UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S SECOND SUPPLEMENTAL BRIEF OPPOSING GOVERNMENT'S MOTION TO ADMIT FOREIGN RECORDS

The defendant, Abu Agila Mohammad Mas'ud Kheir Al-Marimi, respectfully submits this second supplemental brief in opposition to the government's Motion to Admit Foreign Records, ECF 148.

I. Sufficiency of the § 3505 certifications

As an initial matter, the defense offers one additional case of note: *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:10-CV-01182-RCL, 2018 WL 5983385 (D.D.C. Nov. 14, 2018). In that case, the Court addressed a motion for summary judgment and ruled on the potential admissibility of foreign documents under the business records exception. *Id.* at *8–10. The plaintiff argued two witnesses' declarations that were offered to authenticate numerous documents did not establish that the witnesses were qualified for purposes of Evidentiary Rule 803(6). The Court described the certifications to match those offered by the government here: they identified the witnesses' relevant employment, repeated the language of the rule, and were made under penalty of perjury. *Id.* at *9–10. The Court found these "bare-bones declarations" were insufficient because they did not "detail the declarant's familiarity

with the record-keeping procedures"; however, under the relaxed standard that applied at summary judgment, it found the evidence could later be converted into admissible form. *Id.* at *10. For the records to be admissible, the witnesses would have to "explain the record-keeping systems of their organizations and their own familiarity with the record-keeping procedures of their organizations." *Id.* If the defendants could not "sufficiently establish that [the witnesses] are truly qualified witnesses to authenticate these records or that these documents were truly records of a regularly conducted activity," the Court stated it would not admit the records at trial. *Id.*

The Court in *Wye Oak* also commented on supplemental declarations that provided more information but were excluded from consideration for other reasons. The supplemental declarations, too, fell short because they still relied "on largely conclusory statements" to meet the requirements of the rule, and "more detailed explanations" were needed. *Id.* Here, the government similarly seeks to meet its obligations under § 3505 through conclusory statements. As the Court ruled in *Wye Oak*, more is required.

Regarding the government's policy arguments about the difficulty of working with foreign witnesses and its contention the defense's interpretation of § 3505 would "eviscerate the statute," the defense advances three points. First, it is important to keep in mind that the government has chosen to bring this case, decades later, in this country, and in reliance on numerous out-of-court statements to meet its burden of proving guilt beyond a reasonable doubt. That the government may have difficulty

proceeding in that way says nothing about what § 3505 requires.

Second, the government's explanation for why it cannot be expected to provide anything more than boilerplate certifications is not convincing. By the government's account, the Mutual Legal Assistance (MLA) process cannot accommodate anything more than "standardized certificates" because the agents of foreign governments who receive MLA requests would be unable to obtain "customized certificates" that satisfy "a vaguely defined standard." ECF 242, at 5. It is not clear why. The witness is already certifying that records and recordkeeping practices comply with the requirements to be considered business records under U.S. law; it does not require any greater understanding of U.S. law for the witness to provide the information he or she believes supports those conclusions. Moreover, here, the government acknowledges it played a much more active role in the preparation of these certifications: "overseas travel to eight cities in seven countries, by combinations of eight prosecutors, eight agents, and four linguists, for a total of approximately 269 person-days spent traveling and conducting interviews . . . ." ECF 242, at 18. The government could easily have prepared more detailed certifications or accompanying declarations based on its interviews with witnesses for the witnesses to attest to; it already had that information, it just opted not to use it.

That relates to the final point: it does not eviscerate a statute to enforce its requirements. Section 3505 requires the proponent of foreign records to provide a certification from a qualified person. 18 U.S.C. § 3505(c)(2). Contrary to what the government seems to think, § 3505 was not meant to ensure the government can

evade its burden of showing, through a qualified witness, that out-of-court records are authentic and admissible under the hearsay rules. Instead, the statute merely changed how the government may do so by eliminating the requirement for in-person testimony. That was the "cumbersome and expensive" obligation the government's authorities refer to, *United States v. Hing Shair Chan*, 680 F. Supp. 521, 523 (E.D.N.Y. 1988); the statute reduced the logistical burden, not the informational one. *See Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 701 (E.D. Va. 2004) (discussing commentary to Rule 803(6) that referenced "the expense and inconvenience of producing time-consuming foundation witnesses" and concluding "the most appropriate way to view" a Rule 902(11) certificate is "the functional equivalent of testimony offered to authenticate a business record").

The Court should hold the government to the terms of § 3505 and require more information than the conclusory assertions found in the foreign witness certifications.

II. Scottish declaration

The defense objected to the government's failure to provide any evidence speaking to the period in which the foreign records were held in Scottish custody. The government now has provided a declaration from a seemingly knowledgeable witness that speaks to the custody and storage of the documentary evidence by the Scottish authorities. ECF 242-1. The defense intends to explore several issues raised in the declaration during its cross-examination of the "one or more witness" the government intends to call on this topic.

III. Malta witness interviews

The government's suggestion that the Court may consider the unsworn witness interviews as "context and supporting detail" for the § 3505 certifications is unsupported by any case authority. Evidentiary Rule 104(a) does not permit the government to evade the requirements of § 3505, which requires a "foreign certification"—a declaration that, "if falsely made, would subject the maker to criminal penalty . . . ." 18 U.S.C. §§ 3505(a), (c)(2). If the Court finds the government's certifications are deficient on their face, then unsworn statements in the videos or elsewhere cannot alter that finding.

While the government believes it has been a waste of time to discuss the only information it has provided about its certifying witnesses, that "exercise" has revealed more ambiguity about the challenged witnesses' familiarity with the documents than the government previously acknowledged. For example, regarding witness F.B.,[1] the government previously stated only that he "recognized the documents that were shown to him . . . ." ECF 204, at 9. It now clarifies that he "did not recognize the third document he was shown," or the fourth document. ECF 242, at 14. While the government states he did not ultimately certify those documents, it also acknowledges he expressed uncertainty about one of the documents he did ultimately certify. *Id.* at 15.

[1] The defense unintentionally misstated that F.B. certified Document 813 and was shown five, rather than six, documents during his interview. The defense regrets this oversight. The confusion stemmed, in part, from the fact that the documents were not positively identified, by name or production number, during the interview, which has complicated the review process for multiple witnesses.

The defense maintains that teasing out such complexity is a worthwhile exercise because the question before the Court is whether each witness is sufficiently familiar with the records and recordkeeping practices of the foreign companies to satisfy the requirements of § 3505. While the witnesses' statements were not given under oath, their expressions of uncertainty and confusion matter to that end.

IV. Document 1301

In its second supplemental brief, the government cites HS-USAO-122650 for an explanation of Document 1301's origins. ECF No. 242, at 21 n.10. The parties have conferred and identified the correct record as HS-USAO-130790. The defense acknowledges this witness statement provides the kind of information that, if made under oath, would qualify the witness to certify Document 1301 as a Toshiba business record and not an irregular record created by pulling data from a larger database for purposes of litigation. The statement does not appear to be under oath, so the Court should give it the same weight afforded to the Maltese interviews.[2]

V. Document 1013

The defense stands by its previous legal arguments and authorities that support its position that this document is inadmissible, namely that it is not a business record and it is being offered for the truth of the matter asserted. Additionally, the defense offers two brief responses to the government's position.

Regarding the effect-on-the-listener exception, the statements in Document

[2] The statement is a "precognition" of the kind briefly described in the Scottish declaration—a preliminary witness statement. *See* ECF No. 242-1, at 7–8. The record does not include a signature or a statement that it was made under oath.

1013 are not directives or instructions that an action be taken. They are factual statements about the world that described Pan Am's policies, identify equipment it had acquired, and noted procedures that were used. Saying "traffic law requires you to stop at a red light" is not an instruction to "stop at a red light." This case is not like *United States v. Shepard*, 739 F.2d 510, 514 (10th Cir. 1984), for example, which involved "several conversations Ruffalo had with defendant and Civella during which Civella instructed Ruffalo and the defendant to assault Jack Anderson." There was no directive here that any similar, particular action be taken.

The government's new theory that the statements express the declarant's future intention also does not hold up to scrutiny. This is not a case in which a person said, in the future, I will rob a bank, or I will visit the doctor. The statements here are from a company official who was describing the company's policies. He did not express any personal future plan, nor any specific future plan for the company generally. Further, "the danger of unreliability is greatly increased when the action sought to be proved is not one that the declarant could have performed alone, but rather one that required the cooperation" of others. 2 *McCormick On Evid.* § 275 (9th ed.), *available on* Westlaw.

VI. Ancient documents

The government does not identify any authority for its assertion that records may be admitted as ancient documents when they are found in law enforcement custody. The language of the rule providing for the authentication of ancient documents requires that the documents be found where, if they were authentic, they

"would likely be." The natural place these documents would be found is in their home countries, in the possession of the companies and individuals who purportedly created them for use in their businesses. Nothing about these documents renders them likely to be found in the possession of Scottish law enforcement other than the fact that law enforcement collected them to investigate and prosecute this alleged crime.

On that note, the defense maintains that the rationale for the ancient documents exception is undermined when the present controversy itself predates the date before which a document is considered ancient. *See* 2 *McCormick on Evid.* § 323 (9th ed.), *available on* Westlaw (noting "the age requirement generally assured that the assertion was made before the beginning of the present controversy[,]" alleviating reliability concerns). The government's argument that some of the records themselves predate the destruction of Pan Am 103 by weeks or months is beside the point, as the records were necessarily collected afterwards and—again—held somewhere solely for their use in prosecuting those responsible for that event.

VII. Residual exception

Turning at last to the residual exception, the government gives no compelling reason for its application here. Instead, it merely asserts that this evidence is important to its case, and this case is important to win. But if the documents are not business records in the absence of sufficient information about them or the witnesses who seek to certify them, and they are not reliable simply by virtue of their age and provenance, then they are not "near misses" with unusual reliability that qualifies them for the residual exception. Again, that exception is reserved for the most

exceptional circumstances, not cases where the government simply wishes with all its heart that it can rely on certain evidence but does not show it is reliable. *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017).

Reading through the government's authorities confirms they are distinguishable. In *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 391–93 (5th Cir. 1961), the document was a newspaper article reporting on a fire 58 years before trial. The court reasoned that report was sufficiently reliable because a mistake about whether there was, in fact, a fire on that date would have subjected the reporter and the newspaper to embarrassment in the community; a matter "of local interest, when the fact in question is of such a public nature it would be generally known throughout the community," thus merited relaxing the hearsay rule. *Id.* at 397. In *Slatten*, meanwhile, the D.C. Circuit applied the residual exception to a codefendant's self-incriminating statements that were made during debriefs, with the understanding that he could be prosecuted for perjury, and were consistent over time and corroborated by other evidence. 865 F.3d at 808–09. None of the documents here display anything approaching these kinds of circumstantial reliability, particularly if (as is a prerequisite to consideration of the residual exception, *Slatten*, 865 F.3d at 805) they are not shown to be reliable under the other asserted exceptions.

Slatten also illustrates that the analysis for the residual exception is necessarily fact-intensive and requires close scrutiny of each statement at issue to determine whether it displays exceptional indicia of reliability, among other requirements. *See id.* at 807 ("[W]e look to the 'totality of the circumstances . . . that

surround the making of the statement and that render the declarant particularly worthy of belief'; and drawing parallels from the enumerated hearsay exceptions, we must gauge whether the declarant was 'highly unlikely to lie.'") (quoting *Idaho v. Wright*, 497 U.S. 805, 819–20 (1990)). The government has not identified any precedent for the bulk admission of documents from an assortment of declarants that might permit it to bypass its burden as to each document.

CONCLUSION

The Court should decline to admit the government's foreign hearsay documents.

Respectfully submitted,

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