pleading, the amendment relates back to the date of the original pleading." FSM Civ. R. 15(c). Thus, under Rule 15(c), the claims in the Plan's proposed amended complaint relate back to March 16, 2012.

> Rule 15(c) is based on the notion that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading.

6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1496, at 64 (2d ed. 1990); *see also* Cannon v. Kroger Co., 837 F.2d 660, 667 n.14 (4th Cir. 1988).

However, if claims for health insurance premium contributions due before March 16, 2006, had been included in the original complaint and if the FSM had asserted the six-year statute of limitations defense, the statutory defense would have barred their recovery. The proposed amended complaint's relation back to the original filing date of March 16, 2012, cannot revive those claims. The court will therefore permit the amended complaint but bar the Plan from seeking any health insurance premium contributions on wages and salaries earned before March 16, 2006.

III.

Accordingly, the Plan's motion to amend its complaint is granted, but, because the FSM has affirmatively asserted a statute of limitations defense, the Plan is barred from seeking any health insurance premium contributions on Chuuk Special Education Program wages and salaries earned before March 16, 2006.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2013-1506
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SILISIO a/k/a "Sirco" TIPINGENI,	)	
	)	
Defendant.	)	
	)	

ORDER DISPOSING OF PRETRIAL MOTIONS

Ready E. Johnny
Associate Justice

Hearings: June 12, July 8, 2014
Decided: July 16, 2014

APPEARANCES:

For the Plaintiff: Aaron L. Warren, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

For the Defendant: Bethwell O'Sonis, Esq.
Office of the Public Defender
P.O. Box 754
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Criminal Law and Procedure – Jurisdiction

The FSM Supreme Court has jurisdiction to convict and sentence a person who commits, or attempts to commit a crime, in whole or in part within the Federated States of Micronesia. FSM v. Tipingeni, 19 FSM R. 439, 444-45 (Chk. 2014).

Criminal Law and Procedure – Aiding and Abetting; Criminal Law and Procedure – Jurisdiction

Even though the crimes being aided and abetted took place on Guam, the FSM Supreme Court, under 11 F.S.M.C. 103(2)(a), has jurisdiction to convict and punish a defendant on the aiding and abetting charges when the aiding and abetting took place in Chuuk. FSM v. Tipingeni, 19 FSM R. 439, 445 (Chk. 2014).

Criminal Law and Procedure – Civil Rights Offenses; Statutes – Construction

The phrase "whether or not acting under color of law" in the civil rights criminal statute plainly means that Congress, by enacting the statute, made it a crime for a private person to willfully deprive another of, or injure, oppress, threaten, or intimidate the other in the free exercise of his or her rights under the FSM Constitution or laws. FSM v. Tipingeni, 19 FSM R. 439, 445 (Chk. 2014).

Civil Rights; Criminal Law and Procedure – Civil Rights Offenses

"Color of law" means the appearance or semblance without the substance of legal right. "Color of law" usually implies a misuse of power made possible only because the wrongdoer is clothed with the authority of the state. In the context of civil rights statutes or criminal law "color of law" and "state action" are synonymous. FSM v. Tipingeni, 19 FSM R. 439, 445 (Chk. 2014).

Criminal Law and Procedure – Civil Rights Offenses

A person "not acting under the color of law" is a private individual – not a person who is clothed with governmental authority. Tile 11, subsection 701(1) makes certain conduct by purely private persons (as well as those clothed with governmental authority) a crime. FSM v. Tipingeni, 19 FSM R. 439, 446 (Chk. 2014).

Criminal Law and Procedure; Torts

Criminal law and the law of torts (more than any other form of civil law) are related branches of the law; yet in a sense they are two quite different matters. Criminal law's aim is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. Tort law's function is to

compensate someone who is injured for the harm he or she has suffered. FSM v. Tipingeni, 19 FSM R. 439, 446 (Chk. 2014).

Criminal Law and Procedure – Civil Rights Offenses

The FSM always has standing to enforce its own criminal laws and to prosecute violators in order to protect the public against future harm and to punish wrongdoers for past harm. Criminal prosecutions shall be conducted in the name of the Federated States of Micronesia for violations of laws enacted by the FSM Congress, and this includes the criminal law and punishing civil rights violators. FSM v. Tipingeni, 19 FSM R. 439, 446 (Chk. 2014).

Criminal Law and Procedure; Torts

Frequently a defendant's conduct makes him both civilly and criminally liable. FSM v. Tipingeni, 19 FSM R. 439, 446 (Chk. 2014).

