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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,
15 Plaintiff,

16 v.

17 AMR MOHSEN,
18 Defendant.
19 _____

No. CR 03-95-WBS

MEMORANDUM IN SUPPORT OF
DEFENDANT AMR MOHSEN'S POST-
TRIAL MOTIONS FOR JUDGMENT OF
ACQUITTAL AND FOR A NEW TRIAL

Hon. William B. Shubb

20 LEGAL STANDARD

21 The standard in determining a Rule 29 motion for judgment of acquittal is the same
22 as the standard used to determine whether the evidence is sufficient to sustain the verdict:
23 whether viewing all the evidence in the light most favorable to the government, any
24 rational juror could find the essential elements of the crimes proved beyond a reasonable.
25 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "When there is an innocent explanation for
26 a defendant's conduct as well as one that suggests that the defendant was engaged in
27 wrongdoing, the government must produce evidence that would allow a rational jury to
28 conclude beyond a reasonable doubt that the latter explanation is the correct one." *United*

1 *States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992).

2
3 **PHASE ONE RULE 29 MOTION**

4 I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION ON
5 COUNTS 1-4, 10, & 19 BECAUSE THE GOVERNMENT HAS FAILED TO
6 PRESENT EVIDENCE TO SHOW BEYOND A REASONABLE DOUBT THAT
DR. MOHSEN'S STATEMENTS AND THE 1998 NOTEBOOK WERE
RELEVANT TO ANY ISSUE IN THE PATENT LITIGATION.

7 **A. COUNTS 1-4, 10 & 19**

8 In counts 1-4, 10 & 19, Dr. Mohsen was convicted of conspiracy to commit perjury,
9 subornation of perjury, and three counts of perjury. The statements all dealt with what Dr.
10 Mohsen represented to be his 1988 notebook. At trial, the defense effectively conceded
11 that the statements were false, so the critical issue in the trial was whether the statements
12 were "material."

13 The government presented evidence to show that the 1988 notebook could
14 "possibly" be material to the civil patent case because, if the "channel routing" drawing
15 was sufficient evidence to make the invalidity issue a jury issue, the 1988 notebook would
16 be some evidence that Dr. Mohsen's '069 patent conception pre-dated the "channel
17 routing" drawing and, therefore, would be material to that issue, at least at the time that the
18 depositions were given.¹ However, the defense contends that proof that the 1988 notebook
19 "could possibly be material" is not sufficient proof such that a rational juror could find that
20 materiality had been proved beyond a reasonable doubt. The uncontradicted testimony of
21 Dr. Tredennick was that Quickturn's prior art could never have invalidated the '069 patent.
22 RT 1020. Thus, the only evidence in the record demonstrates that the 1988 notebook was
23 not relevant to any issue that would have gone to the jury, and thus was not material.

24
25
26
27

¹ The government didn't even try to show that the 1988 notebook could
28 possibly have been relevant to any of Quickturn's other prior art invalidity claims, i.e., the
hierarchical interconnect and the partial cross-bar architectures.

THE LAW

1
2 In *Kungys v. United States*, 485 U.S. 759 (1988), the Supreme Court defined
3 materiality. In that case, the government alleged that Mr. Kungys had misrepresented the
4 date and place of his birth. *Id.* at 765. The government further alleged that when Mr.
5 Kungys applied for United States citizenship, he made the same misrepresentations. In
6 1982, the United States filed a complaint to denaturalize Mr. Kungys and one of the
7 grounds that the United States advanced to denaturalize Mr. Kungys was that he had made
8 the false statements about his date and place of birth. The district court found that Mr.
9 Kungys had made the misrepresentations but that the misrepresentations were not material
10 and declined to denaturalize him. On appeal, the court of appeals found that those
11 misrepresentations were material.

12 The issue before the Supreme Court was whether Mr. Kungys' misrepresentations as
13 to the date and place of his birth were "material." Justice Scalia held that the standard to
14 determine whether a misrepresentation was material is

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

21 *Id.* at 771 - 772. Justice Scalia further held that Mr. Kungys' misrepresentations were not
22 material because his date and place of birth would not have been relevant to the decision-
23 makers who granted him his visa and his citizenship. *Id.* at 774. Therefore, the *Kungys*
24 holding is that misstatements are only material if the misstatements are as to facts that the
25 decision-maker would have to consider in making his or her decision. Where the
26 misstatements concern matters that would not logically enter into the decision-maker's
27 calculus, the misstatements are not material.

28 Dr. Mohsen's case is somewhat different from the most perjury prosecutions (and
from the *Kungys* case) because the case in which Dr. Mohsen gave his testimony never
went to trial. Most perjury cases involve situations where there actually was a trial. In

1 those cases, the government proves the materiality of the false statement by introducing
2 transcripts of the trial to show exactly what issues were before the judge or the jury and
3 how the false statements were relevant to those issues. *See, e.g., United States v. Leon-*
4 *Reyes*, 177 F.3d 820 (9th Cir. 1999), where the government introduced summaries of the
5 transcripts of the trial testimony to prove that the government was trying to prove that
6 certain money that was allegedly “money laundered” was the proceeds of illegal drug
7 transaction. The government then showed how the defendant’s allegedly perjurious
8 testimony was relevant to that issue because the defendant testified that he provided the
9 funds to the individuals accused of money laundering. *See also, United States v. Lococo*,
10 450 F.2d 1196 (9th Cir. 1971), where the government proved that the defendant’s false
11 testimony was relevant to the grand jury’s investigation of a known gambler and, therefore,
12 hindered the grand jury’s investigation. *See also, United States v. McKenna*, 327 F.3d 830
13 (9th Cir. 2003), where the Court of Appeals made a detailed analysis of the case in order to
14 establish that Ms. McKenna’s deposition testimony was relevant to the issue of her
15 credibility which was an issue for the decision-maker (the magistrate judge) because the
16 Ms. McKenna testified at the trial.

17 In this case, on the other hand, the government had a more difficult time meeting its
18 burden of proof in Dr. Mohsen’s case because the civil patent case did not actually go to
19 trial and, therefore, the government did not have transcripts that it could use to prove that
20 Dr. Mohsen’s testimony was relevant to an issue that the decision-maker had to decide in
21 the case.

22 ANALYSIS

23 In its case in chief, the government did not introduce any evidence that the channel
24 routing drawings actually invalidated the ‘069 patent; the government only proved that
25 QuickTurn “contended” that, at the time of Dr. Mohsen’s depositions, the drawing
26 invalidated the ‘069 patent. The defense did introduce substantial evidence through the
27 uncontroverted testimony of Dr. Tredennick that neither the channel routing drawing nor
28 any of Quickturn’s other prior art would have invalidated the claims of the ‘069 patent. RT

1 1020. Furthermore, the defense introduced evidence through Mr. Blakely that the issue of
2 whether the channel routing drawing invalidated the '069 patent could be raised in a
3 motion for partial summary judgment without introducing the 1988 notebook into
4 evidence. However, even viewing the evidence in the light most favorable to the
5 government, no rational juror could conclude with any degree of certainty that the 1988
6 notebook would ever have been introduced into evidence in the civil patent case if that case
7 had gone to trial. In fact, it was so speculative whether the 1988 notebook was relevant to
8 an issue in the case that the defendant cannot be convicted of perjury. *See United States v.*
9 *Aguilar*, 515 U.S. 593 (1995), discussed in more detail below.

10 In this case, there is no dispute but that the 1988 notebook and Mr. Mohsen's
11 testimony concerning the notebook would only be relevant to an issue in the civil patent
12 case if there existed prior art that (1) invalidated the '069 patent and (2) came into
13 existence between the date of the first entry in the 1988 notebook (July 31, 1988) and the
14 date that the '069 patent was filed (September 20, 1989), the presumed conception date.
15 Mr. Jeffrey Miller, the government's first witness stated as much in his response to the first
16 question asked of him on cross-examination.

17 Q. Locke: Mr. Miller, would you agree with me that if there were no prior art
18 alleged to invalidate a patent then the notebooks would be irrelevant to any
19 patent case?

20 A. If there were no prior art?

21 Q. Yes.

22 A. And we were not making any invalidity defense?

23 Q. That's right.

24 A. Yeah, I think that's true.

25 (Reporter's Transcript (RT) at 180, lines 8 - 14.)

26 In other words, the 1988 notebook might be relevant or it might not, depending upon
27 whether, for instance, Aptix filed and won a motion for partial summary judgment that the
28 channel routing drawing did not actually invalidate the '069 patent. The government has
not, however, introduced any evidence that the "channel routing" drawing would actually

1 invalidate the '069 patent or, at a minimum, could withstand a motion for partial summary
2 judgment. No government witness testified as to how the channel routing drawing would
3 invalidate the '069 patent. Since the only evidence on this issue is that QuickTurn filed
4 pleadings contending that the drawing invalidated the '069 patent, and since not all
5 pleadings actually result in issues that are decided by the jury, the best that can be said for
6 the government's case is that it is possible that the notebook could be relevant.

7 This case contrasts starkly with *Leon-Reyes*, *Lococo*, and *McKenna*, where the
8 government proved exactly how the false testimony was relevant to an issue in each case.
9 In fact, in this criminal case, the government attorneys have stated on the record that they
10 do not believe that it is their burden to prove what issues would have been litigated in the
11 civil patent trial. And government counsel even conceded in his final argument to the jury
12 that there was no evidence from the government's side of the case from which the jury
13 could determine what issues would have actually been presented to the jury.

14 Mr. Waldinger: We don't know what would have happened if Judge Alsup
15 had not dismissed this lawsuit. So that should (sic)(not) be
16 your initial inquiry. Your initial inquiry should not be is
17 this a no harm/no foul argument

18 (RT 1216. Defense counsel believe that Mr. Waldinger argued that the jury should "not"
19 attempt to determine what issues would have been presented to the jury, although the
20 transcript does not include the word "not."). Clearly, the government admitted that it did
21 not even attempt to prove that the notebook would be introduced into evidence in the civil
22 patent case. And where the government fails to meet its burden, it is incumbent upon the
23 Court to grant a judgment of acquittal.

24 **2. Counts 1 & 19**

25 In counts 1 and 19, Dr. Mohsen was convicted of conspiracy to obstruct justice and
26 obstruction of justice.

27 In *United States v. Aguilar*, 515 U.S. 593 (1995), in an opinion by Justice Rehnquist,
28 the Supreme Court held that in order to be guilty of obstruction of justice, the defendant's
actions must have had the "natural and probable effect" of interfering with the due

1 administration of justice. Justice Rehnquist stated, in pertinent part,

2 The action taken by the accused must be with an intent to influence judicial or
3 grand jury proceedings; it is not enough that there be an intent to influence
4 some ancillary proceeding, such as an investigation independent of the court's
5 or grand jury's authority. *United States v. Brown*, 688 F.2d 596, 598 (CA9
6 1982) (citing cases). Some courts have phrased this showing as a "nexus"
7 requirement--that the act must have a relationship in time, causation, or logic
8 with the judicial proceedings. *United States v. Wood*, 6 F.3d 692, 696 (CA10
9 1993); *United States v. Walasek*, 527 F.2d 676, 679, and n. 12 (CA3 1975). In
10 other words, the endeavor must have the "natural and probable effect" of
11 interfering with the due administration of justice. *Wood*, *supra*, at 695;
12 *United States v. Thomas*, 916 F.2d 647, 651 (CA11 1990); *Walasek*, *supra*, at
13 679. This is not to say that the defendant's actions need be successful; an
14 "endeavor" suffices. *United States v. Russell*, 255 U.S. 138, 143, 65 L. Ed.
15 553, 41 S. Ct. 260 (1921). . . .

16 Although respondent urges various broader grounds for affirmance, we
17 find it unnecessary to address them because we think that the "nexus"
18 requirement developed in the decisions of the Courts of Appeals is the correct
19 construction of § 1503.

20 *Aguilar*, 515 U.S. at 528-529, emphasis added. In the *Aguilar* case, Mr. Aguilar, who was
21 a federal district judge in the Northern District of California lied to an FBI agent. The
22 Supreme Court held that the lie to the FBI agent could not support an obstruction of justice
23 charge where the agent *might or might not* testify before a grand jury. In order to support a
24 conviction for obstruction of justice, the lie must have the "natural and probable effect" of
25 interfering with the due administration of justice. Where the evidence only showed that the
26 defendant testified falsely to an investigating agent, the Supreme Court held that the use of
27 the testimony was so speculative that the testimony could not be said to have the "natural
28 and probable effect" of obstructing justice. *Id.* at 598 - 602.

29 Applying the *Aguilar* case to Dr. Mohsen's situation, in order to prove Dr. Mohsen
30 guilty of obstructing justice, the government would have had to show that Dr. Mohsen's
31 attempt (the endeavor) had the "natural and probable effect" of interfering with the
32 administration of justice. An endeavor that involved the falsification of a notebook and
33 false testimony that was not relevant to any issue in the case would not have had the
34 "natural and probable effect" of interfering with the administration of justice because such
35 action would not have had any effect on the resolution of the case. It is speculative.
36 Therefore, since the government has not introduced any evidence from which a reasonable

1 juror could have determined beyond a reasonable doubt that the 1988 notebook or the
2 testimony concerning the notebook were relevant to any issue in the case, that same
3 reasonable juror could not have determined beyond a reasonable doubt that Dr. Mohsen
4 obstructed justice or conspired to obstruct justice.

5 Stated another way, a person cannot obstruct justice by falsifying a notebook that
6 will never be introduced into evidence in a civil case. Nor can a person obstruct justice by
7 lying about a notebook that is not relevant to any issue in the case. Neither the notebook
8 nor the testimony will have a “natural and probable” effect on the due administration of
9 justice because, since they are both irrelevant to any issue in the case, the notebook and the
10 testimony will actually have no effect on the case.

11 **II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION ON**
12 **COUNTS 11-18 BECAUSE THE GOVERNMENT FAILED TO PRESENT**
13 **SUFFICIENT EVIDENCE FOR ANY RATIONAL JUROR TO CONCLUDE**
14 **THAT DR. MOHSEN’S STATEMENTS AND 1988 NOTEBOOK WOULD**
15 **REASONABLY HAVE INFLUENCED QUICKTURN TO PART WITH MONEY**
16 **OR PROPERTY.**

17 At trial, the defense presented the undisputed testimony of Dr. Tredennick that
18 Quickturn’s prior art drawings would never have invalidated the claims of the ‘069 patent.
19 RT 1020. Dr. Tredennick also testified that the opposite conclusion of Quickturn’s expert
20 in the patent litigation case was wrong and, in fact, opined that Quickturn’s expert did not
21 write the report that he signed. RT 1031. The government did not attempt to refute any of
22 this testimony. Nor did it present any other evidence to challenge or contradict his
23 conclusions. (It is telling that the government flew in forensic experts and other witnesses
24 from across the country, but it never even attempted to rebut Dr. Tredennick’s testimony
25 with any witness--even those from nearby Silicon Valley). As a result, the only evidence
26 in the record is that Quickturn’s prior art would never have invalidated the claims of the
27 ‘069 patent.

28 With this evidence, there is no way for a rational juror to conclude beyond a
reasonable doubt that the 1988 notebook “would reasonably influence a person (including
corporate entities) to part with money or property.” Phase One Jury Instruction #20.

1 There is no evidence that Quickturn knew that its prior art would invalidate the '069 patent
2 claims. It thus appears that Quickturn made its bogus prior art claims solely for tactical
3 reasons in order to gain a better litigation position against plaintiffs. Without evidence that
4 Quickturn's prior art claims had some validity, the 1988 notebooks did not (and could not)
5 reasonably influence Quickturn to part with any money. Quickturn did not see the
6 notebooks as anything they had to worry about in defending the patent litigation. Rather,
7 Quickturn affirmatively used the 1988 notebooks to convince the district court to dismiss
8 the patent action against Quickturn and award it attorney fees. The notebooks didn't
9 reasonably influence Quickturn to part with money. It allowed them to win the lawsuit that
10 it otherwise should have lost on the merits. Thus, the Court should grant a judgment of
11 acquittal on counts 11-18.

12
13 **III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION ON THE
14 PERJURY COUNTS BECAUSE DEFENDANT AMR MOHSEN'S ANSWERS
15 ON COUNTS TWO AND THREE ARE LITERALLY TRUE AND THERE IS NO
INDEPENDENT CORROBORATION OTHER THAN DAVID MOORE'S
TESTIMONY TO PROVE COUNT FOUR.**

16 In *Bronston v. United States*, 409 U.S. 352 (1973), the Supreme Court held that a
17 perjury conviction could not be sustained where the defendant's answer was literally true,
18 even though it may have also been unresponsive and misleading. *See also United States v.*
19 *Sainz*, 772 F.2d 559, (9th Cir. 1995) ("Under the teachings of [*Bronston*], a literally true
20 answer, even though unresponsive or 'shrewdly calculated to evade,' cannot form the
21 predicate for a perjury conviction"). "[T]he perjury statute is not to be loosely construed"
22 and "precise questioning is imperative as a predicate for the offense of perjury." *Bronston*,
23 409 U.S. at 361-62.

24 Here, because Dr. Mohsen's negative answers to counts two and three are literally
25 true, they cannot provide the bases for perjury convictions. Count two asks whether Dr.
26 Mohsen ever delivered the original "notebooks" to his attorneys or an independent expert
27 in order to get the results of the tests on those "notebooks." Count three asks whether,
28 other than the limited periods for attorneys in the litigation to copy the notebooks, the

1 original of those “notebooks” were ever out of his possession.² In both instances, Dr.
 2 Mohsen answered in the negative to questions that asked about notebooks in the plural.
 3 The evidence at trial showed at most that Dr. Mohsen had delivered only the 1988
 4 notebook to one or more experts at the time he was asked the questions about “notebooks”
 5 that are charged in counts two and three. His “no” answers to both questions were thus
 6 literally true--even if misleading--because he did not deliver (or have outside his
 7 possession) more than one notebook. To the extent his answers evaded the questions or
 8 were misleading, it was the burden “of the questioner to pin [Dr. Mohsen] down to the
 9 specific object of the questioner’s inquiry.” *Bronston*, 409 U.S. at 575.

10 A hypothetical illustrates this point. If a child eats a single cookie and responds
 11 “no” when his or her mother asks whether he ate the “cookies” in the jar, the child’s
 12 answer is literally true. The child ate one cookie--not cookies. The child may have misled
 13 his mother, but his answer is not perjurous.

14 Although a single out-of-circuit decision rejected a similar argument, this decision is
 15 easily distinguishable (as well as being unpersuasive). In *United States v. Williams*, 552
 16 F.2d 226 (8th Cir. 1977), the Eighth Circuit rejected the defendant’s argument that his
 17 statements were literally true when he answered questions concerning whether he had
 18 accepted money in exchange for the lease of liens (plural) because the evidence showed

19 _____
 20 ² The exact questions and answers charged in counts two and three are set forth
 21 below:

22 Q. Did you ever deliver the original notebooks to [Aptix’s attorneys] or an
 23 independent expert so that they could do an independent test on those
 24 notebooks to see what the tests would show?

25 A. No.

26 Q. You never did that yourself?

27 A. No.

28 *Count 2.*

Q. Other than the limited periods of time necessary to make copies by both
 your lawyers and [Quickturn’s lawyers], were the original notebooks
 ever out of your possession?

A. No.

Count 3.

1 that he only accepted money to release one lien and not to release more than one lien. *Id.*
2 at 229. *Williams* is distinguishable, however, because the court found that the defendant
3 clearly understood the use of the plural in the question to include the singular because he
4 used the terms “lien” and “liens” interchangeably in other parts of his testimony. *Id.* No
5 such similar testimony was presented here. Finally, the *Williams* court gives short shrift to
6 the literally true doctrine and its holding has not been followed in the Ninth Circuit. In
7 sum, because Dr. Mohsen’s statements charged in counts two and three were literally true,
8 the Court should enter a judgment of acquittal on the perjury charges in counts two and
9 three.

10 Likewise, the Court should enter a judgment of acquittal on count three because
11 there was no independent evidence to corroborate David Moore’s testimony that Dr.
12 Mohsen gave him the notebooks in order to establish that the notebooks were out of Dr.
13 Mohsen’s “possession” as charged in count 3. *See United States v. Davis*, 548 F.2d 840,
14 (9th Cir. 1977) (“Where one witness testifies to the fact of perjury, independent
15 corroborative evidence suffices under the two-witness rule if it tends to confirm the truth of
16 the witness’s testimony in material respects and thereby induces belief in his testimony.”).
17 Other than through the testimony of Mr. Moore and exhibits introduced during his
18 testimony, there was no independent corroborative evidence to demonstrate that the
19 notebook was ever out of Dr. Mohsen’s “possession” as was necessary to show the answer
20 charged in count 3 to be false.

21 **IV. THE COURT SHOULD GRANT A JUDGMENT OF ACQUITTAL ON EITHER**
22 **COUNT 2 OR 3 BECAUSE THOSE COUNTS ARE MULTIPPLICITOUS.**

23 Before trial, the defense moved for an order that the government elect between
24 counts 2 and 3 because those counts were multiplicitous. The Court denied the motion
25 “without prejudice of the right of the defendant to renew the motion at the end of trial
26 before judgment and sentencing if the jury should return a verdict of guilty on counts 2 and
27 3.” Order, filed 12/22/05, at 14. Dr. Mohsen now does renews his motion. The Court
28 should grant a judgment of acquittal on either count 2 or 3 on the ground of multiplicity.

1 In the superseding indictment, the government improperly converted the essentially
2 same alleged false statement made during a single deposition on April 29, 1999 into two
3 perjury charges. In relevant part, counts two and three allege that during a deposition on
4 April 29, 1999, Dr. Mohsen falsely answered the following questions:

5
6 COUNT TWO:

7 Q. Did you ever deliver the original notebooks to [Aptix's attorneys] or an
8 independent expert so that they could do an independent test on those notebooks
to see what the test on those notebooks would show?

9 A. No.

10 Q. You never did that yourself?

11 A. No.

12 COUNT THREE:

13 Q. Other than the limited periods of time necessary to make copies by both your
14 lawyers and [QuickTurn's lawyers], were the original of those notebooks ever
out of your possession?

15 A. No.

16 Superseding Indictment, returned 7/27/04, at 7-8.

17 In other contexts, the Ninth Circuit has found that the repetition of a single false
18 statement does not justify more than one criminal count of perjury or making of a false
19 statement. In *United States v. Gebhard*, 422 F.2d 281 (9th Cir. 1970), the Court held that
20 the government could not obtain multiple convictions where the defendant repeated the
21 same lie to a grand jury in response to the same question. 422 F.2d at 289-90. In *United*
22 *States v. Olsowy*, 836 F.2d 439, 442-43 (9th Cir.), *cert. denied*, 485 U.S. 991 (1988). The
23 Court similarly found that repeating a single false statement to the same Secret Service
24 Agent on different occasions warranted only a single § 1001 charge, and thus reversed the
25 defendant's convictions on two of the three multiplicitous counts. Other courts have
26 similarly held counts to be multiplicitous when they charge the repeating of essentially a
27 single false statement in the same proceeding in multiple counts. *See United States v.*
28 *Clarridge*, 811 F. Supp. 697, 705 (D. D.C. 1992) ("Except literally, the inquiries in count I

1 and II are really the same, and the government is artificially multiplying the charges by
2 incorporating them in two counts rather than one.”); *United States v. Williams*, 552 F.2d
3 226, 228 (8th Cir. 1977) (dismissing one perjury count as multiplicitous that repeated an
4 answer to essentially the same prior question charged in other counts); *see also United*
5 *States v. Sue*, 586 F.2d 70, 71 (8th Cir. 1978) (finding two counts multiplicitous because
6 they charged the making of false statements in different paragraphs of a single security
7 agreement under 18 U.S.C. § 1014).

8 Here, counts two and three allege the same perjury charge. Count two charges a
9 subset of count three in that the notebooks had to be out of Dr. Mohsen’s possession (count
10 three) if he in fact delivered them to experts as alleged in count two. Both counts charge
11 that Dr. Mohsen’s answers were false because he gave his 1988 original notebook to one or
12 more forensic experts. Both counts arise out of the same line of questioning to the same
13 questioner only a few transcript pages apart from one another.³ And the proof at trial on
14 these two counts was the same. Moreover, answering the same question phrased
15 differently a second time did not further impair the proceeding or a government function.
16 *See United States v. Graham*, 60 F.3d 463, 467 (8th Cir. 1995) (because the defendant’s
17 repetition of the same false statement at different creditors’ meetings “added nothing
18 further to harm the bankruptcy action,” his three perjury counts were multiplicitous).
19 Therefore, the Court must dismiss either count two or three.

20
21 **V. THE EVIDENCE IS INSUFFICIENT ON COUNTS 14 AND 16-18 BECAUSE**
22 **THE MAILINGS SET FORTH IN THOSE COUNTS WERE NOT INCIDENT TO**
AN ESSENTIAL PART OF THE CHARGED FRAUD SCHEME.

23 “The federal mail fraud statute does not purport to reach all frauds, but only those
24 limited instances in which the use of the mails is a part of the execution of the fraud,
25 leaving all other cases to be dealt with by appropriate state law.” *Schmuck v. United*
26

27 ³ Amr Mohsen’s deposition lasted several days and covered over 1,100 pages of
28 transcripts. The transcript of his deposition on April 29, 1999, is at pages 316-492. The
purported false statement charged in count two is transcribed at page 339 while the
statement charged in count three is transcribed at pages 349-50.

1 *States*, 489 U.S. 705, 710 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95 (1944)).
2 To support a conviction under the mail fraud statute, “the mailing must be ‘for the purpose
3 of executing the scheme.’” *United States v. Maze*, 414 U.S. 395 (1974) (quoting *Kann*,
4 323 U.S. at 94). Although the use of the mails need not be an essential element of the
5 scheme, the mailing must be “incident to an essential part of the scheme” in order to satisfy
6 the statute. *Schmuck*, 489 U.S. at 711 (quoting *Badders v. United States*, 240 U.S. 391,
7 394 (1916)). “The government may not prevail without demonstrating that the mailings
8 were incident to the execution of the scheme, rather than part of an after-the-fact
9 transaction that, although foreseeable, was not in furtherance of the scheme.” *United*
10 *States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000); see also *United States v. Manarite*, 44 F.3d
11 1407 (9th Cir. 1995).

12 In this case, the mailings associated with counts 14 and 16-18 were not in
13 furtherance of the charged scheme to defraud and thus cannot support a mail fraud
14 conviction. With respect to count 14, David Moore testified that, after performing work on
15 the 1989 Day-Timer and the 1988 questioned notebook, he received a \$919.85 check in the
16 mail on June 4, 1999 for the work he had completed. RT 384-85; Exhibit 44 (copy of
17 \$919.85 check); Exhibit 45 (envelope containing check). Moore testified that he reported
18 his findings to Dr. Mohsen concerning the 1988 Notebook in September 1998, RT 367-69,
19 and concerning the Day-Timer on March 4, 1999, RT 382. Moore received the check for
20 this work months later, in the beginning of June 1999. It was sent months after Moore had
21 completed his examination of the notebook and Day-Timer and was not connected to the
22 scheme. The check was collateral or ancillary to the charged fraud; it was not incident to
23 an essential part of the scheme and insufficient to support a mail fraud conviction. See
24 *Henderson v. United States*, 425 F.2d 134, 141 (5th Cir. 1970) (“The mailing is not in
25 execution of the scheme if use of the mails is only collateral or incidental to the scheme, or
26 made after the scheme has been fully consummated or has ‘reached fruition.’”).

27 Further, the mailings charged in counts 16-18 cannot support mail fraud convictions
28 because they all concern only the 1989 notebook that is not part of the charged fraud. In

1 particular, counts 16-18 charge:
2

3	<u>COUNT</u>	<u>Approximate</u>	<u>Sender</u>	<u>Addressee</u>	<u>Item Mailed</u>
4		<u>Date of Mailing</u>			
5	16	3/1/00	Amr Mohsen	Forensic Examiner	Copies of Notebook Pages
6					
7	17	3/2/00	Examiner	Amr Mohsen	Test Results on Notebook copies
8					
9	18	6/1/00	Amr Mohsen	Examiner	\$131 Check

10 The evidence at trial was that the mailings charged in counts 16 and 17 concerned
11 only copies of notebook pages in the 1989 notebook--not the 1988 notebook. Moore
12 testified that, in March 2000, Dr. Mohsen sent him copies of pages from the 1989 notebook
13 to conduct a electrostatic detection apparatus test (EDSA) concerning indentations on the
14 papers. RT 387-88. Moore also performed other tests on the notebook. RT 390-91.
15 Exhibit 47 contains Moore's notes and copies of pages of the 1989 notebook. The mailing
16 of the copies of the notebook pages sent to Moore for testing is charged in count 16 while
17 Moore's mailing to Dr. Mohsen of his test results is charged in count 17. Count 18 charges
18 a mailing by Dr. Mohsen on approximately June 1, 2000 of a check for \$131 to Moore for
19 the tests Moore did on the 1989 notebook in March.⁴

20 Counts 16 through 18 relate only to a 1989 notebook that is not part of the charged
21 fraud. The government charged only that Dr. Mohsen committed fraud in fabricating the
22 1988 notebook--not the 1989 notebook. Moreover, Moore's undisputed testimony was that
23 the notebooks were provided to him in March 2000. This is after Dr. Mohsen had already
24 testified at multiple depositions concerning the notebooks. His tests on the 1989 notebook
25

26 ⁴ This mailing occurred after the evidentiary hearing in May 2000 and, thus,
27 even in the light most favorable to the government--was sent after the scheme had been
28 completed and was not in furtherance of the mail fraud. "A mailing which occurs after the
object of the scheme has been completed is not sufficiently related to the scheme to support
a conviction for mail fraud." *United States v. Keenan*, 657 F.2d 41, 42 (4th Cir. 1981).

1 were not part of the charged fraud. Indeed, though Moore testified that he conducted tests
2 on the 1989 notebook pages and reported those results to Dr. Mohsen, he neither testified
3 as to what his tests showed nor did he render any opinion as to the authenticity of the 1989
4 notebook. Even under the light most favorable to the government, the charged mailings
5 were not “incident to an essential part of the scheme” to defraud Quickturn by fabricating a
6 1988 notebook and committing perjury in connection with that notebook. *See Lo*, 231 F.3d
7 at 478 (“The government may not prevail without demonstrating that the mailings were
8 incident to the execution of the scheme, rather than part of an after-the-fact transaction
9 that, although foreseeable, was not in furtherance of the scheme.”). Rather, the mailings in
10 counts 16-18 concern an unrelated notebook that is not charged as part of the scheme to
11 defraud and cannot serve as the bases to support a mail fraud conviction.

12
13 **VI. THE EVIDENCE IS INSUFFICIENT ON COUNT 20 TO ESTABLISH THAT DR.**
14 **MOHSEN APPLIED FOR A PASSPORT IN VIOLATION OF THE DISTRICT**
15 **COURT’S ORDER.**

16 Finally, the evidence is insufficient on count 20. There was no evidence that Dr.
17 Mohsen applied for (or possessed) a passport after April 8, 2003 as charged in count 20.
18 Circumstantial evidence that he was investigating travel options is not sufficient for a
19 rational juror to conclude beyond a reasonable doubt that Dr. Mohsen applied for a
20 passport. There was no evidence submitted to show what the entry requirements were for
21 U.S. or Egyptian citizens into the Cayman Islands. And, based on the evidence presented
22 at trial, Dr. Mohsen may have been intending to travel to the Cayman Islands or elsewhere
23 using the color copy of his U.S. passport, his naturalization certificate, and/or driver’s
24 license. These documents are all that were needed for U.S. citizens to travel to the Cayman
25 Islands. Trial Exh. BB (consular information sheet) (“U.S. citizens traveling as tourists or
26 attending meetings can enter the Cayman Islands with a U.S. passport, a naturalization
27 certificate or an original, certified birth certificate and photo identification.”), at 1. There
28 was no evidence that Dr. Mohsen asked about the requirements for entry to the Cayman
Islands with the testifying Executive Jet representative or during any conversation

1 overheard by FBI agents, which indicates that he knew that he could travel to the Cayman
2 Islands without an Egyptian passport. While there was plenty of evidence that he was
3 considering travel, there was very meager evidence that he applied for a passport after
4 April 8, 2003, the charge against him. Thus, the evidence is insufficient to sustain a
5 conviction on count 20, and the Court should enter a judgment of acquittal.

6 **PHASE TWO RULE 29 MOTION**

7 VII. THE COURT SHOULD GRANT A JUDGMENT OF ACQUITTAL ON COUNTS
8 21 AND 22 BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN
9 THE GOVERNMENT'S BURDEN OF DISPROVING ENTRAPMENT BEYOND
A REASONABLE DOUBT.

10 Where an entrapment defense is raised and the jury is properly instructed on
11 entrapment, the burden shifts to the government to prove beyond a reasonable doubt that
12 the defendant was either predisposed to commit the crime or was not induced by
13 government agents to commit the crime. *Jacobson v. United States*, 503 U.S. 540, 548
14 (1992). Predisposition must be assessed at the time before defendant's first contact with
15 the government agent. *United States v. Poehlman*, 217 F.3d 692, 698 (9th Cir. 2000).
16 Here, the government failed to present sufficient evidence to satisfy either prong.

17 First, there was insufficient evidence to show that Dr. Mohsen was predisposed to
18 commit the crimes in counts 21 and 22. The evidence showed at most that Dr. Mohsen
19 was predisposed to commit only the times of offense at issue in the first phase of the trial,
20 i.e., non-violent, non-threatening offenses, such as perjury, fraud, obstruction of justice,
21 and suborning perjury. The government's evidence of an intention to vandalize Tom
22 Huang's car and the purported tampering with witness Magda Metwally was more of the
23 same. Neither of these incidents include any threatening or violent conduct towards
24 witnesses. Indeed, there was no evidence that Dr. Mohsen ever approached any other
25 inmate to commit any violent or threatening offense. And, tellingly, the only portion of the
26 note in Dr. Mohsen's own handwriting that the informant gave to the FBI during their first
27 meeting on May 19, 2004, concerned the vandalism of Huang's car; the other parts of the
28 note about intimidating witnesses was written by the informant himself. *See Trial Exh.*

1 127A; RT 1591-92. There is simply no evidence that Dr. Mohsen was predisposed to
2 commit the types of crimes at issue in counts 21 and 22, namely attempted harassing of
3 witnesses or solicitation to commit arson, as of the date the informant became a
4 government agent, i.e., May 19, 2004.

5 Moreover, there was evidence that Dr. Mohsen was reluctant to commit these
6 offenses, especially the arson offense. *See United States v. Skarie*, 971 F.2d 317, 320 (9th
7 Cir. 1992) (in evaluating predisposition, reluctance is the most important factor). For
8 example, in the tape-recorded conversation on May 27, 2004, when the informant asked
9 Dr. Mohsen whether he thought burning up Dr. Mohsen's car would scare the rest, Dr.
10 Mohsen answered, "I think maybe a phone call is enough." Trial Exh. MM, 5/27/04
11 Transcript, at 13. And, Dr. Mohsen, twice expresses concern that burning Dr. Mohsen's
12 car could hurt someone because of the gas in the car. *Id.* at 4 ("Just nobody hurt"), 15.
13 The informant also talked about Dr. Mohsen referring to his conscience with respect to the
14 arson offense. RT 1611. Any statements by Dr. Mohsen in the June 3, 2004 tape-recorded
15 conversation or other evidence that he at some point willingly agreed to the informant's
16 proposals are besides the point. Evidence of a defendant's willingness to commit a crime
17 after he has been entrapped does not show predisposition at the time of the offense. *See*,
18 *e.g. Skarie*, 971 F.2d at 321 ("Where evidence of 'predisposition comes only after the
19 government has devoted considerable time and effort to persuading the defendant, 'rational
20 jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite
21 predisposition prior to the government's investigation and that it existed independent of the
22 Government's many and varied approaches to petitioner.") (quoting *Jacobson*, 503 S.Ct. at
23 553).

24 Likewise, there was insufficient evidence for the government to meet its burden of
25 disproving that the informant induced Dr. Mohsen to commit the crimes. First, the
26 informant was not at all trustworthy or believable, as shown, among other things, by his
27 long-standing and recent crack cocaine use, nine prior felony convictions, and motivation
28 to entice Dr. Mohsen into criminal acts to try to reduce his own sentence. RT 1550, 1584-

1 85, 1597. After gaining Dr. Mohsen's trust by doing legal research for him and playing up
2 his supposed Muslim religion, the informant reviewed Dr. Mohsen's discovery and even
3 took it to his jail cell. RT 1563-64. So he had ready access to the names of witnesses and
4 an incentive to coerce Dr. Mohsen into criminal acts. Even though Dr. Mohsen told the
5 informant that Mr. Moore was not the most damaging witness, Trial Exh. MM, 5/27/04 Tr.
6 at 12, the informant picks his car to burn. The informant also told the FBI agent that the
7 informant had told Dr. Mohsen that he had given his people Dr. Mohsen's address. RT
8 1605. This could only have been done to threaten Dr. Mohsen. And, the informant
9 testified that he would have done almost anything to get out of jail. RT 1588. In these
10 circumstances and where the informant had a number of conversations with Dr. Mohsen
11 that were not tape recorded, there was substantial evidence that the informant induced Dr.
12 Mohsen in a way that overcame his lack of predisposition and reluctance to commit the
13 offenses of which he was convicted in counts 21 and 22.

14
15 **VIII. IN THE ALTERNATIVE, THE COURT SHOULD GRANT DR. MOHSEN A
16 NEW TRIAL.**

17 **A. THE COURT SHOULD GRANT A NEW TRIAL ON COUNTS 1-4 AND
18 10-19 MAIL FRAUD COUNTS BECAUSE THE COURT ERRONEOUSLY
19 DENIED THE JUROR'S REQUEST FOR A COPY OF THE INDICTMENT
20 TO SEE THE SPECIFIC CHARGES, WITHOUT CONSULTATION WITH
21 COUNSEL OR A CONFERENCE, DURING THE JURY'S
22 DELIBERATIONS IN PHASE ONE OF THE TRIAL.**

23 During the jury's deliberations in phase one of the trial, they submitted a note asking
24 whether there is "a copy of the indictment with the specific charges that we can see." See
25 Document 519, filed 2/27/06. The Court denied the request without consulting with the
26 parties. This was error. "Jury messages should be 'answered in open court and . . .
27 [defendant's] counsel should [be] given an opportunity to be heard before the trial judge
28 responds." *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) (*quoting*
Rogers v. United States, 422 U.S. 35, 39 (1975)). Although a defendant may not have a
constitutional right to be personally present at such a conference, he or she did have a Sixth
Amendment right to be represented by counsel at such a conference. *Id.* At such a

1 conference, counsel could ask that the court to respond to the juror's note. *Id.* Because an
2 error in failing to provide defendant's counsel with an opportunity to respond to the juror's
3 note implicates the defendant's constitutional rights, the error requires reversal unless it is
4 found to be harmless beyond a reasonable doubt. *Id.*

5 In this case, the Court should have provided the parties with an opportunity to be
6 heard before rejecting the jury's request for a copy of the indictment to see the specific
7 charges against Dr. Mohsen. In the government's rebuttal closing, the prosecutor made
8 much of allegations that Dr. Mohsen forged notes of a meeting he had with Quickturn's
9 CEO Keith Lobo in which he allegedly provided Mr. Lobo with notice that Quickturn was
10 infringing Aptix's '069 patent. RT 1223-26; *see also* RT 1155, 1161. The note stated,
11 "Gave Keith [Lobo] '069 patent, told QDS [Quickturn] infringes." RT 1223-24. The
12 government then argued that, even if Aptix had won the patent lawsuit, these notes were
13 fraudulent and material to the patent litigation, the perjury charges, and the alleged scheme
14 to defraud to show damages in the patent lawsuit. RT 1223-26.

15 Significantly, however, Dr. Mohsen was not charged with fraud or perjury based on
16 the Lobo note. The government's argument confused the real issues at trial by indicating
17 to the jury that they should convict Dr. Mohsen of fraud and perjury based on the
18 uncharged fraudulent note rather than the charged fraud based on the 1988 notebooks. The
19 jury's note was submitted at 3:15 p.m., only about an hour after the government's closing
20 rebuttal ended (2:14 p.m.). RT 1229. The note asks for a copy of the indictment for
21 clarification of the specific charges against Dr. Mohsen. After the Court answered "no,"
22 the jury shortly thereafter returned a verdict of guilty on all counts. RT 1250 (proceedings
23 resume at 4:22 p.m. where Court states that the jury has informed that they have reached a
24 verdict).

25 The Court should have either provided the jury with a copy of the indictment, which
26 was read to the jury at the start of the trial, or should have provided further specifics of the
27 charges to clarify to the jury what the charges against Dr. Mohsen were. Without doing so,
28 it is likely that the jury was confused of the charges against Dr. Mohsen and may have

1 erroneously found him guilty of counts 1-4 and 10-19 (conspiracy, perjury, mail fraud,
2 and obstruction of justice) for forging the Lobo note--even though the Lobo note was not
3 charged against Dr. Mohsen in any of those counts. This is especially the case where the
4 jury's note and verdict were submitted shortly after the prosecution's closing argument.
5 Thus, the Court should grant a new trial on counts 1-4 and 10-19.

6 Moreover, if the Court grants a new trial on counts in the first phase of the trial, the
7 Court must also grant a new trial on counts 21 and 22 because the verdict on those counts
8 depended in part on evidence and the verdicts in the first phase of the trial.

9
10 **B. ALTERNATIVELY, SHOULD THE COURT DENY DR. MOHSEN'S**
11 **MOTION FOR JUDGMENT OF ACQUITTAL, THE COURT SHOULD**
12 **GRANT A NEW TRIAL ON THE GROUND THAT THE EVIDENCE**
13 **PREPONDERATES HEAVILY AGAINST THE VERDICT.**

14 Where the Court does not find the evidence insufficient to sustain the verdict, a
15 motion for new trial should still be granted where "the evidence preponderates heavily
16 against the verdict." *United States v. Pimental*, 654 F.2d 538, 545 (9th Cir. 1981) (quoting
17 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)). For the reasons
18 stated-above, the Court should grant a judgment of acquittal on all counts of conviction. In
19 the alternative, should the Court deny Dr. Mohsen's motion for judgment of acquittal, Dr.
20 Mohsen moves for a new trial on these same counts on the ground that the jury's verdict
21 was against the vast weight of the evidence for the same reasons stated above.
22
23
24
25
26
27
28

IX. CONCLUSION

For these reasons, the Court should grant a judgment of acquittal on all counts of convictions. Alternatively, the Court should grant Dr. Mohsen's motion for new trial.

Respectfully submitted,

Dated: April 14, 2006

/s/ Bruce Locke
Bruce Locke

/s/ John Balazs
John Balazs

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