

**IMMEDIATE STAY REQUESTED OF ORDER  
REQUIRING COUNSEL TO TAKE DOWN  
FIRM WEBSITE DURING TRIAL**

Docket No. \_\_\_\_\_

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IN THE SUPREME COURT OF CALIFORNIA

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**RICHARD STEINER, CHRISTIE STEINER,  
SIMONA FARRISE AND THE FARRISE FIRM, P.C.**

*Petitioners,*

vs.

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

*Respondent.*

**VOLKSWAGEN GROUP OF AMERICA, et al.**

*Real Parties in Interest.*

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*From a Summary Denial of a Petition for Writ of Mandate  
Second District Court of Appeal, Division Six, Case No. B235347*

*Santa Barbara County Superior Court, Case No. 1374169  
The Hon. Thomas Anderle, Judge Presiding*

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**PETITION FOR REVIEW**

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**FULL LIST OF REAL PARTIES IN INTEREST**

VOLKSWAGEN GROUP OF AMERICA, INC.;

FORD MOTOR COMPANY;

NISSAN NORTH AMERICA, INC.;

PNEUMO-ABEX CORPORATION

**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to California Rule of Court 8.208, petitioners and their counsel certify that apart from the attorneys representing the petitioners in this proceeding, as disclosed on the cover of this Brief, petitioners and their counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that petitioners or their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: August 25, 2011

\_\_\_\_\_  
SHARON J. ARKIN

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**ISSUE PRESENTED AND WHY**  
**REVIEW SHOULD BE GRANTED**

On August 23, 2011, the trial court in this case took the unprecedented – and unjustified – action of ordering the plaintiffs’ counsel in this personal injury asbestos case *to take down her firm’s entire website during the trial of this case* in order to assure that the jurors do not view it. (See Exhibit 1, attached hereto, page 21, ¶ 38.) And it did so without any formal briefing on the issue, and despite the fact that it had specifically admonished the jury not to look up any lawyer, law firm or information about the subject of the action. The Court of Appeal, Second District, Division 6, summarily denied plaintiffs’ petition for writ of mandate seeking an immediate stay on that same day, Tuesday, August 23, 2011. (See Exhibit 2, attached hereto.)

The trial court’s order is an absolute and absolutely improper abrogation of counsel’s free speech rights under both the U.S. and California Constitutions and enforces a prior restraint without demonstration of the existence of the constitutional requirements necessary to justify it. While there is a growing – and legitimate – concern in the legal community about jurors improperly accessing available media resources, including the Internet, to glean information about issues

presented in trials in which they are sitting, the solution to that problem is not the abrogation of the free speech rights of others – whether attorneys, parties, experts or witnesses – during the case.

Immediate relief – in the form of an immediate stay of the order – is necessary so as to prevent the trial court’s unconstitutional order from taking effect. At that point, this important issue can be addressed in a measured and meaningful way and solutions crafted without impinging on constitutional rights.

Grounds for review exist because this petition presents an opportunity for this Court to settle an important question of law, i.e., does concern about the *potential* that a juror *might* view an attorney’s website trump that attorney’s constitutional free speech rights? (California Rule of Court 8.500(b)(1).) Grant of review is also appropriate pursuant to Rule 8.500(b)(4) so that the matter may be ordered transferred back to the appellate court with an order that the petition for mandate be determined on its merits.

### **SUMMARY OF FACTS**

Petitioners, Richard Steiner and his wife, Christie Steiner, are the plaintiffs in an asbestos personal injury action entitled *Steiner v. Advance*

*Auto Parts, et al.*, Santa Barbara County Superior Court, Case No. 1374169, originally filed in the Los Angeles County Superior Court on March 23, 2010 and later transferred to Santa Barbara County. Mr. Steiner has been diagnosed with lung cancer and the complaint alleges personal injury damages resulting from asbestos exposure. His wife seeks loss of consortium damages.

Petitioner Simona Farrise and her law firm, Farrise Firm, P.C., are counsel of record for the Steiners. The defendants remaining in the action are Volkswagen Group of America, Inc., Ford Motor Company, Nissan North America, Inc., and Pneumo-Abex Corporation.

Jury selection in the case started on or about August 16, 2011.

On Thursday, August 19, 2011, the trial court swore in a jury of twelve people, with the selection of alternates to be concluded on Monday, August 22, 2011. After being sworn in, the trial court read preliminary instructions to the jurors. Those instructions included an admonishment to the jury not to “google the lawyers.”

