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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

MAR 10 2005

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

10 SUPERIOR COURT, STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA BARBARA

12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA,

14 Plaintiff,

15 vs.

16 MICHAEL JOE JACKSON,

17 Defendant.

Case No.: 1133603

**RESPONSE TO AND REQUEST THAT
COURT REJECT MR. JACKSON'S
REQUEST FOR A HEARING ON
MARCH 11 RELATING TO HIS EX PARTE
APPLICATION FOR ORDER TO SHOW
CAUSE RE: CONTEMPT AGAINST
MARTIN BASHIR**

Date: March 11, 2005

Time: 8:30 a.m.

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

[VIA FACSIMILE]

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 Martin Bashir hereby respectfully responds to and requests that the Court reject Mr. Jackson's
20 request for a hearing on Mr. Jackson's ex parte application for an order to show cause regarding
21 contempt against Mr. Bashir. The Court should either deny Mr. Jackson's application for an OSC as
22 premature, or, in the alternative provide Mr. Bashir with additional time in which to respond before
23 there is any hearing on whether an OSC should issue.

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25 1. Mr. Jackson's application was hand-delivered to Mr. Bashir's counsel yesterday
26 afternoon, only two days before the requested hearing date. For that reason alone, Mr. Bashir should
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**RESPONSE TO AND REQUEST THAT COURT REJECT MR. JACKSON'S REQUEST FOR A HEARING ON MARCH 11
RELATING TO HIS EX PARTE APPLICATION FOR AN ORDER TO SHOW CAUSE RE: CONTEMPT AGAINST
MARTIN BASHIR**

1 receive more time to respond to Mr. Jackson's arguments, which are without merit both legally and
2 factually.

3 2. In addition, Mr. Jackson's application should be denied because it is premature.
4 Contrary to Mr. Jackson's assertions, during Mr. Bashir's testimony on March 1, 2005, this Court
5 never ordered Mr. Bashir to answer any of Mr. Jackson's questions, and Mr. Bashir never disobeyed
6 any order of this Court. Rather, following the objections of Mr. Bashir's counsel based on the
7 California shield law and the First Amendment, the Court asked Mr. Bashir if he would like to
8 respond or instead would prefer to follow the advice of his counsel on these issues. *E.g.*, Mar. 1,
9 2005 Tr. at 238:27 ("Do you wish to answer?"); *id.* at 265:9-10 ("Do you intend to follow your
10 counsel's advice on those issues?"). The Court then indicated that it would later review the record to
11 determine whether Mr. Bashir was protected from being compelled to answer by the California shield
12 law and/or the First Amendment privilege. *See id.* at 231:16-24; *see also id.* at 233:28-234:4 ("The
13 way I would like to proceed with this is that . . . he does have some protection under the shield law
14 that his counsel has been pointing out. . . . I'll review [the questions] later to determine whether or not
15 I feel a contempt charge should be issued."). Since Mr. Bashir did not disobey any order of this
16 Court, Mr. Jackson has no basis for seeking an OSC.

17 Indeed, there is no reason to resolve these shield law and privilege issues in the show-cause
18 setting at this stage. If Mr. Jackson wants to attempt to compel answers to his questions, the Court
19 set out a procedure for doing so during the March 1 proceedings. *See* Mar. 1, 2005 Tr. at 275:25-28
20 ("THE COURT: . . . I will require the defense to file the appropriate application for subpoena, with
21 the reasons, and allow [Mr. Bashir's counsel] to file an opposition to that."). Mr. Jackson, therefore,
22 must file a motion seeking to subpoena Mr. Bashir, and attempt in that motion to overcome the
23 protections provided by the shield law and the First Amendment. Since the Court has not yet ordered
24 Mr. Bashir to answer any questions; and Mr. Jackson has not tried to make a proper showing as to
25 each question to overcome the shield law and qualified First Amendment privilege, this approach,
26 rather than contempt, is the proper procedure to follow.

2 But even if the Court takes the approach now recommended by Mr. Jackson, before an OSC
3 issues Mr. Bashir should be informed of which questions the Court believes to be outside the scope of
4 the California and First Amendment protections and given the choice of whether to answer them or to
5 stand on his counsel's objections. That is the typical approach in this context — the court rules on a
6 question-by-question basis whether the shield laws apply, and if it rules that those protections do not
7 apply, it orders the witness to answer; until the witness refuses to obey such an order, there is no basis
8 for seeking an OSC. *See, e.g., People v. Sanchez*, 12 Cal. 4th 1, 49 (1995) (affirming decision in
9 which trial court had limited questioning of journalist on basis of shield law and "indicated that it
10 would rule on a 'question by question basis'"); *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 225
11 (1975) ("The key to the application of the above enunciated test is a determination on a question-by-
12 question-basis as to whether or not the answer to a question may tend to endanger the revelation of a
13 protected source."); *cf. Carlson*, 209 F.2d at 214 ("[I]f all the witness does before the grand jury is to
14 decline to answer a question because of a good faith, but erroneous, claim of the privilege against
15 self-incrimination, this is not misbehavior constituting a completed contempt of court. Certainly the
16 assertion of a constitutional right if made in good faith on advice of counsel can hardly be described
17 as such misbehavior.") (internal quotations omitted).

18 3. While it is not possible to respond fully to Mr. Jackson's numerous assertions,
19 needless to say Mr. Bashir objects to Mr. Jackson's application, which is filled with utterly false
20 assertions of fact and manifestly incorrect and incomplete statements about the governing legal
21 principles. For example:

22 The questions posed by Mr. Jackson's counsel are beyond the scope of the District Attorney's
23 direct examination on March 1 and fail to comply with the most fundamental evidentiary principles
24 of relevance and materiality; they simply are not pertinent to the issue of whether Mr. Jackson
25 committed the crimes of which he is accused. Even without regard to the shield law or First
26 Amendment protections accorded Mr. Bashir, the questions cited by Mr. Jackson cannot be the basis
27 for a contempt charge because "a witness may only be held in contempt for refusal to answer
28 questions which are pertinent to the matter in issue." *In re: Moore*, 93 Cal. App. 488, 490 (1928).

1 Indeed, the vast majority of the questions Mr. Jackson cites in his application were beyond the
2 scope of the District Attorney's direct examination. During the course of Mr. Bashir's cross-
3 examination, the Court noted that "[w]hat I think I should do is to limit your examination of him at
4 this time as to the foundation of the tape," and "that's what I'm going to do." Mar. 1, 2005 Tr. at
5 230:11-13. Nevertheless, Mr. Jackson's counsel continued to pose questions that were plainly
6 beyond the scope of the direct examination, to which Mr. Bashir's counsel offered specific and more
7 broad-ranging objections. *See, e.g., id.* at 276:7-11 ("And just to clarify on the questions today, I
8 think there were a number that he declined to answer on the shield law grounds," "[a]nd I wanted to
9 clarify that my objections also go to the questions being beyond the scope of direct testimony."); *id.*
10 at 274:3-9 (Court sustained objection that a "question was beyond the scope of direct examination, as
11 were the last several."); *id.* at 247:3-8 ("MR. BOUTROUS: . . . The scope of direct is very clear.
12 Mr. Mesereau knows what the scope of direct is. And now he's . . . knowingly asking questions that
13 are beyond the scope of direct. And would ask the court to ask him to refrain from doing that.").

14 Moreover, none of these issues is relevant or material to the actual issues in this case —
15 whether Mr. Jackson committed child molestation or criminal conspiracy. The circumstances under
16 which Mr. Jackson agreed to participate in the documentary, and whether he made other statements
17 not broadcast in the documentary, have no "tendency in reason to prove or disprove any disputed fact
18 that is of consequence to the determination of the action." Cal. Evid. Code § 210. Thus, they are not
19 relevant, *see id.*, and stand only as an attempt by Mr. Jackson to create a major distraction away from
20 the charges against him and to deflect attention onto someone else. Such a non-pertinent inquiry
21 cannot be the basis for a contempt proceeding.

22 Finally, Mr. Jackson's application ignores the balancing factors articulated in *Delaney v.*
23 *Superior Court*, 50 Cal. 3d 785 (1990) that are used to determine when a criminal defendant can
24 overcome the protections provided by the California journalists' shield law and compel a journalist to
25 answer questions about unpublished material or newsgathering activities of face contempt sanctions.¹

27 ¹ Mr. Jackson also largely ignores the qualified reporters' privilege under the First Amendment,
28 and the arguments made in Mr. Bashir's Bench Brief about why his testimony should be limited.

1 Among other things, courts must consider the interests sought to be protected by the shield law, the
2 importance of the information to the criminal defendant, and whether there is an alternative source
3 for the information. *See id.* at 810-13.² Mr. Jackson does not attempt to balance, or even explicitly
4 address, these factors.

