UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case No. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

GOVERNMENT'S SURREPLY TO THIRD PARTIES' REPLY IN SUPPORT OF MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING THE GOVERNMENT'S MOTION FOR A PROTECTIVE ORDER

The United States of America, by and through Michael J. Mullaney, Acting U.S. Attorney, and John W. Van Lonkhuyzen and Rebekah L. Sittner, Trial Attorneys, hereby files this Surreply to the Miami Herald Publishing Company and the Associated Press' (the "interveners") Reply in Support of Motion to Intervene for the Limited Purpose of Opposing the Government's Motion for a Protective Order (Doc. # 155). The United States opposes the unprecedented suggestion, made for the first time by interveners in paragraph 3(b) of the prayer for relief of their Reply, that they be given advance copies of all discovery materials before the Government submits them to this Court for ex parte consideration under seal.[1]

1. The Government seeks to underscore how unprecedented and inappropriate the

[1] The Government's previous Response to Third Parties' Motion to Intervene (Doc. # 154) already detailed how, contrary to interveners' unfounded claims, there exists no common law or constitutional right of public or press access to discovery material not yet part of the judicial record, much less ruled upon as to relevance or admissibility. The Government's Response also illustrated how the Government's proposed Order, contrary to interveners' claims, bears no meaningful resemblance to the global gag orders that have come under some scrutiny by the Fifth Circuit. Finally, the Government has already specified, to the extent possible without undermining the very sensitivities at issue, the reasons for the requested protective order. These reasons are spelled out in the Government's Reply to Defendant's Opposition to Government's Motion for a Protective Order (Doc. # 152), on pages 10-13.

interveners' proposed relief would be. Interveners' proposal, which would provide to them (through their attorneys) any and all potentially protected discovery documents even before a party seeks for them to be sealed, is utterly contrary to Federal Rule of Criminal Procedure 16(d) ("Rule 16(d)") as well as to standard, sensible practice.

2. What interveners seek is extraordinary: to be given a first peek at any sensitive documents that might be sealed even before the Government seeks their sealing. As such, the proposal stands on its head the operation of Rule 16(d), in which such materials are provided to the court ex parte for a ruling regarding their sealing. Here, instead, interveners would have this Court provide them with access to such sensitive materials even before the Court has had the opportunity to review them.

3. Rule 16(d)(1) regulates discovery as follows:

> At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Rule 16(d) is clear: review of sealed documents involves only ex parte inspection by the court. What Rule 16(d) does not envision is for intervening parties to act as a clearinghouse, assessing the sensitivity of the very documents whose access the trial judge may restrict after he or she inspects them and reviews the good cause asserted by the party moving to seal the documents.

4. Interveners' proposal, whereby they would enjoy access to each and every document even before this Court can assess its sensitivity, defeats the very purpose of Rule 16(d). The Eleventh Circuit's explanation of the status of pre-trial documents and the function of discovery merits careful attention: "Discovery, whether civil or criminal, is essentially a private

process . . .. If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe." United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986). What the interveners propose is precisely what the Anderson court feared and sought to prevent. Therefore, intervening third party media outlets' Motion must be denied.

WHEREFORE, the United States respectfully requests that the Court deny the intervener media outlets' motion to intervene and their requested relief, grant the Government's Motion for Protective Order, and enter the proposed Protective Order governing sensitive but unclassified discovery in this matter.

Respectfully submitted,

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ACTING UNITED STATES ATTORNEY

July 15, 2009

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Certificate of Service

I hereby certify that on the 15th day of July, 2009, I electronically filed the foregoing document with the Clerk of Court using the Court's CM/ECF system, which will send notification of such filing to Arturo V. Hernandez, Esq., Rhonda A. Anderson, Esq., and Felipe D.J. Millan, Esq., Counsel for Defendant.

I further certify that I have served the foregoing document by electronic mail, and will cause it to be mailed by United States Postal Service, to the following non-CM/ECF participants:

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