

**EXHIBIT D
TO
MS. MCCLATCHEY'S RESPONSE TO
DEFENDANT'S MOTION IN LIMINE TO
EXCLUDE CERTAIN DOCUMENTS AND
TESTIMONY REGARDING IPHOTOART**

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

4 Civil Action No. 05-145J

5 ----- X
6 VALENCIA M. McCLATCHEY,

7 Plaintiff,

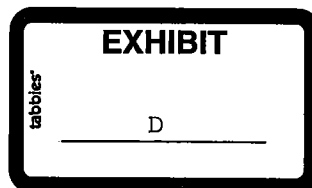
8 vs.

9 THE ASSOCIATED PRESS,

10 Defendant.

11 ----- X
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14 DEPOSITION OF: JAMES R. GERBERICH

15 January 19, 2006, 9:10 a.m.
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1 **Q. Did you produce that E-mail as part of**
 2 **the production in this lawsuit?**
 3 A. I believe, I believe so.
 4 MR. HALL: Counsel, I'll say on
 5 the record I've been through every document
 6 that's been produced in this case several
 7 times and have not seen such an E-mail. I
 8 would ask that it be produced.
 9 MR. PENCHINA: That E-mail, it
 10 has been withheld and identified on the
 11 privilege log. That E-mail conveyed
 12 instructions from the legal department.
 13 MR. HALL: Who was the attorney
 14 that conveyed the instructions?
 15 MR. PENCHINA: As we sit here at
 16 this moment, I do not recall. I will review
 17 the document again and be happy to
 18 specifically identify it for you on the
 19 privilege log.
 20 **Q. Prior to November 2004, the McClatchey**
 21 **photograph was accessible by The Associated Press**
 22 **members and subscribers; is that correct?**
 23 A. Yes.
 24 MR. HALL: I'd just like to mark

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1 since we've been talking about a little bit
 2 as Plaintiff's Exhibit 2, it's a document
 3 labeled AP00192. And it's a photocopy of a
 4 portion of the McClatchey photograph.
 5 (Portion of the McClatchey
 6 photograph marked Plaintiff's Exhibit 2 for
 7 identification as of this date.)
 8 **Q. I'll ask you if you've ever seen this**
 9 **document?**
 10 A. I've not seen this rendition of this
 11 picture.
 12 **Q. Do you recognize the picture in the**
 13 **photocopy?**
 14 A. I do recognize the picture.
 15 **Q. What is the picture?**
 16 A. It shows the barn, a barn and some
 17 smoke. And, as I understand it, it's a picture by
 18 Val McClatchey.
 19 **Q. How did you come to the understanding**
 20 **that this was a picture by Val McClatchey?**
 21 A. It was pointed out to me.
 22 **Q. Who pointed it out to you?**
 23 A. It was, I believe, after it was
 24 requested to provide some information in the time

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1 period I mentioned before, six or eight months ago.
 2 **Q. So would it have been counsel that**
 3 **pointed it out to you?**
 4 A. I was asked to provide information. I
 5 believe that request came from counsel.
 6 **Q. And prior to six or eight months ago in**
 7 **conjunction with this litigation producing**
 8 **documents, were you aware of the McClatchey photo**
 9 **which is represented in one form in Plaintiff's**
 10 **Exhibit 2?**
 11 A. I was not.
 12 **Q. Prior to six or eight months ago in**
 13 **conjunction with this lawsuit, had you ever seen a**
 14 **rendition of the McClatchey photo?**
 15 A. No, I did not.
 16 **Q. Do you have any knowledge where the**
 17 **rendition that is seen in Plaintiff's Exhibit 2 at**
 18 **AP00192 came from?**
 19 A. I do not have knowledge of where this
 20 rendition came from. I have never seen this
 21 rendition.
 22 **Q. So you were involved in the production**
 23 **of documents in this case; is that correct?**
 24 A. I was involved in the production of

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1 documents.
 2 **Q. And you searched for documents in**
 3 **response to a document request that plaintiff's had**
 4 **set out?**
 5 A. Yes.
 6 **Q. And what is in Plaintiff's Exhibit 2 is**
 7 **not one of the documents that you located; is that**
 8 **correct?**
 9 A. That's correct.
 10 **Q. Where did you search for documents?**
 11 A. The only place was for the image would
 12 have been our archive system where we deleted the
 13 image from.
 14 **Q. So do you have any idea how The**
 15 **Associated Press still had the image if it was**
 16 **deleted in November of 2004?**
 17 A. We would retain a secure legal copy of
 18 that image.
 19 **Q. What is a secure legal copy of an image**
 20 **that is retained by The Associated Press even after**
 21 **it deletes an image from its system?**
 22 A. A copy that would be provided to
 23 counsel or others as a matter of record,
 24 inaccessible by anyone but management.