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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE TERRITORY OF GUAM

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 YUNKAI LU,

14 Defendant.

CRIMINAL CASE NO. 17-00041

**UNITED STATES' OPPOSITION TO
DEFENDANT YUNKAI LU'S MOTION
TO TRANSFER VENUE PURSUANT TO
FEDERAL RULE OF CRIMINAL
PROCEDURE 21(b)**

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17 **I. INTRODUCTION**

18 **A. Charges And Trial Date**

19 On September 27, 2017, an Indictment (ECF 1) was returned charging defendants Daoqin
20 Liu, Yunkai LU and Ziwen Weng with an offense arising from the unlawful possession of fifteen
21 or more counterfeit access devices, namely, 118 counterfeit credit cards on Guam.

22 On a date in September, 2017, Daoqin Liu offered to pay Yunkai Lu and Ziwen Weng
23 approximately \$10,000 if they would travel to Guam and use counterfeit credit cards to purchase
24 high-end items. Daoqin Liu provided Yunkai Lu and Ziwen Weng with 118 counterfeit credit
25 cards. Daoqin Liu instructed Yunkai Lu and Ziwen Weng to bring large, empty suitcases with
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1 them. The retail items were to be purchased with the counterfeit credit cards and sent to
2 California and other places where they would be sold. Daoqin Liu reserved two hotel rooms at
3 the Bayview Hotel in Tumon, Guam for eight days, from September 13, 2017 and departing on
4 September 29, 2017. Daoqin Liu rented a vehicle (Honda Odyssey) from Enterprise.

5 On September 14, 2017, Yunkai Lu, Ziwen Weng and Daoqin Liu arrived on Guam.
6 Yunkai Lu and Ziwen Weng were subject to a secondary inspection by Guam Customs and
7 Quarantine Officers. Daoqin Liu exited the Guam International Airport. Guam Customs and
8 Quarantine discovered 118 counterfeit credit cards wrapped in aluminum foil and concealed
9 within boxes of cigarettes. The credit cards bore the names Yunkai Lu and Ziwen Weng. Many
10 of the credit cards bore identical Card Verification Codes on the back of the cards.
11

12 Ziwen Weng admitted that he posted an online advertisement indicating that he needed
13 work and money. On or about September 9 or 10, 2017, Ziwen Weng was contacted by Daoqin
14 Liu. Ziwen Weng and Yunkai Lu both admitted that the following day, they met Daoqin Liu.
15 Daoqin Liu explained the scheme to Ziwen Weng and Yunkai Lu - that they would travel
16 together Guam, purchase items, place them into large suitcases, and earn approximately \$10,000.
17 Yunkai Lu believed he would earn approximately \$400 to \$500. Daoqin Liu agreed to pay for
18 the costs of their travel, hotel and transportation. On or about September 11, 2017, Daoqin Liu
19 gave Ziwen Weng a stack of credit cards. Half of the credit cards (59) bore the name Ziwen
20 Weng, the other half (59) bore the name Yunkai Lu. Yunkai Lu admitted that he handled and
21 examined the credit cards, recognized that his name was embossed on the front of the cards, and
22 noted that some of the cards bore the name of Chinese banks. Yunkai Lu admitted that he
23 believed the cards to be counterfeit. Daoqin Liu instructed Ziwen Weng and Yunkai Lu to sign
24 the reverse side of the credit cards. The three defendants then created a group chat in order to
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1 message each other.

2 Daoqin Liu admitted he has engaged in this type of scheme a total of five times on Guam.
3 He admitted that he traveled to Guam with other persons, purchased items from Duty Free
4 Shops and mailed the items to Macau, Hong Kong and the United States. Some of the items
5 were carried back to the United States by the travelers. Daoqin Liu admitted that he made travel,
6 lodging and transportation reservations. Daoqin Liu admitted that he obtained a box of
7 counterfeit credit cards from an individual who resides in Monterey Park, California.

8
9 Trial in this case is scheduled for December 6, 2017.

10 **B. Motion For Change of Venue**

11 On October 2, 2017, Yunkai Lu filed his Motion to Transfer Venue Pursuant to Federal
12 Rule of Criminal Procedure 21(b). (ECF 9). In that motion, Yunkai Lu asserts that the current
13 venue is prejudicial and inconvenient for him and the witnesses in the case and moves to transfer
14 venue of this case, pursuant to Federal Rules of Criminal Procedure 21(b), to the Los Angeles,
15 California. Yunkai Lu contends that all of the principal witnesses are located in the continental
16 United States.

17 The prosecution objects to Yunkai Lu's motion. Venue is proper in Guam and the
18 interests of justice weigh in favor of keeping venue here. The majority of the ten factors
19 identified by the United States Supreme Court in *Platt v. Minnesota Mining & Mfg. Co.*, 376
20 U.S. 240, 243-244 (1964), weigh in favor of vesting venue in Guam.

22 **II. LEGAL ANALYSIS**

23 **A. Venue**

24 Yunkai Lu concedes that venue of this case is proper in Guam but seeks to have the case
25 transferred under Federal Rule of Criminal Procedure 21(b).

1 As an initial matter, venue is proper in Guam. Defendant Yunkai Lu has been charged
2 with Unlawful Possession of Fifteen or More Counterfeit Access Devices.

3 Title 18 U.S.C. § 3237 (a) states:

4 Except as otherwise expressly provided by enactment of Congress, any offense against
5 the United States begun in one district and completed in another, or committed in more
6 than one district, may be inquired of and prosecuted in any district in which such offense
was begun, continued, or completed.

7 Any offense involving the use of mails, transportation in interstate or foreign commerce,
8 or the importation of an object or person into the United States is a continuing offense
9 and, except as otherwise expressly provided by enactment of Congress, may be inquired
of and prosecuted in any district from, through, or into which such commerce, mail
matter, or imported object or person moves.

10
11 Defendant Yunkai Lu possessed the counterfeit access devices on Guam, such possession
12 began in California and was completed on Guam. The offense may “be inquired of and
13 prosecuted in any district in which such offense was begun, continued or completed.” 18 U.S.C.
14 § 3237(a). Further, the counterfeit access devices were transported in interstate commerce. The
15 offense may be “inquired of and prosecuted in any district from, through, or into which such
16 commerce, mail matter, or imported object or person moves.” 18 U.S.C. § 3237(a). The proper
17 forum for a criminal prosecution is the district in which the crime was committed.
18 Fed.R.Crim.P. 18.

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20 Venue is established by a preponderance of the evidence. *United States v. Angotti*, 105
21 F.3d 539, 541 (9th Cir. 1997). Thus, the only issue before this court is whether this court, in its
22 discretion, should transfer venue for the convenience of the parties.

23 Federal Rule of Criminal Procedure 21(b) provides that:

24 (b) **For Convenience.** Upon the defendant's motion, the court may transfer the
25 proceeding, or one or more counts, against that defendant to another district for the
convenience of the parties, any victim, and the witnesses, and in the interest of justice.

1 Fed.R.Crim.P. 21(b).

2 A district court has broad discretion in ruling on a change of venue motion, and will only
3 be reversed for an abuse of that discretion. See *United States v. Sherwood*, 98 F.3d 402, 410 (9th
4 Cir.1996); *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir.1988); *United States v. Flores-*
5 *Elias*, 650 F.2d 1149, 1150 (9th Cir.1981), cert. denied, 454 U.S. 904 (1982). The primary
6 concern of Rule 21(b) is to “minimize the inconvenience to the defense.” 2 C. Wright, Federal
7 Practice and Procedure, Criminal 2d § 343, at 260 (1982). The Supreme Court has set forth
8 guidelines for evaluation of Rule 21(b) motions in *Platt v. Minnesota Mining & Manufacturing*
9 *Co.*, 376 U.S. 240, 243–44 (1964). The factors focus on balancing convenience and hardship to
10 the parties. *United States v. Daewoo Indus. Co., Ltd.*, 591 F.Supp. 157, 165 (D.Or.1984).
11 Determination of a Rule 21(b) motion to transfer “involves the sound discretion of the trial
12 court.” *United States v. Testa*, 548 F.2d 847, 856 (9th Cir.1977). Courts should consider the
13 following factors when deciding a motion to change venue: “(a) location of the defendants; (b)
14 location of the possible witnesses; (c) location of the events likely to be at issue; (d) location of
15 relevant documents and records; (e) potential for disruption of the defendants' businesses if
16 transfer is denied; (f) expenses to be incurred by the parties if transfer is denied; (g) location of
17 defense counsel; (h) relative accessibility of the place of trial; (i) docket conditions of each
18 potential district; and (j) any other special circumstance that might bear on the desirability of
19 transfer.” *U.S. v. Maldonado–Rivera*, 922 F.2d 934, 966 (2nd Cir.1990) (citing *Platt v.*
20 *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243–44 (1964)). None of these
21 considerations are dispositive. *Id.* Instead, the court must “try to strike a balance and determine
22 which factors are of greatest importance.” *Id.* Some degree of inconvenience is inevitable, and
23 the Court must consider both the defendant's and the government's inconvenience. *Testa*, 548
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1 F.2d at 856.

2 The Ninth Circuit has considered a situation similar to the one before the court in *Testa*,
3 548 F.2d 847. In *Testa*, the appellant, Edward Epstein, was convicted of conspiracy with intent to
4 distribute heroin. Epstein appealed his conviction, arguing that the trial court improperly denied
5 his motion for change of venue, and that the trial should have taken place in the Central District
6 of California rather than the District of Hawaii. Six of Epstein's co-defendants, some of whom
7 were Hawaii residents, pleaded guilty before trial. Epstein and the remaining co-defendant were
8 residents of California, and the overt acts they committed in furtherance of the conspiracy were
9 committed in California and Nevada. Epstein argued that he had been deprived of due process
10 and a right to a fair trial because “the costs of traveling to Hawaii and living there precluded him
11 from producing witnesses from Los Angeles on his behalf, and the government would not have
12 been inconvenienced by the change of venue.” *Id.* at 856.

14 The Ninth Circuit disagreed. Looking to Rule 21(b) of the Federal Rules of Criminal
15 Procedure, the court first noted that “determination of a Rule 21(b) motion involves the sound
16 discretion of the trial court.” *Id.* The Ninth Circuit concluded that Epstein did not demonstrate a
17 need for a transfer because he did not provide specific examples of how his location precluded
18 him from contacting witnesses, or indicate the nature of the testimony he anticipated from the
19 alleged witnesses. See also *United States v. Daewoo Industrial Co., Ltd.*, 591 F.Supp. 157, 160
20 (D.Or.1984) (“The Ninth Circuit has required more than a bald statement of numbers and general
21 location of witnesses in the cases where the issue of witness convenience is addressed.”).
22 Further, Epstein failed to consider the burden that a change of venue would have on the
23 Government: “While Rule 21(b) contemplates minimization of inconvenience to the defense, it
24 has been recognized that some degree of inconvenience is inevitable, and that the government's
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1 inconvenience must be considered as well.” *Id.* at 857. See also *United States v. Ghilarducci*, 220
2 Fed. Appx. 496, 504 (9th Cir. 2007) (affirming the district court's denial of the defendant's
3 motion for change of venue from California to Illinois, and noting that the Government had an
4 interest in trying the case in California because the acts of mail fraud occurred in California and
5 the witnesses were in California). The Ninth Circuit concluded that the district court did not
6 abuse its discretion in denying Epstein's motion for change of venue.

7 **B. Analysis of Platt Factors**

8 **1. Location of the defendant**

9
10 The first *Platt* factor is the location of the defendant. *Platt*, 376 U.S. at 243. Yunkai Lu is
11 a resident of California, however he travelled to Guam and is presently on Guam. Yunkai Lu's
12 residence in California does not in itself entitle him to be tried in the District of California. See
13 *Platt*, 376 U.S. at 245 (noting that the defendant's residence has no “independent significance,”
14 and should not be given dispositive weight); *United States v. McManus*, 535 F.2d 460, 463 (8th
15 Cir.1976) (“Criminal defendants have no constitutional right to have a trial in their home
16 districts, nor does the location of the defendant's home have ‘independent significance in
17 determining whether transfer to that district would be in the interest of justice.’”) (quoting *Platt*,
18 376 U.S. at 245-46) (internal quotation marks omitted). Although defendants “have no
19 constitutional right to a trial in their home districts,” it is a factor to be considered. *Daewoo*, 591
20 F.Supp. at 160. The location of defendant does not favor transfer to Los Angeles, California.

21 **2. Location of witnesses**

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23 The second *Platt* factor is the location of the witnesses. *Platt*, 376 U.S. at 244. Yunkai
24 Lu argues that all of the Government’s witnesses are located in the continental United States.
25 This is incorrect. The witnesses in this case are located in Guam. The witnesses include (among
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1 others) Guam Customs and Quarantine Officers who conducted the secondary inspections,
2 Special Agents, Federal Forensic Examiners and Task Force Officers from the Department of
3 Homeland Security, Homeland Security Investigations who investigated the matter, examined
4 the credit cards, heard the Defendant's confession and conducted examination of his cellular
5 phones, Bayview Hotel, Guam who rented rooms to co-defendant Daoqin Liu, and Enterprise
6 Car Rental who rented a vehicle to co-defendant Daoqin Liu. Defendant argues that the
7 witnesses to the conspiracy, acquisition of the access devices, or the decision to travel to Guam
8 will be in Los Angeles. However, the witnesses who can testify to these three issues are on
9 Guam. Inconvenience to such a great number of witnesses weighs heavily in favor of venue in
10 Guam.
11

12 **3. Location of events likely to be in issue**

13 The events at issue in this case occurred on Guam, defendant possessed the counterfeit
14 access devices in Guam. Defendant argues that the discovery documents indicate that the events
15 that will be discussed in this case occurred in several locations in the continental United States.
16 The charges in this case, however, center on the possession of the counterfeit access devices in
17 Guam. This factor does not favor transferring the case to Los Angeles, California. Based on
18 location of events likely to be in issue, venue should reasonably be in Guam.
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20 **4. Location of documents and records**

21 The documents and records (comprised of reports of investigations, surveillance, lengthy
22 Cellebrite forensic examinations of multiple cellular phones, physical evidence, etc.) in this case
23 are all located in Guam. Therefore, this factor weighs against transferring the case to Los
24 Angeles, California.

25 **5. Disruption of defendant's business**

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1 The fifth Platt factor is “the disruption of defendant's business unless the case is
2 transferred.” *Platt*, 376 U.S. at 244. Defendant’s employment is that of a dog groomer. Yunkai
3 Lu has not indicated what business will be disrupted by trial in Guam. Therefore, this factor
4 does not weigh in favor of transferring the case to Los Angeles, California.

5 **6. Expense to the parties**

6 *Platt* explicitly calls for courts to consider the “expense to the parties,” 376 U.S. at 244.
7 On this issue, the trial in Guam will not involve enormous expense to the taxpayers as the
8 witnesses reside in Guam. However, if venue is changed, the government (and taxpayers) will
9 incur the significant and increased expenses of flying Special Agents, Task Force Officers,
10 Guam Customs Officers and witnesses to California for a trial that can more economically occur
11 on Guam.
12

13 **7. Location of counsel**

14 The Court has appointed Joseph C. Razzano of the Civile and Tang PLLC law firm to
15 represent Yunkai Lu. Defendant’s present counsel in this case is located in Guam. Therefore,
16 this factor weighs against transferring the case. Further, Chinese language interpreters are
17 available on Guam.
18

19 **8. Relative accessibility of place of trial**

20 Yunkai Lu asserts that Los Angeles, California is more accessible to the Defendant’s
21 mother because she will be able to work and to assist her son. Defendant’s mother s in Guam.
22 California is less accessible to the Government’s witnesses than Guam.

23 **9. Docket conditions of each district**

24 This factor weighs against transferring given that the docket for Los Angeles is
25 undoubtedly more congested than the docket in Guam. There is no evidence suggesting that the
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1 docket conditions of either forum compel the transfer of this case. This factor does not weigh in
2 favor of transfer. If trial is held in Guam, there is adequate space available to counsel, and
3 facilities for the jury convenient to the courtroom. Additionally, there are available facilities
4 available for all counsel (e.g., offices, telephones, photocopiers, storage for exhibits and other
5 documents, etc.) and for the jury. The United States Attorneys' office is only a short distance
6 from the federal court. Trial in Guam would not create significant inconvenience to the majority
7 of witnesses.
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9 **10. Special elements affecting the propriety of transfer**

10 Guam is the proper venue for this offense. Defendant Yunkai Lu and his co-defendants
11 possessed the unauthorized counterfeit access devices on Guam. The three defendants
12 specifically traveled to Guam – targeting duty free businesses in Guam in order to use the
13 counterfeit credit cards to commit the acts. Defendants prepared a place to stay at the Bayview
14 Hotel in Tumon, Guam. Defendants rented a vehicle in order to be driven about Guam
15 destinations. Co-defendant Daoqin Liu repeatedly traveled to Guam in the past for the purpose
16 of making illicit purchases with stolen credit card information. Defendants purchased their
17 airline tickets with Guam as the ultimate destination. The counterfeit access devices were
18 possessed on Guam. Guam is the proper venue for prosecution.
19

20 Several factors weigh in favor of retaining the case in Guam. First, the relevant
21 documents, computer forensics, and witnesses are in Guam. Second, both defense counsel and
22 the prosecutor reside in Guam. Finally, this matter is pending in the District of Guam with trial
23 scheduled for December 6, 2017. Moving the trial to the Los Angeles, California will only delay
24 the trial, inconvenience the District of California and involve unnecessary and burdensome travel
25 by the witnesses to the state.
26

1 Policy considerations deserve some weight in assessing the fairness of venue. It is
2 important in criminal cases for the community to be confident wrongdoing conducted in Guam
3 against its citizens is penalized.

4 Moreover, depending on which case proceeds first, the delay caused by having trials on
5 Guam and in the state of California might affect the remaining Defendants' rights to a speedy
6 trial. See *Polizzi*, 500 F.2d at 899 (delay is a relevant consideration in denying transfer where
7 other factors are “fairly balanced”).
8

9 III. CONCLUSION

10 Upon weighing the ten *Platt* factors, a majority of the ten factors support retaining venue
11 in Guam. Guam is where the defendants and where the witnesses are located. Retaining venue
12 in Guam will spare unnecessary expenses to the Government as well as to the Defendant. Guam
13 is accessible to all parties. The documents and records are located in the District. Defendant
14 will not experience disruption of any of his businesses. Court appointed counsel is located in
15 Guam, a place with a relatively open docket. These factors all weigh against transfer. The
16 location of events likely to be at issue occurred on Guam and special elements – the public - can
17 be confident that wrongdoing conducted in Guam will be penalized.

18 Respectfully submitted this 12th day of October, 2017.

19
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21
22 By: /s/ Rosetta L. San Nicolas
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