

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

In the Matter of the Accusation Against:

**DARRYL BONE
CONTRACTING, INC.,
DARRYL BONE, PRES/SEC/TREAS,
dba TONY's TEST AND REPAIR**
2520 Mains Street, #F
Chula Vista, CA 91911

20517 Manzanita Way
Jamul, CA 91935

Automotive Repair Dealer Registration No. ARD 266470
Smog Check Station License No. RC 266470

and

ADRIAN MIGUEL MARTINEZ
1750 Regency Way, Unit A
Chula Vista CA 91911

Smog Check Inspector License No. EO 632516
Smog Check Repair Technician License No.
EI632516
(formerly Advanced Emission Specialist Technician
License No. EA 632516)

and

ADRIAN MIGUEL MARTINEZ, OWNER
dba TONY's SMOG CHECK
2520 Mains Street, #F
Chula Vista, CA 91911

Automotive Repair Dealer Registration No.
ARD 281437
Smog Check, Test Only, Station License No.
TC 281437

Case No. 79/16-152

OAH No. 2016120680

BAR PRECEDENTIAL
DECISION NO. 2018-01

Respondents.


ORDER DESIGNATING DECISION AS PRECEDENT

PRECEDENTIAL DECISION
(Government Code section 11425.60)

The Bureau of Automotive Repair, Department of Consumer Affairs hereby designates as Precedential Legal Conclusions 3 through 11 of *In the Matter of Accusation Against Darryl Bone Contracting, Inc., et al.*, OAH No. 2016120680 (Bureau of Automotive Repair Case No. 79/16-152).

This precedential decision shall become effective on Monday, November 26, 2018.

IT IS SO ORDERED this 21st day of November, 2018.



Grace Arupo Rodriguez
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs

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

In the Matter of the Accusation Against:

DARRYL BONE CONTRACTING, INC.,
dba TONY'S TEST AND REPAIR,
DARRYL BONE, President/Secretary/
Treasurer
Automotive Repair Dealer Reg. No.
ARD 266470
Smog Check Station License No. RC 266470

Case No. 79/16-152

OAH No. 2016120680

ADRIAN MIGUEL MARTINEZ
Smog Check Repair Tech. License No.
EI 632516
Smog Check Inspector License No. EO
632516

and

ADRIAN MIGUEL MARTINEZ, Owner,
dba TONY'S SMOG CHECK, Automotive
Repair Dealer Reg. No. ARD
281437
Smog Check Station License No. TC 281437

Respondents.

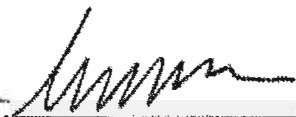
DECISION

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

This Decision shall become effective

August 29, 2017.

DATED: 7/21/17


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

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

In the Matter of Accusation Against:

DARRYL BONE CONTRACTING, INC.,
dba TONY'S TEST AND REPAIR,
DARRYL BONE, President/Secretary/Treasurer
Automotive Repair Dealer Reg. No. ARD 266470
Smog Check Station License No. RC 266470

ADRIAN MIGUEL MARTINEZ
Smog Check Repair Tech. License No. EI 632516
Smog Check Inspector License No. EO 632516

and

ADRIAN MIGUEL MARTINEZ, Owner,
dba TONY'S SMOG CHECK.,
Automotive Repair Dealer Reg. No. ARD 281437
Smog Check Station License No. TC 281437

Case No. 79/16-152

OAH No. 2016120680

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, heard this matter in San Diego, California, on April 24 and 25, 2017.

David E. Hausfold, Deputy Attorney General, Department of Justice, represented complainant Patrick Dorais, Chief, Bureau of Automotive Repair (BAR), Department of Consumer Affairs.

William D. Ferreira, Attorney at Law, represented respondents Darryl Bone Contracting, Inc., doing business as Tony's Test and Repair, respondent Darryl Bone, President/Secretary/Treasurer of Darryl Bone Contracting, Inc., and respondent Adrian Miguel Martinez, in his individual capacity and as owner of Tony's Smog Check.

The matter was submitted on April 25, 2017,

SUMMARY

The Bureau of Automotive Repair reviewed data transmitted by Tony's Test and Repair and Tony's Smog Check related to 12 smog check inspections. Adrian Martinez conducted each inspection. Anomalous data was contained in the data reported, which resulted in the Bureau charging Tony's Test and Repair, Tony's Smog Check, and Mr. Martinez with the improper issuance of certificates of compliance through the use of an illegal procedure known as "clean plugging."

Respondents asserted the 12 vehicles were equipped with simulators, which provided false data during the smog check inspections, and respondents had no reason to suspect there was any problem with those vehicles or with the data that was transmitted during inspections.

A preponderance of the evidence established respondents engaged in clean plugging, misconduct involving fraud, made false representations, engaged in dishonesty, and violated provisions of the Motor Vehicle Inspection Program. Public protection requires respondents' registrations and licenses be revoked.

FACTUAL FINDINGS

Jurisdictional Matters

1. On August 8, 2016, complainant signed the accusation. Complainant sought to revoke or suspend the automotive dealer registrations and smog check station licenses issued to respondents Darryl Bone Contracting, Inc. and Adrian Miguel Martinez, and to revoke or suspend the smog check inspector and technician repair licenses issued to Mr. Martinez. The accusation was served on respondents, whose attorney filed notices of defense. The matter was set for a three-day hearing to commence on April 24, 2017.

On April 24, 2017, the record in the disciplinary proceeding was opened. On April 24 and 25, 2017, sworn testimony and documentary evidence was received. On April 25, 2017, closing arguments were given; the record was closed; and the matter was submitted.

Registration History

2. On September 1, 2011, the Bureau issued Automotive Repair Dealer Registration No. ARD 266470 to respondent Darryl Bone Contracting, Inc., doing business as Tony's Test and Repair. Respondent Darryl Bone was the corporation's president, secretary and treasurer.

There is no history of administrative discipline having been previously imposed against ARD Registration No. ARD 266470.

On April 24, 2014, the Bureau issued Smog Check Station License No. RC 266470 to Tony's Test and Repair.

There is no history of administrative discipline having been previously imposed against Smog Check Station License No. RC 266470.

On May 6, 2014, the Bureau issued STAR certification to Tony's Test and Repair. That certification has never been revoked or cancelled.

3. On September 11, 2015, the Bureau issued Automotive Repair Dealer Registration No. ARD 281437 to respondent Adrian Miguel Martinez, doing business as Tony's Smog Check.

There is no history of administrative discipline having been previously imposed against ARD Registration No. ARD 281437.

On April 24, 2014, the Bureau issued Smog Check Test Only Station License No. TC 281437 to Tony's Smog Check.

There is no history of administrative discipline having been previously imposed against Smog Check Test Only Station License No. TC 281437.

On January 20, 2016, the Bureau issued STAR certification to Tony's Smog Check. That certification has never been revoked or cancelled.

On September 22, 2010, the Bureau issued Advanced Technician Specialist (EA) License No. 632516 to Mr. Martinez. That license was renewed, at Mr. Martinez's election, as Smog Check Inspector (EO) License No. 632516 and Smog Check Repair Technician (EI) License No. 632516.

There is no history of administrative discipline having been previously imposed against these licenses.

Mr. Bone's Background, Education, Training and Experience

4. Darryl Bone is a restaurateur. He owned Tony's Test and Repair from 2012 to 2015. That facility was located in Chula Vista. Tony's Test and Repair held an automotive repair dealer registration and a smog check test and repair license.

Mr. Bone had little formal experience in the automotive repair industry before he purchased Tony's Test and Repair. He had been a licensed general contractor and a licensed plumbing contractor for many years, and ran a successful construction business in which he employed more than 20 persons. He had also held a real estate salesperson's license. He estimated he employed at least 50 persons over the years while holding professional or occupational licenses issued by the State of California.

Mr. Bone met Mr. Martinez in 2012 when he became interested in purchasing Tony's Test and Repair. Mr. Martinez worked as a licensed smog check technician at that time at the station Mr. Bone was interested in acquiring. Mr. Bone was very impressed with Mr. Martinez's skills and character, and kept him on after purchasing Tony's Test and Repair.

According to Mr. Bone, Mr. Martinez was a hardworking, knowledgeable, ethical, honest employee, one of the best employees Mr. Bone ever worked with. In his early operation of Tony's Test and Repair, Mr. Bone observed Mr. Martinez refuse customer requests to conduct fraudulent smog check inspections on numerous occasions.¹

BAR did not issue a citation to Mr. Bone when he was doing business as Tony's Test and Repair, and Mr. Bone was unaware of any consumer complaint's concerning the inspection and repair work Mr. Martinez performed.

Mr. Bone decided to get out of the smog check test and repair business, and he and Mr. Martinez arranged for Mr. Martinez to purchase Tony's Test and Repair.

Mr. Martinez's Background, Training, Experience and Purchase of Tony's Test and Repair

5. Mr. Martinez is 30 years old. He is fluent in Spanish and English. After high school, he worked for Pep Boys in San Diego County, where he was an apprentice mechanic. He then attended Universal Technical Institute (UTI), a trade school in Long Beach, for one and one half years. His program of study at UTI was in the field of general automotive mechanics and smog check inspection and repair. He was told many times in his smog-related classes that he should never engage in illegal testing.

Mr. Martinez attended classes at UTI eight hours a day and worked at a Pep Boys facility in the Long Beach area another eight hours a day. At the conclusion of his formal studies, he passed all testing necessary to receive a certificate of completion and a smog check technician license.

After finishing his studies at UTI and obtaining licensure, Mr. Martinez returned to San Diego County. He went to work for Nina Habib, who owned Tony's Test and Repair at the time. According to Mr. Martinez, Mr. Habib did not engage in fraud in connection with smog check inspections and repairs, but the individual from whom Mr. Habib purchased the business may have done so.

