

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

**MOTION OF REAL PARTIES IN INTEREST FOR STAY  
AND INJUNCTION PENDING APPEAL**

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**ARGUMENT**.....1

    I.    **THE STANDARD GOVERNING A STAY PENDING APPEAL**.....1

    II.   **THE COURT SHOULD STAY ITS NOVEMBER 10 ORDER AND ENJOIN ENFORCEMENT OF THE TWITTER ORDER**.....3

        A.   **This Case Presents Substantial Issues On Appeal** .....3

        B.   **Absent A Stay, Movants Will Suffer Irreparable Harm** .....7

        C.   **The Government Will Not Be Harmed Significantly By A Stay**.....8

        D.   **The Public Interest Favors A Stay** .....10

**CONCLUSION** .....10

**TABLE OF AUTHORITIES**

**Cases**

*Cavel Int’l, Inc. v. Madigan*,  
500 F.3d 544 (7th Cir. 2007) ..... 2

*Ctr. for Int’l Envtl. Law v. Office of U.S. Trade Representative*,  
240 F. Supp. 2d 21 (D.D.C. 2003)..... 4, 8, 9

*Eastland v. U.S. Servicemen’s Fund*,  
421 U.S. 491 (1975)..... 8

*Gibson v. Fla. Legislative Inv. Comm.*,  
372 U.S. 539 (1963)..... 7

*Giovani Carandola, Ltd. v. Bason*,  
303 F.3d 507 (4th Cir. 2002) ..... 10

*Hilton v. Braunskill*,  
481 U.S. 770 (1987)..... 1, 3, 10

*In re Application of the United States*,  
620 F.3d 304 (3d Cir. 2010) ..... 6

*In re Application of the United States*,  
736 F. Supp. 2d 578 (E.D.N.Y. 2010) ..... 5, 6

*In re Application of the United States*,  
747 F. Supp. 2d 827 (S.D. Tex. 2010) ..... 5

*In re Application of the United States*,  
No. 10-2188-SKG, 2011 U.S. Dist. LEXIS 85638 (D. Md. Aug. 3, 2011)..... 5

*In re Application of the United States*,  
No. 10-MC-897 (NGG), 2011 U.S. Dist. LEXIS 93494 (E.D.N.Y. Aug. 22, 2011)..... 5

*In re Grand Jury 87-3 Subpoena*,  
955 F.2d 229 (4th Cir. 1992) ..... 7

*Jewish War Veterans of U.S., Inc. v. Gates*,  
522 F. Supp. 2d 73 (D.D.C. 2007) ..... 8

*Legend Night Club v. Miller*,  
637 F.3d 291 (4th Cir. 2011) ..... 10

*MicroStrategy, Inc. v. Bus. Objects, S.A.*,  
661 F. Supp. 2d 548 (E.D. Va. 2009) ..... 2, 3, 8, 10

*Perlman v. United States*,  
247 U.S. 7 (1918)..... 8

*Providence Journal Co. v. FBI*,  
595 F.2d 889 (1st Cir. 1979)..... 8, 10

*Reiserer v. United States*,  
No. C04-0967C, 2005 U.S. Dist. LEXIS 36229 (W.D. Wash. July 15, 2005)..... 4, 7

*United States v. Jones*,  
No. 10-1259 (U.S. argued Nov. 8, 2011)..... 5

*United States v. Phillip Morris Inc.*,  
314 F.3d 612 (D.C. Cir. 2003)..... 8

*Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*,  
559 F.2d 841 (D.C. Cir. 1977)..... 2

*Wash. Speakers Bureau Inc. v. Leading Auths., Inc.*,  
No. 98cv534, 1999 U.S. Dist. LEXIS 5148 (E.D. Va. 1998)..... 4

**Statutes**

18 U.S.C. § 2703..... passim

**Other Authorities**

Adam Liptak, *Court Casts a Wary Eye on Tracking by GPS*,  
N.Y. Times, Nov. 9, 2011, at A18..... 5

Julia Angwin, *Secret Orders Target Email*,  
Wall St. J., Oct. 10, 2011, at A1 ..... 9

Laurie Ure, *WikiLeaks Witness Takes the Fifth*, CNN (June 16, 2011),  
<http://www.cnn.com/2011/CRIME/06/15/virginia.wikileaks.grand.jury/> ..... 9

**Rules**

Fed. R. Civ. P. 62..... 1

Real Parties in Interest Jacob Appelbaum, Rop Gonggrijp, and Birgitta Jonsdottir (“movants”) move the Court under Fed. R. Civ. P. 62 and its inherent authority to stay the Order entered in this action on November 10, 2011 (Dkt. No. 84), and to enjoin enforcement of Magistrate Judge Buchanan’s December 14, 2010 Order under 18 U.S.C. § 2703(d) directed to Twitter (the “Twitter Order”), pending movants’ appeal to the United States Court of Appeals for the Fourth Circuit.

### **ARGUMENT**

In its November 10 Order and accompanying opinion (Dkt. No. 85), this Court decided novel procedural and substantive issues concerning the validity of the § 2703(d) order directed to Twitter.<sup>1</sup> To preserve the status quo while movants appeal those issues, the Court should stay its Order and enjoin enforcement of the Twitter Order. Absent a stay, movants will suffer irreparable harm from the production of their private information. By contrast, a stay will cause only minimal, temporary harm to the government. And the public interest will be served by the preservation of movants’ privacy pending full appellate consideration of the substantial issues this case presents.

