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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**  
17

18 UNITED STATES OF AMERICA,

19 Plaintiff,

20 vs.

21 BARRY LAMAR BONDS,

22 Defendant.  
23

) Case No. CR 07 0732 SI  
)  
)

) **DEFENDANT’S MOTION IN LIMINE**  
) **THREE: TO BAR INTRODUCTION OF**  
) **OTHER-ATHLETE EVIDENCE FOR**  
) **PURPOSE OF SHOWING GREG**  
) **ANDERSON’S DEALINGS WITH**  
) **DEFENDANT BONDS**  
\_\_\_\_\_

) Date: March 1, 2011  
) Time: 3:30 p.m.  
) Judge: The Honorable Susan Illston  
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## INTRODUCTION

1  
2 The government seeks to introduce the testimony of several athlete witnesses concerning  
3 their respective relationships and dealings with Greg Anderson, who is not expected to testify at  
4 defendant's upcoming trial. The parties have previously briefed whether the "other athlete"  
5 evidence is admissible on the issue of the materiality of testimony of Mr. Bonds to the grand  
6 jury's investigation of Anderson. When that issue was argued at the hearing held on January 21<sup>st</sup>,  
7 however, the Court stated that it was inclined to admit the evidence on another basis: i.e.,  
8 evidence that Anderson engaged in certain conduct and made certain statements relating to  
9 performance-enhancing drugs in his training of the other athletes could serve as proof that  
10 Anderson did the same in the course of working with Mr. Bonds. Counsel for Mr. Bonds  
11 informed the Court that he would address that specific issue.

12 This Court should reject the government's effort to introduce the testimony of the other  
13 athletes for this purpose. The government's argument for the relevance of "other athletes"  
14 evidence necessarily rests on one of two propositions: (a) that Anderson had a propensity to  
15 provide performance enhancing drugs [hereafter "PEDs"] to athletes, so he must have done so  
16 with Mr. Bonds; or (2) other athletes had a propensity to obtain PEDs from Anderson, so Bonds,  
17 an athlete, must have done the same. The first inference is flatly prohibited by the well-  
18 established rules governing the use of character evidence, as set forth in Fed. R. Evid. 404. As to  
19 the second inference, there is no legal basis for the admission of evidence on the theory that a  
20 defendant must have acted in a particular manner because some other members of his profession  
21 so acted.

22 Finally, the other athlete evidence cannot be admitted by resort to Fed. R. Evid. 406,  
23 which governs the introduction of "habit" evidence, since Anderson's conduct and statements  
24 involving others was not sufficiently reflexive, regular, and specific to qualify as such. The Court  
25 should prohibit the admission of the other-athlete evidence to establish the specific nature of  
26 Anderson's dealings with defendant Bonds.  
27  
28

**PROCEDURAL BACKGROUND**

1  
2 On October 15, 2010, the government filed its witness list identifying a number of  
3 athletes it intends to call at trial, including Marvin Benard, Jason Giambi, Jeremy Giambi, Larry  
4 Izzo, Armando Rios, Benito Santiago, and Randy Velarde. *See* government's Witness List, Dkt.  
5 185. The accompanying government proffer essentially stated these witnesses would testify  
6 concerning their relationship with Greg Anderson; their receipt of performance-enhancing drugs  
7 from Anderson; instructions and advice given them by Anderson; other statements made to them  
8 by Anderson; schedules and/or calendars prepared for them by Anderson; Anderson's assistance  
9 in having their blood and urine monitored through Balco; and/or related matters. *Id.*

10 On December 17, defendant filed his Motion to Conform Government's Evidence to this  
11 Court's February 19, 2009 Order. Dkt. 188. In that motion, defendant argued that the proffered  
12 testimony from the other athlete witnesses should be excluded as irrelevant in light of this  
13 Court's February 19, 2009 Order granting defendant's previous motion in limine. *Id.* at 12-16.

14 In defending its effort to introduce evidence from other athletes concerning their dealings  
15 with Anderson, the government's January 7, 2011 response stated:

16 The athlete witnesses will testify about receiving drugs from Greg  
17 Anderson, about instructions Anderson provided regarding the  
18 proper use and administration of the drugs, and what Anderson told  
19 the athletes about the efficacy of the drugs. Several of these athlete  
20 witnesses will testify that they knew that Anderson and Balco were  
21 testing their blood and urine to monitor the results of their steroid  
22 use.

23 *See* government's Opposition to Defendant's Motion in Limine to Exclude Evidence, Dkt. 192, at  
24 17-18. Such evidence would be relevant, the government continued, because it would:

- 25 • Show that Bonds knew he was receiving steroids from Anderson;
- 26 • Show that Bonds's relationship with Balco involved the receipt of steroids;
- 27 • Show that Bonds's relationship with Balco involved the testing of his blood and  
28 urine, "as he admitted in his grand jury transcript;" and
- Corroborate Bonds's purported statements to government witnesses, including  
Steve Hoskins and Kimberly Bell, that Bonds was using steroids.

*Id.* at 18. *See also* transcript of government counsel's statements at subsequent January 21, 2011

1 hearing, Dkt. 201, at 21-22 (“We proffered that several athletes will testify Anderson provided  
2 them with detailed instructions pertinent to steroid admission [sic], and explained to them that  
3 these were steroids, and how they were to be used, and that they weren’t detectable. We do think  
4 that’s pertinent to the required element of Mr. Bonds’ knowledge: his remarks were false. . .”)

5 In his January 14, 2011 reply, defendant again argued that the government’s proffer  
6 constituted an impermissible attempt to establish guilt-by-association and that it violated several  
7 governing rules of evidence, including Fed. R. Evid. 404 (“Character Evidence Not Admissible  
8 to Prove Conduct; Exceptions; Other Crimes”). See Defendant's Reply In Support Of Motion To  
9 Conform Government's Evidence To This Court's February 19, 2009 Order, Dkt. 197, at 19-20).

10 At the January 21, 2011 hearing on the motion to conform, the Court stated its  
11 preliminary view that, to the extent that other athletes testified concerning Anderson’s conduct  
12 and statements during their dealings with him, such testimony would be material to whether or  
13 not defendant’s grand jury testimony had been true. See transcript of January 21<sup>st</sup> hearing (Dkt.  
14 201), at 19-21. The Court thereafter confirmed that defendant would have a further opportunity  
15 to address the issue. *Id.* at 21. He does so here.

16 **I. UNDER FEDERAL RULE OF EVIDENCE 404, THE OTHER-ATHLETE**  
17 **EVIDENCE MAY NOT BE INTRODUCED TO ESTABLISH MR. ANDERSON’S**  
18 **“OTHER ACTS” FOR THE FURTHER PURPOSE OF PROVING ANDERSON’S**  
19 **CONDUCT AND/OR STATEMENTS VIS-A-VIS DEFENDANT BONDS**

20 **A. General Principles**

21 By its express terms, and with exceptions not applicable here,<sup>1</sup> Fed.R.Evid. 404(a)  
22 prohibits evidence of a person’s character “for the purpose of proving action in conformity  
23 therewith on a particular occasion.” *Id. see also United States v. Mayans*, 17 F.3d 1174, 1181  
24 (9th Cir. 1994). Likewise, Fed.R.Evid. 404(b) states that “[e]vidence of other crimes, wrongs, or  
25 acts is not admissible to prove the character of a person in order to show action in conformity

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26 <sup>1</sup>The provision states: “(a) Character evidence generally. – Evidence of a person's  
27 character or a trait of character is not admissible for the purpose of proving action in conformity  
28 therewith on a particular occasion, except . . .” The listed exceptions in subsection (a) apply  
only to character evidence of the accused (subdivision 1), the victim (subdivision 2), and a  
witness (subdivision 3).

1 therewith,” also with exceptions not applicable here. Read together, To put it simply, Rule 404  
2 (a) and (b) prohibit admission of other offense evidence proffered on the theory that “he did it  
3 before, so he is the sort of person who does it, so he probably did it again.” *See, e.g., United*  
4 *States v. Sampson*, 980 F.2d 883, 887 (3rd Cir. 1992) (“If the government offers prior offense  
5 evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no  
6 link of which can be the inference that because the defendant committed . . . offenses before, he  
7 therefore is more likely to have committed this one.”) *See also* 22 Wright & Graham, Federal  
8 Practice & Procedure: Evidence § 5239 (1st ed. 1978 & 2010 supp.) (“Evidence of other crimes  
9 can be used to prove the conduct of a person if the inference to conduct can be made without the  
10 need to infer the person’s character as a step in the reasoning from the other acts to the conduct in  
11 issue.”

12 The prohibition and qualifications stated in section 404(b) apply not only in the usual  
13 instance wherein the government seeks to introduce the “other acts” of a criminal defendant, but  
14 also where any party seeks to introduce the “other acts” of *any person*, to whatever end. *See*  
15 *United States v. McCourt*, 925 F.2d 1229, 1232 (9th Cir. 1991) (“Because Rule 404(b) plainly  
16 proscribes other crimes evidence of “a person,” it cannot reasonably be construed as extending  
17 only to “an accused.”); *id.* at 1235 (“Evidence of ‘other crimes, wrongs, or acts,’ no matter by  
18 whom offered, is not admissible for the purpose of providing propensity or conforming conduct,  
19 although it may be admissible if offered for some other relevant purpose.”)

20 **B. The Proposed Evidence Is Inadmissible to the Extent It Requires an**  
21 **Inference That in His Dealings with Bonds, Anderson Acted in Conformity**  
22 **with His Dealings with Other Athletes**

23 Again, based on the government’s proffer, it readily appears that the central purpose of  
24 the testimony from other athletes is to show that (1) in his dealings with them, Greg Anderson  
25 did and said certain things at certain times relating to the distribution and administration of  
26 performance enhancing drugs, monitoring of the athlete samples at Balco, and related questions;  
27 and (2) such dealings are relevant to establish Bonds’s knowledge, the nature of his dealings with  
28 Anderson and Balco, and thus the falsity of his grand jury testimony denying receipt of steroids

1 from Anderson and Balco.

2 This proposed use of the other-athlete evidence is squarely prohibited by Rule 404(b).  
3 Specifically, the government will seek a jury finding that “he did it before” : i.e., in his dealings  
4 with other athletes, Anderson provided certain substances, said certain things about them,  
5 administered certain training regimens, initiated and described monitoring practices by Balco,  
6 etc. Based on that prior conduct, the government will ask the jury to infer that Anderson is the  
7 type of person who deals PEDs to athletes, and thus, “he did it again:” i.e., Anderson dealt PEDs  
8 to Bonds.<sup>2</sup> This is precisely the inferential chain prohibited by Rule 404(a) and (b).

9 Furthermore, in asserting that the chief purpose of the “other athlete” evidence is to  
10 demonstrate defendant’s purported “knowledge” that his testimony was false, the government  
11 suggests that the “other athlete” evidence could fall within the “knowledge” exception to Rule  
12 404(b)’s general ban on evidence of a person’s other acts. Not so. The rule permits introduction  
13 of other uncharged acts of a person to demonstrate, where relevant, the knowledge (or motive,  
14 intent, etc.) only of the person who committed the other acts, not that of a third party.

15 Thus, the Rule might allow evidence of Mr. Anderson’s acts and statements vis-a-vis the  
16 other athletes to prove *Anderson’s* knowledge, but only if *his* knowledge were a material issue in  
17 dispute, which it plainly is not. In no event may 404(b) be used to introduce one person’s prior  
18 acts to prove that person’s “knowledge,” and then to *impute* such knowledge to another, as the  
19 government implicitly seeks to do here. *See, e.g., United States v. Cardall*, 885 F.2d 656, 671  
20 (10th Cir. 1989) (“We do not believe that the relevance requirement under Rules 404(b), 402 and  
21 104(b) can be met with respect to one defendant by introducing evidence of the bad acts of the  
22 defendant's other associates.”)

23 The government bears the burden of articulating how proffered “other act” evidence  
24 relates to a material issue and escapes the ban on character evidence set forth in Rule 404(b).  
25

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26 <sup>2</sup> Should the government seek to elicit testimony from other athletes describing  
27 Anderson’s statements for the truth of the matter asserted (e.g., to the effect that Anderson was  
28 supplying them with steroids), such testimony is inadmissible under a straightforward application  
of the hearsay rule. Fed. R. Evid. 802.

1 *Huddleston v. United States*, 485 U.S. 681, 691 (1988)<sup>3</sup>; *Cardall, supra*, 885 F.2d at 671.<sup>4</sup> The  
 2 government having failed to carry that burden, the Court should exclude the evidence of other  
 3 athletes concerning their dealings with Anderson.<sup>5</sup>

4 **C. The Other-Athlete Evidence Is Inadmissible Because It Involves An**  
 5 **Impermissible Inference of Guilt by Association**

6 As noted in the Introduction, the government’s proffers to date may also rest on the  
 7 inference that if the other athletes, including several renowned Major League baseball players,  
 8 knowingly ingested illicit steroids at a certain period, so then did Mr. Bonds, the most famous  
 9 baseball player of the same era.

10 Neither Rule 404 nor any other rule of evidence authorizes admission of the other-athlete  
 11 testimony on such a theory. Again, *Cardall* holds that “the relevance requirement under Rules  
 12 404(b), 402 and 104(b) [cannot] be met with respect to one defendant by introducing evidence of  
 13 the bad acts of the defendant’s other associates.” The government’s proffer necessarily rests on an  
 14 assumption of “guilt by association – one of the most odious institutions of history. . . . Guilt  
 15 under our system of government is personal.” *Joint Anti-Fascist Refugee Comm. v. McGrath*,  
 16 341 U.S. 123, 178 (1951) (Douglas, J., concurring). *See also United States v. Garcia*, 151 F.3d  
 17 1243 (“[T]here can be conviction for guilt by association.”) (internal quotation marks omitted);  
 18 *accord Kennedy v. Lockyer*, 379 F.3d 1041, 1056 (9th Cir. 2004); *United States v. Dickens*, 775

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19  
 20 <sup>3</sup> *Huddleston* identified several safeguards which protect a defendant from the erroneous  
 21 introduction of unduly prejudicial evidence, chief among them being a determination that the  
 22 “other act” evidence be introduced for a proper purpose. *Id.* at 691

22 <sup>4</sup> *Cardall* holds that the government must show how the proffered evidence is relevant to  
 23 an issue in the case by “articulat[ing] precisely the evidentiary hypothesis by which a fact of  
 24 consequence may be inferred from the evidence of other acts.” Moreover, the trial court must  
 25 “specifically identify the purpose for which such evidence is offered and a broad statement  
 26 merely invoking or restating Rule 404(b) will not suffice.” 885 F.2d 656 at 671.

26 <sup>5</sup> The government’s proffer does not directly state an intention to adduce evidence from  
 27 other athletes about their dealings with Stan Conte (see government’s Witness List, Dkt. 185),  
 28 but should it try to do so, defendant’s present objection to using Anderson’s other acts and  
 statements to establish his acts and statements in relation to defendant applies equally to the other  
 acts and statements of Mr. Conte.

1 F.2d 1056, 1058 (9th Cir. 1985); *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998)  
 2 (evidence of guilt by association violates Rule 404 because it constitutes “group character  
 3 evidence;” under Fed. R. Evid. 404, it is impermissible for juries to conclude “that a particular  
 4 defendant is guilty simply because the defendant shares some characteristics with a particular  
 5 group.”)

6 **II. THE OTHER-ATHLETE EVIDENCE IS NOT ADMISSIBLE TO SHOW  
 7 ANDERSON’S CONDUCT AND/OR STATEMENTS VIS-A-VIS DEFENDANT  
 8 BONDS BECAUSE SUCH CONDUCT AND/OR STATEMENTS DO NOT  
 9 QUALIFY AS HABIT EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 406**

10 **A. Introduction**

11 As noted, Fed. R. Evid. 404(b) prohibits evidence of a person’s “character” or past “acts”  
 12 to prove that the person acted in conformity with those past acts on a separate occasion. Fed. R.  
 13 Evid. 406, by contrast, provides that evidence of a person’s “habit” *is* admissible to prove that the  
 14 person acted in conformity therewith.<sup>6</sup> Rule 406, therefore, supplies the only alternative basis on  
 15 which the government might attempt to rely in its effort to show that Anderson acted and spoke  
 16 with Bonds just as he had with the other athlete witnesses. Under controlling statutory and  
 17 decisional law, however, the government cannot demonstrate the presence of a cognizable  
 18 “habit” within the meaning of Rule 406 and any effort to introduce the other-athlete evidence  
 19 under the rule must therefore be rejected.

20 **B. General Principles**

21 “The burden of establishing that certain conduct qualifies as evidence of habit falls on the  
 22 party wishing to introduce the evidence.” *United States v. Angwin*, 271 F.3d 786, 799 (9th Cir.  
 23 2001) (Breyer, DJ, by designation), overruled on other grounds, *United States v. Gonzales-  
 24 Flores*, 418 F.3d 1093, 1099 n.3 (9th Cir. 2005).

25 “[C]ourts are somewhat cautious in admitting [habit] evidence” under rule 406 because

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26 <sup>6</sup> Fed. R. Evid. 406 provides: “Evidence of the habit of a person or of the routine practice  
 27 of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is  
 28 relevant to prove that the conduct of the person or organization on a particular occasion was in  
 conformity with the habit or routine practice.”

1 the rule stands as an “exception” to the general prohibition of character evidence. *Angwin*, 271  
2 F.3d at 799. *See also Mathes v. The Clipper Fleet*, 774 F.2d 980, 984 (9th Cir.1985) (noting that  
3 proffered habit evidence must be “carefully scrutinized” to ensure that it establishes a fair  
4 inference of systematic conduct) (citing *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494  
5 (4th Cir. 1977) (“Habit or pattern of conduct of party is never to be lightly established, and  
6 evidence of example, for purpose of establishing such habit, is to be carefully scrutinized before  
7 admission.”)).

8 The Ninth Circuit has held that in deciding whether certain conduct constitutes a “habit”  
9 under rule 406, the district courts must consider three factors: (1) the degree to which the conduct  
10 is reflexive; (2) the specificity or particularity of the conduct; and (3) the regularity or numerosity  
11 of the examples of the conduct. *Angwin*, 271 F.3d at 799 (citing *Weil v. Seltzer*, 873 F.2d 1453,  
12 1460 (D.C. Cir. 1989) and *Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293-94  
13 (7th Cir.1988).) Evidence that does not qualify as “habit” under rule 406 is otherwise considered  
14 evidence of character and subject to the prohibitions of Rule 404. *Angwin*, 271 F.3d at 799;  
15 *Weil, supra*, 873 F.2d at 1461.

16 **C. The Other Athlete Evidence Cannot Be Deemed to Qualify as “Habit”**  
17 **under the Rule**

18 Any attempt to introduce the other-athlete evidence to establish Anderson’s conduct and  
19 statements with respect to defendant Bonds must fail for a host of reasons.

20 First, the government’s anticipated evidence does not describe conduct that is sufficiently  
21 reflexive. In *Angwin*, the Ninth Circuit held that “habit” evidence must amount to conduct that is  
22 “reflexive” or “semi-automatic” and not “volitional.” 271 F.3d at 799. Similarly, in *Mathes*, the  
23 Ninth Circuit described habit evidence as equivalent to “systematic conduct.” 774 F.2d at 984;  
24 *see also Priest v. Rotary*, 98 F.R.D. 755, 759 (D.C.Cal. 1983) (holding that habit evidence must  
25 establish “invariable regularity of action,” or at least “sufficient regularity to make it probable  
26 that [an action] would be carried out in every instance or in most instances.”) (citing 1 Wigmore,  
27 Evidence section 92, p. 520 (3d ed. 1940).)

1 In one frequently cited case, the D.C. Circuit held that an Orthodox Jew could not admit  
2 evidence of his lifelong weekly observation of the Sabbath to establish an alibi in a criminal case.  
3 *Levin v. United States*, 338 F.2d 265, 272 (D.C. Cir. 1964). In rejecting the proffered habit  
4 evidence, the Circuit court held that “the very volitional basis of the activity raises serious  
5 questions as to its invariable nature, and hence its probative value.” *Id.* In light of this criteria,  
6 which was quoted as persuasive authority by the California District Court in *Priest*, 98 F.R.D. at  
7 759 (T. Henderson, DJ), the government cannot meet its burden in establishing that Anderson’s  
8 purported practice in distributing performance enhancing drugs was sufficiently reflexive and  
9 non-volitional to meet the first criteria for establishing a “habit” under rule.

10 Second, the government cannot prove that Anderson’s relationship with Bonds was so  
11 closely similar to his relationship with the other athlete witnesses that Anderson’s practice may  
12 be deemed reliably common. See *Angwin*, 271 F.3d at 799. Under Ninth Circuit law, the  
13 relationships must be “parallel.” *Id.* In other words, a habit is a person’s regular reaction to a  
14 “particular kind of situation with a specific kind of conduct.” *Id.* (quoting Fed. R. Evid. 406  
15 Advisory Committee Notes.) The analysis is necessarily fact-specific. *Id.*

16 In *Angwin*, the defendant sought to introduce evidence of his training by the Coast Guard  
17 Auxiliary in confronting illegal aliens at sea. The Ninth Circuit ruled that the district court  
18 properly excluded the proffered evidence because the facts at trial involved the defendant’s  
19 confrontation of illegal aliens while driving along a road. *Id.* Here, because the government  
20 cannot demonstrate that Anderson’s relationship with Bonds was virtually identical to that he  
21 maintained with the other athletes — and, indeed, all indications are to the contrary —  
22 Anderson’s conduct with respect to the other athletes again cannot be deemed a “habit” within  
23 the meaning of Rule 406.

24 Third, the government cannot produce a sufficient sample size to establish the presence of  
25 a purported “habit.” See *Angwin*, 271 F.3d at 799. The government’s anticipated evidence is not  
26 evidence of Anderson’s purported habit itself but of snapshots purporting to illustrate Anderson’s  
27 habit in action. Testimony describing a habit itself is generally preferred over evidence of  
28

1 individual instances of the purported habit. *Compare* Fed. R. Evid. 404(b) (prohibiting  
2 “evidence of other . . . acts” to prove conformity with those acts on separate occasion) with Fed.  
3 R. Evid. 406 (permitting “evidence of habit” to prove conformity therewith); *see also*  
4 McCormick on Evidence, 5th Ed. (Vol 1) section 195 (noting that habit evidence is most often  
5 evidence of the practice rather than evidence of individual instances of the practice).

6         The relevant distinction between evidence of the habit itself as opposed to evidence of  
7 instances of the habit in action is well illustrated in *Weil, supra*, 873 F.2d 1453. There the D.C.  
8 Circuit reversed a district court’s decision to admit testimony from a doctor’s former patients  
9 offered to establish the doctor’s purported habit of intentionally misinforming his patients about  
10 the medication he was prescribing. The doctor was charged with wrongfully causing the death of  
11 one of his patients who died from complications related to long time steroid use. It was alleged  
12 that the doctor told patients he was prescribing harmless antihistamines when in fact he was  
13 furnishing steroids. The district court admitted evidence from five of the doctor’s former  
14 patients who testified that the doctor told them he was prescribing antihistamines but actually  
15 provided steroids.

16         The Circuit court held that, contrary to the district court’s decision, the former patient  
17 testimony “certainly [did] not meet [the] criteria” for habit evidence. *Id.*, 873 F.2d at 1461. The  
18 court explained:

19                 Before the former patient evidence could be properly admitted as  
20 habit evidence the witnesses must have some knowledge of the  
21 practice and must demonstrate this knowledge prior to giving  
22 testimony concerning the routine practice. Where a witness cannot  
23 demonstrate such knowledge, he cannot testify as to the routine  
24 nature of the practice. Each witness who testified against [the  
25 doctor] only knew of the way [the doctor] treated his own allergies.  
26 Although they each saw [the doctor] on more than one occasion, he  
27 was treating the same patient (the testifying witness) on each  
28 occasion. None of the patients were able to testify concerning [the  
doctor’s] method of treating others. . . . For the former patient  
testimony to be at all probative it must show that [the doctor]  
responded the same way with each patient as he did with the  
testifying patient.

.....

1 Evidence concerning [the doctor's] treatment of five former  
 2 patients is not of the nonvolitional, habitual type that ensures its  
 3 probative value. Rather the former patient evidence is the type of  
 4 character evidence contemplated under Rule 404(b). This evidence  
 5 of [the doctor's] treatment of the former patients was clearly an  
 attempt to show that [the doctor] treated [the dead patient] in  
 conformity with his treatment of the five testifying patients. Thus,  
 the evidence was admitted for an improper purpose and was  
 undoubtedly prejudicial to [the doctor's] defense.

6 873 F.2d at 1461 (quotation marks and citations omitted).

7 The analysis set forth in *Weil*, cited as persuasive authority by the Ninth Circuit in  
 8 *Angwin*, 271 F.3d at 799, governs here. At best, the athlete witnesses could testify only as to  
 9 their own interaction with Mr. Anderson and could not possibly testify as to an unvarying  
 10 practice of "habit" to which Anderson adhered in dealing with other athletes. For that reason,  
 11 too, Rule 406 does not authorize admission of the other-athlete evidence on the grounds  
 12 identified by the government.

### 13 CONCLUSION

14 For the reasons set forth above, the Court should issue an order excluding any evidence  
 15 from the other-athlete witnesses aimed at establishing the nature of Mr. Anderson's actions  
 16 and/or statements with respect to defendant Bonds.

17 Dated: February 14, 2011

Respectfully submitted,

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