

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE

APPLICATION OF FORBES MEDIA LLC
AND THOMAS BREWSTER TO UNSEAL
COURT RECORDS,

Misc. Case No. 2:21-mc-0007 RSM
Related to Case. Nos. GJ-17-432
and GJ-19-097

PETITION OF FORBES MEDIA
LLC AND THOMAS BREWSTER
TO UNSEAL COURT RECORDS

1. Petitioners Forbes Media LLC (“Forbes”) and its Associate Editor Thomas Brewster (“Brewster”) respectfully move this Court for an order unsealing certain court records relating to two orders under the All Writs Act, 28 U.S.C. § 1652, that required Sabre, a travel technology firm, to assist the United States government in effectuating an arrest warrant (the “AWA Orders”). Petitioners are informed and believe that the AWA Orders were issued by this Court in 2017 and 2019, respectively, and are docketed at GJ-17-432 and GJ-19-097. *See* Ex. 1 at 4.

2. Petitioners respectfully request that the Court unseal the AWA Orders; the government’s application for the AWA Orders and any supporting documents, including affidavits; and any other court records relating to the AWA Orders, including, but not limited to, any motions to seal, the dockets in case numbers GJ-17-432 and GJ-19-097, and all docket entries (collectively, the “AWA Materials”).

INTEREST OF THE PETITIONERS

1 3. Petitioners, like all members of the public and the press, have a strong interest in
2 observing and understanding the consideration and disposition of matters by the federal courts.
3 That interest is heightened when the action of the Court concerns actions taken by the executive
4 branch.

5 4. The government’s use of the All Writs Act to obtain judicial orders requiring
6 private technology firms in general, and Sabre in particular, to provide technical assistance to the
7 government is a matter of intense public interest, as well as a subject of Petitioners’ reporting.
8 *See, e.g.,* Thomas Brewster, *The FBI Is Secretly Using a \$2 Billion Travel Company as a Global*
9 *Surveillance Tool*, Forbes (July 16, 2020), <https://perma.cc/R96R-AXL9>.

10 5. The public and the press have a particularly strong interest in access to court
11 records that would shed light on the government’s collection of location records, which “hold for
12 many Americans the privacies of life.” *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018)
13 (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). The disclosure of such information to
14 the government implicates a range of weighty constitutional and policy interests, including
15 reporter-source confidentiality. As a result, the public and press have a keen interest in
16 understanding the government’s basis for seeking AWA Orders directing Sabre to provide it
17 contemporaneous travel information about a targeted individual, as well as the district court’s
18 basis for issuing those AWA orders.

JURISDICTION

19
20 6. “Every court has supervisory power over its own records and files.” *Nixon v.*
21 *Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). As a result, this Court has “jurisdiction in
22 the first instance to adjudicate a claim of right” to inspect those records. *In re Motion for*
23 *Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007).
24
25
26
27

INTRADISTRICT ASSIGNMENT

1 7. The acts or omissions giving rise to this action occurred in the division of this
2 District where the AWA Materials were originally sealed. As a result, pursuant to Local Civil
3 Rule 3(e), assignment of this action to that division would be proper.
4

BACKGROUND FACTS

5 8. Originally adopted in connection with the Judiciary Act of 1789, *see* Judiciary
6 Act of 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82, the All Writs Act in its current form authorizes
7 federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions
8 and agreeable to the usages principles of law,” 28 U.S.C. § 1651.
9

10 9. Although the All Writs Act may be used to issue orders for a range of procedural
11 purposes, All Writs Act orders requiring private technology firms to provide the United States
12 government with “technical assistance” are of particular public interest. *United States v. N.Y.*
13 *Tel. Co.*, 434 U.S. 159, 171 (1977).

14 10. In perhaps the highest profile example, the government in 2016 sought an order
15 under the Act that would have required Apple to provide a means of bypassing security measures
16 on an iPhone that belonged to one of the shooters in the San Bernardino terrorist attack. *See In*
17 *the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant*
18 *on a Black Lexus IS300, California License Plate 35KGD203*, No. ED 15-0451M, 2016 WL
19 618401, at *1 (C.D. Cal. Feb. 16, 2016).

20 11. Before it was mooted, that litigation sparked a wide-ranging public debate on the
21 wisdom and legality of such technical assistance orders. *See, e.g., Amicus Briefs in Support of*
22 *Apple*, Apple (Mar. 2, 2016), <https://perma.cc/PL6K-S6WZ> (collecting court filings and public
23 statements opposing the requested order). And the national conversation about the appropriate
24 scope of such compelled assistance has continued unabated. *Compare, e.g., Alan Z.*
25 *Rozenshtein, Surveillance Intermediaries*, 70 *Stan L. Rev.* 99, 176–177 (2018) (arguing that
26 private firms’ resistance to technical-assistance orders undermines self-government), *with Note,*
27 *Cooperation or Resistance?: The Role of Tech Companies in Government Surveillance*, 131

1 Harv. L. Rev. 1722, 1724 (2018) (arguing that the picture is “more complicated” and that firms
2 play an important role in checking the government).