#### **I. THE STANDARD GOVERNING A STAY PENDING APPEAL.**

Courts consider four factors in determining whether to grant a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see, e.g., MicroStrategy*,

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<sup>1</sup> Movants are also appealing the Court’s November 10 Order to the extent it denied the motion to unseal and the motion for public docketing in this and related matters. Those aspects of the Court’s Order are not at issue in this motion for a stay, and are not addressed further here.

*Inc. v. Bus. Objects, S.A.*, 661 F. Supp. 2d 548, 558 (E.D. Va. 2009).<sup>2</sup>

“Many courts view the first two factors as a sliding scale, with the greater the harm to the movant requiring a lesser showing of the likelihood of success on appeal.” *MicroStrategy*, 661 F. Supp. 2d at 558; *see, e.g., Cavel Int’l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007) (injunction granted pending appeal where appellant makes strong showing of irreparable harm, even though court of appeals “do[es] not suggest that [appellant] has a winning case or even a good case”); *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (“The necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other [stay] factors.”).

In *MicroStrategy*, Judge Friedman of this Court applied the “sliding scale” approach to grant a stay pending appeal. At issue was whether a document belonging to MicroStrategy retained its trade secret status. The district court concluded that it did not and thus dissolved an injunction that had barred a competitor—Business Objects—from possessing and using the document. MicroStrategy sought a stay pending appeal. Applying the four-factor test outlined above, the court concluded that MicroStrategy “ha[d] not raised ‘a substantial legal question’ indicating [its] likelihood of success on appeal.” 661 F. Supp. 2d at 560. The court found, however, that MicroStrategy could be irreparably harmed by the dissolution of the injunction, because “the original purpose of the injunction would have been defeated, and once the information in the [document] is disseminated, it cannot be retrieved and made private again.” *Id.* at 561.

Turning to the third factor, the court found that “[s]taying the dissolution of the

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<sup>2</sup> The same standards apply to an injunction pending appeal. *See Cavel Int’l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007). Thus, the Court need not differentiate between movants’ request for a stay pending appeal of this Court’s November 10 Order and their related request for an injunction pending appeal against enforcement of the Twitter Order.

injunction, and continuing to prohibit Business Objects from possessing the document would not cause any irreparable harm to Business Objects, especially when compared to the irreparable harm MicroStrategy could suffer if the dissolution was not stayed.” *Id.* at 562. And the court found that a stay would serve the “public interest” by “ensur[ing] that the document remains confidential until a final determination as to the value of the document is made.” *Id.* Granting the stay, the court summarized its analysis as follows:

While the court does not believe that its February 10, 2009 decision was in error, or that MicroStrategy has made a strong showing of its likelihood of success on appeal, the court does believe that MicroStrategy could suffer irreparable harm if the court does not stay the dissolution of the injunction. Additionally, the court finds that the harms Business Objects would suffer if the dissolution were to be stayed are minimal, and are the same harms Business Objects has been suffering since the injunction was imposed. Business Objects has not identified any new or additional burdens it would suffer if the dissolution of the injunction were stayed while the appeal is pending. Finally, the public interest weighs in favor of preserving the confidentiality of the document until a final determination can be made as to its trade secret status.

*Id.* As discussed below, the *MicroStrategy* analysis demonstrates that a stay and injunction pending appeal are appropriate here as well.

## **II. THE COURT SHOULD STAY ITS NOVEMBER 10 ORDER AND ENJOIN ENFORCEMENT OF THE TWITTER ORDER.**

Applying the four *Hilton* factors, the Court should stay its November 10 Order and enjoin enforcement of the Twitter Order pending movants’ appeal to the Fourth Circuit.

### **A. This Case Presents Substantial Issues On Appeal.**

The Court has issued a lengthy and thoughtful opinion rejecting movants’ arguments for vacating the Twitter Order. The Court undoubtedly believes that it has addressed all issues correctly. But a district court may grant a stay even if it has confidence in its ruling. To obtain a stay, in other words, the losing party does not have to persuade the district judge ““that his or her decision was probably incorrect.”” *MicroStrategy, Inc.*, 661 F. Supp. 2d at 559 (quoting *Wash.*

*Speakers Bureau, Inc. v. Leading Auths., Inc.*, No. 98cv534, 1999 U.S. Dist. LEXIS 5148, at \*4-\*5 (E.D. Va. 1998)).

A significant factor in assessing the weight of the issues on appeal is their novelty. If a party's position on appeal flies in the face of settled law—especially settled law from the Supreme Court or the court of appeals for the circuit in which the district court sits—the issue is likely insubstantial for purposes of a stay motion. *See, e.g., Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (no substantial issue if a claim is “utterly unsupported by legal authority and repeatedly rejected by the courts”). By contrast, if the issue is one of first impression in the relevant jurisdiction, it is likely to be considered substantial. *See, e.g., id.* (issue is “substantial” where it is “novel” and “admittedly difficult”); *Reiserer v. United States*, No. C04-0967C, 2005 U.S. Dist. LEXIS 36229, at \*4 (W.D. Wash. July 15, 2005) (issue is “serious” in stay pending appeal context where issue is “novel” and “a reasonable jurist could come to a different conclusion”).

Under these standards, the issues presented by this appeal are substantial. Movants focus here, by way of example, on three of those issues: whether movants have a reasonable expectation of privacy in the information contained in the electronic records covered by the Twitter Order; whether Magistrate Judge Buchanan had discretion to require a warrant based on probable cause even if the statutory requirements of § 2703(d) were met; and whether the Twitter Order was unconstitutionally overbroad in violation of the First Amendment.

Addressing the first issue, this Court acknowledged that “[n]either the Supreme Court nor this Circuit has clearly addressed the treatment of IP addresses under the Fourth Amendment.” Dkt. No. 85 at 24. The central question in deciding movants’ Fourth Amendment claim is how to apply the “reasonable expectation of privacy” standard in a world where ordinary personal



interactions require disclosure of ever-increasing amounts of previously private data, often accompanied by purported “consent”—like the Twitter privacy policy at issue here. *See, e.g., In re Application of the United States*, No. 10-MC-897 (NGG), 2011 U.S. Dist. LEXIS 93494, at \*41 (E.D.N.Y. Aug. 22, 2011) (“It is time that the courts begin to address whether revolutionary changes in technology require changes to existing Fourth Amendment doctrine.”). The amicus briefs (which the Court found helpful to its decision, *see* Dkt. No. 85 at 2 n.1) highlight the difficulty in applying pre-Internet precedents to determine what expectations of privacy society considers reasonable under evolving technological conditions.

Movants’ concern about the locational and associational data that the Twitter Order would require to be revealed echoes the concerns in the GPS surveillance and cell site location information cases now confronting the courts (including the Supreme Court).<sup>3</sup> Here, as in those cases, the broad question is whether government collection of information that individuals “voluntarily” disclose can violate a reasonable expectation of privacy, where such disclosure is a required by-product of much personal activity in the digital age and where the tools of electronic monitoring are increasingly comprehensive and intrusive. As Magistrate Judge James Orenstein

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<sup>3</sup> *See, e.g., United States v. Jones*, No. 10-1259 (U.S. argued Nov. 8, 2011) (whether the Fourth Amendment requires the government to obtain a warrant to conduct GPS tracking); *In re Application of the United States*, 2011 U.S. Dist. LEXIS 93494 (E.D.N.Y. Aug. 22, 2011) (historic cell site location information requires Fourth Amendment warrant); *In re Application of the United States*, No. 10-2188-SKG, 2011 U.S. Dist. LEXIS 85638 (D. Md. Aug. 3, 2011) (acquisition of location data through cell site information and cell phone tracking through GPS technology implicates reasonable expectation of privacy and requires warrant under the Fourth Amendment); *In re Application of the United States*, 747 F. Supp. 2d 827 (S.D. Tex. 2010) (historic cell site location information requires Fourth Amendment warrant); *In re Application of the United States*, 736 F. Supp. 2d 578 (E.D.N.Y. 2010) (same). Just how substantial and novel—and complicated—these issues are was made clear by the recent Supreme Court oral argument in *Jones*. *See, e.g., Adam Liptak, Court Casts a Wary Eye on Tracking by GPS*, N.Y. Times, Nov. 9, 2011, at A18 (summarizing the oral argument and noting that “[t]he fit between 18th-century principles and 21st-century surveillance seemed to leave several justices frustrated”). Given that the Court’s decision in *Jones* may significantly affect this case, premature disclosure of movants’ private information before these legal issues are fully resolved would be especially inappropriate.

put it in a similar case:

[T]he Fourth Amendment's concept of an "unreasonable" intrusion into one's personal affairs, by its very nature, is not stuck in the amber of the year 1791. That concept must instead evolve along with the myriad ways in which humans contrive to interact with one another. As the threads that connect us are increasingly entrusted into the hands of strangers who promise to make those connections broader, more intimate, more efficient, and more productive, a jurisprudence that mechanically relies on that fact to disclaim the need for meaningful oversight of the government's investigative techniques unwisely abandons the critical and continuing task of identifying the expectations of privacy our society is prepared to recognize as reasonable.

The Fourth Amendment cannot properly be read to impose on our populace the dilemma of either ceding to the state any meaningful claim to personal privacy or effectively withdrawing from a technologically maturing society.

*In re Application of the United States*, 736 F. Supp. 2d 578, 595-96 (E.D.N.Y. 2010). The Fourth Amendment issue that Magistrate Judge Orenstein identifies—the evolving concept of a reasonable expectation of privacy—is substantial in the context of the locational and associational information revealed through use of Twitter just as surely as it is in the context of similar information revealed through the use of a cell phone.

On the second issue—Magistrate Judge Buchanan's discretion to require a warrant based on probable cause even if the statutory requirements of § 2703(d) were met—this Court acknowledged that its decision conflicts squarely with the Third Circuit's decision in *In re Application of the United States*, 620 F.3d 304 (3d Cir. 2010). Dkt. No. 85 at 48-52. The Court advances a trenchant critique of the Third Circuit's reasoning. But the two distinguished Third Circuit judges who joined the majority opinion in *In re Application of the United States* surely are "reasonable jurists." Because "reasonable jurist[s]" not only "could come to a different conclusion" concerning the Magistrate Judge's discretion under § 2703(d) to require a warrant based on probable cause, but in fact *have* come to different conclusions, this issue must be considered "serious" for purposes of this motion for a stay. *Reiserer*, 2005 U.S. Dist. LEXIS

36229, at \*4.

Finally, the First Amendment concerns with the breadth of the Twitter Order—namely, the fact that the Order seeks detailed information about all of movants’ communication activities on Twitter, regardless of any potential connection to WikiLeaks—also raise substantial issues not yet resolved by the Fourth Circuit. *See, e.g., Gibson v. Fla. Legislative Inv. Comm.*, 372 U.S. 539, 546 (1963) (where “an investigation . . . intrudes into the area of constitutionally protected rights of speech, press, association and petition,” the government must “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest”); *In re Grand Jury 87-3 Subpoena*, 955 F.2d 229, 232-34 (4th Cir. 1992) (considering, in *dicta*, how the First Amendment affects the standards governing grand jury investigations, but expressly declining to decide “the ‘First Amendment versus Grand Jury’ dilemma” that other circuits have resolved by requiring the government to satisfy the “substantial relationship” test.

These and the other significant and novel issues presented by movants’ appeal deserve to be decided by the Fourth Circuit before movants’ private data is disclosed.

**B. Absent A Stay, Movants Will Suffer Irreparable Harm.**

Movants understand from government counsel that, despite the pendency of movants’ appeal, the government is now taking the position that Twitter must comply promptly with Magistrate Judge Buchanan’s § 2703(d) order.<sup>4</sup>

If Twitter is forced to produce the requested information, movants will have suffered irreparable harm: their personal data will have been turned over to the government, and its

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<sup>4</sup> The government previously agreed not to seek to force Twitter to provide any information in response to the Twitter Order pending movants’ challenge of the Twitter Order before this Court. Given the government’s new position, counsel for Twitter has informed movants’ counsel that, absent a stay, Twitter may be forced to comply with the Twitter Order despite the existence of movants’ appeal.

confidentiality will have been lost forever. In the words of Judge Friedman, “[O]nce the information in the [Twitter records] is disseminated, it cannot be retrieved and made private again.” *MicroStrategy, Inc.*, 661 F. Supp. 2d at 561. As one court similarly observed in the FOIA context, “the irreparable harm to [movants] lies in the fact that ‘once the documents are surrendered pursuant to [this Court’s] order, confidentiality will be lost for all time. The status quo could never be restored . . . Failure to grant a stay will entirely destroy appellants’ rights to secure meaningful review.’” *Ctr. for Int’l Envtl. Law*, 240 F. Supp. 2d at 23 (quoting *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979)) (granting stay pending appeal in FOIA case); *see also United States v. Phillip Morris Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003) (“disclosure of privileged documents to an adverse party” constitutes “irreparable harm”); *Jewish War Veterans of U.S., Inc. v. Gates*, 522 F. Supp. 2d 73, 81 (D.D.C. 2007) (loss of protection of Speech or Debate Clause from disclosure of documents constitutes irreparable harm).

This potential for irreparable harm is precisely why the Supreme Court has made clear that individuals like movants must be permitted to challenge government attempts to obtain their information from third parties before compliance where their constitutional rights are potentially affected. *See, e.g., Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 & n.14 (1975); *Perlman v. United States*, 247 U.S. 7 (1918) (establishing the “Perlman exception” to the general rule that orders compelling grand jury testimony or denying motions to quash grand jury subpoenas are not appealable final orders, where an individual whose information is sought from a third party raises a constitutional challenge to the government request).

**C. The Government Will Not Be Harmed Significantly By A Stay.**

For two principal reasons, the government will not be harmed significantly by a stay pending appeal.

First, a stay will cause only a negligible impediment to the government's WikiLeaks investigation. The requested stay covers a single § 2703(d) order to a single Internet service provider relating only to the three movants. The investigation can continue unabated on all other fronts. The grand jury can continue to receive testimony, and it can consider evidence gathered through subpoenas, through search warrants, and through § 2703(d) orders concerning the accounts of persons other than movants. Indeed, that is exactly what has apparently happened during the pendency of this litigation. *See, e.g., Laurie Ure, WikiLeaks Witness Takes the Fifth*, CNN (June 16, 2011), <http://www.cnn.com/2011/CRIME/06/15/virginia.wikileaks.grand.jury/>. The grand jury can even consider evidence concerning movants obtained through § 2703(d) orders served on ISPs other than Twitter without movants' knowledge.<sup>5</sup> Again, that also appears to have occurred here. *See Julia Angwin, Secret Orders Target Email*, Wall St. J., Oct. 10, 2011, at A1.

Second, the minimal impediment that a stay will cause to the investigation can be reduced further by conditioning the stay on movants' timely request that their appeal be expedited. *See, e.g., Ctr. for Int'l Envtl. Law*, 240 F. Supp. 2d at 24. Movants have no objection to the imposition of such a condition. Given that the government has not previously taken the position that delay in receiving the requested information from Twitter was significantly prejudicing its ability to conduct its investigation and that the government agreed not to seek to enforce the Twitter Order while the matter was before this Court, any slight further delay cannot now be deemed significant.

A stay will thus deprive the government of a limited sliver of information for a brief period of time (assuming it succeeds on appeal). "Weighing this . . . hardship against the total

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<sup>5</sup> If movants were aware of such orders in advance of production, they would of course object to them—but Twitter is the only ISP to date to obtain permission to disclose to movants, in advance of production, that it had received a § 2703(d) order concerning their accounts.

and immediate divestiture of [movants'] rights to have effective review in [the court of appeals],” there is no doubt that “the balance of hardship . . . favor[s] the issuance of a stay.”

*Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

**D. The Public Interest Favors A Stay.**

The public interest favors preserving the privacy of movants' personal information until a final determination of movants' claims has been made. *See, e.g., MicroStrategy*, 661 F. Supp. 2d at 562 (“[T]he public interest weighs in favor of preserving the confidentiality of the document until a final determination can be made as to its trade secret status.”). That is especially the case here because movants have raised constitutional, as well as statutory, challenges to the Twitter Order. *See, e.g., Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) (“upholding constitutional rights is in the public interest”) (citing *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)).

**CONCLUSION**

For the foregoing reasons, the four *Hilton* factors weigh in favor of staying this Court's November 10 Order and enjoining enforcement of the Twitter Order pending appeal.

Dated: December 2, 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*)  
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](mailto:afine@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](mailto:cindy@eff.org)  
Email: [tien@eff.org](mailto:tien@eff.org)  
Email: [bankston@eff.org](mailto:bankston@eff.org)  
Email: [marcia@eff.org](mailto: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](mailto:js@greenspunlaw.com)

**Attorneys for BIRGITTA JONSDOTTIR**

Dated: December 2, 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. Kecker (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: jkecker@kvn.com  
Email: rmeny@kvn.com  
Email: sragland@kvn.com

**Attorneys for JACOB APPELBAUM**



Dated: December 2, 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  
235 Montgomery Street, Suite 1070  
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  
235 Montgomery Street, Suite 1070  
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 2nd day of December, 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:

Andrew Peterson  
U.S. Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314

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

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 2nd day of December, 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

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

**[PROPOSED] ORDER GRANTING REAL PARTIES' MOTION FOR A STAY  
AND INJUNCTION PENDING APPEAL**

This matter came before the Court on a motion by Real Parties in Interest Jacob Appelbaum, Birgitta Jonsdottir, and Rop Gonggrijp for a stay of the Court's November 10, 2011 Order (Dkt. No. 84), and to enjoin enforcement of Magistrate Judge Buchanan's December 14, 2010 Order under 18 U.S.C. § 2703(d) directed to Twitter, pending Real Parties' appeal to the United States Court of Appeals for the Fourth Circuit. The Court has reviewed the pleadings and arguments submitted by the parties. For good cause shown, it is hereby ORDERED that Real Parties' motion for stay and injunction is GRANTED.

ENTERED this \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Liam O'Grady  
UNITED STATES DISTRICT JUDGE

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

**NOTICE OF MOTION**

Please take notice that on Friday, January 13, 2012, at 10:00 a.m., or on any other date that is convenient to the Court and the parties, Real Parties in Interest Jacob Appelbaum, Birgitta Jonsdottir, and Rop Gonggrijp will move this Court for hearing on their motion for a stay of the Court's November 10, 2011 Order (Dkt. No. 84), and to enjoin enforcement of Magistrate Judge Buchanan's December 14, 2010 Order under 18 U.S.C. § 2703(d) directed to Twitter, pending Real Parties' appeal to the United States Court of Appeals for the Fourth Circuit.

Dated: December 2, 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*)  
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

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: December 2, 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. Kecker (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: jkecker@kvn.com  
Email: rmeny@kvn.com  
Email: sragland@kvn.com

**Attorneys for JACOB APPELBAUM**

Dated: December 2, 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  
235 Montgomery Street, Suite 1070  
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  
235 Montgomery Street, Suite 1070  
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 2nd day of December, 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:

Andrew Peterson  
U.S. Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314

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

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 2nd day of December, 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

**General Docket  
United States Court of Appeals for the Fourth Circuit**

**Court of Appeals Docket #:** 11-5151 **Docketed:** 12/07/2011  
In re: 2703(d) Application  
**Appeal From:** United States District Court for the Eastern District of Virginia at Alexandria  
**Fee Status:** fee paid

**Case Type Information:**  
1) Criminal  
2) Direct Criminal  
3) null

**Originating Court Information:**  
**District:** 0422-1 : [1:11-dm-00003-TCB-LO](#)  
**Presiding Judge:** Liam O'Grady, U. S. District Court Judge  
**Date Filed:** 01/26/2011  
**Date Order/Judgment:** 11/10/2011      **Date Order/Judgment EOD:** 11/10/2011      **Date NOA Filed:** 11/23/2011

**Prior Cases:**  
None  
**Current Cases:**  
None

In re: APPLICATION OF THE UNITED STATES OF AMERICA  
FOR AN ORDER PURSUANT TO 18 U.S.C. SECTION  
2703(D)

UNITED STATES OF AMERICA  
Plaintiff - Appellee

Andrew Peterson  
Direct: 703-299-3700  
Email: andy.peterson@usdoj.gov  
[NTC Government]  
OFFICE OF THE UNITED STATES ATTORNEY  
2100 Jamieson Avenue  
Alexandria, VA 22314-5194

v.

JACOB APPELBAUM  
Defendant - Appellant

Stuart Alexander Sears  
Direct: 703-684-8000  
Email: stuart@zwerling.com  
[NTC Retained]  
ZWERLING, LEIBIG & MOSELEY, P.C.  
108 North Alfred Street  
Alexandria, VA 22314-0000

John Kenneth Zwerling  
Direct: 703-684-8000  
Email: jz@zwerling.com  
[NTC Retained]  
ZWERLING, LEIBIG & MOSELEY, P.C.  
108 North Alfred Street  
Alexandria, VA 22314-0000

ROP GONGGRIJP  
Defendant - Appellant

Nina Jean Ginsberg  
Direct: 703-684-4333  
Email: nginsberg@dimuro.com  
[NTC Retained]  
DIMUROGINSBERG, PC  
Suite 610  
1101 King Street

BIRGITTA JONSDOTTIR  
Defendant - Appellant

TWITTER, INCORPORATED  
Defendant

Alexandria, VA 22314-2956

Rebecca Kim Glenberg  
Direct: 804-644-8080  
Email: rglenberg@acluva.org  
[NTC Retained]  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF  
VIRGINIA  
Suite 310  
530 East Main Street  
Richmond, VA 23219-0000

Jonathan Shapiro, Attorney  
Direct: 703-352-0100  
Email: js@greenspunlaw.com  
[NTC Retained]  
2nd Floor  
3955 Chain Bridge Road  
Fairfax, VA 22030-0000

John Kuropatkin Roche  
Direct: 202-434-1627  
Email: jroche@perkinscoie.com  
[NTC Represented Below]  
PERKINS COIE LLP  
Suite 600  
700 13th Street, NW  
Washington, DC 20005-2011

In re: APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. SECTION 2703(D)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JACOB APPELBAUM; ROP GONGGRIJP; BIRGITTA JONSDOTTIR

Defendants - Appellants

and

TWITTER, INCORPORATED

Defendant

12/08/2011	<input type="checkbox"/> <a href="#">1</a>	Criminal case docketed. Originating case number: 1:11-dm-00003-TCB-LO. Date notice of appeal filed: 11/23/2011. Case manager: MRadday. [11-5151] (MR)
12/08/2011	<input type="checkbox"/> <a href="#">2</a>	DOCKETING NOTICE issued Re: <a href="#">1</a> case docketed Initial forms due within 14 days. Originating case number: 1:11-dm-00003-TCB-LO.. [11-5151] (MR)
12/08/2011	<input type="checkbox"/> <a href="#">3</a>	BRIEFING ORDER filed.. Opening brief and appendix due 01/12/2012. Response brief due 02/06/2012 [11-5151] (MR)

FILED: December 8, 2011

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 11-5151  
(1:11-dm-00003-TCB-LO)

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In re: APPLICATION OF THE UNITED STATES OF AMERICA FOR AN  
ORDER PURSUANT TO 18 U.S.C. SECTION 2703(D)

-----  
UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JACOB APPELBAUM; ROP GONGGRIJP; BIRGITTA JONSDOTTIR

Defendants - Appellants

and

TWITTER, INCORPORATED

Defendant

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This case has been opened on appeal.

Originating Court	United States District Court for the Eastern District of Virginia at Alexandria
Originating Court Case Number	1:11-dm-00003-TCB-LO

Date notice of appeal filed in originating court	11/23/2011
Appellant(s)	JACOB APPELBAUM, ROP GONGGRIJP, BIRGITTA JONSDOTTIR
Appellate Case Number	11-5151
Case Manager	Michael Radday 804-916-2702



**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**  
1100 East Main Street, Suite 501, Richmond, Virginia 23219

December 8, 2011

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No. 11-5151  
(1:11-dm-00003-TCB-LO)

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In re: APPLICATION OF THE UNITED STATES OF AMERICA FOR AN  
ORDER PURSUANT TO 18 U.S.C. SECTION 2703(D)

-----  
UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JACOB APPELBAUM; ROP GONGGRIJP; BIRGITTA JONSDOTTIR

Defendants - Appellants

and

TWITTER, INCORPORATED

Defendant

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DOCKETING NOTICE--CRIMINAL CASE

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TO: Counsel

ATTACHMENT(S): Memorandum on Sealed and Confidential Information

DUE DATE: 14 days from this notice

- This case has been placed on the court's docket under the above-referenced number, which should be used on all documents filed in this case.
- Counsel should review the above caption and promptly bring any necessary corrections to the case manager's attention.
- In consolidated cases, filings should be made using all case numbers to which the filing applies, beginning with the lead case number.
- Electronic filing is mandatory for counsel in all Fourth Circuit cases. Information on obtaining an electronic filing account is available on the court's Internet site.
- In cases in which more than one attorney represents a party, future notices will be sent only to attorneys who have entered an appearance as counsel of record; other attorneys will be removed from the case.
- Counsel must remove from documents filed with this court any social security numbers, juvenile names, dates of birth, financial account numbers, home addresses in criminal cases, and protected information regarding unexecuted summonses, jurors, presentence investigations, statements of reasons in criminal judgments, and substantial assistance agreements. Any sealed material must be filed in accordance with the enclosed Memorandum on Sealed and Confidential Material. The court does **not** seal its docket; therefore, counsel must use sealed entries for all sealed filings.
- Initial forms must be filed as directed in the following table of forms. The forms, available through the links below or on the court's Internet site, can be completed online and saved for filing in electronic form.

<b>Form:</b>	<b>Required From:</b>	<b>Due:</b>
<a href="#"><u>Appearance of Counsel</u></a>	Counsel of record for any party to the appeal (If not admitted to this court, counsel must complete and submit an <a href="#"><u>application for admission</u></a> .)	Within 14 days of this notice
<a href="#"><u>Disclosure Statement</u></a>	All parties to a civil or bankruptcy case and all corporate defendants in a criminal case (not required from the United States, from indigent parties, or from state or local governments in pro se cases)	Within 14 days of this notice
<a href="#"><u>Docketing Statement</u></a>	Appellant's counsel (not required after Rule 5 grant of permission to appeal)	Within 14 days of this notice
<a href="#"><u>Transcript Order</u></a>	Appellant, only if ordering transcript	Attach to docketing statement

<a href="#">CJA 24</a>	Appellant, only if transcript is at court expense under Criminal Justice Act	Attach to docketing statement
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I will be the case manager for this case. Please contact me at the number listed below if you have any questions regarding your case.

Michael Radday, Deputy Clerk  
804-916-2702

## MEMORANDUM ON SEALED AND CONFIDENTIAL MATERIALS

(FRAP 25(a)(5), Local Rule 25(c) & Judicial Conference Privacy Policy for Electronic Case Files)

**Internet Availability of Docket & Documents (except Appendices):** All Fourth Circuit case dockets are available on the Internet via the Judiciary's PACER system (Public Access to Court Electronic Records). The Fourth Circuit docket is available on the Internet even if the district court docket was sealed. If a party's name was sealed in the district court, it should be replaced by "Under Seal" or a pseudonym on appeal. Documents filed in 2008 and thereafter are available on the Internet via PACER, with the exception of appendices, which are available in paper form only. Due to the electronic availability of court documents, the federal rules prohibit including certain personal data identifiers in court filings. In addition, parties should not include any data in their filings that they would not want on the Internet. Counsel should advise their clients on this subject so that an informed decision can be made. Responsibility rests with counsel and the parties, not with the clerk.

**Federal Rules of Procedure:** The federal rules of procedure require filers to redact any of the following personal data identifiers (PDIs) if included in court filings: (1) social security and tax ID numbers must be limited to last four digits; (2) minor children must be identified by their initials only; (3) dates of birth must show the year only; (4) financial account numbers must be limited to the last four digits only; and (5) home addresses in criminal cases must be limited to city and state only. The federal rules establish limited exceptions to these redaction requirements. See Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037.

**Judicial Conference Privacy Policy:** In addition, the [Privacy Policy for Electronic Case Files](#) prohibits filers from including any of the following criminal documents in the public file: (1) unexecuted summonses or warrants; (2) bail or presentence reports; (3) statement of reasons in judgment of conviction; (4) juvenile records; (5) identifying information about jurors or potential jurors; (6) CJA financial affidavits; (7) ex parte requests to authorize CJA services and (8) any sealed documents, such as motions for downward departure for substantial assistance, plea agreements indicating cooperation, or victim statements.

**Certificate of Confidentiality or Motion to Seal Required for Any Sealed Filing:** A document may not be filed under seal in this court unless it is accompanied by a certificate of confidentiality or motion to seal as set out in more detail below.

**Sealed Volume of Appendix:** All appendices are filed and served in **paper form only**. Sealed documents must be placed in a **separate, sealed volume** of the appendix. In consolidated criminal cases in which presentence reports are being filed for multiple defendants, **each** presentence report must be placed in a separate, sealed volume to which only Government counsel and counsel for the defendant who is the subject of the report have access.

- File four paper copies of sealed appendix volumes, with the cover marked SEALED, in an envelope marked SEALED, with four copies of certificate of confidentiality.
- File six paper copies of public appendix volumes (five if counsel is court-appointed).

- Use electronic entry **Notice of paper filing** to reflect filing of sealed and unsealed volumes.
- Serve one paper copy of sealed and unsealed volumes on counsel (serve presentence reports only on Government counsel and counsel for defendant who is the subject of the report).

**Sealed Version of Brief:** All briefs are filed in **electronic and paper form**. Public briefs are served in electronic form; sealed briefs are served in paper form. There are two possible ways to file a sealed brief:

**1. Option One — File Sealed Version, Public Version, and Certificate of Confidentiality if it is Possible to Create Public, Redacted Version of Brief.**

- File four paper copies of sealed version of brief (with sealed material highlighted and covers marked SEALED), in an envelope marked SEALED, with four copies of certificate of confidentiality.
- File eight paper copies (six if counsel is court-appointed) of public version of brief (with sealed material redacted).
- Use electronic entry **SEALED BRIEF** to file sealed version electronically.
- Use electronic entry **Certificate of confidentiality** to file certificate electronically.
- Use electronic entry **BRIEF** to file public, redacted version electronically.
- Serve one paper copy of sealed version of brief on counsel since sealed version cannot be accessed through CM/ECF. Service of paper version of public brief is not required, but may be agreed to between parties.

**2. Option Two — File Sealed Brief and Motion to Seal if it is Not Possible to Create Public, Redacted Version of Brief.**

- File four paper copies of sealed brief, in an envelope marked SEALED, with four paper copies of motion to seal.
- Use electronic entry **SEALED BRIEF** to file sealed brief electronically.
- Use electronic entry **Motion / to seal** to file motion electronically. Motion must be accessible on public docket for five days prior to ruling; therefore, motion to seal **cannot**, itself, be filed under seal. If necessary, a sealed version and a public version of the motion to seal can be filed, together with a certificate of confidentiality.
- Use electronic entry **BRIEF** to file public, redacted version electronically.
- Court may require filing of a redacted, public version of brief when it rules on motion.

**Sealed Version of Other Documents and Motions:** Other documents and motions are filed in electronic form only. If sealed information must be included, there are two possible ways to file the document:

**1. Option One — File Sealed Version, Public Version, and Certificate of Confidentiality if it is Possible to Create Public, Redacted Version of Document or Motion.**

- Use electronic entry **SEALED DOCUMENT** to file sealed version electronically.
- Use electronic entry **Certificate of confidentiality** to file certificate electronically.

- Use the appropriate electronic entry (e.g., **Motion, Letter**) to file public, redacted version electronically.

**2. Option Two — File Sealed Document and Motion to Seal if it is Not Possible to Create Public, Redacted Version of Document.**

- Use electronic entry **SEALED DOCUMENT** to file sealed document electronically.
- Use electronic entry **Motion / to seal** to file motion to seal electronically. Motion must be accessible on public docket for five days prior to ruling; therefore, motion to seal **cannot**, itself, be filed under seal. If necessary, a sealed version and a public version of the motion to seal can be filed, together with a certificate of confidentiality.

Filed: December 8, 2011

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**BRIEFING ORDER - CRIMINAL/GRAND JURY**

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No. 11-5151, In re: 2703(d) Application  
1:11-dm-00003-TCB-LO

Briefs and appendix shall be served and filed within the time provided in the following schedule:

Appendix due: 01/12/2012

Opening brief due: 01/12/2012

Response brief due: 02/06/2012

Reply brief permitted within 10 days of service of response brief.

The briefs and appendix must conform to the [Rule Requirements for Preparation of Briefs and Appendices](#) and the [Fourth Circuit Checklist for Briefs and Appendices](#), which set forth the applicable [Federal and Local Rules](#). These documents are available as links from this order and at the court's web site, [www.ca4.uscourts.gov](http://www.ca4.uscourts.gov).

All parties to a side must join in a single brief, even in consolidated cases, unless the court grants leave to file separate briefs pursuant to Local Rules 28(a) and 28(d). Failure to file an opening brief within the scheduled time may lead to imposition of sanctions against court-appointed counsel or dismissal of the case pursuant to Local Rule 45 for failure to prosecute; failure to file a response brief will result in loss of the right to be heard at oral argument. The court discourages motions for extension of time and grants extensions of the briefing schedule only in extraordinary circumstances upon a showing of good cause. Local Rule 31(c). If a brief is filed after its due date, the time for filing briefs in the schedule will be extended by the number of days the brief was late.

Pursuant to Local Rule 34(a), the court may, on its own initiative and without prior notice, screen an appeal for decision on the parties' briefs without oral argument. If a case is selected for the oral argument calendar, counsel will receive notice that the case has been tentatively calendared for a specific court session approximately 45 days in advance of the session. Counsel will be afforded 10 days to file any motions that would affect the argument of the case.

Anders Procedures: If defendant's counsel finds no appealable issue and therefore intends to file a brief under Anders v. California, 386 U.S. 738 (1967), the following procedures apply:

(1) If the Anders brief is being filed in a consolidated case in which co-defendants are not proceeding under Anders, counsel must prepare a separate opening brief and move to deconsolidate the Anders appeal.

(2) An Anders brief that simply states there are no appealable issues is insufficient--rather, counsel's opening brief must identify any arguable issues with appropriate record citations and state, in a brief discussion with case citation, why such issues lack merit.

(3) Because counsel must review the entire record in an Anders appeal, counsel must order all transcript in the case (including hearings). Since the court must review the entire record, an appendix is unnecessary, and copying expenses for an Anders appendix are not recoverable under the Criminal Justice Act, although the costs for providing transcripts to the defendant are reimbursable.

(4) Counsel must file a [certificate of service of Anders brief](#) on defendant, stating that the defendant has been provided copies of the Anders brief and all transcripts and advised of his right to file a supplemental pro se brief within 30 days. If the defendant is not English-speaking, the certificate must also state that counsel has arranged to have the Anders brief and counsel's certificate of service of Anders brief on defendant interpreted or translated so that the defendant may choose whether to file a supplemental pro se brief. CJA counsel must first move for authorization of translator or interpreter services under the Criminal Justice Act.

/s/ PATRICIA S. CONNOR, CLERK  
By: Michael Radday, Deputy Clerk