

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

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

-by-

**ORDER**

**235 ST. NICHOLAS, INC., FAROOQ MOHAMMAD (aka MOHAMMAD FAROOQ), MALIK TARIQ (aka TARIQ MALIK), SAJJAD YAQOOB<sup>1</sup>, ZAHOOR KHAN, MICHAEL JOHN and CALEB GUADALUPE,**

DEC Case No.  
CO2-20100615-07

Respondents.

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This administrative enforcement proceeding concerns allegations that respondents 235 St. Nicholas, Inc. (235 St. Nicholas), Farooq Mohammad (aka Mohammad Farooq), Malik Tariq (aka Tariq Malik), Sajjad Yaqoob, Zahoor Khan, Michael John and Caleb Guadalupe (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.

In accordance with 6 NYCRR 622.3(a)(3), staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this proceeding by service of a notice of hearing and complaint dated September 30, 2010 on respondents Tariq, Yaqoob, Khan, John and Guadalupe. Staff prepared an amended complaint dated December 13, 2011, adding 235 St. Nicholas as a respondent. Staff thereafter served the amended complaint on respondents Tariq, Yaqoob, Khan, John, Guadalupe, and 235 St. Nicholas.<sup>2</sup>

Staff alleges that these violations occurred at an official emissions inspection station commonly known as Shell Service Center, located at 235 St. Nicholas Avenue in New York, New York, during the period from June 10, 2008 through December 19, 2009. Staff alleges that respondents Farooq Mohammad and Malik Tariq owned and operated 235 St. Nicholas, Inc., and

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<sup>1</sup> Department staff's caption identifies Mr. Yaqoob's first name as "Sajjad," but he spelled his first name as "Sajjad" at the hearing (see Hearing Transcript, at 60:14-18) and in his application for certification as a motor vehicle inspector (see Exhibit 13). I have therefore revised the caption to reflect accurately respondent Yaqoob's first name.

<sup>2</sup> Staff served the amended complaint on respondent 235 St. Nicholas through the New York Secretary of State, pursuant to Business Corporation Law § 306 (see Exs. 20 and 21; see also Hearing Transcript, at 5:1-4). Staff was unable to serve the complaint or amended complaint on respondent Farooq Mohammad, and he has neither answered nor otherwise appeared in this proceeding (see Hearing Transcript, at 4:17-5:4, 8:14-18).

respondents Tariq, Yaqoob, Khan, John and Guadalupe 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 355 separate occasions. Staff contends that, of these inspections, respondent Zahoor Khan performed 228 inspections, respondent Malik Tariq performed 75 inspections, respondent Michael John performed 26 inspections, respondent Caleb Guadalupe performed 25 inspections, and respondent Sajjad Yaqoob performed 1 inspection (see hearing report [Hearing Report] of Administrative Law Judge [ALJ] Helene G. Goldberger, at Finding of Fact no. 18) and that, as a result, 353 certificates of inspection were issued based on these simulated inspections (see id. at 1, 3).

In its amended 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.] 2, Amended Complaint ¶¶ 13-17); 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. ¶¶ 18-22).

For these violations, Department staff requests a civil penalty of one hundred seventy-seven thousand five hundred dollars (\$177,500) (id. at Wherefore Clause). Staff requests that the penalty be assessed against respondents "collectively" (Hearing Transcript [Tr.], at 15:1-5).<sup>3</sup>

Respondents Tariq, Yaqoob, Khan, John and Guadalupe, through the same counsel, responded to the initial complaint by serving an answer dated October 25, 2010 (see Ex. 3). At the hearing, the ALJ granted the request by counsel for these respondents that the initial answer also serve as the answer to the amended complaint (see Tr., at 7:7-14). The matter was initially assigned to ALJ Edward Buhrmaster and subsequently assigned to ALJ Goldberger (see Ex. 8). A hearing was held on January 24, 2012. Respondents 235 St. Nicholas and Farooq Mohammad did not appear.<sup>4</sup>

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

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<sup>3</sup> Although staff did not use the phrase "jointly and severally," I interpret staff counsel's use of the word "collectively" to mean that staff seeks recovery of the penalty "jointly and severally;" that is, from any or all of the respondents.

<sup>4</sup> At the hearing, counsel stated that he represented respondents Yaqoob, Khan, John and Guadalupe (see Tr., at 3:23-24). In addition, although counsel had prepared an answer on behalf of those respondents as well as respondent Tariq, it is not clear from the transcript whether counsel still represented Tariq. Counsel did not include Tariq when he identified his clients on the record, but did state that he had spoken with Tariq, and that Tariq had told him that "he'll stand by whatever happens and waives his right to cross-examine and give testimony" (id. at 4:2-10).

## Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability as against respondents 235 St. Nicholas, Tariq, Yaqoob, Khan, John and Guadalupe with respect to the first charge. Thus, based upon my review of the record, Department staff has proven its case on the first charge 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. I agree with the ALJ that 235 St. Nicholas is liable for all 355 violations "because, at the time they occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 10). I also agree with the ALJ that each respondent-inspector should be held liable for each of the noncompliant inspections he performed (id.).<sup>5</sup>

According to the records of the New York State Department of State, of which I take official notice pursuant to 6 NYCRR 622.11(a)(5), 235 St. Nicholas, Inc. was dissolved as of October 26, 2011. The noncompliant inspections that are the subject of this enforcement proceeding occurred between June 10, 2008 and December 19, 2009, a period that predates the corporation's dissolution. Where, as here, violations relate to events that occurred prior to the dissolution of a business, subsequent dissolution of that business has no bearing on the proceeding (see Business Corporation Law [BCL] §§ 1006[a][4] & [b] and 1009; Matter of Quadrozzi Concrete Corp., Order of the Commissioner, July 8, 2013, at 2; Matter of AMI Auto Sales Corp., Decision of the Commissioner, February 16, 2012, at 5).

With respect to the second cause of action, violations of 6 NYCRR 217-1.4 cannot be found (Hearing Report, at 11) 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.

## Civil Penalty

Staff requested a penalty of one hundred seventy-seven thousand five hundred dollars (\$177,500), representing a penalty of \$500 for each violation. The ALJ noted that, consistent with the penalty range established by ECL 71-2103 for such violations, the maximum penalties "would come to almost \$8 million" (Hearing Report, at 12), 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, ability to pay, and unique factors (Hearing Report, at 12-13). The ALJ increased the penalty to be assessed against respondents Tariq, John and Guadalupe because of their

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<sup>5</sup> Although the ALJ correctly states that it is not necessary to prove intent to find that respondents violated the ECL provisions at issue in this case (see Hearing Report, at 9), the broad statement in the hearing report that the entire Environmental Conservation Law is a strict liability statute, is not correct (see, e.g., ECL 71-1307(3), 71-1933, 71-2105 [relating to criminal liability]). I therefore do not adopt that broad statement.

violations of the same regulation at other facilities (id. at 12; see also Exs.22 [Order on Consent signed by Tariq, John and Guadalupe admitting violations of 6 NYCRR 217-4.2 at a facility known as 786 Auto Service Center Inc., owned by Tariq and John] and 23 [Order on Consent signed by, among others, John and Guadalupe admitting violations of 6 NYCRR 217-4.2 at a facility known as Bruckner Service Station Inc.]).

The ALJ recommended a total civil penalty of ninety-three thousand four hundred fifty dollars (\$93,450), assessed as follows: (i) respondent 235 St. Nicholas to be assessed a civil penalty of forty-five thousand dollars (\$45,000); (ii) respondent Khan to be assessed a civil penalty of twenty-eight thousand dollars (\$28,000); (iii) respondent Tariq to be assessed a civil penalty of ten thousand dollars (\$10,000); (iv) respondent John to be assessed a civil penalty of five thousand dollars (\$5,000); (v) respondent Guadalupe to be assessed a civil penalty of five thousand dollars (\$5,000); and (vi) respondent Yaqoob to be assessed a civil penalty of four hundred fifty dollars (\$450) (Hearing Report, at 11-13).<sup>6</sup>

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, substantial 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. Jerome Muffler; 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]).<sup>7</sup>

In this matter, at the time the violations occurred, 235 St. Nicholas 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,”

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<sup>6</sup> By recommending penalty amounts for each of the respondents, the ALJ rejected Department staff’s request for joint and several liability (see Hearing Report, at 11-13). Even though joint and several liability may be imposed in administrative enforcement proceedings, I hold that Department staff’s request for the imposition of joint and several liability in this matter is unsupported. No adequate rationale was provided by Department staff to justify imposing joint and several liability in this proceeding.

<sup>7</sup> The fact of violation is the primary determinant of penalty. I do not consider the fact that 235 St. Nicholas may be a “small business” to be a mitigating factor with respect to determining the appropriate penalty for the 355 violations committed at the facility, and therefore decline to adopt that portion of the ALJ’s analysis (see Hearing Report, at 13).

and is not relieved of that responsibility by the inspectors' own duties (see Hearing Report, at 10). 235 St. Nicholas 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 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 235 St. Nicholas – 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.

In consideration of the penalty range established by ECL 71-2103(1), the impacts of this illegal activity (see Hearing Report at 11-13), and my decisions in Jerome Muffler, Autoramo, and New Power, I am imposing on 235 St. Nicholas a civil penalty of fifty thousand six hundred dollars (\$50,600).

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. As evidenced by the appearance of each such respondent's unique inspector's certificate number on inspection records of the New York Department of Motor Vehicles (DMV), the inspector-respondents in this case performed a number of improper inspections, as follows: Khan (228), Tariq (75), John (26), Guadalupe (25) and Yaqoob (1).<sup>8</sup>

At the hearing, respondents Guadalupe, Yaqoob, and John denied performing any of the inspections relating to their inspection certificates, and testified that Farooq Mohammad made copies of their inspector's certificates (see Tr. at 57:4-13, 61:7-13, 63:12-21). Their counsel's closing statement implied that Mr. Mohammad used the copies to perform the illegal inspections (id. at 73:15-74:8). I agree with the ALJ's conclusion that respondents' testimony is not credible (see Hearing Report, at 9). In addition, certified inspectors are responsible for the security of their own inspection certificate. If evidence in a proceeding reveals that an inspector failed to take any steps to prevent – or was aware of or affirmatively allowed – the use of his or her certificate by someone else, such failure may result in liability for noncompliant inspections relating to that certificate.

Mr. Khan performed 228 noncompliant inspections, approximately sixty-seven percent (67%) of the 355 noncompliant inspections at this facility. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that he performed, I assess a civil penalty against Mr. Khan in the amount of eight thousand five hundred dollars (\$8,500).

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<sup>8</sup> See Exs. 12 (Khan's application for certification as a motor vehicle inspector, reflecting inspector certificate number 4SH4), 16 (Tariq's application, certificate number 2NZ1), 15 (John's application, certificate number 6EA7), 14 (Guadalupe's application, certificate number 6NC9), 13 (Yaqoob's application, certificate number 7HZ1); see also Exs. 17, 18, 19a, 19b (DMV records reflecting inspections conducted by respondents); see also Tr., at 50:9-18 (identifying number of illegal inspections performed by each respondent as evidenced by DMV records and inspector certificate numbers).

Mr. Tariq performed 75 noncompliant inspections, approximately twenty percent (20%) of the 355 noncompliant inspections at this facility. In addition, Mr. Tariq has admitted to committing violations of the same regulation during the same time period at a different facility (see Ex. 22). Applying the penalty guidelines set forth above, considering the number of inspections using noncompliant equipment and procedures that he performed, and applying as an aggravating factor Mr. Tariq's admission of other violations, I assess a civil penalty against Mr. Tariq in the amount of three thousand five hundred dollars (\$3,500).

Mr. John performed 26 noncompliant inspections, approximately seven percent (7%) of the 355 noncompliant inspections at this facility. In addition, Mr. John has admitted to committing violations of the same regulation during the same time period at two different facilities (see Exs. 22 and 23). Applying the penalty guidelines set forth above, considering the number of inspections using noncompliant equipment and procedures that he performed, and applying as an aggravating factor Mr. John's admission of other violations, I assess a civil penalty against Mr. John in the amount of one thousand nine hundred dollars (\$1,900).

Mr. Guadalupe performed 25 noncompliant inspections, approximately seven percent (7%) of the 355 noncompliant inspections at this facility. In addition, Mr. Guadalupe has admitted to committing violations of the same regulation during the same time period at two different facilities (see Exs. 22 and 23). Applying the penalty guidelines set forth above, considering the number of inspections using noncompliant equipment and procedures that he performed, and applying as an aggravating factor Mr. Guadalupe's admission of other violations, I assess a civil penalty against Mr. Guadalupe in the amount of one thousand nine hundred dollars (\$1,900).

The evidence reflects that Mr. Yaqoob performed one (1) of the 355 noncompliant inspections at this facility. The version of ECL 71-2103(1) in effect on November 1, 2008, the date on which Mr. Yaqoob committed his violation (see Ex. 19b, at 18), 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. Yaqoob in the amount of three hundred seventy-five dollars (\$375) for his one noncompliant inspection, but suspend the penalty conditioned on Mr. Yaqoob's surrendering his motor vehicle inspector certification to the DMV within thirty (30) days of service of this order on him.

In sum, the overall amount of the civil penalty assessed by this order is sixty-six thousand seven hundred seventy-five dollars (\$66,775), 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 235 St. Nicholas, Inc., Malik Tariq (aka Tariq Malik), Sajjad Yaqoob, Zahoor Khan, Michael John and Caleb Guadalupe 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. Three hundred fifty-five (355) inspections using noncompliant equipment and procedures were performed at 235 St. Nicholas, Inc., of which Zahoor Khan performed two hundred twenty-eight (228), Malik Tariq (aka Tariq Malik) performed seventy-five (75), Michael John performed twenty-six (26), Caleb Guadalupe performed twenty-five (25), and Sajjad Yaqoob performed one (1).
- II. Department staff's claims against respondent Farooq Mohammad (aka Mohammad Farooq) are dismissed without prejudice for failure to serve Mr. Mohammad with the notice of hearing and the complaint.
- III. Department staff's claim that respondents 235 St. Nicholas, Inc., Malik Tariq (aka Tariq Malik), Sajjad Yaqoob, Zahoor Khan, Michael John and Caleb Guadalupe violated 6 NYCRR 217.1-4 is dismissed.
- IV. The following penalties are assessed:
  - A. Respondent 235 St. Nicholas, Inc. is hereby assessed a civil penalty in the amount of fifty thousand six hundred dollars (\$50,600);
  - B. Respondent Zahoor Khan is hereby assessed a civil penalty in the amount of eight thousand five hundred dollars (\$8,500);
  - C. Respondent Malik Tariq (aka Tariq Malik) is hereby assessed a civil penalty in the amount of three thousand five hundred dollars (\$3,500);
  - D. Respondent Michael John is hereby assessed a civil penalty in the amount of one thousand nine hundred dollars (\$1,900);
  - E. Respondent Caleb Guadalupe is hereby assessed a civil penalty in the amount of one thousand nine hundred dollars (\$1,900); and
  - F. Respondent Sajjad Yaqoob is hereby assessed a civil penalty in the amount of three hundred seventy-five dollars (\$375), which penalty is suspended conditioned on Mr. Yaqoob's surrendering his motor vehicle inspector certification to the DMV within thirty (30) days of service of this order on him.

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, 14<sup>th</sup> 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 235 St. Nicholas, Inc., Malik Tariq (aka Tariq Malik), Sajjad Yaqoob, Zahoor Khan, Michael John and Caleb Guadalupe, 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: September 5, 2013  
Albany, New York



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

In the Matter

- of -

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

**235 ST. NICHOLAS, INC.  
FAROOQ MOHAMMAD, MALIK TARIQ, SAJJAD YAQOOB, ZAHOOR KHAN,  
MICHAEL JOHN and CALEB GUADALUPE,**

Respondents.

NYSDEC CASE NO. CO2-20100615-07

**HEARING REPORT**

- by -

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge

February 24, 2012

## Proceedings

Pursuant to a notice of hearing and complaint, dated September 30, 2010 (Hearing Exhibit [Ex.] 1), staff of the New York State Department of Environmental Conservation (DEC or Department) charged Farooq Mohammed, Malik Tariq, Sajjad Yaqoob, Zahoor Khan, Michael John and Caleb Guadalupe (the respondents) with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR), which concerns inspection and maintenance of motor vehicle emissions systems.<sup>1</sup> The Department staff served an amended complaint dated December 13, 2011 in which the same allegations are set forth. However, this complaint adds 235 St. Nicholas, Inc. as a respondent and identifies two other respondents as follows: Farooq Mohammad (a/k/a Mohammad Farooq) and Malik Tariq (a/k/a Tariq Malik). Ex. 2.<sup>2</sup>

The staff alleged in its first cause of action that the respondents violated 6 NYCRR § 217-4.2 by operating an official emission inspection station using equipment and/or procedures that were not in compliance with Department procedures and/or standards, from June 10, 2008 to December 19, 2009, in relation to 355 mandatory annual motor vehicle emission inspections. The Department staff alleged that the respondents used a device to substitute for and simulate the motor vehicles of record.

In the second cause of action in the complaint, staff charges the respondents with violating 6 NYCRR § 217-1.4 by issuing 353 emissions certificates of inspection, as defined by 15 NYCRR 79.1(a), for motor vehicles, from June 10, 2008 to December 19, 2009, based on these same simulated motor vehicle emission inspections.

Staff alleged that all of the violations occurred at the respondents' official emissions inspection station known as Shell Service Center (Shell), located at 235 St. Nicholas Avenue, New York, New York. Staff alleged that 235 St. Nicholas, Inc. owned and operated this official emission inspection station (#7097814) from June 10, 2008 to December 19, 2009. Staff alleged that respondent Farooq Mohammad was the chairman, president, secretary and majority shareholder of 235 St. Nicholas, Inc. and operated the facility from June 10, 2008 to December 19, 2009. Staff alleged that from June 10, 2008 through December 19, 2009, Malik Tariq was the 49% shareholder of the official emission inspection station as well as a certified motor vehicle emission inspector (#2NZ1); Mr. Yaqoob was a certified motor vehicle emission inspector (#7HZ1); Mr. Khan was a certified motor vehicle emission inspector (#4SH4); Mr.

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<sup>1</sup> In the notice of hearing and complaint, staff spelled Mr. Sajjad's name as Sajiad. However at the January 24, 2012 hearing, this respondent spelled his name as Sajjad and this is also how it is spelled on his application for certification as a motor vehicle inspector. Hearing Exhibit 13; Hearing Transcript, page 60. Thus, I have corrected it in this report. In the hearing transcript, Mr. John's name is spelled Michel. Hearing Transcript, page 62. However, because Mr. John's application for certification as a motor vehicle inspector has the spelling as Michael, I assume this latter spelling is correct. Hearing Exhibit 15.

<sup>2</sup> It appears from the facility application filed with the Department of Motor Vehicles that Mr. Mohammad spells his name with an "a" rather than an "e." Hearing Exhibit 11. During the hearing, this respondent was referred to as both Mr. Mohammad and Mr. Farooq. In this report, I will use the former name.

John was a certified motor vehicle inspector (#6EA7); and Mr. Guadalupe was a certified motor vehicle emission inspector (#6NC9).

The respondents Malik Tariq, Sajjad Yaqoob, Zahoor Kahn, Michael John and Caleb Guadalupe, submitted an answer (Ex. 3) by their counsel dated October 25, 2010, in which they denied the staff's charges but did admit that they were certified emissions inspectors who worked at 235 St. Nicholas Avenue from June 10, 2008 to December 19, 2009. The answer does not set forth any affirmative defenses. Neither 235 St. Nicholas, Inc. nor Farooq Mohammad submitted an answer to the complaint or amended complaint. Staff provided copies of receipts for service of the notice of hearing and complaint by the Department of State on 235 St. Nicholas, Inc. on May 25, 2011 and December 14, 2011. Exs. 20, 21. Letters sent to Mr. Mohammad by the Office of Hearings and Mediation Services (OHMS) were returned as undeliverable by the U.S. Postal Service. Exs. 8-9, 10a.<sup>3</sup> At the adjudicatory hearing held on January 24, 2012, in the DEC's Region 2 offices, respondents Sajjad Yaqoob, Zahoor Khan, Michael John, and Caleb Guadalupe appeared and testified. According to his counsel, Mr. Tariq did not appear due to some personal conflict. Hearing Transcript page (TR) 4.

By a statement of readiness dated December 30, 2010 (Ex. 4), DEC staff requested that the Department's OHMS schedule this matter for hearing. Chief Administrative Law Judge James T. McClymonds informed the parties via a letter dated February 4, 2011 (Ex. 5) that the matter was assigned to Administrative Law Judge (ALJ) Edward Buhrmaster. Due to several adjournments requested by the staff and scheduling issues, the matter was reassigned to me. I issued a hearing notice dated January 18, 2012 confirming that the hearing was scheduled for January 24, 2012 at 10:00 a.m. in the DEC's Region 2 offices in Long Island City, New York. Ex. 10.

On January 25, 2012, Mr. Constantakes e-mailed to me copies of two orders on consent that settled similar charges before DEC in *Matter of 786 Auto Service Center* (6/24/10) which respondents Malik Tariq, Michael John and Caleb Guadalupe had signed and *Matter of Bruckner Service Center* (7/18/11) which respondents Michael John and Caleb Guadalupe had signed. These orders settled matters in which these respondents had admitted conducting simulated motor vehicle emissions inspections. Exs. 22 and 23.

On February 9, 2012, staff sent me its corrections to the hearing transcript via e-mail. On February 15, 2012, I sent the parties my corrections to the hearing transcript and requested the respondents' corrections by no later than February 29, 2012. The record closed on February 15, 2012 upon receipt of an e-mail from the respondents' counsel indicating he had no corrections to the transcript.

### Staff's Charges

As noted above, the staff has alleged that the respondents, as the owners/operators of the facility and emissions inspectors: 1) violated 6 NYCRR § 217-4.2 by conducting 355 mandatory

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<sup>3</sup> The letter dated January 18, 2012 that notified the parties of the January 24, 2012 hearing date was returned to the OHMS after the hearing date. I added the letter with the envelope indicating a failure to deliver to the record as Ex. 10A.

annual motor vehicle emission inspections from June 10, 2008 to December 19, 2009 using a device to substitute for and simulate the motor vehicle of record; and 2) violated 6 NYCRR § 217-1.4 by issuing 353 emission certificates of inspections based on simulated motor vehicle emission inspections from June 10, 2008 to December 19, 2009.<sup>4</sup>

Staff maintained that Malik Tariq, Sajjad Yaqoob, Zahoor Kahn, Michael John and Caleb Guadalupe worked as certified inspectors and were aware of the requirements to secure their cards. Staff stated that there was no doubt that these simulated inspections took place and the responsibility rested on the respondents. Because of the serious nature of the violations in the context of DEC's air program, staff explained that it was seeking a penalty of \$500 per illegal inspection.

### Respondents' Position

The respondents Tariq, Yaqoob, Kahn, John, and Guadalupe denied the violations in their answer and Messrs. Guadalupe, Yaqoob, John and Kahn testified at the hearing to deny the allegations. Particularly, each of them claimed that when Mr. Mohammad hired them he required that they produce their driver's licenses and inspector's licenses. TR 57, 61, 63, 69. Messrs. Guadalupe, Yaqoob, and John testified that although they provided their inspector's licenses to Mr. Mohammad, they served as gas attendants only and did not perform any inspections. TR 61, 57-58, 61-62, 63-64. They testified that they believed Mr. Mohammad made copies of their inspector's licenses and used the copies to perform the illegal inspections. TR 57, 59, 61, 63. Mr. Khan stated he was a helper at 235 St. Nicholas and sometimes cleaned, pumped gasoline or helped out in the garage. TR 68. He testified he did not conduct any illegal inspections although he admitted doing some inspections at this facility over the course of the year he worked there – about 1 – 2 daily. TR 69, 71-72.

The respondents' counsel, Mr. Nesci, maintained that the provision of these inspectors' licenses to respondent Mohammad was a condition of employment and although a violation of DMV regulations to photocopy these licenses, it is not a violation of DEC regulations and is not enforced. TR 73-74. Mr. Nesci also stated that because the respondents were foreign born, the provision of the licenses would be viewed as a normal course of business of which Mr. Mohammad took advantage. TR 74. Counsel also argued that the staff had not proven its case against these respondents because *mens rea* was not established. TR 74-75.

### Adjudicatory Hearing

The Department staff was represented by Blaise Constantakes, Assistant Counsel. The staff presented two witnesses, Michael Devaux, a vehicle safety technical analyst employed in the Yonkers office of the DMV, and James Clyne, an environmental engineer and section chief within DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development.

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<sup>4</sup> In paragraph 19 of the complaint, there was a typographical error indicating a violation of 6 NYCRR § 217-4.2 instead of § 217-1.4. At the hearing, staff counsel confirmed it was an error and noted it was corrected in the amended complaint, ¶ 22. TR 14.

The respondents Tariq, Yaqoob, Kahn, John and Guadalupe were represented by Vincent P. Nesci, Esq. of Mount Kisco, New York. Messrs. Yaqoob, Kahn, John and Guadalupe appeared at the hearing and provided testimony. Mr. Tariq did not attend the hearing. The respondents Mohammad and 235 St. Nicholas, Inc. have not appeared in this matter.

In its complaint, the staff requests a penalty of \$177,500 which Mr. Constantakes explained that he seeks from all the respondents. TR 15.

In addition to the exhibits that I marked at the start of the hearing and the parties agreed could be entered into evidence (Exs. 1-10), the staff offered Exs. 11-21. See, exhibit list annexed hereto. Upon staff's offering of Exs. 17-19b, Mr. Nesci limited his agreement to their entry by stating that he did not agree to their admission as to the truth of what these documents contained. TR 13-14. In addition, Mr. Nesci objected to their admission on the grounds that "[t]his is being prosecuted by the Clean Air Division of DMV. So it looks like the DMV has self-certified its own records, which is probably improper." TR 13. I overruled his objections and took in these documents that are records (certified copies) of DMV data. *Id.* All evidence that is submitted is subject to examination by opposing counsel and the trier of fact who will weigh it to make a determination on the outcome. However, counsel did not contest that the data originated from DMV records and he failed to produce any evidence to contest the probative value of the records. *See*, 6 NYCRR § 622.11(a)(11). As to Mr. Nesci's other objections, it is DEC not DMV that is prosecuting this matter. With respect to the document certification, it is appropriate that the agency that keeps the documents in the usual course of its business certifies their authenticity. CPLR Rule 4518(a).

As noted above, I added Ex. 10a to the record when I received the revised notice of enforcement hearing dated January 18, 2012 that I had mailed to Mr. Mohammad and was returned to the OHMS by the U.S. Postal Service. On January 25, 2012, staff provided Mr. Nesci and me with copies of the two consent orders Mr. Constantakes referenced during the cross-examination of the respondents at the hearing and I have taken them into evidence as Exs. 22 and 23. TR 66.

## **FINDINGS OF FACT**

1. On July 23, 2004, Farooq Mohammad, as majority shareholder of 235 St. Nicholas, Inc., submitted an original facility application to DMV to license 235 St. Nicholas, Inc. doing business as Shell Service Center as a motor vehicle inspection station. Ex. 11. The application was approved by DMV, which assigned 235 St. Nicholas, Inc. a facility number of 7097814. *Id.*
2. On June 30, 2005, Zahoor Kahn, applied to DMV for certification as a motor vehicle inspector. Ex.12. DMV approved this application and Mr. Kahn was assigned a certificate number of 4SH4. *Id.*
3. DMV issued to Sajjad Yaqoob a certification as a motor vehicle inspector with the

certificate number of 7HZ1.<sup>5</sup> Ex. 13.

4. On March 29, 2007, Caleb Guadalupe applied to DMV for certification as a motor vehicle inspector. Ex. 14. DMV approved Mr. Guadalupe's application and assigned a certificate number of 6NC9. *Id.*

5. On April 9, 2008, Michael John applied to DMV for certification as a motor vehicle inspector. Ex. 15. DMV approved the application and assigned Mr. John a certificate number of 6EA7. *Id.*

6. On, March 7, 2002, Tariq Malik applied to DMV for certification as a motor vehicle inspector. Ex. 16. DMV approved the application and assigned Mr. Tariq a certificate number of 2NZ1. *Id.*

7. To become a certified motor vehicle inspector, an individual must take a 3 hour course and pass two examinations; the latter exam is taken on the New York Vehicle Inspection Program (NYVIP) work station. TR 23-24. DMV issues each inspector a unique card that must be used to access the work station at the inspection facility. TR 24-25. DMV requires inspectors to safeguard these cards at all times and not allow any other individual to use the card. *Id.*

8. DMV and DEC jointly administer NYVIP, a statewide annual motor vehicle emissions inspection program for gasoline-powered vehicles, which is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations found at 40 CFR Part 51. TR 44.

9. NYVIP features on-board diagnostic (also known as OBD II) testing for model year 1996 and newer light-duty vehicles. TR 34. SGS Testcom is the entity that has the contract with New York State to operate the work station analyzer system. TR 41.

10. To commence the OBD II inspection, a motorist presents his/her vehicle for inspection. TR 16. The inspector does the safety check and then examines the low enhanced emission inspection items. TR 17. The inspector must access the work station analyzer by scanning the bar code from his card with its unique identifying information. TR 17. Next the inspector will scan in the identifying information from the vehicle or manually enter this information. TR 17.

11. The inspector enters into the NYVIP work station the results of the safety inspection and the low enhanced emissions portion of the inspection. TR 18. The inspector is directed by the work station to connect the vehicle to the diagnostic link connector. TR 18. The OBD II inspection begins with two visual checks of the malfunction indicator light (MIL), to see if it comes on when it should, and then to see if it goes off when the vehicle is running. TR 19.

12. After the MIL information is addressed, the NYVIP work station gathers information

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<sup>5</sup> This second page of this document is missing the signature page content and therefore, I was unable to locate a date of application. However, it does appear that DMV approved Mr. Yaqoob's application on April 14, 2008. Ex. 13.

directly from the vehicle's computer. TR 19. After this process is completed, the inspector is instructed to disconnect the NYVIP connector and if the vehicle passed the inspection to scan the inspection certificate bar code. TR 20. Once that is completed, the inspection is done and the vehicle inspection report/receipt is printed out and given to the customer. TR 20.

13. The information obtained by the system will be stored in the NYVIP work station and also transmitted to DMV via SGS Testcom within 5 to 10 seconds. TR 25-26. Both DMV and SGS Testcom maintain the data that is captured during the inspections. *Id.*

14. In 2008, DMV notified DEC about what it found to be irregularities at various emissions testing stations in the New York metropolitan area. TR 42. Based upon the data it was reviewing, DMV concluded that a simulator was being used in these tests rather than the vehicle that was to be tested. TR 42. An investigation by DEC, DMV and the New York State Attorney General ensued in which extensive data analysis was done. TR43-44. Ultimately, they were able to find an electronic signature – 15 data fields that constituted a profile of a simulated inspection. TR 44.

15. The agencies identified 44 inspection stations involved in these noncompliant inspections out of close to 11,000 inspection facilities statewide. TR 44. The agencies found that between 2004 and 2008, out of 18.5 million inspections that were performed in New York State, none had this signature. TR 44-45. But between March 2008 and July 2010, in 44 downstate stations, the electronic signature was found. TR 45.

16. In the official DMV records of inspections that took place at 235 St. Nicholas, Inc. beginning on June 10, 2008 and continuing on dates through December 19, 2009, there is evidence of 355 noncompliant inspections on approximately 235 different dates. Exs. 19a-19b. It is impossible that these emissions tests were performed on real vehicles because the 15 data fields show the identical information for widely varying vehicles, TR 50-52.

17. As an example, on July 28, 2008, 235 St. Nicholas Ave., Inc. inspected a 2000 Chevy Cavalier with a reported VIN number as well as an electronic VIN number that matches DMV records and a profile that matches a Chevy Cavalier. TR 51; Ex. 19b, p. 13. The same car with the same reported VIN number was reinspected on December 4, 2009 at 13:22 and no electronic VIN is recorded and the profile matches the simulator rather than the Chevy Cavalier profile. TR 51-52; Ex. 19a, p. 5.

18. The data provides both the unique facility number of the inspection station and the identifying number of the inspector. Exs. 11-16, 19a, 19b. From this information, it is shown that Tariq performed 75 noncompliant inspections, Yaqoob performed 1 noncompliant inspection, Khan performed 228 noncompliant inspections, John performed 26 noncompliant inspections and Guadalupe performed 25 noncompliant inspections. TR 50; Exs. 19a-19b.

19. In May 2010, Michael John, Maliq Tariq, and Caleb Guadalupe entered into an order on consent with DEC to settle violations of Part 217 for performing improper emissions inspections at 786 Auto Service Center Inc. Ex. 22.

20. In June 2011, Caleb Guadalupe and Michael John entered into an order on consent with DEC to settle violations of Part 217 for performing improper emissions inspections at Bruckner Service Station, Inc. Ex. 23.

21. Between 2007 and 2008, Zahoor Khan worked in various capacities at 235 St. Nicholas including helping in the repair shop by cleaning, working as a gas attendant, and at times doing 1-2 inspections per day. TR 68-72

## DISCUSSION

### Background – I/M Program

This enforcement proceeding charges that 235 St. Nicholas, Inc., its principal Farooq Mohammad (a/k/a Mohammad Farooq), and inspectors Malik Tariq (a/k/a Tariq Malik), Sajjad Yaqoob, Zahoor Khan, Michael John, and Caleb Guadalupe did not check the OBD II systems as part of their inspections of 355 vehicles between June 10, 2008 and December 19, 2009. Ex. 2. Staff claims that instead, the respondents used a simulator to substitute for the vehicles which resulted in a passing inspection for all of these cars.

As explained above and also in greater detail in the Hearing Report of ALJ Edward Buhrmaster dated September 1, 2011 and adopted by the Commissioner in his decision and order of February 16, 2012, *In the Matter of Gurabo Auto Sales Corp.*, the OBD II testing is part of NYVIP, the state's vehicle inspection program that is required under the federal Clean Air Act Amendments of 1990 and 40 CFR part 51. The 1990 Clean Air Act Amendments required an inspection and maintenance (I/M) program in areas of the country, like New York, that have failed to meet the national ambient air quality standards (NAAQS) and are thus identified as non-attainment areas.<sup>6</sup> While automobile manufacturers are required to produce cleaner emitting cars under both federal and California laws (the latter more stringent standards having been adopted by New York State pursuant to Clean Air Act § 177 [42 USC § 7507]), these cars will not remain clean without an inspection program that ensures that the relevant equipment is maintained and repaired as necessary over the life of the vehicle. Thus, any strategy by inspection stations that results in the issuance of inspection stickers based upon noncompliant inspections will undermine efforts to reduce air pollution in the State.

### Liability

Pursuant to 6 NYCRR § 622.11(b), the Department staff bears the burden of proof on the charges it asserts in the complaint. Pursuant to 6 NYCRR § 622.11(c), the staff also has to sustain that burden by a preponderance of the evidence.

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<sup>6</sup> NAAQS place a cap on the allowable concentrations of the particular pollutant in question – these are primary and secondary caps – protecting health and the environment/property, respectively. 42 U.S.C. § 7409(a)(2). The six criteria pollutants that are covered by NAAQS are particulates, sulfur dioxide, nitrogen dioxide, carbon monoxide, ozone and lead. In areas that do not meet the NAAQS and are thus in non-attainment, the state submits a state implementation plan (SIP) to EPA that spells out the actions the state will take to achieve attainment. 42 USC §§ 7413, 7604. The I/M program is part of the New York SIP that is directed at ozone non-attainment. 42 USC §§ 7511a, 7512a. For more information about the State's I/M program: <http://www.dec.ny.gov/chemical/48153.html>.



In this matter, the Department’s witness, James Clyne, credibly testified as to the investigation that gave rise to establishing an “electronic signature” that demonstrated that non-compliant inspections were ongoing at certain inspection stations in the State. TR 42-40. He was able to show how the specific 15-field electronic signature appearing on 235 St. Nicholas, Inc.’s inspection data (as highlighted by Mr. Clyne in Exs. 19a and 19b) represents the data that would be obtained from a simulator rather than a vehicle. TR 45-52.

Specifically, Exs. 19a and 19b have a series of headings across the page that identify the data obtained for each column. The first heading is DMV VIN NUM – the vehicle identification number which is obtained from the DMV registration bar code or by manual entry by the inspector. The next column is INSP DTE which is the date of the inspection. On page 5 of Ex. 19a, Mr. Clyne concluded that the inspection of the 2000 Chevy Cavalier on December 4, 2009 at 13:22 was not a valid inspection but rather the product of a simulator because the data for that vehicle entry mimics the results that appear in the 15 data fields identified as that of a simulator. TR 50-51.

These fields, and the entries that are consistent with the simulator profile (shown here in quotation marks), are as follows:

PCM	ID1	“10”
PCM	ID2	“0”
PID	CNT 1	“11”
PIC	CNT 2	“0” (should read as PID CNT 2) TR 48.
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”

As can be seen from all the highlighted data that appears on Exs. 19a and 19b (Exs. 19a and 19b are the same data extracts from DMV records as 17 and 18 except that the 15-field simulator profile inspections are highlighted in orange), this data is exactly the same for each of these inspections.<sup>7</sup> Mr. Clyne testified that the data for the illegal inspections matched the simulator signature rather than that of legitimate inspections. TR 50-52.

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<sup>7</sup> Not only are these numbers identical for the highlighted inspections in Exs. 19a and 19b at the respondents’ facility, they are also identical to the numbers that were reported in *Gurabo* and *Matter of AMI Auto Sales Corp., et al* (ALJ Hearing Report, 9/1/11).

These data sheets identify 235 St. Nicholas, Inc. as the inspection station because they contain its DMV facility number - 7097814 - on each inspection. This number corresponds to the approved facility application. Ex. 11. Similarly, each inspection on the data sheets provides an inspector number that corresponds with one of the five respondent inspectors' certificate numbers: Malik Tariq (2NZ1); Sajjad Yaqoob (7HZ1); Zahoor Khan (4SH4); Michael John (6EA7); and Caleb Guadalupe (6NC9). Exs. 12-16.

The respondents Yaqoob, Khan, John and Guadalupe testified that although they provided their inspection cards to Mr. Mohammad and suspected that he copied their cards to use in inspections, they claimed that they did not perform any illegal inspections. TR 57-58, 61-62, 63, 69. In fact, Messrs. Guadalupe, Yaqoob, and John testified that they did not perform inspections at this facility. TR 57, 61, 63. Mr. Khan admitted to performing 1-2 inspections per day during the year he worked at the facility but stated that he did not perform any illegal inspections. TR 69, 72. While I might have been prepared to believe these accounts, Mr. Constantakes undermined the credibility of Messrs. John and Guadalupe through his representations regarding the prior enforcement proceedings against these individuals at the hearing and the production of the two consent orders involving these respondents after the hearing. TR 64-66; Exs. 22, 23. While these respondents denied performing illegal inspections, in two consent orders that they executed, Mr. Constantakes revealed their admissions of having done so improperly at other service stations. Exs. 22, 23.

It was the responsibility of all the respondent inspectors to safeguard their inspection cards as required by the DMV regulations and as instructed during the training they received. TR 24-25; 15 NYCRR § 79.17(c)(2). As Mr. Nesci stated at the hearing, "these folks testified quite consistently that they were required to give these copies as a condition of their employment." TR 74. I find that the respondents lacked credibility with respect to this defense and I find that they performed the illegal inspections. Thus, Messrs. Yaqoob, Khan, John and Guadalupe are liable for the simulated inspections.

Mr. Tariq did not attend the hearing and provide any testimony in his defense. TR 4, 74. Based upon the evidence provided by staff, I find him liable for the simulated inspections he performed. Exs. 19a, 19b.

Contrary to Mr. Nesci's assertion that intent (*mens rea*) must be demonstrated by staff to establish liability, that is not a requirement. TR 74-75. The Environmental Conservation Law is a strict liability statute and staff need only demonstrate that the violations were made by the respondents. *See, e.g., Matter of Robert and Rhoda Scott and Melvin Hoffmeister*, 1984 N.Y. ENV LEXIS 25.

DEC has charged the respondents with violations of both 6 NYCRR §§ 217-4.2 (first cause of action) and 217-1.4 (second cause of action). I find that the violations of 6 NYCRR § 217-4.2 have been established; but for the reasons set forth in ALJ Buhrmaster's report in *Gurabo*, I do not find violations of § 217-1.4. I also find that all the violations of § 217-4.2 are attributed to 235 St. Nicholas, Inc. as the licensed inspection station, and that the five respondent inspectors, as the station's certified inspectors, may be held liable for the noncompliant inspections that they performed.

Although I believe that Mr. Mohammad could have been found personally liable based upon his active participation in the activities of the facility as testified to by the respondents, the staff was unable to personally serve him and thus provide notice of the charges. TR 4-5. Therefore, Mr. Mohammad cannot be found personally liable for the violations at this facility.

#### Violation of 6 NYCRR § 217-4.2

Section 217-4.2 of 6 NYCRR provides, “[n]o person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with department [DEC] procedures and/or standards.” “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) sets forth that a license to operate an official inspection station shall be issued only upon written application to DMV, after DMV determines that the station is properly equipped and has competent personnel to perform inspections, and that such inspections will be properly conducted. Section 217-1.3 of 6 NYCRR along with 15 NYCRR § 79.24(b)(1)(ii), as well as the instructions found in the NYVIP vehicle inspections systems operators manual, establish the appropriate procedures and standards that the respondents were to follow to conduct accurate emissions inspections but failed to.

I find that § 217-4.2 was violated 355 separate occasions by the use of a simulator to perform OBD II emissions inspections. The use of a simulator is not consistent with the emissions inspection procedures set forth at 6 NYCRR § 217-1.3, which requires testing of the vehicle’s OBD system to ensure that it functions as designed and completes the diagnostics routines for necessary supported emission control systems. As Mr. Clyne explained in his testimony, if the inspector plugs the NYVIP work station into a simulator, rather than the automobile to be inspected, there can be no determination as to whether the vehicle would pass the OBD II inspection. TR 51-52.

235 St. Nicholas, Inc. is liable for all 355 violations because, at the time they occurred, it 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 the responsibility by the inspectors’ own duties, which include performing inspections in a thorough manner. 15 NYCRR §§ 79.17(b)(1) and (c). As a private corporation, 235 St. Nicholas, Inc. falls within the definition of “person” at 6 NYCRR § 200.1(bi).

Each of the respondent-inspectors is liable for each of the noncompliant inspections he performed. This liability is based upon the connection between the respondent-inspectors who are certified under VTL 304-1 and the official inspection station which is licensed under VTL 303. Section 79.8(b)(2) of 15 NYCRR requires that the inspection station employ at least one full-time employee who is a certified motor vehicle inspector to perform the services required under DMV’s regulations. The inspection station operates through the services that the inspectors provide.

While the Department staff seeks to penalize the respondent-inspectors for all the illegal inspections performed, I find (as ALJ Buhrmaster did in *Gurabo*) that each inspector should be held liable for the specific illegal inspections he performed.

#### Violation of 6 NYCRR § 217-1.4

In the Department staff's second cause of action, it charged violations of 6 NYCRR § 217-1.4. This regulation provides: "No 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."

As found by ALJ Buhrmaster in the *Gurabo* matter, violations of 6 NYCRR § 217-1.4 cannot be found because there is no evidence that 235 St. Nicholas, Inc. was an official inspection station as defined by 15 NYCRR 79.1(g). Section 79.1(g) defines an "official safety inspection station" as one "which has been issued a license by the Commissioner of Motor Vehicles pursuant to Section 303 of the Vehicle and Traffic Law, to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement" (emphasis added). Since the entire focus of the staff's case was the allegations concerning noncompliant emissions inspections, the established facts do not support a violation of this regulation.

As also noted by ALJ Buhrmaster in *Gurabo*, there is a newly promulgated Subpart 217-6 governing motor vehicle enhanced inspection and maintenance program requirements for the period beginning January 1, 2011. Section 217-6.4 of 6 NYCRR provides: "No official emissions inspection station or certified inspector may issue an emission certificate of inspection, as defined by 15 NYCRR section 79.1, for a motor vehicle unless the motor vehicle of record has been inspected pursuant to, and meets the requirements of section 217-6.3 of this Subpart." Section 217-6.3 provides the inspection procedure that an inspection station must use to determine whether the OBD II system performs consistent with the relevant motor vehicle exhaust and emissions standards. These new regulations contain the provisions relevant to the allegations set forth in the second cause of action. However, these regulations do not apply to violations that occurred prior to their promulgation and effective date. Accordingly, the second cause of action must be dismissed.

#### Penalties

As noted by staff in its complaint, the version of ECL § 71-2103 in effect at the time of the alleged violations provided that any person who violates a provision of Article 19 of the ECL, or any code, rule or regulation which was promulgated pursuant thereto, shall be liable for a penalty, in the case of a first violation, of at least Three Hundred Seventy-Five Dollars (\$375.00), but no more than Fifteen Thousand (\$15,000) Dollars, and, in the case of a second and any further violation, a penalty of not more than Twenty-Two Thousand Five-Hundred Dollars (\$22,500.00) per violation. The staff requested a penalty of \$177,500 from the respondents – amounting to \$500 per violation of 6 NYCRR § 217-4.2. While this amount is less than the maximum that could be derived based upon the 355 separate violations, I find for the reasons set forth below that penalties of \$45,000 for 235 St. Nicholas, Inc.; \$28,000 for

Zahoor Khan; \$10,000 for Malik Tariq; \$5,000 for Michael John and Caleb Guadalupe; and \$450 for Sajjad Yaqoob are more appropriate.

The 1990 Civil Penalty Policy requires that all monetary penalty calculations begin with the statutory maximum. The maximum penalty in this matter would come to almost \$8 million, clearly unreasonable given the small business involved. However, the maximum penalty is only the starting point; a number of considerations, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondents' conduct are to be taken into account in determining the appropriate penalty.

With respect to economic benefit, there was no evidence presented of the financial advantage that the respondents gained by violating the law in this matter and so, economic benefit is not a consideration.

With respect to gravity, the violations are extremely serious as they undermine the State's air pollution program by passing vehicles which may have had faulty emissions systems. To the extent these vehicles did not have their emissions systems repaired, as required, they would add pollutants to the air that will increase ozone, a component of smog. Thus, a substantial penalty is warranted given the potential impact on the environment.

The Civil Penalty Policy also provides for factors that could adjust the gravity component: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay; and (e) unique factors. The respondents' culpability in this matter merits an upward penalty adjustment. Prior to receiving their inspection certifications from DMV, the respondent-inspectors received training that demonstrated the correct use of the NYVIP system. With respect to violator cooperation, the respondents were discovered to be violating the law by an investigation by DEC and DMV and therefore, there is no evidence of cooperation. The respondent 235 St. Nicholas, Inc. failed to make an appearance in this matter. And, Mr. Tariq failed to attend the hearing to provide any testimony in his defense. The respondents who did appear elected to proceed to an adjudicatory hearing rather than initiate efforts to resolve the matter outside of litigation.

The Department staff demonstrated that Messrs. Tariq, John and Guadalupe had committed violations of the same regulations at other facilities where they worked and thus, there should be an upward adjustment of the penalties assessed against them for this history of non-compliance. In *Gurabo*, ALJ Buhrmaster found that a history of violations at other facilities in these cases should not require an upward adjustment of the penalty because all of these proceedings were commenced at about the same time. However, because these respondents have committed violations at more than one facility, I find that the penalty should be greater. As for ability to pay, no evidence was presented by the respondents of their financial status.

The Civil Penalty Policy does provide for the consideration of "unique factors" in calculation of the penalty. Counsel for the respondents Tariq, Yaqoob, Khan, John and Guadalupe presented that these respondents were required as a condition of employment to provide their inspector's cards to Mr. Mohammad. TR 74. While this might have been a basis to

mitigate the penalty for the inspector-respondents, as noted above, I did not find the defense credible.

With respect to each of the respondent-inspectors, they should be penalized based upon the number of illegal inspections they each performed – there is no basis to penalize them for the actions of their co-respondents. Mr. Khan performed the bulk of the illegal inspections with approximately 64% of them as documented in Exs.19a-19b. Mr. Tariq performed approximately 21% of the inspections; Messrs. John and Guadalupe each performed approximately 7% of them; and Mr. Yaqoob performed less than 1% of them. Thus, the penalties assessed should be assessed considering their individual illegal activities.

### Penalty Recommendation

For the 355 separate violations of 6 NYCRR § 217-4.2, 235 St. Nicholas, Inc. should be assessed a penalty of \$45,000. Mr. Khan performed the majority of the illegal inspections and a penalty of \$28,000 is appropriate. Mr. Tariq should be penalized \$10,000. I increased the base penalty of \$3,159 for Messrs. John and Guadalupe to \$5,000 due to their continuing history of violations. Based upon Mr. Yaqoob's one violation, I recommend a penalty of \$450.

As explained above, the violations are extremely serious as they undermine a key aspect of New York's efforts to reduce ozone pollution which causes health and property damage. The respondent-inspectors were clearly aware that they were performing illegal actions given the training they received, their failure to connect the NYVIP system to the automobiles that were to be inspected, and their affirmative noncompliant activity in using a simulator during the inspections. However, based upon the fact that 235 St. Nicholas, Inc. is a small business and the dismissal of the second cause of action, I am recommending a substantially lower penalty than what was proposed by staff. Despite the lower penalty, these sums are substantial ones for a small company and will send a message to the inspection station community that noncompliant inspections will not be tolerated.

### **CONCLUSIONS**

1. Between June 10, 2008 and December 19, 2009, the respondents, 235 St. Nicholas, Inc., Malik Tariq (a/k/a Tariq Malik), Sajjad Yaqoob, Zahoor Khan, Michael John and Caleb Guadalupe, used a simulator to perform OBD II emission inspections on 355 separate occasions.
2. This use of a simulator was in violation of 6 NYCRR § 217-4.2, which prohibits the operation of an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards.

### **RECOMMENDATIONS**

1. For the first cause of action, which alleges violation of 6 NYCRR § 217-4.2, respondent 235 St. Nicholas, Inc. should be assessed a civil penalty of \$45,000, respondent Zahoor Khan should be fined \$28,000; Malik Tariq should be fined \$10,000; Michael John and

Caleb Guadalupe should be fined \$5,000 each; and Sajjad Yaqoob should be fined \$450. All penalties should be paid within 30 days of service of the Commissioner's order.

2. The second cause of action, which alleges violations of 6 NYCRR § 217-1.4, should be dismissed as to respondents 235 St. Nicholas, Inc., Zahoor Khan, Maliq Tariq, Michael John and Caleb Guadalupe.
3. All charges against respondent Farooq Mohammad should be dismissed without prejudice.

Exhibit List  
Matter of 235 St. Nicholas, Inc., et al

<u>Exhibit No.</u>	<u>Description</u>	<u>I.D.</u>	<u>In Evidence</u>
1	Notice of Hearing & Complaint – 9/30/10	√	√
2	Amended Complaint – 12/13/11	√	√
3	Answer – 10/25/10	√	√
4	Statement of Readiness – 12/30/10	√	√
5	Letter dated 2/4/11	√	√
6	Hearing Notice – 3/28/11	√	√
7	Notice of Hearing Adjournment – 4/11/11	√	√
8	Hearing Notice – 3/28/11 w/returned env.	√	√
9	Notice of Hrg Adj w/returned env.	√	√
10	Revised Notice of Enforcement Hrg – 1/18/12	√	√
10a	Revised Notice of Enf. Hrg – 1/18/12 w/returned envelope	√	√
11	Original Facility App – 7/26/04	√	√
12	Zahoor Khan App for Inspection Cert	√	√
13	Sajjad Yaqoob Application	√	√
14	Caleb Guadalupe Application	√	√
15	Michael John Application	√	√
16	Tariq Malik Application	√	√
17	DMV Inspection Data - 8/06-9/09	√	√
18	DMV Inspection Data - 9/09-12/09	√	√



<u>Exhibit No.</u>	<u>Description</u>	<u>I.D.</u>	<u>In Evidence</u>
19a	DMV Inspection Data – Highlighted 9/09 – 12/09	√	√
19b	DMV Inspection Data – Highlighted 8/06-9/09	√	√
20	Department of State Receipt for Service 235 St. Nicholas, Inc. – 5/25/11	√	√
21	Department of State Receipt for Service 235 St. Nicholas, Inc. – 12/14/11	√	√
22	Letter dated 6/24/10 from B. Constantakes to V. Nesci w/Order on Consent dated 6/24/10 Matter of 786 Auto Service Center	√	√
23	Letter dated 8/2/11 from B. Constantakes to V. Nesci w/Order on Consent dated 7/18/11 in Matter of Bruckner Service Center	√	√