No. 08-10114

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WEI QIN SUN,

Defendant-Appellant

ON APPEAL FROM THE DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL / DETENTION STATUS

Defendant Sun was sentenced on February 22, 2008, to 41 months' imprisonment. Pursuant to Circuit Rule 28-2.4, I state that, according to the Federal Bureau of Prisons inmate locator database, defendant Sun is currently confined and has an actual or projected release date of April 30, 2010.

s/ Angela M. Miller
ANGELA M. MILLER
Attorney

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a district court in a criminal case. The district court had jurisdiction under 48 U.S.C. 1822 (establishing that the District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States) and 18 U.S.C. 3231 (establishing that the district courts of the United States shall have original jurisdiction of all offenses against the laws of the United States). The district court entered final judgment on February 22, 2008. The defendant filed a timely notice of appeal on March 5,

2008. This Court has jurisdiction under 28 U.S.C. 1291 (granting courts of appeals appellate jurisdiction over final decisions of the United States District Courts and the District Court of Guam), 48 U.S.C. 1821(a) (establishing that the District Court for the Northern Mariana Islands shall constitute part of the same judicial circuit of the United States as Guam), 28 U.S.C. 1294 (granting this Court jurisdiction over appeals from the District Court of Guam), and 28 U.S.C. 41 (same).

STATEMENT OF THE ISSUES

1. Whether the District Court for the Northern Mariana Islands has jurisdiction to hear criminal cases arising under the laws of the United States.

2. Whether the evidence presented at trial was sufficient to support the jury's guilty verdict on all charged counts.

STATEMENT OF THE CASE

On August 10, 2007, a federal grand jury returned a 3-count superseding indictment charging Wei Qin Sun with violating federal law. E.R. 104-108[1]. The indictment charged defendant with (1) conspiracy to commit foreign transportation

[1] Citations to "E.R. __" refer to pages in appellant's Excerpts of Record filed with appellant's opening brief. Citations to "S.E.R. __" refer to pages in appellee's Supplemental Excerpts of Record, filed with this brief. Citations to "Sun Br. __" refer to pages in appellant's opening brief.

for prostitution and foreign transportation of a person in execution of a fraud scheme, in violation of 18 U.S.C. 371 (Count 1); (2) foreign transportation for prostitution, in violation of 18 U.S.C. 2422 and 2 (Counts 2); and, (3) foreign transportation of a person in execution of a fraud scheme, in violation of 18 U.S.C. 2314 and 2 (Count 3). E.R. 104-108.

The trial began on October 15, 2007. Following the close of the government's case, S.E.R. 84-85, and the close of all evidence, S.E.R. 87, the defendant moved for a judgment of acquittal on the ground that there was insufficient proof to support convictions under the charged counts. The district court denied the motions. S.E.R. 86, 88. On October 19, 2007, after a four-day trial, the jury found the defendant guilty on all counts. The district court sentenced defendant on February 22, 2008, to 41 months' imprisonment on each count, to be served concurrently. E.R. 4. Defendant was ordered to pay a $300 assessment, and was sentenced to three years' supervised release. E.R. 5, 7. This appeal followed. E.R. 1.

STATEMENT OF FACTS

Viewed in the light most favorable to the government, and making all reasonable inferences in favor of the jury's verdict, *United States* v. *Inzunza*, 580 F.3d 894, 899 (9th Cir. 2009), the evidence presented at trial established the

following facts.

Defendant Wei Qin Sun (Sun), a citizen of China, operated Phoenix Karaoke, a small bar located on the island of Saipan within the Commonwealth of the Northern Mariana Islands (CNMI). S.E.R. 9, 111-112. Phoenix Karaoke was known in Saipan as a house of prostitution. S.E.R. 3 (patron of Phoenix Karaoke describing it as "a gentlemen's club that catered to the needs of * * * men"), 4 (same patron explaining that the price a man paid for sex with women at the bar depended upon his nationality, and that he would see women leave the bar with male customers and head upstairs, "where the ladies stay"), 8-10 (another patron explaining that Sun indirectly told him if a customer paid a certain fee, the women would go with the customer to engage in sex); see also S.E.R. 9 (same patron explaining that he suspected the women were available for sex because he saw the women and customers "leaving the premises together, and [he's] not a dumb person").

In the fall of 2006, Sun told her boyfriend that she was going to travel to China to recruit a friend of hers to work as a prostitute in the bar. S.E.R. 11-12. Sun traveled to China and met with Xiu Lan Lin (Lin). E.R. 75-76. Lin and Sun had first met in China in 2003, S.E.R. 2, and Lin considered Sun a friend, E.R. 74. At that time, Sun told Lin that she had a job in Saipan where she was able to save

$10,000 a year. E.R. 73. Sun and Lin stayed in touch over the next few years, and Sun continued to talk to Lin about living and working in Saipan. E.R. 74-75. When Sun returned to China in 2006, Sun told Lin that she had opened a bar in Saipan and was in need of waitresses. E.R. 76-77. Lin asked if she could work for Sun. E.R. 77-78. Sun told Lin that she could guarantee Lin would make between $700 and $800 a month, which was much more than Lin could make in China. E.R. 78, 80, 86. Sun explained that over time, her salary would increase to $1000 a month. E.R 86. Sun told Lin that for a fee of 40,000 RMB (roughly $5200, S.E.R. 83), she could arrange for Lin to come to Saipan and work for her. E.R. 81. Lin agreed. S.E.R. 13. Sun returned to Saipan about a week later and told her boyfriend that she had made contact with her friend in China and that she would soon be coming to Saipan. S.E.R. 12.

