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AMR MOHSEN

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendants.	No. CR 03-95-WBS DEFENDANT AMR MOHSEN'S REPLY TO GOVERNMENT'S OPPOSITION TO HIS MOTION FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL Date: June 23, 2006 Time: 10:30 a.m. Hon. William B. Shubb

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT ON COUNTS 1-4 & 10-19 FOR LACK OF MATERIALITY.

A. The Perjury, Subornation of Perjury, and Obstruction of Justice Counts (1-4, 10 & 19)

The government reaches the wrong conclusion on materiality by relying on faulty premises and unsupportable inferences. The government starts out by citing the undisputed propositions that "materiality is tested at the time the false statement is made," and that Aptix was asserting a date of conception of July 31, 1988 for the '069 patent at the time the 1988 notebook was produced in discovery. It then reaches the erroneous

conclusion that this makes the notebook material, emphasizing that Aptix's attorneys stated they would have a difficult time invalidating Quickturn's prior art without the notebooks if the case were to proceed to trial.

But materiality does not depend on what Quickturn's or Aptix's attorneys, Dr. Mohsen, or even Judge Alsup thought. As the Court instructed the jury:

> The test is an objective one. In other words, the appropriate inquiry is not whether the misrepresentation actually influenced the fact finder in this case or what those persons actually involved in the case thought, but whether the recitation had a natural tendency to influence the fact finder's decision on an issue which was relevant to the matters to be determined by the fact finder.

RT 1238. Dr. Tredennick's undisputed testimony was that Quickturn's prior art would *never* have invalidated the '069 patent. RT 1020. The government did not put on any evidence to demonstrate otherwise and did not even seriously attempt to impeach Dr. Tredennick's testimony.[1] The fact that none of Quickturn's prior art could ever have invalidated the '069 patent did not change over time and did not depend on the district court's rulings. It was true in 1998--and every date before and afterward.

The government wrongly characterizes the defense's position as claiming that "a person's deposition can be material only if the case proceeds to trial." Gov't Opp. at 7. The defense has never made such an argument. The government must, however, prove a statement is material to an issue that will be decided by the trier of fact in the case. Where a case goes to trial, the transcripts of the trial and other pleadings can be admitted to show

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[1] The government grasps at straws in arguing that the jury could have disregarded Dr. Tredennick's testimony because his credibility was in question and he had acknowledged that Quickturn had an expert that reached the opposite conclusion. Dr. Tredennick testified that Quickturn's supposed expert was wrong and that the expert didn't even write the report he purportedly authored. RT 1030-31. The government had every opportunity but did not present the testimony of Quickturn's supposed expert nor any other expert to refute Dr. Tredennick. Nor did it impeach his credibility on cross-examination. Rather, it asked him a series of irrelevant questions about other aspects of the case that in no way affected his credibility or conclusions. The government still tries to impeach Dr. Treddenick's background by relying on his website's obvious humorous statements that he has an "appalling lack of knowledge" of computer chip design. RT 1028-29. Given that Dr. Treddenick has a Ph.D. in computer design at the University of Texas, RT 984, has a number of patents related to computer chip design, RT 986-87, and was one of the inventors of the Apple McIntonish computer's "brains chip," RT 986, it shouldn't take much for anyone to recognize that this statement is not meant to be taken seriously. RT 1029-30.

the issue to which the charged false statement is false. Where the case does not go to trial, the government is not relieved of its burden of showing materiality. Rather, the government's burden may be more difficult to meet without trial transcripts. But it is still required to prove the statement at issue was material to an issue to be decided by the trier of fact in the case through testimony, court pleadings, or other evidence. Mere allegations that prior art might have invalidated a patent cannot stand. Here, the government simply failed to present sufficient evidence for any rational juror to conclude beyond a reasonable doubt that the 1988 notebook was relevant or material to any issue known at the time of the allegation to be decided by the trier of fact in the patent litigation.

To try to get around this result, the government wrongly argues that the *Kungys* standard for materiality is limited to immigration contexts, citing *United States v. Alferahin*, 433 F.3d 1148 (9th Cir. 2006). But the *Kungys* standard for materiality--that the statement have a natural tendency to influence to influence the decision of the decision making body to which it was addressed-- has been applied in a variety of other non-immigration criminal statutes in numerous Supreme Court and Ninth Circuit cases. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 509 (1995); *United States v. Johnson*, 297 F.3d 845, 867 n.20 (9th Cir. 2002); *United States v. Scholl*, 166 F.3d 964, 980 (9th Cir. 1999); *United States v. Carpenter*, 95 F.3d 773, 776 (9th Cir. 1996), *cert. denied*, 519 U.S. 1155 (1997). Indeed, the government relies on the Ninth Circuit's decision in *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003), which also uses the *Kungys* standard for materiality.

