

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

In the Matter of the Accusation Against:

**VALLEY SMOG & REPAIR;
FIDEL GUTIERREZ, OWNER,**

Automotive Repair Dealer Registration No.
ARD 278558
Smog Check Station License No. RC 278558

and

FIDEL GUTIERREZ,

Smog Check Inspector License No. EO 635803

Respondent.

Case No. 79/16-3205

OAH No. 2016120187

DECISION

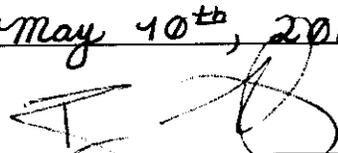
The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517, subdivision (c)(2)(C), technical or other minor changes in the Proposed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

1. Page 9, paragraph 2: "Health and Saf. Code, § 44031.5, subd. (b)" is corrected to "Health and Saf. Code, § 44031.5, subd. (a)."
2. Page 10, paragraph 3: "Health and Saf. Code, § 44035" is removed.
3. Page 11: "Section 1.1.2 of the *Smog Check Manual*" is corrected to "Section 1.1.1 of the *Smog Check Manual*."

The technical or minor changes above do not affect the factual or legal basis of the Proposed Decision.

This Decision shall become effective May 10th, 2017.

DATED: 3/31/2017



RYAN MARCROFT
Assistant Chief Counsel
Division of Legal Affairs
Department of Consumer Affairs

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PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on December 27, 2016, in Fresno, California.

Kristina T. Jarvis, Deputy Attorney General, represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department), State of California.

Respondent Fidel Gutierrez represented himself and his business, Valley Smog & Repair.

Evidence was received, the record was closed, and the matter was submitted for decision on December 27, 2016.

SUMMARY

Complainant seeks to discipline respondent's automotive repair dealer registration, smog check station license, and smog check inspector license based on his numerous violations of California's Smog Check Program. The persuasive evidence established that during a 10-month period respondent issued 17 certificates of compliance by "clean plugging" each of the subject vehicles.¹ Cause exists to discipline his registration and licenses. At hearing, he showed no insight into the impropriety of his fraudulent conduct, and offered no evidence of his ability to perform the duties authorized by his registration and each of his licenses in a manner consistent with public health, safety, and welfare. Therefore, respondent's automotive repair dealer registration, smog check station license, and smog check inspector license should be revoked.

FACTUAL FINDINGS

Procedural Background

1. On November 20, 2014, the Bureau issued Automotive Repair Dealer Registration Number ARD 278558 to respondent dba Valley Smog & Repair. The registration was suspended pursuant to Business and Professions Code section 494, subdivision (a), effective November 7, 2016, and subsequently expired November 30, 2016.²
2. On December 4, 2014, the Bureau issued Smog Check Station License Number RC 278558 to respondent dba Valley Smog & Repair. The station license was suspended pursuant to Business and Professions Code section 494, subdivision (a), effective November 7, 2016, and subsequently expired November 30, 2016.
3. On July 26, 2013, the Bureau issued Smog Check Inspector (EO) License Number EO 635803 to respondent. The inspector license expires August 31, 2017, unless renewed or revoked. The inspector license was suspended pursuant to Business and Professions Code section 494, subdivision (a), effective November 7, 2016.
4. Complainant signed the Accusation on November 21, 2016, solely in his official capacity. The Accusation seeks to discipline respondent's registration, station license, and inspector license based on his issuance of certificates of compliance to 17

¹ "Clean plugging" involves using another vehicle's properly functioning On-Board Diagnostic System, or another surrogate device, to generate passing diagnostic readings for the purpose of issuing fraudulent certificates of compliance to vehicles that would not otherwise pass a properly performed smog inspection and/or are not present for inspection.

² The suspension or expiration of a license or registration does not deprive the Department of jurisdiction to subsequently discipline that license or registration. (Bus. & Prof. Code, § 118, subd. (b).)

vehicles that would not have passed a properly performed smog inspection and/or were not presented for inspection.

California's Smog Check Program

5. In 1994, the California Legislature enacted California's Smog Check Program (Program) in response to amendments to the Federal Clean Air Act. (Health & Saf. Code, § 44000.) The Program requires smog inspection of, with exceptions not relevant, all gasoline-powered vehicles manufactured in or after 1976 and all diesel-powered vehicles manufactured in or after 1998 that are registered in areas of the state designated for Program coverage. (Health & Saf. Code, § 44003, subd. (a).) The purpose of inspection is to ensure compliance with maximum vehicle emission standards adopted by the Department in cooperation with the California Air Resources Board. (Health & Saf. Code, § 44013.)

6. Smog inspection of model-year 2000 and newer gasoline-powered and hybrid vehicles and model-year 1998 and newer diesel-powered vehicles subject to the Program is a two-step process which involves a: (1) visual inspection of the emissions control system to verify each required component is present and properly connected; and (2) functional test of the malfunction indicator light (commonly referred to as the "check engine light") and the On-Board Diagnostic Inspection System (BAR-OIS).

7. The BAR-OIS "consists of an OBD Data Acquisition Device or (DAD) working in conjunction with commercial off-the-shelf computer, barcode scanner, data entry device, and printer. The DAD is the test equipment that meets the requirements of subsection (b) of section 3340.17 of the California Code of Regulations and is certified by the Bureau for use in the Smog Check Program. The DAD facilitates OBD data transfer between the inspected vehicle and the OIS computer. The OIS computer relays inspection information to and from the DAD to the Vehicle Information Database (VID)."³ (Cal. Code Regs., tit. 16, § 3340.1.)

8. Information relayed to the VID includes: the electronic vehicle identification number (eVIN), if applicable;⁴ the communication protocol; and the number of Parameter Identifications (PIDs). A vehicle's "eVIN" is the same as its VIN, except the former is stored electronically in the vehicle's computer rather than physically stamped in various locations of the vehicle. The "communication protocol" is the specific "language" the particular vehicle's Powertrain Control Module uses to "talk" to the vehicle's different components, different scan tools, and other computers or devices such as the BAR-OIS. It is

³ "Vehicle Information Database" or "VID" means a centralized computer database and computer network, which is readily accessible by all licensed Smog Check technicians on a real time basis." (Cal. Code Regs., tit. 16, § 3340.1.)

⁴ Commencing with model-year 2005 vehicles, auto manufacturers are required to program each vehicle's Vehicle Identification Number (VIN) into the vehicle's Powertrain Control Module. Some manufacturers started doing so prior to the 2005 model-year.

programmed during the vehicle's manufacturing. "PIDs" are data points reported by the vehicle's on-board computer to a scan tool or BAR-OIS, such as engine speed, engine temperature, and other input and output values utilized by the vehicle's on-board computer. The "PID count" is the number of data points reported by the vehicle's on-board computer, and is programmed during the vehicle's manufacturing.

The Bureau's Initial Contact with Respondent

9. Arnold Lee is a Program Representative II employed by the Bureau. He visited respondent at Valley Smog & Repair some time prior to the Bureau's issuance of an automotive repair dealer registration to respondent. Mr. Lee introduced himself, described the steps for performing a proper smog inspection, and told respondent it was important for him to follow that procedure every time he performed an inspection. Mr. Lee also explained the Bureau caught the owner of the facility previously operated at respondent's location issuing certificates of compliance to vehicles that did not pass a proper smog inspection, and he, therefore, was going to watch respondent's facility closely.

10. Five days after respondent was issued his automotive repair dealer registration, George Castro, a Program Representative I employed by the Bureau, visited him at Valley Smog & Repair as part of the Bureau's "Education First Program." The Education First Program involves a Bureau representative coming to the registered facility to discuss the requirements of the Bureau's different programs (in respondent's case, California's Smog Check Program) and inspecting the facility. Mr. Lee explained at hearing all new automotive repair dealers participate in the Education First Program, and described the program as a "meet and greet" and an opportunity to get newly registered automotive repair dealers "started on the right foot."

