

MIDDLESEX, SS.

COMMONWEALTH OF MASSACHUSETTS
BOSTON MUNICIPAL AND
DISTRICT COURT DEPARTMENTS
DOCKET NOS. 1248 CR 1075,
1201 CR 3898, and others

COMMONWEALTH

v.

EVANDO ANANIAS, CHRISTIAN FIGUEROA, AND OTHERS

MEMORANDUM OF DECISION ON CONSOLIDATED DEFENDANTS'
MOTION TO COMPEL AND IMPOSE SANCTIONS

On February 16, 2017, this Court issued a Memorandum of Decision denying in part and allowing in part a motion filed by defendants of the Boston Municipal Court and District Court Departments charged with Operating a Motor Vehicle while Under the Influence of Intoxicating Liquor seeking, in limine, to exclude breath test results produced by the Alcotest 9510, a breathalyzer instrument developed by Draeger Safety Diagnostics, Inc. (Draeger). In sum, the Court determined that (1) the Alcotest 9510 breathalyzer device operates in a manner that produces scientifically reliable blood alcohol content (BAC) results; (2) the source code underlying the Alcotest 9510 breathalyzer device was developed and implemented in a manner that produces scientifically reliable BAC results; (3) the theory of blood-to-breath ratio underlying the algorithmic functions used by the Alcotest 9510 to produce BAC results remains sound science; (4) the methodology employed by the Massachusetts State Police Office of Alcohol Testing (OAT) from September 14, 2014 to the present produces scientifically reliable BAC results; and (5) the annual calibration and certification methodology employed by OAT

from June 2011 to September 14, 2014 did not produce scientifically reliable BAC results, but the Commonwealth could demonstrate to the trial judge, on a case-by-case basis, that a particular Alcotest 9510 was calibrated and certified using scientifically reliable methodology, and thus that a particular BAC result is scientifically reliable. *Commonwealth v. Ananias, et. al*, 1248 CR 1075 (February 16, 2017). Following this decision, District and Boston Municipal Court trial judges held hearings with respect to the calibration and certification methodology employed by OAT where the Commonwealth sought to introduce evidence of breath test results that were produced between June 2011 and September 14, 2014. On August 2, 2017, during one such hearing at Taunton District Court, the Court (Brennan, M., J.) determined that OAT had failed to disclose exculpatory worksheets demonstrating that the particular Alcotest 9510 at issue had failed certain calibration tests. *Commonwealth v. Harvey* (1431 CR 2259); *Commonwealth v. Derochers* (1431 CR 1085); and *Commonwealth v. Simmons* (1431 CR 2722). This confirmed the consolidated defendants' suspicion, based upon their comparison of the number of worksheets produced during the *Ananias* litigation to the significantly larger number of the same type of documents provided in response to a subsequent Freedom of Information Act (FOIA) request, that OAT had failed to produce hundreds of similar exculpatory documents.

On August 19, 2017, the consolidated defendants filed this Motion to Compel and Impose Sanctions. The Commonwealth filed a Notice of Discovery on August 31, 2018, and produced the materials identified by the defendants as having been withheld. In a series of additional filings, the Commonwealth asserted that OAT had not made them aware of these documents, despite prosecutors' best efforts to obtain all required discovery. On August 31, 2017, Secretary of Public Safety Daniel J. Bennett directed the Executive Office of Public Safety and Security (EOPSS) to investigate OAT's discovery practices. In an extensive report dated October 16,

2017, EOPSS identified various instances of intentional withholding of exculpatory evidence, blatant disregard of court orders, and other errors, all underscored by “a longstanding and insular institutional culture that was reflexively guarded” at OAT. *Exhibit 28*. In conjunction with this report, by letter to Colonel Richard McKeon of the Massachusetts State Police, Secretary Bennett directed the State Police to take certain actions with respect to the management and operation of OAT, with particular focus on its discovery practices. Meanwhile, and over the course of the ensuing year, tens of thousands of documents not previously provided to the consolidated defendants were turned over by prosecutors. During this time, the parties also engaged in negotiations to resolve the issues raised by the defendants’ Motion for Sanctions. The parties reached a tentative agreement on the majority of these issues, and on August 14, 2018 presented a Joint Stipulation of Facts and Recommended Resolution to the Defendants’ Motion for Sanctions for the Court’s approval. As part of this Stipulation, the parties agreed (1) to expand the period for which Alcotest 9510 BAC results are presumptively excluded from use by the Commonwealth at trial; (2) that the Commonwealth will not seek to admit such results at trial for this enlarged period 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, operating under the influence causing serious bodily injury, and operating under the influence of liquor, 5th offense or greater; and (3) that the period of presumptive exclusion would be enlarged, dating back to June 2011, when the Alcotest 9510 was first introduced in Massachusetts. The parties could not agree on the end-date of this enlarged period: the Commonwealth contends that it should correspond with the defendants’ receipt of all failed or incomplete worksheets on August 31, 2017, whereas the defendants assert that it should extend until OAT obtains accreditation from the ANSI-ASQ

