

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

In the Matter of the Accusation Against:

FARHAD ARBABZADEH, Partner,
MASSOUD KHOSROZADEHE, Partner, dba
SMOG MASTER

28 E. Birch, Fresno, CA 93650
Automotive Repair Dealer Registration
No. ARD 228231
Smog Check, Test Only Station License
No. TC 228231

972 E. Barstow Ave., Clovis, CA 93612
Automotive Repair Dealer Registration
No. ARD 228228
Smog Check, Test Only Station License
No. TC 228228 (Affiliate),

FARHAD ARBABZADEH, Owner
2591 Blackstone, Fresno, CA 93703
Automotive Repair Dealer Registration
No. ARD 266346
Smog Check, Test Only Station License
No. TC 266346 (Affiliate),

MASSOUD KHOSROZADEHE
Smog Check Inspector License No. EO 127907
Smog Check Repair Technician License No. EI
127907,

DANIEL GARZA
Smog Check Inspector License No. EO 147321
Smog Check Repair Technician License No. EI
147321,

Case No. 79/16-9952

OAH No. 2017120503

RONALD P. ASBERRY, JR.
Smog Check Inspector License No. EO 305659
Smog Check Repair Technician License No. EI
305659,

ALFONSO AVILA LONGORIA
Smog Check Inspector License No. EO 313712
Smog Check Repair Technician License No. EI
313712),

Respondents.

PROPOSED DECISION

Administrative Law Judge John E. DeCure, State of California, Office of Administrative Hearings, heard this matter on September 25 and 26, 2018, in Fresno, California.

Deputy Attorney General Andrew M Steinheimer represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau; BAR), Department of Consumer Affairs.

Steven L. Simas and Heather Hoganson, Attorneys at Law, represented respondents Farhad Arbabzadeh and Massoud Khosrozadehe, partners, doing business as Smog Master.

Daniel Garza, Ronald P. Asberry, Jr., and Alfonso A. Longoria were present and represented themselves.

Evidence was received and argument was heard. The record was closed and the matter submitted for decision on September 26, 2018.

FACTUAL FINDINGS

Licensure and Jurisdiction

ARD AND STATION LICENSES

1. In 2003, the Bureau issued Automotive Repair Dealer Registration (ARD) number ARD 228231 to Farhad Arbabzadeh and Massoud Khosrozadehe, partners (respondent partners), doing business as Smog Master (28 E. Birch, Fresno, CA 93650 address). The registration expiration date is June 30, 2019.

Smog Master is certified as a STAR Station.¹ The certification was issued on January 29, 2013, and will remain active unless the ARD registration and/or Smog Check Station license is revoked, canceled, becomes delinquent, or if certification is invalidated.

2. On November 24, 2003, the Bureau issued Smog Check, Test Only, Station License number TC 228231 to respondent partners and Smog Master. The license's expiration date is June 30, 2019.

TECHNICIAN LICENSES

3. In 2003 the Bureau issued Advanced Emission Specialist Technician License Number EA 147321 to respondent Daniel Garza. The advanced emission specialist technician license was due to expire on February 28, 2013, but was cancelled. Pursuant to California Code of Regulations, title 16, section ("Regulation") 3340.28, subdivision (e), the license was renewed, pursuant to respondent's election, as Smog Check Inspector License Number EO 147321 and Smog Check Repair Technician License Number EI 147321 ("technician licenses"), effective January 2, 2013.² The Smog Check Repair Technician license expired on February 28, 2015. The Smog Check Inspector license will expire on February 28, 2019.

4. In 1996 the Bureau issued Advanced Emission Specialist Technician License Number EA 305659 to respondent Ronald P. Asberry, Jr. The advanced emission specialist technician license was due to expire on October 31, 2012, but was cancelled. Pursuant to California Code of Regulations, title 16, section ("Regulation") 3340.28, subdivision (e), the license was renewed, pursuant to respondent's election, as Smog Check Inspector License Number EO 305659 and Smog Check Repair Technician License Number EI 147321 ("technician licenses"), effective October 15, 2012. The Smog Check Repair Technician license expired on October 31, 2014. The Smog Check Inspector license will expire on October 31, 2020.

5. In 1997 the Bureau issued Advanced Emission Specialist Technician License Number EA 313712 to respondent Alfonso Avila Longoria. The advanced emission specialist technician license was due to expire on October 31, 2012, but was cancelled. Pursuant to California Code of Regulations, title 16, section ("Regulation") 3340.28,

¹ STAR stations are Smog Check stations that meet higher performance standards established by the Bureau of Automotive Repair. Some STAR stations are licensed to perform only tests, while others are licensed to perform both tests and repairs. The station is required to post a sign on the services it performs.

² Effective August 1, 2012, California Code of Regulations, title 16, sections 3340.28, 3340.29, and 3340.30 were amended to implement a license restructure from the Advanced Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog Check Inspector (EO) license and/or Smog Check Repair Technician (EI) license.

subdivision (e), the license was renewed, pursuant to respondent's election, as Smog Check Inspector License Number EO 313712 and Smog Check Repair Technician License Number EI 313712 ("technician licenses"), effective October 15, 2012. The Smog Check Repair Technician license expired on October 31, 2014. The Smog Check Inspector license will expire on October 31, 2018.

6. In 1999 the Bureau issued Advanced Emission Specialist Technician License Number EA 127907 to respondent Massoud Khosrozadehe. The advanced emission specialist technician license was due to expire on October 31, 2013, but was cancelled. Pursuant to California Code of Regulations, title 16, section ("Regulation") 3340.28, subdivision (e), the license was renewed, pursuant to respondent's election, as Smog Check Inspector License Number EO 127907 and Smog Check Repair Technician License Number EI 127907 ("technician licenses"), effective October 30, 2013. The Smog Check Repair Technician license expired on October 31, 2014. The Smog Check Inspector license will expire on October 31, 2019.

AFFILIATED LICENSES

7. In 2003 the Bureau issued Automotive Repair Dealer Registration (ARD) number ARD 228228 to Farhad Arbabzadeh and Massoud Khosrozadehe, partners (respondent partners), doing business as Smog Master (972 E. Barstow Ave., Clovis, CA 93612 address). The registration expiration date is June 30, 2019.

On August 26, 2003, the Bureau issued Smog Check, Test Only, Station License number TC 228231 to respondent partners and Smog Master (972 E. Barstow Ave., Clovis, CA 93612 address). The license's expiration date is June 30, 2019.

8. On August 23, 2011, the Bureau issued Automotive Repair Dealer Registration (ARD) number ARD 266346 to Farhad Arbabzadeh, owner, doing business as Smog Master (2591 N. Blackstone, Fresno, CA 93703 address). The registration expiration date is August 31, 2019.

On August 26, 2003, the Bureau issued Smog Check, Test Only, Station License number TC 228231 to Farhad Arbabzadeh, owner, doing business as Smog Master (2591 N. Blackstone, Fresno, CA 93703 address). The license's expiration date is August 31, 2019.

ACCUSATION

9. On October 24, 2017, complainant brought the Accusation solely in his official capacity as the Chief of the Bureau. On October 31, 2017, complainant served the Accusation and other related jurisdictional documents on respondents. Respondents timely filed a Notice of Defense, requesting a hearing. All jurisdictional requirements have been met.

10. The Accusation alleges that Smog Master: 1) issued a smog check certificate after administering the wrong testing protocol regarding one automobile; and 2) issued eight smog check certificates that were false and fraudulent, in that respondents did not actually test the vehicles for which smog certificates were issued. Instead, respondents utilized the illegal technique of “clean plugging,” by entering information into the station’s computer-based smog testing system about the vehicle to be issued a certificate indicating it passed the inspection, but actually connecting the test cable to a different vehicle.

