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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 18 2005

GARY M. BLAIR, Executive Officer

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7 SUPERIOR COURT, STATE OF CALIFORNIA
8 FOR THE COUNTY OF SANTA BARBARA
9

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,
13 vs.

14 MICHAEL JOE JACKSON,
15 Defendant.
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Case No.: 1133603

NOTICE OF MOTION AND MOTION FOR
PROTECTIVE ORDER PRECLUDING
MARTIN BASHIR FROM BEING
REQUIRED TO TESTIFY AND FOR
CLARIFICATION THAT "GAG ORDER"
DOES NOT APPLY TO MARTIN BASHIR;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
MARTIN BASHIR; DECLARATION OF
JOEL KANOFF; DECLARATION OF
THEODORE J. BOUTROUS, JR.;
[PROPOSED] ORDER

Date: January 27, 2005
Time: 9:30 a.m.
Place: Department SM-8,
Judge Rodney S. Melville

[VIA FACSIMILE]

22 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on January 27, 2005, at 9:30 a.m. in the above-entitled Court,
24 located at 312-C East Cook Street, Santa Maria, California 93456-5369, Martin Bashir, a news
25 correspondent for ABC News will, and hereby does, move the Court for a protective order precluding
26 the District Attorney from calling Mr. Bashir to testify at the upcoming criminal trial of Michael
27 Jackson. Mr. Bashir also asks that the Court clarify that its January 16, 2004 Protective Order (the
28 "Gag Order") – which, if read literally, could bar Mr. Bashir from reporting about information he

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER PRECLUDING MARTIN BASHIR FROM BEING
REQUIRED TO TESTIFY AND FOR CLARIFICATION THAT "GAG ORDER" DOES NOT APPLY TO
MARTIN BASHIR; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF MARTIN BASHIR,
JOEL KANOFF, AND THEODORE J. BOUTROUS, JR.; [PROPOSED] ORDER

1 gathered while preparing the documentary "Living with Michael Jackson" - does not apply to
2 Mr. Bashir.¹

3 This Motion is made on the ground that the California journalists' shield law, embodied in
4 both Article I, Section 2(b) of the California Constitution and California Evidence Code § 1070,
5 make clear that Mr. Bashir cannot be compelled to testify either as to the source of any information or
6 any unpublished information obtained during newsgathering. The Supreme Court of California has
7 held that the shield law grants journalists *absolute* protection from compelled disclosure of such
8 information where a prosecutor seeks testimony from the journalist in a criminal trial. *Miller v.*
9 *Superior Court*, 21 Cal. 4th 883, 890-91 (1999).

10 The broadcast version of the documentary "Living with Michael Jackson," speaks for itself
11 and, to the extent this Court is willing to consider admitting any part of it into evidence, it can be
12 authenticated by an ABC News custodian of records, who has submitted a declaration herewith
13 authenticating the tape and who could be called at trial to give the same testimony. Beyond what
14 was actually broadcast, California law absolutely prohibits compelling any information from
15 Mr. Bashir relating to his newsgathering. The First Amendment to the United States Constitution, as
16 well as New York law, also establish a reporters' privilege that precludes any order compelling
17 Mr. Bashir to testify. Accordingly, a protective order should be granted.

18 Moreover, any attempt to apply the Gag Order to Mr. Bashir would result in a prior restraint,
19 directly and seriously interfering with his newsgathering and reporting, in violation of the
20 First Amendment and Article I, Section 2(a) of the California Constitution. The Gag order purports
21 to apply to witnesses and potential witnesses. Thus, in the event the Court grants Mr. Bashir's
22 motion for a protective order, then the Gag Order, by its own terms, is inapplicable to Mr. Bashir and

23
24 ¹ Mr. Bashir is not filing a motion requesting that this motion for a protective order be filed under
25 seal because neither the motion nor any of the attached records contain sealed or otherwise
26 sensitive or confidential information that may properly be kept from the public under California
27 law, the First Amendment, or the Court's orders in this case. See Cal. R. Ct. 243.1-243.2;
28 see also Declaration of Theodore J. Boutrous, Jr. ("Boutrous Decl.") ¶ 1.

1 the Court need not reach the serious constitutional issues raised by seeking to restrain a journalist
2 from reporting information in connection with a criminal trial. But if the Court denies Mr. Bashir's
3 motion for a protective order in whole or in part, it should clarify that the United States and
4 California Constitutions preclude application of the Gag Order to Mr. Bashir.

5 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
6 Points and Authorities, the attached Declaration of Martin Bashir, the attached Declaration of
7 Joel Kanoff, the attached Declaration of Theodore J. Boutrous, Jr., the complete files and records in
8 this action, and on such argument and evidence as may be presented to the Court at the hearing on
9 this Motion.

10 DATED: January 18, 2005

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
Michael H. Doré

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13 By: 
14 Theodore J. Boutrous, Jr.

15 Attorneys for MARTIN BASHIR
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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.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER PRECLUDING MARTIN BASHIR FROM BEING REQUIRED
TO TESTIFY AND FOR CLARIFICATION THAT "GAG ORDER"
DOES NOT APPLY TO MARTIN BASHIR

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REQUIRED TO TESTIFY AND FOR CLARIFICATION THAT "GAG ORDER" DOES NOT APPLY TO
MARTIN BASHIR; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF MARTIN BASHIR,
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	4
A. Mr. Bashir Cannot Be Compelled To Testify Regarding Any Unpublished Information Obtained During His Newgathering And Reporting Relating To "Living With Michael Jackson"	4
1. California's Constitutional and Statutory Shield Law Affords Broad and Absolute Protection against Compelled Testimony and Contempt Regarding Unpublished Information in these Circumstances.....	5
2. The Shield Law Applies to Mr. Bashir and His Documentary, and Therefore He May Not Be Compelled to Disclose any Information Related "Living with Michael Jackson" that was not Included in the Documentary As Broadcast to the Public	7
3. The Court Should Enter a Protective Order Prohibiting Mr. Bashir from Being Called as a Witness at Trial	9
B. The Gag Order Does Not Apply To Mr. Bashir Because (A) The Shield Law Bars Him From Being Called As A Witness, And (B) Even If He Could Be Called To Testify, It Would Violate The United States And California Constitutions To Impose Such A Prior Restraint Against Mr. Bashir	11
III. CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Butterworth v. Smith</i> , 494 U.S. 624 (1990).....	14
<i>Carroll v. Princess Anne</i> , 393 U.S. 175 (1968).....	12
<i>CBS, Inc. v. Davis</i> , 114 S. Ct. 912 (1994).....	3, 12
<i>Dailey v. Superior Court</i> , 112 Cal. 94 (1896).....	14
<i>Delaney v. Superior Court</i> , 50 Cal. 3d 785, 797 (1990).....	6
<i>Elrod v. Burns</i> , 427 U.S. 347, 373 (1976).....	2
<i>Gerawan Farming, Inc. v. Lyons</i> , 24 Cal. 4th 468 (2000).....	13
<i>Hurwitz v. Hoefflin</i> , 84 Cal. App. 4th 1232 (2000).....	11, 14
<i>In re King World Prods., Inc.</i> , 898 F.2d 56 (6th Cir. 1990).....	12
<i>Miller v. Superior Court</i> , 21 Cal. 4th 883 (1999).....	passim
<i>Mitchell v. Superior Court</i> , 37 Cal. 3d 268 (1984).....	10
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976).....	3, 12, 14
<i>New York Times Company v. Superior Court</i> , 51 Cal. 3d 453 (1990).....	6
<i>People v. Mayfield</i> , 14 Cal. 4th 668 (1996).....	2
<i>Playboy Enters., Inc. v. Superior Court</i> , 154 Cal. App. 3d 14 (1984).....	5, 8
<i>Procter & Gamble Co. v. Bankers Trust Co.</i> , 78 F.3d 219 (6th Cir. 1996).....	12
<i>Sammartano v. First Judicial Dist. Court</i> , 303 F.3d 959, 973 (9th Cir. 2002).....	2
<i>Shoen v. Shoen</i> , 5 F.3d 1289 (9th Cir. 1993).....	10
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).....	12

