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 MOTION FOR LEAVE TO FILE SUR-REPLY TO DEFENDANT'S MOTION *IN LIMINE* REGARDING GOVERNMENT'S TRIAL EXHIBITS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this motion for leave to file a sur-reply to the defendant's reply [ECF 507] in support of the defendant's motion in limine regarding government's trial exhibits [ECF 483]. The proposed sur-reply is attached to this pleading.

As detailed in the government's sur-reply, the defense reply includes new facts and arguments that were not present in their opening brief.[1] The government has not had an opportunity to respond to these newly raised points. As the authorities below establish, these circumstances warrant a sur-reply.

Although neither the Federal Rules of Criminal Procedure nor the local criminal rules provide for the filing of sur-replies, the law is clear that "[i]ssues may not be raised for the first time in a reply brief." *United States v. Apodaca*, 251 F. Supp. 3d 1, 5 (D.D.C. 2017); *see also Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991)). By making new arguments for the first time in his Reply, the defendant has potentially placed this Court in the position of reviewing novel assertions and arguments without the benefit of the government's

[1] The defense does not oppose a sur-reply as it relates to Section A.

response. *See, e.g., McBride v. Merrell Dow and Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986).

Federal Rule of Civil Procedure 7(b) has been construed to permit the filing of a surreply where, as here, a party raises issues for the first time in a reply brief. "The standard for granting a leave to file a surreply [in a civil case] is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). "A surreply may be filed ... only to address new matters raised in a reply, to which a party would otherwise be unable to respond." *Gonzalez-Vera v. Townley*, 83 F. Supp. 3d 306, 315 (D.D.C. 2015) (citing *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 270, 276 (D.D.C. 2002)). In this Circuit, "district court[s] routinely grant[] such motions" when this standard is satisfied. *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003). Although the government will respond to the defense at the hearing, the novelty of the defense reply still necessitates a written sur-reply.

Accordingly, the government requests that the Court accept the attached pleading.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: ***/s/ Brittany Keil***

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SUR-REPLY TO DEFENDANT'S MOTION *IN LIMINE* REGARDING GOVERNMENT'S TRIAL EXHIBITS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this sur-reply regarding defendant's motion in limine regarding the government's proposed exhibits [ECF 403].

ARGUMENT

A. The Air Traffic Control Records are Admissible

In their reply, the defense notes, for the first time, that they are objecting to Exhibits 221-227,[1] which are all video or audio recordings from Air Traffic Control records collected from the United Kingdom in or around 1988. *See* ECF 507 at 17.

By approximately July 31, 2026, the government expects to obtain and submit a certification pursuant to 18 U.S.C. § 3505 from a Scottish Air Traffic Controller who was working on December 21, 1988, and who is familiar with the practice of Scottish Air Traffic Controllers. He was involved in the monitoring of Pan Am Flight 103 as it passed through Scottish airspace. Under § 3505(c), a foreign record of regularly conducted activity is defined as "a memorandum,

[1] The government has since also noticed Exhibit 229, which the defense objects to as well for the same reasons.

report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country," of which Exhibits 221-227 and 229 are. The audio and video clips also constitute "record[s] generated by an electronic process or system that produces an accurate result," so they will be self-authenticating pursuant to Fed. R. Evid. 902(13) once appropriately certified.

Separately, the government will be able to authenticate Exhibits 221-227 and 229 under 901(4) and 901(8). To satisfy Rule 901(4), the "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" will clearly demonstrate that these are air traffic control records. The government plans to present a law enforcement witness who will testify as to how evidence was collected in this case, as well as its maintenance. To satisfy Rule 901(8), a law enforcement witness will testify that these recordings are in a condition that creates no suspicion about its authenticity, was in a place where, if authentic, it would likely be; and is at least 20 years old.

B. The Evidence Labels are not Testimonial and Therefore do not Implicate the Confrontation Clause

The defense raises in its reply for the first time that the evidence labels contain testimonial hearsay and therefore violate the Confrontation Clause.

As a preliminary matter, the government has explained in its Response brief that the evidence labels are generally not being offered for the truth of matters asserted. *See* ECF 495 at 28-29. A Scottish law-enforcement witness will testify, consistent with the Scottish Declaration [ECF 495-2], that all evidence collected by the Scottish police was labeled and catalogued according to a consistent process. This fact supports an inference about the reliability of the evidence, but it does not depend on the truthfulness of any particular assertion on any particular tag. When a statement is offered for a purpose other than the truth of what is asserted, the Confrontation Clause does not apply. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).[2]

Moreover, contrary to the defense's suggestion, the government generally does not intend to use the content of the tags to "prove that each piece of evidence was, in fact, what its label describes and that each was, in fact, found where, when, and by whom the label specifies." Instead, as reflected in the extensive pretrial litigation on admissibility, the government will rely on § 3505 certificates, the ancient-documents authentication rule, and/or the testimony of a person with knowledge.

Regardless, even if the labels were offered for their truth, they would still be admissible for that purpose. The government addressed the applicable hearsay exceptions in its initial Response. *See* ECF 495 at 29-30. In short, the tags constitute both present-sense impressions admissible under Fed. R. Evid. 803(1) and ancient documents admissible under Fed. R. Evid. 803(16).

The Confrontation Clause would not bar admission of the labels for their truth, because the labels are not testimonial statements. As the parties have discussed in another context, *e.g.* ECF 261-1, the test for whether a statement is testimonial is whether a reasonable observer would consider the statement's "primary purpose" to be "creating an out-of-court substitute for trial testimony" to "accus[e] a targeted individual." *Williams v. Illinois*, 567 U.S. 50, 84 (2012).[3]

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[2] Likewise, "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59 n.9. That will sometimes be the case at trial, where the person who found an item and filled out the tag is a testifying witness for the government.

[3] Justice Thomas applies a different test, whereby the Confrontation Clause reaches only "'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation." *Williams*, 567 U.S. at 111 (Thomas, J., concurring in the judgment) (quoting *Bryant*, 562 U.S. at 378 (Thomas,

Here, the purpose of the evidence labels was neither to act as a substitute for testimony nor to accuse a targeted individual. The labels were instead created for the administrative purpose of internal police record-keeping. The Scottish investigation of the bombing of Pan Am Flight 103 resulted in the collection of tens of thousands of items of physical and documentary evidence, and it was necessary to have a means of cataloguing and tracking these items. Based on their quantity alone, no reasonable observer would believe that the thousands of labels accompanying each item recovered would someday be offered in a criminal trial, or even that more than a tiny fraction of the corresponding items of evidence would become directly relevant to a future criminal prosecution of a targeted individual.

In arguing that the evidence labels are testimonial, the defense rests entirely on the fact that they were created in the context of a criminal investigation. *See* ECF 507 at 35.[4] But that is the wrong analysis. In the Confrontation Clause analysis, the relevant focus is on the primary purpose of *the specific statement at issue*, not on the primary purpose of the overall endeavor in which the statement arose. That principle was illustrated especially clearly in *Smith v. Arizona*, 602 U.S. 779 (2024). There, the statements at issue were made by a drug lab technician who tested suspected

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J., concurring in the judgment). The evidence labels at issue here are not the kind of solemn document contemplated by Justice Thomas's test.

[4] As part of this framing, the defense quotes selectively from *Davis v. Washington* about the difference between police seeking to determine "what is happening" versus seeking to determine "what happened." ECF 507 at 35 (quoting 547 U.S. 813, 829-30 (2006)). But *Davis* dealt with statements made during police interrogations, which generally "fall squarely within the class of testimonial hearsay." *Davis*, 547 U.S. at 826 (quoting *Crawford v. Washington*, 541 U.S. 36, 36 (2004) (cleaned up)). When a witness is making a statement to an officer, the confrontation analysis turns on why the police are asking the questions: whether to "establish[] the facts of a past crime" or for another purpose like responding to an ongoing emergency. *Id.* But outside the context of police interrogations, there is no such presumption that a statement is testimonial (as the discussion of *Smith* above illustrates). In other words, when the challenged statement was not made during a police interrogation, it is not necessary that the government establish that there was an ongoing emergency.

marijuana in preparation for trial against a charged defendant. 602 U.S. at 789. It is hard to imagine a set of circumstances more "focus[ed] on court," and on a targeted individual, than these. Nonetheless, the Court could not conclude the statements were testimonial, because the record was not sufficiently clear about "exactly which of [the analyst's] statements [were] at issue" and whether those statements had "a focus on court" or some other purpose like "to facilitate internal review and quality control." *Id.* In other words, the question was not whether the lab was investigating a crime, but whether the declarant was giving the equivalent of testimony. Likewise here, the question is not whether the Scottish police were investigating a crime, but whether the officers filling out the labels were making court-focused statements intended for use at trial.

Smith is also instructive for its ruling on remand that "the court should consider the range of recordkeeping activities that lab analysts engage in." *Id.* at 802. Such analysis is useful because the purpose of a given type of statement may become clearer by a comparison with other types of statements made by the same entity. Here, the non-testimonial character of the evidence labels is especially apparent when they are considered in the context of the Scottish police's overall record-keeping practices. In particular, the Scottish police had a practice of generating formal narrative "Witness Statements," including statements by police officers describing the acquisition of evidence. *See* ECF 495-2 at 4-6. When contrasting the evidence labels with the Witness Statements, it becomes especially clear that the evidence labels are purely administrative in character and purpose.

Although the government is not aware of a D.C. Circuit case on point, at least one other federal circuit has found that internal administrative notations, like the evidence labels here, are not testimonial. In *United States v. Seregin*, the Eleventh Circuit considered a confrontation-clause challenge to the admission of a U.S. Postal Service form entitled "Custody Receipt for Seized

Property and Evidence" that documented the seizure of a firearm. 568 F. Appx. 711, 718 (11th Cir. 2014). The court explained that the form was "maintained in the normal course of [the investigating agency's] business" and was "a receipt 'from one officer to another' of the property that was confiscated." *Id.* Accordingly, "its primary purpose is to document the seizure, identify the items seized, and the chain of custody of seized items." *Id.* The same is true here: the disputed evidence labels are a routine part of the Scottish police's business, and their purpose is "to document the seizure, identify the items seized, and the chain of custody of seized items," all of which was for internal police record-keeping purposes (i.e., "from one officer to another").[5]

Accordingly, the confrontation clause does not preclude admission of the evidence labels.

C. IRO Cards do not Contain Hearsay within Hearsay

The defense also objects- for the first time- to Exhibits 824-863[6] and 870, the IRO cards, on Federal Rule of Evidence 805 grounds. Their argument is that "substantive entries reflecting

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[5] Several state appellate courts have reached a similar conclusion. See *People v. Lopez*, 286 P.3d 469, 477-78 (Cal. 2013) ("chain of custody log sheet" was not "made with the requisite degree of formality or solemnity to be considered testimonial"); *Milligan v. Delaware*, 116 A.3d 1232, 1235, 1239-40 (Del. 2015) (admission of "Chain of Possession Log ... located on the outside of the blood kit" was permissible under Melendez-Diaz even without live testimony of all those listed on log); *State v. Brockmeyer*, 751 S.E. 2d 645, 660 (S.C. 2013) ("statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature"); *State v. Benefield*, 2012 WL 447631 at *5, 7 (Conn. Super. Ct. Jan. 10, 2012) (unpublished) ("lab numbers appearing on ... evidence envelopes and slides" are "relevant ... to show chain of custody" but "are not testimonial and may be received into evidence without constitutional violation"); *Commonwealth v. Dyarman*, 33 A.3d 104, 108 (Pa. Super. Ct. 2011) ("calibration logs ... admitted into evidence to establish the chain of custody ... were not 'testimonial' for purposes of the confrontation clause."); *People v. Bradley*, 2010 WL 2473250 at *8-9 (Cal. Ct. App. June 21, 2010) (unpublished) (lab technician's testimony about chain-of-custody and collection of evidence by another agent did not violate Confrontation Clause even though lab technician was not on the scene at the time of collection).

[6] In ECF 495, the government stated, "Exhibits 826 & 827 are IRO cards in Abdelbaset Ali Al-Megrahi's name, documenting his travel from Tripoli to Malta on October 8, 1988, and his return flight departing Malta on October 10, 1988." Al-Megrahi did not return to Malta on October 10, 1988, but rather flew to Rome, so the word return should not have been included. See ECF 495 at 5.

identity, nationality, and travel history" constitute a second layer of hearsay within each IRO card. ECF 507 at 42.

Section 3505 provides that a record "shall not be excluded as evidence by the hearsay rule" if it was made "by (*or from information transmitted by*) a person with knowledge of" the document's contents. 18 U.S.C. § 3505(a)(1)(A). *See also* Fed. R. Evid. 803(6)(A) (substantively identical provision for domestic records). Here, as the defense notes, the information about each traveler's "identity, nationality, and travel history" were "reported by the traveler." ECF 507 at 42. The traveler is a "person with knowledge" of his or her own identity, nationality, and travel history. Moreover, as trial testimony will establish, the Maltese officials who received the IRO cards verified the information provided by checking it against the traveler's passport or other documents. *See United States v. Patrick*, 959 F.2d 991, 1001 (D.C. Cir. 1992) (holding that business records containing information supplied by customer are admissible when business took steps to verify information). Additionally, once the Maltese authorities took custody of the records, they became Maltese records and, which would have the effect of extinguishing any Rule 805 concerns, even if the records were originally made by the travelers. The D.C. Circuit has definitively ruled that "a record of which a firm takes custody is thereby 'made' by the firm within the meaning of [Rule 803(6)] (and thus is admissible if all the other requirements are satisfied)." *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007). Accordingly, the IRO cards admissible without the need for second-layer hearsay analysis.

D. The Defense's Interpretation of the Case Law Regarding Passports is Incorrect

On page 47 of their reply, the defense states:

> Furthermore, the D.D.C. appears to have recognized passports' "hearsay status" and approved of their admission under Rule 803(8) only for the limited purpose of establishing citizenship. *United States v. Clarke*, 628 F. Supp. 2d 15, 22 & n.6 (D.D.C. 2009); see also *United States v. Ullah*, 282 F. App'x 923 (2d Cir. July 2,

2008) (approving exclusion of foreign passport as hearsay based on purpose for which evidence was offered).

The cases the defense cites, however, do not support exclusion of the passports here.

To begin, *United States v. Clarke* did not "recognize[] passports' 'hearsay status.'" That case found that the hearsay rule did not exclude passports for two separate reasons: because 22 U.S.C. § 2705 made them admissible to prove citizenship and because they are public records admissible under Rule 803(8)(A). 628 F. Supp. 2d at 22. Nothing in the opinion suggests the public-records exception is available "only for the limited purpose of proving citizenship," as the defense asserts. ECF 507 at 47. Proving citizenship just happened to be the purpose for which the government was offering the passport in that case.

Similarly, *Ullah* did not hold that passports cannot be admitted as public records; to the contrary, the case expressly recognized that "passports are considered public records under [the public-records] exception." 282 F. Appx. at 926 (citing *United States v. Pluta*, 176 F.3d 43, 50-51 (2d Cir. 1999)). *Ullah* merely found that, in that specific case, the offering party failed to establish the foundation for the public-records exception. *Id.* In particular, the defendant sought to offer his Bangladesh passport for the truth of its statement that he was born in the United States, but there no evidence in the record to support a finding that the foreign issuing agency verified that fact or that it was "obliged under law to observe and report" it. *Id.* In other words, *Ullah*'s was a limited holding relating to what the defendant was trying to prove in that specific case, which was to offer a foreign passport to prove United States citizenship. Here, the government plans to introduce the passports to establish the names the co-conspirators travelled under, their citizenship and their travel in 1988. These are Libyan passports issued to Libyan citizens. *Pluta* made clear that a foreign passport may be admissible in a United States Court to prove foreign citizenship. *Pluta*, 176 F.3d at 51. The stamps in the passport books indicate when and where the co-

conspirators travelled in and around 1988. The government expects to have witnesses who will explain that passport stamps are stamped upon entry and exit of a country, and they are matters observed pursuant to a duty imposed by law as to which matters there was a duty to report. Part of the purpose of the passport is to record international travel. Additionally, as passports are stamped upon entry and exit of an individual into a country, they are also present sense impressions.

E. Rules 1002 and 1003

As noted in the government's opposition, the defendant's original motion made no argument as to why the defense believed that it had raised a question about the authenticity about Exhibit 500, despite the fact that the burden for making such a showing rested with the defense. *See* ECF 495 at 21-23. The response seems to acknowledge as much, arguing that the defense was "confident" that the Court understands its objection. ECF 507 at 27. Regardless of what the defense assumed the Court and government to understand about its arguments – and to be sure, the defense neither referenced nor incorporated its prior filings regarding the carbon copy – now that the defense has actually put those arguments down on paper, the government requests leave to respond to them. *See United States v. Apodaca*, 251 F. Supp. 3d 1, 5 (D.D.C. 2017); *see also Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991)); Fed. R. Crim. P. 47(b) ("A motion must state the grounds on which it is based and the relief or order sought").

The defense has not raised even so much as an insinuation that the content of the original version of the statements is in any way different than either Exhibit 500 or the copy of those statements supplied by Jamal in April 2026, Exhibit G to ECF 426. Most of what the defense identifies in its reply, ECF 507 at 27-28, goes to whether Jamal's deposition testimony that he did not make underlines was accurate and whether Jamal's post-hearing statements that the copy he possessed was a carbon copy (as opposed to a photocopy) were accurate. Everyone, including

Jamal, now agrees it is possible he made the underlines, and everyone agrees that his post-hearing statements regarding whether the copy he possessed was a carbon copy were inaccurate. *See generally* Jamal Decl.[7]

The defense's position about smudges and edges somehow creating a genuine issue about the original's authenticity also do not stand up to scrutiny. First, there are multiple smudges on Exhibit 71 that could have resulted from contact with carbon paper. *See* ECF 507 at 28 (contending that there are "next to no" such marks). The defense has previously conceded that a mark on the bottom of page 71 of Exhibit G-Defense is a mark that "could possibly be consistent with transfer marks." Similar marks appear throughout the document. As just a few examples, *see*, *e.g.*, Exhibit G-Defense at 9 (right side, lower half of the page); 13 (bottom left margin); 16 (bottom margin and left margin on the lower half of the page); 17 (right side of page); 18 (right side of page) 72 (right side, 6-8 lines up from the bottom of the page). The defense's contention about "smooth, dark lines" also does not hold up to scrutiny. For one, it ignores the copious evidence of torn edges depicted in Exhibit G, for example on the first page, and in the bottom right-hand corner of every page from 10-19. The vagaries of how finely a copy machine may delineate torn or folded[8] edges (which would necessarily include an inquiry about how the settings were set) does not create a genuine issue with respect to the original.

The defense still proffered no evidence – nor is there any in the record – that would support a conclusion that either the original is a fraud or that the duplicate does not faithfully reproduce

[7] The government disagrees with the defense regarding the timeline and its characterization of Jamal's statements as "lies," as opposed to mistakes. *See* ECF 507 at 28. The Court's order certainly accelerated the timeline on which the government was able to meet with Jamal in person, but Jamal was already considering these points

[8] If a torn edge was folded underneath at the time it was run through a copy machine, the Court would expect to see edges like those depicted in the bottom right of page 20 of Exhibit G.

that original. At least some such evidence has been present in the vast majority of cases the government is aware of that have excluded a copy under Rule 1003, including those cited by the government in its response, ECF 495 at 26-26, and the two Circuit-level cases cited by the defense. *See United States v. Haddock*, 956 F.2d 1534, 1546-46 (10th Cir. 1992) ("Except for [the proponent], no one—including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent—was familiar with the contents of the photocopies. In addition, witnesses testified that several of the documents bore markings and included statements that did not comport with similar documents prepared in the ordinary course of business"); *Lozano v. Ashcroft*, 258 F.3d 1160, 1166 (10th Cir. 2001) (photocopy did not accurately reproduce key portion of the original). There is nothing in the record before the Court indicating that anyone who viewed the original believes Exhibit 500 to be anything but a faithful reproduction of the content of that original, nor is the government aware of any indication that any such evidence exists. The defense has thus not raised a genuine issue with respect to the original such that the duplicate – which the defense does not contend is anything but a faithful duplicate of the original's contents – is inadmissible under Rule 1003.

The defense abdicates any response under Rule 1004. The defense's motion correctly noted the standards for admission of a document under Rule 1004, but he now claims Rule 1004 to not be at issue in this litigation. The government rightly raised in its response to the defendant's motion the argument that, if the Court disagrees with the government under Rule 1003, the document is admissible under Rule 1004. *See* ECF 495 at 26-27. The uncontested facts – that the original is not within the Court's subpoena power and the United States has no Mutual Legal Assistance Treaty with Libya – adequately demonstrate that the original cannot be obtained by available judicial process. *See* Fed. R. Evid. 1004, Advisory Committee Notes ("When the original is in the possession of a third person, inability to procure it from him by r*esort to process or other judicial procedure* is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required") (emphasis added).[9] If the defendant had a response to offer under Rule 1004, now was the time to have offered it. The Court should find that Exhibit 500 is admissible under that provision. Here, because the government will present, through Jamal, sufficient evidence from which a reasonable juror could find that Exhibit 500 is an accurate copy of the original, Rule 1008 serves to place the burden on the jury to decide whether the original ever existed and whether Exhibit 500 accurately reflects the content of the original. *See* Fed. R. Evid. 1008(a) & (c).[10]

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[9] That the United States is pursuing other avenues to voluntarily obtain the original and original carbon copy from Libya is of no moment. Regardless of whether Libya agrees to provide those documents, they are not available by judicial process, so Rule 1004(b) is satisfied.

[10] The defense reply rightly concedes that in the Rule 1008 context, the Court's function is not to weigh witness credibility in exercising its gatekeeping function. *See* ECF 507 at 32 (citing a treatise for proposition that such evidence should only be excluded if no reasonable juror could find that the disputed fact exists and cases finding that the evidence presented was insufficient to raise a question of fact for the jury).

CONCLUSION

For the above reasons, the Court should overrule the defense objections to the government's proposed exhibits.

Respectfully submitted,

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