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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,)
16 Plaintiff,)
17 v.)
18 BARRY BONDS,)
19 Defendant.)

No. CR 07-0732-SI

**UNITED STATES' OPPOSITION TO
DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE**

Date: February 5, 2009
Time: 10:30 a.m.
Judge: Honorable Susan Illston

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 2
- II. FACTS 3
- III. ARGUMENT 5
 - A. PRETRIAL RESOLUTION OF FOUNDATIONAL ISSUES 5
 - B. GENERAL PRINCIPLES APPLICABLE TO AUTHENTICATION AND CHAIN OF CUSTODY 6
 - C. THE DEFENDANT’S SPECIFIC CLAIMS 8
 - 1. The Blood and Urine Test Results 8
 - a. The Results Are Admissible Pursuant To Fed. R. Evid. 803(6) As Business Records. 8
 - b. The Results Are Admissible For The Non-Hearsay Purpose Of Proving Materiality 17
 - 2. The Calendars 18
 - a. Calendars Reflecting Distribution of Anabolic Steroids To Bonds 18
 - i. Foundation and Authentication 18
 - ii. Relevance 21
 - iii. Hearsay 22
 - A. The Calendars Are Admissible For The Non-Hearsay Purpose of Establishing Materiality 22
 - B. Statements Against Penal Interest–Fed.R.Evid. 804(b)(3) 22
 - C. Co-conspirator Statements–Fed.R.Evid. 801(d)(2)(E) 25
 - D. Business Records–Fed.R.Evid. 803(6) 26
 - E. The Residual Exception–Fed.R.Evid. 807 29
 - b. The Calendars Unrelated To Bonds 30
 - 3. Balco’s Log Sheets Are Admissible 30
 - a. Introduction 30
 - b. The evidence. 31
 - c. The Balco Log Sheets Are Relevant And Not Prejudicial. 31

1 d. The Log Sheets Are Admissible As Non-Hearsay To Prove
2 Materiality. 32

3 e. The Log Sheets Are Admissible Pursuant To Three Hearsay
4 Exceptions. 33

5 i. The Log Sheets Are Business Records Pursuant To Fed. R. Evid.
6 803(6). 33

7 A. Anderson’s Statements To Valente Are Admissible As Statements Against
8 Interest - Fed. R. Evid. 804(b)(3), Pursuant To The Residual Exception -
9 Fed. R. Evid. 807, And As Statements Of A Co-conspirator - Fed. R. Evid.
10 801(d)(2)(E). 34

11 B. The Documents Valente Relied Upon Are Independently
12 Admissible As Business Records Pursuant To Fed. R. Evid. 803(6). . . 39

13 ii. The Log Sheets Are Admissible Pursuant To The Residual Exception
14 Of Fed. R. Evid. 807. 39

15 iii. The Log Sheets Are Statements Of A Co-conspirator Pursuant
16 To The Exception Of Fed. R. Evid. 801(d)(2)(E). 40

17 4. The Handwritten Notes 40

18 5. Greg Anderson’s Tape-Recorded Statements To Steve Hoskins Are
19 Admissible. 41

20 a. Introduction 41

21 b. The Evidence. 41

22 c. The Tape-Recorded Statements Are Relevant. 44

23 d. The Tape-Recorded Statements Are Admissible Under Two
24 Hearsay Exceptions. 44

25 i. The Tape-Recorded Statements Were Against Anderson’s
26 Interests Pursuant To Fed. R. Evid. 804(b)(3). 44

27 ii. Anderson’s Tape-Recorded Statements Are Admissible
28 Pursuant To The Residual Exception Of Fed. R. Evid. 807. 46

6. Expert and Lay Testimony Pertinent To Steroid Use 47

a. The government’s expert testimony is relevant and reliable. 47

b. The government’s lay witnesses will offer percipient, not opinion, testimony. . 52

IV. CONCLUSION 53

TABLE OF AUTHORITIES

FEDERAL CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ballou v. Henri Studios, Inc., 656 F.2d 1147 (5th Cir. 1981) 7

Bourjaily v. United States, 483 U.S. 171 (1987) 10

Cooper v. Eagle Memorial Hospital, Inc., 270 F.3d 456 (7th Cir. 2001) 7

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 2, 49

Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) 6

Hangarter v. Provident Life & Accident Insurance Co., 373 F.3d. 998 (9th Cir. 2004) 49

In re Napster, Inc., 479 F.3d 1078 (9th Cir. 2007) 10

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 49, 51

Link v. Mercedes Benz of North America, 788 F.2d 918 (3d Cir. 1981) 18

Mukhtar v. California State University, 299 F.3d 1053 (9th Cir. 2002); 49

Ohio v. Roberts, 448 U.S. 56 (1980) 46

Orr v. Bank of America, NT & SA, 285 F.3d 764(9th Cir. 2002) 6

Padilla v. Terhune, 309 F.3d 614 (9th Cir. 2002) 45, 46

Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041 (9th Cir. 1999) 10

Thomas v. Newton International Enterprises, 42 F.3d 1266 (9th Cir. 1994) 49

United States v. Alatorre, 222 F.3d 1098 (9th Cir. 2000) 49, 51

United States v. Arteaga, 117 F.3d 388 (9th Cir. 1997) 9, 33

United States v. Bachsian, 4 F.3d 796 (9th Cir. 1993) 29, 37

United States v. Beckman, 298 F.3d 788 (9th Cir. 2002) 52

United States v. Black, 767 F.2d 1334 (9th Cir. 1985) 6

United States v. Blackburn, 922 F.2d 666 (7th Cir. 1993) 9

United States v. Blackwood, 878 F.2d 1200 (9th Cir. 1989) 6

United States v. Bland, 961 F. 2d 123 (9th Cir. 1992) 9

United States v. Boone, 229 F.3d 1231 (9th Cir. 2000) 45, 46

United States v. Catabran, 836 F. 2d 453 (9th Cir. 1988) 9

United States v. Cerone, 830 F.2d 938 (8th Cir. 1987) 26

1 *United States v. Childs*, 5 F.3d 1328 (9th Cir. 1993) 39

2 *United States v. Doe*, 805 F. Supp. 1513 (D. Hawaii 1992) 9

3 *United States v. Durham*, 464 F.3d 976 (9th Cir. 2006) 52

4 *United States v. Egge*, 223 F.3d 1128 (9th Cir. 2000) 26

5 *United States v. Flom*, 558 F.2d 1179 (5th Cir. 1977) 28

6 *United States v. Foster*, 711 F.2d 871 (9th Cir. 1983) 33

7 *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979) 37, 38

8 *United States v. Gaudin*, 515 U.S. 506 (1995) 17

9 *United States v. Gonzalez-Flores*, 418 F.3d 1093 (9th Cir. 2005) 32

10 *United States v. Harrington*, 923 F.2d 1371 (9th Cir. 1991) 6

11 *United States v. Ladd*, 885 F.2d 954 (1st Cir. 1995) 8

12 *United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979) 10

13 *United States v. Luschen*, 614 F.2d 1164 (8th Cir. 1980) 21

14 *United States v. Martin*, 984 F.2d 308 (9th Cir. 1993) 7

15 *United States v. Mata-Ballasteros*, 71 F.3d 754 (9th Cir. 1995) 6

16 *United States v. McKenney*, 846 F.2d 528 (9th Cir. 1988) 9

17 *United States v. Ordonez*, 737 F. 2d 793 (9th Cir. 1984) 9

18 *United States v. Paguio*, 114 F.3d 928 (9th Cir. 1997) 23

19 *United States v. Pang*, 362 F.3d 1187 (9th Cir. 2004) 6

20 *United States v. Perez*, 526 F.3d 543 (9th Cir. 2008) 7, 8

21 *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981) 25

22 *United States v. Pfeiffer*, 539 F.2d 668 (8th Cir. 1968) 27, 28

23 *United States v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997) 23

24 *United States v. Reyes*, 798 F.2d 380 (10th Cir. 1986) 20, 21

25 *United States v. Sanchez-Lima*, 161 F.3d 545 (9th Cir. 1998) 35

26 *United States v. Satterfield*, 572 F.2d 687 (9th Cir. 1978) 23

27 *United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999) 10

28 *United States v. Slaughter*, 891 F.2d 691 (9th Cir. 1989) 23

1 *United States v. Ullrich*, 580 F.2d 765 (5th Cir. 1978) 27, 28
 2 *United States v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994) 36
 3 *United States v. Wilson*, 532 F.2d 641 (8th Cir. 1976) 21
 4 *Williamson v. United States*, 512 U.S. 594 (1994) 23, 25

5 **FEDERAL STATUTES AND RULES**

6 Fed. R. Evid. 102 38
 7 Fed.R.Evid. 103 5
 8 Fed. R. Evid. 104(a) 10, 19
 9 Fed. R. Evid. 401 13
 10 Fed. R. Evid. 402 30
 11 Fed. R. Evid. 403 30, 32
 12 Fed.R.Evid. 801(d)(2)(E) 25, 31
 13 Fed. R. Evid. 802 30
 14 Fed.R.Evid. 803(6) 2, 8, 9, 27, 31, 41
 15 Fed.R.Evid. 804(b)(3) 22, 23, 44, 45
 16 Fed. R. Evid. 807 29, 31, 34
 17 Fed. R. Evid. 901 30
 18 Fed.R.Evid. 901(a) 6, 18
 19 Fed.R.Evid. 901(b)(4) 18, 41

20 **OTHER SOURCES**

21 *Weinstein's Evidence* ¶ 901(a)[01], at 901-16 to 17 (1983) 6
 22
 23
 24
 25
 26
 27
 28

I. INTRODUCTION

1 The United States opposes defendant Barry Bonds's motion in limine. The defendant's
2 January 15, 2009 motion broadly seeks to exclude drug tests, ledgers, doping calendars, and
3 notes maintained by Balco and Greg Anderson in the course of their conspiracy to illegally
4 distribute anabolic steroids and related performance-enhancing drugs to Barry Bonds and others.
5 The defense further moves to exclude a digital recording of the defendant's steroid supplier,
6 Greg Anderson, discussing the administration of steroids to the defendant. The defense also
7 moves to exclude the expert testimony of two witnesses, Dr. Don Catlin and Dr. Larry Bowers,
8 by suggesting that the basis of their testimony cannot meet the threshold for admissibility
9 established under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Finally,
10 the defense moves to exclude observations by percipient witnesses of the defendant's
11 development of physical characteristics consistent with the use of anabolic steroids.
12

13 The defendant's arguments are without merit and should be rejected. The defendant's
14 motion mistakenly suggests that the government must rely on novel applications of the law and
15 unique legal arguments to gain admissibility of this evidence. The defense claims are long on
16 rhetoric and notably short on either factual or legal substance. The government's arguments in
17 support of admissibility, as set forth below, are premised upon straightforward, everyday
18 applications of the rules of evidence governing the admissibility of evidence at trial in federal
19 criminal cases. Indeed, many of the items that the defense seeks to exclude are routine business
20 records maintained by Balco and the blood and urine testing labs used by Balco that are plainly
21 admissible, upon the laying of a proper foundation, pursuant to Fed.R.Evid. 803(6). To the
22 extent the government proposes anything other than an everyday application of the rules of
23 evidence, it will likely be forced to do so only because of the anticipated illegal refusal of Greg
24 Anderson, the defendant's former trainer, former steroid supplier, and close friend, to comply
25 with his legal obligation to testify regarding his knowledge of the defendant's steroid use. As
26 detailed below, the significant and particular guarantees of trustworthiness of the challenged
27 items, along with the ample evidence corroborating the assertions contained with them, strongly
28 support their admissibility.

II. FACTS

1
2 On September 3, 2003, as part of its investigation of the illegal steroid distribution
3 activities of Balco Laboratories, the government executed a search warrant at the Balco business
4 premises in Burlingame, California. Federal agents found documents indicating the illegal
5 distribution of anabolic steroids and other performance-enhancing drugs to dozens of athletes in a
6 variety of sports.

7 Some of the documents seized from Balco indicated that the defendant was using Balco's
8 services to determine whether anabolic steroids were detectable in his blood and urine. Agents
9 found the results of numerous blood tests for the defendant. Agents further found a ledger that
10 reflected a coding system in which the defendant's urine samples were assigned numbers and
11 then referred out for urine testing at Quest Diagnostics, a national drug testing laboratory. The
12 ledger and the drug test results found at Balco that corresponded to the numbers entered under
13 the defendant's name on the ledger indicated that Bonds's urine tested positive for anabolic
14 steroids on three separate occasions in 2000 and 2001. On each occasion, Bonds tested positive
15 for the injectable steroid methenolone. On two of these three occasions, Bonds also tested
16 positive for the injectable steroid nandrolone. Other results showed negative tests for the
17 presence of anabolic steroids but reflected testosterone-to-epitestosterone ratios that strongly
18 indicated the use of anabolic steroids by Bonds. Based upon this information, the government
19 subsequently obtained, pursuant to grand jury subpoena, the records from Quest Diagnostics that
20 confirm the referral of these urine samples from Balco and the testing of the samples pursuant to
21 routine lab protocols at Quest Diagnostics.

22 At the time of the search, Victor Conte and James Valente, another Balco employee,
23 voluntarily provided statements in which they identified Greg Anderson as a participant in the
24 scheme. Based on these statements and corroborating documents found during the search, agents
25 requested and received a separate search warrant for Anderson's residence. There, agents found
26 handwritten notes, calendars, drug ledgers and financial notes indicating that Bonds and other
27 athletes received and paid for illegal athletic performance-enhancing drugs from Anderson.
28 Anderson voluntarily provided a statement in which he confessed to distributing anabolic

1 steroids to several of the athletes; but when asked about documents containing references to
2 Bonds, he declined to provide any further statements. The documents from Anderson's residence
3 provide a detailed record of steroid distribution from Anderson to Bonds from 2001 to 2003,
4 with entries referring to injectable steroids ("test. 1cc"), human growth hormone, and other
5 illegal performance-enhancing drugs.

6 In 2004, the government executed search warrants on Comprehensive Drug Testing, Inc.
7 and Quest Diagnostics for documents and urine samples provided by Bonds and other Balco
8 athletes in connection with Major League Baseball's 2003 drug testing program. Among the
9 items seized were urine samples provided by Bonds and documents associated with those
10 samples.

11 In approximately early 2003, Steve Hoskins, a former associate of Bonds who is expected
12 to be one of the government's percipient witnesses in this case, recorded an in-person
13 conversation he had with Anderson. Hoskins recorded the conversation on his own initiative; the
14 government had no involvement with the decision to record the conversation or the actual
15 recording of the conversation, and only became aware of the recording when it received a copy of
16 it years after the conversation took place. Among other things, the recording contains
17 Anderson's discussion of injecting Bonds and other statements consistent with the administration
18 of anabolic steroids to Bonds.

