

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

In the Matter of the Accusation Against:

NICHOLAS CARL GIBBONS, dba RIPON SMOG, AND EDWARD WILLIAM STOUT

447 Parallel Avenue, Suite 6A

Ripon, CA 95366

Mailing Address:

16201 Julie Lane

Lathrop, CA 95330

Automotive Repair Dealer Registration No. ARD 268840

Smog Check Test Only Station License No. TC 268840

NICHOLAS CARL GIBBONS

16201 Julie Lane

Lathrop, CA 95330

Smog Check Inspector License No. EO 631964

Smog Check Repair Technician License No. EI 631964

and

EDWARD WILLIAM STOUT

216 N. McClure Road

Modesto, CA 95357

Smog Check Inspector License No. EO 637003

OTHER RELATED LICENSES:

NICHOLAS CARL GIBBONS dba LATHROP SMOG

15151 S. Harlan Rd.

Lathrop, CA 95330

Automotive Repair Dealer Registration No. ARD 289396

Smog Check Station License No. RC 289396

Respondents.

Case No. 79/19-18397

OAH No. 2020080092

DECISION

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

This Decision shall be effective on January 19, 2021.

IT IS SO ORDERED this 11 day of December, 2020.

Signature on File

GRACE ARUPO RODRIGUEZ

Assistant Deputy Director

Legal Affairs Division

Department of Consumer Affairs

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In the Matter of the Accusation Against:

**NICHOLAS CARL GIBBONS, dba RIPON SMOG, and EDWARD
WILLIAM STOUT, Respondents**

Case No. 79/19-18397

OAH No. 2020080092

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter via videoconference on October 5, 2020, from Sacramento, California.

Deputy Attorney General Seth Curtis represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs.

Attorney Michael B. Levin represented respondent Nicholas Carl Gibbons (Gibbons), doing business as Ripon Smog, and respondent Edward William Stout (Stout) (collectively, respondents).

Evidence was presented at hearing. The record was closed October 5, 2020.

FACTUAL FINDINGS

Background

1. On April 24, 2012, the Bureau issued Automotive Repair Dealer Registration number ARD 268840 to Gibbons, doing business as Ripon Smog. On May 15, 2012, the Bureau issued Smog Check Test Only Station License No. TC 268840 to Mr. Gibbons doing business as Ripon Smog. The license and registration were in full force and effect at all times referenced herein, and both will expire April 30, 2021, unless renewed or revoked.

2. On January 23, 2018, the Bureau issued Automotive Repair Dealer Registration number ARD 289396 (Lathrop registration) to Mr. Gibbons, doing business as Lathrop Smog. On February 20, 2018, the Bureau issued Smog Check Test and Repair Station License No. RC 289396 to Mr. Gibbons, doing business as Lathrop Smog. The license and registration were in full force and effect at all times referenced herein, and both will expire January 31, 2021, unless renewed or revoked.

3. On March 12, 2014, the Bureau issued Smog Check Inspector License No. EO 631964 and Smog Check Repair Technician License No. EI 631964 to Mr. Gibbons. These licenses were in full force and effect at all times referenced herein, and both will expire April 30, 2022, unless renewed or revoked.

4. On June 16, 2014, the Bureau issued Smog Check Inspector License No. EO 637003 to Mr. Stout. He is employed as a smog technician for Ripon smog and worked in that capacity during the inspection of all vehicles described in the Accusation. His smog check inspector license was in full force and effect at all times referenced herein and will expire July 31, 2022, unless renewed or revoked.

5. The Bureau monitors the performance of automotive repair dealers, smog check stations and smog check inspectors, to ensure they perform their duties pursuant to the smog control laws of the State of California, including the Automotive Repair Act (Business and Professions Code section 9880, et seq). This monitoring includes reviewing smog inspection data generated by licensed smog check stations.

