

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

In the Matter of the Accusation Against:

ALDER SMOG & TIRES, LLC, ARMANDO NEFTALI ABARCA,

LUIS ARMANDO RODRIGUEZ

Automotive Repair Dealer Registration No. ARD 296598

Smog Check Station License No. RC 296598,

LUIS RODRIGUEZ

Smog Check Inspector License No. EO 641766,

ARMANDO NEFTALI ABARCA

Smog Check Inspector License No. EO 641773

Smog Check Repair Technician License No. EI 641773,

Respondents.

Agency Case No. 79/22-16490

OAH No. 2023060793

PROPOSED DECISION

Harden Sooper, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 12, 2024.

Michael B. Brown, Deputy Attorney General, represented complainant Patrick Dorais, Chief, Bureau of Automotive Repair (Bureau), Department of Consumer Affairs.

Nicole Weil, Attorney at Law, represented respondents Alder Smog & Tires, LLC, limited liability corporation (LLC) member Armando Neftali Abarca, and LLC member Luis Armando Rodriguez (respondent Alder Smog & Tires), Armando Neftali Abarca (respondent Abarca), and Luis Armando Rodriguez (respondent Rodriguez) (collectively referred to as respondents). Respondents Abarca and Rodriguez were present at the hearing.

The ALJ received testimony and documentary evidence. The record closed and the matter was submitted for decision on February 12, 2024.

SUMMARY

Complainant seeks to discipline the following licenses in connection with the improper issuance of smog certificates of compliance: respondent Alder Smog & Tires' Automotive Repair Dealer (ARD) license and Smog Check station license; respondent Rodriguez's Smog Check Inspector license; and respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses. Complainant established cause to discipline respondents' licenses because respondents made untrue or misleading statements and violated the Motor Vehicle Inspection Program. Because respondents'

violations occurred due to negligence rather than fraud, placing their licenses on probation for five years will adequately protect the public and allow the Bureau to monitor respondents' business practices.

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 7, 2020, and March 9, 2020, respectively, the Bureau issued respondent Alder Smog & Tires ARD Registration Number ARD 296598 and Smog Check Station License Number RC 296598. Both licenses were scheduled to expire on February 29, 2024.

2. On May 26, 2020, the Bureau issued respondent Alder Smog & Tires STAR Station Certification. The certification will remain active unless the ARD registration or Smog Check station license is revoked, canceled, become delinquent, or the certification is suspended.

3. On March 13, 2019, and July 29, 2019, respectively, the Bureau issued respondent Abarca Smog Check Inspector License Number EO 641773 and Smog Check Repair Technician License Number EI 641773. Both licenses are scheduled to expire on February 28, 2025.

4. On March 11, 2019, the Bureau issued respondent Rodriguez Smog Check Inspector License Number EO 641766. The license is scheduled to expire on October 31, 2024.

5. On March 20, 2023, complainant, in his official capacity, filed an Accusation against respondents.

6. Respondents timely filed Notices of Defense, requesting a hearing.

Background and Investigation

7. California's Smog Check Program requires the owners of most motor vehicles to subject their vehicles to and pass a Smog Check inspection and receive a certificate of compliance every two years when renewing their registration and when the vehicle's title is transferred. These inspections are performed by Smog Check inspectors at Smog Check stations, both of which are licensed by the Bureau. The Smog Check Program is intended to reduce air pollution by identifying and requiring the repair of polluting motor vehicles.

8. Beginning March 9, 2015, the Smog Check Program requires the use of an On-Board Diagnostic Inspection System (BAR-OIS). The system consists of a Bureau-certified Data Acquisition Device (DAD), computer, bar code scanner, and printer. A Smog Check inspector scans a bar code on the vehicle, Department of Motor Vehicles (DMV) registration renewal documents, or both. The bar code identifies the vehicle to be inspected. The inspector then connects the DAD to a port located in the vehicle's passenger compartment. During the inspection, the Bureau receives vehicle information uploaded from the DAD to a Bureau database via an internet connection. The information includes an electronic vehicle identification number (eVIN), a unique number assigned to a vehicle at the time it's manufactured; the communication protocol, which is the specific language the Powertrain Control Module (PCM) uses to relay or communicate information to scan tools or devices such as the BAR-OIS; and the number of Parameter Identifications (PIDs), which is the number of specific data values each PCM reports related to emissions controls. Like the eVIN, the protocol and PIDs are programmed into the vehicle's on-board computer during manufacture and

do not change. Smog Check inspectors must also perform a visual and functional test of each vehicle.

9. If a vehicle passes the Smog Check inspection, the BAR-OIS prints a Vehicle Inspection Report (VIR), including a certificate of compliance. The Smog Check inspector must sign the VIR indicating the inspection was performed within Bureau guidelines. Each inspector has a unique username and password to log into the BAR-OIS, identifying who performed a particular inspection.

10. The Bureau maintains the Vehicle Information Database (VID), which contains DMV registration information, Smog Check data, and certificates of compliance. The Bureau monitors the VID for evidence of fraudulent Smog Checks, including those performed via clean plugging. Clean plugging is an illegal practice in which an individual uses another vehicle's properly functioning on-board diagnostic system or another source to generate passing scores or diagnostic information to issue fraudulent smog certificates for non-smog-compliant or untested vehicles.

11. Marc Ortega, Bureau Program Representative II, performed a detailed review of VID data for Smog Check inspections performed at respondent Alder Smog & Tires in 2022. Mr. Ortega identified seven instances of suspected clean plugging. Mr. Ortega documented his findings in a report dated November 4, 2022. (Ex. 7.)

Instances of Clean Plugging

VEHICLE 1

12. On June 21, 2022, respondent Rodriguez, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2006 Chevrolet Silverado C3500, with a vehicle identification number (VIN) ending in 9231 (Vehicle 1). Vehicle 1 passed

the inspection, and a smog certificate of compliance was issued. However, Vehicle 1's protocol and PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 215 such vehicles.

13. On January 5, 2021, Vehicle 1 had passed a Smog Check inspection at a different Smog Check facility. The eVIN, protocol, and PID count transmitted to the Bureau during the January 5, 2021 inspection matched the expected results for vehicles of the same year, make, model, and engine type.

VEHICLE 2

14. On June 24, 2022, respondent Abarca, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2005 Ford Explorer XLS, with a VIN ending in 2321 (Vehicle 2). Vehicle 2 passed the inspection, and a smog certificate of compliance was issued. However, Vehicle 2's protocol and PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 181 such vehicles. Vehicle 2's eVIN, protocol, and PID count matched that of a 2006 Honda Accord Value with a VIN ending in 4607. The evidence did not disclose whether the 2006 Honda Accord was ever tested at respondent Alder Smog & Tires.

15. On January 26, 2021, Vehicle 2 had passed a Smog Check inspection at a different Smog Check facility. The eVIN, protocol, and PID count transmitted to the Bureau during the January 26, 2021 inspection matched the expected results for vehicles of the same year, make, model, and engine type.

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VEHICLE 3

16. On July 16, 2022, respondent Rodriguez, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2010 Mitsubishi Lancer DE, with a VIN ending in 6980 (Vehicle 3). Vehicle 3 passed the inspection, and a smog certificate of compliance was issued. However, Vehicle 3's PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 193 such vehicles. Vehicle 3's eVIN, protocol, and PID count matched that of a 2009 Mini Cooper with a VIN ending in 6634, tested by respondent Rodriguez at Alder Smog & Tires on the same date.

17. On March 1, 2022, Vehicle 3 had passed a Smog Check inspection at a different Smog Check facility. The eVIN, protocol, and PID count transmitted to the Bureau during the March 1, 2022 inspection matched the expected results for vehicles of the same year, make, model, and engine type.

VEHICLE 4

18. On August 24, 2022, respondent Rodriguez, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2004 Nissan Titan XE, with a VIN ending in 1949 (Vehicle 4). Vehicle 4 passed the inspection, and a smog certificate of compliance was issued. However, Vehicle 4's protocol and PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 1,000 such vehicles. Vehicle 4's eVIN, protocol, and PID count matched that of a 2014 Ram 1500 ST with a VIN ending in 8497, tested by respondent Rodriguez at Alder Smog & Tires on the same date.

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19. On July 18, 2020, Vehicle 4 had passed a Smog Check inspection at a different Smog Check facility. The protocol and PID count transmitted to the Bureau during the July 18, 2020 inspection matched the expected results for vehicles of the same year, make, model, and engine type. As expected, Vehicle 4 did not transmit an eVIN. The federal government did not require vehicles manufactured before 2005 to have an eVIN recorded into their PCM.

VEHICLE 5

20. On August 26, 2022, respondent Rodriguez, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2000 Honda Civic LX, with a VIN ending in 1786 (Vehicle 5). Vehicle 5 passed the inspection, and a smog certificate of compliance was issued. However, Vehicle 5's protocol and PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 645 such vehicles. Vehicle 5's eVIN, protocol, and PID count matched that of a 2012 Nissan Pathfinder with a VIN ending in 4592, tested by respondent Rodriguez at Alder Smog & Tires on the same date.

21. On February 8, 2022, Vehicle 5 had passed a Smog Check inspection at a different Smog Check facility. The protocol and PID count transmitted to the Bureau during the February 8, 2022 inspection matched the expected results for vehicles of the same year, make, model, and engine type. As expected because the vehicle was manufactured before 2005, Vehicle 5 did not transmit an eVIN.

VEHICLE 6

22. On October 5, 2022, respondent Rodriguez, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2006 Chevy Silverado K2500 Heavy

Duty, with a VIN ending in 2389 (Vehicle 6). Vehicle 6 passed the inspection, and a smog certificate of compliance was issued. However, Vehicle 6's protocol and PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 1,000 such vehicles.

23. On October 28, 2020, Vehicle 6 passed a Smog Check inspection at a different Smog Check facility. The eVIN, protocol, and PID count transmitted to the Bureau during the October 28, 2020 inspection matched the expected results for vehicles of the same year, make, model, and engine type.

VEHICLE 7

24. On October 11, 2022, respondent Rodriguez, while working at respondent Alder Smog & Tires, conducted a Smog Check for a 2006 Chevy Silverado K2500 Heavy Duty, with a VIN ending in 3440 (Vehicle 7). Vehicle 7 passed the inspection, and a smog certificate of compliance was issued. However, Vehicle 7's protocol and PID count did not match the expected results for vehicles of the same year, make, model, and engine type, based on Mr. Ortega's analysis of data contained in the VID for 698 such vehicles.

25. On March 18, 2021, Vehicle 7 had passed a Smog Check inspection at a different Smog Check facility. The eVIN, protocol, and PID count transmitted to the Bureau during the March 18, 2021 inspection matched the expected results for vehicles of the same year, make, model, and engine type.

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Respondent Abarca's Prior Citation

26. On July 9, 2021, the Bureau issued a citation to respondent Abarca for violating Health and Safety Code section 44032, which requires qualified technicians at licensed stations to perform tests of emission control devices and systems in accordance with Health and Safety Code section 44012. In the citation, the Bureau alleged that on June 17, 2021, respondent Abarca improperly issued a smog certificate of compliance to a vehicle with a missing fuel evaporative cannister.

27. On May 21, 2022, the citation became effective, requiring respondent Abarca to complete the Bureau's eight-hour certified Smog Check citation training course. On May 23, 2022, respondent Abarca completed the required training.

Mitigation and Rehabilitation Evidence

28. Respondent Alder Smog & Tires has operated since 2020. Respondents Rodriguez and Abarca own the business as members of the LLC and are the only two licensed inspectors working at the business. During 2022, respondents Rodriguez and Abarca inspected approximately 300 vehicles per month, for a total of approximately 3,600 vehicles. The seven vehicles identified by Mr. Ortega represent approximately 0.002 percent of vehicles inspected at respondent Alder Smog & Tires in 2022. Respondents Alder Smog & Tires and Rodriguez have no prior license discipline.

29. In their testimony, both respondent Rodriguez and respondent Abarca denied intentionally clean plugging any vehicle. Based upon a review of vehicle inspection history available on the Bureau's website, respondents Rodriguez and Abarca noted all seven vehicles had recently passed their prior smog inspections and asserted they had no reason to falsely certify any of the vehicles because the recent smog inspections demonstrated the vehicles were in good working order. If the

vehicles had recently failed a smog inspection, respondents would expect the customer to have a motive to ask respondents to clean plug the vehicles.

30. For four of the seven vehicles at issue, i.e., Vehicles 2, 3, 4, and 5, the data transmitted to the Bureau matched a different vehicle than the one allegedly tested. In three instances (i.e., Vehicles 2, 3, and 4), respondent Rodriguez tested the matching vehicle the same day, within about 20 minutes of the vehicle identified as clean plugged. Although he had no specific memory of testing these vehicles, respondent Rodriguez testified he likely inadvertently left the DAD connected to the wrong vehicle, submitting the wrong vehicle data. He attributed the errors to being distracted by personal issues involving his former wife and child visitation issues and his exhaustion from working seven days a week. Respondent Rodriguez also testified in 2022 he and respondent Abarca kept all customer paperwork in one pile, creating the risk of scanning the wrong paperwork. Respondent Rodriguez testified he has since resolved his personal issues and now only works six days a week to allow himself more time to rest.

31. For Vehicle 2, inspected by respondent Abarca, the data transmitted to the Bureau matched a different vehicle. The evidence did not reveal whether respondents tested the matching vehicle, and respondent Abarca did not have a specific memory of testing Vehicle 2. However, respondent Abarca testified he likely made the same error as described by respondent Rodriguez, leaving the DAD connected to the wrong vehicle because he was overwhelmed and attempting to work quickly. He also asserted stress related to working during the COVID-19 pandemic contributed to his mistake.

32. Both respondents Rodriguez and Abarca testified they now leave the customer's paperwork inside the vehicle to eliminate the risk of scanning the wrong

vehicle's paperwork. They also take more time per vehicle rather than attempting to minimize the amount of wait time for customers.

33. Three of the six vehicles inspected by respondent Rodriguez were diesel trucks (Vehicles 1, 6, and 7). Each vehicle transmitted the proper eVIN but did not transmit the expected protocol or PID count. Respondent Rodriguez testified diesel truck owners are known to engage in vehicle tuning, but he presented no specific evidence any of the trucks he inspected were tuned or modified in any way. On cross-examination, Mr. Ortega acknowledged a vehicle owner could modify a vehicle's PID count through vehicle tuning. However, he denied a vehicle owner could change a vehicle's protocol.

Analysis

34. For Vehicle 2, respondent Abarca did not perform a proper inspection, and a smog certificate of compliance should not have been issued. For Vehicles 3, 4, and 5, respondent Rodriguez did not perform proper inspections, and smog certificates of compliance should not have been issued. As to these four vehicles, respondents admitted their actions, i.e., connecting the DAD to the wrong vehicle, caused a smog certificate of compliance to be improperly issued. Respondents denied engaging in intentional misconduct, and their assertions were supported by the absence of a recent failed smog inspection for each vehicle. The evidence did not establish a motive for respondents to engage in intentional misconduct in connection with these vehicles.

35. For Vehicles 1, 6, and 7, the evidence did not establish respondent Rodriguez failed to perform a proper inspection. These three vehicles were all diesel Chevrolet Silverado trucks. Respondent Rodriguez's denial of intentional misconduct

as to these trucks was supported by evidence showing the proper eVIN was transmitted for each truck and the absence of a recent failed smog inspection for each vehicle. The evidence established diesel truck owners sometimes tune their vehicles, which may change the vehicle's PID count, although the evidence did not establish whether these specific trucks were modified. The evidence did not establish a motive for respondent Rodriguez to engage in intentional misconduct in connection with these vehicles.

36. As to Vehicles 2, 3, 4, and 5, complainant did not establish respondents engaged in fraudulent conduct, either intentionally or through gross negligence. Given the relatively small number of violations compared to the large volume of vehicles tested by respondents during 2022, the lack of a motive to commit fraud, and the lack of evidence demonstrating intentional misconduct, the evidence established only that respondents acted negligently in issuing the false certificates of compliance.

Costs

37. The Bureau seeks reimbursement of \$10,951.25 in prosecution costs and \$2,399.76 in investigation costs. Of the prosecution costs, 46.75 hours totaling \$10,285 were incurred by attorneys, and 3.25 hours totaling \$666.25 were incurred by paralegals. The investigation costs are based upon 24 hours incurred by Mr. Ortega.

38. Respondents did not present any evidence of a financial inability to pay costs. Respondent Rodriguez testified he could pay between \$75 and \$100 per month toward costs, but he did not provide any further detail regarding his financial circumstances.

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant bears the burden of proving by a preponderance of the evidence the allegations against respondents. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) A preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Applicable Law

2. If an ARD cannot show a bona fide error, the Bureau may suspend, revoke, or place on probation its registration if the dealer or one of its technicians commits any of the following acts or omissions: (1) making any written or oral statement which it knew or should have known was untrue or misleading, (2) any conduct constituting fraud, or (3) failure in any material respect to comply with the provisions of the Automotive Repair Act or the regulations adopted pursuant to it. (Bus. & Prof. Code, § 9884.7, subds. (a)(1), (a)(4), (a)(6).) Fraud includes a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact. (Bus. & Prof. Code, § 9884.7, subd. (e)(2).)

3. The Bureau may suspend, revoke, or take other disciplinary action against a Smog Check, Test Only Station license; a Smog Check inspector license; or a Smog Repair Technician license if the licensee violates any law under the Motor Vehicle Inspection Program or the regulations adopted pursuant to it. (Health & Saf. Code, § 44072.2, subds. (a), (c).)

4. The Bureau may suspend, revoke, or take other disciplinary action against a Smog Check inspector or Repair Technician if the licensee commits any act involving dishonesty, fraud, or deceit whereby another is injured. (Health & Saf. Code, § 44072.2, subd. (d).)

5. The Bureau must revoke the license of any Smog Check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. (Health & Saf. Code, § 44072.10, subd. (c).)

6. The Bureau may discipline a license even if it is expired or canceled. (Bus. & Prof. Code, § 118, subd. (b).)

Causes for Discipline

RESPONDENT ALDER SMOG & TIRES

First Cause for Discipline: Untrue or Misleading Statements

7. Complainant seeks to discipline respondent Alder Smog & Tires' ARD license pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), for making or authorizing statements it knew or should have known were untrue or misleading.

8. Complainant proved by a preponderance of the evidence respondents Rodriguez and Abarca, while working as technicians for respondent Alder Smog & Tires, made statements they should have known were untrue and misleading when they falsely certified Vehicles 2, 3, 4, and 5 as having passed smog inspections. Respondent Alder Smog & Tires is responsible for the misconduct of its technicians, pursuant to the plain language of Business and Professions Code section 9884.7, subdivision (a), and case law. (See *Arenstein v. California State Bd. of Pharmacy* (1968)

265 Cal.App.2d 179 [pharmacy licensee responsible for the illegal acts of its employees]; *Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793 [licensed automotive dealer subject to discipline for misconduct of salesperson].) Cause therefore exists to discipline respondent Alder Smog & Tires' ARD license pursuant to Business and Professions Code section 9884.7, subdivision (a)(1).

Second Cause for Discipline: Fraud

9. Complainant seeks to discipline respondent Alder Smog & Tires' ARD license pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), for committing acts constituting fraud.

