

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

In the Matter of the Accusation Against:

HOWELLS SERVICE CENTER
JOHN THOMAS HOWELL, Owner
251 S. L. St.
Tulare, CA 93274

Case No. 79/16-1388

OAH No. 2017070771

Automotive Repair Dealer Registration
No. ARD 140278
Smog Check Station License No. TC 140278

ENRIQUE CONTRERAS
Smog Check Inspector License No. EO 634991
Smog Check Repair Technician License No.
EI 634991
Brake Adjuster License No. BA 634991

Respondents.

DECISION

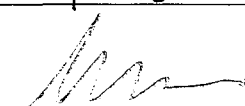
The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517, subdivision (c)(2)(C), a technical or other minor change in the Proposed Decision is made as follows:

1. Page 12, paragraph 1 under Order: "Smog Check Repair Technician No. 634991" is corrected to "Smog Check Repair Technician No. EI 634991."

The technical or minor change made above does not affect the factual or legal basis of the Proposed Decision.

This Decision shall become effective March 14, 2018.

DATED: 2/2/18



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

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PROPOSED DECISION

Administrative Law Judge John E. DeCure, State of California, Office of Administrative Hearings, heard this matter on October 19, 2017, in Visalia, California.

Deputy Attorney General Karen R. Denvir represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau; BAR), Department of Consumer Affairs.

Respondents John Thomas Howell and Enrique Contreras were present and represented themselves.

Evidence was received, argument was heard, and the matter was submitted for decision on October 19, 2017.

FACTUAL FINDINGS

Licensure

1. In 1988, the Bureau issued Automotive Repair Dealer Registration number ARD 140278 to John Thomas Howell (respondent Howell), owner, doing business as Howells Service Center. The registration expiration date is June 30, 2018. On August 15, 1988, the Bureau issued Smog Check Station License number RC 140278 to respondent Howell. The license's expiration date is June 30, 2018.

2. On November 30, 2012, the Bureau issued Smog Check Inspector License number EO 634991, to Enrique Contreras (respondent Contreras). The license expires on August 31, 2018. On December 3, 2012, the Bureau issued Smog Check Repair Technician License number EI 634991 to respondent Contreras. The license expires on August 31, 2018.

3. On March 14, 2013, the Bureau issued Brake Adjuster License Number BA 634991 to respondent Contreras. The license expired on August 31, 2016, without renewal. However, pursuant to Business and Professions Code section 9884.7, the expiration of a license shall not deprive the Bureau from bringing a disciplinary proceeding against that license.

VID Data Review – Clean-Plugging

4. The Accusation was filed by complainant in his official capacity on March 13, 2017. Both respondents timely filed a Notice of Defense, requesting a hearing. All jurisdictional requirements have been met.

The Accusation alleges respondents issued smog check certificates that were false and fraudulent, in that respondents did not actually test the vehicles for which smog certificates were issued. The allegations involve smog testing done following the Bureau's updating, on March 9, 2015, of the California Smog Check Program, which required the use of an On-Board Diagnostic Inspection System (BAR-OIS). The BAR-OIS is smog check equipment required when inspecting model-year 2000 and newer gasoline and hybrid vehicles and most 1998 and newer diesel vehicles. The system consists of a certified Data Acquisition Device (DAD), computer, bar-code scanner, and printer.

5. "Clean-plugging" is an illegal technique used to fraudulently pass a vehicle through a smog check inspection. Part of the smog test is an On Board Diagnostics - Generation II (OBDII) functional test in which the licensed inspector connects a cable from the station's test computer to a Diagnostic Link Connector, which is a plug found inside the vehicle's passenger cabin. Through the plug and cable, the test computer retrieves information from the vehicle's on-board computer. When clean-plugging a vehicle, the technician enters information into the station's computer-based smog testing system about the vehicle to be issued a certificate indicating it passed the inspection, but this is done by

actually connecting the test cable to a different vehicle. The purpose of clean-plugging is to issue fraudulent smog Certificates of Compliance to vehicles that are not in smog compliance or are not even present for testing.

6. The OBDII testing process produces vehicle information including the automobile's Vehicle Identification Number (VIN). A VIN is physically present on all vehicles, and is also required to be programmed into the OBDII system on 2005 and newer vehicles. The VIN has also been programmed into the OBDII system for many earlier-model years of automobiles. This electronically programmed VIN is referred to as the "eVIN," which is transmitted to the Vehicle Information Database (VID) during the smog check and must match the automobile's physical VIN.

7. During an OIS (Onboard Inspection System) smog check, two other types of data distinct to the vehicle being tested are also retrieved and recorded. The first includes the vehicle's "communication protocol," or the specified communication "language" used by the OBDII computer to communicate to scan tools and other devices such as the BAR-OIS. The communication protocol is programmed into the OBDII computer during the vehicle's manufacture and does not change.

The second distinct form of data collected is the total number of Parameter Identifications (PIDs) that exist for the vehicle being tested. PIDs are data points reported by the OBDII computer to the scan tool or BAR-OIS, relaying information about, for example, engine speed (rpm), vehicle speed, and engine temperature. The "PID count" refers to the number of data points reported by the vehicle's OBDII computer. Each make and model vehicle reports a specific number of PID counts; the PID count does not vary for one particular make and model vehicle.

8. On January 25, 2016, Bureau Program Representative II Enrique Lopez initiated an investigation of respondent Howell's facility after reviewing information from the Bureau's Vehicle Information Database (VID). Information on each smog check inspection performed by a smog check station is transmitted electronically to the VID from the station's BAR97 Emissions Inspection System (EIS), a computer-based analyzer. Bureau analysts and engineers search for anomalies in the VID data using automated data checks. If, for example, only one 2007 GMC Yukon has a particular diagnostic trouble code, the computer identifies that result as out of the ordinary and triggers an investigation. Mr. Lopez was experienced in investigating such anomalies.

Clean-Plugged Vehicles

9. On June 29, 2015, respondent Contreras performed a smog inspection on a 2008 Ford F250 Super Duty truck, resulting in issuance of Smog Certificate of Compliance (certificate) no. YT057431C. The OIS test results showed that the eVIN was not recorded, and the communication protocol and PID count recorded during the smog check were not consistent with communication protocols and PID counts for that vehicle's make and model.

This was evidence that the DAD was not connected to the vehicle during the smog inspection, resulting in the issuance of a fraudulent certificate.

10. On September 10, 2015, respondent Contreras performed a smog inspection on a 2004 Ford F250 Super Duty truck, resulting in issuance of certificate no. PU 931979C. The OIS test results showed that the eVIN recorded during the inspection did not match the vehicle's physical VIN. The PID count recorded during the smog check was not consistent with PID counts for that vehicle's make and model. This was evidence that the DAD was not connected to the vehicle during the smog inspection, resulting in the issuance of a fraudulent certificate.

On September 10, 2015, approximately four minutes after respondent Contreras performed a smog inspection on a 2004 Ford F250 Super Duty truck, he conducted a smog inspection on a 2007 GMC Yukon and the eVIN transmitted to the VID was the same eVIN that was recorded during the smog inspection for the 2004 Ford F250. Furthermore, the communication protocol and PID count were also the same as those recorded during the inspection of the 2004 Ford F250. The evidence established that respondent Contreras had fraudulently used the 2007 GMC Yukon's OBDII system during his inspection of the 2004 Ford F250.

11. On October 28, 2015, respondent Contreras performed a smog inspection on a 2001 Nissan Altima, resulting in issuance of certificate no. PY36723OC. This occurred approximately five minutes after the same vehicle failed a smog inspection in respondent Howell's facility. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. Further investigation revealed that the eVIN transmitted during the inspection was for a 2003 Chrysler PT Cruiser registered to respondent Howell, indicating that respondent Contreras used the PT Cruiser for the smog inspection of the 2001 Nissan Altima. This was evidence that the DAD was not connected to the 2001 Nissan Altima during the smog inspection, resulting in the issuance of a fraudulent certificate.

12. On November 24, 2015, respondent Contreras performed a smog inspection on a 2002 Chevrolet Tahoe K1500, resulting in issuance of certificate no. QA013635C. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. The Bureau's VID data showed that approximately eight minutes before this smog inspection, respondent Contreras had conducted a smog inspection on a 2007 Chevrolet Equinox LT which transmitted to the VID the same eVIN, communication protocol, and PID count recorded during the 2002 Chevrolet Tahoe K1500 smog inspection. This indicated that respondent Contreras used the Chevrolet Equinox for the Chevrolet Tahoe's smog inspection. Because the DAD was not connected to the Chevrolet Tahoe during the smog inspection, respondents issued a fraudulent certificate.

13. On January 1, 2016, respondent Contreras performed a smog inspection on a 2003 Toyota Highlander, resulting in issuance of certificate no. QA581200C. This occurred approximately three months after the same vehicle failed a smog inspection at another facility. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. Further investigation revealed that the eVIN transmitted during the inspection was for a 2003 Chrysler PT Cruiser registered to respondent Howell, indicating that respondent Contreras used the PT Cruiser for the smog inspection of the 2003 Toyota Highlander. This was evidence that the DAD was not connected to the 2003 Toyota Highlander during the smog inspection, resulting in the issuance of a fraudulent certificate.

14. On January 22 2016, respondent Contreras performed a smog inspection on a 2000 Nissan Frontier XE, resulting in issuance of certificate no. YV913757C. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. Further investigation revealed that the eVIN transmitted during the inspection was for a 2007 Chevrolet Silverado C1500 registered to respondent Contreras, indicating that respondent Contreras used the Chevrolet Silverado for the smog inspection of the 2000 Nissan Frontier XE. This was evidence that the DAD was not connected to the 2000 Nissan Frontier XE during the smog inspection, resulting in the issuance of a fraudulent certificate.

15. On February 20, 2016, respondent Contreras performed a smog inspection on a 2001 Mitsubishi Galant ES, resulting in issuance of certificate no. YX571480C. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. Further investigation revealed that the eVIN transmitted during the inspection was for a 2011 Nissan Altima, indicating that respondent Contreras used the Nissan Altima for the smog inspection of the 2001 Mitsubishi Galant ES. This was evidence that the DAD was not connected to the 2001 Mitsubishi Galant ES during the smog inspection, resulting in the issuance of a fraudulent certificate.

16. On March 2, 2016, respondent Contreras performed a smog inspection on a 2006 Dodge Ram 2500 Mega Cab, resulting in issuance of certificate no. YX571498C. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. This was evidence that the DAD was not connected to the 2006 Dodge Ram 2500 Mega Cab during the smog inspection, resulting in the issuance of a fraudulent certificate.

17. On April 15, 2016, respondent Contreras performed a smog inspection on a 2001 Ford F250 Super Duty truck, resulting in issuance of certificate no. ZB744061C. The OIS test results showed that the communication protocol and PID count recorded during the

smog check was not consistent with communication protocols and PID counts for that vehicle's make and model. Further investigation revealed that the vehicle had been tested twice during March 2016 at another facility, and had failed both inspections. This was evidence that the DAD was not connected to the 2001 Ford F250 Super Duty truck during the smog inspection, resulting in the issuance of a fraudulent certificate.

18. On April 30, 2016, respondent Contreras performed a smog inspection on a 2003 Volvo XC90 T6, resulting in issuance of certificate no. ZB744089C. The OIS test results showed that the eVIN which was recorded did not match the vehicle's physical VIN, nor was the communication protocol and PID count recorded during the smog check consistent with communication protocols and PID counts for that vehicle's make and model. Further investigation revealed that the eVIN transmitted during the inspection was for a 2003 Chrysler PT Cruiser registered to respondent Howell, indicating that respondent Contreras used the PT Cruiser for the smog inspection of the 2003 Volvo. This was evidence that the DAD was not connected to the 2003 Volvo XC90 T6 during the smog inspection, resulting in the issuance of a fraudulent certificate.

Respondents' Evidence

19. Respondent Contreras testified credibly that he was solely to blame for the clean-plugging incidents, which respondent Howell knew nothing about. Respondent Contreras performed the clean-plugging when respondent Howell was not present, almost exclusively on days when the facility was closed for business. He also accessed Howell's Chrysler PT Cruiser, which was a "shop car" that remained on the facility's premises, unbeknownst to respondent Howell. When Howell confronted him about the BAR's investigation, he initially denied his involvement, but admitted to the wrongdoing and took full responsibility. Respondent Contreras is no longer employed by respondent Howell and is not seeking further employment in the industry as a licensed smog technician. He testified solely because he regrets the harm his actions have caused to respondent Howell and wanted to tell the truth. Respondent Contreras submitted written documentation evidencing that he is ineligible for unemployment benefits, based on his termination from respondent Howell's employment due to dishonest acts.

20. Respondent Howell testified credibly, confirming respondent Contreras's description of events. When respondent Howell realized what respondent Contreras had done, he felt he had no choice but to fire him. Respondent Howell had no knowledge of the clean-plugging activity and was stunned by the allegations when they arose. He was deeply disturbed that respondent Contreras's dishonest acts placed the facility in peril with the BAR, since respondent Howell employs nine people, and every employee has a family to support. Respondent Howell vowed not to provide any of his smog technicians with keys to the shop "ever again." He understands and appreciates the BAR's public protection mission, and was open to any suggestions the BAR may have regarding what a facility can do to deter fraudulent smog testing.

Additional Evidence

21. On May 17, 2016, Mr. Lopez and another BAR representative visited the facility and obtained copies of vehicle inspection reports (VIRs) pertaining to the smog inspections described in Findings 16 through 18, which were reprinted and signed by respondent Contreras. Respondent Howell was unable to locate or provide copies of the VIRs for the vehicles referenced in Findings 9 through 15.

Costs

22. The Board incurred enforcement costs, in the form of Attorney General fees, in the amount of \$8,412.50. The Attorney General's Matter Time Activity report, which details costs totaling \$8,412.50 in increments of one-quarter hour and describes each corresponding task performed, reflects in adequate detail the billable time spent and tasks performed in enforcement of this matter. These costs are reasonable.

23. The Board further incurred its own costs for investigation in the amount of \$15,284.77. A portion of these costs were not reasonably incurred. The Board's documentation in support of these costs consisted of a one-page declaration from Bill Thomas, a BAR Programs Manager II, stating that he had reviewed and approved the records which reflect that the "attachment of costs and fees have been incurred by the agency" in connection with the investigation and prosecution of this matter. The declaration provides no further details. The attachment Mr. Thomas refers to in his declaration is a one-page document which provides columns denoting the fiscal year, hours spent, rate per hour, and cost, for services provided by an unnamed "Program Representative I" and an unnamed "Program Representative II." Unlike the Attorney General's activity report, no description of activities is provided. The attachment shows a total of 203 hours spent at a cost incurred of \$15,284.77.

24. Mr. Lopez's testimony established that this matter was investigated using data review and analysis applied to cases involving potential clean-plugging, a fraudulent technique well known to Mr. Lopez and other BAR investigative personnel. No undercover operations were conducted. The data indicating each clean-plugging violation was straightforward. Mr. Lopez ably demonstrated how he had cross-checked the data for each suspected clean-plugged vehicle by comparing legitimate data from other vehicles of the same make and model. He did so quickly and efficiently. In sum, Mr. Lopez was a seasoned, highly adept Program Representative. There was nothing in his testimony, or in the July 2016 Investigative Report he co-authored, to suggest that the BAR's clean-plugging investigation had proceeded in anything but a timely, orderly fashion. Also, notably, this matter was scheduled for one day of hearing.

