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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SANTA BARBARA  
10 SANTA MARIA DIVISION

11 ~~PROPOSED~~ REDACTED VERSION

12 THE PEOPLE OF THE STATE OF CALIFORNIA, )

No. 1133603

13 Plaintiff, )

PLAINTIFF'S REPLY TO  
DEFENDANT'S OPPOSITION  
TO PLAINTIFF'S "EVIDENCE  
CODE § 1108" MOTION  
(Evid. Code, §§ 1108, 1101(b))

14 v. )

15 MICHAEL JOE JACKSON, )

16 Defendant. )

DATE: January 12, 2005  
TIME: 8:30 a.m.  
DEPT: SM 2 (Melville)

17  
18 ~~FILED UNDER SEAL~~

19  
20 A. Introduction:

21 On December 10, 2004, Plaintiff moved the Court for its order authorizing Plaintiff  
22 to put before the trial jury evidence [REDACTED]  
23 conduct pursuant to Evidence Code sections 1108, subdivision (a) ("1108(a)") and 1101,  
24 subdivision (b) ("1101(b)"). Hearing of that motion was continued from December 20, 2004  
25 to January 12, 2005 to allow Defendant more time to address the merits of the pending motion.

26 On January 3, 2005, Defendant timely served his Opposition to the pending motion.  
27 In it, he argues essentially two points:

28 -- (1) the proposed 1108(a) evidence is "implausible" (Opp. 2:1), "false" (*id.*, 2:7; 3:2),

1 "not credible" (*id.*, 2:15-16; 4:13-14), "incredible" (*id.*, 3:7), "flimsy" (*id.*, 4:4), "utterly  
2 lacking in credibility" (*id.*, 4:7), and "without substance" (*id.*, 5:5). It comes from  
3 "disgruntled" former employees and "tabloid informants" (*id.*, 2:4-5; 5:14; 5:22-24) with an  
4 "ax to grind" (*id.*, 5:22) who are "inherently unbelievable" (*id.*, 5:12), and who "carefully  
5 crafted their allegations" from "media accounts of the prosecution's theory" (*id.*, 5:6-9). "For  
6 the past decade, anyone who wanted the District Attorney's car could simply read the media  
7 accounts and come up with a story that fit the prosecution's theory," he alleges. (*Id.*, 5:9-11.)

8 -- (2) "Mr Jackson is entitled to defend himself against the false charges in the 1108  
9 motion if they are allowed to be introduced at trial." (Opp. 6:14-15 and ff.)

10 B. Summary of Plaintiff's Reply

11 Defendant is mistaken in the major premise of his argument. Most if not all of the  
12 information summarized in our 1108 motion was provided to law enforcement before  
13 previously confidential details were acquired and reported by the popular press. He certainly is  
14 correct in his assertion that he is "entitled to defend himself" against the charges, but it is for  
15 the trier of fact to determine whether those charges are "false."

16 C. Argument

17 J

18 DEFENDANT'S ASSERTIONS CONCERNING BOTH  
19 THE MOTIVATION AND THE OPPORTUNITY FOR  
20 THE PROPOSED § 1108 WITNESSES TO FABRICATE  
21 THEIR REPORTS ARE MISTAKEN

22 A. The "Grand Juries Didn't Indict" Misstatements

23 Defendant asserts that the proposed 1108 evidence "has previously been presented  
24 to two criminal grand juries and one civil jury, and . . . all three juries have rejected the  
25 testimony as false." (Opp. 2:6-7.) "This is the same 'evidence' that left two separate grand  
26 juries so unimpressed with the prosecution's 'case' that they did not return indictments." (*Id.*,  
27 3:4-5.) "It follows that a defendant must be allowed to introduce evidence that a grand jury  
28 heard the prior defense testimony and that an indictment was not returned, and that a civil jury

2

1 found these witnesses to be unconvincing.” (*Id.*, 6:25 – 7:2.)

2 As defendant well knows, the two grand juries that considered evidence against him  
3 in 1994 (a standing grand jury in Los Angeles County; a specially-convened grand jury in  
4 Santa Barbara County) were functioning as *investigative* grand juries. They were not asked to  
5 return indictments or to make “findings.” [REDACTED] refused to testify before them  
6 following his multi-million dollar settlement with defendant in early 1994. That essentially put  
7 the investigation on “hold,” and the Santa Barbara grand jury was discharged. The grand juries  
8 did not “reject” the testimony of any witness.

9 This is at least the third time defendant has asserted, in pleadings to this court,<sup>1</sup> the  
10 falsehood that “two prior grand juries failed to indict,” with its implication that the grand juries  
11 had considered but rejected indictments. Counsel has been called on it each time in the past.  
12 In the circumstances, these particular false statements appear to have been made solely for  
13 public consumption.

14 We use the word “false” advisedly. Counsel for a party may vigorously advocate  
15 his position in the pleadings he files with the court, but he is ethically bound not to “seek to  
16 mislead the judge . . . by an artifice or false statement of fact or law.” (Rules Prof. Conduct,  
17 rule 5-200(B).) Branding the prosecution’s witnesses as “disreputable,” “incredible” and the  
18 “crafters” of “false charges” may perhaps be excused as mere “advocacy” on counsel’s part  
19 and as evidence of his “warm zeal” on his client’s behalf. Knowingly false statements of fact  
20 by that lawyer simply are inexcusable.

21 B. The “Witnesses Repeated Information Already Public” Misstatement

22 To deal with the fact that all those “disgruntled” witnesses listed in the pending  
23 1108 motion separately reported strikingly similar conduct by defendant, his counsel simply  
24 makes up an explanation: “the prosecution’s Section 1108 witnesses had media accounts of the  
25 prosecution’s theory at their disposal when they carefully crafted their allegations . . . .” (Opp.  
26 5:6-9.)

27  
28 <sup>1</sup> See defendant’s motions for to reduce bail and to recuse the district attorney.

1 That isn't so. There weren't "media accounts of the prosecution's theory" available  
2 to the "section 1108 witnesses" at the time most of them were interviewed by investigators in  
3 this case, and most of them were first contacted by investigators rather than themselves  
4 searching out someone to tell their story to. [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] filed his lawsuit under seal on September 14, 1993. The  
14 compromise agreement that settled the lawsuit was filed under seal on January 25, 1994.  
15 Though the pleadings were under seal, the fact the lawsuit was filed was the focus of public  
16 speculation and comment.

17 [REDACTED]  
18 [REDACTED] in February, 1995.

19 Of course, even if every detail of the [REDACTED] lawsuit had become public the day it  
20 was filed, it does not follow as a matter of logic that individuals with similar stories to tell are  
21 making them up. On the other hand, if the various accounts summarized in the pending 1108  
22 motion were given separately, independently and without prior access to the details of [REDACTED]  
23 [REDACTED] complaint, that is strong evidence of their separate and collective credibility.  
24 Branding the reporting individuals as greedy and "disgruntled" doesn't impeach the substance  
25 of their reports.

26 The individual accounts of the several proposed section 1108 witnesses [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED], it is scarcely a credible basis for the allegation that the  
5 proposed 1108 witnesses all made up their accounts from information published in the tabloid  
6 press. Nor does it reduce the persuasive effect of the overall similarity of their accounts.

7 Defendant alleges that

8 this is a situation in which the [REDACTED] stories conformed to other  
9 stories only because they met with [REDACTED], the attorney for  
10 [REDACTED], prior to making their allegations. He then sent them to  
11 his forensic psychiatrist, [REDACTED]. The [REDACTED] never made any of  
12 these allegations prior to meeting with Mr. [REDACTED] and Dr. [REDACTED],  
13 despite the fact that they were represented by counsel and had numerous  
14 opportunities to make the allegations. They not only did not make the  
15 so-called "similar" allegations before they saw [REDACTED] and [REDACTED]  
16 [REDACTED], they didn't make any allegations at all. Therefore, any alleged  
17 similarity with claims made by Mr. [REDACTED] and Dr. [REDACTED] prior client  
18 is not coincidental.

19 (Opp. 6:5-12.)<sup>2</sup>

20 No one – least of all the plaintiff in this prosecution – asserts that the similarity of  
21 the allegations by [REDACTED] is "coincidental." That similarity is due  
22 entirely to defendant's [REDACTED]

23 ////

24 ////

25 ////

26 ////

27 <sup>2</sup> [REDACTED] was [REDACTED] "prior client"; he was not Dr. [REDACTED] patient,  
28 ever. And [REDACTED] first disclosed the fact of his molestation to Dr. [REDACTED] (a psychologist,  
not a psychiatrist), not Attorney [REDACTED].

DEFENDANT OFFERS NO SUPPORT FOR HIS REQUEST THAT THE COURT "FIND THAT THE PROSECUTION'S 'EVIDENCE' IS SO LACKING IN CREDIBILITY THAT IT SHOULD NOT BE ALLOWED AT TRIAL"

A. Name-Calling Is Not Evidence

As noted above, defendant's opposition is long on his conclusory characterization of the proposed 1108 evidence as "implausible," "flimsy" and "utterly lacking in credibility" and on the explicit suggestion that any witness who claims to have observed defendant engage in [REDACTED] fabricates his or her claim out of whole cloth.

Merely labeling the proposed testimony of an adverse witness as "incredible" doesn't make it so. Branding a potential witness as a slanderer and an incipient perjurer without evidence to back up that calumny says far more about the accuser than the witness.

B. The Proposed 1108 Evidence Is Not "Demonstrably False."  
So Assessment Of The Credibility Of A Given Witness  
And His Or Her Evidence Is Peculiarly The Jury's  
Function

Defendant is understandably eager to head off presentation to the jury of evidence of [REDACTED]. He tacitly acknowledges that as an abstract matter the proposed evidence comes squarely within Evidence Code section 1108's ambit if it is not so "incredible" as to warrant its exclusion at the threshold, because it tends to prove his disposition to commit [REDACTED]

To be sure, defendant argues that every bit of the proposed evidence is "implausible" and "incredible." He does not attempt to demonstrate that the proposed testimony of even one of the witnesses, considered on the face of the summary of that

1 proposed testimony, is "incredible." But that is his burden.

2 In *People v. Cudjo* (1993) 6 Cal.4th 585, the California Supreme Court dealt with  
3 the admissibility of evidence of certain out-of-court statements by defendant's brother  
4 Gregory, in which he confessed to one Culver that he had committed the murder for which  
5 defendant was on trial. Culver was prepared to testify to his jailhouse conversation with  
6 Gregory, but the trial court excluded his testimony on the ground Culver was not himself a  
7 reliable witness.

8 The Supreme Court reversed Cudjo's conviction, holding that the trial court abused  
9 its discretion in excluding Culver as a witness on defendant's behalf pursuant to Evidence  
10 Code section 352.

11 [T]he trial court did not focus exclusively, or even primarily, on  
12 whether Gregory's *hearsay statement* might be false. Instead, the court  
13 apparently accepted the prosecution's contention that *Culver* was  
14 probably a liar who should therefore be excluded as a *live witness*. In so  
15 doing, the court erred.

16 (*People v. Cudjo, supra*, 6 Cal.4th at p. 608; emphasis the court's.)

17 The Supreme Court noted:

18 As with other facts, the direct testimony of a single witness is sufficient  
19 to support a finding unless the testimony is physically impossible or its  
20 falsity is apparent "without resorting to inferences or deductions."  
21 [Citations.] Except in those rare instances of demonstrable falsity,  
22 doubts about the credibility of the in-court witness should be left for the  
23 jury's resolution; such doubts do not afford a ground for refusing to  
24 admit evidence under the hearsay exception for statements against penal  
25 interest. [Citations.]

26 (*Id.*, at pp. 608-609.)

27 The Supreme Court discussed the limits of a trial court's discretion to exclude what  
28 it perceives to be "unreliable" testimony pursuant to Evidence Code section 352.

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1 As noted, the trial court apparently concluded that the evidence was  
2 more prejudicial than probative because Culver was not a reliable  
3 witness. However, such doubts, however legitimate, do not constitute  
4 "prejudice" under Evidence Code section 352. (See *People v. Alcalá*  
5 (1992) 4 Cal.4th 742, 791.)

6 (*Id.* p.610.)

7 As with statements admissible as an exception to the hearsay rule, so with testimony  
8 offered to prove defendant's disposition [REDACTED]. That evidence may  
9 not be excluded because defendant deems it "incredible," or even if the court has its own  
10 reservations concerning a given witness's credibility.

11 CONCLUSION

12 Defendant does not disagree that Evidence Code section 1108 was enacted for  
13 precisely the reasons discussed in the pending motion: [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] Defendant does not disagree that the  
17 proposed evidence, if credible, is acutely pertinent to the issue whether he [REDACTED]

18 [REDACTED] His only argument is that the  
19 proposed evidence is "incredible," and his only support for that argument is his ipsi dixit.

20 The credibility of a witness whose evidence is admissible and relevant is for the  
21 jury to assess. The pending motion for the admission of evidence the Legislature has deemed  
22 especially probative in the prosecution of [REDACTED] should be granted.

23 DATED: January 10, 2005

24 Respectfully submitted,

25 THOMAS W. SNEDDON, JR.  
26 District Attorney

27 By: \_\_\_\_\_  
28 Gerald McC. Franklin, Senior Deputy



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2  
3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA  
5 COUNTY OF SANTA BARBARA } SS

6 I am a citizen of the United States and a resident of the County aforesaid; I am over  
7 the age of eighteen years and I am not a party to the within-entitled action. My business  
8 address is: District Attorney's Office; Courthouse; 1112 Santa Barbara Street, Santa Barbara,  
9 California 93101.

10 On January 10, 2005, I served the within REDACTED PLAINTIFF'S REPLY TO  
11 DEFENDANT'S OPPOSITION TO MOTION FOR ADMISSION OF EVIDENCE OF  
12 DEFENDANT'S [REDACTED] (Evid. Code, § 1108) on Defendant, by  
13 THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by personally  
14 delivering a true copy thereof to Mr. Sanger's office in Santa Barbara, by transmitting a  
15 facsimile copy thereof to Attorney Mesereau, and by causing a true copy thereof to be mailed  
16 to Mr. Mesereau, first class postage prepaid, at the addresses shown on the attached Service  
17 List.

18 I declare under penalty of perjury that the foregoing is true and correct.

19 Executed at Santa Barbara, California on this 10th day of January, 2005.

20  
21   
22 Gerald McC. Franklin

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