

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	Case No. 21-CR-00061-LEK-1
	)	
Plaintiff,	)	February 14, 2023
	)	9:32 a.m.
vs.	)	
	)	
MARTIN KAO,	)	
	)	U.S. District Court
Defendant.	)	300 Ala Moana Boulevard
_____	)	Honolulu, HI 96850

TRANSCRIPT OF MOTION HEARING RE MOVANT PACMAR TECHNOLOGIES LLC'S
MOTION FOR RETURN OF PROPERTY PURSUAN TTO 41(G) OF THE FEDERAL
RULES OF CRIMINAL PROCEDURE AS TO MARTIN KAO
BEFORE THE HONORABLE ROM TRADER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	Craig S. Nolan, Esq. U.S. Attorney's Office 300 Ala Moana Boulevard, #6100 Honolulu, HI 96850
For the Defendant:	Victor J. Bakke, Esq. 700 Bishop Street, Suite 2100 Honolulu, HI 96813
For Interested Party Martin Kao:	Michel A. Okazaki, Esq. 370 Kawaihae Street, Apartment E Honolulu, HI 96825
For PacMar Technologies LLC:	Jesse W. Schiel, Esq. Kobayashi Sugita & Goda 999 Bishop Street, Suite 2600 Honolulu, HI 96813
Transcription Service:	Jessica B. Cahill, CER/CET-708 Maukele Transcribers, LLC 467 Maukele Place Wailuku, Maui, HI 96793 Telephone: (808)298-8633

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1 FEBRUARY 14, 2023

9:32 A.M.

2 THE CLERK: The United States District Court for the
3 District of Hawai'i, with the Honorable Magistrate Judge Rom
4 Trader presiding, is now in session. The gallery may be seated.

5 Criminal number 21-00061-LEK, United States of America
6 v. Defendant (01) Martin Kau. This case has been called for a
7 motion hearing. Counsel, your appearances for the record,
8 please, starting with the Government.

9 MR. NOLAN: Good morning, Your Honor. Craig Nolan for
10 the Government.

11 MR. BAKKE: And good morning, Your Honor. Attorney
12 Victor Bakke on behalf of the Defendant, who's present in court.
13 Also present, Your Honor, I would ask to have a special
14 appearance is Attorney Michael Okazaki. He's working -- he's
15 Martin Kau's lawyer on the civil side. He's the one that
16 assisted in -- actually, he's the one that wrote the motion, Your
17 Honor, and I filed it because this is a lot of history that I
18 didn't have privilege too. So I would ask that he be here to
19 argue the motion as well.

20 THE COURT: All right. Any objection to that?

21 MR. NOLAN: No, not from the Government.

22 MR. SCHIEL: None from PacMar.

23 THE COURT: All right.

24 MR. SCHIEL: And good morning, Your Honor. Jesse
25 Schiel for Movant PacMar Technologies, LLC, formerly known as

1 Martin Defense Group.

2 THE COURT: All right. Good morning, folks. Have a
3 seat. We're here on the Movant's motion. I'll take judicial
4 notice of the records and files in this case. I'm aware, Mr.
5 Kau's pending sentencing, I believe it just got moved; did it
6 not, until September or something like that, Mr. Bakke?

7 MR. BAKKE: Yes, Your Honor.

8 THE COURT: All right. And then beyond that, Mr.
9 Nolan, there's a second pending criminal investigation or case
10 that he's been charged in?

11 MR. NOLAN: Correct, Your Honor.

12 THE COURT: All right. And the evidence as it relates
13 to the phone data relate to that particular case as well, right?

14 MR. NOLAN: So, yeah. It's our position that the phone
15 data relate to both the case pending sentencing and the case
16 pending trial.

17 THE COURT: Okay. All right.

18 MR. BAKKE: And, Your Honor, for the Court's
19 information, though, he also has pled guilty in the District of
20 D.C., on a campaign theft.

21 THE COURT: Okay.

22 MR. BAKKE: And so that could be part of that. I'm not
23 the attorney on that. He has a public defender in D.C., but --

24 THE COURT: Sure. Okay. Thank you. I just want to
25 make sure I got an idea of what the landscape looks like. Okay.

1 All right. And so with that, I've reviewed the motion,
2 the Government's response, Defendant's opposition, as well as the
3 reply. I've reviewed the exhibits. I've taken a look at some of
4 the cases that were cited. I can't say I've looked at them with
5 a fine tooth comb, but I did review at least a couple of them.
6 Beyond that, the operative rule, which is 41(g). And with that,
7 I think I waive everything. So it's your motion, Mr. Schiel.

8 MR. SCHIEL: Sure. Thank you, Your Honor. And I won't
9 reiterate everything. I'll just hit some of the salient points
10 and can answer any questions you may have.

11 As you know, we're moving under 41(g) -- Rule 41(g),
12 which allows a non-party that's allegedly been aggrieved by the
13 seizure of its property to have its property returned. That's
14 the case here. The rule has also been interpreted to include
15 petitions for property that -- where the property has rightfully
16 been seized by the Government, and that's the case here as well.
17 We're not asserting that the property was wrongfully or
18 unlawfully seized by the Government.

19 We've set forth the standard in the motion that has
20 some factors that the Court can consider, but, frankly, those are
21 more applicable when the Government is opposing the requested
22 release. For instance, one of the factors is whether, you know,
23 the Government is -- you know, whether the Government has been
24 derelict in some way, and these sorts of things. We're not
25 alleging any of that. And the Government isn't opposing the

1 release of the requested cell phone data to us -- to PacMar. The
2 objection, of course, here is coming solely from Defendant, Mr.
3 Kau. And I'll get to some of those objections, and we responded
4 to them in our reply.

5 But I want to get to what we consider to be the
6 undisputed facts that are pertinent to the Court's analysis and
7 ultimate decision.

8 One is that the cell phone is not Mr. Kau's personal
9 cell phone. That's not asserted in the opp because it's not the
10 case. It's a company cell phone. It was issued to him as any
11 company cell phone is. Paid for by the Company, that's
12 undisputed.

13 And so we would submit that the fact that the cell
14 phone is company property, covered by its policies, is
15 undisputed. The company's handbooks and policies and procedures
16 make it clear that all the work that's done on the company
17 resources electronic devices is the company's property and is
18 assigned to the Company. We've cited those provisions in our
19 motion, reiterated the same in our reply memorandum. And that
20 the sensitive information stored on electronic devices such as
21 the company cell phone remain -- and this is verbatim -- remain
22 the sole property of the company.

23 Mr. Kau acknowledges that these policies existed. He
24 was the company President and CEO at the relevant times in
25 question. He certainly would be imputed to have that knowledge.

1 But he also signed an acknowledgement and that's undisputed.

2 Regarding the arguments that are raised in the
3 opposition, just briefly on that. He doesn't dispute any of
4 those facts. Rather, he turns his attention to asserted rights
5 of privacy to the data and the cell phone Fifth Amendment
6 privilege type arguments, okay. But we think these are misplaced
7 and we've explained why in the reply.

8 First, there's no expectation of privacy in your
9 company cell phone, particularly where the company policies and
10 procedures make that clear. It's no different than the emails on
11 the server that were seized by the DOJ in connection with their
12 criminal actions against Mr. Kau, and those servers have been
13 returned to the company. The company has Mr. Kau's business
14 emails and personal emails that were on the server. Emails and
15 text messages on his company's cell phone are no different.
16 That's our view.

17 Second, because he has no expectation, a reasonable one
18 anyway, of privacy on his company business cell phone that's been
19 seized, there's no need for Mr. Kau to testify regarding whether
20 he had an expectation of privacy or not as to certain emails
21 versus other emails or text messages, versus others. In fact,
22 the DOJ already has all of that data. We're not asking them to
23 return it and forever relinquish control.

24 The DOJ has made it clear they're going to keep the
25 cell phone as evidence in their pending cases as Mr. Kau.

1 They're going to keep the data that's been converted through
2 Cellebrite, as we understand it, and they're going to give us a
3 file that we can use and for the purposes that we've explained in
4 our motions. It's our company data and as a federal contractor,
5 the company is entitled to that and in fact needs it.

6 There's arguments raised in the opposition about
7 whether 41(g) is a proper vehicle for this request. We think
8 those are really misplaced. We obviously don't need a subpoena
9 to get our property back. We don't need a FOIA, through the
10 Government, for that purpose. We're moving under the correct
11 rule. There's case law to support that.

12 So for all those reasons, Your Honor, we'd ask that the
13 motion be granted.

14 THE COURT: All right. Can you help me with one of the
15 discretionary factors that the Court has to consider? And that's
16 the second one, which is to the extent that your client PacMar,
17 is likely to suffer irreparable injury if it's not returned, I
18 think you fleshed it out a little bit, but just to make sure that
19 I'm not missing anything, can you sort of clarify or further
20 expound on that, please, Mr. Schiel?

21 MR. SCHIEL: Sure. I'm not going to abandon arguments
22 about why we are suffering irreparable harm or prejudice from the
23 imminent need of this data, but I will note, as I stated earlier,
24 that I think that analysis is more pertinent when the Government
25 is opposing the request. But we would still argue that, you

1 know, based on the fact that PacMar Technologies is a federal
2 contractor, it's research and development. Primarily it's
3 sources of revenue and business. It has security clearances. It
4 has suspension environment considerations to consider. There are
5 all sorts of reasons why it needs to have the policies it has in
6 place in order to monitor and know what its employees are doing.
7 And this is particularly so when you're talking about a former
8 employee who's committed criminal acts or allegedly so, and
9 who's, in fact, pled to several counts of criminal acts.

10 The company needs to have that data to know what's
11 occurred in totality, so it can take appropriate actions to
12 protect itself and be in front of any type of misdeeds that Mr.
13 Kau committed. And so that would be the immediate need for the
14 data.

15 THE COURT: Then I would like you to touch on one thing
16 before I ask for the Defendant's view on this. But to the extent
17 that they've sort of harped on the fact that it's been some two
18 years or what have you prior to this request being made and
19 extensively throughout that time period you didn't have that
20 data, all right.

21 And, you know, as far as -- and not to the extent that
22 there's an urgency component to these factors that the Court has
23 to consider, but just from a common sense point of view, how is
24 it that the Court should view that sort of circumstance? As far
25 as the last couple of years having gone by, no request having

1 been made, and now you folks are saying that we need it back?
2 And I don't have any fundamental principle difference with you,
3 Mr. Schiel, that it's the company property, okay. I just want to
4 make sure that I'm considering all the different factors.

5 So could you speak to that particular piece? And if
6 they hit on it again, I might have to come back to you, but I
7 just want to get your first read on that.

8 MR. SCHIEL: Understood. Thank you. To be clear, you
9 know, everything was moving quickly in the beginning, and we had
10 a PPP fraud case that we were dealing with, expelling him as a
11 manager and president of the company. There was civil litigation
12 that was really surrounded around those issues and then
13 subsequently with the political fraud aspect as well.

14 During the course of those proceedings, the company had
15 felt that it had uncovered the misdeeds that supported -- you
16 know, they ultimately are relevant to the PPP fraud case that Mr.
17 Nolan and the DOJ are prosecuting, but also to the justifications
18 for expelling him as a manager of the company based on those
19 misdeeds. What's occurred most recently with more indictments,
20 it seems like every time, you know, you open the newspaper,
21 there's something new about Mr. Kao and what he's done. And it's
22 occurred to them, and, you know, when they've made the request to
23 us, the date, they need it, and I can understand why.

24 It would have been nice to have made that request
25 earlier, yes, but it doesn't change the fact that there's an

1 urgent need for it. The company has, you know, 150 plus
2 employees. They're very much active in federal contracting, and
3 they need to know what's occurred. And so for that reason,
4 particularly with new misconduct now being alleged, they need to
5 get to the bottom of some things.

6 THE COURT: All right. Thank you, Mr. Schiel.

7 MR. SCHIEL: Thank you.

8 THE COURT: All right. So with that, Mr. Nolan, I
9 think I know what your position is. Anything further?

10 MR. NOLAN: Let me give you five sentences --

11 THE COURT: Sure.

12 MR. NOLAN: -- just so you have a complete factual
13 background.

14 So you know we -- the Court knows we seized this phone
15 pursuant to warrant.

16 THE COURT: Okay.

17 MR. NOLAN: We extracted the data from it using a
18 number of tools, including Cellebrite. That data can be viewed
19 using a Cellebrite tool, a reader. You can search and that kind
20 of thing. The Government can produce a copy of the extracted
21 data with a Cellebrite reader so that anyone can do the same sort
22 of searching that we can do.

23 I will tell you, I reviewed a limited amount of the
24 data, and there is both, as one would expect, items that appear
25 to be purely personal in nature and items that squarely appear to

1 be business in nature. PacMar is agreeable to us producing only
2 the data and not the phone. The reason for that, primarily, is
3 the phone was used to facilitate some of the crimes. And on top
4 of that, unlike a computer that we can make a pure copy of and
5 give it back to them, the computer itself, and there's no
6 difference between the two, the tools for phone forensics don't
7 extract a complete copy. They don't image the phone. They
8 extract the data they can. And those tools, Cellebrite in
9 particular, updates. I don't know if it's yearly, semiannually.

10 And so if we needed to, we could use the latest version
11 of Cellebrite to go back and take a deeper look. Depending on
12 how the case is going, we might or might need -- might or might
13 not need additional legal process.

14 And then, finally, I would say, I know that Mr. Kau's
15 counsel has asked for an opportunity to view it, perhaps. I just
16 want to make clear to the Court that it would be extremely
17 burdensome for the Court to ask the Government to segregate what
18 appears to be personal information from business information.

19 First of all, it would require a number of judgment
20 calls that the company and Mr. Kao are better positioned to make.
21 Second of all, as you know, there's a huge amount of data, and we
22 just don't have the resources to do something like that.
23 Otherwise, we see this almost like an interpleader action, and
24 that here's the data, and we ask the Court to figure out where it
25 should go at this point.

1 THE COURT: All right. Thank you.

2 MR. NOLAN: Thank you.

3 THE COURT: All right. I'll hear from the Defense.

4 MR. BAKKE: Your Honor, if I can comment on it from the
5 criminal side, which is that this was recovered as part of a
6 search warrant in this active case. As the Court knows, there's
7 still a pending case.

8 So, as the Prosecutor just said, it may be that in that
9 criminal case, the Public Defender who's present in court today,
10 she's watching, she has the case, they may want to take that and
11 say, hey, wait a minute, now we can get to the phone or there's
12 something more in there. So this is still an active
13 investigation, and the Defendant has his rights to that.

14 As far as security goes, I mean, the Government has the
15 phone, so we don't have an exigency circumstance where we're
16 worried about destruction of the item or tampering with the item
17 or anything like that. So that goes back to the -- to PacMar's
18 argument, which is that they need it. They don't need it. They
19 want it, and there's a difference. And they want it because
20 they're doing this civil case.

21 They went through a whole binding arbitration and never
22 asked for it, and that was resolved completely. And as far as I
23 know, PacMar is not being accused of any wrongdoing, criminally
24 or civilly. So there's nothing that they have to defend
25 themselves against. They are strictly on the attack, and they

1 are coming in and trying to get this.

2 So the question is, why can't they wait? The evidence
3 is safe, or the information is safe. And I don't think they've
4 met their burden to do it. But again, coming from the criminal
5 side, Judge, is these matters aren't done yet. And D.C., I don't
6 even know what's on the phone regarding possible phone calls to
7 senators and whoever, and we still have sentencing in both
8 matters. And we don't even have the presentence report yet, at
9 least here in our district.

10 So I don't know what's going to come up, and I don't
11 know if that phone is going to be an issue and if we need to go
12 in and reevaluate it, but we need it there if we can.

13 THE COURT: Okay. But to the extent that the phone is
14 not up for grabs right now, the data is what really we're talking
15 about. So to the extent that if the ask was turn over the phone
16 and that was a disputed call, hypothetically, between the
17 Government and the Movant, the purported owner of the phone and
18 the data, that would be different. Because then I can totally
19 understand where there would be concern in the future. Because
20 it may be there, but if you can't find it now versus being able
21 to run newly improved software I always get nervous when there's
22 software updates that come along. I'm not a particular fan. If
23 it's working, I'm generally happy.

24 But, long story short, bottom line is I think that's a
25 different situation, Mr. Bakke. And beyond that, I'm trying to

1 make sure that I'm following your argument.

2 MR. BAKKE: Correct, Your Honor. My response to that
3 would be that, first of all, who's going to go through these
4 mounds of massive amount of, quote, "data" to determine what is
5 personal property, what is not, what may be incriminating to him?
6 The Government's saying they don't have the resources to really
7 do it, and, quite frankly, they don't have the -- well, not
8 motive, but they don't have the interest in it. This is not
9 their fight. And I don't think the Court should be basically
10 getting into what is turning into a civil discovery issue.

11 THE COURT: Well, you know, this is one of those weird
12 little animals that pops up, right? And that's the reason why
13 Rule 41(g) exists, because it recognizes there are situations
14 when the Court is asked to strike a balance and equitably parse
15 through this and balance the various rights. And like most
16 times, right when people leave the courtroom, chances are good
17 someone's not happy and someone is.

18 And so it's just my role to try to look at the discrete
19 issues that are presented based upon what I got now and make the
20 call. And so that's what I intend to do, Mr. Bakke.

21 MR. BAKKE: Your Honor, and I'm sorry. That's why I
22 said I was coming from the criminal side. I agree. This is a
23 unique case. I don't think it would even be a question if he
24 didn't have one pending case for trial and two for sentencing. I
25 mean, that's what really makes this case different. Otherwise,

1 if everything was done and PacMar just wanted to say, hey, we
2 want the copy directly from you. We don't want you giving it
3 back to the defense, and maybe it disappears, maybe it gets
4 tampered with, that would be a different issue.

5 But here because everything is still going on, and this
6 item was seized as evidence -- because not only did they not --
7 PacMar not ask for it, the Prosecutor never gave us the phone
8 either. And I believe Ms. Panagakos, prior counsel, and correct
9 me if I'm wrong, asked for the phone. The phone was never turned
10 back over.

11 I don't know what the reason for that is, but that's
12 what changes this whole thing, Your Honor, which is why I'm
13 saying we should wait because of the balancing between waiting
14 and protecting Mr. Kau in an active case, versus PacMar's two and
15 a half year request just so that they can come after him civilly,
16 I don't think -- I think that balance falls on the side of the
17 Defendant.

18 THE COURT: Okay. And before I hear from Mr. Okazaki,
19 okay, if he cares to, Mr. Nolan, if you just can clarify that one
20 point with regard to the status of the phone and data. I presume
21 that -- well, speak to what Mr. Bakke had raised.

22 MR. NOLAN: Sure. There have been so many different
23 attorneys to represent Mr. Kau in the PPP fraud matter. I don't
24 recall whether Ms. Panagakos asked for the phone. If she asked
25 for the return of the phone, I can guarantee you I said no

1 because I always do in cases like this. The phone has been
2 available for inspection by the Defense since shortly after the
3 arrest.

4 The initial discovery was probably October of 2020. If
5 not, it would have been November 2020, and that would have been
6 preindictment discovery because we complained on Mr. Kao and
7 talked a lot with his various attorneys, and that was only, I'm
8 going to say, April 2021 or so, where we indicted him, and
9 discovery was actually lawfully due.

10 So I don't recall the Defense ever asking for a full
11 extraction. If they wanted it, we would have made it available
12 to them. It requires -- literally requires a hard drive.
13 Actually, a two, three, four terabyte drive is usually what we
14 request. So it's been available for inspection.

15 This is not the kind of -- based on the case, I can see
16 why the Defense might not have asked for a full extraction in
17 this case because there was a ton, hundreds of thousands of pages
18 that we produced that would have been redundant, you know,
19 because his work email is on the phone, but it's also on the
20 servers and on his computer. And we got all that through
21 subpoena and search warrant.

22 THE COURT: Okay. Got it.

23 MR. NOLAN: Thank you.

24 THE COURT: All right. Anything further?

25 MR. SCHIEL: I do.

1 THE COURT: Hold on.

2 MR. SCHIEL: I don't know who you're pointing at,
3 sorry.

4 MR. OKAZAKI: Okay. Yeah.

5 THE COURT: Mr. Okazaki, go ahead.

6 MR. OKAZAKI: Yeah. Thank you, Your Honor, for letting
7 me --

8 THE COURT: I didn't want you to feel left out.

9 MR. OKAZAKI: Thanks. Yeah, so we just heard from Mr.
10 Nolan, who described, you know, the phone was taken by a search
11 warrant. They use this Cellebrite. I assume it's some type of
12 forensic tool that's able to go through a phone. And he
13 testified that they have a lot of data. And he stated that some
14 of the data is personal in nature. Obviously, personal in nature
15 and other data, he concluded, was also business.

16 Given the volume of the data and the fact that we know
17 there's personal information, I don't think a solution can be to
18 just turn it over to PacMar. There's got to be -- you know, we
19 have a case here of a phone that has personal information, you
20 know, some business information, and it's being requested here
21 under the context of a Rule 41, which basically comes down to
22 ownership. And I don't think it's as simple as saying, oh, the
23 company was paying the installment payments on this phone, so
24 it --

25 THE COURT: Well, it's much more than that. It's

1 basically the terms of use under which that cell phone was
2 provided to Mr. Kau, right.

3 MR. OKAZAKI: Well --

4 THE COURT: It's different if they gave him the phone
5 and didn't tell him anything about it. But, you know, certainly
6 what they're arguing is, look, our policies are clear. You knew
7 that by using this, that everything and anything gets generated
8 is our property. And to the extent that there's some limited
9 personal use, that's fine, but it's going to be treated the same
10 way. That's my understanding.

11 So that's different than simply saying, hey, look,
12 we're making the payments on it, and there's no other -- the
13 scope of the use is not otherwise further defined.

14 MR. OKAZAKI: Okay. If I can address that, then, Your
15 Honor?

16 THE COURT: Sure.

17 MR. OKAZAKI: I don't construe any of these handbooks,
18 documents or policies as being that broad. I have some excerpts
19 here that I brought with me. There is a policy on cellular
20 phones, which I view as mostly relating to, you know, trying to
21 prevent abuse of use of a phone. Like, don't text while you're
22 driving.

23 THE COURT: Yeah.

24 MR. OKAZAKI: Now, there is -- on the next page, I
25 noticed there's actually an email policy. And this policy is

1 actually quite different from the phone policy because it
2 actually says the company reserves the right to access and
3 disclose, as necessary, all messages sent over its email system.
4 So that's very clear.

5 You know, as far as a phone goes, I don't see anything
6 in any of the documents that says everything on your cell phone,
7 including pictures, including notes you may have, notes that may
8 include, you know, doctor's appointments, things about your
9 children that is company property and can be viewed at any time
10 by the company whenever it pleases, with or without cost. I
11 don't see anything like that.

12 I also was looking at the NDG mobile device policy.
13 The copy I have here that was filed, I don't see any signature on
14 it, and I don't see anything in here that says everything on your
15 cell phone is company property. I think what we're dealing here
16 is with reasonable expectations of privacy. And as we pointed
17 out in the moving papers, it is recognized that cellular phones
18 are entitled to, I would say, you know, an additional degree of
19 protection and privacy just because of the nature of the phone
20 and, you know, how everybody relies on phones.

21 THE COURT: So if it was up to you then, you would urge
22 the Court to somehow account for that and do precisely what Mr.
23 Nolan is saying is going to be a big burden for the Government to
24 parse through and segregate out personal from business. That's
25 what you're kind of suggesting, right?

1 MR. OKAZAKI: Well, you know --

2 THE COURT: And notwithstanding how difficult it may
3 be, Judge, the thing being is that my guy's right to privacy,
4 from your standpoint, trumps all that. It doesn't make any
5 difference how much of a pain it is. That's what needs to be
6 done to ensure that his rights are afforded to him. That's
7 basically your position, right?

8 MR. OKAZAKI: Basically. I mean, like I said, I don't
9 think the solution can be that there's just so much data that we
10 just have to hand it over. I can't see that being the solution.

11 And, you know, as far as the urgency, you know, as Mr.
12 Bakke said, it's been two and a half years. In our view, this is
13 -- they're using this Rule 41 to get discovery that they would
14 not be given in one of their civil cases.

15 THE COURT: All right.

16 MR. OKAZAKI: I mean, they have a RICO case going on
17 right now that basically mirrors, you know, all the criminal
18 allegations.

19 THE COURT: Okay.

20 MR. OKAZAKI: If somebody in a civil case said, I want
21 to access someone's phone, and use Cellebrite, and get everything
22 that's on it, I think there would be a lot of objections. And I
23 can see that -- I can't see a court saying, yeah, you can go take
24 whatever you want from someone's phone.

25 THE COURT: All right. Mr. Schiel, I'll give you the

1 last word.

2 MR. SCHIEL: Thank you. I'll be short here. I think,
3 you know, with all due respect, counsel is focusing on other
4 provisions of the documents that we've attached as our exhibits
5 and focusing where maybe it's not specific as the data, but it's
6 just talking about what you can and can't do on your cell phone.

7 But then you get into, for instance, the handbook C-23
8 and 24. They make it very clear. When you use these devices,
9 such as a cell phone or your email server, yeah, sometimes you're
10 going to do personal stuff, but we don't draw a line. I mean,
11 it's very clear.

12 It says, incidental and occasional personal use of
13 email is permitted by the company, but these messages will be
14 treated the same as the other messages. And it goes on to say,
15 since your personal messages can be accessed by company
16 management without prior notice, you should not use email to
17 transmit any messages you would not want read by a third party.
18 Let me make it clear, you don't get to draw the line. You don't
19 get to segregate.

20 So I would submit that, yeah, it is going to be
21 incredibly burdensome, but there's -- why go through that type of
22 effort when there really is no expectation of privacy and what
23 we're talking about?

24 THE COURT: All right.

25 MR. SCHIEL: Thank you.

1 THE COURT: Thank you. All right. Mr. Bakke, I see
2 you actively engaged with your client. Anything else you want to
3 add before I rule?

4 MR. BAKKE: Your Honor, I appreciate that. As you can
5 see, we're kind of cramped in here, so Mr. Kau is sitting behind
6 me, and he's been listening. He wants to make a statement to the
7 Court. I'm advising him not to, but I'll leave it up to the
8 Court.

9 THE COURT: All right. Mr. Kau, I always am a firm
10 believer that while the decisions that the Court makes are not
11 always ones that people agree with, okay, it's generally better
12 to have more of the relevant information in trying to make those
13 decisions. It's not a perfect world, because you have rights,
14 okay. Mr. Bakke has been at this for a long time, okay. I've
15 been around a little while as well, And I would strongly urge
16 you to follow his advice.

17 There's a reason why individuals such as yourself that
18 find, in this case, pending sentencing, pending trial in at least
19 one case -- other case here, and I guess there's the other case
20 that's elsewhere, I forget what the status is. You want to make
21 sure that you do everything possible not to make your situation
22 any worse.

23 So I understand you want to make a statement, but I'm
24 not going to permit you to do so. And I'm not doing this because
25 I'm trying to be rude to you. It's not because I don't think you

1 have something that you feel that should be said. It's just in
2 this situation, I don't think it would be in your interest. And
3 I don't want to have a situation wherein your zeal to provide a
4 statement here today you do something that actually is damaging
5 or creates more problems for you overall. So with all due
6 respect, Mr. Kau, okay. Thank you.

7 All right. The Court's carefully consider the merits
8 of the instant motion within the context of the motion, the
9 Government's response, the opposition by the Defendant, as well
10 as the reply to include the declarations that were submitted and
11 the exhibits. And going through company handbooks is not exactly
12 my favorite reading, but I did endeavor to go through all of the
13 relevant portions of this.

14 First and foremost, I recognize that this is sort of an
15 imperfect situation, okay, but bottom line is that this is the
16 property of the Movant PacMar. They paid for the phone, they
17 provide it to their employees to use the phone subject to terms
18 of use. And, without surprise, anyone that's provided a phone,
19 whether you're five years old or 100 years old, chances are no
20 matter what they tell you, the lines are going to get blurred on
21 personal and business use. That was anticipated by PacMar. It
22 was included in the policies.

23 Rule 41(g) is one of those provisions where it exists
24 so that the Court can endeavor to strike a balance when property
25 is seized, okay. And here the Court believes that PacMar has met

1 the requirements of the rule because the rule authorized the
2 return a property on behalf of any aggrieved person. PacMar
3 clearly qualifies as an aggrieved party in this particular case
4 because they have been deprived of physically the phone, but more
5 importantly, the data on that phone.

6 On that phone, certainly, I have no doubt that there
7 was probably a fair bit of personal data, whether they are
8 contacts, text messages, pick up the kids, photographs, whatever
9 it may be. There's lots of things that are probably on there.
10 But if they're on there, they're on there, because Mr. Kau, who
11 had control over that, made a choice within the context of the
12 terms of use to put that on there. He was told that there was no
13 expectation that he should -- that those things would be treated
14 other than in an open way as it relates to the company. The
15 company had every right to inspect the phone, ask that it be
16 returned, and it was provided for work purposes.

17 So the Court finds that the various factors that it has
18 to consider in a discretionary fashion appear to have been met.
19 I do have some question with regard to whether or not PacMar is
20 likely to suffer irreparable injury if it's not returned,
21 because, you know, the timing of all this. I mentioned that
22 earlier, and that was a question I put to Mr. Schiel.

23 And ultimately, though, the company does have an
24 interest somewhat like the military in good order and discipline,
25 you know, to make sure that it is aware of what information is on

1 there, what his activities were, that is Mr. Kau, and how that
2 impacts with their ongoing business and other endeavors. And to
3 the extent that there's exposure, you know, with regard to legal
4 action, criminal or otherwise, and that's something that they
5 have a right to, I think, assess. And without that, I think that
6 it's a fair argument that they may suffer injury as a result of
7 that.

8 Absent this particular rule. They just got to sit pat
9 and as the Defendant would say, hey, look, wait until
10 everything's over. I get that. That is probably the cleanest
11 way to do it. But by doing that, PacMar has its rights sort of
12 stopped on because they're asking for it now, maybe late by all
13 accounts, but they're asking for it now, and they're entitled to
14 ask for it.

15 And so, absent them bringing this motion and the Court
16 ruling on it, they really don't have much other remedy other than
17 to wait until whatever comes down the line relative to Mr. Kau's
18 activities, criminal, civil, administrative, or otherwise, are
19 finally finished. They're choosing not to do so. They have a
20 right to do that. It's something that the Defense has to be
21 concerned about, but certainly that can be managed going forward
22 in a way that I think is doable.

23 Also, to the extent that the Department of Justice
24 hasn't done anything other than, I think, be upfront about this.
25 We've got the phone. We're not going to give it to you. We're

1 happy to give you the data. They're not trying to delay
2 anything. I didn't hear anything at all in this that the
3 Government was somehow stonewalling. They've been happy to
4 provide this for quite some time.

5 And so it's a situation where you have lawfully seized
6 data and a phone. You have a party who owns that, who wants it
7 back. You have the party who -- against whom the warrant or the
8 subject of the warrant and now subject to prosecution, doesn't
9 want it turned over, at least to the extent that it requires
10 turning over of personal information.

11 But the Court finds that -- well, I'll rule this way.
12 The motion is granted. I'm going to order that the Government
13 turn over the entirety of the data that was extracted from the
14 cell phone. And to the extent that there is both business and
15 personal information on there, although I think the lines can be
16 blurred at times as to what is what, the Court is going to
17 decline to direct that there be any sort of segregation of the
18 data.

19 The data was seized pursuant to a warrant. The
20 Government has it. The company that now wants it back is
21 entitled to all of that, notwithstanding the personal nature of
22 some of the data that might be on there. And that to the extent
23 that I heard Defense arguments that, well, you know, there's no
24 signature acknowledging, or words to that effect, a specific
25 policy, that is just not something that carries much weight with

1 me. I find it very difficult to believe that the guy at the top
2 of the pyramid is disavowing specific knowledge of a particular
3 policy that he's overall in conjunction with probably others
4 responsible for implementing.

5 With that, how much time do you need, Mr. Nolan, to
6 turn over that data? I presume it can be done fairly quickly.

7 MR. NOLAN: The data is actually on the mainland.
8 That's where IRS Forensics was. So I would ask for 30 days, and
9 I would ask that PacMar probably get us a two terabyte hard
10 drive, which I'll ship to the mainland. The forensic guy will
11 load it and then ship it back here, and we'll provide it to Mr.
12 Schiel.

13 THE COURT: So the parties to further discuss. But
14 right now, I'm going to order it be turned over in 30 days, okay.
15 If there's any problems with that, obviously, the parties are
16 free to continue to work together as far as timing. But if it's
17 anything that gets too much further past that, then I'd expect an
18 update as far as what's going on.

19 Otherwise, I'm going to adopt the arguments and
20 authorities relied upon by Movant. And with that, I'm going to
21 direct you, Mr. Schiel, to prepare an appropriate order for the
22 court's review to my orders box no more than seven days. Any
23 questions, sir?

24 MR. SCHIEL: No questions. Thank you.

25 THE COURT: Okay. Mr. Nolan, any questions by you?

1 MR. NOLAN: No. Thank you, Your Honor.

2 THE COURT: Okay. Mr. Bakke, maybe you have a couple
3 of comments, I don't know, but I'll ask anyway.

4 MR. BAKKE: And having fully accepted the Court's
5 ruling, Your Honor, I'm not sure exactly what the appeal process
6 is from this ruling, but to the extent possible that we could ask
7 for a stay to allow an appeal. If it's going to take --

8 THE COURT: Well, the quicker the order comes in, and
9 then that sort of, I think, oftentimes triggers it. I'm not sure
10 if it's 14 days. I can't remember what the guidelines are. But
11 if you're going to appeal it, feel free. If I got this wrong,
12 you know -- trust me, you know, I don't begrudge you folks for
13 taking me up on it, okay? But that's my call, all right. And if
14 you want to go upstairs to Judge Kobayashi on it, you know, I
15 certainly would welcome a review. Okay.

16 MR. BAKKE: And then the last thing, Your Honor, is I
17 understand the Court's ruling is that basically you're giving
18 them everything.

19 THE COURT: Everything.

20 MR. BAKKE: Well, not giving, you're giving them you're
21 authorizing the Government to give them everything, personal and
22 data. So just for the record clear, or so the record is clear,
23 we would be officially then asking, based on that ruling, for a
24 protective order of some sort as to what can be done by PacMar
25 with information that is personal.

1 I mean, I know the Court's not requiring anyone to
2 separate it out, but I guess my argument is generally that the
3 Government seized pursuant to a warrant, stuff that they believe
4 was evidence of a crime. And so now PacMar is getting
5 everything. It seems like there should be some type of
6 restriction onto them as to what they can do with that personal
7 information.

8 THE COURT: Well, you know, there's nothing to prevent
9 you and the Movant from conferring on this point. You know, I
10 could see certain types of information, medical, for example, as
11 being something that it's well within the realm of possibility.
12 They're going to treat that in a particular way to safeguard the
13 information and not do anything else beyond that.

14 But, you know, once you get beyond that, it becomes
15 very murky. And again, I kind of go back down to -- back to,
16 under the circumstances as presented here, I find that Mr. Kao
17 had no reasonable expectation of privacy with respect to any of
18 the personal information that he might have otherwise entered
19 into transacted received using that particular device.

20 And the reason for that is that the terms of use make
21 clear, although perhaps not as clear as you folks would want it
22 phone underscore, et cetera, but I think reading all of those
23 different provisions together, it's clear that the company's
24 policies operate to put people on notice that, look, you use it,
25 it's going to be company property. And so you should understand

1 that and act accordingly. But Mr. Kao chose not to. And it's
2 not a surprise, I'm not faulting him. It just is what it is for
3 him now to come back later and say, hey, look, somehow claw that
4 back. I don't think it works that way. So on a voluntary basis,
5 you're certainly permitted to have a meet and confer on that
6 point.

7 As it relates to the appeal, you can get me that order
8 within seven days. As soon as that order is presented, I'll take
9 it and review it, and then I'll likely, subject to taking
10 further look at some of the rules, but I believe it's 14 days.
11 If I'm wrong about that, my apologies, but I'm willing to stay it
12 for review, the effect or execution of the order for that period
13 of time to review it, and then we'll go from there.

14 If it's affirmed, it's one thing. Great. If it's not
15 affirmed, then, you know, I'll get told what I did wrong and
16 there'll be a new direction we'll be heading. But either way,
17 we'll know soon.

18 Okay. All right. Thank you, folks. Anything further?

19 MR. SCHIEL: Your Honor, I just wanted to clarify on
20 the stay aspect. Is the Court making that determination now or
21 are you expressing that you would entertain a request to stay at
22 the appropriate time based on submissions?

23 THE COURT: I think -- my way of looking at it is if
24 there's an appeal, then it makes sense to stay the execution of
25 the order. Meaning that the order has to be in place so it can

1 be reviewed. But to the extent that it allows you to put your
2 hands on the data in 30 days, best case scenario, right, that,
3 obviously, would be up for review. And I think it's perfectly
4 appropriate to have that stayed pending any appeal to the
5 District Judge, okay.

6 If that appeal is not taken, then you're good to go.
7 But I think, at least for the purposes of the appeal, that they
8 shouldn't have to worry about both, because then it doesn't make
9 any sense. Is that clear enough?

10 MR. SCHIEL: Understood. Thank you.

11 THE COURT: Thank you. Anything else?

12 UNIDENTIFIED SPEAKER: Yes, very quickly, Your Honor. I
13 understand you made your ruling. You know, there's not written
14 order yet, so my understanding is, you know, it's interlocutory.
15 It can be reconsidered at any time.

16 But I just wanted to state that I don't think that
17 PacMar has made a sufficient case that they own this phone. You
18 know, there's no --

19 THE COURT: What was it they were supposed to do?

20 Really bring in a receipt?

21 UNIDENTIFIED SPEAKER: I would say a purchase order or
22 something.

23 THE COURT: If there is a legitimate -- and when I say
24 legitimate, I guess it's all in the eye of the beholder, but, you
25 know, if I thought that that was a legitimate issue, you would

1 have heard from me on that. I struggle to sort of see where --
2 although going back to the beginning they can't prove it's their
3 phone, and they don't get anything. I get that. But, you know,
4 I understand your position, but I'm expressly finding, based upon
5 the totality of the information presented to me, I have no doubt
6 that that phone is the property of PacMar, and that the policies
7 that they're relying on are in place and apply to Mr. Kau.

8 UNIDENTIFIED SPEAKER: And very quickly, just the other
9 thing. You know, our ability to, you know, get into the details
10 of how the phone was acquired and how it was used and everything,
11 we can't really -- we can't do that because of the concerns about
12 the Fifth.

13 THE COURT: Yeah. I get it. And that is a valid
14 point. It's just a function of the circumstances you guys find
15 yourself in, and there's competing, you know, liabilities, right
16 or exposure. And I hear what you're saying, but there's not a
17 whole lot that I'm going to be able to do to sort of try to make
18 that any easier for you. Okay.

19 UNIDENTIFIED SPEAKER: Thank you.

20 THE COURT: All right. Guys, thanks very much. I
21 appreciate you coming in. So seven days on the order, Mr.
22 Schiel. Okay. All right. Take care. Have a good day.

23 MR. NOLAN: Thank you, Your Honor.

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25 MR. SCHIEL: Thank you, Your Honor.

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MR. BAKKE: Thank you, Your Honor.

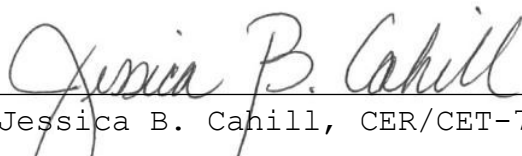
THE CLERK: All rise. This honorable court stands in
recess.

(Proceedings concluded at 10:18 a.m.)

CERTIFICATE

I, Jessica B. Cahill, court approved transcriber, do hereby certify that pursuant to 28 U.S.C. §753, the foregoing is a complete, true, and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated: March 14, 2023



Jessica B. Cahill, CER/CET-708