

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 22-00048TMB-NC
	)	
Plaintiff,	)	Honolulu, Hawaii
	)	February 26, 2024
vs.	)	
	)	
(1) KEITH MITSUYOSHI KANESHIRO,	)	[397] DEFENDANT SHERI J.
(2) DENNIS KUNIYUKI MITSUNAGA,	)	TANAKA'S MOTION TO CONTINUE
(3) TERRI ANN OTANI,	)	TRIAL DATE
(4) AARON SHUNICHI FUJII,	)	[398] DEFENDANT SHERI J.
(5) CHAD MICHAEL MCDONALD,	)	TANAKA'S MOTION TO SEVER
(6) SHERI JEAN TANAKA,	)	TRIAL FROM CO-DEFENDANTS
	)	[417] DEFENDANTS' UNDER SEAL
Defendants.	)	JOINDER TO DEFENDANT SHERI
	)	J. TANAKA'S UNDER SEAL
	)	MOTION TO SEVER TRIAL FROM
	)	CO-DEFENDANTS
	)	[346] DEFENDANTS' MOTIONS IN
	)	LIMINE NOS. 1-4
	)	[341] UNITED STATES' MOTION
	)	IN LIMINE NO. 2
	)	[345] DEFENDANTS' MOTION IN
	)	LIMINE NO. 5
	)	[339] DEFENDANTS' MOTION IN
	)	LIMINE NOS. 6-9
	)	[348] UNITED STATES' MOTION
	)	IN LIMINE NO. 4
	)	[347] DEFENDANTS' MOTION IN
	)	LIMINE NO. 16
	)	[337] DEFENDANTS' MOTION IN
	)	LIMINE NO. 10
	)	[338] DEFENDANT'S MOTION IN
	)	LIMINE NO. 11
	)	[342] DEFENDANTS' MOTIONS IN
	)	LIMINE NOS. 14 & 15
	)	[343] UNITED STATES' MOTION
	)	IN LIMINE NO. 3
	)	[340] UNITED STATES' MOTION
	)	IN LIMINE NO. 1
	)	[344] DEFENDANTS' MOTION IN
	)	LIMINE NOS. 12 & 13
	)	[349] UNITED STATES' REDACTED
	)	MOTION IN LIMINE NO. 5
	)	<i>[Open-court Proceedings</i>
	)	<i>Under Separate Cover]</i>



1 APPEARANCES CONT'D:

2 For Defendant (6)  
3 Sheri Jean Tanaka:

MARK MERMELSTEIN, ESQ.  
ANDREW S. COWAN, ESQ.  
Holmes, Taylor, Athey, Cowan,  
Mermelstein & Jones LLP  
811 Wilshire Blvd., Ste. 1460  
Los Angeles, California 90017

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20 Official Court  
21 Reporter:

Cynthia Fazio, RMR, CRR, CRC  
United States District Court  
300 Ala Moana Blvd., C-270  
Honolulu, Hawaii 96850

22

23

24

25 Proceedings recorded by machine shorthand, transcript produced  
with computer-aided transcription (CAT).

1 MONDAY, FEBRUARY 26, 2024

2 \* \* \* \* \*

3 (Sealed proceedings:)

4 THE COURT: Thank you, Renee.

5 THE COURTROOM MANAGER: We're sealed, Your Honor.

6 THE COURT: Okay. We are under seal. So we are going  
7 to be discussing under seal a couple of motions. It is  
8 defendants' 12 and 13 and government's 5. And let me just see  
9 what I allotted for that.

10 So that was, again, 15 minutes for each side for each  
11 issue. Are the parties ready to proceed that way or is this  
12 another one of those situations in which you think you just  
13 want to --

14 MR. CHIANG: Your Honor, I'm fine with merging my  
15 response and then using my time from our affirmative motion and  
16 merging that into our response.

17 THE COURT: Okay. So it sounds like everybody is in  
18 agreement that we can just -- it's just -- we'll start with  
19 defense, you can make your argument, and then we'll go to the  
20 government, and then we'll get a reply and a reply, or a  
21 response and a response. So, let me just get this set up.

22 So, Mr. Mermelstein, we'll start with you, sir.

23 MR. MERMELSTEIN: Thank you. Ironically I think being  
24 here will keep my back better because it's going to keep me off  
25 the basketball court, so.