Background Information re OIS/BAR-97 Testing and Clean Plugging

OIS/BAR-97 TESTING REPLACED BY OIS TESTING

11. Historically, using the BAR 97 EIS testing method, a technician tested the vehicle on a dynamometer and a probe was used to sample the exhaust gasses emitting from the vehicle while it was run on the dynamometer. However, today the BAR 97 EIS method is often the wrong test protocol, depending on the vehicle to be tested. Beginning on March 9, 2015, facilities such as Smog Master were obligated to test 1998 and newer diesel-powered vehicles, and 2000 and newer gasoline-powered vehicles, with the On Board Diagnostic Inspection System (OIS). The BAR 97 EIS methodology was not to be used any longer on such vehicles. The OIS interfaces with the vehicle’s on-board computer to determine that the engine is operating properly and keeping exhaust emissions at the appropriate level.

CLEAN PLUGGING

12. More specifically, part of the smog test is an On Board Diagnostics generation II (OBDII) functional test in which the licensed inspector connects a cable from the station’s test computer to a Diagnostic Link Connector, which is a plug found inside the vehicle’s passenger cabin. Through the plug and cable, the test computer retrieves information from the vehicle’s on-board computer. One piece of this information can be a test protocol, or communication interface, which is a combination of letters and numbers that indicate a particular system whereby the car’s computer will communicate with the station’s test computer. Another type of data collected by the computers is a parameter identification count (PID), including, for example, the engine speed and temperature and other data used by the computer system to check for compliance with smog laws. Each vehicle reports a specific known PID count, with slight variations, programmed during the manufacture of the vehicle. By clean plugging, the cable is plugged into a second vehicle, and the first vehicle, to which the certificate was issued, has not had its OBDII properly tested.

13. Another important piece of information is the vehicle identification number (VIN) that is physically present on all vehicles and must be programmed into the OBDII computer on 2005 and newer vehicles; on many occasions, the manufacturer also programmed the VIN into the OBDII of earlier-year models. The electronically programmed VIN, or “eVIN,” is captured by the Bureau during a smog check inspection and should match

the vehicle's physical VIN. Clean-plugging may be indicated when the physical VIN recorded by the smog technician does not match the eVIN transmitted by the OBDII.

Partial Stipulation to Allegations in Accusation

14. At hearing, the parties submitted a "Stipulation to Facts," (Stipulation) which was marked as complainant's Exhibit 31 and received in evidence. The Stipulation set forth, verbatim, that the following facts "are true and are deemed established by clear and convincing evidence" as follows:

1. On May 29, 2015, Respondent Garza purported to perform a smog inspection on a 2007 Honda Civic EX ("Vehicle 1"), and Smog Masters issued Certificate of Compliance No. PS419443C for Vehicle 1 which stated that Vehicle 1 passed a smog inspection. However, Respondent Garza did not actually connect the Data Acquisition Device ("DAD") to Vehicle 1 and instead connected the DAD to a 2012 Honda Pilot. Thus, Vehicle 1 was not properly inspected and the Certificate of Compliance should not have been issued.

2. On June 6, 2015, Respondent Garza purported to perform a smog inspection on a 2006 Ford Econoline E350 Super Duty ("Vehicle 2"), and Smog Masters issued Certificate of Compliance No. YR935068 for Vehicle 2 which stated that Vehicle 2 passed a smog inspection. Thus, Vehicle 2 was not properly inspected and the Certificate of Compliance should not have been issued.

3. On October 3, 2015, Respondent Garza purported to perform a smog inspection on a 2009 Chevrolet Aveo LS/LT ("Vehicle 3"), and Smog Masters issued Certificate of Compliance No. PY005585C for Vehicle 3 which stated that Vehicle 1 passed a smog inspection. However, Respondent Garza did not actually connect the Data Acquisition Device ("DAD") to Vehicle 3 and instead connected the DAD to a 2009 Chevrolet Suburban LT. Thus, Vehicle 3 was not properly inspected and the Certificate of Compliance should not have been issued.

4. On January 25, 2016, Respondent Asberry purported to perform a smog inspection on a 2007 Subaru Legacy Outback ("Vehicle 4"), and Smog Masters issued Certificate of Compliance No. VX072976C for Vehicle 4 which stated that Vehicle 4 passed a smog inspection. However, Respondent Asberry did not actually connect the Data Acquisition Device ("DAD") to Vehicle 4 and instead connected the DAD to a 2012

Subaru Forester. Thus, Vehicle 4 was not properly inspected and the Certificate of Compliance should not have been issued.

5. On April 7, 2016, Respondent Asberry purported to perform a smog inspection on a 2006 Toyota Scion ("Vehicle 5"), and Smog Masters issued Certificate of Compliance No. XB568066C for Vehicle 5 which stated that Vehicle 5 passed a smog inspection. However, Respondent Asberry did not actually connect the Data Acquisition Device ("DAD") to Vehicle 5 and instead connected the DAD to a 2008 Toyota 4Runner. Thus, Vehicle 5 was not properly inspected and the Certificate of Compliance should not have been issued.

6. On July 5, 2016, Respondent Asberry purported to perform a smog inspection on a 2008 Hyundai Sonata SE/Limited ("Vehicle 6"), and Smog Masters issued Certificate of Compliance No. ZF685373C for Vehicle 6 which stated that Vehicle 6 passed a smog inspection. However, Respondent Asberry did not actually connect the Data Acquisition Device ("DAD") to Vehicle 6 and instead connected the DAD to a 2011 Hyundai Sonata GLS. Thus, Vehicle 6 was not properly inspected and the Certificate of Compliance should not have been issued.

7. On July 19, 2016, Respondent Asberry purported to perform a smog inspection on a 2006 Lexus GS 300 ("Vehicle 7"), and Smog Masters issued Certificate of Compliance No. ZH151626C for Vehicle 7 which stated that Vehicle 7 passed a smog inspection. However, Respondent Asberry did not actually connect the Data Acquisition Device ("DAD") to Vehicle 7 and instead connected the DAD to a 2007 Lexus LS 460. Thus, Vehicle 7 was not properly inspected and the Certificate of Compliance should not have been issued.

8. On July 28, 2016, Respondent Longoria purported to perform a smog inspection on a 2003 Mitsubishi Outlander ("Vehicle 8"), and Smog Masters issued Certificate of Compliance No. ZH151626C for Vehicle 8 which stated that Vehicle 8 passed a smog inspection. However, Respondent Longoria did not actually connect the Data Acquisition Device ("DAD") to Vehicle 8 and instead connected the DAD to a 2011 Nissan Murano Cross Cabriolet. Thus, Vehicle 8 was not properly inspected and the Certificate of Compliance should not have been issued.

9. On July 16, 2016, Respondent Longoria performed a smog inspection on a 1999 Ford F250 Diesel (“Vehicle 9”). Respondent Smog Masters issued Certificate of Compliance No. ZF37504C for Vehicle 9. However, respondent Longoria conducted a BAR-97 EIS smog check inspection, when a BAR-OIS inspection was required, in order to issue a smog certificate of compliance for the vehicle. Thus, Vehicle 9 was not properly inspected and the Certificate of Compliance should not have been issued.

In entering into this stipulation no party waives their right to argue in favor or against an appropriate level of discipline, if any, in this case. Further, each party maintains the right to call witnesses and present additional evidence.

The Bureau’s Investigation

15. Derek Bryant, a Program Representative I (PRI) for the Bureau’s Fresno office, has been employed with the Bureau for seven years. Mr. Bryant has 23 years of prior experience as an automobile mechanic for new-car dealerships and has been a licensed smog technician since 2012. As a PRI, he regularly receives consumer complaints, reviews Bureau smog check data, performs undercover operations, inspects smog test stations, and writes official reports. Mr. Bryant investigated the allegations against respondents in this matter and wrote a report containing his findings, which was received in evidence.

