

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

In the Matter of the Accusation Against:

LAMAS BROTHERS AUTOMOTIVE INC. dba LEOS AUTO REPAIR, LEONEL LAMAS

1860 Pacific Coast Highway

Lomita, CA 90717

Automotive Repair Dealer Registration No. ARD 249859

Smog Check Station License No. RC 249859

Lamp Station License No. LS 249859, Class A

Brake Inspection Station License No. BS 249859, Class C

and

LEONEL LAMAS

4641 W. 154th Street

Lawndale, CA 90260

Smog Check Inspector License No. EO 37143

Smog Check Repair Technician License No. EI 37143

Brake Adjuster License No. BA 37143, Class C

Lamp Adjuster License No. LA 37143

Respondents.

Case No. 78/21-9982

OAH No. 2022050641.1

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall be effective on AUG 24 2023.

IT IS SO ORDERED this 12 day of July, 2023.



GRACE ARUPO RODRIGUEZ
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs

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OAH Case No. 2022050640.1

PROPOSED DECISION AFTER REMAND

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference initially on December 5, 2022. Complainant was represented by Gillian E. Friedman, Deputy Attorney General. Respondents Lamas Brothers Automotive Inc., doing business as Leos Auto Repair, and Leonel Lamas were present for the hearing and were represented by Michael Levin, Attorney at Law. Oral and documentary evidence was received. The record closed and the matter was submitted for decision on December 5, 2022. At the hearing, the Accusation was amended to update the expiration dates of the registration and licenses as noted in Factual Findings 2 and 3, below. Although the expiration dates have since passed, there was no new evidence of license renewals.

A Proposed Decision was issued on December 16, 2022, in which respondents' licenses and registrations were revoked, the revocations were stayed, and the licenses and registrations were placed on probation for five years on terms and conditions. One term of probation was for respondents to pay to the Bureau of Automotive Repair (Bureau) the full reasonable costs of the investigation and enforcement of this matter in the amount of \$10,228.87.

On January 25, 2023, the Department of Consumer Affairs (Department) issued an Order of Rejection and Remand to Administrative Law Judge "to take additional

evidence regarding the factors set out in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, relating to costs ordered in the above-captioned matter so that the evidence and discussion may be included in the Proposed Decision." (Exhibit 22.)

The ALJ heard this remanded matter by videoconference on May 18, 2023. Complainant was represented by Matthew S. Beasley, Deputy Attorney General. Respondents Lamas Brothers Automotive Inc., doing business as Leos Auto Repair, and Leonel Lamas were present for the hearing and were represented by Michael Levin, Attorney at Law. Oral and documentary evidence was received. The record closed and the matter was submitted for decision on May 18, 2023.

As the remand was limited to evidence and discussion concerning costs, the majority of the Factual Findings, Legal Conclusions, and probation terms remain unchanged from the initial Proposed Decision.

Exhibits and Protective Order

During the December 2022 hearing complainant submitted Exhibits 1-21. New exhibits added by complainant for the May 2023 hearing are numbered 22-24. During the December 2022 hearing respondent submitted Exhibit A. New exhibits added by respondent for the May 2023 hearing are lettered A-P, resulting in two exhibits lettered A. To distinguish them herein, they will be referred to as "Exhibit A" and "Exhibit A 2023."

Respondent filed a motion for a protective order to seal Exhibits H-P. There was no opposition. A separate order is issued to seal these exhibits.

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SUMMARY

Complainant alleges discipline should be imposed against respondents' registration and licenses for improper smog tests on five vehicles via a method known as clean plugging. The evidence supported the conclusion clean plugging occurred. Respondents contend they had no knowledge of the clean plugging, which was performed by an employee who did not have permission or the license necessary to perform smog tests. Respondents contend their registration and licenses should not be revoked, or some lesser discipline should be imposed. Respondents' registration and licenses will be revoked, the revocations will be stayed, and the registration and licenses will be placed on probation. The amount of costs to be paid will be reduced.

FACTUAL FINDINGS

Jurisdictional Matters

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

2. Respondents Lamas Brothers Automotive, Inc., doing business as Leos Auto Repair (facility), and Leonel Lamas (Lamas), own and operate an automotive repair facility in Lomita, California. The facility operates under Automotive Repair Dealer (ARD) registration number ARD 249859, issued by the Bureau in 2007, which will expire on March 31, 2023, unless renewed. The facility was issued Smog Check Station license number RC 249859 by the Bureau on May 15, 2007, which will expire on March 31, 2023, unless renewed. On January 2, 2013, the Bureau certified the facility as a STAR Station. The facility is licensed as a Lamp Station, license number LS 249859,

and as a Brake Inspection Station, license number BS 249859. These licenses were both issued by the Bureau on September 7, 2017, and will expire on March 31, 2023, unless renewed.

3. The Bureau issued Advanced Emission Specialist Technician license number EA 37143 to Lamas in 1997. Due to a change in the law, that license was canceled and reissued on October 23, 2013, as Smog Check Inspector license number EI 37143 and Smog Check Repair Technician license number EO 37143, both of which will expire on October 31, 2023, unless renewed. Lamas was licensed as a Brake Adjuster in May 2017, which expired in October 2020, and as a Lamp Adjuster in June 2017, which expired in October 2020 and was cancelled in December 2020.

