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 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT  
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,	)	CR No. 06-221(B) -TJH
	)	
14 Plaintiff,	)	
	)	<u>REPLY TO DEFENDANT'S RESPONSE</u>
15 v.	)	<u>TO GOVERNMENT'S NOTICE OF</u>
	)	<u>INTENT TO RELY ON RESIDUAL</u>
16 WILLIAM SHAOUL BENJAMIN,	)	<u>HEARSAY EXCEPTION</u>
aka William S. Benjamin,	)	
17 aka William Shaoul Koriel,	)	Date: January 22, 2007
aka William Shawel,	)	Time: 10:00 a.m.
18 aka William Shawel Goreal,	)	Place: Courtroom of the
aka William Sha'oul Koriel	)	Honorable Terry J.
19 Benjamin,	)	Hatter, Jr.
aka William Sha'oul,	)	
20	)	
Defendant.	)	
21	)	
22	)	

23 Plaintiff United States of America, by and through its  
 24 counsel of record, Assistant United States Attorneys Judith A.  
 25 Heinz and Janet C. Hudson, hereby submits its Reply to  
 26 defendant's Response to Government's Notice of Intent to Rely  
 27 //  
 28 //

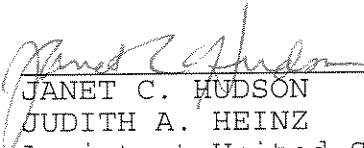
1 on the Residual Hearsay Exception.

2 Dated: January 17, 2008

Respectfully submitted,

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE IIS FILES WILL  
3 NOT BE ADEQUATELY AUTHENTICATED

4 Defendant first argues that proper authentication of the IIS  
5 Files is impossible because "there are no witnesses available to  
6 testify who may have prepared the files, organized the files,  
7 stored the files, or found the files." Response, p. 2.

8 Defendant also argues that the government cannot demonstrate "a  
9 proper chain of custody." Response, p. 3. Defendant cites no  
10 cases in support of these arguments, and the arguments are  
11 without merit.

12 A. Authentication of the IIS Files

13 Contrary to defendant's assertion, it is not necessary for  
14 the government to call a witness who personally prepared,  
15 organized, or stored the files in order to authenticate them.  
16 The Federal Rules of Evidence provide that authentication can be  
17 established in a variety of ways, including by "[t]estimony of  
18 [a] witness with knowledge . . . that a matter is what it is  
19 claimed to be[,]" Rule 901(b)(1), and by distinctive  
20 characteristics such as "[a]pppearance, contents, substance, [or]  
21 internal patterns . . . taken in conjunction with  
22 circumstances[,]" Rule 901(b)(4). For the reasons set forth in  
23 the government's previous filing, the government submits that the  
24 testimony of Mr. Sargon, in conjunction with the testimony of  
25 Special Agents Walker and Oehninger, will establish the  
26 authenticity of the IIS Files.

1 To admit evidence under Rule 901, the trial judge must  
2 determine whether there is prima facie evidence, either direct or  
3 circumstantial, that the document is what is proponent claims it  
4 is. Alexander Dawson, Inc. v. N.L.R.B., 586 F.2d 1300, 1302 (9<sup>th</sup>  
5 Cir. 1978). Once the prima facie authentication has been made  
6 and the judge has admitted the evidence as what it purports to  
7 be, it is the responsibility of the factfinder to determine  
8 whether the document is in fact authentic. Here, the government  
9 submits that the government's evidence is sufficient to establish  
10 prima facie authentication of the IIS Files.

11 B. Chain of Custody of the IIS Files

12 Defendant also argues that the chain of custody is  
13 inadequate, noting that "the files appear to have been found,  
14 after the U.S. invasion, in a private residence . . . .",  
15 Response, p. 2. Defendant argues that the documents are  
16 therefore inadmissible. This argument is without merit.  
17 First, it is hardly surprising that the files were found in a  
18 private residence rather than in the headquarters of the Iraqi  
19 Intelligence Service, because the IIS moved many files to "safe  
20 houses" when it was apparent that the regime was in danger. The  
21 government's witness, Mr. Sargon, has previously testified in the  
22 Dumeisi case that the central archives of the IIS were relocated  
23 from headquarters to "safe houses" when the war began in March  
24 2003. (A copy of Mr. Sargon's testimony has been provided to the  
25 defense; the relevant portion is at Bates No. 784).

26 Second, to the extent that the government cannot identify  
27 the particular IIS officer who brought the files from IIS  
28

1 headquarters to the safe house, this does not render the IIS  
2 Files inadmissible. It is well established that any defect in  
3 the chain of custody goes to the weight of the evidence, not its  
4 admissibility. See United States v. Matta-Ballesteros, 71 F.3d  
5 754, 769 (9<sup>th</sup> Cir. 1995).

6 II. DEFENDANT HAS FAILED TO ESTABLISH THAT DOCUMENTS SIGNED  
7 BY HIM ARE INADMISSIBLE

8 A party's own statement, offered against the party, is not  
9 hearsay. F. R. Evid. 801(d)(2)(A). Several of the documents in  
10 the IIS Files were written and/or signed by defendant and thus  
11 are not hearsay. Defendant nevertheless challenges the  
12 admissibility of these documents, "unless the government is able  
13 to present credible evidence defendant Benjamin wrote, prepared,  
14 or caused to be prepared any correspondence, communication, or  
15 file." Response, p. 5.

16 The basis of defendant's objection is unclear. As described  
17 in the government's Notice, the documents are either letters  
18 signed by defendant, or receipts signed by defendant. This is  
19 credible evidence that defendant wrote or prepared these  
20 documents, or adopted the statements set forth therein. Prima  
21 facie authentication of these documents has therefore been  
22 established and the documents are admissible.

23 III. THE IIS FILES ARE ADMISSIBLE AS CO-CONSPIRATOR STATEMENTS

24 Defendant argues that the IIS Files are not admissible as  
25 statements of co-conspirators under Rule 801(d)(2)(E) because  
26 "the declarant cannot be identified, and the contents of the  
27 files are not detailed or reliable enough to overcome the  
28

1 inability to identify the declarant." Response, p. 7.

2 Defendant's argument is incorrect.

3 Defendant rejects the government's reliance on United States  
4 v. Squillacote, 221 F.3d 542 (4<sup>th</sup> Cir. 2000), even though that  
5 case is on point, with facts that parallel the facts in the  
6 instant case. In Squillacote, the Fourth Circuit found files of  
7 the East German intelligence agency, "HVA," to be admissible as  
8 statements of co-conspirators, notwithstanding the government's  
9 inability to identify the declarants. 221 F.3d 542, 563-64. The  
10 court relied on the following facts:

11 1) the government presented overwhelming evidence of the  
12 defendants' relationship with an individual whose signature  
13 appeared on many of the HVA documents;

14 2) although some of the documents were undated, many bore  
15 dates that were clearly within the course of the conspiracy;

16 3) many of the undated HVA documents showed the same  
17 registration number as the dated documents and the documents  
18 bearing the co-conspirator's signature, thus establishing a  
19 connection between all of the HVA documents;

20 4) by compiling the information in the documents, such as  
21 defendants' real and code names, their assignments, and how they  
22 could be contacted, the East German government was acting in  
23 furtherance of the conspiracy; and

24 5) information in the documents was corroborated in many  
25 respects by the testimony of Clark (another HVA operative) and by  
26 Squillacote's statements to undercover agents. 221 F.3d at 563.

27 The court therefore concluded that "the HVA documents were  
28



1 sufficiently connected to each other and to the conspiracy  
2 established by the government's evidence to make them reliable  
3 and admissible under Rule 801(d)(2)(E), notwithstanding the  
4 government's inability to identify the declarants." 221 F.3d at  
5 563-64.

6 In the instant case, many of the same facts are present.  
7 The documents in the IIS Files are connected to each other  
8 because of the overlap of the same names and signatures found in  
9 multiple files. Much of the information in the documents will be  
10 corroborated by the testimony of Mr. Sargon, another IIS  
11 operative, who will explain how the contents of the documents are  
12 consistent with the methods, procedures, structure, and hierarchy  
13 of the IIS. He will be able to identify signatures on the  
14 documents based on his own personal knowledge, because he saw  
15 those signatures repeatedly in his work for the IIS. The  
16 information compiled in the documents, such as defendant's  
17 contact information, defendant's travel information, and records  
18 of payments to defendant, were clearly compiled in furtherance of  
19 the conspiracy. Furthermore, many of the documents explicitly  
20 refer to defendant as "our source" or "collaborator," indicating  
21 that defendant was an IIS operative working with, and under the  
22 direction of, other IIS operatives. One of the documents  
23 explicitly states that defendant was "commissioned with the duty  
24 of traveling to America and residing there." The dates of the  
25 documents are within the course of the conspiracy. Specific  
26 pieces of information in the documents, such as dates of  
27  
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1 defendant's travel and defendant's telephone numbers, are also  
2 corroborated by external evidence.

3 In the Squillacote case, the court held that "the only  
4 conclusion that can be drawn from the information included in the  
5 documents . . . is that the documents were created by or at the  
6 direction of HVA agents who had knowledge of and were involved in  
7 the conspiracy with the [defendants]." 221 F.3d at 563. In the  
8 instant case, the government submits that the only conclusion  
9 that can be drawn from the information included in the IIS Files  
10 is that the documents were created by or at the direction of IIS  
11 agents who had knowledge of and were involved in the conspiracy  
12 with defendant. The law does not require the government to prove  
13 the identity of each person who prepared these documents in order  
14 for them to be admissible as co-conspirator statements.

15 For these reasons, the documents in the IIS Files are  
16 admissible as nonhearsay co-conspirator statements under Rule  
17 801(d)(2)(E).

18 IV. THE IIS FILES ARE ADMISSIBLE AS BUSINESS RECORDS AND PUBLIC  
19 RECORDS

20 Defendant relies on Rule 803(8)(B) (which provides a hearsay  
21 exception for public records but excludes, in criminal cases,  
22 "matters observed by police officers and other law enforcement  
23 personnel") to argue that the IIS Files are inadmissible because  
24 the IIS is a "law enforcement agency." Response, p. 7.  
25 Defendant relies on a Second Circuit case, United States v.  
26 Oates, 560 F.2d 45 (2d Cir. 1977), in support of his position.  
27 Defendant's argument is wrong for several reasons.  
28

1 First, defendant cites no authority for the proposition that  
2 operatives of a foreign intelligence agency (in this case, the  
3 IIS), engaging in espionage activities, are included within the  
4 scope of "police officers and other law enforcement personnel,"  
5 as required by the Rule. The government submits that the plain  
6 language of the Rule does not encompass foreign spies.

7 Second, in citing the Second Circuit's decision in Oates,  
8 defendant failed to advise the Court that Oates is not good law  
9 in the Ninth Circuit. The Ninth Circuit has expressly rejected  
10 adoption of the reasoning set forth in that case. See United  
11 States v. Hernandez-Rojas, 617 F.2d 533, 534-35 (9<sup>th</sup> Cir. 1980);  
12 United States v. Wilmer, 799 F.2d 495, 500 (9<sup>th</sup> Cir. 1986) ("We  
13 expressly rejected adoption of the reasoning set forth in Oates  
14 in United States v. Hernandez-Rojas . . .").

15 The Ninth Circuit rejected Oates's blanket prohibition on  
16 the admission of law enforcement records under the public records  
17 exception. Rather, district courts in this circuit are to  
18 consider the purpose of the law enforcement exception in  
19 determining the admissibility of a public record. Hernandez-  
20 Rojas, 617 F.2d at 535. Thus, even if records kept by foreign  
21 intelligence agencies were considered "matters observed by police  
22 officers" -- which the government does not concede -- this would  
23 not render them automatically inadmissible, as defendant argues.  
24 Under Ninth Circuit law, Rule 803(8)(B) does not exclude police  
25 records of routine, nonadversarial matters made in a  
26 nonadversarial setting. Wilmer, 799 F.2d at 501, citing United  
27 States v. Orozco, 590 F.2d 789 (9<sup>th</sup> Cir. 1979). The records in  
28

1 the IIS Files are, as defendant characterizes them,  
2 "administrative" and not adversarial. Thus, they would be  
3 admissible notwithstanding Rule 803(8)(B).

4 Finally, the Oates case cited by defendant is  
5 distinguishable. In that case, the government sought to admit a  
6 chemist's report and worksheets in order to prove that a  
7 substance had been tested and found to be heroin, without calling  
8 the chemist as a witness. 560 F.2d at 64. In ruling that the  
9 report and worksheets were inadmissible, the Second Circuit  
10 relied on legislative history indicating that Congress wanted to  
11 prevent the government from using police reports without  
12 policemen to testify:

13 Are police reports without policemen to testify  
14 permitted by the rules as we were given them by the  
15 Supreme Court? . . . Can a judge say, "Well, sure, the  
16 policeman is not available; he is on a trip, or  
17 something. We will use his police report." And that  
18 is the basis for a conviction.

19 560 F.2d at 71. That is far from the situation in the instant  
20 case. The government is not seeking to introduce a report as a  
21 substitute for the testimony of a police officer who is on  
22 vacation. Rather, the government is offering into evidence  
23 regularly-kept files and records of a foreign intelligence  
24 service to prove that defendant was a paid operative of that  
25 foreign intelligence service.

26 Defendant has failed to show that the IIS Files are  
27 inadmissible under Rule 803(8).

28

1 V. THE RESIDUAL EXCEPTION APPLIES

2 In its Notice, the government argued that even if the IIS  
3 Files contained hearsay which did not fall within any other  
4 hearsay exception, the Court should exercise its discretion to  
5 admit this evidence under the "residual exception" of Rule 807.  
6 One of the cases upon which the government relied was United  
7 States v. Dumeisi, 424 F.3d 566 (7<sup>th</sup> Cir. 2005), in which a file  
8 similar to the IIS Files at issue here was admitted pursuant to  
9 Rule 807.

10 In his Response, defendant argues that Dumeisi "has little  
11 to say about the government's motion in this case." Response,  
12 p. 8. Defendant states, erroneously, that "the only issue raised  
13 on appeal was whether the documents were, as represented, found  
14 in Baghdad," and that the issue in Dumeisi was solely one of  
15 authentication, "not hearsay." Id.

16 Defendant misrepresents the issues and holding in the  
17 Dumeisi case. In fact, Dumeisi did raise a hearsay challenge to  
18 the Baghdad File, which the Court of Appeals addressed and  
19 rejected, finding that the Baghdad File was admissible under  
20 Rule 807.

21 The Court of Appeals "first tackle[d] the question of  
22 whether the Baghdad File was properly authenticated," and  
23 concluded that it was. 424 F.3d at 575. The Court of Appeals  
24 then went on to address the hearsay issue. It noted that "the  
25 Baghdad File was admitted [in the district court] under Federal  
26 Rule of Evidence 807, the residual exception to the hearsay  
27 rule," 424 F.3d at 575-76, and summarized the evidence supporting  
28

1 the district court's conclusion that the Baghdad File had  
2 circumstantial guarantees of trustworthiness, which are required  
3 for admission under Rule 807.

4 At oral argument, Dumeisi's counsel evidently conceded that  
5 many of the documents in the Baghdad File were "IIS  
6 communications as they purport to be," but nonetheless challenged  
7 their admissibility, claiming that there was conflicting evidence  
8 "with respect to the timing of the discovery of the Baghdad  
9 File." 424 F.3d at 576. The Court of Appeals considered the  
10 evidence presented at trial, as well as classified evidence, and  
11 concluded that the district court did not err in its finding of  
12 "authenticity and trustworthiness," as required by Rule 807. Id.  
13 The Court of Appeals therefore concluded that "It was within the  
14 court's discretion to admit the Baghdad File under Federal Rule  
15 of Evidence 807." 424 F.3d at 577. The Court of Appeals  
16 declined to address other possible hearsay exceptions which might  
17 apply, "because we have already found the evidence admissible  
18 under Rule 807." Id. Thus, defendant's statement that there was  
19 no hearsay issue in Dumeisi is flatly wrong. The holding in  
20 Dumeisi that the Baghdad file was admissible under Rule 807,  
21 while not binding on this Court, is certainly relevant to the  
22 Court's consideration of this issue.

23 In his Response, defendant fails to address the five  
24 requirements for admission of evidence under Rule 807 and simply  
25 repeats the conclusory statement that the IIS Files are not  
26 trustworthy. The government submits that all the requirements  
27  
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1 for admission of the IIS Files under Rule 807 have been met, for  
2 the reasons stated in the government's Notice.

3 VI. ADMISSION OF THE IIS FILES WILL NOT VIOLATE DEFENDANT'S  
4 RIGHTS UNDER THE CONFRONTATION CLAUSE

5 Defendant argues that admission of the IIS Files would  
6 violate the Sixth Amendment's Confrontation Clause. Response,  
7 p. 9. This argument is incorrect.

8 Defendant cites Crawford v. Washington, 541 U.S. 36 (2004)  
9 in support of his argument. Crawford held that the Confrontation  
10 Clause prohibits admission of "testimonial" statements of a  
11 witness who is absent from trial, unless the declarant is  
12 unavailable and defendant has had a prior opportunity to cross-  
13 examine. 541 U.S. at 59, 68. However, Crawford clearly exempted  
14 "non-testimonial" hearsay from the scope of its holding. 541  
15 U.S. at 68.

16 The Court left "for another day any effort to spell out a  
17 comprehensive definition of 'testimonial.'" Id. However, the  
18 Court went on to explain that at a minimum, the following are  
19 "testimonial": "prior testimony at a preliminary hearing, before  
20 a grand jury, or at a former trial," and "police interrogations."  
21 Id.

22 Elsewhere, the Crawford opinion suggested that business  
23 records and statements in furtherance of a conspiracy are not  
24 testimonial. ("Most of the hearsay exceptions covered statements  
25 that by their nature were not testimonial - for example, business  
26 records or statements in furtherance of a conspiracy," 541 U.S.  
27 at 56.)

1 Based on this framing of the distinction between  
2 "testimonial" and "non-testimonial" evidence, the Ninth Circuit  
3 has held that the following are non-testimonial evidence under  
4 Crawford and therefore admissible:

5 • foreign bank records admitted under § 3505 (United States  
6 v. Hagege, 437 F.3d 943, 958 (9<sup>th</sup> Cir. 2006));

7 • an INS Certificate of Nonexistence of Record (United  
8 States v. Cervantes-Flores, 421 F.3d 825, 834 (9<sup>th</sup> Cir. 2005));

9 • a warrant of deportation (United States v. Bahena-  
10 Cardenas, 411 F.3d 1067, 1075 (9<sup>th</sup> Cir. 2005));

11 • co-conspirator statements (United States v. Larson, 460  
12 F.3d 1200, 1212-13 (9<sup>th</sup> Cir. 2006)).

13 The IIS Files at issue here are akin to both business  
14 records and co-conspirator statements, two categories of evidence  
15 that both the Supreme Court and the Ninth Circuit have stated are  
16 not testimonial and therefore do not implicate the Confrontation  
17 Clause. The IIS Files clearly do not contain prior testimony at  
18 a preliminary hearing, before a grand jury, or at a former trial,  
19 nor police interrogations. Defendant has cited no cases that  
20 contradict the conclusion that the IIS Files are non-testimonial  
21 under Crawford. Defendant's Sixth Amendment argument lacks  
22 merit.

## 23 VII. CONCLUSION

24 For the foregoing reasons, the government respectfully  
25 submits that the IIS Files should be admitted into evidence at  
26 trial.