Sun instructed Lin to complete the necessary paperwork for travel to Saipan. S.E.R. 13. Lin partially filled out the paperwork Sun provided to her, but could not fill it out completely because she did not understand English. S.E.R. 14-17; see also E.R. 18-21. Lin provided basic biographical information, S.E.R. 14-15, but did not include information about her prospective employer or her past employment, S.E.R. 14, nor did she sign the document in all places requiring her signature, S.E.R. 16-17. Lin sent this paperwork to Sun in Saipan, along with

other necessary documents (*e.g.*, criminal history check, housing certification, health certification, etc.). E.R. 83; S.E.R. 18, 19-21. Also included in the paperwork Lin sent to Sun was a certificate indicating that Lin had previously worked as a cleaner in China. E.R. 82-83. Even though she had never worked as a cleaner before, Lin obtained this certificate upon Sun's direction because Sun told Lin that it "was the easiest way" to get Lin into Saipan. E.R. 83.

Lin's completed Nonresident Worker's Affidavit, which was submitted to the Department of Labor, indicated that she would work as a commercial cleaner in Saipan for the Saite Communication Development Corporation. E.R. 18. Her affidavit included the declaration and signature of Leung Min Hu (Hu), who was an officer in the Saite Corporation. E.R. 19; see also S.E.R. 112. Hu was a friend of Sun's who, in addition to her responsibilities at Saite Corporation, took care of Phoenix Karaoke's payroll and taxes. E.R. 91. According to Sun, Hu was affiliated with Phoenix Karaoke and the two worked together to arrange for foreign workers to come to Saipan. E.R. 26 ("Well, right now, [Hu] handles the accounting for my company, which means [Hu] is with me. In other words, [Hu] belongs to my company. Since we merged, I can take the [limited employment] slots from [Hu] and vice versa.").

Sun later explained to Lin that, in order to bring a foreign worker into

Saipan, Sun needed to "purchase a slot from someone, pay for fees required by the government, as well as pay money to others." E.R. 26. Sun also explained to Lin that she and Hu "came to an agreement" that shortly after Lin arrived in Saipan, Sun would try and "switch" Lin's official employment from the Saite Corporation to the Phoenix Corporation (the company that owns Phoenix Karaoke). E.R. 29, 39. Indeed, Sun "purchased the ID" from Saite Corporation – Lin's sponsoring company – with the intent to switch Lin's employment to the Phoenix Corporation within a few months of her arrival in Saipan. E.R. 39-40. Sun and Hu came to this agreement even though it is illegal in Saipan for one employer to try and hire an employee through a different employer. E.R. 69.

Upon Sun's direction, on December 12, 2006, Lin wired 20,000 RMB (approximately $2556, S.E.R. 82) to Sun's sister's bank account. S.E.R. 22-27; see also S.E.R. 89-92. On February 13, 2007, Lin transferred an additional 20,000 RMB (approximately $2581.69, S.E.R. 82) to Sun's sister's account. S.E.R. 29-33, 93-93. Sun's sister, Chun Ying Sun, is a corporate officer and shareholder in Phoenix Corporation. S.E.R. 112. Lin, who did not have 40,000 RMB on hand, raised the money to pay Sun her requested fee by selling her husband's taxi cab and borrowing the rest from friends. S.E.R. 36. Sun requested this 40,000 RMB fee even though the cost of applying for foreign employment is roughly $325, and

it is illegal for a prospective employer, like Sun, to require a prospective employee, like Lin, to pay fees associated with such an application. S.E.R. 5-6. Lin had to borrow an additional 4,750 RMB from a friend to pay for her plane ticket to Saipan, S.E.R. 36-37, even though a prospective employer is supposed to pay for a prospective employee's foreign transportation. S.E.R. 6.

Lin arrived in Saipan on March 2, 2007. S.E.R. 38. Lin testified she thought she would be working for Sun as a waitress in Sun's bar. E.R. 85-86. Sun picked up Lin from the airport, brought her directly to Phoenix Karaoke and showed her to her room on the second floor – one of six very small rooms located in a larger room divided by thin walls that did not reach the ceiling. S.E.R. 38-41. When Lin woke up the next morning, however, Sun told her she was to work in the bar as a prostitute. S.E.R. 42. Sun explained that Lin would receive $3 if a man bought her a drink. S.E.R. 42. Lin would receive $50, of which she could keep $35 for herself, if she had sex with the customer. S.E.R. 42. Lin began to cry, and then told Sun she could not work as a prostitute and wanted to leave. S.E.R. 43-44. Lin left the bar, found a travel agent, and asked about flights leaving Saipan that day. S.E.R. 45-46. The travel agent told Lin to come back the next day, so Lin returned to Phoenix Karaoke. S.E.R. 47-48. Lin went to her room, locked the door and pushed her luggage against the door. S.E.R. 49. Sun

came to her room and asked her to come down to the bar because, if she stayed in her room, she would be interrupting other "xiaojies," or prostitutes, S.E.R. 50, who were receiving customers. S.E.R. 49. Lin eventually came down to the bar and sat with Sun, who told Lin that she had no choice but to work as a prostitute. S.E.R. 51. Sun threatened to kick her out of her room and throw her luggage outside if she refused to work as a prostitute. S.E.R. 52. Lin was afraid Sun would act on her threat, so she went back to her room and locked the door. S.E.R. 52. Lin did not come out for the rest of the evening, but was able to hear a xiaojie return to her adjoining room and have sex with a customer. S.E.R. 53.

The next morning, Lin returned to the travel agent but learned that she would not be able to leave Saipan until later in the week. S.E.R. 54. Lin walked around in an effort to find stores with people who spoke Chinese. S.E.R. 55. Whenever she did, she entered and asked them for help. S.E.R. 55-58. She was told she could file a report against Sun with the Labor Department, but it would take several years for the Department to process her claim. S.E.R. 55-58. She did not know where the Labor Department was located, so she returned to Phoenix Karaoke. S.E.R. 58. She asked Sun to provide her with a return ticket home, but Sun told her she needed to earn her own money to buy herself a ticket. S.E.R. 59. Sun suggested she have sex with several customers to earn enough money. S.E.R.

59. At one point, Sun arranged for an American customer to come to where Lin was sitting in the bar. S.E.R. 60-62. The customer bought Lin a drink; when Lin tried to leave, the customer held her tightly by the waist and rubbed against her. S.E.R. 62-64. Lin ran back to her room and locked herself inside. S.E.R. 65.