6. Tony's Test and Repair (now Tony's Smog Check) is located in an area of El Cajon where a great deal of automotive repair work is performed. There are at least half a dozen other smog check stations in the area. Tony's Test and Repair facility include a 1,200 square foot building. It features a service bay, an office, a customer waiting area, and a

¹ Sometime before Mr. Bone purchased Tony's Test and Repair, the smog check station had reportedly engaged in widespread fraud in conducting smog check inspections, including "clean-piping."

restroom. The facility maintains all tools, devices, manuals and other materials necessary to provide smog inspections.

7. After Mr. Bone purchased Tony's Test and Repair from Mr. Habib, Mr. Martinez continued working at that inspection and repair facility. He very much enjoyed working with Mr. Bone, and Mr. Martinez was instrumental in growing the business. He went from receiving an hourly wage, to receiving a salary and commission, to receiving a straight commission. Business improved to the point that Mr. Martinez believed it would be more profitable to operate a test only facility rather than an inspection and repair facility.

8. In 2015, Mr. Martinez purchased Tony's Test and Repair from Mr. Bone. The details of the sale are not particularly relevant. Mr. Bone financed the transaction. Under the sales agreement, Mr. Martinez pays Mr. Bone \$3,200 per month. The agreement extends over a five-year period.

After purchasing the business, Mr. Martinez changed the name of the operation to Tony's Smog Check. The business currently operates as a test only facility. Mr. Martinez is the only employee, and his operation of Tony's Smog Check is his sole source of income.

Mr. Martinez's business is open from 7:00 a.m. to 7:00 p.m. Monday through Saturday.

Smog Check Inspections in California

9. California's Smog Check Program requires most motor vehicles registered in California to pass a smog inspection and obtain a certificate of compliance every two years when renewing registration and whenever title is transferred. The Smog Check Program is designed and intended to reduce air pollution by identifying and requiring the repair of polluting motor vehicles.

Smog check inspections are performed by licensed smog check technicians at licensed smog check stations.

The BAR 97 Inspection: Inspections in "enhanced" areas of California involve a test that uses an emission inspection system (EIS) often referred to as a BAR 97. The tailpipe emissions portion of the test uses a computer-based five-gas analyzer to measure hydrocarbons (HC), carbon monoxide (CO), oxides of nitrogen (NO_x), carbon dioxide (CO₂) and oxygen (O₂) while the vehicle is running on a dynamometer. For inspections in "basic" areas, a similar test, known as a two speed idle test, is conducted, but instead of applying a load to the vehicle's drive wheels with a dynamometer, the BAR 97 measures tailpipe emissions while the vehicle's engine is running at idle and at 2,500 RPMs.

In these smog check inspections, technicians also provide visual inspections and engage in functional testing. A visual inspection requires a technician to verify the presence and connection of required emission control components and devices. After the visual

inspection, the technician must complete functional testing, e.g. checking ignition timing, the malfunction indicator light (MIL), exhaust gas recirculation systems, a low pressure test of the evaporative emissions controls, and a pressure test of the gas cap.

An On Board Diagnostics (OBDII) functional test is also performed for most 1996 to 1999 model year vehicles. To perform this test, the smog check technician connects a cable from the BAR-97 analyzer to the vehicle's diagnostic link connector (DLC), a multi-pin connection port located in the vehicle's passenger compartment. Through the DLC, the BAR-97 analyzer retrieves data and diagnostic trouble codes (DTCs) from the vehicle's on-board computer. A failure of one or more of the OBDII functional criteria or the presence of a DTC results in a vehicle failing inspection. Following OBDII testing, the technician performs visual inspection and functional testing, then enters the results of the inspection and functional testing into the emission inspection system EIS. The EIS determines whether the vehicle passed the inspection based on the test results obtained.

The EIS is connected by telephone modem to the Vehicle Information Database (VID). If a vehicle passes the overall smog check inspection, a certificate of compliance is issued and transmitted electronically to the VID. The VID contains an internal clock that records the time and date of every smog check inspection.

The VID contains data for all smog check stations and all technicians licensed in California. The VID receives smog check results immediately after inspection. The VID transmits an electronic certificate of compliance to the Department of Motor Vehicles (DMV) for the DMV's use in the vehicle registration process. The Bureau can access the VID to review test data related to smog check inspections performed at any smog check station, and the Bureau can search for, retrieve, and print a test record for every vehicle that has been tested.

The BAR-OIS Inspection: Beginning March 9, 2015, California's Smog Check Program was updated. The program update requires a technician to use an On-Board Diagnostic Inspection System (BAR-OIS), the name of the smog check equipment used in all areas of the California whenever a technician inspects most model-year 2000 and newer gasoline and hybrid vehicles and most 1998 and newer diesel vehicles.

The BAR-OIS system includes a certified Data Acquisition Device (DAD), a computer, a bar code scanner, and a printer. The DAD is an On Board Diagnostic (OBD) scan tool that, when requested by the California BAR-OIS software, retrieves OBD data from the vehicle. All relevant OBD data that the vehicle's on-board computer supports is retrieved during testing. Sensitive data, such as vehicle location and accident-related information, is not retrieved.

The DAD connects the BAR-OIS computer and the vehicle's diagnostic link connector (DLC). The DAD is the only BAR-certified component of the BAR-OIS. The software used during a smog check inspection requires a continuous Internet connection and there is communication with the Bureau's central database through the Internet connection.

The bar code scanner is used to input technician information, the vehicle identification number (VIN), and DMV renewal information. The printer produces a Vehicle Inspection Report (VIR) that contains inspection results and a Smog Check Certificate of Compliance number for passing vehicles at the conclusion of a smog check inspection.

Data retrieved and recorded during an OIS smog check includes the electronic VIN, if any, the communication protocol, and the number of Parameter Identifications (PIDs).

The OBD II communication protocol is a term that describes the specified communication "language" used to communicate with scan tools and other devices, such as the BAR-OIS. The communication protocol is programmed into the vehicle's OBD II system's electronic control unit during manufacture and does not change.

All DADs meet Society of Automotive Engineer standards. Pursuant to these standards, a DAD automatically determines the communication interface of each vehicle being tested. This automated determination of the communication interface, or protocol, is built into the DAD unit. This automatic function identifies five protocols used by vehicles manufactured and sold in the United States that are subject to the Smog Check Program. The following communication protocols are standard for the vast majority of vehicles subject to the California Smog Check Program.

- ISO 9141-2 - Identified as Protocol 19140808 on the OIS Test Details.
- SAE J1850 - Identified as JVPW1850 or JPWM1850 on the OIS Test Details.
- ISO 14230-4 - Identified as KWPS8FE9 or KWPF8FE9 on the OIS Test Details.
- ISO 15765-4 - Identified as ICAN11bt500 on the OIS Test Detail.

Once communication is established, the DAD collects supported OBD II data as requested during the smog check inspection.

The vehicle identification number (VIN) physically present on all vehicles must be programmed into the vehicle's On-Board Diagnostics - Generation II (OBD II) on 2005 and newer vehicles, and it was sometimes programmed into the OBD II system ECU in earlier model-years. This electronically programmed VIN, referred to as the "eVIN," is captured during a smog check inspection and should match the physical VIN on the vehicle.

Parameter identifications (PIDs) are data points reported by the OBD II system ECU to the scan tool or BAR-OIS. Examples of PIDs include engine speed (rpm), vehicle speed, engine temperature, and other input and output values utilized by the OBD II system ECU.

The PID Count, which is the number of data points reported by the OBD II system ECU, is programed during manufacture and does not change.

Calibration identification (CAL ID) permits verification that the OBD II ECU software version installed by the vehicle manufacturer is correct. Calibration verification number (CAL CVN) permits identification that the OBD II ECU software installed by the vehicle manufacturer has not been tampered with or corrupted.

As with a smog check inspection using the BAR 97, a technician performing an inspection with a BAR-OIS computer must also perform visual and functional testing of the vehicle after obtaining data stored in the vehicle's on-board computer, and the technician must report the test results. OIS software determines whether the vehicle passes the inspection, based on the results of the OBD, visual and functional tests.

The EIS or OIS produces a Vehicle Inspection Report (VIR), which is a physical record that contains the test results and the certificate of compliance number that was issued if the vehicle passed the smog check inspection. The smog check technician conducting the inspection must sign the VIR to confirm that the smog check inspection was done within Bureau guidelines.

Clean Piping and Clean Plugging

10. BAR is aware of several illegal methods some smog check stations and smog check technicians use to obtain a certificate of compliance despite the presence of one or more problems with the vehicle that should cause that vehicle to fail a properly conducted smog check inspection.

11. "Clean piping" occurs when an inspection requires the collection and testing of tailpipe emissions. To clean--pipe a vehicle, a smog check technician introduces "clean" exhaust gas from some source other than the vehicle being tested (e.g., from a canister or the exhaust emission from another motor vehicle) into the EIS and fraudulently represents those gasses are the tailpipe exhaust emissions from the vehicle being tested.

12. "Clean plugging" is a term that describes another fraudulent method used to obtain a certificate of compliance. Clean plugging involves the use of another vehicle's properly functioning On Board Diagnostic, generation II, (OBD II) system, or the use of a simulator or some other data-producing source, to generate passing data to the BAR-OIS in order to obtain a certificate of compliance for a vehicle that may not comply with clean air standards and/or may not be present for testing.

The Bureau's Review of Tony's Test and Repair's Data

13. Che Tong is a Bureau program representative. Before he began employment with the Bureau in August 2013, Mr. Tong worked for many years as a senior master mechanic and a service advisor for several vehicle dealerships. He holds certification as an

ASE Master Technician. He did not hold a smog check technician license until he began his employment with the Bureau in 2013.