On Sunday, August 21, 2011, at 4:00 p.m. counsel for defendant Volkswagen Group of America (“VWGOA”) e-mailed plaintiffs’ counsel a letter demanding that significant portions of her website ([www.farriselaw.com](http://www.farriselaw.com)) be “taken down” as inflammatory and “prejudicial.” Counsel also demanded a response by 6:00 p.m. that day.

On that same day, however, VWGOA also served on counsel and the trial court by e-mail a copy of its “Motion for Order to Show Cause Why Farrise Law Website Should Not be Taken Down During Trial,” including the declaration of Charles E. Finberg, and attaching portions of the Farrise Firm website which discussed Ms. Farrise’s success in other asbestos cases litigated by her firm – none of which involved VWOGA. (See Exhibit 3, attached hereto, consisting of the portions of the website objected to by VWOGA’s counsel.)

On Monday morning, August 22, 2011, defendant Ford Motor Company joined in VWOGA’s “motion” for an “OSC.” That same morning, August 22, 2011, plaintiffs and their counsel submitted by e-mail to the trial court and the defendants an “Objection to the Defendant Volkswagen Group of America, Inc.’s Motion for an Order to Show Cause Why Farrise Law Website Should Not Be Taken Down During Trial.” In that document, plaintiffs objected to VWOGA’s “motion” as procedurally improper; noted that the law presumes that jurors obey the instructions that they should not access the Internet with regard to any person or issue in this case, also noted that, even if the jury did not comply with that admonishment there were other structural means of dealing with the issue if and when it arose; and objected to any such potential order as constitutionally improper.

Just prior to the lunch break that morning, at approximately 11:55 a.m., the trial court took up the matter. First, the trial court construed the plaintiffs' "Objection" as their "Opposition" to the OSC itself, rejected the objections raised, **and ordered that the Farrise Firm website be pulled down**. The trial court did state that, upon request, it would make the same order with regard to defendants' counsels' websites.

At the end of the day that same day, the issue came up again because, in the interim and consistent with the trial court's determination during the pre-lunch break argument that the order should be "mutual," plaintiffs requested that the defendants' counsel be similarly required to pull down all **their** websites. At that point the trial court orally limited its order to the discussion of two verdicts plaintiffs' Ms. Farrise had obtained in **other actions** – neither of which involved VWOGA. The trial court did not respond to plaintiffs' request that defense counsel be required to similarly redact and edit **their** websites.

The following morning (Tuesday, August 23, 2011), however, the trial court provided counsel with copies of its updated Final Pre-Trial Conference Order. In paragraph 38 of that written order (the relevant pages of which are attached as Exhibit 1), the trial court stated with regard to the Motion for OSC: "I have seen Plaintiffs [sic] response (from Ms. Arkin). Ruling: Take it down for the time of the trial. The Court will make the

same order with respect to any of the websites of defendants upon request.”

Accordingly, pursuant to the trial court’s current order, plaintiffs’ counsel is required to take down her entire website during the pendency of the trial – which is expected to extend into at least the month of October and, perhaps, into November, 2011.

Plaintiffs and Ms. Farrise filed a request for immediate stay and petition for writ of mandate seeking to have the trial court’s order reversed with the Second District Court of Appeal, Division Six on Tuesday, August 23, 2011. The appellate court denied that petition the same day. (See Exhibit 2.)

### **IMMEDIATE STAY IS REQUESTED**

The trial court’s order commanding Ms. Farrise to take down her entire website during the pendency of the trial of this action is unquestionably an arrogation of her free speech rights under both the U.S. and California Constitutions. The order goes far beyond the usual “gag order” instructing counsel to refrain from discussing the case actually being tried and limits counsel’s right to discuss – in a public forum – *other* cases involving *other* plaintiffs. Even if the order were limited to the website’s discussion of other cases, it would be an unreasonable and unnecessary

prior restraint and would violate Ms. Farrise's free speech rights. But the order is not so limited: It requires that she take down her *entire* website, even with respect to speech wholly unrelated to any other asbestos litigation.

While the issues of juror misconduct in accessing Internet information during the course of a trial raise important issues, those issues should not be decided at the sacrifice of an attorney's constitutional rights – however “temporary.” The issues should be addressed in the context of a calm, rational and unpressured forum where the participants can craft solutions in a reasoned manner – solutions that do not abrogate the constitutional rights of anyone, whether parties, counsel, experts or witnesses.

To that end, an immediate stay of the trial court's order is required in order to assure that the constitutional free speech protections to which Ms. Farrise and her law firm are entitled are not unnecessarily abrogated during consideration of these issues.

Once that stay is in place, review should be granted so that this Court can consider these issues in a reasoned manner or so that the matter can be transferred to the appellate court with instructions to consider the petition for mandate on its merits.

## **LEGAL ARGUMENT**

The resolution of free speech and prior restraint issues resulting from a trial court's order during pending litigation are properly addressed by way of a writ proceeding. (*Maggi v. Superior Court (Alkosser)* (2004) 119 Cal.App.4<sup>th</sup> 1218, 1224, fn 3.) The appellate court's summary denial of the writ petition necessarily requires this Court's intervention by way of issuance of a stay order and by grant of review.

### **THE TRIAL COURT'S ORDER IS A PRIOR RESTRAINT ON FREE SPEECH THAT DOES NOT COMPORT WITH THE MANDATED SHOWING REQUIRED PRIOR TO ISSUANCE OF SUCH AN ORDER**

As explained in *Maggi* at 1224-1224, the First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Similarly, the California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments, on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (California Constitution, art. 1, § 2, subd. (a).)

As this Court noted more than 100 years ago, the “working of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is *unlimited*, but he is responsible at the hands of the law for an abuse of that right. He shall have *no censor* over him to whom he must apply for permission to speak, write or publish, and what he publishes.” (*Dailey v. Superior Court* (1896) 112 Cal. 94, 97, emphasis added, cited by this Court in *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4<sup>th</sup> 121, 142.)

Gag orders – such as the trial court’s order in this case, requiring plaintiff to take down her own web site – are “prior restraints” and “are disfavored and *presumptively invalid*.” (*Maggi*, at 1225; emphasis added; see, also, *U.S. v. Carmichael* (M.D. Ala. 2004) 326 F.Supp.2d 1267, 1279, 1290-1291 [order requiring defendant to take down his website is a prior restraint].)

As the California Constitution makes abundantly clear, speech cannot be limited or restrained, although its *effect* can be punished. For example, with limited exception<sup>1</sup>, an individual’s right to make defamatory

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<sup>1</sup> For example, “fighting words,” obscenity and illegal commercial speech may all be regulated – but none of those exceptions apply here. (See, e.g., *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572 [fighting words]; *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436 [obscene materials];

statements cannot be abrogated *before* a court adjudicates those statements to be defamatory. But that does not preclude imposition of damages resulting from the statements. Similarly, in the absence of a judicial determination that racist comments actually created a hostile environment and are likely to be repeated, an employer cannot be restrained from making racist comments, but can be punished by imposition of damages where that speech creates a hostile work environment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4<sup>th</sup> 121, 141 [injunction proper *only* after there has been a final judicial adjudication that the speech at issue is unprotected and is likely to be repeated absent the injunction].)

No such showing has been made here. The two parts of the website that the defendants complain most vociferously about relate to *true, factual statements* about *other* cases – neither of which involves VWOGA. And even to the extent those discussions involve another party to the instant action – Ford Motor Company – there is no justification for imposition of a prior restraint absent an adjudication that the statements are somehow illegal. But, to date, there has been no showing that the statements are false or defamatory. There has been no showing that the statements are not constitutionally-protected speech. And, most importantly, there has been

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*Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376 [illegal commercial speech].)

no showing that all the other portions of the website warrant the action taken by the trial court.

The only “showing” made is that the website, *if discovered* by the jury, *might* be “prejudicial” to the defendants. But it is impossible to demonstrate how that prejudice might work – since the website discusses *other* plaintiffs in *other cases* with *other diseases*.

More significantly, the real, true, fundamental problem with the court’s order is that there has been no showing that it is necessary. There has been no showing that any juror has viewed the website *or that any juror is likely to*. Indeed, the trial court specifically admonished the jury not to “google the lawyers.” It is to be presumed that – absent any evidence to the contrary – jurors have followed and will follow the instructions they have been given. (*Saari v. Jongordon* (1992) 5 Cal.App.4<sup>th</sup> 797, 807, fn 6.) And the judge can and should reaffirm that admonishment frequently, and explain to the jury that the violation of the court’s orders could lead to a criminal or civil contempt action against them.

Other courts have also concluded that requiring that a website be taken down or modified because of pending litigation is an unconstitutional prior restraint. For example, in *U.S. v. Carmichael* (M.D. Ala. 2004) 326 F.Supp.2d 352, the defendant in a money laundering case created a website which displayed information about the criminal case, including information

regarding informants and government agents working on the case and requesting additional information about them. The prosecution sought to have the website taken down, but the court refused, finding that such an order would be an unconstitutional prior restraint. As the court acknowledged, “[t]he court’s inherent authority or discretion to regulate the actions of trial participants is similarly limited by the constitutional rights of the parties.” (*Id.*, at 1279.) The *Carmichael* court held that even the implied threat of harm to the government agents and informants was insufficient to meet the stringent requirements of a prior restraint. Given that, there is certainly no basis for any limitation on Ms. Farrise’s speech in this case.

It is tragic that defendants have so little faith in the jurors in this case or in the jury system itself. But they have failed to justify their mistrust and have not shown – and cannot show – that the jury, or any particular member of it, will disobey the court’s instructions.

And even if a member of the jury does disobey the instructions and does view Ms. Farrise’s website, that does not justify a prior restraint. Indeed, there are procedural processes in place in the event that something like that happens: Dismiss the offending juror and replace him or her with an alternate. If, in the remote event the offending juror communicates their findings to the rest of the jury, then a mistrial can be declared. But what

*cannot* happen is that plaintiffs’ counsel be required to take down her website altogether or modify her own website presentations which set forth constitutionally-protected speech.

Gag orders are “unconstitutional unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available.” (*Maggi, supra*, internal quotations omitted.) The trial court’s order in this case does not comply with any of those mandates:

**First**, given that the jury has been admonished – and can be admonished again and more vociferously – not to “google the lawyers,” there is no “clear and present danger” that any juror will view Ms. Farrise’s website or, even if one did, it would impair defendants’ right to a fair trial in light of the other instructions to the jury that it is only what they hear from the witness stand or see in the documents admitted into evidence that they can consider in reaching their verdict. Indeed, an approved alternative to a gag order is to engage in “searching questioning of potential jurors” and “the use of emphatic and clear instructions.” (*Nebraska Press Ass’n v. Stuart* (1976) 427 U.S. 539, 564.) No circumstance has yet arisen which triggers that searching questioning. And “emphatic and clear instructions” have been given. Mere anticipation that a juror *might* disobey the

instructions does not warrant a prior restraint on speech.

**Second**, the order is not narrowly tailored to protect the defendants' interest in a fair trial because it completely silences speech, whereas the same goal can be accomplished by reinforcing to the jury that they must not "google the lawyers" and that doing so will subject them to criminal or civil contempt charges.

**Third**, the "less restrictive alternative" is the same, i.e., rather than restraining speech, the jurors can be admonished and *if any of them disobey the order, they can be dismissed from the jury* and/or held in contempt. The worst case scenario is that a mistrial is declared. But there is no justification – none – for forcing plaintiffs' counsel to suppress her constitutionally-protected speech, since other alternatives can cure the problem.

And the case law makes clear that the threat of criminal contempt sanctions or declaring a mistrial is preferred over restraint of constitutional speech. As the United States Supreme Court explained in *Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558-559, the "presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind this distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech

*after* they break the law than to throttle them and all others beforehand.”

(Emphasis in original.)

That is the situation here: There is no justification for restraining counsel’s speech. What must be restrained is the jury’s access to that speech, not the speech itself. If jurors cannot restrain themselves, they are the ones who should be punished, not plaintiffs’ counsel.

Since defendants have made no showing at all – none – that any juror has, or will, disobey the court’s instructions, they cannot meet their burden. Having failed to meet their burden, defendants are not entitled to the relief ordered by the trial court and the trial court’s order must be reversed.

## **CONCLUSION**

As juror access to out-of-court information grows exponentially every year, legitimate concerns have been raised in the legal community about how to deal with the situation. A prior restraint on speech *unconnected with* the case at hand is not, however, a proper way to address those concerns.

An immediate stay of the trial court’s order should be issued and the matter considered upon grant of review. Alternatively, this Court should

issue the requested stay and transfer the matter back to the appellate court  
for consideration of the petition for writ of mandate on its merits.

Dated: August 25, 2011

Respectfully submitted,

FARRISE FIRM, P.C.

THE ARKIN LAW FIRM

By \_\_\_\_\_  
SHARON J. ARKIN  
Attorneys for Petitioners

**CERTIFICATE OF LENGTH OF BRIEF**

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 3940 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: August 25, 2011

\_\_\_\_\_  
SHARON J. ARKIN

## PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address 225 S. Olive St., Suite 102, Los Angeles, CA 90071.

On **August 25, 2011**, I served the documents described as:

<p><b>PETITION FOR REVIEW</b></p>
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on the interested parties in this action by sending a copy of the document to each party by overnight delivery for delivery on Friday, August 26, 2011, the same date that the Petition for Review will be submitted to this Court, addressed as set forth in the attached Service List.

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

**Executed on August 25, 2011, at Brookings, Oregon.**

\_\_\_\_\_  
SHARON J. ARKIN

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