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MARTIN KAO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA vs. MARTIN KAO, Defendant.	CR. NO. 21-00061 LEK MEMORANDUM IN OPPOSITION TO RESTITUTION; EXHIBITS “A” AND “B”; CERTIFICATE OF SERVICE

MEMORANDUM IN OPPOSITION TO RESTITUTION

MEMORANDUM IN OPPOSITION TO RESTITUTION

Comes now Martin Kao, by and through his attorney, Randall K. Hironaka, and hereby submits the instant memorandum in opposition to Pacmar's request for restitution in the above-captioned matter.

DATED: Honolulu, Hawai'i, April 15, 2025.

Respectfully submitted,

MIYOSHI & HIRONAKA, LLLC
Attorneys at Law

By: */s/ Randall K. Hironaka*
RANDALL K. HIRONAKA

Attorney for Defendant
MARTIN KAO

MEMORANDUM IN OPPOSITION

I. INTRODUCTION

Mr. Kao opposes PacMar's request for restitution. There are two main issues herein. First, PacMar is not entitled to restitution pursuant to the Mandatory Victim Restitution Act[1] ("MVRA") and *Lagos v. United States*, 138 S.Ct. 1684 (2018). Second, even if PacMar is entitled to restitution pursuant to the MVRA, it is collaterally estopped from receiving it because it has already been awarded.

II. RELEVANT FACTS

On May 6, 2021, Mr. Kao was charged in an eight-count indictment in the instant matter. PSR at ¶ 1. He was arrested on September 30, 2020. PSR at ¶ 7. Mr. Kao pleaded guilty as charged on September 7, 2022. PSR at ¶ 10.

Arbitration hearings pursuant to a lawsuit between what is essentially now known as PacMar and Mr. Kao occurred over several days during September to October 2021. PacMar prevailed and a Final Award was issued, dated November 23, 2021. *See Exhibit "A."* In addition to various damages, PacMar was awarded the same attorney's fees being requested herein, albeit at an amount adjusted by the arbitrator for reasonableness. *Exhibit "A"* at 88-99.

[1] 18 U.S.C. § 3663A

On April 2, 2025, in an email to counsel for Mr. Kao, the United States indicated that, "for purposes of your opposition, you can assume that the government adopts the views of PacMar in its February 21, 2025 letter and supporting documents (which I previously forwarded to you) and the USPO (as stated in the PSR and in [the probation officer's] August 15, 2024 email attached as Exhibit 1 to the PacMar letter)." *See Exhibit "B"* (PacMar's February 21, 2025 letter to AUSA Nolan; USPO's August 15, 2024 email to PacMar's counsel; invoices from Goodsill Anderson Quinn & Stifel; legal fees, November 8, 2020 engagement letter and invoices from Buckley LLP; legal fees and invoices from Starn O'Toole Marcus & Fisher). In short, the total amount of restitution requested by the government on behalf of PacMar appears to be $858,933.41. *Exhibit "B"* at 2.

III. PURSUANT TO *LAGOS V. UNITED STATES*, PACMAR IS NOT ENTITLED TO RESTITUTION UNDER 18 U.S.C. § 3663A

Mr. Kao agrees with the US Probation and Pretrial Services Office's ("PPSO") assessment that:

> As an initial matter, private investigations, including outside attorney's fees, are not compensable under the MVRA. The [PPSO] submits that PacMar's request for legal fees may be beyond the scope of the instant federal investigation.

PSR at ¶ 66 (citing *Lagos v. United States*, 138 S.Ct. 1684, 1690 (2018)). In her August 15, 2024 email to PacMar's counsel, the USPO clearly related the following:

> In summary, the PPSO is unable to determine the exact restitution amount PacMar is entitled to with regard to the $868,090.91 it incurred in legal fees paid to respond to and assist the government's case involving the instant offense.

See Exhibit "B" at 5.

PacMar's response to the PPSO's concern was nothing more than conclusory statements contained in its February 21, 2025 letter to the AUSA:

> Here, the $868,090.91 in legal fees and costs incurred by PacMar were all incurred in responding to subpoenas and requests for documents and records by the government in the Criminal Case. *Exhibit "B"* at 2.
>
> As mentioned, only amounts incurred in responding to the Hawaii grand jury subpoenas are included in the $845,638.65 figure. *Exhibit "B"* at 3.

Unsurprisingly, in the final PSR, the PPSO concluded as follows:

> Although PacMar highlighted various billed entries to distinguish what it believes is compensable, the PPSO is not in a position to determine which entries are acceptable, pursuant to *Lagos*.

PSR at ¶ 66. Ultimately, the PPSO stated:

> The PPSO believes that the government is in the best position to determine which fees were incurred as part of the government investigation and prosecution in order to be compensable as restitution. Should the issue of restitution remain unresolved at sentencing, the Court may schedule a restitution hearing for a final determination[.]

PSR at ¶ 69. Furthermore:

> In summary, the PPSO is unable to determine the exact restitution amount PacMar is entitled to with regard to the $868,090.91 it incurred in legal fees paid to respond to and assist the government's case involving the instant offense.

PSR at ¶ 72.

First, Mr. Kao agrees with the PPSO's initial concern that PacMar's restitution request is not compensable under the Mandatory Victim Restitution Act ("MVRA"), pursuant to *Lagos*. *See* PSR at ¶ 66. As such, PacMar's request should be denied in its entirety.

Alternatively, Mr. Kao also agrees with the PPSO's conclusion that it (and therefore, the Court) is unable to determine the exact restitution PacMar might be entitled to as a result of "incurring legal fees paid to respond to and assist the government's case involving the instant offense." As PacMar and the United States have not met their burden of proof with respect to the requested restitution, Mr. Kao again argues that PacMar's request should be denied in its entirety.

IV. EVEN IF THIS HONORABLE COURT FINDS THAT PACMAR IS ENTITLED TO THE REQUESTED RESTITUTION, IT HAS ALREADY BEEN AWARDED THE SAME ATTORNEY'S FEES IT IS REQUESTING HEREIN AND IS THUS COLLATERALLY ESTOPPED FROM RECEIVING IT AS RESTITUTION

In *United States v. Edwards*, 595 F.3d 1004 (2010), the Ninth Circuit explained that:

> [C]ollateral estoppel applies only where it is established that (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.

Edwards at 1012 (citing *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir.2000) (internal quotations omitted). The Ninth Circuit also stated that "[t]he party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir.1997).

Here, Mr. Kao argues that collateral estoppel applies to prevent the district court from ordering restitution. Specifically, the issue necessarily decided at the previous proceeding is identical to the one sought to be relitigated. Because the arbitration resolved the issue of attorney's fees compensation to his "victims," including PacMar, relitigation of that issue via a restitution award in this subsequent criminal proceeding is thus prohibited.

The simple fact is that the issue of PacMar's (arguably) compensable attorney's fees has not only been litigated, it has already been awarded. Principles of collateral estoppel should be applied by this Court in denying PacMar's request for restitution in its entirety.

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V. CONCLUSION

For the foregoing reasons and authority cited, Mr. Kao respectfully requests that this Honorable Court deny Pacmar's request for restitution in its entirety.

DATED: Honolulu, Hawai'i, April 15, 2025.

Respectfully submitted,

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