

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

In the Matter of the Accusation Against:

**LUCY VENTURES,
dba SMOG REPAIR AND LUBE;**
1225 Parkside Dr.
Walnut Creek, CA 94596
Mitchel Scott Bornstein,
President/Secretary/Treasurer

Automotive Repair Dealer Registration No.
ARD 282023
Smog Check Station License No. RC 282023
Lamp Station License No. LS 282023, Class A
Brake Station License No. BS 282023, Class C

LUIS ANTONIO CABRIALES

Smog Check Inspector License No. EO 633674
Smog Check Repair Technician License No. EI
633674
Brake Adjuster License No. BA 633674
Lamp Adjuster License No. LA 633674

RANDY LEE HOWELL

Smog Check Inspector License No. EO 633592

BRANDEN L. EBERHART

Smog Check Inspector License No. EO 636778,

Respondents.

Case No. 79/16-13904

OAH No. 2017080930

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

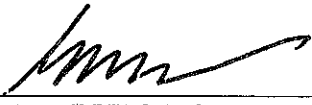
that, pursuant to Government Code section 11517, subdivision (c)(2)(C), technical or other minor changes in the Proposed Decision are made as follows:

1. Page 1, caption: License No. "E0633674" is corrected to "EO 633674."
2. Page 1, caption: License No. "E0636778" is corrected to "EO 636778."
3. Page 1, heading: "PROPOSED DECISION" is added.

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

This Decision shall become effective February 7, 2018.

DATED: 12/20/17



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

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RANDY LEE HOWELL

Smog Check Inspector License No. EO633592

BRANDEN L. EBERHART

Smog Check Inspector License No. E0636778,

Respondents.

Administrative Law Judge Perry O. Johnson, State of California, Office of
Administrative Hearings (OAH), heard this matter on September 7 and 18, 2017, in
Oakland, California.

Deputy Attorney General Justin R. Surber represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair, Department of Consumer Affairs, State of California.

Attorney at Law William D. Ferreira of Automotive Defense Specialists represented Lucy Ventures, LLC, dba Smog Repair and Lube (respondent corporation), and its president/secretary/treasurer Mitchel Scott Bornstein (respondent corporation's president), who was present for all phases of the administrative adjudication proceeding.

Luis Antonio Cabriaes (respondent Cabriaes) was present until approximately 12:30 p.m. on the first day of the hearing, but he was not otherwise represented. (Respondent Cabriaes did not return to the hearing room after the lunch-hour break on September 8, 2017. And, after that first day of the proceeding he made no effort to communicate with OAH regarding any interest to participate in the administrative adjudication proceeding.)

Neither Randy Lee Howell (respondent Howell) nor Branden L. Eberhart (respondent Eberhart) was present for either of the hearing dates in September 2017. (And, those two individual respondents did not file a Notice of Defense, or otherwise state their respective desire to participate in an administrative adjudication proceeding arising from the Accusation's allegations against each of them.)

On September 18, 2017, the matter was submitted for decision and the record closed.

FACTUAL FINDINGS

Interim Suspension Petition, Proceeding, and Orders

1. On July 13, 2017, Patrick Dorais (complainant) in his official capacity as, Chief of the Bureau of Automotive Repair (the Bureau), Department of Consumer Affairs, State of California, served a Petition for Suspension Order against respondents' respective licenses and registration. (Bus. & Prof. Code, § 495.) The petition alleged respondents' commission of acts in violation of the law warranted immediate cessation of all license rights of the respective respondents because should the Bureau permit the subject licentiates to continue in licensed activity would endanger the public health, safety, or welfare. On August 3, 2017, a hearing before an OAH administrative law judge was conducted where respondent corporation and respondent Cabriaes appeared. On August 9, 2017, a Decision issued from OAH whereby immediate suspension was ordered as to: Smog Check Station License No. RC282023 held by respondent corporation; Smog Check Inspector License No. EO633674 and Smog Check Repair Technician License No. EI633674 held by respondent Cabriaes; Smog Check Inspector License No. EO633592 held by respondent Howell; and, Smog Check Inspector License No. EO636778 held by respondent Eberhart.

On or approximately August 9, 2017, the subject licenses held by respondents were suspended. But, the decision set forth that “[a]ll other registrations and licenses at issue in this matter [shall] remain unmodified.” The orders were noted to “remain in effect pending further proceedings . . .” (Bus. & Prof. Code, § 495, subd. (f), and Health & Saf. Code, §44072.10, subd. (e).)

Accusation

2. On August 14, 2017, complainant, in his official capacity, made the Accusation against respondent corporation, respondent Cabriales, respondent Howell, and respondent Eberhart. The accusation seeks revocation of all licenses and the permanent invalidation of the automotive repair dealer registration issued to respondent corporation. The Accusation advances allegations of: knowingly making misleading statements; fraud; various violations of the Motor Vehicle Inspection Program; and dishonesty, fraud, or deceit in various aspects by the each respondent.

On August 18, 2017, respondent corporation, through its attorney, filed a Notice of Defense and Notice of Intent to Assert Affirmative and Special Defenses. On August 25, 2017, the Bureau received a Notice of Defense by respondent Cabriales.

On August 24, 2017, complainant’s attorney served on all respondents as well as respondent corporation’s attorney the Notice of Hearing, which prescribed the initial day of the hearing as September 7, 2017. The hearing in this matter ensued on September 7, 2017.

License History

AUTOMOTIVE REPAIR DEALER REGISTRATION - RESPONDENT CORPORATION

3. On November 16, 2015, the Bureau issued Automotive Repair Dealer Registration Number ARD 282023 (ARD) to respondent corporation to conduct licensed business activities at 1225 Parkside Drive, Walnut Creek, CA 94596 (the establishment’s premises). The ARD was in full force and effect at all times relevant to the allegations set out in the Accusation. It will expire on November 30, 2017, unless renewed, suspended, surrendered, or revoked before that date.

SMOG CHECK STATION LICENSE - RESPONDENT CORPORATION

4. On December 11, 2015, the Bureau issued Smog Check Station License Number RC 282023 (smog station license) to respondent corporation through the establishment’s premises. The smog station license was in full force and effect at all times relevant to the allegations set out in the Accusation. But, by reason of an Interim Suspension Order against respondent corporation, pending the disposition of the hearing in this matter, the smog check station license was suspended on approximately August 9, 2017.

LAMP STATION LICENSE

5. On or about December 11, 2015, the Bureau issued Lamp Station License Number LS 282023, Class A (lamp station license), to respondent corporation to conduct licensed activities at the establishment's premises. The lamp station license was in full force and effect at all times relevant to the allegations set out in the Accusation. The lamp station license will expire on November 30, 2017, unless renewed, suspended, surrendered, or revoked before that date.

BRAKE STATION LICENSE

6. On or about December 11, 2015, the Bureau issued Brake Station License Number BS 282023, Class C (brake station license), to respondent corporation to conduct licensed activities at the establishment's premises. The brake station license was in full force and effect at all times relevant to the allegations set out in the Accusation. The brake station license will expire on November 30, 2017, unless renewed, suspended, surrendered, or revoked before that date.

SMOG CHECK TECHNICIAN'S LICENSES

RESPONDENT LUIS ANTONIO CABRIALES - SMOG CHECK TECHNICIAN LICENSES

7. On September 30, 2011, the Bureau issued Advanced Emission Specialist Technician License Number EA 633647 to respondent Cabriales. Respondent Cabriales's EA technician license was due to expire on January 21, 2014, and was cancelled on February 14, 2014. Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), the license status was renewed, in accordance with respondent Cabriales's election,¹ as Smog Check Inspector License EO 633674 and Smog Check Repair Technician License EI 633674. Respondent Cabriales's Smog Check Inspector License and Smog Check Repair Technician License were renewed to January 31, 2018. By reason of an Interim Suspension Order², pending the disposition of the hearing in this matter, the smog check inspector license and smog check repair technician license were suspended on approximately August 9, 2017.

¹ Effective August 1, 2012, California Code of Regulations, title 16, section 3340.28, 3340.29 and section 3340.30 were amended to implement a license restructure from the Advanced Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog Check Inspector (EO) license and/or Smog Check Repair Technician (EI) license.

² Business and Professions Code section 494.

RESPONDENT LUIS ANTONIO CABRIALES - BRAKE ADJUSTER LICENSE

8. On or about January 4, 2016, the Director issued Brake Adjuster License BA 633674, Class C, to Respondent Cabriales. Respondent Cabriales' Brake Adjuster License will expire on January 31, 2019, unless renewed, suspended, or revoked before that date.

RESPONDENT LUIS ANTONIO CABRIALES - LAMP ADJUSTER LICENSE

9. On or about March 16, 2017, the Director issued Lamp Adjuster License LA 633674, Class A, to respondent Cabriales. Respondent Cabriales's Brake Adjuster License will expire on January 31, 2021, unless renewed, suspended, or revoked before that date.

RESPONDENT RANDY LEE HOWELL - SMOG CHECK INSPECTOR'S LICENSE

10. On or about September 08, 2011, the Director issued Advanced Emission Specialist Technician License Number EA 633592 to Randy Lee Howell (Respondent Howell). Respondent Howell's advanced emission specialist technician license was due to expire on January 31, 2014; however, the license was cancelled on January 27, 2014. Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), the license was renewed, pursuant to respondent Howell's election, as Smog Check Inspector License EO 633592. But, by reason of an Interim Suspension Order against respondent Howell, pending the disposition of the hearing in this matter, this smog check inspector's license was suspended on approximately August 9, 2017.

RESPONDENT BRANDEN L. EBERHART - SMOG CHECK INSPECTOR'S LICENSE

11. On or about April 18, 2014, the Director issued Smog Check Inspector License EO 636778 to Branden L. Eberhart (Respondent Eberhart). Respondent Eberhart's Smog Check Inspector License will expire on December 31, 2017, unless renewed. But, by reason of an Interim Suspension Order against respondent Eberhart, pending the disposition of the hearing in this matter, this smog check inspector's license was suspended on approximately August 9, 2017.

Default of Respondent Cabriales

12. Although he was present for the hearing on the morning of September 7, 2017, respondent Cabriales failed, after the lunch hour break, to return to the hearing site for the balance of the September 7 hearing, or the hearing sessions on Monday, September 18, 2017. Upon a determination that the Accusation, the Notice of Hearing and other jurisdictional documents had been properly served and filed, after September 7, 2017, in accordance with Government Code sections 11503, 11505, 11506, and 11509, the matter

proceeded as a default hearing, under Government Code section 11520, as to respondent Cabriaes.

Rather than the agency exercising its statutory prerogative to internally execute default proceedings against respondent Cabriaes; complainant, through his counsel, however, requested that evidence should be presented at the administrative adjudication proceeding, which included sworn testimony from witnesses and the presentation of substantial documentary evidence, so that the preparation of a proposed decision regarding respondent Cabriaes, based upon the evidence, would be issued through OAH.

Failure by Respondent Howell and Respondent Eberhart to File a Respective Notice of Defense or Otherwise Establish a Desire to Participate in the Administrative Adjudication Proceeding

13. Respondent Howell and respondent Eberhart did not file a respective Notice of Defense or otherwise state that either individual had a desire to participate in the administrative adjudication proceeding that would affect those respondents' respective personal interests. The matter proceeded as a default hearing, under Government Code section 11520, as to respondent Howell and respondent Eberhart.

Complainant's Contentions

14. Complainant contends that, through an investigation's findings and determinations, the three individual respondents, individually or together, were found to have performed ten fraudulent smog inspections using clean-plugging methods. Clean-plugging is the practice of testing one OBD II system (a system that would pass the smog inspection), for the purpose of fraudulently issuing a smog certificate of compliance to another vehicle that would not pass the smog inspection and/or is not present for testing. The vehicle receiving the certificate of compliance is not actually tested during the smog inspection.

Complainant further contends that respondent corporation is culpable for the acts of its employees, namely the three respondent smog check technicians, under the principle of nondelegable duty or strict liability for an employer for acts of his employee. But, complainant's contention that respondent corporation must suffer extreme licensure disciplinary action is not persuasive.

Complainant's Evidence

15. Bureau Program Representative Matthew Rodriguez (PR Rodriguez) provided compelling testimonial evidence at the hearing of this matter as to the unlawful acts of respondent Cabriaes, respondent Howell, and respondent Eberhart. The evidence supported imposition of the most severe license discipline against the three individual technicians.

The evidence, however, against respondent corporation is not legally sufficient so as to warrant revocation of licensure or any form of significant discipline that impedes the operation of the business or private enterprise objectives of respondent corporation or its president.

16. PR Rodriguez offered evidence that his investigation of data assembled from activities at the licensed facility of respondent corporation embraced a detailed overview over the period of September 2016 through January 2017. The investigation included the following factual findings:

2015 IMPLEMENTATION OF UPDATED SMOG CHECK TESTING SYSTEM

17. On March 9, 2015, the Bureau implemented a statewide regulatory change or update requiring the use of the On Board Diagnostic Inspection System (BAR-OIS) instead of the Emission Inspection System (EIS) for the smog testing of 2000 model year and newer gas powered, or 1998 model year or newer diesel powered vehicles, and all hybrid vehicles.

The new BAR-OIS smog inspection uses a Data Acquisition Device (DAD), a computer, a bar code scanner, and printer in the updated smog check process. The DAD is a scan tool that retrieves data from a tested vehicle's On Board Diagnostic, generation II, (OBD II) computer. The DAD connects the BAR-OIS computer to the vehicle's diagnostic link connector (DLC) to retrieve the data from the vehicle. The bar code scanner is used to input technician identification information, the vehicle identification number (VIN), and DMV renewal information. The printer is used to print Vehicle Inspection Reports.

Data retrieved and recorded during a BAR-OIS smog check testing session includes: the e-VIN, which is the digitally stored VIN programmed into a vehicle's Powertrain Control Module (PCM); the communication protocol as used by the OBD II computer to communicate to scan tools and other devices such as the BAR-OIS; and, the number of Parameter Identifications³ (PIDs), which is the number of specific data values each PCM uses relative to emissions controls.

As with the Bureau's past testing protocols such as the Emission Inspection System (EIS), as part of the BAR-OIS smog inspections, a smog check technician also performs a visual and functional test on the vehicle being inspected. The visual inspection of the emission control components verifies that the required emission control devices are present and properly connected. A functional test is performed on the malfunction indicator light

³ Parameter Identifications (PIDs) are data points reported by the OBD II computer to the scan tools or BAR-OIS. PIDs include: engine speed (RPM), vehicle speed, engine temperature, and other input and output values used by the OBD II computer. The "PID Count" is the number of data points reported by the OBD II computer that had been programmed during the manufacturing processes for a particular vehicle make and model.

(MIL). The BAR-OIS software renders the determination as to whether or not the vehicle passes the inspection based on the results of the OBD, visual and functional tests. Upon the vehicle being determined to have passed the inspection, the smog check technician issues a certificate of compliance. The information from the smog inspection is then transmitted to the Vehicle Information Data⁴ base (VID).

The Bureau can access the VID to view test data for smog check inspections performed at any smog check station, or search for, retrieve, and print a test record for a particular vehicle that has been tested.

GENERAL FINDINGS REGARDING CLEAN-PLUGGING PRACTICES IN THE STATE

18. Very important to the resolution of this matter, PR Rodriguez described in detail with persuasiveness and clarity the Bureau's encounter with the illegal activity known as "clean-plugging" activities by unethical, dishonest, grossly negligent, or incompetent personnel performing through the BAR-OIS smog check inspections at licensed smog check stations.

The Bureau has become aware of several methods used by smog check stations and smog check technicians to issue improper/fraudulent smog certificates of compliance. Clean-plugging is the unlawful and unethical practice of testing one OBD II system (a system that would pass the smog inspection), for the purpose of fraudulently issuing a smog certificate of compliance to another vehicle that would not pass the smog inspection and/or was not present for actual testing. The vehicle receiving the certificate of compliance is not actually tested during the smog inspection.

UNLAWFUL ACTS BY RESPONDENT SMOG CHECK TECHNICIANS

19. On approximately September 26, 2016, the Bureau, through PR Rodriguez, initiated an investigation of respondent corporation's business operations at the smog check station known as Smog Repair and Lube in Walnut Creek, California. PR Rodriguez learned that at least three individuals, namely respondent Cabriales, respondent Howell and respondent Eberhart, were licensed and authorized to perform smog check inspections at Smog Repair and Lube. And, he learned that respondent Cabriales acts as the site manager and lead smog check technician.

⁴ VID is a third-party database, which is physically administered under contract by a private company for the Bureau. VID is a collection of "all things smog related" that is stored in a confidential location, which is not "viewable" by the general public. VID includes vehicle information, smog check licensees' information, smog check related Registrations' information, and other critical records. The Bureau, through the agency's computerized tools, can access the information and data stored in VID. And, the VID can send to the California Department of Motor Vehicles any smog check certification for any vehicle.

20. From the records pertaining to suspected clean plugged vehicles, from the Bureau's comprehensive sets of data, PR Rodriguez selected for detailed analysis several vehicles that were determined to have undergone supposed smog inspections by respondent Cabriales, respondent Howell and respondent Eberhart. Upon completion of his detailed study, PR Rodriguez wrote a thorough report of the findings and determinations regarding the ten vehicles, which on various dates were given certificates of compliance by one of the subject technicians.

In his report to the Bureau, PR Rodriguez set out that he derives, from his analysis of detailed data, conclusions that by way of the respective access card issued separately to each of the smog check technicians, vehicles were solely inspected and certified through Smog Repair and Lube as owned by respondent corporation. The data revealed that the 10 vehicles, which were purportedly tested by, or under the control of respondent technicians, were not and could not have been connected to the DAD when the subject vehicles were being certified. The OBD II data purportedly transmitted by those 10 vehicles could not have been transmitted from a source connected to those vehicles.

PR Rodriguez found discrepancies for all of the following critical aspects of the BAR-OIS Smog Check inspections of the 10 closely studied vehicles as performed at Smog Repair and Lube: i) the transmitted e-VIN⁵ record; ii) communication protocol⁶ data; iii) PID count⁷ data for certified vehicles as compared to expected values of "Like Vehicles"⁸; and, iv) other transmitted comparative inspections. Because of various

⁵ The electronic vehicle identification number (e-VIN) has requirements for California OBD II certifiable vehicles, which encompasses all 2005 and later model year vehicles. That data mandated that the VIN must be available in a standardized format through the data link connector. Requirements for federally certified vehicles set forth that 2005 and newer LD vehicles must have the VIN encoded as part of the OBD data stream.

⁶ "Communication protocol" defines the rules governing the network interface for the transfer of data between the PCM and BAR-OIS or diagnostic scan tools. Vehicle manufacturers determine or select the protocol to be used for a manufactured vehicle. The protocol can be recorded in its basic characters or in an expanded form that may include additional characters. The basic form is primary and is always contained within the expanded form. (For example, ICAN11bt5 is a basic form versus the expanded form of ICAN11bt500, or I194 as the basic form versus the expanded form of I1940808).

⁷ The PID count is composed of the number of ECU addresses communicated with the number of data points available. Some vehicles may report multiple PID counts. In such instance, the first PID count is reported to the OBD II computer, while the second PID count is reported to the Transmission Control Module.

⁸ "Like Vehicles" are vehicles of the same manufacture, model and model year as inspected on the BAR-OIS.

discrepancies, the data closely studied by PR Rodriguez led to conclusions that each of the 10 vehicles had not been the vehicle connected to the DAD at the time of certification so that each smog inspection had been fraudulent.

21. On behalf of respondent corporation, doing business as Smog Repair and Lube, respondent Cabriales, respondent Howell, respondent Eberhart, or some other unethical person acting in their respective places, clean plugged 10 vehicles, which then resulted in the issuance of 10 fraudulent Smog Check Certificates of Compliance. PR Rodriguez established that records closely studied by him as to the 10 selected vehicles indicated that for each of the 10 vehicles, identified as having been given by, or through, respondents, a certificate of compliance, such vehicle had not received a lawful smog check inspection; but, rather another vehicle, or source, was used to simulate an OBD II connection.

22. Regarding the fraudulent and unlawful acts and omissions of the three smog check technician respondents, PR Rodriguez offered compelling testimony as follows:

CLEAN PLUG NO. 1

Clean Plug number 1 pertained to the September 26, 2016, issuance of Certificate of Compliance Number QE561390C, for the smog check inspection passing of a 2003 BMW 5301 Automatic, license plate number 5UGR094, with VIN WBADT63413CK29197. The eVIN was incorrectly set out as WBAPh4C5XAA176134. The OIS Test Data transmission showed an inexact Protocol of 1CAN11bt500 with an erroneous PID of 45/11. The inspection was unlawfully completed by respondent Howell. The expected OBD II values for like vehicles regarding an e-VIN number is not usually reported. The precise Protocol for the tested vehicle should have been I914 with an expected PID Count 23/1 or 24/1. On September 26, 2016, respondent Howell, or someone acting in his place, engaged in a fraudulent inspection of the 2003 BMW 5301. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2003 BMW 5301, when it was supposedly certified so that a certificate of compliance was issued fraudulently on September 26, 2016.

Of particular note is that on September 23, 2016, the same 2003 BMW 5301 Automatic vehicle failed an OIS Smog Inspection at Fire House Smog Check Station in Antioch, California, as administered under the Smog Check Technician license held by respondent Howell. During that test, which failed the vehicle on September 23, 2016, an eVIN was not reported, while the communication protocol was listed as I9140808 and the PID count was given as 23/1.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2003 BMW 5301 Automatic as being lawfully certified on September 26, 2016, by respondent Howell. The acts of respondent Howell caused the issuance of a fraudulent Certificate of Compliance.

CLEAN PLUG NO. 2

Clean Plug 2 pertained to the September 26, 2016, issuance of Certificate of Compliance Number QE624203C, for the smog check passing of a 2002 Chevrolet Trailblazer, license plate number 4TLP175 with VIN 1GNDS13S622189217. The OIS Test Data for the 2002 Chevrolet Trailblazer showed an incorrect eVIN of 3GCEK13328G119560, the communication protocol was inexactly listed as 1CAN11bt500 with an erroneous PID of 43/7. The inspection was unlawfully completed by respondent Howell. The expected OBDII value for like vehicles called for an eVIN number of 1GNDS13S622189217. The Protocol should have been JVPW with an expected PID Count 18. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2002 Chevrolet Trailblazer when it was supposedly certified so that a certificate of compliance was issued fraudulently on September 26, 2016, by the acts or omissions of respondent Howell. The subject vehicle was unlawfully deemed by the respondent smog check technician to have passed the smog check inspection by reason of clean plugging activities.

On September 26, 2016, respondent Howell's smog check technician identification number was used to execute a smog inspection of a 2008 Chevrolet Silverado K1500, license number 8U14584, at the establishment's premises. The OIS test data for the 2008 Chevrolet Silverado K1500 showed an eVIN of 3GCEK13328G119560, with the communications protocol was listed as 1CAN11bt500, and a PID count at 43/7. The data transmitted for the fraudulent smog inspection was identical to the data transmitted for the 2008 Chevrolet Silverado as to the eVIN, the communication protocol, and PID count.

Additionally, two years earlier on June 5, 2014, the same 2002 Chevrolet Trailblazer passed an OIS Smog Check Inspection at another facility called Tailpipes Detail and Smog Center. During that earlier inspection the expected OBD II values were reported with a correct or expected eVIN, the communication protocol was listed as JVPW1850 with the PID Count transmitted as 18.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2002 Chevrolet Trailblazer as being lawfully certified on September 26, 2016, by respondent Howell. The acts of respondent Howell caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 3

Clean Plug 3 pertained to the October 7, 2016, issuance of Certificate of Compliance Number QE995703C, for the smog check passing of a 2002 Chrysler Sebring LXI, license plate number 4XIU777, with VIN 1C3EL55R22N322926. The OIS Test Data for the 2002 Chrysler Sebring LXI showed an incorrect eVIN being reported as 1J4NF4FB1AD502301. The data set out incorrectly the communication protocol as 1CAN11bt500 and the PID count was erroneously given as 36/13. The inspection was unlawfully completed by respondent Howell. Similar Vehicle OIS Test Data for a 2002

Chrysler Sebring LXI indicate the correct eVIN being not reported; and data for similar vehicles reflect an expected communication protocol as JVPW, along with an expected PID count of 22/3.

Approximately one year earlier on August 19, 2015, the same 2002 Chrysler Sebring LXI failed an OIS Smog Check Inspection at a facility called SG Smog Check Center. During that inspection, the eVIN was not reported, the communication protocol was listed as JVPW1850 and the PID Count was correctly stated as 22/3.

On October 7, 2016, respondent Howell, or someone acting in his place, engaged in a fraudulent inspection of the 2002 Chrysler Sebring LXI. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2002 Chrysler Sebring LXI when it was supposedly certified so that a certificate of compliance was issued fraudulently on October 7, 2016, by the acts or omissions of respondent Howell.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2002 Chrysler Sebring LXI as being lawfully certified on October 7, 2016, by respondent Howell. The acts of respondent Howell caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 4

Clean Plug 4 pertained to the November 23, 2016, issuance of Certificate of Compliance Number ZL231418C, for the smog check passing of a 2001 Audi A6 2.7T Quattro, license plate number 6FIV887 and VIN WAUED64B71NI26074. The OIS Test Data for the 2001 Audi A6 2.7T Quattro showed an incorrectly reported eVIN of WBAUP935X8VF48059, and the communication protocol was inexactly listed as 1CAN11bt500 along with an erroneous PID count of 46/11. The inspection was unlawfully completed by respondent Eberhart. The expected OBDII value for like vehicles called for an e-VIN number being not reported. The Protocol should have been I914 with an expected PID Count 20, 21/5, 22 or 23/5. The presence of the incorrect values for the 2001 Audi A6 2.7T Quattro in the BAR-OIS Test Data established that the OIS (DAD) was not connected to the 2001 Audi A6 2.7T Quattro when that vehicle was supposedly certified. Hence, a certificate of compliance was issued fraudulently on November 23, 2016, by the acts or omissions of respondent Eberhart. The subject vehicle was unlawfully deemed by respondent Eberhart to have passed the smog check inspection by reason of clean plugging activities.

Approximately one and one-half years earlier on February 3, 2015, the same 2001 Audi A6 2.7T Quattro passed an OIS Smog Check Inspection at a facility called Automotive Unlimited. During that inspection, the eVIN was not reported, the communication protocol was listed as I9140808 and the PID Count was correctly stated as 21/5.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2001 Audi A6 2.7T Quattro as being lawfully certified on November 23, 2016, by respondent Eberhart. The acts of respondent Eberhart caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 5

Clean Plug 5 pertained to the November 28, 2016, issuance of Certificate of Compliance Number ZL324874C, for the smog check passing of a 2001 Volkswagen New Beetle GLS, license plate number 5SZV492. The OIS Test Data for the 2001 Volkswagen New Beetle GLS showed an incorrect eVIN of 5TDBT44A65S251281. And, the communication protocol was erroneously listed as 1CAN11bt500 along with the inexact PID count at 45. The inspection was unlawfully completed by respondent Eberhart. The expected OBD II value for like vehicles called for an e-VIN number as not reported. The Protocol should have been I914 with an expected PID Count of 17/5, 18, or 18/5. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2001 Volkswagen New Beetle GLS vehicle when the vehicle was supposedly certified. Hence, a certificate of compliance was issued fraudulently on November 28, 2016, by the acts or omissions of respondent Eberhart. The subject vehicle was unlawfully deemed by respondent Eberhart to have passed the smog check inspection by reason of clean plugging activities.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2001 Volkswagen New Beetle GLS as being lawfully certified on November 23, 2016, by respondent Eberhart. The acts of respondent Eberhart caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 6

Clean Plug 6 pertained to the December 5, 2016, issuance of Certificate of Compliance Number ZH206225C, for the smog check passing of a 2002 Chevrolet Trailblazer, license plate number 4UBF458 with VIN 1GNDT13S622199727. The OIS Test Data for the 2002 Chevrolet Trailblazer incorrectly showed an eVIN as not being reported. And, the data listed an erroneous communication protocol as 19140808 along with an inexact PID count of 17. The inspection was unlawfully completed by respondent Eberhart. The expected OBD II value for similar vehicles called for the correct e-VIN number of 1GNDT13S622199727. The Protocol, however, should have been JVPW with an expected PID Count of 18. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2002 Chevrolet Trailblazer when it was supposedly certified. Hence, a certificate of compliance was issued fraudulently on December 5, 2016, by the acts or omissions of respondent Eberhart. The subject vehicle was unlawfully deemed by respondent Eberhart to have passed the smog check inspection by reason of clean plugging activities.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2002 Chevrolet Trailblazer as being lawfully certified on December 5, 2016, by respondent Eberhart. The acts of respondent Eberhart caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 7

Clean Plug 7 pertained to the January 9, 2017, issuance of Certificate of Compliance Number ZN466939C for the smog check passing of a 2007 Audi Q7 3.6 Quattro Premium, license No. 7RAZ401, VIN WA1BY74L77D027465. The OIS Test Data for the 2007 Audi Q7 3.6 Quattro Premium showed an incorrect eVIN of 1FTZRI 4U46P A53560. And the data showed the listed communication protocol was JPWM1850 along with an erroneous PID count of 22. The inspection was unlawfully completed by respondent Cabriales. The expected OBD II value for like vehicles called for the correct e-VIN number of 1G3NL12E81C106790. The Protocol should have been ICANI11bt5 with an expected PID Count 43 or 43/14 for the 2007 Audi Q7 3.6 Quattro Premium. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2007 Audi Q7 3.6 Quattro Premium vehicle when it was certified. Hence, a certificate of compliance was issued fraudulently on January 9, 2017, by the acts or omissions of respondent Cabriales. The subject vehicle was unlawfully deemed by respondent Cabriales to have passed the smog check inspection by reason of clean plugging activities.

Additionally, the same 2007 Audi Q7 3.6 Quattro Premium passed an OIS Smog Check Inspection at Rohnert Park Smog on October 13, 2015 at a facility called Quik Smog. During that inspection the expected OBD II values were reported with the correct eVIN as well as the communication protocol listed as ICANI11bt5 and the PID Count as 43/14.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2007 Audi Q7 3.6 Quattro Premium as being lawfully certified on January 9, 2017, by respondent Cabriales. The acts of respondent Cabriales caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 8

Clean Plug 8 pertained to the January 20, 2017, issuance of Certificate of Compliance Number ZH826428C for the smog check passing of a 2004 BMW 745 LI, license plate number 5YAC670, VIN WBAGN63464DS48895. The OIS Test Data for the 2004 BMW 745 LI showed an incorrect eVIN of 2HKYF18535H540346. The data reflected an incorrect communication protocol is listed as I9140808 along with an inaccurate PID count of 24. The inspection was unlawfully completed by respondent Cabriales. The expected OBD II value for like vehicles sets forth the correct e-VIN number of WBAGN63464DS48895. The Protocol, however, should have been KWPF

with an expected PID Count 23/1 or 23/7 for the 2004 BMW 745 LI. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2004 BMW 745 LI vehicle when it was supposedly certified. Hence, a certificate of compliance was issued fraudulently on January 20, 2017, by the acts or omissions of respondent Cabriales. The subject vehicle was unlawfully deemed by respondent Cabriales to have passed the smog check inspection by reason of clean plugging activities.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2004 BMW 745 LI, as being lawfully certified on January 20, 2017, by respondent Cabriales. The acts of respondent Cabriales caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 9

Clean Plug 9 pertained to the January 24, 2017, issuance of Certificate of Compliance Number ZN620158C for the smog check passing of a 2004 BMW 745 LI, license plate number 7LXF416. The smog check transmission included an incorrect e-VIN number of WAIDKAFP3BA058598. And, the data falsely listed the communication protocol as ICAN11bt500 along with the inexact PID count of 44/10. The inspection was unlawfully completed by respondent Cabriales. The expected OBD II value for similar vehicles called for the correct e-VIN number of WBAGN63494DS51273. The Protocol should have been KWPF with an expected PID Count 23/1 or 23/7 for the 2004 BMW 745 LI. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the 2004 BMW 745 LI vehicle when it supposedly was certified. Hence, a certificate of compliance was issued fraudulently on January 24, 2017, by the acts or omissions of respondent Cabriales. The subject vehicle was unlawfully deemed by respondent Cabriales to have passed the smog check inspection by reason of clean plugging activities.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2004 BMW 745 LI, as being lawfully certified on January 24, 2017, by respondent Cabriales. The acts of respondent Cabriales caused the issuance of a fraudulent Smog Certificate of Compliance.

CLEAN PLUG NO. 10

Clean Plug 10 pertained to the January 26, 2017, issuance of Certificate of Compliance Number ZP025253C for the smog check passing of a 2000 GMC Yukon Denali, license plate number 4PPY674, with VIN 1GKEK13R7YR123144. The OIS Test Data for the 2000 GMC Yukon Denali showed the eVIN was 2B3LA53H38H202803. And, the data erroneously listed the communication protocol as ICAN11bt500 and the PID count was inexactly stated as 43/12. The inspection was unlawfully completed by respondent Cabriales. The expected OBD II value for like vehicles called for an e-VIN number of being not reported. The Protocol should have been JVPW with an expected PID Count 22 or 23 to the 2000 GMC Yukon Denali vehicle. Discrepancies in the BAR-OIS Test Data showed that the DAD was not connected to the

2000 GMC Yukon Denali vehicle when it was supposedly certified. Hence, a certificate of compliance was issued fraudulently on January 26, 2017, by the acts or omissions of respondent Cabriales. The subject vehicle was unlawfully deemed by respondent Cabriales to have passed the smog check inspection by reason of clean plugging activities.

The discrepancies in the OIS Test Data showed the OIS DAD was not connected to the 2000 GMC Yukon Denali, as being lawfully certified on January 26, 2017, by respondent Cabriales. The acts of respondent Cabriales caused the issuance of a fraudulent Smog Certificate of Compliance.

Dispositive Findings Regarding the Individual Respondent Smog Check Technicians

23. PR Rodriguez established that in the instance of each of the 10 closely studied set of records and data for the subject vehicles, the access codes assigned to respondent Cabriales, respondent Howell, and respondent Eberhart, without the knowledge, understanding or consent of respondent corporation's president, were used for clean plug activities at the smog check station known as Smog Repair and Lube. The licensed smog check facility at the establishment's premises was under the day-to-day management of respondent Cabriales. The nature and extent of the clean plug activities suggest that the individual respondent technicians acted outside the scope of the employment functions expected by the employing smog check station's owner. And, the devious aspects of the clean plug misconduct lead to an inference that the smog check technicians set out to undermine or sabotage the business venture of respondent corporation's president.

Evidence Supporting the Determination of the Lack of Culpability for Fraud, Dishonesty and Deceit on the part of Respondent Corporation and Its President/Principal Shareholder

24. By his forthright demeanor while testifying; his deliberate, conscientious manner throughout the proceeding; his earnest, thoughtful attitude towards the proceedings; and, his consistency in providing a compelling account of his rational estimations of the conduct and practices of the subject three smog check technicians, respondent corporation's president, Mitchel Scott Bornstein, demonstrated that he was a reliable and credible⁹ witness at the hearing.

25. Respondent corporation was licensed in 2015. At the end of 2015, respondent corporation acquired the establishment's premises in Walnut Creek, Contra Costa County.

In addition to respondent corporation's establishment in Walnut Creek, the corporation's president operates and owns two other smog check stations called Berkeley Smog Test Only Center in Alameda County, which was purchased in 2012, and Firehouse

⁹ California Government Code section 11425.50, subdivision (b), third sentence.

Smog in the City of Antioch, Contra Costa County, which was purchased in early 2015. Beginning in mid-2016, respondent corporation's president became a consultant to the owners of a smog check station in San Francisco called "Oil Can Henry's."

When the Bureau's findings of fraudulent activities by technicians were discovered, respondent corporation and its president had been engaged in the smog check inspection industry for about four years. And, respondent corporation's licensed establishment had operated for approximately one year when the Bureau detected clean plugging activities.

26. When the Bureau's detailed determinations against the respondent technicians were received by respondent corporation's president, he instituted expeditious and severe measures against the offending smog check technicians. The employment of each technician was summarily terminated in July 2017. Respondent corporation's president assured that the remaining technicians were persons without any record of disciplinary action level by the Bureau. And, he directed and implemented significant remedial measures, including installing video cameras at each smog check bay, to monitor the acts of any smog check technician engaged in smog check inspection services the licensed premises operated by him. (The security camera system installed by respondent corporation includes remote viewing capabilities to enable the corporate president, or his designee, to see the work activities of all smog technicians at licensed premises.) Other audit policies and procedures enable scrutiny of invoices for smog check services to be compared with security camera footage to ensure that the vehicles as inspected by a technician represents the same vehicle for which a certificate of compliance issued.

27. Respondent corporation's president is a well-educated, successful businessperson, who has had no motivation or inclination to engage in fraudulent, unlawful clean-plugging activities. He has a bachelor's degree in Economics from Yale University, and a Master's Degree in Business Administration, as awarded in 2002, from UCLA.

Respondent corporation's president is an ethical individual with a sound religious foundation as he is a member of Rodef Sholom Synagogue in San Rafael, Marin County.

Respondent corporation's president has served as a senior-level employee in other corporations and has operated various small businesses over a more than 20-year career in business. He has never been accused of any unethical, unlawful, or fraudulent acts or practices by his past employers, customers, or business associates.

When he resided in New York City, respondent corporation's president was a founder of a limousine company called "Urban Ride." He continues to act as a consultant for that New York corporation.

28. Respondent corporation's president has business interests in not only respondent corporation with its operations of Smog Repair and Lube, but also he is involved with two other smog check stations, namely Berkeley Smog and Firehouse Smog in Antioch, California.

29. Although he stressed to the smog check technicians, who were employed at the subject smog check station, the importance of efficiency and productivity, respondent corporation's president did not have access to the Bureau's database where eVIN transmissions can be analyzed to ascertain whether that data matched the vehicles being subject to smog check inspections. Such transmissions fall within the exclusive dominion of the Bureau. Respondent's corporation was not able to use the Bureau's information to monitor activity of technicians that might be unethical or fraudulent.

30. After receiving complainant's allegations that clean plugging activities had occurred at the establishment's premises, respondent corporation's president effected an analysis of the Bureau's data and records that were furnished him. Although he initially believed the technicians to have been innocent, following his analysis, respondent corporation's president found that in nine of the 10 instances of wrongdoing, DMV VIN numbers, which are necessary to initiate OIS smog inspections, were deliberately typed into the computer system rather than being scanned.

31. The acts of the three technicians were self-motivated, deliberate misconduct. The acts of misconduct by those three individuals were more likely than not fraudulent, deceitful, and dishonest. But, respondent corporation was neither deliberately unethical nor grossly neglectful in the wrongdoing perpetrated by the three technicians. No person having an ownership interest in respondent corporation, including its corporate president, permitted, condoned, or authorized the improper, unlawful smog check inspections carried out by respondent Cabriales, respondent Howell, and respondent Eberhart.

Although California law regarding the imposition of vicarious licensure liability upon an owner-licensee for the acts of such owner's employees, under the doctrine of strict liability or nondelegable duty, "unusual circumstances" can negate the presumption that the employer had the capacity to control the agent. The acts of the three smog check technician respondents exceeded the control of respondent corporation's president in that their conduct, especially as to respondent Cabriales can be inferred to have operated as a deliberate scheme to undermine or sabotage the business purposes of respondent corporation and its president. And, under the facts of this matter, respondent corporation is credible that the reasonably diligent oversight by respondent corporation's president, including the policies and practices that emphasized moral and honest practices of all employees, mitigate suggestions of deliberate or conscious bad acts being carried out by respondent corporation's president.

Moreover, the law does not dictate that an owner-licensee of a regulated business operation, such as a smog check station, must suffer the imposition of a similar penalty or a degree of discipline as imposed upon a wrongdoing licensed employee who actually perpetrated actual acts of dishonesty, fraud, or deceit. Where revocation of the individual respondent technicians may be appropriate, in the instance of a merely negligent business owner-licensee, no more than the period of suspension as suffered to the date of the decision would be appropriate.

Factual Bases to Sustain Causes¹⁰ For Discipline Against Three Individual Respondent Technicians

RESPONDENT EBERHART

*FOURTEENTH CAUSE FOR DISCIPLINE – DISHONESTY, FRAUD OR DECEIT -
SMOG CHECK LICENSE*

32. Respondent Eberhart committed acts involving dishonesty, fraud, or deceit, whereby another was injured by facilitating the issuance of electronic certificates of compliance for vehicles, described in Factual Finding 22 as Clean Plug No. 4, 5, and 6, without performing bona fide inspections of the emission control devices and systems of the vehicles presented to him for inspection. By his unlawful acts, respondent Eberhart deprived the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

*THIRTEENTH CAUSE FOR DISCIPLINE – VIOLATION OF THE MOTOR VEHICLE
INSPECTION PROGRAM – SMOG CHECK LICENSE*

33. Respondent Eberhart violated the Health and Safety Code and applicable regulations in that:

a. Respondent Eberhart failed to ensure that the emission control tests were performed on vehicles, described in Factual Finding 22 as Clean Plug No. 4, 5, and 6, in accordance with procedures prescribed by the Department. Thereby, he violated Health and Safety Code section 44012.

b. Respondent Eberhart willfully made false entries for the electronic certificates of compliance by certifying that vehicles, described in Factual Finding 22 as Clean Plug No. 4, 5, and 6, had been inspected as required when, in fact, they had not undergone a lawful inspection. Thereby, he violated Health and Safety Code section 44059.

c. Respondent Eberhart falsely or fraudulently facilitated the issuance of electronic certificates of compliance for vehicles, described in Factual Finding 22 as Clean Plug No. 4, 5, and 6, without him first performing bona fide inspections of the emission control devices and systems on those vehicles as required by Health and Safety Code section 44012. Thereby, he violated California Code of Regulations, title 16, section 3340.24, subdivision (c).

¹⁰ The causes for discipline as set out in this decision track the order of the allegations in the Accusation in reverse order as the acts of more culpable licensees are set out first under the Factual Findings portion and the Legal Conclusions segment of this decision.

d. Respondent Eberhart failed to inspect and test vehicles described in Factual Finding 22 as Clean Plug No. 4, 5, and 6, in accordance with Health and Safety Code section 44012 and California Code of Regulations, title 16, section 3340.42. Thereby, he violated California Code of Regulations, title 16, section 3340.30, subdivision (a).

e. Respondent Eberhart entered vehicle identification information into the emissions inspection system for a vehicle other than the one being tested. Respondent Eberhart knowingly entered false information about the vehicles being tested into the emissions inspection system. Thereby, he violated California Code of Regulations, title 16, section 3340.41, subdivision (c).

f. Respondent Eberhart failed to conduct the required smog tests and inspections on those vehicles in accordance with the specifications of the Bureau. Thereby, he violated California Code of Regulations, title 16, section 3340.42.

RESPONDENT HOWELL

*TWELFTH CAUSE FOR DISCIPLINE - DISHONESTY, FRAUD OR DECEIT -
SMOG CHECK LICENSE*

34. Respondent Howell committed acts involving dishonesty, fraud, or deceit, whereby another was injured by facilitating the issuance of electronic certificates of compliance for vehicles, described in Factual Finding 22 as Clean Plug No. 1, and 2, without performing bona fide inspections of the emission control devices and systems of the vehicles presented to him for inspection. By his unlawful acts, respondent Howell deprived the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

*ELEVENTH CAUSE FOR DISCIPLINE - VIOLATION OF THE MOTOR VEHICLE
INSPECTION PROGRAM - SMOG CHECK LICENSE*

35. Respondent Howell violated the Health and Safety Code and applicable regulations in that:

a. Respondent Howell failed to ensure that the emission control tests were performed on vehicles, described in Factual Finding 22 as Clean Plug No. 1, and 2, in accordance with procedures prescribed by the Department. Thereby, he violated Health and Safety Code section 44012.

b. Respondent Howell willfully made false entries for the electronic certificates of compliance by certifying that vehicles, described in Factual Finding 22 as Clean Plug No. 1, and 2, had been inspected as required when, in fact, they had not undergone a lawful inspection. Thereby, he violated Health and Safety Code section 44059.

c. Respondent Howell falsely or fraudulently facilitated the issuance of electronic certificates of compliance for vehicles, described in Factual Finding 22 as Clean Plug No. 1, and 2, without him first performing bona fide inspections of the emission control devices and systems on those vehicles as required by Health and Safety Code section 44012. Thereby, he violated California Code of Regulations, title 16, section 3340.24, subdivision (c).

d. Respondent Howell failed to inspect and test vehicles, described in Factual Finding 22 as Clean Plug No. 1, and 2, in accordance with Health and Safety Code section 44012 and California Code of Regulations, title 16, section 3340.42. Thereby, he violated California Code of Regulations, title 16, section 3340.30, subdivision (a).

e. Respondent Howell entered vehicle identification information into the emissions inspection system for a vehicle other than the one being tested. Respondent Eberhart knowingly entered false information about the vehicles being tested into the emissions inspection system. Thereby, he violated California Code of Regulations, title 16, section 3340.41, subdivision (c).

f. Respondent Howell failed to conduct the required smog tests and inspections on those vehicles in accordance with the specifications of the Bureau. Thereby, he violated California Code of Regulations, title 16, section 3340.42.

RESPONDENT CABRIALES

TENTH CAUSE FOR DISCIPLINE- DISHONESTY, FRAUD OR DECEIT – LAMP ADJUSTOR LICENSE

36. Respondent Cabriales committed acts involving dishonesty, fraud, or deceit, whereby another was injured by facilitating the issuance of electronic certificates of compliance for vehicles without performing bona fide inspections of the emission control devices and systems of the vehicles presented to him for inspection. By his unlawful acts, respondent Howell deprived the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

Discipline against the Lamp Adjustor License issued to respondent Cabriales is warranted, under Business and Professions Code section 9889.3, by reason of his unlawful conduct as a licensed smog check technician.

NINTH CAUSE FOR DISCIPLINE- DISHONESTY, FRAUD OR DECEIT – BRAKE ADJUSTOR LICENSE

37. Respondent Cabriales committed acts involving dishonesty, fraud, or deceit, whereby another was injured by facilitating the issuance of electronic certificates of compliance for vehicles without performing bona fide inspections of the emission control devices and systems of the vehicles presented to him for inspection. By his unlawful acts,

respondent Howell deprived the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

Discipline against the Brake Adjustor License issued to respondent Cabriales is warranted, under Business and Professions Code section 9889.3, by reason of his unlawful conduct as a licensed smog check technician.

*EIGHTH CAUSE FOR DISCIPLINE- DISHONESTY, FRAUD OR DECEIT –
SMOG CHECK LICENSES*

38. Respondent Cabriales committed acts involving dishonesty, fraud, or deceit, whereby another was injured by facilitating the issuance of electronic certificates of compliance for vehicles, described in Factual Finding 22 as Clean Plug No. 7, 8, 9 and 10, without performing bona fide inspections of the emission control devices and systems of the vehicles presented to him for inspection. By his unlawful acts, respondent Eberhart deprived the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

*SEVENTH CAUSE FOR DISCIPLINE – VIOLATION OF THE MOTOR VEHICLE
INSPECTION PROGRAM – SMOG CHECK LICENSE*

39. Respondent Cabriales violated the Health and Safety Code and applicable regulations in that:

a. Respondent Cabriales failed to ensure that the emission control tests were performed on vehicles described in Factual Finding 22 as Clean Plug No. 7, 8, 9 and 10, in accordance with procedures prescribed by the Department. Thereby, he violated Health and Safety Code section 44012.

b. Respondent Cabriales willfully made false entries for the electronic certificates of compliance by certifying that vehicles described in Factual Finding 22 as Clean Plug No. 7, 8, 9 and 10, had been inspected as required when, in fact, they had not undergone a lawful inspection. Thereby, he violated Health and Safety Code section 44059.

c. Respondent Cabriales falsely or fraudulently facilitated the issuance of electronic certificates of compliance for vehicles described in Factual Finding 22 as Clean Plug No. 7, 8, 9 and 10, without him first performing bona fide inspections of the emission control devices and systems on those vehicles as required by Health and Safety Code section 44012. Thereby, he violated California Code of Regulations, title 16, section 3340.24, subdivision (c).

d. Respondent Cabriales failed to inspect and test vehicles described in Factual Finding 22 as Clean Plug No. 7, 8, 9 and 10, in accordance with Health and Safety Code section 44012 and California Code of Regulations, title 16, section 3340.42. Thereby, he

violated California Code of Regulations, title 16, section 3340.30, subdivision (a).

e. Respondent Cabriales entered vehicle identification information into the emissions inspection system for a vehicle other than the one being tested. Respondent Cabriales knowingly entered false information about the vehicle being tested into the emissions inspection system. Thereby, he violated California Code of Regulations, title 16, section 3340.41, subdivision (c).

f. Respondent Cabriales failed to conduct the required smog tests and inspections on those vehicles in accordance with the specifications of the Bureau. Thereby, he violated California Code of Regulations, title 16, section 3340.42.

Insufficient Factual Bases to Sustain Causes For Discipline Due to Acts by Respondent Corporation, doing business as Smog Repair and Lube

ALLEGED SIXTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT –
LAMP STATION LICENSE

40. Respondent corporation, or its president, did not commit acts involving dishonesty, fraud or deceit, whereby another was injured, by authorizing, approving, or consenting to smog check technicians, employed at the licensed facility, to fail to perform bona fide inspections of the emission control devices and systems on the 10 vehicles described in Factual Finding 22.

Respondent corporation, or its president, did not possess knowledge that smog check technicians, who engaged in acts for which they had been licensed to execute, had failed to lawfully act as competent Bureau licensees before those persons' respective issuance of electronic certificates of compliance for 10 vehicles when such employees had not first conducted a respective proper smog check inspection.

Because acts by respondent technicians of dishonesty, fraud or deceit cannot be attributed to respondent corporation's smog check station license or automotive repair dealer registration no derivative action may be attributable to respondent corporation's lamp station license.

ALLEGED FIFTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT –
BRAKE STATION LICENSE

41. Respondent corporation, or its president, did not commit acts involving dishonesty, fraud or deceit, whereby another was injured, by authorizing, approving, or consenting to smog check technicians, employed at the licensed facility, to fail to perform bona fide inspections of the emission control devices and systems on the 10 vehicles described in Factual Finding 22.

Respondent corporation, or its president, did not possess knowledge that smog check technicians, who engaged in acts for which they had been licensed to execute, had failed to lawfully act as competent Bureau licensees before those persons' respective issuance of electronic certificates of compliance for 10 vehicles when such employees had not first conducted a respective proper smog check inspection.

Because acts by respondent technicians of dishonesty, fraud or deceit cannot be attributed to respondent corporation's smog check station license or automotive repair dealer registration no derivative action may be attributable to respondent corporation's brake station license.

ALLEGED FOURTH CAUSE FOR DISCIPLINE: DISHONESTY, FRAUD OR DECEIT
SMOG STATION LICENSE

42. Respondent corporation or its president did not commit acts involving dishonesty, fraud or deceit, whereby another was injured, by authorizing, approving, or consenting to smog check technicians, employed at the licensed facility, having failed to perform bona fide inspections of the emission control devices and systems on the vehicles described in Factual Finding 22. Respondent corporation, or its president, did not possess knowledge that smog technicians, who engaged in services for which they had been licensed to execute, had failed to lawfully act before the issuance of electronic certificates of compliance for vehicles when such employees had not first conducted a smog check inspection.

THIRD CAUSE FOR DISCIPLINE: VIOLATION OF THE MOTOR VEHICLE
INSPECTION PROGRAM -SMOG STATION LICENSE

43. Respondent corporation, through the acts and omissions of respondent technicians (Cabriales, Howell, and Eberhart), violated a provision of the Health and Safety Code and two applicable regulations in California Code of Regulations, Title 16. Respondent corporation neglected to thoroughly execute measures or to perfect practices and policies so that its three employee technicians did not violate the law. Respondent corporation's simple negligence or incompetence manifested as follows:

a. Health and Safety Code section 44012: Through incompetence or simple negligence, respondent corporation failed to ensure that emission control tests and test procedures were performed by smog check technicians employed at Smog Repair and Lube in accordance with procedures prescribed by the department.

b. California Code of Regulations, title 16, section 3340.24, subdivision (c): Respondent corporation negligently supervised its employee smog check technicians so that those three individual licensed smog technicians were able to falsely or fraudulently issue electronic certificates of compliance for certain vehicles without those individual licensed technicians first having performed bona fide inspections of the emission control

devices and systems on certain vehicles as required by Health and Safety Code section 44012.

c. California Code of Regulations, title 16, section 3340.42 subdivision (b)(2): Through incompetence or simple negligence, respondent corporation, through the acts of its employee technicians, failed to conduct the required smog tests and functional inspections on certain vehicles in accordance with the Bureau's specification as set out in the Smog Check Manual, which is referenced in California Code of Regulations, title 16, section 3340.45.

ALLEGED SECOND CAUSE FOR DISCIPLINE: FRAUD - REGISTRATION

44. Neither respondent corporation nor its president committed unprofessional and unlawful conduct that constituted fraud. Respondent corporation or its president committed no fraudulent act so as to adversely impact the automotive repair dealer registration issued to the corporation.

ALLEGED FIRST CAUSE FOR DISCIPLINE: MAKING OR AUTHORIZING UNTRUE OR MISLEADING STATEMENTS - ARD

45. Respondent corporation, or its president, negligently made statements that its president knew, or with the exercise of reasonable care by the president, the corporation's chief executive officer should have known, were untrue or misleading in the way of the false statements made by the three smog check technician respondents. Respondent corporation, however, did not authorize, consent, or approve that the technicians would fraudulently purport to test the 10 vehicles, and certified that the 10 vehicles passed inspection and were in compliance with applicable laws and regulations. And, respondent corporation's acts of maintaining the employment of three technicians reflected bona fide error.

Witnesses in Mitigation

46. Respondent corporation's president has the respect, admiration, and support of outstanding and productive members of the community as well as his immediate family. The following individuals offered compelling and persuasive testimony at the hearing as follows:

a. Mr. Michael Frederick Perlis has been a member of the California State Bar for 46 years. Mr. Perlis attended the Georgetown University Law Center in Washington, D.C. He has extensive experience in administrative agency regulatory law in that his career includes several years as a lawyer for the United States Securities and Exchange Commission (SEC). Mr. Perlis' tenure at the SEC included a few years as Assistant Director for the Division of Enforcement. His career as a California practicing lawyer includes several years with the San Francisco law firm of Pettit and Martin. Since 2011, he has been a partner with the Los Angeles law firm of Locke Lord LLP.

Mr. Perlis is respondent corporation's president's father-in-law. He has known respondent corporation's president for "a little over ten years."

Over the years, Mr. Perlis has come to know respondent corporation's president very well. Mr. Perlis views him as being a bright, kind, and honorable man. His knowledge, experience, and full assessment of respondent corporation's president's character, belief systems, and habits prompts Mr. Perlis to proclaim that it is wholly beyond comprehension that respondent corporation's president would have knowingly permitted, or condoned, smog check technicians at the subject licensed facility to engage in fraudulent smog check inspections or to deliberately issue inexact certificates of compliance for smog inspections that were not conducted according to the law.

Mr. Perlis has no doubt that respondent corporation's president will take all necessary, remedial measures to correct the internal business practices at the establishment's premises to prevent repetition of the unlawful conduct as shown by the three smog check technician respondents, whose conduct is noted above. And, Mr. Perlis recognizes that respondent corporation's president is a sophisticated and well-educated businessman, who has the faculty to learn from the experience of being adversely impacted by the wrongdoing of his employee smog check technicians so as to be subject to the instant action by the Bureau against his licenses.

b. Mr. Frederick William Lurman is a businessman and an environmental scientist. He is an air pollution expert; and, he has 40 years of experience engaged in environmental health issues. For the past 25 years, Mr. Lurman has focused his attention upon air pollution health effects whereby he interacts with epidemiologists and physicians in his very expansive studies. Mr. Lurman has authored or co-authored more than one hundred peer-reviewed journal articles on the dire impact of air pollution upon various body systems, such as the cardiovascular system, neurological system, as well as the pulmonary system. He has two distinct master's degrees (1975) in mechanical and environmental engineering from UC Santa Barbara. And, he engaged in two years of study and writing towards a Ph.D. in engineering with an emphasis on air pollution. Since 1977, Mr. Lurman has pursued research regarding air pollution topics.

Mr. Lurman has significant knowledge regarding the Bureau's smog check inspection program. In the 1980's, he testified before the California Legislature at the outset of the crafting of the law for the smog check program. Mr. Lurman has recently authored a comprehensive scholarly paper on the topics of "emission trends" and "air quality" in California over the past 25 years. The paper outlines the success of smog inspections including the adoption of on-board diagnostics as a means to lessen air pollution by automobiles.

Mr. Lurman knows respondent corporation's president very well because he married the stepdaughter of Mr. Lurman. He has known respondent corporation's president for 11 years. Mr. Lurman has spent a significant amount of time with respondent

corporation's president over the past decades. They talk, at least by telephone, no less than every week. Mr. Lurman perceives respondent corporation's president to be a very ethical person.

Mr. Lurman has a grasp of the nature and extent of the unacceptable impact of unlawful "clean plug" activities upon the Bureau's smog inspection program. Mr. Lurman discerns that it is wholly inconsistent with the ethical standards and deeply held beliefs of respondent corporation's president that smog check technicians would permit polluting vehicles to avoid the rigors of smog check inspections by engaging "clean plug" activities.

Although he is a proponent for rigorous enforcement and strict compliance of smog check laws as a means to protect the environment from air pollution caused, or worsened, by emissions from automobiles' engines, Mr. Lurman perceives that flaws are manifestly apparent in the enforcement of the Bureau's regulations in the instance of respondent corporation's president. The subject owner of the licensed smog check station has shown his sensitivity to clean air policies and had set out to fully comply with the Bureau's smog check regulations and State laws; but, he is not a smog check technician himself. More troublesome to Mr. Lurman is that the owner of the subject licensed smog check station had no warning from any Bureau representative that irregularities or possible deliberate wrongdoing had occurred at the establishment's premises.

c. Mr. Allan Lee McCall is the Human Resources senior executive for a company called "Square, Inc.," which is a publicly-traded financial services company. He manages the corporation's compensation programs for the company's employees.

Mr. McCall and respondent corporation's president were classmates as undergraduate students at Yale University more than 20 years.

Mr. McCall has developed skills and knowledge in the area of employment benefits and compensation. In two separate instances in the past, Mr. McCall caused respondent corporation's president to be hired into management-level and corporate-policy implementation positions. Respondent corporation's president always demonstrated the highest degree of business ethics and sound judgment when performing his official duties and while interacting with other company employees.

When respondent corporation's president worked in the corporate setting with Mr. McCall, there was never doubt regarding respondent president's trustworthiness and high level of integrity. Respondent corporation's president projected a hard, uncompromising line of ethics.

Based upon his two-decade long experience with respondent corporation's president, Mr. McCall knows that the subject owner of the licensed smog check station would never engage in unethical or unlawful acts to undermine the smog check inspection laws.

Mr. McCall knows that respondent corporation's president will take detailed and extensive corrective action to correct the wrongs carried out by the three smog check technicians

Mr. McCall knows respondent corporation's president to be a very intelligent, competent, and diligent executive. He knows that despite respondent corporation's president's best effort, he was unable to stop employees from expressing their free will to execute "bad things" in a way that the errant employees' acts were outside the control and ability of respondent corporation's president to adequately monitor in light of the lack of full understanding of the unprofessional conduct of clean plugging.

47. Respondent corporation's president has the support and admiration of many persons in the community. At the hearing of this matter, he offered seven¹¹ declarations, email messages, and letters. (Those forms of written communication supplement and explain the testimonial evidence from respondent corporation's president. (Gov. Code, § 11513, subd. (d)).) The letters and other correspondence uniformly describe respondent corporation's president as being "honest, respectful, law-abiding and considerate"; or "reliable and honest"; or "highest integrity and efficiency"; or "the most honest and upstanding shop owners"; or "honest, trustworthy, hardworking, and reliable . . . [having] high moral character"; or "both prompt and honest about the service needed"; or "utmost honesty and integrity."

48. Licensed smog check technicians, who have been associated with respondent corporation's president, offered testimony at the hearing of this matter.

a. Mr. Adam Kilpatrick is an automobile repair technician who is employed at respondent corporation's licensed automotive repair establishment. He has been associated with respondent corporation's president "off and on" over the past five years. He has ASE certifications in brakes, and advanced engine diagnostics. He was worked in the automotive repair industry for approximately 20 years. Mr. Kilpatrick is licensed also as a smog check technician.

Mr. Kilpatrick characterizes respondent corporation's president as "first class" because he holds "consumer satisfaction" and "good quality of work" as paramount considerations that are "above all else." Respondent corporation's president expects a high degree of "accountability" as a very integral factor in the business. He is an engaged business owner, who cannot be deemed to be an "absentee owner." Respondent corporation's president does not miss a week in coming to the business location. And, he

¹¹ A letter, dated July 24, 2017, by Amy Bornstein; an email message, dated July 28, 2017, by Jake Gukowsky of Jakeyland Productions; a letter, dated July 29, 2017, by Hwi Bin Kim; a letter, dated July 28, 2017, by Arka Kargodorian; an email message, dated July 28, 2017, by Matt Abrams; an email message, dated July 28, 2017, by Jon Dunphy; a letter, dated July 28, 2017, by Ben Zadik, Certified Public Accountant and Chartered Accountant, Walnut Creek.

actively participates in "helping around" the shop, including working "at the counter" and "writing up" work orders.

Mr. Kilpatrick has no personal knowledge that any smog check technician had actively engaged in clean plugging at respondent corporation's licensed premises. But, Mr. Kilpatrick recalls that after the Bureau initiated the Accusation in this matter that respondent corporation's president expressed a suspicion that respondent Cabriales had effected all of the clean plug activities for the 10 vehicles identified in the Accusation. Mr. Kilpatrick never heard any smog check technician state that such person had knowledge of clean plug activities being carried out at respondent corporation's licensed establishment.

Mr. Kilpatrick has determined respondent corporation's president to be an honest owner of the subject smog check facility.

b. Damien Rochells is a smog technician and automobile repair mechanic. He was worked in the industry for 15 years. He has held several ASE certificates.

Mr. Rochells worked as a smog check technician at respondent corporation's establishment from August 2015 during sporadic and irregular periods of time.

Currently, Mr. Rochells is employed at a facility known as "Seven Day Per Week Smog" Check Station.

Based upon his observations and experience with respondent corporation's president, Mr. Rochells holds a strong view that that smog check station owner would never be complicit in any unlawful smog check activities. In the view of Mr. Rochells, respondent corporation's president is "one of the few owners" who is unswerving in his commitment to improving performance conditions. In light of his experience at approximately 10 other smog check stations, respondent corporation's president is at the very top of conducting ethical business practices. In addition, Mr. Rochells has been encouraged by the receptive nature for open discussions concerning good practices as voiced by respondent corporation's president. That business owner had been willing to take fewer customers in order for thorough and professional inspections to be performed at the establishment's premises. Respondent corporation's president has been always willing to listen, learn, and to be engaged in the smog check industry. Only after respondent corporation's president had began to operate the business did he come to the realization that a smog check station owner is "at the mercy" of smog check technicians, who might perform inspections contrary to the Bureau's regulations.

Mr. Rochells described the practical impediments for a smog check technician having a blemish free record of smog inspections. He vividly and credibly relayed his experience of innocently making an error of "plugging" into the wrong car during a smog inspection. He proclaimed that when an error is made with erroneously plugging into a vehicle that a smog check technician has no means of aborting or rescinding the smog inspection after a certain stage.

c. Mr. Jessie Kent is a smog technician. He has been licensed for eight or nine years. Mr. Kent has worked at Berkeley Smog, Firehouse Smog, as well as respondent corporation's licensed establishment. In addition, while a student in a smog check course, Mr. Kent worked at a Bureau Referee Center.

Mr. Kent has a work history for respondent corporation that spanned approximately five years; however, his work has been mostly performed at Firehouse Smog in Antioch and Berkeley Smog. Mr. Kent worked for only a short period of time at the licensed establishment's premises.

Mr. Kent has no knowledge of clean plugging activities being conducted by any smog check technician at respondent corporation's establishment. And, he has no knowledge that passwords used by technicians were ever exchanged or used between technicians.

Mr. Kent has a view that respondent corporation's president is "involved" at the smog check station, where he acts more as a "co-worker" than as a "boss." Respondent corporation's president demonstrates a keen interest to learn more and more about the smog check business. Mr. Kent has "very much" enjoyed having been employed by respondent corporation's president.

Mr. Kent holds an intense view that respondent corporation's president would never tolerate overt acts of unlawful clean plugging activities. They have talked "over and over again" about smog inspections being performed properly and lawfully. Respondent corporation's president has voiced that clean plugging activities make no business or practical sense in light of the tremendous risk of loss of an entire business through licensure revocation.

Mr. Kent has seen the implementation of many detailed remedial measures taken by respondent corporation's president. Mr. Kent personally participated in the placement of surveillance cameras at Berkeley Smog, where he is currently employed.

d. Mr. Kevin McGilbra is a smog check technician and a "mechanic." He has worked in the automotive repair industry since approximately 1996. And, he has been a smog check technician for about 20 years.

As of the date of the hearing in this matter, he had been employed for "about one month" at Quality Star Smog.

Mr. McGilbra was employed by respondent corporation's president beginning in July 2016. Mr. McGilbra views respondent corporation's president to be one of only two employers that he would ever work for again. Respondent corporation's president was "easy going" and never pushy as a smog check owner or manager.

Mr. McGilbra has been favorably impressed with the policies and procedures recently implemented by respondent corporation's president to assure the performance of ethical and correct smog inspections.

Mr. McGilbra has never observed any unlawful smog check inspections performed at respondent corporation's establishment. He has never heard any smog check technicians discuss clean plugging actions at the establishment's premises.

49. In addition to the smog check technicians who appeared as witnesses at the hearing, 14 individuals submitted written declarations¹² under penalty of perjury. Those declarations consistently advanced the following:

- Respondent corporation's president had never asked the smog check technician, who signed the declaration, to work in any manner in which the licensee felt uncomfortable or to violate any rule set forth by the Bureau.
- Respondent corporation's president had never forced, encouraged, or requested the technician to increase his pace during any smog check inspection that the technician had performed at the risk of causing clerical errors that could lead to 'clean-plugging.'
- Respondent corporation's president had never forced, encouraged, or requested the technician to share an assigned password with him or among other employees.
- The writing smog check technician had never witnessed, or knowingly or intentionally observed, permitted or participated in the 'clean-plugging' of any vehicle that had been smogged at the establishment's premises, Berkeley Smog or Firehouse Smog.
- Respondent corporation's president is an upstanding and honest citizen and business owner. The technician has a wonderful working relationship with respondent corporation's president. And, the writing smog check technician is confident that respondent corporation's president would never knowingly or intentionally violate any law set forth by the Bureau.

¹² Declarations by licensed smog check technicians in support of respondent corporation's president as executed under penalty of perjury by Adam Kilpatrick; Damien Rochells; Al Le; Michael Donahoe; Kevin McGilbra; Mozart Macaalay; Jessie Kent; Antoine Bracy; Juan Castaneda; Christopher Solis; Fernando Flores; Dominic B. Ducut; Aladdin Adam; and Enrique Gonzales.

Matters in Rehabilitation

50. Respondent corporation, through its president, has instituted expansive procedures and policies to assure that the unlawful clean plugging activities, or similar misconduct, by licensed smog inspection technicians, will not occur again at licensed facilities owned, managed, or controlled by respondent corporation's president.

Among the measures executed by respondent corporation's president was the creation of a document titled "Smog Inspection Audit Policy and Procedures." Respondent corporation's management has required each licensed smog inspection technician to sign the document. The document includes the following:

1. Prior to all Smog Check Inspections, Technicians MUST use the shop-provided SCAN TOOL to plug into the vehicle being tested and check to live data on RPM's. This ensures the technician is plugging into the vehicle and NOT a Simulator.
2. Each and every vehicle that is to undergo a Smog Inspection must be handwritten and/or typed on the Inspection Sheet by the Smog Inspection Technician prior to performing any inspection.
3. Any smog inspection technician who performs a smog inspection on a vehicle is to sign and date each Invoice and/or Inspection Sheet.
4. Each invoice and/or report generated for each smog inspection is to be kept in a binder for later inspection by the Owner.
5. Every vehicle that enters the facility for a smog inspection is to be recorded via surveillance so that each invoice matches each vehicle's make and model.
6. The Owner will perform an audit of each of (sic) all invoices recorded by the Smog Technician for each vehicle for which a smog inspection was performed for compliance purposes during a random time period.
7. Should any Smog Inspection Technician fail to comply with the procedures outlined herein and perform any illegal smog inspections, a complaint will be filed with the Bureau of Automotive Repair (BAR), and a police report will be immediately filed with the Police Department to deter such conduct.

Respondent corporation has obtained the signatures on the "Smog Inspection Audit Policy and Procedures" document of no less than a half-dozen licensed smog check inspectors employed at the licensed establishment.

51. Also, respondent corporation's president has caused several smog check technicians to affix respective signatures upon a document titled "Employee Liability Agreement." The document, which sets out covenants and promises underpinning the employment services of Smog Check Technicians, includes the following provisions:

Pursuant to my employment with Smog Repair and Lube, I hereby certify that I am a licensed Smog Check Technician with the ability and knowledge to perform all aspects of a California Smog Check Inspection.

[¶] . . . [¶]

I understand that I do not have to perform every Smog Check Inspection. If I have a question about a vehicle, its emission systems or inspection procedures, I may abort the test at any time and direct the vehicle to a State Referee facility if I am unsure of anything. I understand there will be no penalty from aborting a test and sending the consumer to a referee.

[¶] . . . [¶]

I understand the Bureau of Automotive Repair consistently sends undercover vehicles with missing components for the visual portion of the test. I am required to visually verify all components

I understand the Bureau of Automotive Repair consistently sends undercover vehicles to facilities with functional defects in a vehicle to verify compliance with all testing procedures. I must always perform all aspects of the functional tests as required by law including, but not limited to, gas caps, timing, and EGR valves.

[¶] . . . [¶]

Failure to perform a Smog Check Inspection in accordance with these requirements is prohibited, and will be grounds for immediate termination. Performing an inspection outside of the Bureau mandated guidelines is outside the scope and course of my employment. I am only authorized to perform proper Smog Check Inspections at Smog Repair and Lube.

I am required to use the OIS machine for all 1998 and newer diesel vehicles and 2000 and newer Gasoline powered vehicles. I am not authorized, permitted, or allowed to perform ANY offline tests.

When I sign the Vehicle Inspection Report at the conclusion of the Smog Check Inspection, I am certifying under penalty of perjury that I have complied with all Bureau requirements in the performance of the inspection.

Respondent corporation's president has obtained the signatures on the "Employee Liability Agreement" document of no less than a half-dozen licensed smog check inspectors employed at the licensed establishment.

52. Complainant's expert, PR Rodriguez, acknowledged that respondent corporation's written policies, including the "Smog Inspection Audit Policy and Procedures" document, represent the type of practices that an honest owner of a smog check station can implement to meet the goal of strict oversight.

PR Rodriguez noted that there are dishonest smog check technicians, who are very clever, and who can execute unlawful, unethical smog check inspections should such technicians be deliberately intent in devolving into misconduct. Hence, there are no "fool-proof or sure-fired" systems, surveillance equipment, and supervision technicians that an exceedingly scrupulous smog check station owner/ operator can employ to absolutely halt unlawful smog check inspections. No matter what level of "checks and balances" for oversight is created by an honest smog check station owner, a dishonest smog check technician can defeat such checks and balances.

53. PR Rodriguez confirmed that some of the 10 detected illegal clean plugging activities were executed in 90 seconds or less.

54. Before the first filing of the Petition for an Interim Suspension Order so as to close down respondent corporation's licensed establishment, no communication about the suspected wrongdoing by technicians at the establishment was ever conveyed to respondent corporation's president.

Other Matters that Refute Complainant's Accusation's Allegations Against Respondent Corporation

55. Respondent corporation, through its president, offered comprehensive documentary evidence (exhibit "M") suggesting that respective records for supposed clean plugging incidents were corrected by new entries within minutes of the time for the supposed initial illegal smog inspection.

56. Contrary to written assertions by respondent technicians, and in particular respondent Cabriaes, respondent corporation's president was not present at the Walnut Creek, California, licensed facility to dictate, direct, or suggest illegal clean plug activities. Respondent corporation's president established that on nine dates of the 10 days that clean plugging occurred, he was not present at the premises of the licensed establishment, Smog Repair and Lube. And, for the single date where he could not definitely show his whereabouts when a clean plug was performed at the licensed establishment, respondent corporation's president was more likely at his business location in Berkeley.

Costs of Investigation and Prosecution

COSTS OF INVESTIGATION

57. On August 25, 2017, Program Manager I Mark Fernandez, certified that a single program representative was involved with the investigation of this matter. The certification established the following:

Fiscal Year	Hours	Hourly Rate	Cost
2016/17	58	\$73.66	\$4,272.28
Total Costs of Investigation			\$4,272.28

COSTS OF PROSECUTION SERVICES

58. Deputy Attorney General Justin R. Surber certified, on September 16, 2017, that the costs of prosecution by the Department of Justice on behalf of the Bureau were incurred regarding the Accusation against respondents as follows:

Deputy Attorneys General	Fiscal Year 2017	Hours	Rate \$170	Cost \$
DAG Amber N. Wipfler		0.25		\$42.50
DAG Brett Kingsbury		0.50		\$85
DAG Frank H. Pacoe		1.0		\$170
DAG Justin R. Surber		27		\$4,930
DAG Leslie E. Brast		0.25		\$42.50
DAG Surber	2016	1.5		\$255
DAG Surber	2017 supplement	3.25		\$552.50
Paralegal Isabel Barraza	2016	2.0	\$120	\$240

The sum of prosecution costs, through the Department of Justice (DOJ), is \$5,977.50.

59. The total costs of investigation and prosecution in this matter are \$10,249.78

Those are the costs actually, necessarily, and reasonably incurred prosecuting this matter against the three individual smog technician respondents. The hearing of this matter pertained to comprehensive analysis by a Bureau program representative as well as extensive work by complainant's lawyer, Deputy Attorney Surber, as to the individual

smog check technicians. And there was a paralegal personnel who provided billable services regarding assembling and studying those individual respondents' fraudulent and unlawful records that were related to "Clean Plugging" practices permitted, or executed.

But, the imposition upon respondent corporation of more than a fraction of the costs of the Bureau's investigation and prosecution in this matter would not be reasonable, appropriate, or just.

GENERAL FINDING AS TO RESPONDENT TECHNICIANS' LIABILITY FOR THE COSTS

60. Due to the default and resultant failure of respondent Cabriales, respondent Howell, or respondent Eberhart to appear for the hearing, those individual respondents did not advance any meritorious defense in the exercise of their respective rights to a hearing in this matter. Also, those individual respondents cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct in the context of the Accusation. The individual respondents did not raise any "colorable challenge" to complainant's Accusation's causes for discipline. The individual respondents did not contest or refute the conclusions of the Bureau's program representatives that those three individual smog check technicians, with the mismanagement, unethical direction, or grave neglect of respondent Cabriales, respondent Howell, or respondent Eberhart which arose out of five overriding deficiencies, which were: (i) making misleading statements; (ii) engaging in fraud; (iii) violating statutes and regulations pertaining to the Motor Vehicle Inspection Program; (iv) pursuing a pattern of dishonesty, deceit and fraud; and, (v) violating the requirements prescribed in regulations of the Bureau.

The immediate foregoing factors do not indicate that the imposition upon the three individual respondents of no less than ninety (90%) percent of the costs of prosecution and investigation will unfairly penalize respondents. And, a substantial basis does not exist to warrant a reduction of the assessment against the respondent technicians for the costs of prosecution as incurred by complainant.

Respondent Cabriales, respondent Howell, respondent Eberhart are jointly and severally liable for payment to the Department, on behalf of the Bureau, for the reasonable and appropriate costs of investigation and prosecution as set in an amount of \$9,224.80.

RESPONDENT CORPORATION'S OBLIGATION FOR PAYMENT OF ONLY A PORTION OF THE BUREAU'S COSTS RECOVERY

61. Imposition upon respondent corporation of more than ten (10%) percent of the total of costs of investigation and prosecution would be unreasonable and not just. Through the comprehensive presentation of its learned counsel and advocate, respondent corporation advanced an exceedingly meritorious defense. Respondent corporation and its president established slight or inconsequential misconduct, in the form of negligence at most, occurred as to involvement in the matters alleged in the Accusation. Respondent corporation rendered persuasive "colorable challenges" to complainant's Accusation's

causes for discipline. And, most important, respondent corporation refuted five of the six causes for discipline alleged against respondent corporation, so that only the Third Cause for Discipline (violation of the Motor Inspection Program), which was directed at the smog station license, was proven by the weight of the evidence.

62. Accordingly, as of the date of the hearing, the reasonable and appropriate costs owed by respondent corporation to the department, on behalf of the Bureau, is \$1,024.98.

LEGAL CONCLUSIONS

Standard of Proof

1. "Preponderance of the evidence" is the standard of proof to be applied as to facts in dispute under the Accusation from which disciplinary action may result against the registration and license held by respondent. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repairs* (2011) 201 Cal.App.4th 911, 916-918.)

The Factual Findings and Order, herein, rest upon a preponderance of evidence that establishes respondents' unprofessional and unlawful acts and omissions in the matters recorded herein.

Statutory Authorities Generally Affecting Some of Respondents

2. Business and Professions Code section 9884.7, subdivision (a)(1), states:

(a) The director, where the automotive repair dealer cannot show there was a bona fide error, . . . may invalidate temporarily or permanently, 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.

3. Business and Professions Code section 9884.7, subdivision (a)(4), 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.

[¶] . . . [¶]

(4) Any other conduct that constitutes fraud.

4. Business and Professions Code section 9889.3, subdivision (d) provides, “[t]he director may suspend, revoke, or take other disciplinary action against a license . . . if the licensee or any partner, officer, or director thereof . . . [c]ommits any act involving dishonesty, fraud, or deceit whereby another is injured.”

5. Business and Professions Code section 9889.9, establishes, “[w]hen any license has been revoked or suspended following a hearing under the provisions of this article, any additional license issued under Articles 5 [Licenses] and 6 [Lamp and Brake Adjusting Stations] of [the Automotive Repair Act] in the name of the licensee may be likewise revoked or suspended by the director.”

6. Health and Safety Code section 44012 provides, in part: “[t]he test at the smog check stations shall be performed in accordance with procedures prescribed by the department”

7. Health and Safety Code section 44072.8, provides, “[w]hen a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director.”

8. Health and Safety Code section 44072.10, prescribes:

(a) Notwithstanding Sections 44072 and 44072.4, the director, or the director's designee, pending a hearing conducted pursuant to subdivision (e), may temporarily suspend any smog check station or technician's license issued under [Chapter 5- Motor Vehicle Inspection Program], for a period not to exceed 60 days, if the department determines that the licensee's conduct would endanger the public health, safety, or welfare before the matter could be heard pursuant to subdivision (e), based upon reasonable evidence of any of the following:

(1) Fraud.

(2) Tampering.

- (3) Intentional or willful violation of this chapter or any regulation, standard, or procedure of the department implementing this chapter.
- (4) A pattern or regular practice of violating this chapter or any regulation, standard, or procedure of the department implementing this chapter.
- (b) If a motor vehicle dealer sells any used vehicle, knowing that the vehicle has been fraudulently certified, that act shall be additional grounds for suspension or revocation pursuant to Section 11705 of the Vehicle Code. A dealer's license revoked pursuant to this subdivision shall not be reinstated for any reason for a period of at least five years.
- (c) The department shall revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:
- (1) Clean piping, as defined by the department.
 - (2) Tampering with a vehicle emission control system or test analyzer system.
 - (3) Tampering with a vehicle in a manner that would cause the vehicle to falsely pass or falsely fail an inspection.
 - (4) Intentional or willful violation of this chapter or any regulation, standard, or procedure of the department implementing this chapter.
- (d) Once a license has been revoked for a smog check station or technician under subdivision (a) or (c), the license shall not be reinstated for any reason. A hearing shall be held and a decision issued within 60 days after the date on which the notice of the temporary suspension was provided unless the time for the hearing has been extended, or the right to a hearing has been waived, by the licensee.
- (e) The hearing shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, or by court order.
- (f) The department shall adopt, by regulation, procedures to ensure that any affected licensee is provided adequate notice and opportunity

to be heard, except as otherwise provided in subdivision (a), prior to issuing an order temporarily suspending a license under this section.

9. Health and Safety Code section 44072.2, states

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.

[¶] . . . [¶]

Applicable Regulations Affecting Each Respondent

10. California Code of Regulations, title 16, section 3340.24, subdivision (c), states, “[t]he 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.”

11. California Code of Regulations, title 16, section 3340.30, subdivision (a), states that “[a] licensed smog check inspector and/or repair technician shall comply with the following requirements at all times while licensed: . . . [i]nspect, test and repair vehicles, as applicable, 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.”

12. California Code of Regulations, title 16, section 3340.41, subdivision (c), acts at the regulation for “Inspection, Test, and Repair Requirements”; and, dictates that, “[n]o 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.”

13. California Code of Regulations, title 16, section 3340.42, specifies the Smog Check Test Methods and Standards, and further prescribes that smog check inspection methods are to follow the directions set out in the Smog Check Manual.

Statutory Provision Affecting Individual Smog Check Technicians

14. Health and Safety Code section 44059

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

Discussion

FRAUD

15. Fraud is the willful deceit of another with the intent to induce another person to enter a contract or to alter his position to his injury or risk. (Civ. Code, §§ 1572; 1709.) Under California law, in order to find a person culpable of actual fraud, the party must be shown to have concealed material facts from the victim with intent thereby to deceive the victim or to induce the victim to enter into a contract. (*Earl v. Saks & Co.* (1951) 36 Cal.2d 602.)

It must also be stated that the term "fraud" has many definitions. It has been defined as "any kind of artifice employed by one person to deceive another."¹³ Also, it is said to be "a generic term, embracing all multifarious means [that] human ingenuity can devise, and [that] are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated."¹⁴ And, fraud and "bad faith" are synonymous, and also the term has synonyms of "dishonesty, infidelity, faithlessness, perfidy [and] unfairness."¹⁵

California appellate courts have ruled that "where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent. An active concealment has the same force and effect as a representation which is positive in form." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 37.)

Misrepresentation "being a false assertion of fact, commonly takes the form of spoken or written words. Whether a statement is false depends on the meaning of the

¹² *Black's Law Dict.* (Revised 4th ed., 1968) p. 788.

¹³ *Ibid.*

¹⁴ *Ibid.*

words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation [A]n assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word 'not' is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences unless it is material." (Restatement (Second) of Contracts § 159 comment A (1979).)

Respondent Cabriales, respondent Eberhart and respondent Howell, as smog technicians working at respondent's facility called Smog Repair and Lube, made repeated false assertions and misrepresentations through smog check testing devices as provided under Bureau's smog inspection program. The misrepresentations by the three smog check technician personnel were material and substantial.

Respondent corporation, however, did not engage in any multifarious means or unethical artifice employed to deceive another so as to render the acts or omissions of respondent corporation or its president to constitute fraud, willful deceit, or dishonesty.

RESPONDENT CORPORATION, DOING BUSINESS AS SMOG REPAIR AND LUBE
AUTOMOTIVE SERVICES, IS SUBJECT TO AGENCY ACTION, BUT NOT CULPABLE FOR
THE ACTS OF FRAUD, DISHONESTY, AND DECEIT BY THE SMOG CHECK TECHNICIANS

16. In light of the well-established rule of nondelegable duties imposed upon an owner-licensee, respondent corporation is subject to some degree of discipline for the acts and omissions of or by its agents and employees, namely the three smog check technicians-respondent Cabriales, respondent Howell, and respondent Eberhart, at the licensed smog check station and automotive repair dealer's facility. But, the consequences upon its licensure status for the fraud, dishonesty and deceit of the smog check technicians can not be imputed to respondent corporation. The smog check station licensee is subject to the causes for discipline arising out of only the lack of simple due care expected of a similarly situated licensee (negligence).

The nondelegable duties rule, which is similar to the rule of *respondent superior*, advances that a "licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for [the employees'] conduct in the exercise of his license." (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295.) "By virtue of the ownership of a . . . license, such owner has a responsibility to see to it that the license is not used in violation of law." (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 360.) In citing Civil Code section 2330, the court in the *Ford Dealers Association* case commented that: "[t]he settled rule that licensees can be held liable for the acts of their employees comports with the general rule governing principal-agent liability. 'An agent represents his principal for all purposes within the scope of his actual or ostensible authority.' (Civil Code section 2330.)" (*Ford Dealers Assn. v. DMV, supra*, 32 Cal.3d at p. 360.)

The rule of nondelegable duties of licensees is of common law derivation. (*California Assn. of Health Facilities v. Department of Health Services supra*, 16 Cal.4th at 296; *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 251.) The essential justification for the rule is to ensure accountability of licensees so as to safeguard the public health, safety, or welfare. More importantly, if a licensee, such as respondent corporation, were not liable to some form of disciplinary action for the acts and omissions of its agents and independent contractors, "effective regulation would be impossible. [The licensee] could contract away the daily operations of his business to independent contractors and become immune to disciplinary action by the licensing authority." (*California Assn. of Health Facilities v. Department of Health Services, supra*, 16 Cal.4th at p. 296.) Such result would undermine effective law enforcement and regulatory oversight. And, the concept that a licensee will be held liable for the acts of agents is one that has been applied to situations where the agent is an independent contractor or is an employee. (*Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 713; *Rob-Mac, Inc. v. Dept. of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797-798.)

Respondent corporation was obligated to supervise and control the activities and functions of the smog check technicians, who were associated with the automotive repair dealer registration and smog check station license pertaining to the regulated business activities performed at the facilities known as Smog Repair and Lube. Respondent corporation must bear some responsibility for the acts and omissions of respondent Cabriales, respondent Howell and respondent Eberhart, who were employees of respondent Corporation, doing business as Smog Repair and Lube, when the station's lack of practices and policies, or video camera surveillance, allowed those individuals to deviate from the precise execution of methods for testing contemplated under the Motor Vehicle Inspection Program as to Smog Check Stations.

The California Supreme Court has conveyed that the doctrine of strict liability of a licensee for the acts of its employees is not absolute. And the doctrine does not mean that the fraudulent and dishonest acts of an employee whose conduct may warrant licensure revocation, must translate into the licensee-employer suffering revocation or severe agency disciplinary action. In fact, the California Supreme Court has "suggested that there may be a limitation on the doctrine of nondelegable duties for licensees similar to that found in tort law." In the *Ford Dealers Association* decision, while upholding a regulation making automobile dealer licensees liable for the misrepresentations of their sales representatives, in dictum, the Supreme Court proclaimed that there might be an exception to such a rule of liability under "unusual circumstances" that negate the presumption that the employer had the capacity to control the agent. (*Ford Dealers Assn., supra*, 32 Cal.3d at p. 361, fn. 8.)

This is the factual setting, which involves respondent corporation and its president, for which the Supreme Court had in mind where "unusual circumstances" negate the presumption of the employer's capacity to control. Under the circumstances, the fraudulent, dishonest, and deceit of the three smog check technicians cannot be imputed to

respondent corporation to such an extent that its ARD registration and smog check license are subject to revocation or any period of prospective suspension.

As expressed in the *California Assn. of Health Facilities v. Department of Health Services* decision, the Supreme Court observed, "the Ford Dealers Assn. court appeared to suggest an exception to the rule of nondelegable duty akin to the 'scope of employment' exception to the rule of respondent superior liability." (*California Assn. of Health Facilities v. Department of Health Services, supra*, 16 Cal.4th 284, 305-06.) The reasonable acts and reasonable oversight exercised by respondent corporation with regard to the three technicians who engaged in unauthorized, unlawful, fraudulent, and dishonest acts, and which exceeded the scope of employment functions contemplated by the employer-licensee, that is respondent corporation, cannot equate to revocation of the smog check license or permanent invalidation of the automotive dealer registration.

Causes for Discipline

RESPONDENT EBERHART

FOURTEENTH CAUSE FOR DISCIPLINE-DISHONESTY, FRAUD OR DECEIT

17. Cause exists for discipline of the Smog Check Inspector license of respondent Eberhart under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), by reason of the matters set forth in Factual Findings 22 and 32.

THIRTEENTH CAUSE FOR DISCIPLINE- VIOLATIONS OF THE MOTOR VEHICLE INSPECTION PROGRAM

18. Cause exists for discipline of the Smog Check Inspector license of respondent Eberhart under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), as those statutory provisions interact with Health and Safety Code sections 44012 and 44059, as well as California Code of Regulations, title 16, sections 3340.24, subdivision (c), 3340.30, subdivision (a), and 3340.41, subdivision (c), by reason of the matters set forth in Factual Findings 22 and 33.

RESPONDENT HOWELL

TWELFTH CAUSE FOR DISCIPLINE

19. Cause exists for discipline of the Smog Check Inspector license of respondent Howell under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), by reason of the matters set forth in Factual Findings 22 and 34.

ELEVENTH CAUSE FOR DISCIPLINE - VIOLATIONS OF THE MOTOR VEHICLE INSPECTION PROGRAM

20. Cause exists for discipline of the Smog Check Inspector license of respondent Howell under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), as those statutory provisions interact with Health and Safety Code sections 44012 and 44059, as well as California Code of Regulations, title 16, sections 3340.24, subdivision (c), 3340.30, subdivision (a), and 3340.41, subdivision (c), by reason of the matters set forth in Factual Findings 22 and 35.

RESPONDENT CABRIALES

TENTH CAUSE FOR DISCIPLINE - DISHONESTY, FRAUD OR DECEIT - LAMP ADJUSTER LICENSE

21. Cause exists for discipline of the Lamp Adjuster license of respondent Cabriales under Business and Professions Code section 9889.3, subdivision (d), by reason of the matters set forth in Factual Findings 22 and 36.

NINTH CAUSE FOR DISCIPLINE - DISHONESTY, FRAUD OR DECEIT - BRAKE ADJUSTER LICENSE

22. Cause exists for discipline of the Brake Adjuster license of respondent Cabriales under Business and Professions Code section 9889.3, subdivision (d), by reason of the matters set forth in Factual Findings 22 and 37.

EIGHTH CAUSE FOR DISCIPLINE

23. Cause exists for discipline of the Smog Check Inspector license and Smog Check Repair Technician license of respondent Cabriales under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), by reason of the matters set forth in Factual Findings 22 and 38.

SEVENTH CAUSE FOR DISCIPLINE

24. Cause exists for discipline of the Smog Check Inspector license and Smog Check Repair Technician license of respondent Cabriales under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), as those statutory provisions interact with Health and Safety Code sections 44012 and 44059, as well as California Code of Regulations, title 16, sections 3340.24, subdivision (c), 3340.30, subdivision (a), and 3340.41, subdivision (c), by reason of the matters set forth in Factual Findings 22 and 39.

RESPONDENT CORPORATION WITH MITCHEL SCOTT BORNSTEIN AS PRESIDENT

SIXTH CAUSE FOR DISCIPLINE -- LAMP STATION LICENSE

25. No cause exists for discipline of the Lamp Station license of respondent corporation, doing business as Smog Repair and Lube, under Business and Professions Code section 9889.3, subdivision (d), by reason of Factual Finding 40.

FIFTH CAUSE FOR DISCIPLINE -- BRAKE STATION LICENSE

26. No cause exists for discipline of the Brake Station license of respondent corporation, doing business as Smog Repair and Lube, under Business and Professions Code section 9889.3, subdivision (d), by reason of Factual Finding 41.

FOURTH CAUSE FOR DISCIPLINE - SMOG STATION LICENSE

27. No cause for discipline of the Smog Check Inspector license of respondent corporation, doing business as Smog Repair and Lube, under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), by reason of the matters set forth in Factual Finding 42.

THIRD CAUSE FOR DISCIPLINE - SMOG STATION LICENSE

28. Cause exists for discipline of the Smog Check Station license of respondent corporation, doing business as Smog Repair and Lube, under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), as those statutory provisions interact with Health and Safety Code section 44012, as well as California Code of Regulations, title 16, sections 3340.24, subdivision (c), and 3340.42, by reason of the matters set forth in Factual Finding 43.

SECOND CAUSE FOR DISCIPLINE - REGISTRATION

29. No cause exists for discipline of the Automotive Repair Dealer registration of respondent corporation, doing business as Smog Repair and Lube, under Business and Professions Code section 9884.7, subdivision (a)(4), by reason of Factual Finding 44.

FIRST CAUSE FOR DISCIPLINE - REGISTRATION

30. No cause exists for discipline of the Automotive Repair Dealer registration of respondent corporation, doing business as Smog Repair and Lube, under Business and Professions Code section 9884.7, subdivision (a)(1), by reason of Factual Findings 45.

Failure to Appear for the Administrative Adjudication Hearing by respondent Cabriales, respondent Eberhart, and respondent Howell

31. Because respondent Cabriales, respondent Howell, and respondent Eberhart, failed to appear at the hearing of this matter on the day set aside for presentation of the defense to the Accusation's charges, no evidence in mitigation or rehabilitation is available for analysis. Hence, no basis exists to consider those three individual respondents' rehabilitation following the unlawful, fraudulent and deceitful acts, omissions, and behavior committed by those three individual respondents, as described herein above.

32. The Bureau's Guidelines for Disciplinary Orders and Terms of Probation (rev. March 2016), (guidelines) state that that document is "in keeping with the [the Bureau's] mandate to protect the public." The guidelines are "recommended uniform" statements "in order to promote consistency in disciplinary orders . . ." Even though the "guidelines [are to] be levied consistently and appropriately, based on the nature and seriousness of the violation," where an Interim Suspension Order has been issued in "the most egregious cases," the disciplinary action against licensure must be resolved through only "invalidation and revocation of all registrations and licenses."

33. The facts in this case with regard to the three individual smog check technicians, namely respondent Cabriales, respondent Howell, and respondent Eberhart, are uncontroverted and unopposed because those individual respondents did not present any evidence to oppose the strong evidence presented by complainant. The acts of the three smog check technicians involved unlawful conduct were on-going, egregious, unlawful, and corrupt conduct, which spanned several days. As to the licensure disciplinary action to be imposed, complainant is reasonable to request revocation of the licenses of those three individuals.

In accordance with Health and Safety Code section 44072.8, upon the revocations of the respective smog check inspector licenses of respondent Cabriales, respondent Howell, and respondent Eberhart, any additional license issued to such person may be revoked by the Director.

Matters Affecting the Degree of Discipline Against Respondent Corporation

34. Unlike the three individual smog check technicians, respondent corporation presented a comprehensive, erudite, persuasive and credible range of evidence in support of a defense that must lead to its exoneration as to the allegations of having committed acts of fraud, deceit or dishonesty. The appellate court decisions, which are frequently cited as authority for application of the doctrine nondelegable duty or strict liability for discipline of a license of an owner of a business whose culpability springs from the misconduct of an employee or independent contractor performing activities coming under the owner's license, provide guidance.

In *Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, a licensed automobile dealer employed a licensed vehicle salesperson who, after purchasing seven used cars for resale, rolled back odometers to show each vehicle to have less actual mileage. The salesperson, acting for the automobile dealer, sold each of the seven vehicles to consumers who suffered loss or damage by reason of the salesperson's constructive fraud. The salesperson was subject to revocation of his vehicle salesperson license, but Rob-Mac's license was suspended for 15 days with the term of suspension being stayed on the condition of the dealer's satisfactory completion of a two-year probationary period.

In *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, a pharmacist-in-charge and a corporate pharmacy were subject to license discipline because of inexact counts and reports of dangerous drugs, which had been stolen by employees of the pharmacy. Although the employees were subject to not only license revocation and criminal prosecution for the actual drug losses, the pharmacist-in-charge "was put on probation, a rather mild penalty, and was found only to be negligent in his record keeping." (*Id.*, at p 715.) (Emphasis added.)

In this matter, any discipline, which must be of a minor disciplinary import against respondent corporation's license or registration, can only be grounded upon the corporation's president's acts or omissions, which can only be construed as rising out of simple negligence in the hiring and supervision of dishonest or uninspired technicians.

35. Under the Bureau's guidelines, given the most expansive reading, the smog check station's acts and omissions would warrant period of probation for five years based upon a stay of license revocation. But, in light of the unjust nature of the imposition of the ISO, which caused the grievous cessation of smog check station business operations, and the extraordinary remedial measures embraced by respondent corporation's president, the Order below must impose only the issuance of a letter publicly reproofing respondent corporation's smog check station license. All other contemplated dismissal against the ARD registration and other licenses must be dismissed.

RESPONDENT TECHNICIANS

An array of factors in aggravation exists with regard to respondent smog inspection technicians, and includes:

- Respondent technicians performed unlawful and willfully improper smog check inspections that endangered the health and finances of consumers. More importantly, the evidence is clear that respondent Cabriales, respondent Howell and respondent Eberhart engaged in deliberate acts of fraud and deceit when unlawful acts of cleaning plugging of vehicles were performed at the subject smog check station.
- Respondent Cabriales, respondent Howell, and respondent Eberhart, either together or independently, committed fraud in several instances set out in the factual findings.

RESPONDENT CORPORATION

There are factors in mitigation and rehabilitation as to respondent corporation. Those matters include:

- The evidence establishes that respondent corporation's president, as the only "owner" and "ultimate decision-maker," possessed no knowledge or had reason to know that the actions and smog inspections practices of respondent Cabriales, respondent Howell, or respondent Eberhart were "anything less than up to par."
- Respondent corporation reasonably relied upon the licensed status of the three respondent technicians to perform smog inspections properly and then to truthfully certify under penalty of perjury the certificates of compliance that were shown in this matter to have been false.
- The Bureau's eVIN information was never dispatched to respondent corporation. Hence, respondent corporation did not have access to information that would have permitted the corporation's president to assist in better monitoring of the employed technicians.
- There is extensive evidence that respondent Smog Repair and Lube's owner, respondent corporation through its corporate president, has taken several specific steps to minimize recurrence of the violations described herein.
- There is ample indication that respondent corporation has changed in significant degrees its facility's operation so as to indicate that the ARD registration and smog station license will be used in the very best interest of the public and the State of California.
- Respondent corporation's president has implemented practices and policies that exceed any methods devised by the Bureau to thwart acts of unlawful smog check inspections by smog check technicians employed at its licensed smog check station.
- Respondent corporation has embarked upon the voluntary participation in educating its owner/president in the complex nature of smog check inspections.
- Respondent corporation's record of business activities is absent of prior Bureau disciplinary action against any license held by the subject licensee.
- Respondent corporation's simple negligence with regard to the hiring and supervision of three dishonest smog check technicians was not part of a pattern or practice of the corporation or its president.

- No evidence exists of any loss sustained by a consumer due to respondent corporation's negligence in this matter.
- No consumer complaints underpin the allegations set out in the allegations in complainant's Accusation that are aimed at respondent corporation.
- The relative minimal culpability of respondent corporation in the given situations shown by evidence at the hearing must affect the nature of the discipline imposed in this matter to warrant a comparatively mild sanction to be suffered by respondent corporation.

Ultimate Determinations Regarding Respondent Corporation

36. The overwhelming evidence presented at the hearing demonstrates that respondent Cabriales, respondent Eberhart, and respondent Howell violated each of the causes for discipline filed respectively against them in the Accusation. The facts of the case, which are uncontroverted, prove that those three respondents engaged in multiple acts of dishonesty, fraud, and deceit as such misconduct pertains to the state mandated smog check program. First, respondent technicians failed to professionally and competently perform a smog check inspection of vehicles presented to the facility for purposes of undergoing lawful and complete smog check inspections for which precise certificates of compliance would be issued. Then in no less than 10 instances respondents conspired together, or with other unethical persons, to engage in unlawful "Clean Plugging" activities. Specifically, respondent technicians have been shown to have perpetrated a pattern and practice of deliberate fraud and deceit carried out in several unlawful situations.

Respondent technicians are subject to discipline and the only level of discipline that will adequately protect the public is revocation of all licenses held by those individual respondents. That level of discipline is well within the Bureau's guidelines.

37. Complainant is not persuasive with the proposition that because revocation of licensure of the offending smog check technicians is warranted that revocation of the smog check station license and permanent invalidation of the automotive repair dealer registration must follow.

Ancillary to the concept that a licensing agency's ultimate precept is the protection of the public from potential harm by unprofessional, dishonest, and unscrupulous licensees is the guiding principle that disciplinary actions are not intended to punish licensees. In this matter, respondent corporation has suffered the loss of business activities as a smog check station through the implementation of an Interim Suspension Order, which was imposed more than 60 days before the date of this proposed decision. Further administrative action that curtails or impedes respondent corporation's business actions, in light of the minimal misconduct by respondent corporation, would constitute unwarranted punishment.

Business and Professions Code section 495 provides, in pertinent part, “any entity authorized to issue a license or certificate pursuant to this code may publicly reprove a licentiate or certificate holder thereof, for any act that would constitute grounds to suspend or revoke a license or certificate” The facts in this matter regarding the minimal culpability of respondent corporation’s president and the significant and extensive remedial measures, including installation of surveillance cameras in smog check bays, written audit and practice procedures, as well as the tremendous support for respondent corporation’s president by current employees, past customers, and professional family members, dictate that the issuance by the Director of a letter that publicly reproves respondent corporation is the proper resolution of the action against the smog check station. And, the dismissal of the Accusation’s allegations against is required as to respondent corporation’s automotive repair dealer registration, the lamp station license, and the brake station license.

Recovery of Costs of Investigation and Prosecution

38. Complainant has requested that respondents be ordered to pay the department the costs of investigation and prosecution as incurred by the Bureau.

Code section 125.3 prescribes that a “licentiate found to have committed a violation or violations of the licensing act” may be directed “to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.”

The California Supreme Court’s reasoning on the obligation of a licensing agency to fairly and conscientiously impose costs in administrative adjudication as articulated in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46, is persuasive and should be considered in this matter. Scrutiny of certain factors, which pertain to the Director’s exercise of discretion to analyze or examine factors that might mitigate or reduce costs of investigation and prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Findings 57 through 60.

39. The reasonable and appropriate costs of investigation and prosecution, which are owed jointly and severally by respondent Cabriales, respondent Eberhart, and respondent Howell, as set forth in Factual Findings 57 through 60 are in the amount of \$9,224.80.

40. The reasonable and appropriate costs of investigation and prosecution as set forth in Factual Finding 61 amount to \$1,024.98, owed by respondent corporation, doing business as Smog Repair and Lube, by reason of Factual Findings 61 and 62.

ORDERS

Respondent Branden L. Eberhart

1. Smog Check Inspector License Number EO636778 issued to respondent Branden L. Eberhart is revoked, by reason of Legal Conclusions 17 and 18, separately and for all of them.

2. Any and all other licenses issued by the Bureau, for all places of business operated in this state or whose financial or management interests are held in this state by respondent Branden L. Eberhart, are permanently invalidated and revoked, by reason of Legal Conclusion 33.

Respondent Randy Lee Howell

3. Smog Check Inspector License Number EO633592 issued to respondent Randy Lee Howell is revoked, by reason of Legal Conclusions 19 and 20, separately and for all of them.

4. Any and all other licenses issued by the Bureau, for all places of business operated in this state or whose financial or management interests are held in this state by respondent Randy Lee Howell, are permanently invalidated and revoked, by reason of Legal Conclusion 33.

Respondent Luis Antonio Cabriaes

5. Smog Check Inspector License Number EO633674 and Smog Check Repair Technician License Number EI633674 issued to respondent Luis Antonio Cabriaes are revoked, by reason of Legal Conclusions 23 and 24, separately and for all of them.

6. Lamp Adjuster License Number LA633674, Class A, issued to respondent Luis Antonio Cabriaes is revoked, by reason of Legal Conclusions 21.

7. Brake Adjuster License Number BA633674, Class C, issued to respondent Luis Antonio Cabriaes is revoked, by reason of Legal Conclusions 22.

All Individuals Respondent Technicians

8. Within thirty days of the effective date of this decision respondent Eberhart, respondent Howell, and respondent Cabriaes, jointly or severally, shall pay the Director, Department of Consumer Affairs, on behalf of the Bureau, the costs of investigation and prosecution in an amount of \$9,224.80, by reason of Legal Conclusions 38 and 39.

Respondent Lucy Ventures doing business as Smog Repair and Lube

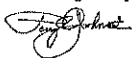
9. Smog Check Test Only Station License Number RC 282023 issued to respondent Lucy Ventures, doing business as Smog Repair and Lube, with Mitchel Scott Bornstein as president, is subject to receipt of a letter from the Director that publicly reproves the licentiate.

10. Within thirty days of the effective date of this decision respondent corporation Lucy Ventures, doing business as Smog Repair and Lube, with Mitchel Scott Bornstein as president, shall pay the Director, Department of Consumer Affairs, on behalf of the Bureau, the costs of investigation and prosecution in an amount of \$1,024.98, by reason of Legal Conclusion 40.

11. The Accusation in Case Number 79/16-13904 is dismissed as against Automotive Repair Dealer Registration Number ARD 282023, Lamp Station License No. LS 282023, Class A, and Brake Station License No. BS 282023, Class C, as issued to Lucy Ventures, doing business as Smog Repair and Lube, with Mitchel Scott Bornstein as president, by reason of Legal Conclusions 25 through 27, 29 and 30.

12. No other automobile repair dealer registration, smog check station license, or other licenses issued by the Bureau, for other places of business operated in this state or whose financial or management interests are held in this State by respondent Lucy Ventures or its president, Mitchel Scott Bornstein, shall be either permanently invalidated or revoked, by reason of Legal Conclusions 16, 34, 35 and 37.

DATED: October 25, 2017

DocuSigned by:


28DB5AD89FE7453

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:

12 **LUCY VENTURES**
13 **dba SMOG REPAIR AND LUBE**
14 **1225 Parkside Dr.**
15 **Walnut Creek, CA 94596**
16 **Mitchel Scott Bornstein- President/Secretary/Treasurer**

17 **Automotive Repair Dealer No. ARD 282023.**
18 **Smog Check Station License No. RC282023**
19 **Lamp Station License No. LS 282023, Class A**
20 **Brake Station License No. BS 282023, Class C**

21 **LUIS ANTONIO CABRIALES**
22 **4613 Knoll Park Circle**
23 **Antioch, CA 94531**

24 **Smog Check Inspector (EO) License No. EO633674**
25 **Smog Check Repair Technician (EI) License No. EI633674**
26 **Brake Adjuster License No. BA 633674, Class C**
27 **Lamp Adjuster License No. LA 633674, Class A**

28 **RANDY LEE HOWELL**
537 Quartz Lane
Vallejo, CA 94589

Smog Check Inspector (EO) license No. EO633592

BRANDEN L. EBERHART
3876 Creekside Pl.
Auburn, CA 95602

Smog Check Inspector (EO) license No. EO636778

Respondents.

Case Number: 79/16-13904
OAH NO. 2017080930
ACCUSATION



1 Complainant alleges:

2 **PARTIES**

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

5 **Automotive Repair Dealer Registration**

6 2. On or about November 16, 2015, the Bureau issued Automotive Repair Dealer
7 Registration Number ARD 282023 ("Registration") to Lucy Ventures dba Smog Repair and Lube
8 (Respondent Lucy). Mitchel Scott Bornstein is the President/Secretary/Treasurer of Respondent
9 Lucy. The registration was in full force and effect at all times relevant to the charges brought
10 herein and will expire on November 30, 2017, unless renewed.

11 **Smog Check Station License**

12 3. On or about December 11, 2015, the Bureau issued Smog Check Station License
13 Number RC 282023 ("smog station license") to Respondent Lucy. The smog station license was
14 in full force and effect at all times relevant to the charges brought herein and will expire on
15 November 30, 2017, unless renewed.

16 **Lamp Station License**

17 4. On or about December 11, 2015, the Bureau issued Lamp Station License Number LS
18 282023, Class A ("lamp station license"), to Respondent Lucy. The lamp station license was in
19 full force and effect at all times relevant to the charges brought herein and will expire on
20 November 30, 2017, unless renewed.

21 **Brake Station License**

22 5. On or about December 11, 2015, the Bureau issued Brake Station License Number
23 BS 282023, Class C ("brake station license"), to Respondent Lucy. The brake station license was
24 in full force and effect at all times relevant to the charges brought herein and will expire on
25 November 30, 2017, unless renewed.

26 **Smog Check Inspector Licenses**

27 6. On or about September 30, 2011, the Director issued Advanced Emission Specialist
28 Technician License Number EA 633674 to Luis Antonio Cabriaes (Respondent Cabriaes).

1 Respondent Cabriales' advanced emission specialist technician license expired on January 31,
2 2014 and was cancelled on February 14, 2014. Pursuant to California Code of Regulations, title
3 16, section 3340.28, subdivision (e), the license was renewed, pursuant to Respondent's election,
4 as Smog Check Inspector License EO 633674 and Smog Check Repair Technician (EI) License
5 No. EI633674. Respondent Cabriales's Smog Check Inspector and Smog Check Repair
6 Technician Licenses will expire on January 31, 2018, unless renewed.¹

7 7. On or about September 08, 2011, the Director issued Advanced Emission Specialist
8 Technician License Number EA 633592 to Randy Lee Howell (Respondent Howell). Respondent
9 Howells' advanced emission specialist technician license was due to expire on January 31, 2014,
10 however, was cancelled on January 27, 2014. Pursuant to California Code of Regulations, title
11 16, section 3340.28, subdivision (e), the license was renewed, pursuant to Respondent's election,
12 as Smog Check Inspector License EO 633592. Respondent Howell's Smog Check Inspector will
13 expire on January 31, 2018, unless renewed.

14 8. On or about April 18, 2014, the Director issued Smog Check Inspector License EO
15 636778 to Branden L. Eberhart (Respondent Eberhart). Respondent Eberhart's Smog Check
16 Inspector License will expire on December 31, 2017, unless renewed.

17 **Brake Adjuster License**

18 9. On or about January 4, 2016, the Director issued Brake Adjuster License BA 633674,
19 Class C, to Respondent Cabriales. Respondent Cabriales's Brake Adjuster License will expire on
20 January 31, 2019, unless renewed.

21 **Lamp Adjuster License**

22 10. On or about March 16, 2017, the Director issued Lamp Adjuster License LA 633674,
23 Class A, to Respondent Cabriales. Respondent Cabriales's Brake Adjuster License will expire on
24 January 31, 2021, unless renewed.

25
26 ¹ Effective August 1, 2012, California Code of Regulations, title 16, section 3340.28,
27 3340.29 and 3340.30 were amended to implement a license restructure from the Advanced
28 Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog
Check Inspector (EO) license and and/or Smog Check Repair Technician (EI) license.

1 11. "Respondents" shall refer to Respondents Lucy, Howell, Cabriaes and Eberhart
2 collectively.

3 **JURISDICTION**

4 12. This Accusation is brought before the Director of the Department of Consumer
5 Affairs (Director) for the Bureau of Automotive Repair, under the authority of the following laws.

6
7 **STATUTORY AND REGULATORY PROVISIONS**

8 13. Section 9884.7 of the Business and Professions Code ("Code") states, in pertinent
9 part:

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

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

18 ...

19 (4) Any other conduct that constitutes fraud.

20 ...

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

23 ...

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

28

1 14. Code section **9884.13** provides, in pertinent part, that the expiration of a valid
2 registration shall not deprive the director or chief of jurisdiction to proceed with a disciplinary
3 proceeding against an automotive repair dealer or to render a decision invalidating a registration
4 temporarily or permanently.

5 18. Section **9889.1** of the Code states:

6 "Any license issued pursuant to Articles 5 and 6 [commencing with section 9887.1 of the
7 Automotive Repair Act] , may be suspended or revoked by the director. The director may refuse
8 to issue a license to any applicant for the reasons set forth in Section 9889.2. The proceedings
9 under this article shall be conducted in accordance with Chapter 5 (commencing with Section
10 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have all
11 the powers granted therein."

12 15. Section **9889.3** of the Code states:

13 "The director may suspend, revoke, or take other disciplinary action against a license as
14 provided in this article [Article 7 (commencing with section 9889.1) of Chapter 20.3 of Division
15 3 of the Business and Professions Code] if the licensee or any partner, officer, or director thereof:

16 . . .

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

18 . . .

19 16. Section **9889.7** of the Code provides, in pertinent part, that the expiration or
20 suspension of a license by operation of law or by order or decision of the Director or a court of
21 law, or the voluntary surrender of a license shall not deprive the Director of jurisdiction to
22 proceed with any disciplinary proceedings.

23 17. Section **44002** of the Health and Safety Code provides, in pertinent part, that the
24 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
25 the Motor Vehicle Inspection Program.

26 18. Section **44012** of the Health and Safety Code requires that tests at smog check
27 stations be performed in accordance with procedures prescribed by the department.

28 19. Section **44059** of the Health and Safety Code states, in pertinent part:

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

5 20. Section **44072.2** of the Health and Safety Code states, in pertinent part:

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

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

11 . . .
12 (c) Violates any of the regulations adopted by the director pursuant to this chapter.

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

14 . . .
15 (h) Violates or attempts to violate the provisions of this chapter relating to the particular
16 activity for which he or she is licensed.

17 21. Section **44072.6** of the Health and Safety Code provides, in pertinent part, that the
18 expiration or suspension of a license by operation of law, or by order or decision of the Director
19 of Consumer Affairs, or a court of law, or the voluntary surrender of the license shall not deprive
20 the Director of jurisdiction to proceed with disciplinary action.

21 22. Section **44072.8** of the Health and Safety Code states:

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

25 23. California Code of Regulations, title 16, section **3340.24**, states:

26 ". . .(c) The bureau may suspend or revoke the license of or pursue other legal action
27 against a licensee, if the licensee falsely or fraudulently issues or obtains a certificate of
28 compliance or a certificate of noncompliance. . ."

1 24. California Code of Regulations, title 16, section **3340.30**, states, in pertinent part:

2 A licensed smog check inspector and/or repair technician shall comply with the following
3 requirements at all times while licensed:

4 (a) Inspect, test and repair vehicles, as applicable, in accordance with section 44012 of the
5 Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this
6 article.

7 ...

8 25. California Code of Regulations, title 16, section **3340.41(c)**, states:

9 "No person shall enter into the emissions inspection system any vehicle identification
10 information or emission control system identification data for any vehicle other than the one
11 being tested. Nor shall any person knowingly enter into the emissions inspection system any false
12 information about the vehicle being tested."

13 26. California Code of Regulations, title 16, section **3340.42**, states, in pertinent part that

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

16 27. California Code of Regulations, title 16, section **3340.45**, states:

17 (a) All Smog Check inspections shall be performed in accordance with requirements and
18 procedures prescribed in the following:

19 (1) Smog Check Inspection Procedures Manual, dated August 2009, which is hereby
20 incorporated by reference. This manual shall be in effect until subparagraph (2) is implemented.

21 (2) Smog Check Manual, dated 2013, which is hereby incorporated by reference. This
22 manual shall become effective on or after January 1, 2013.

23 **FACTUAL SUMMARY**

24 28. On March 9, 2015, the Bureau implemented a statewide regulatory change requiring
25 the use of the On Board Diagnostic Inspection System (BAR-OIS) instead of the Emission
26 Inspection System (EIS) for the smog testing of 2000 model year and newer gas powered and
27 hybrid vehicles.

28

1 29. The new BAR-OIS smog inspection uses a Data Acquisition Device (DAD), a
2 computer, a bar code scanner, and printer. The DAD is a scan tool that retrieves data from a
3 vehicle's On Board Diagnostic-generation II (OBD II) computer. The DAD connects the BAR
4 OIS computer to the vehicle's diagnostic link connector (DLC) to retrieve the data from the
5 vehicle. The bar code scanner is used to input technician information, the vehicle identification
6 number (VIN), and DMV renewal information. The printer is used to print Vehicle Inspection
7 Reports.

8 30. Data retrieved and recorded during a BAR-OIS smog check includes: the eVIN,
9 which is the digitally stored VIN programmed into the vehicle's Powertrain Control Module
10 (PCM); the communication protocol, which is the manufacturer/vehicle's specific "language" the
11 PCM uses to relay information; and the number of Parameter Identifications (PIDs), which is the
12 number of specific data values each PCM uses related to emissions controls.

13 31. As part of the BAR-OIS smog inspections, the technician also performs a visual and
14 functional test on the vehicle being inspected. The visual inspection of the emission control
15 components verifies the required emission control devices are present and properly connected and
16 a functional test is performed of the malfunction indicator light (MIL). The BAR-OIS software
17 makes the determination whether or not the vehicle passes the inspection based on the results of
18 the OBD, visual and functional tests. If the vehicle passes the inspection a certificate of
19 compliance is issued. The information from the smog inspection is then transmitted to the
20 Vehicle Information Data (VID).

21 32. The Bureau can access the VID to view test data on smog check inspections
22 performed at any Smog Check Station, or search for, retrieve, and print a test record for a
23 particular vehicle which has been tested.

24 33. The Bureau has become aware of several methods used by Smog Check stations and
25 Smog Check technicians to issue improper/fraudulent smog certificates of compliance. One
26 method is known as clean plugging. Clean plugging involves using another vehicle's properly
27 functioning OBD II system, or another source, to generate passing diagnostic readings for the
28

1 purpose of issuing fraudulent smog Certificates of Compliance to vehicles that are not in smog
2 compliance and/or are not present for testing.

3 34. The Bureau initiated an investigation of Respondent Lucy's smog station, Smog
4 Repair and Lube. Beginning on or about September 26, 2016 and continuing until about January
5 26, 2017, Respondents² were found to have performed ten fraudulent smog inspections using
6 clean-plugging methods. Clean-plugging is the practice of testing one OBD II system (a system
7 that would pass the smog inspection), for the purpose of fraudulently issuing a smog certificate of
8 compliance to another vehicle that would not pass the smog inspection and/or is not present for
9 testing. The vehicle receiving the certificate of compliance is not actually tested during the smog
10 inspection.

11 35. A Bureau representative reviewed data for vehicles inspected by Respondents
12 Howell, Cabriales and Eberhart and certified by Respondent Lucy. The data revealed that the ten
13 vehicles that were purportedly tested by Respondents were not and could not have been
14 connected to the DAD when they were being certified because the OBD-II data purportedly
15 transmitted by those vehicles could not have been transmitted by those vehicles.

16 36. Respondents clean plugged and issued fraudulent certificates of compliance to the
17 following ten vehicles:

18 a) Clean Plug #1- 2003 BMW 530i Automatic, VIN WBADT63413CK29197, License No.
19 5UGR094:

20

Certificate #	eVIN	Protocol	PID count
QE561390C			
Fraudulent Passing Inspection (9/26/2016)	WBAPH7C5XAA176134	ICAN11bt500	<u>45/11</u>
Expected OBDII Value	Not Usually Reported	I914	<u>23/1 or 24/1</u>

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27 ² Respondents Howell, Cabriales and Eberhart performed the smog tests on behalf of
28 Respondent Lucy.

1 b) Clean Plug #2- 2002 Chevrolet Trailblazer, VIN 1GNDS13S622189217, License No.
2 4TLP175:

Certificate #	eVIN	Protocol	PID count
QE624203C			
Fraudulent Passing Inspection (9/26/2016)	3GCEK13328G119560	ICAN11bt500	<u>43/7</u>
Expected OBDII Value	1GNDS13S622189217	JVPW	<u>18</u>

8
9 c) Clean Plug #3- 2002 Chrysler Sebring LXI, VIN 1C3EL55R22N322926 License No.
10 4XIU777:

Certificate #	eVIN	Protocol	PID count
QE995703C			
Fraudulent Passing Inspection (10/07/2016)	1J4NF4FB1AD502301	ICAN11bt500	<u>36/13</u>
Expected OBDII Value	Not Reported	JVPW	<u>22/3</u>

16
17 d) Clean Plug #4- 2001 Audi A6 2.7T Quattro, VIN WAUED64B71N126074,
18 License No. 6FIV887:

Certificate #	eVIN	Protocol	PID count
ZL231418C			
Fraudulent Passing Inspection (11/23/2016)	WBAUP935X8VF48059	ICAN11bt500	<u>46/11</u>
Expected OBDII Value	Not Reported	I914	<u>20, 21/5, 22 or 23/5</u>

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1 e) Clean Plug #5- 2001 Volkswagen New Beetle GLS, VIN
2 3VWCK21C31M464570, License No. 5SZV492:

Certificate #	eVIN	Protocol	PID count
ZL324874C			
Fraudulent Passing Inspection (11/28/2016)	5TDBT44A65S251281	ICAN11bt500	<u>45</u>
Expected OBDII Value	Not Reported	I914	<u>17/5, 18, or 18/5</u>

8
9 f) Clean Plug #6- 2002 Chevrolet Trailblazer, VIN 1GNDDT13S622199727, License
10 No. 4UBF458:

Certificate #	eVIN	Protocol	PID count
ZL559456C			
Fraudulent Passing Inspection (12/5/2016)	Not Reported	I9140808	<u>17</u>
Expected OBDII Value	1GNDDT13S622199727	JVPW	<u>18</u>

16
17 g) Clean Plug #7- 2007 Audi Q7 3.6 Quattro Premium, VIN
18 WA1BY74L77D027465, License No. 7RAZ401:

Certificate #	eVIN	Protocol	PID count
ZN466939C			
Fraudulent Passing Inspection (01/09/2017)	1FTZR14U46PA53560	JPWM1850	<u>22</u>
Expected OBDII Value	WA1BY74L77D027465	ICAN11bt5	<u>43 or 43/14</u>

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1 h) Clean Plug #8- 2004 BMW 745 LI, VIN WBAGN63464DS48895, License No.
2 5YAC670:

Certificate #	eVIN	Protocol	PID count
ZN826428C			
Fraudulent Passing Inspection (01/20/2017)	2HKYF18535H540346	I9140808	<u>24</u>
Expected OBDII Value	WBAGN63464DS48895	KWPF	<u>23/1 or 23/7</u>

8
9 i) Clean Plug #9- 2004 BMW 745 LI, VIN WBAGN63494DS51273, License No.
10 7LXF416:

Certificate #	eVIN	Protocol	PID count
ZN620158C			
Fraudulent Passing Inspection (1/24/2017)	WA1DKAFP3BA058598	ICAN11bt500	<u>44/10</u>
Expected OBDII Value	WBAGN63494DS51273	KWPF	<u>23/1 or 23/7</u>

16
17 j) Clean Plug #10- 2000 GMC Yukon Denali, VIN 1GKEK13R7YR123144, License
18 No. 4PPY674:

Certificate #	eVIN	Protocol	PID count
ZP025253C			
Fraudulent Passing Inspection (1/26/2017)	2B3LA53H38H202803	ICAN11bt500	<u>43/12</u>
Expected OBDII Value	Not Reported	JVPW	<u>22, or 23</u>

24
25 **FIRST CAUSE FOR DISCIPLINE**

26 **(Misleading Statements - Registration)**

27 37. Respondent Lucy has subjected its registration to discipline under Code section
28 9884.7, subdivision (a)(1), in that it made statements which it knew or which by exercise of

1 reasonable care she should have known were untrue or misleading, as set forth above in
2 paragraphs 34-36, above. Respondents fraudulently purported to test the 10 vehicles, and
3 certified that the 10 vehicles passed inspection and were in compliance with applicable laws and
4 regulations. In fact, Respondents conducted the inspections on those vehicles using clean-
5 plugging methods.

6 **SECOND CAUSE FOR DISCIPLINE**

7 **(Fraud - Registration)**

8 38. Respondent Lucy has subjected its registration to discipline under Code sections 494
9 and 9884.7, subdivision (a)(4), in that she committed acts which constitute fraud, as set forth
10 above in paragraphs 33-35, above.

11 **THIRD CAUSE FOR DISCIPLINE**

12 **(Violation of the Motor Vehicle Inspection Program – Smog Station License)**

13 39. Respondent Lucy has subjected its station license to discipline under Health and
14 Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), in that it violated sections
15 of that Code and applicable regulations, as set forth above in paragraphs 34-36, as follows:

16 a. **Section 44012:** Respondent Lucy failed to ensure that the emission control tests were
17 performed on those vehicles in accordance with procedures prescribed by the department.

18 b. **Section 3340.24, subdivision (c):** Respondent Lucy falsely or fraudulently issued
19 electronic certificates of compliance for those vehicles without performing bona fide inspections
20 of the emission control devices and systems on the vehicles as required by Health and Safety
21 Code section 44012.

22 c. **Section 3340.42:** Respondent Lucy failed to conduct the required smog tests and
23 inspections on those vehicles in accordance with the Bureau's specifications.

24 **FOURTH CAUSE FOR DISCIPLINE**

25 **(Dishonesty, Fraud or Deceit – Smog Station License)**

26 40. Respondent Lucy subjected its station license to discipline under Health and Safety
27 Code sections 44072.10 and 44072.2, subdivision (d), in that it committed acts involving
28 dishonesty, fraud or deceit, whereby another was injured by issuing electronic certificates of

1 compliance for vehicles without performing bona fide inspections of the emission control devices
2 and systems on the vehicles, thereby depriving the People of the State of California of the
3 protection afforded by the Motor Vehicle Inspection Program, as set forth above in paragraphs
4 34-36, above.

5 **FIFTH CAUSE FOR DISCIPLINE**

6 **(Dishonesty, Fraud or Deceit – Brake Station License)**

7 41. Respondent Lucy subjected its Brake Station License to discipline under Code
8 Section 9889.3, subdivision (d), in that it committed acts involving dishonesty, fraud or deceit,
9 whereby another was injured by issuing electronic certificates of compliance for vehicles without
10 performing bona fide inspections of the emission control devices and systems on the vehicles,
11 thereby depriving the People of the State of California of the protection afforded by the Motor
12 Vehicle Inspection Program, as set forth above in paragraphs 34-36, above.

13 **SIXTH CAUSE FOR DISCIPLINE**

14 **(Dishonesty, Fraud or Deceit – Lamp Station License)**

15 42. Respondent Lucy subjected its Lamp Station License to discipline under Code
16 Section 9889.3, subdivision (d), in that it committed acts involving dishonesty, fraud or deceit,
17 whereby another was injured by issuing electronic certificates of compliance for vehicles without
18 performing bona fide inspections of the emission control devices and systems on the vehicles,
19 thereby depriving the People of the State of California of the protection afforded by the Motor
20 Vehicle Inspection Program, as set forth above in paragraphs 34-36, above.

21 **SEVENTH CAUSE FOR DISCIPLINE**

22 **(Violations of the Motor Vehicle Inspection Program – Smog Check License)**

23 43. Respondent Cabriales has subjected his Smog Check Inspector license and Smog
24 Check Repair Technician license to discipline under Health and Safety Code sections 44072.10
25 and 44072.2, subdivisions (a) and (c), in that he violated sections of that Code and applicable
26 regulations, as set forth above in paragraphs 34-36, as follows:

27 a. **Section 44012:** Respondent Cabriales failed to ensure that the emission control tests
28 were performed on those vehicles in accordance with procedures prescribed by the department.

1 b. **Section 44059:** Respondent Cabriales willfully made false entries for the electronic
2 certificates of compliance by certifying that those vehicles had been inspected as required when,
3 in fact, they had not.

4 c. **Section 3340.24, subdivision (c):** Respondent Cabriales falsely or fraudulently
5 issued electronic certificates of compliance for those vehicles without performing bona fide
6 inspections of the emission control devices and systems on the vehicles as required by Health and
7 Safety Code section 44012.

8 d. **Section 3340.30, subdivision (a):** Respondent Cabriales failed to inspect and test
9 those vehicles in accordance with Health and Safety Code section 44012 and California code of
10 Regulations title 16, section 3340.42.

11 e. **Section 3340.41, subdivision (c):** Respondent Cabriales entered vehicle
12 identification information for a vehicle other than the one being tested into the emissions
13 inspection system. Respondent Cabriales knowingly entered false information about the vehicle
14 being tested into the emissions inspection system.

15 f. **Section 3340.42:** Respondent Cabriales failed to conduct the required smog tests and
16 inspections on those vehicles in accordance with the Bureau's specifications.

17 **EIGHTH CAUSE FOR DISCIPLINE**

18 **(Dishonesty, Fraud or Deceit – Smog Check License)**

19 44. Respondent Cabriales subjected his Smog Check Inspector license and Smog Check
20 Repair Technician license to discipline under Health and Safety Code sections 44072.10 and
21 44072.2, subdivision (d), in that he committed acts involving dishonesty, fraud or deceit, whereby
22 another was injured by issuing electronic certificates of compliance for vehicles without
23 performing bona fide inspections of the emission control devices and systems on the vehicles,
24 thereby depriving the People of the State of California of the protection afforded by the Motor
25 Vehicle Inspection Program, as set forth above in paragraphs 34-36.

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1 **NINTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty, Fraud or Deceit – Brake Adjuster License)**

3 45. Respondent Cabriales subjected his Brake Adjuster license to discipline under Section
4 9889.3, subdivision (d), in that he committed acts involving dishonesty, fraud or deceit, whereby
5 another was injured by issuing electronic certificates of compliance for vehicles without
6 performing bona fide inspections of the emission control devices and systems on the vehicles,
7 thereby depriving the People of the State of California of the protection afforded by the Motor
8 Vehicle Inspection Program, as set forth above in paragraphs 34-36, above.

9 **TENTH CAUSE FOR DISCIPLINE**

10 **(Dishonesty, Fraud or Deceit – Lamp Adjuster License)**

11 46. Respondent Cabriales subjected his Lamp Adjuster license to discipline under Section
12 9889.3, subdivision (d), in that he committed acts involving dishonesty, fraud or deceit, whereby
13 another was injured by issuing electronic certificates of compliance for vehicles without
14 performing bona fide inspections of the emission control devices and systems on the vehicles,
15 thereby depriving the People of the State of California of the protection afforded by the Motor
16 Vehicle Inspection Program, as set forth above in paragraphs 34-36, above.

17 **ELEVENTH CAUSE FOR DISCIPLINE**

18 **(Violations of the Motor Vehicle Inspection Program – Smog Check License)**

19 47. Respondent Howell has subjected his Smog Check Inspector license to discipline
20 under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), in that he
21 violated sections of that Code and applicable regulations, as set forth above in paragraphs 34-36,
22 as follows:

23 a. **Section 44012:** Respondent Howell failed to ensure that the emission control tests
24 were performed on those vehicles in accordance with procedures prescribed by the department.

25 b. **Section 44059:** Respondent Howell willfully made false entries for the electronic
26 certificates of compliance by certifying that those vehicles had been inspected as required when,
27 in fact, they had not.

28

1 c. **Section 3340.24, subdivision (c):** Respondent Howell falsely or fraudulently issued
2 electronic certificates of compliance for those vehicles without performing bona fide inspections
3 of the emission control devices and systems on the vehicles as required by Health and Safety
4 Code section 44012.

5 d. **Section 3340.30, subdivision (a):** Respondent Howell failed to inspect and test those
6 vehicles in accordance with Health and Safety Code section 44012 and California code of
7 Regulations title 16, section 3340.42.

8 e. **Section 3340.41, subdivision (c):** Respondent Howell entered vehicle identification
9 information for a vehicle other than the one being tested into the emissions inspection system.
10 Respondent Howell knowingly entered false information about the vehicle being tested into the
11 emissions inspection system.

12 f. **Section 3340.42:** Respondent Howell failed to conduct the required smog tests and
13 inspections on those vehicles in accordance with the Bureau's specifications.

14 **TWELFTH CAUSE FOR DISCIPLINE**

15 **(Dishonesty, Fraud or Deceit – Smog Check License)**

16 48. Respondent Howell subjected his Smog Check Inspector License to discipline under
17 Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that he committed acts
18 involving dishonesty, fraud or deceit, whereby another was injured by issuing electronic
19 certificates of compliance for vehicles without performing bona fide inspections of the emission
20 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, as set forth above
22 in paragraphs 34-36.

23 **THIRTEENTH CAUSE FOR DISCIPLINE**

24 **(Violations of the Motor Vehicle Inspection Program – Smog Check License)**

25 49. Respondent Eberhart has subjected his Smog Check Inspector license to discipline
26 under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a) and (c), in that he
27 violated sections of that Code and applicable regulations, as set forth above in paragraphs 34-36,
28 as follows:

1 a. **Section 44012:** Respondent Eberhart failed to ensure that the emission control tests
2 were performed on those vehicles in accordance with procedures prescribed by the department.

3 b. **Section 44059:** Respondent Eberhart willfully made false entries for the electronic
4 certificates of compliance by certifying that those vehicles had been inspected as required when,
5 in fact, they had not.

6 c. **Section 3340.24, subdivision (c):** Respondent Eberhart falsely or fraudulently issued
7 electronic certificates of compliance for those vehicles without performing bona fide inspections
8 of the emission control devices and systems on the vehicles as required by Health and Safety
9 Code section 44012.

10 d. **Section 3340.30, subdivision (a):** Respondent Eberhart failed to inspect and test
11 those vehicles in accordance with Health and Safety Code section 44012 and California code of
12 Regulations title 16, section 3340.42.

13 e. **Section 3340.41, subdivision (c):** Respondent Eberhart entered vehicle identification
14 information for a vehicle other than the one being tested into the emissions inspection system.
15 Respondent Eberhart knowingly entered false information about the vehicle being tested into the
16 emissions inspection system.

17 e. **Section 3340.42:** Respondent Eberhart failed to conduct the required smog tests and
18 inspections on those vehicles in accordance with the Bureau's specifications.

19 **FOURTEENTH CAUSE FOR DISCIPLINE**

20 **(Dishonesty, Fraud or Deceit – Smog Check License)**

21 50. Respondent Eberhart subjected her Smog Check Inspector License to discipline under
22 Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that he committed acts
23 involving dishonesty, fraud or deceit, whereby another was injured by issuing electronic
24 certificates of compliance for vehicles without performing bona fide inspections of the emission
25 control devices and systems on the vehicles, thereby depriving the People of the State of
26 California of the protection afforded by the Motor Vehicle Inspection Program, as set forth above
27 in paragraphs 34-36.

28 ///

OTHER MATTERS

1
2 51. Pursuant to Code section 9884.7, subdivision (c), the Director may suspend, revoke,
3 or place on probation the registration for all places of business operated in this state by
4 Respondent Lucy, upon a finding that Respondent Lucy has, or is, engaged in a course of
5 repeated and willful violations of the laws and regulations pertaining to an automotive repair
6 dealer.

7 52. Pursuant to Health & Safety Code section 44072.8, if Respondent Lucy's Smog
8 Station License is revoked or suspended, any additional license issued under Chapter 5 of Part 5
9 of Division 26 of the Health and Safety Code in the name of said licensee may be likewise
10 revoked or suspended by the director.

11 53. Pursuant to Code section 9889.9, if Respondent Lucy's Brake Station License is
12 revoked or suspended, any additional license issued under Articles 5 or 6 of Chapter 23.3 of
13 Division 3 of the Business and Professions Code in the name of said licensee may be likewise
14 revoked or suspended by the director.

15 54. Pursuant to Code section 9889.9, if Respondent Lucy's Lamp Station License is
16 revoked or suspended, any additional license issued under Articles 5 or 6 of Chapter 23.3 of
17 Division 3 of the Business and Professions Code in the name of said licensee may be likewise
18 revoked or suspended by the director.

19 55. Pursuant to Health & Safety Code section 44072.8, if Respondent Cabriaes's Smog
20 Check Inspector License or Smog Check Repair Technician License is revoked or suspended, any
21 additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code
22 in the name of said licensee may be likewise revoked or suspended by the director.

23 56. Pursuant to Code section 9889.9, if Respondent Cabriaes's Lamp Adjuster License is
24 revoked or suspended, any additional license issued under Articles 5 or 6 of Chapter 23.3 of
25 Division 3 of the Business and Professions Code in the name of said licensee may be likewise
26 revoked or suspended by the director.

27 57. Pursuant to Code section 9889.9, if Respondent Cabriaes's Brake Adjuster License is
28 revoked or suspended, any additional license issued under Articles 5 or 6 of Chapter 23.3 of

1 Division 3 of the Business and Professions Code in the name of said licensee may be likewise
2 revoked or suspended by the director.

3 58. Pursuant to Health & Safety Code section 44072.8, if Respondent Howell's Smog
4 Check Inspector License is revoked or suspended, any additional license issued under Chapter 5
5 of Part 5 of Division 26 of the Health and Safety Code in the name of said licensee may be
6 likewise revoked or suspended by the director.

7 59. Pursuant to Health & Safety Code section 44072.8, if Respondent Eberhart's Smog
8 Check Inspector License is revoked or suspended, any additional license issued under Chapter 5
9 of Part 5 of Division 26 of the Health and Safety Code in the name of said licensee may be
10 likewise revoked or suspended by the director.

11 **PRAYER**

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

14 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
15 282023 issued to Lucy Ventures doing business as Smog Repair And Lube;

16 2. Revoking or suspending Smog Check Test Only Station License Number TC
17 282023 issued to Lucy Ventures doing business as Smog Repair and Lube;

18 3. Revoking or suspending Lamp Station License No. LS 282023, Class A, issued to
19 Lucy Ventures doing business as Smog Repair and Lube;

20 4. Revoking or suspending Brake Station License No. BS 282023, Class C, issued to
21 Lucy Ventures doing business as Smog Repair and Lube;

22 5. Revoking or suspending any additional Automotive Repair Dealer Registration,
23 Smog Check Station License, Brake Station License, Lamp Station License, Smog Check
24 Inspector License, or Smog Check Repair Technician license, issued to Lucy Ventures;

25 6. Ordering Lucy Ventures to pay the Bureau of Automotive Repair the reasonable
26 costs of the investigation and enforcement of this case, pursuant to Business and Professions
27 Code section 125.3;

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- 1 7. Revoking or suspending Smog Check Inspector (EO) License No. EO633674
- 2 issued to Luis Antonio Cabriales;
- 3 8. Revoking or suspending Smog Check Repair Technician (EI) License No.
- 4 EO633674 issued to Luis Antonio Cabriales;
- 5 9. Revoking or suspending Brake Adjuster License No. BA633674, Class C, issued
- 6 to Luis Antonio Cabriales;
- 7 10. Revoking or suspending Lamp Adjuster License No. LA633674, Class A, issued
- 8 to Luis Antonio Cabriales;
- 9 11. Revoking or suspending any additional Smog Check Station License, Smog Check
- 10 Inspector License, Smog Check Repair Technician License, Lamp Adjuster License, Brake
- 11 Adjuster License, Brake Station License, or Lamp Station License issued to Luis Antonio
- 12 Cabriales;
- 13 12. Ordering Luis Antonio Cabriales to pay the Bureau of Automotive Repair the
- 14 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
- 15 Professions Code section 125.3;
- 16 13. Revoking or suspending Smog Check Inspector License EO633592 issued to
- 17 Randy Lee Howell;
- 18 14. Revoking or suspending any additional Smog Check Station License, Smog Check
- 19 Inspector License, or Smog Check Repair Technician License, issued to Randy Lee Howell;
- 20 15. Ordering Randy Lee Howell to pay the Bureau of Automotive Repair the
- 21 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
- 22 Professions Code section 125.3;
- 23 16. Revoking or suspending Smog Check Inspector License EO636778 to Branden L.
- 24 Eberhart;
- 25 17. Revoking or suspending any additional Smog Check Station License, Smog Check
- 26 Inspector License, or Smog Check Repair Technician License, issued to Branden L. Eberhart;
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1 18. Ordering Branden L. Eberhart to pay the Bureau of Automotive Repair the
2 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
3 Professions Code section 125.3;

4 19. Taking such other and further action as deemed necessary and proper.

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6 DATED:

August 14, 2017



PATRICK DORAIS

Chief

Bureau of Automotive Repair

Department of Consumer Affairs

State of California

Complainant

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