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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA, ) No. CR 03-95-WBS  
15 )  
16 Plaintiff, )  
17 v. )  
18 AMR MOHSEN and ALY MOHSEN, ) Date: January 24, 2006  
Time: 10:30 a.m.  
19 Defendants. ) Hon. William B. Shubb  
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**DEFENDANT AMR MOHSEN'S TRIAL BRIEF**

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20  
21 INTRODUCTION

22 To try to avoid a *Massiah* violation, the Court has bifurcated the trial in two phases. In the  
23 first phase, the jury will hear evidence and deliberate on counts 1-20. Then the jury will hear  
24 additional evidence and deliberate on counts 21-23. This first section of this trial brief raises  
25 issues relevant to the first phase of the trial. The second section raises issues in the second phase.  
26 And the final section raises issues common to both parts of the trial.  
27  
28

1 I. PHASE ONE OF BIFURCATED TRIAL (COUNTS 1-20)

2 **A. MATERIALITY**

3 **1. The Charges In The Superseding Indictment**

4 The defendant, Amr Mohsen and his brother, Aly Mohsen, have been charged in Count 1  
5 with conspiracy to obstruct justice and to commit perjury by fabricating the 1988 notebook and  
6 then committing perjury in testimony given in connection with the case of *Aptix v. QuickTurn*.  
7 (Indictment ¶¶ 1 - 19.) In Counts 2 through 4, Amr Mohsen has been charged separately with  
8 perjury concerning the 1988 notebook. (Indictment ¶¶ 21 - 26.) In Count 10, Amr Mohsen has  
9 been charged with subornation of the perjury committed by his brother, Aly Mohsen, with respect  
10 to the 1988 notebook. (Indictment ¶¶ 37 - 38.) In Counts 11 through 18, Amr Mohsen has been  
11 charged with attempting to commit mail fraud by falsifying the 1988 notebook. (Indictment ¶¶ 39  
12 - 40.) Finally, in Count 19, Amr Mohsen and his brother, Aly Mohsen, have been charged with  
13 obstruction of justice by creating the fraudulent 1988 notebook and by falsely backdating and  
14 witnessing certain entries in the 1988 notebook and thereafter falsely testifying under oath that  
15 they actually created and witnessed the entries on the dates reflected in the fabricated 1988  
16 notebook. (Indictment ¶¶ 41 - 42.)

17 **2. The Court's Interlocutory Decision**

18 On December 6, 2005, this Court denied the defendant's Motion to Dismiss Counts 1-4 and  
19 Counts 10 - 19 of the Superseding Indictment because "this court cannot determine before trial  
20 that the information in defendant's two engineering notebooks and in Amr Mohsen's testimony  
21 about those notebooks was immaterial as a matter of law." (Order re Defendant's Motion to  
22 Dismiss Counts 1-4 and 10-19, p. 12:11-14, hereinafter referred to as "Order.")

23 The Court based its ruling on four separate grounds.

24 First, the Court reasoned that QuickTurn's decision in April of 2000 to abandon the prior  
25 art that was reflected in the Butts' drawings that were dated between July 31, 1988 and September  
26 20, 1989 did not mean that those drawings were not valid defenses, but rather could mean that  
27 QuickTurn abandoned those items of prior art for strategic reasons such as to make its case  
28 simpler and more understandable to the jury. (Order p. 9:fn 3.)

1 Second, the Court held that at the time of the alleged perjury (1998 and 1999), the issue  
2 whether the '069 patent was conceived prior to August 1988 was still an issue because "at the time  
3 that the defendants undertook these acts and created a notebook falsifying the date of conception,  
4 when the invention was conceived was an open and important question." (Order p. 10:10-12.)

5 Third, the Court held that the information that was allegedly falsified in the 1988 and 1989  
6 notebooks "could have served as extrinsic evidence to help resolve ambiguity and further the  
7 Court's understanding of the patent. *See Vitronics Corp. v. Conceptronic Inc.*, 90 F.3d 1576,  
8 1583-84 (Fed. Cir. 1996)." (Order p. 11:10-13.)

9 Fourth, the Court held that "it seems unlikely that Aptix would be dismissed from the suit,  
10 and that dismissal would be affirmed by the Federal Circuit, for falsifying information that was  
11 immaterial to the patent case. The doctrine of unclean hands would not allow such an outcome . . .  
12 ." (Order p. 11:22 - 12:1.)

### 13 **3. Anticipated Rule 29 Motion**

14 Although this Court refused to grant our motion to dismiss these counts, we anticipate  
15 making a Rule 29 motion for judgment of acquittal at the end of the government's case based upon  
16 our contention that the government cannot prove that the 1988 notebook was material to the civil  
17 patent case. Since all of the counts are based on a scheme to obstruct justice and defraud  
18 QuickTurn by falsifying the 1988 notebook, we believe that the government has to prove that the  
19 1988 notebook was material to the civil patent case to prove perjury, subornation of perjury,  
20 obstruction of justice, conspiracy to obstruct justice, and mail fraud.

