UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)	Misc. No. 10GJ3793 No. 1:11DM3 No. 1:11EC3

OBJECTIONS OF REAL PARTIES IN INTEREST TO MAGISTRATE'S JUNE 1, 2011 ORDER ON PUBLIC DOCKETING

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INTRODUCTION

Real parties in interest Jacob Appelbaum, Rop Gonggrijp, and Birgitta Jonsdottir ("Parties") respectfully bring these Objections to the Magistrate's June 1, 2011 Order (the "June 1 Order") concerning their motion for public docketing of the judicial records at issue in this action.

The Magistrate's June 1 Order fails to provide the public with notice of each judicial document that has been sealed in this matter or an opportunity to challenge its sealing, in violation of clear Fourth Circuit caselaw. The Magistrate's May 4, 2011 Order (the "May 4 Order") correctly required docketing of the records relating to the December 14, 2010 Order to Twitter, but the June 1 Order erroneously failed to require individualized public docketing of any other § 2703-related materials in this case, including similar orders issued to entities other than Twitter.

The continued failure to maintain a public docket identifying the name and date of each document filed with the Court, including orders, motions, and other documents, is erroneous. Simply providing a case number and labeling it "Under Seal" is not sufficient to give the public the required notice and opportunity to challenge any sealing. This Court should overturn the Magistrate's denial of Parties' motion and issue an Order requiring the Clerk's Office to provide a public docket identifying the name and date of all judicial records related to any electronic communications orders in this matter, including documents related to any § 2703 orders to companies other than Twitter, redacted if necessary.

BACKGROUND

Parties are three individuals whose private and constitutionally protected information about their communications has been swept up in a criminal investigation being conducted by the government. A detailed summary of the factual background of this case is provided in Parties'

separate Objections to the Magistrate's March 11, 2011 Order denying Parties' Motion to Vacate and Motion to Unseal, and will not be repeated here. *See* Objections of Real Parties in Interest to March 11, 2011 Order (corrected), at 1-5, Mar. 28, 2011, Dkt. No. 45. Instead, this section will focus on the procedural background underlying the public docketing issue.

A. Pre-May 4 Order Proceedings.

In response to an *ex parte* Application by the United States, the Magistrate issued an Order on December 14, 2010 that requires Twitter to disclose detailed information concerning the communications conducted by Parties through their Twitter accounts (the "Twitter Order"). *See* Decl. of Stuart A. Sears, Ex. 1, Jan. 26, 2011, Dkt. No. 2.[1] The Twitter Order and all related documents were filed under seal, and the Order prohibited Twitter from disclosing it. In a January 5, 2011 Order, the Magistrate granted the government's motion to unseal the Twitter Order, holding that unsealing was "in the best interest of the investigation" (the "January 5 Order"). *Id.* Ex. 2.[2] The January 5 Order did not unseal the underlying Application or any other related documents. *See id.* Both the Twitter Order and the January 5 Order were issued by the Court under docket number 10-gj-3793.

Twitter informed Parties of the Twitter Order on January 7, 2011, advising them that Twitter would be forced to comply with it unless Parties took appropriate legal actions. *Id.* Ex. 3. On January 26, 2011, Parties filed a Motion to Vacate the Twitter Order (Dkt. No. 1), and a Motion for Unsealing of Sealed Court Records (Dkt. No. 3).

A portion of the Motion to Unseal is at issue here. The motion to unseal requested that

[1] Although the accompanying Application remains under seal, given the information disclosed in the Twitter Order, the government's investigation appears to relate to the WikiLeaks website.
[2] The government's motion to unseal the Twitter Order is still under seal, despite Parties' motion to unseal it and the government's subsequent agreement that the motion no longer needs to remain sealed. That issue is part of Parties' separate pending Objections to the Magistrate's March 11 Order.

the Court unseal and publicly docket all § 2703-related documents on the 10-gj-3793 docket, including documents associated with the Twitter Order plus those related to any other orders to companies other than Twitter. Parties filed their motions using the 10-gj-3793 docket number on the Court's Twitter Order and the January 5 Order.

Following the filing of Parties' motions, the Court created a new docket number, 1:11-dm-00003, to handle the litigation documents regarding Parties' motions. None of the documents existing prior to the filing of Parties' motions, including the Twitter Order and the government's Application, were filed or docketed in this new 1:11-dm-00003 docket.

A subsequent search of the Court's public docket revealed that three other DM docket numbers were created at the same time, right after the filing of Parties' motions: 1:11-dm-00001, 1:11-dm-00002, and 1:11-dm-00004. A short time later, another DM case, 1:11-dm-00005, was also created. There are no publicly available docket entries for any of these other DM matters. Parties reasonably believe that these dockets were created in connection with orders to companies other than Twitter, with each order assigned to a different "DM" docket number.

Following briefing and oral argument, on March 11, 2011, the Magistrate issued a Memorandum Opinion and Order denying Parties' Motion to Vacate, and denying in part Parties' Motion for Unsealing. Mem. Op., Dkt. No. 38.[3] The Magistrate did not rule on the request for public docketing in that Order, stating that "petitioners' request for public docketing of 10-gj-3793 . . . requires further review and will be taken under consideration." *Id.* at 19.[4]

[3] Parties filed Objections to that decision. Objections of Real Parties in Interest to March 11, 2011 Order (corrected), Mar. 28, 2011, Dkt. No. 45.

[4] As part of that Order, the Magistrate held that all of the litigation documents concerning Parties' motions, now filed on the 1:11-dm-00003 docket, should be unsealed, with one minor redaction to one document. Previously, almost everything had been placed under seal by the Clerk's Office, and there had been no public docketing of any of the litigation materials.

