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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER,	)	
	)	
Defendant.	)	

TRIAL MEMORANDUM ON ISSUE OF WHETHER RECORDS SEIZED FROM THE BELTON MEDECINE PHARMACY ARE RELIABLE BUSINESS RECORDS

On May 6, 2006**,** government agents seized a massive amount of materials from defendant Rostie's Pharmacy, The Medicine Shop, located in Belton, Missouri. Among the many documents that the government wishes to introduce at trial are numerous photo copies of prescriptions that the government contends were written by defendant Elder. These documents were sent by facsimile, according to Rostie, from defendant Solomon, some coming from his pharmacy in Houston and some from the basement of his home.

There are also a very small limited number of original prescriptions written by Elder for persons he believed to be real, existing legitimate patients which were seized during the search. These, along with copies of drivers licenses, were apparently mailed to the Medicine shop from Texas by the patient or someone else in

Texas on behalf of the patient. These may well have constituted a test run of some sort to put the scheme into operation and perhaps convince Rostie that there was in fact a doctor involved that she could point to if questioned. Dr. Elder was unaware of this and never advised any patient to use any particular pharmacy. It is telling that over the course of many months, particularly when filling refills, Rostie never attempted to call Dr. Elder directly and ask him about the bizarre practices going on at the Medicine shop vis a vis scripts and massive refills for scripts generated on the Missouri end.

Defendant Elder has no quarrel with the government over chain of custody issues and will stipulate that the items in court are indeed the items seized on May 6, 2006. That having been said, the defendant has major problems with reliability issues based on the construction and interpretation of Federal Rules of Evidence 803 (business records); 901 (authentication); 1002 (Requirement of Original); 1003 (Admissibility of Duplicates); and 1004 (admissibility of Other Evidence of Contents). If these faxed records are admissible at all against Elder, it is only after the government is able to establish some conspiratorial nexus to him and demonstrate he actually had knowledge of them and was a participant in their faxed transmission from others in Houston and they constitute co-conspirator hearsay evidence. ***United States v. Bell***, 573 F.2d 1040 (8th Cir. 1978). Also See ***United States v. Ordonez***, 737 F.2d 793 (9th Cir. 1984) (co-conspirator hearsay and business record exception

discussed in the context of a drug ledger) (case reversed and both arguments rejected), a case which is cited and discussed again later in this pleading.

The government itself characterizes these documents as fraudulently issued prescriptions. Their own evidence will show that there was no attempt to reconcile the alleged shipments of drugs to Houston by Rostie with ledger payments for those drugs from the Houston recipient. Indeed, apparently large indiscriminate sums of cash were received from Houston by the "bag person", co-defendant Martin, who took her cut and gave cash payments to Rostie. The government will contend that the names on many of the scripts are fraudulent and in alphabetical order further undermining their reliability as a true business record. Quite simply Rostie never intended for these documents to be true genuine business records as envisioned by the Federal Rules of evidence. In ***United States v. Turner***, 189 F.3d 712 (8th cir. 1999) the court stated at 721, quoting from ***United States v. Franks***, 939 F.2d 600 (8th Cir. 1991):

> Evidence is admissible if the trial judge is satisfied, after consideration of such factors as the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood that it has been tampered with, that the evidence has not in all reasonable probability been changed in any significant respect." Id. at 100. Further, "Rule 803(6) is satisfied if the custodian `demonstrates that a document has been prepared and kept in the course of a regularly conducted business activity.'" ***Franks***, 939 F.2d at 602 (quoting ***United States v. Pfeiffer***, 539 F.2d 668, 671 (8th Cir. 1976)). Having reviewed the relevant portions of the trial transcript, we conclude that the testimony

> of Ms. Stovall-Reid and Ms. Bell sufficiently established that the time cards and payroll records had been prepared and kept in the regular course of Cochran Gardens' business.

In ***United States v. Ordonez***, 737 F.2d 793 (9th Cir. 1984) (Amended opinion after denial of rehearing) the 9th Circuit re-affirmed the reversal of a conviction where a drug ledger was admitted to prove the content of the writing as evidence against the defendants who maintained the ledger. On appeal, the government argued an alternative theory for admissibility, claiming it was a business record. The opinion provides a thorough discussion and analysis as what constitutes a business record starting at page 805 of the opinion and dissects Rule 803. The court concluded:

> The government failed to comply with the requirement of the business records exception to the hearsay rule.
>
> The government did not produce the custodian of the records as a witness. No evidence was offered by any person that the records were kept by persons having personal knowledge of the facts recorded or that the entries were made at or near the time of the transaction. No evidence was presented to demonstrate that the persons who made the entries were truthful and had a clear recollection of the facts. The entries were made by many persons, some of them unidentified. The expert's opinion that these entries were business records was not supported by the foundational evidence required by Fed.R.Evid. 803(6).
>
> The government failed to show that evidence of the ledger entries "falls within [the foundational requirements] of a firmly rooted hearsay exception." ***Ohio v. Roberts***, 448 U.S. at 66, 100 S.Ct. at 2539. The ledger entries were inadmissible as proof of the matter asserted for all of the reasons discussed above.

United States v. Ordonez, 737 F.2d 793, 805 (9th Cir. 1984).

An excellent discussion of this issue in some depth appears in ***U.S. Freiden***, 849 F.2d 716 at 942 (2nd Cir. 1988). The case discusses the various interpretations of rule 803 by the other Circuits. In ***Freiden***, the court reversed a conviction in an income tax prosecution where a memorandum was prepared by the defendant's accounting firm accounting for cash he may or may not have deposited with the firm. The custodian's testimony did not satisfy the requirement that it was the regular practice of the business activity to make such a record. As the Court observed, "even a generous approach to the rule" requires that " . . . the records have sufficient indicia of trustworthiness to be considered reliable." ***Id.*** 942.

Defendant Elder worked part time for the Texas Wellness Center from early summer 2004 until January 2005. He was employed by Pleshette Johnson, a Chiropractor at the client, and witness who has been given government immunity. Dr. Elder was provided with blank prescription pads by her. He wrote legitimate scripts for persons he believed to be real identifiable patients after proper acceptable medical examinations. Where, when and how these prescriptions were filled, he cannot say. He was totally unaware that massive copies of what he believes to be altered and counterfeit prescriptions were thereafter faxed to Belton, Missouri and drugs shipped back in large quantities via federal express to Texas and signed for by employees at the Wellness Center. Only one of the hundreds of shipments purports

to bear the signature "Chris" and he denies he signed for or received any such shipments. Furthermore, scripts continued to issue from the Wellness center in his name after he resigned and left Chiropractor Pleshette Johnson's Wellness Center.

As pointed out in the Magistrate's R&R dealing with the ***Daubert*** hearing, the trail and explanation for what happened to the drugs ends at the Wellness Center after receipt of the drugs by immunized witness, Pleshette Johnson who claims she gave the shipments to co-defendant Solomon (See Report and Recommendation, Docket # 318). Where the originals of the records sized in Belton are remains a mystery. Where and what happened to the shipments of drugs remains a mystery. How and under what circumstances some of Dr. Elder's originally issued legitimate scripts may have been duplicated, cut and pasted, altered, copied, or counterfeited remains a mystery and the central and key issue of his defense.

Duplicates of an original document are admissible where there is no genuine issue of reliability. Thus in ***United States v. Ziesman***, 409 F.3d 941 (8th Cir. 2005) the court held that the mere changing of a caption in a lab report on a duplicate used in court was harmless error where it was clear the content of the report had not been changed. The court noted that Rule 1002 expresses the law's preference for using the original of a document to prove the content of the document. See ***Brooks v. Ameren*** UE, 345 F.3d 986, n. 3 (8th Cir. 2003). On the other hand, the government may not put into evidence the transcription of a tape recorded statement because it is

not the “original statement” or a “duplicate” and is simply legally unreliable. ***Wright v. Farmers Co-p of Ark and Okklahoma***, 681 F.2d 549 n. 3(8th cir. 1982). Also see ***Untied States v. Smith***, 893 F.2d 1573 (9th Cir. 1990) (a sufficient quantum of ancillary evidence may establish the reliability of a duplicate in the face of a claim of unreliability).

Fed.R.Evid. 1001(4) defines "duplicate":

> A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

There will be no such evidence offered in this case. There is no witness defense is aware of who is going to say that the seized documents in Belton were a true and accurate reproduction of an original Elder prescription written by him. There will be evidence from a government handwriting expert that the scripts appear to have been written by Dr. Elder, in his opinion. This however is a red herring insofar as it attempts to prove they are truly duplicates within the meaning of Rule 1001. Indeed, the defense will call a computer forensic expert and a local graphics design witness who will testify as to the ease with which these prescriptions may have been created from an original Elder script and then altered prior to facsimile transmission to Missouri.

In summary, these are not business records for all the reasons stated above and this court should not allow the government to bolster their reliability by allowing defendant Rostie to claim they are. Again, defendant will stipulate to the chain of custody. Beyond that, he objects to any stipulation or ruling by the court that these documents otherwise have some indicia of reliability.

WHEREFORE, defendant submits his trial memorandum on the issue of whether certain seized records are "business records."

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on June 15, 2010.

/s/
JOHN R. OSGOOD