Civil Rights; Criminal Law and Procedure – Civil Rights Offenses

In addition to being potentially criminally liable to and subject to punishment by the FSM for the violation of 11 F.S.M.C. 701(1), a defendant could potentially also be civilly liable to the alleged victims in a suit under 11 F.S.M.C. 701(3). Three major differences exist between the criminal case and any potential civil case – in a civil case 1) the alleged victim(s) would be the plaintiff(s); 2) the burden of proof would be lower (preponderance of the evidence as opposed to beyond a reasonable doubt); and 3) the element of willfulness would not be required to establish civil liability. FSM v. Tipingeni, 19 FSM R. 439, 446 (Chk. 2014).

Criminal Law and Procedure – Aiding and Abetting

In order to prove the aiding and abetting charges, the FSM must not only prove beyond a reasonable doubt that the defendant did something to, or was prepared to do something to, assist or help the other or to encourage, advise, or instigate the other in the commission of a crime, but it must also first prove that another committed the underlying crime. FSM v. Tipingeni, 19 FSM R. 439, 447 (Chk. 2014).

Criminal Law and Procedure – Aiding and Abetting

In order to prove the aiding and abetting charges, the prosecution must prove, and therefore must introduce evidence of other crimes not charged in the information (the crimes the defendant is accused of aiding and abetting the commission of), and thus must also introduce evidence about the other person(s) whose commission of those crimes he aided and abetted even when those underlying crimes did not occur in the FSM but happened in a foreign country. FSM v. Tipingeni, 19 FSM R. 439, 447 (Chk. 2014).

Criminal Law and Procedure – Discovery

The FSM must provide the defendant with any prior witness statements once that witness has testified so that the defense may use it in any cross-examination. The FSM will usually, and is encouraged to, provide those statements far in advance of the witness's testimony. FSM v. Tipingeni, 19 FSM R. 439, 447 (Chk. 2014).

Criminal Law and Procedure; Evidence

When the defendant has not indicated what specific pieces of evidence he seeks to exclude and the prosecution does not appear to have informed the defendant what specific evidence it will seek to introduce at trial, the court is not in a position to rule on the evidence's admissibility and will deny the defendant's current motion in limine and will rule on the admissibility of any particular evidence that the defendant objects to if and when that issue comes properly before the court. FSM v. Tipingeni, 19 FSM R. 439, 447 (Chk. 2014).

Criminal Law and Procedure – Depositions

A party in a criminal case seeking to take a deposition must satisfy three elements – 1) there must be exceptional circumstances, 2) it must be in the interest of justice, and 3) it must be the party's own prospective witness whose testimony is to be preserved for use at trial. FSM v. Tipingeni, 19 FSM R. 439, 448 (Chk. 2014).

Criminal Law and Procedure – Depositions

To obtain a court order for taking of a deposition, the movant must show that the witness is unavailable to attend the trial, that the witness's testimony would be material, and that such testimony would be for the moving party's benefit or in some other way in the interest of justice. The movant bears the burden of showing whether exceptional circumstances exist within the meaning of FSM Criminal Rule 15. FSM v. Tipingeni, 19 FSM R. 439, 448 (Chk. 2014).

Criminal Law and Procedure – Depositions

When the witnesses are apparently willing to testify for the prosecution but are all unavailable because they are all on Guam beyond the reach of the court's subpoena power and are all serving sentences of either incarceration or probation that prevent them from leaving Guam and one is incarcerated and serving a life sentence, this constitutes exceptional circumstances for taking a deposition. FSM v. Tipingeni, 19 FSM R. 439, 448 (Chk. 2014).

Criminal Law and Procedure – Depositions

Although the court must first look to FSM sources of law to establish legal requirements in criminal cases rather than begin with a review of other courts' decisions, when the court has not previously interpreted certain aspects of an FSM criminal procedure rule regarding deposition, which is drawn from and identical or similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the rule. FSM v. Tipingeni, 19 FSM R. 439, 448 n.2 (Chk. 2014).

Criminal Law and Procedure – Depositions

Although the alleged victims are unavailable since they are all outside the FSM and cannot be subpoenaed and are generally unwilling to travel to Chuuk to testify because of the events' notoriety and shame and because of concerns over their safety but their evidence is obviously material and it is in the interest of justice that it be preserved for trial, and while fear of testifying at trial may be a ground for finding exceptional circumstances, the court cannot rely on that point when insufficient evidence was provided to show that any particular victim-witness feared testifying at trial in Chuuk. Nevertheless, the victim-witnesses are beyond the reach of the court's subpoena power and cannot be compelled to come to Chuuk and the parties must travel to Guam to take other depositions, so exceptional circumstances exist and they be deposed as well. FSM v. Tipingeni, 19 FSM R. 439, 448 (Chk. 2014).