6. The Bureau administers the California Smog Check Program, which requires most vehicles to pass a smog inspection every two years or when the vehicle's title is transferred to a new owner. These inspections are performed by licensed smog check inspectors at licensed smog check stations. The program reduces air pollution by identifying and requiring the repair of vehicles that pollute the air excessively.

7. In March 2015, the Bureau updated its smog check program to require the use of an On-Board Inspection System (OIS) when inspecting most 2000 model year and newer gasoline and hybrid vehicles and most 1998 and newer diesel vehicles. The OIS consists of a Data Acquisition Device (DAD), a computer, a bar code scanner, and a printer. The DAD is an On-Board Diagnostic (OBD) instrument that retrieves diagnostic data from a vehicle when connected to the vehicle's diagnostic link connector. The bar code scanner is used to input technician information, the vehicle identification number (VIN), and the DMV renewal information. Once connected, the DAD retrieves an electronic VIN (eVIN) from the vehicle's OBD system. The eVIN is programmed into the OBD system of vehicles manufactured for 2005 and newer, and sometimes for vehicles produced before 2005. The eVIN should match the VIN on the vehicle's VIN label. Data retrieved during an inspection, including the eVIN, communication protocol, and number of Parameter Identifications (PIDs), are recorded and transmitted to the Bureau's Vehicle Information Database (VID).

8. The Bureau maintains vehicle smog inspection details transmitted to the Bureau for vehicles that have undergone smog inspections using the OIS. This includes the eVIN, communication protocol, and PID for thousands of vehicles of various production years, makes, and models.

9. Some smog check stations and smog check inspectors have attempted to circumvent the smog check program by using a vehicle's properly functioning OBD system to generate passing diagnostic readings to issue a fraudulent smog certificate of compliance for another vehicle either not tested or not in compliance with the smog check program. This is commonly called "clean-plugging."

10. On June 23, 2020, complainant signed and thereafter filed the Accusation in his official capacity. The Accusation alleges respondents violated the Automotive Repair Act. Specifically, the Accusation charges that respondents issued four fraudulent smog check certificates of compliance, indicating that four vehicles passed a California smog check inspection when they had not, by engaging in the practice of clean-plugging. The Accusation further alleges that respondents' acts constitute fraud, dishonesty and deceit; untrue or misleading statements; and violations of the Motor Vehicle Inspection Program and its underlying regulations. Respondents timely filed Notices of Defense and requested a hearing to present their defense to those charges.

The Bureau's Evidence

11. Ian Evans testified at hearing. He works as a Program Representative II for the Bureau's Southern Headquarters Field Operations Office, and has held that position since 2006. He evaluates data transmitted to the Bureau's Smog Check database by smog inspection facilities, investigating consumer complaints, and preparing investigative reports. Before becoming a Program Representative II, Mr.

Evans worked as a Program Representative I, performing similar but generally less complex duties. He is a licensed smog technician who has worked in the automotive industry for approximately 50 years. In late 2019, Mr. Evans investigated smog inspections performed at Ripon Smog, dating back to 2017. The results of his investigation formed the basis for the Accusation.

12. Mr. Evans testified that to complete an OIS smog inspection, the technician must first log into the OIS platform using his technician's badge and identification. The technician must then scan the bar code on the vehicle's VIN label to enter the vehicle information into the OIS system. The vehicle's VIN and bar code are usually located under the window on the driver's side of the vehicle, or on the driver's side door pillar, or in the driver's side door jamb. If the vehicle's VIN bar code is unreadable or unavailable, a smog technician may also enter that information manually into the system. The technician must then scan the vehicle's DMV smog paperwork and make sure all the information obtained is consistent and appropriate for the vehicle. When reviewing smog inspection data from Ripon Smog, Mr. Evans discovered that the information received from several vehicles during inspection was not the expected data for the vehicles tested. As a result of his review, he determined that respondents conducted smog inspections on four vehicles using the clean-plugging method described above. Mr. Evans described the basis for his findings in detail.

VEHICLE 1:

13. On March 3, 2017, Stout performed a smog inspection on a 2006 Saturn Vue (Vehicle 1), resulting in the issuance of Certificate of Compliance No. QI064435C. The OIS test details for Vehicle 1 showed that the eVIN reported does not match the physical VIN on the vehicle. Mr. Evans reviewed comparative OIS test data for the year,

make, and model of Vehicle 1 and found that the communication protocol and PID count recorded during the smog inspection of Vehicle 1 were not consistent with the communication protocol and PID count normally reported to the Bureau for that vehicle make and model.

14. The OIS test data for Vehicle 1 also revealed that a smog inspection was performed on the vehicle on June 14, 2018 at a different facility. During the June 14, 2018 inspection, the vehicle transmitted an eVIN that matched the vehicle's VIN, and the communication protocol and PID count were consistent with the communication protocol and PID count normally reported to the Bureau for that vehicle make and model. Mr. Evan's review of OIS test data also revealed that on October 20, 2017, a smog test was performed on a 2002 Ford F-150 at another facility. The eVIN transmitted during the smog inspection of the Ford was the same eVIN recorded during the smog inspection performed on Vehicle 1 at Ripon Smog on March 3, 2017. Additionally, the communication protocol and PID count recorded during the inspection of the Ford were consistent with the communication protocol and PID count recorded during the March 3, 2017 inspection of Vehicle 1 at Ripon Smog.

15. Based on these findings, Mr. Evans concluded that the DAD was not connected to Vehicle 1 during the March 3, 2017 smog inspection and that Mr. Stout instead used the Ford's properly functioning OBD II system during the inspection of Vehicle 1, resulting in the issuance of a fraudulent certificate of compliance for that vehicle.

VEHICLE 2:

16. On January 24, 2018, Mr. Stout performed a smog inspection on a 2000 Chevrolet Tahoe K1500 (Vehicle 2), resulting in the issuance of Certificate of

Compliance No. HN290608C. The OIS test details for Vehicle 2 showed that the eVIN reported does not match the physical VIN for the vehicle. Mr. Evans reviewed the comparative OIS test data for the vehicle and found that an eVIN is not reported for that vehicle during a smog inspection. However, the communication protocol and PID count recorded during the smog inspection were not consistent with the communication protocol and PID count normally reported for that year, make, and model vehicle. Based on these findings, Mr. Evans concluded that the DAD was not connected to Vehicle 2 during the January 24, 2018 inspection.

17. The OIS test data for Vehicle 2 also revealed that a smog inspection was performed on the vehicle on March 6, 2018 at a different facility. During the March 6, 2018 inspection, an eVIN was not reported and the communication protocol and PID count were consistent with the communication protocol and PID count normally reported to the Bureau during a smog inspection for that vehicle's year make and model. Mr. Evans' review of additional OIS test data revealed that on January 26, 2018, Mr. Stout performed a smog inspection on a 2009 Nissan Murano S. The eVIN transmitted to the VID during the inspection of the Nissan was the same eVIN that was recorded during the January 24, 2018 inspection of Vehicle 2. The communication protocol and PID count recorded during the inspection of the Nissan were consistent with the communication protocol and PID count recorded during the January 24, 2018 inspection of Vehicle 2 at Ripon Smog.

18. Based on this information, Mr. Evans concluded that Mr. Stout connected the DAD to the Nissan's properly functioning OBD II system during the January 24, 2018 smog inspection of Vehicle 2, resulting in the issuance of a fraudulent certificate of compliance for that vehicle.

VEHICLE 3:

19. On June 28, 2018, Mr. Stout performed a smog inspection on a 2012 Honda Odyssey Touring (Vehicle 3), resulting in the issuance of Certificate of Compliance No. QK108681C. The OIS test details for Vehicle 3 showed that the eVIN reported does not match the physical VIN on the vehicle. Mr. Evans reviewed comparative OIS test data for the year, make, and model of Vehicle 3 and found that the eVIN should have been correctly reported and that the communication protocol and PID count reported during the smog inspection of Vehicle 3 were not consistent with the communication protocol and PID count normally reported to the Bureau for that vehicle make and model. Mr. Evans concluded that the DAD was not connected to Vehicle 3 during the smog inspection.

20. The OIS test data for Vehicle 3 revealed that a smog inspection was performed on Vehicle 3 on November 15, 2018 at a different facility. The eVIN reported during the November 15, 2018 inspection matched the vehicle's physical VIN, and the communication protocol and PID count were consistent with the communication protocol and PID count normally reported to the Bureau during a smog inspection for that vehicle's make and model.

21. Mr. Evans' review of additional OIS test data revealed that on September 4, 2018, Mr. Stout performed a smog inspection on a 2012 Honda Ridgeline RTL. The eVIN transmitted to the VID during the inspection of the Honda was the same eVIN that was recorded during the June 28, 2018 inspection of Vehicle 3, and the communication protocol and PID count recorded during the inspection of the Honda were consistent with those recorded during the June 28, 2018 inspection of Vehicle 3 at Ripon Smog. Based on the information reviewed, Mr. Evans concluded that Mr. Stout connected the DAD to the Honda's properly functioning OBD II system during

the June 28, 2018 smog inspection of Vehicle 3, resulting in the issuance of a fraudulent certificate of compliance for the vehicle.

VEHICLE 4:

22. On July 19, 2018, Mr. Stout performed a smog inspection on a 2006 Ford Focus ZX4 (Vehicle 4), resulting in the issuance of Certificate of Compliance No. HV519491C. The OIS test details for Vehicle 4 showed that the eVIN was not reported to the Bureau's VID during the inspection. Mr. Evans reviewed comparative OIS test data for the year, make, and model of Vehicle 4 and found that the eVIN should have been reported, and that the communication protocol and PID count reported during the smog inspection of Vehicle 4 were not consistent with the communication protocol and PID count normally reported to the Bureau for that vehicle make and model.

23. The OIS test data for Vehicle 4 also revealed that a smog inspection was performed on Vehicle 4 on May 5, 2016, at a different facility. During the May 5, 2016 inspection, the vehicle transmitted an eVIN that matched the vehicle's physical VIN, and the communication protocol and PID count were consistent with the communication protocol and PID count normally reported to the Bureau for that vehicle make and model. Considering the information reviewed, Mr. Evans concluded that the DAD was not connected to Vehicle 4 during the July 19, 2018 smog inspection, resulting in the issuance of a fraudulent certificate of compliance for the vehicle.

Matters in Aggravation

24. On May 9, 2016, the Bureau issued Citation C2016-0258 against Mr. Gibbons' Ripon Smog registration and smog check test only station license for violating Health and Safety Code section 44012 (smog check station failure to perform

inspections in accordance with prescribed procedures). The basis for the citation was that Ripon Smog issued a certificate of compliance to a vehicle after performing a smog inspection using the BAR 97 smog inspection system when the OBD inspection system was required. Pursuant to the citation, the Bureau ordered Gibbons to cease and desist from violating Health and Safety Code section 44012.

25. On May 9, 2016, the Bureau issued Citation M2016-0259 against Mr. Stout's smog technician license for violating Health and Safety Code section 44032 (failure to test emission control systems in accordance with Health and Safety Code section 44012), for using the BAR 97 smog inspection system when the OBD inspection system was required on September 2, 2015. Pursuant to this citation, the Bureau ordered Mr. Stout to cease and desist from violating Health and Safety Code section 44032.

Testimony of Respondent Stout

26. Mr. Stout has been employed at Ripon Smog for approximately seven years and has been a full-time employee since 2017. He has no recollection of performing any of the smog inspections described in the Accusation, but asserted that he would not purposefully engage in clean-plugging. Mr. Stout described his smog inspection duties at Ripon Smog as "a one-person shop." He completes the paperwork for the inspections, parks the vehicles awaiting inspection, and then performs the inspections and issues compliance certifications. He estimated he performs between 15 and 25 smog inspections each day. The facility gets very busy and he must make sure he moves quickly when performing inspections to keep customers happy. Mr. Stout frequently prepares multiple vehicles for inspection simultaneously. He testified that he verifies the VIN number on each vehicle before inspection by scanning the barcode on the vehicle itself and then scanning any DMV documents provided by the

customer. He usually confirms the VIN number by looking at the physical VIN through the vehicle windshield. He then places the smog inspection paperwork for each vehicle on a separate clipboard and places the clipboards on the countertop in the shop in the same order the cars are to be services. He then parks the vehicles in parking spots behind the facility in that same order, so he can quickly move the vehicles into the facility for inspection, in an order that coincides with his prepared paperwork, as soon as he completes the inspection of each vehicle. Mr. Stout surmised that his hastiness may cause him to sometimes bring vehicles in for inspection in the wrong order. As a result, he may accidentally perform a smog inspection on one vehicle, while inadvertently using the smog inspection paperwork for a vehicle actually parked and waiting to be inspected behind the facility. He opined that inadvertently inspecting vehicles in the wrong order may have caused information to be transmitted to the Bureau that resulted in the clean-plugging allegations in the Accusation.

Testimony of Respondent Gibbons

27. Mr. Gibbons is a licensed smog technician. He has owned Ripon Smog for approximately 10 years and also owns Lathrop Smog. Mr. Gibbons currently works solely at Lathrop Smog, and has not performed a smog inspection at Ripon smog since early 2018. He has no knowledge about any of the vehicles alleged to have been clean-plugged in the Accusation. He noted that performing smog inspections quickly has been essential to their business model and customer retention. Since the Accusation was issued, he has implemented several business practices to prevent clean-plugging from reoccurring. He has raised prices so they can spend more time inspecting each vehicle and still make a profit. He prohibits technicians from using DMV paperwork as a sole basis for obtaining vehicle information. The barcode on every vehicle must now be scanned or the physical VIN must be typed into the system

by each technician to ensure there is no chance of scanning or inputting incorrect vehicle information when performing smog inspections. All employees and management have been instructed to "thoroughly cross-reference all numbers and letters that make up the vehicle identification number," to minimize errors. Employees and management have taken a four-hour training course to ensure they are performing inspections accurately and proficiently. Cameras have been installed in both facilities to monitor inspections and ensure employees are abiding by the law when performing inspections. Mr. Gibbons periodically reviews video at both facilities and performs audits to ensure vehicle smog inspections are being performed properly. Mr. Gibbons personally sat down with Mr. Stout and other employees and reviewed proper smog inspection procedure, and explained that he expects them to fully comply with those procedures from now on.

Discussion

28. The Bureau plays a vital role in safeguarding the environment by mandating that vehicles are inspected in accordance with the Bureau's smog check procedures to ensure their emissions do not exceed standards. As the holder of a smog check inspector license, respondent is required by law to ensure smog inspections are performed in accordance with prescribed procedures. The Bureau established that respondents failed to meet this requirement when Mr. Stout certified that Vehicles 1 through 4 had passed a properly performed California smog inspection when they had not. Instead, each vehicle was issued a certificate of compliance after Mr. Stout engaged in acts of clean-plugging.

29. Mr. Stout's assertion that he may have inadvertently clean-plugged Vehicle's 1 through 4 was not credible. There was no evidence that Ford, Nissan, or Honda used to clean-plug vehicles at Ripon Smog were scheduled to receive smog

inspections on or around the same date as the Vehicles 1, 2, and 3. Even had Mr. Stout somehow confused those vehicles—which were not inspected at or around the same time at Ripon Smog—as the vehicles properly scheduled for inspection, as a licensed smog technician, he is responsible for ensuring that he is actually performing smog inspections on the vehicle he has identified to the Bureau as being inspected.

30. By certifying that Vehicles 1 through 4 passed smog inspections when they had not, Mr. Stout undermined the purpose of the California Smog Check Program inasmuch as those vehicles were not properly scrutinized to determine whether their emissions were within acceptable levels or whether the vehicles needed repair to meet emission requirements. Both respondents have also been cited by the Bureau for violating laws and procedures governing smog inspections and have been issued cease and desist orders to compel their compliance. As a licensed smog technician, Mr. Stout must complete each smog inspection in compliance with the law. He has repeatedly failed to meet this obligation. While Mr. Gibbons does not perform smog inspections at Ripon Smog, he holds both the registration and station license for that facility and is responsible for the fraudulent certificates of compliance issued by that facility. To his credit, he has taken some steps to prevent instances of clean-plugging from reoccurring.

31. Regarding Mr. Stout, the evidence presented at hearing, including his history of noncompliance and unpersuasive testimony, demonstrate that it would not be consistent with the public health, safety, and welfare to allow him to retain his smog check inspector license at this time. Consequently, that license should be revoked.

32. Regarding Mr. Gibbons, complainant established cause to discipline his registration and licenses. Automotive repair dealers and station owners are responsible

for ensuring that inspections performed by technicians they employ are performed in compliance with the law and he has been previously cited for noncompliance. However, his role in the fraudulent activity was attenuated. He was not on site when the violations occurred, he credibly testified that he had no knowledge of the inspections for Vehicle's 1 through 4, and he has taken steps to actively prevent clean-plugging from reoccurring. To protect the public interest, Mr. Gibbons' registration and licenses should be disciplined. When all the evidence presented at hearing is considered, a 30-day invalidation of Mr. Gibbons' registration and suspension of his licenses and a three-year period of probation with appropriate terms and conditions would be sufficient to adequately protect the public interest and welfare.

Reasonable Costs

33. Pursuant to Business and Professions Code section 125.3, the Bureau has requested costs of investigation and enforcement in the total amount of \$7,362.97.

This total amount consists of the following:

The Bureau submitted a declaration from Mr. Evans, which requests \$1,464.89 for investigative services, including, records review and report writing. Attached to the declaration is a Case Hours and Cost Spreadsheet that identifies the tasks performed, the date those tasks were performed, and the time and billing rate for each task.

The Bureau submitted a declaration from Program Representative Mark Casillas, which requests \$838.08 for investigative services, including reviewing codes, files, documents, and records, and performing case reviews.

Attached to Mr. Casillas's declaration is a Case Hours and Cost Spreadsheet that identifies the tasks performed, the date those tasks were performed, and the time and billing rate for each task.

The Bureau submitted a Certification of Prosecution Costs and Declaration of the Deputy Attorney General, which requests costs in the amount of \$5,060. Attached to the Deputy Attorney General's Declaration are printouts of documents titled "Matter Time Activity By Professional Type." These documents describe the work performed by the assigned Deputy Attorney Generals and support staff.

The amount of investigative and enforcement costs requested by the Bureau is reasonable, given the work performed and the nature of this case.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In revocation proceedings, the Bureau must prove that charges in the Accusation are true, and it must do so using the preponderance of the evidence standard. (*Imports Performance et al. v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918.) Respondents have the burden of establishing any affirmative defenses.

Applicable Law

2. The Legislature has declared that California's Motor Vehicle Inspection Program (Program) (Health and Safety Code section 44000 et seq.) requires an "enforcement program which is vigorous and effective and includes monitoring the performance of smog check test or repair stations and technicians, as well as the monitoring vehicle emissions as vehicles are being driven." (Health & Saf. Code, § 44001, subd. (b)(5)(E).) The Director of Consumer Affairs (director) has all of the powers and authority granted under the Automotive Repair Act for enforcing the Program; the Program is enforced and administered by the chief of the Bureau. (Health & Saf. Code, §§ 44001.5, 44002.)

