

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law (ECL) of the State of New York, and Title 6, Part 217 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

-by-

ORDER

**SAN MIGUEL AUTO REPAIR CORP., ANDRE
MONCION, HECTOR R. CABRERA , GENELLY
CORNELIO AND CRISTIAN TEJADA,**

DEC Case No.
CO2-20100615-18

Respondents.

This administrative enforcement proceeding concerns allegations that respondents San Miguel Auto Repair Corp. (San Miguel Auto), Andre Moncion, Hector R. Cabrera, Genelly Cornelio and Cristian Tejada (respondents) completed onboard diagnostic (OBD) II inspections of motor vehicles using noncompliant equipment and procedures in violation of 6 NYCRR 217-4.2. OBD inspections, when properly conducted, are designed to monitor the performance of major engine components, including those responsible for controlling emissions.

Staff of the New York State Department of Environmental Conservation (DEC or Department) alleges that these violations occurred at an official emissions inspection station commonly known as San Miguel Auto Repair, located at 2151 Jerome Avenue, Bronx, New York, during the period from February 14, 2009 through July 20, 2010. Staff alleges that respondent Andre Moncion owned and operated San Miguel Auto, and respondents Cabrera, Cornelio and Tejada performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, Department staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 1,049 separate occasions. Staff contends that, of these inspections, respondent Hector R. Cabrera performed 1,001 inspections, respondent Genelly Cornelio performed 47 inspections, and respondent Cristian Tejada performed 1 inspection (see hearing report [Hearing Report] of Administrative Law Judge [ALJ] Daniel P. O'Connell [attached], at 9-10, Finding of Fact Nos. 25, 29, 30) and that, as a result, 1,048 certificates of inspection were issued based on these simulated inspections (see id. at 1).

In accordance with 6 NYCRR 622.3(a)(3), Department staff commenced this proceeding by service of a notice of hearing and complaint dated August 31, 2010 on respondents San Miguel Auto, Moncion, Cornelio and Tejada. In its complaint, Department staff alleges that respondents violated:

- (1) 6 NYCRR 217-4.2, by operating an official emissions inspection station using equipment and procedures that are not in compliance with the Department's procedures and standards (Exhibit [Ex.] 1, Complaint ¶¶ 9-13); and
- (2) 6 NYCRR 217-1.4, by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection (id. ¶¶ 14-18).

For these violations, Department staff requests a civil penalty of five hundred twenty-four thousand five hundred dollars (\$524,500) (id. at Wherefore Clause). Staff requests that the penalty be assessed against respondents jointly and severally (see Staff Closing Brief dated March 18, 2013 [Staff Br.], at 14).

Respondents San Miguel Auto and Moncion, through the same counsel, responded to the complaint by serving an answer dated December 1, 2010, in which respondents denied staff's charges, asserted three affirmative defenses,¹ and requested dismissal of the complaint and the award of costs and disbursements (see Ex. 2). Respondents Tejada and Cornelio each sent a letter in response to the complaint (see Exs. 3, 4).² The matter was initially assigned to ALJ Edward Buhrmaster and subsequently assigned to ALJ O'Connell (see Hearing Report, at 3). The hearing was conducted over two days, on March 9, 2012 and June 21, 2012.

Based on the record, I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.

Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability as against respondents San Miguel Auto, Cornelio and Tejada with respect to the first claim. Thus, based upon my review of the record, Department staff has proven its case on the first claim by a preponderance of the evidence (see 6 NYCRR 622.11[c]), establishing that those respondents operated an official emissions inspection station using equipment or procedures that are not in compliance with DEC procedures or standards, in violation of 6 NYCRR 217-4.2.

In this matter, at the time the violations occurred, San Miguel Auto held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties (see Hearing Report, at 37-38). San Miguel Auto had the responsibility to ensure that inspections conducted at its facility comported with all legal requirements. However, it allowed simulators to be used in inspections at the facility and thereby failed to comply with applicable law. This subverted the intended

¹ Respondents San Miguel Auto and Moncion asserted the following three affirmative defenses: (i) the complaint fails to state a cause of action upon which relief may be granted; (ii) the alleged incidents complained of were the result of actions and/or inactions of third parties over whom respondents had no direction or control; and (iii) the action is barred by the doctrines of collateral estoppel and res judicata (see Ex. 2).

² The ALJ held that these letter-responses, which acknowledged receipt of the notice of hearing and complaint, served as respondents' answers to the complaint (Hearing Report, at 2, 23).

environmental and public health benefits of the legal requirements to address and control vehicular air emissions. Moreover, the official inspection station licensee – in this case San Miguel Auto – has the responsibility to have in place procedures and controls to ensure that no inspector or other person uses the inspector certification number of someone else.

I agree with the ALJ that San Miguel Auto is liable for all 1,049 violations because, at the time the inspections were conducted, it held the license to operate the official inspection station (see Hearing Report, at 37-38).

I also agree with the ALJ that respondent-inspectors Cornelio and Tejada should be held liable for each of the noncompliant inspections they performed (id.). With respect to respondent Moncion, I agree with the ALJ's conclusion that no evidence was offered to show that he was a certified motor vehicle emissions inspector at the relevant time (see Hearing Report, at 5 [Finding of Fact No. 4]). I also agree with the ALJ that, although Mr. Moncion was identified as president of San Miguel Auto (see Ex. 7, at 2), staff did not provide evidence that Moncion was responsible for, or influenced, the violations by the corporation (see Hearing Report, at 24, 29). I therefore adopt the ALJ's recommendation to dismiss the charges against respondent Moncion.³

Staff did not provide any proof of service of the notice of hearing and complaint on respondent Hector R. Cabrera (see Hearing Report, at 2). At the request of counsel for respondents San Miguel Auto and Moncion, the ALJ issued a subpoena to the New York City Department of Health and Mental Hygiene, and obtained a certified copy of Hector R. Cabrera's Certificate of Death (Certificate No. 156-09-049688), reflecting that Mr. Cabrera died on December 10, 2009, a date occurring during the period of time the noncompliant inspections at issue here were performed (see id., at 2-3). Because the record lacks proof of service on Mr. Cabrera or his estate, all claims against him are dismissed.

With respect to the second cause of action, I concur with the ALJ's determination that violations of 6 NYCRR 217-1.4 cannot be found (see Hearing Report, at 38-40) for the reasons stated in my prior decisions (see Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013 [Jerome Muffler], at 3 [citing Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4 and other cases]). Accordingly, the alleged violations of 6 NYCRR 217-1.4 are hereby dismissed as to all respondents.

³ Respondents San Miguel Auto and Moncion asserted three affirmative defenses in their answer. I agree with the ALJ's analysis of the defenses on the merits (see id. at 25-30), and hereby dismiss them. Moreover, these respondents' first "affirmative defense," which asserts that the complaint fails to state a cause of action upon which relief may be granted, is not properly pleaded as an affirmative defense; it is more appropriately considered as a ground to move for dismissal of the complaint (see e.g. Matter of Original Italian Pizza, LLC, Ruling of the Chief Administrative Law Judge, December 15, 2010, at 9 [citing cases]). At this stage of this proceeding, however, any such "defense" has been rendered academic by staff's proof. Finally, these respondents attempted in their closing brief to raise for the first time a defense of laches. Attempting to raise a defense in the closing brief is untimely and, in any event, laches is not available in this circumstance (see Hearing Report, at 27-28).

Civil Penalty

Staff requested a penalty of five hundred twenty-four thousand five hundred dollars (\$524,500), representing a penalty of \$500 for each violation. In its closing brief, Department staff calculated the potential maximum penalty as \$27,266,000 (see Staff Br., at 11), an amount significantly higher than the amount that Department staff has requested.

The ALJ reviewed the factors set forth in the Department's civil penalty policy, including the economic benefit of noncompliance, the gravity of the violations, and factors that could adjust the gravity component such as respondents' culpability, cooperation, history of noncompliance, and ability to pay (see Hearing Report, at 42-46). The ALJ recommended a total civil penalty of ninety-eight thousand nine hundred dollars (\$98,900), assessed as follows: (i) respondent San Miguel Auto to be assessed a civil penalty of ninety-four thousand four hundred dollars (\$94,400); (ii) respondent Cornelio to be assessed a civil penalty of four thousand one hundred twenty-five dollars (\$4,125); and (iii) respondent Tejada to be assessed a civil penalty of three hundred seventy-five dollars (\$375) (Hearing Report, at 46).⁴

Prior decisions have noted the adverse impact of automotive emissions on air quality, and how the use of simulators subverts the regulatory regime designed to address and control these emissions (see e.g. Matter of Gurabo, Decision and Order of the Commissioner, February 16, 2012, at 6-7). Accordingly, appropriate penalties are warranted where violations are found.

I have previously discussed the structure of penalties in administrative enforcement proceedings involving OBD II inspections of motor vehicles using noncompliant equipment and procedures (see e.g. Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013 [Autoramo]; Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013 [New Power]). I have concluded that the facility where the noncompliant inspections occurred should be subject to a substantially higher percentage allocation of the aggregate penalty (see Jerome Muffler, at 4-5; Autoramo, at 4-5; New Power, at 5). With respect to individual inspectors, I allocated the remaining penalty amount based on the number of noncompliant inspections that each inspector conducted. The aggregate penalty amount and the allocation of that amount (a) between the facility and the individual inspectors, and (b) among the inspectors themselves, may be modified based on aggravating or mitigating circumstances as appropriate in each case (see e.g. Jerome Muffler, at 4-5 [discussing examples of mitigating or aggravating factors]).

In consideration of the penalty range established by ECL 71-2103(1), the impacts of this illegal activity, and my decisions in Jerome Muffler, Autoramo, and New Power, I am imposing on respondent San Miguel Auto a civil penalty of one hundred forty-nine thousand dollars (\$149,000).

With respect to individual inspectors, as the number of inspections that an individual performs with noncompliant equipment increases, higher penalties shall be assessed, subject to any aggravating or mitigating circumstances. In this case, as evidenced by the appearance of

⁴ The ALJ appropriately rejected Department staff's request for joint and several liability (see Hearing Report, at 41 [citing prior Commissioner decisions and orders]).

each such respondent's unique inspector's certificate number on inspection records of the New York Department of Motor Vehicles (DMV), inspector-respondent Cornelio performed forty-seven (47) improper inspections, and inspector-respondent Tejada performed one (1) improper inspection.⁵

Respondent Cornelio claimed in her answer that she never worked at San Miguel Auto (see Ex. 4), and attempted to establish at the hearing that she was working elsewhere at the times of the noncompliant inspections associated with her inspection certificate (see e.g. Exs. 27, 28). The record reflects, however, that the noncompliant inspections associated with her inspection certificate occurred prior to the dates she was allegedly employed elsewhere (see Hearing Report, at 10). I therefore agree with the ALJ's conclusion that respondent Cornelio is liable for the 47 noncompliant inspections, approximately four percent (4%) of the 1,049 noncompliant inspections at this facility. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that she performed, I assess a civil penalty against Ms. Cornelio in the amount of one thousand five hundred dollars (\$1,500).

The evidence reflects that Mr. Tejada performed one (1) of the 1,049 noncompliant inspections at this facility. The version of ECL 71-2103(1) in effect on April 9, 2009, the date on which Mr. Tejada committed his violation (see Ex. 13, at 21), stated in relevant part that "any person who violates any provision of article nineteen or any code, rule or regulation which was promulgated pursuant thereto ... shall be liable, in the case of a first violation, for a penalty not less than three hundred seventy-five dollars" (ECL 71-2103 [former (1)]). I therefore assess a civil penalty against Mr. Tejada in the amount of three hundred seventy-five dollars (\$375) for his one noncompliant inspection.

In sum, the overall amount of the civil penalty assessed by this order is one hundred fifty thousand eight hundred seventy-five dollars (\$150,875), which is substantial in light of the number of noncompliant inspections, and should serve as a deterrent against any future noncompliant activity of this kind.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Respondents San Miguel Auto Repair Corp., Genelly Cornelio, and Cristian Tejada are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment and procedures that are not in compliance with Department procedures and standards. One thousand forty-nine (1,049) inspections using noncompliant equipment and procedures were performed at San Miguel Auto

⁵ The DMV inspection records reflect that respondent Cabrera's inspection certificate was utilized with respect to 1,001 of the noncompliant inspections. Because many of these inspections occurred after Mr. Cabrera's death, it is clear that someone else used Mr. Cabrera's inspection certificate, but the record does not establish the identity of that person (compare Ex. 29 [Death Certificate reflecting Mr. Cabrera's death on December 10, 2009] with Ex. 14 [DMV spreadsheet reflecting inspections following Mr. Cabrera's date of death, but associated with Mr. Cabrera's inspection certificate number]).

Repair Corp., of which Genelly Cornelio performed forty-seven (47) and Cristian Tejada performed one (1).

- II. Department staff's claims that respondents Andre Moncion and Hector R. Cabrera violated 6 NYCRR 217-4.2 are dismissed.
- III. Department staff's claim that respondents San Miguel Auto Repair Corp., Andre Moncion, Hector R. Cabrera, Genelly Cornelio and Cristian Tejada violated 6 NYCRR 217-1.4 is dismissed.
- IV. The following penalties are assessed:
 - A. Respondent San Miguel Auto Repair Corp. is hereby assessed a civil penalty in the amount of one hundred forty-nine thousand dollars (\$149,000);
 - B. Respondent Genelly Cornelio is hereby assessed a civil penalty in the amount of one thousand five hundred dollars (\$1,500); and
 - C. Respondent Cristian Tejada is hereby assessed a civil penalty in the amount of three hundred seventy-five dollars (\$375).

The penalty for each respondent shall be due and payable within thirty (30) days of the service of this order upon that respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Blaise Constantakes, Esq.
Assistant Counsel
NYS Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500

- V. All communications from any respondent to the DEC concerning this order shall be directed to Assistant Counsel Blaise Constantakes, at the address set forth in paragraph IV of this order.

- VI. The provisions, terms and conditions of this order shall bind respondents San Miguel Auto Repair Corp., Genelly Cornelio and Cristian Tejada, and their agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: December 17, 2013
Albany, New York

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

Alleged Violations of the New York State
Environmental Conservation Law Article 19,
and Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of
New York Part 217

- by -

San Miguel Auto Repair Corp.,
Andre Moncion,
Hector R. Cabrera,
Genelly Cornelio, and
Cristian Tejada.

Respondents

DEC Case No. C02-20100615-18

Hearing Report

- by -

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

May 10, 2013

Proceedings

Pursuant to a notice of hearing and complaint, dated August 31, 2010 (Exhibit 1), staff of the Department of Environmental Conservation (Department staff) alleged that San Miguel Auto Repair Corp. (San Miguel Auto), Andre Moncion, Hector R. Cabrera, Genelly Cornelio, and Cristian A. Tejada violated provisions of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 217, which concerns motor vehicle emission inspections.

The August 31, 2010 complaint asserted two causes of action. In the first, Respondents allegedly violated 6 NYCRR 217-4.2, which states that no person shall operate an official motor vehicle emission inspection station using equipment or procedures that are not in compliance with the Department's procedures or standards. In the second cause of action, Respondents allegedly violated 6 NYCRR 217-1.4 by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection.

Both violations were alleged to have occurred from February 14, 2009 to July 20, 2010 at San Miguel Auto, an official emission inspection station (DMV Facility No. 7102172), located at 2151 Jerome Avenue, Bronx, New York. During this period, Department staff alleged, in the August 31, 2010 complaint, that San Miguel Auto was a domestic business corporation duly authorized to do business in New York State, and that Andre Moncion owned and operated the inspection station. Department staff alleged further that Hector R. Cabrera, Genelly Cornelio, and Cristian A. Tejada worked at San Miguel Auto as certified motor vehicle emission inspectors, and performed mandatory annual motor vehicle emission inspections.

According to Department staff, Respondents performed a total of 1049 illegal inspections from February 14, 2009 to July 20, 2010 using a device to substitute for, and simulate, the motor vehicle of record, and issued 1048 emission certificates based on these simulated inspections.

For these alleged violations, Department staff requested a total civil penalty of \$524,500. As a result, Department staff seeks \$500 for each of the 1049 inspections that Respondents illegally performed (Department staff's closing brief at 11).

By their attorney, Mary Beth Macina, Esq. (Yonkers), San Miguel Auto and Mr. Moncion filed an answer dated December 1, 2010 (Exhibit 2). These Respondents admitted that San Miguel Auto is a domestic business corporation duly authorized to do business in New York State, and denied the charges alleged in the August 31, 2010 complaint. They asserted three affirmative defenses: (1) the complaint fails to state a cause of action upon which relief may be granted; (2) the violations alleged in the complaint were the result of actions or inactions of third parties over whom Respondents San Miguel Auto and Mr. Moncion had no direction or control; and (3) the action is barred by the doctrines of collateral estoppel and res judicata. San Miguel Auto and Mr. Moncion requested that the Commissioner dismiss the charges alleged in the complaint and award costs and disbursements.

Mr. Tejada answered the August 31, 2010 complaint with a fax that he signed on October 25, 2010, and sent on October 26, 2010 (Exhibit 3). In his October 2010 fax, Mr. Tejada acknowledged that he received notices of hearing and complaints concerning the following inspection facilities: (1) San Miguel Auto Repair Corp.; (2) Dyre Ave Auto Repair Corp.; (3) East Tremont Repair Corp.¹; (4) RV Auto Repairs, Inc.; and (5) Sugar Hill Service Station, Inc.

Ms. Cornelio stated, in an undated letter faxed on November 30, 2010 (Exhibit 4), that she received three different notices of hearing and complaints for the following inspection facilities: (1) Dyre Ave Auto Repair Corp.; (2) Meta Tire Shop Auto Repair; and (3) San Miguel Auto Repair Corp. In her November 2010 letter (Exhibit 4), Ms. Cornelio said that she "never worked at any of these shops as an inspector."

Hector R. Cabrera did not respond to Department staff's August 31, 2010 complaint. At the hearing, Department staff did not provide any proof of service of the notice of hearing and complaint upon Mr. Cabrera. After service of a subpoena *duces tecum*, the New York City Department of Health and Mental Hygiene provided a certified copy of Hector R. Cabrera's Certificate of Death (Certificate No. 156-09-049688). With a cover letter

¹ See *Matter of East Tremont Repair Corp. (East Tremont)*, Order dated July 23, 2012. The Commissioner determined that Mr. Tejada conducted 265 illegal inspections at the East Tremont facility in violation of 6 NYCRR 217-4.2, and assessed Mr. Tejada a civil penalty of \$23,580 (*East Tremont* at 5-6).

dated, January 7, 2013, I provided the parties with a copy of the document. The certified copy of Mr. Cabrera's death certificate is marked for identification as Exhibit 29, and is received into evidence with the parties' consent (Respondents' closing brief at 23-26, and Department staff's closing statement at 1). According to the death certificate (Exhibit 29), Mr. Cabrera died on December 10, 2009. Mr. Cabrera died during the period when the alleged violations occurred (*i.e.*, February 14, 2009 to July 20, 2010), and before Department staff commenced the captioned administrative enforcement matter with service of the August 31, 2010 complaint.

Blaise W. Constantakes, Esq., Assistant Counsel, filed a statement of readiness dated October 3, 2011, on behalf of Department staff. Department staff requested that the Office of Hearings and Mediation Services schedule this matter for hearing. By letter of October 5, 2011, Chief Administrative Law Judge (ALJ) James T. McClymonds informed the parties that the matter had been assigned to ALJ Edward Buhrmaster. Subsequently, the matter was reassigned to me.

After convening a telephone conference call with the parties' representatives on January 13, 2012, I issued a hearing notice dated January 17, 2012 announcing the date, time, and location of the hearing. As announced in that notice, the hearing convened on March 9, 2012 at 10:00 a.m. at the Department's Region 2 office in Long Island City. The hearing reconvened on June 21, 2012 in Long Island City, and concluded on that date.

Two witnesses testified on behalf of Department staff. Lawrence Levine is a Vehicle Safety Technical Analyst II with the New York State Department of Motor Vehicles (NYS DMV), Division of Vehicle Safety, Office of Clean Air (Tr. at 48-50). James J. Clyne, P.E., is an environmental engineer and Chief of the Light Duty Vehicle Section in the Department's Division of Air Resources (Tr. at 175-176).

Mr. Tejada appeared at the hearing, on his own behalf, but did not testify. He cross-examined Department staff's witnesses. Ms. Cornelio appeared at the hearing on her own behalf, and cross-examined Department staff's witnesses. During the June 21, 2012 hearing session, Mr. Moncion and Ms. Cornelio testified.

On March 26, 2012, the Office of Hearings and Mediation Services received the transcript for the March 6, 2012 hearing session. The transcript for the June 21, 2012 hearing session was received on July 6, 2012. The hearing record includes 303 pages of transcript and 29 hearing exhibits.² A copy of the exhibit list is attached to this hearing report as Appendix A.

At the end of the June 21, 2012 hearing session, Mr. Tejada provided a closing statement on the record (Tr. at 296). Written closing briefs were timely received on March 18, 2013 from San Miguel Auto and Mr. Moncion, and from Department staff. Ms. Cornelio did not file a written closing brief. The hearing record closed on March 18, 2013 upon receipt of the closing briefs.

FINDINGS OF FACT

I. The Licensee

1. In October 2006, Andre Moncion, on behalf of San Miguel Auto Repair Corp. (San Miguel Auto), applied to the New York State Department of Motor Vehicles (NYS DMV) for a license to operate a motor vehicle inspection station at 2151 Jerome Avenue in the Bronx. Subsequently, NYS DMV issued a license to San Miguel Auto, and assigned it facility number 7102172. (Tr. at 56, 58; Exhibit 7.)
2. To receive a license to operate a motor vehicle inspection station from the NYS DMV, the facility must employ at least one full-time certified inspector (see 15 NYCRR 79.8[b][2]; Tr. at 188-189). After receiving the license, the facility must display signs showing the fees for the various inspections, as well as a list of the certified inspectors that includes their names, their inspection numbers, the inspection groups, and the expiration dates of the inspectors' certificates (see 15 NYCRR 79.13[f]). The bar code on an inspector's certification card is not displayed on the signs posted in the facility. (Tr. at 88-91, 116.)

² All hearing exhibits were marked for identification; however, Exhibits 5, 9, 15, 21, 22, 23, 24, 25, and 26 were not received into evidence (Appendix A).

3. The licensee who operates a motor vehicle inspection station is responsible for all activities of the certified inspectors and must supervise them accordingly (see 15 NYCRR 79.8[b]; Tr. at 61).
4. At the time of San Miguel Auto's application to NYS DMV, Andre Moncion was its president, and held 100% of the ownership interest in the corporation (Exhibit 7). No evidence was offered to show that Mr. Moncion was a certified motor vehicle emission inspector at the time of the alleged violations.
5. During the period at issue in this matter, Mr. Moncion was not at the facility for long periods from February 2009 to July 2010 because he was receiving medical treatment in the Dominican Republic, his native country. (Tr. at 284-286, 292, 294.) According to Mr. Moncion, Julio Ramirez managed daily operations at San Miguel Auto, during his absences (Tr. at 285, 287-288), and Hector Cabrera performed motor vehicle emission inspections (Tr. at 288).

II. New York Vehicle Inspection Program

6. NYS DMV and the Department jointly administer the New York vehicle inspection program (NYVIP), which is a statewide annual emission inspection program for gasoline-powered vehicles. NYVIP is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations outlined at 40 CFR Part 51. (Tr. at 177-178, 181-182, 186.)
7. For model year 1996 and newer light-duty vehicles, NYVIP requires the completion of an on-board diagnostic (OBD) emission inspection commonly referred to as OBD II, because it succeeds a version that was previously employed. (Tr. at 176-177.)
8. The OBD II inspection monitors the operation of the engine and emissions control system in vehicles that are manufactured with the technology installed (Tr. at 177).
9. To perform an OBD II inspection, the NYVIP work station must receive an approved configuration from SGS Testcom.

SGS Testcom is under contract with NYS DMV to manage the NYVIP program. SGS Testcom is responsible for the development, maintenance, and repair of inspection equipment, as well as the transmission of electronic data from the inspection station to NYS DMV. (Tr. at 52-53, 101, 133, 188.)

10. The bar code on the facility's license must be scanned into the work station before inspections can be performed. This bar code is scanned once to assign the facility's number to the work station. (Tr. at 57, 189.)

III. Inspector Training and Certification

11. On March 1, 2008, Genelly Cornelio applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of Ms. Cornelio's application, NYS DMV assigned her certificate number 7FZ7. (Tr. at 66-67; Exhibit 8.)
12. In November 1999, Hector R. Cabrera applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of Mr. Cabrera's application, NYS DMV assigned him certificate number ZG88. (Tr. at 67-68.)
13. On October 19, 2004, Cristian A. Tejada applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of his application, NYS DMV assigned Mr. Tejada certificate number 4KR8. (Tr. at 73; Exhibit 10.)
14. Each candidate who applies for certification as a motor vehicle emissions inspector must attend a three-hour training class provided by NYS DMV and, subsequently, pass a written test. During the training, the candidates are instructed, among other things, to safeguard their certification cards by securing them when not being used during the inspection process (see 15 NYCRR 79.17[c][2]), and to report lost or stolen certification cards to NYS DMV immediately (see 15 NYCRR 79.17[c][3]). The candidates are advised where to obtain a copy of the regulations, and to become familiar with them. After a candidate passes the written test, he or she receives a temporary certification card, which expires in 90 days. (Tr. at 62-65, 111, 146.)

15. When the candidate returns to the facility, he or she must inform the licensee about obtaining a temporary certification card. To complete the certification process, the licensee scans the bar code on the inspector's temporary certification card and manually enters the candidate's name into the facility's NYVIP work station. Using the work station, the candidate then takes an on-line test. After passing the on-line test, the candidate is authorized to conduct OBD II inspections. (Tr. at 65-66, 78-80, 97, 111, 114.)

IV. OBD II Inspections

16. To begin an OBD II inspection, the inspector must scan the bar code on his or her certification card into the NYVIP work station. The inspection cannot commence unless the bar code on the inspector's certification card is scanned and accepted by the NYVIP work station. (Tr. at 50, 101-102, 189.)
17. The OBD II inspection involves collecting information from the vehicle being presented, such as make, model, and model year. The inspector collects this information by scanning the NYS DMV registration bar code on the vehicle or manually entering information using a keyboard, or some combination of the two. At the same time, the inspector also records the NYS DMV registration-based vehicle identification number (VIN), which is a unique 17-character alphanumeric identifier. (Tr. at 50, 102-103, 140-141, 190-191, 263-264.)
18. Based on the vehicle information, the NYVIP work station determines what type of inspection the vehicle should receive based on its age and weight, and a connection, via the internet, is made to NYS DMV to try to match this information to that contained in the NYS DMV registration file. When the information is matched by the NYS DMV database, the inspection continues on the NYVIP work station with a series of menus that allow the inspector to complete the safety inspection. After that, another series of screens comes up for what is known as the emission control device (ECD) checks. (Tr. at 51, 190-191.)

19. The OBD II inspection is the final inspection component. For the first two parts of the OBD II inspection, the NYVIP work station instructs the inspector to put the key in the ignition and turn it to what is known as the "key on, engine off" position, such that the key is turned but the vehicle is not running. At this point the malfunction indicator light (MIL) should come on, demonstrating that the bulb has not burned out. The next step involves moving to the "key on, engine running" position, which involves turning the ignition on, so that the engine is running, though the car remains idling while parked at the station. At this point, the light should go off, indicating that the OBD system has not found a fault. If the light remains on, it indicates an emissions failure. (Tr. at 51, 190-192.)
20. A complete vehicle inspection includes a safety inspection, a visual inspection of the emission control devices (including the gas cap), and the OBD II inspection. (Tr. at 190.)
21. Following these initial steps, the inspector is directed to plug the NYVIP work station connector into the vehicle's diagnostic link connector (DLC), which is found in every vehicle that is OBD II compliant. With the connection established, the NYVIP work station communicates with the vehicle's on-board computer with standardized requests for which standardized responses are sent back from the vehicle. Based on the information provided during this exchange, which includes identifying information for the vehicle, it is determined whether the vehicle will pass or fail the inspection. (Tr. at 51-53, 55, 192-194.)
22. When the electronic exchange between the vehicle's on-board computer and the NYVIP work station is complete, the NYVIP work station determines whether the vehicle passes or fails the inspection. If the vehicle passes the inspection, the work station prompts the inspector to scan the inspection sticker, which the inspector then places on the windshield, so that NYS DMV can track the sticker (or certificate) to the inspection. The inspector must indicate that he or she scanned the sticker and affixed it to the vehicle. The record of the

full inspection is then sent electronically to SGS Testcom, and to NYS DMV. (Tr. at 52, 194-195.)

V. Simulator Usage

23. Department staff reviewed all of the NYVIP inspection data for 10,000 to 11,000 facilities located throughout the State. From September 1, 2004 to February 28, 2009, Department staff reviewed some 18.5 million inspection records, and found that no vehicles matched the 15-data field signature characterized by simulator usage. However, a review of the inspection records collected from March 2008 to July 2010 showed a simulator signature at 45 inspection facilities, including San Miguel Auto. After July 2010, the electronic signature for the simulator did not appear in any inspection data, which was subsequent to when the enforcement initiative commenced. (Tr. at 205-206, 255, 264-265.)
24. Inspectors at San Miguel Auto performed OBD II inspections during the period between February 14, 2009 and July 20, 2010 (Tr. at 205; Exhibits 11, 12, 13, and 14).
25. Data collected from the OBD II inspections performed at San Miguel Auto shows that inspectors used a simulator for 1049 vehicle emission inspections from February 14, 2009 through July 20, 2010 (Tr. at 220-225; Exhibits 11, 12, 13, and 14).

VI. The Inspectors at San Miguel Auto

26. Department staff offered no proof to show that Andre Moncion was a certified motor vehicle emission inspector at San Miguel Auto during the period at issue in this proceeding.
27. On April 8 and 9, 2009, Cristian Tejada (4KR8 [Exhibit 10]) performed seven vehicle inspections at San Miguel Auto. Three were performed on April 8, 2009, and four were performed on April 9, 2009. Of these seven vehicle inspections, the simulator profile appeared for one performed at 18:15 (6:15 PM) on April 9, 2009. (Tr. at

- 228; Exhibit 13, page 21 of 31.) Except for the seven inspections performed in April 2009, Mr. Tejada's certification number (4KR8) is not associated with any other motor vehicle emission inspections performed at San Miguel Auto from February 14, 2009 to July 20, 2010 (Exhibits 11, 12, 13, and 14).
28. From April 10, 2009 to May 8, 2009, Ms. Cornelio's certification number (7FZ7 [Exhibit 8]) is associated with the motor vehicle emission inspections performed at San Miguel Auto (Exhibit 13, pages 21 of 31 through 22 of 31). The vehicle inspections performed during this period preceded Ms. Cornelio's temporary work assignment at the Metropolitan Hospital beginning in May 2009, and her course work at the Bronx Community College for the Fall 2009 semester, which started at the end of August 2009 (Exhibits 27, and 28). Therefore, Exhibits 27 and 28 fail to establish that Ms. Cornelio was working somewhere other than San Miguel Auto from April 10, 2009 to May 8, 2009.
29. From April 10, 2009 to May 8, 2009, Ms. Cornelio performed 125 inspections at San Miguel Auto. Of the total amount, a simulator was used for 47 inspections. (Tr. at 228; Exhibit 13, pages 21 of 31 through 22 of 31.)
30. From February 14, 2009 to July 20, 2010, 1049 illegal motor vehicle emission inspections were performed at San Miguel Auto. Of the total amount, Hector Cabrera's certification number (ZG88 [Tr. at 67-68]) is associated with 1,001 of them. (Tr. at 227-228; Exhibits 13 and 14.)
31. According to his Certificate of Death (Exhibit 29), Hector R. Cabrera died on the afternoon of December 10, 2009, which is about eight months before Department staff commenced the captioned administrative enforcement proceeding with service of the August 31, 2010 notice of hearing and complaint.
32. Nevertheless, on December 10, 2009 between 9:05 AM and 5:39 PM, Mr. Cabrera's certification number (ZG88 [Tr. at 67-68]) is associated with eight motor vehicle emission inspections at San Miguel Auto, of which a simulator was

used for the one performed at 5:39 PM (Exhibit 14, page 8 of 28).

33. In addition, from December 10, 2009 to September 29, 2010, only Mr. Cabrera's certification number (ZG88 [Tr. at 67-68]) is associated with the motor vehicle emission inspections performed at San Miguel Auto (Exhibit 14, pages 8 of 28 through 28 of 28). From December 10, 2009 to July 20, 2010, a simulator was used to perform many of these inspections (Exhibit 14, pages 8 of 28 through 23 of 28).

Discussion

According to the August 31, 2010 complaint (Exhibit 1), San Miguel Auto, and its certified inspectors, Mr. Tejada, Ms. Cornelio, and Mr. Cabrera did not check the on-board diagnostic (OBD) II systems as part of their inspections for 1049 motor vehicles from February 14, 2009 through July 20, 2010. Rather, Department staff asserted that the inspectors simulated the OBD II inspections for these vehicles by using non-compliant equipment and procedures, and then improperly issued emission certificates.

On behalf of Department staff, Mr. Clyne explained that OBD II testing is part of the New York vehicle inspection program (NYVIP), which is required under the federal Clean Air Act, to reduce low-level ozone pollution. Pursuant to federal law and regulation, New York is required to submit a detailed State Implementation Plan (SIP) describing how to implement and enforce NYVIP. For the vehicle inspection program, New York submitted SIP revisions to the U.S. Environmental Protection Agency in 2006, which outlined the statewide program. In 2009, the Department committed to a vigorous enforcement program based on the review of enhanced inspection data. (Tr. at 176-178, 181-182, 184-186.)

I. The Licensee

To support the allegation that San Miguel Auto is a facility licensed by New York State Department of Motor Vehicles (NYS DMV) to perform OBD II motor vehicle inspections, Department staff offered Exhibit 7. Exhibit 7 is a certified

copy of pages 1 of 4 and 2 of 4 of the Original Facility Application (DMV Form VS-1 [10/05]) filed by San Miguel Auto. During the hearing, Department staff offered Exhibit 7 through the testimony of Mr. Levine (Tr. at 57-60).

At the hearing (Tr. at 59-60, 107-108) and in their closing brief (at 2-4), San Miguel Auto and Mr. Moncion objected to the receipt of Exhibit 7. Respondents asserted that the document is incomplete because Department staff only offered two of the four pages of the application, and none of the supplemental materials that may have been attached. Due to the incomplete nature of Exhibit 7, Respondents argued the following.

First, given its incomplete nature, Respondents asserted they did not have the opportunity to properly cross-examine Department staff's witness about Exhibit 7. Second, Respondents contended that the pages and attachments not offered by Department staff may provide exculpatory information. Respondents argued the presumption should be that the withheld information is unfavorable to Department staff and its case. Third, Respondents also contended that Department staff did not show that Mr. Moncion submitted Exhibit 7. According to Respondents, Exhibit 7 is not dated or signed. Based on the foregoing, Respondents argued that no weight should be assigned to Exhibit 7. (Respondents' closing brief at 2-3.)

Respondent's objections are unsupported. The upper portion of Exhibit 7 shows that the license issued by NYS DMV to San Miguel Auto is for an inspection facility (ISP) (Tr. at 58; Exhibit 7). Contrary to Respondents' contention, Mr. Moncion's signature appears on page 2 of Exhibit 7. Also, on Exhibit 7, Mr. Moncion's date of birth is listed as March 12, 1941 (3-12-41), which corresponds to the date of birth provided on Mr. Moncion's passport from the Dominican Republic (Exhibit 19). Finally, I note that Respondents did not offer the missing pages or attachments associated with Exhibit 7 when the hearing reconvened on June 21, 2012.

Therefore, I find that Andre Moncion, on behalf of San Miguel Auto, applied to NYS DMV for a license to operate a motor vehicle inspection station at 2151 Jerome Avenue in the Bronx. Subsequently, NYS DMV issued a license to San Miguel Auto and assigned it facility number 7102172. (Tr. at 56, 58; Exhibit 7.)

II. Simulator Usage

According to Mr. Clyne, in September 2008, NYS DMV alerted Department staff to what DMV staff believed was the illegal use of simulators within the greater New York metropolitan area. DMV staff's concern was based on what it considered to be very repetitive, and extremely unrealistic readings for engine revolutions per minute (RPM) that had been recorded during OBD II inspections. As part of each OBD II inspection, engine RPM is recorded to ensure that the vehicle is running when it is connected to the NYVIP work station. During a normal inspection, Mr. Clyne testified that the RPM reading for a car idling in park should be between 300 and 1,100. However, some recorded RPM readings were in excess of 5,000. Mr. Clyne explained that such readings were unusual because each vehicle should produce a different RPM reading. (Tr. at 201-203.)

Mr. Clyne testified further that after reviewing the inspection data from the greater New York metropolitan area, Department staff identified five inspection stations that were reporting very high RPM readings (Tr. at 202). Then, with the assistance of DMV staff, and the New York State Attorney General's Office, Department staff initiated an undercover investigation of these facilities in January and February 2009, which extended into the summer of 2009, to monitor vehicles during inspections (Tr. at 203, 206).

Concluding that a high RPM value alone was not a sufficient indicator of simulator use, Department staff undertook an extensive data analysis in an attempt to identify a better profile. Department staff focused on 15 data fields, other than the RPM values which, together constitute an electronic signature for a simulated OBD II inspection. Department staff reviewed all of the NYVIP inspection data for 10,000 to 11,000 facilities in the State. From September 2004 to February 28, 2008, Department staff reviewed some 18.5 million inspection records, and found that no vehicles matched the 15-data field signature. A review of the inspection records collected from March 2008 to July 2010, however, showed a simulator profile at 45 inspection facilities, including San Miguel Auto. After July 2010, the electronic signature for the simulator did not appear in any inspection data, which was subsequent to when the enforcement initiative commenced. (Tr. at 203-207, 255.)

A. Exhibits 11, 12, 13, and 14

Exhibits 11, 12, 13, and 14 are abstracts of data collected from all the OBD II inspections performed at San Miguel Auto from December 2006 through October 2010. Mr. Clyne explained that he requested this information from NYS DMV, and that NYS DMV provided certified paper records, as well as the data in electronic format. According to Mr. Clyne, the data show that a simulator was used for some of the vehicle inspections performed at San Miguel Auto from February 14, 2009 through July 20, 2010. (Tr. at 207-208.) During the hearing, Department staff offered these exhibits as certified business records (Tr. at 208, 213; Department staff's closing brief at 2, 6).

At the hearing, counsel for San Miguel Auto and Mr. Moncion objected to the receipt of Exhibits 11, 12, 13, and 14 for the following reasons (Tr. at 212-215, 228). First, the documents are not complete. Referring to Mr. Clyne's testimony, Respondents' counsel noted there are about 100 data fields for each OBD II inspection, but the information offered in these exhibits is from 48 fields. Second, no foundation was presented about how these exhibits were created. Respondents' counsel argued that the data from the fields not presented in these exhibits may have included exculpatory evidence. During the hearing, Mr. Tejada also objected to the receipt of these exhibits for the same reasons (Tr. at 213-214).

1. Completeness

In their closing brief, San Miguel Auto and Mr. Moncion argued that no weight should be assigned to Exhibits 11, 12, 13, and 14 for a number of reasons. First, as with Exhibit 7, Respondents restated that the information in the latter exhibits is not complete. Because Department staff did not provide the entire record for each OBD II inspection at issue in this proceeding, Respondents contended the presumption should be that the withheld information is unfavorable to Department staff and its case. (Respondents' closing brief at 7.)

This unsupported contention is unpersuasive. Mr. Clyne testified that Exhibit 11 (31 pages) is a list of each and every OBD II vehicle inspections performed at San Miguel Auto from December 21, 2006 to September 9, 2009, and that Exhibit 12 (28 pages) is a list of each and every OBD II vehicle inspections

performed a San Miguel Auto from September 10, 2009 to October 6, 2010 (Tr. at 208). He testified further that the information presented in Exhibits 11 and 12 was an "abstract" of a typical inspection (Tr. at 208).

Mr. Clyne explained that a typical OBD II inspection includes information about the vehicle, the inspector, and the inspection. Information about the inspection includes data stored in each vehicle's on-board diagnostic computer concerning, among other things, the emission control devices (ECD) check and the safety check. According to Mr. Clyne, the information for any OBD II inspection is in excess of 100 data fields. Because all data fields are not pertinent to this administrative enforcement proceeding, Mr. Clyne said that he selected a subset of the data collected during the OBD II inspections so that each row of data presented in the exhibits would represent an inspection. (Tr. at 208-209.)

Pursuant to 6 NYCRR 622.7, discovery is authorized before the adjudicatory hearing commences. As a result, Respondents had access to the complete records upon request. Respondents, however, did not avail themselves of the opportunity to request the data collected during any particular OBD II inspection or set of inspections performed at San Miguel Auto (Tr. at 214-215). Respondents' contention, therefore, is unsupported.

2. Business Records

Second, Respondents argued that Department staff failed to demonstrate how Exhibits 11, 12, 13, and 14 are consistent with the standards for business records, as outlined in Civil Practice Law and Rules (CPLR) § 4518 and related case law (Respondents' closing brief at 7-8; see e.g. *People v Cratsley*, 86 NY2d 81 and *People v Kennedy*, 68 NY2d 569). In addition to the standards outlined in CPLR 4518, Respondents argued further that case law (see e.g., *Johnson v Lutz*, 253 NY 124 [1930]) requires the person who made the record to have actual knowledge of the events recorded.

Respondents continued that an entity who receives another entity's records is not able to lay the necessary foundation for those records even if the recipient files the records with its own records (see *West Valley Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949 [4th Dept. 2002]; *Standard Textile Co.*,

Inc. v National Equipment Rental, Ltd., 80 AD2d 911 [2nd Dept. 1981]). Respondents drew the analogy that the Department receives SGS Testcom's records concerning the OBD II inspections, and the Department then retains those inspection records (Tr. at 195-196). (Respondents' closing brief at 8.)

With respect to electronic records, Respondents argued that it should not be assumed that printing the electronic OBD II vehicle inspection records, in the form of Exhibits 11, 12, 13, and 14, is self-authenticating (see *People v Manges*, 67 AD3d 1328 [4th Dept. 2009]). Respondents argued further that factors such as how the electronic record is stored, maintained, or retrieved may be considered in determining whether the paper exhibits are true and accurate representations of the electronic records. According to Respondents, Department staff offered no testimony that the data for each OBD II vehicle inspection at San Miguel Auto was entered in the regular course of business, that the data were entered at or near the time of the transaction, and that Mr. Clyne, who offered the exhibits through his testimony, had any personal knowledge of the data recorded. (Respondents' closing brief at 8-9.)

Although the rules of evidence need not be strictly applied to the Department's administrative enforcement proceedings (see 6 NYCRR 622.11[a][3]), the language at 6 NYCRR 622.11(a)(6) concerning the receipt of records into evidence closely parallels that of the business records rule at CPLR 4518(a). Respondents' arguments relate to the reliability of the data presented in Exhibits 11, 12, 13, and 14. For the following reasons, I conclude that the data presented in these exhibits are reliable, and should be assigned significant weight.

Through his education, his position with the Department, as the Bureau Chief for the Light Duty Vehicle Section in the Department's Division of Air, as well as his associated work experience (Tr. at 176), Mr. Clyne is familiar with the New York State vehicle inspection program (NYVIP), and its implementation at licensed inspection facilities. The vehicle inspection program is required by the federal Clean Air Act amendments of 1990 to control ground level ozone pollution (Tr. at 178).

Mr. Clyne credibly testified that all inspections must take place at facilities licensed by NYS DMV (Tr. at 188). The licensed facility must use computer equipment and software certified by the Department and NYS DMV, which is available from

NYS DMV's vendor, SGS Testcom (Tr. at 188, 243). In addition, a process has been established to allow licensed facilities to purchase used inspection equipment from other licensed facilities (Tr. at 243-244). Only inspectors, trained and certified by NYS DMV, may use the equipment at licensed facilities to perform motor vehicle inspections. (Tr. at 189.)

For each and every OBD II inspection, the inspector connects the motor vehicle to the NYVIP work station via a standardized connector (Tr. at 192). After the connection is established, the vehicle's on-board diagnostic computer and the NYVIP work station exchange data related to the emissions control equipment on the vehicle (Tr. at 193). When the inspection is complete, the NYVIP work station creates an inspection record, which is stored on the NYVIP work station (Tr. at 195, 241-242). Contemporaneously, the NYVIP work station electronically transmits the data from the inspection to SGS Testcom, via the internet. SGS Testcom retains a copy of the data and electronically transmits a copy of the inspection record to NYS DMV, via the internet. (Tr. at 195, 240.) On a weekly basis, the Department downloads copies of the vehicle inspection records electronically in batches from SGS Testcom, via the internet (Tr. at 196, 237, 239-240).

The data from each motor vehicle inspection is backed-up by SGS Testcom and NYS DMV. The Department also backs-up the data about each motor vehicle inspection onto compact disks. (Tr. at 239-240, 242.) Because SGS Testcom serves as DMV's vendor, SGS Testcom has a contractual obligation to retain and maintain the data associated with each OBD II vehicle inspection (Tr. at 242). The term for the contract between SGS Testcom and NYS DMV is from September 2004 to December 2013 (Tr. at 242). This period includes the time when the alleged violations took place at San Miguel Auto.

San Miguel Auto is a facility, licensed by NYS DMV, to perform OBD II motor vehicle inspections (see Exhibit 7), and a record of each inspection is made. Therefore, the record for each OBD II motor vehicle inspection is made in the regular course of business at San Miguel Auto, and it is the regular course of this business to make such an inspection record.

Based on Mr. Clyne's unrefuted testimony, the record of each OBD II motor vehicle inspection is made contemporaneously with the inspection. During the course of each vehicle

inspection the inspector follows the prompts on the computer screen. Finally, if the vehicle passes the inspection, the software program prompts the inspector to confirm that he or she affixed the inspection sticker on the windshield of the vehicle. (Tr. at 190-195.) As noted above, the inspection record is then saved on the NYVIP work station, and transmitted electronically, via the internet, to SGS Testcom and NYS DMV. The Department subsequently downloads the data. (Tr. at 196, 237, 239-240).

Respondents' reliance on *Johnson* (253 NY 124 [1930]) is misplaced. The source of each OBD II motor vehicle inspection record is the inspector who performed the inspection using the authorized NYVIP work station. The electronic inspection record is automatically transmitted to SGS Testcom and NYS DMV. The Department downloads the data for the vehicle inspections from SGS Testcom. The automatic transmission of the electronic data following the completion of each vehicle inspection assures the reliability of each motor vehicle inspection record. In *Johnson* (253 NY at 127-128), the Court determined, however, that the police officer, not present at the scene of the vehicle accident, prepared an unreliable report because it was based on a collection of hearsay statements from members of the public who may have been present at the scene and witnessed the accident. The multiple layers of hearsay in *Johnson* police report do not exist here.

Respondents expressed concern about the reliability of Exhibits 11, 12, 13, and 14 because they are printouts of electronic records (Respondents' closing brief at 8-9). This concern is unfounded. In contrast to Respondents' contentions, the record of this matter includes a description about the nature of the equipment that must be used to collect the data for each vehicle inspection, as well as a description of how the data for each inspection is collected, transmitted, and stored.

3. Records prepared for Litigation

Third, Respondents asserted that Exhibits 11, 12, 13, and 14 were records prepared for litigation and, therefore, argued these exhibits are unreliable (Respondents' closing brief at 10-12; see e.g. *City of New York v State*, 27 AD3d 1 [1st Dept. 2005]). In *City of New York* (27 AD3d at 7), the court held that to determine exactly how many people the City cared for, who were properly the State's responsibility, and for how long the

City provided the care, the City needed to examine the data for each individual. Instead, the City offered "proof by approximation and assumption," which the court characterized as "speculation and conjecture" (*id.*).

Exhibits 11, 12, 13, and 14 include actual data from each and every OBD II inspection performed at San Miguel Auto, whether legal or not, from December 21, 2006 to September 9, 2009 (see Exhibits 11 and 13), and from September 10, 2009 to October 6, 2010 (see Exhibits 12 and 14). At issue in this proceeding is a portion of the OBD II inspections, reported in these exhibits, that were performed at San Miguel Auto from February 2009 to July 2010. As noted above, the NYVIP work station creates a record of the OBD II motor vehicle inspection upon completion, which is stored on the NYVIP work station (Tr. at 195, 241-242). With Exhibits 11, 12, 13, and 14, Department staff offered exactly what the court described in the *City of New York* matter. Therefore, contrary to Respondents' assertion, Department staff did not improperly create records in the form of Exhibits 11, 12, 13, and 14 for this administrative enforcement hearing.

4. Mr. Clyne's Expertise

Finally, Respondents asserted (at 12-14) that the scope of Mr. Clyne's testimony was improper because it included opinions drawn from the facts presented in Exhibits 11, 12, 13, and 14. Respondents asserted further that Department staff did not provide a sufficient foundation to establish Mr. Clyne as an expert. Accordingly, Respondents argued that Mr. Clyne could not offer an expert opinion that a simulator was used to perform OBD II motor vehicle inspections at San Miguel Auto.

Contrary to Respondents' assertions, I conclude that, during his testimony, Mr. Clyne provided information about his education and his work experiences. Mr. Clyne testified further that he is familiar with the State's vehicle inspection program and the inspection process. (Tr. at 176-197, 230-232, 244-246, 24-259, 264-266.) As discussed further below, Mr. Clyne explained how he, with other members of Department staff, as well as Staff from DMV and the Attorney General's Office, analyzed data from OBD II vehicle inspections performed at San Miguel Auto, and other licensed facilities in the New York Metropolitan area, to show that some inspections were performed

with a device that simulated a motor vehicle's on-board diagnostic computer.

B. Determining the Simulator Signature

Referring to Exhibits 11, 12, 13, and 14, Mr. Clyne identified the column labeled "DMV_FACILITY_NUM," which is the identification number for the inspection facility. Only the facility identification number for San Miguel Auto (7102172 [Exhibit 7]) appears in this column. (Tr. at 209.) Mr. Clyne also identified the column labeled "CI_NUM," which provides the identification numbers for the inspectors (Tr. at 210).

From more than 100 fields generated during the course of an inspection, Mr. Clyne selected the data fields shown in Exhibits 11, 12, 13, and 14 (Tr. at 208-209). From left to right across the top of each page on Exhibits 11, 12, 13, and 14, there are headings for each column of data that is displayed:

DMV_VIN_NUM is the vehicle identification number, which is scanned or manually entered into the NYVIP work station.

INSP_DTE shows the date and time of the inspection.

DMV_FACILITY_NUM is the number that was assigned to the station by NYS DMV, and is programmed into the NYVIP work station when the facility bar code is scanned. In each case, the number is 7102172, which is the number that appears in the upper left hand corner of the first page of San Miguel Auto's facility application (Exhibit 7).

ODOMETER_READING is recorded manually by the inspector.

REC_NUM is the record number, which is a serial tally of inspections.

CI_NUM (certified inspector number) is the unique alphanumeric identifier the NYS DMV assigns to each inspector. Mr. Cabrera's certificate number is ZG88 (Tr. at 68). Ms. Cornelio's certificate number 7FZ7 (Exhibit 8), and Mr. Tejada's certificate number is

4KR8 (Exhibit 10). Prior to starting the inspection, the inspector scans the bar code on his or her certification card, and the inspector's certificate number is recorded for each inspection.

DATA_ENTRY_METHOD indicates how the vehicle information was entered into the inspection record.

GAS_CAP_RESULT is a pass/fail indicator for the gas cap check.

ASSIGNED_CERT_NUM is taken from the scanned bar code on the sticker that the inspector issued for the vehicle passing the inspection.

VEH_YEAR is the model year of the vehicle.

DMV_VEH_MAKE_CDE is the make of the vehicle.

PUBLIC_MODEL_NAME is the model name of the vehicle.

NYVIP_UNIT_NUM is the identifier for the work station that was assigned to the inspection station by SGS Testcom, the program manager. For the period at issue here, one number is shown on Exhibits 11, 12, 13, and 14: A000008750. (Tr. at 216-218.)

Mr. Clyne testified that to the right of these headings on Exhibits 11, 12, 13, and 14 are the headings for entries which, when read together, form the 15-data field electronic signature that constitutes the profile of the simulator used in the greater New York metropolitan area (Tr. at 218, 221, 222). The headings (Exhibits 11, 12, 13, and 14), and the respective entries (shown here in quotation marks) that are consistent with the profile for the simulator are as follows:

PCM_ID1	"10"
PCM_ID2	"0"
PID_CNT1	"11"
PIC_CNT2	"0"
RR_COMP_COMPONENTS	"R"

RR_MISFIRE	"R"
RR_FUEL_CONTROL	"R"
RR_CATALYST	"R"
RR_O2_SENSOR	"R"
RR_EGR	"R"
RR_EVAP_EMISS	"R"
RR_HEATED_CATA	"U"
RR_O2_SENSOR_HEAT	"R"
RR_SEC_AIR_INJ	"U"
RR_AC	"U"

(Tr. at 223-225.)

During his testimony, Mr. Clyne provided an example of an inspection where the simulator was used. Referring to Exhibit 13 (page 21 of 31), Mr. Clyne said that a 1998 Dodge Durango was inspected on April 14, 2009 at 1429 (*i.e.*, 2:29 p.m.) that failed the inspection. The same vehicle was re-inspected on April 15, 2009 at 1207 (*i.e.*, 12:07 p.m.), and passed. However, for the April 15, 2009 inspection, the 15-data field signature characteristic of the simulator is reported. (Tr. at 225-226.) In this example, both inspections are attributed to Ms. Cornelio (Certification No. 7EZ7 [Exhibit 8]).

In addition, Mr. Clyne pointed out that for a typical OBD II vehicle inspection for model years 2005 to present, the information presented in the "DMV_VIN_NUM" and "PCM_VIN" columns should be the same. The information reported in the DMV_VIN_NUM column is the vehicle identification number, which the inspector enters into the NYVIP work station by scanning the vehicle's bar code. The information presented in the PCM_VIN column is the vehicle identification number reported electronically during the OBD II inspection. Mr. Clyne testified that the PCM_VIN column is blank when a simulator is used as with the April 15, 2009 inspection of the 1998 Dodge Durango described above. (Tr. at 225; Exhibit 13, page 21 of 31; Exhibits 11, 12, and 14).

Referring to Exhibits 11, 12, 13, and 14, Mr. Clyne testified that, from February 14, 2009 to July 20, 2010, the 15-

data field signature for the simulator appeared at San Miguel Auto during 1049 OBD II inspections. Mr. Clyne said that he was able to sort the data to determine who performed these inspections. For certificate No. ZG88, Mr. Cabrera, or someone with access to his certification card, performed 1,001 inspections. For certificate No. 7FZ7 (Exhibit 8), Ms. Cornelio performed 47 illegal inspections, and for certificate No. 4KR8 (Exhibit 10), Mr. Tejada performed one illegal inspection. (Tr. at 227-228.)

III. Commencement of Proceeding and Proof of Service

Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Pursuant to 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint must be either by personal service consistent with the CPLR, or by certified mail. A respondent must answer the complaint within 20 days after receiving it (see 6 NYCRR 622.4[a]).

As noted above, each Respondent, except for Hector Cabrera, filed either an answer (Exhibit 2 [San Miguel Auto and Mr. Moncion]) or a letter (Exhibit 3 [Mr. Tejada] and Exhibit 4 [Ms. Cornelio]) after receiving the Department's August 31, 2010 notice of hearing and complaint. The letters filed by Mr. Tejada (Exhibit 3) and Ms. Cornelio (Exhibit 4) serve as their respective answers to the August 31, 2010 complaint (see 6 NYCRR 622.4). In addition, San Miguel Auto, Mr. Moncion, Mr. Tejada, and Ms. Cornelio appeared at the two hearing sessions. Consequently, there is no issue concerning service of the notice of hearing and complaint with respect to these Respondents.

When, as here, a respondent does not appear at the administrative hearing, there is a threshold question whether the non-appearing respondent received a copy of the notice of hearing and complaint in a manner consistent with the regulations. Hector Cabrera neither filed an answer nor appeared at the hearing sessions. Mr. Cabrera's death certificate (Exhibit 29) demonstrates that he died before Department staff commenced the captioned administrative enforcement hearing. At the hearing, Department staff did not offer any proof of service of the August 31, 2010 notice of hearing and complaint upon either Mr. Cabrera or his estate, if one exists (Tr. at 71-72).

Given these circumstances, I conclude that Department staff did not serve the August 31, 2010 notice of hearing and complaint upon either Mr. Cabrera, or his estate, in a manner consistent with 6 NYCRR 622.3(a)(3). Therefore, the Commissioner should dismiss the charges alleged in the August 10, 2010 complaint against Mr. Cabrera.

IV. Individual Corporate Officer Liability

According to the August 31, 2010 complaint, Andre Moncion owned and operated San Miguel Auto, as a domestic business corporation, at the time of the alleged violations (¶¶ 2 and 3, Exhibit 1). At the hearing, Department staff offered Exhibit 7, which is a certified copy of the original facility application (DMV form VS-1 [10/05]) filed by Mr. Moncion, on behalf of San Miguel Auto. With this application, San Miguel Auto sought, and subsequently received, a license to inspect motor vehicles from NYS DMV. Mr. Moncion is identified on page 2 of 4 of the application (see Exhibit 7) as the president of San Miguel Auto, and holds 100% of the stock or ownership of the corporation (Tr. at 58). Therefore, Exhibit 7 connects Mr. Moncion to San Miguel Auto, as a corporate officer. However, San Miguel Auto, as a corporation, exists as a separate legal entity independent of its ownership.

To find that Mr. Moncion, as a corporate officer, is individually liable for the violations alleged in the August 31, 2010 complaint, Department staff must present a legal theory and, as appropriate, evidence that the individual corporate officer was responsible for, or influenced, the corporate actions that constituted the violations. (See also Respondents' closing brief at 22-23.) In this case, Department staff offered nothing to show that Mr. Moncion, as the president of the Respondent corporation, should be held personally liable for the allegedly illegal inspections performed by Mr. Tejada, Ms. Cornelio, and Mr. Cabrera.

In the absence of such a showing, I cannot conclude that Mr. Moncion is personally liable for any of the violations alleged in the complaint. Accordingly, the Commissioner should dismiss the charges alleged in the complaint against him.

V. Respondents' Defenses

In its December 1, 2010 answer (Exhibit 2), San Miguel asserted three affirmative defenses. Ms. Cornelio asserted, in her November 30, 2010 fax (Exhibit 4), that she never worked as an inspector at either San Miguel Auto or at the other facilities identified in her letter. At the hearing, Ms. Cornelio offered information in an attempt to show that she was not present at San Miguel Auto when inspections attributed to her certification number occurred. Mr. Tejada offered information in an attempt to show that a certification card could be copied and used to perform illegal inspections. The assertions raised by Respondents charged in the August 31, 2010 complaint are addressed below.

A. San Miguel Auto

Respondents, San Miguel Auto and Mr. Moncion, asserted three affirmative defenses in their December 1, 2010 answer (Exhibit 2). According to 6 NYCRR 622.4(c), the answer "must explicitly assert any affirmative defenses together with a statement of facts which constitute the grounds of each affirmative defense asserted." None of the affirmative defenses, as asserted in the answer, contained a statement of supporting facts and, therefore, such defenses should be dismissed. To the extent that Respondents provided additional arguments in their closing brief, those arguments are addressed below.

1. Collateral Estoppel and Res Judicata

Respondents asserted that the captioned administrative enforcement proceeding is barred by the doctrines of collateral estoppel and res judicata (Exhibit 2). In their closing brief (at 30), they noted that the Department and DMV jointly administer the New York vehicle inspection program. They noted further that Department staff and DMV staff conducted a joint investigation concerning NYVIP and illegal motor vehicle inspections at San Miguel Auto and other facilities (*id.*).

As a result of this joint investigation, Respondents said that DMV commenced an administrative enforcement matter alleging violations of the Vehicle and Traffic Law and implementing

regulations. After a hearing, DMV determined that Respondents substituted vehicles or used an electronic device for vehicle emissions testing in violation of Vehicle and Traffic Law §§ 303(e)(1) and 303(e)(3), and 15 NYCRR 79.24(b)(1) (see Exhibit 17). NYS DMV assessed San Miguel Auto a total civil penalty of \$15,500, and revoked its certification to perform vehicle inspections. Respondents noted that the DMV Commissioner's determination is under appeal pursuant to CPLR article 78. (Respondents' closing brief at 30.) The status of the appeal is unknown.

Subsequently, Department staff commenced the captioned matter with service of the August 10, 2012 complaint. Respondents acknowledged that the wording of the statutes and regulations implemented by the two State agencies are different. Respondents contended, however, that the substance of the charges considered at the two administrative hearings is the same, and that the alleged illegal activities are the same. Respondents argued that they have already been penalized, and should not be punished twice for the same violations - improper inspections. (Respondents' closing brief at 30.)

In its closing brief, Department staff asserted that collateral estoppel and res judicata do not apply. According to Department staff, collateral estoppel does not apply because this is not a relitigation between the same parties of issues that were actually determined in the DMV proceeding (see *Ashe v Swenson, Ward*, 397 US 436 [1970]). To support this argument, Department staff noted that the Department and DMV are separate State agencies, that they were not parties to each other's litigation, and that their proceedings are not based on the same statutes and regulations. (Department staff's closing brief at 9-10.)

According to Department staff, res judicata also does not apply, because the Department is not in privity with DMV, and could not have raised the claims asserted in the August 31, 2010 complaint in the DMV proceeding (see *Allen v McCurry*, 449 US 90 [1980]). Department staff reiterated that the Department and DMV were not parties to each other's proceedings, and that their separate proceedings were not based upon violations of the same statutes and regulations. (Department staff's closing brief at 10.)

Collateral estoppel and res judicata do not apply here and, accordingly, these affirmative defenses are dismissed. The Commissioner has determined that the Department's and DMV's enforcement activities are not duplicative, in part because, like here, different regulatory standards apply (See *Matter of Geo Auto Repairs, Inc. [Geo]*, Order, March 14, 2012, at 4, n 3; *Matter of AMI Auto Sales Corp. [AMI]*, Decision and Order of the Commissioner, February 16, 2012, at 4-5; and *Matter of Gurabo Auto Sales Corp. [Gurabo]*, Decision and Order of the Commissioner, February 16, 2012, at 4).

In addition to dismissing the charges, Respondents argued further in their closing brief, that the circumstances associated with the civil penalty assessed by the DMV Commissioner and the license revocation should be considered mitigating factors that should substantially reduce the civil penalty requested by Department staff in this proceeding (Respondents' closing brief at 31). This argument is addressed in the discussion below concerning my penalty recommendation.

2. Laches

In their closing brief (at 18-20), Respondents asserted for the first time in this proceeding that the doctrine of laches should apply. Respondents noted that the alleged violations occurred from February 14, 2009 to July 20, 2010. However, Department staff commenced this administrative enforcement proceeding some two and a half years after the alleged violations began with service of the August 31, 2010 complaint.

The regulations allow a respondent to assert additional affirmative defenses at the hearing with leave from the ALJ based on a showing that the affirmative defenses are likely to be meritorious (see 6 NYCRR 622.4[d]). Asserting new affirmative defenses in closing statements is not expressly considered by the regulations. However, given the requirements for leave and a showing at hearing that an affirmative defense is likely to be meritorious, Respondents argument in the March 18, 2013 closing statement concerning laches is untimely, and the Commissioner should not consider it.

Moreover, the equitable doctrine of laches is not available as a defense against a State agency acting in its governmental capacity to enforce a public right (see *Matter of Cortlandt*

Nursing Home v Axelrod, 66 NY2d 169, 177 n 2 [1985], cert denied 476 US 1115 [1986]; *Matter of Stasack*, Ruling of the Chief ALJ on Motion for Clarification and To Strike Affirmative Defenses, December 30, 2010, at 9; *Matter of Cobleskill Stone Products, Inc.*, Rulings of the Chief Administrative Law Judge on Motions, January 18, 2012, at 12).

3. San Miguel Auto's control over Inspectors

When Andre Moncion testified at the hearing, he offered the following information. He stated that during the period at issue in this matter, he owned San Miguel Auto. However, he said that he was frequently not at the facility for long periods because he was receiving medical treatment in the Dominican Republic, his native country. (Tr. at 284-286, 292, 294.) During his absences, Mr. Moncion said that Julio Ramirez managed daily operations at San Miguel Auto (Tr. at 285, 287-288), and Hector Cabrera performed the emission inspections (Tr. at 288).

At some point, Mr. Moncion determined that Mr. Ramirez was mismanaging San Miguel Auto. Mr. Ramirez subsequently left the facility voluntarily, and Mr. Moncion gave the daily responsibilities to his son, Pedro Moncion. (Tr. at 288-290.) Mr. Moncion said that he never saw Mr. Tejada at the facility (Tr. at 290-291), and that Ms. Cornelio was never employed at the facility (Tr. at 291). Mr. Moncion said that he does not know whether Mr. Tejada was authorized to perform inspections at San Miguel Auto because Mr. Moncion never saw Mr. Tejada there (Tr. at 291). Mr. Moncion said that he did not authorize Ms. Cornelio to perform motor vehicle inspections at San Miguel Auto (Tr. at 291).

In their closing brief (at 27), Respondents, San Miguel Auto and Mr. Moncion, argued that Mr. Moncion did not know how to perform motor vehicle inspections because he was not a certified motor vehicle inspector. They asserted, therefore, that Mr. Moncion should not be held liable for any illegal inspections because he did not know how to perform them and, during his absences from the facility, he could not have controlled how others may have performed vehicle inspections at San Miguel Auto. Respondents contended that Department staff did not present any evidence about who managed daily activities at San Miguel Auto and how those activities were managed (Respondents' closing brief at 27).

Based on Mr. Moncion's testimony, Respondents argued further that Department staff did not prove that Messrs. Cabrera and Tejada, and Ms. Cornelio worked at San Miguel Auto, and performed any motor vehicle inspections. Respondents asserted that they should not be held liable for any of the alleged violations. (Respondents' closing brief at 28-29.)

To support the lack of control that Mr. Moncion could exercise over daily activities at San Miguel Auto during the period at issue in this proceeding, Respondents offered a copy of Mr. Moncion's passport from the Dominican Republic, and copies of medical records. In the hearing record, Mr. Moncion's passport is Exhibit 19, and his medical records are Exhibit 20.

For the reasons outlined above, Department staff failed to demonstrate why Mr. Moncion should be held individually liable for the alleged violations when the licensee is San Miguel Auto (Exhibit 7), a domestic business corporation authorized to do business in New York (§ 2, Exhibit 2).

I accept as true Mr. Moncion's testimony that while he was the owner of San Miguel Auto during the period at issue in this proceeding, he was frequently absent from the facility due to prolonged trips to the Dominican Republic. Given his frequent and prolonged absences from the facility, however, I find that Mr. Moncion cannot credibly testify about whether Mr. Tejada and Ms. Cornelio were employed at San Miguel Auto, and whether these inspectors performed vehicle inspections there. The reason that Mr. Moncion never saw Mr. Tejada or Ms. Cornelio at San Miguel Auto was that Mr. Moncion was in the Dominican Republic rather than at the facility.

Respondents' contention that Department staff did not offer any evidence about how daily activities were managed at San Miguel Auto is not correct. As previously noted, Exhibits 11, 12, 13, and 14 are lists of each and every motor vehicle inspection performed at San Miguel Auto from December 2006 to July 2010. These exhibits show that, from February 2009 to July 2010, three certified inspectors, Messrs. Cabrera and Tejada, and Ms. Cornelio, performed motor vehicle inspections at San Miguel Auto, and that some of these inspections were performed illegally.

San Miguel Auto, as the licensee operating a motor vehicle inspection station, is responsible for all activities of the certified inspectors, and must supervise them accordingly (see 15 NYCRR 79.8[b]). Consequently, I conclude that San Miguel Auto violated 6 NYCRR 217-4.2 from February 14, 2009 to July 20, 2010 as alleged in the August 31, 2010 complaint.

B. Cristian A. Tejada

In Mr. Tejada's letter dated October 25, 2010 (Exhibit 3), he stated that he received five notices from the Department alleging violations at five different inspection facilities. The facilities identified in Mr. Tejada's correspondence are: (1) San Miguel Auto Repair Corp.; (2) Dyre Ave Auto Repair Corp.; (3) East Tremont Repair Corp.; (4) RV Auto Repairs, Inc.; and (4) Sugar Hill Service Station, Inc.

Mr. Tejada did not testify at the hearing (Tr. at 268), but introduced six exhibits, which are identified in the hearing record as Exhibits 21-26, inclusive. These exhibits were discussed during Mr. Levine's cross-examination (Tr. at 86-99), but were not received into the hearing record (Tr. at 268-274). In addition, Mr. Tejada cross-examined Mr. Clyne (Tr. at 230-232), and Ms. Cornelio (Tr. at 279-281). Mr. Tejada did not cross-examine Mr. Moncion (Tr. at 291). He offered a closing statement at the end of the June 21, 2012 hearing session (Tr. at 296).

In his closing statement (Tr. at 296), Mr. Tejada reiterated that he received five notices of hearing and complaints from Department staff concerning five different vehicle inspection facilities. He said that he could not work at five different facilities at the same time. Mr. Tejada noted that some of the facilities are in Manhattan and that others are in the Bronx; those in the Bronx are "far apart from each other" (Tr. at 296). After receiving the complaints, Mr. Tejada said that he advised NYS DMV that his certification card was either missing or stolen, and he stated further that NYS DMV issued a new certification card to him. Since NYS DMV issued the replacement certification card, Mr. Tejada said that he has not been charged with any additional violations. Mr. Tejada's various arguments are discussed below.

1. Working at Multiple Inspection Facilities

Department staff has identified Mr. Tejada as a respondent in five matters related to motor vehicle inspection facilities. Each complaint identifies a specific period when violations allegedly occurred. The following chart identifies each facility and the period when the alleged violations took place.

Facility	Period of Alleged Violations
East Tremont Repair Corp.	June 10, 2008 - August 9, 2009
Sugar Hill Service Station, Inc.	October 14 - 27, 2008
Dyre Ave Auto Repair Corp.	June 9, 2009 - October 29, 2009
San Miguel Auto Repair Corp.	February 14, 2009 - July 20, 2010
RV Auto Repairs, Inc.	No Information Available

Neither Mr. Tejada nor Department staff offered any information about the *RV Auto Repairs, Inc.* matter.

Mr. Tejada has the burden to prove his assertion that the dates of the alleged violations at the above identified inspection facilities conflict (see 6 NYCRR 622.11[b][2]). Based on the individual notices of hearings and complaints for the administrative enforcement actions listed above, some of the periods for when the alleged violations occurred do overlap. However, Mr. Tejada offered no evidence to identify any actual conflicts about working, or being present, at more than one facility at the same time.

For example, contrary to Mr. Tejada's assertion, no conflict exists based on a comparison of the dates for the violations asserted in the captioned matter with those concerning the *Sugar Hill Service Station, Inc.* matter. All alleged violations at the Sugar Hill facility occurred in 2008, which predates the period (*i.e.*, February 14, 2009 to July 20, 2010) of alleged violations at San Miguel Auto.

In addition, the hearing record concerning the *East Tremont* matter demonstrates that Mr. Tejada did not perform any vehicle inspections at the East Tremont facility after October 2, 2008

(see *East Tremont, supra*, Hearing Report at 18). Therefore, no conflict exists with respect to the East Tremont and the San Miguel Auto inspections.

According to Exhibit 13 (page 21 of 31), Mr. Tejada's certification number (4KR8 [Exhibit 10]) is associated with seven vehicle inspections at San Miguel Auto. Three were performed on April 8, 2009, and four were performed on April 9, 2009. Of these seven vehicle inspections, the simulator profile appeared for one performed at 18:15 (6:15 PM) on April 9, 2009 (Tr. at 228; Exhibit 13, page 21 of 31). The April 2009 inspections at San Miguel preceded the inspections performed at Dyre Auto from June 9, 2009 to October 29, 2009. Consequently, no conflict exists with respect to the inspections performed at Dyre Auto and San Miguel Auto.

Although some of the periods of when the alleged violations occurred at various vehicle inspection facilities overlap, the foregoing review demonstrates there is no merit to Mr. Tejada's claim.

2. Fake Certifications

The sign posted at every inspection facility, as required by the regulations (see 15 NYCRR 79.13[f]), must include the first and last names of the inspectors, their respective certification numbers, the expiration date of the certifications, the type or types of inspections that each inspector may perform, and the fees for the inspections. The information on the posted sign is generally the same as that printed on the inspector's certification card. However, the bar code on the certification card, which the inspector scans into the work station for each OBD II inspection, does not appear on the posted sign. (Tr. at 88-89, 90-91, 116.)

Through his cross-examination of Mr. Levine, Mr. Tejada attempted to demonstrate that the information on the sign about the inspectors could be used to reproduce the bar code on a certification card, which could then be used to perform OBD II inspections. The probability of reproducing a bar code in this manner is very low (Tr. at 86-99). I conclude, therefore, that Mr. Tejada did not demonstrate his claim.

C. Genelly Cornelio

In response to the August 31, 2010 complaint, Genelly Cornelio faxed a letter on November 30, 2010 in which she stated that she never worked at San Miguel Auto or at any other inspection facility.³ At the hearing, Ms. Cornelio testified (Tr. at 274-282), and offered Exhibits 27 and 28.

Among other things, Ms. Cornelio testified that she was never employed at San Miguel Auto (Tr. at 282). As noted above, Mr. Moncion said that Ms. Cornelio was never employed at San Miguel Auto, during his testimony (Tr. at 291).

Exhibit 27 is a letter dated February 8, 2012 from Vanessa James, Payroll Coordinator, Winston Support Services, LLC.⁴ Winston Support Services is a temporary employment agency. Ms. Cornelio said that Winston Support Services sent her to the Metropolitan Hospital in Manhattan. (Tr. at 275-276, 279.) According to the letter (Exhibit 27), Ms. Cornelio was a clerical assistant, and her assignment was Monday to Friday from 9:00 a.m. to 5:00 p.m., from May 2009 to September 2009. Ms. Cornelio still works for Winston Support Services, but at a location different from the Metropolitan Hospital (Tr. at 280).

Exhibit 28 is a copy of Ms. Cornelio's academic schedule from August 28, 2009 to December 11, 2009 (*i.e.*, Fall 2009 semester), and from January 28, 2010 to May 18, 2010 (*i.e.*, Spring 2010 semester) at the Bronx Community College. Ms. Cornelio said that she attended classes on Monday, Wednesday and Saturday during the Fall 2009 semester (Tr. at 277), and on Monday, Tuesday, Wednesday and Thursday during the Spring 2010 semester (Exhibit 28).

From April 10, 2009 to May 8, 2009, Exhibit 13 shows that Ms. Cornelio's certification number (7FZ7 [Exhibit 8]) is associated with all the vehicle inspections performed at San Miguel Auto. The total number of inspections during this period was 125. Of the total amount, a simulator was used for 47 of them. (Tr. at 228; Exhibits 13, pages 21 of 31 through 22 of 31.)

³ Department staff also served complaints upon Ms. Cornelio concerning alleged violations at Dyre Auto, and Mega Tire Shop Auto Repair.

⁴ In *Dyre Auto*, a copy of Vanessa James's February 8, 2012 letter is marked as Exhibit 23.

Exhibits 13, 27 and 28 establish that the inspections performed between April 10, 2009 and May 8, 2009 at San Miguel Auto occurred before Ms. Cornelio began her temporary work assignment at the Metropolitan Hospital in May 2009, and before Ms. Cornelio began her course work at the Bronx Community College for the Fall 2009 semester, which started at the end of August 2009. With respect to the captioned matter, these exhibits do not establish that Ms. Cornelio was working at the Metropolitan or attending classes at the Bronx Community College when motor vehicle inspections, associated with her certification number, were performed at San Miguel Auto.

In the absence of any corroborating evidence, I do not find Ms. Cornelio's testimony that she was never employed at San Miguel Auto (Tr. at 282) to be credible. For the reasons stated above, I have determined that Mr. Moncion's testimony concerning Ms. Cornelio's employment at San Miguel Auto and performance of inspections was not credible. Consequently, I conclude that Ms. Cornelio violated 6 NYCRR 217-4.2 from February 14, 2009 to July 20, 2010 at San Miguel Auto as alleged in the August 31, 2010 complaint.

VI. Department staff's Proof

Department staff's case relies on the OBD II data (Exhibits 11, 12, 13, and 14), as well as the application documents maintained by NYS DMV (Exhibits 7, 8, 9,⁵ and 10), which connect the inspections performed at the facility to the inspectors. Department staff used the facility number that the NYS DMV assigned to the inspection station, and the certificate numbers assigned to the inspectors, to identify the parties responsible for the inspections documented in Exhibits 11, 12, 13, and 14 because those exhibits do not identify them by name.

Department staff demonstrated that, at the San Miguel Auto facility, Mr. Tejada, Ms. Cornelio, and Mr. Cabrera, or someone using his certification card, employed a simulator for 1049 OBD II inspections between February 14, 2009 and July 20, 2010.

⁵ Exhibit 9 is a copy of Mr. Cabrera's application for certification as a motor vehicle inspector (DMV form VS-120[11/97]). Exhibit 9 was not received into the evidentiary record of the hearing. Mr. Levine's testimony, however, establishes that Mr. Cabrera's certification number was ZG88. (Tr. at 67-73.)

This was done through a combination of the documentary evidence, all of which Mr. Clyne retrieved from NYS DMV as certified copies, and the testimony of Mr. Clyne associating simulator use with the 15-data field electronic signature that appears in the inspection data (Exhibits 11, 12, 13, and 14). There is no question that the inspections documented in Exhibits 11, 12, 13, and 14 are attributable to San Miguel Auto because its NYS DMV-assigned facility number (7102172 [Exhibit 7]), which had been scanned into the NYVIP work station, appeared for each inspection.

VII. Liability for Violations

Department staff alleges that Respondents violated both 6 NYCRR 217-4.2 (first cause of action) and 217-1.4 (second cause of action). Each cause of action is addressed below.

A. 6 NYCRR 217-4.2

Section 217-4.2 states, in pertinent part, that:

"[n]o person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with Department [of Environmental Conservation] procedures and/or standards."

For purposes of this regulation, "official emissions inspection station" means:

"[a] facility that has obtained a license from the Commissioner of Motor Vehicles, under section 303 of the VTL [Vehicle and Traffic Law], to perform motor vehicle emissions inspections in New York State" [6 NYCRR 217-1.1(k)].

VTL § 303(a)(1) provides that a license to operate an official inspection station would be issued only upon written application to NYS DMV, after NYS DMV is satisfied that the station is properly equipped and has competent personnel to make inspections, and that such inspections would be properly conducted.

According to San Miguel and Mr. Moncion, Department staff failed to prove the charge alleged in the first cause of action (Respondents' closing brief at 1). Respondents argued that the only evidence of a simulator was circumstantial because no simulator was recovered from San Miguel Auto (Tr. at 253), and Department staff's witnesses were not present during any of the inspections at issue in this matter (Tr. at 236). They also claimed there is no proof that the station's inspection equipment was working properly because the equipment was not inspected either prior to, or after, the violations allegedly occurred (Tr. at 248-251, 253). (Respondents' closing brief at 4-5.)

Respondents' concerns about the reliability of the NYVIP work station and software are unsubstantiated. The data presented in Exhibits 11, 12, 13, and 14 shows each and every OBD II motor vehicle inspection, legal or not, that was performed at San Miguel Auto from December 2006 to October 2010. From April 26, 2007 to October 6, 2010, only one NYVIP work station was used at San Miguel Auto; it is identified as A000008750 (see Exhibit 11, page 4 of 31 through page 31 of 31 and Exhibit 12). From February 2009 to July 2010, the period at issue in this proceeding, only a portion (*i.e.*, 1049) of the total number of inspections performed at San Miguel Auto were allegedly performed illegally. The simulator profile described by Mr. Clyne during his testimony in this proceeding (Tr. at 223-225), is identical to the profile described in the other related enforcement actions (*cf.* *AMI, supra*, Hearing Report at 11-44; *Gurabo, supra*, Hearing Report at 10-12; *Geo, supra*, Hearing Report at 7-9; and *East Tremont, supra*, Hearing Report at 11-14).

Respondents asserted further that human error occurred when the inspectors manually entered information into the NYVIP work station (Tr. at 50, 191, 263) during inspections which may have generated the irregular data. They claimed that the NYVIP work station and related equipment were improperly set up, or contained incorrect data, before San Miguel Auto acquired them. Finally, they claimed that because Department staff and NYS DMV staff use simulators to test software (Tr. at 201, 230-231), it is possible that agency staff or those operating the NYVIP work station were testing the inspection software and inadvertently forgot to remove the simulation equipment, if in fact a simulator was used at the station. (Respondents' closing brief at 5-6.)

Respondents' concern about human error is speculative. Few data fields can be entered manually during the OBD II emission inspection. They are limited to the VIN number if the car is not registered, the odometer reading (Tr. at 191), and vehicle information concerning the weight, model, year, and fuel type (Tr. at 50). The inspector's certification card must be scanned to begin the inspection (Tr. at 50, 189-190). Then, the bar code on the vehicle registration sticker is scanned (Tr. 190-191). For model years 2005 and later, the on-board diagnostic computer transmits the VIN to the NYVIP work station during the inspection as a check to confirm the VIN that the inspector scanned from the vehicle registration sticker (Tr. at 225; Exhibits 11, 12, 13, and 14). All other data is collected directly from the vehicle's on-board diagnostic computer to the NYVIP work station via the uniform diagnostic link connector (Tr. at 51-53, 192-194).

I conclude that San Miguel Auto violated 6 NYCRR 217-4.2 on 1049 separate occasions by using a simulator to perform OBD II emission inspections. Of that number, Mr. Cabrera, or someone using his certification card to gain access to the NYVIP work station, performed 1001 illegal inspections with a simulator. Ms. Cornelio performed 47 illegal inspections with a simulator, and Mr. Tejada performed one illegal inspection. A simulator is an electronic device not associated with a motor vehicle's on-board diagnostic computer. Its use is not appropriate in the administration of an actual emissions test.

Consequently, the use of a simulator is not consistent with the motor vehicle emission inspection procedures outlined at 6 NYCRR 217-1.3, which requires testing of the vehicle's OBD II system to ensure that it functions as designed, and completes diagnostic routines for necessary supported emission control systems. If an inspector connects the NYVIP work station to a simulator rather than the vehicle that has been presented, whether the vehicle would pass the OBD II inspection cannot be determined.

San Miguel Auto is liable for all 1049 violations, even those performed with Mr. Cabrera's certification card. At the time the inspections were conducted, San Miguel Auto held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the

inspection station," and is not relieved of that responsibility by the inspectors' own duties, which include performing inspections in a thorough manner. [See 15 NYCRR 79.17(b)(1) and (c).]

Ms. Cornelio is liable for the violations attributable to the 47 non-compliant inspections that she performed. Mr. Tejada is liable for the violation attributable to the single non-compliant inspection that he performed. This liability is due to the connection between the official inspection station, which is licensed under VTL § 303, and the inspectors who work at the station and are certified under VTL § 304-a.

Pursuant to 15 NYCRR 79.8(b)(2), the specific duties of the inspection station include employing at all times at least one full-time employee who is a certified motor vehicle inspector to perform the services required under NYS DMV's regulations. In this sense, the inspection station operates through the services that its inspectors provide. There is no basis, however, for holding Ms. Cornelio and Mr. Tejada liable for each other's non-compliant inspections, or for the non-compliant inspections associated with Mr. Cabrera's certification number.

B. 6 NYCRR 217-1.4

In the second cause of action, Respondents are charged with violating 6 NYCRR 217-1.4. According to this provision:

"[n]o official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart."

Pursuant to 15 NYCRR 79.1(g), an official inspection station, however, is one that has been issued a license by the Commissioner of DMV "to conduct *safety* inspections of motor vehicles *exempt* from the emissions inspection requirement" [emphasis added].

In cases similar to the captioned matter, the Commissioner has determined that violations of 6 NYCRR 217-1.4 cannot be found. (See *East Tremont*, supra, at 4; *Geo* supra, at 3-4; *AMI* supra, at 3; and *Gurabo* supra, at 3.) In these cases, the

Commissioner determined there was no evidence that the respondent facilities were official safety inspection stations as defined by 15 NYCRR 79.1(g).

In their closing brief (at 6-7), Respondents, San Miguel Auto and Mr. Moncion, referred to these prior administrative matters, and argued that the Commissioner should similarly dismiss the charge alleged in the second cause of action. According to Respondents, the multiplicity doctrine implies that separate civil penalties may not be assessed because the charges alleged in the first and second causes of action of the August 31, 2010 complaint arise out of a single course of conduct (*id.*).

Department staff argued, however, that Respondents should be found liable for violations of 6 NYCRR 217-1.4. Department staff acknowledged that in *AMI* and *Gurabo*, the definitions of the terms "official safety inspection station" and "official emissions inspection station" have been considered "at odds" (Department staff's closing brief at 4). Department staff asserted, nevertheless, that whether a facility is a safety inspection station for purposes of 15 NYCRR 79.1 or an emissions inspection station for purposes of Part 217, the license to conduct any inspection comes from the NYS DMV Commissioner pursuant to VTL § 303. (Department staff closing brief at 4.)

Department staff noted that NYS DMV issued a license to San Miguel Auto to be an official inspection station (Exhibit 7). Department staff noted further that any licensee, such as San Miguel Auto, is responsible for all inspection activities conducted at the inspection station pursuant to 15 NYCRR 79.8(b), and that the inspectors are responsible for their own inspection activities at the facility pursuant to 15 NYCRR 79.8(b) and 15 NYCRR 79.17(c)(1). Department staff concluded, therefore, that Respondents should be found liable for violations of 6 NYCRR 217-1.4. (Department staff closing brief at 5-7.)

The distinction between an "official safety inspection station" and "official emissions inspection station" is significant. Like the facilities in *East Tremont*, *Geo*, *AMI* and *Gurabo*, San Miguel Auto is an official emission inspection station, rather than an official safety inspection station pursuant to 15 NYCRR 79.1(g). Consequently, the Commissioner should dismiss the charge alleged in the second cause of action

that Respondents in the captioned matter violated 6 NYCRR 217-1.4, consistent with prior administrative decisions.

VIII. Civil Penalty

ECL 71-2103(1) authorizes civil penalties for violations of any provision of ECL Article 19 (Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2. For the period alleged in the complaint (*i.e.*, February 14, 2009 to July 20, 2010), ECL 71-2103(1) provided for a civil penalty of not less than \$375 nor more than \$15,000 for the first violation, and an additional civil penalty not to exceed \$15,000 for each day that a violation continues. In the case of a second or any further violation, ECL 71-2103(1) provided for a civil penalty not to exceed \$22,500, and an additional civil penalty not to exceed \$22,500 for each day that a violation continues.⁶

In the August 31, 2010 complaint, Department staff requested that the Commissioner assess a total civil penalty of \$524,500 (Exhibit 1). Respondents, San Miguel Auto and Mr. Moncion, asserted that Department staff did not comply with the guidance outlined in the Commissioner's Civil Penalty Policy ([DEE-1] dated June 20, 1990). For example, Department staff did not provide a detailed civil penalty calculation either in the August 31, 2010 complaint or at the adjudicatory hearing. (Respondents' closing brief at 20-21.)

Department staff, however, did provide a civil penalty calculation in its closing brief. Department staff stated that the total potential maximum civil penalty for the violations would be \$27,266,000. Department staff explained that the requested civil penalty of \$524,500 is based on the statutory minimum civil penalty of \$500 per violation ($\$524,500 \div 1049$ violations = \$500 per violation). (Department staff's closing brief at 11.)

Department staff stated that the requested civil penalty in this case is consistent with what Department staff sought in the

⁶ With amendments to ECL 71-2103(1) effective May 28, 2010, the minimum civil penalty for the first violation was increased to \$500 not to exceed a maximum of \$18,000, and the civil penalties for subsequent violations shall not exceed \$26,000. Department staff's civil penalty request is based on the May 28, 2010 amendments.

related enforcement matters. Department staff concluded that its total civil penalty request of \$524,500, therefore, was fair and reasonable. (Department staff's closing brief at 13-14.)

In their closing brief (at 22), Respondents, San Miguel Auto and Mr. Moncion, stated that joint and several liability was not an issue at hearing, but noted it had been at issue in other related proceedings. According to Respondents, the *ad damnum* clause of the August 31, 2010 complaint for this matter did not include such a request. Respondents asserted that Department staff has the burden to proving there is a basis for setting aside the corporate form to hold Mr. Moncion individually liable for any the alleged violations.

Department staff requested that the civil penalty be assessed jointly and severally among Respondents (Department staff's closing brief at 14). Here, Department staff did not offer any argument to support its request for joint and several liability.

The Commissioner has determined that in cases like this, however, that it is not appropriate to impose joint and several liability against the facility and the certified inspectors (*see Geo, supra*, at 5, n 4; *AMI, supra*, at 9; and *Gurabo, supra*, at 8).

Respondents argued that the alleged illegal inspections are not separate violations. Rather, the alleged illegal activity should be considered one continuing violation with one cause. According to Respondents, ECL 71-2103 does not provide for a consideration of separate violations. Respondents argued that the statute does not authorize a civil penalty per incident, but per violation. For the purpose of calculating the appropriate civil penalty, Respondents recommended that the alleged illegal inspections be considered a single violation that continued from February 14, 2009 to July 20, 2010, and that the total assessed civil penalty should not exceed \$15,000. (Respondents' closing brief at 17-18.)

Department staff argued, however, that each illegal inspection constitutes a separate violation of the Department's regulations, and I agree. Each simulated inspection was a discrete event occurring on a specific date and time and, by itself, constituted operation of the NYVIP work station in a manner that did not comply with the Department's procedures.

During the period at issue in this proceeding, simulated inspections occurred with ones that were conducted properly.

With reference to DEE-1, Department staff noted that the computation of the maximum potential penalty for all provable violations is only the starting point of any penalty calculation (§ IV.B). It merely sets the ceiling for any civil penalty that is ultimately assessed. (Department staff's closing brief at 11.) Pursuant to DEE-1, an appropriate civil penalty is derived from a number of considerations, including the economic benefit of non-compliance, the gravity of the violations, and the culpability of Respondents' conduct. Each is discussed below.

A. Economic Benefit

DEE-1 states that every effort should be made to calculate and recover the economic benefit of non-compliance (§ IV.C.1). With respect to the economic benefit, Department staff stated that it presented no specific proof (Department staff's closing brief at 11).

B. Gravity Component

According to DEE-1, removal of the economic benefit of non-compliance merely evens the score between violators and those who comply. Therefore, to be a deterrent, the assessed civil penalty must include a gravity component, which reflects the seriousness of the violation. (§ IV.D.1.) The policy states that a "preliminary gravity penalty component" is developed through an analysis addressing the potential harm and actual damage caused by the violation, and the relative importance of the type of violation in the regulatory scheme (§ IV.D.2).

As Mr. Clyne explained, OBD II testing is how the Department and NYS DMV implement NYVIP, an annual vehicle emission inspection program required by the federal Clean Air Act amendments of 1990 and EPA regulations at 40 CFR Part 51 (Tr. at 181-182). It is intended to assure that motor vehicles are properly maintained, which in turn would limit emissions of ozone precursors (*i.e.*, hydrocarbons and nitrogen oxide). Ground level ozone is a pollutant found during the unhealthy air condition known as smog, and can cause a variety of respiratory problems. (Tr. at 178-186; Exhibit 16.)

Respondents contended that the Department and NYS DMV were aware of the alleged violations long before charges were brought. According to Respondents, Department staff's failure to commence the administrative enforcement proceeding in a timely manner is not only an attempt to generate additional civil penalties, but undermines Department staff's concerns about the actual and potential environmental impacts associated with the alleged violations. (Respondents' closing brief at 16.)

The actual damage caused by Respondents' violations cannot be determined. However, a potential for harm is likely when the required OBD II testing is not actually performed because this removes an opportunity to identify vehicles with malfunctioning emission control systems, and fails to ensure that those systems are repaired. (Tr. at 196-197.) Based on the foregoing, Department staff argued that the appropriate civil penalty should be adjusted upward (Department staff's closing brief at 12-13).

C. Penalty Adjustment Factors

According to DEE-1, the penalty derived from the gravity assessment may be adjusted in relation to factors including the culpability of the violator, the violator's cooperation in remedying the violation, any prior history of non-compliance, and the violator's ability to pay a civil penalty. (§ IV.E.)

In this case, violator culpability (§ IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. Due to the training that inspectors receive, including the training on the NYVIP work station, they would have known that using a simulator is not compliant with the procedures for a properly conducted OBD II inspection.

DEE-1 states that mitigation may be appropriate where the cooperation of the violator is manifested, for example, by self-reporting, when not otherwise required by law (§ IV.E.2). Here, however, no such mitigation is appropriate because the violations were determined by an investigation, not by disclosure by any of Respondents.

Mr. Tejada argued that he cooperated by complying with the NYS DMV regulation (see 15 NYCRR 79.17[c][3]), which requires certified inspectors to notify NYS DMV when they suspect that their certification cards have been lost or stolen. After he received notification by mail from Department staff of alleged violations at five different inspection facilities, Mr. Tejada said, in his closing statement (Tr. at 296), that he advised NYS DMV that his certification card was missing, and that DMV issued a new certification card to him with a different number. Mr. Tejada's argument does not establish mitigation because he did not notify NYS DMV that his certification card was lost or stolen until *after* he received Department staff's complaints. (Tr. at 296.)

Department staff offered Exhibits 17 and 18 to show that Respondents have a prior history of non-compliance (Tr. at 27-28). Exhibit 17 is a set of records from NYS DMV that consist of the following documents. The first is a finding sheet dated January 14, 2011 from the NYS DMV Safety Hearing Bureau concerning cases 2-IPO-09679 and 2-INO-10187. In these two DMV cases, San Miguel Auto and Hector Cabrera are identified as respondents. After a hearing, the NYS DMV ALJ concluded that each respondent violated Vehicle and Traffic Law § 303(e)(3) on 31 separate occasions. For these violations each respondent was assessed a total civil penalty of \$15,500 and each respondent's certification to perform vehicle emission inspections was revoked. Attached to the finding sheet is a notice of revocation of inspection station, dated February 8, 2011, which revokes the inspection station license for San Miguel Auto, as well as a notice of civil penalty issued to San Miguel Auto for \$15,500, dated February 9, 2011.

The second part of Exhibit 17 is a copy of a cover letter dated June 28, 2011 from the DMV FOIL office with enclosures that are responsive to Ms. Macina's June 14, 2011 FOIL request. The response included copies of the hearing exhibits concerning NYS DMV cases 2-IPO-09679 and 2-INO-10187.

Exhibit 18 consists of the following two documents. The first is a reinstated notice of civil penalty, dated January 25, 2012, issued to San Miguel Auto, which reinstated the civil penalty of \$15,500. The second is a reinstated notice of revocation of inspection station, dated January 25, 2012, which reinstated the revocation of the inspection station license for San Miguel Auto.

Although Department staff offered Exhibit 17 and 18 to show Respondents' history of non-compliance, counsel for San Miguel Auto argued that, because violations had been determined after an administrative hearing before NYS DMV where civil penalties were assessed, and the inspection station license for San Miguel Auto was revoked, the relief sought by Department staff in this matter was excessive and burdensome. (Tr. at 27-28.)

The Commissioner has determined that the DEC and DMV enforcement activities are not duplicative, in part because, like here, different regulatory standards apply (see *GEO*, supra, at 4, n 3; *AMI*, supra, at 4-5; *Gurabo*, supra, at 4). Accordingly, the Commissioner may rely on these demonstrated DMV violations (Exhibits 17 and 18) as an aggravating factor relevant to this matter to justify a substantial civil penalty against San Miguel Auto and Mr. Tejada.

Respondents, San Miguel Auto and Mr. Moncion, argued that they should not be penalized for going to hearing. According to Respondents, Department staff did not make a reasonable settlement offer. Consequently, Mr. Moncion, an elderly gentleman, in poor health, who was receiving medical treatment in the Dominican Republic, was forced to return to the United States for the administrative enforcement hearing. According to Respondents, Mr. Moncion would have preferred to settle the matter in order to avoid the physical stress associated with traveling from the Dominican Republic and attending the hearing. Respondents asserted that they incurred no economic benefit by going to hearing. They asserted further that San Miguel Auto is a small privately owned business in the South Bronx, which is an area historically known to be economically disadvantaged and underprivileged. (Respondents' closing brief at 14-15, 31.)

Finally, DEE-1 states that the Commissioner may consider the ability of a violator to pay a civil penalty in arriving at the method or structure for payment of final penalties (§ IV.E.4). Although Respondents, San Miguel and Mr. Moncion, asserted that they could not afford to pay any assessed civil penalties particularly because NYS DMV had previously assessed a civil penalty and revoked San Miguel's inspection license (Respondents' closing brief at 31), Respondents offered no evidence during the hearing that they could not afford to pay a civil penalty. In the absence of any financial information, no

conclusions may be drawn about their ability to pay any civil penalty the Commissioner may assess.

D. Civil Penalty Recommendation

Department staff presented a reasonable explanation for the total civil penalty requested in the August 31, 2010 complaint. However, the Commissioner has considered violations similar to those alleged in the captioned matter, and assessed civil penalties for the demonstrated violations (see *East Tremont*, supra, at 4-5; *Geo*, supra, at 4-5; *AMI*, supra, at 6-9; and *Gurabo*, supra, at 5-8). Consistent with these administrative precedents, I recommend that the Commissioner assess civil penalties in the following manner.

As the licensee, San Miguel Auto is the domestic business corporation at which all 1049 motor vehicle inspections using non-compliant equipment and procedures were conducted. Consequently, the Commissioner should assess a total civil penalty of at least \$94,400 against San Miguel Auto.

Ms. Cornelio performed 47 illegal inspections from April 10, 2009 to May 8, 2009 (Tr. at 228; Exhibit 13, pages 21 of 31 through 22 of 31), and should be held individually responsible for them. For these violations, the Commissioner should assess Ms. Cornelio a total civil penalty of \$4,125.

In this matter, Mr. Tejada performed one illegal inspection on April 9, 2009 (Tr. at 228; Exhibit 13, page 21 of 31), and should be held individually responsible for it. For this violation, the Commissioner should assess Mr. Tejada a total civil penalty of \$375, which is the minimum civil penalty that must be assessed for the first violation (see ECL 71-2103[1] eff. May 15, 2003; *Gurabo*, supra, at 6 n 4).

Conclusions

1. Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon San Miguel Auto Repair Corp. and Andre Moncion, as the president of the corporation, in a manner consistent with 6 NYCRR 622.3(a)(3).

2. Department staff failed to demonstrate that Hector Cabrera was served with a copy of the August 31, 2010 notice of hearing and complaint in a manner consistent with 6 NYCRR 622.3(a)(3).
3. Department staff serviced a copy of the August 31, 2010 notice of hearing and complaint upon Genelly Cornelio and Cristian A. Tejada in a manner consistent with 6 NYCRR 622.3(a)(3).
4. Between February 14, 2009 and July 20, 2010, Respondents, San Miguel Auto Repair Corp., Genelly Cornelio, Cristian A. Tejada, and some unknown person or persons with access to the NYVIP work station used a simulator to perform OBD II inspections at San Miguel Auto on 1049 separate occasions. The use of a simulator is a violation of 6 NYCRR 217-4.2, which prohibits the operation of an official motor vehicle emission inspection station using equipment or procedures that are not in compliance with the Department's procedures and standards.
5. Department staff failed to show that Andre Moncion, as president of San Miguel Auto Repair Corp., is personally liable for the violations alleged in the August 31, 2010 complaint.

Recommendations

1. For 1049 separate violations of 6 NYCRR 217-4.2, the Commissioner should assess San Miguel Auto Repair Corp. a total civil penalty of at least \$94,400.
2. For 47 separate violations of 6 NYCRR 217-4.2, the Commissioner should assess Genelly Cornelio a total civil penalty of \$4,125. For one violation of 6 NYCRR 217-4.2, the Commissioner should assess Cristian A. Tejada a total civil penalty of \$375.
3. All civil penalties should be paid within 30 days of service of the Commissioner's order.
4. The Commissioner should dismiss the first cause of action, which alleges violations of 6 NYCRR 217-4.2, against Andre Moncion and Hector Cabrera.

5. The Commissioner should dismiss, with prejudice, against all Respondents, the second cause of action, which alleges violations of 6 NYCRR 217-1.4.

Exhibit List

San Miguel Auto Repair Corporation, et al.
DEC Case No: CO2-20100615-18

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| 1. | Notice of Hearing and Complaint dated August 31, 2010. | Received |
| 2. | Answer dated December 1, 2010 on behalf of San Miguel Auto Repair Corp., and Andre Moncion. | Received |
| 3. | Letter dated October 25, 2010 from Cristian A. Tejada | Received |
| 4. | Fax received on November 31, 2010 from Genelly Cornelio | Received |
| 5. | Press Release from the New York State Attorney General's Office dated New York, New York, October 29, 2009 | Not
Received |
| 6. | Cover letter dated October 28, 2010 to Cristian A. Tejada from Blaise W. Constantakes with attached Notice to Admit and a copy of (DMV form ABS-2) Mr. Tejada's application for certification as a motor vehicle inspector. | Received |
| 7. | DMV form VS-1 (10/05). Certified copy of original facility application filed by San Miguel Auto Repair Corp. (pages 1 and 2 of 4). | Received |
| 8. | DMV form VS-120 (11/07). Certified copy of application for certification as a motor vehicle inspector filed by Genelly Cornelio (pages 1 and 2 of 2). | Received |
| 9. | DMV form VS-120 (11/97). Certified copy of application for certification as a motor vehicle inspector filed by Hector R. Cabrera (pages 1 and 2 of 2). | Not
Received |
| 10. | DMV form VS-120 (3/07). Certified copy of application for certification as a motor vehicle inspector filed by Cristian A. Tejada (pages 1 and 2 of 2, and page 1 of 3). | Received |
| 11. | Cover letter dated January 20, 2010 from Brad Hanscom, DMV Records Access Officer with attached print out of 31 pages. | Received |
| 12. | Cover letter dated October 13, 2010 from Brad Hanscom, DMV Records Access Officer with attached print out of 28 pages. | Received |
| 13. | Print out of 31 pages. Some data highlighted. | Received |

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| 14. | Print out of 28 pages. Some data highlighted. | Received |
| 15. | Certified copies of documents from DMV concerning the East Tremont Auto Repair Corp. and Dyre Auto Repair Corp. matters. (40 pages/20 double sided sheets) | Not
Received |
| 16. | New York State Implementation Plan: New York Metropolitan Area Enhanced Inspection/Maintenance Program. Proposed Revision, June 2009. Federal Register, Vol. 76, No. 180, Sept. 16, 2011, pp. 57691-57696. Federal Register, Vol. 77, No 39, Feb. 28, 2012, pp. 11742-11744. | Received |
| 17. | Set of documents from DMV concerning the San Miguel Auto Repair Corp. Including, among other things, Finding Sheet (01-14-11), Notices of Civil Penalty (02/08/2011, 02/09/2011), Notices of Hearing and Charge Sheets, and NYS DMV Analyzer Status Report (5/27/2010). | Received |
| 18. | Reinstated Notice of Revocation of Inspection Station (1/25/2012), Order No. 6848; Reinstated Notice of Revocation of Inspection Station (1/25/2012), Order No. 7077. | Received |
| 19. | Photocopy of Dominican Republic Passport of Andres Miguel Moncion. | Received |
| 20. | Medical records of Andres Moncion dated 20/05/10 and 11/10/2010. (Spanish) | Received |
| 21. | DMV form SWV-06.02 (Version 5).
NYVIP Vehicle Inspection System Operators Instruction Manual (Figure 2-36 Certified Motor Vehicle Inspector List) | Not
Received |
| 22. | DMV form VS-26 (7/93). Mr. Tejada's Inspector Certification
Certification No. 4KR8.
Expiration date 08/31/2010 | Not
Received |
| 23. | Mr. Tejada's Inspector Certification
Certification No. 8UX2.
Date of Issue 07/19/2010.
Expiration date 08/31/2010. | Not
Received |

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|-----|---|-----------------|
| 24. | DMV form VS-14 (6/02). Official New York State Inspection Station;
Certified Motor Vehicle Inspectors. | Not
Received |
| 25. | URL address from CyanoSoft.
http://www.enet.com/windows/cyanosoft/3260-20_4-107867.html
1D and 2D Barcode Maker | Not
Received |
| 26. | 1D Barcode: Tejada, Cristian CT 4KR8 | Not
Received |
| 27. | Letter dated February 8, 2012 from Vanessa James, Payroll Coordinator,
Winston Support Services, LLC regarding Genelly Cornelio's hours of
employment. | Received |
| 28. | Class Schedule for Genelly Cornelio,
Bronx County Community College.
August 28, 2009 through December 12, 2009;
January 28, 2010 through May 18, 2010. | Received |

Official Notice (6 NYCRR 622.11[a][5]) taken of 15 NYCRR Part 79 (Motor Vehicle Inspection)