1 THE COURT: Keep you off what?

2 MR. MERMELSTEIN: The basketball court. Unless I find  
3 a game here, in which case.

4 Your Honor, I think the -- the issue here, this  
5 relates to defense 12, defense 13, and government's five.

6 THE COURT: Yes.

7 MR. MERMELSTEIN: It relates to a series of actions  
8 taken before the grand jury that investigated this case. None  
9 of what we're talking about -- none of what we're talking about  
10 here is charged in the conspiracy. None of it is part of the  
11 overt acts. None of it could be in furtherance of the  
12 conspiracy. We're talking about conduct that for the most part  
13 is more than three-and-a-half years later. Three-and-a-half  
14 years after the conspiracy.

15 The conduct that we're talking about here I believe  
16 for the most part about entirely is not obstruction of justice  
17 conduct. It's what I would categorize as more obstructionee  
18 conduct, obstruction-like. It's not conduct that rises to the  
19 level of criminal obstruction of justice. It was not charged  
20 as criminal obstruction of justice.

21 So as a threshold matter, if there is some relevance  
22 and it's in fact the less prejudicial than probative, then it  
23 should come in. The real problem I think with this conduct is  
24 having the jury draw some inference from having the word  
25 "obstruction" thrown around when the conduct does not rise to

1 the level of criminal obstruction of justice.

2 And I don't know that there's any limiting instruction  
3 that can be crafted to differentiate between what I'll call  
4 obstructionee conduct and criminal obstruction of justice  
5 conduct. And that's really the concern here. And the jury  
6 would not be given any direction. I'm not aware of any way to  
7 do this, any particular direction as to how you would decide  
8 whether to draw some inference of consciousness of guilt with  
9 respect to the obstruction.

10 Because we have a number of what I'll call  
11 recalcitrant witnesses that were not enthused, were not  
12 interested in testifying. They made speeches, they did a lot  
13 of conduct that I would call obstructionees. Not criminal  
14 obstruction, we're not talking here about false testimony,  
15 we're not talking here about destruction of documents. We're  
16 talking about conduct which insulted the prosecutor. We're  
17 talking about conduct which -- reading speeches. And that  
18 conduct to -- to try -- for the government to argue some  
19 inference is drawn from that conduct, I do not believe it is  
20 appropriate.

21 We have the same problem with respect to Ms. Tanaka's  
22 role in any of this conduct. Ms. Tanaka, as an attorney, has a  
23 duty of zealous advocacy. She has a duty to -- I'm not going  
24 to say she has a duty to engage in obstructionee conduct, but  
25 as a criminal defense attorney with clients appearing before

1 the grand jury, certainly you cannot engage in criminal  
2 obstruction of justice conduct. But if you have a duty of  
3 zealous advocacy, you do have a duty to kind of get right up to  
4 the limit and not cross over the limit, certainly.

5           And so I do not believe it would be appropriate to  
6 draw any inference with respect to any type of consciousness of  
7 guilt with respect to what is in effect zealous advocacy.  
8 If -- if things crossed the line, if there was something that  
9 rose to the level of criminal obstruction of justice conduct,  
10 and it related to the consciousness of guilt of an individual,  
11 it may be admissible with respect to that individual. But if  
12 we're falling short of that, then I believe it's entirely  
13 inappropriate.

14           The -- on the issue of who it's admissible against,  
15 I've read the government's papers a number of times. It's not  
16 clear to me exactly what the request is, because there seems to  
17 be this idea that folks engaged in a conspiracy to engage in  
18 this obstructionee conduct, and it should be admissible against  
19 a whole group of folks, that's just not an analysis I've ever  
20 seen done before and I don't think it's an appropriate  
21 analysis.

22           If there is an individual that engaged in certain  
23 conduct that rises to the threshold that I've been talking  
24 about, and that relates to that individual's consciousness of  
25 guilt, maybe. But to say that because an individual was

1 involved in a underlying conspiracy and one of his  
2 co-conspirators, alleged co-conspirators engaged in conduct  
3 that constitutes consciousness of guilt, that's just not  
4 conduct that's in furtherance of the conspiracy.

