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

JAN 26 2005

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

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,  
vs.

MICHAEL JOE JACKSON,

Defendant.

Case No.: 1133603

**REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR PROTECTIVE ORDER PRECLUDING MARTIN BASHIR FROM BEING REQUIRED TO TESTIFY AND FOR CLARIFICATION THAT "GAG ORDER" DOES NOT APPLY TO MARTIN BASHIR; 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]

**INTRODUCTION**

The District Attorney does not contest any of the legal arguments made by Mr. Bashir, and concedes that his request implicates the provisions of the California journalist's shield law. Opp'n at 3-4. But in his response the District Attorney declares that he seeks testimony from Mr. Bashir about multiple categories of quintessential unpublished information protected by California's shield law, including the *origination* of the idea for the documentary, the *background* of its production, Mr. Bashir's *editorial judgments*, and Mr. Bashir's *opinions* about Mr. Jackson and whether they "chang[ed] as production of the documentary progressed." Several of the categories of information

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1 are beyond the scope of Mr. Bashir's personal knowledge (like corporate broadcast rights), and these  
2 and other categories of information can and should be addressed by other witnesses without calling  
3 Mr. Bashir as witness. The motion for protective order, therefore, should be granted in full.

4 As for the Court's January 16, 2004 Protective Order (the "Gag Order"), the District Attorney  
5 offers *no argument at all*, let alone a justification that could overcome the heavy presumption against  
6 prior restraints on speech and thus justify application of the Gag Order to Mr. Bashir. *See Nebraska*  
7 *Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976) (noting that "prior restraints on speech are the  
8 most serious and least tolerable infringement on First Amendment rights") (quotations omitted).  
9 Thus, if the Court does not grant in full Mr. Bashir's motion for a protective order, it should grant his  
10 uncontested request for clarification that the Gag Order does not apply to him.<sup>1</sup>

## 11 II.

### 12 ARGUMENT

#### 13 A. The Information The District Attorney Seeks From Mr. Bashir Is Quintessential 14 "Unpublished Information" About Which He Cannot Be Compelled To Testify

15 The District Attorney begins by stating that "[t]he People are mindful of the protections  
16 afforded a journalist by California's 'shield law' and the First Amendment." Opp'n at 2, but then  
17 argues that "there are issues concerning the production of 'Living with Michael Jackson,' which the  
18 People believe are relevant to our prosecution of this matter." Opp'n at 2. Relevance, however, is  
19 insufficient to overcome the absolute protections afforded to journalists under the shield laws.  
20 *Miller v. Superior Court*, 21 Cal. 4th 883, 897 (1999).<sup>2</sup> Mr. Bashir may not be compelled to disclose

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21  
22 <sup>1</sup> Mr. Bashir is not filing a motion requesting that this reply be filed under seal because this reply  
23 quotes only non-sensitive material from the redacted version of the opposition served on  
24 Mr. Bashir by the District Attorney and it does not identify the names of prospective witnesses  
indicated in the opposition, which is the only material the District Attorney seeks to keep under  
seal. *See* Declaration of Theodore J. Boutrous, Jr. ("Boutrous Decl.") ¶ 1.

25 <sup>2</sup> In fact, Mr. Bashir questions whether many or all of the issues listed by the District Attorney are  
26 relevant to this case at all, or at the very least whether Mr. Bashir "is the only person competent to  
27 discuss those issue[s]." Opp'n at 2, as the District Attorney contends. *See infra* p. 5. Moreover,  
28 the District Attorney's pending motion seeking admission of Mr. Bashir's "Living With Michael  
Jackson" makes clear that the District Attorney's principal basis for introducing the documentary

[Footnote continued on next page]

1 in response to a prosecution subpoena "any unpublished information obtained or prepared in  
2 gathering, receiving or processing of information for communication to the public." Cal. Const.  
3 Art. I, § 2(b); Cal. Evid. Code § 1070(b).

4 And "unpublished information" is defined and interpreted very broadly. The statute itself  
5 provides:

6 As used in this section, 'unpublished information' includes information not disseminated to the  
7 public by the person from whom disclosure is sought, *whether or not related information has*  
8 *been disseminated* and includes, but is not limited to, all notes, outtakes, photographs, tapes or  
9 other data of whatever sort not itself disseminated to the public through a medium of  
communication, *whether or not published information based upon or related to such material*  
*has been disseminated.*

10 Cal. Evid. Code § 1070(c) (emphasis added).

11 Courts have construed this language very expansively. *See, e.g., Delaney v. Superior Court,*  
12 *50 Cal. 3d 785, 797, 800 (1990)* (concluding that "the shield law's definition of 'unpublished  
13 information' includes a newsperson's unpublished, nonconfidential eyewitness observations of an  
14 occurrence in a public place," and noting that the plain meaning of "'Information' includes 'reception  
15 of knowledge' and 'knowledge obtained from reading, observation, or instruction'" (quoting  
16 Webster's New Int'l Dict. (2d ed. 1958) p. 1276 (emphasis added by court); *Playboy Enters., Inc. v.*  
17 *Superior Court, 154 Cal. App. 3d 14, 23 (1984)* (holding that "whether the published information is  
18 an exact transcription of the source material or paraphrases or summarizes it," and even where  
19 unpublished records would merely "confirm or refute the accuracy of the statements" that were  
20 broadcast, "this material falls squarely within the ambit of article I, section 2 protection").

21 The District Attorney's attempts to obtain information from Mr. Bashir regarding the origin, context  
22 and his opinions of what was broadcast (and not broadcast) in "Living with Michael Jackson" thus  
23 plainly conflict with the shield laws' broad protections.<sup>3</sup>

24 \_\_\_\_\_  
[Footnote continued from previous page]

25 into evidence is to show that the mere *existence and broadcast* of the documentary -- not its truth  
26 or accuracy -- were the motivating factors that prompted Mr. Jackson's alleged crimes.

27 <sup>3</sup> As for Mr. Bashir's educational and professional background, Opp'n at 2, Mr. Bashir already  
28 provided a great deal of such information in his declaration that was attached to his Motion for a

[Footnote continued on next page]

1 Indeed, the headings used by the prosecution in its opposition reveal on their face that the  
2 prosecution wants information related to, but not included in, the broadcast of "Living with Michael  
3 Jackson." See, e.g., Opp'n at 2, sec. B ("Background of Production of 'Living with Michael  
4 Jackson"); *id.* at 3, sec. D ("Origination of Idea for Documentary"); *id.*, sec. F ("Bashir's Opinion  
5 of the Subject of 'Living with Michael Jackson'") (emphases added). The District Attorney seeks to  
6 broadly question Mr. Bashir about his editorial and news judgments, for example, though the  
7 First Amendment and California shield laws establish barriers preventing just this sort of intrusion  
8 into the editorial function. Cf. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)  
9 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size  
10 and content of the paper, and treatment of public issues and public officials -- whether fair or unfair --  
11 constitute the exercise of editorial control and judgment.").

12 Seeking information about the editorial process, including Mr. Bashir's judgments about  
13 content, information regarding the unpublished context and events surrounding his making of the  
14 documentary, Mr. Bashir's relationship with sources (including Mr. Jackson and the alleged victim's  
15 family) and even his opinions about Mr. Jackson based on his journalistic activities, is a direct  
16 intrusion into the "newsgathering and editorial processes." See, e.g., *United States v. Cuthbertson*,  
17 630 F.2d 139, 147 (3d Cir. 1980) ("The compelled production of a reporter's resource materials can  
18 constitute a significant intrusion into the newsgathering and editorial processes," and "[l]ike the  
19 compelled disclosure of confidential sources, it may substantially undercut the public policy favoring  
20 the free flow of information to the public that is the foundation for the privilege.") (citations omitted).  
21 These matters are integral to the newsgathering and editorial processes and are thus protected by the  
22 shield laws. See *Playboy Enters., Inc.*, 154 Cal. App. 3d at 21 (noting that "unpublished information"  
23 includes "factual information that is within the newsperson's knowledge, whether contained in source  
24 material or memory"); *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 251 n.2 (1978)

25  
26 [Footnote continued from previous page]  
27 protective order filed on January 18, 2005; Mr. Bashir is a very well-known journalist, and  
28 abundant information about him is available from public sources; and in any event this  
information seems to bear no relevance to the criminal charges against Mr. Jackson.

1 ("Processing" . . . refers to the editorial process"), *overruled on other grounds by Delaney*, 50 Cal.  
2 3d at 804.<sup>4</sup>

3 In addition, some of the information sought by the District Attorney would be plainly beyond  
4 the personal knowledge of Mr. Bashir, who reported the documentary but does not own the rights to  
5 it and did not distribute it. Thus, while the District Attorney contends that "Mr. Bashir is the only  
6 person competent to discuss" the issues raised in the District Attorney's opposition, Opp'n at 2, this  
7 is incorrect, both because Mr. Bashir would have no personal knowledge regarding many of these  
8 matters and because there are more superior witnesses who can provide the information.  
9 For instance, Mr. Bashir would not be able to testify based on personal knowledge regarding the  
10 breadth of the documentary's broadcast in Europe, the timing and comparative contents of versions  
11 aired in the United States and the United Kingdom, or the intricacies of ownership of the  
12 documentary's broadcast rights. Opp'n at 3, sec. E. These matters, which to say the least seem far  
13 afield from the issues in this case, can and should be addressed, if at all, by the distributors of "Living  
14 with Michael Jackson," not by Mr. Bashir.

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18 <sup>4</sup> The District Attorney's desire to establish that the words spoken by Michael Jackson on camera  
19 and as a voice-over in "Living with Michael Jackson" were actually spoken by him, Opp'n at 3,  
20 sec. C, likewise falls within the shield laws and the First Amendment privilege because it seeks  
21 information about the newsgathering and editorial process. *Playboy Enters., Inc.*, 154 Cal. App.  
22 3d at 21. *See also, e.g., United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982)(under First  
23 Amendment privilege, quashing subpoena seeking testimony from reporter verifying that the  
24 defendant in fact made the statements attributed to him in the article); *Maurice v. NLRB*, 7 Media  
25 Law Reporter 2221 (S.D. W. Va. 1981), vacated on other grounds, 691 F.2d 182 (4<sup>th</sup> Cir.  
26 1982)(under First Amendment privilege, enjoining NLRB from compelling reporter to verify  
27 quotations); *EEOC v. McKellar Development Corp.*, 13 Media Law Reporter 1061 (N.D.  
28 Cal.)(quashing subpoena seeking testimony of journalist to authenticate statements in published  
article, under California shield laws and First Amendment). In any event, Mr. Jackson has never  
disputed that what appears to be his voice in the documentary is, in fact, his voice. Even if a  
dispute should arise, given the world's familiarity with Mr. Jackson's voice it may easily be  
verified by other means. *Cf.* 1 Jefferson, California Evidence Benchbook (Cont.Ed.Bar 3d ed.  
2004), Authentication and Proof of Writings, section 30.28, pages 648-649 (a party may  
authenticate a recording "by means of a comparison, made by the trier of fact, of the disputed  
audiotape recording and a genuine exemplar of the speaker's voice").

1 All of the information sought by the District Attorney, therefore, falls squarely within the  
2 protections of the journalist's shield laws or may be attained from alternative sources who possess the  
3 personal knowledge that Mr. Bashir lacks. Accordingly, the Court should grant Mr. Bashir's motion  
4 for a protective order.

5 **B. The Prosecution Does Not Contest Mr. Bashir's Request For Clarification That**  
6 **The Gag Order Does Not Apply To Him.**

7 The District Attorney does not mention Mr. Bashir's request for the Court to make clear that  
8 he is not subject to the Gag Order. He thus implicitly concedes that application of the gag order to  
9 Mr. Bashir, which would effectively preclude him from reporting on this case, is unnecessary.  
10 But even if the District Attorney attempted to offer some justification for effectively preventing  
11 Mr. Bashir from reporting about this case, prior restraints on speech and publication "are the most  
12 serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*,  
13 427 U.S. at 558-59. Consequently, extremely rigorous standards must be satisfied before one may  
14 overcome the "heavy presumption" against a prior restraint's constitutional validity. *See id.*

15 The District Attorney's failure to offer any justification whatsoever only reinforces the fact there is  
16 no legitimate basis for arbitrarily silencing a member of the media. Accordingly, in the event the  
17 Court does not grant in full Mr. Bashir's motion for a protective order, it should make clear that the  
18 Gag Order does not apply to Mr. Bashir.

19 DATED: January 26, 2005

20 Respectfully submitted,

21 GIBSON, DUNN & CRUTCHER LLP  
22 Theodore J. Boutros, Jr.  
23 Michael H. Dore

24 By:   
25 Theodore J. Boutros, Jr.

26 Attorneys for MARTIN BASHIR

DECLARATION OF THEODORE J. BOUTROUS, JR.

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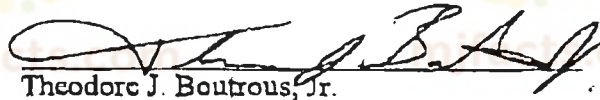
I, THEODORE J. BOUTROUS, JR., hereby declare and state that:

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 the attached reply be filed under seal because the reply quotes only non-sensitive material from the redacted version of the opposition served on Mr. Bashir by the District Attorney and it does not identify the names of prospective witnesses indicated in the opposition, which is the only material the District Attorney seeks to keep under seal.

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

Executed this 26th day of January, 2005, at Los Angeles, California.

  
Theodore J. Boutrous, Jr.

**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 Michael H. Dore, a member of the bar of this Court, and at his direction, on January 26, 2005, I served the following:

**REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR PROTECTIVE ORDER  
PRECLUDING MARTIN BASHIR FROM BEING REQUIRED TO TESTIFY AND FOR  
CLARIFICATION THAT "GAG ORDER" DOES NOT APPLY TO MARTIN BASHIR;  
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.

|   |   |
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| Thomas A. Mesereau, Jr.<br>Collins, Mesereau, Reddock & Yu LLP<br>1875 Century Park East, 7th Floor<br>Los Angeles, CA 90067<br>Attorneys for Defendant Michael Jackson | Tel.: (310) 284-3120<br>Fax:                |
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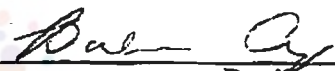
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I am employed in the office of Theodore J. Boutros, Jr., a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.

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

**(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 January 26, 2005, at Los Angeles, California.



Barbara Cruz

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