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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA Plaintiff, v. MARTIN KAO Defendant.	CR. NO. 21-00061 LEK DEFENDANT MARTIN KAO'S OBJECTIONS TO AND APPEAL FROM DISPOSITIVE ORDER [DOCUMENT 92] OF MAGISTRATE JUDGE; EXHIBIT 1
PACMAR TECHNOLOGIES LLC, Movant, v. MARTIN KAO, Respondent/Objecting Party.	

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MARTIN KAO'S OBJECTIONS TO AND APPEAL FROM DISPOSITIVE ORDER [DOCUMENT 92] OF MAGISTRATE JUDGE

Defendant Martin Kao, through civil counsel appearing for the limited purposes of objecting to the order granted in favor of Movant Pacmar Technologies Inc., hereby submits his OBJECTIONS TO AND APPEAL FROM DISPOSITIVE ORDER [DOCUMENT 92] OF MAGISTRATE JUDGE.

I. PROCEDURAL AND FACTUAL BACKGROUND[1]

Martin 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

[1] The following is from Mr. Kao's Memorandum In Opposition, filed as Dkt 89, at pages 2 through 6.

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 U.S. 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. Pacmar recently filed a First 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:

> The Company … 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 U.S. 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 U.S. 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.

A transcript of the hearing will be provided when available.

II. OBJECTIONS

The magistrate judge did not enter findings and conclusions, and instead entered an Order. As stated in the Magistrate Judge's Order:

> **A.** The Motion is GRANTED;
>
> 2. The Court adopts the arguments and authorities relied upon by PacMar and finds that the cellular phone previously issued by PacMar to Defendant Kao during his employment with Pacmar, Apple iPhone 11 Pro (IMEI 353247100759018) (the "Company Cellphone"), and all of the business and personal data stored therein (hereinafter the "Cellphone Data"), are the property of PacMar pursuant to PacMar's policies which were acknowledged by Defendant Kao and that Defendant Kao has no5easonnable expectation of privacy with respect to the Cellphone Data.
>
> 3. Having found that PacMar is the owner of the Company Cellphone and Cellphone Data, the Court further finds that PacMar has met the requirements under Rule 41(g) of the Federal Rules of Criminal Procedure for the return of its property and is therefore entitled to the Government's return of the Cellphone Data under Rule 41(g);
>
> 4. Pursuant to the representations made in the Government's Response, the Government shall retain the Company Cellphone, and a copy of the entirety of the Cellphone Data shall be returned to PacMar within thirty (30) days; and

Dkt. 92. Defendant Martin Kao objects to the foregoing, which is the entirety of the order. Defendant Martin Kao further objects to any express or implied findings, report and recommendation of the Magistrate Judge.

The instant Objections are timely as they are filed within 14 days of the February 15, 2023 Order.

III. LEGAL STANDARD

The Local Criminal Rules for the United States District Court for the District of Hawaii provide for District Judge review of Magistrate Judge orders on dispositive pretrial motions as follows:

CrimLR57.4. Magistrate Judges; Dispositive Pretrial Motions.

> **(A)** Findings and Recommendations by the Magistrate Judge. **All dispositive motions in criminal cases shall be heard by a district judge, unless specifically referred to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B).** Any party may move for reconsideration before the magistrate judge pursuant to CrimLR60.1. A reconsideration motion shall toll the time in which objections from the magistrate judge's findings and recommendations must be filed and served.
>
> **(b) Objections to Reports and Recommendations in Dispositive Matters.**
> Any party who objects to any portion of a magistrate judge's findings and recommendations must serve and file written objections to such findings and recommendations within fourteen (14) days after being served with a copy of the recommended disposition. **Briefing requirements and deadlines are governed by CrimLR12.2.**

CrimLR57.4 (Emphasis added) (1/2023).

The Civil Local Rules provide for similar procedure for objection. *See* LR 74.1 and 74.2.

A Federal Rules of Criminal Procedure Rule 41(g) motion is a dispositive motion. *See e.g. United States v. Collins*, No. 11-CR-00471-DLJ (PSG), 2012 U.S. Dist. LEXIS 35980, at *21 (N.D. Cal. Mar. 16, 2012) ("The court has failed to identify any Ninth Circuit case characterizing a Rule 41(g) motion as non-dispositive, but must conclude that a magistrate judge's consideration of a Rule 41(g) motion is appropriately treated as a report and recommendation on a dispositive motion.") (Magistrate Judge); *see also In re Scranton Hous. Auth.*, 487 F. Supp. 2d 530, 534 (M.D. Pa. 2007) ("[M]agistrate judges do not have jurisdiction under section 636(a) to entertain Rule 41(g) motions. However, this amendment also evidences Congress' intent to grant jurisdiction to magistrate judges to hear Rule 41(g) motions. See id. As such, the Court is of the opinion that the 1989 amendment provided magistrate judges with the authority to hear Rule 41(g) motions pursuant to subsections (b) and (c) of section 636.").

The review of the objections in this proceeding is de novo. 28 U.S.C. §636(b) provides in part as follows:

> **Within fourteen days** after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. **A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made**. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. **The judge may also receive further**

> **evidence or recommit the matter to the magistrate [magistrate judge] with instructions."**

28 U.S.C. §636(b) (Emphasis added).

IV. DISCUSSION OF THE OBJECTIONS

A. THE MAGISTRATE JUDGE ERRONEOUSLY DETERMINED THAT MR. KAO DID NOT HAVE A PRIVACY INTEREST IN THE PHONE EVEN THOUGH MR. KAO COULD NOT TESTIFY AS TO SUCH MATTERS WITHOUT IMPLICATING HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The first argument in Mr. Kao's opposition was the following: "Mr. Kao should not be required to defend his position while criminal sentencing and a criminal case are pending." *See* Dkt. 89 at 7.

> 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).

Id. Mr. Kao, in the Opposition, argued that he could not describe, among other things, his history relating to the cell phone and the handbook documents without the risk of further incrimination. As stated in the Opposition:

> 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.

Id. at 8. Indeed, while the U.S. has the contents of the phone, the U.S. does not necessarily know how Mr. Kao got the phone, whether he had any other phones, the extent of Mr. Kao's control over MDG and its policies, Mr. Kao's state of mind when he was using the phone, and other matters relevant to the issue of whether Mr. Kao had a reasonable expectation of privacy.

The Magistrate Judge effectively penalized Mr. Kao for invoking the privilege against self-incrimination. There should be no penalty or cost to a criminal defendant for invoking the privilege against self-incrimination in a criminal action. *See Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233 (1965).

The phone had been seized around 2.5 years ago, in September 2020. Other than an alleged need to review the data because of its business, there was no identifiable urgency. The data was in safe hands: the U.S. Attorneys' office. The Magistrate Judge failed to give adequate weight to Mr. Kao's constitutional rights.

Even if Pacmar established ownership, this would only be evidence of legal title. There is no dispute that the phone was taken from Mr. Kao and was in his possession. The old axiom that "possession is 9/10's of the law" is relevant here. *See e.g. In re Karis*, 208 B.R. 913, 917 n.2 (Bankr. W.D. Wis. 1997). Mr. Kao was the CEO of the company and (except for a 1% stake) the owner of MDG. Clearly, this position of ownership and control is relevant to whether he had an expectation of privacy. Who at the company at the time Mr. Kao was CEO and owner would have asked Mr. Kao for personal information on his phone? Had Mr. Kao been able to testify, he could have described in detail his state of mind and expectation of privacy with respect to the phone he possessed as the owner and manager of the MDG.

B. RATHER THAN CONSTRUE THE EVIDENCE AGAINST MR. KAO, THE MAGISTRATE JUDGE SHOULD HAVE DENIED THE MOTION WITHOUT PREJUDICE UNTIL AFTER MR. KAO'S CRIMINAL CASE IS OVER.

While the proceeding has elements of a non-criminal proceeding, it arose in a criminal proceeding; indeed, in the very case where Mr. Kao will be sentenced.

Typically, where a civil and a criminal proceeding involve the same facts, the civil proceeding is stayed. *See e.g., Logan v. Robert's Haw.*, No. 20-00113 LEK-WRP, 2021 U.S. Dist. LEXIS 250779, at *5 (D. Haw. Dec. 14, 2021) ("There is no dispute that Meniti has been indicted and that this civil matter involves the same facts as the pending criminal matter; thus, Meniti's Fifth Amendment rights could be threated if this case proceeds.") (citation omitted) (stay granted).

C. THE MAGISTRATE JUDGE'S CONCLUSION THAT MR. KAO HAD NO REASONABLE EXPECTATION OF PRIVACY

CANNOT BE RECONCILED WITH EVEN THE LIMITED RECORD

Pacmar's arguments were based on the patchwork of ambiguous employee handbook pages and other so-called policy excerpts. Even without the benefit of Mr. Kao's testimony, none of these established the right Pacmar was claiming.

None of the documents stated that Pacmar could access the phone's data. 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 Dkt. 82-4 at C-22. Here, the Company did authorize personal calls. Characterizing Mr. Kao as an employee when he controlled the Company is also misleading.

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 alleged right to "monitor equipment, systems, and network traffic" is not a transfer of privacy rights as to everything that may be on the phone, such as photographs.

The Motion was significant in what it did 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.

D. THE MAGISTRATE JUDGE COMMITTED ERROR BY GIVING PACMAR GOVERNMENT WORKPRODUCT THAT PACMAR CLEARLY INTENDS TO USE IN ITS RECENTLY-FILED CIVIL RICO LAWSUIT

The Civil RICO case is currently pending, although the pleadings have not yet been closed.

Pacmar's request appears to be an opportunistic quest for unfettered and broad discovery it would never be able to get under civil discovery rules. PACMAR's request for data is more like a request for the DOJ's investigative work-product for a criminal matter that is not closed. 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.

Indeed, Mr. Nolan stated during the hearing that the data was obtained using Cellebrite, a DOJ forensic tool. 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[.]

Christian v. United States, 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 United States v. Brown*, 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.

If this were a FOIA request, the following from the U.S. D.O.J. 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.

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.[2] It is not even clear that Mr.

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[2] "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

Nolan would be the official who would have authority to respond to a Touhy request.

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.

If such a request were made in a civil case, Mr. Kao would at least be afforded the right to seek a protective order to limit the production of irrelevant and personal information.

E. THE MAGISTRATE JUDGE FAILED TO PROTECT MR. KAO'S PRIVACY INTERESTS IN SEIZED PROPERTY

The Magistrate Judge also failed to give adequate weight to Mr. Kao's constitutional rights when he failed to require the U.S. to segregate the personal information that the U.S. disclosed at the hearing was on the phone. The Magistrate Judge was swayed by alleged burden it would place on the U.S.

Mr. Kao's right to privacy should not have been so readily dismissed. 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

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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).

> 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).

There is no evidence that Mr. Kao did not have a reasonable expectation of privacy regarding the phone with respect to his personal data, such as personal photographs, medical and family information, etc.

F. THE MAGISTRATE JUDGE RULED WITHOUT KNOWING THE CONTENTS OF THE DATA HE ORDERED RELEASED

With respect to the data on the phone, PACMAR asked 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[.]" *See* Dkt. 89 at 8. During the hearing, AUSA Nolan disclosed that the data contains certain files that are clearly personal in nature.

Mr. Kao's position was that he should be informed of the files involved, and clearly personal data should be removed.

> 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.

Dkt. 89 at 9.

The Magistrate Judge erred by ordering production of all the data, without even requiring a basic inventory of the files. **<u>When AUSA Nolan confirmed there were personal files, further inquiry was necessary</u>**. Under the Magistrate Judge's order, if there are photographs of Mr. Kao's wife and minor children they will be produced. If there are files relating to medical care for Mr. Kao or his family, they will be released as well.

The Magistrate Judge's only basis for this sweeping order is his finding that Mr. Kao had no reasonable expectation of privacy as to any of the data. Ironically, he made this conclusion without knowing the types of personal files that were on the phone. Clearly, the types of files someone has on a phone may indicate whether that person in fact had an expectation of privacy.

The Magistrate Judge could not have concluded that Mr. Kao had no reasonable expectation of privacy based on the record. This was not even an evidentiary hearing, and it would not be fair to have an evidentiary hearing until Mr. Kao could testify without fear of further criminal (or sentencing) jeopardy.

G. THE MAGISTRATE JUDGE FAILED TO IMPLEMENT LESS DRASTIC ALTERNATIVES TO A COMPLETE PRODUCTION

Once it was disclosed by the Government that personal files were on the phone, the Magistrate Judge should have, at the least, explored less drastic options to producing everything. The Magistrate appeared reluctant to require segregation of personal files after AUSA Nolan stated it would be burdensome to do so.

A burden on the Government is not a reason to produce personal information. PACMAR is the party that is asking for this information. **At the very least, a special master should be appointed at Pacmar's cost to review and segregate the data.**

V. CONCLUSION

The District Judge has the authority to review the Magistrate Judge's order de novo. Mr. Kao requests the following relief:

1. The Order should be vacated and/or rejected.
2. Alternatively, the Order should be modified in order to protect Mr. Kao's personal data. Pacmar should not be entitled to the data unless it pays to have a special master review the data and segregate the personal data from business data.

//

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DATED: HONOLULU, HAWAII, MARCH 1, 2023.

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EXHIBIT 1

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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 ORDER GRANTING MOTION FOR RETURN OF PROPERTY PURSUANT TO RULE 41(g) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

ORDER GRANTING MOTION FOR RETURN OF PROPERTY PURSUANT TO RULE 41(g) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

PACMAR TECHNOLOGIES LLC f/k/a MARTIN DEFENSE GROUP, LLC f/k/a NAVATEK LLC'S ("**PacMar**" or the "**Company**") MOTION FOR RETURN OF PROPERTY PURSUANT TO RULE 41(g) OF THE FEDERAL RULES OF

CRIMINAL PROCEDURE (the "**Motion**") came on for hearing on February 14, 2023 at 9:30 a.m. before the Honorable Rom Trader. Jesse W. Schiel appeared for Movant PacMar, Craig S. Nolan appeared for Plaintiff UNITED STATES (the "**Government**"), and Victor J. Bakke and Michael Okazaki appeared for Defendant MARTIN KAO ("**Defendant Kao**").

Having considered the Motion, the Memorandum in Opposition filed by Defendant Kao [Dkt. No. 89], the Government's Response to the Motion [Dkt. No. 84, hereinafter the "**Government's Response**"], PacMar's Reply in Support of the Motion [Dkt. No. 90], the arguments of counsel at the hearing on this matter, the records and files herein, and for the reasons set forth on the record during the hearing, the COURT hereby FINDS AND ORDERS as follows:

1. The Motion is GRANTED;

2. The Court adopts the arguments and authorities relied upon by PacMar and finds that the cellular phone previously issued by PacMar to Defendant Kao during his employment with Pacmar, Apple iPhone 11 Pro (IMEI 353247100759018) (the "**Company Cellphone**"), and all of the business and personal data stored therein (hereinafter the "**Cellphone Data**"), are the property of PacMar pursuant to PacMar's policies which were acknowledged by Defendant Kao and that Defendant Kao has no reasonable expectation of privacy with respect to the Cellphone Data.

3. Having found that PacMar is the owner of the Company Cellphone and Cellphone Data, the Court further finds that PacMar has met the requirements under Rule 41(g) of the Federal Rules of Criminal Procedure for the return of its property and is therefore entitled to the Government's return of the Cellphone Data under Rule 41(g);

4. Pursuant to the representations made in the Government's Response, the Government shall retain the Company Cellphone, and a copy of the entirety of the Cellphone Data shall be returned to PacMar within thirty (30) days; and

5. Should Defendant Kao file a timely objection to this order, the Court will stay the execution of this order pending the District Court's disposition of the objection.

DATED: Honolulu, Hawai'i, February 15, 2023.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Rom A. Trader
United States Magistrate Judge