UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 1:22-cr-392 (DLF)**
	)	
ABU AGILA MOHAMMAD	)	
MAS'UD KHEIR AL-MARIMI,	)	
Defendant.	)	

MR. AL-MARIMI'S SUPPORTING CASELAW REGARDING THE APPLICATION OF RULE 803(6)

Mr. Al-Marimi, through counsel, submits this response to the Court's July 17, 2026 Minute Order requesting a supplemental filing "listing cases that address whether Federal Rule of Evidence 803(6) requires that the business regularly retained the relevant records."

The rule makes it a prerequisite for admission that "the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit[.]" Fed. R. Evid. 803(6)(B). This requirement is separate from the requirements that "the record was made" by someone with knowledge and that "making the record was a regular practice of that activity[.]" Fed. R. Evid. 803(6)(A), (C). The Advisory Committee's Notes for Rule 803 further explain that the "unusual reliability of business records" stems from several factors, among them the business's "actual experience . . . in relying upon them[.]"

"Kept" is the past tense of the transitive verb "keep," which means "to retain in one's possession or power"; "to have in control"; to "preserve" or "maintain", as in "to take care of" or "to maintain in a good, fitting, or orderly condition" or "to maintain a record in". *Keep*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/keep. "Maintain" similarly means "to keep in an existing state" and "to preserve from failure or decline". *Maintain*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/maintain.

I. Caselaw

The defense did not locate in-circuit authority that squarely considered the meaning of "kept" in Rule 803(6), including whether it deviates from the plain meaning that records be maintained/retained as part of the entity's regular activities. Courts frequently distinguish the requirements that a record be made and kept in the regular course of an entity's activities and discuss the latter requirement in terms of maintenance and retention.

- **D.C. Circuit**
  - *Queen v. Schultz*, 671 F. App'x 812, 815 (D.C. Cir. 2016) – Affirming ruling that emails were not admissible under Rule 803(6) when it was not clear "who [was] responsible for keeping e-mails in the course of their interchange, which e-mails were required to be sent, which e-mails he was required to send, which e-mails he was required as part of this business activity to [retain], who was going to be a designated custodian, which e-mails were going to be considered vital or necessary elements of communications among the partners, [or] whether the e-mails were going to be relied upon in the conduct of their business."
  - *United States v. Fahnbulleh*, 752 F.3d 470, 478–79 (D.C. Cir. 2014) – Holding "all of the requirements for admission of the evidence as business records were met. First, Fullilove testified that the forms making up Exhibit 100 were prepared by World Vision employees as part of their job responsibility throughout the course of the Food–for–Work program. Second, Fullilove testified that all the forms were maintained in the ordinary course of business. Third, Fullilove testified that these forms were similar to the forms regularly maintained in its other branches. Fourth, Fullilove was World Vision International's Chief Financial Officer, and as such was familiar with the forms and circumstances of their creation."

- *Cousins v. Hathaway*, No. 12-cv-1058 (CRC), 2015 WL 13659633, at *4 (D.D.C. July 9, 2015) – "Under FRE 803(6), a record is admissible if it was made at or near the time of the event described by a person with knowledge of the event; <u>was kept in the regular course of business by an organization that regularly creates these records</u>; and these conditions are demonstrated through the testimony of the custodian or another qualified witness. In her deposition, Rangel testified to all of the requirements necessary to satisfy the business records exception. As someone familiar with the record-keeping requirements at GWU Hospital and competent to identify the notes as records created <u>and maintained in the normal course of business</u>, Rangel's deposition testimony is sufficient to lay the foundation necessary to admit her notes into evidence and submit them to the jury."

- **<u>Other circuits</u>**

  - *United States v. Conde*, 134 F.4th 82, 88 (2d Cir. 2025) – Affirming admission of records based on sworn declaration that certified the records "had been created <u>and maintained</u> in the regular course of Optimum's business[,]" which obviated the need for other foundation evidence related to "Optimum's creation <u>and retention</u> of records of the customers for its services."

  - *United States v. Hunter*, 862 F.3d 725, 728 (8th Cir. 2017) – Affirming admission of records based on testimony that the witness "accesses and uses the IRS database as part of his investigative duties, <u>the database is kept in the regular course of IRS business</u>, and the records are created as returns are filed."

  - *Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 578 (7th Cir. 2015) – "To lay a proper foundation for admitting this evidence under Rule 803(6), <u>Castro needed to be familiar with DeVry's record-keeping practices</u>. *See, e.g.*, *Joseph P. Caulfield & Associates, Inc. v. Litho Productions, Inc.*, 155 F.3d 883, 888 (7th Cir.1998) (no abuse of discretion where district court excluded evidence because foundational witness did not testify as to the business's "regular record-keeping practices"). Her declaration was silent on this issue."

  - *United States v. Cone*, 714 F.3d 197, 219 (4th Cir. 2013) – For a record to be admitted as a business record, it must be "(1) made by a regularly conducted business activity, (2) <u>kept in the 'regular course' of that business</u>, (3) 'the regular practice of that business to make the memorandum,' (4) and made by a person with knowledge or from information transmitted by a person with knowledge." *Clark v. City of L.A.*, 650 F.2d 1033, 1036–37 (9th Cir. 1981).

- *United States v. McCoy*, 504 F. App'x 228, 231 (4th Cir. 2013) – Ruling records were not admissible under Rule 803(6) when the proffered witness "had no basis to know when the records were made, by whom, or whether they were kept as a part of regularly conducted business."

- *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 312–13 (2d Cir. 2008) – Affirming admission of records based on evidence that they were "true and correct copies of documents that were maintained as records at MLBP" and "retained as part of MLBP's standard business practice."

- *United States v. Linn*, 880 F.2d 209, 216 (9th Cir. 1989) – Affirming admission of record when it was "generated automatically, as the trial transcript demonstrates, and was retained in the ordinary course of business, as records of outgoing telephone calls regularly are."

- *Saks Int'l, Inc. v. M/V Exp. Champion*, 817 F.2d 1011, 1013–14 (2d Cir. 1987) – Affirming admission of records based on testimony "that it is the customary course of business in the cargo trade for shore-side stevedores to prepare loading tallies and for the ship to retain them and to rely on them to establish the actual loading count[.]"

- *Stone v. Morris*, 546 F.2d 730, 738 (7th Cir. 1976) – Ruling that record would be admissible under business-records exception upon a showing that it "was prepared by a member of the staff at Joliet and was lodged in the official prison files"; the "fact that the memorandum was retained as part of plaintiff's prison files indicates that it is the type of document routinely relied upon by prison officials."

II. Treatises

- Wright & Miller, 30B *Fed. Prac. & Proc. Evid.* § 6864 (2026 ed.), *available on* Westlaw

  - Federal Rule of Evidence 803(6) relies on the routine nature of organizational record keeping to ensure the reliability of the records it admits. The text of Rule 803(6)(B) requires that a qualifying record be "kept in the course of a regularly conducted activity" and the text of Rule 803(6)(C) requires that the record be made as part of the "regular practice" of that activity. These two requirements are related but distinct. Each corresponds to a separate activity: the record must be regularly made and then regularly kept. The requirements, in tandem, disqualify records that are generated, or come to rest in an organization's files, haphazardly, rather than through a systematic, routinized process. . . . While the isolated making of records is more typically pointed out in the case law, the rule's true focus is on the regular keeping of records. Recall that the rationale for the rule is the reliability of records that the organization plans to rely on at a later time. Consequently, courts should not overlook the regular keeping of records as a key determinant of admissibility.

- Mueller & Kirkpatrick, 4 *Federal Evidence* § 8:78 (4th ed.), *available on* Westlaw
  - (2) *Regularly kept record*. The exception requires that the record be regularly kept. Relating to a regularly conducted business activity is not enough, for the record must also be kept as a matter of regular practice. The Advisory Committee and the Supreme Court wanted to delete this requirement, which also appeared in the Federal Business Records Act, but Congress restored it.[1]

Respectfully submitted,

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[1] For this legislative history, the treatise cites an earlier section, § 8:66, which chronicles:

> In the business records exception of Rule 803(6), amendments in the House did two things. . . . Second, the traditional requirement that the record be of the sort that is regularly kept by the business was restored. The Advisory Committee had required only that the record be kept in the course of a regular activity, but the House thought that trustworthiness is assured only if the record is *regularly kept* in the course of a regular business activity. Both amendments originated in the House Judiciary Committee.

The treatise illustrates the changes with a marked-up version of the rule. Of note, the text originally provided that the statement must be "made . . . in the course of a regularly conducted activity," but Congress changed it to cover statements so made only "*if kept* in the course of a regularly conducted *business* activity[.]"

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