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

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| UNITED STATES OF AMERICA, | ] | |
| v. | ] | CR-03-BE-0530-S |
| RICHARD M. SCRUSHY, | ] | |
| Defendant. | ] | |

ENTERED
OCT 19 2004

**ORDER GRANTING INTERVENTION**

This matter comes before the court on "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" (hereinafter movants or Intervenors)(doc. 219). No Proposed Complaint in Intervention was filed contemporaneously with the subject motion. Instead, the movants incorporated their plea for relief within their motion to intervene. To expedite the matter, the court will treat the motion also as a Complaint in Intervention and address the two-part statement of purpose within the Motion For Leave to Intervene as motions for relief.

The movants seek intervention for the limited purpose of obtaining "an order: (1) requiring that all previous docket entries pertaining to sealed filings in this case be amended to disclose information regarding the substance, type, and/or kind of information that is sealed, and (2) mandating that no additional filing be made under seal unless it has been preceded by a motion, publicly docketed, and with sufficient notice to the public, describing the substance, type and/or kind of information sought to be sealed" (doc. 219, p. 1).

The court recognizes the right of the press to intervene in certain circumstances to gain access to court proceedings and records. See, *In re Alexander Grant & Co.*

*Litigation*, 820 F.2d 352, 354 (11th Cir. 1987); *In re Petition of Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986). Accordingly, the court finds that **intervention** by the Movants for the **limited purpose** stated within the Motion For Leave to Intervene is due to be and hereby is **GRANTED**.

Having considered the complaint, the submissions of the movants and the parties of the case in chief,[1] and the applicable law, the court finds that the **motions included within the Motion For Leave to Intervene** are due to be and hereby are **GRANTED IN PART** and **DENIED IN PART** in accordance with the terms of this Order.

This case has from its beginning generated a high level of public interest and media attention. Unfortunately, both parties to the litigation have shown a propensity for manipulating media coverage in an effort to create a prejudicial atmosphere. The court has an obligation to the public as well as to the government and the defendant to take steps to avoid a carnival atmosphere and to ensure a fair trial. *See*, *United States v. Brown*, 218 F.3d 415, 429 (5th Cir. 2000), *cert. denied*, 531 U.S. 1111, *and mandamus denied,* 250 F.3d 707 (5th Cir. 2001); *Sheppard v. Maxwell*, 384 U.S. 333, 358-60 (1960). The court found it necessary to enter a Protective Order by Consent (doc. 158) with Memorandum Opinion (doc. 159) ordering counsel to refrain from improper prejudicial public comment. Any attempt to taint public opinion endangers the court's ability to empanel a fair and impartial jury -- the heart of a fair trial – and the court cannot and will not allow such conduct.

Even in the face of these difficulties, the court respects and highly values the vital role the press plays in ensuring the public's confidence in the fairness of the justice

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[1] These submissions include the Intervenors' Motion for Leave to Intervene in which the movants incorporated their brief in support (doc. 219), the Defendant's Response (doc. 232), Government's Response (doc. 231), Government's Amended Response (doc. 235), and Intervenors' Reply (doc. 236).

system. The court, however, must balance the First Amendment rights of the press and the public's right to know with the rights of every defendant, and society in general, to a fair trial conducted in a court of law in accordance with rules of evidence and procedure designed to ensure justice.

The right of public access to judicial documents is not absolute. When the interest of press access comes into direct conflict with the Constitutional right to a fair trial, the court has a Constitutional obligation to protect the right to a fair trial. *See, Press Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 9, 106 S. Ct. 2735, 2740-41, 92 L. Ed 2d 1 (1986); *United States v. Brown*, 218 F.3d 415, 429 (5th Cir. 2000); *Belo Broadcasting v. Clark*, 654 F.2d 423, 430 (5th Cir., Unit A 1981), citing *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Sheppard v. Maxwell*, 384 U.S. 333, 358-60 (1960). The court must weigh all factors and tailor limits on access as narrowly as possible without exposing the defendant to any significant risk of interference with his Constitutional rights to a fair trial. *See, Belo Broadcasting v. Clark*, 654 F.2d 423 (5th Cir., Unit A 1981).

Balancing the rights of competing constituencies--here the press, the general public, and the litigants--requires continuing judicial vigilance and awareness, and occasional modifications of case management. In exercising its responsibility, the court, with participation of counsel for both parties, has reviewed all sealed documents and their attendant docket entries. The court has found documents due to be unsealed, as well as documents that must remain sealed in the interest of justice and a fair trial. By separate order, the court is directing that certain documents previously filed under seal be unsealed and publicly docketed. The court is also amending certain docket entries regarding sealed documents to give a clearer indication of the nature of the sealed document.

The court reminds the Intervenors that early in this case the court established a special website with e-mail notification to list participants of all filings in the case. Anyone may participate at no cost, and many media entities have taken advantage of this service. Notification is almost instantaneous with docketing.[2]

As the public and the media are already aware, the government has obtained restraint over Mr. Scrushy's assets to ensure the availability of a pool of assets should a conviction be obtained. In cases with restrained assets, the court has a continuing responsibility to oversee the management of the restrained resources. To this end, documents must be filed and the court must supervise the continued maintenance of assets as the defendant awaits trial. Defendant's fair trial rights require that further information regarding the management of those assets cannot be disclosed until after trial.

With the exception cited in the footnote below, the documents that shall remain sealed are, relate to, or refer to defendant's financial records and/or restrained assets.[3] This information is appropriately made public only in the evidentiary course of the trial as to some of the documents, or, as to other documents, only in the event of a conviction on counts that under law trigger an asset forfeiture proceeding. These documents are of particular sensitivity in this case, which turns on financial dealings,

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[2] Because of this procedure, media representatives have no cause to contact chambers and are reminded to refrain from doing so. The court requests Media counsel to remind their clients that the court should not and will not discuss this or any other on-going case with the media, and that the court will not provide the media with advance notice of the filing of any orders or opinions.

[3] Additionally, Documents 6, 7, and 8 shall remain sealed because they relate to discovery and contain sensitive evidentiary material not appropriate for pre-trial publication. *U.S. v. Anderson*, 799 F.2d 1438, 1441, *reh'g. denied en banc*, 805 F.2d 1043 (11th Cir. 1986), *cert. denied sub nom., Tribune Co. v. U.S.*, 480 U.S. 931 (1987). Docket entries for these documents shall be amended to so indicate by the terms of the separate order discussed herein.

and these documents must remain sealed to help ensure a fair trial. Their release at this point in the proceedings would constitute a significant breach of the defendant's privacy rights as well. The court finds the defendant's Constitutional right to a fair trial mandates the continued sealing of all forfeiture related documents.[4] Further, after trial, all sealed documents will be subject to properly pled motions for lifting of the seal. The court maintains the ability to redact these documents so as not to reveal personally invasive, identifying information that adds nothing the public's knowledge of the proceedings.

Accordingly, the Intervenors' motion to open all documents is **GRANTED IN PART** and **DENIED IN PART** with a separate order to follow specifying which items shall be unsealed and which items fall within the categories defined herein.

Regarding Intervenors' request as to prior and future filings of sealed items, the court specifically rejects Intervenors' invitation to publicly outline the nature and substance of sealed information. Granting this aspect of the motion would totally defeat the purpose for placing certain materials under seal. If the document itself must be sealed to preserve the defendant's fair trial rights, allowing the media, and therefore the public, access to the substance of the document in a motion seeking its sealing would defeat the fundamental purpose for sealing the document in the first place. This portion of the motion is specifically denied. As pointed out in the defendant's response to Intervenors' motion, a substantial difference exists between court proceedings and documentation filed on the docket of a case, and the court possesses broad discretion over the sealing of matters on the docket. Neither counsel nor court administrative staff

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[4] Docket entries for documents already filed that are forfeiture related shall be amended to so indicate by the terms of the separate order discussed herein. Any future forfeiture related documents shall be so identified on the public docket.

is to make reference to the substance of documents sought to be filed under seal unless the motion to seal is denied.

Accordingly, the motion for description of the substance of materials sought to be filed under seal is due to be and hereby is **DENIED.** The court will, however, provide appropriate description of the sealed motions, responses, and orders, both presently on the docket and going forward, so the public may be aware of the general nature of the items involved. Further, counsel for the government and the defendant are instructed to continue the current practice of submitting motions to seal when requesting pleadings or documents be filed under seal. Because this practice is already in place, the court finds that portion of the motion **MOOT**. The court further finds that the portion of the Intervenors' motion asking that motions to seal be made "with sufficient notice to the public, describing the substance, type and/or kind of information sought to be sealed" (doc. 219, p. 1) seeks no type of relief available. Neither a right nor a mechanism to any sort of prior public notice of such filings exists. Accordingly, the portion of the Intervenors' motion regarding "sufficient notice" is due to be and hereby is **DENIED.**

DONE and ORDERED this 18th day of October 2004.

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE