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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

18 UNITED STATES OF AMERICA,) Case No. CR 07 0732 SI
19)
20 Plaintiff,) **DEFENDANT’S MOTION**
) **TO STRIKE SECTION “C”**
21 vs.) **OF HOSKINS RECORDING**
)
22 BARRY LAMAR BONDS,)
23 Defendant.) Date: TBA
) Time: TBA
) Judge: The Honorable Susan Illston

24 **Introduction**

25 Prior to trial, defendant challenged admission of witness Steven Hoskins’s recording of a
26 March, 2003 conversation with Greg Anderson. The Court ruled that the third section (“C”) of
27 that recording could be admitted over a hearsay objection provided that the prosecution laid an
28 adequate foundation required by the hearsay exception for statements against penal interest.

1 Section C of the recording was among those presented to the jury during the prosecution's
2 case in chief. Subsequent testimony adduced by the prosecution from Dr. Larry Bowers,
3 however, fatally undermines the foundational showing required to meet the penal interest
4 exception. Dr. Bowers established that THG, or "The Clear" — the subject of the section C
5 conversation — could not reasonably have been regarded as a regulated "anabolic" steroid in
6 March, 2003. For that reason, possession or distribution of the substance at that time could not
7 reasonably have exposed a person to criminal liability.

8 Accordingly, defendant requests that the Court issue an order striking section C of the
9 recording and that the jury be instructed accordingly.

10 **I. THE COURT SHOULD STRIKE SECTION "C" OF THE HOSKINS**
11 **RECORDING BECAUSE THE GOVERNMENT HAS FAILED TO ESTABLISH**
12 **THAT IT WAS A STATEMENT AGAINST MR. ANDERSON'S PENAL**
13 **INTEREST WHEN MADE**

14 **A. Statement of Facts**

15 On January 7, 2011, defendant filed a renewed motion to exclude portions of the digital
16 recording of a conversation between Stevie Hoskins and Greg Anderson that purportedly
17 occurred in the Giants locker room in March, 2003. *See* Dkt. 196. Defendant contended that the
18 statements on the tape constituted hearsay and did not meet the criteria for the hearsay exception
19 invoked by the government, i.e, statements against penal interest under Fed. R. Evid. 804(b)(3).
20 *Id.*

21 For analytical purposes, the court had previously divided the recording into three sections
22 denominated "A," "B," and "C." (See district court February 19, 2009 Order re: motion in limine
23 [Dkt. 137], at 16.) In part C, Anderson begins by talking about the substances that he was using
24 at that current time: "But the whole thing is . . . everything that I've been doing at this point, it's
25 all undetectable." (*Id.*) In response to a question by Hoskins, Anderson then confirms that he
26 was then using the same stuff that Marion Jones used, "the same stuff that worked at the
27 Olympics." (*Id.*) There is no doubt that this is a reference to the "clear" and/or the "cream," and
28

1 almost certainly the former.¹

2 On February 15, 2011, the court issued an order in response to defendant's renewed
3 motion to exclude. (Dkt. 223.) Adhering to its previous ruling, the order declined to exclude
4 sections "A" and "C" of the recording. As to section C, the court ruled:

5 If Mr. Anderson's statements in Part C are to be admissible as
6 statements against penal interest, *the government will have to lay*
7 *foundation at trial that when Anderson discussed the "stuff that*
worked at the Olympics," he was referring to a substance that was
illegal in March of 2003.

8 (Order, at 7; emphasis added.)

9 At trial, agent Novitzky testified that the distribution of anabolic steroids without a
10 medical prescription was illegal in 2002. (3/22/11 RT at 215.) Defendant thereafter renewed his
11 objection to admission of Parts "A" and "C" during the testimony of Steven Hoskins, but the
12 objections were overruled. (3/23/11 RT at 437.) Parts "A" and "C" were thereafter played
13 before the jury. (3/23/11 RT at 446.)

14 Subsequently, the prosecution called expert witness Larry Bowers, who testified, among
15 other things, concerning the development, testing, and detection of tetrahydrogestrinone, also
16 known as "THG" or "the Clear." (See 3/24/11 RT at 64, et seq.)² His testimony on that subject
17 established that in March of 2003, doping and law enforcement authorities were (a) unaware of
18 the existence of THG, much less of its status as an anabolic steroid; and (b) THG was not
19 classified as an illegal or controlled substance at that time.

20 Specifically, during his direct examination, Dr. Bowers noted that in 2005, the Controlled
21 Substance Act (i.e., 21 U.S.C. section 801, et seq.) expanded the list of compounds listed as
22 anabolic steroids under Schedule III from "about 27" to 49. (3/24/11 RT at 608-09.) Dr. Bowers
23 also noted that before this change, the "DEA's methods" required proof that a purported steroid

24
25 ¹ As defendant has previously noted, the government's indictment of Marion Jones
26 charged her with two counts of false statements to government agents, the first of which was
27 founded on Jones's purportedly false denial of having seen, received, or used the "clear" (and not
any other substance), a count to which Jones admitted guilt in her October 5, 2007 plea
agreement with the government. (See Dkt. 196 [defendant's motion] at 6 and Exh. B, C.)

28 ² The relevant excerpts from Dr. Bowers's testimony discussed below are attached hereto
as Exhibit A.

1 “demonstrate muscle growth, which is a difficult thing to do,” so that previously there had not
2 been so many compounds listed as steroids under Schedule III. (*Id.* at 609.) “After 2005, they
3 basically were allowed to use more modern techniques like demonstrating that they bind to the
4 androgen receptor and cause, you know, genetic expression like an anabolic steroid would
5 demonstrate that they belong in that class.” (*Id.*)

6 Dr. Bowers returned to the issue on cross-examination. He noted that in June, 2003, “we
7 did not know what [THG] was.” (3/24/11 RT at 677.) Bowers himself did not know THG’s
8 steroid structure or that THG was an “anabolic steroid” until August or September of 2003. (*Id.*)
9 Indeed, it was not until evidence was presented in the Duane Chambers case in *early 2004* that
10 the scientific community reached a consensus that THG was an “anabolic steroid.” (*Id.*, at 678.)
11 Dr. Bowers also recalled that THG was not added to the list of controlled substances under
12 schedule III (21 U.S.C. sections 802(41)(A), 812) until the 2005 change in the law. (*Id.*, at 678-
13 79.)

14 **B. The Law**

15 **1. The Governing Hearsay Exception**

16 The Court is familiar with the legal principles that govern the admission of Mr.
17 Anderson’s hearsay statement under the theory proffered by the government , i.e., that it was
18 against Anderson’s penal interest when made and within the meaning of Fed. R. Evid. 804(b)(3).

19 To summarize:

- 20 • To secure admission of hearsay statement under the Rule the proponent must
21 demonstrate that the declarant is unavailable as a witness and that, *inter alia*, “a
22 reasonable person in the declarant's position would have made [the statement]
23 only if the person believed it to be true because, when made, it was so contrary to
24 the declarant's proprietary or pecuniary interest or had so great a tendency to
25 invalidate the declarant's claim against someone else or to expose the declarant to
26 civil or criminal liability.” Fed. R. Evid. 804(b)(3)(A).
- 27 • Whether a disputed statement is admissible as an exception to the hearsay rule is a
28 question of law to be decided by the Court under Fed. R. Evid. 104(a). See 21A

1 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure
 2 § 5053.3 (2d ed. 2005) (footnotes omitted). *See also* 1972 Advisory Committee
 3 Note to Proposed Rule 104(a); *Bourjaily v. United States*, 483 U.S. 171, 174-175.

- 4 • The proponent of the evidence bears “the burden of establishing a foundation
 5 from which to conclude that the statement was within a hearsay exception.” *Los*
 6 *Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 934, as amended by 313
 7 F.3d 1093 (9th Cir.2002) (citation omitted)
- 8 • Finally, the proponent of the hearsay statement must establish that it qualifies
 9 under an exception by a preponderance of the evidence. *Bourjaily*, 483 U.S. at
 10 175; see also *In re Napster Copyright Litigation*, 479 F.3d 1078, 1096 (9th Cir.
 11 2007) (“And we know from *Bourjaily* that preliminary questions of fact under
 12 Rule 104(a) must be established by a preponderance of the evidence.”).

13 2. Federal Law and Anabolic Steroids

14 21 U.S.C. sections 801, et seq., criminalize, among other things, the unauthorized
 15 distribution of “controlled substances.” Controlled substances are categorized by specific
 16 “schedules” numbered one through five and based on varying potentials for abuse, as set forth in
 17 21 U.S.C. section 812.

18 Throughout 2003, “anabolic steroids” were identified as a schedule 3 controlled
 19 substance. See 21 U.S.C. section 812. Also in 2003, and until 2005, an “anabolic steroid” was
 20 defined as follows:

21 (A) The term ‘anabolic steroid’ means any drug or hormonal
 22 substance, chemically and pharmacologically related to
 23 testosterone (other than estrogens, progestins, and corticosteroids)
 that promotes muscle growth, and includes—

[List of 28 compounds]

24 See 21 U.S.C. section 802(41)(A), Historical and Statutory Notes, discussing 2004 Amendment
 25 (effective 2005), including the statute’s prior language, as implemented by Pub.L. 108-358, §
 26 2(a)(1)(B) (emphasis added). As Dr. Bowers observed, THG was not identified on the
 27 “included” list of 28 compounds that followed the 2003 definition (above) of an anabolic steroid.
 28

1 *Id.*; see also 3/24/11 RT at 678-79.

2 Also consistent with Dr. Bowers testimony, the definition of an “anabolic steroid,” as an
3 amendment to section 802 that became effective in 2005, was changed to (1) delete the phrase,
4 “that promotes muscle growth” and (2) expand the list of compounds identified as anabolic
5 steroids from 28 to 49, including, for the first time, tetrahydrogestrinone or THG. 21 U.S.C.
6 section 802(41)(A), Historical and Statutory Notes, discussing 2004 Amendment, including the
7 statute’s prior language, as implemented by Pub.L. 108-358, § 2(a)(1)(B).

8 **C. The Court Should Strike Section C**

9 Given the substance of, and changes to, section 802, as well as the testimony of Dr.
10 Bowers, there are simply no credible grounds for concluding that Mr. Anderson’s statements
11 concerning “the Clear” (TGH) in March, 2003 were against his penal interest within the meaning
12 of Fed. R. Evid. 804(b)(3).

13 This is true for two incontrovertible reasons. First, THG was not specifically identified as
14 a controlled, “anabolic steroid” in March, 2003, and would not be so identified until nearly two
15 years later. Second — as to the only alternative means of demonstrating that THG could meet
16 the criteria for an anabolic steroid in 2003 — there was no scientific consensus that the substance
17 had any anabolic properties at all. See former section 802(41)(A) (“The term ‘anabolic steroid’
18 means any drug or hormonal substance, chemically and pharmacologically related to testosterone
19 (other than estrogens, progestins, and corticosteroids) *that promotes muscle growth . . .*”)
20 (emphasis added)

21 Again, the foundational requirement for the penal interest exception focuses on what a
22 reasonable person in Mr. Anderson’s position would believe. The government has not provided
23 a modicum of evidence, much less a preponderance of the evidence, that such a person would
24 consider THG to be an illegal substance at the time of Mr. Anderson’s 2003 statements, because
25 it clearly was not. The statements thus could not have “so far expose[d]” Mr. Anderson to
26 criminal liability at the time of their making that a reasonable person in his position would have
27 made them only if true. Fed. R. Evid 804(b)(3). The government’s foundational showing is
28 fundamentally deficient and cannot support the jury’s consideration of the challenged statements

1 in section C of the Hoskins recording.

2 **CONCLUSION**

3 For the reasons set forth above, the Court should issue an order excluding section C of the
4 Hoskins recording and instruct the jury concerning the effect of such order.

5 Dated: April 5, 2011

Respectfully submitted,

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9
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12
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