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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>KEITH MITSUYOSHI KANESHIRO (1),<br>DENNIS KUNIYUKI MITSUNAGA (2),<br>TERRI ANN OTANI (3),<br>AARON SHUNICHI FUJII (4),<br>CHAD MICHAEL MCDONALD (5),<br>SHERI JEAN TANAKA (6),<br><br>Defendants. | CR No. 22-00048-TMB-WRP<br><br>UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NO. 13, ECF 344 |

THE UNITED STATES' RESPONSE IN OPPOSITION
TO DEFENDANTS' MOTION *IN LIMINE* NO. 13

## INTRODUCTION

The Court should deny the defendants' Motion *in Limine* No. 13, which seeks to exclude evidence of "Attorney Litigation Conduct" from the L.J.M. Civil Case, including specifically the litigation of MAI's counterclaims against L.J.M. The defendants do not deny that the litigation of the civil counterclaims occurred right in the middle of the charged conspiracy, as bribes flowed to Kaneshiro and as he maneuvered to pin felony criminal charges on L.J.M. The defendants also do not deny that MAI's civil counterclaims were the prelude to the filing of criminal charges against L.J.M. As a matter of fact, they openly concede in their motion that MAI's counterclaims were grounded on "**the same basic facts that supported the theft charges against L.J.M.**" ECF 344 at 21 (bold in original).

The Court should decline the defendants' invitation to erase a critical chapter of the conspiracy charged in the First Superseding Indictment (FSI). As the United States expressed in its previous submissions, "L.J.M.'s filing of the lawsuit was the match that lit the flame of their retribution" and it served as "both the springboard and the bridge to the defendants' pursuit of false criminal charges against L.J.M." ECF 341 at 1–2. The L.J.M. Civil Case was the stage upon which the MAI defendants unveiled their contrived theories that L.J.M. had committed theft against the company. When that failed—and the civil jury rejected those theories by finding in favor of L.J.M. and awarding MAI a single dollar on a single counterclaim—the MAI defendants upped the ante in dramatic fashion. They turned to Kaneshiro to

convert those failed counterclaims into felony theft offenses (which would ultimately be dismissed for lack of probable cause). The MAI defendants' actions in relation to those counterclaims are relevant evidence of (1) what they understood those claims to mean, (2) the effect on the defendants of the jury's rejection of those claims, and (3) the existence of the underlying conspiratorial agreement.

## BACKGROUND

The relevance of the defendants' conduct in the L.J.M. Civil Case has already been discussed in prior briefing. See United States' Motion *in Limine* No. 2: To Admit Evidence Relating to the L.J.M. v. MAI Civil Trial; see also United States Response in Opposition to Defendants' Motion *in Limine* No. 2. We therefore incorporate our discussion and analysis from those submissions in full.

In short, before the defendants' instituted false criminal charges against L.J.M., they pursued her civilly over the same alleged "theft" using a number of counterclaims in the federal civil trial. When they lost (the award of a single dollar on a single counterclaim was unquestionably a loss, as the MAI defendants were not seeking moral victories), they repackaged those same claims into four felony charges, based largely on the same evidence from the civil case, then sent them Kaneshiro. Evidence that the defendants heard the jury say, "Your case is worth $1," and then turn around and institute felony charges (requiring $300 in loss) on precisely the same conduct would strike anyone as suspect.

Indeed, the defendants' conduct with respect to the federal civil case is featured prominently in the FSI itself. For example:

> In July 2014, the civil lawsuit between L.J.M. and MAI, Civil No. 12-00468-DKW, proceeded to trial in federal court. The trial included several counterclaims MAI alleged against L.J.M., including breach of loyalty, intentional interference with prospective business advantage, conversion, and fraud. On July 25, 2014, the jury returned its verdicts, finding no liability on any claim or counterclaim with the exception of MAI's claim against L.J.M. for breach of loyalty. For that claim, the jury awarded MAI one dollar ($1.00) in nominal damages.

FSI ¶ 14.

The FSI then alleges a number of overt acts in which Defendant Sheri Tanaka, MAI's attorney, passed to Kaneshiro and his subordinates material from the civil litigation with the expectation he would use it to charge L.J.M. criminally.

> On or about June 16, 2014, TANAKA sent an email to EA-1 attaching a series of deposition transcripts from a civil lawsuit involving L.J.M. and MAI. The email stated in part, "[p]lease let us know which depositions Mr. Kaneshiro would like to view in hard copy and we will print it and deliver it to your office."

FSI ¶ 22(24).

Even after Dwight Nadamoto, the first prosecutor Kaneshiro assigned to the case, refused to charge L.J.M., and even after MAI lost its counterclaims at the civil trial (except for the $1 award), Tanaka kept sending evidence from the civil trial to J.D., the new prosecutor that Kaneshiro reassigned to the case.

> On or about August 28, 2014, TANAKA sent an email to J.D. regarding the L.J.M. matter, which included transcripts from the federal civil lawsuit between L.J.M. and MAI.

FSI ¶ 22(29).

And in another instance:

> On or about November 3, 2014, TANAKA sent an email to J.D. which stated in part, "[p]lease find attached the Declaration of Chad McDonald and Exhibits "1" – "8". I have 34 Exhibits so will be sending you additional e-mails with the remaining Exhibits." Thereafter on or about November 3, 2014, TANAKA sent a series of emails to J.D. containing various exhibits pertaining to L.J.M.

FSI ¶ 22(37). Those exhibits were evidence from the federal civil trial.

In short, the federal civil trial is a prominent aspect of the conspiracy charged in the FSI. The defendants' attempt to excise this story out of the conspiracy entirely, under the banner of "Attorney Litigation Conduct," should be denied.

## DISCUSSION

1. *Relevance.* The defendants first contend that evidence of MAI's litigation conduct in the federal civil case has "no probative value." ECF 344 at 21. How can that be true? As the United States laid out in its Motion *in Limine* No. 2, Defendant Tanaka's closing arguments laid out the theories behind MAI's counterclaims. ECF 341 at 4. For instance, she argued that MAI's fraud claim was based on L.J.M.'s "fraudulent" conduct "with regard to her time sheets[.]" ECF 341 at 4. And, according to Tanaka, MAI's breach of loyalty claim was based on L.J.M. doing side jobs while working at MAI and using its email account. *Id.* These arguments allow the jury to connect the counterclaims to the criminal charges later brought against L.J.M.—and to see that L.J.M. was charged based on the same conduct and evidence that the civil jury *had just rejected*.

The jury is entitled to consider this evidence to see its counterintuitive effect on the defendants. Hearing from the civil jury that the defendants had no case, they nonetheless doubled down on their efforts to prosecute L.J.M.—on felony charges no less (requiring more than $300 in value stolen where the civil jury awarded them only $1 for breach of duty of loyalty). This is strong evidence that the defendants were not acting for bona fide law enforcement reasons, but for corrupt personal purposes. In fact, the result of the civil trial only increased the conspirators' malice towards L.J.M. Just two weeks later, Defendant Otani referred L.J.M. to the Department of Taxation, subjecting L.J.M. to yet another frivolous investigation. See United States' Motion *in Limine* No. 3, at ECF No. 343.

The defendants next maintain that it was not Defendant Tanaka, but rather her co-counsel, who conceded that, "based on the evidence, it's clear that the [Rule 50] motion should be granted with respect to the conversion claim." ECF 344-4 at 4. This distinction lacks merit. Tanaka witnessed, knew about, heard, agreed with, or at least acquiesced to, her co-counsel's concession. That she then aggressively pursued criminal charges against L.J.M. based on conduct she could not prove *in a civil case*, on a lower standard of proof, is compelling evidence of malice.

The defendants also complain that the elements of conversion are not "identical" to the elements of second-degree theft under Hawaii law. It does not take a law degree to understand that MAI's claim of conversion—that L.J.M. took and deprived another of property—ended up in the felony information despite MAI's

admission it could not civilly pursue that claim "based on the evidence." ECF 344-4 at 4. Indeed, Defendant McDonald's declaration in support of the felony information alleges that L.J.M. "kept" cash payments from Rudy Alivado "for herself rather than passing them on to MAI"—classic conversion. ECF 341-3 at 6.

The defendants next contend that whatever Tanaka said or did on behalf of MAI cannot be attributed to the other MAI defendants, because they do not stand in the shoes of the company. Basic conspiracy law rejects this argument. "When one agrees to be a member of a conspiracy, one agrees to all acts that have been or will be committed by the conspiracy, and, by virtue of that agreement, is responsible for such acts regardless of one's role in their commission." *United States v. Nelson*, 66 F.3d 1036, 1044 (9th Cir. 1995). In this case, Tanaka's conduct and statements in the civil trial comprise acts of a conspirator performed within the timeframe and scope of the alleged conspiracies. When lawfare is a conspiracy's chosen tool of oppression, a lawyer is needed. Tanaka played that role for the conspirators here. Moreover, her statements reveal knowledge about the conspiracy. For instance, in closing, she stated that L.J.M. "may be charged with a crime for her conduct at MAI," and that Kaneshiro "continue[s] to pursue it to this day. ECF 341 at 9. And in an *in limine* motion in July 2014, Tanaka revealed that Kaneshiro's office had been investigating L.J.M. for 21 months—the exact timeframe aligning with her and Dennis Mitsunaga's meeting with Kaneshiro in October 2012. ECF 341 at 9.

Furthermore, the Court should not permit the MAI defendants to distance themselves from the civil case on the highly technical distinction that Tanaka was speaking for MAI, but not the individual MAI defendants. MAI is a small, closely held company. Five of the defendants in this case were, or still are, high ranking officers or agents of MAI: including Dennis Mitsunaga (CEO), Aaron Fujii (COO), Chad McDonald (SVP), Terri Otani (HR Director/Corporate Officer), and Sheri Tanaka (Counsel). Defendants Fujii, McDonald, and Otani each testified for MAI in the civil case—and each submitted declarations in support of the felony information against L.J.M (the only MAI employees to do so). Tanaka represented MAI in the civil litigation, and thereafter "orchestrated" the criminal investigation into L.J.M., according to Judge Nakasone's order dismissing the criminal charges. Mitsunaga, as the CEO, oversaw both the civil litigation as well as the bribery campaign to get Kaneshiro to prosecute L.J.M. They were all in this together.[1]

Indeed, as Defendant McDonald testified in the civil case, L.J.M.'s lawsuit against MAI was "just very, very upsetting" because he believed that L.J.M. was attempting to "essentially destroy, you know, what we worked so hard on building." ECF 341-6 at 32–33. In addition, Defendant Otani was MAI's corporate representative in the civil case and was present each day of trial. The evidence shows that L.J.M.'s lawsuit against MAI was deeply personal to each of the MAI

[1] Like victors claiming their spoils, Tanaka, McDonald, and Otani showed up to watch L.J.M. be arraigned on the orchestrated charges (it is unclear whether they put this event in their timesheets or billed MAI eight hours for their work that day).

defendants and, moreover, that they were aware of what was happening at trial. Their shallow attempt to distance themselves from the civil case is unavailing.

2. *Rule 403*. Exclusion of evidence under FRE 403 is "an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence." *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985). Evidence of attorney conduct in the federal civil trial is highly probative evidence, and there is no danger of unfair prejudice that would "*substantially* outweigh" its probative value. *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995).

The defendants complain that going into MAI's counterclaims and its conduct at the civil trial will require "context" devolving into a "mini-trial." ECF 344 at 23. But this is what happens when defendants engage in a complex criminal conspiracy to harass a civil litigant into submission on multiple fronts, weaponing the legal system against their victim. Each aspect of the conspiracy will have to be explored and be given "context." This evidence is not a "mini-trial"—it is *the trial*. MAI's litigation of counterclaims was a key segment of the conspiracy; indeed, it generated the very evidence the defendants would later use to maliciously prosecute L.J.M.

In any event, any fears raised by the defendants of a "mini-trial" that will "consume substantial time" are overblown. As Judge Nakasone noted in her order dismissing the felony charges against L.J.M. for lack of probable cause, the only difference in the evidence as to the civil counterclaims and "the 2,000 pages of exhibits supporting" the felony criminal charges, was "an interview with Rudy

Alivado, from which no investigative report or witness statement was obtained." ECF 346-1 at 5. Due to extensive overlap between the evidence supporting MAI's counterclaims and the evidence behind the felony information filed against L.J.M., evidence concerning the former would not be a waste of the jury's time.

## CONCLUSION

The Court should deny the defendants' Motion *in Limine* No. 13.

Dated: February 2, 2024

Respectfully submitted,

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*/s/ Andrew Y. Chiang*
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UNITED STATES DISTRICT COURT

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IT IS HEREBY CERTIFIED that:

I, Andrew Y. Chiang, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, CA 92101-8893. I am not a party to the above-entitled action. I have caused service of the foregoing on all parties in this case by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 2024. */s/ Andrew Y. Chiang*
ANDREW Y. CHIANG