

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 08-00026-03/05-CR-W-FJG
)
 TROY R. SOLOMON,)
 CHRISTOPHER L. ELDER,)
 and)
 DELMON L. JOHNSON,)
)
 Defendants.)

**GOVERNMENT’S MOTION IN LIMINE TO ADMIT DOCUMENTS
PURSUANT TO BUSINESS RECORD CERTIFICATIONS**

The United States of America, by Beth Phillips, United States Attorney, and Assistant United States Attorneys, Rudolph R. Rhodes IV and James Curt Bohling, all for the Western District of Missouri, hereby moves this Court *in limine* to admit certain business records through use of business records certifications and without the calling of a live witness.

Federal Rule of Evidence 803(6) provides that the records of regularly conducted activities may be admitted through the testimony of a custodian of records or, alternatively, through the use of a certification pursuant to Federal Rule of Evidence 902(11). Pursuant to these rules, the Government intends to introduce at trial various bank records (Bank of America, Allen Bank & Trust, Wells Fargo Bank, and Washington Mutual Bank), Federal Express shipping records and pharmacy prescription records (Walgreens and C & G Pharmacy). These documents have been made available to the defense. Typically, defense counsel stipulates to the admissibility of such documents, and thus resort to a business records certification is not necessary. In this case, however, counsel for at least one of the defendants has indicated that he

will not so stipulate. In order to avoid the meaningless gesture of calling numerous custodians of records as witnesses at trial, the Government requests that this Court determine that the records are admissible based on the business records certifications prepared by the custodians of records and attached as Exhibit 1. Federal Rules of Evidence 104(a) provides that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court.” In making this preliminary determination, the Court is “not bound by the rules of evidence.” Thus, this court can consider the hearsay business records certifications and determine the admissibility of the records covered by each such certification.

The use of the business records certifications in making this admissibility determination raises no concerns under *Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court has repeatedly rejected the notion that the Confrontation Clause’s limitations on the use of hearsay testimony applies to a district court’s determination of such preliminary questions. *See McCray v. Illinois*, 386 U.S. 300, 313-14 (1967); *United States v. Matlock*, 415 U.S. 164, 174-75 (1974); *Bourjaily v. United States*, 483 U.S. 171, 178 (1987); *see also United States v. Collins*, 966 F.2d 1214, 1222 (7th Cir. 1992)(explaining “the Supreme Court held [in *Bourjaily*] that a judge can, without offending the Sixth Amendment’s Confrontation Clause, consider another person’s out-of-court statements in determining whether these statements are admissible”). Consistent with this line of Supreme Court cases, *Melendez-Diaz v. Massachusetts* recognized that, even after *Crawford*, a district court’s use of business records does not offend the Confrontation Clause. *See Melendez*, 129 S. Ct. 2527 (2009)(“Business and public records are generally admissible absent confrontation . . . because – having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial – they are not

testimonial.”). *See also United States v. Foreman*, 588 F.3d 1159, 1162 n. 5 (8th Cir. 2009)(noting that business records are “nontestimonial” for purposes of *Crawford* and that the Confrontation Clause does not apply to nontestimonial statements).

For the above reasons, the Government respectfully requests that it be allowed to introduce into evidence certain business records upon a determination by this Court, through the consideration of business records certifications pursuant to Federal Rule of Evidence 902(11), that the records are properly admissible business records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on June 14, 2010, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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