Nos. 12-10493, 12-10560

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

versus

HSUAN BIN CHEN,

Defendant-Appellant-Cross-Appellee.

On Appeal From the United States District Court for the Northern District of California
The Honorable Susan Illston
District Court Case No. 09-cr-00110-SI

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RELEASE PENDING APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

On December 21, 2012, in response to an order of this Court on the same day, the district court issued its "Order Stating Reasons for Denying Defendants' Motions for Bail Pending Appeal." The Order makes no finding that Mr. Chen is a flight risk and thus confirms that Mr. Chen has met his burden of proving by clear and convincing evidence that, if released pending appeal, he "is not likely to flee." 18 U.S.C. § 3143(b)(1)(A). Given Mr. Chen's exemplary conduct while defending himself in this matter for over two years, the evidence permits no other conclusion, as the district court recognized both in its clarifying order and when it declared at sentencing that Mr. Chen was "cooperative with the court and responsible with the court and ha[d] come to court when [he was] ordered to come to court and ha[d] shown relatively little inclination to be a flight risk." (*See* Dkt. 963 at 59).

That being so, the government's legitimate interest in enforcing the judgment below will not be threatened by a grant of release pending appeal. Mr. Chen will be available to serve his sentence should his conviction be affirmed. Mr. Chen's equally legitimate interest in pursuing his appeal, however, would be rendered hollow if his motion for release pending appeal

is denied. In that case, Mr. Chen would serve much, if not all, of his sentence before its legality is determined by this Court.

The district court's statement of reasons also effectively demonstrates that the only disputed requirement for release—the existence of "a substantial question," which, if resolved in Mr. Chen's favor, will "likely [] result in reversal"—has been met as well. 18 U.S.C. § 3143(b)(1)(B). In addressing the most obvious example of a substantial question, the lower court could not and did not dispute that this Court announced in *Metro Industries* the broad holding that "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845 (9th Cir. 1996). It is undisputed that all of Mr. Chen's conduct occurred overseas. He never committed a single relevant act in the United States. Because the indictment and the government's proof at trial focused overwhelmingly on foreign conduct, this case falls under the *Metro Industries* rule.

To justify its refusal to require the government to plead and prove an antitrust violation under the rule of reason standard, the district court declared that *Metro Industries* was factually and legally distinguishable from the

present case, and that the decision had not directly addressed the applicability of its holding to an allegation of price fixing. The district court relied on the same reasoning in finding that *Metro Industries* does not raise a substantial question. But whether an exception should be carved out of a categorical rule is, most assuredly, a question that is "new and novel." *United States v. Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985).

Nor, as demonstrated below, is the *Metro Industries* issue the only "fairly debatable question that calls into question the validity of the judgment" against Mr. Chen. *Id*. at 1282-83. All requirements of 18 U.S.C. § 3143(b)(1) having been met, Mr. Chen is entitled to release on bail pending appeal.[1]

II. ARGUMENT

The district court's order demonstrates its own faith in the correctness of its prior rulings on several complex issues. That expression of belief does not address the question now before this Court. An appellate issue that is "fairly debatable" must be deemed substantial "even though the judge or justice hearing the application for bail would affirm on the merits of the

[1] Mr. Chen joins and incorporates by reference the arguments made by co-defendant Hui Hsiung in his Supplemental Memorandum in Support of Motion for Bail Pending Appeal.

appeal." *United States v. Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985) (quoting *D'Aquino v. United States*, 180 F.2d 271, 272 (9th Cir. 1950) (Douglas, Circuit Justice)). "Fairly debatable" questions include those that are novel, are not "plainly covered by the controlling precedents," or are "debatable among jurists of reason." *Id*. at 1281-82 (internal citations and quotations omitted). As Mr. Chen fully explained in his motion for release pending appeal, he will present at least three substantial questions to this Court.

A. *Metro Industries* Requires That Mr. Chen Only Be Prosecuted Under the Rule of Reason

There is no doubt that the alleged conspiracy in this case counts as foreign conduct: the participants were almost exclusively foreign, the acts were predominantly foreign, the targets and effects were global. *Cf. Dee-K Enters., Inc. v. Heaveafil SDN. BHD.*, 299 F.3d 281, 294 (4th Cir. 2002) ("courts should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic"). As noted above, under Ninth Circuit law, "where a Sherman Act claim is based on conduct outside the United States"—as is the case here—"we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Metro Indus.*, 82 F.3d at 845.

The district court identified one reason for distinguishing *Metro Industries* from this case. According to the district court, "the alleged restraint in *Metro Industries* involved a 'previously unexamined business practice,' and the court found that the 'novelty of this arrangement' required the rule of reason analysis." (Dkt. 1094 (quoting *Metro Indus.*, 82 F.3d at 844).) This reasoning, however, does not address *Metro Industries*' alternative holding, in a separate section of the opinion, that "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." 82 F.3d at 845. The *Metro Industrie*s opinion spoke in sweeping terms: "Foreign Conduct Cannot Be Examined Under the *Per Se* Rule." *Id.* Because foreign conduct may affect United States commerce differently than domestic conduct, a *per se* analysis is inappropriate in such cases, "regardless of the inherently suspect appearance of the foreign activities." *Id.* This Court specifically alluded to price-fixing in its discussion of these "foreign activities." *Id.*

Each of *Metro Industries's* alternative holdings carries the same force of law. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"); *Best Life Assur. Co. of Cal. v. C.I.R.*, 281 F.3d 828, 834

(9th Cir. 2002). The three-judge panel that hears Mr. Chen's appeal will therefore be compelled to apply the *Metro Industries* rule. *See Hulteen v. AT & T Corp.*, 498 F.3d 1001, 1009 (9th Cir. 2007). The "substantial nature" of Mr. Chen's lead claim for reversal is beyond dispute.

B. The Sherman Act Does Not Reach Mr. Chen's Extraterritorial Conduct

The Sherman Act does not have any express statement regarding its extraterritorial application. *See* 15 U.S.C. § 1. Accordingly, the district court relied on *Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993), to apply the Sherman Act's proscriptions to Mr. Chen's foreign conduct. (Dkt. 1094.) But as explained in Mr. Chen's motion, *Hartford Fire* does not apply to Mr. Chen's criminal prosecution and is no longer good law.

The district court's recent order does not even address the substance of Mr. Chen's argument, merely citing to *Hartford Fire* and moving on. (Dkt. 1094.) In particular, it does not acknowledge the recent authority that calls into question *Hartford Fire*'s continued vitality. In *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), and *Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491 (U.S.), the Supreme Court has reconsidered the reach of statutes that lack an express statement of extraterritorial application. Whether the

Sherman Act is vulnerable to comparable scrutiny is a "fairly debatable" question that justifies Mr. Chen's release on bail pending appeal.

C. The Government Did Not Meet Its Burden Under the FTAIA as a Matter of Law

The Foreign Trade Antitrust Improvement Act ("FTAIA") subjects foreign conduct to the Sherman Act only if it (1) targets the United States or (2) has a direct, substantial, and reasonably foreseeable effect on United States commerce. 15 U.S.C. § 6a. As the district court noted in its order, this issue was put to the jury. But the jury finding does not eliminate Mr. Chen's substantial question for two reasons.

First, a jury finding does not cure an indictment which fails to state an offense. *See* Fed. R. Crim. P. 12(b)(3)(B). As Mr. Chen explained in his motion for release pending appeal, the government failed to allege conduct meeting the FTAIA exclusions in the indictment. Second, regardless of the jury's finding, the evidence at trial did not meet either FTAIA exclusion as a matter of law. AUO sold and shipped its LCD-TFT panels abroad, where foreign companies incorporated them into consumer products that were sold throughout the world after changing hands multiple times. This does not prove conduct that targeted or had a direct effect on United States commerce. *See Animal Science Prods. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d

Cir. 2011); *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 456 (D. Del. 2007).

Because these are issues of first impression in the Ninth Circuit, they are substantial questions which merit release on bail pending appeal. *See Handy*, 761 F.2d at 1281 (substantial questions include those that are "novel" or "not plainly covered by the controlling precedents") (quoting *D'Aquino*, 180 F.2d at 272).

III. CONCLUSION

The grave liberty interest at stake in Mr. Chen's motion far outweighs the government's interest in immediate incarceration. And Mr. Chen's legitimate interest in challenging the legality of his conviction should not be rendered illusory by forcing him to sacrifice his liberty now when he is not a flight risk. Finally, the district court's repetition of the reasons why it believes its legal rulings were correct on the merits avoids entirely the question of whether those rulings raise "fairly debatable" issues. They do.

For the foregoing reasons, along with those explained in his Motion for Release Pending Appeal, and his Reply, Mr. Chen respectfully requests that the Court grant the motion.

Dated: December 31, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 31, 2012.

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

By: s/ Michael A. Attanasio
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