

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

In the Matter of the Accusation Against:

SERGIO RODAS RODRIGUEZ dba 2020 SMOG CHECK

Automotive Repair Dealer Registration No. ARD 296781,

Smog Check Test Only Station License No. TC 296781,

and

CELIA MARIA RAMIREZ CORTEZ

Smog Check Inspector License No. EO 636510,

Respondents.

Agency Case No. 79/21-6742

OAH No. 2021090935.1

PROPOSED DECISION ON REMAND

Julie Cabos-Owen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 22 and 23, 2022. Stephen D. Svetich, Deputy Attorney General, represented

Patrick Dorais (Complainant), Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs (Department). Michael B. Levin, Attorney at Law, represented Sergio Rodas Rodriguez (Respondent Rodriguez), doing business as 2020 Smog Check, and Celia Maria Ramirez Cortez (Respondent Cortez) (collectively Respondents). Respondents were present for the hearing.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on September 23, 2022.

The original Proposed Decision in this matter was issued on October 17, 2022.

On December 27, 2022, the Department issued an Order of Rejection and Remand to Administrative Law Judge (Remand Order). The Remand Order, which was marked and admitted as Exhibit 33, directed the ALJ "to take additional evidence regarding the factors set forth in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, relating to the costs ordered in the above-captioned action so such evidence and discussion may be included in the Proposed Decision." (Exhibit 33, p. Z2.)

ALJ Julie Cabos-Owen conducted the remand hearing by videoconference on September 14, 2023. Diana Petikyan, Deputy Attorney General, represented Complainant. Respondents represented themselves.

At the remand hearing, Respondents provided additional testimony about their ability to pay costs, and the ALJ considered additional oral argument. The record closed, and the matter was re-submitted for decision on September 14, 2023.

While the majority of the factual findings in the original proposed decision (established through testimony and documentary evidence presented during the

September 2022 hearing) remain unchanged, some factual findings and legal conclusions have been revised, added, or renumbered on remand. (See Factual Findings 44, 45, 46, 48, and 49, Legal Conclusion 20, and paragraphs 10 and 11 of the Order.)

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 26, 2020, the Bureau issued Automotive Repair Dealer (ARD) Registration Number ARD 296781 to Respondent Rodriguez doing business as 2020 Smog Check (Respondent Station).

2. On March 19, 2020, the Bureau issued Smog Check Test Only Station License Number TC 296781 to Respondent Station.

3. The ARD Registration and Smog Check Test Only Station License are scheduled to expire on February 28, 2023.

4. Respondent Station is certified as a STAR Station. That certification was issued on July 31, 2020, and it will remain in effect unless the ARD Registration or Smog Check Test Only Station License is revoked, is cancelled, becomes delinquent, or the certification is invalidated.

5. On January 30, 2014, the Bureau issued Smog Check Inspector License Number EO 636510 to Respondent Cortez. That license is scheduled to expire on March 31, 2024.

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6. On August 4, 2021, Complainant filed the Accusation while acting in his official capacity as Chief of the Bureau. Respondents' counsel filed a joint Notice of Defense on their behalf.

Smog Inspection Program and Inspection Requirements

7. California's smog check program is designed to improve air quality and to protect the public health by reducing air pollution produced through vehicle emissions. The smog check program requires most vehicles in the state to undergo a smog check inspection at specified times. A proper smog inspection determines whether all required emission control devices and systems are installed and functioning properly.

8. Bureau-licensed smog check inspectors at Bureau-licensed smog check stations conduct the mandated smog check inspections. Smog check inspectors are issued a unique personal access code to initiate and perform official smog check inspections.

9. For pre-2000 model year vehicles, the smog check inspection is performed using an Emission Inspection System (EIS), also known as a BAR-97.

10. The smog check inspection of a pre-2000 model year vehicle consists of three parts: a tailpipe emission sample test, a visual inspection, and a functional test. The tailpipe emission sample test analyzes tailpipe emissions obtained while the vehicle's engine is running. During the visual inspection, the smog check inspector verifies the presence of required emission control systems and components. The functional test requires the smog check inspector to physically test certain emission system components.

11. A vehicle must pass all three portions to pass the overall smog check inspection and receive a certificate of compliance. The certificate of compliance is transmitted electronically to database maintained by the Bureau, the Vehicle Information Database (VID).

