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2
3 SUPERIOR COURT OF CALIFORNIA
4 COUNTY OF SAN DIEGO
5

6 IN RE:

7 8 CITY OF SAN DIEGO PHOTO RED
8 LIGHT CASES, MOTIONS TO
9 EXCLUDE EVIDENCE PACKETS fm1

CASE NUMBERS:

B16464A, B16681A, B16772A,
B17833A, B17968A, B17983A,
B18095A, 18404A

RULING & ORDER AFTER
HEARING ON DEFENDANTS'
MOTIONS TO EXCLUDE
EVIDENCE PACKETS

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12 On June 23, 2010, at the time of trial, the court heard motions in limine to exclude the
13 entire evidence packet submitted by American Traffic Solutions (hereafter "ATS," the red light
14 camera company for the City of San Diego) in each of the above-captioned red-light automated
15 enforcement (hereafter "red-light camera" or "photo red light") cases. The court took the
16 motions under submission and solicited briefing on the issues from defense counsel and the
17 City. Having read and considered the Points and Authorities and Reply Brief filed by defense
18 counsel Mitchell Mehdy on July 8 and July 23, 2010, the Points and Authorities filed by defense
19 counsel Elizabeth Aronson on July 17, 2010, the People's Opposition filed on July 19, 2010,
20 and also having considered the testimony of San Diego Police Officer Graves presented at the
21 hearing on defendants' Motion to Exclude Evidence, and also having considered, in particular,
22 *Evidence Code §§1561, 1562, 1271 and 1280, People v. Khaled*, case no. 30-2009-304894
23 [2010 Cal.App.LEXIS 1144], *Crawford v. Washington* (2004) 541 U.S. 36 and *Melendez-Diaz*
24 *v. Massachusetts* (2009) 129 S.Ct. 2527, *People v. Hawkins* (2002) 98 Cal.App.4th 1428,
25 *People v. Chikosi* (2010) 185 Cal.App.4th 238, and other cases cited by counsel, the court
26 makes the findings and rulings that follow.

27 ///

28 1 B16464A (Lim), B16681A (Hernandez), B16772A (K.), B17833A (Ceva),
B17968A (Pedro), B17983A (M. K.), B18095A (Gall), B18404A (S. Ja)

1 ISSUES PRESENTED

2 The main issues in the red-light camera cases before this court are whether the
3 documents submitted by ATS are admissible over defendants' hearsay and 6th Amendment
4 Confrontation Clause objections. The documents and information objected to by defendants
5 are: fn 2

- 6 (a) the interior *Declaration* from the custodian of records of ATS (Exhibit B) ;
- 7 (b) the exterior *Affidavit* from the custodian of records of ATS (Exhibit C);
- 8 (c) the 6 photographs (two front, two rear, close-up face and close-up license plate) and
9 a CD (compact disc) containing digital copies of the photographs together with a digital
10 video-recording fn3 taken by the red light camera system (hereafter referred to
11 collectively as "photographs") of each alleged violation at 8 different intersections.
(Exhibits E 1-7)
- 12 (d) data box information superimposed and imprinted on the photographs (Ex. E 2-5);
- 13 (e) two camera system maintenance records for the intersection in each violation entitled
14 "Field Service & Inspection Logs" (before and after each violation) (Exhibits F-1 & 2);
- 15 (f) an ATS "City of San Diego Image Log," stating the date images for each citation
16 were imported into the ATS database (Exhibit G);
- 17 (g) two documents entitled "Certificate of Bulk Mailing," one from the United States
18 Postal Service and another that appears to be a copy of the first printed on letterhead of
19 the San Diego Police Department (hereafter "SDPD") Automated Enforcement Program.
20 The copy shows the same information but adds a "document number" and "date created"
21 about a week after the original (Exhibits H-1 & 2).

22 As stated by attorney Mehdy in his Reply Brief (p. 7), "The Defense does not have an
23 issue with the evidence used; it is in the manner in which it is presented. The information
24 regarding the alleged violation is purposefully created in the anticipation of litigation, packaged
25 neatly for an officer, and then used to convict a person who never had the opportunity to
26 properly confront anyone other than the officer who can only recite what he has on the papers in
27 front of him."

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2 A representative copy of one entire evidence packet (Case No. B18095) is attached for reference as Exhibits A - H.
3 The CD-R for B18404A, *People v. S* contains digital copies of the 6 photographs, but *no video*.

1 The City of San Diego, (hereafter "City") opposes, contending that (1) the photographs
2 and video are not hearsay, (2) the written information printed on the photographs and digital
3 video recording as well as each of the other written documents all fall within the business
4 records and official records exceptions to the hearsay rule (see Evidence Code §§ 1271, 1280).
5 and (3) all of the documents and imprinted information are "exempt" from the Confrontation
6 Clause because they are not "testimonial" under *Crawford*, supra.

7 ///

8 Applicability of *People v. Khaled*

9 The recent case of *People v. Khaled*, supra, is a decision by the appellate department of
10 the Orange County Superior Court which by its appellate level is not legally binding on the San
11 Diego County Superior Court. The court here notes that the decision in *Khaled* was based on
12 facts and testimony particular to the *full trial* in that case, whereas the decision in the cases
13 before this court is based solely on the defendants' trial *motions to exclude* the City's evidence
14 packet. Thus, while referenced herein, this court has considered the decision and its reasoning,
15 but has not relied on *Khaled* as binding precedent in these matters.

16 ///

17 *Crawford v. Washington* - Testimonial Evidence - 6th Amendment Right to Confront

18 In *Crawford*, the U.S. Supreme Court overturned the "adequate 'indicia of reliability'"
19 test from *Ohio v. Roberts* (1980) 448 U.S. 56 and instead held that "[w]here testimonial
20 statements are at issue, the only indicium of reliability sufficient to satisfy constitutional
21 demands is the one the Constitution actually prescribes: confrontation." (*Crawford*, supra, 541
22 U.S. at p. 68-69.)

23 The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal
24 prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against
25 him." (U.S. Const., 6th Amend.) In discussing the historical background of the Confrontation
26 Clause the Supreme Court noted that a "core class of "testimonial" statements" includes "ex
27 parte in-court testimony . . . such as *affidavits*, custodial examinations, prior testimony that the
28 defendant was unable to cross-examine, or similar pretrial statements that declarants would
reasonably expect to be used prosecutorially," as well as "extrajudicial statements . . . contained
in formalized testimonial materials, such as *affidavits*, depositions, prior testimony, or
confessions., (*Crawford*, supra, 541 U.S. at p. 51-52 [emphasis added], citing *White v. Illinois*

1 (1992) 502 U.S. 346, 365. The court concluded that, "[o]ur cases have thus remained faithful to
2 the Framers' understanding: *Testimonial statements of witnesses absent from trial have been*
3 *admitted only where the declarant is unavailable, and only where the defendant has had a prior*
4 *opportunity to cross-examine.*" (*Crawford, supra*, 541 U.S. at p. 59 [emphasis added].) The
5 applicability under *Crawford* of the Confrontation Clause to the testimonial statements in the
6 written ATS custodian *Affidavit* is discussed at length below.

7 ///

8 **Melendez-Diaz v. Massachusetts - Testimonial Evidence - 6th Amendment Right to Confront**

9 *Melendez-Diaz* involved a state-court drug trial where the prosecution introduced, as
10 prima facie evidence of drug possession, sworn certificates of state laboratory analysts stating
11 that material seized was, in fact, cocaine. The U.S. Supreme Court followed *Crawford*, holding
12 that admission of the analyst's certificates violated the defendant's Sixth Amendment right to
13 confront the witnesses against him, stating:

14 This case involves little more than the application of our holding in *Crawford v.*
15 *Washington*, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177. The Sixth Amendment
16 does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and
17 the admission of such evidence against *Melendez-Diaz* was error.

18 (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2542.

19 The Supreme Court in *Melendez-Diaz* found that the sworn certificates fell within a
20 "core class of testimonial statements" in that they are a declaration "made for the purpose of
21 establishing or proving some fact," i.e. the existence of cocaine. (*Melendez-Diaz, supra*, 129
22 S.Ct. at p. 2532, citing *Crawford, supra*, 541 U.S. at p. 51.) "The 'certificates' are functionally
23 identical to live, in-court testimony, doing 'precisely what a witness does on direct
24 examination.'" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532, citing *Davis v. Washington* (2006)
25 547 U.S. 813, 830. The affidavits were held to be "testimonial statements" and the analysts
26 were "witnesses" for purposes of the Sixth Amendment, so

27 "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that
28 petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be
confronted with' " the analysts at trial."

1 (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532, citing *Crawford, supra*, 541 U.S. at p. 54.) Again
2 citing *Crawford*, the Supreme Court stated that, "[d]ispensing with confrontation because
3 testimony is obviously reliable is akin to dispensing with jury trial because a defendant is
4 obviously guilty. This is not what the Sixth Amendment prescribes." (*Melendez-Diaz, supra*, 129
5 S.Ct. at p. 2536, quoting *Crawford, supra*, 541 U.S. at p. 61-62.)

6 The *Melendez-Diaz* decision went on to discuss the value of cross-examination in
7 "weeding out" agency errors and/or fraud which may result from time pressure, outcome
8 pressure, incentive pressure, lack of proper training, or deficiency in judgment. (See *Melendez-*
9 *Diaz, supra*, 129 S.Ct. at p. 2536-2537.) The Court noted that the affidavits in that case
10 contained only a bare-bones statement that the substance was cocaine. (*Id.* at p. 2537.) The
11 defendant was entitled to *explore by cross-examination the possibility of error* by regarding
12 what tests were performed, whether routine, testing techniques, methodologies, reliability, types
13 and numbers of potential errors, research, general acceptability, published material, problems of
14 subjectivity, bias, unreliability of common tests and whether interpreting results required
15 judgment or skills that the analysts may not have possessed. (*Id.* at p. 2537-2538.) The
16 Supreme Court found "little reason to believe that confrontation will be useless in testing
17 analysts' honesty, proficiency, and methodology--the features that are commonly the focus in
18 the cross-examination of experts." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538.)

19 The Supreme Court noted that the *affidavits* do not qualify as traditional official or
20 business records, and even if they did, their authors would *still be subject to confrontation*.
21 (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538.)

22 "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible
23 record, but could not do what the analysts did here: *create* a record for the sole purpose
24 of providing evidence against a defendant."

25 (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2539 [emphasis in original].) In discussing affidavits as
26 business record and official record hearsay exceptions under *Crawford* the Supreme Court
27 stated:

28 "Most of the hearsay exceptions covered statements that by their nature were not
testimonial--for example, business records or statements in furtherance of a conspiracy."

1 541 U.S., at 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177. Business and public records are
2 generally *admissible absent confrontation* not because they qualify under an exception
3 to the hearsay rules, but because--having been created for the administration of an
4 entity's affairs and not for the purpose of establishing or proving some fact at trial--they
5 are *not testimonial*. Whether or not they qualify as business or official records, the
6 analysts' statements here--prepared specifically for use at petitioner's trial--were
7 testimony against petitioner, and the analysts were subject to confrontation under the
8 Sixth Amendment.

(*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2539-2540 [emphasis added].)

9 Finally, the Supreme Court in *Melendez-Diaz* noted that "[t]he Confrontation Clause
10 may make the prosecution of criminals more burdensome, but that is equally true of the right to
11 trial by jury and the privilege against self-incrimination. The Confrontation Clause--like those
12 other constitutional provisions--is binding, and we may not disregard it at our convenience."
(*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2540.)

13 The applicability under *Crawford* and *Melendez-Diaz* of the Confrontation Clause to the
14 testimonial statements in the written ATS custodian *Affidavit* is discussed at length below.

15 ///

16 Applicable Evidence Code Sections

17 An out of court statement offered to prove the truth of the matter asserted is *inadmissible*
18 hearsay unless an exception to the *hearsay rule* applies. *Evidence Code §1200*.

19 Business records are admissible hearsay exceptions under *Evidence Code §1271* where
20 they are made (a) in the regular course of business, (b) at or near the time of the event, (c) the
21 custodian testifies as to the identity of the record and its mode of preparation, and (d) the
22 sources of information and method and time of preparation indicate trustworthiness.

23 Official records are admissible hearsay exceptions under *Evidence Code §1280* where
24 the records are made (a) in the scope of duty of a public employee, (b) at or near the time of the
25 event, and (c) the sources, method and time of preparation indicate trustworthiness.

26 *Evidence Code §1561* establishes the requirements for custodians of record in response
27 to subpoenas duces tecum. The requirements include placing the records in a labeled sealed
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1 envelope inside an outer addressed envelope, together with an affidavit stating, (i) the signer is
2 the custodian of records with authority to certify the records, (ii) that the enclosed documents
3 are true and correct copies, (iii) prepared by personnel in the ordinary course of business, at or
4 near the time of the event, (iv) identify the records enclosed, and (v) mode of preparation.

5 *Evidence Code §1562* makes copies of §1271 business records admissible, and provides
6 that the affidavit of custodian of records is presumed true as to the statements made under
7 Evidence Code §1561 (i.e. authority to certify, true copy, prepared by personnel in ordinary
8 course, at or near the time, identity, mode of preparation). By the clear language of §1562
9 though, an affidavit of custodian is *not admissible or presumed true* as to non-1561 statements
10 in the affidavit. (See discussion, *infra*, regarding *Affidavit* of custodian of records.)

11 ///

12 **Description and limited admissibility of interior Declaration AND exterior Affidavit**

13 Each evidence packet submitted by ATS has a sealed envelope (see Evidence Code §
14 1560(b) & (c)), containing *inside* a document entitled "Declaration of Custodian of Records,
15 California Evidence Code 1560" (hereafter "*Declaration*") The *Declaration* is identical in all
16 San Diego/ATS red light camera cases. (See Exhibit B)

17 Each evidence packet from ATS also has, *attached to the exterior* of the sealed envelope
18 another document entitled "Affidavit: San Diego Superior Court" (hereafter "*Affidavit*") signed
19 by the Custodian of Records for ATS. Each Affidavit is identical in all San Diego/ATS red
20 light camera cases, except that each individual case contains a header specifically identifying
21 the Citation Number, Defendant's Name, Citing Agency: San Diego Police Department,
22 Date/Time of Violation, Place of Violation, and C.V.C. Section(s) Charged (usually either
23 21453(a)-red light or 21453(c)-red arrow.) (See Exhibit C).

24 There is virtually never an appearance in this court by any photo red light company
25 employee.

26 The City's evidence packet in each case is submitted by ATS pursuant to subpoena
27 duces tecum. Under Evidence Code §§ 1561 and 1562 the *Declarations* and *Affidavits* from the
28 custodian of records would only be admissible to lay a foundation for introducing the records of
ATS. (Evidence Code §§ 1561, 1562; see also, *Taggart v. Super Seer Corp.* (1995) 33
Cal.App.4th 1697; *In re Troy D.* (1989) 215 Cal.App.3d 889, 903). Thus, as discussed below,

1 the custodian of records' *Declaration* in its entirety and applicable portions of the *Affidavit*
2 (mainly paragraph 2) may therefore be admitted specifically for this foundational purpose only
3 but not admitted as to testimonial statements contained therein. The court does not perceive any
4 Confrontation Clause problem with using the custodian's *Declaration* and *Affidavit* paragraph 2
5 for the limited purpose of laying a foundation under Evidence Code §§1561 and 1562. (See
6 *Melendez-Diaz, supra*, 129 S.Ct. at p. 2538-2539.)

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8 **Admissibility of the interior Declaration of Custodian of Records** (Exhibit B)

9 When a private citizen (here, ATS custodian or technician) acts under contract with a
10 public entity (the City or law enforcement agency) to perform work as an agent of the public
11 entity, he or she is acting as a public employee under Evidence Code § 195. (See *Imachi v.*
12 *DMV* (1992) 2 Cal.App.4th 809, 816-817; see also, Jefferson, *California Evidence Benchbook*,
4th ed, § 5.8.)

13 The *Declaration* from the custodian of records is made "under penalty of perjury" and
14 appears to mostly comply with the Evidence Code by making statements laying a foundation for
15 admission of the enclosed documents in summary fashion as described in Evidence Code
16 §§1561 and 1562, specifically:

- 17 - that the signator is the authorized custodian of records,
 - 18 - with authority to certify the attached records,
 - 19 - that the enclosed records are true copies of the business records of ATS,
 - 20 - that the records were prepared in the ordinary course of business,
 - 21 - by the personnel of ATS,
 - 22 - at or near the times of the acts, conditions, or events depicted therein.
- (See Evidence Code §§1561, 1562, 1271 and 1280)

23 The *Declaration* further *identifies* specified items of evidence in the envelope and states, in
24 general, the *mode of preparation* and how the information was obtained or generated, or
25 captured, transmitted and stored in the ATS database in Scottsdale, Arizona. (Evidence Code §§
26 1271, 1280, 1561 and 1562). The *Declaration* goes on to list the actual exhibits in the package,
and then declares, "[i]f I were called as a witness in this matter, I could and would competently
testify under oath to the foregoing facts."

27 The only really questionable conclusory statement in the *Declaration* is in the next to
28 last paragraph: "The source of the information and method of preparation were such as to
indicate their trustworthiness," which is a legal conclusion for the court to make based on the

1 declaration or testimony at trial. Still the court finds that the *Declaration* is admissible under
2 Evidence Code §§ 1561 and 1562.

3 ///

4 **Admissibility of exterior "Affidavit" of Custodian of Records** (Exhibit C)

5 Again, the *Affidavits* from the custodian of records are admissible for the foundational
6 purpose of introducing the business records of ATS and the *Affidavit* is presumed true as to the
7 statements made pursuant to §1561 (i.e. authority to certify, true copy, prepared by personnel in
8 ordinary course, at or near the time, identity, mode of preparation). (Evidence Code §§ 1561,
9 1562, 1271.) The *Affidavits* in these cases are also made "under penalty of perjury," clearly
10 being sworn declarations. Paragraph 2 of the *Affidavits* appropriately state the standard
11 custodian of records language under Evidence Code §§ 1561 and 1562 (i.e. custodian of
12 records, authority to certify, true copies, prepared in the ordinary course of business, at the
13 "time the camera equipment was serviced"). That portion, i.e. Paragraph 2 of the Affidavit, is
therefore admissible.

14 But the remaining 4 paragraphs (paragraphs 1, 3, 4 and 5) of each *Affidavit* contain
15 many testimonial hearsay statements going *far* beyond the custodian declaration authorized in
16 Evidence Code §§1561 and 1562. The testimonial statements describe specific employee
17 procedures, time in training, experience of trainers, duties of trainers, habits of technicians and
18 equipment used by the various department employees of ATS. In addition, the custodian uses
19 technical terms which a witness would explain like 'Advanced Encryption Standard Protocol'
20 and reference to an unspecified 'computer interface'. Without testimony to explain technical
21 terms used in the *Affidavit*, the court is hindered in finding that the "sources, method of
22 preparation, transfer and storage and time are trustworthy as required under Evidence Code
23 §1271. Following is a synopsis of the *Affidavit* statements containing testimony going beyond
foundation:

24 Paragraph 1 states the existence of an ATS contract with the City and goes on to
25 attest to the City and SDPD's cooperative operation of the photo enforcement system.

26 Paragraph 3 pertains to the *Field Service & Inspection Logs* of ATS. In the
27 *Affidavit* the custodian testifies to technician training, experience level of the trainers,
28 duties of the trainers, 'routine' logs, logs prepared with inspections, and purportedly

1 personal knowledge all technicians have developed habits for gathering and reporting
2 data.

3 Paragraph 4 discusses the Photo Images and states acceptable custodian
4 information under §1561 and 1562 including, where the prints originate, employee
5 review in the 'normal course of business', 'at or near the time' of the notice to appear.
6 Paragraph 4 goes on to testify regarding training of employees by staff members who's
7 "sole job" is to "review images and print the notice to appear," review through
8 "*internally developed software*," which the *employee can "enlarge and enhance"*
9 "*without altering the content*," use of "Advanced Encryption Standard protocol," "the
10 *sole purpose of these photographs is to provide the court with violation images.*" The
11 paragraph concludes with appropriate descriptions of the photographs, enlargements and
12 video.

13 Paragraph 5 gives fairly detailed testimony about ATS employee procedures for
14 attempting to identify the correct person to cite, and it describes the certificate of bulk mailing
15 done within 15 days required by Vehicle Code §40518(a). It attests to a "computerized
16 interface" with DMV records, describes the method used to access and match DMV license
17 plate registration records to a California drivers license record which should be for the
18 registered owner, and the preparation and mailing of a notice to appear to the current address
19 linked to the registration.

20 The prosecution appears to contend that the *Affidavit* is admissible for *all* purposes
21 because each *Affidavit* itself falls within the business records or official records hearsay
22 exceptions; but this contention is unsupported. Instead of recording an act, condition or event
23 as part of a business record, the *Affidavit* of custodian of records describes in some detail
24 various aspects of the overall photo red light process at ATS and explains by way of written
25 testimony how the *other enclosed documents* recording *other* acts, conditions or events were
26 created. As stated above, under Evidence Code §1562, an affidavit of custodian is admissible
27 and presumed true as to Evidence Code 1561 statements but, by its clear language, is *not*
28 *admissible or presumed true* as to non-1561 statements. In these cases, since the affidavits
contain largely "testimonial statements" and the custodian is attempting to testify as a "witness"
for purposes of the Sixth Amendment, "[a]bsent a showing that the [custodian or other witness]
is unavailable to testify at trial *and* that defendants had a prior opportunity to cross-examine

1 [her], the defendants here are entitled to "be confronted with" the testifying witness at trial."
2 (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, and *Crawford*, *supra*, 541 U.S. at p. 54.)

3 In addition, in order to qualify under the business records exception, the document must
4 be prepared in the regular course of business (Evidence Code § 1271(a)). And to be considered
5 trustworthy under either the business records or official records exceptions, the document
6 cannot be prepared solely for litigation (see *Palmer v. Hoffman* (1943) 318 U.S. 109; cf. *County*
7 *of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439; see also, *People v. Lugashi* (1988) 205
8 Cal.App.3d 632, 641).

9 In the cases at hand, based on the date the *Affidavits* were signed in relation to the
10 offense dates, ^{fn4} it appears the *Affidavits* were prepared only *after* a citation was issued and it
11 was later decided that the case is going to be litigated, and a subpoena was served.
12 Accordingly, except for paragraph 2, the external *Affidavits* of the custodian of records have
13 been "prepared for litigation" and not in the regular course of business making them
14 inadmissible as business records, and subject to cross-examination as testimonial statements as
15 described in *Crawford* and *Melendez-Diaz*.

16 As such, the ATS *Affidavits* of the custodian of records and the written statements
17 contained therein in paragraphs 1, 3, 4 and 5 are not admissible (except to the limited extent
18 noted in paragraph 2 to lay a foundation under Evidence Code §§ 1561 and 1562), and the
19 motions to exclude are granted as to the *Affidavit*, paragraphs 1, 3, 4 and 5.

20 ///

21 **Admissibility of Photographs and Video** (Exhibits E-1 to E-7)

22 Generally, photographs are demonstrative evidence; "[t]hey are *not testimonial* and they
23 are *not hearsay*." (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746 [emphasis added].) This
24 proposition is equally applicable to videos. (See Cotchett, *California Courtroom Evidence*,
25 2010, § 27.06 [listing a videotape under "demonstrative evidence"].) The officer in the red light
26 camera cases authenticates the photographs and video by testifying as to his familiarity with
27 each intersection which has been personally inspected and periodically checked by the officer
28 accompanying the inspecting technicians from ATS.

4 The violations are dated between 11/15/09 – 12/22/09; all 8 *Affidavits* are dated 4/29/10.

1 Since the photographs and video are not hearsay, there is no need to analyze the
2 applicability of any hearsay exceptions, so the defendants' hearsay and Confrontation Clause
3 objections to the photographs and videos are *overruled* and those items of evidence may be
4 admitted.

5 ///

6 **Admissibility of Information Imprinted on the Photographs (Exhibits E-2 to E-5)**

7 In the San Diego/ATS red-light camera cases the photographs (but not the videos) have
8 writing referred to by the officers as a "data bar" superimposed on them. The writing includes
9 the intersection location, the date of each photograph and time of violation, the red light length,
10 the yellow light length, the time elapsed between photos, and the speed of the vehicle over the
11 sensors. The defendants contend, as in *Khaled*, that the data bar writing imprinted on the
12 photographs constitutes hearsay, and that its admission violates the Confrontation Clause of the
13 Sixth Amendment. ⁵ The proper resolution of this issue depends on whether the printed
14 information is introduced merely to reflect the computer's internal operations and data, or to
15 prove the truth of the imprinted information.

16 In *Aguimatang v. Cal. State Lottery* (1991) 234 Cal.App.3d 769, concerning a printout
17 of lottery winners, the court stated that "[c]omputer printouts are admissible and are presumed
18 to be an accurate representation of the data in the computer. If offered for the truth, however,
19 they must qualify under some hearsay exception, such as business records under Evidence Code
20 sections 1271." (*Aguimatang, supra*, 234 Cal.App.3d at p. 797 [citations omitted] (Emphasis
21 added); see also, *People v. Hernandez* (1997) 55 Cal.App.4th 225.)

22 In *People v. Hawkins* (2002) 98 Cal.App.4th 1428, however, the trial court allowed into
23 evidence computer printouts showing a date and time when computer files were last accessed
24 (i.e. a date/time stamp). The defendant objected on hearsay grounds, arguing the computer
25 printouts did not qualify under the business records exception. The court of appeal rejected
26 defendant's argument. After noting that hearsay is an out of court *statement* offered to prove
27 the truth of the matter stated (Evidence Code §1200), that a statement is an oral or written

28 ⁵ The parties make the same objections to the videos, but the videos do not have any data imprinted on them.
Therefore, the hearsay and confrontation clause *objections to the videos are overruled* and the digital video
recordings may be admitted.

1 verbal expression of a *person* (Evidence Code §225), and considering the definition of “person”
2 (Evidence Code §175), the court stated that “the Evidence Code does not contemplate that a
3 machine can make a statement.” (*Hawkins, supra*, 98 Cal.App.4th at p. 1449 [emphasis added].)
4 The *Hawkins* court went on to cite and agree with “the leading case of *State v. Armstead* (La.
5 1983) 432 So.2d 837,” which explained: “The printout of the results of the computer's internal
6 operations is not hearsay evidence. It does not represent the output of statements placed into the
7 computer by out of court declarant.” . . . “there is no possibility of a conscious misrepresentation,
8 and the possibility of inaccurate or misleading data only materializes if the machine is not
9 functioning properly.” (*Id.* at p. 840; cf. *Ly v. State* (Tex.App. 1995) 908 S.W.2d 598, 600.)

10 “The role that the hearsay rule plays in limiting the fact finder's consideration to
11 reliable evidence received from witnesses who are under oath and subject to cross-
12 examination has no application to the computer generated record in this case. Instead,
13 the admissibility of the computer tracing system record should be measured by the
14 reliability of the system, itself, relative to its proper functioning and accuracy.”
15 [Citations] (Emphasis added.)

16 (*Hawkins, supra*, 98 Cal.App.4th at p. 1449, quoting from *Ly v. State, Id.*) The *Hawkins*
17 court concluded that “the true test for admissibility of a printout reflecting a computer's
18 internal operations is not whether the printout was made in the regular course of
19 business, but whether the computer was operating properly at the time of the printout.”

20 (*Hawkins, supra*, 98 Cal.App.4th at p. 1449-1450 [emphasis added].)

21 Regarding the People's reference to Evidence Code § 1552(a) (computer printout
22 presumed to be accurate) the court in *Hawkins* stated,

23 [t]his presumption operates to establish only that a computer's print function has worked
24 properly. The presumption does not operate to establish the accuracy or reliability of the
25 printed information. On that threshold issue, upon objection the proponent of the
26 evidence must offer foundational evidence that the computer was operating properly.

27 (*Hawkins, supra*, 98 Cal.App.4th at p. 1450 [emphasis added].) In other words, the
28 presumption establishes only “that the data in the printout accurately represents the data in the
computer. There is no presumption that the data itself is accurate or reliable. If the opponent
objects on the ground that the data is unreliable, “the proponent of the evidence must offer
foundational evidence that the computer was operating properly.” (Jefferson, *California*
Evidence Benchbook, 4th ed., § 32.44 [citing *Hawkins*; emphasis in original].)

1 In the cases before this court, there is evidence from the testimony of Officer Graves
2 that, like the date/time stamp at issue in *Hawkins*, the data imprinted on the photographs is a
3 function of the computer and camera system's own internal operations. fn 6

4 Since the information printed on the photographs is a reflection of the system's internal
5 operations, the imprinted information would be admissible *unless* defendants "object on the
6 ground that the data is unreliable," in which case "the [People] must offer foundational evidence
7 that the computer was operating properly." In these cases, the defense objects to *all* of the
8 evidence in the evidence packets including the imprinted data, so the court finds that the defense
9 de facto objects to the reliability of the printed information on the photographs. Therefore, in
10 the face of the objections, the prosecution would have had to show that both the camera system
11 and its internal computer and/or the computer in Arizona were functioning properly. (*Hawkins*,
supra, 98 Cal.App.4th at p. 1450 [emphasis added].)

12 Here, the City essentially concedes that the proper functioning of the camera and
13 computer system were not established at the hearing held in these cases, but assert that the
14 proper functioning would be established by the *Field Service and Inspection Logs*. (See
15 People's Opposition, p. 5-6.) They contend the SDPD officer who testifies at trial can, by
16 looking at the *Field Service and Inspection Logs*, testify to the foundation, or the court itself can
17 review the documents. But the court finds that, even though the *Field Service and Inspection*
18 *Logs* (discussed below) are admissible to show proper operation of the intersection camera
19 systems, they are insufficient under *Hawkins, supra*, to show regular inspection, maintenance
20 and proper functioning of the *internal computer* or of the underlying or connected *computer*
21 *system or server in Arizona* where the information is remotely uploaded, stored and from where
it is retrieved.

22 The two *Field Service and Inspection Logs* in each evidence packet show inspection,
23 maintenance, and repairs made when necessary for the system and its equipment *at each*
24 *intersection* on dates before and after each citation. The logs support an inference in most cases
25 that the cameras, strobes, signs, poles, cabinets, and sensor loops or "trail puck" sensors were all
26 in good working condition on the violation date which fell between the two inspection dates.

27 6 Defense counsel Mehdy states in his Points and Authorities (p. 4) that "a field technician or some other analyst
28 enters such data and the information is therefore transcribed on to the photographs". But there is no evidence of
this. To the contrary, Officer Graves testified that all of the information written on the photograph "data bar" is

1 The logs also indicate the settings and whether or not the settings have been changed for each
2 intersection camera.

3 But there is *no* evidence or mention (indeed to date there is never evidence by the City)
4 that the internal camera computer or its connected counterpart in Arizona, or the computers'
5 date and specific time settings, the local or remote measurements of the exact signal phase
6 times, the speed calculations, the Arizona computer connection with each of the intersection
7 camera systems, etc. were or are ever checked for proper functioning. According to the
8 inspection logs, technicians only check the intersection equipment, with no mention of the
9 computer at the intersection or in Arizona. They only indicate if the intersection equipment is
10 functioning properly, and *if* any of the settings have been changed. They do *not* indicate that
11 they check the accuracy of the settings and measurements being made by the system or verify
12 the functionality of the Arizona computer or its connection to the intersection systems, and data
transfer process, etc.

13 Thus, since the defense objected and there was no evidence presented to support a
14 finding that the *computer system itself* (either in the camera system at the intersection or in
15 Arizona) was operating properly, the information imprinted on the photographs will be
16 excluded in these 8 cases.

17 ///

18 Admissibility of "Field Service and Inspection Logs" (Exhibits F-1 & F-2)

19 **Business Records Exception**

20 The *Field Service and Inspection Logs* (aka "inspection logs" or "maintenance records")
21 submitted by ATS in each evidence packet are admissible as business records. (Evid. Code §
22 1271.) They record an act, condition or event (i.e. the inspection, maintenance, and servicing of
23 the cameras, sensors, strobes, etc.) The *Affidavit* of the custodian of records states the logs are
24 made contemporaneously with the inspection by a person whose job it is, and who is trained, to
inspect, test and report on the system's operation. (See *Affidavit* paragraph 3).

25 The defense points to an issue that arose at the motion hearing when the evidence packet
26 for case number B18095A (Exhibits A-H) was reviewed as a reference for the various
27 objections by defense counsel. Notably in that evidence packet the first inspection log dated

28 _____
automatically stamped on there by the computerized red light camera system at the time of the violation.

1 12/08/09 *before* the defendant's alleged violation ~~indicates~~ "Trail puck needs to be replaced."
2 (Exhibit F-1) The second inspection log dated 12/17/09 *after* the alleged violation indicates
3 "Replaced trail puck." (Exhibit F-2) This raised a question as to whether the intersection system
4 was operating properly for the nine days between the two inspections including the date of the
5 violation in question, a question the officer had no way to answer. But this kind of question
6 goes to the issue of proof beyond a reasonable doubt at trial and not to admissibility of the
7 inspection logs.

8 The custodian of records' *Declaration*, which is admissible, states that the *Field Service*
9 *and Inspection Logs* were made in the regular course of business, though in red-light camera
10 cases the regular course of business and preparation for litigation are intertwined. Although the
11 maintenance logs are signed "under penalty of perjury" indicating that they are intended for use
12 in litigation (and are "testimonial"), they were not prepared *solely* for the purpose of litigation.
13 (Contra *Melendez-Diaz, supra*, 129 S.Ct. at p. 2538.) Rather, maintenance records are generally
14 considered neutral, prepared in the course of business and not generated for use against any
15 particular defendant. (See *People v. Chikosi* (2010) 185 Cal.App.4th 238, 244 (*Chikosi*).

16 In addition, in the cases before this court, Defense counsel acknowledge that ATS has a
17 contract to "mount cameras, preserve, and store all the information" (Mehdy Points and
18 Authorities, p. 3) and "to install, maintain and store all evidence" (Aronson Points and
19 Authorities, p. 1). The custodian's *Affidavit* concurs that ATS "has a contract with the city to
20 service and maintain the automated enforcement system." (*Affidavit* paragraph 1.) ATS is not a
21 party to the litigation and the contract term regarding compensation of ATS was not presented,
22 so there is no evidence that ATS has any particular interest in the outcome of the individual
23 cases as opposed to straight compensation under the contract as required by Vehicle Code §
24 21455.5(g)(1). (See *Lugashi, supra*, 205 Cal.App.3d at p. 641) Either way, ATS appears to
25 have an interest in regularly maintaining and servicing the cameras at each intersection, and
26 likely even a duty to do so under Vehicle Code § 21455.5(c) as well as under their contract with
27 the City, regardless of whether litigation occurs.

28 Accordingly, the *Field Service & Inspection Logs* are deemed *admissible* and the
hearsay objections are overruled.

In addition, because the logs were prepared in the regular course of business at the time
the intersection systems were inspected and maintained, their admission does not violate the 6th

1 Amendment Confrontation Clause (see ~~Crawford~~, *supra*, 541 U.S. at p. 56) and the objections
2 to the *Field Service and Inspection Logs* on this basis are also *overruled*.

3 **Official Records Exception**

4 The *Field Service and Inspection Logs* are also admissible as official records. (Evidence
5 Code § 1280.) Again, they record an act, condition or event (i.e. the inspection, maintenance,
6 and servicing of the cameras, sensors, strobes, etc.) The fact that the maintenance records were
7 made by and within the scope of duty of a public employee is evidence by the fact that, as noted
8 above, ATS employees, by virtue of the contract between ATS and the City, are “public
9 employees” when performing the functions contracted for and, by defense counsels’ own
concessions, the functions contracted for include maintenance of the camera systems.

10 Furthermore, the date is written at the top of each *Field Service & Inspection Log*. And,
11 while the signature of the field technician is not separately noted, the court finds the date at the
12 top to be the date of preparation *and* signing as there is no indication that the inspection and
13 signing were done at different times, and the officer testified that he has been present at various
14 inspections and the inspection logs are prepared *at* the time of the inspections.

15 Finally, there are indicia of trustworthiness. As stated above, the maintenance logs
16 record neutral facts prepared in the course of business and not generated for use against any
17 particular defendant, ATS is not a party to the litigation, and there is no evidence that it has any
18 interest in the outcome of the cases other than whatever contract compensation they receive
19 which, by statute cannot be a contingent fee (Vehicle Code §21455.5). To the contrary, ATS
20 has an interest in regularly maintaining and servicing the cameras at each intersection, and
perhaps even a duty to do so (see Vehicle Code § 21455.5).

21 ///

22 **Admissibility of "Image Log" (Exhibit G)**

23 The *Image Logs* submitted by ATS are *not admissible* as either business records or
24 official records. While they certainly record an act, condition or event (the importing of images
25 to the ATS database), the documents reporting this are not actually “logs” prepared
26 contemporaneous with the act, condition or event. Rather they are all more like “reports” dated
27 several months after the importing of the images. fn7 Furthermore, the *Image Logs*, having
28

7 The violations and import dates are all between 11/15/09 – 12/22/09; all 8 *Image Logs* are dated 4/30/10.

1 been dated at the same time as the preparation of the custodian's declaration and the assembling
2 of the evidence packet submitted to the court, appear to have been created solely for purposes of
3 litigation. Therefore, they do not meet the foundational elements for either hearsay exception.
4 Accordingly, the hearsay objections to the *Image Logs* are *sustained* and they are held
5 *inadmissible*.

6 ///

7 **Compliance with Vehicle Code requirements for operation of red light camera system.**

8 Defense attorney Aronson argues that several requirements of Vehicle Code §§ 21455.5
9 and 21455.7 relating to the proper operation of the automated enforcement system have not
10 been sufficiently proven, and therefore the cases against the defendants should be dismissed.
11 The authorizing statutes for automated red light camera enforcement systems are Vehicle Code
12 §§ 21455.5 (primary agency, system, and citation requirements), 21455.7 per 21455.(a)(1)
13 (yellow light interval length in compliance with mandatory Department of Transportation
14 guidelines), and 210 (*clear photograph* of the driver and license plate). Some of the statutory
15 requirements to be evidenced by the People under those Vehicle Code sections include:

- 16 • signs regularly inspected;
- 17 • yellow light interval compliant with Dept. of Transportation Traffic Manual;
- 18 • warning notices;
- 19 • public announcements;
- 20 • uniform guidelines and procedures to ensure compliance;
- 21 • guidelines for selecting each location, regular inspection (which may be
22 contracted out per Vehicle Code §§ 21455.5(c)(2)(B) and 21455.5(d));
- 23 • proper installation, calibration & operation (which may be contracted out per
24 Vehicle Code §§ 21455.5(c)(2)(C) and 21455.5(d));
- 25 • oversee signal phases and timing;
- 26 • only issue citations approved by law enforcement;
- 27 • public hearing prior to contract for automated system;
- 28 • existence of a contract with an automated enforcement system provider; and
- contract payment not based on the number of citations or percentage of
revenue generated.

(See also fn 8)

8 As the automated enforcement sections only authorize issuance of citations to "the registered owner," the court notes, as an aside, an ongoing concern that sufficient care is not made to match the registered owner to a drivers license for the same person. This court believes that the City has a duty to issue only on a "clear photograph" under Vehicle Code §210, and to correctly match the registration information to the right drivers license including checking for lack of or mismatched middle initials, gender, ethnicity, age, and address where appropriate, and to *dismiss or decline to issue a citation* if there is a reasonable possibility of mismatch. (Vehicle Code §21455.5)

1 In *People v. Sangani*-(1994) 22 Cal.App.4th, 1120, the appellate court stated that
2 “[f]ailure to follow precise regulatory or statutory requirements for laboratory tests generally
3 does not render the test results inadmissible, but instead goes to the weight accorded to the
4 evidence.” (*Id.* at 1136-1137 [relying on *People v. Adams* (1976) 59 Cal.App.3d 559.]) The
5 court went on to say that, in order for a statute to render evidence inadmissible, the statute has to
6 actually say noncompliance renders the evidence inadmissible. (*Id.* at 1137.) See also, *People*
7 *v. Hoag* (2000) 83 Cal.App.4th 1198 where the court of appeal found that Penal Code §1531
8 (knock-notice) requirements could be satisfied by *substantial compliance with the statute*. So,
9 while insufficient evidence of substantial compliance with the authorizing statutes would not
10 make any of the evidence inadmissible, lack of substantial compliance would go to the weight
11 accorded all of the trial evidence and could therefore affect the ultimate findings in each case.

12 As this matter was only heard as a motion to exclude the evidence packet, counsel’s
13 motion here is premature. Therefore the dismissal request based on insufficient proof of
14 statutory compliance is denied without prejudice to make when appropriate following the
15 People’s case in chief in future cases.

16 ///

17 SUMMARY OF RULINGS

- 18 • *People v. Khaled*, is not legally binding as it is not an appellate court case.
- 19 • the ATS *Declarations* and *Affidavits* from the custodian of records are admissible only
20 to the extent they lay a foundation under Evidence Code §§ 1561 and 1562.
- 21 • the ATS interior *Declaration* is admissible under Evidence Code §§ 1560, 1561.
- 22 • Paragraph 2 of the ATS exterior *Affidavit* of custodian of records is admissible under
23 Evidence Code §§ 1560, 1561.
- 24 • the ATS *Affidavits* paragraphs 1, 3, 4 and 5 are not admissible in the absence of a live
25 witness with personal knowledge since those parts of the *Affidavit* go beyond the authority of
26 Evidence Code §§1561 and 1562, do not qualify as business records or official records, and
27 violate the 6th Amendment Confrontation Clause as discussed under *Crawford* and *Melendez-*
28 *Diaz*.

1 • The photographs and video are admissible into evidence as they are demonstrative
2 evidence, therefore not hearsay, therefore their admission does not violate the Confrontation
3 Clause.

4 • Per *Hawkins*, the imprinted information on the photographs is not admissible in these
5 cases following defense objections, since there was no evidence presented that the computer
6 system producing the data (as opposed to the intersection camera and strobe system) was
7 maintained and functioning properly.

8 • The *Field Service and Inspection Logs* are admissible as both business records and
9 official records and do not violate the Confrontation Clause.

10 • The *Image Logs* are not admissible as either business records or official records as
11 they were not logs that were made contemporaneous with the importing of the images and
12 appear to have been created for purpose of litigation for only those cases set for trial.

13 • The defendants' dismissal request based on insufficient proof of substantial
14 compliance with the automated enforcement statutes is denied since the dismissal request is
15 premature until the end of the People's case in chief at trial.

16 ///

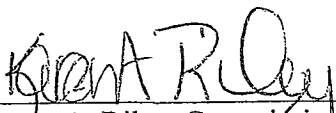
17 CONCLUSION

18 As discussed at length above, the court has excluded the *ATS Affidavit*, the imprinted
19 information on the photographs, and the *Image Logs*. The court points out that it is *not* ruling
20 against the red light camera system as a whole. Rather it is a ruling that sufficient foundation
21 and evidence must be presented and appropriate witnesses must be present at trial to testify and
22 be subject to cross-examination by the defendants.

23 In the absence of the excluded evidence and appropriate witnesses with personal
24 knowledge as discussed herein, the court finds that the People would be unable to prove the
25 within 8 cases beyond a reasonable doubt. Therefore, the within matters are dismissed.

26 IT IS SO ORDERED.

27 DATED: 8-16-2010

28 
Karen A. Riley, Commissioner
San Diego Superior Court
Central Traffic Division