E.D.N.Y.
98-CR-1101
Glasser, J

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of February, two thousand eighteen.

PRESENT:

José A. Cabranes,
Rosemary S. Pooler,
Denny Chin,
Circuit Judges.

RICHARD ROE, JANE DOE,
JOHN DOE 2,

Respondent-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

JOHN DOE,

Defendant-Appellee.

ORDER
No. 10-2905

RICHARD ROE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

v.

JOHN DOE1, JOHN DOE 2,

Defendants.

No. 11-479

On March 22, 2017, movants Forbes Media LLC and Richard Behar ("Intervenors") filed a motion to intervene in, and to unseal documents on the dockets of, the two above-captioned appeals. On April 3, 2017, the Government, without opposing the motion to intervene or addressing the substance of the motion to unseal, filed a motion to appoint a special master to oversee the process of evaluating the continued validity of sealing.

On April 10, 2017, with the concurrence of the Government, this Court granted the motion to intervene filed by Intervenors. On that same day, this Court appointed a special master pursuant to Federal Rule of Appellate Procedure 48(a) to review and issue a report and recommendation with respect to Intervenors' unsealing motion.

The special master, Judge Pamela K. Chen of the United States District Court for the Eastern District of

New York,[1] completed her Special Master Report ("the Report") on July 5, 2017. She submitted a First Addendum to the Report on July 12, 2017, and a Second Addendum on July 14, 2017 (collectively, "the Addenda"). The Report and its Addenda contain complete factual findings and recommendations of law with respect to Intervenors' unsealing requests. Intervenors filed their objections to the Report on October 12, 2017. The Government filed a memorandum in response to Intervenors' objections to the Report on November 2, 2017.

Upon *de novo* review[2] of the Report, the Addenda, and the objections filed thereto, we hereby **ADOPT IN FULL** the conclusions and recommendations of the Report and the Addenda.

The special master shall, in close consultation with the Office of the Clerk of Court, oversee the unsealing all the documents on the dockets of the two above-captioned appeals for which the Report recommends unsealing. The 21 documents on those dockets which the Report recommends be unsealed subject to redaction shall be redacted in the manner set forth in the Report and the Addenda. All documents on those

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[1] This Court first appointed Judge Brian M. Cogan of the Eastern District of New York as special master, but substituted Judge Chen by an order dated April 21, 2017.

[2] Though Federal Rule of Appellate Procedure 48 does not specify a standard of review for appellate courts reviewing the report of a special master, we are guided by Federal Rule of Civil Procedure 53, which states that a special master's conclusions of law are subject to *de novo* review.

dockets for which the Report recommends continued sealing shall remain under seal.

In addition, in accordance with the special master's recommendation, Intervenors' motion to unseal all the motion papers filed by Intervenors in the course of this unsealing action, as well as the *amicus* brief filed in the course of this unsealing action by *amici DCReport.org* et al., is **GRANTED**. It is hereby **ORDERED** that all the motion papers filed by Intervenors in the instant unsealing action, as well the *amicus* brief filed in the instant unsealing action by *amici* DCReport.org, et al., shall themselves be **UNSEALED**.

We hereby **GRANT** Judge Chen the authority to determine whether to unseal any or all motion papers filed in the course of the special master proceeding.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O. Hagan Wolfe

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Richard Roe, Jane Doe,
John Doe 2,

Respondents-Appellants,

v.

United States of America,

Appellee,

John Doe,

Defendant-Appellee.

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SEALED REPORT OF SPECIAL MASTER

Docket No. 10-2905

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Richard Roe

Petitioner,

v.

United States of America,

Appellee,

v.

John Doe 1, John Doe E,

Defendants

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Docket No. 11-479

PAMELA K. CHEN, United States District Judge:

I. Introduction

This is a report by United States District Court Judge Pamela K. Chen, acting as special master, as designated by this panel on April 21, 2017. I was asked to review the motions of Intervenors Richard Behar and Forbes Media LLC ("Forbes") (collectively, "Intervenors") and *amici curiae* David Cay Johnston, DCReport.org, Joe Conason, National Memo, Russ Baker, WhoWhatWhy.org, Dan Wise, and WiseLawNY (collectively, "*Amici*"), joined by Richard Roe[1] as Respondent-Appellee and Petitioner in this matter, to unseal the dockets in cases 10-2905 and 11-479[2] in their entirety. Significantly, the government and John Doe ("Doe") have taken the position that sealing is no longer necessary for the vast majority of the sealed documents at issue in this dispute, with two key exceptions, namely, documents containing information about [redacted] and Doe's criminal case materials that were attached to the civil RICO styled as

[1] Roe's true name, Frederick M. Oberlander, has been known publicly since August 11, 2011. (*See* Letter by Richard Lerner dated June 16, 2017, 17-me-1302, Dkt. No. 16 at 2 (E.D.N.Y.).) Nonetheless, in this Report, I refer to Oberlander by his captioned name, "Roe."

[2] Two appellate matters have been opened in connection with Roe's disclosure of Doe's criminal case materials, one stemming from Roe's appeals of the district court's orders enjoining him and his clients from disseminating Doe's criminal case materials, docketed in 10-2905, and the other stemming from Roe's petition for a writ of mandamus directing the district court to unseal the criminal case docket, docketed separately under 11-479. *Roe v. United States* ("*Roe I*"), 414 F. App'x 327, 328 (2d Cir. 2011). Because these matters have been consolidated I refer to them in this Report as a single "matter."

Kriss v. Bayrock Group LLC, No. 10-cv-03959 (LGS) (DCF) (S.D.N.Y.) (the "SDNY Action"). Initially, there were a few instances where I found the government's and Doe's proposed redactions slightly overbroad, but during the hearing process, they agreed to narrow those redactions. I now agree with the government's and Doe's position with respect to the sealed documents in this matter.

In light of these developments and for the reasons discussed herein, I recommend that this Court (1) unseal those documents as to which the government and Doe no longer seek sealing, (2) continue to maintain under seal in their entirety Doe's criminal case materials and two other documents that the government and Doe seek to keep under seal, and (3) unseal the remaining documents subject to redaction. I find that the limited sealing still sought by the government and Doe is justified by their compelling interests in Doe's safety,[3] [redacted], preventing the improper disclosure and dissemination of Doe's pre-sentencing report ("PSR") and information contained therein, and preserving the government's ability to attract future cooperators. I recommend that

[3] Doe's true name, Felix Sater, became public "when the Clerk's Office in the Eastern District of New York inadvertently unsealed the [criminal] docket sheet, revealing that Sater was 'John Doe' and a cooperator." *See* Summary Order, *In re Applications to Unseal 98 CR 110 (ILG), USA v. John Doe 98-CR-1101*, 13-2373, Dkt. 161-1 at 3. Nonetheless, in this Report, I refer to Sater by his captioned name, "Doe".

104 of the 127[4] documents reviewed by the government and Doe be unsealed, 21 be unsealed subject to redactions, and 2[5] documents should remain entirely under seal. A chart itemizing all of the documents currently under seal, the government's position regarding sealing, and my recommendations regarding sealing/unsealing is attached, as Exhibit A, to this Report. Attached as Exhibit B are copies, in both electronic[6] and hard copy form, of all of the sealed documents, with a few exceptions that are noted herein. The documents are labeled with the same docket numbers as listed on the 10-2905 docket. For documents where I propose redactions, the text to be redacted is highlighted in the document but the text remains visible.

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[4] The Joint Appendix was counted as two documents as it was filed in two parts as Dkt. Nos. 142 and 143. Even though Dkt. Nos. 142 and 143 each contain multiple documents, Dkt Nos. 142 and 143 will each be referred to in this Report as a single "document." Dkt. Nos. 142 and 143, collectively contain materials from Doe's criminal case and the SDNY Action, including the SDNY complaint attaching Doe's 2004 PSR, cooperation and proffer agreements, and financial statement.

[5] As explained herein, even though I recommend that Doe's 2004 PSR remain under seal in its entirety, the PSR is not counted here as a fully sealed document. Based on the docketing of the Joint Appendix on 10-2905, the PSR is part of Dkt. No. 142 and thus, the sealing of the entire PSR amounts to a redaction of a portion of Dkt. No. 142.

[6] The password for the disc containing the documents reviewed and attached hereto as a part of Exhibit B is: [redacted]

II. Background

A. Prior Proceedings

As the panel is aware, this matter has a long and complicated history. Because the panel is familiar with this history, *Roe v. United States* ("*Roe I*"), 414 F. App'x 327, 328 (2d Cir. 2011), *Roe v. United States* ("*Roe II*"), 428 F. App'x 60, 63 (2d Cir. 2011), *Doe v. Lerner*, 16-2935, Dkt. No. 137-1 at 2-3 (2d Cir. April 20, 2017),[7] and because much of this history does not relate to the current unsealing motions, I recite only the proceedings related to the pending unsealing motions and otherwise refer to prior decisions by this Court or the district courts in this matter as they bear on my recommendations regarding the pending unsealing motions.

B. Procedural History for the Instant Unsealing Motions

On March 22, 2017, Behar and Forbes moved to intervene in, and unseal, the entire docket in this matter. (*See* Dkt. No. 379.)[8] On March 31, 2017, the *Amici*

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[7] The last substantive ruling on this matter was this Court's Summary Order issued on April 20, 2017, denying Lerner and Roe's appeal from a June 21, 2016 order, by Judge Cogan, partially denying their motion to unseal documents in the civil contempt proceedings. *See Doe v. Lerner*, 16-2935, Dkt. No. 137-1 at 2-3 (2d Cir. April 20, 2017). Lerner and Roe have not sought *certiorari* regarding this Court's May 21, 2017 ruling, but the time to do so has not yet elapsed.

[8] All docket references without a case number (*e.g.*, "Dkt. 379") refer to docket entries in Case No. 10-2905 (2d Cir.).

sought leave to file a brief in support of the Intervenors' unsealing motion. (Dkt. No. 390.) In response, on April 3, 2017, the government did not oppose Behar's and Forbes's intervention, but opposed the "blanket unsealing of all sealed docket entries and documents" and requested that the Court appoint a special master to conduct hearings on the unsealing motion. (Dkt. Nos. 396, 398.) Doe joined in the government's response on April 3, 2017. (Dkt. No. 401.) On April 6, 2017, the Court granted the *Amici*'s motions to brief the unsealing issue. (Dkt. No. 406.) On April 10, 2017, this Court granted Intervenors' motion to unseal and the government and Doe's motion to appoint a special master. (Dkt. No. 409.)

1. Proceedings before the Special Master

On April 21, 2017, I was appointed special master by this panel to review the unsealing motions. (Dkt. No. 418.) Adopting the practice established by Judge Cogan, on May 2, 2017, I opened two dockets in the district court. The first docket, which is styled as *In Re the Appointment of Pamela K Chen as Special Master* (the "Sealed Docket"), 17-mc-1282, is completely under seal from the public, except for the government and John Doe. The second docket, which is styled as *In Re Public Docket – the Appointment of Pamela K Chen as Special Master* (the "Public Docket"), 17-mc-1302, is publicly available. However, many of the documents filed on the Public Docket have been filed under seal in order to comply with this panel's various sealing orders. A copy of the Sealed Docket, the Public Docket, and the

parties filings therein are collectively attached as Exhibit D.[9]

2. The Sealed Documents

Because of the complicated history of this matter and the strict sealing procedures applied by this Court, the process of identifying and gathering all of the currently sealed documents has presented certain difficulties.[10] I first received documents from the Circuit Clerk's Office that consisted primarily of the 2017 unsealing motion and related filings. Thereafter, the Clerk's Office sent me their hard copy files predating 2017, which my office digitized and forwarded to the government and Doe for their review. The government also reviewed its files and found additional documents. *See* Gov't Letter, dated June 9, 2017, Sealed Docket, 17-mc-1282, Dkt. No. 20 at ECF[11] 3 (describing government's process of identifying and collecting documents at issue, which included obtaining documents from four different sources).[12] After comparing the non-public docket, which contains 377 docket entries

[9] I have not included the attachments to the government's June 9 and 14, 2017 letters (Sealed Docket, 17-mc-1282, Dkt. Nos. 20 and 21), because they are the documents reviewed by the government and Doe, which I have already attached as Exhibit A.

[10] I thank and commend the Clerk's Office staff for their tremendous assistance throughout this process.

[11] "ECF" refers to the pagination generated by the district court's Electronic Court Filing system and not the document's internal pagination.

[12] The Circuit Clerk's Office staff and the government located an additional 12 documents after this letter was filed.

(excluding entries regarding the 2017 unsealing application), to the public docket, which contains 182 entries (also excluding the 2017 entries), I determined that the non-public entries are primarily administrative entries made by the Circuit's staff and do not reflect filings by the parties. However, the government and Doe provided responses as to only 127 documents, leaving 55 public docket entries unaccounted for. With the assistance of the Clerk's Office, I determined that of these 55 public docket entries, only 9 of those entries represented actual documents, which could not be located. The other 46 entries are administrative entries filed by the Circuit's staff and were not associated with an actual document.

3. Hearings

On June 12, 2017, I provided public notice of my intent to conduct a closed hearing, except as to the government and Doe, regarding the need for continued sealing. (Order dated June 12, 2017, Public Docket, 17-mc-1302.) The notice also provided an opportunity for objections to be raised. *Id.* On June 14, 2017, the Intervenors, the *Amici*, Roe, and others filed objections.[13] (Public Docket, 17-mc-1302, Dkt. Nos. 5, 7, 8, 9, 10.) Following a public hearing on those objections on June 16, 2017, I ordered that the unsealing hearing would

[13] The objections were initially filed on the Sealed Docket, 17-mc-1282, but were subsequently refiled, with redactions, on the Public Docket, 17-mc-1302.

be conducted publicly unless and until it became necessary to close the proceeding.

The unsealing hearing took place on June 19, 2017. For the first three hours it was open to the public. Notably, during the public portion of the hearing, the Intervenors put on the record statements from the publicly filed portion of Roe's Supreme Court petition for *certiorari*, setting forth information from Doe's PSR. (*See* Public Docket, 17-mc-1302, Transcript of Hearing ("Tr."), 06/19/17, attached as Exhibit C, Volume ("Vol.") 1 at 55-58)[14]

After approximately three hours, I made the requisite findings to close the hearing except as to the government, Doe, and, initially, Roe. Roe was permitted to participate in the first fifteen minutes of the closed proceeding, so that I could question him primarily about a sealed letter as to which Roe has asserted the attorney-client privilege.[15] (*See* Public Docket, 17-mc-1302, Tr. Vol. 2 at 5-6; Dkt. No. 94.) After Roe and his attorney were excused from the courtroom, I conducted an approximately three-and-one-half-hour hearing with the government and Doe to determine the specific reasons for their requests that certain documents and information remain under seal.

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[14] The transcript of the June 19, 2017 hearing is separated into three volumes each with its own pagination.

[15] I also questioned Roe about some other documents he authored to gain clarification about the source of certain factual assertions contained therein. (*See* Public Docket, 17-mc-1302, Tr. Vol. 2 at 2-5.)

4. Written Submissions on Sealing Issue

With respect to written submissions, the Intervenors and *Amici* filed their motions to unseal in this Court, whereas the government and Doe filed their substantive responses in the Sealed Docket, 17-mc-1282. Redacted versions of the government's and Doe's responses were filed on the Public Docket, 17-mc-1302, on June 16, 2017. (*See* Public Docket, 17-mc-1302, Dkt. Nos. 14 and 15.) In addition, because the Intervenors argued at the June 19, 2017 hearing, for the first time in the current proceedings, that the standard articulated in *United States v. Charmer*, 711 F.2d 1164 (2d Cir. 1983), does not apply to a proceeding such as this one, *i.e.,* a "civil" unsealing motion made by members of the public, as opposed to a litigant, such as Roe (*see* Public Docket, 17-mc-1302, Tr. Vol. 1 at 67-72), I invited the parties to submit briefing on this issue. Those briefs were filed on the Public Docket, 17-mc-1302, on June 22 and 24, 2017. (Public Docket, 17-mc-1302, Dkt. Nos. 27-30.) Although Roe has not formally moved to unseal the documents in this matter, he nonetheless has filed written submissions regarding the unsealing issue and participated in the proceedings before me, as an "Interested Party."

III. Discussion

A. The Instant Motions to Unseal

1. Intervenors' Motion

The Intervenors argue that the public has a First Amendment and common law right of access to

appellate proceedings and documents, and that the sealed documents filed in this Court should be unsealed because they are (1) "critical to understanding" the relationship between Doe and our current president, Donald Trump (Intervenors' Brief, Dkt. No. 379 at 1), and (2) "vital to the public's ability to understand the proceedings in this Court." (*Id.* at 17.) The Intervenors further argue that, in the face of the public's presumptive common law right of access, the government cannot demonstrate a substantial probability that a compelling interest will be harmed by disclosure of these materials. Notably, the Intervenors' initial moving papers did not acknowledge that the PSR was one of the sealed documents they are seeking to unseal or that a different standard applies to PSRs under *Charmer.* However, as previously noted and as discussed below, the Intervenors argue that *Charmer* is not applicable in this matter and, even if applied, does not bar the disclosure of the PSR in this matter.

2. *Amici*'s Motion

Piggy-backing on the Intervenors' brief, the *Amici* argue more generally that the sealed documents in this matter should be unsealed to "uncover facts regarding the effectiveness and integrity of government and their institutions." (*Amici's* Brief, Dkt. No. 414 at 1.) The *Amici* specifically cite the public's interest in learning more about Doe himself and his connections to President Trump. (*Id.* at 2-6.) At the hearing, the *Amici* focused their argument on the unsealing of the moving parties' briefs in this matter, arguing that

these briefs do not contain any non-public information and that their sealing violates the public's First Amendment and common law rights of access. (*See* Public Docket, 17-mc-1302, Tr. Vol. 1 at 17-18, 82-85.)

3. Government's and Doe's Responses

In recognition of developments relating to this matter that have occurred since 2010 – primarily, the wide dissemination of information relating to Doe's criminal case and his cooperation with the government – the government and Doe have taken the position that the vast majority of sealed documents may be fully unsealed, but that several documents should remain under seal in their entirety, including Doe's criminal case materials that are under seal in the SDNY Action, and that a number of other documents should be unsealed with redactions. In support of this continued limited sealing, the government and Doe generally rely upon "five considerations: (1); [redacted]; (2) the need to protect the safety of the government's cooperating witnesses and their families; (3) the need to protect the government's ability to continue to attract cooperating witnesses in the future; (4) the need to continue to keep [Doe's] PSR and its contents under seal; and (5) the need to honor sealing decisions by other courts." (Gov't Letter dated June 9, 2017, Sealed Docket, 17-mc-1282, Dkt. No. 20 at ECF 3)[16] The

[16] Because Doe "joins in the Government's position with respect to all of the documents which they identify to remain under seal" (Doe's Letter dated June 9, 2017, Sealed Docket,

government and Doe also set forth in a chart the particularized basis for each document they maintain should be kept under seal or redacted. (*See id.* at ECF 6-13).

B. Legal Standard

Under the common law, the public has a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.* 435 U.S. 589, 597 (1978). Similarly, the First Amendment provides the public with a "qualified . . . right to attend judicial proceedings and to access certain judicial documents." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004); *see also Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*"). Both the common law and the First Amendment require courts to first determine whether the presumption of access applies to the documents at issue. The presumption of access attaches only to "judicial documents." *Lugosch v. Pyramid Co.*, 435 F.3d 110, 119-20 (2d Cir. 2006). "[T]he mere filing of a paper document with the court is insufficient to render that paper a judicial document;" rather, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*").

17-mc-1282, Dkt. 19, at ECF 1), with a few exceptions, this Report cites only to the government's letter brief.

Under the common law, the presumption of access immediately attaches to judicial documents. *See United States v. Gotti*, 322 F. Supp. 2d 230 (E.D.N.Y. 2004). The common law test for determining whether the public is entitled to access judicial documents requires the court to balance the weight of the presumption of access against countervailing interests, such as the government's interest in confidentiality and privacy. *See Nixon*, 435 U.S. at 597-603; *Lugosch*, 435 F.3d at 119-20. The weight of the common law presumption of access falls on a "continuum" that is determined by "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *United States v. Amodeo* ("*Amodeo II*"), 71 F.3d 1044, 1049 (2d Cir. 1995). Once the presumption of access attaches, however, the presumption applies with greater force under the First Amendment than under the common law. *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013).

Although the presumption under the First Amendment carries greater force than under the common law, the presumption under the First Amendment is qualified and only applies to certain judicial documents. The Second Circuit has applied two approaches in determining whether the public's qualified First Amendment right attaches to a particular item. "First, the public has a right to gain access to judicial records (1) that 'have historically been open to the press and general public,' and (2) where 'public access plays a significant positive role in the functioning of the

particular process in question.'" *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (quoting *Hartford Courant Co.*, 380 F.3d at 92); *Press-Enterprise II*, 478 U.S. at 8-9 ("If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches."). The second approach considers "the extent to which the judicial documents are 'derived from or are a necessary corollary of the capacity to attend the relevant proceedings.'" *Lugosch*, 435 F.3d at 120.

Where the First Amendment right of access attaches, it may be overcome only if the party opposing access demonstrates that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9. A party opposing access must demonstrate that there is a "substantial probability" that disclosure will harm a compelling governmental interest. *Id.* at 14-15. "[The] district court must make specific, on the record" findings that closure or sealing is warranted. *United States v. Alcantara*, 396 F.3d 189, 199 (2d Cir. 2005) (quotations omitted). Those findings "may be entered under seal, if appropriate." *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (quotation omitted).

The First Amendment right applies to criminal and civil proceedings. *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013). It appears, however, that only a few circuits have addressed whether the First Amendment applies to appellate documents. The circuits that have addressed the issue have held that

history and logic dictate that the public's constitutional right of access extends to "judicial documents" generated during the appellate proceedings. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1097 (9th Cir. 2014) (holding that public's right of access extends to appellate dockets and filings therein); *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003) ("There can be no question that the First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this court.").

Based on these principles relating to the public's right of access to the judicial system, I find that the First Amendment right of access applies to appellate proceedings. Appellate records and oral arguments have been historically open to the public, and, logically, public access to appellate proceedings plays a significant role in the functioning of those courts. Public access to appellate proceedings, like public access to trial-level matters, provides assurance to the public that judicial proceedings are conducted fairly to all concerned, discourages litigant misconduct, curbs judicial abuse, and enhances the quality of the proceedings. Thus, the public has both a First Amendment and common law rights of access to the documents deemed to be judicial documents in this matter. However, as the Court has already held in this matter, a different standard applies to the disclosure of PSRs. Under *Charmer,* there is no presumptive right of access to a PSR and a party seeking its disclosure must make "a compelling demonstration that disclosure of the report

is required to meet the ends of justice." 711 F.2d at 1175; *see Roe II*, 428 F. App'x at 67 (quoting *Charmer*, 711 F.2d at 1175).

C. Findings and Recommendations

Having found that the First Amendment right of access applies to appellate proceedings and based on my consideration of the parties' written submissions and argument at the hearing, the government's and Doe's representations during the closed hearing, the documents at issue, and the relevant law, I find that the majority of the sealed documents in this matter should be unsealed. I also find that the government and Doe have demonstrated that the limited sealing and redaction they seek is "essential to preserve higher values and [are] narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9. With respect to those documents to which a right of access attaches, I find that the government and Doe have demonstrated a "substantial probability" that disclosure of the documents or portions thereof will harm a compelling governmental interest, namely, protecting the safety of Doe and his family, [redacted] preventing the unwarranted disclosure of Doe's PSR, and not hindering the government's ability to attract cooperating witnesses in the future. *See Press-Enterprise II*, 478 U.S. at 14-15. As to Doe's criminal case materials, I find that they are not judicial documents as to which a right of access attaches and that they were properly sealed in the SDNY Action. Nothing has changed since the sealing of those documents

that justifies their disclosure at this time. Lastly, with respect to Doe's PSR and information sourced from it, as well as Doe's financial statement, I find that the moving parties have failed to make a "compelling demonstration that disclosure [of these documents and information] . . . is required to meet the ends of justice." *Charmer,* 711 F.2d at 1175.