The Bureau's Investigation of Respondent's Activities

11. In February 2016, Mr. Lee began reviewing BAR-OIS test data corresponding to certificates of compliance respondent issued after purportedly performing proper smog inspections at Valley Smog & Repair. Specifically, he compared the information for three data points – eVIN, communication protocol, and PID count – respondent transmitted to the VID for each vehicle supposedly inspected with the same information transmitted to the VID by other smog inspectors throughout the state for inspections of "like-vehicles" (same model-year, model, and make).

12. Mr. Lee found discrepancies in the information for at least one of the three data points respondent transmitted to the VID when compared to the information reported for the same data points for like-vehicles inspected throughout the state.⁵ Specifically,

⁵ The number of like-vehicles compared to each of the 17 vehicles was based on the most recent total number of like-vehicles tested statewide available to Mr. Lee at the time of his analysis.

Vehicle	Date	Cert. Com. No.	eVIN	Com. Prot.	PID Ct.	No. Like-Veh.	Match ⁶
2001 Nissan Sentra XE/GXE	9/22/15	PU994148C	No/No	JVPW/I914	17/22	1000	91%
2006 Chevy Aveo LT	11/6/15	PY394344C	No/Yes	JVPW/KWPF	22/36 ¹	80	93.8%
2002 Mitsubishi Lancer LS	11/6/15	PY394345C	No/No	JVPW/I914	22/16	333	94.9%
2006 Chevy Aveo LS	11/21/15	QA048686C	No/Yes	I914/KWPF	17/36, 36 ¹⁷	790	95.6%
2000 Ford Windstar LX	11/21/15	QA048688C	No/No	I914/JPWM	17/20	1000	95%
2000 Chevy Astro Van	11/25/15	QA048694C	No/No	I914/JVPW	16/21	1000	95.6%
2003 Chevy Tracker LT	12/2/15	QA481406C	No/No	I914/KWPF	16/23	123	97.6%
2005 Chrysler 300	12/23/15	QA481450C	No/Yes	I914/ICAN	16/43 ⁸	1000	96.9%
2002 Chevy Silverado C2500 HD	1/9/16	QC134490C	No/Yes	I914/JVPW	17/10 ²	414	95.4%

⁶ "Vehicle" refers to the model-year, make, and model of the vehicle respondent purportedly inspected; "date" refers to the date of the inspection; "Cert. Com." refers to the unique identifying number assigned to the certificate of compliance respondent issued; "eVIN" refers to whether respondent reported an eVIN versus whether the particular vehicle tested actually has one, respectively; "Com. Prot." refers to the communication protocol reported by respondent versus the vehicle's actual communication protocol, respectively; "PID Ct." refers to the PID Count reported by respondent versus the vehicle's actual PID Count, respectively; "No. Like-Veh." refers to the number of like-vehicles with which the particular vehicle was compared; and "Match" refers to the percentage of like-vehicles for which an eVIN was correctly reported, if applicable, the correct communication protocol was reported, and the correct PID Count was reported.

⁷ Two PID Counts were reported for some of the like-vehicles because a different PID Count was reported depending on whether the particular vehicle had an automatic or a manual transmission.

2001 Chevy Astro Van	2/18/16	YX443147C	No/Yes	I914/JVPW	16/21	1000	94.5%
2000 Hyundai Tiburon	2/23/16	YX960260C	No/No	I914/I914	17/16, 16.1	224	96.9%
2000 Hyundai Sonata GLS	2/25/16	YX960268C	No/No	I914/KWPF	16/20.1, 21.1	505	87.1%
2003 Cadillac CTS	2/27/16	YX960276C	No/Yes	I914/KWPF	16/22, 22.1	1000	94.8%
2002 GMC Sierra C2500	2/29/16	YX960282C	No/Yes	I914/JVPW	16/22	143	90.2%
2000 Dodge Neon ES	3/14/16	YC540059C	No/No	I914/JVPW	16/15, 17	1000	90.9%
2001 Chrysler Town & Country LX	3/21/16	YZ540071C	No/No	JPWM/JVPW	20/17.3	691	95.9%

13. Mr. Lee conducted a station inspection of Valley Smog & Repair on April 14, 2016. He spoke with respondent, and confirmed respondent was the only licensed smog inspector at the facility. He also confirmed respondent performed each of the smog inspections discussed in Factual Finding 12, and ultimately issued certificates of compliance for each vehicle.

14. Mr. Lee obtained copies of the Vehicle Inspection Report (VIR) issued for each vehicle, except the 2005 Chrysler 300. He also obtained copies of the invoice for each smog inspection, including the one performed on the 2005 Chrysler 300, all of which indicated the subject vehicle passed inspection. Mr. Lee later verified through the VID that respondent did in fact issue a VIR for the 2005 Chrysler 300.

15. Each of the VIRs respondent issued indicates the subject vehicle passed smog inspection. Respondent made the following certification when he signed each VIR:

I certify, under penalty of perjury, under the laws of the State of California, that I performed the inspection in accordance with all bureau requirements, and that the information listed on this vehicle inspection report is true and accurate.

16. At the conclusion of the station inspection, Mr. Lee advised respondent to perform all smog inspections in accordance with the Bureau's specified procedures. He also told respondent to keep copies of all VIRs and invoices for all vehicles inspected in proper order.

17. Sometime after July 2, 2016, Mr. Lee reviewed additional BAR-OIS test data corresponding to certificates of compliance respondent issued after the April 14, 2016 station inspection. He found the following discrepancies in the information for the three data points respondent transmitted to the VID when compared to the information reported for the same data points for like-vehicles inspected throughout the state.

Vehicle	Date	Cert. Com. No.	eVIN	Com. Prot.	PID Ct.	No. Like-Veh.	Match
2004 Chevy Venture	7/2/16	QC971810C	No/Yes	1914/JVPW	16/19	999	97.8%

18. Mr. Lee explained at hearing that a vehicle's eVIN (if applicable), communication protocol, and PID Count are automatically transmitted to the BAR-OIS and the VID once the DAD is connected to the vehicle. Additionally, he explained none of the percentages under the "Match" column were "100%" because some of the like-vehicles also underwent improper smog inspections. Those inspections were either immediately corrected and the vehicle subjected to a proper re-inspection or resulted in the issuance of a fraudulent certificate of compliance. The discrepancy in the information outlined in Factual Findings 12 and 17 established respondent did not actually connect the DAD to any of the 17 vehicles purportedly inspected. But since he issued a certificate of compliance for each vehicle, he had to have clean plugged each one in order for it to pass inspection.

Respondent's Evidence

19. Respondent provided little evidence at hearing. He introduced a copy of his December 15, 2016 correspondence attempting to settle the Accusation by agreeing to three years' probation with an actual 60-day suspension. He justified his proposal as follows:

Such a sentence would, I believe [*sic*] adequately discipline me and allow me a period of probation wherein I could prove to the Bureau that the conduct alleged in the accusation was not intended and was a product a mistake or lack of training. I do want the Bureau to know that I did not "clean plug" vehicles intentionally and had no intent to defrauding [*sic*] the Smog system.

20. At hearing, however, respondent adamantly denied clean plugging any of the 17 vehicles discussed above, either intentionally or unintentionally. He also stated he did not

want to be accused of doing something wrong when he knows he did not do anything wrong without "evidence of 100%" he did something wrong, referring to the "Match" percentages discussed above. He provided no explanation for any of the discrepancies discussed in Factual Findings 12 and 17, other than his speculation that "maybe" the particular vehicle was damaged or "was having a bad day" on the day inspected.