### 21 **4. Anticipated Evidence At Trial**

22 During the trial of this case, we do not intend to contest any of the evidence that the  
23 government presents concerning the falsification of the 1988 notebook. We intend to rely solely  
24 on the defense that the government cannot prove that the 1988 notebook was material to any issue  
25 that the judge or the jury would have to decide in the civil patent case.

26 The presumed conception date of the '069 patent was the filing date of the application for  
27 the patent, September 20, 1989. The first entry in the 1988 notebook is dated July 31, 1988. In  
28 the civil litigation, Aptix and its licensee Meta alleged that QuickTurn had infringed the Aptix

1 '069 patent. In response, QuickTurn denied that it had infringed the '069 patent and, as a defense,  
2 further alleged that the Aptix patent was invalid because Mr. Michael Butts, a QuickTurn  
3 employee, had conceived of inventions that either anticipated or made obvious the '069 patent at  
4 a time prior to Mr. Mohsen's presumed conception of the '069 patent. QuickTurn further alleged  
5 that Mr. Butts had conceived of two of the items of prior art between July 31, 1988 and September  
6 20, 1989. If the allegations were true, the 1988 notebook could have been relevant and, therefore,  
7 material to the issue whether Mr. Mohsen actually conceived of the invention that became his '069  
8 patent prior to Mr. Butts conceiving of his invention. Since the allegations were not true, the 1988  
9 notebook could never be relevant or material.

10 The '069 patent describes an architecture for placing chips on a circuit board. The circuit  
11 board is designed to hold electronic components that must interconnect with each other to obtain a  
12 desired electronic function. Under the '069 patent the electronic components are connected to a  
13 group of first level programmable integrated circuits (PICs) that are connected to at least one  
14 second level programmable integrated circuit (PIC), such that all ultimate end points or terminals  
15 of the electronic components on the circuit board can be programmably interconnected with each  
16 other through combinations of PIC's to achieve the desired electronic function. The second level  
17 PIC is necessary because the first level PICs have a limited number of terminals and would not be  
18 able to communicate with all of the other end points on the circuit board. By including at least one  
19 or more second level PICs that can communicate with all first level PICs, "global" connectivity is  
20 achieved with improved speed and efficiency and all end points can communicate with each other  
21 to achieve the desired electronic function.

22 The invention of the '069 patent is important because it allows a designer to design a  
23 system by programmably interconnecting its electrical components instantly on his desk to  
24 achieve the desired function without having to incur the cost and delay of fabricating a new  
25 custom-tooled circuit board. Any changes to optimize the design can be implemented instantly by  
26 reprogramming the interconnections in the PICs without having to incur the additional cost of new  
27 custom-tooled circuit boards. The prior art that QuickTurn claimed invalidated the '069 patent  
28 described hierarchically connected reconfigurable logic assemblies designed with electrically

1 reconfigurable logic circuits using reconfigurable partial interconnectivity. Such partial  
2 interconnectivity is usable only for electrically reconfigurable electronic circuits with flexible  
3 reprogrammable terminals, which are known commercially as Field-Programmable Gate Arrays  
4 (FPGAs). This partial interconnectivity fails in providing the necessary “global” interconnectivity  
5 of all end points needed for all other electronic components (such as microprocessors, memories,  
6 etc.). The value of the ‘069 invention is that it provides the global interconnectivity needed for  
7 designing systems with any digital electronic components and the invention is not limited only to  
8 FPGAs.

9 Judge Alsup issued his final claim construction ruling on February 28, 2000. We believe  
10 that all of the experts will agree that the purpose of the claims construction ruling is to resolve the  
11 different contentions of the parties and to confirm the interpretation of the patent claims as of the  
12 day that the patent was granted. As the Federal Circuit held in the case of *Markman v. Westview*,  
13 52 F.3d 967, 978 (Fed. Cir. 1995) (en banc):

14 The patent is a fully integrated written instrument. By statute, the patent must  
15 provide a written description of the invention that will enable one of ordinary skill in  
the art to make and use it.

16 Moreover, the *Vitronics* case, *supra*, cited by this Court in denying our motion to dismiss  
17 these counts, holds that extrinsic evidence such as the testimony of experts or the inventor and the  
18 inventor’s notebook

19 may only be relied upon if the patent documents, taken as a whole, are insufficient  
20 to enable the court to construe disputed claim terms. Such instances will rarely, if  
ever, occur. Indeed this case did not present such an instance.

21 *Vitronics*, p. 25-26. See also *American Hoist v. Sowa*, 725 F.2d 1350, 1360 (Fed Cir.), *cert.*  
22 *denied*, 469 U.S. 821 (1984). In making that ruling, Judge Alsup never referred to the 1988  
23 notebook or to the testimony of any witness, but rather Judge Alsup referred only to the text of the  
24 patent application and to the patent prosecution history before the Patent Office. In this case,  
25 Judge Alsup did not cite to any extrinsic evidence in construing the patent; rather, he relied solely  
26 on the patent terms and the prosecution history.

27 In his ruling, Judge Alsup stated, in pertinent part, as follows:

28 The clause requires at least one second-level PIC. Each must be connected to a bus

1 line. Each bus line must also interconnect with a first-level PIC. All ultimate end  
2 points must be connectable to each other through combinations of PIC's, i.e.,  
3 "global" interconnectivity is required (see Col 4:12). **(A system lacking global  
interconnectivity of all end points on the board would not literally fall under  
Claim 4 by plaintiff's own argument.)**

4 (Final Claims Construction Ruling p. 8:23 - 9:1. Emphasis added.)

5 Shortly after that ruling, on April 3, 2000, QuickTurn conceded that two of its prior art  
6 defenses would not invalidate the '069 patent and abandoned those defenses. Those two defenses  
7 were the defenses that, if valid, would have required Aptix to prove that Dr. Mohsen conceived of  
8 the '069 patent prior to the date that Michael Butts conceived of his invention. To do so, Aptix  
9 would have had to rely upon the 1988 notebook. Thus, if the two prior art defenses were valid,  
10 and only if they were valid, the 1988 notebook could have been relevant as some evidence that  
11 Mr. Mohsen conceived of the '069 patent prior to Michael Butts. QuickTurn's concession that the  
12 prior art defenses that it had raised were not valid defenses eliminated any possibility that the 1988  
13 notebook would be relevant to any issue in the case.

14 We anticipate that the witnesses, both expert and fact, will agree that a patent has one  
15 meaning, and only one meaning, from the day that the patent is granted to the day that the patent  
16 expires. We believe that the witnesses will further agree that the date of the filing of the  
17 application for the patent (in Aptix's case, September 20, 1989 for the '069 patent) is the  
18 presumed date of conception of the patent. We further expect that all of the expert witnesses will  
19 agree that the only case in which the patent holder would be required to establish an earlier date of  
20 conception is where the defendant proves that there exists "prior art" that was conceived prior to  
21 the presumed date of conception of the patent that would invalidate the patent. Thus, we believe  
22 that the witnesses will agree that the inventor's notebooks will only be relevant to a civil patent  
23 case when the defendant can first establish as a condition precedent that there is prior art that  
24 invalidates the patent.

25 We believe that the witnesses will agree that QuickTurn initially claimed that two items of  
26 prior art that were conceived between July 30, 1988 and September 20, 1989 invalidated the  
27 Aptix '069 patent. The witnesses will also agree that the two items of prior art that were  
28 conceived by Michael Butts after July 30, 1988 and prior to September 20, 1989 involved partial

1 connectivity between the end points for electrically reconfigurable logic circuits; that is, the  
2 Michael Butts inventions did not allow all end points on the circuit board to communicate with all  
3 other end points needed to achieve the desired electronic function with any electrical components.  
4 Thus, the Butts prior art lacked “global” interconnectivity.

5 We believe that the QuickTurn witnesses will testify that they abandoned the two prior art  
6 defenses because Judge Alsup’s claims construction ruling made it impossible for them to  
7 continue to assert that the items of prior art that were conceived of between July 31, 1988 and  
8 September 20, 1989 invalidated the ‘069 patent.

9 We anticipate that all the expert and fact witnesses will agree that if the Butts’ prior art was  
10 not relevant to the case, the 1988 notebook never would have been relevant to the case. We do  
11 not anticipate that any witness will testify that QuickTurn abandoned these two claims of prior art  
12 defenses for strategic reasons.

13 In denying the defense motion to dismiss, this Court surmised at the end of its opinion that  
14 Judge Alsup would not have dismissed the civil patent case in June of 2000 for fraudulent activity  
15 that was not material to the case. Although we view Judge Alsup’s opinion in the sanction hearing  
16 as not relevant to this criminal case because the burden of proof is different in the two cases, we  
17 can understand that this Court may feel that there must be some evidence to support a finding that  
18 the 1988 notebook was material because the unclean hands doctrine requires that the inequitable  
19 conduct be material to the case.

20 Judge Alsup, however, never actually made a finding in his June 2000 ruling that either  
21 the 1988 or the 1989 notebooks were relevant to any issue that the Court or the jury would have to  
22 decide. Rather Judge Alsup characterized Mr. Mohsen’s alleged fraudulent activity as an attempt  
23 to “strengthen” the patent through the manufacture of counterfeit evidence by pushing back the  
24 conception date of the patent. Judge Alsup stated, in pertinent part, as follows:

25 In the early stages of patent litigation, before the landscape of the relevant prior art  
26 is fully illuminated, a patent owner cannot usually predict the exact combinations of  
27 art that might later be deemed to render a patent claim obvious or anticipated.  
28 Experience teaches, however, that any provable date of invention prior to the  
presumed date of invention (the date of the patent application) will ordinarily place  
the patent owner in a stronger position by rendering any intervening art immaterial.  
Simply put, any earlier date of invention will ordinarily prove better than the

1 presumed date. Thus while QuickTurn, in fact, has set forth various prior-art  
2 references Amr Mohsen was allegedly trying to predate, the Court holds that it is  
3 unnecessary and unfair to require QuickTurn to do so or to prove any motive beyond  
4 fraudulently trying to claim an earlier date. At the time of the attempted fraud, the  
5 manufactured evidence was not only material but was held out by Aptix and Meta as  
6 material.

7 (*Aptix v. QuickTurn*, 2000 U.S. LEXIS 8408, 8474, ¶ 115.) Judge Alsup does not cite to the items  
8 of prior art that QuickTurn “has set forth” because he knows that the prior art that QuickTurn is  
9 referring to was not relevant to the ‘069 patent because that prior art dealt with “partial” not  
10 “global” connectivity. Although it is true that the 1988 notebook may have been an attempt to  
11 claim an earlier date or a belated attempt to manufacture a notebook to justify the actual date of  
12 conception, it is also true that in this case, the attempt did not matter because there was no prior art  
13 that Aptix needed to get behind.

14 Presumably all fraudulent conduct is committed because the person engaging in the  
15 fraudulent conduct thinks that he will gain an advantage. In finding that the fraudulent conduct  
16 was material because the inventor was trying to strengthen his patent, Judge Alsup found that the  
17 fraudulent conduct was “material” because the conduct was fraudulent. This is circular  
18 reasoning; and, in reasoning this way, Judge Alsup effectively eliminated the requirement that the  
19 fraud be “material.” Or, to state it another way, Judge Alsup created a rule that all fraudulent  
20 conduct will always be material because the person committing the fraud will always think that he  
21 was gaining an advantage by committing the fraud. Although it is true that it may sometimes be  
22 important for the patent holder to get behind some prior art and, therefore, that a notebook like the  
23 1988 notebook could in some other cases be relevant and material, that does not mean that the  
24 inventor’s notebook is always material. And, we submit that in this case, the 1988 notebook never  
25 was material.

26 We understand that the government intends to call Judge Alsup as a witness in this criminal  
27 case. We understand that Judge Alsup is a fact witness to some of the activity in the civil patent  
28 case. We have not been advised that the government intends to use Judge Alsup as an expert  
witness so we do not anticipate that the government will attempt to elicit opinion testimony from  
Judge Alsup. Although we believe that some of what Judge Alsup did in the civil patent case, such

1 as his claims construction ruling, is admissible, we do not believe that Judge Alsup's reasons for  
2 what he did in the civil case are relevant or admissible in this case. We also believe that Judge  
3 Alsup's ruling dismissing the case is also not admissible in this case because his finding is not  
4 binding on the criminal case because he used a different standard of proof and that issue is a  
5 matter for the jury. Thus, we would anticipate objecting to any question that asks Judge Alsup to  
6 explain to the jury why he determined that the 1988 notebook was falsified. We would also object  
7 to a question that asked Judge Alsup to tell the jury whether he found that the 1988 notebooks  
8 were material to the civil case. The defense has separately filed a motion in-limine to exclude  
9 Judge Alsup as a witness on the ground that he has no relevant testimony.

### 10 **5. The Law On Materiality**

11 The test of whether a given item of evidence is material to a case is whether it has a natural  
12 tendency or capability to influence the decision-maker. *See Kungys v. United States*, 485 U.S. 759  
13 (1988), *United States v. Adams*, 870 F.2d 1140 (6<sup>th</sup> Cir. 1989), and *United States v. Johnson*, 937  
14 F.2d 392 (8<sup>th</sup> Cir. 1991). Justice Scalia held that the standard to determine whether a  
15 misrepresentation was material is

16 whether the misrepresentation or concealment was predictably capable of affecting,  
17 i.e., had a natural tendency to affect, the official decision. The official decision in  
18 question, of course, is whether the applicant meets the requirement for citizenship,  
so that the test more specifically is whether the misrepresentation or concealment  
had a natural tendency to produce the conclusion that the applicant was qualified.

19 *Kungys*, 458 U.S. at 771-772. This test whether a representation is material is an objective test;  
20 the test does not depend upon the intent or behavior of the person making the representation or the  
21 understanding of the person who is receiving the representation. The test also depends on the  
22 specific facts of the case or situation in which the representation is made; the test is not a generic  
23 test where all misrepresentations of a particular nature will always be material. In *United States v.*  
24 *Johnson, supra*, the Court considered the actual circumstances involved in the negotiation of the  
25 contract to determine that the statement concerning the quantity of windows involved in the bid  
26 was not material to the decision-maker and, therefore, that it could not support a conviction for  
27 making a false statement to a government agency. Similarly, in *United States v. Adams, supra*, the  
28 court found that the statement about income figures and whether they were included in a

1 worksheet or on the actual tax form could not have been material given the state of the facts in the  
2 specific case. Therefore, it is incumbent upon the government to establish exactly how the false  
3 1988 notebook would have had a natural tendency or capability to influence the jury in the  
4 ultimate trial in the civil patent case based upon the specific facts of the case.

5 The *Kungys* test has been consistently followed in the Ninth Circuit both in INS cases and  
6 in perjury cases. See *United States v. Chen*, 324 F.3d 1103, 1104 (9<sup>th</sup> Cir. 2003); *United States v.*  
7 *Carpenter*, 95 F.3d 773, 776 (9<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 1155 (1997); and *United States*  
8 *v. Puerta*, 982 F.2d 1297, 1304 (9<sup>th</sup> Cir. 1992).

9 Thus, the fact that it may sometimes (or even many times) be advantageous to a patent  
10 holder to advance the date that he actually conceived of his invention does not mean that  
11 misrepresentations of the date of invention will be material in all cases; rather the jury in this  
12 criminal case must make a determination whether the date of conception of the invention is an  
13 issue that the jury in the civil patent case was going to have to resolve. This is what Justice Scalia  
14 did in the *Kungys* case. Justice Scalia considered Mr. Kungys's denaturalization case in particular  
15 and ruled that the date that when Mr. Kungys was born or the city in which he was born would not  
16 be material to the decision-maker who decided to grant Mr. Kungys citizenship in the first  
17 instance. It is clear that if there were two people with identical names and one of them had been a  
18 war criminal and the other had not, and the issue in the denaturalization case had been which of  
19 the two Mr. Kungys this person was, then the date and place of birth of this Mr. Kungys would  
20 have been relevant and material.

21 Justice Scalia did not consider that Mr. Kungys had relied on the misrepresentation in his  
22 application for citizenship. Justice Scalia did not consider whether Mr. Kungys thought that he  
23 was gaining an advantage in misrepresenting his date and place of birth. Nor did Justice Scalia  
24 consider the state of mind of the person who considered Mr. Kungys's application in the first  
25 place. What Justice Scalia did was consider whether the person making the decision to grant Mr.  
26 Kungys's application for citizenship would have naturally considered the date and place of birth in  
27 making his decision to grant citizenship. This analysis required Justice Scalia to consider what  
28 facts were relevant to the decision that the decision-maker had to make. In the same way, the

1 Court and the jury in this criminal case must consider what facts would have had a natural  
 2 tendency to influence the judge or the jury in the civil patent case. In order for the 1988 notebook  
 3 to be “material,” the government must establish what issue the jury would have had to decide in  
 4 the civil case that would have required the jury to consider the 1988 notebook. And we submit that  
 5 the government cannot establish “materiality” by reference to generic or hypothetical patent cases;  
 6 the government must establish for this particular case that there would have been an issue properly  
 7 before the jury to which the 1988 notebook would have been relevant.

8  
 9 **B. THE GOVERNMENT’S SO-CALLED “CONSCIOUSNESS OF GUILT”  
 EVIDENCE**

10 In the first part of the bifurcated trial, the government has indicated that it intends to  
 11 present a wide-range of so-called “consciousness of guilt” evidence. Because the defense intends  
 12 to raise only a materiality defense to the perjury, fraud, and obstruction of justice charges against  
 13 Dr. Amr Mohsen in counts 1-19, the government’s consciousness of guilt evidence will have little,  
 14 if any, probative value and the defense will object to this evidence in the first part of the trial as  
 15 inadmissible under Federal Rules of Evidence 404(b) and 403. Thus, Dr. Mohsen moves in limine  
 16 to bar the prosecution from referring to this evidence in opening statement and to order them not  
 17 to present this consciousness of guilt evidence until it presents the rest of its case.

18 In response to the defense’s request for notice of any uncharged acts that the government  
 19 intends to introduce under Rule 404(b), the government has indicated that it may introduce  
 20 evidence of the following in its case-in-chief:

- 21 (1) Dr. Mohsen’s alleged attempts to intimidate witnesses, including arson of a  
 22 witness’s home and car;
- 23 (2) Dr. Mohsen’s alleged efforts to stage vandalism to Tom Huang’s and his  
 24 wife’s vehicles;
- 25 (3) Dr. Mohsen’s alleged efforts to fabricate a mental health defense;
- 26 (4) Dr. Mohsen’s alleged efforts to fabricate a post-indictment “88-95” defense  
 27 with co-defendant Aly Mohsen based on writings seized from Dr. Mohsen’s  
 28 jail cell and recorded conversations; and
- (5) Dr. Mohsen’s alleged efforts to obstruct witnesses’ testimony, i.e. intending  
 to “tamper” with his sister regarding Dr. Mohsen’s alleged efforts to flee the  
 country before trial and by intending to use his wife to “tamper” with Ali

1 Moussa.

2 All of this evidence occurred long after the acts in counts 1-20 took place and after Dr.  
3 Mohsen had been indicted on those charges. The proffered evidence is thus not direct evidence  
4 that Dr. Mohsen did any of the acts or made any of the statements charged against him in counts  
5 1-20. Rather, the government contends the evidence of the acts listed above is admissible to show  
6 “consciousness of guilt,” i.e., to show that he had the necessary “intent” for the charged offense  
7 because the evidence of his various improper, attempts to prevent conviction at trial show that he  
8 believed he was guilty. However, as set forth above, the defense does not intend to contest the  
9 “intent” element or the evidence concerning the fabrication of the 1988 notebooks on counts 1-20.  
10 Instead, the defense will present evidence and argue that Dr. Mohsen is not guilty because his  
11 charged statements and conduct concerning the notebooks were not material to any matter in the  
12 underlying patent litigation. As such, the evidence has little, if any, probative value on counts 1-  
13 20 and “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or  
14 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation  
15 of cumulative evidence.” Fed. R. Evid. 403.

16 In *Old Chief v. United States*, 519 U.S. 172 (1997), the Court explained the scope of a trial  
17 judge’s discretion under Rule 403 and how the lower court is to determine the proffered  
18 evidence’s probative value and weigh the value of the challenged evidence against its danger of  
19 unfair prejudice. With respect to the prejudice side of the scale, “the term ‘unfair prejudice,’ as to  
20 a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the  
21 factfinder into declaring guilt on a ground different from proof specific to the offense charged.”  
22 *Id.* at 180. “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on  
23 an improper basis, commonly, though not necessarily, an emotional one.” *Id.* (quoting Advisory  
24 Committee’s Notes on Fed. R. Evid. 403). “Although . . . ‘propensity evidence’ is relevant, the  
25 risk that a jury will convict for crimes other than those charged--or that, uncertain of guilt, it will  
26 convict anyway because a bad person deserves punishment--creates a prejudicial effect that  
27 outweighs ordinary relevance.” *Id.* at 181 (quoting then-Judge Breyer in *United States v. Moccia*,  
28 681 F.2d 61, 63 (1st Cir. 1982)).

1 On the other side of the scale, what counts is the “probative value” of the evidence as  
2 distinct from its Rule 401 “relevance.” *Id.* at 184. In making this determination, the Court noted  
3 that “Rule 403’s ‘probative value’ signifies the ‘marginal probative value’ of the evidence relative  
4 to the other evidence in the case.” *Id.* at 185 (citing 1 J. Strong, McCormick on Evidence, at 782,  
5 and n.41 (4th ed. 1992)); *see also id.* (quoting 22 C.Wright & K.Graham, Federal Practice and  
6 Procedure § 5250, at 546-47 (1978) (“The probative worth of any particular bit of evidence is  
7 obviously affected by the scarcity or abundance of other evidence on the same point.”). When  
8 deciding “‘whether to exclude on grounds of unfair prejudice,’ the ‘availability of other means of  
9 proof may . . . be an appropriate factor.’” *Id.* (quoting Fed. R. Evid. 403, Advisory Comm. Notes).  
10 “[A] party’s concession is pertinent to the court’s discretion to exclude evidence on the point  
11 conceded. Such a concession, according to the Notes, will sometimes ‘call for the exclusion of  
12 evidence offered to prove [the] point conceded by the opponent.’” *Id.* (quoting Fed. R. Evid. 401,  
13 Adv. Comm. Notes).

14 In this case, the defense expects that the government will present other substantial, direct  
15 evidence to prove the charges against Dr. Mohsen in counts 1-20. This available evidence, along  
16 with Dr. Mohsen’s defense’s decision not to contest the government’s evidence on any ground  
17 other than materiality, makes the probative value of the government’s proffered consciousness of  
18 guilt evidence essentially worthless. None of the consciousness of guilt evidence says anything  
19 concerning the materiality element of the charged offenses, which does not depend on the  
20 defendant’s state of mind. On the other hand, the proffered evidence is highly prejudicial as it is  
21 intended to show that Dr. Mohsen committed new crimes in intimidating and tampering with  
22 witnesses and concocting illegitimate defenses. Some of the evidence also brings to the jury’s  
23 attention Dr. Mohsen’s mental health condition and interjects evidence concerning a possible  
24 mental health defense when Dr. Mohsen’s mental health is not at issue and he has not raised any  
25 mental health defense. This will likely confuse the issues at trial, lead to additional rebuttal  
26 evidence, and unfairly prejudice Dr. Mohsen--even though none of the evidence has any marginal  
27 probative value on the issues in this trial. With no bearing on any of the issues in dispute at trial,  
28 the only real purpose of this evidence is an impermissible one: to show that Dr. Mohsen has

1 committed other wrongful acts and has a propensity to commit criminal offenses.

2 The evidence of witness intimidation and arson is particularly inflammatory and unfairly  
3 prejudicial on counts 1-20. The first 20 counts do not involve any threats, violence, or physical  
4 danger of any kind. Evidence of witness intimidation, threats, and arson are of an entirely more  
5 dangerous and highly inflammatory nature. Such evidence of threats, arson, and murder “makes  
6 conviction more likely because it provokes an emotional response in the jury or otherwise tends to  
7 affect adversely the jury’s attitude toward the defendant wholly apart from its judgment as to his  
8 guilt or innocence” on the fraud and perjury group of offenses. *United States v. Hodges*, 770 F.2d  
9 1475, 1480 (9th Cir. 1985) (district court abused its discretion under Rule 403 in allowing  
10 evidence of attempted extortion from co-conspirator) (quoting *United States v. Bailleaux*, 685  
11 F.2d 1105, 1110 (9th Cir. 1982)). As a result, admission of the highly and unfairly prejudicial  
12 evidence concerning the alleged witness intimidation and arson should be ruled inadmissible  
13 under Rule 403. *United States v. McDermott*, 64 F.3d 1448, 1457 (10th Cir. 1995) (“whatever  
14 probative value the testimony [that defendant made a death threat against witness] had was  
15 substantially outweighed by its potential for unfair prejudice”), *cert. denied*, 516 U.S. 1121  
16 (1996); *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir.) (in holding that district court abused  
17 its discretion under Rule 403 in admitting evidence in a drug conspiracy prosecution that the  
18 defendant threatened witnesses, court explained “that threats ‘constitute a striking example of  
19 evidence that appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to  
20 punish, or otherwise may cause a jury to base its decision on something other than the established  
21 propositions in the case’”) (quoting *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986),  
22 *cert. denied*, 519 U.S. 967 (1996)); *United States v. Vargas*, 702 F. Supp. 70, 73 (S.D. N.Y. 1988)  
23 (excluding evidence of drug-related homicide under Rule 403 because it “would serve merely to  
24 inflame the jury” and such evidence “having a strong emotional or inflammatory impact may pose  
25 a risk of unfair prejudice to the defendant”).

26 For all these reasons, the Court should bar the government from referring to the  
27 government’s consciousness of guilt evidence in its opening statement and should order the  
28 government to delay introducing this evidence until it has presented the rest of its case on counts

1 1-20. After hearing all the government's other evidence on counts 1-20, the Court will then be  
2 able to properly evaluate the challenged evidence's probative value in light of the evidence  
3 already admitted at trial and the defense's concessions at trial. At this point, the defense believes  
4 the Court will be persuaded that--in light of the government's other available proofs and the  
5 defense's decision to present only a materiality defense, that the danger of unfair prejudice and  
6 concerns over the needless presentation of cumulative evidence and waste of time will  
7 substantially outweigh the evidence's essentially non-existent probative value.

## 8 9 II. PHASE TWO OF TRIAL (COUNTS 21-23)

10 On counts 21-23, the defense may present the affirmative defense of entrapment. "The  
11 elements of an entrapment defense are that (1) a government agent induced the defendant to  
12 commit a crime (2) he was not predisposed to commit." *United States v. Thomas*, 134 F.3d 975,  
13 978 (9th Cir. 1998). "Inducement can be any government conduct creating a substantial risk that  
14 an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent  
15 representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need  
16 sympathy or friends." *United States v. Poehlman*, 217 F.3d 692, 698 (9th Cir. 2000) (quoting  
17 *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994)). Predisposition must be assessed at  
18 the time before defendant's first contact with government agents. *Id.* at 703.

19 "[O]nly 'slight evidence is needed to create a factual issue and get the defense to the jury.'"  
20 *United States v. Kesse*, 992 F.2d 1001, 1003 (9th Cir. 1993) (quoting *United States v. Sotelo-*  
21 *Murillo*, 887 F.2d 176, 179 (9th Cir. 1989)). An entrapment instruction supported by slight  
22 evidence is appropriate even if an entrapment defense is inconsistent with a defendant's theory of  
23 the case. *United States v. Marbella*, 73 F.3d 1508, 1512 (9th Cir.), *cert. denied*, 518 U.S. 1020  
24 (1996). Even where the evidence is "weak, insufficient, inconsistent, or of doubtful credibility,"  
25 the defendant is entitled to an entrapment instruction unless "no rational juror could entertain a  
26 reasonable doubt as to either element." *Kesse*, 992 F.2d at 1003 (quoting *Sotelo-Murillo*, 887  
27 F.2d at 178 and *United States v. Hoyt*, 879 F.2d 505, 509, *amended on other grounds*, 888 F.3d  
28 1257 (9th Cir. 1989)). A defendant is not required to testify or admit the crime in order to raise an

1 entrapment defense. *United States v. Barry*, 814 F.2d 1400, 1402 (9th Cir. 1987).

2 When the defense of entrapment is properly raised, the burden shifts to the government to  
3 prove beyond a reasonable doubt that the defendant was either predisposed to commit the crime or  
4 was not induced by government agents to commit the crime. *Jacobson v. United States*, 503 U.S.  
5 540, 548 (1992); *Barry*, 814 F.2d at 1402; *see also* Ninth Circuit Model Criminal Jury Instructions  
6 6.2. The jury must unanimously reject the affirmative defense of entrapment before it can return a  
7 guilty verdict. *United States v. Southwell*, 2005 U.S. App. Lexis 29012 (9th Cir. Dec. 30, 2005)  
8 (affirmative defense of insanity).

9  
10 **III. OTHER ISSUES RELEVANT TO BOTH PHASES OF TRIAL.**

11  
12 **A. FEDERAL RULE OF EVIDENCE 106 (RULE OF COMPLETENESS) ISSUES**

13 The defense anticipates that the government will seek to introduce statements of the  
14 defendants in transcripts, recordings, or other writings. Although such statements of the  
15 defendant may not be barred by the hearsay rule as admissions of a party opponent under Federal  
16 Rule of Evidence 801(d)(2), additional portions of the transcripts, recordings, or writings should  
17 be admitted into evidence at the same time under Federal Rule of Evidence 106. Rule 106  
18 provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an  
19 adverse party may require the introduction at that time of any other part or any other writing or  
20 recorded statement which ought in fairness to be considered contemporaneously with it.” For  
21 example, the perjury charged in counts 2 and 3 requires more than the mere charged question and  
22 answer to put the question and answer in its proper context. Likewise, fairness requires that the  
23 transcript or recordings of phone calls and wire recordings involving the defendant that the  
24 government is allowed to introduce at trial must include more than simply a few of the defendant’s  
25 statements taken out of context, and the defense will likely request that additional portions be  
26 admitted into evidence at the same time to put the statements in proper context. After the  
27 government provides defense counsel with a copy of its exhibits and the specific transcripts,  
28 recordings, and writings it intends to introduce at trial, the defense will identify which other

1 portions it will seek to admit under Rule 106, attempt to resolve disputed issues with government  
2 counsel, and will ask the Court to rule on any unresolved disputes.<sup>1</sup>

3  
4 **B. EVIDENCE FROM DR. MOHSEN'S LAPTOP.**

5 Although the Court ruled that FBI agents unlawfully arrested Dr. Mohsen without a  
6 warrant, the Court did not suppress the laptop as a tainted fruit of the arrest. The government thus  
7 may attempt to introduce evidence from the Dr. Mohsen's laptop computer. His laptop contains  
8 thousands or tens of thousands of computer files. Most, if not all, are irrelevant, privileged,  
9 unduly prejudicial, outside the scope of the items sought by the warrant, and are inadmissible at  
10 trial. Dr. Mohsen will likely raise objections once it learns what, if any, evidence the government  
11 intends to introduce at trial from Dr. Mohsen's laptop.

12  
13 **C. WEEKLY FAMILY VISITS FOR DR. MOHSEN**

14 Finally, the defense will ask the Court for an order permitting a once-a-week family jail  
15 visit for Dr. Mohsen during the trial. As the jury trial is scheduled to proceed on a Monday-  
16 Wednesday trial week, the defense will request a weekly visit with either Dr. Mohsen's wife, son,  
17 or daughters on Thursday mornings.

18 Dated: January 17, 2006

19 Respectfully submitted,

20  
21 /s/ John Balazs  
22 Bruce Locke  
23 John Balazs

24 Attorneys for Defendant  
25 Amr Mohsen

26 \_\_\_\_\_  
27 <sup>1</sup> Although the defense is still in the process of trying to obtain the full pleadings, the  
28 defense understands that Judge Alsup orally ruled on some of Dr. Mohsen's Rule 106 issues when  
the case was set to go to trial on counts 1-19 in 2004. However, these issues were raised by  
different counsel with a different defense strategy and with vastly different evidence and charges  
at issue, i.e., before the government's 404(b) "consciousness of guilt" evidence and the charges in  
counts 20-23 came into play.