B. The May 4 Order.

On May 4, 2011, the Magistrate issued an Order regarding Parties' request for public docketing (the "May 4 Order"). That one-page Order states, in its entirety:

> THIS MATTER remained under consideration as to the issue of docketing the material in case number 10-gj-3793.
>
> UPON REVIEW of the pleadings and upon further review and consideration of the Clerk's Office procedures, it is hereby
>
> ORDERED that case 10-gj-3793 is hereby transferred to new case 1:11-ec-3, which shall remain under seal except as to the previously unsealed §2703(d) Order of December 14, 2010 ("Twitter Order"), and docketed on the running list in the usual manner.

May 4 Order, Dkt. No. 57, attached as Ex. A to Declaration of Stuart A. Sears, May 19, 2011, Dkt. No. 58-1 ("Sears Decl.").

Parties were served with the May 4 Order on May 5, 2011. Counsel for Parties thereafter attempted to view the "running list" referenced in the May 4 Order at the Clerk's Office. Counsel was eventually permitted to view a one-page computer entry listing four "EC" cases—1:11-ec-00001, 1:11-ec-00002, 1:11-ec-00003, and 1:11-ec-00004. Sears Decl. ¶ 3. There was no information on this one-page entry other than these docket numbers, the fact that they were all assigned to Magistrate Buchanan, and that the dockets had been created in early May, on the days immediately before and after the May 4 Order. *Id.*

After Parties, through counsel, contacted the Clerk's Office and the Magistrate's chambers, Parties were informed that additional information would be publicly docketed on the "running list." *Id.* ¶¶ 6-7. Counsel was thereafter provided access to the newly-created running list for "EC" matters. *Id.* ¶¶ 3, 8. That list is virtually identical to the one-page computer entry Parties had previously seen, except that two new notations had been added regarding the individual documents associated with the ec-3 (Twitter) docket, and the list now included

references to an ec-5, ec-6, ec-7, ec-8, and ec-9 docket. *Id.* Ex. B (EC running list). Unlike the ec-3 docket, the other EC dockets contain no individual docket entries or any other information indicating what documents have been filed. All that appears for them is a case name, "USA v. Under Seal," the name of the judge that has been assigned to the matters, and miscellaneous case assignment information. As with the parallel dm-1, dm-2, dm-4, and dm-5 docket numbers created following the filing of Parties' original motions, Parties reasonably believe that the ec-1, ec-2, ec-4, and ec-5 dockets, all created between May 2 and May 6 and assigned to Magistrate Buchanan, concern § 2703-related orders to companies other than Twitter that were the subject of Parties' motion for unsealing and public docketing.

Because this running list did not contain all of the information that Parties had requested in their motion, Parties filed Objections (Dkt. No. 58) to the Magistrate's May 4 Order, requesting that this Court issue an Order requiring public docketing of all of the requested judicial records, including any sealed documents.

C. The June 1 Order.

Two weeks after the filing of those Objections, on June 1, 2011, the Magistrate issued a Memorandum Opinion (Dkt. No. 60) and a new Order (Dkt. No. 61) (collectively, the "June 1 Order").[5] *See* Declaration of Benjamin T. Siracusa Hillman, attached hereto ("Hillman Decl."), Ex. A (Mem. Op., Dkt. No. 60), Ex. B (Order, Dkt. No. 61). This new Order expressly denied Parties' request for public docketing of the non-Twitter documents. It held that while the Court must create docket entries noting "that a sealing order has been entered," the Court need not supply any information to the public beyond a case number for each matter and "whether a particular case is under seal." Mem. Op. at 2, Dkt. No. 60. The June 1 Order states that

[5] The June 1 Order was entered by the Clerk's Office and served on Parties and the government on June 2, 2011.

"[f]urther individual docket entries for all other types of documents filed in a sealed case would be of no real value to the public, other than providing fodder for rank speculation." *Id.* The June 1 Order clarifies that the May 4 Order did not resolve Parties' request for public docketing of the non-Twitter § 2703-related materials.

Parties now bring these Objections to the Magistrate's June 1 Order, requesting, as they did in the Objections to the May 4 Order, that the Court issue an order with clear instructions to the Clerk's Office to create a public docket identifying all § 2703 orders, applications, and other related filings that originated in 10-gj-3793, including documents related to any orders to entities other than Twitter, which either remain in 10-gj-3793 or which have been segregated into the other DM or EC dockets.[6]

ARGUMENT

In the June 1 Order, the Magistrate disregarded settled Fourth Amendment caselaw requiring public docketing of all judicial records sufficient to give the public notice of each sealed order and document filed with the Court. This ruling was in error. Public docketing requires individual docket entries identifying, at a minimum, the name and date of each § 2703-related judicial record filed in this matter. That includes the docketing of any sealed documents, such as any judicial orders to companies other than Twitter, redacted as necessary.

I. A *DE NOVO* STANDARD OF REVIEW APPLIES TO THESE OBJECTIONS.

A *de novo* standard of review governs the Court's review of the June 1 Order. *De novo* review applies because the Fourth Circuit has explained that "the decision to grant or deny access is 'left to the sound discretion of the *trial court*,'" and that "trial court" means the district

[6] Given the overlap with Parties' Objections to the May 4 Order, Parties have requested that the Court consider the two sets of Objections at the same time. *See* Reply in Supp. of Parties' Objs. to May 4 Order at 2, 4 (Dkt. No. 63); *see also* Notice of Hearing, to be filed with the Court today.

court, not a Magistrate, even where the Magistrate has the initial power to make a sealing decision. *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 326 n.2 (4th Cir. 1991) (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989)); *see also Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (holding that denials of the First Amendment right of access receive *de novo* review).