5 Where Mr. Jackson addresses *Delaney*, he completely misstates its holding. According to
6 Mr. Jackson, the case held that a "journalist that witnesses events must disclose unpublished
7 information regarding events." Jackson Mem. at 5. But this summary bares no resemblance
8 whatsoever to the California Supreme Court's actual holding in *Delaney* that the shield law's
9 "definition of 'unpublished information' includes a newsperson's nonconfidential, eyewitness
10 observations of an occurrence in a public place." 50 Cal. 3d at 805.³ The premise underlying
11 Mr. Jackson's entire argument in support of his application, that there is a waiver of the shield law if
12 third parties are present during newsgathering, is simply false. *See id.* at 797 ("The question . . . is
13 whether the shield law's definition of 'unpublished information' includes a newsperson's unpublished,
14 nonconfidential eyewitness observations of an occurrence in a public place. We conclude that it
15 does."); *see also Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 23 (1984)

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18 ² First, though, the criminal defendant must make a threshold showing that there is a "reasonable
19 possibility the information will materially assist his defense." *Delaney*, 50 Cal. 3d at 808.
20 (emphasis omitted). Given the immateriality and irrelevance of Mr. Jackson's question to the
21 criminal charges at issue, Mr. Jackson cannot meet even this initial requirement.

22 ³ Similarly, though Mr. Jackson argues that Mr. Bashir violated section 356 of the Evidence Code,
23 Jackson Mem. at 10, the California Supreme Court has expressly rejected the argument that a
24 journalist's unpublished statements should be provided to the defense under section 356.
25 *Sanchez*, 12 Cal. 4th at 58; *see also id.* ("'[S]ection 356 evidence' is subject to the immunity
26 provided under the shield law."). Mr. Jackson thus is simply wrong that dissemination of some
27 information constitutes a waiver as to other information. *See Cal. Const. Art. I, § 2(b); Cal. Evid.*
28 *Code § 1070(c)* (defining protected "unpublished information" to include "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")
(emphasis added); *see also Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 23
(1984) (noting that 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").

1 (“[The shield law’s] language does not allow the conclusion that protection of unpublished materials
2 or information is dependent upon the continued confidentiality of the source.”).

3 Indeed, the presence of third parties cuts against piercing the shield law because, as
4 Mr. Jackson’s memorandum makes clear, there are many alternative sources available. *See* Jackson
5 Mem. at 7; *see also Delaney*, 50 Cal. 3d at 811 (“Whether there is an alternative source is indeed a
6 factor for the trial court to consider in a criminal proceeding” when deciding whether the shield law
7 applies.). There would be no practical difficulty in calling the four persons named by Mr. Jackson,
8 “all of whom worked for Mr. Jackson,” Jackson Mem. at 7, to answer these questions, but
9 Mr. Jackson does not even mention the alternative-source factor in his memorandum.

10 These are just a few examples of the flaws in Mr. Jackson’s request for an OSC re contempt.

11 4. Accordingly, the Court should reject Mr. Jackson’s request for a hearing on March 11
12 relating to his application for an order to show cause regarding contempt against Mr. Bashir. The
13 Court should either deny Mr. Jackson’s application for an OSC as premature, or set a new hearing
14 date that will ensure that Mr. Bashir’s receives a full and fair opportunity to respond to Mr. Jackson’s
15 application and supporting memorandum. This will afford the parties and the Court the opportunity
16 to address the issues presented by Mr. Jackson’s petition in a full, fair and orderly fashion.
17

18 DATED: March 10, 2005

19 Respectfully submitted,

20 GIBSON, DUNN & CRUTCHER LLP
21 Theodore J. Boutrous, Jr.
22 Michael H. Dore

23 By: 
24 Theodore J. Boutrous, Jr.

25 Attorneys for MARTIN BASHIR
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**CERTIFICATE OF SERVICE
BY FAX AND REGULAR MAIL**

I, **Michael H. Dore**, 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 a member of the bar of this Court, and on March 10, 2005, I served the following:

RESPONSE TO AND REQUEST THAT COURT REJECT MR. JACKSON'S REQUEST FOR A HEARING ON MARCH 11 RELATING TO HIS EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE RE: CONTEMPT AGAINST MARTIN BASHIR

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.

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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Brian Oxman Oxman & Jaroscak 14126 East Rosecrans Santa Fe Springs, CA 90670 Co-Counsel for Defendant Michael Jackson	Tel: (562) 921-5058 Fax: (562) 921-2298

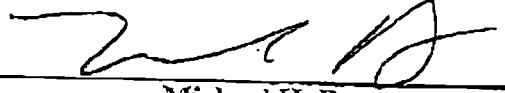
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BY MAIL: I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service 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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- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- (FEDERAL) I declare under penalty of perjury that the foregoing is true and correct.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on March 10, 2005, at Los Angeles, California.



Michael H. Dore

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