

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

In the Matter of the Accusation Against:

S & A TEST ONLY
ARTURO GUTIERREZ, OWNER
Automotive Repair Dealer Registration
Number ARD 252452, Smog Check, Test
Only, Station License Number TC 252457

and

BASEM HANA SABA
Advanced Emission Specialist Technician
License No. EA 200077,

Respondents.

Case No.: 79/11-50

OAH No.: 2010110820

DECISION

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

This Decision shall become effective 2/28/12.

IT IS SO ORDERED January 24, 2012.

ref


DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

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

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Case No. 79/11-50

OAH No. 2010110820

PROPOSED DECISION

The hearing in the above-captioned matter took place on September 20 and 21, 2011, in Van Nuys, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Complainant was represented by M. Travis Peery, Deputy Attorney General. Respondents Arturo Gutierrez and Basem Hana Saba appeared and represented themselves.

Evidence was received, the case was argued, and the matter submitted for decision on September 21, 2011. The ALJ hereby makes his factual findings, legal conclusions, and order.

FACTUAL FINDINGS

The Parties, Jurisdiction, and Nature of the Case

1. Complainant Sherry Mehl brought the action in the above-captioned matter while acting in her official capacity as the Chief of the Bureau of Automotive Repair (Bureau).

2. On October 23, 2007, the Bureau issued Automotive Repair Dealer Registration number ARD 252457 to Respondent Arturo Gutierrez (Gutierrez), doing business as S & A Test Only. Approximately two weeks later, on November 8, 2007, the Bureau licensed Respondent as a Smog Check, Test Only, station, with license number TC 252452. Gutierrez's licenses will expire on October 31, 2011, unless renewed. Respondent Gutierrez does business at a location in Sylmar, California (the facility).

3. In 1998, the Bureau licensed Respondent Basam Hana Saba (Saba) to act as an Advanced Emission Specialist. He holds license number EA 2000777. Saba's license will expire June 30, 2012, unless renewed.

4. Following service of the Accusation on each Respondent, they filed Notices of Defense and requested a hearing, and this proceeding ensued. All jurisdictional requirements have been met.

5. In this action, Complainant asserts that Respondent Saba, while employed by Respondent Gutierrez, smog tested a Bureau-owned vehicle and passed it, despite the fact that the vehicle was missing a component of its emission control system. Further, it is alleged that Saba conducted seven smog tests, on a variety of cars, wherein he did not plug the computers of those vehicles into the smog check system, but instead plugged the smog test system into the computer of a single vehicle, thereby masking potential system malfunctions on the tested vehicles. It is therefore asserted that each of the seven cars was passed by Saba, despite the fact that he used an improper test method.

The December 2009 Undercover Run

6. On December 10, 2009, the Bureau sent a 2001 Ford Ranger to the facility in order to obtain a smog test. The vehicle is owned by the Bureau and was driven by a person employed by the Bureau, who used an assumed name. Prior to that date, Bureau personnel had modified the vehicle by removing the PCV (Positive Crankcase Ventilation) valve and a related hose from the engine. The modification of the engine was thoroughly documented by the Bureau's employees.

7. The PCV valve is a necessary component of the vehicle's emission control system. During a smog test, the technician is required to verify the valve's presence and that it is properly connected; this is part of the visual inspection portion of the overall test. Because the PCV valve was missing, the car should have failed the smog test that was conducted at the facility.

8. The Bureau's driver requested a smog test. When the driver asked for the smog test he was not given a signed copy of the work order. The smog test was performed by Saba; Gutierrez was not present during the test. Saba passed the vehicle, and issued a Certificate of Compliance for it. Saba also issued a Vehicle Inspection Report (VIR) for the Ranger, which he signed under penalty of perjury, stating that he had properly inspected the

car, and that the information in that Report was true. The VIR states that the PCV system passed, which was impossible given the Bureau's modifications to the engine.

9. The Certificate of Compliance and VIR contained false statements regarding the state of the PCV valve and related components. Saba should have failed the vehicle due to the missing PCV valve.

