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DISTRICT OF HAWAII
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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. KEITH MITSUYOSHI KANESHIRO (1), DENNIS KUNIYUKI MITSUNAGA (2), TERRI ANN OTANI (3), AARON SHUNICHI FUJII (4), CHAD MICHAEL MCDONALD (5), SHERI JEAN TANAKA (6), Defendants.	CR No. 22-00048-TMB-NC UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NO. 20, ECF Nos. 599 & 606 **UNDER SEAL**

In her first appearance before the grand jury, before answering any questions, Defendant Terri Otani stated she was invoking her Fifth Amendment privilege and would not answer any questions. That is an abuse of the Fifth Amendment privilege, both because the privilege cannot be asserted in blanket fashion and can be invoked only where a witness has reasonable cause to apprehend danger of incrimination from a direct answer. *See United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir.

1995) ("The only way the Fifth Amendment can be asserted as to testimony is on a question-by-question basis."); *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Consistent with her blanket invocation, Otani then wrongfully invoked her Fifth Amendment right against self-incrimination in response to every question posed to her (save a couple isolated questions).[1] In so doing, Otani took the Fifth to questions like, "[d]o you understand [your Fifth Amendment right]," "are you sick, ma'am," "do you need medical attention today," "what does foregoing mean," "do you commonly use the term 'foregoing,'" "how did you get here today," "are you

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[1] The only portion of Otani's testimony in which she did not invoke the Fifth Amendment is the following limited exchange:

> Q: Are you feeling okay, ma'am?
> A: Headache.
> Q: You have a headache?
> A: Mm-hmm.
> Q: Do you need assistance?
> A: No.
> Q: Do you frequently get headaches?
> A: Sorry?
> Q: Do you frequently get headaches?
> A: I don't know. Can I say I hereby invoke my Fifth Amendment rights because I don't want anyone else to know I'm sick?
> Q: Are you sick, ma'am?
> A: I hereby invoke my Fifth Amendment right against self-incrimination.

ECF No. 247-1 at 14 (full transcript of Otani's grand jury appearance, filed by Otani; in a pretrial ruling, United States District Judge J. Michael Seabright permitted Otani's grand jury transcripts to be publicly filed).

represented by counsel here today,"[2] and more. From start to finish, Otani's appearance was pure obstruction.

Now, in the Defendants' twentieth Motion *in Limine*, Otani seeks to introduce evidence that "district judges in this Court found that Terri Ann Otani properly asserted her Fifth Amendment privilege before the grand jury." ECF No. 599 at 1 ("MIL 20"). But that never happened. Not even close. Otani's motion fails factually and legally.

As a matter of fact, no judge found Otani "properly" invoked her Fifth Amendment privilege—she simply was able to suppress some of her statements after the fact because Judge Kobayashi, frustrated by Otani's plainly obstructive conduct, ordered Otani to return to the grand jury and answer every question previously asked. Otani subsequently returned to the grand jury three times, during which she mostly answered questions but sometimes invoked the Fifth. Later, during the pretrial litigation of this case, Judge Seabright identified a few potentially incriminating questions wrapped up in Otani's initial blanket invocation. Consequently, Judge Seabright ordered some of Otani's responses occurring after Judge Kobayashi's broad order to answer questions to be suppressed. But to be clear, Judge Seabright never condoned any aspect of Otani's effectively blanket invocation of the Fifth

[2] Otani's appearance commenced at 1:19 p.m. and ended at 1:36 p.m. She called Defendant Tanaka before and after her appearance (at 11:34 a.m. and 2:09 p.m.), and Tanaka called Otani twice more (at 2:13 p.m. and 3:51 p.m.).

Amendment. Under any light, to now say the Court found she "properly" invoked the Fifth Amendment is pure revisionist history.

As a matter of law, even if a Court *had* found that Otani properly invoked the Fifth Amendment (which never happened), such evidence would be inadmissible for multiple reasons. First, as Otani intends it, evidence that "district judges in this Court found" Otani "properly asserted her Fifth Amendment privilege" is inadmissible hearsay. Second, the evidence is irrelevant: if Otani managed to not obstruct the grand jury on some instances, that does not bear on whether she obstructed the grand jury on other instances. Third, under Rule 405, a defendant may not use specific acts or course of conduct to prove character, as Otani seeks to do. And fourth, evidence of prior "good acts"—i.e., not obstructing—is not an admissible character trait and is thus inadmissible by virtue of Rule 404(a)'s prohibition against propensity evidence. The Court should deny Otani's motion.

