

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

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

**GOVERNMENT'S RESPONSE TO DEFENDANT ELDER'S TRIAL  
MEMORANDUM REGARDING THE ADMISSIBILITY OF RECORDS SEIZED  
FROM THE MEDICINE SHOPPE**

The United States of America, by and through its undersigned counsel, hereby files this response to defendant Christopher L. Elder's trial memorandum regarding the admissibility of records seized from The Medicine Shoppe pharmacy.

It should be noted from the outset that the various items seized from The Medicine Shoppe are admissible as real evidence. These items (which include prescription records, bank deposit slips, fax cover sheets attached to pharmacy computer printouts, a date book, handwritten notes with phone numbers, photocopies of driver's licenses and state identification cards, and handwritten notes with telephone numbers) are intrinsically part of the acts giving rise to this case. Law enforcement agents seized these items of evidence from TMS on May 10, 2006, and preserved them. Furthermore, the parties have agreed to the chain of custody for this evidence.

While the seized items are admissible as real evidence, they are also admissible as business records. Many of the documents which the United States will offer into evidence include records received, maintained or created by TMS.

The admission of such evidence is controlled by Federal Rule of Evidence 803(6), which provides:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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, records, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6) permits the admission of hearsay contained in so-called business records where the following conditions are met: (1) the record must be made at or near the time of the event recorded or communicated; (2) the record must be by, or from information transmitted by, a person with knowledge; (3) the record must be kept in the course of a regularly conducted business activity; and (4) it must have been the regular practice of that business activity to make the business record. These conditions may be established by the testimony of the custodian or some other qualified witness.

The form that the “record” may assume under Rule 803(6) is described broadly as a “memorandum, report, record, or data compilation in any form.” The contents of the document or records of a regularly conducted activity are admissible under Rule 803(6) where the government can establish the foundation set forth in the rule. Where circumstances indicate trustworthiness, it is not necessary that the person who kept the record, or even the person who had supervision over its preparation, testify. *United States v. Jones*, 554 F.2d 251, 252 (5<sup>th</sup> Cir.

1977)(“It is not essential that the offering witness be the recorder or even be certain of who recorded the item. It is sufficient that the witness be able to identify the record as authentic and specify that it was made and preserved in the regular course of business.”)

It is irrelevant whether the witness introducing the document created the document or simply received and maintained it in the normal course of business. Prescriptions, correspondence, faxes, and other records prepared by one entity and retained in the files of a separate entity, in the normal course of the retaining entity’s business, are admissible under Rule 803(6). *United States v. Pfeiffer*, 539 F.2d 668, 671 (8<sup>th</sup> Cir. 1976). The sound policy supporting such an admission is that the regular receipt of the records, reliance upon them and their integration into the receiving entity’s day-to-day operations lend a “trustworthiness and probative value” to the records. *See Black Sea & Baltic General v. S.S. Hellenic Destiny*, 575 F. Supp. 685, 691 (S.D.N.Y. 1983).

Here, TMS employees, within their normal course of business, regularly maintained prescriptions, including the numerous original prescriptions (Government Exhibit Numbers 1 through 6, 36 through 39, 41, 42, 44, 46, 28, and 50)<sup>1</sup>. This alone provides the “inherent probability of trustworthiness” for admissibility as a business record. *Jones*, 554 F.2d. at 252. TMS employees will testify that the records were made at the time of the event by a person with knowledge. They are therefore inherently admissible as a business record.

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<sup>1</sup> Included within many of these exhibits are numerous original prescriptions written by defendant Elder, totaling hundreds of prescriptions.

Where the foundation required under Rule 803(6) is laid, business records are admissible even when the records are incomplete and inaccurate. Claims of inaccuracy and incompleteness are matters going to the weight of the evidence and not its admissibility. *United States v. Panza*, 750 F.2d 1141, 1151 (2d Cir. 1984); *Matador Drilling Company v. Post*, 662 F.2d 1190, 1199 (5<sup>th</sup> Cir. 1981); *United States v. Gremillion*, 464 F.2d 901, 907 (5<sup>th</sup> Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972).

Under the above standards and the facts and circumstances of this case, all of the records seized at The Medicine Shoppe by law enforcement agents which the United States intends to offer into evidence are records of the pharmacy's regularly conducted activity and were made in the regular course of business by a person with knowledge of the events or information being recorded. They are thus admissible under Fed. R. Evid. 803.

Respectfully submitted,

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By */s/ Rudolph R. Rhodes, IV*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was delivered on June 16, 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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*/s/ Rudolph R. Rhodes, IV*

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Rudolph R. Rhodes IV  
Assistant United States Attorney

RRR/rp