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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 27 2005

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

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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.

Case No.: 1133603

REPLY TO MICHAEL JACKSON'S
"OPPOSITION TO THE MEDIA'S
REQUEST THAT THE COURT CLARIFY
THAT MARTIN BASHIR IS NOT SUBJECT
TO THE GAG ORDER"; DECLARATION
OF THEODORE J. BOUTROUS, JR.

Date: January 28, 2005

Time: 9:30 a.m.

Place: Department SM-8,
Judge Rodney S. Melville

[VIA FACSIMILE]

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REPLY TO MICHAEL JACKSON'S "OPPOSITION TO THE MEDIA'S REQUEST THAT THE COURT CLARIFY THAT
MARTIN BASHIR IS NOT SUBJECT TO THE GAG ORDER"; DECLARATION OF THEODORE J. BOUTROUS, JR.

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 Martin Bashir respectfully submits this reply to Michael Jackson's (belated) opposition to
3 Mr. Bashir's motion for protective order and for clarification that this Court's January 16, 2004
4 Protective Order (the "Gag Order") does not apply to Mr. Bashir.¹

5 1. Mr. Jackson begins by trying to excuse his untimely filing of an opposition, claiming
6 that Mr. Bashir's motion was not served on him until January 24, 2005, Opp. at 2, but this is simply
7 false. Mr. Bashir's motion was served by facsimile on both Mr. Mesereau and Mr. Sanger, as well as
8 the District Attorney, on January 18, 2005, the date it was filed in this Court. Boutrous Decl., ¶ 2,
9 Exh. A. The motion was posted in its entirety on the Court's public website two days later, on
10 January 20, 2005. Accordingly, Mr. Jackson cannot blame insufficient notice for his supposed
11 inability to "file an adequate opposition." See Opp'n at 2. Mr. Bashir's motion was timely filed
12 more than 10 days before tomorrow's hearing and served in accordance with the Court's guidelines
13 and the parties' practice throughout this case.²

14 2. Mr. Jackson next launches an attack on Mr. Bashir's counsel for not seeking to file
15 Mr. Bashir's motion under seal, claiming that this Court "ordered the parties to file everything under
16 conditional seal." Opp. at 2. This too is simply false. This Court has not ordered every document to
17 _____

18
19 1 Mr. Bashir is not filing a motion requesting that this reply be filed under seal because this reply
20 does not contain sealed or otherwise sensitive or confidential information that may properly be
21 kept from the public under California law, the First Amendment, or the Court's orders in this
22 case. See Cal. R. Ct. 243.1-243.2; see also Declaration of Theodore J. Boutrous, Jr.
23 ("Boutrous Decl."), ¶ 1.

24 2 Mr. Jackson has repeatedly served materials by fax alone. See, e.g., Ex Parte Application that
25 Reply to Opposition to Motion for an Order Allowing Individual Sequestered Voir Dire of
26 Prospective Jurors Be Filed Under Seal (filed Jan. 25, 2005). In addition to fax service on
27 January 18, hard copies of the motion and the videotape of "Living with Michael Jackson," were
28 sent by overnight Fed Ex as a courtesy to the parties on January 20, 2005. Boutrous Decl. ¶ 3.
29 Records from Fed Ex indicate that Mr. Sanger's package did not arrive until January 24, 2005,
30 though Mr. Mesereau's package was delivered on January 21, 2005. Id. The only addition to
31 what was faxed to the parties on January 18, 2005 was the videotape, *id.*, which Mr. Jackson's
32 counsel clearly had seen before January 24. See Mr. Jackson's "Opposition to District Attorney's
33 Motion for Admission of Martin Bashir's 'Documentary' 'Living with Michael Jackson'"
34 (filed January 21, 2005).

1 be filed under seal, although that is what Mr. Jackson does. Rather, the Court has specified that only
2 records containing "sensitive" information should be filed under seal. See Transcript of May 28,
3 2004 Proceedings ("May 28 Tr.") at 37:10-13. In fact, the Court expressly rejected a deputy district
4 attorney's suggestion that: "If it's simpler for the Court for us to ask for a sealing order on every
5 single document we file, that might make it easier." *Id.* at 37:16-18. As the Court noted:

6 That's not. That's exactly why Mr. Boutrous is sitting behind you with his . . . pen
7 in hand, which is his weapon. That's not what we want. What we want is what
8 I've ordered. There's a protective order. It clearly - from my viewpoint, it clearly
states what things are protected, what things you can't reveal under that order, and I
just am asking you to look at that again and look at your documents.

9 May 28 Tr. at 37:19-38:2 (emphasis added). Counsel for Mr. Bashir stated in his declaration that he
10 did not believe the motion contained sensitive or confidential information that was subject to sealing
11 under Rule 243.1, the First Amendment or this Court's orders. Indeed, the redacted "Request for
12 Attendance of Out-of-State Witness, Martin Bashir" on which Mr. Bashir's motion was based was
13 posted on the Court's website on January 13, 2005, five days before Mr. Bashir filed his motion.
14 Mr. Jackson points to nothing contained in Mr. Bashir's motion revealing "sensitive" information
15 (and never explains what this sealing issue has to do with his substantive opposition to Mr. Bashir's
16 motion for protective order). And Mr. Bashir's motion was not redacted by the Court in any way
17 before it was placed on the website, reflecting the fact that it did not contain information that justified
18 being filed under conditional seal.

19 3. As for the merits of his opposition to Mr. Bashir's motion for protective order,
20 Mr. Jackson does not cite or analyze any of the many binding legal authorities relied upon by
21 Mr. Bashir, but instead claims he may want to cross-examine Mr. Bashir or call him as a witness.
22 Opp. at 3. There is, however, no need for the Court to address such issues at this point. As set forth
23 in Mr. Bashir's motion and in his reply to the District Attorney's opposition, the California shield
24 law, the First Amendment and New York law preclude the District Attorney from calling Mr. Bashir
25 to testify, so there will be no basis or need for Mr. Jackson to cross-examine him. In the event
26 Mr. Jackson decides to try call Mr. Bashir as a witness as part of his defense, these same shield laws
27 would preclude his testimony, but this Court can cross that bridge if and when Mr. Jackson seeks to
28

1 compel Mr. Bashir to testify. Accordingly, Mr. Bashir's motion for protective order should be
2 granted.³

3 4. Finally, the Court should reject Mr. Jackson's arguments that Mr. Bashir should be
4 deemed subject to the Court's Gag Order. Opp. at 3-4. Mr. Jackson does not even mention, let alone
5 attempt to meet, the exacting constitutional standards that apply to prior restraints, which apply with
6 even greater force when a court seeks to impose a prior restraint against a journalist covering a
7 criminal trial. See Bashir Motion at 11-14; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59
8 (1976) (emphasizing the "heavy presumption" against the constitutional validity of prior restraints,
9 which "are the most serious and the least tolerable infringement on First Amendment rights," and
10 making clear that they are subject to even greater scrutiny when intended to silence the reporting of
11 criminal proceedings.); see also Cal. Const. Art. I § 2(a) ("A law may not restrain or abridge liberty
12 of speech or press."); *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241 (2000) (invalidating a far more
13 narrowly tailored gag order restricting only the public disclosure by trial participants of confidential
14 patient information in the trial of a celebrity plastic surgeon). Instead of addressing these legal
15 issues, Mr. Jackson launches a baseless and unsupported attack on Mr. Bashir's journalistic activities.
16 Opp. at 3-4.⁴ But Mr. Jackson's obvious hostility toward Mr. Bashir is plainly insufficient to justify
17 applying the Gag Order to restrict Mr. Bashir's future reporting on this case.

18 Mr. Bashir is a long-time award-winning journalist who is reporting on this case.
19 Bashir Decl., ¶¶ 2, 4, 9. Mr. Jackson, however, inexplicably declares that Mr. Bashir's reporting on
20 this case is over. Opp. 3-4. But Mr. Jackson simply ignores Mr. Bashir's declaration in which he
21 expressly states that he will be reporting on this case and related matters. Bashir Decl., ¶ 9.

22
23 ³ Mr. Jackson gratuitously suggests that "Mr. Bashir may also overstate his credentials as a
24 journalist." Opp. at 3, but it is undisputed that Mr. Bashir is an award-winning journalist who has
25 been working for major news organizations and networks for many years. See Bashir Decl.,
¶¶ 2, 4.

26 ⁴ Among other things, Mr. Jackson makes a number of unsupported and false assertions about the
27 production, content, distribution and sale of "Living with Michael Jackson." Opp. at 3-4. Since
28 these false assertions are irrelevant to this motion Mr. Bashir will not burden the Court with a
response to them; suffice it to say he disagrees with Mr. Jackson's claims.

1 Mr. Jackson argues that the Gag Order should apply because Mr. Bashir is a "witness,"
2 Opp. at 4, but in the event the Court grants Mr. Bashir's motion for a protective order, then the
3 Gag Order, by its own terms, is inapplicable to Mr. Bashir. See Bashir Motion at 11. Moreover,
4 Mr. Bashir is a potential witness solely because of his journalistic activities and California law
5 affords strong constitutional and statutory protections against interfering with his newsgathering
6 activities under such circumstances. "A comprehensive reporter's immunity provision, in addition to
7 protecting confidential or sensitive sources, has the effect of safeguarding 'the autonomy of the
8 press.' The threat to press autonomy is particularly clear in light of the press's unique role in
9 society." *Miller v. Superior Court*, 21 Cal. 4th 883, 898 (1999).

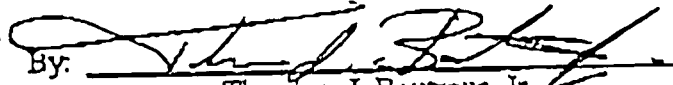
10 Mr. Jackson's ironic attempt to cast Mr. Bashir as a "celebrity" looking for special treatment
11 rings especially hollow. Opp. at 4. Simply put, Mr. Jackson seeks to muzzle a journalist who, as his
12 rancorous opposition demonstrates, he does not like. Any attempt to restrict Mr. Bashir's speech here
13 thus poses the most exceptional threat to the First Amendment: Mr. Jackson, a rich and powerful
14 public figure, is asking this Court to silence a journalist's future speech because Mr. Jackson dislikes
15 the content of that journalist's past speech. A fundamental purpose of the First Amendment is to
16 protect the press and public from precisely this danger and to safeguard our "profound national
17 commitment to the principle that debate on public issues should be uninhibited, robust, and
18 wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

19 In short, while Mr. Jackson "carries a heavy burden of showing justification for the
20 imposition of such a restraint," *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)
21 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)), he has offered no
22 justification other than his antipathy towards Mr. Bashir's journalistic activities. Especially under
23 such circumstances, imposing any sort of prior restraint against Mr. Bashir would patently violate the
24 First Amendment and the California Constitution, and this Court should therefore clarify that the
25 Gag Order does not apply to Mr. Bashir.

1 DATED: January 27, 2005

2 Respectfully submitted,

3 GIBSON, DUNN & CRUTCHER LLP
4 Theodore J. Boutros, Jr.
5 Michael H. Dore

6 By: 
7 Theodore J. Boutros, Jr.

8 Attorneys for MARTIN BASHIR
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Exhibit A

GIBSON, DUNN & CRUTCHER LLP

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REF: People of California v. M. Jackson; SBSC No. 1133603

Attached hereto is NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER PRECLUDING MARTIN BASHIR FROM BEING REQUIRED TO TESTIFY AND CLARIFYING 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

Please file this brief and charge any fees to the credit card number listed on the enclosed fax filing form. Should you have any questions or require further information, please contact me at (213) 229-7085.

Very truly yours,

Michael H. Dore

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**CERTIFICATE OF SERVICE
BY FAX AND REGULAR MAIL**

I, Barbara Cruz, 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 Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Theodore J. Boutrous, Jr., a member of the bar of this Court, and at his direction, on January 27, 2005, I served the following:

REPLY TO MICHAEL JACKSON'S "OPPOSITION TO THE MEDIA'S REQUEST THAT THE COURT CLARIFY THAT MARTIN BASHIR IS NOT SUBJECT TO THE GAG ORDER"; DECLARATION OF THEODORE J. BOUTROUS, JR.

on the interested parties in this action, by the following means of service:

- BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel: (805) 568-2300 Fax: (805) 568-2398
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1 **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to
2 be transmitted by facsimile machine, to the parties and numbers indicated below. No error
3 was reported by the machine.

4 Thomas W. Sneddon 5 District Attorney 6 Santa Barbara County 7 1105 Santa Barbara Street 8 Santa Barbara, CA 93101-2007 9 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
10 Thomas A. Mescreau, Jr. 11 Collins, Mescreau, Reddock & Yu LLP 12 1875 Century Park East, 7th Floor 13 Los Angeles, CA 90067 14 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
15 Robert Sanger 16 Sanger & Swysen, Lawyers 17 233 E. Carrillo Street, Suite C 18 Santa Barbara, CA 93001 19 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

20 I am employed in the office of Theodore J. Boutros, Jr., a member of the bar of this court, and
21 that the foregoing document(s) was(were) printed on recycled paper.

22 (STATE) I declare under penalty of perjury under the laws of the State of California that
23 the foregoing is true and correct.

24 (FEDERAL) I declare under penalty of perjury that the foregoing is true and correct.

25 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing
26 document(s), and all copies made from same, were printed on recycled paper, and that this Certificate
27 of Service was executed by me on January 27, 2005, at Los Angeles, California.

28 
Barbara Cruz