Discussed below and summarized in Exhibit A is a document-by-document unsealing analysis.

1. Documents that Should Be Unsealed in Their Entirety

As reflected in Exhibit A, the government and Doe do not argue for continued sealing as to the vast majority of sealed documents in this matter. The documents that the government and Doe believe may now be unsealed fall into the following categories:

- Documents that are purely administrative in nature. *See*, *e.g.*, Dkt. No. 180 (Notice of Defective filing); Dkt. No. 250 (Notice of Case Manager Change).
- Documents that appear to have been sealed solely because they reference Doe's and Roe's identities, or attach the docket from Doe's criminal case, all of which have since been unsealed. *See*, *e.g.*, Dkt. No. 1 (Notice of Appeal by Roe, attaching sealed district court docket in *United States v. Sater*, 98 CR 1101 (ILG) and identifying Respondent by his true name); Dkt. No. 30 (letter from Roe's

counsel referring to Roe by his true name); Dkt. No. 41 (Order captioned with Roe's true name); Dkt. No. 73 (Stipulation and Order of Substitution of Attorney for John Doe bearing Doe's true name and signature).

- Documents other than those that are purely administrative in nature that do not reference Doe's criminal case in any way. *See*, *e.g.*, Dkt. No. 182 (Order directing the parties to confer and submit proposed order); Dkt. No. 189 (Proposed order re Judge Glasser's continued jurisdiction).

- Documents that, while they reference Doe's criminal matter, including his cooperation with the government, only contain information that is now in the public domain, or information, the disclosure of which does not implicate a compelling governmental interest. *See*, *e.g.*, Dkt. No. 114 (Letter dated 03/03/2011 on behalf of the United States of America re press release discussing Doe's cooperation); Dkt. No. 195 (Order re District Court's continuing jurisdiction to decide issues relating to public disclosure of documents referencing Doe's cooperation).

Almost all of these documents are judicial documents as to which the First Amendment and common law rights of access attach. Because the government has not asserted, nor demonstrated, a compelling interest in non-disclosure, there is no justification for

their continued sealing. *See Press-Enterprise II*, 478 U.S. at 9, 14-15 (party opposing access must demonstrate that "closure is essential to preserve higher values and is narrowly tailored to serve that interest" and there is a "substantial probability" that disclosure will harm a compelling governmental interest); *Lugosch*, 435 F.3d at 119-20 (where common law right of access attaches, court must balance weight of presumption of access against countervailing interests against presumption, such as government's interest in confidentiality and privacy).

2. Documents that Should Remain Sealed in Their Entirety

a) *Doe's Criminal Case Materials*

The government and Doe argue for the continued sealing of Doe's criminal materials that were attached to the SDNY Action, *i.e.*, Doe's cooperation agreement, financial statement, and PSR, and two proffer agreements between Doe and the government. These materials have been under seal in the SDNY since May 2010. *See Kriss v. Bayrock Group*, *LLC*, 10-cv-3959, Dkt. Nos. 2, 401, and 406-1, and *compare* with Dkt. 142, JA 496 – JA 551.

I find that continued sealing of these materials is appropriate, with the exception of the first pages of the proffer agreements and the cooperation agreement, as discussed below. As this Court held in April 2017, Doe's criminal materials do not implicate a First Amendment or common law right of access. *Doe v. Roe*,

16-2935-cv. Dkt. No. 137-1 at ECF 3 (2d Cir. April 20, 2017). [redacted] *See United States v. Doe, In the Matter of the Motion to Unseal Docket*, 98-cv-1101(ILG), Memorandum and Order, Dkt. 221 at ECF 3. Nor are Doe's cooperation or proffer agreements relevant to the SDNY Action. *See Amodeo I*, 44 F.3d at 143 ("The mere filing of a paper or document with the court is insufficient to render that paper a judicial document. . . ."). The fact of Doe's cooperation with the government is well-known, and the details of his cooperation agreement and terms of his proffer sessions with the government do not add any new or relevant information. However, the first pages of the cooperation and the proffer agreements have already been unsealed by Judge Glasser when they were attached to a letter filed by Roe in the Doe's criminal case. (*See* Dkt. No. 142 at Bates SM0005 (JA 586), SM0006 (JA 587), (JA 589) SM0008.) Therefore, I recommend that the first pages of the cooperation and proffer agreements, which were attached to the SDNY complaint, be unsealed because they are already public, (Dkt. No. 142 at Bates SM0002 (JA 466), SM0004 (JA 468), SM0007 (JA 472)), but that the remainder of the cooperation and proffer agreements remain under seal. Even if a right of access existed as to these documents, to the extent the moving parties argue that these agreements should be unsealed because they are relevant to the unsealing proceedings before this Court, there is a fatal circularity to their argument: if accepted, it would mean that all one would need to do

to unseal a document is to move for its unsealing and then claim that the document is a judicial document to which a presumptive right of access attaches because it is relevant to that unsealing proceeding. Surely a document has to be relevant to a proceeding other than one over its own unsealing in order to qualify as a judicial document to which a presumptive right of access attaches. In addition, Doe's cooperation and proffer agreements are not relevant to the public's need to know more about the relationship between Doe and President Trump.

Doe's PSR, as this Court has found and as discussed further below, is also not subject to a right of access, and its disclosure is governed by a heightened standard that requires the moving party to make a compelling showing that disclosure is necessary to meet the ends of justice. Doe's financial statement, because it is a required part of the PSR process, deserves the same degree of protection as the PSR. To permit third parties to obtain and disclose a defendant's financial statement, which contains highly sensitive and personal information, without an "ends of justice" showing would undermine the PSR preparation process, which requires confidentiality to ensure complete and accurate responses by defendants.

b) *Government's Motion for Amended Summary Order*

The government and Doe also maintain that two other documents – Dkt. Nos. 309 and 330 – should

remain under seal in their entirety. [redacted][17]

[redacted]

[17] [redacted]

[redacted][18][redacted]

[redacted]

[18] Also of note is that during the June 19, 2017 closed hearing, the government declined to discuss in greater detail the justification for the continued sealing of Dkt. Nos. 309 and 330, in the presence of Doe's attorney, opting instead to explain further in a sealed and *ex parte* written submission. (*See* Public Docket, 17-mc-1302, Tr. Vol. 3 at 86-87; Gov't Letter dated June 27, 2017, Sealed Docket, 17-mc-1282, Dkt. No. 29.)

[redacted]

Balancing the interests of the government and Doe, on the one hand, against the moving parties' and the public's presumptive right of access, on the other, I find that the sealing of Dkt. Nos. 309 and 330 in their entirety is appropriate. *See Lugosch*, 435 F.3d at 119-20 (where judicial documents involved, court must "balance the presumption of access against countervailing factors"). As discussed, the government and Doe have articulated compelling reasons for the non-disclosure of information [redacted] Indeed, at the June 29, 2017 hearing, Roe's attorney, knowing only that the government filed sealed motions in the summer of 2011, engaged in incendiary speculation about the reasons behind the motions:

> This makes this [] incredibly, incredibly of interest to the public how the Government could in secret move to change an order so that the Judge Glasser would not take up the unsealing, which the Second Circuit had ordered him to take up, and which the Government had asked him to take up. So there is – we submit that there is an issue of overriding misconduct. We submit it's prosecutorial misconduct. And regrettably, it may be judicial misconduct, because that submission should have been made known to the public that the

> Government was moving in secret to try to undo what the Second Circuit had ordered in public.

(Public Docket, 17-mc-1302, Tr. Vol. 1 at 22.) Unsealing any portion of the motions would only fuel more improper and potentially dangerous speculation by Roe and others.

[redacted]

3. Documents that should be Unsealed Subject to Redactions

The government and Doe are seeking the unsealing of certain documents with redactions. The specific bases for these redactions, as identified by the government and Doe, are set forth in Exhibit A and are discussed below.[19] Because of the volume of material at issue and the repetitive nature of the documents, I will address the documents in groups according to the interest served by the redactions.

[19] The government and Doe agreed to narrow some of the proposed redactions during the June 19, 2017 hearing and in their supplemental submissions filed thereafter. (*See* Public Docket, 17-mc-1302, Tr. Vol. 3; Sealed Docket, 17-mc-1282, Dkt. Nos. 22, 23, 24, 25, and 27.)

a) *Protecting the Safety of Doe and his Family*

As the moving parties explain in their unsealing submissions, and as the government and Doe acknowledge, due to the ever-expanding scope of disclosures that have occurred relating to Doe's cooperation, including public disclosures by Doe himself, both the fact and general nature of Doe's cooperation is now well known. (*See*, *e.g.*, Gov't Letter dated June 9, 2017, Sealed Docket, 17-mc-1282, Dkt. No. 20 at ECF 3-4; Intervenors' Brief, Dkt. No. 379 at 16, Exhibit N (discussing Doe's assistance in investigation members of organized crime, such as La Cosa Nostra ("LCN") and referencing Doe's interviews with the media); *Amici's* Brief, Dkt. No. 414 at 4-6.) [redacted] [20] [redacted]

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[20] [redacted]

[redacted][21]

Below is a representative sample of the redactions that I propose on the basis of Doe's safety:

10-2905 Dkt. No.	Redacted Pages	Redacted Text
Dkt. No. 32	Bates SM0004-SM0005	[redacted][22]
Dkt. No. 55	Bates SM0011 Bates SM0023	[redacted]
Dkt. No. 140	Bates SM0013, n.6	[redacted]

Based on the reasons articulated by the government and Doe, I find that the continued sealing of the proposed redacted information is warranted to protect

[21] [redacted]

[22] Certain non-substantive redactions are intended to conform the document to the substantive redactions made elsewhere in the document. [redacted]

the safety of Doe and his family, and that the proposed redactions are narrowly tailored.

b) [redacted]

[redacted][23]

I find that this proposed redaction is justified. [redacted] and is narrowly tailored to achieve that purpose.

c) *Preventing Disclosure of Doe's PSR and Information Sourced from It*

As reflected in Exhibit A, there are numerous documents as to which the government and Doe request redactions on the basis that the information came from, or reveal the contents of, Doe's 2004 PSR. As discussed above, both Judges Glasser and Cogan have

[23] [redacted]

ruled multiple times that Doe's 2004 PSR and all information obtained from it should not be disclosed – decisions that have all been affirmed by this Court. See *Roe II*, 428 F. App'x at 64, 66-67; *In re Application to Unseal 98 CR 1101 (ILG)*, *United States v. John Doe*, 98 11-cr-1101, 13-2373, Dkt. 161-1 at 3 (2d Cir. June 5, 2017); *In re Doe v. Lerner*, 16-2935, Dkt. No. 137-1 at 3 (2d Cir. April 20, 2017); *see also Roe II*, 428 F. App'x at 64-65 (noting Judges Glasser's and Cogan's separate orders directing Roe and his associates to return to EDNY, or destroy, all copies of PSR in their possession).

[redacted] *Charmer,* 711 F2d. at 1175; Memorandum Decision and Order, *In re Motion for Civil Contempt*, 12-mc-557 (BMC), Dkt. 199 at ECF 8-9 (E.D.N.Y. June 21, 2016); *United States v. Doe, In the Matter of the Motion to Unseal Docket*, 98-cv-1101(ILG), Memorandum and Order, Dkt. 221 at ECF 3-4 (E.D.N.Y. March 13, 2013). In affirming Judge Cogan's June 21, 2016 decision approving the continued sealing of the PSR and all information obtained from it, this Court concluded that "neither the First Amendment nor the common law right of access [was] implicated . . . [because] none of the sealed documents were necessary to understand the merits of the civil contempt proceeding [before Judge Cogan] and there is a strong interest in secrecy because both John Doe's safety as a cooperator and the Government's interest in protecting the identity of cooperators are implicated." *Doe v. Lerner*, 16-2935, Dkt. No. 137-1 at 3 (2d Cir. April 20, 2017).

Notwithstanding these prior rulings, Intervenors argue that *Charmer* does not apply here because: (1) *Charmer* only stands for the proposition that a PSR is not a judicial document in an "ordinary criminal case," and that because this is a civil unsealing matter, the applicable access standard is the one from *Press-Enterprise II* and the Circuit's *post-Charmer* cases, such as *Lugosch* and *Hartford Courant Co.* (Public Docket, 17-mc-1302, Dkt. No. 27 at ECF 9-11); (2) *Charmer* is wrong insofar as it held that a PSR is not a judicial document (*id.* at ECF 11, n. 8); and (3) even if Doe's PSR was not a judicial document when it was created as part of the criminal proceeding, "it became [one] when it was made part of the record in Doe's subsequent litigation to prevent its further dissemination" (*id.* at ECF 12). These arguments are unpersuasive.

First, the Intervenors provide no support for their argument that *Charmer* only applies to the disclosure of PSRs in the "ordinary criminal case." Indeed, in making this argument, the Intervenors fail to acknowledge or address this Court's and the district courts' consistent application of *Charmer* in this matter. Furthermore, the sentence in *Charmer* upon which the Intervenors appear to base their argument says nothing of the sort: "This appeal presents questions as to whether and under what circumstances a presentence report prepared by the United States Probation Service . . . for use of the district court in sentencing a defendant in a criminal case may be disclosed to persons other than the defendant, his attorney, or the prosecuting attorney." *Charmer*, 711 F.2d at 1167;

Intervenors' submission, Public Docket, 17-mc-1302, Dkt. 27 at ECF 10 (citing *Charmer*, 711 F.2d at 1167). The context of *Charmer* itself makes clear that the decision applies to the disclosure of the PSR to third persons outside the "ordinary criminal case." In *Charmer*, the PSR was disclosed to a state attorney general, who sought to use it in a separate antitrust action. It was in this context – not dissimilar to this matter[24] – that the Circuit announced the rule that a "district court should not authorize disclosure of a presentence report to a third person in the absence of a compelling demonstration that disclosure of the report is required to meet the ends of justice." *Charmer*, 711 F.2d at 1175.

The Intervenors' interpretation of *Charmer* runs contrary to the purpose of the standard established in that case, which is to protect against the unwarranted or reckless disclosure of the highly sensitive information contained in a PSR, which is frequently given in confidence and is often unchallenged, unverified, or incomplete. *Id.* at 1171. The disclosure of this sensitive and potentially inaccurate information could cause untold harm, both physical and otherwise, to individuals who provide information included in the PSR, as well as those who are the subjects of it. *Id.* at 1175 (recognizing potentially severe consequences that could

[24] Roe suggests that the *Charmer* panel may have been operating under the misconception that a government official, such as a state attorney general, does not have First Amendment or common law rights of access, like private citizens do, and thus *Charmer* is distinguishable from this case. Public Docket, 17-mc-1302, Dkt. No. 28 at ECF 11. Roe, however, offers absolutely no support for this theory.

result from disclosure of information in PSR). Here, there is an additional concern about harm to the Probation Officer who prepared the PSR and at whom Roe levels seemingly unfounded accusations about the officer's conduct. (*See* Public Docket, 17-mc-1302, Dkt. No. 28 at ECF 7, 26, 27.) Indeed, as this panel has already found, "[b]ecause proof of Doe's conviction (as opposed to his cooperation) remains available from other public documents – including a press release by the United States Attorney's Office for the Eastern District of New York – and *because the PSR is an incomplete and ultimately inadmissible document to which neither Doe nor the government will ever have the opportunity to object*, . . . the PSR is of dubious utility in the civil case except as a tool to intimidate and harass Doe by subjecting him to danger." *Roe II*, 428 F. App'x at 67 (emphasis added) (citation omitted).

Second, the Intervenors incorrectly argue that *Charmer* ruled that a PSR is not a judicial document. In fact, the panel in *Charmer* did not apply a First Amendment analysis or reach such a conclusion. Rather, the panel's conclusion that a heightened standard should be applied to the disclosure of PSRs was based on the unique nature and history of PSRs. *Charmer*, 711 F.2d at 1172-75. In any event, regardless of whether the panel in *Charmer* expressly found that PSRs are not judicial documents, in affirming Judge Cogan's decision not to disclose the PSR, this Court found that "neither the First Amendment nor the common law right of access is implicated here." Summary Order, *Doe v. Lerner*, No. 16-2935, Dkt. No. 137-1 at 2

(2d Cir. April 20, 2017); *see also United States v. Alcantara*, 396 F.3d 189, 197 n.6 (2d Cir. 2005) ("Courts have generally held . . . that there is no First Amendment right of access to pre-sentence reports.")

Third, the argument that even if Doe's PSR did not start off as a judicial document when it was prepared as part of the criminal case, it became one when it became the subject of the unsealing action, is precisely the "bootstrapping" approach that Judge Cogan rejected earlier in these proceedings. *See* Memorandum Decision and Order, *In re Motion for Civil Contempt*, 12-mc-557 (BMC), Dkt. 199, at ECF 3-4 (E.D.N.Y. June 21, 2016) (explaining that a sealed docket for the unsealing motions was created to prevent Roe from "bootstrapping himself into the position that the injunctions sought to prohibit," as he had done in the SDNY Action). In effect, the Intervenors' argument is that Roe's act of disclosing Doe's PSR in the civil action, which set off these protracted unsealing and contempt proceedings, somehow transformed the PSR into a judicial document as to which the public now has a First Amendment right of access. In other words, Roe, by improperly disclosing the PSR at a time when he did not have a First Amendment right to the PSR, created such a right. The danger inherent in this argument is obvious: it would allow a third party who is not involved in a criminal case in any way to create a presumption of access to a defendant's PSR simply by moving to unseal the PSR in a separate civil action. Sanctioning such a practice would plainly undermine the protections historically afforded to PSRs, *see*

Charmer, 711 F.3d at 1169-76, and would promote and reward potentially unlawful conduct.

The moving parties and Roe also argue that, even if *Charmer* applies, disclosure of the PSR is "required to meet the ends of justice." This Court has repeatedly rejected this argument. Nothing has changed since the Court's May 2017 decision affirming Judge Cogan's refusal to unseal the PSR that justifies a different result.

The new "ends of justice" bases relied upon by the Intervenors are that the PSR is (1) "critical to [the public's] understanding" the connection between Doe and President Trump (Intervenors' Brief, Dkt. No. 379 at 1), and (2) "vital to the public's ability to understanding the proceedings in this Court." (*Id.* at 17.) These new bases do not amount to a "compelling demonstration that disclosure of the [PSR] is required to meet the ends of justice." *Charmer*, 711 F.2d at 1175.

With regard to the public's need to understand the connection between Doe and President Trump, the moving parties offer no basis for believing that the PSR contains any such information. Indeed, at the June 19, 2017 hearing, Intervenors' counsel could only argue that the PSR "contains information of the highest public significance *potentially.*" (Public Docket, 17-mc-1302, Tr. Vol. I at 70 (emphasis added).) The moving parties' belief that the PSR "potentially" contains "information of the highest public significance" plainly does not meet the standard under *Charmer* of demonstrating that disclosure of the PSR is "required to meet the ends of justice." Mere speculation that a document

might contain information of public significance is not enough to meet this demanding standard. Allowing third parties to access a defendant's PSR based on the mere hope that it might contain information of interest to the public would render the confidentiality and protections afforded to PSRs a nullity.[25]

Furthermore, even if the PSR contained such information, disclosure still would not likely be justified. As a general matter, the "ends of justice" would not be served by releasing information that is of questionable completeness and reliability, especially where disclosure could result in harm not only to the defendant, but to anyone who provided information included in the PSR. Nor would the "ends of justice" be served by breaching the confidentiality that is necessary to facilitate candor, honesty, and completeness by defendants and others who provide information for the PSR.

With regard to the Intervenors' argument that disclosure of the sealed documents in this matter is "vital to the public's ability to understanding *the proceedings* in this Court[ ]" (Intervenors' Brief, Dkt. No. 379 at 17 (emphasis added)), as previously discussed, a party cannot cause the propriety of a PSR disclosure to become the subject of a court proceeding – whether through an unsealing proceeding or the improper disclosure of the PSR – and then argue that the PSR must be disclosed because it is the subject of that court

[25] [redacted]

proceeding. Thus, given the particular nature of the proceedings before this Court, disclosing the PSR to facilitate the public's understanding of them would not "meet the ends of justice."

Roe argues that the Supreme Court has made a determination that full disclosure of the PSR is in the "public interest," *i.e.*, "meets the ends of justice," as demonstrated by the Court allowing Roe to file a partially redacted petition for *certiorari* that disclosed information from the PSR. (Public Docket, 17-mc-1302, Dkt. No. 28 at ECF 7-9, 16) (arguing that this Court is bound by the Supreme Court's "law of the case" determination).) This argument is patently meritless. Clearly, the Supreme Court does not make legal findings via its redaction procedures, as administered by its Clerk's Office staff. And there simply is nothing in the record to even suggest that the Supreme Court made a finding that Doe's disclosure of Doe's PSR information – in knowing contravention of this Court's February 2010 order that any petition to the Supreme Court be filed under seal (*see id.* at 9) – was in the public interest. Indeed, the Supreme Court's denial of Roe's petition for *certiorari* and his petition for reconsideration would suggest otherwise.[26]

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[26] Roe also rehashes the same argument he has been making since 2010 about disclosure of the PSR being necessary to shed light on Doe's purported lies about his ability to pay restitution to the victims of his crimes and the government's alleged complicity with respect to Doe's conduct, as well its failure to protect victims' rights. (Public Docket, 17-mc-1302, Dkt. No. 28 at ECF 7-8, 13.) The Court, however, need not reconsider this argument, which it

Of more merit, however, is the moving parties' argument that Roe's public filing of information from Doe's PSR as part of his petition for *certiorari* justifies the full disclosure of the PSR since the information is already in the public domain. (Intervenors' Brief, Dkt. No. 379 at 15; Public Docket, 17-mc-1302, Dkt. No. 28 at ECF 25 (citing *Gambale v. Deutsche Bank A.G.*, 377 F.3d 133 (2d Cir. 2004) (court lacks authority to keep sealed what is public).) While it is undisputed that information from, or describing the contents of, Doe's PSR was publicly filed as part of Roe's Joint Appendix in the Supreme Court, this disclosure does not justify further disclosure of the PSR.

First, the disclosure of the information by Roe in his petition for *certiorari,* in itself, does not demonstrate that the disclosure meets the ends of justice. Indeed, for the reasons discussed above, I do not think that releasing any of Doe's PSR information in the SDNY Action meets this test.

Second, while it is unfortunate that the sealed information from Doe's PSR was publicly filed on the Supreme Court's docket,[27] there is a difference between Roe's allegations about what is in the PSR and

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rejected in its April 20, 2017 Order. *See Doe v. Lerner*, 16-2935, Dkt. No. 137-1 at 2-3 (2d Cir. April 20, 2017).

[27] Roe used the same tactic here to disclose information from Doe's PSR in the public record, when he gratuitously inserted information from the PSR into his submission on the *legal* question of whether *Charmer* applies to this matter, which necessitated the sealing of that submission. (*See* Public Docket, 17-mc-1302, Dkt. No. 28 at ECF 7.)

confirming those allegations by releasing the PSR. Roe's allegations about what is in the PSR does not justify the disclosure of the entire PSR. Even assuming Roe released actual information from the PSR, the "cat-out-of-the-bag" rationale does not favor disclosure in the same way when the basis for sealing is the sanctity of the PSR as opposed to the defendant's safety or the integrity of the government's investigation. Even if information from the PSR is disclosed, the principle that a PSR should only be disclosed to meet the ends of justice remains intact, and dictates that no additional disclosures be made unless they satisfy this test. Furthermore, permitting disclosure of the PSR under these circumstances would reward Roe and his attorney's improper conduct with respect to the PSR in this matter and potentially incentivize them and others to engage in similar conduct in the future. Accordingly, I do not find that Roe's purported disclosure of information from Doe's PSR on the Supreme Court's docket justifies the additional or full disclosure of the PSR.

Below is a representative sample of the redactions that I propose on the basis of the PSR:

10-2905 Dkt. No.	Redacted pages	Redacted Text
Dkt. No. 66[28]	Bates SM0016	
	Bates SM0034	
Dkt. No. 140	Bate SM0012	
	Bates SM0013	
	Bates SM0049	[29]
		[30]
	Bates SM0062	

[28] The same redactions have been made to Dkt. No. 85, which is Roe's Supreme Court petition for *certiorari*. The petition was filed in this case with redactions that cannot be undone in Dkt. No. 85. The redactions indicated above, however, are in addition to the petition's original redactions.

[29]

[30]

		[redacted]
Dkt. No. 142	(JA-496 to JA 551)	[Entire PSR]
Dkt. No. 142	(JA-584) Bates SM0003	[redacted]
Dkt. No. 143	(JA-668) Bates SM0017 (JA-669) Bates SM0018	[redacted]
Dkt. No. 179	Bates SM0028 Bates SM0029	[redacted]

[31] [redacted]

Dkt. No. 266	Bates SM0017	[redacted]
Dkt. No. 306	Bates SM0012	[redacted]
Dkt. No. 314	Bates SM0007	[redacted]
Dkt. No. 337	Bates SM0007	[redacted]
Dkt. No. 347	Bates SM0022	[redacted]

Lastly, there is one document, Dkt. No. 94, which Roe seeks to unseal with redactions. Roe originally filed the document under seal on the basis of attorney-client and work product privileges. However, as part of the hearing process, he has agreed to the unsealing of the document with redactions. [redacted] I have reviewed the proposed redactions and find that they are appropriate based on Roe's asserted attorney-client and work product privileges.

d) *Prior and Existing Court Orders*

Although certain documents have been redacted pursuant to prior orders by this Court and the EDNY

and SDNY district courts, I believe that the continued sealing of these documents should not be justified solely on the basis of these prior orders because this Court has the authority to (1) revisit and/or rescind its own prior orders based on changed circumstances, and (2) make rulings about unsealing that are different than, or contrary to, those made by district judges in the EDNY and SDNY. To the extent that the government and Doe initially relied on prior court orders as the sole justification for continued sealing, I asked them to provide other bases, if they exist, to continue the sealing of these documents. Where the government did so, and I agreed with that reasoning, I included them in the prior categories of documents to be sealed or redacted. Where the government and Doe offered no additional basis for sealing, I reviewed the documents independently to determine if the redactions should remain.

[redacted]

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[32] [redacted]

[redacted]

10-2905 Dkt. No.	Redacted Pages	Un-Redacted Text
Dkt. No. 143	(JA 634) Bates SM0010 (JA 734) Bates SM0001	[redacted]

4. Missing Documents

As discussed above, there appears to be 9 documents from the Court's docket that could not be located. I cannot take a position on the unsealing of the missing documents, but, as a practical matter, they cannot be unsealed because currently there are no documents to unseal.

IV. Conclusion

For the reasons stated above, I recommend that the panel grant, in part, and deny, in part, Intervenor's and *Amici's* motions to unseal.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: July 5, 2017
Brooklyn, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Richard Roe, Jane Doe,
John Doe 2,

Respondents-Appellants,

v.

United States of America,

Appellee.

John Doe,

Defendant-Appellee.

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UNSEALING ORDER OF SPECIAL MASTER

Docket No. 10-2905

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Richard Roe,

Petitioner,

v.

United States of America,

Respondent,

v.

John Doe 1, John Doe 2,

Defendants.

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Docket No. 11-479

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re the Appointment of Pamela K. Chen as Special Master	17-mc-1282 (PKC)
In Re Public Docket – the Appointment of Pamela K. Chen as Special Master	17-mc-1302 (PKC)

PAMELA K. CHEN, United States District Judge:

On April 21, 2017, I was designated special master by a panel of the Second Circuit in Nos. 10-2905 and 11-479 to review and provide recommendations regarding the motions of Richard Behar and Forbes Media LLC, as intervenors, David Cay Johnston, DCReport.org, Joe Conason, National Memo, Russ Baker, WhoWhatWhy.org, Dan Wise, and WiseLawNY, as *amici curae* [sic], and Richard Roe[1], as Respondent-Appellee and Petitioner, to unseal those dockets. The government and John Doe[2], whose criminal case

[1] Roe's true name, Frederick M. Oberlander ("Oberlander"), has been known publicly since August 11, 2011. (*See* Letter by Richard Lerner dated June 16, 2017, 17-mc-1302, Dkt. No. 16, at 2 (E.D.N.Y.).) I, therefore, refer to Roe by his true name in this Order.

[2] Doe's true name, Felix Sater ("Sater"), became public "when the Clerk's Office in the Eastern District of New York inadvertently unsealed the [criminal] docket sheet, revealing that Sater was 'John Doe' and a cooperator." *See* Summary Order, *In re Applications to Unseal 98 CR 110 (ILG), USA v. John Doe*

materials constituted some of the documents at issue, responded to the unsealing motions.

To facilitate that review, I created two dockets in the district court, one sealed except as to the government and Sater, and one public: (1) *In Re the Appointment of Pamela K. Chen as Special Master*, 17-mc-1282 (the "Sealed Docket"); and (2) *In Re Public Docket – the Appointment of Pamela K. Chen as Special Master*, 17-mc-1302 (the "Public Docket"). However, I directed the parties to file many of the documents on the Public Docket under seal in order to comply with the panel's sealing orders.

Between July 5-14, 2017, I submitted to the panel a Special Master Report (the "Report"), two addenda, and a chart, setting forth my findings and recommendations regarding the unsealing motions filed in Nos. 10-2905 and 11-479. On September 20, 2017, as directed by the panel, I publicly filed redacted versions of the Report, addenda, and chart in No. 10-2905.[3] (No. 10-2905, Dkts. 465, 472-475.) The panel gave the moving parties the opportunity to file objections to the Report and the government and Sater the opportunity to respond. (*Id.*, Dkt. 465.)

On February 9, 2018, the panel issued an order "adopting in full the conclusions and recommendations of the [R]eport and addenda." (*Id.*, Dkt. 494.) In

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98-CR-1101, 13-2373, Dkt. 161-1, at 3. I, therefore, refer to Doe by his true name in this Order.

[3] No. 11-479 is a sealed matter, to which I does [sic] not have access.

addition to granting the unsealing motions to the extent recommended in the Report and unsealing the moving parties' motion papers in Nos. 10-2905 and 11-479, the panel granted me "the authority to determine whether to unseal any or all motion papers filed in the course of the special master proceeding" in the district court. (*Id.*, Dkt. 494.)

Accordingly, I have made determinations regarding the continued sealing and the unsealing, either in whole or part, of all documents filed in both the Public and Sealed Dockets. These determinations are summarized in two charts attached hereto as Exhibits A and B.

With respect to these determinations, I note the following:

(1) *Bases of Determinations*: In making these determinations, I have applied the same reasoning reflected in the Report, which is being unsealed in redacted form in the Public Docket. (*See* Public Docket, Dkt. 79-1; *see also* No. 10-2905, Dkt. 472)[4]

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[4] The Court further notes that it has redacted all references to the February 14, 2011 oral argument before the panel in Nos. 10-2905 and 11-479, which was a closed proceeding. Although the transcript of the argument was unsealed by the Honorable Brian M. Cogan in *In Re Motion for Civil Contempt by John Doe*, 12-mc-557 (*see* 12-mc-557, Order dated July 21, 2016), I have been advised by the Clerk's Office for the Second Circuit that the transcript remains under seal there. I, therefore, decline to unseal references to the sealed oral argument unless instructed by the panel to do so.

(2) *Unsealing of Documents on the Sealed Docket*: Those documents in the Sealed Docket that are being partially or fully unsealed have been re-filed in the Public Docket.

(3) *Second Circuit Documents Attached to District Court Filings*: To the extent that any filing in the Sealed or Public Docket included, as attachments, documents filed in Nos. 10-2905 and 11-479 that are the subject of the unsealing motions, I have kept them under seal, because the continued sealing or the unsealing of those documents is being done by the Circuit pursuant to the panel's adoption of the Report.

(4) *Transcript of Unsealing Hearing on June 19, 2017*: As discussed in the Report (*see* Public Docket, Dkt. 79-1 at 6-7; No. 10-2905, Dkt. 472, at 6-7), I conducted a hearing on the unsealing motions on June 19, 2017. For the first three hours, the hearing was open to the public. After approximately three hours, I made the requisite findings under *Press-Enterprise Co. v. Superior Court of Cal. for Riverdale County*, 478 U.S. 1, 13-14 (1984) ("*Press-Enterprise II*") to close the hearing except as to the government's and Sater's counsel, and, initially, Oberlander and his attorney, Richard Lerner ("Lerner"). Oberlander and Lerner were permitted to participate in the first fifteen minutes of the closed proceeding primarily to discuss possible redactions to a sealed letter as to which Oberlander had asserted the attorney-client privilege. After Oberlander and Lerner were excused from the courtroom, I conducted an approximately three-and-one-half-hour hearing with the government's and Sater's counsel to determine the

specific reasons for their requests that certain documents and information remain under seal.

As noted, the transcript of the public portion of the unsealing hearing has already been filed on the Public Docket. (*See* Public Docket, Dkt. 33.) However, the closed portions of the proceedings—first with Oberlander, his attorney, and the government's and Sater's counsel present, and then with only the government's and Sater's counsel present—were not previously filed on either the Public or Sealed Docket. I now file on the Public Docket, under seal, transcripts of those closed portions of the proceedings. (*See* Public Docket, Dkt. Nos. 37 and 38.) For the same reasons articulated at the unsealing hearing, I find that the sealing of the transcript of the closed proceedings is necessary to protect the compelling interests of the government and Sater, and is narrowly tailored to serve those interests. *Press-Enterprise II*, 478 U.S. at 9 (where First Amendment right of access attaches, it may be overcome only if party opposing access demonstrates that "closure is essential to preserve higher values and is narrowly tailored to serve that interest"); (*see* Public Docket, Dkt. 33, at 104-06).

(5) *Oberlander's Supreme Court Filings Purportedly Disclosing the Contents of Sater's Presentence Report ("PSR")*: Although I permitted the moving parties to recite on the public record at the June 19, 2017 hearing references from Oberlander's petition for writ of *certiorari* that purport to disclose the contents of

Sater's PSR[5], I have redacted similar references in Oberlander's submission entitled, "In Support of C. Collins' Letter Motion and in Support of His Own Motion for Emergency Declaratory and Related Relief . . . " (Public Docket, Dkt. 42 (*i.e.*, Public Docket, Dkt. 32 unsealed with redactions)), because those references came from one of Oberlander's other Supreme Court filings that, contrary to his attorney's representations, is not accessible through the Supreme Court's public docket or Westlaw. (*See* Public Docket, Dkt. 42-1 at ECF 47[6] (Oberlander's Supreme Court motion seeking permission to file a redacted writ petition).)

(6) *Oberlander's Motion for Reconsideration of My Ruling Prohibiting Him from Making Electronic Filings on the Public Docket*: On July 11, 2017, I ruled that Oberlander thereafter was prohibited from filing anything electronically on the Public Docket and that all of his future submissions would be delivered to my chambers in hard copy for filing. (Public Docket, Order dated July 11, 2017.) My ruling was prompted by Oberlander's gratuitous disclosure of information purportedly from Sater's PSR in a brief that was intended to address a purely legal issue ("*Charmer* brief"). (Public Docket, Dkt. 41 (*i.e.*, Public Docket, Dkt. 28 unsealed with redactions).) After it was discovered that Oberlander's *Charmer* brief contained sensitive information, I sealed it. Oberlander responded by filing a

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[5] (Public Docket, Dkt. 33, at 55-58.)

[6] "ECF" refers to the pagination generated by the Court's Electronic Document Filing System and not the document's internal pagination.

motion to unseal the brief.[7] (Public Docket, Dkt. 42 (*i.e.*, Public Docket, Dkt. 32 unsealed with redactions).) In that motion, Oberlander *again* included references to the purported contents of Sater's PSR. (Public Docket, Dkt. 42-1, at 9.) I denied that motion and issued the July 11, 2017 electronic filing ban on Oberlander.

On July 25, 2017, Oberlander submitted to the Court, in hard copy, a motion for reconsideration seeking to lift the filing restriction.[8] That motion is pending. In it, Oberlander argues, *inter alia*, that: (1) having entered the case late, he was unaware of my prior order that all submissions to the Public Docket "be filed under seal until the Second Circuit instructs otherwise" (Public Docket, Order dated May 10, 2017), and thus his failure to comply with this requirement was neither intentional nor willful (Public Docket, Dkt. 35, at 1-3, 5); (2) my application of the rule was "one-sided" because various filings by other parties were not filed under seal (*id.*, at 3-4, 7); and (3) the sealing of Oberlander's *Charmer* brief was content-based and thus *per se* unconstitutional (*id.*, at 8).

I now deny Oberlander's reconsideration motion for three reasons. First, although Oberlander did not appear in the case at the beginning, he (as an attorney) and his counsel, Lerner, had an obligation to know

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[7] As required, Oberlander's motion to unseal his *Charmer* brief was originally filed with access limited to case participants. (Public Docket, Dkts. 32, 42 (*i.e.*, Public Docket, Dkt. 32 unsealed with redactions).)

[8] That motion has been docketed as Dkt. 35 in the Public Docket.

what filing restrictions or protocols had been applied in the case. Second, while Oberlander is correct that the sealing requirement imposed in the Public Docket was not uniformly observed by the parties (*compare* Public Docket, Dkt. 27 (Intervenors' parties'-eyes-only filing of their *Charmer* brief) *with* Dkt. 31 (Government's public filing of its *Charmer* brief), that fact does not relieve Oberlander or his counsel from complying with that requirement. Third, the electronic filing ban imposed on Oberlander following the submission of his *Charmer* brief was not "content"-based for purposes of constitutional analysis. *See*, *e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831, 829 (1995) (viewpoint discrimination is a "subset or particular instance of the more general phenomenon of content discrimination," in which "the government targets not subject matter but particular views taken by speakers on a subject"). Rather, the ban was based on Oberlander's disclosure in his *Charmer* brief of the sealed information that was the very subject of the unsealing motions. Although Oberlander is free to dispute the propriety of sealing this information, he is not free—as he well knows—to disclose that information *before* the Court has ruled on that issue. Thus, I find that the electronic filing ban as to Oberlander was, and continues to be, warranted, and deny Oberlander's motion to reconsider. *See In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 487 (2d. Cir. 2013) ("[D]istrict courts possess the 'inherent power' and responsibility to manage their dockets so as to achieve the orderly and expeditious disposition of cases.") (quotations and citation omitted).

To be clear, while I do not anticipate any future filings by Oberlander or any other party in this matter, Oberlander is still banned from doing so electronically and may only make submissions to the Court in hard copy.

(7) *Termination of the Special Master Proceeding*: With the panel's adoption of the Report, I deem my authority and responsibilities as special master to be terminated, unless and until otherwise instructed by the panel. Accordingly, no future filings should be made in the Public or Sealed Docket without first seeking permission of the Court.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: March 5, 2018
Brooklyn, New York