4. After respondents were properly served with the Accusation, they filed a Notice of Defense requesting a hearing. This hearing was then scheduled.

5. All jurisdictional requirements have been met.

Disciplinary History

6. The Bureau issued citations against respondent facility in February and June 2009 for two instances of passing smog inspections for vehicles missing required emissions parts, and against both respondents in February 2017 for performing an improper smog test. These citations are discussed in more detail below.

7. On February 13, 2009, Citation C09-0947 was issued against respondent facility in the amount of \$500 for violations of Health and Safety Code section 44012, subdivision (f), failure to perform a visual/functional check of emission control devices, and California Code of Regulations, title 16 (Regulation), section 3340.35, subdivision (d), issuing a Certificate of Compliance on January 28, 2009, to a Bureau undercover

vehicle that was improperly tested and had a missing EGR valve. The Citation Service Conference was held on March 11, 2009. The citation is final. Respondent facility complied with the citation.

8. On June 5, 2009, Citation C09-1390 was issued against respondent facility in the amount of \$1,000 for violations of Health and Safety Code section 44012, subdivision (f), failure to perform a visual/functional check of emission control devices, and Regulation section 3340.35, subdivision (d), issuing a Certificate of Compliance on May 27, 2009, to a Bureau undercover vehicle that was improperly tested and had a missing PCV System. The Citation Service Conference was held on June 18, 2009. The citation is final, and respondent facility complied with the citation.

9. On February 7, 2017, Citation C2017-397 was issued to respondent facility and Citation M2017-398 was issued to respondent Lamas for violations of Health and Safety Code sections 44012 and 44032 because, on December 21, 2016, Lamas performed an improper smog test and the facility illegally issued a Certificate of Compliance to a 1999 Ford F250 Diesel using the BAR97 test system when the On-Board Diagnostic Inspection System was required. An Order of Abatement ordered the facility to cease violating the Code by using the wrong test method. No fine was imposed. The Citation Service Conference was held on March 9, 2017. The Decision became effective on April 9, 2017.

Smog Check Procedures, Generally

10. Modern automobiles are increasingly computerized. Computers help to manage the operation of the engine and/or the transmission, and they play a key role in causing the vehicle to run as smog-free as possible. The computers are programmed with an On-Board Diagnostic Inspection System (OIS). If some aspect of

the engine performance is not as it should be, the OIS causes the Malfunction Indicator Light - the "check engine" light on the dashboard - to illuminate.

11. Beginning in March 2015, the Bureau prescribed that the testing process on most vehicles (and as a practical matter virtually all gasoline powered cars) manufactured after 1999 be performed, in part, with the On-Board Diagnostics Generation II (OBDII) functional test. In that test the licensed inspector connects a cable from the smog check station's test computer to a Diagnostic Link Connector, which is a receptacle found inside the vehicle's passenger cabin. Through the receptacle and cable, the test computer retrieves information from the vehicle's on-board computer and OIS. That information is transmitted to the Bureau's Vehicle Information Database, known as the VID, and the information is analyzed to see that the vehicle is functioning so that it will not emit excess pollutants.

12. One piece of information usually obtained from the vehicle during an OBDII functional test is the "eVIN," the Vehicle Identification Number (VIN) in electronic form. The eVIN is programed into the vehicle when it is manufactured. The eVIN must match the VIN stamped on a metal badge that is typically affixed to the top of the vehicle's dashboard in front of the driver, visible through the windshield. Although some cars built between 2000 and 2005 do not transmit an eVIN, the majority do, and the capacity to transmit the eVIN was mandated for cars built after 2005.

13. Another piece of the information obtained from the vehicle during an OBDII functional test is a test protocol, or communication interface, which is identified with a combination of letters and/or numbers. The test protocol indicates a particular system or language whereby the vehicle's computer will communicate with the station's smog test computer. The test protocol is programed into the vehicle when it

is manufactured. A third type of data collected from the vehicle during an OBDII functional test is a parameter identification (PID) count. This refers to the number of data points transmitted from the tested vehicle. The data points may include, for example, the engine speed and temperature and other data used by the computer system to check for proper engine performance and compliance with smog regulations. Each vehicle reports a specific known PID count, with occasional slight variations, programmed into the vehicle when it is manufactured.

14. In some circumstances, smog test inspectors and smog test station operators engage in the illegal practice of "clean plugging." In those cases, the vehicle ostensibly being tested is not connected into the test system and might not even be in the facility. Instead, the test equipment cable is either plugged into another vehicle, or into a simulator which produces data including a test protocol and a PID count.

15. When clean plugging occurs, it leaves an electronic trail in the VID. Primarily this is because the PID count and test protocol transmitted to the VID will not always match cars similar to the vehicle that is supposed to be tested, and the eVIN is likely to be incorrect, or not transmitted.

16. When a smog test is completed and the result is "pass," the facility issues an electronic Certificate of Compliance which is transmitted to the Bureau's VID and to the Department of Motor Vehicles to be used in registration of that vehicle. Licensed smog test stations purchase "blocks" of sequentially numbered Certificates of Compliance. After a smog test the facility also issues a Vehicle Inspection Report (VIR) of the results, pass or fail, a copy of which is transmitted to the Bureau's VID. A copy of the VIR, signed by the smog inspector, is given to the vehicle owner.

