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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendants.	No. CR 03–0095 WBS **UNITED STATES' MOTION *IN LIMINE*** Date: March 6, 2006 Time: 8:30 a.m. Courtroom: D (15th Floor)

Opening Statements and testimony for Phase 2 of this trial begin on March 6, 2006. In advance of Phase 2, the United States hereby submits the following motions *in limine.*

In summary, and as set forth in more detail below, the United States respectfully moves that this Court *preclude* the defense from: **(1)** mentioning in opening statement any comments, opinions or statements of FBI Special Agent Christopher Forvour which are contained in recorded telephone calls from the cooperating inmate in this matter to Agent Forvour because such statements are hearsay; **(2)** mentioning in opening statement any out-of-court statements made by the defendant, including all statements made by the defendant in recorded telephone calls Amr Mohsen made from Santa Rita jail; **(3)** introducing or showing FBI FD-302 reports to witnesses during cross-examination

without first establishing that the witness' recollection needs to be refreshed and that reviewing a 302 would, in fact, refresh the witness' recollection; **(4)** attempting to elicit communications covered by the attorney-client privilege through cross-examination of the cooperating inmate's attorney, Alameda County Public Defender Andrew Steckler.

ARGUMENT

I. DEFENDANT SHOULD BE PRECLUDED FROM ELICITING OUT-OF-COURT STATEMENTS MADE BY FBI SPECIAL AGENT FORVOUR.

Counsel for the United States was recently advised by Mohsen's attorneys that counsel intended to use recordings of phone calls the cooperating inmate made from the Santa Rita jail to FBI Special Agent Christopher Forvour. It is unclear whether defense counsel intends to use portions of these recordings in cross-examination of government witnesses or in the defense case-in-chief. Under either scenario, the recorded conversations initiated by the cooperating inmate to Agent Forvour are hearsay and are not admissible. The cooperating inmate will be a witness in the government's case-in-chief. His portions of the recorded telephone calls are hearsay and are not admissible under FRE 801(d)(2)(D). *See United States v. Yildiz*, 355F.3d 81, 82 (2d Cir. 2004) (out-of-court statements of a government informant are not admissible in a criminal trial and are not admissions by the agent of a party opponent).

As of this writing, the government does not intend to call Agent Forvour in its case-in-chief. The government believes that Mohsen intends to introduce a June 13, 2004 hearsay telephone call between the cooperating inmate and Agent Forvour in which Agent Forvour offers an opinion about Mohsen's behavior during a videotaped meeting between the cooperating inmate and Mohsen. The statements Agent Forvour made in the phone call with the cooperating inmate are hearsay and are not being offered by the defense for any legitimate non-hearsay purpose.

Accordingly, the government requests the Court to order defense counsel **not** to refer to Agent Forvour's June 13, 2004 telephone conversation with the cooperating inmate (or any other telephone conversation between the inmate and Forvour) in opening

statement. The government further requests that the Court require an offer of proof as to the non-hearsay basis for using any recorded telephone conversations between the cooperating inmate and Agent Forvour before those conversations are referred to or used in front of the jury.

II. MOHSEN SHOULD BE PRECLUDED FROM ELICITING HIS OWN OUT-OF-COURT STATEMENTS.

1. The defendant's statements are admissions of a party-opponent if sponsored by the United States; however, they are inadmissible hearsay if sponsored by the defense.

The United States intends to offer recordings of various telephone calls Amr Mohsen initiated from jail. To the extent that the United States introduces into evidence the defendant's testimony, or any other statements, these statements are admissions of a party-opponent and therefore not hearsay. FED. R. EVID. 801(d)(2)(A).

However, to the extent that the *defense* seeks admission of the defendant's statements, the statements constitute inadmissible hearsay. Accordingly, the United States hereby moves *in limine* for an order precluding the defense from eliciting any of the defendant's statements, unless there are non-hearsay grounds for the admission of a particular statement.

2. The "prior consistent statement" doctrine is inapplicable.

Even if the defendant testifies and is cross-examined concerning the truthfulness of his testimony or his prior deposition testimony, the defendant's recorded jail telephone calls are not admissible as "prior consistent statements." For a statement to be deemed "not hearsay" under FRE 801(d)(1)(B), the statement must be "offered to rebut an express or implied charge against the declarant of *recent fabrication or improper influence or motive*." For any "prior consistent statements" to qualify as non-hearsay under this rule, the United States Supreme Court has held, the statement must have been made *before* the alleged fabrication, influence or motive came into being. *Tome v. United States*, 513 U.S. 150, 167 (1995); *see also United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996) (in order to be admitted, "the prior consistent statement must be made *prior* to the time that

the supposed motive to falsify arose") (emphasis added). Prior consistent statements by a witness "may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Tome,* 513 U.S. at 157. Accordingly, "the prior consistent statements *must* rebut the charge of improper motive, not merely 'bolster[ ] the veracity of the story told.'" *Collicott,* 92 F.3d at 979.

Here, the defendant's allegedly prior consistent statements were made during the commission of the charged fraud, *i.e.*, during deposition testimony in the underlying civil litigation. The underlying civil lawsuit was, in fact, the instrumentality that the defendant used to commit the fraud. Thus, the defendant's testimony given in furtherance of the fraudulent enterprise (the civil lawsuit) was not "made *prior* to the time that the supposed motive to falsify arose" (*see Caldicott*, 92 F.3d at 979). Rather the statements were made *after* the filing of the lawsuit and in furtherance of the scheme to defraud QuickTurn Design Systems and the District Court. Thus, the motive to fabricate "came into being" at the moment Aptix Corporation filed the civil lawsuit and Amr Mohsen proffered the phony July 31, 1988 date of conception. The defendant's testimony in the civil lawsuit contains nothing to rebut a charge that his motives for making certain statements was to deceive and defraud. Accordingly, the defendant should be precluded from recounting his deposition testimony, unless there are non-hearsay grounds to do so.

The same analysis applies to any attempt by Mohsen to use recorded jail telephone calls to exculpate himself in Phase 2 of the trial. The telephone at Santa Rita jail was the instrumentality that the defendant used to help facilitate his witness intimidation from the jail. For example, the government intends to offer telephone recordings which establish, among other things, that (1) the defendant used the jail phone to call Tom Huang and his wife to determine the Huangs' address and their schedule to determine when it would be most opportune to vandalize the Huangs' cars in furtherance of his bogus "mistaken car identity" defense to Counts 1–19; (2) the defendant used the jail phone to tamper with his sister (Magda Metwally) to falsely exculpate himself on Count 20; and (3) the defendant used the jail phone to help fabricate his phony insanity and/or incompetency defense.

3. The "rule of completeness" is inapplicable.

The United States anticipates that the defendant may attempt to rely on FRE 106 to introduce portions of Mohsen's recorded phone calls that are not offered by the United States. The United States submits that Rule 106, commonly referred to as the rule of completeness, does not require or suggest that result. Application of the rule of completeness, which requires that a redacted version of a statement not distort the meaning of the statement, is a matter for the Court's discretion. *United States v. Dorell, III*, 758 F.2d 427, 434 (9th Cir. 1985) (upholding redaction of defendant's handwritten statement to exclude reference to political and religious motivations for actions).

The government has provided citations to the defense in advance of Phase 2 the excerpts of the recorded jail phone calls it intends to use. (Copies of recordings of all known telephone calls Mohsen made from Santa Rita jail have previously been provided to the defense during the discovery process). The government requests an opportunity to address any rule of completeness statements that the defense seeks to introduce **before** the defense offers those statements at trial.

III. DEFENDANT SHOULD BE PRECLUDED FROM INTRODUCING OR SHOWING WITNESSES FBI FD-302 REPORTS WITHOUT FIRST ESTABLISHING A PROPER EVIDENTIARY BASIS FOR DOING SO.

Defendant Amr Mohsen has indicated that he may refer to or show government witnesses FBI FD-302 reports during cross-examination. These 302's are not Jencks Act statements of these witnesses and should not be read from or shown to witnesses without first establishing a proper evidentiary basis for doing so. Defense counsel has indicated that he may show 302's to witnesses to "refresh their recollection." As an initial matter, Phase 2 has not even started so there is no reason for counsel to assume that any witness' recollection will need refreshing. Assuming *arguendo* that a witness **does** indicate a lack of specific recollection of a particular fact, the defense must also establish that showing a 302 to the witness would help refresh the witness' recollection **before** reading from or showing the witness an FBI 302.

IV. DEFENDANT SHOULD BE PRECLUDED FROM VIOLATING THE COOPERATING INMATE'S ATTORNEY-CLIENT PRIVILEGE.

The United States intends to called Alameda County Deputy Public Defender Andrew Steckler in its case-in-chief. Mr. Steckler represented the cooperating inmate during the time that the inmate cooperated with the federal government in 2004. The government will call Mr. Steckler on two very narrow points, neither of which involve any aspect of privileged communications between Mr. Steckler and his client. First, the government will elicit testimony that Mr. Steckler contacted the government because his client desired to cooperate against Mohsen. Second, the government will question Mr. Steckler concerning the plea offer made by the Alameda County District Attorney to the cooperating inmate before the cooperating inmate began cooperating with the government, and the sentence that the cooperating witness received after his cooperation was made known to the District Attorney. These two areas do not constitute a waiver of the attorney-client privilege for the following reasons.

First, the District Attorney's offer (which was conveyed to Mr. Steckler) is not a privileged communication between the cooperating inmate and Mr. Steckler; rather it is a communication between one lawyer to another. Second, the sentence the cooperating inmate received is a matter of public record and not a confidential communication between attorney and client.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court enter the *in limine* orders requested.

Dated: March 2, 2006

Respectfully submitted,

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_____/s/_____
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