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Attorneys for the United States

UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

v.

KATHERINE KEALOHA, et al.,

Defendants.

Cr. No. 17-00582 JMS-RLP

UNITED STATES' MOTION FOR  
RULE 15 DEPOSITION

The United States, by and through its counsel, hereby moves the Court for an order authorizing the prompt deposition of material witness Florence Puana. Because this witness may be unavailable to testify at trial, and is willing to sit for a deposition, this Court should exercise its discretion to order that her deposition be taken no later than April 26, 2019.

I.

FACTUAL SUMMARY

1. Florence Puana (“Florence”) is a victim and key government witness in this case. Her testimony is central to establishing one of the motives behind the charged conspiracy, i.e., the Kealohas’ theft of Florence’s funds. After Florence confronted Katherine Kealoha with her fraud and deceit, Katherine Kealoha warned Florence that she would “seek the highest form of legal retribution against ANYONE and EVERYONE who has written or verbally uttered those LIES about me!” *See* ECF No. 389 at 11-12. Katherine Kealoha kept this promise of seeking retribution by moving to have Florence declared an “incapacitated person,” shortly before Florence’s civil lawsuit against Kealoha was scheduled to commence.

Beyond this motive evidence, Florence is also a witness to facts and circumstances leading up to the staged mailbox theft on June 21, 2013. In short, Florence’s testimony is necessary and critical to the United States’ trial presentation. According to counsel for Florence, she is willing to sit for a deposition at this time. *See* Declaration of Counsel at 2.

2. During Gerard Puana’s prior federal criminal case, *see United States v. Puana*, Case No. CR-13-00735-LEK, Gerard Puana’s defense attorney moved for Florence’s deposition. At that point, the basis was as follows:

The reason the defense seeks to depose Mrs. Puana is because her health condition is apparently rapidly deteriorating. Per her son-in-law, Rick

Hartsell, she is 94 years old and is suffering a heart valve issue. She was in the Castle Medical Center's Emergency Room on July 11, 2014. While she was released, she may have to undergo surgery for the heart valve condition. The reality is that by the time trial is had, given her advanced age and serious health issues, she may be unavailable.

*Id.* at ECF No. 122 at 5.<sup>1</sup> The motion for deposition was unopposed, and the Court thereafter ordered Florence's deposition. *Id.* at ECF No. 127.<sup>2</sup>

Now, Florence is 99 years old, and her health problems have not disappeared. Indeed, counsel for Florence has advised the United States that she was hospitalized again this week. *See* Declaration of Counsel. Although jury selection is scheduled to commence on May 13, 2019, testimony will not begin before than May 23, and will continue through at least the end of June 2019. Defendants have sought and obtained continuances of the trial date several times before, and recent developments have raised further questions as to the timeline of the case.<sup>3</sup>

## II.

### THE COURT SHOULD AUTHORIZE A RULE 15 DEPOSITION

1. Under Rule 15(a) of the Federal Rules of Criminal Procedure, "[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

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<sup>1</sup> This document is contained in discovery at Bates No. KEALOHA-13CR0735-PUANA-00184.

<sup>2</sup> Bates No. KEALOHA-13CR0735-PUANA-00196.

<sup>3</sup> *See, e.g.*, ECF Nos. 505, 506 (including sealed Exhibit A); ECF No. 515.

the interest of justice.” Fed. R. Civ. P. 15(a). “Rule 15(a) allows the district court broad discretion in deciding whether to order depositions in a criminal case[.]” *United States v. Olafson*, 213 F.3d 435, 442 (9th Cir. 2000). “[T]he facts of each case must be separately considered to determine whether the exceptional circumstances contemplated by Rule 15(a) exist[.]” *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1569 (9th Cir. 1989).

The Ninth Circuit has held that deposing an ill witness to “preserve [his testimony] and have it for trial . . . is within the contemplation of the Rule.” *Furlow v. United States*, 644 F.2d 764, 767 (9th Cir. 1981) (finding no abuse of discretion where district court permitted deposition of fraud victim who was under VA disability and unable to attend trial); *see also United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984) (holding that government witnesses who were “of advanced age,” “suffered from physical infirmities,” and could not attend trial constituted “exceptional circumstances” and that taking their depositions under Rule 15 was in the “interest of justice”).

Significantly, the moving party under Rule 15 need not conclusively show a witness is unavailable for a deposition to be ordered. “It would be unreasonable and undesirable to require the government to 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). As the

Eleventh Circuit has stated, “[w]hen 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. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993); *see also United States v. Podell*, 369 F. Supp. 151, 153 (S.D.N.Y. 1974) (“Their precarious health, and in addition Waldman’s age, render their presence in New York to testify at trial very doubtful, and indeed, early deposition may be the only insurance the government has to preserve the testimony of these two key witnesses.”).

Here, as a matter of “simple fairness,” given her advanced age and current health status, the interests of justice favor ordering the deposition of Florence Puana. These are exceptional circumstances under which the Court may reasonably exercise its discretion to order a prompt deposition.<sup>4</sup> Although jury selection is scheduled to begin May 13, 2019, there is good cause to set the deposition within the next thirty days to maximize the likelihood that Florence’s testimony will be preserved for this criminal trial.

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<sup>4</sup> The question of *admissibility* of the deposition transcript is a separate matter. *See, e.g., Sines*, 761 F.2d at 1438. The present motion simply seeks to preserve Florence’s testimony in the event she is unavailable at trial.

III.

CONCLUSION

Based on the foregoing, the United States requests an order directing the deposition of Florence Puana by April 26, 2019.

Dated: March 27, 2019.

Respectfully submitted,

WILLIAM P. BARR  
United States Attorney General

ROBERT S. BREWER, JR.  
United States Attorney

/s/ Colin M. McDonald

MICHAEL G. WHEAT

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CR. NO. 17-00582 JMS-RLP  
CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Colin M. McDonald, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, CA 92101-8893.

I am not a party to the above-entitled action. I have caused service of the foregoing on all parties in this case by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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

Executed on March 27, 2019.

/s/ Colin M. McDonald  
COLIN M. MCDONALD

WILLIAM P. BARR  
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ROBERT S. BREWER, Jr.  
United States Attorney  
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DECLARATION OF SPECIAL  
ATTORNEY MICHAEL G. WHEAT

1. My name is Michael Wheat, and I am a Special Attorney to the Attorney General assigned to this matter, and an Assistant United States Attorney in the Southern District of California.

2. I have spoken with counsel for Florence Puana, who advised that Ms. Puana was hospitalized this week with a serious medical condition. Counsel further



advised that although Ms. Puana is 99 years old and in poor health, she is willing to sit for a deposition within the next 30 days.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my belief. Executed on this 27<sup>th</sup> day of March, 2019.



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MICHAEL G. WHEAT  
Special Attorney