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The Subject Smog Tests

17. Between March 2019 and July 2021, smog tests were performed on five vehicles at the facility using the log in information for Lamas (hereafter "the subject vehicles" and "the subject tests"). The subject tests produced anomalous results, indicating in each case the subject tests occurred through clean plugging. In each of the subject tests and for each of the subject vehicles, a Certificate of Compliance was issued by the facility and a VIR was transmitted to the Bureau's VID indicating Lamas was the inspector. Respondents purchased the Certificates of Compliance from the Bureau between March 2019 and June 2021, at the cost of \$8.50 each. Because the subject vehicles were clean plugged, the subject tests were not properly performed, failed to comply with Bureau specifications, and Certificates of Compliance should not have been issued.

18. Bureau Program Representative II Specialist Ian Evans reviewed data transmitted from the facility to the Bureau. He found various anomalies in the subject tests because, in the five subject tests, the protocol and/or the PID count that were transmitted to the VID were not the type that the tested vehicle should have transmitted. In all instances the eVIN did not match the vehicle's actual VIN. Evans reviewed data for vehicles similar to those in the subject tests, to determine what PID count and test protocol were expected. In four cases Evans found 1,000 examples of similar vehicles to those tested by respondent facility. For the fifth vehicle he found 135 comparative vehicles. Evans explained the fifth vehicle was not as popular as the other four, so fewer of them were smog tested. Evans generally found that more than 99 percent of each year, make and model of the same type of vehicles as the subject vehicles transmitted the same protocol and PID count. In every test of the subject vehicles, the information transmitted did not conform to the data transmitted by the

numerous similar vehicles, with limited exceptions noted below, contrary to the expectations generated by Evans' research.

19. The variability in the data reported by respondent facility in the five subject tests supports the conclusion the OIS system was plugged into different vehicles, but not those ostensibly being tested, during the five subject tests.

SUBJECT VEHICLE 1

20. On March 16, 2019, a 2004 Nissan Xterra XE was tested at the facility using the access code and personal identification number (PIN) of Lamas as the inspector. The vehicle transmitted an incorrect eVin, communication protocol ICAN11bt5 when the expected protocol was I914, and had a PID count of 46 when the expected PID count was 22. Similar vehicles did not transmit an eVIN. A Certificate of Compliance was be issued by respondent facility for this vehicle.

21. On March 9, 2016, a previous test was performed on the 2004 Nissan Xterra XE, at a different smog check station. At that time, the OIS test data for the 2004 Nissan Xterra XE shows the eVIN was not transmitted, the communication protocol was transmitted as 1914, and the PID count was 22, consistent with the expected similar vehicles' OIS test data based on Evans' research.

22. Evans researched the eVIN transmitted to respondent facility during the test on subject vehicle 1. The OIS test data is consistent with a 2008 Tacoma Double Cab PreRunner, VIN 3TMJU62N08M065704.

SUBJECT VEHICLE 2

23. On July 12, 2019, a 2001 Ford Expedition XLT was tested at the facility using the access code and PIN of Lamas as the inspector. The vehicle transmitted an

incorrect eVin, the correct communication protocol of JPWM, and the correct PID count of 22. A Certificate of Compliance was be issued by respondent facility for this vehicle.

24. Evans researched the eVIN transmitted to respondent facility during the test on subject vehicle 2. The OIS test data is consistent with a 2003 Ford FI50 Supercrew registered to respondent Lamas.

SUBJECT VEHICLE 3

25. On August 12, 2019, a 2005 Nissan Pathfinder LE was tested at the facility using the access code and PIN of Lamas as the inspector. The vehicle transmitted an incorrect eVin, communication protocol ICAN11bt5 when the expected protocol was I914, and had a PID count of 43 when the expected PID count was 22. A Certificate of Compliance was be issued by respondent facility for this vehicle.

26. Evans researched the eVIN transmitted to respondent facility during the test on subject vehicle 3. The OIS test data is consistent with a 2013 Nissan Xterra X.

SUBJECT VEHICLE 4

27. On March 30, 2020, a 2000 Toyota Tundra Access Cab Limited was tested at the facility using the access code and PIN of Lamas as the inspector. The vehicle transmitted an incorrect eVin, communication protocol JPWM when the expected protocol was I914, and had a PID count of 22 when the expected PID count was 20. Similar vehicles did not transmit an eVIN. A Certificate of Compliance was be issued by respondent facility for this vehicle.

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28. Evans researched the eVIN transmitted to respondent facility during the test on subject vehicle 4. The OIS test data is consistent with a 2003 Ford FI50 Supercrew registered to respondent Lamas.

SUBJECT VEHICLE 5

29. On July 23, 2021, a 2009 Suzuki SX4 Sport was tested at the facility using the access code and PIN of Lamas as the inspector. The vehicle transmitted an incorrect eVin, communication protocol I914 when the expected protocol was ICAN11bt5, and had a PID count of 19/1 when the expected PID count was 36 or 36/9. A Certificate of Compliance was issued by respondent facility for this vehicle.

30. Evans researched the eVIN transmitted to respondent facility during the test on subject vehicle 5. The OIS test data is consistent with a 2003 Saturn LW300.

ALL SUBJECT VEHICLES

31. The Certificates of Compliance issued by respondents contained false and misleading information, which respondents knew, or should have known to be false, and the conduct of respondents in connection with the subject tests and the issuance of the associated Certificates of Compliance was fraudulent, and pernicious to the health, safety, and welfare of the State of California and its citizens.

Respondents' Evidence

32. Respondent Lamas testified the subject tests were performed without his knowledge or permission by his former part-time employee Modesto DeLoera (DeLoera). DeLoera was the owner of subject vehicles 1, 2, and 3. In the past, respondent Lamas had seen DeLoera drive these vehicles to the facility, and some repairs to these vehicles had been performed at the facility. DeLoera is not a skilled

mechanic. He was hired in 2014 as a helper, to pick up parts and transport customers, perform oil changes, and fix tires and brakes. Lamas trusted DeLoera. DeLoera and other employees had access to Lamas' 2003 Ford F150 Supercrew to run these errands. This is the same 2003 Ford F150 Supercrew used to clean plug subject vehicles 2 and 4.

33. DeLoera is not a licensed smog inspector. Lamas and his son, Leonel Lamas, Jr., are the only licensed smog inspectors at the facility. Lamas was present at the facility most of the time and supervised DeLoera and other employees. When Lamas was not present, his son took over as the supervisor.

34. In a letter dated December 1, 2022, Lamas wrote when he "found out about the fraudulent smog checks, I confronted [DeLoera] and he admitted that he had performed the smogs without my knowledge. . . . He was immediately terminated on September 2021 and the password on the BAR-OIS was changed." "[T]here was not [any] estimate or invoice created." (Exhibit A, p. B1.)

35. Lamas testified he discovered DeLoera connecting the smog test cable to a car in September 2021 and when asked why, DeLoera did not answer. When Lamas asked about the five subject vehicles, Lamas first testified DeLoera said nothing. Lamas later testified DeLoera admitted doing subject tests 1, 2, and 3 (for the cars DeLoera owned), but was silent as to subject tests 4 and 5. Lamas checked the smog test history for subject vehicles 1, 2, and 3 and saw the smog tests had been performed at the facility. Lamas does not review VIRs issued at the facility.

36. When asked how DeLoera was able to perform the subject tests if he was supervised by Lamas or his son, Lamas testified DeLoera and other employees had access to the bay where the smog tests were done to do other repairs or for other reasons, and Lamas did not watch all of the employees all of the time.

37. As noted in his letter, Lamas changed his PIN to access the OIS test computer in September 2021 after discovering DeLoera had performed smog tests. Before changing his PIN, Lamas kept his badge (with a bar code to be scanned to start a smog test) hanging by the test computer, with his PIN written on the back. After changing his access information, he keeps his badge in his wallet on his person and has memorized his PIN.

38. Lamas testified Certificates of Compliance were purchased from the Bureau in blocks of 50 and he did not keep track of their use.

39. Respondents' usual practice is to prepare an estimate for a smog test and, after the test is completed, an invoice is prepared. Respondents maintain these records, and the VIRs, for three years. Lamas did not find any estimates, invoices, or VIRs for the subject vehicles and the subject tests. He could not be sure if any of these records had been created, the inference being that DeLoera would not create them under the circumstances. In the alternative, Lamas stated that, if the records had been created, the records would have been destroyed after three years.

40. Lamas worked at Lomita Motors from June 1998 until 2007, when he opened the facility. The facility is open six days per week. Lamas employs his son and three or four other helpers. Lamas estimates he and his son perform 10 to 12 smog tests each week. Lamas testified he has been in the business for 31 years and is proud of his work. He accepts responsibility because the subject tests were performed at his facility.

41. Lamas gave inconsistent testimony of his business income and expenses. At one point he testified his net income was about \$2,000 per month, and later estimated he "brought home" a net income of \$4,500 per month.

Costs

42. The Bureau incurred costs of investigation and prosecution of this matter in the total amount of \$10,228.87. Costs of investigation are \$1,203.87 and costs of prosecution are \$9,025. These costs are reasonable.

Additional Evidence from 2023 Hearing

43. Respondent Lamas submitted a list of his monthly home expenses, created in May 2023, indicating his total monthly home expenses is \$6,323.99. (Exhibit A 2023.) He also submitted several bills and statements to support amounts on this list, for example Exhibit B (home mortgage), Exhibit C (gas bill), Exhibit D (electric bill), Exhibit E (internet bill), Exhibit F (auto insurance bill), and Exhibit G (bank account statement).

44. Some of the bills and statements do not depict the same amounts listed on the list of monthly expenses. For example, the list refers to a home mortgage expense of \$2,255.04 (Exhibit A 2023) while the mortgage statement has an amount due of \$2,391.85. (Exhibit B.) The list refers to a gas expense of \$80.39 (Exhibit A 2023) while the gas bill has an amount due of \$38.21. (Exhibit C.) The list refers to an electricity expense of \$88.53 (Exhibit A 2023) while the electric bill has an amount due of \$99.14. (Exhibit D.) The list refers to car insurance expense of \$197.84 (Exhibit A 2023) while the car insurance bill has an annual amount due of \$1,514 (Exhibit F), which calculates to a monthly amount of \$126. The list refers to a bank monthly charge of \$25 (Exhibit A 2023) while the bank statement does not list any monthly charge. (Exhibit G.) The internet bill of \$56.04 matches the expense list and is a consistent monthly charge. Other monthly expenses on the list have no corresponding

bills or statements, and some would not be expected to, such as groceries and clothing.

45. Lamas testified several of the utility bill amounts vary from month to month and he used monthly averages on the expenses list. Also, the mortgage bill includes fees for escrow, insurance, and taxes, which can be different from month to month. This method may explain some, but not all, of the discrepancies noted above. While the differences for the line items as compared to the actual bills may be minor, these inconsistencies are problematic concerning the credibility of Lamas's evidence regarding his financial circumstances. Further, the total of these monthly personal expenses, that is, \$6,323.99, is substantially less than the testimony he gave in December 2022 of monthly personal expenses in the range of \$15,000 to \$17,000.

46. Lamas testified he is paid every two weeks from his business, currently in the net amount of \$2,618, for a total of \$5,236 every four weeks. Sometimes his pay is higher when he needs more income. Again, this is inconsistent with testimony he gave in December 2022. (See Factual Finding 41.) According to a Form W-2 for the year 2022, Lamas's gross wages from the business were \$79,999.94 which, after taxes and withholdings, resulted in net income of \$64,465.70. (Exhibit H.) Lamas also receives rent from a residential property in the amount of \$3,500 each month. This amount increases every year. Lamas testified to some of the expenses related to the rental property and that he suffers a loss of about \$600 per month on the rental. He also owns the property where the business operates, and charges rent from the business that is below market rate but is in the amount needed to pay the mortgage on the business property.

47. Lamas paid his employee, DeLoera, who did the clean piping, in cash and off the books, because DeLoera did not have a Social Security number. In the 2023

hearing, Lamas testified DeLoera was employed for about three years, contrary to testimony he gave in the 2022 hearing that DeLoera was hired in 2014 and fired in 2021. (See Factual Findings 32, 34.)

47. Several new exhibits are tax-related and depict ordinary business income from the business for 2022 as \$1,578. (See, for example, Exhibits I, J, K, and M.) The Five Year Tax History of the business in Exhibit K depicts losses in 2018 and 2019, and income in 2020 of below \$4,000, and in 2021 of below \$2,500.

48. Lamas testified payment of the costs amount, \$10,228.87, would be a financial hardship, and he does not have the resources to pay any of these costs.

LEGAL CONCLUSIONS

Legal Conclusions of General Applicability

1. Jurisdiction to proceed in this matter exists under Business and Professions Code sections 9884.7 and 9889.3 (which relate to ARD registrations), as well as Health and Safety Code sections 44002 and 44072.2 (which relate to smog check station and inspector licenses), based on Factual Findings 1 through 5. The expiration of any license does not bar the agency from asserting jurisdiction. (Bus. & Prof. Code, §§ 118, subd. (b), and 9884.13; Health & Saf. Code, § 44072.6.)

2. The Accusation lists 10 causes for discipline of respondents' registration and licenses. They often rely upon a connection between certain requirements under regulations and statutes relating to proper smog test procedures. To impose discipline, complainant must prove the allegations by the preponderance of evidence standard of proof. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.)

3. Under Business and Professions Code section 9884.7, subdivision (a), the registration of an automotive repair dealer can be disciplined "for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer," including making or authorizing a written statement 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 (subdivision (a)(1)), any other conduct that constitutes fraud (subdivision (a)(4)), or failure in any material respect to comply with other provisions of the Business and Professions Code or regulations adopted pursuant to it (subdivision (a)(6)).

4. Under Business and Professions Code section 9889.3, subdivision (d), the registration of an automotive repair dealer can be disciplined for committing any act involving dishonesty, fraud, or deceit whereby another is injured.

5. By virtue of ownership of a license, the owner has a responsibility to see to it that the license is not used in violation of the law, and licensees are responsible for the acts of their employees. (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360.) A licensee must be responsible to the licensing authority for the acts of agents or employees performed "in the course of his business in the operation of the license" even if the licensee does not have knowledge of the unlawful acts or authorize the activity. (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192-193.)

6. The automotive repair dealer registration and smog check test station license held by respondent facility, and the smog check inspector and technician licenses held by respondent Lamas, can be disciplined because of the relationships

between the licenses. A registered automotive repair dealer can apply for a smog check station license under Regulation section 3340.10. Testing at the station can be performed only by a properly licensed person, such as a smog check inspector or technician, under Regulation section 3340.15. When a vehicle passes the smog check, the Certificate of Compliance is issued by the station, not the inspector, although the inspector's action of passing the car is a predicate act to the issuance of the Certificate of Compliance.

7. Under Health and Safety Code section 44072.10, subdivisions (a) and (c), a smog test station license or a smog inspector's license can be disciplined based on reasonable evidence of fraud and willful violation of the law, and the licenses can be revoked for fraudulently certifying or participating in the fraudulent certification or inspection of a vehicle.

8. Under Health and Safety Code section 44072.2, subdivisions (a), (c) and (d), the licenses of a smog test station and a smog check inspector can be disciplined for violating any statutes or regulations related to the license, or for committing any act involving dishonesty, fraud, or deceit whereby another is injured.

9. Under Business and Professions Code section 9889.9, if any license issued by the Bureau under that part of the Code is disciplined, any other licenses issued by the Bureau may be disciplined.

Legal Conclusions Specific to the Case

10. In each instance noted below, except where indicated otherwise, complainant proved the violations by a preponderance of the evidence and, therefore, cause was established to suspend or revoke the registration or license, for the reasons set forth in Factual Findings 17 through 30.

FIRST CAUSE FOR DISCIPLINE

11. Respondents facility and Lamas violated Health and Safety Code sections 44072.10, subdivisions (a) and (c), and 44072.2, subdivision (a), by failing to comply with the following sections of the Health and Safety Code:

A. Section 40412, by failing to perform tests of the emission control systems and devices on the subject vehicles in accordance with procedures prescribed by the Department.

B. Section 44012, subdivision (f), by failing to properly perform functional checks of required emission control devices.

C. Section 44015, subdivision (b), when respondent facility issued Certificates of Compliance for the subject vehicles without properly testing and inspecting them to determine if they were in compliance with Health and Safety Code section 44012.

D. Section 44032, when respondent Lamas failed to perform tests of emission control devices and systems in accordance with section 44012.

E. Section 44059: Respondents are responsible for the willfully false entries for issuance of the electronic Certificates of Compliance by allowing certification that the subject vehicles had been inspected as required when, in fact, they had not.

SECOND CAUSE FOR DISCIPLINE

12. Respondent facility violated Health and Safety Code sections 44072.10, subdivisions (a) and (c), and 44072.2, subdivision (a), by failing to comply with

Regulation section 3340.35, subdivision (c), by failing to inspect and test the subject vehicles in accordance with the procedures specified in Regulation section 3340.42.

13. It was not established respondent facility violated Regulation section 3373 by issuing false or misleading estimates, invoices, or work orders, as there was no evidence any estimates, invoices, or work orders were issued regarding the five subject tests.

THIRD CAUSE FOR DISCIPLINE

14. Respondent Lamas violated Health and Safety Code sections 44072.10, subdivisions (a) and (c), and 44072.2, subdivision (a), by failing to comply with the Regulation sections 3340.30, subdivision (a), for failing to inspect vehicles in accordance with test procedures, and 3340.41, subdivision (c), for allowing false information about the subject vehicles to be entered into the Emissions Inspection System providing results for smog inspections which were not actually performed.

FOURTH CAUSE FOR DISCIPLINE

15. Respondent facility violated Business and Professions Code section 9884.7, subdivisions (a)(1) and (c) when, between March 16, 2019, and July 23, 2021, the facility allowed statements to be made which it knew or which by exercise of reasonable care should have known were untrue or misleading when it issued electronic smog Certificates of Compliance for the subject vehicles, certifying those vehicles were in compliance with applicable laws and regulations when, in fact, those vehicles had not been properly inspected as required by Health and Safety Code section 44012.

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FIFTH CAUSE FOR DISCIPLINE

16. Respondent facility violated Business and Professions Code section 9884.7, subdivisions (a)(4) and (c) when, between March 16, 2019, and July 23, 2021, the facility committed acts of fraud when it issued electronic smog Certificates of Compliance for the subject vehicles without bona fide inspections of the emission control devices and systems on those vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

SIXTH CAUSE FOR DISCIPLINE

17. Respondent facility violated Business and Professions Code section 9884.7, subdivisions (a)(6) and (c) when, between March 16, 2019, and July 23, 2021, the facility failed in a material respect to comply with the provisions of statutes or regulations when it issued electronic Certificates of Compliance for the subject vehicles without bona fide inspections of the emission control devices and systems on those vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

SEVENTH CAUSE FOR DISCIPLINE

18. Respondent Lamas' inspector and technician licenses can be disciplined for violating Health and Safety Code sections 44072.10, subdivisions (a) and (c), and 44072.2, subdivision (d), in that Lamas committed dishonest, fraudulent, or deceitful acts whereby another is injured by allowing the issuance of Certificates of Compliance for the subject vehicle without bona fide inspections of the emission control devices and systems on the vehicle, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

EIGHTH AND NINTH CAUSES FOR DISCIPLINE

19. Respondent facility's Brake Inspection Station and Lamp Station licenses and respondent Lamas' Brake Adjustor and Lamp Adjustor licenses can be disciplined under Business and Professions Code section 9889.3, subdivision (d), in that respondents committed acts involving dishonesty, fraud, or deceit whereby another was injured.

TENTH CAUSE FOR DISCIPLINE

20. Respondent facility's Smog Check Station license can be disciplined for violating Health and Safety Code sections 44072.10, subdivisions (a) and (c), and 44072.2, subdivision (d), in that the facility committed dishonest, fraudulent, or deceitful acts whereby another was injured by allowing the issuance of Certificates of Compliance for the subject vehicles without bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

Costs

21. Pursuant to Business and Professions Code section 125.3, the Bureau is entitled to recover its costs, based on Legal Conclusions 1 through 20. The reasonable amount of costs is \$10,228.87, based on Factual Finding 42.

22. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter licensees from exercising their

right to a hearing. Thus, the Bureau must not assess the full costs where it would unfairly penalize the licensee who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Bureau must consider a licensee's subjective good faith belief in the merits of his or her position and whether the licensee has raised a colorable challenge; the Bureau must consider a licensee's ability to pay; and the Bureau may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Zuckerman, supra* at p. 45.)

23. Applying these factors results in a reduction of the amount of costs. Respondents used the hearing process for a determination one of the alleged bases for discipline was not established by the evidence (see Legal Conclusion 13), and to obtain an outcome of probation instead of outright revocation (see Legal Conclusions 28-31, below). These same elements may be considered as respondents' "colorable challenge" to the allegations against them. The varying and inconsistent evidence of Lamas's income and expenses is troubling and, as noted, negatively affects his credibility. However, the overall picture established respondents have some limits on their ability to pay the total amount of costs. The Bureau did not conduct a disproportionately large investigation here and respondents' conduct was not relatively innocuous.

24. Costs will be reduced by half, to a total of \$5,114.43. Also considered in this reduction is that the probation terms allow respondents to pay costs over the first 54 months of probation, which would be an amount of \$94.71 per month. In light of all of the evidence submitted, this amount is within respondents' ability to pay.

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Other Legal Conclusions

25. Any other ARD registration held by respondents may be disciplined pursuant to Business and Professions Code section 9884.7, subdivision (c), for the violations established herein. The STAR certification may be disciplined in light of the order that follows.

26. Any other licenses issued to respondents pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code may be disciplined as a result of the discipline of the licenses that are the subject to this proceeding, based on Health and Safety Code section 44072.8.

27. All allegations upon which findings or conclusions are not made are deemed unproven, or surplusage.

Determination

28. The ALJ has reviewed and considered the Bureau's Guidelines for Disciplinary Orders and Terms of Probation (rev. March 2016) (Guidelines) in arriving at the disposition for this case, including the various factors to be considered and the recommended discipline for the various types of misconduct established in this case. The primary purpose of this proceeding is to protect the public, not to punish a licensee. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.)

29. The Guidelines list 15 aggravating factors that should be considered in determining discipline. The following two aggravating factors apply to respondents. Respondents had prior office conferences and citations from the Bureau. The Guidelines list 12 mitigating factors. The applicable mitigating factor is that respondents have changed their business practice so that Lamas's badge and PIN are

more secure and the offending employee was terminated. The Guidelines specify the recommended discipline for the established misconduct of respondents varies from outright revocation to two, three, or five years of license probation with various optional terms.

30. In this case, a five-year probation is warranted. On the one hand, respondents acted negligently by failing to supervise DeLoera, being lax in keeping Lamas's smog inspector badge and PIN secure, and in not monitoring the use of the smog test computer and issuance of Certificates of Compliance. Such failures allowed DeLoera to clean plug the five subject vehicles. Respondents are responsible for the acts of their employee. Respondents also have a history of citations, in 2009 and 2017, for improper smog tests. On the other hand, respondents themselves did not perform the five subject tests. DeLoera's acts were willful and contrary to law. The five subject tests were spread over a period from March 2019 to July 2021, making DeLoera's unlawful acts infrequent and perhaps harder to discover.

31. Outright revocation under such circumstances would be overly punitive. The discipline order below is intended to protect the public from any further improper smog tests as well as to facilitate the rehabilitation of the probationers without being unduly burdensome. Such considerations warrant a probationary period of five years, as well as a five-day actual suspension for respondents to implement practices to provide increased supervision of employees and better oversight of the issuance of VIRs and Certificates of Compliance at respondent facility, and training courses to assure probationers have knowledge of currently required procedures.

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ORDER

1. IT IS HEREBY ORDERED that the ARD Registration issued to respondent Lamas Brothers Automotive, Inc., doing business as Leos Auto Repair, and Leonel Lamas, number ARD 249859, is hereby revoked. The revocation is stayed under terms, as noted below.

2. IT IS HEREBY ORDERED that the Smog Check Station license issued to respondent Lamas Brothers Automotive, Inc., doing business as Leos Auto Repair, and Leonel Lamas, number RC 249859, is revoked. The revocation is stayed under terms, as noted below.

3. IT IS HEREBY ORDERED that the Lamp Station license issued to respondent Lamas Brothers Automotive, Inc., doing business as Leos Auto Repair, and Leonel Lamas, number LS 249859, Class A, is revoked. The revocation is stayed under terms, as noted below.

4. IT IS HEREBY ORDERED that the Brake Inspection Station license issued to respondent Lamas Brothers Automotive, Inc., doing business as Leos Auto Repair, and Leonel Lamas, number BS 249859, Class C, is revoked. The revocation is stayed under terms, as noted below.

5. IT IS HEREBY ORDERED that the Smog Check Inspector license issued to respondent Leonel Lamas, number EO 37143, is revoked. The revocation is stayed under terms, as noted below.

6. IT IS HEREBY ORDERED that the Smog Check Repair Technician license issued to respondent Leonel Lamas, number EI 37143, is revoked. The revocation is stayed under terms, as noted below.