19 The government has notified the defense that it intends to call two expert witnesses, both
20 of whom have been qualified and permitted to testify as experts in prior proceedings before this
21 Court. One of these experts is Dr. Larry Bowers, the medical director for the United States Anti-
22 Doping Agency, who will testify that steroid users develop such symptoms as increased muscle
23 mass, shrunken testicles, acne on the upper back, moodiness, and an erratic sexual drive. The
24 government will introduce testimony from several percipient witnesses close to Bonds who will
25 testify that Bonds exhibited some or all of these symptoms between approximately 1998 and
26 2003. Dr. Bowers will further testify that the urine and blood test results for Bonds reflect
27 steroid use, and that the steroids involved are usually, though not exclusively, injectable steroids.

1 Dr. Bowers testified as an expert on steroids and banned performance-enhancing drugs in
2 *United States v. Graham*, CR 06-0725-SI, a case tried before this Court last year.

3 The government's other expert is Dr. Don Catlin, one of the world's leading drug testing
4 experts and the researcher who discovered "the clear," also known as tetrahydrogestrinone or
5 "THG." Dr. Catlin will testify that he tested the urine sample Bonds submitted to Major League
6 Baseball in 2003 and determined that the sample was positive for THG and Clomid, an anti-
7 estrogen drug typically used by steroid users to "jump-start" the replenishment of natural
8 testosterone following its suppression by the use of anabolic steroids. In addition, Dr. Catlin will
9 testify that Bonds's sample is positive for exogenous, that is, foreign, testosterone, itself an
10 anabolic steroid and controlled substance under federal law. Dr. Catlin testified as an expert
11 regarding his testing of urine samples of a defendant in *United States v. Thomas*, CR 06-0803-SI,
12 a case tried before this Court last year.

13 In November 2008, the defense suggested that the parties seek to resolve some of the
14 issues regarding the admissibility of the evidence in this case through an informal exchange of
15 letters. See Exhibits A and B to the defense motion. The government entered into this process
16 with the understanding that the purpose of these letters was a good-faith exchange of positions in
17 the hopes of narrowing pretrial issues. The government received assurances from Bonds's
18 counsel that the purpose of this process was to streamline the litigation, and that the process was
19 not intended to create a basis for an assertion of rights by either party.

20 III. ARGUMENT

21 A. PRETRIAL RESOLUTION OF FOUNDATIONAL ISSUES

22 In general, the government concurs with the defendant's position that the Court can, and
23 should, rule pretrial with respect to the admissibility of the challenged evidence. The policy
24 reasons underlying Fed.R.Evid. 103 and 104 support resolution of evidentiary issues pretrial, if
25 possible, in the interests of an efficient pretrial presentation by both parties. The government
26 accordingly has no procedural objection to proceeding by pretrial motion in limine to resolve
27 these issues. The government notes, however, that the Court may find that certain questions
28 cannot easily be resolved until foundational testimony has been received and considered at trial.

1 In addition, the government simply does not know whether Greg Anderson will testify. In the
2 event the Court finds that an item may be admissible assuming the government meets certain
3 foundational requirements, the government respectfully requests that the Court simply reserve
4 ruling until those foundational witnesses have testified at trial.

5 **B. GENERAL PRINCIPLES APPLICABLE TO AUTHENTICATION AND**
6 **CHAIN OF CUSTODY**

7 The authentication of evidence is “satisfied by evidence sufficient to support a finding
8 that the matter in question is what its proponent claims.” Fed.R.Evid. 901(a). An item is
9 sufficiently authenticated under Rule 901(a) “if sufficient proof has been introduced so that a
10 reasonable juror could find in favor of authenticity or identification.” *United States v. Black*, 767
11 F.2d 1334, 1342 (9th Cir. 1985) (citing 5 J. Weinstein & M. Berger, *Weinstein’s Evidence*
12 ¶ 901(a)[01], at 901-16 to 17 (1983)). Put another way, if a witness offers testimony from which
13 a reasonable juror could find in favor of authenticity, the trial court may properly admit the
14 evidence to allow the jury to decide what probative force it has. *United States v. Blackwood*, 878
15 F.2d 1200, 1202 (9th Cir. 1989). “The proponent need not establish a proper foundation through
16 personal knowledge; a proper foundation ‘can rest on any manner permitted by Federal Rule of
17 Evidence 901(b) and 902.’” *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) (citing
18 *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002)).

19 With respect to chain of custody, the prosecution must introduce sufficient proof so that a
20 reasonable juror could find that the offered item is in substantially the same condition as when
21 the item was seized by the government, and may admit the item if there is a reasonable
22 probability the item has not been changed in important respects following the government’s
23 seizure. *United States v. Harrington*, 923 F.2d 1371, 1374 (9th Cir. 1991) (citing *Gallego v.*
24 *United States*, 276 F.2d 914, 917 (9th Cir. 1960)). It is a well-established principle of federal
25 law, as the defense concedes, that “a defect in the chain of custody goes to the weight, not the
26 admissibility, of the evidence introduced.” *United States v. Mata-Ballasteros*, 71 F.3d 754, 769
27 (9th Cir. 1995) (citations omitted).

28 The defendant cites to three fact-specific cases in his preliminary argument in support of
the notion that this Court must apply special standards to admit evidence relating to blood and

1 urine testing. This premise is wrong. In fact, the same authentication and chain of custody
2 principles apply equally to blood and urine test results as they would to any other item of
3 evidence. For example, in *Cooper v. Eagle Memorial Hospital, Inc.*, 270 F.3d 456, 463 (7th Cir.
4 2001), the Seventh Circuit found that an uninterrupted chain of custody, even as it pertains to a
5 tissue sample, is not a prerequisite to admissibility. *See also Ballou v. Henri Studios, Inc.*, 656
6 F.2d 1147, 1155 (5th Cir. 1981) (stating that claims of “alteration, contamination, or
7 adulteration” of blood samples that serve as the basis of blood tests to determine intoxication go
8 to the “weight and not the admissibility of the evidence”).

9 The cases cited by the defense have no bearing on the admissibility questions before the
10 Court in the instant motion. In fact, two of the cases have nothing to do with authentication or
11 chain of custody at all. The Ninth Circuit’s concern in *United States v. Martin*, 984 F.2d 308
12 (9th Cir. 1993), was not admissibility, but the right to confrontation in the context of a supervised
13 release violation. The facts of that case are easily distinguishable from the instant case. First, the
14 defendant’s positive drug test results in that case were the *only* evidence of the defendant’s guilt
15 in violating the terms of his supervised release. The government’s evidence that Bonds lied
16 when he denied knowingly taking steroids, among other false statements, will include a number
17 of exhibits and witnesses above and beyond the test results. Second, the Ninth Circuit found that
18 the defendant in *Martin* was denied an opportunity to refute the evidence: Bonds has had ample
19 opportunity to challenge the test results the government seeks to offer in this case. Third, as
20 discussed in greater detail below, the chain of custody with respect to Bonds’s urine samples is
21 completely reliable; once the samples at issue in this case were in the possession of Quest and the
22 UCLA lab, the documentation of those entities establishes that the samples were handled
23 properly.

24 In *United States v. Perez*, 526 F.3d 543 (9th Cir. 2008), a supervised release case similar
25 to *Martin*, the Court articulated due process concerns about the use of drug test results to violate
26 a defendant’s term of supervised release based upon affirmative evidence of dilution of the
27 sample and the lab’s history of unreliable testing. Furthermore, the test result, as with *Martin*,
28 was the sole evidence of the defendant’s violation of supervised release. These factors led the

1 Ninth Circuit to state, “[w]e caution that this is an unusual case with unusual facts that should not
2 be taken out of context.” *Id.* at 545. The instant case is not like the “unusual case” considered by
3 the Ninth Circuit in *Perez*. Notably, the defense has provided no evidence that the samples did
4 not belong to Bonds or that there were some tangible problems with the testing processes of
5 Quest and the UCLA Lab. Indeed, Bonds himself has admitted submitting numerous blood and
6 urine samples to Balco for testing.

7 The sole case cited by the defense that contains pertinent case law, *United States v. Ladd*,
8 885 F.2d 954 (1st Cir. 1995), is easily distinguishable. In *Ladd*, the First Circuit found that the
9 government had simply failed to introduce sufficient evidence to establish that the blood sample
10 tested was the sample at issue in the case after a government lab had transferred the sample to a
11 private lab and a numbering error had occurred. The government did not introduce any evidence
12 to explain the numbering discrepancies. In other words, the government’s showing failed to
13 fulfill the basic authentication requirement under Rule 901(a) that the item “was what its
14 proponent claims.” Here, there are no factual problems similar to the discrepancies in labeling
15 noted in *Ladd*, and the government will elicit testimony from the person who numbered the
16 samples and sent them to Quest, and from the representatives of the labs who received and
17 processed the samples, pursuant to normal lab procedures. A similar showing of proof supports
18 admissibility of the sample from CDT.

19 As detailed in the following sections, the government’s proof at trial as to each of these
20 items meets the basic authentication and chain of custody requirements required for admissibility
21 under the Federal Rules of Evidence and Ninth Circuit precedent. For the reasons stated below,
22 the government requests that the Court deny the defendant’s motion.

23 C. THE DEFENDANT’S SPECIFIC CLAIMS

24 1. The Blood and Urine Test Results

25 a. The Results Are Admissible Pursuant To Fed. R. Evid. 803(6) As Business 26 Records.

27 The defendant seeks to exclude certain laboratory tests results for blood and urine
28 samples. The defendant claims, without further explanation, that the test results are irrelevant,

1 hearsay, lack foundation, authentication, and chain of custody, and that they should be deemed
2 inadmissible because of the “unreliability of the test results and procedures.” Mot. 8. The
3 defendant then requests a *Daubert* hearing, and finishes with an unexplained assertion that the
4 admission of the test results would create undue confusion and prejudice.

5 Federal Rule of Evidence 803(6) provides that:

6 “A memorandum, report, record, or data compilation, in any form, of acts, events,
7 conditions, opinions, or diagnoses, made at or near the time by, or from information
8 transmitted by, a person with knowledge, if kept in the course of a regularly conducted
9 business activity, and if it was the regular practice of that business activity to make the
10 memorandum, report, record, or data compilation, all as shown by the testimony of the
custodian or other qualified witness, unless the source of information or the method or
circumstances of preparation indicate lack of trustworthiness are not excluded by the
hearsay prohibition.”

11 *See also United States v. Ordonez*, 737 F. 2d 793, 805 (9th Cir. 1984).

12 The failure of the testifying knowledgeable party to have personally completed the record,
13 or even to know who completed the record, does not prevent a document from being admissible
14 as a business record. *United States v. Bland*, 961 F. 2d 123, 127 (9th Cir. 1992). Nor does the
15 fact that the record contains erasures or is incomplete preclude admission under this rule. *Id.*
16 Instead, the accuracy, fullness, and completeness of the record goes to the weight to be given the
17 evidence, and not to its admissibility. *United States v. Catabran*, 836 F. 2d 453, 458 (9th Cir.
18 1988).

19 Laboratory reports and medical records are admissible under Rule 803(6). *United States*
20 *v. Blackburn*, 922 F.2d 666, 670 (7th Cir. 1993); *see also* Fed. R. Evid. 803(6) (“opinions” and
21 “diagnoses” admissible as business records). Laboratory results that are admitted under the
22 business record exception may also be used to prove the truth of the information contained
23 within them. *United States v. Arteaga*, 117 F.3d 388, 396 (9th Cir. 1997) (by definition a hearsay
24 problem only arises when evidence is being used to assert the truth of the matter and a hearsay
25 exception alleviates any barrier to that use). For example, in *United States v. Doe*, 805 F. Supp.
26 1513, 1517 (D. Hawaii 1992), the court permitted the government to introduce “HIV database
27 records as proof that the independent laboratories conducting the tests said the HIV tests were
28

1 negative.” *Id.* at 1517; *see also United States v. McKenney*, 846 F.2d 528, 529 (9th Cir. 1988)
2 (admitting the results of intoxilyzer tests to prove intoxicated state of defendant).

3 A district court has “wide discretion” in determining whether a business record meets the
4 trustworthiness standard. *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999). A record
5 may be found trustworthy where the document’s creator had no incentive to generate
6 untrustworthy evidence, and circumstantial guarantees of trustworthiness were present. *Sana v.*
7 *Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1046 (9th Cir. 1999). “There are circumstantial
8 guarantees of trustworthiness in a record contemporaneously prepared by one who acts under a
9 business duty of care and accuracy, particularly when the business entity for which the record is
10 made relies on it.” *United States v. Licavoli*, 604 F.2d 613, 622 (9th Cir. 1979).

11 Fed. R. Evid. 104(a) states that preliminary questions about the admissibility of evidence
12 shall be determined by the court, and that in making that determination, the court is not bound by
13 the rules of evidence except those with respect to privileges. The trial court’s decision is based
14 upon a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 172 (1987); *In*
15 *re Napster, Inc.*, 479 F.3d 1078, 1095 (9th Cir. 2007).

16 In the present case, the government will present evidence from custodians or other
17 qualified witnesses from each of the labs that will establish that the labs handled the samples
18 appropriately and according to established laboratory protocol. These witnesses will also testify
19 that the reports were made at or near the time of the events by or from information from a person
20 with knowledge, that the reports were kept in the course of a regularly conducted business
21 activity, and that it was the regular practice of the labs to make the reports.

22 The defendant does not specify his basis for asserting that the testing results and
23 procedures could be unreliable. In fact, each of the testing entities is a professional, reliable
24 laboratory engaged in the business of accurately testing samples and reporting same. The reports
25 themselves contain no facial discrepancies that would create any doubt as to their accuracy, and
26 the defendant’s unsupported and conclusory allegations are insufficient to raise any. Further, the
27 defendant has admitted ingesting THG, one of the substances detected in the lab reports.

28 Likewise, he has admitted using the “cream,” which, when used in conjunction with the “clear,”

1 can result in blood test results showing suppressed testosterone levels, which is exactly what
2 some of the proffered lab results indicate. Thus, the lab reports are trustworthy based on the
3 defendant's own admissions and are therefore admissible.

4 The defendant also makes a generalized request for a *Daubert* hearing on "these issues,"
5 but again identifies no specific ground for such a hearing. The *Daubert* demand is inapposite to
6 these exhibits, as the government is not proffering these results through the testimony of an
7 expert, but is instead introducing them as business records prepared in the regular course of
8 business. In other words, the government is simply offering these exhibits to prove that the labs
9 reported these results for these specific specimens. The defendant is not entitled to a *Daubert*
10 hearing under such circumstances.

11 The Urine/Blood Test Results are set forth in Exhibit 1 filed concurrently herewith and
12 the evidentiary foundation and legal argument for each of these samples is addressed herein by
13 laboratory.

14 1. Quest Diagnostics Inc.

15 Quest Diagnostics, Inc. ("Quest") performed a large number of tests on urine specimens
16 obtained from the defendant. Each sample followed the following procedure, with foundational
17 evidence listed below each entry:

18 a. The defendant gives Anderson urine sample.

- 19 - The defendant's testimony in grand jury stating that he gave urine samples to
20 Anderson for him to bring to Balco for testing;
21 - Testimony of Valente that Anderson gave sample to him and identified it as the
22 defendant's sample, admissible as summarized below.

23 * b. Anderson gives the defendant's sample to Valente.

- 24 - The defendant's grand jury testimony that he believed his urine samples were
25 going to Balco;
26 - Testimony of Valente that Anderson gave sample to him and identified it as the
27 defendant's sample, admissible as summarized elsewhere herein;
28 - Balco log, including ID/donor numbers for the defendant's samples that match

1 Quest's.

2 c. Valente sent samples to Quest.

- 3 - Valente's testimony;
- 4 - Balco log, including ID/donor numbers for the defendant's samples that match
- 5 Quest's;
- 6 - Valente/Quest correspondence at Balco referencing Bonds's identification
- 7 numbers;
- 8 - Quest's records file, which reflect referral from Balco.

9 d. Quest's internal chain of custody documents, except for the test relating to donor #

10 100145, collected on 02/05/2001, which documents could not be located by Quest.

- 11 - Quest's own internal chain of custody documents, which provide detailed and
- 12 specific sequence of events in terms of handling and testing sample, which is
- 13 identified by identification number given to sample by Balco and contained in
- 14 Balco records;
- 15 - Quest records custodian witness.

16 e. Quest sends test results back to Valente/Balco.

- 17 - Quest's own correspondence files;
- 18 - documents found at Balco;
- 19 - testimony of Quest records custodian;
- 20 - testimony of Valente.

21 f. Balco maintains actual test result.

- 22 - test results found at Balco;
- 23 - testimony of Valente.

24 g. Valente/Balco gives test result to Anderson.

- 25 - testimony of Valente;
- 26 - documents found at Anderson residence;
- 27 - statements against penal interest by Anderson.

28 The foundation, authentication, and chain of custody documents (other than the

1 02/05/2001 sample) for each Quest sample are more than adequate for admission into evidence
2 for each of the test results. Any defect in the chain of custody for the 02/05/2001 sample simply
3 goes to the weight to be accorded to the evidence and not to its admissibility. These records are
4 particularly trustworthy because they are found in various locations, thus providing interlocking
5 corroboration against a charge of later alteration. Both the Balco and the Quest contributors to
6 the records are under a business duty of care and accuracy and rely upon the accuracy of the
7 records.

8 The defendant's objection on relevance grounds is difficult to understand. Fed. R. Evid.
9 401 defines relevant evidence as that which has any tendency to make the existence of any fact of
10 consequence more or less probable than it would be without the evidence. The urine test results
11 are plainly relevant. The test results: 1) consistently request that the samples be tested for the
12 presence of anabolic steroids, for no medical treatment purpose; 2) show three separate positive
13 tests for the injectable anabolic steroids methenolone and nandrolone; and 3) show other results
14 (such as testosterone/epitestosterone ratios, suppression of natural testosterone, etc.) that are
15 indicative of anabolic steroid use. Test results reflecting repeated steroid use are directly relevant
16 to the issue of whether the defendant knowingly lied to the grand jury when he denied knowingly
17 using anabolic steroids

18 2. LabOne & Specialty Lab

19 LabOne & Specialty Lab performed a number of tests on blood specimens obtained from
20 the defendant. Each sample followed the following procedure, with foundational evidence listed
21 below each entry:

22 a. Dr. Ting withdraws blood sample from the defendant.

- 23 - The defendant's testimony in grand jury;
- 24 - Ting's testimony that he drew blood from the defendant on multiple occasions
25 for delivery by Anderson to Balco.

26 b. Ting gives the defendant's sample to Anderson.

- 27 - The defendant's testimony in grand jury that he thinks samples are going to
28 Balco;

- 1 - Ting's testimony.
- 2 c. Balco submits samples to LabOne & Specialty Lab.
- 3 - Ting's testimony;
- 4 - LabOne and Specialty Lab records.
- 5 d. LabOne's and Specialty Lab's internal chain of custody.
- 6 - LabOne's and Specialty Lab's internal chain of custody documents;
- 7 - LabOne's and Specialty Lab's records custodian.
- 8 e. LabOne and Specialty Lab sends test results back to Balco.
- 9 - LabOne's and Specialty Lab's correspondence files;
- 10 - documents found at Balco;
- 11 - LabOne's and Specialty Lab's records custodian;
- 12 - testimony of Valente.
- 13 f. Balco maintains actual test result.
- 14 - test results found at Balco;
- 15 - testimony of Valente.
- 16 g. Valente/Balco gives test result to Anderson.
- 17 - testimony of Valente.

18 The foundation, authentication, and chain of custody for each LabOne and Specialty Lab
19 sample are more than adequate for admission into evidence for each of the test results. These
20 specimens were submitted under the defendant's name (or in the case of Specialty Lab, under "B,
21 B") and are also identified by his date of birth. The fact that these records were found in various
22 locations, thus providing corroboration against a claim that the documents themselves were
23 altered after they came into Balco's possession.

24 Blood tests of the defendant that consistently request that the samples be tested for the
25 presence of "testosterone, free and total," for no medical treatment purpose, and show other
26 results (such as liver enzymes, cholesterol levels, etc.) that are indicative of anabolic steroid use,
27 are relevant to the issue of whether the defendant knowingly lied to the grand jury about his use
28 of anabolic steroids.

3. Major League Baseball (“MLB”)/UCLA Olympic Lab

MLB obtained a urine specimen from the defendant in 2003 as part of a player drug testing program. This sample was recovered by federal law enforcement agents during the execution of a search warrant and subsequently tested by the UCLA Olympic Testing Lab.

a. Comprehensive Drug Testing (“CDT”) contractor collected urine samples from the defendant.

- testimony of CDT contractor;
- business record/form memorializing this event contains the name of the person collecting the sample and the defendant’s initials on the form acknowledging that a sample was taken.

b. Urine sample forwarded from contractor to Quest.

- Quest documents indicating receipt of the sample from the contractor;
- Quest internal chain of custody documents at Quest while testing was performed on the sample.

c. Agents seize defendant’s samples from Quest.

- testimony of agents that the defendant’s sample, along with the samples for several other players, were seized from Quest in 2004.

d. Agents personally deliver samples to UCLA Olympic Lab.

- testimony of agents who personally delivered the samples to the UCLA Olympic Lab for analysis;
- UCLA Olympic Lab records custodian testimony;
- UCLA Olympic Lab chain of custody documents.

e. Test result generated by UCLA Olympic Lab.

- UCLA Olympic Lab records custodian testimony;
- UCLA Olympic Lab chain of custody documents;
- testimony of Dr. Don Catlin, then-director of the UCLA Olympic Lab, confirming presence of THG, Clomiphene, and exogenous testosterone in the defendant’s urine.

1 The foundation, authentication, and chain of custody for the MLB/UCLA sample are
2 more than adequate for admission into evidence for the test results. Similarly, the relevance is
3 obvious, showing that the defendant was using anabolic steroids, THG, and a drug typically
4 utilized by hard-core steroid users, Clomiphene.

5 4. St. Joseph's Hospital and Medical Center ("St. Joseph's") and Chandler Regional Lab
6 ("Chandler")

7 These labs obtained and tested blood samples from the defendant at the request of the San
8 Francisco Giants Major League Baseball team ("SF Giants"). The government obtained these
9 test results and will seek to admit them through the testimony of hospital and laboratory
10 personnel.

- 11 a. St. Joseph's and Chandler's internal chain of custody.
- 12 - St. Joseph's and Chandler's internal chain of custody documents;
 - 13 - St. Joseph's and Chandler's records custodian.
- 14 b. St. Joseph's and Chandler send test results back to the SF Giants.
- 15 - St. Joseph's and Chandler's correspondence files;
 - 16 - documents obtained from the SF Giants;
 - 17 - St. Joseph's and Chandler's records custodian.

18 The foundation, authentication, and chain of custody for the St. Joseph's and Chandler
19 tests are more than adequate for admission into evidence for the test results.

20 The documents are relevant because they provide a baseline for the defendant's blood
21 chemistry for comparison to other tests and provide a broader basis for the government's experts'
22 opinions. Additionally, the data contained within these reports will be analyzed for other results
23 (such as liver enzymes, cholesterol levels, etc.) that are indicative of anabolic steroid use, and are
24 relevant to the issue of whether the defendant knowingly lied to the grand jury about his use of
25 anabolic steroids.

26 5. MLB/CDT/Institut National de la Recherche Scientifique ("INRS")

27 MLB obtained a urine specimen from the defendant in 2006 as part of a player drug-
28 testing program. The sample was sent to INRS, a lab in Montreal, tested and found to be positive

1 for D-amphetamine, an illegal controlled substance that is also banned by MLB. The
2 government does not intend to introduce evidence of this test in its case in chief, but reserves its
3 right to use this evidence for other purposes.

4 **b. The Results Are Admissible For The Non-Hearsay Purpose Of Proving**
5 **Materiality**

6 The urine and blood test results are admissible for the non-hearsay purpose of
7 establishing the materiality of the false statements Bonds made to the grand jury. To be material,
8 a “statement must have a natural tendency to influence, or be capable of influencing, the decision
9 of the decision-making body to which it was addressed.” *United States v. Gaudin*, 515 U.S. 506,
10 509 (1995) (internal quotations, bracket and citation omitted). The government is thus required
11 to show that Bonds’s false statements were material to the grand jury before whom he was
12 testifying in that they had a natural tendency to influence, or were capable of influencing, the
13 decisions of the grand jury. As part of its proof of the materiality of Bonds’s false statements, the
14 government will necessarily need to explain the course of the Balco investigation, the
15 identification of Anderson and Conte as primary targets of that investigation, and a summary of
16 the evidence presented to the grand jury. At the time of Bonds’s grand jury appearance, the
17 government believed that Conte, Anderson and their associates were involved in illegally
18 distributing steroids. However, their distribution methods, payment arrangements, involvement
19 in actually injecting or otherwise administering the drugs, and other specific details of their
20 activities were not completely understood. The defendant’s own public statements suggested a
21 strong link between Bonds and Anderson and Conte, suggesting that Bonds, in particular, might
22 have knowledge about some of these matters.

23 The seizure of the challenged blood and urine test results directly linked Bonds to Balco.
24 By definition, this evidence plays an important role in the government’s proof that Bonds’s false
25 statements before the grand jury regarding his knowing receipt and use of anabolic steroids from
26 Anderson and Conte had the ability to influence the grand jury’s decision in evaluating the case
27 against those individuals. The test results raised the inference that Bonds was a knowing
28 recipient of steroids who was knowingly having his blood and urine tested as part of his regimen

1 of steroids use and receipt; Bonds denied that he was knowingly participating in such a scheme.
2 In explaining materiality, the government should be permitted, and is indeed required, to provide
3 the context in which the false statements were made.

4 In sum, the government is, in part, offering the test results not for the truth of the
5 information asserted within them, but for the relevant purposes of explaining the course of the
6 government's investigative conduct and decisions in requiring Bonds to testify, and further
7 proving the ways in which Bonds's testimony could have materially affected the grand jury,
8 particularly as that testimony contradicted the test results. The test results should be deemed
9 admissible for this non-hearsay purpose.

10 **2. The Calendars**

11 The defendant objects to the admission of calendars seized at Anderson's residence.
12 Bonds argues that the calendars are not relevant, lack foundation and authentication, constitute
13 hearsay, are unduly prejudicial, and are "fundamentally unreliable." Mot. 9. The government
14 addresses each of these arguments in turn.

15 **a. Calendars Reflecting Distribution of Anabolic Steroids To Bonds**

16 **i. Foundation and Authentication**

17 There is more than "sufficient evidence" to support a finding that the calendars reflect
18 schedules for distribution of steroids and other substances to the defendant. Fed.R.Evid. 901(a).
19 For authentication of the calendars, the government can rely on "[a]pppearance, contents,
20 substance, internal patterns, or other distinctive characteristics, taken in conjunction with
21 circumstances." Fed.R.Evid. 901(b)(4).

22 As the Third Circuit observed in describing how circumstantial evidence may provide an
23 appropriate basis for authentication:

24 [T]he showing of authenticity is not on a par with more technical evidentiary rules, such
25 as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie
26 showing, to the court, of authenticity, not a full argument on admissibility. Once a prima
27 facie case is made, the evidence goes to the jury and it is the jury who will ultimately
28 determine the authenticity of the evidence, not the court. The only requirement is that
there has been substantial evidence from which they could infer that the document was
authentic.

Link v. Mercedes Benz of North America, 788 F.2d 918, 928 (3d Cir. 1981) (quoting *United*

1 *States v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976) (emphasis omitted)).

2 The Court may consider hearsay in evaluating whether the authentication threshold has
3 been met. Fed.R.Evid. 104(a) expressly states that the Court, in making determinations on
4 admissibility questions, “is not bound by the rules of evidence except those with respect to
5 privileges.” The government may accordingly lay a foundation for the admissibility of the
6 calendars and other challenged exhibits through hearsay and other testimony that may not be
7 admissible at trial.

8 The government will lay a foundation for the admissibility of the calendars through the
9 following evidence at trial: (1) the testimony of Special Agent Jeff Novitzky; and (2) the
10 testimony of Jeremy Giambi, Jason Giambi, Bobby Estalella, Marvin Benard, and Benito
11 Santiago, all athletes who obtained steroids from Anderson. Agent Novitzky’s testimony will
12 provide ample evidence from which the jury can find that Anderson authored the calendars in
13 question.

14 Agent Novitzky will testify that the calendars were seized during the September 3, 2003
15 search of Anderson’s residence. Several files were found in Anderson’s residence. The files
16 were organized by athlete. Most of the athlete files, including the one for Bonds, contained
17 doping calendars, notes, and other materials associated with the distribution of illegal steroids to
18 the athletes. Anderson stated that he distributed anabolic steroids and human growth hormone to
19 some of his professional athlete clients, an admission that corroborates the presence and contents
20 of the calendars in the files. Many of the calendars contain the name of Anderson’s ex-wife,
21 another fact that tends to lead to the reasonable conclusion that Anderson created the calendars.

22 Agent Novitzky will further testify that Anderson told him that he often did not put his
23 name on the packages of drugs he sent to his athlete clients because he thought it was “not such a
24 good idea.” Anderson further stated that when Major League Baseball began testing for steroids
25 (in early 2003, before the 2003 baseball season) he began giving some of his baseball clients “the
26 clear” and “the cream” that he had received from Balco. Anderson stated that he typically dealt
27 with James Valente at Balco. Anderson stated that Valente had told him that “the cream” was a
28

1 combination of testosterone and epitestosterone that was safe for athletes being tested for
2 steroids because the epitestosterone would mask the testosterone.

