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

In the Matter of the Accusation Against:

BENNY MARTINEZ-MEMBER, BENNYS SMOG LLC dba BENNYS SMOG,

Automotive Repair Dealer Registration No. ARD 282367

Smog Check Station License No. RC 282367

and

BENNY MARTINEZ,

Smog Check Inspector License No. EO 638920

Smog Check Repair Technician License No. EI 638920

Respondents.

Case No. 79/18-7150

OAH No. 2019070929

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Bureau of Automotive Repair as its Decision in the above-entitled matter.

This Decision shall become effective on_____

IT IS SO ORDERED this _____ day of _____.

By: _____

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PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 28, 2020, in Los Angeles, California.

Michelle Nijm, Deputy Attorney General, appeared on behalf of complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs (Department).

William D. Ferreira, Attorney at Law, appeared on behalf of respondents Benny Martinez-Member, Bennys Smog LLC doing business as Bennys Smog (respondent Station) and Benny Martinez (respondent Martinez). Respondent Station and respondent Martinez are referred to collectively as "respondents."

At hearing, complainant moved to amend the Accusation (Exhibit 1) by adding allegations based on violations of Health and Safety Code section 44072.10, subdivision (c).[1] Respondents opposed the motion. The proposed amendments did not modify or supplement the factual allegations contained in the Accusation; thus, respondents were unable to demonstrate they needed additional time to prepare a defense to the amendments. (See Gov. Code, § 11507.) The ALJ thereby granted complainant's motion and ordered the amendment of the Accusation by interlineation as follows:

1. The spelling of Accusation was corrected on AGO-001;

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[1] All undesignated satutory references are to the Health and Safety Code.

2. The phrase "44072.10, subdivision (c)" was added to paragraph 26, line 21, which was amended to read as follows: "pursuant to Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subdivision (c), in that between February"; and

3. The phrase "44072.10, subdivision (c)" was added to paragraph 29, line 28, which was amended to read as follows: "subject to discipline pursuant to Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subdivision (c), in that".

The ALJ kept the record open until February 7, 2020, to allow respondents to submit additional exhibits and to allow complainant to file a response to the exhibits. On January 30, 2020, respondents filed two documents: the first, a copy of a Smog Check Vehicle Inspection Report (VIR), dated June 26, 2017, for a KIA Sedona alongside a Bennys Smog invoice, issued to Jose Munoz and dated June 26, 2017, for a smog test for the same Kia Sedona, marked as Exhibit C, and the second, a copy of a VIR, dated February 24, 2018, for a Lincoln Navigator alongside a Bennys Smog invoice, issued to Jose Munoz and dated February 24, 2018, for a smog test for the same Kia Sedona identified in Exhibit C, marked as Exhibit D. Complainant submitted no objection to the admission of Exhibits C or D, and the documents were admitted into evidence.

The record was closed and the matter was deemed submitted on February 7, 2020.

EVIDENTIARY MATTER

At the administrative hearing, respondents requested that the ALJ take official notice of a Bureau PowerPoint presentation, dated January 18, 2018, and entitled "OBD Data Check," given by Clay Leek, BAR Deputy Chief, to the BAR Advisory Group. The document, marked as Exhibit B, discusses a BAR-created computer program that blocks smog repair stations from issuing a certificate of compliance for an inspected vehicle transmitting data that varies excessively from the expected computer data for that vehicle or contains mismatched information or other irregularities. Included in the presentation are results of the certificate-blocking program and BAR license and registration discipline statistics. Respondents contend that Exhibit B is relevant because it shows the availability of the certificate-blocking program as a condition of probation. In support of their request, respondents filed a declaration by William Ferreira, Esq., stating that he had found Exhibit B on the Bureau website. Mr. Ferreira's Declaration was marked as Exhibit E.

On February 7, 2020, complainant filed an Objection to Request for Judicial Notice, marked as Exhibit 14, asserting that respondents had failed to lay an appropriate foundation for admission of Exhibit B or demonstrate that Exhibit B is the proper subject of a request for judicial notice. Complainant did not dispute the availability of Exhibit B on the BAR website or the accuracy of its contents.

Government Code section 11515 states in pertinent part: "In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State." California trial courts may take judicial notice of the official acts of the legislative,

executive, and judicial departments of the United States and any state, territory, or possession of the United States. (Evid. Code, § 452, subd. (c).) Only relevant evidence is admissible by judicial notice. (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 231.)

Posting Exhibit B on the BAR website is an official act, falling within the scope of Evidence Code section 452, subdivision (c). Exhibit B is also admissible as an official record under the relaxed evidentiary rules of the Government Code. However, the contents of the document are not relevant for respondents' stated purpose. Exhibit B does not address license probation or the feasibility of implementing the certificate-blocking program as a condition of license probation. Accordingly, respondents' request for official notice of Exhibit B is denied.

SUMMARY

Complainant established that respondents engaged in clean plugging four vehicles in violation of the Automotive Repair Act and the Motor Vehicle Inspection Program. Cause therefore exists to discipline respondents' registration and licenses. Respondents, however, demonstrated that the clean plugging was unintentional. Revocation, therefore, would be unduly punitive. A 30-day suspension and five-year probationary period consistent with the Bureau's disciplinary guidelines will protect the public.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant filed this action in his official capacity.

2. Respondent Station is an automotive repair and smog check facility located in Rialto. BAR issued an automotive repair registration (ARD 282367) to respondent Station on December 30, 2015. The registration is scheduled to expire on December 31, 2020. BAR also licensed respondent Station as a smog check station (RC 282367) on November 30, 2017. Respondent Station's smog check station license is scheduled to expire on December 31, 2020. Respondent Station was certified as a STAR station on December 14, 2017.

3. Respondent Martinez holds a Smog Check Inspector (EO) license (EO 638920), issued by BAR on January 20, 2016, and a Smog Check Repair Technician license (EI 638920), issued by BAR on November 20, 2017. These two licenses expire on April 30, 2020.

4. Respondent Martinez is the Smog Check Inspector and Repair Technician who performed the four smog tests at respondent Station that are at issue in this proceeding.

5. After service of the Accusation, respondents timely filed a Notice of Defense, seeking a hearing. This hearing followed.

Smog Test Procedures

6. Under California law, beginning in March 2015, a smog inspector conducting a smog test inspection on most vehicles built after 1999 is required to

retrieve information from the tested vehicle's On-Board Diagnostic Inspection System (OIS). Specifically, the licensed inspector connects the smog check station's test computer through a cable, called the Data Acquisition Device (DAD), to a Diagnostic Link Connector (DLC), which is a receptacle data port found inside the vehicle's passenger cabin. Through the DAD cable, the station's computer retrieves information from the vehicle's on-board computer. During the smog test, the data retrieved from the vehicle's on-board computer is sent to the test station's computer and then transmitted over the Internet to the Bureau's database, known as the Vehicle Information Database (VID). The data transmitted to the VID includes the "eVIN," a test protocol, and a parameter identification (PID) count. Each of these elements is described in more detail below.

7. The eVIN is the Vehicle Identification Number (VIN) in electronic form. 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. Some vehicles have a bar code on a doorpost that, when scanned, also transmits the VIN. Although some vehicles built between 2000 and 2005 do not transmit an eVIN, the majority do so, and vehicles built after 2005 are required to be able to transmit an eVin.