The next day, Lin asked Sun to take her to the travel agency and buy her a ticket home. S.E.R. 66. Lin explained she did not want back any of the money she had already paid to Sun – she just wanted a ticket home. S.E.R. 67. Sun got angry and explained to Lin that she was not obligated to buy her a ticket home because Lin did not work for Phoenix Corporation – she worked for Saite Corporation. S.E.R. 68. Lin was "shocked" by this revelation and demanded to know why the defendant lied to her in China by telling her she would be working for the defendant's company. S.E.R. 68. Sun explained that she did not need to explain everything to Lin clearly. S.E.R. 68.

Lin remained at Phoenix Karaoke for a few more days, although she did not work as a prostitute. S.E.R. 69-70. Lin eventually met a person who told her to go to the Ombudsman's Office and explain her situation. S.E.R. 71. She did, and a worker at that office arranged for Lin to meet with an FBI agent. S.E.R. 71-72. After meeting with the FBI agent, Lin agreed to go to Phoenix Karaoke and speak with Sun while wearing a recording device. S.E.R. 72-73. During this

conversation, Sun told Lin that she agreed to help Lin come to Saipan so that she could work for Sun. E.R. 30; see also E.R. 60 ("[I]f you didn't agree to get into this business in the beginning, I wouldn't have helped you come over."). When Lin protested that Sun did not expressly tell her she was expected to work as a prostitute, Sun responded that "[t]hese things don't need to be talked about in plain words," E.R. 63, and that if Lin was more experienced, she "would have been able to see through everything a long time ago," E.R. 27.

Based on the information obtained from the recorded conversation, the FBI conducted a search of Phoenix Karaoke. S.E.R. 75. Among other things, the FBI found a ledger detailing payments made to the women who worked in the bar as prostitutes. S.E.R. 76-81, 97-109.

Lin was eventually able to move into a shelter. S.E.R. 74.

SUMMARY OF ARGUMENT

1. The district court had jurisdiction to hear this case. The District Court for the Northern Mariana Islands was created pursuant to Congress's authority under Article IV of the United States Constitution; thus it is not an Article III court and does not requires Article III judges to preside over the cases for which it has jurisdiction. Although Congress granted the District Court for the Northern Mariana Islands the same jurisdiction as that of United States District Courts, the

Supreme Court has held that non-Article III judges may preside in non-Article III courts hearing cases brought under the criminal laws enacted by Congress. Moreover, every court of appeals to have considered an argument similar to the defendant's has rejected it.

2. The jury found the defendant guilty of conspiracy based on ample evidence that the defendant agreed with a business associate to falsify documents so that the defendant could bring Lin into Saipan from China and work at Phoenix Karaoke as a prostitute. Sun paid Hu, Sun's business associate, to sponsor Lin's employment in Saipan; Sun and Hu agreed that Lin would actually work for Sun; Hu was familiar with the nature of Sun's business because Hu handled the accounting for Phoenix Karaoke; and Sun intended for Lin to work as a prostitute once she arrived in Saipan. This evidence was more than sufficient to support the jury's finding that Sun conspired with Hu to commit foreign transportation for prostitution and foreign transportation of a person in execution of a fraud scheme.

3. The jury found the defendant guilty of foreign transportation for prostitution based on ample evidence that the defendant induced and enticed Lin to come to Saipan from China, and that the defendant intended Lin to work as a prostitute once in Saipan. Lin came to Saipan because the defendant promised Lin a well-paying job as a waitress in her bar. Sun facilitated Lin's travel by providing

her with the necessary paperwork and instructing Lin how to complete that paperwork. This evidence was sufficient for a jury to conclude that Sun induced Lin to travel to Saipan. The jury also heard evidence from multiple sources that Sun intended Lin to work as a prostitute once in Saipan. This evidence was more than sufficient to support the jury's verdict that Sun was guilty of foreign transportation for prostitution.

4. The jury found the defendant guilty of devising a scheme to defraud Lin of more than $5000 and causing her to travel in execution of that scheme based on ample evidence that the defendant falsely promised Lin a job as a waitress when in fact the defendant intended Lin to work as a prostitute. Even assuming the defendant intended to make the nature of the work clear before Lin left China, the defendant nonetheless induced Lin's travel and intended to defraud her of more than $5000 by making additional false promises, such as a promise that she would make substantially more money than she could in China and that she would be legally working for defendant's company. This evidence was more than sufficient to support the jury's verdict, as Lin testified that she would not have come to Saipan had she known: (1) she would work as a prostitute; (2) she would make significantly less money than defendant promised; and, (3) she would not be working legally for defendant's company.

ARGUMENT

I

THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS HAS JURISDICTION TO HEAR CRIMINAL CASES ARISING UNDER THE LAWS OF THE UNITED STATES

The District Court for the Northern Mariana Islands had jurisdiction to hear defendant's criminal case. Defendant argues (Sun Br. 8-23) that because the judge for the District Court for Northern Mariana Islands was not appointed pursuant to Article III and, consequently, lacks the independence derived from the security of life tenure and an irreducible compensation, her conviction (and, presumably, all convictions of all defendants tried for federal criminal offenses in the District Court for the Northern Mariana Islands) must be set aside. This argument is without merit, as the Supreme Court and every other court to consider whether non-Article III judges may properly preside over criminal trials arising under the laws of the United States has held that they can. In other words, every court to have considered defendant's argument has rejected it. This Court should reject defendant's argument as well.