5           So, yes, a co-conspirator could be responsible for the  
6 acts of a co-conspirator, but it's only -- it's limited to acts  
7 that are in furtherance of the conspiracy. So to say that  
8 there should be something attributable to one -- attributable  
9 against one defendant because three-and-a-half years later  
10 another defendant engaged in certain conduct well beyond the  
11 end of the conspiracy, I don't believe that's the correct  
12 analysis. I think the way to do this would be to do it on an  
13 individual by individual basis and actually see if there is  
14 something that rises to the level of consciousness of guilt  
15 with respect to that individual, not with respect to anyone  
16 else.

17           And so there are a number of challenges that I think  
18 it's ultimately the government's burden here to admit this  
19 evidence. The government has the burden to run through the  
20 *Bailey* factors and establish that the conduct that they are  
21 proposing to offer in meets all of those -- all of those  
22 factors.

23           I think just big picture, Your Honor, you have  
24 essentially an attorney, Ms. Tanaka, who represented a number  
25 of individuals. This was her first time appearing as a

1 criminal defense attorney before a federal grand jury. This is  
2 someone who is frustrated because the government wouldn't tell  
3 her what the investigation was all about. And maybe you and I  
4 and other folks who have more preindictment experience  
5 understand that the government doesn't have a particular duty  
6 to share what an investigation is all about.

7           And I think you have a situation where the advice was  
8 conservative in terms of invoking. There were Motions to  
9 Compel brought. There were folks who were invoking across the  
10 board. There were Motions to Compel that were filed, and as a  
11 result of that, appropriate lines were drawn in terms of what  
12 is appropriate to testify about, what is not appropriate to  
13 testify about. In one -- with respect to Ms. Otani, I think  
14 that the court actually -- seems like the court got it wrong  
15 because the court actually compelled her to testify, Your Honor  
16 has issued an order on that. So I think there was a line drawn  
17 that needed to take place with respect to what was or was not  
18 fair game with respect to Fifth Amendment invocation. And I  
19 think that got -- I think that got sorted out.

20           And so with respect to each of these particular  
21 buckets of evidence, I think that we need to go through it,  
22 have the government explain, they haven't done it in the motion  
23 papers, explain how it meets all the factors and explain who  
24 they propose to have it be admissible against. Because this  
25 sort of blunderbuss of it all comes in against everyone is just

1 not the appropriate analysis that needs to be done here.

2 Specifically I wanted to talk for a minute about the  
3 Fifth Amendment. Because I think that's very dangerous  
4 territory if we're going to -- if we're going to wade into  
5 that. There's the suggestion that there was the wrongful  
6 invocation of the Fifth Amendment. And I think unless there  
7 has been some threshold establishment that it was in fact a  
8 wrongful invocation of the Fifth Amendment, I think there is a  
9 substantial danger of attributing something negative in terms  
10 of consciousness of guilt to invoking one's Fifth Amendment  
11 rights before the grand jury.

12 THE COURT: Yeah, but that doesn't mean a witness can  
13 invoke the Fifth Amendment to each and every question no matter  
14 what it is.

15 MR. MERMELSTEIN: Of course. And --

16 THE COURT: Didn't that in fact occur in this case?

17 MR. MERMELSTEIN: I think there were certain witnesses  
18 that did invoke on the basis that ultimately was brought before  
19 the judges. There were different Motions to Compel, different  
20 judges. And some line drawing was made in terms of what is or  
21 is not appropriate.

22 But I think it's very dangerous territory to then put  
23 that in front of a jury and have a jury draw the conclusion  
24 that that behavior constituted consciousness of guilt because  
25 of the Fifth Amendment right to remain silent. And I just

1 don't see how we're -- we would instruct the jury as to when  
2 the line was crossed or -- or not have the jury draw some  
3 adverse conclusion based on the proper invocation of the Fifth  
4 Amendment.

5           And I think all of the stuff, Your Honor mentioned the  
6 word sideshow a couple -- long time ago, couple hours ago. And  
7 I think a lot of the stuff really has the risk of becoming a  
8 sideshow, because when -- when we go through each of these  
9 things, and we look at the probative value in terms of the  
10 consciousness of -- alleged consciousness of guilt with respect  
11 to that individual that engaged in the conduct, when you  
12 consider that against the risk of all of the other defendants  
13 and something nefarious being attributed to all the other  
14 defendants, I don't think we're left with much of anything  
15 that -- that survives.

16           Let me also talk -- I want to be mindful of my time  
17 here and talk about Motion in Limine 13 -- are we doing 13 at  
18 this point?

19           THE COURT: We're doing 12, 13 and five. And you're  
20 doing a combined argument in favor of 12 and 13, and whatever  
21 opposition you have to five.

