

**COMMONWEALTH OF MASSACHUSETTS**

**MIDDLESEX, SS.**

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

**COMMONWEALTH**

**v.**

**EVANDO ANANIAS, CHRISTIAN FIGUEROA, AND OTHERS**

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**MEMORANDUM OF DECISION ON COMMONWEALTH'S MOTION TO ADMIT  
BREATH TESTS RESULTS**

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On January 9, 2019, following a three day evidentiary hearing, this court issued a Memorandum of Decision on Consolidated Defendants' Motion to Compel and to Impose Sanctions. The Memorandum of Decision incorporated a Joint Stipulation of Facts and Recommended Resolution (the "settlement agreement"), which the Court had formally approved on November 5, 2018. Pursuant to the settlement agreement, breath tests administered on the Alcotest 9510 breathalyzer are presumptively excluded from use in criminal prosecutions from the time the machine was introduced in Massachusetts in June, 2011, until such time as this Court deems them admissible.<sup>1</sup> The sole issue addressed by the Court during this hearing was the end date of the enlarged period of presumptive exclusion of breath tests. The Commonwealth requested that all breath tests be excluded only through August 31, 2017 (the date on which

<sup>1</sup> Under the settlement agreement, the Commonwealth agrees not to seek to establish the reliability of OAT's methodology for the period of presumptive exclusion, except in cases alleging Motor Vehicle Homicide, Operating Under the Influence with Serious Bodily Injury, and Operating Under the Influence, 5<sup>th</sup> Offense or greater. For cases involving these offenses, although the period of presumptive exclusion of breath tests applies, the Commonwealth may seek to demonstrate the reliability OAT's calibration and certification methodology to a trial judge on a case-by-case basis.

requested that all breath tests be excluded only through August 31, 2017 (the date on which defendants received all the failed or incomplete calibration worksheets that were intentionally withheld by OAT), whereas the consolidated defendants requested that the period of exclusion continue until OAT receives accreditation. The parties agreed to be bound by the Court's decision.

The Court ordered that the period of presumptive exclusion of breath test results be extended until the Commonwealth 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;
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.<sup>2</sup>

The Commonwealth has fully complied with the Court's orders. Specifically, the Court finds as follows:

**Order #1**

OAT submitted its application for accreditation to American National Standards Institute (ANSI) National Accreditation Board (ANAB) on February 28, 2019; however, the Court required not simply that an application be filed, rather that it also be *demonstrably substantially likely to succeed*. The first such demonstration by the Commonwealth to the Court is the letter of accreditation assessment authored by ANAB, dated June 12, 2019. The Commonwealth contends that the accreditation report is retrospective and assesses protocols and procedures already in place at OAT and reflected in its accreditation application, and thus that the operative date for 'demonstrably substantially likely success' of the application should be its filing date. The defendants counter that, despite OAT receiving ANAB's accreditation report in mid-June, neither Commonwealth nor the defendants were provided with it until July 8, 2019. This delay in disclosure, the defendants argue, is symptomatic of the lack of transparency that resulted in the extension of this litigation, contributed to the loss of public confidence in the system, and underscored the need for sanctions to be imposed. Standing alone, the failure to produce the ANAB report until almost a month after it was written certainly inspires little confidence in

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<sup>2</sup> See Memorandum of Decision on Consolidated Defendants' Motion to Compel and Impose Sanctions, 17-18 (January 9, 2019).

OAT's ability to conduct itself as a public institution or its willingness to fully embrace a change to its guarded, uncooperative ways. As a result, the concept of a further sanction, i.e., ordering that the operative date to satisfy the Court's January 9, 2019 order be the date of accreditation, holds some appeal. Ultimately, however, the Court's purpose is to determine the point at which the breath tests produced by the Alcotest 9510 subject to the calibration and certification procedures employed by OAT are reliable and when the public would trust them as reliable. As to the issue of actual reliability, the Court is convinced by the inescapable logic of the Commonwealth's position that success inherently demonstrates likelihood of success. With respect to public perception of reliability, the Court is satisfied that OAT's other efforts to improve responsiveness and transparency (as outlined below) sufficiently offset the delay in disclosure here that no additional sanction is required.

The Commonwealth also argues that, for the purpose of determining admissibility of a particular breath test result, the Court should look to the date the test was administered rather than the date the instrument was certified. As the defendants correctly point out, this approach is inconsistent with the settlement agreement, as well as with previous orders of the Court, which were based upon the date of calibration and certification.

Thus, the Court finds that the Commonwealth satisfied Order #1 for all Alcotest 9510 breathalyzer machines calibrated and certified on or after **February 28, 2019**.

### **Order #2**

OAT's application for accreditation was uploaded onto the eDiscovery portal (<https://oatediscovery.chs.state.ma.us/oatpublic>) on **March 8, 2019**. It is located in the Reference Material section under ANAB Accreditation Documentation.

### **Order #3**

Information regarding ANAB accreditation requirements and a link to purchase documentation was published on the eDiscovery portal on **April 18, 2019**.

**Order #4**

OAT promulgated discovery protocols on **April 5, 2019**.

**Order #5**

OAT's Discovery Materials policy was uploaded to the eDiscovery portal on **April 5, 2019**.

**Order #6**

OAT conducted trainings for its employees on **March 1, 2019 and March 28, 2019**. The training included issues and obligations relating to exculpatory evidence.

**Order #7**

Documents from discovery trainings, including attendance sheets, were uploaded onto the Reference Materials section of the eDiscovery portal under "Exculpatory Evidence Training" on **March 15, 2019 and April 4, 2019**.

Based upon the foregoing, the Court finds that the Commonwealth satisfied all of the requirements of the January 9, 2019 Memorandum of Decision on Consolidated Defendants' Motion to Compel and to Impose Sanctions as of April 18, 2019. Accordingly, it is hereby ordered that the Commonwealth's Motion to Admit Breath Tests is **ALLOWED** for all Alcotest **9510 machines calibrated and certified on or after April 18, 2019**.

Dated: July 29, 2019

So Ordered,

Robert A. Brennan  
Justice of the District Court