The Bureau's Review of Data Generated By Gutierrez' Test Equipment

10. In April 2010, a Bureau representative conducted a review of data contained in the Bureau's Vehicle Information Database (VID), which data had been generated by the test equipment at the facility. The VID receives information from the smog test systems at each licensed facility in the state. The information includes the identity of the vehicle, the place where a smog test is conducted on that vehicle, the identity of the technician conducting the smog test, and information generated during the test, including the results of the tests.

11. Among the data placed in the VID during the testing process is information obtained from the car's On Board Diagnostics system, part of the computer system that governs many modern vehicle operations. The system, known as the OBD II, is the one that will turn on the "check engine" dashboard light if there is a malfunction that implicates emission control or other performance problems. However, the system will also record other information, including trouble codes of potential problems that are not at a point that the check engine light (known as the MIL—Malfunction Indicator Light) will be activated.

12. During the performance of a smog test, the technician is required to connect the test system—known as the BAR-97 Analyzer—to the subject vehicle's OBD II through the Diagnostic Link Connector. Practically speaking, this is the same as connecting two computer components to each other with a cable. A vehicle that fails the OBD II test fails the smog test.

13. The BAR-97 can obtain some codes and transmit them to the VID even where those codes have not activated the MIL and would not cause the test to fail. The technician conducting the test does not have access to such codes.

14. The VID established that during the period from January 4 through January 16, 2010, seven vehicles tested at the facility by Saba all recorded the same two diagnostic trouble codes into the test system. Those codes were P1768 and P1784. Those two trouble codes are specific to Chrysler-manufactured vehicles, and would not be generated by the diagnostic systems of vehicles that had not been manufactured by Chrysler. The two trouble codes at issue pertain to issues in the transmission of such Chrysler cars.

15. The seven vehicles that ostensibly generated the Chrysler trouble codes are identified as follows:

- (A) 1998 Chevrolet pickup, tested January 5, 2010, between 1:54 and

- 2:04 p.m.;
- (B) 1998 GMC pickup, tested January 6, 2010, between 9:38 and 9:48 a.m.;
- (C) 1998 Ford Ranger, tested January 6, 2010, between 12:04 and 12:17 p.m.;
- (D) 2001 Kia Sephia, tested January 11, 2010, between 10:20 and 10:38 a.m.;
- (E) 1997 Ford Aspire, tested January 13, 2010, between 2:06 and 2:13 p.m.;
- (F) 2003 Toyota Camry, tested January 16, 2010, between 12:42 and 12:49 p.m.;
- (G) 1996 Toyota Previa, tested January 16, 2010, between 2:41 and 3:02 p.m.

16. Essentially, it is impossible for the seven vehicles listed above to generate trouble code P1768 or trouble code P1784. The only reasonable inference, given the evidence, is that Respondent Saba plugged the BAR-97 smog testing equipment into the same Chrysler on the seven occasions when the cars identified in Factual Finding 15 were tested. This constitutes a violation of applicable statutes and regulations governing the performance of smog checks in California, through a practice labeled by the Bureau as “clean plugging ”

17. Respondent Saba, acting on behalf of Gutierrez, issued a Certificate of Compliance for each of the seven vehicles in question, and caused reports of each vehicle passing the smog check to be transmitted to the VID as well as the Department of Motor Vehicles. However, because the OBD II system of each vehicle was not properly checked, they should not have passed, and no certificate of compliance should have issued to those seven cars.

Evidence Provided by Respondents

18. Respondent Gutierrez was not present when any of the vehicles was tested. Based on his testimony, at that point in time Gutierrez was very much an absentee owner, and he had left the day-to-day operation of the station to Saba because he had another business to operate. Saba had worked at the station for several years, and had been employed by the person who sold the station to Gutierrez. Gutierrez trusted Saba’s ability and professionalism.

19. Saba admitted that he quite likely never opened the hood of the Ford Ranger. He surmised that he was likely distracted in some way. He has been taking a heavy regimen of pain killers since he suffered an injury, which has limited his ability to work. He admitted that the prescription medications make him distractible, and can impair his concentration. This contention was borne out by his demeanor during the hearing.

20. As to the clean plugging charges, Saba denied that he intentionally did so. However, he owned an older Chrysler vehicle in January 2010, and he testified that he would often use the BAR-97 machine to clear trouble codes on that vehicle. He asserted that he might have failed to properly clear the machine before conducting a test with it.

