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7 ATTORNEYS FOR DEFENDANT ALY MOHSEN

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO OFFICE

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 ALY MOHSEN,
15 Defendant.

CASE NO. CR 03-0095-02 WBS
DEFENDANT'S SENTENCING
MEMORANDUM

17 I. INTRODUCTION

18 Defendant Aly Mohsen, M.D., pled guilty to one count of Conspiracy to Obstruct Justice
19 and Commit Perjury, in violation of Title 18 USC 371, five counts of Perjury, in violation of
20 Title 18 USC 1621(1), and one count of Obstruction of Justice, Aiding and Abetting, in violation
21 of Title 18 USC 1503 and 2. There is no Plea Agreement in this case. The United States
22 Probation Office has prepared a Presentence Report (PSR) and concluded that the advisory
23 United States Sentencing Guideline (USSG) in this case is Total Offense Level 16, Criminal
24 History Category I. Dr. Mohsen objects to the Guideline calculation in the PSR, as indicated
25 below.

26 Dr. Mohsen comes now before the Court requesting that the Court determine that the
27 advisory Guideline in this case is Total Offense Level 7, Criminal History Category I, and that he
28 be sentenced to probation, upon the conditions that he serve six months in home detention and

1 perform meaningful community service at the Jordan Valley Community Clinic in Springfield,
2 Missouri.¹

3 Aly Mohsen accepts full responsibility for his actions in this matter despite the fact that
4 he has been consistently and repeatedly victimized by his brother, Amr—a man Aly had been
5 raised to love, respect and trust. That victimization began when Amr induced Aly to falsely
6 witness the 1988 Notebook; it continued when Amr allowed Aly to be called as a witness by the
7 Aptix attorneys in the evidentiary hearing before Judge Alsup without informing Aly that he had
8 exercised his Fifth Amendment privilege not to testify in those proceedings,² and it continued
9 when an opportunity was presented during early plea negotiations to resolve this matter in a way
10 that was fair and just to both Aly and Amr. As a result of his trust, faith and love for his brother,
11 Aly Mohsen's life has been substantially diminished, his once thriving medical practice
12 destroyed, and his health, both physical and emotional, has deteriorated dramatically. For the
13 reasons set forth in this memorandum, it is respectfully submitted that the sentence
14 recommended herein, under all the circumstances, is fair, just, and equitable.

15 II. PROCEDURAL HISTORY

16 Amr Mohsen and Aly Mohsen were originally indicted in a 19 count Indictment on
17 March 25, 2003. Aly Mohsen was named in 6 counts of the Indictment. Plea negotiations took
18 place, during which, in January 2004, Aly Mohsen agreed to plead guilty to several counts in
19 exchange for the Government's agreement that his guideline calculation be set at a Level 10 and
20 that Aly be considered eligible for probation and home detention. That agreement recognized

21
22 ¹The requested sentence closely approximates the likely sentence Aly Mohsen would have received
23 pursuant to a plea agreement he reached with the United States in January, 2004. That agreement was rejected by
the Government when the co-defendant, Amr Mohsen, refused to enter a plea of guilty.

24 ²It is appalling that the Aptix attorneys called Aly Mohsen as a witness in the proceedings before Judge
25 Alsup, knowing the facts available to them and not available to Aly Mohsen, without informing Aly that his brother,
26 the author of the contested Notebook and the chief executive officer of the proponent of that Notebook, had retained
27 criminal defense counsel and was refusing to testify in those proceedings. It is disappointing that Judge Alsup,
28 being aware that Amr Mohsen was asserting his Fifth Amendment privilege and aware of the bizarre events that had
already occurred in the litigation regarding the contested Notebook, did not, at the very least *sua sponte*, inform Aly
Mohsen of the peril in which he was being placed and the advisability of consulting with independent counsel. Had
the Aptix attorneys or Judge Alsup so advised Aly, it is reasonable to assume that he would not have testified at that
hearing and that he would have purged himself of the earlier deposition perjury.

1 Aly Mohsen's limited role in this matter and contained a three-level departure for a minor role
2 pursuant to United States Sentencing Guideline, Section 3B1.2. The agreed factual basis in that
3 agreement was as follows:

4 Paragraph 2 – I agree that I am guilty of the offense to which I will
5 plead guilty, and I agree that the following facts are true: My
6 brother, Amr Mohsen ("Amr"), is the founder, chairman and CEO
7 of Aptix Corporation. Sometime between March 29, 1998, and
8 April 19, 1998, Amr requested that I sign as a witness to an
9 engineering notebook ("1998 Notebook") and backdate each of my
10 signatures to the year 1988 when, in truth and fact, the year I was
11 actually signing and witnessing the 1988 Notebook was 1998. I
12 knew and understood that the Notebook Amr asked me to sign and
13 backdate would be used by Amr in an attempt to influence the
14 outcome of a civil patent infringement lawsuit entitled *Aptix
15 Corporation, et al., v. Quick Turn Design Systems, Inc.*, No. C98-
16 00762 WHA, which had been filed by Aptix in federal court in San
17 Francisco, California.

18 However, the Government conditioned acceptance of the plea agreement on the
19 concurrent pleas of guilty by Aly Mohsen's brother and co-defendant, Amr Mohsen. Although
20 he executed his own plea agreement, Amr ultimately refused to plead guilty and the plea offer
21 was withdrawn by the Government. After Amr's refusal to accept the plea agreement offer of the
22 Government, Aly Mohsen offered to cooperate with the Government in its prosecution of Amr.
23 Six Superseding Indictments were subsequently filed in this Court, expanding charges to 23
24 counts, including one additional count charging Aly Mohsen with perjury in connection with his
25 testimony in the evidentiary hearing. On January 24, 2006, fully two years after he had agreed to
26 plead guilty, Aly Mohsen, as indicated above, without benefit of a plea agreement, has pled
27 guilty to all counts with which he has been charged.

28 III. BACKGROUND

Aly Mohsen's offenses occurred in the context of a "patent dispute" involving an
invention claimed to be originally developed by his brother Amr. Aly's involvement occurred
when he was approached by his brother to essentially "authenticate" entries made in an
engineer's notebook. Aly was aware that Aptix used patented technology, and that the
information contained in the notebook related to that technology. Amr had a habit over the
years, when the two brothers were together, to talk about his work and inventions. When Amr

1 asked Aly to sign and backdate the notebook entries, Aly knew that his brother had previously
2 discussed with him in a general way the information contained in the notebook. Complying with
3 his older brother's wishes, Aly signed and dated the entries in the places and with the dates as
4 directed by Amr. Subsequently, on May 25, 1999, at a deposition emanating from the patent
5 dispute litigation, Aly was instructed by his brother to testify that he had signed the notebook on
6 the dates stated and to confirm that copies of pages of the notebook had been given to him by
7 Amr at the time of signing. Aly was assured at the time that this "authentication" of the entries
8 was effectively accurate, if not precisely true, and that there would be no further question with
9 respect to the matter. Again, Aly complied with his brother's wishes.

10 Aly heard nothing about the dispute for over a year and forgot about it. He then was
11 asked by his brother and his brother's lawyers to testify at the hearing involving the patent
12 dispute. At that time, Aly was actively involved in his medical practice in Missouri, working 6 or
13 7 days per week; nonetheless, he again complied with his brother's request. He took a night
14 flight from St. Louis to San Francisco and arrived at court that morning. He met briefly with
15 Amr's attorneys who simply told him to say what he had already said in his deposition
16 testimony. Aly knew that his testimony during the deposition was a lie, but he was afraid to say
17 anything different in court. He did not know that his brother had already asserted the 5th
18 Amendment regarding his own testimony. Nor did the Aptix lawyers or Judge Alsup inform him
19 that his brother had exercised his 5th Amendment privilege nor did they advise him to seek the
20 advice of independent counsel before testifying. In that testimony, Aly simply reiterated his
21 earlier deposition testimony. After his testimony, Aly heard nothing more about the matter for a
22 period of three years and continued in his active medical practice and volunteer work, for, in
23 truth, he had no interest in the Aptix litigation one way or the other.

24 In 2003, Amr was indicted, as was Aly, and Aly's world was torn apart. As a result of
25 the publicity this case received, Aly Mohsen's very active medical practice dwindled from 6
26 days per week in five states to one day per week in a small town in Arkansas. The specter of the
27 criminal prosecution virtually destroyed what was once a thriving medical practice. In addition,
28

1 as indicated in the PSR (¶ 96-98), Aly's health has substantially deteriorated, and he is now
2 partially disabled.

3 Understanding the participation of Aly Mohsen in this case requires an understanding of
4 Egyptian family culture and the role of an older brother in that culture. This background is
5 offered not as an excuse for Aly's actions, but rather because it provides an explanation for how
6 a well respected, moral, caring, and responsible professional medical doctor, father and respected
7 United States Army combat veteran physician, could commit the crimes of perjury and
8 obstruction of justice.

9 Aly's father was a doctoral level theologian who taught at a university in Egypt. All of
10 Aly's siblings hold doctorate degrees; his two sisters are university professors in nuclear physics
11 and electrical engineering. Amr holds a doctorate from Cal Tech and was always regarded as the
12 "genius" in the family; more significantly, Amr was always regarded as his father's favorite. Aly
13 was raised to respect and trust this revered older brother. Aly's father died in 1975 of a heart
14 attack, and Amr, as the oldest son, took on the role of "head of the family." Amr came to the
15 United States on scholarship at Cal Tech to pursue his Ph.D., and Aly, after completing his
16 medical education in Egypt and his two years of service in the Egyptian army, came to the
17 United States where his brother Amr provided housing and assistance while Aly completed his
18 United States-required medical training. As a result, in addition to his admiration and respect for
19 Amr, Aly was indebted to him for the assistance that he rendered during this period of Aly's life.
20 This family dynamic provides a meaningful context for the Court to consider when judging Aly's
21 compliance with his brother, Amr's, requests in the instant case. Even the Government must
22 concede that, but for the manipulation by his older brother, Aly Mohsen would never have been
23 involved in any criminal conduct.

24 After Aly completed his medical training in California, he relocated to Kansas City,
25 Missouri, to pursue residency training. Aly became a United States citizen and enlisted in the
26 U.S. Army Reserves, where he rose to the rank of Captain in the Medical Corps. After residency
27 training in Kansas City, Aly relocated to Roseburg, Oregon, where he worked at the Veterans
28 Administration Hospital. At the outbreak of the first Gulf War, Aly volunteered for active duty

1 and was assigned to a "MASH" type field hospital in the combat theater. After 5 months of
2 active duty status at the field hospital, Aly returned to Reserve status, his current status. In 1986,
3 Aly relocated to Springfield, Missouri, to resume his medical practice. He remains in
4 Springfield.

5 Several factors are important in reaching an understanding of how such an accomplished
6 physician, one who has honorably served his adopted country, served his family and his
7 community selflessly, could have violated important laws protecting the integrity of our legal
8 system. At no time during the course of the litigation regarding his brother's patent dispute was
9 Aly informed of the true nature of the dispute, the importance of his role in that litigation, or the
10 potential consequences of his participation. He was told by Amr on any number of occasions
11 that the litigation would ultimately be settled. When he was asked to appear at his deposition, he
12 was informed by Amr that the dispute would be settled and that all that Aly would have to do
13 was to verify that he had signed the notebook. Aly now realizes how manipulated and abused he
14 was by his brother and how wrong Aly's decision was to comply with his brother's requests.
15 Although he continues in his love for his older brother, he knows full well that his brother used
16 him repeatedly.

17 Since his indictment, Dr. Mohsen has been under the supervision of the U.S. Pretrial
18 Services Office in the Western District of Missouri. As the Court has been informed, Dr. Mohsen
19 has fully complied with the conditions of his release. He has returned to the fully socialized and
20 socially valuable life that he led before he became embroiled in his brother's litigation.

21 Attached to this memorandum for the court's consideration are the following documents:

- 22 1. Letters of recommendation from Aly's family, friends, and patients which
23 speak far more eloquently than can be conveyed in this sentencing
24 memorandum of the kind of decent, loving, and caring man who now
25 stands before the court for sentencing.
- 26 2. Patient evaluation forms which demonstrate what a compassionate and
27 effective physician Aly Mohsen is to those he treats.

- 1 3. Recent medical reports regarding Aly Mohsen’s current medical
- 2 condition.
- 3 4. A list of Aly Mohsen’s public service contributions, which demonstrate
- 4 that Aly Mohsen is and has always been a giving and vital member of his
- 5 community.
- 6 5. A printout of a website put together by friends of Aly Mohsen’s, which
- 7 demonstrates the breadth and depth of the community support for this
- 8 man.
- 9 6. A November 13, 2006, letter from Aly Mohsen’s Pretrial Service Officer
- 10 regarding Aly Mohsen’s activities and level of responsibility while on
- 11 pretrial supervision.

12 IV. APPLICABLE SENTENCING LAW

13 The landmark decision in *United States v. Booker*, 160 L. Ed. 2d 621, 125 S.Ct. 738
14 (2005), changed sentencing in the Federal Courts. *Booker* renders the Guidelines as advisory
15 only, and instructs the sentencing courts to consider the Guidelines in context of all of those
16 factors enumerated in Title 18 USC 3553(a). The Court found that the mandatory application of
17 the Guidelines was unconstitutional. In the *Booker* Remedy Opinion, the Court stated:

18 “We answer the question of remedy by finding the provision of the
19 federal sentencing statute that makes the Guidelines mandatory, 18
20 U.S.C.A. 3553(b)(1) (Supp. 2004), incompatible with today’s
21 constitutional holding. We conclude that this provision must be
22 severed and excised, as must one other statutory section, 3742(e)
23 (main ed. And Supp. 2004), which depends upon the Guidelines
24 mandatory nature. So modified, the Federal Sentencing Act, See
 Sentencing Reform Act of 1984, as amended, 18 U.S.C. 3551 et
 seq., 28 U.S.C. 991 et seq., makes the Guidelines effectively
 advisory. It requires a sentencing court to consider Guidelines
 ranges, see 18 U.S.C.A. 3553(a)(4) (Supp. 2004), but it permits the
 court to tailor the sentence in light of other statutory concerns as
 well, see 3553(a) (Supp. 2004).” At 651.

25 Further, with respect to appellate review of sentencing decisions, the Court stated:

26 “We infer appropriate review standards from related statutory
27 language, the structure of the statute, and the ‘sound administration
28 of justice.’ And in this instance those factors, in addition to the past

1 two decades of appellate practice in cases involving departures,
 2 imply a practical standard of review already familiar to appellate
 courts: review for ‘unreasonableness.’”

3 . . . Section 3553(a) remains in effect, and sets forth numerous
 4 factors that guide sentencing. Those factors in turn will guide
 appellate courts, as they have in the past, in determining whether a
 5 sentence is unreasonable.” *Booker*, at 660-661.

6 The 9th Circuit is continually articulating its instructions for the implementation of the
 7 Supreme Court’s directive in *Booker*. The sentencing court is to accurately calculate the
 8 Guidelines, it may then determine if there are any justifiable departures from the Guidelines, and
 9 then consider the Guidelines as but one factor among all of the factors outlined in Title 18 USC
 10 3553(a), to reach a reasonable sentence. *United States v. Menyweather*, 431 F.3d 692, 696 (9th
 11 Cir. 2005). A formal determination of “departures,” as required under a mandatory guideline
 12 system, may be both redundant or unnecessary, under a unitary determination of reasonableness
 13 of a sentence. *United States v. Mohamed*, 459 F.3d 979, 986-87 (9th Cir. 2006). See, also,
 14 *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) (the district court is to first
 15 calculate the Guidelines accurately and then examine the sentence for reasonableness in light of
 16 18 USC 3553(a)). Further, the court said, “An error in determining the Guidelines range, or in
 17 understanding the authority to depart from that range, can prevent district courts from properly
 18 considering the Guidelines.” *Menyweather, id.*, at 697.³ Significantly, the 9th Circuit has also
 19 underlined that a sentence within the Guideline range is not necessarily reasonable.

20 “. . . *Booker* does not establish that a sentence within the
 21 Guidelines range is per se reasonable, and therefore legal. Rather,
 22 the reasonableness of a sentence is informed by all of the § 3553(a)
 23 factors, including the Guidelines range. *See Booker*, 543 U.S. at
 24 245-46, 264-65. A sentence that is within the Guidelines range
 therefore may be unreasonable and thus imposed in violation of
 law pursuant to §3742(a)(1). This conclusion is in accord with our
 sister circuits. *United States v. Plouffe*, 445 F.3d 1126, 1130 (9th
 Cir. 2006), *cert. denied*, 126 S.Ct. 2314, 164 L.Ed. 832 (2006).

25 Also:

26
 27 ³A sentencing court’s interpretation of the Guidelines is reviewed *de novo*; application of the Guidelines to
 28 facts of the case is reviewed for abuse of discretion; and factual findings are reviewed for clear error *United States*
v. Kimbrew, 406 f.3D 1149, 1152 (9th Cir. 2005).

1 “We do not suggest that district courts are bound to sentence
2 within the applicable Guidelines ranges when sentencing, because
the Guidelines are now advisory.” *Cantrell, id.*, at 1279.

3 Finally, the Court stated that the “reasonableness” of a sentence is reviewed for an abuse
4 of discretion. *Menyweather, id.*, at 701. See also, *United States v. Yahnke*, 395 F.3d 823, 826
5 (8th Cir. 2005) (equating a sentence that is “reasonable” with a sentence that is “not an abuse of
6 discretion.”). Determining “reasonableness” is a complicated and often subtle process that
7 requires the court to consider all of the complex factors inherent in any case and specifically
8 related to the individual standing before it.

9 The Court must now consider 18 USC 3553(a) in its entirety and impose a sentence
10 “sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)
11 of this subsection.” The court, in determining the particular sentence to be imposed, shall
12 consider –

- 13 (1) The nature and circumstances of the offense and the history and characteristics of
14 the defendant;
- 15 (2) The need for the sentence imposed --
 - 16 (a) to reflect the seriousness of the offense, promote respect for the law and
17 provide just punishment for the offense;
 - 18 (b) to afford adequate deterrence to criminal conduct;
 - 19 (c) to protect the public from further crimes of the defendant; and
 - 20 (d) to provide the defendant with needed education or vocational training,
21 medical care or other correctional treatment in the most effective manner;

22 The sentencing court is now required to consider factors that the Guidelines effectively
23 prohibited from consideration (ie: Age, USSG 5H1.1; Education and Vocational Skills, USSG
24 5H1.2; Mental and Emotional Condition, USSG 5H1.3; Physical Condition Including Drug or
25 Alcohol Dependence, USSG 5H1.4; Employment, USSG 5H1.5; Family Ties and
26 Responsibilities, USSG 5H1.6; Socio-economic Status, USSG 5H1.10; Civic and Military
27 Contributions, USSG 5H1.11; and Lack of Youthful Guidance, USSG 5H1.12.). *United States v.*
28

1 *Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (en banc). To consider the “history and
2 characteristics of the defendant,” the Court must now consider factors the Guidelines eschewed.

3 In order to meet the mandate of the *Booker* remedy, then, this court must calculate the
4 appropriate guidelines range and may consider appropriate departures. It must also apply the
5 3553(a) factors and address any other specific characteristics of the defendant or his offense that
6 might impact the determination of a “reasonable” sentence under the particular circumstances of
7 this case.

8 V. OBJECTIONS TO THE PRESENTENCE REPORT

9 The following objections, delineated by paragraph of the PSR, are to facts, omissions, or
10 analysis contained in the PSR.

11 *Paragraphs 50 & 59*: The PSR identifies Aly Mohsen’s visit with his brother Amr at
12 Santa Rita (Alameda County Jail)⁴ and the June 7, 2004, telephone conversation (Bates Numbers
13 US007000 - US007022) between Aly Mohsen and his incarcerated brother and a quote lifted out
14 of context to support an adjustment for obstruction of justice. The PSR asserts that Aly
15 encouraged his brother to feign symptoms for an upcoming psychiatric evaluation in order to
16 gain a continuance. The PSR provided this quote, “The second thing that you need to do is to buy
17 time to fire those sons of bitches . . . You need to go to the hospital. . . Be admitted to the
18 hospital . . . Six months in the hospital.” The PSR asserts that this “encouragement” delayed the
19 proceedings and obstructed justice because Amr was later determined to be competent.⁵

20 The context of Aly Mohsen’s comments to his brother, both within the very conversation
21 in which they were stated, the procedural posture of the case, and Amr’s medical/psychiatric
22 condition are vital to the analysis of whether the quoted comment could possibly constitute an
23 obstruction of justice.

24
25
26 ⁴Aly’s visit to his brother at Santa Rita took place the day after their mother’s funeral. Aly was
accompanied by all of his siblings at this visit.

27
28 ⁵It should be noted that although Amr was determined to be competent, he was also diagnosed by
Government evaluators with major depression.

1 Amr Mohsen had **already been evaluated** by mental health professionals before the June
2 7, 2004, conversation took place. In fact, Michele Epstein, M.D. and Dale Watson, PhD, had
3 provided written evaluations dated May 25, 2004, and concluded that Amr Mohsen was suffering
4 from serious psychiatric problems. (Reports attached). Those reports were made available to Aly
5 Mohsen, a medical doctor, who was extremely concerned about his brother's welfare. The
6 transcript of the June 7, 2004, telephone conversation makes it clear that the medical reports had
7 been sent to Aly and that Amr was asking for Aly's opinion. The June 7, 2004, phone
8 conversation began at 9:36 p.m. California time, or 11:36 p.m. Aly Mohsen's time. Aly was
9 awakened from sleep by the call. It is for that reason that the early part of the conversation is
10 somewhat disjointed. Rather than encouraging Amr to fake symptoms, Aly was concerned that
11 his brother obtain proper treatment for his condition, about which Aly had been informed
12 through the reports. In fact, Aly worked to overcome his brother's resistance to proper
13 treatment.⁶ Later in the call, as Amr appears to be jumping from subject to subject, the following
14 exchange takes place:

15 Amr: The hearing (UI) but there is one important thing which is
16 the insanity matter. I am going to see one of the psychologists who
would determine my condition and how it affected what happened.

17 Ali: Do one thing at the time. You are jumping.

18 Amr: I know but they are supposed to provide something by mid
19 July to determine if we are going to use the insanity defense or not.

20 Ali: Do what you have to do but think of the most important thing
21 that you need to do. And going to the hospital does not mean that
you have to stay six months.

22 Amr: Ah.

23 Ali: It would give you a chance to get out of the place you are in
24 and start taking useful medicine. (Bates US00714)

25 ///

26
27 ⁶Aly's concerns about his brother's mental stability dated back to Amr's refusal to enter into plea
28 negotiations with the Government, when it was obvious to Aly that a crime had occurred and that both Amr and he
were responsible.

1 Clearly, this exchange demonstrates, **during the same conversation**, that Aly's concerns
2 were for his brother's psychological welfare and not a case strategy. Further, the overall context
3 must be considered. Both Aly's visit with his brother and the June 7, 2004, recorded
4 conversation, took place **six months after** Aly had already agreed to plead guilty, but his brother
5 had refused. Neither the personal visit nor the deliberately isolated quote lifted from a 25 page
6 transcription of a conversation translated from Arabic to English in any way substantiates the
7 accusation that Aly was attempting to obstruct justice.

8 Further, Amr's cell at Santa Rita had been searched and officials confiscated hand
9 written notes, some of which substantiate that Amr was contemplating an insanity defense well
10 before any meeting or conversation with his brother Aly. In fact, on May 17, 2004, the insanity
11 issue was raised as a possible defense in open court. On May 21, 2004, the court ordered a
12 medical evaluation regarding Amr's competence and set a hearing regarding Amr's potential
13 insanity defense, and on June 4, 2004, the court entered an order sealing Dr. Watson's
14 evaluation. There is absolutely nothing in the June 7, 2004, transcript on which the probation
15 officer relies that remotely constitutes an attempt to obstruct justice much less any actual
16 obstruction—nowhere does Aly Mohsen suggest faking psychiatric symptoms. The facts are that
17 Amr Mohsen had previously made his complaints both to his attorneys and to the court. Those
18 complaints had been evaluated by competent psychiatric personnel, and their reports, containing
19 a full discussion of Amr Mohsen's symptoms, had been provided to his brother, all well in
20 advance of the June 7, 2004, telephone conversation.

21 The facts of this case clearly indicate that throughout this episode, Aly was manipulated
22 by his brother. From the very beginning--when Amr brought the fabricated notebook to Aly and
23 asked Aly to sign it without informing him of its importance, to bringing Aly before a deposition
24 and instructing him to confirm his signature, to refusing to agree to a plea agreement that fairly
25 characterized Aly's and Amr's roles in this case--Amr has been manipulating and using Aly for
26 his own purposes. If there was a delay in the proceedings because of a faked psychiatric
27 condition, it was not Aly Mohsen who was either responsible for it or participated in it.

28

1 Notably, if the Government believed that Aly Mohsen obstructed justice during the
2 recorded conversation or during his visit with Amr, how does it explain that no new obstruction
3 charges were filed against Aly in the 4th, 5th, and 6th Superseding Indictments filed in this case,
4 all of which were filed after the alleged obstruction acts? It is submitted that no such charges
5 were filed because what is readily apparent from a reading of the complete transcript of the June
6 7, 2004, telephone conversation, has always been readily apparent to the Government—there
7 was no effort on Aly Mohsen’s part to obstruct justice.

8 It is, therefore, respectfully requested that the Court delete the isolated quotation and its
9 unfair inference in Paragraph 50, and at Paragraph 59 determine that there is no basis for an
10 obstruction of justice adjustment.

11 **Paragraph 57:** Based on the above analysis, it is respectfully requested that this
12 paragraph be deleted in its entirety.

13 **Paragraphs 67 & 73:** The defendant also objects to the application of USSG 2J1.2(b)(2),
14 the so-called “substantial interference with the administration of justice” adjustment. USSG
15 2J1.2, comment. (n. 1), states:

16 “Substantial interference with the administration of justice”
17 includes a premature or improper termination of a felony
18 investigation; an indictment, verdict, or any judicial determination
19 based upon perjury, false testimony, or other false evidence; or the
unnecessary expenditure of substantial governmental or court
resources.

20 Neither Dr. Mohsen’s testimony at the May 25, 1999, deposition, nor his testimony at the
21 May 10, 2000, hearing, in any way fulfilled “n. 1’s” requirements. This adjustment exists in
22 2J1.2, because some perjuries result in the substantial interference of the administration of justice
23 and some do not. Aly Mohsen’s does not. Aly Mohsen did not initiate, nor did he pursue this
24 civil litigation. It was solely Amr Mohsen who initiated and pursued this litigation. It is true that
25 Amr Mohsen used Aly Mohsen’s “signature” and testimony to support his false contention, but it
26 is also clear that Amr Mohsen submitted a wealth of other “evidence” to support his claim. The
27 litigation proceeded from depositions to a hearing only in part based on Aly Mohsen’s actions.
28 The substantial interference was not attributable to Aly Mohsen.

1 At the hearing in front of Judge Alsup on May 10, 2000, the Judge simply dismissed Aly
2 Mohsen's testimony as lacking credibility (FINDINGS OF FACT AND CONCLUSIONS OF
3 LAW AFTER EVIDENTIARY HEARING ON MOTION FOR TERMINATING SANCTIONS,
4 p. 30-31). The Judge did not rely on Aly Mohsen's testimony to make an erroneous finding, nor
5 did the testimony led to any governmental action or expenditure of any greater court resources.⁷
6 Again, the litigation simply proceeded as usual. Ironically, the fabricated Notebook probably
7 reduced the litigation time and expense which would otherwise have occurred in the patent
8 litigation; that case was filed based on the patent itself and the date of the application for the
9 patent. It is apparent that the creation of the 1988 Notebook was an afterthought by Amr
10 Mohsen to address a potential problem regarding the invention date. The discovery of the
11 fabricated Notebook led to an early termination of the litigation through the terminating
12 sanctions imposed by Judge Alsup. Had that not occurred, it is entirely likely that the patent
13 litigation, like most patent cases, would have gone on for far longer and consumed far more
14 resources of both the court and the parties. Had the court made a finding based on Aly Mohsen's
15 testimony or the litigation been altered substantially, then arguably this adjustment applies. It
16 simply did not happen. Therefore, the defendant requests that the Court not apply this
17 adjustment in the Guideline calculation.

18 **Role in the Offense Adjustment:** Aly Mohsen requests that the Court apply a three level
19 reduction in the Offense Level for minor/minimal role pursuant to USSG 3B1.2. Any fair reading
20 of this case results in the conclusion that Aly Mohsen, particularly in comparison to Amr
21 Mohsen's role, was indeed almost minimal and certainly minor. The three level reduction
22 applies.

23 To make a determination of the applicability of a role in the offense reduction, the court
24 is to look to the other participant's behavior in the case at hand and then compare that with the
25 defendant. *United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994) and *United States v.*
26 *Petti*, 973 F.2d 1441, 1447 (9th Cir. 1992). The PSR's recitation of the facts of this offense

27 _____
28 ⁷Costs or expenditure of resources to prosecute a defendant for perjury cannot be the basis for application
of this enhancement. *United States v. Duran*, 37 F.3d 557 (9th Cir. 1994).

1 exemplifies the differences in the roles of Amr and Aly Mohsen. Of the 40 paragraphs describing
2 the offense behavior, Aly Mohsen appears in only 12. It is clear that Amr initiated these crimes,
3 duped his brother into witnessing the fabricated Notebook, then duped his brother into being
4 deposed without informing him of what that meant, then continued to dupe his brother by
5 causing him to testify at the evidentiary hearing in front of Judge Alsup, and then refused a plea
6 agreement that honestly characterized his brother's offense behavior and that would have in all
7 likelihood resulted in a sentence for Aly Mohsen of six months home detention.⁸ Further, the
8 extent to which Amr went to further his civil case was far beyond any actions Aly, at the behest
9 of his brother, took.

10 Clearly, Aly Mohsen's role in this offense was minimal, but it did have an impact on the
11 litigation. As a result, although his role is less than minor, it may not constitute a truly "minimal"
12 role. The Guideline (USSG 3B1.2) allows the Court to reduce an offense level by three levels in
13 such a case. Consequently, Aly is entitled to a three level role in the offense reduction pursuant
14 to USSG 3B1.2. Significantly, this is precisely the reduction that the Government recognized as
15 applicable to Aly Mohsen's involvement in this case when it proposed the original plea
16 agreement in this matter, an agreement that was denied to Aly because of his brother's continued
17 effort to manipulate the system.

18 **Paragraph 64:** Relying on USSG 2J1.3(d)(1) and applying the "grouping" rules of USSG
19 3D1.2,, the PSR concludes that Count 9 cannot be grouped with Counts 5-8 and 19. The
20 reasoning is that Aly Mohsen's testimony in his deposition and his testimony at trial constitutes
21 two separate proceedings. There is only one reported case on this topic and it specifically rejects
22 the PSR's reasoning in the instant case. In *United States v. Weissman*, 22 F.Supp.2d 187
23 (S.D.N.Y. 1998), Mr. Weissman was convicted of two counts of perjury, based on his testimony
24 in a deposition taken before a Senate Subcommittee's counsel and testimony before the Senate
25

26 ⁸The sheer magnitude of the abusive treatment of Aly Mohsen by his brother is difficult to comprehend—
27 getting Aly Mohsen involved in his fraudulent scheme was almost as reprehensible as the scheme itself, but Amr
28 Mohsen's last-minute refusal to plead guilty as part of a bargain that would have provided his brother, Aly Mohsen,
with a reasonable chance to avoid incarceration and a reasonable chance to save his medical career is nothing short
of monstrous.

1 Subcommittee. The PSR in that case grouped the two counts for Guideline calculation purposes.
 2 The Government objected, citing USSG 2J1.3(d)(1). The Court rejected the Government’s
 3 reasoning, stating that perjury convictions related to separate stages of a civil case are to be
 4 grouped under USSG 3D1.2. The court stated:

5 “Mr. Weissman may therefore be analogized to a defendant in a
 6 civil case who commits perjury in a pre-trial deposition and then
 7 does it again at the trial. I do not know of any case considering
 8 whether these stages of a civil case should be considered “separate
 9 proceedings” un U.S.S.G. § 2J1.3(d)(1). If such a case were
 10 presented to me, with the two instances of the defendant’s civil
 11 litigation perjury made the subject of separate counts in a criminal
 indictment, I would be inclined to hold that the counts involved
 “the same victim” (the plaintiff) and “two or more acts . . .
 constituting part of a common scheme or plan” (depriving the
 plaintiff of his civil remedy), and group the counts under U.S.S.G.
 § 3D1.2(b). Id. at 193.

12 In light of the above, it is respectfully requested that the Court group all counts of
 13 conviction in this case to form a single Guideline. Aly Mohsen’s testimony at the evidentiary
 14 hearing, covering precisely the same topics as were covered in his deposition testimony in the
 15 same case, is no more a separate proceeding than are different questions asked in the same
 16 deposition or different questions asked in different sessions of a deposition—it is all part of a
 17 common scheme of plan with the same victim.

18 **Paragraphs 66-84:** Aly Mohsen requests that the Court adopt the following Guideline
 19 calculation:

20 Group 1: Counts 1, 5-9, 19

21	USSG 2J1.2(a)/1.3(a) Base	12
22	OFFENSE LEVEL	12
23	USSG 3B1.2 Minor Role	<u>-3</u>
24	ADJUSTED OFFENSE LEVEL	<u>9</u>
25	USSG 3E1.1(a) Acceptance of Responsibility	<u>-2</u>
26	TOTAL OFFENSE LEVEL	7

27 ///

28 ///

1 VI. A REASONABLE SENTENCE

2 In the wake of *Booker* several district courts have already proposed frameworks within
3 which a sentencing court may reach a reasonable sentence. One court in particular has provided a
4 framework for sentencing in the realm of “advisory Guidelines.” In *United States v. Ranum*, 353
5 F. Supp. 2d 984 (E.D. Wisc. 2005), Judge Adelman stated:

6 “I determined that the factors set forth in § 3553(a) fell into three
7 general categories: the nature of the offense, the history and
8 character of the defendant, and the needs of the public and the
9 victims of the offense. I analyzed each category and in so doing
considered the specific statutory factors under § 3553(a), including
the advisory guidelines.”

10 Tying the court’s analysis to the factors outlined in § 3553(a), enables appropriate review
11 of the sentence. Judge Adelman’s scheme for determining a sentence can be directly applied in
12 the present case.

13 **The Nature of the Offense**

14 Certainly, any perjury conduct offends the integrity of the justice system. However, in
15 this case the context of Aly Mohsen’s conduct must be considered. As stated above, Aly
16 Mohsen’s offense behavior was conducted entirely at the direction and control of his brother.
17 Aly was led to believe that his conduct was inconsequential and when he realized its importance,
18 he felt trapped into repeating his previous statements. He should be held accountable, to be sure,
19 but that accountability should be balanced by the true context of his behavior.

20 **History and Character of the Defendant**

21 18 USC 3553(a) enables the Court to consider a myriad of factors previously prohibited
22 by the Guidelines (except in consideration of departures). Listed below are several factors that
23 militate in favor of a mitigated sentence in this case and their consideration would result in a
24 reasonable sentence, as contemplated by the sentencing scheme adopted by the 9th Circuit.

25 **Health:** One of Aly Mohsen’s physicians had determined that he is “totally disabled” at
26 this time, although Aly continues to try to work, at least on a minimal level. The attached
27 medical records indicate, among other things, 1) spinal fusion, 2) laminectomy, 3) progressive
28 degenerative joint disease, 4) carpal tunnel, 5) knee injuries. Aly takes multiple medications (list

1 provided the Probation Officer). Clearly, as stated in USSG 5H1.4, it would be far less costly for
2 the Government for Aly to remain in the community and bear the cost of his own medical
3 treatment.

4 ***Collateral Consequences:*** The cost of this prosecution to Dr. Mohsen has been
5 enormous. His indictment resulted in the loss of over 4/5 of his medical practice. Also his
6 reputation in the community has been tarnished, simply because of his foolish decision to
7 support his brother. His income has been drastically reduced, and there is question whether he
8 will be able to continue to practice medicine at all, given the insurance consequences of a felony
9 conviction regardless of whether he is able to maintain a medical license.

10 Presently, Dr. Mohsen is licensed to practice medicine only in the State of Arkansas. He
11 recently underwent a review of his license in the wake of his plea to the present charges.
12 Submitted on Dr. Mohsen's behalf were affidavits and questionnaires prepared by a number of
13 Dr. Mohsen's patients. The questionnaires are attached for the Court's consideration, as they
14 clearly describe an exceptional physician who demonstrates extraordinary skill and caring in
15 treating his patients.

16 The Court can consider the collateral impact of incarceration of Dr. Mohsen on his
17 patients. He presently serves the small, rural, and isolated community of Harrison, Arkansas. The
18 clinic at which Dr. Mohsen works serves a community of 17,000 people and a surrounding area
19 (within 50 miles) of almost 50,000. Dr. Mohsen is the only pain management physician in the
20 area and he provides unique treatment for his patients, the majority of whom are elderly and
21 infirm and for whom lengthy travel for care should Dr. Mohsen not be available would impose
22 an extreme hardship. Should he be removed from the community, or lose his license because of
23 incarceration, this population would no longer be served. Although far from certain, it is Dr.
24 Mohsen's understanding that if he is incarcerated in this case, he will lose his license to practice
25 medicine in Arkansas; while it is possible that if he is placed on probation, he may be able to
26 retain that licensure.

27 ***Cultural Influence:*** There is no doubt that the cultural influence of Egyptian families
28 played a major role in Aly's offense. Traditional Egyptian values led to his blind support of his

1 brother and to the commission of this offense. The cultural context of Aly's behavior is not an
2 excuse for his crime. However, it serves to explain how such an accomplished and well respected
3 physician and father could commit a serious offense. The cultural influences are powerful and, as
4 indicated above, the roles of Amr and Aly in their family led, sadly, to Aly's mistaken belief in
5 his brother. As many of the attached letters of support attest, Aly Mohsen felt that he owed a
6 duty of loyalty and respect to his older brother.

7 ***Community Activities and Military Service:*** Taken together, these two factors are a
8 mitigating circumstance. Aly has not only practiced medicine, he has contributed to numerous
9 volunteer activities over the years. Those volunteer activities are substantial, a partial list
10 includes: President - Central Society of Rehabilitation Medicine, American Board of Physical
11 and Rehabilitation Medicine, Secretary of Green County Medical Society, Liaison to Missouri
12 State Medical Association, Examiner for Board Certification, Member Governing Board of
13 Physical Medicine and Rehabilitation, etc. Further, Aly volunteered for the U.S. Army Reserve
14 Medical Corps in 1983. He is still a member. He also volunteered for active duty during the first
15 Gulf War and served 5 months in a "MASH" type unit during the war.

16 **Needs of the Public and Victims of the Offense**

17 Fundamentally, the integrity of the justice system and an act of "restorative justice" must
18 be considerations at sentencing. The system relies on truthful participation of witnesses and other
19 participants. Some sanctions must be imposed as a result of this offense. However, the role that
20 Aly Mohsen played in this offense, as clearly distinguished from that of his brother, must be
21 considered when sanctions are imposed. A sentence of probation and a period of home detention,
22 in the light of Aly's actual participation in the offense as well as the severe collateral
23 consequences of that participation and this prosecution, is reasonable and just.

24 Aly Mohsen is in a unique position to engage in an act of "restorative justice," that is,
25 paying back the community for his transgression. Aly has already made overtures to the Jordan
26 Valley Community Health Center Clinic, in Springfield, Missouri, where he can volunteer his
27 time as a pain management and rehabilitation physician. The clinic presently does not have a
28 physician with the unique training and qualifications of Aly Mohsen and would benefit

1 tremendously from his expertise, caring, and commitment. A sentence of probation, conditioned
2 upon his volunteer work at the clinic, would compensate the community at large for his offense
3 and do tremendous good.

4 Although it is clear that Aly Mohsen committed a serious offense, his life and profession
5 should not be destroyed as a consequence. The clear driving force behind these offenses was
6 Amr Mohsen, not Aly Mohsen. The Court must distinguish them. Any sentence of imprisonment
7 will result in the revocation of Aly Mohsen's medical license and effectively end his career as a
8 physician. Such a loss will not only affect Aly Mohsen, but the many patients he is serving and
9 whom he could possibly serve in the future.

10 Based on the above, it is respectfully requested that the Court sentence Aly Mohsen to
11 five years probation, upon the conditions that he serve six months in home detention and perform
12 1,000 hours of community service.²

13 DATED: NOVEMBER 30, 2006

BERLINER COHEN

14
15 BY: 

FRANK R. UBHAUS
ATTORNEYS FOR DEFENDANT ALY MOHSEN

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28 ²One thousand hours over two and a half years results in approximately one full day of volunteer service per week for 50 weeks per year.

United States v. Mohsen, et al.

Case No. CR-03-0095 WBS

CERTIFICATE OF SERVICE

I, Pamela K. Stallings, declare under penalty of perjury under the laws of the State of California 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 party to the within action. I am an employee of BERLINER COHEN, and my business address is Ten Almaden Boulevard, Suite 1100, San Jose, California 95113. On December 1, 2006, I served the following documents:

DEFENDANT'S SENTENCING MEMORANDUM

in the following manner:

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date at _____ a.m. from the sending facsimile machine telephone number of (408) 998-5388. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued by the transmitting facsimile machine.

by electronic filing

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

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

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

Honorable William B. Shubb
Judge of the United States District Court
Eastern District of California
501 I Street, Suite. 4-200
Sacramento, CA 95814

Ms. Sara Black
United States Probation Officer
United States Courthouse and Federal Building
450 Golden Gate Avenue, 17th Floor
San Francisco, CA 95102

1 I am readily familiar with my firm's practice for collection and processing of correspondence
2 for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight
3 mail services, to wit, that correspondence will be deposited with the United States Postal
4 Service/overnight mail service this same day in the ordinary course of business.

5 Executed on December 1, 2006, at San Jose, California.

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Pamela K. Stallings