**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| STATE OF DELAWARE | : | |
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| v. | : | |
| | : | I.D. No. 1501012702 |
| CHRISTIAN MANN | : | |
| | : | |
| Defendant. | : | |
| | : | |

**ORDER**

*Upon Defendant's Motion in Limine*
*Denied*

**AND NOW TO WIT**, this 1st day of April, 2016, upon consideration of Defendant's Motion *in Limine* and the record in this case, **IT APPEARS THAT:**

1. Defendant is charged with twenty-five counts of Dealing in Child Pornography based on images found in a Microsoft OneDrive[1] account.

2. The State has represented that it intends to introduce evidence at trial obtained from Microsoft pursuant to a search warrant. Namely, the State seeks to admit images found in the OneDrive account and their associated exchangeable image file ("EFIX") data.[2] Additionally, the State intends to introduce evidence of the subscriber information linked with the OneDrive account under D.R.E. 803(6).[3]

3. Defendant filed the instant motion to preclude the State from introducing this evidence. In support of the motion, Defendant argues that the evidence the State wishes to admit

[1] OneDrive, formerly SkyDrive, is Microsoft's cloud storage service, which allows users to upload files and access them from Windows PCs, Macs and mobile devices.
[2] EXIF data is created when a picture is taken and is embedded in the image. EFIX data is information such as the date and time the picture was taken as well as the GPS coordinates of where the picture was taken.
[3] D.R.E. 803(6) is commonly referred to as the "business records" exception.

constitutes inadmissible hearsay and would violate the Confrontation Clause. Further, Defendant contends that Colleen Holt's ("Ms. Holt") declaration of authentication of business records fails to comply with D.R.E. 902(11). In its response, the State argues: (1) photographs are not statements and therefore not hearsay; (2) EFIX data is computer generated and therefore not hearsay; and (3) subscriber information associated with the OneDrive account does qualify as a business record within the meaning of D.R.E. 803(6).

4. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[4] A "statement" is defined in D.R.E. 801(a) as (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended to be as an assertion. The images the State seeks to introduce are neither testimonial nor assertive in character.[5] Therefore, they do not constitute inadmissible hearsay. However, the State must authenticate these images pursuant to D.R.E. 901(a).[6]

5. Defendant's argument that the EFIX data associated with the images constitutes hearsay is unavailing. As the State correctly points out, EFIX data is computer-generated and is created automatically when a picture is taken.[7] The information that is embedded in the image is not the product of human creation. Courts in other jurisdictions have addressed similar arguments. Generally, computer-generated data is not hearsay where the material does not replicate a declarant's out-of-court statement.[8] These holdings are sound; the EFIX data associated with the images is not hearsay.

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[4] D.R.E. 801(c).
[5] *See U.S. v. Oaxaca*, 569 F.2d 518, 525 (9th Cir. 1978) (holding that photographs that are not assertive or testimonial in nature are not hearsay).
[6] "The requirement of authentication or identification 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." D.R.E. 901(a).
[7] *See Baker v. State*, 117 A.3d 676, 683 (Md. App. 2015).
[8] *See Easterling v. Easterling*, 2007 WL 4530831, at *3 (Tenn. Ct. App. Dec. 21, 2007) (acknowledging case law that indicates computer-generated records are not hearsay); *U.S. v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005) (holding that header information accompanying each photograph was created automatically by the computer and not

6. Furthermore, Defendant objects that the declaration of authentication of business records does not comply with D.R.E. 902(11).[9] The objection is general and does not give a specific reason. Preliminarily, under D.R.E. 103(a), any objection to the admission of evidence must state a specific ground. On the other hand, Ms. Holt's declaration states that the records were made at or near the time of the occurrence, were kept in the course of regularly conducted activity, and made by the regularly conducted activity as a regular practice. The declaration was made under penalty of perjury that it was true and correct. Notice has been provided and both the record and declaration have been reviewed by Defendant. Whether evidence has been properly authenticated is within the discretion of the trial judge to decide.[10] The State has made a sufficient showing and any objections to the form of the declaration—had there been any—have been waived.[11]

7. Finally, Defendant argues that admission of this evidence would violate his rights under the Confrontation Clause.[12] Only testimonial hearsay is subject to the Confrontation Clause.[13]

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hearsay); *Ly v. State*, 908 S.W2d. 598, 600 (Tx. Ct. App. 1995) (holding that computer-generated data created automatically without the input of a human declarant is not hearsay).

[9] D.R.E. 902(11) provides, in its entirety:

> Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any law of the United States or of this State, certifying that the record
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
> (B) was kept in the course of the regularly conducted activity; and
> (C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must 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.

[10] *See Hendricks v. State*, 871 A.2d 1118, 1121 (Del. 2005).

[11] To alleviate any undue concern, the declaration was made in a manner compliant with any law of the United States. *See* 28 U.S.C.A. § 1746(2).

[12] *See Crawford v. Washington*, 541 U.S. 36 (2004).

[13] *See Dixon v. State*, 996 A.2d 1271, 1278 (Del. 2010).

Business records of login and subscriber information are not prepared in anticipation of litigation and are not testimonial evidence; therefore, the Confrontation Clause does not apply.[14]

Considering the foregoing, Defendant's motion *in limine* is **DENIED**.

**IT IS SO ORDERED.**

***/s/ Richard F. Stokes***

The Honorable Richard F. Stokes

cc: Prothonotary
Julie L. Johnson, Esquire
Gary F. Traynor, Esquire

[14] *State v. Garvey*, 2015 WL 5750124, at *3 (Del. Super. Sept. 30, 2015) (holding that records kept in the regular course of business are non-testimonial).