Discussion

21. The persuasive evidence established that between September 22, 2015, and July 2, 2016, respondent issued certificates of compliance to 17 vehicles. In doing so, he certified under penalty of perjury that each vehicle passed a properly performed smog inspection. However, he never connected the DAD to any of the vehicles while it was being inspected. Instead, he connected the DAD to another vehicle or another surrogate device in order to generate fraudulent BAR-OIS data and a certificate of compliance. In other words, he clean plugged each of the 17 vehicles. Such conduct constituted dishonest, fraudulent, and deceitful acts, and violated the statutes and regulations governing California's Smog Check Program.

22. Additionally, respondent did not have a copy of the VIR for the December 23, 2015 smog inspection of the 2005 Chrysler 300 during an April 14, 2016 station inspection. As explained further below, the law requires licensees to keep copies of VIRs for all smog inspections performed for at least three years.

Summary

23. Cause exists to discipline respondent's automotive repair dealer registration, station license, and inspector license based on his issuance of certificates of compliance to 17 vehicles by clean plugging each of them. When all the evidence is considered, respondent failed to demonstrate his ability to perform the duties authorized by his registration and licenses in a manner consistent with public health, safety, and welfare, even on a probationary basis. Therefore, his automotive repair dealer registration, station license, and inspector license should be revoked.

Costs of Investigation and Enforcement

24. Pursuant to Business and Professions Code section 125.3, complainant requested costs of investigation and enforcement in the total amount of \$13,394.10. This amount consists of costs incurred directly by the Bureau (\$9,186.60), as well as costs incurred by the Office of the Attorney General and for which the Bureau has been, or will be, billed (\$4,207.50).

25. At hearing, complainant introduced, without objection, a Certification of Investigative and Other Costs in support of the costs incurred directly by the Bureau. The Certification indicates the Bureau incurred costs in the amount of \$9,186.60 during Fiscal Year 2015/2016 for work performed by a Program Representative II. This amount is based

on 122 hours of work billed at the hourly rate of \$75.30. No information about the general tasks performed or the amount of time spent on each particular task is provided in the Certification. However, Mr. Lee's investigation report was introduced at hearing and he testified about the scope of his investigation. Such evidence was sufficient evidence of the general tasks he performed during his investigation.

26. Complainant also introduced, without objection, a Certification of Prosecution Costs: Declaration of Kristina T. Jarvis, which requests costs in the amount of \$4,207.50. Attached to the Certification is a printout of a Matter Time Activity by Professional Type, which describes tasks performed by the Office of the Attorney General through December 23, 2016, and for which the Bureau has been billed the total sum of \$3,697.50. Ms. Jarvis also explained in her declaration she anticipated spending an additional 3.0 hours preparing for hearing, for which she would bill the Bureau an additional \$510.

27. Costs of investigation and enforcement in the total amount of \$13,394.10 are reasonable in light of the issues involved in this matter as explained in Legal Conclusion 24 below.

LEGAL CONCLUSIONS

Applicable Standard of Proof

1. Complainant has the burden of proving the allegations in the Accusation by a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Law

2. A person is required to hold a valid automotive repair dealer registration before acting in the capacity of an automotive repair dealer. (Bus. & Prof. Code, § 9884.6.) The holder of a valid automotive repair dealer registration may apply for a license to act as a smog check station. (Cal. Code Regs., tit. 16, § 3340.10.) Smog inspections must generally be performed by licensed smog check inspectors at licensed smog check stations. (Health & Saf. Code, §§ 44014, subd. (a), 44031.5, subd. (a), 44032.) The qualifications and requirements for licensure as a smog check inspector are specified in California Code of Regulations, title 16, sections 3340.28 and 3340.29. (Health & Saf. Code, § 44031.5, subd. (b).)

3. Smog inspections,

shall be performed in accordance with procedures prescribed by the department and may require loaded mode dynamometer testing in enhanced areas, two-speed idle testing utilizing a vehicle's onboard diagnostic system, or other appropriate test procedures as determined by the department in consultation with the state board. The department shall implement testing using onboard diagnostic systems, in lieu of loaded mode dynamometer or two-speed idle testing, on model year 2000 and newer vehicles only, earlier than January 1, 2013. However, the department, in consultation with the state board, may prescribe alternative test procedures that include loaded mode dynamometer or two-speed idle testing for vehicles with onboard diagnostic systems that the department and the state board determine exhibit operational problems.

(Health & Saf. Code, § 44012; see also, Health & Saf. Code, § 44035.)

4. The following are the relevant procedures for performing smog inspections adopted by the Department:

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

[¶] . . . [¶]

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

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

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

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

(Cal. Code Regs., tit. 16, § 3340.42.)

And,

Starting on or after January 1, 2013, OBD equipped vehicles shall fail the OBD inspection if any one of the following conditions occurs as applicable to the vehicle:

[¶] . . . [¶]

(7) The vehicle's OBD system data is inappropriate for the vehicle being tested

(Cal. Code Regs., tit. 16, § 3340.42.2, subd. (c).)

Additionally,

All Smog Check inspections shall be performed in accordance with requirements and procedures prescribed in the following:

(1) Smog Check Inspection Procedures Manual, dated August 2009, which is hereby incorporated by reference. This manual shall be in effect until subparagraph (2) is implemented.

(2) Smog Check Manual, dated 2013, which is hereby incorporated by reference. This manual shall become effective on or after January 1, 2013.

(Cal. Code Regs., tit. 16, § 3340.45.)

Section 1.1.2 of the *Smog Check Manual* provides the following regarding identifying the vehicle being inspected:

Inspectors must follow the EIS⁸ or OIS prompts to input the vehicle identification number (VIN), license plate number, and odometer reading. Typically, the remaining vehicle information populates via the Vehicle Information Database (VID) and/or the EIS Vehicle Look-Up Table. The chart on the next page provides details for entering vehicle information.

No person shall enter any vehicle identification information for any vehicle other than the one being tested. Nor shall any person knowingly enter any false information about the vehicle being tested.

⁸ EIS refers to the BAR97 Emissions Inspection System, the system used for performing smog inspections of gasoline-powered vehicles manufactured prior to 2000.

- The bar code scanner must be used as the first method of entry. Manual entry must only be used in cases where the vehicle is not equipped with a bar code or the bar code is illegible, and the registration documents are unavailable or do not include a bar code. In these cases, you may proceed with the inspection and manually enter the vehicle identification information, as needed.
- When using the vehicle registration documents to scan vehicle information, you must first verify the VIN shown on the registration document matches the VIN on the vehicle. If the VIN does **not** match, the inspector shall use the VIN affixed to the vehicle and inform the customer of the mismatch and that it may cause the Department of Motor Vehicles (DMV) not to accept the test results.
- If VID communication failure occurs on the EIS, the inspector must enter all applicable information. However, for a California registered vehicle, inspectors must first verify that the VIN and license plate entries are correct, and check that the EIS phone/communication line is properly connected. If VIN and plate entries are correct, and communication failure continues, complete the inspection as prompted by the EIS. In these cases, DMV may request a copy of the VIR as proof of certification. Advise the motorist to retain a copy of the VIR throughout the registration process.
- The OIS will not function without a continuous Internet connection to the VID. Anytime that OIS fails to communicate with the VID, the problem must be fixed before performing an inspection. The OIS will not perform off-line inspections like the BAR-97 EIS.

Accuracy is critical to ensure the appropriate test sequences and standards are applied. For all inspections, the inspectors must verify that all vehicle information is complete and correct. If not, inspectors must make the necessary corrections.

**Each inspector is responsible for the accuracy of the test.
Once a certificate is issued it is impossible to void that
certificate.**

(Bold original.)

