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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 and ALY MOHSEN, Defendants.	No. CR 03-95-WBS Date: December 8, 2006 Time: 10:30 a.m. Hon. William B. Shubb

DEFENDANT AMR MOHSEN'S SENTENCING MEMORANDUM, INCLUDING REQUEST FOR EVIDENTIARY HEARING

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I. INTRODUCTION

Before the offenses here, defendant Amr Mohsen, Ph.D., 59, was a highly successful engineer and businessman without any prior criminal history. As a result of this case, he has lost his house, his company, his savings, his dignity, and his freedom. There is no doubt that the offenses for which he was convicted are very serious. But the 14-year sentence recommended by the probation officer is based on erroneous guideline factors and is greater than necessary to fulfill the purposes of sentencing set forth in 18 U.S.C. § 3553(a). Dr. Mohsen objects to the guideline enhancements for loss and aggravating role set forth in the presentence report and requests an

evidentiary hearing to determine the proper loss enhancement under U.S.S.G. § 2F1.1. As set forth below, in this case a sentence of 8 years is "sufficient, but not greater than necessary to comply with the purposes of sentencing" set forth in § 3553(a).

II. POST-BOOKER SENTENCING PROCEDURE

In *United States v. Booker*, 543 U.S. 220 (2004), the Supreme Court held that a defendant's rights under the Sixth Amendment are violated when a district court imposes a sentence, pursuant to the Sentencing Reform Act and the Sentencing Guidelines, that is greater than the maximum authorized by the facts found by the jury's verdict or admitted by the defendant. *Id.* at 244. Instead of requiring that all guideline enhancements and upward departures be proven beyond a reasonable doubt to satisfy the Sixth Amendment, however, the Court created the unusual remedy of severing and excising the Sentencing Reform Act's provisions concerning the mandatory nature of the guidelines and appellate review, thereby making the guidelines "effectively advisory." *Id.* at 245.

In light of *Booker*, a sentencing court is no longer bound by the policy statements or guideline range calculated under the Sentencing Guidelines Manual. A district court, however, is still required to "consult [the] Guidelines and take them into account when sentencing." *Id.* at 264. Moreover, the old system of "departures" no longer exists under the current advisory guideline system. Rather, "any deviation from the applicable advisory guidelines range [is] viewed as an exercise of the district court's post-*Booker* discretion and reviewed only for reasonableness." *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006). On appeal, an appellate court now reviews the district court's sentence under a highly deferential standard, determining only whether the sentence is "unreasonable" in light of the § 3553(a) factors that guide sentencing. *Id.* at 260-63.

Ultimately, after considering the guideline range, the Court must impose an appropriate sentence in light of the sentencing factors set forth in 18 U.S.C. § 3553(a). Section 3553(a) states that sentencing courts "shall impose a sentence sufficient, but not greater than necessary, to comply with the" sentencing purposes set forth in this section. In doing so, the Court "shall

consider," in addition to the Sentencing Guidelines, the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence impose--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available; . . .
>
> (6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

III. OBJECTIONS TO GUIDELINE CALCULATIONS

A. ANY FACTUAL ENHANCEMENTS TO THE BASE GUIDELINE RANGE HERE MUST BE PROVEN BEYOND A REASONABLE DOUBT, OR ALTERNATIVELY, BY CLEAR AND CONVINCING EVIDENCE, TO PASS MUSTER UNDER THE DUE PROCESS CLAUSE.

1. THE DUE PROCESS CLAUSE AND THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE REQUIRE THAT FACTUAL FINDINGS SUPPORTING GUIDELINE ENHANCEMENTS BE PROVEN BEYOND A REASONABLE DOUBT.

Before *Booker*, courts generally followed the preponderance of the evidence standard based on the Sentencing Commission's suggestion in a 1991 policy statement that the Commission "believes" the preponderance standard satisfies due process requirements. U.S.S.G. § 6A1.3 , p.s., comment; *United States v. Barnes*, 25 F.3d 1287, 1290 (9th Cir. 1997). ("[w]hen the government seeks an upward adjustment [under U.S.S.G. § 2F1.1] of the offense level it bears the burden of proving loss by a preponderance of the evidence."). But recent decisions culminating in Judge Stevens' majority opinion in *Booker* casts significant constitutional doubt on the Sentencing

Commission's 15-year old opinion that the preponderance standard satisfies due process. *See Booker*, 543 U.S. at 306 n.4 (Scalia, J., dissenting in part) ("[T]he Commission's view of what is 'better' is no longer authoritative, and district judges are free to disagree--as are appellate judges.").

As the Court enumerated more than twenty-five years ago in *In re Winship*, 397 U.S. 358 (1970), the role of the standard of proof as embodied in the Due Process Clause of the Fifth Amendment is to "instruct the factfinder concerning the degree of confidence our society thinks that he should have in the correctness of factual conclusions for a particular type of adjudication." *Id.* at 370. In a civil suit for damages, the preponderance standard is acceptable because it is viewed as no more serious for there to be an error in favor of the plaintiff or the defendant. *Id.* at 371-72. But "[w]here one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt." *Id.* at 363-64; *id.* at 370, 371-72 (Harlan, J., concurring); *see also Addington v. Texas*, 441 U.S. 418, 423 (1979) ("standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision," holding that clear and convincing standard is required for civil commitment). In *Winship*, the Court found that the potential loss of liberty in a juvenile delinquency proceeding required the use of the beyond a reasonable doubt standard with respect to the judge's factfinding, even though the proceeding did not result in a "conviction" for a "crime."

In *Apprendi v. New Jersey*, 530 U.S. 466 (1999), the Court stated: "Since *Winship*, we have made clear beyond peradventure that *Winshi*p's due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Id.* at 484. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that any "increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--not matter how the state labels it--must be found by a jury beyond a reasonable doubt." *Id.* at 602. And significantly, in *Summerlin v. Schriro*, 542 U.S. 348 (2004), the Court held that *Ring* was not retroactive because, though the Sixth Amendment rights at stake were

fundamental, Arizona's requirement that the judge make the factfindings beyond a reasonable doubt protected the "fundamental fairness and accuracy of the criminal proceeding." *Id.* at 355-56.

In *Booker*, the questions presented and holdings were stated solely in terms of the Sixth Amendment, 543 U.S. at 226-27, 229 n.1, 232-34, 244, 267, but there are indications that a majority of the Court would hold that the Fifth Amendment requires more than a preponderance of the evidence, even if the Guidelines are "advisory." In *Blakely v. Washington*, 542 U.S. 396 (2004), the majority strongly criticized real offense sentencing generally. *Id.* at 306. In *Booker*, a majority indicated that its decision in *United States v. Watts*, 519 U.S. 148 (1997), which permitted increased sentencing based on acquitted conduct, was wrongly decided**.** 543 U.S. at 240 n.4 (suggesting that *Watts* was wrongly decided and noting Justice Kennedy's dissent in *Watts*). Justice Scalia also sharply criticized the unreliability of the way facts are found in the federal guideline system, *Id.* at 304, and Justice Thomas believed that the Court had corrected the Commission's "mistaken belief" that judges may use the preponderance of the evidence standard in sentencing. *Id.* at 319 n.6.

As a result, a number of courts after *Booker* have adopted the beyond a reasonable doubt standard as a matter of constitutional avoidance, as a matter of discretion, or as an indicator of how much weight they should give the guideline range. *See United States v. Pimental*, 367 F. Supp.2d 143, 154 (D. Mass. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp.2d 1019, 1028 (D. Neb. Feb. 1, 2005), *aff'd in unpublished opn.*, 2005 U.S. App. Lexis 27957 (8th Cir. 2005); *United States v. Gray*, 362 F. Supp.2d 714, 720-24 (S.D. W.Va. 2005); *see also United States v. Kandirakis*, 441 F.Supp.2d 282, 325-29 (D. Mass. 2006) (although agreeing that the "Fifth Amendment and its Supreme Court interpretation require proof beyond a reasonable doubt of enhancement facts," the district court found itself bound by contrary First Circuit precedent); *but see United States v. Okai*, 454 F.3d 898 (8th Cir. 2006) (reversing district court's use of beyond a

reasonable doubt standard for sentencing facts).[1]

The question whether the beyond a reasonable doubt standard is required under the Due Process Clause or the doctrine of constitutional avoidance has not been squarely addressed in the Ninth Circuit after *Booker*. In *United States v. Staten*, 450 F.3d 384, *amended*, 466 F.3d 708 (9th Cir. 2006), the Court accepted the government's concession that the clear and convincing standard of proof applied to a guideline enhancement that increased the defendant's guideline range by four levels and doubled her sentence. *Id.* at 392-93. But *Staten* did not directly address the issue raised here: whether post-*Booker*, the Due Process Clause and the statutory interpretation doctrine of constitutional doubt require the application of the beyond a reasonable doubt standard in making any non-jury factual findings underlying any guideline enhancements. *See United States v. Buckland*, 289 F.3d 558 (9th Cir.) (en banc) (under the doctrine of constitutional avoidance, the Court recognized the need to avoid constitutional questions by interpreting the federal drug statute as including a requirement of proof beyond a reasonable doubt to a jury), *cert. denied*, 535 U.S. 1105 (2002).

