

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

In the Matter of the Accusation Against:

AMR ARDELLATIF ELKURDI, OWNER, dba KURDI'S AUTO CARE

11861 Paramount Blvd. #A

Downey, CA 90241

Automotive Repair Dealer Registration No. ARD 298296

Smog Check Test Only Station License No. TC 298296

ABDALLAH ABDULKAREEM ABABNEH

3826 Maxson Rd., Apt C

El Monte, CA 91732

Smog Check Inspector License No. EO 642414

Respondents.

Case No. 79/21-10628

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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 December 19, 2023.

IT IS SO ORDERED this 6 day of November, 2023.



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

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FOR THE BUREAU OF AUTOMOTIVE REPAIR
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In the Matter of the Accusation Against:

AMR ABDELLATIF ELKURDI, OWNER,

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Automotive Repair Dealer Registration No. ARD 298296

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And

ABDALLAH ABDULKAREEM ABABNEH

Smog Check Inspector License No. E0 642414

Respondents.

Agency Case No. 79/21-10628

OAH No. 2022070650

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 7 through 9, 2023, by videoconference.

Kevin J. Schettig, Deputy Attorney General, represented Complainant Patrick Dorais. Respondent Amr Abdellatif Elkurdi and Respondent Abdallah Abdulkareem Ababneh were represented by Frank C. Brucculeri and John Schafer, Frank Brucculeri Law Corporation. Respondent Amr Abdellatif Elkurdi did not appear at the hearing. Respondent Abdallah Abdulkareem Ababneh appeared on August 8 and 9, 2023.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 9, 2023.

Thereafter, on August 31, 2023, the ALJ issued an order reopening the record, so that Complainant could upload a copy of a video, received as Exhibit 5, as the video received would not play in its entirety.

Complainant timely complied, and the second version of Exhibit 5 was received as Exhibit 39.

The record was again closed on September 13, 2023.

The ALJ hereby makes his factual findings, legal conclusions, and order, as follows.

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INTRODUCTION

In this case Complainant seeks to discipline Respondents' licenses to operate auto repair facilities, smog test facilities and to act as smog check technicians. Complainant alleges that Respondent Ababneh conducted 10 illegal and fraudulent smog tests by engaging in the illegal practice of "clean plugging" while he was employed at Respondent Elkurdi's smog test facility, known as Kurdi's Smog. Respondents deny the allegations, and through the testimony of Respondent Ababneh and an expert witness, they proffered explanations for seemingly improper activity.

The weight of the evidence supports Complainant's allegations that a series of fraudulent smog tests were conducted over a period of months. Therefore, Respondents' licenses shall be revoked.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant instituted and maintained this action in his official capacity as Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department).

RESPONDENTS' LICENSES UTILIZED DURING THE EVENTS IN QUESTION

2. (A) Respondent Amr Abdellatif Elkurdi (Elkurdi) received Automotive Repair Dealer Registration (ARD) number ARD 298296 from the Bureau on October 22, 2020. At that time the ARD was issued to him as the sole owner of AE Interlock, which was then the business name for his repair business. In March 2021, Elkurdi changed his

business name to Kurdi's Smog, and in October 2021 he again changed his business name, to Kurdi's Auto Care. The ARD is due to expire on October 31, 2023. This case pertains to the time period when Elkurdi was operating as Kurdi's Smog, and references to Kurdi's Smog are to Respondent Elkurdi's facility and to his business.

(B) On March 22, 2021, the Bureau issued a Smog Check, Test Only license to Elkurdi, number TC 298296. As of May 11, 2023, this license was expired and inactive pending inspection due to an address change. (Ex. 2, p. A48.) However, the Smog Check license was in full force and effect during the events relevant to this proceeding. At such times, Respondent Elkurdi's Smog Check station was operating at 11861 Paramount Boulevard, Unit B, in Downey, California, under the business name Kurdi's Smog.

(C) Prior to the expiration of Elkurdi's Smog Check license, his facility was certified as a STAR Station. That certification was issued on April 19, 2021. It is inferred that the STAR Certification became inactive when the Smog Check license lapsed.

3. Respondent Abdallah Abdulkareem Ababneh (Ababneh) is licensed by the Bureau as a Smog Check Inspector. He holds license number EO 642414 which was issued to him on January 6, 2020. It is due to expire on December 31, 2023.

RESPONDENTS' OTHER LICENSES

4. (A) Elkurdi holds an ARD for a sole proprietorship he operates under the business name Smog Express, in Whittier. That ARD, number ARD 295782, was issued to Elkkurdi by the Bureau on October 30, 2019, and it is due to expire on October 31, 2023.

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(B) Elkurdi also holds Smog Check, Test Only license number TC 295782, which license was issued to him on November 12, 2019. That license is due to expire on October 31, 2023.

(C) Smog Express is certified as a STAR Station. The STAR Certification was issued by the Bureau on January 15, 2020. It will remain active unless the licenses associated with Smog Express are revoked, cancelled, become delinquent, or if the certification is suspended.

5. (A) Ababneh holds an ARD for a sole proprietorship he operates under the business name Downey Smog Center, in Downey. That ARD, number ARD 294016, was issued to Ababneh by the Bureau on April 22, 2019, and it is due to expire on April 30, 2024.

(B) Ababneh also holds Smog Check, Test Only license number TC 294016, which license was issued to him on September 6, 2019. That license is due to expire on April 30, 2024.

(C) Downey Smog Center is certified as a STAR Station. The STAR Certification was issued by the Bureau on October 16, 2019. It will remain active unless the licenses associated with Downey Smog Center are revoked, cancelled, become delinquent, or if the certification is suspended.

