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SUPERIOR COURT, STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL JOE JACKSON,

Defendant.

Case No.: 1133603

OPPOSITION OF NATIONAL BROADCASTING COMPANY, INC.; CBS BROADCASTING INC.; FOX NEWS NETWORK L.L.C.; ABC, INC.; CABLE NEWS NETWORK, INC.; THE NEW YORK TIMES COMPANY; *LOS ANGELES TIMES*; COURTROOM TELEVISION NETWORK LLC; AND SANTA BARBARA NEWS-PRESS TO PLAINTIFF'S REQUEST FOR PROTECTIVE ORDER BINDING BOTH PARTIES REGARDING PUBLIC STATEMENTS CONCERNING THIS CASE

Date: January 16, 2004
Time: 8:30 a.m.
Place: Department SM2,
Judge Rodney S. Melville

[VIA FACSIMILE]

I. INTRODUCTION

National Broadcasting Company, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network, Inc.; The New York Times Company; *Los Angeles Times*;

Courtroom Television LLC; and Santa Barbara News-Press (collectively, the "Access Proponents") respectfully oppose Plaintiff's Request for Protective Order Binding Both Parties Regarding Public Statements Concerning This Case ("Request for Protective Order" or "Request"). The breadth of the protective (or "gag") order sought by the prosecution is matched only by its patent unconstitutionality. It would, among other things, extinguish the defendant's ability to "[r]elease or authorize the release . . . of *any* purported extrajudicial statement . . . relating to this case,"[1] and thus the public and the media's ability to receive any such statements.[2] Nor is this proposed sweeping prior restraint on speech supported by any showing that less restrictive and more narrowly tailored means are unworkable.

This Court should therefore deny the Request and adopt a more balanced and measured response. Such a response should be tailored to the evolving circumstances of this case and address only those risks of pretrial or trial publicity that are so weighty as to override the free speech and free press rights secured by the Federal and California Constitutions.. Appropriate measures could include reminding or admonishing counsel of their obligations under the Rules of Professional Conduct, and/or incorporating the relevant provisions thereof into an order, enforceable through this Court's contempt and inherent authority, applicable to both attorneys and non-attorneys sufficiently connected with the case so as to necessitate such a restriction.

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1 The proposed order would also broadly restrict the ability of parties or counsel to release even *unsealed* documents that have yet to be ruled inadmissible by the court. The Access Proponents take particular exception to this provision of the proposed order.

2 Because the protective order sought by the prosecution would "directly impair[] or curtail[]" the Access Proponents' "ability to gather the news concerning th[is] trial," the Access Proponents have standing to oppose the prosecution's request therefor. *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975); *see also Radio and Television News Ass'n v. United States Dist. Ct.*, 781 F.2d 1443, 1445 (9th Cir. 1986); *Levine v. United States Dist. Ct.*, 764 F.2d 590, 594 (9th Cir. 1985) (citing, *inter alia*, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

II.
THE PRIOR RESTRAINT ON SPEECH SOUGHT BY THE PROSECUTION HAS NOT BEEN SHOWN TO BE THE LEAST RESTRICTIVE AND MOST NARROWLY TAILORED MEANS OF ELIMINATING A CLEAR AND PRESENT DANGER OR A SERIOUS AND IMMINENT THREAT TO THE FAIRNESS OF THE TRIAL IN THIS CASE

Under the First Amendment to the United States Constitution and the "even broader" free-speech and free-press guarantees of Article I, Section 2 of the California Constitution, "[g]ag orders on trial participants are unconstitutional unless":

> (1) the speech sought to be restrained poses a *clear and present danger* or *serious and imminent threat* to a protected competing interest;
> (2) the order is *narrowly tailored* to protect that interest; and
> (3) *no less restrictive alternatives* are available.

Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232, 1241 (2000) (footnote and citations omitted) (emphases added) (invalidating a far more narrowly tailored protective order restricting only the public disclosure of confidential patient information in the trial of a celebrity plastic surgeon);[3] *see also Levine v. United States Dist. Ct.*, 764 F.2d 590, 595 (1985) (invalidating, as overbroad, a gag order directed at only the prosecuting and defense attorneys in an espionage case). In discharging its burden to show that each of these stringent criteria for prior restraints has been satisfied, the party seeking such a restraint—here, the prosecution—must "produc[e] evidence" that its "right to a fair trial has been or will be compromised by pretrial publicity." *Hurvitz*, at 1242. "[I]t is not enough for a court to decide that the fair trial right *may* be affected by the exercise of free speech." *Id.* (emphasis in original) (citation omitted). As the United States Supreme Court has explained, "*[a]ny* prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. [citations omitted] Respondent thus carries a heavy burden of showing justification for the

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[3] The Second Appellate District's authoritative statement of the governing standard for determining the constitutionality of gag orders of the sort sought by the prosecution here supersedes the earlier, outdated "reasonable likelihood . . . of difficult[y in] empanelling . . . an impartial jury" standard stated by *Younger v. Smith*, 30 Cal. App. 3d 138 (1973), on which the trial court in *Peterson* and the prosecution here rely. Post-*Younger* decisions by both the California and United States Supreme Courts, discussed below, have elucidated the proper balance to be struck between the right to a fair trial and the right to free speech and a free press.

imposition of such a restraint." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) (emphasis added) (citations omitted).

Here, the prosecution has failed to produce any such evidence. Instead, it has offered only bare "speculation," unsupported by any facts, that the interviews that Defendant Jackson and his counsel each gave to CBS and CNN[4] would pose such a "clear and present danger" or "serious and imminent threat" to fairness of the trial in this case as to justify a gag order of the breadth sought by the prosecution here. *Hurvitz*, 84 Cal. App. 4th at 1241-42. The proposed order would prevent the Defendant from "releas[ing] or authoriz[ing] the release for public dissemination of *any* purported extrajudicial statement . . . relating to this case." (emphasis added). In other words, it would violate the principle that "[t]he 'accused has a First Amendment right to reply publicly to the prosecutor's charges, and the public has a right to hear that reply, because of its ongoing concern for the integrity of the criminal justice system and the need to hear from those most directly affected by it.'" *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987) (citation omitted) (invalidating a gag order directed at another celebrity defendant on trial for serious criminal charges).

Not only does the prosecution's paper-thin evidentiary showing fail to satisfy the exacting requirements of the First Amendment and Article I, Section 2 for prior restraints of any kind, but it also provides no basis for this Court to conclude at this time that "no less restrictive" or "narrowly tailored" means of ensuring a fair trial exist. *See Ford*, 830 F.2d at 600 ("such an order 'must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate'"). Furthermore, there is no reason to conclude that reminding or admonishing counsel to abide by the relevant Rule of Professional Conduct governing extrajudicial statements would be insufficient to ensure that no "extrajudicial statement[s]" [are] made that would produce "a substantial likelihood of materially prejudicing an adjudicative proceeding in the [instant] matter." Cal. R. Prof. Cond. 5-120.

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[4] In those interviews, Defendant Jackson and his lawyer asserted Jackson's alleged factual innocence of the serious charges against him and broadly outlined the theory of his defense.

Moreover, this Court has available to it a range of graduated measures to counter any actual negative influences on the impartiality of the jury or its ability to render an accurate and just verdict, including sanctions, continuances, voir dire, and admonitions and instructions to the jury. As Justice Kennedy has explained,

> Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. See generally Simon, Does the Court's Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?, *29 Stan. L. Rev. 515 (1977);* Dreschel, An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue, *18 Hofstra L. Rev. 1 (1989).* *Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054-55 (1991) (opinion of Kennedy, J., joined by Marshall, Blackmun, and Stevens, JJ.). Indeed, the effect of any potentially prejudicial extrajudicial statements the prospective jurors *might* be exposed to now, long before trial, would surely dissipate quickly. *Cf. id.* at 1045 ("As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date.").

Although the imperative to ensure a fair trial grows stronger as the date of the trial draws closer, the California Supreme Court has held that even *in the midst of* a trial, when the interest in a fair trial is at its apex, courts still "must presume that jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal. 4th 1178, 1223 (1999) (celebrity trial). It follows *a fortiori* then that there is no need for a gag order in this case at this time, when there remain many more options to ensure a fair trial other than a mistrial or retrial. Because courts "must presume that jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see," whatever potentially prejudicial extrajudicial statements any of the participants in this trial *might* make to the media would presumptively have no effect on a properly instructed jury that has been subjected to voir dire.

> We repeatedly have stressed our adherence to the fundamental premise that, as a general matter, cautionary admonitions and instructions serve to correct and cure myriad improprieties, including the receipt by jurors of information that was kept from

> them. To paraphrase Justice Holmes, it must be assumed that a jury does its duty, abides by cautionary instructions, and finds facts only because those facts are proved. (*Aikens v. Wisconsin (1904) 195 U.S. 194, 206.*)

NBC Subsidiary, 20 Cal. 4th at 1223-24.

As for the primary authority relied upon by the prosecution in defense of the constitutionality of its prayed-for protective order—*Gentile v. State Bar of Nevada*—one need only look at the final paragraph of the Court's opinion in that case to see why the broadly worded gag order sought by the prosecution here is unconstitutional:

> The restraint on speech is *narrowly tailored* to achieve those objectives. The regulation of attorneys' speech is limited – it applies *only* to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing *only* speech having a substantial likelihood of materially prejudicing that proceeding.

501 U.S. 1030, 1076 (1991) (emphases added). By reiterating that the rule of professional conduct at issue in *Gentile* was "narrowly tailored" and by repeatedly emphasizing that it applies "*only*" to "speech having a substantial likelihood of materially prejudicing that proceeding" (language that tracks Cal. R. Prof. Cond. 5-120), the Supreme Court made the following principle clear: even in the specialized realm of prior restraints directed at officers of the court, the "substantial likelihood of materially prejudicing th[e] proceeding" is a federal constitutional minimum or floor below which trial courts must not go in regulating the speech of lawyers appearing before them. In other words, anything that sweeps more broadly and restrains more speech than is covered by this standard falls outside the outer bounds of constitutionality set by *Gentile*.

The proposed order here proscribes more than what is covered by Rule 5-120 and thus is not as "narrowly tailored" as the general lawyer-speech restriction upheld on its face in *Gentile*. It is therefore presumptively unconstitutional. Even assuming for purposes of argument that the proposed order reaches no further than what is proscribed by Rule 5-120's "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" standard, there is no reason why the prosecution's concerns cannot adequately be met simply by a Court order setting forth the terms of Rule 5-120, applicable to both attorneys and non-attorneys sufficiently connected with the case so as

to necessitate such a restriction, the violation of which would be punishable as contempt of court. Doing so would eliminate much of the uncertainty, and the apparent unconstitutionality, of the capaciously worded protective order presently sought by the prosecution.

Indeed, doing so is consistent with the careful balancing of First and Sixth Amendment values in *Gentile*—a balance that recognizes just how crucial the comments and information from parties and counsel to the media that are not inconsistent with the "substantial likelihood of material[] prejudic[e]" standard are to public understanding and scrutiny of ongoing criminal prosecutions:

> [T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media. . . . [T]he "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials. [The standard] is constitutional . . . for . . . it imposes only narrow and necessary limitations on lawyers' speech.

Gentile, 501 U.S. at 1070, 1075.

That delicate constitutional balance would be impermissibly upset were this Court to grant the prosecution's Request for Protective Order in disregard of the high bar set by the Court of Appeal in *Hurvitz* for gag orders on trial participants. That bar, mandated by the First Amendment and by its "broader" companion guarantee in the California Constitution, mandates, at a minimum: (1) "a clear and present danger or serious and imminent threat to a protected competing interest" (such as the interest in a fair trial); (2) narrow tailoring to protect that competing interest; and (3) the absence of any "less restrictive alternatives." 84 Cal. App. 4th at 1241. None of these three requirements are satisfied by the overbroad protective order that the prosecution would have this Court adopt.

III.
CONCLUSION

More narrowly tailored and less restrictive means are readily available to this Court to address whatever legitimate concerns the prosecution may have regarding the pretrial publicity in this case. The prosecution has not carried its heavy burden of establishing that more drastic and heavy-handed prior restraints on speech are necessary or justified, at least at this time. Consequently, this Court should deny the Plaintiff's Request for Protective Order.

DATED: January 12, 2004

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
Julian W. Poon

By: _____
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Attorneys for National Broadcasting Company, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network, Inc.; The New York Times Company; *Los Angeles Times*; Courtroom Television Network LLC; Santa Barbara News-Press

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CERTIFICATE OF SERVICE

MAIL, COMMERCIAL OVERNIGHT MESSENGER, FAX, HAND DELIVERY

I, Lindie S. Joy, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Julian W. Poon, a member of the bar of this Court, and at his/her direction, on January 12, 2004, I served the following:

OPPOSITION OF NATIONAL BROADCASTING COMPANY, INC.; CBS BROADCASTING INC.; FOX NEWS NETWORK L.L.C.; ABC, INC.; CABLE NEWS NETWORK, INC.; THE NEW YORK TIMES COMPANY; *LOS ANGELES TIMES*; COURTROOM TELEVISION NETWORK LLC; AND SANTA BARBARA NEWS-PRESS TO PLAINTIFF'S REQUEST FOR PROTECTIVE ORDER BINDING BOTH PARTIES REGARDING PUBLIC STATEMENTS CONCERNING THIS CASE

on the interested parties in this action, by:

☒ **Service by Mail:** placing true and correct copy(ies) thereof in an envelope addressed to the attorney(s) of record, addressed as follows:

Gerald McC. Franklin
Senior Deputy District Attorney
Santa Barbara County
1105 Santa Barbara Street
Santa Barbara, CA 93101-2007

Matthew Geragos
Geragos & Geragos
350 S. Grand Avenue, Suite 3900
Los Angeles, CA 90071-3480

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

☐ **Service by Commercial Overnight Messenger:** placing true and correct copy(ies) thereof in an envelope addressed to the attorney(s) of record, addressed as follows:

and after sealing said envelope I caused same to be delivered to the aforementioned attorney(s) by qualified commercial overnight messenger.

///

☒ **Service by Fax:** causing a true copy thereof to be sent via facsimile to the attorney(s) of record at the telecopier number(s) so indicated, addressed as follows:

Attorney Name & Address	**Fax and Callback Number**
Gerald McC. Franklin Senior Deputy District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007	Facsimile: (805) 568-2398 Telephone:(805) 568-2306
Matthew Geragos Geragos & Geragos 350 S. Grand Avenue, Suite 3900 Los Angeles, CA 90071-3480	Facsimile: (213) 625-1600 Telephone:(213) 625-3900

and that the transmission was reported as completed and without error.

☐ **Service by Hand Delivery:** delivering true and correct copy(ies) thereof and sufficient envelope(s) addressed to the attorney(s) of record, addressed as follows:

to a messenger or messengers for personal delivery.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on January 12, 2004 at Los Angeles, California.

Lindie S. Joy

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