UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **Plaintiff,**	)	
v.	)	**No. 1:25-CR-76-JMC**
CORTNEY MERRITTS, **Defendant.**	)	

<u>DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION *IN LIMINE* TO ADMIT CERTAIN EVIDENCE</u>

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Defendant Cortney Merritts ("Merritts"), by and through undersigned counsel, respectfully responds to the Government's motion *in limine* to admit certain evidence. (Doc. 23).

In its motion, the Government cites boilerplate law about self-authenticating records pursuant to Federal Rule of Evidence 902 and simultaneously asks this Court to pre-admit what the prosecution mischaracterizes as "certain summary testimony and exhibits" pursuant to Federal Rule of Evidence 1006. While, as a general matter, the defense does not take issue with the concept of the admissibility of certain evidence pursuant to Federal Rule of Evidence 902, this Court should reject the Government's premature attempt to backdoor otherwise inadmissible evidence into the record. Furthermore, having failed to timely provide proper notice of expert opinion testimony,[1] the Government asks this Court to admit expert opinions as "summary" evidence, but the law mandates otherwise. This Court should deny the Government's motion *in limine* and address these evidentiary issues at trial.

I. Background

On March 20, 2025, Merritts was charged in an indictment with two counts of wire fraud, in

[1] The Government curiously *opposes* the defense's motion in limine to exclude expert testimony even though, in its response, the Government correctly concedes it failed to comply with the mandates of expert witness disclosures pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G).

violation of 18 U.S.C. § 1343.[2] (Doc. 1). The indictment also contains a forfeiture allegation. Merritts has pleaded not guilty to each count and has denied the forfeiture allegation.

II. Self-Authenticating Documents

To be clear, the defense does not take issue with the concept of self-authenticating business records and certainly is not insisting on the testimony of a custodian of records for all business records the Government seeks to admit at trial. However, as it stands, the Government has provided this Court with no evidentiary basis to establish the admissibility of any of this evidence. Thus, to the extent the Government only seeks a ruling as to the authenticity of the private sector business records referenced in its motion, the defense does not object provided the Government otherwise lays sufficient foundation and establishes its relevance and admissibility at trial; in that respect, the defense reserves the right to lodge objections on all other grounds.

However, it is an altogether different story as it relates to certain government records. Specifically, in its motion, the Government broadly seeks to include a wide array of records it obtained from the United States SBA. But, as to some of those records, that is a bridge too far. For instance, the Sixth Amendment's Confrontation Clause bars the admission of so-called "lack of records" and other testimonial statements without the live, in-court testimony of the individual who performed any such search and the individual who made each particular testimonial statement. The Government records disclosed in discovery are replete with such documents.

In *United States v. Maga*, a defendant was indicted for failing to file federal income tax returns for tax years 2002 through 2006. 475 F. App'x 538, 540 (6th Cir. 2012) (unpublished opinion). The Government prepared Maga's official tax transcripts for use at trial. *Id.* These transcripts, also known as Form 4340s, were prepared by an IRS employee, DePowell, who testified

[2] The defense maintains its position set out in its pending motions to dismiss the indictment. However, this response is being filed due to this Court's deadline.

at trial that "he first cross-referenced the social security number that the agent gave to him with the Social Security Administration to confirm that it belonged to Maga, then generated the Form 4340s by accessing the IRS master file remotely and printing them out at his desk. After verifying the accuracy of the Form 4340s against the data on the computer, he presented his findings to Resident Agent–in–Charge Martha Williams for further verification. Williams signed the certification at the end of each of the transcripts and DePowell affixed the seal. On the witness stand, DePowell identified the Form 4340s he generated and their accompanying 'certificates of official record,' observing that the Form 4340s revealed no record of Maga filing a tax return for the years 2002, 2003, 2004, 2005, and 2006." *Id.* Maga was convicted of five counts of failure to file a tax return. On appeal, Maga argued the district court erred in admitting the Forms 4340 over his objection because their admission violated his rights under the Confrontation Clause. *Id.* at 541. The court unambiguously held, "The Form 4340s and their certificates qualify as 'testimonial' statements triggering confrontation rights." *Id.*

Central to the court's determination of this issue was the seminal Supreme Court decision *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), which triggered a sea change in how the admission of documents in criminal trials are to be analyzed. The *Maga* court explained, "Business record or not, the Supreme Court's decision in *Melendez–Diaz v. Massachusetts* requires the government to demonstrate that the IRS did not generate the forms and certificates for trial to defeat confrontation rights challenges." *Maga*, 475 F. App'x at 541.

The *Maga* court noted that statements are "testimonial" if they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* (quoting *Crawford v. Washington,* 541 U.S. 36, 51–52 (2004)). The Government argued that DePowell, the IRS employee, merely located the Forms 4340 (as though he simply found a document that previously existed). *Id.* at 542. The court disagreed, noting that "DePowell's own testimony explains that, in fact, he 'generate[d]' the transcripts by 'access[ing] the master file.' The forms and the certificates did not exist before an agent in the Criminal Investigation Division asked for them." *Id.* Accordingly, the court determined the forms were testimonial because "DePowell created the documents under circumstances where one could reasonably believe that the government would use them at trial." *Id.*

The Government countered that the forms were merely synopses of tax records translated into plain English. *Id.* Rejecting this argument, the court explained, "these 'transcripts' are not exact copies of the data the IRS ordinarily maintains in its master files. Generating a Form 4340 involves searching through raw data and returning the result, 'NO RECORD OF RETURN FILED,' rather than copying a preexisting record." *Id.* The Government further argued that because "the forms 'are no different than any computer record for which a printout is generated,'" the court should "treat a Form 4340 as functionally equivalent to a copy, even if it does not merely reproduce the underlying coded data." *Id.* Rejecting this invitation to violate the defendant's constitutional rights, the court explained, "once a certifier assesses the substantive similarity of the content, as opposed to authenticating the exactness of the copy, he crosses the testimonial line: 'certify[ing] to [the record's] substance or effect.'" *Id.* (citing *Melendez–Diaz,* 557 U.S. at 322). The *Maga* court then concluded, "under *Melendez–Diaz's* reasoning, the Form 4340s and their certificates are testimonial in nature." *Id.*

This analysis rings true throughout this body of relevant case law—none of which the Government acknowledges in its motion. *See, e.g., Tabaka v. D.C.*, 976 A.2d 173, 175–76 (D.C. 2009) ("The Supreme Court's analysis [in *Melendez-Diaz*] conclusively shows that the [certificate of no-record] in this case, 'a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it,' *id.,* was inadmissible over objection without corresponding testimony by the DMV official who had performed the search"); *Campos-Alvarez v.*

United States, 16 A.3d 954, 961 (D.C. 2011) ("as the government concedes, it was constitutional error to admit the certificates of no record without live testimony from their preparer"); *United States v. Norwood*, 603 F.3d 1063, 1068 (9th Cir. 2010) ("the government concedes that under *Melendez–Diaz,* Washington Department of Employment Security Assistant Records Officer Jodi Arndt's affidavit, prepared for use at Norwood's trial to prove the absence of any record of Norwood having legitimate employment, should not have been admitted without Arndt presenting herself at trial for examination"); *United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010) ("[Certificates of Nonexistence of Record] are not routinely produced in the course of government business but instead are exclusively generated for use at trial. They are, therefore, testimonial"). With respect to IRS records, the Government in this case readily intends to violate this same constitutional precedent.

But the problem runs deeper for the Government in this case. The records from the SBA include testimonial statements in "reports" that include analyses. *See United States v. Cameron,* 699 F.3d 621, 647 (1st Cir. 2012) (holding that the reports in that case were testimonial because they did not simply consist of "underlying records arranged and formatted in a readable way for presentation purposes," but instead "convey[ed] an *analysis* that was performed using pre-existing data") (emphasis in original).

Thus, as it applies to any record in which the Confrontation Clause is implicated, Merritts opposes the admissibility of any such record without the necessary constitutional foundation being laid. In the event the Government complies with the constitution and lays adequate foundation, this Court can make an admissibility determination at trial.

III. This Court Should Reject the Government's Attempt to Backdoor Expert Opinions into Evidence by Calling Them "Summary" Testimony and Evidence

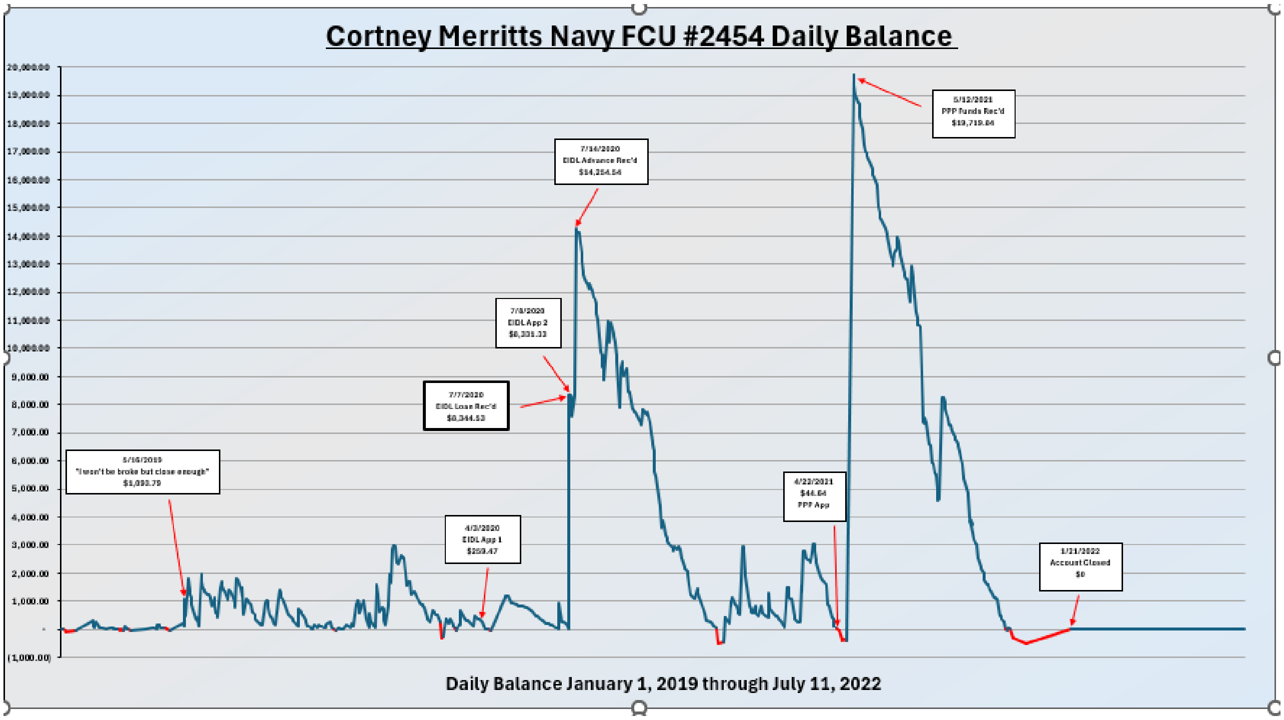
As set out in its motion, the Government seeks a pre-trial ruling admitting documents it characterizes as "summary charts" and admitting the testimony of "the FBI agents who prepared them," all with the understanding that the Government will "instruct any witness testifying about the summary exhibits not to provide any improper opinion or inferential testimony in relation to those exhibits." (*See* Doc. 23 at 6). And with respect to the content of the exhibits, the Government argues—citing no legal authority—that any "concerns the defense has about the contents of the exhibits can and should be addressed through cross-examination, not preclusion of the exhibits from evidence." (*Id*. at 7-8).

At the outset, the Government's proposed course of action is inconsistent with the Federal Rules of Evidence and relevant legal authority. Indeed, exhibits introduced under Rule 1006 must "fairly summarize voluminous trial evidence and assist the jury in understanding the testimony already introduced." *Petrone v. Werner Enters., Inc.*, 42 F.4th 962, 969 (8th Cir. 2022). But critically, the rule requires that the summaries accurately *summarize* the voluminous documents without further editorializing on their contents. *See United States v. White*, 737 F.3d 1121, 1134 (7th Cir. 2013) (holding that a Rule 1006 summary "must accurately *summarize* [the] documents [and] *must not misrepresent* their contents") (emphasis added). In other words, summaries are admissible only if they are, in fact, summaries—and it is not appropriate to admit them as the Government requests and simply to leave it up to cross-examination to expose misrepresentations contained within their contents. *See id*.

The proposed summary charts and accompanying testimony at issue here are problematic for many reasons, each of which requires denial of the Government's motion.

First, the FBI subjectively *characterizes* certain alleged expenses by analyzing bank records. For example, the FBI concludes certain expenditures constitute "moving supplies" while other expenditures do not. And, in that same vein, the Government arbitrarily created certain categories and placed certain alleged transactions into each category. Those are not summaries, they are opinions.

Second, the Government created what it calls a "summary chart" that is no more than a totally misleading graph with cherry-picked alleged evidence suggesting an improper relation to the statements referenced and transactions that are the subject of the graph:



This is not a summary chart. It is a theory of prosecution that is not properly admitted as a Government exhibit under Rule 1006 (or any other rule for that matter).

Third, another so-called "summary chart" characterizes "Income Sources," "Income," "Investments," and other technical accounting classifications—none of which is accompanied by an expert disclosure and none of which even comports with generally accepted accounting principles. Indeed, the Government has not established that the FBI special agents who formed these opinions are even remotely qualified to do so and the deadline for the prosecution to make expert witness disclosures has long passed. This proposed exhibit does not *summarize* voluminous records; it reaches conclusions about those records that both invade the province of the jury and that constitute inadmissible expert opinions without proper notice pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G).

Fourth, the proposed "summary charts" and "summary testimony" include expert opinions.

To be clear, there is no dispute that "[e]xpert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence." *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986); *see also United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984). But it is admissible only as *expert testimony*. And "an IRS *expert*'s analysis of" transactions can also constitute "admissible evidence." *Windfelder*, 790 F.2d at 581. But again, only as *expert testimony*.

In *United States v. Benson*, the Government called an IRS Revenue Agent "to summarize the government's trial evidence and give his expert opinion as to why that evidence showed that *Benson* was required to file income tax returns[.]" 941 F.2d. 598, 603 (7th Cir. 1991). Reversing the conviction, the Seventh Circuit explained that an expert opinion must be informed by the witness' expertise. *Id.* at 604. That revenue agent offered testimony consisting "of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw." *Id.* In forming his opinions, he "had to make credibility determinations" in that he had to rely on the testimony of other witnesses. *Id.* And, as the Seventh Circuit explained, "the jury does not need an expert to tell it whom to believe." *Id.* (internal citations omitted).

This Court should exclude the Government's proposed "summary charts" and "summary testimony" because it is simply inadmissible expert testimony in disguise. But, at a bare minimum, this Court should reserve ruling on these issues to determine whether they are admissible at trial.

IV. Conclusion

For the foregoing reasons, and for any other reasons this Court may determine at the pretrial conference and at trial, Merritts respectfully requests that this Court deny the Government's motion *in limine*.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the Office of the United States Attorney and all other counsel in this case.

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