8. The test protocol is the communication language used by the vehicle's on-board computer/power train module to transmit data to the test station's computer. It is a combination of letters and numbers that indicate one of several available computer languages. One of these available test protocols will be specific to a vehicle manufacturer and vehicle year and model.

9. The PID count refers to the number of data points transmitted from the tested vehicle. The data may include, for example, the engine coolant temperature,

intake air temperature, fuel mixture, and other data used by the on-board computer system to check for proper engine performance and compliance with smog laws. Each year, make, and model of vehicle reports a specific known PID count, with occasional slight variations, programmed during the manufacture of the vehicle. At a minimum, a vehicle will report a PID count of the number of data points reporting from the on-board computer/power train control module that include data that is specific to emissions controls. Sometimes a PID count consists of two numbers, such as "20/8." In such instances, the second number indicates the number of data points reporting from other computer modules in the vehicle, such as the airbag control module or the transmission control module.

10. A licensed smog check technician or inspector is the only person authorized by the Bureau to perform smog tests. The technician or inspector is issued a personal access code and license number, which are used to access the test station's computer to use the OIS to perform smog tests.

11. Licensed smog check technicians and inspectors are required by California Code of Regulations, title 16 (Regulations), section 3340.45, to follow the inspection procedures set forth in The Smog Check Manual (Manual). These procedures include the entry of vehicle identification information into the VID, and are described as follows in the Manual:

> 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.

- 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.

(Exhibit 12, p. 4; Exhibit 13, p. 6, emphasis in original.)

12. If a vehicle passes all parts of a smog test, it will be issued a Certificate of Compliance that is transmitted automatically to the Bureau's VID. The smog test station also prints the VIR, signed by the inspector, indicating whether the vehicle passed the smog test and, if so, the number assigned to the Certificate of Compliance. The printout is given to the vehicle owner, and the station is required to save a copy. The Certificate of Compliance is also transmitted to the DMV for use in vehicle registration.

13. In some circumstances, smog check inspectors and smog test station operators engage in the illegal practice of clean plugging. In clean plugging, the vehicle being tested is not connected to the test station's computer system. Instead, the test station's DAD is either plugged into another vehicle, or into a simulator which produces data of the type that should be communicated from the vehicle being tested. By this method, a Certificate of Compliance may be issued even though the vehicle listed on the VIR was not the vehicle, or source (simulator), from which the computer data was received.

14. In some instances, a vehicle owner who doubts the vehicle will pass a smog test may take unlawful actions, without the smog technician's knowledge, to ensure the vehicle's passage. These actions include installing a different on-board computer to be connected to the DAD at the smog test station or installing a different computer circuit in the vehicle's on-board computer.

The Bureau Inspection

15. Marc Ortega is a Program Representative II specialist at the Bureau. He reviewed data in the Bureau's VID and specifically data of smog tests performed by respondent Martinez at respondent Station. Mr. Ortega's investigation revealed anomalies in information about the smog inspections respondent Martinez conducted for four vehicles over the course of 13 months. (Exhibit 4.) Specifically, Mr. Ortega found that four vehicles inspected by respondent Martinez between February 14, 2017, and February 24, 2018, had communication protocols and PID amounts that did not match the expected protocols or PID amounts for the vehicles being certified. According to Mr. Ortega, these discrepancies confirmed that these vehicles, each of which received smog certificates from Respondent Station, were not properly tested

and instead were clean plugged. The specifics regarding each of the four vehicles follows.

VEHICLE 1, 2004 DODGE STRATUS SE

16. Vehicle 1 is a 2004 Dodge Stratus SE, tested by respondent Martinez on February 14, 2017. The VIR indicates respondent Martinez entered the VIN for Vehicle 1 manually or by scanning a DMV document. This vehicle reported communication protocol I914, when protocol JVPW was expected. It reported a PID count of 20 rather than the expected PID count 18/3. An eVIN was expected but was not reported. Mr. Ortega testified he did not know the source of the false data. According to Mr. Ortega, 98.6 percent of tested 2004 Dodge Stratus SE vehicles reported the expected data. No information was provided regarding the prior testing history of Vehicle 1, i.e., whether Vehicle 1 has transmitted the expected data in prior smog tests.

VEHICLE 2, 2003 HONDA ODYSSEY EXL

17. Vehicle 2 is a 2003 Honda Odyssey EXL, tested by respondent Martinez on October 5, 2017. The VIN was scanned from the vehicle. This vehicle reported communication protocol ICAN29bt5, when protocol I914 was expected. It reported a PID count of 37/19 rather than the expected PID count of 16. An eVIN was reported, but it was not expected. The same vehicle was tested on May 2, 2015, at a different smog check station, at which time it did not transmit an eVIN and had the expected communication protocol and PID count. According to Mr. Ortega, 99.5 percent of tested 2003 Honda Odyssey EXL vehicles reported the expected data.

18. According to Mr. Ortega's investigation, the test data shows that a 2009 Honda Accord EXL was the vehicle used to generate the VIR for Vehicle 2. The data transmitted by the 2009 Honda Accord EXL matched the data transmitted for Vehicle

2. The 2009 Honda Accord EXL was smog-certified by respondent Martinez at respondent Station on October 5, 2017, with a test time start as 10:15 a.m., on the same day as, and one minute after, the inspection of Vehicle 2. (Exhibit 7, pp. AGO-002, AGO-006.)

VEHICLE 3, 2003 NISSAN FRONTIER KING CAB XE

19. Vehicle 3 is a 2003 Nissan Frontier King Cab XE, tested by respondent Martinez on November 28, 2017. The VIN was manually entered or scanned from a DMV document. This vehicle reported the communication protocol ICAN11bt5, when protocol I914 was expected. It reported a PID count of 128 rather than the expected PID count of 18. An eVIN was reported, but it was not expected. The same vehicle was tested on November 23, 2016, at a different smog check station, at which time it transmitted the expected communication protocol and PID count and did not transmit an eVIN. According to Mr. Ortega, 99.3 percent of tested 2003 Nissan Frontier King Cab XE vehicles reported the expected data. Mr. Ortega opined that the incorrect data was transmitted by a simulator.

VEHICLE 4, 2005 LINCOLN NAVIGATOR

20. Vehicle 4 was a 2005 Lincoln Navigator, tested by respondent Martinez on February 24, 2018. The VIN was manually entered or scanned from a DMV document. This vehicle reported communication protocol KWPF, when protocol ICAN11bt5 was expected. It reported a PID count of 20 rather than the expected PID count of 44 or 44/16. The wrong eVIN was reported. According to Mr. Ortega, 99.4 percent of tested 2005 Lincoln Navigator vehicles reported the expected data. On December 10, 2017, Respondent Martinez had tested Vehicle 4 and had transmitted the correct eVIN, communication protocol, and PID count.

21. According to Mr. Ortega's investigation, the test data shows that a 2005 Kia Sedona was the vehicle used to generate the VIR for Vehicle 4. The data transmitted by the 2005 Kia Sedona matched the data transmitted for Vehicle 2. The 2005 Kia Sedona was smog-certified by respondent Martinez at respondent Station on June 26, 2017.

