Nos. 12-10492; 12-10559

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

v.

HUI HSIUNG,

Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 3:09-cr-00110-SI
District Judge Susan Illston

DEFENDANT HUI HSIUNG'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR BAIL PENDING APPEAL

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INTRODUCTION

This Court remanded Dr. Hsiung's appeal to the district court to clarify what exactly "the reasons for its order denying * * * Hsiung's motion[] for bail pending appeal" were. Order at 3 (Dkt. 17). The district court's terse response—penned just three hours after this Court issued its remand order—is notable principally for what it does not say. For nowhere in its ruling does the Court suggest—let alone make any findings of fact—that Dr. Hsiung is a flight risk. That comes as no surprise, given that the district court had previously found that he 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." Hsiung Motion Ex. 1 at 59 (N.D. Cal. Dkt. 963). And more importantly for this Court, the omission greatly simplifies this bail proceeding. No longer must this Court resolve whether—as the government previously insisted—the district court denied bail because it deemed Dr. Hsiung a flight risk. Because there is no reason to disturb the finding that Dr. Hsiung is not likely to flee, all this Court must do is pass upon the *sole* rationale adopted by the district court in denying bail: the supposed lack of any "substantial question" posed by this appeal.

That rationale is deeply flawed and does not come close to outweighing the grave liberty interests at stake in this motion. The district court misapprehended what it means for an appellate question to be "substantial" under the Bail Reform

Act. The court simply repeated what it had already written when disposing of Dr. Hsiung's claims during the lower court proceedings. But the question at this point is not whether the district court still considers its merits ruling correct; the question instead is whether the court, despite its conclusions, nevertheless recognizes that the question itself is "fairly debatable." *United States* v. *Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985).

That makes sense. Were bail pending appeal possible only when the district court "believe[d] its ruling[s] to be erroneous," that "would make a mockery of the requirement * * * that the application for bail be made in the first instance in the district court." *Id.* Thus, a defendant seeking release pending appeal "need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks and alterations omitted); *see Handy*, 761 F.2d at 1281-82 (quoting *Barefoot* to define "substantial question").

The district court in this case lost sight of these principles. In denying Dr. Hsiung's motion, the court—not surprisingly—believed it had sound reasons for rejecting Dr. Hsiung's claims on their merits. But the relevant question is whether these issues are "fairly debatable"—that is, whether they are "new and novel," or

"raise important questions about the scope and meaning" of a controlling precedent, or "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." *Id.* at 1281.

There is. As Dr. Hsiung repeatedly argued in the district court, this criminal prosecution raises complex questions concerning whether and how the Sherman Act applies to foreign conduct. Because the Sherman Act claim is "based on conduct outside the United States," Dr. Hsiung argued that this Court's binding precedent in *Metro Industries, Inc.* v. *Sammi Corp.* required rule-of-reason analysis. 82 F.3d 839, 845 (9th Cir. 1996). And Dr. Hsiung further contended that the Sherman Act could not be stretched to criminalize his foreign conduct in light of the strong presumption against extraterritorial application of U.S. law. The district court erred in characterizing these important and novel questions as insubstantial. Dr. Hsiung is therefore entitled to remain free on bail until this Court answers these substantial questions.

I. *METRO INDUSTRIES* RAISES A SUBSTANTIAL QUESTION.

Throughout this prosecution, the district court has resisted the idea that *Metro Industries* applies to this case. But instead of analyzing whether that point is fairly debatable for purposes of resolving Dr. Hsiung's bail motion, the court merely repeated its view of the merits. And "repeat" is the operative word: The

district court simply reiterated what it had said in its prior denials of Dr. Hsiung's *Metro Industries* claim. *Compare* Hsiung Motion Ex. 6 at 5 (N.D. Cal. Dkt. 250) ("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. *Metro Industries* did not address * * * the *mens rea* standard in a criminal antitrust price fixing prosecution involving foreign conduct") (citation omitted), *and* Hsiung Motion Ex. 4 at 7 (N.D. Cal. Dkt. 923) ("[T]he *Metro Industries* case [i]s factually and legally distinguishable from this case"), *with* Order Stating Reasons For Denying Defendants' Motions For Bail Pending Appeal, Ex. 1 at 3 (N.D. Cal. Dkt. 1094) (identical). No doubt the district court stands by its decision on the merits. But the issue in this procedural posture is not whether the district court is right on the question; it is whether the question itself is substantial.

The district court thought *Metro Industries* posed no substantial question because the Sherman Act § 1 violation at issue there—a market-division claim—was not the same Sherman Act § 1 violation at issue here—a price-fixing claim. But *Metro Industries* announced a bright-line rule applicable across the board to *all* Sherman Act violations based on foreign conduct. A district court cannot balk at applying a bright-line rule simply because the rule has yet to have been applied to whatever idiosyncratic fact pattern happens to face the court. As this Court has

emphasized, a "broad rule" like the one announced in *Metro Industries* is a "rule that must be applied in the many factually distinct situations that come before the lower courts." *Musladin* v. *Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009).

Nor is there any question about the breadth of the *Metro Industries* foreign-conduct rule. The title of the section setting forth the bright-line rule says it all: "Foreign Conduct Cannot Be Examined Under the Per Se Rule." 82 F.3d at 844. And the Court repeated this rule (and its foreign-conduct trigger) in the very first sentence of the section: "[A]pplication of the per se rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-45. More telling still, the Court identified different types of restraints to which the bright-line rule would apply. Notable among those examples was "price fixing in a foreign country." *Id.* That example, along with the others—a "market division * * * occur[ing] in a foreign country" and "[a] foreign joint venture"—share only one common denominator: foreign conduct. *Id*. And just in case there were any lingering ambiguity about the scope of this rule, the Court concluded the section with yet another definitive pronouncement: "[W]here 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." *Id.* at 845.

The important point is that the district court's ruling—that "*Metro Industries* did not address the * * * standard in a criminal antitrust price fixing prosecution

involving foreign conduct," Order Denying Bail, Ex. 1 at 3—cannot be harmonized with what this Court itself said in *Metro Industries*. Because a price-fixing prosecution involving foreign conduct is "based on conduct outside the United States," this Court "appl[ies] rule of reason analysis to determine whether there is a Sherman Act violation." *Metro Industries*, 82 F.3d at 845.

In refusing to apply this bright-line rule, the district court also quoted from a different section of *Metro Industries* that concluded that the particular restraint at issue in the case was a "previously unexamined business practice" warranting rule-of-reason analysis. *Id.* at 844. But this ruling (in Part I.A of *Metro Industries*) does nothing to undermine the force of the decision's other holding (in Part I.B) that all foreign conduct is subject to rule-of-reason analysis. *See English* v. *United States*, 42 F.3d 473, 485 (9th Cir. 1994); *see also United States* v. *Wright*, 496 F.3d 371, 375 n.10 (5th Cir. 2007) (explaining that it is "well-settled that alternative holdings are binding"); *Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003) (similar). Accordingly, the district court erred in narrowly focusing on the holding in *Metro Industries* that does not apply here, rather than the holding that does.

But this Court need not at this point even resolve whether the district court erred on the merits. At this stage, all that matters is that our interpretation of *Metro Industries*, if not indisputably correct, is at least fairly debatable. Indeed, that debate has already started to play out in the federal courts. Some, like the district

court here, have refused to apply *Metro Industries* to price fixing. *See, e.g.*, *eMag Solutions, LLC* v. *Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1061 (N.D. Cal. 2006). Others have understood this Court's bright-line rule to govern *all* restraints involving foreign conduct. *See, e.g.*, *United States* v. *Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 194 (D. Mass. 1999) (interpreting *Metro Industries* "to apply the rule of reason to a price-fixing case just because the defendant is foreign") (emphasis omitted); *Dee-K Enterprises, Inc.* v. *Heveafil Sendirian Berhad*, 299 F.3d 281, 286 n.2 (4th Cir. 2002) (observing that in *Metro Industries* "the Ninth Circuit * * * suggested that the foreign-conduct question affects the substantive analysis of a particular offense under the antitrust laws"); *United States* v. *LSL Biotechnologies*, 379 F.3d 672, 697-698 (9th Cir. 2004) (Aldisert, J., dissenting and discussing an issue not addressed by the majority) (interpreting *Metro Industries* to require rule-of-reason analysis for a horizontal trade restraint that involved foreign conduct).

This "contrariety of views concerning" *Metro Industries* demonstrates that Dr. Hsiung has raised a substantial question. *Handy*, 82 F.3d at 1281 (internal quotation marks omitted). "[I]n the interests of the administration of justice" this Court "should give directions to its district judges" and "some clarification of [the] existing rule should be made." *Id.* Because Dr. Hsiung's reliance on *Metro*

Industries is "an appeal to precedent" that at least "might possibly prevail," he has raised a substantial question entitling him to bail pending appeal. *Id.*

II. THE EXTRATERRITORIALITY ISSUE LIKEWISE PRESENTS A SUBSTANTIAL QUESTION.

The district court's two-sentence adjudication of Dr. Hsiung's extraterritoriality argument likewise misapprehends the law and the limited nature of the inquiry in this bail proceeding. According to that court, the extraterritoriality issue is not substantial because "the [Supreme] Court has repeatedly held that the Sherman Act applies to foreign conduct that was intended to produce, and did produce, an effect in the United States." Order Denying Bail, Ex. 1 at 3 (citing *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796-97 & n. 24 (1993)). But that observation says nothing about whether the Supreme Court's more recent decisions have vitiated this "effects" test for extraterritorial application—"an important question[] concerning the scope and meaning" of Supreme Court precedent. *Handy*, 82 F.3d at 1281. Nor did the district court consider the "new and novel" question whether the Sherman Act's criminal prohibitions have a more limited reach than its civil provisions. *Id.* Because these qualify as "substantial questions" under *Handy*, Dr. Hsiung's extraterritoriality arguments also warrant bail pending appeal.

The district court's principal error was starting and stopping its extraterritoriality analysis with case law that is nearly 20 years old. What it should have done—but never did—was examine the Supreme Court's more recent and muscular case law on extraterritoriality The Supreme Court has now set forth its own bright-line rule for determining with certainty whether a statute does or does not apply to conduct occurring beyond U.S. borders: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). Period. There are no (as yet) recognized exceptions to this rule. The district court therefore could not meaningfully assess whether Dr. Hsiung's extraterritoriality argument presented a fairly debatable question when it failed even to acknowledge *Morrison* or the evolution of Supreme Court doctrine.

The district court's anachronistic approach to the question is particularly surprising, since this Court has recognized that "*Morrison* shows the [Supreme] Court's interest in the extraterritorial application of statutes." *Pakootas* v. *Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1221 n.45 (9th Cir. 2011). Indeed, since *Morrison*, courts have found it necessary to reconsider the extraterritorial reach of other laws. *E.g.*, *Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491 (U.S.) (ordering supplemental briefing and reargument in the Supreme Court on the question whether the Alien Tort Statute applies extraterritorially). The Second Circuit, for

example, recently relied on *Morrison* to hold that the Racketeer Influenced and Corrupt Organization Act (RICO) does not extend beyond U.S. borders. *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010). According to the court, *Morrison* "wholeheartedly embrace[d] application of the presumption against extraterritoriality" with a "bright line" clear-statement rule, and abrogated prior precedent using a "conduct and effects" test to measure RICO's extraterritorial application. *Id.* at 33. It is surely "fairly debatable" whether the same analysis applies to the "effects" test under the Sherman Act. And in any event, *Hartford Fire* arose in the civil context and does not automatically apply to this criminal prosecution, with Dr. Hsiung's freedom on the line. As commentators have noted, this case marks the first occasion in over a decade for "courts to grapple with unresolved issues concerning the Sherman Act's territorial reach in a criminal setting." Mark S. Popofsky & Anthony Biagioli, *The Sherman Act's Extraterritorial Criminal Reach: Unresolved Questions Raised By* United States v. AU Optronics Corp., CPI Antitrust Chronicle 11 (Aug. 2011), *available at* http://www.ropesgray.com/files/upload/20110831_ PopofskyBagioliAug-11(2).pdf.

But again, it is important to keep in mind that Dr. Hsiung need not prove at this preliminary stage that he is likely to prevail on these arguments. To justify his release on bail pending appeal, it suffices that there is "a school of thought, a

philosophical view, * * * an analogy, [and] an appeal * * * to reason" that *Hartford Fire* is no longer good law—not to mention a "new and novel" question concerning how to interpret the Sherman Act's criminal prohibitions. *Handy*, 761 F.2d at 1281 (internal quotation marks omitted). Because these extraterritoriality arguments fall squarely within this Court's definition of a substantial question, Dr. Hsiung is entitled to bail pending appeal.

CONCLUSION

The Seventh Circuit once observed that it "would not regard a decision to grant bail pending appeal as a concession by the trial judge that he lacked confidence in his decision, but rather as an acknowledgement that some legal questions are simply harder to resolve than others." *United States* v. *Shoffner*, 791 F.2d 586, 588 n.3 (7th Cir. 1986). Those hard questions abound here. Indeed, the district court itself confessed that this unprecedented prosecution repeatedly placed the court and the parties in "unchartered waters." Hsiung Motion Ex. 3 at 6 (N.D. Cal. Dkt. 822, Tr. 4699). Because Dr. Hsiung has satisfied the requirements of the Bail Reform Act, he should not be forced to serve a substantial portion of his sentence while this Court resolves these hard questions.

For the foregoing reasons, and for the reasons in Dr. Hsiung's initial motion and reply, this Court should grant release pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Memorandum was electronically filed with the Clerk using the appellate CM/ECF system on December 31, 2012. I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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