KEVIN V. RYAN (CSBN 118321)
United States Attorney

MARK KROTOSKI (CSBN 138549)
Chief, Criminal Division

ROBIN L. HARRIS (CSBN 123364)
KYLE F. WALDINGER (ILSB 6238304)
Assistant United States Attorneys

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-7016/6830
Facsimile: (415) 436-7234

Attorneys for the United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendant.	No. CR 03-0095 WBS **UNITED STATES' REPLY TO AMR MOHSEN'S SENTENCING MEMORANDUM** Date: December 8, 2006 Time: 10:30 a.m. Courtroom D

INTRODUCTION

Defendant Amr Mohsen has filed a sentencing memorandum in which he requests the Court to sentence him to 8 years imprisonment. Mohsen also requests an evidentiary hearing on the issue of Mohsen's intended loss. For the reasons set forth below, as well as those in the government's December 1, 2006 sentencing memorandum, the government opposes both Mohsen's 8-year sentencing recommendation and Mohsen's request for an evidentiary hearing.

First, Mohsen's eight-year sentencing recommendation contains neither a meaningful analysis of the applicable sentencing guidelines nor an explanation for how Mohsen has reached his proposed eight-year figure. Mohsen's arson conviction (count 22) alone should result in a 60-month sentence. *See* 18 U.S.C. § 373 which proscribes a sentence of "not more than one-half of

the maximum term of imprisonment...for the crime solicited" which, in this case, was arson to commit a federal felony in violation of 18 U.S.C. § 844(h)(1). A violation of 18 U.S.C. § 844(h)(1) carries a *mandatory consecutive* sentence of ten years. Accordingly the PSR has calculated that Mohsen's sentence on count 22 should be 60 months (one-half of ten years) and has recommended that the 60 months be served consecutive to the sentence on counts 1-21. *See* PSR ¶ 65. Thus, Mohsen's proposed eight-year sentence is, essentially, a recommendation of three years imprisonment for all of Mohsen's other convictions, including conspiracy; perjury; obstruction of justice; mail fraud; contempt and witness tampering which would then be followed by a five-year sentence on count 22. A three-year sentence for Mohsen's mail fraud, perjury, obstruction of justice, attempted witness tampering and contempt is patently unreasonable and bears no relationship to either the sentencing guidelines or the principles set forth in 18 U.S.C. § 3553. Nor does the proposed three-year sentence for Mohsen's convictions on counts 1-21 account for the fact that the Court *must* require some portion of Mohsen's sentence on count 20 (contempt) to be served consecutive to the sentence on counts 1-19 because Mohsen's contempt was committed while he was on pre-trial release. *See* 18 U.S.C. § 3147 *requiring* a consecutive sentence for any crime committed while a person is on pre-trial release.

Second, Mohsen's request for an evidentiary hearing and an additional opportunity to cross-examine government trial witness Jeff Miller is yet another attempt to side-track the court and postpone the day of reckoning. Jeff Miller testified during the government's case-in-chief and was extensively questioned on the issue of Mohsen's intended loss. During the six-week jury trial, the Court heard more than enough evidence regarding Mohsen's intended loss to resolve any factual disputes in the PSR. We also note that Mohsen has offered no explanation as to why he should be given a second bite at the apple when he was given the opportunity for full cross-examination of Jeff Miller at trial. *See* RT 180-212 (attorney Bruce Locke's cross-examination of Jeff Miller). Nor has Mohsen made any effort to explain why QuickTurn's expert's damages figure has *any* bearing on the amount *Mohsen* intended to cause QuickTurn to pay *if* QuickTurn had not ferreted out Mohsen's fraud. Quite simply, QuickTurn was the victim of Mohsen's fraudulent scheme. The relevant and operative measure of intended loss is the

amount *Mohsen* intended to cause QuickTurn to pay not vice versa. All of the evidence of Mohsen's approximately $70,000,000 intended loss was presented through trial exhibits and trial testimony. There is no need or justification to further delay Mohsen's sentencing for an unnecessary evidentiary hearing.

ANALYSIS

A. An Eight-Year Sentence Is Unreasonable

Mohsen's sentencing memorandum does not provide any insight into how Mohsen arrived at his eight-year sentencing recommendation. Although the sentencing guidelines are now advisory, the court must nevertheless make calculations under the guidelines and must properly calculate the applicable range under the advisory guidelines. *United States v. Mohamed*, 459 F.3d 979, 985 (9th Cir. 2006). Here, Mohsen has not explained his view of how the guidelines should be calculated, other than to object to the 17-level enhancement for loss and the 4-level enhancement for his role in the offense. Even if the Court were to accept Mohsen's argument that the loss should be calculated based upon QuickTurn's attorney's fees rather than the loss Mohsen intended to cause QuickTurn, the resulting sentence would either (1) be increased **13** levels under U.S.S.G. 2F1.1(b)(1)(N) because QuickTurn spent approximately $4.6 million defending the patent lawsuit or (2) be increased **11** levels because, according to Mohsen, QuickTurn spent approximately $1.3 million discovering the fraud in the notebooks. *See* PSR ¶ 58 and Mohsen sentencing memo pg.8. Mohsen provides no explanation for his conclusion that the Court should find a 6-level enhancement for loss. *See* Mohsen sentencing memo pg. 8.

In the same vein, Mohsen objects to a 4-level enhancement for his "otherwise extensive" role in the offense. Yet Mohsen has wholly failed to explain why document examiner David Moore, ink chemist Robert Kuranz, San Jose Police Dispatcher Alma Carrillo and the attorneys at Howrey & Simon (including Andy Piatnicia whose tape recorded interview with Mohsen about the "theft" of the Notebooks from Mohsen's car was played at trial for the jury) should **not** be considered "unknowing" participants who unknowingly furthered Mohsen's fraudulent scheme. The facts at trial established by any standard of proof, including clear and convincing, that the above individuals were all unknowingly recruited by Mohsen to help facilitate and

further Mohsen's fraud. These many unknowing participants, coupled with Aly Mohsen's knowing participation, clearly and convincingly establish that Mohsen's role in the offense was otherwise extensive.

B. Burden of Proof For Sentencing Enhancements Post-Booker

Mohsen spends most of his sentencing memorandum on a lengthy historical review of the government's burden of proof for sentencing enhancements prior to the Supreme Court's decision in *Booker*. In view of the fact that the sentencing guidelines are now advisory and serve as the starting place for formulating a "reasonable" sentence (*see United States v. Mohamed*, 459 F.3d 979, 985 (9th Cir. 2006)), the Court can fashion a reasonable sentence under either the preponderance of evidence (*see United States v. Kilby*, 443 F.3d, 1135, 1139 (9th Cir. 2006)) or the clear and convincing standard. (*See United States v. Staten*, 450 F.3d 384, 392 (9th Cir. 2006) ("In the aftermath of *Booker*, we have noted that while the preponderance of the evidence standard will still generally satisfy due process concerns, a heightened burden may sometimes be imposed.). In this case, we respectfully submit that the government has met its burden on all sentencing enhancements, including the intended loss, under both standards.

The government reiterates that its basis for seeking an enhancement for intended loss of more than $40,000,000 (17 levels) is based on: (1) Government Exhibit 33A which was introduced at trial and contained *Aptix's* calculation of the *compensatory* damages that supposedly resulted from Aptix's claim that QuickTurn infringed the 069 patent; (2) Government Exhibit 29 which was introduced at trial and consisted of Mohsen's phony backdated notes that were supposed to represent proof by Mohsen that QuickTurn "willfully" infringed the 069 patent; (3) Deposition testimony from Amr Mohsen, also introduced at trial, in which Mohsen claimed to have given Keith Lobo (QuickTurn's President) notice of infringement in August 1996; (4) Trial testimony of Jeff Miller, which was subject to cross-examination by Mohsen, establishing that Aptix sought between $22 and $24 million in compensatory damages and intended to have that amount tripled based upon Aptix's claim that QuickTurn "willfully" infringed the 069 patent (*see* RT 167:7-168:4) and; (5) Expert trial testimony from patent expert Jay Kesan, which was subject to cross-examination by Mohsen, concerning the multiplier that is used to compute

damages in patent infringement lawsuits. This proof satisfies both the preponderance and the clear and convincing standard that Mohsen intended QuickTurn to sustain a loss of more than $40,000,000, which results in a 17-level increase to the base offense level.

C. The Intended Loss Is Based Upon Mohsen's Intent, Not the Victim's Intent

Amr Mohsen finds himself in the untenable position of (1) having previously lied and falsified documents to exponentially increase QuickTurn's loss in the civil case (*see* Exhibit 29 and Mohsen deposition testimony pgs. 575-76, 648-49 and 657) and (2) scrambling to retroactively minimize those damages now that Mohsen's own bogus documents and false testimony will be used to calculate Mohsen's prison sentence rather than to fortify his bank account. All of the documents introduced at trial by the government in support of the $70,000,000 intended loss figure were either manufactured by Mohsen or produced by Aptix to QuickTurn in the civil case. Government Exhibit 29 (the phony Keith Lobo notes) was created by Mohsen and was intended to falsely serve as "proof" of Mohsen's alleged notice of infringement to QuickTurn. Exhibit 29 was also Mohsen's "proof" of (1) the *date* of alleged notice of infringement which, as Jay Kesan and Jeff Miller testified, starts the damages clock running and (2) *willfulness* which provides a basis for tripling the compensatory damages. Government Exhibit 33A is Aptix's own expert (Michael Wagner) damages report. Mohsen created the phony notes in Exhibit 29 to triple the compensatory damages set forth in Exhibit 33A. Notwithstanding all of the evidence the government presented to support the $70,000,000 intended loss figure, Mohsen now argues that either (1) there was no intended loss or (2) the loss should be limited to QuickTurn's attorneys' fees, but only those fees that were spent by QuickTurn to ferret out Mohsen's fraud. Finally, Mohsen makes the unique, and entirely legally unfounded argument, that the loss should be based upon *QuickTurn's* expert's calculations, rather than on the figure Mohsen actually intended. We address each argument in turn.

Mohsen continues to make the argument that there is no intended loss "because Mohsen was entitled to win the lawsuit on the merits." *See* Mohsen sentencing memo, pg. 9. This argument is thoroughly disturbing because it reveals that Mohsen has utterly failed to comprehend the true nature of the damage he caused in this case. As this Court is now well

aware, Mohsen's criminal conduct sought to distort and pervert the legal process and to undermine the foundation of our legal system, namely that lawsuits are decided by the fact finder based upon documents that are what they purport to be and upon testimony that is truthful. Quite simply, Mohsen was not entitled to "win" the lawsuit against QuickTurn by using perjured testimony, sponsoring false documents and by intentionally and artificially increasing QuickTurn's potential damages to force an unfair settlement. Mohsen fully intended to bring QuickTurn to financial ruin. If Mohsen had not been caught, QuickTurn could have settled the lawsuit for a vastly inflated amount, which is exactly what Mohsen intended and what the guidelines are designed to address.

Second, even if Mohsen would have won the lawsuit, which we will never know because Mohsen's misconduct prevented the lawsuit from being adjudicated on its true merits, this "fact" has *no* bearing on the loss Mohsen intended to cause. Mohsen claimed, via Exhibit 33A, that Aptix's compensatory damages were between $22 and $24 million. Mohsen also manufactured false evidence (Exhibit 29) to support Aptix's claim that the $22 or $24 million compensatory damages should be tripled.

Third, despite all of the evidence that Mohsen fabricated and that Aptix sponsored in the civil case to exponentially increase the potential loss to QuickTurn, Mohsen now makes the stunning argument that Exhibit 33A (Aptix's expert compensatory damages report) "was *intended* to be a sky-high, starting point for settlement negotiations–not a final damage calculation." Mohsen sentencing memo pg. 10, emphasis supplied. Separate and apart from the unsupported notion that Michael Wagner, Aptix's hand-selected expert and the author of Exhibit 33A, was a co-conspirator in Mohsen's effort to defraud QuickTurn, we note that Mohsen never took the position in the civil case that his own expert's damage report should be disregarded by QuickTurn. To the contrary, Mohsen affirmatively sought to inflate his recovery three-fold by manufacturing phony evidence of QuickTurn's alleged "willfulness." We also observe that even Mohsen has characterized Exhibit 33A as something that was "intended." ("[T]he report [Exhibit 33A] was *intended* to be a sky-high starting point for settlement negotiations"). *Id*. at 10. Mohsen cannot have it both ways. In the civil case, Mohsen sought and intended to cause

QuickTurn an astronomical loss. Now that he is in the criminal arena, Mohsen should not be permitted to disavow his *own* intentions regarding the amount of loss. "[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is *greater than the actual loss*." *See* U.S.S.G. 2F1.1, n.8, emphasis supplied. Here, the intended loss is clearly capable of determination based upon Mohsen's own evidence and testimony. The intended loss of $70,000,000 is greater than the actual loss and should, therefore, be used in calculating the loss enhancement.

Finally, the concept of intended loss is specifically focused on the loss that the defendant intended to cause. Mohsen, however, has attempted to turn this proposition on its head by suggesting that it is QuickTurn's calculations of damages, *not* Mohsen's, that should determine the *intended* loss amount. *See* Mohsen sentencing memo, pg. 12. The government is unaware of any authority, and Mohsen has cited none, for the proposition that the defendant's intended loss should be determined based upon the victim's (*ie*. QuickTurn) defensive loss calculations rather than upon the defendant's offensive calculations. Intended loss is just that: the amount of loss that the defendant *intended* to cause the victim.

D. Mohsen Was Not Entrapped

Despite having received an entrapment instruction at trial which required the government to prove beyond a reasonable doubt that Mohsen was *not* entrapped by a government agent into committing counts 21 and 22, Mohsen now argues for a downward departure from an as-of-yet unspecified guideline range for "imperfect entrapment." *See* Mohsen sentencing memo, pg. 15. There is no factual basis for any such departure. Mohsen was firmly at the helm during his attempted witness tampering and during his solicitation of an arson on David Moore's car. The Court is familiar with the videotapes (which were played at trial) of (1) Mohsen berating the cooperating inmate for not making additional intimidating phone calls to the Avery-Dennison employees; (2) expressing satisfaction with the photograph of the arson to David Moore's car, but reiterating his "hope" that "they got the right car"; (3) instructing the cooperating inmate to make sure "Kimo" would use gasoline for the arson; (4) repeatedly harassing the cooperating inmate to find someone to break into Tom Huang's car to create credibility for Mohsen's bogus

"mistaken car identity defense," and (5) instructing the cooperating inmate to find someone to track Judge Alsup's whereabouts and determine Judge Alsup's patterns to figure out how difficult it would be to murder Judge Alsup. Mohsen's behavior in Santa Rita jail was yet another manifestation of the consistent pattern Mohsen has displayed throughout his six-year criminal odyssey. Mohsen was willing to game the system and win at any cost in both the criminal and civil justice arenas. Mohsen was predisposed to commit counts 21 and 22 and required no inducement to do so. There is no basis for a downward departure in this case at all, let alone for so-called "imperfect entrapment."

E. There Is No Basis For An Evidentiary Hearing

Mohsen now requests an evidentiary hearing, ostensibly for two purposes: (1) to call QuickTurn's attorney, Jeff Miller, as an adverse witness in an attempt to establish that QuickTurn's damages expert calculated a lower damages figure than did Michael Wagner (Aptix's damages expert) and (2) to call Ken Serwin, Ph.D., to contradict *Aptix's* own expert, Michael Wagner, and to opine that the "Wagner report substantially overstates a reasonable estimate of 'intended' loss in this case." Mohsen sentencing memo pg. 12.

As an initial matter, there is no general right to an evidentiary hearing at sentencing. *United States v. Kimball*, 975 F.2d 563, 568 (9th Cir. 1992), *cert. denied*, 507 U.S. 918 (1993). *Cf. United States v. Real-Hernandez*, 90 F.3d 356, 362 (9th Cir. 1996) (explaining that there is "no general right to an evidentiary hearing at sentencing" and that such hearings are discretionary, not mandatory. Where the district court uses values from documents prepared by the defendant, himself, it was not an abuse of discretion not to hold a hearing on the matter. *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999).

Second, the testimony Mohsen seeks at this proposed evidentiary hearing has *no* bearing whatsoever on the issue of Mohsen's *intended* loss. Mohsen does not seek to cross-examine Miller or introduce the as-of-yet incomplete Serwin report to establish that Mohsen *intended* a lesser amount of financial harm to QuickTurn. Rather, Mohsen seeks to establish that the *actual* loss *might* have been less than $70,000,000 *if* the civil fact-finder had accepted the victim's view of loss rather than Mohsen's. This proposition, however, has *nothing* to do with the issue that

the Court needs to resolve, namely what is the amount of loss that Mohsen *intended* to cause QuickTurn *regardless* of whether that amount was realistically possible? The government does not need to prove that Mohsen's intended $70,000,000 loss was a probable, or even realistic, loss figure that would have resulted from Mohsen's scheme. Rather, the government's burden is only to prove what Mohsen *intended* from his scheme. Loss under U.S.S.G. § 2F1.1 "does not require the loss the defendant intended to inflict be realistically possible." *United States v. Robinson,* 94 F.3d 1325, 1328 (9th Cir. 1996). *See also, United States v. Koenig*, 952 F.2d, 267, 271 (9th Cir. 1991) ("If the district court chooses to calculate the intended loss, there is no requirement mandating consideration of the 'probable loss' that would result from the intended plan").

Second, the government is unaware of any authority requiring the district court to hold an evidentiary hearing solely to permit a defendant to retroactively contradict his *own* evidence of loss. Mohsen's proposed hearing is unnecessary because he seeks to establish an irrelevant proposition that is uncontested by the government, *ie*. that the "actual loss", if Mohsen's misconduct had not been discovered, might have been less than the amount of loss that Mohsen *intended.* Because the advisory guidelines specifically direct that "if an intended loss that the defendant was attempting to inflict *can be determined*, this figure will be used if it is *greater* than the actual loss" (*see* 2F1.1. n.8, emphasis supplied), the "actual loss" that Mohsen seeks to establish in the proposed evidentiary hearing is irrelevant. In this case, the Court can determine the loss Mohsen *intended* to inflict on QuickTurn from the current record. The Court does not need to consider Mohsen's proposed evidence, from either further cross-examination of Jeff Miller or from a newly retained damages expert, that the "actual loss" might have been less than the amount Mohsen intended because the guidelines direct the Court to use the loss figure which is "greater." *Id.*

Finally, we respectfully request that *if* the Court is inclined to hold an evidentiary hearing, which we maintain is unnecessary and counterproductive to a determination of Mohsen's intended loss, that any such evidentiary hearing take place at a future date to be determined based upon the availability of Jeff Miller, who is currently a partner at the Orrick, Harrington law firm.

//

CONCLUSION

For the reasons stated herein and in the government's December 1, 2006 memorandum, the United States respectfully requests the Court to sentence Mohsen to 228 months imprisonment, followed by a five-year term of supervised release. The United States further requests the Court to order payment of a $1700 special assessment and restitution to the victim, Cadence. The United States requests the Court to impose judgment and sentence without an evidentiary hearing for the reasons set forth herein.

Dated: December 5, 2006

Respectfully Submitted,

KEVIN V. RYAN
United States Attorney

/S/ Robin L. Harris
ROBIN L. HARRIS
KYLE F. WALDINGER
Assistant United States Attorneys