Mr. Tong is knowledgeable concerning smog check inspections using the On-Board Diagnostic Inspection System (BAR-OIS) and the method by which data is transmitted. Mr. Tong, through his testimony and investigative reports, provided much of the technical information contained in Factual Findings 9 - 12.

14. Mr. Tong reviewed VID data transmitted from Tony's Test and Repair from the Smog Check On-board Diagnostic Inspection System (OIS) for the period from June 08, 2015, through September 30, 2015. In connection with his review, Mr. Tong identified data from nine inspections that was consistent with the issuing of certificates of compliance utilizing clean plugging. Mr. Martinez's smog check license was used to perform each of the nine inspections.

Mr. Tong determined that during the smog check inspections at issue, the data transmitted by Tony's Test and Repair to the VID did not correspond to data obtained in prior testing or with unalterable manufacturer computer values for the vehicles that were purportedly being inspected. The nine inspections reportedly performed using respondent's OIS equipment involved different year, make, and model vehicles. The testing transmitted an eVIN for each vehicle when most vehicle's on-board computers did not support an eVIN. The OIS test data for each vehicle contained a PID count of "21." Mr. Tong believed it was uncommon for nine vehicles of differing years, makes, and models to all transmit unsupported eVINs and have a PID count of "21."

In reviewing the data transmitted by Tony's Test and Repair, Mr. Tong observed calibration verification number (CAL CVN) values of "1791BC82" and a distance traveled of "1,000 km" for many inspections. He determined those values were the default values listed on pages 14, 15, and 17 of a User Guide for an ECUsim 5100 simulator, a device that can be programmed to simulate values produced by a vehicle during a smog check inspection; that device also permits the user to configure other values, including the eVIN, communication protocol, and the Calibration ID (CAL ID). The ECUsim 5100 simulator has a default value of 1,000 km for Distance Traveled, "21" as the default PID value, and "JMB*36761500" for the default CAL ID value.

15. Mr. Tong's review resulted in the following specific findings:

2001 Mercedes-Benz C320

OIS Test Detail indicates that on June 08, 2015, between 1731 and 1735 hours, a 2001 Mercedes-Benz C320, VIN "WDBRF64J81F037127", California license plate # 5KZX432, passed an OIS inspection. Certificate of Compliance # YR829909C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516 (Exhibit

6). The Test Detail shows eVIN "WDBRF64J81F037127" was stored in the memory during this OIS inspection as well as a PID count of "21". The Communication Protocol of "JVPW1850" was also in the memory during this OIS inspection.

OIS Test Detail shows on March 31, 2015, between 0922 and 0928 hours a prior OIS test was performed at another station on this same 2001 Mercedes-Benz C320 and the vehicle had failed the inspection. The vehicle had no support for the eVIN, and had a PID count of "22". The Communication Protocol of "KWPF8FE9" was in the memory during this OIS inspection.

Comparative OIS Test Data for 2001 Mercedes-Benz C320 vehicles reports the eVIN is not supported, the communication protocol is "KWPF" and has a PID count of "22".

The eVIN, PID value, and the Communication Protocol should match between the two above mentioned OIS Tests, and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2001 Mercedes-Benz C320 being certified, causing the issuance of illegal smog Certificate of Compliance.

2002 Kia Sedona

OIS Test detail indicates that on July 14, 2015, between 1502 and 1505 hours, a 2002 Kia Sedona EX/LX, VIN "KNDUP131626317322", California license plate # 4YQE709, passed an OIS inspection. Certificate of Compliance # PS990061C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "KNDUP131626317322" was stored in the memory during this OIS inspection as well as a PID count value of "21".

Comparative OIS Test Data for 2002 Kia Sedona EX/LX reports the eVIN is not supported and has a PID count of "20".

The eVIN, and the PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2002 Kia Sedona EX/LX being certified, causing the issuance of an illegal smog Certificate of Compliance.

2001 Mitsubishi Montero XLS

OIS Test Detail indicates that on July 24, 2015, between 1300 and 1302 hours, a 2001 Mitsubishi Montero XLS, VIN

"JA4MW31R41J012334", California license plate # 4LPB807, passed an OIS inspection. Certificate of Compliance # PU320954C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "JA4MW31R41J012334" was stored in the memory during this OIS inspection as well as a PID count of "21".

OIS Test Detail shows on June 26, 2015, between 0845 and 0857 hours a prior OIS test was performed at another station on this same 2001 Mitsubishi Montero XLS and the vehicle had failed the inspection. The vehicle had no support for eVIN and has a PID count of "20" was in the memory during this OIS inspection.

Comparative OIS Test Data for 2001 Mitsubishi Montero XLS vehicles reports the eVIN is not supported and a PID count of "20".

The eVIN and the PID value should match between the two above mentioned OIS Tests, and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition

Device (DAD) was not connected to the 2001 Mitsubishi Montero XLS being certified, causing the issuance of an illegal smog Certificate of Compliance.

2001 Volvo S40

OIS Test Detail indicates that on July 30, 2015, between 1820 and 1823 hours, a 2001 Volvo S40 1.9T, VIN "YV1VS29541F658682", California license plate # 6YUB386, passed an OIS inspection. Certificate of Compliance # PU320998C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. .. The Test Detail shows eVIN "YV1VS29541F658682" was stored in the memory during this OIS inspection as well as a PID count of "21". The Communication Protocol of "JVPW1850" was also stored in the memory during this OIS inspection.

Comparative OIS Test Data for 2001 Volvo S40 1.9T reports the eVIN is not supported, the communication protocol of "I914", and has a PID count of "17".

The eVIN, the PID value, and the Communication Protocol should match between the above mentioned OIS Tests and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2001 Volvo S40 1.9T being certified, causing the issuance of an illegal smog Certificate of Compliance.

2004 Nissan Titan XE/SE/LE

OIS Test Detail indicates that on August 22, 2015, between 1300 and 1303 hours, a 2004 Nissan Titan XE/SE/LE, VIN "1N6AA07A54N567259", California license plate # XPLOSV2, passed an OIS inspection. Certificate of Compliance # YT800369C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "1N6AA07A54N567259" was stored in the memory during this OIS inspection as well as a PID count of "21".

Comparative OIS Test Data for 2004 Nissan Titan XE/SE/LE reports the eVIN is not supported and has a PID count of "22".

The eVIN and PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2004 Nissan Titan XE/SE/LE being certified, causing the issuance of an illegal smog Certificate of Compliance.

2003 Kia Rio

OIS Test Detail indicates that on August 24, 2015, between 1815 and 1817 hours, a 2003 Kia Rio, VIN KNADC125636240241, California license plate # 6SKG524, passed an OIS inspection. Certificate of Compliance # YT800379C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "KNADC125636240241" was stored in the memory during this OIS inspection as well as a PID count of "21",

OIS Test Detail shows on June 08, 2015, between 1419 and 1440 hours a prior OIS test was performed at another station on this same 2003 Kia Rio and the vehicle had failed the inspection (Exhibit 19). The test detail showed no support for the eVIN and has a PID count of "16" in the memory during this OIS inspection.

OIS Test Detail shows on July 06, 2015, between 1550 and 1622 hours a prior OIS test was performed at another station on this same 2003 Kia Rio and the vehicle had failed the inspection. The test detail showed no support for the eVIN and has the PID count of "16" in the memory during this OIS Inspection.

Comparative OIS Test Data for 2003 Kia Rio reports the eVIN is not supported and has a PID count of "16".

The eVIN, and the PID value should match between the three above mentioned OIS Tests, and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2003 Kia Rio being certified, causing the issuance of an illegal smog Certificate of Compliance.

2001 Toyota Camry CE/LE/XLE

OIS Test Detail indicates that on September 01, 2015, between 1639 and 1642 hours, a 2001 Toyota Camry CE/LE/XLE, VIN "4TIBG22KX1U101826", California license plate # 6MJS882, passed an OIS inspection. Certificate of Compliance #YV0I 0128C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "4TIBG22KX1U101826" was stored in the memory during this OIS inspection as well as a PID count of "21".

Comparative OIS Test Data for 2001 Toyota Camry CE/LE/XLE reports the eVIN is not supported and has a PID count of "17" (Exhibit 23, Expected OBDII values for 2001 Toyota Camry CE/LE/XLE).

The eVIN and PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2001 Toyota Camry CE/LE/XLE being certified, causing the issuance of an illegal smog Certificate of Compliance.

2000 Dodge Ram Van B2500

OIS Test Detail indicates that on September 02, 2015, between 1804 and 1806 hours, a 2000 Dodge Ram Van B2500, VIN "2B6JB21Z8YK178325", California license plate # 5KSA060, passed at OIS inspection. Certificate of Compliance YV010141C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The

Test Detail shows eVIN "4T1BG22KX1U101826" was stored in the memory during this OIS inspection as well as a PID count of "21".

Comparative OIS Test Data for 2000 Dodge Ram Van B2500 reports the eVIN is not supported and has a PID count of "16".

The eVIN and PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2000 Dodge Ram Van B2500 being certified, causing the issuance of an illegal smog Certificate of Compliance.

2000 Ford F250 Super Duty

OIS Test Detail indicates that on September 04, 2015, between 1722 and 1724 hours, a 2000 Ford F250 Super Duty, VIN "3FTNW20S2YMA67614", California license plate # 69698A1, passed an OIS inspection. Certificate of Compliance # PW044661C was issued under Smog Check Station license # RC266470 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "4T1BG22KX1U101826" was stored in the memory during this OIS inspection as well as a PID count of "21".

Comparative OIS Test Data for 2000 Ford F250 Super Duty reports the eVIN is not supported and has a PID count of "19".

The eVIN and PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2000 Ford F250 Super Duty being certified, causing the issuance of an illegal smog Certificate of Compliance.

16. Mr. Tong concluded the data transmitted by Tony's Test and Repair for all nine vehicles was the result of clean plugging, and the clean plugging was the result of the use of a simulator.

The Bureau's Review of Tony's Smog Check's Data

17. Mr. Tong reviewed data transmitted from Tony's Smog Check for the period from November 05, 2015 to February 12, 2016. He identified data from three inspections that was consistent with the issuing of certificates of compliance utilizing clean plugging. Mr. Martinez's smog check license was used to perform each inspection.

The data transmitted by Tony's Smog Check for the three inspections did not correspond to data obtained in prior testing or with unalterable manufacturer computer values.

for the vehicles that were purportedly being inspected. The three inspections reportedly performed on respondent's OIS equipment involved different year, make, and model vehicles, and the testing transmitted an eVIN for each vehicle when the on-board computer did not support an eVIN. The OIS test data for each vehicle contained a PID count of "21."

In reviewing data transmitted by Tony's Smog Check, Mr. Tong observed the CAL CVN value of "1791BC82" and the distance traveled was "1,000 km," consistent with default values for the ECUsim 5100 device.

18. Mr. Tong's review included the following specific findings:

2006 Volvo S40 2.4i

OIS Test Detail indicates that on November 05, 2015, between 1644 and 1647 hours, a 2006 Volvo S40 2.4i, VIN "YV1MS382062151253", California license plate # 6NTU626, passed an OIS inspection. Certificate of Compliance # PY477925C was issued under Smog Check Station license # TC281437 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows Communication Protocol of "ICAN11bt500" was stored in the memory during this OIS inspection as well as PID count of "21".

Comparative OIS Test for 2006 Volvo S40 2.4i reports the communication protocol "ICAN29bt5" and a PID count of "39".

The communication protocol PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2006 Volvo S40 2.4i being certified, causing the issuance of an illegal smog Certificate of Compliance.

2002-Mercedes-Benz S500.

OIS Test Detail indicates that on December 29, 2015, between 1848 and 1852 hours, a 2002 Mercedes-Benz S500, VIN "WDBNG75J62A291658", California license plate # 6PJM806, passed an OIS inspection. Certificate of Compliance # QC102571C was issued under Smog Check Station license # TC281437 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "WDBNG7SJ62A291658" was stored in the memory during this OIS inspection as well as PID count of "21". The Communication Protocol of "19140808" was also in the memory during this OIS inspection.

Comparative OIS Test for 2002 Mercedes-Benz S500 reports no support for the eVIN, the communication protocol "KWP" and a PID count of "22" (Exhibit 8, Expected OBD-II values for 2002 Mercedes-Benz S500).

The communication protocol and PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2002 Mercedes-Benz S500 being certified, causing the issuance of illegal smog Certificate of Compliance.

2002 Nissan Sentra SE-R

OIS Test Detail indicates that on January 30, 2016, between 1423 and 1426 hours, a 2002 Nissan Sentra SE-R Spec V, VIN "3N1AB51D82L704145", California license plate # 6GKN535, passed an OIS inspection. Certificate of Compliance # YX280889C was issued under Smog Check Station license # TC281437 and certified under the license of Smog Check Inspector Adrian Martinez, EO632516. The Test Detail shows eVIN "3N1AB51D82L704145" was stored in the memory during this OIS inspection as well as PID count of "21".

OIS Test Detail shows on January 28, 2016, between 1127 and 1131 hours a prior OIS test was performed at another station on this same 2002 Nissan Sentra SE - R Spec V and the vehicle had failed the inspection. The vehicle had no support for the eVIN, and had a PID count of "18".

Comparative OIS Test for 2002 Nissan Sentra SE-R Spec V reports no support for the eVIN and had a PID count of "18".

The communication protocol and PID value should match between the above mentioned OIS Test and the comparative OIS test data. The discrepancies in the OIS Test Data prove that the OIS Data Acquisition Device (DAD) was not connected to the 2002 Nissan Sentra SE-R Spec V being certified, causing the issuance of an illegal smog Certificate of Compliance.

19. Mr. Tong concluded the data transmitted by Tony's Smog Check for all three vehicles was the result of clean plugging, and that the clean plugging was the result of the use of a simulator.

20. On cross-examination, Mr. Tong conceded he was not licensed as a smog check inspector before his employment with the Bureau. Mr. Tong was aware that Tony's

Test and Repair and Tony's Smog Check were Bureau certified STAR smog check stations, and he knew that vehicles directed to or inspected at STAR stations often possessed "high emitter" profiles. Mr. Tong knew STAR stations were the subject of frequent Bureau audits and employed certified STAR technicians. Mr. Tong was not aware of any disciplinary action against respondents' registrations, licenses, or STAR certifications.

Mr. Tong agreed that no informant claimed respondents engaged in wrongdoing. He conceded his opinions and conclusions were based on his review of VID and other data, and his investigation did not involve surveillance or an undercover operation. He admitted that he and another Bureau program representative, George Lane, made an unannounced visit to respondents' facility and looked for, but did not find, a simulator or other evidence of wrongdoing.

Mr. Tong admitted he never spoke with the owner of any vehicle at issue to determine whether the vehicle owner modified any part of the on-board computer or installed a simulator.

Mr. Tong admitted he never confronted any respondent with his findings, and he never asked any respondent to explain what he believed to be significant inconsistencies in the data respondents reported to the VID.

Mr. Tong conceded a technician performing a smog check inspection usually had no idea whether the vehicle's on board computer had the capacity to transmit an eVIN, the appropriate protocol for the vehicle being tested, or the proper PID count.

Mr. Tong was aware the inconsistent data at issue came directly from respondents' facility, but he acknowledged each respondent's responsibility for the production of that data was a matter of inference.

Mr. Tong's relatively recent licensure as a smog check inspector, respondents' certified STAR status, the percentage of high emitter vehicles inspected at respondents' facility, respondents' lack of prior discipline, and the method by which Mr. Tong conducted his investigation did not impact his credibility.

21. Respondents' expert conceded some type of simulator was probably used to generate the inconsistent data respondents transmitted during the 12 smog check inspections at issue. Respondents did not contend Mr. Tong was wrong about there being inconsistent data that was likely generated by simulator; instead, they argued unknown persons presented to Mr. Martinez with 12 vehicles that were equipped with simulators before he began the smog check inspections; Mr. Martinez was unaware of the presence of those simulators during the inspections; and Mr. Martinez reasonably could not determine the data that was being obtained and transmitted during the 12 inspections was the result of the vehicles being equipped with simulators.

Complainant's Other Evidence

22. Jonathan Gee received a bachelor's degree in mechanical engineering from California State University, Sacramento (CSUS) in 1995 and a master's degree in mechanical engineering from CSUS in 1998. He completed additional postgraduate education in computer science. He was employed by the Bureau from 1995 through 2001, when he participated in the development of the Smog Check II program and BAR 97 specifications. After working for two years for a laser manufacturer and after owning an Aamco transmission repair facility for three years, Mr. Gee returned to employment with the Bureau. Since 2012, Mr. Gee has been involved in identifying fraudulent smog check inspections through statistical analysis, worked with OBD-II simulators, including the ECUsim 2000 and the ECUsim 5100, and developed and created test methods for the BAR-OIS Data Acquisition Device. Mr. Gee also was a principal engineer in developing the OIS system.

Mr. Gee testified that the number of statistical anomalies occurring during smog check inspections in San Diego County was 0.006 percent. The number of anomalies occurring at respondents' facility was 0.009 percent.

Simulators, such as the ECUsim 5100 and ECUsim 2000, have been on the market since 2009. The only legitimate use for these simulators is in the development of scan tools and testing software. Their use in defeating a smog check inspection is unlawful.

The data at issue could not be produced without the use of a simulator, and no simulator other than an ECUsim 5100 or an ECUsim 2000 could have produced that data. And, a voltage reading of 12.4 volts, which was measured by respondents' DAD and transmitted to the VID, made it highly likely that a power source such as a wall plug was used to power the simulator; the data could not have been produced by a simulator installed in a vehicle because the reported voltage would have been in the area of 13.5 to 14.5 volts.

Mr. Gee had personal experience using an ECUsim 5100 and an ECUsim 2000. The ECUsim 5100 is about 10 inches by 4 inches by 1.5 inches. It costs approximately \$1,500 and comes with one programming card. Additional programming cards cost extra. The ECUsim 5100 cannot be installed in a vehicle in such a manner that its presence would not be known to a licensed smog check technician.

The ECUsim 2000 is about 6 inches by 3 inches by 1 inch. It has holes that permit its attachment behind the dashboard of a motor vehicle. The ECUsim2000 costs about \$600, and extra programming cards are an additional \$200 or so each. The ECUsim 2000 can be installed behind the dashboard in the area where a vehicle's on-board port is located, but its presence would likely be known to a seasoned licensed smog check technician conducting a smog check inspection.

On cross examination, Mr. Gee conceded he had no idea where the vehicles at issue came from, whether they were auction vehicles or whether they were salvage vehicles. He

believed persons wishing to obtain a certificate of compliance for a vehicle requiring expensive repairs or to enhance engine performance might use a simulator to defeat BAR-OIS testing. He believed the individual using the simulator to produce the data in this case was very familiar with computer programming and attempted to match various protocols. He believed the likelihood of Mr. Martinez innocently and unknowingly testing 12 vehicles equipped with ECUsim devices was "one in a billion." Mr. Gee testified that a smog certificate could not be issued today if inconsistent data, such as that at issue in this proceeding, was obtained because of changes in BAR-OIS testing procedures.