5. A smog check station may issue a certificate of compliance or a certificate of noncompliance only for vehicles inspected in accordance with Health and Safety Code section 44012. (Health & Saf. Code, § 44015, subd. (b); Cal. Code Regs., tit. 16, §§ 3340.30, subd. (a), 3340.35, subd. (c).) Smog check stations are required to “make, keep secure, and have available for inspection on request of the bureau, or its representative, legible records showing the station’s transactions as a licensee for a period of not less than three years after completion of any transaction to which the records refer.” (Cal. Code Regs., tit. 16, § 3340.15, subd. (e).) Smog check inspectors are required to do the same. (Health & Saf. Code, § 44072.2, subd. (g).)

Cause for Discipline

AUTOMOTIVE REPAIR DEALER REGISTRATION NUMBER ARD 278558

UNTRUE AND MISLEADING STATEMENTS

6. Except when the automotive repair dealer can show there was a bona fide error, an automotive repair dealer registration may be disciplined when the dealer has made or authorized “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.” (Bus. & Prof. Code, § 9884.7, subd. (a)(1).) Between September 22, 2015, and July 2, 2016, respondent made untrue and misleading statements on 17 separate occasions by issuing a certificate of compliance for each of the vehicles discussed above, thereby certifying under penalty of perjury the subject vehicle had passed a properly performed smog inspection. In reality, however, none of the vehicles underwent a proper smog inspection, and instead each was clean plugged. Therefore, cause exists to discipline respondent’s automotive repair dealer registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(1).

FRAUDULENT CONDUCT

7. Except when the automotive repair dealer can show there was a bona fide error, an automotive repair dealer registration may be disciplined when the dealer has engaged in “any other conduct that constitutes fraud.” (Bus. & Prof. Code, § 9884.7, subd. (a)(4).) Between September 22, 2015, and July 2, 2016, respondent committed fraud on 17 separate occasions by issuing a certificate of compliance for each of the vehicles discussed above, thereby certifying under penalty of perjury the subject vehicle had passed a properly performed smog inspection. In reality, however, none of the vehicles underwent a proper smog inspection, and instead each was clean plugged. Therefore, cause exists to discipline

respondent's automotive repair dealer registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(4).

SMOG CHECK STATION LICENSE NUMBER RC 278558

STATUTORY VIOLATIONS

8. A smog check station license may be disciplined if the licensee "violates any section of this chapter and the regulations adopted pursuant to it, which relate to the licensed activities." (Health & Saf. Code, § 44072.2, subd. (a).) Health and Safety Code section 44012 requires all smog inspections to be performed in accordance with procedures established by the Department. Smog inspections of model-year 2000 and newer gasoline-powered vehicles and model-year 1998 and newer diesel-powered vehicles must include "an OBD-focused test." (Cal. Code Regs., tit. 16, § 3340.42, subd. (a)(3).) None of the 17 vehicles for which respondent issued certificates of compliance discussed above underwent "an OBD-focused test" since respondent did not connect the DAD to any of the vehicles. Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (a), as that statute relates to Health and Safety Code section 44012.

9. Health and Safety Code section 44015, subdivision (a)(1), precludes a licensed smog check station from issuing a certificate of compliance for "a vehicle that has been tampered with." Each of the 17 vehicles discussed above was tampered with in that the DAD was connected to a different vehicle, or another surrogate device, while the particular vehicle was undergoing smog inspection. Nonetheless, respondent issued certificates of compliance to each of the vehicles. Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (a), as that statute relates to Health and Safety Code section 44015, subdivision (a)(1).

10. Smog check stations are required to keep records of its licensed activities and make those records available for inspection by the director of the Department or his or her authorized representative for period of at least three years. (Health & Saf. Code, § 44072.2, subd. (g).) Respondent failed to produce a copy of the VIR for the 2005 Chrysler 300 during Mr. Lee's April 14, 2016 station inspection. Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (a), as that statute relates to Health and Safety Code section 44072.2, subdivision (g).

REGULATORY VIOLATIONS

11. A smog check station license may be disciplined if the licensee "violates any of the regulations adopted by the director pursuant to this chapter." (Health & Saf. Code, § 44072.2, subd. (c).) California Code of Regulations, title 16, section 3340.35, subdivision (c), allows licensed smog check stations to issue certificates of compliance only to vehicles that have undergone a proper smog inspection. None of the 17 vehicles discussed above underwent a proper smog inspection as explained in Legal Conclusion 8, yet respondent still

issued a certificate of compliance for each. Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (c), as that statute relates to California Code of Regulations, title 16, section 3340.35, subdivision (c).

12. None of the 17 vehicles for which respondent issued certificates of compliance underwent a proper smog inspection pursuant to California Code of Regulations, title 16, section 3340.42, subdivision (a)(3), as explained in Legal Conclusion 8. Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (c), as that statute relates to California Code of Regulations, title 16, section 3340.42, subdivision (a)(3).

13. Respondent failed to produce a copy of the VIR for the 2005 Chrysler 300 during Mr. Lee's April 14, 2016 facility inspection as required by California Code of Regulations, title 16, section 3340.15, subdivision (e). Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (c), as that statute relates to California Code of Regulations, title 16, section 3340.15, subdivision (e).

DISHONEST, FRAUDULENT, AND DECEITFUL ACTS

14. A smog check station license may be disciplined if the licensee "commits any act involving dishonesty, fraud, or deceit whereby another is injured." (Health & Saf. Code, § 44072.2, subd. (d).) Between September 22, 2015, and July 2, 2016, respondent engaged in 17 separate acts of dishonesty, fraud, and deceit by issuing a certificate of compliance for each of the vehicles discussed above, thereby certifying under penalty of perjury the subject vehicle had passed a properly performed smog inspection. In reality, however, none of the vehicles underwent a proper smog inspection, and instead each was clean plugged. His conduct deprived the people of the State of California of the protections afforded by the California Smog Check Program. Therefore, cause exists to discipline his station license pursuant to Health and Safety Code section 44072.2, subdivision (d).

SMOG CHECK INSPECTOR LICENSE NUMBER EO 635803

STATUTORY VIOLATIONS

15. A smog check inspector license may be disciplined if the licensee "violates any section of this chapter and the regulations adopted pursuant to it, which related to the licensed activities." (Health & Saf. Code, § 44072.2, subd. (a).) Respondent violated Health and Safety Code section 44012 by failing to perform a smog inspection in accordance with the procedures established by the Department on the 17 vehicles discussed above as explained in Legal Conclusion 8. Therefore, cause exists to discipline his inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a), as that statute relates to Health and Safety Code section 44012.

REGULATORY VIOLATIONS

16. Licensed smog check inspectors are required to perform smog inspections in accordance with Health and Safety Code sections 44012 and 44035 and California Code of Regulations, title 16, section 3340.42. (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).) Respondent did not perform any of the 17 smog inspections discussed above in accordance with Health and Safety Code sections 44012 and 44035 or California Code of Regulations, title 16, section 3340.42, as explained in Legal Conclusion 8. Therefore, cause exists to discipline his inspector license pursuant to Health and Safety Code section 44072.2, subdivision (c), as that statute relates to California Code of Regulations, title 16, section 3340.30, subdivision (a).

17. None of the 17 vehicles for which respondent issued certificates of compliance underwent a proper smog inspection pursuant to California Code of Regulations, title 16, section 3340.42, subdivision (a)(3), as explained in Legal Conclusion 12. Therefore, cause exists to discipline respondent's station license pursuant to Health and Safety Code section 44072.2, subdivision (c), as that statute relates to California Code of Regulations, title 16, section 3340.42, subdivision (a)(3).

DISHONEST, FRAUDULENT, AND DECEITFUL ACTS

18. A smog check inspector license may be disciplined if the licensee "commits any act involving dishonesty, fraud, or deceit whereby another is injured." (Health & Saf. Code, § 44072.2, subd. (d).) Between September 22, 2015, and July 2, 2016, respondent engaged in 17 separate acts of dishonesty, fraud, and deceit as explained in Legal Conclusion 14. Therefore, cause exists to discipline his inspector license pursuant to Health and Safety Code section 44072.2, subdivision (d).

Additional Matters

19. "[T]he registration for all places of business operated in the state by an automotive repair dealer" may be disciplined "upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it." (Bus. & Prof. Code, § 9884.7, subd. (c).) Respondent has engaged in such conduct for the reasons explained in Legal Conclusions 6 and 7. Therefore, cause exists pursuant to Business and Professions Code section 9884.7, subdivision (c), to discipline all other automotive repair dealer registrations issued to him.

20. Health and Safety Code section 44072.8 provides, "when a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director." Respondent's station license should be disciplined for the reasons explained in Legal Conclusions 8 through 14, and his inspector license should be disciplined for the reasons explained in Legal Conclusions 15 through 18. Therefore, cause exists pursuant to

Health and Safety Code section 44072.8 to discipline any other smog check station licenses issued to him.

21. Respondent's station license should be disciplined for the reasons explained in Legal Conclusions 8 through 14, and his inspector license should be disciplined for the reasons explained in Legal Conclusions 15 through 18. Therefore, cause exists pursuant to Health and Safety Code section 44072.8 to discipline any other smog inspector licenses issued to him.

Conclusion

22. Cause exists to discipline respondent's automotive repair dealer registration for the reasons explained in Legal Conclusions 6 and 7, individually and collectively. Cause also exists to discipline his station license for the reasons explained in Legal Conclusions 8 through 14, individually and collectively. And, cause exists to discipline his inspector license for the reasons explained in Legal Conclusions 15 through 18, individually and collectively. When all the evidence is considered, respondent failed to introduce evidence of his ability to perform the duties authorized under his registration or either his station license or inspector license in a manner consistent with public health, safety, and welfare, even on a probationary basis, as explained in Factual Findings 19, 20, and 23. Therefore, his automotive repair dealer registration, smog check station license, and smog check inspector license should each be revoked. Additionally, all other registrations, station licenses, and inspector licenses issued in his name should be revoked.

Award of Costs

23. Business and Professions Code section 125.3 states, in part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] . . . [¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the

hearing, including, but not limited to, charges imposed by the Attorney General.

California Code of Regulations, title 1, section 1042, subdivision (b), states the following about cost recovery:

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

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

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*, at p. 45.)

24. The declaration signed by Ms. Jarvis constitutes prima facie evidence of the reasonableness of the costs incurred by her office and billed, or to be billed, to the Bureau in the amount of \$4,207.50. (Bus. & Prof., § 125.3, subd. (c).) Respondent failed to rebut such evidence. Complainant also introduced sufficient evidence to establish the reasonableness of all the investigation costs incurred directly by the Bureau in the amount of \$9,186.60 as explained in Factual Finding 25. Therefore, after considering the relevant evidence and the pertinent *Zuckerman* factors, costs in the total amount of \$13,394.10 are reasonable and are awarded as set forth in the Order below.

ORDER

1. Automotive Repair Dealer Registration Number ARD 278558 issued to respondent Fidel Gutierrez dba Valley Smog & Repair is REVOKED.
2. All other automotive repair dealer registrations issued to respondent are REVOKED.
3. Smog Check Station License Number RC 278558 issued to respondent dba Valley Smog & Repair is REVOKED.
4. All other smog check station licenses issued to respondent are REVOKED.
5. Smog Check Inspector License Number EO 635803 issued to respondent is REVOKED.
6. All other smog check inspector licenses issued to respondent are REVOKED.
7. Respondent shall reimburse the Bureau of Automotive Repair the sum of \$13,394.10 for costs incurred investigating and enforcing this matter within 30 days of the effective date of the decision. Respondent may pay these costs according to a payment plan approved by the Bureau, or its designee.

DATED: January 20, 2017

DocuSigned by:
Coren D. Wong
F42876F5E756451

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. 79/16-3205

13 **VALLEY SMOG & REPAIR;**
14 **FIDEL GUTIERREZ, OWNER**
12736 Avenue 416
Orosi, CA 93647

ACCUSATION

15 Automotive Repair Dealer Registration No.
ARD 278558
16 Smog Check Station License No. RC 278558

17 and

18 **FIDEL GUTIERREZ**
12257 Avenue 400, Apt B
19 Cutler, CA 93615

20 and

21 P.O. Box 193
Cutler, CA 93615

22 Smog Check Inspector License No.
23 EO 635803

24 Respondents.

25
26 ///

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28 ///

1 Patrick Dorais ("Complainant") alleges:

2 **PARTIES**

3 1. Complainant brings this Accusation and Petition to Revoke Probation solely in his
4 official capacity as the Chief of the Bureau of Automotive Repair ("Bureau"), Department of
5 Consumer Affairs.

6 **Automotive Repair Dealer Registration**

7 2. On or about November 20, 2014, the Director of Consumer Affairs ("Director")
8 issued Automotive Repair Dealer Registration Number ARD 278558 ("registration") to Fidel
9 Gutierrez ("Respondent"), owner of Valley Smog & Repair. The registration was in full force
10 and effect at all times relevant to the charges brought herein and will expire on November 30,
11 2016, unless renewed.

12 **Smog Check Station License**

13 3. On or about December 4, 2014, the Director issued Smog Check Station License
14 Number RC 278558 to Respondent. The smog check station license was in full force and effect
15 at all times relevant to the charges brought herein and will expire on November 30, 2016, unless
16 renewed.

17 **Technician License**

18 4. On or about July 26, 2013, the Director issued Smog Check Inspector License
19 Number EO 635803 to Respondent. The smog check inspector license was in full force and
20 effect at all times relevant to the charges brought herein and will expire on August 31, 2017,
21 unless renewed.

22 **STATUTORY PROVISIONS**

23 5. This Accusation is brought before the Director of the Department of Consumer
24 Affairs ("Director") for the Bureau of Automotive Repair, under the authority of the following
25 laws.

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

28

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

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

10 ...

11 (4) Any other conduct that constitutes fraud.

12

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

15

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

21 7. Code section 9884.13 provides, in pertinent part, that the expiration of a valid
22 registration shall not deprive the director or chief of jurisdiction to proceed with a disciplinary
23 proceeding against an automotive repair dealer or to render a decision invalidating a registration
24 temporarily or permanently.

25 8. Code section 118(b), states:

26 The suspension, expiration, or forfeiture by operation of law of a license issued
27 by a board in the department, or its suspension, forfeiture, or cancellation by order of
28 the board or by order of a court of law, or its surrender without the written consent of
the board, shall not, during any period in which it may be renewed, restored, reissued,
or reinstated, deprive the board of its authority to institute or continue a disciplinary
proceeding against the licensee upon any ground provided by law or to enter an order
suspending or revoking the license or otherwise taking disciplinary action against the
licensee on any such ground.

29 9. Code section 477 provides, in pertinent part, that "Board" includes "bureau,"
30 "commission," "committee," "department," "division," "examining committee," "program," and
31 "agency." "License" includes certificate, registration or other means to engage in a business or
32 profession regulated by the Code.

1 10. Health and Safety Code ("Health & Saf.") section 44002 provides, in pertinent part,
2 that the Director has all the powers and authority granted under the Automotive Repair Act for
3 enforcing the Motor Vehicle Inspection Program.

4 11. Health & Saf. Code section 44012 states in pertinent part that smog checks shall be
5 performed in accordance with procedures prescribed by the department and may require...testing
6 utilizing a vehicle's onboard diagnostic system...

7 12. Health & Saf. Code section 44015 states in pertinent part:

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

10 13. Health & Saf. Code section 44072.2 states in pertinent part:

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

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

15

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

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

18

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

23 14. Health & Saf. Code section 44072.6 provides, in pertinent part, that the expiration or
24 suspension of a license by operation of law, or by order or decision of the Director
25 of Consumer Affairs, or a court of law, or the voluntary surrender of the license shall not deprive
the Director of jurisdiction to proceed with disciplinary action.

26 15. Health & Saf. Code section 44072.8 states:

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

CALIFORNIA CODE OF REGULATIONS

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16. California Code of Regulations, title 16 (Regulation) Code section 3340.15 states in pertinent part:

A smog check station shall meet the following requirements for licensure and shall comply with these requirements at all times while licensed.

....

(e) The station shall make, keep secure, and have available for inspection on request of the bureau, or its representative, legible records showing the station's transactions as a licensee for a period of not less than three years after completion of any transaction to which the records refer.

All records shall be open for reasonable inspection and/or reproduction by the bureau or its representative. Station records required to be maintained shall include copies of:

....

(3) Vehicle inspection reports generated either manually or by the emissions inspection system...

17. Regulation Code section 3340.30 states in pertinent part:

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

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

18. Regulation Code section 3340.35 states in pertinent part:

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

19. Regulation Code section 3340.42 states in pertinent part:

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

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

3

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

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

9

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

13 **COST RECOVERY**

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

18 **UPDATED SMOG CHECK PROGRAM - ON BOARD DIAGNOSTIC SYSTEM**

19 21. On March 9, 2015, California's Smog Check Program was updated to keep pace with
20 ever-advancing technology. The program update requires the use of an On-Board Diagnostic
21 Inspection System (BAR-OIS). BAR-OIS is the smog check equipment required in all areas of
22 the State when inspecting most model-year 2000 and newer gasoline and hybrid vehicles and
23 most 1998 and newer diesel vehicles instead of the BAR-97 emission inspection system (EIS)
24 used for most model year 1999 and older gasoline and hybrid vehicles and 1997 and older diesel
25 vehicles. The BAR-OIS system consists of a certified Data Acquisition Device (DAD),
26 computer, bar code scanner, and printer.

27 22. The DAD is an On Board Diagnostic (OBD) scan tool that, when requested by the
28 California BAR-OIS software, retrieves OBD data from the vehicle. The DAD connects between

1 the BAR-OIS computer and the vehicle's diagnostic link connector. The bar code scanner is used
2 to input technician information, the vehicle identification number, and DMV renewal
3 information. The vehicle identification number (VIN) that is physically present on all vehicles is
4 required to be programmed into the vehicle's On-Board Diagnostics - Generation II (OBD II) on
5 2005 and newer vehicles, and on many occasions was programmed into the OBD II computer in
6 earlier model-years. The electronically programmed VIN is referred to as the "eVIN", is captured
7 by the Bureau during a smog check inspection, and must match the physical VIN on the vehicle.
8 The printer is used to provide a Vehicle Inspection Report (VIR), which shows the inspection
9 results and the Smog Check Certificate of Compliance Number for passing vehicles. Data
10 retrieved and recorded during an OIS smog check includes the eVIN, the communication
11 protocol,¹ and the number of Parameter Identifications (PID's)².

12 23. As with the BAR-97 EIS, the technician also performs a visual and functional test on
13 the vehicle. The visual inspection of the emission control components verifies the required
14 emission control devices are present and properly connected and a functional test is performed of
15 the malfunction indicator light. The OIS software makes the determination whether or not the
16 vehicle passes the inspection based on the results of the OBD, visual, and functional tests.

17 **BACKGROUND FACTS**

18 **Review of OIS Test Data**

19 24. Bureau Representative "A.L." reviewed BAR-OIS test data pertaining to smog
20 inspections conducted at Respondent's facility. A.L. found that Respondent performed smog
21 inspections on seventeen (17) vehicles identified below using a method known as "clean
22

23 ¹ The OBD II communication protocol describes the specific manufacturer/vehicle
24 communication "language" used by the OBD II computer to communicate to scan tools and other
25 devices such as the BAR-OIS. The communication protocol is programmed into the OBD II
26 computer during manufacture and does not change.

27 ² PID's are data points reported by the OBD II computer to the scan tool or BAR-OIS (for
28 example, engine speed (rpm), vehicle speed, engine temperature, etc.) The PID count is the
number of data points reported by the OBD II computer, is programmed during manufacture, and
does not change. Each make and model vehicle reports a specific number of PID counts; i.e., the
PID count does not vary for that make and model vehicle.

1 plugging”³ resulting in the issuance of fraudulent certificates of compliance for the vehicles.

2 **Vehicle #1**

3 25. The OIS test data showed that on September 22, 2015, Respondent performed a smog
4 inspection on a 2001 Nissan Sentra XE/GXE (Vehicle 1), resulting in the issuance of electronic
5 Smog Certificate of Compliance No. PU994148C. Representative A.L. reviewed the comparative
6 OIS test data for 2001 Nissan Sentra XE/GXE vehicles and found that the communication
7 protocol and PID count recorded during the smog check on Vehicle 1 were not consistent with the
8 communication protocol and PID count for that make and model vehicle. Representative A.L.
9 concluded that the DAD was not connected to Vehicle 1 during the smog inspection, resulting in
10 the issuance of a fraudulent smog certificate of compliance for the vehicle.

11 **Vehicle #2**

12 26. The OIS test data showed that on November 6, 2015, Respondent performed a smog
13 inspection on a 2006 Chevrolet Aveo LT with VIN ending in 692 (Vehicle 2), resulting in the
14 issuance of electronic Smog Certificate of Compliance No. PY394344C. The OIS test details for
15 Vehicle 2 showed that the eVIN was not recorded during the inspection. Representative A.L.
16 reviewed the comparative OIS test data for 2006 Chevrolet Aveo LT vehicles and found that the
17 eVIN is recorded during the inspection. Further, the communication protocol and PID count
18 recorded during the smog check on Vehicle 2 were not consistent with the communication
19 protocol and PID count for that make and model vehicle. Representative A.L. concluded that the
20 DAD was not connected to Vehicle 2 during the smog inspection, resulting in the issuance of a
21 fraudulent smog certificate of compliance for the vehicle.

22 **Vehicle #3**

23 27. The OIS test data showed that on November 6, 2015, Respondent performed a smog
24 inspection on a 2002 Mitsubishi Lancer LS (Vehicle 3), resulting in the issuance of electronic
25 Smog Certificate of Compliance No. PY394345C. Representative A.L. reviewed the comparative

26 ³ Clean-plugging is the use of a vehicle’s properly functioning OBD II system, or another
27 source, to generate passing diagnostic readings for the purpose of issuing a fraudulent smog
28 certificate of compliance to another vehicle that is not in compliance with the Smog Check
Program and/or is not present for testing.

1 OIS test data for 2002 Mitsubishi Lancer LS vehicles and found that the communication protocol
2 and PID count recorded during the smog check on Vehicle 3 were not consistent with the
3 communication protocol and PID count for that make and model vehicle. Representative A.L.
4 concluded that the DAD was not connected to Vehicle 3 during the smog inspection, resulting in
5 the issuance of a fraudulent smog certificate of compliance for the vehicle.

6 **Vehicle #4**

7 28. The OIS test data showed that on November 21, 2015, Respondent performed a smog
8 inspection on a 2006 Chevrolet Aveo LS with VIN ending in 875 (Vehicle 4), resulting in the
9 issuance of electronic Smog Certificate of Compliance No. QA048686C. The OIS test details for
10 Vehicle 4 showed that the eVIN was not recorded during the inspection. Representative A.L.
11 reviewed the comparative OIS test data for 2006 Chevrolet Aveo LT vehicles and found that the
12 eVIN is recorded during the inspection. Further, the communication protocol and PID count
13 recorded during the smog check on Vehicle 4 were not consistent with the communication
14 protocol and PID count for that make and model vehicle. Representative Lee concluded that the
15 DAD was not connected to Vehicle 4 during the smog inspection, resulting in the issuance of a
16 fraudulent smog certificate of compliance for the vehicle.

