudulent inspection.

CLEAN	2007 Honda CR-V LX, VIN: JHLRE48367C028587			
PLUG # 7	Technician: Respondent Kent			
	<u>Cert. # ZL423668C</u>	<u>eVIN Number</u>	<u>Protocol</u>	<u>PID Count</u>
	Fraudulent Inspection (12/1/2016)	5J6RM4H74EL092556	ICAN29bt500	37
	Expected Value	JHLRE48367C028587	ICAN29bt5	39 19

CLEAN	2008 Toyota Highlander Hybrid, VIN: JTEEW41A382010973			
PLUG # 8	Technician: Respondent Kent			
	<u>Cert. # ZN874261C</u>	<u>eVIN Number</u>	<u>Protocol</u>	<u>PID Count</u>
	Fraudulent Inspection (1/23/2017)	Not Reported.	JVPW1850	18
	Expected Value	JTEEW41A382010973	ICAN11bt5	45 21

FIRST CAUSE FOR DISCIPLINE

(Misleading Statements - Registration)

28. Respondent Shop has subjected its registration to discipline under Code section 9884.7(a)(1), in that Respondent Shop made statements which it knew or which by the exercise of reasonable care it should have known were untrue or misleading, as set forth above in Factual Background. Respondent Shop purported to test the eight vehicles and certified that the eight vehicles passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent Shop conducted the inspections on those vehicles using clean-plugging methods.

SECOND CAUSE FOR DISCIPLINE

(Fraud - Registration)

29. Respondent Shop has subjected its registration to discipline under Code section 9884.7(a)(4), in that it committed acts which constitute fraud, as set forth above in Factual Background.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty, Fraud or Deceit – Station License)**

3 31. Respondent Shop has subjected its station license to discipline under Health and
4 Safety Code section 44072.2(d), in that Respondent Shop committed acts involving dishonesty,
5 fraud, or deceit, whereby another was injured, by issuing electronic certificates of compliance for
6 vehicles without performing bona fide inspections of the emission control devices and systems on
7 the vehicles, thereby depriving the People of the State of California of the protection afforded by
8 the Motor Vehicle Inspection Program. The circumstances are set forth above in detail in Factual
9 Background.

10 **FIFTH CAUSE FOR DISCIPLINE**

11 **(Violations of the Motor Vehicle Inspection Program – Respondent Kent's Smog**
12 **Check Inspector License and Smog Check Repair Technician License)**

13 32. Respondent Kent has subjected his Smog Check Inspector License and Smog Check
14 Repair Technician License to discipline under Health and Safety Code section 44072.2(a) and (c),
15 in that he violated sections of the Health and Safety Code and applicable regulations, as set forth
16 above in Factual Background, as follows:

17 a. **Health and Safety Code Section 44012:** Respondent Kent failed to ensure that the
18 emission control tests were performed on the vehicles in accordance with procedures prescribed
19 by the department.

20 b. **Health and Safety Code Section 44059:** Respondent Kent willfully made false
21 entries on the electronic certificates of compliance by certifying that the vehicles had been
22 inspected as required when, in fact, they had not.

23 c. **California Code of Regulations, title 16, Section 3340.30(a):** Respondent Kent
24 failed to inspect and test the vehicles in accordance with Health and Safety Code sections 44012
25 and 44035 and/or California Code of Regulations, title 16, section 3340.42.

26 d. **California Code of Regulations, title 16, Section 3340.41(c):** Respondent Kent
27 entered into the emissions inspection system vehicle identification information or emission
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1 control system identification data for a vehicle other than the one being tested, and/or knowingly
2 entered into the emissions inspection system false information about the vehicles being tested.

3 e. **California Code of Regulations, title 16, Section 3340.42:** Respondent Kent failed
4 to conduct the required smog tests and inspections on the vehicles in accordance with the
5 Bureau's specifications.

6 **SIXTH CAUSE FOR DISCIPLINE**

7 **(Dishonesty, Fraud or Deceit – Respondent Kent's Smog Check Inspector License and**
8 **Smog Check Repair Technician License)**

9 33. Respondent Kent has subjected his Smog Check Inspector License and Smog Check
10 Repair Technician License to discipline under Health and Safety Code section 44072.2(d), in that
11 he committed acts involving dishonesty, fraud, or deceit whereby another was injured, when he
12 willfully made false entries on the electronic certificates of compliance and certified that the
13 vehicles had been inspected as required when, in fact, they had not, depriving the People of the
14 State of California of the protection afforded by the Motor Vehicle Inspection Program. The
15 circumstances are described in more detail above in Factual Background.

16 **SEVENTH CAUSE FOR DISCIPLINE**

17 **(Violations of the Motor Vehicle Inspection Program – Respondent Rochells's Smog**
18 **Check Inspector License and Smog Check Repair Technician License)**

19 34. Respondent Rochells has subjected his Smog Check Inspector License and Smog
20 Check Repair Technician License to discipline under Health and Safety Code section 44072.2(a)
21 and (c), in that he violated sections of the Health and Safety Code and applicable regulations, as
22 set forth above in Factual Background, as follows:

23 a. **Health and Safety Code Section 44012:** Respondent Rochells failed to ensure that
24 the emission control tests were performed on the vehicle in accordance with procedures
25 prescribed by the department.

