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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEREMY JOHNSON, et al.,

Defendants.

**OBJECTION TO COURT'S PROPOSED
ORDER**

Case No.: 2:11-CR-00501-DN-PMW

Judge David Nuffer
Magistrate Judge Paul M. Warner

The Court invited comment on the Court's proposed order filed March 23, 2016.¹

We acknowledge that the Court has authority to protect jurors from harassment, including as set forth in DUCrimR 57-8 and DUCivR 47-2, but this power "is limited."² The Court's proposed order could accomplish this without inclusion of subparagraphs (c), (d), (e).

Subparagraph (e) is a particularly onerous prior restraint on free speech, which places the Court as a continuing gate-keeper for any and all contact with jurors. We know of no authority that allows the Court to be so involved in the post-trial affairs of jurors, when the threat to justice is substantially lower. In fact, the Fifth Circuit specifically condemned the practice of requiring a

¹ Doc. 1384.

² *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1237 (10th Cir. 1986) ("We indicate only that the court's power to impose prior restraints on first amendment rights is limited and that with few exceptions it must be exercised in response to specific compelling reasons.")

showing of “good cause” in order to speak with jurors. “A court may not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special treatment by carrying the burden of showing good cause. The first amendment right to gather news is ‘good cause’ enough.”³ We understand that the Court in that case, as with most cases in this area, arose in the context of news gathering under the First Amendment, but Defendant shares those interests, and potentially further interests in furtherance of his due process rights. Should the Court require further authority on this point, with additional time, we would be willing to provide supplemental authority.

Of particular concern is the lack of an understanding as to what the basis for the Court’s order is. We understand that the Court has listed several potential justifications for its proposed order, including “[i]ssues arising during trial regarding civility and compliance with court rules and orders,” and “[i]ssues arising during trial from possible contact with witnesses in violation of court orders and Utah Rules of Professional Conduct...” With respect, we do not believe any of these allusions to issues that arose during trial, with the possible exception of one instance of possible contact on February 25, 2016, which did not involve any contact by the parties, would merit the need to shield jurors from any contact by the parties. If anything, we believe that the Defendants’ actions on February 25th in bringing that one instance to the Court’s immediate attention, and throughout the trial, demonstrated their respect for the Court’s orders in this area of the law.

We understand that once a verdict is rendered, any concerns of jury intimidation or possible tampering such as arose on February 25th cease. And as the Tenth Circuit stated in a different context: “Even though the threat to justice caused by news media contact with jurors is much lower after trial than it is during trial, the courts have properly exercised their right to

³ *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982).

protect jurors from unwanted post-trial harassment.”⁴ Thus, the Court’s order should be “narrowly tailored” to meet valid justifications.⁵ The Court’s proposed provisions in subparagraphs (a) and (b) would adequately protect the jurors who wish to avoid post-trial contact from interested parties. Proposed subparagraph (f) is an adequate enforcement mechanism and adequately apprises all parties of the consequences of violating subparagraphs (a) and (b) without the need for the Court to insert itself as a screen to any juror contact.

RESPECTFULLY SUBMITTED this 24th day of March, 2016.

MUMFORD P.C.

/s/ Bradley N. Mumford

Bradley N. Mumford
Counsel for Defendant Scott Leavitt

⁴ *Mechem*, 801 F.2d at 1236 (internal citation omitted)

⁵ *In re Express-News Corp.*, 695 F.2d at 808-09 (citations omitted). Undersigned counsel further notes his concern regarding the Court’s description of post-trial motions as “meritless.” To describe motions as potentially “meritless” before any have been filed is inappropriate.