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**Attorney for Defendant**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF OREGON**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**HAWAZEN SAMEER MOTHAFAR,**

**Defendant.**

**Case No. 3:20-cr-00506-HZ**

**DEFENDANT'S RESPONSE  
TO GOVERNMENT'S  
MOTION TO TAKE  
DEPOSITION PURSUANT TO  
RULE 15 OF THE FEDERAL  
RULES OF CRIMINAL  
PROCEDURE**

**ORAL ARGUMENT  
REQUESTED**

The defendant, Hawazen Sameer Mothafar, through counsel, hereby responds to the government's motion to take a foreign deposition of an Iraqi prisoner, Yasir Al Anzi, pursuant to Rule 15 of the Federal Rules of Criminal Procedure (CR 23). For the reasons stated below, the defense respectfully requests that the Court deny the government's motion.

**I. Background**

The government has charged Mr. Mothafar with two counts of Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. §

2339B(a)(1), one count of Providing or Attempting to Provide Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B(a)(1), one count of making False Statements in an Immigration Application, in violation of 18 U.S.C. § 1546(a), and one count of making a False Statement to a Government Agency, in violation of 18 U.S.C. § 1001(a)(2). CR 1.

Mr. Mothafar made his initial appearance before a magistrate judge on November 5, 2020, and was released on conditions. CR 7-8. Mr. Mothafar remains on pretrial release and is in compliance with all imposed conditions.

On April 4, 2021, the government moved for an order pursuant to Rule 15 that would permit the taking of a deposition of Yasir Al Anzi, who is currently serving a life sentence in Iraq. CR 23. According to the government, Mr. Al Anzi is a “senior ISIS official” (CR 23 at 2) who, in a prior interview with the FBI, allegedly implicated an individual living in the United States that he knew as Abu Ubayda. The government alleges that Mr. Mothafar is Abu Ubayda.

## **II. Applicable Law**

“Depositions generally are disfavored in criminal cases” and can only be authorized to preserve evidence. *United States v. Drogoul*, 1 F.3d 1546, 1551 (11th Cir. 1993). “[F]oreign depositions are suspect and, consequently, not favored,” because of “the absence of procedural protections afforded the parties in the United States.” *Id.*

Nonetheless, Rule 15 of the Federal Rules of Criminal Procedure authorizes a Court to permit a moving party to depose a prospective witness and preserve that testimony for trial because of “exceptional circumstances” and if doing so is in the “interests of justice.” Rule 15(a)(1).

Where, as here, the government seeks to depose a foreign witness without the defendant’s presence, Rule 15 requires the government to make five additional showings:

- (1) The witness's testimony could provide substantial proof of a material fact in a felony prosecution;
- (2) There is a substantial likelihood that the witness's attendance at trial cannot be obtained;
- (3) The witness's presence for a deposition in the United States cannot be obtained;
- (4) The defendant cannot be present because:
  - a. The country where the witness is located will not permit the defendant to attend the deposition;
  - b. For an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
  - c. For an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
- (5) The defendant can meaningfully participate in the deposition through reasonable means.

Rule 15(c)(3).

### **III. Argument**

The government's motion should be denied for two reasons. First, the government has failed to meet Rule 15's standard for when a defendant can be physically excluded from a foreign deposition. Second, the government's proposed method for taking the deposition casts doubt on the need to "preserve" testimony through Rule 15 given that the exact same procedures would be available for live testimony during a trial.

Rule 15 generally requires that a defendant be permitted to physically attend any deposition conducted under that rule. *See* Rule 15(c)(1), (2). However, the rule does provide for a limited exception when a foreign deposition is taken. Rule 15(c)(3). As relevant here, Rule 15(c)(3) only permits an out-of-custody defendant's exclusion from a foreign deposition for two reasons: (1) "the country where the witness is located will not permit the defendant to attend the deposition";

or (2) “no reasonable conditions will assure an appearance at the deposition or at trial or sentencing.” Rule 15(c)(3)(D)(i), (iii). The government has failed to show that either of these conditions has been met.

The government does not appear to rely on the first exception, as its motion does not claim that the Iraqi government “will not permit” Mr. Mothafar’s attendance at the proposed deposition. Instead, the government cites the second exception (CR 23 at 8), but instead of addressing whether “reasonable conditions” could be placed on Mr. Mothafar to assure his appearance at a deposition or future court hearings, the government relies on the alleged conditions in Iraq to argue that his presence (and that of his attorney) should be waived. The cases relied on by the government to avoid the clear text of Rule 15 do not support its argument.

Indeed, the government does not cite any cases that simply ignore Rule 15(c)’s requirement that a defendant has a right to attend a deposition unless one of the enumerated exceptions apply. The government does cite three cases where courts found that excluding a defendant would not violate the Confrontation Clause (CR 23 at 9), but all three of those cases involved a finding that one of the three Rule 15 exceptions applied. For example, in *United States v. McKeeve*, 131 F.3d 1 (1st Cir. 1997) and *United States v. Medjuck*, 156 F.3d 916 (9th Cir. 1998), the defendants were in custody and “secure transportation and continuing custody” was not possible with respect to traveling to a foreign country, so the Rule 15(c)(3)(ii) exception for in-custody defendant’s applied. In *United States v. Cooper*, 947 F.Supp.2d 108 (D.D.C. 2013), like here, the defendant was out-of-custody so only Rule 15(c)(3)(i) or (iii) could apply. As shown in an earlier opinion, the court in *Cooper* relied on the third exception because the defendant expressly stated that he could not be present at the foreign deposition because he feared “arrest, incarceration, or bodily harm” should he travel to that country. *United States v. Cooper*, 1:12-cr-00211-ABJ (D.D.C., CR

20 at 2, Dec. 28, 2012). Thus, the court found that no conditions could assure the defendant's appearance at the deposition. *Id.*

Here, in contrast, the government relies on its own travel advisories and State Department policy about limiting the number of U.S. personnel in Iraq to argue that Mr. Mothafar and his attorney should not be permitted to attend the Rule 15 deposition in person. The government acknowledges "the unusual nature of its request" and seeks support from *United States v. Hayat*, 2017 WL 6539610 (E.D. Cal. 2017), which discusses the risks of traveling to Pakistan being alleviated by the option of a video deposition. However, *Hayat* is unhelpful to the government as the petitioner in that case (an inmate filing for collateral relief), was the one seeking the deposition and had offered to do so by video conferencing. In other words, to the extent that that inmate could avail himself of the procedural protections for a defendant set forth in Rule 15, he had willingly waived them. That is not the case here.

In addition to failing to meet the clear standard of Rule 15's requirement regarding a defendant's right to be present, the government's proposed method of conducting the deposition casts doubt on whether "exceptional circumstances" exist and whether the "interests of justice" support the proposed deposition. The purpose of Rule 15 is to "preserve testimony for trial." Rule 15(a). This focus on "preservation" presupposes that a prospective witness's testimony, and the method by which the testimony would be given, cannot occur during a trial. If it could, there would be no need to "preserve" anything.

The government does not allege that Mr. Al Anzi's testimony must be preserved because he is ill and would possibly not be alive during the trial in this case. Nor does the government suggest that he might flee or otherwise be rendered physically unavailable to appear. Based on the proceedings in another federal prosecution involving Mr. Al Anzi's testimony (CR 23 at 6-7) and

the affidavit attached to the Rule 15 motion here, the Iraqi government appears to be willing to make Mr. Al Anzi available whenever the U.S. government so requests. Indeed, nowhere in the government's motion does it claim that the Iraqi government would not make Mr. Al Anzi available to testify by video at Mr. Mothafar's trial.

Given the government's proposed arrangements for taking the Rule 15 deposition, it is unclear why it should be permitted to take advantage of an early deposition rather than relying on live video testimony at trial. Indeed, in other cases the government has moved alternatively for either a Rule 15 deposition or live testimony via CCTV. *See, e.g., United States v. Mostafa*, 14 F.Supp.3d 515 (S.D.N.Y. 2014). In *Mostafa*, the court approved of live CCTV testimony where the defendant, while objecting to both a Rule 15 deposition and live CCTV testimony, expressly stated a preference for CCTV should the court permit any remote testimony by the proposed witness. *Id.* at 519 n.2. The court ultimately fashioned a live CCTV procedure that largely mimicked what would occur during live, in-person testimony—the cameras were to be “positioned such that the jury can see [the witness's] face at all times and such that [the witness] can see the faces of the jurors, defendant, and the questioner as he testifies, as he would in a courtroom.” *Id.* at 525.

Mr. Mothafar takes the same position here as the *Mostafa* defendant did; although he anticipates objecting to any testimony by Mr. Al Anzi based on reliability grounds—which would be raised in a pretrial motion in limine—should the Court allow any remote testimony, the defense requests that it be limited to live testimony via CCTV during trial. Given that there appears to be no impediment to that occurring, the defense objects to the government's Rule 15 motion as unwarranted because there are no exceptional circumstances demonstrating the need to “preserve”

any testimony, and the interest of justice do not support a deposition where the exact same testimony can occur at trial.

As noted, the defense position is that the Court should deny the government's Rule 15 motion because there is no applicable exception that would permit Mr. Mothafar and his attorney's physical exclusion from the deposition. Alternatively, the defense respectfully requests that the Court deny the motion (at least at this point) because it appears that Mr. Al Anzi is available to testify at trial via the exact same procedures the government proposes are used for the deposition.

Respectfully submitted this 23rd day of August, 2021.

/s/ Mark Ahlemeyer  
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