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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 BARRY BONDS,)
17 Defendant.)

No. CR 07-0732-SI

**UNITED STATES’S RESPONSE TO
DEFENDANT’S OBJECTIONS TO
GOVERNMENT’S PROPOSED JURY
INSTRUCTIONS RE: COUNT FIVE
(Docket #345)**

Date: April 6, 2011
Judge: Honorable Susan Illston

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20 In this afternoon’s charging conference, the Court expressed concern about whether a
21 proper instruction on Count Five (obstruction of justice) should instruct the jury that a statement
22 supporting conviction must be intentionally evasive, false, AND misleading, because the
23 language in the third superseding indictment (hereinafter “indictment”) is in the conjunctive.
24 The government hereby supplies the Court with additional authority to support its position that it
25 is entitled to have the jury instructed in the disjunctive.

26 The “intentionally evasive, false, and misleading” language is not in 18 U.S.C. § 1503
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itself.¹ Rather, the language in the indictment reflects caselaw that has affirmed that obstruction of justice may be accomplished by different means: through false statements, through evasive statements, or through misleading statements. *See United States v. Remini*, 967 F.2d 754, 755 (2d Cir. 1992) (noting without criticism where indictment “charged Gambino with giving false, evasive and misleading testimony to a grand jury,” district court “ruled that literally true but evasive and misleading testimony would support prosecution of Gambino for obstruction of justice”); *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (holding that defendant violated Section 1503 by concealing documents from grand jury); *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979) (noting that either false or evasive testimony both can effectively impede justice, and therefore sustain a conviction under 18 U.S.C. § 1503).

It is well established that an indictment count may allege in the conjunctive a number of means of committing a crime, but that a jury can convict on that count if it finds that any one of the alleged means was used. *See Crain v. United States*, 162 U.S. 625, 634-636 (1896) (cited in *United States v. Miller*, 471 U.S. 130, 136 (1985)); *see also United States v. Bettencourt*, 614 F.2d 214, 219 (9th Cir.1980) (“[A] jury may convict on a finding of any of the elements of a disjunctively defined offense, despite the grand jury’s choice of conjunctive language in the indictment.”); *United States v. Abascal*, 564 F.2d 821, 832 (9th Cir.1977) (“The government may charge in the conjunctive form that which the statutes denounce disjunctively, and evidence supporting any one of the charges will support a guilty verdict.”); *United States v. UCO Oil Co.*, 546 F.2d 833, 838 (9th Cir.1976) (“Once it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment.”).

The government therefore respectfully asks that the instruction on Count Five require that the jury find that a statement was intentionally evasive, or intentionally misleading, OR intentionally false. The Court’s concern that there is no evidence in the record to support a finding that some of the statements (other than those in Counts 1-3) offered to support Count Five were false, should not lead it to strike these as possible bases for conviction, since a

¹ Government counsel may have misspoken.

1 reasonable jury could find that these statements were intentionally evasive or misleading, when
2 considered in the context of the grand jury testimony.

3 To the extent that the Court is concerned about the evidence supporting the government's
4 allegations, the government can make the requisite showing in post-trial pleadings, if necessary.

5 Finally, the government has reviewed this Court's Order from February 15, 2011 (Docket
6 #223) and finds no support for the defendant's claim that Count Five must be premised on a
7 finding that the totality of the defendant's grand jury testimony was intentionally evasive,
8 misleading, or false. The Court's Order clearly explained that the charge was limited to
9 statements made in the grand jury testimony. The government's proposed instruction for Count
10 Five is entirely consistent with the Court's prior rulings.

11 **CONCLUSION**

12 For the above-stated reasons, the government asks the Court to reject the defendant's
13 objections to the government's proposed instruction on Count Five.

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15 DATED: April 6, 2011

16 Respectfully submitted,

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19 /s/

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