

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

15-CR-227-CJS

RICHARD PETIX,

Defendant.

NOTICE OF MOTION AND MOTION IN LIMINE
REGARDING BUSINESS RECORD CERTIFICATIONS

PLEASE TAKE NOTICE that the United States of America, by its Attorney, James P. Kennedy, Jr., Acting United States Attorney for the Western District of New York, Wei Xiang, Assistant United States Attorney, of counsel, hereby moves the Court for a pretrial determination on the admissibility of three sets of trial exhibits under Rules 902(11) and 803(6) of the Federal Rules of Evidence.

DATED: Buffalo, New York, April 19, 2017.

JAMES P. KENNEDY, JR.
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UNITED STATES OF AMERICA,

v.

15-CR-227-CJS

RICHARD PETIX,

Defendant.

DECLARATION

WEI XIANG, under 28 U.S.C. § 1746, hereby declares as follows:

1. I am an Assistant United States Attorney for the Western District of New York assigned to the prosecution of the above-referenced case. This declaration is submitted in support of the government's motion in limine regarding the admissibility of three sets of trial exhibits under Rules 902(11) and 803(6) of the Federal Rules of Evidence.

2. Records that are created and maintained in the regular course of business are excepted from the hearsay rule under Rule 803(6). This business record exception allows introduction of reliable and accurate records without calling witnesses with personal knowledge of their creation. United States v. Williams, 205 F.3d 23, 34 (2d Cir. 2000). The Second Circuit has repeatedly stated that Rule 803(6) "favor[s] the admission of evidence rather than its exclusion if it has any probative value at all." Id. (quoting Matter of Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1981)). The principal precondition to

admissibility is that the records have “sufficient indicia of trustworthiness to be considered reliable.” Id. at 34 (internal quotation omitted).

3. Business records accompanied by a custodian certification under Rule 902(11) are self-authenticating. No extrinsic evidence of authenticity, such as live testimony by a custodian, is needed to admit the records. United States v. Komasa, 767 F.3d 151, 154-55 (2d Cir. 2014); United States v. Adefehinti, 510 F.3d 319, 325 (D.C. Cir. 2007) (Rule 902(11) extends Rule 803(6) “by allowing a written foundation in lieu of an oral one”). The proponent of the evidence must simply give an adverse party reasonable written notice under Rule 902(11) for a fair opportunity to challenge the records and certification. See, e.g., United States v. Rom, 528 F. App’x 24, 27 (2d Cir. 2013) (summary order) (five days were sufficient notice for defendant’s own bank records). These foundation requirements for business records were streamlined to avoid “the expense and inconvenience of producing time-consuming foundation witnesses.” Komasa, 767 F.3d at 155 (quoting Rule 803 advisory committee note).

4. At trial in this case, the government intends to offer three sets of business records that are listed in its proposed Exhibit List at Dkt. 67:

a. Gov’t Tr. Ex. 10A consists of account statements for four Bank of America accounts in the names of Richard Petix and Brittany Benight. Gov’t Tr. Ex. 10B is a disc containing electronic copies of deposit slips and ledgers for these accounts, showing, among other things, out-of-state counter deposits of cash that correspond to SMS exchanges found

on Petix's cell phone about Bitcoin transactions. Both exhibits were disclosed to the defendant on or about April 18, 2016, along with the business record certification that is attached herein as Exhibit 1.

b. Gov't Tr. Ex. 8 consists of toll records from Verizon Wireless for telephone number 585-434-6338. The call history shows, among other things, an incoming call from the telephone number of HSI Special Agent Brad Brechler on the night of December 3, 2015. (SA Brechler will testify that when he made that call, Petix's cell phone rang in response.) This exhibit was disclosed to the defendant on or about April 18, 2016, along with the business record certification that is attached herein as Exhibit 2.

c. Gov't Tr. Ex. 7 is a disc containing account data, including email content, for accounts rpetix7@gmail.com and rich13598@gmail.com. The data show, among other things, emails about Bitcoin transactions and a receipt from Best Buy for Petix's laptop computer. This exhibit was disclosed to the defendant on or about disclosed on or about May 9, 2016, along with the business record certification that is attached herein as Exhibit 3.

5. On April 8, 2017, I emailed written notice to both counsels for the defendant of the government's intent under Rules 902(11) and 803(6) to offer the above-described business records via their accompanying custodian certifications. The notice is attached herein as Exhibit 4. I also asked whether they intend to object to admissibility under those Rules.

6. As of the time of the filing of this motion, the government has received no response from the defendant. The government, therefore, moves for a pretrial determination of admissibility under Rules 902(11) and 803(6), or an order requiring the defendant, if he so intends, to challenge the introduction of the certified copies of the above-described records prior to the commencement of trial so that the Court may consider any such challenge.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 19, 2017.

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