UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 22-cr-392 (DLF)**
	:	
ABU AGILA MOHAMMAD MAS'UD KHEIR AL-MARIMI,	:	
	:	
Defendant.	:	

GOVERNMENT'S MOTION FOR A RULE 15 DEPOSITION OF [redacted]

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves this Court, pursuant to Federal Rule of Criminal Procedure Rule 15, to order the deposition of a foreign-national witness, [redacted]. The purpose of the deposition is to preserve important testimony about the forensic examination of the crime scene and related evidence by a witness who is beyond the subpoena power of the United States and is substantially likely to become unavailable to testify at trial. The government further requests that this deposition be taken under seal. In support of this motion, the government states the following:

BACKGROUND

A. The Bombing of Pan Am Flight 103

On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, while *en route* from London's Heathrow Airport to John F. Kennedy International Airport in New York City. The explosion resulted in the deaths of 270 people, 259 of whom were aboard the flight, with another 11 residents of Lockerbie killed in an inferno caused by falling airplane debris that destroyed an entire city block instantaneously.

Debris and wreckage covered an area of 845 square miles, with thousands of items collected for examination to determine the cause of the crash. The ensuing investigation revealed that the destruction of Pan Am Flight 103 was caused by the detonation of an explosive device (*i.e.,* "an improvised explosive device") that was placed inside a copper-colored suitcase stored within the aircraft's forward cargo compartment. The government anticipates that its evidence will show that the Defendant built the bomb that brought down Pan Am Flight 103.

B. Procedural History

On November 29, 2022, a federal grand jury in the District of Columbia returned a three-count indictment charging the Defendant with destruction of an aircraft resulting in death, in violation of 18 U.S.C. §§ 32(a)(2), 34, and 2; destruction of an aircraft resulting in death, in violation of 18 U.S.C. §§ 32(a)(1), 34, and 2; and destruction of a vehicle used in foreign commerce by means of an explosive, resulting in death, in violation of 18 U.S.C. § 844(i). A trial date is scheduled for April 20, 2026.

C. [redacted] Expertise and Anticipated Testimony

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

E. Proposed Procedures

The government proposes that the deposition of [redacted] be carried out in the following manner:

1. The deposition should be held in the fall of 2025, at a time convenient to the parties and the Court, [redacted]. This will allow the government time to confirm with the witness his availability with [redacted] authorities, and to

litigate this Motion. The proposed date will also provide both parties sufficient time to prepare for the deposition.[2]

2. The deposition should take place in a secure location outside the United States, in the [redacted]. The government will take the following steps to ensure that the defendant will be able to meaningfully participate in the deposition:

   a. Members of the defense team will be able to directly participate in the deposition. The government will facilitate the travel of members of the defense team to the location of the deposition for the duration of the deposition.

   b. The defendant, who remains in custody, as well as other members of the defense team will be able to meaningfully participate in the deposition from a courtroom in the United States District of Columbia Courthouse. The government will coordinate with the FBI and courthouse personnel, to include the U.S. Marshal Service, to ensure that there is a two-way contemporaneous video/audio link between the witness and the defendant. The defendant, along with U.S.-based members of the defense team will be able to view the deposition live from the courtroom and will be able to participate by video/ audio link. The government will also set up a separate secure means of communication so that the foreign-based defense team and U.S.-based defense team (which includes the defendant) will have a separate means of communicating privately during the deposition.

[2] Consistent with Rule 15(e)(3), all statements made by this witness related to the subject matter of the witness's anticipated testimony that are in the government's possession have already been turned over in discovery.

3. The deposition will be taken under oath to impress upon the witness the seriousness of the matter and to ensure that there are consequences in the event the witness is untruthful and to render it admissible, if necessary, under Fed. R. Evid. 804(b)(1).
4. The deposition should be videotaped. This measure will accurately preserve the testimony of the witness. Also, if admitted at a future court proceeding, the videotape will allow the fact-finder to observe the witness during the testimony, and thus, provide a sound basis for evaluating the credibility of the witness.
5. This Court should preside over the deposition, making rulings as if the witness were testifying at trial. The presence of the Court will also ensure that the deposition is conducted fairly. The government suggests that the Court preside over the deposition from the courtroom via secure video and audio link.

The government has provided to the defense all reports regarding interviews of the witness that are in its possession. The government will continue to collect any and all material in its possession relevant to the cross-examination of the witness, to include any *Brady*, *Giglio* or other discoverable material, and to provide it to the defense in advance of the scheduled deposition. The video deposition will similarly remain under seal and subject to the protective order, if and until offered into evidence at trial, or upon further order of the Court.

LEGAL ANALYSIS

A. A Deposition Pursuant to Federal Rule of Criminal Procedure Rule 15 is Warranted

A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice." Fed. R. Crim. P. 15(a)(1). "The word 'may'" in Rule 15(a)(1) "signifies that the district court retains broad discretion in granting a Rule 15(a) motion and that the court should review

these motions on a case-by-case basis, examining whether the particular circumstances of each case constitute 'exceptional circumstances.'" *United States v. Dillman,* 15 F.3d 384, 389 (5th Cir. 1994).

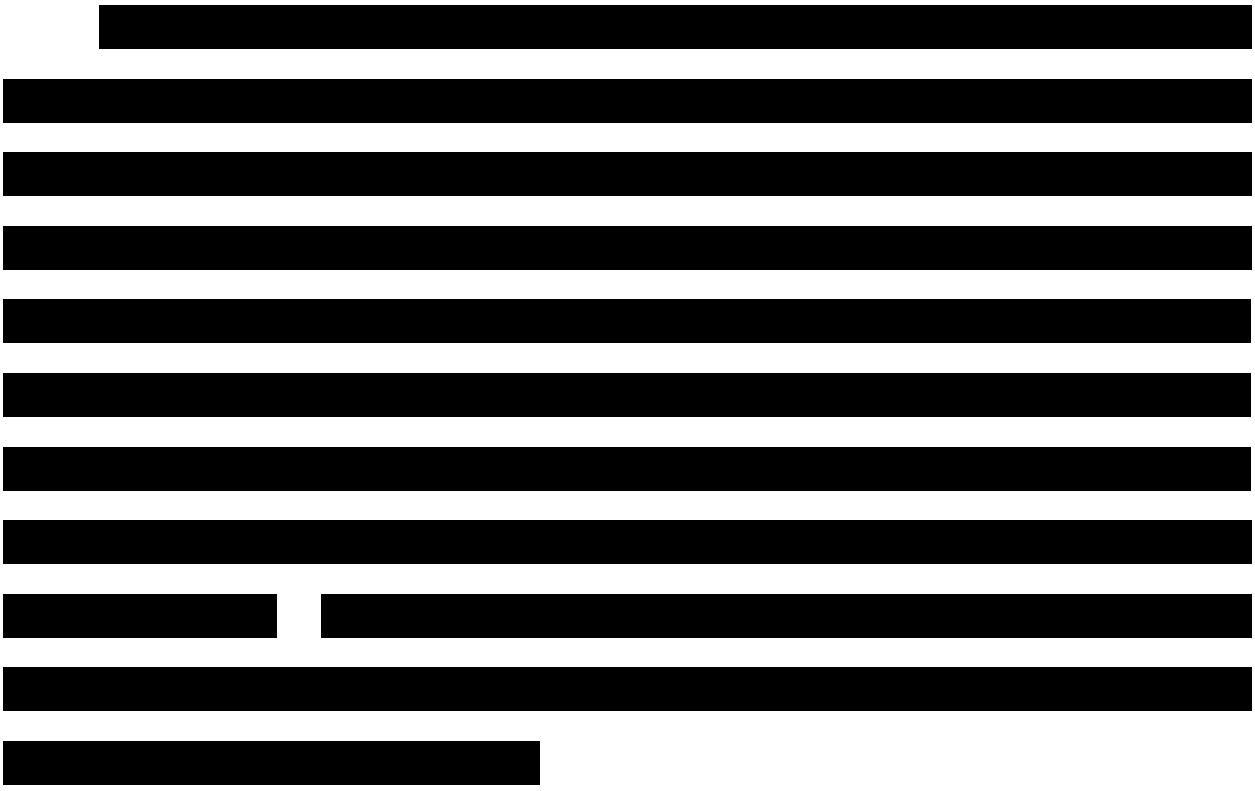
"While the Rule neither defines nor elucidates the 'exceptional circumstances' and 'interest of justice' standards, some guidance in this regard is found in the Advisory Committee's note, which states that a court may permit a party to depose a witness in a criminal case if (a) the witness will be unavailable to testify at trial, (b) the testimony is material to the moving party's case, and (c) the testimony is necessary to avoid an injustice." *United States v. Hajbeh*, 284 F. Supp. 2d 380, 382 (E.D. Va. 2003); *accord United States v. Kelly*, 36 F.3d 1118, 1125 (D.C. Cir. 1994) ("Critical factors toward meeting [movant's] burden include (1) the materiality of the testimony; and (2) the unavailability of the witness to testify at trial.") (citing *United States v. Ismaili*, 828 F.2d 153, 159 (3d Cir. 1987)).[3]

1. Materiality

"In assessing whether testimony is material for Rule 15(a)(1) purposes, courts have used the standards developed for applying and interpreting *Brady v. Maryland*, 373 U.S. 83 (1963)." *United States v. Vo*, 53 F. Supp. 3d 77, 81 (D.D.C. 2014) (Bates, J.). "'[E]vidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been

[3] *See also, United States v. Johnpoll*, 739 F.2d 702, 709 (2nd Cir. 1984) ("It is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if the witness' testimony is material to the case and if the witness is unavailable to appear at trial."); *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993) ("When a prospective witness is unlikely to appear at trial and his or her testimony is critical to the case, simple fairness requires permitting the moving party to preserve that testimony – by deposing the witness – absent significant countervailing factors which would render the taking of the deposition unjust."); *United States v. Bello*, 532 F.2d 422, 423 (5th Cir. 1976) (court held that when a witness is an unservable deponent unlikely to return to the U.S., extraordinary circumstances exist to justify the Rule 15 deposition of that witness).

disclosed, the result of the proceeding would have been different.'" *Id.* (citation omitted). "A 'reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.'" *Id.* "So, the witness need not provide totally unique testimony; nor does she need to be a 'critical' witness." *Id.*; *see also Drogoul*, 1 F.3d at 1553-54 (government demonstrated materiality of prospective Italian witnesses where evidence necessary "directly to refute" defendant's defense); *United States v. Cooper*, 947 F. Supp. 2d 108, 112 n.2 (D.D.C. 2013) ("as the victims of the alleged fraud and participants in relevant communications with [defendant], [witnesses] are likely to provide testimony that is highly material to the charges in the indictment").



2. Unavailabilty

"A potential witness is unavailable for purposes of Rule 15(a) . . . whenever a substantial likelihood exists that the proposed deponent will not testify at trial." *Drogoul*, 1 F.3d at 1553. This inquiry mandates a focus on the trial, and not the deposition; "[T]o resolve a motion under Rule 15, courts need only look to the witness' unavailability 'for trial' and not to whether they have actually consented to make themselves available for the deposition." *United States v. Vilar*, 568 F. Supp. 2d 429, 439 (S.D.N.Y. 2008).

The moving party need not conclusively demonstrate trial unavailability. "It would be unreasonable and undesirable to require the government assert with certainty that a witness will be unavailable for trial months ahead of time, simply to obtain authorization to take his deposition." *United States v. Sines*, 761 F.2d 1434, 1439 (9th Cir. 1985). Thus, "[w]hen the question is close a court may allow a deposition in order to preserve a witness' testimony, leaving until trial the question of whether a deposition will be admitted into evidence." *United States v, Mann*, 590 F.2d 361, 366 (1st Cir. 1978); *see also Vo*, 53 F. Supp.3d at 81 ("Courts do not require a very strong showing of unavailability.").[5] By the same token, "[a]lthough the Rule does not necessarily require a showing of certainty that a witness will be unavailable, surely it requires a showing of a specific reason why the witness might not be available. Unfounded speculation is not enough. There is always the possibility that a witness will not be available. This cannot create 'exceptional circumstances.'" *United States v. Varbaro*, 597 F. Supp. 1173, 1181-82 (S.D.N.Y. 1984).

In applying the flexible "unavailability" standard, courts have considered factors such as: whether a witness is a foreign national located outside the United States (and thus beyond the

subpoena power of the United States);[4] whether a foreign-national witness has declared his or her unwillingness to testify at trial;[5] whether any treaty obligations concerning witness compulsion emanate from the witness's home country;[6] and whether there is a likelihood that the witness will die before the scheduled trial.[7]

[redacted] Even if a foreign-national witness "has declared his willingness to testify at trial," this does not necessarily preclude a finding of unavailability. *United States v. Cordoba*, 2012 WL 3597416, at *4 (S.D. Fla. Aug. 20, 2012). Instead, the possibility exists that such a witness "may nonetheless be found to be unavailable if he cannot be subpoenaed upon changing his mind." *Id.; see also United States v. Nguyen*, 2013 WL

[4] Rule 17 of the Federal Rules of Criminal Procedure provides that "[i]f the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service." However, Section 1783(a) only authorizes a federal court to issue a subpoena to "a national or resident of the United States who is in a foreign country," a principle that recognizes that "[a]liens who are inhabitants of a foreign country . . . owe no allegiance to the United States" and therefore "cannot be compelled to respond to a subpoena." *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950).

[5] *See, e.g.*, *United States v. Warren*, 713 F. Supp. 2d 1, 4 (D.D.C. 2010) ("Evidence that a witness specifically refuses to testify at trial is 'potent proof of unavailability for purposes of Rule 15(a).'" (citation omitted)); *Vilar*, 568 F. Supp. 2d at 439 (granting Rule 15 deposition on basis of, among other factors, "representations of the witness' counsel that they have reached a 'final' decision to decline to testify at trial").

[6] *See, e.g.*, *Drogoul*, 1 F.3d at 1553 ("Under a treaty between the United States and Italy, potential witnesses may be ordered by the Italian government to testify in the United States, but one who refuses to do so may not be removed to this country.").

[7] *See, e.g., In re Grand Jury Proceedings*, 697 F. Supp. 2d 262, 273 (D.R.I. 2010) (granting Rule 15 motion where "the potential witnesses are all at varying stages of terminal illness"); *but see United States v. Nuss*, 2010 WL 1484715, at * 2 (S.D. W. Va. 2010) (denying Rule 15 motion where unavailability argument was based on "nothing more than unfounded speculation that the witnesses may be harmed").

2402957, at *2 (W.D. Wa. 2013) ("Although five of the witnesses identified by the government are currently willing to travel and testify at trial in October 2013, the Court cannot ignore the uncertainty of the witnesses' future willingness to travel."); *United States v. Cooper*, 947 F. Supp. 2d 108, 113-14 (D.D.C. 2013) (Bates, J.) ("[E]ven if Nabadan and Sujiarto could leave Indonesia and said that they were willing to come here to testify, their presence at trial could not be guaranteed. They are beyond the Court's subpoena power, and should they decide not to testify before trial begins, their testimony could not then be compelled."); *United States v. Gianis*, 2008 WL 750587, at *2 (W.D. Wa. 2008) ("Ms. Tenney's statement that her client may be willing to come to the United States voluntarily to testify is by no means a definitive commitment to do so, and if Mr. Youngberg were to choose not to, and the Government *then* moved to take a deposition, further delays in bringing Mr. Gianis to trial would likely result.").

In addition to being a foreign-national witness, it is well established that age and infirmity are sufficient to warrant a Rule 15 deposition. *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984). In *Keithan*, the court found that a Rule 15 deposition was warranted due to the age of the witnesses, both of whom were in their 80s, and both of whom suffered infirmities that prevented them from leaving their home to travel to the courthouse, which was 60 miles away. While the significant health issues of those witnesses are not currently present in this case, similar concerns about travelling to the courthouse at trial still exist. [redacted]

In *United States v. McDade*, as here, there was no specifically identified infirmity. *McDade*, 1994 WL 161243 (E.D. Pa. 1994). However, in *McDade*, at the time of the request, the

case was paused pending an appeal. The Court found that taking a Rule 15 deposition was appropriate in light of the uncertainty when the trial might occur and the fact that "the witnesses were elderly, and thus actuarially, less likely to remain available." *Id*. At *5. The witnesses were 78 and 81. That, combined with the fact that testimony was material, justified the taking of the depositions. [redacted]

3. The interest of justice favors a deposition.

"In addition to the 'exceptional circumstances' requirement, Rule 15(a)(1) permits depositions only 'in the interest of justice.'" *Vo*, 53 F. Supp. 3d. at 82. Courts assessing this factor have looked to "countervailing considerations" that might weigh against the requested deposition. *Id.* For example, parties opposing Rule 15 motions have argued that the deposition would prejudice the prospective deponent, *id.* at 83-85; that the deposition testimony would be unreliable or inadmissible, *United States v. Ramos*, 45 F.3d 1519, 1523 (11th Cir. 1995), that the location of the deposition would be unsafe, *id.*; that the deposition might be inaccurately translated from a foreign language, *United States v. Drogoul*, 1 F.3d 1546, 1554 (11th Cir. 1993), and that the moving party was untimely in seeking the deposition, *id.* at 1555-56.

No countervailing considerations are present here, especially in light of the procedures that the government proposes above. Because the defendant would be virtually present for the deposition, his rights would not be affected. *See* Fed. R. Crim. P. 15(c)(3) (permitting foreign depositions without the defendant's physical presence where certain conditions are met and the defendant can meaningfully participate through other means);[9] *See also United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989) (upholding admission of a foreign deposition taken without the defendant's physical presence prior to the amendments to Rule 15 that added subpart (c)(3)); *Maryland v. Craig*, 497 U.S. 836 (1990) (upholding state statute that permitted certain child victims to testify via CCTV); *United States v. Gigante*, 166 F.3d 75, 79-82 (allowing live testimony via CCTV in lieu of a Rule 15 deposition).

[9] The government addresses those factors as they apply to [redacted] deposition in Part E, *supra*.

Because the deposition would be videotaped, the factfinder would not be deprived of the opportunity to observe the witness's demeanor. *Cf. United States v. Milian-Rodriguez*, 828 F.2d 679, 686 (11th Cir. 1987) (noting that, in criminal cases, depositions without such opportunity are "disfavored"). And because the Court would preside over the deposition and make evidentiary rulings in real time, there would be little risk that the deposition would result in a legally defective record or require the Court to revisit any objections lodged during the testimony.

Moreover, a Rule 15 deposition of [redacted] would promote the efficient progress of this case toward trial. As a noticed expert, the government expects the defense might challenge the admission of his testimony on *Daubert* grounds.[10] The factors the Court would consider on the issue of admissibility would be virtually coextensive with those in his testimony at trial. Deposing [redacted] would therefore not only guard against the risk he will become unavailable for trial, but also create the evidentiary record for the admissibility litigation.

On the other side of the balance, the importance of preserving [redacted] testimony for trial weighs heavily. The bombing of Pan Am Flight 103 was a crime of extraordinary magnitude. It extinguished 270 lives, caused dramatic geopolitical consequences, and remains one of the most notorious acts of terrorism in modern history. It is therefore profoundly important to the litigants and the public that the case be decided with the benefit of all relevant and admissible evidence, including especially [redacted] testimony about the key pieces of forensic evidence.

In sum, the interests of justice counsel in favor of the requested Rule 15 deposition.

B. The deposition can take place outside of the United States

Fed. R. Crim. P. 15 provides that a deposition may be taken outside the United States without the defendant's presence if the Court finds all of the following factors:

[10] *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579 (1993)

> (A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
> (B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
> (C) the witness's presence for a deposition in the United States cannot be obtained;
> (D) the defendant cannot be present because:
> (i) the country where the witness is located will not permit the defendant to attend the deposition;
> (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
> (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
> (E) the defendant can meaningfully participate in the deposition through reasonable means.

Fed. R. Crim. P. 15(c)(3). For the reasons stated above, [redacted] testimony would provide substantial proof of a material fact in a felony prosecution, and there is a substantial likelihood that his attendance at trial cannot be obtained and that his presence in the United States for a deposition cannot be obtained.

The defendant in this case cannot travel to the [redacted]. The U.S. Marshals Service (USMS) has informed undersigned counsel that because, among other reasons, it does not have authority to maintain custody of a prisoner in a foreign country, the defendant cannot be securely transported to a foreign country and kept in custody for the duration of the deposition.[11] Moreover, the procedures proposed by the United States above will assure the defendant's meaningful participation in the proceedings. He will be physically present in the courtroom here in the United States, with a video-link to the deposition of [redacted], and an ability to hold private conversations with his counsel as the deposition progresses. This satisfies Rule 15(c)(3)(E)'s meaningful-participation requirement. *See United States v. Trabelsi*, 2023 WL

[11] The government expects to file a declaration from a representative of USMS explaining its position in greater detail.

4341429 at *5 (D.D.C. April 5, 2023) (granting request for a foreign Rule 15 deposition with a *pro se* in-custody defendant); *United States v. Cooper*, No. 12-cr-211 (JDB), ECF 20 (D.D.C. 2012) (permitting a foreign Rule 15 deposition without the defendant's physical presence where the United States would arrange for the defendant to observe the proceedings remotely and communicate privately with defense counsel).

C. The deposition can and should be sealed

The deposition of [redacted] should be closed to the public, all docket activity related to the deposition should be under seal, and the recording of the deposition should be subject to the protective order, unless and until it is offered at trial or another public proceeding. The propriety of these procedures flows from Rule 15(e), which directs that a deposition in a criminal case "must be taken and filed in the same manner as a deposition in a civil action." The Rulemakers' decision to treat criminal Rule 15 depositions like civil depositions supports closure in two ways: (1) civil depositions have traditionally been closed to the public; and (2) civil depositions may not be filed with the court until they are used in the judicial proceeding or the court so orders it, which, in turn, limits the public's or press's right of access to such unfiled materials.

First, civil depositions have traditionally been closed proceedings. As the Supreme Court has noted, "pretrial depositions and interrogatories are not public components of a civil trial." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Thus, "[s]uch proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." *Id.*; *see also United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private.");

Kimberlin v. Quinlan, 145 F.R.D. 1, 2 (D.D.C. 1992) (declining to permit CNN to attend deposition of, among others, Richard Thornburgh: "Depositions . . . are not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking") (citation omitted); *see generally* Wright & Miller, Federal Practice and Procedure § 2041 (3d ed.) ("it should be noted that it has been held that neither the public nor representatives of the press have a right to be present at the taking of a deposition").

Second, in adjudging the access rights of the press and public, federal courts distinguish between discovery materials that have been filed with the court and those materials which have not. "The rights of the public kick in when material produced during discovery is filed with the court." *Bond v. Utreras,* 585 F.3d 1061, 1075 (1st Cir. 2009). And, Fed. R. Civ. P. 5(d)(1) -- which, pursuant to Rule 15(e), governs the "filing" of any Rule 15 criminal deposition -- directs that depositions are among the types of discovery requests and responses that "must not be filed until they are used in the proceeding or [until] the court orders filing." Thus, until – and if – the Rule 15 deposition is introduced as evidence, the Rules forbid its pretrial filing. This, in turn, means that there is no presumptive right of access to the deposition. *See United States v. Kravetz*, 706 F.3d 47, 55 (1st Cir. 2013) ("courts of appeals have uniformly held that the public has no common law or constitutional right of access to materials that are gained through civil discovery but neither introduced as evidence at trial nor submitted to the court as documentation in support of motions or trial papers"); *United States v. Smith*, 985 F. Supp. 2d 506, 518 (S.D.N.Y. 2013) ("[d]ocuments that play no role in the performance of Article III functions' are accorded little weight as presumptively accessible") (citation omitted).

In addition, the limited federal case law addressing Rule 15 sealings confirms this reading of that Rule. *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998), considered the propriety of a

district court's closure of the courtroom during an Illinois governor's Rule 15 deposition. In the midst of a defendant's multi-week fraud trial, a juror became sick and the court had to temporarily adjourn the trial. However, this adjournment conflicted with the planned testimony of a defense witness: Illinois Governor James Edgar, who was scheduled to leave the next day for a three-week overseas business trip. Accordingly, the parties agreed "that his testimony would be taken by video deposition" in a closed courtroom. *Id.* at 505. The district court overruled the Associated Press's subsequent objection to this closure, reasoning that the Governor was not giving testimony, but was "provid[ing] 'a videotaped deposition for possible use at trial.'" *Id.* at 511. The district court also concluded that it would "keep the videotape sealed until such time as it would be played for the jury." *Id.* The Governor's testimony was then "videotaped in the courtroom . . . with only the parties, the district judge, court personnel and the Governor's attorneys in attendance." *Id.* at 505-06. The Associated Press appealed, claiming that "the district court improperly allowed Governor Edgar to testify in private" and asserting that "the Governor's testimony was actually trial testimony that was merely disguised as a Rule 15 deposition." *Id.* at 512. The government disagreed, contending that the district court "properly excluded the public and press from Governor Edgar's deposition" and arguing that, "[u]ntil admitted into the record, potential evidence is not ordinarily within the scope of public access." *Id.* The Seventh Circuit rejected the Associated Press's objection to the closed Rule 15 proceeding. Noting that "it is well established that discovered but not-yet-admitted evidence is not ordinarily within the scope of press access," the Seventh Circuit reasoned that "the taping of the Governor's testimony was permissible pursuant to Rule 15(g) of the Federal Rules of Criminal Procedure," which permits the taking of a potential witness's testimony by deposition upon the agreement of the parties. *Id.* at 512-13. "Under these circumstances, it appears that the district court acted well within its discretion in permitting the

testimony of the Governor to be taken by videotape." *Id.* at 513.

Similarly, in *United States v. McDade*, defendant McDade (a congressman) sought the depositions of two defense witnesses "in order to preserve their testimony for use at trial, should direly ill health or fading memory befall them." *McDade*, 1994 WL 161243 at *1. The district court found that the requisite "exceptional circumstances" had been met and granted defendant's Rule 15 motions. *Id.* at *2. The district court judge additionally suggested that the depositions be videotaped and conducted in his courtroom "with the players situate[d] as at trial." *Id.* at *3. The court also resolved an issue that the parties disagreed on: "whether the depositions should be open to the public." *Id.* Noting that the depositions "will only be offered as substantive evidence at trial if the witnesses become unavailable," the court rejected any suggestion that the Rule 15 depositions were like typical pretrial proceedings. "Unlike situations where a pretrial proceeding is sought to be closed to the public, and only the result revealed after the fact, here, if the deposition testimony is offered, it will be made part of the public record at that time." *Id.* at *3. Additionally, the court reasoned that opening the depositions to the public "would unnecessarily risk tainting the venue and could deprive Congressman McDade or the government . . . of a fair trial." *Id.* "Avoidance of these risks constitutes good cause for restricting public access to the deposition testimony until it is offered at trial." *Id.*

Accordingly, the deposition of [redacted] should remain nonpublic unless and until it is used in a public proceeding.

CONCLUSION

For the foregoing reasons, the Court should order that [redacted] be deposed according to the procedures described above.

Respectfully submitted,

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By: ***/s/ Brittany Keil***

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been served by email upon counsel for the defendant, on July 17, 2025.

/s/ Brittany Keil
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