26 b. **Health and Safety Code Section 44059:** Respondent Rochells willfully made false
27 entries on the electronic certificate of compliance by certifying that the vehicle had been
28 inspected as required when, in fact, it had not.

1 c. **California Code of Regulations, title 16, Section 3340.30(a):** Respondent Rochells
2 failed to inspect and test the vehicle in accordance with Health and Safety Code sections 44012
3 and 44035 and/or California Code of Regulations, title 16, section 3340.42.

4 d. **California Code of Regulations, title 16, Section 3340.41(c):** Respondent Rochells
5 entered into the emissions inspection system vehicle identification information or emission
6 control system identification data for a vehicle other than the one being tested, and/or knowingly
7 entered into the emissions inspection system false information about the vehicle being tested.

8 e. **California Code of Regulations, title 16, Section 3340.42:** Respondent Rochells
9 failed to conduct the required smog tests and inspections on the vehicle in accordance with the
10 Bureau's specifications.

11 **EIGHTH CAUSE FOR DISCIPLINE**

12 **(Dishonesty, Fraud or Deceit – Respondent Rochells's Smog Check Inspector License**
13 **and Smog Check Repair Technician License)**

14 35. Respondent Rochells has subjected his Smog Check Inspector License and Smog
15 Check Repair Technician License to discipline under Health and Safety Code section 44072.2(d),
16 in that he committed acts involving dishonesty, fraud, or deceit whereby another was injured,
17 when he willfully made false entries on the electronic certificate of compliance and certified that
18 the vehicle had been inspected as required when, in fact, it had not, depriving the People of the
19 State of California of the protection afforded by the Motor Vehicle Inspection Program. The
20 circumstances are described in more detail above in Factual Background.

21 **OTHER MATTERS**

22 36. Pursuant to section 9884.7(c) of the Code, the Director may suspend, revoke, or place
23 on probation the automotive repair dealer registrations for all places of business operated in this
24 state by Respondent Shop upon a finding that Respondent Shop has, or is, engaged in a course of
25 repeated and willful violations of the laws and regulations pertaining to an automotive repair
26 dealer.

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37. Pursuant to Health & Safety Code section 44072.8, if Respondent Shop's station license is revoked or suspended, any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name of Respondent Shop may be likewise revoked or suspended by the Director.

38. Pursuant to Health & Safety Code section 44072.8, if Respondent Kent's Smog Check Inspector License or Smog Check Repair Technician License are revoked or suspended, any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name of Respondent Kent may be likewise revoked or suspended by the Director.

39. Pursuant to Health & Safety Code section 44072.8, if Respondent Rochells's Smog Check Inspector License or Smog Check Repair Technician License are revoked or suspended, any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name of Respondent Rochells may be likewise revoked or suspended by the Director.

PRAYER

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

1. Revoking or suspending Automotive Repair Dealer Registration Number ARD 269642, issued to Mitchel Scott Bornstein - President/Secretary/Treasurer, Reid Ventures d.b.a. Berkeley Smog Test Only Center (Respondent Shop);

2. Revoking or suspending any other automotive repair dealer registration issued to Mitchel Scott Bornstein;

3. Revoking or suspending Smog Check, Test Only, Station License Number TC 269642, issued to Respondent Shop;

4. Revoking or suspending any other license issued under Chapter 5, Part 5, Division 26 of the Health and Safety Code in the name of Mitchel Scott Bornstein;

5. Revoking or suspending Smog Check Inspector License No. EO 630955, issued to Jessie Lewis Kent (Respondent Kent);

6. Revoking or suspending Smog Check Repair Technician License No. EI 630955, issued to Respondent Kent;

1 7. Revoking or suspending any other license issued under Chapter 5, Part 5, Division 26
2 of the Health and Safety Code in the name of Respondent Kent;

3 8. Revoking or suspending Smog Check Inspector License No. EO 150861, issued to
4 Damien Francis Rochells (Respondent Rochells);

5 9. Revoking or suspending Smog Check Repair Technician License No. EI 150861,
6 issued to Respondent Rochells;

7 10. Revoking or suspending any other license issued under Chapter 5, Part 5, Division 26
8 of the Health and Safety Code in the name of Respondent Rochells;

9 11. Ordering Respondent Shop, Respondent Kent and Respondent Rochells to pay the
10 Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this
11 case, pursuant to Business and Professions Code section 125.3;

12 12. Taking such other and further action as is deemed necessary and proper.
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16 DATED:

October 11, 2017

Patrick Dorais

PATRICK DORAIS

Chief

Bureau of Automotive Repair

Department of Consumer Affairs

State of California

Complainant

SF2017203750

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