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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’ SUPPLEMENTAL
FILING IN RESPONSE TO
DEFENDANT’S MOTION IN LIMINE
TO EXCLUDE EVIDENCE**

Judge: Honorable Susan Illston

20
21 Greg Anderson’s out-of-court statements to James Valente at the time he submitted the
22 defendant’s blood and urine specimens to Balco should be admitted at trial pursuant to
23 Fed.R.Evid. 801(d)(2)(C) as statements authorized by Bonds, and pursuant to Fed.R.Evid.
24 801(d)(2)(D), as statements made by an agent of Bonds, “concerning a matter within the scope of
25 the agency or employment.”

26 A. Fed.R.Evid. 801(d)(2)(C) and 801(d)(2)(D)

27 A statement is not hearsay where it is “offered against [the] party” and either made “by a
28 person authorized by the party to make a statement concerning the subject[.]” Fed.R.Evid.

1 801(d)(2)(C), or made by an agent “concerning a matter within the scope of the agency or
2 employment, made during the existence of the relationship.” Fed.R.Evid. 801(d)(2)(D).
3 Speaking authority can be either “expressly or implicitly” bestowed upon an individual. *Penguin*
4 *Books U.S.A., Inc. v. New Christian Church of Full Endeavor*, 262 F. Supp. 2d 251, 260
5 (S.D.N.Y. 2003) (citing 5 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal
6 Evidence, § 801.32 at 801-60). The person making the statements must have the authority to
7 speak on a particular subject on behalf of the party the admission is to be used against. *Id.* (citing
8 30B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure Evidence, § 7022);
9 *Precision Piping and Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 619 (4th
10 Cir. 1991).

11 Rule 801(d)(2)(D) requires “a foundation to show that an otherwise excludable statement
12 relates to a matter within the scope of the agent’s employment.” *Harris v. Itzhaki*, 183 F.3d
13 1043, 1054 (9th Cir. 1999) (citing *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir.
14 1986)). The existence of an agency relationship under Rule 801(d)(2)(D) is a question for the
15 court under Fed.R.Evid. 104(a) and must be proved by substantial evidence. *United States v.*
16 *Flores*, 679 F.2d 173, 178 (9th Cir. 1982). “The contents of the statement shall be considered but
17 are not alone sufficient to establish . . . the agency or employment relationship and scope
18 thereof.” Fed.R.Evid. 801(d)(2).

19 B. Anderson’s identifications of the specimens are admissible pursuant to 801(d)(2)(C)

20 In the grand jury, Valente testified that he made entries identifying specimens belonging
21 to Bonds when Anderson told him that the samples belonged to Bonds. See Exhibit A (5/25/06
22 grand jury transcript of testimony of James Valente, p. 55).

23 Bonds testified in the grand jury that he had authorized Anderson, as his trainer, *i.e.* his
24 employee, to take his blood and urine samples to Balco in order to get them tested. Pertinent
25 excerpts of Bonds’s testimony include the following:

26 Q: Did he [Anderson] ever ask you to provide blood samples or urine samples for testing?

27 A: Yes.

28 Q: When did he start asking you to do that, right off the bat or as time went on?

1 A: I don't know, I believe it was maybe 2000, 2001, I believe so.

2 * * *

3 Q: Okay. How many times did you provide blood samples for testing? Was that a
4 common thing or just happen a few times? Or what would you estimate?

5 A: I don't know, maybe five or six times, maximum.

6 Q: And would that be all within the 2000, 2001 period, or would it be over the last
7 several years?

8 A: Over the last – all the way until now, this year.

9 Q: And regarding the urine samples, – let me ask, I guess, the same questions regarding
10 the urine samples. How often did you provide those?

11 A: Oh, I can't recall. Maybe four times, maybe. I don't recall.

12 See Exhibit B (12/4/03 grand jury testimony of Barry Bonds), pp. 17-18.

13 Q: Did you provide the blood samples directly to Mr. Anderson?

14 A: Yeah I had my own personal doctor come up to draw my blood. I only let my own
15 personal doctor touch me. And my own personal doctor came up and drew my blood and
16 Greg took it to Balco.

17 Q: What about the urine samples?

18 A: Same thing, come to my house, here, go.

19 Exhibit B, p. 20.

20 Q: Yes, I agree, that looks like a urine test, yes.

21 A: I gave samples to Greg. Greg took them to Balco.

22 Exhibit B, p. 76.

23 This testimony confirms that the defendant authorized Anderson to take his urine
24 specimens to Balco for testing. Common sense dictates that Anderson identified the specimens;
25 otherwise Anderson himself would not have known which athlete's urine he had submitted.

26 Bonds also told Stan Conte, the former Giants trainer, that Anderson would take his blood and
27 analyze it. See Exhibit C (5/25/06 testimony of Stan Conte), p. 35.

1 C. Anderson's identifications of the specimens are admissible pursuant to 801(d)(2)(D)

2 Anderson's statements are further admissible pursuant to Rule 801(d)(2)(D). In order to
3 admit the statement under this subsection of Rule 801(d), the Court must find that Anderson
4 served as Bonds's "agent or servant," and that the statement was made "concerning a matter
5 within the scope of the agency or employment."

6 Bonds identified Anderson as his trainer in his grand jury testimony. Valente and
7 multiple athlete witnesses who knew Bonds and Anderson all described Anderson as Bonds's
8 trainer. Anderson's statements identifying the urine as belonging to Bonds logically emanate
9 from Anderson's agency relationship with Bonds as his trainer. Furthermore, Anderson was
10 delivering urine specimens for numerous other athletes, and thus needed to identify Bonds's to
11 ensure he knew which belonged to Bonds. Anderson's statements identifying the urine
12 specimens as belonging to Bonds were within the context of their trainer-trainee relationship, and
13 for the purpose of furthering the ends of getting Bonds's urine and blood tested. Anderson was
14 acting as Bonds's agent, and used the simplest manner imaginable to keep the specimens straight,
15 by using his client's name.

16 In *United States v. Shunk*, 881 F.2d 917 (10th Cir. 1989), the defendant's brother sold a
17 pistol to an undercover officer and made statements that the defendant was the actual owner of
18 the pistol. *Id.* at 918. The Tenth Circuit found that the brother's statements were admissible
19 under Rule 801(d)(2)(D) because: (1) the brother had indicated that he was acting as the
20 defendant's agent; and (2) the defendant had ratified his agent's conduct through subsequent
21 statements. Similarly, in *United States v. Jones*, 766 F.2d 412 (9th Cir. 1985), the government
22 sought to introduce out-of-court statements made to an extortion victim by two men who had
23 come to pick up ransom money. *Id.* at 415. The Court found that independent evidence,
24 including the testimony of a third party whom the defendant had tried to recruit for the scheme,
25 and the victim's observation of the defendant in the vicinity of the attempted money pick up, was
26 sufficient to support both the existence of an agency relationship and admission of the statements
27 against the defendant pursuant to Fed.R.Evid. 801(d)(2)(D). In this case, the evidence of both the
28 existence of the agency relationship and the defendant's authorization to his agent to make the