16. Mr. Bryant testified that the smog test procedure³ a licensed technician must follow involves first entering the badge identifying the technician, then attesting that he agrees to meet all BAR legal requirements for smog testing. The smog check computer then asks the technician to scan the physical “bar code” located on the vehicle; if the technician is unable to scan the bar code, he can scan the consumer’s Department of Motor Vehicles (DMV) registration notice. The DMV notice is mailed to notify consumers that their automobile registration is due to be renewed and smog testing is required for renewal. If the smog technician scans the DMV notice incorrectly, the smog check computer will indicate the mistake. The technician must answer several prompts, confirming that the vehicle matches the same vehicle’s identifying information that the technician has scanned into the computer. The BAR’s statewide computer retrieves the data from smog inspections, and triggers an investigation when the information it retrieves from a vehicle’s on-board computer – such as the VIN, PID counts, protocols, etc. – does not match that of other like vehicles. In such investigations, Mr. Bryant then cross-references the data recorded from such smog tests flagged for further inquiry with the data recorded from 1,000 other like vehicles.

³ Licensed California Smog Technicians are trained to refer to the BAR’s Smog Check Manual (See Exh. 32) and Smog Check Reference Guide for technical support regarding required protocols.

17. Mr. Bryant performed a data cross-referencing inspection on Vehicles 1 through 8 and found that Vehicles 1, 3, 4, 6, and 7 had VINs that did not match between the vehicles tested and the vehicles for which the certificates were issued. Vehicle 2 had no VIN entered when that data should have been transmitted, the PID count of 21 did not match the PID counts of 46 or 47 for like 2006 Ford Econoline E350 Super Duty models, and the type of communication protocol listed was 1914, whereas the expected protocol should have been ICAN11bt5. Vehicle 8 had an eVIN reported, yet no such reportage occurs with a 2003 Mitsubishi Outlander LS when smog tested. Vehicle 8 also had the wrong communication protocol and PID count for such vehicles. As a result of his inspection, Mr. Bryant determined that clean plugging had occurred with Vehicles 1 through 8.

18. In a clean plugging investigation, Mr. Bryant gathers data and records and cross-references data collected from the BAR computer to determine whether clean plugging occurred, but he does not typically attempt to determine whether a car was clean plugged by a technician for a particular motive, or by technician error. When asked whether respondents may have scanned DMV documents customers presented for their vehicles' smog checks but failed to notice that the customers had brought in the wrong car – i.e., a car that did not match their DMV paperwork – he described this type of analysis as going beyond his normal level of inquiry. He also does not consider whether an automobile is a known “polluter” that is otherwise likely to fail a smog check without being clean plugged; again, this type of scrutiny goes beyond his typical inquiry. He admitted he did not know whether customers had been misled, and did not seek out or interview any customers; this, too, is not a typical focus of his investigation. While he said it was possible that respondents made mistakes in clean plugging the vehicles, his job is not to determine whether mistakes happened. Instead, he documents the data and documentary evidence that shows instances of clean plugging.

Alleged Bias against Respondents

FIELD VISIT

19. Mr. Bryant noted in his inspection report that he had performed a field visit to Smog Master on August 22, 2016, and requested records pertaining to Vehicle 2, in particular an invoice or Vehicle Inspection Report (VIR) for the vehicle. The records were not produced during the visit, but Mr. Bryant recalled that respondent provided the records to his office approximately two days after the inspection visit. Mr. Bryant admitted that a two-day document retrieval was acceptable and did not violate BAR regulations, but he did not update his investigation report, which was dated March 28, 2017, to reflect that respondent had produced all requested records. Mr. Bryant offered no excuses for failing to update his report in this regard.

20. Although Mr. Bryant did not allege in his report that any statutory violations resulted, the Accusation contained: at Paragraph 66, a factual allegation that respondent failed to provide the records during the field visit; an allegation in the Twelfth Cause for Discipline alleging a violation of California Code of Regulations, title 16 (Regulation), section 3340.15, subdivision (e); and a Fourteenth Cause for Discipline solely alleging a

violation of Health and Safety Code section 44072.2, subdivision (g), based on respondent's alleged failure to produce the records. Mr. Bryant testified credibly that he played no role in the drafting of the Accusation, which was solely handled by the Office of the Attorney General after his investigation concluded and the case was referred to them for prosecution. At hearing, complainant, citing a lack of evidence, withdrew the above-referenced allegations regarding failure to provide records.

21. Respondents' counsel characterized Mr. Bryant's failure to update his report to reflect that respondents complied with the BAR's record request as evidence of substantial bias against respondents, and grossly unethical misconduct. Although Mr. Bryant's failure to credit respondents with providing further documentation led to two mistaken allegations in the Accusation, several other factors indicate that he did not act in a biased manner. Mr. Bryant alleged no violations of failure to produce documents in his report, and had no hand in drafting the Accusation. He readily conceded that respondents timely complied with his request for further documentation, admitted he failed to update his report, and made no excuses for the oversight. Mr. Bryant's testimony on this issue was reasonable and conciliatory, and absent any shading or overreaching. The mistaken charges were appropriately withdrawn at hearing.

SUMMARY TEXT IN INVESTIGATION REPORT

22. Respondents strenuously objected to portions of text Mr. Bryant included in his report as evidencing substantial bias toward respondents. Specifically, the report's synopsis contains a statement that respondents "committed serious environmental and computer crimes in addition to numerous violations" of various statutes, regulations, and codes, including the Penal Code. In the report's conclusion, Mr. Bryant states that respondents "fraudulently" issued smog certificates of compliance, and that these "illegal acts committed by the subjects show how they disregard and violate numerous sections" of civil statutes, regulations, and codes, including the Penal Code. "It is evident," Mr. Bryant states, that respondents:

do not wish to partner with the State of California in the reduction of harmful and hazardous vehicle emissions but instead willingly choose to bypass the purpose of the Smog Check program and consistently deceive the public by performing fraudulent Smog Check inspections and certifications.

Mr. Bryant closes his report by recommending that the matter be forwarded to the Attorney General, and to the District Attorney's office for "appropriate action" to be taken against respondents.

23. Mr. Bryant testified that in any clean plugging case he investigates, he always recommends forwarding the matter to the District Attorney because clean plugging

constitutes a crime. He described the other language restated above as verbiage he includes in all of his reports as a matter of course.⁴

24. The evidence regarding Mr. Bryant's report-writing did not reveal bias against respondents. Whether the Bureau made a referral to the District Attorney is of no evidentiary import in this case, because the allegations in the Accusation concern administrative violations only. It is the Bureau's prerogative to make referrals to other agencies; that was Mr. Bryant's decision, but it had no effect on the Accusation. Despite using the rather severe phraseology in the summary portions of his report as noted above, Mr. Bryant wrote a central narrative that was uniformly plain-stated and direct, describing his investigative actions and findings with precision and specificity. Aside from this purely factual reportage, the only narrative conclusions Mr. Bryant drew were when the evidence showed a "fraudulent" clean plugging inspection and a resulting "fraudulent" certificate issuance for a particular vehicle; notably, those conclusions proved correct, as set forth below. When testifying regarding his report, Mr. Bryant was calm and evenhanded, discussing his findings without conjecture or emotion. Even under extensive, vigorous cross-examination, he exhibited no bias or animosity toward respondents.

Respondents' Evidence

25. Thomas Brouillette has been a licensed California smog technician since 1984. He has taught smog-technician courses for the BAR and has reviewed BAR cases for respondents' counsel's law firm since 2013. He testified that he was asked to carefully assess respondents' business practices in light of the allegations in the Accusation.

26. Mr. Brouillette interviewed all of the named respondents and conducted a site visit at respondents' facility on April 18, 2018. He also reviewed the BAR's evidence in support of the Accusation and the Accusation itself. He described the owner/partners as being humble and agreeable to his process of inspection and making recommendations. He agreed that the BAR's evidence showed clean plugging occurred regarding Vehicles 1 through 8, and that respondent Longoria had used the wrong testing protocol regarding Vehicle 9, as alleged. Although he did not investigate or gather evidence, he opined that the clean plugging was not fraudulent, but instead involved "mistakes" by respondents Garza, Asberry, Jr., and Longoria (respondent technicians), who were not paying close attention to the vehicles they were inspecting. Mr. Brouillette reviewed documentation as well, and found that Smog Master invoices, which were still hand-prepared, were often incomplete and missing useful identifying information. He recommended that to avoid future mistakes, respondents should invest in "MaxxTraxx," an auto shop computer software product which allows for more thorough, accurate invoicing.

27. Mr. Brouillette considered the BAR's "Inspector Follow-Up Pass Rate" (FPR) averages. On its web site, the BAR describes the FPR as:

⁴ Mr. Bryant estimated he has written nearly a thousand reports at this point in his career.

a long-term STAR performance measure that evaluates the performance of both stations and inspectors. It is the only performance measure that evaluates the performance of an inspector to determine a station's eligibility for the STAR Program. For this reason, FPR scores are given to both Smog Check stations and inspectors.

The FPR performance measure examines whether vehicles certified by stations and inspectors in their previous inspection cycle are passing their current initial inspection at a higher or lower rate than expected for "similar vehicles." Station FPR scores reflect the performance of the station at the time the vehicles were previously certified at that station. Inspector FPR scores reflect the performance of the inspector at the time they last certified the vehicle, regardless of the station at which the inspector worked when he/she previously certified the vehicle. Smog Check inspection performance during the previous inspection cycle is measured by comparing, in the current cycle, the actual failure rate on initial tests to the expected failure rate for similar vehicles statewide

(Cal. Bureau of Auto Rep., Inspector Follow-Up Pass Rate Summary, Inspector Nos. 127907, 313712, 305659, 147321, Station Nos. 228231, 266346, 228228 (Aug. 2018); See also Exh. L.)

When Mr. Brouillette reviewed the FPR scores, he noted that from July 2011 until July 2018, the scores for respondent technicians were consistently good, high, or very high, as were the scores of the Smog Master facilities. These scores indicated to him that overall, respondents are doing smog inspections accurately and efficiently.

28. Respondent Longoria testified that he had been a smog technician for Smog Master since approximately 2001, and worked there until 2010, when he became a pharmacy technician and went to work at a CVS Pharmacy. Mr. Longoria worked for CVS until April 2016, when he decided to return to his former position at Smog Master in May 2016. By then the BAR changes requiring performance of BAR-OIS inspections rather than BAR-97 smog inspections for certain cars had taken effect, and he was unaware of the change in procedure. He had no intention to use the wrong testing protocol when he smog-tested the 1999 Ford F250 Diesel using the BAR-97 method; he was simply in error. Mr. Longoria had no recollection that any clean plugging of Vehicle 8 occurred, and could not recall having performed the smog test. He has done "thousands" of smog checks over the course of his career and has never attempted to clean plug an automobile. He noted that the two cars involved – a Mitsubishi Outlander and a Nissan Murano – are both sport utility vehicles, and surmised that he must not have been paying close attention to the make and model of the vehicle to be smog tested. He understands the BAR's concerns and respects its regulatory authority.

29. Respondent Longoria now follows a more thorough preliminary inspection protocol at Smog Master since this matter arose, including: 1) asking the customer about the purpose of their visit; 2) asking for vehicle documentation; 3) having the customer fill out the invoice, which can occasionally flag a situation in which the customer has brought in the wrong vehicle for the DMV paperwork they present; 4) inspect the vehicle; and 5) scan the doorjamb bar code, and physically identify the VIN on the vehicle's dashboard. By following this protocol, Smog Master intends to ensure not to ever clean plug a vehicle by mistake again.

30. Respondent Asberry, Jr., testified that he has worked in the smog testing industry for almost 30 years. He has no recollection of the clean plugged smog tests and could only surmise that he must have relied on the customers' DMV paperwork, which list an automobile's make and year, but not the model. He had no other explanation, except to say, "I did it – it was a mistake, and I'm not here to deny it." However, he understands the purpose of the state's smog program and had no intention of ever circumventing the smog program by testing the wrong vehicles. He now follows Smog Master's new protocols for more thoroughly identifying each vehicle to be tested, performs a "walk-around" on each vehicle, performs a bar scan, determines the VIN by inspecting the doorjamb and dashboard, then checks to ensure the customer's paperwork matches the actual vehicle. He stated these extra steps are important, because of the hundreds of cars Smog Master inspects weekly, two to three cars per week will be presented with a customer's DMV paperwork that does not match that particular vehicle.

31. Respondent Garza testified that he had been employed by Smog Master at their Birch Street location since 2003. He acts as a manager and a smog technician, handling testing as well as handling payments from customers. He has smog-tested "thousands" of automobiles over the years, and had no recollection of the clean plugged vehicles. He could only surmise that he would have made a mistake by plugging into the wrong vehicle, which he could have done because he sometimes relied on using a customer's DMV paperwork to identify the vehicle rather than following the proper BAR protocol to identify the vehicle himself. He understands the purpose of California's Smog Check Program is to ensure clean air by performing proper smog checks on all vehicles. He was mortified by his clean plugging mistakes, admitting he may not have even looked at the models of the vehicles he was testing at the time. Now, he and other Smog Master technicians double- and triple-check each vehicle to ensure the car and paperwork match, double-checking the doorjamb and dashboard VIN displays. He admitted the clean plugging would not have occurred had he compared this information before hooking up the DAD and beginning the smog checks.

32. Respondent technicians presented as sincere, candid witnesses respectful of the BAR's authority. All three expressed remorse for their violations, but denied having any intention of knowingly clean plugging vehicles which could not otherwise pass a smog inspection.

33. Respondent Khosrozadehe testified that he met his business partner, respondent Arbabzadeh, when he went to work for him in 1986 in Fresno, managing

respondent Arbabzadeh's smog testing location on Birch Avenue. He became licensed as a smog technician in approximately 2000 and partnered with respondent Arbabzadeh in 2003. Smog Master is a busy enterprise, performing approximately 16,000 smog tests per year, but respondent partners have always cooperated with the BAR, and Smog Master has no history of citations or discipline.

34. Respondent Khosrozadehe had "never seen anything like" the Accusation and had no idea that the violations alleged had occurred. Respondent partners first learned of the clean plugging allegations when they spoke with Mr. Bryant, and they immediately called a meeting and spoke with all of their smog technicians. In particular, they warned their technicians about making errors by working too fast and not paying attention to matching the paperwork and the vehicle being presented for testing. They advised technicians not to rush their work under any circumstances. Since then, Smog Master has instituted a protocol for ensuring against smog testing the wrong vehicle. Technicians record the car's license plate and scan the bar codes located on the doorjamb and dashboard, then double-check that information against the customer's paperwork. In May 2018, respondent partners invested in MaxxTraxx software in order to transition from hand-written invoices to a computer-based invoicing system. The MaxxTraxx system will take time to implement, and the technicians are still learning to work with it. Respondent Khosrozadehe believes the BAR's upcoming certificate blocking program should also insure against mistakes.⁵ Regarding the eight clean plugged vehicles, Smog Master had no opportunity to refund the customers' money or perform follow-up testing at no charge, which is their standard policy if the shop makes an error while testing a vehicle. The customers never returned, so Smog Master was unaware of the problem. Respondent Khosrozadehe presented as a sincere, genuine witness.

35. Respondent Arbabzadeh testified that he opened his first test only station in 1997, then three others over the next two years. Respondent partners co-own the Birch Avenue and Clovis locations. Respondent Arbabzadeh has no disciplinary history, has always cooperated with the BAR, and believes in the California Smog Check Program. He was unaware of the mistakes that led to the Accusation, as they have never happened before. He knows about clean plugging in the smog testing industry and is aware dishonest technicians engage in such practices in order to make extra money "on the side." He is not concerned that his technicians, whom he describes as "the best," would clean plug automobiles for money because he pays them salaries ranging from \$45,000 to \$60,000 per year, which is nearly double the standard salary for a smog technician in Fresno. He did not fire respondent technicians as a result of the Accusation due to their long history of trustworthiness, and no problems or violations. However, he has warned them that "if this happens again," any technician responsible for performing an illegal smog inspection will be fired. Respondent Arbabzadeh reiterated the vehicle identification protocol Smog Master

⁵ Judicial notice was taken that the BAR is in the process of implementing real-time Smog Check certificate blocking as provided by AB 2289 (Eng., Ch. 258, Stats. of 2010). When OBD data from a vehicle's computer does not match what is expected, the vehicle will fail the Smog Check and require re-inspection and certification at a state Referee facility. (Bur. of Automotive Repair, Strategic Plan 2018-2022; See also Exhibit M.)

uses to ensure against mistakes. He has reviewed company smog testing records from 2015 through May of 2018 to identify any paperwork errors that may have occurred. Aside from the allegations regarding Vehicles 1 through 9 in the Accusation, he found no other errors in the 51,330 other smog tests Smog Master performed during that time period. Respondent Arbabzadeh presented as a sincere, candid witness.

36. Respondents offered the testimony of Robert Gonzalez, a licensed private investigator in California since 2002. Mr. Gonzalez primarily attempted to testify about interviews he had conducted with the owners or relatives of Vehicles 1 through 8. Complainant objected on hearsay grounds, and the objection was sustained. Although Mr. Gonzalez's declaration and investigation report were marked collectively as Exhibit J and received in evidence, any and all hearsay statements contained therein were disregarded and given no weight.

37. Mr. Gonzalez is a certified fraud investigator through the Association of Certified Fraud Examiners, and he was critical of the investigation by Mr. Bryant. He believed Mr. Bryant did not look for "red flags" that would indicate fraud, such as how the respondent technicians would have benefitted from clean plugging vehicles, and whether they were "living beyond their means." Mr. Gonzalez considered these factors and found no evidence that respondent technicians sought to enrich themselves. He viewed respondent Garza as credible in his claim that the clean plugging was due to mistakes, not fraud. Despite opining on all three respondent technicians, Mr. Gonzalez admitted he had only interviewed respondent Garza, and did not record any interview notes regarding that interview in his investigation report. As a result, Mr. Gonzalez's findings regarding respondent technicians were given less weight.

38. Mr. Gonzalez sharply criticized Mr. Bryant for not correcting his investigative report with evidence of respondents' compliance with the BAR's records request. Mr. Gonzalez said that ethically, an investigator must include all evidence that would rebut the evidence previously gathered.

Bona Fide Errors

39. Business and Professions Code section 9884.7, subdivision (a), provides:

(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.

40. Respondents' counsel argues that respondent technicians committed "bona fide errors" in the clean plugging of Vehicles 1 through 8, and in respondent Longoria's application of the wrong BAR-97 testing protocol regarding Vehicle 9. Thus, they contend, because a showing of bona fide error nullifies the Bureau's ability to discipline licensees pursuant to Business and Professions Code section 9884.7, subdivision (a), respondents committed no disciplinable violations as alleged in the Accusation.

41. This argument is not persuasive. The Latin origin of "bona fide" is "with good faith;" i.e., an honest mistake. The evidence established that every violation alleged in the Accusation occurred, at the very least, due to respondent technicians' admittedly careless inattention. In fact, none of the respondent technicians could even recall the incorrect, inadequate testing they performed in any of the nine alleged instances of misconduct. Although respondent technicians were sincere witnesses, they could do no better than to surmise that they had made mistakes due to not paying proper attention to their work. Their negligent inattention – not an "honest mistake," such as a computer glitch, or a misplaced document – was, at a minimum, the root cause of the violations. Had respondent technicians followed the smog inspection protocols plainly set forth by the BAR in each instance, no such mistakes would have occurred. These failures to employ established procedures are what led to the violations detailed in the Accusation.

Additional Evidence

42. Respondents submitted 14 "Customer Satisfaction Surveys" from Smog Master customers that had patronized Smog Master for anywhere between four and 25 years. Most of these customers extolled respondents' good, friendly service, and several commented on respondents' reputation for honesty and fairness.

Costs

43. The Bureau incurred enforcement costs, in the form of Attorney General fees, in the amount of \$16,760. The Attorney General's Matter Time Activity report, which details those costs in increments of one-quarter hour and describes each corresponding task performed, reflects in adequate detail the billable time spent and tasks performed in enforcement of this matter. These costs are reasonable, but subject to a reduction as set forth in the Legal Conclusions below.

LEGAL CONCLUSIONS

Improper BAR-97 Smog Inspection

FIRST CAUSE FOR DISCIPLINE: UNTRUE OR MISLEADING STATEMENTS (ARD)

1. Cause exists to discipline the automotive repair dealer registration issued to respondent Smog Master pursuant to Business and Professions Code section 9884.7,

subdivision (a)(1), in that regarding Vehicle 9, respondent Longoria certified under penalty of perjury that he performed the smog inspection on the vehicle in accordance with all Bureau requirements and that the vehicle passed inspection and was in compliance with all applicable laws and regulations; however, respondent Longoria had conducted a BAR-97 EIS smog check inspection, when a BAR-OIS inspection was required, in order to issue a smog certificate of compliance, despite not testing or inspecting the vehicle as required by Health and Safety Code section 44012. Respondent Smog Master knew, or in the exercise of reasonable care should have known, these statements to be untrue, as set forth in Findings 11, 14 and 28.

SECOND CAUSE FOR DISCIPLINE: FRAUD (ARD)

2. Cause exists to discipline the automotive repair dealer registration issued to respondent Smog Master pursuant to Business and Professions Code section 9884.7, subdivision (a)(4). The evidence established that regarding the BAR-97-tested Vehicle 9, respondent engaged in fraudulent conduct by issuing an electronic certificate of compliance for the vehicle without ensuring that a bona fide inspection of the emission control devices and systems was performed, as set forth in Findings 11, 14 and 28.⁶

THIRD CAUSE FOR DISCIPLINE: VIOLATIONS OF MOTOR VEHICLE INSPECTION PROGRAM (SMOG CHECK STATION)

3. Cause exists to discipline the smog check station license issued to respondent Smog Master pursuant to Health and Safety Code section 44072.2, subdivision (a). As set forth in Findings 11, 14 and 28, respondent failed to comply with section 44012 by: 1) failing to ensure a BAR-OIS inspection was performed on Vehicle 9 as prescribed by the BAR; and 2) failing to comply with section 44015 by issuing a smog certificate of compliance for Vehicle 9 without ensuring the vehicle was properly tested and inspected to show compliance with section 44012.

FOURTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS (SMOG CHECK STATION)

4. Cause exists to discipline the smog check station license issued to respondent Smog Master pursuant to Health and Safety Code section 44072.2, subdivision (c). As set forth in Findings 11, 14 and 28, the evidence established that respondent failed to comply with provisions of California Code of Regulations, title 16 (Regulation). Respondent

⁶ On the days indicated in each of the Accusation's allegations regarding transmission of certificates, the false smog certificates and related information were transmitted to a vehicle data base. The Department of Motor Vehicles (DMV) accesses that data base to establish that a vehicle has passed a smog check before renewing the vehicle's registration. It is reasonably inferred that the owners of these vehicles were able to renew the registration of the vehicles, and that the DMV relied on the false information in the data base in renewing the vehicle registrations.

violated Regulation section 3340.35, subdivision (c), by issuing an electronic smog certificate of compliance for the improperly inspected Vehicle 9, even though the vehicle had not been inspected pursuant to Regulation section 3340.42. Furthermore, respondent Smog Master violated Regulation 3340.42 by failing to ensure the required smog test was conducted on Vehicle 9 pursuant to the Bureau's specifications.

FIFTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK STATION)

5. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog check station license issued to respondent Smog Master under this Code section as set forth in Legal Conclusions 1 and 2. By issuing an electronic certificate of compliance on Vehicle 9 without ensuring that a bona fide inspection was performed on the vehicle's emission control devices and systems, respondent Smog Master caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

SIXTH CAUSE FOR DISCIPLINE: INSPECTION PROGRAM (SMOG CHECK INSPECTOR LICENSE - LONGORIA)

6. Cause exists to discipline respondent Longoria's smog check inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a), due to his failure to comply with section Health and Safety Code section 44012, by failing to perform emission control tests on Vehicle 9, in accordance with procedures prescribed by the Bureau, as set forth in Findings 11, 14 and 28.

SEVENTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS (SMOG CHECK INSPECTOR LICENSE - LONGORIA)

7. Cause exists to discipline respondent Longoria's smog check inspector license pursuant to Health and Safety Code section 44072.2, subdivision (c), due to his failure to comply with Regulation section 3340.30, subdivision (a), by failing to inspect and test Vehicle 9 in accordance with Health and Safety Code section 44012, and his failure to comply with Regulation section 3340.42, by failing to conduct the required smog check methods on Vehicle 9 in accordance with procedures prescribed by the Bureau, as set forth in Findings 11, 14 and 28.

EIGHTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK INSPECTOR LICENSE - LONGORIA)

8. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog

check inspector license issued to respondent Longoria under this Code section as set forth in Legal Conclusions 1 and 2. By issuing an electronic certificate of compliance on Vehicle 9 without ensuring that a bona fide inspection was performed on the vehicle's emission control devices and systems, respondent Longoria caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

Clean Plugging

NINTH CAUSE FOR DISCIPLINE: UNTRUE OR MISLEADING STATEMENTS (ARD)

9. Cause exists to discipline the automotive repair dealer registration issued to respondent Smog Master pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that regarding Vehicles 1 through 8, respondent Smog Master certified under penalty of perjury that Smog Master performed the smog inspection on the vehicles in accordance with all Bureau requirements, and that the vehicles passed inspection and were in compliance with all applicable laws and regulations; however, respondent Smog Master conducted, or caused to be conducted, smog check inspections using clean plugging methods in which different vehicles are substituted during the inspection in order to issue smog certificates of compliance, without testing or inspecting the vehicles as required by Health and Safety Code section 44012. Respondent Smog Master knew, or in the exercise of reasonable care should have known, these statements to be untrue, as set forth in Findings 12 through 17, 28, 30 and 31.

TENTH CAUSE FOR DISCIPLINE: UNTRUE OR MISLEADING STATEMENTS (ARD)

10. Cause exists to discipline the automotive repair dealer registration issued to respondent Smog Master pursuant to Business and Professions Code section 9884.7, subdivision (a)(4). The evidence established that regarding Vehicles 1 through 8, respondent engaged in fraudulent conduct by issuing electronic certificates of compliance for the vehicles without ensuring that bona fide inspections of the emission control devices and systems were performed, as set forth in Findings 12 through 17, 28, 30 and 31.

ELEVENTH CAUSE FOR DISCIPLINE: VIOLATIONS OF MOTOR VEHICLE INSPECTION PROGRAM (SMOG CHECK STATION)

11. Cause exists to discipline the smog check station license issued to respondent Smog Master pursuant to Health and Safety Code section 44072.2, subdivision (a). As set forth in Findings 12 through 17, 28, 30 and 31, respondent Smog Master failed to comply with section 44012, subdivision (a), by failing to ensure the emission control tests were performed on Vehicles 1 through 8 as prescribed by the BAR; and 2) failing to comply with section 44015 by issuing smog certificates of compliance for Vehicles 1 through 8 without ensuring the vehicles were properly tested and inspected to show compliance with section 44012.

TWELFTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS (SMOG CHECK STATION)

12. Cause exists to discipline the smog check station license issued to respondent Smog Master pursuant to Health and Safety Code section 44072.2, subdivision (c). As set forth in Findings 12 through 17, 28, 30 and 31, the evidence established that respondent failed to comply with provisions of California Code of Regulations, title 16 (Regulation). Respondent violated Regulation section 3340.35, subdivision (c), by issuing electronic smog certificates of compliance for the improperly inspected Vehicles 1 through 8, even though the vehicles had not been inspected pursuant to Regulation section 3340.42. Furthermore, respondent Smog Master violated Regulation 3340.42 by failing to ensure the required smog tests were conducted on Vehicles 1 through 8 pursuant to the Bureau's specifications.⁷

THIRTEENTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK STATION)

13. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog check station license issued to respondent Smog Master under this Code section as set forth in Legal Conclusions 9 and 10. By issuing electronic certificates of compliance on Vehicles 1 through 8 without ensuring that bona fide inspections were performed on the vehicles' emission control devices and systems, respondent Smog Master caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

FOURTEENTH CAUSE FOR DISCIPLINE: FAILURE TO MAINTAIN VEHICLE INSPECTION REPORT AND INVOICE (SMOG CHECK STATION)

14. (Complainant withdrew this cause for discipline at hearing.)

FIFTEENTH CAUSE FOR DISCIPLINE: INSPECTION PROGRAM (SMOG CHECK INSPECTOR LICENSE - GARZA)

15. Cause exists to discipline respondent Garza's smog check inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a), due to his failure to comply with section Health and Safety Code section 44012, by failing to perform emission control tests on Vehicles 1 through 3, in accordance with procedures prescribed by the Bureau, as set forth in Findings 12 through 17, and 31.

⁷ Complainant withdrew the allegation contending respondent Smog Master failed to make available copies of a vehicle inspection report and invoices for Vehicle 2, in violation of Regulation section 3340.15, subdivision (e).

SIXTEENTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS (SMOG CHECK INSPECTOR LICENSE – GARZA)

16. Cause exists to discipline the smog check inspector license issued to respondent Garza pursuant to Health and Safety Code section 44072.2, subdivision (c). As set forth in Findings 12 through 17, and 31, the evidence established that respondent Garza failed to comply with provisions of California Code of Regulations, title 16 (Regulation). Respondent Garza violated Regulation section 3340.30, subdivision (a), by failing to inspect Vehicles 1 through 3 in accordance with Health and Safety Code sections 44012 and 44035, and Regulation section 3340.42. Furthermore, respondent Garza violated Regulation 3340.42 by failing to conduct the required smog tests on Vehicles 1 through 3 pursuant to the Bureau's specifications.

SEVENTEENTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK INSPECTOR AND SMOG CHECK REPAIR TECHNICIAN LICENSES – GARZA)

17. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog check inspector and smog check repair technician licenses issued to respondent Garza under this Code section as set forth in Legal Conclusion 15. By issuing electronic certificates of compliance on Vehicles 1 through 3 without ensuring that bona fide inspections were performed on the vehicles' emission control devices and systems, respondent Garza caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

EIGHTEENTH CAUSE FOR DISCIPLINE: INSPECTION PROGRAM (SMOG CHECK INSPECTOR LICENSE – ASBERRY, JR.)

18. Cause exists to discipline respondent Asberry, Jr.'s smog check inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a), due to his failure to comply with section Health and Safety Code section 44012, by failing to perform emission control tests on Vehicles 4 through 7, in accordance with procedures prescribed by the Bureau, as set forth in Findings 12 through 17, and 30.

NINETEENTH CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS (SMOG CHECK INSPECTOR LICENSE – ASBERRY, JR.)

19. Cause exists to discipline the smog check inspector license issued to respondent Asberry, Jr., pursuant to Health and Safety Code section 44072.2, subdivision (c). As set forth in Findings 12 through 17, and 30, the evidence established that respondent Asberry, Jr., failed to comply with provisions of California Code of Regulations, title 16 (Regulation). Respondent Asberry, Jr., violated Regulation section 3340.30, subdivision (a), by failing to inspect Vehicles 4 through 7 in accordance with Health and Safety Code sections 44012 and 44035, and Regulation section 3340.42. Furthermore, respondent

Asberry, Jr., violated Regulation 3340.42 by failing to conduct the required smog tests on Vehicles 4 through 7 pursuant to the Bureau's specifications.

TWENTIETH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK INSPECTOR AND SMOG CHECK REPAIR TECHNICIAN LICENSES – ASBERRY, JR.)

20. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog check inspector and smog check repair technician licenses issued to respondent Asberry, Jr., under this Code section as set forth in Legal Conclusion 18. By issuing electronic certificates of compliance on Vehicles 4 through 7 without ensuring that bona fide inspections were performed on the vehicles' emission control devices and systems, respondent Asberry, Jr., caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

TWENTY-FIRST CAUSE FOR DISCIPLINE: INSPECTION PROGRAM (SMOG CHECK INSPECTOR LICENSE – LONGORIA)

21. Cause exists to discipline respondent Longoria's smog check inspector license pursuant to Health and Safety Code section 44072.2, subdivision (a), due to his failure to comply with section Health and Safety Code section 44012, by failing to perform an emission control test on Vehicle 8, in accordance with procedures prescribed by the Bureau, as set forth in Findings 12 through 17, and 28.

TWENTY-SECOND CAUSE FOR DISCIPLINE: FAILURE TO COMPLY WITH REGULATIONS (SMOG CHECK INSPECTOR LICENSE – LONGORIA.)

22. Cause exists to discipline the smog check inspector license issued to respondent Asberry, Jr., pursuant to Health and Safety Code section 44072.2, subdivision (c). As set forth in Findings 12 through 17, and 28, the evidence established that respondent Longoria failed to comply with provisions of California Code of Regulations, title 16 (Regulation). Respondent Longoria violated Regulation section 3340.30, subdivision (a), by failing to inspect Vehicle 8 in accordance with Health and Safety Code sections 44012 and 44035, and Regulation section 3340.42. Furthermore, respondent Longoria violated Regulation 3340.42 by failing to conduct the required smog test on Vehicle 8 pursuant to the Bureau's specifications.

TWENTY-THIRD CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK INSPECTOR AND SMOG CHECK REPAIR TECHNICIAN LICENSES – LONGORIA)

23. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog check inspector and smog check repair technician licenses issued to respondent Longoria

under this Code section as set forth in Legal Conclusion 21. By issuing an electronic certificate of compliance on Vehicle 8 without ensuring that a bona fide inspection was performed on the vehicle's emission control devices and systems, respondent Longoria caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

TWENTY-FOURTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT (SMOG CHECK INSPECTOR LICENSE – KHOSROZADEHE)

24. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may take disciplinary action against a licensee who commits any act involving dishonesty, fraud, or deceit whereby another is injured. Cause exists to discipline the smog check inspector license issued to respondent Khosrozadehe as set forth in Findings 12 through 17, 30 and 31. By allowing the use of false information for electronic certificates of compliance on Vehicles 1 through 8 without ensuring that bona fide inspections were performed on the vehicle's emission control devices and systems, respondent Khosrozadehe caused injury to the People of the State of California by depriving them of the protection afforded by California's Motor Vehicle Inspection Program.

Appropriate Discipline

25. The BAR has promulgated Guidelines for Disciplinary Orders and Terms of Probation (Guidelines) for the purpose of determining appropriate discipline.

26. Factors in Aggravation include:

1. Prior warnings from BAR.
2. Prior Office Conference(s) with BAR.
3. Prior history of citations.
4. Prior history of formal disciplinary action.
5. Failure to permit BAR inspection of records.
6. Evidence of abuse of mechanic's lien.
7. Evidence of attempts to intimidate consumer.
8. Evidence of negligent or willful improper repair work that endangers consumers.
9. Evidence that the unlawful act was part of a pattern of practice.
10. Failure to comply with BAR request for corrective action/retraining.
11. Currently on probation for improper acts.
12. Failure to successfully complete prior probation.
13. Failure to pay court judgment to victim.
14. Violation of previous court order.
15. Evidence of any other conduct which constitutes fraud or gross negligence.

Aggravating factors 1 through 8 and 10 through 14 do not apply to respondents. However, this case involves improper smog inspections on a total of nine vehicles, so a pattern of practice was established.

27. Factors in Mitigation include:

1. Evidence that respondent implemented BAR's suggested resolution to a consumer complaint.
2. Evidence of restitution to the consumer and/or correct repair of the consumer's vehicle.
3. Evidence of voluntary participation in retraining for self or employees.
4. Evidence of voluntary purchase of proper diagnostic equipment and manuals.
5. Evidence of a medical condition that temporarily prevented respondent from exercising supervision and control over employees or others at the time of the violation.
6. Absence of prior disciplinary action.
7. Evidence that the violation was not part of a pattern or practice.
8. Evidence of no loss to consumer and no damage to consumer's property. (Undercover vehicles are viewed the same as consumer property.)
9. Evidence of retraining and has initiated steps to minimize recurrence.
10. Evidence of resolution of all consumer complaints with a subsequent change in business practice.
11. Evidence of substantial measures to correct its business practices and/or business operations so as to minimize the likelihood of recurrence of the violation.
12. Evidence of any other conduct which would constitute a factor in mitigation.

None of the five respondents have any prior disciplinary records over a period of many years. All five respondents took the allegations of wrongdoing seriously; respondent technicians recognized their negligence, and took responsibility for not following standard protocols required by BAR for smog inspections. They admitted their mistakes, made no excuses, and expressed willingness to fully comply with the Bureau. Respondent partners hired a smog testing expert to assess their business operations and make recommendations for improvements. They instituted protocols to ensure more thorough identification of vehicles, employed a new computer software system for better, more thorough invoicing, and made an extensive review of thousands of previous smog inspections to determine how Smog Master's technicians were performing.

28. The Guidelines state that in determining the level of discipline:

The maximum order for each individual violation is revocation of the applicable registration or license along with an order for recovery of BAR's reasonable costs of investigation and

enforcement. Multiple violations or multiple instances of the same violations should be taken into consideration when determining orders.

The recommended disciplinary order for most of the specific violations respondents committed is five years of probation. However, the fact that “multiple violations” and “multiple instances of the same violations” were established in this case is an important factor suggesting further consideration.

29. Respondent partners’ misconduct indicated a general lack of awareness regarding the actions of their employees. They were unaware of any clean plugging activity until Mr. Bryant contacted them and the Accusation was filed. On the other hand, they had employed respondent technicians for many years with no problems, reasonably considered them to be trustworthy, and had no reason to suspect clean plugging. Respondent partners took several appropriate steps to ensure against future violations.

30. Respondent technicians attested to having no recollection of the clean plugging, but each admitted that they had sometimes used customers’ DMV paperwork to identify a vehicle to be smog tested, and then did little follow-up identification of the vehicle; this left ample room for error, particularly if a customer with multiple vehicles innocently brought in their DMV paperwork but presented a different car, such as a family car driven by the customer’s spouse or adult children. Such negligence would open the door to clean plugging by testing the wrong vehicle. All three technicians conceded, differently in their own words but uniformly, that their work had been too sloppy and too hasty. These admissions of gross inattention were conjectural, since the technicians had no memory of the actual smog inspections they performed on Vehicles 1 through 8.

31. Mr. Bryant was correct in stating that his job was not to determine whether mistakes were made – clean plugging due to gross inattention is still clean plugging, and the act of issuing a certificate attesting the correct vehicle was inspected and passed the test when such is not the case is fraudulent and in violation of multiple statutes and regulations. This reality is confirmed by the 23 substantiated legal conclusions set forth above, and cannot be escaped by respondents’ speculation about what might have happened.

32. Nonetheless, the facts complainant presented were purely technical, establishing the clean plugging violations, but they neither provided nor suggested any nefarious context for the respondents’ conduct. As a result, it was equally speculative for the Bureau’s investigative report to characterize respondents as environmental and computer criminals determined to violate the law. This is why the boilerplate phraseology Mr. Bryant’s report included was offensive to respondents: to them, it overstepped the mark.

33. These considerations do not determine the degree of culpability, but they are helpful in weighing whether respondents would be candidates for probation, or whether public protection requires revocation of their licensure. In sum, respondents were candid, appropriately remorseful, and presented significant evidence of rehabilitation. Respondents’

long history of no prior discipline is a substantial mitigating factor: respondent technicians collectively have 58 years of practice without prior discipline; respondent Khosrozadehe's technician license has 19 years without prior discipline; and respondent partners' registration and test only station licenses collectively have 29 years without prior discipline. These factors indicate that respondents can be successfully rehabilitated by the order set forth below.

34. At hearing, respondent partners asserted they were unaware of their technicians' misconduct regarding clean plugging the eight vehicles, and their counsel further contended that respondent partners committed no dishonest or fraudulent acts themselves. However, the doctrine of *respondeat superior* has long held employers responsible for the acts of their employees. If a licensee elects to operate his business through employees, the licensee must be responsible to the licensing authority for the employees' conduct in the exercise of the license. (*Mantzoros v. State Bd. of Equalization* (1948) 87 Cal.App.2d 140, 144.) By virtue of ownership of a license, the owner has a responsibility to see to it that the license is not used in violation of the law. (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360.)

35. A licensee can be held responsible for his or her employees' actions even though the licensee has not participated in the wrongful conduct and has no knowledge of it. A non-negligent, licensed employer may be subject to discipline by the licensing agency when his employees perform a licensed activity negligently or in violation of statutes. The employer licensee's liability for the conduct of an employee acting under the employer's license is based on the theory that the employer licensee has a non-delegable duty of compliance. (*Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 799.) The rule of imputed knowledge arose to prevent licensees from staying away from the premises to avoid responsibility for wrongful acts occurring on the premises. The rule also exists to encourage licensees to monitor their employees. (*Santa Ana Food Market v. Alcoholic Beverage Control Bd.* (1999) 76 Cal.App.4th 570, 575-76.) In this case, respondent partners are not being unjustly held liable for the actions of their employees, as their lack of managerial oversight was a factor in the misconduct the technicians committed.

Costs of Investigation and Enforcement

36. Complainant has requested that respondents be ordered to pay the Bureau the costs of investigation and enforcement of the case. Business and Professions Code section 125.3 provides that respondents may be ordered to pay the Bureau "a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

37. The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the

financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

38. In this case, the hours of investigation and enforcement were in accordance with scope of the evidence the Bureau produced in support of the alleged misconduct, as set forth in Finding 43. The Bureau proved 22-and-two-thirds, or 91.66 percent, of the 24 allegations against respondents.

39. The Attorney General's and the Bureau's costs of investigation established reasonable costs in the total amount of \$16,760. Due to respondents' success at getting one-and-one-third, or 8.34 percent, of the provable allegations reduced at hearing, which is a *Zuckerman* factor, these costs should be reduced by 8.34 percent to \$15,362.

ORDER

Automotive Repair Dealer Registration No. ARD 228231, and Smog Check, Test Only, Station License No. TC 228231, issued to Farhad Arbabzadeh and Massoud Khosrozadehe, partners, is REVOKED.

Smog Check Inspector License No. EO 147321, and Smog Check Repair Technician License No. EI 147321, issued to Daniel Garza, is REVOKED.

Smog Check Inspector License No. EO 305659, and Smog Check Repair Technician License No. EI 305659, issued to Ronald P; Asberry, Jr., is REVOKED.

Smog Check Inspector License No. EO 313712, and Smog Check Repair Technician License No. EI 313712, issued to Alfonso Avila Longoria, is REVOKED.

Smog Check Inspector License No. EO 127907, issued to Massoud Khosrozadehe, is REVOKED.

However, the revocations are STAYED and respondents are placed on probation for four (4) years on the following terms and conditions, applicable to each individual respondent.

Terms and Conditions of Probation

Standard Terms and Conditions of Probation

1. Obey All Laws

During the period of probation, Respondent shall comply with all federal and state statutes, regulations and rules governing all BAR registrations and licenses held by Respondent.

2. Quarterly Reporting

During the period of probation, Respondent shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, 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

Respondent shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by BAR 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

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

5. Tolling of Probation

If, during probation, Respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, Respondent shall notify BAR 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 Respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

6. Violation of Probation

If Respondent violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard may set aside the stay order and carry out the disciplinary order provided in the decision. Once Respondent is served notice of BAR'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

Respondent shall, at all times while on probation, maintain a current and active registration and/or license(s) with BAR, including any period during which suspension or probation is tolled. If Respondent's registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by Respondent within 30 days of that date. If Respondent's registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal Respondent's registration or license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

8. Cost Recovery

Respondent shall pay the Bureau of Automotive Repair \$15,362, for the reasonable costs of the investigation and enforcement of case No. 79/16-9952. Because this probationary order is applicable to five respondents, respondents are jointly and severally liable for the full payment of these costs. Respondents shall make such payment pursuant to a payment plan within the Bureau's discretion to establish.

Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for case No. 79/16-9952. 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. BAR 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, Respondent's affected registration and/or license will be fully restored or issued without restriction, if Respondent meets all current requirements for registration or licensure and has paid all outstanding fees, monetary penalties, or cost recovery owed to BAR.

10. License Surrender

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

Respondent may not petition the Director for reinstatement of the surrendered registration and/or license, or apply for a new registration or license under the jurisdiction of BAR at any

time before the date of the originally scheduled completion of probation. If Respondent applies to BAR for a registration or license at any time after that date, Respondent must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

11. Supervision Requirements

Respondent shall not delegate his supervisory duties, as they relate to the business activities relevant to the probationary registration and/or license, to another person during the period of probation. Any persons employed by Respondent to carry out such business activities shall be directly supervised by Respondent. In the event that a bona fide medical condition arises during the period of probation, which temporarily prevents Respondent from exercising direct supervision over employees, notice and medical substantiation of the condition shall be submitted to BAR within ten (10) days of the medical affirmation of the condition.

Optional Terms and Conditions of Probation

12. Training Course

(Applicable to respondents Garza, Asberry, Jr., and Longoria only):

During the period of probation, Respondent shall attend and successfully complete a BAR-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 Respondent. Respondent shall provide to the Bureau proof of enrollment in the course within 30 days of the effective date of the decision, and proof of successful course completion within 180 days of the effective date of the decision. Failure to provide proof of enrollment and/or successful course completion to the Bureau within the timeframes specified shall constitute a violation of probation, and Respondent shall be prohibited from issuing any certificate of compliance or noncompliance until such proof is received.

DATED: October 26, 2018

DocuSigned by:
John DeCure
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JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings