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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendant.	No. CR 03-0095 WBS **UNITED STATES' OPPOSITION TO AMR MOHSEN'S MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL** Date: June 23, 2006 Time: 10:30 a.m. Courtroom: D, 15th Floor

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INTRODUCTION

Defendant Amr Mohsen moves for a judgment of acquittal and/or a new trial on numerous grounds following his conviction by a jury on 17 of the 18 counts with which he was charged. With regard to Phase One of the trial (counts 1–20), Amr first argues that the evidence was insufficient to sustain his convictions on count 1 (conspiracy to commit perjury and obstruct justice); counts 2–4 (perjury); count 10 (subornation of perjury); and count 19 (obstruction of justice) because his false deposition testimony was not "relevant to any issue that would have gone to the jury, and thus was not material." Def. Mem., at 2. Second, Amr claims that the government's evidence was insufficient to sustain convictions on counts 11–18 (mail fraud) because no rational juror could conclude that the 1988 Notebook "would reasonably influence a person (including corporate

entities) to part with money or property." Def. Mem, at 8. Third, Amr claims that the evidence was insufficient to sustain convictions on counts 2–3 (perjury) because his answers were "literally true" and that there was no independent corroboration, other than government witness David Moore's testimony, to prove count 3 (perjury).[1] Fourth, Amr requests that the Court grant a judgment of acquittal on either count 2 or count 3 on the ground that those counts are "multiplicitous." Fifth, he argues that the evidence on counts 14 and 16–18 (mail fraud) was insufficient because the alleged mailings were not part of the charged fraud scheme. Finally, Amr asserts that the evidence on count 20 (contempt of court) was insufficient to establish a violation of the Court's pretrial release order.

As for Phase Two of the trial (counts 21 and 22), Amr argues that the government did not meet its burden of proving that he was not entrapped into committing the crimes of which the jury convicted him. Finally, the defendant asserts that he should be granted a new trial on counts 1–4 and 10–19 because the Court did not consult with counsel before responding to the jury's note asking whether there was "a copy of the indictment with the specific charges that we can see." CR 519.

As is set forth in detail below, taken in the light most favorable to the government, the evidence on each of the counts of conviction was more than sufficient to sustain the government's burden of proof beyond a reasonable doubt.

LEGAL STANDARDS

I. STANDARDS FOR MOTIONS FOR A JUDGMENT OF ACQUITTAL.

Rule 29(c) of the Federal Rules of Criminal Procedure states in pertinent part that "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c). The test for determining whether to grant such a motion "is whether at the time of the motion there was relevant evidence from which the

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[1]The heading for Section III of the defendant's motion states that there is no "independent corroboration other than David Moore's testimony to prove *Count Four*." Def. Mem., at 9 (emphasis added). However, the text of the defendant's "independent corroboration" argument refers only to *count 3*. *See* Def. Mem., at 11.

jury could reasonably find [the defendant] guilty beyond a reasonable doubt, viewing the evidence in light favorable to the Government." *United States v. Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972); *United States v. Nelson*, 419 F.2d 1237, 1242 (9th Cir. 1969). In ruling on a Rule 29(c) motion, a district court must bear in mind that "it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts." *Id.* at 1241.

In considering a Rule 29 motion for a judgment of acquittal, the evidence against the defendant is reviewed in the light most favorable to the government to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Von Willie*, 59 F.3d 922, 928 (9th Cir. 1995). All reasonable inferences are drawn in favor of the government. *United States v. Andrino-Carillo*, 63 F.3d 922, 924 (9th Cir. 1995), *cert. denied*, 516 U.S. 1064 (1996).[2]

II. STANDARDS FOR MOTIONS FOR A NEW TRIAL.

Although "[a] district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal," *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992), motions for a new trial "should be granted only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Rush*, 749 F.2d 1369, 1371 (9th Cir. 1984). The burden of justifying a new trial rests with the defendant. *See United States v. Shaffer*, 789 F.2d 682, 687 (9th Cir. 1986). In considering motions for a new trial, courts are "not obliged to

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[2]In his brief, the defendant cites to *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992), for the proposition that, where there is an innocent explanation for a defendant's actions, as well as one that suggests that the defendant was engaged in wrongdoing, the government must present evidence that would allow a rational jury to conclude that the latter explanation is correct. *See* Def. Mem., at 1–2. Although this assertion accurately reflects the law, the defendant fails to identify any evidence presented at trial that is subject to an "innocent explanation." In any event, *Vasquez-Chan* is of limited applicability here. Unlike the defendants in *Vasquez-Chan*, who had plausible exculpatory reasons as to why they did not possess the drugs at issue, the defendant has not offered, and cannot offer, any exculpatory reasons for why he testified falsely, why he encouraged his brother to testify falsely, why he created the fraudulent 1988 Notebook, and why he secretly retained two experts to examine his handiwork.

view the evidence in the light most favorable to the verdict" and are free to weigh the evidence and evaluate the credibility of the witnesses. *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000). In order for a court to grant a motion for a new trial, it must conclude that, "despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Id.* at 1097 (quotation omitted).

SUMMARY OF ARGUMENT

This Court presided over both phases of the jury trial, as well as the extensive motions that were filed during the pretrial process. The Court is, therefore, extremely familiar with the facts of this case and all of the evidence that was presented at trial. Simply put, the evidence at trial was overwhelming on all counts for which Amr Mohsen was convicted. The defendant's motion for a judgment of acquittal and for a new trial should be denied for all of the following reasons.

First, Mohsen's continued insistence that the 1988 Notebook was not material to any of the issues in the civil patent litigation between Aptix and QuickTurn because defense expert "Nick" Tredennick opined that "QuickTurn's prior art could never have invalidated the '069 patent" (Def. Mem., at 2) misses the mark concerning what is legally and factually necessary to establish materiality. All pertinent case authority holds that whether a false statement is material is determined at the time the false statement is made. Thus, whether the 1988 Notebook would hypothetically have been "relevant to any issue that would have gone to the jury" (*id.*) is not the operative measure of materiality. As this Court's jury instructions made crystal clear: "The 'materiality' of a false statement must be tested as of the time the alleged false statement was made, and not on the basis of events that occurred later. The government need not prove that the perjured testimony actually influenced the decision-making body." *Instruction No. 15* (Phase One).

Second, there was overwhelming evidence that Mohsen's fraud — which included (1) manufacturing phony documents; (2) lying in numerous depositions; (3) staging a bogus theft; (4) mailing scraps of the phony notebooks back to himself to try and get

around the limitations of the Best Evidence Rule; and (4) artificially attempting to treble Aptix's alleged damages — reasonably caused QuickTurn to part with money. The evidence established that QuickTurn spent money on forensic examiners in an attempt to determine the authenticity of Aptix's evidence, which evidence was intended by Aptix to support a multi-million dollar judgment against QuickTurn. Trial testimony from Jeff Miller (one of the attorneys defending QuickTurn in the patent lawsuit) and government intellectual property expert Professor Jay Kesan established that most civil patent infringement lawsuits settle before trial. Thus, QuickTurn could reasonably have settled the lawsuit and paid millions of dollars to Aptix as a result of Mohsen's manufactured evidence and perjured deposition testimony. It was not necessary for the government to prove that QuickTurn actually parted with any money — although QuickTurn did spend hundreds of thousands of dollars on attorneys' fees and forensic experts in an entirely reasonable attempt to get to the truth concerning the authenticity of the documents Mohsen proffered — only that the false representations could have had such a result.

Third, Mohsen's answers to the questions charged in perjury counts 2–3 were not "literally true." There was ample evidence for the jury to conclude that the questions posed to the defendant were intended to refer to either notebook and that the defendant's answers to those questions were false. Nor is there any merit to Mohsen's assertion that other than David Moore's testimony, there was no "independent" proof to support the perjury conviction on count 3. There was ample evidence in addition to Moore's testimony that the 1988 Notebook *was* out of Mohsen's possession "[o]ther than the limited periods of time necessary to make copies."

Fourth, perjury counts 2 and 3 are not multiplicitous: Trial testimony established that Mohsen **both** delivered the original 1988 Notebook to an independent expert (Kuranz) and left the 1988 Notebook for seven days outside of his custody when he left the Notebook with his secretly retained document examiner, David Moore. These were two separate inquiries for which Mohsen gave two separate false answers.

Fifth, the mailings charged in counts 14 and 16–18 were part of Mohsen's scheme

to defraud QuickTurn.

Finally, the defendant's argument that the evidence was insufficient to sustain the government's burden of disproving entrapment beyond a reasonable doubt is without merit. The jury heard extensive testimony from Manuel "Manny" Primas regarding his contacts with the defendant in jail. Primas testified that the defendant solicited him to have threatening telephone calls made to witnesses and to have a witness's car burned. The same jury had heard testimony about the defendant's efforts to obstruct justice in the civil case. Primas offered significant additional and corroborating evidence (including recordings of his conversations with the defendant and writings made by the defendant) that supported the conclusion that it was *the defendant* who had approached Primas and had come up with the plan to commit the crimes. Indeed, there can be no conclusion other than that CEO-turned-prisoner Amr Mohsen was the individual who was steering the ship with respect to the witness tampering crimes.

ARGUMENT

I. THERE WAS OVERWHELMING EVIDENCE DEMONSTRATING THAT THE ENGINEERING NOTEBOOKS AND THE DEFENDANT'S TESTIMONY ABOUT THOSE NOTEBOOKS WERE MATERIAL.

Similar to the position he took in his pretrial motion to dismiss, the defendant argues that the fraudulent "1988 Notebook was not relevant to any issue that would have gone to the [civil] jury, and thus was not material." Def. Mem., at 2. The defendant's argument is without merit because the Ninth Circuit has held unequivocally that "materiality is tested at the time a false statement was made" and that a false statement can be "material" even if a truthful statement would not have been helpful to the decisionmaker. *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003); *United States v. Lococo*, 450 F.2d 1196, 1199 n.3 (9th Cir. 1972) ("Materiality is tested as of the time the investigation is being made."). Under *McKenna*, a false statement is material if

> it has a natural tendency to influence, or was capable of influencing the decision of the decision-making body to which it was addressed. To be material a false statement need only be relevant to any subsidiary issue under consideration. The government need not prove that the perjured testimony actually influenced the relevant decision-making body. Further,

> materiality is tested at the time the alleged false statement was made: Later proof that a truthful statement would not have helped the [decision-making body] does not render the false testimony immaterial.

Id. at 839 (quotations omitted).

In this case, the United States demonstrated that, at the time the defendant produced the fraudulent 1988 Notebook in discovery and at the time he testified falsely about the genesis of that notebook, Aptix was asserting a date of conception of July 31, 1988 for the '069 invention. Although the defendant now argues that the claimed July 31, 1988 conception date was irrelevant to any issue in the civil patent litigation, neither the defendant nor Aptix (nor any other party) took that position at the time the defendant gave his false testimony. On the contrary, Aptix's attorneys recognized that, without the 1988 Notebook (and its corresponding July 31, 1988 date of conception), Aptix would "have a hard ro[w] to hoe to avoid invalidating prior art." RT 141–42; Ex. 25, at 37.

The defendant makes much ado about the fact that his expert witness, Dr. Tredennick, opined that QuickTurn's prior art would not have invalidated the '069 patent. However, the defendant ignores the fact that Tredennick testified that QuickTurn had retained an expert who had arrived at just the opposite conclusion.[3]

The defendant's essential argument that a person's deposition testimony can be material only if the case proceeds to trial defies logic. If that were the case, then a lying plaintiff-deponent could avoid prosecution for perjury by dismissing his civil action. That is why the Ninth Circuit has *never* held that deposition testimony can be perjurious *only if* the case thereafter proceeds to trial. Indeed, in *McKenna*, the Ninth Circuit was careful to make clear that it was not basing its materiality finding on the fact that McKenna *in fact*

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[3]In any event, the jury was free to disregard the testimony of Dr. Tredennick, whose credibility and judgment were certainly in question, given (1) the huge sums of money that he had been paid for his testimony by Aptix and the defendant, *see* RT 987–88; (2) his gratuitous disparaging comments about QuickTurn's expert, *see* RT 1031; (3) his demeanor on the stand; and (4) his flippant responses to questions concerning his unprofessional web-site in which he marketed himself as a person having an appalling lack of knowledge about the subject matter upon which Mohsen had retained him to offer an opinion, *see* RT 1028–30.

later testified at her civil trial, but rather on the fact that McKenna's deposition statements "would have been admissible to impeach McKenna's credibility *if* she testified against the government at trial." *McKenna*, 327 F.3d at 840 (emphasis added).

The defendant's blind reliance on *Kungys v. United States*, 485 U.S. 759 (1988), is misplaced. The holding in *Kungys* regarding materiality is largely focused on what is "material" on a *citizenship application*. Unlike date and place of birth in a citizenship application (which the *Kungys* Court held were *never* material), the date of invention and the scope of the invention are almost always relevant and material in a patent infringement case. As Judge Alsup noted in his June 2000 order,

> [i]n the early stages of patent litigation, before the landscape of the relevant prior art is fully illuminated, a patent owner cannot usually predict the exact combinations of art that might later be deemed to render a patent claim obvious or anticipated. 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 presumed date.

Aptix Corp. v. QuickTurn Design Systems, Inc., 2000 WL 852813, at *25 (N.D. Cal. June 14, 2000).

Although the defendant will surely take the position, as he has in the past, that "it does not matter than *Kungys* was a citizenship case; 'materiality' does not have a different meaning in different statutes," CR 390, at 8:17–20, the Ninth Circuit disagrees. Rather, the court of appeals has recognized that materiality *does* have a different meaning in immigration contexts, such as the one presented in *Kungys*. *See United States v. Alferahin*, 433 F.3d 1148 (9th Cir. 2006). In *Alferahin*, the court specifically noted that "the *Kungys* decision established a more rigorous definition of materiality that is unique to the context of denaturalization proceedings." *Id.* at 1155. Accordingly, *Kungys's* guidance with respect to the issue of materiality must be measured in this light.