Moreover, objections to a Magistrate's order that dispose of an entire underlying matter are considered "dispositive" and must be reviewed *de novo*. *See ALCOA v. EPA*, 663 F.2d 499, 501-02 (4th Cir. 1981); Fed. R. Civ. P. 72(b); Fed. R. Crim. P. 59(b). Because the June 1 Order resolves Parties' request for public docketing, it is "dispositive" and subject to *de novo* review. *See, e.g.*, *ALCOA*, 663 F.2d at 501-02 (holding that a Magistrate's order is dispositive where the motion before the Magistrate set forth all of the relief requested in the proceeding); *NLRB v. Frazier*, 966 F.2d 812, 815, 817 (3d Cir. 1992) (holding that a Magistrate's order is dispositive where the proceeding was instituted for the sole purpose of determining a motion to quash a subpoena).

Finally, even if a "contrary to law" standard were applied, *see* Fed. R. Civ. P. 72(a); Fed. R. Crim. P. 59(a), it would not change the ultimate standard of review because the issues before this Court are pure questions of law. When courts review pure questions of law using a contrary to law standard, they conduct a *de novo* review of such legal questions. *See, e.g.*, *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (reviewing a Magistrate's order under the "contrary to law" standard and noting that questions of law are reviewed *de novo* under this standard); *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) (same); *see also United States v. Curtis*, 237 F.3d 598, 607 (6th Cir. 2001) (for review of a Magistrate's orders, mixed questions of fact and law are treated as questions of law and reviewed *de novo*).

II. THE MAGISTRATE ERRED IN FAILING TO ORDER PUBLIC DOCKETING OF THE SEALED DOCUMENTS RELATED TO ANY ORDERS TO ENTITIES OTHER THAN TWITTER.

A. Because It Does Not Include Individual Docket Entries, The Current EC Running List Is Inadequate.

In response to Parties' request for public docketing, the Magistrate directed the Clerk's Office to create a "running list" of electronic communications orders. May 4 Order. Although the requirement that electronic communications orders be indexed in some form is a first step, the Magistrate's Orders are insufficient because they fail to require public docketing of each document filed with the Court.

Both the common law and the Constitution create a strong presumption of access to judicial records and documents. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Va. Dep't of State Police*, 386 F.3d at 575. The Fourth Circuit has specifically noted that the public's interest in access "may be magnified" "[i]n the context of the criminal justice system" because "[s]ociety has an understandable interest not only in the administration of criminal trials, but also in law enforcement systems and how well they work." *In re Application & Affidavit for a Search Warrant*, 923 F.2d at 330-31. "Regardless of whether the right of access arises from the First Amendment or the common law, it 'may be abrogated only in unusual circumstances.'" *Va. Dep't of State Police*, 386 F.3d at 576 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 182 (4th Cir. 1988)).

Public docketing of all judicial matters is an essential component of this right of access. It is fundamental both in its own right and as a means to facilitate the right of access to judicial records. Thus, the Fourth Circuit has repeatedly made clear that courts must publicly docket even sealed judicial records in a manner that "give[s] the public notice" of each document sealed or sought to be sealed, sufficient to give the public "a reasonable opportunity to challenge" the

sealing of each document in advance of the sealing. *Stone*, 855 F.2d at 181-82; *see also Baltimore Sun*, 886 F.2d at 65 (same); *United States v. Soussoudis* (*In re Wash. Post Co.*), 807 F.2d 383, 390 (4th Cir. 1986) (same); E.D. Va. Local Crim. R. 49 (requiring that each sealing request be docketed "in a way that discloses its nature as a motion to seal").[7] The purpose of this notice is to enable the public to keep a "watchful eye" on the operation of the government and the courts. *Nixon*, 435 U.S. at 598.

Docket sheets with individual entries for each document filed with a court perform this essential role. They serve as an "index" that catalogues the proceedings and as a "publication" that "provides the public and press with notice of case developments," a role that "assumes particular importance when the court is considering sealing a proceeding or judicial record." *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029 & n.15 (11th Cir. 2005). By providing an "index to judicial proceedings and documents," docket sheets "endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). That is why the Fourth Circuit has consistently required public docketing, even for matters that merit continued sealing. *Stone*, 855 F.2d at 181-82; *Baltimore Sun*, 886 F.2d at 65; *In re Wash. Post Co.*, 807 F.2d at 390. Far from being of "no real value to the public, other than providing fodder for rank speculation," June 1 Order at 2, therefore, docket sheets are critical to ensuring that the right of public access is a meaningful, not just a theoretical, right.

Federal Rule of Criminal Procedure 55 echoes the Fourth Circuit's and other circuits'

[7] In the case of search warrants, where the requirement to conduct proceedings "with dispatch to prevent destruction or removal of the evidence" may necessitate moving quickly before the public can be given an opportunity to raise objections, the Fourth Circuit has nevertheless adhered to the requirement of public docketing to provide the public with notice of the sealing and "an opportunity . . . to voice objections to the denial of access," holding that such notice "can be given by docketing the order sealing the documents." *Baltimore Sun*, 886 F.2d at 65.

rules on public docketing of judicial orders. It provides that "*every* court order or judgment," along with the "date of entry," "must" be entered by the clerk in the records of the district court's criminal proceedings. Fed. R. Crim. P. 55 (emphasis added). Although the government claims that Rule 55 is "silent" on whether § 2703 orders should be docketed, *see* Govt's Resp. to Parties' Objs. to May 4 Order, at 11, Dkt. No. 62 ("Govt's Resp."), "every order" means "every order," not "some orders," and the use of "must" makes clear that public docketing is not optional—for any court orders. The Judicial Conference has similarly established that redacted docket sheets should be posted even where cases are otherwise sealed. *See* Tim Reagan & George Cort, Fed. Judicial Ctr., *Sealed Cases in Federal Courts* 2 (2009) (discussing new Judicial Conference policy).