BACKGROUND

1. During the grand jury investigation of this matter, a grand jury subpoena was issued for testimony from Terri Otani. The subpoena called for Otani's appearance before the grand jury on February 4, 2021. Between January 29 and February 3, 2021, FBI Special Agents made repeated efforts to serve Otani the subpoena. That included calling her phone number multiple times, traveling to her residence, and traveling to her place of employment, Mitsunaga and Associates, Inc. ("MAI"). At MAI, the FBI was ushered out of the office and told by an employee

that the employee was not supposed to have let the FBI inside the office. On February 2, 2021, the FBI ultimately placed Otani's grand jury subpoena under the door to her apartment.[3] *See* Exhibit 1.

Despite not answering her phone and failing to return messages, Otani received notice of the subpoena and required grand jury appearance. That is clear because after being reminded of the grand jury appearance, Otani sent the following message response to the FBI:

> Can you a (sic) least response that I'm under care medical. Under this condition I can't under stand questions under this condition since I can't stand even step up!

Exhibit 1 at 3. In response, an FBI Special Agent asked Otani to give him a call so he could address her concerns. Otani did not respond. The FBI sent Otani another text message, reminding her of her obligation to appear before the grand jury. Otani failed to appear. *Id.*

Accordingly, the United States filed a motion for an order to show cause why Otani should not be held in contempt. *See* Exhibit 1. Otani appeared for that hearing on May 13, 2021, with Tanaka on the phone representing her. At that hearing, United

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[3] Defendant Tanaka and Defendant Otani were in direct contact during this time. In fact, on February 1, 2021—right in the middle of the FBI's service efforts—they spoke on the phone for nearly 30 minutes. Then they had a 46-minute phone conversation on February 7, 2021. This is reminiscent of Tanaka's contact with MAI employee Arnold Koya, who also evaded service while in direct phone contact with Tanaka. *See* USA's Sealed MIL 5 and Sealed Response to Defendants' MIL 12 at 3 n.2.

States District Judge Leslie E. Kobayashi ordered Otani to appear and testify before the Grand Jury for the District of Hawaii on May 27, 2021.

On May 27, 2021, Otani appeared before the grand jury, represented by Tanaka. Like other MAI witnesses, Defendant Otani brought a written script to the grand jury, and launched into it as soon as the first question was asked. *See* Exhibit 2 (Otani's Speech). Otani opened her speech by falsely accusing the assigned Special Attorney of being responsible for a car wreck she was involved in months earlier:

> I am so mortified by your conduct, Michael Wheat. On March 1, I left my home in the late evening and was driving through Mapunapuna to get something to eat. I noticed I was being aggressively followed by another car which caused me to lose control of my steering wheel. My car rammed into a traffic light pole and my air bags deployed. A man immediately opened the passenger door to my car and when I looked up, I saw a woman standing behind the man. He said they were going to call the police. When the police arrived and they were helping me exit my car, the two individuals who called the police were nowhere to be seen. At that moment, I saw that my car was completed totaled.
>
> Given Michael Wheat's harassing and intimidating manner in which he and his FBI agents have been treating witnesses outside of Court, I believe it was Michael Wheat's agents that were following me that night. Since the accident, I have had ongoing excruciating and constant pain. I am lucky to be alive today.

Otani then followed up with a serious assertion about the same prosecutor—also false:

> I am hopeful that you will scrutinize and analyze carefully whatever Michael Wheat presents to you after I leave. Michael Wheat has been known to present false evidence and withhold evidence like he did in San Diego. Thank you again!
>
> Michael Wheat has refused to tell me and others why we are here, what his investigation is about, and has repeatedly violated our constitutional

> rights. Based upon the foregoing, I hereby invoke my Fifth Amendment right against self-incrimination and I therefore respectfully decline to answer any questions.

Exhibit 2. After reading from the prepared statement, Otani refused to answer the 50-or-so questions posed to her in the grand jury (except for the limited exchange identified above), purportedly based on the Fifth Amendment privilege against self-incrimination. *See* ECF No. 247-1 (Otani's grand jury testimony, filed by Otani). Those questions included "How did you get here today," "Are you sick," and "Did someone tell you to invoke your Fifth Amendment to every question?"

