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8
9 **BEFORE THE**
DEPARTMENT OF CONSUMER AFFAIRS
10 **FOR THE BUREAU OF AUTOMOTIVE REPAIR**
11 **STATE OF CALIFORNIA**
12

13 In the Matter of the Accusation Against:

Case No. 79/19-13430

14 **ERNESTO DANIEL GUTIERREZ**
15 **DBA E & J AUTO REPAIR**
710 W. 14th Street
16 Merced, CA 95340
Automotive Repair Dealer Registration No. ARD
17 **283029**
Smog Check Station License No. RC 283029

ACCUSATION

18
19 **ERNESTO DANIEL GUTIERREZ**
1300 3rd Street
20 Atwater, CA 95301
Smog Check Inspector License No. EO 635664
21 **Smog Check Repair Technician License No. EI**
22 **635664**

23 **VICTOR ROMERO**
5601 S. HWY 59
24 Merced, CA 95341
Smog Check Inspector License No. EO 634257
25 **Smog Check Repair Technician License No. EI**
26 **634257**

27 Respondents.
28

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.

Automotive Repair Dealer Registration

2. On or about March 16, 2016, the Bureau issued Automotive Repair Dealer Registration Number ARD 283029 (registration) to Ernesto Daniel Gutierrez (Respondent Gutierrez), doing business as E & J Auto Repair. The registration was in full force and effect at all times relevant to the charges brought herein and will expire on March 31, 2021, unless renewed.

Smog Check Station License

3. On or about April 14, 2016, the Bureau issued Smog Check Station License Number RC 283029 to Respondent Gutierrez, doing business as E & J Auto Repair. The license was in full force and effect at all times relevant to the charges brought herein and will expire on March 31, 2021, unless renewed.

Smog Check Inspector License – Ernesto Daniel Gutierrez

4. On or about July 11, 2013, the Bureau issued Smog Check Inspector License Number EO 635664 to Respondent Gutierrez. The license was in full force and effect at all times relevant to the charges brought herein and will expire on May 31, 2021, unless renewed.

Smog Check Repair Technician License – Ernesto Daniel Gutierrez

5. On or about June 24, 2013, the Bureau issued Smog Check Repair Technician License Number EI 635664 to Respondent Gutierrez. The license was in full force and effect at all times relevant to the charges brought herein and will expire on May 31, 2021, unless renewed.

Smog Check Inspector License – Victor Romero

6. On or about July 9, 2014, the Bureau issued Smog Check Inspector License Number EO 634257 to Victor Romero (Respondent Romero). The license was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2020, unless renewed.

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

16. Health and Safety Code section 44072.8 states that 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.

STATUTORY PROVISIONS

17. Code section 9884.7 states, in pertinent part:

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

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

• • • •

(4) Any other conduct that constitutes fraud.

• • • •

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

(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.

18. Code section 9884.9, subdivision (a) states, in pertinent part, that the automotive repair dealer shall give to the consumer a written estimated price for labor and parts necessary for a specific job. No work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer.

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

4 20. Health and Safety Code section 44072.2 states, in pertinent part:

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

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

9

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

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

13 21. Health and Safety Code section 44072.10 states, in pertinent part:

14

15 (c) The department shall revoke the license of any smog check technician or
16 station licensee who fraudulently certifies vehicles or participates in the fraudulent
inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of
17 the following:

18

19 (4) Intentional or willful violation of this chapter or any regulation, standard, or
procedure of the department implementing this chapter . . .

20 22. Health and Safety Code section 44024.5, subdivision (a), states:

21 The department shall compile and maintain statistical and emissions profiles
22 and data from motor vehicles that are subject to the motor vehicle inspection
program. The department may use data from any source, including remote sensing
23 data, in use data, and other motor vehicle inspection program data, to develop and
confirm the validity of the profiles, to evaluate the program, and to assess the
24 performance of smog check stations. The department shall undertake these
requirements directly or seek a qualified vendor for these services.

25 23. Health and Safety Code section 44037 states, in pertinent part:

26 (a) The department shall compile and maintain records, using the sampling
27 methodology necessary to ensure their scientific validity and reliability, of tests and
repairs performed by qualified smog check technicians at licensed smog check
28 stations pursuant to this chapter on all of the following information:

1 (1) The motor vehicle identification information and the test data collected at
2 the station.

