# Part 1



Prehearing Respondent.

Daliang Guo To SEC.

Case No. 13-cv-5584.

May, 24, 2023.

1. My Background and why I said "Something good":

I am 60 years old. My friend and family describe me as a kind and thoughtful man. I would make the effort gently remove a spider from my home rather than cause it harm, or purchase a turtle from the local Seafood market in order to take it home and set it free. As a devout Buddhist, my deep faith allow me to see the best in people. I'm vegetarian. There is a red heart sign on my ID Card for donated organs.

Sadly, my earnest nature and eagerness to to please combined with my youthful naiveté, I had [redacted] after my criminal case. I believe United Nations showased CKB products. Hundreds of media outlets that the products good. The biggest company in china, Alibaba, invested CKB. I believe the founder Santose. She own a big foundation in U.N. and U.N. promote the products of CKB in the world wide teacher meeting. There were a lot of famours people support CKB.

That's why I said "I want to do Something good for the world!".

2. Why I said "that CKB was risk-free were only his hope" and "his personal view".

The translator is no good. My means is that I believe CKB would go to public befor SEC Case.

The CKB still said they would go publick after SEC Case. And at that time I said "that CKB was risk-free is my hope and my personal view. I stop to do CKB after SEC Case and I still hope CKB would go public and sove all the problem. But I have no too much confedence after SEC Case. I really didn't knew anything insid the CKB. I was just a Sales.

3. I was not the first Sales in New York. I was introduced by John Joe ( a maneger of a by company in New yurk ) and Jason He ( Ph.D degree in U.S.A ). They earn more real money them me. Jason He get the Same title with me. They are good friends of CKB founder bfore CKB Business and all the meeting and training in U.S. It was arraged by them. SEC did not charge them. FBI have more information about John Joe. I just practic my GED class in prison. Both of them a really leader. they training me how to do the CKB.

4. About the highest ranking promoters:

There were ove 8 highest ranking promotes before I get the the title. Jason He is one of them. There were over 12 people get the the highest ranking. I get the highest ranking is because the people work hard. they have mone under me

experince about Business than me.

5. About penney stock.

Nobody get the stock. we just get the point. prpt. we just believe the founder said that the prpt. could change the stock after the CKB go public.

6. About "He never asked for CKB financial Statement".

I was not state of CKB. I have no power or right to get the information of CKB ~~F~~inacial Statement.

7. I never told anybody that I already had CKB stock.

The CKB e-mail to every Sales that they will go public and ask everybody Send their ~~pr~~int (prpt.) to CKB to prepare to Caculat ~~how~~ how much stock we will get. we still recieve the email like that even after SEC Case. But nobody receive ~~to~~ the stock.

8. About the "$ 3,979,867".

Every Sales knew that the real money

went to CKB, the virtual E-wallet went to investor. The investor invested the E-wallet point to CKB again and again and earn more E-wallet point and prpt. point. Every people have E-wallet and prpt. even they sales nothing. They just use family and friends people's name to invest the E-wallet point and earn more E-wallet and prpt. you can earn a lot of E-wallet point even you do not sponcer anybody. It's very clear in the back office of CKB.

The E-wallet point is not real money. It's unfair to use the E-wallet to punish me. There are still a lot of E-wallet point in many investors back office in CKB's computer now.

SEC plus my family member's E-wallet point into my account. My own account is 2.6 million point. Every people believed the CKB would go public and E-wallet point would have high value in future.

During the discovery the defence requested that government provide the back office data. The defence was provided with a drive that purported contained the raw data. But this was virtually inaccessible without the CKB operating system which was in Shern's control, and never provide the master database.

Shern had told Yau Lin: "The Government will never understand the database!"

The DNA in this Case is in the database. we just Could use the E-wallet point to buy products to sell and earn a little money. Noboby Could sell a lot of products. Most E-wallet have to invest again and again and earn more and more E-wallet point. That's why we can't find more victims. There was only one victims complan me about $1000 in my trial. Most witness do not know me.

My income in 2 years totally less $400,000. Most of the money used to return to the Custermer and Business. Even I haven't Buy one new furniture in 2 years and there's not air condition in my kitchen. The officer in New York Court know about this.

I got [redacted] in prison. I have 2 times to ICU. My family my kids have a lot of disaster now. I Can't help them. I'm a really poor man. I need help mercy. and justice.

9. About my leadership.

As we learned at trial, I have no managerial or decisidecision-making within CKB. My Sales volume was inflated by those who joined after me. The Sales volume Come from the E-wallet point invest again and again. It's not real money Sales volume.

As Wendy Lee observed at trial, there were many different groups or pods each doing "their own thing" to generate Sales volum. Many of

the Sales figures attributed to the E-wallet was based on the virtual valuation generated by Sherm.

A large amount of real money was sent to company and CKB use the money to Build 5 schools and buy 9 Companies.

The probation office concedes that because of CKB's accounting structure, "loss can not be reasonably determined". There was no lifestyle presented at trial to establish that I was living lavishly. The opposite to be true.

Nothing could be more untrue especially given the fact that true master mind behind CKB was never charged with a crime.

10. The information from my trial transcription.

At page 140, Ms. Kim. The government lawyer said: "... CKB's investors rarely got any money from CKB directly for the commissions in their Cash Wallet or for the prpt."

It's true. I am also an investor, I also rarely got money from the cash wallet.

Ms Kim said at page 334: "Don't think about the company. If there's no salesman, there would be no Sales volum for the company."

The DNA of the CKB is in the CKB's back office — the black box.

At page 714, wendy Lee Said: " Guo didn't speak English and didn't use computer. ... Different team had their own way of doing things " she also Said: " I had a high title but I was not involved CKB'S policy ".

At P 872. FBI agent Said: " I know Guo had upline named John Doe ".

At P.1027 to P.1062, My lawyer Browns Said: " where is the life style evidence that Guo was power player? why don't we have a witness Said: " Guo talk to me, he lied to me ? ". FBI agent Said: " I dont know who charge of CKB. I dont know where the headquarters are ... This is FBI IS that the type of evidence that we're in criminal Case when a man's very life is on the line ? The SEC Sat down and talked with Santos, why didn't FBI ^. Guo's SEC testimonial, Government has a lot of Slicing and cutting and mixing. Can you really trust a case like this, when you are not getting the full information ? .... If anyone should be arrested, it should be Shern. where is the evidence that Guo had Secret bank accounts ?

11. The information from " The Sentence position ".

Santos held herself out as an education missionary and former UN emissary whose

vision was the education of children world wide. she spoke at CKB events and on online video to her followers and future investors. Her presentations promulgated the myth of CKB as a company whose goal was the edulcation of children based on cultural values central to the community.

Howard Shern was the master of the CKB universe.

Guo merely echoed the Same CKB mantra which he learned from those who recruted him.

We objects to the Loss figure of $390 million. Shern developed a Sophisticated System to issue reward points and virtual Currency in the Seller's- e-wallet. Many of the Sales were discussions about the often inflated value of their virtual wallets. There was no lifestyle evidence presented at trial to establish that Guo was living lavishly. Again, the opposite appears to be true. Guo live modesty during the relevant.

12. The information from My Sentencing Hearing.

Q: My Lawyer. A: FBI agent.