In *United States v. Kilby*, 443 F.3d 1135 (9th Cir. 2006), the Court rejected the defendant's argument that guideline enhancements must be found beyond a reasonable doubt. But *Kilby* simply carried over pre-*Booker* law in stating that drug quantity determinations and other factual guideline disputes should generally be determined under a preponderance of the evidence standard. There is no indication in the *Kilby* opinion that the Court addressed the actual arguments made here, i.e., that in light of changes in constitutional jurisprudence set forth in *Booker* and other decisions, the Due Process Clause and the doctrine of constitutional avoidance require that the proof beyond a reasonable doubt standard be used for factual guideline issues. Thus, *Kilby* is not controlling. For the reasons stated above, the Court should hold that sentencing facts not found by the jury that increase the guideline range must be proven beyond a reasonable doubt to pass muster under the Due Process Clause and the doctrine of constitutional avoidance.

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[1] The Third Circuit recently granted rehearing en banc to review its conclusion that the preponderance of the evidence standard for enhancement facts is sufficient to satisfy due process requirements, despite *Booker*. *United States v. Grier*, 449 F.3d 558, 563, *vac'd and reh'g en banc granted*, 453 F.3d 554 (3d. Cir. 2006).

2. ALTERNATIVELY, THE COURT MUST FIND THE QUANTITY OF DRUGS INVOLVED IN THIS CASE AND ANY ENHANCEMENTS BY CLEAR AND CONVINCING EVIDENCE.

Although the Ninth Circuit has not directly addressed Dr. Mohsen's argument that post-*Booker*, factual findings that increase a defendant's guideline range must be proven beyond a reasonable doubt, the Ninth Circuit recently held that, as in pre-*Booker* cases, "while the preponderance of the evidence standard will still satisfy due process concerns, a heightened burden may sometimes be imposed." *Staten*, 450 F.3d at 392. Quoting *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 961 (1992), the court reiterated that the clear and convincing standard is necessary to protect a defendant's liberty interest under the Due Process Clause whenever "a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." *Staten*, 450 F.3d at 393. In *Staten*, the Court agreed with the government that the clear and convincing standard applied to an enhancement that increased the defendant's offense level by 4 levels and more than doubled her sentence. *Id.* at 391; *see also United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (clear and convincing standard applies to enhancement to offense level that increased guideline range from 24-30 months to 63-78 months), *cert. denied*, 528 U.S. 1163 (2000); *United States v. Mezas de Jesus*, 217 F.3d 638, 642-43 (9th Cir. 2000) (clear and convincing standard applies where proof of uncharged kidnapping that raised sentencing range from 21-27 months to 57-71 months); *United States v. Jordan*, 256 F.3d 922, 928-29 (9th Cir. 2001) (if the increase is caused by multiple enhancements, all must meet the heightened standard). Likewise, in this case, the contested enhancements recommended in the presentence report increase Dr. Mohsen's offense level by 11 levels for his so-called "intended" loss and 4 levels for a role enhancement. Each enhancement would also significantly increase his final sentence. Thus, the Court should find that the loss and role enhancements must be proven by clear and convincing evidence (assuming the Court rejects the argument that they must be proven beyond a reasonable doubt).

B. THE COURT SHOULD FIND NO MORE THAN A 6-LEVEL LOSS ENHANCEMENT UNDER U.S.S.G. § 2F1.1.

The presentence report correctly finds no actual loss, but it adopts the government's view in recommending an 11-level enhancement for an intended loss between $40-$80,000,000. The government bears the burden of proof for any fact that is necessary to an enhancement from the base offense level. *United States v. Ameline*, 409 F.3d 1073, 1086 (9th Cir. 2005) (en banc). When the defendant raises an objection to an enhancement, the district court must resolve the dispute and cannot rely on the PSR. *Id.* In doing so, the district court's loss determination must not be based on mere speculation, *United States v. Barnes*, 25 F.3d 1287, 1290 (9th Cir. 1997), and it must be based on a realistic, economic approach. *United States v. Harper*, 32 F.3d 1387, 1392 (9th Cir. 1994).

1. "Actual" Loss

There was no "actual" loss in this case. The district court dismissed the patent suit filed by Meta and Aptix and plaintiffs received no money from Quickturn. Alternatively, actual loss under the guidelines should be calculated as between $800,000 and $1.5 million, based on the $1,367,288.97 in attorney's fees that Aptix was ordered to pay to Quickturn for the attorney's fees Quickturn spent dealing with the notebooks. In the district court's June 14, 2000 order, the court dismissed the Aptix/Meta complaint, declared the '069 patent unenforceable, and ordered that Aptix pay all of QuickTurn's attorney fees in the suit as a sanction for the court's finding that Aptix, through Dr. Mohsen, had attempted to defraud Quickturn through the creation of a fraudulent notebook or notebooks. The parties ultimately agreed to settle the amount of attorney fees at $ 4.2 million, *see Order*, N.D. Cal. No. C98-00762, dkt entry #529, 11/6/00. This $4.2 million was for the entire action; approximately $1.3 million of this amount was for Quickturn's attorneys fees with Dr. Mohsen's alleged misconduct involving the notebooks. *See* N.D. Cal. No. C98-00762, "Submission of Attorney's fees and costs by Quickturn," filed 6/30/00 (dkt entry #505) and "Declaration of Jeffrey A. Miller," filed 6/30/00 (dkt entry #506); Orders re Attorney's fees (dkt entry # 524, filed 9/8/00 & dkt entry #529, filed 11/6/00). To the extent that the Court does not agree that the offense involved no guideline loss, this $1.3 million amount should be used

as a reasonable proxy for the loss caused by the fraud in this case. U.S.S.G. § 2F.1.1, comment. (n.9) ("The court need only make a reasonable estimate of the loss, given the available information."); *see also U.S. v. Krenning*, 93 F.3d 1257, 1269 (5th Cir. 1996) ("The method used to calculate the loss . . . must bear some reasonable relation to the actual or intended harm of the offense. Whatever method is employed, *the focus of the calculation should be on the harm caused to the victim of the fraud*") (emphasis added). This would increase the base offense level for group one by 11 levels instead of by 17 levels.

2. "Intended" Loss

In a fraud case, any intended loss figure must be reduced by the amount to which the defendant was legitimately entitled to collect. For instance, in a tax fraud case, an amount of intended loss based upon claims supported by fraudulent deduction, must be reduced by amount that would have been refunded based upon legal deductions to which the defendant was entitled. *United States v. Rice*, 52 F.3d 843, 848 (10th Cir. 1995). Similarly, in a Medicare fraud case, the defendant "must be given credit for the medical services that he rendered that were justified by medical necessity. As always, the burden is on the government to establish what services were not medically necessary." *United States v. Rutgard*, 116 F.3d 1270, 1293 (9th Cir. 1997).

Under these principles, in this case there was *no intended loss* because Dr. Mohsen was entitled to win the lawsuit on the merits. The trial evidence demonstrated that none of QuickTurn's claims of prior art could have invalidated the '069 patent, and thus Aptix and Meta were entitled to win the suit against QuickTurn on the merits, regardless of the notebooks. Unless the government demonstrates that Quickturn's prior art would have invalidated the '069 patent, any fraud concerning the notebooks in no way could have affected the success of the lawsuit or caused any loss to Quickturn. Since Aptix and Meta were entitled to win the suit against QuickTurn, there was no intended loss attributable to any fraudulent conduct concerning the notebook. Rather, the only evidence introduced at trial was that Quickturn's prior art could never had invalidated Amr's '069 patent, RT 1020 (testimony of Dr. Tredennick) , which thus made the notebooks totally irrelevant. Any higher loss calculation is unjustified under the facts of this case.

Even if the government could show that Quickturn's prior art could have invalidated the

'069 patent, the government's purported "intended" loss figure of over $40 million is wholly speculative and not appropriate in this case. The over $40 million in "intended" loss comes from Quickturn's attorney Jeffrey Miller's testimony about the Wagner damage report, which was disclosed by Meta and Aptix during the patent litigation. He testified that the Wagner report claimed possible damages at between $22-25 million, RT 165-66,[2] and that damages would have tripled if Meta and Aptix could prove that Quickturn "willfully" infringed on the '069 patent. RT 167. However, this report was marked "Attorney's Eyes Only." *See* Trial Exhibit 33. In order to protect intellectual property rights and to prevent companies involved in patent disputes from using discovery to obtain information about the opposing company's technology and trade secrets, most pleadings and documents in a patent suit are marked "Attorneys Eyes Only" and the attorneys are prohibited from sharing them with parties. Dr. Mohsen thus cannot be held responsible for an amount supplied by attorneys for Meta which he neither had control nor saw.

Moreover, the Wagner report undoubtedly overstates a realistic loss figure in that the report was intended to be a sky-high, starting point for settlement negotiations--not a final damage calculation. The Wagner report uses an unrealistic 9.6% royalty rate as the rate Quickturn would have paid to license the '069 patent, where the industry standard for this type of patent should be closer to 1%. Indeed, when Aptix licensed the '069 patent to Mentor Graphics and Meta Systems, the agreement included a provision for a license rate of not more than one percent. *See* Patent License Agreement between Aptix and Mentor & Meta, dated 2/13/98 (Sent. Exh. A). In fact, when Aptix was sold out of bankruptcy, the entire company, *including the still-valid '069 patent*, sold for only $1.7 million. .

Finally, any "intended" loss figure should not include any tripling of damages. In patent infringement actions, a district court "may increase the damages up to three times the amount found or assessed" if the infringement was willful. 35 U.S.C. § 284 (1988). "[A] determination

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[2] Dr. Mohsen's counsel asked government's counsel in a letter dated November 20, 2006, for a copy of any similar expert report or information *prepared by Quickturn* concerning potential damages in the event it was found to have infringed on the '069 patent. To the extent that such a report exist with a lower damage figure, it represents mitigating *Brady* material that should be provided to defense counsel. Counsel renews the request for any such Quickturn report and asks that the Court provide it prior to any evidentiary hearing set in this case.

of 'willfullness' (or 'bad faith' or 'wanton disregard of the patentee's patent rights') is a necessary predicate for imposition of enhanced damages." *Sharper Image Corp. v. Honeywell, Inc.*, 222 F.R.D. 621, 629 (N.D. Cal. 2004) . To enhance damages under this section, however, the jury must first find that the infringement was "willful" by clear and convincing evidence. *Id.* at 629 n.15. Even then the district judge is not required to enhance damages. *Id.* In deciding whether to enhance the damages after a finding of willfullness, a district court considers various factors, such as whether there was deliberate copying, whether the infringer knew of the patent and had a good faith belief that it was invalid, the infringer's behavior as a party to the litigation, the defendant's size and financial condition, and the closeness of the willfullness issue. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 827 (Fed. Cir. 1992).

Here, the government has come nowhere close to meeting its burden of showing that the guideline range should be increased--under any standard of proof--on the ground that Dr. Mohsen intended that his lawsuit would have resulted in damages being increased from $20 plus million to more than $40 million based on Quickturn's willful infringement. See *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991) (en banc) (describing preponderance standard as a "meaningful" one; it is a "misinterpretation [of the preponderance test] that it calls on the trier of fact to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted"). The government's view that an over $40 million loss figure is appropriate under § 2F1.1 should be rejected as pure speculation, *see, e.g. United States v. Barnes*, 25 F.3d 1287, 1290 (9th Cir. 1997) , and not based on a realistic, economic approach. *United States v. Harper*, 32 F.3d 1387, 1392 (9th Cir. 1994).

3. Request For Evidentiary Hearing

To the extent that the Court intends to increase Dr. Mohsen's guideline range based on the amount of "intended" rather than "actual" loss, Dr. Mohsen requests that the Court set an evidentiary hearing where the government would bear the burden of proving any loss enhancement. For the evidentiary hearing, Dr. Mohsen requests court-authorization to subpoena Quickturn's attorney Jeffrey Miller with an order that he be required to bring (1) any Quickturn's

reports or documents concerning any damage/loss analysis that Quickturn had prepared concerning the patent lawsuit[3] and (2) any documents regarding when Quickturn first became aware of the '069 patent. At trial, Miller's testimony regarding the Wagner report and estimated damages understandably was not subjected to vigorous cross-examination because the issue of damages or loss was not under consideration by the jury and because defense counsel relied solely on a materiality defense at the trial on the fraud and perjury charges. Mr. Miller's testimony is relevant on at least two points. First, counsel desires to question Miller to show that Quickturn had its own damage report prepared that likely estimated a much lower damage figure than that set forth in the Wagner report. And, second, that Quickturn was independently put on notice of the '069 patent before, at, or shortly after the date of the Mohsen-Lobo meeting, so that the "Lobo note" could not have resulted in tripling of damages as the government suggests.

Further, counsel intends to call Ken Serwin, Ph.D., an intellectual property damages expert, to demonstrate that the Wagner report substantially overstates a reasonable estimate of "intended" loss in this case. *See* Sent. Exh. B (CV, Ken Serwin). Although Serwin has not completed his analysis,[4] he is expected to testify that a reasonable estimate of the expected damages to be obtained from the patent suit through settlement or trial would have been based on a much lower royalty rate than the 9.6% figure used in the Wanger report and thus significantly less than $20 million.

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[3] In a letter faxed to prosecutors on November 20, 2006, defense counsel requested any Quickturn report or other information concerning the loss or intended loss in this case as *Brady* material. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring disclosure of all favorable evidence that is material with respect to either "guilt *or to punishment*") (emphasis added). To date, the prosecution has not responded to the letter. Dr. Mohsen requests that the government be ordered to disclose any Quickturn report generated during the patent litigation concerning damages and all other *Brady* material.

[4] On November 29,. 2006, Dr. Mohsen's counsel submitted an *ex parte* request under the CJA act for authorization to retain Ken Serwin as a intellectual property damage expert to testify at an evidentiary hearing in this case, should the Court grant the request for a hearing.

C. THE COURT SHOULD FIND THAT ONLY A 2-LEVEL RATHER THAN A 4-LEVEL AGGRAVATING ROLE ENHANCEMENT APPLIES.

The presentence report recommends adding a 4-level aggravating role enhancement under U.S.S.G. § 3B1.1 in this case even though it involved at most two criminally culpable persons on the ground that the fraud was "otherwise extensive." At most, only a 2-level rather than a 4-level aggravating role enhancement should be applied. The conduct at issue here does not qualify as "otherwise extensive." Neither Moore, nor Kuranz facilitated Dr. Mohsen's fraud, nor did the attorneys for Meta or Aptix. Even as charged, the fraud was a rather, simplistic fabrication of notebooks by the defendant--not one involving a large enterprise. Thus, only a 2-level rather than 4-level role enhancement for supervising his brother is applicable.[5]

IV. UNDER 18 U.S.C. § 3553(a), THE COURT SHOULD SENTENCE DR. MOHSEN TO NOT MORE THAN 8 YEARS IMPRISONMENT AS "SUFFICIENT, BUT NOT GREATER THAN NECESSARY TO COMPLY WITH THE PURPOSES" OF SENTENCING.

Ultimately, after considering the guideline range and grounds for departure, the Court must impose an appropriate sentence in light of the sentencing factors set forth in 18 U.S.C. § 3553(a). Section 3553(a) states that sentencing courts "shall impose a sentence sufficient, but not greater than necessary, to comply with the" sentencing purposes set forth in this section. In doing so, the Court "shall consider," in addition to the Sentencing Guidelines, the following factors:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence impose--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

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[5] The contempt of court grouping conviction does not score in the total offense level under the probation officer's guideline calculations. Nonetheless, to the extent that it would affect the Court's total offense level, Dr. Mohsen objects to the inclusion of a 3-level enhancement under U.S.S.G. § 2J1.7 to Group 2. For the reasons stated in Judge David A. Nelson's dissent in *United States v. Benson*, 134 F.3d 787, 789-90 (6th Cir. 1998), it would constitute impermissible double counting to apply the 3-level enhancement for being on pretrial release to the contempt charged for violating a pretrial release condition.

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available; . . .

(6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

These factors warrant a sentence of not more than 8 years in this case. .

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(a) nature and circumstances of the offense (including imperfect and sentencing entrapment)

The charges at issue in this case are serious offenses. But it is important to consider all the circumstances of the offense. With respect to the perjury and fraud charges in phase one of the trial, Aptix and Meta's patent infringement action was dismissed, even though it should have succeeded on the merits. Thus, despite the views expressed in a letter from Cadence's (formerly Quickturn) General Counsel, there was no actual loss to Quickturn (and likely a gain in having a meritorious patent infringement suit against it dismissed for Dr. Mohsen's litigation misconduct).[6] Moreover, no actual person was actually harassed or intimidated by any of Dr. Mohsen's conduct concerning the attempted witness intimidation offense because there was no evidence that the informant Primas made any of the supposed phone calls. And, the FBI staged the car arson so that no witness's car was ever burned. Indeed, there was substantial evidence presented at trial that Dr. Mohsen repeatedly stated that he did not want the informant to engage in any conduct that would hurt anybody. *See, e.g.* Trial Exh. MM, 5/27/04, at 4, 13, 15; RT 1611. That's not to refute

[6] In his letter to the Court dated October 26, 2006, Cadence's general counsel falsely claims that "Mohsen fabricated the core of the purported evidence on which he based his patent infringement case." Letter of R.T. Smith McKeithen, dated 10/26/06, at 1. Nothing could be further from the truth. Mohsen's '069 patent was and is still valid--independent of the notebooks. The suit was based on technology described in the '069 patent application, which is indisputably legitimate. Neither Quickturn nor the government ever showed that Quickturn invented its technology before Mohsen did as McKeithen falsely claims. The notebooks ultimately resulted in Quickturn winning a lawsuit because of Mohsen's misconduct that Quickturn had no business winning on the merits.

the seriousness of the charges, but rather to demonstrate that Dr. Mohsen himself was ultimately harmed the most by his own conduct.

Further, although the old system of "departures" no longer exists under the current advisory guideline system which permits non-guidelines variances in light of the sentencing factors set forth in 18 U.S.C. § 3553(a), *see United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006) ("any deviation from the applicable advisory guidelines range [is] viewed as an exercise of the district court's post-*Booker* discretion" instead of as a "departure" under the prior mandatory guidelines scheme"), even in pre-*Booker* cases, the Ninth Circuit repeatedly recognized that downward departures may be warranted in cases of "imperfect entrapment" where law enforcement agents engage in conduct that resembles, but does not constitute, a complete entrapment defense. *See United States v. McClelland*, 72 F.3d 717, 725-726 (9th Cir. 1995) (district court did not err by downward departing on the basis of facts raised by defendant's entrapment offense); *United States v. Garza-Juarez*, 992 F.2d 896, 912-913 (9th Cir. 1993) (district court did not err by downward departing on the basis of facts raised by defendant's entrapment offense, although the lower court did not hold that as a matter of law the defendant had been entrapped). In these cases, the Ninth Circuit relied on U.S.S.G. §5K.12 (policy statement), which states that "[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range."

Even if one or more of the entrapment factors, such as the defendant's predisposition to commit the crime or the defendant's initiation of the criminal conduct may have precluded the jury from acquitting the defendant, the defendant nonetheless may be entitled to a below guideline sentence if other factors such as the level of inducement, and the amount of the defendant's reluctance may indicate that the defendant is "less morally blameworthy and less likely to commit crimes in the future," thus justifying a downward departure. *McCllelland*, 72 F.3d at 725-726 & nn. 5, 6; *Garza-Juarez*, 992 F.2d at 913 n.1. In particular, a district court may "properly determine that a defendant who first proposed an illegal scheme, but who later expressed serious reservations and acted only after strong and repeated inducements by the government is less morally

blameworthy and less likely to commit crimes in the future than a defendant who eagerly participated in an illegal scheme with no inducement other than the initial suggestion by a government agent." *Id.* Thus, in *McCllelland*, the Ninth Circuit upheld a six-level imperfect entrapment downward departure where the government agent prodded the defendant even though the defendant repeatedly expressed reluctance and hesitation and where the defendant was in a vulnerable emotional state. *Id.* at 725-726 & n.6.

Similarly, "[s]entencing entrapment occurs when 'a defendant although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment." *United States v. Parrilla*, 114 F.3d 124, 127 (9th Cir. 1997) (quoting *United States v. Staufer*, 38 F.3d 1103, 1106 (9th Cir. 1994); *accord United States v. Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997); *United States v. Naranjo*, 52 F.3d 245 (9th Cir. 1995). A court may "prevent sentencing entrapment by exercising its discretion to ensure that a given sentence reflected the defendant's criminal predisposition and culpability." *Parilla*, 114 F.3d at 127. A court may reduce a sentence under the doctrine of sentencing entrapment, even where the entrapment results in a mandatory sentence. *See Ramirez-Rangel*, 103 F.3d at 1507-08.

Here, Dr. Mohsen was by all accounts in a vulnerable emotional state while incarcerated. He suffered from major depression, his mother had just passed away, he faced the disgrace of public scandal and humiliation, and he experienced being jailed for the first time. Further, the company he founded and built over 15 years, Aptix, had declared bankruptcy while he was incarcerated, causing him to lose over $16 million in investments. Primas, a hardened felon and crack cocaine addict with nine prior felonies and multiple prior prison sentences, immediately pegged Dr. Mohsen as a "pigeon." Primas conceded that he would have done anything to get out from under the 12 year sentence he was facing. Dr. Mohsen repeatedly expressed reluctance to engage in the solicitation to murder Judge Alsup, as the jury found in acquitting him of that conduct. On the tapes, Dr. Mohsen can repeatedly be heard stating that he did not want anybody to be hurt and that his "conscience" was bothering him. Significantly, Primas testified that Dr. Mohsen also made the same types of comments about his conscience when they discussed burning Moore's car. RT 1611. Their tape recorded conversations provide other expressions of

reluctance. For instance on the May 27, 2004 tape, Primas asks whether burning Moore's car would scare him, and Dr. Mohsen replied "I think maybe a phone call is enough." Trial Exh. MM, 5/27/04, at 13. Dr. Mohsen twice expresses his concern that nobody would get hurt; *id.* at 4, 15. Dr. Mohsen also told the informant that Moore was not the most damaging witness against him, which suggests that any idea to burn his car would have came from Primas, not Dr. Mohsen. Overall, Dr. Mohsen's emotional vulnerability and demonstrated reluctance to the arson offense justifies a below guideline variance under the imperfect and sentencing entrapment doctrines.

(b) history and characteristics of the defendant

Dr. Amr Mohsen is a 59 year old man with no prior record and a long history of personal and professional accomplishments and good deeds. Significantly, almost 50 family members, friends, and co-workers have submitted letters demonstrating Dr. Mohsen's good character and asking for leniency at sentencing. These letters come from persons in all walks of life, including professors, religious leaders, physician, business executives, classmates, employees, close friends, and relatives.

These letters attest to Dr. Mohsen's long-history of good character and conduct, before the events charged against him occurred. *See, e.g.* Salman Asadullah, Sentencing Letters ("SL"), Vol. I, at p.8 ("Dr. Mohsen was highly accomplished in the field of Electrical Engineering as an entrepreneur and also very involved in community and social work"); Sarah Azad, M.D., Vol. I, at p.10 ("Without hesitation, Dr. Mohsen lent me a portion of my tuition, interest-free, and without a designated date for repayment. His help made my medical school studies a possibility and my current work with the indigent population of Santa Clara County a reality."); Shaista Azad, M.D. ("Were it not for the generous help of Dr. Mohsen, I don't think that that mosque would have been built. Now, years later, thousands of people are able to worship at the MCA because of his contribution."); Rasheed Azzam, Ph.D., Vol. I, at p. 12 ("I have always known Amr to be a good family man, a good friend, and someone who has contributed generously to the welfare of his community... For more than 40 years I have not heard anything negative about Amr from any of his colleagues at work or from others who know him."); Hamdi El-Sissi, Ph.D., Vol. I, at p.17 ("To the best of my knowledge, onside [sic] the scope of the current case, I have never observed

him lying or committing any other immoral transgressions"); Shafy Eltoukhy, Vol. I, at p.21 ("Amr approved an interest free loan from the company that enabled me to put part of the down payment on a house"); Khaled Labib, Ph.D., Vol. II, at p.35 ("I have met several top executives during my career, but hardly ever met someone with his kindness and willingness to help"); Sherif Rasmy, Vol. II, at p.57 ("I got in a serious depression that cost me my job and almost my marriage in year 2000. Amr flew from CA to PA and spent few days with me to help me get out of my illness").

They also document his extensive professional accomplishments and opine that he still has more to give to society. *See, e.g.,* Tarek Consol, SL, Vol. I, at p.15 (noting that Dr. Mohsen led the development of the industry standard CMOS 256K DRAM while at Intel and that his Aptix products received awards for best and most innovative products) ("It would be a loss to technology, society, and community to not allow him to be of benefit. His contributions would be priceless."); Hussein J. Hanafi, Ph.D., Vol. I, at p.26 ("I would suggest any alternative sentencing other than imprisonment be applied to Dr. Mohsen so that the society at large may continue benefitting from his brilliance, innovation, dedication, generosity, and compassion."); Dr. Tarek Kamel, Vol. II, at p.33 ("Over the years, Dr. Mohsen has proven to be a top notch scientist who has issued over 40 patents").

And, while Dr. Mohsen's actions and prosecutions have put enormous stresses on his family and relatives, they remain strongly supportive and ask the Court for leniency for him in sentencing. *See* Sentencing Letters of Noha Mohamed Abel-Salam, Vol. I, at p.2-3; Nadia Anis, Vol. I, at p.7; Rania S. Lashin, Vol. II, at p.37; Sammer Lashin, Vol. II, at p.38-39; Ayman Metwally, Vol. II, at p.44; Bahira Metwally, Vol. II, at 45-46; Magda Metwally, Vol. II, at p.47-48; Ehab Mohsen, Vol. II, at 49-50; Dr. Mona Mohsen, Vol. II, at p.51; Raania Mohsen, Vol. II, at p.52-53; Shereen Mohsen, Vol. II, at p.54; Waleed Mohsen, Vol. II, at p.55; Heba Abdel-Salam, Vol. II, at p.59-60.

Together, these persons recognize Dr. Mohsen as a man whose life is not worth throwing away through lengthy incarceration for the rest of his life. The nature and circumstances of the offense and the history and characteristics of the offender warrant some leniency.

(2)(A) The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(2)(B) The need to afford adequate deterrence to criminal conduct; and

(2)(C) The need to protect the public from further crimes of the defendant;

There is no question that the charges Dr. Mohsen has been convicted of are serious. Still, there was no monetary loss and no victim harmed in the offenses. A total sentence of 8 years imprisonment would reflect the seriousness of the offenses, promote respect for the law, and provide just punishment. Moreover, no greater sentence is needed to afford adequate deterrence or to protect the public from further crimes of the defendant. Dr. Mohsen is now a convicted felon who has lost his career, savings, and the respect of his community. After a lengthy 8 year prison sentence, Dr. Mohsen will be supervised by a federal probation officer for 5 years. There is no reason to believe that he would commit further crimes upon release or that a greater sentence is necessary for deter future offenses.

(2)(D) The need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (3) the kinds of sentences available;

A long sentence is not necessary to provide Dr. Mohsen with any correctional treatment.

(6) The need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct;

Although records of other persons who have been convicted of similar offenses are hard to come by, an 8 year sentence appears to be within the range of appropriate sentences for persons convicted of similar crimes with a long history of achievement and good deeds and without any criminal record.

(7) The need to provide restitution to any victims of the offense.

This factor is inapplicable as there already has been an order that Aptix pay attorney's fees and costs to Quickturn, and thus no restitution order here is appropriate. If the Court were to order restitution, this factor would favor a shorter sentence so that Dr. Mohsen would be able to regain employment and pay off the restitution obligation.

V. CONCLUSION

Dr. Mohsen has been convicted of a variety of serious offenses for which he should be punished. But the guidelines and § 3553(a) factors do not call for him to be locked up for essentially the rest of his life. In addition to the offense conduct, the Court should factor in the circumstances of the offense and the history of Dr. Mohsen. For all the reasons set forth above, the Court should sentence Dr. Mohsen to a sentence of not more than 8 years imprisonment as an appropriate sentence that is "sufficient, but not greater than necessary, to comply with" all the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

Dated: December 1, 2006

Respectfully submitted,

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/s/ John Balazs
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