22. Based on Mr. Ortega's testimony, complainant established that Vehicles 1, 2, 3, and 4 had been clean plugged, either by connecting a vehicle other than the one being tested to respondent Station's computer or by using a simulator. Mr. Ortega did not establish whether respondents knowingly or intentionally entered false information regarding the tested vehicle, planned to use the incorrect vehicle, or intended to deceive BAR or the Department by their actions. Nor did Mr. Ortega present any evidence that respondents benefited financially from the clean plugging. In addition, Mr. Ortega did not establish that four separate unrelated instances of clean plugging constituted a pattern of any wrongdoing by respondents.

Respondents' Evidence

23. Respondent Martinez testified openly and candidly. He is 50 years old. Becoming a smog check repair technician and opening respondent Station is his second career. Before obtaining his licenses, he was a maintenance mechanic, repairing and installing machinery for two furniture companies for 15 years. While working as a maintenance mechanic, he attended automotive training at night after work. He took the automobile repair test three times; it took him four months to pass the test. Neither respondent Station nor respondent Martinez have a history of license discipline.

24. Respondent Martinez denied intentionally clean plugging any vehicle. He testified he never demanded or accepted extra money to cheat on a smog test and he always said no to anyone who asked him to do so. Respondent Martinez supplied invoices for each of the vehicles showing that he had charged $41 for the inspection. He testified he never accepted more for a test that was reflected on the invoice.

25. Respondent Martinez testified he had no incentive to clean plug any vehicles. He pointed out he would make more money if a vehicle failed the smog inspection because he could then charge the vehicle owner to repair the problem. Respondent Martinez also presented evidence showing that none of the four vehicles had ever failed a smog test prior to testing at respondent Station. (Exhibit A.) Thus, the vehicles' owners had no reason to suspect the vehicles would fail a smog inspection when tested by respondent Station or to demand that the vehicles clean-plugged.

26. Respondent Martinez pointed out that the problematic tests occurred soon after he obtained his smog check repair and inspection licenses. He testified that he had not received extensive training at school on OIS testing and most of the focus of his training was on BAR-97 testing, a different type of smog test for older vehicles.

27. Respondent Martinez had plausible explanations for the clean plugging of the four vehicles. With respect to Vehicle 1, respondent Martinez explained that respondent Station had two adjacent bays where the vehicles were tested and his employee, who was responsible for driving the vehicles into the bays, may have driven the wrong car into the testing bay. Respondent Martinez explained that similar confusion resulted in the erroneous testing results for Vehicle 2. Respondent Martinez believes he confused the two Hondas, which were in adjacent bays, and scanned the wrong VINs into the computer. With respect to Vehicle 3, respondent Martinez testified he did not own a simulator, and, if he had owned one, it would not make

sense to use it only one time. He therefore contended that the simulator had been installed by the vehicle owner without his knowledge. With respect to Vehicle 4, respondent Martinez pointed out that the Lincoln Navigator and the Kia Sedona were owned by the same individual and presented invoices confirming his testimony. (Exhibits C and D.) He believed he was given the incorrect DMV paperwork by the owner and scanned the wrong VIN into the computer.

28. Respondent Martinez acknowledged he did not always follow the procedures set forth in the Manual for entering the VIN. (See Factual Finding 11.) For Vehicles 1, 3, and 4, Respondent Martinez scanned the VIN on the DMV registration documents, and he admitted he may not have verified that the VIN on the registration document was the same as the VIN on the vehicle, as the Manual requires. He explained that often the vehicle VINs were illegible or blocked with garbage. He attributed his mistakes to his inexperience and not to any intentional misconduct. Nonetheless, he admitted his conduct violated BAR procedures.

29. Since receiving the Accusation, respondent Martinez now takes the necessary time to make sure he has the correct VIN and the VIN on the paperwork matches the VIN on the vehicle. If he notices anything amiss with the vehicle to be tested or with the paperwork, he rejects the vehicle for testing. Respondent Martinez is willing to take additional training to improve his skills.

30. Respondent Martinez takes his smog inspector and technician licenses seriously. He has three children and several grandchildren, and he does not want them to breathe bad air.

31. Complainant offered no evidence refuting respondents' explanation of the accidental clean plugging of Vehicles 1, 2, and 4 or demonstrating respondents had any knowledge of the simulator used with Vehicle 3.

Costs of Investigation and Enforcement

32. Under Business and Professions Code section 125.3, complainant requested costs of investigation and enforcement in the amount of $7,255.76. This amount consists of costs incurred by BAR investigators and legal fees of the Office of the Attorney General for which the Bureau has been, or will be, billed.

33. At hearing, complainant introduced documentation to support its investigation and prosecution costs. (Exhibit 11.) Specifically, complainant produced a Certification of Prosecution Costs: Declaration of Michelle Nijm, requesting prosecution costs in the amount of $6,585, consisting of actually incurred costs of $6,145 and projected costs of $440. Attached to that certification is a printout of a billing statement, which describes tasks performed by the Office of the Attorney General through January 24, 2020. The printout reflects that three different Deputies Attorney General worked on this matter and were supervised by two different Supervising Deputies Attorney General. Considering that many of the tasks listed were duplicative and complainant presented only one witness in the matter, the amount of actually incurred costs shall be reduced by 20 percent ($1,229) to $4,916. Complainant's estimated costs are disallowed, as complainant failed to present evidence of the actual costs incurred to the date of hearing. (See Bus. & Prof. Code, § 125.3, subd. (c) [permitting good faith estimate of costs only where evidence of actual costs incurred unavailable].)

34. Complainant also introduced evidence of investigation costs of $670.76, consisting of Mr. Ortega's certification and a printout of Investigative and Other Costs. The Bureau's investigation costs are reasonable.

35. Respondent Martinez's sole source of income are his earnings from respondent Station. He testified he would be able to pay the requested costs pursuant to a reasonable payment plan.

LEGAL CONCLUSIONS

1. The Bureau's highest priority in exercising its licensing, regulatory, and disciplinary functions is protection of the public. (Bus. & Prof. Code, § 9880.3.)

2. The Clean Air Act, 42 U.S.C. § 7401, et seq., provides air quality standards for the nation and requires individual state compliance. (42 U.S.C. §§ 7410, 7413.) To control and eliminate air pollutants, the California Legislature established uniform procedures for compliance with standards which control or eliminate pollution. (Section 43000, subd. (c).) The Bureau must adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and sources of air pollution. (Section 43013, subd. (a).) As of January 1, 2006, the Bureau has been charged with implementing regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions. (Section 43018.5, subd. (a).)

3. When an agency alleges licensee misconduct, as is the case with this Accusation, complainant has the burden of proving the allegations of 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.)

Applicable Law

4. A. Business and Professions Code section 9884.7, subdivision (a), authorizes the Director of Consumer Affairs (Director) to discipline the registration of an automotive repair dealer if the automotive repair dealer cannot show there was a bona fide error, and any of the following occur: the dealer or any employee makes or authorizes any 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 (subd. (a)(1)); conducts an act that constitutes fraud (subd. (a)(4)); or fails to materially comply with the Program or its regulations (subd. (a)(6)).

