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By order of the Court, Presiding Judge Robert C. Naraja

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IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

<b>MODERN INVESTMENT, INC., and</b>	)	<b>CIVIL CASE NO. 19-0266</b>
<b>TRINIDAD BENAVENTE, and DOES 1-</b>	)	
<b>10,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>ORDER DENYING PLAINTIFF’S</b>
	)	<b>MOTION TO PERMIT</b>
<b>vs.</b>	)	<b>INTERNATIONAL VIDEO</b>
	)	<b>TESTIMONY FROM CHINA</b>
<b>SUNLEADER (SAIPAN) CO. LTD, et. al.</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

INTRODUCTION

**THIS MATTER** arose in the Plaintiff’s on-going Motion for a Preliminary Injunction which first came before this Court on January 12, 2021. The Plaintiffs were represented by Robert Torres, Esq., for Modern Investment, Inc.; as well as Charity Hodson, Esq. for Trinidad Benavente and DOES 1-10. Defendants Sunleader (SAIPAN) Co, Ltd., Hui Tau Tsang, Dragon Pacific Corporation and Sunyes Saupan Corporation are represented by Stephen Nutting, Esq. The Defendants are also Third-Party Plaintiffs against Dihong Shao, a Third-Party Defendant and represented by Thomas Clifford, Esq. and Wilhelm Dingler, Esq., *Pro Hac Vice*. Sean Frink, Esq. appeared for Defendant Yantze Corporation.

The instant matter concerns the Plaintiff’s February 10, 2021 Motion to Allow the Remote Testimony of Mr. Xiao Jia from the People’s Republic of China. Based upon the

1 matters adduced in Court and after review of the parties' briefs, the Court **DENIES** the  
2 Plaintiff's Motion.

3 **BACKGROUND**

4 The Plaintiffs filed this suit to recover for injuries to their buildings allegedly caused  
5 by the construction of the Royal View Hotel. Their preliminary injunction seeks to halt  
6 construction. The construction project added four floors to the Sunleader building in  
7 Garapan which is adjacent to the Ocean View Hotel and the Benavente building. The Ocean  
8 View Hotel is owned by Modern Investment while the Benavente building is leased to Fun  
9 and Games. As a result of the construction, the Sunleader building will become the Royal  
10 View Hotel. The Plaintiffs allege the modifications to the Sunleader building has and will  
11 continue to injure the foundation of their buildings causing numerous large cracks  
12 throughout their buildings.  
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15 The evidentiary hearing on the Plaintiff's Motion for a Preliminary Injunction  
16 commenced on January 12, 2021. The hearing remained ongoing on February 10, 2021  
17 when the Plaintiffs called witness Mr. Xiao Jia to testify. Defendant Yantze objected on the  
18 basis that it would be illegal under The People's Republic of China's ("China") law for the  
19 witness to testify without adhering to the procedural requirements of Article 277 of the  
20 Chinese Civil Procedure Law. Article 277 requires the moving party to obtain the consent of  
21 the Chinese government. If Article 277 is violated, the testimony likely would subject both  
22 parties' attorneys to arrest if they visited China. Following the submission of briefs, the  
23 Court heard the motion on February 23, 2021.  
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**LEGAL STANDARD**

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2 At issue in this matter is whether Article 277 of the Chinese Civil Procedure Law  
3 permits testimony during a Preliminary Injunction hearing in the Commonwealth. The  
4 Chinese law was translated in a previous federal case as follows:

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6 “The request for and provision of judicial assistance shall be conducted  
7 through the channels stipulated in the international treaties concluded or  
8 acceded to by the People’s Republic of China. Where no treaty relations exist,  
9 the request for and provision of judicial assistance shall be conducted through  
10 diplomatic channels.

11 The embassy or a consulate in the People’s Republic of China of a foreign  
12 state may serve documents on, investigate, and take evidence from its  
13 citizens, provided that the law of the People’s Republic of China is not  
14 violated and that no compulsory measures are adopted.

15 Except for the circumstances set forth in the preceding paragraph, no foreign  
16 agency or individual may, without the consent of the competent authorities of  
17 the People’s Republic of China, serve documents, carry out an investigation  
18 or collect evidence within the territory of the People’s Republic of China.”  
19 *Motorola v. Hytera*, 365 F. Supp. 3d 916, 927 (N. D. Ill. 2019) quoting  
20 Article 277 of the Chinese Civil Procedure Law.

21 In other words, no foreign agency or individual can collect evidence without  
22 China’s consent. *Id.* The only exception is that an embassy or consulate in China  
23 may take evidence from its citizens provided the evidence is voluntarily produced.  
24 *Id.* No cases have been found in which a court knowingly allowed<sup>1</sup> testimony by  
25 video from China despite its likely illegality, but at least six federal district courts  
26 have not permitted testimony from China because of its likely illegality. *See Chen v.*  
27 *Hunan Manor Enter.*, 2020 U.S. Dist. LEXIS 19452 at 3-4 (S.D.N.Y. 2020), *Excel*

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28 <sup>1</sup> Following the hearing the parties stipulated, on March 9, 2021, to the submission of an unmarked exhibit titled *Proving Chinese Law in the Courts of the United States: Surveying and Critiquing the Article 277 cases* by Richard Wagner, Esq., a visiting fellow at the East Asian Legal Studies Center, University of Wisconsin Law School. That article includes a case, *Popular Imports v. Wong Int’l*, 166 F.R.D 276 (E.D.N.Y 1996), in which witnesses were permitted to testify from China. When the parties objected for the first time after some witnesses sought to recant their testimony and perjury concerns arose about some others, the objection was deemed untimely and thus waived. The Court only would have considered the objection if made prior to the testimony.

1 *Fortress Ltd. v. Wilhelm*, 2020 U.S. Dist. LEXIS 49706 at 12 (D. Ariz. 2020),  
2 *Zhizheng Wang v. Hull*, 2020 U.S. Dist. LEXIS 108944 at 4 (W.D. Wash. 2020),  
3 *Junjiang Ji v. Jling Inc.*, 2019 U.S. Dist. LEXIS 55341 at 1 (E.D.N.Y. 2019),  
4 *Melaleuca, Inc. v. Kot Nam Shan*, 2018 U.S. Dist. LEXIS 71296 at 2 (D. Conn.  
5 2018), *Emerson Elec. Co. v. Suzhou Cleva Elec. Appliance Co.*, 2014 U.S. Dist.  
6 LEXIS 89062 at 4 (E.D. Mo. 2014).

## 8 DISCUSSION

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10 The question of whether a witness can testify remotely from the People’s Republic of  
11 China (“China”) appears to be one of first impression in the Commonwealth of the Northern  
12 Mariana Islands (“CNMI”). The Plaintiffs present a strong argument that given the obstacles  
13 posed by the COVID-19 pandemic, which include difficulty in obtaining travel visas, as well  
14 as the growing acceptance of remote testimony that the witness should be permitted to  
15 testify. However, Chinese law likely does not permit the testimony of a Chinese citizen from  
16 China and at least six federal district courts, as discussed below, have not allowed such  
17 testimony. Neither party cites to a case in which a witness was permitted to testify from  
18 China and this Court also found no such case. In reaching its decision, the Court examined  
19 the relevant NMI caselaw, how federal jurisdictions have dealt with the issue, and other  
20 considerations put forth by the Plaintiffs.  
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### 23 A. Relevant CNMI Caselaw

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25 Although the meaning of Article 277 is an apparent issue of first impression in the  
26 CNMI, a similar issue arose locally in *Rally* concerning the ability to serve parties in Japan  
27 in a manner not permitted by Japanese Law and bypassing the procedures of the Hague  
28 Convention. *Rally, Inc. et. al v. John Hycenko*, Civ. No. 96-895 (NMI Super. Ct. 1996)  
(published, P.J. Castro). The Plaintiffs in *Rally* did not translate the documents into Japanese

1 and made service by registered mail which is not permitted under Japanese law. However,  
2 Japanese Law does not recognize service by registered mail as valid. *Id.* at 2 (*citing*  
3 International Law Digest at IC-1, *Bankston v. Toyota Motor Corp.* 889 F.2d 172, 174 (8th  
4 Cir. 1989)). The service also overlooked obligations under the Hague Convention treaty to  
5 make service through Japan’s Central Authority.  
6

7 Similar to Article 277, the Convention states that each signatory party shall designate  
8 a Central Authority through which service shall be affected. Accordingly, Japan designated  
9 its Ministry of Foreign Affairs which required the complaints and all documents pertaining  
10 to service to be translated into Japanese. Service must then be made in accordance with  
11 Japan’s internal laws. *Rally, Inc. et. al. v. John Hycenko et. al* at 2.  
12

13 The *Rally* Plaintiffs raised concerns about Japan’s objections to certain provisions of  
14 the Hague treaty and also possible careless drafting in the treaty which are not relevant to  
15 this case. *Id.* Citing persuasive caselaw, the *Rally* court found the careless drafting argument  
16 to be implausible and found it “even more implausible to this Court that Japan would allow  
17 non-Japanese citizens to serve Japanese citizens in Japan through a service of process  
18 method which is not permitted under Japanese law.” *Rally, Inc. et. al. v. John Hycenko, et.*  
19 *al.* at 4. Thus, “because Plaintiffs served Defendants by registered U.S. mail without  
20 translating the documents into Japanese, this Court finds that the service was in violation of  
21 the Hague Convention and is therefore Quashed.” *Id.* The Court finds this case instructive  
22 that foreign laws must be accorded adherence and respect in the CNMI.  
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#### 25 B. Federal District Courts

26 In *Wang*, the Court considered the same question now before this Court. The moving  
27 party sought to testify from China by video conference due in part to complications posed by  
28 the COVID-19 pandemic in June 2020. *Wang v. Hull*, 2020 WL 4734930 at 1 (W.D. Wash.

1 2020) The *Wang* court found the non-moving party’s interpretation of Article 277 of the  
2 Chinese Civil law to be reasonable and consistent with caselaw and guidance from the U.S.  
3 Department of State (“State Department”):

4 “The Chinese law on which the State Department advisory is based, Article  
5 277 of the Chinese Civil Law, provides that, except when coordinated in  
6 conformity with international treaties to which China is a party, “no foreign  
7 authority or individual is allowed to serve process, conduct investigation, or  
8 obtain evidence within the borders of People's Republic of China without  
9 permission from the country's Central Authority.”

10 *Wang v. Hull*, 2020 WL 4734930 at 1 (W.D. Wash. 2020) (citing Taking  
11 Voluntary Depositions of Willing Witnesses, U.S. Dep't of State Bureau of  
12 Consular Affairs China Judicial Assistance Information (2019), available at  
13 [https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-](https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html)  
14 [Information/China.html](https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html) (last visited March 31, 2021)).

15 The Court noted that it was not clear that the law would be interpreted so broadly,  
16 without engaging in any substantial discussion to why, but that it “would not require the  
17 [D]efendant to bet on that outcome.” *Id.* at 1 (citing *Ji v. Jling, Inc.*, 2019 WL 1441130, at 2,  
18 4, and 6 (E.D.N.Y. Mar. 31, 2019)). Neither will this court.

19 In a similar vein, in *Junjian* the moving party *conceded* that China regards the  
20 administration of oaths by foreign attorneys or consular officials as a violation of China’s  
21 judicial sovereignty. *Junjian v. Jling*, 2019 WL 1441130 at 5 (E.D.N.Y. 2019). For that  
22 reason, oath administrators face arrest, detention, expulsion and deportation as possible  
23 penalties. *Id.* The Court also received an affirmation from a Chinese attorney which  
24 reinforced the illegality of the testimony. *Id.* at 11. The Court struck the testimony. *Id.*

25 The Plaintiffs argue that the America’s federal court system is split regarding the  
26 admissibility of remote testimony. *See* Plaintiff’s Reply Brief at 2. It does not, however, cite  
27 to any cases in which a witness was permitted to testify from China. Rather, at least six  
28 federal district courts have not permitted testimony from China because of its likely  
illegality. *See Chen v. Hunan Manor Enter.*, 2020 U.S. Dist. LEXIS 19452 at 3-4 (S.D.N.Y.

1 2020), *Excel Fortress Ltd. v. Wilhelm*, 2020 U.S. Dist. LEXIS 49706 at 12 (D. Ariz. 2020),  
2 *Zhizheng Wang v. Hull*, 2020 U.S. Dist. LEXIS 108944 at 4 (W.D. Wash. 2020), *Junjiang Ji*  
3 *v. Jling Inc.*, 2019 U.S. Dist. LEXIS 55341 at 1 (E.D.N.Y. 2019), *Melaleuca, Inc. v. Kot*  
4 *Nam Shan*, 2018 U.S. Dist. LEXIS 71296 at 2 (D. Conn. 2018), *Emerson Elec. Co. v.*  
5 *Suzhou Cleva Elec. Appliance Co.*, 2014 U.S. Dist. LEXIS 89062 at 4 (E.D. Mo. 2014). The  
6 Plaintiffs instead relies on two cases which did not consider testimony but rather the  
7 production of documents.  
8

9         The first case, *Sun Group*, found that requiring the production of documents would  
10 violate Article 277. *Sun Group v. CRRC Corp.*, 2019 WL 6134958 at 2 (N.D. Cal. 2019). It  
11 then allowed discovery through the procedures established by the Hague Convention. The  
12 second case, *Motorola*, did not reach Article 277, considering the Article 277 question too  
13 complex for it decide, and instead found the comity factors would not allow the forensic  
14 inspection of the defendant’s computers located in China. *Motorola Solutions, Inc. v. Hytera*  
15 *Communications Corp.*, 365 F. Supp. 3d. 916 (N.D. Ill. 2019). The Plaintiffs are mistaken  
16 when they say “the *Motorola* case did not stop at the analysis of Article 277” because it did  
17 not make a decision one way or the other. See Plaintiffs’ Brief at 6. The *Motorola* court  
18 doubted the relevance of the information sought and faulted the moving party for making  
19 such an extensive production request so late in the discovery process.  
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22         *Sun Group* is distinct from this matter, however, because the non-moving party,  
23 CRRC Corporation, had documents stored both on paper and electronically among its  
24 holdings both in the United States and China. *Sun Group v. CRRC Corp.*, 2019 WL 6134958  
25 at 6. The *Sun Group* Court found the electronic documents not to be stored internationally,  
26 even when physically stored on an international computer, because the non-moving party  
27 could still access them from their computers in the United States. *Id.* For the physical  
28

1 documents, the *Sun Group* Court found that Article 277 *did bar* their production and the  
2 moving party must proceed through the Hague Convention. *Id.* (emphasis added)

3 A battle of declarations also emerged in *Sun Group* from Chinese attorneys. The  
4 non-moving party presented a declaration from an attorney, practicing in China since 2004,  
5 that not only must parties proceed through the Hague Convention, but that “no person,  
6 organization or institution may provide evidence at his or her own volition for use in civil  
7 proceedings abroad.” *Id.* at 2. The declaration identifies Article 277 as the legal obstacle. *Id.*

9 Likewise, the moving party presented a declaration from a Professor of Chinese and  
10 Hong Kong law who concluded the opposite. That attorney states, “Article 277 merely  
11 prohibits non-Chinese persons from physically performing tasks in China.” However, that  
12 statement was contradicted by an official statement received by the non-moving party from  
13 the China Ministry of Justice:  
14

15 “As provided by the Civil Procedure Law of the People’s Republic of China,  
16 any foreign judicial department(s) under international treaties to collect  
17 evidence within Chinese territories shall be conducted through channels  
18 prescribed by the rules of the international treaty...[and]... [w]hen a foreign  
19 country intends to propound discovery in the PRC, it shall submit its request  
20 to the Ministry of Justice of the People’s Republic of China through the  
21 channels in accordance to the rules set forth in the Evidence Convention.” *Id.*

22 The *Sun Group* Court also notes an earlier case where a practicing Chinese attorney  
23 “opined that pursuant to Article 263, the former identical version of Article 277, complying  
24 with a discovery request to produce documents located in the PRC would violate China’s  
25 Civil Procedure Law.” *Id.* at fn. 2 *citing Milliken & Co. v. Bank of China*, 758 F. Supp. 2d  
26 238, 249 (S.D.N.Y. 2010).

27 The Plaintiffs also cites to *Motorola v. Hytera* in which the Court abstained on the  
28 interpretation of Article 277 before holding the comity factors were not satisfied. *Motorola  
Sols., Inc. v. Hytera Communs. Corp.*, 365 F. Supp. 3d 916 (N.D. Ill. 2019). There, the



1 moving party obtained a declaration from a former Chinese judge, now practicing law in  
2 China, as follows:

3 “The purpose of the last two paragraphs of Article 277 is mainly to ensure  
4 that the Chinese judicial sovereignty over its subjects within the Chinese  
5 territory is not violated by any foreign party in contravention of Chinese and  
international laws and conventions.

6 It is clear from the context that the act of "making an investigation and  
7 collecting evidence" within the meaning of Article 277 refers mainly to the  
8 exercise of investigative power reserved for Chinese judicial and executive  
9 authorities, which would include, for example, such acts **as deposing of**  
10 **witnesses** (emphasis added), the viewing and examining of a party's medical  
11 records, and the raiding of corporate offices, for the purpose of a judicial  
12 proceedings. The act of "making investigations and collecting evidence"  
13 under Article 277 *does not include voluntary production of documents or*  
14 *voluntary disclosure of information* (emphasis in original) of one party to  
another party or to a third-party investigator for the purpose of resolving a  
dispute in or out of court because these acts do not encroach on the  
supremacy of Chinese judicial or executive authorities. Thus, the hiring of a  
discovery vendor to search for and produce information in a company's own  
files would not implicate Article 277.

15 I am not aware of any Chinese law or regulation that generally forbids the  
16 litigant opening up "access" of foreign individuals or organizations to  
17 documents, information, or objects that might be used in a judicial  
proceeding in a foreign country.” *Id.* at 927-928.

18 First and foremost, the *Motorola* Court notes the declarant overlooks the issue before  
19 that Court was the involuntary production of documents while the declaration opines on the  
20 voluntary production of documents. *Id.* Given such an obvious and fundamental mistake-of-  
21 fact this Court finds that opinion to have little credibility and therefore affords it little  
22 weight. The *Motorola* Court also notes a conflicting declaration was received from another  
23 Chinese attorney but does not discuss that declaration.  
24

25 On the substance of the declaration, the *Motorola* Court further notes the moving  
26 party interprets the opinion as stating Article 277 applies “only when discovery is collected  
27 by foreigners, and that it does not apply here because discovery will be conducted by a third-  
28 party, Chinese national.” *Id.* at fn. 7. Of course, under the facts of this case, foreigners and

1 not a Chinese national will take the witnesses testimony. Despite the factual error in the  
2 declaration, the substance is relevant to the Plaintiff's argument that voluntary, versus  
3 involuntary, testimony should be permitted. However, the declaration does not help the  
4 Plaintiff's argument on whether foreigners may take a voluntary witness's testimony.

5  
6 The declaration begins by clarifying that the purpose of Article 277 is "to ensure that  
7 the Chinese judicial sovereignty over its subjects," like the witness, is not violated "by any  
8 foreign party," but here this Court would be violating the Chinese judicial sovereignty,  
9 without following "Chinese and international laws and conventions." Finally, the "deposing  
10 of [a] witnesses" is expressly given as an example of the "investigative power reserved for  
11 Chinese judicial and executive authorities." *Id.* Here, this Court would be exercising the  
12 investigative power normally reserved for the Chinese government.

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14 C. United States Supreme Court Caselaw

15  
16 The Plaintiffs cites to and relies substantially on *Animal Science v. Hebei*, a 2019  
17 United States Supreme Court case in which the Court considered the ability of the  
18 Defendant to comply with both United States antitrust laws and Chinese laws for exporting  
19 Vitamin C. 138 S. Ct. 1865 (2018). *Animal Science* was also briefly referenced in a law  
20 review article submitted by the parties for the prospect that Federal Rule of Civil Procedure  
21 44.1 "instructs that, in determining foreign law, 'the court may consider any relevant  
22 material or source.'" The Commonwealth's NMI R. Civ. P. 44.1 is virtually identical to the  
23 federal. *See* NMI R. Civ. P. 44.1, *see also* Fed. R. Civ. P. 44.1.

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25 In *Animal Science*, a Chinese law required price fixing while United States antitrust  
26 laws forbid price fixing. The Second Circuit had reversed the District Court because the  
27 Second Circuit held that under the abstention doctrine China's interests were greater in that  
28 conflict of law. The Supreme Court however vacated and remanded the Second Circuit's

1 decision for reconsideration of whether the defendant was, under Chinese law, in effect  
2 excused from United States antitrust laws. In doing so, it held a Court should afford  
3 respectful consideration of a foreign country's interpretation of its laws but was not bound  
4 by that interpretation. *Id.* (citing Fed. Rule Civ. Proc. 44.1). The Supreme Court, however,  
5 noted that "[t]he correct interpretation of Chinese law is not before the Court, and we take  
6 no position on it." *Animal Science v. Hebei*, 138 S. Ct. at 1875. Crucially, this Court has not  
7 been presented with an interpretation of Article 277 from the Chinese government. Thus, the  
8 holding in *Animal Science* is of minimal relevance to this proceeding.

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10         It found, however, that the Second Circuit should have made a more extensive  
11 review of the record and rather than relying on the *amicus curiae* brief from the Ministry of  
12 Commerce of the People's Republic of China in support of the Chinese sellers. *Id.* The  
13 Supreme Court held domestic courts are not bound by a foreign country's interpretation of  
14 its laws but not that the existence of such laws may be disregarded altogether. Nor may they  
15 be construed in a favorable way simply when convenient. Despite that holding, there is no  
16 indication that either the Second Circuit or Supreme Court considered any question related  
17 to the admissibility of evidence or testimony. Rather, the sole question was whether the  
18 defendant could comply with both United States antitrust law and Chinese laws for the  
19 foreign export of Vitamin C. *Animal Science. v. Hebei*, 837 F.3d at 193 (2nd Cir. 2016).  
20 Neither Court considered the applicability of Chinese law on a witness's testimony.

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24         D. Legal Opinion from Practicing Chinese Attorney

25         The Plaintiffs submits an opinion from a practicing Chinese attorney which contends  
26 that the witness would not be considered a witness under Chinese law and that Article 73 of  
27 Chinese Civil Procedure Law would permit the testimony. *See* Plaintiff's Un-Numbered  
28 Exhibit: Legal Opinions. The opinion explains that because the witness is acting as the

1 “designated corporate representative” that “[h]is participation is as a representative of  
2 Modern Investment, Inc., not as a witness in court.” *See* Plaintiff’s Un-Numbered Exhibit:  
3 Legal Opinions at 1-2.

4         It is difficult for this Court to understand how that could be true. The Plaintiffs seeks  
5 to have the witness sworn so that he can testify before this Court. The opinion provides little  
6 help to the Court because it devotes only two sentences to the issue without referencing any  
7 legal authority. *Id.* In a similar vein, the opinion asserts in one, admitting long, sentence that  
8 the witness can state the circumstances in which he took photos and videos. He would be a  
9 representative of the company and “not as a witness to provide evidences [sic] or testify in  
10 the court.” *Id.* at 2. Again, the opinion does not explain the reasoning behind the conclusion  
11 or cite to any legal authority. Needless to say, if the witness perjured himself prosecution  
12 may prove difficult if he is not considered a witness under, the forum country, China’s, law.  
13 Extradition could also prove difficult, especially if the Chinese government considers the  
14 testimony to have been conducted illegally.  
15

16  
17         Next the opinion explains that even if the witness would be considered a witness  
18 under Chinese law, Article 73 of Chinese Civil Procedure law permits his testimony. *Id.* at  
19 2-3. Based on the information provided, Article 73 covers when a witness may testify “by  
20 means of written testimony, audio-visual transmission technology or audio-visual materials”  
21 when unable to appear in Court for a variety of reasons, several of which would apply here.  
22 *Id.* This confuses the issue, however, because it permits the witness to testify before Chinese  
23 Courts, but does not address a witness testifying before a Court outside of China.  
24

25  
26         Perhaps Article 73 could permit a witness to testify internationally with the  
27 permission of a Chinese Court, however the Plaintiffs have not sought such permission.  
28 Even when one or more of the express provisions of Article 73 applies, Article 73 still

1 requires a Chinese Court versus a Saipan Court to make that determination. *Id.* For all of  
2 these reasons, the Court finds the opinion to be unpersuasive.

3 E. State Department Guidance on Voluntary Witnesses

4 The Plaintiff, as does the author of a law review article submitted by the parties,  
5 argues that Article 277 does not apply for voluntary testimony. However, State Department  
6 guidance directly addresses the question of voluntary testimony and judicial sovereignty in a  
7 document titled “Taking Voluntary Depositions of Willing Witnesses.”<sup>2</sup> It cautions  
8 “[j]udges from U.S. Federal, State, or local courts ... should not perform official functions  
9 in foreign countries **without the express written consent** of host country authorities”  
10 (emphasis added). *See* Defendant’s Opposition Brief (citing Consular Affairs, U.S. Depart.  
11 Of State, *Taking Voluntary Depositions of Willing Witnesses*, 7 Foreign Affairs Manual 920,  
12 at 923(a) (2013); available at <https://fam.state.gov/fam/07fam/07fam0920.html> (last visited  
13 March 31, 2021)). Although, the State Department does not and cannot use “must”  
14 language, under the separation of powers doctrine in guidance for courts who are outside of  
15 the Executive Branch, it does provide a compelling reason for its guidance. It explains “such  
16 actions may violate the judicial sovereignty of the host country.” *Id.* Despite a key factual  
17 error, a declaration the Court received in *Motorola* raises similar concerns. It notes that  
18 “deposing of [a] witnesses” is expressly given as an example of the “investigative power  
19 reserved for Chinese judicial and executive authorities.” *Motorola v. Hytera*, 365 F. Supp.  
20 3d 916, 927 (N. D. Ill. 2019). Here, this Court would be exercising the investigative power  
21 normally reserved for the Chinese government. *Id.*

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<sup>2</sup> *Taking Voluntary Depositions of Willing Witnesses*, U.S. Dep’t of State Bureau of Consular Affairs China  
Judicial Assistance Information (2019), available at [https://travel.state.gov/content/travel/en/legal/Judicial-  
Assistance-Country-Information/China.html](https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html) (last visited March 31, 2021).

1 A law article<sup>3</sup> submitted by the parties also argues that voluntary testimony should be  
2 permitted. The article provided some additional caselaw beyond what was in the briefs the  
3 parties had already submitted but did not materially affect the information already in the  
4 record. The author disagreed with the holdings in many of the cases because of radically  
5 different discovery procedures between the two countries. However, he did not cite to any  
6 case law which supports his opinion, in making his assertions. Nor do the Plaintiffs. Rather,  
7 as discussed above, at least six federal district courts have not permitted such testimony.  
8

9 F. Rule 43(a) of NMI Civil Procedure

10 Rule 43(a), provides that:

11 “At trial, the witnesses’ testimony must be taken in open court unless a  
12 Commonwealth law, the Commonwealth Rules of Evidence, these rules,  
13 or other rules adopted by the Supreme Court provide otherwise. For good  
14 cause in compelling circumstances and with appropriate safeguards, the  
15 court may permit testimony in open court by contemporaneous  
16 transmission from a different location.” NMI R. Civ. P. 43(a).

17 The Plaintiffs rely heavily on Rule 43(a) permitting video testimony because of the  
18 compelling circumstances posed by the COVID-19 pandemic while the Defendants argue it  
19 does not apply to a preliminary injunction hearing. This presents two questions for the court:  
20 1) Does Rule 43(a) contemplate international testimony? and 2) Are there appropriate  
21 safeguards in this instance?

22 The rules provide, under NMI R. Civ. P. 30(b)(4) that a remote deposition is deemed  
23 to take place where the questions are answered by the deponent. That means, in applying to  
24 this testimony, that despite the hearing taking place in Saipan that testimony would be given  
25 internationally in China for the purposes of the NMI Rules of Civil Procedure.  
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<sup>3</sup> Following the hearing the parties stipulated, on March 9, 2021, to the submission of an unmarked exhibit  
titled *Proving Chinese Law in the Courts of the United States: Surveying and Critiquing the Article 277 cases*  
by Richard Wagner, Esq., a visiting fellow at the East Asian Legal Studies Center, University of Wisconsin  
Law School.

1 Rule 43(a) gives no indication it contemplates international testimony. It is difficult  
2 for this Court to understand how Rule 43(a) could override another country's law to permit  
3 testimony which is illegal in the forum country. Consider too that under NMI R. Civ. P.  
4 30(h)(1)(c) depositions must be taken in the CNMI unless the parties agree otherwise. In  
5 other words, a lower standard would apply for international testimony than domestic  
6 depositions. Consider that a deposition, even only a small distance away in Guam, would  
7 require both parties' agreement while international testimony can proceed over the objection  
8 of a party. The Court takes this discrepancy as further indication that Rule 43(a) does not  
9 contemplate international testimony or even testimony outside of the CNMI.  
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11 Moreover, there are hardly appropriate safeguards, as required by Rule 43(a) when  
12 allowing video testimony, which can rectify a violation of another country's laws or ensure  
13 that a witness, testifying internationally, could be prosecuted for perjury should the need  
14 arise. The Court in *Banki* expressed concerns that video testimony (from Iran) reduces the  
15 "ordeal of testifying in a courtroom" and the effect that can have on a witness's veracity.  
16 *United States v. Banki*, 2010 WL 1063453 at 2 (S.D.N.Y. 2010) (quoting *United States v.*  
17 *Gigante*, 166 F.3d 75, 81(2nd Cir. 1998)). Even with video testimony becoming more  
18 common since 2010, the difficulty in prosecuting the witness in the CNMI for perjured  
19 testimony given in China could have a similar effect. Notably, the Commonwealth's  
20 Supreme Court observed "that the Philippines would not need to honor a custody or other  
21 order from a U.S. court" in upholding the trial court's decision not to allow a parent to bring  
22 their child to visit relatives in the Philippines during a family law case. *Inos v. Inos*, 2015  
23 MP 5, ¶ 11. To the same extent, extradition from China could prove difficult should the need  
24 arise. In conclusion, even if Rule 43(a) does contemplate international testimony this Court  
25 finds that appropriate safeguards do not exist to rectify a violation of another country's laws,  
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1 likely exposing the parties to the risk of arrest in China, nor are the necessary legal  
2 safeguards present to ensure the integrity of the witness's testimony.

3 G. Decision

4 In this question of first impression, the Court has carefully considered CNMI  
5 caselaw as well as caselaw from other jurisdictions. The parties have not provided, and the  
6 Court has not found any, caselaw in which a witness was permitted to testify from China.  
7 The Plaintiffs attempt to draw a distinction between voluntary and non-voluntary testimony.  
8 That distinction could be compelling; however, it is neither reflected in the plain text of  
9 Article 277 or the opinion they received from a practicing Chinese attorney. In fact, the State  
10 Department explains such testimony would be prohibited in a document titled *Taking*  
11 *Voluntary Depositions of Willing Witnesses* with violators facing arrest. These sources, as  
12 well as caselaw, overwhelming make clear that the motion must be denied. To the extent a  
13 genuine question may still remain about the meaning and application of Article 277 and  
14 whether it would be interpreted so narrowly, the moving party has not met its burden.  
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19 **CONCLUSION**

20 Based on the likely illegality of the testimony under Article 277, the criminal  
21 liability the parties could face, caselaw both in the CNMI and the rest of the United States,  
22 and the guidance from the State Department, the Plaintiff's motion to permit testimony  
23 internationally by video is **DENIED**.  
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25 **SO ORDERED** this 8th day of April, 2021.

26  
27 /s/  
28 **ROBERTO C. NARAJA**, Presiding Judge