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

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

No. CR 07-0732-SI

**UNITED STATES’ SUPPLEMENTAL
BRIEF IN SUPPORT OF
ADMISSIBILITY OF EXPERT
OPINION TESTIMONY PROFFERED
BY THE GOVERNMENT PURSUANT
TO DAUBERT**

Judge: Honorable Susan Illston

20
21 Defendant Bonds challenges the government’s showing that Dr. Larry Bowers is qualified
22 to testify as an expert that steroid users develop symptoms such as increased muscle mass,
23 shrunk testicles, acne on the upper back, moodiness, and an erratic sex drive, among other
24 symptoms. Bonds asserts that “Dr. Bowers’ testimony concerning these side-effects fails to pass
25 muster under [Federal Rule of Evidence] 702 because (1) it is not based upon sufficient facts or
26 data, (2) it is not the product of reliable principles and methods, and (3) the witness has not
27 applied the principles and methods reliably to the facts of this case.” Bonds Reply at 24. Bonds
28 also argues that Dr. Bowers’s testimony is contrary to “some peer-reviewed literature” or

1 “inconsistent with the latest available scientific literature.” Bonds Reply at 25, 26. Bonds
2 further challenges Dr. Bowers’s qualifications to testify on the side effects of human growth
3 hormone, the use of insulin in connection with performance-enhancing drugs, and related
4 matters.

5 With this pleading, the government is submitting a supplemental declaration from Dr.
6 Bowers that addresses Bonds’s objections. Dr. Bowers’s supplemental declaration, taken in
7 conjunction with his January 26, 2009 declaration on file with the Court, is sufficient to allow the
8 Court to find that he is qualified as an expert on the physiological and mental effects of steroids
9 and other performance-enhancing drugs.

10 As summarized in Dr. Bowers’s supplemental declaration, the physiological side effects
11 of steroid use on the physique are so well documented in the scientific literature as to be beyond
12 any serious dispute, and are generally accepted within the medical community. Based upon the
13 instant filing and the government’s original filing, the government respectfully requests that the
14 Court find the government’s expert testimony admissible under Rule 702. The government
15 believes that this finding can be made from the government’s filings and does not require a time
16 consuming evidentiary hearing outside of the presence of the jury.

17 ARGUMENT

18 THE GOVERNMENT’S EXPERT TESTIMONY IS ADMISSIBLE UNDER 19 THE DAUBERT STANDARD, WHICH IS A FLEXIBLE RULE OF INCLUSION, NOT EXCLUSION

20 As the government noted in its initial brief, testimony from a qualified expert “is
21 admissible pursuant to Rule 702 if it is both relevant and reliable.” *Elsayed Mukhtar v.*
22 *California State University*, 299 F.3d 1053, 1063 (9th Cir. 2002); *see Daubert v. Merrell Dow*
23 *Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). As the Supreme Court explained, “[t]he
24 inquiry envisioned by Rule 702 is...a flexible one.” *Daubert*, 509 U.S. at 594. Although the
25 Court in *Daubert* provided a list of factors for determining whether expert testimony is reliable,
26 *id.* at 593-94, a court should not “mechanically apply the *Daubert* factors,” *Hangerter v.*
27 *Provident Life & Accident Insurance Co.*, 373 F.3d. 998, 1017 (9th Cir. 2004), because
28 *Daubert*’s list of specific factors “neither necessarily nor exclusively applies to all experts or

1 every case.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42 (1999). Instead, the *Daubert*
2 factors are meant to be “helpful, not definitive.” *Id.* at 151. A district court has “broad latitude
3 in determining whether an expert’s testimony is reliable” and “in deciding how to determine the
4 testimony’s reliability.” *Elsayed Mukhtar*, 299 F.3d at 1064. Although a court should make “a
5 preliminary determination that [a proffered] expert’s testimony is reliable,” *Elsayed Mukhtar*,
6 293 F.3d at 1063, a court need not hold a separate *Daubert* hearing before admitting expert
7 testimony. *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000).