3 In addition, the government intends to call several client-athletes of Anderson to
4 authenticate their own calendars. The athlete witnesses, all of whom received hard copies of
5 calendars that are extremely similar to Bonds's calendars, are expected to testify that they
6 received hard copies of some of their calendars from Anderson. While none of these athletes
7 were familiar with the contents of Bonds's calendars, the athletes will uniformly testify that their
8 own calendars, which closely resemble Bonds's calendars, came directly from Anderson.

9 A third basis for authentication could come from Anderson himself. The government
10 intends to call Anderson to testify. If Anderson elects to testify truthfully, the government
11 expects that he will authenticate the calendars. Anderson pleaded guilty before this Court in
12 2005 and provided a sworn statement in which he admitted distributing anabolic steroids to
13 athletes through and including the date of September 3, 2003, another fact the Court may
14 consider in determining the authentication issue. In 2006, Anderson was served with a grand
15 jury subpoena requiring him to appear before a grand jury and answer questions pertinent to his
16 activities. Anderson illegally refused to testify and was ultimately held in civil contempt by the
17 Hon. William Alsup of this Court. Anderson spent over a year in prison until his release in
18 November 2007 following the grand jury's return of an indictment against Bonds. Based on this
19 background, the government does not know if Anderson will comply with his legal obligations
20 and answer questions regarding these documents.

21 Even if Anderson does not testify, considering the above-summarized anticipated
22 testimony from Agent Novitzky and the athletes, there is sufficient evidence to authenticate the
23 calendars based on their contents. In *United States v. Reyes*, 798 F.2d 380, 383 (10th Cir. 1986),
24 the defendant objected to the admission of handwritten notes on authenticity grounds. The notes
25 were seized from the defendant's residence, and their contents included the name of the
26 defendant, initials of his co-conspirators, notations of numbers and ounces, and phone numbers.
27 The court found no abuse of discretion in the admission of the notes. It stated: "The source of
28 the notes and the correspondence of information contained in the notes to members of the

1 conspiracy provided ample foundation for their admissibility.” *Id.* at 383. This case is the same,
2 because the contents of the notes indicate that they were written by someone involved in the
3 conspiracy to distribute anabolic steroids to athletes. *Id.*

4 Similarly, in *United States v. Wilson*, 532 F.2d 641, 644-45 (8th Cir. 1976), the court
5 admitted the contents of two notebooks found in a house that an informer said was being used in
6 a narcotics operation. Although the author was unknown, the court found that the contents of the
7 books, nicknames of the defendants, and code terms referring to heroin, were sufficient for
8 authentication purposes. And in *United States v. Luschen*, 614 F.2d 1164, 1174 (8th Cir. 1980),
9 a prosecution for conspiracy to distribute cocaine, the trial court allowed expert testimony as to
10 the meaning of notations in a notebook found in the defendant's bedroom. The court allowed the
11 contents of the writing to be used in determining the identity of the declarant for purposes of
12 Rule 901 because dates and prices listed in the notebook corresponded to the dates of drug
13 transactions in the case. Handwriting analysis was not required. *Id.* at 1174.

14 Here, Agent Novitzky will testify that he found the calendars in Anderson’s residence.
15 The calendars contained distinctive notes that referenced steroid distribution to Bonds and the
16 other athletes. Some of the calendars bore the name of Anderson’s ex-wife. Anderson
17 acknowledged to Agent Novitzky that he distributed steroids and other drugs to some of the
18 athletes. Several of the athletes will identify the calendars and confirm that they received drugs
19 from Anderson consistent with the notations on the calendars as well as hard copies of the
20 calendars themselves. In sum, ample evidence links Anderson to the calendars, and they are
21 what the government offers them as, that is, doping calendars prepared by Anderson.

22 ii. Relevance

23 The calendars are relevant because they have a tendency to prove facts of consequence to
24 this case, that is, they support the inference that the defendant knew that the items he was
25 receiving from Anderson were steroids, and that he was therefore knowingly providing false
26 statements when he told the grand jury that he had not knowingly taken steroids that he had
27 received from Anderson. This inference is particularly supported by the testimony of the other
28 athletes, several of whom will testify that Anderson discussed with them the steroids that he was

1 providing to them. Furthermore, the fact that some of the entries on the calendars reference
2 injectable items is also relevant to knowledge, and directly relevant to Count Four, the allegation
3 that Bonds testified falsely when he stated that neither Anderson nor anyone associated with
4 Anderson ever injected him with anything. The calendars are also directly relevant to Counts Six
5 through Ten, all of which allege that Bonds testified falsely when he claimed that he did not
6 begin to receive items from Anderson until after the 2002 season. Several of the calendars reflect
7 the distribution of anabolic steroids and other drugs to Bonds in 2001 and 2002, contrary to the
8 time frame to which he testified in his grand jury testimony. For all of these reasons, the
9 calendars are relevant.

10 **iii. Hearsay**

11 **A. The Calendars Are Admissible For The Non-Hearsay Purpose**
12 **of Establishing Materiality**

13 As with the urine test results, the calendars are admissible in this case for the non-hearsay
14 purpose of establishing the materiality of the false statements Bonds made to the grand jury. The
15 government is required to demonstrate that the false statements were capable of influencing the
16 decision of the grand jury. As a part of the government's investigation of Anderson and Conte,
17 Bonds was repeatedly asked questions about the calendars in the grand jury. In his grand jury
18 testimony, Bonds consistently denied knowledge of the calendars and the information contained
19 within them. The calendars suggested Bonds's knowing receipt of anabolic steroids, a premise
20 which Bonds denied repeatedly in the grand jury, thus presenting a conflict between the
21 documentary evidence and Bonds's statements. The grand jury, of course, was evaluating the
22 state of the evidence against Anderson and Conte. The calendars should thus be admitted for the
23 non-hearsay purpose of demonstrating how Bonds's statements could have affected the grand
24 jury's evaluation of the calendars.

25 **B. Statements Against Penal Interest—Fed.R.Evid. 804(b)(3)**

26 To gain admissibility of a statement under Fed.R.Evid. 804(b)(3), the party offering the
27 statement must show: (1) the declarant is unavailable as a witness; (2) the statement so far
28 subjected the declarant to civil or criminal liability that a reasonable person in the declarant's

1 position would not have made the statement unless he believed it to be true; and (3)
2 corroborating circumstances clearly indicate the trustworthiness of the statement. *United States*
3 *v. Paguio*, 114 F.3d 928, 932 (9th Cir. 1997). “Rule 804(b)(3) is founded on the commonsense
4 notion that reasonable people, even reasonable people who are not especially honest, tend not to
5 make self-inculpatory statements unless they believe them to be true.” *Williamson v. United*
6 *States*, 512 U.S. 594, 599 (1994).

7 The first requirement, of course, will not be subject to determination until the time of
8 trial. Anderson has been served with a trial subpoena requiring his testimony at trial. If he
9 testifies, Anderson will be available and this exception will not apply. In turn, if Anderson
10 refuses to testify he will be “unavailable” for purposes of the rule. Fed.R.Evid. 804(a)(2); *United*
11 *States v. Ramos-Oseguera*, 120 F.3d 1028, 1034 (9th Cir. 1997) (witness who persists in refusing
12 to testify despite order to do so is unavailable pursuant to Fed.R.Evid. 804(a)(2)).

13 The second requirement references the language in the rule that provides for admissibility
14 of hearsay from an absent declarant of a “statement which . . . was so far contrary to the
15 declarant’s pecuniary interest . . . or so far tended to subject the declarant to civil or criminal
16 liability, . . . that a reasonable person in the declarant’s position would not have made the
17 statement unless believing it to be true.” Fed.R.Evid. 804(b)(3). The word “tending” broadens
18 this definition, so that the statement need not be a confession that conclusively establishes guilt.
19 *United States v. Slaughter*, 891 F.2d 691, 698 (9th Cir. 1989); *United States v. Satterfield*, 572
20 F.2d 687, 691 (9th Cir. 1978). “Whether a statement is in fact against interest must be
21 determined from the circumstances of each case,” *Williamson*, 512 U.S. at 601, and “can only be
22 determined by viewing it in context.” *Id.* at 603.

23 A reasonable person in Anderson’s position would have known that creating the
24 documents tended to subject him to criminal liability, and Anderson’s own statements to Agent
25 Novitzky at the time of the seizure of the calendars demonstrated that he did, in fact, know the
26 documentation of his illegal drug distribution activities subjected him to criminal liability.
27 Anderson admitted to Agent Novitzky that he didn’t think it was a “good idea” to have his name
28 on the packages sending out the drugs by way of explaining why he did not affix his name to the

1 drug packages. Anderson stored the calendars in a closet. He used codes on the calendars as
2 shorthand for the drugs he was distributing, and used Bonds's initials "BB" as shorthand to
3 reference Bonds's calendar. After initially acknowledging distributing steroids to some athletes,
4 Anderson refused to answer any further questions once agents broached the subject of Bonds. In
5 short, all of his conduct surrounding the creation and maintenance of the calendars suggests that
6 Anderson knew he was acting illegally.

7 Rule 804(b)(3) also contemplates the admissibility of statements that run strongly
8 contrary to the declarant's "pecuniary interest." The rationale for admissibility under this theory
9 is equally strong. Anderson benefitted greatly from his association with Bonds. In addition to
10 receiving significant income from Bonds, Bonds bestowed upon Anderson the incalculable
11 benefit of publicly endorsing his work as a trainer. Anderson would have been ruined financially
12 if he had made false statements, or created false documents, reflecting Bonds's steroid use.
13 There is simply no sensible explanation for the existence of these documents other than to view
14 them as what they must be: a chronicle of Anderson's conduct in distributing steroids to Bonds
15 and instructions on how and when to use them.

16 As to the third element, the corroborating circumstances indicate the trustworthiness of
17 the calendars. The calendars were found in Anderson's home. Some of the calendars contained
18 Anderson's ex-wife's name. Several athletes testified in the grand jury regarding their personal
19 calendars, and in doing so confirmed that Anderson personally provided them with the calendars
20 and explained their contents. At least two athletes clearly understood, based upon their
21 conversations with Anderson, that the calendars outlined a regimen for their own steroid use.
22 There is overwhelming evidence that Anderson created the documents. Notably, for all of the
23 evasiveness and false statements in Bonds's grand jury testimony, Bonds never said that the
24 calendars were inaccurate, nor did he deny that Anderson provided him with substances. He
25 simply denied knowing what the substances were. Neither the evidence nor logic suggests that
26 the calendars lack trustworthiness.

27 The defendant's objection under this argument contains the mistaken assertion that a
28 declaration against penal interest may only be used to inculcate the declarant. The defense relies

1 on a misreading of *Williamson v. United States*, 512 U.S. 594, 599 (1994), to argue that the
2 calendars therefore cannot be used at trial against the defendant. Read in context, however,
3 *Williamson* reveals that the Supreme Court's concern was in permitting the party introducing the
4 statement to also introduce collateral, non-self-inculpatory statements along with the self-
5 inculpatory statements for purposes of context. *Id.* at 601. *Williamson* did not bar the use of a
6 legitimately self-inculpatory statement against another party, and the defense argument that the
7 calendars would have to be redacted at trial in this case because they also have the effect of
8 inculpatory Bonds is not accurate.

9 The statements in the calendars are solidly self-inculpatory. Anderson knew he was
10 subjecting himself to criminal liability through his conduct in this case. The totality of the
11 circumstances provides the calendars with a high level of reliability and trustworthiness and they
12 are admissible.

13 C. Co-conspirator Statements – Fed. R. Evid. 801(d)(2)(E)

14 The calendars at Anderson's residence are further admissible pursuant to Fed.R.Evid.
15 801(d)(2)(E) as co-conspirator statements. Rule 801(d)(2)(E) provides that a statement is not
16 hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of
17 the conspiracy." Before a statement may be admitted, the proponent must show: "(1) that the
18 declaration be in furtherance of the conspiracy; (2) that the declaration be made during the course
19 of the conspiracy; and (3) that there is independent proof of the existence of the conspiracy and
20 of the connection of the declarant and the defendant with it." *United States v. Perez*, 658 F.2d
21 654, 658 (9th Cir. 1981).

22 The calendars at Anderson's residence were declarations in furtherance of the conspiracy
23 to defraud the United States through the illicit distribution of misbranded drugs. The original
24 indictment against Anderson alleged, in Count Eight, that Anderson was involved in distributing
25 misbranded drugs for the purpose of defrauding the United States. The indictment alleged that,
26 as part of the conspiracy, Anderson, Conte, and the other charged co-conspirators distributed "the
27 Cream," an anabolic steroid in the form of a testosterone-based cream, for the purpose of
28 concealing the elevated testosterone levels of individual athletes from drug testing authorities.

1 Anderson, Conte, and the other charged defendants also distributed “the Clear,” a newly
2 manufactured, designer steroid not yet recognized by law enforcement or the testing community,
3 as a drug that would have steroid-like effects but would likely not result in positive steroid tests
4 given its novel structure. In furtherance of the conspiracy, the charged defendants also warned
5 athletes to keep their use of the drugs secret, and provided athletes with false cover stories in the
6 event they were caught with the drugs and needed to provide an explanation. The evidence in
7 this case demonstrates that Bonds, like many of the athletes, was a joint venturer in the secrecy
8 facet of the Balco conspiracy.

9 The evidence of Bonds’s activity in submitting blood and urine samples to Balco so that
10 his samples could be screened for any positive steroid results establishes that his role was not
11 simply that of a user, but a person who was actively furthering the objects of the conspiracy, i.e.
12 monitoring test results to ensure the substances remained undetectable. Under such
13 circumstances, the calendars Anderson designed to assist him in successfully executing the
14 conspiracy should be appropriately admissible against Bonds as statements in furtherance of the
15 conspiracy. Finally, the ledgers, calendars, and statements by Anderson (“this is Barry’s urine”) were
16 clearly in furtherance of the conspiracy’s goal of creating undetectable steroids. *See e.g.*
17 *United States v. Cerone*, 830 F.2d 938, 949 (8th Cir. 1987) (co-conspirator’s notes documenting
18 meetings, disbursement of funds, etc. properly admitted under exception).

19 Bonds may claim that he was simply an end user of the drugs, and that therefore he
20 should not be viewed as a co-conspirator. However, as discussed, Bonds did much more than
21 simply purchase a small quantity of drugs. *United States v. Egge*, 223 F.3d 1128 (9th Cir. 2000).
22 He agreed to have his blood and urine tested to ensure their products worked and were
23 undetectable. These activities tangibly benefitted the conspiracy in a manner that far exceeds the
24 simple, limited benefit of a person buying a small amount of drugs from a drug dealer.

25 **D. Business Records – Fed. R. Evid. 803(6)**

26 The calendars are further admissible as business records pursuant to the authority
27 discussed previously. If Anderson testifies truthfully, the government expects that he would
28 testify that he created the calendars as distribution and usage records in connection with his

1 distribution of anabolic steroids and other drugs to his client athletes. The evidence, including
2 Anderson's own guilty plea in 2005, overwhelmingly suggests that such conduct in supplying
3 steroids, and making recommendations regarding their use, was a part and parcel of Anderson's
4 professional relationship with these athletes. Anderson plainly maintained these calendars as a
5 part of his regularly conducted business activity. Such testimony would clearly fulfill the
6 requirements of Fed.R.Evid. 803(6).

7 Even if Anderson refuses to testify, these records are admissible under Rule 803(6) based
8 upon: (1) Anderson's statements against penal interest to Agent Novitzky at the time of the
9 search warrant, in which Anderson admitted that he distributed steroids to athletes; and (2) the
10 testimony of the other client-athletes whom the government intends to call as witnesses in its
11 case-in-chief, all of whom will acknowledge receipt of the calendars and authenticate them as
12 records of the drugs they received from Anderson pursuant to his training recommendations.
13 While these athletes are clearly not employees of Anderson, they are qualified witnesses
14 knowledgeable of the manner in which Anderson routinely prepared these calendars based on
15 their own client relationships with Anderson. Their testimony satisfies the requirements for
16 admissibility under Rule 803(6). A witness is not required to have knowledge of the preparation
17 of the record for a business record so long as the records "have all the indicia of trustworthiness
18 that the federal rules requires for the admission of hearsay evidence." *United States v. Ullrich*,
19 580 F.2d 765 (5th Cir. 1978). For the reasons stated above in the discussion viewing the
20 calendars as statements against penal interest, the calendars have a very high level of
21 trustworthiness based upon the circumstances in which they were maintained, the anticipated
22 testimony of Anderson's other client-athletes, and the strong self-inculcating effect they have as
23 to Anderson.

24 The Eighth Circuit's holding in *United States v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir.
25 1968), supports admissibility of the challenged calendars as business records based on the
26 testimony of the client athletes. In *Pfeiffer*, the Eighth Circuit introduced records prepared by a
27 common carrier through the testimony of an employee of a shipper familiar with the common
28 carrier's practices. The shipping employee was sufficiently well-versed in the common carrier's

1 billing and record keeping practices to demonstrate a “circumstantial guarantee of
2 trustworthiness,” and the Court upheld the admissibility of the records under a business records
3 theory despite the employee’s lack of knowledge regarding the preparation of the actual records
4 admitted. *Id.* at 671. The Fifth Circuit reached a similar conclusion in *United States v. Flom*,
5 558 F.2d 1179, 1182 (5th Cir. 1977), finding records of a company admissible under the business
6 records exception based upon the informed testimony of an employee of a second company. The
7 Fifth Circuit noted that “[a]lthough the usual case involves an employee of the preparing
8 business laying the necessary foundation under 803(6), the law is clear that under circumstances
9 which demonstrate trustworthiness it is not necessary that the one who kept the record, or even
10 had supervision over their preparation, testify.” *Id.*

11 In *United States v. Ullrich*, 580 F.2d 765, 771 (5th Cir. 1978), the prosecution introduced
12 records to prove the identity of an automobile through the testimony of an employee of an
13 automobile dealership. The records were prepared by an automobile manufacturer and a credit
14 agency, and sent to the dealership. The Fifth Circuit held that their introduction was proper.
15 “Although these documents were furnished originally from other sources, [the employee-witness]
16 testified that they were kept in the regular course of the dealership's business. In effect, they
17 were integrated into the records of the dealership and were used by it.” *Id.* at 771.

18 *Pfeiffer*, *Flom*, and *Ullrich* all support the proposition that Anderson’s calendars are
19 admissible as business records even if Anderson refuses to testify. In addition to the client
20 athletes’ anticipated testimony, Agent Novitzky will testify to Anderson’s statements regarding
21 his steroid distribution activities. These statements, which are plainly statements against penal
22 interest and occurred after Agent Novitzky had entered the residence to execute a search warrant,
23 provide a foundational basis and circumstances that demonstrate trustworthiness, in that
24 Anderson confirmed his role in illegally distributing anabolic steroids to several of his athletes.
25 His statements, when combined with the statements of the client-athletes in which they
26 authenticate their own calendars and acknowledge receiving them from Anderson as part of their
27 receipt of drugs, provides ample reassurances of trustworthiness, and supports the admission of
28 the calendars under Rule 803(6).

1 **E. The Residual Exception – Fed. R. Evid. 807**

2 A proponent of evidence under this exception must satisfy the following: (1) the evidence
3 must have circumstantial guarantees of trustworthiness; (2) it must be offered to prove a material
4 fact; (3) it must be more probative on the point for which it is offered than any other evidence
5 which the proponent can procure through reasonable efforts; (4) the adverse party must be
6 notified of the proponent's intention to introduce the evidence sufficiently in advance of trial to
7 permit the adverse party a fair opportunity to meet the evidence; and (5) admission of the
8 evidence must serve the general purposes of the Rules of Evidence and must be in the interests of
9 justice. Fed. R. Evid. 807; *United States v. Bachsian*, 4 F.3d 796, 798 (9th Cir. 1993) (dealing
10 with Fed. R. Evid 803(24), predecessor to Fed. R. Evid. 807).

11 The calendars satisfy these requirements. They obviously relate to material facts. There
12 are abundant circumstantial guarantees of trustworthiness, some of which have been previously
13 referenced, but are briefly summarized again here: (1) Bonds admitted in his grand jury
14 testimony that he obtained, and used, the clear and cream provided by Anderson as a part of his
15 training regimen; (2) the calendars were found in Anderson's residence and contained the name
16 of his ex-wife, suggesting he created them; (3) Anderson admitted to Agent Novitzky that he
17 distributed steroids to athletes; and (4) other client-athletes will testify regarding their receipt of
18 drugs from Anderson and his creation and use of the calendars to monitor their receipt and usage.
19 Furthermore, there is no evidence suggesting that the documents lack trustworthiness; it was in
20 Anderson's self-interest to make sure that the records accurately tracked the steroid regimen of
21 his athletes both to keep the athletes healthy and to keep them from getting caught by drug-
22 testing authorities. The conduct in this case was Anderson's profession; it would make no sense
23 for him not to take great care in maintaining these records accurately, and it would have been
24 professionally self-destructive for him to handle them inaccurately. The defense has provided no
25 evidence suggesting the calendars lack trustworthiness, and does not even bother to articulate any
26 basis for questioning the trustworthiness of the calendars in its filing.

27 As Anderson may refuse to testify, the Anderson-related evidence is more probative than
28 anything else the government may offer on the pertinent issues. Furthermore, admissibility

1 vindicates the general purposes of the rules and interests of justice are satisfied, in that there are
2 sufficient indicia of reliability. The alternative in this case would be that the defendant succeeds
3 in keeping out inculpatory evidence based upon the illegal refusal of his close associate to testify.
4 That would be unjust. The calendars should accordingly be admitted under Rule 807.

5 **b. The Calendars Unrelated To Bonds**

6 The calendars unrelated to Bonds are admissible not for the truth of the matter asserted
7 but to demonstrate materiality, as they corroborate Bonds's calendars and provide further
8 evidence of the nexus of Anderson's role in the distribution of steroids to athletes, the topic
9 which was the focus of the investigation in 2003. If the calendars for the other athletes are
10 hearsay, they are admissible under the same exceptions to the hearsay rule that governed the
11 analysis of Bonds's calendars, that is, as statements against penal interest, co-conspirator
12 statements, business records, and under the residual hearsay exception.

13 The defense argues that the calendars are not relevant. This argument is without merit.
14 The calendars of other athletes are relevant to establish Bonds's relationship with Anderson. As
15 discussed previously, the calendars belonging to other athletes tend to prove that Bonds's
16 calendars, which were virtually identical, were, in fact, calendars associated with Anderson's
17 distribution of steroids to Bonds, by virtue of their physical proximity to Bonds's calendars and
18 their virtually identical appearance and content. Furthermore, the calendars of other athletes will
19 corroborate the testimony by those athletes related to their steroid activities with Anderson.

20 **3. Balco's Log Sheets Are Admissible**

21 **a. Introduction**

22 Bonds argues that the Balco log sheets at Defense Exhibit C.2.b. are inadmissible on the
23 following grounds: irrelevance (Fed. R. Evid. 402); lack of foundation and authentication (Fed.
24 R. Evid. 901); lack of chain of custody; hearsay (Fed. R. Evid. 802); undue prejudice (Fed. R.
25 Evid. 403); and "fundamental unreliability under the Due Process Clause." Mot. at 8-9. The
26 objections should be overruled because the evidence is relevant, will be authenticated by its
27 creator, and is admissible pursuant to three hearsay exceptions: (1) as business records pursuant
28

1 to Fed. R. Evid. 803(6); (2) pursuant to the residual exception in Fed. R. Evid. 807; and (3) as
2 statements of a co-conspirator pursuant to Fed. R. Evid. 801(d)(2)(E).

3 **b. The evidence.**

4 The Balco log sheets record results of urinalyses that were performed on urine samples
5 submitted to Balco by its clients. The log sheets were created by James Valente, who will
6 authenticate them and lay the foundation for their creation. Mr. Valente was the Director of
7 Operations at Balco from 1995 through September 2003, when the log sheets were discovered
8 during the execution of the Balco search warrant. As this Court is aware, Mr. Valente pleaded
9 guilty to conspiring to distribute anabolic steroids in connection with his employment at Balco.
10 According to Mr. Valente, the log sheets constituted records kept at Balco in the regular and
11 ordinary course of its business, made at or near the time of receiving the information contained in
12 the log sheets, and by a person, *i.e.* Mr. Valente, with knowledge of the information entered in
13 the log sheets. Specifically, the log sheets documented the receipt of urine samples, the identity
14 of the sample provider, the assignment of an identification number to the urine sample, and the
15 results of analyses performed upon the urine by outside laboratories to whom Balco sent the
16 samples. In other words, with respect to the last point, upon receipt of a urine sample, Mr.
17 Valente sent it to an outside laboratory for analysis and subsequently received the results of the
18 analysis via facsimile and mail. Mr. Valente then recorded that information from the results onto
19 the log sheets. The entries on the log sheets associated with the defendant bear his name or
20 initials and were entered by Mr. Valente based upon the defendant's personal trainer, Greg
21 Anderson, submitting urine samples to Mr. Valente and advising Mr. Valente that the samples
22 were from the defendant. Upon receipt of a urinalysis of the defendant's urine, Mr. Valente
23 recorded the results on the log sheet, filed a hard copy of the results at Balco, and provided a
24 copy to Greg Anderson.

25 **c. The Balco Log Sheets Are Relevant And Not Prejudicial.**

26 The log sheets are relevant because they provide a link in the chain of custody of the
27 defendant's urine samples and, through the assigned identification numbers, allow the trier of
28 fact to match urinalyses with the defendant's urine samples. The results from the laboratories

1 contain only identification numbers, and therefore the log sheets are necessary to identify the
2 individual associated with a particular identification number. The log sheets also corroborate
3 other witnesses who submitted urine samples to Balco for the same purpose as the defendant.
4 For example, the Balco log sheets contain entries for Armando Rios, Marvin Benard, Benito
5 Santiago, Jason Giambi, and Jeremy Giambi, all of whom will confirm that they submitted urine
6 samples to Balco.

7 The defendant's argument for excluding the evidence as unfairly prejudicial is without
8 merit for two reasons. First, as stated, the evidence is directly relevant to the elements of the
9 offense, *i.e.* that the defendant testified falsely about his knowing steroid use. Second, the
10 evidence is neither unduly prejudicial nor is its probative value substantially outweighed by any
11 arguable prejudice. In order to exclude evidence pursuant to Rule 403, the evidence must be
12 unfairly prejudicial, and not merely constitute relevant evidence of guilt. "Unfairly prejudicial"
13 evidence refers to "the capacity of some concededly relevant evidence to lure the factfinder into
14 declaring guilt on a ground different from proof specific to the offense charged." *United States v.*
15 *Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) (evidence that aliens suffered heat stroke
16 was unfairly prejudicial in case where defendant charged with alien smuggling). Further, the
17 probative value of the evidence must be "substantially outweighed by the danger of unfair
18 prejudice." Fed. R. Evid. 403 (emphasis added). Proof that the defendant's urine tested positive
19 for steroids on multiple occasions obviously possesses significant probative value, and the jury
20 deserves to be presented with the complete facts. The defendant's motion is akin to a bank
21 robber moving to exclude video evidence of himself inside of the bank for no other reason than it
22 is going to prove his guilt. The evidence is not "unfairly" prejudicial simply because it tends to
23 prove guilt.

24 **d. The Log Sheets Are Admissible As Non-Hearsay To Prove Materiality.**

25 The Balco log sheets are admissible for the non-hearsay purpose of establishing the
26 materiality of the false statements Bonds made to the grand jury. As noted in previous sections,
27 the government is required to prove that Bonds's false statements to the grand jury were material,
28 that is, capable of influencing the grand jury's decisions. A necessary part of that showing will

1 include a presentation of the evidentiary context in which Bonds made the false statements.
2 Anderson and Conte were primary targets of the investigation. As the Balco log sheets raise
3 questions about the nature of Bonds's involvement with Conte, including details about the testing
4 program, the government should be permitted to offer the Balco log sheets for the non-hearsay
5 purpose of explaining how Bonds's false statements about the timing and nature of the items he
6 received from Anderson could have influenced a grand jury which was reviewing such evidence
7 as a part of its decision-making process.

8 **e. The Log Sheets Are Admissible Pursuant To Three Hearsay Exceptions.**

9 **i. The Log Sheets Are Business Records Pursuant To Fed. R. Evid.**
10 **803(6).**

11 Mr. Valente's testimony will satisfy each of the business records requirements discussed
12 above. He will testify that he was the custodian of the log sheets at Balco and that they were
13 created at or near the time of his receipt of the items indicated on the log sheets from information
14 transmitted by people with knowledge of the events. For example, he can testify that entries for
15 the defendant were made at or near the time the Anderson delivered urine samples to Valente at
16 Balco and told Valente they were the defendant's. Valente will further testify that it was Balco's
17 regular practice to make the log sheets and they were kept in the regular course of Balco's
18 business activities. Drug dealers' ledgers have been ruled admissible as business records with
19 far fewer indicia of legitimacy than Balco's log sheets. *See United States v. Foster*, 711 F.2d
20 871, 882 (9th Cir. 1983) (defendant's co-conspirator's ledger of her heroin transactions in the
21 course of their drug dealing admissible as a business record despite facts that ledger was
22 incomplete, contained blank pages, and recorded entries out of sequence).

23 The fact that some of the information Valente recorded in the log sheets came from other
24 sources – such as Anderson telling Valente he was giving Valente Bonds's urine and the
25 urinalyses from another laboratory – does not preclude application of the exception. In this
26 “double hearsay” situation, if “each statement [qualifies] under some exemption or exception to
27 the hearsay rule” the log sheets are admissible. *United States v. Arteaga*, 117 F.3d 388, 396 n.12
28 (9th Cir. 1997).

1 **A. Anderson's Statements To Valente Are Admissible As**
2 **Statements Against Interest - Fed. R. Evid. 804(b)(3), Pursuant**
3 **To The Residual Exception - Fed. R. Evid. 807, And As**
4 **Statements Of A Co-conspirator - Fed. R. Evid. 801(d)(2)(E).**

5 Each time Anderson brought one of the defendant's urine samples to Valente, he said
6 words to the effect of "this is Barry's urine." Valente relied upon those statements by Anderson
7 in creating the log sheets, and the statements are admissible for several reasons: (1) as statements
8 against Anderson's interest; (2) pursuant to the residual hearsay exception; and (3) as statements
9 by a co-conspirator.

10 First, pursuant to the authorities cited above, and assuming Anderson unlawfully refuses
11 to testify at trial, Anderson's statements to Valente about the defendant's urine samples are
12 admissible as being against Anderson's interest because they so far subjected him to criminal
13 liability at the time he made them that he would not have done so if they were untrue.
14 Furthermore, the statements are amply corroborated by independent evidence. At the time
15 Anderson submitted the defendant's urine samples to Valente, Anderson was engaged in
16 distributing steroids and other illegal substances to the defendant. Valente will testify that Balco
17 regularly submitted athlete's urine samples to Quest Laboratories for analysis to determine
18 whether steroids were detectable in the urine. Accordingly, when Anderson transported the
19 defendant's urine samples to Valente for that purpose, he had no incentive or motive other than
20 to be completely accurate when he told Valente the source of the urine sample. Those statements
21 obviously subjected Anderson to criminal liability because he subsequently pleaded guilty to a
22 criminal offense related to his steroid dealings in conjunction with Balco. Although nothing
23 further is necessary, additional corroboration comes from the defendant himself, who repeatedly
24 admitted in his grand jury testimony providing urine samples to Anderson for Anderson to
25 deliver to Balco for testing.

26 Second, Anderson's statements to Valente regarding the identity of the source of a urine
27 sample are also admissible pursuant to the residual hearsay exception of Fed. R. Evid. 807. The
28 government can satisfy each of the required elements discussed above and several Ninth Circuit
cases support admissibility pursuant to the exception.

1 Ninth Circuit precedents – with factual scenarios far less compelling than this case –
2 establish that there are numerous circumstances in which the application of Fed. R. Evid. 807 to
3 Anderson’s statements is appropriate. Indeed, the fact that Anderson may unlawfully refuse to
4 testify represents exactly the type of scenario that the residual exception was intended to remedy
5 by providing the proponent of reliable evidence another mechanism through which to present that
6 evidence to the trier of fact. Anderson’s choice to spend more than a year in jail rather than
7 simply tell the truth about his knowledge of the defendant’s steroid use, places the evidence of
8 his statements directly into the residual exception’s ambit.

9 In *United States v. Sanchez-Lima*, 161 F.3d 545, 549 (9th Cir. 1998), the Ninth Circuit
10 held that it was reversible error for the district court to exclude video-taped statements by eye-
11 witnesses taken in Mexico. Sanchez-Lima was charged with assaulting a federal officer and,
12 pursuant to Rule 807, offered video-taped statements of eyewitnesses taken in Mexico in support
13 of his self-defense and mistake theories. *Sanchez-Lima*, 161 F.3d at 548.

14 The statements possessed guarantees of trustworthiness because the declarants (1) were
15 under oath and subject to the penalty of perjury; (2) made the statements voluntarily; (3)
16 based the statements on facts within their own personal knowledge; (4) did not contradict
17 any of their previous statements to government agents and defense investigators; and (5)
18 had their testimony preserved on videotape which would allow the jurors an opportunity
19 to view their demeanor . . . The government had an opportunity to develop the testimony
20 of these witnesses before they were deported, and the government also had notice and the
21 option to participate in taking the videotaped statements.

22 *Id.* The Ninth Circuit further noted, “Ordinarily, exceptional circumstances exist when the
23 prospective deponent is unavailable for trial and the absence of the testimony would result in an
24 injustice.” *Id.* Like the witnesses in *Sanchez-Lima*, Anderson made his statements to Valente
25 voluntarily based on his own knowledge. His statements do not contradict any other statements
26 of which the government is aware, and they communicated information that Anderson had
27 enormous incentive to be accurate about. Anderson was entrusted by his clients, including the
28 defendant, to submit their urine to Balco for testing to determine whether steroids were
detectable in the urine. It is axiomatic that he was under a significant duty to accurately advise
Balco about the identity of the urine provider so that the correct urinalysis results could later be
attributed to the correct client. Finally, just as the government had an opportunity to address the
witnesses in *Sanchez-Lima*, the defendant has direct access to Anderson, his close friend for

1 decades. Thus, pursuant to *Sanchez-Lima*, in the event Anderson is legally unavailable for trial,
2 it would be an injustice – and error – to exclude his statements to Valente regarding the
3 defendant’s urine samples.

4 In *United States v. Valdez-Soto*, 31 F.3d 1467, 1473 (9th Cir. 1994), the Ninth Circuit
5 held that hearsay statements by a trial witness inculcating the defendant were properly admitted
6 pursuant to the residual hearsay exception. The witness, Cortez, implicated himself and others,
7 including the defendant, in statements he made to the F.B.I. immediately following his arrest.
8 *Valdez-Soto*, 31 F.3d at 1470. When Cortez changed his story at trial, the government was
9 allowed to introduce the previous statements pursuant to the residual hearsay exception. *Id.*
10 The Ninth Circuit found that “Rule 803(24)¹ easily encompasses a case like ours where the
11 evidence has the requisite indicia of trustworthiness but is not otherwise admissible.” *Id.* at
12 1471. Those indicia were as follows:

13 Cortez gave the statements to FBI agents soon after his arrest . . . [and] . . . if a statement
14 is proximate in time to the event, less opportunity for fabrication exists . . . although the
15 interview was not directly recorded and transcribed, it was witnessed by a translator who
16 contemporaneously recorded the details . . . [and] . . . Special Agent Fresques also took
17 notes . . . Cortez cooperated unhesitatingly from the start . . . [Cortez was] informed of his
18 rights and signed a written waiver of them . . . [and] . . . He certainly would have realized
19 that lying in the face of such uncertainty would seriously jeopardize any chance he had to
20 benefit from cooperating . . . In addition, as the district court recognized, *id.*, his
21 statements-which were quite detailed-were consistent with the physical evidence in this
22 case.

19 *Id.* at 1472. The Ninth Circuit noted that “the trial judge has a fair degree of latitude in deciding
20 whether to admit statements under” Fed. R. Evid. 807. *Id.* at 1471. Given that latitude, *Valdez-*
21 *Soto* favors admitting Anderson’s statements, regardless of whether he testifies. “The rule [807]
22 requires only that the hearsay have ‘equivalent circumstantial guarantees of trustworthiness’ to
23 any of the rule’s enumerated exceptions. In addition to factors such as ‘the declarant’s perception,
24 memory, narration, or sincerity concerning the matter asserted,’ . . . we’ve recognized that
25 corroborating evidence is a valid consideration in determining the trustworthiness of out-of-court
26 statements for purposes of Rule 803(24).” *Id.* at 1471. Based on the indicia of trustworthiness
27 and corroboration of Anderson’s statements to Valente identifying the defendant’s urine samples,
28

¹ Predecessor to Fed. R. Evid. 807.

1 Fed. R. Evid. 807 “easily encompasses” the evidence and it is admissible pursuant to *Valdez-*
2 *Soto*.

3 In *Bachsian*, documents similar to the Balco log sheets were admitted pursuant to the
4 residual hearsay exception because of particularized guarantees of trustworthiness and the fact
5 that admission “furthered the federal rules’ paramount goal of making relevant evidence
6 admissible.” *Bachsian*, 4 F.3d at 799. The documents were ocean bills of lading, packing lists,
7 and commercial invoices, admitted for the purpose of proving the contents of stolen shipping
8 containers. *Id.* at 798. The trustworthiness factors were as follows: “customs brokers and United
9 States Customs regularly rely upon the accuracy of such documents . . . the bill of lading was
10 prepared by the shipper in the exporting country and that the documentation had to be accurate in
11 order to load the goods on the ocean vessel . . . the individual who prepared the documents would
12 have had been under some duty to insure that the documents were accurate and would have no
13 incentive to misrepresent the facts recorded on the documents [and] a customs broker testified
14 that he had processed similar documents for the same exporting company before and that they
15 had never been inaccurate.” *Id.* Likewise, Balco and its clients regularly relied upon the
16 accuracy of the information in the Balco log sheets, which Valente kept for years. Anderson had
17 a duty to accurately report and Valente had a duty to accurately record the information and
18 neither of them had any incentive to misrepresent anything in the log sheets.

19 The Ninth Circuit in *Bachsian* also provided guidance regarding the need – or lack
20 thereof – of calling certain foundational witnesses in this situation. “Perhaps the testimony of
21 employees of the exporting companies would have been more probative, but it could not be
22 secured through reasonable efforts. We refuse to find that the government needed to drag the
23 shipping clerks of the exporting companies into court.” *Id.* at 799. Anderson was performing an
24 equally routine and mundane, albeit against his penal interest, task by dropping off a urine
25 sample from a client, which he did countless times at Balco. Accordingly, even in the absence of
26 his recalcitrance, there should be no need for the government to have to “drag” him into court for
27 this particular testimony and it should be admissible pursuant to Rule 807.

28 In *United States v. Friedman*, 593 F.2d 109, 114 (9th Cir. 1979), the Ninth Circuit held

1 that admitting hearsay letters from a Chilean official who was not the custodian of the records,
2 wherein the official confirmed that he examined Chilean immigration records and that they
3 confirmed certain visits by the defendants, was proper.

4 The Chilean official who summarized the official immigration records surely encountered
5 no problems of perception or memory in transferring the information from the records to
6 the travel documents. There was no difficulty in the narration of the information; the
7 information on the travel documents is simple and unambiguous; it pertains only to dates
8 of entry and exit and involves no statements of a testimonial nature as to what Johnson or
Garrity did in Chile. We are not persuaded that the Chilean official had any reason to
falsify or misrepresent the documents. Consequently, we affirm the trial court's finding of
equivalent trustworthiness.

9 *Friedman*, 593 F.2d at 119. Once again, because Anderson's statements to Valente are so simple
10 and trustworthy, it necessarily follows that the log sheets possess abundant indicia of
11 trustworthiness.

12 Anderson's statements to Valente, and therefore the Balco log sheets, satisfy the
13 requirements under Fed. R. Evid. 807. They relate to material facts, *i.e.* the defendant's
14 knowledgeable use of steroids and other substances, there are abundant circumstantial guarantees
15 of trustworthiness, they are more probative than other evidence the government can procure, and
16 the general purposes of the Federal Rules of Evidence and the interests of justice will best be
17 served by admitting them. The purpose of the rules of evidence is that they "shall be construed
18 to secure fairness in administration . . . to the end that the truth may be ascertained and
19 proceedings justly determined." Fed. R. Evid. 102.

20 Third, for the reasons discussed above related to the conspiracy among Anderson and
21 others to keep the clear and cream secret, statements by Anderson to Valente in furtherance of
22 that conspiracy are admissible. Anderson's statements to Valente identifying individual urine
23 samples furthered the goal of the conspiracy to test the urine of individuals using the clear and
24 the cream and to accurately document and preserve the results of those tests.

25 Anderson's statements to Valente and the log sheets are links in the chain of evidence
26 that the defendant knowingly used steroids. The only reason their admissibility is being litigated
27 is because the defendant's close friend, Anderson, has thus far illegally refused to testify
28 regarding his knowledge of the defendant's steroid use. There is abundant, credible evidence of

1 trustworthiness and if these proceedings are to be justly determined and fairly administered, this
2 evidence should be admitted.

3 **B. The Documents Valente Relied Upon Are Independently**
4 **Admissible As Business Records Pursuant To Fed. R. Evid.**
5 **803(6).**

6 As previously argued, the lab documents Valente used to create the log sheets are
7 admissible because they are business records of the laboratory that generated them. The outside
8 lab documents found within the Balco files are also admissible as Balco's own business records
9 because they possess sufficient indicia of trustworthiness. "Exhibits can be admitted as business
10 records of an entity, even when that entity was not the maker of those records, so long as the
11 other requirements of Fed. R. Evid. 803(6) are met and the circumstances indicate the records are
12 trustworthy." *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993) (certificates of title,
13 purchase orders, and odometer statements possessed by auto dealer were admissible business
14 records even though auto dealer did not create them because other requirements of Fed. R. Evid.
15 803(6) were met and circumstances indicated they were trustworthy). Just like the auto dealer in
16 *Childs*, Balco retained lab reports generated for Balco in order to conduct its business. Balco
17 routinely relied upon the lab reports, and there is no evidence the reports were inaccurate.
18 Businesses routinely compile their own records by virtue of information or documentation
19 transmitted from outside sources.

20 Thus, because information Valente received orally from Anderson and in lab reports from
21 the outside laboratory is independently admissible, the double hearsay requirement of *Arteaga* is
22 satisfied, and the Balco log sheets are admissible as Balco's business records.

23 **ii. The Log Sheets Are Admissible Pursuant To The Residual Exception**
24 **Of Fed. R. Evid. 807.**

25 If the Court should find that the log sheets do not qualify as business records, they are
26 nevertheless admissible pursuant to the residual exception of Fed. R. Evid. 807. As explained
27 above, the log sheets meet all of the requirements of this exception and, especially in light of
28 *Bachsian* and *Friedman*, where documents with no more guarantees of trustworthiness than the
log sheets were held admissible, it would be a significant injustice to allow the defendant to

1 dodge this evidence by virtue of his close friend's unlawful refusal to testify against him.

2 **iii. The Log Sheets Are Statements Of A Co-conspirator Pursuant To**
 3 **Fed. R. Evid. 801(d)(2)(E).**

4 Again, for the reasons discussed above related to the conspiracy among Valente and
 5 others to keep the clear and cream secret, statements by Valente in the form of the log sheets and
 6 in furtherance of that conspiracy are admissible. Valente documented Balco's receipt of urine
 7 samples from known users of the clear and cream and the subsequent test results performed on
 8 those samples to determine whether they revealed use of the clear and cream. That exercise
 9 furthered the goal of the conspiracy to keep those substances undetectable by monitoring the
 10 urine of known users such as the defendant. Accordingly, Valente's statements in the form of the
 11 log sheets are admissible as statements of a co-conspirator in furtherance of the conspiracy.

12 **4. The Handwritten Notes**

13 Bonds further objects to five pages of handwritten notes. The first note to which the
 14 defendant objects was found at Balco (Mot. Exhibit 2c, Bate Stamp BB 113, a sheet containing
 15 various names and code numbers, along with the notation "Barry Bond 100121" in the middle of
 16 the document). The remaining four pages of notes in Exhibit 2c were found at Anderson's
 17 residence, including the following:

18 (1) A sheet captioned "Barry" and followed by notes reflecting the dates and prices of
 19 "blood tests," "G," "depo test cyp 3 bottles off & reg. season," "clear & cream," and
 20 "Clomifend;" (Bate Stamp 23955);

21 (2) an envelope with the words "Barry's \$6,000" (Bate Stamp 23826);

22 (3) an envelope captioned "12-24-99" with the notation "\$1,000 Sandy Face X-mas,"
 "500 Barry Stuff," and "500 Tax's" (Bate Stamp 23837);

23 (4) A sheet captioned "Gary" with various dates referencing "pee," "G-40 little one,"
 24 "T.S. 1cc," "40 G little one," and "1cc T/ 40-G little one," followed by an entry stating

25 "Barry
 12-2-02
 T-1cc G-30 little
 26 Pee"

(Bate Stamp 23844).

27 As noted previously, Rule 901(b)(4) permits authentication based upon "[a]pppearance,
 28 contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction

1 with circumstances.” Fed.R.Evid. 901(b)(4). The contents of the challenged notes include the
2 defendant’s name and the names of other athletes who had admitted knowingly receiving
3 illegally distributed anabolic steroids from Anderson. The notes were found on the Balco
4 premises and at Anderson’s residence. These facts amply support the admission of these
5 documents under the authentication requirements of Fed. R. Evid. 901.

6 The note from Balco is a business record that should be deemed admissible pursuant to
7 Fed.R.Evid. 803(6). The government expects to lay a foundation for this document through the
8 testimony of James Valente, a Balco employee who created many of the Balco business records
9 and was personally involved in handling and creating drug logs, correspondence pertaining to
10 blood and urine tests, and other documents associated with the defendant’s regime of blood and
11 urine screening for steroids. Valente’s testimony will lay an appropriate foundation for the
12 document; it is therefore admissible pursuant to Fed. R. Evid. 803(6).

13 The notes from Anderson’s residence are admissible under the same rationales as
14 discussed previously for the calendars. These notes are admissible for the non-hearsay purpose
15 of establishing the materiality of Bonds’s false statements before the grand jury. They are further
16 admissible under the same theories described above for the calendars: (1) as statements against
17 penal interest; (2) co-conspirator statements; (3) business records of Anderson’s steroid
18 trafficking enterprise; and (4) under the residual hearsay exception.

19 **5. Greg Anderson’s Tape-Recorded Statements To Steve Hoskins Are** 20 **Admissible.**

21 **a. Introduction**

22 The defendant argues that a recorded conversation between Greg Anderson and Steve
23 Hoskins is inadmissible because it is irrelevant and constitutes hearsay. Mot. at 20. The
24 objections should be overruled because the evidence is undeniably relevant and admissible
25 pursuant to two hearsay exceptions.

26 **b. The Evidence.**

27 Steve Hoskins was the defendant’s friend since childhood and the defendant’s personal
28 assistant for many years beginning in approximately 1993. During the course of their

1 relationship, Hoskins learned firsthand through observation and conversations with the defendant
2 that he was acquiring and using anabolic steroids with Greg Anderson's assistance. Hoskins
3 subsequently decided to discuss the defendant's steroid use with the defendant's father, Bobby
4 Bonds. According to Hoskins, Bobby Bonds did not believe that his son was using steroids, so
5 Hoskins decided to tape a conversation with Greg Anderson wherein Anderson discussed the
6 defendant's steroids use and the fact that Anderson assisted the defendant with steroids.

7 According to Hoskins, the conversation took place between himself and Greg Anderson in
8 approximately March of 2003 at PacBell Park near the defendant's locker. They were having the
9 conversation in normal voices until another player walked by them, at which point they started to
10 whisper. Hoskins captured the following statements on tape during his conversation with
11 Anderson:

12 **Hoskins:** You know, um, when Barry's taking those shots, Dr. Ting said that one of, one of the
13 basketball players....he's was taking them shots, and doing it in his thigh....and he's...oh
shit...it's fuckin'....

14 **Anderson:** Oh, I know. Yeah, you can't even, you can't even walk after that.

15 **Hoskins:** Yeah, no, he said he had to go in and graft his...

16 **Anderson:** Oh yeah, you know what happened? He got uh...

17 **Hoskins:** He must have put it in the wrong place.

18 **Anderson:** No, what happens is, they put too much in one area, and what it does, it 'ill, it 'ill
19 actually ball up and puddle. And what happens is, it actually will eat away and make an
indentation. And it's a cyst. It makes a big fuckin' cyst. And you have to drain it. Oh yeah, it's
20 gnarly...Hi Benito...oh it's gnarly.

21 **Hoskins:** He said his shit went....that's why he has to, he had to switch off of one cheek to the
other. Is that why Barry's didn't do it in one spot, and you didn't just let him do it one time?

22 **Anderson:** Oh no. I never. I never just go there. I move it all over the place.

23 ...

24 **Hoskins:** Yeah, that's why he was like...(laughs) he was like, tell Greg if he's puttin' it in one
25 fuckin' place, to tell him to move that shit somewhere else.

26 **Anderson:** Oh, no, no, no. I learned that when I first started doing that shit....sixteen years
27 ago...because uh...guys would get a gnarly infections...and it was gross...I mean, to the point
where you had to have surgery just to get that fuckin' thing taken out.

28 ...

1 **Hoskins:** What if they decide that...I think, didn't they say they're going to test...um...they
2 don't know. They're not testing the players yet. They're just doing random shit. So they're just
going to get a percentage. And then after they figure out the percentage...then if it's high
enough, then they'll do whatever.

3 **Anderson:** Well, what, what I understand is that, what they're doing is they're...um...they're,
4 they did 25 players, random, supposedly, in spring training.

5 **Hoskins:** Oh, so you don't even...

6 **Anderson:** And then, so those guys have already been tested twice. They got tested, then a
7 week later they got tested again. Same guys. So what happens is, is those guys are pretty much
done for the year.

8 **Hoskins:** Okay

9 **Anderson:** They don't ever have to get tested again. Now supposedly, there's gonna to be three
10 guys...excuse me, not three...one hundred and fifty guys tested during, random during the
season...Which he's going to be on that list, easy....

11 **Hoskins:** Oh yeah, definitely.

12 **Anderson:** So, in that...after...but they're going to test him once, then test him again. And
then after, he supposed to be...

13 **Hoskins:** But do we know?

14 **Anderson:** Do we know when they're going to do it?

15 **Hoskins:** Yeah. Does he know?

16 **Anderson:** I, I, I have an idea. See I gotta..., where, where the lab that does my stuff, is this lab
17 that does entire baseball...

18 **Hoskins:** Oh okay. Oh the same...

19 **Anderson:** Yeah. So, they...I'll know...I'll know like probably a week in advance, or two
20 weeks in advance before they're gonna do it. But it's going to be in either the end of May,
beginning of June. It's right before the All-Star break definitely. So after the All-Star
break...fucking, we're like fucking clear as a mother.

21 **Hoskins:** Okay, so what you want...so they'll...the guys from Major League Baseball....so
22 baseball will tell, you'll know when they're gonna do it, but you won't know exactly if it's gonna
be him.

23 **Anderson:** Right.

24 **Hoskins:** Or will you know...

25 **Anderson:** He may not even get tested.

26 **Hoskins:** Right, that's what I'm saying.

27 **Anderson:** Because it's supposed to be computerized.

28 **Hoskins:** But we just know if...he's gonna be....

1 **Anderson:** He's gonna be. But the whole thing is...everything that I've been doing at this
point, it's all undetectable.
2
3 **Hoskins:** Right.
4 **Anderson:** See, the stuff that I have...we created it. And you can't, you can't buy it anywhere.
You can't get it anywhere else. But, you can take it the day of and pee...
5 **Hoskins:** Uh-huh.
6 **Anderson:** And it comes up with nothing.
7 **Hoskins:** Isn't that the same shit that Marion Jones and them were using?
8 **Anderson:** Yeah same stuff, the same stuff that worked at the Olympics.
9 **Hoskins:** Right, right.
10 **Anderson:** And they test them every fucking week.
11 **Hoskins:** Every week. Right, right.
12 **Anderson:** So that's why I know it works. So that's why I'm not even trippin'. So that's cool.
13 ...

14 **c. The Tape-Recorded Statements Are Relevant.**

15 The relevancy of this evidence could not be more apparent. In the course of the
16 conversation, the defendant's personal trainer, Anderson, makes statements related to injecting
17 the defendant, possessing access to inside information related to when Major League Baseball
18 would test the defendant, and providing the defendant with an undetectable substance also being
19 used by Marion Jones. This is overwhelming evidence that the defendant committed perjury as
20 set forth in the second superseding indictment when he denied knowingly using steroids or ever
21 being injected by anyone other than a doctor.

22 **d. The Tape-Recorded Statements Are Admissible Under Two Hearsay**
23 **Exceptions.**

24 **i. The Tape-Recorded Statements Were Against Anderson's Interests**
25 **Pursuant To Fed. R. Evid. 804(b)(3).**

26 In *United States v. Boone*, the Ninth Circuit held that a tape recorded statement under
27 almost identical circumstances was properly admitted as a statement against the declarant's
interest:

28 Unbeknownst to Lamar Williams, his girlfriend Tarchanda Cunningham surreptitiously
tape recorded him implicating himself and Defendant Anthony Boone in an armed

1 robbery. Over Boone's hearsay and Confrontation Clause objections, Williams's
2 out-of-court statements were received in evidence against Boone as statements against
interest . . . We affirm.

3 *United States v. Boone*, 229 F.3d 1231, 1232 (9th Cir. 2000). The Ninth Circuit admitted the
4 taped statement as one against Williams's interest pursuant to Fed. R. Evid. 804(b)(3), and its
5 reasoning is equally applicable here. *Boone*, 229 F.3d at 1233. At the time the recording was
6 made, Williams was confiding in his girlfriend/co-conspirator and had no motive to shift the
7 blame to someone else or to minimize his own culpability. Williams was charged as a co-
8 conspirator, but remained at large at the time of trial, and Cunningham was cooperating with the
9 F.B.I. when she recorded the conversation. *Id.* at 1232. "Here, the taped conversation between
10 Williams and his girlfriend occurred in what appeared to *Williams* to be a private setting and in
11 which, as far as *he knew*, there was no police involvement." *Id.* at 1234 (emphasis in original).
12 "Williams's lack of exculpatory motive while inculcating himself provides the circumstantial
13 guarantee of reliability that underpins the hearsay exception for statements against interest." *Id.*
14 at 1232. The facts herein are even more compelling than *Boone* for admitting the tape recording.
15 Like Williams, Anderson was speaking to a close confidant, as they both served the defendant,
16 and Anderson had no motive to shift any blame or say anything untrue about the defendant or to
17 minimize his own involvement with the defendant's steroid use. As far as Anderson knew, the
18 conversation with Hoskins was private and did not involve law enforcement in any way. Like
19 Williams, Anderson may be legally unavailable at trial because he may unlawfully refuse to
20 testify. However, unlike Williams, who was a fugitive and beyond the defendant's subpoena
21 power, there is nothing – except his fear of the truth – preventing this defendant from calling
22 Anderson to trial to testify. Lastly, unlike Cunningham, Hoskins was not cooperating with law
23 enforcement in any way when the tape was made.

24 In *Padilla v. Terhune*, 309 F.3d 614, 619 (9th Cir. 2002), a trial witness, Munoz, was
25 allowed to testify about statements made to him by one of two people who participated in the
26 robbery and murder that the defendant was charged with. Munoz could not even remember
27 which person made the statement to him, he was very young and allegedly under the influence of
28 drugs and alcohol when he heard the statement, and he testified from memory (versus possessing

1 notes or a recording of exactly what was said). *Id.* Despite these facts, the statements against
2 interest were admitted through Munoz's testimony pursuant to Rule 804(b)(3) – “The speaker
3 made his admission to Munoz, a close friend, in a private setting, with no reason to think the
4 police would become involved, unabashedly inculcating himself while making no effort to
5 mitigate his own conduct or to shift blame.” *Id.* The circumstances surrounding Anderson's
6 tape-recorded statements to Hoskins are more compelling than the facts in *Padilla*. Hoskins
7 possesses none of Munoz's shortcomings as a witness, and the statements are documented in the
8 recording. Similar to the declarant in *Padilla*, Anderson made his admissions to a confidant in a
9 private setting while making no effort to mitigate his own conduct or shift blame.

10 According to *Boone* and *Padilla*, Anderson's tape-recorded statements to Steve Hoskins
11 are admissible pursuant to Fed. R. Evid. 804(b)(3) and the defense objections related to this
12 hearsay exception should be rejected.

13 **ii. Anderson's Tape-Recorded Statements Are Admissible Pursuant To The**
14 **Residual Exception Of Fed. R. Evid. 807.**

15 As a preliminary matter, since *Padilla* and *Boone* rely on the residual trustworthiness
16 doctrine of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), they are equally applicable in the context of
17 analyzing the residual hearsay exception of Rule 807, and Anderson's tape-recorded statements
18 are therefore admissible pursuant that authority in this context as well. *See Padilla*, 309 F.3d at
19 618; *Boone*, 229 F.3d at 1233. Nevertheless, the Ninth Circuit authorities discussed above
20 directly addressing Rule 807, *i.e. Sanchez-Lima, Valdez-Soto, Bachsian*, and *Friedman*, provide
21 additional, independent authority for admitting Anderson's tape-recorded statements pursuant to
22 this exception.

23 The tape-recorded statements relate to material facts and are more probative than any
24 other evidence the government can procure through reasonable efforts. Further, there are
25 abundant indicia of trustworthiness surrounding Anderson's statements to Hoskins:

- 26 ▶ Anderson was speaking with a close confidant
27 ▶ Anderson had no motive or reason to lie
28 ▶ Anderson implicated himself in the defendant's illegal steroid use

- 1 ▶ Anderson had no reason to think law enforcement was involved in the conversation
- 2 ▶ the conversation setting was private
- 3 ▶ Anderson was involved in distributing steroids at the time in conjunction with Balco
- 4 ▶ Balco was distributing the cream and the clear at the time, which were undetectable
- 5 ▶ Marion Jones had received the clear at the time

6 These statements are admissible for the same reasons Anderson's statements to Valente
7 regarding the urine samples are admissible. There is no credible, logical, or reasonable
8 explanation for why they should not be believed. It makes absolutely no sense that Anderson
9 would have made false statements to Hoskins regarding the fact that he injected the defendant,
10 was privy to MLB's steroid testing schedule, and was not too worried about the defendant getting
11 caught because the substance he was administering to the defendant, *i.e.* the clear, was
12 undetectable. On their face, these statements are patently believable, but when coupled with the
13 fact that Anderson chose to spend over a year in jail rather than answer questions about these
14 statements, the argument in favor of admissibility becomes overwhelming. The recording should
15 be deemed admissible.

16 **6. Expert and Lay Testimony Pertinent To Steroid Use**

17 **a. The government's expert testimony is relevant and reliable.**

18 At trial, the government intends to call two expert witnesses, Dr. Larry Bowers and Dr.
19 Don Catlin. As set forth above, Dr. Bowers is the medical director for the United States Anti-
20 Doping Agency.² He will testify that steroid users develop symptoms such as increased muscle
21 mass, shrunken testicles, acne on the upper back, moodiness, and an erratic sexual drive. Dr.
22 Bowers will further testify that the urine and blood test results for Bonds reflect steroid use, and
23 that the steroids revealed by the blood and urine tests are usually administered by injection. Dr.
24 Catlin will testify that he tested the urine sample Bonds submitted to Major League Baseball in
25 2003 and determined that the sample was positive for THG and Clomid, an anti-estrogen drug
26 typically used by steroid users to "jump-start" the replenishment of natural testosterone following
27

28 ² Dr. Bowers's declaration with his attached CV is attached as Exhibit 2.

1 its suppression by the use of anabolic steroids.³ In addition, Dr. Catlin will testify that Bonds's
2 sample is positive for exogenous, that is foreign, testosterone, itself an anabolic steroid and
3 controlled substance under federal law. As the Court is aware, the Court found that both Dr.
4 Catlin and Dr. Bowers qualified as experts on the subjects on which they would testify in this
5 trial in *United States v. Thomas*, No. CR 06-0803-SI, although only Dr. Catlin testified in that
6 trial, and Dr. Bowers testified as an expert in *United States v. Graham*, No. CR 06-0725-SI.
7 Both Dr. Bowers and Dr. Catlin also testified in the grand jury, and their grand jury testimony
8 was produced to defendant on September 25, 2008.

9 Without addressing in detail either doctor's expertise or the basis for, or nature of, their
10 grand jury or proposed trial testimony, Bonds argues (Mot. 20-23) that testimony from Drs.
11 Catlin and Bowers would be neither relevant nor reliable. In particular, he argues that their
12 expert testimony would consist of "nothing more than anecdotal junk science," and is
13 inadmissible because the two doctors "lack the necessary expertise in the relevant field," the side
14 effects of steroid use "are not established by scientifically reliable principles," and "the testimony
15 is irrelevant and unduly prejudicial." Motion at 23. In fact, Dr. Catlin's testimony will rest on
16 and reflect scientific testing of samples of Bonds's urine. Bonds cannot meaningfully challenge
17 the relevance or reliability of that testimony. Similarly, Dr. Bowers's proposed testimony on the
18 physical and mental effects of steroid use is relevant because it would tend to prove the central
19 factual allegation of the indictment – that Bonds lied when he denied that he knowingly took
20 anabolic steroids. His testimony would assist the jury by explaining the nature of anabolic
21 steroids and how steroids affect the body, and he would provide direct testimony that Bonds's
22 blood and urine tested positive for illegal steroids. Finally, Bonds's cursory challenge to the
23 experts' qualifications is without merit. In short, Bonds has given the Court no reason to reach a
24 different result than it reached in the *Graham* and *Thomas* trials.

25 Federal Rule of Evidence 702 allows a court to admit testimony based on "scientific,
26

27 ³ Dr. Catlin's CV is attached as Exhibit 3. Excerpts from Dr. Catlin's grand jury
28 testimony are attached as Exhibits 4 (2003 testimony) and 5 (2006 testimony). Exhibits 4 and 5
retain the original pagination of the grand jury transcript.

1 technical, or other specialized knowledge” that “will assist the trier of fact” in understanding the
2 evidence or in determining a fact in issue. A witness may qualify as an expert “by knowledge,
3 skill, experience, training, or education.” As the Ninth Circuit has made clear, Rule 702
4 “contemplates a broad conception of expert qualifications” and is “intended to embrace more
5 than a narrow definition of qualified expert.” *Thomas v. Newton International Enterprises*, 42
6 F.3d 1266, 1269 (9th Cir. 1994) (citing Fed. R. Evid. 702, Advisory Comm. Notes).

7 Testimony from a qualified expert “is admissible pursuant to Rule 702 if it is both
8 relevant and reliable.” *Elsayed Mukhtar v. California State University*, 299 F.3d 1053, 1063 (9th
9 Cir. 2002); see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). As the
10 Supreme Court explained, “[t]he inquiry envisioned by Rule 702 is...a flexible one.” *Daubert*,
11 509 U.S. at 594. Although the Court in *Daubert* provided a list of factors for determining
12 whether expert testimony is reliable, *id.* at 593-94, a court should not “mechanically apply the
13 *Daubert* factors,” *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d. 998, 1017
14 (9th Cir. 2004), because *Daubert*’s list of specific factors “neither necessarily nor exclusively
15 applies to all experts or every case.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42
16 (1999). Instead, the *Daubert* factors are meant to be “helpful, not definitive.” *Id.* at 151. A
17 district court has “broad latitude in determining whether an expert’s testimony is reliable” and
18 “in deciding how to determine the testimony’s reliability.” *Elsayed Mukhtar*, 299 F.3d at 1064.
19 Although a court should make “a preliminary determination that [a proffered] expert’s testimony
20 is reliable,” *Elsayed Mukhtar*, 293 F.3d at 1063, a court need not hold a separate *Daubert* hearing
21 before admitting expert testimony. *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir.
22 2000).

23 The testimony of Dr. Catlin and Dr. Bowers easily meets these standards. First, both
24 doctors are qualified to testify as experts. As his attached curriculum vitae and grand jury
25 testimony make clear, Dr. Catlin is a medical doctor who served as a professor of medical and
26 molecular pharmacology and as the director of the UCLA Olympic Analytic Laboratory. See
27 Exhibit 5 at 4-5; Exhibit 4 at 3-5. Since the early 1980s, Dr. Catlin’s career has been entirely
28 dedicated to developing testing for the presence of steroids in the bodily fluids of athletes. See

1 Exhibit 4 at 7-8. As of the date of his 2003 grand jury testimony his laboratory performed steroid
2 testing for the U.S. Olympic Committee, the National Collegiate Athletic Association, and the
3 National Football League and conducted 22,000 tests per year. Exhibit 4 at 8, 12. He personally
4 developed the means to test for THG, which prior to Dr. Catlin's research had been an
5 undetectable steroid. Exhibit 4 at 36-40. In short, Dr. Catlin is plainly an expert in researching
6 and analyzing the effect of performance-enhancing substances on athletes, and he is eminently, if
7 not uniquely, qualified to test urine samples for the presence of steroids and other performance-
8 enhancing drugs and to testify about the results of that testing.

9 Dr. Bowers has likewise devoted much of his career to the analysis of performance-
10 enhancing drugs. From 1992 to 2000, while serving as a professor in the Department of
11 Pathology and Laboratory Medicine at Indiana University Purdue University at Indianapolis, Dr.
12 Bowers was director of athletic drug testing and the toxicology laboratory. Exhibit 2 at ¶ 3. As
13 Dr. Bowers explains in his declaration, his research on performance-enhancing drugs has allowed
14 him to become familiar with the physiological results of anabolic steroid use. *Id.* at ¶¶ 4-5.
15 Accordingly, it is irrelevant that, as Bonds argues (Mot. 22), Dr. Bowers does not have a degree
16 in pharmacology; his primary expertise is in the physical and mental manifestations of anabolic
17 steroid use. As this Court found in *Graham*, he easily qualifies as an expert in that field.

18 Second, both doctors' testimony also rests on reliable methodology. Dr. Bowers's
19 testimony will rely on years of study, empirical analysis, and scientific testing. As noted, for the
20 last 16 years, Dr. Bowers has participated in or overseen testing in the effects of performance-
21 enhancing drugs, and his conclusions are accepted in the scientific community. Indeed, some of
22 Dr. Bowers's anticipated testimony will merely explain to the jury aspects of the effects of
23 performance-enhancing substances such as testosterone and human growth hormone that are
24 widely understood by the public. For example, there is little controversy over Dr. Bowers's
25 assertion that testosterone "is a chemical that causes muscle growth and retention of muscle" and
26 "can make a person stronger...benefit a person's ability to recover." Exhibit 2 at ¶ 6.b. As Dr.
27 Catlin testified in the grand jury, the effects of anabolic steroids "are well known. They are
28 described in many scientific articles. The mechanism of how they happen is known. ...And the

1 full pharmacology of these agents is pretty well known. It is very well known. There is no
2 question about it.” Exhibit 4 at 23.

3 Similarly, there is no “junk science” in Dr. Catlin’s methodology. As he explained in his
4 grand jury testimony, Dr. Catlin has tested athletes’ urine samples for steroids for nearly 30
5 years. His testing has been accepted at the highest levels of professional athletics, including by
6 the NFL, NCAA, and the U.S. Olympic Committee. He performs 22,000 tests a year for those
7 and other clients, and his laboratory has been certified by the World Anti-Doping Agency, an
8 entity formed by the International Olympic Committee. Exhibit 5 at 4-5. In addition, as Dr.
9 Catlin explained, his laboratory employs procedures that ensure the integrity and chain of custody
10 on each test that it performs. Exhibit 4 at 8-9. Bonds has not suggested any reason to challenge
11 Dr. Catlin’s methodology in testing for steroids, and accordingly, this Court should find that his
12 expert testimony would be reliable.⁴

13 In sum, Drs. Bowers and Catlin are qualified to testify as experts, and their testimony is
14 both relevant and reliable. For those reasons, the Court need not hold a *Daubert* hearing before
15 admitting their testimony. To the contrary, Dr. Catlin’s testing for the presence of steroids
16 presents a case where “the reliability of an expert’s methods is properly taken for granted,”
17 *Kumho Tire*, 526 U.S. at 152-53, and a hearing would result in the kind of “unjustifiable expense
18 and delay” that the Rules of Evidence are intended to avoid. *See United States v. Alatorre*, 222
19 F.3d at 1102. Similarly, Dr. Bowers’s declaration and CV demonstrates the basis for his
20 specialized knowledge of the effects of steroids the human body. Defendant, who had Dr.
21 Bowers’s CV and grand jury testimony before filing their motion in limine, has raised no specific
22 objection to his testimony or given the Court any reason to doubt his methodology. Accordingly,
23 both witnesses should be permitted to testify as experts without further proceedings to establish
24 the admissibility of their testimony.

25
26 ⁴ Because there is no basis to question the methodology that Dr. Catlin uses to conduct
27 steroid testing, the government submits that the Court need not inquire into that methodology
28 before finding that he is qualified to testify as an expert. If necessary, however, the government
can submit a declaration from Dr. Catlin that explains his methodology or simply ask Dr. Catlin
to explain that methodology when he testifies at trial.

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2 **b. The government's lay witnesses will offer percipient, not opinion,
3 testimony.**

4 Bonds also moves (Mot. 24-25) to exclude testimony from lay witnesses as to changes in
5 his physical or mental condition. He argues that such testimony is not percipient evidence, but
6 instead constitutes lay opinion testimony that fails to satisfy the requirements of Federal Rule of
7 Evidence 701. That contention rests on a misapprehension of the testimony the government
8 intends to present. The government's lay witnesses will testify only to changes that they
9 observed in Bonds's physical or mental condition; they will not offer an opinion on whether
10 those changes were the result of Bonds's use of steroids. *See United States v. Durham*, 464 F.3d
11 976, 985 n.13 (9th Cir. 2006) (distinguishing between percipient and opinion testimony); *United*
12 *States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (testimony from "personal knowledge" is
13 not lay opinion testimony). Moreover, the relevance of the witnesses' testimony concerning
14 Bonds's physical and mental condition will be established by expert testimony from Dr. Bowers,
15 who, as explained above, will explain that steroid use results in specific mental and physical
16 changes in the user. Because Dr. Bowers's testimony is relevant and admissible, the lay
17 witnesses who will testify about Bonds's mental and physical condition is also admissible.

18 Bonds also argues (Mot. 24) that the government should be barred from presenting
19 testimony from any lay witness it failed to identify in its December 26, 2008 letter. The
20 government was not required to give Bonds a witness list in that letter; instead, the government
21 will provide a witness list on February 13, 2009, pursuant to the Court's standard scheduling
22 order. Moreover, the procedure in which the parties exchanged letters pursuant to the Court's
23 December 16, 2008 order was an informal attempt to narrow pretrial issues and did not create a
24 right of exclusion. Accordingly, the defendant's effort to rely on that procedure to bar the
25 government from presenting relevant and admissible testimony should be rejected.

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IV. CONCLUSION

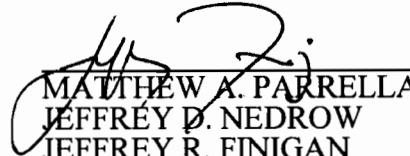
For the above-stated reasons, the government respectfully requests that the defendant's motion in limine be denied. The government respectfully requests a ruling of the Court providing for the admissibility of all of the challenged items of evidence, subject to the government laying an appropriate foundation for their admissibility at trial.

DATED: January 29, 2009

Respectfully submitted,

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United States Attorney


MATTHEW A. PARRELLA
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JEFFREY R. FINIGAN
J. DOUGLAS WILSON
Assistant United States Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the office of the United States Attorney, Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned certifies that he caused copies of

UNITED STATES' MOTION AND [PROPOSED] ORDER FOR SEALING ITS OPPOSITION; UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE (FILED UNDERSEAL); EXHIBITS TO UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION (FILED UNDERSEAL); MOTION FOR LEAVE TO FILE OVERSIZED BRIEF AND [PROPOSED] ORDER

in the case of U.S. v. BARRY LAMAR BONDS, No. CR-07-0732 SI,

to be served on the parties in this action, addressed as follows which are the last known addresses:

Dennis Patrick Riordan
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102

(By Personal Service - Messenger), I caused such envelope to be delivered by hand to the person or offices of each addressee(s) above.

Allen Ruby
Ruby & Schofield
125 South Market Street, Suite 1001
San Jose, CA 95113


(By Fed Ex), I caused each such envelope to be delivered by FED EX to the address listed above.

(By Facsimile), I caused each such document to be sent by Facsimile to the person or offices of each addressee(s) above.

(By Mail), I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at San Francisco, California.

1 I declare under penalty of perjury that the foregoing is true and correct.

2 January 29, 2009

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4 WILSON WONG
5 United States Attorney's Office

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