National Accreditation Board (ANAB). To resolve this dispute, the parties agreed to submit the issue to the Court and to be bound by its decision.

As part of this agreement, the parties also sought to notify any person who may have received an adverse criminal disposition as a result of a breath test administered on the Alcotest 9510 during the applicable time period. Although the proposed Stipulation was widely reported and available on both print and electronic media, this formal notification process proved to be more complicated than anticipated. Ultimately, all consolidated defendants who were represented by counsel with valid email addresses were afforded an opportunity to comment on the Stipulation. The Court received two responses. *Exhibits 2 and 3*. On November 5, 2018, the Court formally approved the parties' Joint Stipulation of Facts and Recommended Resolution to the Defendants' Motion for Sanctions. On the unresolved issue, the Court heard testimony and received thirty-two exhibits into evidence during a three day hearing in November 2018 at the Salem District Court. The Court also was given access to view OAT's eDiscovery portal. The hearing concluded on November 26, 2018. At the defendants' request, the parties were given until December 10, 2018 to file additional memoranda.

Findings of Fact

A. Stipulated Facts

The Parties' Joint Stipulation of Relevant facts and Recommended Resolution to the Defendants' Motion for Sanctions contains the following Stipulation of Relevant Facts, which the Court incorporates into this decision:¹

1. The Office of Alcohol Testing (OAT) is a unit within Massachusetts State Police Crime Laboratory.

¹ For the sake of clarity, the Court has redacted footnotes and exhibit references contained in the original document.

2. At several hearings, Melissa O'Meara and Kerry Collins represented to the Court that the certification/calibration worksheets were synonymous with the written protocols, prior to the promulgation of version 1.0 of the annual certification/calibration written protocols.

3. The Court ordered OAT to produce a copy of all of the annual certification/calibration worksheets used to perform the annual calibration of 9510 units.

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 worksheets 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 worksheet were intentionally withheld by the OAT.

8. The OAT did not inform 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 other documents.

11. In addition, in response to the consolidated defendants' 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.

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 2017, within days of the release of the EOPPS report on Discovery irregularities at OAT.

15. The OAT section of the Massachusetts State Police Crime Laboratory will apply for accreditation by the ANSI-ASQ 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 Attorneys' offices, through multiple conferences 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 filing of the Motion for Sanctions in this matter. The parties agree to stipulate to the facts contained therein.

Exhibit 1 (see Appendix).

B. *Additional Findings of Fact*

During the November 2018 hearing, the court heard testimony from three witnesses, two on behalf of the consolidated defendants and one for the Commonwealth. Attorney Thomas Workman testified regarding his role as the defense team's computer forensic expert. His testimony focused on the discovery process and highlighted the difficulty the defendants experienced receiving, locating, and identifying particular documents due to the disorganization at OAT and the dysfunction between OAT and prosecutors. He specifically cited the tens of thousands of documents provided by the Commonwealth at various intervals since August 2017, which he described as being uncatalogued or indexed, and characterized as being produced in a chaotic and confusing manner. Although Mr. Workman must be credited for the persistence and diligence that uncovered OAT's intentional withholding of significant, exculpatory documents, the court does not fully credit his testimony. Mr. Workman's testimony was colored, at least in part, by his obvious disdain and antipathy for OAT, however well-founded it may have been in this instance. Of particular concern was his testimony regarding the OAT eDiscovery portal. Mr. Workman maintained that he was wholly unaware of this portal prior to the January 2107 *Daubert/Lanigan* hearing in this case. Yet, when confronted with evidence that he had accessed the portal months prior to the hearing, Mr. Workman adamantly refused to allow for the simple possibility that he may have been mistaken. Instead, he testified that his wife, secretary, and deceased former secretary had access to his eDiscovery portal password, and intimated that it

could have been one of them who accessed OAT's portal using his credentials. The court does not credit this testimony and finds that it substantially undermines Mr. Workman's testimony in this matter. The defendants' second witness, Janine Arvizu, testified via videoconference. She is the same expert on laboratory quality auditing who testified during the original *Ananias* proceedings. Here, she focused on the accreditation process and testified about various issues at OAT that, she opined, would remain obstacles to accreditation by a national body. As with her presentation in 2017, this Court found Ms. Arvizu's testimony to be credible on the whole. However, consistent with the Court's view at that time, Ms. Arvizu maintains a standard of review that "might be so high as to be unattainable." *Ananias*, 1248 CR 1075 at 26. The Court also views her testimony in this case through the lens of her lack of specific expertise in calibration laboratories as it relates to her assessment of OAT's readiness for accreditation, as well as her substantial reliance on Attorney Workman's reporting rather than her own review of discovery documents to draw her conclusions.

The Commonwealth's sole witness was Kristen Sullivan, the Chief Science Officer and Laboratory Director for the Massachusetts State Police Crime Laboratory. She testified in detail regarding the accreditation process, including her own role in ensuring that every unit under the State Police Crime Laboratory umbrella, other than OAT, has achieved accreditation by an outside, nationally recognized body. Director Sullivan outlined the steps OAT has taken to seek accreditation, and she testified about discovery practices at OAT as well as the Crime Lab's response to the 2017 EOPSS investigation into OAT practices. Although this Court fully credits Ms. Sullivan's testimony regarding the facts, it does not equally embrace all of the observations and opinions she proffered. Ms. Sullivan continues to oversee the operations at OAT, even if indirectly. She works with all of the people who were the subject of the EOPSS investigation

and was interviewed as part of that probe. Thus, the Court is mindful that, despite her best intentions and efforts, Director Sullivan's analysis is inherently impacted by the fact that she is not a wholly independent witness.

Based upon these credibility determinations and upon consideration of the documentary evidence presented, the Court makes the following additional findings of fact:

22. The consolidated defendants, through their forensic expert, Thomas Workman, were aware of the existence of the OAT eDiscovery portal prior to the January 2017 *Ananias* hearing.

23. At the time of that hearing, the eDiscovery portal did not include any reference to the Massachusetts State Police Quality Assurance (QA) Manual. The QA Manual dictates procedures, instructions, and requirements for calibration and certification of the Alcotest 9510 breathalyzer. *Exhibit 24*. The QA was in existence at the time of the January 2017 *Ananias* hearing, but was not provided to the defendants as part of discovery.

24. The QA Manual contains different information than OAT's Quality Control (QC) Manual, which was furnished to the defendants before the January 2017 *Ananias* hearing. The QC Manual is a document that provides instructions to OAT employees primarily on topics such as storage and maintenance of various solutions and equipment used at the lab. *Exhibit 26*.

25. The QA Manual contains relevant material that would have assisted the defense in its examination of Melissa O'Meara regarding the reliability of OAT's scientific methodology. Its production was subject to discovery orders issued prior to the January 2017 hearing.

26. Although not specifically listed by the Commonwealth in its Notice of Discovery, the QA Manual was provided to the defendants in the August 31, 2017 discovery documents.

27. OAT's Calibration and Certification Protocols have not been subjected to a validation study. The laboratory has relied on performance checks to validate the protocols. The practice of relying on performance checks to validate results is consistent with the approach followed in other units of the State Police Crime Laboratory, all of which have achieved accreditation. To the extent that these performance checks fall short of external validation studies, the ANAB accreditation process will cure any such deficiencies.

28. Although the investigation into the discovery practices at OAT, and particularly into aspects of the discovery process related to the *Ananias* hearing and the role of certain OAT employees in intentionally withholding exculpatory information, likely would have benefitted from an outside agency perspective, the EOPSS investigation was thorough, detailed, comprehensive, and credible. It produced a critical analysis of the culture at OAT and uncovered enormously concerning practices that compromised criminal prosecutions and substantially interfered with the liberty interests, driving privileges, and employment opportunities of individual defendants.

29. After this investigation, EOPSS maintained oversight of OAT with respect to the discovery provided to the defendants in this case. To the extent that discovery materials produced on and after August 31, 2017 were voluminous, uncatalogued, unlabeled, or otherwise overwhelming, it was not the product of bad faith on the part of EOPSS or the prosecutors. If anything, it was the result of EOPSS's effort to over-correct for OAT's prior intentional misconduct. Throughout this process, there remained a level of dysfunction in the communication between OAT and prosecutors with respect to discovery materials. However, the inability of the defendants to locate certain documents contained within the discovery was also a

product of Mr. Workman's lack of expertise needed to search the discovery provided by OAT effectively.

30. As a result of the EOPSS investigation, on October 16, 2017, the Secretary of Public Safety directed the State Police to take the following actions: (1) expand the reach of the Crime Laboratory's Case Management Unit (CMU), which adheres to protocols that specifically delineate how to respond to discovery requests, to cover OAT; (2) require OAT to eliminate its longstanding policy of requiring court orders before complying with "non-standard" discovery requests from prosecutors, and instead comply with all document requests from prosecutors' offices; (3) enhance and expand OAT's eDiscovery portal; (4) obtain ANAB accreditation within twelve months; and (5) conduct enhanced training for OAT employees, focusing on identification of and duties regarding exculpatory information.

31. The State Police CMU does not process OAT discovery requests, nor has OAT developed its own discovery protocols. OAT has no formal, uniform policy with respect to discovery requests. OAT's failure to produce 432 incomplete Alcotest 9510 worksheets and the QA Manual prior to the January 2017 hearing was the result of the lack of such a discovery policy. There is nothing currently in place at OAT to ensure that discovery requests are being handled properly and in a uniform fashion.

32. The OAT eDiscovery portal has been expanded significantly in the past year. It is accessible and easily navigated. All of the information contained in the "OAT records" typically found in court case files is available on the eDiscovery portal. The portal allows the user to search for breath test records, breathalyzer certifications, and periodic test records. It has a reference section that includes Alcotest 9510 record information, Officer in Charge guides, Breath Test Operator Training manuals, and OAT protocols. It also has a section that

provides updates – the most recent, dated 10/3/18, deals with an update to the “uncertainty of measurement” section of the breath test certification summary.

33. OAT is not ANAB accredited. Currently, twenty-two measurement laboratories in twelve states in the United States are accredited.

34. The ANAB accreditation process involves ten steps: (1) application to ANAB; (2) preparation of a “conformance file” for the lead assessor assigned to review the application; (3) e-dialogue with the lead assessor regarding the conformance file; (4) on-site assessment (once the conformance file is complete); (5) closing report (a “punch list” of non-conformities that must be addressed by the lab); (6) remedial proposals by the lab; (7) objective proof by the lab of remediation; (8) ANAB board review; (9) certificate of accreditation; (10) annual “surveillance” visits.

35. OAT has worked diligently toward applying for accreditation, particularly since the directives issued by the Director of Public Safety. In order to apply for accreditation, OAT must have certain technical and administrative reporting requirements in place. Preparation of the application involves a standard-by-standard review to ensure that all protocols meet official requirements. At the time of this hearing, all technical components were in place; however, the lab was still addressing administrative aspects of the application. It is expected that its application to ANAB will be finalized by February 2019.

36. Retired Superior Court Justice Jane Haggerty was hired to evaluate OAT’s training, particularly as to obligations regarding exculpatory information, and to make recommendations to enhance it. She has completed her assessment and discussed her findings with the Secretary of Public Safety and the Director of the Crime Laboratory.

37. On August 1, 2018, Director Sullivan sent a letter to all District Attorneys, the Boston Bar Association, all Chiefs of Police, and the Committee for Public Counsel Services outlining the activity of OAT over the course of the prior year, particularly in response to the February 16, 2017 *Ananias* decision, the October 2017 EOPSS investigation, and Judge Haggerty's recommendations. *Exhibit 31*.

Applicable Law

Under Mass R. Crim. P. 14(c)(1), in response to noncompliance with a discovery order, "the court may make a further order for discovery, grant a continuance, or enter such orders as it deems just under the circumstances." In general, "(s)anctions are remedial in nature . . . (and) should be tailored appropriately to cure any prejudice resulting from a party's noncompliance and ensure a fair trial." *Commonwealth v. Carney*, 458 Mass. 418, 427 (2010). However, when the noncompliance is intentional and the information withheld exculpatory, a court may also consider fashioning a remedy designed "to discourage government agents from such deliberate and insidious attempts to subvert a defendant's right to a fair trial." *Commonwealth v. Jackson*, 391 Mass. 749, 754 (1984). The remedy must not be punitive, but under certain circumstances may be prophylactic, if narrowly tailored to remedy the particular misconduct. *See CPCS v. AG*, 480 Mass. 700, 729-33 (2018); *Commonwealth v. Cronk*, 396 Mass 194, 198-99 (1985).

Discussion, Rulings and Orders

It is uncontested that exculpatory materials in the form of 432 failed calibration worksheets were intentionally withheld from the consolidated defendants by OAT. The Court has also determined that the Quality Assurance Manual, which directly addresses calibration procedures and as such was material to the issue of the reliability of OAT's scientific methodology, was not disclosed, despite being subject to discovery orders. The Secretary of

Public Safety and the Executive Office of Public Safety and Security found, and the Commonwealth concedes, that “OAT leadership made serious errors of judgment in its responses to court-ordered discovery, errors which were enabled by a longstanding culture that was reflexively guarded . . . and which was inattentive to the legal obligations borne by those whose work facilitates criminal prosecutions.” *Exhibit 28, p.1*. The degree to which OAT’s misconduct impeded the consolidated defendants’ ability to obtain a full, fair, and complete *Daubert/Lanigan* hearing is difficult to quantify. It certainly was not negligible. Similarly, the extent to which consideration of this withheld evidence in context, during real time cross-examination of Melissa O’Meara, would have impacted this Court’s qualitative assessment of OAT’s methodology cannot be determined retrospectively. It is noteworthy, however, that the Court fully credited Ms. O’Meara’s testimony in its decision of February 16, 2017. Ultimately, OAT’s misconduct resulted in a deprivation of the consolidated defendants’ due process rights. *See CPCS*, 480 Mass. at 730, *citing Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth v. Daniels*, 445 Mass. 392, 401, 407-09 (2005) (Commonwealth’s failure to provide exculpatory witness statement violated defendant’s right to due process). Moreover, the negative impact of EOPSS’s findings regarding OAT’s approach to exculpatory information on public trust and confidence in the fairness of the system and the integrity of the process cannot be overstated. It is these harms in the aggregate that this ruling must remedy through the imposition of sanctions. Thus, this Court’s mandate, if not simple, is clear: to fashion a remedy that not only addresses the particular wrong in this case, but that also best ensures and restores confidence that OAT’s methodology produces scientifically reliable breathalyzer results and that OAT is fully disclosing those instances where its ability to do so may be compromised.

The Commonwealth argues that a fair operative date for the enlarged period of presumptive exclusion of breathalyzer tests in criminal prosecutions coincides with the date that the failed calibration worksheets were disclosed, August 31, 2017. It asserts that the voluntary self-sanction of suppressing the vast majority of evidential breath tests for a six-year period is more than sufficient. I disagree. Indeed, the sanctions contemplated by agreement of the parties already go beyond the most narrowly remedial. In this case, an appropriate remedy must include, at a minimum, substantial compliance by OAT with the directives imposed on it by the Director of Public Safety. The Commonwealth has demonstrated OAT's compliance with only two of these five directives. Nor are these requirements alone, even if fulfilled, sufficient to provide the level of transparency necessary to remedy the harm to the criminal justice system. Where, as here, the details of government misconduct have spread beyond the legal community, "the court must also act, within the bounds of the law, to restore the public's faith in the integrity of the courts." *Bridgeman v. District Attorney of Suffolk County*, 476 Mass. 298, 337 (2017) (Hines, J. dissenting).

The consolidated defendants assert that the misconduct in this case was so egregious that the most just remedy is to exclude breathalyzer results until OAT achieves formal accreditation. They posit that they were denied a full and fair *Daubert/Lanigan* hearing and thus, by definition, a fair trial. From the defendants' perspective, OAT cannot be trusted until fully accredited by a national organization. Although the defendants' position with respect to the substantive impact of OAT's misconduct on the right to a fair hearing is justified, their argument goes too far. In its February 2017 *Ananias* decision, this Court found that "(a)lthough accreditation is a laudable goal, the Court is not convinced that its absence inherently undermines the reliability of OAT's

work.” *Ananias*, 1248 CR 1075 at 2. The Court stands by this conclusion, while recognizing that the context is now different.

In order to remedy the prejudice caused by OAT’s misconduct against the consolidated defendants and the resulting damage to the criminal justice system, OAT must first demonstrate that its current methodology will produce scientifically reliable BAC results. Mindful that OAT, by EOPSS’s mandate, must ultimately become accredited, the Court is satisfied that this aspect of prejudice can be mitigated by OAT formally filing its application for accreditation, as long as the Commonwealth shows that the application is substantially likely to be approved.² *Cf. Commonwealth v. Baldwin*, 385 Mass. 165, 177 (1982) (judge may exclude evidence withheld in violation of discovery obligation as a sanction). The application itself requires OAT to demonstrate that it is comporting with ANAB standards as defined by the ANAB Accreditation Requirements manual. *Exhibit 21*. Yet, this alone is not a sufficient panacea. OAT must also address the discovery practices that contributed to its misconduct. Specifically, OAT must promulgate formal discovery protocols consistent with those employed by the State Police Crime Management Unit. These protocols must include a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence. *See CPCS*, 480 Mass. at 729-734 (2018). Alternatively, the Court will be satisfied by the Commonwealth’s representation that OAT’s discovery is being handled by the State Police CMU. Regardless, the Commonwealth must certify that all OAT staff has been trained on the obligations relating to exculpatory evidence. In the interest of transparency and in the spirit of the Director of Public Safety’s October 16, 2017 directives, OAT’s application for accreditation must be available for viewing

² For example, the Commonwealth may provide copies of applications filed by already accredited measurement labs that are substantially similar to OAT’s application.

on the eDiscovery portal, along with the ANAB Accreditation Requirements manual. At each stage of the accreditation process, updates confirming OAT's compliance must be posted on the portal. In addition, OAT's discovery protocol, once promulgated, must be uploaded onto the eDiscovery portal, along with any discovery training materials. The Court finds that making this information available on an electronic public portal will contribute to the restoration of confidence in the reliability of the scientific results produced by OAT, and thus further remedy the prejudice caused by OAT's violation of its obligations.

Accordingly, the Court orders that the period of presumptive exclusion of Alcotest 9510 breathalyzer results in such criminal prosecutions as have been agreed by the parties shall be extended until the Commonwealth, upon motion to this Court³, demonstrates:

1. that OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed;
2. that OAT's accreditation application has been uploaded onto the eDiscovery portal;
3. that the ANAB Accreditation Requirements manual is available for viewing on the eDiscovery portal;
4. that OAT has promulgated discovery protocols consistent with those employed by the State Police Case Management Unit, including a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence; or, in the alternative, that the CMU is responsible for processing OAT's discovery;
5. that OAT's discovery protocol has been uploaded to the eDiscovery portal;

³ Unless specifically requested otherwise, the Court will decide this motion on papers submitted by the parties.

6. that all OAT employees have received training on the meaning of exculpatory information and the obligations relating to it; and
7. that all written materials used to train OAT employees on discovery, and particularly on exculpatory evidence, have been uploaded to the eDiscovery portal.

If all of these requirements have been met, the Court may still, upon motion of the consolidated defendants, reinstate the period of presumptive exclusion if OAT fails to update the progress of its application for accreditation on the eDiscovery portal, or otherwise fails to make good faith efforts to gain accreditation. *See Parties' Joint Stipulation, Exhibit 1, p. 4 ("Accreditation of the Office of Alcohol Testing")*.

January 9, 2019

So Ordered,

Robert A. Brennan
Justice of the District Court

APPENDIX

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 worksheets⁴ were synonymous with the written protocols, prior to the promulgation of version 1.0 of the annual certification/calibration⁵ written protocols.

⁴ 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.

⁵ See FN1.

3. The Court ordered OAT to produce a copy of all of the annual certification/calibration⁶ worksheets used to perform the annual calibration of 9510 units.
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.⁷

⁶ See FN1.

⁷ *Ananias* at 29

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.
15. The OAT section of the Massachusetts State Police Crime Laboratory will apply for accreditation by the ANSI-ASQ⁸ 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.

II. ACCREDITATION OF THE OFFICE OF ALCOHOL TESTING

⁸ American National Standards Institute – American Society for Quality (ANSI-ASQ).

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/calibration⁹ 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/calibration¹⁰ procedure, which will note when documents are missing, see Exhibit 6;
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;

⁹ See FN1.

¹⁰ See FN1.

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

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, 2014¹¹, 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

¹¹ 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.

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).¹²

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 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

¹² 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.

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.

Respectfully Submitted

Respectfully Submitted

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