Despite these clear requirements from the caselaw, Rules, and the Judicial Conference policy, the June 1 Order held that there need not be a publicly available docket with individual docket entries for any of the sealed documents related to § 2703 orders to companies other than Twitter. Instead, according to the Order, the newly-instituted EC running list[8] adequately provides public docketing because it reveals the case number assigned to each matter and "whether a particular case is under seal." June 1 Order at 2. With the exception of the indexing of the Twitter documents in 1:11-ec-00003, which Parties do not challenge, however, this new "EC" list violates the requirement that every document filed with the Court, including sealed documents, must be publicly docketed, with docket entries identifying each document and the date of filing. *See, e.g.*, *Baltimore Sun*, 886 F.2d at 65; *Stone*, 855 F.2d at 181; *In re Wash. Post*

[8] The term "running list" originally referred to a publicly available hard copy, "permanent docket book," in which a tracking number for search warrants and pen register orders was assigned by the Clerk's Office. *See Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 427 (4th Cir. 2005). Next to the tracking number, the deputy clerk would record entries for each document, such as "Search Warrant" and "Affidavit Under Seal," identifying the documents associated with that tracking number. *See id.*

Co., 807 F.2d at 390; Fed. R. Crim. P. 55; E.D. Va. Local Crim. R. 49. Indeed, other than with respect to the Twitter Order documents, the EC running list contains no information aside from the docket number, the date the docket number was assigned by the Clerk's Office, and the name of the assigned judge. Sears Decl. Ex. B. This EC list does not, therefore, even contain the information included on the running list referenced in the Fourth Circuit's *Media General* case, *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424 (4th Cir. 2005), after which the Court's new EC running list is presumably modeled. *See id.* at 427 (noting that the specific items "Search Warrant" and "Affidavit Under Seal" were individually docketed on the "running list"); *see also supra* note 8. Regardless of whether it is appropriate to maintain certain *documents* under seal, a public docket—somewhere—containing docket entries identifying any other orders, applications, motions, or other documents is required.

Docketing is particularly important here because absent individualized public docketing, the public will not know whether an entry on the EC list refers to a § 2703 order, a pen register order, a trap and trace order, or some other type of order for which the Court may use the EC list. Nor will the public have any notice of whether the Court has denied any such requests by the government. As a result, the public will not be able to determine whether it is appropriate to bring a challenge to such sealing, or what legal principles would apply to such a challenge, because different rules may apply to the sealing of different documents. *See, e.g.*, *Baltimore Sun*, 886 F.2d at 65-66 (establishing principles for sealing of search warrant affidavits).

The June 1 Order simply cannot be reconciled with the extensive caselaw prohibiting secret dockets and sealed docket sheets, which emphasizes the need for *individual* docket entries. In *In re State-Record Co., Inc.*, 917 F.2d 124 (4th Cir. 1990), the Fourth Circuit vacated a district court's order sealing the docket sheet in a criminal case. Remarking that "we can not understand

how the docket entry sheet could be prejudicial," the court expressed concern that "harmless" information—that is, the individual docket entries for each event—had "been withheld from the public." *Id.* at 129. The Fourth Circuit therefore held the sealing to be overbroad in violation of the First Amendment; in the court's words, it "violate[d] one of the cardinal rules that closure orders must be tailored as narrowly as possible." *Id.* As here, in *In re State-Record Co.*, the case number, the name of the assigned judge, and the fact of sealing were already publicly known, but the contents of the docket sheet were entirely sealed. Those publicly known facts were not sufficient to provide public docketing there. *See id.* (vacating the district court's sealing order). Nor are they sufficient here.

Other circuits have similarly invalidated the use of secret, sealed dockets that lack any individual docket information for the public to view. In *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), a challenge to a secret criminal docketing system used by the Connecticut state courts, the Second Circuit held that the First Amendment requires that docket sheets be presumptively open. "[T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Id.* at 93. "[D]ocket sheets," the court explained, "provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id.* This "index" and "information" of which the Second Circuit spoke goes far beyond the existence of a case and the Judge's name, the inclusion of which alone is not sufficient to enable the exercise of First Amendment rights. Far from being "of no real value to the public," Mem. Op. at 2, Dkt. No. 60, the docketing of individual documents is necessary to enable the exercise of First Amendment rights, and is, hence, of constitutional dimension. *Hartford Courant*, 380 F.3d at 96.

In *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), the Eleventh Circuit similarly invalidated a federal court's use of a parallel sealed criminal docketing procedure, explaining that the "maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings." *Id.* at 715. The court explained that the failure to record certain individual pretrial events on the public docket was impermissible because it "completely hid from public view" the occurrence of those events. *Id.* The Eleventh Circuit also condemned the district court's sealed docketing procedure for "effectively preclud[ing] the public and the press from seeking to exercise" their right of access. *Id.* The court held that the failure to docket publicly each individual event was unconstitutional, even though, in *Valenti*, other events and the case's existence were already publicly known. *Id.*; *see also Ochoa-Vasquez*, 428 F.3d at 1029 n.15 (explaining that the docket sheet's role in providing notice of case developments to the public and press "assumes particular importance when the court is considering sealing a proceeding or judicial record").

Likewise, in *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988), the Eighth Circuit held that the sealing of district court docket sheets in a challenge to the sealing of certain search warrant affidavits and related materials was "improper." *Id.* at 575. The court noted that docketing a motion to seal documents served the important purpose of notifying the public and giving it the opportunity to present objections to the sealing. *Id.* The court held that "absent extraordinary circumstances," the entry of a sealing order must also be separately noted on the court's docket. *Id.* Here, as in *Gunn*, it is not sufficient simply to indicate that a sealed case exists and to leave the public guessing whether an order sealing the documents was ever entered or what other documents may

have been filed with a court.[9]

The Fourth Circuit's numerous other cases requiring public docketing, including *Stone*, *Baltimore Sun*, and *In re Washington Post*, also make clear that individualized docketing is necessary. Although those cases do not expressly discuss the need to docket each specific document or proceeding, that is an implicit holding of each case. In those cases, there was already a public docket for at least a portion of each of the cases. Hence, the issue before the court was whether there needed to be public docketing of the specific sealed documents or hearings at stake. *See Stone*, 855 F.2d at 181-82; *Baltimore Sun*, 886 F.2d at 65-66; *In re Wash Post Co.*, 807 F.2d at 390. The Fourth Circuit has consistently answered that question in the affirmative.

These cases from the Fourth Circuit and other circuits make clear that contrary to the June 1 Order, dockets must be publicly maintained for each judicial record to provide the public with notice and the opportunity to bring a challenge to any sealing request. Allowing § 2703-related documents to be exempt from the generally-applicable public docketing requirements would create a secret, nonpublic court system for electronic communications orders. That is contrary to the fundamental principles of our judicial system, and the Court should not permit it here.

The government has attempted to justify the newly-instituted EC running list system by asserting that it is "nearly identical" to the system described in *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 878 (S.D. Tex. 2008). *See* Govt's Resp. at 13

[9] The June 1 Order states that the current EC list shows "whether a particular case is under seal." June 1 Order at 2. That a docket sheet says a case is under seal does not necessarily mean that the Court entered a sealing order. For example, the docket created to house the instant challenge, 1:11-dm-00003, was initially sealed in its entirety *sua sponte* by the Clerk's Office without any sealing order for the case; it was only unsealed after Parties moved for unsealing, and the Magistrate granted their request.

n.8, Dkt. No. 62. Not so. As that case explains, the Southern District of Texas dockets each electronic surveillance order, including § 2703 orders, under a separate case number *and* separately indexes the following under that number: "the Government's application, affidavits, and other supporting material, as well as any orders of the court, including extensions and sealing orders." *Id.*[10] The practice of public docketing in the Southern District of Texas, which includes Houston, our nation's fourth-most-populous city, belies the government's warning that it would be an "unprecedented step" to create a public docket for § 2703 proceedings. *See* Govt's Resp. at 12, Dkt. No. 62. Moreover, even if some courts have not publicly docketed § 2703-related documents, that does not justify a violation here. *See Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009) (rejecting decades of practice considered constitutional under prior decisions, and noting that "[t]he doctrine of *stare decisis* does not require us to approve routine constitutional violations").

Nor will public docketing of § 2703-related materials reveal sensitive details about the government's ongoing investigations, such as who the recipients of orders are, who the targets of

[10] An examination of publicly accessible PACER docket sheets confirms that the Southern District of Texas engages in much more robust public docketing of sealed § 2703 and other electronic communications proceedings than the newly-instituted EC list involved here. For example, a typical case title on those electronic communications docket sheets indicates the type of order at issue, rather than a generic "Under Seal," and separately indexes each document filed within that case. *See, e.g.*, Hillman Decl. Ex. C (docket sheet for S.D. Tex. Case No. 4:07-mj-00351) (titled "USA v. Application for Order Authorizing the use of available Technology to provide real time notification of cell site activations," and separately indexing "Sealed Affidavit by USA" in support of the application, and "Sealed Order"); *id.* Ex. D (S.D. Tex. Case No. 4:07-mj-00617) (titled "USA v. Application Authorizing the Disclosure Location Based Services," and separately indexing "Sealed Application," "Sealed Affidavit," and "Sealed Order"). Similarly, where a further order dealing with the same matter is requested and issued, that is separately indicated. *See, e.g.*, *id.* Ex. E (S.D. Tex. Case No. 4:04-mj-00279) (titled "USA v. Pen Register," and separately indicating filing of "Sealed Order" granting the request, a motion to dismiss by the government, and an order granting that motion). Applications for a non-disclosure order under 18 U.S.C. § 2705(b) have also been separately docketed. *See, e.g.*, *id.* Ex. F (S.D. Tex. Case No. 4:09-mj-00937) ("USA v. Application of the United States for An Order Pursuant to 18 USC 2705(b)").

investigations are, or what information the government is requesting. Where the underlying application and order remain sealed, this information would not appear on the public docket. Instead, docketing the name and date of each document would simply reveal information such as the type of order sought (§ 2703 order, pen register, or other), whether the Court granted or denied any request for an order, whether a non-disclosure order was sought and granted or denied, and whether any motions have been filed challenging the requests or orders. The information is "harmless" to the government, *see In re State-Record*, 917 F.2d at 129, but it is critical to the public. That this information is harmless is abundantly demonstrated by the ec-3 docket for the Twitter Order. The Court has now docketed each of the items on the ec-3 Twitter Order docket, including the still-sealed Application and still-sealed motion to unseal, but no sensitive investigative details are revealed on the running list. *See* Sears Decl. Ex. B; *see also supra* note 10 and S.D. Tex. examples cited therein. That should now be done for the non-Twitter dockets, in much the same manner.

Moreover, the Fourth Circuit has made clear that courts must publicly docket all sealed judicial records, regardless of whether public docketing would allegedly affect important government interests. In *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986), a case that involved sensitive national security concerns and classified information, the government argued that the ordinary principle of providing public docketing of a motion to seal documents should not be required "where national security interests are at stake," in part because, much as the government argues here, "notice of a closure motion alone could lead the news media to guess at the nature of the covert operations involved." *Id.* at 391 & n.8. The Fourth Circuit rejected that argument, holding that the ordinary "procedural requirements . . . are fully applicable." *Id.* at 392. As the Fourth Circuit explained, where sealing is at issue, a court does not have "discretion

to adapt its procedures to the specific circumstances." *Id.* at 391.

In addition, that the § 2703-related documents that Parties seek to have publicly docketed may not now be docketed in 10-gj-3793, or in the 1:11-dm-00003 or 1:11-ec-00003 dockets newly created by the Magistrate, cannot justify any failure to publicly docket them. When Parties filed their motion, the Twitter Order and January 5 Order were labeled by the Court with docket number 10-gj-3793. Parties therefore moved for unsealing and public docketing of documents related to any § 2703 orders filed on the 10-gj-3793 docket. As described in more detail above, it was only after Parties filed their motions that new "DM" case numbers were created for the matters, and, eventually, that new "EC" numbers were created, apparently to house the underlying § 2703 orders and applications. It is appropriate to file a single motion to unseal to address multiple sealed documents within a single case. *See, e.g., Media Gen. Operations, Inc.*, 417 F.3d at 427; *Va. Dep't of State Police*, 386 F.3d at 577-81. The Magistrate's subsequent decision to segregate this case into separate DM and EC docket numbers does not change the scope of Parties' request for unsealing of all of the documents under the original case number.

Finally, the June 1 Order asserts that individualized public docketing would be an undue burden on the Clerk's Office. June 1 Order at 2. To be clear, Parties do not seek the adoption of any particular procedure or administrative mechanism for public docketing. Parties are not, in other words, challenging the use of the EC "running list" mechanism, instead of the use of a normal case docket. Instead, Parties request an order requiring the Clerk's Office to provide sufficient information—through whatever administrative vehicle the Clerk's Office adopts—to give adequate notice to the public of the filing under seal of each order, motion, or other document, sufficient to provide the public with an opportunity to challenge their sealing, exactly

as the Magistrate has already done with respect to the 1:11-ec-00003 Twitter docket. That is what well-established Fourth Circuit caselaw requires, and it is what the First Amendment and common law principles of the right of access mandate.

B. Section 2703 Orders and Related Documents Should Not Be Treated As Grand Jury Documents For Public Docketing Purposes.

In its most recent filing, the government argues that there is no right of public docketing at all because § 2703 orders and related documents should be treated as if they were grand jury documents, which do not need to be publicly docketed. *See* Govt's Resp. at 7-11, Dkt. No. 62. The Magistrate has already rejected that argument. The May 4 Order makes clear that, at least with respect to the Twitter documents, public docketing on the running list is required, even for those § 2703-related documents that are still sealed, such as the government's Application for the Twitter Order. Thus, that Order implicitly recognizes that § 2703 proceedings should not be treated as grand jury proceedings exempt from the public docketing requirements. The June 1 Order makes this point crystal clear. It expressly draws a distinction between those cases subject to the new procedures of the EC running list—i.e., § 2703 proceedings—which "must" have "a publicly available docket number," and those "before the grand jury," which need not. Mem. Op. at 1, 2, Dkt. No. 60. The § 2703-related documents that Parties seek to have publicly docketed are clearly in the former category; Parties have not, for example, sought to unseal or to docket publicly any grand jury subpoenas. The Magistrate's creation and public docketing of a separate "DM" proceeding to house Parties' motions—as contrasted with the non-publicly-docketed grand jury ancillary proceedings to which the grand jury cases cited by the government refer—further demonstrates that the Magistrate has already determined that the § 2703-related documents at issue here are separate and distinct from any grand jury proceeding, and should be treated as such for docketing purposes.

Even if the Magistrate had not already rejected the government's argument, it would still fail. Section 2703 documents are not grand jury documents, and § 2703 proceedings are not grand jury proceedings. Grand jury proceedings are distinct from other forms of proceedings. *See United States v. Williams*, 504 U.S. 36, 47 (1992) ("[T]he grand jury is an institution separate from the courts, over whose functioning the courts do not preside . . . ."); *see also In re Grand Jury Subpoena*, 920 F.2d 235, 241 (4th Cir. 1990) (finding that information obtained by search warrants were not grand jury materials); *In re Grand Jury Proceedings*, 503 F. Supp. 2d 800, 807-08 (E.D. Va. 2007) (noting that the Fourth Circuit has construed the scope of what constitutes "matter[s] occurring before the grand jury" narrowly). Grand jury documents are issued by the grand jury, and kept in the grand jury files. At issue here are judicial orders and judicial documents, issued by a federal Magistrate judge, and filed with the Court. As judicial records and documents, they are subject to both a right of access and the requirement that they be publicly docketed. *See Va. Dep't of State Police*, 386 F.3d at 575 ("The common law presumes a right of the public to inspect and copy '*all* judicial records and documents.'" (emphasis added) (citation omitted) (quoting *Stone*, 855 F.2d at 180)); *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 891-92 (S.D. Tex. 2008) (labeling § 2703(d) orders "'top drawer' judicial records," subject to the highest presumption of access, because they are "documents authored or generated by the court itself").

In this respect, § 2703 orders are no different for public docketing purposes than search warrants, which also are issued in the investigative, pre-charge stage of a case, by a judge, upon a specific showing, but which the Fourth Circuit has made clear are judicial records that are subject to the common law right of access and that must be publicly docketed. *Baltimore Sun*, 886 F.2d at 65-66. There is no reason for treating § 2703-related documents any differently for

public docketing purposes. That is precisely what the Magistrate concluded, as the May 4 Order provides that § 2703 matters shall be docketed on the running list "in the usual manner"—that is, as is done with search warrants. May 4 Order, Dkt. No. 57.[11]

Implicitly recognizing that § 2703-related documents are not actually grand jury documents, the government attempts to expand the grand jury exception to the right of access to cover all "investigative proceedings," a much broader category of proceedings as the government defines the term. *See* Govt's Resp. at 7-11, Dkt. No. 62. The Fourth Circuit has foreclosed that very argument, establishing that pre-indictment, "investigative proceedings" are not categorically exempt from the right of access. *See, e.g.*, *Va. Dep't of State Police*, 386 F.3d at 579-80 (holding that there is a right of access to "all 'judicial records and documents,'" and affirming district court's unsealing of documents related to an ongoing investigation); *Baltimore Sun*, 886 F.2d at 66 (vacating district court's decision sealing pre-indictment search warrant affidavits, which was based solely on a finding that the general interest in keeping investigations secret outweighed the right of access); *see also Media Gen. Operations, Inc.*, 417 F.3d at 429-30 (recognizing, in the investigative stage of the case, the requirement of public notice and the opportunity to object to sealed judicial records, and noting that the pre-indictment investigative documents at issue there were individually publicly docketed).

The government attempts to avoid this conclusion by citing several cases dealing with actual grand jury proceedings for the proposition that all "investigative documents and proceedings" should be kept secret. *See* Govt's Resp. at 7-11, Dkt. No. 62. To the contrary, these cases specifically limit themselves to the grand jury context. *See, e.g.*, *Douglas Oil Co. v.*

[11] The government has previously argued that search warrants are different because their execution is "typically a public act," known to the target. Govt's Resp. at 10, Dkt. No. 62. But because public docketing of sealed § 2703 orders will reveal neither the target nor the recipient, this claimed difference is irrelevant to the question of whether § 2703 orders need to be publicly docketed.

Petrol Stops N.W., 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, *grand jury proceedings* have been closed to the public, and records of such proceedings have been kept from the public eye." (emphasis added)); *In re Sealed Case*, 199 F.3d 522, 525-26 (D.C. Cir. 2000) (rejecting request for docketing of grand jury ancillary proceedings, and noting that "the grand jury context presents an unusual setting where privacy and secrecy are the norm"); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (discussing grand jury ancillary proceedings, and noting that their secrecy is governed by Fed. R. Crim. P. 6).[12] This presumption of secrecy is, therefore, only applicable in the actual grand jury context. *See Hartford Courant*, 380 F.3d at 96 ("The only [court of appeals] decision denying a First Amendment right to public docketing concerned grand jury proceedings, which the Supreme Court has emphasized are entitled to a presumption of secrecy." (discussing *In re Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000))); *see also Baltimore Sun*, 886 F.2d at 65 (contrasting the "rule of secrecy that is imposed with clearly defined exceptions on matters occurring before a grand jury" with the silence of the federal rule governing search warrants, and holding that as a result of that silence, the ordinary common law right of access applied to search warrant materials). No court has extended the secrecy afforded to grand jury proceedings to encompass judicial orders and records outside the grand jury context as the government now desires. Outside the grand jury context, dockets must be publicly maintained.[13]

There is similarly no support for the government's assertion that public docketing is not required because it would reveal information covered by Federal Rule of Criminal Procedure

[12] Even in *In re Motions of Dow Jones & Co.*, which involved grand jury ancillary proceedings, the court of appeals questioned the district court's decision to engage in blanket sealing of the docket, and remanded the case for reconsideration of whether that was necessary. *See* 142 F.3d at 504.

[13] Moreover, this Court has historically docketed on the public running list both search warrants and pen register proceedings—"investigative proceedings" under the government's rubric. *See Media Gen. Operations, Inc.*, 417 F.3d at 427.

6(e), the grand jury secrecy rule. *See* Govt's Resp. at 10, 16-17, Dkt. No. 62. As discussed above, *supra* at 15-16, and as the ec-3 (Twitter) docket makes clear, public docketing would not reveal any such information. *See In re State-Record Co., Inc.*, 917 F.2d at 129 (concluding that docket sheets contain harmless information that should not be withheld from the public). Regardless, Rule 6(e) does not govern the sealing of anything other than grand jury proceedings. *See In re Grand Jury Proceedings*, 503 F. Supp. 2d at 807-08 (construing Rule 6(e) narrowly); *United States v. Rosen*, 471 F. Supp. 2d 651, 654-55 (E.D. Va. 2007) (same).

Finally, that the government could have sought to avoid public docketing by issuing a grand jury subpoena subject to Rule 6(e) instead of a § 2703(d) order is irrelevant. Had the government done so, it would have been prevented from imposing secrecy on the subpoena's recipient. *See* Fed. R. Crim. P. 6(e)(2); *see also Butterworth v. Smith*, 494 U.S. 624, 635-36 (1990) (holding that a state statute that imposed a secrecy requirement on recipients of grand jury subpoenas violated the First Amendment). That, of course, is what the government was able to accomplish by obtaining a § 2703 order and a non-disclosure order under 18 U.S.C. § 2705(b). The government cannot have it both ways. It cannot treat § 2703 orders as grand jury documents for public docketing purposes—to avoid public docketing—but treat them as non-grand jury documents for sealing purposes—to enable it to gag the recipient from disclosing the order's existence.

CONCLUSION

For the foregoing reasons, Parties respectfully request that the Court issue an Order directing the Clerk's Office to provide individual public docket entries for each of the sealed documents related to any § 2703 orders to entities other than Twitter, identifying the name and date of each document filed with the Court.

Dated: June 16, 2011

By: /s/ Rebecca K. Glenberg
Rebecca K. Glenberg, VSB No. 44099
AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
530 E. Main Street, Suite 310
Richmond, VA 23219
Telephone: 804.644.8080
Facsimile: 804.649.2733
Email: rglenberg@acluva.org

Aden J. Fine (admitted *pro hac vice*)
Benjamin Siracusa Hillman (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212.549.2500
Facsimile: 212.549.2651
Email: afine@aclu.org
Email: bsiracusahillman@aclu.org

Cindy A. Cohn (admitted *pro hac vice*)
Lee Tien (admitted *pro hac vice*)
Kevin S. Bankston (admitted *pro hac vice*)
Marcia Hofmann (admitted *pro hac vice*)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: 415.436.9333 x108
Facsimile: 415 436.9993
Email: cindy@eff.org
Email: tien@eff.org
Email: bankston@eff.org
Email: marcia@eff.org

Jonathan Shapiro
GREENSPUN, SHAPIRO, DAVIS
& LEARY, P.C.
3955 Chain Bridge Road
Second Floor
Fairfax, VA 22030
Telephone: 703.352.0100
Facsimile: 703.591.7268
Email: js@greenspunlaw.com

Attorneys for BIRGITTA JONSDOTTIR

Dated: June 16, 2011

By: /s/ John K. Zwerling_____

John K. Zwerling, VSB No. 8201
Stuart Sears, VSB No. 71436
ZWERLING, LEIBIG & MOSELEY, P.C.
108 North Alfred Street
Alexandria, VA 22314
Telephone: 703.684.8000
Facsimile: 703.684.9700
Email: JZ@Zwerling.com
Email: Chris@Zwerling.com
Email: Andrea@Zwerling.com
Email: Stuart@Zwerling.com

John W. Keker (admitted *pro hac vice*)
Rachael E. Meny (admitted *pro hac vice*)
Steven P. Ragland (admitted *pro hac vice*)
KEKER & VAN NEST LLP
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: 415.391.5400
Facsimile: 415.397.7188
Email: jkeker@kvn.com
Email: rmeny@kvn.com
Email: sragland@kvn.com

Attorneys for JACOB APPELBAUM

Dated: June 16, 2011

By: /s/ Nina J. Ginsberg_____

Nina J. Ginsberg, VSB No. 19472
DIMUROGINSBERG, P.C.
908 King Street, Suite 200
Alexandria, VA 22314
Telephone: 703.684.4333
Facsimile: 703.548.3181
Email: nginsberg@dimuro.com

John D. Cline (admitted *pro hac vice*)
LAW OFFICE OF JOHN D. CLINE
115 Sansome Street, Suite 1204
San Francisco, CA 94104
Telephone: 415.322.8319
Facsimile: 415.524.8265
Email: cline@johndclinelaw.com

K.C. Maxwell (admitted *pro hac vice*)
LAW OFFICE OF K.C. MAXWELL
115 Sansome Street, Suite 1204
San Francisco, CA 94104
Telephone: 415.322.8817
Facsimile: 415.888.2372
Email: kcm@kcmaxlaw.com

Attorneys for ROP GONGGRIJP

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

Tracy D. McCormick
Andrew Peterson
U.S. Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
Telephone: 703-299-3175
Email: tracy.mccormick@usdoj.gov

John K. Zwerling, VSB No. 8201
Stuart Sears, VSB No. 71436
ZWERLING, LEIBIG & MOSELEY, P.C.
108 North Alfred Street
Alexandria, VA 22314
Telephone: (703) 684-8000
Facsimile: (703) 684-9700
Email: JZ@Zwerling.com
Email: Stuart@Zwerling.com

Jonathan Shapiro
GREENSPUN, SHAPIRO, DAVIS
& LEARY, P.C.
3955 Chain Bridge Road
Second Floor
Fairfax, VA 22030
Telephone: (703) 352-0100
Facsimile: (703) 591-7268
Email: js@greenspunlaw.com

Nina J. Ginsberg, VSB No. 19472
DIMUROGINSBERG, P.C.
908 King Street, Suite 200
Alexandria, VA 22314
Telephone: 703.684.4333
Facsimile: 703.548.3181
Email: nginsberg@dimuro.com

John K. Roche
PERKINS COIE, LLP
700 13th Street, N.W., Suite 600
Washington, DC 20005
Telephone: 202-654-6200
Facsimile: 202-654-6211
Email: jroche@perkinscoie.com

Marvin David Miller
1203 Duke Street
The Gorham House
Alexandria, VA 22314
Telephone: (703) 548-5000
Email: katherine@marvinmilleratlaw.com

I also certify that on this 16th day of June, 2011, I caused the following party to be served by first-class United States mail:

Christopher Soghoian (*pro se)*
Graduate Fellow, Center for Applied Cybersecurity Research
Indiana University
P.O. Box 2266
Washington, DC 20013
Telephone: 617-308-6368

By: /s/ Rebecca K. Glenberg
Rebecca K. Glenberg, VSB No. 44099
AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
530 E. Main Street, Suite 310
Richmond, VA 23219
Telephone: 804.644.8080
Facsimile: 804.649.2733
Email: rglenberg@acluva.org