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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 UNITED STATES OF AMERICA,) Case No.: CR 07-0732 SI
20)
Plaintiffs,) DEFENDANT'S CASE
21) MANAGEMENT CONFERENCE
vs.) STATEMENT
22)
BARRY LAMAR BONDS,) Date: February 18, 2011
23) Time: 11:00 a.m.
Defendants.) Hon: Susan Illston
24)

25
26 I. INTRODUCTION

27 On February 14, 2011, the parties filed *in limine* motions to be heard on March 1, in
28 accordance with the schedule established by the Court. Unfortunately, some of the motions filed

1 by the Government were not actually motions *in limine*. Instead they were purposefully vague
2 applications asking the Court to endorse the admissibility of broad categories of evidence which
3 appear nowhere on the Witness List and Exhibit List filed by the Government in October, 2010.
4 The defense believes it has not seen many of these items.

5 Defendant respectfully asks for the assistance of the Court in establishing an appropriate
6 procedure for the Government motions discussed below.

7 **II. THREE OF THE MOTIONS FILED BY THE GOVERNMENT ON FEBRUARY 14**
8 **ARE NOT MOTIONS *IN LIMINE*, AND REFER TO EVIDENCE WHICH THE**
9 **COURT HAS NOT SEEN.**

10 The Government's February 14 filings are ill-advised, but the defense can deal with most of
11 them, including motions that purport to be "*in limine*" but really aren't. Three motions, however,
12 cannot be addressed on the schedule established by the Court. The defense believes that for this
13 reason alone they can and should be denied, but in any event they should be brought to the Court's
14 attention without delay.

15 **A. Motion F Concerning Photographs.¹**

16 In its Motion F, "the United States moves *in limine* for the admissibility of a series of
17 photos taken of the defendant over the years." What photos? The Government's Exhibit List
18 contains indistinct copies of several photographs – Exhibits 35, 36, 72, 73 – none corresponding to
19 "a series of photos taken of the defendant over the years." Motion F goes on to say that "the
20 Government will call agents and witnesses familiar with the defendant to testify that the photos are
21 ... of the defendant, from the relevant time periods ..." What "agents and witnesses"? The
22 Government's Witness List discloses no witness who will testify about photographs. No
23 photographs were attached to Motion F.

24 Motion F thus asks the Court to admit an unspecified number of photographs purporting to
25 contain images which the Court and counsel have not seen, based upon the testimony of unnamed
26 witnesses, contrary to the contents of the Government's Exhibit List and Witness List, and all

27 ¹ For ease of reference, a copy of Government Motions F, J and N is attached to this Case
28 Management Conference Statement as Exhibit "A".

1 without a showing of good cause.

2 **B. Motion J – Mr. Bonds' Alleged Motivation To Provide False Statements.**

3 In Motion J "the United States moves *in limine* to admit evidence of the defendant's
4 professional baseball accomplishments, remuneration and expected future earnings as evidence of
5 his motivation to provide false testimony to the Grand Jury regarding his use of steroids."

6 There is nothing in the Government's Exhibit List which remotely corresponds to Motion J,
7 nor does the Witness List disclose the testimony of anyone who is going to testify about Mr. Bonds'
8 "professional baseball accomplishments, remuneration, and expected future earnings." Most of this
9 would seem to call for the testimony of an expert witness; it goes without saying that there has
10 been no Rule 16 disclosure of any such person.

11 So this is another motion which asks the Court to approve in advance testimony and
12 presumably documents whose contents and boundaries remain a mystery. As with the unidentified
13 photographs, there is no showing of good cause for the late and incomplete disclosure of this
14 evidence.

15 **C. Motion N – The Alleged 2006 Positive Amphetamine Test.**

16 Motion N asks for a finding that the defendant's 2006 positive amphetamine test is
17 admissible under Fed. R. Evid. 404(b)" Motion N also purportedly "provides notice of the
18 intention to use this evidence."

19 Like many of the Government's legal positions, this is a curious kind of "notice." Once
20 again there is nothing in either the Government's Exhibit List or its Witness List which references a
21 2006 amphetamine test. The Court is asked to make a finding of admissibility without being told
22 anything about the supposed test, like what was tested, when, by whom, what documents if any
23 provide evidence of such a test, how the Government acquired proof of such a test, and why this
24 has crept into the Government's case 6 weeks before trial. Since the able prosecutors for the
25 Government obviously know how irregular this is, Motion N may signal fundamental defects in the
26 prosecution of Mr. Bonds.

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1 **III. REMEDY.**

2 Motions F, J and N deserve to be stricken. They are disrespectful to the Court, by asking
3 for evidentiary rulings when the evidence itself is concealed. Is the United States Government
4 really going to start asking District Courts to admit photographs before they have been shown to
5 the Court and counsel? Is the Government free to disregard its own Exhibit Lists and Witness Lists
6 without even acknowledging an obligation to show good cause? Is it the Government's view that
7 District Courts may decide the admissibility of purported laboratory tests before any information
8 about such tests has been proffered?

9 And more specifically in respect to this case, what about the disclosure, motions and case
10 management schedules established by the Court? The last date for filing motions *in limine* was
11 February 14. Even if the Government dribbles out bits and pieces of information about their
12 photographs, statistics, "future earnings" calculations and "amphetamine tests" in the days ahead,
13 when and on what schedule does defendant have a fair opportunity to challenge these items before
14 trial? When is defendant's opportunity to locate relevant documents, identify and interview defense
15 witnesses, perhaps expert witnesses, in response to the Government's new "proof" if and when the
16 Government decides to show its hand?

17 These of course are matters committed to the discretion of the Court. If the Court is not
18 disposed to strike Motions F, J and N, then defendant asks the Court to consider the following: At
19 a minimum, these three motions should be ordered off calendar immediately. The Government
20 should be ordered to file and serve an amended Exhibit List and an amended Witness List
21 containing all the information which it seeks to offer in connection with Motions F, J and N, not
22 later than Wednesday, February 23, along with a showing of good cause for the late disclosure of
23 new items. On February 25 defendant should respond in writing to the Government's February 23
24 filings. Without further argument the parties would await notification from the Court as to whether
25 Motions F, J and N are restored to the calendar, and if so, on what terms.

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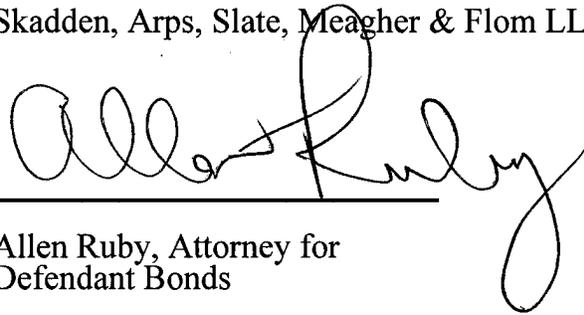
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DATED: February 16, 2011.

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom LLP



A handwritten signature in cursive script, appearing to read "Allen Ruby", is written over a horizontal line. The signature is positioned to the right of the typed name below.

Allen Ruby, Attorney for
Defendant Bonds

Exhibit "A"

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BARRY LAMAR BONDS,)
)
Defendant.)

No. CR 07-0732-SI

**UNITED STATES' MOTIONS IN
LIMINE**

Date: March 1, 2011
Time: 3:30 p.m.
Judge: Honorable Susan Illston

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F. This Court should rule that photographs of the defendant are admissible

The United States moves *in limine* for the admissibility of a series of photos taken of the defendant over the years. Photographs may be admitted into evidence so long as the government's testimony establishes that the foundation evidence underlying the photos is "sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a); see *United States v. Oaxaca*, 569 F.2d 518, 525 (9th Cir. 1978); *United States v. Stearns*, 550 F.2d 1167, 1171 (9th Cir. 1977). A photograph is not an assertion, oral, written, verbal, or non-verbal, as described under Fed. R. Evid. 801(a), and therefore is not hearsay. The

1 admission of photographs is largely a matter of discretion for the trial judge. *Stearns*, 550 F.2d at
2 1171; see *United States v. Taylor*, 530 F.2d 639, 642 (5th Cir. 1976).

3 The United States's proposed photographs depict the defendant's physical features over a
4 period of time, and are relevant to show the defendant's knowledge of the obvious and dramatic
5 changes in his physique which he experienced once he started using anabolic steroids. Given the
6 highly recognizable nature of the defendant and the high-profile nature of his profession, the
7 pictures are virtually self-authenticating in that they depict the defendant at various stages of his
8 physical development. However, the government will call agents and witnesses familiar with the
9 defendant to testify that the photos are, in fact, of the defendant, from the relevant time periods,
10 in order to lay a proper foundation for their admissibility pursuant to Fed.R.Evid. 901(a).
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1 **J. This Court should rule that evidence of the defendant's motivation to provide false**
2 **statements is admissible**

3 The United States moves *in limine* to admit evidence of the defendant's professional
4 baseball accomplishments, remuneration, and expected future earnings as evidence of his
5 motivation to provide false testimony to the grand jury regarding his use of steroids.

6 The defendant broke the single-season and career home run record during his career and
7 currently holds both records. He broke the single-season record in 2001, just two years prior to
8 his grand jury testimony. His incentive to provide false testimony was thus significant, as he
9 knew that if his steroid abuse became public, the legitimacy of his athletic accomplishments
10 would be tainted, and his earnings put in jeopardy.

11 The government should be permitted to introduce evidence of the link between the
12 defendant's steroid use and his athletic accomplishments as a means of explaining his motivation
13 to provide false testimony. Such evidence is relevant to the element of knowledge in this case.
14 The government is required to prove that the defendant knowingly provided false statements
15 when he denied knowingly taking steroids, and denied taking anything but vitamins provided to
16 him by Anderson prior to 2003. Evidence of the defendant's athletic accomplishments in the
17 years immediately prior to 2003 tends to suggest that the defendant knowingly provided false
18 statements on these topics because of his effort to avoid questions being raised with respect to his
19 athletic accomplishments. Furthermore, such evidence ties directly into the defendant's overall
20 effort to obstruct justice through his grand jury testimony. His athletic accomplishments in the
21 years before 2003 tends to prove that the defendant acted with intent to obstruct the grand jury
22 process when he refused in the grand jury to directly answer questions regarding his steroid use
23 and knowingly provided false statements on these subject matters. As the evidence pertaining to
24 his athletic accomplishments immediately prior to 2003 tends to prove a material fact, it should
25 be deemed admissible.
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N. **This Court should rule that the defendant's 2006 positive amphetamine test is admissible**

The United States moves *in limine* for a finding that the defendant's 2006 positive amphetamine test is admissible under Fed. R. Evid. 404(b), and simultaneously provides notice

1 of the intention to use this evidence.

2 Under Rule 404(b), other wrongs or acts are admissible for the purpose of showing a
3 defendant's absence of mistake or accident. See *United States v. Verduzco*, 373 F.3d 1022,
4 10257 (9th Cir. 2004) (observing that Rule 404(b) acts may occur later, or subsequent to, crime
5 for which defendant stands trial). In this case, the defendant claims that at the time of his 2003
6 grand jury testimony, he had never knowingly taken performance enhancing substances. The
7 defendant's 2006 amphetamine test result tends to show that he did have knowledge that he was
8 taking performance enhancing substances. As at least one government witness will testify,
9 professional baseball players have used amphetamines prior to a baseball game to amplify their
10 energy and endurance during the game. The defendant's positive test for this performance
11 enhancing substance after his grand jury testimony, tends to show that the defendant's use of
12 performance enhancing substances prior to 2003 was intentional and knowing, and that his grand
13 jury testimony was false.

14 The defendant's use of an illegal drug, amphetamines, in 2006, as a method of enhancing
15 his athletic performance is relevant to his knowledge as to whether he knew the true nature of the
16 substances he took – also for athletic performance enhancement – prior to his grand jury
17 testimony in 2003. Any argument regarding the fact that the defendant's amphetamine use
18 occurred after his grand jury testimony regarding his steroid use goes to the weight to be
19 accorded the evidence, and its admissibility.

20 In addition, the government may also cross-examine the defendant, should he testify, on
21 the 2006 amphetamine test result, under Fed. R. Evid. 608(b).