

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
-vs-)	Case No. 17-CR-179-HE
)	
DAVID CHESLEY GOODYEAR,)	
)	
Defendant.)	

UNITED STATES' TRIAL BRIEF

The United States submits this Trial Brief to assist the Court during trial, which is set to begin on February 13, 2018. This brief is limited to evidentiary and legal issues the United States anticipates will arise.

I. Charged Conduct and Anticipated Evidence

Defendant David Chesley Goodyear is charged with one count of violating Title 18, United States Code, Section 1030(a)(5)(A), for knowingly causing denial-of-service attacks against Astronomics, an online telescope retailer located in Norman, Oklahoma, which caused at least \$5,000 in aggregate harm to Astronomics. The Indictment alleges the attacks against Astronomics and its affiliate Cloudy Nights occurred between on or about August 13, 2016, and on or about August 31, 2016.

The United States will offer evidence that Goodyear was a customer of Astronomics and a registered user of CloudyNights.com, a free online forum

for astronomy enthusiasts. Cloudy Nights is paid for, operated, and maintained by Astronomics as part of its business, and registered Cloudy Nights users receive a discount on purchases at Astronomics. Every webpage of Cloudy Nights indicates that Cloudy Nights is “brought to you by Astronomics,” and the same family owns both entities. Astronomics’ retail website is hosted on a private server maintained at its offices in Norman, Oklahoma. Cloudy Nights’ website is hosted on a server maintained by Pair Networks, Inc., and its content is maintained in a database. Cloudy Nights generates no direct revenue, and its business is to maintain online fora for astronomy enthusiasts to discuss telescopes, telescope accessories, astrophotography, and related interests.

Every registered user of Cloudy Nights must agree to abide by the Terms of Service, a document with a theme best summarized as the Golden Rule. Users are admonished to be kind and respectful of others, to avoid profanity, to not discuss religion or politics, etc. Once a user has been approved, he/she may post on the public boards send and receive personal messages. Users are advised that if they violate the Terms of Service, they may be banned.

Astronomics has enlisted approximately 10-20 Administrators of Cloudy Nights, as well as 20-30 Moderators, to manage and maintain the

online fora. They are the staff and governing structure of Cloudy Nights. The Administrators approve classified advertisements and new users and take action when issues arise in the message boards. The Moderators are lower-level supervisors of Cloudy Nights. Each Moderator is assigned specific fora to monitor and maintain. Users can flag posts for review by Moderators, and Moderators can hide offending posts, move offending posts, issue strikes against members for violations, and alert Administrators about issues. Administrators and Moderators are unpaid.

Moderators and Administrators have access to closed message boards to discuss violations of the Terms of Service and appropriate action. Moderators and Administrators communicate in those closed boards several times a day as part of the regular business of moderating and administering Cloudy Nights. When registered users flag messages for the assigned Moderators, Moderators receive an alert to visit the Report Center, where they can comment and discuss whether action should be taken. There is also an Admin Forum that is not accessible to Moderators, where Administrators undertake the business of governing member conduct and determining appropriate disciplinary action.

The Moderator and Administrator fora, as well as the other fora on Cloudy Nights, are maintained in a database in the regular course of business of Cloudy Nights by Greg Kettell, one of the Administrators. The United States

is filing a declaration of Mr. Kettell in conjunction with its Motion in Limine. Defendant originally registered at Cloudy Nights with username Wolfman_4_Ever, but he received a permanent ban on August 26, 2013, for what were deemed to be violations of the Terms of Service.¹ In total, the United States will present evidence connecting Goodyear to eleven usernames that were banned between August 26, 2013, and August 13, 2016. His primary IP address was banned in December 2014, and Goodyear responded by sending a message from his personal email account to the Administrators stating that he could not be stopped and that he had access to proxy servers and thousands of other accounts. In January 2016, Administrators and Moderators suspected that user JamesSober was actually Goodyear. JamesSober was banned on August 9, 2016, for violating the Terms of Service. These interactions with Goodyear and the consequences, including his strikes and bans, are documented in the Administrator and Moderator fora maintained in Cloudy Nights' database.

¹ On August 26, 2013, Goodyear immediately registered username HappyAstro and sent a threatening message regarding his Wolfman ban to an Administrator or Moderator, asking to fight. HappyAstro was banned the same day. Goodyear then registered a new username, Skunky, but Skunky was banned in early April 2014, after a Moderator or Administrator reported receiving threatening personal messages from Skunky. Goodyear then registered other usernames using the same two IP addresses he had used for Wolfman_4_Ever, HappyAstro, and Skunky.

On August 13, 2016, a new user named HawaiiAPUser registered and posted a screenshot timestamped 12:40 pm showing the user was being denied access to the forum. In the post, HawaiiAPUser used profanity and embedded pornography, posting the pornography all over Cloudy Nights. HawaiiAPUser identified certain Moderators and Administrators by name and stated that he was “coming for” the Vice President of Astronomics and Administrator of Cloudy Nights, Michael Bieler. HawaiiAPUser stated that he was going to “talk with my contacts and just DOS this site as well as A55tronomics.” (Goodyear_001023.)

Later on August 13, 2016, Cloudy Nights’ website became unresponsive. Astronomics also began experiencing outages. IT professionals and service providers informed Bieler and Kettell that the sites were experiencing denial-of-service attacks. The attacks on Cloudy Nights were first reported in the General Housekeeping forum at that time. Kettell, Bieler, and others communicated in the Administrator and Moderator forums about the attacks, giving updates about the accessibility of both websites. Administrators and Moderators connected the August 13, 2016 threat with the denial-of-service attacks. Bieler contacted law enforcement to report the DOS attacks. Kettell accessed the Cloudy Nights error logs and identified the user denied access at 12:40 pm to be JamesSober. Other pieces of information were discussed,

including HawaiiAPUser's IP address, identical photos posted by JamesSober and Skunky, purchases made by Wolfman and photos of those purchases appearing from JamesSober, as well as geographic clues from JamesSober's photos. As a result of Kettell's work, and that of other Administrators and Moderators, Kettell and Bieler advised the FBI that they suspected David Goodyear was JamesSober and HawaiiAPUser and that he had caused the DOS attacks.

On August 31, 2016, FBI Special Agent Josh Sadowsky and Los Angeles Police Department Detective Trevor Larsen approached Goodyear outside his residence. Goodyear willingly spoke with the agents for approximately 35 minutes, ultimately admitting that he was Wolfman_4_Ever and JamesSober, identifying the August 13th threat posted by HawaiiAPUser as his, confessing that he asked hackers to take down both sites, and stating that he would like to apologize to Astronomics and Cloudy Nights. Goodyear explained that he had gotten angry when he discovered his username JamesSober had been banned, and he used Google to find a hacking forum to place a request for Cloudy Nights and Astronomics to be taken down. He admitted that he created username Wolfman_4_Ever at hackforums.net and posted one message—a request that the forum's users take down Cloudy Nights and Astronomics. Goodyear admitted that he knew it was wrong and that he knew it was “highly

illegal” to cause a DOS attack. The interview was recorded.

II. Evidentiary and Legal Issues

A. Goodyear’s Own Cloudy Nights Posts, Emails, and Interview Are Not Hearsay.

Goodyear’s own posts and messages on Cloudy Nights (as, e.g., Wolfman_4_Ever, HappyAstro, Skunky, DeepSpacBlakHole, JamesSober, and HawaiiAPUser) are admissible as non-hearsay because they will be offered only to show the fact that they were made, not the truth of the matters asserted. Pursuant to Federal Rule of Evidence 801(c)(2), the statements are admissible as non-hearsay.

For example, the United States intends to show Goodyear’s posts under various usernames were deemed to violate the Terms of Service. Those records will be offered to show the effect on the listener/audience—specifically, how Moderators and Administrators responded to those posts. Over time, Administrators and Moderators issued strikes, banned usernames, and banned Goodyear’s primary IP address at his home. Those actions are relevant to Defendant’s motive to cause DOS attacks on Astronomics and Cloudy Nights. The United States does not intend to offer any of Goodyear’s posts or messages for the truth of what he wrote or to prove they constituted violations—only for the fact that those usernames made the posts or messages or were reported to have done so by Administrators and Moderators.

Further, Goodyear's emails, posts, and messages are not hearsay pursuant to Federal Rule of Evidence 801(d)(2), because they are statements of a party-opponent. In order to establish the applicability of Rule 801(d)(2), the United States is required to "produce evidence sufficient to support a finding" that Goodyear authored the posts. *See* Fed. R. Evid. 104(a), 901(a).² Though the United States will offer admissible evidence tying Goodyear to the usernames, the Court is "not bound by evidence rules" in deciding such preliminary questions of admissibility. Fed. R. Evid. 104(a). Defendant admitted in his August 31, 2016, interview that he was Wolfman_4_Ever, JamesSober, and HawaiiAPUser. Furthermore, the United States will introduce evidence that Goodyear used certain IP addresses and other evidence establishing his authorship of posts by DeepSpacBlakHole, HappyAstro, ReFracAsCt, Sdakotaastro, and Skunky.

The August 31, 2016 recorded interview is also admissible pursuant to Federal Rule of Evidence 801(d)(2). Because of difficulty hearing portions of the recorded interview, particularly over the Court sound system, the United

² In *United States v. Hassanshahi*, the District Court for the District of Columbia discussed the possibility that the United States is required to establish authorship by a preponderance of the evidence, ultimately suggesting that, instead, Rule 901 establishes the proper standard. 195 F. Supp. 3d 35, 48 n.7 (D.D.C. 2016) (citing *Bourjaily v. United States*, 483 U.S. 171, 176 (1987); *United States v. Harvey*, 117 F.3d 1044, 1049-50 (7th Cir. 1997)). The United States expects that its evidence will be sufficient to satisfy either standard.

States intends to offer a certified transcript to aid the jury's ability to understand what is said. The transcript will be synced with the audio recording for trial presentation.³

B. Administrator and Moderator Posts Are Not Hearsay.

The United States intends to call Bieler and Kettell as witnesses and to elicit that they notified law enforcement they believed Goodyear was responsible for the denial-of-service attacks on Astronomics and Cloudy Nights. Evidence may not be excluded on the grounds of hearsay if offered for something other than the truth of the matters asserted. Fed. R. Evid. 801(c)(2). Evidence is not hearsay if it is offered "to demonstrate the circumstances which served as a foundation or basis in fact for the witnesses' subsequent actions." *United States v. Freeman*, 514 F.2d 1184, 1190–91 (10th Cir. 1975). To explain why Bieler and Kettell notified law enforcement about Goodyear, the United States intends to introduce into evidence records from Cloudy Nights. The records will include forum and message board posts and statements made out of court by Administrators and Moderators regarding conduct on Cloudy Nights, proposed disciplinary actions for such conduct, as well as Administrators' and Moderators' reactions to the denial-of-service attacks.

³ The United States produced the transcript in discovery to Defendant, at Goodyear_001750-1810.

Thus, those out-of-court statements are admissible for nonhearsay purposes to show the effects on the listener and motive for Goodyear.

The significance of the offered statements lies in the fact that they were made and the effect on the listener, not the truth of the matter asserted. Statements regarding Goodyear's pre-offense conduct on Cloudy Nights, under various usernames, illuminate why Moderators and Administrators took disciplinary actions on those usernames. Those disciplinary actions ultimately provided a motive for Goodyear's attack. Statements by Moderators and Administrators regarding the August 13, 2016 threat by HawaiiAPUser are significant because they alerted Kettell and Bieler to the threat and caused Kettell and Bieler to contact law enforcement.

This evidence is also admissible to show the reasons that that the investigation proceeded as it did. Evidence is not hearsay if admitted for the limited purpose of explaining the background of an investigation. *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987); see *United States v. Barela*, 973 F.2d 852, 854-55 (10th Cir. 1992) (holding that out-of-court statements "may come in for a nonprejudicial relevant use, such as demonstrating reasons for taking certain investigatory steps"). Here, the significance of the offered statements lies in the fact that the FBI interviewed David Goodyear—not the truth of the matters asserted.

For example, the United States intends to introduce evidence of a forum post from early 2016 discussing the identity of Cloudy Nights participant “JamesSober.” The United States will separately introduce evidence that Goodyear admitted to FBI agents that he was JamesSober; therefore, this testimony will not be introduced to establish that Goodyear was JamesSober. Instead, the posts will show that Cloudy Nights Moderators believed that JamesSober was Goodyear and their stated reasons for such beliefs. Further evidence will show that this information was passed along to the FBI and directly led to the FBI confronting Goodyear.

Details from the Administrator and Moderator posts will contextualize and explain later evidence. For example, in one post, an Administrator asserts that Goodyear purchased a certain telescope on another website called “Astromart.” (Goodyear_001439.) Thereafter, JamesSober posted a picture of the same telescope on the Cloudy Nights message board. Agents later confronted Goodyear with this evidence in their interview.

None of the forum posts is so unfairly prejudicial to warrant its exclusion under Federal Rule of Evidence 403. Out-of-court statements “offered to explain the background of an investigation, like all evidence, must be evaluated under the criteria in Fed. R. Evid. Rules 401 and 403 for relevance and to prevent confusion or prejudice on the part of the jury.” *Freeman*, 816

F.2d at 563. Here, the posts discuss Goodyear's behavior on the message boards, but they do so in a fair, unprejudicial manner. (Goodyear_001440 ("As far as I can tell, JamesSober's two strikes were for minor stuff.")) Furthermore, such evidence does not go directly to the elements of the crime at issue. Instead, such evidence provides the necessary background to understand the evidence. *United States v. Cass*, 127 F.3d 1218, 1223 (10th Cir. 1997) (explaining that hearsay statements that directly go to guilt of defendant are less likely admissible as background evidence).

C. Even if Hearsay, Moderator and Administrator Discussions from Cloudy Nights Message Boards Are Admissible as Business Records.

The United States is contemporaneously filing a motion *in limine* to admit Moderator and Administrator private message boards as business records. Should the Court decline to pre-admit those exhibits, the United States intends to produce testimony from Kettell and Bieler further attesting to the nature of those records.

D. At a Minimum, Posts Regarding the DOS Attacks Are Present Sense Impressions and Excited Utterances.

Even if the Court determines the Cloudy Nights message board contents are hearsay and not business records, many of the message board contents, as well as emails, are admissible because they fall into other Federal Rule of Evidence 803 exceptions.

For example, the DoS attacks on Astronomics were reported by Cloudy Nights' Administrators and/or Moderators, as well as the Vice President of Astronomics and other Cloudy Nights users, as the attacks were occurring. These statements as "[a] statement describing an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). The Tenth Circuit has affirmed admission of hearsay pursuant to Federal Rule of Evidence 803(1) when the statements "were made at the time" the events were occurring. *United States v. Allen*, 235 F.3d 482, 493 (10th Cir. 2000).

Michael Bieler, the Vice President of Astronomics, not only posted within the Cloudy Nights message boards about the attacks as they were happening but also sent emails to an FBI Special Agent notifying him contemporaneously when attacks were occurring. Similarly, Cloudy Nights' Administrators and Moderators posted messages about the DoS attacks happening to Cloudy Nights as the attacks were happening. The posts contain statements such as "Looks like he hit us around 6 minutes ago as we are down now." (Goodyear_001454.) Newcomers to Cloudy Nights also posted complaints about the site's disruptions during the attacks. All of those realtime messages are admissible as present sense impressions and exceptions to the rule against hearsay, pursuant to Federal Rule of Evidence 803(1).

Michael Bieler's messages also constitute excited utterances because the

DoS attacks represented a threat to his family's business and caused tremendous stress and emotional and physical turmoil, which he stated as the attacks were occurring. "[S]tatement[s] relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" are exceptions to the rule against hearsay. Fed. R. Evid. 803(2). "The exception proceeds on the theory 'that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.'" *United States v. Magnan*, 863 F.3d 1284, 1292 (10th Cir. 2017) (citing Fed. R. Evid. 803 advisory committee's note). "Whether the excited utterance exception to the rule against hearsay applies under the particular circumstances of a case is an inquiry committed to the sound discretion of the district court." *Id.* (citing *United States v. Smith*, 606 F.3d 1270, 1279 (10th Cir. 2010)). "Because the inquiry is fact-intensive, a district court's decision to admit such testimony 'necessitates heightened deference.'" *Id.*

Bieler's posts and emails regarding the DOS attacks are admissible as excited utterances pursuant to Federal Rule of Evidence 803(2). The Tenth Circuit has affirmed admission pursuant to Federal Rule of Evidence 803(2) when the evidence showed the declarant "was distressed," as Bieler was here. *Allen*, 235 F.3d at 493. Bieler informed the FBI that he wanted the attacks to

stop because he feared Astronomics would “be out of business shortly” and reported that the attacks “sent my father to the hospital today for cardiac problems. It is literally killing him.” (Goodyear_001013, Goodyear_001079.) Those statements are excited utterances made when Bieler was distressed by the attacks and concerned about the future of his family’s business and his father’s health.

III. Conclusion

The United States stands ready to provide any additional information, legal analysis, or briefing desired by the Court.

Respectfully submitted,

ROBERT J. TROESTER
Acting United States Attorney

s/ K. McKenzie Anderson
K. McKenzie Anderson
Oklahoma Bar No. 30471
William E. Farrior
Oklahoma Bar No. 22137
Assistant United States Attorneys
210 West Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102
(405) 553-8781 - Telephone
(405) 553-8888 - Facsimile
mckenzie.anderson@usdoj.gov
william.farrior@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

William H. Campbell
Sharon B. Marshall

s/ K. McKenzie Anderson
Assistant U.S. Attorney