B. Neither the Automotive Repair Act (Bus. & Prof. Code, § 9880 et seq.), nor the regulations promulgated under it, define "bona fide error." A bona fide error is defined as a mistake that is unintentional, inadvertent, and in good faith. (Black's Law Dict. (5th ed. 1979) p. 161, col. 1.) Good faith is defined as "that state of mind denoting honesty of purpose, freedom from intention to defraud, and . . . being faithful to one's duty or obligation." (*Id.* at p. 624, col. 1; *Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 920–921.)

5. Section 44072.2, subdivision (a), authorizes the Director to discipline a license if the license holder violates statutory provisions of the Motor Vehicle Inspection Program, which establishes inspections standards and test procedures. These provisions including failing to ensure that the emission control tests are performed in accordance with BAR procedures (section 44012); issuing electronic smog certificates of compliance without ensuring that the vehicles were properly tested and inspected (section 44015, subd. (b)); and making false entries for the electronic smog certificates of compliance (section 44059).

6. Section 44072.2, subdivision (c), authorizes the Director to discipline a license if the license holder fails to comply with the following regulations: falsely or fraudulently issuing electronic certificates of compliance (Cal. Code Regs., tit. 16 (Reg.), § 3340.24, subd. (c)); improperly issuing electronic certificates of compliance when the vehicles had not been properly inspected in accordance with Regulations, section 3340.42 (Reg., § 3340.35, subd. (c)); and failing to conduct the required smog tests and inspections in accordance with BAR specifications (Reg., § 3340.42).

7. Section 44072.2, subdivision (d), authorizes the Director to discipline a license if the license holder "commits any act involving dishonesty, fraud, or deceit whereby another is injured." The statute does not define "fraud."

8. A. Section 44072.10, subdivision (c), authorized the Director to revoke a license for fraudulently certifying or participating in the fraudulent certification or inspection of a vehicle. The statute defines a fraudulent inspection to include the "[i]ntentional or willful violation of this chapter or any regulation, standard, or procedure of the department implementing this chapter."

B. Respondents' counsel argued that complainant cannot prove that respondents engaged in fraudulent inspections because, as set forth in California Civil Code sections 1571 through 1573, a finding of fraud requires either an intent to deceive (actual fraud – Civ. Code, § 1572), or a "breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice" (constructive fraud - Civ. Code, § 1573). Respondents' argument is not persuasive.

C. Civil Code sections 1571 through 1573 do not control in this matter. When two statutes ostensibly cover the same subject matter, are inconsistent, and

cannot be harmonized, the specific statute controls over the more general statute. (See Code Civ. Proc., § 1859; *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 119.) In this case, the specific statute, section 44072.10, subdivision (c)(4), controls. Specifically, a "fraudulent inspection" occurs when a licensee intentionally or willfully violates any law or regulation of the Motor Vehicle Inspection Program.

D. Section 44072.10, subdivision (c)(4), defines "fraudulent inspection" in the disjunctive: either an intentional or a willful violation of the law may result in a fraudulent inspection. Statutory construction "that renders some statutory language surplusage or redundant is to be avoided." *(Bernard v. Foley* (2006) 39 Cal.4th 794, 810–811.) Therefore, to avoid redundancy, "willful" should be construed as having a different meaning than "intentional."

E. "Willful" is not defined in either the Health and Safety Code or the Business and Professions Code. When a term is not defined within the code in which it is used, the term may be defined by reference to a different code. (See *Brown v. State Department of Health* (1978) 86 Cal.App.3d 548, 554 [applying the Penal Code definition of "knowingly" to a Business and Professions Code statute].) Penal Code section 7 defines "willful" as the general intent to perform an act, not a specific intent to violate a law. The terms "willful" or "willfully" means "'a purpose or willingness to commit the act . . .' without regard to motive, intent to injure, or knowledge of the act's prohibited character. . . . The terms imply that the person knows what he is doing, intends to do what he is doing, and is a free agent. . . . Stated another way, the term 'willful' requires only that the prohibited act occur intentionally." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [citations omitted].)

F. The courts have employed the Penal Code definition of "willful" in licensing discipline cases. (See *Acco Engineered Systems, Inc. v. Contractors' State License Bd.* (2018) 30 Cal.App.5th 80 [applying the Penal Code definition of "willful" to Contractors State License Board disciplinary proceedings]; *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1093 [willful violation of rules governing attorneys "does not require bad faith or actual knowledge of the provision which is violated"].) The *Acco* court rejected the argument that liability based on willful conduct would be precluded where a licensee acted in good faith. (*Acco Engineered Systems, Inc., supra,* 30 Cal.App.5th at p. 93 ["moral blameworthiness is not a necessary element of willful conduct" [citation omitted]].) The court also rejected the contention that construing willful to require only a general intent meant that every violation of the licensing program would be subject to disciplinary action, akin to a strict liability standard. (*Id.* at p. 92.) According to the court, licensees would not subject their licenses to discipline if they violated a licensing law on mistaken advice from the agency or if the governing statutes were ambiguous or subject to interpretation. (*Id.* at p. 93.)

9. The Director may revoke the registration for all places of business operated in this state by an automotive repair dealer 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).)

10. When the Director revokes a license under the Motor Vehicle Inspection Program, the Director may revoke any additional license in the name of the licensee issued under the Program. (Section 44072.8.)

Causes for Discipline

11. *First Cause for Discipline Against Respondent Station (Untrue or Misleading Statements)*: Complainant established by a preponderance of evidence that respondent Station made or authorized statements which it knew or in the exercise of reasonable care should have known were untrue or misleading as follows: Between February 14, 2017, and February 24, 2018, respondent Station certified that four vehicles passed smog check inspections and were in compliance with applicable laws and regulations. In fact, respondent Station, through respondent Martinez, failed to enter the correct VIN into its computer when testing Vehicles 1, 3, and 4. Respondent Martinez erroneously and negligently relied on the DMV paperwork instead of checking the VIN on the vehicle, as he was required to do. (Factual Findings 15,16, 19 through 21, 27, and 28.) Complainant also established by a preponderance of evidence that respondent Martinez failed to connect the DAD to Vehicle 2, the vehicle that was to be tested. (Factual Findings 17, 18, 27.) As a result, the information respondent Martinez provided to BAR and the DMV for the smog tests of these four vehicles was untrue and misleading and respondent Station issued false smog certificates for the four vehicles. Respondent Station's conduct constitutes negligence, not a bona fide error, because with proper diligence respondent Station should have known the smog certificates were false. Cause therefore exists to discipline respondent Station's ARD registration pursuant to Business and Professions Code section 98847, subdivision (a)(1). (Legal Conclusion 4.)

12. *Second Cause for Discipline against Respondent Station (Fraud):* Complainant failed to establish by a preponderance of evidence that respondent Station committed acts of fraud by clean plugging vehicles. Neither the Automotive Repair Act nor the regulations promulgated under it include a definition of "fraud." In

general, fraud will be found when an individual "intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him." (*Wayne v. Bureau of Private Investigators and Adjusters, Department of Professional and Vocational Standards* (1962) 201 Cal.App.2d 427, 438; see Civ. Code, § 1572.) Complainant failed to establish that respondent Station intentionally transmitted false data for the purpose of deceiving the Bureau or the DMV. (Factual Findings 22 through 28, and 31; Legal Conclusion 4.) Cause therefore does not exist to discipline respondent Station's ARD registration under Business and Professions Code section 9884.7, subdivision (a)(4).

