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

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

No. CR 07-0732-SI

**UNITED STATES' RESPONSE TO
DEFENDANT'S CASE MANAGEMENT
STATEMENT**

Date: February 18, 2011
Time: 11:00 a.m.
Judge: Honorable Susan Illston

19
20 **I. INTRODUCTION**

21 On February 16, 2011, the defense filed a document captioned "Case Management
22 Statement." Contrary to its caption, the document is actually a motion to strike three sections of
23 the government's February 14, 2011 motion in limine on procedural grounds. The three sections
24 referenced address the government's intent to introduce certain photographs of the defendant at
25 trial (Section F), the government's intent to introduce evidence of the defendant's motivation to
26 testify falsely in the grand jury (Section J), and the government's intent to introduce evidence of
27 Bonds's 2006 positive test for amphetamine use (Section N). The defense asserts that the

1 government should not be permitted to argue for the admissibility of these items because it failed
2 to identify these issues five months ago, in its October 2010 pretrial filings. The defense also
3 appears to argue that the raising of these issues now, over a month before trial, is so untimely as
4 to bar their consideration. For the reasons stated below, the defendant's request for a procedural
5 bar to these items should be rejected.

6 **II. THE CHALLENGED SECTIONS SHOULD BE EVALUATED ON THEIR**
7 **MERITS AND NOT PROCEDURALLY BARRED**

8 In August 2010, following the Ninth Circuit's remand, the parties in this case appeared
9 before the Court for a status conference. At the August 6, 2010 status conference, the Court set
10 this matter for trial on March 21, 2011. The defense suggested that the parties submit their
11 pretrial filings in October 2010, five months prior to trial. While the submission of witness lists
12 and exhibit lists five months in advance of trial was unusual, the government agreed as a matter
13 of good faith, in part because this case has a lengthy history, and many of the witnesses and
14 issues are well-established. Both the government's witness list and exhibit list explicitly stated,
15 however, that the government reserved the right to amend and supplement the lists as the case
16 proceeded closer to trial.

17 This is a criminal case, not a civil case. Contrary to the defendant's apparent position,
18 testimony not expressly listed in a witness list, and even exhibits not contained on an exhibit list,
19 may come in at trial at the Court's discretion. The government has the right to continue to refine
20 its case and ask leave of Court to supplement its witness list and exhibit list. Given the five
21 month gap between the October filings and the trial date, it would be surprising if the exhibit list
22 and witness list remained identical. The government sought to flag these issues in its motions in
23 limine out of deference to the Court so that the Court would not be caught by surprise during the
24 proceedings, and to afford time to resolve these issues pretrial.

25 The defendant's memorandum ignores these common-sense precepts, and seeks to use the
26 October 2010 filings as a procedural pretext for excluding any changes to the government's case
27 after that date. This argument is legally and procedurally meritless. The October 2010 filing
28 deadline for pretrial papers did not create a right of exclusion, and the government is not

1 precluded from continuing to sharpen its case and evaluate its evidence, especially over a period
2 of nearly half a year. If the defense had been forthright regarding its interest in using the October
3 2010 lists as a pretext for excluding witnesses and exhibits, the government would have argued
4 against such an artificially early deadline and requested a deadline consistent with that contained
5 in the Court's pretrial order, i.e. a filing deadline of three days before the pretrial conference.
6 Consistent with the Court's longstanding pretrial order, the government will file its revised
7 witness lists and exhibit lists on that date, February 24, 2011.

8 The defense further raises the issue of discovery in its claims. While the government has
9 disclosed some photographs to the defense, the government acknowledges that it has not
10 produced and identified the precise photographs it intends to introduce at trial; it will do so by
11 the close of business today, February 17, 2011. The photographs all consist of media photos in
12 the public realm taken during Bonds's playing career. The government submits that the defense,
13 which includes at least six experienced criminal defense lawyers, should have ample time and
14 resources in the 32 days until trial to examine these photographs and determine appropriate
15 pretrial and trial responses. With respect to the issue of Bonds's athletic performance, the
16 government may have demonstrative exhibits, but it does not plan to offer any other exhibits.
17 The information regarding Bonds's remarkable athletic accomplishments in the years prior to his
18 grand jury testimony is, of course, public knowledge. As to the positive amphetamine test, the
19 defense has received discovery regarding that test (Bates Stamp Numbers 1897-2030) and has
20 been fully aware of this issue for a considerable period of time.

21 The defense has identified no prejudice from the government's request to introduce these
22 topics at trial. The defense should be required to respond on the merits so that the Court may
23 resolve these questions substantively. While the defense has failed to identify any particular
24 reason why these topics cannot be addressed consistent with the other motions, the government
25 does not object to the defense motion for additional time to respond. The defense claim that
26 these topics should be barred as a matter of procedural right, however is completely without
27 merit and should be rejected.