The government takes *Alferahin* out-of-context in quoting its language that "the *Kungys* decision established a more rigorous definition of materiality that is unique to the context of denaturalization proceedings." Gov't Opp. at 8 (quoting *Alferahin*, 433 F.3d at 1155). This language, however, did not refer to the general *Kungys* materiality test that has been repeatedly applied to numerous non-immigration, criminal statutes, but rather it refers to an *additional* requirement in cases where the government seeks to deprive an individual of the right to citizenship that requires the government also produce evidence to show that

the person may have been disqualified for citizenship:

> While the *Kungys* Court produced multiple opinions on the meaning of "materiality," all nine justices agreed that a material misrepresentation must have at least "a natural tendency to produce the conclusion that the applicant was qualified" for citizenship . . . .
>
> *In addition to these requirements*, however, Justice Brennan's controlling opinion in *Kungys* emphasized that "citizenship is a most precious right, and as such should never be forfeited on the basis of mere speculation or suspicion. . . . Justice Brennan therefore opined that the government also had to support its assertion of materiality with "evidence sufficient to raise a fair inference that a statutorily disqualifying fact actually existed." . . . Thus, the *Kungys* decision established a more rigorous definition of materiality that is unique in the context of denaturalization proceedings.

433 F.3d at 1155 (citations omitted, emphasis added).

In downplaying the importance of the *Kungys* decision, the government instead asks the Court to give weight to Judge Alsup's June 2000 order in determining the materiality of the 1988 notebook and Dr. Mohsen's statements. But Judge Alsup's opinion was not introduced into evidence and, of course, considered "materiality" in the civil context with a lesser burden of proof. Furthermore, Judge Alsup did not apply the *Kungys* test for materiality in determining what sanctions should be imposed after he concluded that Dr. Mohsen committed fraud in the patent litigation. Judge Alsup made no finding in his June 2000 ruling that either the 1988 or the 1989 notebooks were relevant to any issue that the Court or the jury would have to decide. Rather Judge Alsup characterized Mr. Mohsen's alleged fraudulent activity as an attempt to "strengthen" the patent through the manufacture of counterfeit evidence by pushing back the conception date of the patent. Judge Alsup stated, in pertinent part, as follows:

> 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 v. QuickTurn, 2000 U.S. LEXIS 8408, 8474, ¶ 115. Judge Alsup did not cite to QuickTurn's prior art because he knew that it was not relevant to the '069 patent because that prior art dealt with "partial" not "global" connectivity. Regardless whether the 1988 notebook was a misguided attempt to claim an earlier date, the attempt did not matter in

this case because there was no prior art that Aptix needed to get behind.[2]

The government then spends a lot of time trying to justify the materiality of the 1988 notebook based on evidence that Dr. Mohsen provided notice of infringement to Quickturn's president Keith Lobo in August 1996. In short, the government contends that Aptix provided a fabricated set of notes purporting to be of the meeting where he gave Lobo notice of the infringement and that Dr. Mohsen testified in his deposition that the meeting took place shortly after the issuance of the '069 patent. The government claims that the evidence of the fraudulent Lobo notes made the 1988 notebook material because the Lobo notes started the damages clock running and was relevant to a determination of damages if Quickturn lost the lawsuit. Gov't Opp. at 8-10. This alleged "Lobo" fraud cannot be used to support the fraud, perjury, and obstruction of justice counts, however, because it was not charged in the indictment. The indictment clearly charged that Dr. Mohsen committed fraud in fabricating the 1988 notebook. Nowhere does it charge any fraud in connection with the purported fabrication of the Keith Lobo note or Dr. Mohsen's deposition testimony about his meeting with Lobo.

Further, evidence of the Lobo note and meeting cannot make the 1988 notebook material. If the 1988 notebook was irrelevant to any issue to be decided by the jury, the notebook was not material as a matter of law. Period. To convict Dr. Mohsen of the alleged Lobo fraud, the Fifth Amendment's grand jury guarantee and principles of fair notice require that the fraud be found by a grand jury and charged in an indictment. *See, e.g. United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002). It was not and thus the Lobo fraud cannot be considered in determining whether the evidence was sufficient to sustain the verdict on the fraud, perjury, and obstruction of justice counts. *Cf. Griffin v. United States*, 502 U.S. 46 (1991) (where "the Constitution forbids conviction on a

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[2] Presumably all fraudulent conduct is committed because the person engaging in the fraudulent conduct thinks that he will gain an advantage. In finding that the fraudulent conduct was material because the inventor was trying to strengthen his patent, Judge Alsup found that the fraudulent conduct was "material" because the conduct was fraudulent. This is circular reasoning; and, in reasoning this way, Judge Alsup effectively eliminated the requirement that the fraud be "material."

particular ground, the constitutional guarantee is violated by a general verdict that may have rested" on the improper ground) (*citing Stromberg v. California*, 283 U.S. 359 (1931)).

B. Obstruction Of Justice Counts (counts 1 & 19)

Despite the government's protests, *United States v. Aguilar*, 515 U.S. 593 (1995), is right on point concerning the obstruction of justice charges in counts 1 and 19. The issue of the date of conception was not the central issue in the patent litigation case. Instead, Quickturn made bogus prior art defenses to create an issue to derail the lawsuit. Indeed, Judge Alsup rendered his final ruling after the claim construction hearing without any reference to the notebook. RT 590. Because uncontroverted testimony proved Quickturn's prior art did not invalidate the '069 patent at the time of Dr. Mohsen's depositions and when the notebook was turned over in discovery, the notebook never was material to any issue to be decided by the trier of fact and never had *the natural and probable effect of interfering with the due administration of justice,* as *Aguilar* requires for conviction for obstruction of justice.

The government's fall-back argument that the jury could have found Dr. Mohsen guilty for acts of a co-conspirator based on Aly Mohsen's purportedly false testimony under the Court's *Pinkerton* instruction is similarly unavailing. First, if the 1988 notebook and Dr. Mohsen's deposition testimony about it did not amount to obstruction because it was not material and could not have had a natural and probable effect of interfering with the due administration of justice, then Aly Mohsen's testimony about the same 1988 notebook similarly could not have amounted to obstruction of justice. Moreover, Aptix had denounced any reliance on the 1988 notebook to support an earlier conception date for the '069 patent at least by April 3, 2000, when it filed a pleading confirming that it would rely *only* on the Sept. 20, 1989 filing date for the '069 patent. As a result, even if a conspiracy between Amr and Aly Mohsen had existed at one time, any such conspiracy had terminated before Aly Mohsen testified at the evidentiary hearing in May 2000.

C. The Mail Fraud Counts (counts 11-18)

The government makes several arguments on why the 1988 notebook and associated statements were material on the mail fraud counts. None have merit. First, as set forth above, the 1988 notebook was not shown to be material at the time of Dr. Mohsen's depositions or when the notebook was provided in discovery. Rather, it was never material because Quickturn's prior art could never have invalidated the '069 patent. Second, the 1988 notebook could not have caused Quickturn to settle or expend money to challenge the notebook. Unless and until Quickturn's prior art was shown to have some potential to invalidate the '069 patent (and the government did not even attempt to present any evidence to suggest that it could), the notebook was meaningless.[3] There was no real possibility that the notebook would have caused Quickturn to settle. In fact, the opposite was true. Quickturn used the 1988 notebook affirmatively to win the lawsuit by moving away from a frivolous prior art position and convincing the district court to dismiss the lawsuit because of plaintiffs' meaningless notebook. Moreover, a reasonable entity would not spend any money on forensic testing or otherwise challenging a notebook supporting a prior conception date of a patent when it knew it had no relevant prior art that could have invalidated the patent. The notebooks did not (and could not) have influenced Quickturn to part with money by settling or challenging Aptix's evidence, except that it allowed Quickturn to win a lawsuit even though it had no valid defense.

[3] And Dr. Mohsen's own expert Blakely did not confirm the reasonableness of Quickturn's decision to part with money to test the authenticity of the 1988 notebook as the government contends. Gov't Opp. at 14. Blakely's testimony that he would "would want to get to the bottom" of whether the notebook was fraudulent if he were defending the patent litigation presupposes that his client had a legitimate prior art defense for which the notebook was submitted to get behind. RT 1083-84. Here, there was no evidence presented that Quickturn had any colorable prior art defense.

II. MOHSEN'S STATEMENTS CHARGED IN COUNTS TWO AND THREE DO NOT CONSTITUTE PERJURY BECAUSE THEY ARE LITERALLY TRUE AND THERE IS NO INDEPENDENT CORROBORATION OTHER THAN MOORE'S TESTIMONY TO PROVE COUNT THREE.

Forgetting that Dr. Mohsen made the same Rule 29 argument after the close of the government's case at trial, the government erroneously states that Mohsen's "literally true" argument was made for the first time in his post-trial motion for acquittal. In any event, it's not important as a defendant is permitted to make a Rule 29 motion for the first time after trial, even if he or she did not make one before the verdict.[4] *See* Fed. R. Crim. P. 29(c)(3) ("A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.").

On the merits, the government does not contest that the questions charged in counts two and three ask about "notebooks" in the plural. Nor does it dispute that the answer is literally true in that at most the evidence showed that Dr. Mohsen delivered or had out of his possession only one notebook, not notebook"s" in the plural. Rather, attempting to analogize this case to *United States v. Matthews*, 589 F.2d 442 (9th Cir. 1978), the government contends that the Court should not grant a judgment of acquittal because the question is susceptible to an interpretation that the questioner was asking "whether the defendant had taken *either* notebook to be forensically examined or whether *either* notebook had been out of his possession." Gov't Opp. at 15.

This is not so. Rather, this case is more akin to *United States v. Cook*, 489 F.2d 286 (9th Cir. 1973), than *Matthews*. Unlike the question charged in *Mathews* that the Court found subject to two interpretations, in this case a grammatically correct reading of the question asked of Dr. Mohsen made his answer literally true because it asked in the plural and he answered in the singular. While his answer may have been misleading, it was not false. In *Cook*, the defendant argued that his denial of knowledge of kickbacks to the

[4] Likewise, despite the government's suggestion, there is no requirement that a defendant first argue the grounds for a Rule 29 motion to the jury.

police was not true because the question asked only about kickbacks in the present--not the past. In rejecting that government's argument that the questions were reasonably directed to either the past or present, the Court found that the only grammatically correct reading of the questions showed that the questions was that the questions referred to the present only. 489 F.2d at 287:

> Fairly interpreted, *Bronston[v. United States*, 409 U.S. 352 (1973),] stands for the precept that a perjury conviction cannot be based on answers which are literally true, even though false information is conveyed by implication. A precise grammatical reading of the challenged question and answer demonstrate that Cook's answer was literally true. Consequently *Bronston* controls.

Id. The Court thus found that there not evidence to prove the perjury charge beyond a reasonable doubt as a matter of law, which entitled the defendant to an acquittal. Likewise, here the question asked was not ambiguous and, under the only grammatically correct interpretation, the question asked about notebooks in the plural so that Dr. Mohsen's answer was not false. Further, even under the government's position, the Court should enter a judgment of acquittal because the government points to no evidence in the record to prove beyond a reasonable doubt that Dr. Mohsen understood the question to be referring to *any* notebook in the litigation. All the relevant deposition questions referred to both notebooks.

Finally, a judgment of acquittal is warranted on count 3 because there was no independent corroboration of Moore's testimony that the 1988 notebook was out of Dr. Mohsen's possession as charged. The exhibits and other evidence referred to by the government at pages 16 and 17 of its opposition demonstrate at most that Moore examined the notebook--not that the notebook was out of Dr. Mohsen's possession since it could have been examined and copied while Dr. Mohsen met with Moore.

III. THE COURT MUST VACATE THE CONVICTION ON EITHER COUNTS TWO OR THREE AS MULTIPLICITOUS.

As this Court has noted, "the [Blockburger] test for multiplicity-charging a single offense in more than one count--is whether each separately violated statutory provision 'requires proof of an additional fact which the other does not.'" *Order Re: Defendant's Motion to Dismiss Counts 1-3, 10, 19 & 20*, filed Dec. 22, 2005, at 4 (citations omitted). This test is not satisfied here. In this case, the government needed only to prove the same fact to establish each count, i.e., that the notebooks were delivered to an independent expert for testing. This fact would demonstrate the falsity of count two and also show that the notebooks were out of Dr. Mohsen's possession, as charged in count three. That's all the *Blockburger* test requires for counts to be multiplicitous.

Sidestepping the *Blockburger* analysis, the government argues unpersuasively that it presented different evidence to establish counts two and three. Gov't Opp. at 17-18. In fact, the government's opposition essentially concedes that it presented the same evidence that Dr. Mohsen delivered the notebooks to David Moore to prove both counts two and three. That the government also presented additional evidence concerning Robert Kuranz is unnecessary and besides the point.[5] In *United States v. Clarridge*, 811 F. Supp. 697 (D. D.C. 1992), the court made this very point:

> The government, in its papers and at oral argument, stresses that the facts alleged in the indictment do not limit it from proving the charges by other evidence. Even if the government could prove the falsity of Counts 1 and II by separate evidence, this does not necessarily mean that separate counts exist. Blockburger does not hold that separate offenses exist if additional facts could possibly be established to prove each charge, but that the offenses are distinct if they require proof of an additional fact.

Id. at 705 n.11; *see also United States v. Doulin*, 538 F.2d 466, 471 (2d Cir.) (multiple counts found appropriate where the "proof of each falsehood necessitated the establishment

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[5] Kuranz testified that Dr. Mohsen did not leave the notebooks with Kuranz so that Kuranz's testimony does not support the charge in count 3 that Dr. Mohsen falsely stated that the notebooks were never out of his possession. Further, it doesn't appear that Kuranz actually tested the 1988 notebook in that he examined papers with blue ink (Exh. 35, p.1, lines 2-5) while the 1988 notebook examined by Moore contained no blue ink. RT 312, 358.

of different facts"), *cert. denied*, 429 U.S. 895 (1976).

Finally, regardless whether count two asks a more specific question than the inquiry in count three, "[s]eparate counts are only appropriate where the 'inquires [are] directed to a separate facet of the overall transaction being investigated.'" *Clarridge*, 811 F. Supp. at 705 (*quoting Doulin*, 538 F.2d at 471 (2d Cir.)). Both questions here are focused on the same aspect of the deposition, i.e., whether Dr. Mohsen had given the notebooks to independent experts. Multiple counts are thus improper because asking the question a second time in a slightly different way "did not further impair the proceeding or a government function." *United States v. Salas-Camacho*, 859 F.2d 788, 791 (9th Cir. 1988); *United States v. Graham*, 60 F.3d 463, 467 (8th Cir. 1995); *Clarridge*, 811 F. Supp. at 705 ("Counts VI and VII also fail the second prong of the multiplicity analysis articulated by some Circuits, in that the repetition of the alleged lie did not further impair the operations of the Iran-Contra committees.").

Where multiplicitous convictions occur, "the only remedy consistent with the congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions." *Ball v. United States*, 470 U.S. 856, 864 (9th Cir. 1985). Thus, the Court must vacate the conviction on either count two or three.

IV. THE MAILINGS CHARGED IN COUNTS 14 & 16-18 WERE NOT INCIDENT TO AN ESSENTIAL PART OF THE CHARGED SCHEME TO DEFRAUD.

With respect to count 14, the charged mailing concerned a $919.85 check that Moore testified receiving from Dr. Mohsen in June 1999, for prior work that Moore had completed and had already reported the results to Dr. Mohsen months earlier. Exhibits 44 & 45. The government's only response is a conclusory statement that such after-the-fact payment "was clearly incident to the scheme to defraud." Gov't Opp. at 19. But this is not true. Even assuming Dr. Mohsen mailed a check to Moore after Moore completed and reported his results, the mailing can not serve as a predicate for mail fraud because it was

sent long afterwards and was not "for the purpose of executing the scheme." *United States v. Maze*, 414 U.S. 395 (1974). "The government may not prevail without demonstrating that the mailings were incident to the execution of the scheme, rather than part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the scheme." *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000); *see also United States v. Keenan*, 657 F.2d 41, 42 (4th Cir. 1981) ("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"). Because the payment charged in counts 14 is an after-the-fact dealings that was not part of or in furtherance of the charged fraud scheme, the mailing cannot support a mail fraud conviction under the rule of *Lo*.[6]

With respect to counts 16-18, the government concedes that the mailings associated with those counts all concern the 1989 notebook. The government's assertion that the indictment charged and the government proved that the 1989 notebook were part of the charged scheme to defraud is incredulous. While the last indictment filed January 24, 2006 refers to the 1989 notebook in a few background paragraphs, the indictment cannot be fairly read as including allegations that Dr. Mohsen fabricated any part of the 1989 notebook as part of the scheme to defraud, as the indictment expressly alleges with respect to the 1988 notebook. *See* Superseding Indictment filed Jan. 10, 2006, at 5, ¶20a ("Between March 29, 1998 and May 4, 1998, Amr Mohsen fabricated the 1988 Notebook."). There is simply no place where the government alleged that Dr. Mohsen fabricated any part of the 1989 notebook in order to prove any of the charges against him.

The government's assertion "that there was ample evidence at trial that the 1989 Notebook was integral to the fraud" (Gov't Opp. at 19) is also laughable. At trial the government never presented any evidence to show that the 1989 notebook was not fully complete and accurate. While Moore testified that he performed tests on the 1989

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[6] Although the mailed payment charged in count 18 is infirm because it was for payment for a test concerning the *uncharged* 1989 notebook, the evidence supporting count 18 is also insufficient for the same reason as count 14, i.e., it is an after-the-fact payment for work already completed and is not in-furtherance of the charged fraud.

notebook pages, the government did not even ask Moore what the results of those tests were. Nor was there any other evidence presented to show that the 1989 notebook was fabricated in any way.[7] And there was *nothing* presented at trial to show how the 1989 notebook was part of or affected the charged fraud scheme. As a result, Dr. Mohsen's entire defense at trial was that the 1988 notebook and his statements concerning it were not material to the perjury, fraud or other charges. The government's single reference to Quickturn's attorney Jeffrey Miller's testimony that he was "suspicious" of the 1989 notebook does not in any way show that it was part of the charged fraud. There was absolutely no evidence or argument from either side that the 1989 notebooks could provide a basis for the fraud charges or were material to the mail fraud charges. Indeed, the government made no argument at all concerning the 1989 notebook being fraudulent in either its opening statement or closing arguments. Because the 1989 notebook was neither charged nor relied upon by the government to prove its fraud charges, any testing or mailing associated with the 1989 notebook cannot sustain the mail fraud convictions in counts 16-18.

Presumably recognizing the weakness of its argument, the government throws the Court a number of red-herrings. First, it argues that the fraud persisted through at least June 2000 and that Judge Alsup considered whether Dr. Mohsen had fabricated entries in the 1989 notebook as well as the 1988 notebook. This is besides the point. Regardless whether Judge Alsup believed entries in the 1989 notebook were fraudulent, the government never charged Dr. Mohsen with any such purported fraud. And there is no dispute that the indictment charged mail fraud *with respect to the 1988 notebook* through June 2000.

The government also clouds the real issue here by arguing that Aptix intended to use both the 1988 and 1989 notebooks at trial and by suggesting that Aptix would have used

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[7] In footnote 7 of its brief, the government asserts without any support in the record that the documents mailed in counts 16 and 17 do not appear to be the 1989 notebook but rather pages from another unproduced notebook. Gov't Opp. at 22 n.7. This allegation is baseless.

the 1989 notebook if Judge Alsup were to rule that a photocopy of the missing 1988 notebook was inadmissible. But the 1989 notebook in no way could have been used to support an earlier conception date to get behind Quickturn's prior art. It thus could not have been used as a substitute for the 1988 notebook to continue the charged fraud.[8] Indeed, the government made no attempt to show that the 1989 notebook was relevant to or part of the charged fraud scheme. And, just as importantly, there was no evidence shown that anything in the 1989 notebook was fabricated.

The 1989 notebook was clearly not part of the charged fraud. And the government's after-the-fact rationalizations are meritless. Because the mailings in counts 16-18 have nothing to do with the charged fraud, the Court must enter a judgment of acquittal on these counts.

V. THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO CONCLUDE THAT DR. MOHSEN APPLIED FOR AN EGYPTIAN PASSPORT IN VIOLATION OF THE COURT'S ORDER.

The government plays hide the ball in arguing that the evidence showed that "the defendant was undoubtedly making plans to flee the country prior to the March 2004 trial and needed a valid passport to do so." Gov't Opp. at 22. Although there certainly was substantial evidence that Dr. Mohsen was thinking of traveling, there was very little, if any, evidence that he had applied for a passport in violation of the terms of his pretrial release. The government spends most of its argument pointing to evidence that Dr. Mohsen was planning on traveling to the Cayman Islands, which is besides the point. It is undisputed that an U.S. citizen, such as Dr. Mohsen, can travel to the Cayman Islands without a passport. Trial Exh. BB.

The evidence the government points to that Dr. Mohsen had applied for a passport is

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[8] The government also states that "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 Quick Turn in the civil patent lawsuit." Gov't Opp. at 21. This is not true. Dr. Mohsen certainly contends that the 1989 notebook had absolutely no bearing on any purported scheme to defraud Quick Turn in the patent suit.

slim to none. No passport or application for passport was introduced at trial. Dr. Mohsen was observed entering the Egyptian consulate for only 5 minutes and there was no evidence that his visit had anything to do with obtaining an Egyptian passport. Moreover, the Egyptian website evidence introduced by the government showed that the Consulate required a police report to obtain a replacement for a lost or stolen website, Exh. 86, and there was no evidence of any such police report in Dr. Mohsen's papers or otherwise introduced at trial. And any notes from his vehicle or jail cell were ambiguous and did not demonstrate that Dr. Mohsen applied for a passport after his release on bail in this case.

The government also asserts that there was no evidence that Dr. Mohsen was aware that he could travel to a foreign country without a passport and that the Executive Jet representative Emma Sword testified that her company requires a passport to enter the Cayman Islands from the United States. But when asked on cross-examination, Ms. Sword clearly stated that she neither remembered the person purported to be Dr. Mohsen asking about passport requirements for the Cayman Islands nor that she told him that her company required a passport to travel on their aircraft to the Cayman Islands. RT 796. And no FBI agent testified that he overheard Dr. Mohsen ask about passport requirements for U.S. citizens entering the Cayman Islands. It is a reasonable inference to draw from the testimony at trial that Dr. Mohsen knew that a passport was not required for entry from the Cayman Islands website or elsewhere in that he did not ask Ms. Sword whether a passport was necessary. Because the evidence was insufficient for a rational juror to conclude beyond a reasonable doubt that Dr. Mohsen had applied for a passport after he was released on bail, the Court must enter a judgment of acquittal on count 20.

VI. THE EVIDENCE WAS INSUFFICIENT TO PROVE LACK OF ENTRAPMENT ON COUNTS 21 AND 22 BEYOND A REASONABLE DOUBT.

The government and the defense agree that a defendant's predisposition is measured with respect to an entrapment defense at the time before the informant Primas became a government agent in May 2004. The government incorrectly argues, however, that the

government presented substantial evidence of Dr. Mohsen's predisposition through evidence of (1) the crimes charged in phase one of the trial, (2) a phone call to his sister Metwally purportedly to coach her to present false testimony, (3) soliciting the informant to vandalize the Huangs' car to explain the break in of Dr. Mohsen's own car, and (4) attempt to flee before trial. Gov't Opp. at 25-26. But all these offenses--even assuming that they were proven--go only to show that Dr. Mohsen was predisposed to commit non-violent crimes generally.[9] This evidence in no way shows that Dr. Mohsen was predisposed to commit the type of threatening and violent offenses charged in counts 21 and 22 (attempted witness tampering and solicitation to commit arson). A person who is predisposed to drive recklessly is not also predisposed to rob a bank. And the government ignores the substantial evidence set forth in Dr. Mohsen's motion that he was reluctant to commit the acts charged in counts 21 and 22. Mohsen Mtn, at 18. Overall, the evidence was insufficient as a matter of law to show that Dr. Mohsen was predisposed to commit the *type* of crimes charged in counts 21 and 22.

The government also argues that Dr. Mohsen has not pointed to any evidence of inducement and that the evidence showed that he--not the informant Primas--was the driving force behind the solicitation to make threatening phone calls and burn a car. But this implies an overly narrow view of inducement and ignores substantial evidence presented at trial. "Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need sympathy or friends. *United States v. Poehlman*, 217 F.3d at 698 (quoting *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994)).

[9] It is worth pointing out that the government did not prove that Dr. Mohsen attempted to get his sister to give false information about his intention to leave the country before trial as the government alleges. Ms. Metwally did not testify as to that at all. *See* RT 1643. And, in the transcript of her jail call with Dr. Mohsen, Dr. Mohsen told her only to talk to his attorney about what he had told her about his intention to leave before he was arrested. Exhibit 110 (transcript of June 11, 2004 telephone call between Dr. Mohsen and Magda Metwally).

The government's argument ignores the evidence that the informant had copied Dr. Mohsen's home address and other personal information from Dr. Mohsen's papers (RT RT 1578-80, Exhibit 52 & LL) and told Dr. Mohsen that he had given his people Dr. Mohsen's address, which could only have been done to threaten him. RT 1605. And the informant himself admitted that he would have done anything to get out of jail. RT 1588. Moreover, Dr. Mohsen repeatedly expressed concern about the risk that people could get hurt if a car were burned and showed reluctance in having the informant's people commit the arson, indicating that he would not have committed the crime except for inducement by the informant. *See* Def. Motion, at 18. The evidence that Dr. Mohsen appeared to agree to the informant's acts (phone calls and faked burning of car) after the fact does not demonstrate that Dr. Mohsen was not induced earlier to commit the crimes. *See, e.g. Jacobson v. United States*, 503 U.S. 540, 548 (1992); *United States v. Skarie*, 971 F.2d 317, 321 (9th Cir. 1992). The Court should thus grant a judgment of acquittal on counts 21 and 22 because the evidence was insufficient to show beyond a reasonable doubt that Dr. Mohsen was not entrapped in committing those crimes by the informant.

VII. THE COURT'S ERROR IN NOT CONSULTING WITH COUNSEL ABOUT THE JUROR'S QUESTION ASKING FOR A COPY OF THE INDICTMENT REQUIRES A NEW TRIAL ON COUNTS 1-4 AND 10-19.

The government initially cites cases for the proposition that a district court has discretion whether or not to give a copy of the indictment to the jury during its deliberations.[10] Although this may be a correct restatement of the law, it completely misses the point. The defense does not dispute that a court generally has discretion whether to give the jury a copy of the indictment during deliberations. Rather, Dr. Mohsen's claim is that the court erred in failing to bring the question to the parties' attention to get their input

[10] In a section entitled "Standards For Motions For A New Trial," at 3-4 of the government's opposition, the government refers to law concerning motions for a new trial based on the ground that the verdict weighed heavily against the evidence. This law is generally not applicable to motions for a new trial based on trial errors, such as the one set forth here.

before answering in the negative. Here, the question can reasonably be read as asking for more information about the nature of the charges. Informing the parties of the jury's question about the charges would have enabled the defense to ask that the indictment be read again to the jury (as it was at the beginning of the trial) so the jury would understand exactly what the charges were against Dr. Mohsen and would not be confused by the government's misleading closing arguments.[11]

The government disputes Dr. Mohsen's contention that the government's closing arguments were misleading in that they suggested to the jury that it could convict Dr. Mohsen of the fraud and perjury charges based on the evidence of the fraudulent Lobo notes. The government certainly argued repeatedly, however, that the Lobo notes constituted additional fraud and were designed to increase the damages from the patent litigation. In addition to arguing that the Lobo notes demonstrated the 1988 notebook was material, RT 1223-26, the prosecutors described the Lobo notes as "further[ing] the fraud," RT 1136, increasing damages "through falsified documents, RT 1137, a "complete fraud," RT 1138; "very important," RT 1144, a "complete fraud," RT 1146, made up "out of whole cloth," RT 1146, and "fraudulent." RT 1224. *see generally* RT 1136-38; 1144-46; RT 1223-26.[12] With all this, it is not surprising that the jury wanted to see a copy of the indictment "with the specific charges." Document 519, filed 2/27/06. Without any copy of the indictment to guide them, it is very easy to see how the jury may have improperly convicted Dr. Mohsen of the fraud and perjury charges based on the government's arguments concerning the uncharged fraud involving the Lobo notes--even if it believed

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[11] The government's argument that Dr. Mohsen did not object to the court's failure to inform him of the jury's question about the indictment also misses the mark. The defense had no opportunity to object as the jury had already returned a verdict when the court informed the parties of the jury's question and the Court's answer. RT 1250.

[12] The government also faults defense counsel "for not taking the opportunity in either of his closing arguments to address the Keith Lobo notes, apparently realizing how deadly they were to his "materiality" defense. Gov't Opp. at 29. But the prosecution did not argue in its initial summation that the Lobo notes somehow made the 1988 notebook material. It was only in its rebuttal argument did the government make that argument so that the defense had no opportunity to respond.

the 1988 notebook and Dr. Mohsen's deposition testimony was not material to any issue to be decided by the trier of fact in the patent litigation.

In this manner, the government's closing argument resulted in a "constructive amendment" of the indictment warranting a new trial. "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them. *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002). A constructive amendment occurs where "(1) there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument," or (2) the crime charged [in the indictment] was substantially altered at trial so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *Id.* (*quoting United States v. Van Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)). This is exactly what the government did at Dr. Mohsen's trial. To get around the weakness in their case in proving the materiality of the 1988 notebook, the government presented evidence and argued to the jury that it should nonetheless convict because of the Lobo notes, regardless whether the 1988 notebook was otherwise material. Answering the jury's question by advising that it could not convict on the basis of the Lobo fraud evidence or by reading or giving it a copy of the indictment would likely have alleviated this problem. Thus, the Court's failure to obtain the input of the parties before denying the jury's request for a copy of the indictment to see the "specific charges" requires reversal for a new trial on counts 1-4 & 10-19.

CONCLUSION

For all these reasons, the Court should grant Dr. Mohsen's motion for a judgment of acquittal or, alternatively, for a new trial.

Respectfully submitted,

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