In response to Otani's obstruction, the United States filed a motion to compel Otani's testimony. At the subsequent motion hearing, Otani—through Tanaka—failed to articulate any proper basis for invoking the Fifth Amendment. Judge Kobayashi disagreed that Otani had made a "blanket" assertion of the Fifth Amendment,[4] but found Otani had not carried her burden of demonstrating risk of incrimination as to the questions posed to her. Judge Kobayashi therefore ordered

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[4] It is not ultimately a significant fact for this motion, but it is difficult to interpret Otani's conduct as anything but a blanket invocation of the Fifth Amendment. At the end of Otani's opening speech, before answering any questions, Otani invoked her Fifth Amendment right and stated that she was "declin[ing] to answer any questions." ECF No. 247-1 at tr. p. 5:23–25. That is a blanket invocation. She then robotically invoked the Fifth Amendment to every question posed (with the exception of the headache exchange cited above)—even the most innocuous questions. And at the end of it all, she was asked "Is it your intention to invoke your Fifth Amendment right to each and every question put to you today?" Her response: "I hereby invoke my Fifth Amendment right against self-incrimination, and I therefore respectfully decline to answer any questions." ECF No. 247-1 at tr. p. 15:1–5. From beginning to end, Otani improperly asserted a blanket invocation of the Fifth Amendment.

that Otani return to the grand jury and answer the questions previously asked of her. *See* ECF No. 315 at 41–42. Judge Kobayashi did not require Otani to answer other questions, explaining that "[i]f there are additional questions, which the government is entitled to ask, I'm not making any ruling on that because I don't know what those questions are . . . ." ECF No. 315 at 41–42 (citing the record).

Subsequently, Otani appeared before the grand jury on three occasions. During those appearances, she answered some questions and invoked the Fifth Amendment as to others. *See e.g.*, ECF No. 315 at 42–44.

2. Fast forward to this case. In a pretrial motion, Otani sought dismissal "on the ground that the Prosecution violated Ms. Otani's Fifth Amendment right against self-incrimination" during the grand jury investigation. ECF No. 247. In the alternative, Otani sought suppression of "all statements made before the Grand Jury." *Id.* at 2.

In an omnibus ruling, United States District Judge J. Michael Seabright denied Otani's motion to dismiss (along with other motions filed by other defendants). ECF No. 315. With respect to Otani's dismissal request, the Court found "no reason to dismiss the FSI, must less any prosecutorial misconduct in any violations of Otani's Fifth Amendment rights." ECF No. 315 at 47. As for Otani's suppression request, the Court was "only concerned with the fifty questions from May 27, 2021, that the prosecution re-asked Otani at any subsequent grand jury proceeding. If Otani had asserted a Fifth Amendment privilege as to any of those fifty particular questions,

she would have been at risk of being held in contempt of [Judge Kobayashi's prior order]." *Id.* at 44-45. The Court recognized that certain facts tended to show that Tanaka (and thereby Otani) were aware of the ability to invoke the Fifth Amendment as to individual questions. *Id.* at 45. But nonetheless, the Court found "it appears that Otani was not given a full opportunity to invoke the privilege on an individual-question basis prior to [Judge Kobayashi's] Order."[5] *Id.* Given that fact, the court ordered "suppression of the answers to any of the fifty questions that were re-asked by the prosecution at a grand jury session (and to which there is a reasonable basis to assert a Fifth Amendment privilege)." *Id.* at 45-46. The Court stated it would "not, however, suppress answers Otani gave to any other questions that were asked at the other grand jury sessions (that is, questions other than the fifty asked on May 27, 2021)." ECF No. 315 at 46.

Rather than proceeding directly to briefing, the Court asked counsel if they would be amenable to meeting and conferring as to which of Otani's answers should be suppressed. ECF No. 315 at 48. The United States agreed. Thereafter, the United States submitted a proposed list of questions to suppress. ECF No. 321. Otani then filed a "motion for disputed evidence to be suppressed," which sought to suppress statements far beyond the parameters Judge Seabright previously set (including statements beyond her May 27, 2021 appearance). ECF No. 322. After a response

[5] No one in the grand jury prevented Otani from doing so. This may have been a reference to Otani's counsel at the time—Tanaka.

from the United States, ECF No. 325, on February 20, 2024, the Court[6] issued an order suppressing select portions of Otani's grand jury testimony, including from days other than May 27, 2021. ECF No. 434.

Never in the sequence of facts above did any judge find that "Terri Ann Otani properly asserted her Fifth Amendment privilege before the grand jury." *But see* Defense MIL 20 at 1 ("The instant motion in limine seeks to admit evidence that district judges in this Court found that Terri Ann Otani properly asserted her Fifth Amendment privilege before the grand jury."). *At most*, Judge Seabright construed Judge Kobayashi's order for Otani to answer every question asked during Otani's first grand jury appearance to be overbroad. His analysis of Judge Kobayashi's order, however, in no way condoned any aspect of Otani's obstructive behavior.

ARGUMENT

1. Evidence that does not exist cannot be admitted

Otani seeks to "admit evidence that district judges in this Court found that Terri Ann Otani properly asserted her Fifth Amendment privilege before the grand jury." MIL 20 at 1. That evidence does not exist. The Court's analysis can end here. Otani's motion should be denied.

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[6] On January 24, 2024, Judge Seabright recused himself from this matter.

2. Even if the evidence sought to be admitted existed, Otani's motion fails because it is based on a false premise

Beyond the non-existence of the evidence she wants admitted, a separate overarching fallacy dooms Otani's motion. Her motion rests on this sentence: "It is axiomatic that, *if* a district judge's finding that Ms. Otani's abuse of her Fifth Amendment privilege is evidence of grand jury obstruction establishing consciousness of guilt, *then* a district judge's finding that Ms. Otani properly asserted her Fifth Amendment privilege is evidence that she was not obstructing the grand jury and does not establish consciousness of guilt." MIL 20 at 3 (italics added). The "if" premise of Otani's syllogism is false (and the "then" conclusion does not follow in any event—as explored in the Rule 401 discussion below).

Indeed, no prior findings are being introduced as "evidence of grand jury obstruction establishing consciousness of guilt." The prior judicial findings are not being offered for their truth or otherwise to prove the obstructive conduct. Otani's own words and actions—along with her MAI cohorts' words and actions—will prove that. The Court has even ordered a limiting instruction on this point:

> You are about to hear [OR HAVE HEARD] evidence that several United States District Judges issued Orders relating to the conduct of certain witnesses before the grand jury. *I instruct you that this evidence is admitted only for the limited purpose of establishing that these judges responded to address the conduct of these witnesses. You must therefore consider this evidence only for that limited purpose and not for any other purpose. You may not rely on these Orders as evidence of any improper conduct.*

ECF No. 593 at 11, Limiting Instruction No. 8 (emphasis added). Once the limited evidentiary purpose of the prior judicial orders is in focus, Otani's motion—contingent on a completely different purpose—crumbles.

3. Even if the evidence sought to be admitted existed, the evidence would be irrelevant

Rule 401 only permits relevant evidence. That is a low bar. *United States v. Lloyd*, 807 F.3d 1128, 1152 n.6 (9th Cir. 2015). But Otani's requested evidence never even leaves the floor. Assuming a judge had found that Otani had at some point "properly asserted" her Fifth Amendment rights to *some questioning*—to be clear, no judge said that—that is irrelevant for proving or disproving whether Otani frivolously invoked the Fifth Amendment to *other questioning* and thereby worked to conceal facts from the grand jury. Put another way, if someone robbed a bank on Friday, it is irrelevant for them to claim they did not rob the bank on Monday or Wednesday. Friday is the relevant day. So too here. Otani can attempt to establish that her Fifth Amendment invocations were proper as to the exchanges introduced by the United States to prove her obstruction (say, her invocations to questions such as, "Is it your intention to invoke your Fifth Amendment right to each and every question put to you today," "are you sick, ma'am," "what does foregoing mean," and "do you commonly use the term 'foregoing'"). But point to *other* statements—purportedly to show she validly invoked as to those *other* statements—says nothing about her wrongful invocations to the questions at issue.

4. Even if the evidence sought to be admitted existed and was relevant, the evidence is inadmissible hearsay

Even if the judicial findings Otani seeks to admit existed, they would be inadmissible hearsay. That is because Otani's theory of admissibility is to introduce those judicial findings for the truth. That is the only way to interpret her motion, which contends that "a district judge's finding that Ms. Otani properly asserted her Fifth Amendment privilege is evidence that she was not obstructing the grand jury and does not establish consciousness of guilt." MIL 20 at 3. That is classic hearsay, seeking to import a judge's findings and make that substantive evidence for the jury to consider.[7]

5. The proffered evidence violates character evidence rules

Next, Otani's proffered evidence constitutes inadmissible character evidence. Rule 404(a) outlines the general prohibition against character evidence: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Fed. R. Evid. 404(a). The rule provides a limited exception for defendants, permitting them to introduce evidence of a "pertinent" character trait. Fed. R. Evid. 404(a)(2). Depending on the type of case and allegations, that might include traits such as honesty, truthfulness, law-abidingness, or peaceableness. *See, e.g., United States v. Geston*, 299 F.3d 1130, 1137–38 (9th Cir. 2002); *United States v. Keiser*, 57 F.3d

[7] To be clear, Otani fails to identify any potential non-hearsay usage of any judicial finding that she "properly" invoked the Fifth Amendment.

847, 853 (9th Cir. 1995); *Arizona v. Elmer*, 21 F.3d 331, 334–35 (9th Cir. 1994); *United States v. Diaz*, 961 F.2d 1417 (9th Cir. 1992); *United States v. Hedgecorth*, 873 F.2d 1307, 1313 (9th Cir. 1989); *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988); *United States v. Giese*, 597 F.2d 1170, 1190 (9th Cir. 1979). On the other hand, a propensity to engage in specific crimes—as opposed to general law-abidingness—is not an admissible character trait. *See Diaz*, 961 F.2d at 1419 ("A defendant's propensity to engage in large scale drug dealing, however, is not an admissible character trait. Proneness to large scale drug dealing cannot be viewed simply as the converse of the character trait of 'law-abidingness.'").

Here, *rightfully* invoking the Fifth Amendment on some occasions—but not others—is not a "character trait" that Otani can offer into evidence. Rather, it is propensity evidence, i.e., "I didn't abuse the Fifth Amendment on those other questions, so I must not have abused it in response to the questions cited by the United States." That is not permitted. *See United States v. Dimora*, 750 F.3d 619, 630 (6th Cir. 2014) ("For the same reason that prior 'bad acts' may not be used to show a predisposition to commit crimes, prior 'good acts' generally may not be used to show a predisposition not to commit crimes."); *United States v. Marrero*, 904 F.2d 251, 260 (5th Cir. 1990) (excluding defendant from offering evidence of legitimate billings in a false claims act case because it was irrelevant that the defendant "did not overcharge in every instance in which she had the opportunity to do so").

Furthermore, under Rule 405(a), "[w]hen evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion." Fed. R. Evid. 405(a); *United States v. Barry*, 814 F.2d 1400, 1403 (9th Cir. 1987) ("[T]his evidence may take the form of testimony as to reputation under Rules 405(a) and 803(21) or of opinion testimony under Rule 405(a)."). In other words, a defendant cannot introduce specific acts or course of conduct to prove character. *See* Rule 405(a); *Michelson v. United States*, 335 U.S. 469, 477 (1948) ("The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits[.]"). Otani's proffered evidence—even if it existed and even if it were proof of a pertinent character trait—is not in the form of reputation or opinion; rather, it is evidence of specific instances of conduct. Accordingly, Rule 405(a) prohibits it.

6. <u>Rule 403 bars the proffered evidence</u>

As outlined above, the probative value of Otani's proffered evidence is zero. That is the scenario where the Rule 403 scale most easily tips in favor of exclusion. Here, the "probative value" of the proffered evidence is "substantially outweighed" by the potential to confuse the issues, mislead the jury, waste time, and cause undue delay. *See* Fed. R. Evid. 403. To begin, no judge made the finding Otani wants to admit, so the confusion embedded in this evidence is instantly high. Moreover, if Otani's desire is to point to all the times she *did not* obstruct, that is an irrelevant

sleight of hand that would confuse and mislead the jury as to the actual conduct in issue. This delay on irrelevant issues would not be worth the jury's time. In other words, the "probative value" of the proffered evidence is substantially outweighed by multiple Rule 403 concerns.

CONCLUSION

The Court should deny Defendants' twentieth Motion *in Limine*.

Respectfully submitted,

Dated: April 5, 2024

MERRICK B. GARLAND
Attorney General

/s/ Colin M. McDonald
MICHAEL G. WHEAT
JOSEPH J.M. ORABONA
JANAKI G. CHOPRA
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EXHIBIT 1

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DISTRICT OF HAWAII
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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

IN RE GRAND JURY PROCEEDING *re: Terri Ann Otani*	Case No. MC 21-00098 LEK-KJM UNITED STATES' MOTION FOR ORDER TO SHOW CAUSE WHY ABSENT GRAND JURY WITNESS SHOULD NOT BE HELD IN CONTEMPT ***FILED UNDER SEAL***

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, and hereby files its motion for an order to show cause why Terri Ann Otani should not be held in contempt for failing to appear as required before the federal grand jury for the District of Hawaii. The United States further moves for an order

requiring Ms. Otani to appear before the grand jury on Thursday, May 13, 2021 at 9:00 a.m. Subject to the Court's availability, the United States respectfully requests a hearing on this matter on Wednesday, May 12, after 2:30 p.m., or Thursday, May 13 at 9:00 a.m.

I.

STATEMENT OF FACTS

The federal grand jury for the District of Hawaii is investigating potential violations of federal law. As part of those efforts, a grand jury subpoena was issued for testimony from Terri Ann Otani. The subpoena called for Ms. Otani's appearance before the grand jury on February 4, 2021. *See* Exhibit 1 (Subpoena). Between January 29 and February 3, 2021, Special Agents with the Federal Bureau of Investigation (FBI) made repeated efforts to serve Ms. Otani the subpoena. *See generally* Exhibit 2 (Affidavit). As outlined in the attached affidavit of FBI Special Agent Darrin Sakanoi, the FBI sought to locate and serve Ms. Otani by, among other things, calling the phone number associated to her multiple times, traveling to her residence, and traveling to her place of employment, Mitsunaga and Associates, Inc. (MAI). *Id.* At MAI, the FBI was ushered out of the office and told by an employee that he was not supposed to have let the FBI into MAI's office. *Id.* at ¶ 5.[1] On February 2, 2021, the FBI ultimately placed Ms. Otani's grand jury subpoena completely under the door to her apartment. *Id.* at ¶ 7.

Despite not answering her phone and failing to return messages, Ms. Otani received notice of the subpoena and required grand jury appearance. That is clear

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[1] The employee said that MAI was represented by Sheri J. Tanaka. Exhibit 2 at ¶ 5. The United States is aware that Ms. Tanaka currently represents other MAI employees. However, the United States has not received any information from Ms. Tanaka or Ms. Otani that she is represented.

because after being reminded of the grand jury appearance, she sent the following text message response to the FBI:

> Can you a (sic) least response that I'm under care medical. Under this condition I can't under stand questions under this condition since I can't stand even step up!

Ex. B at ¶ 10. In response, FBI Special Agent Sakanoi stated, "Ms. Otani please give me a call at 808-479-8919 so we can address your concerns. Thank you." *Id.* at ¶ 11. Ms. Otani did not respond to SA Sakanoi's message, either by text or phone. Accordingly, several hours later, SA Sakanoi reminded Ms. Otani of her obligation to appear before the grand jury:

> Good Evening Ms. Otani, since I have not heard from you, you are still instructed to report to the U.S. Courthouse tomorrow, 2/04/2021, at 1:00 p.m. Please call me at (808) 479-8919 should you have any questions. Thank you, Darrin Sakanoi, FBI Honolulu Division

Id. at ¶ 12. The following day, Ms. Otani did not appear before the grand jury as required.

II.

MOTION

Federal Rule of Criminal Procedure 17(g) provides that the court "may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district." Fed. R. Crim. P. 17(g); *see United States v. Bryan*, 339 U.S. 323, 331 (1950) ("A subpoena has never been treated as an invitation to a game of hare and hounds in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity."). In this case, after playing a game of hare and hounds, Ms. Otani was served a grand jury subpoena issued by the United States District Court for the District of

Hawaii. *See* Exhibit A. Based on her text message response to the FBI, Ms. Otani knew her appearance was required. But she failed to appear. Accordingly, the United States moves this Court to issue an order to show cause as to why Ms. Otani should not be held in contempt. The United States also requests a court order requiring Ms. Otani to appear at the grand jury session on Thursday, May 13, 2021 at 9:00 a.m.

The United States respectfully requests a hearing on this matter after 2:30 p.m. on Wednesday, May 12, or on Thursday, May 13 at 9:00 a.m.

Respectfully submitted,

Dated: May 5, 2021

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Attorney General

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JOSEPH J.M ORABONA
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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

IN RE GRAND JURY PROCEEDING *re: Terri Ann Otani*	Case No. 21-00098 LEK-KJM ***FILED UNDER SEAL*** CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a file-stamped copy of the United States' Motion and accompanying exhibits will be duly served, upon filing, on the following individual via first-class mail:

Terri Ann Otani
3050 Ala Poha Place, Apt. E7
Honolulu, Hawaii 96818

Additionally, the United States will attempt to hand-deliver a file-stamped copy of the Motion and accompanying exhibits to the above address no later than May 6, 2021.

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

Executed on May 5, 2021

COLIN M. MCDONALD
Special Attorney

EXHIBIT 1

NOTE: Please bring this subpoena with you on the date specified.

AO 110 (Rev. 01/09) Subpoena to Testify Before a Grand Jury

UNITED STATES DISTRICT COURT

for the

District of Hawai'i

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: Terri Ann R. Otani

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: United States Courthouse 300 Ala Moana Blv., 1st Floor Honolulu, Hawai'i 96850	Date and Time: Thursday, February 4, 2021 at 9:00 a.m.

***This is a continuing investigation. You are requested not to disclose the existence of this Subpoena for an indefinite period of time. Any such disclosure could interfere with the investigation being conducted and thereby impede the enforcement of the law.

Please call Special Attorney, Michael G. Wheat at 619-546-8437 to confirm receipt of this Subpoena and to confirm the date of your testimony.

THE GOVERNMENT WILL NOT BE RESPONSIBLE FOR ANY PARKING VIOLATIONS WHICH YOU MAY RECEIVE.

Date: January 21, 2021

SUE BEITIA
CLERK OF COURT

Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena, are:

Michael G. Wheat
Special Attorney
880 Front Street, Room 6293
San Diego, CA 92101
Telephone: 619-546-8437/ Facsimile: 619-546-0631
Email: Michael.Wheat@usdoj.gov

NOTE : Please bring this subpoena with you on the date specified.

PROOF OF SERVICE

This subpoena for (*name of individual or organization*) Terri Ann R. Otani

was received by me on (date) ________________

☐ I personally served the subpoena on the individual at *(place)* ______________________________

______________________________ on *(date)* ______________ *; or*

☐ I left the subpoena at the individual's residence or usual place of abode with *(name)* ______________

______________________________ , a person of suitable age and discretion who resides there,

on *(date)* ______________ ,and mailed a copy to the individual's last known address; or

☐ I served the subpoena on *(name of individual)* ______________________________ , who is designated by law to accept service of process in behalf of (*name of organization*) ______________________

______________________________ on (*date*) ______________ ; or

☐ I returned the subpoena unexecuted because ______________________________ ; or

☐ Other (*specify*):

I declare under penalty of perjury that this information is true.

Date: ________________

____
Server's signature

____
Printed name and title

____
Server's address

Additional information regarding attempted service, etc:

EXHIBIT 2

WARNING: THIS IS A SEALED DOCUMENT CONTAINING NON-PUBLIC INFORMATION

MERRICK B. GARLAND
Attorney General
RANDY S. GROSSMAN
Acting United States Attorney
MICHAEL G. WHEAT, CBN 118598
JOSEPH J.M. ORABONA, CBN 223317
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Attorneys for the United States

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

IN RE GRAND JURY PROCEEDING *re: Terri Ann Otani*	Case No. 21-00098 LEK-KJM AFFIDAVIT OF FBI SPECIAL AGENT DARRIN SAKANOI ***FILED UNDER SEAL***

I, Special Agent Darrin Sakanoi, hereby states as follows:

1. I am a Special Agent with the Federal Bureau of Investigation and have been so employed since October 2003.

2. On January 29, 2021, at approximately 11:40 a.m., I called telephone number (808) 220-4429, which, based on public records checks, is a number believed to be used by Terri Ann Otani (Otani), in order to coordinate the service of a federal Grand Jury subpoena ordering her to testify on February 04, 2021 before the federal Grand Jury for the District of Hawaii. The phone rang and a pre-recorded voice message greeting with a female voice identifying herself as "Terri," requested the caller to leave a message. I identified myself and left a voice message for Terri Otani to call me back on my cellular telephone.

3. After receiving no response from Otani, on February 01, 2021 at approximately 11:03 a.m., I again called the number referenced above associated with Otani. The telephone was almost immediately disconnected with no option to leave a voice message.

4. On February 02, 2021, at approximately 10:55 a.m., after no response from Otani, FBI Forensic Accountant (FoA) Brian Mix and I went to the office of Mitsunaga and Associates, Inc. (MAI), 747 Amana Street, Suite 216, Honolulu, Hawaii 96814 (L1), a business where Otani was believed to be employed. A message on the door of L1 advised to call 945-7002 to obtain access into the office. I called 945-7002 and was connected to a female employee (hereinafter referred to as UF1) of MAI. I identified myself to UF1 and asked if I could enter MAI's office to speak with three MAI employees, including Otani. UF1 told me to call MAI's receptionist at 945-7882 (a telephone number known by the FBI to be MAI's main office telephone number). I called 945-7882 twice, with both going to a pre-recorded greeting with a female voice requesting the caller to leave a message. I left a voice message on my first call, identifying myself and requesting entrance into MAI to speak with someone.

5. On February 02, 2021, at approximately 11:00 a.m., a male (hereinafter referred to as UM1) approached L1 from the elevator bay. FoA Mix and I identified

ourselves to UM1 and asked if Otani and two other MAI employees were in the office. UM1 advised that they were not in the office. I told UM1 that we were attempting to meet the three MAI employees, including Otani, and asked UM1 if he or anyone in the office could place us in contact with the three employees. UM1 opened the door to L1 and allowed FoA Mix and me to enter the office. UM1 was observed going to another room within L1 and speaking to an individual who could not be observed from where FoA Mix and I were standing. The unknown individual was believed by FoA Mix and me to be MAI's receptionist. After speaking to the unknown individual, UM1 told FoA Mix and me that the three MAI employees we were looking for were not at the office and they could not release any other information to the FBI. I told UM1 that the FBI had a court order to serve the three MAI employees, including Otani, and the FBI needed to get in contact with them as soon as possible. UM1 went back to the unknown individual in the other room at L1 and spoke with him/her. After speaking with the unknown individual, UM1 told FoA Mix and me to follow him outside of the office. FoA Mix and I followed UM1 out of L1 and the door to the entrance of L1 was closed. UM1 told FoA Mix and me that he did not know what was going on, but he was not supposed to have let the FBI into MAI's office. UM1 was asked who the Mitsunagas' attorney was. UM1 replied that he was not sure if he could answer that question. FoA Mix asked UM1 if their attorney was Sheri Tanaka. UM1 replied, "Yes, it's Sheri." I asked UM1 what Tanaka's contact number was and where she was located. UM1 replied that he did not have Tanaka's number and she was currently on the U.S. Mainland.

6. On February 02, 2021, at approximately 11:09 a.m., I called (808) 276-4942, a number known to be utilized by Sheri J. Tanaka. The telephone rang and a pre-recorded automated voice message greeting requested the caller to leave a message. I left a voice message for Sheri Tanaka, identifying myself and stating that the FBI had a federal Grand Jury subpoena to serve three MAI employees, including

Otani. I further advised Tanaka that the FBI attempted to contact the three MAI employees several times with no response. I instructed Tanaka to call me on my cellular telephone as soon as possible. I did not receive a return call from Tanaka regarding the respective voice message I left on Tanaka's telephone.

7. On February 02, 2021, at approximately 11:58 a.m., FoA Mix and I arrived at 3050 Ala Poha Place, Honolulu, Hawaii 96818 (L2). At approximately, 12:00 p.m., FoA Mix and I identified ourselves to the Building Manager (hereinafter referred to as UM2) of L2 and told him that we had a court order to serve Terri Otani who lives in apartment number E7. UM2 advised that he saw Otani's vehicle parked at L2 earlier in the morning. UM2 believed Otani may still be in her apartment. UM2 escorted FoA Mix and me to apartment number E7. I knocked on the respective door to the apartment several times and verbally called out Otani's name with no response. I asked UM2 if he positively knew that this was Otani's unit. UM2 replied, "Yes." I placed Otani's federal Grand Jury subpoena completely under the door to her apartment in the presence of FoA Mix and UM2.

8. On February 02, 2021, at approximately 12:05 p.m., I called telephone number (808) 220-4429, the number associated with Otani, twice. On both occasions the dial tone stopped almost immediately after dialing the number with no opportunity to leave a voice message.

9. On February 03, 2021, at approximately 12:13 p.m., I sent a text message from my cellular telephone number (808) 479-8919 to telephone number (808) 220-4429, the number associated with Otani, and FBI Acting Supervisory Special Agent (A/SSA) Laura Salazar's cellular telephone number. My text message to Otani was as follows:

- "Good Afternoon Ms. Otani, this is Darrin Sakanoi with the FBI Honolulu Division. I left a federal grand jury subpoena under your door yesterday as no one answered the door and I have tried calling you multiple times. Please

report to U.S. District Court, 300 Ala Moana Blvd, Honolulu, HI 96850, tomorrow (02/04/2021) at 1:00 p.m. We will meet you on the 2nd floor of the Courthouse. Please let me know should you have any questions at 808-479-8919. Thank you"

10. On February 03, 2021, at approximately 1:15 p.m., a response from (808) 220-4429, the number associated with Otani, was received by me and A/SSA Salazar. The text message from (808) 220-4429 to me and A/SSA Salazar was as follows:

- "Can you a (sic) least response that I'm under care medical. Under this condition I can't under stand questions under this condition since I can't stand even step up!"

11. On February 03, 2021, at approximately 1:21 p.m., I responded to the text message sent from telephone number (808) 220-4429, the number associated with Otani. My text message to Otani was as follows:

- "Ms. Otani please give me a call at 808-479-8919 so we can address your concerns. Thank you"

12. On February 03, 2021, at approximately 5:21 p.m., after no response from Otani, I sent a text message from my cellular telephone number (808) 479-8919 to telephone number (808) 220-4429, the number associated with Otani, and A/SSA Salazar's cellular telephone. My text message to Otani was as follows:

- "Good Evening Ms. Otani, since I have not heard from you, you are still instructed to report to the U.S. Courthouse tomorrow, 2/04/2021, at 1:00 p.m. Please call me at (808) 479-8919 should you have any questions. Thank you, Darrin Sakanoi, FBI Honolulu Division"

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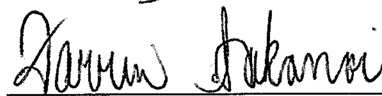
13. On February 04, 2021, at approximately 11:00 a.m., A/SSA Salazar and I were present at U.S. District Court for the District of Hawaii in which the federal Grand Jury for the District of Hawaii was convening. SA Robert Nelson arrived subsequently. A/SSA Salazar, SA Nelson, and I did not observe Otani at any time at the federal courthouse between approximately 11:00 a.m. until the federal Grand Jury adjourned that day after 4:30 p.m. Further, no one at the courthouse said anything about having seen Ms. Otani present prior to 11:00 a.m., and she did not testify in the grand jury.

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

Executed on May 5, 2021.



DARRIN SAKANOI
Special Agent
Federal Bureau of Investigation