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8 APPEARING SPECIALLY
9 for Defendant Amr Mohsen
10 On Motion for Substitution of Counsel

11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA)
14)
15 Plaintiff,)
16 vs.)
17)
18 AMR MOHSEN,)
19)
20 Defendant.)

No. CR-03-0095 WBS
**REQUEST FOR LEAVE TO
FILE REPLY RE: CONFLICT
OF INTEREST**

**Date: August 3, 2006
Time: 10:00 a.m.
Hon. William B. Shubb**

21 Undersigned counsel, appearing specially for defendant Amr Mohsen, seeks the Court's
22 permission to file this brief reply in the wake of the new information contained in the
23 government's reply. Counsel had thought that the question before the Court on August 3, 2006
24 was to be whether Weinberg & Wilder would be permitted to represent Dr. Mohsen in post-
25 conviction proceedings, or would prospectively be disqualified due to a non-waiveable conflict
26 of interest. As an ancillary matter, the Court may also inquire into the source of the funds used
27 to pay the firm's retainer.

28 The government's reply with respect to the conflict issue is almost perfunctory. If the
closest putative analogy the government can adduce is *Simon v. Ratelle*, 21 F.3d 1446 (9th Cir.

1 1994), it is little wonder that the government seeks to divert the Court to other matters.¹ And as
2 to those matters, rather than wait a few days to fully investigate the facts, the government
3 provides the Court with partial information, so it can pile on the innuendo and pejoratives.

4 Rather than conflate the issues, as the government seeks to do, undersigned counsel
5 submits that the issues are more readily resolved if addressed in an orderly and logical fashion.
6 The first issue which must be settled is Dr. Mohsen's representation in post-conviction
7 proceedings. Undersigned counsel submits that the issues related to the waiver of the conflict, as
8 well as the source of Weinberg & Wilder's attorney's fees, can be resolved in a straightforward
9 manner, if not muddied by extraneous matters.

10 The conflict and waiver issue has been fully briefed. As to the source of the retainer,
11 the funds were deposited by Dr. Metwally into the Weinberg & Wilder trust account on June 20
12 and 21, 2006, in the form of three personal checks. The checks were drawn on three accounts
13 held by Dr. Metwally or other of her family members. Two of these accounts are personal
14 checking accounts; the third is a Schwab investment account. Some of the funds used to pay the
15 retainer were obtained by Dr. Metwally from another family member in April 2006, when the
16 family began looking for new counsel.

17 None of the funds came from Dr. Mohsen, directly or indirectly. The retainer is
18 comprised entirely of the earnings, savings and investment gains of the Metwally family. Dr.

19
20 ¹ *Simon v. Rattelle* involved two brothers, one of whom, Sheldon, was charged and
21 convicted of a fatal shooting that the other, uncharged brother, Xavier, had committed and
22 confessed to their shared attorney and to their mother. Sheldon's first trial resulted in a mistrial,
23 notwithstanding his representation by a profoundly conflicted attorney. Following the mistrial,
24 the mother hired new counsel for Sheldon, one Jefferson. Sheldon was convicted at his re-trial.
25 The Ninth Circuit concluded that Jefferson was ineffective for failing to investigate or present
26 the defense that Xavier had committed the murder. Jefferson had been disbarred in the interim,
27 and the Court found that his ineffective assistance in Sheldon's case was consistent with his prior
28 misconduct. Jefferson had also stated at one point that he believed he represented "the family,"
rather than Sheldon.

1 Metwally will bring supporting documentation to the hearing on August 3, 2006, and she will be
2 available for questioning by the Court.²

3 As for the government's suggestion that the Court look to Dr. Metwally and her
4 immediate family for reimbursement of CJA expenditures, there is neither case law, statutory
5 law nor any judicial policy which permits such action. In the first place, neither Dr. Metwally
6 nor any member of her immediate family are parties to any action before the Court. The Court
7 thus lacks the personal jurisdiction required to reach Dr. Metwally's or her family's assets. The
8 government's citation to the the Guide to Judiciary Policies and Procedures is shockingly
9 misleading. Paragraph 2.06 states as follows:

10 Family Resources. The initial determination of eligibility should be made without
11 regard to the financial ability of the person's family unless his family indicates
12 willingness and financial ability to retain counsel promptly. At or following
13 appointment of counsel, the judicial officer may inquire into the financial
14 situation of *the person's spouse (or parents, if he is a juvenile)* and if the *such*
15 *spouse or parents indicate their willingness to pay all or part of the costs of*
16 *counsel, the judicial officer may direct deposit or reimbursement.*

14 VII Guide to Judiciary Policies and Procedures ¶ 2.06. (Italics supplied)

15 Clearly, the only family members who may be looked to for payment or reimbursement
16 of CJA expenditures are the spouse or parents of the defendant. Even then, the Court cannot
17 compel these closest family members to contribute to the costs of the defendant's representation,
18 it can only gauge their ability and "willingness" to do so.

19 Accordingly, there would appear to be only two lawful options at this point: Either Dr.
20 Metwally can pay the costs of post-trial representation, or CJA can continue to absorb those
21 costs. Incidentally, the government consistently misstates the standard for CJA eligibility
22 standard for appointment of counsel, which is "financially unable to obtain adequate
23 representation . . .," not indigency. 18 U.S.C. § 3006A(a). In the instant case, the costs of trial

24
25 ² In the age of identity theft, counsel did not think it prudent to place the Metwally
26 family's account statements in the public domain. Of course, the statements can be made
27 available to the Court, without public filing, if the Court wishes to review them prior to the
28 hearing.

1 representation by private counsel far exceeded the financial capability of Dr. Mohsen or his
2 family, including the Metwallys. The costs of post-trial representation are substantially less.

3 As for the Cadence checks, counsel has been informed and believes as follows:

4 First, the check in the amount of \$8,062.04 was deposited with other funds into the
5 “Debtor in Possession” account set up by the bankruptcy trustee. Second, the two checks mailed
6 to Dr. Mohsen at the jail on July 12 and 19, 2006 have been reported to the bankruptcy trustee,
7 and on instruction will be forwarded to the trustee’s counsel.

8 An “earn out” is a contractually-triggered distribution. Consequently, Dr. Mohsen had
9 no control whatsoever over the timing of the earn-out payments. Dr. Mohsen did not request any
10 of the listed Cadence payments, nor did he endorse or cash either of the checks. If Dr. Mohsen
11 had intended to be “surreptitious,” he would not have allowed the checks to be sent to the jail, in
12 the first place, nor would he have filled out property release forms creating a complete paper trail
13 leading to his wife.

14 Dr. Mohsen’s spouse, Merwat, his son, Ehab, and Dr. Metwally have assured counsel
15 that they have not cashed any of the Cadence checks. None of his family have the requisite
16 signatory authority. But beyond this, the family is mindful of the bankruptcy, and they have
17 notified the bankruptcy trustee of every Cadence check received by them. Both Mrs. Mohsen
18 and Ehab Mohsen will be present at the hearing on August 3rd to assist the Court in determining
19 the disposition of the Cadence checks.

20 Advanced Investment Management (“AIM”) is a Delaware Limited Liability Company
21 (LLC) that was formed in May, 2001, some years before the criminal and bankruptcy actions
22 were filed. I have been informed and believe that AIM, LLC owns a number of shares of
23 Cadence (Get2Chip) stock.³ Whether the payments to AIM are part of the bankruptcy estate is a
24 question to be determined within the bankruptcy forum.

25 _____
26 ³ I am further informed and believe that Dr. Mohsen no longer has any interest in the
27 assets of the LLC.

1 In advance of the hearing, undersigned counsel will endeavor to secure more complete
2 information and documentation concerning the Cadence pay-outs.

3 Undersigned counsel believes that there has been no wrongdoing by Dr. Mohsen or his
4 family. Moreover, counsel believes that, absent the Court's finding of wrongdoing, the
5 government's attorneys should not participate in the CJA inquiry. As demonstrated by its reply,
6 the government will inject an unproductive degree of argumentativeness and adversarial zeal into
7 a straightforward factual inquiry. As soon as the question of Dr. Mohsen's representation is
8 settled, his attorney can subpoena the relevant transactional documents, if the government has
9 not already done so.

10 As noted above, once the disposition of the Cadence payments is determined, the
11 question remains whether the company's separate legal status places those payments outside the
12 reach of bankruptcy estate. The government's attorneys – like most criminal defense counsel –
13 bring no special expertise to that determination

14 In short, while Dr. Mohsen does not question the Court's authority to probe into the
15 unexpected Cadence distributions, he requests that each of the pending issues be addressed
16 independently, in a logical sequence, and with adequate information. The question of Dr.
17 Mohsen's post-conviction representation must, of course, be decided first.

18 Finally, in light of the new and serious allegations in the government's reply,
19 undersigned counsel, respectfully urges the Court to allow this reply on Dr. Mohsen's behalf.

20
21 Dated: July 31, 2006

Respectfully submitted,

WEINBERG & WILDER

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25 /s/

NINA WILDER

Appearing Specially

for Defendant Amr Mohsen

On Motion for Substitution of Counsel

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CERTIFICATE OF SERVICE

I, Corey S. O'Connor, declare under penalty of perjury under the laws of the United States of America that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a part to the within action. I am an employee of WEINBERG & WILDER, and my business address in 523 Octavia Street, San Francisco, CA 94102. I served the following document(s):

REQUEST FOR LEAVE TO FILE REPLY RE: CONFLICT OF INTEREST

in the following manner:

X by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below. The transmission was reported as complete with out error by the machine.

* by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail, at San Francisco, California addressed as set forth below.

by overnight mail by placing the document(s) listed above in a sealed overnight mail envelope with the postage thereon fully prepaid, addressed as set forth below .

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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Executed on this day, July 31, 2006, at San Francisco, California.

/s/
Corey S. O'Connor