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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN LEUNG, Defendant.	Case No. CR-09-0110 (SI) **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR RELEASE ON BAIL PENDING APPEAL** Date: August 30, 2103 Time: 11 a.m. Judge: The Honorable Susan Illston

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INTRODUCTION

Defendant Steven Leung was convicted following a jury trial in this matter of violating the Sherman Ant-Trust Act. He was sentenced on April 30, 2013 to a term of 24 months in prison. See Dkt. 1149. At that time, the court scheduled a self-surrender date of September 9, 2013.

By this motion, defendant seeks an order granting his release on bail pending appeal. As set forth below, his continued release would pose neither a flight risk nor a danger to the community, and his appeal has not been taken for the purpose of delay. Furthermore, the claims he will advance on appeal, including those complaining of juror misconduct and bias as well as those raised by his previously convicted co-defendants, must be deemed "fairly debatable," and hence "substantial," within the meaning of the governing bail statute.

ARGUMENT

I. THE DISTRICT COURT MUST ORDER RELEASE ON BAIL PENDING APPEAL WHERE A DEFENDANT ESTABLISHES THAT HE IS NOT A FLIGHT RISK; THAT HE IS NOT A DANGER TO THE COMMUNITY; THAT HIS APPEAL IS NOT TAKEN FOR PURPOSES OF DELAY; AND THAT HE RAISES A SUBSTANTIAL ISSUE ON APPEAL

The statute governing release pending appeal, 18 U.S.C §3143(b), provides, in relevant part, as follows:

> **Release or detention pending appeal by the defendant – (1)** Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –
>
> > **(A)** by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
> >
> > **(B)** that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in —
> >
> > > **(I)** reversal;
> > >
> > > **(ii)** an order for a new trial,
> > >
> > > **(iii)** a sentence that does not include a term of imprisonment; or

> **(iv)** a reduced sentence to a term of imprisonment less than the total of time already served plus the expected duration of the appeal process.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title . . . [1]

The Ninth Circuit addressed the "substantial issue" prong of the test for release pending appeal in *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985). In *Handy*, appellant was denied release by the district court which had rejected his suppression motion. The Ninth Circuit remanded the matter for reconsideration, defining a "substantial question" as a "fairly debatable question that calls into question the validity of the judgment." *Id*. at 1282-83.

> [P]roperly interpreted [under § 3143] "substantial" defines the *level of merit* required in the question presented and `likely to result in reversal or an order for a new trial' defines the *type of question* that must be presented.

Handy, 761 F.2d at 1281.

> As the D.C. Circuit stated in construing the meaning of 18 U.S.C. § 3143: [A] substantial question is one that is "fairly debatable," "fairly doubtful," or "one of more substance than would be necessary to a finding that it was not frivolous."

United States v. Perholtz, 836 F.2d 554, 555 (D.C.Cir 1987)(citing cases); *accord, United States v. Giancola*, 754 F.2d 898 (11th Cir.1985); *United States v. Randall*, 761 F.2d 122, 124-125 (2d Cir. 1985); *United States v. Miller,* 753 F.2d 19 (3rd Cir. 1985)(class of substantial questions includes one that is novel and not controlled by existing precedent).

The crux of the "substantial question" analysis is a reasonable basis for appeal, rather than a likelihood of success once the issues are fully developed:

> Congress did not intend to limit bail pending appeal to cases in which the defendant can demonstrate at the outset of appellate proceedings that the appeal will probably result in reversal or an order for a new trial . . . . [*R]equiring the defendant to demonstrate to the District Court that its ruling is likely to result in reversal is tantamount to requiring the District Court to certify that it believes its ruling to be erroneous. Such an interpretation of the Act would make a mockery of the requirement of*

[1] The remaining provisions of §3143(b) are inapplicable to the offenses at issue.

Fed.R.App.P. 9(b) that the application for bail be made.

Handy, 761 F.2d at 1280-81 (emphases added); *accord, Giancola, supra; Randall, supra.*

In *Handy,* the Ninth Circuit further expounded on the kind of issues that satisfy the "substantial question" requirement:

> The question may be "substantial" even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable.

Handy, 761 F.2d at 1281 (emphasis added)(quoting *D'Aquino v. United States*, 180 F.2d 271, 272 (11th Cir. 1950)(Douglas, Circuit Justice). Stated otherwise, the district court should consider " 'whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail.' " *Handy*, 761 F.2d at 1281 (quoting *Herzog* v. *United States*, 75 S. Ct. 349, 351 (1955)).

The question then is not whether this Court at this stage believes Mr. Leung *will* prevail on appeal, but rather whether the issue that he raises is of the type that make "fairly debatable" the validity of the judgment within the meaning of the bail statute, *Handy*, and related precedent.

II. MR. LEUNG'S CONTINUED RELEASE PENDING APPEAL WOULD NOT POSE A FLIGHT RISK OR A DANGER TO THE COMMUNITY

There can be no serious claim that Mr. Leung would present a flight risk should the court order his continued release pending appeal. As the court is aware, his pre-trial release was conditioned on execution of a substantial secured bond and he has faithfully complied with all conditions of such release. He underwent an initial trial where the jury reached no verdict. He obviously was aware that he could be convicted at a second trial and had ample opportunity to abscond before retrial if that was his intention, yet he voluntarily appeared to be tried a second time. He surrendered his passport before the conclusion of the retrial.

Furthermore, Mr. Leung has very substantial ties to the community. He, his wife, Bell, and his two children moved to the United States to live until all legal matters relating to his trial and conviction, including any incarceration, have been resolved. He and the two children are United States citizens. He has been employed by AUO since the time of his conviction and will remain so until any period of incarceration begins. In the meantime, he has concluded a long term lease for an apartment in San Ramon, near his brother and his family. Mr. Leung's children have attended, and will continue to attend school in the San Ramon school district. Mr. Leung's elderly parents, too, live in the Bay Area. *See* Exh. A (Declaration of Steven Leung, discussing these and related matters).

Perhaps most importantly, the court has authorized Mr. Leung's release from a date prior to trial, through the time of sentencing, and until the date of self-surrender. Such authorization necessarily rested on the Court's findings that Mr. Leung presented neither a flight risk nor a danger to the community. *See* 18 U.S.C §§3142(a), 3143(a) and (b). There is no factual basis for departing from those findings at this juncture.

III. THE APPEAL IS ADVANCED IN GOOD FAITH AND WILL RAISE A SUBSTANTIAL QUESTION OF LAW AND/OR FACT INVOLVING THE COURT'S DISPOSITION OF DEFENDANT'S CLAIM OF JUROR MISCONDUCT AND BIAS

Mr. Leung is not appealing his conviction or seeking bail on appeal for the purpose of delay; here again, no plausible factual basis appears for concluding otherwise. See §31432(b)(1)(B). Accordingly, this motion must be decided on the only remaining ground placed in issue by the bail statute, i.e., whether he will raise a substantial question of fact or law likely to result in, *inter alia*, reversal or an order for a new trial.

As the court well knows, in his post-trial motion for a new trial, Mr. Leung advanced a claim of juror misconduct and bias based on the sworn affidavit submitted by one juror, Loretta Simms, to the effect that certain female jurors, including juror C.B., had repeatedly discussed the facts of the case during the trial and had reached conclusions on the questions of guilt or innocence that no other evidence elicited at trial could alter. The court considered the claim on the merits but rejected defendant's evidentiary proffer on the grounds that Fed.R.Evid. 606(b)

foreclosed consideration of it.[2] For purposes of appeal, the Circuit must and will consider the averments in the Simms declaration to be true. If the Circuit finds that those averments state a claim of reversible error, it will reverse and either order a new trial or remand for an evidentiary hearing, with either remedy meeting the requirements of §3143(b)(1)(B). For that reason, and those that follow, the jury misconduct issue thus raises a fairly debatable, i.e., substantial question, within the meaning of §3143(b).

A. General Principles of Law.

1. Juror Bias

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.1998) (en banc); *see also Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982)

Consistent with these principles, "the bias or prejudice of even a single juror would violate [the defendant's] right to a fair trial." *Dyer*, 151 F.3d at 973 (citation omitted); *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"). And "the presence of a biased

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[2] Rule 606 is entitled "Juror's Competency as a Witness.: Subsection (b) states:

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *Dyer*, 151 F.3d at 973 n.2 (citation omitted). "Like a judge who is biased . . . the presence of a biased juror introduces a structural defect not subject to harmless error analysis. *Id.*, citing *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

"Voir dire plays a critical role in assuring criminal defendants that their Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge cannot fulfill [the] responsibility to remove prospective jurors who may be biased and defense counsel cannot intelligently exercise peremptory challenges." *United States v. Spaar*, 748 F.2d 1249, 1253 (8th Cir.1984). Although "[b]ias can be revealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *Gonzalez*, 214 F.3d at 1111-12, citing *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977).

Finally, a disqualifying bias may appear on a showing of either *actual* or *implied* bias. *Gonzalez*, 214 F.3d at 1111. "In essence, [a]ctual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Id*., at 1112 (internal quotations and citations omitted). If a defendant in the post-trial context shows that a juror "failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," then he has demonstrated actual bias entitling him to a new trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); accord, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir.2001). Whether a juror is dishonest is a question of fact. *Dyer,* 151 F.3d at 973.

2. Juror Misconduct

It is established beyond peradventure that a juror commits misconduct that may warrant dismissal when he or she disobeys the trial court's instructions. See, e.g., *United States v. Eldred*, 588 F.2d 746, 752 (9th Cir. 1978); *United States v. Almonte*, 594 F.2d 261, 267 (1st Cir. 1979).

As to the issue of premature discussions of a case, the Third Circuit has observed:

> There are a number of reasons for this prohibition on premature deliberations in a criminal case. *See generally* Lillian B. Hardwick & B. Lee Ware, *Juror Misconduct* § 7.04, at 7-27 (1988). First, since the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason. . . Second, once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion. Consequently, the mere act of openly expressing his or her views may tend to cause the juror to approach the case with less than a fully open mind and to adhere to the publicly expressed viewpoint. . .
>
> Third, the jury system is meant to involve decisionmaking as a collective, deliberative process and premature discussions among individual jurors may thwart that goal. . . Fourth, because the court provides the jury with legal instructions only after all the evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the court's instructions on the reasonable doubt standard. . . Fifth, if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence (as occurred here) and jurors form premature conclusions about the case, the burden of proof will have been, in effect, shifted from the government to the defendant, who has "the burden of changing by evidence the opinion thus formed."
>
> Finally, requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt.

See United States v. Resko, 3 F.3d 684 (3rd Cir. 1993). *See also United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010) (quoting the above excerpt from *Resko* and deeming post-verdict inquiry into pre-deliberation case discussion cognizable).

3. The Right to a Hearing

In *Smith v. Phillips*, *supra*, the Supreme Court held:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id., 455 U.S. at 215. See also *Dyer v. Calderon,* 151 F.3d 970, 974 ("[A] court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and

circumstances." (citing *Remmer v. United States,* 350 U.S. 377, 379 (1956) and *Remmer v. United States,* 347 U.S. 227, 230 (1954)); *see also United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) ("[T]the Supreme Court has stressed that the remedy for allegations of jury bias is a hearing, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.") A similar rule applies where a claim of juror misconduct is at issue. *Dyer*, 151 F.3d at 978; A*ngulo,* 4 F.3d at 847.

Of course, as *Angulo* observes, an evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias. *Angulo,* 4 F.3d at 847. "[I]n determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source. *Id.* (quoting *Hard v. Burlington N.R.R.*, 812 F.2d 482, 485 (9th Cir.1987)) In this case, however, the content of the allegations facially indicate the presence of serious bias and misconduct, as discussed further below.

B. Evidence and Claim Relating to Presence of Bias and Misconduct

1. Jury Voir Dire

At the commencement of voir dire, the Court was at pains to inform jurors that they were not to discuss the case with one another or anyone else in order to fairly assess the charges and evidence against Mr. Leung. 1 RT 38-41. One of the prosecutors himself began his questioning of the jurors with a lengthy statement concerning the importance of impartiality. 1 RT 76-79. Defense counsel opened her questioning by stressing the same theme. 1 RT 100-101.

In the course of its initial admonitions, the court specifically stated:

> One of the things I will tell you every single time that you leave the courtroom is you may not discuss this matter with each other or with anyone else until the case is over. And one of the promises you'll have to make if you are on the jury is that until the case is completed, you can't talk to people about it, you can't answer questions about it . . .
> . . .
>
> This is something that we are slowly coming to grips with, and sometimes jurors find it hard to follow those rules. And the

> problem is if the jurors break those rules and do communicate it can cause all kinds of problems in the case, including a mistrial which would mean we'd have to start all over again, which would be a real shame.

(1 RT 38-40)

> One of the problems that happens is if you talk about it, you may find that you are making up your mind or you are talking yourself into a position or you are persuading yourself about how you feel about the case.
>
> And another instruction you will get is you are not to make up your minds until you have heard all the evidence, you must wait until the end after you have heard all the evidence to decide the case.

RT 40-41.

The Court's preliminary instructions before the taking of evidence emphasized the same directives, i.e, that jurors were to keep an open mind and to refrain from reaching decisions about the case and talking to other jurors about it until the commencement of deliberations. 2 RT 158-59 (stressing, *inter alia*, that the prohibition specifically included case discussions with other jurors). Indeed, the court issued similar directives to the jurors on scores of occasions, usually at the onset of a recess, throughout the trial. *See* RT 324, 360, 402, 433, 505, 577, 621, 547, 715, 782, 833, 877, 922, 954, 985, 1056, 1090, 1119, 1141, 1187, 1223, 1260, 1270, 1336, 1416, 1516, 1564, 1593, 1613, 1662, 1694, 1726, 1772, 1807, 1847, 1887, 1907, 1949, 2036, 2062.

Finally, of particular significance, at the time the court gave its initial admonitions at the beginning of voir dire, the court specifically inquired, "Is there anybody here who couldn't promise not to communicate about the case until it's over?" 1 RT 39. No juror, including juror C.B, whose presence in the courtroom is confirmed by her short voir dire conducted moments afterwards (1 RT 43-44) and who is the subject of the Simms declaration, indicated that they could not do so. Very shortly thereafter, the court said, "So it will be important that you follow those rules, that there be no communication of any sort [about the case], electronically, orally or any other way until the case is over. Anybody who can't promise that?" 1 RT 40. Only one juror—*not* juror C.B.— responded to the question, with only a request for clarification of the

court's directive. *Id*.

2. Motion for a New Trial and the Court's Related Ruling

As noted, defendant's motion for a new trial relied in part on the affidavit of juror Simms as the basis for a claim of juror misconduct and bias. *See* Dkt. 1133, 1136; Exh. B (Simms declaration). In that declaration, Simms described her having heard other female jurors, specifically including juror C.B., repeatedly discussing the evidence in the case before the defense had begun to present evidence. The discussions, as reported, firmly supported the conclusion that such jurors had reached conclusions concerning the most fundamental issue in the case well prior to deliberations. See Exh. B. Defendant contended that this violation of the court's instructions and evidence of bias entitled him to a new trial or, at a minimum, an evidentiary hearing on the issue. Dkt. 1133, 1136 at 1-4.

The government opposed the motion on the procedural ground that both the motion and the juror claim were untimely. Dkt. 1144, at 1-8. In addition, as a substantive matter, the government argued that Fed.R.Evid. 606(b) prohibited consideration of the declaration, relying, *inter alia*, on *Tanner v. United States*, 483 U.S. 107 (1987) and various Ninth Circuit and extra-Circuit authorities. Dkt. 1144 at 8-11.

Following defendant's reply, the Court denied the motion in an order issued on May 2, 2013. Dkt. 1156. The court rejected the government's procedural claim but, relying primarily on *United States v. Williams-Davis*, 90 F.3d 490, 504-505 (D.C. Cir. 1996) and *United States v. Tierney*, concluded that Rule 606(b) operated to preclude consideration of the Simms affidavit. Dkt. 1156 at 3-4.

C. It is Fairly Debatable Whether Evidence of the Jurors' Pre-Deliberation Case Discussions Were Cognizable Notwithstanding Fed.R.Evid. 606(b)

It is clear that *if* the averments made by Ms. Simms had been confirmed at a hearing, they would have supplied a powerful basis for finding that defendant had been denied his Sixth Amendment right to a fair and impartial jury and a verdict untainted by misconduct, thereby entitling him to a new trial. Thus, the central issue on which Mr. Leung's jury claim will rise or

fall involves the scope of Rule 606(b) itself.

1. Admissibility of Pre-Deliberation Case Discussions As General Evidence of Misconduct

The question whether Rule 606(b) bars consideration of evidence of pre-trial discussions and deliberations has not been firmly resolved. To begin, as the government has conceded, the Rule itself "expressly bars juror testimony related to matters occurring *during jury deliberations."* Dkt. 1144 at 9:17-18 (emphasis in original). See also 3 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 6:21 (3d ed.2012) ("Because clear language in the provision limits proof of matters occurring 'during the course of the jury's deliberations,' it seems that Rule 606(b) does not apply to misconduct by jurors occurring prior to deliberations.")

Second, while the Supreme Court in *Tanner* invoked Rule 606(b) in declining to consider post-verdict claims that jurors had been using drugs and alcohol while sitting as jurors during trial, the Court did not expressly address the question whether the rule excludes juror testimony as to all matters occurring before or after deliberations.[3] Nor did the Court consider that question as to pre-deliberation conduct that, as here, violated the trial court's express and repeated instructions. In any event, as Mueller and Kirkpatrick observe, *Tanner* simply supplied "some argument" that Rule 606(b) may, as a temporal matter, be read so broadly as to exclude evidence of the type Mr. Leung has proffered.

Third, notwithstanding the government's new trial arguments to the contrary, the Ninth Circuit has not expressly adhered to a categorical rule barring consideration of pre-deliberation conduct or statements evincing misconduct or bias. Indeed, the Circuit has suggested that opposite is true. Thus, in *United States v. Henley*, 238 F.3d 1111 (9th Cir.2001), after discussing why racist statements made by a juror were for other reasons not precluded under 606(b), the Court observed:

In this case, there would be even stronger reason to conclude that

[3] *Tanner* is invoked and discussed in *United States v. Williams-Davis*, *supra,* the D.C. Circuit case on which this Court's new trial order primarily relied.

> Rule 606(b) should not bar juror testimony regarding O'Reilly's alleged racist statements, because the statements in question were made *before* deliberations began and *outside* the jury room. Rule 606(b)'s primary purpose-the insulation of jurors' private deliberations from post-verdict scrutiny-would not be implicated by permitting juror testimony about what O'Reilly allegedly said while carpooling with other jurors.

Henley, 238 F.3d at 1121.

Finally, despite the provisions of Rule 606(b), at least one other Circuit has approved a post-verdict inquiry into the fact and substance of pre-deliberation discussions concerning a case as a means of determining the prejudicial effect of erroneous pre-trial instructions permitting such discussion. *See United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010). That decision, issued well after *Tanner*, cannot be squared with the reading of Rule 606(b) that pre-empted inquiry into defendant's juror claim in the present matter.

In light of the above, the proposition that Rule 606(b) categorically bars examination of a misconduct or bias claim based on discussions concerning the nature and significance of evidence that occur before deliberations have begun is, at least in this Circuit, a "fairly debatable' within the meaning of the bail statute. The issue, moreover, is one that *should* be debated both because the Simms declaration proffered by Mr. Leung so strongly suggests a denial of his right to a fair trial and since its consideration would do nothing to invade the sanctity or secrecy of the formal deliberations themselves.

2. Admissibility of Pre-Deliberation Case Discussions as Evidence of Dishonesty and Bias on Voir Dire

Putting aside the question whether evidence of the jurors' pre-deliberation case discussions were cognizable as a general matter, the Ninth Circuit has recognized an independent basis on which the court arguably should have considered it. Specifically, this Circuit adheres to the rule that "[s]tatements [offered in support of an application for a new trial] which tend to show deceit during *voir dire* are not barred by [Rule 606(b)]." *Hard v. Burlington Northern R.R.,* 812 F.2d 482, 485 (9th Cir.1987); *accord*, *Henley, supra*, 1121 (citing Hard; and stating, "[i]f appellants can show that a juror 'failed to answer honestly a material question on voir dire, and then further show that a correct response would have

provided a valid basis for a challenge for cause,' then they are entitled to a new trial." [quoting *McDonough Power Equipment, Inc., supra,* 464 U.S. at 556]). Regardless of any Circuit split on this question, the Ninth Circuit's holding on this point is binding on all other Ninth Circuit panels and on this Court. *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004).

Aware of its central importance to ensuring a fair trial, this court directly asked jurors at the commencement of voir dire whether any jurors could not promise adherence to the rule against talking to others about the case prior to deliberations. None of the jurors, including juror C.B., stated or suggested that they would have any such difficultly. Nor did juror C.B. volunteer anything when counsel engaged other jurors on their ability to remain impartial. *See, e.g.*, RT 100, et seq.

Ms. Linn's affidavit, however, avers that juror C.B. and others repeatedly broke their promise and defied the court's directive once the evidentiary phase of trial was underway. A truthful answer on voir dire that they could not or would not refrain from communicating with others about the case before deliberations would have provided a valid basis for a challenge for cause. Certainly this is at least *arguably* or *debatably* true under *Hard*, such that Mr. Leung should have been afforded a hearing on his claim, and this is all that is required for purposes of satisfying the *Handy* criteria. Accordingly, an order granting Mr. Leung's release on bail pending appeal is in order.

IV. THE CLAIMS ADVANCED ON APPEAL BY OTHER DEFENDANTS CONVICTED AT MR. LEUNG'S INITIAL TRIAL, WHICH MR. LEUNG WILL ALSO ADVANCE ON APPEAL, LIKEWISE RAISE SUBSTANTIAL QUESTIONS OF FACT AND LAW WITHIN THE MEANING OF THE BAIL STATUTE

Prior to Mr. Leung's retrial in this matter, his counsel secured the court's ruling that all his previous motions and objections in the matter were preserved. 1 RT 2, 12-13. That being so, in the course of his appeal, Mr. Leung intends to advance several arguments that have been advanced by his previously convicted co-defendant, AUO Corporation. As applied to Mr. Leung, those arguments include the following: (1) defendant's convictions must be reversed because the government failed to plead and prove the elements of a rule of reason case as

required by the Ninth Circuit's ruling in *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996); (2) the indictment was deficient because it failed to plead the requirements of the FTAIA, and the district court constructively amended the indictment by allowing the government to proceed based on theories not pleaded; (3) The government failed to prove the elements of the FTAIA; and (4) The indictment did not allege, and the jury was not required to find proven, the elements of an intent to negatively affect, and a substantial effect on, United States commerce.

All such arguments are set forth in the opening and reply briefs that AUO has filed in its appeal, attached hereto as Exhibits C (opening brief excerpts) and D (reply brief excerpts). Oral argument on the AUO appeal has been scheduled for October 18th, only six weeks after this motion for bail pending appeal is to be heard. Mr. Leung recognizes that this Court has previously ruled that the foregoing claims did not raise issues that were substantial for purposes of the bail statute, but that was before the matter was briefed in the Ninth Circuit. He submits that AUO's appellate briefing plainly establishes that the issues raised therein, which will be raised in Mr. Leung's appeal as well, are indeed substantial and fairly debatable.[4]

CONCLUSION

For the reasons stated, this Court should issue an order releasing Mr. Leung on bail pending appeal.

Dated: August 16, 2013

Respectfully submitted,

Dennis P. Riordan
Donald M. Horgan

RIORDAN & HORGAN

By /s/ Dennis P. Riordan
Dennis P. Riordan

Attorneys for Defendant
STEVEN LEUNG

[4] Such appellate briefing is also cognizable as a matter of judicial notice under Fed.R.Evid. 201. *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir.2002)