STATE OF MICHIGAN

IN THE 52-4 JUDICIAL DISTRICT COURT

PEOPLE OF THE CITY OF TROY,

Plaintiff,

v

NICHOLAS AUBREY,

Defendant,

Hon. Kirsten Nielsen Hartig

Case No. 2019-004326-OD

and

PEOPLE OF THE CITY OF TROY,

Plaintiff,

v

SARAH KAGAN,

Defendant.

Case No. 2019-005122-OD

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS AUBREY'S AND KAGAN'S MOTIONS TO SUPPRESS THE DATAMASTER LOGS AND RESULTS

This matter is before the Court on Defendant Nicholas Aubrey's (**"Aubrey"**) and Defendant Sarah Kagan's (**"Kagan"**) motions to suppress Troy Police Department's (**"the department"**) DataMaster logs and its results. The People of the City of Troy (**"People"**) filed its oppositions. Aubrey's and Kagan's cases were consolidated for the purpose of conducting an evidentiary hearing.

The evidentiary hearing began on September 24, 2020, and continued on October 2, 15, and 23, 2020. The Court heard testimony from Michigan State Police Sergeant Dean York (**"Sgt. York"**), Technical Supervisor for the Michigan State Police Breath Alcohol Program, Mark Fondren (**"Mr. Fondren"**), and Michigan State University's National Super Conducting Cyclotron Laboratory physicist, Dr. Andreas Stolz (**"Dr. Stolz"**).

Following the evidentiary hearing, the Court requested the parties file supplemental briefs. The Court has considered the parties' filings, exhibits, witness testimonies, and arguments. For the following reasons, Aubrey's and Kagan's motions to suppress are granted in part and denied in part.

BACKGROUND

This case presents a novel issue in light of the recent *Fontenot* decision addressing the tension between an individual's right to confront witnesses and the admissibility of DataMaster logs in operating while intoxicated cases. *People v Fontenot*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 350391). This issue takes on added significance in light of recent, disturbing events involving the Michigan State Police Department (**"MSP"**) and its DataMaster vendor, Intoximeters.

FACTS AND PROCEDURAL HISTORY

On September 7, 2019, Aubrey was arrested on the suspicion of operating a motor vehicle while intoxicated and transported to the Troy Police Department. At the Troy Police Department, Aubrey submitted to two breath tests on the department's DataMaster instrument, which were conducted by Police Service Aide, Melina Walkowiak (**"PSA Walkowiak"**). The first test registered .12 grams of alcohol per 210 liters of breath and the second test registered .13 grams of alcohol per 210 liters of breath. Aubrey was then charged with a misdemeanor offense of operating a motor vehicle while intoxicated, MCL 257.625(1).

Likewise, on October 28, 2019, Kagan was arrested on the suspicion of operating a motor vehicle while intoxicated and transported to the Troy Police Department. At the department, Kagan submitted to two breath tests on the department's DataMaster instrument, which were conducted by Police Service Aide, William Braley (**"PSA Braley"**). Both tests registered .11 grams of

alcohol per 210 liters of breath. Kagan was then charged with a misdemeanor offense of operating a motor vehicle while intoxicated, MCL 257.625(1).

Kagan previously filed a motion to suppress the test results from the horizontal gaze nystagmus assessment (**"HGN"**) and preliminary breath test (**"PBT"**). An evidentiary hearing was held on January 4, 2020, and the Court suppressed the HGN and PBT test results. However, the Court denied Kagan's request to dismiss because the Court found there was probable cause that Kagan committed the charged offense without the suppressed evidence.

On January 10, 2020, the MSP sent a letter to prosecuting agencies, informing them the MSP discovered an issue involving all 203 DataMaster instruments in Michigan. The letter stated a stop order on the current vendor's contract was issued on January 7, 2020, due to performance-related issues. Three days later, the MSP issued a formal statement, announcing an investigation into potential fraud committed by contract employees of its DataMaster vendor, Intoximeters. Further, the MSP announced all 203 DataMaster instruments would be taken out of service until each instrument was inspected and verified to ensure that each instrument was properly calibrated. On or about February 13, 2020, the MSP announced all 203 DataMaster instruments were placed back in service.

In 2019, the individuals responsible for inspecting, verifying, and certifying the DataMaster instruments were Andrew Clark (**"Mr. Clark"**) and David John (**"Mr. John"**). Mr. Clark and Mr. John were discharged from Intoximeters and charged with felonies by the Michigan Attorney General for crimes allegedly committed, involving the 120-day verification tests. However, on or about December 11, 2020, all criminal charges against Mr. Clark arising out of the Eaton County District Court were dismissed. Mr. Clark allegedly conducted the 120-day

verification tests on the Troy Police Department's DataMaster instrument on February 5, 2019, June 5, 2019, and September 27, 2019.[1]

Aubrey and Kagan now challenge the accuracy of the department's DataMaster instrument and move the Court to suppress the department's DataMaster logs and its results, contending that the department's DataMaster instrument and its results are unreliable.

ANALYSIS

As a threshold matter, DataMaster results are admissible to prove a defendant's guilt. MCL 257.625a(6)(b)(ii). However, the "test results must be both relevant and *reliable*." *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001) (emphasis added). "[T]he reliability of the testing device remains a prerequisite to the admissibility of breath test results." *People v Kozar*, 54 Mich App 503, 509; 221 NW2d 170, note 2 (1974).

"The proponent of evidence bears the burden of establishing its relevance and admissibility." *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). The proponent must prove admissibility by a preponderance of the evidence. *People v Jones*, 270 Mich App 208, 217; 714 NW2d 362 (2006).

Further, "[t]here is no bright-line rule of automatic suppression of evidence where an administrative rule has been violated." *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998). The Michigan Court of Appeals held that, suppression "is required only when there is a deviation from the administrative rules that call[s] into question the accuracy of the test." *Fosnaugh*, 248 Mich App at 450.

Here, the relevancy of the DataMaster results is not at issue, but the department's DataMaster instrument and the reliability of its results have been called into question. The logs are substantive evidence in establishing the reliability of the department's DataMaster instrument. The

[1] The 120-day verification tests at issue in these cases involve June 5, 2019, and September 27, 2019.

People bear the burden of showing that the department's DataMaster instrument and its results are reliable. *Martin*, 271 Mich App at 316.

The People seek to admit the DataMaster logs without having to produce Mr. Clark, Intoximeter's former representative who allegedly performed the 120-day inspections on the department's DataMaster instrument three times in 2019 and who allegedly performed the 120-day verification tests correctly. The People contend that even if there is a discrepancy in the method followed by Mr. Clark in conducting the 120-day inspections, the discrepancy does not call into question the accuracy of the department's DataMaster instrument. The People maintain the department's DataMaster logs show that the instrument passed all of its weekly accuracy checks for the months of September 2019 through January 2020.

This Court is bound by the recent *Fontenot* decision. *Fontenot*, *supra* at 2. The *Fontenot* decision was designated "for publication" on September 10, 2020. *Fontenot*, slip op at 1. The *Fontenot* court held DataMaster logs are nontestimonial. *Fontenot*, slip op at 2. The 2-1 majority in *Fontenot* reasoned that the primary purpose of the DataMaster logs and the certifications were "created before the defendant's breathalyzer test to prove the accuracy of the DataMaster instrument; they were not created for the purpose of prosecuting defendant specifically." *Fontenot*, slip op at 3.

According to the 2-1 majority in *Fontenot*, DataMaster logs and the 120-day verification results do not trigger the Sixth Amendment Confrontation Clause, and individuals who conduct the inspection and verification of a DataMaster instrument are not required to testify and be subject to cross-examination.

The 2-1 *Fontenot* court also held DataMaster logs are admissible as business records under MRE 803(6), even if the records are not accurate or trustworthy. However, the *Fontenot* court stated, "[the] ruling does not prevent [a] defendant from challenging the accuracy of DataMaster

testing machine itself in the future." *Fontenot*, note 3. The *Fontenot* court "express[ed] no opinion on that question, or on whether such a challenge would go to weight rather admissibility of the evidence." *Fontenot*, note 3.

Under MCR 7.215(C)(2), "the publication of an opinion by the Court of Appeals creates binding precedent statewide, and the opinion remains binding until such time as a decision of the Supreme Court enters altering the lower court decision or questioning the rationale." *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996). The plain language of MCR 7.215(C)(2) provides that neither the filing of an application for leave to appeal to the Supreme Court nor an order granting leave diminishes the precedential effect of a published opinion of the Court of Appeals.

Therefore, this Court must follow the holding in *Fontenot* under the doctrine of stare decisis. However, following note 3 of the *Fontenot* opinion, it is this Court's opinion, the Court has discretion to consider Aubrey's and Kagan's challenge to the department's DataMaster instrument as it relates to the admissibility of the evidence.[2]

Aubrey and Kagan advance several arguments in moving to suppress the DataMaster logs and its results. Aubrey and Kagan contend the failure to comply with administrative regulations regarding the department's DataMaster instrument preclude admission of the logs and its results.

Specifically, Administrative Rule R 325.2653 governs equipment accuracy. Subsection (1) requires a breath alcohol test instrument to be inspected, verified for accuracy, and certified at least once each calendar week by an appropriate class operator. R 325.2653(1). The term "calendar

[2] Based on the decision in *Fontenot*, the logs are admissible without requiring any testimony aside from PSA Walkowiak and PSA Braley, the individuals who administered the breath tests to Aubrey and Kagan. The People contend PSA Walkowiak, PSA Braley, or another officer who is the keeper of the department's DataMaster records, can authenticate the log sheets, verify access to the logs, and verify that the logs are kept in the regular course of business of the Troy Police Department. The People further contend Mr. Fondren can testify in lieu of Mr. Clark about the 120-day verification test results completed by Mr. Clark, based on Mr. Clark's written data and Mr. Fondren's physical examination of the data.

week" means a seven-day period from Sunday through Saturday. *People v Rexford*, 228 Mich App 371, 374; 579 NW2d 111 (1998). Subsection (2) requires the test for accuracy shall be made using an alcohol standard approved by the MSP and must meet the requirements for accuracy by having a test result that does not exceed plus or minus five percent. R 325.2653(2).

Subsection (3) requires a breath alcohol test instrument to be inspected, verified for accuracy, and certified every 120 days by an authorized representative of the manufacturer or a class IVB operator. R 325.2653(3).

At the evidentiary hearing, Mr. Clark did not appear and was considered an unavailable witness for a variety of reasons. Rather, the People called Sgt. York and Mr. Fondren. The People intended to call Sergeant Joseph Haddad (**"Sgt. Haddad"**), the custodian of Troy Police Department's DataMaster records; however, Sgt. Haddad's testimony was waived by Aubrey and Kagan. The logs for the department's DataMaster instrument for the months of June 2019 through January 2020 were conditionally admitted. The log for each month showed the results of the weekly accuracy check conducted on the instrument as well as the result of the 120-day inspections and certifications for those months. Each log was signed and dated by Sgt. Haddad.

After the logs were conditionally admitted, the People called Sgt. York to testify. Sgt. York testified he performed a 120-day verification test on January 25, 2020, and the inspection revealed the department's DataMaster instrument was in proper working order. This occurred approximately four months after the breath tests were administered to Aubrey and approximately three months after the breath tests were administered to Kagan, and therefore, are of minimal relevance to establish accuracy for the tests administered in September 2019 and October 2019.

After Sgt. York testified, the People called Mr. Fondren, Technical Supervisor for the Michigan State Police Breath Alcohol Program, to attempt to establish the department's DataMaster instrument and its results were reliable.

Mr. Fondren's testimony focused on his interpretation of Mr. Clark's work and data. Mr. Fondren testified he was not present when Mr. Clark performed any 120-day verification test, and had no pictures or videos, and could only offer his opinion from his review of Mr. Clark's work and the department's DataMaster print outs, including OD-84s[3] and OD-33s.[4] Mr. Fondren acknowledged Mr. Clark logged every single simulator temperature as either 34, 34.0, or 34.00 on all of the department's OD-84s and on other OD-84s throughout Michigan, despite the fact other individuals who ran 120-day verification tests, like Sgt. York, logged different temperatures by varying degrees, such as 34.01, 34.02, or 33.99.[5] Mr. Fondren categorized Mr. Clark's logging of the identical temperatures as "remarkable" and acknowledged the procedure Mr. Clark used to obtain the temperature readings were done incorrectly.

Mr. Fondren further testified there were errors in records of other department's DataMaster printouts written by Mr. Clark, relating to barometric pressure.[6] However, Mr. Fondren opined there were allegedly no such discrepancies with respect to the 120-day verification tests conducted on the Troy Police Department's DataMaster instrument on June 5, 2019, and September 27, 2019.

Mr. Fondren further stated it was possible for Mr. Clark to have engaged in some means of fraud in Troy that are different from the allegations stemming from the MSP investigation in Beverly Hills – a community in which its DataMaster instrument has been implicated.

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[3] An OD-84 is an evidential breath testing inspection report containing hand-recorded data of the 120-day verification test results of a DataMaster instrument in a check-list format. A service technician is required to mark each box to indicate he followed every step in the calibration process to verify the instrument is accurate and reliable.

[4] An OD-33 is an evidential breath testing log showing hand-recorded data of the weekly accuracy test results of a DataMaster instrument. A service technician is required to fill out all sections of the form, which include the instrument's location, instrument number, ORI number, month, year, dry gas alcohol standard lot number/expiration date, day, operation performed, target, external standard, operator ORI number, certification number, and signature.

[5] This was also confirmed by Dr. Stolz.

[6] A DataMaster instrument must know what the barometric pressure is when a dry-gas test is performed. Generally, a cylinder of dry gas has a nominal value of .08. One atmosphere of pressure is equivalent to 1,013 millibars. Mr. Fondren acknowledged most DataMaster instruments are not exactly one atmosphere of pressure. In turn, barometric pressure changes and may change by a millibar or two or three. However, barometric pressure should not change significantly over a 20-25-minute period, the time an on-site inspection takes place. Mr. Fondren admitted that some of the barometric pressure values written by Mr. Clark showed significant barometric pressure changes that were not reflected anywhere else across Michigan.

On February 21, 2019, Mr. Clark performed an accuracy check on Beverly Hills Police Department's DataMaster instrument and submitted an OD-84 with its corresponding tickets. Nearly one year later, Mr. Fondren discovered Mr. Clark used a different DataMaster instrument to perform the accuracy check and changed the serial number on that instrument to match the serial number on the Beverly Hills Police Department's DataMaster instrument. Mr. Fondren's admissions suggest Mr. Clark was not physically present at the Beverly Hills Police Department when he allegedly performed the accuracy check on Beverly Hills Police Department's DataMaster instrument.

It is this Court's opinion Mr. Fondren was unable to testify as to the substance or accuracy of Mr. Clark's work. Mr. Clark's work and data are fairly treated as suspect in light of his alleged fraud, forgery, and irregularities of his data. In turn, Mr. Fondren's attempt to utilize Mr. Clark's work and data to opine that the department's DataMaster instrument and its results were reliable is suspect.[7]

During cross-examination, Mr. Fondren was contradictory, argumentative, and evasive. Moreover, the substance of Mr. Fondren's testimony undermined his credibility. The Court will not go into an in-depth discussion of Mr. Fondren's testimony as it was comprehensive and lengthy. However, the Court will illuminate certain key points.

First, Mr. Fondren admitted he allowed Mr. Clark to continue conducting 120-day verification tests, for a period of seven weeks, even though he knew Mr. Clark was missing 120-day verification deadlines and he had serious concerns about Mr. Clark's performance and work product.[8]

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[7] The Court heard substantial evidence about Mr. Clark's alleged fraud in Beverly Hills, which fairly calls into question whether Mr. Clark correctly performed the 120-day verification tests in Troy.

[8] On November 15, 2019, a letter from the MSP was sent to Intoximeters, informing Intoximeters to terminate Mr. Clark. However, Mr. Clark was permitted to continue performing 120-verification tests until on or about January 8, 2020.

Second, Mr. Fondren admitted he allowed Mr. Clark to continue submitting OD-84s with simulator temperatures documented at 34 degrees Celsius, despite acknowledging that such a thing was implausible.

And third, in open court, while the Court was sitting, an event occurred that significantly lessened Mr. Fondren's credibility. The Court issued a sequestration order on September 24, 2020. Despite the order, on October 2, 2020, Mr. Fondren appeared in court accompanied by Jeffrey Nye, the Director of the Michigan State Police Forensic Division. The Court made specific reference to a document written to Jeffrey Nye. The Court then asked the City Attorney, Allan Motzny, who the man was sitting behind him. Mr. Fondren interjected, even though the question was asked of the City Attorney, and stated, "he's just with me, we drove over together."

The Court finds Mr. Fondren's response deliberately disingenuous as it was later discovered the individual was not simply his ride, but Jeffrey Nye. Jeffrey Nye would have been subject to the sequestration order if his presence was known to the Court. Consequently, Mr. Fondren's testimony is suspect based on his lack of transparency and lack of candor.

In contrast, Aubrey's and Kagan's expert witness, Dr. Stolz, was knowledgeable and credible. The Court, after questioning by both attorneys, qualified Dr. Stolz as an expert in the field of metrology.

Dr. Stolz received his master's degree and PhD in physics from the Technical University in Munich, Germany, where he studied metrology; the study of analyzing data or performing measurements for the purpose of determining measurement uncertainty, scientific traceability, and performing statistical analysis.

Dr. Stolz began working at Michigan State University's National Super Conducting Cyclotron Laboratory (**"Cyclotron Laboratory"**) in 2001. In 2008, Dr. Stolz became the department head of operations of the Cyclotron Laboratory and currently works in that capacity,

where he performs research on rare isotopes, which involves performing measurements, developing new measurement instruments, and developing new methods of measurement, among other things.

Dr. Stolz published articles in peer-reviewed journals in the field of physics and has given national and international presentations on metrology, including forensic metrology. Further, Dr. Stolz has been qualified as an expert in over 30 cases involving DataMaster instruments and measurements with breath alcohol.

Aubrey and Kagan called Dr. Stolz as an expert witness to dispute the accuracy of the department's DataMaster instrument. Dr. Stolz testified that, to a reasonable degree of scientific certainty, the department's DataMaster instrument and its results were not scientifically reliable. Dr. Stolz reasoned the method of testing in this case lacked scientific traceability and opined that the wet bath solution used by the MSP was not credible because the manufacturer of the solution, Guth Laboratories, is not an accredited laboratory under the International Organization for Standardization.

The standard for external accuracy checks and calibrations for DataMaster instruments involve either a dry gas or wet bath test. Under the standard wet bath simulator test, the simulator containing a solution of known BrAC/BAC value must be at the operating temperature of 34 degrees Celsius, plus or minus .2 degrees, before use.[9] A temperature deviation from 34 degrees Celsius by more or less than .2 degrees would have an impact on the reading of the ethanol concentration by 6.8 to 7.4 percent.

Dr. Stolz testified Mr. Clark's work and data involving the simulator solution concentrations and the temperatures Mr. Clark recorded by hand were unable to be traced back to

[9] Aubrey's and Kagan's Exhibit Y. The wet bath calibration test includes testing solutions that are set at predetermined alcohol concentrations of .04, .08, and .20, and designed to test whether the machine will pick up any solution or interference.

a known reference standard, as required to be scientifically reliable. Dr. Stolz reasoned that because Mr. Clark wrote the simulator temperatures on the OD-84s as either 34, 34.0, or 34.00 without any additional documentation or records, it is unknown how those particular temperatures were obtained, and that was highly unlikely that the simulator temperature would read 34, 34.0, or 34.00 for many measurements over several months.[10] As a result, Dr. Stolz opined there was no objective proof the wet bath calibration test results were reliable.

Dr. Stolz further testified there was no evidence that the 120-day verification tests were done correctly, as there were no eyewitnesses, no videos, and no photographs of Mr. Clark's work. Dr. Stolz opined that, to a reasonable degree of scientific certainty, the department's DataMaster instrument could not be considered reliable on either September 7, 2019, or October 28, 2019. Ultimately, Dr. Stolz opined if the 120-day verification tests were not done correctly, then the subject tests cannot be considered reliable, from a scientific standpoint.

Here, it is undisputed that the 120-day verification tests are crucial in determining whether the subject test results are reliable. If calibrations are done incorrectly, a DataMaster instrument could show that a person was above the legal driving limit when the person was not, or it could show that a person was below the legal driving limit when the person was not.

The People have shown by a preponderance of the evidence the department's DataMaster instrument was properly functioning on January 25, 2020. However, there exists little evidence the department's DataMaster instrument was properly functioning at the time the tests were administered to Aubrey and Kagan.[11]

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[10] Dr. Stolz indicated the temperatures Mr. Clark recorded could reflect a measurement other than the temperature reading of the wet bath simulator, such as the setting of the thermostat of the wet bath simulator, or a number that the wet bath simulator displayed.

[11] The 120-day verification test on January 25, 2020, occurred four months after the breath alcohol tests were administered to Aubrey and three months after the breath alcohol tests were administered to Kagan.

Even though the department's DataMaster instrument passed its 7-day verification tests that took place between September 2019 and January 2020, Mr. Clark was the one who performed the 120-day verification tests on June 5, 2019, and September 27, 2019, which ultimately calls into question whether the department's DataMaster instrument was properly calibrated at those times.[12]

As each 120-day verification test result creates a reference point that the 7-day verification test is referred to, not knowing whether the 120-day verification tests are accurate and reliable calls into question whether or not the 7-day verification tests are also accurate and reliable because the 7-day verification test results are only accurate when viewed as a single-point verification, and by themselves, are insufficient to establish that a DataMaster instrument provides reliable measurement results.

The People essentially ask the Court to disregard Administrative Rule R 325.2653(3) and rely on the 7-day verification tests, R 325.2653(1), to establish that the department's DataMaster instrument was reliable based on the holding in *People v Rexford*, 228 Mich App 371; 579 NW2d 111 (1998).

The *Rexford* court held that, "failure to test breath alcohol machine for 13 days, in violation of the 7-day verification test requirements did not warrant suppression of defendant's breath tests results because the violation was "clearly harmless." *See Rexford*, 228 Mich App at 379. The Court of Appeals reasoned that the error was clearly harmless "because there is no showing of the inaccuracy of the apparatus or the Breathalyzer test results where only one test was missed in a six-month period and the tests that were performed showed the apparatus to be accurate." *Rexford*, 228 Mich App at 379.

[12] The Court acknowledges that Troy Police Department's DataMaster instrument's 120-day verification tests were not found to be falsified by the MSP investigation. However, the Court is not inclined to accept this conclusion as proof that the machine was verified and certified properly in June 2019 and September 2019.

Further, the Court of Appeals noted, "the failure to comply with Rule 3(1) does not concern the administration of the Breathalyzer tests so as to sufficiently call into question the accuracy of the test. Therefore, violation of Rule 3(1) does not warrant suppression of the evidence of the Breathalyzer tests." *Rexford*, 228 Mich App at 379.

The Court finds *Rexford* is distinguishable as the issue here involves alleged violations of the 120-day verification tests rather than the 7-day verification tests. The 7-day verification tests occur approximately 52 times a year, while the 120-day verification tests occur only 3 times a year. It follows that a violation of a 7-day verification test is less consequential than a violation of a 120-day verification test. This Court is not willing to hold that alleged violations of the 120-day verification tests are "harmless," as to do so would render Administrative Rule R 325.2653 nugatory because the Court is required to interpret Administrative Rule R 325.2653 in its *entirety* in the most reasonable manner possible. *See Duffy v Mich Dep't of Nat Resources,* 490 Mich 198, 215; 805 NW2d 399, note 7 (2011); *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

Moreover, the People argue that the logs are admissible as business records because they are nontestimonial. *Fontenot*, slip op at 2. The People reason the logs are nontestimonial because they are kept in the regular course of regularly conducted business activity and it is the regular practice of the Troy Police Department to record the results of the weekly accuracy checks and the 120-day verification tests on the logs to show compliance with the administrative rules. The People further argue the trustworthiness provision of MRE 803(6) does not apply because the source of the information is the DataMaster instrument itself and the trustworthiness provision only applies when the records in question are prepared in anticipation of litigation. *Fontenot*, slip op at 4. As a result, the People request the OD-33 logs be admitted into evidence because they are the records used to demonstrate the reliability of the instrument.[13]

[13] The OD-84s are not used to lay the foundation for the admissibility of breath test results.

On the other hand, Aubrey and Kagan contend if the OD-84 logs demonstrate that the department's DataMaster instrument is unreliable or inaccurate, then the logs are not admissible under MRE 803(6), and as a result, both the logs and the instrument are not admissible. The *Fontenot* court specifically held that DataMaster logs are not prepared for the purpose of litigation. *Fontenot*, slip op at 4. And further held that, "MRE 803(6) addresses the trustworthiness of the type of document in question, not the specific document at issue in a given case. Whether the DataMaster logs at issue in this case were accurate has no effect on whether they are an actual business record." *Fontenot*, slip op at 5.

This Court is bound to follow the *Fontenot* decision and finds that the logs are nontestimonial and admissible as business records under MRE 803(6). However, in light of the fact Mr. Clark's work and data were neither independently recorded nor credibly verified, the People have failed to prove Mr. Clark's work and data is reliable. Moreover, Mr. Fondren's and Dr. Stolz's testimonies demonstrate there was a significant deviation from Administrative Rule R 325.2653 that has called into question the accuracy of the department's DataMaster instrument results.

This Court finds the People cannot rely on Mr. Fondren's testimony to justify Mr. Clark's work and data as reliable to support the accuracy of the department's DataMaster instrument.

The People further argue that even though Mr. Fondren admitted there was evidence Mr. Clark falsified records for some DataMaster instruments, there was no evidence presented to suggest the 120-day inspections of Troy Police Department's DataMaster instruments were improperly conducted. The Court disagrees. To the contrary, there has been sufficient testimony challenging the accuracy of the department's DataMaster instrument and its results, justifying suppression of the department's DataMaster instrument and its results.

For the foregoing reasons, the Court finds that the People failed to meet its burden in establishing that Troy Police Department's DataMaster instrument and its results are reliable.

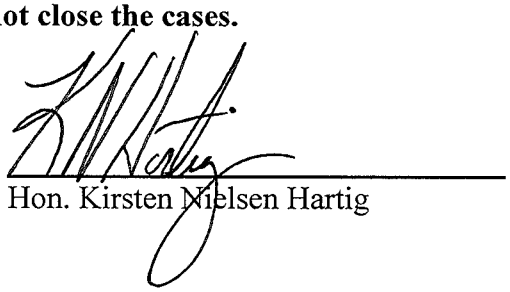
CONCLUSION

Aubrey's and Kagan's motions to suppress are granted in part and denied in part. Troy Police Department's DataMaster logs are admissible; however, Troy Police Department's DataMaster instrument and its results were unreliable, and therefore, suppressed.

This is not a final order and does not close the cases.

It is so ordered.

Dated: December 23, 2020



Hon. Kirsten Nielsen Hartig