

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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RICHARD ROE, *et al.*, )  
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 Appellants, )  
 ) Nos. 10-2905-cr, 11-479-cr  
 v. )  
 )  
 )  
 UNITED STATES OF AMERICA, *et al.*, )  
 )  
 )  
 Appellees. )  

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**AMENDED BRIEF OF INVESTIGATIVE JOURNALISTS,  
AS AMICI CURIAE, IN SUPPORT OF  
FORBES MEDIA’S MOTION TO UNSEAL**

Dated: April 26, 2017

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## **FRAP 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, I, the undersigned counsel of record for the institutional Amici, *DCReport.org*, *Who.What.Why.*, *The National Memo*, and *WiseLawNY*, that:

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## **INTERESTS OF THE AMICI CURIAE**

David Cay Johnston and *DCReport.org*; Russ Baker and *WhoWhatWhy*; Joe Conason and *The National Memo*; and Dan Wise and *WiseLawNY* (the “Amici”) respectfully submit this amended brief in support of the motion of Intervenors Forbes Media LLC and Richard Behar (“Intervenors”), to unseal judicially-sealed records potentially bearing on issues of the utmost public importance.<sup>1</sup>

Investigative journalists seek to bring hidden information to light for public benefit, uncovering facts regarding the effectiveness and integrity of government and other institutions. In turn, such enterprising journalism enables citizens to better understand and assess those in positions of power, including law enforcement and the judiciary. Access to official government proceedings, such as court cases involving matters of public significance, is central to this work.

The amici curiae are investigative journalists and their publications. The amici are among those currently seeking to report on Felix Sater, whose activities – legitimate or illegitimate – have taken on national, indeed worldwide, significance. Their coverage of Mr. Sater, as a long-standing subject of public interest and concern, has been materially impeded by the courtroom closings, sealing of documents and gagging of attorneys that has been a hallmark of this case for nearly 20 years now, and in its many iterations.

## **THE INDIVIDUAL AMICI CURIAE**

Amicus curiae David Cay Johnston, amicus DCReport’s founder, is a Pulitzer Prize-winning investigative reporter. Johnston is also the author of a best-selling biography of the

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<sup>1</sup> No Amici have moved for leave to file this amended brief. No party or party’s counsel authored this brief in whole or in part; and no party or party’s counsel, other than Amici, contributed money intended to fund preparing or submitting the brief.

President, The Making of Donald Trump. Johnston was the reporter who recently received – from an unknown source – two pages from President Trump’s 2005 tax return.

Amicus DCReport.org was founded in 2016 by amicus Johnston. DCReport, Inc., operating as DCReport.org, is a nonprofit, non-advertising news service. DCReport has given extensive coverage to connections between Russian oligarchs and high-level Trump administration officials and advisers.

Amicus curiae Joe Conason is an American journalist, author and political commentator. He is the founder and editor-in-chief of amicus, The National Memo. Conason was formerly the executive editor of the New York Observer for almost 20 years. He has covered every American presidential election since 1980.

Amicus The National Memo is a daily political newsletter and website, featuring breaking news, commentary and analysis.

Amicus curiae Russ Baker is an award winning investigative journalist, author and commentator. He is the founder and Editor-in-Chief of amicus, WhoWhatWhy. Baker is the author of the best-selling work of presidential history, Family of Secrets. He has written for many leading American and European publications and has been a Contributing Editor of the Columbia Journalism Review.

Amicus WhoWhatWhy is the operating name for Real News Project, Inc., a non-profit news organization and online publication practicing a form of deep investigative reporting known as forensic journalism. On March 27, Baker and WhoWhatWhy published a widely-praised investigative report on Felix Sater, Donald Trump and the FBI.

For 28 years, Amicus curiae Dan Wise covered legal news in New York City for the New York Law Journal. He now freelances, regularly posting law-related exclusives on his blog, WiseLawNY.

Amicus WiseLawNY is a law blog written and published by Dan Wise. WiseLawNY has covered the Felix Sater sealing issues since 2011.

### **PRELIMINARY STATEMENT**

When public access to judicial proceedings is unavailable, accountability, itself essential for public confidence and trust, is lost. Only in the most extraordinary circumstances should records be withheld and then only for the minimum time necessary to protect life and limb or other governmental interests of the highest order. Taxpayer-financed courts should not be operated as private gatherings of the invited, but as public forums serving justice, not only for the parties but for the broader public as well.

The unwarranted sealing of records and proceedings in this case, strikes at the heart of our democratic traditions of accountability, open courts and a free press. Perhaps no one could have predicted the spectacular arc of Mr. Sater's career – criminal and otherwise – or its current impact on matters of national and international significance. But this simply proves the wisdom of the general presumption of openness of judicial proceedings. Records that may become vital to a full understanding of issues or events must remain open and accessible to journalists and the public at all times.

## SUMMARY OF THE ARGUMENT

The Amici will not reargue the law already well-briefed by the movant. Suffice to say there can essentially be no dispute over the presumption of openness and accessibility to judicial proceedings guaranteed under the common law and the First Amendment. The troubling record of nearly 20 years of unwarranted secrecy in this case – while Mr. Sater traveled the world on now highly-newsworthy – and often non-governmental missions – is demonstrated by a detailed timeline of Mr. Sater’s publicly-reported activities. (Point I)

Undisputed common law precedent mandates the unsealing requested by the Movant. (Point II)

Undisputed constitutional precedent also mandates unsealing. (Point III)

Finally, the First Amendment also casts serious doubt on the gag orders, affecting only certain of the attorneys herein, still outstanding in these cases. (Point IV)

## ARGUMENT

### **I. THE COURSE OF EVENTS HAS PROVEN THAT THE NEED TO “PROTECT” MR. SATER’S NAME AND IDENTITY HAS BEEN MISUNDERSTOOD AND GROSSLY OVERVALUED BY THIS COURT; FROM THE OUTSET, IT WAS NEVER REALLY POSSIBLE TO PUT THE “GENIE” OF MR. SATER’S ALREADY WIDELY AND PUBLICLY-KNOWN IDENTITY AND ACTIVITIES “BACK IN THE BOTTLE”**

Felix Sater’s name and identity were widely and contemporaneously disseminated in publicly-available sources regarding his criminal and business activities. In fact, a major national business publication had already revealed Mr. Sater’s name, detailed the federal criminal charges against him (including Sater’s alleged involvement with Russian and Italian organized crime) and also even reported his agreement to act as a federal informant – a month before the filing of the first formal federal Information against him.



Based solely on such publicly-available sources (detailed in the timeline below), the sealing of Felix Sater's records made little or no sense from the very outset of his federal involvement; perpetuating the sealing nearly two decades later, under all of the prior and current circumstances, cannot be justified.

Timeline: Felix Sater's Criminal Activities, Related Events  
and Their Publicly-Available Sources (1991-Present)

- 1991. Felix Sater stabs a man in the cheek and neck, breaking his jaw, lacerating his face, and severing nerves. (NYT, 12/18/07)
- February, 1993. Sater is tried and convicted of first degree assault and serves approximately one year in prison. (Id.) To Amici's knowledge, no records of Sater's state conviction and imprisonment are contemporaneously sealed.
- 1993-1998. According to a later federal complaint (see below), during this period Sater – presumably out of prison – works with the Russian and Italian mob in a criminal enterprise whose chief goal is running stock scams and laundering money. (Business Week, “The Gym Bag that Squealed,” 11/9/98)
- The 1998 Business Week article names Sater, identifies him as a government cooperator, and reports that he is about to be charged in the White Rock “pump-and-dump” stock scheme. (Id.)
- December 10, 1998. Sater is formally charged in a federal criminal Information with six counts of stock fraud and money laundering. Sater is named in the caption; his identity is not disguised as “John Doe” or “Richard Roe.” On that same day, Sater pleads guilty to a single federal charge of fraud and agrees to assist the US government as a government cooperator, as reported the month before in Business Week. (See also Press Release, infra.)
- March 2, 2000. The acting US Attorney, EDNY, issues an official “press release,” naming Sater and describing in detail his connection to the White Rock stock fraud. In a footnote, Sater is identified as having previously pled to the charges. (See, infra)
- September 13, 2000. Lest there be any doubt about the uninterrupted public-availability of the 3/2/00 release, an actual copy of it is included in a congressional report. (House of Representatives, Hearing, “Organized Crime on Wall Street,” Sept. 13, 2000, conducted by the Subcommittee on Finance and Hazardous Materials of the Committee on Commerce [reproducing E.D.N.Y. U.S. Attorney's press release, dated March 2, 2000, pp. 198-206 at p. 199])
- October 2003. Salvatore Lauria, a co-defendant in the White Rock fraud, publishes a book, The Scorpion and the Frog: High Times and High Crimes, self-described as:

“The True Story of One Man’s Fraudulent Rise and Fall on the Wall Street of the Nineties.” Sater appears as a character in the book, thinly-disguised, under the name of “Lex Tera”] (New Millenium Press)

- December 17, 2007. The New York Times becomes the next major media source to publicly-reveal Sater’s name and criminal past. (Id.)

- May 10, 2010. Frederick Oberlander files *Kriss v. Bayrock Group*, 10-cv-6338 (SDNY) – not under seal – naming Sater and claiming investors in Bayrock had been defrauded, inter alia, by the failure to reveal Sater’s criminal convictions, under seal in the federal cases

- Feb. 14, 2011. Second Circuit affirms Glasser orders to seal the *Kriss* case and to gag Oberlander and his attorney, Richard E. Lerner.

- Summer 2012. The Miami Herald moves to unseal the Sater files. That newspaper had previously published at least two detailed articles about Sater’s real estate development ventures under scrutiny, each specifically naming and identifying Mr. Sater. (Miami Herald, 7/1/12; Id., 7/31/12)

- August 10-16, 2012. A mistake in the EDNY clerk’s office results in Sater’s entire criminal file becoming available to the public on the PACER system. The snafu also means that Sater’s files are automatically uploaded onto databases maintained by Westlaw and Nexis. (WiseLawNY, “Informer’s Docket Sheet Likely to Become Public,” 8/22/12)

- Aug. 22, 2012. New York Times reports that Glasser signals he will release Sater’s docket sheet because “the genie is out of the bottle.” (NYT, 8/22/12)

- Feb. 25, 2016. The Associated Press moves to intervene and to unseal Judge Cogan’s docket.

- May 10, 2016—Ruling on the AP motion, Cogan orders release of all but 28 of the 280 documents he had maintained under seal since 2012. However, he reaffirmed the gag orders directed at Lerner and Oberlander.

- February 19, 2017. Finally, Felix Sater voluntarily reveals his name and identity to the rest of the world, that may not have been previously-exposed to the foregoing multiplicity of publicly-available sources, when he reportedly meets with Ukrainian politician Andrey Artemenko and Donald Trump’s personal lawyer, Michael D. Cohen, to discuss a plan to lift sanctions against Russia. (NYT, “A Back-Channel Plan for Ukraine and Russia, Courtesy of Trump Associates”)

- April 20 & 21, 2017.

The Wall Street Journal reports that, on February 1, 2017, Felix Sater’s attorney, Robert Wolf, wrote a letter threatening to go public with Sater’s claim for millions in attorneys’ fees against Bayrock Group, developer of the failed Trump Soho and Trump Ft. Lauderdale projects,

among others. (Sater's name and identity are fully disclosed in the Wolf letter and in the Wall Street Journal report.) ("Publicity Over Dispute by Former Trump Partners Could Tarnish President, One Warns; A former Trump business partner suggests he could publicize another partner's controversial past—and warns the headlines could tarnish the president," Wall Street Journal (4/20/17, emphasis added).

See also AlterNet, "Trump's Organized Crime Ties Bring Blackmail to the White House; Says one former business partner, 'The headline will be 'The Kazakh Gangster and President Trump.'" (4/21/17) (Sater's name appears throughout this article as well).

## **II. THE COURT'S CONTINUING SEALING ORDERS ARE INCONSISTENT WITH THE COMMON-LAW TRADITION OF OPEN JUDICIAL PROCEEDINGS**

This Court has held that under the common law as well as the First Amendment, "a strong presumption of access" attaches to judicial documents. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 112 (2d Cir. 2006); see also *United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995) (judicial document is presumptively subject to public inspection); *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 296 (2d Cir. 2011) ("Courts and commentators have long recognized the centrality of openness to adjudicatory proceedings. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account") (internal quotations and citations omitted).

Although this presumption may be balanced by countervailing factors, such as efficiency of law enforcement and privacy interests, *Amodeo*, 71 F.3d at 1050-51, neither is sufficient to overcome the presumption here.

### **III. THE COURT’S SEALING ORDERS ALSO VIOLATE THE CONSTITUTIONAL PRESUMPTION AND REQUIREMENT OF OPEN COURTROOMS AND RECORDS UNDER THE FIRST AMENDMENT**

This Court has held that under the common law as well as the First Amendment, “a strong presumption of access” attaches to judicial documents. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 112 (2d Cir. 2006).

The presumption of access to judicial documents is even stronger under the First Amendment than under the common law. While the common law presumption is subject to a balancing of interests, the presumption under the First Amendment is subject to “strict scrutiny” so that the party seeking to overcome the presumption must show an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *See, e.g., The Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (1991) (“Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”) (*citing* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)); *see generally* Smolla and Nimmer on Freedom of Speech, § 25:8 (Press access to information, institutions, and events – Press-Enterprise II – Access to court documents and exhibits).

### **IV. THE EXTRAORDINARY “GAGGING” ORDERS ON CERTAIN ATTORNEYS IN THESE CASES ARE ALSO UNWARRANTED AND UNCONSTITUTIONAL**

This Court has held that a gag order entered against an attorney may be constitutionally permissible, but only if there is “substantial likelihood of materially prejudicing an adjudicative

proceeding.” United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (quoting Gentile v. State Bar of Nev., 501 U.S. 1030 (1991)).

The gag orders that are still being imposed in these cases include what the Amici submit are clearly overbroad bans on potential communications, to the media, or others, regarding materials that have already been unsealed, that are thus publicly-available, and therefore deemed no longer material over which this Court has any further control. As such, the gag orders are plainly unwarranted and unconstitutional and should be lifted.

### **CONCLUSION**

For all of the foregoing reasons, Forbes Media’s motion to unseal should be granted in its entirety and the existing gag orders should be lifted.

Dated: April 26, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I caused this document to be electronically transmitted to the clerk's office by emailing a pdf of this Amended Amici Curiae brief and the accompanying motion papers to unseal the Amended Amici brief to newcases@ca2.uscourts.gov, copying all registered parties, this 26th day of April, 2017. In addition, I hereby certify that I have caused copies of this document and the accompanying papers to be mailed to all registered parties by overnight mail.

\_\_\_\_\_/s/\_\_\_\_\_  
Henry R. Kaufman  
*Attorney for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

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Dated: April 26, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
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