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10 DANIELLE STAUB

11 **UNITED STATES DISTRICT COURT**

12 **CENTRAL DISTRICT OF CALIFORNIA**

13 KEVIN MAHER; MARIBEL MAHER,)

14 Plaintiffs,)

15 v.)

16 DANIELLE STAUB; and DOES 1)
17 through 20, inclusive,)

18 Defendants.)

Case No. CV-09-8646-CAS (JCx)
Hon. Christina A. Snyder

**MOTION IN LIMINE NO. FOUR (4)
TO EXCLUDE ANY EVIDENCE,
DOCUMENTS, AND OR
TESTIMONY OF THE SEXUAL
HISTORY OF DEFENDANT
DANIELLE STAUB**

Final Pre-Trial Status Conference

Date: October 18, 2010

Time: 11:00 AM

Dept.: 5

Date Action Filed: October 8, 2009

Trial Date: 02/15/11

21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

22 Defendant DANIELLE STAUB (hereinafter "STAUB" or "Defendant")
23 hereby moves this court, in limine, before jury selection or the commencement of
24 trial, for an order excluding Plaintiff KEVIN MAHER (hereinafter "MAHER" or
25 "Plaintiff") from introducing any evidence, documents, testimony, comment and/or
26 opinion regarding any irrelevant, prejudicial aspects of the Defendant's sexual
27 history outside of her marriage to Plaintiff, Kevin Maher, and unrelated to the
28 causes of action before the Court. Pursuant to this Court's rules, this Motion in

1 Limine will be heard on the date of the Final Pre-Trial Status Conference on
2 October 18, 2010 at 11:00 AM, or as soon thereafter as convenient to this Court.
3 This Motion is based upon the grounds that said information and evidence is
4 inadmissible character evidence, is irrelevant to the issues in this case, and will
5 create a substantial danger of prejudice to the Defendant.

6
7 DATED: September 20, 2010 **SCHUMANN, RALLO & ROSENBERG, LLP**

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9 By: /S/ Peter Cook
10 Kim Schumann, Esq.
11 Peter Cook, Esq.
12 Eric Arevalo, Esq.
13 Attorneys for Defendant,
14 DANIELLE STAUB
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This cases arises out of a cause of action for defamation, regarding the following three statements purportedly made by Defendant about Plaintiff to tabloid magazine, *People Magazine*:

- (1) KEVIN MAHER “raped defendant on a bed of broken glass”
[Complaint, ¶ 6(a)];
- (2) KEVIN MAHER “inserted a handgun inside of defendant and played Russian Roulette” [Complaint, ¶ 6(b)];
- (3) KEVIN MAHER “killed defendant’s dog by way of hanging”
[Complaint, ¶ 6(c)];

Although, Plaintiff’s case solely revolves around the claim of his own defamation, Plaintiff has indicated on multiple separate occasions that he intends to bring in irrelevant, unduly prejudicial and improper character evidence regarding the Defendant’s sexual history, including evidence that the Defendant was a prostitute and a stripper prior to and after her marriage to Plaintiff, and further evidence regarding sex tapes that have recently been published that feature the Defendant.

In order to prove liability in a case for defamation in California, the elements are as follows: (1) That the Defendant made one or more of the alleged defamatory statements to Mark Dagostino; (2) that Dagostino reasonably understood that the statements were about Plaintiff; (3) that Dagostino reasonably understood the statements to mean that Plaintiff had raped Defendant, inserted a gun into the Defendant’s vagina, and killed Defendant's dog; and (4) that the statements were false. CACI 1700, *citing* Cal. Civ. Code §§ 45, 46; *also citing* Restatement 2d Torts § 558. None of these four elements implicate Ms. STAUB's character in any fashion.

///

1 As such, evidence regarding or related to the Defendant's sexual history
2 should be excluded, because such evidence is improper character evidence under
3 Federal Rules of Evidence ["FRE"] 404, lacks relevance under FRE 402, and is
4 unduly prejudicial under FRE 403.

5 **2. THIS COURT SHOULD EXCLUDE ALL EVIDENCE**
6 **REGARDING OR RELATED TO DEFENDANT'S SEXUAL**
7 **HISTORY UNDER FEDERAL RULES OF EVIDENCE ["FRE"]**
8 **§ 404(b)**

9 Evidence of bad acts is only admissible subject to the strictures imposed FRE
10 404(b), which provides:

11 Evidence of other crimes, wrongs, or acts is not admissible to prove
12 the character of a person in order to show action in conformity
therewith.

13 Rule 404(b) protects against the danger that the jury will either punish the
14 defendant for offenses other than those before them because they are convinced the
15 defendant has a propensity to engage in illegal activity. *See United States v. Brown*
16 880 F.2d 1012, 1014 (9th Cir. 1989) (*finding* "the rule is designed to avoid a danger
17 that the jury will punish the defendant for offenses other than the offense charge, or
18 at least will convict when unsure of guilt, because it is convinced the defendant is a
19 bad man deserving of punishment").

20 FRE 404(b) restates the traditional view that evidence of other crimes or
21 other acts are admissible only when the proffered evidence is relevant to a material
22 issue in the case, other than the defendant's criminal character. *See United States v.*
23 *McKoy*, 771 F.2d 1207, 1213 (9th Cir. 1985) (holding that FRE 404(b) prohibits
24 introducing evidence of a defendant's prior crimes to show that the defendant has a
25 bad character).

26 Although FRE 404(b) permits introduction of character evidence for limited
27 purposes, such "as proof of motive, opportunity, intent, preparation, plan,
28 knowledge, identity, or absence of mistake or accident," such evidence is not

1 looked upon with favor. See United States v. Hodges 770 F.2d 1475, 1479 (9th Cir.
2 1985) (*finding* “[w]e have emphasized that extrinsic acts evidence is not looked
3 upon with favor.”)

4 Further, there exists no presumption that evidence of other crimes or bad acts
5 is admissible. McKoy, *supra* at 1214. Instead, to establish the admissibility of other
6 acts evidence, the Ninth Circuit has held that the district court must find that it
7 passes a four-part test as follows:

- 8 (1) it must prove a material element of the offense for which the
9 defendant is charged;
- 10 (2) the prior conduct must be similar to the charged conduct;
- 11 (3) proof of the prior conduct must be based upon sufficient
evidence; and
- 12 (4) the prior conduct must not be too remote in time.

12 United States v. Basinger, 60 F.3d 1400, 1408 (9th Cir. 1995).

13 In this matter, Plaintiff, KEVIN MAHER, as well as numerous other people,
14 including witnesses Caroline Manzo and Daniel Aguilar, have maintained that the
15 Defendant was prostitute or stripper. Further, Plaintiff has indicated that the
16 Defendant has led a promiscuous lifestyle, and is a “nymphomaniac.” Such
17 characterizations of the Defendant’s sex life have been depicted in Plaintiff’s book,
18 COP WITHOUT A BADGE. Additionally, sex tapes featuring the Defendant have
19 recently become tabloid fodder. Plaintiff has indicated that he seeks to have Steven
20 Zalewski, a man that has possession of one of these sex tapes, testify at trial.

21 Testimony regarding the Defendant’s sexual history, and intimations of her
22 sexual proclivities both before and after her relationship with Plaintiff, have nothing
23 to do with this case.

24 To establish liability, Plaintiff’s burden is very fact-based and somewhat
25 mechanical, and does not require any questioning of the Defendant’s character.
26 Plaintiff must first establish that the statements were made, that they statements
27 were understood by a third person to mean that Plaintiff had performed the alleged
28 defamatory acts, and that the statements are, in fact, false. None of these elements

1 of proof are related whatsoever on any character trait of the Defendant, and
2 particularly any evidence that the Defendant was a prostitute, or a stripper, or is
3 promiscuous, or has been featured in sex tapes.

4 Further, issues regarding the Defendant's sex life has nothing to do with the
5 cause of action for defamation. The what, who, where, when and why of Ms.
6 STAUB's sex life has nothing to do with whether or not she made defamatory
7 statements regarding the Plaintiff.

8 As such, the introduction of any evidence regarding the Defendant's past and
9 current sexual history does not pass the Ninth Circuit's four-part test; and further,
10 does not have any bearing on proving Plaintiff's case. As such, any and all
11 evidence, testimony or documents regarding or referencing the Defendant as a
12 prostitute, stripper, or being promiscuous, and any and all evidence regarding the
13 Defendant's sex tapes, should be excluded as inadmissible under FRE 404(b).

14 **2. EVIDENCE OF THE DEFENDANT'S SEXUAL HISTORY IS**
15 **NOT RELEVANT UNDER FRE 402**

16 FRE 401 defines relevant evidence as "evidence having any tendency to
17 make the existence of any fact that is of consequence to the determination of the
18 action more probable or less probable than it would be without the evidence."
19 Under FRE 402, "Evidence which is not relevant is not admissible."

20 In this case, evidence of the Defendant's sexual history has no tendency to
21 make the existence of any fact more or less probable in this case. If the Defendant
22 was a prostitute twenty-five years ago, that would have no bearing on whether or
23 not she published allegedly defamatory statements. If the Defendant is featured in
24 sex tapes, that does not establish the truth as to whether she was raped, violated
25 with a gun, or if Plaintiff killed her dog.

26 The Defendant's sex life prior to and after her relationship with Plaintiff is
27 entirely irrelevant to this case. As such, any and all evidence, testimony or
28 documents regarding or referencing the Defendant as a prostitute, stripper, or being

1 promiscuous, and any and all evidence regarding the Defendant's sex tapes, should
2 be excluded as inadmissible under FRE 402.

3 **4. THIS COURT SHOULD EXCLUDE ALL EVIDENCE OF**
4 **DEFENDANT'S SEXUAL HISTORY AS THE PREJUDICE IN**
5 **ALLOWING SUCH EVIDENCE GREATLY OUTWEIGHS ANY**
6 **PREJUDICIAL VALUE PURSUANT TO FRE 403**

7 Even if evidence of the Defendant's sexual history satisfies the requirements
8 of FRE 402 and 404(b), it still must satisfy the FRE 403 balancing test: "evidence
9 may be excluded if its probative value is substantially outweighed by the danger of
10 unfair prejudice, confusion of the issues, or misleading the jury, or by
11 considerations of undue delay, waste of time, or needless presentation of
12 cumulative evidence."

13 In this case, it is fairly clear that introducing evidence of the Defendant's
14 sexual history serves mostly to prejudice the Defendant. Such evidence would only
15 serve to paint the Defendant as a sexually promiscuous person that has sought to
16 perform sex acts as a trade, which could inflame a jury, and cause them to punish
17 her for her perceived sexual past. Evidence that she was ever a prostitute, or a slut,
18 or a whore, will create an unfair label on the Defendant, thereby depriving her of a
19 fair trial.

20 The probative value of this evidence is minuscule. If evidence of the
21 Defendant's sexual history has any relevance to the cause of action for defamation,
22 it is easily outweighed by the prejudice that will materialize once the Defendant is
23 labeled a prostitute, or a slut, or a whore.

24 As such, because evidence of the Defendant's sexual history has no relevance
25 to the case at hand, is improper character evidence, and is unduly prejudicial against
26 the Defendant, any and all evidence, testimony or documents regarding or
27 referencing the Defendant as a prostitute, stripper, or being promiscuous, and any

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1 and all evidence regarding the Defendant's sex tapes, should be excluded as
2 inadmissible under FRE 403.

3 **5. CONCLUSION**

4 For the reasons stated above, Defendant, DANIELLE STAUB, respectfully
5 requests that this Court exclude any and all evidence of the Defendant's past sexual
6 history, including any and all evidence, testimony or documents regarding or
7 referencing the Defendant as a prostitute, stripper, or being promiscuous, and any
8 and all evidence regarding the Defendant's sex tapes.

9
10 DATED: September 20, 2010 **SCHUMANN, RALLO & ROSENBERG, LLP**

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