

13-1534-cr (L)
United States v. Komasa

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2013

6
7 (Argued: June 6, 2014

Decided: August 28, 2014)

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9 Docket Nos. 13-1534-cr(L); 13-1550-cr(Con)

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13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

16
17 v.

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19 THOMAS KOMASA, HEIDI KOMASA,

20
21 *Defendants-Appellants.*

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25 Before: POOLER, HALL, and LOHIER, *Circuit Judges.*

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27 Thomas and Heidi Komasa appeal from their judgments of conviction,
28 which were entered April 17, 2013 and April 22, 2013, respectively, in the United
29 States District Court for the District of Vermont (William K. Sessions III, *J.*). Both
30 were convicted of mail, wire and bank fraud, and conspiracy, flowing from a

1 scheme to commit mortgage fraud. On appeal, they raise multiple challenges to
2 their convictions. This opinion addresses their argument that the district court
3 erred in admitting the loan application files for the mortgages at issue as self-
4 authenticating pursuant to Rule 902(11) of the Federal Rules of Evidence. We
5 consider the remainder of the Komasa's claims in a summary order published
6 contemporaneously with this opinion.

7 Affirmed.

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9 _____
10 ELIZABETH D. MANN, *Tepper Dardeck Levins &*
11 *Gatos, LLP, Rutland, VT, for Defendant-Appellant Thomas*
12 *Komasa.*

13 STEVEN YUROWITZ, *Newman & Greenberg, New*
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18 *brief), Burlington, VT, for Appellee United States of*
19 *America.*

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22 POOLER, *Circuit Judge:*

23 Thomas and Heidi Komasa appeal from their convictions on multiple
24 counts of mail, wire and bank fraud, and conspiracy, after a jury trial in the

1 United States District Court for the District of Vermont (William K. Sessions, III,
2 J.). Their convictions flow from a mortgage fraud scheme in which the Komasa
3 purchased and refinanced various residential properties in the greater Burlington
4 area in the mid-2000s. Both appeal their convictions on a number of grounds,
5 although this opinion is limited to their challenge to the district court's decision
6 to admit the loan files at issue as self-authenticating pursuant to Rule 902(11) of
7 the Federal Rules of Evidence. The remainder of the Komasa's claims are
8 resolved in a summary order published contemporaneously with this opinion.

9 The Komasa argue that the district court abused its discretion in
10 admitting the loan applications as self-authenticating pursuant to Rule 902(11)
11 because the government failed to provide defendants with the written notice
12 required by this rule. The district court excused the lack of written notice after
13 finding that defendants had actual notice of the government's intention to admit
14 the records as self-authenticating, satisfying the rule's purpose. As the district
15 court's finding of actual notice was not clearly erroneous, we affirm.

16 **BACKGROUND**

17 A federal grand jury issued a superseding indictment against the Komasa
18 on May 27, 2010, charging each of them with nine counts of mail, wire, and bank

1 fraud, and conspiracy, all in connection with the Komosas' obtaining various
2 purchase-money mortgages between 2004 and 2006. Thomas Komasa was also
3 charged with one count of scheming to defraud a local bank and credit union in a
4 check scam. In broad terms, the superseding indictment alleged that the
5 Komosas engaged in a cycle of obtaining purchase-money mortgages on various
6 properties, only to refinance as real estate prices climbed, each time withdrawing
7 the accrued equity.

8 Each mortgage was initiated by completing a Fannie Mae Form 1003,
9 called the Uniform Residential Loan Application. These loan applications were
10 the primary evidence in the government's case-in-chief. On the day the trial
11 began, the government moved to admit the loan files related to each transaction
12 at issue as self-authenticating documents pursuant to Rules 803(6) and 902(11) of
13 the Federal Rules of Evidence. Defendants objected:

14 I don't believe they're admissible, your Honor. I
15 think that there has been an absence of compliance with
16 federal rule of evidence 902(11) which requires advance,
17 written notice from the government of an intent to use
18 self-authenticating documents.

19
20 We have been given a variety of certificates over
21 the course of this case. We have also been given a
22 witness list that included a multitude of custodians of

1 records. There has been no clear statement by the
2 government of their intent to rely on self-authenticating
3 documents, and that would be absolutely in violation of
4 the rule.

5
6 App'x at 111-112.

7 The government conceded that it did not provide the written notice
8 required by Rule 902(11), but argued that defense counsel were orally informed
9 of its intent to proffer the loan files as self-authenticating. The district court
10 declined to rule on the issue before trial, instead allowing defendants to renew
11 their objection during trial.

12 Defendants did raise their objection to admitting the loan files as self-
13 authenticating documents again at trial:

14 [T]he government, by its own admission, has never
15 given written notice of their intent to rely on self-
16 authenticating documents. . . . The government, no less
17 than any other litigant, is required to ensure that the
18 evidence that it intends to offer is admissible, to
19 anticipate objections from opposing parties, and to
20 comply with the federal rules of evidence.

21
22 App'x at 165. Defense counsel argued that while the government submitted the
23 authenticating certificates required by Rule 803(6) during the discovery period:

24 they have also given me a list of
25 witnesses that say the custodian of

1 records . . . could be called as a
2 witness. It's not up to me to figure
3 out in advance what they're going to
4 do.

5
6 * * *

7
8 THE COURT: What are you thinking when they
9 give you actually a self-
10 authenticating document like a
11 certificate under Rule 902, subsection
12 11 — and I'm sure that there must be
13 a cover letter. They are giving you
14 this certificate. Obviously that is the
15 way by which they intend to
16 introduce these documents.

17
18 App'x at 166-67. The district court admitted the loan files as self-authenticating
19 documents, concluding that the certifications at issue complied with Rule 803(6),
20 and "that the three requirements of [Rule 902(11)] [we]re met." App'x at 169.

21 After the jury delivered its verdict finding Thomas Komasa guilty on all
22 ten counts of the superseding indictment, and Heidi Komasa guilty on all but
23 Count Two of the charges against her, both defendants filed motions for
24 judgments of acquittal, or, alternatively, for new trials. *United States v. Komasa*,
25 No. 2:10-cr-72, 2012 WL 5392099 (D. Vt. Nov. 5, 2012). Thomas Komasa again

1 challenged the admissibility of the loan files as self-authenticating documents—a
2 challenge again rejected by the district court:

3 It is true the Government failed to provide
4 written notice to the defendants that it intended to
5 introduce the loan files as self-authenticating pursuant
6 to Rule 902(11). However, the Government produced
7 all loan files and business records certificates as part of
8 discovery well in advance of trial. At a motions hearing
9 in 2012, the Government represented orally that the loan
10 files were admissible as self-authenticating records. It
11 gave the defense copies of recently completed
12 declarations from records custodians for six of the
13 mortgage lenders on April 17, 2012, although some of
14 those declarations did not comply with Rule 803(6).
15 Other certifications were turned over later. Those
16 certifications complied with Rule 803(6). On June 19,
17 2012, the Government turned over by email declarations
18 which complied with the Rule and were intended to be
19 offered into evidence. Those certifications indicated the
20 records were kept in the course of a regularly conducted
21 business activity, made in the regularly conducted
22 business activity as a regular practice of the institution,
23 and were made at or near the time of the occurrence of
24 the matters set forth through automated processes or by,
25 or from information transmitted by, a person with
26 knowledge of those matters.

27
28 The defense was clearly on notice that the
29 Government sought to introduce the loan documents as
30 business records under Rule 803(6), and that the
31 documents were intended to qualify as
32 self-authenticating under Rule 902(11). To be sure, the
33 rule requires written notice. However, the Government

1 provided both oral notice and the certificates which
2 were clearly for the purpose of notifying the defense the
3 Government intended to introduce such documents as
4 self-authenticating. Given actual notice and substantial
5 compliance with Rules 803(6) and 902(11), the Court
6 permitted introduction of the documents. The Court
7 reaffirms the decision here.

8
9 *Id.* at *3-4 (citation omitted). These appeals followed.

10 DISCUSSION

11 “The notion that certain documents are self-validating has origins in
12 Roman law.” 31 Charles Alan Wright & Victor James Gold, *Federal Practice and*
13 *Procedure Evidence* § 7131 (1st ed. 2000). The current parameters for admitting
14 documents as self-authenticating are set forth in Rule 902(11), which provides
15 that:

16 The following items of evidence are self-authenticating;
17 they require no extrinsic evidence of authenticity in
18 order to be admitted:

19

20 (11) The original or a copy of a domestic record that
21 meets the requirements of Rule 803(6)(A)-(C), as shown
22 by a certification of the custodian or another qualified
23 person that complies with a federal statute or a rule
24 prescribed by the Supreme Court. Before the trial or
25 hearing, the proponent must give an adverse party
26 reasonable written notice of the intent to offer the
27 record—and must make the record and certification
28 available for inspection—so that the party has a fair
29 opportunity to challenge them.

1
2 Fed. R. Evid. 902(11). A record of regularly conducted business activity would be
3 eligible for admission as self-authenticating under Rules 902(11) and 803(6) if the
4 record is accompanied by a written declaration of its custodian, or other
5 qualified person, who certifies that:

- 6 (A) the record was made at or near the time by—or from
- 7 information transmitted by—someone with knowledge;
- 8 (B) the record was kept in the course of a regularly
- 9 conducted activity of a business, organization,
- 10 occupation, or calling, whether or not for profit;
- 11 (C) making the record was a regular practice of that
- 12 activity;
- 13 (D) all these conditions are shown by the testimony of
- 14 the custodian or another qualified witness, or by a
- 15 certification that complies with Rule 902(11)

16
17 Fed. R. Evid. 803(6). Rules 902(11) and 803(6) are thus designed to work in
18 tandem.

19 Rule 902(11) was added to create “a procedure by which parties can
20 authenticate certain records of regularly conducted activity, other than through
21 the testimony of a foundation witness.” Fed. R. Evid. 902 advisory committee’s
22 note (2000 amendment). When Rule 902(11) was added, Rule 803(6) was also
23 amended so “that the foundation requirements of Rule 803(6) can be satisfied
24 under certain circumstances without the expense and inconvenience of

1 producing time-consuming foundation witnesses.” Fed. R. Evid. 803 advisory
2 committee note (2000 amendment).

3 We now turn to the issue of whether the district court properly admitted
4 the loan files at issue here. “[W]e review evidentiary rulings only for abuse of
5 discretion.” *United States v. Contorinis*, 692 F.3d 136, 144 (2d Cir. 2012). A district
6 court abuses its discretion if it commits an error of law, makes a clearly erroneous
7 assessment of the evidence, or “render[s] a decision that cannot be located within
8 the range of permissible decisions[.]” *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008)
9 (internal quotation marks omitted).

10 There is no dispute here whether the written notice specified in Rule
11 902(11) was provided. The question before us is whether that requirement may
12 be excused where an objecting party admits to having actual notice and an
13 opportunity to challenge the Rule 902(11) evidence. Rule 902(11)’s notice
14 requirement is “intended to give the opponent of the evidence a full opportunity
15 to test the adequacy of the foundation set forth in the declaration.” Fed. R. Evid.
16 902 advisory committee’s note (2000 amendment). The district court here found
17 that while written notice was lacking, the defendants had actual notice of the
18 government’s intent through the government’s oral representations of a plan to

1 proffer the documents as self-authenticating and also because the government
2 provided the defendants with copies of the records and authenticating
3 certificates. *Komasa*, 2012 WL 5392099 at *3-4. There is adequate evidence in the
4 record to support that factual finding. The government turned over declarations
5 from six of the mortgage lenders in April 2012, and while the certifications were
6 not in complete compliance with Rule 803(6)(A)-(C), the final compliant versions
7 of the certifications were provided before the trial began.

8 While not faced with the ideal set of circumstances, we cannot say the
9 district court abused its discretion in admitting the documents as self-
10 authenticating. This is especially the case because here, as defendants candidly
11 admitted at oral argument, they did have a chance to challenge the authenticating
12 certificates. *See, e.g., United States v. Daniels*, 723 F.3d 562, 579-81 (5th Cir. 2013)
13 (central aspect of rule is to provide adverse party adequate time to investigate
14 and challenge the adequacy of the underlying records). The defendants' reliance
15 on *United States v. Brown* is inapposite, as the issue there was ultimately not just
16 the timeliness of the notice but that there was no qualified witness to lay the
17 foundation for the documents at issue. 553 F.3d 768, 793 (5th Cir. 2008).

1 That said, we caution that parties fail to comply with the Rule 902(11)'s
2 written notice requirements at their own risk. As counsel for the government
3 conceded at oral argument, a single sentence added to the cover letter forwarding
4 the certifications and documents would have complied with the rule. The
5 defendants admittedly had the loan files in question for more than two years,
6 were orally informed of the government's intent to proffer the documents as self-
7 authenticating and, given the nature of the case, could not be surprised by the
8 government's decision to introduce them at trial.

9 We also reject defendants' challenge to the certifications accompanying the
10 loan documents. At trial, defendants objected to the use of the certificates
11 because at least some of the certificates averred that the records at issue were
12 kept or generated via an "automated process." App'x at 159. Defendants argue
13 that "[t]here is no provision in the Federal Rules of Evidence for the introduction
14 of documents "'made' through automated process in the absence of testimony
15 from the custodian of records . . . regarding the automated processes." The
16 district court found the certificates were adequate because Thomas Komasa had
17 demonstrated:

18

1 no basis to evaluate the admissibility of documents
2 obtained from computer recovery systems differently
3 than documents obtained by personal review of records,
4 assuming there is suitable authentication by persons in
5 the position to testify to their authenticity. Here, the
6 certifications adequately laid the foundation for the
7 trustworthiness of the records. The fact that the
8 documents were obtained by automated processes does
9 not affect their admissibility.

10
11 *Komasa*, 2012 WL 5392099, at *4.

12 We agree with the district court's assessment that as a practical matter, the
13 fact that the documents were obtained by an automated process does not affect
14 their admissibility in this case. To lay a proper foundation for a business record,
15 a custodian or other qualified witness must testify that the document was "'kept
16 in the course of a regularly conducted business activity and also that it was the
17 regular practice of that business activity to make the [record].'" *United States v.*
18 *Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (quoting *United States v. Freidin*, 849 F.2d
19 716, 719–20 (2d Cir. 1988) (alteration in *Williams*)). "The custodian need not have
20 personal knowledge of the actual creation of the document" to lay a proper
21 foundation. *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995) (internal
22 quotation marks omitted); see also *United States v. Jakobetz*, 955 F.2d 786, 800-01 (2d
23 Cir. 1992) (holding that a toll receipt incorporated into a business's records

1 qualified as a business record, despite the fact that its custodian had no
2 knowledge of the toll receipt's preparation, because the receipt had been so
3 embedded in the company's business records to allow such an inference of
4 authenticity); *In re Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981)
5 (finding that "business records are admissible if witnesses testify that the records
6 are integrated into a company's records and relied upon in its day-to-day
7 operations," and noting that the relevant financial statements were requested by
8 a bank and were regularly used by the bank to make decisions whether to extend
9 credit). Using an "automated process" to compile the records in question does
10 not render the documents inadmissible.

11 Because we conclude that the district court properly admitted the
12 mortgage loan files as self-authenticating documents, we do not address the
13 district court's alternate determination that the documents were properly
14 admitted under the residual hearsay rule, Rule 807(a) of the Federal Rules of
15 Evidence.

16 CONCLUSION

17 For the reasons stated above, as well as the reasons stated in the
18 accompanying summary order, the judgments of the district court are affirmed.