

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

In the Matter of the Accusation Against:

JOHN GATELY LUZ, PRESIDENT J BRO INDUSTRIES; dba 88 SMOG TEST ONLY

640 Garfield Ave. #5

El Cajon, CA 92020

Automotive Repair Dealer Registration No. ARD 273127

Smog Check Test Only Station License No. TC 273127

and

SHIVAN SALIH ISSA

348 S. Meadowbrook Drive B

San Diego, CA 92114

Smog Check Inspector License No. EO 641676

Smog Check Repair Technician License No. EI 641676

Respondents.

Case No. 79-22-5657

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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 February 2, 2024.

IT IS SO ORDERED this 20 day of December, 2023.



GRACE ARUPO RODRIGUEZ
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs

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OAH No. 2023080175

PROPOSED DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on November 6 and 7, 2023.

Craig S. Menchin, Deputy Attorney General, Department of Justice, State of California, represented complainant Patrick Dorais, Chief, Bureau of Automotive Repair (bureau), Department of Consumer Affairs (department), State of California.

Adam B. Bown, Attorney at Law, represented respondent, John Gately Luz, President, J Bro Industries dba 88 Smog Test Only, who was present at the hearing.

Randall V. Sutter, Attorney at Law, represented respondent, Shivan Salih Issa, who was present at the hearing.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on November 7, 2023.

FACTUAL FINDINGS

Registration and License History

1. The bureau issued the following licenses to J Bro Industries, John Gately Luz, President, dba 88 Smog Test Only: Automotive Repair Dealer Registration No. ARD 273127 on May 23, 2013, which expires on May 31, 2024, unless renewed; Smog Check Test Only Station License No. TC 273127 on June 4, 2013, which expires on May 31, 2024, unless renewed; and STAR Station certification on July 23, 2013.

2. The bureau issued the following licenses to Shivan Salih Issa: Smog Check Inspector License No. EO 641676, effective January 25, 2019, which expires on January 31, 2025, unless renewed; and Smog Check Repair Technician License No. EI 641676, on May 22, 2019, which expired on January 31, 2021, and has not been renewed.

Jurisdictional Background

3. On April 18, 2023, complainant signed the accusation in his official capacity. The accusation alleged that Mr. Luz's automotive repair dealer registration and smog check station license should be disciplined for conduct that occurred between April 17, 2021, and April 14, 2022, on the following grounds:

- Pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), Mr. Luz's automotive repair dealer registration is subject to discipline because his employee made or authorized untrue or misleading statements when smog certifications were issued for 11 vehicles, using the clean plugging method to issue smog certificates of compliance, and the vehicles were not inspected or tested as required by Health and Safety Code section 44012. (First Cause for Discipline);
- Pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), Mr. Luz's automotive repair dealer registration is subject to discipline because his employee committed acts which constitute fraud by issuing electronic certificates of compliance for 11 vehicles without performing bona fide inspections of the emission control devices and systems. (Second Cause for Discipline);

- Pursuant to Health and Safety Code section 44072.2, subdivision (a), Mr. Luz's smog check station license is subject to discipline because his employee violated the Motor Vehicle Inspection Program and regulations adopted pursuant to it, based on violations of Health and Safety Code sections 44012 (failed to test emission controls systems and devices of 11 vehicles) and 44015 (issued electronic certificates of compliance, but failed to properly test and inspect the 11 vehicles.) (Third Cause for Discipline);
- Pursuant to Health and Safety Code sections 44072.2, subdivision (c), Mr. Luz's smog check station license is subject to discipline because his employee failed to comply with California Code of Regulations, title 16, sections 3340.35, subdivision (c), (issued electronic certificates of compliance, but failed to inspect the 11 vehicles to ensure they had the required emission control equipment and devices installed and functioning correctly), and 3340.42 (failed to conduct required smog tests on 11 vehicles in accordance with the bureau's specifications.) (Fourth Cause for Discipline); and
- Pursuant to Health and Safety Code sections 44072.2, subdivision (d), Mr. Luz's smog check station license is subject to discipline because his employee committed acts involving dishonesty, fraud, or deceit by issuing electronic certificates of compliance for 11 vehicles without performing bona fide inspections of the emission control devices and systems. (Fifth Cause for Discipline).

4. The accusation alleged that Mr. Issa's smog check inspector license and smog check repair technician license should be disciplined for conduct that occurred between April 17, 2021, and April 14, 2022, on the following grounds:

- Pursuant to Health and Safety Code section 44072.2, subdivision (a), Mr. Issa's smog check inspector and smog check repair technician licenses are subject to discipline because he violated Health and Safety Code section 44012 when he failed to test the emission controls systems and devices for 11 vehicles. (Sixth Cause for Discipline);
- Pursuant to Health and Safety Code section 44072.2, subdivision (c), Mr. Issa's smog check inspector and smog check repair technician licenses are subject to discipline because he violated the California Code of Regulations, title 16, section 3340.30, subdivision (a) (failed to test and inspect 11 vehicles in accordance with Health and Safety Code section 44012), and section 3340.42 (failed to conduct required smog tests and inspections on 11 vehicles in accordance with the bureau's specifications.) (Seventh Cause for Discipline); and
- Pursuant to Health and Safety Code section 44072.2, subdivision (d), in conjunction with Health and Safety Code section 44072.10, subdivision (c), Mr. Issa's smog check inspector and smog check repair technician licenses are subject to discipline because he committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic certificates of compliance for 11 vehicles without performing bona fide inspections of emission control devices and systems. (Eighth Cause for Discipline).

Complainant's Evidence

ALLEGATIONS OF CLEAN PLUGGING

5. Beginning March 9, 2015, California's Smog Check Program was updated to require the use of an On-Board Diagnostic Inspection System (OIS). The program

ensures vehicles do not emit excessive and toxic pollutants that are harmful to individuals and the environment. It requires that vehicles be tested by licensed inspectors at licensed smog stations biannually and/or when re-registered in order to detect non-compliant vehicles, so they are repaired or taken off the road. The OIS is required for inspections of most gasoline vehicles that are model-year 2000 and newer. Inspectors are given a personal access code to access the emissions inspection system (EIS). The OIS system consists of a data acquisition device (DAD), computer, bar code scanner, and printer. The DAD is an on-board diagnostic (OBD) scan tool that retrieves OBD data from the vehicle being tested. The OIS software communicates with the bureau's Vehicle Information Database (VID). The inspector accesses the OIS platform with a personal code and scans the barcode on the vehicle for the vehicle identification number (VIN), scans any documents, verifies the vehicle being tested reflects the vehicle in the VID and verifies the odometer reading. The inspector connects the DAD to the vehicle to be certified. The On-Board Diagnostic, generation II, system (OBD II), test function occurs when the DAD is connected to the vehicle. The inspector is prompted to start the inspection by linking the DAD to the vehicle, and after the data is collected, the inspector is prompted to disconnect the DAD and turn off the vehicle's engine. The DAD transmits the vehicle's data to the OIS platform, which is sent to the VID. The inspector then conducts a visual and functional test of the vehicle.

6. "Clean plugging" refers to the use of another vehicle's properly functioning OBD II or another source, to generate passing diagnostic readings for the purpose of issuing fraudulent smog certificates of compliance to vehicles that are not in smog compliance and/or not present for testing.

7. The bureau conducted an investigation by reviewing information for 88 Smog Test Only from the bureau's VID. The bureau alleges that between April 17, 2021, and April 14, 2022, Mr. Luz's employee, Mr. Issa, engaged in fraudulent smog check inspections at 88 Smog Test Only when the 11 vehicles, identified below, were issued certificates of compliance by using the clean plugging method, resulting in fraudulent certificates of compliance. In the accusation, complainant submitted a chart alleging a pattern of discrepancies as shown by the information transmitted during the inspections and the documented information known about these vehicles, such as incorrect electronic vehicle identification numbers (eVINs), incorrect vehicle communication protocols, and incorrect parameter identification (PID) counts. The chart outlines the following alleged discrepancies for the 11 vehicles:

- Vehicle 1 – 2007 BMW 335 I: certificate of compliance (SA144586C) issued by 88 Smog Test Only¹ under Mr. Issa's smog check inspector license; eVIN transmitted did not match vehicle's license or VIN (GVM842); reported protocol (ICAN11bt5) did not match expected protocol (KWPF); and reported PID (45/11) did not match expected PID (22 or 22/10).
- Vehicle 2 – 2008 Volkswagen Passat Turbo: certificate of compliance (SA692546C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted did not match vehicle's license or VIN (97115J2); and reported PID (42/5/7/5/7/5) did not match expected PID (37/14).

¹ 88 Smog Test Only was formerly known as 76 Smog Test Only Station.

- Vehicle 3 – 2010 BMW 528 I: certificate of compliance (SE311860C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted did not match vehicle's license or VIN (WBANU5C58AC126750); reported protocol (ICAN29bt5) did not match expected protocol (ICAN11bt5); and reported PID (42/17) did not match expected PID (45/14 or 46/11).
- Vehicle 4 – 2000 Honda Accord SE: certificate of compliance (SE894894C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted was not expected and did not match vehicle's license or VIN (6TZF226); reported protocol (ICAN11bt5) did not match expected protocol (I914); and reported PID (38/21) did not match expected PID (16).
- Vehicle 5 – 2002 Nissan Xterra SE: certificate of compliance (SG815562C) issued 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted was not expected and did not match vehicle's license or VIN (6XSR662); and reported protocol (JPWM) did not match expected protocol (I914).
- Vehicle 6 – 2006 Toyota Tundra Double Cab SR5: certificate of compliance (SG815583C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted did not match vehicle's license or VIN (95708W2); and reported PID (2/5/7/5/7/5) did not match expected PID (47).
- Vehicle 7 – 2008 Toyota Prius: certificate of compliance (SI081789C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted did not match vehicle's license or VIN (97116J2); and reported PID (40/17) did not match expected PID (38/21 or 38/21/17 or 38/21/5).

- Vehicle 8 – 2009 Toyota Prius: certificate of compliance (IN406839C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted did not match vehicle's license or VIN (8ELW414); and reported PID (45/11) did not match expected PID (38/21 or 38/21/17 or 38/21/5).
- Vehicle 9 – 2002 Lexus ES 300: certificate of compliance (SO278560C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted was not expected and did not match vehicle's license or VIN (7UTB659); reported protocol (ICAN11bt5) did not match expected protocol (I914); and reported PID (42) did not match expected PID (21).
- Vehicle 10 – 2001 Ford Focus SE: certificate of compliance (SO485361C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted was expected but was not reported; reported protocol did not match expected protocol; and reported PID did not match expected PID.
- Vehicle 11 – 2002 Toyota Sienna LE: certificate of compliance (SQ010734C) issued by 88 Smog Test Only under Mr. Issa's smog check inspector license; eVIN transmitted was not expected and did not match vehicle's license or VIN (V548716); reported protocol (I914) did not match expected protocol (JPWM); and reported PID (18) did not match expected PID (17).

MR. ORTEGA'S INVESTIGATIVE REPORT, DECLARATION, AND TESTIMONY

8. The following is a summary of the testimony of Marc Ortega, which is consistent with his investigative report and declaration. He is employed as a Program Representative II for the bureau, where he has worked since 2005. He became a licensed smog check inspector in 1986 and has performed over 30,000 smog check inspections. Mr. Ortega's duties for the bureau include reviewing smog check data,

researching anomalies, and compiling reports indicating his findings and conclusions. As part of his duties, he reviews data collected by the bureau from smog inspections and conducts comparative analyses.

9. Mr. Ortega explained that the purpose of the Smog Check Program is to ensure that vehicles do not emit excessive and toxic pollutants that are harmful to individuals and the environment. He explained that "clean plugging" is a method used by some inspectors to improperly issue passing smog certificates for vehicles that were not actually inspected. Clean plugging involves an inspector using a different vehicle or some other electronic device that will provide passing OBD II information, in order to issue a certificate of compliance, which is done for a vehicle that will not properly pass an OIS inspection or a vehicle that was not present during an inspection.

10. Mr. Ortega investigated 88 Smog Test Only because there were irregularities detected on the bureau's database regarding smog inspections that had been conducted at the shop. He looked at smog test data for inspections performed at 88 Smog Test Only. He prepared an investigative report that referenced 11 examples of improper smog inspections conducted by Mr. Issa at 88 Smog Test Only. His investigative report was received as evidence and consistent with his testimony and the allegations of the clean plugging of Vehicles 1 through 11, as set forth in the accusation.

11. Mr. Ortega testified the same "surrogate" vehicle was used to smog Vehicle 1 (2007 BMW 335 I) and Vehicle 8 (2009 Toyota Prius), as shown by a Vehicle Inspection Report (VIR), dated July 12, 2021, which was generated showing Mr. Issa as the inspector.

12. Mr. Ortega testified there was no smog history for Vehicle 2 (2008 Volkswagen Passat Turbo), so he requested DMV records for Vehicle 2. The DMV records show the eVIN transmitted for Vehicle 2 corresponded to a 2015 Hyundai vehicle, which was registered to Nossat Issa. Later in the hearing, Mr. Issa testified that Nossat Issa is his brother and the owner of the automotive repair shop that is next door to 88 Smog Test Only.

13. On cross-examination, Mr. Ortega testified that during the course of the investigation he did not visit 88 Smog Test Only or have any communication with Mr. Luz or Mr. Issa because the "data clearly points to clean plugging."

14. On cross-examination, Mr. Ortega testified that during the period of the alleged clean plugging at 88 Smog Test Only, the manner in which an inspector would access the OIS system was by typing a password into the keyboard. A change has since been implemented by the bureau, whereby as of about five months ago, an inspector must use a biometric palm scanner to access the OIS system. The purpose of the change was to prevent any person other than the licensed technician from using the technician's credentials to access the OIS system.

Respondent Luz's Evidence

15. The following is a summary of the evidence submitted by Mr. Luz including, but not limited to, the following: a statement by Mr. Issa; a statement by Mr. Luz; text messages between Mr. Luz and Mr. Issa; a declaration by Mr. Luz; curriculum vitae of Mr. Luz; a character letter by Mr. and Ms. Macdonald; a character letter by Dr. Birrane; a character letter by Dr. Mochalkin; a character letter by Mr. Nguyen; Google reviews; Yelp reviews; VIR reports for Vehicles 1 through 11; and VIR reports for other vehicles.

MR. LUZ'S TESTIMONY

16. The following is a summary of the testimony of Mr. Luz, which is consistent with his statement and declaration and other evidence he submitted. He earned a bachelor's degree in music, and then earned a bachelor's degree in science and a doctoral degree in pharmacology at Cornell University. He completed his post-doctoral research at the University of California, San Diego. His focuses were on structural biology and protein engineering. In 2013, he purchased 88 Smog Test Only from Thao Tran. The business already had the ARD registration and smog check station license. He is the sole owner. His shop has a bay at the far end and there are two other bays that are also used by Mr. Issa, who works at the business that is next door and owned by Mr. Issa's brother. Mr. Luz obtained his smog check inspector license in 2019 or 2020. He has conducted smog inspections when he needs to sub for his technician, Tich Nguyen. He has done about 200 to 300 smog inspections himself. He enjoys working and chatting with customers, but he does not care for the accounting duties of the business. In an average month, 88 Smog Test Only performs about 200 to 230 smog inspections. In a slow month, they perform about 170 smog inspections.

17. Mr. Luz is aware of the meaning of clean plugging. He has never clean plugged a car although he has been asked to do so. For those who have asked him to clean plug, he tells them it is not worth the risk to his business license. He is conscious of his personal and business reputation.

18. Mr. Luz first met Mr. Issa around 2016 or 2017 when Mr. Issa's work moved next to 88 Smog Test Only. Mr. Issa did oil changes and routine repairs at his shop. Mr. Issa occasionally worked on Mr. Luz's vehicle. Mr. Issa worked on a lot of salvaged vehicles. Around 2019, Mr. Issa asked him to do smog checks at 88 Smog

Test Only. At first, Mr. Luz was "annoyed" because he thought Mr. Issa was going to conduct smog inspections at Mr. Issa's shop. Mr. Luz first checked with the bureau to make sure there was no violation. He spoke with a representative on the phone who told him an arrangement to allow Mr. Issa to conduct smog inspections in his shop was acceptable even though Mr. Issa was not his employee. Mr. Luz thought about it and decided it would be "okay." Mr. Luz told Mr. Issa to not get in the way of his customers and perform smog inspections at the end of the business day. Mr. Luz's regular hours of operation were 8:30 a.m. to 5:00 p.m. during the weekdays, and 8:30 a.m. to 3:00 p.m. on Saturdays. Mr. Luz would leave the door open and let Mr. Issa do his smog inspections. Mr. Luz did not make any money by allowing Mr. Issa to use his smog inspection machines. When he added the costs of his rent, leased equipment, and certificates, he was charging Mr. Issa less to do the smog inspections than what it was costing himself. Mr. Luz agreed to this arrangement because Mr. Issa seemed like a good person. He saw Mr. Issa with his family and felt he was trustworthy. Mr. Luz had achieved a lot in his profession and he wanted to help others. His agreement with Mr. Issa was oral aside from some text messages regarding the parameters of using the equipment and paying him for expenses.

19. Mr. Luz submitted a letter, dated April 28, 2023, signed by Mr. Issa. The letter was drafted by Mr. Luz. The letter indicates that Mr. Issa is not an employee or contractor of Mr. Luz's, and Mr. Issa's access to Mr. Luz's smog equipment was a courtesy. It states that Mr. Luz had no participation in "my activities regarding, nor in the solicitation or handling, of the vehicles of my customers in including phone calls, text messages, email, or any other form of communication." The letter does not acknowledge that clean plugging was being done by Mr. Issa at Mr. Luz's shop or with Mr. Luz's equipment. Mr. Luz had initially written that Mr. Issa was the owner of the

shop next door, but Mr. Issa asked Mr. Luz to remove that language. Mr. Issa then signed the edited letter within a few minutes after Mr. Luz gave it to him to sign.

20. Mr. Luz submitted screenshots of text messages between himself and Mr. Issa. One of the text message exchanges reads:

[Mr. Issa] Some [sic] stolen my identity and I'm working on it and I'm taking full responsibility and you have nothing [sic] wrong.

[Mr. Luz] The BAR doesn't care if it happened in my shop they will hold me responsible. This is going to cost me a lot of money and I might lose my business.

[Mr. Issa] I'm on your side it can be as [sic] witness you have not done nothing [sic] wrong, I'm frustrated I [sic] working with Lawer [sic].

[Mr. Luz] Unfortunately it's too late for all that. If the BAR shuts down my shop there is nothing I can do.

21. Mr. Luz keeps all of his invoices in boxes that are organized by year, and each month is in a different folder. For complete transparency, he searched and located the invoice that he had for each of the vehicles that were allegedly clean plugged. He also pulled the VIR reports for the vehicles. It appears to him that the signature on the invoices are the same as the signatures on the VIR reports. He believes it is Mr. Issa's signature. He noticed that on some of the invoices the name "Nossat Issa" is written. He does not know a "Nossat Issa."

22. Mr. Luz agreed to the arrangement of permitting Mr. Issa to use his smog inspection equipment because he thought it would be helpful for Mr. Issa to get experience. He also thought that if Mr. Nguyen was sick and he could not sub for Mr. Nguyen that Mr. Issa could help. His intentions with this arrangement were good. He stated, "I have nothing to do with any of these clean plugging vehicles . . . I never took one red penny." When Mr. Luz learned of the accusation against him, he was shocked and surprised. He does not understand the bureau's quality control if it allows vehicles to pass smog inspections when data does not match for vehicles. He does not have access to the bureau's data and it would be helpful for licensees to have a tool to learn of discrepancies to stop any unpermitted activities. He has worked in laboratories and such discrepancies would not be permitted. He was also saddened that someone he trusted could have put him in this situation. After he received the accusation, he contacted the bureau to have Mr. Issa removed from having access to his smog equipment. He is also old enough to remember the "horrible smog reports coming out of L.A." and it is "quite amazing in California that we can have that many cars on the road and have the clear air we have." He takes his role seriously of keeping the air clean and he does not present any danger to the public.

23. On cross-examination by Mr. Menchin, Mr. Luz testified that he understands he is responsible for everything "that is under his control" that happens at his shop. He did not give Mr. Issa or anyone else approval to clean plug vehicles. He is personally present at 88 Smog Test Only about one to three times each month. When Mr. Nguyen is on vacation, he is there every day. He does not have a manager for his business.

24. On cross-examination by Mr. Sutter, Mr. Luz testified there were occasions that Mr. Issa subbed for Mr. Nguyen including when Mr. Nguyen's son

tragically passed away. He never paid Mr. Issa as an employee. He would instead deduct what Mr. Issa owed him for those smog inspections. He never observed Mr. Issa clean plugging a vehicle because in the OIS system, a technician can enter the wrong vehicle information and it will not be visually noticed by others. Whereas with the older BAR97 equipment, there would physically be two vehicles used in a clean plugging scenario. He did not personally observe Mr. Issa signing the VIR reports for the vehicles in question. He has not spoken with Mr. Issa regarding this matter since he retained his attorney.

DR. BIRRANE'S TESTIMONY

25. The following is a summary of the testimony of Gabriel Birrane, Ph.D., which is consistent with a character letter he wrote in support of Mr. Luz. He earned a doctoral degree in chemistry and biochemistry. He works as a structural biologist at Harvard Medical School where is a scientist and runs a laboratory. His office is in the Beth Israel Deaconess Medical Center on the Harvard campus where he has worked since 1999. He conducts research for small, medium, and large pharmaceutical companies.

26. Dr. Birrane has known Mr. Luz since about 2017 when they met through a research colleague, Igor Mochalkin, who works at a pharmaceutical company. Mr. Luz consulted on Dr. Birrane's academic projects for several months by working on projects at his lab at Harvard. Mr. Luz was an advisor to Dr. Birrane's students. Mr. Luz also wrote a section of a research paper that was published by Dr. Birrane, and contributed to another research paper. Dr. Birrane described Mr. Luz's work as "excellent" and that Mr. Luz worked very well with students and was very detailed and smart and able to work with different groups at different times. Mr. Luz has a background of working for several pharmaceutical companies, so Mr. Luz was a great

help to Dr. Birrane. Mr. Luz continues to assist Dr. Birrane with purchasing research equipment and supplies for Dr. Birrane's research laboratory. He is aware of the accusation against Mr. Luz and found it "very unusual" and "seemed very out of character." He did not think that Mr. Luz would be involved in "this kind of dealing in any way shape or form." Mr. Luz has always been professional and honest.

MS. MACDONALD'S TESTIMONY

27. The following is a summary of Stephanie Macdonald's testimony, which is consistent with a character letter written by Ms. Macdonald and her husband Colin Macdonald. She has known Mr. Luz since 2008 when they worked together in the bio-tech industry. She left the bio-tech industry and went into business with her husband and Mr. Luz as independent owners of a retail shop called Kit Fox Outfitters. Their company provides cardiopulmonary resuscitation (CPR), first aid and wilderness training. Mr. Luz is an equal and silent partner. He does not play a day-to-day role in the business operations. However, when they are looking to provide new products, Mr. Luz conducts research. She speaks with Mr. Luz every few months.

28. Ms. Macdonald is aware of the accusation because Mr. Luz told her about it and she read the accusation. She believes Mr. Luz is a truthful person and she would not be in business with someone who is not truthful. She has no reason to doubt Mr. Luz's veracity and sincerity. He has never lied to her. He has been a good business partner. She believes he is of good character. She does not believe that Mr. Luz committed any of the conduct alleged in the accusation. She would not hesitate to bring her vehicle to his shop for a smog inspection.

OTHER EVIDENCE SUBMITTED BY MR. LUZ

29. Mr. Luz submitted a character letter signed on October 15, 2023, by Igor Mochalkin, Ph.D., who stated he is a computational chemist and crystallographer who worked with Mr. Luz at Eli Lilly beginning in 2012. At that time, Mr. Luz was managing a "very productive and successful biochemistry and biophysics laboratory" . . . "supporting the design and development of drug molecules for the treatment of various clinical diseases." Some years later, Dr. Mochalkin took a position at EMD Serono and recruited Mr. Luz in an initiative project because he was of "good character and sound morals." Dr. Mochalkin is aware of the accusation. He has known Mr. Luz to be "honest and trustworthy."

30. Mr. Luz submitted a character letter signed on October 15, 2023, by Tich Nguyen who reported that he has been employed by Mr. Luz at 88 Smog Test Only since 2016. Mr. Luz has never instructed him to perform any illicit smog tests. Mr. Nguyen had on several occasions reminded Mr. Issa that "all smog tests must be performed according to California BAR rules and regulations." Mr. Nguyen has never witnessed Mr. Luz communicating with Mr. Issa's customers. He has never witnessed Mr. Luz perform any illicit smog tests. He is aware of the accusation against Mr. Luz. He has known Mr. Luz to be "a person of good character and ethics."

31. Mr. Luz also submitted several pages of customer reviews that showed 88 Smog Test Only has an average of 4.8 out of 5 stars on Google and 4.9 out of 5 stars on Yelp.

Respondent Issa's Evidence

MR. ISSA'S TESTIMONY

32. The following is a summary of Mr. Issa's testimony. He submitted no additional supporting evidence. He was born in Iraq in 1981. He worked as a mechanic starting at 17 years old at his cousin's mechanic shop. He learned to repair American, Japanese, and European vehicles. He had no formal academic schooling in Iraq. He speaks Kurdish, Turkish, and an Arabic dialect from the region where he is from. He learned to speak English because he loves the language. When the United States military came to Iraq, he began working as a "maintenance guy" for KBR – an American contractor for the United States military. KBR moved to a different city in Iraq and he was given a recommendation to work for the United States military as an interpreter because he could speak English. It was a very hard job and he worked in very dangerous situations where he lost a lot of friends and soldiers with whom he worked. He received "a lot of special recognitions" for the work he did as an interpreter.

33. Mr. Issa's "superior" at his job suggested that he go to the United States. He never thought he would come here, but he had a chance because many people gave him recommendations for immigration. He came to the United States on June 6, 2010, and he was granted permanent residency for himself and his wife and two children. His situation was different from other refugees because he did not have to apply for permanent residency. He was automatically granted his permanent residency because of a recommendation from the United States military. He and his family lived in Lowell, Massachusetts, for three months and then moved to San Diego. He has been in San Diego since August 2010. He and his wife now have six children who are all minors.

34. When Mr. Issa moved to San Diego, he enrolled in a continuing education program for automotive repair for about one year. He then took classes at Miramar College for three years in a Toyota certified technician program. He worked at Meinecke Oil Change and a tire shop. He earned his licenses in smog check inspection and repair. He did not renew his smog check repair technician license because he was working and did not have time. He worked for Mossy Toyota in Pacific Beach for a couple of years. He then started working for his brother's business, N&S Lube Service, in 2017.

35. A few months after Mr. Issa got his smog check inspector license in January 2019, he started doing smog inspections at the shop next door - 88 Smog Test Only. He asked Mr. Luz to use Mr. Luz's OIS machine because his brother, Nozat Issa, could not afford an OIS machine for N&S Lube Service. A few months later, he got a copy of the key for 88 Smog Test Only. He never considered himself an employee or independent contractor of 88 Smog Test Only. On a few occasions, Mr. Luz asked him to cover for Mr. Nguyen. He did not get paid to fill-in for Mr. Nguyen. There were about four people who worked at N&S Lube Service and they had access to the key for 88 Smog Test Only. Mr. Luz input in his OIS system that Mr. Issa could access the equipment during certain time parameters of 8:00 a.m. to 5:00 p.m. Mr. Issa usually worked at N&S Lube Service until about 3:00 p.m. He also provided occasional caregiver services for his sister who is disabled.

36. When Mr. Issa did smog inspections at Mr. Luz's shop, he would always leave an invoice on Mr. Luz's table. He testified that Mr. Luz did not locate invoices for Vehicles 4 through 8. In the case of these vehicles, Mr. Issa does not believe he conducted the smog inspections because he would have completed an invoice. He noted there were a lot of customers at N&S Lube Service who left their cars at the

shop, so the shop would write the customer name "Nozat Issa" who is his brother. One of their regular customers was American Auto Exports.

37. Mr. Issa never heard of the term "clean plugging" until this case occurred. He has been asked to do illicit smog inspections, but he never did it. He had a badge to access Mr. Luz's OIS equipment. He would leave his badge on the OIS machine. Mr. Nguyen's and Mr. Luz's badges were also left on the OIS machine. He had his password memorized, but he also had it written on a small piece of paper that he left at N&S Lube Service. He never gave anyone permission to use his credentials to access Mr. Luz's OIS machine. He only saw Mr. Luz about every three or four months at 88 Smog Test Only. He does not believe that Mr. Luz used his credentials to access the OIS machine. He testified, "It could be someone else who works for him or for my brother." When he received the accusation he was confused and shocked. He asked his friend to read it for him. He has never clean plugged a vehicle. He would never do anything to jeopardize his smog check inspector license. He stated, "I 100 percent value my license, my reputation, my career, everything." After he received the accusation, an employee, who worked for his brother, quit in April 2023. He suspects that employee may have used his credentials without his permission, but he cannot say for sure. He noted that it is not his signature on the VIRs for Vehicles 1, 2, 3, 8, 10, and 11. He also noted that Vehicles 1, 4, and 6 were smog inspected on a Saturday after 3:00 p.m. and he would have left work by then.

38. Mr. Issa no longer works at N&S Lube Service. He wants to one day have his own shop. He now keeps his badge in his wallet. If his license is revoked, it would cause severe financial hardship for his family because he is the main supporter for his family. He has full respect for the laws and regulations of the United States. He takes responsibility for leaving his badge and password to be exposed for others to use. He

takes responsibility for others using his credentials without his permission to perform illicit smog inspections. However, he did not perform the clean plug inspections. He understands that it is his responsibility to safeguard his badge and password.

39. Concerning his texts with Mr. Luz and letter he signed, Mr. Issa stated:

I am adult enough and I have to take some responsibility to not take care of my badge and my password and not keep in a safe place. That's what I meant. Excuse my English. I have the guiltiness of this matter of not to take care of my identification – that's what happened. I feel I have the guiltiness. That's what I meant.

Cost Recovery

40. Complainant sought recovery of investigation costs of \$1,178.54 and \$2,199.78, and enforcement costs of \$7,795, for a total of \$11,173.32.

41. Marc Casillas, Program Representative II, signed a declaration with attached Case Hours and Costs Spreadsheets that listed the time he spent between April 11, 2022, and August 22, 2022, performing "Documents/Evidence" (2.5 hours), and "Case Review" (8.5 hours on this matter.) The total time he spent was 11 hours and at the hourly rate of \$107.14, amounted to \$1,178.54. The evidence of investigative costs complied with California Code of Regulations, title 1, section 1042, subdivision (b)(1), and the \$1,178.54 costs requested were reasonable.

42. Marc Ortega signed a declaration with attached Case Hours and Costs Spreadsheets that listed the time he spent between April 18, 2022, and August 15, 2022, performing "Review" (11 hours) and "Report Writing" (11 hours) on this matter.

The total time he spent was 22 hours and at the hourly rate of \$99.99, amounted to \$2,199.78. The evidence of investigative costs complied with California Code of Regulations, title 1, section 1042, subdivision (b)(1), and the \$2,199.78 costs requested were reasonable.

43. The Deputy Attorney General who prosecuted the case executed a declaration requesting enforcement costs of \$7,795 through November 1, 2023. Attached to his declaration was a document entitled "Matter Time Activity by Professional Type," that identified the tasks performed, the time spent on each task, and the hourly rate of the persons performing the tasks for the costs up through November 1, 2023. The declaration and the attachment seeking enforcement costs of \$7,795 complied with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b)(2), and those prosecution costs were reasonable.

44. Mr. Issa made arguments regarding his ability to pay costs to the bureau including that his family is dependent on his income. Mr. Luz did not make arguments regarding his ability to pay costs to the bureau.

LEGAL CONCLUSIONS

Public Protection

1. "Protection of the public shall be the highest priority for the Bureau of Automotive Repair in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof. Code, § 9880.3.)

2. Health and Safety Code section 43000 states that air pollutants from automobiles are "the primary cause of air pollution"; elimination of such air pollutants is necessary to protect and preserve "the public health and well-being" and to prevent "irritation to the senses, interference with visibility, and damage to vegetation and property"; and "the state has a responsibility to establish uniform procedures for compliance with standards which control or eliminate those air pollutants." California's Motor Vehicle Inspection Program was enacted to assure that California meets or exceeds emission reduction targets. (Health & Saf. Code, § 44000, et seq.) Smog testing and related repairs are conducted by bureau licensed smog check stations and smog check technicians. (Health & Saf. Code, § 44014.)

Burden and Standard of Proof

3. Complainant bears the burden of proof of establishing that the charges in the accusation are true. (*Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 582.)

4. The standard of proof in proceedings to discipline automotive repair dealers, smog check stations, and/or smog check technicians is the preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918.)

5. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Ibid.*, italics in original.) "If the evidence is so evenly balanced that you are unable to say that

the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

6. In disciplinary proceedings, the burden is on the respondent to produce positive evidence of rehabilitation. (*Epstein v. California Horse Racing Board* (1963) 222 Cal.App.2d 831, 842-843.)

Disciplinary Authority

7. Business and Professions Code section 9884.7 provides:

(a) The director, where the automotive repair dealer² 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

² An "automotive repair dealer" is a "person who, for compensation, engages in the business of repairing or diagnosing malfunctions of motor vehicles." (Bus. & Prof. Code, § 9880.1, subd. (a).) Automotive repair dealers are governed by the Automotive Repair Act. (Bus. & Prof. Code, §§ 9880, et seq.)

misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

[¶] . . . [¶]

(4) Any other conduct that constitutes fraud.

[¶] . . . [¶]

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

[¶] . . . [¶]

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

8. Business and Professions Code section 9884.13 states, in pertinent part, that the expiration of a valid registration shall not deprive the Director or Chief of jurisdiction to proceed with a disciplinary proceeding against an automotive repair dealer or to render a decision invalidating a registration temporarily or permanently.

9. Health and Safety Code section 44072.2 provides:

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

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

[1] . . . [1]

(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. . . .

10. Health and Safety Code section 44072.8 provides:

When a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director.

11. Health and Safety Code section 44072.10, subdivision (c), states, "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:

(1) Clean piping, as defined by the department.

(2) Tampering with a vehicle emission control system or test analyzer system.

(3) Tampering with a vehicle in a manner that would cause the vehicle to falsely pass or falsely fail an inspection.

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

Statutory and Regulatory Violations

STATUTES

12. Health and Safety Code section 44012, provides that tests at smog check stations "shall be performed in accordance with procedures prescribed by the department and may require . . . testing utilizing a vehicle's onboard diagnostic system, or other appropriate test procedures as determined by the department in consultation with the state board. The department shall implement testing using onboard diagnostic systems, in lieu of loaded mode dynamometer or two-speed idle testing, on model year 2000 and newer vehicles"

13. Health and Safety Code section 44015, subdivisions (a) and (b), requires that a "licensed smog check station shall not issue a certificate of compliance, except as authorized by this chapter, to . . ." a vehicle that has been tampered with," and "a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance."

14. Health and Safety Code section 44059 states:

The willful making of any false statement or entry with regard to a material matter in any oath, affidavit, certificate of compliance or noncompliance, or application form which is required by this chapter or Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business and Professions Code, constitutes perjury and is punishable as provided in the Penal Code.

15. Health and Safety Code section 44032 provides:

No person shall perform, for compensation, tests or repairs of emission control devices or systems of motor vehicles required by this chapter unless the person performing the test or repair is a qualified smog check technician and the test or repair is performed at a licensed smog check station. Qualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012.

REGULATIONS

16. California Code of Regulations title 16, section 3340.24, subdivision (c), states, "The bureau may suspend or revoke the license of or pursue other legal action against a licensee, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a certificate of noncompliance."

17. California Code of Regulations title 16, section 3340.30, states, "A smog check technician shall comply with the following requirements at all times while licensed."

(a) A licensed technician shall inspect, test and repair vehicles in accordance with section 44012 of the Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this article.

18. California Code of Regulations, title 16, section 3340.35, subdivision (c), requires a licensed smog check station to "issue a certificate of compliance or noncompliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in section 3340.42 of this article and has all the required emission control equipment and devices installed and functioning correctly."

19. California Code of Regulations, title 16, section 3340.41, subdivision (c), mandates that:

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

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

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

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

[¶] . . . [¶]

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

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

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

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

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

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

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

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

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

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

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

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

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

Case Law Regarding Fraud

21. The expansive definition of fraud has been discussed by the appellate court as follows: "[F]raud embraces multifarious means whereby one person gains an advantage over another and means in effect bad faith, dishonesty or overreaching. . . . 'It is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling and unfair ways by which another is cheated.' [Citations.]" (*Wayne v. Bureau of Private Investigators and Adjusters, Department of Professional and Vocational Standards* (1962) 201 Cal.App.2d 427, 437-438.) Indeed, "[T]here is no absolute or fixed rule for determining what facts will constitute fraud; whether or not it is found depends upon the particular facts of the case under inquiry." (*Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 674-675.) And continuing, "Fraud may be proved by direct evidence or it may be inferred from all of the circumstances in the case." (*Supra.*)

Cause Exists to Discipline

22. Cause exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), to discipline Mr. Luz's automotive repair dealer registration because untrue or misleading statements were made when smog certifications were issued for 11 vehicles. (First Cause for Discipline)

23. Cause exists pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), to discipline Mr. Luz's automotive repair dealer registration because an employee or another person committed acts which constituted fraud. (Second Cause for Discipline)

24. Cause exists pursuant to Health and Safety Code section 44072.2, subdivision (a), to discipline Mr. Luz's smog check station license because his employee or another person violated the Motor Vehicle Inspection Program and regulations adopted pursuant to it, based on violations of Health and Safety Code sections 44012 and 44015. (Third Cause for Discipline)

25. Cause exists pursuant to Health and Safety Code sections 44072.2, subdivision (c), to discipline Mr. Luz's smog check station license because his employee or another person failed to comply with California Code of Regulations, title 16, sections 3340.35, subdivision (c), and 3340.42. (Fourth Cause for Discipline)

26. Cause exists pursuant to Health and Safety Code sections 44072.2, subdivision (d), to discipline Mr. Luz's smog check station license because his employee or another person committed acts involving dishonesty, fraud, or deceit by issuing electronic certificates of compliance for 11 vehicles without performing bona fide inspections of the emission control devices and systems. (Fifth Cause for Discipline)

27. Cause exists pursuant to Health and Safety Code section 44072.2, subdivision (a), to discipline Mr. Issa's smog check inspector and smog check repair technician licenses because he violated Health and Safety Code section 44012 when his credentials were used and failed to test the emission controls systems and devices for 11 vehicles. (Sixth Cause for Discipline)

28. Cause exists pursuant to Health and Safety Code section 44072.2, subdivision (c), to discipline Mr. Issa's smog check inspector and smog check repair technician licenses because he or another person using his credentials violated the California Code of Regulations, title 16, section 3340.30, subdivision (a), and section 3340.42. (Seventh Cause for Discipline)

29. Cause exists pursuant to Health and Safety Code section 44072.2, subdivision (d), in conjunction with Health and Safety Code section 44072.10, subdivision (c), to discipline Mr. Issa's smog check inspector and smog check repair technician licenses because he or another person using his credentials committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic certificates of compliance for 11 vehicles without performing bona fide inspections of emission control devices and systems. (Eighth Cause for Discipline)

Evaluation and Appropriate Level of Discipline

30. Motor vehicle engine exhaust pollution has been shown to create health hazards for human beings, with the hazards increasing with the level of pollution. The incidents of clean plugging of the 11 subject vehicles resulted in the issuance of fraudulent certificates of compliance allowing multiple vehicles to further pollute the air of California thereby injuring the public.

31. California Code of Regulations, title 16, section 3395.4, provides that in reaching a decision on a disciplinary action, the bureau must consider the disciplinary guidelines entitled "Guidelines for Disciplinary Orders and Terms of Probation" [Rev. March 2016]. These guidelines provide the recommended sanctions for various violations. The recommended discipline for issuing fraudulent inspections (Health &

Saf. Code, § 44072.2, subd. (d)) is revocation. Factors in aggravation and mitigation may be considered when fashioning the appropriate measure of discipline.

32. Business and Professions Code section 9889.9 and Health and Safety Code section 44072.8 provide that when a license has been revoked following a hearing, any additional license issued under the Automotive Repair Act and Motor Vehicle Inspection Program in the name of the licensee may be likewise revoked or suspended by the department's Director. Revocation of the additional licenses is not mandatory.

33. Mr. Luz bears the responsibility for what happens at his shop. The owner of a license is obligated to see that the license is not used in violation of the law. If a licensee elects to operate his business through employees, the licensee must be responsible to the licensing authority for their conduct and is responsible for the acts of his agents or employees done in the course of his business. A licensee may not insulate himself from regulation by electing to function through employees or independent contractors. (*Rob-Mac, Inc. v. Dept. of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797.)

34. In this case, Mr. Luz was not aware of what was happening at his shop – 88 Smog Test Only. He only went to his shop about every one to three months. His technician, Mr. Nguyen, appears to have been more like a manager who warned Mr. Issa to ensure that all rules were being followed. This record does not call for revocation of Mr. Luz's licenses. He has held his licenses for 10 years without incident. It is apparent from the record that he did not intentionally permit fraud to occur at his shop nor did he himself commit fraud at his shop. However, discipline is warranted because the illicit smog inspections of 11 vehicles occurred at his shop. In addition, this clean plugging case differs from others in that Mr. Issa is not an employee or

contractor of 88 Smog Test Only. Rather, Mr. Issa is an employee of the shop next door - N&S Lube Serve - and Mr. Luz granted Mr. Issa permission to use Mr. Luz's OIS machine for Mr. Issa's smog inspections because Mr. Issa's brother could not afford an OIS machine. While Mr. Luz indicated he contacted the bureau and was told that this arrangement was permissible, Mr. Luz is still responsible for who has access to his shop's OIS machine - even if it is not a direct employee of his shop. It seems that neither Mr. Luz nor Mr. Nguyen had regular supervision of Mr. Issa's use of Mr. Luz's OIS machine. Mr. Luz was forthright when he asserted that he did not clean plug any vehicles nor did he permit anyone else to clean plug vehicles. He was also contrite when he stated that he was trying to help Mr. Issa by permitting Mr. Issa to use his OIS machine. Nonetheless, Mr. Luz has a great level of responsibility for which he should be disciplined for his failure to monitor the goings-on at his shop.

35. As such, the appropriate discipline in this case is the revocation of Mr. Luz's automotive repair dealer registration and smog check station license. However, the revocation shall be stayed and placed on three years' probation with terms and conditions. In addition, Mr. Luz shall pay the full costs to the bureau, as he did not testify to his financial inability to pay such costs, and Mr. Issa testified to the financial strain on his family due to his wife and six children relying on him financially.

36. Concerning Mr. Issa, he was forthright when he stated that he did not commit any clean plugging nor did he permit another person to commit fraud with his credentials. However, Mr. Issa did admit that he should have safeguarded his badge and password. His acknowledgement of wrongfully leaving his credentials without safeguarding them is demonstrative of mitigation. He also has no history of any disciplinary action. Mr. Issa has so much to lose including supporting his wife and six children - all of whom are minors. It is difficult to believe that he would have

intentionally committed fraudulent clean plugging. It is more believable that someone at his brother's shop – N&S Lube Service – wrongfully used his password that he left on a piece of paper at N&S Lube Service, and wrongfully used his badge that he left on the OIS machine at 88 Smog Test Only. He is a fairly recent immigrant who served alongside the United States military in Iraq as an interpreter in what has been known as a very dangerous position alongside our country's serviceman. For his service to the United States military, he was granted a fast-track permanent residency along with his wife and children to the United States, and he is now a citizen. He has so much to lose and it is unimaginable that he would risk his reputation and long-journey to the United States for a clean-plugging scheme.

37. The appropriate level of discipline against Mr. Issa to protect the public is to revoke his licenses, stay the revocations, and place his licenses on probation for three years. This will permit the bureau to continue to monitor Mr. Issa and him to attend courses regarding his license. Financially, Mr. Issa cannot afford the costs in this case, as his wife and six children rely on him financially. As such, Mr. Luz will bear the responsibility to pay the full costs to the bureau and Mr. Issa will have no responsibility to pay costs to the bureau.

Costs

38. Business and Professions Code section 125.3, subdivision (a), authorizes an administrative law judge to direct a licensee who has violated the applicable licensing act to pay a sum not to exceed the reasonable costs of investigation and prosecution. The certification of costs in all respects satisfied the requirements of California Code of Regulations, title 1, section 1042, subdivision (b), and the certification supports a finding that costs in the amount of \$11,173.32 are reasonable in both the nature and extent of the work performed.

39. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth five factors to be considered in determining whether a particular licensee should be ordered to pay the reasonable costs of investigation and prosecution under statutes like Business and professions Code section 125.3. Those factors are: 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. (*Ibid.*)

40. Applying the *Zuckerman* factors to this case leads to the following conclusions: Mr. Luz and Mr. Issa were not successful in getting some of the charges reduced; they asserted a good faith belief in the merits of their positions; they raised a colorable challenge to the proposed discipline; Mr. Issa expressed not having financial ability to pay costs, although Mr. Luz did not express whether he had or did not have a financial ability to pay costs; and the scope of the investigation was appropriate in light of the alleged misconduct.

41. In consideration of all the factors of this case, Mr. Luz shall pay to the bureau \$11,173.32.

ORDER

1. Automotive Repair Dealer Registration No. ARD 273127 issued to respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only, is revoked. However, revocation of Automotive Repair Dealer Registration No. ARD

273127 is stayed, and Automotive Repair Dealer Registration No. ARD 273127 is placed on probation for three years on the following terms and conditions.

2. Smog Check Station License No. TC 273127 issued to respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only, is revoked. However, revocation of Smog Check Station License No. TC 273127 is stayed, and Smog Check Station License No. TC 273127 is placed on probation for three years on the following terms and conditions.

3. Smog Check Inspector License No. EO 641676 issued to respondent Shivan Salih Issa, is revoked. However, revocation of Smog Check Inspector License No. EO 641676 is stayed, and Smog Check Inspector License No. EO 641676 is placed on probation for three years on the following terms and conditions.

4. Smog Check Repair Technician License No. EI 641676 issued to respondent Shivan Salih Issa, is revoked. However, revocation of Smog Check Repair Technician License No. EI 641676 is stayed, and Smog Check Repair Technician License No. EI 641676 is placed on probation for three years on the following terms and conditions.

5. Respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only, shall pay complainant's costs of investigation and enforcement of \$11,173.32, which may be paid on such terms as may be determined by the bureau.

A. OBEY ALL LAWS

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

B. QUARTERLY REPORTING

During the period of probation, respondents shall report either by personal appearance of their partners, owners, or officers or in writing as determined by the bureau on a schedule set by 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.

C. REPORT FINANCIAL INTERESTS

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

D. ACCESS TO EXAMINE VEHICLES AND RECORDS

Respondents 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. Respondents shall also provide the bureau representatives unrestricted access to all records pursuant to the bureau laws and regulations.

E. TOLLING OF PROBATION

If, during probation, respondents do business elsewhere or otherwise ceases to do business in the jurisdiction of California, respondents shall notify the bureau in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that respondents obeys all laws, shall be held in abeyance during any period of time of 30 days or more in which respondents are not engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which respondents are not 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.

F. VIOLATION OF PROBATION

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

G. MAINTAIN VALID LICENSE

Respondents shall, at all times while on probation, maintain a current and active registration with the bureau, including any period during which suspension or probation is tolled. If respondents' registration is expired at the time the decision becomes effective, the registration must be renewed by respondents within 30 days of that date. If respondents' registration expires during a term of probation, by operation

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

H. COST RECOVERY

Respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only, shall pay \$11,173.32 to the bureau for the reasonable costs of the investigation and enforcement of Case No. 79/22-5657 (OAH Case No. 2023080175). Respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only shall make such payment as follows: Respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only may pay the costs in a lump sum or according to a payment plan acceptable to the bureau during the term of probation. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent John Gately Luz, President, J Bro Industries dba 88 Smog Test Only 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. Case No. 79/22-5657 (OAH Case No. 2023080175). 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.

I. COMPLETION OF PROBATION

Upon successful completion of probation, respondents' affected registration will be fully restored or issued without restriction, if respondents meet all current requirements for registration and have paid all outstanding fees, monetary penalties, or cost recovery owed to the bureau.

J. LICENSE SURRENDER

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

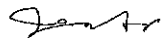
Respondents may not petition the Director for reinstatement of the surrendered registration or apply for a new registration or license under the jurisdiction of the bureau at any time before the date of the originally scheduled completion of probation. If respondents apply to the bureau for a registration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

K. TRAINING COURSES

Within 60 days of the effective date of this decision, all respondents and their officers and employees shall attend a "Write It Right" presentation provided by a bureau representative, at the location, date, and time determined by the bureau.

Within 180 days of the effective date of a decision, all respondents and their officers and employees shall complete ordered coursework or training that is acceptable to the bureau and relevant to the adjudicated violations, which shall include training regarding how to properly complete drive cycles to reset vehicles' monitors after the completing repairs and any other topics ordered by the bureau. Respondents shall submit to the bureau satisfactory evidence of completion of coursework or training within the timeline specified for completion of the ordered coursework or training.

DATE: December 7, 2023



JAMI A. TEAGLE-BURGOS

Administrative Law Judge

Office of Administrative Hearings