The defendant's motion also ignores the significant and damning evidence presented against him at trial. Jeff Miller testified that the defendant produced in discovery a set of notes that Mohsen later testified were of a meeting he had with Keith

Lobo in August 1996. RT 147–50. The jury was also shown clips of Mohsen's sworn deposition testimony about his alleged preparation of these "Keith Lobo" notes. At the time, Lobo was QuickTurn's President. Mohsen, in sworn deposition testimony, asserted that this meeting occurred shortly after the issuance of the '069 patent. The Keith Lobo notes were intended to support two crucial aspects of Aptix's damages claims against QuickTurn: First, the notes, which the government proved at trial were completely bogus[4], were used by Aptix to show that it had supposedly put QuickTurn on notice of QuickTurn's alleged infringement of the '069 patent as early as August 19, 1996. Jeff Miller and Jay Kesan both testified that such a "notice of infringement" is a necessary pre-condition to any claim of damages for patent infringement. *See* RT 146 & 550. Thus, the Keith Lobo notes, which were authored by Mohsen and sponsored by Aptix as proof of notice of infringement in the civil case, represented yet another totally fraudulent date and document that artificially started the clock running on Aptix's alleged damages.

Second, once an inventor has given notice of infringement, as Mohsen claimed to have done by reference to the phony Keith Lobo notes, the inventor is entitled to treble damages which, according to calculations of royalties and lost profits made by Aptix's own damages expert, would have been approximately $70,000,000. *See* RT 152 & 166–68. Thus, the bogus Keith Lobo notes were intended by Mohsen to artificially and exponentially increase QuickTurn's financial exposure in the lawsuit. At a basic level, the defendant's motion fails even to consider the fact that the authenticity of the 1988 Notebook, or lack thereof, would be relevant and material to whether *other* documents

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[4]Robert Kuranz, Mohsen's secretly retained ink expert, testified that Mohsen mailed him a prototype of the Keith Lobo notes and asked Kuranz to test the various inks on that prototype ***before*** the "final" version of those notes (dated August 19, 1996) were produced to QuickTurn. *See* Ex. 29. The notes that Mohsen mailed to Kuranz were simply dated "8/19." RT 281–82. After Kuranz asked Mohsen what year the Keith Lobo notes were actually written, Mohsen told Kuranz that the notes were written in 1989. RT 283. This evidence conclusively demonstrated that Exhibit 29 was completely bogus because Mohsen did not apply for the '069 patent until September 20, 1989, and the patent (a copy of which Mohsen claims to have given to Keith Lobo during this supposed meeting) did not even issue until August 1996.

authored by Mohsen and produced in the patent lawsuit (such as the bogus Keith Lobo notes) could be relied upon by QuickTurn and, ultimately, by the fact-finder as genuine.

Third, the defendant has taken certain excerpts from Jeff Miller's trial testimony which relate to a series of hypothetical assumptions advanced by the defense and has attempted to use these limited excerpts to support a false conclusion — namely, that Jeff Miller testified that the 1988 Notebook would not have been relevant to the patent case. *See* Def. Mem., at 5 (quoting RT 180). The particular excerpt of testimony cited by defendant referred to a *hypothetical* situation about which counsel asked Mr. Miller on cross-examination, which hypothetical relied on two assumptions, neither of which were present in the *actual* litigation between Aptix and QuickTurn. Counsel's question asked Mr. Miller to (1) assume that there was no prior art alleged by QuickTurn to invalidate the patent and (2) that QuickTurn was not making any invalidity defense. *Id.* In response to these two hypothetical assumptions, Mr. Miller responded that if *both* hypothetical assumptions were present, *then and only then*, the 1988 Notebook would have been irrelevant to the patent case. Counsel's question completely ignored all of Mr. Miller's testimony on direct examination in which Mr. Miller painstakingly explained to the jury that: (1) QuickTurn asserted numerous prior art defenses throughout the litigation, including a defense under § 102(e) of the Patent Code that relied solely on the date of the Butts patent application (a date that fell after Mohsen's phony July 31, 1988 date of conception (*see* RT 172 and Ex. 33C) but before the date of the filing of '069 patent) and (2) QuickTurn was advancing an invalidity defense so that the Mohsen 1988 Notebook would absolutely be relevant at trial: "Yes, the Mohsen notebook and his July 31st , 1988 date of conception absolutely would have been a battle royale at trial if we had put on our 102(e) defense." RT 218. Simply put, counsel asked Mr. Miller to assume two facts — that QuickTurn was not making any prior art defense and was not alleging invalidity of the '069 patent — neither of which bore any relationship to what Jeff Miller testified *actually* happened in the litigation between QuickTurn and Aptix. The jury clearly understood that QuickTurn was relying on the date of the Butts patent application (QuickTurn's § 102(e) defense) and that the Butts patent application was dated *after* Mohsen's phony July 31, 1988 date of conception. Thus, the hypothetical that counsel asked Mr. Miller

might have been pertinent if the question had encompassed factual assumptions that bore some relationship to the actual patent case between Aptix and QuickTurn, but it did not. The jury saw through the flaws in the questioning and fully understood Mr. Miller's response to the questions at RT 180 to be referring to a set of assumptions that were *not* actual factors in the lawsuit.

Fourth, materiality is *not* an element of the obstruction of justice charges in counts 1 and 19, and the defendant's motion with respect to those counts should be denied for that additional reason. *See United States v. Ruggiero*, 934 F.2d 440, 446 (2d Cir. 1991) ("18 U.S.C. § 1503 carries no materiality element.").

Finally, the defendant's reliance on *United States v. Aguilar*, 515 U.S. 593 (1995), is misplaced. As an initial matter, *Aguilar* dealt with the entirely different question of whether lies to an FBI agent who had not yet been subpoenaed to testify before a grand jury had a "natural and probable effect" of interfering with the due administration of justice. Here, the government proved that the issue of the date of conception of the '069 patent *was* the central issue in the lawsuit between Aptix and QuickTurn during and at the time of the defendant's obstructive conduct. The government proved that the defendant's actions *did* constitute an endeavor to obstruct and impede justice, in that those actions had a "natural and probable effect" of interfering with numerous of aspects of the civil justice system, including the discovery process, the settlement process, the question of whether terminating sanctions and attorneys' fees should be imposed, and, ultimately, the decision on the merits. Further, the defendant's motion conveniently ignores the fact that the jury that convicted him was given a *Pinkerton* instruction and could find the defendant guilty of the obstruction charge based on *Aly* Mohsen's obstructive conduct. Thus, even setting aside the question of whether the defendant's and Aly's deposition testimony could be said to have a "natural and probable effect" of interfering with the administration of justice, there can be no serious dispute that Aly's false testimony at the May 2000 evidentiary hearing had that effect.

II. QUICKTURN REASONABLY PARTED WITH MONEY.

Mohsen's argument that "there is no way for a rational juror to conclude beyond a reasonable doubt that the 1988 Notebook" would have reasonably influenced QuickTurn

to part with money relies entirely on testimony from Mohsen's expert witness, Dr. Tredennick. Def. Mem., at 9. Dr. Tredennick testified that the prior art QuickTurn asserted would not have invalidated the claims of the '069 patent. *See, e.g.*, RT 1010. Mohsen's argument completely ignores several key factual and legal issues.

