UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 08-20314

v.

ISSAM HAMAMA,

Defendant.
_____/

DEFENDANT'S RESPONSE TO GOVERNMENT'S
MOTION TO ADMIT DOCUMENTS AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant Issam Hamama, by and through undersigned counsel, respectfully submits the following Memorandum of Points and Authorities in support of the Response to Government's Motion to Admit Documents.

Defendant served for the United States in Iraq as a translator and cultural advisor to U.S. forces engaged in operations in Iraq. The Government is charging Defendant with conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371 and 18 U.S.C. § 951(a). In addition it charges Defendant with making false statements on a Security Clearance Application, Standard Form 86 and in an interview with agents of the Federal Bureau of Investigation, in violation of 18 U.S.C. § 1001(a)(2). In support of these charges, the Government requests to admit into evidence certain files which it claims supports these charges. Defendant requests this Court exclude these files as inadmissible hearsay not within any exception.

The IIS Documents Fail to Meet Authenticity Requirements

The Federal Rules of Evidence require documents to be authenticated before they can be admitted into evidence.[1] To be authenticated, the proponent must present evidence sufficient to support a finding that the document or evidence in question is what its proponent claims it to be.[2]

The Government intends to authenticate the Iraqi files through testimony of its witness, Mr. Sargon. Mr. Sargon claims to be a former Iraqi Intelligence officer who is familiar with Iraqi intelligence files. Mr. Sargon has testified in companion cases as to the credibility of documents similar to the ones at issue here. However, Mr. Sargon's testimony was at times self-contradictory, defensive, and revealed a strong bias in favor of the Government's position. Mr. Sargon stated during his testimony of January 30, 2008 that he had previously been paid between $100 to $300 per month in salary as an Iraqi Intelligence Services ("IIS") director for M-4.[3] He additionally stated that he was able to live comfortably on this amount.[4] He then stated that he had been paid around $112,000 thus far for his testimony, travel, and other expenses on behalf of the United States Government.[5] This is quite a large discrepancy in pay, indicating a strong incentive to testify in favor of the Government. He adamantly denies being paid for testimony in court on behalf of the Government,[6] but has a hard time explaining what it is he is being paid for, and states that he was not paid prior to testimony he was paid afterward, and is being paid in-

[1] Fed. R. Evid. 901(a).
[2] Fed. R. Evid. 901(a).
[3] Reporter's Daily Transcript of Trial Proceedings Testimony of Mr. Sargon at 118, *United States v. Benjamin* (Jan. 30, 2008).
[4] *Id.*
[5] *Id.*
[6] *Id.* at 127-28.

stallment payments based on continued cooperation with the United States Government, indicating that this pay depends on his continued testimony in favor of the Government's position.[7]

Further, Mr. Sargon contradicts himself several times during his testimony as to the IIS files at issue in the Benjamin case. For instance, he states that the IIS was "clean because it was a very rigid system" (in reply to a question regarding possible corruption within the Intelligence Service). Immediately afterward, he was unable to explain why payment meant for a source would be paid to a third party that wasn't verified as an agent for the source, and why such a rigid system did not have a better organized system of maintaining records.[8] He states that lump sums were paid to handlers to be paid out to the source without verification of spending or receipts,[9] and that officers did not comply with rules because the administrative files were not directly under supervision, further contradicting his testimony about the rigid adherence to rules that the IIS practiced.[10] Furthermore, he questioned his own veracity as a witness, when he suggested himself during testimony on January 30, 2008 that he had a hard time remembering details of files and methods of organizing files because it had been a while since he had left the Intelligence Service.[11]

Even if Mr. Sargon is established as a qualified witness, the proposed testimony is inadequate to authenticate the files because it cannot prove that these documents are really what the Government purports them to be: documents and letters accurately recorded by the Iraqi intelligence services in furtherance of a conspiracy in which Defendant was involved in. Exhibits 1.2, 1.16, 1.17, 1.19, 1.20, 1.23, 1.24, 1.25, 1.26, 1.37, 1.38, 1.39, 1.40, 1.41, 1.45, 1.5-1.7, 1.12, 1.15,

[7] Reporter's Transcript of Trial Proceedings, *United States v. Benjamin* at 9-10 (Jan. 31, 2008) (No. 06-221).
[8] *Id.* at 16-17. *See also Id.*, at 34.
[9] *Id.* at 121.
[10] *Id.* at 124.
[11] *Id.*

1.48, 1.49, 1.52, and 1.54 cannot be authenticated because they are handwritten on unofficial stationary or blank sheets of paper, illegible in their original forms, unsigned, not dated, or otherwise unmarked. If these are genuine IIS documents, it appears the IIS did not have a set standard for creation or organization of its records. It would be impossible for a person not directly involved in creating these specific files to distinguish between truly official documents and fraudulent documents.

Even if Mr. Sargon testifies that he is aware of the record keeping methods of the IIS at the time he was at the IIS, he cannot testify as to the standards for record keeping, safekeeping, or organization of documents kept by the IIS during the time these records were allegedly created. Though he states that standards within the IIS were "rigid," he has not been able to explain the possibility of fabricated documents for the personal purposes of the IIS officers, such as the usage of bogus intelligence files and fabrication of "sources" to take money out of Iraq.[12] He cannot prove that these documents were created by government officials, much less prove that they are genuine documents made contemporaneously with the alleged actions of Defendant. He also cannot argue as to the authenticity of exhibits such as 1.37, 1.38, 1.41, 1.5, 1.6, 1.7, 1.27 and 1.48, where the English translations of the documents are inconsistent with the original Arabic versions.

Furthermore, his testimony cannot refute the likelihood that the documents were fabricated for the purposes of implicating Iraqi expats such as Defendant Hamama. The idea of creating convincing forged documents created solely for the purposes of incriminating individuals is not a

[12] Note that Mr. Sargon discussed in his testimony of January 31, 2008 in *United States v. Benjamin* the Iraqi law regulating the amount of money Iraqi citizens could lawfully take out of the country, and the ways in which the IIS could help individuals to take additional money out of the country. Reporter's Transcript of Trial Proceedings, *United States v. Benjamin* at 61-64 (Jan. 31, 2008).

new one. As the 5th circuit in US v. Lopez put it, where a court considers the authenticity of documents to be admitted into evidence, "it is not enough that the documents present an 'aura of authenticity'."[13] There must be enough evidence to establish the authenticity of the documents under a prima facie standard.[14] In the present situation, the documents do not even present an aura of authenticity. They are disorganized, incomplete documents that do not have the consistency in markings and format that one would naturally expect to find in the business records of a government agency.

Finally, the other witnesses that the Government presents as qualified will be unable to testify as to the authenticity of these documents for the same reasons set out above for Mr. Sargon, unless they were themselves direct participants in the creation of the documents or had knowledge that was more in depth than that of Mr. Sargon's. In addition the Government does not offer any written authentications by the IIS or any other Iraqi governmental entity that would help support the alleged authenticity of these documents. Thus, Defendant respectfully requests that all of the above-mentioned exhibits and other exhibits posing these authenticity issues be excluded on the basis of failure to authenticate.

The IIS Documents are Hearsay Because the Co-Conspirator Exception Does not Apply

Some or all of the documents the Government wishes to submit into evidence constitute hearsay and should be excluded. Defendant objects to exhibits 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.22, 1.23, 1.24, 1.26, 1.37, 1.38, 1.39, 1.41, 1.40, 1.45, 1.5-1.12, 1.4, and 1.48 through 1.54 on the basis of hearsay. These documents constitute hearsay as defined under the Federal Rules of Evi-

[13] *United States v. Lopez*, 873 F. 2d 769, 772 (5th Cir. 1989) (quoting US v. Perlmuter, 693 F 2d 1290, 1293 (9th Cir. 1982).).
[14] *See United States v. Carriger*, 592 F. 2d 312, 316 (6th Cir. 1979).

