IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 10-223 (RBW)
WILLIAM R. CLEMENS,	)	
Defendant.	)	

DEFENDANT'S MOTION TO STRIKE PORTIONS OF THE TRIAL TESTIMONY OF GOVERNMENT WITNESS ANDY PETTITTE

Defendant William R. Clemens, by and through his attorneys, respectfully moves to strike trial testimony elicited from Government witness Andrew Pettitte regarding what might have been said about HGH during a passing conversation Mr. Pettitte had with Mr. Clemens during an intense workout twelve years ago.

INTRODUCTION

On April 23, 2012, the Court questioned whether equivocal testimony by Mr. Pettitte about a statement allegedly made by Mr. Clemens would meet the threshold required in order to "be admissible as an admission." Apr. 23, 2012 A.M. Trial Tr. at 72:15–21. The Court specifically questioned the Government concerning whether Mr. Pettitte would be "definitive" when he took the stand concerning the alleged admission by Mr. Clemens. *Id.* at 73:13–19. The Government represented to the Court that Mr. Pettitte would definitively testify to Mr. Clemens's admission. The Court's question proved to be as prescient as the Government's answer was inaccurate.

On May 2, 2012, Mr. Pettitte testified on cross-examination that, as he sat on the stand that day, he believed he very well might have misunderstood Mr. Clemens in 1999 or 2000. Mr. Pettitte then went even further, agreeing that there was a 50 percent probability that he had misunderstood Mr. Clemens's alleged statements in 1999 or 2000. May 2, 2012 A.M. Trial Tr. at 22:21 – 23:4. On re-direct, the Government never directly confronted Mr. Pettitte's uncertain testimony, instead skirting the critical issue even as it asked Mr. Pettitte to identify a pitcher against whom he once hit a home run. The Court immediately recognized the issue, observing:

> I had recognized that and, in fact, had spoken to my Clerk about that when I left the bench. Because I had understood that something else was going to transpire based upon what was said [by the Government] in the opening statement, which did not bear itself out during his testimony . . . . And that what we do have now, based upon the testimony, is an indication by Mr. Pettitte that he's not sure what Mr. Clemens said, that Mr. Clemens may have said it was him, but he also may have said something different and maybe he did mishear him. That's how I understand the current record to be as far as his testimony.
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> * * *
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> I never heard, and I was waiting for that question to be asked. I never heard him say my current recollection, despite what I said to Mr. Clemens that second time, is that he, in fact, did tell me that he used HGH . . . . So my understanding is that his position is that at this time, he is conflicted. He doesn't know what Mr. Clemens said to him . . . . I thought what we would hear is that well, you know, Mr. Pettitte, currently what is your memory of what Mr. Clemens told you back in 1999. He was never asked that. What – and so as I see his testimony now before the jury is that, you know, I don't know. I may have misheard him. That's the bottom line, I think, where his testimony is.

Id. at 70:17 – 74:6.

Under well established rules governing the threshold standard for admitting evidence, the testimony the Court accurately recounted is not definitive enough to qualify to be an admissible statement by a party opponent. The Court should not allow the jury to consider an alleged

"admission" that has all the weight of a coin flip. This is especially true where, as the Court recognized during the first trial, Mr. Pettitte is a critical witness and Mr. Clemens faces severe prejudice should Mr. Pettitte's testimony be presented in a way that does not comport with the rules. The Court should therefore strike the account of what Mr. Clemens *might* have said to Mr. Pettitte from the record and instruct the jury not to consider the 50/50 conversation for any purpose.

ARGUMENT

A. Mr. Pettitte's Uncertain Testimony About A Conversation That May (50 Percent) Or May Not (50 Percent) Have Happened Should Be Stricken Under FRE 104(a).

Under Federal Rule of Evidence 104(a), the Court determines preliminary questions regarding the admissibility of evidence. The threshold for establishing admissibility of a preliminary fact question is proof by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987). This preponderance standard "ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." *Id.* at 175. A "preponderance" of the evidence is greater than 50 percent. *See National Lime Ass'n v. EPA*, 627 F.2d 416, 443 n.139 (D.C. Cir. 1980) ("a preponderance of the evidence … demands only 51% certainty"); *see also Kahn v. Elwood*, 232 F. Supp.2d 344, 351 n.5 (M.D. Pa. 2002) ("A more likely than not standard means fifty-one percent or higher. Thus, [the proponent] could have failed to prove that he was more likely than not going to face [a proposition] and still have shown that there was a '50–50 chance.'").

The burden to show that a piece of evidence meets the standard for admissibility falls on the party seeking to admit that evidence. Therefore, if the record presents two equally possible interpretations of a piece of evidence, then the party with the burden of proving the admissibility

of that evidence fails. *See United States v. Pair*, Case No. 02-003 (PLF/JMF), 2002 WL 554531, at *2 (D.D.C. Mar. 28, 2002) ("The problem for the government is that on this record, either inference is as legitimately drawn as the other. But the most fundamental principle is that if the evidence is in equipoise, the party with the burden of proof fails to carry that burden.").

Courts have excluded purported admissions by a party opponent that have failed to rise to this threshold. For example, in *Hamel v. General Motors Corp.*, Case No. 86-4388-R, 1990 WL 7490, at **6–7 (D. Kan. Jan. 9, 1990), a civil defendant filed a motion for new trial based, in part, on the in-trial exclusion of a purported admission by party-opponent under Rule 801(d)(2). The trial court applied Rule 104(a) and the preponderance of the evidence standard to affirm the inadmissibility of the purported admission because the testimonial sponsor of that admission was only able to testify that the content of the admission was "merely an assumption." *Id.* at *6; *see also Boca Investerings Partnership v. United States*, 128 F. Supp.2d 16, 19–20 (D.D.C. 2000) (granting motion to exclude government exhibits because testimony offered to sponsor a potential business record under Rule 803(6) was "equivocal").

The Court anticipated this very issue on April 23 and asked the Government whether its "good faith belief is that [Mr. Pettitte is] going to get on the stand and say *definitively* that, yes, Mr. Clemens did, despite the other things he said, that Mr. Clemens did, in fact, tell him he was using HGH back in 1999. Is that right, Government counsel?" Apr. 23, 2012 A.M. Trial Tr. at 73:15–19 (emphasis added). Government counsel responded unequivocally: "Yes, it is, Your Honor. Mr. Pettitte will say that from the witness stand." *Id.* at 73:20–21. The Government's representation to the Court proved to be inaccurate.

Mr. Pettitte's testimony regarding what Mr. Clemens might have said in a passing conversation in the 1999/2000 baseball off-season should be stricken for the same reasons as the

equivocal testimony in *Hamel* and *Boca Investerings*. In this case, the Government is the party that bears the burden of establishing the admissibility of any statements by Mr. Clemens to Mr. Pettitte under Rule 801(d)(2). Yet during cross-examination, Mr. Pettitte testified as follows:

> Q: So Mr. Pettitte, let me see if we can get this right. In 1999 or 2000, you thought that Mr. Clemens had told you that he used HGH, right?
>
> A. Yes.
>
> Q. In 2005, when Mr. Clemens told you he did not, you believed in your mind you misunderstood him, right?
>
> A: Yes.
>
> Q: And the fact is, sir, you thought about this a lot from 2005 to this day, and *as you sit here today* you believe in your heart and your mind that you very well might have misunderstood Mr. Clemens in 1999 or 2000?
>
> A: I could have.
>
> Q: And *as you sit here today*, if you think about it in your own mind, it's 50/50, might have heard or you might have misunderstood him; is that fair?
>
> A: I'd say that's fair.

May 2, 2012 A.M. Trial Tr. at 22:18 – 23:4 (emphasis added).

On re-direct, the Government never directly confronted Mr. Pettitte's 50/50 memory as Mr. Pettitte "sit[s] here today." Indeed, if anything, Mr. Pettitte on re-direct underscored the fact that he truly does not know today what Mr. Clemens actually said in 1999 or 2000. For example, Mr. Pettitte responded to a question regarding any conversations with Mr. Clemens before Mr. Pettitte first used HGH himself by referring to "[t]he conversation that *I thought I had* in 1999 or 2000." *See id.* at 51:8 (emphasis added). Moreover, although the prosecutor asked Mr. Pettitte during re-direct examination whether, as he sat on the witness stand that day, he

remembered the 1999/2000 conversation with Mr. Clemens "[a]s you've described it," *see* May 2, 2012 A.M. Trial Tr. at 53:19–25, the ambiguous question and Mr. Pettitte's bare "Yes" only embrace the uncertainty Mr. Pettitte testified about during cross-examination.

As the Court quickly recognized after Mr. Pettitte was excused, the prosecutor *never* directly asked Mr. Pettitte whether he was sure at the time he was testifying that Mr. Clemens had told him in 1999 or 2000 that Mr. Clemens had used HGH. The Government's equivocal and uncertain redirect left the account of Mr. Clemens's purported admission just as unclear as when the redirect examination began. *See also id.* at 73:9–17 (Court's accurate recounting of redirect examination).

The facts elicited from Mr. Pettitte regarding the circumstances surrounding the 1999/2000 conversation fully explain why Mr. Pettitte equivocated on the witness stand:

- The statement was a "passing comment" and "casual comment" by Mr. Clemens, as opposed to "a conversation where we sit down and we have something we want to talk about that's important and we try to focus on it" (May 1, 2012 P.M. Trial Tr. at 109:4–13 & 110:2–4);
- The conversation took place in the middle of an intense workout routine (*id.* at 108:15–17);
- Both Mr. Pettitte and Mr. Clemens were "moving around" during the workout and "were constantly doing stuff" while the conversation took place (*id.* at 28:10–12; *see also id.* at 109:1–3);
- Both Mr. Pettitte and Mr. Clemens were "huffing and puffing" from the workout during the conversation (*id.* at 108:18–23);
- Mr. Pettitte could not remember where the conversation took place, either "in the gym or outside the gym" (*id.* at 27:15–16; *see also id.* at 108:12–14);
- Mr. Pettitte could not remember how the conversation came up (*id.* at 109:18–20); and
- Mr. Pettitte could not remember "any other specifics of the conversation" other than a very cursory description (*id.* at 109:14–17; *see also id.* at 27:10–18 (responding sparingly to question seeking "everything you remember about that discussion")).

Against these facts, the Government chose not to directly ask the only significant question it should have asked on re-direct: "Mr. Pettitte, as you sit here today, what is your best memory of what Mr. Clemens told you during your workout in 1999 or 2000?" The Government chose to evade this question, surely cognizant of the facts laid out above, and it did so at its own peril. By definition, Mr. Pettitte's 50/50 memory of what Mr. Clemens told him falls short of the "greater than 50 percent" preponderance of the evidence standard.

B. Mr. Pettitte's Uncertain Testimony About The 1999/2000 Conversation Should Also Be Stricken under FRE 401 and 403.

Even if the Court was satisfied that Mr. Pettitte's testimony met the Rule 104 threshold, it fails to satisfy Rule 401. Under that Rule, evidence is relevant only if it has "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." Fed. R. Evid. 401. Mr. Pettitte's equivocal testimony does not make the existence of the alleged admission by Mr. Clemens more probable because he is only 50 percent sure it happened *at all*. Moreover, Mr. Pettitte's equivocal testimony cannot make it more probable that Mr. Clemens actually used human growth hormone before the alleged conversation because even Mr. Pettitte, the witness offering the allegedly relevant testimony, never thought Mr. Clemens used human growth hormone. *See* May 2, 2012 A.M. Trial Tr. at 37:2–7 (Mr. Pettitte never thought Mr. Clemens was using HGH or steroids between 1999 and 2007). Why should the jury be allowed to consider Mr. Clemens's purported admission to Mr. Pettitte in its deliberation of whether Mr. Clemens used HGH when the alleged statements did not even make Mr. Clemens's potential use more probable *to Mr. Pettitte himself*? His testimony, by definition, does not satisfy Rule 401.

Mr. Pettitte's testimony about the 1999/2000 conversation should also be excluded under Rule 403. As discussed above, the probative value of Mr. Pettitte's equivocal testimony is slight. On the other hand, the risk of undue prejudice from Mr. Pettitte's ambiguous account is great because, as the Court itself recognized, Mr. Pettitte is a critical witness. *See* July 14, 2011 A.M. Trial Tr. at 47:16–18 (Court comments notably made before Mr. Pettitte's equivocation became part of the trial record). The jury might very well take more from Mr. Pettitte's testimony than it actually deserves simply because Mr. Pettitte appeared credible and was Mr. Clemens's teammate and close friend. This would be terribly unfair given the limitations Mr. Pettitte put on his own memory and the Government's failure to clarify the record on redirect. The purported admission should therefore be excluded. *See Brown v. City of North Chicago*, 365 Fed. Appx. 13, 15 (7th Cir. 2010) (affirming exclusion of alleged Rule 801(d)(2)(D) admission under Rule 403 because the proposed admission "could confuse the jury and unfairly prejudice" the party making the statement).

Rule 403 also negates any potential argument by the Government that the shakiness of Mr. Pettitte's testimony should only go to the weight of that testimony rather than its admissibility. Ironically, in order to salvage Mr. Pettitte's testimony in an effort to convict Mr. Clemens of perjury and false and misleading testimony, the Government will essentially need to argue that Mr. Pettitte testified falsely on May 2, *i.e.*, that his memory was actually better than 50/50. But had the Government wanted to pursue this argument, it needed to ask Mr. Pettitte the right questions on redirect. The prosecutor did not. The testimony should be excluded under Rule 403.

C. The Court Should Instruct The Jury To Disregard The Prosecutor's Opening Statement Regarding The 1999/2000 Conversation.

Before the first trial, the Court commented:

> I will only say this in reference to opening statements. There has been a trend I've seen where many times lawyers will make representations about what the evidence will show. And ultimately, although that seed has been planted, nothing is ever presented to blossom into anything, *i.e.*, admissible evidence. If that occurs and there are statements made that are not borne out by evidence, I will not hesitate to tell this jury that they must totally disregard any such statements of that nature. I'll specifically identify what those statements were and tell them there was no evidence to that effect, and therefore, they cannot consider that in deciding this case.

July 13, 2011 A.M. Trial Tr. at 4:3–11.

Mr. Clemens asks the Court to enforce this standard against the overreaching of the Government in its opening statement. *See* April 23, 2012 P.M. Trial Tr. at 59:24-60:6) ("And Mr. Pettitte, who I told you viewed Mr. Clemens as a mentor, looked up to him, wanted to know his secrets, wanted to know what worked for him, what made him successful. So Mr. Pettitte had a conversation with Mr. Clemens. And they got to talking, and Mr. Clemens told Mr. Pettitte that he had used human growth hormone and that it helped him with recovery."). The Government's preview of this evidence misstated the context of the conversation and overstated Mr. Pettitte's certainty as to whether the conversation occurred at all. The jury should be instructed that it is to totally disregard the Government's opening statement on this topic.

CONCLUSION

Accordingly, and for each of the reasons set forth above, this Court should strike Mr. Pettitte's testimony regarding the substance of his alleged conversation with Mr. Clemens in 1999 or 2000. The Court should instruct the jury that it is not to consider Mr. Pettitte's testimony about the 1999/2000 conversation because the Government did not present sufficiently

reliable evidence to establish that Mr. Clemens ever said to Mr. Pettitte that he used HGH.[1] The Court should further instruct the jury that it is to disregard the prosecutor's comments in opening statement about the 1999/2000 conversation because the Government did not present sufficient evidence to support the claim.

Respectfully submitted,

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/s/

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1 For the Court's reference, the testimony subject to this motion is recorded in the May 1, 2012 P.M. Transcript at 27:10–20; 27:24-28:7; 28:23-29:2; 34:22-35:15; 49:20:50:6; 51:21-23; 63:1-6; and 110:11–15; and in the May 2, 2012 A.M. Transcript at 20:16-22; 22:14-23:4.