UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO ADMIT FOREIGN RECORDS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this second supplemental brief in support of its Motion to Admit Foreign Records [ECF 148].

A. The Court should admit the government's exhibits under § 3505.

The heart of the dispute is whether § 3505 certificates in general — and these § 3505 certificates in particular — are sufficient when they track the language of the statute. The answer is yes. The entire purpose of 18 U.S.C. § 3505 was to provide an efficient, clearly defined path to admission for foreign business records, allowing parties to know ahead of time exactly what attestations they must obtain from foreign witnesses. Here, the government has complied exactly with § 3505's plain language. The standard certifications supporting this motion are consistent with the statute's text, with the overwhelming weight of caselaw, with the purposes of all relevant rules of evidence, with international treaties for evidence sharing, and with the Department of Justice's routine practice. Meanwhile, the defense has failed completely to show that the "source of information or the method or circumstances of preparation indicate lack of trustworthiness." 18 U.S.C. § 3505(a)(1). Accordingly, the records "shall not be excluded." *Id.*

1. Standard certifications satisfy § 3505.

The government's first supplemental brief provided extensive authority[1] supporting the position that standard or "boilerplate" certifications (that is, those that simply track the statute's language) are sufficient foundation for the admission of records of a regularly conducted activity. *See* ECF 204 at 1-5. And at the November 12 status conference, the Court remarked that "the defense is likely to have the burden to come forth with something to rebut what the government provides." 11/12/25 Trans. at 58. The government submits that this is an accurate statement of the law: a facially valid § 3505 certificate essentially shifts the burden of persuasion to the party opposing admission.

That dynamic is reflected in the statute's procedural sequencing, whereby the offering party is required to provide "notice" of its intention to offer certified records and the opposing party then files a "motion opposing admission."[2] The statute also makes clear what such a motion would require: some affirmative reason why "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." 18 U.S.C. § 3505(a)(1). Because the defense has failed to make that showing here, the standard § 3505 certifications are sufficient. *See United States v. Adefehinti*, 510 F.3d 319, 324 (D.C. Cir. 2007) (affirming admission of business records that were "accompanied by certificates with assertions tracking Rule 902(11)'s specifications," despite defense argument that some of the custodians gave testimony that "undermines the certificates").

[1] As briefing on this motion continues, the government continues to locate additional authorities in support of its position. *See, e.g.*, *United States v. Heatherly*, 985 F.3d 254, 270 (3d Cir. 2021) (rejecting argument that "the rules require the custodian to explain in detail who compiled the records, how, or how she knows they are accurate").

[2] In this case, the government opted to move proactively *in limine* for admission of the records to ensure that the issue was fully joined and timely resolved before trial. Regardless, the statute contemplates the opposing party putting forth affirmative arguments against admission.

In arguing the opposite position, that certificates must contain more detail in the first instance, the defense quotes heavily from a treatise. *See* ECF 229 at 1-2 (citing Mueller & Kirkpatrick, 5 FEDERAL EVIDENCE § 9:40). However, the treatise's statements of law are almost entirely unsupported by citations to caselaw or statute.

To start, the treatise's statement that "[c]ourts have taken a relatively strict approach to what is required in the certificate" is footnoted with a citation to three cases. The first case offers nothing more than a prospective statement that "the requirements of Federal Rule of Evidence 803(6) and 902(11), as well as all other Federal Rules of Evidence, will be strictly enforced,"[3] with no suggestion that the certificates would need to do anything more than track the rule's language. *Nat'l Indoor Football League, L.L.C. v. R.P.C. Emp. Servs., Inc.*, no. 2:02-cv-548, 2006 WL 1437261, at *3 (W.D. Pa. Mar. 16, 2006). The second case denied the admission of certain business records, but not because the level of detail was lacking; instead, the certificates were deficient because they completely failed to address some of the required factors. *See Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 705 (E.D. Va. 2004) (explaining, for example, that "[s]everal of the declarations here evince a complete lack of compliance with the fourth requirement of Rule 902(11)" because they "fail to assert that the records were made by the regularly conducted activity as a regular practice"). The third case, which the treatise cites with a "*cf.*" signal, did not involve certified business records at all: it involved a challenge to a district court's finding that a foreign criminal record and fingerprint form were authenticated "based only

[3] The court made this remark while granting the plaintiff's motion *in limine* to offer voluminous "medical records, invoices, and [insurance] claim forms as evidence to prove its damages and costs." The court found as a general matter that admitting the documents pursuant to certifications was appropriate because "requiring Plaintiff to bring into Court all of the various medical providers, who are located all across the United States, would be unduly burdensome to the Plaintiff, and this situation appears to typify the reason why Federal Rules of Evidence 803(6) and 902(11) were adopted and promulgated." 2006 WL 1437261 at *3.

on their 'aura of authenticity' and not on compliance with the [Federal Rules of Evidence]"; in reversing, the Ninth Circuit remarked that "[t]his circuit requires strict compliance with the authenticity rules." *United States v. Perlmuter*, 693 F.2d 1290, 1292 (9th Cir. 1982). These cases hardly establish a "relatively strict approach" to business-records certificates. And regardless, saying a rule is enforced strictly is question-begging when the disputed issue is what the rule requires in the first place.

Similarly problematic is the defense's reliance on the treatise to show that "affidavits 'drafted in a conclusory manner' rarely suffice when challenged." ECF 229 at 2 (quoting Mueller & Kirkpatrick). The source puts it differently: "Courts have been intolerant of affidavits drafted in a conclusory manner, and more detail beyond setting forth the language of the rule is usually necessary." But even for that weaker proposition, the treatise does not cite a single case, nor for its subsequent recommendation that "[s]pecific facts should be recited" in support of each of the foundational requirements. This Court should not rely on a completely unsupported statement about what is "usually necessary," especially when the government has offered such plentiful examples of how courts have actually addressed the issue. Moreover, to the extent the Court wishes to consider secondary sources, a different treatise states the opposite position: "The cases generally accept as sufficient certifications tracking the specific terms of the rule." 2 MCCORMICK ON EVID. § 292 (9th ed.).

Apart from the treatise, the principal authority relied on in this section of the defense brief is *United States v. Pancholi*, no. 19-cr-20639, 2023 WL 5706197 (E.D. Mich. Sept. 5, 2023). But *Pancholi* is inapposite. In *Pancholi*, the defendant objected to the admission of emails allegedly sent by him from a generic email address to the U.S. Department of State. The government sought to offer the emails using a standard business records certificate. Although framed as a question of

authenticity, the defendant seems only to have contested his authorship of the emails — that is, he does not seem to have disputed that the government's exhibits were genuinely emails received and retained by the State Department. In these circumstances the *Pancholi* court found that the government's business-records certificate could not authenticate the records *as the defendant's emails* because, "[a]ssuming Defendant was the author of the emails in question, he did not have a business duty to report the information in those emails." *Id.* at *4. *Pancholi* is therefore not an example of a court requiring more detail from a conclusory business-records certificate; it is an example of a court finding a business-records attestation to be facially unsuited for the purpose for which it was offered.

The defense also relies on *Rambus, Inc.*, one of the cases cited in the treatise discussed above. *See* ECF 229 at 2, 4 (citing 348 F. Supp. 2d 698). As already noted, the problem in *Rambus* was not that the affidavits were conclusory, but that they failed to attest to each of the required factors, even in conclusory fashion.

As a practical matter, the defense's theory of § 3505 would eviscerate the statute. Requests for certified foreign records are almost always made by proxy: the government transmits a Mutual Legal Assistance (MLA) request to a foreign government, and the foreign government in turn makes the request of the business that holds the records. The only way for this system of international cooperation to work is if standardized certificates can be relied upon. It is impossible to expect the agents of foreign governments (presumably unfamiliar with the U.S. legal system) to respond to every MLA request by obtaining customized certificates that satisfy a vaguely defined standard, and it is inconceivable that this is what Congress meant to require when enacting § 3505. Indeed, in some cases the governing treaties actually *include* a standard § 3505 certificate with directions that it be used when providing records. For example, the treaty with Japan provides:

> Originals or copies of business records requested by the United States of America may be authenticated by Japan by use of CERTIFICATION OF BUSINESS RECORDS, attached hereto as Form A-1. Originals or copies of business records authenticated in such manner shall be admissible in evidence in the United States of America for the truth of the matters asserted therein.

MUTUAL LEGAL ASSISTANCE TREATY BETWEEN THE UNITED STATES AND JAPAN (signed August 5, 2003), at 14; *see also id.* at 16 (Form A-1, a standard § 3505 certificate). Such treaties are approved by the Senate, ratified by the President, and carry the force of law "equivalent to an act of the legislature." *Cheung v. United States*, 213 F.3d 82, 94-95 (2d Cir. 2000).[4] For countries without such a treaty provision, it is still the general practice of the Department of Justice to provide standard § 3505 certifications to be executed when fulfilling any request. Whether pursuant to country-specific treaty or the generally applicable statute, the clear intent behind the law is that standardized certificates will suffice.

In sum, the defense's supplemental pleading does not provide any reason for this Court to depart from the well-established rule that conclusory certificates are sufficient foundation for the admission of foreign business records.

2. The Scottish procedures provide extra assurances of authenticity.

In response to the defense's original arguments based on the records' having passed through Scottish custody, the government proffered that the Scottish authorities adhered to rigorous procedures that enhance, rather than diminish, the reliability of the documents. *See* ECF 183 at 3-5. The government has now obtained a Declaration from a senior Scottish police official setting forth those procedures in detail. *See* Exhibit 1 (hereinafter the "Scottish Declaration").[5]

[4] For this reason, the treaties provide a separate and additional basis to admit the records.

[5] The government also anticipates calling one or more witnesses at trial to testify about these same procedures. Additional testimony will relate to the specific procedures used to process crime-scene evidence collected from the site of the crash.

As explained in the Scottish Declaration, the foreign records the government is now offering — like all evidence the Scottish authorities collected — were meticulously documented and catalogued. *See, e.g.*, Ex. 1 at 2-3 (describing labeling procedures involving unique identifiers, description of place and date of collection, and signatures of responsible personnel); *id.* at 3 (describing logging of evidence in Productions Books and ledgers); *id.* at 3-4 (describing "HOLMES" computer system used to track evidence, which has been in continuous use since beginning of investigation). Along with basic data about each piece of evidence, the Scots also kept detailed records of witness statements from persons involved in the collection, including seizing officers as well as business owners/employees who provided documents. *Id.* at 4-6. Once in Scottish custody, the evidence was kept in a "production store," secured with an alarm system and accessible only by authorized personnel. *Id.* at 6. Before providing digital copies of the documents to the U.S. authorities, the Scots comprehensively compared the scans to the originals to make sure they were accurate. *Id.* at 8-9. The rigor of all these procedures reflects case's extraordinary importance to the Scottish authorities and the broader UK public, as well as its status as an open criminal investigation even to this day. *Id.* at 9. This exemplary level of care was also necessary because the Scottish authorities had their own criminal trial to consider. As the Declaration notes, more than 1,800 documentary productions or exhibits were entered into evidence by the prosecution during that proceeding. *Id.* at 8. The Scottish trial court's reliance on these documents as evidence, and the higher court's affirmance of the resulting judgment on appeal, instill even greater confidence in the reliability of the records.

In arguing the Scottish-custody point, the defense uses the metaphor of "links" in a "chain," and cites two cases as purportedly analogous. ECF 229 at 10-13 (citing *United States v. Petrie*, 302 F.3d 1280, 1288 (11th Cir. 2002); *Adefehinti,* 510 F.3d at 326). These arguments confuse the

issues. The "chain" invoked by the court in *Petrie* was the original intra-corporate transmittal of information ultimately memorialized in the document at issue — not the passage of finished records from one entity to another, as we have here. 302 F.3d 1288. And the cases collected in *Adefehinti* involved records created by a third party being certified by an employee of the company that acquired them. 510 F.3d at 326. Here, the government is offering certificates from the originating businesses, not the Scottish police who obtained copies of the records. This is not a chain with loose ends, but a closed loop in which the originating entity is the same one certifying the records, and it has no missing links.

Since there is no "break in the chain of custody" here, the defense's invocation of caselaw on that issue is likewise misplaced. *See* ECF 229 at 12 (citing *United States v. Mejia*, 597 F.3d 1329, 1336 (D.C. Cir. 2010)). Regardless, it is not the case that, "when dealing with physical evidence, such a break in the chain of custody would be obviously problematic." *Id.* Serious breaks in a chain of custody *can be* problematic, but only when the proponent is relying on the chain of custody to establish authenticity — usually with fungible items like drugs. *See generally United States v. Rawlins*, 606 F.3d 73, 82-83 (3d Cir. 2010). And even where the chain of custody matters, "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988)); *see also Rawlins*, 606 F.3d 73, 82 (3d Cir. 2010) ("We have long rejected the proposition that evidence may only be admitted if a 'complete and exclusive' chain of custody is established" (quoting *United States v. DeLarosa*, 450 F.2d 1057, 1068 (3d Cir. 1971)). Indeed, the D.C. Circuit has re-affirmed, post-*Mejia*, that gaps in the chain of custody do not preclude the admission even of fungible items like drugs so long as the proponent demonstrates

that, " as a matter of reasonable probability, possibilities of misidentification and adulteration have been eliminated." *United States v. Mitchell*, 816 F.3d 865, 873 (D.C. Cir. 2016).

Here, however, the government has authenticated the records using the § 3505 certificates. *See* 18 U.S.C. § 3505(a)(2) (providing that certificate *"shall* authenticate" a foreign record (emphasis added)). The witnesses were able to execute because they recognized the documents, which bear all the hallmarks of their businesses' records. *Cf.* Fed. R. Evid. 901(b)(1) (authentication by witness with knowledge); 901(b)(4) (authentication based on "appearance, contents, substance, internal patterns, or other distinctive characteristics"). This foundation obviates any reliance on chain of custody to authenticate the items. *See United States v. Humphrey*, 208 F.3d 1190, 1204 (10th Cir. 2000) ("[T]hese documents were unlike fungible evidence, such as drugs or cash, where absent a reliable chain of custody there would be a relatively high risk that the original item had been contaminated or tampered with. If a proffered exhibit 'is unique, readily identifiable and relatively resistant to change, the foundation need only consist of testimony that the evidence is what its proponent claims.'" (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989))).

Even if there were some conceivable basis to suspect that the documents are forgeries or were tampered with while in Scottish custody, that would not be a reason to exclude them on authenticity grounds. As the D.C. Circuit explained when affirming the conviction in *Khatallah*, the question for admissibility is not whether the government can "conclusively prove[]" authenticity, but "only whether the government's showing 'permit[s] a reasonable juror to find that the evidence is what its proponent claims." *United States v. Khatallah*, 41 F.4th 608, 623 (D.C. Cir. 2022) (quoting *United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982)). With that low bar satisfied, the defense's arguments "go to the *weight* of the evidence — not to its

admissibility." *Id.* (quoting *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004) (emphasis in original)).

Finally, the defense posits that, because of the passage of time while the Scots held the documents, the originating businesses might "no longer maintain the records in question as part of their regular business activities." ECF 229 at 11. But there is no rule that the specific record — or even the general type of record — must still be retained by the originating business at the time it is offered as an exhibit. Such a requirement would be contrary to the past-tense phrasing of the statute. *See* 18 U.S.C. § 3505 (requiring, for example, that the record "*was* kept in the course of a regularly conducted business activity" (emphasis added)). It would also have no basis in logic. If a business's practices in 1988 were such that the information in a record could be presumed accurate, that fact does not retroactively change if the company later modifies its recordkeeping practices or goes out of business. Moreover, the Scots' custody of the documents was purely to preserve them for later use in a trial; this does not mean the records were "kept" by the Scots "in the course of a regularly conducted business activity" such that the Scottish police become custodians for purposes of § 3505. It is therefore inaccurate to say that the certifying "company employees seem to be vouching for a third-party's practices." ECF 229 at 13.

3. The Maltese interviews only reinforce what the certificates have already established.

Before turning the Malta witnesses, it bears repeating the government's position, supported by all the authorities already discussed, that a facially valid § 3505 certificate is sufficient foundation for the admission of a foreign business record, with no need for extrinsic supporting evidence. The § 3505 certificates executed by the Maltese witnesses are all facially valid. The Court therefore does not need to consult the interview videos for further support of the records' admissibility. Contrary to the defense's framing, there is no "gap" to be "close[d]," and the

government is not "fall[ing] back" on the recorded interviews. ECF 229 at 5. The only reason the videos are at issue is because the defense's response brief used them as the basis of a blanket assertion that certain witnesses stated they did not recognize a document they were shown[6] or used ambivalent language such as 'might be' or 'appears to be.'" ECF 173 at 6 n.3. The government refuted that argument in its reply brief, ECF 183 at 10-13, and provided even more detail for every Maltese certifying witness in its supplemental brief, ECF 204 at 5-10.

If the Court wishes to consider the videos, it can do so despite their being unsworn. The government here has complied with § 3505(c)(2)'s requirement that written certifications be of a type that, "if falsely made, would subject the maker to criminal penalty under the laws of that country." Unlike in the cases cited by the defense, we are not offering the videos as a substitute for a § 3505 certificate. *See* ECF 229 at 5-6 (citing *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1372–73 (Fed. Cir. 2021); *S.E.C. v. Franklin*, 348 F. Supp. 2d 1159, 1163 (S.D. Cal. 2004)). To the extent the interviews are relevant, it is to provide context and supporting detail to the certificates. When deciding threshold questions like whether a document is hearsay-excepted, the Court is not bound by the rules of evidence, let alone limited to sworn statements. *See* Fed. R. Evid. 104(a). So there is no prohibition on considering the interviews or any other extrinsic evidence, although we reiterate that the Court does not need to do so given that the certificates are sufficient on their own.

With all that said, any consideration of the Malta interview videos only reinforces the validity of the certifications and the reliability of the records. The defense's original argument

[6] By making the argument in such general terms, the defense failed to identify which specific documents the witnesses supposedly did not identify. As shown below, it turns out that the only documents witnesses did not recognize were documents they did not certify. As previously argued, this fact weighs in favor of the reliability of the certificates that *were* executed, because it shows the witnesses were not blindly certifying anything that was put in front of them. *See, e.g.*, ECF 183 at 12-13.

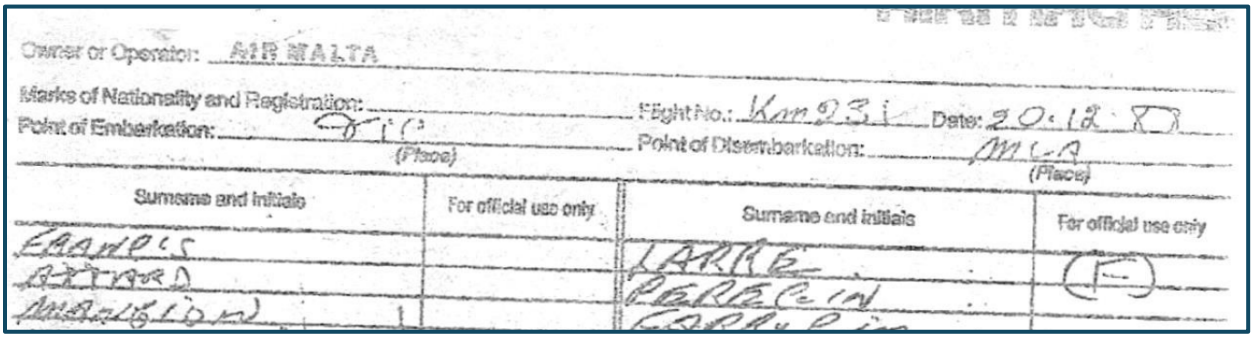
about the videos was a blanket, conclusory assertion that certain witnesses displayed "uncertainty." Their supplemental pleading provides more detail, ECF 229 at 6-10, and in doing so reveals the argument to be meritless. In particular:

S.A. – The defense describes the witness as hesitating and using the phrases "could be," "probably," and "99%" in response to the document marked M2-25 (Ex. 703). But S.A. did not certify that document. *Compare* Ex. 703-c (certification of M2-25 by witness A.A.), *with* Ex. 702-c (certification of documents other than M2-25 by S.A.). Any hesitance on this document is therefore irrelevant except that it strengthens the reliability of S.A.'s attestations on the documents he did certify, proving he was not just blindly certifying whatever was put in front of him. The same goes for M2-28 (Ex. 701), which consists of two separate documents photocopied onto a single page: S.A. recognized one of the documents (M2-28B) but not the other (M2-28A). S.A. certified only M2-28B, and a different witness certified M2-28A. *See* Ex. 701-C.

A.Bu. – As the defense concedes, the witness "positively identified several" of the documents. ECF 229 at 7. These are the ones he certified.

A.D. – The defense says that the witness was "not certain" about Exhibit 810. ECF 229 at 8. But the video reveals that any uncertainty was in his recollection about a detail of the document's content — namely, whether a specific Air Malta route had a specific flight number — rather than whether the document was a genuine company record kept in the ordinary course of business. When shown the document, after looking closely at it, A.D. spoke to himself under his breath and then pointed to the top of the document (excerpted below) and wondered aloud about the handwritten flight number, "231, is it?" The prosecutor agreed that appeared to be what was written. Continuing to look at the document, he muttered to himself mostly inaudibly, saying the number "231" several more times. He finally said, "I'm not certain whether it used to be…" and

pointed his finger back and forth between where "KM231" appears and the upper-left corner of the document where the "Point of Embarkation" is listed. He said, "This says Tripoli – from Tripoli to Malta. And the flight number is KM231. But I cannot… [pointing finger back and forth] put them together… But that is more or less how they used to do it at the time, because at the airport, I think in '88 they did not have computerization" (referring to the fact that the manifest is handwritten).


Owner or Operator: AIR MALTA
Marks of Nationality and Registration:
Flight No.: KM231 Date: 20.12.87
Point of Embarkation: TRIPOLI (Place)
Point of Disembarkation: MALTA (Place)

Surname and initials	For official use only	Surname and initials	For official use only
FRANCIS		LARKE	
ARTARD		PARECHIN	

The witness subsequently confirmed, in response to a question from the prosecutor, that these were the type of document — "passenger lists," as he described them — with which he was familiar. Accordingly, even if A.D. was "not certain" 35 years later whether KM231 was the correct flight number for the Tripoli-Malta route, that fact does not diminish his ability to certify the document as an authentic Air Malta business record. *See, e.g.*, *United States v. Khatallah*, 278 F. Supp. 3d 1, 7 (D.D.C. 2017) ("[T]here is no requirement that the witness who lays the foundation for admission of a business record be able to personally attest to its accuracy." (quoting *United States v. Smith*, 804 F.3d 724, 729 (5th Cir. 2015) (internal quotation marks omitted)).

A.Bo. – The government has thoroughly summarized this witness's interview in prior pleadings. *See* ECF 183 at 9, 11-12; ECF 204 at 8. Throughout the interview, he clearly demonstrated his sufficient knowledge about how documents from the relevant period were created and used. For example, he commented on what information "usually" appears in documents like Exhibit 806, demonstrating familiarity with them as a class, and added that "[t]his hasn't changed

much, to be honest." Multiple times, he emphasized that the company's usage of the documents in question has remained consistent: "We are still using [ia], many airlines are still using these basic systems," and "We still use the same – roughly the same system." Notably, his repeated use of the first person "we" confirms that, despite being a lawyer by trade, A.Bo. is directly involved in and familiar with the airline's business activities, not merely providing legal advice at arm's length.[7]

F.B. – The defense states that the government is relying on F.B. to certify Exhibit 813, but that is incorrect; the certification for Exhibit 813 was executed by a different witness. *See* Ex. 813-c. When purporting to summarize the video, the defense's representations are similarly inaccurate. The witness was shown six documents (not five), he positively identified four (not two), and those four documents are the ones he certified.

F.B. was first (at 3:45) shown Exhibit 812, which he readily recognized and confirmed was kept in the ordinary course of business. He was next (at 5:13) shown Exhibit 823, which he also recognized and began explaining. He was sufficiently confident in his recollection that he corrected the prosecutor: when asked, "they show the arrivals and the checkouts?," he clarified it was only checkouts. When asked, "Is that what the checkout records generally looked like in 1988," F.B. nodded emphatically and said, "Yes, yes. As far as I know yes." When asked, "And they were kept as the regular course of business, every day, with the checkouts?," he responded affirmatively.

F.B. did not recognize the third document he was shown (at 6:12). The interviewers assured him that was fine, and he did not certify that document. Likewise the fourth document (at 7:25) he did not recognize and accordingly did not certify.

[7] The government's original exhibits mistakenly included a copy of A.Bo.'s certificate as corresponding with Ex. 805. The actual certifying witnesses for that exhibit were D.V. and A.D. The government has provided a corrected version of Ex. 805-c to the defense and shared it with the Court via USAFx.

When the prosecutor showed him Exhibit 821 (at 8:45), a Hilton registration card, F.B. tentatively responded that he was not involved in such documents at the Hilton because he worked "downstairs" rather than at the front desk. But after giving it more thought, F.B. stated, "I'm trying to remember, because I did work at front desk for a time at the Hilton,"[8] then nodded his head, patted his hand on the document, and concluded, "I would say yes, this is a Hilton [inaudible]." Later, when he was preparing to sign the certification, the prosecutors showed him Exhibit 821 again (at 15:31) to be certain: "Are you comfortable signing that?" and "Yeah, I can't remember if you were comfortable recognizing this as what was regularly kept at that time or not," to which F.B. again responded in the affirmative. Finally, when showed Exhibit 822 (at 12:58) and asked "what is that?," F.B. immediately explained what it was and how it was generated ("When they [the guests] come in, they have to fill in this.").

In sum, the defense's suggestion that the government obtained false certifications from F.B. is baseless. He recognized every document that he certified.

D.V. – The witness was first shown Exhibit 815, a three-page passenger manifest with a handwritten first page and printed second and third pages. Looking only at the first page, D.V. commented that he was having trouble with the handwriting. The prosecutor handed him Exhibit 805, a second passenger manifest. When asked if he recognized them as Libyan Arab Airlines documents, D.V. looked at the first page of Exhibit 815 and said "it could be" but that his recollection was that the manifests were computerized. When the prosecutor flipped to the second page, he immediately recognized the document, responding, "ah, that's it, that's it, that's it." When asked whether the document looked the way he remembered, he commented on the color of the

[8] The witness worked at several different hotels, so it is understandable it would take a moment to recall which positions he held at which hotels.

paper the copy was printed on ("they were green rather than white") but identified no other discrepancies with the content or format of the manifest ("they looked like this; this was the type of text"). He was next shown Ex. 814, depicting passes for airport employees; he paged through the document and commented about his memories of the people mentioned in it. Next, the prosecutor showed Exhibit 818, a set of flight timetables, asking "Do you recognize this at all? And it's okay if you do not." The witness paged through the 26-page document and remarked, "[inaudible][9] but I don't know for what year these are, you know? Because, let's see…" A prosecutor asked, "Even if you don't know the specific date, do you know what that is?," and the witness immediately responded, "This is the timetable… We used to have these at the office, you know, small books like that. We give them to the passengers."

The prosecutor next showed Exhibit 816, another flight manifest, which D.V. recognized and began commenting upon. Then the prosecutor showed Exhibit 820, another manifest, which D.V. immediately recognized as being for flight "147," searching his memory for the route that was assigned that number ("Could that be from Benghazi?") and commenting on the flight's passenger capacity ("It used to take about eighty"). When the prosecutor asked whether Exhibit 820 "looks like" a flight manifest, the witness responded, "Yes, yes, it *is* a flight manifest," and commented on the cosmetic appearance of the originals: "They were rather bigger than that; at that time I think we had the big green paper [mimics sound of 1980s-vintage computer printer]."

Near the end of the interview, when the prosecutor presented the certificate to be signed, D.V. asked for clarification on one of the attestations. When the prosecutor explained it, he readily agreed, stating among other things that the manifests were necessary for purposes like "to submit

[9] Because the witness spoke quickly and with an accent, the beginning of the sentence is difficult to hear, but sounds like "Timetables I remember."

how many seats were sold… typical airline knowledge, it was normal practice." The prosecutor finally showed the witness Exhibit 819 and 817, flight manifests similar to those that had already been discussed, and once again the witness confirmed that he recognized them as documents used by the airline he'd worked for.

* * *

The exercise of summarizing the Malta interviews has consumed approximately 20 pages of the parties' briefing and many hours of the government's time reviewing and transcribing relevant portions of the videos. After all that, the defense's original conclusory allegations about the videos have proven completely unfounded. Needlessly miring this already-complex case in such fact-intensive pretrial arguments is the inevitable consequence of the defense's position that standard § 3505 certificates are insufficient to establish admissibility. It is also exactly what the statute was designed to prevent, a point we address next.

4. The rule's purposes strongly favor admission.

As discussed in a previous filing, the general business-records exception to the rule against hearsay is justified by the "unusual reliability" of business records, as well as by the necessity of admitting records without subjecting the proponent to "burdensome and crippling" foundational requirements. *See generally* ECF 147 at 17 (quoting Fed. R. Evid. 803, Advisory Committee Note to 1972 Proposed Rules). Against that background, § 3505 was enacted for the specific purpose of making it easier to admit foreign business records. *See generally* ECF 204 at 1-2 (citing cases and legislative history). The statute's drafters recognized that a "simple, inexpensive substitute" was necessary to replace the "cumbersome and expensive procedures" previously required. *United States v. Hing Shair Chan*, 680 F. Supp. 521, 523 (E.D.N.Y. 1988) (quoting H.R. Rep. No. 98–907, at 3 (1984)). They meant the statute to make foreign records "more readily admissible." *United*

States v. Garcia Abrego, 141 F.3d 142, 177 (5th Cir. 1998) (quoting H.R. Rep. No. 98–907, at 2). According, § 3505 spells out in specific terms what attestations a foreign-records certificate must contain.

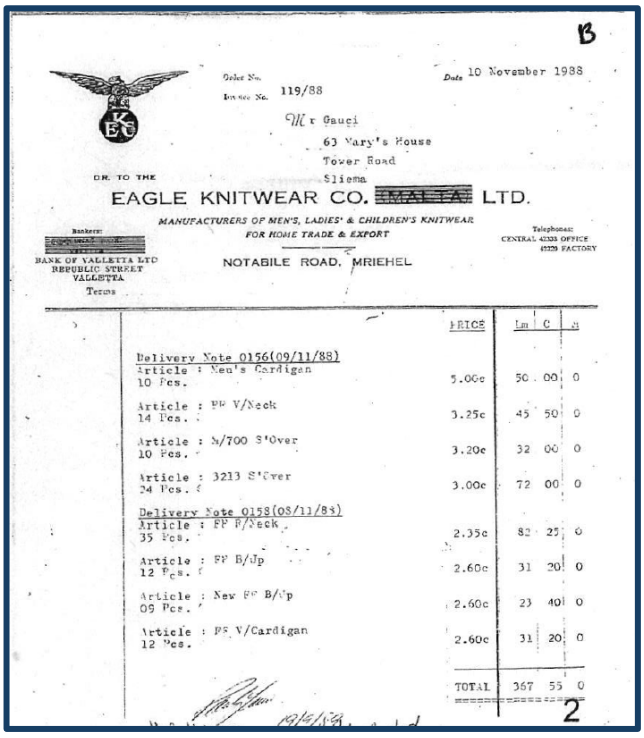
In reliance on the statute's plain text, and on the ample precedents holding that standardized certifications are sufficient, the government diligently obtained the certifications that it has submitted to the Court. The first travel overseas for this purpose took place in October of 2023, and the process overall and has involved trips 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 (to say nothing of the time spent preparing for the interviews, including identifying the appropriate witnesses and accomplishing the necessary coordination with foreign authorities, which for one country took more than two years).

Throughout the extensive litigation over these documents, the defense has never provided any concrete reason to think the information in the government's proffered exhibits in inaccurate. Their arguments have instead been addressed at the formalities of § 3505. To be sure, technical compliance is important, which is why the government has adhered scrupulously to the statute's requirements. But those formalities are not ends in themselves; they exist in service of the "benchmark question in this and every situation involving the admission of documentary evidence: do the documents bear the indicia of reliability?" *United States v. Al-Imam*, 382 F. Supp. 3d 51, 57 (D.D.C. 2019) (quoting *United States v. Jawara*, 474 F.3d 565, 584 (9th Cir. 2007)).

These documents bear the indicia of reliability. On their face, the government's exhibits are conventional day-to-day records from familiar types of businesses like hotels, airlines, and clothing merchants. They are entirely mundane, with nothing "highly unusual" about their "provenance." ECF 229 at 12. Granted, the documents are old, so they might differ in appearance

from comparable records being generated today, but in substance they are the same. Accordingly, even within the four corners of each document, there is reason to infer that they are records of the type that the originating entities made and kept as part of their regular practice using information from a person with knowledge, lending additional credence to the government's § 3505-compliant certifications. *See United States v. Hing Shair Chan*, 680 F. Supp. 521, 524 (E.D.N.Y. 1988) (finding Hong Kong hotel records admissible based on standard § 3505 certificate, and taking judicial notice "of the fact that Hong Kong's trade and service economy is sophisticated and its hotel business practices are much like those in the United States, making it likely that the records were as authentic and accurate as they appeared to be").

Take for example Exhibit 701, a Maltese clothing record. The document bears the company's name, logo, and contact information; a date; a customer's name and address; a space for "Order no." and "Invoice no."; an itemized list of "Article[s]," such as "Men's Cardigan," with each line specifying a quantity and price; and a "TOTAL" sum at the bottom. The accompanying certificate establishes, and common sense confirms, that this document is a sales record from the Eagle Knitwear clothing company — there is no reason to think otherwise. For the defense to call the reliability of this record into question, they would need to provide reason to think that the document is a forgery rather than a genuine record of Eagle Knitwear, or that it was created as a one-off rather than a routine



B

Date 10 November 1988

Invoice No. 119/88

Mr Gauci
63 Mary's House
Tower Road
Sliema

DR. TO THE

EAGLE KNITWEAR CO. [redacted] LTD.

MANUFACTURERS OF MEN'S, LADIES' & CHILDREN'S KNITWEAR
FOR HOME TRADE & EXPORT

NOTABILE ROAD, MRIEHEL

Telephones: CENTRAL 43225 OFFICE 45229 FACTORY

Bankers: [redacted] BANK OF VALLETTA LTD REPUBLIC STREET VALLETTA

Terms

	PRICE	Lm	C	M
Delivery Note 0156(09/11/88)				
Article : Men's Cardigan 10 Pcs.	5.00c	50	00	0
Article : FF V/Neck 14 Pcs.	3.25c	45	50	0
Article : M/700 S'Over 10 Pcs.	3.20c	32	00	0
Article : 3213 S'Over 24 Pcs.	3.00c	72	00	0
Delivery Note 0158(08/11/88)				
Article : FF F/Neck 35 Pcs.	2.35c	82	25	0
Article : FF B/Up 12 Pcs.	2.60c	31	20	0
Article : New FF B/Up 09 Pcs.	2.60c	23	40	0
Article : FF V/Cardigan 12 Pcs.	2.60c	31	20	0
TOTAL		367	55	0

2

part of Eagle Knitwear's business, or that the person creating the record had no knowledge of the sales in question and was just listing articles and quantities without regard to accuracy.

They have not done so, for this exhibit or any of the others. That failure to rebut the *prima facie* foundation established by the certifications is what distinguishes this case from *Pancholi*, discussed above, and from *Ekiyor* and *Browne*, the outlier cases of which the government apprised the Court in its supplemental brief, ECF 204 at 3-4. In all those cases, the defense could point to something wrong with the records that called the certifications into doubt. *See also* 5 WEINSTEIN'S FEDERAL EVIDENCE § 902.13 (available on LexisNexis) ("An opponent who believes that the declarant has not established a sufficient foundation will have to present evidence that demonstrates the failure."). Here, the government's § 3505-compliant foundation has gone unrefuted, so the "benchmark question" of "reliability" should be resolved in the government's favor.

The other animating concern of the general business-records rule and of § 3505 — necessity — is also acutely present here. The events documented in the proffered exhibits, like clothing sales and flight schedules, were routine and unremarkable when they happened, and that was more than 35 years ago. In the decades since, many of the percipient witnesses have died, and many others' memories of specific events have faded. Facing that reality, the government has expended enormous effort and resources to identify, locate, and interview persons associated with the various businesses who are able to recognize the relevant documents and attest to their status as routine business records. Succeeding in this endeavor required securing the witnesses' voluntary assistance in executing certificates that subject them to the threat of criminal punishment in return for no tangible benefit. This process has been anything but "simple [and] inexpensive," but the defense's theory would hold that it is still not enough, and that the statute requires the extra step

of persuading each of the dozens of foreign witnesses to draft bespoke affidavits (which would inevitably spawn even more extensive litigation over whether each affidavit contained an adequate level of factual detail). This unworkable alternative would be exactly the type of "technical roadblock" that § 3505 was intended to prevent. *United States v. Strickland*, 935 F.2d 822, 831 (7th Cir. 1991).

For all these reasons, the Court should rule that the government's certified exhibits are admissible under 18 U.S.C. § 3505.

5. Exhibit 1301 is admissible.

Based on a summary of a statement he gave to Scottish prosecutors in 1999, the certifying witness for Exhibit 1301 described the document this way:

> This is a copy of a document that I recognise. This is a document created in the course of Toshiba's business and was kept by Toshiba to show which product should contain a particular part. In this case it shows which audio products contain two types of printed circuit board - 92192791 and 92192935. It would have been used to determine which parts should be distributed to the production line. The information about the products would be supplied by the production department and they would be the people within Toshiba who would know these matters.[10]

This explanation is precisely consistent with the attestations in § 3505 certification signed by the witness and submitted in support of the government's motion. It refutes the defense's suggestion that the document was "made at the request of investigators." ECF 229 at 13.

Regardless, even if Exhibit 1301 were printed from a database at the request of investigators, that provenance would not disqualify the information as Toshiba's business records. Data stored on computer systems does not exist in legible form until a specific query of the database is made and the results displayed or printed. This is true of one of the most common forms

[10] Produced at bates no. HS-USAO-122650. The witness then goes on to give detailed explanations of the information reflected in the document.

of business records used in criminal cases: phone records. When a phone company provides a log of a user's calling activity, they are not pulling a preexisting document from a giant filing cabinet. Instead, they generate a document containing data responsive to specified parameters. Even if those parameters are provided by investigators, that fact "does not turn the data contained in the print-out into information created for litigation"; instead, "the physical manner in which the exhibit was generated simply reflects the fact that the business records were electronic, and hence their production required some choice and offered some flexibility in printing out only the requested information." *United States v. Burgos-Montes*, 786 F.3d 92, 120 (1st Cir. 2015).

The difference in *United States v. Ekiyor* is that the data there "appear[ed] to reflect conclusions reached about underlying baggage data, rather than mere replication of the underlying data itself," meaning the government had not established that "that the information in the baggage log consists *solely* of a subset of a larger underlying database" *United States v. Robinson*, no. 15-20652-16, 2018 WL 5077260, at *2 (E.D. Mich. Oct. 18, 2018) (quoting, adding emphasis to, and distinguishing *Ekiyor*, 90 F. Supp. 3d 735, 743 (E.D. Mich. 2015)). Here, Exhibit 1301 contains no "conclusions," only the underlying data.

Accordingly, the Court should admit Exhibit 1301 pursuant to 18 U.S.C. § 3505.

6. Exhibit 1013 contains no double hearsay.

As the defense notes, the double-hearsay argument against Exhibit 1009 is now resolved. The defense also responds that "it is not clear how the government intends to use [Exhibit] 1024 to rebut a potential defense argument." The relevance of the document necessarily depends on the whether and how the defense puts the "Helsinki Warning" at issue in trial. Their response suggests they may not do so at all, in which case the government would not offer the exhibit. Depending

how the issue arises, the government might also elect to offer only portions[11] of the exhibit. Accordingly, at this time the government asks the Court to defer ruling on Exhibit 1024.

Turning to the remaining exhibit, Exhibit 1013, it is necessary to clarify what layers of hearsay are at issue. A telex or email can be understood as asserting, at the first level, that a certain person sent a certain message to one or more other persons on a certain date and time (the type of information contained in a message's "headers"). The second-layer statement is whatever is the content of the message. *See United States v. Ayelotan*, 917 F.3d 394, 402 (5th Cir. 2019) (explaining the distinction between layers).

At the first level, there is little question that business entities send, receive, and retain email (or, formerly, telex) messages as a routine part of their activities, and that they rely on the accuracy of the "headers" to know things like when the message was sent and to whom. There is accordingly no reason to doubt the validity of a business-records certification to the extent it establishes the reliability at the first layer.

The harder question comes at the second layer. It is here that not "every single email with any company" qualifies for the business-records exception. ECF 229 at 16 (quoting *United States v. Daneshvar*, 925 F.3d 766, 777 (6th Cir. 2019)). Depending on a message's content, it may or may not be the *type* of email sent as a regular practice of the business. At this layer, it is right to distinguish between (for example) an internal weekly report from a subordinate to a supervisor, versus an email from an outside alleging that one of the employees had committed a crime. In the

[11] For now, we note that the defense is incorrect to infer that the document was "created and arranged at the request of investigators." ECF 229 at 18. According to a summary of a statement the certifying witness gave to Scottish prosecutors in 1999, "All of these telexes were originally just small pieces of paper that were ripped off the machine. I would staple them together to form a page like this." (Produced in discovery as HS-USAO-123732.)

latter case, a court would rightly question whether the message's assertions qualify for the exception such that they can be offered for their truth.

Courts do not always analyze the layers separately in this way. But it is clear from their reasoning that, when they exclude company emails from the business-records exception, it is because of the second layer. Taking the cases cited by the defense: In *United States v. Daneshvar*, the Seventh Circuit affirmed exclusion of an internal company email that was "a one-time discussion regarding what to tell doctors." 925 F.3d at 777. In *United States v. Cone*, the Fourth Circuit found that there was insufficient foundation to apply the exception to customer emails complaining that they'd received counterfeit goods from the defendants' business. 714 F.3d 197, 219 (4th Cir. 2013). In *Queen v. Schultz*, the ultimate issue of the case was whether the plaintiff and defendant had formed a business partnership to create a TV show. 671 F. App'x 812, 815 (D.C. Cir. 2016). The plaintiff tried to rely on this "ostensible partnership" as foundation to admit 1,200 of his own emails, but as he conceded at trial, his "focus was to get a television show, not to keep records exactly accurate." *Id.* Still, a number of the emails were admitted for purpose other than the truth of their actual assertions, indicating that the reliability problem was with the email's substantive content, not the fact of their having been sent.[12]

In this case, unlike those above, Exhibit 1013's content is reflective of routine internal business correspondence. But more importantly, the substance of the message is not hearsay in the first place, because it is not being offered for the truth of any matter asserted. *Cone*, discussed just

[12] Likewise *United States v. Pancholi*, discussed above. The court there held the defendant's emails to the State Department ineligible for the business-records exception not because the State Department didn't routinely receive and retain emails, but because the person who sent *those particular* emails "did not have a business duty to report the information" therein. 2023 WL 5706197 at *4. Although framed as a question of authenticity, not hearsay-exceptedness, the issue turned on the same second-layer problem we are discussing here.

above, is instructive on this point. Although the Fourth Circuit held that the emails from customers lacked sufficient foundation to be offered for their truth (i.e., to prove that the customers received counterfeit goods), the court affirmed the district court's admission of the same emails for the "non-hearsay purpose" of showing that the defendants were "on notice as to the counterfeit nature of the goods they sold." 714 F.3d at 219.

The defense argues that the statements in the messages "must be true" for them to have relevance, ECF 229 at 19, but that is not so. Take the assertion that the FAA had approved x-rays as an alternative to physical searches. If that fact were false, but if it were communicated to Pan Am's security operations staff as if it were true, it would still cause employees to act in accordance with what they believed was the authorized policy. Conversely, if it were true that the FAA had approved x-rays, but if Pan Am had never communicated that fact to its employees on the ground, the existence of that approval would do little or nothing to support an inference that employees subsequently acted in accordance. The truthfulness or falsity of the assertion about the FAA is therefore immaterial, and the statement matters only insofar as someone heard and acted on it. This is textbook "effect on the listener."

That conclusion follows even more strongly for other parts of the messages, like the directive "IN THE EVENT OF A NO[-]SHOW INTERLINE PAX [passenger] AND HIS BAG IS ALREADY LOAD[ED] IN THE BELLY [of the plane,] WE GO!!!!!" Unlike the point about FAA approval above, this statement is not an assertion of any separately existing fact. It is an imperative with its own operative effect, being communicated to the employees responsible for carrying it out. The message constitutes the internal dissemination of corporate policy, a species of "order or instruction," which "is, by its nature, neither true nor false and thus cannot be offered for its truth." *United States v. Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984) (citing *United States v. Keane*, 522

F.2d 534, 558 (7th Cir. 1975)); *cf. also United States v. Davis*, 596 F.3d 852, 856 (D.C. Cir. 2010) (citing *Shephard* in support of holding that money orders are "legally operative documents with a meaning independent of the truth of the words they display"). Corporate policies only exist to the extent that they are spoken or written into existence, and that is what is happening here. Its relevance is, in other words, the fact that it was said and not the truth of any assertion.

The cases cited by the defense only illustrate why their argument is wrong. In *American President Lines, LLC v. Matson, Inc.*, the plaintiff company APL sought to offer multi-layer hearsay: testimony from APL employees that they'd been told by Home Depot employees that the defendant company Matson had threatened them (the Home Depot employees) not to do business with APL. 775 F. Supp. 3d 379, 404 (D.D.C. 2025). On these facts, competent evidence of Matson's statements (the threats) could be admitted to show those statements' effect (provoking fear) on the listener (the Home Depot employees).[13] But APL's only evidence of the threats was the out-of-court statements of the Home Depot employees, who told the APL employees (the "listeners") that the threats happened. *Id.* If *those* statements were being offered "purely for their effect on the listener and not for the truth of the matter asserted, then APL has no evidence that Matson made these threats." *Id.* Analogizing to this case, the government's exhibits (instructions from Pan Am to employees) are like the bottom-level statements in *American President Lines* (threats from Matson to Home Depot). The analogous second-level statement in this case would be a letter from a Pan Am employee to a third party written after the bombing, asserting something like "In March of 1988, corporate told us we have a new policy of x-raying bags." But that is not what we are offering.

[13] The court did consider the effect-on-the-listener argument at this hearsay layer because the Matson statements would be admissible regardless as party-opponent statements under Rule 801(d)(2)(D).

Likewise, *United States v. White* confirms that a statement need not be "bereft of factual assertions" to be admissible as a command relevant for its effect on the recipient. ECF 229 at 20 (citing *White*, 639 F.3d at 337–38). The statement there was a demand note for money from a bank teller, which included assertions that "I have a gun" and "no one will get hurt." *White*, 639 F.3d at 338. The Court found the note was not being offered for the truth of these assertions because "[t]he government did not seek to prove that [the defendant] actually had a gun, but rather that the teller feared that he did." *Id.* Likewise here, the government is not using Exhibit 1013 to prove that the FAA approved Pan Am's x-ray plan, but rather that Pan Am's employees would have conducted themselves according to a belief that such approval existed.

It would be a different analysis if, sometime after the fact, the company sent a message retrospectively stating "In March of 1988 we implemented a policy of x-raying interline bags." That would be a factual assertion offered for the truth of the fact asserted. But the point being established here – that "planes with unattended interline baggage could take off," as the defense puts it – involves future events. The prospective nature of the matter provides a separate and additional basis for admission, even if the statement is construed as a statement of Pan Am's "intent" or "plan" being offered for the truth of the matter asserted. *See* Fed. R. Evid. 803(3). The message constitutes a statement of Pan Am's intention of how to apply its security procedures going forward, and it is blackletter law that statements of future intention are admissible to show that the declarant acted in conformity with that intention. *See United States v. Johnson*, 354 F. Supp. 2d 939, 963 (N.D. Iowa 2005), *aff'd in part*, 495 F.3d 951 (8th Cir. 2007) (citing Fed. R. Evid. 803(3), collecting cases, and deeming this hearsay exception "firmly rooted"); *cf. Mun. Revenue Serv., Inc. v. Xspand, Inc*., 700 F. Supp. 2d 692, 706 (M.D. Pa. 2010) (applying Rule

803(3) to statements by individuals reflecting the decisionmaking "of the entities that they represent").

Finally, the government is not offering a vague theory about the effect on "some unidentified listener." ECF 229 at 20. The listener in question is Pan Am's ground security staff at Frankfurt airport, as we have explained already. *See* ECF 183 at 6; ECF 204 at 15. Moreover, this exhibit will not be offered in a vacuum. The government has already notified the defense of its intention to call an expert witness in airline security who evaluated Pan Am's procedures at Frankfurt and will testify that checked interline baggage was x-rayed and loaded onto aircraft without being subjected to passenger reconciliation. Exhibit 1013, explaining the policy to employees, supports this conclusion and establishes the reason operations were conducted that way. Because the "fact… of consequence in determining [this] action" is not what the FAA decided was permissible, but what the Frankfurt crew actually did, the government's "actual use" of Exhibit 1013 at trial will be exclusively to support an inference about the listener's response. *United States v. Graham*, 47 F.4th 561, 567 (7th Cir. 2022); *cf. id.* (explaining that government purportedly offered out-of-court statements describing defendant's violent conduct for their effect on listening victim, but "did not actually use [the] statements in that way," "made no effort to connect" the statements to victim's state of mind, and did not ask victim about the statements affected her).

7. The government is withdrawing its § 3505 notice for certain exhibits.

As noted at the November 12 status conference, the government has learned that § 3505 certificates for certain Swiss records that the government believed were forthcoming, *see* ECF 148 at 12 n.5, are not actually so. *See* 11/12/25 Trans. at 31-32. Those exhibits are as follows:

Ex. 1513	Ex. 1529	Ex. 1539
Ex. 1519	Ex. 1533	Ex. 1541
Ex. 1525	Ex. 1534	Ex. 1546
Ex. 1526	Ex. 1537	

The government anticipates that certificates for these documents may still be executed at a future date, or that live testimony will provide the foundation for their admission. In the meantime, the government is not presently requesting a ruling on their admissibility under § 3505.

As also discussed at the status conference, the government is also aware that a certificate from Senegal, Ex. 1403-c, has a blank field. Until such time as the government obtained a corrected certificate, we are not seeking admission of Ex. 1403 under § 3505.

All other documents offered under § 3505, however, can and should be ruled admissible at on that basis.

B. The exhibits are admissible as Ancient Documents.

The government's opening brief explained why, even in the absence of a § 3505 certificate, the government's proffered exhibits would be admissible under the Ancient Documents exception, Rule 803(16). That exception covers any "statement in a document that was prepared before January 1, 1998, and whose authenticity is established." In turn, Rule 901(b)(8) provides that a document can be proven authentic 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."

All of those criteria for the Ancient Documents exception are met here. The documents are more than 20 years old, and they are in a condition that create no suspicion about their authenticity. Moreover, as has now been confirmed by the Scottish Declaration, Ex. 1, the documents came from exactly the place where they would likely be if authentic. This sworn statement nullifies the defense's arguments that there is a lack of information about where the documents have been located since their creation and about "how the documents were stored or archived after the Scottish trial." ECF 173 at 14. It establishes that the documents have been kept in secure custody

since they were first obtained from the originating businesses more than twenty years ago. *See generally* Ex. 1. In particular, the Declaration explains how the documents have been maintained in a "production store" where they have been meticulously catalogued and protected from tampering by restricted-access systems and an alarm mechanism. *See id.* at 6.

The defense asserts the existence of never-specified "unanswered questions about the documents' creation and use that arise from the lengthy time gap between the documents' original production and [the certifiers'] current employment." ECF 229 at 11. The suggestion seems to be that the certifications cannot be relied upon because it is implausible the witnesses actually remembered the things they attested to. This argument requires one to believe that the certifying witnesses committed crimes by attesting falsely, which they had no conceivable motivation to do. It is also belied by the Malta videos, which display those witnesses' vivid recollections.

But even if the "lengthy time gap" argument were accepted on its own terms, that would only strengthen the argument for the Ancient Documents exception by showing its rationale to be fully applicable here. *See, e.g.*, *Compton v. Davis Oil Co.*, 607 F. Supp. 1221, 1228 (D. Wyo. 1985) ("Statements in such ancient documents are admissible due to a rule of necessity as well as to the reliability of such evidence in comparison to any other form of available evidence."). This rationale is itself ancient: long before the Federal Rules of Evidence existed, the Supreme Court observed that, when events must be "proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice." *Fulkerson v. Holmes*, 117 U.S. 389, 397, 6 S. Ct. 780, 784, 29 L. Ed. 915 (1886).

The defense has also argued that the justifications for the Ancient Documents exception are not present here because, although the documents are old, the crime is also old. *See* ECF 173

at 14 n.7. But the rule contains no such limitation. And in any event, the business records at issue here were created before the bombing of Pan Am Flight 103, so they still "antedate[] the present controversy" no matter how the relevant "controversy" is defined. Fed. R. Evid. 803, Advisory Committee Notes. The timing of their creation is an additional factor in favor of their reliability.

C. The Residual Exception applies regardless.

Finally, no matter how the Court resolves the issues discussed above, the Residual Exception would still authorize the admission of the documents. That exception applies when:

> (1) the statement is 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) it is 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. As the D.C. Circuit has summarized it, this exception applies to otherwise-inadmissible hearsay that is "very important and very reliable." *United States v. Washington*, 106 F.3d 983, 1001 (D.C. Cir. 1997) (quoting *United States v. Kim*, 595 F.2d 755, 766 (D.C. Cir. 1979)).

There is ample precedent for admitting business records under the Residual Exception, Rule 807, even where there is no certificate establishing the foundation for technical application of the business records exception. *See generally* ECF 148 at 19-20 (discussing cases from First, Third, Fifth, and Ninth Circuits). Consistent with those authorities, even if the Court were to disagree with all the government's other arguments, the exhibits would still be admissible under the Residual Exception because they are very reliable and very important.

1. The documents are reliable.

For all the same reasons justifying their admission under the business records and ancient documents exceptions, these exhibits have "sufficient guarantees of trustworthiness" to be

admissible under the Residual Exception. *See* Fed. R. Evid. 807(a)(1). In short, all of the records were made long before this case existed, and even before the crime took place. Their creation was for the purpose of administering the operations of businesses and other entities, meaning the authors of the records had every incentive for accuracy and no motive to fabricate. Even if an employee of one of these businesses wanted to fabricate a record for the purpose of falsely incriminating the defendant, it would have required an impossible level of foresight and coordination to do so, given that each document is only a small strand in the overall tapestry that makes up the government's case. "There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence," and in this case, common sense confirms that the documents can be relied upon. *Dallas Cnty. v. Com. Union Assur. Co.*, 286 F.2d 388, 397 (5th Cir. 1961). *See also id.* (admitting newspaper article, even though not a "business record" or "ancient document," because "[t]aking a common sense view of this case, it is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse— if there had been no fire").

The rule's commentary instructs that "a court assessing guarantees of trustworthiness may consider whether the statement is a 'near-miss' of one of the Rule 803 or 804 exceptions."[14] Fed. R. Evid. 807, Committee Notes to 2019 Amendments. For all the reasons argued above, if any of the government's exhibits here were to fall short of admissibility under § 3505 or the ancient documents exception, it would be a very near miss. In such a case the court "should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the

[14] This clarification was necessary because some courts had previously taken the position that "near-miss" statements were ineligible for the residual exception. *See generally, e.g.*, *United States v. Deeb*, 13 F.3d 1532, 1536 (11th Cir. 1994) (discussing and rejecting the so-called "'near-miss argument,' which maintains that a hearsay statement that is close to, but that does not fit precisely into, a recognized hearsay exception is not admissible under [the residual exception]").

hearsay misses the admissibility requirements of the standard exception." *Id.* If the shortcoming were a technical one not bearing heavily on the "benchmark question" of reliability, then admission under the residual exception would be the necessary way to serve justice and further the jury's search for truth.

2. The documents are important.

Moreover, each of these documents is "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(a)(2). The documents are being offered to prove the discrete transactions and other occurrences documented in them – for example, that a certain type of clothing was sold to a certain store on a certain date; or that a certain flight had a certain number of checked bags onboard. No witness could possibly remember these details so many years later, nor does there exist any other documentation of these facts that would stand a better chance of admission than the exhibits the government has put forth here.

The facts at issue are vital to the government's case. For example, without the Maltese clothing records, the government would be hard-pressed to prove that the bomb suitcase originated in Malta. Without the Frankfurt Airport records, the government could not establish that an unaccompanied suitcase was transferred from the inbound Malta flight to the outbound Heathrow flight. It will be impossible to corroborate the defendant's confession without this evidence.

As discussed above, the government has exhausted all reasonable efforts to establish the foundation for these exhibits under 18 U.S.C. § 3505, the statute designed to streamline their admission. In the event the Court were to find that those efforts fell short, and that the exhibits are not admissible under the Ancient Documents exception, we would be left in the "truly exceptional" situation where the residual exception is necessary. *United States v. Slatten*, 865 F.3d 767, 807

(D.C. Cir. 2017) (quoting *United States v. Phillips*, 219 F.3d 404, 419 n.23 (5th Cir. 2000)); *see also United States v. Cree*, 778 F.2d 474, 478 (8th Cir. 1985) (affirming admission under residual exception of victim's inculpatory statements to police because, "[w]hile evidence should be admitted under [the residual exception] in only those cases presenting exceptional circumstances, it is hard to imagine many cases more compelling than this case").

CONCLUSION

For the above reasons, and those already argued, the government's motion should be granted.

Respectfully submitted,

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