25. Despite the fact the BAR's investigation verified that 10 violations had occurred, the method of investigation and verification the BAR used to establish those violations was near identical, and uncontroversial. There was no indication that the investigation required 203 hours – or more than five weeks of full-time labor – to conduct and complete. Some of those costs may be reasonable, but absent any further details, it is not reasonable to pass all of those

costs onto respondent. A more reasonable estimate of time required to investigate this matter and prepare a report is 72 hours.

26. The predominant billable hourly rate the BAR employed was \$76.30, for 191 hours it incurred during the 2015/ 2016 fiscal year. Applying that hourly rate, the BAR reasonably incurred 72 hours, or \$5,493.60, in costs.

27. Respondent Howell testified that due to the high overhead costs associated with running his facility, his financial ability to pay a substantial cost recovery award is limited. Respondent Contreras offered no information regarding his ability to pay.

LEGAL CONCLUSIONS

First Cause for Discipline: Untrue or Misleading Statements

1. Cause exists to discipline the automotive repair dealer registration issued to respondent Howell pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that Howell, through his employee respondent Contreras, authorized statements which in the exercise of reasonable care he should have known to be untrue by certifying that each of the 10 vehicles listed in Findings 9 through 18 had been properly inspected and found to be in compliance with applicable laws and regulations.

Second Cause for Discipline: Fraud

2. Cause does not exist to discipline the automotive repair dealer registration issued to respondent Howell pursuant to Business and Professions Code section 9884.7, subdivision (a)(4). The evidence did not establish that Howell engaged in fraudulent conduct by issuing electronic certificates of compliance for the 10 vehicles listed in Findings 9 through 18 without performing bona fide smog inspections. California Civil Code section 3294, subdivision (c)(3), defines "fraud" as involving an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention of depriving a person of property or legal rights or otherwise causing injury. In this case, Howell had no intent to misrepresent, conceal material facts, or deceive either the public or the BAR, as he was unaware of Contreras's clean-plugging activities.

Third Cause for Discipline: Violations of the Motor Vehicle Inspection Program

3. Cause exists to discipline the smog check station license issued to respondent Howell pursuant to Health and Safety Code section 44072.2, subdivision (a), in that he failed to comply with the following provisions of the Health and Safety Code pertaining to the Motor Vehicle Inspection Program:

- a. Section 44012: failing to ensure that emission control tests were performed on the 10 vehicles listed in Findings 9 through 18 in accordance with bureau procedures.
- b. Section 44015: issuing electronic certificates of compliance for the 10 vehicles listed in Findings 9 through 18 without proper testing and inspection.

Fourth Cause for Discipline: Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program

4. Cause exists to discipline the smog check station license issued to respondent Howell pursuant to Health and Safety Code section 44072.2, subdivision (c), in that he failed to comply with provisions of the California Code of Regulations, title 16, as follows:

- a. Section 3340.15, subdivision (e)(3): Howell failed to make or keep secure the vehicle inspection reports pertaining to the smog inspections performed on the six clean-plugged vehicles referenced in Findings 9 through 14, or failed to make those records available for inspection by the BAR, as set forth in Finding 22.
- b. Section 3340.35, subdivision (c): Howell issued electronic smog certificates of compliance for the 10 vehicles referenced in Findings 9 through 18, despite the vehicles not being inspected in accordance with section 3340.42.
- c. Section 3340.42: Howell failed to ensure that the required smog tests were conducted on the 10 vehicles referenced in Findings 9 through 18 in accordance with the Bureau's specifications.

Fifth Cause for Discipline: Dishonesty, Fraud or Deceit

5. Cause does not exist to discipline the smog check station license issued to respondent Howell pursuant to Health and Safety Code section 44072.2, subdivision (d). The evidence did not establish that Howell engaged in acts of dishonesty, fraud or deceit by issuing electronic certificates of compliance for the 10 vehicles referenced in Findings 9 through 18 without performing bona fide smog inspections, to the detriment of the people of the state of California.

Sixth Cause for Discipline: Failure to Maintain Vehicle Inspections for Three Years

6. Cause exists to discipline the smog check station license issued to respondent Howell pursuant to Health and Safety Code section 44072.2, subdivision (g), in that Howell

failed to keep the vehicle inspections reports pertaining to the smog inspections performed on the six vehicles referenced in Findings 9 through 14, or failed to have those records available for inspection by the BAR, as set forth in Finding 22.

Seventh Cause for Discipline: Violations of the Motor Vehicle Inspection Program

7. Cause exists to discipline the smog check inspector and smog check repair technician licenses issued to respondent Contreras pursuant to Health and Safety Code section 44072.2, subdivision (a), in that he failed to comply with the Health and Safety Code section 44012 pertaining to the Motor Vehicle Inspection Program by: failing to perform emission control tests on the 10 vehicles referenced in Findings 9 through 18 in accordance with Bureau procedures.

Eighth Cause for Discipline: Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program

8. Cause exists to discipline the smog check inspector and smog check repair technician licenses issued to respondent Contreras pursuant to Health and Safety Code section 44072.2, subdivision (c), in that he failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.30, subdivision (a): respondent failed to inspect and test the 10 vehicles listed in Findings 9 through 18 in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

b. Section 3340.42: respondent failed to conduct the required smog tests and inspections on the 10 vehicles listed in Findings 9 through 18 in accordance with the Bureau's specifications.

Ninth Cause for Discipline: Dishonesty, Fraud or Deceit

9. Cause exists to discipline the smog check inspector and smog check repair technician licenses issued to respondent Contreras pursuant to Health and Safety Code section 44072.2, subdivision (d), in that he engaged in acts of dishonesty, fraud or deceit by issuing electronic certificates of compliance for the 10 vehicles listed in Findings 9 through 18 without performing bona fide smog inspections, to the detriment of the people of the state of California.

Tenth Cause for Discipline: Dishonesty, Fraud or Deceit

10. Cause exists to discipline the brake adjuster license issued to respondent Contreras pursuant to Business and Professions Code section 9889.3, subdivision (d), in that

he engaged in acts of dishonesty, fraud or deceit whereby another was injured, as set forth in Findings 9 through 18.

Matters in Aggravation

11. On February 18, 2011, the BAR issued Citation no. C2011-0927 against respondent Howell for violation of Health and Safety Code section 44012, subdivision (f) (failure to determine emission control devices and systems required by law are installed and functioning correctly via test procedures), and title 16, California Code of Regulations, section 3340.35, subdivision (c) (issuing a certificate of compliance to an improperly tested vehicle). The underlying facts involved respondent's issuance of a certificate of compliance to a BAR undercover vehicle with a non-functioning check engine light. The BAR assessed a \$1,000 civil penalty, which respondent paid.

Discipline of Other Licenses

12. Under Health and Safety Code section 44072.8, the suspension or revocation of a smog check station license or smog technician license constitutes cause to suspend or revoke other such licenses held by the disciplined licensee. Accordingly, if the smog check station license issued to respondent Howell is disciplined, his technician license may also be disciplined.

13. Business and Professions Code section 9884.7, subdivision (c), provides that "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."

Appropriate Discipline

14. Respondent Contreras's misconduct in clean-plugging 10 vehicles reflects a fundamental lack of honesty, integrity and commitment to the goals of the smog check program. It would be contrary to the public interest to allow him to keep his inspector, repair technician, and brake adjuster licenses.

15. Although it was not established that respondent Howell knew about the clean-plugging, the fact that his employee was able to repeatedly commit these violations indicates a lack of oversight and appropriate procedural safeguards by Howell as the smog check station licensee. Howell did not offer any evidence of a plan to prevent future violations by other technicians he may employ, other than to not issue keys to the facility to them. However, Howell displayed a cooperative attitude and was open toward working with the BAR to employ further safeguards. It would not be contrary to the public interest to allow Howell to keep his smog check station license on a probationary basis.

16. Because the violations involved smog check inspections and not general auto repair, and it was not established that Howell knew about Contreras's misconduct, outright revocation of his auto repair dealer registration is not warranted. It would not be contrary to the public interest to allow Howell to keep his auto repair dealer registration on a probationary basis.

Costs of Investigation and Enforcement

17. Complainant has requested that respondents be ordered to pay the bureau the costs of investigation and enforcement of the case. Business and Professions Code section 125.3 provides that respondents may be ordered to pay the Bureau "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The actual costs of investigation and enforcement sought by the Bureau are \$23,697.27.

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

19. In this case, two factors are significant. First, the hours of investigation were inappropriately excessive in relation to the alleged misconduct as set forth in Findings 23 through 25. As a result, not all of the BAR's \$15,284.77 in actual costs are reasonable, and those costs should be reduced to \$5,593.60.

20. Second, a factor that could militate in respondent Howell's favor is his financial ability to pay a cost recovery award, although no evidence was offered on this issue aside from Howell's complaint that his costs of operating his facility are high.

21. The Attorney General costs of investigation and enforcement of \$8,412.50 are determined to be reasonable, as are the BAR's reduced costs in the amount of \$5,593.60. Combined, these costs total \$13,906.10. Howell and Contreras shall each be required to pay \$6,953.05, which is one-half of the total amount of costs. However, respondents shall be jointly and severally liable for payment of \$13,906.10 in costs. In the event that one respondent fails to, or is unable to, pay his \$6,953.05 share of costs, the BAR is entitled to seek reimbursement of the remaining balance due from the other respondent.

ORDER

1. Smog Check Inspector License No. EO 634991, Smog Check Repair Technician No. 634991, and Brake Adjuster License No. BA 634991, issued to respondent Enrique Contreras, are revoked pursuant to Legal Conclusions 7, 8, 9 and 10.

Respondent Contreras shall pay the BAR's actual and reasonable costs of investigation and enforcement of this matter in the amount of \$6,953.05. This amount shall be paid to the bureau within 60 days of the effective date of this decision, unless the bureau, upon a request from Contreras, allows payment to be made in installments. Howell and Contreras shall each be required to pay \$6,953.05, which is one-half of the total amount of costs. Although \$6,953.05 in costs are apportioned equally to Howell, Contreras shall be jointly and severally liable for payment of \$13,906.10 in costs. In the event that respondent Howell fails to, or is unable to, pay his share of costs, the BAR is entitled to seek reimbursement of the remaining balance due from Contreras.

2. Automotive Repair Dealer Registration Number ARD 140278, and Smog Check Station License Number RC 140278, issued to respondent John Thomas Howell, owner, doing business as Howells Service Center, are revoked pursuant to Legal Conclusions 1, 3, 4 and 6. However, the revocation is stayed for three (3) years, during which time respondent Howell shall be subject to the following terms and conditions of probation:

1. Obey All Laws

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

2. Quarterly Reporting

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

3. Report Financial Interests

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

4. Access to Examine Vehicles and Records

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

5. Tolling of Probation

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

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

6. Violation of Probation

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

7. Maintain Valid License

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

8. Cost Recovery

Respondent shall pay the Bureau of Automotive Repair \$6,953.05 for the reasonable costs of the investigation and enforcement of case no. 79/16-1388. Respondent shall make such payment as outlined in a payment schedule agreeable to the BAR. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money

order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for case no. 79/16-1388. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. The BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

Although \$6,953.05 in costs are apportioned equally to respondent and Contreras, they both shall be jointly and severally liable for payment of \$13,906.10 in costs. In the event that Contreras fails to, or is unable to, pay his share of costs, the BAR is entitled to seek reimbursement of the remaining balance due from respondent.

9. Completion of Probation

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

10. License Surrender

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

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

DATED: November 20, 2017

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

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8
9 **BEFORE THE**
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE BUREAU OF AUTOMOTIVE REPAIR
10 **STATE OF CALIFORNIA**

11
12 In the Matter of the Accusation Against:

Case No. **79/16-1388**

13 **HOWELLS SERVICE CENTER**
JOHN THOMAS HOWELL, OWNER
14 **251 S. L St.**
Tulare, CA 93274

A C C U S A T I O N
(Smog Check)

15 **Automotive Repair Dealer Reg. No. ARD 140278**
16 **Smog Check Station License No. RC 140278**

17 **And**

18 **ENRIQUE CONTRERAS**
226 W. Beacon Ave.
19 **Tulare, CA 93274**

20 **Smog Check Inspector License No. EO 634991**
Smog Check Repair Technician No. EI 634991
21 **Brake Adjuster License No. BA 634991**

22 Respondents.

23
24 Complainant alleges:

25 **PARTIES**

26 1. Patrick Dorais ("Complainant") brings this Accusation solely in his official capacity
27 as the Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

28 ///

1 **Howells Service Center; John Thomas Howell, Owner**

2 2. In or about 1988, the Bureau issued Automotive Repair Dealer Registration Number
3 ARD 140278 (“registration”) to John Thomas Howell (“Respondent Howell”), owner of Howells
4 Service Center. The registration was in full force and effect at all times relevant to the charges
5 brought herein and will expire on June 30, 2017, unless renewed.

6 3. On or about August 15, 1988, the Bureau issued Smog Check Station License
7 Number RC 140278 to Respondent Howell. The license was in full force and effect at all times
8 relevant to the charges brought herein and will expire on June 30, 2017, unless renewed.

9 **Enrique Contreras**

10 4. On or about November 30, 2012, the Bureau issued Smog Check Inspector License
11 Number EO 634991 to Enrique Contreras (“Respondent Contreras”). The license was in full
12 force and effect at all times relevant to the charges brought herein and will expire on August 31,
13 2018, unless renewed.

14 5. On or about December 3, 2012, the Bureau issued Smog Check Repair Technician
15 License Number EI 634991 to Respondent Contreras. The license was in full force and effect at
16 all times relevant to the charges brought herein and will expire on August 31, 2018, unless
17 renewed.

18 6. On or about March 14, 2013, the Bureau issued Brake Adjuster License Number BA
19 634991 to Respondent Contreras. The license expired on August 31, 2016, without renewal.

20 **JURISDICTION**

21 7. This Accusation is brought before the Director of the Department of Consumer
22 Affairs (“Director”) for the Bureau of Automotive Repair, under the authority of the following
23 laws.

24 8. Business and Professions Code (“Bus. & Prof. Code”) section 9884.7 provides that
25 the Director may revoke an automotive repair dealer registration.

26 9. Bus. & Prof. Code section 9884.13 provides, in pertinent part, that the expiration of a
27 valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary

28 ///

1 proceeding against an automotive repair dealer or to render a decision temporarily or permanently
2 invalidating (suspending or revoking) a registration.

3 10. Bus. & Prof. Code section 9889.1 provides, in pertinent part, that the Director may
4 suspend or revoke any license issued under Articles 5 and 6 (commencing with section 9887.1) of
5 the Automotive Repair Act.

6 11. Bus. & Prof. Code section 9889.7 provides, in pertinent part, that the expiration or
7 suspension of a license by operation of law or by order or decision of the Director or a court of
8 law, or the voluntary surrender of a license shall not deprive the Director of jurisdiction to
9 proceed with any disciplinary proceedings.

10 12. Health and Safety Code ("Health & Saf. Code") section 44002 provides, in pertinent
11 part, that the Director has all the powers and authority granted under the Automotive Repair Act
12 for enforcing the Motor Vehicle Inspection Program.

13 13. Health & Saf. Code section 44072.6 provides, in pertinent part, that the expiration or
14 suspension of a license by operation of law, or by order or decision of the Director of Consumer
15 Affairs, or a court of law, or the voluntary surrender of the license shall not deprive the Director
16 of jurisdiction to proceed with disciplinary action.

17 14. Health & Saf. Code section 44072.8 states that when a license has been revoked or
18 suspended following a hearing under this article, any additional license issued under this chapter
19 in the name of the licensee may be likewise revoked or suspended by the director.

20 **STATUTORY AND REGULATORY PROVISIONS**

21 15. Bus. & Prof. Code section 9884.7 states, in pertinent part:

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

28 (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.

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(4) Any other conduct that constitutes fraud.

....

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

16. Bus. & Prof. Code section 9889.3 states, in pertinent 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:

....

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

17. Bus. & Prof. Code section 22, subdivision (a), states:

“Board” as used in any provision of this Code, refers to the board in which the administration of the provision is vested, and unless otherwise expressly provided, shall include “bureau,” “commission,” “committee,” “department,” “division,” “examining committee,” “program,” and “agency.”

18. Bus. & Prof. Code section 477, subdivision (b), states, in pertinent part, that a “license” includes “registration” and “certificate.”

19. Health & Saf. Code section 44072.2 states, in pertinent 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 [the Motor Vehicle Inspection Program (Health and Saf. Code § 44000, et seq.)] 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.

....

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1 (g) Fails to make and keep records showing his or her transactions as a
2 licensee, or fails to have those records available for inspection by the director or his
3 or her duly authorized representative for a period of not less than three years after
4 completion of any transaction to which the records refer, or refuses to comply with a
5 written request of the director to make the records available for inspection . . .

6 20. Health & Saf. Code section 44072.10 states, in pertinent part:

7

8 (c) The department shall revoke the license of any smog check technician
9 or station licensee who fraudulently certifies vehicles or participates in the fraudulent
10 inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of
11 the following:

12

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

15 21. Health & Saf. Code section 44024.5, subdivision (a), states:

16 The department shall compile and maintain statistical and emissions
17 profiles and data from motor vehicles that are subject to the motor vehicle inspection
18 program. The department may use data from any source, including remote sensing
19 data, in use data, and other motor vehicle inspection program data, to develop and
20 confirm the validity of the profiles, to evaluate the program, and to assess the
21 performance of smog check stations. The department shall undertake these
22 requirements directly or seek a qualified vendor for these services.

23 22. Health & Saf. Code section 44037 states, in pertinent part:

24 (a) The department shall compile and maintain records, using the
25 sampling methodology necessary to ensure their scientific validity and reliability, of
26 tests and repairs performed by qualified smog check technicians at licensed smog
27 check stations pursuant to this chapter on all of the following information:

28 (1) The motor vehicle identification information and the test data
collected at the station.

. . . .

(5) Data received and compiled through the use of the centralized
computer database and computer network to be established pursuant to Section
44037.1, and any other information determined to be essential by the department for
program enhancement to achieve greater efficiency, consumer protection, cost-
effectiveness, convenience, or emission reductions . . .

23. Health & Saf. Code section 44037.1 states, in pertinent part:

(a) On or before January 1, 1995, the department shall design and
establish the equipment necessary to operate a centralized computer data base and
computer network that is readily accessible by all licensed smog check technicians on
a real time basis.

1 (b) The centralized computer data base and network shall be designed
with all of the following capabilities:

2

3 (2) To provide smog check technicians and the department with
4 information as to the date and result of prior smog check tests performed on each
5 vehicle to discourage vehicle owners from shopping for certificates of compliance
as to permit the department to identify smog check stations for further investigation
as potential violators of this chapter.

6 (3) To provide the department with data on the failure rates and repair
7 effectiveness for vehicles of each make and model year on a statewide basis, and by
8 smog check station and technician, to facilitate identification of smog check stations
and technicians as potential violators of this chapter.

9

10 (8) To be compatible with the department's recordkeeping and
11 compilation requirements established by Section 44037.

12

13 (c) After January 1, 1995, each smog check station shall transmit vehicle
14 data emission test results to the department's centralized data base. Each smog check
station shall also transmit vehicle data and emission measurements made before and
after repair . . .

15 24. Title 16, California Code of Regulations, section 3340.17 states, in pertinent part:

16

17 (c) Vehicle data and test results from the OBD Inspection System (OIS)
18 shall be transmitted to the bureau's centralized database . . .

19 COST RECOVERY

20 25. Bus. & Prof. Code section 125.3 provides, in pertinent part, that a Board may request
21 the administrative law judge to direct a licentiate found to have committed a violation or
22 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
23 and enforcement of the case with failure of a licentiate to comply subjecting the license to not
24 being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs
25 may be included in a stipulated settlement.

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1 REVIEW OF OIS TEST DATA FOR HOWELLS SERVICE CENTER

2 **Background**

3 26. On March 9, 2015, California's Smog Check Program was updated to keep pace with
4 ever-advancing technology. The program update requires the use of an On-Board Diagnostic
5 Inspection System (BAR-OIS). BAR-OIS is the smog check equipment required in all areas of
6 the State when inspecting most model-year 2000 and newer gasoline and hybrid vehicles and
7 most 1998 and newer diesel vehicles. The system consists of a certified Data Acquisition Device
8 (DAD), computer, bar code scanner, and printer.

9 27. The DAD is an On Board Diagnostic (OBD) scan tool that, when requested by the
10 California BAR-OIS software, retrieves OBD data from the vehicle. The DAD connects between
11 the BAR-OIS computer and the vehicle's diagnostic link connector. The bar code scanner is used
12 to input technician information, the vehicle identification number, and DMV renewal
13 information. The vehicle identification number (VIN) that is physically present on all vehicles is
14 required to be programmed into the vehicle's On-Board Diagnostics – Generation II (OBD II) on
15 2005 and newer vehicles, and on many occasions was programmed into the OBD II computer in
16 earlier model-years. The electronically programmed VIN is referred to as the "eVIN", is captured
17 by the Bureau during a smog check inspection, and should match the physical VIN on the vehicle.
18 The printer is used to provide a Vehicle Inspection Report (VIR), which shows the inspection
19 results and the Smog Check Certificate of Compliance Number for passing vehicles. Data
20 retrieved and recorded during an OIS smog check includes the eVIN, the communication
21 protocol¹, and the number of Parameter Identifications (PID's)².

22 _____
23 ¹ The OBD II communication protocol describes the specified communication "language"
24 used by the OBD II computer to communicate to scan tools and other devices such as the BAR-
OIS. The communication protocol is programmed into the OBD II computer during manufacture
and does not change.

25 ² PID's are data points reported by the OBD II computer to the scan tool or BAR-OIS (for
26 example, engine speed (rpm), vehicle speed, engine temperature, etc.) The PID count is the
27 number of data points reported by the OBD II computer and is programmed during manufacture.
Each make and model vehicle reports a specific number of PID counts; i.e., the PID count does
not vary for that make and model vehicle.

1 **Factual Allegations**

2 28. Bureau Representative E. L. reviewed OIS test data pertaining to smog inspections
3 conducted at Respondent Howell's smog check facility. E. L. found that the facility's smog
4 check technician, Respondent Contreras, performed smog inspections on the 10 vehicles
5 identified below using a method known as "clean plugging",³ resulting in the issuance of
6 fraudulent certificates of compliance for the vehicles. E. L. also found that the same eVIN was
7 recorded during the inspections on Vehicles 3, 5, and 10.

8 29. On or about May 17, 2016, E. L. and another Bureau Representative made a field
9 visit to the facility and obtained copies of vehicle inspection reports ("VIRs") pertaining to the
10 smog inspections conducted on Vehicles 7 through 10, which were reprinted and signed by
11 Contreras. Respondent Howell was unable to locate or provide copies of the VIRs for Vehicles 1
12 through 6. E. L. observed a 2003 Chrysler PT Cruiser and 2007 Chevrolet Silverado C1500
13 parked in a lot adjacent to the facility. Later, E. L. obtained the DMV information for both
14 vehicles and found that the 2003 Chrysler PT Cruiser was registered to Respondent Howell and
15 the 2007 Chevrolet Silverado C1500 was registered to Respondent Contreras. E. L. obtained the
16 VIN numbers for the two vehicles from the Bureau's Vehicle Information Database ("VID") as
17 well as smog check inspection histories. E. L. found that the VIN number for the 2003 Chrysler
18 PT Cruiser was used to certify Vehicles 3, 5, and 10; the VIN number for the 2007 Chevrolet
19 Silverado C1500 was used to certify Vehicle 6.

20 **Vehicle 1:**

21 30. The OIS test data showed that on June 29, 2015, Respondent Contreras performed a
22 smog inspection on a 2008 Ford F250 Super Duty ("Vehicle 1"), resulting in the issuance of
23 electronic Smog Certificate of Compliance No. YT057431C. The OIS test details for Vehicle 1
24 showed that the eVIN was not recorded during the inspection. E. L. reviewed the Comparative

25 _____
26 ³ Clean-plugging is the use of a vehicle's properly functioning OBD II system, or another
27 source, to generate passing diagnostic readings for the purpose of issuing a fraudulent smog
28 certificate of compliance to another vehicle that is not in compliance with the Smog Check
Program and/or is not present for testing.

1 OIS Test Data for 2008 Ford F250 Super Duty vehicles and found that the majority transmitted
2 the eVIN during the inspection. Further, the communication protocol and PID count recorded
3 during the smog check on Vehicle 1 were not consistent with the communication protocol and
4 PID count for that make and model vehicle. E. L. concluded that the DAD was not connected to
5 Vehicle 1 during the smog inspection, resulting in the issuance of a fraudulent certificate of
6 compliance for the vehicle.

7 **Vehicle 2:**

8 31. The OIS test data showed that on September 10, 2015, at 09:15 hours, Respondent
9 Contreras performed a smog inspection on a 2004 Ford F250 Super Duty ("Vehicle 2"), resulting
10 in the issuance of electronic Smog Certificate of Compliance No. PU931979C. The OIS test
11 details for Vehicle 2 showed that the eVIN recorded during the inspection did not match the
12 physical VIN on the vehicle. E. L. reviewed the Comparative OIS Test Data for 2004 Ford F250
13 Super Duty vehicles and found that the majority do not transmit the eVIN during the inspection.
14 Further, the PID count recorded during the smog check on Vehicle 2 was not consistent with the
15 PID count for that make and model vehicle. E. L. concluded that the DAD was not connected to
16 Vehicle 2 during the smog inspection.

17 32. The Bureau's VID data showed that on September 10, 2015, at 09:19 hours,
18 Respondent Contreras conducted a smog inspection on a 2007 GMC Yukon and that the eVIN
19 transmitted to the VID was the same eVIN that was recorded during the smog inspection on
20 Vehicle 2. Further, the communication protocol and PID count recorded during the inspection on
21 the 2007 GMC Yukon were consistent with the communication protocol and PID count recorded
22 during the inspection on Vehicle 2. E. L. concluded that Respondent Contreras used the 2007
23 GMC Yukon's properly functioning OBD II system during the smog inspection on Vehicle 2,
24 resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

25 **Vehicle 3:**

26 33. The OIS test data showed that on October 28, 2015, at 19:22 hours, Respondent
27 Contreras performed a smog inspection on a 2001 Nissan Altima ("Vehicle 3"). The vehicle
28 failed the inspection. At 19:27 hours, Respondent Contreras performed a second smog inspection

1 on Vehicle 3, resulting in the issuance of electronic Smog Certificate of Compliance No.
2 PY367230C. The OIS test details for Vehicle 3 showed that the eVIN was recorded during the
3 second inspection and that it did not match the physical VIN on the vehicle. E. L. reviewed the
4 Comparative OIS Test Data for 2001 Nissan Altima vehicles and found that the communication
5 protocol and PID count recorded during the second smog check on Vehicle 3 were not consistent
6 with the communication protocol and PID count for that make and model vehicle. E. L.
7 concluded that the DAD was not connected to Vehicle 3 during the second smog inspection.
8 E. L. also found that the eVIN transmitted during the second inspection was for the 2003 Chrysler
9 PT Cruiser registered to Respondent Howell. E. L. concluded that Respondent Contreras used the
10 2003 Chrysler PT Cruiser's properly functioning OBD II system during the smog inspection on
11 Vehicle 3, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

12 **Vehicle 4:**

13 34. The OIS test data showed that on November 24, 2015, at 13:26 hours, Respondent
14 Contreras performed a smog inspection on a 2002 Chevrolet Tahoe K1500 ("Vehicle 4"),
15 resulting in the issuance of electronic Smog Certificate of Compliance No. QA013635C. The
16 OIS test details for Vehicle 4 showed that the eVIN recorded during the inspection did not match
17 the physical VIN on the vehicle. E. L. reviewed the Comparative OIS Test Data for 2002
18 Chevrolet Tahoe K1500 vehicles and found that the communication protocol and PID count
19 recorded during the smog check on Vehicle 4 were not consistent with the communication
20 protocol and PID count for that make and model vehicle. E. L. concluded that the DAD was not
21 connected to Vehicle 4 during the smog inspection.

22 35. The Bureau's VID data showed that on November 24, 2015, at 13:18 hours,
23 Respondent Contreras conducted a smog inspection on a 2007 Chevrolet Equinox LT and that the
24 eVIN transmitted to the VID was the same eVIN that was recorded during the smog inspection on
25 Vehicle 4. Further, the communication protocol and PID count recorded during the inspection on
26 the 2007 Chevrolet Equinox LT were consistent with the communication protocol and PID count
27 recorded during the inspection on Vehicle 4. E. L. concluded that Respondent Contreras used the

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1 2007 Chevrolet Equinox LT's properly functioning OBD II system during the smog inspection on
2 Vehicle 4, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

3 **Vehicle 5:**

4 36. The OIS test data showed that on October 5, 2015, a 2003 Toyota Highlander
5 ("Vehicle 5") was smog tested at another facility and failed the inspection. The OIS test details
6 showed that the eVIN was not transmitted during the inspection. On January 1, 2016,
7 Respondent Contreras performed a smog inspection on Vehicle 5, resulting in the issuance of
8 electronic Smog Certificate of Compliance No. QA581200C. The OIS test details for Vehicle 5
9 showed that the eVIN was recorded during the inspection of January 1, 2016, and that it did not
10 match the physical VIN on the vehicle. E. L. reviewed the Comparative OIS Test Data for 2003
11 Toyota Highlander vehicles and found that the communication protocol and PID count recorded
12 during the January 1, 2016, smog check on Vehicle 5 were not consistent with the communication
13 protocol and PID count for that make and model vehicle. E. L. concluded that the DAD was not
14 connected to Vehicle 5 during the January 1, 2016, smog inspection. E. L. also found that the
15 eVIN transmitted during the January 1, 2016, inspection was for the 2003 Chrysler PT Cruiser
16 registered to Respondent Howell. E. L. concluded that Respondent Contreras used the 2003
17 Chrysler PT Cruiser's properly functioning OBD II system during the smog inspection on Vehicle
18 5, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

19 **Vehicle 6:**

20 37. The OIS test data showed that on January 22, 2016, Respondent Contreras performed
21 a smog inspection on a 2000 Nissan Frontier XE ("Vehicle 6"), resulting in the issuance of
22 electronic Smog Certificate of Compliance No. YV913757C. The OIS test details for Vehicle 6
23 showed that the eVIN recorded during the inspection did not match the physical VIN on the
24 vehicle. E. L. reviewed the Comparative OIS Test Data for 2000 Nissan Frontier XE vehicles and
25 found that the majority do not transmit the eVIN during the inspection. Further, the
26 communication protocol and PID count recorded during the smog check on Vehicle 6 were not
27 consistent with the communication protocol and PID count for that make and model vehicle.

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1 E. L. concluded that the DAD was not connected to Vehicle 6 during the smog inspection. E. L.
2 also found that the eVIN transmitted during the inspection was for the 2007 Chevrolet Silverado
3 C1500 registered to Respondent Contreras. E. L. concluded that Respondent Contreras used the
4 2007 Chevrolet Silverado C1500's properly functioning OBD II system during the smog
5 inspection on Vehicle 6, resulting in the issuance of a fraudulent smog certificate of compliance
6 for the vehicle.

7 **Vehicle 7:**

8 38. The OIS test data showed that on February 20, 2016, Respondent Contreras
9 performed a smog inspection on a 2001 Mitsubishi Galant ES ("Vehicle 7"), resulting in the
10 issuance of electronic Smog Certificate of Compliance No. YX571480C. The OIS test details for
11 Vehicle 7 showed that the eVIN recorded during the inspection did not match the physical VIN
12 on the vehicle. E. L. reviewed the Comparative OIS Test Data for 2001 Mitsubishi Galant ES
13 vehicles and found that the majority do not transmit the eVIN during the inspection. Further, the
14 communication protocol and PID count recorded during the smog check on Vehicle 7 were not
15 consistent with the communication protocol and PID count for that make and model vehicle.
16 E. L. concluded that the DAD was not connected to Vehicle 7 during the smog inspection,
17 resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle. In
18 addition, the eVIN that was transmitted during the inspection was for a 2011 Nissan Altima.

19 **Vehicle 8:**

20 39. The OIS test data showed that on March 2, 2016, Respondent Contreras performed a
21 smog inspection on a 2006 Dodge Ram 2500 Mega Cab ("Vehicle 8"), resulting in the issuance of
22 electronic Smog Certificate of Compliance No. YX571498C. The OIS test details for Vehicle 8
23 showed that the eVIN was not recorded during the inspection. E. L. reviewed the Comparative
24 OIS Test Data for 2006 Dodge Ram 2500 Mega Cab vehicles and found that the majority
25 transmitted the eVIN during the inspection. Further, the communication protocol and PID count
26 recorded during the smog check on Vehicle 8 were not consistent with the communication
27 protocol and PID count for that make and model vehicle. E. L. concluded that the DAD was not

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1 connected to Vehicle 8 during the smog inspection, resulting in the issuance of a fraudulent
2 certificate of compliance for the vehicle.

3 **Vehicle 9:**

4 40. The OIS test data showed that on March 2, 2016, and March 7, 2016, a 2001 Ford
5 F250 Super Duty ("Vehicle 9") was tested at another smog check facility. The vehicle failed both
6 inspections due to a Comprehensive Component OBDII monitor not being ready. On April 15,
7 2016, Respondent Contreras performed a smog inspection on Vehicle 9, resulting in the issuance
8 of electronic Smog Certificate of Compliance No. ZB744061C. E. L. reviewed the Comparative
9 OIS Test Data for 2001 Ford F250 Super Duty vehicles and found that communication protocol
10 and PID count recorded during the smog check on Vehicle 9 were not consistent with the
11 communication protocol and PID count for that make and model vehicle. E. L. concluded that the
12 DAD was not connected to Vehicle 9 during the smog inspection, resulting in the issuance of a
13 fraudulent certificate of compliance for the vehicle.

14 **Vehicle 10:**

15 41. The OIS test data showed that on April 30, 2016, Respondent Contreras performed a
16 smog inspection on a 2003 Volvo XC90 T6 ("Vehicle 10"), resulting in the issuance of electronic
17 Smog Certificate of Compliance No. ZB744089C. The OIS test details for Vehicle 10 showed
18 that the eVIN was recorded during the inspection and that it did not match the physical VIN on
19 the vehicle. E. L. reviewed the Comparative OIS Test Data for 2003 Volvo XC90 T6 vehicles
20 and found that the majority do not transmit the eVIN during the inspection. Further, the
21 communication protocol and PID count recorded during the smog check on Vehicle 10 were not
22 consistent with the communication protocol and PID count for that make and model vehicle.
23 E. L. concluded that the DAD was not connected to Vehicle 10 during the smog inspection. E. L.
24 also found that the eVIN transmitted during the inspection was for the 2003 Chrysler PT Cruiser
25 registered to Respondent Howell. E. L. concluded that Respondent Contreras used the 2003
26 Chrysler PT Cruiser's properly functioning OBD II system during the smog inspection on Vehicle
27 10, resulting in the issuance of a fraudulent smog certificate of compliance for the vehicle.

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1 FIRST CAUSE FOR DISCIPLINE

2 (Untrue or Misleading Statements)

3 42. Respondent Howell's registration is subject to disciplinary action pursuant to Bus. &
4 Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized statements
5 which he knew or in the exercise of reasonable care should have known to be untrue or
6 misleading, as follows: Respondent Howell's smog check technician, Respondent Contreras,
7 certified that Vehicles 1 through 10, identified in paragraphs 30 to 41 above, had passed
8 inspection and were in compliance with applicable laws and regulations. In fact, Respondent
9 Contreras conducted the smog inspections on the vehicles using clean-plugging methods in that
10 he substituted or used his own vehicle (the 2007 Chevrolet Silverado C1500), Respondent
11 Howell's vehicle (the 2003 Chrysler PT Cruiser) or a different vehicle during the inspections in
12 order to issue smog certificates of compliance for the ten vehicles, and did not test or inspect the
13 vehicles as required by Health & Saf. Code section 44012.

14 SECOND CAUSE FOR DISCIPLINE

15 (Fraud)

16 43. Respondent Howell's registration is subject to disciplinary action pursuant to Bus. &
17 Prof. Code section 9884.7, subdivision (a)(4), in that Respondent committed acts which constitute
18 fraud by issuing electronic smog certificates of compliance for vehicles 1 through 10, identified in
19 paragraphs 30 to 41 above, without ensuring that bona fide inspections were performed of the
20 emission control devices and systems on the vehicles, thereby depriving the People of the State of
21 California of the protection afforded by the Motor Vehicle Inspection Program.

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1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Violations of the Motor Vehicle Inspection Program)**

3 44. Respondent Howell's smog check station license is subject to disciplinary action
4 pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to
5 comply with the following sections of that Code:

6 a. **Section 44012:** Respondent failed to ensure that the emission control tests were
7 performed on vehicles 1 through 10, identified in paragraphs 30 to 41 above, in accordance with
8 procedures prescribed by the department.

9 b. **Section 44015:** Respondent issued electronic smog certificates of compliance for
10 vehicles 1 through 10, identified in paragraphs 30 to 41 above, without ensuring that the vehicles
11 were properly tested and inspected to determine if they were in compliance with Health & Saf.
12 Code section 44012.

13 **FOURTH CAUSE FOR DISCIPLINE**

14 **(Failure to Comply with Regulations Pursuant**
15 **to the Motor Vehicle Inspection Program)**

16 45. Respondent Howell's smog check station license is subject to disciplinary action
17 pursuant to Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to
18 comply with provisions of Title 16, California Code of Regulations, as follows:

19 a. **Section 3340.15, subdivision (e)(3):** Respondent failed to make or keep secure the
20 vehicle inspection reports pertaining to the smog inspections performed on Vehicles 1 through 6
21 or failed to have those records available for inspection by Bureau Representative E. L.

22 b. **Section 3340.35, subdivision (c):** Respondent issued electronic smog certificates of
23 compliance for vehicles 1 through 10, identified in paragraphs 30 to 41 above, even though the
24 vehicles had not been inspected in accordance with section 3340.42.

25 c. **Section 3340.42:** Respondent failed to ensure that the required smog tests were
26 conducted on vehicles 1 through 10, identified in paragraphs 30 to 41 above, in accordance with
27 the Bureau's specifications.

