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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendant.	No. CR 03-0095 WBS **SUPPLEMENTAL SENTENCING MEMORANDUM** Date: January 5, 2007 Time: 9:00 am Before Hon. William B. Shubb

INTRODUCTION

There are three different positions on sentencing now before the Court, all of which would result in defendant Mohsen receiving a lengthy prison term. The defense has submitted a recommendation of eight years of incarceration, a severe penalty for a man whose charged crimes caused measurable injury principally, if not exclusively, to himself, his career, and his family. The Presentence Investigation Report [hereafter "PSIR"] recommends fourteen years, the government nineteen, both draconian penalties for a man nearing sixty years of age with no criminal record, and whose life had been characterized by truly impressive achievements prior to the remarkably senseless conduct that led to his downfall.

The principal issue separating the defendant's recommendation from those of the Probation Officer and the government is one on which the Court has ordered an evidentiary hearing–i.e., the question of intended financial loss. It is the position of both the PSIR and the government that the intended loss can be fixed at 70 million dollars–the amount of treble damages that QuickTurn might have been required to pay had they lost the patent suit regarding which Mohsen was found to have committed perjury and obstruction of justice. As the PSIR found no actual loss suffered by QuickTurn, the use of the proposed intended loss figure would increase the base offense level by 17. That being so, for the reasons stated by defendant Mohsen in his initial sentencing memorandum, the government must prove the existence of the 70 million dollar intended loss by clear and convincing evidence. United States v. Mezas de Jesus, 217 F.3d 638, 642 (9th Cir. 2000) (Where a sentencing factor has "an extremely disproportionate effect on the sentence relative to the offense of conviction . . . the government must prove such a sentencing factor by 'clear and convincing' evidence.") (internal quotations omitted).

An intended loss is just that: not an actual loss, or even a probable or possible loss, but an illegal loss that the defendant intended to cause by his criminal conduct. The government must thus prove to this Court by clear and convincing evidence that defendant Mohsen intended by his criminal conduct to win for Aptix and Meta a lawsuit as to which these companies had no legal right to prevail and thereby to cause QuickTurn to pay out 70 million dollars in unjustified damages. There is no direct evidence in this record that Mohsen believed that, absent his falsification of documents, Aptix and Meta could not and should not win their lawsuit against QuickTurn, but the government will argue that defendant's resort to falsification is circumstantial evidence of that state of mind: if defendant thought Aptix and Meta were legally entitled to win, Mohsen would not have resorted to cheating. But an equally reasonable possibility is that Mohsen feared the companies might unfairly lose a lawsuit that was meritorious, and therefore decided to surreptitiously place his finger on the scales to eliminate all possible risk of an adverse verdict. In the latter situation, Mohsen intended no unjustified loss. The pivotal question is

whether the present record and the evidence to be taken at the forthcoming hearing will permit the Court to conclude that the government has clearly proved that Mohsen possessed the former state of mind rather than the latter.

In order to sustain its substantial burden of proof on this critical mental state issue, the government really must establish that Aptix and Meta were not entitled to prevail in the patent suit. If that fact were established, it would support the conclusion that Mohsen committed the charged offenses because he knew that his wrongdoing was necessary if Aptix and Meta were to defeat QuickTurn's legitimate claim of prior art and to reap damages that the plaintiffs were not legally entitled to. If the record does not support the conclusion that QuickTurn was entitled to defeat the Aptix-Meta claim of patent infringement–indeed, if the record rather supports the conclusion that the claim of patent infringement was valid–then Mohsen's stupid misdeeds and subsequent, clumsy efforts to avoid their detection caused QuickTurn neither an actual or intended loss. Indeed, his misconduct bestowed on QuickTurn a windfall benefit–the dismissal of a meritorious lawsuit that would have resulted in a fair, equitable, and significant damage award to Aptix and Meta.

The appeal of Judge Alsup's order dismissing the Aptix-Meta lawsuit due to Mohsen's misconduct confirmed that the Aptix patent was valid and therefore one that would have been awarded a presumption of correctness had the patent lawsuit proceeded to judgment. The only evidence offered at Mohsen's trial as to the validity of the Aptix patent vis-a-vis QuickTurn's claim of prior art supported the conclusion that QuickTurn had no prior art that could have defeated the Aptix patent. That conclusion is further bolstered by the documentary and testimonial evidence tendered in support of this memorandum. The government cannot prove that Mohsen intended to cause QuickTurn to suffer an illegal loss, much less the 70 million dollar loss proposed in the PSIR.