3 12. As Petitioners have reported, circumventing encryption is not the only context in
4 which the All Writs Act has been invoked to compel private companies to assist federal
5 government surveillance efforts. *See Brewster, supra*. According to records unsealed in the
6 Southern District of California in February 2020, the government has used the Act to require
7 Sabre, a leading travel technology company, to engage in “real-time” monitoring of travelers
8 who are the subject of an active arrest warrant for the government. *See Ex. 1 at 4*.

9 13. Sabre is one of the three largest players in its market, responsible for more than
10 one-third of global air travel bookings. *See Brewster, supra*. As a result, it has a staggering
11 volume and diversity of records, including “itineraries, fares, reservations, connecting flights and
12 ticket costs,” as well as “crew schedules and other logistical information.” *Id*.

13 14. Pursuant to the All Writs Act, the government has sought orders requiring Sabre
14 “to provide representatives of the FBI complete and contemporaneous ‘real time’ account
15 activity information” on targeted travelers, what the government has described as a “hot watch.”
16 *Ex. 1 at 2, 4*.

17 15. In support of its application in the Southern District of California, the government
18 identified several other instances in which it had asked for—and obtained—orders under the All
19 Writs Act that imposed similar surveillance obligations on Sabre. *See Ex. 1 at 4*. Two of them,
20 identified in the application as AWA order GJ19-097 and GJ17-432, were issued by this Court in
21 2019 and 2017 respectively. *Id*. The government’s application adverted that those matters were
22 still under seal at the time. *Id*. Petitioners are informed and believe that the matters are still
23 under seal.

24 16. Petitioners are also informed and believe that this District has historically used the
25 ‘GJ’ designation for surveillance orders other than warrants, regardless whether those orders are
26 associated with a grand jury proceeding. *See* Petition to Unseal Electronic Surveillance Dockets,
27 Applications, and Orders at 10, No. 2:17-mc-00145 (W.D. Wash. Nov. 15, 2017). While the

1 District has since created a new designation for some of those non-warrant surveillance orders,
2 All Writs Act orders are not among them. *See Signed Memorandum Regarding New Docketing*
3 *Procedures in W.D. Washington*, EFF (last visited Jan. 24, 2021), <https://perma.cc/79QW-JMJ6>.
4 As a result, it is not possible for Applicants or other members of the public to know whether or
5 not the AWA Materials at issue are associated with any grand jury proceeding.

6 **REQUEST FOR RELIEF**

- 7 17. Applicants seek an order unsealing the AWA Materials.
8 18. Applicants seek any further relief that the Court deems just and proper.

9
10
11 DATED this 25th day of January, 2021.

12 Davis Wright Tremaine LLP

13
14 By s/Ambika Kumar Doran
15 Ambika Kumar Doran, WSBA # 38237
16 920 Fifth Avenue, Suite 3300
17 Seattle, WA 98104-1610
18 Telephone: (206) 757-8030
19 Fax: (206) 757-7030
20 E-mail: ambikadoran@dwt.com

21 REPORTERS COMMITTEE FOR
22 FREEDOM OF THE PRESS
23 Katie Townsend
24 *Pro hac vice application pending*
25 1156 15th Street NW, Suite 1020
26 Washington, D.C. 20005
27 Telephone: (202) 795-9300
E-mail: ktownsend@rcfp.org

*Attorneys for Applicants Forbes Media LLC and
Thomas Brewster*

CERTIFICATE OF SERVICE

1 I hereby certify that on January 25, 2021, I caused to be served the foregoing document
2 by Certified Mail on the United States Attorney for the Western District of Washington at:

3
4 United States Attorney's Office
700 Stewart Street, Suite 5220
5 Seattle, WA 98101-1271

6 DATED this 25th day of January, 2021.

7
8 Davis Wright Tremaine LLP

9
10 By s/Ambika Kumar Doran
11 Ambika Kumar Doran, WSBA # 38237
920 Fifth Avenue, Suite 3300
12 Seattle, WA 98104-1610
Telephone: (206) 757-8030
13 Fax: (206) 757-7030
E-mail: ambikadoran@dwt.com

14 *Attorney for Petitioners Forbes Media LLC and
Thomas Brewster*