

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
v.	)	<b>No. 22-cr-392 (DLF)</b>
	)	
<b>ABU AGILA MOHAMMAD</b>	)	
<b>MAS'UD KHEIR AL-MARIMI,</b>	)	
<b>Defendant.</b>	)	

**DEFENDANT'S RESPONSE TO GOVERNMENT'S  
MOTION TO ADMIT FOREIGN RECORDS**

The government requests advance rulings that numerous foreign documents are admissible under at least one of the exceptions to the rule against hearsay. ECF No. 148. The defense opposes the bulk admission of these documents through barebones certifications that reveal almost nothing about the records, the witness' familiarity with them, or the practices of each company. The government's motion merely recites the general rules and describes large categories of the documents at issue, and the certifications it has provided to authenticate the documents contain only the most cursory information about each witness. A finding of admissibility on this record would risk violating Mr. Al-Marimi's constitutional right to confront the evidence against him.

**BACKGROUND**

The government has charged Mr. Al-Marimi with offenses related to the bombing of Pan American World Airways Flight 103 (Pan Am 103) in December 1988. In 2000, two men were tried under Scottish law for the bombing. Relevant to this motion, the Scottish court found that the suitcase containing the bomb departed from

Malta, travelled through Frankfurt, and was loaded onto the Pan Am flight in London. It further found that clothing in the suitcase was purchased in Malta at a particular shop on a particular date, that the timer for the bomb was traceable to a Swiss manufacturer, and that the bomb was contained in a Toshiba radio.

The Scottish court's findings were based in part on records the government seeks to admit pursuant to several hearsay exceptions. In particular, the government has identified 106 specific foreign documents from seven countries that it seeks to admit as business or public records "without the need for live testimony from a custodian." ECF 148, at 2; *see id.* at 8–14 (listing documents). Most of these documents appear to have been obtained before the Scottish trial and stored in the custody of Scottish law enforcement, as indicated by their associated Crown Production numbers and evidence tags. *Id.* at 7 n.1; *see, e.g.*, Document 903. Some lack those additional attributes. *See, e.g.*, Document 701.<sup>1</sup> To facilitate the admission of these documents, the government has provided certifications from 29 foreign witnesses. Eleven documents have no associated certification. *Id.* at 12 n.5 (representing that certain Swiss documents have been certified but that the certifications had not been received at the time of filing).

Additionally, the government requests a ruling on the admissibility under the hearsay rules of an unspecified number of Maltese and Czechoslovak immigration

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<sup>1</sup> With two exceptions known to the defense, the 700 and 800 series documents do not have Scottish investigation hallmarks, while the remaining documents do. The exceptions are Document 818, which has an evidence tag, and Document 1102, which has a "High Court of Justiciary" cover sheet rather than a Crown Production number.

records. *Id.* at 14–16. Because the government presently plans to admit these records through live witnesses, it has not prepared or submitted certifications for them. *Id.* at 16. It nonetheless seeks a favorable ruling based on “the current record, i.e., its proffer that unidentified foreign witnesses could attest that the records meet the requirements for admission under the hearsay rules.

### **LEGAL STANDARD**

“The proponent of evidence must show by a preponderance of the evidence that any necessary prerequisites for admission have been met.” *United States v. Khatallah*, 278 F. Supp. 3d 1 (D.D.C. 2017) (citing *Bourjaily v. United States*, 483 U.S. 171, 176 (1987)). To authenticate an item of evidence, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a).

Hearsay is an out-of-court statement that a party offers in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). Hearsay is inadmissible unless permitted by a federal statute, the Federal Rules of Evidence, or some other applicable authority. Fed. R. Evid. 802.

The admissibility of foreign business records in a criminal proceeding is governed by 18 U.S.C. § 3505, which generally tracks the requirements of the business-records hearsay exception under Federal Rule of Evidence 803(6).<sup>2</sup> Section

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<sup>2</sup> Rule 803(6) covers records of an act, event, condition, opinion, or diagnosis if:

- (A) The record was made at or near the time by—or from information transmitted by—someone with knowledge;
- (B) The record was kept in the course of a regularly conducted activity of a

3505(a) provides:

(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—

(A) Such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) Such record was kept in the course of a regularly conducted business activity;

(C) The business activity made such a record as a regular practice; and

(D) If such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

18 U.S.C. § 3505(a). The statute defines “foreign certification” to mean “a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country[.]” 18 U.S.C. § 3505(c)(2).

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business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

The public records exception, Rule 803(8), covers a record or statement of a public office if it sets out, among other categories of information, “a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel[,]” and “the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” Fed. R. Evid. 803(8). A foreign public record is self-authenticating and may be admitted without a witness if it appears to be “signed or attested by a person who is authorized by a foreign country’s law to do so.” Fed. R. Evid. 902(3). “[T]he proffered document must be executed by a proper official in his official capacity, or the genuineness of the document must be attested to by a proper official in his official capacity[,]” and “there must be some indication that the official vouching for the document is who he purports to be.” ECF 148, at 5 (quoting *United States v. Fuchs*, 118 F.4th 911, 917 (7th Cir. 2024)).

The business records exception is justified by the belief that businesses and similar entities rely on their own internal records and thus take care and implement procedures to ensure their reliability. Fed. R. Evid. 803, advisory committee’s notes. The public-records exception is justified by a similar assumption that public officials perform their duties reliably, including by accurately recording information that they are required to record. *Id.* While there is a “high probability” that qualifying records contain accurate information, it remains “necessary that the proponent of particular records establish the trustworthiness of those records.” *United States v. Rich*, 580 F.2d 929, 938 (9th Cir. 1978).

## ARGUMENT

The defense opposes the government’s request on several grounds. A table detailing which objections apply to which documents is attached.<sup>3</sup> Exh. 1.

**I. The government has not shown its witnesses are custodians or other qualified persons capable of certifying these records under § 3505 and Rule 803(6).**

Regarding the documents offered as business records—the Maltese clothing and travel records, the Czech hotel records, the German records, the U.K. records, the non-travel Swiss records, and the Maltese and Czechoslovak immigration records—the government has not provided near enough information about each certifying witness to meet the requirements of § 3505 and Rule 803(6). Those authorities require the certification be made by a records custodian or another qualified person. 18 U.S.C. § 3505(a)(2), (c)(2); Fed. R. Evid. 803(6)(D). While this individual need not have personally prepared the records, “he or she must be familiar with the creation and record keeping procedures of the organization” in order to establish the records’ trustworthiness. *Khatallah*, 278 F. Supp. 3d at 6 (quoting *United States v. Jenkins*, 345 F.3d 928, 935–36 (6th Cir. 2003)).

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<sup>3</sup> The table is sorted by document topic, to track the government’s discussion. The documents offered as public records are bolded/italicized. For some documents, two witness certifications were provided. The column “witness uncertain during interview” indicates a witness stated they did not recognize a document they were shown during their recorded interview or used ambivalent language such as “might be” or “appears to be.” The “Scottish case document column indicates if the document included a Crown Production number or other hallmark of having been produced from a foreign investigative case file. The “document-specific issue” column indicates, by number, which of the issues discussed below in Section II (numbered 1–7) is present.

The government's certifications state only the witness' names, the companies they were either employed by or associated with, their current or former positions, that the records meet the requirements for the exception, and that the witness is subject to criminal punishment for making a false statement. *See, e.g.*, Document 1005-c. A handful further indicate which country's laws the witness is subject to. *See, e.g.*, Document 903-c.

It is informative to contrast the government's presentation here to its presentation in another case, *United States v. Khatallah*, 278 F. Supp. 3d 1 (D.D.C. 2017). There, the government likewise sought a pretrial ruling on the admissibility of foreign telephone records under Rule 803(6) and 18 U.S.C. § 3505. *Khatallah*, No. 1:14-cr-141 (CRC), Doc. No. 285 (Aug. 17, 2017).<sup>4</sup> At first, it provided only a barebones certification akin to the ones the government provides here:

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS

I, the undersigned, Mohamed Ben Ayed, with the understanding that I am subject to criminal penalty under the laws of Libya for an intentionally false declaration, declare that I am:

employed by/associated with Libyana Telecommunications in the position of CEO - Chief Executive Officer and by reason of my position am authorized and qualified to make this declaration.

I further declare that the documents attached hereto are original records or true copies of records which:

1. were made at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters;
2. were kept in the course of regularly conducted business activity;
3. were made by the said business activity as a regular practice; and,
4. if not original records, are duplicates of original records.

The originals or duplicates of these records are maintained in the country of Libya

Doc. No. 285-1. The government quickly sought to bolster its showing, however, amending its request to instead ask for a pretrial hearing at which it could present additional information through testifying witnesses. Doc. Nos. 289, 295. It

<sup>4</sup> Citations to the *Khatallah* docket appear as "Doc. No. \_\_\_\_" for the sake of brevity and to distinguish them from citations to the docket in this case.

apparently recognized that the certification alone was insufficient to support a finding of admissibility.

At the hearing, the government elicited extensive testimony about the certifying witness, his history with the telephone company, his knowledge and familiarity with its records and recordkeeping systems (some of which he designed), and how law enforcement obtained the records from him. *Khatallah*, 278 F. Supp. 3d at 3–4, 6–7. The Court relied on that testimony to conclude that the witness had the requisite knowledge to serve as “another qualifying person” capable of certifying the records under § 3505. *Id.* at 7.

In other cases where the government failed to provide sufficiently detailed information, courts have refused to admit foreign documents under the business-records exception. *See, e.g., United States v. Porter*, 821 F.2d 968, 977 (4th Cir. 1987) (holding that a security guard who merely had access to company files but did not know how the records were created or the record keeping requirements of the company was not a custodian or an “otherwise qualified witness”); *United States v. Bacas*, 662 F. Supp. 2d 481, 486–87 (E.D. Va. 2009) (holding the government “failed to lay the foundation sufficient to render [a person] an ‘otherwise qualified witness’” because his “generalized testimony [did] not establish that [he was] familiar with the military police force’s creation and maintenance of the certificates”).

On the current threadbare record, the Court should likewise reject the government’s requests for admission under the business-records exception. The government’s certifications are uniformly deficient. And regarding the documents for

which the government has provided no certification—the Swiss MEBO records and the Maltese and Czechoslovak immigration records—no showing has been made at all.<sup>5</sup> Seeking greater detail and allowing true adversarial testing would not be a pointless formality, as several of the certifications raise flags about the witness’s attestations. *See, e.g.*, Document 814-c (witness wrote a check next to only three of four requirements); Document 802-c (handwritten note scratching out “is a duplicate” and stating “it appears to be”); *cf. Boca Investorings P’ship v. United States*, 128 F. Supp. 2d 16, 19–20 (D.D.C. 2000) (rejecting proposed business records where testimony showed witness “assumed” the document was the type prepared by his business but could not state who in fact prepared it).<sup>6</sup>

## **II. The documents lack sufficient indicia of trustworthiness.**

Rules 803(6) and (8) and § 3505 all foreclose admission if “the source of information or the method or circumstances of preparation” for a document “indicate lack of trustworthiness.” The documents here lack sufficient indicia of trustworthiness for one or more reasons.

First, many of the records appear to have been provided to the government not

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<sup>5</sup> Since there are no certifications for these records, the defense does not engage with the government’s arguments that they would be admissible as business or public records. *See* ECF 148, at 16–18. It would be premature to do so.

<sup>6</sup> On September 5, 2025, the government provided the defense with a compilation of § 3505 discovery related to the Maltese witnesses. Of 43 recorded interviews, 12 involve witnesses who provided certifications in connection with ECF 148. The production did not include video interviews for the other certifying witnesses from other countries—i.e., it was both under- and overinclusive. Several of the witnesses displayed exceptional memories about the documents and their prior involvement in the Scottish case, whereas others had difficulty remembering events and appeared visibly uncertain about several documents.

by the original business or government entities that supposedly created them, but rather by the Scottish authorities who stored copies of them after the Scottish trial. Only the Maltese records do not include Crown Production numbers and Scottish evidence tags. Because the company or entity that supposedly created these records did not produce the copies that the government seeks to rely on, it is reasonable to question whether each entity continues to store such records, and whether each witness was knowledgeable about how the records *were* created or maintained when they were originally produced decades ago. This is particularly so given that each witness certified the records were in the custody of the entity they were associated with. *Compare* Document 1101-c (stating the records are “in the custody of the above-named business,” despite the records seemingly coming from the Scottish casefile) *with* Document 701-c (stating same, but regarding records without associated Scottish record hallmarks); *see also* Document 1574-c (stating the witness “caused the production” of a document with Scottish record hallmarks); Document 1403-c (same).

The lack of information from the persons qualified to authenticate the records, combined with concerns about their immediate and historic provenance, means there are missing links in the chain of custody that typically establishes trustworthiness for such records. A finding of admissibility is not warranted in such cases. *See United States v. Petrie*, 302 F.3d 1280, 1288 (11th Cir. 2002) (affirming exclusion of business records because witness was not able to testify “about the initial link in the chain producing the record—that is, whether the circumstances surrounding the origination and compilation of the documents indicate reliability and

trustworthiness”).

Second, the defense notes the following issues unique to specific records:

1. Documents 905 and 908 – Appear to be letters making reservations with a hotel. The letters appear to have been written by Libyan officials, and one features Libyan letterhead. Neither features any hallmarks of being copied or stored by the hotel that supposedly produced them in 1991.
2. Documents 1009, 1013, 1024 – Appear to contain reported statements from other sources/declarations, constituting multiple layers of hearsay. Hearsay within hearsay is inadmissible unless “each part of the combined statements conforms with an exception to the rule” against hearsay. Fed. R. Evid. 805. Thus, Rule 803(6) does not support the admissibility of statements contained within business records unless the percipient witness was “himself acting in the regular course of business[.]” *United States v. Slatten*, 865 F.3d 767, 806 (D.C. Cir. 2017) (quoting *United States v. Warren*, 42 F.3d 647, 656 (D.C. Cir. 1994)); see also *United States v. Smith*, 521 F.2d 957, 964 (D.C. Cir. 1975) (A “witness’[s] description of [an incident] . . . is not made in the regular course of the witness’[s] business and does not deserve the presumption of regularity accorded a business record.”).
3. Documents 818, 903–908, 1004–1007, 1011–1013, 1018, 1031, 1101, 1103–1107, 1403, 1513–1515, 1519–1520, 1525–1526, 1529–1530, 1531, 1533–1534, 1539, 1541, 1549–1551, 1558–1559, 1573–1576 – These documents do not include an original (i.e., from the time of the Scottish investigation and trial) certification in the submitted pdf file, making it particularly important that the current certifying witness is qualified and knowledgeable about the original recordkeeping and provenance.
4. Document 1301 – The government describes this document as a use-list from the Toshiba Corporation for a specific variety of circuit board. That is not immediately apparent from the record itself, and the defense questions whether the company would have prepared such a list in the ordinary course of business or whether it was prepared upon request to assist in the investigation or prosecution of the Pan Am 103 bombing.
5. Document 1403 – This record has a Crown Production number and a Scottish evidence tag, but the tag is completely blank except for the “Label No.” field. This, too, raises questions about the provenance of the document and its trustworthiness.

6. Documents 802–809, 811 – The certification for these documents, signed by Andre Borg, features handwriting that scratched out “is” a duplicate and wrote “it appears to be” a duplicate.
7. Documents 814–820 – The certifying witness for these documents, Dennis Vella, appears to have written a checkmark next to three of the four legal requirements listed in the certification, failing to check (D) that each record “if not an original record, is a duplicate of the original.”

These issues indicate a lack of trustworthiness. And their particularized nature drives home the problems with finding the records admissible *en masse*; in *Khatallah*, the government sought the admission of only one type of foreign business record, and the parties thoroughly briefed a range of issues relating to its trustworthiness. Such extensive presentations are simply not possible when the government provides not one but several categories of records comprising over 100 different documents.

### **III. The public records exception does not apply.**

The government argues the Swiss travel records and the Senegalese record are foreign public records. The same trustworthiness requirement applies, Fed. R. Evid. 803(8), and additional requirements apply relating to the foreign law and authority granted to the producing and certifying officials, Fed. R. Evid. 902(3).

Again, these documents appear to have been produced decades ago and stored somewhere after the Scottish trial, yet the certifications (dated 2024 and 2025) state the certifying official “caused the production” of the records in their official capacities. *See* Documents 1403c, 1549c. That discrepancy alone undermines the usual presumption of trustworthiness afforded to official records, as the provenance of the records is no longer clear and exclusively within the domain of the government entity.

Separately, the Senegalese official did not provide his position or official title, and the original French copy of his certification does not appear to feature the “official seal” described in the translated copy. Document 1403c. Thus, there is no indication in the record that Mr. Ndiaye “is who he purports to be.” Fed. R. Evid. 902(3). The Swiss official identifies himself as the head of the visa section at the Department of Foreign Affairs, but the defense could not locate the original copy of his certification, and the translated copy submitted by the government does not display the official seal that is likely present on the original. Thus, while it is likely the Swiss official is who he purports to be, there remains a question as to his identity (particularly given the absence of the official seal on the Senegalese certification).

The Court should not find these documents admissible as public records.

#### **IV. The ancient records and residual exceptions do not apply.**

The government alternatively floats two other hearsay exceptions as potentially applying to all the records: the ancient documents exception and the residual exception. ECF 148, at 18–20. The government has not established that either should apply here.

The ancient documents exception, Rule 803(16), covers statements in documents that were “prepared before January 1, 1998, and whose authenticity is established.” Fed. R. Evid. 803(16). The authenticity of an ancient document is established by evidence that it:

- (A) Is in a condition that creates no suspicion about its authenticity;
- (B) Was in a place where, if authentic, it would likely be; and
- (C) Is at least 20 years old when offered.

Fed. R. Evid. 901(b)(8). The exception is justified by the belief that “age affords assurance that the writing antedates the present controversy.” Fed. R. Evid. 803, Advisory Committee’s notes.

The government argues each document was “collected in a place where [it] would be expected to be,” and it points to the Scottish investigation hallmarks as lending “circumstantial evidence to the government’s argument about how the documents were collected.” ECF 148, at 19. But no witness has attested to where *any* document was located for purposes of this prosecution, and a few seem to have attested erroneously (the foreign officials). There is no information available about how the documents were stored or archived after the Scottish trial, assuming they were in fact retrieved during that investigation. Likewise, for the Maltese records that lack the Scottish investigation hallmarks, there is no information available about their provenance other than the boilerplate certifications that the records are “in the custody of the [] business[.]” *See, e.g.*, Document 702-c. Even that is questionable, however, as the available recordings of witness interviews uniformly feature the government providing the witnesses with copies of the records (not the other way around) and asking each person if they recognize each document (some did not). Without this foundational information, there is no basis to find the records qualify as trustworthy ancient documents.<sup>7</sup>

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<sup>7</sup> Additionally, like the La Belle Discotheque bombing documents addressed in separate briefing, all these records were collected close in time and immediately following the event in question, during a criminal investigation of the incident. This undermines the rationale behind the ancient documents rule, which reasons that old documents are more likely to be divorced from the instant controversy.

The residual hearsay exception, Rule 807, provides for the admission of hearsay statements that meet no other exception if they are:

- (1) supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
- (2) more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Fed. R. Evid. 807. “[T]he legislative history of the [residual hearsay] exception indicates that it should be applied sparingly.” *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017) (quoting *S.E.C. v. First City. Fin. Corp.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989)). “[P]erfunctory citations to Rule 807 are insufficient to satisfy the ‘extremely narrow’ residual hearsay exception, which ‘requires testimony to be very important and very reliable.’” *Pietrangelo v. Refresh Club, Inc.*, No. 18-CV-1943, 2023 WL 6388880, at \*10 (D.D.C. Sept. 29, 2023) (quoting *Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017)). The residual exception applies “only in the most ‘exceptional circumstances[.]’” *Slatten*, 865 F.3d at 807 (quoting *United States v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979)).

The government argues that the documents are trustworthy, even if they lack a certification that fully complies with the applicable authorities. ECF 148, at 20. This is not the case. The problems with the government’s certifications are not mere technical failures; fundamentally, the government has not submitted sufficient information to satisfy the hearsay exception or establish the trustworthiness of these records. Its cited cases that approved the admission of foreign banks records are inapposite. *See, e.g., United States v. Wilson*, 249 F.3d 366, 375–76 (5th Cir. 2001)

(rejecting defendant’s arguments that the records were untrustworthy because they were “incomplete or inaccurate”; those arguments went to the weight of the evidence, not its admissibility). Application of the residual exception—the most exceptional of the hearsay exceptions—would be wholly inappropriate here.

**V. Unless the documents qualify as business or public records, they are testimonial evidence and are inadmissible under the Confrontation Clause.**

“The Sixth Amendment’s Confrontation Clause generally bars the introduction of testimonial statements of a witness absent from the trial [if admitted for their truth] unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.” *United States v. Bostick*, 791 F.3d 127, 147–48 (D.C. Cir. 2015) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)). The confrontation right reflects the importance of live testimony, which is the “only” procedure through which “the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness.” *United States v. Burden*, 934 F.3d 675, 685 (D.C. Cir. 2019) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 373–74 (1798)). As the Supreme Court emphasized in *Craig*, confrontation rights are particularly critical where questions of reliability exist. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

The government is generally correct that foreign business and public records that were not created for use at trial do not implicate the defendant’s confrontation right, and that other circuits have extended that logic to the certifications that authenticate such records. *See* ECF 148, at 5–6 (citing, e.g., *United States v. Al-Imam*,

382 F. Supp. 3d 51, 59 (D.D.C. 2019)). But if the government does not satisfy its burden of establishing that records fall within those exceptions to the hearsay rule, they are properly deemed testimonial evidence and remain subject to the Confrontation Clause. The normal confrontation-like protections inherent to the hearsay exceptions do not apply. *See United States v. Adefehinti*, 510 F.3d 319, 328 (D.C. Cir. 2007) (reasoning advance-notice requirements and the ability of the defense to call “a certificate’s signatory to the stand” renders the admission of business records “a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause”). It would be particularly troubling to permit the government to present “its evidence via *ex parte* affidavits[,]” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324–25 (2009), when it is difficult, if not impossible, for the defense to call the associated witnesses due to their locations outside the United States.

Because the government has not shown these documents qualify, the records should be treated as testimonial statements that the government “would be expected to provide if called at trial,” *United States v. Jackson*, 636 F.3d 687, 696–97 (5th Cir. 2011), because they “do precisely *what a witness does* on direct examination[,]” *Davis v. Washington*, 547 U.S. 813, 830 (2006).

**VI. Under Rule 403, the Court should not permit the bulk admission of what should be the *exception* to the rule against hearsay.**

Finally, this Court has previously been reluctant to admit bulk evidence pursuant to *exceptions* to the hearsay rule, in lieu of live witness testimony. *See United States v. Ausby*, 436 F. Supp. 3d 134, 151–53 (D.D.C. 2019). In *Ausby*, the

government sought to rely on twelve witness trial transcripts from a previous trial, plus ten additional witness trial transcripts to refresh the recollections of surviving witnesses. *Id.* at 151. The Court found no precedent for such a bulk admission and acknowledged the defendant's concerns about freezing his new trial, replaying the old one, and a "trial by transcript." *Id.* It noted that the hearsay exceptions are, in fact, exceptions to the "broader principle" that "prohibits admission of certain statements made by a declarant other than while testifying at trial." *Id.* at 152 (quoting *United States v. Salerno*, 505 U.S. 317, 320 (1992)). Bulk admission of hearsay evidence would treat the hearsay exceptions not as exceptions but as "the primary vehicle for the admission of key evidence to prove the criminal charge against the defendant" and "runs contrary to the purpose of the rule, raising troubling fairness concerns" that are appropriately considered through a "stringent application" of Rule 403, which required consideration of all the evidence seriatim. *Id.*

Even if the Court finds most or all of the government's documents admissible under the hearsay exceptions, a "stringent application" of Rule 403 to the documents is necessary before they are presented to the jury.

### **CONCLUSION**

The Court should reject the government's deficient submissions in support of its motion and decline to admit this mountain of untrustworthy hearsay evidence.

Respectfully submitted,

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# Exhibit 1

Document	Country	Topic	No certification	Witness	Witness 2	Interview video produced	Witness uncertain during interview	Witness not a qualified person	Scottish case document	Document-specific issue
701	Malta	Clothing		Alexander Aquilina		X		X		
702	Malta	Clothing		Stephen Aquilina		X		X		
703	Malta	Clothing		Alexander Aquilina		X		X		
704	Malta	Clothing		Stephen Aquilina		X	X	X		
705	Malta	Clothing		Stephen Aquilina		X	X	X		
706	Malta	Clothing		Francis Farrugia		X		X		
707	Malta	Clothing		Francis Farrugia		X		X		
708	Malta	Clothing		Alexander Bugeja		X	X	X		
709	Malta	Clothing		Alexander Bugeja		X	X	X		
710	Malta	Clothing		Alexander Bugeja		X	X	X		
711	Malta	Clothing		Alexander Bugeja		X	X	X		
712	Malta	Clothing		Alexander Calleja		X		X		
713	Malta	Clothing		Alexander Calleja		X		X		
714	Malta	Clothing		Alexander Calleja		X		X		
715	Malta	Clothing		Alfred Grech		X		X		
716	Malta	Clothing		Paul Mallia		X		X		
717	Malta	Clothing		Paul Mallia		X		X		
718	Malta	Clothing		Paul Mallia		X		X		
801	Malta	Travel - Malta		Anthony Dalli		X	X	X		
802	Malta	Travel - Malta		Andre Borg		X	X	X		6
803	Malta	Travel - Malta		Andre Borg		X	X	X		6
804	Malta	Travel - Malta		Andre Borg		X	X	X		6
805	Malta	Travel - Malta		Andre Borg		X	X	X		6
806	Malta	Travel - Malta		Andre Borg		X	X	X		6
807	Malta	Travel - Malta		Andre Borg		X	X	X		6
808	Malta	Travel - Malta		Andre Borg		X	X	X		6
809	Malta	Travel - Malta		Andre Borg		X	X	X		6
810	Malta	Travel - Malta		Anthony Dalli		X	X	X		
811	Malta	Travel - Malta		Andre Borg		X	X	X		6
812	Malta	Travel - Malta		Francis Busuttil	Stefan Stilon	X	X	X		
813	Malta	Travel - Malta		Francis Busuttil		X	X	X		
814	Malta	Travel - Malta		Dennis Vella		X	X	X		7
815	Malta	Travel - Malta		Dennis Vella		X	X	X		7
816	Malta	Travel - Malta		Dennis Vella		X	X	X		7
817	Malta	Travel - Malta		Dennis Vella		X	X	X		7
818	Malta	Travel - Malta		Dennis Vella		X	X	X	X	3, 7
819	Malta	Travel - Malta		Dennis Vella		X	X	X		7
820	Malta	Travel - Malta		Dennis Vella		X	X	X		7
821	Malta	Travel - Malta		Francis Busuttil		X	X	X		
822	Malta	Travel - Malta		Francis Busuttil		X	X	X		
823	Malta	Travel - Malta		Francis Busuttil		X	X	X		
903	Czech Republic	Travel - Megrahi		Jiri Legner				X	X	3
904	Czech Republic	Travel - Megrahi		Jiri Legner				X	X	3
905	Czech Republic	Travel - Megrahi		Jiri Legner				X	X	1, 3
906	Czech Republic	Travel - Megrahi		Jiri Legner				X	X	3
907	Czech Republic	Travel - Megrahi		Jiri Legner				X	X	3
908	Czech Republic	Travel - Megrahi		Jiri Legner				X	X	1, 3
1004	Germany	Travel - Frankfurt		Andreas Schweiner				X	X	3
1005	Germany	Travel - Frankfurt		Andreas Schweiner	Gunter Kasteleiner			X	X	3
1006	Germany	Travel - Frankfurt		Gunter Kasteleiner				X	X	3
1007	Germany	Travel - Frankfurt		Gunter Kasteleiner				X	X	3
1008	Germany	Travel - Frankfurt		Wolfgang Manner				X	X	
1009	Germany	Travel - Frankfurt		Wolfgang Manner				X	X	2
1011	Germany	Travel - Frankfurt		Wolfgang Manner				X	X	3
1012	Germany	Travel - Frankfurt		Martin Huebner				X	X	3
1013	Germany	Travel - Frankfurt		Martin Huebner				X	X	2, 3
1014	Germany	Travel - Frankfurt		Martin Huebner	Wulf Kron-Mos			X	X	

1015	Germany	Travel - Frankfurt		Wulf Kron-Mos				X	X	
1016	Germany	Travel - Frankfurt		Gregory Grissum				X	X	
1017	Germany	Travel - Frankfurt		Kurt Berg				X	X	
1018	Germany	Travel - Frankfurt		Andreas Schweiner				X	X	3
1019	Germany	Travel - Frankfurt		Kurt Berg				X	X	
1020	Germany	Travel - Frankfurt		Kurt Berg				X	X	
1022	Germany	Travel - Frankfurt		Roland O'Neill				X	X	
1024	Germany	Travel - Frankfurt		Wulf Kron-Mos				X	X	2
1026	Germany	Travel - Frankfurt		Wulf Kron-Mos				X	X	
1028	Germany	Travel - Frankfurt		Kurt Berg				X	X	
1031	Germany	Travel - Frankfurt		Oliver Koch				X	X	3
1403	Senegal	Libyan use of timer		Ndiaga Ndiaye				X	X	3,5
1101	UK	Travel - London		Jane Ford				X	X	3
1102	UK	Travel - London		Jane Ford				X	X	
1103	UK	Travel - London		Jane Ford				X	X	3
1104	UK	Travel - London		Jane Ford				X	X	3
1105	UK	Travel - London		Jane Ford				X	X	3
1106	UK	Travel - London		Jane Ford				X	X	3
1107	UK	Travel - London		Jane Ford				X	X	3
1514	Switzerland	MEBO supplier		Urs Bonfadelli				X	X	3
1515	Switzerland	MEBO supplier		Marco Foglia				X	X	3
1520	Switzerland	MEBO supplier		Urs Bonfadelli				X	X	3
1530	Switzerland	MEBO supplier		Urs Bonfadelli				X	X	3
1531	Switzerland	MEBO supplier		Urs Bonfadelli				X	X	3
1579	Switzerland	MEBO supplier		Marco Foglia				X	X	
1513	Switzerland	MEBO records	X	N/A				X	X	3
1519	Switzerland	MEBO records	X	N/A				X	X	3
1525	Switzerland	MEBO records	X	N/A				X	X	3
1526	Switzerland	MEBO records	X	N/A				X	X	3
1529	Switzerland	MEBO records	X	N/A				X	X	3
1533	Switzerland	MEBO records	X	N/A				X	X	3
1534	Switzerland	MEBO records	X	N/A				X	X	3
1537	Switzerland	MEBO records	X	N/A				X	X	
1539	Switzerland	MEBO records	X	N/A				X	X	3
1541	Switzerland	MEBO records	X	N/A				X	X	3
1546	Switzerland	MEBO records	X	N/A				X	X	
1549	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1550	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1551	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1558	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1559	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1573	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1574	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1575	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1576	Switzerland	Travel - Swiss		Andre Klaus				X	X	3
1577	Switzerland	Travel - Swiss		Andre Klaus				X	X	
1301	Japan	Radio		Kazuo Kazai				X	X	4
1302	Japan	Radio		Yoshihiro Miura				X	X	
1305	Japan	Radio		Yoshihiro Miura				X	X	
?	Malta	Immigration	X	?				X	?	
?	Czechoslovakia	Immigration	X	?				X	?	