No. 14-676

In the Supreme Court of the United States

LORIENTON N.A. PALMER,
FREDERICK MARTIN OBERLANDER,
Petitioners,

v.

JOHN DOE 98-CR-01101, UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX

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QUESTIONS PRESENTED

1. Despite this Court's holdings that the public has a first amendment right to access criminal trials, the Second Circuit uses a *cooperator exception* to allow closure without proof of necessity, the mere fact of cooperation sufficient. Does this violate the constitution?

2. In a circuit conflict, the Second Circuit uses this *cooperator exception* to allow blanket sealing of cases without individual particularized reviewable findings, while the Fourth Circuit has held blanket sealing unconstitutional. May a court seal entire cases and everything filed in them without particularized findings?

3. The Second Circuit uses this *cooperator exception* to defy victim rights and mandatory sentencing laws, letting convicted cooperator–defendants evade restitution by holding the fact of their cooperation justifies not telling victims of the case, yet claiming their secret sentencings are really public, which if true requires victim notification. Does this violate the constitution?

4. The Second Circuit uses this *cooperator exception* to defy the first amendment by letting courts enjoin third parties who learn of the secret case from telling anyone, even victims of ongoing crimes involved, even Congress, without evidentiary hearings or findings, or other due process. Does this violate the constitution?

5. The Second Circuit upheld the district court's rulings maintaining the sealing of documents by a non-precedential "summary order" it admitted violated its own precedents but applied nonetheless to this "special

case." Does a federal appellate court violate the constitution when it purports to issue non-precedential orders; that is, does Article III require appellate courts to give precedential value to all their decisions?

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The Second Circuit published a Summary Order *sub nom In re Applications to Unseal 98-cr-1101 (ILG),* 568 Fed.Appx. 68, 2014 U.S. App. LEXIS 10436 (June 5, 2014) (App.1) The order of the district court from which the appeal was taken to the Second Circuit was issued on March 14, 2013 and possibly remains under seal, if it ever was lawfully sealed, though in any event certain information contained therein is public. The sealed order is submitted to this court in a separate sealed appendix. (App.AI at 184.)

JURISDICTION

This appeal is from a final decision and order of the Second Circuit Court of Appeals upholding an order of a district court in the Eastern District of New York which declined to "unseal" certain documents.

This Second Circuit order was entered on June 5, 2014, and by order of this court on petitioners' motion, the time to file this petition was enlarged to run through and including November 3, 2014.

Statutory jurisdiction lies in 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article III

U.S. Constitution, Amendment I

U.S. Constitution, Amendment VI

18 U.S.C. § 1506, "Theft or Alteration of Record or Process; False Bail"

18 U.S.C. § 3553(c), "Imposition of a Sentence"

18 U.S.C. § 3663, "Order of Restitution"

18 U.S.C. § 3663A, "Mandatory Restitution to Victims of Certain Crimes"

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18 U.S.C. § 3771, "The Crime Victims' Rights Act"

Federal Rule of Criminal Procedure 32, "Sentencing and Judgment"

Federal Rule of Civil Procedure 65(d), "Injunctions and Restraining Order"

28 CFR § 45.10, "Procedures to Promote Compliance with Crime Victims' Rights Obligations"

28 CFR § 50.9, "Policy with Regard to Open Judicial Proceedings"

STATEMENT OF THE CASE

I. Everything Secret Degenerates – – Especially the Administration of Justice

The United States Court of Appeals for the Second Circuit and district courts within, in active concert with United States Attorneys, have created an unconstitutional regime of secret criminal cases, falsified dockets, illegal sentences, and prior restraints in the name of "protecting" the safety of cooperators.

If this writ is granted, petitioners will ask this Court use its supervisory powers to stop this defiance of the Constitution and statutes, not only with respect to the inferior courts involved, but also with respect to the practice of law conducted before those courts by the United States. Prosecutorial discretion and inherent judicial power are extraordinary, but not infinite, and not immune to the guarantees of enumerated and unenumerated rights. Such discretion and power may not be exercised corruptly, and as they have for too long, they must be reined in by this Court.

Petitioners begin their explanation of the case by analogizing it to the only thing like it in modern history, the Whitey Bulger scandal in Boston.

II. The Boston U.S. Attorney's and FBI Offices Facilitated and Covered-Up the Crimes of Racketeer Whitey Bulger Because He Was an Informant

In the 1970s, the Boston FBI office recruited local mobster Whitey Bulger and others as informants, beginning an infamous quarter-century partnership in corruption wherein they gave the FBI information

about organized crime and in return the FBI ignored their crimes, even their murders; allowed innocents to be convicted in their place, and told them of witnesses who might testify against them so the informants could have them killed and maintain their cover.

The corruption lasted to 1994, when a corrupt FBI agent warned Bulger and others that they'd been indicted on racketeering charges and Bulger became a fugitive from justice for twenty years until captured.

In 2003, the House Committee on Government Reform released the report of its investigation into the scandal, *Everything Secret Degenerates: The FBI Use of Murderers as Informants*. Among its conclusions:

- The FBI perjured, and obstructed state and local prosecutions, to help their informants.
- Persons as senior as the FBI Director knew.
- The FBI Office of Professional Responsibility lied when it said no favors had been given the informants and prevented the committee from obtaining information that proved the lie.
- The U.S. Attorney committed perjury, and admitted he'd been intimidated, threatened by the FBI if he interfered with these informants.
- The DOJ impeded the committee by withholding, editing, or claiming to have lost papers.
- In response to suits filed by the victims of these crimes, the DOJ used litigation tactics "contrary to respect for the rule of law."

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The August 19, 2014, headline in *Time's* movie section, reviewing a documentary on the scandal, was, *Who's the Bigger Criminal, Whitey Bulger or the FBI?*

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Notably, the report says of federal judge Mark Wolf, whose landmark decision in *U.S. v. Salemme*, 91 F.Supp.2d 141 (D.Mass. 1999), started the oversight process that led to the committee's investigation, "He is owed a significant debt of gratitude by everyone devoted to law enforcement in a democratic society."

III. The Eastern District of New York U.S. Attorney's and FBI Offices Facilitated and Covered-Up the Crimes of Racketeer Felix Sater, a Respondent Here, Because He Was a Cooperator – but Unlike the Bulger Case, Here, the Federal Courts Knowingly Went Along, Ultimately Causing $1B of Injury

In this case, like Whitey Bulger, respondent Felix Sater, a career criminal and convicted racketeer, became a cooperating witness and an informant in the Eastern District of New York and in return was covertly, and illicitly, not only allowed to, but emboldened to, in fact facilitated in his efforts to, commit a billion dollars of continuing predicate crime during the ten years following his conviction.

And, like Bulger's case, when one of the petitioners, an attorney representing victims of those crimes, discovered the corruption and sought to expose it to bring Sater and those complicit with him to justice, the Department of Justice did all it could, no matter how

corrupt, to cover it up and silence him and his clients, actively working to prevent state, local, or private prosecution of Sater.

But there all further resemblance to Bulger ends, as there's no Judge Wolf here. To the contrary, to use the politic language of *Caperton*[1], the evidence would support the conclusion by an objective, well-informed observer to a constitutionally intolerable degree of confidence, that persons in the Department of Justice were aided and abetted in keeping its corruption secret by the collusion of Second Circuit district and appellate judges, themselves implicated *ab initio* because of the illegal concealment of Sater's criminal case and the illegal sentence he received, judges who, in creating or upholding a cooperator exception to the constitution, repudiated their oaths and abused the contempt power to silence those who would tell the truth, falsified judicial records, fabricated evidence, refused to afford due process, and ultimately perpetrated direct fraud not only on the institution of the court but on this Court itself.

A. Sater's 1990s racketeering and related proceedings, 1998 to 2001, by which time his conviction and cooperation had been made public by the government, court, et al.

Felix Sater has a long history of defrauding investors and partners in his business ventures. For

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[1] *Caperton v. AT Massey Coal Co., Inc*., 556 U.S. 868 (2009), quoting *Withrow v. Larkin*, 421 U.S. 35 (1975) ("probability of actual bias…[by]…judge…too high to be constitutionally tolerable").

example, in 1998 he pled guilty to racketeering for operating a "pump-and-dump" penny stock fraud in partnership with other Russian and La Cosa Nostra career criminals, bilking investors of at least $40,000,000.

That should have signaled the end of his business career and the possibility of restitution for the victims of his crimes. Not so. Because he agreed to cooperate, his entire criminal docket was not only "sealed," but "super-sealed," indeed illegally so, *infra*, leaving his victims and third parties unaware of his conviction.[2]

Apparently, from the time of his plea in 1998 through the end of 2001, Sater cooperated in the investigation, arrest, and prosecution of his co-conspirators in the stock fraud.[3]

While petitioners don't know the details of his cooperation (but take it on faith that there was at least some), one thing they do know, because it is a matter of public record, is that on and after March 2, 2000, by the deliberate action of the government, the fact of Sater's conviction, and that of several of his co-conspirators who also agreed to cooperate, like Sal Lauria, became

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[2] This court's *Richmond* line of cases, with which familiarity is assumed, all require procedural and substantive formality before a proceeding or document in a criminal case may lawfully be closed to public access. The judge in Sater's criminal case stated on the record many times that he never signed a sealing order, (App.M at 86-87), as is confirmed by the record, see *U.S. v. Sater*, 98-CR-1101 (E.D.N.Y.) (Glasser, J.), as is the fact that no record findings capable of review to justify any such closure were made.

[3] All relevant process in relation to his co-conspirators took place *sub nom. U.S. v. Coppa*, 00-CR-196 (E.D.N.Y.) (Glasser, J.).

public property forever because Loretta Lynch, then E.D.N.Y. U.S. Attorneys, Lewis D. Schiliro, NYC FBI Assistant Director, Howard Safir, N.Y.P.D. Commissioner, issued a worldwide press release announcing the arrest of the *Coppa* defendants and disclosing that Sater, Lauria, et al. had already pled guilty to racketeering charges.[4]

Six months later, on September 13, 2000, the release was placed in the Congressional Record during House hearings, *Organized Crime on Wall Street*.

Arguably, there might be some debate whether the press release itself effectively revealed that Sater et al. were cooperating, for example given the fact that they'd already pled, but any ambiguity on that score went away within a year, because by 2001 the government, *Coppa* defense attorneys, and the presiding judge (Glasser, J.) had placed in the public files of the case, thus making it public property, any number of documents explicitly confirming Sater's cooperation.[5]

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[4] The press release did travel around the world: "19 Charged in Stock Scheme Tied to Mob," *The New York Times*, March 3, 2000; "40M Stock Scam 19 Said to Have Ties to U.S., Russian Mobs Are Charged," *The New York Daily News*, March 2, 2000; "Borscht Boys & Goodfellas In $40M Stock Swindle: Feds," *The New York Post*, March 6, 2000 ; "Mob Influence Hit on Wall Street," *CNN Moneyline News Hour*, aired March 2, 2000; "19 Accused After $40M Stock Fraud," *The Manchester Guardian UK*.

[5] The public court files of the *Coppa* case, which have always been public (but which were hidden in the E.D.N.Y. for two years, *infra*) contain: (1) The government's witness list for the *Coppa* proceeding against Daniel Persico, a captain in the Colombo crime family, showing Sater set to testify as a government witness; (2) a memorandum in support of *Coppa* defendant Lev's request for

In short, by late 2001, anyone who cared to know, certainly including the *Coppa* defendants and their lawyers, knew Sater had pled and was cooperating, as the information was public property and publicly available – if you knew where to look.

Then why was there any legal basis to maintain the "sealing" (illegal concealment) of his entire criminal case (of course Sater had not yet been sentenced himself)? Petitioners do not know, for this point has never been answered despite their many times raising it throughout the years of litigation, but a good guess is that the FBI promised to do a favor for Sater after the 9/11 attacks, and making his criminal record disappear was the favor.[6]

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additional information on "cooperating witnesses" Sater and other(s); (3) An objection by Lev's attorney, Jeffrey Lichtman, to information in Lev's PSR about his "threat" against Sater (see next); (4) said PSR, discussing Lev's threat; and excerpts from the website of Jeffrey Lichtman describing how he had Lev's charges reduced from racketeering to harassing a government witness (Sater) by showing that said witness was committing crimes of fraud during his cooperation. (App.AG at 168-178).

[6] In Lauria's 2003 autobiography *The Scorpion and the Frog*, he says he and Sater were resigned to imprisonment because their attempt at freedom, buying Stinger missiles from Afghanistan, had failed, but that right after 9/11 Sater called him excitedly to tell him that they were now going to be the FBI's new best friend because of Sater's Middle East contacts and that in return the FBI would "suppress" Sater (and Lauria's) connection to the *Coppa* case "as much as possible." (App.AH at 182-183).

B. Sater's all-new racketeering and related proceedings while cooperating or informing, from 2002 through 2009

During the ensuing years of his cooperating and informing, while not yet sentenced for the stock racketeering so supposedly subject to incarceration and revocation of his cooperation agreement if he committed crime, Sater took advantage of the secrecy by resuming his old tricks and defrauding new victims.

By 2002, he had infiltrated and largely controlled Bayrock, a New York developer with ties to organized crime, in the next several years using it to launder hundreds of millions, skim and extort millions more, and again swindle his investors and partners, for example fraudulently inducing banks to lend hundreds of millions to Bayrock by concealment fraud (hiding the material fact of his conviction from them), threatening to kill anyone at the firm he thought knew of the crimes committed there and might report it.[7,8]

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[7] At least three Bayrock persons, one former employee and two partners, have given sworn statements that Sater had threatened to kill them if they ever complained about or revealed anything Sater had been doing wrongfully at Bayrock.

[8] It should be noted for the record that, while the Sater press release was written up and publicized widely, oddly enough his name was not used in any of that coverage, and so even to this day searching on his name will not find it, except in the Congressional record, where of course one would have to know to look in the first place. Similarly, while the public *Coppa* records were always available, one would have to think to look there. Thus, it's understandable that many persons, including at Bayrock, would not know of his conviction, even though it was public property.

(By no means was Sater the only person committing crimes at Bayrock; Julius Schwarz, it's CEO and General Counsel, was responsible as well because he was aware of Sater's secret conviction yet hid it.)

Supposedly, after taking a fortune out of the firm, and arranging for much of it to be placed into trusts for his family to remove it from the reach of his victims (recall he had yet to be sentenced), Sater severed his ownership in and other ties to Bayrock in 2008.

C. Sater's sentencing in 2009

Finally, on October 23, 2009, more than a decade after his guilty plea and long after his purported cooperation and informing had ended, Sater stood before federal district judge I. Leo Glasser in courtroom 8B of the Eastern District of New York to be sentenced.

It was over in less than an hour. Though Sater had faced nearly 20 years of confinement, Judge Glasser[9] imposed neither confinement nor probation. That, at least, was within his discretion.

But, though Sater had also faced mandatory forfeiture of $80,000,000, Judge Glasser imposed no forfeiture, only a fine of $25,000, and though Sater had further faced mandatory restitution of $40,000,000, Judge Glasser imposed no restitution at all, in sum

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[9] Judge Glasser had years before gained notoriety for sentencing "Sammy the Bull" Gravano to 4½ years' time served as a reward for cooperating against John Gotti, suggesting the 19 mob hits Gravano had admitted couild be thought of as a public service.

letting Sater keep virtually all of the millions he'd admitted receiving from the criminal scheme[10].

The government might have been expected to complain about its loss of $79,975,000. But that was the last thing the government was going to do because the government had intentionally fouled the criminal information to which Sater had pled, making imposition of a forfeiture sentencing order, though mandatory, impossible, doing so to "protect" Sater from receiving a sentence mandated by Congress[11].

Those defrauded lenders might have been expected to complain, since during his allocution Sater admitted that he'd concealed his conviction from them because he knew they wouldn't have lent otherwise.[12] After all, most of the loans had been written off, many of the lenders had become insolvent, and not one would have lent a dime had they known the truth, as Sater had just admitted. But those complaints were never going to happen because even then the lenders still had no idea of his conviction, thus had no idea of his

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[10] In his 2004 PSR, of which this Court allowed limited disclosure by its order of June 25, 2012 on docket 12-112, the Officer states that he did not ask Sater what he had done with the millions of dollars of proceeds of the stock fraud he had admitted receiving.

[11] The sentencing transcript says there was a bargained forefeiture order in the cooperation as to a house in Hampton Bays. The cooperation agreement does describe such a house but the public property records do not show a transfer occurred. In any event, whatever the truth, the house would have been worth perhaps $420,000, or 1/200th the mandatory forfeiture order.

[12] The sentencing transcript is in the Appendix. (App.E at 32).

sentencing, a situation everyone present in that courtroom had every reason to perpetuate forever.[13]

Probation wasn't going to say anything because five years before, in the 2004 PSR they'd prepared when Sater was first scheduled to be sentenced, fn.10, the officer who wrote it admitted he'd participated with the government in helping Sater conceal his conviction from Bayrock and his partners at the firm, thus facilitating and emboldening Sater's crimes, including the financial institution concealment fraud.

Thus, while the four FBI agents present, including Leo Taddeo -- who as former head of the E.D.N.Y. Russian organized crime squad and Sater's handler was well familiar with the crimes of Sater and his father, a Mogilevich crime syndicate boss[14] -- might have been expected to arrest Sater once they heard him confess bank fraud, that was the last thing they were going to do because it had been part of the government's deal with him to facilitate, and ignore, the crimes, and they would certainly have some explaining to do how this all happened under their noses.

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[13] One should note Sater's allocution, where he complains that he had been trying to turn his life around but because the NY Times had "outed" him he had to leave "his" company (Bayrock) because the banks would now no longer lend. Does this sound like someone who expected that this would ever become public, or like someone who had been promised it would all stay secret forever?

[14] His father, Michael Sheferofsky, had his own criminal record and corresponding secret docket in the E.D.N.Y. see *infra*.

Accordingly, the E.D.N.Y. AUSA's present, Todd Kaminsky and Marshall Miller, who might have been expected to ask to adjourn to void Sater's plea agreement and ask his bail be revoked so he could be held in custody while they sought to indict him for the continuing racketeering he'd just admitted (participating in the operation of Bayrock through a pattern of bank fraud), weren't going to do anything because they, too, had compromised themselves by that arrangement to help him hide his conviction – a conviction that was already public property, remember.

The AUSA's had another reason to keep this all concealed, or rather 1,200 reasons, namely Sater's victims. Naturally all those victims of Sater's stock fraud, most of them elderly, some Holocaust survivors, would have been expected to raise hell about his minimal sentence and the nearly 15 years it took to get there, and would have been expected to sue for an order of restitution[15]. After all, at interest that $40,000,000 of mandatory restitution Sater should have been sentenced to would have grown to $120,000,000 by 2009.

Moreover, his liability to his victims in civil RICO wasn't actionable until his conviction became final on entry of a judgment and commitment order[16], and by 2009 with accretion, treble damages, and attorneys' fees, that liability likely exceeded $500,000,000.

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[15] Victims may petition for restitution if denied same, or denied sufficient amounts thereof, at sentencing. 18 U.S.C. § 3771(d).

[16] 18 U.S.C. § 1964(d).

So indeed those victims might have been expected to make themselves heard vociferously, but that, too, was never going to happen because, like the banks, the victims had never been told of Sater's sentencing (or, for that matter, even the existence of his case).

However, unlike the banks, the victims were the express beneficiaries of a statutory right not only to be told of it, but to be invited to participate in it[17], and it was the duty of the very same AUSA's, Kaminksy and Miller, to make that happen. And rather inevitably, since there would have been little point in their saving Sater from tens of millions in mandatory forfeiture only to have him ordered to pay tens of millions in mandatory restitution, those AUSA's repudiated their duty and completely ignored the victims, not even bothering to find them beyond those on lists they already had from the NASD; that this was a repudiation of their duty there can be no doubt because AUSA Miller was at the time the E.D.N.Y. victims' rights compliance officer and so had to know perfectly well what his duties were to the victims – and to the law.[18]

Mr. Miller is now the fourth ranking official in the Department of Justice, Principal Deputy Assistant Attorney General for the Criminal Division to Leslie Caldwell, Assistant Attorney General for the Criminal Division, the third ranking official. Ordinarily one

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[17] 18 U.S.C. § 3771(a).

[18] Remember, their duty is to seek out the victims, inform them of their rights, and see to it that they were treated with fairness and dignity. *Id.* Intentionally failing to notify them of an open court (public) sentencing proceeding is a serious transgression.

might wonder whether Ms. Caldwell knows that her assistant participated in this dishonor of the victims, and what that augurs for his fealty to victims' rights, rights of court access, and his respect for Congressional mandate in his current position, but this case long ago departed from the ordinary, and there is no need to wonder whether she knows, because she does.

Of that there is no doubt, because Ms. Caldwell, who at the time of Sater's plea bargain and conviction was herself an E.D.N.Y. AUSA and at the time of his 2009 sentencing was head of Morgan Lewis's criminal defense practice, was also right there in court at that sentencing, appearing as Sater's lead defense counsel.

One presumes Ms. Caldwell wouldn't have wanted this to see the light of day if, as seems quite likely, the fees Sater was paying her firm had to be traceable to money he'd taken from Bayrock[19], thus further traceable to the financing he'd procured by fraud, or to money he'd kept from his earlier racketeering and had been spared forfeiting; either way the money was proceeds of specified unlawful activity.

(That she knew their provenance is without doubt as well, because in March 2010, barely six months after his sentencing, Sater gave deposition testimony in which he said that Ms. Caldwell had advised him that he should refuse to testify whether he'd concealed any convictions while at Bayrock because if he admitted he

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[19] His 2004 PSR says Sater told his probation officer that he had a negative net worth, and the only source of income anyone is aware of over the ensuing years was from Bayrock.

had he'd be exposing himself to criminal liability[20]; unless she was corruptly advising him to take the fifth and so was guilty of obstruction, Ms. Caldwell was obviously well aware that her client had committed hundreds of millions of dollars of concealment fraud at Bayrock, just as he'd allocated to at his sentencing.)

And finally, as to Ms. Caldwell, we must presume that she normally did not allow her cooperator clients to admit at their sentencing allocutions that they had used the secrecy of their dockets to perpetrate bank fraud while cooperating unless she knew in advance that no one would be surprised and no one would care.

And that suggests the question, Why let him admit it at all? If he's in open court, admitting his participation in a billion dollars of bank fraud, doesn't he risk having the banks go after him, or Bayrock?

But then of course he wasn't in open court. Even though the Second Circuit has held that there is a first

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[20] "On the advice of counsel, I am not going to answer that question as I don't have to incriminate myself…On the advice of counsel, I won't answer past what I have already answered…My counsel is Leslie Caldwell from Morgan Lewis."

"Did she know you would be asked this question?"

"Yes."

"Did she advise you not to answer this question?"

"Yes."

"The grounds being again?"

"Not to incriminate myself…"

amendment public right of access to sentencings[21], and other laws and rules provide the same[22], nothing anywhere in the (now public) Sater docket shows there was any unsealing of the case before sentencing; quite the contrary. So surely, albeit illegally, his sentencing was not being held in public.