13. *Third Cause for Discipline against Respondent Station (Failure to Comply with the Motor Vehicle Inspection Program)*: Complainant established by a preponderance of evidence that respondent Station violated sections 44012, 44015, subdivision (b), and 44059 by (1) failing to ensure that the emission control tests for Vehicles 1, 2, 3, and 4 were performed in accordance with BAR procedures; (2) issuing electronic certificates of compliance without ensuring that the vehicles were properly tested and inspected; and (3) making false entries for the electronic certificates of compliance. (Factual Findings 15 through 22, and 28.) Cause therefore exists for discipline of Respondent Station's ARD registration and smog check station license pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), and section 44072.2, subdivision (a). (Legal Conclusion 5.)

14. *Fourth Cause for Discipline against Respondent Station (Failure to Comply with Regulations pursuant to the Motor Vehicle Inspection Program)*: Complainant established by a preponderance of evidence that respondent Station, through respondent Martinez, issued fraudulent electronic certificates of compliance for

Vehicles 1, 2, 3, and 4 without performing bona fide inspections of the emission control devices and systems as required by section 44012 and not in accordance with BAR specifications in violation of Regulations, sections 3340.24, subdivision (c), 3340.35, subdivision (c), and 3340.42. (Factual Findings 15 through 22 and 28.) Cause therefore exists to discipline respondent Station's smog check station license pursuant to section 44072.2, subdivision (c). (Legal Conclusion 6.)

15. *Fifth Cause for Discipline against Respondent Station (Dishonesty, Fraud or Deceit)*: Complainant failed to establish by a preponderance of evidence that respondent Station committed acts of fraud or deceit by clean plugging vehicles. Cause therefore does not exist to discipline respondent Station's smog check station license under section 44072.2, subdivision (d). (Factual Findings 22, 24 through 28, and 31; Legal Conclusions 7, 12.) However, complainant established by a preponderance of evidence that respondent Station willfully violated the Motor Vehicle Inspection Program and specific procedures set forth in the Manual because respondent Martinez failed to input the proper VIN for Vehicles 1, 3, and 4, and mistakenly tested the wrong vehicle when inspecting Vehicle 2. (Factual Findings 15 through 22.) Respondent Station, through respondent Martinez, therefore conducted a "fraudulent inspection" as defined by section 44072.10, subdivision (c), cause exists to discipline respondent Station's smog check station license pursuant to that section. (Legal Conclusion 8.)

16. *Sixth Cause for Discipline against Respondent Martinez (Failure to Comply with the Motor Vehicle Inspection Program)*: Complainant established by a preponderance of evidence that respondent Martinez failed to comply with the procedures set forth in the Manual and section 44012 in a material respect in performing emission tests on Vehicles 1, 2, 3, and 4. (Factual Findings 15 through 22 and 28.) Cause therefore exists to discipline respondent Martinez's smog check repair

technician and smog check inspector licenses pursuant to section 44072.2, subdivision (a). (Legal Conclusion 5.)

17. *Seventh Cause for Discipline against Respondent Martinez (Failure to Comply with Regulations pursuant to the Motor Vehicle Inspection Program):* Complainant established by a preponderance of evidence that respondent Martinez fraudulently issued electronic certificates for Vehicles 1, 2, 3, and 4 and failed to inspect the four vehicles in accordance with the Manual and statutory requirements in violation of Regulations, sections 3340.24, subdivision (c), 3340.30, subdivision (a), and 3340.42. (Factual Findings 15 through 22, and 28.) Cause therefore exists under section 44072.2, subdivision (c), to discipline respondent Martinez's smog check inspector and smog check repair technician licenses. (Legal Conclusion 6.)

18. *Eighth Cause for Discipline against Respondent Martinez (Dishonesty, Fraud or Deceit):* Complainant failed to establish by a preponderance of evidence that respondent Martinez committed acts of fraud or deceit by clean plugging vehicles. Cause therefore does not exist to discipline respondent Martinez's smog check inspector and smog check repair technician licenses under section 44072.2, subdivision (d). (Factual Findings 22, 24 through 28, and 31; Legal Conclusions 7, 12.) However, complainant established by a preponderance of evidence that respondent Martinez willfully violated the Motor Vehicle Inspection Program and specific procedures set forth in the Manual by failing to input the proper VIN for Vehicles 1, 3, and 4, and mistakenly testing the wrong vehicle when inspecting Vehicle 2. (Factual Findings 15 through 22.) Respondent Martinez therefore conducted a "fraudulent inspection" as defined by section 44072.10, subdivision (c), and cause exists to discipline respondent Martinez's smog check repair technician and smog check inspector licenses pursuant to that statute. (Legal Conclusion 8.)

Disposition

19. Having found cause for discipline on seven of the eight causes of action set forth in the Accusation, it is necessary to determine the appropriate level of discipline. The Bureau's Guidelines for Disciplinary Orders and Terms of Probation (rev. March 2016 (Guidelines)), issued pursuant to Regulations, section 3395.4, set forth the various factors to be considered in determining the appropriate level of discipline as well as the recommended discipline for the various types of misconduct established in this case.

20. The Guidelines identify 15 aggravating and 12 mitigating factors to be considered in determining discipline. None of the listed aggravating factors apply here. In mitigation, respondents have never been disciplined, warned, or cited by the Bureau. There also was no evidence that the clean plugging was a pattern of practice or that respondents engaged in any other fraudulent or grossly negligent conduct. Respondent Martinez also acknowledged his inexperience, and he has changed his inspection practices, making sure to follow the Manual procedures and ensure that he inputs the proper VIN into the station computer. (Factual Findings 20 through 29.)

21. The Guidelines set forth ranges of discipline for specific statutory and regulatory violations. For the statutes in the eight causes for discipline alleged in the Accusation, the recommended discipline ranges from two to five years of probation to mandatory license revocation under section 44072.10, subdivision (c). Under appropriate circumstances, a decision after an administrative hearing may include a stay of execution and the condition that respondent comply with specified terms and conditions of probation. (Gov. Code, § 11519, subds. (a) & (b).)

22. The statutes relating to licensing of professions are designed to protect the public from dishonest, untruthful, and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, in issuing and disciplining licenses, a state agency is primarily concerned with protection of the public, maintaining the integrity and high standards of the profession, and preserving public confidence in licensure. (*Ibid.*; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.)

23. The clean plugging established here warrants less than an outright revocation of respondents' registration and licenses. Although complainant proved that respondents clean plugged, complainant failed to prove respondents' conduct was intentional and respondents satisfied many of the mitigating factors identified in the Guidelines. The four instances of clean plugging do not reflect a pattern of wrongful or deceptive misconduct. They occurred over the course of 13 months when respondent Martinez was inexperienced, his explanations of what occurred are plausible, and he has no disciplinary record. The discipline contained in the Order below will ensure public protection, as well as facilitate the rehabilitation of respondents without being unduly punitive or burdensome.