3

4 (5) Data received and compiled through the use of the centralized computer
5 database and computer network to be established pursuant to Section 44037.1, and
6 any other information determined to be essential by the department for program
enhancement to achieve greater efficiency, consumer protection, cost-effectiveness,
convenience, or emission reductions . . .

7 24. Health and Safety Code section 44037.1 states, in pertinent part:

8 (a) On or before January 1, 1995, the department shall design and establish the
9 equipment necessary to operate a centralized computer data base and computer
network that is readily accessible by all licensed smog check technicians on a real
time basis.

10 (b) The centralized computer data base and network shall be designed with all
11 of the following capabilities:

12

13 (2) To provide smog check technicians and the department with information as
14 to the date and result of prior smog check tests performed on each vehicle to
discourage vehicle owners from shopping for certificates of compliance and to permit
the department to identify smog check stations for further investigation as potential
violators of this chapter.

15 (3) To provide the department with data on the failure rates and repair
16 effectiveness for vehicles of each make and model year on a statewide basis, and by
17 smog check station and technician, to facilitate identification of smog check stations
and technicians as potential violators of this chapter.

18

19 (8) To be compatible with the department's recordkeeping and compilation
20 requirements established by Section 44037.

21

22 (c) After January 1, 1995, each smog check station shall transmit vehicle data
23 emission test results to the department's centralized data base. Each smog check
24 station shall also transmit vehicle data and emission measurements made before and
after repair . . .

25 25. Health and Safety Code section 44012 states, in pertinent part:

26 The test at the smog check stations shall be performed in accordance with procedures
27 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
28 system, or other appropriate test procedures as determined by the department in
consultation with the state board. The department shall implement testing using onboard

1 diagnostic systems, in lieu of loaded mode dynamometer or two-speed idle testing, on
2 model year 2000 and newer vehicles only, beginning no earlier than January 1, 2013.
3 However, the department, in consultation with the state board, may prescribe alternative
4 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:

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

7
8 26. Health and Safety Code section 44015 states:

9 (a) A licensed smog check station shall not issue a certificate of compliance,
except as authorized by this chapter, to any vehicle that meets the following criteria:

10 (1) A vehicle that has been tampered with.

11 (2) A vehicle identified pursuant to subparagraph (K) of paragraph (3) of
12 subdivision (b) of Section 44036. A vehicle identified pursuant to subparagraph (K)
of paragraph (3) of subdivision (b) of Section 44036 shall be directed to the
13 department to determine whether an inadvertent error can explain the irregularity, or
whether the vehicle otherwise meets smog check requirements, allowing the
14 certificate for compliance to be issued, or the vehicle shall be reinspected by a
referee or another smog check station.

15 (3) A vehicle that, prior to repairs, has been initially identified by the smog
16 check station as a gross polluter. Certification of a gross polluting vehicle shall be
conducted by a designated test-only facility, or a test-and-repair station that is both
17 licensed and certified pursuant to Sections 44014 and 44014.2.

18 (4) A vehicle described in subdivision (c).

19 (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
20 noncompliance.

21 (c) (1) A repair cost waiver shall be issued, upon request of the vehicle owner,
by an entity authorized to perform referee functions for a vehicle that has been
22 properly tested but does not meet the applicable emission standards when it is
determined that no adjustment or repair can be made that will reduce emissions from
23 the inspected motor vehicle without exceeding the applicable repair cost limit
established under Section 44017 and that every defect specified by paragraph (2) of
24 subdivision (a) of Section 43204, and by paragraphs (2) and (3) of subdivision (a) of
Section 43205, has been corrected. A repair cost waiver issued pursuant to this
25 paragraph shall be accepted in lieu of a certificate of compliance for the purposes of
compliance with Section 4000.3 of the Vehicle Code. No repair cost waiver shall
26 exceed two years' duration. No repair cost waiver shall be issued until the vehicle
owner has expended an amount equal to the applicable repair cost limit specified in
27 Section 44017.

28 (2) An economic hardship extension shall be issued, upon request of a
qualified low-income motor vehicle owner, by an entity authorized to perform

referee functions, for a motor vehicle that has been properly tested but does not meet the applicable emission standards when it is determined that no adjustment or repair

can be made that will reduce emissions from the inspected motor vehicle without exceeding the applicable repair cost limit, as established pursuant to Section 44017.1, that every defect specified in paragraph (2) of subdivision (a) of Section 43204, and in paragraphs (2) and (3) of subdivision (a) of Section 43205, has been corrected, that the low-income vehicle owner would suffer an economic hardship if the extension is not issued, and that all appropriate emissions-related repairs up to the amount of the applicable repair cost limit in Section 44017.1 have been performed.

(d) No repair cost waiver or economic hardship extension shall be issued under any of the following circumstances:

(1) If a motor vehicle was issued a repair cost waiver or economic hardship extension in the previous biennial inspection of that vehicle. A repair cost waiver or economic hardship extension may be issued to a motor vehicle owner only once for a particular motor vehicle belonging to that owner. However, a repair cost waiver or economic hardship extension may be issued for a motor vehicle that participated in a previous waiver or extension program prior to January 1, 1998, as determined by the department. For waivers or extensions issued in the program operative on or after January 1, 1998, a waiver or extension may be issued for a motor vehicle only once per owner.

(2) Upon initial registration of all of the following:

(A) A direct import motor vehicle.

(B) A motor vehicle previously registered outside this state.

(C) A dismantled motor vehicle pursuant to Section 11519 of the Vehicle Code.

(D) A motor vehicle that has had an engine change.

(E) An alternate fuel vehicle.

(F) A specially constructed vehicle.

(e) Except as provided in subdivision (f), a certificate of compliance or noncompliance shall be valid for 90 days.

(f) Excluding any vehicle whose transfer of ownership and registration is described in subdivision (d) of Section 4000.1 of the Vehicle Code, and except as otherwise provided in Sections 4000.1, 24007, 24007.5, and 24007.6 of the Vehicle Code, a licensed motor vehicle dealer shall be responsible for having a smog check inspection performed on, and a certificate of compliance or noncompliance issued for, every motor vehicle offered for retail sale. A certificate issued to a licensed motor vehicle dealer shall be valid for a two-year period, or until the vehicle is sold and registered to a retail buyer, whichever occurs first.

(g) A test may be made at any time within 90 days prior to the date otherwise required.

REGULATORY PROVISIONS

27. California Code of Regulations, title 16 (CCR), section 3340.17 states, in pertinent part:

. . . .

(c) Vehicle data and test results from the OBD Inspection System (OIS) shall be transmitted to the bureau's centralized database . . .

28. CCR section 3340.30 states, in pertinent part:

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

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

29. CCR section 3340.41, subdivision (c) states:

(c) No person shall enter into the BAR-97 Emissions Inspection System or the OBD Inspection System any vehicle identification information or emission control system identification data for any vehicle other than the one being tested. Nor shall any person knowingly enter into the BAR-97 Emissions Inspection System or the OBD Inspection System any false information about the vehicle being tested.

30. CCR 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.

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1 (2) A two-speed idle mode test shall be the test method used to inspect 1976
2 - 1999 model-year vehicles, except diesel-powered, registered in all program areas of
3 the state, except in those areas of the state where the enhanced program has been
4 implemented. The two-speed idle mode test shall measure hydrocarbon, carbon
5 monoxide and carbon dioxide emissions at high RPM and again at idle RPM, as
6 contained in the bureau's specifications referenced in subsection (a) of Section
7 3340.17 of this article. Exhaust emissions from a vehicle subject to this inspection
8 shall be measured and compared to the emission standards set forth in this section and
9 as shown in Table III. A vehicle passes the two-speed idle mode test if all of its
10 measured emissions are less than or equal to the applicable emissions standards
11 specified in Table III.

12 (3) An OBD-focused test, shall be the test method used to inspect gasoline-
13 powered vehicles 2000 model-year and newer, and diesel-powered vehicles 1998
14 model-year and newer. The OBD test failure criteria are specified in section
15 3340.42.2.

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

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

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

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

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

28 (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

1 emissions standards for the vehicle included in the tables described in subsection (a),
2 as applicable. However, the provisions described in section 44017 of the Health and
Safety Code may apply.

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

5 31. CCR section 3340.45 states, in pertinent part:

6 (a) All Smog Check inspections shall be performed in accordance with
7 requirements and procedures prescribed in the following:

8

9 (2) Bureau of Automotive Repair Smog Check Manuel, dated November 2,
10 2017, which is hereby incorporated by reference. The manual shall become
effective on August 2, 2018.

11 **COST RECOVERY**

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

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

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

25 34. The DAD is an On Board Diagnostic (OBD) scan tool that, when requested by the
26 California BAR-OIS software, retrieves OBD data from the vehicle. The DAD connects between
27 the BAR-OIS computer and the vehicle's diagnostic link connector. The bar code scanner is used
28 to input technician information, the vehicle identification number, and DMV renewal

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

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

15 **REVIEW OF OIS TEST DATA**

16 36. Bureau Representative E.L. reviewed BAR-OIS test data pertaining to smog check
17 inspections conducted at E & J Auto Repair. E.L. found that Respondent Romero performed a
18 smog check inspection on the vehicle identified below using a method known as “clean
19 plugging”,³ resulting in the issuance of a fraudulent certificate of compliance for that vehicle.

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23 ¹ The OBD II communication protocol describes the specific manufacturer/vehicle
24 communication “language” used by the OBD II computer to communicate to scan tools and other
25 devices such as the BAR-OIS. The communication protocol is programmed into the OBD II
26 computer during manufacture.

25 ² PID's are data points reported by the OBD II computer to the scan tool or BAR-OIS (for
26 example, engine speed [rpm], vehicle speed, engine temperature, etc.) The PID count is the
27 number of data points reported by the OBD II computer and is programmed during manufacture.
28 Each make and model vehicle reports a specific number of PID counts.

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

1 **CLEAN-PLUGGING**

2 37. BAR-OIS test data showed that on June 20, 2019, a smog check inspection was
3 performed at E & J Auto Repair by Respondent Romero on a 2001 Dodge Neon SE (Vehicle 1),
4 resulting in the issuance of Certificate of Compliance No. QU411046C. The BAR-OIS test
5 details for Vehicle 1 showed that the eVIN recorded during the inspection was
6 1G1BE5SM7H7191757, which did not match the physical VIN on Vehicle 1, a communication
7 protocol of ICAN11bt5 and a PID count of 45|4.

8 38. Bureau Representative E.L. utilized the Bureau's database and found that Vehicle 1
9 was previously tested on June 9, 2015 and May 3, 2017 at another licensed smog facility. The
10 BAR-OIS test data from those inspections showed no eVIN was transmitted, as expected, and the
11 communication protocol and PID count were consistent with the make and model of Vehicle 1.
12 E.L. concluded that the DAD was not connected to Vehicle 1 during the smog inspection,
13 resulting in the issuance of a fraudulent smog certificate of compliance for that vehicle.

14 39. Furthermore, E.L. utilized the Bureau's database and found that the eVIN transmitted
15 during the inspection of Vehicle 1 on June 20, 2019 matches a 2017 Chevrolet Cruze LT. The
16 communication protocol and PID count transmitted to the Bureau's database during the
17 inspection of Vehicle 1 were consistent with the communication protocol and PID count for the
18 2017 Chevrolet Cruze LT. On August 28, 2019, during a station inspection at E & J Auto Repair,
19 E.L. obtained an invoice dated June 25, 2019 for service work performed on a 2017 Chevrolet
20 Cruze LT with VIN 1G1BE5SM7H7191757, which matched the eVIN recorded during the
21 inspection of Vehicle 1. E.L. concluded that Respondent Romero used the 2017 Chevrolet Cruze
22 LT's properly functioning OBD II system during the smog inspection of Vehicle 1, resulting in
23 the issuance of a fraudulent smog certificate of compliance for that vehicle.

24 **FIRST CAUSE FOR DISCIPLINE**

25 **(Untrue or Misleading Statements – Respondent Gutierrez)**

26 40. Respondent Gutierrez's registration is subject to discipline pursuant to Code section
27 9884.7, subdivision (a)(1), in that Respondent made or authorized statements which he knew or in
28 the exercise of reasonable care should have known to be untrue or misleading, as follows:

1 Respondent Gutierrez's employee, Respondent Romero, certified that Vehicle 1 identified in
2 paragraphs 37 through 39 above, had passed inspection and was in compliance with applicable
3 laws and regulations. In fact, Respondent Romero conducted the smog inspection on the vehicle
4 using the clean-plugging method, in that he used a different vehicle during the inspection in order
5 to issue smog certificates of compliance for that vehicle, and did not test or inspect the vehicle as
6 required by Health & Safety Code section 44012.

7 **SECOND CAUSE FOR DISCIPLINE**

8 **(Fraud – Respondent Gutierrez)**

9 41. Respondent Gutierrez's registration is subject to discipline pursuant to Code section
10 9884.7, subdivision (a)(4), in that he committed acts that constitute fraud by issuing an electronic
11 smog certificate of compliance for Vehicle 1, identified in paragraphs 37 through 39 above,
12 without ensuring that a bona fide inspection was performed of the emission control devices and
13 systems on the vehicle, thereby depriving the People of the State of California of the protection
14 afforded by the Motor Vehicle Inspection Program.

15 **THIRD CAUSE FOR DISCIPLINE**

16 **(Violations of Motor Vehicle Inspection Program – Respondent Gutierrez)**

17 42. Respondent Gutierrez's smog check station license is subject to discipline pursuant to
18 Health & Safety Code section 44072.2, subdivision (a), in that he failed to comply with the
19 following sections of that Code:

20 a. **Section 44012**: Respondent Gutierrez failed to ensure that the emission control
21 tests were performed on Vehicle 1, identified in paragraphs 37 through 39 above, in accordance
22 with procedures prescribed by the department.

23 b. **Section 44015**: Respondent Gutierrez issued an electronic smog certificate of
24 compliance for Vehicle 1, identified in paragraphs 37 through 39 above, without ensuring that the
25 vehicle was properly tested and inspected to determine if it was in compliance with Health &
26 Safety Code section 44012.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Failure to Comply with Regulations – Respondent Gutierrez)**

3 43. Respondent Gutierrez's smog check station license is subject to discipline pursuant to
4 Health & Safety Code section 44072.2, subdivision (c), in that he failed to comply with
5 provisions of the California Code of Regulations, title 16, as follows:

6 a. **Section 3340.35, subdivision (c):** Respondent Gutierrez issued an electronic
7 smog certificate of compliance for Vehicle 1, identified in paragraphs 37 through 39 above, even
8 though the vehicle had not been inspected in accordance with section 3340.42.

9 b. **Section 3340.42:** Respondent Gutierrez failed to ensure that the required smog
10 tests were conducted on Vehicle 1, identified in paragraphs 37 through 39 above, in accordance
11 with the Bureau's specifications.

12 **FIFTH CAUSE FOR DISCIPLINE**

13 **(Dishonesty, Fraud or Deceit – Respondent Gutierrez)**

14 44. Respondent Gutierrez's smog check station license is subject to discipline under
15 Health & Safety Code section 44072.2, subdivision (d), in that he committed dishonest,
16 fraudulent or deceitful acts whereby another was injured by issuing an electronic smog
17 certificates of compliance for Vehicle 1, identified in paragraphs 37 through 39 above, without
18 ensuring that a bona fide inspection was performed of the emission control devices and systems
19 on the vehicle, thereby depriving the People of the State of California of the protection afforded
20 by the Motor Vehicle Inspection program.

21 **SIXTH CAUSE FOR DISCIPLINE**

22 **(Violations of Motor Vehicle Inspection Program – Respondent Romero)**

23 45. Respondent Romero's smog check inspector license and smog check repair technician
24 license are subject to discipline pursuant to Health & Safety Code section 44072.2, subdivision
25 (a), in that he failed to comply with Code section 44012 in a material respect, as follows:
26 Respondent Romero failed to perform the emission control test on Vehicle 1, identified in
27 paragraphs 37 through 39 above, in accordance with procedures prescribed by the department.

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1 **SEVENTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty, Fraud or Deceit – Respondent Romero)**

3 46. Respondent Romero's smog check inspector license and smog check repair technician
4 license are subject to discipline pursuant to Health & Safety Code section 44072.2, subdivision
5 (d), in that he committed dishonest, fraudulent, or deceitful acts whereby another was injured by
6 using false information for electronic smog certificate of compliance issued for Vehicle 1,
7 identified in paragraphs 37 through 39 above, thereby failing to perform a bona fide inspection of
8 the emission control devices and systems on the vehicle and depriving the people of the State of
9 California of the protection afforded by the Motor Vehicle Inspection Program.

10 **EIGHTH CAUSE FOR DISCIPLINE**

11 **(Failure to Comply with Regulations Pursuant to the Motor**
12 **Vehicle Inspection Program – Respondent Romero)**

13 47. Respondent Romero's smog check inspector license and smog check repair technician
14 licenses are subject to disciplinary action pursuant to Health & Safety Code section 44072.2,
15 subdivision (c), in that he failed to comply with provisions of the California Code of Regulations,
16 title 16, as follows:

17 a. **Section 3340.30, subdivision (a):** Respondent Romero failed to inspect and
18 test Vehicle 1, identified in paragraphs 37 through 39 above, in accordance with Health & Safety
19 Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

20 b. **Section 3340.42:** Respondent Romero failed to conduct the required smog tests
21 on Vehicle 1, identified in paragraphs 37 through 39 above, in accordance with the Bureau's
22 specifications.

23 **UNDERCOVER OPERATION – AUGUST 21, 2019**

24 48. On or about August 21, 2019, a Bureau operator using an alias (the "operator") drove
25 a 2000 Mercury (Vehicle 2) to E & J Auto Repair and requested a smog inspection. The operator
26 of Vehicle 2 did not receive a written estimate or sign a work order prior to the inspection being
27 performed at E & J Auto Repair.

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49. At the completion of the inspection, the operator filled out a work order with her alias and signed it. The operator then paid the invoice amount of \$35 and received a copy of the estimate, invoice, and VIR. The VIR and Certificate of Compliance No. QW559500C had Respondent Romero's signature and inspector license number on it, certifying that he had tested and inspected Vehicle 2 and that it was in compliance with applicable laws and regulations.

50. On or about September 17, 2019, a Bureau representative inspected Vehicle 2, and concluded that Certificate of Compliance No. QW559500C should not have been issued for Vehicle 2 because components of the vehicle's Exhaust Gas Recirculation (EGR) system were missing.

NINTH CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements – Respondent Gutierrez)

51. Respondent Gutierrez's registration is subject to discipline under Code section 9884.7, subdivision (a)(1), in that on or about August 21, 2019, he made statements which he knew or which by exercise of reasonable care should have been known to be untrue or misleading when he issued electronic Certificate of Compliance No. QW559500C for Vehicle 2, certifying that the vehicle had passed inspection and was in compliance with applicable laws and regulations when, in fact, the vehicle could not have passed the visual portion of the smog inspection because components of the vehicle's EGR system were missing.

TENTH CAUSE FOR DISCIPLINE

(Fraud – Respondent Gutierrez)

52. Respondent Gutierrez's registration is subject to discipline under Code section 9884.7, subdivision (a)(4), in that on or about August 21, 2019, he committed acts constituting fraud. Specifically, Respondent obtained payment from the operator for performing a smog inspection on the Bureau's 2000 Mercury Sable as specified by the Bureau and in accordance with the Vehicle Code, when, in fact, it had not, as set forth in paragraphs 48 through 50, above.

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1 **ELEVENTH CAUSE FOR DISCIPLINE**

2 **(Failure to Comply with Code – Respondent Gutierrez)**

3 53. Respondent Gutierrez's registration is subject to discipline under Code section
4 9884.7, subdivision (a)(6), in that on or about August 21, 2019, he failed to comply with Code
5 section 9884.9, subdivision (a), in that he failed to provide the operator with a written estimated
6 price for a specific job.

7 **TWELFTH CAUSE FOR DISCIPLINE**

8 **(Failure to Comply with Provisions of the Motor**

9 **Vehicle Inspection Program – Respondent Gutierrez)**

10 54. Respondent Gutierrez's smog check station license is subject to discipline under
11 Health and Safety Code section 44072.2, subdivision (a), in that on or about August 21, 2019,
12 regarding Vehicle 2, he failed to comply with the following sections of that Code:

13 a. **Section 44012(a):** Respondent Gutierrez failed to determine that all emission
14 control devices and systems required by law were installed and functioning correctly in
15 accordance with test procedures.

16 b. **Section 44012, subdivision (f):** Respondent Gutierrez failed to properly
17 perform a smog inspection of the vehicle in accordance with procedures prescribed by the
18 department.

19 c. **Section 44015, subdivision (b):** Respondent Gutierrez issued electronic
20 Certificate of Compliance No. QW559500C for Vehicle 2 without properly testing and inspecting
21 the vehicle to determine if it was in compliance with section 44012 of the Health and Safety
22 Code.

23 **THIRTEENTH CAUSE FOR DISCIPLINE**

24 **(Failure to Comply with Regulations – Respondent Gutierrez)**

25 55. Respondent Gutierrez's smog check station license is subject to discipline under
26 Health and Safety Code section 44072.2, subdivision (c), in that on or about August 21, 2019,
27 regarding Vehicle 2, he failed to materially comply with the following sections of the California
28 Code of Regulations, title 16:

1 a. **Section 3340.35, subdivision (c):** Respondent Gutierrez issued electronic
2 Certificate of Compliance No. QW559500C for Vehicle 2 even though the vehicle had not been
3 tested and inspected in accordance with the procedures specified in section 3340.42 of that Code.

4 b. **Section 3340.42:** Respondent Gutierrez failed to properly conduct the required
5 smog tests and inspections for the vehicle in accordance with the Bureau's specifications.

6 **FOURTEENTH CAUSE FOR DISCIPLINE**

7 **(Dishonesty, Fraud or Deceit – Respondent Gutierrez)**

8 56. Respondent Gutierrez's smog check station license is subject to discipline under
9 Health and Safety Code section 44072.2, subdivision (d), in that on or about August 21, 2019, he
10 committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing
11 electronic Certificate of Compliance No. QW559500C for Vehicle 2 when, without performing a
12 bona fide inspection of the emission control devices and systems on that vehicle, thereby
13 depriving the People of the State of California of the protection afforded by the Motor Vehicle
14 Inspection Program.

15 **FIFTEENTH CAUSE FOR DISCIPLINE**

16 **(Failure to Comply with Provisions of the Motor Vehicle**

17 **Inspection Program – Respondent Romero)**

18 57. Respondent Romero's smog check inspector license and smog check repair technician
19 licenses are subject to discipline under Health and Safety Code section 44072.2(a), in that on or
20 about August 21, 2019, regarding Vehicle 2, he failed to comply with the following sections of
21 that Code:

22 a. **Section 44012, subdivision (a):** Respondent Romero failed to determine that
23 all emission control devices and systems required by law were installed and functioning correctly
24 in accordance with test procedures.

25 b. **Section 44012, subdivision (f):** Respondent Romero failed to properly
26 perform a smog inspection of the vehicle in accordance with procedures prescribed by the
27 department.

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1 c. **Section 44032:** Respondent Romero failed to properly perform a smog
2 inspection of the vehicle in accordance with section 44012 of the Health and Safety Code.

3 **SIXTEENTH CAUSE FOR DISCIPLINE**

4 **(Failure to Comply with Regulations – Respondent Romero)**

5 58. Respondent Romero’s smog check inspector license and smog check repair technician
6 licenses are subject to discipline under Health and Safety Code section 44072.2(c), in that on or
7 about August 21, 2019, regarding Vehicle 2, he failed to comply with the following sections of
8 the California Code of Regulations, title 16:

9 a. **Section 3340.30, subdivision (a):** Respondent Romero failed to inspect and
10 test Vehicle 2 in accordance with Health and Safety Code sections 44012 and 44035, and
11 California Code of Regulations, title 16, section 3340.42.

12 b. **Section 3340.41, subdivision (c):** Respondent Romero entered false
13 information into the EIS for electronic Certificate of Compliance No. QW559500C by entering
14 "Not Applicable" for the EGR visual inspection result when, in fact, Vehicle 2 had an EGR
15 component.

16 c. **Section 3340.42:** Respondent Romero failed to properly conduct the required
17 smog tests and inspections on the vehicle in accordance with the Bureau’s specifications.

18 d. **Section 3340.45, subdivision (a)(2):** Respondent Romero violated Section
19 1.3.1 of the Smog Check Manual, by entering “Not Applicable” in the EIS for the EGR visual
20 inspection result.

21 **SEVENTEENTH CAUSE FOR DISCIPLINE**

22 **(Dishonesty, Fraud or Deceit – Respondent Romero)**

23 59. Respondent Romero’s smog check inspector license and smog check repair technician
24 licenses are subject to discipline under Health and Safety Code section 44072.2, subdivision (d),
25 in that on or about August 21, 2019, he committed acts involving dishonesty, fraud or deceit
26 whereby another was injured by issuing electronic Certificate of Compliance No. QW559500C
27 for Vehicle 2 without performing a bona fide inspection of the emission control devices and
28

1 systems on that vehicle, thereby depriving the People of the State of California of the protection
2 afforded by the Motor Vehicle Inspection Program.

3 **OTHER MATTERS**

4 60. Pursuant to Code section 9884.7, subdivision (c), the Director may suspend, revoke or
5 place on probation the registration for all places of business operated in this state by Ernesto
6 Daniel Gutierrez upon a finding that he has, or is, engaged in a course of repeated and willful
7 violations of the laws and regulations pertaining to an automotive repair dealer.

8 61. Pursuant to Health & Safety Code section 44072.8, if Smog Check Station License
9 Number RC 283029, issued to Ernesto Daniel Gutierrez, doing business as E & J Auto Repair, is
10 revoked or suspended, any additional license issued under Chapter 5 of Part 5 of Division 26 of
11 the Health & Safety Code in the name of said licensee may be likewise revoked or suspended by
12 the Director.

13 62. Pursuant to Health & Safety Code section 44072.8, if Smog Check Inspector License
14 Number EO 635664 and/or Smog Check Repair Technician License Number EI 635664, issued to
15 Ernesto Daniel Gutierrez, are revoked or suspended, any additional license issued under Chapter
16 5 of Part 5 of Division 26 of the Health & Safety Code in the name of said licensee may be
17 likewise revoked or suspended by the Director.

18 63. Pursuant to Health & Safety Code section 44072.8, if Smog Check Inspector License
19 Number EO 634257 and/or Smog Check Repair Technician License Number EI 634257, issued to
20 Victor Romero are revoked or suspended, any additional license issued under Chapter 5 of Part 5
21 of Division 26 of the Health & Safety Code in the name of said licensee may be likewise revoked
22 or suspended by the Director.

23 **PRAYER**

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

26 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
27 283029, issued to Ernesto Daniel Gutierrez, doing business as E & J Auto Repair;

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- 1 2. Revoking or suspending Smog Check Station License Number RC 283029, issued to
2 Ernesto Daniel Gutierrez, doing business as E & J Auto Repair;
- 3 3. Revoking or suspending Smog Check Inspector License Number EO 635664, issued
4 to Ernesto Daniel Gutierrez;
- 5 4. Revoking or suspending Smog Check Repair Technician License Number EI 635664,
6 issued to Ernesto Daniel Gutierrez;
- 7 5. Revoking or suspending any other automotive repair dealer registration issued to
8 Ernesto Daniel Gutierrez;
- 9 6. Revoking or suspending any additional license issued under Chapter 5 of Part 5 of
10 Division 26 of the Health & Safety Code of the Health and Safety Code in the name of Ernesto
11 Daniel Gutierrez;
- 12 7. Revoking or suspending Smog Check Inspector License Number EO 634257, issued
13 to Victor Romero;
- 14 8. Revoking or suspending Smog Check Repair Technician License Number EI 634257,
15 issued to Victor Romero;
- 16 9. Revoking or suspending any additional license issued under Chapter 5 of Part 5 of
17 Division 26 of the Health & Safety Code of the Health and Safety Code in the name of Victor
18 Romero;
- 19 10. Ordering Ernesto Daniel Gutierrez, doing business as E & J Auto Repair, and Victor
20 Romero, to pay the Director of Consumer Affairs the reasonable costs of the investigation and
21 enforcement of this case, pursuant to Business and Professions Code section 125.3; and,
- 22 11. Taking such other and further action as deemed necessary and proper.

23
24 DATED: April 10, 2020

Signature on File

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

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