I. THE EVIDENCE AT TRIAL SUPPORTED THE CONCLUSION THAT APTIX AND META WERE ENTITLED TO WIN THE CIVIL SUIT PATENT INFRINGEMENT SUIT AGAINST QuickTurn, AND THUS THAT MOHSEN

INTENDED NO ILLEGAL LOSS TO QuickTurn

A. In Calculating An Intended Loss Figure, The Figure Must Be Reduced By The Amount The Defendant Was Legitimately Entitled To Collect.

In a fraud case, any intended loss figure must be reduced by the amount which the defendant was legitimately entitled to collect. For instance, in a tax fraud case, an amount of intended loss based upon fraudulent deductions must be reduced by the 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). Thus, in this case, any allegation of intended loss from the civil suit must be reduced by the amount that Aptix & Meta were legitimately entitled to collect from QuickTurn.

As set forth in the previous sentencing memoranda and as supplemented below, the defense contends that, rather than proving Mohsen intended to cause QuickTurn to suffer an illegal loss, the record supports the conclusion that Aptix & Meta were entitled to prevail in the civil suit; therefore, there is no intended loss under the guidelines.[1]

B. Dr. Mohsen's '069 Patent' Is Presumptively Valid, And There Has Been No Finding By Court Or By Jury That QuickTurn's Alleged Prior Art Could Defeat The Mohsen '069 Patent Which Remains Valid.

Having been issued a patent by the Patent Office, Dr. Mohsen's '069 patent is presumed valid. "Under 35 U.S.C. § 282, a patent is presumed valid and one challenging its validity bears

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[1] In the Sentencing Memorandum, Dr. Mohsen suggested that if the Court disagrees with the assertion that there was no intended loss, the Court could base a calculation upon a finding of actual loss, which Dr. Mohsen has suggested could be found to be $1.3 million--the amount of attorney fee's calculated by QuickTurn to be attributed to 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).

the burden of proving invalidity by clear and convincing evidence." Innovative Scuba Concepts, Inc. v. Feder Industries, Inc., 26 F.3d 1112, 1115 (Fed. Cir. 1994). The presumption of validity remains, and the burden of proof remains with the challenger, even if a challenger to the validity of a patentee presents prima facie evidence of invalidity. Id.

After the Claim Construction hearing in the Aptix & Meta v. QuickTurn civil suit, the only material that QuickTurn continued to allege as invalidating prior art were the Butts drawings from the '473 patent application (no patent issued on these particular drawings). Yet, as is clear from the face of Dr. Mohsen's '069 patent, QuickTurn's '473 patent application was cited to the patent examiner who reviewed it before issuing the '069 patent, thus indicating the examiner's opinion that the technologies were different. Patent case law has given deference to the Patent and Trademark Office to issue a valid patent over prior art or evidence bearing on validity which was reviewed during the patent prosecution. American Hoist v. Sowa, 725 F.2d 1350, 1361 (Fed. Cir. 1984).

Furthermore, there has been no finding by a court or jury that QuickTurn's prior art could defeat Dr. Mohsen's '069. Although Judge Alsup ruled in favor of QuickTurn in the civil suit by Aptix & Meta, the ruling dismissing Aptix & Meta's suit was based upon litigation misconduct, and not upon the merits of the suit. Judge Alsup's holding that the '069 patent was unenforceable, moreover, was later overturned by the Federal Circuit. Aptix & Meta v. QuickTurn, 269 F.3d 1369 (Fed. Cir. 2001).

Nor was the jury in the criminal case required to find that QuickTurn would have prevailed in its claim that its prior art could defeat the '069 patent. Indeed, the jury was given no instructions on principles of patent law whatsoever. The jury was required only to find that Dr. Mohsen's misconduct was material to issues involved in the litigation.

Indeed, as set forth in the previously filed sentencing memorandum, Dr. Tredennick testified that QuickTurn's alleged prior art could never have invalidated Dr. Mohsen's '069 patent (RT 1020). Thus, that Aptix & Meta were entitled to prevail against this Quikturn's prior

art defense was not contested at trial.

That Dr. Mohsen's '069 patent (1) is presumptively valid, (2) has never been invalidated, and (3) could not be invalidated by QuickTurn's alleged prior art is all circumstantial evidence that Dr. Mohsen believed he had a valid patent and intended no loss beyond that which Aptix and Meta were entitled to recover, and supports a finding that there was no intended loss beyond what Aptix and Meta were entitled to recover.

Certainly, the government has not produced clear and convincing evidence that QuickTurn's prior art could invalidate the '069 patent, and that Aptix and Meta were not entitled to prevail in their infringement suit.

II. THE DECLARATION OF ALAN MACPHERSON, WHICH DESCRIBES QuickTurn'S FURTHER ATTEMPTS TO PATENT THE BUTTS DRAWINGS IN THE '231 PATENT APPLICATION, ESTABLISHES THAT QuickTurn HAD PREVIOUSLY CONCEDED THERE WAS NO PRIOR ART THAT COULD INVALIDATE A HIERARCHICAL TWO-STAGE GLOBAL INTERCONNECT STRUCTURE SUCH AS DR. MOHSEN'S '069 PATENT, AND THAT QuickTurn HAD ACQUIESCED IN THE PATENT OFFICE'S FINDING THAT THE BUTTS DRAWINGS DID NOT SUPPORT A CLAIM OF A HIERARCHICAL TWO-STAGE GLOBAL INTERCONNECT STRUCTURE.

Supplementing the evidence at trial, Dr. Mohsen now presents the declaration of patent attorney Alan MacPherson. Mr. MacPherson is the one witness Mohsen intends to call at the January 5th hearing in the event the government challenges the assertions contained in his declaration.

In his declaration, Mr. MacPherson examines the prosecution file[2] for QuickTurn's '231 patent[3], which was a continuation of its prior '473 patent. In Claim '231 patent, QuickTurn attempted to patent the same Butts drawing which they later alleged as invalidating prior art in the Aptix and Meta v. QuickTurn civil suit. QuickTurn's attorneys for the '231 patent

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[2] The term "prosecution file" refers to the application file for a patent.

[3] U.S. Patent No. 5,452,231 was issued upon application Serial No. 08/245,310. These will both be referred to herein as the '231 patent and '231 application, although Mr. MacPherson sometimes refers to the "'310 application" in his declaration.

prosecution were James Brooks and his partner Jeffrey Miller, who also represented QuickTurn in defending against the civil patent infringement suit by Aptix and Meta. In the '231 patent application, Patent Officer Vincent Trans (the same examiner who issued the Mohsen '069 patent), initially issued a patent for Claim 30 not as a global interconnect structure, but as a "partial crossbar architecture for using a hardward [sic] logic emulation system". See Exhibit C, MacPherson Declaration ¶3.

QuickTurn's attorneys (James Brooks and Jeffrey Miller) wrote back to the Patent Office attempting to clarify that Claim 30 was seeking a patent for a hierarchical two-stage global interconnect structure. QuickTurn's description of Claim 30 of its '231 application was essentially describing the same technology that is covered by Dr. Mohsen's '069 patent. See MacPherson Declaration ¶14. In submitting Claim 30 for consideration as a hierarchical global interconnect structure, moreover, QuickTurn's attorneys asserted in April and May of 1995, that there was no prior art that could prevent it from being patented. See MacPherson Declaration ¶¶ 6, 12, 13.

The assertions of QuickTurn's attorneys Brooks and Miller that there was no prior art that could defeat a hierarchical two-stage global interconnect structure (the structure described in Mohsen's '069 patent), was contrary to their assertions thereafter in defending the Aptix & Meta v. QuickTurn patent infringement suit. In that suit, they alleged the Butts drawings and the Spandorfer report as prior art that could invalidate Dr. Mohsen's patent for a hierarchical two-stage global interconnect structure. The assertions of QuickTurn's attorneys Brooks and Miller were also contrary to Miller's testimony at the criminal trial which continued to assert that Butts drawing and Spandorfer report were prior art that could invalidate Dr. Mohsen's patent. See MacPherson Declaration ¶ 20. The assertions of QuickTurn's attorneys Brooks and Miller that there was no prior art that could defeat a hierarchical two-stage global interconnect structure (the structure described in Mohsen's '069 patent), is further evidence that even QuickTurn's attorneys would have to concede that Dr. Mohsen's '069 patent was valid, that QuickTurn had no prior art

to defeat it, and thus that Aptix and Meta were entitled to prevail in their infringement suit. It is thus further evidence that there was no intended loss beyond that which Aptix and Meta were entitled to gain, and that under the sentencing guidelines this Court should find no intended loss.

Secondly, the '231 patent prosecution file reveals that Patent Examiner Trans found that the Butts drawing (which was later alleged as invalidating prior art in the Aptix & Meta infringement suit). did not support a claim of a hierarchical two-stage global interconnect structure. See MacPherson Declaration ¶¶ 9, 10, 15, 32. QuickTurn agreed to withdraw Claim 30, and the patent issued on the other claims without Claim 30. Although QuickTurn retained the right to resubmit the claim in any future application. QuickTurn never did so. Thus, QuickTurn acquiesced in the Patent Officer's conclusion that the Butts drawing did not support a claim of a hierarchical two-stage global interconnect structure. See MacPherson Declaration ¶¶ 11, 23, 32, 34.

QuickTurn's acquiescence in the Patent Officer's conclusion that the Butts drawing did not support a claim of a hierarchical two-stage global interconnect structure, was contrary to QuickTurn's arguments in the civil infringement suit by Aptix and Meta in which QuickTurn asserted that the Butts drawing did support a claim of global interconnectivity so as to constitute prior art that could defeat Mohsen's '069 patent. The acquiescence in the Patent Officer Trans's conclusion that the Butts drawing did not support a claim of a hierarchical two-stage global interconnect structure, was also contrary to the testimony of QuickTurn's attorney, Jeffrey Miller in the criminal trial, where Miller asserted that the Butts drawing could support a claim of global interconnectivity so as to constitute invalidating prior art against the '069 patent.

Further, QuickTurn's Initial Disclosure Statements (IDS) in the '231 application contains numerous statements describing the Butts technology as a "partial crossbar" technology as opposed to technology that connects globally. See MacPherson Declaration ¶¶ 26, 27. Again, these statements that the Butts drawing is a "partial crossbar" technology are contrary to QuickTurn's later insistence in defending the infringement suit by Aptix and Meta, that the Butts

drawing supports a claim of global interconnectivity. The statements that the Butts drawing is a "partial crossbar" technology are also contrary to the testimony of QuickTurn's attorney, Jeffrey Miller in the criminal trial to the effect that the Butts drawing is globally interconnective.

As revealed in the '231 prosecution file, and summarized by Alan MacPherson, the acquiescence of QuickTurn and its attorneys in Patent Officer Trans's assessment that the Butts drawing did not support a claim of global interconnectivity, and the statements of QuickTurn and its attorneys describing the Butts drawing as a partial cross-bar technology, are concessions that QuickTurn's claims of prior art in the civil suit could not have succeeded in invalidating Mohsen's '069 patent. It is further evidence that even QuickTurn's attorneys would have to concede that Dr. Mohsen's '069 patent was valid, that QuickTurn had no prior art to defeat it, and thus that Aptix and Meta were entitled to prevail in their infringement suit. It is thus further evidence that there was no loss intended by Mohsen beyond that which Aptix and Meta were entitled by law to gain, and that under the sentencing guidelines this Court should find no intended loss.

Further, Vincent Trans, the Patent Examiner who issued QuickTurn the '231 patent and who denied Claim 30 of that application, was the same Patent Examiner who also issued Mohsen's '069 patent. Patent case law has given higher deference to the validity of a patent over prior art disclosed in another patent issued by the same patent examiner. Kimberly-Clark vs. Johnson & Johnson, 745 F.2d 1437, 1457 (Fed. Cir. 1984). This further supports the claim that Aptix and Meta were entitled to win the civil suit. The government certainly has not proven and cannot prove by clear and convincing evidence that QuickTurn should have prevailed over Aptix and Meta and thus that Mohsen intended to inflict on QuickTurn an unjustified loss.

III. BECAUSE THE WAGNER REPORT WAS PROTECTED BY THE PROTECTIVE ORDER AND NOT REVIEWABLE BY DR. MOHSEN, AND WAS COMMISSIONED BY META GRAPHICS, KNOWLEDGE OF THE WAGNER REPORT CANNOT BE ATTRIBUTED TO DR. MOHSEN AS SUPPORTING ANY INTENDED LOSS FIGURE.

Even if the Court were to find that the Government had presented clear and convincing

evidence that Aptix and Meta would have lost their suit against QuickTurn, there is no evidence that Amr Mohsen intended a $70 million loss, as suggested by the Government. The only evidence to support such a potential loss figure that has been offered by the Government is the $22.5 million figure is the January 12, 2000 report of Michael Wagner ("Wagner Report"). The Government claims this figure could possibly have been trebled because QuickTurn was allegedly willfully infringing upon the '069 patent. The figures in the Wagner Report cannot be used to demonstrate what Amr Mohsen intended to gain from the lawsuit, because there has been no showing, however, that Amr Mohsen, reviewed or saw the Wagner Report. Indeed, the evidence is that he was precluded from seeing the report.

At the outset, the defense must note, as the Court noted at trial, Aptix is not Amr Mohsen. (RT 816). This civil suit was brought by Meta and Aptix against QuickTurn. Meta and its parent Mentor Graphics were licensees of the '069 patent. Pursuant to Aptix's licensing agreement with Meta, Meta was obliged to cover all litigation expenses in infringement suits, "including expert expenses." See Exhibit A, Patent License Agreement ¶ 5.4 ("Licensee agrees to advance, on a monthly basis, Licensor's reasonable attorney's fees and litigation expenses (including expert expenses) . . .) (emphasis added). The Wagner Report, was thus not paid for by Aptix, but was paid for by Meta and Mentor, licensees of the '069 patent from Aptix. Amr Mohsen is not Aptix; and Aptix is not Meta nor Mentor. The Wagner Report was thus not paid for by Amr Mohsen.

Secondly, the Wagner Report is clearly covered by the protective order executed as part of the litigation between Aptix and Meta v. QuickTurn. See Exhibit B, Protective Order. Pursuant to the Protective Order prepared and signed by QuickTurn's counsel (Jeffrey Miller for James Brooks) and counsel for each of the plaintiffs Meta and Aptix, any confidential documents were to be stamped "Confidential -- Attorney's Eyes Only" or some variant thereof, to designate that they were subject to the Protective Order. See Protective Order ¶ 4. Pursuant to the Protective Order, any documents so marked could only be disclosed to the attorneys, their staff and to experts, and could not be shared beyond such those persons. See Protective Order ¶ 8.

The Wagner Report was clearly covered by this Protective Order. First and foremost, it is clearly stamped "Confidential -- Attorneys' Eyes Only" making clear it was indeed covered by the Order. See Exhibit D, Wagner Report Cover. Second, the Protective Order, itself, specifically applies to experts. (Protective Order ¶ 8). The Protective Order also lists such items "correspondence," "reports," "market studies," customer lists," and "pricing" amongst the types of documents protected. (Protective Order ¶2). These are all of the types of documents referred to and included in the Wagner Report and its exhibits. Indeed, a review of the first page of the Introduction to the Wagner report itself makes clear that it was based upon a review of several reports of QuickTurn Expert Mack Folsom; these again are precisely the type of confidential information which QuickTurn sought to keep confidential. See Exhibit D, Wagner Report Page 1.

Finally, counsel has spoken with Robert Taylor, from Howrey Simon, who represented Aptix in the Meta and Aptix v. QuickTurn litigation, and who signed the Protective Order on behalf of Aptix. He stated that the Wagner Report was protected by the Protective Order and could not be shared to anyone besides attorneys and other experts. See Exhibit E, Zilversmit Declaration re: Robert Taylor. There has been no showing that Mohsen intended QuickTurn to suffer damages in the amount stated in the Wagner Report.

CONCLUSION

For all these reasons, the defense respectfully requests that this Court find no intended loss, and calculate the loss figure at $0, thereby reducing the total offense level from 31, as stated in the PSIR, to 14. Alternatively, the defense requests that this Court use an actual loss figure of $1.3 million.

Dated: December 29, 2006

Respectfully submitted,

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