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Attorney for Defendant
MARTIN KAO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. MARTIN KAO, Defendant.	CR. NO. 21-00061 JAO **DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR RETURN OF PROPERTY PURSUANT TO RULE 41(g) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE; CERTIFICATE OF SERVICE**

DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR RETURN OF PROPERTY PURSUANT TO RULE 41(g) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMES NOW, Defendant MARTIN KAO, by and through his attorney, the Law Office of Victor J. Bakke, and hereby submits his Memorandum in Opposition to Motion for Return of Property Pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure as follows:

I. PROCEDURAL AND FACTUAL BACKGROUND

Defendant Martin Kao ("Mr. Kao") is the former CEO and Manager of the Martin Defense Group, LLC, fka Navatek LLC, nka Pacmar Technologies, LLC (the "Company").

In 2008, he was recruited to become the Company's CFO.

In October 2012, Mr. Kao was appointed the CEO of the Company.

In March 2019, Mr. Loui and Mr. Kao entered into an Operating Agreement that transferred control of the Company to Mr. Kao.

After being charged by Criminal Complaint dated 9/29/20, Martin Kao was arrested on September 30, 2020. (Mr. Kao would be charged by indictment on May 6, 2021, commencing the above-entitled criminal action).

At the time of his arrest, his Iphone was seized.

On November 9, 2020, a civil complaint was filed against Mr. Kao by Navatek Capital Inc., the 1% owner of MDG, on Nov. 9, 2020. See Circuit Court of the First Circuit, Civil No. 1CCV-20-0001511. The complaint contained derivative and direct claims.

On March 20, 2021, Mr. Kao, through his counsel at the time, filed a motion to dismiss or in the alternative to compel arbitration. That motion was eventually taken off the calendar.

On April 1, 2021, the parties in the civil action entered into a: Stipulation and Order to (1) Refer Matter to Voluntary Settlement Conference; and (2) Stay Proceedings Pending Alternative Dispute Resolution.

The settlement conference was not successful, and the parties entered into an agreement with Dispute Prevention and Resolution on May 26, 2021 to engage in binding arbitration.

On May 24, 2021, two days before the parties executed the agreement with Dispute Prevention and Resolution, Mr. Kao's prior counsel filed a Motion to Stay Arbitration Pending Resolution of Criminal Proceedings.

The Order Denying the Motion to Stay Arbitration Pending Resolution of Criminal Proceedings was signed on June 6, 2021.

The arbitration proceeding started on Sept. 27, 202; with hearings held on Sept. 28, 2021; Sept. 29, 202; Sept. 30, 2021; Oct. 1, 2021; Oct. 5, 2021; and Oct. 7, 2021. Mr. Kao did not testify at the arbitration. He asserted his rights to remain silent under the U.S. and Hawaii Constitutions.

After the arbitration hearing, the arbitrator entered its his Award on Nov. 23, 2021. The award was a total of $6,125,781.80.

The Final Judgment Confirming Arbitration Award filed on April 28, 2022. A Notice of Appeal was filed on May 27, 2022.

MDG filed a fraudulent transfer action against Mr. Kao and others on May 8, 2022, relating to certain properties and a mortgage.

An indictment against Mr. Kao for alleged campaign finance violations was filed on February 10, 2022, in federal district court in the District of Columbia.

On June 22, 2022, MDG filed a 66-page civil RICO Complaint against Mr. Kao and others in the US District Court for the District of Hawaii. See Pacmar Technologies LLC (fka Martin Defense Group, LLC), and Navatek Holdings LLC v. Martin Kao et al, Case 1:22-cv-00283-LEK-WRP. MDG recently filed an First Amended Amended Complaint, which expanded the pleading to 112 pages.

By letter dated 12/21/22, Pacmar, through counsel, wrote to AUSA Craig Nolan and made the following request:

> As you know, we represent PacMar Technologies LLC f/k/a Martin Defense Group, LLC f/k/a Navatek LLC ("PacMar" or the "Company") and Steven Loui. We write to request the Department of Justice's ("DOJ") assistance related to the recovery of certain Company property seized by the DOJ from Defendant Martin Kao ("Defendant Kao").
>
> In 2020, around the time the DOJ arrested Defendant Kao, it seized various property, including certain Company property1, potentially relevant to Mr. Kao's crimes in the Criminal Case. Among the items seized was an Apple iPhone 11 Pro (IMEI 353247100759018) associated with the phone number ending in 0371 ("Mr. Kao's Company Cellphone"). Mr. Kao's Company Cellphone was registered to a Company business account assigned to Defendant Kao.
>
> Pursuant to the Company's employment policies in effect at the time (which remain in effect), Company cellphones and computers used by its employees, including Mr. Kao's Company Cellphone and the content and records therein, are Company property. For the avoidance of doubt, this

> includes all forms of data related to the communications and applications stored thereon, which includes but is not limited to the call logs, voice message data, text messages, e-mails, and other forms of messaging; still and live photographs and video; audio files; storing dates, appointments, and other information on personal calendars, among other data (collectively, the "Cellphone Data").
>
> Unlike servers and other property temporarily seized by the DOJ that have since been returned to the Company, the Company has no record of the DOJ returning either Mr. Kao's Company Cellphone or the Cellphone Data to the Company.
>
> The Company therefore requests that the DOJ return Mr. Kao's Company Cellphone and/or the Cellphone Data to the Company as soon as possible. To the extent the DOJ desires to maintain possession of Mr. Kao's Company Cellphone as physical evidence in its pending Criminal Case, the DOJ's return of the extracted Cellphone Data through a searchable reader (i.e., CelleBrite) will suffice in lieu of a return of the physical Cellphone.

Dkt 82-9.

Mr. Kao, through counsel, objected to the return of the cellphone or its contents.

On January 5, 2023, another indictment was brought against Martin Kao in CR23-0003, United States District Court for the District of Hawaii. The indictment asserts a claim for bank fraud and forfeiture relating to 4902 Kahala Avenue, Honolulu, Hawaii.

On January 24, 2023, Pacmar filed a motion under Fed. R. Crim. P. 41(g) for return of the cellphone or the cellphone data.

On January 26, 2023, the US filed a response, stating in part:

> [T]he government does not oppose an order to return a copy of the data extracted by the government from the cellphone seized from and used by Martin Kao, which PacMar states in its Motion is sufficient at this point in time. … Because Mr. Kao objected to such production, he should have an opportunity to respond to PacMar's Motion.
>
> Finally, the government notes that although Mr. Kao has entered guilty pleas to all charges in the instant wire fraud matter, he has not yet been sentenced, and he was recently indicted in this District for bank fraud in CR 23-00003 LEK. The cellphone at issue constitutes and contains evidence in both prosecutions.

Dkt 84 at 2. The US clarified that "if such Motion is granted after Mr. Kao's opportunity to respond, that the Court limit the scope of the order to a production of a copy of the data extracted by the government from the cellphone." Id. at 3.

II. <u>RULE</u>

Pacmar's Motion is made pursuant to Fed. Rules Crim. Proc. R 41(g), which provides as follows:

> (g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed Rules Crim Proc R 41.

III. <u>ARGUMENT</u>

In its Motion, PACMAR "seeks the return of Defendant MARTIN KAO'S … Apple iPhone 11 Pro (IMEI 353247100759018) … or in the alternative, the return of the call logs, voice message data, text messages, e-mails, and other forms of messaging; still and live photographs and video; audio files; storing dates, appointments, and other information on personal calendars, among other data … contained therein pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure." Dkt 82-1 at 1.

Mr. Kao has objected and has been provided an opportunity to provide more detail about his objection.

A. MR. KAO SHOULD NOT BE REQUIRED TO DEFEND HIS POSITION WHILECRIMINAL SENTENCING AND A CRIMINAL CASE ARE PENDING.

Mr. Kao has and will continue to invoke his privilege against self-incrimination enshrined in the Fifth Amendment of the United States Constitution, Article I, Section 10 of the Hawai'i Constitution and Hawai'i Rule of Evidence 509. As the US points out, Mr. Kao has not been sentenced in two pending cases and a new criminal indictment was recently filed. "Whether an answer "would furnish a link in the chain of evidence needed to prosecute" has also been liberally construed." United States v. Chandler, 380 F.2d 993, 997 (2d Cir. 1967).

Mr. Kao opposes the motion based on information that is already publicly available. However, he is at a disadvantage because he still faces legal jeopardy and any statement or declaration made here could be used against him. Pacmar has concocted an urgent need knowing that Mr. Kao is still under legal jeopardy.

In order to fully oppose the instant motion, Mr. Kao would have testify as to the following topic: his history relating to cellphone use at the company; his recollection regarding the documents produced by Pacmar; his history relating to cell phone and the phone number; the reasons for any text message; his personal and business contacts; and other matters that may implicate the privilege against self-incrimination.

Even if PACMAR could establish a legal and equitable interest in the phone that is greater than Mr. Kao's interest, it is not entitled to the data printout and report(s), which are the fruit of the US's search and seizure. There is no reasonable evidence of urgency. After taking no action for almost 2.5 years, PACMAR suddenly finds an urgent need for the data on the phone.

B. MR. KAO SHOULD BE PROVIDED ACCESS TO THE LIST OR DATA BEFORE ANY DECISION TO RELEASE IS MADE

With respect to the data on the phone, PACMAR is asking for "call logs, voice message data, text messages, e-mails, and other forms of messaging; still and live photographs and video; audio files; storing dates, appointments, and other information on personal calendars, among other data[.]" The US states it can produce " a copy of the data extracted by the government from the cellphone seized from and used by Martin Kao[.]" See dkt 84 at 2. However, it is not clear what this data is comprised of or what the authority for production is.

At a minimum, before any decision adverse to Mr. Kao is made, a copy of the "data" that the US proposes to produce should be inspected by Mr. Kao and his counsel. Any data that is clearly personal, such as personal contacts, information regarding his family, health information, personal text messages, personal photographs, personal search history, among others, should be excluded.

To the extent there is data that could be claimed as company-related, a list of these files can be produced and Pacmar can assert a particularized basis for obtaining this information.

Lastly, the use of Rule 41(g) by a company to obtain "data" from a cell phone used by a former employee is a novel use of the rule. PACMAR's request for data is more like a request for the DOJ's workproduct and fruits of investigation. Given the new indictment and the refusal to turn over the phone, Mr. Kao questions the propriety of giving a third party documents that are apparently still part of a continuing investigation and/or criminal action.

If this were a FOIA request, the following from the US DOJ guidelines would apply:

> If you request records relating to another person, and disclosure of the records could invade that person's privacy, they ordinarily will not be disclosed to you. For example, if you seek information that would show that someone else (including your spouse or another member of your immediate family) has ever been the subject of a criminal investigation or was even mentioned in a criminal file and you do not provide the subject's consent or proof of their death, in almost all cases DOJ will respond by stating that it will "neither confirm nor deny" the

> existence of responsive law enforcement records. Law enforcement information about a living person is released without that person's consent only when no personal privacy interest would be invaded by disclosing the information, such as when the information is already public or required to be made public, or in cases where the individual's privacy interest is outweighed by a strong public interest in disclosure. You may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. § 1746 by that individual authorizing disclosure of the records to you, or by submitting proof that the individual is deceased. Each component can require you to supply additional information if necessary to verify that a particular individual has consented to disclosure.

https://www.justice.gov/oip/make-foia-request-doj#6. Pacmar cannot claim that it is seeking records on itself. Pacmar has fallen far short of making such a showing. Pacmar's request appears to be a misguided attempt to conduct a wide-net search for information that may be relevant to its recently-filed Civil RICO claim.

As disguised discovery for Pacmar's civil RICO claim, there is also the issue of whether such documents would be subject to the policies implementing United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) if a proper demand were made. See e.g. Justice Manual, Title 1, Section 1-6.100.[1]

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[1] "Subpart B of Part 16 of Title 28, Code of Federal Regulations, sometimes referred to as the Department's Touhy regulations, named after United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), provide that no present or former employee of the Department of Justice may testify or produce Departmental records in response to subpoenas or demands of courts or other authorities issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official." Source: https://www.justice.gov/jm/jm-1-6000-doj-personnel-witnesses#1-6.100 (last visited 2/5/23).

C. THE DATA IS THE PRODUCT OF THE CRIMINAL INVESTIGATION

Pacmar has suggested the use of Cellebrite to create the data/report. See Dkt 82-9 at 3 ("To the extent the DOJ desires to maintain possession of Mr. Kao's Company Cellphone as physical evidence in its pending Criminal Case, the DOJ's return of the extracted Cellphone Data through a searchable reader (i.e., CelleBrite) will suffice in lieu of a return of the physical Cellphone.").

Pacmar's reference to one of the most widely-used forensic tools by Federal and State law enforcement is telling. Cellebrite data is commonly used in relation to criminal prosecutions:

> Some of this evidence was presented in the form of Cellebrite Extraction Reports, which are forensic analyses of data extracted from mobile phones. In short, a Cellebrite Extraction Report lists all call logs, contacts, text messages, and data files on a mobile phone at the time of the extraction, which is conducted using Cellebrite technology. Id. During the trial, the government presented Cellebrite Extraction Reports for three mobile phones[.]

<u>Christian v. United States</u>, No. 1:19-cv-1058 (LMB), 2020 U.S. Dist. LEXIS 104646, at *5-6 (E.D. Va. June 15, 2020) (citation omitted). See also <u>United States v. Brown</u>, 308 F. Supp. 3d 620, 626 (D.R.I. 2018) (" The government points out that this new Cellebrite report captured much more than the previous report, including extensive data on Mr. Brown's location, cell tower locations, text messages, Facebook conversations, and web browsing history. Id. at 3-5.").

Pacmar is not entitled to a Cellebrite or similar report. It is not clear if the US has a Cellebrite or similar report that was disclosed to Mr. Kao and his criminal defense.

D. CELLPHONE DATA IS CONSIDERED SENSITIVE AND IS USUALLY NOT ACCESSIBLE WITHOUT A WARRANT

Cellphone data is typically obtained only through a search warrant. A search warrant is usually required because cellphones are known to contain broad, personal information:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," id., at 630, 6 S. Ct. 524, 29 L. Ed. 746. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. [12] Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Riley v. California, 573 U.S. 373, 403, 134 S. Ct. 2473, 2494-95 (2014).

Other than paying the bill, there is no evidence that PACMAR even treated the cell phone and its content as company property. PACMAR knew that Mr. Kao did not use the phone only for business purposes. There is no evidence that Mr. Kao did not have a reasonable expectation of privacy regarding the phone.

There is no evidence that PACMAR ever sought to obtain the phone during the years after Mr. Kao's arrest. It was only in December 2022, almost 2.5 years after the phone was seized, that it asked for the contents of the phone. Its claims of urgency are belied by its conduct.

E. PACMAR'S CLAIM OF OWNERSHIP LACKS FOUNDATION

The documents provided by PACMAR are haphazard, ambiguous, and insufficient to establish ownership of the phone.

First, the phone was taken from Mr. Kao, and the US never treated PACMAR as the owner. It is believed Mr. Kao cooperated with the US.

Second, regardless of any installment payment or monthly bill for the cell phone, Mr. Kao had possession and use of the phone. He also by necessity had a SIM card. Depending on the phone, a SIM card may also contain personal information. See e.g. State v. Moore, 429 S.C. 465, 486 n.13, 839 S.E.2d 882, 893 (2020).

The so-called evidence from the Handbook is ambiguous at best. The Handbook provides:

> 6. If an employee is issued a company cell phone, this may not be used for personal phone calls unless authorized by the Company prior to usage. All rules from this policy applies to company issued cell phones.

See 82-4 at C-22. Here, the Company did authorize personal calls.

Furthermore, "[t]he purpose of this policy is to promote a safe and productive work environment and increase public safety." The policy, which is contained on page C-22, does not state that Cellphone data is company property.

Instead, consistent with the purpose of the policy, it is focused on avoiding excessive use, prohibiting use while driving, and prohibiting unauthorized use or illegal activity.

The Handbook states: "All personnel records, including an employee’s personnel file, are the property of the company and are confidential." See Dkt 82-4 at A-9. A cell phone is not a personnel record.

The Handbook further states:

> Inspections. Desks, telephones and computers are company property. The Company has the right to enter or inspect work area including, but not limited to, desks, lockers, computers and computer storage disks, with or without notice.

Dkt 82-4 at C-13. This applies by its terms to work areas. Furthermore, telephone is reasonably understood to mean the company's land-based phone that would be located on a desk. Cellular Phones are treated differently in the Handbook. See C-22.

The only signed acknowledgement by Mr. Kao of a Handbook is an undated acknowledgement for a Navatek Lifting Bodies Technologies, LLC, handbook. See Dkt 82-5. It is not attached to any handbook. Nothing in the acknowledgement makes it clear that the handbook is the one produced separately as Dkt 82-4.

The dates are also inconsistent. The acknowledgement is on a form that states "Last revision: 10/01/2008[.]" See Dkt 82-5 at 2. However, the Handbook is comprised of sections that were revised after 2008. The handbook attached as Dkt 82-4 states "Last revision: 1/2010" after its table of contents. See 82-4 at 4. Sections A-1 to A-11 states "Last revision: 2/2009[.]" See Dkt 82-4. Sections B-1 to B-8 states "Last revision: 1/2010[.]" See Dkt 82-4. Sections C-1 to C-25 states "Last revision: 1/2010[.]" See Dkt 82-4. Sections D-1 to D-25 states "Last revision: 1/2010[.]" See Dkt 82-4.

The Motion is also significant in what it does not include. There is no agreement between Mr. Kao and the Company regarding the receipt of the subject cell phone, and any special terms and conditions. There is no document to Mr. Kao stating that his use of the subject cell phone is limited to business use.

This mosaic of ambiguous documents cannot authorize Pacmar to obtain Mr. Kao's confidential phone records.

IV. CONCLUSION

The Motion should be denied.

DATED: Honolulu, Hawaii, February 6, 2023.

/s/ Victor J. Bakke
VICTOR J. BAKKE

Attorney for Defendant
MARTIN KAO