TABLE OF AUTHORITIES
[Continued]

Page(s)

<i>United States v. Burke</i> , 700 F.2d 70 (2d Cir. 1983).....	10
<i>United States v. Corporale</i> , 806 F.2d 1487 (11th Cir. 1986).....	10
<i>United States v. Cuthbertson</i> , 650 F.2d 139 (3d Cir. 1980).....	10
<i>United States v. Gotti</i> , No. 04 Cr. 690 (SAS), 2004 U.S. Dist. LEXIS 24192 (S.D.N.Y. Dec. 3, 2004)	13
<i>United States v. Hubbard</i> , 493 F. Supp. 202 (D.D.C. 1979).....	10

Constitutional Provisions

United States Constitution, Amend. I	passim
California Constitution, Art. I § 2(a).....	3, 14
California Constitution, Art. I, § 2(b)	passim

Statutes

Cal. Evid. Code § 1070(b).....	4, 5
Cal. Evid. Code § 1070(c).....	5, 8, 9
N.Y. Civ. Rights Law § 79-h	11

Other Authorities

Alexander Bickel, <i>Domesticated Civil Disobedience: The First Amendment, from Sullivan to The Pentagon Papers</i> , THE MORALITY OF CONSENT (1975), p. 61).....	3
Duane D. Morse & John W. Zucker, <i>The Journalist's Privilege in Testimonial Privileges</i> 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983).....	10

INTRODUCTION

The District Attorney for the County of Santa Barbara has caused an order to be issued today from a New York court requiring that Martin Bashir appear and testify on a wide range of issues at trial in this case regarding his newsgathering and reporting in connection with the documentary "Living with Michael Jackson" (the "documentary"), which was broadcast in the United States on ABC and in the United Kingdom on ITV1 in February 2003.² Mr. Bashir is an award-winning journalist who has worked for the British Broadcasting Corporation ("BBC") and Granada Television in the United Kingdom and is currently employed as a correspondent for ABC News.

This Court should enter a protective order precluding Mr. Bashir from being called as a witness. The California journalists' shield law, embodied in Article I, Section 2(b) of the California Constitution and California Evidence Code § 1070, provides *absolute* protection from contempt for any television reporter who, when subpoenaed in a criminal action by the prosecution, declines to disclose his sources or unpublished information obtained during newsgathering. *Miller v. Superior Court*, 21 Cal. 4th 883, 897 (1999). "A comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of safeguarding 'the autonomy of the press.' The threat to press autonomy is particularly clear in light of the press's unique role in society." *Id.* at 898. Mr. Bashir was and is a television journalist covered by the California shield law. The videotape of the documentary speaks for itself and provides all of the evidence that may be properly elicited from Mr. Bashir under California law, the First Amendment and New York law. To the extent this Court is willing to consider admitting any part of the broadcast into evidence, it can be authenticated by an ABC News custodian of records, who has submitted a declaration herewith

² In response to the show cause order issued by the New York court Mr. Bashir entered into a stipulation with the New York prosecutor accepting service of the order while at the same time reserving all rights to object to being called as a witness and to contest the Gag Order based on California law, the First Amendment, and all other laws in this Court. See Boutrous Decl., Exh. A (January 18, 2005 Order).

1 authenticating the tape and who could be called at trial to give the same testimony. See Declaration
2 of Joel Kanoff ("Kanoff Decl.") ¶ 2, Exh. A.³

3 Accordingly, this Court should enter a protective order prohibiting Mr. Bashir from being
4 called as a witness. Put simply, Mr. Bashir's testimony is prohibited given the explicit and
5 impenetrable boundaries imposed by California law under these circumstances. Requiring reporters
6 to come to court to testify about their newsgathering unduly burdens constitutionally-protected
7 journalistic activities, and risks improperly transforming reporters into agents of the prosecution.

8 The Court should also clarify that its January 16, 2004 Gag Order does not apply to
9 Mr. Bashir. The Gag Order was served upon Mr. Bashir along with the New York Court's Order to
10 Show Cause and its broad terms threaten "persons subpoenaed or expected to testify in this matter"
11 with contempt if they speak about any number of subjects related to the case. See Boutrous Decl.,
12 Exh. B at 1-3. Thus, in the event the Court grants Mr. Bashir's motion for a protective order, then the
13 Gag Order, by its own terms, is inapplicable to Mr. Bashir and the Court need not reach the serious
14 constitutional issues that would be raised by seeking to restrain a journalist from reporting on a
15 criminal trial.

16 But if the Court denies Mr. Bashir's motion for a protective order in whole or in part, and thus
17 allows him to be called as witness, the Court should immediately make clear that the Gag Order does
18 not apply to Mr. Bashir.⁴ The Gag Order is a prior restraint, pure and simple. If applied to a

21 ³ This Motion and the supporting declarations are filed by facsimile machine. Movant will submit
22 to the Court and parties hard copies of these materials, including the Kanoff Declaration and the
23 authenticated videotape. See *People v. Mayfield*, 14 Cal. 4th 668, 747 (1996) ("To be admissible
24 in evidence, an audio or video recording must be authenticated," and "[a] video recording is
authenticated by testimony or other evidence that it accurately depicts what it purports to show.")
(internal quotations omitted).

25 ⁴ The "Supreme Court has made clear that '[t]he loss of First Amendment freedoms, for even
26 minimal periods of time, unquestionably constitutes irreparable injury" *Sammartano v.*
27 *First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S.
347, 373 (1976)). Indeed, "each passing day may constitute a separate and cognizable

[Footnote continued on next page]

1 journalist reporting the news in connection with a criminal trial, it would be an especially egregious
2 violation of the First Amendment and Article I, Section 2 of the California Constitution.

3 The Supreme Court of the United States has never upheld such a prior restraint and, to be
4 enforceable, such a restriction on speech must overcome "a 'heavy presumption' against its
5 constitutional validity" because "prior restraints on speech and publication are the most serious and
6 the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*,
7 427 U.S. 539, 558-59 (1976) (invalidating gag order against press in criminal trial) (quotations
8 omitted). The California Constitution expressly bans prior restraints and provides even broader,
9 unlimited protection: "Every person may freely speak, write and publish his or her sentiments, on all
10 subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of
11 speech or press." Cal. Const. Art. I § 2(a). Since the documentary aired in February 2003,
12 Mr. Bashir has been free to report about issues relating to this matter, including this criminal case,
13 without restriction. He is being called as witness solely based on his newsgathering and reporting in
14 connection with "Living with Michael Jackson," which was broadcast to and watched by millions of
15 people around the world. There is no basis whatsoever for suddenly "freez[ing]"⁵ Mr. Bashir's
16 speech and reporting simply because the District Attorney has now decided to call him as a witness
17 on the eve of trial; it cannot have been this Court's intent to do so when it issued the Gag Order over
18 a year ago.

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22 [Footnote continued from previous page]

23 infringement of the First Amendment." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994)
24 (Blackmun, J., in chambers) (ordering immediate stay of prior restraint).

25 ⁵ *Nebraska Press Ass'n*, 427 U.S. at 559 ("If it can be said that a threat of criminal or civil
26 sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.") (citing
27 Alexander Bickel, *Domesticated Civil Disobedience: The First Amendment, from Sullivan to The*
28 *Pentagon Papers*, *THE MORALITY OF CONSENT* (1975), p. 61).

ARGUMENT

A. Mr. Bashir Cannot Be Compelled To Testify Regarding Any Unpublished Information Obtained During His Newsgathering And Reporting Relating To "Living With Michael Jackson"

The District Attorney claims that Mr. Bashir is a material witness "on the issue of production, editing and displaying of the video documentary "Living with Michael Jackson"" and that he is necessary to "clarify the extent to which the documentary was edited and whether or not . . . statements were presented out of context." See Boutros Decl., Exh. C (redacted Request for Attendance of Out-of-State Witness, Martin Bashir) ("Request for Attendance") at 2. The Request for Attendance further notes that Mr. Bashir "found particularly worrisome Jackson's practice of sleeping in the same room with children, often in the same bed," and that "[c]onversations with the Defendant concerning his sleeping arrangement with children, and particularly with the victim of the current case, are clearly material, relevant and necessary to the prosecution in Santa Barbara County."

Id.

As shown below, the District Attorney seeks textbook "unpublished information" about which Mr. Bashir cannot be compelled to testify. The California Constitution and Evidence Code create broad and absolute protections from compelled disclosure under these circumstances for anyone connected with a radio or television station who refuses to disclose a source or any unpublished information obtained during newsgathering. Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(b). As a longtime and award-winning journalist who was engaged in newsgathering on a matter of public interest when he was working on the documentary "Living with Michael Jackson" for broadcast on the largest commercial television channel in the United Kingdom and, later, on the ABC television network in the United States, Mr. Bashir plainly is protected by the shield law. He is thus entitled to absolute protection from any attempt by the prosecution to compel disclosure of any information relating to the documentary that was not broadcast to the public.

1. California's Constitutional and Statutory Shield Law Affords Broad and Absolute Protection against Compelled Testimony and Contempt Regarding Unpublished Information in these Circumstances

Article I, Section 2(b) of the California Constitution and California Evidence Code § 1070 dictate that television journalists may not be held in contempt for refusing to disclose information about a report or broadcast that was not included in the broadcast itself. Under these "journalists' shield laws":

[A] radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, . . . [may not be] adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(b). Anyone even "connected with" a television station, therefore, may receive the protection of these provisions.

"[T]he meaning of 'unpublished information' was defined in broad, nonrestrictive terms." *Miller*, 21 Cal. 4th at 897 (quotations omitted). Specifically, the shield law defines unpublished information as

information not disseminated to the public by the person from whom disclosure is sought, *whether or not related information has been disseminated* and includes, but is not limited to, all notes, outtakes, photographs, tapes or *other data of whatever sort* not itself disseminated to the public through the medium of communication, *whether or not published information based upon or related to such material has been disseminated*.

Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(c) (emphasis added). This comprehensive definition encompasses all related "factual information that is within the newsperson's knowledge, whether contained in source material or memory." *Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 21 (1984). Indeed, even where unpublished information is an exact transcription of what was broadcast, and it would be used merely to confirm or refute the accuracy of statements that were broadcast, "this material falls squarely within the ambit of article I, section 2 protection." *Id.* at 23.

1 The Supreme Court of California has held that Article I, Section 2(b) of the California
2 Constitution and California Evidence Code § 1070 grant journalists *absolute* protection from
3 compelled disclosure and contempt where a prosecutor seeks testimony from the journalist about
4 unpublished information (or sources) in a criminal trial. *Miller*, 21 Cal. 4th at 890-91 ("The shield
5 law is, by its own terms, *absolute* rather than qualified in immunizing a newsperson from contempt
6 for revealing unpublished information obtained in the newsgathering process.") (emphasis in
7 original); *id.* ("We find nothing in the shield law's language or history to suggest the immunity from
8 contempt is qualified such that it can be overcome by a showing of need for unpublished information
9 within the scope of the shield law.") (quoting *New York Times Company v. Superior Court*, 51 Cal.
10 3d 453, 461 (1990)). Moreover, the Court has held that "the shield law's protection is *not* contingent
11 on a showing that a newsperson's unpublished information was obtained in confidence." *New York*
12 *Times Company*, 51 Cal. 3d at 461; *see also Delaney v. Superior Court*, 50 Cal. 3d 785, 797, 799-800
13 (1990) (holding that "the shield law's definition of 'unpublished information' is not restricted to
14 information obtained in confidence by a newsperson" and "includes a newsperson's unpublished,
15 nonconfidential eyewitness observations of an occurrence in a public place").

16 In *Miller*, the Supreme Court rejected the argument of the prosecution that the right of the
17 People to "due process of law" under the California Constitution conflicted with the shield law and
18 made Article 2(b) a qualified immunity, rather than an absolute one. *Id.* at 896-97. The Court
19 reiterated that this absolute protection "may be overcome only by a countervailing federal
20 constitutional right," and concluded that the People have no federal constitutional right to due process
21 or otherwise that can overcome the shield law. *Id.* at 897.⁶ The Court, therefore, ordered the trial
22 court to quash a subpoena seeking a complete, unedited videotape of a jailhouse interview, only
23 portions of which had been broadcast. *Id.* at 901.