6. (A) Ababneh holds an ARD for a sole proprietorship he operates under the business name 605 Smog Center, in La Puente. The ARD, number ARD 298407, was issued to Ababneh by the Bureau on November 5, 2020, and it is due to expire on November 30, 2023.

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(B) Ababneh also holds Smog Check, Test Only license number TC 298407, which license was issued to him on February 28, 2023. That license is due to expire on April 30, 2024.

(C) 605 Smog Center is certified as a STAR Station. The STAR Certification was issued by the Bureau on January 19, 2021. It will remain active unless the licenses associated with Downey Smog Center are revoked, cancelled, become delinquent, or if the certification is suspended.

7. After they were served with the Accusation, Respondents filed a Notice of Defense, requesting a hearing. This proceeding ensued. All jurisdictional requirements have been satisfied.

The Smog Check Program and Smog Test Procedures

8. California's Smog Check Program (Program) is designed and intended to reduce air pollution by identifying and requiring the repair of motor vehicles that are not performing properly, thereby emitting pollutants in excess of proper limits. The Program is vital to protecting the health and welfare of California's citizens. It follows that assuring that smog checks are conducted properly is important to the efficacy of the Program. Only those vehicles tested and found to be in compliance with applicable rules and regulations are to pass the test. When a vehicle passes, an electronic Certificate of Compliance is transmitted to the Department of Motor Vehicles.

9. Smog checks require a visual, functional, and computer-based inspection. The inspector must look at the vehicle being tested to assure that all appropriate components are in place, and he or she must see whether some modifications have been made to the vehicle which might affect the emissions control systems. Functional tests may include pressure testing the gas cap, checking the engine timing, or

checking the Exhaust Gas Recirculation system. For most vehicles from the model years 1996 to 1999 a functional test of the On-Board Diagnostics system must be performed, to determine that the system is operating properly.

10. Vehicles built before 1999 may be tested with the system known as BAR-97, which samples and analyzes exhaust pipe emissions while the vehicle is running, usually on a dynamometer. The BAR-97 system measures Hydrocarbons (HC), Carbon Monoxide (CO), Oxides of Nitrogen (NO_x), Carbon Dioxide (CO₂), and Oxygen (O₂). That system was not used to test any of the vehicles that are the subject of this proceeding.

11. Computers help to manage the operation of modern vehicles, including the engine and/or the transmission, and vehicle computers play a key role in causing the vehicle to run as smog-free as possible. The computers are programmed with an On-Board Diagnostic Inspection System (OIS). If some aspect of the engine performance is not as it should be, the OIS causes the “trouble light”—the light on the dashboard that says “check engine” to the driver—to illuminate. The OIS plays a role in smog checks.

12. Beginning in March 2015, the Bureau prescribed that the testing process on most vehicles (and as a practical matter virtually all gasoline powered cars) constructed after 1999 be performed, in part, with the On-Board Diagnostics Generation II (OBDII) test. In that test, the licensed inspector connects a cable from the smog check station’s test computer to a Diagnostic Link Connector (DLC), which is a plug found inside the vehicle’s passenger cabin. Through the plug and cable, the test computer retrieves information from the vehicle’s on-board computer. That information is transmitted to the Bureau’s Vehicle Information Database, known as the VID.

13. An important piece of information obtained from the vehicle during this process is usually the "eVIN," the Vehicle Identification Number (VIN) in electronic form. The eVIN should match the VIN stamped on a metal badge that is typically affixed to the top of the vehicle's dashboard in front of the driver, visible through the windshield. Although some cars built between 2000 and 2005 do not transmit an eVIN, the majority do so, and the capacity to transmit the eVIN was mandated for cars built after 2005.

14. Another piece of the electronically-retrieved information is a test protocol, or communication interface, which is a combination of letters and numbers that indicate a particular system whereby the car's computer will communicate with the station's test computer. A third type of data collected by the system is a parameter identification (PID) count. This refers to the number of data points transmitted from the tested vehicle. The data may include, for example, the engine speed and temperature and other data used by the computer system to check for proper engine performance and compliance with smog regulations. Each vehicle reports a specific known PID count, with occasional slight variations, programmed during the manufacture of the vehicle. Newer cars typically have a higher PID count. Other information, not pertinent to this matter can be obtained, such as whether a particular oxygen sensor or catalytic converter is malfunctioning, or whether the evaporative system is being supported. A significant amount of data is transmitted to the VID, which the Bureau can utilize to monitor smog checks and compliance with applicable laws and regulations.

15. Licensed Smog Check Inspectors are the only persons authorized by the Bureau to perform official inspections. Inspectors are issued a personal access code (PAC) and a license number, which are used to gain access to the BAR 97 and OIS to

perform smog check inspections. Recently, the Bureau instituted the use of palm readers to verify the technician's identity and to allow them access to the test system, but during the period relevant to this case, inspectors put their PAC into the system to gain access.

16. An inspector uses a bar code scanner to input technician information, the VIN, and DMV renewal information. The technician uses the vehicle's DLC to connect the Data Acquisition Device (DAD) to the vehicle's OBDII system. Data retrieved and captured from a vehicle's OBDII system during an OIS smog check inspection is transmitted to the VID, and includes the eVIN, communication protocol, and PID count. During the test, the inspector is prompted by the Emissions inspection system (EIS) to input information. This could be a prompt to verify that a certain piece of equipment is present on the vehicle and working, or it might be a prompt, at the end of the test, to print the VIR and to issue a Certificate of Compliance. (The technician signs the VIR at the end of the test, under penalty of perjury.)