(Of course if it were in open court, the fact that the transcript shows his real name used throughout would eliminate any chance of his cooperation or his conviction remaining secret, as both were disclosed.)

Finally, there is the judge presiding (Glasser, J.). He, too, had a duty to the victims, or rather in his case to ensure that the government discharged its duty to them[23], and the transcript shows he did nothing about victims' rights whatsoever. At a minimum, this is consistent with a sealed, rather than public, sentencing proceeding, because even if illegally sealed it might at least explain why the victims hadn't been told of it[24].

IV. Petitioner Oberlander Discovers the Crimes and the Cover-Up and Sues to Stop Them

Petitioner Oberlander is a New York attorney who represents minority partners in Bayrock, one of them Bayrock's former Director of Finance, and also

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[21] *U.S. v. Alcantara*, 396 F.3d 189 (2d. Cir. 2005).

[22] See, 18 U.S.C. § 3553(c) (court at time of sentencing shall state "in open court" its reasons for imposing the particular sentence).

[23] 18 U.S.C. § 3771(b)(1).

[24] 18 U.S.C. § 3771(a)(2).

represents victims of Sater's 1990s stock fraud. These partners engaged petitioner on suspicion they had been defrauded by other partners, including Sater and Schwarz. Subsequently, they directed him to sue.

When petitioner began drafting a RICO complaint in 2009, publicly available information showed Sater was "connected to" organized crime. For example, a 1998 *Business Week* article, and a 2007 *New York Times* article, discussed Sater's involvement in the aforementioned stock fraud. And it was widely believed that Sater had been only an "unindicted co-conspirator" who avoided prosecution by cooperating; he was indeed listed as an unindicted co-conspirator in the public *Coppa* docket.

There was, however, information from which one could infer Sater *had* been prosecuted. For example, a co-conspirator, Klotsman had told the *Times* Sater had pled guilty. And the *Times* quoted Sater's lawyer, who didn't deny it, but just challenged anyone to find it.

On March 1, 2010, these suspicions were confirmed when unexpectedly, and without solicitation, petitioner received documents from a whistleblower, a former employee of Bayrock, who found them on the Bayrock email servers during his prior work there.

The documents were Sater's criminal complaint, information, proffer, and cooperation agreement, all from 1998, and a PSR from 2004, all from his secret case, 98-CR-1101 E.D.N.Y., identifying Sater by his true name, confirming he had pled guilty to racketeering, and had been scheduled for sentencing in 2004.

Petitioner, concluding at least $750,000,000 of the firm's capital, had been procured with the fraudulent concealment of Sater's conviction, and that the firm's customers were being defrauded daily by sales of condominiums pursuant to false and misleading offerings, acted quickly.

On May 10, 2010, petitioner filed a civil RICO complaint, 10-CV-3959, S.D.N.Y., charging Sater and others with operating the firm through a pattern of crime, including excerpts from the documents. Within a day *Courthouse News* had the story and a copy of the complaint with the excerpts online, available for download. Additionally, upon receipt, the firm's general counsel disseminated the complaint to several named defendants and attorneys on May 12, 2010.

V. Procedural History I

On May 18, Sater obtained an ex parte TRO from the same judge who had secretly tried him, (Glasser, J., E.D.N.Y.), enjoining dissemination of the documents and ordering a hearing to ascertain how petitioner got them, making petitioner a respondent in his secret criminal case, *U.S. v. Sater*, (recall he had been sentenced only a few months before).

On June 14, the second of four days of hearings, petitioner asked the court reveal any order purporting to seal anything, or bind him. ***Judge Glasser admitted "there is no formal order" and he couldn't "find any order signed by me, which directed that this file be sealed," and there was no indication in the first filing "or in any subsequent document that an application was made or request was made in that document to seal that***

file." He further emphasized that there were no orders ever issued that bound petitioner and there were no sealing orders ever issued. (App.M at 85 *et seq*.).

On July 20, Judge Glasser issued a permanent injunction prohibiting dissemination of the PSR and stated that while one could infer that the former Bayrock employee who gave petitioner the documents "may" have stolen them he still wondered "[w]hat order of the Court was violated by that. ***Sater testified briefly, but neither he nor other witnesses spoke of any threat of harm they had encountered or had reason to believe they would encounter if anyone knew of Sater's role in the stock fraud, nor did anyone introduce non-parol evidence of it***.

Judge Glasser issued TRO's on the other documents, claiming to have found a risk of harm to Sater, but refused to state what that risk was or where he had obtained the evidence of it, and never put any of it on the record (we now know, because he had none).

Petitioner appealed, but it was delayed for months because Judge Glasser refused to send the notices to the Second Circuit, keeping them in chambers.

Finally, on their transmittal, the government moved to seal the appeal and, prior to any hearings or submissions, ***the Second Circuit issued sua sponte ex parte gag orders barring petitioner and his clients from revealing any documents filed in related cases in the Eastern or Southern Districts or the Second Circuit and expressly barred them from telling Congress what they had learned.***

At argument on the government's motion to seal, ***AUSA Kaminsky said Sater's criminal case had been secret since inception***, (App.AL at 207 *et seq*.).

On questioning by the panel, Kaminsky said he believed there was a serious risk of harm to Sater if any of this got public.

Petitioner argued that none of these facts were in the record, so were only argument, and that the First Amendment required the appellate docket be public. The court conceded that media organizations could not have been enjoined had they come into possession of the documents at issue, and such appellate proceedings would be open, but petitioners could be gagged because they're not the media:

Judge Cabranes asked for assurance from the government that: "[W]e are not talking about preventing a news organization from publishing a matter of public concern or impinging on editorial discretion."

Judge Pooler responded to petitioner's First Amendment arguments with: "We are not dealing here with prior restraint of the press or media. That's what the Pentagon Papers case was about. [Newspapers have a special charge in publishing information for citizens. [Petitioner] doesn't have any charge in making this information available to citizens."

The court then issued a summary order, maintaining the appellate case under blanket seal, noting ***"In light of the serious, indeed grave, concerns expressed by the United States regarding the possible consequences of unsealing these documents, and the absence of any sufficiently***

persuasive countervailing considerations expressed by [petitioner]...”

*****

The importance of the last pages to the maintenance of a court system built upon fundamental fairness and due process cannot be over-emphasized. Respectfully we ask the Court to consider the following:

- Judge Glasser issued a permanent injunction on dissemination without regard to the norms of procedural and substantive due process.
- AUSA Kaminsky sat through four days of district court hearings without introducing evidence or asking a witness about risk of harm…
- The Second Circuit blanket sealed an entire appeal, to this day maintaining hundreds of filings under seal, based on a record with no evidence of any risk or reason to believe there might be a risk based solely on Kaminsky's beliefs, which petitioner wasn't allowed to contest because it wasn't done at a hearing.
- ***The government had made the conviction public ten years before, by the press release, but Kaminsky was there perpetrating fraud on the institution of the court by lying, saying the government had not*** (petitioner hadn't yet found the press release).
- When petitioner found the press release after the hearing, and confronted Kaminsky with it, the government asked to unseal Sater's docket

by letter which admitted that the government had not had any evidence for over ten years that there had ever been any risk of harm or any impediment to recruiting cooperators, which meant ***Kaminsky knew he had no factual basis to be opining and arguing before the Second Circuit that there was grave, imminent risk and cooperator recruiting might be impaired***. (App.V at 130).

- ***Kaminsky had been at Sater's sentencing a year earlier and had heard him admit the bank fraud he perpetrated at Bayrock, and was in possession of a copy of petitioner's May 10, 2010 RICO complaint and knew it exposed the massive related crimes at Bayrock, yet if petitioner had not found the press release Kaminsky would have prevailed in arguing that Sater's hundreds of millions of concealment frauds could never be revealed because there might be a threat to him. Forgive us for thinking the threat would be a lot more to Kaminsky et al. for allowing Sater to commit the frauds at Bayrock.***

- ***Finally, the government, Sater, the court, all of them, knew there was a public Coppa file in Lee Summit Archives for ten years holding documents showing the public revelation of Sater's cooperation, not just conviction. Why weren't they admitting it? Presumably, they knew he wouldn't find it, because when petitioner began requesting it from Lee in November 2010, before the***

Second Circuit hearing, he was told, and would be told for years, that it had been requested by, and then disappeared in, the E.D.N.Y., while the E.D.N.Y. professed to have no idea how they had misplaced it, maintaining this lie for two years until it turned up one day after Sater's docket had gone public.

VI. Procedural History II

The Second Circuit eventually upheld the injunction on the PSR, and this Court denied cert, but not before granting petitioner's motion, see docket 12-112, to be allowed to disclose the contents of the PSR which he felt showed government and judicial misconduct.

While the initial disclosure was, as ordered, without use of Sater's name, the press interest even before this court's order granting the motion had motivated several persons, most prominently *The Miami Herald* and petitioner Palmer, a private citizen, to join in the attempt to unseal Sater's case, and after an accident in the E.D.N.Y. clerk's office that exposed the entire docket online for a week, Judge Glasser ruled he had no choice but to unseal it permanently.

Judge Glasser then proceeded to hold hearings on what documents on the docket would be unsealed and what would remain sealed, or "sealed," and those hearings concluded in late 2012.

At the beginning of those hearings, Judge Glasser ordered everyone but Sater and his counsel and the government removed from the courtroom, including movants (petitioners here), and announced that we petitioners were prohibited from introducing any

evidence into the unsealing proceedings, that he would rule based on his own knowledge of the case and what the government gave him and what Sater gave him, but would take evidence from no one else, even though petitioners here had authored almost 75% of all the documents in question during the prior years of litigation and so already had access to them anyway.

Then, when petitioners sought to introduce evidence by document, through motion for judicial notice, Judge Glasser threatened quasi-criminal sanctions for "vexatious litigation" and held the submissions out of order.

Petitioners then appealed from the unsealing order, as noted in the front of this petition, on the ground that the entire proceeding had been structurally defective because the failure to allow us to present evidence that there never had been any risk and that it had all been public for years anyway was Fifth Amendment structural error.

The Second Circuit in a summary order upheld Judge Glasser, held that even though we had not been permitted to introduce evidence we had "made our views known" [sic], whatever that means, and further held that even though Judge Glasser had made no record findings of risk (or anything else) capable of appellate review, merely listing "risk" conclusorily as his reason for each closure maintained, that because of the "gravity" of Sater's cooperation the binding precedent that there must be such express, reviewable evidentiary findings need not apply in this special case.

Petitioners seek cert therefrom.

VII. Procedural History II

In the interest of expedience, petitioners will accelerate the remainder of this petition to present the points in bullet point list format rather than text.

- On March 19, 2013, a few days before petitioner's prior petition was due to be conferenced, the Solicitor General forwarded a "sealed," secret, ex parte order of Judge Glasser's (App.AI at 184) to this Court which we had never seen and which was never docketed and which contained the statement (this is now a matter of public knowledge) that Sater had been sentenced in public, in other words in open court.

  In the prior pages, petitioners explained that it was inconceivable that it was taking place in open court because Sater was admitting a billion dollars of fraud while cooperating. Petitioners also explained that if in fact it was open court, then that meant that Judge Glasser, Kaminsky, and Miller had willfully and intentionally defied their statutory obligations to the victims. Yet there that order is.

  Regrettably, it appears that that much of it was a fraud directed at this Court, if so the first time in known history that a sitting federal judge perpetrated a fraud targeted at this very Court.

  Equally if not more regrettable is that the order also contains a ruling that one Danny Persico had threatened the life of Sater in an attack on Lauria soon after the unsealings began claiming that he only then knew who had informed on

him. Persico is a member of organized crime and was a co-conspirator of Sater and Lauria's in the stock fraud. But Persico is more than that. He is a childhood friend of Lauria's, and Lauria admits in his own book that he himself told Persico he informed on him and that while he seemed to take it well, the FBI told him later (this is 2002, remember) that Persico had been making threats against him, a story he repeated in his (Lauria's) own sentencing allocution before Judge Glasser in 2004.

Ordinarily, the ramifications of a sitting judge participating in the fabrication of evidence like this to justify the concealment he was responsible for would be unthinkable, but on May 15, 2011, Sater's lawyers wrote petitioner through counsel warning that they had an agreement with Judge Glasser that he would not take up any unsealing motion we made and would ignore our arguments if he did[25]. Both happened as they predicted, as noted already in the refusal to allow us to admit evidence and, as we mention in closing, with the ex parte, secret withdrawal of the government's March 17, 2011 letter motion to unseal, kept from us for six months.

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[25] "Even if Judge Glasser decides to hold a hearing or oral argument to determine whether to unseal specific docket entries of Doe's criminal proceeding, he will do so without considering your arguments or appeals. If you believe you are driving the unsealing issue, you are mistaken."

And in view of the several ex parte merits conferences Judge Glasser ordered with the government and counsel for Sater, to petitioner's exclusions, and without petitioner's knowledge, all shown on the now unsealed docket of 98-CR-1101, who *wouldn't* believe this is all collusive, at best.[26]

- Under no circumstances is this petition a claim of error, and importantly we ask this Court to understand that this problem of illegally secret cooperator cases and cover-ups that make the Bulger case, at least in terms of dollars, look like an amateur operation is not limited to this one case.

- At approximately the same time that Sater was pleading guilty, three co-conspirators, Richard Appel, Sal Romano, and Myron Gushlak, were engaged in pump-and-dump fraud of their own, involving a penny stock controlled by Gushlak. As with Sater, they bribed brokers to push the

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[26] A Status Conference as to Felix Sater was held on 1/10/2012 before Senior Judge I. Leo Glasser: AUSA Todd Kaminsky and Evan Norris appeared on behalf of the Government. Michael Beys and Jason Berland appeared on behalf of John Doe. The Court directed the government and John Doe to provide a detailed chronological account with transcripts, of what the core issues involving this case and how it evolved into a First Amendment issue. The Court will issue an Order on Notice to Mr. Lerner directing the parties to brief the issues before the Court. The parties agreed to submit a Scheduling Order to the Court to be "So Ordered." (Court Reporter Charleane Heading.) (Francis, Ogoro) (Entered: 01110/2012)

stock, in this case including brokers at a firm called Montrose.

Eventually all three were caught and pled out and became cooperators. That's not the interesting part. What's interesting is that they, each of them, openly admitted and stipulated that they were co-conspirators in the scheme. Accordingly, both for *Pinkerton* and restitution purposes they had to have exactly the same set of victims to whom they were liable.

When Romano came to be sentenced, the government told the E.D.N.Y. judge, Carol Amon, now chief judge of that district, that Romano had been a great cooperator and that sadly she could not order Romano to pay restitution because the government simply had no idea who they were. The government then asked her to issue a finding to that effect, which she did, thus for all practical purposes ending any ability to get Romano to pay restitution.

When Appel came to be sentenced, surprisingly enough all of a sudden the government knew who the victims were, and sought and obtained a $3,000,000 restitution order.

But when Gushlak came up for sentencing, his restitution order was for $17,000,000, on top of a $25,000,000 find. Why?

Because, as to restitution, the sentencing judge held that as Gushlak, Roman, and Appel had co-equal liability, and the government's expert for Gushlak's trial had calculated $17,000,000 as the aggregate loss for all of them, including all

the persons Appel had defrauded at Montrose to further the scheme even though Gushlak had never heard of them, Gushlak had to pay for all of it.

Of course this is correct, but that's not the point. The point is, the victim loss sheets, as the dockets reveal, were in the possession of FINRA (blue sheets), and it is not possible that they didn't exist and so the victims couldn't be found for "wonderful" cooperator Romano but could be found for the other two.

What's even more impressive is that the reason Gushlak was fined $25,000,000 and sentenced to may years' incarceration was that the judge denied him acceptance credit. Why? Because the government showed the judge that, just like Sater, Gushlak had used his secrecy to defraud investors, lenders and partners, just as Sater admitted doing at Bayrock.

It's very fascinating that what sends one man to prison becomes something that is not to be spoken about as to Sater, but petitioners will speak, for what it is, more evidence that Sater, like untold others, is benefiting from a covert, and corrupt, promise to keep him "safe."

- Finally we bring up two cases. One, Sheferofsky, is a criminal case in the E.D.N.Y. where the defendant admitted to running a scheme of attempted extortion and extortion for ten years. His entire docket was hidden for six years, with no evidence of formality observed, but importantly, when he got sentenced, the

government said there need be no restitution because the victims were dead, criminals, or unknown. The government had to know perfectly well that the statute provides that restitution is awardable to the representative of a victim, too. It's probably not irrelevant then to note that Sheferofsky is, or was, Sater's father, and the dates on the closures of his docket match the concealment of Sater's.

- The other is *United States v. Shereshevsky* (no relation), SDNY Docket No. 94-cr-248. On May 5, 1994, Shereshevsky was arraigned for bank fraud, pled not guilty and was released on bail. That was what the public docket reflected until, June 26, 2002. The docket reflects that on that date it was "entered" that eight years earlier, on May 5, 1994 (*viz*. the same date as the docketed not-guilty plea) Shereshevsky had actually pled guilty to bank fraud. The Southern District deliberately allowed false information to remain on the public docket for eight years, a fraud on the public.

  Presumably, Shereshevsky was given the benefit of secrecy because he was a cooperator, and apparently got leniency – time served, two years supervised release, and a restitution order off $39,000. What did Shereshevsky do with himself while "cooperating" with the government? He perpetrated a multi-hundred million dollar WexTrust Ponzi scheme.

  One of the judges who, apparently, actively falsified his docket, Michael Mukasey, went on to become the Attorney General. On September

24, 2001, he issued a "speedy trial" ruling on the docket, to keep up the false appearance that the defendant had actually pled not guilty. (App. F at 42).

REASONS FOR GRANTING THE WRIT

I. The Integrity of the Federal Court System Depends on This Court's Confirming That Lower Courts May no More Defy Binding Precedent or Wrongfully Infringe Upon Fundamental Rights Than They May Defy Mandatory Sentencing or Similar Statutes

The factual history of this case is complex, but the legal principles are not. Simply put, the Second Circuit courts have seceded from the (juridical) union to form their own state where the cooperator exception they have invented of whole cloth trumps everything else, including the enumerated and unenumerated fundamental rights of liberty. And that is something they cannot be permitted to do.

This case is not about judicial error. Indeed, taking the word "error" literally, there may well be none. What there is here, instead, is judicial *defiance*.

When a lower court decision conflicts with this court's binding precedent, ordinarily that's "mere" error and this court is not likely to grant a writ. But when the conflict is so outside the norm of judicial decision-making that it requires intervention and review by this court, that's cert-worthy. And where, as in this case as the record plainly shows, that great conflict, that great deviation from the norm, is an intentional, blatant disregard for that precedent then, petitioners submit, this Court is compelled to act.

II. A lower federal court's core "inherent power" does not include the power to refuse to impose the lawful sentences Congress mandates, including restitution

Of course, the lower federal courts have inherent powers. But, save for a "core" subset, have long been understood to be subject to Congressional override.[27] Even that "core" exception proves petitioner's point here, because while Congress cannot interfere with the ability of a lower court to decide a particular case, that limitation does not apply at all to the authority of Congress to set minimum sentences.

This Court held precisely, and unanimously, so a century ago in the *Killits* case, *Ex Parte United States*, 242 U.S. 27 (1916): When a federal court refuses to

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[27] The Fourth Circuit explained in *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011) [citations and explanations omitted, emph. add.]:

> The inherent power of…lower federal courts falls into three…categories…[F]irst…core Article III power…the ability of a lower federal court to decide a case over which it has jurisdiction…once Congress has established lower federal courts and provided jurisdiction over a given case, Congress may not interfere with such courts by dictating the result *in a particular case*…[S]econd…powers "necessary to the exercise of all others"…these…are deemed necessary to protect the efficient and orderly administration of justice and…command respect for the court's orders, judgments, procedures, and authority"…These…are subject to congressional regulation…[T]hird…"those reasonably useful to achieve justice"…Examples…"the power of a district court to appoint an auditor to aid in litigation involving a complex commercial matter"…Such are subject to congressional regulation…

impose a mandatory sentence, it violates the law and operates illegally. If there were any doubt that this applies to a mandatory order of restitution, this Court put that to rest in *Dolan v. United States*, 103 S.Ct. 2553 (2010), noting that when Congress said in the restitution statute that such an order must be imposed at sentencing notwithstanding any other provision of law, 18 U.S.C. § 3663A, Congress meant it.

What about cooperator safety? Every filing by respondent Sater and the government solemnly intones that warning, arguing that the courts must hide all this to keep Sater safe, even if, regrettably, he gets to keep all the money he stole.

The reply must be, Where in Article III are federal courts vested with police powers? Nowhere. And, petitioners aver it to be common knowledge that, were there even such a risk, the Federal Witness Protection program has never lost a participant.

And frankly, the mere idea is simply nonsensical that a felon like Felix Sater can assert a subjective fear, decline witness protection, and as a result then be allowed to evade restitution, keep the secret of his conviction, and commit concealment frauds, again by using that secrecy, and have the courts assert some inherent power to protect him by enjoining even his victims, those like petitioner's clients, who found out and would stop it.

III. Lower courts' "inherent power" cannot include the power to defy binding precedent; moreover, the issuance of a purported non-precedential "summary order" by a federal appeals court, as the Second Circuit issuance here, is unconstitutional

An elegant argument proving these points is in *Anastasoff v. United States*, 223 F.3d 898, *vacated en banc*, 215 F.3d 1024 (8th Cir. 2000) wherein a panel of the Eighth Circuit, later reversed *en banc* held that a federal appellate court's issuance of non-precedential decisions (summary orders) is unconstitutional. Petitioners adopt it in its entirety.

IV. Lower courts' "inherent power" cannot include the power to wrongfully infringe upon enumerated or unenumerated rights

This, of all, is completely self-evident. And therefore, petitioners submit respectfully, it was wrong to deny them due process for all these years, both procedural and, to the extent extant and not covered by first amendment or other provisions, unenumerated and thus substantive.

But as wrong as that was, and remains, it was even more wrong to do that to the confederates of these criminals, clueless as to the *Brady* violations that must be rampant with undisclosed deals, and above all else to the victims of these criminals, who have no voice save that which the courts and the government are tasked to give them. A mighty poor voice it is, indeed.

CONCLUSION

For all the foregoing reasons, it is most respectfully requested that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit be GRANTED.

Dated: November 3, 2014

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

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SEALED APPENDIX

APPENDIX A

13-2373-cv
In re: Applications to Unseal

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 13-2373-cv

[Filed June 5, 2014]

IN RE APPLICATIONS TO UNSEAL 98 CR 1101 (ILG), USA V. JOHN DOE 98-CR-01101	)
- -	)
LORIENTON N.A. PALMER, FREDERICK MARTIN OBERLANDER, *Movants-Appellants,* -v.- JOHN DOE 98-CR-01101, UNITED STATES OF AMERICA, *Respondents-Appellees.*	)

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this

court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

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 5th day of June, two thousand fourteen.

PRESENT:

JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
DENNY CHIN, *Circuit Judges*.

FOR MOVANTS-APPELLANTS:

FREDERICK M. OBERLANDER (Richard E. Lerner, Law Office of Richard E. Lerner, P.C., New York, NY, *on the brief*), Montauk, NY.

FOR RESPONDENTS-APPELLEES:

EVAN M. NORRIS (Todd Kaminsky, Peter A. Norling, Elizabeth Kramer, *on the brief*), Assistant United States Attorneys, *for* Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Jason H. Berland, Beys, Stein & Morbargha LLP, New York, NY.

Appeal from orders, entered March 15, 2013, May 15, 2013, and May 17, 2013, of the United States

District Court for the Eastern District of New York (I. Leo Glasser, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the District Court are **AFFIRMED**.

Movants seek the unsealing of certain documents relating to the cooperation of Felix Sater (formerly known publicly only as "John Doe") in a number of criminal cases. This matter has already been before us twice. *See Roe v. United States*, 428 F. App'x 60 (2d Cir. 2011); *Roe v. United States*, 414 F. App'x 327 (2d Cir. 2011). We assume the parties' familiarity with the underlying facts, procedural history, and issues for review, to which we refer only as necessary to explain our decision.

DISCUSSION

The Supreme Court has held that judicial proceedings are presumptively open under the First Amendment. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). It has also recognized a common-law right of presumptive access to judicial records and documents. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). This right of access is, of course, qualified, and documents may be sealed in some cases. We have held, however, that "[d]ocuments to which the public has a qualified right of access may be sealed only if 'specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (quoting *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13–14 (1986)). Such findings

must be made "on the record for our review," but "may be entered under seal, if appropriate." *Id.* (internal quotation marks omitted).

After we last heard this case, our summary order remanded to the District Court "with instructions (i) to rule upon the government's [then-pending] unsealing motion of March 17, 2011," and "(ii) to issue a final determination regarding whether the dissemination of the other (non-PSR) sealed documents in John Doe's criminal case, particularly those that refer to Doe's cooperation, should be enjoined." *Roe*, 428 F. App'x at 68–69.

That procedure was ultimately modified when the Clerk's Office in the Eastern District of New York inadvertently unsealed the docket sheet, revealing that Sater was "John Doe" and a cooperator. Judge Glasser then held a series of hearings, with only the Government and Sater's counsel present, and went through the entire docket to determine which documents should be unsealed. Thereafter, he issued two orders—one sealed, one unsealed—detailing which documents were to be kept sealed.

Movants first object that they were not allowed to attend these proceedings, although they were parties to the case. *See Aref*, 533 F.3d at 81 (holding that "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper"). This argument fails. Judge Glasser's sealed order is persuasive in concluding that the hearings should be closed, because the contents of the documents on their face implicate compelling interests. We have expressly held that judicial findings justifying sealing may be entered under seal. *See Aref*, 533 F.3d at 82.

Moreover, it appears from the docket sheet that Movants informed the District Court of their views in written submissions. *See, e.g.*, E.D.N.Y. No. 12-mc-150, dkt. 97.

Movants next challenge the District Court's determination that a number of documents (approximately 25% of them) would remain under seal, in whole or in part. Judge Glasser's sealed order lays out the District Court's basis for ongoing sealing—generally, safety of persons or property; integrity of government investigation and law enforcement interests; and protection of cooperator's anonymity.

As a general matter, "[b]road and general findings by the trial court . . . are not sufficient to justify closure." *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). And any such sealing must be narrowly tailored. *See Aref*, 533 F.3d at 82 ("[I]t is the responsibility of the district court to ensure that sealing documents to which the public has a First Amendment right is no broader than necessary.").

Here, the District Court laid out each document that was to remain sealed in a series of tables and noted for each the basis for continued sealing. Where possible, it limited the sealing to redactions on certain pages. We have reviewed the District Court's sealed order. Given the extent and gravity of Sater's cooperation, we conclude that these findings are sufficient.

CONCLUSION

We have reviewed the record and considered plaintiffs' remaining arguments on appeal, and find them to be without merit. For the reasons set out above, we **AFFIRM** the District Court's March 15, 2013, May 15, 2013, and May 17, 2013, orders.

This panel shall retain jurisdiction over any further appeals from proceedings in the District Court.

The mandate shall issue forthwith.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

12 MC 150 (ILG)

[Filed May 17, 2013]

In the Matter of the Motion to	)
Unseal Docket No. 98-1101	)
	)

ORDER

GLASSER, United States District Judge:

On May 15, 2013, the Court received via facsimile from The Law Office of Richard E. Lerner, P.C., a five page letter which, in bold type, is introduced with these centered legends:

Request for Emergency Prerogative *Quo Warranto* Relief From Prior Restraint With Respect to the Order Docketed on March 13, 2013

That This Court Show Cause By What Authority It Believes, If It Believes, It Has Lawfully Concealed Said Judicial Document From the Public and Enjoined Its Dissemination by Those Who Have It

He then begins as follows: "We write in receipt of a May 8, 2013 letter from the U.S. Supreme Court requiring (emphasis mine) we seek clarification from your honor with respect to the March 13, 2013 order on docket 12-MC-150 (No. 105) which the Supreme Court

calls "apparently" sealed. The letter triggers a jurisdictional fifteen days therefrom to obtain clarification. We seek emergency relief from a certain portion of the March 13th Order insofar as it unlawfully (ultra vires) or invalidly (unconstitutionally) bears the legend 'FILED UNDER SEAL.'" The letter was not filed on ECF because, as he announces at the outset in bold type, that he has not done so "so the court may confirm the entirety of its contents is public property and must be publicly uploaded without redaction immediately." His letter will be docketed and thus be made available to the public. I will not venture to summarize the letter or comment on its accusatory tenor, e.g., "The court's failure to follow the law . . . " at p. 4; his reservation of "the right to supplement this, and invite the media, members of the public and Mr. Sater's many victims to join this application, at p. 5; his reminder to the Court, the government and Mr. Sater of 18 U.S.C. § 1505 which, in substance, makes it unlawful to obstruct or impede any Congressional inquiry on investigation, p. 3 n.3. The irrelevance of his "reservation" and "reminder" ostensibly prompted by a letter from the Clerk of the Supreme Court resonate with a sinister ring.

Discussion

The May 8th letter from the Clerk of the Supreme Court regards Lerner's "petition for rehearing in this case" and is attached as an Exhibit to the government's letter in Opposition, Docket No. 119. It reads in part:

> On pages 4-7 of that petition, you quote from a March 14, 2013, order from the United States District Court for the Eastern District of New York. Because the first page of that order clearly

> reflects it is under seal, it would appear that the rehearing petition cannot be filed on the public record. If you wish to file the petition, you may ask the lower court to unseal those portions, or you may file a motion for leave to file the petition under seal with a redacted copy for the public record.
>
> Your rehearing petition will be deemed timely if you take the corrective action within 15 days of this letter. Rule 44.6.

It plainly does not require him to "seek clarification" of my order of March 13th. It explicitly advises him how to proceed. It does not characterize that Order as "apparently" sealed. It "clearly reflects it is under seal." His "Request" addressed to this Court in his May 15th submission is a misrepresentation of that letter. The emergency relief he seeks, he candidly states, is to have that order declared unlawful or unconstitutional and uses the Clerk of the Court's letter as a pretext for yet another attack on this Court's Orders. His "Request" is denied.

I would also note that his request for Emergency *Quo Warranto* relief is misguided. As long ago as 1820, Chief Justice Marshall wrote that "a writ of *quo warranto* could not be maintained except at the instance of the government, and as the writ was issued by a private individual without the authority of the government it could not be sustained . . . . " Wallace v. Anderson, 18 U.S. 291, 292 (1820). See also Johnson v. Manhattan Ry Co., et al., 289 U.S. 479, 502 (1933), where the Court wrote "*Quo Warranto* is addressed to preventing a continued exercise of authority unlawfully asserted, not to a correction of what already has been

done under it or to a vindication of private rights. It is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States, and by it only, for there is no statute delegating to an individual the right to resort to it."; Allah v. Linde, 2008 WL 1699441 (W.S. Wash.) ("Under federal law, it appears that a *quo warranto* proceeding can be brought only by the United States, and not by private individuals.")

I confess to being confounded as to how to respond to his request that I show cause by what authority I assume the right to issue Orders in this case. Perhaps Article III of the United States Constitution is a responsive start. In addition, I would incorporate by reference, my Orders, docketed in 12 MC 150 and numbered, 42, 62, 104, 106, 109 and 118, in response. I would also add a few lines written by Judge Newman in In re Application of the Herald Company, 734 F.3d 93, 100 (2d Cir. 1984) as follows: "The trial judge must articulate the basis for appellate review. If such articulation would itself reveal information entitled to remain confidential, the basis for closure may be set forth in a sealed portion of the record." Reliance on that teaching was placed in docket no. 106, my Order of March 13, 2013.

SO ORDERED.

Dated: Brooklyn, New York
May 17, 2013

/s/
I. Leo Glasser

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

12 MC 150 (ILG)

[Filed May 15, 2013]

In the Matter of the Motion to)
Unseal Docket No. 98-1101)
)

ORDER

GLASSER, United States District Judge:

In a letter dated March 27th, 2013, Docket No. 108, Frederick Oberlander and intervenor Lorienton Palmer requested the Court to docket the sealed Memorandum and Order (M&O) of March 15, 2013, mistakenly referenced the "March 14 Order" and for permission to move for a reconsideration of that M&O within 14 days thereafter pursuant to Local Rule 6.3, mistakenly referred to as 16.3. In an Order issued the following day, March 28, 2013, learning that the sealed M&O, Docket No. 106, was inadvertently sealed, it was unsealed and the requested enlargement was granted, Docket No. 109.

In a letter dated April 11, 2013, Docket No. 110, which the movants requested partially sealed, they requested an additional enlargement to file their motion for reconsideration which the Court granted, Docket No. 112.

Local Rule 6.3 of the United States District Courts for the Southern and Eastern Districts of New York captioned "Motions for Reconsideration or Reargument," provides in relevant part:

> There shall be served with the Notice of Motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. (emphasis mine).

On April 19, 2013, a nineteen page Joint Motion for Reconsideration was filed, Docket No. 113.[1] That submission contains not a sentence, a word or even a syllable which smacks of a matter or controlling decision which counsel doesn't even purport to believe the Court overlooked to require reconsideration of its March 15, 2013 Memorandum and Order.

In a letter response dated April 26, 2013, Docket No. 115, to their motion to reconsider, the government opposed it for essentially the same reasons.

Having made reference to the relevant Local Rule and blatantly ignored it, they manifest as well an indifference to the certification required by Rule 11(b)(1), Fed. R. Civ. P., that their motion was not presented "for any improper purpose." Their "Joint Motion to Reconsider" is a transparent pretext for airing, yet again, arguments they have repeatedly

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[1] On April 22, 2013, they filed a corrected version of their joint motion which they represented made no substantive changes but merely fixed typographical errors and added or removed a few words. This version is docketed as #114-2. Page references made infra are to the pages in the corrected version.

made and scurrilous charges they have leveled at judges, courts, prosecutors and other lawyers. Those include, for example, "discussion must be made of the intellectually dishonest EDNY history of attempting to restrain the speech of the 'little people' who don't buy info by the barrel, most infamously in the context of Zyprexa," at p. 5; referring to the opinion in Zyprexa,[2] "we assume the court knew perfectly well what was the law and what it was doing and made a bet that the individuals whose civil rights it was violating wouldn't or couldn't, pay to appeal. *That's* intellectual dishonesty. Or judicial hubris. Either works." at p. 6-7, "We assert that U.S. v Doe, the 1995 2d Circuit case around which too many judges in this district seems to have built a cottage industry of sealing whatever the government or cooperator wants on the mere 'possibility' of a threat is unconstitutional per se." at p. 10; this Court "illegally hid a felony conviction" at p. 9.

The tenor of that submission and of countless others to which the few excerpts above give barely a hint, magnify the failure to obey the Local Rule and require, if not compel, that their Joint Motion be and it is, hereby denied. Their Joint Motion also respectfully demands (emphasis mine), that the caption to case numbered 98 CR 1101 (ILG) be changed to read United States v. Felix Sater, instead of v. John Doe. To that extent only, their motion is granted. Referring to Sater

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[2] No citation is provided to this case nor is the "court" named. I provide just one citation in the body of which the history of that litigation is given as "Appendix B, History of the Zyprexa Products Liability Litigation, Case No. 04-MD-1596." In re Zyprexa Products Litigation, 260 FRD 13 (E.D.N.Y. August 17, 2009) (Weinstein, J).

as "John Doe" no longer serves any useful purpose since his role as the defendant in this case is now a matter of public record. The Clerk of Court is to make the necessary change accordingly.

In a letter dated May 10th, but not filed until May 13th, Docket No. 117, the movants "request a one week extension of time to reply to the government's letter of April 26th." The government's letter is plainly a mirror reflection of my denial of their motion and to which a reply is neither wanted nor warranted. Their request is denied.

SO ORDERED.

Dated: Brooklyn, New York
May 15, 2013

/s/
I. Leo Glasser

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

12 MC 150 (ILG)

[Filed March 13, 2013]

In the Matter of the Motion to)
Unseal Docket No. 98-1101)
)

ORDER

GLASSER, United States District Judge:

In an Opinion and Order dated August 27, 2012, Dkt. No. 42, familiarity with which is assumed, the Court granted a motion to unseal the docket sheet only in 98 CR 1101 and directed that a hearing will be held thereafter on October 2, 2012 to determine whether any document sealed and filed in that case should be unsealed. A request by the government to adjourn that hearing until October 9, 2012 was granted. At the hearing held that day, I stated my belief that I was obedient to the law in having notice of that hearing docketed and the hearing itself open to the public. I then stated that my determination of which documents may remain sealed and which may be unsealed can only be made upon a review of those documents. Given my familiarity with this case, I found a substantial probability of prejudice to the compelling interest that inheres those documents that can only be protected by a review of them in a closed courtroom. I stated those

compelling interests to be, among other things, the risk of harm to the defendant; the integrity of government activity sufficient to trump the public's common law and First Amendment right of access to the Court. See In re Herald, 734 F.2d 93, 100 (2d Cir. 1984); United States v. Haller, 837 F.2d 84, 88 (2d Cir. 1988). I then declared the proceedings to be closed and the courtroom to be vacated. Hr'g Tr. 5-6, Oct. 9, 2012.

Hearings were subsequently held in camera on that day, i.e., October 9th, 23rd, November 16th, 2012, January 18th and on a conference call on the 14th, 2013. Present at those hearings were counsel for Felix Sater (John Doe) and the United States. It was their burden to establish that there were compelling interests that superseded the general common law and qualified First Amendment right of access to those documents.

At the conclusion of those hearings, the Court finds that their burden was not carried as regards the following docket numbered documents which are hereby directed to be unsealed in their entirety: 1, 2, 5-8, 10, 11, 13-15, 17, 18-25, 29-35, 37-39, 41-49, 51- 56, 58-61, 65-67, 69-75, 77, 78, 81-86, 89-99, 101-108, 110, 111, 113, 114, 116, 117, 120, 123-126, 128-131, 133-136, 139, 140, 143-152, 155-157, 159-168, 174-184, 186-190, 193, 198, 200-201.

The Court finds that the required burden of proof was satisfied as regards the docket numbered documents not included in those listed above and should remain sealed in their entirety or remain sealed as redacted. A Memorandum and Order providing the bases for those findings, together with the documents at issue and the sealed transcripts of the in camera proceedings at which those findings were made will

remain sealed and submitted to the Court of Appeals for review and determination.

SO ORDERED.

Dated: Brooklyn, New York
March 12, 2013

/s/
I. Leo Glasser

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-98-1101

[Dated October 23, 2009]

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN DOE,

Defendant.

United States Courthouse
Brooklyn, New York

October 23, 2009
10:00 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Plaintiff:

BENTON J. CAMPBELL, ESQ.
United States Attorney
BY: TODD KAMINSKY, ESQ.
MARSHALL MILLER, ESQ.
Assistant United States Attorneys

For the Defendant:

KELLY MOORE, ESQ.
LESLIE CALDWELL, ESQ.

Court Reporter:

FREDERICK R. GUERINO, C.S.R.
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by CAT.

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THE COURT CLERK: Criminal cause for sentencing, docket number 98-CR-1101, United States v. John Doe.

Counsel, please approach and state your name for the record.

MR. KAMINSKY: For the United States, Todd Kaminsky and Marshall Miller.

Good morning, your Honor.

THE COURT: Good morning.

MS. CALDWELL: Your Honor, for Mr. Slater, Leslie Caldwell and Kelly Moore.

THE COURT: Good morning.

MR. KAMINSKY: We are joined by probation officer Michelle Espinoza.

MS. ESPINOZA: Good morning, your Honor.

THE COURT: Are you ready to proceed?

MR. KAMINSKY: Yes, Your Honor.

MS. CALDWELL: Yes, your Honor.

THE COURT: Have you reviewed the presentence report with your client?

MS. CALDWELL: Ms. Moore will address the issues on the presentence report.

THE COURT: You took some exception to some aspects of the presentence report. Why don't we dispose of that first.

MS. MOORE: Yes, Your Honor.

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THE COURT: I think for the most part the probation department was in agreement with your observations. I think we start at paragraph 110. 23 should be changed to 20.

MS. ESPINOZA: Yes, Your Honor.

THE COURT: And in paragraph 115, 37 should be changed to 34.

MS. ESPINOZA: Correct.

THE COURT: Paragraph 117, 41 should now read 34.

Paragraph 121, 45 should read 38.

MS. ESPINOZA: Yes, your Honor.

THE COURT: Paragraph 123 should now read 1 instead of 0; paragraph 125 becomes 2 instead of 1; paragraph 126 becomes 38; paragraph 128 becomes 40; 130 becomes 37; and 192 should read 37 on the first line and 262 to 327 on the second line. On paragraph 201, the range should range from 20 instead of 25.

MS. ESPINOZA: Correct, your Honor.

THE COURT: I think that was all of it.

MS. MOORE: That's right, your Honor.

THE COURT: I take it you received a communication that I found on my desk this morning.

MS. CALDWELL: Yes, Your Honor. We received that yesterday.

THE COURT: You want to be heard?

MS. CALDWELL: Yes, Your Honor. I will start with

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that, since the court raised the issue.

Mr. Slater a couple of weeks ago was out with his wife at a restaurant and had a little too much to drink and was driving home. Mr. Slater realized that he had too much to drink and pulled over into a park and was actually sitting in his car. We have the police reports, which we could provide to the court, if you like. He was

sitting in his car with the engine running, but parked, thinking that if he sat for half an hour or an hour he would be able to drive again. He was only a couple of miles from his home. The police officer asked him to get out of the car, which he did, and he failed the field sobriety test. I believe he tested .9 and .829 was the state limit. That case is pending in Nassau County. We really don't think that case has any bearing on this case or should have any bearing on this case, in light of all of the other circumstances of this case, which I would like to address now.

THE COURT: Go ahead.

MS. CALDWELL: Unless the court has any questions about the DWI.

THE COURT: Does the government want to comment in it now?

MR. KAMINSKY: No, Your Honor, other than the fact that we think this incident, while unfortunate, does not reflect in any way the extraordinary cooperation Mr. Slater

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provided starting in 1998 and continuing nearly up to the present day.

THE COURT: All right.

MS. CALDWELL: Felix Slater was really a self-made man, as you know from the presentence report and letters. He was an immigrant from Russia. He worked his way to Wall Street where he was very successful. He was a young man who was working at several at the time name brand brokerage firms,

including Shearson Lehman, until one unfortunate night in 1991, at age 25, he went to a bar, had too much to drink, and got into an altercation with another person. The other person suffered. Mr. Slater hit that the other person, and that impulsive act resulted in a criminal conviction for Mr. Slater. That had a cascade of consequences for him. He lost his Series 7 brokerage license. As a convicted felon, he was not really able to get legitimate work. He was in need of money. He was married and had a young child. He foolishly connected with some friends from his boyhood who were operating a securities brokerage firm.

As the court will recall in the mid-'90s there were a lot of pump-and-dump type brokerage firms, and Mr. Slater foolishly connected with those individuals. He left that business in 1996 of his own accord. He has not engaged in criminal activity since 1996.

Mr. Slater was working in Russia when in 1998 the

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New York City Police Department happened to stumble upon a mini storage box that contained a cash of documents, all described in the government's letter, that were linked to Mr. Slater. Again, this was not an investigation that was pending or ongoing. There were no charges brought. This was a box of documents, to use the government's word, "indecipherable," but connected to Mr. Slater.

Mr. Slater was in Russia working as a consultant for AT&T at the time and heard that the F.B.I. was looking for him. [redacted]

[redacted]

Mr. Slater provided, flew to the United States to surrender to F.B.I. he began to cooperate, pled guilty in 1998, and he's been cooperating ever since.

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His cooperation has included the type of cooperation that the court often sees which is against traditional criminals, including people who worked at the brokerage firm where Mr. Slater worked. Again, he surrendered in 1998. No one had yet been prosecuted in connection with the State Street brokerage firm where he worked. But the government was able to prosecute more than 19 people at various levels of that operation, ranging from the brokers, to the people who were transferring money, [redacted]

[p.8]

[redacted]

The government describes Mr. Slater's cooperation in

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their letter as exemplary. He has worked with several F.B.I. agents over the years. Four of those agents are here in court today, and I understand, if the court permits, at least one of them will address the court.

The government also says that Mr. Slater's cooperation was above and beyond what could be expected of a cooperating defendant. If it is, that's an understatement, but Mr. Slater is somebody who cooperated for ten years, your Honor. He's somebody whose life has changed dramatically since 1996. He is somebody who legally turned his life around. He made a stupid mistake in a bar fight, and again that had a ripple effect which caused him to make another stupid mistake. But really since 1996 he has been working legitimate jobs, cooperating since 1998 with the government. He has a very stable and healthy family life, and his wife, his mother, and sister are all present in court here today with him and are very supportive of him. He has three young school-aged daughters who he's very dedicated to.

This is an individual who really has turned his life around. You have the letters from his Rabbi describing his involvement with the community, and we really

think, you know, I'm hesitant to use the word in the context of a criminal sentencing, I'm hesitant to use the word "redemption," but I think it fits Mr. Slater. I think he has redeemed himself. He has made many, many amends over the

[p.10]

last 13 years -- excuse me, the last eleven years since he's cooperating. He's not going to - notwithstanding the DWI incident - he's not going to appear before this court or any other court again in the context of a criminal case.

We understand that to ask for a sentence of no jail term and no probation is extraordinary, but we think it is warranted in this case where Mr. Slater really has been under a sort of defacto probation for the last ten years. As he has worked very closely with the F.B.I. agents, the government has not seen it necessary to impose any kind of restrictions or conditions on Mr. Slater over the last ten years. He has been traveling freely and does travel to Russia in connection with the real estate business he's involved in, and the government has not imposed any reporting requirement on him over those last ten years.

THE COURT: You have to slow down a little bit for the arms of our court reporter.

MS. CALDWELL: As I always did before.

In any event, your Honor, I think Mr. Slater is really deserving of the full measure of leniency that this court can impose, given the extraordinary circumstances of his cooperation and the fact he has

really rehabilitated himself in these last -- really since 1996. Thank you.

THE COURT: Mr. Kaminsky or Mr. Miller.

MR. KAMINSKY: I will address the court first.

[p.11]

While the underlying criminal conduct involved was serious and real, I don't think there's any question that Mr. Slater has prevented far more financial fraud than he has caused. In a moment, your Honor, if the court permits, I would like to ask Special Agent Leo Taddeo to address the court. He is a senior F.B.I. agent who first worked with Mr. Slater. What he could tell you and what he will tell you is that Mr. Slater was really the F.B.I.'s entry into the types of financial frauds that were being perpetrated at the time in the mid to late '90s the criminal financial wizards were one step ahead of law enforcement, and literally that was until Felix Slater cooperated with the F.B.I.

The 19 other defendants in the United States v. Coppa case that came before your Honor is certainly the most concrete form of that. But far and beyond those 19 defendants, Felix Slater explained to the F.B.I. how these schemes operated. And then there are instances far too numerous to mention in a 5K letter, but they would take any given investigation they were looking into at the time, bring it in front of Felix Slater, and he would explain to them what was going on. He clearly illuminated and elicited information to them which brought countless arrests and halted the fraud at the time. That would be enough, your Honor, for us to stand here and tell you that Felix Slater went above and beyond, but that was only the beginning.

[p.12]

Time and time again all agents here, and numerous others who couldn't be here today, have told the government Felix Slater was one of the best cooperators we worked with. There was nothing he wouldn't do. No task was too big. He was really helpful and was the key to open a hundred different doors that they couldn't open prior to that time.

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So, your Honor, if the court permits, at this time I would like to ask Special Agent Leo Taddeo, who from the inception worked with Felix Slater, address the court and tell you about that experience.

THE COURT: All right. Let him come up.

A VOICE: Good morning, your Honor.

THE COURT: Good morning.

State your name.

A VOICE: Leo Taddeo. I'm the Assistant Special Agent in the City of Baltimore's Field Office.

Good morning, your Honor. First I would like to corroborate and confirm the 5K letter and statements made by Mr. Kaminsky and add a view observations, if I could.

I worked with Mr. Slater from the outset of this stock fraud investigation and he was the epitome of professionalism in our efforts to not only uncover the scheme, but all of the different individuals involved. He answered every single phone call I made to him. He answered every question honestly. He did his best to be truthful and not exaggerate. A person in his situation would have easily believed that he could get more favor from the F.B.I. by making a bigger story than what was already apparent, but he didn't exaggerate or try to make himself anymore important than he already was.

I also observed his interaction with his family and

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other individuals, and I can say he's a dedicated family man and actually a pleasure to work with.

In terms of the effects of his cooperation, in addition to what is in the 5K letter, I just want to add in the mid-'90s, the F.B.I. was facing the probability of seeing organized crime on Wall Street, but not being able to do much about it. And given between success and failure for us is often an effective cooperating witness. Felix Slater was that cooperating witness.

THE COURT: He had Frank Coppa at one point, too.

AGENT TADDEO: Your Honor? Your Honor, he was instrumental bringing Frank Coppa in, and as a result of his cooperation, caused further damage to the Bonnano family. Without his cooperation, it would have been a few more years where the F.B.I. would have effectively removed La Cosa Nostra from the penny stock business. And I would easily credit Felix not only

his efforts, but the cascading efforts of bringing other witnesses in to basically eliminate the threat on Wall Street.

Once again, I know he worked with other agents, and I heard nothing but similar comments from them about the nature of his cooperation and his personality and professionalism, and I'm here today on his behalf. I hope that his family can get on with their lives, and he can go on to be prosperous and a good dad and husband. I know he is.

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Those are my comments, your Honor.

I'm happy to answer any questions.

THE COURT: Thank you. Mr. Miller.

MR. MILLER: Your Honor, I don't want to try the court's patience by repeating what has already been said by Ms. Caldwell, Mr. Kaminsky, and Agent Taddeo, but I did want to underline two things. One was Mr. Slater's cooperation to the office and the many investigations he participated in. The length of his cooperation is extraordinary. And I wanted to be here to express from the office's perspective just how capable a cooperator he was, how important a cooperator he was, and how effective he was.

[redacted]

So those are the two points I wanted to make.

THE COURT: All right.

Mr. Slater, what would you like to say to me this morning?

THE DEFENDANT: I have been writing what I am going

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to say for eleven years, but I don't want to read it.

I'm not proud of what I have done. I felt I was trapped at the time I agreed to do it. I had a bar fight, went to jail which something I never thought I would ever do nobody ever thought I would go to jail for a bar fight. I had to find money for an appeal that my lawyer was trying to file and I didn't have a job. I had a four-month-old daughter at that moment, legal bills mounting, personal bills, and a childhood acquaintance approached me with this scheme, which I subsequently pled guilty to in front of your Honor.

THE COURT: Is that Clarkson?

THE DEFENDANT: Yes. Prior to that I never had any run-ins with the law. I worked with very legitimate firms, very honest. I had one complaint in the entire time I worked on Wall Street prior to my criminal activity.

During the two and a half years that I was involved in this activity, I spent a year of those in jail. I hated myself, despised myself for doing the things I was doing while I was doing them, because my parents did not sacrifice what they sacrificed to have me come to this country and become a criminal. The acts that I committed were despicable. They just weren't financial fraud. I took ability and opportunity and flushed them

down the toilet. The bar fight and the acts that I took afterwards are not a

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justification. I'm just merely trying to explain the circumstances under which I engaged in that activity, what was happening to me at the time.

I quit of my own accord, approximately two years before the government asked me, until I found out that there was a case getting started or investigation. I quit. I did not want to be involved in criminal activity. I went to Russia to work in telecommunications to get away from what I was involved with here. [redacted] But more importantly because why I have continued all of these years, why I was asked many times by various agents, by various prosecutors, is it time yet to get sentenced? I said no, I'm willing to continue working. I did it because I want some redemption. Yes, I am a criminal.

Yes, I am guilty of the things that I have done. The worse thing that could happen, your Honor, despite whatever sentence you impose upon me, I went into real estate development and I built a very successful real estate company right up the block, a Trump project, built the whole thing. Years ago they wrote an article in the newspaper, "executive with ties to Donald Trump has a criminal past" the next month I had to leave my company, the company that I built

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with my own two hands, otherwise the banks would have said there's a criminal involved. I had to get out.

At that moment I thought my life was over. Here I am trying to rehabilitate myself and keep getting the rug pulled out from under me. I thought that was the case until a week later my daughter came home and said the kids at school said my Dad is a terrorist.

I guess the worst thing that is going to happen and is happening is the blight I put on my children, and I will now in the past and in the future try to do good deeds, try to be a positive member for my family and for my community to in some way hopefully balance out the mountain of garbage I heaped on my own life.

In closing, your Honor, I'm guilty of the things I have done and I stand before you with no justification, and I'm ready to accept any punishment you feel is deserving for me to fulfill anything that I have done.

THE COURT: I frequently hear a phrase that Ms. Caldwell used, literally hundreds of persons who stand before me that do use, "I made a terrible mistake." The word "mistake" always intrigues me. Given what you have done over the past eleven years raises a question as how is it possible, given the character that you exemplified those eleven years, how is it possible that you became involved in an enterprise, which is what the RICO prosecution was all

[p.19]

about, calculated a massive series of securities frauds, which were conceived by a cadre of callous, corrupt venisons of the security industry, who also enlisted the assistance of the likes of Garafalo and Cochlin (ph), the Persico and the Colombo families, and I have asked myself countless times how has that happening? And I have been able to answer that question by assuming

and believing that most of us have a little voice inside us which speaks to us when we think of or about to do something wrong. It says to us, don't do it, it is wrong. And there were times that I have come to know that there are some persons who don't have that little voice. They never hear it, never listen to it. And there are some who do. I guess you exemplify that category; you heard that voice. You weren't listening to it at the time when Clarkson invited you to join them.

I'm required, although it is an oxymoron, to consider the guidelines which are unconstitutional, but I'm to be guided by them, and if I do disregard them drastically, an appellate court will tell me I did something unreasonable, although semantically I never understood why if a judge has discretion, how could it be abused by definition. He has the privilege of doing whatever he believes to be right.

One of the greater judges of our country, Judge Friendly, attempted to resolute that years ago and concluded when the Court of Appeals says a district court judge abuses

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discretion, all they are saying is we disagree with him. That becomes relevant in connection with your sentence because I'm obliged to consider the nature and circumstances of the offense and the seriousness of the offense. The seriousness of offenses I guess for most people who automatically define offenses which inflict serious physical harm, murder, rape, burglary, assault, but the offense with which you were involved was also extremely serious because one can't measure how many, literally hundreds of persons, bought Fun Time,

Hydrock, Holly, United States Bridge, worthless stock, lost money which they have set aside for retirement. Lost money which they set aside for their children's education. And the harm with which that kind of crime, characterized as white collar crime, is in many respects far more serious than the floating infliction of a serious act. So I'm obliged to consider the seriousness of the offense.

I'm obliged to consider the sentence achieving promotion and respect for the law. It is a rather curious factor for the court to consider, promote respect for the law. What does that mean? Obviously it doesn't mean that I can administer a credible injection into your head and instantaneously instill respect for the law. What it means is to convey an understanding - which at this point I believe is irrelevant for me to covey - convey an understanding that

[p.21]

when the law makes certain conduct illegal, it means it. That's what promoting respect for the law means, believe what the law means when it says securities fraud is a crime. Don't do it. And the arm of the law is pretty long. It eventually will catch up to you.

The most difficult task of that statute, 3553(a), which the court is obliged to consider imposing just punishment, and there is no mathematical, scientific, or any other guide to determine what just punishment is, I sometimes like to think of a question that somebody said was asked about God. Somebody asked whether God prays. And the response was, that's a remarkable silly question, God prays? What would God pray for? And the answer was that God prays that his

sense of mercy will overcome his desire for justice, and naturally would be factored into what is just punishment in your case.

What is interesting and difficult about your case, literally hundreds of cases like it, judges tend to become cynical and mindful. So with cooperators. We understand in most instances there's a very quick cost benefit analysis which is made. A person is apprehended for having committed a crime, and rather quickly decides that perhaps the best way to minimize my sentence is to begin to cooperate. And the other troublesome and interesting aspect of this phase of sentencing in this case is the more sophisticated and

[p.22]

knowledgeable the criminal, the more valuable is his cooperation, and the more benefit he can obtain, and offset the punishment which might otherwise have been imposed. We see that all of the time, low-level drug dealers, couriers, have no information they can give to the government which would provide any assistance, so they suffer the sentence which the law requires. A person who was higher-up on the ladder, drug trade or a securities fraud has a lot of knowledge and information to convey to the government, is obviously in a much better position.

So really getting down to the crux of this, to what extent should your very valuable cooperation offset the guideline sentence, which statutorily for RICO is 20 years, and for guideline, 262 to 300-some-odd-months, to what extent does your cooperation offset that enormous amount of time? I don't think anybody truly suspects that a sentence of 20 years or 262 months

would be imposed, except the newspapers like to trump the numbers, facing a jail term of 120 years and so on.

But there's another factor which I regard as quite relevant, in a very real sense, I think and you said it. You have be writing your little allocution to me for eleven years. I've often wondered why it takes the government eleven years or twelve years to bring a cooperator in for sentencing. In your case they were aware of your assistance,

[p.23]

the quality and extent of it. They didn't have to wait to call upon you to testify, have your sentence first, and thought maybe you would refuse to testify in a case thereafter because you had already been sentenced.

For eleven years I would suspect you had gone to bed every night or every other night sleeping a little restlessly and wondering what your sentence is going to be. Then when the day of punishment comes, what will be my fate? For a period of eleven years, and its true of cooperating generally, there is a kind of psychological imprisonment and burden which they carry over that long period of time. Their life is not quite the same. They don't have that same carefree double mint care sense of life because they are worried about when will that end. So in effect there has been a sentence which already has been imposed.

It's interesting in thinking about what I would do this morning, I will use the word "redemption." That in a sense the remarkable assistance you have given to them, which they told me about in a letter, Agent Taddeo just elaborated on, in effect manifested a desire in you, the harm you caused a lot of harmless people

who were thwarted by the likes of you and Aleks Paul and Clarkson, Salamon, the whole group of thieves, that's essentially what they were. And the extent of your cooperation overall of those years clearly manifests that you have a very sincere and deep respect for the law, at

[p.24]

least to this essence would suggest would be an appropriate inference.

I'm not going to impose a term of incarceration, and I'm not going to impose a sentence, but the statute, it is interesting, the RICO statute provides that the penalty shall be a fine or imprisonment. It doesn't say probation and it doesn't make imprisonment mandatory. It could be a fine or imprisonment. I have a duty not only to you, Mr. Slater, to see that justice is done to you, I have that obligation, and I also have an obligation to the community which has in a sense put you here, and some form of punishment, although it comes very late, I think it is appropriate in the discharge of my duty to put someone on some degree of punishment, and I'm going to impose a fine of $25,000. I've listened to and looked at the factors one should consider in imposing the fine. They all clearly justify a fine in that sum, which given the enormity of what you did, although many years ago, I think is appropriate.

I think there's only one count in the indictment.

MS. CALDWELL: That's correct, your Honor. It was a one count information.

THE COURT: According to the statute, the fine should be paid immediately to the clerk of the court. If

for some reason during the time it would be inappropriate and an application is made to that, I will consider it.

[p.25]

I think I'm also obliged to advise you that you have a right to appeal the sentence. If you cannot afford to pay the cost of that appeal, you can make an application to have the cost waived.

I think there's a forfeiture charge which was agreed upon.

MS. CALDWELL: Your Honor, Mr. Slater forfeited a house in the Hamptons as part of his cooperation agreement.

THE COURT: In Hampton Bays?

MR. CALDWELL: Yes.

THE COURT: I think it was provided for the cooperation.

I don't think there's anything else for me to do in connection to this proceeding.

MS. CALDWELL: No. Thank you, your Honor.

MR. KAMINSKY: No, Your Honor.

THE COURT: I wish you well next time you go to dinner with your wife drink more miserly, modestly.

I think these proceedings are concluded.

APPENDIX F

U.S. District Court
Southern District of New York (Foley Square)
CRIMINAL DOCKET FOR CASE #:
1:94-cr-00248-CSH-1

Case title: USA v. Shereshevsky

Date Filed: 05/05/1994
Date Terminated: 06/18/2002

Pending Counts
18:371 BANK FRAUD
(1)

Disposition
Imprisonment: Time served. Defendant advised of his right to appeal. Supervised release: 24 months. Special assessment: $50, due in full immediately.

Date Filed	#	Docket Text
05/05/1994	1	WAIVER OF INDICTMENT by Joseph Shereshevsky (rag) (Entered: 05/06/1994)
05/05/1994	2	INFORMATION as to Joseph Shereshevsky (1) count(s) 1 (rag) (Entered: 05/06/1994)
* * *		

05/05/1994		PLEA entered by Joseph Shereshevsky . Court accepts plea. Not Guilty: Joseph Shereshevsky (1) count(s) 1 (rag) (Entered: 05/06/1994)
* * *		
05/05/1994		PLEA entered by Joseph Shereshevsky. Court accepts plea. Guilty: Joseph Shereshevsky (1) count(s) 1 . (Plea filed under seal). (ph) (Entered: 06/26/2002)
* * *		

09/24/2001		ORDER EXCLUDING TIME UNDER THE SPEEDY TRIAL ACT as to Joseph Shereshevsky ...that the request for a 30-day exclusion from today, September 17, 2001, purs. to Title 18 U.S.C. Sec. 3161(h) (8) (A) is hereby granted for all criminal cases in which an indictment or information has been filed and is pending,..., Continuing due to Extraordinary circumstances time is excluded from 9/17/01 to 10/17/01 (Signed by Chief Judge Michael B. Mukasey); [Original filed in M10-468 Document No. 22] (ICMSUSER) (Entered: 10/01/2001)
6/18/2002		Sentencing held Joseph Shereshevsky (1) count(s) 1. (ph) (Entered: 06/26/2002)
* * *		

APPENDIX G

Constitutional, Statutory and Regulatory Provisions

The United States Constitution

Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Section 2, Paragraph 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the

Citizens thereof, and foreign States, Citizens or Subjects.

* * *

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Theft or Alteration of Record or Process; False Bail (18 USC § 1506)

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect; or

Whoever acknowledges, or procures to be acknowledged in any such court, any recognizance, bail, or judgment, in the name of any other person not privy or consenting to the same—

Shall be fined under this title or imprisoned not more than five years, or both.

Imposition of a Sentence (18 USC § 3553 (c))

(c) **Statement of Reasons for Imposing a Sentence.**— The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994 (w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the

statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

Order of Restitution (18 USC § 3663)

(a)

(1)

(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848 (a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A (c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

* * *

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

Mandatory Restitution to Victims of Certain Crimes (18 USC § 3663A)

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)

(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), [1] when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848 (a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856 (a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

Procedure for Issuance and Enforcement of Order of Restitution (18 USC § 3664)

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

* * *

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

* * *

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

* * *

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

* * *

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

* * *

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

* * *

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

* * *

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding

or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)

(1)

(A)

(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source,

including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

The Crime Victims' Rights Act (18 USC § 3771)

(a) Rights of Crime Victims.— A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights Afforded.—

(1) In general.— In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

* * *

(c) Best Efforts To Accord Rights.—

(1) Government.— Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.— The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.— Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and Limitations.—

(1) Rights.— The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.— In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.— The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a

continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.— In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.— In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

* * *

Pleas (Federal Rule of Criminal Procedure 11(b))

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the

court must address the defendant personally in open court....

Sentencing and Judgment (Federal Rule of Criminal Procedure 32)

I. Rule 32. Sentencing and Judgment

* * *

(c) Presentence Investigation.

(1) ***Required Investigation.***

(A) ***In General.*** The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. §3593 (c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. §3553, and the court explains its finding on the record.

(B) ***Restitution.*** If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

* * *

(2) ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the

defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

* * *

(2) ***Additional Information.*** The presentence report must also contain the following:

* * *

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

* * *

(D) when the law provides for restitution, information sufficient for a restitution order;

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

Injunctions and Restraining Orders (Federal Rule of Civil Procedure 65(d))

Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Procedures to Promote Compliance with Crime Victims' Rights Obligations (28 CFR 45.10)

(a) Definitions. The following definitions shall apply with respect to this section, which implements the provisions of the Justice for All Act that relate to protection of the rights of crime victims. See 18 U.S.C. 3771.

Crime victim means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights, but

in no event shall the defendant be named as such guardian or representative.

Crime victims' rights means those rights provided in 18 U.S.C. 3771.

Employee of the Department of Justice means an attorney, investigator, law enforcement officer, or other personnel employed by any division or office of the Department of Justice whose regular course of duties includes direct interaction with crime victims, not including a contractor.

Office of the Department of Justice means a component of the Department of Justice whose employees directly interact with crime victims in the regular course of their duties.

(b) The Attorney General shall designate an official within the Executive Office for United States Attorneys (EOUSA) to receive and investigate complaints alleging the failure of Department of Justice employees to provide rights to crime victims under 18 U.S.C. 3771. The official shall be called the Department of Justice Victims' Rights Ombudsman (VRO). The VRO shall then designate, in consultation with each office of the Department of Justice, an official in each office to serve as the initial point of contact (POC) for complainants.

* * *

(e) Disciplinary procedures.

(1) If, based on the investigation, the VRO determines that a Department of Justice employee has wantonly or willfully failed to provide the complainant with a right listed in 18 U.S.C. 3771,

the VRO shall recommend, in conformity with laws and regulations regarding employee discipline, a range of disciplinary sanctions to the head of the office of the Department of Justice in which the employee is located, or to the official who has been designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office. The head of that office of the Department of Justice, or the other official designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office, shall be the final decision-maker regarding the disciplinary sanction to be imposed, in accordance with applicable laws and regulations.

(2) Disciplinary sanctions available under paragraph (e)(1) of this section include all sanctions provided under the Department of Justice Human Resources Order, 1200.1.

Policy With Regard To Open Judicial Proceedings (28 CFR § 50.9).

Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should take a position on any motion to close a judicial proceeding, and should ordinarily oppose closure; it should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice. In furtherance of the Department's concern for the right of the public to

attend judicial proceedings and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all attorneys for the United States.

(a) These guidelines apply to all federal trials, pre- and post-trial evidentiary proceedings, arraignments, bond hearings, plea proceedings, sentencing proceedings, or portions thereof, except as indicated in paragraph (e) of this section.

(b) A Government attorney has a compelling duty to protect the societal interest in open proceedings.

(c) A Government attorney shall not move for or consent to closure of a proceeding covered by these guidelines unless:

(1) No reasonable alternative exists for protecting the interests at stake;

(2) Closure is clearly likely to prevent the harm sought to be avoided;

(3) The degree of closure is minimized to the greatest extent possible;

(4) The public is given adequate notice of the proposed closure; and, in addition, the motion for closure is made on the record, except where the disclosure of the details of the motion papers would clearly defeat the reason for closure specified under paragraph (c)(6) of this section;

(5) Transcripts of the closed proceedings will be unsealed as soon as the interests requiring closure no longer obtain; and

(6) Failure to close the proceedings will produce;

(i) A substantial likelihood of denial of the right of any person to a fair trial; or

(ii) A substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or

(iii) A substantial likelihood that ongoing investigations will be seriously jeopardized.

(d) A government attorney shall not move for or consent to the closure of any proceeding, civil or criminal, except with the express authorization of:

(1) The Deputy Attorney General, or,

(2) The Associate Attorney General, if the Division seeking authorization is under the supervision of the Associate Attorney General.

(e) These guidelines do not apply to:

(1) The closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) In camera inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege; or

(3) Grand jury proceedings or proceedings ancillary thereto; or

(4) Conferences traditionally held at the bench or in chambers during the course of an open proceeding; or

(5) The closure of judicial proceedings pursuant to 18 U.S.C. 3509 (d) and (e) for the protection of child victims or child witnesses.

(f) Because of the vital public interest in open judicial proceedings, the records of any proceeding closed pursuant to this section, and still sealed 60 days after termination of the proceeding, shall be reviewed to determine if the reasons for closure are still applicable. If they are not, an appropriate motion will be made to have the records unsealed. If the reasons for closure are still applicable after 60 days, this review is to be repeated every 60 days until such time as the records are unsealed. Compliance with this section will be monitored by the Criminal Division.

(g) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

APPENDIX H

JEFFREY LICHTMAN
ATTORNEY AT LAW
[Letterhead]

October 10, 2000

BY TELEFAX: (718) 254-6180
Eric O. Corngold, Esq.
Assistant United States Attorney
Eastern District of New York
1 Pierrepont Plaza
Brooklyn, New York 11201

Re: United States v. Coppa, et al., 00 CR 196 (ILG)

Dear Mr. Corngold:

I am writing on behalf of defendant Daniel Lev to follow up on our meeting of June 15, 2000 during which I reviewed certain discovery materials pertinent to this case. At our meeting, I noted my request for certain exculpatory and impeachment materials included in your general index which I believed to be Brady and/or Giglio material, i.e., bank, phone and financial records of Eugene Klotzman and Felix Sater; NASD/SEC disciplinary and employment history for Klotzman and Sater; customer complaints regarding Klotzman and Sater; materials from People v. Sater; and any recorded witness statements from these or any government witness which serve to impeach them or exculpate the

defendant. United States v. Shvarts, 90 F. Supp.2d 219 (E.D.N.Y. 2000)(Glasser, J.). Of course my request is not limited to materials found in your general index. Any other such materials within the government's possession or control is also requested.

Please contact me if you have any questions with regard to this request.

Very truly yours,

/s/
Jeffrey Lichtman

APPENDIX I

[SEAL] **U.S. Department of Justice**

United States Attorney
Eastern District of New York

EOC: DBP
F. #1998r01996
3500-1.wpd

136 Pierrepont Street
Brooklyn, New York 11201

November 20, 2001

BY FEDERAL EXPRESS

Lawrence Ray
2 Cedar Ridge Lane
Warren, New Jersey 07059

Re: United States v. Lawrence Ray,
Criminal Docket No. 00-196 (ILG)

Dear Mr. Ray:

Enclosed are copies of documents and audiocassette tapes which the government is providing to you pursuant to its obligations under the Jencks Act, which is codified at Section 3500 of Title 18 of the United States Code, and Rules 16 and 26.2 of the Federal Rules of Criminal Procedure. As a courtesy, since you are not an attorney, we also have enclosed copies of Section 3500 and Rules 16 and 26.2.

As you will see, taken together, Section 3500 and Rule 26.2 provide that after a witness called by the

government has testified on direct examination, a defendant may ask the judge to order the government to give the defendant copies of any written or recorded statements of the witness in the government's possession relating to the subject matter about which the witness testified. As a courtesy, this Office generally does not wait for a defendant to make a motion to receive such materials, nor do we wait until the witness has testified on direct examination to provide copies of such materials. We also generally take a broad view regarding which statements "relate" to the subject matter of a witness's testimony.

With these principles in mind, we are providing you with copies of (i) transcripts of prior testimony of Professor Steven Thel, who will be called by the government as an expert witness,[1] (ii) copies of reports of interviews of you by FBI Special Agents Gary Uher and Leo Taddeo,[2] both of whom the government expects to call as witnesses, and (iii) audiotapes of recorded conversations involving Joseph Polito and Felix Sater, both of whom will be called by the government as a cooperating witnesses.[3] With regard to the audiotapes, we do not intend to offer any of them into evidence at

---

[1] The nature of Professor Thel's expert testimony is detailed in a separate letter to you dated today.

[2] Copies of the Uher and Taddeo reports were provided to you previously. We nonetheless provide you with additional copies as a courtesy.

[3] You were provided, under cover of a letter dated yesterday, with copies of materials relating to the testimony of Polito and Sater, along with copies of materials relating to another cooperating witness, Salvatore Lauria.

trial and do not believe they will have any relevancy at trial. However, for the reasons set forth above, we provide them to you, in an abundance of caution, to ensure that there is no question that we have satisfied all of our obligations to you under Section 3500.

* * *

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-98-1102

[Dated February 5, 2004]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
-against-	)
	)
SALVATORE LAURIA,	)
	)
Defendant.	)
	)

United States Courthouse

Brooklyn, New York

February 5, 2004
10:00 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
ROSLYNN R. MAUSKOPF, ESQ.
United States Attorney

BY: ERIC CORNGOLD, ESQ.
Assistant United States Attorney

For the Defendant:
ROBERT G. STAHL, ESQ.

Court Reporter:
FREDERICK R. GUERINO, C.S.R.
225 Cadman Plaza East
Brooklyn, New York
(781) 613-2503

* * *

[p.2]

THE COURT CLERK: Criminal cause for sentencing: United States of America v. Salvatore Lauria.

MR. CORNGOLD: Eric Corngold for the United States.

MR. STAHL: Robert Stahl on behalf of Mr. Lauria.

THE COURT: Ready to proceed?

MR. STAHL: Yes, Your Honor.

* * *

[p.3]

* * *

THE COURT: Mr. Stahl, do you want to be heard beyond that?

MR. STAHL: Not on the legal argument. On the sentencing, yes, Your Honor.

THE COURT: Go ahead.

MR. STAHL: Your Honor, obviously between the PSR,

[p.4]

* * *

Mr. Lauria is someone whose family is here in court today to show their support and it has not been easy. As your Honor is aware, Mr. Lauria cooperated fully with the government immediately and extensively in bringing upon not only himself, which is not a concern to Mr. Lauria in particular, but to his family, and to make amends for the acts that he did. Mr. Lauria cooperated not only against other brokers and money launderers, but also against organized crime, which I think is laid out in both our submissions. And that led to a number of threats against Mr. Lauria and his family, including against his young daughter.

But, in addition to that, Mr. Lauria was the person at White Rock, State Street Capital that had been legitimately involved in the stock market business, had signed all of the leases, and put his name personally responsible for all of the money, and has settled with every investor who has filed a suit. He has settled with the creditors of those companies, from the phone systems to the furniture leases, has not walked away from it, did not declare bankruptcy, and did not say I just can't do this. He saw that he had to live up to his responsibilities, that he

[p.5]

had completely gone off course from his upbringing from a very humble background, hard-working, family oriented, to live up to those financial responsibilities, as well as his family responsibilities. And he, unlike some other individuals involved in this, went out and did the best he could and settled with those people. So anyone that filed an action against the companies, or Mr. Lauria or others, Mr. Lauria has settled with, and has left him, as you can see from the financials, in difficult financial shape, and obviously leaving his family in difficult financial shape.

* * *

[p.6]

* * *

THE COURT: Who are all of these people that you say he settled with, who are they?

MR. STAHL: They were investors that filed lawsuits.

THE COURT: How many were those?

MR. STAHL: I would say about between 15 and 20.

THE COURT: That's just a minuscule percentage of the number of investors who were defrauded, who suffered substantial losses as a result of Mr. Lauria's activity. Fifteen to 20 is not even a drop in the bucket.

MR. STAHL: Your Honor, I understand. I'm not putting Mr. Lauria up for a commendation at all. Mr.

Lauria committed a complicated stock fraud, as we have seen too many times in this courtroom, and when I have been before you on other matters, people who start out legitimately, become greedy. They go on a slippery slope and the next thing they know they are involved in this. That's not excusable. But my point to your Honor is, Mr. Lauria has done what he can within his own financial means, and the people that sought claims, people that lost money in the investments, and

[p.7]

companies that had leased equipment to Mr. Lauria's company is not just his companies, but the people who were involved with Mr. Lauria, and none of the other partners have taken any of this action. This is something Mr. Lauria has done in an effort to live up to his responsibilities.

* * *

In addition to that, he has settled with the people that came forward. Obviously Mr. Lauria could not go out and track down each and every individual investor and offer them a penny on each dollar that was lost. He was one part of a very large group of individuals. Most of them have been before your Honor, 24, I believe, individuals that the government directly, through Mr. Lauria's cooperation, was able to indict, in addition to all of the other cases, including ongoing cases that he has cooperated and still cooperates to this day with the United States.

* * *

[p.9]

* * *

THE COURT: Mr. Stahl made reference to threats which I see no reference to in your letter.

What do you know about that?

MR. CORNGOLD: The threats, your Honor, Mr. Lauria reported them. They are described in Mr. Stahl's letter. Agent Taddeo is here. I think the answer is, well, we were never able to identify who made the threats, and that doesn't mean that we don't believe that what he described didn't exist. We were just never able to track them down.

Is that fair?

AGENT TADDEO: That's correct.

MR. STAHL: Your Honor, first we know in particular there was the initial approach by a private investigator hired by Mr. Persico, and that was someone that Mr. Lauria had grown up in the neighborhood with. So that's one of the individuals that he was very concerned about, because Mr. Persico viewed as the ultimate act of betrayal.

Second, Mr. Lauria, the telephone call, I'm talking about to his wife talking about how cute their daughter is,

[p.10]

was traced to a phone booth a mile and a half away, and was reported to the local police, and of course was reported to Agent Taddeo and his squad at the time, and I believe that was all verified. Obviously, as Mr.

Corngold said, they were never able to trace who made the call, but it was certainly a clear message to Mr. Lauria and his family.

* * *

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00-CR-1005 (NGG)

[Dated June 20, 2006]

UNITED STATES OF AMERICA	)
	)
-against-	)
	)
MICHAEL SHEFEROFSKY	)
a/k/a Mikhail Sater	)
	)
Defendant	)
	)

U.S. Courthouse

Brooklyn, New York

SEALED PROCEEDING

June 20, 2006
9:30 a.m.

BEFORE:

HONORABLE NICHOLAS G. Garaufis
United States District Judge

APPEARANCES:

For the Government:
LORETTA E. LYNCH

United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201
BY: THOMAS ALAN FIRESTONE
Assistant U.S. Attorney

For the Defendant:
MALMAN, MALMAN & ROSENTHAL
4040 Sheridan Street
Hollywood, Florida 33021
BY: MYLES H. MALMAN
and
STAHL & HORBLIT
47 Maple Street
Suite 206
Summit, New Jersey 07901
BY: ROBERT G. STAHL

* * *

[p.2]

Court Reporter:
RONALD E. TOLKIN, RPR, RMR, CRR
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
718-613-2647

***

THE CLERK: Criminal cause for sentences.

Counsel, please state your appearances.

MR. STAHL: Good morning, Robert Stall and Myles Malman on behalf of Michael Sheferofsky.

THE COURT: Good morning.

MR. FIRESTONE: Thomas Firestone for the government.

* * *

[p.13]

* * *

THE COURT: Is there any restitution here?

MR. FIRESTONE: No. I believe that is addressed in the addendum to the --

THE COURT: Let me just take a look.

[p.14]

THE COURT: You agree with Probation?

MR. FIRESTONE: Yes, absolutely.

THE COURT: I just needed to cover that. Since this case deals with an extortion restitution is often part of the sentence.

MR. FIRESTONE: It would be except for the fact as indicated in the probation report, the victims are either unidentifiable, dead or were extorted of money which was itself the proceeds of criminal activity.

THE COURT: All right.

* * *

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04-CR-234 (CBA)

[Dated January 11, 2008]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
SALVATORE D. ROMANO,	)
	)
Defendant.	)
	)

January 11, 2008
Brooklyn, New York

TRANSCRIPT OF CRIMINAL CAUSE
FOR SENTENCING
BEFORE THE HONORABLE CAROL B. AMON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
United States Attorney's Office
BY: JEFFREY GOLDBERG, ESQ.
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant:
MICHAEL F. BACHNER, ESQ.
Bachner & Herskovits, P.C.
26 Broadway
New York, New York 10004

Court Transcriber:
CARLA NUTTER
TypeWrite Word Processing Service
356 Eltingville Boulevard
Staten Island, New York 10312

* * *

[p.35]

THE DEFENDANT: Of course, Your Honor, please. I'm not minimizing that number. I would never do that. All I'm trying to say is I have the ability to pay back $10 million. I'm forty years old, I can work, I'm earning money in the last two years -- six figures. I expect that to go to a high six figures. If this case is about the victims and me paying it back the only shot I would have is working. That's the only way I can do that.

THE COURT: Well, that's another issue. Let me just ask the government. I get letters here that say, you know, restitution can't be calculated.

MR. GOLDBERG: It really can't, Judge, with respect to the securities fraud. I think Probation put it best when they cited the statute involving impracticable calculation.

I will note that there is an outstanding restitution with respect to Mr. Romano's 1992 case. As

of July it was $675,000.00 that he owed. I know he has resumed actively making payments on that but that is a number that's out there that --

THE COURT: So what are the financial penalties available here?

MR. GOLDBERG: Well, Probation has concluded that he is unable to pay a fine. He's obviously -- I mean that report was filed September 2006 and Mr. Romano is apparently doing much better now. I don't know what Probation's position on

[p.36]

that is but he does have this outstanding balance of $675,000.00 minus whatever payments he has made in recent months.

* * *

THE DEFENDANT:

* * *

[p.37]

We're pillars in our community now because we've been there for three or four years now and if I lose any of that momentum, obviously, it's going to hurt the victims that lost $40 million because I'm going to be unable to pay.

THE COURT: Well, nobody knows who they are so you're not going to be able to pay them anyway. I guess you have the restitution from Judge Dearie's case that you could pay.

* * *

MR. BACHNER:

* * *

[p.38]

* * *

One of the problems because it was impractical if not impossible to find out who the victims were, it was really hard or impractical to even determine, you know, if an investor invested money, did he sell the stock for a profit, did he lose any of that money? ...

* * *

[p.45]

* * *

MR. GOLDBERG: And I was reminded by Probation that I believe Your Honor is making the finding about restitution being impracticable under 3665.

THE COURT: I have nobody to order restitution to because the information hasn't been provided to me and I accept the representation that it's too difficult to do.

MR. GOLDBERG: Thank you, Your Honor.

* * *

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98-CR-1101

[Dated June 14, 2010]

UNITED STATES OF AMERICA,	)
	)
v.	)
	)
JOHN DOE,	)
	)
Defendant.	)
	)

U.S. Courthouse
Brooklyn, New York

June 14, 2010
12:00 o'clock p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES SENIOR JUDGE

APPEARANCES:

For the Movant:
KELLY MOORE, ESQ.
BRIAN HERMAN, ESQ.

For the Respondent:
RICHARD E. LERNER, ESQ.
LAUREN ROCKLIN, ESQ.

For Non-Party Movant:
STAMATIOS STAMOULIS, ESQ.

Court Reporter:
Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2419

* * *

[p.3]

* * *

THE COURT:

* * *

[p.5]

* * *

Now, with respect to your inquiries as to the order which may have been issued, there is no formal order which I believe is not issued by virtually any judge in this courthouse with respect to sealing. I notice the letter I got from you says facsimile under seal and to the extent that I so ordered it, I have tacitly approved it.

* * *

So there is no formal order, and to the extent that you want to know what that order said and to whom it was

[p.6]

addressed it's a request which has no merit. I can't make an order sealing a document and saying this document is sealed and not to be looked at by Mr. Lerner, Mr. Stamoulis. It's a document which is placed under seal. It's filed under seal. And if anybody wants to see what it is that has been filed under seal, the procedure is to make an application to the court to unseal it.

* * *

[p.9]

* * *

So when your letter asks me to show you what order is directed to Mr. Oberlander, there isn't any.

* * *

APPENDIX N

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 98-1101

[Dated July 20, 2010]

IN RE: JOHN DOE,

United States Courthouse
Brooklyn, New York,

July 20, 2010
10:30 o'clock a.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
MORGAN LEWIS & BOCKIUS, LLP
101 Park Avenue
New York, N. Y.
BY: KELLY MOORE, ESQ.
LESLIE R. CALDWELL, ESQ.
DAVID A. SNIDER, ESQ.
BRIAN A. HERMAN, ESQ.

For the Defendant:
WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
150 East 42nd Street
New York, N. Y. 10017
BY: RICHARD LERNER, ESQ.
LAUREN J. ROCKLIN, ESQ.

Court Reporter:
Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-613-2509

HENRY SHAPRIO

* * *

[p.11]

* * *

THE COURT: Excuse me. Just a minute. Is there some presumption that an order -- assuming that there is an order and you do not know whether the order was or was not signed -- what you do know by looking at the docket sheet is that this is a sealed file, sealed by order of the court.

Is there some presumption that the order is invalid because it was not signed, is that what I'm hearing?

MS. LERNER: I'm referring to the Hartford case--

THE COURT: Mr. Lerner, I am asking you what I am understanding, is there is a presumption of the invalidity of an order?

MS. LERNER: I think, your Honor stated on the record that this is just matter of factly and indicated as I recall it wasn't even signed, it's docket said is sealed. If there is a signed order, let us see it, because without a signed order this proceeding is unconstitutional.

THE COURT: It may be, Mr. Lerner, that you are correct. You are not answering the question.

MS. LERNER: I don't have to make any presumption. The United States Supreme Court has held the appellate courts

[p.12]

do not have to presume there is a signed order in the file when there is--

THE COURT: If there is an order or docket entry that says this has been sealed by order of the court, any person is free to ignore that order and if by some chance, some document in that file becomes available to any person, that person is free to assume that the order has no efficacy?

* * *

[p.13]

* * *

MS. LERNER: There is nothing in the record, that we are aware of, because we cannot see the docket sheet or the sealing order. There is nothing on the order finding a more fundamental interest in the First

Amendment would be served by sealing this court file. There is nothing on the record finding this was the least restrictive alternative.

* * *

[p.14]

* * *

Now, your Honor, ordered -- the order itself signed by your Honor incorporates Ms. Moore's arguments and it says for the reasons stated, but that is constitutionally insufficient according to Amadao, you must make independent findings to support a prior restraint.

It must be the order itself. The TRO is a nullity. Failing to make the requisite findings in the order to show cause, in as much it constitutes a prior restraint, renders that prior restraint unconstitutional.

* * *

[p.15]

* * *

MS. LERNER: Your Honor, you sealed the entire docket, yet you indicated there are thirteen items in the docket, six of which are sealed, which means there are others which are not sealed and yet the entire file has been sealed.

* * *

He returned, your honor, the original document that he obtained from Mr. Bernstein.

Now, it may not be so clear in the record that he -- those were actually the originals obtained from Mr. Bernstein. If the Court would like a representation from Mr. Oberlander to that effect, I would ask that he give it. But those were the originals.

Your Honor can do nothing to stop the dissemination of photocopies or electronic copies and the selective enforcement or selective gag order directed only at Mr. Oberlander and not, for example, Business Week, ...

* * *

[p.16]

noted in our papers, has on its website an article which states that it has a copy of the criminal -- the sealed criminal complaint in this matter.

Your Honor, cannot selectively enforce a gag order against Mr. Oberlander. You cannot gag him and not gag Business Week.

If you're going to take on a little guy you have to take on a big guy. He'll not sit here and accept that, neither will I. We will fight this to the end. A permanent injunction cannot be granted.

Thank you, your Honor.

* * *

THE COURT: Your application is granted to file a supplemental brief.

There are a number of things, which are troublesome in this case. Going back to the original order to show cause, that document was troublesome

because it just said that there was a significant breach in the processes of this Court with respect to criminal dockets.

There was, as I think, indicated on that occasion, I was very concerned about the integrity of the record of this Court and that file. It turns out that the first document on

[p.17]

that docket sheet is a notification by an assistant United States attorney of the filing of an information, which eventually evolved into an indictment.

There is no indication, that is docket number one, which I obtained or had the clerk obtain from Kansas city or wherever these files are shipped, because it was no longer available in the courthouse. There is not any indication in that document or in a subsequent document that an application was made or request was made in that document to seal that file. Nor have I been able to find any order signed by me, which directed that this file be sealed.

* * *

Let us assume for the moment that an order was signed by me somewhere along the line, as it may have been, directing that the file in this case be sealed. That order is directed to whom? Who is bound by it? That order, it would appear, is directed to the clerk of the court who is informed that this document or this file is sealed and is not to be made available, except upon an order of the Court unsealing it.

When the order to show cause was first brought into

[p.18]

this Court, it was a very serious concern as to whether somebody in this courthouse unsealed that file or made document which were sealed available to third parties. That was a very significant concern.

A hearing, which we held some weeks ago, makes it plain and, I think, it is beyond dispute that these documents were not removed by John Doe, he properly had them. The cooperation agreement was a document which was in the possession of his then attorney. His attorney had a perfect right, as did John Doe, to have a copy of that cooperation agreement, had a perfect right to have whatever document pertained to his case, which may have been part of the file.

Assume that John Doe decided to make the cooperation agreement, the proffer agreement available to a third-party, would an order have been violated? The answer is clearly, no. John Doe had these documents, so the testimony has thus far revealed, Mr. Bernstein has not submitted an affidavit nor has he testified. You cannot find him for the purpose of serving the subpoena.

What we have on the record is the testimony by John Doe that he did not give those documents to Mr. Bernstein, which gives rise to the legitimate inference that Mr. Bernstein may have stolen them, may have improperly obtained those documents.

What order of ...

* * *

[p.19]

Those documents then came into the hands of Mr. Oberlander. Mr. Oberlander knew that those documents were sealed documents, contained very, very serious information and his assertion or testimony that, well, it wasn't his words, it was his client's words, is remarkable for it's disingenuous. To say that I am not a criminal lawyer and I don't know what it meant, I have a sealed document, is preposterous. Particularly, since he had the electronic filing information from the Southern District that said if it's a cooperation agreement, be very, very careful before you use it.

Now, what happened, assuming that the documents were in John Doe's cabinet or in his desk, as they had a perfect right to be, they were his documents, and the documents were then wrongfully taken by Mr. Bernstein. Mr. Bernstein is a converter, Mr. Bernstein has no title to those documents, no legal right to those documents, to that tangible document whether it would be a piece of paper, whether it be a gold ring or whatever it is, it was a tangible item which was converted, given the testimony that I have by Mr. Bernstein --

MS. LERNER: John Doe, I believe. Bernstein did not testify.

THE COURT: I am saying based on the testimony. Mr. Bernstein then analogizing these events to the fundamental principle of conversion, or larceny, if you will, past it onto Mr. Oberlander.

[p.20]

Mr. Oberlander had no better right to those documents than Mr. Bernstein had. If we were to describe this change of events in terms of property rights, title, Mr. Bernstein had no title and he had no title to give to Mr. Oberlander.

Mr. Oberlander even if he were an innocent purchaser for value, would not have acquired title to those documents, because Mr. Bernstein had no title to give him. If requests were made of Mr. Oberlander to return those documents and Mr. Oberlander refused, it may be that an action for conversion may be available against Mr. Oberlander.

It may be that there is some disciplinary rule, which might be applicable to Mr. Oberlander, who had documents which he knew or perhaps should have known may have been improperly obtained by Bernstein and passed onto him.

It may be that there is some ethical principle, which should have precluded Mr. Oberlander from using those documents. Because the sensitivity of those documents would have been apparent to any reasonable person, particularly one who is trained in the law ostensibly.

So the question is, yes, something bad was done, something very bad and perhaps despicable was done by the use of those documents annexed to a complaint in the Southern District, in a civil case, but the question is what order was violated?

* * *

[p.22]

* * *

What I have just declared is not to be understood at this moment as a determination that injunctive relief may not be appropriate, but I am troubled by the issues as I have outlined them as to whether an order signed by a judge on one of those sealing envelopes, which says, not to be unsealed except by order of the Court, is binding upon any third-party person, is binding or is the procedure, which is intended by that procedure, which informs any third-party who has notice or will have notice by looking at a docket sheet, looking at the ECF, this is a case under seal -- under sealed or filed under seal-- make application to the Court to unseal the document.

Whether having knowledge that the case was one, which

[p.23]

has been filed under seal, whether an order was issued or not, it is a case which is filed under seal, and clearly indicates the content of that sealed file is not to be disclosed, except upon order of the Court, whether that can be ignored, whether that is presumptively meaningless and has no binding effect upon anybody.

* * *

[p.25]

* * *

MS. MOORE: Your Honor, in light of Mr. Lerner's last

[p.26]

submission, I would seek clarification with respect to the PSR that it's clear --

THE COURT: Before you get to that. Am I correct that the documents, at least Mr. Lerner's last submission says this whole proceeding now is moot because the documents have been surrendered, turned over to you, is that correct?

MS. MOORE: Not that I know of. I think, as I understand his position, which I don't agree with, he's entitled to keep all copies of the documents, as long as he returned the originals, so, I believe, in his letter he states that if at the court proceeding he marked as exhibits the original versions of those documents, but his client has maintained both electronic and hard copies, so clearly the intent was not to give back, as Judge Jones ordered in Visa, all copies as well. It doesn't get the originals back and are free to disseminating copies.

THE COURT: I think, I indicated Mr. Oberlander should not do that. I think it was in the form of an order and that order, I believe, if I have not done so, I am doing it now and if you want it in writing until I resolve this issue.

MR. LERNER: You are issuing a further TRO?

THE COURT: Yes, I am.

I'm issuing a further TRO for the reasons that I have indicated.

I think there is irreparable harm, which is imminent

[p.27]

to Mr. John Doe, those documents contained information which is highly, highly sensitive and if disseminated it is discriminatively to a person that should not get the information.

I think, it would put Mr. John Doe's safety at risk. The likelihood of success is or is not present. Again, if Charmer Industies is being read correctly by me and, I think, it is, I think, the burden with respect to whether or not there is some need to maintain those documents or to keep them should be shifted to you. Until next week, okay.

I do not think we need any further hearing. You will submit the briefs and I will make my determination. The TRO is continued for another ten days.

Is there anything further?

MS. MOORE: No, your Honor.

THE COURT: Thank you.

MS. MOORE: I do have one last application. With respect to the transcript to have my client's name replaced with John Doe.

THE COURT: Yes.

MS. MOORE: Thank you.

APPENDIX O

Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178-0060
Tel: 212.309.6000
Fax: 212.309.6001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Kelly A. Moore
Partner
212.309.6612
kelly.moore@MorganLewis.com

August 12, 2010

TO BE FILED UNDER SEAL

The Honorable I. Leo Glasser
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Doe, 98 CR 1101 (ILG)

Dear Judge Glasser:

We represent John Doe, the movant on an application for injunctive relief with respect to certain sealed and confidential documents.

We are in receipt of Mr. Lerner's letter of this morning. While we disagree with his characterizations, we agree

that, if the Court so-orders the standstill, a hearing tomorrow is unnecessary.

We reserve our rights to seek clarification of the Court's orders in the event the standstill is terminated. We also reserve our rights with respect to Josh Bernstein's non-compliance with the Court's order.

Respectfully,

/s/Kelly A. Moore
Kelly A. Moore

cc: Richard Lerner, Esq. (by email)
Stam Stamoulis, Esq. (by email)
AUSA Todd Kaminsky (by email)

DBI/65437647.2

[Handwritten Note: The standstill agreement has been "so ordered" and the hearing rescheduled for August 13th, 2010 is hereby adjourned [ ] So ordered I.L. Glasser USDJ 8/14/10]

APPENDIX P

Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178-0060
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Morgan Lewis
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August 12, 2010

TO BE FILED UNDER SEAL

The Honorable I. Leo Glasser
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Doe, 98 CR 1101 (ILG)

Dear Judge Glasser:

We represent John Doe, the movant on an application for injunctive relief with respect to certain sealed and confidential documents.

Enclosed please find a stipulation of standstill by and among movant and respondents, which we respectfully request that the Court so-order as soon as possible.

Respectfully,

/s/Kelly A. Moore
Kelly A. Moore

cc: Richard Lerner, Esq. (by email)
Stam Stamoulis, Esq. (by email)
AUSA Todd Kaminsky (by email)

DBI/65437647.1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98 CR 1101 (ILG)

FILED UNDER SEAL

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
-against-	)
	)
JOHN DOE,	)
	)
Defendant.	)
	)

STIPULATED STANDSTILL ORDER

WHEREAS Frederick M. Oberlander and Jody Kriss (together with Michael Ejekam, "Respondents"), but not Michael Ejekam, are in possession of paper (but not originals) or electronic copies of certain documents (the "Documents") related to a certain criminal matter referenced by Case No. 98-CR-1101 (the "Criminal Matter");

WHEREAS certain of the Documents and information therefrom were appended to, cited, quoted or referenced in a complaint ("SDNY Complaint") filed in a civil action captioned *Kriss et al. v. Bayrock Group LLC el al.*, No. 10 CV 3959 (the "SDNY Action").

WHEREAS the Court has issued one or more orders, be they temporary restraining orders ("TROs") or injunctions or other orders or decrees of whatever kind,

concerning the Documents and the Respondents have appealed therefrom;

WHEREAS John Doe (the "Movant") seeks further relief from the Court concerning the Documents including an injunction concerning dissemination (the "Further Requested Relief");

WHEREAS Movant contends that he has a right to the return of the Documents and that Respondents may not use the Documents or information therefrom;

WHEREAS Respondents contend that the current orders and the Further Requested Relief are improper, violate certain constitutional rights, and are procedurally invalid;

WHEREAS the parties have submitted memoranda and declarations in support of their respective positions;

WHEREAS pursuant to an order of the Court, Movant was scheduled to file a supplemental memorandum of law (the "Supplemental Memorandum") on July 27, 2010, which date was adjourned by agreement of the parties;

WHEREAS counsel for Movant and Respondents are engaged in discussions to achieve a mutually acceptable resolution of proceedings before the Court concerning the Documents and the Further Requested Relief (a "Settlement") prior to entry by this Court of an order addressing the Further Requested Relief (the "Order");

WHEREAS counsel signing this stipulated standstill order represent that they are authorized to enter this

stipulated standstill order on behalf of their respective clients;

NOW THEREFORE, Movant and Respondents, by and through their undersigned counsel, hereby stipulate and agree to, and request that the Court enter an order providing for, the following:

1. Stay of Proceedings in this Action; Status Quo Maintained:

    a. Movant's time to file the Supplemental Memorandum is adjourned until September 27, 2010, unless this agreement is terminated earlier pursuant to paragraph 4 below. If the agreement is terminated prior to September 27, 2010, then the Supplemental Memorandum shall be filed within one week of the termination date;

    b. The Court shall not issue the Order or any other relief of any kind not presently in existence at the time of execution hereof, prior to submission of the Supplemental Memorandum;

    c. Pending a Settlement or issuance of the Order, Respondents (and their agents or anyone acting at the direction of Respondents) may not disseminate the Documents or information obtained therefrom except as may be required for purposes of Respondents' pending appeal, in which case the provisions of Paragraph 3.e shall be applicable;

    d. While this stipulated standstill order is in effect, Respondents (and their agents or anyone acting

at the direction of Respondents) shall not file any application to unseal the Documents;

2. The SDNY Action:

   a. Judge Buchwald may be provided a copy of this stipulated standstill order;

   b. Respondents shall make an application to Judge Buchwald for a 60 day extension of their time to serve the SDNY Complaint on the defendants in the SDNY Action;

   c. Respondents reserve the right to provide each of the defendants in the SDNY Action a redacted copy of the SDNY Complaint. Movant and Respondents shall promptly meet and confer in good faith concerning the redactions. The redacted version of the SDNY Complaint shall not include the Documents as exhibits and shall not include references to, quotations of or information derived from the Documents;

   d. In no event shall Respondents serve an unredacted copy of the SDNY Complaint or the Documents as exhibits prior to issuance of the Order;

   e. Nothing herein shall preclude Respondents from filing and serving an amended complaint in the SDNY Action that does not include the Documents or references to, quotations of or information derived from the Documents;

   f. It is understood that in the further proceedings before Judge Buchwald, Movant's counsel will be permitted to communicate directly with

respondent Oberlander, in his capacity as counsel for respondents Kriss and Ejekam and as counsel for those whom either or both may represent in their derivative capacities.

3. Appeals

   a. Respondents have filed a notice of appeal from certain orders of the Court, and in the event the Court grants the Order in whole or in part, it is anticipated that Respondents may file additional appeals;

   b. In the event the Court denies the Order in whole or in part, it is anticipated that Movant may file an appeal;

   c. The parties reserve their rights to make all arguments on appeal, and nothing herein shall constitute a waiver of any such rights;

   d. Nothing herein shall prevent Movant from seeking an order to preserve the status quo pending any appeal;

   e. If, during the pendency of this standstill, Respondents determine that they are required to submit the Documents or information derived therefrom to the Second Circuit in connection with their pending appeal, Respondents shall provide reasonable advanced notice of any such filing to Movant and to the United States Attorneys Office for the Eastern District of New York so that Movant and/or the United States Attorneys Office for the Eastern District of New York may make an application to have the materials sealed.

4. Termination of the Stipulated Standstill Order

    a. Any party may terminate this stipulated standstill order on 7 calendar days' advance written notice for any reason, which notice shall be served on the undersigned counsel by (a) overnight mail and (b) by facsimile or email.

    b. Unless so terminated, this stipulated standstill order shall terminate on September 27, 2010;

5. Reservation of Rights

    a. Except as otherwise stated herein, the parties reserve all of their respective rights, claims and arguments;

    b. No party will argue that, by entering into this stipulated standstill order, the other party has conceded the validity of any order of the Court or the Further Requested Relief, or any argument or claim raised by the other party, or waived the right to make any argument or claim;

    c. Movant will not argue that by entering into this standstill Respondents implicitly agreed that there was no emergency or waived or are estopped from asserting any claim of emergency for emergency or expedited appeal or mandamus, the parties hereto agreeing that the primary purpose of this agreement is to accelerate resolution of this dispute without waiting for further rulings and appeals.

6. This agreement shall become valid only upon the execution by all three signatories hereto.

Dated: New York, New York, ~~July~~ 8/12/,2010

MORGAN, LEWIS & BOCKIUS LLP

By: /s/Brian A. Herman

Brian A. Herman
Attorney for Movant John Doe

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By:/s/Richard E. Lerner 8/11/10

Richard E. Lerner
Attorneys for Respondent Fred Oberlander

STAMOULIS & WEINBLATT LLC

By:/s/Stamatios Stamoulis 8/12/2010

Stamatios Stamoulis
Attorney for Respondents Jody Kriss and Michael Ejekam

SO ORDERED

/s/

8/12/10

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4079191.1

APPENDIX Q

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98 CR 1101 (ILG)

FILED UNDER SEAL

[Dated September 27, 2010]

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
-against-	)
	)
JOHN DOE,	)
	)
Defendant.	)
	)

AMENDMENT TO STIPULATED STANDSTILL ORDER

WHEREAS John Doe (the "Movant") and Frederick M. Oberlander and Jody Kriss (together with Michael Ejekam, "Respondents") executed a Stipulated Standstill Order so ordered by the Court on August 12, 2010 (the "Standstill Order");

WHEREAS the Standstill Order is scheduled to terminate on September 27, 2010;

WHEREAS the parties have agreed to extend the term of the Standstill Order;

NOW THEREFORE, Movant and Respondents, by and through their undersigned counsel, hereby stipulate and agree to, and request that the Court enter an order providing for, the following:

1. Paragraph "1.a." of the Standstill Order is amended to state as follows:

   Movant's time to file the Supplemental Memorandum is adjourned until January 14, 2011, unless this agreement is terminated earlier pursuant to paragraph 4 below. If the agreement is terminated prior to January 14, 2011, then the Supplemental Memorandum shall be filed within one week of the termination date.

2. Paragraph "4.b." of the Standstill Order is amended to state as follows:

   Unless so terminated, this stipulated standstill order shall terminate on January 14, 2011.

3. All other terms in the Standstill Order remain unchanged.

Dated: New York, New York,
September 27, 2010

MORGAN, LEWIS & BOCKIUS LLP

By:/s/Brian A. Herman

Leslie R. Caldwell
Kelly A. Moore
Brian A. Herman

Attorney for Movant John Doe

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By:/s/Richard E. Lerner

Richard E. Lerner

Attorneys for Respondent Fred Oberlander

STAMOULIS & WEINBLATT LLC

By:/s/Stamatios Stamoulis

Stamatios Stamoulis

Attorney for Respondents Jody Kriss and Michael Ejekam

SO ORDERED

/s/I.L.Glasser
U S D J

9/27/10

DBI/65634538.2

APPENDIX R

Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178-0060
Tel: 212.309.6000
Fax: 212.309.6001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Kelly A. Moore
Partner
212.309.6612
kelly.moore@morganlewis.com

November 16, 2010

VIA FACSIMILE

TO BE FILED UNDER SEAL

The Honorable I. Leo Glasser
United States District Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Doe, 98 CR 1101 (ILG)

Dear Judge Glasser:

We represent the movant John Doe in the above-captioned matter. I am writing to advise Your Honor that the Respondents have elected to terminate the current standstill agreement in this matter effective

November 17, 2010. Pursuant to the standstill agreement, we have until November 24, 2010 to submit a supplemental memorandum of law in support of our application for relief, including an order directing the Respondents to return or destroy all copies of the sensitive and confidential documents in their possession that were taken from our client without his consent or knowledge and that relate to a sealed criminal matter. I have spoken to AUSA Todd Kaminsky and he has advised me that the government also intends to file a submission in this matter by November 24, 2010, setting forth its position that this Court has the authority to order the return or destruction of the documents and materials at issue.

Respectfully,

/s/Kelly A. Moore
Kelly A. Moore

cc: Richard Lerner, Esq.
Stam Stamoulis, Esq.
AUSA Todd Kaminsky
AUSA Peter Norling

DBI/66039901.1

APPENDIX S

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

03cr833

[Dated November 17, 2010]

UNITED STATES OF AMERICA ,

v.

MYRON GUSHLAK,

Defendant.

U. S. Courthouse
Brooklyn, New York

November 17 , 2010

11:15 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
LORETTA E. LYNCH, ESQ.
United States Attorney
By: DANIEL SPECTOR

Assistant U.S. Attorney
271 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant:
ALAN FUTERFAS, ESQ.

Also Present;
Charles Linehan,
Assistant District
Attorney, NY County

Court Reporter:
Burton H. Sulzer
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2481
Fax # (718) 613-2505

* * *

[p.2]

(Open court-case called-appearances noted.)

THE COURT: Sorry for the delay.

This is a sentencing proceeding for Myron L. Gushlak. Mr. Gushlak, are you satisfied with the assistance that your attorney has given you thus far in this matter?

THE DEFENDANT: Yes , sir.

* * *

[p.27]

* * *

THE COURT: The government offers three grounds for concluding that the defendant has not accepted. One is that it's not warranted because of the obstructive conduct, which we have already discussed, and the second is that the Kealy e-mail in which he stated that he has no criminal record and has never had a run-in with the SEC constitutes a basis for denying him acceptance of responsibility , and the third is his involvement in the alleged German stock fraud.

So on the Kealy e-mail, could you just briefly speak to that.

MR. SPECTOR: Certainly, your Honor.

THE COURT: Then I'll hear briefly from the other side -- briefly and briefly.

MR. SPECTOR: There are a number of disturbing aspects to the Kealy e-mail.

First of all, the context in which it's made in which he not only says I have no criminal record but attaches the dismissal order from the complaint in this case is clearly intended to convey the false impression that the charges in the case were dismissed.

* * *

[p.28]

* * *

THE COURT: What about the argument that pursuant to his cooperation agreement he was not to disclose the circumstances of his cooperation?

MR. SPECTOR: He should have contacted his attorney and brought that to our attention and we could have dealt with it appropriately.

That doesn't give him a license to lie ...

* * *

Certainly, I can understand no one wants to be a witness in any case, particularly an organized crime case, but at the same time, the timing of this e-mail suggests that his

[p.29]

real motive, or at least a major component of his real motive, was to avoid public disclosure of the truth, that is his criminal conduct, because if people who deal with him in his business know the truth about him, they are obviously going to be less likely to deal with him.

* * *

[p.57]

* * *

THE COURT: Then there is also the issue of the

[p.58]

amount of assets that's available to pay a fine and for restitution. Have you figured out whether restitution can be ascertained as to the charges to which the defendant pleaded guilty?

MR. SPECTOR: I believe it can.

Just so the court understands, there was litigation about that in Appel. Our view then and now is that Judge Gleeson incorrectly calculated restitution.

We're prepared to address that issue, but our view was, it wasn't the best procedure, it sort of bogs down what is a fairly bogged down proceeding by adding that today when we can deal with it within 90 days permitted by the statute. So that's our application.

THE COURT: All right.

* * *

[p.68]

* * *

THE COURT: He could have put them into Commonwealth or Fidelity and they increased in value too, but what he did is, he put them in a trust for the benefit of his children beyond the reach of himself to pay any fine or provide any restitution for the crimes to which he's pleaded guilty,

[p.69]

that's all I'm saying.

This was a conscious choice to protect these funds. He was just protecting the funds, he's saying, for the benefit of his children, but he was also protecting the funds, in effect, to keep them out of the reach of the court.

* * *

[p.87]

* * *

MR. SPECTOR: I appreciate that, Judge, thank you. An analogy we often see where it does come into play is, for example, a felon in possession case where the defendant committed a murder somewhere else that couldn't be proven up or wasn't proven up beyond a reasonable doubt, but can be proven up by a preponderance of the evidence at the

[p.88]

sentencing for the felon in possession.

This case shouldn't be treated any differently just because it's a more complicated fact pattern. When you looked at the facts as we discussed extensively this morning, there are three witness statements who all say the same thing, and that is the defendant committed securities fraud.

When you asked the defense what they had to counter that, their answer essentially was, well, he hasn't been charged in Germany, which really isn't any answer at all. So the German fraud by itself in our view completely eviscerates the cooperation credit.

But, as you know, that is not the only problem. There is also the Kealy e-mail, which the court has already discussed, and there is also something we have not talked with today and that his posting repeatedly on his Website the GlobalNet Company as an example of a company he helped to take public.

We attached printouts from the Website in our sentencing submission. That by itself is another fraud. That is a fraud in the inducement because if clients really knew the truth about GlobalNet, they would be very unlikely to deal with the defendant.

The reason this is so important when you try to evaluate the cooperation credit is, you can imagine what would have happened if we had put him on the witness stand in some

[p.89]

of those cases we contemplated and this came out on cross. It would have been a complete disaster; he would have been total think discredited as a witness, he wouldn't be usable to us as a witness and a person like that, who does these things essentially behind the back of the government for years, is not entitled to any credit for cooperation.

* * *

The second is the fine. As the court's noted already, he put $50 million outside the reach of this court or, as far as I can tell, any court. Because those two avenues are not available a higher range of

imprisonment should be imposed than might otherwise have been.

* * *

APPENDIX T

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

11-1957

[Filed May 18, 2012]

UNITED STATES OF AMERICA,	)
Appellee,	)
	)
—against—	)
	)
MYRON L. GUSHLAK,	)
Defendant-Appellant	)
	)

To Be Argued By:
DANIEL A. SPECTOR

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF FOR THE UNITED STATES

LORETTA E. LYNCH,
United States Attorney,
Eastern District of New York.

AMY BUSA,
Daniel A. Spector,
Assistant United States Attorneys,
Of Counsel.

* * *

[pp.9-10]

* * *

IV. Gushlak's Breach Of His Cooperation Agreement

While Gushlak provided the assistance to law enforcement authorities noted above, he also breached his obligations under the cooperation agreement in numerous ways. After learning of Gushlak's conduct, the government summoned Gushlak to a proffer session in December 2009 and confronted him with evidence of his breach. Immediately after the proffer session, the government sought to revoke Gushlak's bail. The district court conducted a bail revocation hearing and denied the government's application but ordered the government to conduct a full investigation and bring all relevant facts to the court's attention at sentencing. (JA 244, 294).

A. Gushlak's Abuse Of The Secrecy Of His Cooperation To Deceive Business Partners

Gushlak exploited the fact that his case remained sealed by lying to business associates concerning his criminal past. (JA 167).First , in an email exchange in 2007 with Bob Kealy, the case CEO of a company with whom Gushlak was doing business, Kealy questioned Gushlak concerning his criminal past. (JA 167-68). In

response, Gushlak attached a copy of the dismissal of the Hy-Tech Complaint and continued as follows:

> I have no criminal record in any country period. Also please note that I have no SEC violations nor have I ever crossed paths with the SEC ever. Please have me removed from the report before it goes anywhere and confirm this to me in writing tomorrow .

* * *

In addition, a review of the website for Gushlak's company, Blue Water Partners, in December 2009 revealed that Gushlak listed Global Net (the stock fraud for which he pled guilty in this case) as an example of companies that Gushlak had "taken public over the years." (JA 233-37).

B. Allegations Of A German Stock Fraud

In approximately 2008, the government learned that Gushlak was under investigation in Germany for a stock fraud involving three companies traded in Germany: Star Energy, Star Gold

* * *

APPENDIX U

[SEAL] **U.S. Department of Justice**

United States Attorney
Eastern District of New York

PN: EK: TK
F. #1998R01996

271 Cadman Plaza East
Brooklyn, New York 11201

November 23, 2010

TO BE FILED UNDER SEAL

The Honorable I. Leo Glasser
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Felix Sater
Criminal Docket No. 98 CR 1101 (ILG)

Dear Judge Glasser:

The government writes with respect to whether the Court has the authority to order Frederick Oberlander, Esq. to return the sealed documents in his possession from the above-captioned case and to enjoin him from disseminating those documents. The Court does have such authority. Moreover, such an order is necessary to prevent Mr. Oberlander from undermining the Court's orders, to protect Felix Sater and to prevent the abuse of the sealing process in this district.

I. Legal Discussion

A. The Court Has Authority Over Mr. Oberlander Pursuant to the All Writs Act

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Under the Act, a federal court possesses the power to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." Pennsylvania Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 40 (1985) (quoting United States v. New York Telephone Co., 434 U.S. 159, 172 (1977)). The Act is to be used only when necessary and when there is no applicable statutory

* * *

APPENDIX V

[SEAL] **U.S. Department of Justice**

United States Attorney
Eastern District of New York

MM: EK: TK
F. #1998R01996

271 Cadman Plaza East
Brooklyn, New York 11201

March 17, 2011

TO BE FILED UNDER SEAL

The Honorable I. Leo Glasser
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Felix Sater
Criminal Docket No. 98 CR 1101 (ILG)

Dear Judge Glasser:

The government writes in response to Mr. Lerner's letter, dated February 3, 2011, demanding that the Court "immediately docket all events that have occurred in this case, from its inception." For the reasons stated below, the government believes that specific docket entries and documents that do not directly reference the defendant's cooperation may be unsealed at this time. However, those documents in which the defendant's cooperation is made plain should

remain sealed in order to ensure the defendant's safety, among other reasons. The government will submit a separate, sealed letter, available to the defendant but not to the intervenors or the public, detailing each docket entry and related document and making specific recommendations as to each.[1]

* * *

Analysis

In essence, the Second Circuit's cases concerning sealing require the Court to balance the public's qualified First Amendment and common law right to judicial documents against other compelling factors. Here, the compelling factors at issue are the safety of the defendant and his family and law enforcement's interest in procuring cooperation from other defendants now and in the future. That the government revealed the defendant's criminal conviction in the March 2, 2000 press release necessarily influences that balancing test. The government has no information that any person has sought to harm the defendant or his family since the press release was issued, nor that the government's ability to secure cooperation has been

---

[1] Although an appeal of this Court's permanent injunction with respect to the Presentence Report (the "PSR") is currently pending before the Second Circuit Court of Appeals, this Court nevertheless has the jurisdiction to issue rulings with respect to sealing that do not concern the PSR. "[T]he filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal." New York State Nat. Org. for Women v. Terry, 886 F. 2d 1339, 1350 (2d Cir. 1989). If an appeal is taken from a judgment that "does not determine the entire action," the district court "may proceed with those matters not involved in the appeal." Id.

negatively affected. Therefore, there is not a compelling need for the continued sealing of those docket entries and documents that reveal no more information than was disclosed in the press release. Thus, the government advocates the unsealing of those docket entries and documents that merely reflect the fact that Mr. Sater was a defendant in the Eastern District of New York who pleaded guilty to participating in a RICO conspiracy and was sentenced for the commission of that offense. However, those docket entries and documents that disclose the fact that the defendant cooperated with law enforcement authorities should remain under seal.

I. Documents and Entries to be Unsealed

Accordingly, the following entries and documents should be unsealed: 1) the docket itself should be unsealed as a necessary prerequisite to the disclosure of all other items listed below; 2) the defendant's name on the docket sheet should be changed from John Doe to Felix Sater; 3) the fact of the defendant's conviction, including the date of his guilty plea, the crime to which he pleaded guilty and the criminal information should all be unsealed. These entries and items do not mention the defendant's cooperation and reveal little more than that which was previously revealed in the press release. In addition, the public docket should reflect the date of the defendant's sentencing and the sentence issued by the Court. As will be discussed below, while several aspects of the defendant's sentencing should remain sealed, the public's understanding of how a particular defendant is sentenced is "important to the proper functioning of . . . judicial proceedings" and the public's understanding of

whether justice was properly meted out. See United States v. Alcantara, 369 F.3d 189, 198 (2d Cir. 2005) Also, while there is little support for the proposition that scheduling orders enjoy a presumption of access under the First Amendment, see United States v. Sattar, 471 F. Supp.2d 380, 389-90 (S.D.N.Y. 2006), the government does not object in this case to the unsealing of those entries and documents that merely reflect the scheduling of the case and other ministerial requests and orders made and issued by the parties and the Court.

* * *

APPENDIX W

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98-CR-1101

[Dated April 1, 2011]

UNITED STATES OF AMERICA	)
	)
-against-	)
	)
JOHN DOE,	)
	)
DEFENDANT,	)
	)

U.S. Courthouse
Brooklyn, New York

April 1, 2011
11:00 o'clock a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
LORETTA LYNCH
United States Attorney
147 Pierrepont Street
Brooklyn, New York 11201

BY: TODD KAMINSKY
Assistant U.S. Attorney

For John Doe:
MICHAEL BEYS, ESQ.
NADER MOBARGHA, ESQ.

For Mr. Roe:
RICHARD LERNER, ESQ.
DAVID SCHULZ, ESQ.

Court Reporter:
SHELDON SILVERMAN
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2537

* * *

[p.11]

* * *

MR. KAMINSKY: Very briefly. The Second Circuit mandate does specifically entrust your Honor with enforcing the district court's orders. One such order that still has not been complied with -- it is baffling -- they still maintain the very orders that are subject to the injunction and the TRO. The case that was handed up to your Honor earlier before by Mr. Beys, the in re contempt proceedings of Gerald Crawford, specifically state that a litigant does not have the ability to say "I'm going to violate the order, hold on to this stuff and wait for the circuit to prove I'm right." He must hand over and/or place those documents in some type of transitory place and wait for

the circuit to rule, but he still has them, in direct contravention of the court's order saying give them back, give them to the U.S. Attorney's Office. No one gave anything.

THE COURT: The directive to give them back is in Judge Glasser's order, not the circuit, right?

MR. KAMINSKY: Right.

MR. LERNER: I would like to object to that statement, your Honor. There is no order directing the destruction of electronic copies or return of photocopies.

[p.12]

The original that was provided to Mr. Roe by Mr. Bernstein, lawfully, at that, was handed up to court. It is in the court's possession. It was stated at the hearings that the original has been returned. Therefore, there is no further original to be returned and there are only electronic copies.

THE COURT: Mr. Kaminsky, quote for me the portion of the order upon which you are relying. Direct me to that.

MR. KAMINSKY: The Second Circuit mandate of yours or Judge Glasser's order to them?

THE COURT: I assume you will agree with me the Second Circuit's order in and of itself does not require the return of either originals or copies, right? It incorporates Judge Glasser's orders?

MR. KAMINSKY: That's correct. It says you have the limited mandate of implementing and overseeing compliance with our orders and the previous

orders entered by Judge Glasser. That's a quote. One of those orders, your Honor, because I'm currently immersed in drafting the appeal, I have two hearings singed into my head and at the end of the July 20th proceeding, Mr. Doe's counsel at the time, Ms. Moore, says specifically to Judge Glasser we would like you to include in the TRO copies of the documents because although Mr. Roe is telling you he's given them back to you, what good is that if he has the copies? The judge said I agree. Mr. Learner's response is are you issuing a further

[p.13]

TRO? The judge says I am.

THE COURT: I need to see that. I'm sure you're not misrepresenting that but I need to see it.

MR. LERNER: There's no specific directive by the court --

THE COURT: I'll look at it and then I'll see.

MR. BEYS: If the government doesn't submit it, we'll gladly submit it to your Honor.

THE COURT: Does anybody have it here?

MR. BEYS: We don't have the transcript here. We have a joint appendix.

MR. KAMINSKY: I point you to, beginning on line 4 of page 706 of the transcript.

THE COURT: Mr. Learner, you want to respond to what the transcript says?

MR. LERNER: May I take my copy?

THE COURT: Sure. That's our copy but you can look at ours or we can trade, whichever you prefer.

(Pause.)

MR. LERNER: Page 706 of the joint appendix?

THE COURT: Correct, line 4.

(Pause.)

MR. LERNER: There's no specific directive by Judge Glasser to destroy the electronic copies of the document and there's been no dissemination of the document. Therefore,

[p.14]

there's been no violation of any TRO and we would request further briefing before you wish to entertain this issue.

THE COURT: No, it's absolutely clear on its face Judge Glasser intended you to destroy electronic copies and to return any photocopies. If that is not done by the end of Monday, I will hold your client in contempt.

* * *

APPENDIX X

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
150 East 42nd Street, New York, NY 10017-5639
Tel: 212.490.3000 Fax: 212.490.3038
[Letterhead]

April 4, 2011

Filed in Camera but Requesting Unsealing and Docketing

By Facsimile – 718-613-2236

The Hon. Brian M. Cogan
U.S. District Court for the Eastern District
of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Roe v. US v. Doe
2d Cir. Case No.: Roe v. US v. Doe, 10-2905 & 11-479-cr
EDNY Case No.: US v. Doe, 98-CR-1101 (ILG)
Our File No.: 07765.00155

Application for Reconsideration of Affirmative Injunction or Stay Pending Submission of Application for Stay to the Second Circuit

Dear Judge Cogan:

We represent attorney "Richard Roe." We respectfully request reconsideration of the affirmative order you issued on April 1, 2011, directing Mr. Roe to delete from the hard drive of his computer four "documents" that were the subject of previous hearings before Judge Glasser and to return any photocopies of the documents in his possession. Alternatively, we request a stay of the injunction pending submission of an application for a stay to the Court of Appeals. The request for an injunction was raised by the U.S. Attorney's office without advance notice and without briefing, and we believe the April 1st injunction was improvidently granted for the following reasons:

1. Mr. Kaminsky unexpectedly requested the injunction under this Court's remand authority to oversee compliance with "orders previously entered by Judge Glasser" (JA 1248),[1] contending Judge Glasser had orally ordered Mr. Roe to give all copies of the documents to the U.S. Attorney at a hearing on July 20,2010. As recounted by Mr. Kaminsky:

> [A]t the end of the July 20th proceeding, Mr. Doe's counsel at that time, Ms. Moore, says specifically to Judge Glasser we would like you to include in the TRO copies of the documents because although Mr. Roe is telling you he's given them back to you, what good is that if he has copies? The judge says I agree; Mr. Lerner's response is, are you issuing a further TRO? The judge says I am.

---

[1] "JA" refers to the Joint Appendix for Mr. Roe's pending appeal, copy of which is in your Honor's possession.

(April 1, 2011 Hearing Tr. at 12-13). That incomplete description, however, was misleading. The exchange paraphrased by Mr. Kaminsky followed an inquiry by Judge Glasser as to whether the "whole proceeding was moot because the documents have been surrendered?" (JA 706:4-7.) Ms. Moore explained that it was not, because only the originals had been returned, and expressed the concern that Mr. Roe should not be allowed to give just the originals back while remaining "free to disseminating [sic] copies." (JA 706:8-17.) Judge Glasser immediately responded to her specific concern about dissemination of copies by saying "I think, I indicated [Mr. Roe] should not do ***that*** (JA 706:18-19; emphasis added). He continued: "I think it was in the form of an order and that order, I believe, if I have not done so, I am doing it now and if you want it in writing ***until I resolve this issue.***" (JA 706:19-22.) At this point Mr. Lerner asked "You are issuing another TRO?" and Judge Glasser responded, "Yes, I am. ***I'm Issuing a further TRO for the reasons that I have indicated.***" (JA 706:23 to 707:1; emphasis added).

In context, the "further TRO" Judge Glasser said he intended to issue was the extension of the existing TRO beyond the July 20 hearing. Leaving no doubt that this "further order" was an extension of the ***existing*** TRO, Judge Glasser concluded the exchange by stating: "***The*** TRO is continued for another ten days," (JA 706:25 to JA 707:15; emphasis added).

This Court's injunction of April 1st overlooked that there was only one "TRO" ever issued by Judge Glasser, which did not require the destruction of all copies of the documents, and his "further order" of July

20 simply extended its term. The TRO issued by Judge Glasser appears at page JA 5, and it provides:

> "ORDERED, that pending said hearing, Messrs. Kriss, Ejekam and [Roe] and their representatives, employees and agents, and all other persons acting in concert with them and all other persons who have obtained the Sealed and Confidential Materials, are restrained and enjoined from disseminating the Sealed and Confidential Materials or information therein further[.]"

This Court misapprehended that there a specific order from Judge Glasser for Mr. Roe to return all hard copies of the documents and destroy all electronic copies. There was not. The TRO was only intended to preserve the status quo *because that's all a TRO can do* and Judge Glasser understood that a TRO could not properly have ordered the destruction of all copies of the documents because that was a part of the final relief sought in the proceeding. (See JA 4) ("ORDERED, that Jody Kriss, Michael Ejekam and [Roe] show cause . . . why an order should not be issued requiring [them] and any other persons who have acquired the Sealed and Confidential Materials to immediately return the Sealed and Confidential Materials to Mr. [Roe].") This was the ultimate relief sought in the order to show cause, and *no order was ever issued granting this prayer for relief*.

2. This Court's April 1st order was also entered without the benefit of the subsequent history in this proceeding, which confirms that the July 20 extension of the TRO was ***not*** an order to destroy all copies of the documents in Mr. Roe's possession. In a Stipulated Order entered

by Judge Glasser on August 12, 2010 "[p]ending a Settlement or issuance of [a further order]", Mr. Roe agreed not to "*disseminate the Documents or information obtained therefrom, except as may be required for the purposes of [his] pending appeal . . . .*" (JA 717, ¶1c.) Plainly, as of August 12 Judge Glasser understood that Mr. Roe retained copies and that he would use them in arguing his appeal, and *Judge Glasser expressed no intent that the copies held by Mr. Roe must be destroyed*.

Again, after Mr. Roe withdrew his consent to the standstill agreement in the stipulated order, and asked Judge Glasser to proceed and issue a final order on his right to use the documents, the U.S. Attorney on November 23, 2010 specifically requested the court at that point "*to order Frederick Oberlander, Esq., to return the sealed documents in his possession . . .*" (JA-728.) This request makes no sense if Mr. Roe was already under order to return or destroy all copies of the documents.

Mr. Doe's own counsel had just written a similar letter to Judge Glasser on November 16, 2010, acknowledging that under the Stipulated Order "we have until November 24, 2010 to submit a supplemental memorandum of law in support of our application for relief, *including an order directing the Respondents to return or destroy all copies of the sensitive and confidential documents* in their possessions that were taken from our client without his consent and knowledge and that relate to a sealed criminal matter." (JA-727; emphasis added). Thus we see that Doe also understood that Judge Glasser had not ordered the destruction of the documents, and was now seeking

such an order, *Judge Glasser never issued any such subsequent order*.

Contrary to the unexpected about-face and surprise posture they took last Friday, both the government and Mr. Doe have previously acknowledged that Mr. Roe was not under any order to return or destroy all copies of the documents at issue, facts not presented to the court last Friday.

3. Due to the manner in which the issue was raised, the court was also not presented with a number of legal reasons why Judge Glasser's oral order of July 20 should not be enforced under the limited remand jurisdiction granted by the Second Circuit, even if that order had actually directed the destruction of all copies of the documents. The order was not an order. It was invalid. We are not here suggesting that it was appealable (or not), or that Judge Glasser abused his discretion in issuing it. We are instead saying it was entirely dictum and thus not enforceable. The remand cannot be read as requiring your honor to enforce non-existent or unenforceable orders.

Oral, unwritten orders like Judge Glasser's do not comport with FRCP 52 (which requires express findings of fact and conclusions of law when a court issues an order) and FRCP 65. Oral orders violate the form and content required by Rule 65, which is "properly met by a written order," document lacking here." *Garcia v. Yonkers Sch. Dist*., 561 F.3d 97, 104-06 (2d Cir. 2009). Here, Judge Glasser never issued a written order directing the return or destruction of any further documents. Moreover, the only written order ever issued by Judge Glasser is the original TRO,

which was extended several times but is no longer in force. (Although Mr. Roe has *voluntarily* continued to behave as if the TRO were in force.)

> Moreover, orders must have findings and all of the FRCP 65 requirements must be self-contained within the four corners of the document. "For the reasons stated" cannot suffice as there are no reasons stated in that transcript and if there were it would not be clear which ones Judge Glasser was referring to.
>
> Indeed it is precisely for this reason, to avoid argument on what is and isn't a valid order, that FRCP 65 requires a writing, There is no wiggle room. As the *Garcia* court, which adopted the clear reasoning of *Bates v. Johnson*, 901 F.2d 1424 (7th Cir. 1990) ("***Oral statements are not injunctions***"), stated: "For many of the reasons discussed supra Part II(B)(1), however, we conclude that the District Court's statements at the September 15, 2004 hearing did not constitute a temporary restraining order *because they did not detail the acts restrained or required* ***and were not reduced to a written order***." (Emphasis added).

* * *

We regret the facts and law were not properly laid out for the Court before it ordered the destruction of all copies of the documents in Roe's possession, but we were not aware in advance that this issue would be raised at the April 1st hearing. The full record compels reconsideration and we urgently ask that the April 1st injunction be withdrawn so it is not necessary to file a

further appeal to preserve Mr. Roe's position on the issues already before the Second Circuit.

The above should dispel any implication that Roe has not scrupulously abided by the orders issued by Judge Glasser. ***Roe has not simply disregarded orders, as counsel repeatedly suggest.***[2] To the contrary, he has always sought to abide by Judge Glasser's TRO, notwithstanding his belief that it is a transparently invalid unconstitutional prior restraint on his First Amendment rights. He will voluntarily continue to abide by the non-dissemination directive of the TRO during the pendency of the appeal, so there is no risk that if this Court rescinds its injunction to delete the documents from Mr. Roe's computer that they will then be freely disseminated. While the appeal is pending, Mr. Roe will continue to seek guidance from

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[2] For example, in his letter requesting summary contempt, Doe's counsel accuses Roe of defying a May 14, 2010 order of Judge Buchwald, which he knows full well was superseded by an abeyance order a few days later, and he omitted any mention of that abeyance from his letter to this court demanding summary contempt findings.

Additionally, in the government's argument to the court on April 1st, Mr. Kaminsky stated that Roe is in violation of some court order, "[H]e still has them in direct contravention of the court's order saying give them back, give them to the U.S. Attorney's office." The Court will note nothing on July 20 refers to the U.S. Attorney's office, and the documents themselves did not come from that office, but from Bayrock. Please note that the order to show cause before Judge Glasser sought the return of the documents at issue to Mr. Doe, not to the government, and did not seek their destruction. (See JA 4). The government never moved for recovery of the documents, and thus lacks standing to assert that they should be returned to it, much less destroyed.

this Court on what he may do with the information in the disputed documents.

Accordingly, we respectfully request this Court:

A. Reconsider its oral order of April 1, 2010, and withdraw its injunction that Mr. Roe delete the documents at issue from the "c" drive of his desktop computer by no later than April 4, 2011;

B. Failing that, we request a stay of the injunction for two days, to afford the Second Circuit an opportunity to consider a motion to stay this Court's order, and

C. Further request that this letter and the proceeding of April 1, 2011 be unsealed and that a public docket of these proceedings be maintained.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/Richard E. Lerner
Richard E. Lerner

cc: Via E-Mail:
Michael Beys and Nader Mobargha – Counsel for Doe
Todd Kaminsky – US Attorney's Office
David Schulz – Counsel for Roe
"Richard Roe"

APPENDIX Y

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98 Cr. 1101 (ILG)

[Filed April 4, 2011]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
- against-	)
	)
FELIX SATER,	)
	)
Defendant.	)
	)

SEALED ORDER

The Court has reviewed Richard Roe's motion for reconsideration. It is denied. It was plainly the intent of Judge Glasser to have those documents destroyed or returned. There is no prejudice to Roe because in the event he prevails in having the sealing order overturned in the Circuit, he will again have access to the documents.

SO ORDERED.

/s/ Hon. Brian M. Cogan
U.S.D.J.

Dated: Brooklyn, New York
April 4, 2011

APPENDIX Z

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 98-1101 (ILG)

[Filed January 26, 2012]

UNITED STATES OF AMERICA,	)
	)
- against-	)
	)
JOHN DOE,	)
	)
Defendant.	)
	)

SCHEDULING ORDER

Upon the January 26, 2012 application of LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, by Assistant United States Attorneys Todd Kaminsky and Evan M. Norris, and full consideration having been given to this matter,

IT IS HEREBY ORDERED that, in light of the government's withdrawal of its March 17, 2011 motion to unseal and the reasons provided therefor, the only issue ripe for decision following the remand of this case from the United States Court of Appeals for the Second Circuit is whether this Court should permanently enjoin non-party Richard Roe from disseminating the following sealed documents in his possession relating to the defendant John Doe: (a) two proffer agreements,

(b) a cooperation agreement, (c) a criminal complaint and (d) a criminal information;

IT IS HEREBY FURTHER ORDERED that the parties file briefs setting forth their respective positions with regard to the matter referred to above pursuant to the following schedule:

1. The government shall file its brief on or before February 7, 2012;

2. Doe and Roe shall file their responsive briefs on or before February 21, 2012;

3. The government shall file any reply on or before February 28, 2012; and

IT IS HEREBY FURTHER ORDERED that the Court will hold oral argument on March ~~6~~ 9th, 2012 at 11:00 AM.

SO ORDERED.

Dated: Brooklyn, New York
January 26, 2012

s/ I Leo Glasser

THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT JUDGE

APPENDIX AA

[SEAL] **U.S. Department of Justice**

United States Attorney
Eastern District of New York

EK: EMN/TK
F. #1998R01996

271 Cadman Plaza East
Brooklyn, New York 11201

January 26, 2012

By Hand

Submitted Under Seal and
Ex Parte as to Richard Roe

The Honorable I. Leo Glasser
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. John Doe
Criminal Docket No. 98-1101 (ILG)

Dear Judge Glasser:

The government writes to respectfully request that the Court issue the enclosed proposed order setting forth a briefing schedule to resolve the matter that remains to be decided in the above-captioned case following the remand from the Second Circuit Court of Appeals.

I. Background

A. John Doe's Conviction and Cooperation

On December 10, 1998, John Doe pleaded guilty, pursuant to a cooperation agreement, to an information charging him with participating in a racketeering enterprise, in violation of 18 U.S.C. § 1962. The RICO predicate acts consisted of securities fraud in connection with offerings and after-market manipulation of the securities of multiple entities and the unlawful laundering of the proceeds of these schemes.[1]

* * *

[1] Sections A through G of this Background section are largely taken from the government's April 11, 2011 brief filed with the Second Circuit. For ease of reading, the citations included therein to the parties' joint appendix and the government's appendix are omitted.

APPENDIX AB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98 CR 1101 (ILG)

[Filed February 2, 2012]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
- against-	)
	)
JOHN DOE,	)
	)
Defendant.	)
	)

ORDER

GLASSER, United States District Judge:

In a letter dated January 26th, 2012, the government moved this Court for an Order that would direct the designated parties to brief the issue regarding whether Richard Roe should be permanently enjoined from publicly disseminating the specifically identified sealed documents in his possession. The motion was granted and an Order styled "Scheduling Order" was issued on that date. That Order is not sealed. Oral argument is to be held on March 9th, 2012 at 11 a.m.

The letter motion in support of that requested Order was "Submitted under Seal." The Court approved that submission, fully aware of the public's qualified First Amendment and common law right of access and aware also of the limitation upon those rights warranted by the factors discussed in United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995). Among those factors were the need to "preserve higher values," including the integrity of an ongoing investigation and the safety of John Doe, which were duly considered and found to weigh more heavily in the balance.

A letter from Richard Roe, transmitted to the Court by facsimile and dated January 31, 2012, "demanding" the unsealing of the government's January 26th letter is denied. He also requests that the Court expand the breadth of the issues to be considered at oral argument, which is also denied. The discrete issue to be addressed at oral argument is whether Richard Roe violated an Order of this Court by publishing the specifically identified documents in his possession and if he has, should he be permanently enjoined from disseminating them. The issue sought to be added will be scheduled and heard in due course.

SO ORDERED.

Dated: Brooklyn, New York
February 2, 2012

s/ILG

I. Leo Glasser

APPENDIX AC

[SEAL] **U.S. Department of Justice**

Office of the Solicitor General

Washington, D.C. 20530

March 19, 2013

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Roe v. United States, No. 12-112
(scheduled for conference of March 22, 2013)

Dear Mr. Suter:

Yesterday afternoon, this office learned that the district court on March 13, 2013, entered a public order and a sealed opinion in this case. The district court's public order is attached to this letter. The United States has prepared a motion to file under seal the district court's sealed opinion and is filing that motion concurrently with this letter.

Sincerely,

Donald B. Verrilli, Jr.
Solicitor General

cc: See Attached Service List

SERVICE LIST: 12-112

Richard E. Lerner
Attorney at Law
255 West 36th Street
New York, NY 10018

Joshua D. Liston
Beys, Stein & Mobargha LLP
405 Lexington Ave., 7th Floor
New York, NY 10174

* * *

[Attachment Order of the United States Eastern District of New York in 12 MC 150 (ILG), Filed March 13, 2013 already reproduced in this Appendix]

APPENDIX AD

From: Todd.Kaminsky@usdoj.gov
To: fred55@aol.com; richardlerner@msn.com
CC: Elizabeth.Kramer@usdoj.gov
Subject: Sealed Document
Date: Thu, 28 Mar 2013 00:40:30 +0000

Dear Mr. Lerner and Mr. Oberlander:

During a telephone call with Mr. Oberlander, I was informed that during the litigation over your petition for certiorari, the Solicitor General's Office inadvertently sent you a sealed, ex parte document issued by The Honorable I. Leo Glasser on March 13, 2013. As discussed, this document was sent to you in error and was not intended to be viewed by you, as Mr. Oberlander readily conceded that he understood during the telephone call. We request that you return the document, and any copies thereof, to the United States Attorney's Office for the Eastern District of New York (attn: Todd Kaminsky) as soon as possible.

The document at issue and the information contained therein are subject to a valid sealing order, as stated on the face of the document. We remind you of the Second Circuit's order, issued on February 14, 2011, stating that you are "enjoined from publicly distributing and revealing in any way, to any person, or in any court, proceeding or forum . . . any documents or contents thereof subject to sealing orders in Docket No. 10-2905-cr or in any related proceedings before the District Court for the Eastern District of New York . . . ."

We appreciate your attention to our request.

Todd Kaminsky
Assistant United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
P: (718) 254-6367
F: (718) 254-6669

APPENDIX AE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. _____

SALVATORE LAURIA,	)
	)
Plaintiff,	)
	)
-against-	)
	)
JODY KRISS,	)
	)
Defendant.	)
	)

COMPLAINT

Plaintiff Salvatore Lauria ("Lauria") by and through his attorneys, Beys Stein Mobargha & Berland LLP, for his Complaint against Defendant Jody Kriss, alleges as follows:

PRELIMINARY STATEMENT

1. This case is about a billion-dollar shakedown by real estate developer Jody Kriss ("Kriss"), who made millions of dollars as consigliere for the Russian mob. Like Tom Hagen in "The Godfather," Kriss and his father, attorney Ronald Kriss, were the "front men" for the Bayrock Group ("Bayrock"), a real estate development company, owned and run by people Kriss himself claims were mobsters. Kriss was the Chief

Financial Officer ("CPO") of Bayrock and his father was the outside general counsel for what Kriss claims was a mob outfit. In fact, his co-workers nicknamed Kriss "VOR-TON," a word play on "Wharton," the school he attended, and the Russian "vor-in-law" ("thief-in-law," as Russian mobsters are known), because – as he used to brag – Kriss could steal more using his Wharton degree than 100 gangsters combined. Yet ultimately, because Kriss was unsatisfied with the millions he made as Bayrock's front man, he

* * *

paragraph, 165-page complaint, and in both instances only fleetingly. The first mention of Lauria's name was merely to state that he and others were involved with, and pleaded guilty to, a Russian and Italian stock brokerage "pump and dump" scheme prior to joining Bayrock, a now 20-year old crime to which Lauria already had pleaded guilty. The second mention of Lauria's name was the spurious allegation that he may or may not have received kickbacks in connection with Mafia investments at Bayrock. That is it. Nevertheless, Kriss named him as a defendant in the $100 million RICO action. The real purpose of naming Lauria was to identify Lauria as an informant for the federal government, to dredge up his past and expose him to danger, so that the prestigious law firms and deep-pocketed defendants would pay to get out of the case. It was also payback for the $1.5 million commission Lauria received in 2007.

35. Thus, by illegally gathering and illegally disseminating sealed confidential information, Kriss had set in motion what would prove to be a persistent

pattern of conduct, aimed at emotionally, mentally, physically, and financially harming Lauria.

The Second Frivolous Action concerns crimes which Kriss and Ronald Kriss are guilty of

36. Yet, the real irony in the Second Frivolous complaint is that Kriss accuses Lauria and others of crimes that Jody Kriss and his father Ronald Kriss, the outside general counsel of Bayrock, are themselves guilty of committing. The Second Frivolous Action epitomizes the age-old adage of the pot calling the kettle black.

37. First, the complaint alleges, among other things, that "Bayrock is substantially and covertly mob owned and operated .... " Kriss accuses Bayrock of covering up the past of its convicted employees, and asserts that no investor would partner with Bayrock for any venture if this information were revealed. However, simply by virtue of his positions as CFO, COO, Director of Finance, and self-proclaimed co-founder of Bayrock, Kriss was the very name and face of Bayrock. He was the front for Lauria and other Bayrock employees, hiding their criminal histories and ties to organized crime from Bayrock's unsuspecting investors and banks. And his father, Ronald Kriss, Bayrock's counsel, hatched, legally blessed, and employed this hide-and-seek scheme. Indeed, both Kriss and his father were well aware of what was transpiring in the halls of Bayrock's offices and the aisles of the private jets they used to travel to Turkey and Russia to expand their network of wealthy criminals. They knew exactly who worked at Bayrock. That was why they were there in the first place.

38. Second, in the complaint, Kriss accuses Bayrock of filing "false condominium offering documents." However, it was Kriss who signed these documents as CFO on behalf of Bayrock. Kriss conveniently omits this crucial fact from his complaint.

39. Third, Kriss claims in the complaint that one employee took from Bayrock $8,000,000; another took $4,000,000, and yet another took $15,000,000. Without any explanation, he claims that the money simultaneously came from "crime" and from Bayrock. Again, conspicuously absent from the complaint is that he was the Director of Finance and the CFO of Bayrock. As such, he was in charge of the money that entered and left Bayrock's coffers. Consequently, it was Kriss who was most familiar with Bayrock's alleged "criminal" financial sources, if any. And it was Kriss who would have approved, or at least played a part in, any improper distribution of revenues to Bayrock's employees.

40. Fourth, Kriss claims that Bayrock – a company he claims he founded and financially managed – paid one of its employees a "million dollars a year in unreported income" and "intentionally understated [its] partnership taxable income, by at least $50,000,000 to as much as $100,000,000." Once again, if that was the case, it was Kriss – the Director of Finance and the CFO – who created and approved the transaction and examined Bayrock's tax returns

* * *

Kriss and his attorneys intentionally put Lauria's life in danger

47. At one point in the midst of their frivolous litigation campaign, Kriss and his rogue lawyers decided to bypass the courts and the press and went straight to the court of organized crime. They did the unthinkable: they disclosed the judicially-sealed information to a famous criminal lawyer who had represented the very members of the mafia that Lauria had cooperated against.

48. The result of this disclosure was a violent one for Lauria. In or about July 2012, one of the members of the mafia tracked down Lauria in a restaurant in Bay Ridge, Brooklyn, where Lauria was having lunch with his current business colleagues. Undaunted by the public scene, the mafia member beat Lauria in broad daylight, menacingly telling Lauria, "you're dead – I am going to kill you and the fucking Russians. You're a rat. I did two years because of you." Lauria knew how serious the threat was. He had heard that the very same family of this mafia member has a long history of murder and violence. Consequently, immediately after the encounter, Lauria sought the protection of the FBI.

* * *

APPENDIX AF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98 CR 1101(ILG)

TO BE FILED UNDER SEAL

UNITED STATES	)
	)
Plaintiff,	)
	)
-against-	)
	)
JOHN DOE,	)
	)
Defendant.	)
	)

MOVANT JOHN DOE'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF PERMANENT INJUNCTION

MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
Tel: 212.309.6000

Attorneys for Movant John Doe

PRELIMINARY STATEMENT

The Court has the power and authority under the All Writs Act to order the Respondents to return or destroy documents that were unlawfully taken from John Doe and are part of a case that was sealed by the Court. The First Amendment does not protect the actions of the agent of a thief who threatens to publish his ill-gotten gains to extort a settlement and put a man's life at risk.

FACTUAL BACKGROUND

The facts underlying this matter begin on May 10, 2010, when Respondent Oberlander, an attorney, filed publicly in the United States District Court for the Southern District of New York a civil RICO complaint (the "SDNY Complaint") that he knew contained extraordinarily sensitive and sealed information about John Doe which, if disclosed, would endanger not only Mr. Doe's life, but also the lives of Mr. Doe's family. Specifically, Mr. Oberlander knowingly attached as exhibits to the SDNY Complaint certain documents (the "Exhibits") that, to this day, are part of or relate to a sealed record in a Federal criminal case in which Mr. Doe was a defendant and cooperating witness.[1] The

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[1] Mr. Oberlander testified that the Exhibits were comprised of the following (1) "five pages from the PSR" (*i.e.,* excerpts from Mr. Doe's 2004 Presentence Report (the "PSR")); (2) "two proffer agreements" (*i.e.,* Mr. Doe's proffer agreements dated October 2, 1998 and October 29, 1998 (the "Proffer Agreements")); and (3) "the cooperation agreement" (*i.e.,* Mr. Doe's cooperation agreement dated December 10, 1998 between John Doe and the government (the "Cooperation Agreement")). 6/21 Tr. at 28-29. Mr. Oberlander further testified that on or about March 3, 2010, the

SDNY Complaint contained countless references to the

* * *

PSR to be returned to the United States Attorney's Office. 6/21 Tr. at 88-92. The Court also modified and extended the 5/18 TRO to include the Criminal Complaint and the Information pending a decision on the present motion.

At the July 20 hearing, the Court heard oral arguments and made preliminary findings of fact with respect to how the Sealed and Confidential Documents were obtained. Specifically, the Court stated: "Mr. Bernstein is a converter, Mr. Bernstein has no title to those documents, no legal right to those documents, to that tangible document whether it would be a piece of paper, whether it be a gold ring or whatever it is, it was a tangible item which was converted .... " 7/20 Tr. at 19. The Court further stated: "Mr. Oberlander had no better right to those documents than Mr. Bernstein

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following documents were transmitted to him via email (the "3/3/10 Email") from Joshua Bernstein: the PSR, the Proffer Agreements, the Cooperation Agreement, a criminal complaint in case number 98 CR 1101 (*i.e.,* the Complaint and Affidavit In Support of Arrest Warrants against, among others, John Doe (filed under Docket number 98-754M) (the "Criminal Complaint")), and a draft of an information (the "Information"). 6/21 Tr. at 11-13. Mr. Oberlander also testified that Arnold Bernstein, Joshua Bernstein's father, and Gerry Feinberg, an attorney representing Joshua Bernstein in another matter (a civil case captioned *Bernstein v. Bayrock Group LLC* Case No. 002579/2009), were addressees on the 3/3/10 Email. 6/21 Tr. at 14. The PSR, the Proffer Agreements, the Cooperation Agreement, the Criminal Complaint, and the Information are referred to hereinafter, collectively, as the "Sealed and Confidential Documents."

had. If we were to describe this change of events in terms of property rights, title, Mr. Bernstein had no title and he had no title to give Mr. Oberlander." 7/20 Tr. at 20. The Court granted Mr. Doe's application to file a supplemental brief by July 27 and extended the 5/18 TRO pending a decision by the Court. After counsel for Respondent Oberlander asserted his position that the Court's permanent order regarding the presentence report applied only to the "original" copy that Mr. Oberlander obtained from Joshua Bernstein, the Court also issued a further TRO against the dissemination of any *copies* of the PSR. 7/20 Tr. at 26-27.

On July 26, counsel for Mr. Doe sent a letter to the Court advising that the parties were negotiating a standstill agreement "with the goal of reaching a consensual resolution to the proceedings before this Court" and requesting an extension of the 5/18 TRO. The Court extended the 5/18 TRO until August 3 and further extended the TRO until August 13. On August 12, the parties agreed to a stipulated standstill order (the "Standstill Agreement"), which the Court so-ordered that day. Among other things, the Standstill Agreement provided that pending a settlement or issuance of the an order granting or denying the relief requested,

* * *

APPENDIX AG

EOC:DP
F. # 1998r01996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00 Cr 196 (ILG)

UNITED STATES OF AMERICA)
)
- against -)
)
DANIEL PERSICO,)
)
Defendants.)

THE GOVERNMENT'S WITNESS LIST

1. Traci Manuel
2. Joseph Polito
3. Felix Sater
4. Special Agent Leo Taddeo
5. Professor Steven Thel

Respectfully submitted,

ALAN S. VINEGRAD
United States Attorney
Eastern District of New York

Eric C. Corngold
David B. Pitofsky
Assistant U.S. Attorneys
(Of counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00 CR 196 (ILG)

[Filed November 15, 2000]

UNITED STATES OF AMERICA,	)
	)
- against -	)
	)
DANIEL LEV, et al.,	)
	)
Defendants.	)
	)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DANIEL LEV'S PRETRIAL MOTIONS

JEFFREY LICHTMAN
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34th Floor
New York, New York 10010
(212) 689-8555

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Attorneys for Daniel Lev

POINT IV

DEFENDANT DANIEL LEV IS ENTITLED TO PRETRIAL DISCLOSURE OF ANY AND ALL INFORMATION FALLING WITH THE PURVIEW OF BRADY V. MARYLAND[4] AND ITS PROGENY

As noted previously, Daniel Lev's involvement in the wide-ranging crimes charged in this Indictment are limited to his single investment in U.S. Bridge. According to the government, cooperating witnesses Gennady Klotsman and Felix Sater served as the solicitors of Lev for his investment. Therefore, the lion's share of proof against Lev will come from the mouths of these cooperators. As such, the credibility of these witnesses are of paramount importance to Daniel Lev's defense.

With this in mind, on March 27, 2000 the defendant served a general discovery letter on the government which requested disclosure of all Brady material known to the government. In the government's Rule 16 letter of April 21, 2000, no mention was made of the government's possession of any Brady material. The government's May 24, 2000 "general index of the documents available for inspection and copying", however, contains materials which clearly are impeachment materials, i.e., "People v. Sater" materials.

As these materials were not forwarded to the defense, Lev served a more specific Brady demand

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[4] Brady v. Maryland, 373 U.S. 83 (1963).

pursuant to its letter of October 10, 2000. In this letter, Lev requested:

> bank, phone and financial records of Eugene Klotsman and Felix Sater; NASD/SEC disciplinary and employment history for Klotsman and Sater; customer complaints regarding Klotsman and Sater; materials from People v. Sater, and any recorded witness statements from these or any government witness which serve to

* * *

JEFFREY LICHTMAN
ATTORNEY AT LAW
[Letterhead]

January 16, 2002

BY FEDERAL EXPRESS
May Ann Betts
United States Probation Officer
Eastern District of New York
75 Clinton Street
Room 405
Brooklyn, New York 11201-4201

Re: U.S. v. Lev, 00 CR 196 (S-1)(ILG)

Dear Ms. Betts:

As counsel for Daniel Lev, I am submitting, pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, his objections to the Presentence Report ("PSR"). The objections are factual in nature and will be addressed in the order stated in the PSR.

Paragraph 33:

The defendant rejects the claim that he was involved in the U.S. Bridge Stock fraud. In addition, as defendant Lev allocuted during his guilty plea, he harassed Felix Sater's father in an attempt to convince him that he should dissuade his son from testifying in the U.S. v. Coppa, et al. Case. As the government knows, Mr. Lev was approached by Mr. Sater (not the other way around) and never threatened or intimidated him in any manner. In sum, Mr. Lev attempted to

influence Felix Sater from testifying against *him and anyone else* in this case.

Furthermore, Daniel Lev's guilty plea was not the sole cause Felix Sater was not called as a witness in this case. Sater was a witness against many other defendants who ultimately pleaded guilty. In the defendant's estimation, the reason the RICO charges against him were dropped is because the bulk of the evidence against him – the testimony of government witnesses Sater and Gennady Klotsman – was unreliable.

* * *

* * *

43. Daniel Lev was arrested on March 2, 2000, and provided no post-arrest statement. According to the Government, while not an employee of White Rock/State Street, Lev was involved in the USBNY stock deal in that he lent $300,000 to USBNY which was used to purchase 3 million warrants (the right to busy stock). At the time of the IPO of U.S. Bridge of New York, the warrants were in Lev's name, and White Rock's principals had arranged to purchase all of Lev's warrants at a low price for purposes of then inflating the price and selling them at substantial profit. During the summer of 2000, following the arrests for the instant offense, Lev confronted Felix Sater's father and verbally abused and harassed him with the objective to get Felix Stater to not truthfully testify against Lev. The Government did not provide information related to the extent of the verbal abuse and harassment, or whether there was any express or implied threat of injury or damage. Due to Lev's guilty plea, Sater was not called as a witness. No aggravating or mitigating role adjustment appears warranted.

* * *

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United States v. Russo, 00 CR 1289 (E.D.N.Y. 2004)
Defendant charged with possession with intent to distribute heroin received downward departure from 78-97 months to a non-custodial sentence of supervised release due to extraordinary family circumstances.

United States v. Fazio, 00 CR 1183 (S.D.N.Y. 2003)
PDF
Defendant convicted of laundering $2.5 million of proceeds of illegal gambling operation received downward departure at sentencing to 5 years probation on grounds that he suffered significantly reduced mental capacity during the commission of the crime due to a pathological gambling disorder. Sentence was extraordinary in that amended sentencing guideline prohibiting such departure was due to go into effect the next day.

United States v. Fares, 01 CR 1175 (S.D.N.Y. 2002)
PDF
Motion for severance of defendant and charges granted in federal money laundering and structuring case.

United States v. Khmelnitsky, 01 CR 890 (S.D.N.Y. 2002)
Prior felon convicted of tax evasion received downward departure to three months imprisonment due to extraordinary family circumstances.

United States v. Lev, 00 CR 196 (E.D.N.Y. 2001)
Federal RICO charges (along with securities fraud and money laundering charges) dismissed by government after Mr. Lichtman's investigation of government's

linchpin witness revealed his repeated perjury and fraud while cooperating with the government.

* * *

APPENDIX AH

The SCORPION and the FROG

* * *

CHAPTER NINETEEN

Of course, it didn't end with that first de-briefing with the FBI and the other law enforcement agencies after my surrender. They kept after me, and what they kept after was more about crooked stuff involving Danny. Which I couldn't give them because there wasn't any to give.

"Sure, I gave him IPO stock," I told one of the two FBI agents assigned to me. "Danny's my best friend. Obviously, you know that. He wasn't my 'protection.' I would go to him for advice."

That was enough to trigger a leading question.

"Why would you go to him?"

As if there was any question there. Why would I go to him? Because Danny was part of a family referred to as "organized crime," because he was a good person to ask about dealing with critical issues that came up involving persons in organized crime. But I didn't say that.

"Just because he was my friend." I tried to make it clear that I wasn't the one in the company that dealt

with the sticky issues of conflicts with Mob-related problems. That was Lex's department.

"I was running the firm, guys," I told the agents. "I was wearing a suit, every day. I'd be going in and building up the firm. Lex was the negotiator. When it came to dealing with organized crime, he was the one to do it."

They didn't like that, but that was all they were going to get out of me, and they finally accepted that, and sent me home. Danny, I hoped, was safe.

* * *

But because of my cooperation, they gave me the courtesy of bringing myself in, in response to the indictment. ...

* * *

As far as the real facts of the case went, they already had what they needed. They got that from Gene, who knew everything, and had apparently told everything. They had Vlad, they had Andrew Bressman. All these owners and dealers were already cooperating, so there wasn't anything important they needed from me except Danny.

* * *

Then, in March 2000, they indicted the whole group, nineteen people, in what was billed as one of the biggest Mob-related indictments ever done on Wall Street. I wasn't part of that indictment, of course, because I had already agreed to plead. That made the FBI guys worry about my safety. The ones who were

indicted included some heavy Mob figures, and the fact that I already had made a deal was a problem.

"You should leave your house," the Feds told me. "It's not safe for you to stay here. Your buddy Danny is furious. And if he's what we think he is (meaning a Mob guy), you're in danger."

I wasn't worried about Danny, although I was unhappy to hear that he was furious. ...

* * *

But then another issue came up, which was that it didn't sit okay with the authorities–the FBI, the Justice Department, the whole prosecution team–that I was living in a $2 million house. Forget the agreement that I would be able to keep my primary home. Some of these civil servants were men and women who lived in developments, and it didn't go down for them to see me living where I was. So I had to sell the house, and move into a rental house.

* * *

One day, I got a disturbing anonymous phone call. It was a threat against my youngest daughter, and that was a terrible experience. Then I learned that Danny's lawyer had hired a private investigator to find me. I knew that because the PI showed up when I was out, and spoke to Lynn, who was walking the dog. She told him that I was out, and asked for his number, which gave him the confirmation that I lived there. That made me uneasy. But not really frightened, because what was there for him to take action against me for? If he read the case, which would show what my voluntary testimony had been, he would see that I had

not said anything against him. He already knew that I was cooperating, but I was telling the truth. So there was nothing I could say that would hurt him.

It was true that Danny had helped Andrew Bressman, and had collected a payoff for doing it, which I didn't know until the Feds told me. That was what got Danny into the indictment: the fact that after going with me and John Diorio and Forty to face the Mob guys who were threatening Andrew, Danny had gone back to Andrew and hit him up for money. I had told Danny not to do it, that I would give him stock that would be worth more than any money he would get out of Andrew. But he had gone anyway, and I think he got $25,000 out of him. When Andrew was pulled in, he gave them that information and it went down as extortion against Danny, and that's why he was indicted with everybody else.

Still, I considered it my fault that Danny got in trouble over that, because I brought him into the situation with Andrew. But even before that incident, I had discouraged Danny from coming around to my company, because of the way I knew it appeared. It looked like we were connected, which was not good for either of us.

"It will hurt me," I had told Danny, "It will hurt you."

When Danny did get indicted, he pleaded guilty, and pulled a one-year suspended sentence on work release. ...

* * *

Prosecutions continued throughout that year and the next. In 2001, I was working in the new business I had chosen, which was building houses. I was building houses in the $800,000 to $1 million range, making decent money at it. I figure that four houses would realize a $1 million profit, which would let me buy Lynn a house again. Until the tragedy of September 11, the matter of my sentencing was a big weight hanging over my head. It was very likely that I would do serious time; the question was how much. But a few days after September 11, I got a call from Lex, telling me that the information we had provided about Osama bin Laden was now being actively pursued, and our situation had improved. Three days before the attack on the World Trade Center, the Taliban or Al Qaeda had assassinated the man we had hoped would be our contact, Ahmad Shah Massoud, the man who had become the Northern Alliance leader.

Lex had gotten a call from a boss of a new section in the FBI who wanted to talk to him about the whole Stinger deal. We had done a careful job of putting it together, using connections Lex thought he had with both sides in the Afghan War. We had provided the actual serial numbers of the Stingers, which had been available in '98, and we had passed on what we thought was an active cell phone number for bin Laden.

To our way of thinking at the time, we had provided a way to reach bin Laden that should have been important to the U.S. government. Gene had fouled the deal by raising our asking price for the Stingers from $300,000 to $3 million. Now the information was deemed important, even though the Stinger deal had

not gone through. Lex, for all his other faults, was a very patriotic guy and a diehard Republican, and he was anxious to help the country any way he could–particularly if it served his purposes.

Then the entire block of defendants indicted in my case pleaded guilty, so it ended up that there was no trial after all. Most of the guilty pleas brought one to three-year sentences. I was grateful to Lex for including me in the record of the details he gave the FBI when they came to him about the Stingers and the bin Laden contacts, because that improved my case. The FBI and the prosecution wanted to suppress our involvement as much as possible even after 9/11.

* * *