A. Article IV "Territorial Courts" Have Jurisdiction To Hear Cases Arising Under The Laws Of The United States

As defendant readily acknowledges (Sun Br. 15), the protections for judges

set forth in Article III (*i.e.*, life tenure and irreducible compensation) do not apply to all courts established by Congress. Territorial courts are established pursuant to Congress's authority under Article IV of the Constitution to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[2] U.S. Const. Art. IV, § 3, cl. 2. These courts are not created under the authority of Article III, but from Congress "in the execution of those general powers which [Congress] possesses over the territories of the United States." *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

Congress's power over the territories is plenary, see, *e.g.*, *The "City of Panama,"* 101 U.S. (Otto) 453, 459 (1879) ("[I]n legislating for the territories, Congress exercises the unlimited powers of the general and of a State government."), and includes the power to choose appropriate judicial tribunals, *United States* v. *Canel*, 708 F.2d 894, 896 (3d Cir.), cert. denied, 464 U.S. 852 (1983). See also *Palmore* v. *United States*, 411 U.S. 389, 408 (1973) (explaining that the requirements of Article III "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to

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[2] Judges serving on the District Court for the Northern Mariana Islands, like judges appointed to serve on the District Court for Guam and the District Court for the Virgin Islands, are appointed for a term of ten years, and may be removed from office at any time by the President for cause. See 48 U.S.C. 1821(b) (Northern Mariana Islands); 48 U.S.C. 1424b (Guam); 48 U.S.C. 1614 (Virgin Islands).

specialized areas having particularized needs and warranting distinctive treatment"). Of course, Congress *could* have invested judges presiding over cases heard in territorial courts with life tenure and irreducible compensation as a matter of legislative grace (rather than as a constitutional requirement).[3] *McAllister* v. *United States*, 141 U.S. 174, 186 (1891). But the fact remains, "[t]hat is not now the law." *Ibid.* Simply put, Article III's requirements do not apply to the territories. See *Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901) ("[T]he judicial clause of the Constitution has no application to courts created in the territories."); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850) (territorial governments "are not organized under the Constitution, nor subject to its complex distribution of the powers of government").

As early as 1828, the Supreme Court recognized that non-Article III courts, created by Congress and located outside the States of the Federal union, could hear cases arising under the laws of the United States. *Canter*, *supra*, (holding that a territorial court in Florida could hear a case falling under the admiralty jurisdiction of federal district courts sitting in the United States); see also *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 64

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[3] Congress has done so with respect to judges presiding over federal cases in Puerto Rico. See Pub. L. No. 89-571, 80 Stat. 764 (1966).

(1982) (explaining that the territorial exception from Article III's requirements "dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government"). Specifically with respect to criminal cases arising under the laws of the United States, the Supreme Court explained in *Palmore* that

> neither [it] nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction.

411 U.S. at 407. The Court noted that "the enforcement of federal criminal law [has not] been deemed the exclusive province of federal Art. III courts." *Id.* at 402; see also *id.* at 402-404 (noting that state courts, Article IV territorial courts, military courts martial, and other non-Article III courts have regularly tried criminal cases arising under the general laws of Congress).

The courts of appeals have faithfully followed the Supreme Court's holdings in *Canter* and *Palmore*, and have routinely recognized Article IV courts' jurisdiction to hear federal criminal cases. In *Canel*, the Third Circuit rejected a challenge to the District Court for the Virgin Islands' jurisdiction to preside over trials for violations of federal criminal statutes. The Third Circuit noted that, "to

hold that Title 18 could not be enforced in the District Court of the Virgin Islands, the entire title would be for all intents and purposes a dead letter in the territory." 708 F.2d at 896. In granting the District Court for the Virgin Islands jurisdiction similar to that of the United States District Courts, the court reasoned that Congress was acting with the "plenary sovereignty recognized in * * * *Canter*." *Ibid.*; see also *Government of the Canal Zone* v. *Scott*, 502 F.2d 566 (5th Cir. 1974) (holding that the United States District Court for the Canal Zone, a territorial court, had jurisdiction to hear defendant's federal criminal case); *United States* v. *Montanez*, 371 F.2d 79 (2d Cir.) (same, with respect to the United States District Court for the District of Puerto Rico), cert. denied, 389 U.S. 884 (1967); cf. *United States* v. *Santos*, 623 F.2d 75 (9th Cir. 1980) (holding that the District Court of Guam had jurisdiction to hear defendant's federal criminal trial); *Acosta Abreu* v. *United States*, 308 F.2d 248, 248 (1st Cir. 1962) (holding that defendant's appeal of his criminal conviction based upon the argument that the judge for Puerto Rico was not appointed for life was "obviously wholly without any merit whatsoever and entirely frivolous"), cert. denied, 372 U.S. 918 (1963).

B. The District Court for the Northern Mariana Islands Is An Article IV Territorial Court

Defendant recognizes the territorial exception to Article III's requirements,

but nonetheless argues (Sun Br. 15-23) that the District Court for the Northern Mariana Islands is not properly considered a "territorial court," as Congress and the Supreme Court have considered such courts. According to the defendant, Article IV territorial courts were designed to be temporary, and given the Commonwealth of the Northern Mariana Islands' (CNMI) relationship with the United States, its District Court requires judges appointed pursuant to Article III. This argument is unavailing: no court has held that Article IV courts may only exist in territories or possessions that maintain a temporary status or relationship with the United States.

The District Court for the Northern Mariana Islands is properly considered an Article IV "territorial court" with jurisdiction to hear criminal cases arising under the laws of the United States, and no court has held otherwise. *Nguyen* v. *United States*, 539 U.S. 69, 72-73 (2003) (describing the District Court for the Northern Mariana Islands as "an Article IV territorial court with subject-matter jurisdiction substantially similar to the jurisdiction of the District Court of Guam"); *Guam* v. *Olsen*, 431 U.S. 195, 196 n.1 (1977) (noting that the District Court of Guam was created under Article IV); *Gioda* v. *Saipan Stevedoring Co.*, 855 F.2d 625, 628 (9th Cir. 1988) (explaining that the CNMI's judicial system "was to be patterned on the existing territorial courts of Guam"); *Sablan* v. *Santos*,

634 F.2d 1153, 1155 (9th Cir. 1980) (explaining that the District Court for the Northern Mariana Islands is not an Article III court).