3. Business and Professions Code section 9884.7, provides in pertinent part that:

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

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

reasonable care should be known, to be untrue or misleading.

[¶] . . . [¶]

(4) Any other conduct that constitutes fraud.

[¶] . . . [¶]

(c) Notwithstanding subdivision (b), the director may suspend, revoke, or place on probation the registration for all places of business operated in this state by an automotive repair dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it.

4. Pursuant to Health and Safety Code section 44072.2, the director may suspend, revoke, or take other disciplinary action against a license if the licensee does any of the following:

(a) Violates any section of this chapter and the regulations adopted pursuant to it, which is related to the licensed activities.

[¶] . . . [¶]

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

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

5. Pursuant to Health and Safety Code section 44072.10, subdivision (c), the department shall revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:

[¶] . . . [¶]

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

6. A smog test "shall be performed in accordance with procedures prescribed by the department....." (Health & Saf. Code, § 44012; Cal. Code Regs., tit. 16, § 3340.42.) A smog check technician shall inspect, test and repair vehicles, as applicable, in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42. (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).) A smog check station's license or a qualified smog check technician's qualification may be suspended or revoked by the Bureau, after a hearing, for failure to meet or maintain the standards prescribed for qualification, equipment, performance, or conduct. (Health & Saf. Code, § 44035, subd. (a).)

7. A licensed smog check station shall not issue a certificate of compliance to any vehicle that has not met the requirements of Health and Safety Code section 44012. (Health & Saf. Code, § 44015, subd. (b).) A licensed station shall issue a certificate of compliance or noncompliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in Health and

Safety Code section 3340.42 of this article and “has all the required emission control equipment and devices installed and functioning correctly.....” (Cal. Code Regs., tit. 16, § 3340.35, subd. (c).)

Discipline of Other Licenses

8. Under Health and Safety Code section 44072.8, the suspension or revocation of a smog check inspector license or smog check repair technician license constitutes cause to suspend or revoke other such licenses held by the disciplined licensee.

Causes for Discipline

9. As specified in Factual Findings 28 through 32, Mr. Gibbons made or authorized statements he knew, or should have known, to be untrue or misleading, and failed to comply with the laws and regulations governing the Motor Vehicle Inspection Program when his smog technician, Mr. Stout, failed to perform smog inspections on Vehicles 1 through 4, in accordance with prescribed procedures, and Mr. Gibbons issued certificates of compliance for those vehicles. Therefore, cause exists to discipline Mr. Gibbons’ automotive repair dealer registrations pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), and to discipline his station licenses and smog check repair technician license pursuant to Health and Safety Code sections 44072.2, subdivisions (a) and (c).

10. As specified in Factual Findings 28 through 32, Mr. Gibbons engaged in fraud,¹ by issuing certificates of compliance for Vehicles 1 through 4, without ensuring proper smog inspections were performed on the vehicles. Therefore, cause exists to discipline Mr. Gibbons' automotive repair dealer registrations pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), and to discipline his station licenses and smog check repair technician license pursuant to Health and Safety Code section 44072.2, subdivision (d).

11. As specified in Factual Findings 28 through 31, Mr. Stout failed to comply with the laws and regulations governing the Motor Vehicle Inspection Program and engaged in dishonest, fraudulent or deceitful acts injuring another when he failed to perform smog inspections on Vehicles 1 through 4, in accordance with prescribed procedures, in violation of Health and Safety Code section 44012. Therefore, cause exists to discipline Mr. Stout's smog check inspector license pursuant to Health and Safety Code sections 44072.2, subdivisions (a), (c), and (d).

¹ 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.)