P28. Q: what I'm asking you is what did you specifically find in the course of your investigation. Did you go to Mr. Guo's home in New York?

A. I did not.

Q. Did you send an agent to Gwo's home?
A. I don't know wether or not we did.
Q: do you recall the testimony at trial that a lot of people where trying to inflate the value of their e-wallet so they could covert that evaluation into future stock shares?
A. I'm not sure I understand what you're saying.
Q. Let me ask you a different and perhaps better question. the prtt. point system. was generated by Howard Shern. Isn't that true?
A. I don't know who generated. but this points equated to a cash value when you looked in the back office.

[ my explain: It's no value at that time. It's just estimate about the stock share in future ]

P32: A... you got your own comissions into your e-wallet which is what they wanted.

[ my explain: Every people use their own E-wallet point to earn more E-wallet point ]

P35-48 Brown ( my Lawyer):

I think this case is unique. this is not a typical pyramid scheme despite the government's efforts to paint it that way.

It was rooted in education. You're going to be doing something good for children and you're going to be educating your community.

I think ..., how Mr. Guo find himself in a situation where he thinks he's doing something good.

If Mr. Guo is guilty. he's guilty is being a promoter but he's also like everyone else in his situation equally misled by the company itself.

Mr. Guo joined the company earlier ~~in~~ in time does not make him more culpable than the people who joined downstream and were engaged in activity that was not foreseeable him.

So I think that that's one of the ultimate question in a case that's this complex and this layered is have do we determine Culpability?

... economic harm, well, what's the loss?. what did the victims loss in this case?

we don't have any concrete evidence of direct economic victim loss directly attributable to Mr. Guo.

There's no lifestyle evidence, there's no concrete independent evidence aside from this dubious, mysterious black back office that the government is trying to hang its hat on that directly connects Mr. Guo to ill-gotten gains.

Howard Shern, after he was held in contempt by SEC, sent a locked hard drive that didn't contain an operating system. It was just raw data.

who knows where that raw data come from?

The raw data ... and according to the SEC analyst's declaration, there are millions and millions of fields that were part of this ... the content of this information was undigestible.

SO we have this black box that the government is relying on to attribute gain to my client.

This is from Shern himself, the main architect of this entire worldwide fraud who's never been brought to justice.

I think for lack of a better word from my humble perspective.

The government wants a leadership role enhancement. The trial testimony was clear that he had no ~~leadship~~ leadership role.

I think the back office is the Rosetta stone. It's the Rubik's Cube. It's the black box ... the secret to CKB is hidden in the back office, in the true back office.

Where were those funds transferred? Where did all the money go? It went to Shern in Hong Kong. It didn't go to Mr. Guo.

But the back office is really the troubling heart of this case.

... that there issues regarding the e-wallet and whether that was virtual money or how those monies were generated.

Mr. Guo has learned his lesson. He will never do this again.

Page 54 ~ page 58. (Mr. Guo speak):

during two year's period, I even haven't purchased one new furniture. My family. eight of us. we don't even have a sofa. we have no dining room. In the kitchen, we don't even have an A.C. I have a small and broken dining table not even enough to accomodat my whole family.

we also didn't have money to hire a baby sitter.

I feel so sad I trust CKB too much. I have no ability to invest in the company deeper.

13. About my self-defense on pre-trial report.

Most e-wallet point be repeatedy invested. we can see in the SEC report that Kiki Lin loaned 180,000 E-wallet point to somebody. she only took back a few pieces of clothing from her friend. The 180,000 E-wallet point a large number of new E-wallet point and prpt. and help move people to a higher level. I also lent a lot of virtual E-wallet point to help dowlin upgrade. but I didn't take anything from anyone else. This is one of the reasons why so few people have lost their money.

The company's comission is issued by virtual E-wallet points. Most of the E-wallet

points are returned, loaned, re-invested and so on. I have only a very small part of the points into real money. it's no enough to maintain basic living and business expenses.

Chang admitted at the trial that he didnt have any contact method with me. what I said to Wendy Lee for a few minutes was the basic rule of the company.

when the company has negative news, there are also more positive news. shern said the CKIB had passed the Hong Kong government investigation and everything was fine and CKIB ready to go to public.

Wendy Lee admitted at SEC hearing that I rarely answer her phone calls.

So far only one people complained to me for $1000. There are a lot of CKIB member write letter to my lawyer said that I am a good people. The just believe the CKIB company.

There's a lot of story I want to say. my English no good. I just began to learn Englis in priso.

I just want to tell the true story. The dark cloud should not cover the real world.

14. The information from my appeals.

The government denies all error. For the reasons below and in the opening brief, however, Guo's convictions and sentence cannot stand.

## ARGUMENT.

A. The district court erred by denying the motion to acquit with regard to conspiracy and the counts for which the government relied on coconspirator liability.

The government failed to prove guilt by failing to prove Guo had a meeting of mind with others to commit wire fraud (AOB 27).

Rather, the evidence showed Guo consistently asserting, even to his codefendants, that CKB was a good company that was going public and that PIPT were valuable (AOB 29-30). He never acknowledged to anyone else during the relevant period that these claims were false. The only agreement the government identified at trial was an agreement after the SEC action — and after the substantive counts were complete — to cover-up past actions (AOB 31). Not only is a cover-up not the same as a conspiracy to commit the acts in the first place, even to the extent that later agreement was an

agreement to commit wire fraud. the Subsequent agreement could not create liability for past actions by marketers that CKB was a great investment may not prove he actually believed it, but it does show the government lacked evidence Guo shared a meeting of minds with others that CKB was a Scam. ( See AOB 29.). The government had to prove both fraud and conspiracy.

[ my explain: At the SEC hearing. the translator is no good. I asked to change the translator. SEC Said the report will be give to me to review and sign. and then it's would be effect. My Lawyer, I would get the report in 2 weeks to recorrect. But now, After 10 years. I have not any chance to recorrect! There are a lot error in the SEC hearing report! ].

Chang testified he had no direct means of contacting Guo, and prior to the SEC action had only spoken to Guo twice, both at public events during which Guo maintained CKB was a good investment. ( 3-ER-404, 3-ER-454-55)

The government tries to counter this argument by claiming evidence purportedly showing Guo knowingly lied to investors corroborated chang's account. But this makes little sense. Nor can evidence purportedly showing Guo lying to investors

explain how and when Chang could have reached an understanding with Guo before the SEC action. in the face of Chang testifying he and Guo were not in contact. That time is important, again, because without evidence of an agreement before SEC action, the vicarious liability counts (3, 6-7, 9, 11-12), which all predate that action, must fail.

Guo did with his co-defendants — selling CKB packs — was not so obviously illegal that anyone doing it had to assume anyone else doing it was a knowing accomplice, as one could with a coordinated beating of a handcuffed suspect (or, for example, drug sales). See AoB 28-29). If CKB was so obviously a scam, then how was it able to attract so much investment, and how was someone like Wilson Li, an experienced businessman who bought into CKB intending to be a promoter and quit when he could not attract investors. (5-ER-924-32), a victim rather than an unsuccessful co-conspirator?

And unlike Gonzalez, where the deputies began covering-up even before the beating, here Guo and his co-defendants sold CKB openly at public meetings, and only began talking cover-up years later, after the filing of the SEC action made explicit both that there was something wrong with SEC and that the other defendants had been alerted to those issues.

B. The district court's erroneous Pinkerton instruction failed to properly instruct jurors that they could only convict Guo for an alleged coconspirator's offense if that offense was committed at a moment both Guo and the person committing the offense were part of the same conspiracy.

The district court replaced the requirement of synchrony particularized to the offense in question with a loose, vague, and generalized timing requirement, telling jurors they could find Guo "guilty of wire fraud" generally if they ~~found~~ found he was a member of the same conspiracy at the time the wire fraud offenses were committed (1-ER-12-27). This alteration was particularly damaging because the government pointed jurors to both a consiratorial agreement and wire fraud offenses committed after the charged counts.

1. The district court gave an erroneous pinkerton instruction.

2. The district court's error was Was reversible any standard of review

... Additionally, the error affected Guo's ~~substantian~~ substantial right because there was

a "reasonable probability that the error affected the outcome of [his] trial." See United States v. Marcus, 560 U.S. 256, 262 (2010). The majority of the counts involved transactions in which Guo had no role, and for which the government was relying on pinkerton liability (AOB. 31-32).

For instance, it spent significant time arguing that Guo's answers in his deposition demonstrated.

Finally the district court's instructional error also meets the last plain error prong: "the jury's possible reliance on a legally invalid ~~theor~~ theory constitutes a miscarriage of justice which would seriously affect" the fairness, integrity or public reputation of judicial proceedings." See United States v. Vazquez-Hernandez, 849 F.3d. 1219.1229. (9th Cir. 2017).

C. There was insufficient evidence that the wire in count 3 was in furtherance of a conspiracy.

1. The standard of review is de novo, not plain error.

Guo made a Rule 29 motion as to all counts. noting the absence of evidence proving conspiracy and the lack of evidence linking Guo to the transactions. (GAB 28).

2. The government did not prove that Lin Sent the wire in furtherance of alleged conspiracy.

The government put on almost no evidence about Kiki Lin or this wire; ....

Moreover, even if the government proved Lin had attained a certain status as a Marketer at that point, the logic of its claim that anyone successful at promoting CKB was necessarily part of the conspiracy fails, especially in light of the government choosing not to prosecute many high-ranked CKB promoters, like Yao Lin, JC Ma and John Joa (see, e.g. 2-CR-286 ...).

Moreover, elsewhere the government claims the conspirators sent little investor cash to CKB, but instead retained most of the cash to pay themselves commissions. (GAB. 8-11-16). By the government's own calculation, however, Lin Sent 80% of the May 2012 deposits to CKB (GAB 5-1.) ...

In either event, the $4,700 wire would not have been in furtherance of the conspiracy, and so not a fit basis on which to convict Guo.

D. The district court's exclusion of Chen's excited utterance was an abuse of discretion.

Chen's statement addressed the exciting event,

her arrest, directly, saying that she should not be arrested and that instead authorities should arrest Shern (1-ER-3).

---~~Ita~~ The government makes no attempt to explain how, in light of the actual testimony, the district court's factual finding could have been anything other than clear error.

Finally, the government asserts that any error was harmless. (GA/AB 61.) The excluded statement, however, was important to Guo's defense because it demonstrated how Guo's codefendants spoke about the case prior to agreeting to cooperate against him. The government built its case by using Guo's co-operating codefendants - particularly Chen's husband, Chang - to paint Guo as an essential and culpable figure within CKB (See, 3-ER 392-93. 3-ER-400)..... The key value of Chen's statement would have been to give a window into who Guo's coconspirators described as central to the scheme prior to their cooperation. That upon her arrest Chen singled out Shern and made no mention of Guo would have better allowed Guo to argue that the cooperating witnesses were now exaggerating his importance to please the government.

E. The district court erred in imposing the §3B1.1(a) leader/organizer enhancement.

1. The government misstates the standard of review: under the proper standard, the district's legal error in identifying the correct standard is reviewed de novo.

2. The government does not seriously contend the district court correctly identified the requirements for applying the §3B1.1(a) enhancement.

3. The evidence demonstrates the enhancement cannot apply to Guo, who did not exercise control or organizational authority over others, but at most facilitated other's participation in the offense.

"Under this circuit's clear articulation of [§3B1.1], even a defendant with an important role in an offense cannot receive an enhancement unless there is also a showing that the defendant had control over others" ...

"Authority" and "control" both indicate to tell others what to do and force their obedience. Authority means the power to enforce laws, exact obedience, command, determine, or Jude."

In contract, Guo neither originated CKB nor ~~direct~~ dictated terms to others. As the government conceded, "nobody is claiming that Mr. Guo [was] the architect of CKB" (6-ER-1198). Indeed, as a marketer, he was not even formally part of CKB. He held no position ~~wh~~ within the company and had no role in decision-making: instead, he was akin to an independent contractor. (3-ER-462-63, 3-ER-486-89). He had no role in setting the terms on which CKB packs were sold, nor the system by which proceeds were ~~did~~ divided between the company and marketers. He also could not exclude anyone from CKB: a person gained the ability to promote CKB simply by buying a business pack (3-ER-469; 2-ER-253). Shern and Santos "organized" the offense within the meaning of this court's case, and Guo was organized ~~int~~ into it by them.

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Seen through this lens, it is clear that ~~the~~ what the government claims was "organizing" by Guo was most mere facilitation of an offense organized and controlled by Shern and Santos.

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But the division of investors into different "legs" was a function of the CKB multilevel marketing structure conceived by Shern and Santos, (3-ER-418-19) ... even the government

acknowledges Guo was working ~~with~~ within the CKIB commission structure set up by Shern and Santos. (GAIB 67.n-14). Telling other participants ~~how~~ how to maximize their share of CKIB's proceeds involved no excercise of control or authority.

Similarly, it points to Guo teaching others how to sell, but ignores that the core mis-representations originated with CKB, not Guo.

powerpoint presentations from Shern telling investors CKB was "A Great Enterprise to creat Everyday Millionaries" and describing P2P1 was a way to share the company's future" and a "passive earning opportunity")

More generally, Guo could only provide advice to others. The government also incorrectly claim Guo recruited Lee, But it's own citation shows she was recruited by Alice Jin (GAIB 68-69). ~~included~~ including Lee, Guo, had no way to force any one to do what he said. Indeed, Lee testified about her ability to Market CKIB as she pleased: "I use my own way." (4-ER-848).

The government further claim Guo "organized" participants because he once arraged a meeting with Shern for marketers to air concerns. But this meeting does not Guo organizing the CKIB scheme, which already running. Nor does it show Guo having any control over CKIB.

Finally, the government point to Guo

earning more than other marketers, but the facts again fail to ~~show~~ show control authority, the actual organizers took far more than him.

More importantly, however, even the government acknowledges Guo's share came from following rules created by CKB, not from Guo forcing an unequal ~~division~~ division on others (GAB 10).

This is part one of my response.

I just begin to learn English in prison. I am practice my GED class, with the help of inmates. I can do sth. like this. I have no money to looking for lawyer. I just use the information of my Criminal lawyer of Federal public Defender. I hope this could help me.

My lawyer said I was a Scapegoat. They punishing me so severely, as the Saying goes, one might as well be hanged for a sheep as a lamb.

# Part 2.



cite to relevant precedent

page(s).

1. Bemis v. Edwards,
   45 F. 3d 1369 (9th cir. 1995) — 17
2. Levine v. United States,
   383 U.S. 265 (1966) — 7, 11
3. people of Territory of Guam v. Cepeda,
   69 F. 3d 369 (9th Cir. 1995 — 16
4. United States v. Alarcon-Simi
   300 F. 3d 1172 (9th cir. 2002) — 17
5. United States v. Avila,
   905 F. 2d 295 (9th cir. 1990) — 23, 24
6. United States v. Avila
   95 F. 3d 887 (9th cir 1996) — 21
7. United States v. Barajas-Montiel.
   185 F. 3d 947 (9th cir. 1999) — 21
8. United States v. Canyper.
   66 F. 3d 229 (9th cir 1995) — 23, 24
9. United States v. Cruz,
   554 F. 3d 840 (9th cir 2009) — 13
10. United States v. Doe,
    778 F. 3d 814 (9th cir. 2015) — 20, 22, 29
11. United States v. Espinoza-Valdez,
    889 F. 3d 654 (9th cir, 2018) — 2
12. United States v. Flyer
    633 F. 3d 911 (9th. cir 2011) — 13
13. United States v. Garcia
    497 F. 3d 964 (9th cir 2007) — 11

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| 28. United States v. Navarro Viayra, 365 F.3d 790 (9th Cir. 2004) | 13 |
| 29. United States v. Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004) | 10, 13 |
| 30. United States v. Quintana-Torres, 235 F.3d 1197 (9th Cir. 2000) | 13 |
| 31. United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995) | 16 |
| 32 United States v. Rojas 554 F.2d 938 (9th Cir. 197) | 3.4 |
| 33 United States v. Suarez, 655 F. App'x 549 (9th Cir. 2016) | 21 |
| 34 United States v. Sullivan, 522 F.3d 967 (9th Cir. 2008) | 3 |
| 35. United States v. Varela 993 F.2d 686 (9th Cir. 1993) | 24 |
| 36. United States v. Vazquez-Hernandez. 849 F.3d 1219 (9th Cir. 2017) | 12 |
| 37 United States v. whitney, 673 F.3d 396 (9th. 2012) | 22, 26 |

# I. INTRODUCTON

The government denies all error. For the reasons below and in the opening bref, however, Guo's convictions and Sentence Cannot Stand.

# II. ARGUMENT

## A. The district Court erred by denying the motion to acquit with regard to conspiracy and the Counts for which the government relied on coconspirator liability.

The evidence showed Guo consistently asserting, even to his codefendants, that CHB was a good company that was going public and that PIPT were valuable (AOB 29-30). The only areement the government identifed at trial was an agreement after SEC action - and after the substantive Count were Complete - to cover-up past aitions. (AOB 31.).

The government's arguments in response fail to identify evidence Guo had the required meeting of minds about misleading investors with any of his alleged coconspirators within the relevant time-frame.

1. First, the government directs much of its opposition at a strawman not raised in the opening brief: whether there was sufficient evidence Guo "knew CKB was a scam when he promoted it." The government could not prove conspiracy with evidence Guo and alleged conconspirators like Lee and Chang each separately knew CKB was a scam. See United States v Espinoza-Valdez, 889 F. 3d 654, 657 (9th Cir, 2018). ("[m]ere association and activity with a conspirator does not meet the test"); See also United States v Loveland, 825 F 3d 555, 557-58 (9th Cir. 2016). Rather, the government had to prove an "actual meeting of minds" Espinoza-Valdez, 889 F. 3d at 657.

A key illustration of the government's confusion of the issues is how it treats the fact that when Guo spoke to other marketers, he betrayed no doubt about CKB. (AOB 29-30). .... This assertion, however, misses the point with regard to conspiracy and the required meeting of minds. It does show the government lacked evidence Guo shared a meeting of minds with others that CKB was a scam (See ~~AB 2~~ AOB 29).

Similarly, the government's citation to United States v. Sullivan, 522 F. 3d 967. 974 (9th Cir. 2008), addresses the elements of fraud, not conspiracy. But for Guo to be guilty of codefendants' crimes, the government had to prove both fraud and conspiracy.

2. Second, the government asserts it proved the necessary agreement via Heywood Chang's vague, conclusory, and undated claim that he had an "understanding" with his uplines, including Guo, that it was necessary to lie to get investor money. (GAB 34-35). It points to a case in which shaky witness testimony supported sufficiency because the testimony was not inherently implausible." (GAB 34, citing United States v Rojas, 554 F. 2d 938, 943 (9th Cir 1977).)

But Chang's testimony was not merely shaky, it was undated. such that there was no basis to conclude he was referring to a time before the SEC action. The government asserts that, Chang's claim indicated agreement with Guo "shortly after [Chang] joined CKB in 2012." (GAB 39.). Rather, Chang testified he independently realized CKB might be fraudulent after a series of events including an october 2012 newspaper report, but offers no hint as to when he purportedly shared his awareness with Guo or learned the Guo shared it. while Chang did mention confronting wendy Lee, Yao Lin,

and JC Ma (but not Guo) in that timeframe, he testified that at that point they steadfastly maintained they had been truthful when promoting CKB to him.

Moreover, any testimony from Chang that his understanding with Guo dated to mid-2012 would have been "inherently implausible." Rojas, 554 F.2d at 943. Not only was Chang a cooperator with incentive to fabricate, by Chang's own account he had no opportunity to form an agreement with Guo before the SEC action (AOB 13). Chang testified he had no direct means of contacting Guo, and prior to the SEC action had only spoken to Guo twice, both at public events during which Guo maintained CKB was a good investment. (3-ER-404).

The government tries to counter this argument by claiming evidence purportedly showing Guo knowingly lied to investors corroborated Chang's account (GAB 34-35). But this makes little sense: the government alleges Guo was lying to investors before Chang came along (GAB 13), so his purported lies could hardly prove an agreement with Chang. Nor can evidence purportedly showing Guo lying to investors explain how and when could have reached an understanding with Guo before SEC action, in the face of Chang testifying he and Guo were not in contact. That time is important again, because without evidence of an agreement before the SEC action, the vicarious liability counts (3, 6-7, 9, 11-12) must fail (AOB 31-32).

3. third, the government asserts it put on evidence of a common motive, joint action, and coordinated cover-up between Guo, Lee, Chang, and others ~~atki~~ akin to the conspiracy in United States v. Gonzalez, 906 F.3d 784 (9th Cir. 2018). But this case bears no resemblance to Gonzalez. In Gonzalez, a sheriff's deputy insulted by a handcuffed suspect called over more deputies; one deputy suggested seeing how tough the suspect was while another removed a potential witness from the room; and then the deputies beat their still-handcuffed victim. Id. at 788, 792. Immediately after the beating, the deputies huddled to concoct a story to justify their action. Id. at 789, 792. The deputies' joint actions were flagrantly and explicitly illegal, and they began their cover-up even before the beating by removing the potential witness. by contrast, here the thing Guo did with his codefendants - selling CKB packs - was not so obviously illegal that anyone doing it had to assume anyone else doing it was a knowing accomplice, as one could with a coordinated beating of a handcuffed suspect (or, for example, drug sales). (AOB 28). The government argues CKB's business "practically shouted fraud" because most of the proceeds went to Marketers and its educational programs were subpar. (GAB 37) But this argument proves too much: if CKB was so obviously a scame, then how was it able to able to attract so much investment, and how was someone like Wilson Li, an experienced Businessman who bought into CKB intending to be a promoter and quit when he could not attract investors, (5-ER-924), a victim rather than an unsuccessful coconspirator?

And unlike in Gonzalez, where the deputies began covering-up even before the beating, here Guo and his co-defendants sold CKB openly at public meetings, and only began talking cover-up years later, after the filing of the SEC action made explicit both that there was something wrong with CKB and that the other defendants had been alerted to those issues.

In sum, the government confuses the issues and fails to point to evidence Guo actually had a meeting of minds with his alleged coconspirators. Contrary to the government's suggestions, to prevail on this claim, Guo need not demonstrate complete innocence: as this court has made clear, one can commit crimes, even while associating with others, without entering into conspiracy. Loveland, 825 F.3d at 557. What Guo has to show is a dearth of evidence of a meeting of minds between him and his alleged coconspirators at times relevant to the charged counts. Despite having four coconspirators cooperating against Guo, the government was unable to evidence such an agreement. Accordingly, counts 1, 3, 6-7, 9, and 11-12 should be reversed.

B. The district court's erroneous pinkerton instruction failed to properly instruct jurors that they could only convict Guo for an alleged coconspirator's offense if that offense was comitted at a moment both Guo and the person committing the offense were part of the same conspiracy.

A person is vicariously liable for a foreseeable criminal act that a coconspirator commits in furtherance of the conspiracy, but only to the extent both conspirators were part of the conspiracy at the ~~time~~ time that the criminal act was commited. (AOB 32) (citing, inter alia, United States v. Lothian, 976 F.2d 1257, 1262 (9th Cir. 1992); Levine v. United States, 383 U.S. 262, 266 (1966)). These principles are reflected in this Court's model instruction, which instructs that a defendant cannot be liable for a coconspirator's offense charged in a particular count unless "the defendant was a member of the same conspiracy at the time the offense charged in count — was committed." Ninth Circuit Model Jury Instruction 8.25 (2010 ed). As argued in the opening brief, here the district court gave broad instructions about vicarious liability, telling jurors "[e]ach member of the conspiracy is responsibe for the action of the other conspirators performed during the course and in furtherance of the conspiracy," and "one who willfully joins an existing conspiracy is as responsible for it as the originators." (AOB 33). But the district court replaced the requirement of synchrony particularized to the offense in question with loose, vague, and generalized timing requirement, telling jurors they could find Gow "guilty of wire fraud" generally if they found he "was a member of the same conspiracy at the time the wire fraud offenses were commited (1-ER-27). This alteration was particularly damaging because the government pointed jurors to both a conspiratorial

agreement and wire fraud offenses committed after the charged counts. (AOB 31). Under the court's instruction, jurors could have concluded Guo joined the conspiracy when he met with his codefendants after the SEC action, and because Lee and Chang continued to commit wire fraud offenses after that meeting, Guo also was liable for their acts predating that agreement. (AOB) 34-35).

1. The district court gave an erroneous pinkerton instruction.

The government's primary contention in opposition is that the instruction was not erroneous, and indeed actually overstated the government's burden as requiring that for Guo to be guilty of any offense, he had to be a member of the conspiracy during the periods that all the charged wire fraud offenses were committed (GAB 43).

As argued in the opening brief, however, that reading is strained and unnatural in light of the aggressive and broad language about group liability elsewhere in the instructions. (AOB 34). That broad language included wording that, if not corrected by precise limiting language, would leave jurors with the incorrect impression that in joining an existing conspiracy, a person accepts liability for the conspiracy's past actions: "one who willfully joins an existing conspiracy is as responsible for it as the originators." (1-ER-25). Given this broad understanding of group liability, jurors would heard the contested language as permitting liability for

all the conspiracy's past offenses if Guo was a member of the conspiracy at a time when any wire fraud offense, even one not charged, was committed by another conspirator.

The government makes two arguments against this reading. First, it asserts the term "the wire fraud offenses" in the instructions necessarily refers only to the charged counts. (GAB 45.) But this is naked assertion: it gives no reason why a juror would not have concluded that any wire fraud offense, charged or not, would suffice. Indeed, jurors would have been primed to think of uncharged acts of coconspirators as being relevant to the conspiracy, having been instructed on the concept of overt act (1-ER-24).

Second, the government argues that because the Pinkerton instruction's fifth element says the offense at issue in a count must have been foreseeable and within the scope of the agreement, jurors would have understood they had to determine whether the charged count occurred after Guo joined the conspiracy. (GAB 45.). Not so. The fifth element could just as likely mean it had to be foreseeable to Guo when joining an existing conspiracy that crimes like that had already been committed to further the conspiracy. The government also inaccurately asserts that the opening brief attacked the model instruction. (GAB 46). But the opening brief argued that district court mangled the part of the model instruction that kept the instruction legal, not that the model is incorrect (AOB 34).

2. The district court's error reversible under any standard of review.

The government also contends Guo did not do enough to preserve this issue and that there was no plain error. (GAB 41-43). As the opening brief notes, however, Guo objected to the Pinkerton instruction in its entirety. (AOB 20). This preserved his claim against the instruction, even if his argument on appeal varies from the arguments articulated below. See United States v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004). ("it is claims that are deemed waived or forfeited, not arguments"). But even if plain error applies, the requirements for reversal are met here, where there was "(1) error, (2) that is plain, and (3) that affects substantial rights" and that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings" United States v. Joseph, 716 F.3d 1273, 1277 (9th Cir. 2013) (cleaned up)

First, there was error that was plain. While the government claims there was "no clear or controlling authority" here, (GAB 46), this court's precedent makes plain a person is not liable for coconspirator's

crimes committed before he joined the conspiracy. See United States v. Garcia, 497 F.3d 964, 967 (9th Cir. 2007); Lothian, 976 F.2d at 1262; Levine, 383 U.S. at 266. the district court's instruction misdescribed this element of coconspirator liability, and so allowed jurors to convict Guo for offenses that his alleged coconspirators committed before he joined any conspiracy, so long as some some coconspirator continued to commit fraud offenses after he joined a conspiracy. See supra.

Additionally, the error affected Guo's substantial rights because there was a "reasonable probability that the error affected the outcome of this trial" See United States v. Marcus, 560 U.S. 258, 262 (2010). The majority of the counts involved transactions in which Guo had no role, and for which the government was rely on pinckerton liability. (AOB 31). During closing arguments, the defense argued there was no proof of conspiratorial agreement. (6-ER-1, 68-69). The government responded by pointing to events after SEC action was filed — and after all of the substantive counts in the case were complete: an october 2013 Wechat call and further discussion in the cafeteria of Chang's lawyer's office. (6-ER-1204). While the government now argues it raised those post-SEC discussions to jurors only as proof of an antecedent agreement, (GAB 48). during closing arguments it was less nuanced. For instance, it spent significant time arguing that Guo's answer in his SEC deposition demonstrated "the agreement that he was

part of ~~that~~ out of that Cafeteria meeting at Long Beach "(6-ER-1204) Given that October 2013 agreement is what the government urged to jurors, there is a more than reasonable probability that properly-instructed jurors would have concluded Guo was at least not liable for the acts of others predating the post-SEC October 2013 discussions.

Finally, the district court's instructional error also meets the last plain error prong: "the jury's possible reliance on a legally invalid theory constitutes a miscarriage of justice which would seriously affect "the fairness, integrity or pubic reputation of judicial proceedings" See United States v. Vazquez-Hernandez. 849. F. 3d 1219. 1229 (9th Cir. 2017).

C. There was insufficient that the wire in Count 3 was in furtherance of a conspiracy.

The district court further erred by denying Guo's Rule 29 on count 3, involving a $47,000 wire from Kiki Lin to CKB ~~co~~ on May 2, 2012. To prove Guo guilty of this wire that had no apparent connection to him. The government had to prove, inter alia. that Lin sent the wire for the purpose of executing a scheme to defraud and that she sent it in furtherance of a conspiracy with Guo. (AOB 36) The government, however, failed to do so, neither calling Lin to testify nor presending other evidence demonstrating the source of the money and why Lin sent it (AOB 37.)

i. The standard of review is de novo, not plain error.

The government first argues that this claim was waived or forfeited, and so should be reviewed for plain error, if at all. (GAB 52.) As the government acknowledges, however, Guo made a Rule 29 motion as to all counts, noting the absence of evidence proving conspiracy and the lack of evidence linking Guo to transactions. (GAB 28). These broad objections preserved for appeal at least Guo's claim that the evidence was insufficient to prove the wire was sent in furtherance of a conspiracy with Guo. See, eg. United States v. Kavaouni, 379 F.3d 1139 (9th Cir 2004). See also United States v. Navarro Viayra, 365 F. 3d. 790 (9th Cir 2004) (Rule 29 motions do not need to state specific ground on which they are based); Pallares-Galan, 359 F.3d. 1095 ("it is claims that are deemed waived or forfeited, not arguments"). The government's citation to United States v. Quintana-Torres. 235 F.3d 1197 (9th Cir. 2000), (see GAB 52), is inapposit. There the defendant moved on one specified ground, id, at 1199; here, Guo broadly challenged the conspiracy evidence as to all counts.

Moreover, even if this sufficiency claim were subject to plain error, "plain-error review of a sufficiency-of-the-evidence claim is only 'theoretically more stringent' than the standard for a preserved claim." United States v. Flyer. 633 F.3d 911 (9th Cir. 2011). (quoting United States v Cruz, 554 F.3d 840 (9th Cir 2009). If the government's case cannot survive the insufficient-evidence test, the district court erred and that error is plain. And the last two prongs of the plain-error test are necessarily satisfied when a conviction is based on insufficient evidence. Flyer, 633.3d. at 917, Cruz, 554 F. 3d at 845.

2. The government did not prove that Lin sent the wire in furtherance of the alleged conspiracy.

The government put on almost no evidence about Kiki Lin or this wire; most glaringly, it did not call her to testify as to when she realized. (AOB 36). Nonetheless, the government argues there was evidence sufficient to show the wire contained investor funds sent to CKB to further a conspiracy with Guo. (GAB 52)

First, the government argues that in May 2012, Lin was so high-ranked a promoter that one can assume she had joined a conspiracy. (GAB 53). But the government notably includes no citation for this claim. It is unclear what rank Lin had already reached by May 2, 2012, or how steeped she was in CKB then. (3-ER-407) (Lin a speaker at a CKB event months later in October 2012); 3-ER-411 (Lin eventually reached senior executive vice president status, but no testimony as to when).). Moreover, even the government proved Lin had attained a certain status as a marketer at that point, the logic of its claim that anyone successful at promoting CKB was necessarily part of the conspiracy fails, especially in light of the government choosing not to prosecute many high-ranked CKB promoters, like Yaw Lin, JC Ma, and John Joa (2-ER-286, 346, 3-ER-465, 5-ER-1006). See also n. 2. Supra. Additionally, the government's claim that by arguing de novo review in this opening brief, Guo is foreclosed from arguing in reply that the plain error standard in met (GAB 54), is not supported by its cases, which say nothing against addressing in a reply brief an appellee's assertion that plain error applies. The government had to prove a meeting of minds between Lin and Guo by May 2012. See Section II

A, supra. It failed to do so, which is particularly striking given it had secured Lin's cooperation and so could have called her.

Second, it claims the $47,000 can be assumed to be investor fund obtained through the fraud scheme, and not, for instance, Lin's own side business with CKB, because the May 2012 account statement for the account from which she sent the wire "showed multiple deposits of $1,380, the price of a CKB business pack" (GAB 51). But a close look at that same account statement thoroughly undermines that claim. The account statement shows only four deposits of $1380 and one other deposit of $4140 (a multiple of $1380), accounting for less than 5% of the $209,000 deposited in the account that month. (1-GER-273). Moreover, elsewhere the government claims the conspirators sent little investor cash to CKB, but instead retained most of the cash to pay themselves commissions. (GAB 8-11-16). By the government's own calculation, however, Lin sent 80% of the May 2012 deposits to CKB (GAB 51.). That Lin was ~~#~~ not dealing with the deposits the way the government alleges conspirators dealt with investor money suggests that either the money being wired was not investor money or Lin was not then part of the conspiracy. In either event, the $47,000 wire would not have been in furtherance of the conspiracy, and so not a fit basis on which to convict Guo.

(See my defence 13. From the government report we can see that Kiki Lin loaned 180,0000 E-wallet point to her friend and only get back a few pieces of old cloths)

D. The district Court's exclusion of Chen's excited utterance was an abuse of discretion.

The district court also reversible erred when it prevented Guo from eliciting testimony about Toni Chen's frantic assertion upon her arrest that Howard Shern should be the one being arrested, not her. (AOB 39). The district court erred by misconstruing the excited utterance hearsay exception to turn solely on elapsed time between the exciting event and the statement, rather than whether the declarant was still in an excited excitement, and, moreover, even under that wrong standard, relied on a speculative view of the facts unspported by the record. (AOB-42. inter alia, people of Territory of Guam v. Cepeda, 69 F.3d 369 (ath cir. 1995); United States v. Rivera, 43. F.3d. 1921, 1296 (9th Cir. 1995).)

preliminarily, the government does not make, and so waives, any argument that the district Court properly understood the rule to require a holistic analysis of whether the statement was a product of stress and excitement, as opposed to simply elapsed time. Instead, the government argues that this Court can affirm for other reasons in the record, but these argument fail.

First, the govenment argues Chen's statement did not meet the requirement that it relate to be the circumstances of the startling occurence preceding

it, relying on a comparison to United States v. Alarcon-Simi, 300 F.3d 1172 (9th Cir. 2002) (GAB 59). But unlike in Alarcon-Simi, the excited utterance here addressed the arrest. Whereas in Alarcon-Simi, the defendant, upon his arrest, made some general (and undocumented in the ~~report~~ record) claim about not knowing about the fraudulent check-cashing scheme for which he had been arrested, see id. at 1174, here, Chen's statement addressed the exciting event, her arrest, directly, saying that she should not be arrested and that instead authorities should arrest Shern. (1-ER-3). As this Court has explained, the "relating to" requirement is fairly broad, and need not be a description of the startling event. See Bemis v. Edwards, 45 F.3d 1369, n.1 (9th Cir 1995). Thus, for instance, a declarant's statement identifying a defendant as his assailant upon the startling event of viewing a picture of the defendant two months after the assault was admissible, because the statement related to the reviewing even though it primarily described past events. See id. (describing United States v. Napier, 518 F.2d 316 (9th Cir. 1975)); See also United States v. Lim, 984 F.2d 331 (9th Cir, 1993) (arrest an exciting event, such that arrestee's statement that someone else had previously given him drugs found during arrest was admissible under the exception).

The government also argues Guo did demonstrate Chen was excited at the time she made the statement because he did not elicit a description of Chen's demeanor. (GAB 60) But this argument ignores

that because the district court misapprehended the rule, it cut off Guo's questioning just as Guo was eliciting precisely that information. Guo elicited from Agent Talamantez that Chen was surprised by her arrest, but when defense counsel returned to the topic, asking if Chen was upset, the government objected and the court cut off the inquiry, saying, baselessly, that Chen had had plenty of time to falsify a story so her statement was not an excited utterance. (1-ER-2, 1-ER-6). As demonstrated by Chen's husband's description of the "terrifying" and "incredibly desperate situation" of being arrested with their young children on the layover a vacation trip, (3-ER-563), had Guo been allowed to complete his inquiry he would have been able to demonstrate Chen made the statement in the requisite excited state.

Additionally, the Government asserts, without development, that, "given the testimony cited by the district court." the district court did not clearly err in determining Chen had had plenty of time to formulate a statement. (GAB 60). But, as demonstrated in the opening brief, Agent Talmantez's testimony including nothing from which to conclude that Chen plenty of time after her arrest to formulate her statement (AOB 41). This is especially true given that Agent Talmantez testified she was the one who told Chen she was under arrest and that Chen was suprised by the news. (1-ER-4-6). The government makes no attempt to explain how, in light of the actual testimony, the district court's factual finding could have been anything other than clear error.

Finally, the government asserts any error was harmless (GAB 61). The excluded statement, however, was important to Guo's defense because it demonstrated how Guo's codefendants spoke about the case prior to agreeing to cooperate against him. The government built its case by using Guo's cooperating codefendants - particularly Chen's husband, Chang — to paint Guo as an essential and culpable figure within CKB. (See, 3-ER-392, 3-ER-400, 415, 420, 4-ER-599, 775, 796, 6-ER-1107. ("Guo "had to have known it. He was at the top of the food chain.")). The key value of Chen's statement would have been to give a window into who Guo's co-conspirators described as central to the scheme prior to their cooperation. That upon her arrest Chen singled out Shern and made no mention of Guo would have better allowed Guo to argue that the cooperating witnesses were now exaggerating his importance to please the government. While the government claims Chen's statement was cumulative because a disgruntled customer also identified Shern to the FBI as the key figure in CKB, (GAB 62), jurors would have regarded someone admittedly involved in the CKB scheme like Chen, as a more authoritative source than a customer with a limited view of CKB.

E. The district court erred in imposing the §3B1.1(a) leader/organizer enhancement.

1. The government misstates the standard of review:

under the proper standard, the district Court's legal erro in indentifying the correct standard is reviewed de novo.

Citing outdated precedent, the government asserts application of a USSG §3B1.1 enhancement is a purely factual question reviewed for clear error. (GAB 65, citing United States v. Doe, 778 F.3d 814, 821-26 (4th Cir. 2015) (repeating clear error standard, but then analyzing the legal definition of "organizer")). More recently, however, this Court clarified en banc that all decisions to apply a particular guideline involve three distict components, reviewed under three distinct standards: (1) "selecting and correctly interpreting the right Guidelines provision," reviewed de novo; (2) finding the relevant historical facts (who, what, when, where, and why), reviewed for clear error; and (3) the determination whether the historical facts meet the correct standard, almost always reviewed for abuse of discretion. United States v. Gasca-Ruiz, 852 F.3d 1167 (9th Cir. 2017) (en banc). See also United States v. Holden, 908 F.3d 395, 401 (9th Cir. 2018) (applying clarified framework to review of a §3B1.1 enhancement). Accordingly, whether the district Court correctly interpreted §3B1.1(a) is reviewed de novo.

2. The government does not seriously contend the distric court correctly identified the requirements for applying the §3B1.1(a) enhancement.

The opening brief demonstrated that the district court misinterpreted §3B1.1(a) by not requiring proof Guo had control or organizational authority over others. (AOB 45-46). See also United States v. Mares-Molina, 913 F.2d 770, 773 (9th Cir. 1990) ("Some degree of control or organizational authority over others is required in order for section 3B1.1 to apply"); Holden, 908 F.3d at 402; United States v. Barajas-Montiel, 185 F.3d 947, 957 (9th Cir. 1999); United States v. Avila, 95 F.3d 887, 890 (9th Cir. 1996). Despite Guo objecting to the enhancement because he "had no control or authority over others in the network," the district court did not address his authority or control, instead focusing on his success promoting ckB (AOB 46-47).

The government does not meaningfully contend the district court actually identified and applied the correct standard. (See GAB 66-74.) Accordingly, it has waived any such argument. See United States v. McEnry, 659 F.3d 893, 902 (9th Cir. 2011). See also United States v. Suarez, 655 F. App'x 549, 551 (9th Cir. 2016) (vacating sentence where district court applied wrong understanding of §3B1.1).

3. The evidence demonstrates the enhancement cannot apply to Guo, who did not exercise control or organizational authority over others. But at most facilitated others' participation in the offense.

The government directs most of its efforts to arguing Guo's actions constituted "organizing" and so the enhancement applied. (GAB 66-74) The government's arguments, however fail to distinguish between "organizing" by exercising control or organizational authority over other participants, and merely "facilitating" codefendants' commission of an offense, which does not meet the requirement of §3B.1. See Holden, 908 F. 3d at 401-03.

1. This Court has made clear that a defendant's integral role or a high degree of culpability in an offense cannot on its own justify a §3B1.1 enhancement. Doe, 778 F. 3d at 825-26. Rather, as noted above, the enhancement requires "some degree of control or organizational authority over others." Holden, 908 F. 3d at 402. This is true for "organizers" as much as "leaders": a defendant "organizes" other participants only if he or she has "the necessary influence and ability to coordinate their behavior so as to achieve the desired criminal results" Id. (citation omitted, emphasis added)). "Under this Circuit's clear articulation of [§3B1.1], even a defendant with an important role in an offese cannot receive an enhancement unless there is also a showing that the defendant had control over others" United States v. Whitney, 673 F. 3d 965. 975 (9th Cir. 2012) (cleaned up).

"Authority" and "control" both indicate power to tell others what to do and force their obedience. Authority means "[t]he power to enforce laws, exact obedience

command, determine, or judge." See AUTHORITY, American Heritage Dictionary of the English Language (5th. ed. 2020) Similarly, "control" means "[a]uthority or ability to manage or direct." See CONTROL, American Heritage Dictionary of the English Language, (5th ed. 2020). Helping other participants commit an offense without actually having the ability to control those other participants is "[m]ere facilitation of criminal activity," which is not sufficient to support the enhancement. "Hidden, 908 F.3d at 902 (emphasis in original).

2. Nonetheless, the government asserts one can "organize" others without actually having the power to tell them what to do. Simply by providing other participants with suggestions about how to better partipate in the scheme. (GAB 70-71). It bases this on language saying the enhancement applies where a person organizes others in an offense even if he or she does not then "retain a supervisory role over the other participants" (GAB 71, citing United States v Carruper, 66 F.3d 229, 231-32) (9th Cir. 1995) and United States v. Avila, 905 F. 2d 2d 245. 298 (9th Cir. 1990). The government's argument, however, wholly ignores the word "retain": as that word implies, control is required at some point, even if no permanent hierarchy is created.

Indeed, the cases on which the government relies show that while there need not be a permanent hierarchical relationship to be an "organizer"

whithin the meaning of the enhancement, at some point the defendant must have able to tell other participants what to do and enforce those orders. In Camper, the defendant "used [a codefendant] as a 'runner,'" sending her to get cash with counterfeit credit cards: he "organized" the scheme both in the sense of having put it together, but also, by dint of his control over the counterfeiting instruments, in the sense of being able to exclude his codefendant if she varied from his instructions. See 66 F.3d at 231-32. Similarly, in Avila, the defendant put together drug deals involving numerous suppliers in which he negotiated prices and had the ability to exclude suppliers who did not meet his terms. 905 F.2d at 298. See also United States v. Varela 993 F.2d 686, 691 (9th Cir. 1993).

In contrast, Guo neither originated CKB nor dictated terms to others. As the government conceded, "nobody is claiming that Mr. Guo [was] the architect of CKB" (6-ER-1198). Indeed, as a marketer, he was not even formally part of CKB. He held no position whithin the company and had no role in decision-making: instead he was akin to an independent contractor. (3-ER-462-63). He had no role in setting the terms on which CKB packs were sold, nor the system by which proceeds where divided between the company and marketers: CKB generated

those terms unilaterally. (4-ER-839, 1-GER-253). He also could not exclude anyone from CKB: a person gained the ability to promote CKB simply by buying a business pack. (3-ER-469). Similarly, contrary to the government's claim that Guo "provided the template" for CKB's sales pitch (GAB67.) that pitch came from Shern in powerpoints that Guo and other marketers were obliged to use. (1-GER-214n69). Thus, Shern and Santos "organized" the offense within the meaning of this Court's cases, and Guo was organized into it by them.

3. Instead of organizing, Guo's actions amounted at most to mere facilitation. This Court's cases show facilitation involves a defendant helping other participants better commit an offense, without actually having control or authority over them. For instance, a fraud defendant who instructed another participant to send proceeds to that defendant's accounts in Ghana only facilitated the offense: "Defendant did not exercise control or 'organizational authority' over [the other participant] by telling him how to go about depositing money in an account any more than if he had given [the other participant] directions to his house," Holden, 908 F. 3d at 403. In a case involving conspiracy by federal inmates to defraud the government by filing false tax returns, a defendant who provided another participant with tax forms and instructions on how to file false returns did not "organize" the offense, where

he was not "the brain power" or ringleader "behind the scheme. Whitney, 673 F.3d at 970-976). In a case involving conspiracy to rob a banks, the fact that a defendant had worked for banks and the scheme was based on her knowledge of ATM procedures was insufficient to make her an organizer. United States v. Harper, 33 F.3d 1143. 1151 (9th Cir. 1994).

Seen through this lens, it is clear that what the government claims was "organizing" by Guo was at most mere facilitation of an offense organized and controlled by Shern and Santos. First, the government claims Guo was an organizer because he purportedly arranged his downlines into separate "legs" and instructed others to place productive recruits close to themselves within their pyramids. (GAB 67.) But the division of investors into different "legs" was a function of the CKB multilevel marketing structure conceived by Shern and Santos, which generated a new leg for a marketer when a person that marketer sold to made a sale and so acquired their own downline (3-ER-418.) As for instructing others on how to arrange their investments and the investments of their downlines to increase their ranking and profits, even the government acknowledges Guo was working within the CKB commission structure set up by Shern and Santos (GAB 67) Telling other participants how to maximize their share of of CKB's proceeds involved no exercise of control or authority, but at most the "facilitation of offering others suggestions.

Second, the government claims Guo "organized" the offense by teaching others how to promote CKB, and by giving Lee advice about how to talk to investors about bad press and the problems with the prpt. auction market. (GAB 68). The government's citations, however, do not show Guo organizing CKB, but rather playing a role organized for him by Sherm and CKB. Thus, for instance, it writes Guo "provided... instructional videos," as if he generated videos on his own initiative, when in fact the testimony was CKB hired him — organized him — to make the videos. (GAB 68). Similarly, it points to Guo teaching others how to sell, but ignores that the core misrepresentations originated with CKB, not Guo. (GAB 68. 1-ER-214-69). (powerpoint presentations from Sherm telling investors CKB was "A Great Enterprise to create Everyday Millionaires," and describing PRPT as a way "to share the company's future" and a "passive earning opportunity"). More generally, Guo could only provide advice to others, including Lee: he had no way to force anyone to do what he said. Indeed, Lee testified about her ability to market CKB as she pleased: "I use my own way." (4-ER-848). The government also incorrectly claims Guo recruited Lee, but its own citation shows she was recruited by Alice Jin (Compare GAB 68-69 with 4-ER-786)

The government further claims Guo "organized" participants because he once arraged a meeting with shern for marketers to air concerns, ~~reer~~ resulting in proposed changes to the system for selling PRPT. (GAB 69). But this meeting does not show Guo organizing the CKB scheme, which already running. Nor does it show Guo having any control over CKB or other marketers: at most he called a meeting that produced a proposal to bring CKB closer to its marketing claims. (4-ER-608) There was no testimony that Guo could do anything more than make proposals to shern and CKB for them to take or leave as they pleased.

Finally, the government points to Guo earning more than other marketers, but the facts again fail to show control or organizational authority. preliminarily, while Guo earned more than other marketers, the actual organizers took far more than him. The government calculates he received less than $4 million. (GAB 5.) But those who actually controlled CKB, like shern and Santos, took for themselves a least 15% of the $260 million in overall proceeds — or $39 million. (5-ER-1217, 6-ER-1264.) More importantly, however, even the government acknowledges Guo's share came from following rules created by CKB, not from Guo forcing an unequal division on others (GAB 10.).

## Conclusion.

There are a lot of story of CKB. There are a lot of error in this case. I need help, mercy and justice. please help me take away the big burden on my shoulder and in my mind. I am just one of many salsman. I become the bigest victim in this case. I just beliere U.N. shern. and Santos. They created and Control the CKB. I do not want to be a scapegoat. I do not want to be hanged for a sheep as a lamb!

please! Help me!. Thank you! So much!