IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. MARTIN KAO, Defendant.	CR NO. 21-00061 LEK-KJM ORDER GRANTING THE UNITED STATES' MOTION FOR ORDER AUTHORIZING APPLICATION OF DEFENDANT'S BOND DEPOSIT TO PAYMENT OF SPECIAL ASSESSMENT AND RESTITUTION

ORDER GRANTING THE UNITED STATES' MOTION FOR ORDER AUTHORIZING APPLICATION OF DEFENDANT'S BOND DEPOSIT TO PAYMENT OF SPECIAL ASSESSMENT AND RESTITUTION

On August 5, 2024, the United States filed a Motion for Order Authorizing Application of Defendant's Bond Deposit to Payment of Special Assessment and Restitution ("Motion"). ECF No. 132. Defendant Martin Kao ("Defendant") filed a Memorandum in Opposition on August 15, 2024 ("Opposition"). ECF No. 136. The Court held a hearing on the Motion on August 19, 2024, at which time the Court continued the hearing until after Defendant's sentencing. ECF No. 137.

The Court held a further hearing on February 13, 2025. ECF No. 147. At the hearing, the Court permitted Defendant's spouse, Third-Party in Interest Tiffany Jennifer Lam ("Lam"), to intervene for the limited purposes of the Motion. *Id.* Lam filed her objection to the Motion during the hearing ("Lam Objection").

ECF No. 149. On February 27, 2025, the Government filed a response to Lam's Objection. ECF No. 154. That same day, Defendant filed a declaration. ECF No. 155.

After carefully considering the memoranda, applicable law, record in this case, and arguments of counsel, the Court GRANTS the Motion for the reasons set forth below.

DISCUSSION

I. 28 U.S.C. § 2044

In the Motion, the Government seeks an order authorizing application of Defendant's $2 million bond deposit for payment of his special assessment and restitution, pursuant to 28 U.S.C. § 2044. Section 2044 requires the Court to order a defendant's bail bond to be held over and paid to the United States attorney to be applied towards payment of any assessment, fine, restitution, or penalty, so long as the posted bail money belongs to and was deposited by or on behalf of the defendant:

> On motion of the United States attorney, the court shall order any money belonging to and deposited by or on behalf of the defendant with the court for the purposes of a criminal appearance bail bond (trial or appeal) to be held and paid over to the United States attorney to be applied to the payment of any assessment, fine, restitution, or penalty imposed upon the defendant. The court shall not release any money deposited for bond purposes after a plea or a verdict of the defendant's guilt has been entered and before sentencing except upon a showing that an assessment, fine, restitution or penalty cannot be

> imposed for the offense the defendant committed or that the defendant would suffer an undue hardship. This section shall not apply to any third party surety.

28 U.S.C. § 2044.

"Section 2044 codifies the discretion courts have long exercised, to pay, on a proper motion, bond or bail money to the parties with a legally established superior claim to it." *United States v. Higgins*, 987 F.2d 543, 546 (8th Cir. 1993) (other citation omitted) (citing *United States v. Rubenstein*, 971 F.2d 288, 294 (9th Cir. 1992)). "[T]he applicability of Section 2044 requires two showings: (1) that the money was deposited by the defendant or on the defendant's behalf; and (2) that the money belongs to the defendant." *United States v. Hughes*, No. 3:15-CR-11, 2017 WL 2462725, at *1 (S.D. Tex. June 6, 2017). As to the second prong, the burden rests with the government to establish by a preponderance of the evidence that the funds in question belonged to the defendant and were not deposited by a third-party surety. *See, e.g.*, *United States v. Hills*, No. 1:16-CR-329, 2022 WL 1127888 at *3 (N.D. Ohio April 15, 2022) (collecting cases).

II. Affidavit of Cash Bail

Defendant was arrested on September 30, 2020. ECF Nos. 1, 9. On or about October 8, 2020, Defendant posted a $2 million secured bond, all by way of a cash deposit, which is presently held by the Clerk of the Court. ECF Nos. 14, 150. Defendant also signed a notarized Affidavit by Owner of Cash Bail ("Bail

Affidavit), in which he represented to the Court that he owned the $2 million deposited as bail, and that the $2 million was to be returned to him upon any bond exoneration:

AFFIDAVIT BY OWNER OF CASH BAIL

I, Martin Kao on oath say that I reside at [redacted] Honolulu, HI [redacted] and that the $2,000.000.00 cash deposited as bail on the foregoing bond is owned by me and is to be returned to me at the above address upon exoneration of this bond.

In compliance with the regulations issued by the Internal Revenue Service of the Department of the Treasury for the Internal Revenue Code Section 6050I(g), I hereby submit the following:

Social Security Number [redacted]715 Date of Birth [redacted]/1973

Occupation Business Owner

Method of ID: HI Drivers License

ID Number [redacted]

October 8, 2020

Signature of owner of cash security

Subscribed to before me on this 8th day of October 2020

Joell Yuen, 1st Circuit
Notary Public, State of Hawaii
My Commission Expires June 12, 2024

JOELL YUEN NOTARY 16-230 PUBLIC STATE OF HAWAII

Doc. Date 10/8/2020 # Pages
Joell Yuen First Circuit
Doc. Description: Affidavit of Cash Bail
Notary Signature Date 10/8/2020
NOTARY CERTIFICATION

ECF No. 150.

Defendant pled guilty on September 7, 2022, ECF Nos. 76, 77, and was subsequently sentenced on February 13, 2025. ECF No. 146. The district court entered an Amended Judgment on February 24, 2025, which imposed restitution of $12,841,490 and an $800 special assessment. ECF No. 151.

Notwithstanding Defendant's Bond Affidavit, Defendant argues that (i) the Government failed to identify the source of the posted money or confirm the absence of third-party claims to the money, and/or (ii) the posted funds are joint marital assets not subject to § 2044. ECF No. 136 at 3; ECF No. 155.

III. A Preponderance of the Evidence Shows that the Bail Funds Belong to Defendant

Defendant and Lam claim that the $2 million used to pay for Defendant's secured bond constitutes joint marital assets that are not subject to turnover to the United States Attorney. Lam states under oath that she withdrew the $2 million from a Merrill Lynch account, which she and Defendant considered to be a joint marital asset. ECF No. 149-1 ("Martin and I agreed that all our financial assets, including . . . all our joint and individual bank and financial accounts . . . were joint marital assets[.]"). Defendant subsequently filed a substantially similar declaration containing the same statement. ECF No. 155 ("Tiffany and I agreed that all our financial assets, including . . . all our joint and individual bank and financial accounts . . . were joint marital assets[.]").

As a starting point, many courts have found that a defendant's signing of an appearance bond representing his ownership of the posted bond property as sufficient evidence of such ownership. *See Hills,* 2022 WL 1127888 at *4 (finding each defendant's sworn representations that they were the sole owners of the property securing the bonds as strong evidence of each defendant's ownership in the absence of any contrary claim); *United States v. Srithongrun*, No. 4:19-CR-00752-7, 2023 WL 2232023, at *1 (S. D. Tex. Feb. 22, 2023) (finding a cashier's check and bond affidavit compelling evidence that deposit belonged to defendant absent any evidence of third party ownership); *United States v. Bell*, No. 20CR2887-WQH, 2025 WL 319241, at *5 (S.D. Cal. Jan. 21, 2025) (ordering turnover pursuant to § 2044 notwithstanding spouse's community property claim). Here, the Court looks beyond solely the Bond Affidavit to resolve Defendant and Lam's arguments that the funds are joint marital assets.

In addition to the Bond Affidavit, the Government submits the opening and other documents for the Merrill Lynch account, which identify Defendant, and only Defendant, as the account owner. ECF No. 154-1. Defendant's and Lam's declarations do not dispute that the account was held solely by Defendant. Instead, they assert that, as part of their marital agreement, they considered this account to be joint marital property. Nevertheless, even if the Court were to consider the account a joint account in spite of the Bond Affidavit and account documents showing otherwise, Defendant would be entitled under Hawaii law to all deposits in the account. Haw. Rev. Stat. § 412:4-105 ("Any deposit account held in the names of two or more persons may be paid, on request and according to its terms, to any one or more of the persons.”). For this reason, each of the cases Lam relies upon is readily distinguishable. *See United States v. Gonzalez*, No. 11-CR-80211, 2013 WL 654918, *5 (S.D. Fla., Feb 21. 2023) (bond was co-signed by third parties, precluding a court finding that the funds belonged to the defendant); *United States v. Arnold*, Cr. No. 18-30, 2020 WL 957415, *2-3 (N.D. Miss. Feb. 27, 2020) (deposit receipt identified wife as “Payer” and there was no evidence of defendant’s ownership); *United States v. Equere*, 916 F. Supp. 450, 453 (E.D. Pa. 1996) (defendant’s brother, not the defendant, posted bail); *United States v. Sparger*, 79 F.Supp.2d 714, 719 (W.D. Tex. 1999) (bail money was posted by defense counsel and thus did not belong to defendant); *United States v. Salyer*, Cr. No. 10-61, 2014 WL 412088, *3, 5 (E.D. Cal. Feb. 3, 2014) (it was clear that the “cash posted” was “eventually provided” by defendant’s sister).

Further, in response to Lam’s arguments that Hawaii law regarding division of marital assets in a divorce proceeding precludes a finding that Defendant owns the funds, the Government correctly points out that Hawaii divorce property distribution case law does not apply in here. *See, e.g., United States v. Real Prop. Located at 148 Maunalanikai Place in Honolulu, Haw.*, No. CIV. 07-00049 HG LEK, 2008 WL 3166799, at *8 (D. Haw. Aug. 6, 2008) (acknowledging that, under Hawaii divorce law, the “marital estate” can only be determined after an evidentiary trial). Moreover, divorce law principles governing property distribution "only apply to the parties to the divorce action." *Id.* For that reason, Lam's cited cases are inapposite. *See Collins v. Wassell*, 133 Haw. 34, 42, 323 P.3d 1216, 1224 (2014) (discussing the partnership principles that provide "guidance for family courts to use in dividing property upon divorce"); *Gussin v. Gussin*, 73 Haw. 470, 483, 836 P.2d 484, 486 (1992) (likewise acknowledging that "in divorce proceedings regarding division and distribution of the parties' estate" the court is guided by partnership principles). There being no divorce case pending or complete, Lam cannot rely on divorce law to make a claim to the Merrill Lynch account held solely in Defendant's name.

Taking into account all of the information the parties have submitted, and considering (i) Defendant's Bail Affidavit attesting to ownership of the $2 million cash bail and asserting that it should be returned to him upon exoneration; (ii) the account documents identifying Defendant as the sole owner of the account from which the bond was paid; and (iii) the inapplicability of divorce law principles of marital assets to this criminal proceeding, the Court finds by a preponderance of the evidence that Defendant's $2 million cash bond was deposited on the defendant's behalf with money belonging to Defendant. Accordingly, the Court GRANTS the Motion and ORDERS the $2 million be applied to the satisfaction of Defendant's criminal penalties, including his special assessment and/or order of restitution.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 4, 2025.

Kenneth J. Mansfield
United States Magistrate Judge

United States v. Kao, Crim. No. 21-00064 LEK-KJM; Order Granting the United States' Motion for Order Authorizing Application of Defendant's Bond Deposit to Payment of Special Assessment and Restitution