No. 12-10492
(consolidated with 12-10493, 12-10500, 12-10514, 12-10558, 12-10559, 12-10560)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee Cross Appellant,

v.

HUI HSIUNG, HSUAN BIN CHEN, AU OPTRONICS CORPORATION, and AUO OPTRONICS CORPORATION AMERICA, INC.
Appellants Cross Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:09-cr-00110-SI
(Honorable Susan Illston)

SUPPLEMENTAL OPPOSITION OF THE UNITED STATES OF AMERICA TO DEFENDANTS HUI HSIUNG AND HSUAN BIN CHEN'S MOTIONS FOR BAIL PENDING APPEAL

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In response to this Court's Order, the district court has explained its reasons for denying defendants Hsuan Bin Chen and Hui Hsiung bail pending appeal. In their supplemental memoranda, defendants suggest this Court need not address whether defendants are flight risks because the district court did not rely on risk of flight in its most recent order explaining the denial of bail. Hsiung Supp. Mem. at 1; Chen Supp. Mem. at 1. But this Court must make an independent determination that defendants are not likely to flee before granting bail, Fed. R. App. P. 9(c), and the defendants bear the burden of demonstrating that fact by clear and convincing evidence, 18 U.S.C. § 3143(b)(1)(A). For the reasons set forth in the government's original opposition paper, the defendants have not met their burden.

Defendants also contend that the district court has "misapprehended" the standard for bail pending appeal because the order states only that the district court believed it had "sound reasons" for rejecting defendants' claims and not whether the issues themselves raise a substantial question. Hsiung Supp. Mem. at 1-2; *see also* Chen Supp. Mem. at 3-4. Undoubtedly, the district court does believe its rulings are correct. But it is equally clear from the court's order that it found defendants' appeal raises no substantial question because, for example, defendants' extraterritoriality argument is foreclosed by binding Supreme Court authority and their reliance on the factually and legally distinct *Metro Industries, Inc. v. Sammi Corp.* is unavailing. Order at 3-4 ("the applicability of *Metro Industries* does not

present a 'substantial' question"; "Defendants have not shown that [the application of the Sherman Act to foreign conduct] is a 'substantial question'"; "defendants have not shown a 'substantial' question as to the sufficiency of the evidence" on the Foreign Trade Antitrust Improvements Act's exceptions).

With respect to the reasons the district court provided for denying bail pending appeal, defendants largely repeat the arguments made in their original motion for bail pending appeal, none of which establish a substantial question of law or fact on appeal likely to result in reversal or a new trial.

1. Defendants claim that this case involves an impermissible application of the Sherman Act to foreign conduct but do not explain how this claimed error was properly preserved. In fact, defendants themselves requested the jury be instructed on the circumstances in which the Sherman Act applies to foreign conduct. Gov. Opp. Ex. J at 5-6, Ex. H at 28. A claimed error that is not properly preserved cannot justify granting bail pending appeal. *See United States v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985). Had this argument been properly preserved, it would still not present a substantial question because it is foreclosed by binding Supreme Court precedent establishing "that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24 (1993); *see also id.* at 814.

Defendants devote much of their supplemental memoranda to their hope that the Supreme Court will reconsider this "well established" proposition, *id.* at 814, in light of *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). Hsiung Supp. Mem. at 9-10; Chen Supp. Mem. at 6-7. But even if the Supreme Court did reconsider and hold that the Sherman Act does not apply extraterritorially—and *Morrison* provides no basis to do so—the issue would not present a substantial question because this case does not involve the extraterritorial application of the Sherman Act. Criminal conspiracies occur where any overt act in furtherance of the conspiracy by any co-conspirator occurs. *See United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986). Here, the trial record is replete with evidence that co-conspirators committed overt acts in the United States, including discussing TFT-LCD prices with competitors in the United States and marketing and selling price-fixed panels to U.S. companies.

2. Defendants' argument that their price-fixing agreement should have been evaluated under the rule of reason also suffers from several fatal flaws. Again, the argument does not present a substantial question likely to result in reversal or a new trial because defendants waived the argument in the district court when they abandoned any request that the jury be instructed on the rule of reason. Gov. Opp. Ex. I at 7 n.4. Even if it were properly preserved, the argument is based upon a fundamental misunderstanding of this Court's decision in *Metro Industries, Inc. v.*

Sammi Corp., 82 F.3d 839 (9th Cir. 1996). *Metro Industries* does not hold that a fact-finder must consider procompetitive justifications for a foreign price-fixing conspiracy. Indeed, no court has ever held that. And while defendants claim there is a debate on the issue in the federal courts, Hsiung Supp. Mem. at 6-7, even the cases they cite hold that price-fixing conspiracies, both foreign and domestic, are *per se* unlawful and not subject to the rule of reason. *See United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 194 (D. Mass. 1999) (It is "wrong to apply the rule of reason analysis to a price-fixing case *just because* the defendant is foreign."); *Dee K Enters., Inc. v. Heveafil Sdn. Bhd*, 299 F.3d 281, 286 n.2 (4th Cir. 2002) ("allegations that an antitrust case involves only foreign conduct [raises] a jurisdictional issue" and does not alter "substantive antitrust analysis"); *United States v. LSL Biotechs.*, 379 F.3d 672, 697-98 & n.10 (9th Cir. 2004) (Aldisert, J., dissenting) (finding Supreme Court "long ago held that international conduct such as price fixing and territorial allocations among horizontal competitors is *per se* unreasonable and hence *per se* unlawful under Section 1 of the Sherman Act").

Moreover, even if defendants' reading of *Metro Industries* were correct, it would still not present a substantial question on appeal because *Metro Industries* is factually distinct and thus, inapplicable here. The claim at issue in *Metro Industries* involved wholly foreign conduct, 82 F.3d at 845, while these

defendants' price-fixing conspiracy was carried out, in part, inside the United States.

3. Finally, Chen reiterates his claim that his appeal presents a substantial question as to whether "the government failed to allege conduct meeting the FTAIA exclusions in the indictment" and whether the evidence at trial met either FTAIA exclusion "as a matter of law." Chen Supp. Mem. at 7. As in his initial motion for release pending appeal, Chen fails entirely to explain why he believes the indictment was defective and makes only a conclusory assertion that the evidence was insufficient to prove the defendants' price-fixing conspiracy satisfied the FTAIA's effects exception (without even addressing the evidence concerning the FTAIA's other exception for conduct involving import commerce). Chen Supp. Mem. at 7-8. This is wholly insufficient to satisfy Chen's burden to show a substantial question likely to result in reversal or a new trial. *See United States v. Montoya*, 908 F.2d 450, 451 (9th Cir. 1990) (denying bail pending appeal when defendant failed to explain the basis of the claimed errors).

For the reasons set forth above and in the government's original opposition, defendants' motions for bail pending appeal should be denied.

Respectfully submitted.

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January 7, 2013

CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on January 7, 2013, I electronically filed the foregoing Supplemental Opposition of the United States of America to Defendant Hui Hsiung and Hsuan Bin Chen's Motions for Bail Pending Appeal, with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 7, 2013

/s/ Kristen C. Limarzi
Attorney