No. 09-10079

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BARRY LAMAR BONDS,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES AS APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 07-CR-00732-SI

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TABLE OF CONTENTS

INTRODUCTION. 1

JURISDICTION, TIMELINESS, AND BAIL STATUS. 2

ISSUE PRESENTED.. 3

STATEMENT OF THE CASE. 3

STATEMENT OF THE FACTS. 4

The BALCO investigation. 4

Bonds's testimony before the grand jury. 6

Greg Anderson. 12

The Criminal Charges Against Bonds. 13

The Motion in Limine To Exclude Evidence. 14

The District Court's Ruling.. 19

Anderson's Refusal To Testify. 21

SUMMARY OF ARGUMENT. 21

ARGUMENT.. 25

THE DISTRICT COURT'S ORDER EXCLUDING EVIDENCE RELATING TO THE LABORATORY TEST RESULTS SHOULD BE REVERSED. 25

A. Standards of review. 25

B. The district court wrongly excluded Anderson's statements to Valente identifying Bonds's blood and urine samples. 26

1. The district court abused its discretion in finding Anderson's statements inadmissible under Fed. R. Evid. 801(d)(2)(C). 26

2. Ample evidence established that Anderson was Bonds's agent or servant. 36

3. The district court's misunderstanding of the scope of the residual exception to the hearsay rule led it to erroneously conclude that Anderson's statements should not be admitted under it. 42

C. The BALCO logs are plainly relevant to whether Bonds lied to the grand jury when he testified that he did not knowingly take steroids. 53

CONCLUSION. 56

STATEMENT OF RELATED CASES.. 57

CERTIFICATE OF COMPLIANCE.. 58

CERTIFICATE OF SERVICE. 59

ADDENDUM. 60

TABLE OF AUTHORITIES

FEDERAL CASES

Aliotta v. National R.R. Passenger Corp., 315 F.3d 756 (7th Cir. 2003). 33

Beck v. Haik, 377 F.3d 624 (6th Cir. 2004), *overruled on other grounds by Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009). 40, 41

Boise Cascade Corp. v. United States E.P.A., 942 F.2d 1427 (9th Cir. 1991). . . . 29

Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir. 1986). 36

Fong v. American Airlines Inc., 626 F.2d 759 (9th Cir. 1980). 45

Glendale Federal Bank, FSB v. United States, 39 Fed. Cl. 422 (Fed. Cl. 1997). 29

Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985). 33

Hanson v. Waller, 888 F.2d 806 (9th Cir. 1989). 31

Harris v. Itzhaki, 183 F.3d 1043 (9th Cir. 1999). 36

Horner v. Merit Sys. Protection Bd., 815 F.2d 668 (Fed. Cir. 1987). 29

Idaho v. Wright, 497 U.S. 805 (1990). 51

Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990). 39, 40, 41

Metro-Goldwyn-Meyers Studio v. Grokster, Ltd ., 454 F. Supp. 2d 966 (C.D. Cal. 2006). 40

Michaels v. Michaels, 767 F.2d 1185 (7th Cir. 1985). 29, 30

Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992). 34

Precision Piping and Instruments, Inc. v. E.I. du Pont de Nemours and Co., 951 F.2d 613 (4th Cir. 1991).. 26

Reid Brothers Logging Company v. Ketchikan Pulp Company, 699 F.2d 1292 (9th Cir. 1983). 27

United States v. Benavidez-Benavidez, 217 F.3d 720 (9th Cir. 2000). 26

United States v. Chang, 207 F.3d 1169 (9th Cir. 2000). 36

United States v. Curtin, 489 F.3d 935 (9th Cir. 2007) (en banc). 54

United States v. Durham, 464 F.3d 976 (9th Cir. 2006).. 25

United States v. Finley, 301 F.3d 1000 (9th Cir. 2002). 26

United States v. Friedman, 593 F.2d 109 (9th Cir. 1979). 51

United States v. George, 960 F.2d 97 (9th Cir. 1992). 51

United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976).. 27

United States v. Laster, 258 F.3d 525 (6th Cir. 2001). 46

United States v. Marchini, 797 F.2d 759 (9th Cir. 1986). 45

United States v. McGee, 189 F.3d 626 (7th Cir. 1999).. 33

United States v. Morgan, 385 F.3d 196 (2d Cir. 2004). 51

United States v. Ortega, 203 F.3d 675 (9th Cir. 2000).. 25

United States v. Perez, 658 F.2d 654 (9th Cir. 1981). 47

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006).. 55

United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998). 43

United States v. Shunk, 881 F.2d 917 (10th Cir. 1989). 38

United States v. Sokolow, 91 F.3d 396 (3d Cir. 1996). 30

United States v. United States Gypsum Co., 333 U.S. 364 (1948). 37

United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994).. . . . . 46, 52

Williamson v. United States, 512 U.S. 594 (1994). 48

STATE CASES

Cristler v. Express Messenger Systems, Inc., 171 Cal. App. 4th,
72 Cal. Rptr. 3d 34 (Cal. App. 4 Dist. 2009). 41

FEDERAL STATUTES, REGULATIONS, RULES, AND GUIDELINES

18 U.S.C. § 1503. 4

18 U.S.C. § 1623(a).. 4

18 U.S.C. § 3231. 2

18 U.S.C. § 3731. 3

18 U.S.C. § 6003. 6

28 U.S.C. § 1291. 3

28 C.F.R. § 0.175.. 6

Fed. R. Evid. 102.. 46

Fed. R. Evid. 401. 53

Fed. R. Evid. 402.. 53

Fed. R. Evid. 801(d)(2). 36

Fed. R. Evid. 801(d)(2)(C). . . . . *passim*

Fed. R. Evid. 801(d)(2)(D). . . . . *passim*

Fed. R. Evid. 801(d)(2)(E). 17, 47

Fed. R. Evid. 803(6). 15, 16, 17

Fed. R. Evid. 803(24). 45

Fed. R. Evid. 804(a)(2). 44

Fed. R. Evid. 804(b)(3). 34, 47

Fed. R. Evid. 807. . . . . *passim*

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INTRODUCTION

Barry Bonds has been charged with making false statements to a grand jury investigating the illegal distribution of performance-enhancing drugs. The grand jury concluded that Bonds lied numerous times, including when he claimed that he had not knowingly received illegal performance-enhancing drugs from his trainer, Greg Anderson, during 2000 and 2001.

To prove perjury at trial, the government intended to introduce evidence it obtained from BALCO Laboratories, Inc. ("BALCO") which showed that Bonds had tested positive for illegal substances during 2000 and 2001. Specifically, the government proffered that Bonds had testified in the grand jury that in 2000 and

2001 he gave his blood and urine samples to Anderson so that Anderson could have those samples tested at BALCO. BALCO employee James Valente would testify that when he received the samples from Anderson, Anderson identified them as having come from Bonds. Upon receipt of the urine samples, Valente entered Bonds's name or initials into log sheets, assigned each sample a number, and sent the sample to a laboratory for analysis. In contrast, Valente sent the blood samples to a laboratory for testing under Bonds's name. Anderson refused to testify in the grand jury, and will continue to refuse to testify at Bonds's trial upon pain of contempt.

Bonds moved to exclude (a) Valente's testimony that Anderson identified the samples as coming from Bonds, (b) the log sheets, and (c) the test results. The district court excluded all of this evidence. In so doing, the court misapplied the Federal Rules of Evidence, made erroneous findings of fact, and imposed an unjustifiably high standard for admissibility. Its ruling should be reversed.

JURISDICTION, TIMELINESS, AND BAIL STATUS

This is a government appeal from the district court's order excluding evidence in a criminal case. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The district court issued a written order excluding the evidence on

February 19, 2009. ER 4-24.[1] On February 27, 2009, the United States filed a timely notice of appeal. ER 1-3. This Court has jurisdiction pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291. Bonds is not in custody.

ISSUE PRESENTED

Whether the district court erred in excluding (1) Valente's testimony that Anderson identified urine and blood samples as belonging to Bonds when he delivered them to BALCO for testing given that, among other things, Bonds admitted in the grand jury that he authorized Anderson to deliver his samples to BALCO for testing, and (2) log sheets from the ledger Valente regularly kept to record receipt of the samples and the corresponding test results where the documents qualify as business records, and any question about whether they are sufficiently connected to Bonds goes to weight not admissibility.

STATEMENT OF THE CASE

On December 4, 2008, a grand jury for the Northern District of California returned a Second Superseding Indictment charging Barry Lamar Bonds with ten

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[1] " ER" refers to the government's excerpts of record from *United States v. Bonds*, No. 07-CR-00732, which are contained in five volumes and bates stamped pages 1-805. "JND" refers to a volume of judicially noticeable documents from *United States v. Victor Conte, et al.*, No. 04-CR-0044 and the docket sheet in *In re: Greg Francis Anderson*, No. 06-XR-90292-WHA. The Honorable Susan Illston presided over *Conte* and is presiding over *Bonds*. The Honorable William H. Alsup presided over *In re: Greg Francis Anderson*.

counts of making false declarations before the grand jury (18 U.S.C. § 1623(a)), and one count of obstruction of justice (18 U.S.C. § 1503). Clerk's Record ("CR") 77; ER 182-97, 801. Trial was set to begin on March 2, 2009. CR 52; ER 800. Before trial, Bonds moved *in limine* to exclude evidence. CR 82; ER 801. On February 19, 2009, the district court issued a written order granting in part Bonds's motion. CR 137; *see* ER 4-24, 804. On February 27, 2009, the government filed a notice of appeal from the district court's order. ER 1-3.

STATEMENT OF THE FACTS

The BALCO investigation

BALCO Laboratories, Inc. ("BALCO") was a Burlingame California corporation that performed, among other tasks, blood testing. ER 184. In 2003, the Internal Revenue Service began investigating whether BALCO was distributing anabolic steroids and other illegal performance-enhancing drugs and laundering the proceeds of that distribution. ER 185, 459. On September 3, 2003, law enforcement officers executed a search warrant at BALCO's Burlingame premises. ER 185, 459. During the search, federal agents found documents indicating illegal distribution of anabolic steroids and other performance-enhancing drugs to dozens of athletes in a variety of sports. ER 459.

Evidence seized during that search revealed that Barry Bonds had a relationship with BALCO. ER 185, 459. Specifically, agents found the results of numerous blood tests for Bonds. ER 459. They also found a ledger maintained by the BALCO Director of Operations, James Valente, which revealed a coding system in which Bonds's urine samples were assigned numbers and then referred for testing to Quest Diagnostics ("Quest"), a national drug testing laboratory. ER 459, 468, 487-88. For example, log sheets from the ledger revealed three donor numbers assigned to "Barry B.": 100121 (collected on 11/20/00), 100145 (collected on 2/4/01), and 100155 (collected on 2/18/01). ER 245. Drug test results found at BALCO corresponding to those donor numbers showed positive test results for the injectable steroids methenolone and nandrolone. *See* ER 257-58 (Quest report for 100121 (date 11/28/00), positive for both); ER 263 (Quest report for 100145 (date 2/5/01), positive for methenolone); ER 266-67 (Quest report for 100155 (date 2/19/01), positive for both). Moreover, blood test results in Bonds's name found at BALCO revealed liver enzymes and cholesterol levels consistent with anabolic steroid use. ER 460, 470, 503; *see, e.g.,* ER 280.

Interviewed at the time of the search, BALCO owner Victor Conte and Valente implicated Greg Anderson in a scheme to distribute illegal steroids. ER 459. Based on that information and the documents found at BALCO, agents

executed a search warrant at Anderson's home. ER 459. There they found handwritten notes, calendars, and drug ledgers suggesting that Bonds and other athletes had received and paid for illegal performance-enhancing drugs. ER 459-60; *see* ER 386-451. Specifically, the seized documents suggested a detailed record of steroid distribution from Anderson to Bonds from 2001 to 2003. ER 460; *see, e.g.,* ER 387, 399, 401, 403, 435; *see generally* ER 386-451. Although Anderson initially implicated himself and athlete clients of his, he refused to explain any of the documents containing references to Bonds. ER 460.

Bonds was thereafter subpoenaed to testify before a federal grand jury to answer questions regarding his knowledge and involvement with BALCO, Conte, Valente, and Anderson. ER 185.

Bonds's testimony before the grand jury

Bonds testified before the grand jury on December 4, 2003 under an immunity order (18 U.S.C. § 6003, 28 C.F.R. § 0.175). ER 37-39, 185. Before asking questions related to the BALCO investigation, the prosecutor explained that the immunity order precluded the government from using any of Bonds's testimony in a prosecution against him, unless he committed perjury. ER 34, 38-42. Bonds said he understood that he could be criminally prosecuted if he testified untruthfully. ER 40, 42.

Bonds testified that he was born on July 24, 1964, that he had been a professional baseball player since 1985, and that he had played for the San Francisco Giants since 1993. ER 42-43, 142. In 2001, he set the single-season home run record by hitting 73 home runs. ER 43.

Bonds said he had known Greg Anderson for more than 25 years -- since "[f]ifth grade, 6th grade" (ER 43-44) -- and that starting in around 1998, he began training with him regularly at World's Gym in Burlingame. ER 44-45. Bonds switched trainers to work with Anderson because he wanted "another coach" to push his body "to another level." ER 45-46. Bonds recounted that he "liked Greg's philosophy" of weight training and believed in having multiple trainers because people should be "experts in their . . . fields." ER 46; *see id.* ("I have a running coach, I have a stretch and flexibility coach, I have a strengthening coach."). In addition to weight training with Bonds, Anderson helped Bonds with his nutrition, and provided him with "[v]itamins and protein shakes." ER 48. Starting in 2003, Anderson began supplying Bonds with a "cream" and some "flax seed oil" that Bonds "assumed" Anderson got from BALCO. ER 54, 58-59, 62-68, 70-71. Bonds testified that Anderson was with him "every day." ER 92; *see also* ER 68 ("Greg comes to the ballpark every day, and we train every day.").

Although Bonds said that Anderson never asked for money, Bonds paid Anderson $15,000 cash each year for "training" him "every day." ER 77, 92, 100-02, 165; *see* ER 116 (Bonds says he and Anderson still train together "regularly"). Bonds also said that during spring training, Anderson would travel to meet and train with him on "[e]very other weekend." ER 92-93. Ultimately, Bonds admitted that he paid Anderson for his work just as he paid his other trainers. ER 170. Bonds also gave Anderson a $20,000 cash bonus after he hit 73 home runs. ER 164.

Around 2000, Bonds began providing Anderson with blood and urine samples so that they could be tested at BALCO to determine whether he had any "deficiencies."[2] ER 47-49; *see* ER 48 (Bonds explains that getting "the blood test at BALCO was just the thing to figure out what you're deficient in and be able to supplement that with vitamins or food intake"). Calling the testing "a neat idea," Bonds estimated that he provided Anderson with five or six blood samples for testing. ER 48. Bonds usually had his doctor – Dr. [Arthur] Ting – draw his blood at his house, and then the doctor would give the blood sample to Anderson to deliver to BALCO for testing. ER 50, 143; *see* ER 50 ("I had my own personal

[2] Bonds testified – as did Valente – that BALCO was located "[r]ight down the street" from the World Gym where he trained with Anderson. ER 71; *see* ER 621.

doctor come up to draw my blood. I only let my own personal doctor touch me. And my own personal doctor came up and drew my blood and Greg took it to BALCO."); ER 71 (explaining that on one occasion, he had his doctor draw his blood at BALCO); ER 74, 143 ("My doctor comes up to my house, I give Greg the blood."); ER 152-53 (Bonds explains that the doctor came to his house "with vials" and "drew the blood, we just gave it to Greg. Greg went down there [*i.e.*, BALCO] and dealt with it").

Although he could not recall the exact number, Bonds estimated that he provided four urine samples directly to Anderson to be submitted to BALCO. ER 48-49, 106. Regarding the urine samples, Bonds said the following:

> Q. What about the urine samples?
>
> A. Same thing, come to my house, here, go.
>
> Q. That was the doctor, that was at your house, and provided it to -
>
> A. Yes.
>
> Q. - - to Mr. Anderson; right?
>
> A. Yes.
>
> Q. Did he tell you where those samples would be tested?
>
> A. Where he was taking them?

Q. Yes.

A. I believe BALCO.

Q. Did he tell you that?

A. Yeah – yes.

Q. Did he tell you what he was going to test them for?

A. I believe it was the same thing for the blood, the blood and the thing are the exact same thing. So, I didn't ask him.

ER 50; *see also* ER 51, 107.

Bonds also testified about his own and Anderson's relationship with BALCO and Victor Conte. ER 51-53. He explained that he visited BALCO "two or three times," and that on one of those trips Anderson introduced him to Conte and told him that Conte would be testing and analyzing his blood. ER 52-53, 63, 71, 113. Bonds even talked to Conte about "drawing the blood" to "analyze" the "levels of [his] body." ER 113-14.[3]

Confronted with the results from Quest for the urine sample associated with "Barry B." and donor number 100121, Bonds said that he had never seen the

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[3] Stan Conte – a San Francisco Giants' trainer with no relation to Victor Conte – testified in the grand jury that Bonds told him that he and Anderson were "developing a program that was specific to [Bonds]; that they would take [Bonds's] blood and analyze it and decide which vitamins he needed and then tailor it to his particular needs." ER 759.

results and that he simply "gave samples to Greg. Greg took them to BALCO." ER 106-11.[4] Regarding the blood tests, Bonds claimed that he never asked to see them because he had "no reason to doubt or disbelieve [Anderson]," that he relied on Anderson to give him the results because "I didn't see the papers," and that Anderson "just said: 'You're negative – you're negative.'" ER 107, 124. Confronted with a November 2001 lab result that revealed that his blood was being tested for testosterone, Bonds stated that he "just gave the blood" to his doctor and then to Anderson, and that "Greg just tells me" the results and he "never saw the documents." ER 142-43. When asked about the extraordinary level of trust he placed in Anderson, Bonds responded "You're right. I did trust Greg." ER 124. He added "[n]o one ever told me anything" was wrong with the test results, that Anderson had just told him that "'everything's fine,'" and because he trusted Anderson, he "didn't think about it." ER 153. Bonds also said that Anderson never told him that any of the BALCO products that Anderson used on him were either steroids or would mask steroids. ER 70.

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[4] Bonds confirmed that he was working with Anderson at the time when urine sample 100121 was taken (*i.e.*, 11-28-2000). ER 107-08. Although sample 100121 tested positive for methenolone and nandrolone, Bonds denied taking steroids in November 2000. ER 110. Bonds also claimed that he had "no idea" why Conte or anyone at BALCO had his urine or blood samples tested for steroids. ER 121-23, 143.

Greg Anderson

On February 12, 2004, a federal grand jury in the Northern District of California returned an indictment in *United States v. Conte et al.*, CR No. 04-0044-SI, charging Greg Anderson, Conte, Valente, and Remi Korchemny[5] with, among other things, conspiring to illegally distribute anabolic steroids, and conspiring to defraud the United States by introducing and delivering into interstate commerce "misbranded drugs." JND 1-31.

On July 15, 2005, Anderson pleaded guilty to conspiring to distribute and to possess with the intent to distribute anabolic steroids and money laundering associated with the illegal distribution. JND 46-47. At his plea hearing, Anderson admitted that between December 1, 2001 and September 3, 2003, he engaged in a conspiracy with Conte and Valente to distribute illegal steroids and other performance enhancing drugs to athletes. JND 43-45. Specifically, Anderson admitted that, among other things, he had distributed to various athletes a "testosterone/epitestosterone cream" (a.k.a. "the cream") and "synthetic tetrahydragestrinone" (a.k.a. "THG" or "the clear") which he had obtained from BALCO. JND 43-46.

---

[5] Korchemny was a track coach who got performance-enhancing drugs from Conte and provided them to track athletes. JND 2.

On April 20, 2006, Anderson was subpoenaed to testify before the grand jury investigating whether Bonds committed perjury when he testified in December of 2003 that he did not knowingly use steroids. Anderson refused to testify before the grand jury, was twice held in civil contempt, and was twice ordered incarcerated until he complied with the subpoena. JND 51-58.

On November 15, 2007, the grand jury indicted Bonds for making false statements. CR 1; ER 6 n.2, 797. Anderson was released from custody that day. JND 58 (CR 83); *see also* ER 6 n.2.

The Criminal Charges Against Bonds

By second superseding indictment filed December 4, 2008, the grand jury charged Bonds with ten counts of making false statements in the grand jury and one count of obstruction of justice. CR 77; ER 184-94. The indictment charged that Bonds lied during his testimony when he (1) denied having ever knowingly taken steroids, (2) denied having ever taken testosterone that he got from Anderson, (3) denied taking steroids in 2001, (4) claimed that Anderson never gave him any injections, (5) denied that Anderson ever gave him human growth hormone, (6) denied having received testosterone or "the cream" from Anderson prior to 2003, (7) denied getting the "the clear" from Anderson prior to 2003, (8) denied taking anything other than vitamins from Anderson prior to 2003, (9)

denied getting the cream or the clear from Anderson during the 2001 season, and (10) denied getting the cream or the clear from Anderson until after the 2002 baseball season. ER 184-94. The indictment also charged obstruction of justice based on Bonds's having given "intentionally evasive, false, and misleading" testimony in the grand jury that included the false statements in Counts 1-10. ER 193.

The Motion in Limine To Exclude Evidence

During discovery, the government produced several categories of evidence - *e.g.*, laboratory and chemical tests, documentary evidence, and expert opinion on the effects of anabolic steroids and human growth hormone – that it intended to introduce at trial. *See* ER 195-97, 204. On January 15, 2009, Bonds filed a motion *in limine* seeking exclusion of all of this evidence on multiple grounds. CR 82; *see* ER 198-228. The government opposed the motion. ER 452-511. The following is a summary of those pleadings as relevant to the issues raised on appeal:

Laboratory test results (urine): Bonds objected to the admission of the laboratory test results for Bonds's urine on relevance grounds "[u]nless the government can supply persuasive, admissible evidence demonstrating that a specific blood or urine sample belonged to Mr. Bonds." ER 210.

In response, the government stated that the Quest laboratory test results on the urine samples were admissible as business records under Federal Rule of Evidence Rule 803(6). ER 464-66. It offered the following evidence to establish that the test results fit within the business records exception: Bonds gave his urine samples to Anderson so that the samples would be tested at BALCO (Bonds's grand jury testimony, Valente testimony); Anderson gave the samples to Valente at BALCO and identified them as belonging to Bonds (Valente testimony); Valente entered Bonds's name on the BALCO log sheet as "Barry B.," "BB," or "Barry" alongside the donor number that he assigned to the sample (Valente testimony, BALCO log sheet); Valente sent the samples to Quest for testing (Valente testimony, BALCO log sheet, Valente/Quest correspondence found at BALCO that refers to Bonds's identification donor numbers, Quest records that reflect referrals for testing of those samples from BALCO); Quest received the urine samples, tested them, and sent test results back to Valente at BALCO (Quest documents revealing chain of custody and other correspondence, documents found at BALCO, testimony of Quest records custodian, Valente testimony); BALCO-maintained copies of the results (documents found during search of BALCO, Valente testimony); and Valente gave the test results to Anderson (Valente

testimony, documents found at Anderson's home, statements made by Anderson during search of his home). ER 467-69; *see* ER 437-41.

Laboratory test results (blood): Again, Bonds objected to admission of the laboratory test results for his blood on relevance grounds "[u]nless the government can supply persuasive, admissible evidence demonstrating that a specific blood or urine sample belonged to Mr. Bonds." ER 210.

In response, the government stated that the LabOne and Specialty Laboratories test results for the blood samples were admissible as business records under Rule 803(6). It offered the following evidence to establish that the test results fit within that exception: Bonds allowed his doctor, Dr. Ting, to draw his blood and then give the samples to Anderson so that they would be delivered to BALCO (Bonds's grand jury testimony, Dr. Ting testimony); Anderson gave the samples to Valente and identified them as belonging to Bonds (Valente testimony, Conte testimony); BALCO submitted the samples under Bonds's name and birth date to LabOne and Specialty Laboratories for testing (Valente testimony, Dr. Ting testimony, LabOne and Specialty Laboratories records); LabOne and Specialty Laboratories received the blood samples, tested them, and sent test results back to Valente at BALCO (LabOne's and Specialty Laboratories' documents revealing chain of custody and other correspondence, documents found

at BALCO, testimony of records custodians from both labs, Valente testimony); BALCO maintained copies of the results (documents found during search of BALCO, Valente testimony); and Valente gave the test results to Anderson (Valente testimony). ER 469-70; *see, e.g.*, ER 260, 261, 277-78.

BALCO log sheets: Bonds objected to the admission of the BALCO log sheets on the grounds that "[a]lthough the logs themselves were allegedly authored by a witness that the government intends to call at trial, they contain information – *e.g.*, the source of the specific blood or urine sample – that constitutes inadmissible hearsay." ER 211.

The government responded that the BALCO log sheets were admissible (1) as business records under Rule 803(6); (2) under the residual exception, Rule 807; and (3) as co-conspirator statements under Rule 801(d)(2)(E). It would authenticate the logs through Valente who created and kept them. Valente would testify that he kept the logs in the ordinary course of business to record the identity of the person who provided the sample for testing. With respect to Bonds's samples, Valente would testify that he received them from Anderson who identified them as having come from Bonds. Valente recorded "Barry B.," BB," or "Barry" in the log and assigned a donor number at the time that he received the sample from Anderson. ER 489-96; *see also* ER 696-99 (Valente expected to

testify at trial that one of his "day-to-day responsibilities" at BALCO was to keep the log "to monitor circumstances where he was sending out samples, urine samples, to the labs . . . to get them checked to see whether or not they were detectible for steroids," that Anderson "'on a regular basis, would come in and give me samples,'" that he knew "'Anderson as a person who is associated with Mr. Bonds,'" and that Anderson would come in on a regular basis and tell him that "'Yeah, this is on behalf of Barry'"). Regarding Bonds's claim that Anderson's statements identifying the samples were inadmissible hearsay, the government offered that the statements were (1) admissible as admissions of party opponent because Anderson had either been authorized to speak on behalf of Bonds or was acting as Bonds's employee or agent when he identified the samples, or they were co-conspirator statements; (2) statements against Anderson's penal interest and therefore admissible under Federal Rule of Evidence 804(b)(3); and (3) admissible under Federal Rule of Evidence 807, the residual exception to the hearsay rule, because the surrounding circumstances established their trustworthiness. ER 489-96, 746-50.

The government also argued that the BALCO log sheets and test results were independently admissible as business records even if the district court excluded Anderson's statements to Valente. ER 495, 750.

The District Court's Ruling

In its written order, the district court held that unless Anderson testified at trial, it would exclude on relevance grounds the test results on the urine samples from Quest, the BALCO log sheets, and the test results on the blood samples from LabOne and Specialty Laboratories. ER 4-24. In a nutshell, it concluded that without Anderson's testimony, the government could not establish that the samples came from Bonds, and thus had no way to tie the test results to Bonds. ER 12, 14. It excluded the BALCO log sheets Valente maintained as business records because it concluded that even if they were business records, without Anderson's testimony, the government could not sufficiently establish that the samples came from Bonds. ER 12. It rejected the government's arguments that Anderson's out-of-court statements to Valente identifying the samples as Bonds's were admissible for the following reasons.

First, it held that the statements were not admissible under Rule 804(b)(3) as statements against penal interest because "there is nothing criminal about submitting a urine or blood sample for analysis at a laboratory" and thus "[i]t is not evident" how Anderson's saying "'[t]his sample is from Bonds'" would have subjected Anderson to criminal liability. ER 7.

Second, it held that the statements were inadmissible as co-conspirator statements because the government had not demonstrated that Valente and Anderson were conspiring to defraud the United States by distributing misbranded drugs because they had pleaded guilty to conspiring to distribute anabolic steroids. ER 8. The court also found that the government had failed to demonstrate that Bonds was a party to the Valente/Anderson conspiracy. ER 8.

Third, the court held that there were insufficient guarantees of trustworthiness to admit Anderson's statements under Rule 807 because Valente testified in the grand jury that on one occasion he, Valente, "mislabeled" a sample he received from Anderson. ER 9-10. The court also found Anderson's statements suspect because when Valente submitted the urine samples to Quest for testing, his transmittal letters stated that a "Dr. Goldman" had ordered that Bonds's urine samples be tested for steroids. The court concluded that because Valente testified in the grand jury that he had never seen Dr. Goldman (who was the BALCO medical director) actually consult with Bonds, Anderson's statements identifying Bonds's samples were suspect. ER 9-10; *see* ER 628-31.

Fourth, the court rejected the government's argument that the statements were admissible as admissions by a party opponent. Specifically, the court held that the government had not provided sufficient evidence to establish that (1)

Anderson, as Bonds's trainer, was authorized to identify the samples given that "[t]rainers, unlike lawyers, brokers, sale personnel, and those with supervisory responsibilities, are not generally authorized to speak for principals," and (2) "the task of identifying [Bonds's] samples was within the scope of Anderson's agency." ER 10-12.

Anderson's Refusal To Testify

The government subpoenaed Anderson to testify at Bonds's trial. Because it had excluded evidence based on his possible recalcitrance, the district court agreed to determine before trial whether Anderson would persist in his refusal to testify in the government's case-in-chief. ER 804 (CR 146). After the court carefully explained that Anderson's testimony was "central" to the presentation of the government's case, that he had no right to refuse to testify at the trial and if he continued to refuse to testify at trial, he would be in contempt and the court would incarcerate him until he did testify, Anderson still said that he would not testify for the government at Bonds's trial. ER 778-80.

SUMMARY OF ARGUMENT

Barry Bonds is charged with making false statements to the grand jury about whether he knew that one of his trainers, Greg Anderson, was supplying him with non-detectable performance-enhancing drugs as early as 2000 and 2001. As part

of its proof that Bonds committed perjury, the government intended to introduce laboratory test results from 2000 and 2001 establishing that Bonds's urine and blood samples had tested positive for steroids or indicated the presence of steroids. In his grand jury testimony, Bonds admitted that he had given blood and urine samples to Anderson so that Anderson could deliver them to BALCO for testing. When Anderson delivered the samples, he identified them as belonging to Bonds, and Valente labeled them as such before sending them to the labs for testing. As he did in the grand jury, Anderson refuses to testify at trial.

Because Anderson will not testify that he delivered Bonds's samples to Valente, the district court excluded all of the evidence related to the drug test results. This ruling is wrong and should be reversed.

First, the district court erroneously concluded that Anderson's out-of-court statements to Valente identifying the samples as having come from Bonds were inadmissible hearsay. Bonds testified in the grand jury that he authorized Anderson to deliver urine and blood samples to BALCO for testing. The very nature of that task meant that Anderson was also authorized to identify the samples, and this alone established that the statements were admissible under Federal Rule of Evidence 801(d)(2)(C). The district court's conclusion otherwise rested on a misunderstanding of the scope of the rule and clearly erroneous

findings of fact. Moreover, the district court erred in concluding that the government had failed to demonstrate that as Bonds's servant or employee, Anderson was acting within the scope of his employment when he identified the samples to Valente. Again, the district court's decision rested on a misunderstanding of the scope of the rule and clearly erroneous findings of fact. In short, the record firmly established that Anderson's statements were admissible as admissions of a party opponent and the district court abused its discretion in excluding them as hearsay.

Second, even if the statements were hearsay, the district court erred in failing to admit them under the residual exception to the hearsay rule. Again, the district court's decision rested on an unjustifiably narrow reading of the scope of Federal Rule of Evidence 807. This Court has explicitly held that the residual exception exists to provide courts with flexibility in admitting statements traditionally regarded as hearsay but not falling within any of the conventional exceptions. For that reason, the reference in the rule to "guarantees of trustworthiness" equivalent to those in the enumerated exceptions strongly suggests that *almost fitting* within one of these exceptions cuts in favor of admission, not against. In addressing the trustworthiness of the statements, however, the district court focused on what Valente did with them after he

received them, and never addressed whether Anderson had a motive to lie when he identified the samples as belonging to Bonds. This was error. Nothing called into question Anderson's credibility vis-a-vis the challenged statements. Because the district court wrongly construed the scope of Rule 807, and because it improperly focused on Valente's actions rather than Anderson's lack of a motive to lie in assessing whether the statements were trustworthy, it abused its discretion in finding the statements were inadmissible under Rule 807.

Finally, even if this Court were to conclude that the district court properly excluded Anderson's statements, it does not follow that the log sheets and test results are inadmissible as well. The district court agreed that both the log sheets and the test results were business records but excluded them as irrelevant without Anderson's testimony. But the log sheets identify three urine samples submitted in 2000 and 2001 as belonging to "Barry B.," and the test results that correspond to the "Barry B." samples reveal positive results for steroids. On their face, therefore, these documents tend to show that Bonds was lying when he testified in the grand jury that he did not knowingly take steroids during that time. If Bonds wishes to argue that the log sheets do not reflect his urine samples, he is free to make that argument to the jury, but there is no question that this evidence meets the low standard of relevance set by the Federal Rules.

ARGUMENT

THE DISTRICT COURT'S ORDER EXCLUDING EVIDENCE RELATING TO THE LABORATORY TEST RESULTS SHOULD BE REVERSED

The district court's decision to exclude the laboratory test results and the BALCO log sheets was driven by its conclusion that, without Anderson's testimony, the government could not establish that the blood and urine samples submitted for testing actually came from Bonds. Underlying that ruling was its decision to exclude Valente's testimony establishing that Anderson told him that the samples he was delivering belonged to Bonds. Both rulings are in error and should be reversed.

A. Standards of review

The district court's construction or interpretation of the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule, is reviewed *de novo*. *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006) (citations omitted). This Court reviews for abuse of discretion a district court's decision to exclude evidence at trial. *United States v. Ortega,* 203 F.3d 675, 682 (9th Cir. 2000) (exclusion under a hearsay rule). Reversal is appropriate where the trial court made an error of law or a clearly erroneous finding of fact, or where the reviewing court has "'a definite and firm conviction that the district

court committed a clear error of judgment.'" *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (quoting *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000)).

B. The district court wrongly excluded Anderson's statements to Valente identifying Bonds's blood and urine samples

1. The district court abused its discretion in finding Anderson's statements inadmissible under Fed. R. Evid. 801(d)(2)(C)

Under Federal Rule of Evidence 801(d)(2)(C), a statement is not hearsay if it is offered against a party and is "a statement by a person authorized by the party to make a statement concerning the subject." "Authority" as it is used in Rule 801(d)(2)(C) means "authority to speak" on a particular subject on behalf of someone else. *See Precision Piping and Instruments, Inc. v. E.I. du Pont de Nemours and Co.,* 951 F.2d 613, 619 (4th Cir. 1991); *see id.* ("Authority" as it is used in Fed. R. Evid. 801(d)(2)(C) "should be distinguished from its use by the district court here in applying Rule 801(d)(2)(D). In the former, a statement is not hearsay if it is offered against a party and is a statement by a person authorized by the party to make a statement concerning the subject").

"A party can authorize virtually anyone to speak for him – a spouse, parent, offspring, friend, business partner or associate, employee, attorney, broker, and so

forth." 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:50, p. 409 (3d ed. 2007) (hereinafter "Federal Evidence"); *see, e.g.*, *Reid Brothers Logging Company v. Ketchikan Pulp Company*, 699 F.2d 1292, 1306-07 (9th Cir. 1983) (report on party company's operations written by employee of related company at request of party's board chairman and distributed by party to its executives, officers, and managers was clearly authorized and admissible under Rule 801(d)(2)(C)). Speaking authority exists even though not expressly conferred where the nature of the relationship and the task the speaker is to perform imply this result. Federal Evidence § 8:50, p. 410-11; *see, e.g., United States v. Iaconetti*, 540 F.2d 574, 576-77 (2d Cir. 1976) (where defendant GSA quality assurance specialist requests bribe from company president, testimony from president's colleague relating defendant's request for a bribe is admissible under Rule 801(d)(2)(C) because "by demanding the bribe [defendant] necessarily authorized the persons who ran the business to discuss his demand among themselves").

Bonds's grand jury testimony unequivocally established that as early as 2000, he started giving blood and urine samples to Anderson to deliver to BALCO for the sole purpose of having those samples tested. *See* ER 47-51, 71, 74, 76-77, 106-08, 143, 152-53. Bonds testified at length about the process by which he gave

the samples to Anderson, that he had his doctor travel to his home to draw his blood because he let no one else touch him, and how, in each case, Anderson took the blood samples to BALCO for testing. ER 50, 71, 74, 143, 152-53. Bonds said he gave his urine samples to Anderson for the same purpose. ER 50-51. Although Bonds was not asked whether he specifically told Anderson to identify his samples to the employees at BALCO, given the rest of his testimony and the nature of the task, there can be no doubt that he bestowed on Anderson the authority to do so. To conclude otherwise leads to the illogical result that Anderson was only authorized to deliver the samples to Valente and that Valente had to guess at what to do with them and how to record them from there.

The district court committed multiple legal errors in rejecting the government's argument that Bonds's grand jury testimony established that he had authorized Anderson to identify his blood and urine samples.

First, the court conflated the requirements of Rule 801(d)(2)(C) and Rule 801 (d)(2)(D) when it concluded that the government had not shown that "defendant hired Anderson" to perform the "task" of delivering his samples to BALCO. ER 11. Setting aside the factual inaccuracy of that finding,[6] the premise

[6] Bonds testified that he paid Anderson $15,000 per year as his trainer, and that he once gave him a $20,000 bonus. Although Bonds referred to Anderson as a "friend," when pressed, he admitted that he paid Anderson just as he paid all of

is legally flawed. Federal Rules of Evidence 801(d)(2)(C) and (D) "are presented in the disjunctive and should not be collapsed into one rule." *Glendale Federal Bank, FSB v. United States*, 39 Fed. Cl. 422, 424 (Fed. Cl. 1997). Federal Rule of Evidence 801(d)(2) has "five distinct parts," and "each of these five parts describes a circumstance under which a statement will be considered an admission by a party-opponent." *Id.* Although "the difference between the 'person authorized' of 801(d)(2)(C) and the 'agent' of 801(d)(2)(D) is not as apparent," a court should not treat either Rule 801(d)(2)(C) or Rule 801(d)(2) (D) "as superfluous nor interpret either rule so as to render its companion rule without effect." *Id.* (citing *Horner v. Merit Sys. Protection Bd.,* 815 F.2d 668, 674 (Fed. Cir. 1987) & *Boise Cascade Corp. v. United States E.P.A.,* 942 F.2d 1427, 1432 (9th Cir. 1991)).

Applying this analysis, if Anderson is an agent or employee, then his statement falls into category (D) and the court was not required to determine whether or not he was specifically "authorized" to speak, provided the statements were within the scope of his duties. If Anderson was not an agent, then his statements may fall into category (C), and the court was only required to determine whether his statements were "authorized" within the meaning of the Rule.

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his other trainers. *See* ER 100-02, 170.

Glendale Federal Bank, FSB, 39 Fed. Cl. at 424; *see, e.g., Michaels v. Michaels*, 767 F.2d 1185, 1201 (7th Cir. 1985) (telexes sent by a third party to potential buyers of defendant's company were admissible under Rule 801(d)(2)(C) because "[v]iewing the other evidence in the light most favorable to the plaintiff, [the defendant] authorized [the third party] to act as the Company's broker and contact . . . potential buyers" "even if a broker is not an agent for purposes of Rule 801(d)(2)(D)"); *but see United States v. Sokolow*, 91 F.3d 396, 402 (3d Cir. 1996) (Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered).

The bottom line is that Bonds could authorize anyone – *e.g.*, a friend, a colleague, a trainer – to speak for him on any given subject, and the government was not required to show that Anderson was also "hired" for that specific purpose. By imposing this additional requirement under the rule, the district court legally erred.

Second, the district court's conclusion that "the rationale for Rule 801(d)(2)(C) simply does not apply here" because "[t]rainers, unlike lawyers, brokers, sales personnel, and those with supervisory responsibilities, are not generally authorized to speak for principals" is not only legally wrong, it ignores most of Bonds's grand jury testimony. As a legal matter, Rule 801(d)(2)(C)

contains no limitation on who can be authorized to speak for a party on a particular subject, and as noted above, a party can authorize *anyone* to speak on their behalf.[7] While the status of the speaker may have some bearing on whether the party actually authorized the person to speak on their behalf, it is not dispositive. Rather, the existence and limits of the authority are determined in light of conduct by the party and the speaker and the surrounding circumstances. Federal Evidence § 8:50, p. 411.

Bonds's and Anderson's conduct and the surrounding circumstances overwhelmingly support that Bonds authorized Anderson to identify his blood and urine samples. As revealed by Bonds's grand jury testimony, Bonds and Anderson's relationship exceeded that of a run-of-the-mill trainer/client: the men

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[7] The district court was apparently relying on Bonds's citation to "*Hanson v. Waller*, 888 F.2d 806, 814 (9th Cir. 1989)" which Bonds claimed stood for the proposition that "the exclusion does not apply to most employees, but rather applies only where there is true speaking authority of the sort given to attorneys and spokespersons." *See* ER 762. Any reliance was misplaced. First, Bonds incorrectly represented that *Hanson* was a Ninth Circuit case and thus binding on the district court. *Hanson* is an Eleventh Circuit case and thus not binding. Second, *Hanson* set no such limitation. The Eleventh Circuit merely held that the contents of Hanson's attorney's letter to defendants' attorney was attributable to Hanson under Rule 801(d)(2)(C) because "[a]lthough an attorney does not have authority to make an out-of-court admission for his client in all instances, he does have authority to make admissions which are directly related to the management of litigation." 888 F.2d at 814. The decision does not state that Rule 801(d)(2)(C) does not apply to "most employees."

trained together daily during the baseball season; Anderson monitored not only Bonds's weight training, but also his nutritional needs; during spring training, Anderson traveled to meet and train with Bonds on "[e]very other weekend" (ER 92-93); and Bonds testified that he viewed Anderson as "a loyal person" who would be "there" for him at any time of the day or night. ER 91. Regarding this particular task, not only did Bonds endorse it as a "neat idea" (ER 48), he chose only people he trusted to handle his samples. Bonds repeatedly said that he only let his "own personal doctor" draw his blood, and that he allowed only Anderson to take his samples to BALCO. ER 50; *see* ER 71, 74, 143, 152-53 (Bonds said he purposely gave his "trusted" trainer and friend his blood and urine samples to deliver to BALCO to "deal[] with it").

Moreover, the nature of the task supports that Bonds authorized Anderson to identify his samples. The purpose of the testing regimen was to determine, in the government's view, whether Bonds was testing positive for steroids, or, according to Bonds's testimony, to determine if he had any nutritional deficiencies. In either case, logic dictates that Anderson was authorized to identify the samples as belonging to Bonds. Bonds told the grand jury that he did not get the written test results himself and instead trusted Anderson to give him that information. Consequently, the only way Bonds could have received the test

results is if he had authorized Anderson to properly identify the samples when he dropped them off at BALCO.

Third, the district court erred in concluding that "Anderson's statement identifying the source of the samples is not an 'admission' of the type contemplated by Rule 801(d)(2)(C) because, as discussed above, the government had not established that it was against Anderson's interest to identify the samples for Valente." ER 11.[8] Rule 801(d)(2)(C) does not require that the statement be against the declarant's or even the party's interest, and the district court cited no legal basis for imposing one. To the contrary, "[t]o qualify as an admission, no specific 'against interest' component is required." *Aliotta v. National R.R. Passenger Corp.,* 315 F.3d 756, 761 (7th Cir. 2003); *see Guam v. Ojeda*, 758 F.2d 403, 408 (9th Cir. 1985) ("Cases interpreting section 801(d)(2)(A) are in agreement that statements need not be incriminating to be admissions." (citing California state court cases)); *see also United States v. McGee,* 189 F.3d 626, 631 (7th Cir. 1999) (holding that there is no "requirement that admissions by a party-opponent be inculpatory" and that "the statement need only be made by the party

[8] The government had additionally argued that Anderson's statements to Valente identifying Bonds's samples were admissible under Rule 804(b)(3) as a statement against Anderson's penal interest. ER 490. The district court rejected that argument. *See* ER 6-8.

against whom it is offered"); *cf. Pappas v. Middle Earth Condominium Ass'n,* 963 F.2d 534, 538 (2d Cir. 1992) ("The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate.") (citation omitted). Rule 801(d)(2)(C) states only that a statement is admissible against a party if it is "a statement by a person authorized by the party to make a statement concerning the subject." That is precisely what occurred here: Bonds authorized Anderson to speak on *his* behalf. The district court thus erred in imposing yet another hurdle to admission that does not exist in the rule.

Finally, the district court wrongly placed extraordinary weight on the fact that Bonds could not recall the exact number of samples that he had submitted for testing at BALCO. It is unclear why the district court concluded that Bonds's lack of memory about the exact number of samples led it to conclude that the government had failed to establish that Anderson was authorized to identify the samples he delivered as belonging to Bonds. The record contained ample evidence corroborating that the samples that Bonds was talking about were the ones that Anderson identified as Bonds's to Valente. The searches at BALCO and Anderson's residence uncovered documents establishing that Bonds's urine (tested at Quest) and Bonds's blood (tested at LabOne and Specialty Lab) were received

during the time period Bonds testified he provided samples to Anderson. *See, e.g.,* ER 48 (Bonds says he provided five or six blood samples and four urine samples for testing), ER 245, 263, 266-67, 437-41, 443, 445 (documents revealing test results for urine and blood identified as Bonds's sent to BALCO care of Victor Conte in same time period). Dr. Ting will testify that when he drew Bonds's blood during this time period, he gave the samples to Anderson to deliver to BALCO. ER 469-70.

In any event, nothing in the record remotely suggests that Anderson had a motive to falsely identify samples he delivered to Valente as belonging to Bonds. On the contrary, the record firmly establishes that Anderson was Bonds's trusted friend, valued employee, and personal trainer who, when questioned by agents during the search of his residence, admitted his own conduct but refused to provide any information about Bonds. To this day, Anderson refuses to cooperate with the authorities.

In sum, the record unequivocally established that Anderson, as authorized, properly identified Bonds's blood and urine samples every time he delivered them to BALCO for testing. The district court abused its discretion in failing to admit these statements under Rule 801(d)(2)(C).

2. Ample evidence established that Anderson was Bonds's agent or servant

The district court also erred in concluding that Anderson's statements were inadmissible under Rule 801(d)(2)(D). Rule 801(d)(2)(D) provides that "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is admissible if offered against the party. The rule "requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment." *Harris v. Itzhaki,* 183 F.3d 1043, 1054 (9th Cir. 1999) (citing *Breneman v. Kennecott Corp.,* 799 F.2d 470, 473 (9th Cir. 1986)); *see also United States v. Chang,* 207 F.3d 1169, 1176 (9th Cir. 2000) (explaining that a party proffering evidence pursuant to Rule 801(d)(2)(D) bears the burden of establishing an adequate foundation). When a court is evaluating whether such a foundation has been established, "[t]he contents of the statement shall be considered but are not alone sufficient to establish . . . the agency or employment relationship and scope thereof." Fed. R. Evid. 801(d)(2).

Bonds's grand jury testimony established that Anderson was one of three of Bonds's paid, "regular" trainers, and that he and Anderson worked together nearly every day. Bonds testified that he provided his urine and blood samples to

Anderson in conjunction with Anderson's role as his trainer so that he could be tested for any nutritional "deficiencies." Bonds testified that he not only provided Anderson with his samples for delivery to BALCO, but that he opted to receive information about the testing results *through* Anderson. By delivering the samples to BALCO and identifying those samples as belonging to Bonds, therefore, Anderson was plainly acting as Bonds's conduit for the test results. Anderson could not accomplish this task *unless* he properly identified the samples.

The district court rejected this basis for admitting the statements for two reasons: (1) the government did not cite "any evidence of the nature" of Bonds's and Anderson's relationship, and (2) "it is not evident that defendant even paid Anderson." Neither reason withstands scrutiny. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Here, the government's proffered evidence was more than sufficient to establish that Anderson was acting on Bonds's behalf.

First, Bonds's grand jury testimony is replete with details of their close professional association and ratifies that Anderson was acting as his agent or employee when he delivered the samples. Anderson's "employment" was to train

Bonds and assist him with nutritional and other supplements. As part of that employment, Anderson suggested -- and Bonds agreed -- that Bonds should get his blood and urine tested by BALCO. As Bonds's grand jury testimony confirms Anderson's delivery of those samples to BALCO and identifying them as having come from Bonds was plainly within the scope of his employment as Bonds's most-trusted trainer. *See, e.g.*, *United States v. Shunk*, 881 F.2d 917, 921 (10th Cir. 1989) (defendant's statements to authorities ratified that his brother was acting as his agent when he told undercover officer that weapon brother was seeking to sell belonged to defendant: brother's statements admissible under Rule 801(d)(2)(D)).

Second, the court clearly erred in finding that Anderson was not paid as an employee. Bonds testified that he paid Anderson $15,000 per year for training him, and that he gave Anderson a $20,000 bonus after he hit 73 home runs in a single season. ER 100-02, 164-65, 170. Indeed, Bonds admitted to the grand jurors that he paid Anderson just as he paid his other trainers. ER 170. Thus, the district court's conclusion that Anderson was not a paid employee because "[d]efendant testified to the grand jury that he did not pay Anderson but gave him a $3,000 ring as a gift," ER 12 n.8, was just flat wrong. And, the court's exclusive reliance on this erroneous finding in holding that the government had

"not established by a preponderance of the evidence that Anderson was defendant's agent or that the task of identifying defendant's samples was within the scope of Anderson's agency," ER 12, mandates reversal.

Finally, the district court's claim (ER 11-12) that the government had failed to meet its burden of showing that Anderson was in Bonds's employ as contemplated by the rule because Anderson might have been an "independent contractor" and "[i]n the Ninth Circuit, independent contractors do not qualify as agents for the purposes of Rule 801(d)(2)(D)," misstates both the law and the record. The district court cited to *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990) as support that in this Circuit there is a categorical rule that independent contractors cannot be agents or employees for the purposes of Rule 801(d)(2)(D). But scrutiny of *Merrick* reveals that its holding is not so broad.

Merrick sued his employer, Farmers Insurance Group, for age discrimination and retaliation. *Id.* at 1436. The employer claimed that Merrick had been discharged based on his "gross misconduct" at a Christmas party. *Id.* The district court granted summary judgment on the age discrimination claim, but the retaliation claim was tried to a jury who found for the employer. Merrick appealed alleging numerous errors, including that the district court erroneously excluded testimony proffered under Rule 801(d)(2)(D) regarding statements made

by two insurance agents and a district manager about the Christmas party. This Court affirmed the district court's ruling by simply stating that Merrick had not established "that the insurance agents and the district manager were 'agents' of Farmers as opposed to independent contractors; nor did he show that their statements about the Christmas party concerned a matter within the scope of their agency." *Id.* at 1440.

Merrick did not announce a hard and fast rule that independent contractors cannot qualify as agents for purposes of Rule 801(d)(2)(D). Nor would such a rule make sense. Courts should examine the nature of the relationship between the parties and whether the "agent" or "employee" was acting at the behest of the principal or employer when they spoke rather than adhering to formulaic definitions of terms such as "independent contractor." *See, e.g.*, *Metro- Goldwyn-Meyers Studio v. Grokster, Ltd .,* 454 F. Supp. 2d 966, 973-74 (C.D. Cal. 2006) (noting that "statement is admissible under Rule 801(d)(2)(D) so long as it is made by an agent within the scope of agency, regardless of the precise contractual relationship between the agent and the party against whom the evidence is offered"); *cf. Beck v. Haik,* 377 F.3d 624, 639-40 & n.5 (6th Cir. 2004) (concluding that statement by a "consultant" qualified as non-hearsay pursuant to Rule 801(d)(2)(D)), *overruled on other grounds by Adkins v. Wolever*, 554 F.3d

650 (6th Cir. 2009). Indeed, "[a]n agent who is not a servant is . . . an independent contractor when he contracts to act on account of the principal." Restatement (Second) Agency, § 2 comment b (1958).

But even if *Merrick* did establish a hard and fast rule that independent contractors' statements cannot qualify as admissions under Rule 801(d)(2)(D), the evidence cited by the government showed that Anderson was not acting as an independent contractor when he delivered Bonds's samples for testing. Under California law, an independent contractor is defined as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." *Cristler v. Express Messenger Systems, Inc.,* 171 Cal. App. 4th 72, 77, 89 Cal. Rptr. 3d 34, 38 (Cal. App. 4 Dist. 2009)(internal quotations omitted).

Bonds testified that he paid Anderson $15,000 per year to train him, not some "specified recompense for a specified result." Moreover, Anderson was hired for more than a single task within a specified time period: Bonds relied on Anderson as a weight-training coach, a nutritional advisor, and to deliver his urine and blood samples to BALCO for testing. And, Bonds clearly exercised control over the means by which he was trained: Bonds switched trainers to work with

Anderson because he wanted "another coach" to push his body "to another level," and he purposefully split his training among several coaches. ER 45-46, 170; *see* ER 46 ("I have a running coach, I have a stretch and flexibility coach, I have a strengthening coach."). Bonds also called on Anderson to travel to him to train with him on "[e]very other weekend." ER 92-93. Regarding the blood and urine samples, Bonds was quite particular about how that was accomplished: he had his doctor draw blood and he let only Anderson deliver the samples to BALCO.

In sum, the record reveals that Anderson was actually quite subservient and that he was at Bonds's beck and call nearly every day of the year. It was thus more than sufficient to establish that Anderson was acting as Bonds's "servant" when he delivered the samples to BALCO. Anderson's statements to Valente identifying the samples were thus plainly admissible under Rule 801(d)(2)(D).

3. The district court's misunderstanding of the scope of the residual exception to the hearsay rule led it to erroneously conclude that Anderson's statements should not be admitted under it

Even if Anderson's statements are hearsay, the district court erred in concluding that they were not admissible under Rule 807. Rule 807 provides that

> [a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as

> evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

See United States v. Sanchez-Lima, 161 F.3d 545, 547 (9th Cir. 1998) (to be admissible under Rule 807, hearsay "must have circumstantial guarantees of trustworthiness equivalent to the listed exceptions to the hearsay rule") (citation omitted).

There can be no dispute that the government met the first two requirements of Rule 807. Anderson's statements identifying Bonds's samples are certainly probative of a material fact: *i.e.*, that Bonds's samples tested positive for performance-enhancing drugs rebuts his claim that he did not knowingly take steroids during that time period. The evidence is thus material to a determination of whether Bonds lied to the grand jury. And, given the court's order excluding all of the relevant drug tests because it concluded Anderson's statements were inadmissible, the statements are plainly important to the government's case. In any event, neither Bonds nor the district court has ever questioned whether Anderson's statements were material.

Neither Bonds nor the district court directly questioned whether the evidence was "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." As Bonds's grand jury testimony makes clear and Valente's trial testimony will corroborate, Anderson was the only person who delivered Bonds's samples to BALCO for testing. Anderson – as he did during the grand jury investigation – refuses to testify at Bonds's trial for the government and threat of contempt and additional jail time will not persuade him otherwise. The statements made to Valente identifying the samples as belonging to Bonds are thus the most probative evidence on the point that the government can procure through reasonable means.

Despite this strong showing under Rule 807, the district court questioned whether the government's argument that Anderson's contemptuous refusal to testify created "exactly the type of scenario that the residual exception was intended to remedy." ER 9. The court concluded instead that because "Rule 804 governs situations when a witness is 'unavailable' to testify and provides that one such scenario occurs when the declarant 'persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so,'" Anderson's unavailability was of little import. ER 9 (quoting Fed. R. Evid. 804(a)(2)).

Anderson's contemptuous refusal to testify is *the reason* his out-of-court statements are "more probative on the point" for which they are offered than any other evidence that the government can procure through reasonable efforts. *See, e.g.*, *United States v. Marchini*, 797 F.2d 759, 764 (9th Cir. 1986) (out-of-court statements more probative on point for which they were offered than any other evidence which the government could have procured with reasonable efforts where declarant's marriage to defendant made her unavailable to testify at trial and her testimony "was unique as she was the only person that could establish the link between the drafting of the supplier checks and their conversion to cash which demonstrated" her husband guilt). Far from being irrelevant, Anderson's absence from the trial satisfies the government's burden of demonstrating that the statements are more probative than any other evidence that the government can procure by reasonable means.

This was but one example of how the district court misapprehended the scope and requirements of Rule 807. The court also held the view that Rule 807 should be used only 'rarely' and 'in exceptional circumstances.'" ER 9 (quoting *Fong v. American Airlines Inc.*, 626 F.2d 759, 763 (9th Cir. 1980)). But this Court has also stated "that Rule 803(24) [Rule 807's precursor] exists to provide courts with flexibility in admitting statements traditionally regarded as hearsay but not

falling within any of the conventional exceptions." *United States v. Valdez-Soto,* 31 F.3d 1467, 1471 (9th Cir. 1994); *see also United States v. Laster*, 258 F.3d 525, 530 (6th Cir. 2001) (refusing to accept "narrow interpretation" of Rule 807 and holding that if the statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception: "specifically covered [by a hearsay exception] means only that if a statement is *admissible* under one of the [803] exceptions, such [] subsection should be relied upon" instead) (emphasis in original; citation omitted). Indeed, contrary to the district court's view and Bonds's claim below (*see* ER 597), this Court has explicitly stated that "the reference to guarantees of trustworthiness equivalent to those in the enumerated exceptions strongly suggests that *almost fitting* within one of these exceptions cuts in favor of admission, not against." *Valdez-Soto,* 31 F.3d at 1471 (emphasis added). This makes sense given that, under Rule 807, the court must determine whether "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." *See also* Fed. R. Evid. 102 (federal evidence rules should be construed to, among other things, promote "growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined").

Because it had an exceptionally narrow view of when the residual exception applied, the district court never even considered that Anderson's statements

"almost" fit other hearsay exceptions and that such a fact should cut in favor of their admission under Rule 807. Specifically, in addition to seeking admission under Rules 801(d)(2)(C) and (D), the government claimed that they were admissible as co-conspirator statements or because they were against Anderson's penal interest at the time that they were made. As with its Rules 801(d)(2)(C) and (D) rulings, the district court's rejected the government's arguments under Rules 801(d)(2)(E) and Rule 804(b)(3) in part because it added requirements for admission that do not exist.

For example, the court rejected the government's argument that the statements were admissible as co-conspirator statements because it found that Valente and Anderson did not plead guilty to the misbranding conspiracy and "[t]heir guilty pleas do not establish that Anderson gave defendant's urine samples to Valente in furtherance of their drug distribution conspiracy." ER 8. But the government was not required by Rule 801(d)(2)(E) to prove the existence of the misbranding conspiracy beyond a reasonable doubt. *See United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981) (prosecution's evidence "need not compel finding the existence of a conspiracy beyond a reasonable doubt"). The government alleged that Anderson, Conte, and Valente conspired to misbrand drugs to allow them to develop undetectable steroids for use among elite athletes. Documents seized from BALCO and Anderson's residence sufficiently showed

the existence of that conspiracy. And, if anything, Anderson's and Valente's guilty pleas to distributing steroids supported the existence of a misbranding conspiracy.

The district court also expanded on what the government had to show to establish that these statements were against Anderson's penal interest. It rejected the penal interest argument because it concluded that it was not "evident" how Anderson "subjected himself to criminal liability by saying, 'This sample is from Bonds.'" ER 7-8. But the government was not required to show that the statements were criminal on their face. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) ("[e]ven statements that are on their face neutral may actually be against the declarant's interest"). The government was only required to show, in context, how the statement was against Anderson's penal interest. "Whether a statement is in fact against interest must be determined from the circumstances of each case," and "can only be determined by viewing it in context." *Id.* at 601, 603. Once again, the district court misunderstood the government's burden under the applicable rule.

This pattern of creating additional hurdles carried over into the court's assessment of what the government was required to show to establish that Anderson's statements were trustworthy under Rule 807. The court found Anderson's statements "untrustworthy" for two reasons: (1) Bonds claimed that

Valente once "mislabeled" one of his blood samples, and (2) *Valente* testified in the grand jury that Bonds never consulted with a "Dr. Goldman," who was "the medical director of BALCO" and who Valente identified on letters to Quest as the source of the request for testing on Bonds's samples. ER 9-10.

As a factual matter, Valente's handling of the samples did not establish as the court found that Bonds's samples had been "tampered with. ER 10. Valente's testimony in the grand jury about replacing Bonds's name with Anderson's on a blood sample made perfect sense. BALCO employees Conte and Valente were involved in the conspiracy to manufacture and distribute designer drugs to elite athletes. No evidence suggests that the labs – Quest, LabOne, or Speciality Laboratories – were a party to the BALCO conspiracy. Unlike the urine samples which were assigned donor numbers, the blood samples were sent to LabOne and Speciality Laboratories under Bonds's actual name or initials and referenced his birth date. *See, e.g.*, 260-61, 277, 280-81, 283, 285, 290. Valente testified that, on one occasion, Anderson asked him to send Bonds's blood samples to the outside lab under his own, *i.e.*, Anderson's, name. According to Valente, Anderson asked for this because Bonds had requested "privacy." ER 625. Valente's willingness to do it shows only that he was willing to lie to protect BALCO's customers; it provides no basis for inferring that Anderson would falsely attribute a sample to Bonds. Far from casting doubt on the blood-sample records, evidence that the

conspirators attempted to get Bonds's blood tested in secret supports that Anderson's statements identifying the samples as Bonds's were trustworthy.

Similarly, Valente's cover story in the letters – *i.e.*, that a "Dr. Goldman" was requesting the labs test the samples for steroids – was simply part of the ongoing conspiracy to make BALCO's actions look legitimate. It had nothing to do with Anderson's statements identifying Bonds's samples.

But even if the district court properly assessed that Valente's handling of the samples when he sent them to the outside labs amounted to "tampering," it simply does not matter. The court was required to determine whether *Anderson*'s statements to Valente identifying the samples had "circumstantial guarantees of trustworthiness" and not whether Valente's handling of those samples thereafter was in some way suspect. The government was not required to prove that Valente's testimony is trustworthy because he will testify at trial and his handling of the samples will be subject to cross-examination. By focusing on this red herring, the district court failed to address the pivotal question before it: did Anderson have any motive to lie when he identified these samples as belonging to Bonds? The answer to that question is no.

The Supreme Court has "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness,'"under the Confrontation Clause, and "courts have considerable leeway in their consideration

of appropriate factors." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). When determining trustworthiness under Rule 807, however, courts look at a few common factors such as the closeness of the relationship between the declarant and the party, whether the declarant had a motive to fabricate, and whether the declarant had personal knowledge of the underlying event. *See, e.g.,United States v. Morgan*, 385 F.3d 196, 209 (2d Cir. 2004) (letter written by codefendant to her boyfriend admitted against the defendant: letter sufficiently trustworthy because it was written to an intimate acquaintance in privacy of codefendant's hotel room with no expectation that it would find its way to police); *United States v. George*, 960 F.2d 97, 100 (9th Cir. 1992) (lack of motive to fabricate weighs heavily in favor trustworthiness); *United States v. Friedman*, 593 F.2d 109, 118-19 (9th Cir. 1979) (official who summarized records had no reason to falsify or misrepresent).

Valente will testify that he knew Greg Anderson as a trainer for Bonds, that he saw Bonds and Anderson together at BALCO, that Anderson regularly delivered the urine and blood samples from Bonds for testing, that he trusted that Anderson was properly identifying the samples because of the purpose of the testing itself (*i.e.*, to determine whether BALCO designer drugs being supplied to athletes were detectable), and that he was required to keep accurate records regarding the identity of athletes submitting samples. ER 467-70, 486-87, 489.

Valente's testimony is corroborated by Bonds's grand jury testimony. *See Valdez-Soto*, 31 F.3d at 1471 (corroborating evidence can be considered to determine whether statements have the requisite guarantees of trustworthiness). Bonds admitted that he gave Anderson blood and urine samples for the purpose of having them tested at BALCO. Although Bonds said that he never asked Anderson to see the "papers" revealing the results, he did say that he relied on Anderson to deliver those results and that he had "no reason to doubt or disbelieve" Anderson. ER 107, 124, 153. In fact, it was in Anderson's capacity as "trusted" trainer and friend that Bonds gave him the blood and urine samples to deliver to BALCO in the first place. ER 124, 152-53. Dr. Ting will also testify that he drew Bonds's blood in Anderson's presence and then gave it to Anderson to deliver to BALCO. ER 469. All this evidence corroborates the trustworthiness of Anderson's statements.

In sum, nothing in this record calls into question Anderson's credibility vis-a-vis the challenged statements. Because the district court wrongly construed the scope of Rule 807, and because it improperly focused on Valente's actions rather than Anderson's lack of a motive to lie in assessing trustworthiness, it abused its discretion in finding the statements inadmissible under Rule 807.

C. The BALCO logs are plainly relevant to whether Bonds lied to the grand jury when he testified that he did not knowingly take steroids

Although the district court concluded that the BALCO log sheets maintained by Valente were admissible under the business records exception to the hearsay rule, it nonetheless excluded them. ER 12. Because Anderson's statements to Valente identifying the samples would be excluded as inadmissible hearsay, the court reasoned, the log sheets themselves are irrelevant because "the government cannot link the samples to [Bonds] without Anderson's testimony." ER 12. This was error. The log sheets themselves identify three of the urine samples that tested positive for steroids – numbers 100121, 100145, and 100155 -- as belonging to "Barry B." *See* ER 437. On their face, therefore, the log sheets are relevant even without Anderson's testimony or Anderson's statements.

Rule 402 of the Federal Rules of Evidence states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "To be 'relevant,' evidence need

not be conclusive proof of a fact sought to be proved, or even strong evidence of the same." *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). All that is required is a "tendency" to establish the fact at issue. "As the Advisory Committee Notes to the 1972 Proposed Rules state, '[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'" *Id.* In that relation, "'[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.'" *Id.*

The United States charged Bonds with lying to the grand jury about whether, prior to 2003, he knowingly took steroids that he received from Anderson. On their face, the BALCO log sheets that identify the various samples received in 2000 and 2001 as belonging to Bonds are "relevant" to the question the jury must decide. The documents plainly tend to make the existence of a fact – *i.e.*, Bonds lied in the grand jury – more probable than they would be without the evidence. The log sheets state that they reflect the receipt of samples for "Barry B," "BB," or "Barry" and Valente will testify that he received the samples from Anderson. Bonds testified in the grand jury that he gave urine samples to Anderson with the understanding that he was taking them to BALCO. When the results for the samples sent to Quest came back to BALCO, Valente wrote the

results on the log sheet; he also wrote "BB" on the results and gave them to Anderson.

Because the district court has already concluded that the log sheets are business records, and indeed Valente will testify that he kept the logs in the ordinary course of business, it erred in excluding them as irrelevant. If Bonds wishes to argue that the log sheets do not reflect his urine samples, he is free to make that argument to the jury, but the logs meet the low standard of relevance set by the Federal Rules. *See, e.g., United States v. Quattrone,* 441 F.3d 153, 188 (2d Cir. 2006) ("so long as a chain of inferences leads the trier of fact to conclude that the proffered submission affects the mix of material information, the evidence cannot be excluded at the threshold relevance inquiry").

Because the log sheets are relevant and admissible, the test results are admissible as well. When Valente received Bonds's urine samples he sent them to Quest for testing. When sent to Quest, the samples were labeled with only the donor number that Valente assigned to them. The district court excluded the results of Bonds's 2000 and 2001 tests because it found that without the log sheets or Anderson's statements to Valente, the government cannot show that the test results relate to Bonds. ER 12. If the district court's ruling excluding the logs on relevance grounds is overturned, however, then the evidence will show that the

Quest lab results relate to Bonds and the test results themselves should be admitted.

CONCLUSION

For the foregoing reasons, the district court's ruling excluding Anderson's statements to Valente identifying Bonds's samples, the BALCO log sheets, and the drug test results should be reversed.

DATED: June 1, 2009

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STATEMENT OF RELATED CASES

There are no related cases pending in this circuit.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32-1

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more and contains 12,567 words.

Date: June 1, 2009

/s/
Barbara J. Valliere
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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid , or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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ADDENDUM

TABLE OF CONTENTS

PAGE NUMBER

Fed. R. Evid. 401 60

Fed. R. Evid. 402 61

Fed. R. Evid. 801(d)(2) 62

Fed. R. Evid. 804(b)(3) 63

Fed. R. Evid. 807 64

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS

Federal Rules of Evidence 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS

Federal Rules of Evidence 402

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Federal Rules of Evidence 801(d)(2)

Rule 801. Definitions

(d) Statements which are not hearsay. A statement is not hearsay if --

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Federal Rules of Evidence 804(b)(3)

Review Court Orders which may amend this Rule.
Review expert commentary from The National Institute for Trial Advocacy

Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Federal Rules of Evidence 807

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.