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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

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U.S. DISTRICT COURT
N.D. OF ALABAMA

Handwritten initials

UNITED STATES OF AMERICA,

v.

Case No. CR-03-BE-0530-S

RICHARD M. SCRUSHY,

Defendant.

**DEFENDANT'S RESPONSE TO THE MOTION BY BLOOMBERG NEWS, THE
ASSOCIATED PRESS, THE REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS, THE HEARST CORPORATION AND THE BIRMINGHAM NEWS
COMPANY FOR LEAVE TO INTERVENE**

Comes now, defendant Richard M. Scrushy ("Defendant" or "Mr. Scrushy"), through his counsel and respectfully submits this response to the motion to intervene by the above stated news organizations and shows as follows:

Defendant does not object to the motion to intervene. We do object to the relief sought by the intervenors to the extent that it implicates and effects the Defendant's Constitutional right to a fair trial. Contrary to the intervenors contention, the Court here has had one objective in sealing documents in this case - the preservation of the Defendant's Constitutional rights. In this regard some background leading to the April 13, 2004 consent order and the contested sealed documents entered after that order will be helpful.

232

After having its way with Richard Scrushy for almost 18 months - including improper leaks during the grand jury stage of the case,¹ collaboration with the SEC in getting what it hoped was negative evidence disseminated to the public, visits by the President of the United States to Birmingham to announce his position on corporate crime on the eve of charges being revealed publicly, a formal press conference in Alabama and Washington to proclaim Mr. Scrushy's guilt, along with gratuitous comments about the character of evidence in court papers having nothing to do with the issue - the prosecutors in this case moved on March 25, 2004 to declare a freeze on public comment about the case.

Although the Defendant initially objected to the imposition of a formal gag order we ultimately agreed to a consent order which required both parties to comply with the Alabama State Bar Rules with regard to public statements about the case. The Defendant has adhered to the Court's directive regarding public comments. We agreed to the Consent Order because it was the Court's stated intent that the Defendant receive a fair trial. Further, we were persuaded by the Court's reasoning that there was sufficient time to mitigate the harm done by the government. We believed the Consent Order was fair and more importantly that it would work going forward. The problem is and has been that the government has failed to comply with the direct requirements of the Consent Order. The government has sought to circumvent the Order at every turn, leaving the

¹ DOJ policy regarding grand jury investigations dictates that the investigation into potential charges against and defendant should be out of the public view. The United States elected to orchestrate its investigation so as to highlight Mr. Scrushy. It took pleas from the alleged co-conspirators early in the investigation to generate maximum public exposure. Under any "normal" investigative strategy those pleas could and should have occurred after Mr. Scrushy was indicted. That way, the alleged co-conspirators would not have been sentenced after Mr. Scrushy's trial. The government elected to pursue its media policy and subsequently objected when certain judges refused to go along with the continuing delay of sentencing to advance the government's trial strategy. Now many alleged co-conspirators have been sentenced and received slaps on the wrist in exchange for their cooperation. The government's media driven strategy backfired.

Defendant in a position to either comply and say nothing, make fair response and risk contempt or worse, lose the Court's confidence in our ability to remain disciplined in the face of the government's violation of the Court's directive. It is this series of events that resulted in the Court's filing of an inordinate number of sealed documents since April 13, 2004. The government now has the temerity to file a one paragraph response to the motion by the news media, ignoring all that preceded this motion and without so much as commenting for the public that it is largely their violations of the Court's directives and the Consent Order that has brought us to this crossroad.

Turning specifically to the motion, we are aware that the Court intends to unseal certain documents which have been reviewed with the participation of both parties. The government makes no mention of this in their brief response or their agreement with this process. We submit that the remaining items under seal are correctly sealed and that the docket should only reflect the nature of the motion, response or order. For instance, motions that relate to Mr. Scrushy's financial situation pending trial or the ongoing restraint of his assets should simply have the reference "Forfeiture Related Items" and the Court should enter an order justifying the continued sealing of those documents as critical to the Defendant's Constitutional right to a fair trial.

The intervenors motion is predicated upon the proposition that "the public's access to criminal trial proceeding is firmly established." (intervenors brief of 4). We take no issue with this proposition. The problem is that the Court's discretion to control documents is quite different and none of the case law submitted by the intervenors counters this proposition. See e.g. Hartford Conrant Company v. Pellegrino, 380 F.3d

83, 91-94 (2d Cir. 2004)(detailed analysis leading to conclusion that there is a qualified First Amendment right of access to the docket).

Eleventh Circuit precedent clearly authorizes sealing of specific documents to preserve Defendant's Constitutional right to a fair trial. United States v. Valenti, 987, F.2d 708, 715 (11th Cir. 1993)(bench conferences and some motions completely hidden from docket and not unsealed long after any possible Constitutional concern had passed). Valenti also dealt with access to public proceedings which is not at issue here. It appears intervenors want to mix the standards for proceedings with the standard for court documents to arrive at a higher overall standard. A careful review of the cited cases reveal that such a higher standard for documents is not justified. This conclusion is also supported by Belo Broadcasting v. Clark, 654 F.2d 423, 430 (5th Cir., Unit A 1981), wherein the court, citing to Nixon v. Warner Communications 435U.S. 589, 598 (1978), found it:

"uncontested" that the right to inspect and copy judicial records is not absolute. (cite omitted) The question becomes, then, under what circumstances access may be denied, and to whose judgment that decision is substantially committed. The Supreme Court's answer to the second question suggests the impossibility of definitively answering the first: "The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (cite omitted) The District of Columbia Circuit, whose decision was reversed in Warner Communications, acknowledged the same answers to the prefatory questions: "Because no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rest within the sound discretion of the courts, subject to appellate review for abuse" (cite omitted).

Belo Broadcasting, 654 F.2d at 430.

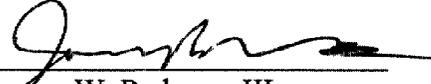
Access to proceedings is quite different from access to documents. Although the intervenors attempt to gain access to the substance of all future sealed filings, it is clear

that the cited authority does not go that far. Indeed, a detailed description would defeat the entire purpose for sealing sensitive documents which directly relate to the Defendant's Constitutional right to a fair trial. United States v. Kooistra 796, F.2d 1390, 1391 (11th Cir 1986)(findings do not need to be extensive - they need only set out enough so that the reviewing court can determine, in conjunction with a review of the sealed document, what interest were implicated). What is required is that the court provide sufficient finding in its sealed order so that the Eleventh Circuit can view the sealed documents and the order and understand the rationale for sealing. Such a record is currently available to the Eleventh Circuit in this case. We therefore oppose intervenors second request and recommend that the docket reflect the general nature of the sealed document with a sealed order indicating the basis for sealing each item.

CONCLUSION

While we do not object to intervention, we do object to the docket completely revealing those items the Court intends to maintain under seal. We do not object to the docket reflecting the general nature of the motion, response or order. The Court should continue its practice of receiving proposed items under seal and upon review either maintain those items under seal or unseal them. This has been the practice of the Court thus far and should continue. We are confident that the Court has thus far correctly balanced Defendant's fair trial rights against the public's right to access and that the Court's orders going forward will continue this tradition.

Respectfully submitted,


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A handwritten signature in black ink that reads "Arthur W. Leach". The signature is written in a cursive style with a horizontal line underneath it.

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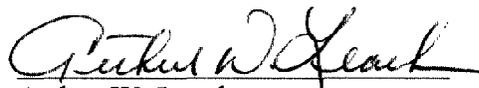
Counsel for Defendant Richard M. Scrushy

CERTIFICATE OF SERVICE

I certify that I have this day, October 8, 2004, served a true and correct copy of the foregoing Response to the Motion to Intervene, upon the United States Government and their counsel by hand delivery to the office of the United States Attorney in Birmingham, Alabama to the attention of the following government lawyers:

Alice Martin, United States Attorney
Richard C. Smith, Deputy Chief, Fraud Division

And by mail to: Gilbert E. Johnson, Jr
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