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12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 _____)
15 UNITED STATES DEPARTMENT)
OF JUSTICE)

16 v.)
17 _____)
18 _____)
19 _____)
20 _____)

FIRST AMENDED COMPLAINT

CIV. NO. 11-2667

FILED UNDER SEAL
PURSUANT TO
18 U.S.C. § 3511(d)
AND THIS COURT'S ORDER
DATED JULY 8, 2011

21
22 Plaintiff the United States Department of Justice, by its undersigned attorneys, brings this
23 First Amended Complaint pursuant to Federal Rule of Civil Procedure 15 to enforce compliance
24 with a National Security Letter, including compliance with the National Security Letter's
25 information request and its nondisclosure provision, and states as follows:

26 **INTRODUCTION**

27 1. Counterintelligence and counterterrorism investigations ordinarily must be carried out
28 in secrecy if they are to succeed. Because these investigations are directed at groups or

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NORTHERN DISTRICT OF CALIFORNIA

1 individuals taking efforts to keep their own activities secret, it is essential that targets not learn
2 that they are the subject of such an investigation. If targets learn that their activities are being
3 investigated, they can be expected to take action to avoid detection or disrupt the government's
4 intelligence gathering efforts. The same concern applies to knowledge about the sources and
5 methods the United States intelligence community may be using to acquire information,
6 knowledge which can be used both by the immediate targets of an investigation and by other
7 terrorist and foreign intelligence organizations. And even after a particular investigation has
8 been completed, information about the government's investigative methods can educate other
9 potential targets about how to circumvent and disrupt future counterintelligence or
10 counterterrorism investigations.

11 2. The [redacted] Federal Bureau of Investigation ("FBI") is conducting an
12 ongoing, authorized national security investigation. As part of that investigation, [redacted]
13 2011 the FBI sent defendant [redacted]
14 [redacted] a National Security Letter ("NSL") as authorized by statute, 18
15 U.S.C. § 2709, seeking limited and specific information necessary to the investigation which the
16 FBI had and has been unable to obtain elsewhere. An authorized FBI official certified to
17 defendant that disclosure of the fact or contents of the [redacted] 2011 NSL sent to defendant may,
18 *inter alia*, endanger national security. Moreover, disclosure of the fact or contents of the NSL is
19 prohibited by statute, 18 U.S.C. § 2709.

20 3. Defendant has objected to the NSL, including its request for information as well as its
21 nondisclosure requirement. The FBI continues to need the information requested in the NSL to
22 further an ongoing national security investigation. Moreover, as an authorized FBI official has
23 certified, disclosure of the fact or contents of the NSL may, *inter alia*, endanger the national
24 security of the United States. For those reasons, the Department of Justice brings this action for
25 declaratory and injunctive relief to obtain information necessary to the FBI's investigation,
26 protect the national security, and enforce the law. This Court should enter a declaratory
27 judgment, and enter an injunction to the effect that, the defendant must comply with the NSL it
28

1 received and, moreover, that defendant is bound by the nondisclosure provisions of 18 U.S.C.
2 § 2709 and the NSL.

3 **JURISDICTION AND VENUE**

4 4. The Court has jurisdiction pursuant to 18 U.S.C. § 3511(c), which provides that, when
5 the recipient of an NSL “fail[s] to comply with [the] request for records, a report, or other
6 information,” the Attorney General “may invoke the aid of any district court of the United States
7 within the jurisdiction in which the investigation is carried on or the person or entity resides,
8 carries on business, or may be found, to compel compliance with the request.” The NSL request
9 here included notification and imposition of the nondisclosure requirement. *Accord* 18 U.S.C.
10 § 2709(c)(2) (among other things, an NSL “notif[ies] the person or entity to whom the request is
11 directed of the nondisclosure requirement.”). Under section 3511(c), this Court “may issue an
12 order requiring the person or entity to comply with the request,” including its nondisclosure
13 requirement, and failure to obey the order of the Court may be punished as contempt. *Id.* The
14 Court also has jurisdiction under 28 U.S.C. § 1345.

15 5. Venue lies in the Northern District of California pursuant to 18 U.S.C. § 3511(c) and
16 28 U.S.C. § 1391.

17 **PARTIES**

18 6. Plaintiff is the United States Department of Justice, an Executive Agency of the
19 United States of America led by the United States Attorney General. The Federal Bureau of
20 Investigation (“FBI”) is a law enforcement agency within the Department of Justice.

21 7. Defendant [REDACTED]

22 [REDACTED] (“defendant”), is a [REDACTED]

23 [REDACTED] with a principal place of business at [REDACTED]

24 [REDACTED] Defendant [REDACTED]
25 [REDACTED]

26 **STATUTORY BACKGROUND**

27 8. Title 18 U.S.C. § 2709 authorizes the FBI to issue NSLs in connection with foreign
28 counterintelligence and counterterrorism investigations. The FBI has similar authority to issue

1 NSLs under the National Security Act of 1947, the Fair Credit Reporting Act, and the Right to
2 Financial Privacy Act. *See* 12 U.S.C. §§ 3414(a)(1) and 3414(a)(5); 15 U.S.C. § 1681u, 1681v;
3 50 U.S.C. § 436.

4 9. Subsections (a) and (b) of § 2709 authorize the FBI to request “subscriber
5 information” and “toll billing records information,” or “electronic communication transactional
6 records,” from wire or electronic communication service providers. In order to issue an NSL, a
7 designated official must certify that the information sought is “relevant to an authorized
8 investigation to protect against international terrorism or clandestine intelligence activities”
9 *Id.* § 2709(b)(1)-(2). When an NSL is issued in connection with an investigation of a “United
10 States person,” the same officials must certify that the investigation is “not conducted solely on
11 the basis of activities protected by the first amendment” *Id.*

12 10. To protect the secrecy of counterintelligence and counterterrorism investigations,
13 § 2709(c) permits the placement of a nondisclosure obligation on an NSL recipient. Section
14 2709(c) prohibits disclosure when a designated FBI official certifies, prior to the issuance of the
15 NSL, that “otherwise there may result a danger to the national security of the United States,
16 interference with a criminal, counterterrorism, or counterintelligence investigation, interference
17 with diplomatic relations, or danger to the life or physical safety of any person.” *Id.*

18 § 2709(c)(1). When such a certification is made, the NSL itself notifies the recipient of the
19 nondisclosure requirement. *Id.* § 2709(c)(2).

20 11. Title 18 U.S.C. § 3511 provides for judicial review of NSLs.

21 12. Section 3511(a) authorizes the recipient of an NSL to petition a district court “for an
22 order modifying or setting aside the request” for information contained in the NSL.

23 13. Section 3511(b) authorizes the recipient of an NSL to petition a district court “for an
24 order modifying or setting aside a nondisclosure requirement imposed in connection with” the
25 NSL. *Id.* § 3511(b)(1).

26 14. Section 3511(c) authorizes the government to petition a district court for enforcement
27 of an NSL. Section 3511(c) provides that, when the recipient of an NSL “fail[s] to comply with
28 [the] request for records, a report, or other information,” the Attorney General “may invoke the

1 aid of any district court of the United States within the jurisdiction in which the investigation is
2 carried on or the person or entity resides, carries on business, or may be found, to compel
3 compliance with the request.” Where a designated official has certified the need for
4 nondisclosure pursuant to 18 U.S.C. § 2709(c), the NSL “request” includes notification and
5 imposition of the nondisclosure requirement. *Id.* § 2709(c)(2). Pursuant to 18 U.S.C. § 3511(c),
6 a court “may issue an order requiring the person or entity to comply with the request,” including
7 its nondisclosure requirement, and failure to obey the order of the court may be punished as
8 contempt. *Id.*

9 15. As the Attorney General informed the Chairman of the Senate Judiciary Committee
10 in a letter dated December 9, 2010, since February 2009, all NSLs are required to include a
11 notice that informs recipients of the opportunity to contest the nondisclosure requirement through
12 government-initiated judicial review.

13 16. Since 2009, therefore, in all NSLs issued nationwide that include imposition of a
14 nondisclosure obligation pursuant to 18 U.S.C. § 2709(c), the FBI has complied with the
15 “reciprocal notice” procedures suggested by the United States Court of Appeals for the Second
16 Circuit in *John Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

17 17. All NSLs issued nationwide that include imposition of a nondisclosure obligation
18 pursuant to 18 U.S.C. § 2709(c), including the [REDACTED] 2011 NSL issued to defendant, have
19 informed the recipient that, *inter alia*, “[i]n accordance with 18 U.S.C. § 3511(a) and (b)(1), you
20 have a right to challenge this letter if compliance would be unreasonable, oppressive, or
21 otherwise unlawful.”

22 18. All NSLs issued nationwide that include imposition of a nondisclosure obligation
23 pursuant to 18 U.S.C. § 2709(c), including the [REDACTED] 2011 NSL issued to petitioner, have
24 informed the recipient that, *inter alia*, “[y]ou also have the right to challenge the nondisclosure
25 requirement. . . . If you wish to make a disclosure that is prohibited by the nondisclosure
26 requirement, you must notify the FBI, in writing, of your desire to do so within 10 calendar days
27 of receipt of this letter.” Such NSLs have provided an appropriate address or fax number where
28 such objection may be sent, and stated “[i]f you send notice within 10 calendar days, the FBI will

1 initiate judicial proceedings in approximately 30 days in order to demonstrate to a federal judge
2 the need for nondisclosure and to obtain a judicial order requiring continued nondisclosure.”

3 19. As the Attorney General further informed the Chairman of the Senate Judiciary
4 Committee in the Attorney General’s December 9, 2010 letter, the FBI also will ensure that in
5 any case in which an NSL recipient challenges a nondisclosure obligation imposed pursuant to
6 18 U.S.C. § 2709(c), the recipient is notified when compliance with the nondisclosure obligation
7 is no longer required.

8 **STATEMENT OF THE CLAIM**

9 **I. Defendant And Electronic Communication Services**

10 20. Defendant [REDACTED]

11 [REDACTED]
12 21. The [REDACTED] that Defendant provides to its [REDACTED]
13 [REDACTED]

14 Defendant [REDACTED]

15 **II. FBI’s Investigation**

16 22. During the course of an ongoing, authorized national security investigation, the FBI
17 [REDACTED]

18 [REDACTED] The FBI’s [REDACTED] opened a national
19 security investigation to [REDACTED]

20 23. The FBI [REDACTED]

21 The FBI then determined that [REDACTED]

22 [REDACTED] The FBI then [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 24 [REDACTED]

26 [REDACTED] defendant. Pursuant to 18 U.S.C.

27 § 2709, the FBI served defendant with the [REDACTED] 2011 NSL, requesting the [REDACTED]
28 [REDACTED]

1 25. The NSL served on Defendant was issued by the [REDACTED]
2 [REDACTED] under the authority of 18 U.S.C. § 2709. See [REDACTED] 2011
3 NSL (attachment A). The [REDACTED] in accordance with 18 U.S.C.
4 § 2709(b), that the information sought was relevant to an authorized investigation to protect
5 against international terrorism or clandestine intelligence activities. *Id.*

6 26. The NSL, dated [REDACTED] 2011, sought [REDACTED]
7 [REDACTED]

8 27. The NSL informed defendant of the prohibition against disclosing the contents of the
9 NSL, certifying, in accordance with 18 U.S.C. § 2709(c), that such disclosure could result in an
10 enumerated harm that is related to an “authorized investigation to protect against international
11 terrorism or clandestine intelligence activities.”

12 28. The NSL notified defendant that, in accordance with 18 U.S.C. § 3511(a) and (b),
13 defendant had a right to challenge the letter if compliance would be unreasonable, oppressive, or
14 otherwise illegal.

15 29. The NSL also advised that defendant had 10 days to notify the FBI as to whether it
16 desired to challenge the nondisclosure provision.

17 **III. Defendant’s Refusal To Comply With The National Security Letter**

18 30. In a letter sent via electronic mail, dated [REDACTED] 2011, defendant, through counsel,
19 advised that it intended to “exercise its rights under 18 U.S.C. § 3511(a) and (b) to challenge the
20 NSL referenced above, including the nondisclosure provision of the NSL.”

21 31. Defendant’s [REDACTED] 2011 letter also requested an extension of time in order to
22 consider legal issues regarding the NSL. FBI agreed to extend the due date for compliance with
23 the NSL to [REDACTED] 2011.

24 32. On [REDACTED] 2011, defendant [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 33. Defendant's [REDACTED] notified the FBI that
2 defendant does not intend to comply with the NSL's demand for information or its nondisclosure
3 requirement.

4 34. To date, the FBI's [REDACTED] has been unable to [REDACTED]
5 [REDACTED] The FBI continues to need that
6 information to further an ongoing national security investigation.

7 35. Pursuant to 18 U.S.C. § 3511(e), the plaintiff is prepared to make available to the
8 Court *ex parte* and *in camera* further evidence supporting the need for nondisclosure of the fact
9 or contents of the NSL to petitioner.

10 36. The NSL nondisclosure requirements were imposed on petitioner consistent with the
11 law, 18 U.S.C. § 2709(c), are fully authorized and in all other respects are proper and entitled to
12 enforcement by this Court.

13 37. The NSL information requests were imposed on petitioner consistent with the law,
14 18 U.S.C. § 2709, are fully authorized and in all other respects are proper and entitled to
15 enforcement by this Court.

16 **COUNT ONE – VIOLATION OF 18 U.S.C. § 2709**

17 38. Plaintiff incorporates by reference paragraphs 1 through 37 above.

18 39. Defendant's failure to comply with the lawfully issued NSL, including its
19 information request and its nondisclosure requirement, would violate federal law, 18 U.S.C.
20 § 2709.

21 **COUNT TWO - FAILURE TO ABIDE BY A VALID NATIONAL SECURITY LETTER;**

22 **INTERFERENCE WITH THE UNITED STATES' SOVEREIGN INTERESTS**

23 40. Plaintiff incorporates by reference paragraphs 1 through 39 above.

24 41. Defendant's failure to comply with the lawfully issued NSL, including its
25 information request and its nondisclosure requirement, would interfere with the United States'
26 vindication of its sovereign interests in law enforcement, counterintelligence, and the protection
27 of national security.

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RELIEF REQUESTED

WHEREFORE, the United States Department of Justice requests the following relief:

1. That this Court enter an Order pursuant to 18 U.S.C. § 3511(c) that petitioner is bound by the provisions of 18 U.S.C. § 2709 and the [redacted] 2011 NSL to petitioner, including the requirement that petitioner provide the requested information to the FBI and the nondisclosure provisions of 18 U.S.C. § 2709(c) and the NSL.

2. That this Court enter an Order pursuant to 18 U.S.C. § 3511(c) affirming that disclosure of the fact or contents of the NSLs to petitioner may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of a person; and that the petitioner is bound by the nondisclosure provisions of 18 U.S.C. § 2709 and the NSLs to petitioner, including the requirement that petitioner not disclose the fact or contents of the NSLs to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request).

3. That this Court enjoin petitioner, in accordance with 18 U.S.C. §§ 2709(c) and 3511(c), from disclosing to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the FBI has sought or obtained access to information or records from petitioner under 18 U.S.C. § 2709.

4. That this Court Order petitioner, in accordance with 18 U.S.C. §§ 2709 and 3511(c), to promptly provide to the FBI the information requested in the [redacted] 2011 NSL.

5. That this Court grant the Attorney General such other and further relief as may be just and proper.

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Dated: April 18, 2013

Respectfully submitted,

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