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

18 UNITED STATES OF AMERICA,) Case No. CR 07 0732 SI
19)
20 Plaintiff,) **DEFENDANT’S MOTION**
) **TO STRIKE TESTIMONY**
) **OF OTHER ATHLETES**
21 vs.)
22 BARRY LAMAR BONDS,) Date: TBA
) Time: TBA
23 Defendant.) Judge: The Honorable Susan Illston

24 **I. Introduction**

25 In its March 7 Order (Dkt. 275), this Court denied Mr. Bonds’s motion to exclude the
26 testimony of other professional athletes. It held that such testimony was relevant to show Greg
27 Anderson’s access to drugs, his knowledge of drugs, and his ability to distribute drugs. Most
28

1 importantly, it held that such testimony was admissible to show “the *manner in which* Mr.
2 Anderson actually distributed performance enhancing drugs.” (Order at 4) Invoking the *modus*
3 *operandi* and plan doctrines, the Court rejected the defendant’s arguments under Rules 403 and
4 404.

5 The Court’s ruling necessarily relied on the government’s proffer. In its pretrial filings,
6 the government claimed that it would offer athletes’ testimony to show “Anderson’s routine
7 practices with other athlete clients for the purpose of showing that Anderson used the same
8 practices with the defendant.” (Govt. Opp. to Def.’s *In Limine* Three [Dkt. 230] at 6.)

9 But the testimony actually presented at trial differed substantially from the proffer. The
10 government called only four athletes to the stand: Jason Giambi, Jeremy Giambi, Marvin
11 Barnard, and Randy Velarde. The testimony of these athletes revealed that Mr. Anderson did not
12 have any distinctive or idiosyncratic methodology in distributing drugs. Consequently, the high
13 degree of similarity required for the *modus operandi* doctrine is not present, and the evidence
14 should be stricken.

15 **II. The Modus Operandi Doctrine**

16 Relying on the government’s proffer, this Court ruled that the other athletes’ testimony
17 would show Anderson’s *modus operandi* in distributing drugs. The *modus operandi* doctrine,
18 also known as the “signature crimes” doctrine, is a form of non-propensity reasoning. It operates
19 by showing that a person engaged in very distinctive conduct. It is most commonly employed to
20 demonstrate identity, but regardless of the precise purpose for which it is used, it requires a very
21 high degree of similarity. McCormick made the classic statement of the doctrine’s requirements.
22 The doctrine allows the proponent:

23 To prove other crimes by the accused so nearly identical in method
24 as to earmark them as the handiwork of the accused. Much more is
25 demanded than the mere repeated commission of crimes of the
26 same class, such as repeated murders, robberies or rapes. The
27 pattern and characteristics of the crimes must be so unusual and
28 distinctive as to be like a signature.

1 *McCormick on Evidence* § 190 (6th ed. 2006). For decades, courts around the country have
2 relied on McCormick's formulation in applying the modus operandi doctrine.¹ Other evidence
3 law commentators, including both the leading general evidence treatise authors and also the
4 leading 404(b) treatise authors, have echoed McCormick's formulation.²

5 The Ninth Circuit has applied the doctrine in accord with these strict standards. As the
6 Ninth Circuit has stated, the modus operandi doctrine requires "peculiar, unique, or bizarre"
7 conduct. *United States v. Perkins*, 937 F.2d 1397, 1400 (9th Cir. 1991) (citing cases).
8 Committing the same act repeatedly is insufficient. What is required is that the act is committed
9 in a "distinctive" manner. *United States v. Mayans*, 17 F.3d 1174, 1184 (9th Cir. 1994).
10 Maintenance of these high standards is necessary to ensure that purported modus operandi
11 reasoning does not devolve into simple propensity reasoning. As the Seventh Circuit has said,
12 "We have cautioned that if defined broadly enough, modus operandi evidence can easily become
13 nothing more than the character evidence that Rule 404(b) prohibits." *United States v. Robinson*,
14 161 F.3d 463, 468 (7th Cir. 1998).

15 In its order, this Court suggested that it was faced with a "unique question that has been
16 brought about by a unique factual situation." (Order at 5.) It is true that this case is somewhat
17 unusual because in most cases, the prosecution employs the modus operandi in order to admit the
18 *defendant's* prior distinctive acts, whereas in this case, the prosecution used the doctrine to admit
19 a *third party's* prior distinctive acts. But the nature of the inference is the same.³ The

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21 ¹ See also, e.g., *United States v. Sampson*, 385 F.3d 183, 192 n.7 (2d Cir. 2004) (quoting
22 *McCormick*); *United States v. Morley*, 199 F.3d 129 (3d Cir. 1999) (same); *United States v.*
Guerrero, 169 F.3d 933, 939 (5th Cir. 1999); *United States v. Drew*, 894 F.2d 965, 970 (8th Cir.
1990) (same).

23 ² See, e.g., David P. Leonard, *The New Wigmore: A Treatise on Evidence -- Evidence of*
24 *Other Misconduct and Similar Events* § 13.5 (2009) ("Because the legitimacy of the application
25 to any given case depends very highly on the similarity of the charged and uncharged conduct,
26 much greater similarity is required if the character ban is to be maintained."); 1 Edward J.
Imwinkelried, *Uncharged Misconduct Evidence* § 3.10 (1998) ("The methodology must be
peculiar; the methodology must 'set apart' the perpetrator."); 1 Mueller & Kirkpatrick, *Federal*
Evidence § 4:36 (3d ed. 2008) ("[T]he modus operandi must be unique or highly distinctive.").

27 ³ In fact, this case is no different than countless other cases where the prosecution seeks
28 to present evidence of an accused drug dealer's prior instances of drug dealing. See *Mayans*, 17
F.3d at 1184 n.6 ("If a distinctive modus operandi can be discerned in acts this dissimilar, then it

1 prosecution seeks to argue that because Mr. Anderson engaged in certain conduct with other
2 baseball players, he probably engaged in the same conduct with Mr. Bonds. There is nothing
3 about this case that justifies a departure from the usual standards that govern the *modus operandi*
4 doctrine.

5 **III. The Other Athletes' Testimony at Trial**

6 *A. Variance from Proffer*

7 The government's proffer stated that the athletes' testimony would show Anderson's
8 *modus operandi* in several specific respects. In fact, their testimony made no such showing.

9 Prior to trial, the government represented that the testimony would show "the way
10 Anderson tracked steroid cycles using calendars." (Govt. Opp. to Def.'s *In Limine* Three at 6.)
11 But two of the four athletes — Jeremy Giambi and Velarde — offered no testimony *whatsoever*
12 about the use of calendars. Bernard said that he received a calendar related to HGH, but not for
13 Deca. (RT 1232, 1242.)⁴ Jason Giambi said that he received a calendar for the use of
14 testosterone. (RT 1186-87.) None of the athletes offered any testimony that Anderson used the
15 calendars to "track steroid cycles."

16 The government also represented that the testimony would show "the way Anderson
17 monitored his clients' steroid usage by testing blood and urine samples." (Govt. Opp. to Def.'s
18 *In Limine* Three at 6.) Again, the testimony did not show a consistent *modus operandi*, and the
19 testimony did not show that Anderson used tests to "monitor steroid usage." Jason Giambi gave
20 Anderson blood and urine samples; Anderson told him that the blood work was needed to check
21 for various deficiencies. (RT 1179, 1182.) Jason Giambi apparently shipped samples to
22 Anderson, also for the purpose of checking for deficiencies. (RT 1207-08.) Anderson obtained
23 only blood samples, not urine, for Bernard and Velarde. (RT 1235, 1267.) He told Bernard
24 nothing about why he wanted blood work, and Bernard received no results. (RT 1235.) Velarde
25 similarly testified that he did not know the reason for the blood work. (RT 1267.) None of the
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27 would appear that practically every high-level drug dealer in the greater Los Angeles area has the
28 identical *modus operandi*.").

⁴ The relevant pages from the Reporter's Transcript are attached as Exhibit A.

1 athletes received more than one test. None of the athletes testified that Anderson used tests to
2 monitor usage of the drugs he provided them.

3 In sum, the testimony at trial differed substantially from the proffer.

4 *B. Other Differences Between the Witnesses*

5 Moreover, while the testimony (if believed) established that Mr. Anderson repeatedly
6 distributed performance-enhancing drugs to baseball players, it did not establish that he did so in
7 any unique or peculiar or idiosyncratic or bizarre manner. In fact, the athletes' testimony
8 revealed several dissimilarities.

9 Among other things, the athletes did not all receive the same drugs from Mr. Anderson.
10 Jason Giambi initially received injectable testosterone, and later received the clear and the cream,
11 along with some pills. (RT 1186, 1189.) Jeremy Giambi received testosterone, HGH, and two
12 vials. (RT 1209.) Bernard initially received Deca, and later received HGH, as well as the clear
13 and the cream. (RT 1231, 1236-37, 1240-41). Velarde received only supplement pills and HGH
14 (RT 1268-69.) Velarde never received the cream and the clear. (RT 1273.)

15 The athletes did not all receive drugs in the same way from Mr. Anderson. Jason and
16 Jeremy Giambi received packages in the mail. (RT 1195, 1208.) Bernard received drugs in
17 person from Mr. Anderson at the ballpark. (RT 1241.) Velarde arranged meetings in the parking
18 lot. (RT 1268-69.)

19 The athletes did not all administer the drugs in the same way. For the injectable drugs,
20 Jason and Jeremy Giambi injected themselves. (RT 1198-99, 1213). Bernard sometimes
21 injected himself, and at least one time, was injected by Anderson at Anderson's gym. (RT 1232.)
22 Velarde was injected by Anderson in the parking lot. (RT 1269-70.)

23 Mr. Anderson did not tell the athletes the same thing about the drugs he was giving them.
24 Mr. Anderson told Jason Giambi that the cream was used to raise epitestosterone levels and thus
25 evade ratio tests. (RT 1190.) Mr. Anderson also told Jason Giambi that the clear and the cream
26 had steroid-like effects without actually being steroids. (RT 1200.) Mr. Anderson told Jeremy
27 Giambi that the cream and the clear were undetectable alternatives to steroids, but he never gave
28 him any indication exactly what it was. (RT 1211, 1217, 1220-22.) What he told Bernard is

1 unclear — on direct, Bernard said Anderson had described steroids, but he conceded that when
2 he was asked about the topic before the grand jury, he had never mentioned that Anderson said
3 anything about steroids. (RT 1236, 1256-59.) Anderson specifically told Jeremy Giambi that the
4 substances were similar to androstane, but did not tell other athletes the same. (RT 1219.) Mr.
5 Anderson apparently never even mentioned the clear and the cream to Velarde.

6 Nothing about Mr. Anderson’s manner of distributing drugs to these four athletes was
7 distinctive or idiosyncratic or peculiar. In fact, the testimony shows clearly that Mr. Anderson
8 *altered* his manner depending on the circumstances. He gave different athletes different drugs at
9 different times depending on their needs, and he did so in different ways, depending on what was
10 convenient. The testimony reveals no “signature” quality — it simply reveals that Mr. Anderson
11 sold drugs to four professional athletes. As a result, it cannot be used to support a valid inference
12 under the modus operandi doctrine.

13 That is especially true in this case, where the government’s own evidence has
14 demonstrated that Mr. Anderson’s relationship with the other players was nothing like his
15 relationship with Mr. Bonds. Mr. Anderson was close to Mr. Bonds as a trainer and family
16 friend. By contrast, Mr. Anderson had limited relationships with the other players, some of
17 whom he only met a few times. (RT 1205, 1268-69.) Mr. Anderson did not even behave
18 similarly with the other athletes, and so there is no reason to think that he behaved in any
19 particular way in his dealings with Mr. Bonds, with whom he had a very different relationship.

20 **IV. The Plan Doctrine**

21 As an alternative to its modus operandi ruling, this Court also suggested that the other
22 athletes’ testimony could be admitted under the 404(b) plan doctrine. The Court suggested that
23 the evidence “shows that Mr. Anderson had a general ‘plan’” to distribute drugs and to distribute
24 them in a certain way. (Order, at 5.) But once again, the athletes’ testimony at trial demonstrated
25 that the plan doctrine cannot be applied here.

26 The 404(b) plan doctrine requires that the various acts be “connected, mutually
27 dependent, and interlocking.” *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 197 (3d Cir. 2000)
28 (quoting *Imwinkelried, supra*, § 3:22). Repeated commission of similar acts is not sufficient to

1 show a plan — rather, the success of one act must be dependent on the success of the others.
2 “For example, when a criminal steals a car to use it in a robbery, the automobile theft can be
3 proved in a prosecution for the robbery.” *McCormick on Evidence, supra*, § 190; see *United*
4 *States v. Green*, 617 F.3d 233, 240-49 (3d Cir. 2010); *Lewis v. United States*, 771 F.2d 454, 456
5 (10th Cir. 1985).

6 Simply admitting similar acts to show a general plan “cannot be defended” because
7 “admitting them on the theory that they prove a plan often smacks of a thin fiction that merely
8 disguises what is in substance the forbidden general propensity inference.” 1 *Federal Evidence*,
9 *supra*, § 4:35. If such a theory were accepted, a cocaine dealer’s prior drug convictions could
10 always be admitted to show that he had a general plan to deal drugs and make money. See
11 *United States v. Lynn*, 856 F.2d 430, 435 (1st Cir. 1988) (reversing trial court’s decision to admit
12 prior drug sale to show a “plan”); *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978) (same).
13 Or an accused rapist’s prior sexual assaults could always be admitted to show that he had a
14 general plan to rape women. Repeated commission of a crime cannot justify use of the 404(b)
15 plan doctrine because then the plan exception of 404(b) would swallow the rule of 404. As
16 courts have recognized, the plan doctrine is limited to cases of interdependent acts.

17 Mr. Anderson’s conduct with other athletes and his alleged conduct with the defendant
18 were not interdependent. The success of his sale to Mr. Velarde, for example, did not depend on
19 the success of his sale to Jason Giambi. Even assuming the truth of all of the other athletes’
20 testimony, all it demonstrated was that Mr. Anderson sold drugs to several baseball players.
21 From that, the government will ask the jury to infer that he violated drug laws with Mr. Bonds as
22 well. But “[t]he inference from ‘pattern’ by itself is *exactly* the forbidden inference that one who
23 violated the drug laws on one occasion must have violated them on the occasion charged in the
24 indictment.” *United States v. Beasley*, 809 F.2d 1273, 1278 (7th Cir. 1987).

25 In short, the testimony of the other athletes did not demonstrate that Mr. Anderson had a
26 “plan” as that term has been interpreted under 404(b).

1 **V. Conclusion**

2 The government did not deliver on its promise to prove Anderson’s “routine practices.”
3 Now that the other athletes have testified, it is clear that their testimony cannot justify an
4 inference of modus operandi or plan. It is at least arguably true that the other athletes’ testimony
5 remains relevant for the mundane non-propensity purposes of showing Anderson’s ability,
6 access, and knowledge. Of course, there is no real dispute about Mr. Anderson’s ability, access,
7 and knowledge — other evidence in the case, including Mr. Anderson’s plea agreement,
8 demonstrates those points. As a result, the “discounted probative value” of the other athletes’
9 testimony for these non-propensity purposes is exceedingly low. *Old Chief v. United States*, 519
10 U.S. 172, 183 (1997).

11 The potential for unfair prejudice, by contrast, is high. Unfair prejudice consists of the
12 risk that the jury will consider the evidence for one of two forbidden purposes: (1) the inference
13 of guilt by association, or (2) the inference that Mr. Anderson had a propensity to distribute drugs
14 in a certain way. The Court instructed the jury not to consider the former inference, but this is
15 the sort of case where it is doubtful that the jury can realistically cabin the relevance of the
16 evidence to so narrow a purpose when the forbidden inferences are so much more obvious and
17 alluring.

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1 The other athletes' testimony should therefore be stricken under Rules 403 and 404. At
2 an absolute minimum, the prosecution should be precluded from using pretextual arguments
3 about "modus operandi" and "plan" to make what is, in reality, nothing more than a banal
4 propensity inference. The evidence did not show what the prosecution said it would show, and
5 the prosecution should not be allowed to use a bait-and-switch tactic to place propensity evidence
6 before the jury.

7 Dated: April 5, 2011

Respectfully submitted,

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