Costs

24. Business and Professions Code section 125.3 provides that a licentiate found to have committed a violation of an applicable licensing act shall pay the reasonable costs of the investigation and enforcement of the case. As set forth in Factual Findings 31 and 32, that amount is $5,586.76, consisting of $4,916 of enforcement costs and $670.76 of investigation costs. Apportionment of costs is addressed in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32,

45, where the administrative law judge and the licensing agency are directed to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Bureau must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Bureau must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the Bureau must consider a respondent'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 respondent engaged in relatively innocuous misconduct.

25. Applying the *Zuckerman* criteria, respondent Martinez received a reduction in the severity of the discipline imposed and he had a good faith belief in the merits of his position. Costs therefore are reduced to $4,000. Respondents shall be permitted to pay such costs on a reasonable payment plan.

ORDER

1. The Automotive Repair Dealer registration, number ARD 282367, issued to respondent Bennys Smog LLC, doing business as Bennys Smog, is hereby revoked. Any other ARD registration held by it is hereby revoked. The revocations are stayed under the probation conditions noted below.

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2. The Smog Check, Test Only, Station license, number RC 282367, issued to respondent Bennys Smog LLC, doing business as Bennys Smog, is hereby revoked. Any other license issued to him to operate a smog check station is hereby revoked. The revocations are stayed under the probation conditions noted below.

3. The Smog Check Inspector license issued to respondent Benny Martinez, number EO 638920, is hereby revoked. The revocation is stayed under the probation conditions noted below.

4. The Smog Check Repair Technician license issued to respondent Benny Martinez, number EI 638920, is hereby revoked. The revocation is stayed under the probation conditions noted below.

5. Respondents are jointly and severally liable for payment of costs and shall pay the amount of $4,000 to the Bureau of Automotive Repair on a schedule to be ordered by the Bureau.

Conditions Applicable to All Licenses and Registrations

6. The revocations of all license and registrations of respondents are stayed for a period of five years under the following conditions:

(1) All license and registrations of respondents are suspended for 30 days.

(2) During the period of probation, respondents shall comply with all statutes, regulations, and rules governing automotive inspections, estimates, and repairs.

(3) During the period of probation, respondents shall post a prominent sign, provided by the Bureau, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign shall be

conspicuously displayed in a location open to and frequented by customers and shall remain posted during the entire period of actual suspension.

(4) During the period of probation, respondents or respondents' authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the Bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

(5) During the period of probation, respondents shall, within 30 days of the effective date of this action, report any financial interest which any partners, officers, or owners of the respondent facility may have in any other business required to be registered pursuant to Business and Professions Code section 9884.6.

(6) During the period of probation, respondents shall provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.

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

(8) Should the Director of Consumer Affairs determine that respondents have failed to comply with the terms and conditions of probation, the Department may, after giving notice and opportunity to be heard, temporarily or permanently invalidate the registration or suspend or revoke the license.

(9) Upon successful completion of probation, the registration and licenses shall be fully restored.

DATE: March 9, 2020

DocuSigned by:
Cindy Forman
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CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings

XAVIER BECERRA
Attorney General of California
MARC D. GREENBAUM
Supervising Deputy Attorney General
MICHAEL BROWN
Deputy Attorney General
State Bar No. 231237
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6308
Facsimile: (213) 897-2804
E-mail: MichaelB.Brown@doj.ca.gov
Attorneys for Complainant

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

In the Matter of the Accusation Against: **BENNY MARTINEZ-MEMBER,** **BENNYS SMOG LLC** **DBA BENNYS SMOG** **523 W Rialto Ave #B** **Rialto, CA 92375** **MAILING ADDRESS** **1241 W. Sequoia Ave** **Bloomington, CA 92316** **Automotive Repair Dealer Registration No. ARD 282367** **Smog Check Station License No. RC 282367** **and** **BENNY MARTINEZ** **1241 W. Sequoia Ave** **Bloomington, CA 92316** **Smog Check Inspector License Number EO 638920** **Check Repair Technician License Number EI 638920** Respondents.	Case No. 79/18-7150 **ACCUSATION**

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Complainant alleges:

PARTIES

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

Benny Martinez-Member, Bennys Smog LLC dba Bennys Smog

Automotive Repair Dealer Registration

2. On or about December 30, 2015, the Bureau of Automotive Repair issued Automotive Repair Dealer Registration Number ARD 282367 ("registration") to Benny Martinez-Member, Bennys Smog LLC dba Bennys Smog ("Respondent Bennys Smog"). The Automotive Repair Dealer Registration was in full force and effect at all times relevant to the charges brought herein and will expire on December 31, 2018, unless renewed.

Smog Check Station License

3. On or about November 30, 2017, the Bureau issued Smog Check Station License Number RC 282367 to Respondent Bennys Smog. The Smog Check Station License was in full force and effect at all times relevant to the charges brought herein and will expire on December 31, 2018, unless renewed.

STAR Station Certification

4. On or about December 14, 2017, the Bureau certified Bennys Smog as a STAR Station. The certification will remain active unless ARD 282367 and/or RC 282367 is revoked, canceled, become delinquent, or the certification is invalidated.

Benny Martinez

Inspector License/Repair Technician License

5. On or about January 20, 2016, the Bureau issued Smog Check Inspector License Number EO 638920 to Benny Martinez ("Respondent Martinez"). On or about November 20, 2017, the Bureau issued Smog Check Repair Technician License Number EI 638920 ("repair technician license") to Respondent Martinez. The inspector license and repair technician license were in full force and effect at all times relevant to the charges brought herein and will expire on April 30, 2020, unless renewed.

JURISDICTION

6. Business and Professions Code ("Code") section 9884.7 provides that the Director may revoke an automotive repair dealer registration.

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

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

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

STATUTORY PROVISIONS

10. Section 9884.7 of the Code states:

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

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

. . .

"(4) Any other conduct which constitutes fraud.

. . .

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"(c) Notwithstanding subdivision (b), the director may suspend, revoke, or place on probation the registration for all places of business operated in this state by an automotive repair dealer 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."

11. Section 44012 of the Health and Safety Code states:

"The test at the smog check stations 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, 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, beginning no 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. The department shall ensure, as appropriate to the test method, the following:

"(a) Emission control systems required by state and federal law are reducing excess emissions in accordance with the standards adopted pursuant to subdivisions (a) and (c) of Section 44013.

"(b) Motor vehicles are preconditioned to ensure representative and stabilized operation of the vehicle's emission control system.

"(c) For other than diesel-powered vehicles, the vehicle's exhaust emissions of hydrocarbons, carbon monoxide, carbon dioxide, and oxides of nitrogen in an idle mode or loaded mode are tested in accordance with procedures prescribed by the department. In determining how loaded mode and evaporative emissions testing shall be conducted, the department shall ensure that the emission reduction targets for the enhanced program are met.

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"(d) For other than diesel-powered vehicles, the vehicle's fuel evaporative system and crankcase ventilation system are tested to reduce any nonexhaust sources of volatile organic compound emissions, in accordance with procedures prescribed by the department.

"(e) For diesel-powered vehicles, a visual inspection is made of emission control devices and the vehicle's exhaust emissions are tested in accordance with procedures prescribed by the department that may include, but are not limited to, onboard diagnostic testing. The test may include testing of emissions of any or all of the pollutants specified in subdivision (c) and, upon the adoption of applicable standards, measurement of emissions of smoke or particulates, or both.

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

"(g) A determination as to whether the motor vehicle complies with the emission standards for that vehicle's class and model-year as prescribed by the department.

"(h) An analysis of pass and fail rates of vehicles subject to an onboard diagnostic test and a tailpipe test to assess whether any vehicles passing their onboard diagnostic test have, or would have, failed a tailpipe test, and whether any vehicles failing their onboard diagnostic test have or would have passed a tailpipe test.

"(i) The test procedures may authorize smog check stations to refuse the testing of a vehicle that would be unsafe to test, or that cannot physically be inspected, as specified by the department by regulation. The refusal to test a vehicle for those reasons shall not excuse or exempt the vehicle from compliance with all applicable requirements of this chapter."

12. Section 44015 of the Health and Safety Code states:

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

13. Section 44059 of the Health and Safety Code states:

"The willful making of any false statement or entry with regard to a material matter in any oath, affidavit, certificate of compliance or noncompliance, or application form which is required

by this chapter or Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business and Professions Code, constitutes perjury and is punishable as provided in the Penal Code."

14. Section 44072.2 of the Health and Safety Code states:

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

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

. . .

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

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

15. Section 44072.8 of the Health and Safety Code states:

"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."

REGULATORY PROVISIONS

16. California Code of Regulations, title 16, section 3340.24, subdivision (c) states:

. . .

"(c) The bureau may suspend or revoke the license of or pursue other legal action against a licensee, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a certificate of noncompliance."

17. California Code of Regulations, title 16, section 3340.30, subdivision (a) states:

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

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

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

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

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

"(1) A loaded-mode test shall be the test method used to inspect 1976 - 1999 model-year vehicle, except diesel-powered, registered in the enhanced program areas of the state. The loaded-mode test shall measure hydrocarbon, carbon monoxide, carbon dioxide and oxides of nitrogen emissions, as contained in the bureau's specifications referenced in subsection (a) of Section 3340.17 of this article. The loaded-mode test shall use Acceleration Simulation Mode (ASM) test equipment, including a chassis dynamometer, certified by the bureau.

"On and after March 31, 2010, exhaust emissions from a vehicle subject to this inspection shall be measured and compared to the emissions standards shown in the Vehicle Look-up Table (VLT) Row Specific Emissions Standards (Cutpoints) Table, dated March 2010, which is hereby incorporated by reference. If the emissions standards for a specific vehicle are not included in this table then the exhaust emissions shall be compared to the emissions standards set forth in TABLE I or TABLE II, as applicable. A vehicle passes the loaded-mode test if all of its measured emissions are less than or equal to the applicable emission standards specified in the applicable table.

"(2) A two-speed idle mode test shall be the test method used to inspect 1976 - 1999 model-year vehicles, except diesel-powered, registered in all program areas of the state, except in those areas of the state where the enhanced program has been implemented. The two-speed idle mode test shall measure hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and

again at idle RPM, as contained in the bureau's specifications referenced in subsection (a) of Section 3340.17 of this article. Exhaust emissions from a vehicle subject to this inspection shall be measured and compared to the emission standards set forth in this section and as shown in TABLE III. A vehicle passes the two-speed idle mode test if all of its measured emissions are less than or equal to the applicable emissions standards specified in Table III.

"(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.

"(c) The bureau may require any combination of the inspection methods in sections (a) and (b) under any of the following circumstances:

"(1) Vehicles that the department randomly selects pursuant to Health and Safety Code section 44014.7 as a means of identifying potential operational problems with vehicle OBD systems.

"(2) Vehicles identified by the bureau as being operationally or physically incompatible with inspection equipment.

"(3) Vehicles with OBD systems that have demonstrated operational problems.

"(d) Pursuant to section 39032.5 of the Health and Safety Code, gross polluter standards are as follows:

"(1) A gross polluter means a vehicle with excess hydrocarbon, carbon monoxide, or oxides of nitrogen emissions pursuant to the gross polluter emissions standards included in the tables described in subsection (a), as applicable.

"(2) Vehicles with emission levels exceeding the emission standards for gross polluters during an initial inspection will be considered gross polluters and the provisions pertaining to gross polluting vehicles will apply, including, but not limited to, sections 44014.5, 44015, and 44081 of the Health and Safety Code.

"(3) A gross polluting vehicle shall not be passed or issued a certificate of compliance until the vehicle's emissions are reduced to or below the applicable emissions standards for the vehicle included in the tables described in subsection (a), as applicable. However, the provisions described in section 44017 of the Health and Safety Code may apply.

"(4) This subsection applies in all program areas statewide to vehicles requiring inspection pursuant to sections 44005 and 44011 of the Health and Safety Code."

COST RECOVERY

20. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to 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, with failure of the licentiate to comply subjecting the license to not being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

FACTUAL BACKGROUND

21. A Bureau Representative conducted a review of Bennys Smog BAR-OIS smog check inspection records from the Vehicle Identification Database ("VID"). The review showed four (4) vehicles that have been certified at Bennys Smog with unexpected vehicle communication protocol and unexpected Parameter Identification[1] (PID) count. All of the following inspections were performed by Respondents Martinez. The data from the certified vehicles were compared to the OIS test data of similar vehicles of the same year, make and model that received passing Smog Check inspections and received smog certificates. The data comparison showed multiple discrepancies with four (4) vehicles that were all certified with unexpected vehicle

[1] Parameter Identifications (PIDs) are data points reported by the OBD II computer to the scan tool or BAR OIS.

communication protocols[2] and unexpected PID counts, which confirms the vehicles receiving smog certificates were fraudulently tested during the smog inspection using the clean plugging method[3]. The following chart illustrates the clean plugging activities of Respondents Bennys Smog and Martinez between February 14, 2017 to February 24, 2018.

TABLE 1

Test No.	Test Date	Vehicle Certified & License No.	Certificate No.	Technician License No.	OIS Test Data Details
1.	02/14/2017	2004 Dodge Stratus SE 5RPP532	ZP485511C	EO 638920 (Respondent Martinez)	Comm. Protocol: I914 (expected: JVPW) PID Count: 20 (expected: 18/3) e-VIN No.: Not Reported (Expected: e-VIN-1B3EL36XX4 N315093)
2.	10/05/2017	2003 Honda Odyssey EXL 5CNP391	HF955078C	EO 638920 (Respondent Martinez)	Comm. Protocol: ICAN29bt5 (expected: I914) PID Count: 37/19 (expected: 16) e-VIN No.: 1HGCP26819 A084940 (Expected: e-VIN-Not Expected)

[2] Protocol is simply the language used to communicate with a vehicle's computer(s). Protocol is a communication interface. This automated determination of the communication interface, or protocol, is built into the Data Acquisition Device (DAD) unit. This automatic function identifies five (5) protocols used by vehicles manufactured and sold in the United States that are subject to the Smog Check program.

[3] 'Clean Plugging' refers to the use of another vehicle's properly functioning On Board Diagnostic, generation II, (OBD II) system, or another source, to generate passing diagnostic readings for the purpose of issuing fraudulent smog Certificates of Compliance to vehicles that are not in smog compliance and/or not present for testing.