7. IT IS HEREBY ORDERED that the Brake Adjuster license issued to respondent Leonel Lamas, number BA 37143, Class C, is revoked. The revocation is stayed under terms, as noted below.

8. IT IS HEREBY ORDERED that the Lamp Adjuster license issued to respondent Leonel Lamas, number LA 37143, Class A, is revoked. The revocation is stayed under terms, as noted below.

All of the foregoing revocations are stayed, and respondents' registration and licenses are placed on probation for five years under the terms specified below.

Any additional license issued under Chapter 5 of the Health and Safety Code in the name of respondents Lamas Brothers Automotive, Inc., doing business as Leos Auto Repair, or Leonel Lamas, is subject to the same terms specified below.

During the period of probation for the above registration, licenses and licensing rights, respondents shall:

1. Obey All Laws

During the period of probation, respondents shall comply with all federal and state statutes, regulations and rules governing all Bureau of Automotive Repair (Bureau) registrations and licenses held by respondents.

2. Posting of Sign

During the period of suspension specified in term 12 below, respondents shall prominently post a sign or signs, provided by the Bureau, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign or signs shall be conspicuously displayed in a location or locations open to and

frequented by customers. The location(s) of the sign(s) shall be approved by the Bureau and shall remain posted during the entire period of actual suspension.

3. Quarterly Reporting

During the period of probation, respondents shall report either by personal appearance or in writing as determined by the Bureau on a schedule set by the Bureau, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

4. Report Financial Interests

Respondents shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by the Bureau during the period of probation, report any financial interest which any respondent or any partners, officers, or owners of any respondent facility may have in any other business required to be registered pursuant to Business and Professions Code section 9884.6.

5. Access to Examine Vehicles and Records

Respondents shall provide Bureau representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondents shall also provide Bureau representatives unrestricted access to all records pursuant to Bureau laws and regulations.

6. Tolling of Probation

If, during probation, a respondent(s) leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction

of California, that respondent(s) shall notify the Bureau in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

All provisions of probation other than cost reimbursement requirements, training requirements, and that respondents obey all laws, shall be held in abeyance during any period of time of 30 days or more in which a respondent(s) is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which a respondent(s) is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

7. Violation of Probation

If a respondent(s) violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard may set aside the stay order and carry out the disciplinary order provided in the decision. Once respondent(s) is served notice of the Bureau's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

8. Maintain Valid License

Respondents shall, at all times while on probation, maintain a current and active registration and/or licenses with the Bureau, including any period during which suspension or probation is tolled. If a respondent's registration or license is expired at

the time the decision becomes effective, the registration or license must be renewed by respondent within 30 days of that date. If a respondent's registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal respondent's registration or license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall constitute a violation of probation.

9. Cost Recovery

Respondents are jointly and severally liable to pay the Bureau \$5,114.43 for the reasonable costs of the investigation and enforcement of case number 78/21-9982. Respondents shall make such payments according to a payment plan approved by the Bureau. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six months before probation terminates. Respondents shall make payment by check or money order payable to the "Bureau of Automotive Repair" and shall indicate on the check or money order that it is for cost recovery payment for case number 78/21-9982. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. The Bureau reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

10. Completion of Probation

Upon successful completion of probation, respondents' affected registration and licenses will be fully restored or issued without restriction, if respondents meet all

current requirements for registration or licensure and have paid all outstanding fees, monetary penalties, or cost recovery owed to the Bureau.

11. License Surrender

Following the effective date of a decision that orders a stay of invalidation or revocation, if a respondent(s) ceases business operations or is otherwise unable to satisfy the terms and conditions of probation, respondent(s) may request that the stay be vacated. Such request shall be made in writing to the Bureau. The Director and the Bureau Chief reserve the right to evaluate the respondent's request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

Respondents may not petition the Director for reinstatement of a surrendered registration and/or license, or apply for a new registration or license under the jurisdiction of the Bureau at any time before the date of the originally scheduled completion of probation. If respondents apply to the Bureau for a registration or license at any time after that date, respondents must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to the Bureau and left outstanding at the time of surrender.

12. Actual Suspension

Respondents' registration, licenses and licensing rights, each and every one of them, are suspended for five (5) consecutive days, beginning on the effective date of the Decision and Order.

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13. Training Courses

During the period of probation, respondent Leonel Lamas shall attend and successfully complete a Bureau -specified and -approved training course in inspection, diagnosis and/or repair of emission systems failures and engine performance, applicable to the class of license he holds. Respondent Leonel Lamas shall provide to the Bureau proof of enrollment in the course within 30 days of the effective date of the decision, and proof of successful course completion within 180 days of the effective date of the decision.

Failure to provide proof of enrollment and/or successful course completion to the Bureau within the timeframes specified shall constitute a violation of probation, and respondent Leonel Lamas shall be prohibited from issuing any Certificate of Compliance or noncompliance until such proof is received.

Within 60 days of the effective date of the decision, respondent Leonel Lamas shall attend a Write It Right presentation provided by a Bureau Representative, at the location, date, and time determined by the Bureau.

DATE: **06/02/2023**

David Rosenman

DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings