UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

**[FILED 4/28/95]**

UNITED STATES OF AMERICA; Plaintiff

v. Civil No.: 95-5048

NAT, L.C. AND D.R. PARTNERS
d/b/a DONREY MEDIA GROUP; Defendants

COMMUNITY PUBLISHERS, INC.; and
SHEARIN INC., d/b/a SHEARIN & COMPANY REALTORS; Plaintiffs

v.Civil No.: 95-5026

DONREY CORP. d/b/a DONREY MEDIA GROUP,
NAT, L.C.; THOMSON NEWSPAPERS, INC., and
THE NORTHWEST ARKANSAS TIMES; Defendants

RESPONSE OF THE UNITED STATES TO DEFENDANTS' MOTION
TO EXCLUDE EVIDENCE OR, ALTERATIVELY,
FOR CONFIDENTIALITY PROCEDURES

The United States hereby opposes defendants' motion to exclude certain broad categories of evidence, or alternatively, to have the Court apply procedures to maintain the confidentiality of a number of broad categories of information described in the motion. Defendants' Motion for a Protective Order. Although the Government does not oppose procedures for maintaining the confidentiality of specified documents that contain properly designated, confidential business information under Fed. R. Civ. P. Rule 26, it does oppose defendant's general invocation of confidentiality for broad classes of documents. Defendants could (and should) easily provide -- but have failed to do so -- a specific list of documents on the

government's exhibit list that they believe are appropriately protected as confidential. Instead, by merely describing broad categories of information, defendants would place a tremendous burden on the Court and the parties to predetermine whether documents on the respective exhibit lists fall within the defendants' descriptions. The result would be uncertainty and likely delay of trial.

In order to expedite trial, the United States has repeatedly requested that defendants specifically identify any documents in the Government's exhibit list that are "confidential" under the Supplemental Stipulation and Order.[1/] It appears to the government that few if any of the documents in the Government's current exhibit list fall within the defendants' descriptions.[2/] In particular, there is no justification for defendant's request that the sale price for the *Northwest Arkansas Times* be kept secret. Nonetheless, defendants may still dispute the confidentiality of documents that have long been on the Governments' exhibit list at trial.

The Supplemental Stipulation and Order provides that the movant for a protective order must identify the documents for which itis seeking protection, or identify information the movant felt

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[1] *See Motion of the United States Challenging the Confidentiality of Certain Documents; letter from Craig Conrath, to Jerry Jones (April 17, 1995); and letter from Craig Conrath, to Jerry Jones (April 23, 1995)*

[2] *Nor does the United States anticipate eliciting testimony that might fall within the descriptions provided (excluding unforeseen rebuttal, etc.).*

should be deemed confidential testimony.[3/] Defendant's broad descriptions of confidential information provide little more guidance than a request that this Court exclude any document held to be protectable under Rule 26(c).[4/] Thus defendant's motion presumes that they can determine at trial, on a document-by-document basis, whether a document sought to be admitted into evidence falls within the descriptions they provide. It is "wholly improper" for litigants "to claim for themselves the role of deciding which testimony and documents will be shielded from public disclosure." United States v. IBM, 82 F.R.D. 183, 185 (S.D.N.Y. 1979). The second alternative, asking the court to decide at trial, is unnecessarily burdensome and will cause undue delay.

Consequently, the United States opposes Defendants' Motion for a Protective Order to the extent it seeks to prevent the admission of otherwise admissible evidence (including testimony). Moreover,

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[3] *"The producing party ... shall then determine whether or not it wishes to maintain the confidentiality of **such document** or information. If it does, the producing party ... shall then file ... a motion for a protective order limiting or imposing conditions on use of **such document** or information in open court." Confidentiality Order at ¶ 10.*

[4] *Under the common law, "[t]he public has ... a right of access to public records, including judicial records. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). In general, the right entitles the public to have access to "materials upon which a judicial decision is based." Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980). Consequently, a party requesting the sealing of judicial records must demonstrate "to what extent [the] party's interest in privacy or confidentiality of its processes outweighs [the] strong presumption in favor of public access to judicial proceedings." Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991).*

the United States opposes defendants' attempt to overly burden the Court and the parties by imposing on them the burden of determining which of the documents on its exhibit list fall within the defendants' broad descriptions. The United States does not, however, oppose the imposition of procedures to protect the confidentiality of any specific documents that defendants identify and this Court deems confidential under Rule 26. Nor does the Government oppose the imposition of confidentiality provisions for testimony that properly falls within Rule 26 and the descriptions in defendants' motion.

Respectfully submitted,

/S/_____
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