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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 PROPOSED
INSTRUCTIONS (Docket #344)**

Date: April 6, 2011
Time: 3:00 p.m.
Judge: Honorable Susan Illston

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20 The United States does not object to defendant's proposed instructions numbers 1 and 7.

21 The United States objects to the remaining proposed instructions for the following reasons.

22 **A. Defense instruction request #2**

23 The defendant asks the Court to deviate from the standard Ninth Circuit Model Jury Instruction
24 3.9 on the credibility of witnesses, based in part on the Sixth Circuit's model jury instructions.

25 The United States asks the Court not to deviate from the approved Ninth Circuit model jury
26 instruction. Number 6 of the model instruction, which states that the jury may take into account
27 whether any other evidence contradicted the witness's testimony, and number 10 of the

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1 instruction, which states that the jury may take into account any other factors that bear on
 2 believability, fully encompass the additional language the defendant proposes. The model
 3 instructions therefore afford the defendant the ability to argue to the jury that particular witnesses
 4 should not be believed because of inconsistent statements. There is no reason to particularly
 5 highlight this factor by stating it in the jury instruction twice.

6 **B. Defense instructions ##3, 6, and 8**

7 The defendant asks the Court to instruct the jury that the government violated its
 8 disclosure obligations, and to provide the jury with instructions on state law regarding
 9 recordings, and federal law from *2011* (not 2003) on the distribution of human growth hormone.
 10 This is completely improper. As the government forecasted in its motions in limine, the
 11 defendant is trying to inject legal issues that are properly only before this Court, into the factual
 12 inquiry before the jury. The Court should reject the defendant's bid to do this.

13 **C. Defense instruction request #4, regarding Count Five – Obstruction of Justice**

14 In *United States v. Thomas*, 612 F.3d 1107, 1130 (9th Cir. 2010), the Ninth Circuit
 15 explicitly approved of the following jury instruction on obstruction of justice:

16 In order for the defendant to be found guilty of Count [5], the
 17 government must prove each of the following elements beyond a
 18 reasonable doubt:

- 19 1. The defendant corruptly, that is, for the purpose of obstructing
 20 justice,
- 21 2. Obstructed, influenced or impeded, or endeavored to influence,
 22 obstruct or impede, through one of the below listed statements,
- 23 3. The due administration of justice.

24 In order for the defendant to be found guilty of Count [5], you
 25 must all agree that one or more of the following statements
 26 obstructed, influenced or impeded the due administration of
 27 justice, or was made for the purpose of obstructing, influencing or
 28 impeding the due administration of justice. (All of you must agree
 as to which statement or statements so qualify):

1. The statement contained in Count 1;
2. The statement contained in Count 2;
3. The statement contained in Count 3;
- [4.] Statement A: [A portion of [the defendant's] grand jury
 testimony that did not appear in the superseding indictment.]

.....

26 The United States asks that this instruction, which has been explicitly approved, be given
 27 to the jury. The defendant's proposed instruction does not track the instruction that was
 28

1 approved by the Ninth Circuit. For example, line 3 of the instruction requires that the jury find
2 that the that the defendant's grand jury testimony "in its totality" was "intentionally evasive,
3 false, *and* misleading." Docket #344 at 5 (emphasis added).

4 **D. Defense instruction request #5**

5 The United States notes that in *United States v. Doss*, 630 F.3d 1181, 1187 (9th Cir.
6 2011), the Ninth Circuit approvingly cited jury instructions that defined "corruptly" as "to act
7 deliberately for the purpose of improperly influencing or obstructing, or interfering with the
8 administration of justice."

9 **CONCLUSION**

10 For the above-stated reasons, the government respectfully partially opposes the
11 defendant's proposed jury instructions.

12
13 DATED: April 6, 2011

Respectfully submitted,

14
15 MELINDA HAAG
16 United States Attorney

17 /s/

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