22           MR. MERMELSTEIN: Okay. So, moving on to 13 for a  
23 moment. The government's argument both with respect to 12 and  
24 13 that there was some modus operandi here, which was a  
25 suggestion in their original notice, it seems to me they've

1 largely abandoned the modus operandi theory. I think modus  
2 operandi is limited to proving up identity. So I don't think  
3 that's any issue here, which is why I spent my time focused on  
4 the consciousness of guilt.

5           When you talk about -- so this is really focused on  
6 attorney litigation conduct. I think there's a very dangerous,  
7 speaking personally as an attorney that takes positions on  
8 behalf of clients all the time, and then if you were to ask,  
9 well, why did I take a particular position on a particular  
10 issue, to then say, well, that was on me or that was on my  
11 client, I'm not quite sure how we parse through who we can  
12 infer that that decision was on.

13           So this issue really relates to a decision not to  
14 oppose a Motion to Dismiss for the conversion claim in the  
15 civil case, and the argument that it's admissible to show that  
16 Tanaka knew there was no probable cause for the criminal theft,  
17 is one of the particular pieces of attorney litigation conduct  
18 that the government seeks to admit.

19           It just seems to me that in any litigation, decisions  
20 are made between a client, an attorney in this case, to  
21 corporate clients, not an individual client. And so I was  
22 going to say Tanaka was the mouthpiece here, but she wasn't  
23 even the mouthpiece. Her trial partner, Myron Takemoto, was  
24 the mouthpiece here. And Mr. Takemoto agreed to have a certain  
25 -- a cross-claim withdrawn.

1           The government wants to attribute that conduct to  
2 Tanaka and draw some inference about how Tanaka felt about  
3 something. And I just don't see how you get there. Even if  
4 you get from Takemoto to Tanaka, or Tanaka then to -- to the  
5 corporate clients, who are we going to attribute that knowledge  
6 to, and -- and based on what? You have a privilege that is in  
7 between the attorney and -- and the clients. Who are we going  
8 to draw this adverse inference against?

9           And lots of times, I mean like imagine a situation  
10 where a U.S. Attorney's Office in a situation similar to this  
11 doesn't seek an indictment on the -- on obstruction of justice  
12 conduct. What would you attribute to the particular Assistant  
13 U.S. Attorney in a situation where an entire -- an office  
14 doesn't seek an indictment. Do you attribute they didn't have  
15 probable cause, they didn't think they could convince a grand  
16 jury of probable cause? Maybe they decided that using the  
17 obstruction of justice conduct as 404(b) evidence was  
18 sufficient. Maybe it just wasn't important. To try to  
19 conclude that the reason that particular attorney didn't do  
20 something was because they didn't think they had probable cause  
21 for it I think is it's very dangerous territory.

22           Their boss could have told them not to do it. I don't  
23 know. But I think it's a very dangerous and I think it's a  
24 very speculative inference to try to conclude that because the  
25 attorney said something in court or did something in court or

1 didn't do something in court, that the reason they did that was  
2 because of X or Y or Z or A or B or C.

3 Let me -- if the Court has questions, I'm happy to  
4 address. Otherwise I think I'll reserve the remainder of my  
5 time.

6 THE COURT: No, I don't have any questions. Thank  
7 you.

8 MR. MERMELSTEIN: Thank you.

9 MR. CHIANG: Your Honor, I'll start with grand jury  
10 conduct and then I'll move on to the civil attorney litigation  
11 conduct.

12 THE COURT: Okay.

13 MR. CHIANG: Your Honor, when a group of people, you  
14 know, band together and try to stop the grand jury from  
15 figuring out what they did, that is relevant admissible  
16 evidence. It's consciousness of guilt. We would seek to admit  
17 it under 404(b). But it's -- it's -- you know, it's evidence  
18 of trying to stop the grand jury from figuring out what they  
19 did. This is evidence that can go before a jury under a proper  
20 404(b) analysis. And this is evidence that is admissible at  
21 least, at least against Sheri Tanaka, and at most against the  
22 people who she was representing, which is the rest of the MAI  
23 defendants.

24 Ms. Tanaka represented each defendant that went into  
25 that grand jury. She counseled them. And, you know, the Ninth

1 Circuit has said, One who advises with corrupt motive the  
2 witness to take the Fifth Amendment can and does obstruct the  
3 influence of the due administration of justice.

4 And in this particular case we have evidence that  
5 Ms. Tanaka did do that. She had -- she had witnesses go to the  
6 grand jury, first read these false typed out prepared speeches.  
7 These speeches, you know, contained falsehoods about the  
8 prosecutor who was assisting the grand jury in the case. It  
9 contained other falsehoods. One witness said the FBI was  
10 terrorizing me and then from -- he read the FBI was terrorizing  
11 him from a speech and then later admitted that that hadn't  
12 really happened. And, you know, evidence from the grand jury  
13 showed that these statements were aided or facilitated by  
14 Ms. Tanaka.

15 One particular statement, you know, a witness said  
16 that Ms. Tanaka helped him write it. And there was these --  
17 and she also highlighted these all cap letters that said --  
18 that told the witness to repeat the statement over and over and  
19 over again.

20 So, you know, I think that's evidence of a corrupt  
21 motive in trying to -- in counseling someone to take the Fifth  
22 Amendment. And, you know, there's other conduct as well that  
23 is not limited to reading false speeches and inappropriately  
24 pleading the fifth. We have witnesses -- one witness in  
25 particular who dodged grand jury subpoenas on three occasions,

1 and there's evidence that shows that while he was dodging those  
2 subpoenas, he was speaking to Ms. Tanaka on the phone the  
3 entire time. And we also have another witness who at the time  
4 was the CFO or MAI, came to the grand jury and wanted to  
5 present a prepared statement to the grand jury that was filled  
6 with things that were false about Laurel Mau and her  
7 prosecution.

8           So all these things are happening and these things  
9 are, you know, quite -- they're -- they're bizarre in one  
10 sense, but they're also very brazen of people coming in and  
11 trying to block the grand jury from figuring out exactly what  
12 happened. And based on the evidence, it's quite clear that  
13 Ms. Tanaka was behind that. She was -- she was representing  
14 these witnesses, she was speaking to these witnesses. And we  
15 have one witness in particular that -- that tied the conduct to  
16 her.

17           So I think that, you know, this is relevant 404(b)  
18 evidence, at least with respect to Ms. Tanaka, but because she  
19 was also acting at the behest of MAI and the other defendants  
20 are principals, agents, officers of MAI, you know, she was  
21 acting -- she was acting for them.

22           I think that this evidence therefore should come in  
23 against all of the evidence -- against all of the defendants.  
24 We ask the Court to, you know, do the requisite 403 balancing  
25 test. And I think when the Court does do that, the potential

1 for prejudice is not outweighed by the probative value of the  
2 evidence.

3 So, with that, let me move on to the attorney  
4 litigation conduct.

5 As we argued earlier this morning, the civil case  
6 evidence, the civil case is an important chapter of this  
7 conspiracy because, you know, it generated the very evidence  
8 that was used in the criminal case. And that's what makes the  
9 attorney conduct in a civil case so relevant.

10 I think for one thing, for one thing, you know, we  
11 want to admit the judgment and the verdict to show effect on  
12 the listener on the -- on the counterclaims. But the jury is  
13 not going to understand what these counterclaims mean. They're  
14 not going to understand what these counterclaims are about  
15 without hearing what Ms. Tanaka argued about them during  
16 closing arguments. In her closing argument she basically  
17 tied -- she basically explained what these counterclaims were  
18 about and this allows the jury to make the connection that the  
19 counterclaims from the MAI civil trial are basically repackaged  
20 versions of the criminal charges that came later. Right? Or  
21 rather, more accurately, that the MAI defendants repackaged  
22 those counterclaims and turned them into criminal charges.

23 So the jury needs to understand, you know, what those  
24 counterclaims are. And they will -- and they understand it by  
25 hearing how Ms. Tanaka made her closing arguments and how she

1 explained what those counterclaims were from the civil trial.

2 Now, there's, you know, additional things from the  
3 civil trial that reflect Ms. Tanaka's knowledge about the  
4 conspiracy. When -- during closing arguments she told the jury  
5 that Laurel Mau may be charged with a crime for her conduct,  
6 and Kaneshiro continues to pursue it to this day. How does  
7 she -- how does she know that?

8 You know, at the time that the civil trial was  
9 happening, Kaneshiro's deputy, Dwight Nadamoto, had already  
10 made the decision that he wasn't going to charge her because he  
11 believed that she committed no crimes. Then one month later,  
12 at the -- at the civil trial closing, Ms. Tanaka is telling a  
13 group of people that Keith Kaneshiro may still charge her.  
14 He's still pursuing her. How does she know that? These --  
15 statements like these, these are statements of conspirators  
16 reflecting knowledge about a conspiracy. You know, it doesn't  
17 matter that it's being made in the context of litigation. I  
18 would argue that that statement isn't really relevant to the  
19 civil -- to the -- the civil claims themselves. But yet she  
20 still made them, and it shows knowledge.

21 In her -- in her -- in one of the Motions in Limine --  
22 in Motion in Limines in the civil case she wrote that Kaneshiro  
23 had been investigating Laurel Mau for 21 months. And so if you  
24 date that -- the date of that pleading back 21 months, that  
25 takes it to October of 2012, which is the very day that -- the

1 very month that Dennis Mitsunaga sat down with Keith Kaneshiro  
2 and requested that he press charges against Laurel Mau. How  
3 does Sheri Tanaka know that that was -- that day, that month  
4 was when Keith Kaneshiro began to investigate Laurel Mau?  
5 Again, these are statements of a conspirator with knowledge  
6 about a conspiracy. So there's a whole host of things that  
7 happened in the civil trial that are relevant. They come in as  
8 substantive evidence. Thank you.

9 THE COURT: Thank you. Mr. Mermelstein, how long do  
10 you need for your rebuttal?

11 MR. MERMELSTEIN: Not long, Your Honor.

12 THE COURT: Well --

13 MR. MERMELSTEIN: How long do I have?

14 THE COURT: Let's try to assign a number. How about  
15 five minutes?

16 MR. MERMELSTEIN: Five minutes is great.

17 THE COURT: Great.

18 MR. MERMELSTEIN: Your Honor, what we heard here was  
19 an analysis at a 40,000-foot level whereas what we need, or  
20 what the government needs is an analysis at the four-foot  
21 level. It's their burden to prove, to show you that they've  
22 traced through the factors and there's a particular chain of  
23 inferences that shows it should be admissible against specific  
24 people, and they've fallen woefully short of that.

25 They're asking you for a blanket ruling with respect

1 to an entire panoply of conduct, some of which invokes Fifth  
2 Amendment issues, other of which invokes conduct that does  
3 clearly not rise to the level of criminal obstruction of  
4 justice.

5           When I heard the conduct that we're talking about, I  
6 did not hear any conduct that talks about anything that would  
7 rise to the level of a violation of 18 U.S.C. 1510 for  
8 obstructing a criminal investigation or making a false  
9 declaration before the grand jury under 1623, or perjury under  
10 1621. We didn't get there. And for the government to say they  
11 want to just put this all in is not appropriate and it's not  
12 consistent with the law. And this type of information  
13 absolutely runs the risk of the jury concluding that folks were  
14 recalcitrant witnesses, were not interested in participating in  
15 this process, but from Ms. Tanaka's vantage point was  
16 fulfilling her duty of zealous advocacy. And the absolute risk  
17 here is that jurors will draw some nefarious conclusion from  
18 that, and that is that is the concern.

19           It's very similar in fact when you think about the  
20 bribery allegations here, and the Supreme Court has been very  
21 tight to circumscribe what needs to be proved for bribery,  
22 because we have First Amendment conduct in terms of campaign  
23 donations on one side and we have other First Amendment  
24 conduct, the right to redress, government to remedy harms as a  
25 victim on the other side. And so the Supreme Court has been

1 very tight in terms of what actually needs to be proved to run  
2 afoul of the bribery laws. And I think we're doing the same  
3 thing here, we're running the risk of the same thing here all  
4 for conduct that is minimally probative.

5 I do not think a blanket ruling is -- is appropriate  
6 at all. Counsel mentioned dodging subpoenas. Well, where is  
7 the line? One would have to sort of look very carefully at,  
8 well, was the subpoena served properly. If the subpoena is  
9 served properly, okay, then the witness has to appear. But if  
10 the subpoena wasn't served, then it's not inappropriate to --  
11 to not appear and it's not inappropriate to counsel a witness  
12 that if you haven't been served properly you don't need to  
13 appear. I don't think we can do this at a 40,000-foot level.

14 Counsel talked about moving over to -- moving over to  
15 in limine 13 for a moment on the attorney conduct. Counsel  
16 talked about Ms. Tanaka referencing Keith Kaneshiro's name in  
17 the civil case. That was -- must have been an overstatement.  
18 But Mr. Kaneshiro's name -- it was not Mr. Kaneshiro will  
19 charge this case. This wasn't a statement about her alleged  
20 co-conspirator that he will charge this case. Certainly I  
21 think counsel meant to say it was a statement by, if anything,  
22 the DPA. There was no reference in the closing argument to  
23 Mr. Kaneshiro will charge this case.

24 In terms of the references to the criminal case in the  
25 civil case, as I understand it, MAI actually filed a Motion in

1 Limine to exclude all references to the criminal investigation  
2 because MAI did not think it was appropriate to be in the civil  
3 case at all. And MAI lost that motion and the trial judge made  
4 a determination that the criminal investigation had some  
5 relevance to the civil case. That wasn't MAI's request. That  
6 was the ruling by the court. Well, once the court has made  
7 that ruling, then sure, there's going to be references to the  
8 criminal investigation because that's what the court had ruled.

9 And to say that well, Ms. Tanaka knew the  
10 investigation --

11 (Alarm ringing.)

12 MR. MERMELSTEIN: I will take my cue and wrap up in a  
13 moment, Your Honor.

14 To say that Ms. Tanaka -- to draw some inference from  
15 the fact that Ms. Tanaka knew the investigation had been going  
16 for 21 months, well, she was aware of when the referral had  
17 been made. She was aware of when the dialogue had moved from  
18 Honolulu Police Department to the DPA. So of course she knew  
19 how long the investigation had been going on. That doesn't  
20 prove a bribe. It doesn't show anything about the bribe -- an  
21 alleged bribe. What it shows is an awareness of a criminal  
22 investigation. They all knew there was a criminal  
23 investigation because they had litigated the propriety of  
24 admitting the fact of the investigation.

25 And as for a statement that the government, the DPA

1 may file these charges, it's a matter under investigation. Of  
2 course they may file the charges. That doesn't show anything  
3 one way or the other. So, I just -- it looks to me like this  
4 attorney litigation conduct is -- the chain of inferences that  
5 the government would need to make to establish some probative  
6 value from that is -- is very speculative. I think it verges  
7 on -- I think it also puts the defendants in a very awkward  
8 spot because it puts them to the position where if they have to  
9 explain that conduct, then they have to talk about waiving  
10 privilege and getting into -- or whether an attorney can  
11 testify about why the attorney did -- took certain steps, made  
12 certain decisions in court, and I think that that's --  
13 that's -- ultimately invades the privilege. I don't know that  
14 the attorney has the ability to do that.

15 THE COURT: And your last point?

16 MR. MERMELSTEIN: That is my last point, Your Honor.

17 THE COURT: Thank you very much.

18 MR. MERMELSTEIN: Thank you.

19 MR. CHIANG: Very briefly, Your Honor. Regarding  
20 Mr. Mermelstein's interpretation of Ms. Tanaka's statements in  
21 the civil case, that's for a jury to decide. The jury can  
22 decide what those statements meant.

23 And then going to prosecution -- to the obstruction  
24 issues, I'm not aware that the acts have to arise to a  
25 chargeable offense for them to constitute other act evidence

1 under 404(b). So long as they are acts that are trying to  
2 thwart the grand jury investigation and reflect, you know, a --  
3 a inference of consciousness of guilt, that is proper 404(b)  
4 evidence. And if the Court wants -- sees any -- any, you know,  
5 danger of prejudice from that type of evidence, then the Court  
6 can issue a proper limiting instruction that says that 404(b)  
7 conduct should be considered only for consciousness of guilt  
8 and not for evidence of the substantive act.

9 THE COURT: All right. Thank you. Anything else we  
10 need to discuss under seal today? On this issue?

11 MR. CHIANG: Not from us.

12 MR. MERMELSTEIN: No, Your Honor.

13 THE COURT: All right. Let's go ahead and unseal the  
14 courtroom, please.

15 (End of sealed proceedings.)

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT REPORTER'S CERTIFICATE

I, CYNTHIA FAZIO, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing pages is a complete, true, and correct transcript of the stenographically reported SEALED proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, February 29, 2024.

/s/ Cynthia Fazio  
CYNTHIA FAZIO, RMR, CRR, CRC