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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA,) No. CR 03-95-WBS
15)
16 Plaintiff,) DEFENDANT AMR MOHSEN’S REPLY
17) TO GOVERNMENT’S SENTENCING
18 v.) MEMORANDUM
19 AMR MOHSEN and ALY MOHSEN,) Date: December 8, 2006
20 Defendants.) Time: 10:30 a.m.
) Hon. William B. Shubb
)

21 I. THE PROBATION OFFICER CORRECTLY FOUND THAT DR. MOHSEN’S
22 OFFENSE DID NOT INVOLVE “SOPHISTICATED MEANS” UNDER U.S.S.G.
§ 2F1.1(b)(5).

23 The Court should deny the government’s request that a 2-level enhancement be applied to
24 Dr. Mohsen’s offense level under U.S.S.G. § 2F1.1(b)(5) on the ground that the fraud offense
25 involved “sophisticated means.” The probation officer has it right. Dr. Mohsen’s offense
26 involved “crude,” not “sophisticated” means. The offense involved a simplistic dummied up of
27 notebook entries. The fact that he took the notebook to experts for testing and presented it to his
28 attorneys as accurate does not convert the offense into a “sophisticated” one under the fraud

1 guideline. Application note 15 defines “sophisticated means” as “complex or especially intricate
2 offense conduct pertaining to the execution or concealment of an offense.” U.S.S.G. § 2F1.1,
3 comment. (n.15). The note provides examples as conducting a telemarketing scheme from
4 multiple jurisdictions and “hiding assets or transactions, or both, through use of fictitious entities,
5 corporate shells, or offshore bank accounts.” *Id.* The fraud here is not in the same ballpark.¹
6

7 II. EVEN IF 18 U.S.C. § 3147 APPLIES, A CONSECUTIVE SENTENCE ON COUNT 20
8 DOES NOT INCREASE THE GUIDELINE RANGE OR TOTAL SENTENCE IN THIS
9 CASE.

10 First, Dr. Mohsen disagrees that 18 U.S.C. § 3147 applies to count 20. Section 3147
11 mandates a consecutive term of imprisonment for any offense committed while a defendant is on
12 federal pretrial release. But judges have split on whether this statute (and the accompanying
13 U.S.S.G. § 2J1.7) applies where the sole offense committed while on release is a violation of a
14 release condition rather than a new substantive offense. *See U.S. v. Benson*, 134 F.3d 787 (6th
15 Cir. 1998) (applying § 3147) (2-1); *United States v. Lofton*, 716 F. Supp. 483 (W.D. Wash. 1989)
16 (district court refused to apply § 3147 where the offense committed on release was failure to
17 appear in violation of § 3146). The defense believes section 3147 should not be deemed to apply
18 for the reasons stated in *Lofton* and Judge David A. Nelson’s dissent in *Benson*. 134 F.3d at 789-
19 90.

20 Moreover, even if 18 U.S.C. § 3147 does apply here, the statute does not increase the
21 guideline range or total sentence in this case. Section 3147 is implemented through a 3-level
22 enhancement under U.S.S.G. § 2J1.7 to the group of offenses committed while the defendant was
23 on release. Here, that is group II, which does not increase the total guideline offense level or
24 sentencing range. Rather, the Court should still determine the appropriate “total punishment”
25 under the guidelines and then impose a portion of that sentence on count 20 to run consecutive to

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27 ¹ Further, the government’s reference of the 1989 notebook as a relevant factor for
28 enhancing Mohsen’s sentence is not warranted. Gov’t Sent. Mem, at 4, 5. The 1989 notebook
was not used in the *Aptix v. QuickTurn* litigation. Further, Mohsen’s deposition testimony
admitted that he had made additions to the 1989 notebook after the fact.

1 the other counts. *See* U.S.S.G. § 2J1.7, comment. (n.2) & backg'd. For example, if the Court
2 were to follow the probation officers' total recommended sentence of 108 months (in addition to
3 the mandatory consecutive 60 month sentence on count 22), the Court could impose a sentence
4 consistent with the guidelines and section 3147 of 12 months on count 20, to run consecutive to a
5 sentence of 96 months on counts 1, 2-4, 10-19 and the 60 month sentence on count 22.

6
7 III. AN INTENDED LOSS OF \$70,000,000 IS PURE GOVERNMENT FANTASY.

8 The government has still never attempted to show that Quickturn had any valid prior art
9 defense or that it could have won the lawsuit against Aptix and Meta if the suit had not been
10 dismissed for litigation misconduct. At most, the evidence showed that Dr. Mohsen intended to
11 shortcut the litigation, by creating a fraudulent notebook that would have short-circuited
12 Quickturn's bogus prior art defense. But the *undisputed evidence* from Dr. Tredennick showed
13 that Aptix and Meta would have won the lawsuit anyway--without the notebook, and that
14 QuickTurn, therefore was not entitled to any damages. This testimony went unrebutted by the
15 Government. If the Court accepts this unrebutted testimony that Aptix was entitled to win the
16 lawsuit, and that the intended loss figure should be \$0, the defense would agree with the
17 Government's assertion that there is no basis for a "mini-trial on the amount of damages." Gov't
18 Sent. Mem, at 11.

19 Second, for the reasons stated in Dr. Mohsen's initial Sentencing Memorandum, an
20 intended loss of \$70 million is pure fantasy. The government asserts that the trial evidence
21 supported a finding that Aptix could have sought treble damages and could have used the Wagner
22 expert report suggesting that compensatory damages were in the range of \$22.7 to \$24.6 million;
23 thus, Aptix could have been awarded in the amount of \$70 million. (Govt Mem at 11). One of the
24 government's most fundamental error is equating a request with an intention. When a plaintiff
25 seeks a certain amount of damages in a lawsuit, it does not mean that the plaintiff "intends" to
26 obtain that amount through the lawsuit. Plaintiffs almost always ask for far more than they expect
27 or intend to receive from a successful lawsuit.

28 The government also asserts without support or evidence that Exhibit 33A, the Wagner

1 report, was accessible to Mohsen despite the fact that it was marked “For Attorney’s Eyes Only.”
2 The government asserts that because it was prepared by Aptix’s expert, there would be no reason
3 to shield it from Aptix’s CEO. Gov’t Sent. Mem, at 10. Yet, the government misunderstands the
4 protective order in this and other cases. Because experts in general are given access to the
5 proprietary information of plaintiff and defendant, expert reports cannot be released to *either party*
6 outside of the attorneys themselves. The marking “For Attorney’s Eyes Only” precludes *either*
7 *party* from reviewing the documents.

8 Moreover, the assumption that Dr. Mohsen “intended” to obtain treble damages through the
9 lawsuit has no support in the record. For the reasons previously stated, a tripling of damages for
10 “willful” infringement is a very high standard and enhanced damages are discretionary and
11 available only in limited circumstances. *See* Dr. Mohsen’s Sentencing Memorandum, at 10-11.
12 Though a request for treble damages is often made in patent infringement actions, it is not
13 reasonable to believe that Dr. Mohsen intended that he would actually receive *any* enhanced
14 damages through his lawsuit.²

15 Finally, Dr. Mohsen renews his request for an evidentiary hearing to the extent the Court
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18 ² Even if damages had been tripled for “wilfulness,” however, the government’s
19 estimate far inflates the actual dollar figure. The Wagner report, which the government relies on,
20 basis its damage estimate on the ground that Quickturn would have to pay Aptix/Meta royalties for
21 infringing on its ‘069 patent for the period ending June 30, 1999. Trial Exh. 33, at 3. The
22 government then triples this amount to get to its \$70 million estimate of intended loss. But
23 Quickturn was certainly put on notice of its infringement when the lawsuit was filed on February
24 26, 1998. Trial Exh. 1. Thus, the Keith Lobo note could only have potentially caused enhanced
25 damaged for willful infringement from the date of the Lobo meeting , i.e., August 19, 1996 to the
26 date the lawsuit was filed, i.e., February 26, 1999. But the government triples damages for the
27 entire period covered by the Wagner report, or more than 16 months after the lawsuit was filed.
28 Thus, even if the government’s theory was correct (which it is not), its math is wrong and the
intended damages would be much lower.

25 Additionally, the defense has been informed by Aptix’s former attorneys that QuickTurn
26 received several letters suggesting that Quickturn had notice of infringement at or near the time of
27 the meeting with Lobo. The defense made a Brady request to the government requesting copies of
28 any documents reflecting QuickTurn’s notice of infringement. The government has throughout
the criminal litigation demonstrated itself capable of getting any documents it needed from
QuickTurn on a moment’s notice. Yet, the government has not provided the requested Brady
discovery as of yet.

1 intends to use an “intended” rather than “actual” loss amount for the fraud guideline scoring.³
2 Despite the government’s protests, Quickturn’s attorney Jeffrey Miller was not subject to cross-
3 examination on the amount of “intended” loss at trial. A jury doesn’t determine “loss” under the
4 guidelines, the judge does. Counsel believed that it would have taken away from the (ultimately
5 unsuccessful) materiality defense to contest Miller’s irrelevant loss estimates in front of the jury.
6 As the government knows, defense counsel raised only a materiality defense and did not contest
7 most of the evidence in phase one of the trial. The “Keith Lobo” note was a red herring that was
8 not part of the charged fraud and did not become an issue until the prosecution pushed the note as
9 a theory in its rebuttal closing. The defense at trial, of course, had no motive to present evidence
10 regarding the authenticity of the notes nor to cross-examine regarding the notes which at the outset
11 of trial appeared at best a collateral issue.⁴

12
13 IV. THE COURT SHOULD REJECT THE GOVERNMENT’S ALTERNATIVE REQUEST
14 FOR AN UPWARD DEPARTURE TO 228 MONTHS.

15 The Court should also reject the government’s alternative request for a 2-level upward
16 “departure” to a total sentence of 228 months. The government’s first ground is that witness
17 tampering has not been taken into account by the adjusted offense level of 31. This is nonsense.
18 Dr. Mohsen is getting a mandatory 5 year consecutive sentence for the arson charge which
19 ordinarily would be grouped with the witness tampering charges. Moreover, the attempted
20 witness tampering of asking the informant to make phone calls that were in fact never made is the
21 primary reason why Dr. Mohsen’s offense level was raised 2-levels for obstruction of justice. *See*
22 PSR, at 21, ¶72.

23 Although the defense contests much of the factual basis for the government’s second
24 purported ground for departure, these reasons have all been taken into account by the guidelines
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26
27 ³ The defense will confer with Mr. Riordan and Mr. Zilversmit to determine dates at
which they may be available which would afford Mr. Mohsen his right to counsel of choice.

28 ⁴ Significantly, the government has present *no evidence* to contest or rebut the fact that
the meeting *did* take place on August 19, 1996 or the substance of that meeting.

1 and/or are not adequate grounds to impose an above-guideline sentence.

2 The third purported ground--that Dr. Mohsen misused his position as CEO of Aptix--has
3 already been taken into account through the fraud guideline scoring rules. Moreover, the facts that
4 his conduct resulted in a bankrupting of Aptix and substantial financial and personal losses to Dr.
5 Mohsen constitute mitigating grounds for a lower sentence.

6 Fourth, there is no reason to believe that Dr. Mohsen will commit further crimes or be a
7 danger to the public. His lawsuit is over and his criminal trial has concluded. There is no
8 evidence that he was ever involved in any criminal activity prior to this case. After a sentence of
9 imprisonment, Dr. Mohsen will be supervised by federal probation for five years. There is no
10 reason to think he will commit any offense upon his release.

11 The government's last purported reason is again, not a reason that would warrant an above
12 guideline sentence. The government suggests that an upward departure is necessary to punish Dr.
13 Mohsen for his misconduct in the civil suit for protection of our judicial system. But the civil suit
14 filed by Dr. Mohsen's company to protect Dr. Mohsen's patent from infringement by the
15 un rebutted infringement by QuickTurn was dismissed by Judge Alsup as punishment for litigation
16 misconduct. In a very real sense, all of the fraud related punishment in this case has already been
17 severely punished by Judge Alsup's order. But even without an upward departure, the guidelines
18 more than sufficiently punish Dr. Mohsen for the offenses of which he has been convicted here.
19 18 U.S.C. § 3553(a) requires the Court to impose a sentence that is "sufficient, *but not greater*
20 *than necessary* to comply with the purposes" of sentencing. An upward departure is not needed to
21 satisfy this objective. In fact, for the reasons stated in Dr. Mohsen's Sentencing Memorandum,
22 the Court should impose a sentence of not more than 8 years imprisonment.

23
24 V. NO RESTITUTION IS APPROPRIATE HERE.

25 The Court should not order restitution in this case. First, there was no loss to Quickturn in
26 this case. The lawsuit was dismissed against Aptix and Meta so that Quickturn did not receive or
27 incur damages with respect to the lawsuit. Quickturn's attorney's fees should not be deemed to
28 qualify as a "loss" in this case under the restitution statute. 18 U.S.C. § 3663A(b)(2).

