



litigation—including during the hearing scheduled on December 1, 2020, before the Second Circuit on Defendant’s bail motion.

### **BACKGROUND**

On November 20, 2019, the jury returned a guilty verdict against Defendant for one count of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Shortly after the jurors returned their guilty verdict, the Court received a letter from Juror No. 6 containing allegations of juror misconduct. *See* ECF No. 201. On December 13, 2019, the Court conducted a confidential interview of Juror No. 3 with an attorney from both sides present. On January 13, 2020, the Court published an Opinion (one sentence of the Opinion was amended on January 15, 2020) declining to conduct any further inquiries into the alleged juror misconduct and finding no basis to vacate the jury’s guilty verdict (ECF No’s. 199-201).

On November 16, 2020, Defendant filed an emergency application to the Second Circuit for bail pending appeal. Defendant argued that “the district court erred in prematurely terminating its investigation of severe juror misconduct,” and this error presented a “substantial question” that would support continuing his release on bail pending appeal. Def. Mot. at 9–11. Defendant attached, under seal, four of the thirteen sealed exhibits bearing on the juror misconduct discussed in his motion. *See id.* Ex. J, Ex. K, Ex. L, Ex. M.

On November 20, 2020, the Government wrote to the Court requesting permission to submit, under seal, redacted versions of the thirteen documents related to alleged juror misconduct (ECF No. 276). The Court granted the Government’s request on November 20, 2020 (ECF No. 277). The Government and Defendant’s counsel conferred and agreed upon a set of proposed redactions for the thirteen documents. The Government submitted the thirteen redacted

documents, under seal, to the Court for its consideration on November 24, 2020. The Government now moves the Court to unseal the redacted versions of the thirteen documents.

### **LEGAL STANDARD**

“[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion). “In determining if a document should be publicly accessible, a court should: (i) determine if it is a judicial document; (ii) determine the weight of the presumption of access attached to it; and (iii) balance the countervailing interests against the presumption of access.” *United States v. Smith*, 985 F.Supp.2d 506, 518 (S.D.N.Y. 2013) (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006)).

### **ARGUMENT**

Judicial documents are “items filed with the court that are relevant to the performance of the judicial function and useful in the judicial process.” *S.E.C. v. TheStreet.com*, 273 F.3d 222, 231 (2d Cir. 2001). In turn, a document is relevant to the performance of the judicial function “if it would reasonably have the tendency to influence a district court’s ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court’s decision.” *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019). The bulk of the documents at issue—party “submissions to the Court,” ECF No. 201 at 3—fit comfortably within the scope of judicial documents. Likewise, the letter from Juror No. 6 and the interview of Juror No. 3, both described in the Court’s public order, factored into the Court’s ultimate decision to decline further inquiry or grant relief to Defendant. Thus, the documents in question are all “judicial documents” subject to a “presumption of access.” Here, however, because the Court ultimately determined the post-

conviction issue of juror misconduct did not taint the jury's verdict, the presumption of access is limited. *See, e.g. Maxwell*, 929 F.3d at 49–50 (citing *United States v. Amodeo*, 71 F.2d 1044, 1050 (2d Cir. 1995)) (“[W]hile evidence introduced at trial or in connection with summary judgment enjoys a strong presumption of public access, documents that play only a negligible role in the performance of Article III duties are accorded only a low presumption . . .”) (quotations omitted).

“The presumption of access can only be overcome ‘by specific, on-the-record findings that higher values necessitate a narrowly tailored sealing.’” *United States v. Caicedo Velandia*, No. 10-CR-00288-01, 2019 WL 6913524, at \*2 (E.D.N.Y. Dec. 19, 2019) (quoting *Lugosch*, 435 F.3d at 126). These values include “the integrity of the judicial process, the right of the defendants and of the government to a fair trial, the abiding interest in the fair administration of justice, and the privacy concerns expressed by the jurors for themselves and for their families.” *Application of Daily News*, 787 F.Supp. 319, 323 (E.D.N.Y. 1992). Here, the key countervailing interest is the privacy of the jurors.

The jurors' privacy interest is limited, though, by the reality that the substance of much of the sealed material, if not the content, is now public in the Court's January 15, 2020 Opinion and Defendant's emergency application to the Second Circuit. *See In re Application to Unseal 98 Cr. 1101(ILG)*, 891 F. Supp. 2d 296, 300 (E.D.N.Y. 2012) (balancing of interests “academic” where the information sealed has already been publicly revealed). Moreover, the parties have worked in close collaboration to agree upon redactions, primarily of personally identifiable information (“PII”), to ensure the continued anonymity of the jurors in question. The parties believe the proposed, narrow, redactions will thus satisfy the twin goals of providing the public access to the material while still protecting the privacy interests of jurors. *See Caicedo Velandia*,

2019 WL 6913524 (E.D.N.Y. Dec. 19, 2019) (unsealing documents and finding that the privacy interests of third parties with no public ramifications justified proposed redactions).

Additionally, unsealing the redacted documents will allow the parties fully litigate the juror misconduct issue in future public filings and any oral argument without inadvertently implicating the Court's Sealing Order or compromising the jurors' privacy interests.

### **CONCLUSION**

These interests of unsealing the thirteen documents – allowing the public greater access to the proceedings and the parties more flexibility in presenting their arguments – outweigh the jurors' remaining privacy interests in their sealing, particularly given the proposed redactions will preserve the jurors' anonymity. Therefore, the Government requests that the Court unseal redacted versions of the thirteen documents.

Respectfully submitted,

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