3.	11/28/2017	2003 Nissan Frontier King Cab XE 7H50452	HJ301698C	EO 638920 (Respondent Martinez)	Comm. Protocol: ICAN11bt5 (expected: I914) PID Count: 128 (expected: 18) e-VIN No.: 1A1JC5444R7 252367 (Expected: e-VIN- Not Expected)
4.	02/24/2018	2005 Lincoln Navigator 5NQM773	HP121747C	EO 638920 (Respondent Martinez)	Comm. Protocol: KWPF (expected: ICAN11bt5) PID Count:20 (expected: 44 or 44/16) e-VIN No.: KNDUP13275 6619277 (Expected: e-VIN- 5LMFU275X5 LJ23959)

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

22. Respondent Bennys Smog's registration is subject to discipline pursuant to Code section 9884.7, subdivision (a)(1), in that between February 14, 2017, through February 24, 2018, Respondent Bennys Smog made or authorized statements which he knew or in the exercise of reasonable care should have known to be untrue or misleading, as follows: Respondent Bennys Smog certified that vehicles 1 through 4, set forth above in Table 1, had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent Bennys Smog conducted the inspections on the vehicles using the clean plugging method by substituting or

using different vehicles or another source during the OBD II functional tests in order to issue smog certificates of compliance for the 4 vehicles, and did not test or inspect the 4 vehicles as required by Health and Safety Code section 44012.

SECOND CAUSE FOR DISCIPLINE

(Fraud)

23. Respondent Bennys Smog's registration is subject to discipline pursuant to Code section 9884.7, subdivision (a)(4), in that between February 14, 2017, through February 24, 2018, Respondent Bennys Smog committed acts which constitute fraud by issuing electronic smog certificates of compliance for vehicles 1 through 4, set forth above in Table 1, without performing 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.

THIRD CAUSE FOR DISCIPLINE

(Failure to Comply with the Motor Vehicle Inspection Program)

24. Respondent Bennys Smog's registration and smog check station license are subject to discipline pursuant to Code section, subdivision 9884.7(a)(6) and Health and Safety Code section 44072.2, subdivision (a), in that between February 14, 2017, through February 24, 2018, regarding vehicles 1 through 4, set forth above in Table 1, Respondent Bennys Smog failed to comply with the following sections of that Code:

a. **Section 44012:** Respondent Bennys Smog failed to ensure that the emission control tests were performed on vehicles 1 through 4, in accordance with procedures prescribed by the department.

b. **Section 44015:** Respondent Bennys Smog issued electronic smog certificates of compliance for vehicles 1 through 4, without ensuring that the vehicles were properly tested and inspected to determine if they were in compliance with Health and Safety Code section 44012.

c. **Section 44059:** Respondent Bennys Smog willfully made false entries for the electronic smog certificates of compliance by certifying that those vehicles had been inspected as required when, in fact, they had not.

FOURTH CAUSE FOR DISCIPLINE

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

25. Respondent Bennys Smog's smog check station license is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (c), in that between February 14, 2017, through February 24, 2018, regarding vehicles 1 through 4, set forth above in Table 1, Respondent Bennys Smog failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.24, subdivision (c)**: Respondent Bennys Smog falsely or fraudulently issued electronic smog certificates of compliance for those vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles as required by Health and Safety Code section 44012.

b. **Section 3340.35, subdivision (c)**: Respondent Bennys Smog issued electronic smog certificates of compliance even though those vehicles had not been inspected in accordance with section 3340.42 of that Code.

c. **Section 3340.42**: Respondent Bennys Smog failed to conduct the required smog tests and inspections on those vehicles in accordance with the Bureau's specifications.

FIFTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud or Deceit)

26. Respondent Bennys Smog's smog check station license is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), in that between February 14, 2017, through February 24, 2018, regarding vehicles 1 through 4, set forth above in Table 1, Respondent Bennys Smog committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic smog certificates of compliance for those vehicles without performing 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.

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SIXTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

27. Respondent Martinez's smog check inspector license and repair technician license are subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (a), in that between February 14, 2017, through February 24, 2018, regarding vehicles number 1 and 4, set forth above in Table 1, he failed to comply with section 44012 of that Code in a material respect, as follows: Respondent Martinez failed to perform the emission control tests on those vehicles in accordance with procedures prescribed by the department.

SEVENTH CAUSE FOR DISCIPLINE

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

28. Respondent Martinez's smog check inspector license and repair technician license are subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (c), in that between February 14, 2017, through February 24, 2018, regarding vehicles number 1 and 4, set forth above in Table 1, he failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.24, subdivision (c)**: Respondent Martinez falsely or fraudulently issued electronic smog certificates of compliance without performing bona fide inspections of the emission control devices and systems on those vehicles as required by Health and Safety Code section 44012.

b. **Section 3340.30 subdivision (a)**: Respondent Martinez failed to inspect and test those vehicles in accordance with Health and Safety Code sections 44012.

c. **Section 3340.42**: Respondent Martinez failed to conduct the required smog tests and inspections on those vehicles in accordance with the Bureau's specifications.

EIGHTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud or Deceit)

29. Respondent Martinez's smog check inspector license and repair technician license are subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), in that

between February 14, 2017, through February 24, 2018, regarding vehicles number 1 and 4, set forth above in Table 1, he committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic smog certificates of compliance without performing 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.

OTHER MATTERS

30. Pursuant to Code section 9884.7, subdivision (c), the director may suspend revoke, or place on probation the registrations for all places of business operated in this state by Benny Martinez-Member, Bennys Smog LLC, upon a finding that he has, or is, engaged in a course of repeated and willful violation of the laws and regulations pertaining to an automotive repair dealer.

31. Pursuant to Health and Safety Code section 44072.8, if Smog Check Station License Number RC 282367, issued to by Benny Martinez-Member, Bennys Smog LLC doing business as Bennys Smog, is revoked or suspended, any additional license issued under this Chapter 5 of Part 5 of Div 26 of the Health and Safety Code in the name of said licensee may be likewise revoked or suspended by the director.

32. Pursuant to Health and Safety Code section 44072.8, if Smog Check Inspector License No. EO 638920 and Smog Check Repair Technician License Number EI 638920, issued to Benny Martinez, is revoked or suspended, any additional license issued under this Chapter 5 of Part 5 of Div 26 of the Health and Safety Code in the name of said licensee may be likewise revoked or suspended by the director.

PRAYER

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

1. Revoking or suspending Automotive Repair Dealer Registration Number ARD 282367, issued to Benny Martinez-Member, Bennys Smog LLC doing business as Bennys Smog;

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2. Revoking, suspending, or placing on probation any other automotive repair dealer registration issued to Benny Martinez;

3. Revoking or suspending Smog Check Station License Number RC 282367, issued to Benny Martinez-Member, Bennys Smog LLC doing business as Bennys Smog;

4. Revoking or suspending Smog Check Inspector License Number EO 638920, issued to Benny Martinez;

5. Revoking or suspending Smog Check Repair Technician License Number EI 638920, issued to Benny Martinez;

6. Revoking or suspending any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name of Benny Martinez;

7. Ordering Benny Martinez-Member, Bennys Smog LLC doing business as Bennys Smog and Benny Martinez to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and

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

DATED: July 31, 2018

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

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