No. 11-50948

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MELVIN DAVID TOWNS, JR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES OF AMERICA

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RECOMMENDATION ON ORAL ARGUMENT

The United States of America suggests oral argument would not significantly aid the decisional process in this case. The issue(s) raised on this appeal can be determined upon the briefs that adequately present the record and legal arguments relevant to this appeal. *See* FED. R. APP. P. 34(a)(2)(C).

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JURISDICTION

This is an appeal from a final judgment of the district court in a criminal case. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by admitting, as business records, transaction logs from pharmacies accompanied by business records affidavits that complied with Federal Rules of Evidence 803(6) and 902(11).

2. Whether the admission of transaction logs, which are kept by pharmacies in the regular course of business and show repeated pseudoephedrine purchases by Appellant and his cohorts, violated Appellant's rights under the Confrontation Clause.

3. Whether the district court erred in denying Appellant a safety valve reduction.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

By grand jury superceding indictment returned on April 6, 2011, in the Western District of Texas, San Antonio Division, Appellant Melvin David Towns, Jr. was charged with one count of conspiracy to manufacture methamphetamine and conspiracy to possess and distribute pseudoephedrine in violation of 18 U.S.C. § 846 (1R. at 15-18).[1] A jury convicted Appellant of this charge on June 2, 2011. (1R. at

[1] References to the Record on Appeal for the various volumes of the Supplemental Electronic Transcript are designated "R" followed by the pertinent page number(s), as assigned by the Clerk of this Court. References to the Electronic Pleadings, Volume 1, are designed "1R" followed by the pertinent page number(s), as assigned by the Clerk of this Court.

207). On June 15, 2011, Appellant filed a motion for new trial, which was denied by the district court on June 21, 2011 (1R. 9, 214-23). On June 30, 2011, Appellant filed a motion for reconsideration of his motion for new trial, which was denied by the district court on July 19, 2011 (1R. at 9, 227-32). Subsequently, on October 5, 2011, the district court sentenced Appellant to 120 months of imprisonment, 5 years supervised release, and a $100 special assessment (1R. 272-77). Appellant timely filed notice of appeal (1R. at 270-71).

B. Statement of Facts

1. Michael Sanders

At trial, the Government called two witnesses who were involved in the conspiracy with Appellant to manufacture methamphetamine and possess and distribute pseudoephedrine. The first witness, Michael Sanders ("Sanders"), testified that he had been arrested on conspiracy to manufacture methamphetamine and possess and distribute pseudoephedrine in October of 2009 and had been charged with three individuals, including Appellant's sister, Beth Grier ("Grier") (R. at 169, 171, 180). Sanders explained that he pled guilty, was awaiting sentencing, and hoped to receive a reduced sentence because of his cooperation with the Government (R. at 169-70).

Sanders told the jury that, like Appellant, he was born and raised in Gonzales, Texas, and was connected to Appellant through methamphetamine use and production (R. at 172-74, 179). Sanders claimed he would sell Appellant methamphetamine, and on occasion, Appellant sold him methamphetamine (R. at 175). Sanders witnessed Appellant ingest methamphetamine on occasion and noted that Appellant always maintained a supply of methamphetamine (R. at 189-90). Sanders admitted to being a constant user of methamphetamine, testifying that in a one month period, he ingested, on average, about half an ounce of methamphetamine (R. at 190). Sanders added that for legitimate employment, Appellant used a truck and trailer to transport oil field supplies (R. at 189). Sanders considered Appellant a friend, so much so that initially Sanders did not tell the Government that Appellant was involved in the methamphetamine business (R. at 214-15). Only after the Government confronted Sanders with pseudoephedrine logs showing Appellant making large purchases did Sanders implicate Appellant (R. at 214-15)

Sanders explained that he started using methamphetamine in his twenties and transitioned into producing or "cooking" methamphetamine after being taught how to do so by a man named Louis Martinez (R. at 171-72, 175). Sanders explained how methamphetamine is produced—mixing together anhydrous ammonia, lithium, pseudoephedrine, and camp fuel (R. at 176-78). Sanders procured the anhydrous

ammonia, a liquid gas contained in a large metal tank, from a friend named Kelly Dale House ("House") (R. at 176, 209, *see* 233-34). Sanders obtained lithium from batteries and pseudoephedrine from cold and allergy medicine.

Sanders manufactured methamphetamine on a ranch containing several acres of property in Gonzales, Texas, owned by Appellant and Appellant's sister, Grier (R. at 179-81). According to Sanders, he and Appellant cooked methamphetamine together at this location eight to ten times over a time span of four to six months; Sanders would be responsible for the majority of the work, but Appellant would assist by drawing off the gas (R. at 175-76, 181, 183). Appellant and Grier provided Sanders with pseudoephedrine tablets to be used in making methamphetamine (R. at 182, 186). Sanders also purchased such tablets himself for the same purpose (R. at 178-79, 186). Appellant and Sanders had an agreement that they would split each batch of methamphetamine after it was manufactured; most of the batches yielded about one ounce of methamphetamine (R. at 182, 184). Sanders would both use and sell his share of the methamphetamine (R. at 173). If Grier provided Sanders with pseudoephedrine tablets, as payment, she would receive half of the methamphetamine produced (R. at 182). Another individual named Joey West ("West") also cooked methamphetamine on Appellant's property but worked alone (R. at 188).

Sanders and Appellant manufactured methamphetamine at another location as well, property owned in Navasota, Texas, by Appellant's friend Don Cohorst (R. at 184). They manufactured methamphetamine at this location approximately twenty to thirty times, and each batch produced would yield about once ounce (R. at 185). Appellant and Sanders always agreed to split the methamphetamine once it was manufactured (R. at 185). Sanders assumed Appellant manufactured methamphetamine on his own because on a few occasions, Appellant requested that Sanders try to make methamphetamine utilizing someone else's leftover fluid (R. at 191).

Sanders testified that both he and Appellant provided the pseudoephedrine pills to manufacture the methamphetamine (R. at 186). Sanders recalled that on some occasions, he and Appellant would accompany each other to the same store to purchase these pills (R. at 186-87). Sanders recalled that he and Appellant would sometimes travel to the Houston and Conroe, Texas, area together to make these purchases (R. at 186). Sanders verified that he had seen the transaction logs from CVS, Wal-Mart, Walgreens, and Target, reflecting purchases of pseudoephedrine pills and added that he occasionally would also purchase pills at HEB or little mom and pop pharmacies (R. at 187). Sanders claimed that Appellant would obtain pseudoephedrine pills from other people as well (R. at 213).

2. Joey West

The second co-conspirator to testify for the Government was Joey West. West testified that he had been arrested on conspiracy to manufacture methamphetamine and possess and distribute pseudoephedrine in April of 2010 and had been charged with two other individuals (R. at 220). West explained that he pled guilty, was awaiting sentencing, and hoped that he would receive a reduced sentence because of his cooperation with the Government (R. at 221-22).

Like Sanders and Appellant, West was born and raised in Gonzales, Texas (R. at 222). West told the jury about his conviction for possession of cocaine and admitted to the use of marijuana, cocaine, and methamphetamine (R. at 223).

West explained that Sanders taught him to manufacture or "cook" methamphetamine about six years prior (R. at 223-24). West both used and sold the methamphetamine that he produced (R. at 224). Like Sanders and Appellant, West obtained the ammonia gas that he used to manufacture methamphetamine from House; as payment for one tank of ammonia gas, West would provide Sanders with $1500 to give to House as an up-front payment and then West would pay House an additional $1500 when the ammonia was delivered (R. at 233-34). West bought pseudoephedrine pills, mostly in cities other than Gonzales, Texas, for use in his manufacturing process (R. at 225). West told the jury that he could only buy one box

of pseudoephedrine pills per day, because of legal regulations, and to circumvent the law, he went to different pharmacies in the same day to buy a box of pills (R. at 226). West also received pseudoephedrine pills from other people for use in manufacturing methamphetamine and would give these people, in return, either methamphetamine or money (R. at 226).

West testified that he manufactured methamphetamine on a ranch owned by Appellant in Gonzales, Texas (R. at 226). West met Appellant through a man named Ken Nippert ("Nippert"), who rented a house on Appellant's property (R. at 227). Nippert provided West with a key to the property, and West noted that Appellant never excluded him from the property (R. at 231). West manufactured methamphetamine on this property out of a little building near the house which is part of a garage (R. at 228). West claimed that he produced methamphetamine in Sanders' presence but not in front of Appellant (R. at 228). West witnessed Sanders and Appellant manufacturing methamphetamine together on that property on about twenty occasions; Grier was present on some of these occassions (R. at 228, 232). West stated that he did not conduct methamphetamine business with Appellant, but that on one occasion, Appellant brought West some pseudoephedrine pills to use in West's production process, and West gave Appellant some drugs in return (R. at 229). This transaction occurred on Appellant's ranch property (R. at 230) West added that

Appellant always kept a metal cylinder filled with anhydrous ammonia gas in the building where the methamphetamine was manufactured (R. at 230). West explained that he observed both Sanders and Appellant, each separately, transport a cylinder filled with ammonia gas (R. at 231).

3. Trooper James Pieprzica

In early 2009, Trooper James Pieprzica ("Pieprzica") with the Department of Public Safety began investigating various individuals who were using cold or allergy medicine, which contains pseudoephedrine, to manufacture methamphetamine and who were purchasing cold or allergy medicine at pharmacies in order to provide it to others who would use it to manufacture methamphetamine (R. at 125). As a result of his investigation, Pieprzica developed a list containing names of individuals, along with these individuals' dates of birth and driver's license numbers, that he believed could be involved in this conspiracy (R. at 126). Pieprzica submitted a request to the custodian of records for various pharmacies, including Walgreens, Target, Walmart, and CVS. This request contained these individuals' names and identifiers and requested records relating to these individuals' purchase of products containing pseudoephedrine for a specific date range (R. at 127-28). These companies had such information available because they were required to collect and maintain it pursuant to state and federal regulations (R. at 127-28).

4. Transaction Logs and Summaries of Evidence

At trial, certain pseudoephedrine transaction logs pertaining to Appellant and his co-conspirators and accomplices, such as Sanders, West, and Grier, were admitted at trial as Government Exhibits 1A and B through 4A and B. These logs came from Walgreens, Walmart, Target, and CVS and contained various information such as the name of particular company, store location, description of item bought which contained pseudoephedrine, total grams of pseudoephedrine purchased, the individual's name who purchased that item, the date the item was purchased, and the time it was purchased. (Gov. Ex. 1A-4B). Each company's log was accompanied by a business records affidavit which was signed and notarized by the custodian of records for the particular company. (Gov. Ex. 1A-4B). The logs, business records affidavits for each of the logs, and notice that the Government was going to introduce this evidence at Appellant's trial, was provided by the Government to counsel for Defendant on January 12, 2011 (*See* Gov. Exhibit 1, attached hereto).

Several exhibits containing summary evidence of Government Exhibits 1A and B through 4A and B were also introduced at trial. Government Exhibits 5-9 are summary evidence exhibits categorized by a particular individual, e.g., Government Exhibit 5 relates to Appellant, Government Exhibit 6 relates to Sanders, Government Exhibit 7 relates to West, and Government Exhibit 9 relates to Grier. Government

Exhibits 5-9, which are categorized by individual, show all purchases of pseudoephedrine pills by that a particular individual for a specific period of time, broken down by store name, location, and amount purchased. Government Exhibit 10 is a summary exhibit of the total number of pseudoephedrine transactions for Appellant, Sanders, and Grier over a specific period of time. Government Exhibit 10 shows, cumulatively, that Appellant made a total of 94 purchases for a total of 223.74 grams of pseudoephedrine in a timespan of about two years, Sanders made 123 purchases of 302.16 grams of pseudoephedrine in a timespan of a year and a half, and Grier made 365 purchases of a total of 817.44 grams in a timespan of about a year and a half. Government Exhibit 11 is a summary exhibit that illustrates all of the purchases made by Appellant and all of the purchases made by Sanders, organized by location and date. This summary exhibit is particularly compelling because it illustrates that Appellant and Sanders, on four different dates, were at the exact same store in the same town making purchases of pseudoephedrine pills within minutes of each other (Gov. Ex. 11). Government Exhibit 12 is a summary exhibit of a map showing the various stores where Appellant purchased pseudoephedrine pills and all of the different cities across Texas and Louisiana, sixteen in total, where Appellant purchased pseudoephedrine pills.

5. Character Witnesses for Appellant

Appellant called four witnesses, Terry Ruddock ("Ruddock"), Michael Gibson ("M. Gibson"), Judy Gibson ("J. Gibson"), and Becky Towns ("Towns") (R. at 181). Ruddock testified, in substance, that he has known Appellant for most of his life and finds him to be law abiding; Ruddock also testified that he finds himself to be law abiding and that he knows nothing about methamphetamine (R. at 284). M. Gibson testified, in substance, that he has known Appellant for forty years and finds him to be law-abiding (R. at 286, 290). M. Gibson testified that on occasion, he hired Appellant to use Appellant's truck and trailer to move large tools used in the oil business (R. 286-89). M. Gibson further testified that he would not be friends with someone involved in drugs (R. at 293). J. Gibson, who is married to M. Gibson, testified that she has known Appellant her whole life as a family friend and finds Appellant to be law abiding (R. at 297, 300). M. Gibson said that in 2008, they often hired Appellant to perform hauling services for a company that her husband, M. Gibson, manages (R. at 298). Towns, Appellant's wife, also testified. She testified that in 2008, Appellant was hired extensively by various companies to haul items (R. at 311). Towns testified that in 2008, Appellant made approximately $50,000 from his trucking business, but that in 2009, he had a third knee surgery and did not work very much (R. at 317-19).

6. Appellant

Appellant testified that he owns a ranch property in Gonzales, Texas, with his sister and that there are a variety of buildings such as a shed on this property (R. at 322-24). He confirmed that the entrance to the property has a gate with a variety of locks on it (R. at 324). He added that Nippert rents a house on the property and that both Sanders and West have been on that property (R. at 326-29). Appellant told the jury, however, that he did not like West's "past" and told Nippert that he did not care for West being out there (R. at 327). Appellant also testified that he told his sister Grier that he did not like Sanders because he was "trouble" (R. at 328). Appellant also said that he made "idle threats" to his sister Grier and Sanders because he had "heard of some of the things that were going on at his place" (R. at 328-29). Appellant claimed to have told Sanders and Grier that he did not want them at his house, but he does not know if they heeded his instructions (R. at 330). Appellant claimed not to be friends with Sanders and not to be involved with Sanders in making methamphetamine or procuring any chemicals for its production (R. at 351, 361).

Regarding his employment, Appellant testified that he had a dually pickup and a large trailer that he uses to haul various items for companies (R. at 335, 36).

Appellant testified that he usually would work for a couple of days, then not work for a period of time, and then get work again (R. at 337).

Appellant's sole explanation for his large and frequent purchases of cold and allergy medicine is that he likes to stock up on it and use it to stay awake when he hauls items using his dually pickup truck and trailer (R. 344-45). Appellant told the jury that because the law restricted how much he could buy, he would travel around to two or three different stores at a time and pick up a box at each store so that he could have an ample supply (R. at 346). Appellant claims to take all of this cold medicine to stay awake even though he has diabetes, high blood pressure, takes arthritis medicine, takes other medicine, and is on painkillers. Appellant claims that he disregards the warning label on the box which says to see a doctor before taking the medicine if you have heart disease and denies asking a doctor if he should have been taking the medicine (R. at 352-54). Appellant avers that he was buying large amounts of this medicine simply so that he could take it and not fall asleep while driving his truck and trailer, even though his employment was sporadic and he was not driving every day (R. at 356-57). Appellant was shown the transaction logs depicting his purchases of pseudoephedrine pills (R. at 354-60). Appellant confirmed that for the period of February through March of 2008, he had purchased about 60 tablets (R. at 355-56). Appellant also agrees that it is "right" that he had also purchased about

60 tablets for the period of March through April of 2008 (R. at 356). He affirmed making five purchases for 12 grams of pseudoephedrine from May 15 through May 31 of 2008 (R. at 357). Appellant agrees that the transaction logs show that he was regularly buying 60, 70, 80 pills in a 30 day period (R. at 358).

SUMMARY OF THE ARGUMENT

1. The district court properly admitted the pseudoephedrine transaction logs as business records because they were both trustworthy and properly authenticated. Contrary to Appellant's assertion, there is no requirement in law that the Government is required to call individuals who enter underlying data into business records. Such would be a particularly onerous burden in this case, as it would have required the Government to call approximately 500 employees of various CVS, Walgreens, Walmart, and Target stores all across Texas who entered data concerning individuals who purchased products containing pseudoephedrine. Moreover, Appellant had an opportunity to cross-examine each and every person against whom the pseudoephedrine transaction logs were entered in order to verify the accuracy of that information but declined to do so. Fifth Circuit precedent makes clear that records kept by a company are not inherently untrustworthy simply because they are regulated by statute. Rather, assuming a company has incentives to maintain those records according to statute, those records are necessarily relied on by the company and

therefore trustworthy. Because companies have a variety of reasons to comply with the statutes regulating pseudoephedrine purchases, including avoidance of civil liability, proof that the companies are not violating the law, and the ability to avoid government sanctions, records kept according to those statutes are trustworthy. 2.

The pseudoephedrine transaction logs are mandated by statute to deal with the growing epidemic of the manufacture, delivery and consumption of methamphetamine. While this purpose is governmental and serves law-enforcement needs, these records are not kept or generated solely in anticipation of a criminal trial or prepared for use at trial. The transaction logs are an unambiguous collection of facts and no objective witness, such as a clerk at a local pharmacy, would expect to be called as a witness at trial. Therefore, these logs are in fact business records, are not testimonial, and therefore, are not subject to the confrontation clause. The Eighth Circuit has held that pseudoephedrine logs, as business records, are not subject to the Confrontation Clause, and this Court should similarly find.

3. Contrary to Appellant's contention, the district court did not err in denying Appellant safety valve, and the district court recognized that it had the option of granting this reduction to Appellant. In fact, the district court went to great lengths to allow Appellant to qualify for the safety valve reduction after he had already been found guilty at trial by resetting the sentencing hearing so that Appellant could debrief

with the Government. During that debrief, Appellant claimed that he did not provide Mike Sanders with all those pills and stated that he was going to stand by what he said at trial. Appellant's claim at trial was that he purchased illegal quantities of pseudoephedrine so that he could maintain alertness during trips where he hauled items in his truck and trailer. The jury did not find Appellant to be credible and found him guilty as charged. At sentencing, Appellant claimed that he qualified for the safety valve reduction due in part to the fact that he passed a polygraph test. The district court noted that Appellant was never asked the question of whether he went all over the state and purchased pseudoephedrine pills illegally. The district court thus gave credence to the transaction logs introduced at trial which established as such. The district court found that Appellant did not qualify for a safety valve reduction because he had not truthfully provided to the Government all information that he had about his offense of conviction. As the transcript makes plain, the district court made a judgment call on Appellant's credibility, and the court was well within its authority to do so.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT PROPERLY ADMITTED THE PSEUDOEPHEDRINE TRANSACTION LOGS AS BUSINESS RECORDS.

Appellant argues that the logs, which are accompanied by business records affidavits, were improperly admitted and fail to meet the admission requirements of FED. R. EVID. 803(6) because they are neither trustworthy nor properly authenticated. (*See* Appellant's Br. at 15-26). These arguments find no support from current precedent which grants the district court broad discretion to determine whether particular documents may be admitted as business records. *United States v. Parsee*, 178 F.3d 374, 380 (5th Cir. 1999) (holding that a district court enjoys great latitude in determining the admissibility of business records). As discussed below, Appellant's claims should thus be denied.

A. Standard of Review

Review of a trial court's evidentiary rulings is for abuse of discretion, subject to harmless error review. *United States v. Jimenez Lopez*, 873 F.2d 769, 771 (5th Cir. 1989). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (internal citations omitted).

B. The district court did not abuse its discretion in admitting the transaction logs as business records, finding them to be trustworthy.

Federal Rule of Evidence 803(6) governs the admissibility of business records, and one of its requirements is that "neither the source of information nor the method

or circumstances of preparation indicate a lack of trustworthiness."[2] Appellant claims that the transaction logs are untrustworthy for several reasons. First, he argues that the logs are untrustworthy because the Government was not required to call every employee from CVS, Walgreens, Target, and Walmart who manually entered specific purchases of pseudoephedrine into the logs as witnesses. (1R. 23, 27-30; *see* Appellant's Br. at 23-24). Second, Appellant argues that the logs are untrustworthy because their existence is mandated by statute, not voluntary business practice. (*See* Appellant's Br. at 16). Appellant also claims that the logs are untrustworthy because companies do not use or rely on the transaction logs to carry on their business and because the logs are required by law to be kept confidential. (Appellant's Br. at 17-19).

1. The Government was not required to call every witness who entered the underlying data for the logs in order for the logs to be deemed trustworthy.

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[2] Federal Rule of Evidence 803(6) also states that records of regularly conducted activity may be admitted so long as the record was (1) made at or near the time by, or from information transmitted by, a person with knowledge (2) kept in the course of a regularly conducted business activity, and (3) it was the regular practice of that business activity to make the [record]. *United States v. Ned*, 637 F.3d 662, 569 (5th Cir. 2011) (internal citations omitted); FED. R. EVID. 803(6). Business records are self-authenticating and may be introduced without in-person foundation testimony from the record custodian so long as the records are accompanied by a written declaration by a qualified custodian that meets the three foundational requirements outlined above. FED. R. EVID. 803(6), 902(11). The party intending to offer the record must provide written notice of that intention to all adverse parties and make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. FED. R. EVID. 902(11).

FED. R. EVID. 803(6) was created to ease the introduction of business records by eliminating the need for testimony from every person who entered data into the record in the normal course of business. The transaction logs in this case were not created for a specific trial but rather in accordance with statutes designed to combat a "growing epidemic" of methamphetamine use, manufacture, and distribution. *See* Bill Analysis, Tex. H.B. 164, 79th Leg., R.S. (2005) (made a part of this Court's Record at 1R. at 148-59)(noting the rationale for regulating pseudoephedrine purchases). As such, FED. R. EVID. 803(6) should control .

Nevertheless, Appellant contends the Government was required to produce every employee who inputted the data found in the transaction logs (1R. at 27-28). In this case, Appellant made a total of 94 purchases, Sanders made a total of 123 purchases, Grier made a total of 365 purchases, and West made a total of 70 purchases, over a multi-year period across the state of Texas in many different stores. (Gov. Ex. 7, 10). Thus, under Appellant's theory, the Government would had to have called close to 500 witnesses to establish the trustworthiness of the logs. Appellant's desire to place such a burden on the Government is the type of scenario where the "sky [may] fall" on the Government's ability to prosecute defendants. *See United States v. Melendez-Diaz*, 557 U.S. 305, 129 S.Ct. 2527, 2540, 2555 (2009).

Indeed, in *Melendez-Diaz* the Supreme Court expressed its concern that, in the absence of any limitation on authentication testimony, the prosecution would have to produce unlimited numbers of witnesses to authenticate data contained in various types of records. *See id.* at 2541 (noting the possibility but not the indication that "obstructionist defendants" may abuse the confrontation clause privilege by requiring the prosecution to produce various witnesses). For this reason, *Melendez-Diaz* suggests, however, that as long as a particular record is not created for the *sole* purpose of providing evidence against a defendant for use at trial, then such a record would not be testimonial and would qualify as a business record. *Id*. at 2539-40. As such, this Court should not entertain Appellants' argument.[3]

2. The transaction logs are trustworthy because both the Government and Appellant had the opportunity to call as a witness or cross-examine every person to which the transaction logs related.

Appellant had an ample opportunity to verify the trustworthiness of the transaction logs. The transaction logs introduced at trial showed pseudoephedrine purchases made by Appellant, Grier, West, and Sanders (*See* Gov. Ex. 5-9). Appellant requested that his sister, Grier, be transported to San Antonio, Texas, so that

[3]Importantly, Appellant has never claimed that he had a right to confront the actual custodians of records who prepared the affidavits attached to the transaction logs in this case (R. 27-28). Regardless, such contention would be without merit as per *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007); *see also Melendez-Diaz*, 129 S.Ct. at 2547 (Kennedy, J. dissenting).

she could be available for his trial, and such was ordered by the district court (1R. at 89). If he chose, Appellant, therefore, could have called Grier as a witness to testify about the pseudoephedrine logs memorializing her purchases. West and Sanders testified at trial as Government witnesses. Sanders verified, upon questioning from the Government, that he had seen the transaction logs from CVS, Wal-Mart, Walgreens, and Target (R. at 187). Although given the opportunity, Appellant did not ask West or Sanders any questions pertaining to the transaction logs, such as whether they remembered making the specific purchases referenced on the logs. Moreover, Appellant testified and was shown the transaction logs depicting his pseudoephedrine purchases (R. at 354-60). Appellant confirmed that for the period of February through March of 2008, he had purchased about 60 tablets (R. at 355-56). Appellant also agrees that it is "right" that he had also purchased about 60 tablets for the period of March through April of 2008 (R. at 356). He affirmed making five purchases for 12 grams of pseudoephedrine from May 15 through May 31, 2008 (R. at 357). Appellant agrees that the transaction logs show that he was regularly buying 60, 70, 80 pills in a 30 day period (R. at 358). Although Appellant prefaced one of his answers with "if the logs are accurate," Appellant never provided any testimony suggesting any reason whatsoever about why the logs would be incorrect and therefore untrustworthy (R. at 359). Thus, this Court should find the logs to be amply trustworthy.

3. The Fifth Circuit case of *Veytia-Bravo* controls and rejects all of Appellant's arguments pertaining to why the transaction logs in this case are untrustworthy.

This Court's opinion in *Veyita-Bravo* defeats Appellant's contention that the logs in this case are untrustworthy because they are created by government regulation and not at the behest of companies. In *Veytia-Bravo,* the Government introduced records of firearm and ammunition sales prepared by a company called Globe Store ("Globe"). *United States v. Veytia-Bravo*, 603 F.2d 1187, 1188 (5th Cir. 1979). Globe had gone out of business by the time of trial, and no person associated with the store testified. *Id.* Instead, the Government called an agent with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") who explained that ATF was the current custodian of these records and that Globe had forwarded these records to ATF for maintenance after going out of business. *Id.* The ATF agent testified that the records being introduced had been made by Globe in that company's regular course of business pursuant to ATF regulations. *Id.*

The records in *Veytia-Bravo* were found to be trustworthy. In so holding, this Court described the Globe records as "transaction logs," which recorded ammunition sales and "Form 4473s," which recorded firearms sales and seemed to be persuaded by the voluminous and standardized nature of these documents. *See id.* Also, the

Court found the foundation testimony provided by the ATF agent at trial to be sufficient; that agent testified that "Globe prepared these records pursuant to ATF regulations [and that] ATF promulgated these regulations to facilitate enforcement of 18 U.S.C. § 922(b)-(d), which prohibits licensed dealers from selling firearms or ammunition to certain types of purchasers." *Id.* This Court further recited the firearm statute, paying particular attention to the statute's detail and specificity. *See id.* at 1189-90.

Also, this Court, in deciding upon the trustworthiness of the Globe records, discussed and ultimately distinguished two cases, *Palmer v. Hoffman* and *Matthews v. United States*, which Appellant relies upon. *Id.* at 1189. In *Palmer*, an accident report was found not to be a business record because it was prepared by a railroad employee pursuant to company rules for primary use in litigation. *See Palmer*, 318 U.S. at 111-15. In *Matthews*, sugar reports prepared by a company only three times pursuant to Internal Revenue Source regulations were found not to be business records. *See Matthews*, 217 F.2d at 414. Appellant's reliance is not supported by *Veytia-Bravo*. The *Veytia-Bravo* panel limited *Matthews* to its facts and determined that it should not apply to other cases because its suggestion that records regulated by law are inherently untrustworthy "conflict[s] with the realities of today's business world in which many, if not most, of the records of every business are required to be

kept by some government edict." *Veytia-Bravo*, 603 F.2d at 1191. *Matthews* was further distinguished because the company in that case only prepared "special episodic reports of only certain sales which were...legal" and had no incentive to keep the records with precision in order to show compliance with the law. *Id.* *Palmer* was distinguished because the accident reports in that case were prepared by the company specifically and only for litigation. *Id.* Ultimately, the Court held that because Globe "necessarily relied upon these records in the conduct of its own affairs, both to comply with the regulation's requirement that a complete record of all sales be kept and to show that it had not violated 18 U.S.C. § 922 by knowingly selling firearms or ammunition to one who could not purchase them," the records were trustworthy. *Id.* at 1191.

This case is sufficiently analogous to *Veytia-Bravo*. The same foundational testimony was provided in both cases. Both the ATF agent and Trooper Pieprzica testified that the particular records in each case were prepared by a company pursuant to specific regulations that were promulgated to fulfill a governmental purpose. *Id.* at 1189; (R. at 127-32).

Moreover, the Texas and federal statutes governing pseudoephedrine purchases are just as detailed and specific as the statute governing firearm and ammunition sales in *Veytia-Bravo*.[4]

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[4] Title Six, Subtitle C, Chapter 486 of the Texas Health and Safety Code regulates over-the-counter sales of pseudoephedrine. This law was enacted in 2005, and the 2005 enactment was in effect at the time of Appellants' indictment and trial. The 2005 version of the Texas statute required businesses to maintain a record of each sale of pseudoephedrine for two years after the date of purchase. TEX. HEALTH & SAFETY CODE § 486.015 (2005); *see also* 21 U.S.C. § 830(a)(1) (same). Such records are authorized by Texas statute to be provided to the Department of Public Safety and by federal statute to the Attorney General. TEX. HEALTH & SAFETY CODE §486.015 (2005); 21 U.S.C. § 830(a)(2). State and federal statutes regulate where products containing pseudoephedrine shall be stored, such as behind the pharmacy counter or in a locked case near the pharmacy counter. *See* Tex. Health & Safety Code § 486.013 (2005); 21 U.S.C. § 830(e). The 2005 version of Texas Health and Safety Code Section 486.014 regulates how a purchase of a product containing pseudoephedrine shall be conducted and states:

> Section 486.014
>
> Before completing an over-the-counter sale of a product containing ephedrine, pseudoephedrine, or norpseudoephedrine, a business establishment that engages in those sales shall:
>
> (1) require the person making the purchase to:
>
> (A) display a driver's license or other form of identification containing the person's photograph and indicating that the person is 16 years of age or older; and
>
> (B) sign for the purchase;
>
> (2) make a record of the sale, including the name of the person making the purchase, the date of the purchase, and the item and number of grams purchased; and
>
> (3) take actions necessary to prevent a person who makes over-the-counter purchases of one or more products containing ephedrine, pseudoephedrine, or norpseudoephedrine from obtaining from the establishment in a single transaction more than:
>
> (A) two packages of these products; or
>
> (B) six grams of ephedrine, pseudoephedrine, norpseudoephedrine, or a combination of these substances

In September of 2011, the statute was amended to add an electronic logging system and to parallel the federal provisions. TEX. HEALTH & SAFETY CODE §§ 486.014, 4860141 (2011). The federal statute is very similar but provides that the total amount of

Just as all companies wishing to sell firearm and ammunition were required to comply with the regulations and maintain transaction logs of purchases in *Veytia-Bravo*, all companies selling pseudoephedrine, including those at issue in this case — Walgreens, CVS, Walmart, and Target— are required by law to collect data from the purchaser of pseudoephedrine and maintain a record of that purchase. Such action is done with regularity and is done in the regular course of business for each of these companies.

Appellant argues that *Veytia-Bravo* is distinguishable because in that case, Globe was required to record information about every sale is made of a firearm or ammunition, while in this case, companies are not required to record all sells of pseudoephedrine. (Appellant's Br. at 21). Appellant cites to the federal statute that exempts companies from recording sales of less than 60 milligrams of pseudoephedrine. (*Id.*); 21 U.S.C. § 830(e)(1)(A)(iii). Such distinction is without merit because the Texas statute has no such limitation, therefore meaning that companies operating in Texas must record all transactions. *See generally* TEX. HEALTH & SAFETY CODE, Title Six, Subtitle C, Chapter 486. Also, sales of less than

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pseudoephedrine purchased per day may not exceed 3.6 grams, regardless of the number of transactions. 21 U.S.C. § 830(a)(2), (d)(1). 21 United States Code Section 844 also makes it a crime for a person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of a product with a pseudoephedrine base.

60 milligrams of pseudoephedrine do not occur frequently, if ever, as standard packages containing pseudoephedrine tablets contain 20 capsules, with each tablet containing 120 milligrams of pseudoephedrine, or 10 tablets, with each tablet containing 240 milligrams of pseudoephedrine (*See, e.g.,* Gov. Ex. 13, 14). Thus, 60 milligrams of pseudoephedrine amounts to no more than 1 tablet, most likely 1/2 of 1 tablet, and sales of this sort do not practically occur. Appellant's distinction is without merit.

Appellant further argues that companies have no reason to comply with the pseudoephedrine regulations because the records do not involve "profit-making endeavors" and cannot be used "in buying and selling merchandise." (Appellant's Br. at 17-18). However, per this Court's holding in *Veytia-Bravo*, as long as a company has incentives to comply with the regulations, it necessarily relies on the records it creates pursuant to these regulations, making the records trustworthy. *Veytia-Bravo*, 603 F.2d at 1191; *see also United States v. Ragano*, 520 F.2d 1191, 1200-01 (5th Cir. 1975) (reports required under state law to be filed by a corporation were business records because the company's failure to file accurate reports might cause it to lose its corporate privileges). The company Globe in *Veytia-Bravo* had an incentive to comply with the firearm regulations because it needed to show that it was not breaking the law by selling firearms to those who could not lawfully have them. *Veytia-Bravo*,

603 F.2d at 1191. Similarly, companies in this case have an incentive to comply with the pseudoephedrine regulations to show that they are not aiding and abetting an illegal purchase by a person of more than 9 grams of a product with pseudoephedrine during a 30 day period, which is criminalized under 21 U.S.C. § 844. Companies also have an incentive to comply with the regulations to avoid sanctions by the Attorney General. If the regulations are not complied with, the Attorney General has the authority to revoke exemptions for that company. 21 U.S.C. § 830(b)(2)(E). Exemptions permit companies not to send reports to the Attorney General for particular transactions, such as distribution of drug products pursuant to a valid prescription or redistribution of drug products to long term care facilities or residents of long term care facilities. 21 U.S.C. § 830(b)(2)(D). If these exemptions are revoked, companies will necessarily have to spend a great deal of money sending numerous reports to the Attorney General. The 2011 amendments to Title Six, Subtitle C, Chapter 486 of the Texas Health and Safety Code added an incentive for companies to comply with pseudoephedrine regulations. If a particular company complies with these regulations, then the company and its employees cannot be held civilly liable for any act or omission done in compliance with the regulations. *See* TEX. HEALTH & SAFETY CODE § 486.0145 (2011).

These inducements ensure significant compliance by companies with the regulations and therefore ensure the accuracy and completeness of these records in the operation of the companies' business. But purely from a profit-making, cost-benefit analysis, companies are afforded substantial financial benefits if they comply with these regulations and great cost if they do not. As such, the district court's decision to admit these transaction logs as trustworthy should not be disturbed.

C. The district court did not abuse its discretion in finding the business records to be authenticated.

The transaction logs were properly authenticated. Appellant has never complained about the content of the affidavits from the companies' custodians of records and never requested that those custodians appear in court. (*See* R. at 125-30, 133-36). The Government satisfied the notice requirement of Federal Rule of Evidence 902(11) by providing the logs, business records affidavits for each of the logs, and notice that the Government was going to introduce this evidence to Appellant on January 12, 2011, almost six months prior to trial (*See* Gov. Exhibit 1, attached hereto).

The standard for authentication is not a burdensome one. *United States. v. Jackson,* 636 F.3d 687, 693 (5th Cir. 2011); *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009). "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in

question is what its proponent claims." *Jackson*, 636 F.3d at 693; Fed. R. Evid. 901(a). Conclusive evidence that something is as claimed to be is not required. *Jackson*, 636 F.3d at 693.

Appellant makes only one argument pertaining to authentication— that the business records are not authenticated because the affidavits do not "[explain] the record keeping system of the organizations." (Appellant's Br. at 26). Such an explanation is not required by the Rules of Evidence to properly authenticate a document and is unnecessary under the standards for authentication. *See* Fed. R. Evid. 803(6), 902(11). As such, this Court should find that the district court properly admitted the transaction logs as authenticated.

II. THE DISTRICT COURT'S ADMISSION OF THE PSEUDOEPHEDRINE TRANSACTION LOGS DID NOT VIOLATE THE CONFRONTATION CLAUSE

A. Standard of Review

This Court reviews an alleged Confrontation Clause violation *de novo*, subject to a harmless-error analysis. *Morgan*, 505 F.3d at 338.

B. The pseudoephedrine transaction logs were not prepared for use at trial and are therefore not testimonial.

Appellant argues that the admission of the transaction logs violated his Sixth Amendment rights under the Confrontation Clause. Specifically, he claims that the transaction logs are "testimonial" statements and were prepared for use at trial.

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Supreme Court held that this right is violated where the prosecution introduces "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Business records are typically not, by their nature, testimonial. *Id.*

In *Melendez-Diaz*, the Supreme Court explained that business 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." *Melendez-Diaz*, 129 S.Ct. at 2539-40. At issue in *Melendez-Diaz* were certificates, which were essentially affidavits, certifying that a substance tested by a lab was in fact cocaine. *Id*. at 2531. The Supreme Court noted that these lab report affidavits were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" and were functionally identical to what a live witness would testify to at trial. *Id.* at 2532. Therefore, it was a violation of the Confrontation Clause for the prosecution to admit the lab report affidavit without allowing the defendant an opportunity to confront that witness at trial, absent a

showing the analyst was unavailable to testify at trial and the defendant was given a prior opportunity to cross-examine the analyst. *Id.* at 2532.

The Supreme Court applied *Melendez-Diaz* to a set of facts where the prosecution offered and the court admitted a laboratory report containing the Defendant's blood alcohol level where the prosecution did not call the analyst who signed the certification but called another analyst familiar with the pertinent laboratory procedures. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2709 (2011). This was deemed a violation of the Confrontation Clause. *Id.* at 2716. The Supreme Court noted in its analysis that "a document created *solely* for an evidentiary purpose...made in the aid of a police investigation" is likely testimonial. *Id.* at 2717 (emphasis added). The Supreme Court has never held that just because something is relevant to a criminal prosecution, it is therefore testimonial; rather, the sole purpose must be evidentiary with an eye toward trial. *Melendez-Diaz*, 129 S.Ct. at 2539-40; *Bullcoming*, 131 S.Ct. at 2717. Ultimately, *Bullcoming* is not particularly relevant to this case because it dealt with the requirement, under the Confrontation Clause, for the prosecution to call an author of a laboratory report, a document created specifically as evidence for trial. *Id.* at 2716.

Of specific relevance, however, is the Eighth Circuit's holding in *United States v. Mashek*. In considering a case where the Government introduced pseudoephedrine

transaction logs against a defendant at trial, the Eighth Circuit held that the pseudoephedrine logs were different than the lab report at issue in *Melendez-Diaz* because the logs were not "prepared for the purpose of providing evidence against the accused at trial." *United States v. Mashek*, 660 F.3d 922, 930 (8th Cir. 2010). The Eighth Circuit found that the "pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6)." *Id.* The Eighth Circuit cited *Melendez-Diaz* for the proposition that typically, business records are not testimonial and then held that pseudoephedrine logs are business records and are non-testimonial statements to which the Confrontation Clause does not apply. *Id.*

Appellant argues that the holding in *Mashek* should be limited because it was decided under plain error review. (Appellant's Br. at 12-13). However, the Eighth Circuit did not limit the language of its opinion to a situation involving only plain error, and more notably, did not engage in any plain error analysis. *See id.* Rather, the Eighth Circuit specifically held that the pseudoephedrine logs were business records to which the Confrontation Clause does not apply. *Id.*

In this case, pseudoephedrine transaction logs were not created solely for an evidentiary purpose or with an eye towards trial. The pseudoephedrine transaction logs here are not of the same character as the laboratory reports in either *Melendez-*

Diaz or *Bullcoming*; the logs are routinely recorded business records containing an objective catalog of unambiguous factual matters which are kept pursuant to various state and federal regulations. These logs would not lead an objective witness, like a store clerk at a local Walgreens, to believe that their entries of pseudoephedrine purchases would be used at a later trial. The legislative history confirms that the laws regulating pseudoephedrine were not created to develop evidence for use at some unknown defendant's later trial. In fact, the Texas statutes regulating over-the-counter sales of pseudoephedrine were put into law due to the "growing epidemic in Texas" of the manufacture, delivery, and consumption of methamphetamine. (R. at 148); *See* Bill Analysis, Tex. H.B. 164, 79th Leg., R.S. (2005). Citizens are dealing with this epidemic by experiencing high "monetary and human costs," such as people's exposure to explosions and toxic chemicals associated with methamphetamine labs and the large amount of money it takes to clean up such explosions (R. at 148); *See* Bill Analysis, Tex. H.B. 164, 79th Leg., R.S. (2005). There is no question that these laws were passed for a governmental and even a law-enforcement purpose; however, there is nothing set forth or contained in the House Bill Analysis that demonstrates these records are generated and maintained solely in anticipation of a criminal trial or prepared for use at trial. For these reasons, this Court should find that the

pseudoephedrine transaction logs are not testimonial and are therefore not subject to the Confrontation Clause.

III. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT A SAFETY VALVE REDUCTION.

A. Standard of Review

A district court's interpretation of 18 U.S.C. § 3553(f) is reviewed de novo, but a district court's decision of whether or not to apply the safety valve provision contained therein is reviewed for clear error.

B. Legal Argument

Appellant argues that the district court erred because it denied him safety valve and because it believed Appellant was ineligible for safety valve simply because Appellant went to trial.[5]

The following exchange occurred at a sentencing hearing on September 2, 2011, that was ultimately rescheduled, and illustrates that the district court did consider applying a safety valve reduction to Appellant even after he protested his innocence and went to trial:

[5] Appellant met all but one of the qualifications for safety valve provided in 18 U.S.C. § 3553 (f). As per the district court's finding, he did not meet the requirement of truthfully providing to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.

> The Court: The way I could potentially avoid the application of the minimum mandatory is through safety valve. Why wasn't safety valve available here?
>
> Mr. Villarreal: ...the major hurdle is that...the government has to be satisfied and has to report to the Court that Mr. Towns has disclosed everything that he knows about the offense...[and] Mr. Towns isn't in a position to do that.
> ...
> The Court: ...So you know, Congress gets to impose appropriate punishments for various crimes, and so they've done so in this case. And so I'm left no choice today other than giving a ten-year sentence. But Congress has provided a way for relief in this situation by safety valve. **And I'm willing to entertain that**... Mr. Strauss, is there any value to safety valve here or not?
>
> Mr. Strauss: I wouldn't know until we sat down...we sat down before...as I understand it...Mr. Towns said, "I didn't do it. I'm not guilty. I don't know."

(R. at 19-20) (emphasis added).

The district court then told Appellant he wanted to give him an opportunity to debrief with the Government so that the court could consider safety valve thereby being able to consider sentencing him under the minimum mandatory sentence (R. at 21). The district court wanted to ensure that Appellant received a fair and just sentence (R. at 21). The exchange illustrates the lengths to which the district court went to ensure that Appellant potentially qualified for safety valve, even after he pleaded not guilty.

A debrief occurred on September 27, 2011. Appellant stated in response to the Government telling him that he would say whatever he wanted, "[w]ell, it's just like

I said in the trial, I didn't furnish Mike Sanders with all these pills and manufacture drugs with him, and you know, I don't know how else to put it, other than what I said at the trial. And there's really nothing else I have to say about that, sir." (1R. at 257). The Government then verified that Appellant had nothing more to add to or change from his trial testimony (1R. at 258).

On October 5, 2011, Appellant appeared before the district court for sentencing. The district court stated that it had read the transcript of the debrief. (R. at 458). Appellant's attorney argued Appellant should receive a safety valve reduction and told the district court the information Appellant would have provided at the debrief would have been historical, specifically that Sanders lived with Appellant and Appellant used methamphetamine in the past (R. at 458-60). Appellant's attorney argued that because Appellant had "passed" a polygraph test, he should therefore receive a safety valve reduction (R. at 463).

The district court aptly noted that during the polygraph, Appellant was not asked whether he went "around portions of the state buying Sudafed packages illegally" (R. at 463). This statement is indicative of the district court's disbelief that Appellant had truthfully provided to the Government all information and evidence Appellant had concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. Indeed, this fact— that Appellant had

bought pseudoephedrine all around Texas illegally— was established at trial through the transaction logs, not Appellant's testimony. (Gov. Ex. 11). In the debrief, Appellant stated that he did not furnish Mike Sanders with pills; this contradicts the evidence introduced at trial showing that he and Sanders purchased pseudoephedrine together (1R. at 257; Gov. Ex. 11). The district court apparently did not find Appellant's claims credible, because it determined Appellant had not truthfully provided all information to the Government (R. at 464, Gov. Ex. 11). The district court said, "I have tried to help you by giving you the opportunity to do safety valve, but you have not met the requirements of safety valve, as I read the transcript, and accordingly, safety valve is inapplicable here" (R. 464). This record evidences that the district court acted well within its considerable discretion to deny safety valve. As such, this Court should affirm Appellant's sentence.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be affirmed.

Respectfully submitted,
ROBERT PITMAN
United States Attorney

By:
/s/ Daphne D. Newaz
DAPHNE D. NEWAZ
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2012, I filed this document with the Fifth Circuit Court of Appeals using the CM/ECF filing system, which will cause a copy of the document to be delivered to counsel for Appellant, Cynthia Orr.

/s/ Daphne D. Newaz
DAPHNE D. NEWAZ
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January 12, 2011

FILE COPY

Mr. Alfredo Villarreal
727 E. Durango Blvd., Suite 207
San Antonio, TX 78206-1278

Re: United States v. Melvin David Towns, Jr., SA-10-CR-614-XR

Dear Mr. Villarreal:

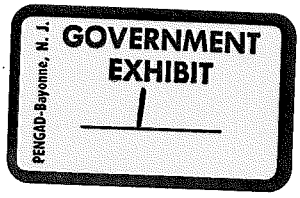
Enclosed please find four compact disks containing electronically generated and stored business records of Walgreens, Walmart, Target and CVS respectively. This disks contain the pseudoephedrine purchase records of the defendant, his accomplices, co-conspirators, and others in this case. Also enclosed are the affidavits of the business records custodians of Walgreens, Walmart, Target, and CVS and which pertain to the records contained on the compact disks. Please be advised the Government intends to offer the compact disks and the affidavits at time of trial pursuant to the provisions of Rules 803(6) and 902(11), Federal Rules of Evidence. Thank you.

Sincerely,

JOHN E. MURPHY
United States Attorney

By: 

CHARLIE STRAUSS
Assistant United States Attorney



CERTIFICATE OF COMPLIANCE

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/s/ *Daphne D. Newaz*
Daphne D. Newaz

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