dence because they include out of court statements which refer to Defendant directly or indirectly, or otherwise incriminate Defendant, depriving Defendant of the right to cross examine the declarants.[15] Pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, statements that would otherwise be excluded as hearsay are admissible if they are by a co-conspirator of a party during the course and in furtherance of the conspiracy.[16]

As set out in Defendant's Motion In Limine to Preclude Co-conspirator's statements, the Government is required to prove under a preponderance of evidence standard (1) that a conspiracy existed, (2) that the defendant and the declarant were members of that conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy.[17] Under this standard, the IIS documents are hearsay not subject to the co-conspirator exception and thus should be excluded. The Government does not appear to have evidence other than the unreliable documents at issue in the present Motion to prove the existence of a conspiracy that Defendant Hamama was a part of. At a minimum, the Government should be required to prove outside of the presence of the jury that this exception applies to the documents before any hearsay evidence is admitted before the jury, as requested in Defendant's Motion in Limine to Preclude Admission of Co-Conspirator Hearsay Statements.

No Hearsay Exceptions Apply to the Documents in Question

In addition, the business records and residual hearsay exceptions do not apply to the Government's evidence, rendering these documents inadmissible.

[15] Fed. R. Evid. 801(c).
[16] *See Defendant's Motion in Limine to Preclude Co-Conspirator's Statements.*
[17] *See Bourjaily v. United States,* 483 U.S. 171, 175 (1987). *See also*, *United States v. Enright*, 579 F. 2d 980, 986 (6th Cir. 1978).

The Business Records Exception Does Not Apply Because the Records are Untrustworthy, Disorganized, and Incomplete

Federal Rule of Evidence 803(6) provides for admission of business records,

> made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness.[18]

Some courts have excluded records similar to the ones at question here, stating explicitly that, "Rule 803(8)(B) specifically excludes reports prepared by law enforcement from the public records exception to the hearsay rule if used against a criminal defendant, admitting such records under the business records exception would render Rule 803(8)(B) meaningless." [19] Defendant urges the Court to find these records inadmissible on this basis.

For the sake of argument, assuming the business records exception is applied regardless of the persuasive case law set out above, it is doubtful the Iraqi Intelligence Service could even be defined as a "business" under the business records exception. Even if it fits under this definition, the circumstances in which the documents were found, as well as the format of the documents themselves indicate a lack of trustworthiness, rendering the documents inadmissible. Admitting these documents as business records would go against the policy considerations underlying the exception. Business records are traditionally admitted over hearsay exceptions because businesses who keep records have strong incentives to keep accurate, organized records.[20] This exception is "based on the indicia of reliability that attaches to a record created or maintained by an employer in the ordinary or regular course of their business. An employer's independent motivation

[18] *See Dyno v. McWane*, 198 F. 3d 567, 575 (6th. Cir. 1999). *See also*, *United States v. Jenkins*, 345 F. 3d 928 (6th Cir. 2003).
[19] *See Air Land Forwarders v. United States*, 172 F. 3d 1338, 1345 (C.A. Fed., 1999).
[20] *Air Land Forwarders, Inc. v. United States* at 1342-43 (discussing the relevancy and importance of considering the extent to which a business relied on documents before admitting under the business records exception).

for creating and maintaining reliable business records obviates the need for sworn testimony and cross-examination."[21]

Similar assurances of credibility and reliability do not exist regarding these documents. In fact, there were strong incentives for agents within the IIS during the Sadam Hussein era to fabricate records.[22] These documents were discovered in a house, rather than in a government building, and there appear to have been no standards for organizing, storing, or providing for safekeeping of the documents, further adding to the untrustworthiness of these documents. Additionally, as set out above, many of the documents the Government seeks to admit are undated, on blank sheets of notebook paper with no official markings or illegible, thus failing to establish whether the documents were prepared at or near the time of the events set out in the documents, or in the regular course of business.

Defendant submits that even if these records are authentic, there is insufficient evidence to show that they were created for regularly conducted business activities. There is a strong likelihood that these documents were fabricated and maintained by an organization with the motivation to create and maintain unreliable records for the sole purpose of eliminating those whom the service knew to oppose the Saddam Hussein regime.[23] In this sense, these records could be analogized to the IRS cards deemed inadmissible in *United States v. Bohrer* in the 10th circuit. The documents were created and maintained solely to eliminate opponents of Saddam Hussein living

[21] *Cobbins v. Tenn. DOT*, 566 F. 3d 582, 588 (6th Cir. Tenn. 2009) (quoting *Redken Labs, Inc. v. Levin*, 843 F. 2d 226, 229 (6th Cir. 1988)).
[22] Joost Hiltermann, *Bureacracy of Repression: The Iraqi Government in Its Own Word*s (Feb. 1994) *available at* http://www.hrw.org/legacy/reports/1994/iraq/. ("Agents of the security police and military intelligence, like their counterparts elsewhere, had a natural interest in exaggerating their accomplishments before their superiors.")
[23] Ibrahim Al-Marashi, *Iraqi Intelligence Operations and Objectives in Turkey*, 2 Alternatives: Turk. J. of Int'l Relations (2003), http://www.alternativesjournal.net/volume2/number1/marashi.htm.

in the United States, and thus the circumstances posed "a situation dripping with the motivation to misrepresent."[24]

Agents in the IIS during the Saddam Hussein era had strong incentives to fabricate records, because they obtained advancements and prestige in ranking based on the number of "informants" they recruited for the Iraqi government. There is evidence of disinformation campaigns conducted by the IIS, further undermining the credibility of any documentation produced by this agency.[25] Furthermore, there is no known documentation of criminal penalties or demotion in ranks being imposed upon agents who provided inaccurate information on alleged sources. In short, there was little or no incentive for the IIS to create and maintain well organized, accurate records as is usual in a business record falling under this exception.

Accordingly, Defendant urges the court to exclude these documents based on Defendant's 6th amendment confrontation rights as set out in *Crawford v. Washington.*[26] The United States Supreme Court has stated that business records are admissible absent confrontation only if they "have been created for the administration of an entity's affairs and not for . . . the purpose of establishing or proving some fact at trial."[27] Defendant contends that these documents have been created solely for the improper purposes of falsely implicating defendant in a conspiracy against the United States and thus fall under the definition of testimonial under *Crawford*.[28]

Rule 106 of the Federal Rules of Evidence Supports Exclusion of the Records

[24] *See Air Land Forwarders, Inc. v. United States*, 172 F. 3d at 1344.
[25] Ibrahim Al-Marashi, *Iraqi Intelligence Operations and Objectives in Turkey*, 2 Alternatives: Turk. J. of Int'l Relations (2003), http://www.alternativesjournal.net/volume2/number1/marashi.htm.
[26] *Crawford v. Washington*, 541 U.S. 36.
[27] *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).
[28] *See State v. Aragon*, 2010 NMSC 8 (N.M. 2010) (interpreting the US Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. at 2532 to establish that a person is a witness for Confrontation Clause purposes when that person's statements go to an issue of guilt or innocence, and thus following that absent a showing that such persons were unavailable to testify at trial and that Defendant had a prior opportunity to cross-examine them, the Defendant is entitled to be confronted with the person at trial.)

Rule 106 of the Federal Rules of Evidence states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part . . . which ought in fairness to be considered contemporaneously with it."[29] The Government's own witness, Mr. Sargon has testified in a companion case that each IIS record related to a source contains both administrative and intelligence files as well as "secret information cards" about the source within each of these files.[30] The Government has only presented portions of alleged administrative files related to Defendant that would normally exist if Defendant truly was a source for the IIS. The administrative file lacks a "secret information card", and an intelligence file has not been presented at all. The files are clearly incomplete, and missing essential aspects of what Government contends are business records. Defendant anticipates that the Government will be unable to produce the files necessary to make the files complete, further revealing the untrustworthy, incomplete nature of the documents in question.

Defendant feels that this partial presentation of evidence unfairly prejudices him. Without intelligence files, it is impossible for the Government to establish that the Defendant was in fact providing the IIS with information or cooperating with them in some sort of conspiracy. The incomplete presentation of evidence also puts an unfair burden on Defendant in establishing a defense against the allegations that he provided "information" for the IIS. The Government should not be allowed to present incomplete records on the one hand, and then on the other hand, have the same incomplete documents admitted as documents falling under the business records exception. Defendant urges the Court to require the Government to produce complete documentation of Defendant's alleged activities as a source for the IIS. Specifically, the Government should at a

[29] *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 152, 172 (1988).
[30] Reporter's Daily Transcript of Trial Proceedings Testimony of Mr. Sargon at 122-23, *United States v. Benjamin* (Jan. 30, 2008) (No. 06-221). *See also Id.* at 126.

minimum be required to present complete administrative and intelligence records purportedly related to the Defendant. Should the Government fail to do so, Defendant urges the Court exclude the incomplete, untrustworthy evidence.

The Residual Hearsay Exception Does Not Apply Because the Evidence is Untrustworthy

The Government also argues that the evidence should be admitted under Rule 807, the residual hearsay exception. The rule requires evidence to have "equivalent circumstantial guarantees of trustworthiness as compared to evidence admitted under the other hearsay exceptions. Additionally the evidence must go to material fact, must be more probative than any other evidence that reasonably could have been procured, and must support the general purposes of the Rules of Evidence and the interests of justice."[31] The Court must also consider the independent restrictions on the admission of certain evidence contained in the Confrontation clause of the 6th amendment protecting a criminal defendant's right to confront witnesses against him.[32] Additionally, this circuit has considered the declarant's relationship with the defendant and the government, and the declarant's motivations, as well as the existence of corroborating evidence available for cross-examination in considering the applicability of the residual hearsay exception.[33] For all of the reasons set out above, regarding inaccuracy of translation, disorganization and incompleteness of the records, authenticity of documents, and motivations of the alleged declarants to falsely accuse Defendant of the alleged conspiracy, the residual exception should

[31] *See United States v. Canan*, 48 F. 3d 954, 960 (6th Cir. Ky. 1995). *See also Rush v. Ill. Cent. R.R. Co.,* 399 F. 3d 705, 720 (6h Cir. 2005).
[32] *United States v. Canan* at 954.
[33] *United States v. Darwich*, 337 F.3d 645, 660 (6th Cir. 2003) ("To ensure "equivalent circumstantial guarantees of trustworthiness" in the context of admitting grand jury testimony under the residual hearsay exception, Barlow listed the important factors, including: 'the declarant's relationship with both the defendant and the government, the declarant's motivation to testify before the grand jury, the extent to which the testimony reflects the declarant's personal knowledge, whether the declarant has ever recanted the testimony, and the existence of corroborating evidence available for cross-examination.'"). *See also*, *United States v. Canan* at 960 (stating that "Whether a statement possesses the requisite "indicia of trustworthiness," id., depends upon the circumstances "that surround the making of the hearsay statement and that render the declarant particularly worthy of belief.").

not apply to the Government's evidence. The documents do not contain any "equivalent circumstantial guarantees of trustworthiness" as required under letter of the law, and thus the residual exception does not apply.

Defendant respectfully submits that the co-conspirator, residual and business records exceptions to the hearsay rule do not apply here, for the above reasons, and the documents should not be admitted under this or any exception because of the inherent untrustworthiness of the documents and of the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2010, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following: Ms. Barbara McQuade, U.S. Attorney barabara.mcquade@usdoj.gov and Mr. Michael Martin, Assistant U.S. Attorney at michael.c.martin@usdoj.gov.

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