Respondent's Evidence

23. Oscar Gomez is a certified ASE Master Technician who specializes in smog check inspections, the repair of smog systems, and training individuals seeking to become licensed smog check inspectors and smog system repair technicians. He also had several years of employment as a general automotive mechanic and shop foreman. Mr. Gomez prepared a written report and provided expert testimony.

Mr. Gomez reviewed all materials complainant provided in discovery. He consulted reputable service manuals and sources such as Mitchell, All Data, the OBD Clearing House, an OBD website, the smogcheck.ca.gov website, Wikipedia, and an article in Motor Age. Mr. Gomez understood Mr. Tong's opinions and the reasons for them. According to Mr. Gomez's report, "It is suggested by the data that the BAR cannot conclusively rule that these twelve vehicles were illegally inspected based on the data alone."

Mr. Gomez commented upon the inconsistent data submitted for each vehicle. He mentioned the possibility that an "insidious customer" could have purchased an ECUsim device "for deluding technicians in the field." He believed the ECUsim 2000 could easily be installed behind the dashboard and mounted in the area where the vehicle's diagnostic link connector was located, "making it impossible for us, the technicians, to determine that we are NOT connecting directly to the vehicle but instead, we are connecting into an OBDII Simulator." He opined, "What Mr. Tong and BAR have failed to realize is the ability computer programmers have in the automotive industry and any industry to manipulate any computer's software to emit any data the programmer decides to send out." He believed pass through devices, such as tuners, chips, aftermarket devices, or other facsimilia items, could be used by programmers. "In the Smog Check Industry," he wrote, "known individuals promote this service as a cost effective method of avoiding costly emission repairs." Mr. Gomez believed the data the Bureau's witnesses reviewed was not sufficient to determine whether Mr. Martinez engaged in foul play; he believed undercover runs were required to reach that conclusion.

Mr. Gomez testified smog check technicians are not required to look under the dashboard to ensure they are connecting the DAD to an OBDII port, although he teaches that procedure in his training course. Technicians do not know whether eVINs, correct protocols, or correct PID counts are being communicated to the VID. Mr. Gomez believed it was highly likely that an ECUsim 5100 or an ECUsim 2000 produced the data associated with the

12 smog check inspections at issue; he thought it might take anywhere from five to fifteen minutes to program a simulator to generate the data at issue; he believed it was "unlikely" Mr. Martinez attached the DAD to an ECUsim device because of the time that would have been required for him to do so. He had never seen a simulator installed in any vehicle he inspected, but he heard about that happening on one occasion.

On cross-examination, Mr. Gomez acknowledged he never spoke with Mr. Bone or Mr. Martinez. He had not programmed a simulator himself and had never seen a simulator in person. He acknowledged that when a vehicle's engine was running and the vehicle was undergoing a smog check inspection, 14.5 volts should be reported.

24. Mr. Bone testified about those matters outlined in Factual Findings 4, 6 and 7. He had no expertise in smog check inspections when he purchased Tony's Test and Repair. He had no contact with Bureau representatives after the initial inspection of his facility. He was not aware of any consumer complaint when he owned Tony's Test and Repair.

On one occasion, Mr. Martinez told Mr. Bone that he suspected a repair shop a few doors away was sending manipulated vehicles to the smog check station. According to Mr. Bone, "It was just a theory." There was a laptop computer at the facility, but he never saw anything plugged into it. He looked at depictions of ECUsim devices and testified he never saw anything like that at his facility.

Mr. Bone was not aware of Mr. Martinez conducting an improper smog check inspection. He expressed concern that if his ARD registration and smog check station license were revoked, that "might put a mark on my record" and could have a negative impact on his contractor's license, realtor's license, and alcohol beverage control license.

25. Mr. Martinez testified about the matters outlined in Factual Findings 5 through 8. When he started working at Tony's Test and Repair, customers came into the shop almost daily requesting an illegal smog check inspection. He was offered \$100 to \$350 to perform an illegal inspection. He said he never conducted an illegal inspection. Although business was slow at first, it picked up, and he currently inspects 20 to 25 vehicles per day.

Many of the vehicles Mr. Martinez inspects were repaired in Tijuana or were purchased at auction or were salvage vehicles from the Otay Mesa area. Mr. Martinez tries to avoid doing smog check inspections for licensed vehicle dealers.

Mr. Martinez testified he had never seen a simulator and did not know how to program a simulator. He said he first learned about a simulator when he read Mr. Gomez's report. He said he does not own a computer. He said he had no idea what an eVIN was before he was served with the accusation.

Mr. Martinez recalled Bureau representatives Tong and Lane "popping in" to Tony's Smog Check one day. They told him they were looking into three complaints about illegal repairs being performed there. He spoke with Mr. Lane while Mr. Tong wandered about the

premises. Mr. Martinez testified all his equipment and tools were open to view. There was no mention of his alleged use of a simulator or anomalous data.

With respect to the claim that a repair facility down the street presented one or more of the 12 vehicles for inspection, each equipped with a ECUsim 2000 device that had been programmed to circumvent a properly conducted smog check inspection, Mr. Martinez testified, "I can't prove it. I heard rumors that he got popped ... the state can prove it ... the BAR should know about him...I heard he was doing illegal stuff."

Mr. Martinez testified he now carefully checks the connection between the DAD and the on-board computer port, increases the engine's RPMs during testing to see if the vehicle is actually being tested, and always uses a live data scanner.

On cross-examination, Mr. Martinez testified he spends five to ten minutes conducting a smog check inspection. He said, "Before the accusation, we used to really go fast." Mr. Martinez never contacted any customer who requested a smog check inspection at issue. He testified it was not his practice to put a customer's address or customer's phone number on an invoice.

Mr. Martinez testified he was making just enough money to pay what he owed to Mr. Bone and to take care of his personal obligations, including child support for his two young children. He currently resides with other family members.

Summary of Arguments and Disciplinary Recommendations

26. Complainant argued the standard of proof required to impose discipline upon the registrations and licenses at issue was a preponderance of the evidence under *Imports Performance v. Dept of Consumer Affairs, Bureau of Auto Repair* (2011) 201 Cal. App. 4th 911.

Complainant argued protection of the public was the Bureau's highest priority; a preponderance the evidence established a simulator was used to clean plug the 12 vehicles at issue, and the anomalous data transmitted to the Bureau was not generated by hidden simulators affixed to those vehicles. Mr. Martinez conducted the smog check inspections and engaged in fraud. Complainant argued revocation of all registrations and licenses was the only sanction that would protect the public.

27. Respondents argued *Imports Performance* involved an advanced emission (EA) specialist technician license, and the licenses at issue were a smog check inspector (EO) license and a smog check repair technician (EI) license. Respondents argued the EO and EI licenses require more education, training, and experience to obtain than an EA license, and were quite similar to professional licenses; accordingly, clear and convincing evidence was required to impose discipline. As to the registrations and licenses, respondents argued that, as a practical matter, the same standard of proof applied because the registrations

and licenses could not be disciplined unless it was established by clear and convincing evidence that the technician engaged in wrongdoing.

Respondents conceded an ECUsim 5100 or ECUsim 2000 produced the anomalous data transmitted to the Bureau for the 12 smog check inspections at issue. Respondents argued an unknown individual or individuals equipped the vehicles with undiscoverable simulators before Mr. Martinez conducted the inspections, and it would be unjust to hold respondents liable for unforeseeable criminal acts committed by others. Respondents argued the Bureau's own statistical data established that what occurred at respondents' smog check station was a rare occurrence but within statistical probability without there being any wrongdoing, and Mr. Martinez's training and good moral character made his participation in improper smog check inspections unlikely. Finally, the Bureau's unannounced search of Tony's Smog Check did not produce any evidence of wrongdoing. Respondents argued complainant failed to meet its burden of persuasion and the accusation should be dismissed.

Evaluation of the Evidence

28. The evaluation set forth hereafter reaches the same conclusions whether the burden of proof is a preponderance of the evidence or clear and convincing evidence.

Tony's Test and Repair: Nine vehicles inspected at Tony's Test and Repair received certificates of compliance following smog check inspections conducted by Mr. Martinez. The data transmitted to the Bureau for those inspections was not the result of legitimate smog check inspections, but involved data generated by an ECUsim 5100 or ECUsim 2000. The voltage recorded and transmitted to the Bureau for the nine inspections established an ECUsim device was used that was connected to a wall plug or some other source of power that produced 12.4 volts of electricity; the data transmitted to the Bureau was not produced by an ECUsim device installed in a vehicle being inspected. Mr. Martinez's unique personal identification number was used for each smog check inspection. No one other than Mr. Martinez knew that number.

The issuance of the nine certificates of compliance involved the use of a fraudulent practice known as clean plugging. Mr. Martinez was responsible for causing or permitting clean plugging in each instance. Mr. Bone was unaware of Mr. Martinez's misconduct because he did not supervise Mr. Martinez and had no quality assurance system in place. The misconduct occurring at Mr. Bone's smog check station was not the result of a bona fide error. Discipline must be imposed upon Mr. Bone's automotive repair dealer registration and smog check station license as a result of untrue and misleading statements, conduct constituting fraud, and the failure in a material respect to comply with provisions of the Automotive Repair Act.

Tony's Smog Check: Three vehicles inspected at Tony's Smog Check received certificates of compliance following smog check inspections conducted by Mr. Martinez. The data transmitted to the Bureau for those inspections was not the result of legitimate smog check inspections, but involved data generated by an ECUsim 5100 or ECUsim 2000. The

voltage recorded and transmitted to the Bureau for the three inspections established the ECUsim device was connected to a wall plug or some other source of power that produced 12.4 volts of electricity; the data transmitted to the Bureau was not produced by an ECUsim device installed in a vehicle being inspected. Mr. Martinez's unique personal identification number was used for each smog check inspection. No one other than Mr. Martinez knew that number.

