UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v. - :

S14 98 Cr. 1023 (LAK)

SULAIMAN ABU GHAYTH, :
a/k/a "Salman Abu Ghayth,"

:

Defendant.

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**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO OFFER THE TESTIMONY OF WITNESS VIA LIVE CLOSED-CIRCUIT VIDEO DURING TRIAL OR, IN THE ALTERNATIVE, FOR HIS DEPOSITION PURSUANT TO RULE 15**

The Government submits this memorandum of law in opposition to the defendant's motion to offer the testimony of a witness via live, closed-circuit video during trial or, in the alternative, for his deposition pursuant to Rule 15 (the "Motion"), filed on March 16, 2014 by defendant Sulaiman Abu Ghayth. The Motion requests permission to offer the video testimony of Khalid Sheikh Mohammed, or to depose Mohammed pursuant to Federal Rule of Criminal Procedure 15.

The Court should deny the Motion for the reasons set forth below. First, the Motion is procedurally barred. The defendant does not even attempt to show cause for the Motion's utterly extraordinary untimeliness. And the defendant cannot begin to show prejudice that would flow from the Court's declining to excuse that untimeliness. See infra Part I.C-.D. Second, the Motion wholly and unambiguously fails on the merits. This is for a simple reason: Mohammed has flatly and definitively refused to testify. Ordering a deposition of him is

accordingly a waste of time. And it is perfectly obvious that a deposition in which the proposed deponent does not testify cannot be expected to produce the "material" testimony that is the legal pre-requisite of a Rule 15 deposition. See infra Part II.

## I. The Motion Should Be Denied as Procedurally Barred

The Court set February 26, 2014 as the deadline for the filing of any Rule 15 motion. Transcript of Feb. 19, 2014, at 14. The defendant has now filed his Motion more than two and a half weeks after that deadline—two weeks into trial and days after the Government has rested. It is untimely. The defendant does not even try to explain, or to establish cause for, the Motion's untimeliness. Moreover, the defendant cannot establish prejudice because Mohammed has flatly said that he will not testify on the defendant's behalf. See Exhibit B to the Motion, at 1. The Court therefore should deny the Motion as procedurally barred.

### A. Applicable Law

The Federal Rules of Criminal Procedure provide that the failure to meet a motion deadline constitutes a waiver. Fed. R. Crim. P. 12(c), 12(e). The Court "may grant relief from the waiver upon a showing of (1) cause for the defendant's non-compliance, and (2) actual prejudice arising from the waiver." United States v. Howard, 998 F.2d 42, 52 (2d Cir. 1993); see also United States v. Forrester, 60 F.3d 52, 59 (2d Cir. 1995).

### B. Background

The defendant made his initial motion for in-person access to Mohammed on February 4, 2014. See Docket Entry 1468. At that time, the trial was scheduled to commence less than three weeks later, on February 24. See Order dated Jan. 8, 2014 (Docket Entry 1440). On February 11, the Government informed the defendant that the requested interview of Mohammed could go forward subject to enumerated conditions (and arranged for cleared counsel to travel to

travel to Guantanamo Bay on February 16, five days later). See Gov't Ltr. dated Feb. 17, 2014 (Docket Entry 1512).

On February 14—three days after approval of the defendant's request for in-person access—the defendant informed the Government that he had now changed his mind, and preferred to proceed by providing written questions to Mohammad. From there it was another three days—before the defendant, on Saturday, February 15 at 9:45 p.m., and again at 8:40 p.m. on Sunday, February 16, began providing questions. There were literally hundreds upon hundreds of questions. Id. The defendant's written questions were approved by the appropriate government agencies and available to Mohammed before 4:00 p.m. on February 18, 2014. See Transcript of Feb. 19, 2014 ("Feb. 19 Tr.") at 6. (Monday, February 17 was a federal holiday.) During this time, the trial was scheduled to commence on February 24, 2014. See Order dated Jan. 8, 2014 (Docket Entry 1440).

In his motion for a trial adjournment filed on February 18, 2014, the defendant estimated that it would take "some four days" for the questions to be presented to Mohammed and answered. Def. Mtn. to Continue, filed on Feb. 18, 2014, at 12. By letter on the same day, February 18, the Government consented to a one-week adjournment of the trial date (from February 24 to March 3) for the sole purpose of giving the defendant every opportunity—well beyond what was legally necessary—to communicate with Mohammed. See Gov't Ltr. dated February 18, 2014 at 3 (Docket Entry 1513). On February 19, the Court set a deadline of February 26, 2014 for the filing of any Rule 15 motion. See Feb. 19 Tr. at 14. The Court also issued an Order setting forth the agreed-upon conditions for handling the questions. See Order dated Feb. 19, 2014 (Docket Entry 1494) ("Feb. 19 Order").

After all this, Mohammed refused to provide his answers to the appropriate government agencies for classification review until approximately Thursday, March 6, 2014—more than two weeks after the questions were available to Mohammed. See Transcript of Feb. 28, 2014; Transcript of Mar. 6, 2014, at 119-120. Mohammed's refusal to hand over the answers was apparently due to a demand he was making regarding an additional condition that was not set forth in the Court's Feb. 19 Order. *See* Transcript of February 28, 2014. The Court and the Government learned of this requested additional condition on February 27 and 28, respectively. But the defendant, *see* infra at 6-7, had long been aware of that requested additional condition—indeed, from the day that the Court entered its February 19 Order. Ultimately, Mohammed's answers were provided to walled-off Government personnel on the evening of March 6, 2014. All of Mohammed's answers, in complete, unredacted, unclassified form, were given to the defendant on the morning of March 13, 2014. See Transcript of Mar. 13, 2014 at 781.

On Friday, March 14, 2014, the defendant told the Court that he would file the Motion at "latest first thing Sunday morning." Transcript of March 14, 2014 at 1014 ("[T]he earliest would be . . . by sometime early tomorrow afternoon [March 15, 2014], the latest first thing Sunday morning"). That would have been "first thing" on the morning of March 16, 2014. The defendant missed even that self-imposed deadline, filing his Motion a little before 8:00 p.m. yesterday—over three days after he had received Mohammed's answers.

**C. The Defendant Cannot Establish Cause for the Motion's Untimeliness**

In the Motion, the defendant does not even attempt to explain the reasons for the Motion's untimeliness, much less show good cause for that delay. This is because he cannot.

The defendant first asked the U.S. Department of Defense ("DoD") for in-person access to a number of detainees held at Guantanamo Bay—which list presumably included

Mohammed—on December 20, 2013. See Decl. of Stanley L. Cohen dated Feb. 3, 2014 & Exh. D thereto. The defendant cannot explain or account for his delay in contacting the DoD. As of the time of his arrest on March 1, 2013, the defendant—like much of the world—knew that Mohammed existed and was being held in Guantanamo Bay. The defendant could have sought access to Mohammed at that time, in the spring or summer of 2013, to determine whether Mohammed had any information that might exculpate him. However, the defendant waited until December 2013 to contact the DoD regarding Mohammed. Notwithstanding trial adjournment-after-adjournment, this Motion is being made when it is—during trial, after the Government has rested—for the simple reason that the defendant inexplicably waited until the last minute (indeed, well past the last minute) to file a motion which, obvious to all, could very well prove time consuming to resolve. Given that inexcusable delay, the defendant cannot now show cause for missing the Court's oft-enlarged deadline to file the Motion.[1]

In addition, even after contacting the DoD, the defendant caused extensive delays throughout the process. As mentioned above, the defendant made his initial motion for in-person access to Mohammed on February 4, 2014. See Docket Entry 1468. Just one week later, on February 11, the Government informed the defendant that the requested interview of Mohammed could go forward subject to enumerated conditions, and arranged for cleared counsel to travel to Guantanamo Bay on February 16—thereby providing access less than two weeks after the defendant had filed his motion. See Gov't Ltr. dated Feb. 17, 2014 (Docket Entry 1512).

On February 14—three days after approval of the defendant's request for access—the defendant informed the Government that he preferred to proceed by written

[1] In United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004), the defendant, Zacarias Moussaoui, moved for access to individuals detained at Guantanamo Bay. There, the District Court entered two orders directing that Moussaoui be granted access to individuals detained at Guantanamo Bay. See United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D.V.A. 2003). It took nearly three months from the entry of the latter order until the Court of Appeals affirmed, in part, vacated, in part, and remanded. See Moussaoui, 365 F.3d at 317. That decision, of course, led to still more litigation.

questions to Mohammad. Id. Again, the Government obliged. But it took the defendant until the night of February 16—a Sunday night before a federal holiday on Monday—to provide all of its hundreds of requested questions to walled-off Government personnel. Nevertheless, the defendant's written questions were approved in their entirety and made available to Mohammed before 4:00 p.m. on February 18, 2014—less than two days later.

The complexities associated with responding to the defendant's shifting requests for access to Mohammed cannot be understated. Moreover, even though access was not warranted, even though the defendant presented multiple, different requests for access, even though responding to the defendant's requests was extremely time consuming, and even though the defendant made these requests inexcusably late, the Government still complied before trial with each of the defendant's requests. And, based on the defendant's assertion that Mohammed's responses would take about four days to complete, it appeared to all that due to the Government's responsiveness, the defendant would—notwithstanding all of this—be able to file his Rule 15 motion before the Court's February 26 deadline.

But more delay was to follow. Mohammed, through counsel, refused to provide his answer to the appropriate government agencies for classification review until approximately Thursday, March 6, 2014—more than two weeks after the questions were available to Mohammed. See Transcript of Feb. 28, 2014 ("Feb. 28 Tr."); Transcript of Mar. 6, 2014, at 119-120. This delay was due to Mohammed's requirement that his military prosecutors be walled-off from the Government personnel who reviewed the answers. The defendant's counsel knew of that requirement no later than February 19, 2014, the same day the Court entered a consent order

setting out the conditions governing the submission of questions and review of answers. The Government did not learn of Mohammed's requirement until February 27, 2014.[2]

Ultimately, and as described above, Mohammed relented, and his answers were provided to walled-off Government personnel on the evening of March 6, 2014. A little over six days later, Mohammed's answers, in complete, unredacted, unclassified form, were given to the defendant on the morning of March 13. See Transcript of Mar. 13, 2014 at 781. Over three days later—last night just before 8:00 p.m.—the defendant finally filed the Motion, two weeks into trial and two days after the Government rested.

Throughout this process, the Government has made abundant effort to accommodate the defendant's requests in connection with Mohammed—agreeing to an interview, and then the submission of questions, even as neither was legally necessary, and even as the defendant's February 4, 2014 motion on this score was itself made so very late. To further accommodate the defendant's requests with respect to Mohammed, the Government consented to one adjournment of the trial. And the Government refrained, until February 28, 2014—one business day before trial—from pressing the argument that the defendant, by missing the Court's deadline for a Rule 15 motion, had forfeited his right to make such a motion.

The Motion has been filed extraordinarily late. Twenty days late; long after Jeopardy has attached; after the Government has rested; and at a time when Rule 15 litigation can be accommodated only by what would inevitably amount to a long mid-trial adjournment, at a point when there is in fact only a few more hours of trial testimony to come at most. The

[2] At a pretrial conference on February 28, 2014, the Court asked defense counsel whether "on February 19," Mohammed's attorney "conveyed to the defense counsel, you, I take it, in writing, that walling off military prosecutors was a necessary precondition to Mohammed's answering any written questions. Is that true?" Feb. 28 Tr. at 3. Defense counsel said that it was true. Id. The Court made clear that defense counsel had "never previously informed me of that. . . . I do not consider the failure to provide the Court with that information for the last nine days to have been very helpful at all." Id. at 7-8. Stressing lawyers' "duty of candor to courts," the Court concluded that defense counsel "should have told me." Id. at 8.

defendant has shown no "cause" for his very late filing of the Motion and, as set forth above, he cannot do so. Under a well-established body of law—see generally United States v. Yu–Leung, 51 F.3d 1116, 1122 (2d Cir.1995); United States v. Yousef, 327 F.3d 56, 125 (2d Cir. 2003); Forrester, 60 F.3d at 59; Howard, 998 F.2d at 52—that is fatal to the defendant's badly belated Motion.

**D. The Defendant Cannot Establish Prejudice**

Moreover, the defendant cannot establish that he will be prejudiced if the Court declines to relieve the defendant of the procedural default. The only possible prejudice to the defendant would be his inability to call or depose Mohammed, but Mohammed has flatly refused to testify on the defendant's behalf. Indeed, Mohammed could not have been clearer on that point: "Therefore, [Abu Ghayth] should know in advance that I will not agree to give any video or audio recorded testimony at the request of the government or the defense. These answers should suffice." Exhibit B to the Motion, at 1.

Mohammed's refusal is simple and explicit. And the defendant's attorney-declaration—which mischaracterizes the statement as Mohammed "indicat[ing] that he is hesitant to testify in the ongoing trial of Mr. Abu Ghayth," Cohen Decl. to the Motion ¶ 11—undercuts that refusal not at all. Defense counsel's bald assertion that, according to Mohammed's lawyer, the Motion will "dispel[]" Mohammed's "misgivings . . . and he will thereafter stand ready, willing and able to appear on behalf of Abu Ghayth with regard to the subject matters set forth in his written declaration," id. ¶ 13, is rank speculation, unsupported by anything in Mohammed's answers. Indeed, Mohammed's position is plain: He will not testify. And defense counsel's baseless assertion, set out only in an attorney affidavit, is further undermined in light of the fact that—despite frequent contact with Mohammed's attorney, see Cohen Decl. to the

Motion ¶¶ 6-13, and many months of focus on Mohammed, see supra at 2-3; see generally Cohen Decl. to the Motion; Def. Mem of Law at 4—the defendant is, even today, unable to proffer that Mohammed would testify even if the trial were adjourned for a deposition. This is dispositive.

As the defendant cannot succeed on the Motion—because he has no witness—he cannot establish that he will be prejudiced if the Court declines to relieve the defendant of the procedural default. His Motion is little more than an attempt to delay the trial after Jeopardy has attached and it should be denied as procedurally barred.[3]

## II. The Motion Fails on the Merits

In any event, even if the Court were to reach the Motion's merits, it should be denied. The defendant cannot carry his burden of showing that a Rule 15 deposition of Mohammed would result in material, exculpatory testimony, because Mohammed has said emphatically that he will not testify.

### A. Applicable Law

Rule 15 authorizes a party to "move that a prospective witness be deposed in order to preserve testimony for trial," and a "court may grant the motion because of exceptional circumstances and in the interest of justice." Fed. R. Crim. P. 15(a)(1). In this Circuit, it has been "well-settled" for 30 years that "the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness' testimony is material to the case and if the

[3] Granting the Motion will, however, result in prejudice to the Government. A jury is empaneled and Jeopardy has attached. Granting the Motion would result in a significant adjournment after the Government has concluded its case-in-chief. As anyone who has tried cases knows, this would cause immense prejudice to the Government in any number of ways. In addition, it could result in the introduction of testimony that neither party had the opportunity to prepare for or open on. By establishing a pretrial deadline for Rule 15 motions, the Court allotted time for their pretrial resolution, to allow both parties to shape their addresses and presentation of proof in light of the Court's ruling. That is now wholly impossible, and the Government's inability to front any potential testimony from Mohammed or explain it to the jury in opening would certainly inure to its detriment. Accordingly, among many other things, granting the Motion is emphatically not "in the interest of justice." Fed. R. Crim. P. 15(a)(1).

witness is unavailable to appear at trial." United States v. Johnpoll, 739 F.2d 702, 709 (2d Cir. 1984). The burden of satisfying the Johnpoll test is on the party seeking a Rule 15 deposition. United States v. Whiting, 308 F.2d 537, 541 (2d Cir. 1962); see also United States v. Kelley, 36 F.3d 1118, 1124 (D.C. Cir. 1994). "The decision to grant or deny a motion to take a deposition rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion." Johnpoll, 739 F.2d at 708.

The first prong of the Johnpoll inquiry is the materiality prong. Id. at 709. Materiality is a fact-based inquiry that turns on the relevance of the proposed testimony to the elements of the charged crimes. See, e.g., United States v. Cohen, 260 F.3d 68, 78 (2d Cir. 2001) (holding that the proposed testimony not material because it was not relevant to the question of the defendant's guilt or innocence); Johnpoll, 739 F.2d at 709.

When a defendant makes a motion for a Rule 15 deposition, he must typically show, beyond "unsubstantiated speculation," that the testimony sought "exculpates the defendant." Kelley, 36 F.3d at 1125 (affirming denial of depositions where anticipated testimony, although relevant, was not exculpatory) (internal quotation marks and citation omitted); United States v. Merritt, No. 90 Cr. 767 (JSM), 1991 WL 79235, at *5 (S.D.N.Y. May 7, 1991) (denying Rule 15 deposition request where "the defendants have made no showing that the deponents' testimony would be exculpatory"); United States v. Esquivel, 755 F. Supp. 434, 439 (D.D.C. 1990) ("[A] defendant typically demonstrates the 'exceptional circumstances' necessary for success on a Rule 15(a) motion by some preliminary showing that the testimony will exculpate him."). The moving party must do more than show that the testimony sought is relevant to the case. United States v. Ismaili, 828 F.2d 153, 161 & n.6 (3d Cir. 1987) (holding that a district court cannot abuse its discretion in denying a Rule 15 deposition where the

testimony "could not negate the crux of the government's indictment"). Moreover, a Rule 15 motion should be denied if it seeks to take testimony that is cumulative, United States v. Stein, 482 F. Supp. 2d 360, 365 (S.D.N.Y. 2007) (citing United States v. Grossman, No. S2 03 Cr. 1156 (SHS), 2005 WL 486735, at *3 (S.D.N.Y. Mar. 2, 2005)), or that is inadmissible, Grossman, 2005 WL 486735, at *3.[4]

**B. The Defendant Cannot Carry His Burden Because He Has No Witness**

The defendant's Motion fails categorically on the merits. The defendant simply cannot satisfy his burden to show that the evidence he seeks to introduce via a Rule 15 deposition would be material. See Whiting, 308 F.2d 537, 541 (2d Cir. 1962) (holding that the burden of demonstrating exceptional circumstances is on the party seeking a Rule 15 deposition). Mohammed's proffered testimony is not material because there is no testimony; Mohammed has explicitly said that he will not testify. See supra Part I.D. *A fortiori*, then, the proffered "testimony" cannot "exculpate[] the defendant," Kelley, 36 F.3d 1118, 1125 (D.C. Cir. 1994), because there is no proffered testimony. There is no proffered evidence. There is no basis for a Rule 15 motion as there is nothing that—even if the Motion were granted—would be put before the jury. The Court therefore should deny the Motion on the merits.[5]

[4] The second prong of the Johnpoll inquiry is the unavailability prong. 739 F.2d at 709. The Government concedes that Mohammed is unavailable.

[5] Indeed, even if Mohammed was willing to testify, the defendant has failed to establish the materiality and admissibility of Mohammed's testimony. First, the witness proffers no first-hand knowledge of the defendant, failing to note a single instance in which he had personal contact with the defendant. See generally Exhibit B to the Motion; see also id. at 1, 2. Second, the witness says that he cannot provide any information about al Qaeda's training camps in Afghanistan -- a central component of the Government's proof -- because he was stationed elsewhere. See id. at 1-2. And finally, the witness acknowledges that his testimony about other "extensive areas" relating to al Qaeda would not be based on personal knowledge but presumably on hearsay. See id. at 2.

Two other points bear brief mention. First, the defendant already has FBI interview reports of Mohammed, produced by the Government. In those reports, Mohammed has described the defendant as having a senior position in al Qaeda. Unsworn assertions—with no realistic possibility that these assertions will be followed by sworn testimony—is what Mohammed is today offering; those are, as always, insufficiently reliable. Second, Mohammed has maintained that he first became involved in any way in the al Qaeda airplanes bomb plot in November 2001,

## III. Conclusion

For all of the foregoing reasons, the Court should deny the Motion as procedurally barred and on the merits.

Dated: New York, New York
March 17, 2013

Respectfully submitted,

PREET BHARARA
United States Attorney

By: /s/ MICHAEL FERRARA
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only after he (Mohammed) was forced to become involved in the plot following the death of a senior al Qaeda plotter, Abu Hafs al-Masri. What Mohammed knew or did not know starting in November 2001 about who in al Qaeda had been previously made aware of the airplanes plot—before Mohammed himself became aware of the plot—is hearsay and sheds precious little light on the question of the defendant's knowledge of the plot more than a month earlier, when the defendant repeatedly threatened a "storm of airplanes."

**AFFIRMATION OF SERVICE**

NICHOLAS LEWIN, pursuant to 28 U.S.C. § 1746, hereby declares under the penalty of perjury:

I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York. On March 17, 2014, I caused copies of the foregoing memorandum of law in opposition to the defendant's motion to offer the testimony of a witness via live, closed-circuit video during trial or, in the alternative, for his deposition pursuant to Rule 15 to be delivered by ECF and email to Stanley L. Cohen, Esq. (at stanleycohenlaw@verizon.net), Geoffrey S. Stewart, Esq. (at gstewart.defender@gmail.com), and Zoe J. Dolan, Esq. (at zdolan@gmail.com).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: New York, New York
March 17, 2014

/s/ Nicholas J. Lewin
Nicholas J. Lewin
Assistant United States Attorney