

ECF

**U.S. District Court
Southern District of New York (Foley Square)
CRIMINAL DOCKET FOR CASE #: 1:16-mj-01881-LTS-1**

Case title: USA v. In re: Unsealing Request of The New York
Times Company

Date Filed: 03/21/2016

Assigned to: Judge Laura Taylor Swain

Defendant (1)

**In re: Unsealing Request of The New
York Times Company**

Pending Counts

None

Disposition

Highest Offense Level (Opening)

None

Terminated Counts

None

Disposition

Highest Offense Level (Terminated)

None

Complaints

None

Disposition

Interested Party

Joseph Manuel Hunter

represented by **Diane Ferrone**

Diane Ferrone, Esq
205 West 54th Street
New York, NY 10019
(646) 337-9010

Email: dferrone@sercarzandriopelle.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Designation: CJA Appointment

Marlon Geoffrey Kirton

Marlon G. Kirton, P.C.
230 Park Ave. Ste. 1000
New York, NY (646) 435-5519

(646) 435-5519
Fax: (212) 808-3020
Email: marlongkirtonpc@optimum.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Interested Party

Michael Filter

represented by **Richard Harris Rosenberg**
Richard H. Rosenberg, Attorney At Law
217 Broadway
Suite 707
New York, NY 10007
(212)-586-3838
Fax: (212)-962-5037
Email: richrosenberg@msn.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Interested Party

Timothy Vamvakias

represented by **Bobbi C Sternheim**
Law Offices of Bobbi C. Sternheim
33 West 19th Street-4th Fl.
New York, NY 10007
(212) 243-1100
Fax: (888) 587-4737
Email: bc@sternheimlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Interested Party

Dennis Gogel

represented by **Glenn Andrew Garber**
Glenn A. Garber, P.C.
233 Broadway
Suite 2370
New York, NY 10279
(212) 965-9370
Fax: (212) 965-9375
Email: ggarber@glenngarber.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Interested Party

Slawomir Soborski

represented by **William Joseph Stampur**
Stampur & Roth (NY)
299 Broadway, Suite 800
New York, NY 10007
(212) 619-4240
Fax: (212) 619-6743
Email: wjstampur@hotmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Interested Party

Adam Samia

represented by **Sarah Kunstler**
Law Office of Sarah Kunstler
315 Flatbush Avenue #103
Brooklyn, NY 11217
718-783-3682
Fax: 347-402-2014
Email: sarah@kunstlerlaw.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Susan Gail Kellman
Law Offices of Susan G. Kellman
25 Eighth Avenue
Brooklyn, NY 11217
(718)-783-8200
Fax: (718)-783-8226
Email: sgk@kellmanesq.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Interested Party

Carl David Stillwell

represented by **Robert William Ray**
Fox Rothschild, Attorneys at Law (NYC)
100 Park Avenue, Suite 1500
New York, NY 10017
212-878-7900
Fax: 212-798-0940
Email: rwrap@foxrothschild.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Plaintiff

USA

represented by **Aimee Hector**

U.S. Attorney's Office, SDNY (St Andw's)
One St. Andrew's Plaza
New York, NY 10007
(212) 637-2203
Fax: (212) 637-2937
Email: aimee.hector@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Assistant US Attorney

Anna Margaret Skotko

U.S. Attorney's Office, SDNY (St Andw's)
One St. Andrew's Plaza
New York, NY 10007
(212) 637-1591
Fax: (212) 637-0097
Email: anna.skotko@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Assistant US Attorney

Emil Joseph Bove , III

US Attorneys Office, SDNY
One St. Andrew's Plaza
New York, NY 10007
(212) 637-2444
Fax: (212) 637-2443
Email: Emil.Bove@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Assistant US Attorney

Michael Dennis Lockard

United States Attorney's Office, SDNY
One Saint Andrew's Plaza
New York, NY 10007
(212) 637-2193
Fax: (212) 637-2527
Email: michael.lockard@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Assistant US Attorney

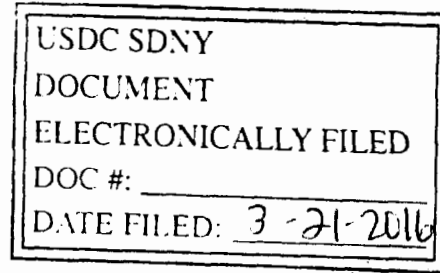
Rachel Peter Kovner

United States Attorney's Office, SDNY
One Saint Andrew's Plaza
New York, NY 10007
(212)-637-2470
Fax: (212)-637-2937
Email: rachel.kovner@usdoj.gov
LEAD ATTORNEY

ATTORNEY TO BE NOTICED
Designation: Assistant US Attorney

Date Filed	#	Docket Text
03/21/2016	2	LETTER by In re: Unsealing Request of The New York Times Company addressed to Judge Laura Taylor Swain from David McGraw dated March 16, 2016 re: Request for 45 Sealed Documents in Case number 13 CR 521 LTS be made public or that the parties be required to demonstrate why the documents should remain under seal, and for a right to file a response or be heard regarding any party submissions. (vb) (Entered: 03/22/2016)
03/22/2016	1	ORDER as to In re: Unsealing Request of The New York Times Company. The Clerk of the Court is requested to open a new Magistrate matter captioned "In re Unsealing Request of The New York Times Company, and is ordered to assign the matter to the docket of the undersigned, and designate it for ECF filing and docket the Times letter as well as this order in the matter. The Times may appear in the Magistrate matter by counsel and move for the unsealing of any or all of the documents filed under seal in case no. 13 CR 521 LTS, which motion is to be filed no later than March 25, 2016. Counsel for the Government and the defendants in the Criminal case may file in the Magistrate Matter a response to the Time's request no later than April 15, 2016. It is further ordered that counsel may submit ex parte any request to file their response under seal, no later than April 12, 2016. Counsel previously appointed under CJA for defendants who have already been sentenced by this court are hereby reappointed as CJA counsel for the limited purpose of appearing in the Magistrate matter to address the Times' request. (Signed by Judge Laura Taylor Swain on 3/21/16)(vb) (Entered: 03/22/2016)
03/24/2016		Attorney update in case as to In re: Unsealing Request of The New York Times Company. Attorney Aimee Hector,Anna Margaret Skotko,Emil Joseph Bove, III,Michael Dennis Lockard,Rachel Peter Kovner for USA,Robert William Ray for Carl David Stillwell,Susan Gail Kellman,Sarah Kunstler for Adam Samia,William Joseph Stampur for Slawomir Soborski,Glenn Andrew Garber for Dennis Gogel,Bobbi C Sternheim for Timothy Vamvakias,Richard Harris Rosenberg for Michael Filter,Diane Ferrone,Marlon Geoffrey Kirton for Joseph Manuel Hunter added.. (vb) (Entered: 03/24/2016)
03/24/2016		Case Designated ECF as to In re: Unsealing Request of The New York Times Company. (vb) (Entered: 03/24/2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA

-v-

No. 13 CR 521-LTS

JOSEPH MANUEL HUNTER, et al.,

Defendants.

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ORDER

The Court has received a request from third party The New York Times Company (the "Times"), dated March 16, 2016, to unseal 45 documents filed under seal in this matter.

Accordingly, it is hereby

ORDERED, that the Clerk of Court is respectfully requested to open a new Magistrate matter captioned "In re Unsealing Request of The New York Times Company," assign that matter to the docket of the undersigned, designate it for ECF filing, and docket the Times' letter (which is attached to this Order) as well as this Order in that matter, and it is further

ORDERED, that the Times may appear in the Magistrate matter by counsel and move for the unsealing of any or all of the documents filed under seal in case no. 13 CR 521-LTS, which motion is to be filed no later than **March 25, 2016**, and it is further


ORDERED, that counsel for the Government and for the Defendants in the above-captioned criminal case may file, in the Magistrate matter, a response to the Times' request not later than **April 15, 2016**, and it is further

ORDERED, that counsel may submit ex parte any request to file their response under seal, which request must be submitted no later than **April 12, 2016**, and it is further

ORDERED, that counsel previously appointed under the Criminal Justice Act (“CJA”) for Defendants who have already been sentenced by this Court are hereby reappointed as CJA counsel for the limited purpose of appearing in the Magistrate matter to address the Times’ request.

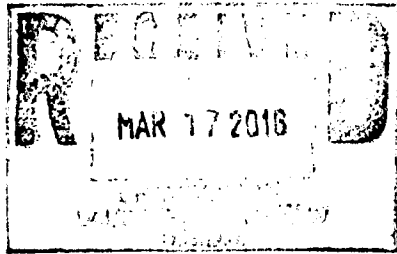
SO ORDERED.

Dated: New York, New York
March 21, 2016


LAURA TAYLOR SWAIN
United States District Judge

Copy mailed to:

David McCraw, Esq.
Vice President and Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, N.Y. 10018



David McCraw
Vice President and
Assistant General Counsel

620 Eighth Avenue
New York, NY 10018

tel 212.556-4031
fax 212.556-4634
mccraw@nytimes.com

March 16, 2016

VIA FEDERAL EXPRESS

The Honorable Laura T. Swain
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: United States v. Hunter et al. (13 Cr. 521 (LTS))

Dear Judge Swain:

I write on behalf of The New York Times Company (“The Times”) in respect to certain documents that are sealed in the above-referenced action. We believe that the sealing of these materials was done in violation of established law in this circuit, and we respectfully request that the materials be unsealed or that the parties be required to establish why the sealing remains proper. If Your Honor prefers, we are prepared to move by formal motion to intervene and seek the unsealing.

We are specifically concerned about the 45 documents that were filed under seal on various dates from 2013 through 2016.¹ The sheer volume of these documents and their scattered placement across the docket make it impossible for us to know what these documents are. We note that 10 of these documents were filed at the initiation of the case immediately following the filing of the indictment. The remaining sealed documents appear dispersed throughout the docket: For example, some were filed around the time of court conferences (see Docket Nos. 62, 67), others around the entering of guilty pleas (see Docket No. 106, 130) or sentencing submission (see Docket No. 162), and so on.

¹ See Docket Nos. 1–10, 29, 39, 44, 47, 50–53, 57–58, 62, 67, 71–72, 74–75, 90–91, 93, 106, 112–13, 126–27, 130, 140, 162, 186, 219, 229, 234–35, 237, and 241–42.

There is no indication on the docket sheet or in the public case files of the sealed documents' subject matter or of any legal justification or court order instructing the sealing. The public's qualified right to judicial documents arises both at common law and under the First Amendment, and in both instances the Court is required to determine that there are countervailing interests of substantial weight to put aside the public right of access.

The Common-Law Right of Access. The common law creates a public right of access to judicial documents. United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) (“Amodeo I”). The right is a qualified one that “predate[s] the Constitution,” *id.*, and that is firmly established in the American legal system. See Nixon v. Warner Commc'ns, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”) (internal footnotes omitted); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006) (“The common law right of public access to judicial documents is firmly rooted in our nation’s history.”). To determine whether the right applies, courts employ a three-step analysis that looks at (1) whether a document is a “judicial document”; (2) if it is, how strong the presumption of access is; and (3) whether countervailing concerns overcome the presumption and justify continued sealing. United States v. Erie Cnty., 763 F.3d 235, 239 (2d Cir. 2014).

While the sealing in this case prevents us from properly applying this analysis to the 45 documents at issue, any document that is “relevant to the performance of the judicial function and useful in the judicial process” qualifies as a judicial document. Lugosch, 435 F.3d at 119 (quoting Amodeo I, 44 F.3d at 145). Once a document is found to be a judicial document, it receives the strongest presumption of access if it plays a role in the Court’s determination of “substantive legal rights,” and the weakest presumption if it plays only a “negligible role” in the court’s performance of its duties. *Id.* Even then, to deny access, the Court must find that “countervailing factors” justify sealing. *Id.* at 120. There are no findings on the record here to demonstrate that the sealing is necessary. To the contrary, any concerns pertaining to a fair trial or ongoing government investigation that may have animated this Court’s provisional sealing have significantly diminished: five defendants have pleaded guilty and, of those, only two are still awaiting sentencing. (See Docket Nos. 250, 254.) While we recognize that there are two defendants awaiting trial, we note that their indictments were not filed until July 22, 2015 (see Docket No. 166), at which point 37 documents were already filed under seal with the Court. Moreover, any countervailing factor can likely be dealt with through limited redaction rather than through complete sealing of over three dozen documents.

The First Amendment Right of Access. Independent of the common-law right of public access, the First Amendment also provides a right of access to judicial documents. Documents are subject to the First Amendment right if they meet the “experience and logic” test, that is, they have been historically open to the press and general public, and if public access “plays a significant positive role in the functioning of the particular process in question.” Lugosch, 435 F.3d at 120 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)); see also Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 92 (2d

Cir. 2004); United States v. Suarez, 880 F.2d 626, 630 (2d Cir. 1989). The First Amendment right attaches not only to the proceedings but also to documents that are part of the proceedings, including those at various stages of a criminal case. See Hartford Courant, 380 F.3d at 91–92 (citing cases where the court found a First Amendment right of access to various types of judicial documents and proceedings); United States v. Alcantara, 396 F.3d 189, 197–98 (2d Cir. 2005) (First Amendment right of access to sentencing proceedings); United States v. Haller, 837 F.2d 84 (2d Cir. 1988) (plea agreement); United States v. Nafis, No. 12-cr-720 (CBA), 2013 U.S. Dist. LEXIS 134399 (E.D.N.Y. Sept. 19, 2013) (Government’s sentencing submission).

“Once a First Amendment right of access to judicial documents is found, the documents ‘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.’ And, ‘[b]road and general findings by the trial court . . . are not sufficient to justify closure.’” Erie Cnty., 763 F.3d at 239 (quoting Lugosch, 435 F.3d at 120 (quoting In re New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987))). The party seeking sealing or closure carries the burden of making this showing, which includes both identifying a compelling interest that will be harmed by access and demonstrating that granting access would create a “substantial probability of prejudice” to that interest. See United States v. Doe, 63 F.3d 121, 128–30 (2d Cir. 1995).

Because of the scope of sealing here, it is impossible to address whether the First Amendment right attaches to the materials at issue, whether “higher values” justify restrictions, or whether more narrow tailoring is possible. But the law places the burden on the party seeking sealing to make that case, and there appears to have been no such showing here to justify continued sealing. To the extent the sealing was justified on the basis of fair trial rights or protection of an ongoing investigation, those concerns have dissipated, as discussed above.

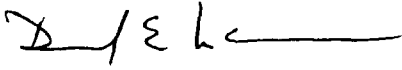
Finally, The Times is unaware of any review undertaken by the Government to “determine if the reasons for closure are still applicable” – a review that the Government is required by Justice Department regulations to conduct 60 days after the termination of “any proceeding . . . until such time as the records are unsealed.” See 28 C.F.R. § 50.9(f). This requirement reflects “the vital public interest in open judicial proceedings” and the Government’s “overriding affirmative duty to oppose their closure.” See 28 C.F.R. § 50.9 (noting a “strong presumption against closing proceedings or portions thereof”).

We therefore ask that all 45 documents be made public or, alternatively, that the parties be required to demonstrate why the documents should remain under seal. If the parties make such a submission, we ask for the right to file a response and otherwise to be heard.

We thank the Court for its consideration of this matter.

We thank the Court for its consideration of this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D/E McCraw", with a long horizontal line extending to the right.

David E. McCraw

cc: All Counsel of Record (via email)