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1 **FIFTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty, Fraud or Deceit)**

3 46. Respondent Howell's smog check station license is subject to disciplinary action
4 pursuant to Health & Saf. Code section 44072.2, subdivision (d), in that Respondent committed
5 dishonest, fraudulent or deceitful acts whereby another is injured by issuing electronic smog
6 certificates of compliance for vehicles 1 through 10, identified in paragraphs 30 to 41 above,
7 without ensuring that bona fide inspections were performed of the emission control devices and
8 systems on the vehicles, thereby depriving the People of the State of California of the protection
9 afforded by the Motor Vehicle Inspection Program.

10 **SIXTH CAUSE FOR DISCIPLINE**

11 **(Failure to Maintain Vehicle Inspections for Three Years)**

12 47. Respondent Howell's smog check station license is subject to disciplinary action
13 pursuant to Health & Saf. Code section 44072.2, subdivision (g), in that Respondent failed to
14 make or keep the vehicle inspections reports pertaining to the smog inspections performed on
15 Vehicles 1 through 6 or failed to have those records available for inspection by Bureau
16 Representative E. L.

17 **SEVENTH CAUSE FOR DISCIPLINE**

18 **(Violations of the Motor Vehicle Inspection Program)**

19 48. Respondent Contreras' smog check inspector and smog check repair technician
20 licenses are subject to disciplinary action pursuant to Health & Saf. Code section 44072.2,
21 subdivision (a), in that Respondent failed to comply with section 44012 of that Code in a material
22 respect, as follows: Respondent failed to perform the emission control tests on vehicles 1 through
23 10, identified in paragraphs 30 to 41 above, in accordance with procedures prescribed by the
24 department.

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1 **EIGHTH CAUSE FOR DISCIPLINE**

2 **(Failure to Comply with Regulations Pursuant**
3 **to the Motor Vehicle Inspection Program)**

4 49. Respondent Contreras' smog check inspector and smog check repair technician
5 licenses are subject to disciplinary action pursuant to Health & Saf. Code section 44072.2,
6 subdivision (c), in that Respondent failed to comply with provisions of Title 16, California Code
7 of Regulations, as follows:

8 a. **Section 3340.30, subdivision (a)**: Respondent failed to inspect and test vehicles 1
9 through 10, identified in paragraphs 30 to 41 above, in accordance with Health & Saf. Code
10 sections 44012 and 44035, and Title 16, California Code of Regulations, section 3340.42.

11 b. **Section 3340.42**: Respondent failed to conduct the required smog tests on vehicles 1
12 through 10, identified in paragraphs 30 to 41 above, in accordance with the Bureau's
13 specifications.

14 **NINTH CAUSE FOR DISCIPLINE**

15 **(Dishonesty, Fraud or Deceit)**

16 50. Respondent Contreras' smog check inspector and smog check repair technician
17 licenses are subject to disciplinary action pursuant to Health & Saf. Code section 44072.2,
18 subdivision (d), in that Respondent committed dishonest, fraudulent, or deceitful acts whereby
19 another is injured by issuing electronic smog certificates of compliance for vehicles 1 through 10,
20 identified in paragraphs 30 to 41 above, without performing bona fide inspections of the emission
21 control devices and systems on the vehicles, thereby depriving the People of the State of
22 California of the protection afforded by the Motor Vehicle Inspection Program.

23 **TENTH CAUSE FOR DISCIPLINE**

24 **(Dishonesty, Fraud, or Deceit)**

25 51. Respondent Contreras' brake adjuster license is subject to disciplinary action pursuant
26 to Bus. & Prof. Code section 9889.3, subdivision (d), in that Respondent committed acts
27 involving dishonesty, fraud, or deceit whereby another was injured, as set forth in paragraph 50
28 above.

1 MATTERS IN AGGRAVATION

2 52. To determine the degree of discipline, if any, to be imposed on Respondent John
3 Thomas Howell, owner of Howells Service Center, Complainant alleges as follows: On or about
4 February 18, 2011, the Bureau issued Citation No. C2011-0927 against Respondent for violations
5 of Health & Saf. Code section 44012, subdivision (f) (failure to determine that emission control
6 devices and systems required by State and Federal law are installed and functioning correctly in
7 accordance with test procedures); and Title 16, California Code of Regulations, section 3340.35,
8 subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). On
9 February 2, 2011, Respondent issued a certificate of compliance to a Bureau undercover vehicle
10 with a non-functional check engine light. The Bureau assessed civil penalties totaling \$1,000
11 against Respondent for the violations. Respondent paid the fine on March 14, 2011.

12 OTHER MATTERS

13 53. Pursuant to Bus. & Prof. Code section 9884.7, subdivision (c), the Director may
14 suspend, revoke or place on probation the registration for all places of business operated in this
15 state by Respondent John Thomas Howell, owner of Howells Service Center, upon a finding that
16 Respondent has, or is, engaged in a course of repeated and willful violations of the laws and
17 regulations pertaining to an automotive repair dealer.

18 54. Pursuant to Health & Saf. Code section 44072.8, if Smog Check Station License
19 Number RC 140278, issued to Respondent John Thomas Howell, owner of Howells Service
20 Center, is revoked or suspended, any additional license issued under this chapter in the name of
21 said licensee may be likewise revoked or suspended by the Director.

22 55. Pursuant to Health & Saf. Code section 44072.8, if Smog Check Inspector License
23 Number EO 634991 and Smog Check Repair Technician License No. EI 634991, issued to
24 Enrique Contreras, are revoked or suspended, any additional license issued under this chapter in
25 the name of said licensee may be likewise revoked or suspended by the Director.

26 56. Pursuant to Bus. & Prof. Code section 9889.9, if Brake Adjuster License Number BA
27 634991, issued to Enrique Contreras, is revoked or suspended, any additional license issued under

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1 Articles 5 and 6 of Chapter 20.3 of the Bus. & Prof. Code in the name of said licensee may be
2 likewise revoked or suspended by the Director.

3 **PRAYER**

4 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein alleged,
5 and that following the hearing, the Director of Consumer Affairs issue a decision:

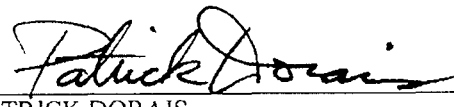
- 6 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
7 140278, issued to John Thomas Howell, owner of Howells Service Center;
- 8 2. Revoking or suspending any other automotive repair dealer registration issued to John
9 Thomas Howell;
- 10 3. Revoking or suspending Smog Check Station License Number RC 140278, issued to
11 John Thomas Howell, owner of Howells Service Center;
- 12 4. Revoking or suspending any additional license issued under Chapter 5 of the Health
13 and Safety Code in the name of John Thomas Howell;
- 14 5. Revoking or suspending Smog Check Inspector License Number EO 634991, issued
15 to Enrique Contreras;
- 16 6. Revoking or suspending Smog Check Repair Technician License Number EI 634991,
17 issued to Enrique Contreras;
- 18 7. Revoking or suspending any additional license issued under Chapter 5 of the Health
19 and Safety Code in the name of Enrique Contreras;
- 20 8. Revoking or suspending Brake Adjuster License Number BA 634991, issued to
21 Enrique Contreras;
- 22 9. Revoking or suspending any additional license issued under Articles 5 and 6 of
23 Chapter 20.3 of the Business and Professions Code in the name of Enrique Contreras;
- 24 10. Ordering John Thomas Howell, owner of Howells Service Center, and Enrique
25 Contreras, to pay the Director of Consumer Affairs the reasonable costs of the investigation and
26 enforcement of this case, pursuant to Business and Professions Code section 125.3; and

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11. Taking such other and further action as deemed necessary and proper.

DATED: *March 13, 2017* 

PATRICK DORAIS
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

03562-SA2016104072