

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

DISTRICT COURT DEPARTMENT
CONCORD DIVISION
NO. 1248CR001075

COMMONWEALTH

v.

EVANDO ANANIAS AND OTHERS

**THE PARTIES' JOINT STIPULATION OF FACTS AND RECOMMENDED
RESOLUTION TO THE DEFENDANTS' MOTION FOR SANCTIONS**

Now come the parties in the above captioned matter and submit the following resolution to the Defendants' motion for sanctions to the court for its consideration. The parties have diligently conferenced the matter and hereby propose a series of measures which will bring the instant litigation to a close.

I. STIPULATION OF RELEVANT FACTS

1. The Office of Alcohol Testing (OAT) is a unit within the Massachusetts State Police Crime Laboratory.
2. At several hearings, Melissa O'Meara and Kerry Collins represented to the Court that the certification/calibration worksheets¹ were synonymous with the written protocols, prior to the promulgation of version 1.0 of the annual certification/calibration² written protocols.
3. The Court ordered OAT to produce a copy of all of the annual certification/calibration³ worksheets used to perform the annual calibration of 9510 units.

¹ At times these were described as "calibration worksheets", at other times they were described as "certification worksheets", regardless of the nomenclature an exemplar is appended as Exhibit 1.

² See FN1.

³ See FN1.

4. The OAT produced 1,976 worksheets as single-page PDF documents, and represented that these were all of the materials that the court ordered produced.
5. The 1,976 worksheet documents included 11 instances of a failed annual calibration, also referred to as “incomplete worksheets”.
6. There were an additional 432 worksheets that represented failures of the annual calibration process.
7. The 432 failed worksheets were intentionally withheld by the OAT.
8. The OAT did not inform the Ananias prosecutors, the Ananias defense attorneys, or the Court that they were withholding the 432 worksheets.
9. The withheld failing annual calibration worksheets were exculpatory materials.
10. The 432 withheld worksheets were provided to the defendants’ counsel on August 31, 2017 – along with approximately 10,000 documents.
11. In addition, in response to the consolidated defendant’s motion, the Commonwealth provided “curve data” on October 24, 2017.
12. The OAT further provided approximately 30,000 additional documents on December 17, 2017.
13. The production of documents on August 31, 2017 included the production of the pages that were attached to each worksheet by either a paper clip or a staple, as was noted in the February 2017 Ananias decision.⁴
14. The technical leader of the OAT, Melissa O’Meara, was a witness for the Commonwealth in the Ananias matter, and was terminated by EOPPS in October of 2017, within days of the release of the EOPPS report on Discovery irregularities at OAT.

⁴ *Ananias* at 29

15. The OAT section of the Massachusetts State Police Crime Laboratory will apply for accreditation by the ANSI-ASQ⁵ National Accreditation Board (ANAB) by August 1, 2019.
16. OAT has a mechanism to provide some of the information maintained in the OAT 9510 database, and that mechanism is referred to as the eDiscovery Portal.
17. The eDiscovery portal was first available to the public on August 16, 2016, and notification was made on October 7, 2016 by the State Police Crime Laboratory to the Massachusetts District Attorneys' Association and the Committee for Public Counsel Services.
18. The attorneys for the consolidated defendants maintain that they were unaware of the existence of the portal prior to this Court's February 2017 order.
19. A second generation of the eDiscovery Portal is scheduled for release at the end of the summer, 2018. This version will include the failing worksheets and the 10,000 documents provided to the Ananias defendants in August 31, 2017.
20. From September 2017 to the present, the Ananias prosecutors have been in contact with all of the District Attorney's offices, through multiple conference calls. The Ananias prosecutors have the authority to negotiate on behalf of all District Attorneys' Offices throughout the Commonwealth.
21. The Executive Office of Public Safety conducted an investigation into discovery practices at the Office of Alcohol Testing, shortly after the filing of the Motion for Sanctions in this matter. The parties agree to stipulate to the facts contained therein, a copy of which is appended to this pleading as exhibit 2.

⁵ American National Standards Institute – American Society for Quality (ANSI-ASQ).

II. ACCREDITATION OF THE OFFICE OF ALCOHOL TESTING

The Commonwealth agrees that OAT will apply for ANSI-ASQ National Accreditation Board accreditation by August 1, 2019. Following the application for accreditation, the Commonwealth represents that OAT will diligently pursue the completion of the accreditation process in good faith. OAT will report through the Commonwealth the status of its accreditation process at intervals deemed appropriate by this Court. If this Court finds that OAT's efforts at gaining accreditation are not being made in good faith, the Commonwealth agrees to suspend the use of the 9510 instrument at trial until such time as the Court is satisfied by the progress of OAT.

III. AGREED DISCOVERY PRACTICES

Since the commencement of the instant litigation, OAT has designed and developed an expanded eDiscovery portal which will streamline and improve the provision of discovery materials to the various District Attorneys' Offices. Specifically, the Commonwealth represents that the eDiscovery portal will allow for equal access to the following items for all users, exemplars of each are attached as exhibits:

1. Breath test searches (serial number and location), see Exhibit 3;
2. Certification/calibration⁶ records, see Exhibit 4;
3. Test types 1, 2, or 3 for a given 9510 instrument or 9510 location, see Exhibit 5;
4. Complete instrument files, including repair records, calibration documentation and backup documentation within the certification/calibration⁷ procedure, which will note when documents are missing, see Exhibit 6;

⁶ See FN1.

5. Data dictionaries with an explanation for each column heading, see Exhibit 7;
6. Certificates of analysis for ethanol solutions, see Exhibit 8;
7. Certificates of analysis for dry-gas standards, see Exhibit 9;
8. Message codes; see Exhibit 10;
9. Simulator calibration information, see Exhibit 11;
10. Barometer calibrations, see Exhibit 12;
11. All current and prior versions of laboratory protocols, see Exhibit 13;
12. Breath Test Operator (hereinafter “BTO”) training materials and Officer in Charge (hereinafter “OIC”) training materials, see Exhibit 14; and
13. A list of report types, generated by the 9510 instrument, see Exhibit 15.

The Commonwealth further agrees to provide the following discovery upon request:

1. Raw data (e.g., curve data, type 4 tests, and mis-try data), available on a quarterly basis, to be disseminated to the various District Attorneys, see Exhibit 16;
2. List of certified BTOs, see Exhibit 17; and
3. BTO online training program, see Exhibit 18.

Lastly, the Commonwealth agrees that the MSP Crime Laboratory will amend the terms of use of its eDiscovery portal to advise the user that records may be amended when errors are discovered.

The Commonwealth agrees not to oppose a discovery motion for the full 9510 database, in backup format as it was supplied on October 24, 2017, provided that an appropriate protective order is filed that prohibits the disclosure of CORI data, passwords, and IP Addresses.

IV. EXPANSION OF THE COURT’S FEBRUARY 2017 ORDER

⁷ See FN1.

On February 16, 2017, this Court ordered that the defendants' *Daubert* motion be allowed "as to any results produced by a device calibrated and certified between June of 2011 and September 14, 2014⁸, subject to the possibility of a case-by-case demonstration of the reliability of OAT's calibration of a particular device to a trial judge in the court in which the Commonwealth seeks to offer the result as evidence." *Commonwealth v. Ananias, et. al.*, 1248CR001075, 32 (2017). The parties agree to expand the period for which the instrument shall be deemed "presumptively . . . excluded" from use by the Commonwealth. *Id.* at 31. The Commonwealth further agrees not to seek to establish the reliability of OAT's calibration and certification on a case-by-case basis in this enlarged period at trial in any offense alleging a violation of G.L. c. 90, or 90B except in cases alleging motor vehicle homicide by operation under the influence, in violation of G.L. c. 90, § 24G; operating under the influence causing serious bodily injury, in violation of G.L. c. 90, § 24L; and operating under the influence of liquor as a 5th or greater offense, in violation of G.L. c. 90, § 24(1)(a)(1).⁹

The parties have good-faith disagreements as to the date to which this period should be enlarged and agree to submit the question for a hearing. The parties agree to be bound by the decision of this Court. The parties agree that the earliest date at which said period shall end will be August 31, 2017, and the latest date shall be the date at which OAT achieves accreditation.

V. COSTS

The Defendants wish to seek an order of costs as a sanction against OAT. The parties agree that the Defendants should be afforded the opportunity to so petition with adequate notice

⁸ The parties have always agreed that, consistent with the reasoning in the Court's Memorandum of Decision the beginning date of this period is June 2011.

⁹ The Commonwealth likewise reserves the right to establish the reliability of OAT's calibration and certification in cases alleging Manslaughter by motor vehicle, in violation of G.L. c. 265, § 13½.

to the appropriate parties with an opportunity to respond to the petition. A full accounting of the defendant's time will be provided at the conclusion of the litigation.

VI. IDENTIFICATION AND NOTICE

The Commonwealth agrees to provide written notice of the terms of this agreement to defendants who were charged with an operating under the influence offense, submitted to a breath test administered on a Draeger 9510 instrument, and received an adverse disposition between June 1, 2011 and August 31, 2017. Such notice will be drafted by the defense team with the assent of the Commonwealth, and will be mailed to affected defendants at the addresses which they have on file with the registry of motor vehicles for those who had a valid Massachusetts driver's license at the time of their breath-test, and to the address contained in the OAT 9510 database for those without a Massachusetts drivers license or who have an out of state driver's license. Notice will also be provided via electronic mail to the last attorney of record for each such case. Said notice shall not be construed as a concession or admission that any individual is entitled to any relief. The identification and notice provision shall be developed and filed with the Court and is subject to the Court's approval.

VII. APPLICATION OF JUDICIAL ESTOPPEL

All parties agree to be bound by the foregoing proposal and recognize that the doctrine of judicial estoppel binds them to its terms. *See Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634 (2005). All parties rely upon the agreements made herein to their detriment by foregoing an opportunity for a full hearing and adjudication before this Court. The parties further agree that all rights are reserved relative to the filing and argument of all speedy trial motions to dismiss pursuant to Mass. R. Crim. P. 36, our general laws, the Massachusetts Declaration of Rights, or the Constitution of the United States.

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List of Exhibits

- Exhibit 1 Exemplar of a Worksheet used to Certify and Calibrate a Massachusetts 9510
- Exhibit 2 Discovery Practices at the Office of Alcohol Testing, October 16, 2017
- Exhibit 3 Breath test searches (serial number and location)
- Exhibit 4 Certification/calibration records
- Exhibit 5 Test types 1, 2, or 3 for a given 9510 instrument or 9510 location
- Exhibit 6 Complete instrument files
- Exhibit 7 Data dictionaries with an explanation for each column heading
- Exhibit 8 Certificates of analysis for ethanol solutions
- Exhibit 9 Certificates of analysis for dry-gas standards
- Exhibit 10 Message codes
- Exhibit 11 Simulator calibration information
- Exhibit 12 Barometer calibrations
- Exhibit 13 All current and prior versions of laboratory protocols
- Exhibit 14 BTO training materials and OIC training materials
- Exhibit 15 A list of report types, generated by the 9510 instrument
- Exhibit 16 Raw data¹⁰
- Exhibit 17 List of certified BTOS
- Exhibit 18 BTO online training program

¹⁰ Password filed separately under seal and available upon order of the Court.