10. Complainant did not prove by a preponderance of the evidence respondents Rodriguez and Abarca, while working as technicians for respondent Alder Smog & Tires, committed fraud by falsely certifying Vehicles 2, 3, 4, and 5 as having passed smog inspections. Fraud "is never presumed; it must be established by proof." (*Dorn v. Lichenin* (1951) 105 Cal.App.2d 796, 801.) Complainant did not present any evidence respondents engaged in willful fraudulent conduct, nor did their conduct rise to the level of gross negligence, as described in Factual Finding 35. Cause therefore does not exist to discipline respondent Alder Smog & Tires' ARD license pursuant to Business and Professions Code section 9884.7, subdivision (a)(4).

Third Cause for Discipline: Material Violations of Automotive Repair Act

11. Complainant seeks to discipline respondent Alder Smog & Tires' ARD license pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), for committing material violations of the Automotive Repair Act.

12. Complainant proved by a preponderance of the evidence respondent Alder Smog & Tires materially violated the Automotive Repair Act because its technicians, respondents Rodriguez and Abarca, violated Business and Professions Code section 9884.7, subdivision (a)(1) by falsely issuing smog certificates of compliance for Vehicles 2, 3, 4, and 5, as described in Legal Conclusion 8. Cause therefore exists to discipline respondent Alder Smog & Tires' ARD license pursuant to Business and Professions Code section 9884.7, subdivision (a)(6).

Fourth Cause for Discipline: Violations of Motor Vehicle Inspection Program

13. Complainant seeks to discipline respondent Alder Smog & Tires' Smog Check Station license pursuant to Health and Safety Code section 44072.2, subdivision (a), for violating provisions of the Motor Vehicle Inspection Program as follows: (1) failing to properly conduct emissions control tests (Health & Saf. Code, § 44012); (2) issuing electronic smog certificates of compliance without ensuring the vehicles were properly tested and inspected (Health & Saf. Code, § 44015, subd. (b)); and (3) willfully making false entries for electronic smog certificates of compliance. (Health & Saf. Code, § 44059.)

14. Complainant proved by a preponderance of the evidence respondent Alder Smog & Tires violated provisions of the Motor Vehicle Inspection Program by falsely certifying Vehicles 2, 3, 4, and 5 as passing smog inspections. Respondent Alder Smog & Tires did not properly conduct emissions control tests and issued electronic smog certificates of compliance without ensuring the vehicles were properly tested. Cause therefore exists to discipline respondent Alder Smog & Tires' Smog Check Station license pursuant to Health and Safety Code section 44072.2, subdivision (a).

Fifth Cause for Discipline: Violations of Motor Vehicle Inspection Program Regulations

15. Complainant seeks to discipline respondent Alder Smog & Tires' Smog Check Station license pursuant to Health and Safety Code section 44072.2, subdivision (c), for violating regulations adopted under the Motor Vehicle Inspection Program as follows: (1) falsely or fraudulently issuing a smog certificate of compliance (Cal. Code Regs., tit. 16 (CCR), § 3340.24, subd. (c)); (2) issuing smog certificates of compliance without properly inspecting and testing vehicles (CCR, § 3340.35, subd. (c)); (3) entering false vehicle data into Bureau systems (CCR, § 3340.41, subd. (c)); (4) failing to conduct smog tests and inspections in accordance with the Bureau's specifications (CCR, § 3340.42); and (5) creating false and misleading records. (CCR, § 3373.)

16. Complainant proved by a preponderance of evidence respondent Alder Smog & Tires violated the above regulations adopted under the Motor Vehicle Inspection Program by falsely certifying Vehicles 2, 3, 4, and 5 as passing smog inspections. Respondent Alder Smog & Tires, through its technicians, issued false certificates of compliance, did not properly conduct smog inspections, entered false data in Bureau systems, and created false and misleading records. Cause therefore exists to discipline respondent Alder Smog & Tires' Smog Check Station license pursuant to Health and Safety Code section 44072.2, subdivision (c), in conjunction with the regulations described above.

Sixth Cause for Discipline: Dishonesty, Fraud, or Deceit

17. Complainant seeks to discipline respondent Alder Smog & Tires' Smog Check Station license pursuant to Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subdivision (c), because respondent Alder Smog & Tires

committed dishonest, fraudulent, or deceitful acts in connection with the issuance of fraudulent smog certificates of compliance.

18. Complainant did not prove by a preponderance of the evidence respondent Alder Smog & Tires committed dishonest, fraudulent, and deceitful acts when it issued certificates of smog compliance for Vehicles 2, 3, 4, and 5 without performing proper emissions tests. As described in Factual Finding 35, the evidence established only negligent conduct. Cause therefore does not exist to discipline respondent Alder Smog & Tires' Smog Check Station license pursuant to Health and Safety Code section 44072.2, subdivisions (a) and (c).

RESPONDENT RODRIGUEZ

Seventh Cause for Discipline: Violations of Motor Vehicle Inspection Program

19. Complainant seeks to discipline respondent Rodriguez's Smog Check Inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a) for violating provisions of the Motor Vehicle Inspection Program as follows: (1) failing to determine whether emission control devices were installed and functioning correctly (Health & Saf. Code, § 44012, subd. (a)); (2) failing to properly perform emission control tests (Health & Saf. Code, §§ 44012, subd. (f); 44032); and (3) making false entries for electronic certificates of compliance. (Health & Saf. Code, § 44059.)

20. Complainant proved by a preponderance of the evidence respondent Rodriguez violated provisions of the Motor Vehicle Inspection Program by falsely certifying Vehicles 3, 4, and 5 as passing smog inspections. Respondent Rodriguez did not properly conduct emissions control tests, issued electronic smog certificates of compliance without ensuring the vehicles were properly tested and inspected, failed to

properly test emissions control devices and systems, and made false entries for electronic certificates of compliance. Cause therefore exists to discipline respondent Rodriguez's Smog Check Inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a).

Eighth Cause for Discipline: Violations of Motor Vehicle Inspection Program Regulations

21. Complainant seeks to discipline respondent Rodriguez's Smog Check Inspector license pursuant to Health and Safety Code section 44072.2, subdivision (c), for violating regulations adopted under the Motor Vehicle Inspection Program as follows: (1) falsely or fraudulently issuing a smog certificate of compliance (CCR, § 3340.24, subd. (c)); (2) failing to inspect and test vehicles in accordance with Health and Safety Code sections 44012 and 44035 and CCR section 3340.42 (CCR, § 3340.30, subd. (a)); (3) entering false vehicle data into Bureau systems (CCR, § 3340.41, subd. (c)); and (4) failing to conduct smog tests and inspections in accordance with the Bureau's specifications. (CCR, § 3340.42.)

22. Complainant proved by a preponderance of evidence respondent Rodriguez violated the above regulations adopted under the Motor Vehicle Inspection Program by falsely certifying Vehicles 3, 4, and 5 as passing smog inspections. Respondent Rodriguez issued false certificates of compliance, did not properly conduct smog inspections, and entered false data in Bureau systems. Cause therefore exists to discipline respondent Rodriguez's Smog Check Inspector license pursuant to Health and Safety Code section 44072.2, subdivision (c), in conjunction with the regulations described above.

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Ninth Cause for Discipline: Dishonesty, Fraud, or Deceit

23. Complainant seeks to discipline respondent Rodriguez's Smog Check Inspector license pursuant to Health and Safety Code sections 44072.2, subdivision (d) and 44072.10, subdivision (c), because respondent Rodriguez committed dishonest, fraudulent, or deceitful acts in connection with the issuance of fraudulent smog certificates of compliance.

24. Complainant did not prove by a preponderance of the evidence respondent Rodriguez committed dishonest, fraudulent, and deceitful acts when he issued certificates of smog compliance for Vehicles 3, 4, and 5 without performing proper emissions tests. As described in Factual Finding 35, the evidence established only negligent conduct. Cause therefore does not exist to discipline respondent Rodriguez's Smog Check Inspector license pursuant to Health and Safety Code section 44072.2, subdivision (d), and section 44072.10, subdivision (c).

RESPONDENT ABARCA

Tenth Cause for Discipline: Violations of Motor Vehicle Inspection Program

25. Complainant seeks to discipline respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses pursuant to Health and Safety Code section 44072.2, subdivision (a), for violating provisions of the Motor Vehicle Inspection Program as follows: (1) failing to determine whether emission control devices were installed and functioning correctly (Health & Saf. Code, § 44012, subd. (a)); (2) failing to properly perform emission control tests (Health & Saf. Code, §§

44012, subd. (f); 44032); and (3) making false entries for electronic certificates of compliance. (Health & Saf. Code, § 44059.)

26. Complainant proved by a preponderance of the evidence respondent Abarca violated provisions of the Motor Vehicle Inspection Program by falsely certifying Vehicle 2 as passing a smog inspection. Respondent Abarca did not properly conduct emissions control tests, issued electronic smog certificates of compliance without ensuring the vehicles were properly tested and inspected, failed to properly test emissions control devices and systems, and made false entries for electronic certificates of compliance. Cause therefore exists to discipline respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses pursuant to Health and Safety Code section 44072.2, subdivision (a).

Eleventh Cause for Discipline: Violations of Motor Vehicle Inspection Program Regulations

27. Complainant seeks to discipline respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses pursuant to Health and Safety Code section 44072.2, subdivision (c) for violating regulations adopted under the Motor Vehicle Inspection Program as follows: (1) falsely or fraudulently issuing a smog certificate of compliance (CCR, § 3340.24, subd. (c)); (2) failing to inspect and test vehicles in accordance with Health and Safety Code sections 44012 and 44035 and CCR section 3340.42 (CCR, § 3340.30, subd. (a)); (3) entering false vehicle data into Bureau systems (CCR, § 3340.41, subd. (c)); and (4) failing to conduct smog tests and inspections in accordance with the Bureau's specifications. (CCR, § 3340.42.)

28. Complainant proved by a preponderance of evidence respondent Abarca violated the above regulations adopted under the Motor Vehicle Inspection Program

by falsely certifying Vehicle 2 as passing smog inspections. Respondent Abarca issued false certificates of compliance, did not properly conduct smog inspections, and entered false data in Bureau systems. Cause therefore exists to discipline respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses pursuant to Health and Safety Code section 44072.2, subdivision (c), in conjunction with the regulations described above.

Twelfth Cause for Discipline: Dishonesty, Fraud, or Deceit

29. Complainant seeks to discipline respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses pursuant to Health and Safety Code sections 44072.2, subdivision (d) and 44072.10, subdivision (c), because respondent Abarca committed dishonest, fraudulent, or deceitful acts in connection with the issuance of fraudulent smog certificates of compliance.

30. Complainant did not prove by a preponderance of the evidence respondent Abarca committed dishonest, fraudulent, and deceitful acts when he issued a certificate of smog compliance for Vehicle 2 without performing proper emissions tests. As described in Factual Finding 35, the evidence established only negligent conduct. Cause therefore does not exist to discipline respondent Abarca's Smog Check Inspector and Smog Check Repair Technician licenses pursuant to Health and Safety Code section 44072.2, subdivision (d), and section 44072.10, subdivision (c).

Disposition

31. The Bureau's Guidelines for Disciplinary Orders and Terms of Probation, revised June 2021 (Guidelines) set forth recommended discipline for various violations of the Business and Professions and Health and Safety Codes, including Business and Professions Code sections 9884.7, subdivisions (a)(1) and (a)(6), and Health and Safety

Code section 44072.2, subdivisions (a) and (c). The recommended minimum discipline for violations of these statutes is two or three years of probation. The Guidelines also set forth recommended discipline for various violations of the Bureau's regulations, including CCR sections 3340.30, subdivision (a); 3340.41, subdivision (c); and 3340.42. The recommended minimum discipline for violations of these regulations is five years of probation. The recommended maximum penalty for the statutory and regulatory violations is revocation.

32. The Bureau's Guidelines set forth aggravating factors to consider in determining the level of discipline imposed on licensees. The Bureau's aggravating factors pertinent here include (1) a prior history of citations; and (2) evidence the unlawful act was of a pattern of practice. (Guidelines, p. 2.) Respondents' false certification of four vehicles resulted from business practices involving disorganized customer paperwork and working too quickly. Respondent Abarca received a Bureau citation in 2021. The other listed aggravating factors are inapplicable.

33. The Guidelines also set forth mitigating factors to consider in determining the level of discipline imposed on licensees. Mitigating factors pertinent here include (1) the absence of prior disciplinary action, which applies to respondents Alder Smog & Tires and Rodriguez, and (2) evidence of substantial measures to correct business practices to minimize the likelihood of recurrence of the violations. (Guidelines, p. 2–3.) Respondent Alder Smog & Tires has changed its business practices by leaving customer paperwork inside each vehicle and spending more time inspecting each vehicle. The other listed mitigating factors are inapplicable.

34. Considering the Board's Guidelines, revocation of respondents' licenses is not warranted. Respondents Alder Smog & Tires and Rodriguez have no prior license discipline. Respondent Abarca has one prior citation. The evidence established

respondents' violations resulted from negligence, not fraud. Respondents have modified their business practices to avoid future recurrence of the violations. Placing respondents' licenses on probation for five years will allow the Bureau to monitor respondents' business practices and ensure public safety.

Other Matters

35. The Bureau may suspend, revoke, or place on probation the registration for all places of business operated in California by an ARD upon a finding that the ARD has, or is, engaged in a course of repeated and willful violations of the Automotive Repair Act or the regulations adopted pursuant to it. (Bus. & Prof. Code, § 9884.7, subd. (c).)

36. "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].)

37. 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.)

38. Complainant proved respondent Alder Tires & Smog engaged in a course of repeated and willful violations of the Automotive Repair Act and the regulations adopted pursuant to it, because respondents Rodriguez and Abarca acted with the requisite general intent when they conducted improper smog inspections of four vehicles. Cause therefore exists to discipline the registration for all places of business operated in California by respondent Alder Tires & Smog, pursuant to Business and Professions Code section 9884.7, subdivision (c).

39. When the Bureau revokes or suspends a license following a hearing, the Bureau may likewise suspend or revoke any additional license issued under the Motor Vehicle Inspection Program in the name of the licensee. (Health & Saf. Code, § 44072.8.) Because suspension or revocation of respondents’ licenses is not warranted

in this case, cause therefore does not exist to suspend or revoke any additional licenses issued to respondents, pursuant to Health and Safety Code section 44072.8.

Costs

40. Complainant is entitled to recover the reasonable costs of prosecution and investigation of this matter. (Bus. & Prof. Code, § 125.3.) In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 (*Zuckerman*), the Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought. These factors include: 1) the licentiate's success in getting the charges dismissed or the severity of the discipline imposed reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Zuckerman, supra*, 29 Cal.4th at p. 45.)

41. Complainant requests reimbursement of \$10,951.25 in prosecution costs and \$2,399.76 in investigation costs. The costs are unreasonable under the *Zuckerman* factors. Respondents were successful in getting some charges dismissed and reducing the severity of the proposed discipline. They raised a colorable challenge to the proposed discipline and presented evidence of a good faith belief in the merits of their position. They did not present evidence of an inability to pay costs. The Bureau's investigation was reasonable considering the alleged misconduct. It is therefore appropriate to reduce costs to \$5,000, with the respondents separately liable as follows: respondent Alder Smog & Tires for \$3,500; respondent Rodriguez for \$1,000; and respondent Abarca for \$500.

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ORDER

Respondent Alder Smog & Tires, LLC

1. Automotive Repair Dealer Registration Number ARD 296598, and all other ARD registrations, issued to respondent Alder Smog & Tires, LLC, are revoked.

2. Smog Check Station License Number RC 296598 issued to respondent Alder Smog & Tires, LLC, is revoked.

3. However, the revocations are stayed, and respondent Alder Smog & Tires, LLC is placed on probation for five years on the terms and conditions below.

Respondent Luis Rodriguez

4. Smog Check Inspector License Number EO 641766 issued to respondent Luis Rodriguez is revoked.

5. However, the revocation is stayed, and respondent Luis Rodriguez is placed on probation for five years on the terms and conditions below.

Respondent Armando Neftali Abarca

6. Smog Check Inspector License Number EO 641773 issued to respondent Armando Neftali Abarca is revoked.

7. Smog Check Repair Technician License Number EI 641773 issued to respondent Armando Neftali Abarca is revoked.

8. However, the revocations are stayed, and respondent Armando Neftali Abarca is placed on probation for five years on the terms and conditions below.

Probation Terms and Conditions

1. OBEY ALL LAWS: During the period of probation, respondents shall comply with all federal and state statutes, regulations and rules governing all Bureau registrations and licenses held by respondents.

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

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

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

5. TOLLING OF PROBATION: If, during probation, respondents leave the jurisdiction of California to reside or do business elsewhere or otherwise cease to do business in the jurisdiction of California, respondents shall notify the Bureau in writing

within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

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

6. VIOLATION OF PROBATION: If respondents violate or fail to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard may set aside the stay order and carry out the disciplinary order provided in the decision. Once respondents are served notice of the Bureau's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

7. MAINTAIN VALID LICENSE: Respondents shall, at all times while on probation, maintain a current and active registration and/or license(s) with the Bureau, including any period during which suspension or probation is tolled. If a respondent's registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by that respondent within 30 days of that date. If a respondent's registration or license expires during a term of probation, by

operation of law or otherwise, then upon renewal that respondent's registration or license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

8. COST RECOVERY: Respondents Alder Smog & Tires, LLC; Luis Rodriguez; and Armando Neftali Abarca shall reimburse the Bureau for its costs of prosecution and investigation in the amounts of \$3,500, \$1,000, and \$500, respectively. The Bureau or its designee may establish a payment plan for cost recovery; however, respondents shall pay the full amount of cost recovery at least 180 days prior to completion of probation. Respondents shall make payment by check or money order payable to the Bureau and shall indicate on the check or money order that it is for cost recovery payment for case number 79/22-16490. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. The Bureau reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

9. COMPLETION OF PROBATION: Upon successful completion of probation, respondents' affected registration and/or licenses will be fully restored or issued without restriction, if respondents meet all current requirements for registration or licensure and has paid all outstanding fees, monetary penalties, or cost recovery owed to the Bureau.

10. LICENSE SURRENDER: Following the effective date of a decision that orders a stay of invalidation or revocation, if respondents cease business operations or are otherwise unable to satisfy the terms and conditions of probation, respondents may request that the stay be vacated. Such request shall be made in writing to the

Bureau. The Director and the Bureau Chief reserve the right to evaluate a respondent's request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

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

11. TRAINING COURSE: During the period of probation, respondents Rodriguez and Abarca shall attend and successfully complete a Bureau-specified and -approved training course in inspection, diagnosis and/or repair of emission systems failures and engine performance, applicable to the class of license held by the respondents. Respondents Rodriguez and Abarca shall provide to the Bureau proof of enrollment in the course within 30 days of the effective date of the decision, and proof of successful course completion within 180 days of the effective date of the decision.

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

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12. NOTIFICATION TO EMPLOYER: When performing services that fall within the scope of their licenses, respondents Rodriguez and Abarca shall provide each of their current or future employers a copy of the decision and the underlying Accusation before commencing employment. Notification to respondents' current employer shall occur no later than the effective date of the decision. Respondents shall submit to Bureau, upon request, satisfactory evidence of compliance with this term of probation.

DATE: **03/06/2024**

Harden Sooper

HARDEN SOOPER

Administrative Law Judge

Office of Administrative Hearings