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**FILED**  
SUPERIOR COURT of CALIFORNIA  
COUNTY of SANTA BARBARA

FEB 14 2005

GARY M. BLAIR, Executive Officer

BY Carrie L. Wagner  
CARRIE L. WAGNER, Deputy Clerk

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

Santa Maria Division

PEOPLE OF THE STATE OF )  
CALIFORNIA )

Case No. 1193603

vs. )

Notice of Motion and Motion to Quash  
Subpoena Duces Tecum;  
Memorandum In Support of Motion

MICHAEL JOE JACKSON )

Defendant. )

Date: TBD  
Time: 8:30 a.m.  
Place: Santa Maria Division

HOLTHOUSE, CARLIN & VAN )  
TRIGHT LLP )

Movant. )

To the Clerk of the above designated department of the Superior Court of the  
State of California for the County of Santa Barbara, and to Thomas W. Sneddon,  
Jr., District Attorney for the County of Santa Barbara, and his deputy in this  
matter, Senior Deputy District Attorney Gordon Auchincloss:

PLEASE TAKE NOTICE that on a date to be set by the Court, at 8:30 a.m.,  
in the Santa Maria Division courthouse, or as soon thereafter as counsel may be  
heard, Holthouse Carlin & Van Trigt LLP ("Movant"), by counsel, will move the

1 Court to quash the subpoena duces tecum served upon Movant by the District  
2 Attorney.

3 The motion is made pursuant to non-statutory authority. The grounds  
4 for the requested relief include the following:

5 1) the subpoena seeks documents and records that must be sought  
6 pursuant to the criminal discovery process, and not by means of a third party  
7 subpoena duces tecum;

8 2) alternatively, the subpoena must be quashed because it fails to  
9 satisfy the requirements of Code of Civil Procedure 1985 or otherwise to establish  
10 with sufficient particularity that there is good cause for production of the  
11 subpoenaed documents, and because it is overbroad and burdensome;

12 3) alternatively, enforcement of the subpoena should be stayed until  
13 those persons who may have a claim of privilege to raise with respect to the  
14 documents have had an opportunity to review the documents and assert any  
15 applicable privileges.

16 The motion is based on this notice, the following memorandum, the  
17 attached exhibit, the files and records of the case and such further argument and  
18 evidence as may be presented at the hearing on the motion.

19 Respectfully submitted,

20 Nasatir, Hirsch, Podberesky & Genego

21 By: 

22 William J. Genego, Esq.

23 By: 

24 FOR Michael D. Nasatir, Esq.  
25 Counsel for Movant  
26 Holthouse Carlin & Van Trigt LLP  
27  
28

Dated: 2.10.05

I.

Factual Background

On or about February 3, 2005, the District Attorney for Santa Barbara County served a subpoena duces tecum styled with the caption of this case (People v. Michael Joe Jackson), on Holthouse Carlin & Van Trigt LLP. Exhibit A (subpoena duces tecum with accompanying material). The subpoena indicates the records to be produced are described in the accompanying affidavit. Exh A, p. 2.

The accompanying affidavit represents on "information and belief" that Movant "has in their possession or under their control" documents which the affidavit identifies by a descriptive label or category. The affidavit references nine different types or categories of documents, some of which are for a specific date and others which are for a period of time, as follows:

- 1) Statement of Assets and Liabilities as of 12/31/99, 12/31/00, 12/31/01, 12/31/02 and through termination.
- 2) Statement of Revenues and Liabilities as of 12/31/00, 12/31/01, 12/31/02 and through termination.
- 3) Balances for all Asset, Liability and Equity accounts as of 12/31/99, 12/31/00, 12/31/01, 12/31/02 and through termination.
- 4) Balances for all Revenue and Expense accounts as of 12/31/00, 12/31/01, 12/31/02 and through termination.
- 5) Accounts Payable Check Registers, in detail by vendor, for the 2000, 2001 and 2002 calendar years, through termination.
- 6) Unpaid Accounts Payable and Accrued Liabilities Balances, in detail by vendor, as of 12/31/99, 12/31/00, 12/31/01, 12/31/02 and through termination.
- 7) Bank statements for all active deposits, collection and loan collateral accounts, as of 12/31/99, 12/31/00, 12/31/01, 12/31/02 and through termination.

1 8) Periodic statements reporting music publishing activity related to the  
2 Sony/ATV and MIJAC catalogs, including statements received from  
3 12/31/99 through termination.

4 9) Reports or statements providing evidence of value for any music  
5 publishing catalogs, real estate or other real property, received from  
6 12/31/99 through termination.  
7

8 A cover letter transmitting the subpoena specifies that "[w]ithin 5 days of  
9 receipt," the custodian is to make a copy of "all records described in the [affidavit  
10 accompanying] the subpoena;" place the documents in an envelope (provided by the  
11 party issuing the subpoena), and place that envelope in a second envelope (provided  
12 by the party issuing the subpoena) that is addressed to the Court, and complete a  
13 declaration (sent with the subpoena). Exh A, p. 1; see Evidence Code section 1560.  
14 The declaration requires the individual signing the declaration to state that he or  
15 she is the custodian of the records and to complete the first section of the  
16 declaration, representing that: "true copies of all the records described" in the  
17 subpoena are enclosed in the envelope and that they are business records, or to  
18 complete the second section, entitled "No Records," and complete the following  
19 statement: "After a diligent search, I declare that this business has none of the  
20 following records: . . ." Exh A, p. 5; see Evidence Code section 1561.

21 The subpoena indicates the date for which the documents are subpoenaed is  
22 February 16, 2005, and that the type of hearing is "Jury Trial." Exh A, p. 2. The  
23 affidavit states the "documents are material to the proper presentation of this case  
24 by reason of the following facts: To prove motive on behalf of the defendant for the  
25 charged offenses and to corroborate the victims of the charges offenses." Exh A, p.

26 4.

27 ///

28 ///

1 II.

2 Argument

3 A. Penal Code Section 1054 Establishes the Exclusive Means For Obtaining the  
4 Subject Records and Requires That the Subpoena Be Quashed

5 1. Introduction

6 The enactment of Penal Code (PC) section 1054, *et seq.* created for the first  
7 time a statutory scheme governing both the substance and procedure of criminal  
8 discovery between the prosecution and defense. *People v. Superior Court (Barrett)*  
9 (2000) 80 Cal. App.4th 1305, 1311, 96 Cal. Rptr.2d 264. "The procedural  
10 mechanisms of the statutory scheme (§ 1054, *et seq.*), are exclusive - - that is, the  
11 parties to a criminal proceeding may not employ discovery procedures other than  
12 those authorized by Chapter 10." *Barrett*, 80 Cal. App.4th at 1312-13. *citing*, PC §  
13 1054.5(a).<sup>1</sup>

14 The "meaning of 'discovery'" for purposes of the statute, is made "clear . . . in  
15 its statement of purposes: 'To save court time by requiring that discovery be  
16 conducted informally *between and among the parties* before judicial enforcement is  
17 requested." *People v. Sanchez* (1994) 24 Cal. App.4th 1012, 1026 30 Cal. Rptr.2d  
18 111, *quoting*, PC § 1054(b)(emphasis added by court). According to this definition,  
19 the discovery statute applies if the information sought is from the other party. The  
20 statute applies not only to the parties individually, but also to their agents and  
21 employees.<sup>2</sup>

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23 <sup>1</sup> PC Section 1054.5(a) provides as follows: "No order requiring discovery shall be  
24 made in criminal cases except as provided in this chapter. This chapter shall be the  
25 only means by which the defendant may compel the disclosure or production of  
26 information from prosecuting attorneys, law enforcement agencies which  
27 investigated or prepared the case against the defendant, or any other persons or  
28 agencies which the prosecuting attorney or investigating agency may have  
employed to assist them in performing their duties."

<sup>2</sup> *People v. Superior Court* (2000) 80 Cal. App.4th 1305, 96 Cal. Rptr.2d 264

(continued...)

1 To obtain information covered by the discovery provisions, a party is required  
2 first to make "an informal request of opposing counsel for the desired materials and  
3 information." PC § 1054.5(b). A party may not seek court enforcement to obtain the  
4 desired materials and information unless it has first made the required informal  
5 request. PC § 1054.5(b). Where a party has made the required informal request,  
6 and opposing counsel has not provided the desired materials and information  
7 within 15 days, the statute provides that "the party may seek a court order" for  
8 enforcement of its request. PC § 1054.5(b).

9 2. The Subpoena Seeks Records of the Defendant and May Not Be  
10 Obtained By Subpoena

11 The District Attorney's subpoena seeks documents and records of the  
12 defendant that the District Attorney asserts, based on information and belief, are in  
13 the custody of Movant. Because the items sought by the District Attorney are  
14 documents and records of the defendant, the District Attorney's subpoena is a  
15 request for discovery within the meaning of PC section 1054(b). *Sanchez*, 24 Cal.  
16 App.4th at 1026. The statutory discovery scheme thus provides the "exclusive"  
17 means for seeking the documents, and the District Attorney "may not employ

18 \_\_\_\_\_  
19 <sup>2</sup>(...continued)  
20 (although California Department of Corrections (CDC) is a distinct and separate  
21 government entity from the District Attorney, defense request for documents and  
22 records of CDC relating to investigation of prison murder for which defendant was  
23 being prosecuted are subject to discovery procedures and not subpoena, because  
24 CDC was investigating agency for District Attorney with respect to charged  
25 murder); *Walters v. Superior Court* (2000) 80 Cal. App.4th 1074, 95 Cal. Rptr.2d  
26 880 (reciprocal discovery procedures apply to defense request to examine evidence  
27 in custody of police "because police are not third parties for these purposes and an  
28 examination of seized evidence is discovery, not 'investigation.'"); *People v. Superior  
Court (Broderick)* (1991) 231 Cal. App.3d 584, 594, 282 Cal. Rptr. 418 (rejecting  
argument of defendant that proceeding to enforce criminal subpoena was premature  
on grounds that prosecution had failed to follow the procedures set forth in  
Proposition 115 because "Proposition 115 discovery procedures apply only to  
discovery between the People and the defendant" and "People claim that all of the  
subpoenas in issue here were to third parties with no direct formal or legal  
relationship to the defendant or the criminal defense team."')

1 discovery procedures other than those authorized by Chapter 10" to obtain the  
2 documents. *Barrett*, 80 Cal. App.4th at 1312-13.

3 This means the District Attorney must seek the documents by compliance  
4 with the discovery process, which he has not done, and that he may not obtain the  
5 documents by the process he has employed, a third-party criminal subpoena duces  
6 tecum. Accordingly, the subpoena should be withdrawn, and if not, it should be  
7 quashed or declared invalid.

8  
9 B. The Subpoena Must Be Quashed Because It Fails to Establish Good Cause, Is  
10 Overbroad and Burdensome, and Seeks Material That May Be Privileged

11 1. Introduction

12 Penal Code "Sections 1326 and 1327 set forth the procedure for either the  
13 prosecution or the defendant to obtain discovery records possessed by third parties."  
14 *Barrett*, 80 Cal. App.4th at 1315. As the Court in *Barrett* confirmed, "The issuance  
15 of a subpoena duces tecum . . . is purely a ministerial act and does not constitute  
16 legal process in the sense that it entitles the person on whose behalf it is issued to  
17 obtain access to the records described therein until a judicial determination has  
18 been made that the person is legally entitled to receive them." *Barrett*, 80 Cal.  
19 App.4th at 1316, quoting, *People v. Blair* (1979) 25 Cal.3d 640, 651, 159 Cal. Rptr.  
20 818.

21 A criminal subpoena issued by prosecution must comply with Code of Civil  
22 Procedure (CCP) section 1985(b). *People v. York* (1980) 108 Cal. App.3d 779, 789-  
23 792, 166 Cal. Rptr. 717; *Johnson v. Superior Court for Santa Barbara County* (1968)  
24 258 Cal. App.2d 829, 837, 66 Cal.Rptr. 134; *People v. Brinson* (1961) 191 Cal.  
25 App.2d 253, 12 Cal. Rptr. 625; see also *People v. Superior Court (Broderick)* (1991)  
26 231 Cal. App.3d 584, 587-88, 282 Cal. Rptr. 418 (assuming without discussion that  
27 subpoena duces tecum issued by prosecution is subject to CCP); but see, *M.B. v.*  
28

1 *Superior Court* (2002) 103 Cal. App.4th 1384, 127 Cal. Rptr.2d 454.<sup>3</sup>

2 Section 1985(b) requires that the subpoena be accompanied by affidavit  
3 showing good cause and materiality for production of the subpoenaed items.  
4 Specifically, CCP section 1985(b) provides as follows:

5 A copy of an affidavit shall be served with a subpoena duces  
6 tecum issued before trial, showing good cause for the production  
7 of the matters and things described in the subpoena, specifying  
8 the exact matters or things desired to be produced, setting forth  
9 in full detail the materiality thereof to the issues involved in the  
10 case, and stating that the witness has the desired matters or

11  
12 <sup>3</sup> The court of appeal in *M.B. v. Superior Court* (2002) 103 Cal. App.4th 1384,  
13 127 Cal. Rptr.2d 454, in upholding a subpoena duces tecum issued by a grand jury,  
14 ruled that the subpoena was not subject to CCP section 1985, and concluded, in  
15 dictum, that "the affidavit requirement [of CCP section 1985] does not apply to  
16 either criminal trials or criminal grand jury proceedings." *Id.*, at 1394, 462. The  
17 court distinguished the cases holding CCP section 1985 applicable to a criminal  
18 trial subpoena on the ground that all but one had been decided before *Pitchess*,  
19 which it relied on as support for its conclusion, explaining that the Court in  
20 *Pitchess* ruled that the requirements of CCP section 1985 were not applicable to a  
21 subpoena issued by a criminal defendant for police officer personnel records. *M.B.*,  
22 103 Cal. App.4th at 1394, citing, *Pitchess v. Superior Court* (1974) 11 Cal.3d 531,  
23 113 Cal. Rptr. 897.

24 As explained by the court in *Pacific Lighting Leasing Co. V. Superior Court*  
25 (1976) 60 Cal. App.3d 552, 131 Cal. Rptr. 559, the Court in *Pitchess* was discussing  
26 "the right of an accused to seek discovery in the course of preparing his defense to a  
27 criminal prosecution," which it noted was "a judicially created doctrine evolving in  
28 the absence of guiding legislation." *Pacific Lighting*, 60 Cal. 3d 561, quoting,  
29 *Pitchess*, 11 Cal.3d at 535-37. Moreover, the Court's holding that a defendant was  
30 not required to meet the specificity requirements of CCP section 1985 in order to  
31 establish good cause for enforcement of a subpoena for police officer personnel  
32 records was based on constitutional concerns specific to a defendant, and the  
33 decision was limited to "an accused in a criminal case . . ." *Pacific Lighting*, 60 Cal.  
34 3d 562, quoting, *Pitchess*, 11 Cal.3d at 535-37 ("Were a court to require strict  
35 adherence to the provisions of CCP 1985 and 2036(a), it is likely that Fifth  
36 Amendment problems would develop in many instances. Therefore, in contrast to  
37 the formal requirements for civil discovery, an accused in a criminal prosecution  
38 may compel discovery by demonstrating that the requested information will  
39 facilitate the ascertainment of the facts and a fair trial." (internal quotations and  
40 citations omitted)(emphasis added))

1 things in his or her possession or under his or her control.

2 Even if CCP 1985(b) were deemed not to govern a criminal subpoena duces  
3 tecum issued by the prosecution, the privacy and Fourth Amendment interests  
4 implicated by a third party subpoena duces tecum would still require that the  
5 subpoena comply "with the normal requirement that the party seeking discovery of  
6 documents furnish 'factual data by the required affidavit' justifying disclosure."  
7 *Pacific Lighting*, 60 Cal. 3d at 567, quoting, *Johnson v. Superior Court*, 258 Cal.  
8 App.2d at 837. Indeed, this is the standard a defendant must satisfy where the  
9 request does not implicate Fifth Amendment concerns. *Pacific Lighting*, 60 Cal.  
10 App.3d at 567 "The right to discovery by a subpoena duces tecum of third party  
11 records" requires a "showing 'the requested information will facilitate the  
12 ascertainment of the facts and a fair trial.'" *Barrett*, 80 Cal. App.4th at 1316,  
13 quoting, *Pitchess*, 11 Cal.3d at 536.

14 While the exact *degree* of factual specificity that is required to satisfy these  
15 requirements is, of course, subject to a case-by-case determination, "/t/he  
16 requirement of . . . good cause . . . is not met by an affidavit which is totally devoid  
17 of any statement of facts." *Pacific Lighting*, 60 Cal. App.3d at 567, quoting,  
18 *Johnson*, 258 Cal. App.2d at 835 (emphasis added). As the court in *Barrett* noted,  
19 "[a] subpoena duces tecum that makes a blanket demand for [third party]  
20 documents and amounts to nothing more than a fishing expedition is subject to  
21 being quashed." *Barrett*, 80 Cal. App.4th at 1320, n.7, citing, *People v. Serrata*  
22 (1976) 62 Cal. App.3d 9, 15, 193 Cal. Rptr. 144.

23 A third party served with a subpoena duces tecum may also contest the  
24 subpoena on the grounds that it is overbroad. *M.B. v. Superior Court*, 103 Cal.  
25 App.4th at 1387, n.4; *Barrett*, 80 Cal. App.4th at 1320, n.7 (in prosecution for prison  
26 murder occurring in 1996, court of appeal directed defendant and the District  
27 Attorney "to address whether the request for prison records dating back to January  
28 1992 was overbroad" and after determining it was premature to consider

1 overbreadth in the writ proceeding, added that "[r]he issue . . . is one that the trial  
2 court should consider if raised in further proceedings below.")

3 In addition to the objections to the subpoena that the third party has the  
4 right to assert, where the materials sought by the subpoena may be subject to a  
5 privilege held by another, the custodian has an obligation to take steps to preserve  
6 the opportunity to invoke that privilege. *People v. Superior Court (Laff)* (2001), 25  
7 Cal.4th 703, 713, 107 Cal. Rptr.2d 323 ("[T]he custodian of materials protected by  
8 an evidentiary privilege owes a duty to the holder of the privilege to claim the  
9 privilege and to take actions necessary to ensure that the materials are not  
10 disclosed improperly." (citation omitted)).

11  
12 2. The Subpoena Fails to Establish Good Cause, Is Overbroad and  
13 Burdensome, and Seeks Material That May Be Privileged

14 The affidavit here contains no specific facts and fails to establish good cause  
15 for production under either CCP section 1985 or the standards that are otherwise  
16 applicable by case law to a third party subpoena duces tecum.

17 In the words of the Court in *Barrett*, this subpoena is a "fishing expedition"  
18 and is subject to being quashed. There are simply no facts stated, as required by  
19 law, to establish good cause and/or materiality or relevance.

20 Separate and apart from the failure to establish good cause, the subpoena  
21 also must be quashed because it is overbroad. The subpoena does not even specify  
22 to whom or what the described records pertain and, as served, would apply to all of  
23 Movant's clients. As such, it infringes upon Movant's privacy and Fourth  
24 Amendment interests. It is also overbroad as to time, as it seeks documents  
25 "through termination." Because it is overbroad, it is also burdensome and  
26 oppressive as it would unreasonably require Movant to devote countless hours to  
27 attempt compliance with its overbroad scope.

28 Movant also objects to production and disclosure of the records in fulfillment

1 of its obligation to take steps to preserve the opportunity for others to invoke any  
2 claims of privilege they may have with respect to the documents. *People v. Superior*  
3 *Court (Laff)*, 25 Cal.4th at 713. Accordingly, even if the subpoena is not quashed,  
4 Movant requests the Court order the production and disclosure of the documents be  
5 stayed until claims of privilege can be invoked by any interested parties and  
6 adjudicated by the Court at an in camera hearing.

7  
8 III.

9 Conclusion

10 For all the foregoing reasons, the Court should order the subpoena quashed  
11 or, alternatively, order that its enforcement be stayed to allow claims of privilege to  
12 be asserted and adjudicated.

13 Respectfully submitted,

14 Nasatir, Hirsch, Podberesky & Genego

15 By:

16   
William J. Genego, Esq.

17 By:

18   
FGR Michael D. Nasatir, Esq.

19 Counsel for Movant  
20 Holthouse Carlin & Van Trigt LLP  
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1 PROOF OF SERVICE

2  
3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of  
5 California. I am over the age of 18 and not a party to the  
6 within action; my business address is: 2115 Main Street, Santa  
7 Monica, California 90405.

8 On February 10, 2005, I served the foregoing document  
9 described as: NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA DUCES  
10 TECUM; MEMORANDUM IN SUPPORT OF MOTION, on all interested parties  
11 in this action by placing a true copy thereof enclosed in a  
12 sealed envelope addressed as follows:

13 Gordon Auchincloss, Esq.  
14 Senior Deputy District Attorney  
15 1112 Santa Barbara Street  
16 Santa Barbara, California 93101

17 X (BY MAIL) I caused such envelope with postage thereon fully  
18 prepaid to be placed in the United States mail at Santa  
19 Monica, California

20 \_\_\_\_\_ (BY PERSONAL SERVICE) I caused such envelope to be delivered  
21 by hand to the offices of the addressee.

22 Executed on February 10, 2005 at Santa Monica, California.

23 X (State) I declare under penalty of perjury under the laws  
24 of the State of California that the above is true  
25 and correct.

26 \_\_\_\_\_ (Federal) I declare that I am employed in the office of a  
27 member of the bar of this court at whose direction  
28 the service was made.

29   
30 Marcia Espinoza