Congress established the District Court for the Northern Mariana Islands in Chapter 17 of Title 48, "Territories and Insular Possessions." 48 U.S.C. 1821. Congress granted it the same jurisdiction as that of a United States District Court, 48 U.S.C. 1822, and provided that it shall constitute part of the same judicial circuit as Guam, 48 U.S.C. 1821(a). Like Guam, 48 U.S.C. 1421a, and the Virgin Islands, 48 U.S.C. 1541, the CNMI is "an unincorporated territory of the United States," *Saipan Stevedore Co, Inc.* v. *Director, OWC*, 133 F.3d 717, 720 (9th Cir. 1998) – *i.e.*, a territory not intended for statehood from the time of its acquisition, see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268-270 (1990); see also *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1460 n.18 (9th Cir. 1990), cert. denied, 506 U.S. 1027 (1992).

The CNMI's relationship with the United States is governed by the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (Covenant). 48 U.S.C. 1801. While the Covenant provides for a formal political relationship between the CNMI and the United States, that does not transform the CNMI into a State or a national capitol territory (*i.e.*, the District of Columbia) – entities that enjoy the protections

of Article III.

Defendant's argument (Sun Br. 19) that the CNMI "is no different from the District of Columbia" is unavailing, and her reliance (Sun Br. 17-20) on *O'Donoghue* v. *United States*, 289 U.S. 516 (1933) is misplaced. In *O'Donoghue*, the Court held that the Supreme Court of the District of Columbia (currently the United States District Court for the District of Columbia) and the Court of Appeals of the District of Columbia (currently the United States Court of Appeals for the District of Columbia Circuit) were established pursuant to Article III of the Constitution, and therefore the judges of those courts must be afforded the protections of Article III. The Court reasoned that the creation of the District of Columbia was provided for in the Constitution itself. See U.S. Const. Art. I, § 8, cl. 17 (granting Congress power to exercise exclusive jurisdiction over "such District * * * as may * * * become the Seat of the Government of the United States"). This clause, unlike the territorial clause, includes "an unqualified grant of permanent legislative power over a selected area set apart for the enduring purpose of general government, to which the administration of purely local affairs is obviously subordinate and incidental." *O'Donoghue*, 289 U.S. at 539. The Court described the District of Columbia not as a "subdivision of the outlying dominion of the United States," but as "the capital – the very heart – of the Union

itself." *Ibid.* (internal quotation marks omitted).

The Court also reasoned that the land occupying the District of Columbia began as a part of the Federal union and was not taken out of the union by virtue of its cession to the federal government. *O'Donoghue*, 289 U.S. at 540. The same cannot be said for the CNMI. Moreover, the District of Columbia was created by land ceded from Maryland and Virginia, whose citizens were entitled to "all the rights, guaranties, and immunities of the Constitution," among which was the right to have their federal cases heard by Article III judges. *Ibid.* Such is not the case with citizens of the CNMI, as Article III does not apply to the territories, in general, *id.* at 541, or to the CNMI, in particular, see Covenant, Sec. 501.

II

THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTIONS

A. Standard Of Review

This Court's standard of review for evaluating the sufficiency of the evidence "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Inzunza*, 580 F.3d 894, 899 (9th Cir. 2009) (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)). A

reviewing court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *United States* v. *Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007) (internal citation omitted). Rather, the reviewing court must "consider[] all evidence in the light most favorable to the prosecution and draw[] all reasonable inferences in favor of the prosecution." *Ibid*. This Court reviews the denial of a motion for acquittal de novo. *United States* v. *Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998).

B. Sufficient Evidence Supports The Defendant's Conviction For Conspiracy

Ample evidence supports the defendant's conviction for conspiring to commit foreign transportation for prostitution and foreign transportation of a person in execution of a fraud scheme, in violation of 18 U.S.C. 371. To prove a conspiracy, the government must establish: "(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States* v. *Sullivan*, 522 F.3d 967, 976 (9th Cir. 2008).

The essence of any conspiracy is an agreement between two or more individuals to commit a crime. *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *United States* v. *James*, 109 F.3d 597, 600 (9th Cir. 1997). While defendant does not directly attack the evidence of an agreement between Sun and

Hu, defendant asserts that there is insufficient evidence that the two agreed to commit the substantive charges set forth in the indictment. Specifically, defendant argues (Sun Br. 24-27) there was no evidence Hu knew Sun intended Lin to work as a prostitute in Saipan, and no evidence Hu knew about the fees Lin paid to Sun. Defendant argues (Sun Br. 24-25) that, at best, the evidence suggested the defendant and Hu engaged in a *different* conspiracy – a conspiracy to avoid the local labor and immigration laws of the Northern Mariana Islands. This argument fails.[4]

When viewed in the light most favorable to the government, *Inzunza*, 580 F.3d at 899, and when all reasonable inferences are drawn in the government's favor, *Stanton*, 501 F.3d at 1099, the evidence supports the jury's finding that Sun and Hu conspired to commit the substantive crimes charged. As an initial matter, there is no question that the evidence is sufficient to support a finding that Hu agreed with Sun to falsify Lin's immigration paperwork to reflect that Lin would

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[4] Defendant does not appear to challenge the jury's necessary finding that an overt act was committed in furtherance of the conspiracy. In any event, the evidence was sufficient to show, *e.g.*, that Hu filed an application with CNMI's Department of Labor to employ Lin as a commercial cleaner for Saite Corporation, E.R. 18-21, 90-91; S.E.R. 111; and that Sun transported Lin from the airport to Phoenix Karaoke, S.E.R. 38, in furtherance of the schemes to transport a person in foreign travel for purposes of prostitution and to defraud Lin. Moreover, the jury's necessary finding that Sun had the requisite intent to commit the substantive offenses is discussed in Parts II.C. and II.D.

work for Hu's company. Sun's own statements provide this evidence: Sun told Lin that she and Hu "came to the agreement" that Sun would use a slot allocated to Hu's company to bring Lin to Saipan, E.R. 26, and that after Lin arrived, Sun would switch the slot to her own company, E.R. 29. Sun explained to Lin that Lin "belong[ed] to [Sun's] friend's store," E.R. 39, and that, generally, a foreign worker comes to Saipan and works for a year for the company that sponsored her – in Lin's case, the Saite Corporation. See E.R. 26, 39-40. Lin's application reflects this agreement: Lin's completed Nonresident Worker's Affidavit and Application for Labor Certificate and Immigration Entry Permit, which Hu filed with the Department of Labor, indicated that Lin would work as a commercial cleaner in Saipan for the Saite Communication Development Corporation. E.R. 18. Hu is an officer in this Corporation, S.E.R. 111-112, and Hu, not the defendant, signed Lin's affidavit, E.R. 19.

Despite the defendant's arguments to the contrary, the evidence is also sufficient to support the jury's finding that Sun and Hu both knew the purpose of falsifying the paperwork was to bring Lin to Saipan so that she could work as a prostitute for Sun. The jury heard evidence that Hu "handles the accounting for [Sun's] company" and that Sun considered Hu part of Sun's company. E.R. 26; see also E.R. 29. Indeed, Hu told the FBI that she took care of Phoenix Karaoke's

payroll and taxes. E.R. 91. It was more than reasonable for the jury to infer that, by handling Phoenix Karaoke's financial affairs, Hu was fully aware of the type of business Sun was conducting. *Stanton*, 501 F.3d at 1099.

The jury also heard evidence from which a reasonable jury could conclude that Hu knew about the fees Lin paid to Sun. Lin paid Sun more than $5000 as part of a "processing fee." E.R. 81; S.E.R. 25-33, 82-83. After Lin arrived, Sun explained to Lin that to employ a foreign worker, Sun needed to "*purchase a slot from someone*, pay for fees required by the government, as well as pay money to others." E.R. 26 (emphasis added). Sun further told Lin that nearly every foreign worker that comes to Saipan has to purchase an ID (*i.e.*, work permit), and that Sun purchased the ID for Lin. E.R. 39. Sun told Lin that the ID must initially be bought from someone who owns a company. E.R. 39; see also E.R. 40 ("[Y]ou purchase an ID from a company in order for the company to sponsor you."). And, as noted above, Sun told Lin that she and Hu agreed that Sun would buy a slot from Hu and try to switch the sponsorship to Phoenix Corporation at a later date. E.R. 29. Finally, Sun plainly stated to Lin that "[t]he reason [she] helped [Lin] come over [to Saipan] was because [Sun] was hoping that [Lin] could work" at Phoenix Karaoke. E.R. 30.

From this evidence, a rational juror could easily conclude: (1) Hu, as the

owner of Saite Corporation, could sponsor a foreign worker; (2) Sun agreed to pay Hu to sponsor Lin; (3) Hu knew the nature of Sun's business given her relationship with Sun and her role in Phoenix Karaoke's financial operations, (4) Hu knew that Sun intended for Lin to come to Saipan to work at Phoenix Karaoke as a prostitute; and (5) Sun directed Lin to pay her more than $5000 to cover all or part of the cost of the ID she was buying from Hu. Sun's actions and statements provide more than sufficient evidence to support the jury's verdict that she conspired with Hu to commit the crimes of foreign transportation for prostitution and foreign transportation of a person in execution of a fraud scheme.

C. Sufficient Evidence Supports The Defendant's Conviction For Foreign Transportation For Prostitution

The jury's verdict was supported by ample evidence that the defendant knowingly induced and enticed Lin to travel from China to Saipan with the intent that Lin would engage in prostitution once she arrived in Saipan.

Section 2422 of Title 18 prohibits, among other things, knowingly persuading, inducing, enticing or coercing any person "to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution." 18 U.S.C. 2422(a). To establish a violation of Section 2422, the government must prove that a defendant: (1) knowingly persuaded,

induced, enticed or coerced the victim to travel in interstate commerce, (2) with the intent for the victim to engage in prostitution. Cf. *Lerma* v. *United States*, 387 F.2d 187, 188 (8th Cir. 1968) (setting forth similar elements to establish a violation of 18 U.S.C. 2421). Sun argues (Sun Br. 31-34) that the evidence presented at trial was insufficient to support the jury's finding that she persuaded or induced Lin to come to Saipan. Rather, Sun argues (Sun Br. 33-34) that Lin initiated the discussion of coming to Saipan and that Sun did nothing more "than offer an opportunity for [Lin] to travel to Saipan after [Lin] raised the subject."[5] Defendant argues (Sun Br. 33) that a violation of 18 U.S.C. 2422 requires "the defendant herself [to] have initiated the discussion and made some effort to get the other person to act on whatever wishes she may have harbored." The defendant misstates both the law and the facts.

This Court has previously explained that "inducement," "persuasion," and "enticement" as used in 18 U.S.C. 2422 are to be given their common usage and

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[5] Defendant Sun does not challenge the jury's necessary finding that she intended Lin to engage in prostitution once in Saipan, nor could she. The evidence was more than sufficient to show that her purpose in traveling to China was to recruit Lin to come to Saipan to work as a prostitute. See, *e.g.*, S.E.R. 12 (defendant's former boyfriend testifying that defendant told him she was traveling to China to recruit prostitutes and planned to bring back a friend to work in her bar); see also E.R. 60 ("[I]f you didn't agree to get into this business in the beginning, I wouldn't have helped you come over.").

meaning. *United States* v. *Rashkovski*, 301 F.3d 1133, 1136-1137 (9th Cir. 2002), cert. denied, 537 U.S. 1179 (2003); see also *Batsell* v. *United States*, 403 F.2d 395, 399 (8th Cir. 1968), cert. denied, 393 U.S. 1094 (1969). In *Rashkovski*, this Court held that a defendant induced victims to come to the United States to engage in prostitution by offering to make and pay for their travel arrangements, even though the women expressed their pre-existing desires to come to the United States. 301 F.3d at 1137. This Court explained that nothing in Section 2422 "requires [the defendant] to have created out of whole cloth the [victims'] desire to" travel; "it merely requires that [the defendant] * * * convinced or influenced [the victims] to actually undergo the journey, or made the possibility more appealing." *Ibid.* This Court concluded that a rational jury could conclude, based on the evidence that the victims accepted the defendant's offer and traveled with his assistance, that the defendant persuaded, induced, or enticed them to travel. *Ibid.*; see also *United States* v. *Pelton*, 578 F.2d 701, 713 (8th Cir.) ("When an offer to travel interstate for purposes of prostitution elicits a positive response from a woman to whom it is made, it constitutes a requisite inducement under the statute."), cert. denied, 439 U.S. 964 (1978); *Harms* v. *United States*, 272 F.2d 478, 481 (4th Cir. 1959) (explaining that "the requisite inducement [required for a violation of 18 U.S.C. 2422] is any offer sufficient to cause the [victim] to

respond"), cert. denied, 361 U.S. 961 (1960).

The evidence was more than sufficient to support the jury's finding that the defendant induced and enticed Lin to travel from China to Saipan by promising Lin a well-paying job as a waitress in defendant's bar. That Lin was eager to come to Saipan is of no consequence. *Rashkovski*, 301 F.3d at 1137 ("[I]t is not significant that [the victims] had pre-existing wishes to leave Russia for the United States, especially considering that they never acted upon those desires until [the defendant] made it attainable."). The defendant told Lin that she needed additional waitresses to work at her bar and that she could apply to have someone from China come to Saipan to work for her. E.R. 77. Lin "jokingly" asked the defendant if she could work for her. E.R. 77. In Lin's experience, being a waitress entailed bringing customers food and beverages. E.R. 77. The defendant then told Lin that she could make between $700-800 a month – guaranteed. E.R. 78, 80. That promised salary was eight times more than Lin could make in China. E.R. 78-79. It was only after that conversation that Lin seriously considered leaving China. E.R. 78. The defendant's promise of a high paying job in Saipan, and her stated ability to apply for Lin's admission to Saipan, was sufficient evidence from which a reasonable jury could conclude that the defendant "convinced or influenced [Lin] to actually undergo the journey" to Saipan.

Rashkovski, 301 F.3d at 1137.

Moreover, the defendant facilitated Lin's travel to Saipan. The defendant arranged to have the necessary paperwork mailed to Lin. S.E.R. 13. The defendant also told Lin certain information to include on the paperwork, even though it was false, because according to the defendant it "was the easiest way to get [Lin] to [Saipan]." E.R. 82-83. The defendant also filled in some of the paperwork's missing information, S.E.R. 14-17, and had it notarized for Lin's benefit, S.E.R. 18. Once Lin's visa was approved, the defendant instructed Lin to book a flight to Saipan as soon as possible, which Lin did. S.E.R. 34-35. These actions provide additional evidence that the defendant induced Lin's travel to Saipan. *Pelton*, 578 F.2d at 713 (concluding that a defendant induced a woman to travel by making her travel arrangements, even though the woman had been willing to travel to work for the defendant); cf. *United States* v. *Reed*, 96 F.2d 785, 787 (2d Cir.) (concluding that evidence was sufficient to support conviction under 18 U.S.C. 399, an earlier version of 18 U.S.C. 2422, because defendant "brought about" the victim's travel by writing her letters about the job opportunities she would have if she traveled to defendant's location), cert. denied, 305 U.S. 612 (1938).

D. Sufficient Evidence Supports The Defendant's Conviction For Foreign Transportation Of A Person In Execution Of A Scheme To Defraud

The jury's verdict was supported by ample evidence that the defendant devised a scheme to defraud Lin of more than $5000 and caused her to travel from China to Saipan in execution of that scheme.

Section 2314 of Title 18 prohibits, among other things, devising a scheme to defraud a person of $5000 or more while inducing that person to travel in foreign commerce in execution of the scheme. 18 U.S.C. 2314; *United States* v. *Chang Da Liu*, 538 F.3d 1078, 1085 (9th Cir. 2008). To establish a violation of Section 2314, the government must prove that a defendant (1) devised a scheme intending to defraud a victim of money by false pretenses or representations, and (2) caused or induced an intended victim to travel in foreign commerce with the intent to defraud that person of more than $5000. *United States* v. *Reina*, 446 F.2d 16, 17 (9th Cir. 1971).

Defendant argues (Sun Br. 27-31) that the government failed to prove that she had an intent to defraud Lin because the defendant thought that Lin knew she would be working as a prostitute in Saipan.[6] This argument fails for several

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[6] Defendant does not appear to challenge the jury's necessary finding that she induced Lin to travel in interstate commerce as part of the scheme to defraud Lin of more than $5000, nor could she. As set forth above, pp. 27-31, *supra*, the

(continued...)

reasons. First, the only evidence the defendant points to in support of her argument that she thought Lin knew she would be working as a prostitute are self serving statements she made to Lin in a lengthy conversation the two women had *after* Lin arrived in Saipan and *after* Lin made it clear to the defendant that she would not engage in prostitution. But in that same conversation, the defendant told Lin that "there are certain things that * * * cannot be said," E.R. 27, when Lin demanded to know why the defendant did not explicitly tell her she would be working as a prostitute when she came to Saipan. The defendant also told Lin during that conversation that she did not want to tell Lin too much because the defendant wanted "to toughen [Lin] up." E.R. 29. When Lin informed the defendant that she should have said up front, before she left China, that Lin was to

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[6](...continued)
evidence was more than sufficient to show that the defendant, through her false promises of a high paying job in Saipan and her efforts to facilitate Lin's travel, induced and enticed Lin to travel from China to Saipan. Nor does defendant appear to challenge the jury's necessary finding that the defendant intended to defraud Lin of $5000 or more. The jury heard evidence that the defendant required Lin to pay 40,000 RMB (roughly $5200, S.E.R. 83) to arrange for Lin to come to Saipan. E.R. 81. The government produced ample evidence that Lin transferred roughly $5200 to the defendant's sister, an officer of Phoenix Corporation. S.E.R. 22-33, 89-96. The jury also heard testimony from the Acting Director of the CNMI Department of Labor that the fees associated with filing an employment application are roughly $325, S.E.R. 5, and it is against the law for an employer to require the prospective employee to pay for those fees, S.E.R. 5-6.

work as a prostitute, the defendant responded, "Why should I tell you everything?", E.R. 62, and "These things don't need to be talked about in plain words," E.R. 63. Moreover, the jury heard Lin state numerous times during the conversation that the defendant did not make it clear that she was to come to Saipan to work as a prostitute and that she would *not* have come to Saipan if it had been clear. See, *e.g.*, E.R. 28 ("I totally didn't know that I was to come here to be a [prostitute]."), 40 ("If you told me when we were in China that I was to come here to engage in the business of being a [prostitute], I wouldn't have come."), 41 ("You should have explained everything clear to me.").

Even assuming that the defendant intended to disclose the true nature of her business to Lin, the jury still had sufficient evidence before it to find the defendant guilty of violating the statute for the simple reason that the defendant made *additional* false representations to Lin, and these false representations played a part in the defendant's scheme to defraud Lin of $5000. The jury was instructed – without objection – that to find the defendant guilty of violating 18 U.S.C. 2314, they had to agree "on at least one of the particular false promises or statements that was made." E.R. 102. The false promise must have been "material"; that is, the promise "would reasonably influence a person to part with money or property," but the jury was *not* required to find specifically that the defendant was

misrepresenting the nature of the work Lin would be performing in Saipan in order to find the defendant guilty. The purpose of the statute is to criminalize a defendant's intent to defraud a victim *of money* through false promises, whatever those false promises may be. The defendant's argument that she did not intend to misrepresent the *nature of the work* in Saipan does not change the defendant's intent to defraud Lin of $5000 through other false promises, such as the promise of a high salary and legal status with the defendant's company, that "would reasonably influence a person to part with money" and travel to Saipan. E.R. 102.

For example, the jury heard ample evidence that the defendant promised Lin a job where she would initially earn between $700-800 a month, and eventually $1000 a month. E.R. 86. Lin testified that her family did not have a lot of money, E.R. 71, and the salary the defendant promised was much more than she could make in China, E.R. 78. Indeed, Lin testified that she was initially joking when she asked the defendant if she could come to Saipan and work for her and only became serious about traveling to Saipan after the defendant mentioned how much money she could make working there. E.R. 78; see also E.R. 47 ("If you said that you were only making [$300-500 a month], I wouldn't have wanted to come."). The defendant's promise of a guaranteed high salary, however, was obviously false. Once in Saipan, the defendant explained that Lin would make just $3 each

time a customer bought her a drink, and $35 each time she had sex with a customer. S.E.R. 42. But the records recovered from Phoenix Karaoke indicate that none of the prostitutes working there was earning anywhere near that much money, S.E.R. 97-109, and the defendant admitted that business was slow, E.R. 31 ("There aren't too many customers. There aren't too many customers, indeed."). Thus, there was more than sufficient evidence for the jury to conclude that absent the defendant's false promise of a salary over eight times what Lin could make in China, Lin would not have paid the defendant the $5200 fee; nor would she have traveled to Saipan. *Chang Da Liu*, 538 F.3d at 1085 (finding evidence sufficient to prove that defendant used false promises to induce victims to travel from China to the CNMI with the intent to defraud them of more than $5000).

Moreover, the defendant told Lin that she would be working for the defendant's company, Phoenix Corporation, see, *e.g.*, E.R. 77-78; S.E.R. 13, and have legal status in Saipan, E.R. 26 ("When my husband asked you if you have a legal status, you told him, 'Yes.'"). Lin thought that she would be working for the defendant's company the entire time she was in Saipan. S.E.R. 68. Lin obviously trusted the defendant – she considered the defendant her friend, and followed the defendant's instructions to include knowingly false information on her work application because the defendant explained that doing so was the easiest way to

get Lin to Saipan. E.R. 74, 82-83; S.E.R. 18. But it was clear that the defendant did not disclose the true nature of the relationship between the Saite Corporation and the Phoenix Corporation. When Lin asked the defendant why she did not disclose this information before she left China, the defendant responded, "The thing is that you don't need to know whether or not you belong to my place." E.R. 39. Had the defendant told Lin the truth, Lin would not have traveled to Saipan. See E.R. 39 (explaining that if she knew the defendant was not part of the Saite Corporation, she "wouldn't have come * * * because everyone here is an illegal worker"); see also E.R. 40 ("If I knew this is how it works, I wouldn't have agreed to come."). Indeed, Lin testified that she was "shocked" when the defendant told her that she worked for Saite Corporation and therefore the defendant was not obligated to help her return to China. S.E.R. 68. Based on this evidence, it was not unreasonable for the jury to conclude that the defendant's false assurance to Lin that she would be working legally for the Phoenix Corporation influenced Lin's decision to pay the defendant more than $5000 to come to Saipan.

The facts of this case are strikingly similar to those in *United States* v. *Chang Da Liu*. In *Chang Da Liu*, the defendant, like the defendant here, was a Chinese national who ran a house of prostitution in the CNMI. 538 F.3d at 1081. The defendant recruited potential employees in China by placing advertisements

for hotel waitresses advertising salaries of $3000-4000 a month; applicants were required to pay a $6000 processing fee. *Ibid.* Two victims signed agreements to be waitresses, paid the $6000 fee and traveled to Saipan, where they learned they were required to engage in prostitution. *Id.* at 1081-1082. This Court rejected the defendant's sufficiency argument and concluded that the evidence supported a finding that the defendant used false promises to induce her victims to travel from China to the CNMI with the intent to defraud them of more than $5000. *Id.* at 1085. The evidence in this case is equally strong. Given evidence that the defendant falsely promised Lin a job: (1) as a waitress, (2) earning more than $700 a month, (3) at a company the defendant owned, and (4) with legal status, a rational juror could easily conclude that the defendant devised a scheme intending to defraud Lin of more than $5000 and induced her to travel from China to Saipan in execution of that scheme. *Ibid.*

CONCLUSION

The appellant's convictions should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that I am not aware of any other cases that are related to this appeal.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(b) because it contains no more than 9215 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using WordPerfect X4, in 14-point Times New Roman Font.

s/ Angela M. Miller
ANGELA M. MILLER
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Dated: March 8, 2010

CERTIFICATE OF SERVICE

I certify that on March 8, 2010, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Angela M. Miller
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Dated: March 8, 2010