DANIEL M. PETROCELLI (S.B. #97802)
dpetrocelli@omm.com
DREW E. BREUDER (S.B. #198466)
dbreuder@omm.com
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, CA 90067-6035
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

THEODORE J. BOUTROUS JR. (S.B. #132099)
tboutrous@gibsondunn.com
NATHANIEL L. BACH (S.B. #246518)
nbach@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7804
Facsimile: (213) 229-6804

*Attorneys for Defendant Home Box Office, Inc.*

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

OPTIMUM PRODUCTIONS, a California corporation; and JOHN BRANCA and JOHN MCCLAIN, in the respective capacities as CO-EXECUTORS OF THE ESTATE OF MICHAEL J. JACKSON,

Plaintiffs,

v.

HOME BOX OFFICE, a Division of TIME WARNER ENTERTAINMENT, L.P., a Delaware Limited Partnership; HOME BOX OFFICE, INC., a Delaware corporation; DOES 1 through 5, business entities unknown; and DOES 6 through 10, individuals unknown,

Defendants.

Case No. 2:19-cv-01862-GW-PJW

Hon. George H. Wu

**DEFENDANT HOME BOX OFFICE, INC.'S NOTICE OF MOTION AND MOTION TO STAY ORDER COMPELLING ARBITRATION PENDING RESOLUTION OF APPEAL, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

**[PROPOSED ORDER FILED CONCURRENTLY HEREWITH]**

Hearing Date: November 7, 2019
Hearing Time: 8:30 a.m.

**TO THIS COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

Please take notice that on November 7, 2019, at 8:30 a.m., in Courtroom 9D of the above-captioned court, located at 350 West 1st Street, Los Angeles, California 90012, or as soon thereafter as may be heard, Defendant Home Box Office, Inc. ("HBO") will, and hereby does, move the Court for an order staying enforcement of the Court's order compelling arbitration until resolution of HBO's appeal of that order. *See* Dkts. 40, 55.

This Motion is made on the ground that all factors to be considered weigh in favor of a stay, and is based on this notice, the attached memorandum of points and authorities, the papers, pleadings, and evidence on file in this case, and any such additional papers and arguments as may be presented before or at the hearing of this matter. This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place in Court on October 21, 2019.

Dated: October 28, 2019

O'MELVENY & MYERS LLP
GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Daniel M. Petrocelli*
Daniel M. Petrocelli

By: /s/ *Theodore J. Boutrous Jr.*
Theodore J. Boutrous Jr.

*Attorneys for Defendant Home Box Office, Inc.*

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The Court should stay Plaintiffs' effort to force Home Box Office, Inc. ("HBO") to arbitrate their meritless claims attacking *Leaving Neverland* based on a more than 27-year-old, expired contract. HBO has timely appealed the Court's order granting Plaintiffs' motion to compel arbitration (Dkts. 40, 55, the "Order"), and the Ninth Circuit has already set a briefing schedule for HBO's appeal. There is no rush to arbitrate Plaintiffs' claims based on that 1992 Agreement, and a stay of the Court's Order pending resolution of HBO's appeal is not only appropriate under the test employed by the Ninth Circuit, but critical to protecting the fundamental constitutional rights threatened by Plaintiffs' effort to arbitrate.

*First*, and most critically, HBO will be irreparably harmed without a stay because Plaintiffs' demand to immediately arbitrate seeks to provide them a perpetual forum to attack HBO's speech about Michael Jackson and represents a serious threat to HBO's exercise of its free speech rights to continue to distribute an important, award-winning documentary like *Leaving Neverland*. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And fundamental First Amendment rights are threatened when media defendants like HBO are forced into prolonged and costly litigation over the exercise of their constitutional rights. *See Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1376 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996) (recognizing the "'chilling effect' of any protracted litigation" when it comes to "important First Amendment" rights). *Second*, a stay is warranted because of the difficult legal issues at play here, and courts grant stays pending appeal in such situations. Moreover, HBO is likely to prevail on its appeal given Plaintiffs' efforts to invoke

an expired arbitration agreement and hold HBO hostage to it in perpetuity. *Third*, a stay will not will not prejudice nor substantially injure Plaintiffs, who seek only money damages. *Fourth*, the public interest favors a stay given the strong interests in protecting the exercise of First Amendment rights and promoting expressive, newsworthy works exploring issues of public concern such as *Leaving Neverland*.

Therefore, because there is no urgency for an arbitration to begin now—particularly given the ongoing harm to HBO by forcing it to defend the exercise of its First Amendment rights—the Court should preserve the status quo and issue a stay of its order pending resolution of HBO's appeal.

## II. BACKGROUND

On July 22, 1992, TTC Touring Corporation ("TTC") and Home Box Office, a division of Time Warner Entertainment Co. L.P. ("TWE")—the alleged predecessors of Plaintiff Optimum Productions and HBO, respectively—entered into an agreement (the "1992 Agreement") relating to the production and television exhibition of Mr. Jackson's live concert performance in Bucharest, Romania. Dkt. 18, Ex. B. The 1992 Agreement granted TWE a license to exhibit the Bucharest performance "one time only" on October 10, 1992, "and at no other time." *Id.* at 2. In consideration for these rights, TWE paid TTC a license fee, the last portion of which was to be delivered within five days after the delivery of the program to TWE (with delivery no later than October 8, 1992). *Id.* at 1–2. The longest any performable rights or obligations lasted under the 1992 Agreement was through the "Holdback Period"—defined as the 12-month period immediately following the October 10, 1992, exhibition date. *Id*. at 2, 5–6. After the conclusion of the Holdback Period on October 10, 1993, the 1992 Agreement was fully performed. The 1992 Agreement also incorporated a confidentiality rider as an addendum to the main contract (the "Confidentiality Provisions"), which includes the non-disparagement sentence that is the basis of the claims that Plaintiffs seek to

arbitrate.

Nearly 26 years after the Holdback Period concluded, *Leaving Neverland* premiered on HBO. *Leaving Neverland* tells the personal stories of two individuals who allege that as young boys they were sexually abused by Mr. Jackson for years. *Leaving Neverland* premiered on HBO on March 3, 2019, in the midst of a nationwide cultural debate about sexual abuse and harassment, and whether such misconduct had for too long been tolerated or suppressed in favor of protecting the wealthy, famous, and powerful.

On February 21, 2019, Plaintiffs filed a petition to compel arbitration in Los Angeles County Superior Court, which HBO removed to this Court. Dkts. 1, 1-1. Plaintiffs alleged that HBO's exhibition of *Leaving Neverland* violated the non-disparagement sentence of the 1992 Agreement and sought to compel arbitration under that agreement's arbitration clause. On April 15, 2019, Plaintiffs filed a motion to compel arbitration. Dkt. 18. On July 15, 2019, the Court indicated that it "would" find Plaintiffs' claims arbitrable. Dkt. 40 at 6. However, the Court declined to enter an order compelling arbitration at that time because it also found that even the "initiation of litigation" by Plaintiffs may have "trigger[ed] First Amendment concerns," and noted that "Plaintiffs' arbitration action is seeking to recover damages based upon [HBO's] broadcasting [of] a documentary." *Id.* at 9. In light of these First Amendment considerations, the Court invited HBO to file an anti-SLAPP motion, Dkt. 40, and HBO did so, Dkt. 46. On September 20, 2019, the Court issued consolidated final rulings, granting Plaintiffs' motion to compel arbitration and denying HBO's anti-SLAPP motion. Dkt. 55. On October 21, 2019, HBO timely filed a notice of appeal of the order pursuant to 9 U.S.C. § 16(a)(3). Dkt. 64. The Ninth Circuit has set a briefing schedule for HBO's appeal, with HBO's final brief due no later than March 20, 2020. Dkt. 69. In a joint report submitted to the Court on October 22, 2019, HBO informed the Court that it would seek a stay of the Order pending completion of its appeal. Dkt. 65.

## III. LEGAL STANDARD

Courts have "discretion to grant a stay of arbitration pending appeal, applying the standards for granting a preliminary injunction." *See Whaley v. Pac. Seafood Grp.*, 2017 WL 4973193, at *1 (D. Ore. Nov. 1, 2017); *Divxnetworks, Inc. v. Gericom AG*, 2007 WL 4538623, at *2 (S.D. Cal. Dec. 19, 2007) (court has "discretion to stay" order compelling arbitration pending appeal); *see also* Fed. R. App. Proc. 8(a)(1) ("A party must ordinarily move first in the district court for … a stay of the judgment or order of a district court pending appeal.").[1] In exercising that discretion, the Court considers four factors: (1) whether the applicant will be irreparably injured absent a stay; (2) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Whaley*, 2017 WL 4973193, at *1, citing *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). All factors here weigh in favor of a stay, and the Court should grant HBO's Motion.

## IV. ARGUMENT

### A. The Court Should Stay Enforcement of Its Order Compelling Arbitration Pending Resolution of HBO's Appeal.

#### 1. HBO Will Suffer Irreparable Harm In the Absence of a Stay.

Fifty-five years ago, the United States Supreme Court recognized in *New York Times v. Sullivan* that the mere threat of "expens[ive]" but meritless litigation can have a "self-censor[ing]" effect that may improperly deter "would-be critics of official conduct . . . from voicing their criticism." 376 U.S. 254, 279 (1964). Since then, courts around the country, including the Ninth Circuit, "have recognized the

[1] The Court retains jurisdiction to consider this Motion following HBO's notice of appeal. *See Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) ("The district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo."); *Mezhbein v. Salazar*, 2008 WL 1908533, at *1 (C.D. Cal. Apr. 27, 2008) ("Even though Respondent has filed a notice of appeal, this Court retains jurisdiction to consider a motion to stay proceedings.").

importance of protecting a free and vigorous press" and reinforced the fundamental principle that "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." *See Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992) (quoting *Good Gov't Group of Seal Beach, Inc. v. Sup. Ct*, 22 Cal. 3d 672, 685 (1978), *cert. denied*, 441 U.S. 961 (1979); *Masson*, 832 F. Supp. at 1376 (confirming that courts should guard against the "'chilling effect' of any protracted litigation" where "important First Amendment" rights are implicated). Moreover, as "the threat of litigation itself may have a chilling effect on the exercise of free speech . . . pretrial disposition, where possible, is desirable." *Harris v. Tomcak*, 94 F.R.D. 687, 696 n.12 (E.D. Cal. 1982).

Litigation against media organizations such as HBO is not only costly, but highly disruptive, taking filmmakers and others away from their creative work to participate in the defense of such claims. *See Immuno A.G. v. Moor-Jankowski,* 145 A.D. 2d 114, 128 (1st Dep't 1989), *aff'd,* 74 N.Y.2d 548 (1989), *vacated on other grounds* 497 U.S. 1021 (1990), *aff'd*, 77 N.Y.2d 235, *cert. denied,* 500 U.S. 954 (1991) ("To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights."); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) (internal citation omitted) ("The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."); *cf.* Dkt. 40 at 9 ("[T]he initiation of the litigation itself can trigger First Amendment concerns."). Forcing HBO to arbitrate now, prior to resolution of HBO's appeal, would have precisely that improper disruptive effect by requiring it to expend time and resources defending itself for exercising its First Amendment rights.

Moreover, HBO will suffer irreparable harm to its First Amendment rights in

the absence of a stay. Here, Plaintiffs have succeeded in obtaining an order to hold HBO hostage to an arbitration over an unquestionably fully performed and thus expired agreement, and seek a perpetual forum in arbitration to attempt to police and chill HBO's speech. *Cf. Cooper Cos. v. Transcon. Ins. Co.*, 31 Cal. App. 4th 1094, 1103 (1995) ("[C]onstruing a contract to confer a right in perpetuity is clearly disfavored."). Plaintiffs' motion to compel arbitration—and the Court's grant thereof—in and of itself harms HBO's ability to speak freely about Mr. Jackson. Such harm is irreparable and weighs heavily in favor of a stay. *Klein*, 584 F.3d at 1208 ("Both this court and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod*, 427 U.S. at 373)).

Indeed, given Plaintiffs' demand, not only must HBO submit to arbitration over its distribution of *Leaving Neverland*, but HBO must be mindful that any additional commentary it might want to exhibit about *Leaving Neverland* or Mr. Jackson may subject it to additional claims. Others who did business with Mr. Jackson decades ago also could face a similar conundrum, especially those who do not necessarily have the resources to defend against the Estate's efforts to control the historical narrative about Mr. Jackson. In light of the serious First Amendment concerns presented by Plaintiffs' effort to force HBO arbitrate their claims, particularly over a 27-year-old expired contract, a stay pending resolution of HBO's appeal is necessary to prevent the irreparable harm to HBO's First Amendment rights and afford HBO the opportunity to dispose of Plaintiffs' claims at the earliest stage possible.

### 2. HBO's Appeal Presents "Difficult" Legal Questions On Which It Is Likely To Prevail.

In considering whether the moving party has demonstrated a likelihood of success on the merits, courts do not "rigidly apply" that factor because to do so "would require the district court to conclude that it was probably incorrect in its

determination on the merits." *Divxnetworks*, 2007 WL 4538623 at *3 (citation and quotation marks omitted); *see also General Teamsters Union Local No. 439 v. Sunrise Sanitation Servs Inc.*, 2006 WL 2091947, at *3 (E.D. Cal. July 26, 2006) (same). Rather, courts may properly stay their own orders when they have "ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Divxnetworks*, 2007 WL 4538623, at *3 (citation omitted); *Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14, 16 (D. Haw. 1972) (holding that stays are particularly appropriate where "the trial court is charting new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review"). Here, the issues bound up with Plaintiffs' effort to arbitrate claims over *Leaving Neverland* based on a 27-year-old contract present precisely the type of "difficult" legal questions sufficient to satisfy this first factor. Indeed, before ruling on Plaintiffs' motion to compel arbitration, the Court held three separate hearings, issued three separate tentative rulings, asked for supplemental briefing on the issue of arbitrability, confirmed the important First Amendment concerns bound up with Plaintiffs' request to arbitrate their claims, Dkt. 40 at 9, and invited HBO to file an anti-SLAPP motion. Plaintiffs' unprecedented effort to arbitrate claims arising in 2019 over an expired contract from 1992—and the thorny legal questions such effort raises—satisfies this factor.

Moreover, while not necessary for HBO to carry this factor, HBO is likely to succeed on the issues presented in its appeal. For example, although the 1992 Agreement was fully performed more than a ***quarter century ago***, Plaintiffs nevertheless argued that the arbitration provision remains fully enforceable against HBO, Dkts. 18, 25, 36, and the Court accepted such argument in issuing its Order, Dkt. 40.[2] Nevertheless, Plaintiffs have still not identified *any authority* in which a

[2] In granting Plaintiffs' motion to compel arbitration, the Court found that an arbitration clause may remain in effect after the expiration of the underlying agreement, relying on the Supreme Court's decision in *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 252 (1977). Dkt. 40 at 8. But the circumstances in *Nolde Brothers* were very different, and not

party was compelled to arbitrate under similar circumstances—*i.e.*, based on a 27-year-old contract that was fully performed fifteenth months after it was entered. To the contrary, the authority presented by HBO confirms that arbitration agreements do not have unlimited life in the absence of a provision so specifying. *See Just Film, Inc. v. Merchant Servs., Inc.*, 2011 WL 2433044, at *4 (N.D. Cal. June 13, 2011) ("The dead hand of a *long-expired arbitration clause cannot govern forever*.") (emphasis added and internal quotations and citations omitted)). "Although there is a general presumption in favor of arbitrability, it *does not apply 'wholesale in the context of an expired . . . agreement* for to do so would make limitless the contractual obligation to arbitrate.'" *Id.* at *5 (emphasis added) (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991)). Were it otherwise, one party to a long-terminated contract could commence an arbitration on any topic whatsoever, at any time, forcing another party into an arbitration that it could not have reasonably anticipated. *Cf. Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (rejecting efforts to expand the Federal Arbitration Act to compel arbitration in ways in which parties did not expressly agree). That is precisely what Plaintiffs improperly attempt to accomplish here.

In light of the "difficult" questions presented, *Divxnetworks*, 2007 WL 4538623, at *3, and HBO's likelihood of success, staying this Court's Order pending appeal is warranted and indeed the most prudent, equitable course of action, *see Whaley*, 2017 WL 4973193, at *1 (granting stay of arbitration pending appeal).

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controlling. The contract in *Nolde Brothers* had expired just four days before the events giving rise to the litigation. *Nolde Bros.*, 430 U.S. at 247. Here, there is a ***26-year gap*** between full performance and expiration of the 1992 Agreement and Plaintiffs' attempt to compel arbitration. Here, the Court even noted that "[t]he rule in *Nolde Brothers* is not limitless. . . ." Dkt. 40 at 8.

### 3. Plaintiffs Will Not Be Substantially Injured By A Stay.

Plaintiffs will not be prejudiced, much less "substantially injure[d]," in any way by a stay of this Court's Order pending resolution of HBO's appeal. *Whaley*, 2017 WL 4973193, at *1. Plaintiffs seek only monetary damages. *See* Dkt. 1-1 at 22–23 (requesting that Plaintiffs be awarded in arbitration "damages . . . which could exceed $100 million" as well as punitive damages). However, "[t]he potential delay in Plaintiff[s'] ability to recover" damages "does not constitute a substantial injury" constituting harm sufficient to deny a stay. *Brown v. Wal-Mart Stores, Inc.*, 2012 WL 5818300 (N.D. Cal. Nov. 15, 2012); *see also Gustavson v. Mars, Inc.*, 2014 WL 6986421, at *3 (N.D. Cal. Dec. 10, 2014) ("[M]ere delay in monetary recovery is an insufficient basis to deny a stay."), *citing Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110-12 (9th Cir. 2005).

The court's ruling in *Orange Belt Dist. Council of Painters No. 48 v. Standard Drywall Inc.*, 1979 WL 1943, at *1 (S.D. Cal. Oct. 16, 1979) is instructive. There, the court granted a stay of its order compelling arbitration pending appeal and explained that "[t]he underlying dispute . . . involves a failure to pay money . . . and does not involve the exercise of individual or constitutional rights." *Id.* Therefore, the court found that "[a] delay in arbitration would appear to present no irreparable harm." *Id.* (noting that the purpose of a stay order is "to preserve the status quo pending appeal" and that "the status quo would be served by delaying arbitration proceedings, with their attendant time and expense, until the appellate court's resolution of this matter"). *Id.* This action presents a similar but more compelling case for a stay. Here, Plaintiffs seek only money damages and it is *HBO*, not Plaintiffs, whose constitutional rights are implicated by being forced to arbitrate claims based on the exercise of their First Amendment rights. Therefore, Plaintiffs will not suffer any "comparable hardship" as a result of the stay. *See id.*

Nor would a stay "put Plaintiffs at a strategic disadvantage" because a stay will "last only as long as it takes for the Ninth Circuit panel to issue its opinion." *See Meijer, Inc. v. Abbott Laboratories*, 2009 WL 723882, at *4 (N.D. Cal. Mar. 18, 2009).[3] Here, Plaintiffs seek to bring contract claims for damages allegedly caused by injury to Mr. Jackson's reputation. Dkt. 1-1 at 23 (seeking damages regarding alleged injury "to the legacy of Michael Jackson"). The commercial effects of *Leaving Neverland* on Mr. Jackson's legacy, if any, will be better capable of being determined with more (not less) time to allow those effects to settle. Therefore, a stay will benefit the parties for this reason as well.

4. **The Public Interest Weighs In Favor Of A Stay.**

Finally, staying arbitration pending appeal will advance the public interest. Courts consider the public interest only in "certain cases" where that interest is implicated. *See Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988); *Westlands Water Dist. v. Natural Resources Defense Council,* 43 F.3d 457, 459 (9th Cir. 1994) ("If the public interest is involved, the district court must also determine whether the public interest favors the [movant]."). That interest is implicated here. Just as HBO has a strong interest in protecting its own First Amendment rights, *see supra*, Section IV.A.1, the public has a strong interest in promoting expressive, newsworthy works such as *Leaving Neverland*; in ensuring that speech of "would-be critics" is not chilled, *Sullivan*, 376 U.S. at 279; and in protecting and encouraging reporting about sexual abuse, generally, and particularly about sexual abuse of minors, *see* Cal. Penal Code § 11164 *et seq.* (imposing mandatory reporting obligation on certain individuals in cases of known or suspected child abuse or neglect). Indeed, Plaintiffs' effort to arbitrate its claims

[3] The Ninth Circuit has found that stays are reasonable even if they last "months, if not years." *Chronicle Pub. Co. v. Nat'l Broad. Co*., 294 F.2d 744, 749 (9th Cir. 1961) (affirming grant of stay).

against HBO threaten these principles and will improperly deter and chill third parties' speech about Mr. Jackson by making them a target of Mr. Jackson's Estate.

The Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles." *Klein*, 584 F.3d at 1208 (quoting *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 964, 974 (9th Cir. 2002) (collecting cases)); *see also Suntrust Bank v. Houghton Mifflin Co*., 268 F.3d 1257, 1276 (11th Cir. 2001) (the "public interest is ***always*** served in promoting First Amendment values") (emphasis added); *G & V Lounge, Inc. v. Mich. Liquor Control Com'n,* 23 F.3d 1071, 1079 (6th Cir. 1994) (noting "it is always in the public interest to prevent the violation of a party's constitutional rights"). Staying the arbitration pending appeal, therefore, will protect the public interests in maintaining the free exchange of ideas, including those expressed in *Leaving Neverland*, and in minimizing the threat of costly, time-consuming litigation for critics of public figures.

## V. CONCLUSION

For the reasons set forth herein, the Court should grant HBO's Motion, and stay enforcement of its order compelling arbitration until HBO's appeal is resolved.

Dated: October 28, 2019

O'MELVENY & MYERS LLP
GIBSON DUNN & CRUTCHER LLP

By: /s/ *Daniel M. Petrocelli*
Daniel M. Petrocelli

By: /s/ *Theodore J. Boutrous Jr.*
Theodore J. Boutrous Jr.

*Attorneys for Defendant Home Box Office, Inc.*