The issuance of the three certificates of compliance involved the use of a fraudulent practice known as clean plugging. Mr. Martinez was responsible for causing or permitting the clean plugging in each instance. Mr. Martinez did not establish a bona fide error; thus, discipline must be imposed upon his automotive repair dealer registration and smog check station license as a result of untrue and misleading statements, conduct constituting fraud, and the failure in a material respect to comply with provisions of the Automotive Repair Act.

Adrian Miguel Martinez: Mr. Martinez is a bright, hardworking individual who is knowledgeable and experienced in matters related to smog check inspections, the repair of vehicles that have failed smog check inspections, and the processes by which data is obtained and transmitted to the Bureau during smog check inspections. He knew from his training at UTI that he should never engage in illegal test activities. He knew from his early experience at Tony's Test and Repair, before Mr. Bone took over its ownership, that there was a huge market for illegal smog check inspections and a great financial incentive to provide them. Supervision over Mr. Martinez's licensed activities was minimal when he worked for Mr. Bone and was non-existent when he was self-employed.

Complainant established Mr. Martinez had the means, motive, and opportunity to engage in the misconduct alleged. As an experienced, licensed smog check technician, Mr. Martinez possessed sufficient education, training, knowledge and experience to use or obtain the use of a simulator. Mr. Martinez had a strong financial motive to engage in fraud - it was highly profitable. Finally, Mr. Martinez lacked supervision and had opportunities throughout the day to conduct fraudulent smog inspections in secret. Mr. Martinez was the only person who conducted the smog check inspections at issue.

Mr. Martinez's testimony concerning not knowing what an eVIN was and his asserted unfamiliarity with simulators rang hollow given his industry experience. His testimony that he was set up and some other person equipped the twelve vehicles at issue with simulators that he failed to detect during routine smog check inspections defied common sense. Mr. Gomez's testimony that technicians were at risk as a result of the conduct of "insidious customers" did not provide Mr. Martinez with a defense. Mr. Gomez, who had a great deal of experience in the smog check inspection and repair field, conducted thousands of inspections; he claimed he had never seen a simulator in person. Mr. Martinez's assertion that he was the victim of a consumer(s) who successfully concealed a dozen simulators was totally at odds with Mr. Gomez's experience in the field.

The assertion that complainant failed to sustain its burden of persuasion because complainant did not conduct surveillance or engage in an undercover operation, and the

absence of an admission against interest or other evidence directly connecting Mr. Martinez to the misconduct at issue, was not persuasive given the documentation and persuasive expert testimony presented and the inferences that must be drawn from that evidence, particularly when it is weighed against respondents' evidence to the contrary. Complainant presented evidence that clearly and convincingly established that Mr. Martinez caused or permitted the clean plugging of the twelve vehicles at issue in this proceeding.

Disciplinary Guidelines

29. The Bureau's disciplinary guidelines provide in part:

To foster uniformity of penalties and to make sure our licensees and registrants understand the consequences of violations of the Automotive Repair Act... the Bureau of Automotive Repair has established these guidelines. The guidelines provide a range of penalties for each section of law found to have been violated. The Bureau requests that Administrative Law Judges take into account the "Factors in Aggravation and in Mitigation" listed below, when deciding the severity of the penalty within the range.

In aggravation, the conduct at issue involved fraud. In mitigation, no respondent was the subject of any kind of prior discipline.

The minimum recommended discipline for making false and misleading statements is ~~a 90-day suspension, with 80-days stayed, and two years' probation; the maximum sanction is~~ revocation. The minimum recommended discipline for conduct involving fraud is revocation, stayed, with a 30-day suspension, and five years' probation; the maximum sanction is revocation.

Costs of Investigation and Prosecution

30. Complainant produced a declaration signed by William D. Thomas, Program Manager II, dated April 13, 2017, to which there was a one page attachment that stated 77.5 hours of services were provided in the investigation of Tony's Test and Repair. Investigative costs of \$5,518.25 were claimed for those services. Neither the declaration nor the attachment set forth the general tasks performed, the dates the tasks were performed, or the time spent on each task. This information was readily available.

Complainant produced another declaration signed by William D. Thomas, also dated April 13, 2017, to which there was a one page attachment that stated 68.75 hours of services were provided in the investigation of Tony's Smog Check. Investigative costs of \$4,833.13 were claimed for those services. Neither the declaration nor the attachment set forth the

general tasks performed, the dates the tasks were performed, or the time spent on each task. This information was readily available.

The declarations and attachments did not meet the requirements of California Code of Regulations, title 1, section 1042.

31. A certification of costs was signed by the deputy attorney general who prosecuted this disciplinary action. A schedule was attached to his declaration that described the legal services provided in the prosecution of respondents Tony's Test and Repair and Darryl Bone, the dates of legal services, who provided the services, the amount of work performed on each date, and each professional's hourly rate. The hourly rates were reasonable. Enforcement costs of \$9,567.50 were documented.

The declaration and schedule met the requirements of California Code of Regulations, title 1, section 1042.

32. A certification of costs was signed by the deputy attorney general who prosecuted this disciplinary action. A schedule was attached to his declaration that described the legal services provided in the prosecution of Tony's Smog Check and Adrian Miguel Martinez, the dates of legal services, who provided the services, the amount of work performed on each date, and each professional's hourly rate. The hourly rates were reasonable. Enforcement costs of \$8,972.50 were documented.

The declaration and schedule met the requirements of California Code of Regulations, title 1, section 1042.

33. The hearing involved complicated factual and legal issues. Counsel for complainant was well prepared, knowledgeable about all factual and legal issues, and very professional. Complainant is entitled to recover its costs of enforcement.

Counsel for respondent was well prepared, knowledgeable about all factual and legal issues, and very professional. Respondents used the hearing process in an unsuccessful effort to obtain a reduction in the severity of the recommended discipline. Respondents offered no evidence establishing their inability to make payments related to cost recovery.

LEGAL CONCLUSIONS

Purpose of Administrative Disciplinary Proceedings

1. Administrative proceedings to revoke, suspend, or impose discipline on a licensee are noncriminal and nonpenal; they are not intended to punish the licensee, but to protect the public. (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1206.)

2. Business and Professions Code section 9880.3 states protection of the public is the highest priority for the Bureau of Automotive Repair in exercising its licensing, regulatory, and disciplinary functions; whenever protection of the public is inconsistent with other interests sought to be promoted, protection of the public is paramount.

Burden and Standard of Proof

3. In administrative disciplinary proceedings, the burden of proving the charges rests upon the party making the charges. The obligation of a party to sustain the burden of proof requires the production of evidence. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175.) Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

4. Courts draw a distinction between professional licenses (such as those held by doctors and lawyers) and nonprofessional or occupational licenses (such as those held by food processors and vehicle salespersons). In proceedings to revoke professional licenses, the clear and convincing evidence standard of proof applies, while in proceedings to revoke nonprofessional or occupational licenses, the preponderance of the evidence standard applies. (*imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916.)

The Automotive Repair Dealer Registration:

5. An individual does not need to demonstrate education, training to experience to hold an automotive repair dealer registration. An individual seeking registration simply completes a form and pays a fee (Business & Professions Code § 9984.2) after which the director must issue the registration (Bus & Prof. Code, § 9984.2)

6. The preponderance of the evidence standard applies in this disciplinary proceeding as it relates to the automotive repair dealer registrations and smog check station licenses because extensive education, training, and experience is not required to hold a smog check station license.

The Technician Licenses:

7. In order to obtain a smog check technician license, an individual must meet the education, training and experience requirements set forth in Health and Safety Code section 44045.5. These standards have been in effect since January 1, 1995.

8. California Code of Regulations, title 16, section 3340.28, sets forth qualifications necessary to obtain a smog check inspector (EO) license and a smog check repair technician (EI) license. The regulation provides in part:

(a) An individual may qualify for the following Smog Check licenses:

(1) Smog Check Inspector. The Smog Check Inspector license allows an individual to inspect, and certify the emissions control systems on vehicles subject to the Smog Check Program in all areas of the state. The Smog Check Inspector license expires pursuant to the requirements in subsection (d) of section 3340.29 of this Article.

(2) Smog Check Repair Technician. The Smog Check Repair Technician license allows an individual to diagnose, adjust, and repair the emissions control systems on vehicles subject to the Smog Check Program at smog check stations in all areas of the state. The Smog Check Repair Technician license expires pursuant to the requirements in subsection (d) of section 3340.29 of this Article.

(b) Smog Check Inspector Qualifications.

The Smog Check Inspector license requires an examination. The qualifications to take the examination for the Smog Check Inspector license are:

(1) The applicant must provide proof, satisfactory to the bureau, of:

(A) The successful completion of bureau specified engine emission control training with the last two years, and successful completion of the bureau's smog check training within the last two years; or

(B) At the bureau's discretion, successful completion of a competency assessment within the last two years; and successful completion of the bureau's smog check training within the last two years; or

(C) The applicant must provide proof, satisfactory to the bureau, of meeting the qualifications established in subsection (c)(1) and successful completion of the bureau's smog check training within the last two years.

[¶] ... [¶]

(c) Smog Check Repair Technician Qualifications. The Smog Check Repair Technician license requires an examination. The

qualifications to take the examination for the Smog Check Repair Technician license are:

(1) The applicant must provide proof, satisfactory to the bureau, of:

(A) Possession of an Associate of Arts or Associate of Science degree or higher in Automotive Technology, from a state accredited or recognized college, public school, or trade school, and one year automotive repair experience in the engine performance area; or

(B) Possession of a certificate in automotive technology, from a state accredited or recognized college, public school, or trade school with a minimum of 720 hours course work that includes at least 280 hours course work in the engine performance area, and one year of automotive repair experience in the engine performance area; or

(C) A minimum of two years of automotive repair experience in the engine performance area, and successful completion of bureau specified diagnostic and repair training within the last five years; or

(D) The applicant must provide proof, satisfactory to the bureau, of certification in the categories of Electrical/Electronic Systems (A6), Engine Performance (A8) and Advanced Engine Performance Specialist (L1) from the National Institute for Automotive Service Excellence, or other such established and nationally recognized automotive repair certification institution as determined by the bureau.

The Import Performance Opinion:

9. *Imports Performance v. Dep't/Consumer Affairs, Bureau of Auto Repair* (2011) 201 Cal.App.4th 911, 916 -17, states:

Although an applicant for an advanced emission specialist technician license must complete certain course work (Cal. Code Regs., tit. 16, § 3340.28, subd. (b)(3)) and pass an examination (Cal. Code Regs., tit. 16, § 3340.29), such requirements are not similar to the "extensive educational,

training and testing requirements" necessary to obtain a professional license. (*San Benito Foods v. Veneman*, supra, 50 Cal.App.4th at p. 1894, 58 Cal.Rptr.2d 571.) Accordingly, an advanced emission specialist technician license is a nonprofessional or occupational license and proceedings to revoke such a license are governed by the preponderance of evidence standard of proof.

Complainant argued *Imports Performance* was controlling, and the EO and EI licenses at issue were not "professional licenses" subject to the clear and convincing evidence standard.

Respondents claimed *Imports Performance* was not controlling because the decision was published before amendments to California Code of Regulations, title 16, section 3340.28, became effective, and the licenses at issue require greater education, training and experience than the license at issue in *Imports Performance*. Respondents also claimed disciplinary charges against automotive dealer registrations must be proven by clear and convincing evidence where liability arises solely out of a technician's misconduct. As observed in *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1113, "If the agent or employee is exonerated, the principal or employer cannot be held vicariously liable."

10. Since *Imports Performance* was decided, California Code of Regulations, title 16, section 3340.28, was twice amended: the first amendment was operative on February 1, 2012; and, the second amendment was operative on July 28, 2016. The 2012 amendment added several provisions related to the education, training, and experience necessary to hold EO and EI licenses. While additional education, training and experience became necessary to obtain EO and EI licenses, the nature and extent of the additional education, training, and experience did not transform the EO and EI licenses into "professional licenses" requiring the application of the clear and convincing standard of proof. The opinions expressed in *Imports Performance* related to the standard of proof apply in this proceeding.

11. The preponderance of the evidence standard applies in this disciplinary proceeding for the smog check inspector (EO) and smog check repair technician (EI) licenses.

Disciplinary Statutes and Regulations

12. Business and Professions Code section 9889.3 provides in part:

The director may suspend, revoke, or take other disciplinary action against a license as provided in this article [Article 7 (commencing with section 9889.1) of the Automotive Repair Act] if the licensee or any partner; officer, or director thereof:

(a) Violates any section of the Business and Professions Code which relates to his or her licensed activities.

[¶] ... [¶]

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

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

13 Business and Professions Code section 9884.7 provides in part:

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

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

[¶] ... [¶]

(4) Any other conduct which 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.

14. Health and Safety Code section 44012 requires the test at a smog check station shall be performed in accordance with procedures prescribed by the department, pursuant to Health and Safety Code section 44013.

15. Health and Safety Code section 44015 prohibits a licensed smog check station from issuing a certificate of compliance to any vehicle that has been tampered with.

16. Health and Safety Code section 44032 requires qualified technicians to perform tests of emission control devices and systems in accordance with Section 44012.

17. Health and Safety Code section 44072.2 provides in part: 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.

¶...¶

(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. . .

18. California Code of Regulations, title 16 section 3340.24, sub-division (c), provides, "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."

19. California Code of Regulations, title 16, section 3340.30, provides in part:

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.

(b) A licensed technician shall maintain on file with the bureau a correct mailing address pursuant to section 3303.3 of Article 1 of this Chapter. . . .

20. California Code of Regulations, title 16, section 3340.35, provides a licensed station shall issue a certificate of compliance. . . 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.

21. California Code of Regulations, title 16, section 3340.41, subdivision (c), provides, "No person shall enter into the emissions 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 emissions inspection system any false information about the vehicle being tested."

22. California Code of Regulations, title 16, section. 3340.42, provides in part that smog check stations and smog check technicians shall conduct tests and inspections in accordance with the Bureau's BAR 97 Emission Inspection System Specifications and/or the On Board Data Inspection System referenced in subdivisions (a) and (b) of Section 3340.17.

23. California Code of Regulations, title 16, section 3373, provides:

No automotive repair dealer or individual in charge shall, in filling out an estimate, invoice, or work order, or record required to be maintained by section 3340.15(f) of this chapter, withhold there from or insert therein any statement or information which will cause any such document to be false or misleading, or where the tendency or effect thereby would be to mislead or deceive customers, prospective customers, or the public.

The Meaning of "Fraud"

24. Business and Professions Code sections 9884.7 and 9889.3 and Health and Safety Code section 44072.2 authorize administrative discipline for "fraud." Civil Code section 1571 states: "Fraud is either actual or constructive." Actual fraud is defined in Civil Code section 1572 to include "an intent to deceive another party. . . ." Constructive fraud is defined in Civil Code section 1573 to include "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault. . . by misleading another to his prejudice. . . ."

There 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. Fraud may be proved by direct evidence or it may be inferred from all of the circumstances in the case. (*Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 674-675.) For example, in an action

regarding a private investigator's license, the appellate court explained fraud 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. (*Wayne v. Bureau of Private Investigators and Adjusters, Department of Professional and Vocational Standards* (1962) 201 Cal.App.2d 427, 437 - 438.)

The Automotive Repair Act does not limit the term "fraud" to actual fraud, and the limitation of that term would defeat the legislative purpose of the Automotive Repair Act, which is to protect consumers.

Liability for Employee Conduct

25. A licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct. The essential justification for this rule is to ensure accountability of licensees so as to safeguard the public welfare. If a licensee were not liable for the actions of employees or an independent contractor, effective regulation would be impossible. The licensee could contract away the daily operations of his business and become immune to disciplinary action by the licensing authority. (*California Assn. of Health Facilities v. Dep't of Health Servs.* (1997) 16 Cal.4th 284, 295-97.)

Cause Exists to Impose Discipline on Respondents' Registrations and Licenses

26. As previously noted in Factual Finding 28, the conclusions set forth below were established by clear and convincing evidence, even though complainant's burden of proof was by a preponderance of the evidence.

27. First Cause for Discipline (Untrue or Misleading Statements): Respondent Tony's Test and Repair's dealer registration is subject to disciplinary action pursuant to Business and Code section 9884.7, subdivision (a)(1). Respondent, through Mr. Martinez, made or authorized statements which respondent knew or in the exercise of reasonable care should have known were untrue or misleading, as follows: Respondent certified that nine vehicles passed smog check inspections and were in compliance with applicable laws and regulations. In fact, respondent, through its employee, Adrian Miguel Martinez, used clean plugging methods in order to issue smog certificates of compliance for the vehicles, and did not actually test or inspect the vehicles as required by Health and Safety Code section 44012.

28. Second Cause for Discipline (Fraud): Respondent Tony's Test and Repair's dealer registration is subject to disciplinary action pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), in that respondent committed acts that constitute fraud by issuing electronic smog certificates of compliance for nine vehicles without performing bona fide inspections of the emission control devices and systems for those vehicles, thereby

depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

29. Third Cause for Discipline (Violation of Motor Vehicle Inspection Program):
Respondent Tony's Test and Repair's smog check station license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (a), in that respondent failed to comply with the following sections of that Code:

a. Section 44012, subdivision (a): Respondent failed to ensure that all emission control devices and systems required by law for the nine vehicles were installed and functioning correctly in accordance with test procedures.

b. Section 44012, subdivision (f): Respondent failed to ensure that the emission control tests were performed on nine vehicles in accordance with procedures prescribed by the department.

c. Section 44015, subdivision (b): Respondent issued electronic smog certificates of compliance for nine vehicles without ensuring that the vehicles were properly tested and inspected to determine if they were in compliance with Health and Safety Code section 44012.

d. Section 44059: Respondent willfully made false entries for electronic certificates of compliance for vehicles 1 through 9, identified in Table 1 above, by certifying that the vehicle had been inspected as required when, in fact, they had not.

30. Fourth Cause for Discipline (Failure to Comply with Regulations):
Respondent Tony's Test and Repair smog check station license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.24, subdivision (c): Respondent, through his employee, falsely or fraudulently issued electronic smog certificates of compliance for nine vehicles.

b. Section 3340.35, subdivision (c): Respondent, through his employee, issued electronic smog certificates of compliance for nine vehicles even though the vehicles had not been inspected in accordance with section 3340.42.

c. Section 3340.42: Respondent failed to ensure that the required smog tests were conducted on nine vehicles in accordance with the Bureau's specifications.

d. Section 3373: Respondent, through his employee, created a false and misleading record by issuing a document that was false and misleading.

31. Fifth Cause for Discipline (Dishonesty, Fraud or Deceit): Respondent Tony's Test and Repair's smog check station license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent committed dishonest, fraudulent or deceitful acts whereby another was injured by issuing electronic smog certificates of compliance for nine vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

32. Sixth Cause for Discipline (Violation of Motor Vehicle Inspection Program): Respondent Adrian Miguel Martinez's technician license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (a), in that respondent failed to comply with the following sections of the Business and Professions:

a. Section 33012, subdivision 9a): Respondent failed to ensure that all emission control devices and systems required by law for nine vehicles purportedly tested at Tony's Test and Repair were installed and functioning correctly in accordance with test procedures.

b. Section 44012, subdivision (f): Respondent failed to perform the emission control tests on nine vehicles purportedly tested at Tony's Test and Repair in accordance with procedures prescribed by the department.

c. Section 44015, subdivision (b): Respondent caused to be issued electronic smog certificates of compliance for nine vehicles he purportedly tested at Tony's Test and Repair without properly testing and inspecting the vehicles to determine whether they were in compliance with Health and Safety Code section 44012.

d. Section 44059: Respondent willfully made false entries for electronic certificates of compliance for vehicles 1 through 9, identified in Table 1 above, by certifying that the vehicles had been inspected as required when, in fact, they had not.

33. Seventh Cause for Discipline (Failure to Comply with Regulations): Respondent Adrian Miguel Martinez's technician license is subject to disciplinary action

pursuant to Health and Safety Code section 44072.2, subdivision (c), in that Respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.24, subdivision (c): Respondent falsely or fraudulently issued electronic smog certificates of compliance for nine vehicles he purportedly tested at Tony's Test and Repair.

b. Section 3340.30, subdivision (a): Respondent failed to inspect and test nine vehicles he purportedly tested at Tony's Test and Repair in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

c. Section 3340.41, subdivision (c): Respondent entered into the emissions inspection system vehicle identification information or emission control system identification data for a vehicle other than the one being tested for vehicles 1 through 9, identified in Table 1 above.

d. Section 3340.42: Respondent failed to conduct the required smog tests on vehicles 1 through 9, identified in Table 1 above, in accordance with the Bureau's specifications.

34. Eighth Cause for Discipline (Dishonesty, Fraud and Deceit): Respondent Adrian Miguel Martinez's technician license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent committed dishonest, fraudulent, and deceitful acts whereby another was injured by issuing electronic smog certificates of compliance for nine vehicles he purportedly tested at Tony's Test and Repair without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

35. Ninth Cause for Discipline (Untrue or Misleading Statements): Respondent Tony's Smog's dealer registration is subject to disciplinary action pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that respondent made or authorized statements which he knew or in the exercise of reasonable care should have known to be untrue or misleading, as follows: Respondent certified that three vehicles had passed inspection and were in compliance with applicable laws and regulations. In fact, respondent conducted the inspections on the vehicles using clean plugging methods in order to issue smog certificates of compliance for the vehicles, and did not actually test or inspect the vehicles as required by Health and Safety Code section 44012.

36. Tenth Cause for Discipline (Fraud): Respondent Tony's Smog's dealer registration is subject to disciplinary action pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), in that respondent committed acts that constitute fraud by issuing electronic smog certificates of compliance for three vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby

depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

37. Eleventh Cause for Discipline (Violation of Motor Vehicle Inspection Program): Respondent Tony's Smog's smog check station license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (a), in that respondent failed to comply with the following sections of that Code:

- a. Section 44012 subdivision (a): Respondent failed to ensure that all emission control devices and systems required by law for three vehicles were installed and functioning correctly in accordance with test procedures.
- b. Section 44012, subdivision (f): Respondent failed to ensure that the emission control tests were performed on three vehicles in accordance with procedures prescribed by the department.
- c. Section 44015, subdivision (b): Respondent issued electronic smog certificates of compliance for three vehicles without ensuring that the vehicles were properly tested and inspected to determine if they were in compliance with Health and Safety Code section 44012.
- d. Section 44059: Respondent willfully made false entries for electronic certificates of compliance for three vehicles by certifying that the vehicles had been inspected as required when, in fact, they had not.

38. Twelfth Cause for Discipline (Failure to Comply with Regulations): Respondent Tony's Smog's smog check station license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

- a. Section 3340.24, subdivision (c): Respondent falsely or fraudulently issued electronic smog certificates of compliance for three vehicles.
- b. Section 3340.35, subdivision (c): Respondent issued electronic smog certificates of compliance for three vehicles even though the vehicles had not been inspected in accordance with section 3340.42.
- c. Section 3340.42: Respondent failed to ensure that the required smog tests were conducted on three vehicles in accordance with the Bureau's specifications.

d. Section 3373: Respondent created a false and misleading record by issuing a document that was false and misleading.

39. Thirteenth Cause for Discipline (Dishonesty, Fraud or Deceit): Respondent Tony's Smog's smog check station license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent committed dishonest, fraudulent and deceitful acts whereby another was injured by issuing electronic smog certificates of compliance for three vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

40. Fourteenth Cause for Discipline (Violation of Motor Vehicle Inspection Program): Respondent Adrian Miguel Martinez's technician license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (a), in that Respondent failed to comply with the following sections of that Code:

a. Section 44012, subdivision (a): Respondent failed to ensure that all emission control devices and systems required by law for three vehicles were installed and functioning correctly in accordance with test procedures.

b. Section 44012, subdivision (f): Respondent failed to perform the emission control tests on three vehicles in accordance with procedures prescribed by the department.

c. Section 44015, subdivision (b): Respondent issued electronic smog certificates of compliance for three vehicles without properly testing and inspecting the vehicles to determine if they were in compliance with Health and Safety Code section 44012.

d. Section 44059: Respondent willfully made false entries for electronic certificates of compliance for three vehicles by certifying that the vehicles had been inspected as required when, in fact, they had not been inspected as required.

41. Fifteenth Cause for Discipline (Failure to Comply with Regulations)
Respondent Adrian Miguel Martinez's technician license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.24, subdivision (c): Respondent falsely or fraudulently issued electronic smog certificates of compliance for three vehicles.

b. Section 3340.30, subdivision (a): Respondent failed to inspect and test three vehicles in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

c. Section 3340.41, subdivision (c): Respondent entered into the emissions inspection system vehicle identification information or emission control system identification data for a vehicle other than the one being tested for three vehicles.

d. Section 3340.42: Respondent failed to conduct the required smog tests on three vehicles in accordance with the Bureau's specifications.

42. Sixteenth Cause for Discipline (Dishonesty, Fraud or Deceit): Respondent Adrian Miguel Martinez's technician license is subject to disciplinary action pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent committed dishonest, fraudulent, and deceitful acts whereby another was injured by issuing electronic smog certificates of compliance for three vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

The Degree of Discipline

43. The appropriate degree of discipline is the revocation of all registrations and licenses.

Respondent Adrian Miguel Martinez engaged in numerous acts of fraud in his capacity as a smog check technician and as the owner and operator of an automotive repair dealership and smog check station. He denied responsibility for any wrongdoing, even though his misconduct was established by clear and convincing evidence. His registration and licenses must be revoked.

Respondent Tony's Test and Repair was responsible for the Mr. Martinez's conduct. While Mr. Bone may not have known of Mr. Martinez's misconduct, the lack of supervision and absence of oversight at Tony's Test and Repair created a climate in which wrongdoing was likely to occur, especially in light of the smog check station's history before Mr. Bone assumed ownership. Mr. Bone was aware that Mr. Martinez was asked to perform illegal smog check inspections. He knew there was a great financial incentive to provide fraudulent inspections. Respondent Tony's Test and Repair produced no evidence to establish it made every effort to discourage wrongdoing. The public interest is served by holding automotive repair dealers and smog check stations responsible for the acts of their technicians in all but the most unusual cases, thereby providing these registrants and licensees with a strong incentive to prevent wrongdoing in the first place. Revocation of Tony's Test and Repair's registration and license is appropriate and in the public interest.

Costs of Investigation and Enforcement

44. Business and Professions Code section 125.3 provides in part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department. . . the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] ... [¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a)

45. California Administrative Code, title 1, section 1042, provides in part:

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

[¶] ... [¶]

(4) The ALJ may permit a party to present testimony relevant to the amount and reasonableness of costs.

(c) The proposed decision shall include a factual finding and legal conclusion on the request for costs and shall state the reasons for denying a request or awarding less than the amount requested. Any award of costs shall be specified in the order.

46. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that the imposition of costs for investigation and enforcement under a regulation that is almost identical to Business and Professions Code section 125.3 did not violate due process, but it was incumbent on the State Board of Chiropractic Examiners to exercise its discretion to reduce or eliminate cost awards in a manner that ensured the application of the regulation did not "deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing."

The Supreme Court set forth four factors the board was required to consider in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing process to obtain dismissal of the charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a "subjective" good faith belief in the merits of his position; (3) whether the licensee raised a "colorable challenge" to the proposed discipline; and (4) whether the licensee had the financial ability to make payments.

47. The *Zuckerman* criteria were applied in this proceeding. Directing respondent Tony's Test and Repair to pay \$9,567.50 in enforcement costs is justified. And, directing respondent Adrian Miguel Martinez to pay \$8,972.50 in enforcement costs is justified.

ORDERS

Automotive Repair Dealer Registration No. ARD 266470 and Smog Check Station License No. RC 266470 issued to respondent Darryl Bone Contracting, Inc., doing business as Tony's Test and Repair, are revoked.

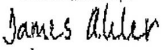
Respondent Darryl Bone Contracting, Inc. is directed to pay \$9,567.50 to the Bureau of Automotive Repair.

Automotive Repair Dealer Registration No. ARD 281437 and Smog Check, Test Only, Station License No. TC 281437 issued to respondent Adrian Miguel Martinez, doing business as Tony's Smog Check, are revoked.

Smog Check Inspector License No. EO 632516 and Smog Check Repair Technician License No. EI 632516 issued to respondent Adrian Miguel Martinez are revoked.

Respondent Adrian Miguel Martinez is directed to pay \$8,972.50 to the Bureau of Automotive Repair.

DATED: May 10, 2017

Deauthorized by:

BAC70B8654309431...

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings