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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 REPLY TO "PACMAR TECHNOLOGIES LLC'S RESPONSE TO OBJECTIONS TO AND APPEAL FROM DISPOSITIVE ORDER [DOCUMENT 92] OF MAGISTRATE JUDGE" [DOCUMENT 95]
PACMAR TECHNOLOGIES LLC Movant v. MARTIN KAO Respondent/Objecting Party	HEARING: DATE: APRIL 13, 2023 TIME: 11:00 AM JUDGE: HON. LESLIE KOBAYASHI

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DEFENDANT MARTIN KAO'S REPLY TO "PACMAR TECHNOLOGIES LLC'S RESPONSE TO OBJECTIONS TO AND APPEAL FROM DISPOSITIVE ORDER [DOCUMENT 92] OF MAGISTRATE JUDGE" [DOCUMENT 95]

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 REPLY to PACMAR TECHNOLOGIES LLC'S RESPONSE TO OBJECTIONS TO AND APPEAL FROM DISPOSITIVE ORDER [DOCUMENT 92] OF MAGISTRATE JUDGE [DOCUMENT 95].

I. <u>REBUTTAL</u>

A. <u>STANDARD OF REVIEW</u>

As a preliminary matter, Defendant Kao reiterates that the standard of review should be *de novo*. The proceeding initiated by Pacmar's Fed. R. Crim. P. Rule 41(g) motion is unusual in that it is both criminal and civil in nature. It was brought by Pacmar, a civil litigant who is not a party to the criminal case. Indeed, it is the hybrid nature of the proceeding that allowed Pacmar to appear and bring the motion in the first instance.

The proceeding is deemed dispositive because it completely disposed of the ancillary proceeding regarding the phone and will result in loss of Mr. Kao's property and privacy rights in favor of a third-party if it is enforced. The order can be accurately characterized as an order that completely resolves a matter collateral to the main (criminal) case. The fact that the criminal proceeding is still pending is irrelevant given the nature of the proceeding, the relief provided to a non-party to the criminal case, and the permanent effect of the order.

Second, under FRCP Rule 72, a matter is subject to clearly-erroneous review if "a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide[.]" See FRCP 72(a). Otherwise, dispositive motions are subject to *de novo* review. See FRCP 72(b)(3). The magistrate's order was dispositive in that it completely resolved Pacmar's claim made by its Rule 41(g) motion.

Finally, the Magistrate judge did not have jurisdiction to issue a dispositive order depriving Mr. Kao of his property and privacy rights. Therefore, the Magistrate's order (if it is to have any legal status) can only be viewed as a recommendation subject to the District Judge's *de novo* review.

B. THE MAGISTRATE JUDGE COULD NOT HAVE SUMMARILY DETERMINED THAT MR. KAO DID NOT HAVE A PRIVACY INTEREST IN THE IPHONE DATA

PACMAR argues that "What the DOJ knows or does not know about the history of Defendant Kao's use of the Company Cellphone is irrelevant." Dkt 95 at 13. PACMAR argues that "Defendant Kao has no privacy interest in the Company Cellphone, as it was at all times subject to PacMar's Information System Security Policies and Procedures Manual and Employee Mobile Device Policy." Id.

These arguments are incorrect.

First, there is no reason why PACMAR needs or should be given Mr. Kao's personal data. Although nobody other than the United States knows exactly what is on the phone, Mr. Kao believes the personal information may include his personal medical data, medical data of his wife, and medical data concerning his son's disabilities. The data regarding his wife and kids are not limited to medical records, but also personal photographs, including private photographs of Mr. Kao's minor children, and even childbirth photographs. That PACMAR is opposed to segregating out personal information from business information is very troubling.

Second, the scope of Mr. Kao's reasonable expectation of privacy is not defined by some patchwork of handbook policies of questionable authenticity and ambiguous meaning. Without hearing from Mr. Kao, the Magistrate Judge could not have summarily determined that Mr. Kao did not have a privacy interest in the phone and its contents.

Because Mr. Kao is facing sentencing, he elected to remain silent and did not offer a declaration or testimony regarding his state of mind during relevant timeframes. PACMAR effectively obtained the equivalent of summary judgment because Mr. Kao, as the opposing party, could not submit his own testimony and evidence.

The Magistrate should have denied the motion (without prejudice to refiling at a more appropriate time) or continued it until after sentencing. Even if the phone contains information that PACMAR is entitled to keep confidential, the Phone and its contents are under the safekeeping of the United States Attorney's office. PACMAR waited about 2.5 years to bring the motion. There was no demonstrable need to rush the proceedings to the detriment of Mr. Kao.

C. THE NATURE OF PACMAR'S OWNERSHIP AND THE APPLICABILITY AND EFFECT OF THE HANDBOOK MATERIALS IS A MATTER OF DISPUTE

PACMAR claims it is undisputed that it is the owner of the cellphone. However, the "evidence" of ownership was from Verizon's consolidated invoice to MDG, where a "Device Payment Agreement" is listed under Martin Kao's charges. See Document 82-8 at 3.

Contrary to its assertion, PACMAR's ownership of the phone is not established by this evidence. Assuming that Mr. Kao went to Verizon and purchased the iphone, is that a benefit for Mr. Kao or is it MDG's phone? PACMAR does not describe how this phone was obtained. PACMAR does not discuss the SIM card. PACMAR did not attach any receipt, user agreement, or even the Device Payment Agreement. PACMAR did not identify any separate agreement between Mr. Kao and MDG at the time Mr. Kao first obtained the phone.

Even if PACMAR established legal title, that is insufficient. As PACMAR should know, ownership may be based on legal title or beneficial interest. Possession can be more important than legal title in establishing actual ownership. As an extreme example, the seller under an agreement of sale retains legal title but the law treats the purchaser as the true owner. Ownership issues could not be fully explored because Mr. Kao elected to remain silent. However, it was undisputed that Mr. Kao had possession of the phone. It was error for the Magistrate Judge to have made a ruling without having explored the nature and scope of Mr. Kao's possessory interest. This exploration should have occurred after Mr. Kao's sentencing.

The patchwork of policies that PACMAR stitched together would not support summary judgment, let alone the deprivation of a criminal defendant's property and privacy rights during a time when his privilege against self-incrimination must be protected and respected. The policies that PACMAR cherry-picks to establish its alleged ownership rights actually undermine its arguments when viewed in proper context.

The policies by their terms are policies for employees and it is misleading to characterize Mr. Kao as an employee in 2019 and 2020. As PACMAR knows from its arbitration with Mr. Kao, Mr. Kao was paid by distributions (not by W-2 employee compensation) and had a capital account (based on 99% ownership) in 2019 and 2020.[1]

The "Cellular Phones" policy (Document 82-4 at 45) states the following as its purpose: "The purpose of this policy is to promote a safe and productive work environment and increase public safety. This policy applies to both incoming and outgoing cellular calls." See Id at 45. By its plain terms, this policy applies to personal and company cell phones, and it is intended to govern safe and efficient usage. It does not purport to give PACMAR/MDG any ownership interest in a phone's contents.

The "Electronic Mail and Internet Usage" policy focuses on the company's email system. See Document 82-4 at 46. It does not purport to govern cell phones or the contents of cell phones. PACMAR isolates and then underscores a provision that states: "Computers, computer files, electronic communication systems, internet access, and software furnished to employees are Company property intended to be used solely for business purposes . . . . **<u>All work done with Company resources will be owned by the Company or will be deemed assigned to the Company</u>**." See Dkt 95 at 6 (emphasis supplied). PACMAR is

[1] <u>See</u> <u>Navatek Capital Inc. et al v. Martin Kao</u>, 1CCV-20-0001511, Circuit Court of the First Circuit, State of Hawaii, at Dkt 452, Final Judgment Confirming Arbitration Award, at Exhibit A (Redacted Award) at 24, 63, 72 (judicial notice requested).

reaching for straws. First, none of the equipment listed is a cellular phone, which is the subject of the Policy on the prior page. Second, the purpose of this provision is obviously to ensure that MDG owns the intellectual property produced from the company's IT and software system.[2] The argument that it gives MDG ownership of personal information on an iPhone is unavailing.

The "MDG Employee Mobile Device Policy" is similarly unhelpful to PACMAR. It is focused on the productive use of mobile devices, not the ownership of content. Indeed, it states in part:

> The Company owns any and all **phone numbers** for accounts that are paid for by the Company.
>
> **Employees are eligible to upgrade beyond the standard-issue device or provide their own nonstandard device** at their own expense, provided the device conforms to the Company's IT/Security policy requirements.
>
> The Company provides a mobile device as both a necessity for the regular and complete execution of the employee's professional responsibilities **and a benefit for the employee.**

Document 82-7 at 2 (emphases added). This policy can hardly be construed as a waiver of all rights to privacy in a phone. Significantly, the Policy describes company-issued mobile devices as also an employee **benefit**. It would hardly be a benefit if "Defendant Kao had no right to privacy in the device" or if "personal uses was at his own risk" and the company owned his personal data. The Policy only

[2] I.e., a type of work-for-hire IP-protection clause.

identifies as disciplinary consequences for "excessive or inappropriate use" the banning of use during business hours or repossession. Id. at 3.

Furthermore, the Policy allows the employee to keep the phone by paying for it: "Upon termination or departure from the Company, the employee's mobile device **may be purchased at fair value** (as determined by the Company), and if so desired by the employee, the phone line may be released to the employee." This right to purchase and take the phone line weakens any claim PACMAR may claim to the personal and other data on the phone. Mr. Kao would purchase the phone at fair value, which appears to be under $400.[3]

PACMAR also cherry-picks and quotes from a provision regarding inspection. The alleged right of inspection contained in the mobile device policy states: "At any time upon request by Company management, the employee shall produce the mobile device for return or inspection." See Document 82-7 at 2. Even if the phone is subject to this policy, PACMAR greatly exaggerates the effect of the provision.

First, who was the "Company management" at the time Mr. Kao had the iPhone? PACMAR alleges that "[f]rom and after 2018, as President and CEO of

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[3] https://swappa.com/guide/apple-iphone-11-pro/prices#:~:text=What's%20the%20best%20price%20for,to%20the%20MSRP%20of%20%24999.

PacMar, Defendant Kao was responsible for oversight of all of PacMar's business operations[.]" Dkt 95 at 7.[4] If Mr. Kao is considered management during the time he had the phone, then it is Mr. Kao that had the right to inspect his own phone. Mr. Kao's reasonable expectation of privacy should include an assessment of expectations given the facts and circumstances.

Second, the provision does not state that PACMAR owns any personal data on the phone. The provision does not state that an employee cannot remove personal data before returning the phone. Indeed, the Policy states that employees "shall make reasonable efforts to… [p]rotect their own personal data, as the Company will not responsible for personal data loss[.]" This provision clearly indicates that personal data will not be property of the Company.

Third, the inspection provision must be read in conjunction with the Policy's "Disciplinary Consequences" provision, which states: "The Company retains the right to monitor employees for excessive or inappropriate use of their mobile devices. If an employee's usage causes a prolonged decline in productivity or interferes with our operations, the Company may ban that employee from using mobile devices during business hours and/or repossess a Company-provided

[4] In its opposition, PACMAR dismisses the following rhetorical question raised in the objection: "Who at the company at the time Mr. Kao was CEO and owner would have asked Mr. Kao for personal information on his phone?" See Dkt 95 at 15. However, it is a relevant and significant issue, especially in the context of the asserted right to inspect.

mobile device." Dkt 82-7 at 3. Logically, given the Policy as a whole, the right to inspect is to confirm whether excessive or inappropriate use occurred. There is no expectation from the Policy that personal data belongs to the company.

D. THE MAGISTRATE JUDGE COMMITTED ERROR BY GIVING PACMAR GOVERNMENT WORKPRODUCT OF A CRIMINAL SEARCH AND SEIZURE

The government asserts that it seized the phone pursuant to a warrant:

> Pursuant to warrant, the government seized the cell phone at issue on or about September 30, 2020, from Defendant Kao at the offices of the Navatek companies that are now PacMar in connection with the arrest of Defendant Kao.

Dkt 96 at 2. PACMAR's argument that the phone should not be afforded the same scrutiny as property taken by criminal warrant is without merit. As stated by the United States:

> 5. After seizing the cell phone, the government **used forensic tools** to extract data from the cell phone.
> 6. The extracted data set contains both business data **and personal data**.

Dkt 96 at 2 (emphasis added). The government states it can provide a Cellebrite report and/or raw data.

It is believed that extracting raw data still requires special tools. PACMAR should be required to wait until the phone can be released to make its request. By then, perhaps, Mr. Kao will be able to testify without fear of incrimination.

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

Having PACMAR pay for a special master to segregate company data from personal data is an option. The United States is amenable to the use of a special master as long as the United States does not pay for it:

> To the extent that the Court orders the segregation of business data from personal data before data is produced to PacMar, the government requests that a third-party, such as a special master, be appointed by the Court because such task would be unduly burdensome if placed upon the government. Furthermore, PacMar and/or Defendant Kao, and not the government, should bear the costs incurred for such a process because the government's obligation is merely to return property to its owner at the conclusion of proceedings and the instant dispute between PacMar and Defendant Kao is a part of a long-running business and legal dispute between the two.

Dkt 96 at 4. PACMAR should bear the cost of a special master because it is the one claiming an urgent need to review the data.

II. <u>CONCLUSION</u>

Based on the submissions, the record,[5] and argument that may be raised at hearing, Mr. Kao requests the following:

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

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[5] According to the court reporter, the original transcript of the hearing on the motion will be or has been filed with the Court.

have a special master review the data and segregate the personal data from business data.

DATED: HONOLULU, HAWAII, APRIL 6, 2023.

/s/ Chuck C. Choi
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