

1 GIBSON, DUNN & CRUTCHER LLP
2 THEODORE J. BOUTROUS, JR., SBN 132099
3 MICHAEL H. DORE, SBN 227442
4 333 South Grand Avenue,
Los Angeles, CA 90071-3197
Telephone: (213) 229-7804
Facsimile: (213) 229-6804

5 Attorneys for JAY LENO

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

FEB 18 2005

GARY M. BLAIR, Executive Officer

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

**NOTICE OF EXPEDITED MOTION AND
EXPEDITED MOTION FOR
CLARIFICATION THAT "GAG ORDER"
DOES NOT APPLY TO JAY LENO;
MEMORANDUM OF POINTS AND
AUTHORITIES**

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

[VIA FACSIMILE]

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19 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that as soon as possible in the above-entitled Court, located at
21 312-C East Cook Street, Santa Maria, California 93456-5369, Jay Leno, an entertainment personality
22 regularly appearing on the NBC television network will, and hereby does, move this Court, on an
23 expedited basis, to clarify that its January 16, 2004 Protective Order (the "Gag Order") does not
24 apply to Mr. Leno. If the Court decides the Gag Order applies to Mr. Leno, he further requests that
25 the Court clarify that the Gag Order only limits Mr. Leno's ability to disclose evidence of which he
26 may have direct, first-hand knowledge, assuming only for the sake of argument that any such
27 evidence exists.
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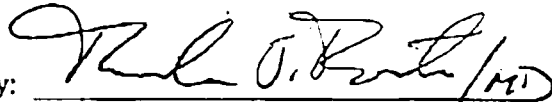
**NOTICE OF EXPEDITED MOTION AND EXPEDITED MOTION FOR CLARIFICATION THAT "GAG ORDER" DOES
NOT APPLY TO JAY LENO; MEMORANDUM OF POINTS AND AUTHORITIES**

1 This Motion is made on the ground that this Court could not possibly have intended its
2 Gag Order, which was issued more than a year ago, to limit public personalities like Mr. Leno from
3 commenting on public proceedings in this case. Indeed, any attempt to apply the Gag Order to
4 Mr. Leno here would result in a prior restraint in violation of the First Amendment and Article I,
5 Section 2(a) of the California Constitution. Nevertheless, if the Court does apply the Gag Order to
6 Mr. Leno it should clarify that the Gag Order limits only Mr. Leno's ability to speak publicly about
7 the very narrow category of information, if there is any, noted above.

8 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
9 Points and Authorities, the complete files and records in this action, and on such argument and
10 evidence as may be presented to the Court at the hearing on this expedited Motion, which Mr. Leno
11 respectfully asks this Court to schedule as soon as possible.

12 DATED: February 18, 2005

13 GIBSON, DUNN & CRUTCHER LLP
14 Theodore J. Boutrous, Jr.
15 Michael H. Dore

16 By: 
17 Theodore J. Boutrous, Jr.

18 Attorneys for JAY LENO
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ARGUMENT

Yesterday, February 17, 2005, Michael Jackson served Jay Leno with a subpoena requiring that Mr. Leno appear and testify at Mr. Jackson's criminal trial. He also served Mr. Leno with a copy of the Court's Gag Order, the broad terms of which threaten "persons subpoenaed or expected to testify in this matter" with contempt if they speak about any number of subjects related to the case. But when the Court issued its Gag Order more than one year ago, it could not possibly have been seeking to affect the ability of entertainment personalities like Mr. Leno to comment about public information in this case. The Court, therefore, should clarify that the Gag Order does not apply to Mr. Leno at all.

Indeed, any such restriction on Mr. Leno, a public figure whose occupation largely hinges on his ability to speak about contemporaneous public issues, would impose a prior restraint in direct violation of the First Amendment and Article I, Section 2(a) of the California Constitution. Nevertheless, if the Court does apply the Gag Order to Mr. Leno, it should clarify that the Gag Order only limits Mr. Leno's ability to disclose evidence of which he may have direct, first-hand knowledge, assuming only for the sake of argument that any such evidence exists. Moreover, the Court should do so as soon as possible, since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Sammartino v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

A. The Court Should Clarify That The Gag Order Does Not Apply To Mr. Leno Because The Court Could Not Possibly Have Intended For Its Gag Order To Limit Public Commentary By An Entertainment Personality About Public Information Related To This Case

Mr. Leno is the host of "The Tonight Show," which airs nightly on the NBC television network. As part of his role on "The Tonight Show," Mr. Leno comments and engages guests on noteworthy contemporaneous issues of public interest. Until Michael Jackson served Mr. Leno with a subpoena, nobody could even argue that Mr. Leno was limited in any way from commenting on and discussing at will issues related to this case. Now that Mr. Jackson seeks to call Mr. Leno as a

witness, there is a danger that the Gag Order potentially could be interpreted to limit Mr. Leno's ability to publicly speak about the trial.¹

Indeed, the Gag Order was issued in January 2004, more than a year ago and long before there was any suggestion that Mr. Jackson's list of prospective witnesses would include Mr. Leno. During that time, nobody ever has argued that such an order restricting Mr. Leno's speech is necessary to protect Mr. Jackson's right to a fair trial. There is no basis either in law or common sense for affecting the ability of an entertainment personality like Mr. Leno to make observations and comments about public information that he believes is of interest to his viewers. This could not have been the Court's intent back in early 2004, and the Court thus should clarify that the Gag Order does not apply to Mr. Leno at all, or at least that Mr. Leno is not restricted from publicly commenting on this case like any other entertainer and television host around the world.

B. The Gag Order Should Not Be Applied To Mr. Leno At All, Since It Would Impose A Prior Restraint On His Speech In Violation Of The First Amendment And Article I, Section 2(A) Of The California Constitution

The Gag Order is a prior restraint. *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241 (2000) ("Orders which restrict or preclude a citizen from speaking in advance are known as 'prior restraints,' and are disfavored and presumptively invalid."). Like all prior restraints, it is subject to "a 'heavy presumption' against its constitutional validity," because "prior restraints on speech and publication 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 addition, 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." *Id.* at 559; *see also United States v. Gotti*, No. 04 Cr.

¹ Mr. Leno's subpoena is dated December 27, 2004, which is more than one month before the subpoena was actually served on February 17, 2005 and anyone could even argue that the provisions of the Gag Order were triggered. In that time, Mr. Leno was able to comment about the case without fear of judicial reprisal. Aside from Mr. Leno being served, nothing has changed, and the Court thus should clarify that Mr. Leno is free to do what he has been able to do throughout the course of the Court's proceedings.

690 (SAS), 2004 U.S. Dist. LEXIS 24192, at *3, 8 (S.D.N.Y. Dec. 3, 2004) (refusing to issue a gag order against a radio personality who was a prospective witness and alleged intended victim of the defendant and had been “regularly attack[ing]” the defendant as part of a segment on his show). There is no justification for imposing a prior restraint against Mr. Leno, let alone anything close to a showing that would rebut the “‘heavy presumption’ against its constitutional validity,” *Nebraska Press Ass’n*, 427 U.S. at 558-59, or the “even broader” protection against prior restraints under Article I, Section 2(a) of the California Constitution.²

C. If The Court Applies The Gag Order To Mr. Leno, It Should Clarify That The Gag Order Only Limits Mr. Leno’s Ability To Disclose Evidence Of Which He May Have Direct, First-Hand Knowledge, Assuming Only For The Sake Of Argument That Any Such Evidence Exists

If applied at all, the Gag Order should only be construed to stand for the proposition that Mr. Leno may not disclose evidence of which he may have direct, first-hand knowledge, assuming only for the sake of argument that any such evidence exists. Such a construction would thus clarify that Mr. Leno may comment on this case like any other entertainer and television host. *Cf.* Jan. 28, 2005 Tr. at 136:8-13 (noting that journalist Martin Bashir, though subpoenaed, can “report this case just like any other journalist in the room or outside the room, in the world”). Any restriction on Mr. Leno’s ability to do so would arbitrarily prevent a public figure from exercising his constitutional right to express his opinions and publicly discuss issues related to this trial—as any other television host across the country, and indeed the world, is free to do.

III.

CONCLUSION

For the foregoing reasons, Mr. Leno respectfully requests that the Court clarify that its Gag Order does not apply to Mr. Leno. In the event the Court does apply the Gag Order to Mr. Leno, he further requests that the Court immediately clarify that the Gag Order only limits Mr. Leno’s

² *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 491, 493 (2000) (stating that the free-speech guarantee under Article I, Section 2 of the California Constitution is “even ‘broader’ and ‘greater’” than those afforded under the First Amendment, and that “[A]rticle I’s right to freedom of speech, unlike the First Amendment’s, is ‘unlimited’ in scope”).

1 ability to disclose evidence of which he may have direct, first-hand knowledge, assuming only for the
2 sake of argument that any such evidence exists.

3 DATED: February 18, 2005

4 Respectfully submitted,

5 GIBSON, DUNN & CRUTCHER LLP
6 Theodore J. Boutros, Jr.
7 Michael H. Dore

8 By: 
9 Theodore J. Boutros, Jr.

10 Attorneys for JAY LENO
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CERTIFICATE OF SERVICE

BY FAX

I, Christopher Giunaven, 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 Michael H. Dore, a member of the bar of this Court, and at his direction, on February 18, 2005, I served the following:

NOTICE OF EXPEDITED MOTION AND EXPEDITED MOTION FOR CLARIFICATION THAT "GAG ORDER" DOES NOT APPLY TO JAY LENO; MEMORANDUM OF POINTS AND AUTHORITIES

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

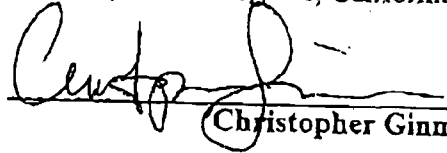
- BY FACSIMILE: From facsimile number (213) 229-7520, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated below. No error was reported by the machine.

Table with 3 rows and 2 columns. Row 1: 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. Row 2: Thomas A. Mesereau, Jr., Collins, Mesereau, Reddock & Yu LLP, 1875 Century Park East, 7th Floor, Los Angeles, CA 90067, Attorneys for Defendant Michael Jackson. Tel: (310) 284-3120, Fax: . Row 3: Robert Sanger, Sanger & Swysen, Lawyers, 233 E. Carrillo Street, Suite C, Santa Barbara, CA 93001, Co-Counsel for Defendant Michael Jackson. Tel: (805) 962-4887, Fax: (805) 963-7311.

- I am employed in the office of Theodore J. Boutros, Jr., a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.
- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1
2 (FEDERAL) I declare under penalty of perjury that the foregoing is true and correct.

3 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing
4 document(s), and all copies made from same, were printed on recycled paper, and that this Certificate
5 of Service was executed by me on February 18, 2005, at Los Angeles, California.

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8 Christopher Ginnaven

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