No. 12-10493

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v.

HSUAN BIN CHEN
Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:03-cr-00110-SI
(Honorable Susan Illston)

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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PRELIMINARY STATEMENT[1]

On October 2, 2012, the district court entered judgments of conviction against defendants Hsuan Bin Chen and Hui Hsiung for conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and sentenced them each to serve thirty-six months in prison and pay a $200,000 fine. Ex. D, E (Judgments, ECF Nos. 978, 980). The district court denied them bail pending appeal and ordered Chen and Hsiung to report to prison on November 30, 2012. *Id.* Defendants appealed their convictions and now seek bail from this Court, claiming that their arguments on appeal present a substantial question of law or fact likely to result in reversal or a new trial and that they are not flight risks.

Defendants' arguments all rest on the claim that, because their conduct was foreign, either the Sherman Act does not apply or the conspiracy must be evaluated under the "rule of reason," which would permit the fact finder to consider procompetitive justifications for the conspiracy. The substantial evidence that the conspiracy was carried out, in part, in the United States and involved and greatly impacted U.S. import commerce render these questions easily answered and the convictions readily affirmed. Moreover, defendants have not demonstrated by clear and convincing evidence that they are not flight risks. Thus, bail pending appeal should be denied.

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[1] Pursuant to the Court's order dated December 6, 2012, the United States is also filing this opposition in United States v. Hui Hsiung, No. 12-10492.

The indictment charged and the government proved that defendants conspired to fix the price of thin-film transistor, liquid crystal display panels (TFT-LCDs) sold in the United States and incorporated into desktop computer monitors and notebook computers sold in the United States. Before trial, the district court denied a motion to dismiss the indictment for failure to allege a "substantial and intended effect" in the United States as required for wholly foreign conduct by *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). Ex. F (Order Den. Defs.' Mot. to Dismiss the Indictment, ECF No. 287). The district court found that "unlike *Nippon* . . . the conspiracy alleged in the indictment is not based on 'wholly foreign conduct,' but alleges a conspiracy involving overt acts "both inside and outside the United States," and, thus, the concerns raised in *Hartford Fire* and *Nippon Paper* "simply do not apply." *Id.* at 4-5.

The district court also rejected defendants' motion to dismiss the indictment for failure to meet the requirements of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. *Id.* at 7-8. The FTAIA limits the reach of the Sherman Act when the conduct involves foreign commerce, but leaves the statute applicable when the conduct either involves import commerce or has a "direct, substantial, and reasonably foreseeable effect" on import commerce of the United States or commerce inside the United States. 15 U.S.C. § 6a. The district court

found that the FTAIA did not bar this prosecution because the indictment adequately alleged a domestic conspiracy with domestic victims. Ex. F at 7-8.

The district court also denied a motion to dismiss the indictment in which defendants argued that, under this Court's decision in *Metro Industries Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), defendants' price-fixing conspiracy is not a *per se* violation of the Sherman Act and must be evaluated under the "rule of reason." Ex. G (Order Den. Defs.' Mot. to Dismiss the Indictment and for a Bill of Particulars, ECF No. 250). The court found *Metro Industries* factually and legally distinct.

At trial, the district court instructed the jury consistent with the FTAIA, telling the jurors they must find beyond a reasonable doubt that members of the conspiracy engaged in one or both of the following: (a) "fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States or, for delivery to the United States," or (b) "fixing the price of TFT-LCD panels that were incorporated into finished products, such as notebook computers, desktop computer monitors, and televisions; and that this conduct had a direct[,] substantial[,] and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States."

Tr. 4721.[2] The district court had sustained defendants' only objection to part (a) of the proposed instruction, adding the word "targeted" as requested, Tr. 4699-700, but had rejected defendants' argument that part (b) of the instruction should not be given because the facts supporting such a finding were not adequately alleged in the indictment, Ex. H at 30 (Excerpt from Stip. and Party-Proposed Jury Instr., ECF No. 807).

At the defendants' request, the district court also instructed the jury on the application of the Sherman Act to foreign conduct. To convict, the jury had to find beyond a reasonable doubt one or both of the following: (a) "that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States," or (b) "that the conspiracy had a substantial and intended effect in the United States." Tr. 4720. Defendants all agreed that part (b) of that instruction was a correct statement of the requirements for "extraterritorial jurisdiction over foreign anticompetitive conduct, and should be given." Ex. H at 28. Defendants voluntarily relinquished any request that the jury be instructed on the rule of reason, and they stipulated to the price fixing instruction that was ultimately given to the jury. *Id.* at 15. The jury convicted defendants Chen and Hsiung, as well as their employers, AU Optronics Corporation (AUO) and AU

[2] Tr. refers to the trial transcript pages excerpted in Exhibit A. Sent. Tr. refers to the sentencing transcript pages excerpted in Exhibit B. GX refers to the government trial exhibits contained in Exhibit C.

Optronics America (AUOA).

After trial, the district court denied defendants' motion for acquittal or for a new trial. Ex. I (Order Den. Mot. for J. of Acquittal and for New Trial, ECF No. 920). The court found that defendants had waived any claim that their conduct should have been evaluated under the rule of reason by abandoning their proposed instructions and that, in any event, *Metro Industries* did not require a rule of reason analysis. *Id.* at 7 & n.4. The court further found that the evidence was sufficient to allow the jury to convict under the instructions given and that defendants "cannot be heard to complain" about instructions to which they had stipulated. *Id.* at 6 & n.3.

At sentencing, the district court found that the conspiracy affected $2.34 billion of AUO's commerce in TFT-LCDs that were incorporated into computer monitors and laptops sold for delivery to the United States. Sent. Tr. at 8-9. The court further found that Chen and Hsiung were organizers or leaders of the conspiracy, and sentenced each to serve 36 months in prison and to pay a $200,000 fine. *Id.* at 9, 19-20. Chen and Hsiung both sought bail pending appeal, but the district court denied that request, finding that defendants had not met any of the statutory requirements for release. *Id.* at 58 (listing requirements for bail pending appeal and stating "I don't find any of those things to be true").

Defendants now seek bail pending appeal in this Court, arguing that their

appeal raises three substantial questions of law: (1) whether the Sherman Act applies to defendants' conspiracy; (2) whether, under this Court's decision in *Metro Industries*, defendants' conspiracy must be evaluated under the rule of reason; and (3) whether the government proved that defendants' conspiracy is within the reach of the Sherman Act as amended by the FTAIA. Each of these arguments has been considered and rejected by the district court—some more than once. Indeed, the district court found that none of them raised a substantial question of law or fact. Sent. Tr. at 58.

Defendants attempt to characterize this case as an unprecedented application of the Sherman Act to a wholly foreign conspiracy. In fact, defendants' price-fixing conspiracy is not out of the ordinary. Like many others, the conspiracy involved both foreign and domestic conduct and had effects both inside and outside the United States. There is nothing novel about prosecuting such conduct under the Sherman Act. And defendants' claims of a substantial question rest on arguments that were waived in the district court, are foreclosed by Supreme Court authority, are contrary to the evidence, or are based on a misreading of circuit precedent.

STATEMENT OF THE FACTS

TFT-LCDs are a major component of desktop computer monitors and notebook computers—accounting for 70 to 80 percent of the cost of a finished monitor and 30 to 40 percent of the cost of a finished notebook computer. Tr. 525-26. Large

U.S. personal computer companies like Dell, Hewlett-Packard, Apple, and Compaq are major purchasers of TFT-LCDs, and the United States is the largest markets for those companies' monitors and notebook computers.

In September 2001, the major TFT-LCD suppliers in Taiwan and Korea entered into a pervasive and systematic conspiracy to fix the prices of TFT-LCD panels worldwide. Over the next five years, senior executives from AU Optronics Corporation (AUO) and its co-conspirators met on an almost monthly basis—sixty meetings in all—to agree on prices to charge their customers. Defendants Chen and Hsiung, AUO's highest ranking executives, participated in many of these meetings and also directed their subordinates to attend these meetings, take notes, and report on the matters discussed and prices agreed upon. Tr. 660-61, 3018-19, 3035-37; GX 15T. Representatives from the conspiring firms also met one-on-one in Asia and the United States to police and carry out the conspiracy. Tr. 884-86; GX 515T. Because so many of their price-fixed products were sold in the United States, the conspirators specifically discussed their major U.S. customers at many of their meetings. *See, e.g.*, GX 303T, 435T.

Knowing their conduct was illegal, the conspirators tried to maintain the secrecy of these meetings by varying locations, staggering arrivals and departures of attendees to avoid being seen together, limiting distribution of the meeting reports, and deleting incriminating emails. *See, e.g.*, Tr. 3007-10; GX 6T, 89,

302T. The conspiracy ended only when the FBI raided AUO's U.S. subsidiary, defendant AUOA, in late 2006. Tr. 1031. When it became known that the conspiracy had been uncovered, AUOA's employees attempted to rid their files of incriminating electronic evidence. Tr. 1041-44.

In all, the conspirators fixed the price of at least $71.8 billion in panels. Tr. 3311-13. Of that total, at least $23.5 billion in panels were imported into the United States in finished products like notebook computers and computer monitors and at least $638 million were imported as raw panels. Tr. 3309-16; GX 775. The average price per panel from 2001 to 2006 was $205, and during this time, the conspirators' margin per panel was higher by an average of $53 due to the conspiracy. Tr. 3326, 3357-61. All told, the conspirators reaped more than $2 billion in illicit gains at the expense of U.S. customers. Tr. 3378.

ARGUMENT

I. Standard for Detention after Conviction and Pending Appeal

Under the Bail Reform Act of 1984, a criminal conviction is presumed correct and "the burden is on the convicted defendant to overcome that presumption." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (*citing* S. Rep. No. 98-225, at 26 (1983)). Thus, a defendant convicted and sentenced to a term of imprisonment must be detained pending appeal unless a judicial officer finds "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" and "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 the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). This provision reflects Congress's view that "once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (quoting H. Rep. No. 91-907, at 186-87 (1970)).

A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (quoting *Giancola*, 754 F.2d at 901). And a substantial question is likely to result in reversal or a new trial only if the question is "so integral to the merits of the conviction" that an appellate holding to the contrary will likely require a reversal of the conviction or a new trial. *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23). Questions that are substantial yet harmless or insufficiently preserved do not satisfy the Bail Reform Act's requirements. *Id.* at 900-01. The defendant seeking release bears the burden of meeting the Act's requirements. *United States v. Wheeler*, 795 F.2d 839, 840 (9th Cir. 1986).

On appeal, this Court reviews the district court's legal determinations de novo but the "underlying factual determinations for clear error." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003).

II. Defendants Have Not Presented a Substantial Question Permitting Bail

Defendants' claim of a substantial question rests on their assertion that this prosecution involves a novel application of the Sherman Act to foreign conduct. But price-fixing conspiracies routinely involve acts both inside and outside the United States. There is nothing novel about prosecuting under the Sherman Act a price-fixing conspiracy that takes place, in part, inside the United States and involves and affects a substantial amount of U.S. commerce.

A. This Prosecution Does Not Involve an Extraterritorial Application of the Sherman Act

Defendants stand convicted of conspiring to fix the price of TFT-LCD panels—more than $23 billion of which were sold to customers in the United States either as raw panels or incorporated into notebook computers and computer monitors. The formation and execution of this massive, systematic conspiracy entailed acts both abroad, where the TFT-LCDs were manufactured, and in the United States, where the conspirators' unwitting customers were forced to pay higher prices for those TFT-LCDs because of the conspiracy. Criminal conspiracies like this one 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) ("Any conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country."). The trial record is replete with evidence of overt acts in the United States in furtherance of this price-fixing conspiracy.

Chen and Hsiung's co-defendant, AUOA, was a "branch office" of AUO located in the United States—a "tentacle" or "extension of AUO." Tr. 834-35. As AUOA's president, Hsiung directed AUOA employees in the United States to discuss TFT-LCD prices with their competitors, and to sell price-fixed panels to major U.S. companies like HP, Apple, and Dell. Tr. 825, 831, 858-59, 884-88; GX 84, 86, 89. For example, in November 2004, Hsiung discussed panel prices for Dell with a vice president at co-conspiring firm LG and then emailed AUOA employee Michael Wong in the United States. GX 89 ("I disclosed $140/$160/$250/$270 to him and he said that they will offer the same prices to Dell."). Hours later, Wong contacted Dell in the United States and offered the agreed-upon prices. GX 823.

That the conspiracy involved substantial anticompetitive conduct outside the United States does not immunize the conspirators from prosecution under the Sherman Act. And defendants do not cite a single case in which an indictment was dismissed or a conviction reversed because the price-fixing conspiracy involved conduct outside the United States as well as conduct inside the United States.

B. Supreme Court Authority Holds the Sherman Act Applies Extraterritorially

Even if this Court were to conclude that this case presents an extraterritorial application of the Sherman Act, it is well settled "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*, 509 U.S. at 796-97 & n.24; *see also id.* at 814 (Scalia, J., dissenting) ("We have . . . found the presumption [against extraterritoriality] overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.").

Relying on *Hartford Fire*, and at the defendants' request, the district court instructed the jury that, if it found the conspirators' conduct was wholly foreign, it could convict only if the conspiracy had "a substantial and intended effect in the United States." Tr. 4720; Ex. J at 5-6 (Defs.' Proposed Prelim. Jury Instr., ECF No. 411); Ex. H at 28. Defendants now claim that *Hartford Fire* is not good law and the district court's reliance on it raises a substantial question on appeal. But defendants waived any attack on *Hartford Fire* when they told the district court the instruction was correct and "should be given." Ex. H at 28. Because this claim of error was not properly preserved, it cannot justify granting bail pending appeal. *See United States v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985) (citing *Miller*, 753 F.2d at 23).

Moreover, defendants' mere hope that the Supreme Court will reconsider a legal proposition that all nine justices agreed was, by 1993, already well established cannot constitute a substantial question justifying bail pending appeal. Defendants suggest that the Supreme Court would decide *Hartford Fire* differently today based on a recent decision regarding one provision of the federal securities laws and an order of additional briefing in a case concerning the Alien Tort Statute. Hsiung Mot. at 12-13; Chen Mot. at 13-14. But the "well established" proposition that the Sherman Act applies to wholly foreign conduct does not become "fairly debatable" because the Supreme Court orders briefing in a case involving an entirely different statute. And the Court's conclusion—or possible future conclusion—that other statutes do not apply extraterritorially does not undermine the Court's decision in *Hartford Fire.*

Alternatively, defendants argue that *Hartford Fire* could be read narrowly to address only the extraterritorial application of the Sherman Act in civil cases. Hsiung Mot. at 13-14; Chen Mot. at 12-13. But defendants cite no language in *Hartford Fire* itself that supports such a reading, and the argument goes against bedrock principles of statutory construction. *See United States v. Thomson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion) (explaining that interpreting a criminal statute in a civil setting establishes its "authoritative meaning"). Section 1 of the Sherman Act is a criminal statute containing a single

operative phrase outlawing conspiracies in restraint of trade or commerce among the states or with foreign nations. "Under settled principles of statutory construction, [courts] are bound to apply [*Hartford Fire*'s holding] by interpreting Section One the same way in a criminal case." *Nippon Paper*, 109 F.3d at 9. The Sherman Act's "words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort." *N. Sec. Co. v. United States*, 193 U.S. 197, 401-02 (1904) (Holmes, J., dissenting).

Defendants rely on *United States v. Bowman*, 260 U.S. 94 (1922), for the proposition that the presumption against extraterritoriality applies differently to criminal statutes. Hsiung Mot. 13-14; Chen Mot at 12-13. But, like the defendant in *Nippon Paper*, they "misread[] the opinion." *Nippon Paper*, 109 F.3d at 6. *Bowman* did not suggest that "a different, more resilient presumption arises in criminal cases," but "merely restated the presumption against extraterritoriality previously established in civil cases like *American Banana*, 213 U.S. at 357." *Id.* The *Bowman* Court regarded *American Banana*, a Sherman Act case, as the appropriate analogy because the antitrust statute "is criminal as well as civil." 260 U.S. at 98. As the First Circuit explained, "[t]his seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the *Bowman* Court was attempting to craft a special, more rigorous rule for

criminal proceedings." *Nippon Paper*, 109 F.3d at 6 n.4. Although this Court has had no occasion to consider the impact of *Bowman* on the Sherman Act, defendants present no reason why this Court would disagree with the First Circuit's careful analysis of *Bowman*, and, thus, do not raise a substantial question. *See Giancola*, 754 F.2d at 901 (An issue "could well be insubstantial even though one could not point to controlling precedent" if there is "no real reason to believe that this circuit would depart from unanimous resolution of the issue by other circuits.").

C. Defendants' Conduct Is Not Subject to the Rule of Reason

Defendants also claim that the district court erred when it denied them the right to defend their conduct under the rule of reason. Ordinarily a fact finder determines whether conduct violates Section 1 of the Sherman Act on a case-by-case basis by examining any adverse effect on competition as well as any legitimate procompetitive justifications. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 119-20 (1984). This mode of analysis is called the rule of reason. But certain categories of agreements "are deemed unlawful *per se*," without the need for case-by-case evaluation, because they "always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 885-86 (internal quotations omitted).

Here, the government charged and proved that defendants participated in a price-fixing conspiracy—conduct which the Supreme Court has long held *per se* illegal under the Sherman Act. *United States v. Socony-Vacuum*, 310 U.S. 150, 222-23 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-99 (1927). Nevertheless, defendants argue that this Court's decision in *Metro Industries*, 82 F.3d 839, requires a rule-of-reason analysis here because defendants' price-fixing conspiracy involved some foreign conduct. Defendants have misread *Metro Industries* and, indeed, cannot cite a single case in which *Metro Industries* was read to require a rule-of-reason analysis of a price-fixing conspiracy.[3]

As an initial matter, this claimed error does not present a substantial question likely to lead to reversal or a new trial because, as the district court concluded, defendants waived the argument by "voluntarily abandoning their proposed rule-of-reason jury instructions and stipulating to the price-fixing instructions given to the jury." Ex. I at 7 n.4. Thus, it cannot justify bail pending appeal. *See Bilanzich*, 771 F.2d at 299.

[3] To the contrary, district courts in three separate cases, including this one, have rejected such a reading of *Metro Industries*. *See* Ex. G; *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050 (N.D. Cal. 2006); Order Den. Mot. to Dismiss Indictment or, in the Alternative, for Ruling as a Matter of Law Re: Rule of Reason, *United States v. Eagle Eyes Traffic Indus. Co., Ltd.*, No. 3:11-cr-00488 (N.D. Cal. Sept. 11, 2012).

In any event, *Metro Industries* did not hold that foreign price-fixing agreements must be examined under the rule of reason. Instead, this Court held that ordinary *per se* analysis is not appropriate in a case involving wholly foreign conduct because "conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States." *Metro Indus.*, 82 F.3d at 843. The Court did not hold that a fact-finder must consider any procompetitive justification for a foreign price-fixing conspiracy. Indeed, there are no procompetitive justifications for price fixing. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (Price fixing is "the supreme evil of antitrust.").

This Court held that "the potential illegality of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities." *Metro Indus.*, 82 F.3d at 845. This is nothing more than a restatement of the *Hartford Fire* Court's declaration 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." 509 U.S. at 796. Indeed, *Metro Industries* cites *Hartford Fire* for this point. 82 F.3d at 845.

Finally, *Metro Industries* does not raise a substantial question because it is factually distinct and, thus, inapplicable here. The claim at issue in *Metro*

Industries involved wholly foreign conduct, whereas the defendants here stand convicted of a price-fixing conspiracy involving both foreign and domestic conduct. *See Metro Indus.*, 82 F.3d at 845 (characterizing conduct as occurring outside the United States).[4] "*Metro Industries* does not hold that a case that alleges a *per se* violation of § 1 of the Sherman Act, but which also involves some 'foreign conduct' – e.g., an agreement involving both foreign and U.S. conspirators, which was hatched in a foreign country, but which was carried out at least partly in the United States – requires application of the 'rule of reason' analysis." *eMag Solutions*, 426 F. Supp. 2d at 1061.[5]

D. The Government Alleged and Proved Conduct Within the Reach of the Sherman Act as Amended by the FTAIA

Finally, Chen argues that his appeal presents a substantial question regarding the "scope and application of the FTAIA exclusions." Chen Mot. at 15-17. The FTAIA provides that all conduct involving foreign commerce is outside the

[4] Defendants claim that *Metro Industries* involved both foreign and domestic conduct, but again, they misread the opinion. The opinion concerns only the plaintiff's claim that the defendant and other exporters in Korea violated Section 1 of the Sherman Act when they established an export registration system. 82 F.3d at 843. In the background section of the opinion, the Court describes other allegations from a separate case, some of which involve domestic conduct, but the only conduct at issue on appeal was entirely foreign.

[5] As explained above at p. 12, in the event the jury concluded defendants' conspiracy involved wholly foreign conduct, they were instructed to convict only if the requirement of *Hartford Fire* and *Metro Industries* were met—that is, if the conduct had a "substantial and intended effect in the United States." Tr. 4720.

Sherman Act's reach except conduct involving import commerce (the import commerce exception) or conduct involving non-import foreign commerce that has a "direct, substantial, and reasonably foreseeable effect" on interstate commerce, import commerce, or certain export commerce (the effects exception). 15 U.S.C. § 6a; *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004). [6]

As an initial matter, Chen asserts in passing that the district court erred in refusing to dismiss the indictment for failure to allege conduct that meets these exceptions. Chen Mot. at 15. Such a conclusory assertion without any explanation cannot support bail pending appeal. *See United States v. Montoya*, 908 F.2d 450, 451 (9th Cir. 1990) (denying bail pending appeal where defense counsel claimed "the acts charged as money laundering were not properly the subject of a prosecution" but "does not tell us why").

Chen also claims that the district court misinterpreted the import commerce exception, and the exception is limited to conduct that "target[s] import goods or services." Chen Mot. at 16 (quoting *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011)). But the district court sustained defendants' only challenge to the jury instruction on the import commerce exception—

[6] Chen claims that this Court "has never considered the application or scope of these exclusions," Chen Mot. at 15, but that is not the case. *See United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004) (interpreting the FTAIA's effects exception). The jury instruction on the effects exception was consistent with *LSL*, and defendants did not object to the accuracy of that instruction.

specifically adding the word "targeted" as defendants requested. Tr. 4699-700; *see also* Ex. K at 4 (AUO Defs.' Resp. to United States' Mem. Re Final Jury Instr., ECF No. 814) ("The Court correctly inserted the 'targeted' language in the 'Elements of the Offense' instruction."). Thus, defendants cannot claim on appeal that the jury was improperly instructed on this point.

Finally, Chen claims that the evidence was insufficient to prove defendants' conspiracy fits within either the FTAIA's import commerce or effects exceptions. While the evidence need only be sufficient as to one of the exceptions for the guilty verdict to be affirmed, *see Griffin v. United States*, 502 U.S. 46, 56 (1991), the evidence supports both exceptions. Regarding the import commerce exception, Chen claims the evidence was insufficient to prove the defendants "fixed the prices of TFT-LCD panels *targeted* for sale or delivery to the United States" because AUO's TFT-LCD panels were "placed into foreign warehouses," then "incorporated . . . into consumer products . . . sold to consumers throughout the world." Chen Mot. at 16. Chen ignores evidence that, in addition to panels incorporated into consumer goods and sold in the United States and elsewhere, AUO and its co-conspirators sold more than $638 million in raw panels for delivery to the United States between October 2001 and June 2006. GX 775; *see also* Tr. 3310-11. That evidence was sufficient to allow the jury to find beyond a

reasonable doubt that defendants' conspiracy involved import commerce. *See* Ex. I at 6.

Regarding the effects exception, Chen asserts without explanation that defendants' conduct "cannot have a 'direct' effect on United States commerce within the meaning of the FTAIA." Chen Mot. at 17. The evidence showed that defendants fixed the price of TFT-LCD panels that accounted for 70 to 80 percent of the cost of a finished monitor and 30 to 40 percent of the cost of a finished notebook computer. Tr. 525-26. Many of those finished goods—60 to 70 percent of those assembled for Dell, for example—were imported into the United States. Tr. 2885-86. Thus, the jury could readily conclude that the inflated prices for TFT-LCDs charged by defendants and their co-conspirators directly resulted in inflated prices for finished products that were imported into the United States. And Chen's conclusory statement that this effect cannot be "direct" does not satisfy his burden to show a substantial question. *See Montoya*, 908 F.2d at 451 (denying bail pending appeal when defense counsel "fails to tell us in what respect the Government failed to prove [an] element and on what basis he draws that inference").

III. Defendants Have Not Established by Clear and Convincing Evidence That They Are Not Likely to Flee

The district court also determined that defendants Chen and Hsiung had failed to show by clear and convincing evidence that they were unlikely to flee. Sent. Tr.

at 58-59 (listing requirements for bail pending appeal and stating "I don't find any of those things to be true"). Defendants have not shown that this factual determination was clearly erroneous.

To the contrary, defendants pose a serious risk of flight. Both are Taiwanese nationals with residences in Taiwan. The United States has no extradition treaty with Taiwan, Sent. Tr. at 59, and would, in the event defendants fled to Taiwan, have no mechanism by which to obtain custody of them. Although defendants claim it would be impossible for them to flee the United States without their passports, in practice, passport controls for persons leaving the United States are imperfect. *United States v. Khanu*, 675 F. Supp. 2d 69, 71 (D.D.C. 2009) ("Although Defendant has surrendered his passport, it is not far-fetched to believe that a convicted felon facing prison time and deportation would attempt to flee to a nearby safe haven such as Mexico.").

Defendants have the financial means to flee. Although they have posted assets as bond, defendants have continued to earn substantial salaries while under indictment and even after conviction. For example, in 2011, Hsiung worked as a part-time consultant for two different companies, earning a six-figure annual salary. Chen and Hsiung also enjoy the support of AUO, which still employs them both and has substantial assets of its own.

Defendants' ties to the community also fail to demonstrate they are unlikely to flee. Although Hsiung is a naturalized U.S. citizen, he grew up in Taiwan and has resided there since 1996. Chen also resides in Taiwan and, because he is not a U.S. citizen, faces deportation after he serves his prison sentence. Because Chen will be unable to return to the United States after he completes his sentence, any ties he has to this country provide little assurance that he will remain here long enough to serve his sentence. *See Khanu*, 675 F. Supp. 2d at 71.

Finally, Chen and Hsiung contend that their prior compliance with the conditions of pre-trial release demonstrate they are not flight risks. But when they were placed on pre-trial release, the defendants had a much lower incentive to flee. Defendants knew the pre-trial, trial, and sentencing process would take years and may result in acquittal. Now, post-conviction and sentencing, the window of opportunity to flee is closing and, thus, the incentive to do so is greater now than before.

CONCLUSION

For the reasons set forth above, defendants' motions for bail pending appeal should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on December 10, 2012, I electronically filed the foregoing 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.

December 10, 2012 /s/ Kristen C. Limarzi
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