UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA	*	**CRIMINAL NO. 2:16cr7-KS-MTP**
v.	*	
CHARLES BOLTON **LINDA BOLTON**	*	

* * *

MOTION IN LIMINE IN SUPPORT OF EXCLUDING
ARGUMENTS ABOUT JOHN W. LEE'S UNAVAILIBILITY TO TESTIFY

NOW INTO COURT, through the undersigned Assistant United States Attorneys, comes the United States of America who respectfully moves this Honorable Court to exclude any arguments by the defense that the United States controls or should have called witness John W. Lee to testify regarding business records and tax returns. In support thereof, the United States respectfully submits the following:

The United States intends to introduce business records, checks, check registers, and tax returns of John W. Lee, an attorney and friend of the Boltons. These records are admissible under the hearsay exception as business records. Lee's attorney has informed the government that Lee will invoke his Fifth Amendment right against testifying in the Boltons' trial and will be unavailable to testify. In lieu of Lee's testimony, the United States intends to admit the records as business records through stipulation and, possibly, through other witnesses with personal knowledge of the records. Therefore, the United States seeks an order precluding the defense from arguing that the government has a duty to call Lee, controls whether Lee testifies, or the fact that the government did not call Lee is a weakness in the government's case against the Boltons.

1. The Lee records are relevant and admissible.

The Lee records are relevant under rules 401 and 402 which allow for the admission of evidence having "any tendency to make a fact more or less probable that it would be without the evidence" and the fact is "of consequence" except as otherwise excluded by the Constitution, law or other rule of evidence. Fed.R.Evid. 401, 402; *United States v. Perez-Solis*, 709 F.3d 453, 464 (5th Cir. 2013); *see also United States v. Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (Evidence is relevant once it appears "to alter the probabilities of a consequential fact.") (internal citation omitted). Here, the Lee records will establish that many of the checks that Lee wrote to the Sports 22 Restaurant were designated in his business records as for "supplies" or other goods and services. Many of the check registers and memo lines in the checks from Lee to Sports 22 Restaurant record the checks as being for goods and services. The government will also seek to admit Lee's tax returns for the years 2009-2013 to show that Lee also claimed deductions for the checks he wrote to Sports 22 Restaurant and Hall Avenue Package Store because the checks were for supplies or goods and services. The checks, check registers, and tax returns are relevant because they tend to establish that the Lee checks were for goods and services (income to Sports 22 or Hall Avenue Package Store), and not loans or income to Lee.

The checks, check registers, and tax returns are all admissible under hearsay exceptions 803(6) and 803(8). *See United States v. Iredia*, 866 F.2d 114, 120 (5th Cir. 1989) (bank records are admissible under the business record exception to the hearsay rule); *United States v. Stephani,* 388 F.App'x 579, at *1 (9th Cir. 2009) (tax returns are admissible under the public records exception to the hearsay rule).The government seeks to admit the Lee checks and check registers through stipulation, or alternatively, through the testimony of a representative of Lee's firm, and through a representative from the bank. The government seeks to admit Lee's tax

returns through stipulation. Lee's tax returns, as well as the Lee checks and check registers, are also self-authenticating and can be admitted through Federal Rule of Evidence 902(4) (certified public documents, i.e., tax records), and 902(11)(certified domestic records of a regularly conducted activity). *See United States v. Towns*, 718 F.3d 404, 409 (5th Cir. 2013) ("According to Rule 902(11), records of regularly conducted business activity—even copies—are self-authenticating if certified as accurate by the custodian"); *United States v. Lockett*, 601 F. App'x 325, 327–28 (5th Cir. 2015) (the standard for authentication is not burdensome and merely requires evidence that is sufficient to support a finding that the item in question is what its proponent claims it to be); *Burkhalter v. Allstate Indem. Co.*, No. CIV.A. 12-2368, 2012 WL 6697230, at *1 (E.D. La. Dec. 21, 2012) (Under Federal Rule of Evidence 902(4)(A), a public record is self-authenticating when the copy is certified as correct by a custodian or another person authorized to make the certification.).

2. The Court should preclude defendants from arguing that the government must call Lee as a witness.

The government believes that when it offers Lee's business and public records, the defendants may argue that the government needs to call Lee to testify about the records, or that Lee's unavailability suggests something adverse about the government's case. The Court should prevent the defendants from making these arguments for several reasons. First, the government has no control over whether Lee invokes his Fifth Amendment right not to testify. Once a defendant invokes this right, the government cannot compel a witness to testify and incriminate himself. *See Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) ("The privilege against self-incrimination is an exception to the general principle that the Government has the right to everyone's testimony.") (internal citations omitted). Second, because the records the government seeks to introduce are business and public records, firmly rooted in hearsay exceptions, no

confrontation clause issue is implicated. *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005) (confrontation clause is triggered only with respect to "testimonial" evidence, not to non-testimonial evidence that falls into a firmly rooted hearsay exception).

Therefore, the defendants should be precluded from arguing that Lee must testify so that the Boltons can have an opportunity to cross-examine Lee, that they are prejudiced by the government's failure to call him, or that the government is hiding something or has a weak case because Lee is unavailable.

CONCLUSION

WHEREFORE, for the reasons outlined above, the United States respectfully moves this Court to exclude any and all arguments by the defendants that the United States controls the testimony of John W. Lee, should have called him, or the fact that the government did not call Lee shows a weakness in the government's case.

New Orleans, Louisiana, this 22nd day of August, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel of record.

s/ Sharan E. Lieberman
SHARAN E. LIEBERMAN
Assistant United States Attorney