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RECEIVED AND FILED  
IN OPEN COURT  
JUL 25 2016  
DAVID W. PETERSON  
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,	)	
	)	No. 15-1-00972-7
Plaintiff,	)	
	)	SUPPLEMENTAL RESPONSE REGARDING
v.	)	ADMISSIBILITY OF NSM-008
	)	
GERALDO CASTRO DEJESUS,	)	
Age: 31; DOB: 09/26/1984,	)	
	)	
Defendant.	)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney BARBARA O. DENNIS, Deputy Prosecuting Attorney, with the following supplemental briefing regarding the admissibility of NSM-008. The defendant asks this court to exclude NSM-008 as inadmissible hearsay. The state previously replied, arguing that the label was admissible under ER 803(a)(6) and RCW 5.45 as a business record.

Although the label qualifies as a business record, the Court need not reach that analysis as the label is not hearsay. Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>1</sup> A "declarant" is defined as a person; thus, the hearsay rule does not apply to documents generated by computers with little to no human involvement.<sup>2</sup> Moreover, NSM-008 is not a "statement" as

<sup>1</sup> ER 801(c).

<sup>2</sup> See Tegland, 5B Wash. Prac., Evidence Law and Practice § 801.6 (5th ed.)



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1 it is defined by ER 801(a). A “statement” is (1) an oral or written assertion or (2) nonverbal  
2 conduct of a person, if it is intended by the person as an assertion.<sup>3</sup> The Washington Supreme  
3 Court had this to say in *in re Dependency of Penelope B.*, 104 Wash 2d. 643 (1985):

4  
5 “Many out of court utterances fall within such categories as greetings, pleasantries,  
6 expressions of joy, annoyance or other emotions when they are not intentional  
7 expressions of fact or opinion; hence they are not assertions for purposes of the hearsay  
8 rule .... The admissibility of nonassertive verbal or nonverbal as circumstantial evidence  
9 of a fact in issue is governed by principles of relevance, not by hearsay principles. An  
10 assertion that is circumstantial evidence proves a fact indirectly, by implication;  
11 credibility of the declarant is not important because the relevance of the assertion does  
12 not depend on its truth.”

13 NSM-008 is not an assertion. It is a label for purposes of identification. It has numbers  
14 and letters on it but makes no assertion and therefore is not hearsay. As such it is governed by  
15 the general rules of admissibility and relevance. The general provision of ER 901, which sets  
16 forth authentication requirements, is satisfied when the proponent provides evidence sufficient to  
17 support a finding that the matter in question is what the proponent claims it to be.<sup>4</sup> In this case,  
18 the test-fire process is a system that will be fully described by a competent witness and will be  
19 shown to be an accurate manner in producing results. ER 901(b)(9) permits the State to  
20 authenticate this process in this fashion.

21  
22 Even if the court believes NSM-008 is an assertion, it is an implied assertion which still  
23 does not place it into the category of hearsay. The legislative history of the Federal Rules of  
24 Evidence—later adopted in Washington—shows that the drafters of the federal rules fully  
25 intended that the traditional rule should be abandoned, taking implied assertions out of the  
26 definition of hearsay.<sup>5</sup>

27  
28 <sup>3</sup> ER 801(a).

29 <sup>4</sup> ER 901(a).

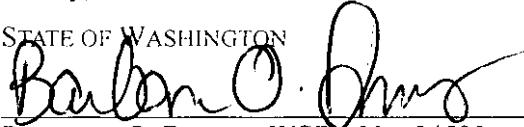
30 <sup>5</sup> Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 *Tex. L. Rev.* 49–93 (1982), and  
31 authorities cited therein.



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For the above reasons, and incorporating the arguments made in the initial State's response, the State respectfully requests the Court deny the defendant's motion to suppress.

RESPECTFULLY SUBMITTED this 24th day of July, 2016.

STATE OF WASHINGTON  
  
BARBARA O. DENNIS, WSBA NO. 34590  
Deputy Prosecuting Attorney

Prosecutor's File Number-15-143920-5