8 The case law establishes that even without a supplemental declaration, Bonds’s
9 objections to Dr. Bowers seek to set the bar to the admission of expert testimony too high. As
10 the Ninth Circuit has recognized, the Supreme Court’s decision in *Daubert* sets a “liberal
11 standard of admissibility.” *Dorn v. Burlington Northern Santa Fe Railway*, 397 F.3d 1183, 1196
12 (9th Cir. 2005). As the Court explained in *Dorn*, “[t]he Supreme Court in *Daubert* ... was not
13 overly concerned about the prospect that some dubious scientific theories may pass the gate
14 keeper and reach the jury...; indeed, the Court said, ‘Vigorous cross-examination, presentation of
15 contrary evidence, and careful instruction on the burden of proof are the traditional and
16 appropriate means of attacking shaky but admissible evidence.’” *Id.* at 1196. Although there is
17 nothing “shaky” about Dr. Bowers’s proffered expert testimony, the Court’s admonition in
18 *Daubert* makes clear that, as the court of appeals has held, “the reasonableness of the
19 assumptions underlying the experts’ ... analysis [or] criticisms of an expert’s method of
20 calculation [are] matters for the jury’s consideration in weighing that evidence.” *Humetrix, Inc.*
21 *v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001); *see also Kumho Tire Ltd. v. Carmichael*,
22 526 U.S. 137, 153 (1999) (expert testimony should be admitted if it falls within “the range where
23 experts might reasonably differ, and where the jury must decide among the conflicting views”).

24 In short, Bonds’s disagreement with Dr. Bowers’s conclusions is not a basis for excluding
25 that testimony if Dr. Bowers has sufficient “specialized knowledge” and he relied on a
26 reasonable methodology in arriving at his opinions. His two declarations plainly meet the
27 “specialized knowledge” standard, and demonstrate a sound methodology in arriving at his
28 conclusions. That methodology is an entire professional career devoted to studying and

1 combating the use of anabolic steroids, human growth hormone, and other performance-
2 enhancing drugs in sports. The first declaration establishes Dr. Bowers as one of the leading
3 experts in the field of anti-doping; he is the senior education and research director of the agency
4 responsible for detecting, and eliminating, the use of anabolic steroids, human growth hormone,
5 and other performance-enhancing drugs by Americans participating in Olympic sports. The
6 supplemental declaration provides greater detail, and a more specific description, of the sources
7 relied upon by Dr. Bowers in accumulating this “specialized knowledge.” The supplemental
8 declaration establishes Dr. Bowers’s familiarity with the side effects of anabolic steroids and
9 human growth hormone through specific examples of scientific literature, peer-reviewed studies,
10 interviews with athletes, and other sources of information considered by Dr. Bowers. Dr.
11 Bowers’s familiarity with these materials demonstrates that he possesses a basis of “specialized
12 knowledge” sufficient to permit him to testify as an expert, and express his expert opinion, on the
13 subject matter of the side effects of anabolic steroids and human growth hormone.

14 Bonds is free to cross-examine Dr. Bowers about his conclusions and to confront him
15 with scientific literature that, Bonds believes, contradicts Dr. Bowers’s conclusions. Moreover,
16 upon giving proper notice to the government, *see* Fed. R. Crim. P. 16(b)(1)(C), and complying
17 with Federal Rule of Evidence 702, Bonds may call his own expert to give testimony that
18 contradicts Dr. Bowers. (No such notice has been provided at the time of this filing). However,
19 possessing such cross-examination material – which is all the defense exhibited at the previous
20 hearing on this matter on February 5, 2009 – is not a basis for conducting a *Daubert* hearing.
21 Indeed, if all the defense has to do is provide a sample of its cross-examination, every proffered
22 expert will hereafter be subject to a *Daubert* hearing. That is precisely the inefficiency *Daubert*
23 aims to avoid.

24 In sum, the Court is not presented with the circumstances that *Daubert* was designed to
25 govern, where the Court needs to function as a gatekeeper and exclude dubious expert testimony
26 “to ensure that the courtroom door remains closed to junk science.” *In re Joint*, 52 F.3d 124,
27 1135 (2d Cir. 1995). Dr. Bowers’s opinions are precisely the type of reliable expert testimony
28 that is admissible under Rule 702 and *Daubert*. Dr. Bowers’s expert testimony should