Appropriate Discipline

12. As specified in Factual Findings 31 and 32, the public health, safety, and welfare dictate that Mr. Stout smog check inspector license be revoked, and that Mr. Gibbons' registrations and licenses be suspended for 30-days and thereafter subject to probationary terms for three years.

Costs

13. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated the licensing act may be ordered to pay the reasonable costs of investigation and prosecution of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These 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 in light of the alleged misconduct.

14. As specified in Factual Finding 33, the reasonable cost of investigation and enforcement of this matter as established at hearing is \$7,362.97. When all the factors specified in *Zuckerman* are considered, there is no basis to reduce the amount of cost sought by the Bureau.

ORDER

1. Smog Check Inspector License No. EO 637003, issued to respondent Edward William Stout, is REVOKED.
2. All other licenses issued to respondent Edward William Stout pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code, are REVOKED.
3. Respondents are jointly and severally liable to pay the Bureau of Automotive Repair a total of \$7,362.97 for the reasonable cost of the investigation and enforcement of Case No. 79/19-18397.
4. Automotive Repair Dealer Registration No. ARD 268840, and any other automotive repair dealer registration, issued to respondent Nicholas Carl Gibbons, is invalidated, and Smog Check, Test Only, Station License No. TC 268840, and Smog Check Inspector License No. EO 631964, and Smog Check Repair Technician License No. EI 631964, any other licenses, issued pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code, to Nicholas Carl Gibbons, are revoked; provided, however, the invalidations and revocations are stayed and the registrations and licenses are suspended for a period of thirty (30) days and, thereafter, placed on probation for three (3) years on the following terms and conditions:

1. Obey All Laws

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

2. Posting of Sign

During the period of suspension, Mr. Gibbons shall prominently post a sign or signs, provided by the Bureau, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign or signs shall be conspicuously displayed in a location or locations open to and frequented by customers. The location(s) of the sign(s) shall be approved by the Bureau and shall remain posted during the entire period of actual suspension.

3. Quarterly Reporting

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

4. Report Financial Interests

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

5. Access to Examine Vehicles and Records

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

representatives unrestricted access to all records pursuant to Bureau laws and regulations.

6. Tolling of Probation

If, during probation, Mr. Gibbons leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, Mr. Gibbons 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 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 Mr. Gibbons is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

7. Violation of Probation

If Mr. Gibbons 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 Mr. Gibbons is served notice of Bureau's intent to set aside the stay, the

Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

8. Maintain Valid License

Mr. Gibbons 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 Mr. Gibbons' registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by Mr. Gibbons within 30 days of that date. If Mr. Gibbons' registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal Gibbons' 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.

9. Cost Recovery

Respondents are jointly and severally responsible to pay the Bureau of Automotive Repair a total of \$7,362.97 for the reasonable cost of the investigation and enforcement of Case No. 79/19-18397. Mr. Gibbons shall pay the Bureau of Automotive Repair its reasonable costs of the investigation and enforcement in this case pursuant to a payment plan established by the Bureau to be paid during the period of probation established in this order.

Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. The Bureau reserves the right to pursue any other lawful measures in

collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

10. Completion of Probation

Upon successful completion of probation, Mr. Gibbons' affected registration and/or license will be fully restored or issued without restriction, if he meets all current requirements for registration or licensure and has paid all outstanding fees, monetary penalties, or cost recovery owed to the Bureau.

11. License Surrender

Following the effective date of a decision that orders a stay of invalidation or revocation, if Mr. Gibbons ceases business operations or is otherwise unable to satisfy the terms and conditions of probation, he may request that the stay be vacated. Such request shall be made in writing to Bureau. The Director and the Bureau Chief reserve the right to evaluate Mr. Gibbons' 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.

Mr. Gibbons 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 the Bureau at any time before the date of the originally scheduled completion of probation. If Mr. Gibbons applies to the Bureau for a registration or

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license at any time after that date, he must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to Bureau and left outstanding at the time of surrender.

DATE: November 4, 2020

Signed Copy on File
ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings