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TIFFANY JENNIFER LAM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. MARTIN KAO, Defendant.	Case No: 1:21-cr-00061-LEK THIRD-PARTY IN INTEREST TIFFANY JENNIFER LAM'S OBJECTION TO THE ORDER GRANTING THE UNITED STATES' MOTION FOR ORDER AUTHORIZING APPLICATION OF DEFENDANT'S BOND DEPOSIT TO PAYMENT OF SPECIAL ASSESSMENT AND RESTITUTION [ECF No. 156]; CERTIFICATE OF SERVICE <u>HEARING</u>: Date: February 13, 2025 Time: 3:00 PM Judge: Hon. Kenneth J. Mansfield

THIRD-PARTY IN INTEREST TIFFANY JENNIFER LAM'S OBJECTION TO THE ORDER GRANTING THE UNITED STATES' MOTION FOR ORDER AUTHORIZING APPLICATION OF DEFENDANT'S BOND DEPOSIT TO PAYMENT OF SPECIAL ASSESSMENT AND RESTITUTION

Third-Party In Interest TIFFANY JENNIFER LAM ("Lam"), by and through her counsel Miyoshi & Hironaka LLLC, and pursuant to Local Rule 74.1 of the United States District Court for the District of Hawai`i, hereby submits her Objection to the Order Granting the United States' Motion for Order Authorizing Application of Defendant's Bond Deposit to Payment of Special Assessment and Restitution ("Order"). ECF No. 156. Respectfully, the Honorable Magistrate Judge Kenneth J. Mansfield erred in finding that under 28 U.S.C. § 2044 Lam did not have any ownership interest in the cash bail posted on behalf of Defendant Martin Kao ("Bail"). Accordingly, the Order should be reversed.

I. FACTUAL SUMMARY[1]

A. Marriage Partnership

Lam is married to Martin Kao ("Kao"). Lam and Kao have been married since February 7, 2007. Lam was 31 years of age and Kao was 34 years of age at the time. Lam and Kao have two children aged 10 and 11.

[1] Lam hereby incorporates her Declaration attached to Lam's Objection to the United States' Motion for Order Authorizing Application of Defendant's Bond Deposit to Payment of Special Assessment and Restitution and Kao's Declaration previously submitted herein in this matter. ECF Nos. 149, 155.

Lam and Kao did not have substantial liquid assets at the time they married in 2007. Their primary asset was real property located in Manoa ("Manoa Property") that Lam owned prior to marriage which she inherited from her grandfather. Lam owned the Manoa Property free of any mortgage or other encumbrance. The Manoa Property is a marital asset which Lam and Kao currently own jointly.

After Lam and Kao married, Lam relinquished her career as a certified public accountant and did not work. Lam's role in the marriage was to be the primary homemaker, wife, and mother.

At the time Lam and Kao married, they agreed that all their financial assets, including the Manoa Property and all their joint and individual bank and financial accounts (collectively "Accounts"), were joint marital assets to be considered part of their marital estate ("Marital Agreement"). Lam relied on the Marital Agreement in making decisions regarding her personal life, career, finances and other marital matters. All funds in their Accounts accumulated during marriage were considered marital property.

Over the course of their marriage, Lam and Kao deposited income and other monies into their Accounts which were used to pay family living expenses and accumulate marital savings. Lam directly and indirectly contributed to those Accounts including the management of income and expenses, investment decisions, and college savings for the children. Since being married, Lam and Kao have always filed joint Federal and State tax returns.

B. <u>Posting Of Kao's Bail</u>

Kao was arrested on September 30, 2020. At the time of Kao's arrest, one of the Accounts was with Merrill Lynch, Account No. **-*2641 ("Merrill Lynch Account"), which had a balance of approximately $5,000,000.00. On or about October 1, 2020, the United States seized $2,000,000.00 ("Seized Funds") from the Merrill Lynch Account in connection with this case.

After Kao's arrest, Lam was informed that Kao's Bail was set in the amount of $2,000,000.00. Lam immediately contacted Merrill Lynch to withdraw funds totaling $2,000,000.00 from the Merrill Lynch Account to pay for Kao's Bail. On October 6, 2020, Lam requested that Merrill Lynch issue a $2,000,000.00 cashier's check from the Merrill Lynch Account made payable to the United District Court of Hawaii. As of the date that Lam requested Merrill Lynch to issue the cashier's check, and after removal of the Seized Funds, the Merrill Lynch Account had an approximate balance of $3,000,000.00.

On the morning of October 7, 2020, Lam went to the offices of Merrill Lynch and picked up the $2,000,000.00 cashier's check for Kao's Bail. Later that morning, Lam met Ms. Erin Patrick from United States Pretrial Services Offices in front of the Federal Courthouse to hand over the $2,000,000.00 cashier's check and personally post Kao's Bail. Lam was accompanied by her brother, Todd. Upon delivery of the $2,000,000.00 cashier's check to Ms. Patrick, Lam was not provided with a receipt for posting Kao's Bail.

After issuance of the cashier's check, the approximate balance in the Merrill Lynch Account was $1,000,000.00. The Merrill Lynch Account was closed, and the remaining funds were transferred to another Account and subsequently used to pay Kao's various legal expenses and costs ("Kao's Legal Fees") expended in this and other criminal and civil matters. Pursuant to the Marital Agreement, Lam had a joint marital interest in the Merrill Lynch Account, which included the $2,000,000.00 used for Kao's Bail and the $1,000,000.00 expended on Kao's Legal Fees.

II. DISCUSSION

The United States moved to apply the Bail to the restitution/fines ordered in connection with Kao's sentence in this case ("United States' Motion"). The United States invoked 28 U.S.C. § 2044 as a basis for its request:

> 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 USCA § 2044 (emphasis supplied).[2] The United States "bears the burden of showing, by a preponderance of the evidence, that" the Bail belongs to Kao and that it is not owned by a third party. *United States v. Gonzalez*, No. 11-CR-80211, 2013 WL 654918, at *4 (S.D. Fla. Feb. 21, 2013) (28 U.S.C. § 2044 not applicable to bond paid by defendant's sister). *See e.g., Equere*, 916 F. Supp. at 454 (28 U.S.C. § 2044 not applicable to bond paid by defendant's brother); *United States v. Sparger*, 79 F.Supp.2d 714, 719 (W.D. Tex. 1999) (28 U.S.C. § 2044 not applicable to bond paid by defendant's attorney); *United States v. Salyer*, No. 2:10-CR-0061 LKK, 2014 WL 412088, at *5 (E.D. Cal. Feb. 3, 2014), report and recommendation adopted, No. 2:10-CR-0061 LKK, 2014 WL 1270583 (E.D. Cal. Mar. 26, 2014) (28 U.S.C. § 2044 not applicable to bond paid by defendant's sister). In other words, the United States must show "(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. Arnold*, No. 1:18-CR-30-1, 2020 WL 957415, at *3 (N.D. Miss. Feb. 27, 2020) (internal quotations and citations omitted) (28 U.S.C. § 2044 not applicable to bond paid by defendant's wife).

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[2] *See United States v. Equere*, 916 F. Supp. 450, 453 n.4 (E.D. Pa. 1996) (stating that "the [third party surety] disclaimer applies to" third party individuals).

The Order principally relies on two facts to deny Lam her ownership interest in the Bail: (1) the Affidavit by Owner of Cash Bail ("Bail Affidavit") signed and notarized by Kao stating that he was the owner of the cash deposited as Bail, and (2) that Kao was the individual account holder of the Merrill Lynch Account, the source of the money used to fund the Bail. First, while it is undisputed that Kao signed the Bail Affidavit, Kao's statement that he was the owner of the Bail does not necessarily preclude Lam's co-ownership of the monies in the Merrill Lynch Account that funded the Bail. Lam and Kao entered into the Marital Agreement, well before funding the Bail, agreeing that all their finances, including monies in their Accounts, were joint marital property. Thus, even if Kao intended to take ownership of all the monies in the Merrill Lynch Account, Kao could not do so unilaterally, even by signing and notarizing the Bail Affidavit. While Lam allowed Kao to use the Merrill Lynch Account monies for the Bail, which was simply a financial arrangement to deposit funds with the court to secure Kao's appearance at trial,[3] Lam never intended to nor did disclaim her ownership interest in the Bail.

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[3] Although the <u>location</u> of the joint marital monies changed from the Merrill Lynch Account to the registry of the court, the <u>ownership status</u> of those monies remained the same. In other words, the Bail constituted joint marital property and was not "owned" by the court.

Second, the fact that Kao was the individual account holder of the Merrill Lynch Account does not mean that Kao was the sole owner of the monies maintained in such account. The Order states in relevant part as follows:

> 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.").

Order at 6, 7. While Section 412:4-105 states that 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" it does not answer the second prong posed by 28 USC § 2044, which is whether the "money belongs to the defendant [Kao]." As discussed above, the money in the Merrill Lynch Account that funded the Bail was a joint marital asset that belonged to both Lam and Kao under their Marital Agreement. Indeed, under Hawaii law, spouses are entitled to contract with each other, as Lam and Kao did in their Marital Agreement:

> (a) A married person may make contracts, *oral* and written, sealed and unsealed, with the married person's spouse, or any other person, in the same manner as if the married person were sole.
>
> . . . .
>
> (c) All contracts made between spouses, whenever made, whether before or after June 6, 1987, and not otherwise invalid because of any other law, shall be valid.

Haw. Rev. Stat. § 572-22 (emphasis supplied). Here, it is undisputed that Kao and Lam entered into a valid marital contract[4] which provided Lam with ownership interest in the monies that funded the Bail.

Third, *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) is distinguishable. *148 Maunalanikai Place* case concerned a forfeiture case. There, the non-defendant spouse sought to make a claim on real property subject to forfeiture under 18 U.S.C. § 983. The non-defendant spouse argued "that, as a matter of Hawaii divorce law, he has acquired an interest or is entitled to obtain an interest" in the subject real property. The Court held that the non-defendant spouse did not have standing to assert a claim on the real property. The Court found that the non-defendant spouse had no direct legal ownership of the property since he was not title owner of the property, did not contribute any funds to purchase the property, and never had possession of or exercised any dominion or control over the property. The Court also found that the defendant spouse had already abandoned and forfeited her interest in the real property and that it was not part of their divorce case. The Court went on to add that the non-defendant spouse had no

[4] Lam provided valuable consideration for the benefits supplied to her under the Marital Agreement when Lam gave up her certified public accountant career to become a full-time homemaker, wife and mother. ECF No. 149.

legal interest in the defendant spouse's drug proceeds or in any property that she acquired with her drug proceeds under Hawaii law.

Unlike *148 Maunalanikai Place*, Lam is not making a claim to the Bail based on divorce law. To the contrary, Lam has a direct interest in the Bail pursuant to the valid marital contract between Lam and Kao – i.e., the Marital Agreement. *See* Haw. Rev. Stat. § 572-22. Lam exercised dominion and control over joint marital assets, including the Merrill Lynch Account, throughout her 18-year marriage to Kao. In fact, Lam directly withdrew funds from the Merrill Lynch Account and posted those funds with this Court for Kao's Bail. More significantly, unlike a forfeiture action under 18 U.S.C. § 983, a request to apply bail under 28 U.S.C. § 2044 requires inquiry into the ownership of the funds used to post the bail. The answer to that inquiry in this case is that funds used to post the Bail jointly belong to Lam and Kao.

Finally, in determining the amount of Lam's joint ownership interest in the Bail, Hawaii law is instructive. In the instance of joint marital assets, Hawaii courts apply the partnership model. *See e.g., Collins v. Wassell*, 133 Hawai`i 34, 42, 323 P.3d 1216, 1224 (2014) (stating that "[c]ases in this jurisdiction have 'created a framework based on partnership principles that provides further guidance for family courts to use in dividing property upon divorce.'"). "Under general partnership law, 'each partner is entitled to be repaid his contributions to the partnership property, whether made by way of capital or advances.'" *Gussin v. Gussin*, 73 Haw. 470, 483, 836 P.2d 484, 491 (1992) (citation omitted). "In the absence of any agreement between husband and wife . . . partnership principles of law require an equal division of the marital property" where the facts show a marriage and the existence of jointly owned property. *Id.* at 484, 836 P.2d at 491.

Lam had joint ownership interest in the Merrill Lynch Account at the time Lam withdrew $2,000,000 from the account to pay for Kao's Bail. Under *Gussin*, Lam owned fifty percent (50%) of the funds that were used to post the Bail. Accordingly, $1,000,000 of the Bail belongs to Lam.

III. CONCLUSION

Based on the foregoing, Lam respectfully requests that the Order be reversed and that the United States' Motion be denied with respect to Lam's joint interest in the Bail. Lam further requests that her ownership interest in the Bail be returned to her as the conditions of Kao's bond have now been satisfied. *See* Fed. R. Crim. P. 46 ("The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture.")

DATED: Honolulu, Hawaii, March 18, 2025.

/s/Philip W. Miyoshi
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TIFFANY JENNIFER LAM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. MARTIN KAO, Defendant.	)	Case No: 1:21-cr-00061-LEK CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2025, a copy of the foregoing filing will be served on all counsel of record.

DATED: Honolulu, Hawaii, March 18, 2025.

/s/Philip W. Miyoshi
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