

1 MELINDA HAAG (CABN 132612)
United States Attorney

2 J. DOUGLAS WILSON (DCBN 412811)
3 Deputy Chief, Criminal Division

4 MATTHEW A. PARRELLA (NYBN 2040855)
JEFFREY D. NEDROW (CABN 161299)
5 MERRY JEAN CHAN (CABN 229254)
Assistant United States Attorneys

6 150 Almaden Boulevard, Suite 900
7 San Jose, CA 95113
Telephone: (408) 535-5045
8 Facsimile: (408) 535-5066
Email: jeff.nedrow@usdoj.gov

9 Attorneys for Plaintiff

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 BARRY BONDS,)
17 Defendant.)
18)
19)
20)

No. CR 07-0732-SI

**UNITED STATES' RESPONSE TO THE
DEFENDANT'S MOTION *IN LIMINE*
THREE TO BAR INTRODUCTION OF
OTHER ATHLETE EVIDENCE TO
SHOW GREG ANDERSON'S
DEALINGS WITH THE DEFENDANT
(DOCKET #221)**

Date: March 1, 2011
Time: 2:00 p.m.
Judge: Honorable Susan Illston

21 **INTRODUCTION**

22 The United States opposes the defendant's February 14, 2011 motion *in limine* number
23 three to exclude other-athlete evidence, which renews the motion *in limine* the district court ruled
24 on January 21, 2011. As with the defendant's motion regarding the admissibility of the Hoskins
25 recording of Greg Anderson, this is a motion for reconsideration filed in violation of the Local
26 Rules, and should be stricken. If this Court is inclined to revisit the merits of its recent ruling,
27 this Court should find that the testimony of other athletes regarding their dealings with Anderson
28 and that they knew Anderson was providing them with performance enhancing drugs tends to

1 show that the defendant also knew or should have known that he was receiving steroids from
 2 Anderson. This is not impermissible propensity evidence, but proper under the Federal Rules of
 3 Evidence.

4 ARGUMENT

5 **I. This Court should dismiss the defendant's motion for failure to comply with the** 6 **Local Rules governing the filing of a motion for reconsideration**

7 Defendant's eleven-page motion asks this Court to reconsider its recent January 21, 2011
 8 ruling that "in general, if the other athletes testify in the manner and to the effect that the
 9 government has offered they will testify, . . . that's admissible evidence" because if "Anderson
 10 behaved in this way toward other athletes, gave them dates, gave them times, gave them places,
 11 gave them pieces of paper, told them what he was doing, . . . that's material to whether or not
 12 [the defendant's] testimony is true." 1/21/11 tr. at 18-20.¹ The defendant failed to obtain leave of
 13 this Court to file his motion for reconsideration. For this reason, this Court should strike or
 14 summarily deny the motion.

15 Motions to reconsider, while allowed, are an "extraordinary remedy, to be used sparingly
 16 in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d
 17 934, 945 (9th Cir. 2003) (internal quotations and citations omitted); *cf. Thomas v. Bible*, 983
 18 F.2d 152, 154 (9th Cir.1993) ("a court is generally precluded from reconsidering an issue that has
 19 already been decided by the same court, or a higher court in the identical case").

20 This District's Local Rules reflect the Ninth Circuit's proclamations, and prohibits a party
 21 from filing a notice for reconsideration "without first obtaining leave of Court to file the motion."
 22 Civ. L. R. 7-9(a) (motions for reconsideration); Crim. L. R. 2-1 (applying Civil Local Rules to
 23 criminal context). The defendant failed to obtain leave of the court to file its motion.

24 Moreover, the defendant cannot provide this Court with grounds to grant him leave to
 25 move for reconsideration of the Court's recent order. The Local Rules require a party moving for
 26 leave to file a motion for reconsideration to show that (1) a material difference in fact or law
 27 exists from that was presented to the Court before entry of the interlocutory order for which
 28 reconsideration is sought, (2) new material facts emerged or a change of law occurred after the

¹ A copy of the January 11, 2011 transcript is attached as Exh. A.

1 order, or (3) there was a “manifest failure by the Court to consider material facts or dispositive
2 legal arguments which were presented to the Court before such interlocutory order.” Civ. L. R.
3 709(b). No material facts or law has changed in the approximately three weeks since this Court
4 originally resolved the motion.

5 Nor has the defendant shown that this Court failed to properly consider the material facts
6 and legal arguments originally presented to it. In the defendant’s January 14, 2011 papers, he
7 argued that the testimony of other athletes should be precluded because it was one of guilt by
8 association in violation of Fed. R. Evid. 401, 403, and 404. *See* Docket #197 at 19-20. At the
9 January 21, 2011 hearing, defense counsel raised the argument that the other athlete evidence
10 impermissibly suggested that if “Anderson distributed drugs to these other people, then he
11 logically must have distributed them to [the defendant]” and guilt by association, acknowledging
12 that the argument was not a new one, but had already been made in the defendant’s briefing.
13 1/21/11 tr. at 19-20. The Court specifically responded to the concern, stating that it believed the
14 other-athlete testimony, as proffered by the government, to be admissible. *Id.* at 19-20.

15 The Court did suggest that if the testimony at trial was not as the government proffered, it
16 might exclude the testimony, and that it would later determine how many other athletes could
17 provide similar testimony under Fed. R. Evid. 403. *Id.* at 21-22. Defense counsel noted that
18 because “the Court has sort of indicated that it’s going to deal with that testimony on a case-by-
19 case basis,” “I think we’ll have the opportunity to perhaps address” “the 403 issue and similar
20 offenses.” *Id.* at 20-21. The Court responded, “So you will.” *Id.* at 21. Contrary to the
21 defendant’s assertion, *see* Def. Mot. *In Limine* Three at 3, the Court’s statement did not authorize
22 the defendant to rebrief the issue of whether other-athlete testimony is admissible, but only
23 acknowledged that the defendant could make witness-specific objections at trial.

24 Because the defendant failed to abide by the Local Rules, and because he could not
25 present sufficient grounds to obtain leave to file a motion for reconsideration, this Court should
26 strike or summarily deny his motion seeking to bar other-athlete testimony.

1 **II. Fed. R. Evid. 404(b) does not govern the other athlete testimony**

2 The defendant attempts to shoehorn the other-athlete testimony into the rubric of prior
3 bad acts evidence, which may be excluded under Fed. R. Evid. 404. It is not. Rule 404(b)
4 prohibits the use of evidence of other acts to prove the character of “a person in order to show
5 action in conformity therewith.” Thus, the United States could not offer the evidence that
6 Anderson supplied steroids to other athletes for the purpose of showing that Anderson also
7 supplied steroids to the defendant. But Rule 404(b)’s prohibition clearly does not apply to using
8 acts by one person to prove something about an entirely different person. *See* Def. Mot. *In*
9 *Limine* Three at 5 (acknowledging that Rule 404(b) “permits introduction of other uncharged acts
10 of a person to demonstrate” knowledge “only of the person who committed the other acts, not
11 that of a third party”). And that is what the government seeks to do with the other athlete
12 testimony.

13 Athletes other than the defendant will testify that they received performance enhancing
14 drugs from Anderson, along with instructions for, and monitoring over, the use of these drugs.
15 Based on these communications and interactions with Anderson, the athletes understood that they
16 were using illegal steroids. The government will offer this evidence to show that Anderson’s
17 practices made it likely that clients knew the nature of the substances Anderson provided them.
18 In combination with evidence that the defendant was also a client of Anderson’s, this evidence
19 tends to show that the defendant knew that Anderson was providing him steroids. This is
20 relevant and admissible evidence.

21 The defendant is also mistaken in arguing that the other-athlete testimony would amount
22 to guilt by association. *See* Def. Mot. *In Limine* Three at 6. The relevance of the evidence is not
23 that because other professional athletes knowingly used steroids, the defendant, also a
24 professional athlete, necessarily did. The government submits that because other professional
25 athletes, based on their professional training and background, understood quite clearly through
26 their dealings with Anderson that they were using steroids, it is likely that the defendant, also a
27 professional athlete, had the same knowledge. This is not a Rule 404(b) question, and the
28 defendant’s citation of the Tenth Circuit case *United States v. Cardall*, 885 F.2d 656 (10th Cir.

1 1989) (explaining that evidence of similar bad acts could not be admitted against defendant
2 Holman under Rule 404(b) where there was no evidence that Holman had engaged in bad act to
3 which other acts could be similar), is inapposite.

4 **III. Other-athlete testimony is admissible as relevant evidence and**
5 **under Fed. R. Evid. 406**

6 The defendant argues that other athletes' testimony about Anderson's practices is
7 inadmissible because it does not fit the requirements of Fed. R. Evid. 406, which permits
8 evidence of habit of a person or of the routine practice of an organization to prove that the
9 conduct of the person or organization on a particular occasion was in conformity with the habit
10 or routine practice. That contention misapprehends the structure of the Federal Rules of
11 Evidence and erroneously limits the scope of Rule 406.

12 Under Fed. R. Evid. 402, all relevant evidence is admissible unless its admission would
13 violate the Constitution, a federal statute, or some other provision of the Rules of evidence. Rule
14 406 merely clarifies that "[e]vidence of the habit of a person . . . is relevant." Thus, relevant
15 evidence that is otherwise admissible may be admitted at trial even if it is not habit evidence.
16 Because, as this Court has already found, the other-athlete testimony is relevant, the Court should
17 admit it regardless of whether it fits into Rule 406, unless the defendant can identify a legal basis
18 for its exclusion.

19 In fact, however, the other-athlete evidence also qualifies as habit evidence under Rule
20 406 and therefore that rule dispels any doubts as to its relevance and admissibility. The
21 defendant has indicated elsewhere that he does not dispute that Anderson did in fact administer
22 steroids to him, and the government will offer evidence to this effect. What is at issue, and what
23 the government seeks to prove through the other-athlete testimony is that Anderson's habit and
24 practice in his delivery of steroids tends to prove that the defendant knew that Anderson was
25 providing him with steroids.

26 The advisory committee's note to Rule 406 notes that the "trend" in the caselaw "towards
27 admitting evidence of business transactions between or of the parties and a third person as
28 tending to prove that he made the same bargain or proposal in the litigated situation." Consistent
with this trend, the Ninth Circuit held in *United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir.

1 2000), that evidence of immigration official's general practice of watching a suspected illegal
2 alien attempting to sneak across the border, and only then approaching the individual to
3 determine his or her admissibility for immigration purposes, was properly admitted under Rule
4 406. Thus, Rule 406 permits evidence that Anderson's routine practices with other athlete-
5 clients for the purpose of showing that Anderson used the same practices with the defendant.

6 *United States v. Angwin*, 271 F.3d 786 (9th Cir. 2001), *overruled on other grounds*,
7 *United States v. Lopez*, 484 F.3d 1186, 1188 (9th Cir. 2007) (en banc), does not support the
8 defendant's position that Anderson's habit and practices in delivery steroids does not fit Rule
9 406. In *Angwin*, the Ninth Circuit held that the district court properly excluded evidence of the
10 defendant's training to prudently take the least confrontational course of action in rescuing
11 distressed boats at sea to show that he acted similarly when aliens approached his motorhome.
12 *Id.* at 799-800. The purported habit was simply "not sufficiently parallel" to his conduct on the
13 day of the crime. *Id.* at 799. Moreover, the training the defendant sought to admit under Rule
14 406 was not sufficiently reflexive and specific to constitute habit evidence, because a general
15 approach to responding dangerous situations is, by definition, something that has to be applied
16 differently to each particular situation. *Id.* at 800.

17 By contrast, Anderson's habit and practices in delivering steroids to other professional
18 athletes is sufficiently parallel under Rule 406 to his habit and practices in delivering steroids to
19 the defendant, also a professional athlete. The defendant's arguments that the defendant's
20 relationship with Anderson was different than his relationship with other athletes is a matter of
21 characterization – not absolute fact – and goes to weight, not admissibility. *See* Def. Mot. *In*
22 *Limine* Three at 9.

23 In addition, unlike the general approach at issue in *Angwin*, the government seeks to offer
24 evidence of Anderson's specific habit and routine practices in a specific situation (delivering
25 steroids to professional athletes): the way Anderson tracked steroid cycles using calendars, the
26 way Anderson monitored his clients' steroid usage by testing blood and urine samples, etc.

27 Nor does *Weil v. Seltzer*, 873 F.2d 1453 (D.C. Cir. 1989), require the exclusion of the
28 other-athlete evidence for the purpose of showing that Anderson comported himself in a

1 particular way in supplying the defendant with steroids. In *Weil*, the plaintiff failed to establish
2 that Dr. Seltzer habitually misrepresented steroids as antihistamines or decongestants to his
3 allergy patients. *Id.* at 1460-61. The plaintiff presented the testimony of five former patients, but
4 made no proffer as to whether he reacted the same way with each of his allergy patients. *Id.* at
5 1461. In light of the plaintiff's failure to establish this evidence as habit evidence, it actually
6 amounted to propensity evidence that asked the jury to infer that because the doctor had
7 misrepresented steroids to five patients, he did the same the deceased plaintiff. *Id.*

8 The defendant's argument that the government is likewise unable to produce a sufficient
9 sample size to establish the presence of a habit, *see* Def. Mot. *In Limine* Three at 9-10, is
10 incorrect. The government is ready to present testimony from the majority of Anderson's
11 professional athlete client roster. In addition, the government can and has established by proffer
12 that Anderson was in the habit of keeping calendars, collecting blood and urine samples, and
13 communicating with his clients about their steroid cycles in a particular manner for his steroid
14 customers. In fact, although the documentary evidence has been deemed inadmissible due to
15 Anderson's illegal refusal to testify, this Court is aware that Anderson, just like he did with the
16 other athletes, kept such calendars and collected blood and urine samples from the defendant
17 himself. The United States asks this Court to prohibit the defendant from suggesting otherwise.

18
19 The other-athlete testimony is admissible under Rule 406, and should not be excluded
20 under Fed. R. Evid. 403. Anderson's illegal refusal to testify has rendered inadmissible
21 Anderson's records for the defendant's use of steroids. Other-athlete testimony establishing that
22 Anderson's behavior in the delivery of steroids to the defendant would have made it unlikely that
23 the defendant was ignorant that he was receiving and using steroids. Any concern that the jury
24 might confuse this habit evidence with propensity evidence should at most occasion a limiting
25 instruction. It is not a reason to exclude the evidence. *See United States v. Jackson*, 84 F.3d
26 1154, 1159 (9th Cir. 1996) (noting that Rule 404(b) is rule of inclusion and evidence that could
27 prove propensity should be admitted so long as evidence is also relevant to issue in case other
28 than criminal propensity).