First, it was not necessary for the government to prove that QuickTurn's prior art would have invalidated the '069 patent if the civil case had gone to trial. The government was only required to prove that Mohsen's false statements were material "as of the time the alleged false statement was made." *Instruction No. 20* (Phase One). Jeff Miller testified that the central issue in the '069 patent lawsuit, as of June 1, 1998, was the date of conception. RT 84. The phony 1988 Notebook had been produced by Aptix to QuickTurn on May 4, 1998 (RT 69) to support a false July 31, 1988 date of conception. Thus, as of the time the bogus notebook was produced in the litigation (May 4, 1998), the central issue in the lawsuit was the date of conception. RT 84; *see also* RT 86 ("It was a major issue in the lawsuit.").

Second, Jeff Miller and Jay Kesan both testified that most civil lawsuits settle and do not actually proceed to trial. RT 52 (Miller testimony); *see also* RT 557 (Kesan testimony) ("In civil litigation, settling is very common, where they say, 'okay, well, you know, maybe we're infringing and your patent is valid, and so you know, let's settle this case.'"). Miller also testified that civil discovery plays a "critical" role in the settlement process, noting that "during discovery if we obtain documents from the other side that are particularly damaging we will strongly encourage our clients to settle." RT 53. Thus, regardless of whether or not QuickTurn's prior art could have invalidated the '069 patent at trial, the jury heard uncontroverted testimony that most civil cases do not go to trial and that most civil cases are settled based upon evidence developed during the discovery process. The government convincingly proved that the 1988 Notebook, which was provided by Aptix during the discovery process, was a completely bogus document that falsely asserted a date of conception that fell before some of QuickTurn's claims of prior art. This critical false document could very well have caused QuickTurn to settle the

lawsuit, before Mohsen's fraud was discovered. As Jeff Miller explained: "Well, when we received the 1988 notebook, I admit I was concerned because we [QuickTurn] felt we had prior art that would invalidate the patent. But some of that prior art was dated after this July 31st, 1988 date." RT 85.

Third, although the government was not required to prove that "anyone was actually defrauded or sustained a monetary loss (*Instruction No. 20*)," QuickTurn's legitimate concerns about the authenticity of the Notebook reasonably led it to spend money on (1) forensic experts to examine the Notebook and (2) attorneys to litigate whether QuickTurn could compel Aptix to provide the original documents for testing. In fact, Jeff Miller, who represented QuickTurn in the civil case, was spending nearly two-thirds of his time (at a cost to QuickTurn of $208.00 per hour) on forensic issues related to the genuineness of the 1988 Notebook. *See* RT 108. Mr. Miller clearly and concisely explained to the jury precisely why QuickTurn was reasonably influenced to part with money to pay forensic experts and attorneys' fees to determine the authenticity of the 1988 Notebook: "The reason, as I've stated earlier, was that we needed to know what the date was and whether the July 31st 1988 date was a valid and real date, because we needed to understand what the prior art that was going to be available to QuickTurn in an attempt to invalidate the '069 patent, or frankly, ***whether or not maybe QuickTurn should consider settling this case.***" RT 108 (emphasis added); *see also* RT 96 (noting that "we needed to plan accordingly" if the July 31st, 1988 date of conception was valid).[5]

Fourth, despite Dr. Tredennick's opinion that QuickTurn's prior art would not have invalidated the '069 patent at a hypothetical civil trial, the jury received evidence that QuickTurn had its own expert who had reached the opposite conclusion. RT 1029. This fact alone (*i.e.*, competing expert opinions on the impact of QuickTurn's prior art on

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[5]The money QuickTurn spent on forensic experts and attorneys' fees is but one component of QuickTurn's actual monetary loss as a result of Mohsen's fraud. The government established at trial that Mohsen intended QuickTurn's loss to be approximately $70,000,000, based upon calculations provided by Aptix's own damages expert and the phony Keith Lobo notes which were intended to treble those damages. *See, e.g.*, RT 152 & 166–68.

the validity of the '069 patent) shows the absurdity of Mohsen's entirely unsupported statement that "QuickTurn did not see the notebooks as anything they had to worry about in defending the patent litigation." Def. Mem., at 9. In fact, Jeff Miller, who was retained to represent QuickTurn in the civil litigation, testified just the opposite: "[T]he date of conception was going to be a big issue in this case. And we [QuickTurn] needed to know whether or not the July 31st, 1988 conception date was an actual date." RT 96.

Finally, Mohsen's *own* patent law expert, Roger Blakely, confirmed the "reasonableness" of QuickTurn's decision to part with money to determine the authenticity of the 1988 Notebook:

> Q: Would you consider that important in your responsibility to represent your client, to get to the bottom of whether the notebook was authentic or not?
>
> A: I would certainly want to get to the bottom of it.

RT 1084. For these reasons, there was sufficient evidence for the jury to conclude that the defendant's actions reasonably would have influenced QuickTurn to part with money.

III. MOHSEN'S RESPONSES TO THE QUESTIONS ALLEGED IN COUNTS 2 AND 3 WERE *NOT* "LITERALLY TRUE."

Mohsen argues for the first time that his answers to the questions in counts 2 and 3 are "literally true" and are not, therefore, sufficient to sustain his convictions on those counts. Def. Mem., at 9. We note that Mohsen did not make this argument to the jury. Mohsen argued at trial that his false answers to counts 2 and 3 were not "material" to the issues in the patent case, *not* that Mohsen's answers were "literally true." Nevertheless, Mohsen's belated argument relies on a twisted attempt to fit his false testimony into the parameters of *Bronston v. United States*, 409 U.S. 352, 361–62 (1973), which holds that "precise questioning is imperative as a predicate for the offense of perjury."

In this case, Mohsen's answers to the questions asked in counts 2 and 3 were literally false, not literally true. Mohsen's argument that his answers were "literally true" rests entirely on the fact that the questions referred to "Notebooks" in the plural, not "Notebook" in the singular. However, unlike the answers in *Bronston*, Mohsen's answers

to the questions in counts 2 and 3 were not unresponsive. They were entirely responsive to the questions that were asked. The issue presented here, which was not presented in *Bronston*, is "What was the intended *meaning* of the questions alleged in counts 2 and 3?" As other courts have held, "[t]he intended meaning of a question and answer are matters for the jury to decide." *United States v. Williams*, 552 F.2d 226 (8th Cir. 1977).

The facts of this case are similar to those considered by the Ninth Circuit in *United States v. Matthews*, 589 F.2d 442 (9th Cir. 1978). In that case, the court noted that the allegedly perjurious answer before it

> was not unresponsive. It was a forthright "no." It was not, as in *Bronston*, a statement of fact the truth of which could be ascertained without reference to the question that elicited it. Here the answer cannot be separated from the question if the truth of the answer is to be determined. If the "no" is to have meaning it must be read to echo and negate the language of the question itself.

Id. at 444. The *Matthews* court then rejected the defendant's argument that, where a question is subject to two interpretations, the answer "must be proved false as to both questions." *Id.* On the contrary, the Ninth Circuit adopted the approach that, where a question is subject to two interpretations, the court should "give the issue to the jury" and "place on the prosecution the burden of proving beyond a reasonable doubt that the defendant understood the question as did the government and that, so understood, the defendant's answer was false." *Id.* at 445.

In this case, there was ample evidence for the jury to conclude that the questions were intended to ask, and that QuickTurn wanted to determine, whether the defendant had taken *either* notebook to be forensically examined or whether *either* notebook had been out of his possession. The government also proved beyond a reasonable doubt that Mohsen understood the question to be referring to *any* notebook that he had produced in the litigation. *See id.* at 444 ("[T]he critical inquiry is as to the meaning attached to the question by the accused.") (citing *United States v. Cash*, 552 F.2d 1025 (9th Cir. 1975)).

IV. THERE WAS CORROBORATION OF MOORE'S TESTIMONY.

The defendant next argues that the Court should enter a judgment of acquittal on

count 3 because there was no "independent" evidence to corroborate the testimony of David Moore that Mohsen gave him the notebooks and, thus, that the notebooks were out of Mohsen's possession. *See* Def. Mem., at 11. In support of this argument, the defendant cites a single case, *United States v. Davis*, 548 F.2d 840 (9th Cir. 1977).

As an initial matter, the government notes that, upon the defendant's request, this Court added the word "independent" to jury instruction 14. *See* CR 521 (jury instructions); RT 934–37. At the time, counsel for the government acceded to that request, but noted that the government might object during closing arguments, depending on how counsel argued the meaning of "independent" to the jury. *See* RT 936. When asked by the Court how counsel wanted to define "independent," defense counsel indicated that they would not be arguing the issue "specifically to the jury." RT 936. Indeed, during closing arguments, defense counsel made no argument to the jury as to what "independent" meant and never argued that the government had not produced "independent" evidence to corroborate the testimony of David Moore.

Turning to the substance of the defendant's argument, there was ample evidence independent of the testimony of David Moore to demonstrate that the defendant's testimony was false. Moore testified that the defendant came to Moore's house on or about September 19, 1998 and left the 1988 Notebook in Moore's possession. RT 305–07; *see also* RT 365. Moore's testimony was corroborated by numerous exhibits that supported his assertion that the 1988 Notebook had been left in Moore's possession by Mohsen for at least some period of time. These exhibits included the following:

- Exhibit 38, which contained color-coded copies, photographs, and color video prints of the 1988 Notebook and which were made by Moore when the 1988 Notebook was in his sole possession, *see* RT 309;
- Exhibit 36, Moore's chronological notes of his work for the defendant, *see* RT 359–60; and
- Exhibit 39, a fax letter to Moore from the defendant attaching an unobliterated copy of the cover of a notebook similar to the 1988 Notebook, *see* RT 361–62.

Further, Moore's testimony that the defendant left the 1988 Notebook with him for

seven days (during which time Moore performed an extensive forensic examination on the 1988 Notebook) is corroborated by the fact that the defendant later arranged to have the 1988 Notebook "stolen." When the defendant mailed the "stolen" fragments of the 1988 Notebook back to himself, all of the incriminating portions of the 1988 Notebook that had been pointed out to him by Moore were torn off. *See* RT 365–66 (testimony of Moore that he "went over in great detail all the problems that [he] had found with the notebook"). If Moore had not in fact had the 1988 Notebook in his possession in order to perform the extensive forensic examination (as he testified), the defendant would never have known about all of the forensic problems with the Notebook.

V. COUNTS 2 AND 3 ARE NOT MULTIPLICITOUS.

The defendant also renews his pretrial "multiplicity" motion and requests that the Court grant a judgment of acquittal on either count 2 or count 3. In essence, the defendant argues that those charges "improperly converted the essentially same alleged false statement made during a single deposition . . . into two perjury charges." Def. Mem., at 12. The defendant contends that count 2 charges a subset of count 3 because "the notebooks had to be out of Dr. Mohsen's possession (count three) if he in fact delivered them to experts as alleged in count two." Def. Mem., at 13.

The defendant's argument that the 1988 Notebook "had to be out of [his] possession" if he made such a delivery is belied by the evidence. As the evidence at trial showed, Mohsen brought (*i.e.*, delivered) the 1988 Notebook to two forensic document examiners, Robert Kuranz and David Moore. With respect to Kuranz, the evidence shows that Mohsen physically brought the 1988 Notebook to Kuranz on only one occasion. *See, e.g.*, RT 258. During that visit, there is *no* evidence to support the conclusion that Mohsen left the 1988 Notebook in Kuranz's custody or that the 1988 Notebook was out of Mohsen's possession during that trip. *See, e.g.*, RT 260 (noting that ink plugs were taken from 1988 Notebook in defendant's presence). Based on the evidence presented at trial, it is clear that count 2 does not charge a "subset" of count 3.

Moreover, the government presented different evidence to demonstrate the falsity

of the statements alleged in counts 2 and 3. The defendant's answer to count 3 was false because the defendant met with David Moore on or about September 19, 1998, *see* RT 303–04, and left the 1988 Notebook with Moore for approximately seven days, *see* RT 305–07. This evidence demonstrated the falsity of the defendant's testimony that the notebooks had never been out of his possession.

The proof with respect to the falsity of the answer alleged in count 2 was different. The evidence showed that the defendant "delivered" the 1988 Notebook to two different experts on at least two different occasions (*i.e.*, Moore in Fair Oaks, California and Kuranz in Janesville, Wisconsin).

As the United States has previously argued, the fact that each of the questions related to the defendant's handling of the notebooks and that there is overlapping proof of the falsity of his answers does not mean that the counts are multiplicitous. *See United States v. Doulin*, 538 F.2d 466, 471 (2d Cir. 1976) ("[W]here the grand jury is focusing its attention upon a series of related acts occurring over a period of time, it is inevitable that its questions will overlap to a certain degree. But such overlapping alone is not enough to require that the allegedly false responses of the witness be consolidated into a single perjury count where, as here, each of the critical inquiries was directed to a separate facet of the overall transaction being investigated.").

For all of these reasons, this Court should deny the defendant's request that dismiss or grant a judgment of acquittal on either count 2 or count 3.

VI. ALL OF THE MAILINGS WERE INCIDENT TO AN ESSENTIAL PART OF THE FRAUDULENT SCHEME.

The defendant next argues that the mailings alleged in counts 14, 16, 17 and 18 were not in furtherance of the charged scheme to defraud. *See* Def. Mem., at 14. Mohsen's argument is unavailing for the following reasons.

First, with respect to Count 14, David Moore testified that the charged mailing (a check in the amount of $919.85) represented payment for the secret forensic examination on the 1989 DayTimer and the 1988 Notebook, both of which were integral to Mohsen's

scheme to defraud QuickTurn. Mohsen cites no evidence to support his conclusion that the $919.85 check was "collateral or ancillary to the charged fraud." Def. Mem., at 14. Because the Count 14 mailing represented payment for Moore's forensic work on documents (the 1988 Notebook and the 1989 DayTimer, which documents were produced in the litigation in furtherance of Mohsen's scheme to defraud QuickTurn), the Count 14 mailing was clearly incident to the scheme to defraud. The fact that Mohsen lagged on payment for Moore's services (which services were integral to the charged scheme) does not make the mailing an after-the-fact "collateral" matter.

Second, Mohsen's argument that the mailings in counts 16–18 cannot support the mail fraud convictions "because they all concern only the 1989 notebook" is similarly unpersuasive. The indictment charged Mohsen with a scheme to defraud QuickTurn and to gain an unfair litigation advantage in a patent infringement lawsuit. The charging language for the mail fraud counts incorporates by reference paragraphs 5 through 17 of the indictment. The 1989 Notebook is referred to and identified as the "1989 Notebook" in paragraphs 5, 8, 9, 10, 11, and 16 of the indictment. Although the phony 1988 Notebook was the basis for the fraudulent July 31, 1988 date of conception, there was ample evidence at trial that the 1989 Notebook was also integral to the fraud. For example, Jeff Miller testified that the 1989 Notebook was "really suspicious" because "it appeared to be that there was a lot of information added to this Notebook [Exhibit 4 — the 1989 Notebook] after the patent attorney made this copy." RT 77.

Mohsen implemented his scheme by producing false documents during the civil discovery process which, in part, required him to hire secret experts **before** he produced certain documents to figure out what he could get away with and how to avoid the forensically incriminating problems that Moore's examination of the 1988 Notebook revealed.[6] As the government charged in the indictment and proved at trial, the scheme to

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[6]Mohsen first consulted with Moore on August 25, 1998 and first brought Moore the 1988 Notebook in September 1998. By this time, Aptix had already produced the phony 1988 (continued...)

defraud persisted at least through June 2000 and involved both the 1988 and 1989 Notebooks; perjured deposition testimony; a staged theft; and other fraudulent documents (including a doctored 1989 Daytimer and a phony photocopy of the 1988 Notebook). In fact, in May 2000, Judge Alsup held an evidentiary hearing to determine whether Mohsen committed fraud "by fabricating an entire engineering notebook and altering numerous entries in a once-genuine notebook [the 1989 Notebook] in order to establish a fraudulent date of invention some fourteen months before the presumed date of invention." *Aptix Corp.*, 2000 WL 852813, at *1. Moreover, the jury was read an evidentiary stipulation informing them that the civil lawsuit was dismissed by Judge Alsup on June 14, 2000 for litigation misconduct by Aptix. And, the indictment charges Mohsen with a scheme to defraud that continued through June 2000. *See Superseding Indictment*, ¶ 40. In sum, Mohsen was charged with and the government proved at trial, a far-ranging scheme to defraud that continued until June 2000 when Judge Alsup dismissed Aptix's lawsuit.

The jury also heard testimony that, after the 1988 Notebook was "stolen," Mohsen continued his fraud by manufacturing additional fraudulent documents (including copies of pages of the 1988 Notebook that Aly "found"; the 1989 DayTimer, which contained false entries related to the 1988 Notebook; and the bogus "FL" mailing, which contained non-incriminating scraps from the 1988 Notebook) in an effort to (1) document that the 1988 Notebook truly was created and witnessed in 1988 and 1989 and (2) get around the Best Evidence Rule by proving that the 1988 Notebook was both genuine and not lost or destroyed in bad faith. Mr. Miller testified that in January 2000 Aptix was planning on using both the 1988 and **1989** Notebooks at trial and that QuickTurn had filed a motion

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[6](...continued)
Notebook to QuickTurn. Thus, Mohsen's initial secret consultation with Moore was to determine what forensic examination by QuickTurn's experts would reveal. The subsequent documents that Mohsen sent to Moore for forensic examination were all given to Moore **before** Mohsen produced the documents in the litigation. Mohsen's subsequent mailings (counts 16–18) were to determine how to avoid the forensically incriminating problems Moore discovered during his secret examination of the 1988 Notebook.

claiming that the Best Evidence Rule precluded Aptix from using photocopies of both Notebooks. *See* RT 153 ("It's my recollection that they were planning on using a copy of **both** the '88 and '89 notebooks in that trial.") (emphasis added).

Thus, as of March 2000 when Mohsen mailed Moore the items charged in counts 16 and 17, Mohsen did not know whether Judge Alsup was going to permit Aptix to rely on a photocopy of the 1988 Notebook. Accordingly, Mohsen continued and furthered his scheme to defraud QuickTurn by mailing additional bogus documents relating to the development of the '069 patent in order to educate himself on what phony documents he might be able to use if Judge Alsup denied Aptix's motion. There was no reason for Mohsen to continue secretly vetting bogus documents relating to the '069 invention through Moore other than to further his scheme against QuickTurn. Mohsen does not suggest (nor could he, in view of the evidence presented at trial) that the mailings in counts 16 and 17 do not relate to the scheme to defraud QuickTurn in the civil patent lawsuit. Rather, Mohsen's only point is that the indictment does not explicitly charge him with using the 1989 Notebook as part of the fraud. *See* Def. Mem., at 14 ("[T]he mailings charged in counts 16–18 cannot support mail fraud convictions because they all concern the 1989 notebook that is not part of the charged fraud.").

As discussed above, the 1989 Notebook was specifically identified in numerous paragraphs in the indictment, all of which were incorporated by reference into the mail fraud charges. The government charged and proved at trial that Mohsen's scheme to defraud QuickTurn was much broader than merely stating a false date of conception and supporting that phony date with the bogus 1988 Notebook. Rather, the government charged and proved a broad-ranging scheme that encompassed, among other aspects, multiple fraudulent documents, including the 1989 Notebook (to which Mohsen added embellishments to make it appear as if his invention was more fully developed than was actually the case in 1989, *see* RT 77–78), the 1989 DayTimer and the photocopy of the 1988 Notebook. The mailings charged in counts 16 and 17 represent an integral aspect of the scheme to defraud: these mailings related to forensic testing Mohsen requested

Moore to perform on Notebook pages in order to school himself on how to prepare additional fraudulent documents in the event that Aptix was not permitted to use photocopies of the 1988 and 1989 Notebooks at trial.[7]

Finally, count 18 represented the mailing of payment to Moore for the forensic work Mohsen commissioned in counts 16 and 17. Again, the fact that Mohsen delayed payment for the work he requested — forensic work which was designed to educate Mohsen on what fraud he could further perpetrate on QuickTurn if he was not permitted to introduce a photocopy of the 1988 Notebook at trial — does not render the mailing in count 18 "collateral" to the fraud scheme.

VII. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO CONCLUDE THAT THE DEFENDANT HAD APPLIED FOR AN EGYPTIAN PASSPORT IN VIOLATION OF THE DISTRICT COURT'S ORDER.

The defendant also argues that there was not enough evidence for the jury to conclude that he had applied for an Egyptian passport in violation of the conditions of his release. However, as the evidence made clear at trial, the defendant was undoubtedly making plans to flee the country prior to the March 2004 trial and needed a valid passport to do so. Indeed, counsel for the defendant admitted as much during closing argument. RT 1200 ("[T]he Government has presented lots of evidence, substantial evidence, from a number of witnesses that Amr Mohsen was thinking of planning on traveling.").

The evidence that supports the conclusion that the defendant was intending to flee the country, and that he had applied for an Egyptian passport as part of that plan, includes the following. *First*, the defendant obtained quotes from Executive Jet Management for travel from either San Jose or Fort Lauderdale to the Cayman Islands. Specifically, the

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[7]We note that the documents Mohsen mailed to Moore in Count 16 and that Moore mailed back to Mohsen in Count 17 do not appear to be pages from the actual 1989 doctored Notebook that had been produced to QuickTurn in the litigation and "stolen" by Mohsen before forensic testing could be commenced. The pages Mohsen mailed to Moore in Count 16 appear to be additional incarnations of as of yet unproduced Notebook pages, which Mohsen wanted Moore to test in order to determine whether they would pass forensic muster if Mohsen needed to rely on them to further his fraud.

defendant was overheard making those reservations on a payphone, and faxed reservation confirmations were found in his car at the time of his arrest. *See* RT 680–82, 787–91, 867–71; Exs. 82 & 83; *see also* RT 752–53 (testimony regarding defendant's telephone conversation regarding travel to Florida). *Second*, the defendant was overheard asking a reservations agent what he needed in terms of "passports." RT 780. As government witness Emma Sword noted, Executive Jet Management *requires* its passengers to have passports to enter the Cayman Islands from the United States. *See* RT 792–95. *Third*, notes found in the defendant's car contain the notation "passport," *see* RT 877; Ex. 83, supporting the conclusion that the defendant was focusing on the need to have a passport. Copies of Mohsen's American passport (which he had surrendered to the Clerk of the Court on April 9, 2003 as required by his bail bond) and an expired Egyptian passport were also recovered from defendant's car and introduced at trial. *See* RT 882–84; Ex. 85. Trial testimony from Brian Anderson, whose company hosted the San Francisco Egyptian Consulate's web site during 2004, established that these passport photocopies (current American passport and expired Egyptian passport) were consistent with the documents an Egyptian citizen was required to provide to obtain a replacement for a lost or stolen Egyptian passport. *See* RT 762–65; Ex. 86. *Fourth*, notes recovered from the defendant's jail cell suggest that he wanted his wife to obtain papers related to the loss of his Egyptian passport in the 1990s, but that he "was not interested in application in 2004." RT 894; Ex. 97A. This note clearly suggests that a passport application by Mohsen in 2004 *did* exist, presumably in the files of the Egyptian Consulate. *Finally*, it is undisputed that the defendant was without a United States passport, but was eligible to obtain an Egyptian passport. FBI agents testified that Mohsen was observed entering the Egyptian Consulate in San Francisco, where the Consulate's own web site declared that an Egyptian citizen could get a passport. *See* Ex. 86.[8] And of course, the defendant had been observed

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[8]The Consulate's web site also states that, to replace a lost passport, an applicant must have a copy of the lost Egyptian passport and a copy of any other passports possessed by the (continued...)

liquidating bank accounts and trying to get as much money as possible in the 72 hours before he was arrested. *See generally* RT 731–32; 734–35; 741–44; 899.

The defendant argues now, and argued at trial, that a passport is not required to travel to the Cayman Islands. *See* Def. Mem., at 16–17; RT 1201–02. However, there was no evidence that Mohsen was aware that he might be able to travel to a foreign country without a passport. On the contrary, Emma Sword testified that Executive Jet (the company that Mohsen telephoned to obtain quotes for private flights to the Cayman Islands) requires a passport to enter the Cayman Islands from the United States. There is no other evidence that the defendant received any different information.

Taking all of the evidence in the case into account could only have strengthened the jury's conclusion that the defendant had, in fact, applied for an Egyptian passport. As an initial matter, the jury had heard the overwhelming evidence of the defendant's guilt on the conspiracy, perjury, subornation of perjury, mail fraud, and obstruction of justice charges. The defendant's guilt on these charges was clearly taken by the jury as a motive for the defendant's intention to flee. The jury had also heard extensive evidence of the defendant's Herculean efforts to obstruct justice in the patent case against QuickTurn. They heard that Mohsen had traveled to Wisconsin to have Kuranz do forensic testing on the 1988 Notebook, and that he had subsequently sent Kuranz additional documents to test. The jury also heard that the defendant had traveled to the Sacramento area at odd hours and on more than one occasion to meet with Moore to have additional examinations performed on the notebooks. They had also heard about the lengths that he had gone to make the notebooks disappear by arranging to have them stolen and then sent back to him a year later. Based on these actions, the jury could reasonably conclude that the defendant intended to make sure that he would be able to get out of the country and that he would not take a chance of being denied entry to the Cayman Islands (or denied exit

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[8](...continued)
applicant. *See* Ex. 86. After the defendant's arrest, a copy of his expired Egyptian passport and his United States passport were recovered from his car. *See* RT 882–84; Ex. 85.

from the United States) because he was without a passport.

For all of these reasons, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the defendant had applied for an Egyptian passport in violation of the terms of his pretrial release and that he had therefore committed a contempt of court.

VIII. THE GOVERNMENT PROVED THAT THERE WAS NO ENTRAPMENT.

Mohsen argues that his convictions in Phase Two on counts 21 and 22 should be vacated because the government failed to prove that Mohsen was both predisposed and not induced by a government agent to commit the crimes. The evidence at trial on both issues was overwhelming.

A. Predisposition

Predisposition "is the defendant's willingness to commit the offense *prior* to being contacted by government agents coupled with the wherewithal to do so." *United States v. Poehlman*, 217 F.3d 692, 698 (9th Cir. 2000) (emphasis in original). In this case, the jury had overwhelming proof of Mohsen's willingness to intimidate witnesses and thwart the court system before Mr. Primas became a government agent in May 2004. First, the jury had already heard evidence about and convicted Mohsen of a smorgasbord of crimes in Phase One of the trial. The 15 counts of conviction in Phase One included obstruction of justice and perjury, both of which related to Mohsen's efforts to subvert the civil justice system and to stack the deck in his favor in the patent infringement case. The crimes of conviction in Phase One all occurred many years before Mohsen ever met Primas. Moreover, the crimes in Phase Two were of the exact same nature which Mohsen committed in Phase One, only the arena had shifted from the civil justice system to the criminal justice system. In Phase Two, Mohsen was convicted of attempted witness tampering (count 21) and solicitating an arson of a government witness's car to commit a federal felony, *i.e.*, witness intimidation (count 22). In Phase Two, Mohsen escalated his criminal behavior to new and more dangerous forms of obstruction of the legal system because the stakes were higher for Mohsen, and he had fewer options available to him

since his efforts to flee the country were unsuccessful.

Second, Mohsen's immediate initial action upon his arrival at Santa Rita jail was to call his sister Magda Metwally to coach her as to what to falsely say about whether or not he truly intended to leave the country. This evidence alone demonstrates Mohsen's predisposition to tamper with witnesses.

Third, the proof at trial of Mohsen's pre-May 19, 2004 behavior while he was incarcerated, but before the government met with Mr. Primas, was convincing proof in itself of Mohsen's predisposition to commit counts 21 and 22. Mr. Primas brought with him to the May 19, 2004 initial meeting with the government a note in Mohsen's handwriting. The note that Mohsen had written, *see* Ex. 88 & RT 1423–24, was a threat letter Mohsen wanted Primas to have someone leave in the Huangs' car after breaking the window in the Huangs' car. Mohsen's proposed vandalism and the note that Mohsen personally authored were another incarnation of witness tampering because, if the proposed vandalism had actually occurred, the Huangs would have been witnesses to a phony break-in. Mohsen clearly intended that the vandalism to the Huangs cars would enable the Huangs to become trial witnesses who would unwittingly support Mohsen's false defense that the break-in to Mohsen's car in 1998 (which Mohsen had arranged to stage the theft of the Notebooks) was really a case of mistaken car identity. The fact that Mohsen was attempting to arrange a convoluted and violent scheme to tamper with the Huangs (by breaking into their car and making them witnesses to Mohsen's false defense of mistaken car identity) was just another form of obstruction of justice concocted by Mohsen **before** Primas became a government agent.

Finally, we note that Mohsen's contempt of court (count 20) involved yet another attempt to subvert the criminal justice system. Count 20, which was presented during Phase One, involved evidence that even the defense conceded indicated that Mohsen was attempting to jump bail and flee to the Cayman Islands to avoid his criminal trial. The contempt of court conviction also shows Mohsen's predisposition to commit crimes to disrupt his criminal trial or avoid it altogether.

B. Inducement

Because Mohsen was so clearly predisposed to commit counts 21 and 22, he required little or no inducement to do so. *See United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994). In fact, Mohsen has not pointed to any evidence of inducement at all. Though Mohsen attempted at trial to suggest that Primas exploited a friendship with Mohsen and their common religion to induce Mohsen to commit counts 21 and 22, the jury clearly rejected that premise. There was no evidence for the jury to conclude that Mohsen was "induced" to intimidate witnesses in his **own** trial simply because he and Mr. Primas were friends and fellow Muslims. Indeed, all evidence, including the audio- and videotaped conversations between Mohsen and Primas, clearly showed that Mohsen was the driving force behind the threatening calls and the arson. The jury heard a recording of Mohsen berating Primas for failing to have Primas' source call each witness individually and ordering Primas to have all witnesses called again and personally threatened. The jury also heard Mohsen imploring Primas to burn Moore's car "ASAP." Finally, the jury saw a videotape in which Mohsen was shown a photograph that supposedly documented the arson to Moore's car. Mohsen expressed approval for the job; his only "hesitation" was his "hope" that they "got the right car."

> Where government agents merely make themselves available to participate in a criminal transaction . . . they do not induce commission of the crime. "An improper inducement . . . goes beyond providing an ordinary 'opportunity to commit a crime.' An "inducement" consists of an "opportunity" *plus* something else — typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive.

Poehlman, 217 F.3d at 701 (emphasis in original). In this case, Mohsen's only motive to threaten witnesses with harassing telephone calls and to burn Dave Moore's car was a criminal motive to obstruct and derail his trial. There was no "non-criminal type of motive" which was in any way exploited by the government or its agent.

The jury was given instructions on entrapment and clearly found that the government met its burden of proving predisposition and/or lack of inducement. There is no basis for reversing the jury's sound verdict, especially in light of the panoply of

criminal activity for which the jury had already convicted Mohsen during Phase One.

IX. THE COURT COMMITTED NO ERROR IN NOT PROVIDING A COPY OF THE INDICTMENT TO THE JURY.

The defendant's penultimate argument is that the Court should grant a new trial on counts 1–4 and 10–19 because the Court responded "no" to the jury's question as to whether there was "a copy of the indictment with the specific charges that we can see." *See* CR 519; *see also* Def. Mem., at 19.

As an initial matter, it was entirely within the Court's discretion as to whether to allow the jury to see a copy of the indictment. *See United States v. Murray*, 492 F.2d 178, 193 (9th Cir. 1973) ("Whether an accusatory pleading should be permitted to go to the jury room is a matter within the discretion of the trial judge."); *see also United States v. Petersen*, 548 F.2d 279, 280 (9th Cir. 1977); *United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974); *accord United States v. Downen*, 496 F.2d 314, 320 (10th Cir. 1974) ("We recently reaffirmed the rule that whether an indictment may be taken to the jury room is a matter within the sound discretion of the Trial Court."). Given that the Court had had government counsel read a redacted portion of the indictment to the venire, given that the indictment contained arguably prejudicial information regarding the charges against Aly Mohsen, and given that the Court's instructions summarized each of the charges, the Court did not abuse its discretion in answering "no" to the jury's question.

In any event, prior to the return of the verdict by the jury, the defendant raised no objection to this Court's negative response to the jury's question. *See* RT 1250–51. Accordingly, the defendant has waived any claim that the Court's actions were in error.

Finally, the substance of the defendant's argument is off the mark. Specifically, the defendant argues that the Court should have provided the indictment to the jury because the government referred to the "Keith Lobo" notes in its rebuttal argument.[9] The

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[9]Of course, the government did not wait until its rebuttal argument to discuss the Keith Lobo notes. Government counsel also explained in its first closing argument why the Keith Lobo (continued...)

defendant then goes on to argue that the "government's argument confused the real issues at trial by indicating to the jury that they should convict Dr. Mohsen of fraud and perjury based on the uncharged fraudulent note rather than the charged fraud based on the 1988 notebook[]." Def. Mem., at 20. Of course, the government made no such argument to the jury, *see also* RT 1224 (noting that Keith Lobo notes were not charged in indictment), and the defendant's argument here simply ignores what the government *did* argue.

The government first argued that the 1988 Notebook and the defendant's lies and mailings were material because, *at the time* of the lies and mailings, the date of conception of the '069 patent was at issue. *See, e.g.*, RT 1216–18. Government counsel then argued that, even if the jury bought the defendant's argument (*i.e.*, that the 1988 Notebook was not material because Aptix did not need to rely on the 1988 Notebook because QuickTurn's prior art could not invalidate the '069 patent), the 1988 Notebook *would still be* material. Counsel argued that, even under the defendant's view of the case, the 1988 Notebook would still be material and relevant because the question of whether the defendant fabricated the 1988 Notebook would have been relevant and material to the question of whether the defendant had also fabricated the Keith Lobo notes in an effort to treble the damages that QuickTurn would have to pay. *See* RT 1222–26. The government also raised this argument in its initial closing argument. *See also* RT 1136–37. The defendant did not take the opportunity in either of his closing arguments to address the Keith Lobo notes, apparently realizing how deadly they were to his "materiality" defense. Instead of suggesting that the jury was confused (as the defendant argues), the jury's finding that the defendant *had* made material false statements in his depositions and that the mailings alleged in the indictment *were* part of a material scheme to defraud suggests only that they were simply not fooled by the defendant's "lies and damned lies" defense and saw the defendant's conduct for what it truly was — "a complete fraud from bark to core." *Aptix Corp.*, 2000 WL 852813, at *24.

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[9](...continued)
notes were "so very important" to the Aptix lawsuit. RT 1136; *see also* RT 1137–38, 1144–46.

X. THE COURT SHOULD REJECT THE DEFENDANT'S FINAL CATCH-ALL ARGUMENT.

The defendant's final argument is simply that "the evidence preponderates heavily against the verdict." Def. Mem., at 21. This contention is not supported by any analysis. In any event, however, it cannot be true. The government proved without a doubt that the defendant had fabricated the 1988 Notebook; that he and his brother had lied and lied again about the authenticity of the 1988 Notebook; and that the defendant had caused numerous mailings as part of his scheme to defraud QuickTurn. The defendant's main defense in Phase One of the trial was that the 1988 Notebook was not "material." There was overwhelming evidence to establish such materiality, and there can be no serious argument that the evidence "preponderates heavily" against such a finding.

CONCLUSION

Based on the foregoing, the United States respectfully requests the Court to deny defendant Amr Mohsen's motion for a judgment of acquittal and/or a new trial.

Dated: May 12, 2006

Respectfully Submitted,

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