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25 ⁶ Even when a competing federal constitutional right is at stake, the shield law affords journalists
26 qualified protection from compelled disclosure and contempt. *Delaney*, 50 Cal. 3d at 807-14
27 (describing multi-factor balancing test that must be applied to determine if compelled disclosure
28 is permissible).

2. The Shield Law Applies to Mr. Bashir and His Documentary, and Therefore He May Not Be Compelled to Disclose any Information Related "Living with Michael Jackson" that was not Included in the Documentary As Broadcast to the Public

The shield law plainly applies here. First, Mr. Bashir is a "television news reporter . . . connected to a television station." He has worked as a journalist since 1986. Declaration of Martin Bashir ("Bashir Decl.") ¶ 2. From 1987 through 1999, he worked as a reporter for BBC Television News. *Id.* ¶ 3, during which time he was named the "Journalist of the Year" by the Royal Television Society in 1996 and "Journalist of the Year" by the BBC's International Awards in 1998. *Id.* ¶ 4. In 1999, Mr. Bashir moved to Granada Television, *id.* ¶ 5, part of the ITV network, the largest commercial television network in the United Kingdom.⁷

Mr. Bashir's title with Granada Television was "Reporter/Presenter for News and Current Affairs," *id.*, and in 2002 he began preparing the documentary "Living with Michael Jackson." *Id.* ¶ 6. The documentary was prepared as a "Special" for the Granada-produced "Tonight with Trevor McDonald," ITV's flagship current-affairs program that airs twice weekly in prime time. *Id.*⁸ At the time of Mr. Bashir's newsgathering for the documentary, Granada had a contract with ITV to broadcast the program in the United Kingdom on Channel ITV1. *Id.* The program aired on ITV1 in February 2003, and subsequently won the "Programme of the Year" award at the 2002/2003 Royal Television Society Journalism Awards. *Id.* ¶ 7. The ABC network broadcast the documentary on

⁷ Mr. Bashir hereby requests that the Court take judicial notice of these facts pursuant to section 452(h) of the California Evidence Code. See <http://www.itv.com/page.asp?partid=1088> ("About ITV" page on ITV's official website); http://www.granadatv.co.uk/corporate_info.php?region=Granada&content=12 ("About Us" page on ITV Granada Television's official website).

⁸ Mr. Bashir further requests that the Court take judicial notice, pursuant to section 452(h) of the California Evidence Code, of the fact Trevor McDonald is a newscaster for ITV. See http://www.itv.com/news/presenters_658340.html (Bulletin on ITV official website noting that "Trevor, the nation's most popular newscaster, has received more awards than any other news broadcaster in Britain").

1 television stations across the United States in February 2003 as well. *Id.* ¶ 8. Mr. Bashir left
2 Granada Television to become a correspondent for ABC News and its 20/20 program. *Id.* ¶ 9.

3 Accordingly, California's shield law applies to Mr. Bashir. He has been a television journalist
4 for nearly twenty years, including the time during which he gathered information and reported
5 "Living with Michael Jackson." And the documentary was a television news special, prepared for a
6 prime-time news program on a major television network. Mr. Bashir, therefore, cannot be compelled
7 to testify about any "unpublished information" he obtained or created in connection with his work
8 while preparing the documentary.

9 Second, the testimony that the District Attorney seeks to elicit from Mr. Bashir falls squarely
10 within the "broad, nonrestrictive terms"⁹ of the shield law's definition of "unpublished information
11 obtained or prepared in gathering, receiving, or processing of information for communication to the
12 public." Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(c). Among other things, the District
13 Attorney indicates that he intends to question Mr. Bashir about his "numerous conversations with
14 Mr. Jackson about his relationship with young boys and with the victim in particular" in connection
15 with his work on "Living with Michael Jackson." Boutrous Decl., Exh. C at 2. The District Attorney
16 further notes that "the documentary 'Living with Michael Jackson' as presented is less than two hours
17 in length meaning seven months of interviews and film were substantially edited." *Id.* In other
18 words, the District Attorney seeks to elicit testimony from Mr. Bashir about his numerous
19 conversations beyond those included in the broadcast, the editing of these unbroadcast portions of his
20 interviews with Mr. Jackson, the "context" of those portions of the interviews that were broadcast
21 (i.e., what occurred during portions of the interviews that were not broadcast), and Mr. Bashir's
22 impressions of Mr. Jackson. Boutrous Decl., Exh. C at 1-2. This is classic "unpublished
23 information" covered by the shield law. Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(c);
24 *Playboy Enters., Inc.*, 154 Cal. App. 3d at 21 (unpublished information includes all related "factual
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26 _____
27 ⁹ *Miller*, 21 Cal. 4th at 897.
28

1 information that is within the newsmen's knowledge, whether contained in source material or
2 memory"). The shield law thus precludes Mr. Bashir from being compelled to testify on these
3 matters and he "shall not be held in contempt . . . for refusing to disclose" this unpublished
4 information. Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(c).

5 **3. The Court Should Enter a Protective Order Prohibiting Mr. Bashir from**
6 **Being Called as a Witness at Trial**

7 Given that these sharp and absolute restrictions on the testimony that may be elicited from
8 Mr. Bashir under these circumstances, the Court should enter a protective order precluding him from
9 being called as a witness. The broadcast version of "Living with Michael Jackson" speaks for itself
10 and provides all of the evidence to which the District Attorney is entitled in the event this Court
11 permits any part of the documentary to be introduced as evidence at trial. While the District Attorney
12 claims Mr. Bashir's testimony is necessary for "establishing the foundation for the admissibility of
13 the documentary," Boutros Decl., Exh. C at 2, the broadcast version of the documentary can be
14 authenticated by an ABC News custodian of records, who has submitted a declaration herewith
15 authenticating the tape and who could be called at trial to give the same testimony. Kanoff Decl., ¶ 2,
16 Exh. A.

17 On the other hand, requiring Mr. Bashir to appear and testify not only is prohibited by the
18 shield law, it would unduly burden and seriously interfere with his newsgathering activities in
19 connection with this case, see Bashir Decl. ¶ 10, and, more generally, damage the "autonomy of the
20 press" to gather and disseminate information on behalf of the public. Indeed, as it stands right now,
21 the burdens could not be more onerous as Mr. Bashir has been instructed that due to his "witness"
22 status he is now subject to the Court's Gag Order, a clear violation of the First Amendment and the
23 California Constitution.

24 Moreover, in *Miller*, the California Supreme Court emphasized that journalists are easy
25 targets for subpoenas because of their constitutionally-ordained role of gathering and disseminating
26 information to the public; the shield law is specifically intended to protect the press from undue
27 interference in gathering and reporting the news:

1 A comprehensive reporter's immunity provision, in addition to protecting confidential
2 or sensitive sources, has the effect of safeguarding 'the autonomy of the press.'
3 The threat to press autonomy is particularly clear in light of the press's unique role in
4 society. As the institution that gathers and disseminates information, journalists often
5 serve as the eyes and ears of the public. Because journalists not only gather a great
6 deal of information, but publicly identify themselves as possessing it, they are
7 especially prone to be called upon by litigants seeking to minimize the costs of
8 obtaining needed information.

9 *Id.* at 898 (citations and quotations omitted). Likewise, as the Ninth Circuit expressly noted in
10 discussing the basis for the First Amendment-based reporters' privilege, "the compelled disclosure of
11 non-confidential information harms the press' ability to gather information 'by converting the press
12 in the public's mind into an investigative arm of prosecutors and the courts If perceived as an
13 adjunct of the police or the courts, journalists might well be shunned by persons who might otherwise
14 give them information without a promise of confidentiality.'" *Shoen v. Shoen*, 5 F.3d 1289, 1295
15 (9th Cir. 1993) (quoting Duane D. Morse & John W. Zucker, *The Journalist's Privilege in*
16 *Testimonial Privileges* 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983)) (emphasis
17 added).¹⁰

18 ¹⁰ The separate, qualified reporters' privilege afforded by the First Amendment to the United States
19 Constitution also protects Mr. Bashir from being called as a witness in this case. *See Shoen*, 5
20 F.3d at 1292. The California Supreme Court has recognized a qualified privilege for journalists
21 against compelled disclosure that is rooted in the "protections for freedom of the press enshrined
22 in the United States Constitution and the correlative provision (art. I, § 2, subd. (a)) of the
23 California Constitution." *See Mitchell v. Superior Court*, 37 Cal. 3d 268, 274-79 (1984);
24 Although *Mitchell* itself did not arise from a criminal case, many other jurisdictions recognize
25 that concerns for the independence of the press warrant a First Amendment or common-law
26 qualified privilege from compelled disclosure in criminal cases. *See, e.g., Shoen*, 5 F.3d at 1292
27 (noting that in the Ninth Circuit a "'partial First Amendment shield' protects journalists against
28 compelled disclosure in all judicial proceedings, civil and criminal alike"); *United States v.*
Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) ("[T]he interests of the press that form the
foundation for the privilege are not diminished because the nature of the underlying proceedings
out of which the request for the information arises is a criminal trial."); *see also United States v.*
Burke, 700 F.2d 70, 77 (2d Cir. 1983) (applying reporter's privilege in criminal case); *United*
States v. Corporale, 806 F.2d 1487, 1504 (11th Cir. 1986) (same); *United States v. Hubbard*,
493 F. Supp. 202, 205 (D.D.C. 1979) (same). New York law also establishes a reporters'

[Footnote continued on next page]

1 In short, the shield law precludes calling Mr. Bashir as a witness in this case. There is simply
2 no legitimate basis for disrupting Mr. Bashir's journalistic activities and creating the false impression
3 that Mr. Bashir is an agent of the prosecution by calling him to the witness stand. See Bashir Decl.,
4 ¶ 10. The Court should therefore enter the protective order.

5 **B. The Gag Order Does Not Apply To Mr. Bashir Because (A) The Shield Law Bars**
6 **Him From Being Called As A Witness, And (B) Even If He Could Be Called To**
7 **Testify, It Would Violate The United States And California Constitutions To**
8 **Impose Such A Prior Restraint Against Mr. Bashir**

9 The Court should also make clear, immediately, that this Court's Gag order does not apply to
10 Mr. Bashir, irrespective of whether the District Attorney is allowed to call Mr. Bashir as a witness.
11 The Gag Order prohibits "any persons subpoenaed or expected to testify in this matter," among
12 others, from making various public statements related to the case. See Gag Order at 1-3. Obviously,
13 if the Court grants Mr. Bashir's motion for a protective order, then the Gag Order, by its own terms,
14 is inapplicable to Mr. Bashir.

15 If, however, the Court denies Mr. Bashir's motion for a protective order in whole or in part,
16 and allows him to be called as witness, the Court should make clear that the Gag Order does not
17 apply to Mr. Bashir. The Gag Order could, if read literally, bar Mr. Bashir from reporting
18 information he gathered while preparing the documentary "Living with Michael Jackson," and it
19 cannot possibly have been this Court's intent to apply the Gag Order in these circumstances. To do
20 so would strike at the core of Mr. Bashir's right to gather news and report to the public and would
21 flatly violate the First Amendment and Article I, Section 2(a) of California Constitution.

22 The Gag Order is a prior restraint. *Hurwitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241 (2000)
23 ("Orders which restrict or preclude a citizen from speaking in advance are known as 'prior restraints,'
24 and are disfavored and presumptively invalid."). Like all prior restraints, it is subject to "a 'heavy
25 presumption' against its constitutional validity," because "prior restraints on speech and publication

26 [Footnote continued from previous page]

27 privilege that protects Mr. Bashir from being forced to testify in this case. N.Y. Civ. Rights Law
28 § 79-h.

are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976) (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)). In order to be lawful, it "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). So powerful is the presumption against enjoining publication of news that the Supreme Court has never affirmed the imposition of such an order. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996) (striking down prior restraint imposed against *Business Week* magazine and declaring: "Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial."); see also, e.g., *CBS, Inc. v. Davis*, 114 S. Ct. 912 (1994) (Blackmun, J., in chambers) (temporary injunction against national broadcast of allegedly confidential and proprietary material contained in surreptitiously obtained videotapes unconstitutional; stay granted); *In re King World Prods., Inc.*, 898 F.2d 56, 60 (6th Cir. 1990) (granting writ of mandamus lifting temporary restraint against broadcast of material allegedly illegally obtained).

The United States Supreme Court has expressly recognized that "[t]he damage [from a prior restraint] can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." *Nebraska Press Association*, 427 U.S. at 559. In particular, "[t]ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment," and "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings." *Id.* (internal citations omitted). Thus, in *Nebraska Press Association*, the Court struck down a gag order restraining the media from publishing or broadcasting accounts of confessions or admissions made by the accused, or facts "strongly implicative" of the accused, in a widely reported mass murder. *Id.* at 541, 570.

1 Just recently, in *United States v. Gotti*, No. 04 Cr. 690 (SAS), 2004 U.S. Dist. LEXIS 24192
2 (S.D.N.Y. Dec. 3, 2004), a federal district court refused to issue a gag order against a member of the
3 media who also happened to be one of the key witnesses – and one of the defendant's alleged intended
4 victims – in a high-profile criminal trial. The defendant, John Gotti, Jr., sought a gag order forbidding a
5 New York City radio talk-show host, who was almost certain to be a witness at the trial, from "making
6 any further extrajudicial statements about the pending case against Gotti until the completion of the
7 trial." *Id.* at *2. Gotti had been indicted on a number of charges, including racketeering in connection
8 with the attempted murder of the talk-show host, Curtis Sliwa. Sliwa had "regularly attack[ed] Gotti"
9 on his show and discussed the charges and the merits of the case against Gotti. *Id.* at *3. He had
10 "repeatedly discussed the details of events that are central to the allegations against Gotti," and
11 "insisted time and again that Gotti is guilty of the charges in the indictment." *Id.* at *10-11.
12 According to the court, Sliwa's "diatribes" were "quintessentially prejudicial." *Id.* at *11. Gotti
13 contended that a gag order directed specifically at Sliwa was necessary to preserve Gotti's right to a fair
14 trial by an impartial jury. *Id.* at *5. Yet the district court rejected Gotti's request, holding:

15 Although Sliwa's repeated on-air attacks have the potential to interfere with Gotti's
16 right to a fair trial, an order silencing Sliwa is not required to prevent this from
17 happening. Indeed, such an order would be less effective than using searching voir
18 dire as well as a targeted jury instruction to root out any prejudice resulting from
19 Sliwa's broadcasts.

18 *Id.* at *8.

19 Here, of course, the argument for imposing a Gag Order on Mr. Bashir is far weaker than it
20 was in *Gotti*. Unlike Mr. Sliwa, Mr. Bashir is being called solely to testify about his journalistic
21 activities. Nor has anyone ever argued that such an order restricting Mr. Bashir's speech is necessary
22 to protect Mr. Jackson's right to a fair trial.

23 Article I, Section 2(a) of the California Constitution provides "even broader"¹¹ protection
24 against prior restraints than the extraordinarily broad protections afforded by the First Amendment.

25
26 ¹¹ *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 491, 493 (2000) (stating that Article I,
27 Section 2's free-speech guarantee is "even 'broader' and 'greater'" than those afforded under the
28 [Footnote continued on next page]

1 That provision dictates that "[e]very person may freely speak, write and publish his or her sentiments.
2 on all subjects, being responsible for the abuse of this right." See Cal. Const. Art. I § 2(a).
3 Put simply, "[a] law may not restrain or abridge liberty of speech or press." *Id.* And as the California
4 Supreme Court held long ago, the meaning of this "terse and vigorous" section is

5 so plain that construction is not needed. *The right of the citizen to freely speak, write,*
6 *and publish his sentiments is unlimited, but he is responsible at the hands of the law*
7 *for an abuse of that right. He shall have no censor over him to whom he must apply*
for permission to speak, write, or publish, but he shall be held accountable to the law
for what he speaks, what he writes, and what he publishes.

8 *Dalley v. Superior Court*, 112 Cal. 94, 97 (1896) (emphasis added); see also *Hurvitz*, 84 Cal. App.
9 4th at 1241 (invalidating a far more narrowly tailored gag order restricting only the public disclosure
10 by trial participants of confidential patient information in the trial of a celebrity plastic surgeon).

11 Mr. Bashir is currently a correspondent for ABC News and his responsibilities include
12 reporting on this case. Since the initial broadcast of the documentary, both in the United Kingdom
13 and in the United States, Mr. Bashir has been free to report at will on issues relating to this case.
14 Bashir Decl. ¶¶ 9, 10. But the Gag Order would, if read literally and applied to him, bar him from
15 reporting about information that he obtained in connection with his work on "Living with Michael
16 Jackson" simply because the District Attorney seeks to call him as a witness about his prior
17 journalistic activities. There is, however, no justification for such a prior restraint against Mr. Bashir,
18 let alone anything close to a showing that would rebut the "'heavy presumption' against its
19 constitutional validity." *Nebraska Press Ass'n*, 427 U.S. at 558-59; see also *Butterworth v. Smith*,
20 494 U.S. 624, 634-35 (1990) (striking down on First Amendment grounds Florida's statute barring
21 grand jury witnesses – including the respondent, a journalist who was called as a witness and wanted
22 to publish a news story about the grand jury experience – from speaking about the substance of their
23 testimony). To impose a prior restraint against Mr. Bashir under these circumstances would be an
24 unprecedented and egregious violation of the First Amendment and Article I, Section 2(a).

25 [Footnote continued from previous page]

26 First Amendment, and that "[A]rticle I's right to freedom of speech, unlike the
27 First Amendment's, is 'unlimited' in scope").

III.

CONCLUSION

The District Attorney's effort to call Mr. Bashir as a witness directly and unconstitutionally encroaches on the independence necessary to fulfill the press's fundamental role by seeking to conscript a journalist in aid of the government's case. California law anticipated such a situation and offers journalists like Mr. Bashir absolute constitutionally-based protection against compelled disclosure of precisely the kind of unpublished information the District Attorney seeks. Mr. Bashir, therefore, respectfully requests that the Court enter a protective order precluding him from being called as a witness. If the Court denies this motion for a protective order in any respect, Mr. Bashir also respectfully requests that the Court make clear that he is not subject to the Gag Order and may report the news freely and without restriction.

DATED: January 18, 2005

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

Theodore J. Boutrous, Jr.

Michael H. Dore

By: 

Theodore J. Boutrous, Jr.

Attorneys for MARTIN BASHIR

DECLARATION OF MARTIN BASHIR

I, MARTIN BASHIR, hereby declare and state that:

1. I am a journalist currently employed by American Broadcasting Companies, Inc.

I reported the documentary "Living with Michael Jackson," which aired in February 2003 and was based on several months of interviews with Mr. Jackson and others. I have personal knowledge of all facts herein stated. If called as a witness, I could testify competently to the following:

2. I began working as a journalist in 1986 having completed a first degree in English and post-graduate research at King's College, London. I have written for a variety of publications including The Financial Times, The Sunday Times, The Evening Standard, The Daily Express, Tatler and The Observer.

3. I began working in print and radio before moving to BBC Television in 1987. From 1987 to 1999, I worked as a reporter for BBC Television News.

4. I was the Royal Television Society's Journalist of the Year in 1996 and in 1998 I was voted Journalist of the Year by the BBC's International Awards.

5. In 1999, I took new employment with Granada Television. I was employed as a senior correspondent from 1999 until July 2004. My title was "Reporter/Presenter for News and Current Affairs."

6. In 2002, I began preparing a documentary called "Living with Michael Jackson." Throughout the time the documentary was produced, Granada Television had a contract with ITV to broadcast it in the United Kingdom on Channel ITV1. The documentary was prepared for news purposes, as a "Special" for the current-affairs program "Tonight with Trevor McDonald." Granada produces this program, which airs in prime time on Channel ITV1 twice each week.

7. The documentary aired on Channel ITV1 in February 2003 and subsequently won the "Programme of the Year" award at the 2002/2003 Royal Television Society Journalism Awards.

8. "Living with Michael Jackson" also aired on ABC in the United States in February 2003.

1 9. In July 2004, I left Granada Television to become a correspondent for ABC News and
2 its 20/20 program. As part of my responsibilities, I will be reporting on the upcoming criminal trial
3 of Michael Jackson and related matters.

4 10. I believe that if I am called as witness in this case, it will significantly interfere with
5 my ability to gather and disseminate information to the public about this case. I also believe that it
6 would create the false impression that I have been and am an arm of the prosecution, casting doubt
7 not only on my future journalistic activities, but raising questions about my past work as well. For a
8 journalist to pursue his work, he cannot be perceived as an agent of either the prosecution or the
9 defense.

10 I declare under penalty of perjury under the laws of the State of California that the foregoing
11 is true and correct.

12 Executed this 18th day of January, 2005, at Los Angeles, California.

13 
14 Martin Bashir
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DECLARATION OF JOEL KANOFF

I, JOEL KANOFF, hereby declare and state that:

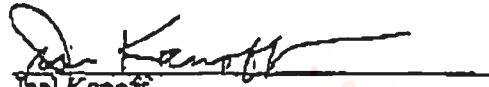
I have personal knowledge of all facts herein stated. If called as a witness, I could and would testify competently to the following:

1. I am the Director, Video Resources and Digital Archives, for ABC News. In that capacity, I am responsible for the maintenance of all records of ABC News broadcasts and serve as the custodian of records for ABC News broadcasts.

2. Attached hereto as Exhibit "A" is a true and correct copy of the ABC television program 20/20, which aired on the ABC Television Network in the United States on February 6, 2003. This program featured Martin Bashir's documentary entitled "Living with Michael Jackson."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of January, 2005, at New York, New York.


Joel Kanoff
Declarant

DECLARATION OF THEODORE J. BOUTROUS, JR.

I, THEODORE J. BOUTROUS, JR., hereby declare and state that:

I am a lawyer admitted to practice in the State of California, a partner in the law firm of Gibson, Dunn & Crutcher LLP, and counsel for Martin Bashir. I have personal knowledge of all facts herein stated. If called as a witness, I could testify competently to the following:

1. Movant is not filing a motion requesting that his motion for a protective order be filed under seal because neither the motion nor any of the attached records contain sealed or otherwise sensitive or confidential information that may properly be kept from the public under California law, the First Amendment, or the Court's orders in this case. See Cal. R. Ct. 243.1-243.2.

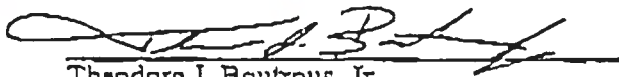
2. Attached hereto as Exhibit "A" is a true and correct copy of the stipulated order issued today by the New York Supreme Court.

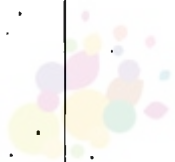
3. Attached hereto as Exhibit "B" is a true and correct copy of the Court's "Protective Order" that was filed on January 16, 2004.

4. Attached hereto as Exhibit "C" is a true and correct copy of the redacted "Request for Attendance of Out-of-State Witness Martin Bashir" filed by the District Attorney on January 7, 2005, and posted on the Court's website on January 13, 2005.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of January, 2005, at Los Angeles, California.


Theodore J. Boutrous, Jr.



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EXHIBIT A



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mjfacts.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X
IN THE MATTER OF THE APPLICATION OF :
PATRICK MCKINLEY, ASSISTANT DISTRICT :
ATTORNEY, COUNTY OF SANTA BARBARA, : ORDER
STATE OF CALIFORNIA, FOR THE APPEARANCE :
OF MARTIN BASHIR, AS MATERIAL WITNESS FOR : SCID NO.: 30324/04
THE SUPERIOR COURT OF THE STATE OF :
CALIFORNIA, COUNTY OF SANTA BARBARA. :
-----X

WHEREAS, this matter having been presented to me as a Justice of the Supreme Court, Part 60, State of New York, by Assistant District Attorney Maureen T. O'Connor, in the presence of David Schulz, counsel for Martin Bashir, the material witness named in a certificate dated December 21, 2004, of the Honorable Rodney Melville, Judge of Superior Court of the County of Santa Barbara, State of California, stating that a criminal action against Michael Joe Jackson is scheduled for trial on January 31, 2005 and Martin Bashir's presence as a witness is material and necessary in said court, that the testimony of Martin Bashir, is necessary and material for the State of California in said action, and requesting that Martin Bashir be ordered to attend and testify as a material and necessary witness on March 1, 2005 or any subsequent adjourn dates, or such days as the case may be continued or postponed; and

WHEREAS, Martin Bashir contends that (1) he is protected as a journalist from being compelled to testify in California pursuant to statutory, common law and constitutional privileges, including the California Shield Law, and (2) a January 14, 2004 Protective Order issued by Judge Melville that may apply to Bashir as a witness in the case, would impose an undue hardship upon him and violate his constitutional rights, but it is understood by the parties that his claim of journalist privilege and objection to the protective order are preserved and may be litigated in

Superior Court, County of Santa Barbara, State of California; NOW THEREFORE,

IT IS HEREBY ORDERED, that pursuant to Criminal Procedure Law Section 640.10, Martin Bashir must appear before the Superior Court, in and for the County of Santa Barbara, State of California, on March 1, 2005, or on such days as the case may be continued or postponed. Compliance with this Order shall not be deemed a waiver of any claim of journalist's privilege or other substantive defenses to the testimony being sought, nor a waiver of any right to challenge the January 14, 2004 Protective Order on constitutional or other grounds.

ENTERED as an Order on this _____ day of January, 2005.

JUDGE BRENDA SOLOFF *BS*

JUSTICE OF THE SUPREME COURT

FILED JAN 12 2005

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN THE MATTER OF THE APPLICATION OF
PATRICK MCKINLEY, ASSISTANT DISTRICT
ATTORNEY, COUNTY OF SANTA BARBARA,
STATE OF CALIFORNIA, FOR THE APPEARANCE
OF MARTIN BASHIR, AS MATERIAL WITNESS FOR
THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SANTA BARBARA.

ORDER

ROBERT M. MONTGOMERY
District Attorney
New York County
One Hoffman Place
New York, New York 10013
(212) 315-9010

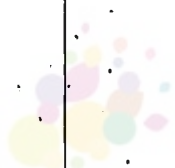


EXHIBIT B

JAN 16 2004

GARY M. BLAIR
Deputy Clerk
By: *Lorna Frey*
LORNA FREY Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

MICHAEL JACKSON, et al.

Defendant.

Case No.: 1133603

Protective Order

TO: Thomas W. Sneddon, District Attorney for the County of Santa Barbara; and to
Mark I. Gorgas, attorney of record for Defendant Michael Jackson, and all interested parties:

It is the Order of this Court that no attorney connected with this case as Prosecutor or
Defense Counsel, nor any other attorney working in or with the offices of either of them, nor
their agents, staff, or experts, nor any judicial officer or court employee, nor any law
enforcement employee of any agency involved in this case, nor any persons subpoenaed or
expected to testify in this matter, shall do any of the following:

1. Release or authorize the release for public dissemination of any purported extrajudicial
statement of either the defendant or witnesses relating to this case;

2. Release or authorize the release of any documents, exhibits, photographs, or any evidence, the admissibility of which may have to be determined by the Court;
3. Make any statement for public dissemination as to the existence or possible existence of any document, exhibit, photograph or any other evidence, the admissibility of which may have to be determined by the Court;
4. Express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence;
5. Make any statement outside of court as to the content, nature, substance, or effect of any statements or testimony that have been given or is expected to be given in any proceeding in or relating to this matter;
6. Issue any statement as to the identity of any prospective witness, or the witness's probable testimony, or the effect thereof;
7. Make any out-of-court statement as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter.

This Order does not include any of the following:

1. Factual statements of the accused person's name, age, residence, occupation and family status.
2. The time and place of arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation.
3. The nature, substance, and text of the charge, including a brief description of the offenses charged.

4. Quotations from, or any reference without comment to, public records of the Court in the case.
5. The scheduling and result of any stage of the judicial proceedings held in open court in an open or public session.
6. A request for assistance in obtaining evidence or the names of possible witnesses.
7. Any witness may discuss any matter with any Prosecution or Defense Attorney in this action, or any agent thereof, and if represented may discuss any matter with his or her own attorney.

Any violation of this order will result in a contempt action for any offender within the jurisdiction of this Court. A copy of this Order shall be provided to any prospective witness that a party intends to call for any proceeding in this action.

DATED: January 16, 2004

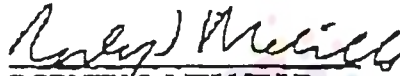

RODNEY S. MELVILLE
Judge of the Superior Court



EXHIBIT C

1 THOMAS W. SNEDDON, JR.
2 DISTRICT ATTORNEY
3 By: Patrick J. McKinley
4 Assistant District Attorney
5 State Bar #44297
6 1105 Santa Barbara Street
7 Santa Barbara, CA 93101
8 Telephone: (805) 568-2300
9 Attorneys for Plaintiff

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 07 2005

BY GARY M. BLAIR, Executive Officer
BY Carrie L. Wagner
CARRIE L. WAGNER, Deputy Clerk

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA BARBARA
12 COOK STREET DIVISION

13 PEOPLE OF THE STATE OF CALIFORNIA,) Case No. 1133603
14 Plaintiff,)
15 vs.) REDACTED VERSION
16 MICHAEL JOE JACKSON,) REQUEST FOR ATTENDANCE
17 Defendant.) OF OUT-OF-STATE WITNESS.
18) MARTIN BASHIR

19 TO THE SUPERIOR COURT OF SANTA BARBARA, COUNTY OF SANTA BARBARA.
20 STATE OF CALIFORNIA:

21 The undersigned, Assistant District Attorney for the County of Santa Barbara, State of
22 California, hereby states and certifies as follows:

23 1. That there is now pending in this court, the above-entitled criminal prosecution by the
24 State of California against the above entitled wherein he stands accused of 1 Count of Penal Code
25 section 182 (Conspiracy to Commit Extortion, False Imprisonment and Child Abduction), 4 Counts
26 of Penal Code section 268a (Child Molestation) and 1 Count of Penal Code section 664/268e
27 (Attempted Child Molestation), and 4 Counts of Furnishing An Intoxicant for Purposes of
28 Committing a Felony.

29 2. That the said defendant's trial is set to begin January 31, 2005, in the above-named

1 court. It is expected that the witness would be required to testify on or about March 1, 2005 or on
2 any subsequent adjourn date that his testimony shall be adjourned or continued to.

3 3. The witness is presently employed by ABC as a reporter for the news show "20/20".

4 4. That the said Martin Bashir, now residing at New York County, New York, is a
5 necessary and material witness for the People of the State of California. The witness is material on
6 the issue of the production, editing and displaying of the video documentary "Living with Michael
7 Jackson."

8 5. Martin Bashir is a reporter who lived and traveled with Michael Jackson for about
9 seven months for the purpose of producing a documentary about his life. The documentary titled
10 "Living with Michael Jackson" aired in England and in the United States in February 2003.

11 Bashir narrated the documentary and frequently commented on Mr. Jackson's
12 relationship with children. He found particularly worrisome Jackson's practice of sleeping in the
13 same room with children, often in the same bed.

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 Conversations with the Defendant concerning his sleeping arrangement with children
20 and particularly with the victim of the current case, are clearly material, relevant and necessary to
21 the prosecution in Santa Barbara County.

22 It is believed that Mr. Bashir had numerous conversations with Mr. Jackson about
23 his relationship with young boys and with the victim in particular. The documentary "Living with
24 Michael Jackson" as presented is less than two hours in length meaning seven months of interviews
25 and film were substantially edited. Mr. Bashir is a necessary witness to establishing the foundation
26 for the admissibility of the documentary. He will also clarify the extent to which the documentary
27 was edited and whether or not the statements were presented out of context.
28

1 6. That if the said witness, as such witness, comes into the State of California in obedience
2 to a summons directing to attend and testify at said jury trial, the laws of the State of California, and
3 of any other state through which said witness may be required to pass by the ordinary course of travel
4 to attend such jury trial, give protection from arrest or the service of process, either civil or criminal,
5 in connection with matters which arose before entrance into said state pursuant to said summons.

6 WHEREFORE, it is requested for and on behalf of the State of California that your
7 Honor certify to the above and foregoing by the issuance of a certificate thereto under the seal of the
8 said Superior Court of the County of Santa Barbara, State of California, so that it may be presented to
9 a judge of the court of record in the State of New York, in a proceeding to compel the attendance of
10 said Martin Bashir, as a witness at said proceeding at the time and date above set forth and pursuant
11 to law.

12 Dated December 15, 2004, in the County of Santa Barbara, State of California.

13 Respectfully submitted.

14 THOMAS W. SNEDDON, JR.
15 DISTRICT ATTORNEY

16 By: 

17 PATRICK J. MCKINLEY
18 ASSISTANT DISTRICT ATTORNEY
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