21. Mr. Gutierrez has taken steps to supervise the facility more closely. While he himself is not trained in conducting smog tests, he has been keeping a better presence at the

facility. In the meantime, he has asked his son to become active in the business, and his son has taken courses to qualify as a technician, and should have taken the test to become a technician by the time this proposed decision issues.

Costs and Prior Warnings from the Bureau

22. The Bureau incurred costs, in the form of charges by the Department of Justice, of \$13,915. During the course of the hearing, Respondent Saba testified that he is heavily in debt, and not working full time due to his medical condition. It appears unlikely that he would be able to pay any substantial costs. Respondent Gutierrez operates the facility, and another business, and it is reasonably inferred that he would be better able to make payment against the costs.

23. In June 2009, the Bureau held a conference with Respondents to advise them that they had found a number of violations by Saba, where “clean coupling” had occurred. The Bureau asserted that in numerous instances Saba did not properly conduct the Low Pressure Evaporative Test. The Respondents were warned that discipline would follow future violations of the statutes and regulations.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter pursuant to Business and Professions Code section 9884.7 and Health and Safety Code section 44072.2 was established, based on Factual Findings 1 through 4.

2. (A) Section 9884.7, subdivision (a), of the Business and Professions Code provides, in part, that the director of the Bureau may, “where the automotive repair dealer cannot show there was a bona fide error” discipline the registration for various enumerated acts, such as false and misleading statements (subd.(a)(1)), fraud (subd. (a)(4)), or conduct constituting gross negligence (subd. (a)(5)). The statute places the burden on the Bureau to prove grounds for discipline, and it allocates to the licensee the burden of proving a “bona fide error.” (Evid. Code, § 500.)

(B) The term “bona fide error” is not defined in the statute, but plainly refers to a mistake that arises in the context of a good faith act.¹

(C) Given Respondent Saba’s testimony, and the evidence offered by Complainant, it can not be found that Saba’s failure to properly test the Ford Ranger, or his failure to properly check the OBD II system of the seven vehicles identified Factual Finding

¹ Black’s Law Dictionary (4th ed. 1968) defines an error as “a mistaken judgment or incorrect belief as to the existence or effect of matters of fact, . . .” (p. 637, right column) while bona fide is defined as “in or with good faith; honestly, openly, and sincerely; without deceit or fraud.” (*Id.*, p. 223, right column.)

15, resulted from “bona fide error.” This Conclusion is based on Factual Findings 6 through 17.

3. Cause was established to discipline Respondent Gutierrez’s ARD pursuant to Business and Professions Code section 9884.7, subdivision (a)(1) for making untrue statements was established, based on Legal Conclusions 1 and 2, and Factual Findings 6 through 17.

4. Cause was established to discipline the ARD held by Gutierrez pursuant to Business and Professions Code section 9884.7, subdivision (a)(3), for failure to provide a customer with a signed copy of the work order, based on Factual Finding 8.

5. (A) Cause was not established to discipline Gutierrez’s ARD pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), for fraud, in connection with the undercover run, in that it was not established that Gutierrez or Saba acted with fraudulent intent in the transactions in question. This Conclusion is based on Factual Findings 18 and 19.

(B) Cause was established to discipline Gutierrez’s ARD pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), for fraud, in connection with the tests of the vehicles identified in Factual Finding 15, in that Respondent Saba employed the practice of “clean plugging” on seven vehicles over a period of days. This Conclusion is supported by Factual Findings 10 through 17.

6. Cause was established to discipline Respondent Gutierrez’s smog check station license pursuant to Health and Safety Code section 44072.2, subdivision (a), for violation of sections 44012 and 44015 of that code in connection with eight inspections. This Conclusion is based on Factual Findings 6 through 17, which establish that each vehicle was not properly tested.

7. Cause was established to discipline Respondent Gutierrez’s smog check station license pursuant to Health and Safety Code section 44072.2, subdivision (c), for failure to comply with regulations enacted by the Bureau. In this case Respondent violated California Code of Regulations (CCR), title 16, section 3340.35, subdivision (c),² by issuing eight certificates of compliance for vehicles that were improperly tested. He also violated CCR section 3340.42, in that his employee, Saba, failed to conduct an inspection in compliance with Bureau specifications. This Conclusion is based on Factual Findings 10 through 17.

8. Cause was established to discipline Respondent Gutierrez’s smog check station license pursuant to Health and Safety Code section 4072.2, subdivision (d), for dishonesty, fraud, or deceit in connection with his employee’s issuance of seven certificates of

² All citations to the CCR are to title 16 thereof.

compliance on those vehicles referred to in Factual Finding 15. This Conclusion is based on Factual Findings 10 through 17.

9. Cause was established to discipline Respondent Saba's technician license pursuant to Health and Safety Code section 44072.2, subdivision (a), in that he failed to comply with various provisions of that Code in connection with the testing of the Ford Ranger and the seven vehicles identified in Factual Finding 15. The violations include violation of section 44012, requiring performance of smog checks in compliance with Bureau procedures, and violation of section 44059, by willfully making a false entries on the VIR in connection with the test of the Ford Ranger. This Conclusion is based on Factual Findings 10 through 17.

10. Cause was established to discipline Respondent Saba's technician license pursuant to Health and Safety Code section 44072.2, subdivision (c), in that he failed to comply with Bureau regulations. The regulations violated include CCR sections 3340.24, subdivision (c) (false or fraudulent electronic certificate of compliance); 3340.30, subdivision (a) (failure to inspect vehicles in accordance with CCR section 3340.42 and Health and Saf. Code §§ 44012 & 44035); 3340.41, subdivision (c) (entry of false information into the EIS); and, section 3340.42 (failure to perform tests to Bureau specifications). This Conclusion is based on Factual Findings 6 through 17.

11. Cause was established to discipline Respondent Saba's technician license pursuant to Health and Safety Code section 44072.2, subdivision (d), for dishonest, deceitful, or fraudulent acts in "clean plugging" the seven vehicles identified in Factual Finding 15, based on Factual Findings 10 through 17.

12. Cause exists to order Respondents to pay costs pursuant to Business and Professions Code section 123.5, based on Legal Conclusions 1 through 11. Under *Zuckerman v. State Board of Chiropractic Examiners*, (2002) 29 Cal.App.4th 32, 45, the Board must consider the ability to pay costs. Here the evidence suggests that Saba has little or no ability to pay costs at this time or in the foreseeable future. At the same time, his impecunious nature should not shift payment of all of the costs onto Gutierrez, whose fault is, ultimately, more passive than active. It was Saba who conducted the inspections. In all the facts and circumstances, Gutierrez should be ordered to pay costs of \$6,500, or approximately one-half of the amount claimed, per a payment schedule.

13. The Bureau has developed guidelines for use in determining what sort of discipline should flow from violations of the statutes and regulations that it is charged with enforcing. The guidelines are incorporated into the regulations, at CCR section 3395.4 (hereafter Guidelines). Those Guidelines provide factors in aggravation and mitigation. Here, there is no prior discipline, but Respondents had been warned in June 2009 that there had been shortcuts and violations, and that further violations would lead to discipline.

14. The Guidelines call for minimum discipline in the form of stayed orders of revocation, 30 to 60 days of suspension, and at least two years probation.

15. The purpose of proceedings of this type are to protect the public, and not to punish an errant licensee. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) The public can only be protected if Respondent Saba's license is revoked. Even if his excuses are accepted, they only prove that he is incapacitated from reliably performing his duties. However, the excuse of his medical condition is inadequate to provide a defense to seven separate acts of "clean plugging." Respondent Gutierrez appears unlikely to violate the laws again, and he has taken steps to have someone with a real stake in the business become the technician. Under the circumstances, outright revocation is unnecessary, and a short suspension should be sufficient to impress upon him the importance of carefully operating his shop.

ORDER

1. The Advanced Emission Specialist Technician License, No. EA 200077, issued to Respondent Basem Hana Saba, is hereby revoked.

2. The Automotive Repair Dealer Registration, number ARD 252457, issued to Respondent Arturo Gutierrez, doing business as S & A Test Only, and the Smog Check, Test Only, station license, number TC 252452, also issued to Respondent Gutierrez, are hereby revoked. However, that revocation or invalidation stayed, on the following terms and conditions:

A. Respondent Gutierrez' licenses shall be placed on probation for a period of two years from the effective date of this order.

B. Respondents' licenses, and each of them, shall be suspended for a period of seven days beginning on the effective date of this order.

C. If Respondent fully complies with probation, at the end of the two-year period, the licenses shall be fully restored.

D. Respondent shall pay costs in the amount of \$6,500, in monthly installments of \$282.60 per month, until the entire amount is paid, beginning 30 days after the effective date of this order. Failure to pay the costs may be deemed a violation of probation.

E. During the period of probation, Respondent shall:

i. Comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.

ii. Post a prominent sign where he operates his smog check station and ARD, provided by the Bureau, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign shall be conspicuously displayed in a location open to and frequented by customers and shall remain posted during the entire period of actual suspension.

iii. Respondent or respondent's authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the Bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

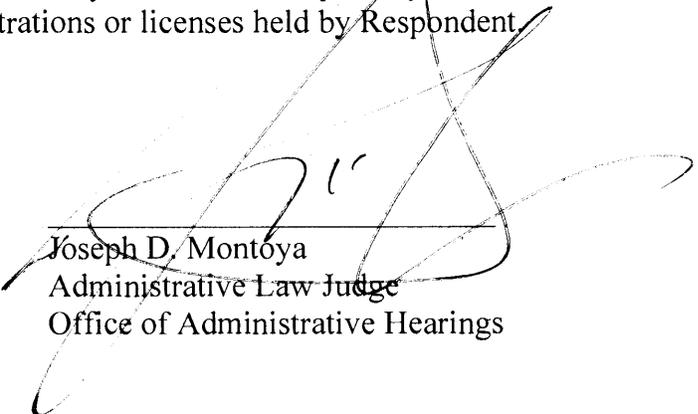
iv. Within 30 days of the effective date of this action, report any financial interest which any partners, officers, or owners of the respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

v. Provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.

vi. If an accusation is filed against respondent during the term of probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter until the final decision on the accusation, and the period of probation shall be extended until such decision.

vii. Should the Director of Consumer Affairs determine that respondent has failed to comply with the terms and conditions of probation, the Department may, after giving notice and opportunity to be heard temporarily or permanently invalidate the registrations or licenses held by Respondent.

October 21, 2011



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:

Case No. 79/11-10

12 **S & A TEST ONLY**
13 **ARTURO GUTIERREZ, OWNER**
14 **13940 Foothill Blvd., #108**
Slymar, CA 91342
15 **Automotive Repair Dealer Reg. No. ARD 252457**
Smog Check, Test Only, Station License No. TC
16 **252457**

ACCUSATION

SMOG CHECK

17 **and**

18 **BASEM HANA SABA**
19 **28277 Foxlane Drive**
Canyon Country, CA 91351-2839
20 **Advanced Emission Specialist Technician**
License No. EA 200077

21 Respondents.

22 Complainant alleges:

23 **PARTIES**

24 1. Sherry Mehl ("Complainant") brings this Accusation solely in her official capacity as
25 the Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

26 **S & A Test Only; Arturo Gutierrez, Owner**

27 2. In or about 2007, the Director of Consumer Affairs ("Director") issued Automotive
28 Repair Dealer Registration Number ARD 252457 (hereinafter "registration") to Arturo Gutierrez

1 ("Respondent Gutierrez"), owner of S & A Test Only. Respondent's registration was in full force
2 and effect at all times relevant to the charges brought herein and will expire on October 31, 2010,
3 unless renewed.

4 3. On or about November 8, 2007, the Director issued Smog Check, Test Only, Station
5 License Number TC 252457 (hereinafter "smog check station license") to Respondent Gutierrez.
6 Respondent's smog check station license was in full force and effect at all times relevant to the
7 charges brought herein and will expire on October 31, 2010, unless renewed.

8 **Basem Hana Saba**

9 4. In or about 1998, the Director issued Advanced Emission Specialist Technician
10 License Number EA 200077 (hereinafter "technician license") to Basem Hana Saba ("Respondent
11 Saba"). Respondent's technician license was in full force and effect at all times relevant to the
12 charges brought herein and will expire on June 30, 2012, unless renewed.

13 **JURISDICTION**

14 5. Business and Professions Code ("Bus. & Prof. Code") section 9884.7 provides that
15 the Director may revoke an automotive repair dealer registration.

16 6. Bus. & Prof. Code section 9884.13 provides, in pertinent part, that the expiration of a
17 valid registration shall not deprive the Director of jurisdiction to proceed with a disciplinary
18 proceeding against an automotive repair dealer or to render a decision temporarily or permanently
19 invalidating (suspending or revoking) a registration .

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

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

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28 ///

1 12. Health & Saf. Code section 44072.10 states, in pertinent part:

2

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

6

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

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

11 **COST RECOVERY**

12 14. Bus. & Prof. Code section 125.3 provides, in pertinent part, that a Board may request
13 the administrative law judge to direct a licentiate found to have committed a violation or
14 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
15 and enforcement of the case.

16 **UNDERCOVER OPERATION: 2001 FORD RANGER**

17 15. On December 10, 2009, an undercover operator with the Bureau (hereinafter
18 "operator") took the Bureau's 2001 Ford Ranger to Respondent Gutierrez's facility and requested
19 a smog inspection. The positive crankcase ventilation ("PCV") valve on the Bureau-documented
20 vehicle was missing. The operator signed a work order authorizing the inspection, but did not
21 receive a copy. After the inspection was completed, the operator paid the facility \$49 and
22 received copies of an invoice and a vehicle inspection report. The vehicle inspection report
23 indicated that the smog inspection was performed by Respondent Saba. That same day,
24 electronic smog Certificate of Compliance #NO972060C was issued for the vehicle.

25 **FIRST CAUSE FOR DISCIPLINE**

26 **(Untrue or Misleading Statements)**

27 16. Respondent Gutierrez's registration is subject to disciplinary action pursuant to Bus.
28 & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized a

1 statement which he knew or in the exercise of reasonable care should have known to be untrue or
2 misleading, as follows: Respondent Gutierrez's technician, Respondent Saba, certified under
3 penalty of perjury on the vehicle inspection report that the Bureau's 2001 Ford Ranger had passed
4 inspection and was in compliance with applicable laws and regulations. In fact, the PCV valve on
5 the vehicle was missing and as such, the vehicle would not pass the inspection required by Health
6 & Saf. Code section 44012.

7 **SECOND CAUSE FOR DISCIPLINE**

8 **(Failure to Provide Customer with Copy of Signed Document)**

9 17. Respondent Gutierrez's registration is subject to disciplinary action pursuant to Bus.
10 & Prof. Code section 9884.7, subdivision (a)(3), in that Respondent failed to provide the operator
11 with a copy of the work order as soon as the operator signed the document.

12 **THIRD CAUSE FOR DISCIPLINE**

13 **(Fraud)**

14 18. Respondent Gutierrez's registration is subject to disciplinary action pursuant to Bus.
15 & Prof. Code section 9884.7, subdivision (a)(4), in that Respondent committed an act that
16 constitutes fraud by issuing an electronic smog certificate of compliance for the Bureau's 2001
17 Ford Ranger without performing a bona fide inspection of the emission control devices and
18 systems on the vehicle, thereby depriving the People of the State of California of the protection
19 afforded by the Motor Vehicle Inspection Program.

20 **FOURTH CAUSE FOR DISCIPLINE**

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

22 19. Respondent Gutierrez's smog check station license is subject to disciplinary action
23 pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to
24 comply with the following sections of that Code:

25 a. **Section 44012:** Respondent failed to ensure that the emission control tests were
26 performed on the Bureau's 2001 Ford Ranger in accordance with procedures prescribed by the
27 department.

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

3 **SEVENTH CAUSE FOR DISCIPLINE**

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

5 22. Respondent Saba's technician license is subject to disciplinary action pursuant to
6 Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to comply with
7 provisions of that Code, in the following material respects:

8 a. **Section 44012:** Respondent failed to perform the emission control tests on the
9 Bureau's 2001 Ford Ranger in accordance with procedures prescribed by the department.

10 b. **Section 44059:** Respondent willfully made a false entry on the vehicle inspection
11 report, as set forth in paragraph 15 above.

12 **EIGHTH CAUSE FOR DISCIPLINE**

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

15 23. Respondent Saba's technician license is subject to disciplinary action pursuant to
16 Health & Saf. Code section 44072.2, subdivision (c), in that he failed to comply with provisions
17 of California Code of Regulations, title 16, as follows:

18 a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued an
19 electronic smog certificate of compliance for the Bureau's 2001 Ford Ranger.

20 b. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test the Bureau's
21 2001 Ford Ranger in accordance with Health & Saf. Code sections 44012 and 44035, and
22 Regulation 3340.42.

23 c. **3340.41, subdivision (c):** Respondent knowingly entered into the EIS false
24 information about the Bureau's 2001 Ford Ranger.

25 d. **Section 3340.42:** Respondent failed to conduct the required smog tests on the
26 Bureau's 2001 Ford Ranger in accordance with the Bureau's specifications.

27 ///

28 ///

1 **NINTH CAUSE FOR DISCIPLINE**

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

3 24. Respondent Saba's technician license is subject to disciplinary action pursuant to
4 Health & Saf. Code section 44072.2, subdivision (d), in that Respondent committed a dishonest,
5 fraudulent, or deceitful act whereby another is injured by issuing an electronic smog certificate of
6 compliance for the Bureau's 2001 Ford Ranger without performing a bona fide inspection of the
7 emission control devices and systems on the vehicle, thereby depriving the People of the State of
8 California of the protection afforded by the Motor Vehicle Inspection Program.

9 **VID DATA REVIEW**

10 25. The Bureau initiated an investigation against Respondent Gutierrez based on a review
11 of information from the Bureau's Vehicle Information Database ("VID"), which indicated that
12 Respondent may be engaging in fraudulent smog check activities.

13 26. On April 26, 2010, a representative of the Bureau conducted a detailed review of VID
14 data for all smog inspections performed at Respondent Gutierrez's facility for the period of
15 January 4, 2010, through January 16, 2010. The representative found that the seven vehicles
16 identified below recorded the same two diagnostic trouble codes (hereinafter "code") during the
17 OBD II tests¹ regardless of the make or model of the vehicle. The representative obtained
18 information indicating that the two codes were not applicable to any of the vehicles, with the
19 exception of vehicle 3 which recorded only one of the codes. The VID data also indicated that
20 Respondent Saba had performed the inspections on the seven vehicles.

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24 ¹ The On Board Diagnostics (OBD II) functional test is an automated function of the
25 BAR-97 analyzer. During the OBD II functional test, the technician is required to connect an
26 interface cable from the BAR-97 analyzer to a Diagnostic Link Connector (DLC) which is
27 located inside the vehicle. Through the DLC, the BAR-97 analyzer automatically retrieves
28 information from the vehicle's on-board computer about the status of the readiness indicators,
trouble codes, and the MIL (malfunction indicator light). If the vehicle fails the OBD II
functional test, it will fail the overall inspection.

27. The Bureau concluded that Respondent Saba performed the smog inspections on the seven vehicles using a different vehicle during the OBD II tests, a method known as "clean plugging",² resulting in the issuance of fraudulent certificates of compliance for the vehicles.

Date & Time of Inspection	Vehicle Certified & License No.	Certificate No.
1. 01/05/2010 13:54 - 14:04	1998 Chevrolet C1500 pickup; License No. 8T28149	NQ211262C
2. 01/06/2010 09:38 - 09:48	1998 GMC C1500 pickup; License No. 6M27719	NQ211268C
3. 01/06/2010 12:04 - 12:17	1998 Ford Ranger; License No. 5V21605	NQ211270C
4. 01/11/2010 10:20 - 10:38	2001 Kia Sephia; License No. 5XWF963	NQ297402C
5. 01/13/2010 14:06 - 14:13	1997 Ford Aspire; License No. 5WNS794	NQ297423C
6. 01/16/2010 12:42 - 12:49	2003 Toyota Camry; License No. 4ZNL635	NQ297449C
7. 01/16/2010 14:51 - 15:02	1996 Toyota Previa; License No. 4VJV471	NQ406204C

TENTH CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

28. Respondent Gutierrez's registration is subject to disciplinary action pursuant to Bus. & Prof. Code section 9884.7, subdivision (a)(1), in that Respondent made or authorized statements which he knew or in the exercise of reasonable care should have known to be untrue or misleading, as follows: Respondent Gutierrez's technician, Respondent Saba, certified that vehicles 1 through 7, identified in paragraph 27 above, had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent Saba conducted the inspections on the vehicles using clean-plugging methods in that he substituted or used a different vehicle (s) during the OBD II functional tests in order to issue smog certificates of compliance for

² Clean-plugging is the use of the OBD II readiness monitor status and stored fault code (trouble code) status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that is not in compliance due to a failure to complete the minimum number of self tests, known as monitors, or due to the presence of a stored fault code that indicates an emission control system or component failure.

1 the vehicles, and did not test or inspect the vehicles as required by Health & Saf. Code section
2 44012.

3 **ELEVENTH CAUSE FOR DISCIPLINE**

4 **(Fraud)**

5 29. Respondent Gutierrez's registration is subject to disciplinary action pursuant to Bus.
6 & Prof. Code section 9884.7, subdivision (a)(4), in that Respondent committed acts that constitute
7 fraud by issuing electronic smog certificates of compliance for vehicles 1 through 7, identified in
8 paragraph 27 above, without performing bona fide inspections of the emission control devices
9 and systems on the vehicles, thereby depriving the People of the State of California of the
10 protection afforded by the Motor Vehicle Inspection Program.

11 **TWELFTH CAUSE FOR DISCIPLINE**

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

13 30. Respondent Gutierrez's smog check station license is subject to disciplinary action
14 pursuant to Health & Saf. Code section 44072.2, subdivision (a), in that Respondent failed to
15 comply with the following sections of that Code:

16 a. **Section 44012:** Respondent failed to ensure that the emission control tests were
17 performed on vehicles 1 through 7, identified in paragraph 27 above, in accordance with
18 procedures prescribed by the department.

19 b. **Section 44015:** Respondent issued electronic smog certificates of compliance for
20 vehicles 1 through 7, identified in paragraph 27 above, without ensuring that the vehicles were
21 properly tested and inspected to determine if they were in compliance with Health & Saf. Code
22 section 44012.

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1 section 44012 of that Code in a material respect, as follows: Respondent failed to perform the
2 emission control tests on vehicles 1 through 7, identified in paragraph 27 above, in accordance
3 with procedures prescribed by the department.

4 **SIXTEENTH CAUSE FOR DISCIPLINE**

5 **(Failure to Comply with Regulations Pursuant**
6 **to the Motor Vehicle Inspection Program)**

7 34. Respondent Saba's technician license is subject to disciplinary action pursuant to
8 Health & Saf. Code section 44072.2, subdivision (c), in that Respondent failed to comply with
9 provisions of California Code of Regulations, title 16, as follows:

10 a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued
11 electronic smog certificates of compliance for vehicles 1 through 7, identified in paragraph 27
12 above.

13 b. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test vehicles 1
14 through 7, identified in paragraph 27 above, in accordance with Health & Saf. Code sections
15 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

16 c. **Section 3340.42:** Respondent failed to conduct the required smog tests on vehicles 1
17 through 7, identified in paragraph 27 above, in accordance with the Bureau's specifications.

18 **SEVENTEENTH CAUSE FOR DISCIPLINE**

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

20 35. Respondent Saba's technician license is subject to disciplinary action pursuant to
21 Health & Saf. Code section 44072.2, subdivision (d), in that Respondent committed dishonest,
22 fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of
23 compliance for vehicles 1 through 7, identified in paragraph 27 above, without performing bona
24 fide inspections of the emission control devices and systems on the vehicles, thereby depriving
25 the People of the State of California of the protection afforded by the Motor Vehicle Inspection
26 Program.

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1 6. Revoking or suspending any additional license issued under Chapter 5 of the Health
2 and Safety Code in the name of Basem Hana Saba;

3 7. Ordering Arturo Gutierrez, owner of S & A Test Only, and Basem Hana Saba to pay
4 the Director of Consumer Affairs the reasonable costs of the investigation and enforcement of this
5 case, pursuant to Business and Professions Code section 125.3;

6 8. Taking such other and further action as deemed necessary and proper.

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8 DATED: 8/18/10


SHERRY MEHL
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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