12. On most 1996 to 1999 model year vehicles, an On-Board Diagnostics (OBDII) functional test is also performed. The smog check inspector is required to connect a test cable from the EIS to a Diagnostic Link Connector (DLC), which is a plug located in the vehicle's passenger compartment. Through the DLC, the EIS retrieves information from the vehicle's on-board computer. When that information is retrieved, it is relayed to the VID.

13. In certain "Enhanced" areas of California, the tailpipe emission sample test is an Acceleration Simulation Mode (ASM) test performed using the BAR-97 and a dynamometer. During the ASM test, a probe is inserted into the vehicle's tailpipe, and a sample of its tailpipe emissions is sent to the BAR-97 analyzer. This a computer-based, five-gas analyzer that measures the levels of three pollutants -- hydrocarbons (HC), carbon monoxide (CO), and oxides of nitrogen (NOX) -- and the levels of two non-pollutants -- carbon dioxide (CO₂) and oxygen (O₂) -- emitted through a vehicle's tailpipe. Each vehicle make and model has acceptable pollutant levels called "cut points" which should not be exceeded. All three pollutants must be below their cut points. If a vehicle exceeds any of the cut points for any of the pollutants, the vehicle should fail the smog inspection.

14. The ASM test entails two loaded mode sequences that measure a vehicle's tailpipe emissions while the vehicle is on a dynamometer. The vehicle's drive wheels are placed onto rollers, and the vehicle is driven at speeds of 15 miles per hour

during Mode 1 and 25 miles per hour during Mode 2. The purpose of the ASM test is to simulate driving conditions while the emissions are sampled by the EIS.

15. Based on the results of the tailpipe emissions sample test, the visual inspection, and functional test, and any on-board diagnostic information, the EIS determines whether a vehicle passes the overall inspection. If a vehicle passes the inspection, a certificate of compliance, with a unique control number, is issued and transmitted electronically to the VID. The vehicle information and test results are also electronically transmitted to the DMV.

16. After the smog check inspection, the EIS prints a Vehicle Inspection Report (VIR), which is a physical record of the test results and shows the smog check certificate of compliance number for a vehicle that passes the smog check inspection. The inspector must sign the VIR to indicate the inspection was performed within Bureau guidelines.

17. By issuing a certificate of compliance for a vehicle, the issuing smog station and inspector certify the vehicle has been properly inspected and has all the required emission control equipment devices installed and functioning correctly.

18. The VID contains the dates and times of all smog inspections, the identities of the inspectors and stations performing the inspections, the identity of the vehicles tested (license plate and Vehicle Identification Number [VIN]), and all data obtained during the smog check inspections, including second-by-second emissions data the EIS records during the tailpipe emissions sample test. Bureau employees have access to the VID, and they use the information stored there when conducting investigations.

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19. The Bureau has become aware of methods some smog check stations and smog check inspectors use to issue fraudulent certificates of compliance to vehicles that would not pass a properly performed smog check inspection. One such method is known as "clean gassing." Clean gassing is a method by which a smog inspector introduces a surrogate gas, or a mixture of surrogate gas and exhaust emissions, into the BAR-97, thereby altering the tested exhaust gasses for that vehicle. Through clean gassing, a vehicle that should fail the tailpipe test of a smog inspection would instead pass the smog inspection based on fraudulent emission readings rather than the vehicle's actual emissions.

20. The Bureau can identify clean gassing activity by analyzing specific second-by-second emissions data recorded by the EIS during a smog inspection. Second-by-second data shows vehicle emissions levels and speed during the ASM test. Dramatic simultaneous drops and rises in the concentrations of NOX, CO, and HC during a smog inspection indicate a surrogate gas was introduced at specific times during the ASM test to obtain passable readings for those pollutants.

21. Clean gassing undermines the Bureau's efforts to reduce automobile emissions by allowing polluting vehicles to continue contributing to air pollution.

Analysis of Test Data from Respondents

22. Prior to June 4, 2021, Ian Evans, a Bureau Program Representative II, initiated an investigation of the smog check activities at Respondent Station by reviewing EIS smog test data transmitted to the VID. Mr. Evans prepared a written report summarizing the findings of his investigation. At hearing, Mr. Evans testified credibly regarding the investigation in conformity with his report.

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23. Based on his investigation, Mr. Evans identified 10 pre-2000 model year vehicles for which Respondent Cortez at Respondent Station issued smog certificates of compliance between August 1, 2020, and April 30, 2021, and for which the second-by-second emissions data showed an unusual pattern of gas readings consistent with clean gassing.

24. The tailpipe portion of the inspections for all 10 vehicles was performed using the BAR-97 ASM test at two loaded mode sequences of 15 and 25 miles per hour. In each of the 10 tests, the data showed at least one sharp, simultaneous drop in the concentrations of NOX, CO, and HC during the ASM test's period of steady-state speed. The simultaneous drop in pollutants was followed by a simultaneous rise of the same pollutants several seconds later. The 10 vehicles also had a second sharp, simultaneous drop in the same pollutant concentrations later in the test.

25. All 10 vehicles failed prior smog check inspections for failing at least the tailpipe emissions portion of the inspection due to elevated pollutant levels measured during the ASM test. Nine of the 10 vehicles underwent their first failing inspection at Respondent Station, and their second passing inspection at Respondent Station occurred within days or hours after their first inspection. All 10 vehicles passed the tailpipe portion of their second inspections at Respondent Station, and they were issued electronic certificates of compliance.

26. Specifically, the 10 vehicles and the dates of inspections are as follows:

(1) Vehicle 1 – 1996 Ford Aerostar:

On August 11, 2020, at 11:01 a.m., Respondent Cortez inspected a 1996 Ford Aerostar (VIN ending in 5674) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RM730362C.

Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station four days prior, on August 7, 2020. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

(2) Vehicle 2 – 1997 Chevrolet S10 Pickup:

On August 21, 2020, at 4:11 p.m., Respondent Cortez inspected a 1997 Chevrolet S10 Pickup (VIN ending in 8149) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RM730362C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station three days prior, on August 18, 2020. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

(3) Vehicle 3 – 1998 Ford E350:

On August 24, 2020, at 9:43 a.m., Respondent Cortez inspected a 1998 Ford E350 (VIN ending in 9115) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RM730386C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX

during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station three days prior, on August 21, 2020. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test. The vehicle failed as a "gross polluter," which is a vehicle that is a significant source of smog emissions by exceeding one or more of the emissions standards by at least twice the standard.

(4) Vehicle 4 – 1997 Toyota T100:

On September 21, 2020, at 3:54 p.m., Respondent Cortez inspected a 1997 Toyota T100 (VIN ending in 9696) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RQ086316C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station 10 days prior, on September 11, 2020. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test. The vehicle failed as a "gross polluter."

(5) Vehicle 5 – 1995 Toyota Tacoma 2WD:

On November 11, 2020, at 3:08 p.m., Respondent Cortez inspected a 1995 Toyota Tacoma 2WD (VIN ending in 9398) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RS242042C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC,

CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station two days prior, on November 9, 2020. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

(6) Vehicle 6 – 1990 Toyota Pickup:

On November 30, 2020, at 4:43 p.m., Respondent Cortez inspected a 1990 Toyota Pickup (VIN ending in 2841) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RS982613C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station the same day, on November 30, 2020, at 10:48 a.m. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

(7) Vehicle 7 – 1997 Honda Civic:

On February 27, 2021, at 1:08 p.m., Respondent Cortez inspected a 1997 Honda Civic (VIN ending in 1455) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RW722082C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station two days prior, on February 25, 2021. The vehicle failed the

previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

(8) Vehicle 8 – 1991 Mazda 626:

On March 31, 2021, at 11:44 a.m., Respondent Cortez inspected a 1991 Mazda 626 (VIN ending in 7308) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. RY696808C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station nine days prior, on March 22, 2021. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test. The vehicle failed as a "gross polluter."

(9) Vehicle 9 – 1997 Ford E150 Club Wagon:

On April 30, 2021, at 2:16 p.m., Respondent Cortez inspected a 1997 Ford E150 Club Wagon (VIN ending in 3032) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. SA470324C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Another technician inspected the same vehicle at another station several weeks prior, on February 11, 2021. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels

of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

(10) Vehicle 10 – 1993 Plymouth Voyager:

On April 30, 2021, at 2:41 p.m., Respondent Cortez inspected a 1993 Plymouth Voyager (VIN ending in 7197) at Respondent Station. The vehicle passed the inspection, and Respondents issued Certificate of Compliance No. SA470325C. Second-by-second data shows emission readings inconsistent with a legitimate smog check inspection (i.e., sharp, simultaneous drop and rise in the concentrations of HC, CO, and NOX during the ASM test). Respondent Cortez inspected the same vehicle at Respondent Station two days prior, on April 28, 2021. The vehicle failed the previous inspection. Second-by-second data from the previous inspection shows levels of HC, CO, and NOX exceeded their cut points during the loaded mode sequences of the ASM test.

27. Mr. Evans referred the smog check inspections of the 10 vehicles to the Bureau's Engineering and Research Branch for a further in-depth evaluation. Air Quality Engineer Francis J. Di Genova evaluated the second-by-second data for the smog check inspections of the 10 vehicles. At hearing, Mr. Di Genova testified credibly regarding his findings and opinions. His two affidavits (Exhibits 29 and 30) supplemented his testimony.

28. Mr. Di Genova has been employed by the Bureau since April 2014. He is currently an Air Quality Engineer II in the Bureau's Program Evaluation and Referee Unit. Mr. Di Genova has worked in the air quality field over 40 years. He holds a Bachelor of Science degree in physics and a Master of Science degree in environmental science. He has extensive experience in the private and public sectors,

including over 10 years with the California Air Resources Board. Mr. Di Genova was involved in the certification testing of the BAR-97 analyzer. He has authored or co-authored numerous publications related to vehicular emissions, emissions controls, and emissions measurement data and analysis.

29. The Bureau has accumulated sufficient second-by-second data to identify properly performed smog check inspections. Mr. Di Genova noted the second-by-second emissions data generated by clean-gassing often shows a distinctly different pattern from those generated during legitimate ASM smog check inspections. The pattern has certain characteristics which are unmistakable when viewed by a trained air pollution specialist who is familiar with automotive emissions and their measurement.

30. In the Bureau's vehicle testing laboratory, Mr. Di Genova has conducted studies modifying smog check equipment in various ways to duplicate methods of fraudulent testing and the unique data signatures which result from that. He has used such information to identify the sources of anomalous data observed in the VID that cannot be plausibly explained by any other means. Typically, this data depicted the simultaneous sharp drop in pollutants followed by a simultaneous, sharp rise of the same pollutants several seconds later in Mode 1 of the test, and the same type of drop and rise again during Mode 2 of the test. The only plausible explanation which could produce such results is the intermittent injection of a clean surrogate gas which does not contain any significant concentration of HC, CO, NOX, or O2 into the EIS in place of some or all the exhaust from the subject vehicle during the test.

31. After reviewing the second-by-second data for the smog inspections of the 10 vehicles at Respondent Station, Mr. Di Genova concluded that each of the 10 vehicles tested by Respondent Cortez at Respondent Station was clean gassed.

32. Mr. Di Genova found: the second-by-second data sent to the VID by Respondent Station for each of the 10 vehicles is "not consistent with a valid steady state California Smog Check [ASM] emission test of a vehicle with a gasoline-powered, spark ignition engine," but instead is "entirely consistent with clean gassing." (Exhibit 30, p. A195; Di Genova testimony.) Mr. Di Genova noted the "multiple sharp, significant, simultaneous changes in all pollutants that are documented in the second-by-second data from each of these tests are highly irregular and cannot be explained by air dilution, catalyst light-off, change in Air-Fuel ratio of the charge to the engine, installation of a new replacement catalytic converter(s) or other appropriate emission control device(s), or by any single component failure of the [EIS]," and "there is no plausible explanation for the data" other than deliberate clean gassing. (*Ibid.*)

33. Based on the second-by-second test data for the 10 vehicles, Mr. Evans and Mr. Di Genova concluded the 10 vehicles received fraudulent smog check certificates of compliance by way of clean gassing. The 10 certificates of compliance Respondent Cortez caused Respondent Station to issue were fraudulent because they contained false and misleading information that the subject vehicles had been properly inspected when, in fact, they had not. Instead, each vehicle passed the ASM test based on false and altered exhaust emission readings (i.e., clean gassing) rather than the vehicle's true emission levels.

34. Complainant's evidence that each of the 10 vehicles was clean gassed was persuasive and un rebutted. Complainant established there is no other plausible explanation for the smog test data for the 10 vehicles. The 10 vehicles' relatively contemporaneous histories of failed smog inspections (some just days prior, and one just hours prior) further support the conclusion that Respondents fraudulently certified the 10 vehicles were properly inspected.

Respondents' Testimony

35. Respondent Cortez works at Respondent Station from 9:00 a.m. to 5:00 p.m., five days per week, and half a day on Saturdays. Respondent Rodriguez pays her \$500 per week in cash. Respondent Station accepts only cash from customers.

36. Respondent Cortez testified at the administrative hearing. She presented as a respectful witness. She denied inserting any external gases to alter, dilute, or replace gasses during the vehicle emissions portion of the 10 smog check inspections at issue. However, her testimony was insufficient to rebut Complainant's persuasive evidence of obvious clean gassing.

37. Respondent Rodriguez testified at the administrative hearing. His testimony was confusing, often elusive, and at points untruthful. His deceitfulness in several portions of his testimony tainted the remainder of his testimony, and his overall credibility was negated.

38. For example, when Respondent Rodriguez was asked how he found the location to open Respondent Station, he testified that he "was passing by and decided to open [his] own business." He denied having family members in the smog check business. Respondent Rodriguez later admitted that his son had previously been in the smog check business and that Respondent Rodriguez found the location for Respondent Station because it used to be the location of his son's smog check station. Respondent Rodriguez denied knowing why his son no longer owned the smog check station. He denied knowing his son's smog check station license was revoked for clean gassing activity, and he asserted he did "not have much contact with [his] son." Respondent Rodriguez later admitted he used to work for H&M Smog, the smog check station previously owned by his son. When asked if that license was revoked,

Respondent Rodriguez testified, "I guess so." When asked whether he knew his stepson had also previously been a smog check inspector, Respondent Rodriguez testified he had "heard rumors that he was." Respondent Rodriguez denied knowing his stepson's license was also revoked.

39. Respondent Rodriguez denied having any jobs other than ownership of Respondent Station. However, he also testified he was employed as a part-time smog technician at Golden Smog Test Only. Respondent Rodriguez first testified the only California licenses he held were his ARD registration, smog check test only station license, and smog technician's license. He later admitted he also holds a California real estate license which he does not use.

40. Respondents sought to contradict Complainant's evidence of their clean gassing by asserting that they were "having problems" with the BAR-97 at Respondent Station in 2020. Respondents recalled having to call the service provider to repair the BAR-97 when it "was down" and prevented them from performing any smog checks inspections until it was fixed. Respondent Rodriguez did not notice any problems performing smog check inspections before having to call the service provider. Since Respondents could not perform smog check inspections when the BAR-97 "was down," there was no evidence that this affected any of the 10 smog check inspections at issue.

41. Respondents admitted they were required to recalibrate the BAR-97 every three days, and if it was not calibrated, it would not allow them to perform any smog check inspection. Consequently, Respondents could not have performed any of the 10 smog check inspections at issue unless the BAR-97 was calibrated every three days and appropriately operational.

42. Given the foregoing, Respondents' assertions that the anomalies in the second-by-second data were somehow caused by a faulty BAR-97 were not persuasive. Moreover, Respondents' assertions were contradicted by the evidence that, in at least one case (Vehicle 6 on November 30, 2020), Respondent Station's BAR-97 was functioning just hours prior to their fraudulent smog check inspection.

43. Mr. Di Genova testified credibly he saw "no hint of any equipment defect" in the data for the 10 vehicles at issue. He has never seen similar second-by-second data caused by any BAR-97 malfunction. Mr. Di Genova noted that, if the BAR-97 was not working or there was a power loss, no data would have been recorded and all data would be zeros. He also noted that, if the BAR-97's analytical bench malfunctioned, not all pollutant levels would be affected equally because NOX is measured by another sensor. However, in each of the 10 smog check inspections at issue, all pollutants simultaneously dropped and rose at the same time. Mr. Di Genova maintained that "the fingerprints of clean gassing are unmistakable in this case," and there is "no legitimate scientific explanation" for the data other than clean gassing.

Costs

44. Complainant submitted, as evidence of the costs of prosecution of the Accusation, a Certification of Prosecution Costs: Declaration of Stephen D. Svetich, certifying the Department of Justice, Office of the Attorney General billed the Bureau \$11,978.75 for legal services provided through September 21, 2022. The legal services included 53 hours of trial attorney and supervisory attorney time, plus paralegal support.

45. Complainant submitted, as evidence of the investigative costs in this matter, the Declaration of Mr. Evans certifying his investigative costs of \$804.33 (nine

hours at \$89.37 per hour), and the Declaration of Mark Casillas certifying his case review costs of \$578.28 (six hours at \$96.38 per hour), with investigative costs totaling \$1,382.61.

46. The evidence established that Complainant incurred investigation and prosecution costs totaling \$13,361.36, all of which are deemed reasonable. (See Legal Conclusion 20.)

Respondents' Character Evidence

47. Respondents have the support of two customers who wrote letters on their behalf attesting to their honesty. Respondent Cortez is also supported by two friends who wrote letters on her behalf. None of the authors indicated they were aware of the allegations in the Accusation. Consequently, the letters were afforded little weight.

Respondents' Testimony re: Ability to Pay Costs

48. Respondent Rodriguez testified that, if his licenses are revoked, he would have no ability to pay any Bureau-ordered costs. He maintained his only earnings are approximately \$500 weekly (up to about \$2,500 per month) from Respondent Station through Ms. Cortez's work there. Respondent Rodriguez asserted he provides the sole financial support for his family, and their current monthly expenses include \$1,500 for rent, \$200 for car insurance, \$117 for medical insurance, and \$600 for food. He noted he has serious health issues that have prevented him from working as a smog check technician.

49. Respondent Cortez testified that, if her license is revoked, she would have no ability to pay any Bureau-ordered costs. She lives by herself and is financially

dependent on her smog technician earnings. Her current monthly expenses include \$1,000 for rent, \$270 for car insurance, \$100 for groceries, and \$100 to \$200 for medical expenses. She has also incurred credit card debt which she is working to pay down.

LEGAL CONCLUSIONS

1. Business and Professions Code section 9884.7, subdivision (a), authorizes the Director (Director) of the Department to discipline the registration of an automotive repair dealer for "acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer," including: "[m]aking or authorizing 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" (subd. (a)(1)); "[a]ny other conduct which constitutes fraud" (subd. (a)(4)); and "[f]ailure in any material respect to comply with the provisions of [Automotive Repair Act] or regulations adopted pursuant to it" (subd. (a)(6)).

2. Business and Professions Code, section 9884.7 imposes liability on automotive repair dealers for the violations of the dealers or their employees "related to the conduct of business of the automotive repair dealer." In this case, Respondents' violations occurred during the performance of smog inspections which were "related to the conduct of business of the automotive repair dealer" and which were subject to the requirements of the Automotive Repair Act (Business and Professions Code sections 9880 et seq.). Consequently, the Bureau may discipline the ARD registration of

Respondent Station for the violations of Respondent Station and any of its employees while conducting those smog inspections.

3. Health and Safety Code section 44072.2, subdivisions (a) and (c), authorizes the Director to discipline a license if the license holder violates provisions of the Motor Vehicle Inspection Program which establishes inspections standards and test procedures. These provisions include Health and Safety Code sections 44012 (tests at smog check stations shall be performed in accordance with procedures prescribed by the department), and 44015 (authorizing issuance of certificate of compliance if vehicle meets requirements), and California Code of Regulations, title 16 (CCR), sections 3340.24, subdivision (c) (prohibiting false or fraudulent issuance of certificate of compliance), 3340.30, subdivision (a) (mandating inspections/tests in accordance with the Motor Vehicle Inspection Program), 3340.35, subdivision (c) (providing issuance of certificate of compliance for a properly inspected vehicle), 3340.41, subdivision (c) (prohibiting knowingly entering into the EIS any false information about the vehicle being tested), 3340.42 (establishing specific emissions test methods and standards to apply during inspections), and 3340.45, subdivision (a) (requiring smog check inspections be performed as prescribed).

4. Health and Safety Code section 44032 provides, in pertinent part, "Qualified technicians shall perform tests of emission control devices and systems in accordance with [Health and Safety Code] Section 44012." Health and Safety Code section 44012 provides: "The test at the smog check stations shall be performed in accordance with procedures prescribed by the department....."

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5. CCR section 3340.30, subdivision (a), provides:

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

(a) Inspect, 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.

6. Health and Safety Code section 44072.2, subdivision (d), authorizes the Director to discipline a license if the license holder "commits any act involving dishonesty, fraud, or deceit whereby another is injured."

7. Health and Safety Code section 44072.10, subdivision (c), provides:

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: [¶] . . . [¶]

(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.

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

8. "Willful" is not defined in either the Health and Safety Code or the Business and Professions Code. When a term is not defined within the code in which it is used, the term may be defined by reference to a different code. (See *Brown v. State Department of Health* (1978) 86 Cal.App.3d 548, 554 [applying the Penal Code definition of "knowingly" to a Business and Professions Code statute].) Within the context of license discipline cases, the term "willful" has been exported from the Penal Code. (See *Acco Engineered Systems, Inc. v. Contractors' State License Bd.* (2018) 30 Cal.App.5th 80.) Penal Code section 7 defines "willful" as the general intent to perform an act, not a specific intent to violate a law. The term "willfully" means "'a purpose or willingness to commit the act' without regard to motive, intent to injure, or knowledge of the act's prohibited character." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 (citations omitted).) The term implies "that the person knows what he is doing, intends to do what he is doing, and is a free agent. Stated another way, the term 'willful' requires only that the prohibited act occur intentionally." (*Ibid.*)

9. Applying that definition here, Respondents willfully violated the laws and regulations of the Motor Vehicle Inspection Program when they issued certificates of compliance without conducting bona fide smog inspections. Respondents certified 10 vehicles passed inspection by using the clean gassing method. They did not test or inspect the vehicles as required by Health and Safety Code section 44012. Consequently, Respondents conducted fraudulent inspections as defined by Health and Safety Code section 44072.10, subdivision (c)(4).

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10. *First Cause for Discipline:* Cause exists to discipline Respondent Station's ARD registration under Business and Professions Code section 9884.7, subdivision (a)(1), in that Respondents made or authorized statements related to the business of an automotive repair dealer which they knew, or should have known, were untrue or misleading, as set forth in Factual Findings 7 through 34.

11. *Second Cause for Discipline:* Cause exists to discipline Respondent Station's ARD registration under Business and Professions Code section 9884.7, subdivision (a)(4), in that Respondents engaged in conduct related to the business of an automotive repair dealer constituting fraud, as set forth in Factual Findings 7 through 34.

12. *Third Cause for Discipline:* Cause exists to discipline Respondent Station's ARD registration under Business and Professions Code section 9884.7, subdivision (a)(6), in that Respondents failed to comply with the provisions of the Automotive Repair Act as set forth in Factual Findings 7 through 34.

13. *Fourth Cause for Discipline:* Cause exists to discipline Respondent Station's Smog Check Test Only Station License under Health and Safety Code section 44072.2, subdivision (a), in that Respondents failed to comply with the provisions of the Motor Vehicle Inspection Program, specifically Health and Safety Code sections 44012 (failure to ensure inspections were performed in accordance with prescribed procedures), 44015 (unauthorized issuance of smog certificate of compliance), and 44072.10, subdivision (c)(2) through (c)(4) (fraudulently certifying vehicles or participating in fraudulent inspection of vehicles), as set forth in Factual Findings 7 through 34.

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14. *Fifth Cause for Discipline:* Cause exists to discipline Respondent Station's Smog Check Test Only Station License under Health and Safety Code section 44072.2, subdivision (c), in that Respondents failed to comply with regulations adopted pursuant to the Motor Vehicle Inspection Program, specifically CCR, sections 3340.24, subdivision (c), 3340.35, subdivision (c), 3340.41, 3340.42, and 3340.45, as set forth in Factual Findings 7 through 34.

15. *Sixth Cause for Discipline:* Cause exists to discipline Respondent Station's Smog Check Test Only Station License under Health and Safety Code section 44072.2, subdivision (d), in that Respondents committed dishonesty, fraud, and deceit which injured the public by allowing polluting vehicles to continue operating without proper inspection and certification, as set forth in Factual Findings 7 through 34.

16. *Seventh Cause for Discipline:* Cause exists to discipline Respondent Cortez's Smog Check Inspector License under Health and Safety Code section 44072.2, subdivision (a), in that Respondent Cortez failed to comply with the provisions of the Motor Vehicle Inspection Program, specifically Health and Safety Code section 44012, subdivision (a) (failure to perform inspections in accordance with prescribed procedures), as set forth in Factual Findings 7 through 34.

17. *Eighth Cause for Discipline:* Cause exists to discipline Respondent Cortez's Smog Check Inspector License under Health and Safety Code section 44072.2, subdivision (a), in that Respondent Cortez failed to comply with the provisions of the Motor Vehicle Inspection Program, specifically Health and Safety Code section 44072.10, subdivision (c)(2) through (c)(4) (fraudulently certifying vehicles or participating in fraudulent inspection of vehicles), as set forth in Factual Findings 7 through 34.

18. *Ninth Cause for Discipline:* Cause exists to discipline Respondent Cortez's Smog Check Inspector License under Health and Safety Code section 44072.2, subdivision (c), in that Respondent Cortez failed to comply with regulations adopted pursuant to the Motor Vehicle Inspection Program, specifically CCR sections 3340.24, subdivision (c), 3340.35, subdivision (c), 3340.41, 3340.42, and 3340.45, as set forth in Factual Findings 7 through 34.

19. *Tenth Cause for Discipline:* Cause exists to discipline Respondent Cortez's Smog Check Inspector License under Health and Safety Code section 44072.2, subdivision (d), in that Respondent Cortez committed dishonesty, fraud, and deceit which injured the public by allowing polluting vehicles to continue operating without proper inspection and certification, as set forth in Factual Findings 7 through 34.

20. *Costs:* Pursuant to Business and Professions Code section 125.3, Complainant is entitled to recover the reasonable costs incurred in the investigation and prosecution of this matter. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 (*Zuckerman*), the Supreme Court set forth factors to consider in determining the reasonableness of costs. These factors include: (1) the licentiate's success in getting the charges dismissed or the severity of the discipline imposed reduced; (2) the licentiate's subjective good faith belief in the merits of his or her position; (3) whether the licentiate raised a colorable challenge to the proposed discipline; (4) the licentiate's financial ability to pay; and (5) whether the scope of the investigation was appropriate in light of the alleged misconduct. The *Zuckerman* factors are applied to this case as follows: because 10 of the 10 causes for discipline were established, Respondents were unsuccessful in getting charges dismissed or the severity of discipline reduced; because Respondents' testimony lacked credibility, they did not establish any good faith belief in their position; Respondents did not raise a

justifiable challenge to the proposed discipline; and the scope of the Bureau investigation was appropriate in light of the alleged misconduct and the complexity of the subject matter. However, Respondents established their inability to pay Bureau-ordered costs should their licenses be revoked. Considering all the *Zuckerman* factors, there is no basis for reducing the award of Complainant's reasonable costs. However, given Respondents' inability to pay Bureau-ordered costs once their licenses are revoked, they should not be required to pay the costs of enforcement of this matter unless and until they seek re-licensure or reinstatement of their licenses. At the time of re-licensure or reinstatement, each Respondent should owe one-half of the ordered costs. Therefore, pursuant to Business and Professions Code section 125.3, Complainant is entitled to recover the reasonable costs of investigation and prosecution in the amount of \$13,361.36 (\$6,680.68 from each Respondent), as set forth in Factual Findings 44 through 46, and 48 and 49.

21. *Smog Check Licenses Discipline.* Health and Safety Code section 44072.10, subdivision (c), requires that the Bureau "revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles." (See Legal Conclusion 7 through 9.) Having found Respondents fraudulently certified and engaged in the fraudulent inspection of vehicles, the Bureau is required to revoke Respondent Cortez's Smog Check Inspector License and Respondent Station's Smog Check Test Only Station License.

22. *ARD Registration Discipline.* Respondent Station must ensure it is conducting its automotive repair business in compliance with the Automotive Repair Act and applicable regulations. This included a responsibility to ensure lawful smog inspections according to specified procedures. Respondent Station failed to ensure compliance with the law and issued false certificates of compliance. In doing so,

Respondent Station placed the public at risk by allowing vehicles to operate when their emissions systems had not been confirmed as meeting established air quality standards designed to control sources of air pollution. Respondent Rodriguez was not a credible witness, and he provided no evidence to assure the Bureau that Respondent Station would comply with the operative laws and regulations in the future. Consequently, invalidation of Respondent Station's ARD registration is warranted to protect the public health, safety, and welfare.

ORDER

1. Automotive Repair Dealer Registration Number ARD 296781, issued to Sergio Rodas Rodriguez, dba 2020 Smog Check, is hereby revoked.
2. Smog Check Test Only Station License Number TC 296781, issued to Sergio Rodas Rodriguez, dba 2020 Smog Check, is hereby revoked.
3. Smog Check Inspector License Number EO 636510 issued to Celia Maria Ramirez Cortez is hereby revoked.
4. Any additional license issued to Respondent Sergio Rodas Rodriguez under the Motor Vehicle Inspection Program (Health & Saf., div. 26, pt. 5, ch. 5) is revoked.
5. Any registration for all places of business operated in California in the name of Sergio Rodas Rodriguez is revoked.
6. If Respondent Sergio Rodas Rodriguez later applies for issuance of a license or reinstatement of his revoked license(s), he shall reimburse the Bureau

\$6,680.68 for its enforcement costs in this case, before reinstatement or issuance of any license, or as the Bureau in its discretion may otherwise order.

7. If Respondent Celia Maria Ramirez Cortez later applies for issuance of a license or reinstatement of her revoked license, she shall reimburse the Bureau \$6,680.68 for its enforcement costs in this case, before reinstatement or issuance of any license, or as the Bureau in its discretion may otherwise order.

DATE: **10/04/2023**

Signed Copy on File

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings