

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

In the Matter of the Accusation Against:

RENTERIAS TIRE SERVICE & MECHANIC

305 Salinas Road #B
Watsonville, CA 95076

Mailing Address:

300 Salinas Road
Watsonville, CA 95076

EFRAIN RENTERIA, PARTNER

MARIA G. MARTINEZ, PARTNER

Automotive Repair Dealer Registration No.
ARD 251157

Smog Check Station License No. RC 251157
Lamp Station License No. LS 251157, Class A
Brake Station License No. BS 251157, Class A

and

JOHN VIZCAINO GUTIERREZ

95 Bisceglia Avenue
Morgan Hill, CA 95037
Advanced Emission Specialist Technician
License No. EA 042382

Respondents.

Case No. 79/13-01

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 only as to respondent Renterias Tire Service & Mechanic, Efrain Renteria and Maria G. Martinez, Partners, Automotive Repair Dealer Registration No. ARD 251157, Smog Check Station License No. RC 251157, Lamp Station License No. LS 251157, Class A, and Brake Station License No. BS 251157, Class A; except that pursuant to Government Code section 11517(c)(2)(C), the typographical error on page 2, paragraph 3, line 3, in the Proposed Decision is corrected as follows:

The date of "February 28, 2014" is corrected to read "February 19, 2013."

The suspension of Smog Check Station License No. RC 251157, Lamp Station License No. LS 251157, Class A, and Brake Station License No. BS 251157, Class A, shall commence on the effective date of this Decision.

This Decision shall become effective 4/2/13.

DATED: FEB 20 2013



DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

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

In the Matter of the Accusation Against:

RENERIAS TIRE SERVICE & MECHANIC
EFRAIN RENTERIA
MARIA G. MARTINEZ

and

JOHN VIZCAINO GUTIERREZ

Respondents.

Case No. 79/13-01

OAH No. 2012080730

PROPOSED DECISION

Administrative Law Judge Paul Slavit, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on November 28, 2012.

Nicholas Tsukamaki, Deputy Attorney General, represented complainant Bureau of Automotive Repair.

Thomas N. Griffin, Esq. represented respondents Efrain Renteria and Maria G. Martinez.

Respondent John Vizcaino Gutierrez did not appear.

The case initially was submitted on November 28, 2012. On December 20, 2012, the record was reopened to permit counsel to submit further briefing. The record was closed on January 18, 2013.

FACTUAL FINDINGS

1. John Wallauch, Chief of the Bureau of Automotive Repair, Department of Consumers Affairs (bureau) brought this accusation in his official capacity.
2. Respondents Efrain Renteria and Maria G. Martinez (collectively, Renterias) are partners doing business as Renterias Tire Service & Mechanic. The business is registered and licensed as follows:
 - a. Renterias Tire Service & Mechanic was registered as an Automotive Repair Dealer under registration number ARD 251157 on

August 21, 2007. The license will expire on June 30, 2013, unless renewed.

b. Renterias Tire Service & Mechanic was licensed as a Smog Check License Station under license number RC 251157 on August 21, 2007. The license will expire on June 30, 2013, unless renewed.

c. Renterias Tire Service & Mechanic was licensed as a Lamp Station under license number LS 251157 on June 12, 2012. The license will expire on June 30, 2013, unless renewed.

d. Renterias Tire Service & Mechanic was licensed as a Brake Station under license number BS 251157, Class A, on June 12, 2012. The license will expire on June 30, 2013, unless renewed.

3. Respondent John Vizcaino Gutierrez was licensed as an Advanced Emission Specialist Technician under license number EA 042382 in 1997. The license will expire on February 28, 2014, unless renewed.

Prior Disciplinary History

4. On October 30, 2008, the bureau issued a citation against Renterias. Through the action of its then-licensed smog technician Rigo Marmudes, Renterias were found to have issued a smog certificate to a vehicle that in fact was not smog compliant. Pursuant to a citation conference, respondent was ordered to pay a \$500 penalty, which, according to Renterias, was paid by Marmudes.

Preliminary Information

5. Lance West, Program Representative II, testified for the bureau concerning the investigation that led to this accusation. As a Program Representative II his duties include taking consumer complaints, conducting surveillance and undercover operations, and investigating shops and smog technicians to ensure compliance with the California smog test program.

6. West explained that a smog certification test consists of three parts—the tail pipe emissions sample, a visual inspection by the technician, and a functional test of the engine. If a vehicle fails any part of the test, it necessarily fails the entire smog test, and a smog certificate legally cannot be issued.

7. In tracking the performance and results of smog tests, a statewide computer system, designated the Emission Inspection System (EIS), collects extensive information, which is maintained in the Vehicle Information Database (VID). On a test-by-test basis, the VID is able to provide information about which licensed facility and which licensed smog technician performed a given smog test, as well as the test process and results for the vehicle. West can access the VID and obtain a highly detailed report, referred to as the BAR 97 Test Detail (BAR 97), for the smog test facility in order to conduct an investigation.

By contrast, even though each licensed smog technician—such as Gutierrez—is provided with an EIS access code in order to conduct smog tests, the information available to the technician is limited, and does not provide all information transmitted to the EIS. Similarly, the vehicle inspection report (VIR) provided by the test station to a vehicle owner as proof of smog compliance is a simplified report containing only basic information. The holder of the smog check station license—in this case, Renterias—does not have access to the EIS.

8. Vehicles manufactured since 1996 have on-board computers (referred to as OBD II) that control the emission system in the vehicle. The EIS in the smog check station has a cable that connects to the OBD II in the vehicle being tested, so that the OBD II can transmit information to EIS about the vehicle, its engine operation, and any internal computer codes that indicate problems, or potential problems with the emissions system. This is an element of the functional test portion of the total smog test.

9. The information from the OBD II is included in the BAR 97 report in two ways. First, the report includes a category “Malfunction Indicator Light(MIL)/on board diagnostics.” This is intended to indicate whether the vehicle’s OBD II is registering any problems or warning lights. For instance, if the “check engine” light is on, this would be reported by OBD II, and the technician should enter “F” (for fail) in the on board diagnostics category.

Secondly, the report lists a category for “MIL Status.” The MIL Status indicates whether the EIS cable has been connected to the OBD II. If the MIL Status category is blank on the BAR 97 report, it indicates that EIS was not connected to the OBD II for test purposes. If the systems have not been connected for testing, the test was not conducted properly, and the car cannot be issued a smog certificate of compliance.

The Bureau’s Investigation

10. With reference to this case, West testified that around September 2011, he received an anonymous tip that illegal or improper smog certifications were being issued by Renterias’ shop. Based on that information, West initiated an investigation in accordance with bureau procedures.

11. West first reviewed the VID for Renterias’ business. For the period August 5, 2011 through September 30, 2011, he found nine vehicles that had been issued smog certificates, which were suspect. He then visited the shop, and spoke with respondent Gutierrez. He asked to see the vehicle inspection reports and invoices for the nine vehicles. West uses these documents as a basis for comparison with the BAR 97 reports to look for any discrepancies between the two.

Gutierrez did not produce the documents immediately, but said that he would look into it. However, Gutierrez never responded to West. West had two contacts with Gutierrez, and in each, Gutierrez denied any wrongdoing with regard to the smog certifications.

12. At a later date, West returned to the shop and learned that Gutierrez was no longer working there; and had been replaced by another licensed smog technician, Guillermo Magdeleno. Magdeleno and respondent Efrain Renteria thereafter were able to locate some, but not all, of the requested documents and provide them to West.

13. The nine vehicles investigated by West are identified as follows:

	Year	Make	Model	License No.	Date of Smog Certificate
1.	2001	Honda	Accord	6DMX417	08/05/2011
2.	1996	Plymouth	Voyager	3RSP220	08/23/2011
3.	2001	Dodge	Dakota	6G27106	08/24/2011
4.	2003	Dodge	Ram 1500	8X32907	08/29/2011
5.	2003	Chevrolet	Silverado	8V50260	09/01/2011
6.	2000	Chevrolet	Tahoe	4KPN169	09/13/2011
7.	2003	Toyota	Tacoma	7Z17655	09/23/2011
8.	2001	Toyota	Tacoma	6R14130	09/29/2011
9.	2001	Cadillac	Deville	6APG551	09/30/2011

The BAR 97 reports include the test station identification number and technician identification number for each vehicle tested and issued a smog certificate of compliance. From that information, West confirmed that the vehicles were tested and issued smog certificates by respondent Gutierrez while working at respondent Renterias' licensed facility.

14. Based on year, make and model, each of these nine vehicles is subject to testing with the OBD II – EIS connection. However, in each instance, while respondent Gutierrez entered “P” (pass) for MIL/on board diagnostics, the respective BAR 97 report shows that the MIL Status was blank, indicating that the OBD II – EIS connection, in fact, was never established. As such, the test was not conducted properly, and a valid smog certificate should not have been issued for any of the nine vehicles.

15. With specific reference to the 2003 Chevrolet Silverado, West noted that on August 29, 2011, Gutierrez correctly performed a smog test on the vehicle--including use of the EIS – OBD II connection--and determined that it failed. On September 1, 2011, however, Gutierrez performed a smog test again, did not connect the EIS to the vehicle's OBD II system, and issued a smog certificate of compliance. Neither Renterias' shop records, nor independent bureau records reveal any corrective work performed on the 2003 Silverado between the first and second tests. Inasmuch as the OBD II connection was not established, it is unknown whether the engine would have reported problem codes, or was operating properly. In any event, the engine function test was not performed properly, and the smog certificate should not have been issued.

Respondent's Contentions

16. Renterias first purchased their business as a professional tire shop approximately 13 years ago. In 2007, they expanded the business to add an auto mechanic shop and smog test station. In 2012, Renterias added lamp and brake station licenses to the

operation. The tire store operates seven days per week, while the mechanic and test facilities are closed on Sunday. The business employs 11 people, including the two Renterias.

17. It appears that the Renterias themselves never have been licensed as smog technicians; instead they employ a licensed technician to perform emissions tests. Over time, they have employed four technicians, of whom Gutierrez was the third.

18. Until recently, Renterias assumed little responsibility for oversight of the smog test station operations, or the business generally. Respondent Martinez performed payroll and some bookkeeping functions, and had no other involvement with the business operations. Respondent Efraim Renteria is a mechanic, and works on cars separately from the smog station. In the past, he frequently worked off-site on out-call jobs, and was not present to oversee the work of Gutierrez or previous smog technicians.

19. Renterias relied on the fact that Gutierrez was duly licensed as an advanced emission specialist technician, meaning that he had the necessary training and knowledge to conduct the tests, and trusted him to perform smog tests properly. Gutierrez signed each VIR under penalty of perjury, certifying that he had performed the smog inspection in accordance with applicable regulations, and that the test results were accurate. The VIR does not include information concerning the performance of the OBD II function test, and Renterias do not have access to the VID; therefore, they had no way to verify that smog tests were performed properly unless they personally were present when the tests were conducted.

20. Renterias had no knowledge of any problems with Gutierrez's smog certifications until West visited the business and spoke with them about his investigation. At that point, Renterias cooperated with the investigation by providing VIR reports and invoices as requested. In addition, they have taken several steps to remedy problems at the business:

a. First, Renterias confronted Gutierrez about the smog tests and bureau investigation. Gutierrez already had caused some concern for Renterias by failing to adhere to his work schedule. For instance, Gutierrez traveled to Mexico every three months, resulting in extended absences. Morales once saw Gutierrez surreptitiously accept cash from a customer. The testimony was contradictory whether Renterias terminated Gutierrez, or he left of his own volition. However, it is clear that once he was confronted about the bureau investigation and the other issues, Gutierrez stopped working at the business.

b. Efraim Renteria acknowledges that he should have provided better supervision of Gutierrez, particularly in light of his citation problem with technician Mormudes. Therefore, approximately a year ago, Renterias hired Morales to provide better administrative support. Morales now serves as shop manager, performs accounting and payroll functions, and maintains contact with the licensed technicians in the business.

c. At Morales' recommendation, respondent Efraim Renteria hired a mechanic to attend to out-call jobs, and now spends his time on-site, supervises the technicians, and generally devotes more time and attention to detail.

d. In addition, Morales plans to institute a review process to check the smog technician's compliance once or twice a month.

e. Finally, Renterias hired a new smog technician (Magdaleno) to replace Gutierrez. Magdaleno is duly licensed, and he has been performing appropriately since his hire.

Costs

21. In connection with the investigation and prosecution of this accusation, the bureau submitted a certification of costs showing billable time for bureau agents and staff in the sum of \$8,442.66; and for attorneys and support staff in the sum of \$5,155. The case of *Zuckerman v. Board of Chiropractic Engineers* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the respondent has been successful at the hearing in getting charges reduced or dismissed; respondent's subjective good faith belief in the merits of his position; whether the respondent has raised a colorable challenge to the proposed discipline; the financial ability to pay the cost award; and whether the scope of the investigation was appropriate to the alleged conduct of the respondent. In this case, the principal factor bearing on the award of costs is Renterias' ability to pay.

22. The bureau argues for a term of probation to include an actual suspension of 30 days for all bureau-issued license—i.e., auto repair dealer, and smog, lamp and brake stations. However, Renterias assert that a 30-day suspension will put the business's employees out of work for at least that period, and endanger the viability of the business as a whole.

For the month of October 2012, the business had expenses of \$113,536, of which \$21,433 was payroll; income was only \$108,426—a \$5,000 net negative. No evidence was offered to suggest that the business has reserves to draw from in the event of a suspension. Renterias explained that there are ongoing loan and lease payments as part of the monthly expenses.

23. No evidence was offered to dispute the reasonableness of the fees requested. It is noted, however, that this investigation did not entail undercover operations or surveillance, and that only one program representative worked on the case. The investigation principally involved review of BAR 97 and VIR reports, and shop invoices. There apparently were five visits to the business, of unknown duration. As such, the claimed expenditure of 111 hours of investigation seems excessive. In the absence of contradictory evidence or objection, however, the claimed costs are deemed reasonable.

Without discounting respondents' liability for the actions of their employee, it does appear that the subject violations were committed by Gutierrez without respondents' knowledge, participation or consent. The evidence suggests that respondents' business currently operates at a loss; and the testing business will be closed for a week as a result of this decision. As such, it appears that a reduction of the costs attributable to respondents is

warranted. Costs shall be reduced to \$5,572.16 for investigative costs, and \$3,402.30 for attorneys' fees, for a total of \$8,974.46.

LEGAL CONCLUSIONS

1. Business and Professions Code section 9884.7, provides in pertinent part:

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

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

(4) Any other conduct that constitutes fraud. . .

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

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

2. Pursuant to Health and Safety Code section 44002 the bureau has the same powers and authority granted by the Automotive Repair Act to enforce the Motor Vehicle Inspection Program.

Health and Safety Code section 44072.2 further provides:

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.

(b) Is convicted of any crime substantially related to the qualifications, functions, or duties of the license holder in question.

(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. . . .

Cause for Discipline against Renterias' Auto Repair Registration

3. Cause exists for discipline against respondent's auto repair dealer registration pursuant to Business and Professions Code section 9884.7, subdivisions (a)(1), (a)(4), and (a)(6), pertaining to the 2001 Honda Accord, 1996 Plymouth Voyager, 2001 Dodge Dakota, 2003 Dodge Ram 1500, 2003 Chevrolet Silverado, 2000 Chevrolet Tahoe, 2003 Toyota Tacoma, 2001 Toyota Tacoma, and 2001 Cadillac Deville as set forth in Findings 5 through 14.

4. Cause exists for discipline against respondent's auto repair dealer registration pursuant to Health and Safety Code section 44072.2, subdivisions (a), (c) and (d), pertaining to the 2001 Honda Accord, 1996 Plymouth Voyager, 2001 Dodge Dakota, 2003 Dodge Ram 1500, 2003 Chevrolet Silverado, 2000 Chevrolet Tahoe, 2003 Toyota Tacoma, 2001 Toyota Tacoma, and 2001 Cadillac Deville as set forth in Findings 5 through 14.

Cause for Discipline against Renterias' Smog Test Only Station License

5. Cause exists for discipline against respondent's smog check station license pursuant to Health and Safety Code section 44072.2, subdivision (c), with regard to the 2001 Honda Accord, 1996 Plymouth Voyager, 2001 Dodge Dakota, 2003 Dodge Ram 1500, 2003 Chevrolet Silverado, 2000 Chevrolet Tahoe, 2003 Toyota Tacoma, 2001 Toyota Tacoma, and 2001 Cadillac Deville as set forth in Findings 5 through 14.

Discipline against Gutierrez's Advanced Emissions Specialist License

6. On December 5, 2012, notice was received that respondent Gutierrez had executed a stipulated settlement and disciplinary order, which the bureau's counsel received on the day of the hearing; and that on that basis, the bureau asked to withdraw its request for entry of Gutierrez's default. The bureau requested instead that the stipulated settlement and disciplinary order be submitted for the bureau's further action.

Factors in Mitigation or Aggravation

7. The bureau's guidelines for disciplinary penalties in Code of Regulations, title 16, section 3395.4 set forth factors in aggravation, some of which are present here. These include prior notices of violations, prior office conference with the bureau, and prior history

of formal disciplinary action. It is noted, however, that each of these factors arise from a single incident.

8. Similarly, some of the bureau's stated factors in mitigation also apply. Notably, there is substantial evidence that Renterias' shop has taken specific steps to minimize recurrence, and instituted internal controls designed to eliminate errors.

9. It is reasonable to conclude that respondent Gutierrez was a renegade employee who issued nine certificates of compliance without properly conducting the functional portion of the smog test. Even though Gutierrez was the technician who improperly performed the tests and issued the invalid smog certificates, Renterias are not insulated from responsibility for his wrongdoing.

Renterias own and operate the business as partners, and, as holders of the automotive repair dealer registration and smog check station license, are responsible for their business's compliance with applicable statutes and regulations. Throughout the testimony it was clear that at the time of the violations, Renterias conducted little supervision or oversight of their smog business operations. Respondent Martinez appears to have worked only part-time, and only on bookkeeping and payroll functions not directly connected to the smog station operation. Respondent Renteria candidly acknowledged that until recently, he spent much of his time performing repairs off-premises, and provided no oversight to the smog station.

10. It is therefore encouraging to see that Renterias have installed a manager to address administrative matters, and accepted his recommendation to work on-site and send another mechanic to perform off-site jobs.

11. Considering the nine instances of improper smog certifications, and the factors in aggravation and mitigation, it is appropriate that Renterias' registration and test license be placed on probation, with a brief suspension of their test operations, to allow them to continue implementing appropriate controls and oversight of those operations.

Evidentiary Decisions

12. On December 20, 2012, when the record was reopened, the parties' supplemental briefs were ordered to address three specific questions: (1) whether the stipulated settlement and disciplinary order as to Gutierrez is admissible in this proceeding; (2) whether the administrative law judge has the authority to take official notice of the settlement and its terms; and (3) if so, how the settlement and its proposed disciplinary terms might affect any potential discipline against Renterias.

Each party submitted a brief as directed. In addition, respondents submitted a declaration of Juan Morales setting forth new evidence concerning the smog test system in their smog station.

13. It is determined that the stipulated settlement is not admissible, in that it comprises an offer of compromise or settlement which is inadmissible pursuant to Government Code section 11415.60, subdivision (a).

Further, the declaration of Juan Morales submitted with respondents' brief is not admitted into evidence, in that it exceeds the limited scope of inquiry for which the record was reopened.

ORDER

1. The request for default against John Vizcaino Gutierrez's advanced emission specialist technician license number EA 042382 is deemed withdrawn, no decision is issued against him, and the matter shall proceed pursuant to stipulation.

2. Automotive repair dealer registration number ARD 251157, smog check license station license number RC 251157, lamp station license number LS 251157, and brake station license number BS 251157, Class A issued to Efrain Renteria and Maria G. Martinez, doing business as Renterias Tire Service & Mechanic, are revoked. Revocation is stayed, and the registration and licenses shall be placed on probation for a period of two years on the following terms and conditions:

- a. Efrain Renteria and Maria G. Martinez shall serve an actual suspension of seven days as to smog check license station license number RC 251157, lamp station license number LS 251157, and brake station license number BS 251157, Class A.
- b. During the period of probation, respondents shall:
 - (i) Comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.
 - (ii) Post a prominent sign, 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) Respondents' 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, respondents shall 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.

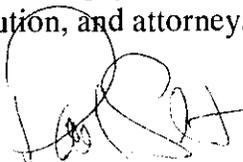
(vi) Should the Director of Consumer Affairs determine that respondent has failed to comply with the terms and conditions of probation, the department may, after giving notice and opportunity to be heard, temporarily or permanently invalidate the registration; suspend or revoke the license.

(vii) If the accusation involves false and misleading advertising, during the period of probation, respondent shall submit any proposed advertising copy, whether revised or new, to the bureau at least 30 days prior to its use.

(viii) During the period of probation, respondent shall not perform any form of smog inspection, or emission system diagnosis or repair, until respondent has purchased, installed, and maintained the diagnostic and repair equipment prescribed by BAR necessary to properly perform such work, and BAR has been given 10 days notice of the availability of the equipment for inspection by a BAR representative.

3 Respondents Renteria and Martinez shall pay the bureau the sum of \$8,974.46 for reasonable costs of investigation and prosecution, and attorneys' fees.

DATED: January 25, 2013



PAUL SLAVIT
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
3 NICHOLAS TSUKAMAKI
Deputy Attorney General
4 State Bar No. 253959
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-1188
6 Facsimile: (415) 703-5480
Attorneys for Complainant

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11 **STATE OF CALIFORNIA**

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15 **Mailing Address:**
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17 **Watsonville, CA 95076**
18 **EFRAIN RENTERIA, PARTNER**
19 **MARIA G. MARTINEZ, PARTNER**
20 **Automotive Repair Dealer Registration**
21 **No. ARD 251157**
22 **Smog Check Station License No. RC 251157**
23 **Lamp Station License No. LS 251157, Class A**
24 **Brake Station License No. BS 251157, Class A**

19 and

20 **JOHN VIZCAINO GUTIERREZ**
21 **95 Bisceglia Avenue**
22 **Morgan Hill, CA 95037**
23 **Advanced Emission Specialist Technician License**
24 **No. EA 042382**

23 Respondents.

Case No. 79/13-01

[AMENDED]
ACCUSATION

SMOG CHECK

25 Complainant alleges:

26 **PARTIES**

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



1 (a) The director, where the automotive repair dealer cannot show there
2 was a bona fide error, may refuse to validate, or may invalidate temporarily or
3 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.

4 (1) Making or authorizing in any manner or by any means whatever any
5 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.

6 (4) Any other conduct which constitutes fraud.

7 (b) Except as provided for in subdivision (c), if an automotive repair
8 dealer operates more than one place of business in this state, the director pursuant to
subdivision (a) shall only invalidate temporarily or permanently the registration of the
9 specific place of business which has violated any of the provisions of this chapter.
10 This violation, or action by the director, shall not affect in any manner the right of the
automotive repair dealer to operate his or her other places of business.

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

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

18 9. Code section 477 provides, in pertinent part, that "Board" includes "bureau,"
19 "commission," "committee," "department," "division," "examining committee," "program," and
20 "agency." "License" includes certificate, registration or other means to engage in a business or
21 profession regulated by the Code.

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

25 11. Code section 9889.7 provides, in pertinent part, that the expiration or suspension of a
26 license by operation of law or by order or decision of the Director or a court of law, or the
27 voluntary surrender of a license shall not deprive the Director of jurisdiction to proceed with any
28 disciplinary proceedings.

1 12. Code section 9889.3 states, in pertinent part:

2 The director may suspend, revoke, or take other disciplinary action
3 against a license as provided in this article [Article 7 (commencing with section
4 9889.1) of the Automotive Repair Act] if the licensee or any partner, officer, or
5 director thereof:

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

8 13. Section 44002 of the Health and Safety Code provides, in pertinent part, that the
9 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
10 the Motor Vehicle Inspection Program.

11 14. Section 44072.2 of the Health and Safety Code states, in pertinent part:

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

15 (a) Violates any section of this chapter [the Motor Vehicle Inspection
16 Program (Health and Saf. Code, § 44000, et seq.)] and the regulations adopted
17 pursuant to it, which related to the licensed activities.

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

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

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

26 16. Section 44072.8 of the Health and Safety Code states:

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

COST RECOVERY

1 17. Code section 125.3 provides, in pertinent part, that a Board may request the
2 administrative law judge to direct a licensee found to have committed a violation or violations of
3 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
4 enforcement of the case.

1 **FACTUAL BACKGROUND**

2 18. On or about October 3, 2011, the Bureau conducted a detailed review of the Vehicle
 3 Information Database ("VID") for all smog inspections performed at Respondent Renterias'
 4 facility, for the period August 5, 2011, through September 30, 2011. The VID showed that for
 5 vehicles 1 through 9, set forth in Table 1, below, the malfunction indicator lamp ("MIL") status
 6 line was blank, indicating the vehicle's power train control module ("PCM") had not been
 7 scanned. Although vehicles 1 through 9 received smog certificates, none of those vehicles were
 8 tested during the OBD II functional test. Instead, when prompted by the Emission Inspection
 9 System ("EIS") about whether or not the vehicle required an OBD II test, Respondent Gutierrez
 10 *for the OBD II portion of the test, Gutierrez entered "P" for*
 11 *Pass, but did not do the required OBD II test. Gutierrez then*
 12 *entered "No" and continued on with the inspection and issued the certificates of compliance for*
 13 *those vehicles.*
 14 *Issued certificates of compliance for those vehicles.*

12 **TABLE 1**

Date & Time of Inspection	Vehicle Certified & License Number	Certificate Number
1. 8/5/2011 1046 - 1051 hours	2001 Honda Accord, Lic. No. 6DMX417	OE733544
2. 8/23/2011 1705 - 1712 hours	1996 Plymouth Voyager, Lic. No. 3RSP220	OG058249
3. 8/24/2011 1206 - 1212 hours	2001 Dodge Dakota, Lic. No. 6G27106	OG058250
4. 8/29/2011 1509 - 1515 hours	2003 Dodge Ram, License No. 8X32907	OG329616
5. 9/1/2011 1613 - 1622 hours	2003 Chevrolet Silverado, Lic. No. 8V50260	OG329627
6. 9/13/2011 1044 - 1048 hours	2000 Chevrolet Tahoe, Lic. No. 4KPN169	OG329647
7. 9/23/2011 1806 - 1814 hours	2003 Toyota Tacoma, Lic. No. 7Z17655	OG621123
8. 9/29/2011 1559 - 1608 hours	2001 Toyota Tacoma, Lic. No. 6R14130	OG621132
9. 9/30/2011 1500 - 1518 hours	2001 Cadillac Deville, Lic. No. 6APG551	OG621135

24 **FIRST CAUSE FOR DISCIPLINE**

25 **(Misleading Statements)**

26
 27 19. Respondent Renterias has subjected its registration to discipline under Code section
 28 9884.7, subdivision (a)(1), in that between August 5, and September 30, 2011, it made statements

1 which it knew or which by exercise of reasonable care it should have known were untrue or
2 misleading as follows: Respondent Renterias certified that vehicles 1 through 9, identified in
3 Table 1, above, had passed inspection and were in compliance with applicable laws and
4 regulations. In fact, Respondent Renterias conducted the inspections without performing the
5 required OBD II functional tests in order to issue smog certificates of compliance for the 9
6 vehicles, and did not test or inspect those vehicles as required by Health and Safety Code section
7 44012.

8 **SECOND CAUSE FOR DISCIPLINE**

9 **(Fraud)**

10 20. Respondent Renterias has subjected its registration to discipline under Code section
11 9884.7, subdivision (a)(4), in that between August 5, 2011, and September 30, 2011, it committed
12 acts which constitute fraud by issuing electronic certificates of compliance for vehicles 1 through
13 9, identified in Table 1, above, without performing bona fide inspections of the emission control
14 devices and systems on those vehicles, thereby depriving the People of the State of California of
15 the protection afforded by the Motor Vehicle Inspection Program.

16 **THIRD CAUSE FOR DISCIPLINE**

17 **(Violation of the Motor Vehicle Inspection Program)**

18 21. Respondent Renterias has subjected its station license to discipline under Health and
19 Safety Code section 44072.2, subdivision (a), in that between August 5, 2011, and September 30,
20 2011, regarding vehicles 1 through 9, identified in Table 1, above, it violated sections of that
21 Code, as follows:

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

24 b. **Section 44015:** Respondent Renterias issued electronic certificates of compliance for
25 those vehicles without ensuring that the vehicles were properly tested and inspected to determine
26 if they were in compliance with Health and Safety Code section 44012.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

3 22. Respondent Renterias has subjected its station license to discipline under Health and
4 Safety Code section 44072.2, subdivision (c), in that between August 5, 2011, and September 30,
5 2011, regarding vehicles 1 through 9, identified in Table 1, above, it violated sections of the
6 California Code of Regulations, title 16, as follows:

7 a. **Section 3340.35, subdivision (c):** Respondent Renterias issued electronic certificates
8 of compliance even though those vehicles had not been inspected in accordance with section
9 3340.42 of that Code.

10 b. **Section 3340.42:** Respondent Renterias failed to conduct the required smog tests and
11 inspections on those vehicles in accordance with the Bureau's specifications.

12 **FIFTH CAUSE FOR DISCIPLINE**

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

14 23. Respondent Renterias has subjected its station license to discipline under Health and
15 Safety Code section 44072.2, subdivision (d), in that between August 5, 2011, and September 30,
16 2011, regarding vehicles 1 through 9, identified in Table 1, above, it committed acts involving
17 dishonesty, fraud or deceit whereby another was injured by issuing electronic certificates of
18 compliance for those vehicles without performing bona fide inspections of the emission control
19 devices and systems on the vehicles, thereby depriving the People of the State of California of the
20 protection afforded by the Motor Vehicle Inspection Program.

21 **SIXTH CAUSE FOR DISCIPLINE**

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

23 24. Respondent Gutierrez has subjected his technician license to discipline under Health
24 and Safety Code section 44072.2, subdivision (a), in that between August 5, 2011, and September
25 30, 2011, regarding vehicles 1 through 9, identified in Table 1, above, he violated sections of that
26 Code, as follows:

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1 a. **Section 44012, subdivision (a):** Respondent Gutierrez failed to determine that all
2 emission control devices and systems required by law were installed and functioning correctly in
3 accordance with test procedures.

4 b. **Section 44012, subdivision (f):** Respondent Gutierrez failed to perform emission
5 control tests on that vehicle in accordance with procedures prescribed by the department.

6 c. **Section 44032:** Respondent Gutierrez failed to perform tests of the emission control
7 devices and systems on that vehicle in accordance with section 44012 of that Code.

8 **SEVENTH CAUSE FOR DISCIPLINE**

9 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

10 25. Respondent Gutierrez has subjected his technician license to discipline under Health
11 and Safety Code section 44072.2, subdivision (c), in that between August 5, 2011, and September
12 30, 2011, regarding vehicles 1 through 9, identified in Table 1, above, he violated sections of the
13 California Code of Regulations, title 16, as follows:

14 a. **Section 3340.30, subdivision (a):** Respondent Gutierrez failed to inspect and test
15 those vehicles in accordance with Health and Safety Code section 44012.

16 b. **Section 3340.41, subdivision (c):** Respondent Gutierrez entered false information
17 into the EIS by entering "No" when prompted about whether the vehicle required an OBD II
18 *functional test when, in fact, vehicles 1 through 9 all required the OBD II functional test.*
functional test when, in fact, vehicles 1 through 9 all required the OBD II functional test.
functional test when, in fact, vehicles 1 through 9 all required the OBD II functional test.

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

21 **EIGHTH CAUSE FOR DISCIPLINE**

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

23 26. Respondent Gutierrez has subjected his technician license to discipline under Health
24 and Safety Code section 44072.2, subdivision (d), in that between August 5, 2011, and September
25 30, 2011, regarding vehicles 1 through 9, identified in Table 1, above, he committed acts
26 involving dishonesty, fraud or deceit whereby another was injured by issuing electronic
27 certificates of compliance without performing bona fide inspections of the emission control

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1 devices and systems on those vehicles, thereby depriving the People of the State of California
2 of the protection afforded by the Motor Vehicle Inspection Program.

3 **NINTH CAUSE FOR DISCIPLINE**

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

5 27. Respondent Renterias has subjected its lamp and brake station licenses to discipline
6 under Code section 9889.3, subdivision (d), in that between August 5, 2011, and September 30,
7 2011, regarding vehicles 1 through 9, identified in Table 1, above, it committed acts involving
8 dishonesty, fraud or deceit whereby another was injured, as more particularly set forth in
9 paragraphs 20, 23, and 26, above.

10 **OTHER MATTERS**

11 28. Under Code section 9884.7, subdivision (c), the director may invalidate temporarily
12 or permanently or refuse to validate, the registrations for all places of business operated in this
13 state by Renterias Tire Service & Mechanic, upon a finding that it has, or is, engaged in a course
14 of repeated and willful violations of the laws and regulations pertaining to an automotive repair
15 dealer.

16 29. Under Health and Safety Code section 44072.8, if Smog Check Station License
17 Number RC 251157, issued to Renterias Tire Service & Mechanic, is revoked or suspended, any
18 additional license issued under this chapter in the name of said licensee may be likewise revoked
19 or suspended by the director.

20 30. Under Code section 9889.9, if Lamp Station License Number LS 251157, Class A,
21 issued to Renterias Tire Service & Mechanic, is revoked or suspended, any additional license
22 issued under Articles 5 and 6 of Chapter 20.3 of the Code in the name of said licensee may be
23 likewise revoked or suspended by the Director.

24 31. Under Code section 9889.9, if Brake Station License Number BS 251157, Class, A,
25 issued to Renterias Tire Service & Mechanic, is revoked or suspended, any additional license
26 issued under Articles 5 and 6 of Chapter 20.3 of the Code in the name of said licensee may be
27 likewise revoked or suspended by the Director.

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10. Ordering Renterias Tire Service & Mechanic and John Vizcaino Gutierrez to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and,

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

DATED: July 3, 2012


JOHN WALLAUCH
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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