Evidence – Witnesses

Although the Civil Procedure Rules provide that FSM nationals and residents are subject to the court's subpoenas even in foreign countries, there is no similar provision in the Criminal Procedure Rules. The only relevant Criminal Procedure Rule states that a subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the FSM. FSM v. Tipingeni, 19 FSM R. 439, 448 n.3 (Chk. 2014).

Criminal Law and Procedure – Depositions

While some of the prosecution witnesses may, in fact, be both willing and able to travel to Chuuk to appear in court, the court will still permit them to be deposed in Guam along with the other prosecution witnesses because exceptional circumstances exist to justify their depositions – they could change their minds; they are beyond the reach of the court's subpoena power; and the parties must

travel to Guam to take other depositions since their evidence is material and it is in the interests of justice that their testimony be preserved for trial. FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014).

Criminal Law and Procedure – Depositions

Rule 15 has elaborate provisions to make it possible for the defendant and his attorney to be present at the taking of a deposition. FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014).

Criminal Law and Procedure – Right to Confront Witnesses

Because the FSM Declaration of Rights was modeled after the U.S. Bill of Rights, the court may look to U.S. sources for guidance in interpreting similar Declaration of Rights provisions, such as the right to confrontation, found in the FSM Constitution's Declaration of Rights at Article IV, section 6, and in the U.S. Constitution in its Sixth Amendment. FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014).

Criminal Law and Procedure – Depositions; Criminal Law and Procedure – Right to Confront Witnesses

The prosecution may use Rule 15 to depose its witnesses because the FSM's Confrontation Clause does not always require a physical confrontation before the fact-finder, but the justification for using a deposition at a criminal trial as evidence against a defendant is much stronger if defendant has been present or if he or she has waived the right to be present. FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014).

Criminal Law and Procedure – Right to Confront Witnesses; Evidence – Hearsay

The FSM's confrontation clause does not always require a physical confrontation before the fact-finder. For example, there are certain well-established exceptions to the rule barring hearsay that, because of their indicia of reliability or trustworthiness, allow the introduction of evidence from witnesses a defendant will be unable to confront. FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014).

Criminal Law and Procedure – Depositions; Criminal Law and Procedure – Right to Confront Witnesses

When the government conducts a Rule 15 deposition in a foreign land with a view toward introducing it at trial, the Confrontation Clause requires, at a minimum, that the government undertake diligent efforts to secure the defendant's presence. FSM v. Tipingeni, 19 FSM R. 439, 450 (Chk. 2014).

Criminal Law and Procedure – Depositions

Whenever a deposition is taken at the instance of the government the court may direct that the that the FSM tender the defendant and his counsel with round-trip air transportation and with per diem for their anticipated stay at the deposition site and the cost of the deposition's transcript must also be paid by the government. FSM v. Tipingeni, 19 FSM R. 439, 450 (Chk. 2014).

Criminal Law and Procedure – Depositions; Criminal Law and Procedure – Right to Confront Witnesses

A defendant's failure, absent good cause shown, to appear at the deposition of a government witness after notice and the government's tender of expenses constitutes a waiver of that right and of any objection to the taking and use of the deposition based upon that right. FSM v. Tipingeni, 19 FSM R. 439, 450 (Chk. 2014).

Criminal Law and Procedure – Depositions

If, for whatever reason, a defendant does not wish to or is unable to attend the depositions of prosecution witnesses but does not want to waive his right of confrontation, the prosecution must arrange for his use of two telephone connections to the depositions, one to monitor the proceedings and the other a private line connected to his defense counsel so that he may confer with counsel when needed. The open line for the defendant to monitor the proceedings may be, but is not required to be,

a video transmission line such as Skype. FSM v. Tipingeni, 19 FSM R. 439, 450 (Chk. 2014).

Criminal Law and Procedure – Depositions; Criminal Law and Procedure – Right to Confront Witnesses; Translation

The scope and manner of examination and cross-examination during the Rule 15 depositions is the same as would be allowed in the trial itself. This includes the prosecution making available to the defendant or his counsel for examination and use during the deposition any statement of the witness being deposed which is in the government's possession and to which the defendant would be entitled at the trial. The deposition procedure will also include frequent pauses in the testimony so as to allow for translation for the defendant's benefit. The prosecution will be responsible for engaging and compensating a court-approved translator so that the defendant can follow the testimony and confer with his defense counsel. FSM v. Tipingeni, 19 FSM R. 439, 450 (Chk. 2014).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On June 12, 2014, this came before the court to hear 1) Defendant's Motion in Limine, filed April 28, 2014; Defendant's Motion to Dismiss Aiding and Abetting Charges for Lack of Subject Matter Jurisdiction over the Substantive Offense, filed May 2, 2014; 2) the prosecution's Motion to Conduct Rule 15 Depositions, filed May 5, 2014; 3) the prosecution's Motion to Show Cause, filed June 2, 2014. And on July 8, 2014, this came before the court to telephonically hear Defendant's Motion to Dismiss the Charge of Civil Rights Violation Because it Does Not Apply to Him as a Private Individual, filed June 19, 2014; Plaintiff's Response in Opposition to Defendant's June 19, 2014 Motion to Dismiss, filed June 20, 2014; and Defendant's Supplement to His Motion to Dismiss the Charge of Civil Rights Violation Because the State [sic] Has No Standing, filed June 26, 2014.

I. Background

On December 4, 2013, the FSM filed a criminal information charging the defendant, Silisio a/k/a "Sirco" Tipingeni, with committing the crimes of aiding and abetting the deprivation of others' civil rights to be free from slavery, involuntary servitude, or peonage (eight counts); aggravated criminal mischief; and money laundering. He allegedly committed these crimes by deceiving and inducing young Chuukese women into traveling to Guam, ostensibly for lawful paid employment there, but actually to be coerced and forced into prostitution at the Blue House bar, a business run by a Korean national, Song Ja Cha, who paid him for his part in the scheme.

II. Motions to Dismiss

A. *Jurisdiction over Aiding and Abetting Charges*

Tipingeni contends that the aiding and abetting charges must be dismissed because aiding and abetting is not an independent crime and because the substantive crimes that he is alleged to have aided and abetted occurred outside the FSM so an FSM court would lack jurisdiction over both the substantive crime and the aiding and abetting charges.

While the substantive crime, deprivation of the civil right to be free from slavery, involuntary servitude, or peonage may have, or virtually all of it may have, taken place outside the FSM, all or virtually of Tipingeni's alleged acts of aiding and abetting a crime occurred in Chuuk. Under 11

F.S.M.C. 103(2)(a), the FSM Supreme Court has jurisdiction to convict and sentence a person who "commits, or attempts to commit a crime, in whole or in part within the Federated States of Micronesia."

California's similarly-worded statute declared that "[a]ll persons who commit, in whole or in part, any crime within this state" were "liable to punishment under the laws of this state." Cal. Penal Code § 27(1). The California Supreme Court held that, based on that statute, when a defendant in San Francisco, California prepared and sent a box of poisoned candy to a woman in Delaware and she ate it and died, California courts had jurisdiction to try and convict the defendant of murder. People v. Botkin, 64 P. 286, 287 (Cal. 1901). Courts interpreting similarly-worded statues in other jurisdictions reach the same result. *See, e.g.*, State v. Willoughby, 892 P.2d 1319, 1325, 1328-29 (Ariz. 1995) (Arizona court could punish and convict person for premeditated murder of his wife in Mexico when premeditation took place in Arizona and statute gave court jurisdiction if conduct constituting one or more of the required elements of a crime occurred in Arizona); Lane v. State, 388 So. 2d 1022, 1027-28 (Fla. 1980) (Florida courts could exercise jurisdiction over and punish murder committed in Alabama when statute gave court jurisdiction over crimes "committed wholly or partly within the state" and kidnaping took place in Florida before the murder in Alabama); Smith v. State, 697 P.2d 113, 114-15 (Nev. 1983) (statute permits Nevada court to try and convict defendant for rape and attempted murder in California when the intent to commit those crimes was formed in Nevada at the time the defendant kidnaped the victim in Nevada); People v. Zayas, 111 N.E. 465, 466 (N.Y. 1916) (New York court could convict and punish for larceny by false pretenses a defendant who made misrepresentations in New York but received the property in Pennsylvania because statute gave court jurisdiction to punish any "person who commits within the state any crime, in whole or in part").

Accordingly, the court, under 11 F.S.M.C. 103(2)(a), has jurisdiction to convict and punish Tipingeni on the aiding and abetting charges. His motion to dismiss on jurisdictional grounds is denied.

B. *Whether Private Person Can Commit Civil Rights Offense*

Tipingeni contends that since he is a private person he cannot be held criminally liable for violating a civil right enshrined in the Constitution because the Declaration of Rights is meant to protect persons from the government, not from other private individuals. He contends that, based on the allegations in the information, he should not criminally prosecuted by the government but should have been civilly sued by the alleged victims.

The statute reads:

> A person commits a crime if he or she willfully, whether or not acting under color of law, deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of, or because of his or her having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia . . . .

11 F.S.M.C. 701(1). The phrase "whether or not acting under color of law" plainly means that Congress, by enacting the statute, made it a crime for a private person to willfully deprive another of, or injure, oppress, threaten, or intimidate the other in the free exercise of his or her rights under the FSM Constitution or laws.

"Color of law" means the appearance or semblance without the substance of legal right. FSM v. GMP Hawaii, Inc., 16 FSM Intrm. 479, 483 n.3 (Pon. 2009). "Color of law" usually implies a misuse of power made possible only because the wrongdoer is clothed with the authority of the state. *Id.*;

BLACK'S LAW DICTIONARY 302 (9th ed. 2009). In the context of civil rights statutes or criminal law "color of law" and "state action" are synonymous. BLACK'S LAW DICTIONARY 302 (9th ed. 2009). It follows then that a person "not acting under the color of law" is a private individual – not a person who is clothed with governmental authority. Thus, subsection 701(1) makes certain conduct by purely private persons (as well as those clothed with governmental authority) a crime.

Subsection 701(2) provides that the maximum possible jail sentence for violating subsection 701(1) is ten years. And subsection 701(3) permits the victim to file a civil suit against the offender.

Tipingeni contends that the FSM's case should be dismissed and that if there is any remedy, it should be by the alleged victims filing civil suits against him and that the FSM does not have standing to prosecute or sue him in their place. He is mistaken. He overlooks the different, but related, nature of criminal law and the civil law of torts.

> Criminal law and the law of torts (more than any other form of civil law) are related branches of the law; yet in a sense they are two quite different matters. The aim of criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he [or she] has suffered.

1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.3(b), at 17 (1986).

The FSM always has standing to enforce its own criminal laws and to prosecute violators in order to protect the public against future harm and to punish wrongdoers for past harm. "Criminal prosecutions shall be conducted in the name of the Federated States of Micronesia for violations of . . . (1) laws enacted by the Congress of the Federated States of Micronesia . . . ." 12 F.S.M.C. 102. This includes the criminal law punishing civil rights violators.[1] 11 F.S.M.C. 701(1) and (2). Thus, the FSM may seek to hold Tipingeni criminally liable under 11 F.S.M.C. 701(1).

"Frequently the defendant's conduct makes him both civilly and criminally liable." 1 LAFAVE & SCOTT, *supra*, § 1.3(b), at 19. Thus, in addition to being potentially criminally liable to and subject to punishment by the FSM in this case for the violation of 11 F.S.M.C. 701(1), Tipingeni could potentially also be civilly liable to the alleged victims in a suit under 11 F.S.M.C. 701(3). Three major differences exist between this criminal case and any potential civil case – in a civil case 1) the alleged victim(s) would be the plaintiff(s); 2) the burden of proof would be lower (preponderance of the evidence as opposed to beyond a reasonable doubt), *see* In re Attorney Disciplinary Proceeding, 9 FSM Intrm. 165, 173-74 (App. 1999) (in attorney discipline cases, the burden is clear and convincing evidence which is higher than the preponderance of the evidence burden in civil cases but lower than the beyond a reasonable doubt burden in criminal cases); and 3) the element of willfulness would not be required to establish civil liability under 11 F.S.M.C. 701(3), Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 411 (App. 2000).

Accordingly, the court denies Tipingeni's motion to dismiss that he brought on the ground that as a private individual he cannot be held criminally liable.

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[1] Prosecution, conviction, and affirmance on appeal of a civil rights crime, is not unknown in the FSM. *See* Wainit v. FSM, 15 FSM Intrm. 43, 45 (App. 2007) (conviction of person acting under color of law).

III. Motion in Limine

Tipingeni moves to exclude any evidence or mention of, comment on, or argument about "Blue House," prostitution, peonage, slavery, commercial sex house, the names of other alleged perpetrators that are not charged in the Criminal Case No. 2013-1506 information, and documents of any investigation done outside this court's jurisdiction such as interviews and witness statements. Tipingeni asserts that these items are all not only inadmissible but also cannot be mentioned because they did not occur in the FSM but happened in a foreign country. This contention is wholly without merit.

Tipingeni seeks to exclude any evidence that refers to "other crimes not charged in this information" or to "individuals not charged in this information." The court must reject this contention. Tipingeni is charged with eight counts of aiding and abetting. In order to prove the aiding and abetting charges, the FSM must not only prove beyond a reasonable doubt that Tipingeni did something to, or was prepared to do something to, assist or help the other or to encourage, advise, or instigate the other in the commission of a crime, FSM v. Sam, 14 FSM Intrm. 328, 332 (Chk. 2006), but it must also first prove that another committed the underlying crime, FSM v. Sam, 15 FSM Intrm. 457, 462 (Chk. 2007). Therefore, in order to prove the aiding and abetting charges in this information, the prosecution must prove, and therefore must introduce evidence of other crimes not charged in this information (the crimes Tipingeni is accused of aiding and abetting the commission of), and thus must also introduce evidence about the other person(s) whose commission of those crimes he aided and abetted.

Tipingeni also contends that the FSM will seek to use written statements and interviews of witnesses and that these documents must be excluded since they would violate his constitutional right to confront his accusers. The FSM acknowledges that Tipingeni's right to confront the witnesses against him "is of paramount concern," but further contends that the motion is premature when Tipingeni has not identified any specific item of evidence he seeks to exclude. The FSM, during the June 12th hearing, indicated that it had already given defense counsel copies of all of the evidence it had in its possession. The FSM must provide Tipingeni with any prior witness statements once that witness has testified so that the defense may use it in any cross-examination. FSM Crim. R. 26.2(a). The FSM will usually, and is encouraged to, provide those statements far in advance of the witness's testimony. FSM v. Walter, 13 FSM Intrm. 264, 268 (Chk. 2005). It appears that the FSM may have already done so.

When Tipingeni has not indicated what specific pieces of evidence he seeks to exclude and the FSM does not appear to have informed Tipingeni what specific evidence it will seek to introduce at trial, the court is not in a position to rule on the evidence's admissibility. The court will therefore deny Tipingeni's current motion in limine and will rule on the admissibility of any particular evidence that Tipingeni objects to if and when that issue comes properly before the court.

IV. Deposition Testimony

The FSM moves to depose and use at trial the deposition witness testimony of Song Ja Cha, Freda Eseun, and Saknin Weira, who were all convicted in Guam of related offenses and are serving sentences; many of the victims whose constitutional rights were allegedly deprived; and a number of other persons on Guam who had contact with the victims. the FSM seeks to depose these eleven witnesses on Guam. Tipingeni opposes the motion arguing that it would violate his constitutional right to confront the witnesses against him.

A. *Exceptional Circumstances*

The FSM relies on Criminal Procedure Rule 15, which provides:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . .

FSM Crim. R. 15(a).

A party in a criminal case seeking to take a deposition must satisfy three elements – 1) there must be exceptional circumstances, 2) it must be in the interest of justice, and 3) it must be the party's own prospective witness whose testimony is to be preserved for use at trial. FSM v. Wainit, 13 FSM Intrm. 301, 304 (Chk. 2005). To obtain a court order for taking of a deposition, the movant must show that the witness is unavailable to attend the trial, that the witness's testimony would be material, and that such testimony would be for the moving party's benefit or in some other way in the interest of justice. Wolfe v. FSM, 2 FSM Intrm. 115, 122 (App. 1985) (interpreting FSM Crim. R. 15(a)); Wainit, 13 FSM Intrm. at 304. The movant bears the burden of showing whether exceptional circumstances exist within the meaning of FSM Criminal Rule 15. Wolfe, 2 FSM Intrm. at 122.

The three co-conspirators are apparently willing to testify for the prosecution but are all unavailable. They are all on Guam beyond the reach of the court's subpoena power and are all serving sentences of either incarceration or probation that prevent them from leaving Guam. Song Ja Cha is incarcerated and serving a life sentence. This constitutes exceptional circumstances. United States v. Sines, 761 F.2d 1434, 1439 (9th Cir. 1985)[2] (government permitted, so that it could use the testimony at trial if needed, to depose witness who would remain incarcerated in Thailand for a significant number of years and who would not be allowed to leave the country); United States v. Acevedo-Ramos, 605 F. Supp. 190, 192 (D.P.R. 1985) (exceptional circumstances existed when Massachusetts refused to release witness to attend trial in Puerto Rico until his own homicide trial was over). The other two, Freda Eseun and Saknin Weira, are also unavailable. Their sentences of probation include travel restrictions, and they are beyond the reach of the court's subpoena power. These three prosecution witnesses and alleged fellow participants in the criminal scheme are all unavailable; they have material evidence; and it would be in the interests of justice to preserve their testimony for trial.

The FSM also asserts that alleged victims are unavailable since they are all on Guam (or in Hawaii) and cannot be subpoenaed[3] and are generally unwilling to travel to Chuuk to testify because of the events' notoriety and shame and because of concerns over their safety. They cannot be compelled to return to Chuuk because they are beyond the court's subpoena power. Their evidence is obviously material and it is in the interest of justice that it be preserved for trial. While fear of

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[2] Although the court must first look to FSM sources of law to establish legal requirements in criminal cases rather than begin with a review of other courts' decisions, Alphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982), when the court has not previously interpreted certain aspects of an FSM criminal procedure rule (in this case Rule 15) which is drawn from and identical or similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the rule. *See, e.g.*, Zhang Xiaohui v. FSM, 15 FSM Intrm. 162, 167 n.3 (App. 2007); Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984).

[3] Although the Civil Procedure Rules provide that FSM nationals and residents are subject to the court's subpoenas even in foreign countries, FSM Civ. R. 45(e)(2), there is no similar provision in the Criminal Procedure Rules. The only relevant Criminal Procedure Rule states: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the Federated States of Micronesia." FSM Crim. R. 17(e).

testifying at trial may be a ground for finding exceptional circumstances, *see* United States v. Johnson, 752 F.2d 206, 209-10 (6th Cir. 1985), the court does not rely on that point because insufficient evidence was provided to show that any particular victim-witness feared testifying at trial in Chuuk. The victim-witnesses are, however, beyond the reach of the court's subpoena power and cannot be compelled to come to Chuuk and the parties must travel to Guam to take other depositions.

While some of these other prosecution witnesses may, in fact, be both willing and able to travel to Chuuk to appear in court, the court will still permit them to be deposed in Guam along with the other prosecution witnesses because exceptional circumstances exist to justify their depositions – they could change their minds; they are beyond the reach of the court's subpoena power; and the parties must travel to Guam to take other depositions. United States v. Drogoul, 1 F.3d 1546, 1557 (11th Cir. 1993) (while ordinarily exceptional circumstances do not exist when a prospective deponent has declared he is willing to appear at trial, when the government must be allowed to depose seven witnesses in Italy who have declared they will not appear for trial, it will be allowed, since the additional depositions would involve the expenditure of marginally more time, money, and effort, to depose six more witnesses in Italy who indicated they were willing to attend trial but who might change their minds and who were beyond the court's subpoena power); United States v. Des Marteau, 162 F.R.D. 36, 368 (M.D. Fla. 1995) (when parties had to travel to Quebec to take the depositions of other witnesses, exceptional circumstances existed to depose another witness in Quebec who had indicated that she was willing to travel to Florida to testify). Furthermore, the expense of bringing a large number of otherwise unavailable witnesses from a foreign country, even if they were willing to attend trial, is a factor that may be considered when determining whether there are exceptional circumstances and the depositions are in the interests of justice. *See* United States v. Sun Myung Moon, 93 F.R.D. 558, 559-60 (S.D.N.Y. 1982) (because of the expense involved in bringing them to New York, defendant allowed to depose 120 witnesses in Japan). From the FSM's summary of these prosecution witnesses' anticipated testimony, it appears that their evidence is material and it is in the interests of justice that their testimony be preserved for trial.

B. *Right of Confrontation and Deposition Procedure*

Tipingeni contends that taking testimony by deposition will violate his constitutional right to confront the witnesses against him. He contends that the Constitution, FSM Const. art. IV, § 6, requires a face-to-face meeting with the witness appearing before the fact-finder. He seems to contend that Criminal Procedure Rule 15 is unconstitutional, at least if used to depose prosecution witnesses.

"Rule 15 has elaborate provisions to make it possible for the defendant and his attorney to be present at the taking of a deposition." 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 244, at 36 (3d ed. 2000). Because the FSM Declaration of Rights was modeled after the U.S. Bill of Rights, the court may look to U.S. sources for guidance in interpreting similar Declaration of Rights provisions, such as the right to confrontation, FSM v. Wainit, 10 FSM Intrm. 618, 621 n.1 (Chk. 2002), found in the FSM Constitution's Declaration of Rights at Article IV, section 6, and in the U.S. Constitution in its Sixth Amendment. Thus, the prosecution may use Rule 15 to depose witnesses because "the Confrontation Clause of the Sixth Amendment does not always require a physical confrontation, [but] the justification for using a deposition at a criminal trial as evidence against a defendant is much stronger if defendant has been present or if he or she has waived the right to be present." 2 WRIGHT, *supra*, § 244, at 36 (footnotes omitted). Likewise, the FSM's confrontation clause, FSM Const. art. IV, § 6, does not always require a physical confrontation before the fact-finder. For example, there are certain well-established exceptions to the rule barring hearsay that, because of their indicia of reliability or trustworthiness, allow the introduction of evidence from witnesses a defendant will be unable to confront. *See* FSM Evid. R. 804(b); *see also* SCREP No. 23, II J. of Micro. Con. Con. 793, 802; *cf.* United States v. King, 552 F.2d 833, 838-44 (9th Cir. 1976).

"When the government conducts a Rule 15 deposition in a foreign land with a view toward introducing it at trial, the Confrontation Clause requires, at a minimum, that the government undertake diligent efforts to secure the defendant's presence." United States v. McKeeve, 131 F.3d 1, 8 (1st Cir. 1997) (citing United States v. Kelly, 892 F.2d 255, 262 (3d Cir. 1989); United States v. Salim, 855 F.2d 944, 950 (2d Cir. 1988)). The FSM has indicated that it expects that, if its motion is granted, the court will order it to cover the expenses for Tipingeni and his defense counsel to travel to Guam and attend the depositions. This is correct. "Whenever a deposition is taken at the instance of the government . . . the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government." FSM Crim. R. 15(c). The court therefore directs that the FSM tender the defendant and his counsel with round-trip air transportation to Guam and with per diem for their anticipated stay there.

Tipingeni has, on request, the right to be present at the depositions subject to such terms as the court may fix, "but the defendant's failure, absent good cause shown, to appear after notice and [the FSM's] tender of expenses . . . shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right." FSM Crim. R. 15(b). The court takes Tipingeni's insistence on his right to confront the witnesses against him to be his request.

If, for whatever reason, Tipingeni does not wish to or is unable to attend the depositions on Guam but does not want to waive his right of confrontation, the FSM shall arrange for his use of two telephone connections to the depositions, one to monitor the proceedings and the other a private line connected to his defense counsel so that he may confer with counsel when needed. *Cf.* United States v. Medjuck, 156 F.3d 916, 920 (9th Cir. 1998) (since defendant's actual physical presence at deposition was not possible, confrontation right satisfied when defendant was able to witness depositions by live video feed and to participate with his attorneys by private telephone connection during the depositions); United States v. Gifford, 892 F.2d 263, 264 (3d Cir. 1989) (confrontation right and due process not violated when defendant was able to listen to deposition through open telephone line and confer with his attorney through a private line and the deposition was videotaped). The open line for Tipingeni to monitor the proceedings may be, but is not required to be, a video transmission line such as Skype.

The scope and manner of examination and cross-examination during the Rule 15 depositions will be the same as would be allowed in the trial itself. FSM Crim. R. 15(d)(2). This will include the FSM making available to Tipingeni or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the government's possession and to which the defendant would be entitled at the trial. *Id.* The deposition procedure will also include frequent pauses in the testimony so as to allow for translation into the Chuukese language for Tipingeni's benefit. The prosecution will be responsible for engaging and compensating a court-approved translator so that Tipingeni can follow the testimony and confer with his defense counsel.

C. *Depositions May Be Taken*

The court finds that exceptional circumstances exist, that the prosecution witnesses' testimony is material, and that preserving their testimony for trial is in the interests of justice. Accordingly, the FSM will be permitted to depose on Guam the witnesses listed in their motion in a manner consistent with this decision and Rule 15. The parties shall file, no later than August 8, 2014, a report with the court on what arrangements have been made.

V. CONCLUSION

Accordingly, the defendant's motions to dismiss and his motion in limine are denied. Silisio a/k/a "Sirco" Tipingeni may raise the admissibility of any specific item of evidence at the appropriate time. The FSM's motion to depose eleven witnesses on Guam is granted under the terms and conditions set out above.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

TADASY ANDREW and HEIRS OF EDMOND TULENKUN, Appellants, vs. HEIRS OF TULENSRU SEYMOUR, Appellees.	APPEAL CASE NO. K3-2013 KSC Civil Action No. 45-12

ORDER TAXING $65 IN COSTS

Martin G. Yinug
Chief Justice

Decided: July 31, 2014

APPEARANCES:

For the Appellants: Sasaki L. George, Esq.
P.O. Box 487
Tafunsak, Kosrae FM 96944

For the Appellees: Harry A. Seymour, Esq.
P.O. Box 389
Tafunsak, Kosrae FM 96944

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HEADNOTES

Costs – Proceudre

A prevailing party who desires costs to be taxed must state them in an itemized and verified bill of costs which must be filed with the clerk, with proof of service, within 14 days after the entry of the appellate judgment. The appellate clerk will act on the bill of costs, at least where no opposition has been filed; when there is opposition, the matter is usually referred to the court or a judge thereof. Andrew v. Heirs of Seymour, 19 FSM R. 451, 452 (App. 2014).