17 **Vehicle #5**

18 29. The OIS test data showed that on November 21, 2015, Respondent performed a smog
19 inspection on a 2000 Ford Windstar LX (Vehicle 5), resulting in the issuance of electronic Smog
20 Certificate of Compliance No. QA048688C. Representative A.L. reviewed the comparative OIS
21 test data for 2000 Ford Windstar LX vehicles and found that the communication protocol and PID
22 count recorded during the smog check on Vehicle 5 were not consistent with the communication
23 protocol and PID count for that make and model vehicle. Representative A.L. concluded that the
24 DAD was not connected to Vehicle 5 during the smog inspection, resulting in the issuance of a
25 fraudulent smog certificate of compliance for the vehicle.

26 **Vehicle #6**

27 30. The OIS test data showed that on November 25, 2015, Respondent performed a smog
28 inspection on a 2000 Chevrolet Astro Van (Vehicle 6), resulting in the issuance of electronic

1 Smog Certificate of Compliance No. QA048694C. Representative A.L. reviewed the
2 comparative OIS test data for 2000 Chevrolet Astro Van vehicles and found that the
3 communication protocol and PID count recorded during the smog check on Vehicle 6 were not
4 consistent with the communication protocol and PID count for that make and model vehicle.
5 Representative A.L. concluded that the DAD was not connected to Vehicle 6 during the smog
6 inspection, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

7 **Vehicle #7**

8 31. The OIS test data showed that on December 2, 2015, Respondent performed a smog
9 inspection on a 2003 Chevrolet Tracker LT (Vehicle 7), resulting in the issuance of electronic
10 Smog Certificate of Compliance No. QA481406C. Representative A.L. reviewed the
11 comparative OIS test data for 2003 Chevrolet Tracker LT vehicles and found that the
12 communication protocol and PID count recorded during the smog check on Vehicle 7 were not
13 consistent with the communication protocol and PID count for that make and model vehicle.
14 Representative A.L. concluded that the DAD was not connected to Vehicle 7 during the smog
15 inspection, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

16 **Vehicle #8**

17 32. The OIS test data showed that on December 23, 2015, Respondent performed a smog
18 inspection on a 2005 Chrysler 300 (Vehicle 8), resulting in the issuance of electronic Smog
19 Certificate of Compliance No. QA481450C. The OIS test details for Vehicle 8 showed that the
20 eVIN was not recorded during the inspection. Representative A.L. reviewed the comparative OIS
21 test data for 2005 Chrysler 300 vehicles and found that the eVIN is recorded during the
22 inspection. Further, the communication protocol and PID count recorded during the smog check
23 on Vehicle 8 were not consistent with the communication protocol and PID count for that make
24 and model vehicle. Representative A.L. concluded that the DAD was not connected to Vehicle 8
25 during the smog inspection, resulting in the issuance of a fraudulent smog certificate of
26 compliance for the vehicle.

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1 **Vehicle #9**

2 33. The OIS test data showed that on January 9, 2016, Respondent performed a smog
3 inspection on a 2002 Chevrolet Silverado C2500 HD (diesel) (Vehicle 9), resulting in the
4 issuance of electronic Smog Certificate of Compliance No. QC134490C. The OIS test details for
5 Vehicle 9 showed that the eVIN was not recorded during the inspection. Representative A.L.
6 reviewed the comparative OIS test data for 2002 Chevrolet Silverado C2500 HD (diesel) vehicles
7 and found that the eVIN is recorded during the inspection. Further, the communication protocol
8 and PID count recorded during the smog check on Vehicle 9 were not consistent with the
9 communication protocol and PID count for that make and model vehicle. Representative A.L.
10 concluded that the DAD was not connected to Vehicle 9 during the smog inspection, resulting in
11 the issuance of a fraudulent smog certificate of compliance for the vehicle.

12 **Vehicle #10**

13 34. The OIS test data showed that on February 18, 2016, Respondent performed a smog
14 inspection on a 2001 Chevrolet Astro Van (Vehicle 10), resulting in the issuance of electronic
15 Smog Certificate of Compliance No. YX443147C. The OIS test details for Vehicle 9 showed that
16 the eVIN was not recorded during the inspection. Representative A.L. reviewed the comparative
17 OIS test data for 2001 Chevrolet Astro Van vehicles and found that the eVIN is recorded during
18 the inspection. Further, the communication protocol and PID count recorded during the smog
19 check on Vehicle 10 were not consistent with the communication protocol and PID count for that
20 make and model vehicle. Representative A.L. concluded that the DAD was not connected to
21 Vehicle 10 during the smog inspection, resulting in the issuance of a fraudulent smog certificate
22 of compliance for the vehicle.

23 **Vehicle #11**

24 35. The OIS test data showed that on February 23, 2016, Respondent performed a smog
25 inspection on a 2000 Hyundai Tiburon (Vehicle 11), resulting in the issuance of electronic Smog
26 Certificate of Compliance No. YX960260C. Representative A.L. reviewed the comparative OIS
27 test data for 2000 Hyundai Tiburon vehicles and found that the communication protocol and PID
28 count recorded during the smog check on Vehicle 11 were not consistent with the communication

1 protocol and PID count for that make and model vehicle. Representative A.L. concluded that the
2 DAD was not connected to Vehicle 11 during the smog inspection, resulting in the issuance of a
3 fraudulent smog certificate of compliance for the vehicle.

4 **Vehicle #12**

5 36. The OIS test data showed that on February 25, 2016, Respondent performed a smog
6 inspection on a 2000 Hyundai Sonata GLS (Vehicle 12), resulting in the issuance of electronic
7 Smog Certificate of Compliance No. YX960268C. Representative A.L. reviewed the
8 comparative OIS test data for 2000 Hyundai Sonata GLS vehicles and found that the
9 communication protocol and PID count recorded during the smog check on Vehicle 12 were not
10 consistent with the communication protocol and PID count for that make and model vehicle.
11 Representative A.L. concluded that the DAD was not connected to Vehicle 12 during the smog
12 inspection, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

13 **Vehicle #13**

14 37. The OIS test data showed that on February 27, 2016, Respondent performed a smog
15 inspection on a 2003 Cadillac CTS (Vehicle 13), resulting in the issuance of electronic Smog
16 Certificate of Compliance No. YX960276C. The OIS test details for Vehicle 13 showed that the
17 eVIN was not recorded during the inspection. Representative A.L. reviewed the comparative OIS
18 test data for 2003 Cadillac CTS vehicles and found that the eVIN is recorded during the
19 inspection. Further, the communication protocol and PID count recorded during the smog check
20 on Vehicle 13 were not consistent with the communication protocol and PID count for that make
21 and model vehicle. Representative A.L. concluded that the DAD was not connected to Vehicle
22 13 during the smog inspection, resulting in the issuance of a fraudulent smog certificate of
23 compliance for the vehicle.

24 **Vehicle #14**

25 38. The OIS test data showed that on February 29, 2016, Respondent performed a smog
26 inspection on a 2002 GMC Sierra C2500 (Vehicle 14), resulting in the issuance of electronic
27 Smog Certificate of Compliance No. YX960282C. The OIS test details for Vehicle 14 showed
28 that the eVIN was not recorded during the inspection. Representative A.L. reviewed the

1 comparative OIS test data for 2002 GMC Sierra C2500 vehicles and found that the eVIN is
2 recorded during the inspection. Further, the communication protocol and PID count recorded
3 during the smog check on Vehicle 14 were not consistent with the communication protocol and
4 PID count for that make and model vehicle. Representative A.L. concluded that the DAD was
5 not connected to Vehicle 14 during the smog inspection, resulting in the issuance of a fraudulent
6 smog certificate of compliance for the vehicle.