17. In some circumstances, dishonest smog check inspectors and test center operators engage in the illegal practice of "clean plugging." In those cases, the vehicle ostensibly being tested is not connected to the smog test system, and might not even be in the facility. Instead, the test equipment is either plugged into another vehicle, or into a simulator which produces data roughly of the type that should be communicated from the vehicle ostensibly being tested. Such simulators are often referred to as "defeat devices."

18. When clean plugging occurs, it often leaves an electronic trail in the VID. This is primarily because the PID counts and the protocol data transmitted in these circumstances does not match that transmitted by hundreds of other cars of the same make and model as the car that is ostensibly being tested. And, in many cases the

eVIN will not be transmitted, or will be incorrect. Other data is recorded in the VID that may provide evidence of clean plugging. However, simulators have been evolving to a point they may not leave obviously false data behind.

The Subject Inspections

19. As noted in the introduction, this case involves 10 smog check tests, all conducted at Kurdi's Smog by Respondent Ababneh. During nine of the tests, Bureau representatives were conducting surveillance of the facility. The inspections in question, sometimes hereafter "the subject inspections," occurred on May 26, 2021, June 30, 2021, July 23, 2021, and August 13, 2021.

20. Nicholas H. Magaña is employed by the Bureau as a Program Representative II, Specialist. In that position he investigates the activities of smog check stations and smog test inspectors, including investigation of potentially fraudulent activity. He has been with the Bureau for approximately 10 years, and before that he was employed in the automobile repair business for many years. He holds licenses issued by the Bureau, including as a smog check inspector and repair technician, and he is certified by the ASE (National Institute for Automotive Service Excellence) as a master technician, with a specialty in emissions diagnostics. Magaña was the primary investigator in this matter.

THE 2003 CHRYSLER TOWN AND COUNTRY LIMITED

21. Magaña reviewed test data from Kurdi's Smog and found anomalous results from the test of a 2003 Chrysler Town and Country Limited (the Chrysler). Data sent to the VID from Kurdi's showed that on May 26, 2021, the Chrysler was tested there by Ababneh. An eVIN was transmitted to the VID, the number ending in the

digits 8548. The communication protocol was transmitted as ICAN11bt 5, and the PID count was 46.

22. Magaña reviewed data that had come from smog testing 382 Chryslers of the same year and model. In 95.8 percent of the cases, such vehicles did not transmit an eVIN, they communicated in the JVPW protocol, and their PID count was 17/3. Further, Magaña found a prior smog test for the Chrysler, conducted in June 2019 at another facility, where the Chrysler, then carrying Virginia license plates, did not transmit an eVIN, and transmitted the expected communication protocol JVPW and a PID count of 17/3.

23. Further research by Magaña established that the data transmitted, ostensibly by the Chrysler on May 26, 2021, came from a 2005 Ford Econoline 350 Super Duty Wagon (the Econoline). He found data which established the Econoline was tested at Kurdi's smog by Ababneh on June 18, 2021, and a Certificate of Compliance was issued for it on that day.

24. DMV records established that the registered owners of the Chrysler and the Econoline have different names and addresses. The owner of the Chrysler has an address on Imperial Highway in Downey, and the owner of the Econoline an address on Western, in Gardena.

TEST AND SURVEILLANCE ON JUNE 30, 2021

25. His suspicion aroused by the anomalous data generated during the May 26, 2021 test of the Chrysler, Magaña undertook surveillance of Kurdi's Smog on June 30, 2021. He was assisted by another Program Representative, Mark Casillas. Although Casillas is Magaña's supervisor, Magaña was the lead investigator.

26. Magaña and Casillas went to locations near the facility, where they could see into the work bay when the east-facing work bay door was open. When looking at the building, Kurdi's Smog was one of three work bays, situated to the right when observed from the surveillance vantage point. There was no wall or interior barrier between the smog test bay and the other two work bays, which housed an auto repair business.

27. The two investigators matched the recording time on the recording devices they had—video and still photo cameras—to match the internal clock in the VID, which is set to Pacific Standard Time. (Ex. 4, p. A62.) Magaña began taking photographs at approximately 1311 hours, and Casillas began video recording at 1342 hours. They concluded at about 1402 hours.

28. According to data retrieved from the VID, Ababneh tested a 2001 Chevrolet Silverado C1500 (Silverado) between 1324 and 1350 hours. He caused a Certificate of Compliance to be issued by Kurdi's Smog, indicating that the Silverado passed the test. However, the Silverado was not in the test bay during the time the VID shows that the test occurred. Instead, a 2004 Acura TSX (Acura) occupied the inspection bay between 1311 and 1338 hours. Further, a 2001 Mercedes Benz CLK 320 (Mercedes Benz) came to the facility, parked partially in the inspection bay, and blocked the Acura in. The Mercedes Benz later drove away, and the Acura pulled out of the inspection bay at 1338 hours, or half-way through the purported test of the Silverado. At 1339 hours, while the purported test of the Silverado remained underway, a 1997 Toyota Supra went into the inspection bay, and remained there until 1357 hours, after completion of the purported test of the Silverado.

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TESTS AND SURVEILLANCE ON JULY 23, 2021

29. On July 23, 2021, Magaña and Casillas returned to a location near Kurdi's Smog for another round of surveillance. After making sure that the time stamps on the recording equipment matched the clock time of the VID they commenced surveillance. Casillas operated a video recorder, beginning at 1351 hours, and Magaña had begun photographing the facility at 1344 hours. The surveillance ended at 1628 hours.

30. Data drawn from the VID showed that four smog tests were conducted at Kurdi's Smog during the surveillance period, i.e., 1344 to 1628 hours. However, only one of the cars tested was seen in the test bay; the other three tested vehicles were not seen in the inspection bay.

Test of the Chevrolet Cobalt

31. At 1404 hours a white Nissan Altima (Altima) drove up to the inspection bay, pausing while a pick-up truck backed out of the inspection bay. The Altima was driven part way into the inspection bay. Ababneh greeted the driver of the Altima in a manner indicating they were familiar with each other.

32. Within a minute of the Altima's arrival (1405 hours), Ababneh was seen approaching it with a DAD. However, a test of the Altima did not commence then. Instead, the VID indicates that at 1411 hours a test began on a 2005 Chevrolet Cobalt (Cobalt), which was not in the inspection bay. The test concluded at 1419, with the Altima remaining in the inspection bay during the Cobalt's test period. Ababneh was seen walking in and around the inspection bay during the time the Cobalt was purportedly tested.

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33. Ababneh caused a Certificate of Compliance to be issued by Kurdi's Smog for the absent Cobalt.

34. The VID data obtained by Magaña shows that just after the Cobalt was tested, Ababneh tested the Altima; that test began at 14:21 and ended at 14:29 hours. In the video tape made by the investigators, Ababneh can be seen taking what appears to be a DAD out of the Altima. He also shared some paperwork with the driver before the Altima backed out of the inspection bay and was driven away, which occurred at 14:31 hours.

Test of the Ford F150

35. At 14:48 hours, or seventeen minutes after the Altima left the facility, a test was begun by Ababneh on a 2007 Ford F150 (F150). Data from the VID shows the end of the test occurred at 1501 hours. However, during the 13-minute test window, there were no vehicles of any type in the inspection bay, although Ababneh can be seen on the video during that period moving around the inspection bay, and he can be seen leaving and reentering that test area. At one point during the F150 test, Ababneh walked out of the inspection bay and spoke with others outside the building.

36. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent 2007 Ford F150.

Test of a 2009 Hyundai

37. VID data obtained by Magaña shows that a 2009 Hyundai Sonata GLS (Hyundai) was tested by Ababneh at the facility between 1508 and 1521 hours, although the vehicle was not present in the inspection bay during that period, which area remained devoid of vehicles after the Altima drove away. After 1500 hours,

Ababneh is not seen on the video tape, Exhibit 6, until 1514 hours, or at the halfway point of the test of the Hyundai. At 1514 hours, Ababneh, who was ostensibly conducting the smog test, walked out of the facility, got into a black Mercedes, and then drove away from the facility with the test of the Hyundai ongoing. Ababneh returned at 1534, or 13 minutes after the test of the Hyundai ended.

38. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent 2009 Hyundai.

TESTS AND SURVEILLANCE ON AUGUST 13, 2021

39. On August 13, 2021, Magaña and Program Representative II(s) Marc Ortega went to a location near Kurdi's Smog for a third round of surveillance. After making sure that the time stamps on the recording equipment matched the clock time of the VID they commenced surveillance, one video camera starting at 1115 hours, and the other at 1116. Photographs were taken as well. The surveillance ended at 1458 hours.

40. Data drawn from the VID shows that five smog tests were conducted at Kurdi's Smog during the surveillance period, i.e., between 1116 and 1451 hours, and all five vehicles were issued a Certificate of Compliance. However, during this period only one car was in the test bay, and it belonged to Elkurdi. The five ostensibly tested vehicles were not seen in the inspection bay at the time of the tests.

Test of a Ford F150 Supercrew

41. VID data shows that on August 13, 2021, from 1305 to 1317 hours, a 2004 Ford F150 Supercrew (Ford Supercrew) was tested by Ababneh at Kurdi's Smog, and passed by him. However, the Ford Supercrew was not in the test bay at that time.

As noted above, the test bay was instead occupied by a blue BMW which had a foreign style vanity license plate that said "ELKURDI."

42. During the test period, Ababneh was seen walking in and around the test bay, talking on his phone during much of the time. At 1307 he came out of the bay and spoke to a man who had pulled up in a pick-up truck; by his gestures Ababneh may have been providing directions. The truck left at 1310. At 1317, the end of the test period for the Ford Supercrew, Ababneh can be seen on video on the left side of Elkurdi's BMW; there is no test equipment on that side of the test bay.

43. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent Ford Supercrew.

Test of a 2006 Jeep Liberty Sport

44. Data from the VID shows that on August 13, 2021, between 1325 and 1344 hours, Ababneh tested and passed a 2006 Jeep Liberty Sport (Jeep Liberty) at Kurdi's Smog. As with the Ford Supercrew, the Jeep Liberty was not in the test bay or seen on the surveillance video. Instead, Elkurdi's BMW occupied the test bay during the ostensible test period. Ababneh was observed walking in and around the test bay during the period when the Jeep Liberty was tested.

45. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent Jeep Liberty.

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Test of a 2007 Nissan Versa

46. Data from the VID shows that on August 13, 2021, between 1350 and 1402 hours, Ababneh tested and passed a 2007 Nissan Versa S (Nissan Versa) at Kurdi's Smog. As with the Ford Supercrew and the Jeep Liberty, the Nissan Versa was not in the test bay or seen on the surveillance video. Instead, Elkurdi's BMW occupied the test bay during the ostensible test period. Magaña observed Ababneh walking in and around the test bay during the period when the Nissan Versa was purportedly tested.

47. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent Nissan Versa.

Test of a 2011 Jeep Wrangler Unlimited Rubicon

48. Data from the VID shows that on August 13, 2021, between 1407 and 1426 hours, Ababneh tested and passed a 2011 Jeep Wrangler Unlimited Rubicon (Jeep Wrangler) at Kurdi's Smog. As with the other vehicles tested that day, the Jeep Wrangler was not in the test bay or seen on the surveillance video. Instead, Elkurdi's BMW occupied the test bay during the ostensible test period. Magaña observed Ababneh walking in and around the test bay during the period when the Nissan Versa was purportedly tested.

49. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent Jeep Wrangler.

Test of a 2004 Honda Civic

50. Data from the VID shows that on August 13, 2021, between 1435 and 1445 hours, Ababneh tested and passed a 2004 Honda Civic DX VP (Honda Civic) at

Kurdi's Smog. As with the other vehicles tested that day, the Honda Civic was not in the test bay or seen on the surveillance video. Instead, Elkurdi's BMW occupied the test bay during the ostensible test period. Magaña observed Ababneh walking in and around the test bay during the period when the Honda Civic was purportedly tested.

51. Ababneh caused Kurdi's Smog to issue a Certificate of Compliance to the absent Honda Civic.

Respondents' Defense

52. Respondents' defense was based on the testimony of Ababneh and Oscar Gomez, an expert witness. The gist of the defense was that Ababneh likely mixed-up paperwork for the Chrysler Town and Country and the Econoline, and thus there was no intent to defraud. It was posited that the owner of the Econoline brought it in for testing in May but inadvertently brought paperwork for the Chrysler, and that the owner of the Ford did not have a Certificate of Compliance on record for his or her Econoline, so had to bring the car back in June, when it was properly tested. As to the other nine tests, it was claimed that the tests were conducted on the vehicles while they were parked in an area behind the shop; it was asserted that to test a vehicle outside the work bay is not itself clean piping.

53. Gomez currently is an instructor of automotive repair, including smog testing. He holds 17 different ASE certifications, including a master technician certification, as well as licenses from the Bureau, including brake and lamp licenses. Shortly before the hearing in this matter he qualified to run a smog test station. He was active in conducting smog tests during the period 2007 to 2012, when he shifted his career to being a full-time educator.

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54. To prepare for his testimony Gomez reviewed the Accusation and the investigation report, Exhibit 4. He denied prior communication with Elkurdi or Ababneh.

55. Gomez opined that Ababnah might have accidentally used the wrong paperwork when testing the Chrysler, somehow using the Econoline's paperwork. In part, his analysis was tied to how much milage was shown on the paperwork for the ostensible Chrysler, and the later-generated paperwork from the subsequent test of the Econoline. The VIR generated after the May 26, 2021 test of the Chrysler indicated the car tested had 110,816 miles on the odometer. (Ex. 11, p. A82.) The VIR generated by the test of the Econoline on June 18, 2021 showed odometer milage of 110,895, which was 79 miles more than generated in the ostensible test of the Chrysler about one month before. (Ex. 15, p. A109.) This is contrasted to the milage on the Chrysler when tested in June 2019, which was 124,620, when the car was first registered in California. (Ex. 14, p. A107.)

56. Gomez pointed to VID data showing "Distance Traveled Since Engine Codes Cleared" which, on the June 18, 2021, test was 8655 kilometers, or just under 5378 miles. (Ex. 15, p. A110.) The test on May 26, 2021 showed that 8529 kilometers, or 5299 miles, had been travelled since the Engine Codes were cleared. This indicates the Econoline travelled 126 kilometers between the May 26 and June 18 tests, or 78.3 miles.

57. Ababneh testified that he had no exact memory of the Chrysler test, but asserted he could have scanned the wrong paperwork. He denied clean plugging the Chrysler. He testified it was possible to confuse the two vehicles, i.e., a Chrysler Town and Country and a Ford Econoline.

58. The evidence establishes that the Econoline was tested at Kurdi's on both May 26 and June 18, 2021. The evidence indicates that the Chrysler's paperwork was scanned on May 26, six days after the "Smog Due Date," further information from the VID indicates the source of the VIN and license plate number was "DMV Document Scan." (Ex. 11, p. A83.) Respondents asserted that it was likely that the Econoline's owner brought it in for a test in May and inadvertently brought the Chrysler's paperwork with it. Later, it was argued, the Econoline's owner must have realized that a Certificate of Compliance had not been filed for the Econoline, which was brought back to Kurdi's Smog for testing, again, approximately two weeks before the Smog Due Date of June 30, 2021. (Ex. 15, p. A110.)

59. Ababneh testified he conducted smog tests behind the building that housed Kurdi's because of crowding in the work bay. He testified to the effect that the crowding was the result of Elkurdi or the mechanics who occupied the two adjacent bays often leaving tools or parts in the test bay, or in the one case, Elkurdi leaving his car in the test bay. Ababneh testified that there was, at the time of the tests, a door to the area behind the building, to the right of where tools were stored. Ababneh testified that the customers knew to go to the back of the building, or that the mechanics—inferentially those who worked adjacent to the test bay—would direct customers to the back.

60. While Ababneh admitted to not having a good memory of the nine tests that occurred during the Bureau's surveillance, he denied using a simulator for any tests. He testified that he tried to obtain the facility's records from Elkurdi, but the latter claimed the records were lost.

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61. Respondents' defenses are not credited. Although Ababneh testified on cross-examination that paperwork mistakes happen all the time, the evidence does not establish that there was a paperwork mix-up during the first test, especially where Ababneh cannot attest to such an event, and no records have been adduced that might support the claim. By Respondents' account, a customer who paid for a test had to come back a few weeks later for a retest, something that should have been an unusual event, and which there should have been paperwork for, as the operator is required to retain records and have them available for inspection for a three-year period. As previously found, the Chrysler and Econoline owners do not appear to have any connection.

62. The claim that the vehicles were being tested behind the station each day of surveillance is not credited. Ababneh was seen in the empty test bay during many of the tests, and even in the test bay when Elkurdi's car was parked in it, when tests were purportedly being carried out in the back of the facility. Indeed, he was sometimes filmed in front of the building during purported tests. Except when the BMW was in the bay, the video indicates that cars could be taken into the test bay, and cars were seen there, notably the Nissan Altima that was the subject of a legitimate test. (Factual Findings 31-34.) Ababneh testified that Elkurdi came to the facility about one time per month, which makes it difficult to sustain a claim that he was routinely crowding the test bay. It is noted there was little or no traffic with customers, who according to Ababneh just knew to go to the back, a claim that stretches credulity. Ababneh testified there was a cashier on the premises, and one would expect some customers to be seen interacting with the cashier in the main part of the shop, but such did not occur during the surveillance days.

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63. That Ababneh left the facility in the middle of the test of the 2009 Hyundai discredits him. Although he testified he never gave out his access code or had someone finish a test for him, the test was completed and a Certificate of Compliance was issued, while he was not on the premises; as noted in Factual Finding 37 he returned to the facility approximately 13 minutes after the test was over. Magaña testified that if prompts from the computer are not responded to, the test will “time out.” It did not time out, further supporting the inference that someone completed the test for Ababneh. This tends to detract from Ababneh’s credibility, leaving his other claims suspect.

Costs

64. The Bureau has incurred costs of investigation and enforcement totaling \$33,296.02, which are reasonable on their face.

Other Matters

65. Neither Respondent has any record of discipline, though a citation was issued to Ababneh for testing a vehicle out of the test bay of another facility.

66. Ababneh testified that he supports his wife and children with the income from his licensed activities, and he also contributes to his parents’ support, send money to Jordan, where they reside.

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LEGAL CONCLUSIONS

Rules of General Applicability

AUTHORITY AND JURISDICTION

1. The Director of the Department of Consumer Affairs (Director) has the authority under the Automotive Repair Act (Bus. & Prof. Code, §§ 9880 et seq.) (Act), administer the Act, including the power to revoke any license issued under the Act where cause to revoke is established. (Bus. & Prof. Code, § 9889.1.)

2. The Bureau is within the Department, and under the supervision and control of the Director has the duty of enforcing and administering the Act. (§ 9882.) Similarly, the duty of enforcing and administering the Motor Vehicle Inspection Program (Program) is vested in the Chief of the Bureau who is responsible to the Director. (Health & Saf. Code, § 44001.5.)

3. The Department has the sole and exclusive authority within the state for developing and implementing the Program. For the purposes of administration and enforcement of the Program, the Department has all the powers and authority granted under the Program, the Act, and the Regulations, commencing with California Code of Regulations, title 16 (CCR), section 3300, and all inspections and repairs performed pursuant to the Program must meet the requirements of these statutes and regulations. (Health & Saf. Code, § 44002.) (Further references to the CCR shall be to title 16 thereof.)

4. The Bureau's highest priority in exercising its licensing, regulatory, and disciplinary functions is protection of the public. (Bus. & Prof. Code, § 9880.3.)

5. Jurisdiction to proceed in this matter exists under Business and Professions Code section 9884.7 (which relates to ARD registrations), as well as Health and Safety Code sections 44002 and 44072.2 (which relate to smog check station and inspector licenses), based on Factual Findings 1 through 7. The expiration of any licenses does not bar the agency from asserting jurisdiction. (Bus. & Prof. Code, §§ 118, subd. (b); 9884.13; Health & Saf. Code, § 44072.6.)

6. (A) Under Business and Professions Code section 9884.7, subdivision (a), the registration of an automotive repair dealer can be disciplined “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,” including “(1) Making or authorizing a written statement 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,” or “(4) Any other conduct that constitutes fraud”. Under this statute, the Elkurdi is responsible for the actions of Ababneh or any other of Elkurdi’s employees.

(B) By virtue of ownership of a license, the owner has a responsibility to see to it that the license is not used in violation of the law. (*Rob-Mac, Inc. v. DMV* (1983) 148 Cal.App.3d 793; *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360.)

(C) The automotive repair dealer registration and smog check test station license held by the Elkurdi, and the smog check inspector license held by Ababneh, can be disciplined because of the relationships between the licenses. A registered automotive repair dealer can apply for a smog check test and repair station license under CCR section 3340.10. Testing at the station can be performed only by a properly

licensed person, such as a smog check inspector, under CCR section 3340.15. When a vehicle passes the smog check, the Certificate of Compliance is issued by the station, not the inspector, although the inspector's action of passing the car is a predicate act to the issuance of the Certificate of Compliance.

7. Under Health and Safety Code section 44072.10, subdivisions (a) and (c), a smog check station license or a smog inspector's license can be disciplined based on reasonable evidence of fraud and willful violation of the law, and the licenses can be revoked for fraudulently certifying or participating in the fraudulent certification or inspection of a vehicle.

8. Under Health and Safety Code section 44072.2, subdivisions (a), (c) and (d), the licenses of a smog check station and a smog check inspector can be disciplined for violating any statutes or regulations related to the license, or for committing any act involving dishonesty, fraud, or deceit whereby another is injured.

9. Under Business and Professions Code section 9889.9, if any license issued by the Bureau under the Act is disciplined, any other licenses issued by the Bureau may be disciplined. Health and Safety Code section 44072.8 provides similar authority to the Director of the Department when licenses have been revoked or suspended after a hearing.

STANDARD OF PROOF

10. Because the licenses at issue in this case are occupational, as opposed to professional licenses Complainant is obligated to prove the allegations of the Accusation by a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) "Preponderance of the evidence means evidence that has more convincing force

than that opposed to it. [Citations] . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324–325 (emphasis in original).)

ASSESSING CREDIBILITY

11. (A) The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.* at p. 67–68, quoting from *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777.) The testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd. of Cal.* (1956) 143 Cal.App.2d 628, 632, quoting *Marovich v. Central Cal. Traction Co.* (1923) 191 Cal. 295, 304.)

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(C) Discrepancies in a witness's testimony, or between that witness's testimony and that of others does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 879.)

(D) "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Bd.*, *supra*, 58 Cal.App.3d at pp. 877–878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

(E) An expert's credibility may be evaluated by looking to his or her qualifications. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. Los Angeles County* (1968) 267 Cal.App.2d 837, 847.)

(F) The trier of fact may reject the testimony of a witness, including an expert witness even if it is uncontradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) An expert's opinion is no better than the facts on which it is based and, "where the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923–924.)

(G) Even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. For example, an expert's opinion based on assumptions of fact without evidentiary

support, or on speculative or conjectural factors, has no evidentiary value and may be excluded from evidence. Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert's opinion is worth no more than the reasons upon which it rests. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) The bare conclusion of an expert without supporting facts is not entitled to evidentiary weight. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.)

(H) The presiding officer in an administrative proceeding may evaluate evidence based on his or her experience or training. (Gov. Code, § 11425.50, subd. (c).)

Dispositive Legal Conclusions

AS TO RESPONDENT ELKURDI

12. Cause has been established to discipline the ARD registration held by Elkurdi pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that he made statements which he knew, or in the exercise of reasonable care should have known to be untrue or misleading, by issuing Certificates of Compliance for the 10 subject vehicles. This Conclusion is based on Factual Findings 1 through 63.

13. Cause has been established to discipline the ARD registration held by Elkurdi pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), for fraud in the issuance of the Certificates of Compliance for the ten subject vehicles, in that bona fide inspections were not performed before issuing those Certificates, and by clean plugging. This Conclusion is based on Factual Findings 1 through 63.

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14. Cause has been established to discipline the ARD registration held by Elkurdi pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), because he failed in a material respect to comply with the statutes and regulations pertaining to the smog inspections that were performed by his employee Ababneh, at his facility for the 10 subject vehicles. This Conclusion is based on Factual Findings 1 through 63.

15. Respondent Elkurdi violated Health and Safety Code section 44012 by failing to ensure that emission control tests were performed on the 10 subject vehicles in accordance with procedures prescribed by the Department, based on Factual Findings 1 through 63.

16. Respondent Elkurdi violated Health and Safety Code section 44015, subdivision (b), by issuing Certificates of Compliance for the 10 subject vehicles without properly testing them to determine if they complied with Health and Safety Code section 44012. This Conclusion is based on Factual Findings 1 through 63.

17. Respondent Elkurdi violated Health and Safety Code section 44072.10 by using the clean plugging method to issue 10 fraudulent Certificates of Compliance, based on Factual Findings 1 through 63.

18. Respondent Elkurdi violated Health and Safety Code section 44072.2, subdivision (a), by his violations of provisions of the Health and Safety Code, based on Legal Conclusions 15 through 17, and their factual predicates. His station license is therefore subject to discipline.

19. Respondent Elkurdi violated CCR section 3340.24, subdivision (c), by falsely or fraudulently issuing the Certificates of Compliance for the 10 subject vehicles, based on Factual Findings 1 through 63.

20. Respondent Elkurdi violated CCR section 3340.35, subdivision (c), by issuing the Certificates of Compliance for the 10 subject vehicles, because the vehicles had not been inspected in accordance with CCR section 3340.42, based on Factual Findings 1 through 63.

21. Respondent Elkurdi violated CCR sections 3340.42 and 3340.45 by failing to conduct the smog tests on the 10 subject vehicles in accordance with Bureau specifications, based on Factual Findings 1 through 63.

22. Cause exists to discipline Respondent Elkurdi's station license, because he violated Health and Safety Code section 44072.2, subdivision (c), through his violation of applicable regulations, based on Legal Conclusions 19 through 21, and their factual predicates.

23. Cause exists to discipline Respondent Elkurdi's station license pursuant to Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subdivision (c), because his issuance of Certificates of Compliance without performing bona fide smog inspections amounted to fraud, dishonesty, or deceit, which deprived the People of the State of California of protections afforded them by the Program. This Conclusion is based on Factual Findings 1 through 63.

AS TO RESPONDENT ABABNEH

24. Respondent Ababneh violated Health and Safety Code section 44012 by failing to ensure that smog tests were performed on the subject vehicles in compliance with procedures prescribed by the Department, based on Factual Findings 1 through 63.

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25. Respondent Ababneh violated Health and Safety Code section 44032 by failing to perform smog tests in compliance with Health and Safety Code section 44032, based on Factual Findings 1 through 63, and Legal Conclusion 24.

26. Respondent Ababneh violated Health and Safety Code section 44072.10 by using the clean plugging method to issue fraudulent Certificates of Compliance based on Factual Findings 1 through 63.

27. Respondent Ababneh's Smog Check Inspector and Smog Check Repair Technician licenses are subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (a), for his failure to comply with Health and Safety Code sections 44012, 44032, and 44072.10, based on Legal Conclusions 24, 25, and 26, and their factual predicates.

28. Respondent Ababneh violated CCR section 3340.24, subdivision (c), by falsely or fraudulently causing the issuance of 10 Certificates of Compliance, based on Factual Findings 1 through 63.

29. Respondent Ababneh violated CCR section 3340.30, subdivision (a), by failing to inspect and test the 10 subject vehicles in accordance with Health & Safety Code sections 44012 and 44035 and CCR section 3340.42, based on Factual Findings 1 through 63.

30. Respondent Ababneh violated CCR section 3340.41, subdivision (c) when he knowingly entered false information into the emissions inspection system, based on Factual Findings 1 through 63.

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31. Respondent Ababneh violated CCR sections 3340.42 and 3340.45, by failing to conduct smog tests on the subject vehicles in accordance with Bureau Regulations, based on Factual Findings 1 through 63.

32. Cause exists to discipline Respondent Ababneh's smog check inspector's license, because he violated Health and Safety Code section 44072.2, subdivision (c), through his violation of applicable regulations, based on Legal Conclusions 28 through 31, and their factual predicates.

33. Cause exists to discipline Respondent Ababneh's smog check inspector's license pursuant to Health and Safety Code sections 44072.2, subdivision (d) and 44072.10, subdivision (c), because his issuance of Certificates of Compliance without performing bona fide smog inspections amounted to fraud, dishonesty, or deceit, which deprived the People of the State of California of protections afforded them by the Program. This Conclusion is based on Factual Findings 1 through 63.

34. Bureau regulations require smog tests shall be performed only in a work area approved by the Bureau. (CCR, § 3340.15, subd. (a).) A smog check station shall make, keep secure, and have available for inspection legible records showing the station's transactions for a period not less than three years after completion of a transaction. (*Id.*, at subd. (e).) Elkurdi might have submitted transaction records that would have shed light on the tests of the Chrysler and Econoline. He did not, failing to appear and support Ababneh's claims. These matters do not inspire confidence that further violations will not occur.

35. Respondents provided no evidence of extenuation or mitigation, and neither Respondent adduced evidence of rehabilitation.

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36. The purpose proceedings of this type is to protect the public. (Bus. & Prof. Code, § 9880.3; e.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) As concluded herein, the misconduct established in this case has been pernicious to the public welfare, occurring on more than one occasion. Based on this record, the public can be protected only by the revocation of the licenses and registrations held by Respondents.

Costs

37. (A) Based on the foregoing, the Bureau is entitled to recover its costs pursuant to Business and Professions Code section 125.3, based on Legal Conclusions 1 through 29. The reasonable amount of costs is \$33,296.02, based on Factual Finding 64, absent other considerations.

(B) Relevant to this matter is the case of *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45 (*Zuckerman*), which pertained to a cost regulation with language similar to Business and Professions Code section 125.3. In that case the Supreme Court held that an agency must exercise its discretion to reduce or eliminate cost awards in a manner which will ensure that the costs statute does not deter licensees with potentially meritorious claims or defenses from exercising their right to a hearing. It held that the agency must consider the licensee's subjective good faith belief in the merits of his or her position and whether the licensee has raised a colorable challenge to the proposed discipline. The Court further required that the agency must determine that the licensee will be financially able to make later payments.

(C) Respondents, through one of them, made claims for their defense, which were rejected. Elkurdi did not bother to appear, so it is difficult to conclude he

had a good faith defense. Neither Respondent offered any evidence on their ability to pay the costs, though it is fairly inferred that payment by Ababneh will be problematic.

(D) In light of the order that follows, each Respondent should be responsible for paying half of the costs, or \$16,648.01, if and when they obtain reinstatement of their licenses, payment to be made on an installment basis as may be agreed to by the Bureau.

Other Conclusions

38. Any other ARD registrations held by Elkurdi may be disciplined pursuant to Business and Professions Code section 9884.7, subdivision (c), for the violations established herein, and based on the order that follows.

39. Any other licenses issued to Elkurdi pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code may be disciplined as a result of the discipline of his licenses that are the subject to this proceeding, based on Health and Safety Code section 44072.8. The STAR certifications held by Elkurdi are subject to revocation as well.

40. (A) Any other licenses issued to Ababneh pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code may be disciplined as a result of the discipline of his license that is the subject to this proceeding, based on Health and Safety Code section 44072.8.

(B) However, the ARD registrations held by Ababneh are not subject to Health and Safety Code section 44072.8. While Complainant sought relief under that statute against other licenses issued under the Health and Safety Code, no relief was

sought against Ababneh's ARD registrations for Downey Smog Center or 605 Smog Center. (Ex. 1, pp. A21-A22.)

41. All allegations upon which findings or conclusions are not made are deemed unproven, or surplusage.

ORDER

1. The Automotive Repair Dealer registration, number ARD 298296, issued to Respondent Amr Abdellatif Elkurdi, is hereby revoked. Any other ARD held by him is hereby revoked, including ARD number 295782.

2. The Smog Check, Test Only, Station license, number TC 298296, issued to Respondent Amr Abdellatif Elkurdi, is hereby revoked. Any other license issued him to operate a smog check station, including license number TC 295782, is hereby revoked.

3. The STAR Certifications issued to Respondent Amr Abdellatif Elkurdi are hereby invalidated.

4. The Smog Check Inspector license, number EO 642414, issued to Respondent Abdallah Abdulkareem Ababneh is revoked. Any other license authorizing him to conduct smog tests is hereby revoked.

5. The Smog Check, Test Only, Station licenses, numbers TC 294016 and TC 298407, issued to Respondent Abdallah Abdulkareem Ababneh, are hereby revoked. Any other license issued him to operate a smog check station, is hereby revoked.

6. Any STAR Certifications issued to Respondent Abdallah Abdulkareem Ababneh are hereby invalidated.

7. Respondents are each to pay costs in the amount of \$16,648.01, if and when they obtain reinstatement of any of the licenses hereby revoked. They may make payments on an installment basis, as agreed to by the Bureau.

DATE: **10/12/2023**

Signed Copy on File

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings