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 FURTHER REPLY IN SUPPORT OF MOTIONS *IN LIMINE* REGARDING LA BELLE DISCOTHEQUE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this reply to the defendant's most recent response [ECF 430] regarding the government's motions *in limine* regarding the bombing of the La Belle Discotheque [ECF 147]. This pleading addresses the application of Rule 403 and hearsay issues.

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TABLE OF CONTENTS

I. The La Belle Evidence Does Not Violate Rule 403.

The briefing on the La Belle evidence so far has focused on its non-propensity relevance under Rule 404(b). Following the May 4, 2026, hearing, the government understands the Court to be primarily concerned with the risk of unfair prejudice that could result from introducing evidence of the defendant's involvement in a second significant terrorist act, and whether that prejudice might substantially outweigh the probative value of the evidence. We accordingly offer this additional briefing on the application of Rule 403, which supplements the arguments on that issue from the previous briefs. *See* ECF 147 at 14; ECF 182 at 9-11.

A. Legal Standards.

As the D.C. Circuit has repeatedly emphasized, Rule 403 excludes evidence only when its probative value "is ***substantially*** outweighed by the danger of ***unfair*** prejudice." *United States v. Manner*, 887 F.2d 317, 322 (D.C. Cir. 1989) (quoting *United States v. Moore*, 732 F.2d 983, 989 (D.C. Cir. 1984), and *United States v. Day*, 591 F.2d 861, 878 (D.C. Cir.1978); (each quoting and adding emphasis to Fed. R. Evid. 403). With the scales so calibrated, the law of this circuit is to "lean toward admitting evidence in close cases." *Id.* (citing *United States v. Payne*, 805 F.2d 1062, 1066 (D.C. Cir. 1986); *Moore*, 732 F.2d at 989). That approach is consistent both with "the 'thrust of the Federal Rules,' which favors 'admissibility,'" and with the Supreme Court's teaching about the "fundamental and comprehensive" need to "develop all relevant facts in the adversary system," which is required both for the "ends of criminal justice" and the "very integrity of the judicial system and public confidence in [it]." *Day*, 591 F.2d at 879 (quoting J. Weinstein & M. Berger, Evidence P 403(03) at 403-18 (1977); and *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

Those principles and the "lean toward admitting" apply with full force when the disputed evidence involves other bad acts being offered under Rule 404(b). "Rule 403 'tilts, as do the rules as a whole, toward the admission of evidence in close cases,' even when other crimes evidence is involved." *United States v. Cassell*, 292 F.3d 788, 795 (D.C. Cir. 2002) (quoting *Moore,* 732 F.2d at 989). Accordingly, once relevance has been established for a valid Rule 404(b) purpose, exclusion on Rule 403 grounds requires the objecting party to surpass "a high barrier." *United States v. Lieu*, 963 F.3d 122, 128 (D.C. Cir. 2020).

The D.C. Circuit affords broad discretion to a district court's balancing of Rule 403, applying an exceptionally deferential standard of review. A district court's Rule 403 decision "will not be disturbed on appeal except for ***grave abuse***." *United States v. Weisz*, 718 F.2d 413, 431 (D.C. Cir. 1983) (emphasis in original, citations omitted). In numerous cases affirming the admission of other-acts evidence over Rule 403 challenges, the D.C. Circuit has cited the "grave abuse" standard but found it unnecessary to even reach that level of deference, instead ruling that there was no error at all in the district courts' decisionmaking. *See, e.g.*, *United States v. Green*, 149 F.4th 733, 753 (D.C. Cir. 2025) (district court "well within its discretion" to admit photograph of uncharged drugs admitted in drug case); *Lieu*, 963 F.3d at 128 (district court "reasonably" allowed testimony by victim of uncharged child sexual abuse in case charging child pornography and interstate travel for purpose of sexual contact with minor); *United States v. Straker*, 800 F.3d 570, 592 (D.C. Cir. 2015) (district court "successfully" balanced Rule 403 factors when admitting uncharged kidnappings in kidnapping case); *United States v. Bell*, 795 F.3d 88, 99 (D.C. Cir. 2015) (district court admitting uncharged murder in gang case "not an abuse of discretion—much less grave abuse"); *United States v. Burwell*, 642 F.3d 1062, 1068 (D.C. Cir. 2011) [1] (district court "did not abuse its discretion" in admitting uncharged acts despite failing to consider the "particularly egregious" nature of one act); *United States v. Lewis*, 318 Fed. Appx. 1, 2 (D.C. Cir. 2009) (unpub.)

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[1] In *Burwell* the D.C. Circuit granted rehearing *en banc* on other grounds and ultimately affirmed and reinstated the original opinion. *See* 690 F.3d 500 (D.C. Cir. 2012).

(district court "within its discretion" to admit defendant's possession of child pornography in case charging interstate travel with intent to have illicit sexual contact with minor); *United States v. McCarson*, 527 F.3d 170, 174 (D.C. Cir. 2008) (district court "clear[ly]" did not gravely abuse discretion in firearm and drug case by admitting prior convictions for firearm possession and drug distribution); *Cassell*, 292 F.3d at 792 ("we agree with the district court's analysis" under Rule 403 to admit prior firearm possession in firearm case).

Where the D.C. Circuit has occasionally found error, the non-propensity value of the evidence has been generally be scarce to none. *See, e.g.*, *United States v. Sheffield*, 832 F.3d 296, 307 (D.C. Cir. 2016) (harmless error to admit "decade-old conviction" with "little evidentiary relevance"); *United States v. McGill*, 815 F.3d 846, 886 (D.C. Cir. 2016) (harmless error to allow evidence of other acts that "push[ed] logical limits" and that "the government ma[de] no serious effort to defend"); *United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003) (harmless error to admit uncharged drug dealing where relevance for intent was "hard to see" and relevance for opportunity was of "likely minimal" value to jury).[2]

On appellate review, "courts ordinarily 'give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.'" *United States v. McDowell*, 762 F.2d 1072, 1076 (D.C. Cir. 1985) (quoting *Day*, 591 F.2d at 879 (in turn quoting J. Weinstein & M. Berger, Evidence P 403(03) at 403-18 (1977))).

[2] Other cases, which we note here for completeness, found the admission of other-acts evidence to violate Rule 404(b) because the acts had no non-propensity relevance at all. *See, e.g.*, *United States v. Johnson*, 519 F.3d 478, 484 (D.C. Cir. 2008); *United States v. Linares*, 367 F.3d 941, 952 (D.C. Cir. 2004). This is a separate question from Rule 403 balancing. A Rule 404(b) violation is dispositive of the Rule 403 balancing question since it means the legitimate probative value is zero. The government has addressed Rule 404(b) relevance in our prior pleadings, most comprehensively ECF 432

Here, for the reasons that follow, it would be the correct and appropriate exercise of the Court's discretion to allow the government to present evidence of the defendant's involvement in the La Belle bombing and other uncharged acts for the Rule 404(b) purposes the government has previously identified.

B. The Evidence has Substantial Probative Value for Multiple Purposes.

1. The seven valid purposes of the La Belle evidence are important to the government's case.

During the May 4 hearing, the Court several times suggested that some of the proffered bases of relevance for the La Belle evidence might only marginally advance the government's case. The government respectfully disagrees for the reasons discussed at the hearing.

The broader point, however, is that the probative value of any piece of evidence must be assessed holistically. In a variety of contexts, courts have recognized that components of a case can seem small in isolation but gain force when combined. As the Supreme Court has put it: "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987). The D.C. Circuit has applied the same reasoning to other-acts evidence introduced under Rule 404(b), which should not be expected to prove the case all by itself but rather to "be a 'brick' in the 'wall' of evidence needed to prove" an element of the offense. *United States v. Crowder*, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (citing Fed. R. Evid. 401, advisory committee notes).

In the context of Rule 403, the Supreme Court has observed that "a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once." *Old Chief*, 519 U.S. at 187. That is the case for the La Belle evidence: the combined probative value of each of the government's seven theories of relevance is "greater than its constituent parts," because the La Belle evidence simultaneously advance the government's case in multiple important ways.

To be sure, the defense can and will seek to argue that the jury should not accept the inferences argued by the government. For example, they can attempt to attack the "doctrine of chances" theory by arguing that the defendant might coincidentally have been vacationing in both Berlin in 1986 and Malta in 1988, and they can attempt to attack the "corroboration" theory by arguing that someone seeking to fabricate a confession might possibly have had access to some special files detailing the defendant's decades-old travel itinerary. But whatever success the defense might have in explaining away one or two of the government's legitimate arguments that flow from the La Belle evidence, it is far more difficult to explain away all seven of them. The strong probative value of this evidence is a function of how many separate non-propensity inferences it supports, all of which are central to the case (and any one of the non-propensity purposes would be sufficient to justify admission of the evidence).

Put another way, if the Court were to exclude the La Belle evidence, it would weaken the government's case seven times over. The loss of this evidence would significantly impair the government's ability to demonstrate the defendant's motives and associations as an ESO operative, ***and*** to demonstrate his knowledge of bombmaking skills, ***and*** to satisfy the offenses' *mens rea* elements by proving his awareness of the bomb's malicious purpose, ***and*** to prove his identity as the person who traveled to Malta at the time of the bombing, ***and*** to rule out the possibility of wrong-place-wrong-time through the doctrine of chances, ***and*** to show that the statement contained portions that would not plausibly have been fabricated, ***and*** to corroborate the reliability of the statement through independent documentary evidence.

Each of these is a separate valid use of the evidence, and whatever one thinks of the persuasive force of any single one in isolation, to deprive the government of all of them would greatly weaken the government's case. That is especially so because there is no substitute evidence that could serve the same purposes, a point we address next.

2. The government's other evidence is not an adequate substitute.

Although it is far from a dispositive factor, courts may consider the availability of other, non-Rule 404(b) evidence that would serve the same purposes as other-act evidence challenged under Rule 403. *See Old Chief*, 519 U.S. at 182-83 ("If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered."). Here, any consideration of the available alternative evidence serves only to underscore the probative value of the La Belle evidence and to support its admissibility under Rule 403. Since the evidence serves seven purposes, we address in turn why there is no alternative with "substantially the same or greater probative value" for each:

Motive: The government alleges that the defendant built and activated the bomb that destroyed Pan Am Flight 103 because he was directed to do so in his capacity as a technical operative for Libya's ESO. His longstanding employment in that position, and the fact that that employment had previously involved the creation of explosive devices, is highly probative of the likelihood that he did, in fact, carry out such an order from his superiors. During the May 4 hearing, the Court asked the parties what other evidence the government expected to offer to establish the defendant's role in the ESO. The government is seeking to admit one or more documents on that point that are currently subject to a sealed motion. Otherwise, the government plans to call a witness whose anticipated testimony would establish at most that he understood the defendant to hold a position in the ESO's technical administration as of late 1988. We do not expect this testimony would establish the length of the defendant's tenure in that position or the fact that his role involved working with explosives.

Merely hearing that the defendant was a technical employee would be far less helpful to the jury's ascertainment of the truth than learning that one of his core duties in that role was traveling to foreign countries to equip explosives for use against American targets. The analysis here is therefore similar to that in *United States v. Straker*. There, the defendants argued that prior-kidnapping evidence "was unnecessary to show their relationships, given other evidence that the defendants formed friendships in boyhood or during military service." The D.C. Circuit rejected that argument, explaining that the evidence of those relationships "d[id] not speak to their repeated experience of trusting one another to carry through with felonious conspiracies without revealing their activities to law enforcement." *Straker*, 800 F.3d at 592.

<u>Knowledge:</u> Likewise, there is no alternate evidence to establish the defendant's knowledge of bombmaking. Other than the documents addressed in the sealed motion (whose admissibility is not yet clear), no other evidence tends to suggest that the defendant possessed the necessary skills to successfully design and construct a functioning explosive device. Only the prior successful perpetration of the La Belle bombing will show that. *See United States v. Trenkler*, 61 F.3d 45, 56 (1st Cir. 1995) (rejecting Rule 403 argument concerning prior act of bombmaking and explaining, "[o]bviously, the fact that [the defendant] had in the past built a remote-control bomb has some relevance on whether he possessed the skill and knowledge necessary to build the [charged] bomb").

<u>Identity:</u> As recently as the May 4 hearing, the defense has disputed whether the person who traveled under the defendant's name and with passport number 835004 was actually the defendant. *See* 5/4/26 Tr. 99-101. Tying the defendant to that passport number is critical to the

government's case because that is the passport number used by the person with the defendant's name[3] who traveled to Malta before, and left just after, the bomb was put into transit. The government will seek to make that link through handwriting and fingerprint analysis, but the defense will surely contest that analysis. A verifiable statement by the defendant about how he traveled to Berlin in 1986, and corresponding documents showing that he did so using passport number 835004, is invaluable evidence to prove that he is really the person who used that passport number.

Intent: The defendant's statement is almost silent as to what was going through his mind when he committed the physical acts that caused the destruction of Pan Am Flight 103. In it, he says "I didn't know the exact target, but I did know that Americans would be targeted with this explosive device." Other than this one remark, the government has no direct evidence of the defendant's mental state. Whether "know[ing] Americans would be targeted," if the jury credits that remark, is sufficient to establish the offense's *mens rea* elements will be a matter the jury. In any event, this statement of knowledge is not inconsistent with a belief that he was participating in a legitimate military operation. His prior involvement in an attack on a nightclub is the most probative evidence to refute that possibility. *See United States v. Harrison*, 679 F.2d 942, 948 (D.C. Cir. 1982) ("The intent with which a person commits an act on a given occasion can many times be ***best proven*** by testimony or evidence of his acts over a period of time prior thereto, particularly when the activity involves a continuous course of dealing." (emphasis added)).[4]

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[3] In an example of how the defense is taking no argument off the table, they appear to dispute whether the various anglicizations of the Arabic name are even the same person.

[4] The same is true of the defendant's involvement in an operation to attempt to assassinate the U.S. Secretary of State. In the course of describing that operation, the defendant specifically noted that at the time of that operation, "we were in a state of mobilization against America and the West, [and] there was a strong feeling in favor of carrying out ***any act*** against the Americans" (emphasis added).

<u>Lack of Accident</u>: The doctrine of chances, discussed at ECF 432 at 16-19 and at the May 4 hearing, holds that repeated events (like the defendant's presence at multiple crime scenes in foreign countries far from his home) are unlikely to be the product of innocent coincidence. This common-sense argument is unavailable if there is only a single data point. The government could still prove that the defendant was in Malta when the Pan Am 103 bombing was initiated there, but that would only prompt the response, "So what? Lots of people were in Malta that day." To make its legitimate argument about the improbability of innocent coincidence, the government needs the second data point of the defendant's presence in Berlin in 1986 – the argument is completely unavailable without it. *Cf. United States v. Rodriguez*, 215 F.3d 110, 119 (1st Cir. 2000) (discussing probative force of other-crimes evidence to "overcome the possibility that a particular defendant's association with criminal co-conspirators was wholly innocent or that, if he was with them at the scene of criminal activity, he was 'merely present,' without guilty knowledge or intent").

<u>Context of Statement:</u> As discussed more fully in the government's prior brief, ECF 432 at 7-11, the government needs the jury to understand that the Pan Am Flight 103 bombing was just one of several "operations outside Libya" that the defendant freely discussed as part of the same interview in which he categorically denied involvement in violent acts inside Libya. The full scope of the statement supports important arguments about the defendant's motivations in giving the statement and about the unlikelihood that a person fabricating such a document would design it in this way. During the May 4 hearing, the Court contemplated that the statement could be partially redacted to retain the evidence of multiple operations outside Libya but conceal the details. *See* 5/4/26 Tr. 66. This would result in the translated version saying:

> Yes, I participated in a number of operations, among them [redacted] and the Lockerbie airliner bombing, as well as [redacted] and also [redacted]

[redacted] I also participated in [redacted]

…followed by extensive block redactions throughout the remainder of the document. Although this is theoretically possible, the government submits that it would only invite jurors to speculate about what was beneath the boxes, probably imagining acts more prejudicial than those actually described. Such redaction would also prevent jurors from seeing the level of detail with which the statement describes these other operations and the types of details included and omitted, all of which bear subtly but meaningfully on whether it has the flavor of a genuine interview or a fabrication. With the statement's authenticity and reliability in such critical dispute, jurors will look hard at it from every angle to see whether it rings true or false. Extensive redactions would both hinder that analysis and frustrate the jury by showing them that potentially relevant facts are being withheld from them.

Corroboration of Statement: The defendant's statement is the centerpiece of the government's case, and almost all the other evidence serves in some degree to corroborate it by confirming the various details in the defendant's account. The corroborative value of the La Belle evidence, however, is uniquely strong for two reasons.

First, it is individualized to the defendant in a way that virtually none of the other evidence is. For example, the defendant says in his statement that he used Semtex in the Pan Am 103 bomb, and the forensic analysis confirms that Semtex was indeed used, but that forensic analysis can't show whether it was the defendant who used it. The Stasi documents that corroborate the La Belle portion of the statement, by contrast, prove that *the defendant* did exactly what he claimed to have done, namely, travel to Berlin in April 1986. The only other corroborating documentary evidence of any part of the statement that is so individualized and direct is the "IRO cards" and flight records that show the defendant's travel to and from Malta at times relevant to the Pan Am 103 bombing.

Second, the portions of the statement addressing La Belle can be corroborated on the basis of facts that are not otherwise public, or that are far less public than those that can otherwise be corroborated. The bombing of Pan Am Flight 103 resulted in a highly public trial in which the Scottish government sought to establish Libya's responsibility for the attack. The defense can, and likely will, argue that a careful observer of that trial would be able to fabricate a statement that is broadly consistent with the evidence possessed by western authorities. But the same is not true of the Stasi documents, which contain highly specific details about the defendant's operational travel with respect to La Belle. The defense has already argued that someone in Libya could have known these details because portions of some of the documents were briefly displayed on an American public television program that aired in 2015. *See* ECF 176-2 at 13. The weakness of this argument[5] reflects the strength of the La Belle evidence for establishing the statement's reliability.

In sum, the government does not possess similarly probative evidence that can serve any of the seven purposes for which the La Belle evidence is relevant.

3. <u>The defense's trial strategy does not determine what is probative.</u>

During the May 4 hearing, the Court several times suggested that the admission of the La Belle evidence might depend on whether the defense meaningfully disputes certain elements or facts. *See* 5/4/26 Tr. 72-73,82.[6] The government respectfully submits that, under binding D.C.

[5] Among other problems, the unrefuted timeline of the interview places it well before the show aired, and the documentary did not show the Flight Record, Ex. 611, so it would not have given the supposed fabricators a basis to include the statement about remaining in Berlin for approximately two weeks.

[6] In particular, the Court suggested that the government's "doctrine of chances" argument might only be available if the defense argued that "he was on vacation in Malta" or had "some other excuse" for being there. 5/4/26 Tr. 82. But unless the defense can convince the jury that the flight records and IRO cards (which bear the defendant's signature and fingerprint) are fabrications, they ***have*** to argue that he could have been in Malta for innocent reasons, because the only alternative is that he was there for the bombing.

Circuit precedent, a defendant's "choice not to put at issue an element of the charged offense is irrelevant to the admissibility of evidence offered to prove that element." *United States v. McCarson*, 527 F.3d 170, 173 (D.C. Cir. 2008). Therefore this factor should not weigh meaningfully in the Court's Rule 403 balancing.

As a baseline principle, when the defense declines to explicitly challenge an element of the offense, the government is "not thereby relieved of its burden of proving [that element] beyond a reasonable doubt." *United States v. Douglas*, 482 F.3d 591, 599 (D.C. Cir. 2007). Accordingly the relevant question is not whether the defense affirmatively disputes a particular element of the offense, but rather whether ""a reasonable jury ***could***" find that element unproven given the facts of the case. *Id.* (quoting and adding emphasis to *United States v. Linares*, 367 F.3d 941, 951 (D.C. Cir. 2004)).

For example, in *United States v. Straker*, a kidnapping case, the district court admitted evidence of prior kidnappings to show "the background of the conspiracy and how the relationships between the participants developed, as well as defendants' motive, intent, knowledge, preparation, and plan." 800 F.3d at 588 (quoting district court). The defense argued on appeal that "the evidence of the uncharged hostage takings was unnecessary to show their intent or motive because they did not raise innocent-motive defenses." The D.C. Circuit disagreed: "That argument ignores the government's burden, regardless of the nature of the defense, to prove beyond a reasonable doubt that defendants knowingly and intentionally joined the [charged] conspiracy." *Straker*, 800 F.3d at 591 (citing *Douglas*, 482 F.3d at 597; *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997)).

A counterexample confirms the same point. One of the few times the D.C. Circuit has found admission of other-acts evidence to have been improper, it emphasized that it reached that decision not "based on anything [the defense] did or failed to do at trial," but rather because, on the facts of that case, "no reasonable jury could have acquitted [the defendant] based on the belief that the government had proved possession [of the firearm] but not *knowing* possession." *Linares*, 367 F.3d at 951.[7]

Here, regardless of what the defense chooses tactically to argue, a reasonable jury *could* acquit the defendant based on a belief that he built the bomb that destroyed Pan Am Flight 103 but that he did so ignorant to or confused about its purposes, or in a good-faith belief in the lawfulness of orders by his superiors. This is accordingly a case where intent is "really" at issue, not just "technically" so. *Cf. United States v. Johnson*, 970 F.2d 907, 913 (D.C. Cir. 1992). The defendant's involvement in a prior bombing of a civilian target is the strongest possible probative evidence to establish his culpable *mens rea*, short of a direct admission by him, which does not exist.

At this stage of the case, the defense has left open all possible theories of defense, and it would be surprising if they did not contest the *mens rea* elements. There would be nothing inconsistent about them arguing to the jury, "You should find the statement unreliable, but even if you disagree with us about that, the statement proves at most that he didn't learn the target was a civilian aircraft until after the fact." Even without this specific argument, it is commonplace for defense closings to include arguments to the effect of "The government's burden is to prove *each and every element* beyond a reasonable doubt, and they have not done so here"; or "I only have

[7] Indeed, the prior-crime evidence in *Linares* was excluded under Rule 401, not Rule 403. *See* 367 F.3d at 952 (explicitly declining to reach the defense's Rule 403 argument). A subsequent decision of the D.C. Circuit highlighted a key aspect of the *Linares* court's reasoning: the prior gun possession in *Linares* was ostensibly to prove knowledge, but the trial court in *Linares* had already decided to instruct the jury only on actual (as opposed to constructive) possession, which did not involve knowledge as an element. *See United States v. Garner*, 396 F.3d 438, 442 (D.C. Cir. 2005). The supposed "knowledge" evidence was therefore irrelevant and excludable under Rule 401 before even reaching the Rule 403 balancing. *See id.*

enough time to address the biggest problems with the government's evidence, but when you deliberate you should look at all the holes in their case, not just the ones I talk about now."

Indeed, even when defendants have affirmatively and conclusively stipulated to intent, the D.C. Circuit has squarely rejected the argument that "the Rule 403 balance will always tip in favor of exclusion;" rather, any such stipulation would be a factor that "trial courts *may*" take into account. *Crowder*, 141 F.3d at 1210. *See id*. at 1204, 1210 (affirming admission of uncharged drug transaction to prove intent and knowledge despite defendant's offer to stipulate that "anybody who possessed those drugs possessed them with the intent to distribute"); *United States v. Bowie*, 232 F.3d 923, 931 (D.C. Cir. 2000) (affirming admission of other-acts evidence despite defendant's repeated offer to stipulate, and further noting that he "never offered to stipulate that he confessed" to conduct that other-act would have corroborated); *Burwell*, 642 F.3d at 1067 ("The [defendants'] offer to stipulate to their association [with racketeering enterprise] has no bearing on the government's entitlement to prove its case; rather, it is only one factor the court considers in conducting its Rule 403 analysis."). Here, of course, the defense has offered no stipulation.

C. The Risk of *Unfair* Prejudice is Comparatively Low.

The defendant is charged with helping perpetrate an act of indiscriminate violence that caused the death of hundreds in a highly public and gruesome spectacle. No amount of sanitizing will change that. Given that baseline, two lines of decisions from the D.C. Circuit apply with force here. The first teaches that the possible prejudicial effect of other-crimes evidence should be assessed relative to the charged-crime evidence, with there being less marginal risk of jury inflammation when the charged offense is very serious to begin with. The second line of cases holds that, because similar-crimes evidence *always* poses a risk of prejudice, courts should exclude the evidence when the prejudice is "compelling or unique."

1. <u>Courts evaluate the prejudicial effect of "other crimes" in relative, not absolute, terms.</u>

When courts evaluate the potential for unfair prejudice to result from the introduction of other-acts evidence, a significant factor is how the evidence of the uncharged crime compares with the charged crime in terms of seriousness and inflammatory potential. *See United States v. Lawson*, 410 F.3d 735, 742 (D.C. Cir. 2005) (affirming admission of uncharged robberies that "add[ed] no emotional or other pejorative emphasis not already introduced by the evidence of the [charged] robbery"); *Straker*, 800 F.3d at 591 (affirming admission of uncharged, nonfatal kidnappings that "added 'no emotional or other pejorative emphasis not already introduced by the evidence'" (quoting district court's quotation of *Lawson,* 410 F.3d at 742)); *United States v. Mosquera-Murillo*, 153 F. Supp. 3d 130, 185 (D.D.C. 2015), aff'd, 902 F.3d 285 (D.C. Cir. 2018) (finding no "serious risk of undue prejudice" where "the unindicted conduct at issue here . . . generally involves criminal activity that is no more serious than that charged in the indictment" (citing *Bell*, 795 F.3d at 99–100; *Straker*, 800 F.3d at 591)).

That reasoning holds even when the uncharged crime is murder. In *United States v. Bell*, the defendant faced charges including two counts of aiding and abetting murder, with the government alleging that he was the getaway driver for a double-homicide. 795 F.3d at 101. The district court admitted evidence of two other murders committed by the defendant personally, one of which involved the defense challenged on Rule 403 grounds on appeal.[8] *Id.* at 99-100. the D.C. Circuit affirmed, explaining that any risk of prejudice was "reduce[d]" because the uncharged murder "'did not involve conduct any more sensational or disturbing than the [other]' conduct attributed to" the defendant. *Id.* at 99-100 (quoting *United States v. Roldan-Zapata*, 916 F.2d 795,

[8] The defendant waived his Rule 403 argument as to the second uncharged murder. *See Bell*, 795 F.3d at 100 n.14.

804 (2d Cir. 1990)). That was so even though the listed examples of "other conduct" involved only nonfatal shootings. *Id.*

Bell is not the only time the D.C. Circuit has affirmed the admission of other-act evidence arguably more serious than the charged conduct. In *United States v. Lieu*, the defendant was charged with one count of distribution of child pornography and one count of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a minor who, unbeknownst to him, was fictitious. 963 F.3d at 125. The district court allowed testimony by the defendant's stepdaughter about how, six to eight years before the charged conduct, on multiple occasions when she was between six and eight years old, the defendant had her touch his unclothed erect penis. *Id.* The district court found, and the D.C. Circuit agreed, that any unfair prejudice to the defendant would be "minimal" because, although the conduct was "abhorrent," the evidence on these episodes "would neither dominate the trial nor be especially graphic in the context of the crimes for which [the defendant] had been charged." *Id.* (quoting opinion below, internal quotation marks removed). Meanwhile, the prior episode, although remote in time, had "significant" probative value on the questions of intent and knowledge.[9] *Id.*

As discussed in Section D.2 below, the mode of proving the La Belle bombing would involve very little inflammatory details and therefore expose the jury to no "more sensational or disturbing" evidence than they are already seeing, *Bell*, 795 F.3d 88. And while undoubtedly a serious offense, the La Belle bombing is at least "no more serious than" the Pan Am Flight 103 bombing. *Mosquera-Murillo*, 153 F. Supp. 3d at 185. The government does not wish to trivialize

[9] Notably, given our arguments about the corroborative value of the La Belle evidence, Judge Contreras in *Lieu* also found the stepdaughter's testimony to have probative value for "corroborating" the veracity of the defendant's statements to an undercover officer about the uncharged acts he had committed against her. *United States v. Lieu*, 298 F. Supp. 3d 32, 55 (D.D.C. 2018).

the seriousness of the La Belle bombing in the least, and to the extent our prior briefing suggested otherwise, we regret the inartful drafting.[10] Nonetheless, the point remains that the La Belle bombing was *no more* serious or inflammatory than the charged bombing of Pan Am Flight 103, and the D.C. Circuit has identified this factor as weighing in favor of admission in the Rule 403 balancing.[11]

2. <u>Here there is no "compelling or unique" prejudice beyond what is inherently present in a terrorism case.</u>

Terrorism cases, by their nature, involve allegations of extremely serious misconduct. When a defendant is charged with such an offense, evidence offered under Rule 404(b) is likely to involve similarly serious conduct. That is especially true when, like here, the alleged offense conduct involved a durable organizational structure with a continuing mission, rather than a one-off attack by a lone wolf. Whether offered to prove motive, knowledge, identity, intent, or any other purpose, Rule 404(b) evidence frequently involves acts that are similar to the offense charged.

Based on the same reasoning, the D.C. Circuit in other contexts has held that similar-crimes evidence always carries some danger that a jury might draw an improper propensity inference, but that this baseline risk does not mean "that such evidence has an automatic unfair and substantial

[10] The government's prior brief described the La Belle bombing as involving "roughly one-tenth the fatalities of the offense charged." ECF 432 at 20. That was an error — the correct proportion is roughly one one-hundredth (or in percentage terms 1.1%). La Belle involved 3 fatalities and Pan Am Flight 103 involved 270.

[11] Moreover, while it would be an overstatement to say the heinousness of the La Belle bombing "pales" in comparison to the bombing of Pan Am Flight 103, that description would fairly apply to the other uncharged operations discussed in the defendant's statement, which did not result in any harm to anyone and, in one case, reflect positively on the defendant in that he intervened to prevent violence from taking place. *See United States v. Mahdi*, 598 F.3d 883, 892 (D.C. Cir. 2010) (finding no "undue prejudice" where other-acts evidence "involved two relatively minor incidents which paled alongside the extreme violence of the acts of which Mahdi was indicted and convicted").

prejudicial effect on the jury." *Cassell*, 292 F.3d at 796. If it did, it would "give rise to a *per se* rule of exclusion," *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008), that would swallow the "rule of inclusion" that Rule 404(b) is meant to be, *Bowie*, 232 F.3d at 929. Accordingly, the D.C. Circuit has routinely affirmed admission of similar-crime evidence where defendants have not identified any "compelling or unique" prejudice. *Pettiford*, 517 F.3d at 590 (quoting *Douglas*, 482 F.3d at 601; itself quoting *United States v. Mitchell*, 49 F.3d 769, 777 (D.C. Cir. 1995)).

Here, the defense has identified no "compelling or unique" prejudice beyond that which would generally attach to similar-crimes evidence in cases charging serious terrorist attacks. To avoid creating a "*per se* rule of exclusion" that applies in cases of significant state-sponsored violence, the Court should require more for a finding of unfair prejudice than the inherent seriousness of a terror attack.

D. The Court's Precautions Will Further Support Admissibility.

In its frequent affirmances of the admission of other-acts evidence of Rule 403 objections, the D.C. Circuit has identified certain procedural factors that support admissibility. Those are (1) when district courts show they have thoroughly considered the issues and explained their reasoning; (2) when district courts have placed reasonable limits on nature and quantity of the other-acts evidence to lessen its prejudicial effect; and (3) when district courts give, or at least offer to give, a limiting instruction about the proper uses of the evidence. All three of these factors will be present if the Court admits the government's proffered evidence.

1. <u>The Court will have thoroughly considered all relevant factors and explained its reasoning.</u>

Consistent with the importance of this issue to the parties, the Court has given thorough consideration to the legal and factual issues. After accepting more than 100 pages of briefing and hearing argument on multiple occasions, the Court clearly appreciates the defendant's concerns about the risk of prejudice and has seen that the government's stated purposes for introducing the evidence are not fig leafs for propensity inferences. If the Court ultimately admits the disputed evidence, that decision will be the product of the type of "thoughtful consideration" that the D.C. Circuit has expressly "commend[ed]" in its Rule 403 cases. *United States v. Long*, 328 F.3d 655, 665 (D.C. Cir. 2003)[12] (quoting *United States v. Boney*, 977 F.2d 624, 631 (D.C. Cir. 1992)). *See also United States v. Burch*, 156 F.3d 1315, 1324 (D.C. Cir. 1998) (quoting *United States v. Brown,* 490 F.2d 758, 764 (D.C.Cir.1973) (affirming admission of prior drug trafficking evidence where "the trial judge was clearly aware of the potential danger for 'jury misuse of the evidence'"); *Boney*, 977 F.2d at 631 ("Rule 403 contemplates the thoughtful consideration of the trial court").

2. The Court can place appropriate limits on the government's trial presentation.

Admitting other-acts evidence is not an all-or-nothing proposition. Courts admitting other-acts evidence for permissible Rule 404(b) purposes have discretion to place limits on the quantity and type of evidence to ensure that any unfairly prejudicial effect is minimized while still preserving the evidence's probative value. In its numerous affirmances in Rule 404(b) / Rule 403 cases, the D.C. Circuit has frequently cited district courts' exercise of this discretion as a significant factor. For example, in *United States v. Han* the D.C. Circuit found that the district court took "appropriate step[s]" to minimize prejudice including preventing the trial presentation from "linger[ing] on the more salacious details" of the uncharged conduct. 962 F.3d 568, 573 (D.C. Cir. 2020) (citing *Pettiford*, 517 F.3d at 590). In *United States v. Straker*, the D.C. Circuit found Rule 403 satisfied "[g]iven the care the district court took to limit and focus the evidentiary presentation." 800 F.3d at 588. And in *United States v. Long*, the D.C. Circuit commended the "restraints" the district court placed on the admission of uncharged child-pornography

[12] Abrogated on other grounds by *United States v. Booker*, 543 U.S. 220 (2005).

photographs, "exclud[ing] photographs at either extreme, either because they were too explicit or barely probative," rather than admitting all 301 photos the government offered. 328 F.3d at 665.

In this case it is already clear that, if the Court allows evidence about La Belle, it will exercise the level of care that the D.C. Circuit considers sufficient to satisfy Rule 403. The Court previewed during the May 4 hearing that it would place appropriate limits on what evidence the government offers, not "letting in all the gory details." 5/4/26 Tr. 110. We agree fully with that approach. The government intends to show the jury no bloody photographs, no weeping family members, and no maimed survivors. The facts that are necessary for the legitimate purposes the government has identified are (1) that the defendant described his role in the La Belle bombing within the same statement that described his role in the Pan Am 103 bombing; (2) that the stated details of his travel for the La Belle operation are confirmed accurate by independent documentary evidence; and (3) that there was, in fact, a bombing of the La Belle nightclub consistent with the defendant's description of it. Establishing these points can be done with a minimum of inflammatory detail and will likely consume less than one trial day out of the anticipated multi-week trial. We submit that the precise contours of the evidence can be litigated closer to trial, after the defense has had the benefit of receiving the government's exhibit list and the overall picture of the trial has come into better focus. *See* ECF 254 ¶¶ 26, 29 (setting schedules for motions *in limine* related to exhibits and other issues).

3. <u>A limiting instruction is available.</u>

Multiple panels of the D.C. Circuit have reaffirmed that "it is the law, pure and simple, that jury instructions can sufficiently protect a defendant's interest in being free from undue prejudice," *United States v. Perholtz*, 842 F.2d 343, 361 (D.C. Cir. 1988) (quoting *United States v. Daniels*, 770 F.2d 1111, 1120 (D.C. Cir. 1985) (Starr, J., concurring)); *see also Burwell*, 642 F.3d at 1068 (same); *United States v. North*, 910 F.2d 843, 897 (D.C. Cir. 1990)[13] (same). That is true even when a limiting instruction requires seemingly impossible "mental gymnastic[s]" or have "marginal effect." *Long*, 328 F.3d at 662 (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.1932) (L. Hand, J.); and citing *Brown*, 490 F.2d at 765–66 & nn. 20–21, 777–78).

Consequently, when evaluating the admission of other-acts evidence over a Rule 403 objection, the D.C. Circuit has regularly found prejudice to be minimized when district courts craft "careful limiting instruction to guide the jury away from drawing a conclusion on the basis of character or propensity." *Burch*, 156 F.3d at 1324 (quoting *Brown,* 490 F.2d at 764). *See also Lieu*, 963 F.3d at 130 ("[T]he district court minimized the risk of an improper propensity inference through jury instructions carefully setting forth the permissible and impermissible uses [of defendant's sexual abuse of minor stepdaughter]."); *Pettiford*, 517 F.3d at 590 (quoting with approval district court's limiting instruction, delivered both at the time the evidence came in and before the jury received the case).

Here, the government will not object to a limiting instruction delineating the permissible and impermissible uses of the other-acts evidence.

* * *

For all these reasons, Rule 403 does not preclude the admission of evidence about the La Belle Discotheque bombing and the other uncharged acts discussed in the defendant's statement. To the contrary, fairness requires that the government have the use of this highly probative evidence and that the jury be able to decide the case in full view of the relevant facts. The defendant's objection should be overruled because the risk of unfair prejudice does not substantially outweigh the probative value of the La Belle evidence; instead, the opposite is true.

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[13] Partially withdrawn and modified on other grounds. *See* 920 F.2d 940 (D.C. Cir. 1990).

II. The Stasi Documents Should Be Admitted.

To reiterate the general principle, "the rules [of evidence] as a whole" tilt "toward the admission of evidence in close cases." *Cassell*, 292 F.3d at 795 (quoting *Moore,* 732 F.2d 989); *see also Day*, 591 F.2d at 879 (explaining how both "the 'thrust of the Federal Rules'" and the instructions of the Supreme Court establish a general preference for admissibility over exclusion). With regard to the hearsay analysis of the Stasi documents, we recognize that this case presents unusually complex issues. Nonetheless, as argued before and below, well-established law supports the admissibility of the Stasi documents on multiple independent grounds. Given the reliability of the Stasi documents and their probative importance for the jury's determination of the facts, the Court should admit them.

A. The Stasi Records Reliably Document Objective Facts.

Resolving evidentiary questions involves the application of common sense, *Dallas Cnty. v. Com. Union Assur. Co.*, 286 F.2d 388, 395 (5th Cir. 1961), and common sense teaches that the simplest explanation is often the correct one. Indeed, when there are no plausible alternatives, the simplest explanation is almost inevitably the right one. Here, the simplest explanation for the existence of archival Stasi documents showing the defendant and Shadi traveling to East Berlin in April 1986 is that the defendant and Shadi did, in fact, travel to East Berlin in April 1986. In their response to the government's supplement, and during argument at the May 4 hearing, the defense continues to assert the unreliability of the Stasi documents as a general matter. But for that to be so, the records must carry a risk of intentional deception or inadvertent mistake. Both of these possibilities are refuted by the government's arguments and evidence (including but not limited to the declarations from multiple former Stasi employees and a current Archives employee).

In their most recent reply brief, the defense repeatedly emphasizes that the Stasi were bad actors — a point that no one disputes but which is logically untethered from the questions at issue.

The argument appears to be that, because the Stasi were engaged in wrongful conduct, their internal records are likely to be inaccurate. This is a non sequitur, and the defense does not even try to explain how point A connects to point B. *Cf. United States v. Kairys*, 782 F.2d 1374, 1379–80 (7th Cir. 1986) (rejecting "the vague allegation that the Soviet Union regularly releases forged documents" for propaganda purposes as "not sufficient to make the [archival Soviet] document suspicious for purposes of admissibility"). To be sure, the Stasi's affinity for propaganda and defaming its perceived enemies might raise question about the truthfulness of its *external* communications, but not about the files it compiled for internal use. The government has consistently emphasized this distinction in its briefing on this issue, *see* ECF 182 at 14; ECF 411 at 24, and the defense has consistently ignored it.

We must be clear that one can (and should) condemn the Stasi while still recognizing that their internal files are very likely to be accurate. Malicious actors are often perfectly diligent recordkeepers – a recurring example in the caselaw being the Nazis. *See, e.g.*, *United States v. Szehinskyj*, 104 F. Supp. 2d 480, 493 (E.D. Pa. 2000), *aff'd*, 277 F.3d 331 (3d Cir. 2002) ("The six Nazi wartime documents that mention [the defendant] are clear, unequivocal, and convincing evidence that he [committed the alleged conduct]. . . . [T]hey are perhaps the most reliable evidence possible, since they, unlike memories, have not faded with time."). These cases are discussed further below as they bear strongly on the government's authenticity arguments.[14] They moreover belie the defense's assertion that admitting the Stasi documents would "create a custom-built hearsay exception for the BStU," ECF 430 at 17; instead, as the Nazi archives cases show,

[14] The Nazi cases discussed herein were denaturalization cases, not criminal prosecutions, but this does not alter their evidentiary reasoning or diminish their persuasive force. The government's research did not reveal similar cases from the D.C. Circuit, but neither did it reveal any D.C. Circuit cases about archived documents, or ancient documents generally, that are contrary.

admitting archival documents like these is an entirely conventional application of the Ancient Documents exception.

The defense makes similar arguments with respect to the public records exception, arguing that the Stasi should not be considered a government agency because their function was "hardly a noble one, nor one created by a democratic government." ECF 430 at 10. This argument is groundless. The public records exception is premised in part on "the assumption that a public official will perform his duty properly." *Id.* (citing Fed. R. Evid. 803, advisory committee notes). Doing one's duty "properly" does not equate to doing it benevolently; it just means the official is doing the job assigned to them, and the job of Stasi employees was to accurately surveil their subjects. They did that job "meticulously," as the defense reminds us. ECF 430 at 7 (quoting journal article). Of course the Stasi did not employ techniques that we would consider "acceptable," ECF 430 at 9, but that is because those tactics involved grave violations of privacy, dignity, and liberty – not because they resulted in unreliable information about the persons they surveilled. Nor does the "objective and ministerial" nature of a task have any logical dependence on the "meritorious obligation[s]" that give rise to it. *Id.* 15 Recording hotel occupancy was every bit as "objective and ministerial" for the Stasi as recording license plates is for U.S. law enforcement.

Accordingly, on the benchmark question of reliability, the Court should find that the Stasi documents are likely to contain accurate information.

[15] The defense cites a line from *Ellis v. Int'l Playtex, Inc*., about public agencies' presumed "motive . . . to inform the public fairly and adequately." ECF 430 at 9. (citing 745 F.2d 292, 300 (4th Cir. 1984)). But that case involved a different public-records exception not at issue here, Rule 803(8)(c), which applies to reports setting forth factual findings. If we were offering externally disseminated Stasi publications, we would not be making the same arguments about their reliability.

B. The Stasi Documents are Sufficiently Authenticated as Ancient Documents.

1. Legal standards.

Preliminary questions of authenticity are decided under Federal Rule of Evidence 104(b). *See, e.g.*, *United States v. Roberson*, 581 F. Supp. 3d 65, 76 n.7 (D.D.C. 2022) (citing Fed. R. Evid. 901, advisory committee notes to 1972 proposed rules). That rule provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." The relevant "fact" for these purposes is that the exhibit is what it purports to be.

"In determining whether the [proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact… by a preponderance of the evidence." *Huddleston v. United States*, 485 U.S. 681, 690 (1988). In other words, ***even if*** the Court is not convinced it is more likely than not that a document is what it purports to be, and ***even if*** the Court discredits the testimony that would establish its authenticity, the document is still sufficiently authenticated if a reasonable jury could think differently. Once that low bar is satisfied, any arguments by the defense "go to the ***weight*** of the evidence — not to its ***admissibility***." *United States v. Khatallah*, 41 F.4th 608, 623 (D.C. Cir. 2022) (quoting *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004) (emphasis in original)).

Rule 901 provides some "examples only – not a complete list – of evidence that satisfies the requirement." Fed. R. Evid. 901(b). Those include, as relevant here:

> **(1) *Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

> **(4)** ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
>
> **(7)** ***Evidence About Public Records.*** Evidence that: . . . **(B)** a purported public record or statement is from the office where items of this kind are kept.
>
> **(8)** ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, 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.

Id.

2. The government's exhibits are authenticated in multiple ways.

On all of the Rule 901(b) bases quoted above, or on any alone, the government's evidence would allow a reasonable jury to find that the proffered documents are authentic Stasi records that predate 1998:

- A knowledgeable witness from the Stasi Archives, as previewed in the Archives Declaration (ECF 411-1),[16] will testify that the documents are what they are claimed to be. *See* Fed. R. Evid. 901(b)(1).

- That same witness will explain how the documents' various distinctive characteristics make them identifiable as authentic Stasi documents. *See* Fed. R. Evid. 901(b)(4).[17]

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[16] As discussed during the May 4 hearing, the declarant has declined to travel to the United States to testify, but the government has located another employee of the archives who has equal or greater knowledge of the relevant institutional subject matter. We wish to clarify that this witness, unlike the declarant, was not the employee originally responsible for fulfilling a request to locate documents relevant to this case. Nonetheless, the substitute witness has reviewed the relevant documents and made all the same observations about their evident authenticity. An academic article by the witness, which illustrates his qualifications, is available here: https://american-archivist.kglmeridian.com/view/journals/aarc/75/1/article-p81.xml?body=PDF.

[17] The defense has argued that the archivist's testimony would constitute an expert opinion under Rule 702. *See* ECF 430 at 12. While the government does not concede that point, we will nonetheless prepare and disclose an expert notice for this witness.

- The evidence will establish that these "purported public record[s]" came from the office where items of this kind are kept, namely, the Stasi Archives. *See* Fed. R. Evid. 901(b)(7). And,

- The evidence will establish that the documents are in a condition that creates no suspicion about their authenticity, were in the Stasi Archives where such authentic records would likely be, and are more than 20 years old. *See* Fed. R. Evid. 901(b)(8).

Regarding the last point, which involves a showing that the document "was in a place where, if authentic, it would likely be," the Court at the May 4 hearing asked a series of questions about where these specific Stasi documents were located before they entered the Archives and how they got from one place to the other. *See* 5/4/26 Tr. 115-20. The caselaw, however, does not require any such accounting for the provenance of a document back to its origin. Instead, courts interpret the relevant "place" to be the place where the document was recently found, not it could have been found at some point in the past. For example, in *United States v. Firishchak*, the Seventh Circuit affirmed the admission of Nazi wartime documents over an authenticity challenge, explaining that the documents "were housed in a state regional archive where one would expect to find such documents." 468 F.3d at 1021. In *United States v. Szehinskyj*, a district court found Nazi documents sufficiently authenticated when they were found in three different archives in Russia, Ukraine, and Germany, which a witness confirmed was "where they would likely be." 104 F. Supp. 2d at 489-90. And in *United States v. Kairys*, the Seventh Circuit affirmed admission of a German SS document because it was "found in the Soviet Union archives, the depository for German SS documents." 782 F.2d at 1380.[18] None of these cases base their analysis on – or even make mention

[18] The government's research did not reveal relevant any decisions from the D.C. Circuit relevant to this point or to the ancient documents rules generally.

of -- how the archives acquired their holdings as a general matter, much less how any specific documents traveled to the archives from their places of origin.

Indeed, where the argument has been raised, courts (including two U.S. Courts of Appeals) have squarely rejected the notion that the proponent of an ancient document must show how it got to the place where it was ultimately found. *See Kairys*, 782 F.2d at 1379 ("[T]he defendant notes that the government failed to establish the proper chain of custody from [the originating Nazi concentration camp] to the Soviet archives. However, it is not necessary to show a chain of custody for ancient documents. Rule 901(b)(8) merely requires that the document be found in a place where, if authentic, it would likely be."); *United States v. Stelmokas*, 100 F.3d 302, 312 (3d Cir. 1996) (rejecting argument that archival "documents cannot be treated as authentic because it is unclear how they were moved to the . . . archives"); *Wilmington Tr., N.A. v. Segal*, 21-CV-1540, 2025 WL 2841618, at *4 (E.D.N.Y. Sept. 9, 2025) ("[I]t is not necessary for Plaintiff to establish the chain of custody of these ancient documents in order to authenticate them.").

Consistent with the above cases, the fact of the Stasi documents' presence in the Stasi Archives is sufficient to satisfy Rule 901(b)(8)(B). Regardless, the government will still elicit testimony from its Stasi Archives witness about how the archives' documents were collected as a general matter and why their provenance makes them reliable.[19]

[19] The defense points to a copy of the Visitors List that does not include the BStU stamp. *See* ECF 430. To clarify, the version the government intends to offer is the stamped version, and we are providing that version as a replacement for Ex. 603. Our understanding of why an unstamped version of the document exists is because, soon after reunification in the early 1990s, German criminal investigators obtained records from the then-young archives for use in the La Belle investigation. The U.S. government's requests to Germany in the instant case resulted in our obtaining stamped, high-quality copies of Stasi documents that came directly from the archives, as well as unstamped, lower-quality copies of some of the same documents that had been earlier made part of the German police files. The fact that these multiple copies are substantively identical to one another is a point in favor of, not against, their reliability.

Additionally, even if the Court were to depart from the authorities above and hold that Rule 901(b)(8) requires conclusive evidence of a document's original provenance, that would not make the exhibits ineligible for admission as ancient documents. Rule 901(b)(8) is only one way of authenticating an ancient document; it is not the only way. The other available methods include relying on the "distinctive characteristics of the item." *See United States v. Habteyes*, 356 F. Supp. 3d 573 (E.D.V.A. 2018) (discussing alternative "means of authenticating an ancient document" and quoting Fed. R. Evid. 901(b)(3)).[20] The government will use that as a separate and independently sufficient basis of authentication here. *See* ECF 411-1 (Archives Declaration: "I recognize this as a copy of a Stasi document from the Archives. This is apparent to me because of the document's distinctive appearance as a type I recognize.").

C. No "Nested Hearsay" Precludes Admission.

One of the government's bases for admission of the Stasi documents is their status as ancient documents exempt from the rule against hearsay under Fed. R. Evid. 803(16). *See* ECF 147 at 24; ECF 411 at 7. During recent argument, the Court raised questions about a division of authority on the impact of "nested hearsay" on this basis of admission. Herein we convey the government's understanding of that legal issue and explain why, regardless of which side of the split is correct, there are no "nested hearsay" issues that would preclude admission of the Stasi records as ancient documents.

Rule 803(16) provides a hearsay exception for "statements in ancient documents" By the terms of the rule, any "statement in a document" prepared before 1998 is exempt from the rule

[20] As *Habteyes* shows, the ancient-documents hearsay exception is available for documents of sufficient age regardless of what method is used to authenticate them. That is consistent with the text of Rule 803(16), which requires only that the document's "authenticity be established," not that it "be established pursuant to Rule 901(b)(8)."

against hearsay. But as some courts have recognized, some "statements in ancient documents" may themselves contain assertive statements, potentially implicating the "Hearsay Within Hearsay" rule, Fed. R. Evid. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.").

At the May 4 hearing, the Court asked whether the government was arguing to "adopt the minority approach" that holds that ancient documents are admissible without regard to embedded hearsay. 5/4/26 Tr. 126. The Court is correct that, if it were to accept that view of the law, no further analysis of any "nested hearsay" would be necessary once the documents were established to be ancient – the government would win at the threshold. The Court would have good reason to resolve the legal question that way, because the minority position is the one more consistent with the plain text of Rule 803(16) and the purposes that animate it. *See generally, e.g.*, Wright & Miller 30B Fed. Prac. & Proc. Evid. § 6935, Statements in Ancient Documents (Rule 803(16))—Firsthand Knowledge and Hearsay within Hearsay, (2026 ed.) (arguing for minority approach on textual and purposivist grounds and finding contrary analysis "incomplete and superficial").

Our main argument, however, is that the Court does not need to pick a side in the debate because the Stasi records are admissible as ancient documents even under the majority rule. Neither the visa requests that underlay the Visitors List nor the registration cards that underlay the Hotel Report are inadmissible hearsay, and in the case of the Flight Record there is no second-layer statement at all. The government does not oppose inquiring into the underlying sources; we encourage such an inquiry, because it serves only to buttress the reliability of the "statements in ancient documents" that the government is seeking to offer. In particular:

1. <u>The Visitors List.</u>

The visa requests summarized in the Visitors List would not be hearsay because they are not assertions of fact. *See* ECF 411 at 8-9 (citing cases including *United States v. Long*, 905 F.2d

1572, 1580 (D.C. Cir. 1990). Responding to this argument, the defense contends that a visa request is hearsay because it "asserts that X person with X name and X info seeks a visa for X dates," which is "exactly what the government hopes to prove." ECF 430 at 21.

The defense's argument fundamentally misunderstands the definition of hearsay.[21] The underlying document in question does not *assert the existence* of a request; the document *is* the request. If the document in question were an internal Libyan government memorandum saying something to the effect of "In the spring of 1986 we requested an East German visa for Abu Agila Masud," *that* would be hearsay. It would purport to establish a separately-existing fact, and it would be capable of being proven true or false. But here we are considering the request itself, not an after-the-fact assertion that the request was made.

Two hypothetical questions further demonstrate the difference. First: how would one go about proving the truth or falsity of the "matter" that the defense believes is being "asserted" by the visa request? The request is what it is; there is no metaphysical "truth" of what Libya was requesting from East Germany separate from the formal written document that the one government sent to the other. Second: if the visa request document is hearsay, how else could a party prove that a request was made? The visa request – like many other forms of verbal acts – consisted of words and cannot be described without reference to those words. The defense's flawed hearsay argument would apply equally to *any* form of evidence or testimony about the out-of-court statement through which the request was conveyed from Libya to East Germany.

[21] This has been a persistent point of confusion in the defense's briefing in every context in which out-of-court statements are at issue. *See, e.g.*, ECF 438 at 1-6 (government's sur-reply on defense motion to exclude parts of defendant's statement); ECF 419-1 at 8-9 (government's reply regarding evidentiary objections during foreign deposition).

Simply characterizing a statement as "asserting" something, as the defense does here, can be done to virtually any verbal utterance or writing (the exclamation "ouch!" is an assertion of pain; the command "hand over the cash" is an assertion that the listener should give the money). This semantic move does not thereby transform the statements into "assertions" for purposes of the definition of hearsay; otherwise, that definition would collapse and everything would be hearsay. *See Long*, 905 F.2d at 1579 n.12 (explaining it would be "circular" to wrongly assume "that any communication made in words is an assertion").

Separately and independently, the underlying visa requests are non-hearsay under Federal Rule of Evidence 801(d)(2)(E). *See* ECF 411 at 9-10. The defense dismisses this argument as "risible" while ignoring the breadth of Rule 801(d)(2)(E) as interpreted by the D.C. Circuit and others.

The law is clear that, despite being called the "co-conspirator" exception, Rule 801(d)(2)(E) is not limited to statements of those joined together in a criminal agreement. Rather, as the D.C. Circuit has ruled and reaffirmed, "Rule 801(d)(2)(E) allows for admission of statements by individuals acting in furtherance of a lawful joint enterprise." *United States v. Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009) (citing *United States v. Gewin*, 471 F.3d 197, 202 (D.C. Cir. 2006); *Weisz*, 718 F.2d at 433). "[T]he doctrine is not limited to unlawful combinations. Rather, the rule, based on concepts of agency and partnership law and applicable in both civil and criminal trials, 'embodies the long-standing doctrine that when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are . . . admissible against the others, if made in furtherance of the common goal.'" *Gewin*, 471 F.3d. at 201 (quoting *Weisz*, 718 F.2d at 433 (D.C. Cir. 1983)). Other circuits agree. *See United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011) ("Although the rule speaks of statements made in furtherance of a 'conspiracy,' we have recognized that admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of the endeavor."); *United States v. Holland*, 117 F.4th 1352, 1356 (11th Cir. 2024) (explaining at length why "the coconspirator exclusion does not depend on the lawfulness of the conspiracy at issue").[22]

Here, the conclusion is inescapable that the defendant was "acting in concert toward a common goal" with the person(s) who prepared and transmitted the visa request on his behalf. At the very least, they shared the common goal of facilitating his travel to Berlin, even if there was not a shared understanding of what he would do when he got there. The implausible alternative is that Libya's consular staff prepared the visa request in the defendant's name while ignorant to his travel plans and the defendant made his travel plans while ignorant to the existence of a visa request. Obviously this was not the case; rather, the government employees who generated the visa request were acting as agents and partners. Given the defendant's employment, there is strong reason to infer that the visa requesters would have understood he was going to Berlin on ESO business, but that inference is not necessary to support a finding that they were "acting in concert toward a common goal" and that the visa request was made "in furtherance of [that] common goal." *Gewin*, 471 F.3d at 201.

Finally, and again in the alternative, the declarations establish that the visa records were kept as routine records of the East German Foreign Ministry, making them admissible under Rule 803(6). *See* ECF 411 at 9-10. The defense's argument to the contrary is that the declarants did not work for the foreign ministry, but that does not matter because "there is no reason why a proper

[22] As discussed in *Holland*, before the enactment of the Federal Rules of Evidence the Supreme Court explained that "when any number of persons associate themselves together in the prosecution of a common plan or enterprise, ***lawful or unlawful***, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917) (emphasis added) (citing American and English common law back to 1813).

foundation for application of Rule 803(6) cannot be laid, in part or in whole, by the testimony of a government agent or other person outside the organization whose records are sought to be admitted." *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986); *see also Zayre Corp. v. S.M. & R. Co., Inc.*, 882 F.2d 1145, 1150 (7th Cir. 1989) (explaining that Rule 803(6)'s phrase "'other qualified witness' is interpreted broadly" and "need not be an employee of the entity" (quoting 4 Weinstein's Evidence ¶ 803(6)[02] (1988))).

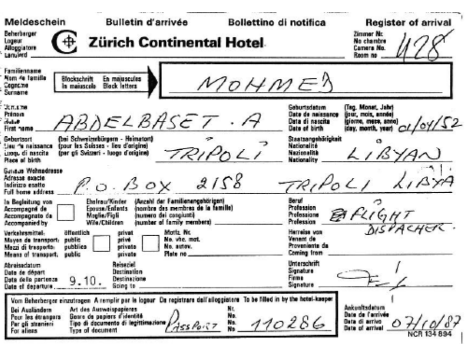
2. The Hotel Report.

The hotel registration cards that underlay the Hotel Report are doubly exempt from the rule against hearsay because they are the statement of the defendant and because they are records of a regularly conducted activity. *See* ECF 411 at 10-11.

The government has submitted multiple declarations establishing that the Hotel Metropol's registration cards were filled out by hotel guests at the time of check-in. *See* Ex. 608-c at ¶ 4 (former Stasi employee who learned this fact in the course of his duties generating reports based on hotel information); ECF 411-1 at ¶ 16 (employee of Stasi Archives who is also familiar with Stasi's practice of receiving records from hotels, and moreover has direct personal knowledge of this practice). The defense argues that this evidence falls "well short of establishing" that a Metropol registration card in the defendant's name, which supplied the basis of the information in the Hotel Report, would have been filled out by the defendant.

Whether the defendant was the person who filled out the card (and therefore its declarant, making it exempt under Rule 801(d)(2)(A)) is a preliminary question to be decided by the Court under Rule 104(a) and "should be established by a preponderance of proof." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) (citing *Bourjaily*, 483 U.S. at 175–176). The declarations, and the reasonable inferences that flow from them, are sufficient to meet this low standard. The knowledgeable declarants speak to "hotels" generally, and the defense provides no reason to think the Metropol would have been excluded from this group. To the contrary, in this specific context of East Germany, there is unusually strong reason to believe that hotels employed consistent practices, as they were overwhelming state-run.

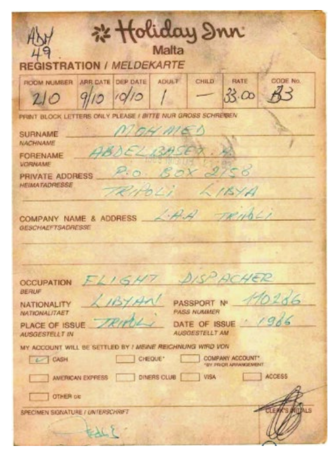
Separately and independently, the registration cards were the hotel's business records regardless of who filled them out. The defense cannot explain how these cards, by their appearance, could possibly be anything other than a record created and used in the routine business of the hotel whose insignia they bear. Their character as such is already clear in isolation, but it becomes even clearer when they are compared with functionally-identical registration cards from other hotels in roughly the same time period, which the Court has already found to be properly certified as business records:


Meldeschein Bulletin d'arrivée Bollettino di notifica Register of arrival
Zürich Continental Hotel
428
MOHMED
ABDELBASET . A
01/04/52
TRIPOLI
LIBYAN
P.O. BOX 2158 TRIPOLI LIBYA
FLIGHT DISPACHER
9.10.
PASSPORT 110286
07/10/87

Portion of Ex. 1556


Meldeschein der Beherbergungsstätten
10. 10. 86
„Hotel Metropol"
BSTU
0086

Portion of Ex. 609


Holiday Inn
Malta
REGISTRATION / MELDEKARTE
210 9/10 10/10 1 — 33.00 B3
SURNAME MOHMED
FORENAME ABDELBASET. A
PRIVATE ADDRESS P.O. BOX 2158 TRIPOLI LIBYA
COMPANY NAME & ADDRESS LAA TRIPOLI
OCCUPATION FLIGHT DISPACHER
NATIONALITY LIBYAN PASSPORT Nº 110286
PLACE OF ISSUE TRIPOLI DATE OF ISSUE 1986

Portion of Ex. 822

It is simply not plausible to believe that the Hotel Metropol's registration cards did anything other than accurately reflect the names and identifying details that were provided by guests checking into the hotel. The defense's arguments, aimed at exclusion of the highly probative evidence that resulted from such cards, are an attempt to invert the Rules of Evidence's preference for "general, normative goals above subservience to specific, technical rules." *S.E.C. v. Singer*, 786 F. Supp. 1158, 1166 (S.D.N.Y. 1992) (quoting Jack B. Weinstein & Margaret A. Berger, 1

Weinstein's Evidence § 102[01] at 102–6 (1991)). The Court should not allow the truth-seeking process to be impeded in this way.

3. The Flight Record.

The Flight Record (Ex. 611) contains no second-layer hearsay, and the defense does not appear to argue otherwise. Their arguments are instead directed at the general proposition that "[t]here is no basis to admit the Flight record." ECF 430 at 5. The ancient documents exception, however, squarely applies here: it is a document older than 1988 whose authenticity is established by the Archives Declaration. Under the law as summarized in section C.2 above, it is irrelevant to the application of this hearsay exception that "no one claims to know what it should look like or explains why or how it was created or kept before the Stasi somehow acquired it." ECF 430 at 6. If such facts were necessary for the application of the ancient-documents rule, the entire purpose of the rule would be defeated (especially for documents that predate the living memory of any now-living person).

Under Rules 104(b) and 901, the government need only present sufficient evidence for a reasonable jury to conclude that this document is genuinely a document that was prepared before January 1, 1998, but the government's evidence will further allow a reasonable jury to find that it is genuinely an Interflug flight record from 1986. That showing will be made through the testimony of an archivist who has knowledge that the Stasi routinely collected flight records and that Exhibit 611 is a document from the Stasi Archives that he recognizes as a flight record. Along with this, the document has distinguishing characteristics (including the airline's name) that make it self-evidently a record generated by an airline. *See* Fed. R. Evid. 901(4). Its status as an airline record becomes even more clear when one compares it to other flight manifests of similar vintage that have already been conditionally admitted as certified business records. *See* Fed. R. Evid 901(3) (authentication by "comparison with an authenticated specimen by… the trier of fact).

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LN143   18DEC MLA
 181500
  PNL
  LN143/18DEC MLA PART1
  -TIP084Y
  1ABDELAH/MOHAMEDMR-A3
  1ABDELBASET/ELBAHLOULMSTR-B3
  1ABDELKARIM/MAHGOUBMR-C3
  1ABDELMUNEM/WAHDANMR .I/LN146Y14TIP
  1ABDELRAZAG/MOHDMR-D2 .I/LN142Y13TIP
  1ABDULBASAT/MOHAMEDMR-E2
  1ADDNAN/ABOSIDOUMR
  1ADRIBIKA/BMR .I/SR648Y18ZRH
  1AHLAM/AHMEDMRS-F7
  1AHMED/IBRAHIMMSTR-G3
  1AHMED/RAHUMAMR
  1AHMED/SULAYMANMR-H3 .I/KM141Y15FCO
  1AHSAN/ABDELNABIMRS-I5 .I/KM221Y17CAI
  1ALBAHLOUL/MOHAMEDMR-J4 .I/LN142Y11TIP
  1AMIRA/ELHKARMISS-K3 .I/LN146Y14TIP
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Portion of Ex. 816

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INTERFLUG *** RESI *** 22-APR-86  09:06:09  IFRCAS.LST;3100

1106  22APR PE1  4303
CAS IF 830/23APR
EQ   Y048          OF   Y048          LA   Y050
LOAD
Y021       Y015
SXFMLA
006 00
SXFTIP     MLATIP
015 00     000 00

Y    (N)                 (C)(V)     (D)                              (R)

SXFTIP
     1 [redacted]   [redacted]*OK   R03IF21APR813/CC55/XBNACIF830/23 PAP +INT
     1 [redacted]   [redacted]*OK   ZWDIF21APR501/DR5                KK  +PAP
     1 [redacted]
     1 [redacted]   [redacted]*OK   HELIF21APR102/RH05               RCFM+ATS
     1 [redacted]   [redacted]*OK   ZWDIF16APR501/DR1                PAP +ATS
     1 [redacted]   [redacted]*OK   PH1IF18APR502/HP01/SCH
     1 [redacted]   [redacted] OK   HDGLO. 19APR
     1 [redacted]   [redacted]*OK   PH1IF21APR502/HP01/SCH
     1 [redacted]   [redacted]*OK   PH1IF21APR502/HP01/SCH
     1 [redacted]   [redacted]*OK   PH1IF21APR502/HP01/SCCH
     1 ABDULHAKIM/MR   2LU1CE*OK    PH1IF21APR502/HP01/SCH
     1 ABDAGILA/MR
     1 [redacted]   [redacted]*OK   ZWDIF21APR501/DR6/ KK LN414Y23AP ATS
```

Portion of Ex. 611

Once the low threshold of authenticating the record as an ancient document has been met, its entire contents are a "statement in a document that was prepared before January 1, 1998," and the exhibit is therefore "not excluded by the rule against hearsay." Fed. R. Evid. 803(16).

D. The Residual Exception Applies Regardless.

Even if the Court finds the Stasi documents to be inadmissible on any other basis, the residual exception, Fed. R. Evid. 807, would still allow their admission. This exception requires that the evidence be "supported by sufficient guarantees of trustworthiness" and "more probative on the point for which it is offered than any other" available evidence. *See generally* ECF 147 at 19-20 (quoting and discussing Fed. R. Evid. 807).

On trustworthiness, we incorporate arguments already made about the many factors supporting the reliability of the documents. *See* ECF 411 at 17-24. Of particular note is the way the details in the documents harmonize so precisely with the defendant's statement, despite those pieces of evidence being separated by dozens of years and more than a thousand miles of geography. The defense's attempt to cast suspicion on the documents' reliability is just as insubstantial as the one addressed by the Third Circuit in one of the Nazi-archives cases:

> We cannot conceive that any rational person would believe that someone set out to incriminate [the defendant] and planted fake documents in widely-scattered places [i.e., the German and Lithuanian archives] for that purpose. If anyone created the documents to injure [the defendant], the fabricator most peculiarly placed the bulk of the documents in a location where they were not accessible to the public and from which, in fact, they were not released for decades. There certainly is no evidence in the record that anyone hatched such a bizarre plot. Indeed, [the defendant] does not explain what motivation any person would have had to fabricate documents so as to attribute responsibility to him for the atrocities in Lithuania or how that could have been accomplished. [The defendant] was hardly a prominent figure in the war and it is difficult to conceive why someone would go to the lengths he suggests in order to frame him. [Defendant's] attack on the authenticity of the documents is not substantial.

United States v. Stelmokas, 100 F.3d 302, 313 (3d Cir. 1996). Just as the Third Circuit could rely on archived Nazi documents, this Court can rely on archived Stasi documents. If anything, the fabrication argument is even weaker here because the information about the defendant in the Stasi documents is completely mundane and innocuous on its face.

On probativeness, we refer back to the arguments in the Rule 403 section of this brief, and particularly the unique factors that make the Stasi documents stronger than any other available evidence on the points for which they are offered. If the documents are excluded, the jury will see *no evidence at all* to corroborate the defendant's admission that he took part in the La Belle bombing. And they will be free to conclude that his presence in Malta was an innocent coincidence, because they will have no idea that he was also in Berlin at the time of another ESO operation in that city. Depriving the jury of this reliable evidence would be a distortion of the facts, and the fundamental purpose of the residual exception is to prevent such distortions, thereby "facilitate[ing] the basic purpose of the Federal Rules of Evidence: truth ascertainment and fair adjudication of controversies.'" *United States v. Arrington*, 634 F. Supp. 3d 57, 66 (W.D.N.Y. 2022) (quoting 5 Weinstein's Federal Evidence § 807.02 [1] (2022)).

In sum, this is a paradigmatic case for the residual exception.[23] The Court should apply it and admit the documents.

CONCLUSION

For the reasons above and those already argued, the Court should grant the government's motions *in limine*.

Respectfully submitted,

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[23] The defense notes that Rule 807(b) requires that the proponent make notice of its intent to offer the statement, including by providing "the declarant's name." ECF 430 at 21. The defense has the declarant's name for the Hotel Report, and they know the identities of the institutions that generated the Visitors List and Flight Record, which suffices to satisfy the notice requirement. *See United States v. Burdulis*, 753 F.3d 255, 264 (1st Cir. 2014) (identity of corporation that manufactured device with inscribed statement offered under Rule 807). The government has disclosed everything it has been able to learn about the documents after a diligent inquiry, giving the defense a fair opportunity to meet the evidence. *See Sours v. Glanz*, 24 Fed. Appx. 912, 916–17 (10th Cir. 2001) (Henry, J., concurring) ("If the declarant's name and address are unknown despite reasonable efforts to locate the information, it is enough to give all the information the proponent has been able to acquire by diligent inquiry." (quoting 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence,* § 807.04[2] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2001)).