

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA        )  
  )  
                  v.                        )        1:12-cr-00160-JAW  
  )  
MALCOLM A. FRENCH, et al.        )

**ORDER OVERRULING MALCOLM FRENCH’S OBJECTION TO THE  
MAGISTRATE JUDGE’S ORDER REGARDING DEPOSITION**

In this marijuana production and harboring of illegal aliens case, the Government requests a Rule 15(a) deposition of one of the illegal aliens allegedly harbored by the Defendants. The Court affirms the Magistrate Judge’s Order authorizing the deposition.

**I. PROCEDURAL HISTORY**

On September 14, 2012, a federal grand jury indicted Malcolm A. French and five other Defendants for an alleged marijuana growing conspiracy and harboring illegal aliens. *Indictment* (ECF No. 2). On February 20, 2013, the United States moved for leave of court to depose a prospective witness. *Mot. for Leave to Depose Prospective Witness* (ECF No. 86) (*Gov’t’s Mot.*). On March 8, 2013, Malcolm A. French opposed the Government’s motion. *Def. Malcolm French’s Mem. in Opp’n to the Gov’t’s Mot. for Leave to Depose Prospective Witness* (ECF No. 96) (*French Opp’n*). Defendants Robert Berg, Rodney Russell, and Haynes Timberland, Inc., subsequently joined Mr. French’s memorandum in opposition. *Def. Robert Berg’s Joinder in Def. Malcolm French’s Mem. in Opp’n* (ECF No. 98); *Def. Rodney*

*Russell's Joinder in Def. Malcolm French's Mem. in Opp'n* (ECF No. 101); *Def.'s Haynes Timberland, Inc.'s Joinder in Def. Malcolm French's Mem. in Opp'n to Gov't's Mot. for Leave to Depose Prospective Witness* (ECF No. 102). Defendant Kendall Chase did not oppose the Government's motion. *Notice of Def., Kendall Chase, Not to Oppose Dep. Req. by Gov't* (ECF No. 104). Defendant Moises Soto has not taken a position the Government's motion.<sup>1</sup>

On March 22, 2013, the Magistrate Judge issued an Order granting the Government's motion. *Order* (ECF No. 114) (*Order*). Pursuant to that Order, on April 4, 2013, the Government filed a Notice to Take Oral Deposition, scheduling the deposition before this Judge on Tuesday, May 14, 2013. *Notice to Take Oral Dep.* (ECF No. 126) (*Dep. Notice*). On April 5, 2013, Mr. French objected to the Magistrate Judge's Order, *Def. Malcolm French's Objection to the Magistrate [Judge's] Order Regarding Dep.* (ECF No. 127) (*French Objection*), and on April 9, 2013, the Government responded. *Gov't's Resp. to Def.'s Objections to the Magistrate[] [Judge's] Order Regarding Dep.* (ECF No. 129) (*Gov't's Resp.*).

## **II. THE PARTIES' POSITIONS AND THE MAGISTRATE JUDGE'S ORDER**

### **A. The Government's Motion**

---

<sup>1</sup> Mr. Soto had not been arrested when the Government filed its motion and when the other Defendants filed their positions. He was arrested on March 15, 2013 in the Southern District of Texas and made an initial appearance in this Court and was detained on April 22, 2013. *Minute Entry* (ECF No. 132).

In its motion, the Government requested permission to take a videotaped deposition of Martin Roblero, a cooperating witness.<sup>2</sup> *Gov't's Mot.* at 1. The Government said that Mr. Roblero is an illegal Mexican alien who was working in what it says was the Defendants' marijuana grow in Washington County, Maine. *Id.* at 2. The Government said that Mr. Roblero was present at the grow site in the summer of 2009, when a law enforcement aircraft flew overhead and discovered the marijuana grow operation. *Id.* Mr. Roblero would testify that he as well as other people who were working on the marijuana operation fled the area as the airplane flew overhead. *Id.*

After this incident, Mr. Roblero was, according to the Government, "spirited out of Maine" and ended up in the Indianapolis area, where he was arrested and convicted for child molestation. *Id.* Mr. Roblero testified before the federal grand jury that ultimately handed down the indictments in this case. *Id.* The Government represented that Mr. Roblero was likely to be released from his state sentence on March 3, 2013, and that he was likely to be deported to Mexico upon completion of his sentence. *Id.* at 2-3.

Claiming "exceptional circumstances" and the "interest of justice," the Government asked for permission to depose Mr. Roblero under Rule 15 of the Federal Rules of Criminal Procedure. *Id.* at 3 (citing FED. R. CRIM. P. 15(a)).

## **B. Malcolm French's Opposition**

---

<sup>2</sup> The Government's motion referred only to a cooperating witness. *Gov't's Mot.* at 1. Since then, however, the Government has revealed that the cooperating witness is Martin Roblero. *Dep. Notice.*

Noting that the use of depositions in lieu of trial testimony is disfavored in criminal cases, Mr. French worried that Mr. Roblero would be deposed in Indiana and “whisked away to Mexico after giving his testimony, never to return again,” and would have “no fear of being prosecuted or punished for committing perjury” and a “built-in incentive to curry favor with the Government.” *French Opp’n* at 2. Mr. French objected to the Government’s demand that the Court and defense counsel “scurry about to make efforts to ameliorate the effects of the Government’s own actions and delay in securing the testimony of a witness the Government itself is removing from the [C]ountry.” *Id.* at 3. Mr. French asserted that “the Government can just as easily detain [Mr. Roblero] until the time of trial and transport him to Maine.” *Id.*

Next, Mr. French contended that the Government had failed to demonstrate that Mr. Roblero was going to be “absent from the trial or hearing” and that the “statement’s proponent has not been able, by process or other reasonable means, to procure . . . [a] declarant’s attendance.” *Id.* at 3-4 (citing FED. R. EVID. 804(a)(5)). Mr. French also complained that the Government’s proposal required defense counsel to “stop work on every other matter in their busy practices in order to prepare for a trial deposition of [Mr. Roblero] on short-notice, and weeks or months before an actual trial,” which he maintained was a “serious inconvenience.” *Id.* at 4. He further argued that “conducting a criminal trial or any trial for that matter is an organic process that is not so easily compartmentalized” and that there is a risk that “when the trial starts Defendants will come to realize that there were certain

lines of questioning that they should have subjected [Mr. Roblero] to based on what they hear from other witnesses.” *Id.* at 5. Finally, he urged the Court to reject the proposal to use videoconferencing to depose Mr. Roblero and instead allow defense counsel to have the right to “face-to-face” confrontation. *Id.* at 5-6.

### **C. The Magistrate Judge’s Order**

The Magistrate Judge issued her Order on March 22, 2013, granting the Government’s motion for leave to depose Mr. Roblero. *Order*. She observed that the decision as to whether to grant a motion to take the deposition of a prospective witness for use at a criminal trial is discretionary, subject to certain considerations. *Id.* at 3. Applying an Eleventh Circuit test that the Magistrate Judge had previously applied in another case, she considered whether (1) the witness is likely to be unavailable at trial, (2) injustice will otherwise result without the material testimony that the deposition could provide, and (3) countervailing factors would make the deposition unjust to the nonmoving party. *Id.* (citing *United States v. Bunnell*, 201 F. Supp. 2d 169, 170 (D. Me. 2002) (citing *United States v. Ramos*, 45 F.3d 1519, 1522-23 (11th Cir. 1995))).

She concluded that there was a “substantial likelihood that the cooperating witness could be unavailable for trial.” *Id.* Trial, she noted, was scheduled for the fall of 2013 and there are “substantial constitutional and procedural concerns with holding in custody for a prolonged period of time a material witness who is not charged with any crime in connection with these events.” *Id.* at 3-4 (citing 18 U.S.C. § 3144). Moreover, she observed that if Mr. Roblero were released in the

United States, his continued presence here would be illegal. *Id.* at 4. She rejected the Defendants' implicit contention that the United States Attorney's Office controls the deportation of Mr. Roblero. *Id.* at 4.

After reviewing Mr. Roblero's proposed testimony, she concluded that it was "material to the issues that will be raised at trial." *Id.* at 5. Regarding the potential impact on the Defendants, the Magistrate Judge dispelled the Defendants' concern that they would be required to travel to Indianapolis or to depose Mr. Roblero by videoconference; she noted that the Government has arranged to bring Mr. Roblero to Maine for testimony before the Court, thereby mitigating any prejudice to the Defendants. *Id.* She also rejected the contention that the Defendants were being asked to depose Mr. Roblero "on the fly." *Id.* The Magistrate Judge ordered a number of conditions: (1) that the videotaped deposition take place in the courtroom; (2) that the judge presiding over the criminal trial also preside over the deposition and be available to rule on objections; (3) that the Defendants shall be allowed to attend the deposition; (4) that the Government provide all discovery required by Rule 15(e)(3); (5) that the Government provide defense counsel with a transcript of the deposition; and (6) that the deposition be scheduled through the Clerk's Office at the mutual convenience of the parties and the Court. *Id.* at 6.

#### **D. The Notice of Deposition**

On April 4, 2013, the Government filed a Notice of Deposition, notifying defense counsel that the Roblero deposition would take place in the District Court

courtroom in Bangor, Maine, on Tuesday, May 14, 2013, beginning at 8:30 a.m. *Dep. Notice.*

### **E. Malcolm French's Objection**

On April 5, 2013, Mr. French objected to the Magistrate Judge's Order. *French Objection.* In his objection, Mr. French reiterates many of his earlier arguments. *Id.* at 1-6. Mr. French remains decidedly skeptical about the Government's inability to detain Mr. Roblero and bring him to trial in Maine in the fall. *Id.* at 3. Next, Mr. French asserts that Mr. Roblero's deposition testimony would not be admissible at trial under Federal Rule of Evidence 804(a)(5) because the Government will have procured Mr. Roblero's absence by deporting him. *Id.* at 3-4. He rejects the view that 8 U.S.C. § 1324(d) allows this type of procedure. *Id.* at 4. He claims the Magistrate Judge gave "short shrift" to the prejudice to the Defendants, again arguing that they have been required to prepare for the trial deposition on "short-notice, and weeks or months before an actual trial." *Id.* at 5. He reiterates his objection to the use of "canned deposition testimony" as part of the Government's case-in-chief. *Id.* Finally, he discusses potential prejudice to Defendant Moises Soto. *Id.* at 6.

### **F. The Government's Response**

In response, the Government points out that Mr. French has not contended that the Magistrate Judge's Order was either clearly erroneous or contrary to law, which is the legal standard for this Court's review of a non-dispositive matter. *Gov't's Resp.* at 1. The Government also objects to Mr. French's attempt to

represent the interests of Mr. Soto, who is separately represented by defense counsel, and has not objected to the Order. *Id.* at 1-2.

### III. DISCUSSION

Mr. French discusses two distinct but related issues in his objection: “the propriety of *taking* the depositions and the propriety of *using* the depositions at trial.” *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984) (emphasis in original). Only the first requires decision, but both bear some discussion. As the Magistrate Judge’s Order was on a nondispositive matter, the Court will affirm the Order unless it was “contrary to law or clearly erroneous.” FED. R. CRIM. P. 59(a).

#### A. Rule 15(a)

Federal Rule of Criminal Procedure 15(a) allows a party to move to take the deposition of a prospective witness so long as the party demonstrates “exceptional circumstances” and that the deposition is “in the interest of justice.” FED. R. CRIM. P. 15(a)(1). As Rule 15(a) suggests, the law disfavors depositions in a criminal case. *See United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997) (“The use of deposition testimony in criminal trials is disfavored, largely because such evidence tends to diminish a defendant’s Sixth Amendment confrontation rights”); *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419 (5th Cir. 1992) (“Trial by deposition steps hard on the right of criminal defendants to confront their accusers”). A court may permit a party to take a deposition under Rule 15(a) “not for discovery of information but only to preserve evidence.” 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 242 (4th ed. 2009).

The Eleventh Circuit explained Rule 15(a)'s "exceptional circumstances" in *United States v. Drogoul*, 1 F.3d 1546 (11th Cir. 1993):

[O]rdinarily, exceptional circumstances exist within the meaning of Rule 15(a) when the prospective deponent is unavailable for trial and the absence of his or her testimony would result in an injustice. The principal consideration guiding whether the absence of a particular witness's testimony would produce injustice is the materiality of that testimony to the case. 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.

*Id.* at 1552 (internal citations omitted); *see also United States v. Bunnell*, 201 F. Supp. 2d 169, 170 (D. Me. 2002). "The primary reasons for the law's normal antipathy toward depositions in criminal cases are the factfinder's usual inability to observe the demeanor of deposition witnesses, and the threat that poses to the defendant's Sixth Amendment confrontation rights." *Drogoul*, 1 F.3d at 1552. The First Circuit has held that a district court abused its discretion in granting the government's motion to dispose when the Government "failed even to extract a promise from [the witness] to return for the trial" and "it was clear that the prime reason for the deposition was the impermissible one of clearing the way for this critical witness to leave the court's jurisdiction." *United States v. Mann*, 590 F.2d 361, 366 (1st Cir. 1978).

Here, the Magistrate Judge concluded that there "appears to be a substantial likelihood that the cooperating witness could be unavailable for trial"; that Mr. Roblero's "testimony is material to the issues that will be raised at trial"; and that any countervailing factors did not make the deposition unjust to the Defendants.

*Order* at 3-5. Mr. French does not contend that the Magistrate Judge applied the wrong test or that her conclusions were clearly erroneous. *French Objection* at 2-6.

The Court affirms the Magistrate Judge's determination. Mr. French stresses that the law disfavors criminal depositions, but deposing Mr. Roblero does not implicate the "primary reasons for the law's normal antipathy," since the deposition will be conducted in a way that seeks to protect the Defendants' confrontation rights and preserves the witness's demeanor for jury assessment. The deposition will be videotaped; Mr. Roblero will be under oath; he will be subject to cross-examination; each of the Defendants may attend the deposition; each will be represented by counsel; the deposition will be held in the same courtroom where the jury trial will be held; the Judge who is expected to preside over the jury trial will preside over the deposition; and the Judge will rule on objections in the same fashion as at a trial.

If admitted at trial, the deposition would differ from live testimony in that (1) Mr. Roblero would not be physically present in the courtroom while the jurors are present and therefore the jurors would not have the opportunity to evaluate his appearance face-to-face; and (2) the testimony will be frozen in time and counsel, both for the Government and the defense, will be unable to respond to subsequent developments.<sup>3</sup>

---

<sup>3</sup> Mr. French argues that Mr. Roblero could give his pretrial testimony with impunity because he would know that after the testimony, he would be deported and therefore "the ordinary oath that a witness takes which carries with it the risk of prosecution for perjury [will not be] present." *French Objection* at 2. This concern does not withstand analysis. Whether Mr. Roblero testifies before or at trial, he will presumably still be subject to deportation. Therefore, the issue is whether it matters when he testifies. If Mr. Roblero lies during his deposition, an obvious sanction could be the exclusion of the perjured testimony and, here, the delay between the deposition and the trial would

This case is distinguishable from *Mann*, in which the First Circuit held that it was an abuse of discretion to allow a deposition when “the prime reason for the deposition [was] the impermissible one of clearing the way for this critical witness to leave the court’s jurisdiction.” *Mann*, 590 F.2d at 366. In *Mann*, the material witness was “a juvenile foreign citizen who had been illegally imprisoned with adults since her apprehension at the airport.” *Id.* at 365. Here, by contrast, Mr. Roblero is a foreign citizen who served a prison sentence following a conviction for child molestation, and who is subject to a deportation order. The Court does not know whether the Government may lawfully detain or otherwise keep Mr. Roblero in the United States until trial in September 2013 given his deportation status and criminal history. In addition, the *Mann* Court was more concerned about the admission of the deposition at trial than with the taking of the deposition. *Id.* at 366 (“the major harm to the other party’s interests does not occur unless the deposition is admitted”); *id.* (“When the question is close a court may allow a deposition in order to preserve a witness’ testimony, leaving until trial the question of whether the deposition will be admitted as evidence”).

The Court concludes that while it is far from certain that the deposition would be admissible at trial, the Government has made enough of a showing to justify taking the deposition to preserve Mr. Roblero’s testimony. Its conclusion “accords no presumption of admissibility” to the deposition, and the Court expects the Government to make “as vigorous an attempt to secure the presence of the

---

offer the Defendants time to confirm and move to exclude any perjured testimony. If Mr. Roblero lies during his trial testimony, the Defendants would be required to react immediately to undo the damage to the jury. In this sense, the timing of the deposition benefits the Defendants.

witness as it would have made if it did not have the prior recorded testimony.” *Id.* at 366-67.

## **B. Admissibility**

Whether the deposition will be admissible at trial will likely depend on whether it fits the prior testimony hearsay exception.<sup>4</sup> *See* FED. R. EVID. 804(b)(1). Under Rule of Evidence 804(b)(1), testimony is not excluded by the rule against hearsay if the declarant is unavailable as a witness, the testimony was given at a lawful deposition, and the testimony is offered against a party who had an opportunity and similar motive to develop it by cross-examination. FED. R. EVID. 804(b)(1). To prove that a witness is “unavailable,” the proponent of the statement must demonstrate that it “has not been able, by process or other reasonable means, to procure the declarant’s attendance.” FED. R. EVID. 804(a)(5)(A). Mr. Roblero’s deposition testimony would not be admissible, however, “if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from attending or testifying.” FED. R. EVID. 804(a).

Mr. French argues that if Mr. Roblero is absent at trial, the Government would have caused his unavailability, making the deposition inadmissible; the motion to depose should, he contends, thus be denied “as a futile exercise.” *French Objection* at 4. The Court concludes, however, that it is unclear whether Mr. Roblero will be “unavailable” under Rule 804(a)(5) if he returns to Mexico and does

---

<sup>4</sup> The Confrontation Clause would not raise an independent bar to admissibility, as testimony admitted under Rule 804(b)(1) “is, by definition, not vulnerable to a challenge based upon the Confrontation Clause.” *McKeeve*, 131 F.3d at 9.

not appear at trial. The answer will depend in large part on what the Government does to prevent him from leaving the Country and to secure his presence at trial.

The law favors live testimony and requires the Government to take “all reasonable steps to bring to trial a witness whose testimony” it chooses to present. *Mann*, 590 F.2d at 366. In the First Circuit, this includes an obligation to take all reasonable steps to prevent a witness from leaving the Country before trial. In *Mann*, the First Circuit vacated a conviction based in part on the introduction at trial of a Rule 15 deposition for a material witness that the prosecutors had elected not to charge and instead had allowed to fly back to Australia. *Id.* at 366-68. In the words of the *Mann* Court, “[i]mplicit . . . in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent.” *Id.* at 368. The First Circuit stated that “‘other reasonable means’ besides subpoenas must be tried before a witness can be found unavailable.” *Id.* at 367. In *Mann*, the First Circuit suggested such alternatives as “lesser custody, or perhaps simply . . . supplying maintenance, and retaining her passport and ticket.” *Id.* at 366.

Other courts have adopted the First Circuit’s view. See *United States v. Yida*, 498 F.3d 945, 954-57 (9th Cir. 2007) (“[W]e adopt the First Circuit’s approach, as articulated in *Mann*, assessing the reasonableness of the government’s actions *both before and after* [the witness’s] material witness warrant was released and he was deported”); *United States v. Allie*, 978 F.2d 1401, 1407 (5th Cir. 1992) (“We agree with the *Mann* court that the government’s good faith efforts to assure the

witnesses' availability at trial should include efforts aimed at keeping the witnesses in the United States"). The Ninth Circuit addressed a somewhat similar situation in *Yida* where a material witness who testified in the first trial against a defendant was deported after a mistrial. *Yida*, 498 F.3d at 948. The witness, safely abroad, reneged on a promise to return for the retrial and the district court rejected the Government's efforts to admit at the second trial the missing witness's testimony from the first trial. *Id.* at 949. The Ninth Circuit concluded that the Government did not act reasonably "in allowing [the material witness] to be deported." *Id.* at 958.

The *Yida* Court concluded that the Government had failed to prove that it used "reasonable means" to procure the missing witness's attendance even though:

(1) [the witness] and his attorney made oral assurances that he would return<sup>5</sup>; (2) he had cooperated with the government prior to the first trial; (3) the government was concerned about his Fifth Amendment due process rights (because it was keeping him imprisoned solely on the material witness warrant after he had completed his sentence); and (4) the government agreed to pay his expenses to return to testify.

*Id.* at 957. The Ninth Circuit suggested that the Government "could have released [the witness] from federal custody, but required him to remain in the United States until he had testified at the retrial." *Id.* at 959. It wrote that "[s]uch release might have been accompanied by the confiscation of his passport, service of a subpoena, and the imposition of conditions on his release such as home confinement, limited travel, and/or some form of electronic detention." *Id.* At the same time, *Yida* is

---

<sup>5</sup> The Government in *Yida* had also received "advance approval from DHS to have [the witness] paroled back into the United States" if asked to testify at a second trial. *Yida*, 498 F.3d at 948.

distinguishable because it concerned prior trial testimony rather than a videotaped deposition. The *Yida* Court observed that its “assessment of the reasonableness of the government’s actions would be altered if its efforts included the taking of a witness’s video-recorded deposition before allowing deportation to occur.” *Id.* In the Ninth Circuit’s view, “[a] video deposition . . . would be almost as good as if [the witness] had testified live at the second trial.” *Id.*

In *United States v. Aguilar-Tamayo*, 300 F.3d 562 (5th Cir. 2002), the Government presented at trial the Rule 15 video depositions of witnesses the Government had deported before trial. *Id.* at 563. “The depositions were conducted with the witnesses under oath, before a U.S. magistrate judge, and with the participation of both Aguilar-Tamayo and his attorney.” *Id.* at 564. The witnesses were deported to Mexico after the depositions. *Id.* The Fifth Circuit had “serious doubts” about the district court’s admission of the depositions given that the Government “took no steps to secure the presence of the witnesses after they had been deported.” *Id.* at 566.<sup>6</sup>

Courts have suggested a variety of governmental efforts to assure the availability of alien witnesses that have passed muster. In *Allie*, the Fifth Circuit held that the Government had met its burden by “giving the witnesses the option of remaining in the United States with work permits, telling the witnesses about the payment of witness fees and travel cost reimbursement, giving the witnesses a

---

<sup>6</sup> Ultimately, the Fifth Circuit affirmed Mr. Aguilar-Tamayo’s conviction and sentence. *Aguilar-Tamayo*, 300 F.3d at 567. “[G]iven the overall strength of the prosecution’s case against the defendant”, the Fifth Circuit concluded that “any error in allowing the videotaped depositions to be admitted at trial was harmless beyond a reasonable doubt.” *Id.*

subpoena and a letter to facilitate their reentry into the United States, calling the witnesses in Mexico, getting the witnesses' repeated assurances that they would return, apprising the border inspectors of the witnesses' expected arrival and issuing checks to be given to the witnesses upon their reentry in to the United States." *Allie*, 978 F.2d at 1407-08. In *United States v. Wilson*, 36 F. Supp. 2d 1177 (N.D. Ca. 1999), the district court noted that "[g]ood faith and reasonable efforts require at least some affirmative action, such as issuing a subpoena, arranging payment of travel expenses, or taking affirmative steps to ensure the alien remains in the United States until trial is complete." *Id.* at 1182. In *United States v. Linton*, 502 F. Supp. 878 (D. Nev. 1980), the district court required the material witness to personally visit the office of the U.S. Department of Probation "not less than two times each week." *Id.* at 880. Similarly, in *United States v. Molina*, C.R. No. C-08-890, 2009 U.S. Dist. LEXIS 1534 (S.D. Tex. Jan. 12, 2009), the magistrate judge observed that paroling a material witness "obviates the need for a deposition, limits expenses to the taxpayers, and reduces lengthy detentions of the material witness." *Id.* at \*7-8.

In this case, the Government has not explained why it must deport Mr. Roblero before the September 2013 trial. Although the Government represented that a deportation order had been issued and that Mr. Roblero "is to be returned to Mexico within a week of the completion of his sentence," *Gov't's Mot.* at 2-3, the Government represented in its reply memorandum that Mr. Roblero will be in Bangor for his deposition and that the Government "intends to take reasonable

steps to bring [Mr. Roblero] back to testify in September.” *Gov’t’s Reply* at 2. Mr. Roblero consented to detention pending his deposition on May 14, 2013. *Order of Detention* (ECF No. 125).

The delay between now and September 4, 2013, when trial is scheduled to commence, is slightly less than four months. The Government should be aware that if it deports Mr. Roblero before trial, the Government will be required to demonstrate that he is “unavailable as a witness” before his deposition testimony may be admitted. FED. R. EVID. 804(a). Whether it will be able to make that showing if it deports Mr. Roblero is an open question.

#### **IV. CONCLUSION**

The Court **OVERRULES** Defendant Malcolm French’s Objection to the Magistrate [Judge’s] Order Regarding Deposition (ECF No. 127) and **AFFIRMS** the Magistrate Judge’s Order authorizing the deposition of Martin Roblero (ECF No. 114).

**SO ORDERED.**

/s/ John A. Woodcock, Jr.  
**JOHN A. WOODCOCK, JR.**  
**CHIEF UNITED STATES DISTRICT JUDGE**

Dated this 8th day of May, 2013

**Defendant (1)**

**MALCOLM A FRENCH**

represented by **TERENCE M. HARRIGAN**  
VAFIADES, BROUNTAS &  
KOMINSKY  
23 WATER STREET  
P. O. BOX 919  
BANGOR, ME 04402-0919  
(207) 947-6915  
Email: tmh@vbk.com  
*TERMINATED: 09/28/2012*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**JAMES A. BILLINGS**  
MCKEE LAW  
133 STATE STREET  
AUGUSTA, ME 04332  
207- 620-8294  
Email: jbillings@mckeelawmaine.com  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**WALTER F. MCKEE**  
MCKEE BILLINGS  
133 STATE STREET  
AUGUSTA, ME 04332  
207-620-8294  
Email: wmckee@mckeebillings.com  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Defendant (2)**

**RODNEY RUSSELL**  
*also known as*  
ROD

represented by **STEVEN C. PETERSON**  
LAW OFFICES OF STEVEN C.  
PETERSON  
643 ROCKLAND STREET  
ROCKPORT, ME 04856  
(207) 236-8481  
Email: atticus30@juno.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**WILLIAM S. MADDOX**  
LAW OFFICE OF WILLIAM S.

MADDOX  
P.O. BOX 1202  
ROCKLAND, ME 04841  
207-594-4020  
Email: wsmaddox@midcoast.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Defendant (3)**

**ROBERT BERG**  
*also known as*  
**BOBBY**

represented by **CHARLES E. GILBERT , III**  
GILBERT & GREIF, P.A.  
82 COLUMBIA STREET  
P.O. BOX 2339  
BANGOR, ME 04402-2339  
947-2223  
Email: ceg@yourlawpartner.com  
*TERMINATED: 10/12/2012*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**RICHARD S. BERNE**  
LAW OFFICE OF RICHARD S.  
BERNE, LLC  
482 CONGRESS STREET  
SUITE 402  
PORTLAND, ME 04101  
(207) 871-7770  
Email: berne@bernelawme.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Defendant (4)**

**KENDALL CHASE**

represented by **JEFFREY M. SILVERSTEIN**  
LAW OFFICE OF JEFFREY M.  
SILVERSTEIN, PA  
9 CENTRAL STREET  
SUITE 209  
BANGOR, ME 04401  
(207) 992-9158  
Fax: (207) 941-9608  
Email:  
silversteinlaw.jms@gmail.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

*Designation: Retained*

**Defendant (5)**

**MOISES SOTO**

represented by **HUNTER J. TZOVARRAS**  
LAW OFFICE OF HUNTER  
TZOVARRAS  
23 WATER STREET  
SUITE 407  
BANGOR, ME 04401  
207-262-9300  
Email: mainedefender@gmail.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: CJA Appointment*

**Defendant (6)**

**HAYNES TIMBERLAND INC**

represented by **THOMAS S. MARJERISON**  
NORMAN, HANSON & DETROY  
415 CONGRESS STREET  
P. O. BOX 4600 DTS  
PORTLAND, ME 04112  
774-7000  
Email: tmarjerison@nhdlaw.com  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Plaintiff**

**USA**

represented by **JOEL B. CASEY**  
OFFICE OF THE U.S. ATTORNEY  
DISTRICT OF MAINE  
202 HARLOW STREET, ROOM  
111  
BANGOR, ME 04401  
945-0373  
Email: joel.casey@usdoj.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**DONALD E. CLARK**  
U.S. ATTORNEY'S OFFICE  
DISTRICT OF MAINE  
100 MIDDLE STREET PLAZA  
PORTLAND, ME 04101  
(207) 780-3257  
Email: donald.clark@usdoj.gov  
*ATTORNEY TO BE NOTICED*