7 **Vehicle #15**

8 39. The OIS test data showed that on March 14, 2016, Respondent performed a smog
9 inspection on a 2000 Dodge Neon ES (Vehicle 15), resulting in the issuance of electronic Smog
10 Certificate of Compliance No. YZ540059C. Representative A.L. reviewed the comparative OIS
11 test data for 2000 Dodge Neon ES vehicles and found that the communication protocol and PID
12 count recorded during the smog check on Vehicle 15 were not consistent with the communication
13 protocol and PID count for that make and model vehicle. Representative A.L. concluded that the
14 DAD was not connected to Vehicle 15 during the smog inspection, resulting in the issuance of a
15 fraudulent smog certificate of compliance for the vehicle.

16 **Vehicle #16**

17 40. The OIS test data showed that on March 21, 2016, Respondent performed a smog
18 inspection on a 2001 Chrysler Town & Country LX (Vehicle 16), resulting in the issuance of
19 electronic Smog Certificate of Compliance No. YZ540071C. Representative A.L. reviewed the
20 comparative OIS test data for 2001 Chrysler Town & Country LX vehicles and found that the
21 communication protocol and PID count recorded during the smog check on Vehicle 16 were not
22 consistent with the communication protocol and PID count for that make and model vehicle.
23 Representative A.L. concluded that the DAD was not connected to Vehicle 16 during the smog
24 inspection, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

25 **Vehicle #17**

26 41. The OIS test data showed that on July 2, 2016, Respondent performed a smog
27 inspection on a 2004 Chevrolet Venture (Vehicle 17), resulting in the issuance of electronic Smog
28 Certificate of Compliance No. QC971810C. The OIS test details for Vehicle 17 showed that the

1 eVIN was not recorded during the inspection. Representative A.L. reviewed the comparative OIS
2 test data for 2004 Chevrolet Venture vehicles and found that the eVIN is recorded during the
3 inspection. Further, the communication protocol and PID count recorded during the smog check
4 on Vehicle 17 were not consistent with the communication protocol and PID count for that make
5 and model vehicle. Representative A.L. concluded that the DAD was not connected to Vehicle
6 17 during the smog inspection, resulting in the issuance of a fraudulent smog certificate of
7 compliance for the vehicle.

8 **Field Visit**

9 42. On or about April 14, 2016, Representative A.L. made a field visit to the facility and
10 obtained copies of the VIRs pertaining to smog inspections conducted on vehicles 1-7 and 9-16.
11 The VIRs pertaining to vehicles 1-7, and 9-16 were signed by Respondent under penalty of
12 perjury. The VIR pertaining to vehicle 8 was unable to be found by Respondent but he stated that
13 he had signed it under penalty of perjury. The VIR pertaining to vehicle 17 was not obtained.

14 **FIRST CAUSE FOR DISCIPLINE**

15 (Untrue or Misleading Statements)

16 43. Respondent's registration is subject to discipline pursuant to Code section 9884.7,
17 subdivision (a)(1), in that he made or authorized statements which he knew or in the exercise of
18 reasonable care should have known to be untrue or misleading. Specifically, Respondent certified
19 that vehicles 1 through 17, identified in paragraphs 25 through 41, above, had passed inspection
20 and were in compliance with applicable laws and regulations. In fact, Respondent conducted
21 smog inspections on the vehicles using clean-plugging methods in that he substituted a different
22 vehicle during the inspections in order to issue smog certificates of compliance for the seventeen
23 vehicles, and did not test or inspect the vehicles as required by Health & Saf. Code section 44012.

24 **SECOND CAUSE FOR DISCIPLINE**

25 (Fraud)

26 44. Respondent's registration is subject to discipline pursuant to Code section 9884.7,
27 subdivision (a)(4), in that he committed acts that constitute fraud by issuing electronic smog
28 certificates of compliance for vehicles 1 through 17, identified in paragraphs 25 through 41

1 above, without ensuring that bona fide inspections were performed of the emission control
2 devices and systems on the vehicles, thereby depriving the People of the State of California of the
3 protection afforded by the Motor Vehicle Inspection Program.

4 **THIRD CAUSE FOR DISCIPLINE**

5 (Motor Vehicle Inspection Program – Code Violations)

6 45. Respondent's Station License is subject to discipline pursuant to Health & Saf. Code
7 section 44072.2(a), in that it failed to comply with the following sections of the Health & Saf.
8 Code, as follows:

9 a. **Section 44012(a)**: Respondent failed to ensure that the emission control tests were
10 performed on vehicles 1 through 17, identified in paragraphs 25 through 41 above, in accordance
11 with procedures prescribed by the department.

12 b. **Section 44015**: Respondent issued electronic smog certificates of compliance for
13 vehicles 1 through 17, identified in paragraphs 25 through 41 above, without ensuring that the
14 vehicles were properly tested and inspected to determine if they were in compliance with Health
15 & Saf. Code section 44012.

16 c. **Section 44072.2(g)**: Respondent failed to make, keep, or have available for
17 inspection, records showing his transactions as a licensee in that he failed to keep or retain a copy
18 of the VIR for vehicle #8, as set forth in paragraph 42, above.

19 **FOURTH CAUSE FOR DISCIPLINE**

20 (Failure to Comply with Regulations)

21 46. Respondent's Station License is subject to discipline pursuant to Health & Saf. Code
22 section 44072.2(c), in that it failed to comply with provisions of the Regulations, as follows:

23 a. **Section 3340.35(c)**: Respondent issued electronic smog certificates of compliance
24 for vehicles 1 through 17, identified in paragraphs 25 through 41 above, even though the vehicles
25 had not been inspected in accordance with Regulation section 3340.42.

26 b. **Section 3340.42**: Respondent failed to ensure that the required smog tests were
27 conducted on vehicles 1 through 17, identified in paragraphs 25 through 41 above, in accordance
28 with the Bureau's specifications.

1 c. Section 3340.15(e): Respondent failed to make, keep secure, or have available for
2 inspection, the vehicle inspection report for vehicle 8, identified in paragraph 32 above, for no
3 less than three years.

4 **FIFTH CAUSE FOR DISCIPLINE**

5 (Dishonesty, Fraud or Deceit)

6 47. Respondent's Station License is subject to discipline pursuant to Health & Saf. Code
7 section 44072.2(d), in that Respondent committed dishonest, fraudulent or deceitful acts whereby
8 another is injured by issuing electronic smog certificates of compliance for vehicles 1 through 17,
9 identified in paragraphs 25 through 41 above, without ensuring that a bona fide inspection was
10 performed of the emission control devices and systems on the vehicles, thereby depriving the
11 people of the State of California of the protection afforded by the Motor Vehicle Inspection
12 Program.

13 **SIXTH CAUSE FOR DISCIPLINE**

14 (Motor Vehicle Inspection Program - Code Violations)

15 48. Respondent's smog check inspector license is subject to discipline pursuant to Health
16 & Saf. Code section 44072.2(a), in that he violated Health & Saf. Code section 44012 by failing
17 to perform the emission control tests on vehicles 1 through 17, identified in paragraphs 25
18 through 41 above, in accord with procedures prescribed by the department.

19 **SEVENTH CAUSE FOR DISCIPLINE**

20 (Failure to Comply with Regulations)

21 49. Respondent's smog check inspector license is subject to discipline pursuant to
22 Health & Saf. Code section 44072.2(c), in that he failed to comply with provisions of the
23 Regulations, as follows:

24 a. Section 3340.30(a): Respondent failed to inspect and test vehicles 1 through 17,
25 identified in paragraphs 25 through 41 above, in accordance with Health & Saf. Code sections
26 44012 and 44035, and Regulations, section 3340.42.

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