

ORIGINAL FILED
MAR 14 2013

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**ORIGINAL
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MAR 14 2013
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 Attorneys for Petitioner
11 [REDACTED]

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

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14 **CV 13 1165**

15) Case No. _____
16)
17) **PETITION TO SET ASIDE NATIONAL**
18) **SECURITY LETTERS AND**
19) **NONDISCLOSURE REQUIREMENTS**
20) **IMPOSED IN CONNECTION**
21) **THEREWITH**
22)
23) [18 U.S.C. §3511(a), (b), Civil L.R. 79-5, 7-11]
24)
25) FILED UNDER SEAL
26)
27)
28)

18 IN RE MATTER OF NATIONAL SECURITY
19 LETTERS

1 **PETITION**

2 Petitioner [REDACTED] or "Petitioner") has received two National
3 Security Letters ("NSLs") issued by the Federal Bureau of Investigation ("FBI") demanding certain
4 customer records in the Petitioner's possession pursuant to 18 U.S.C. § 2709 ("NSL Statute").
5 Pursuant to section 2709(c), the NSLs prohibit Petitioner from disclosing the existence of the
6 demands to its customer or to the public.

7 Petitioner hereby petitions the Court under 18 U.S.C. §§ 3511(a) and (b) for an order setting
8 aside both NSLs, including both the request for records and the nondisclosure requirements
9 imposed in connection with the NSLs, on the following legal grounds, as explained further in the
10 accompanying Memorandum of Points and Authorities and Declaration of [REDACTED]

11 1. The nondisclosure provision of the NSL Statute on its face violates the First
12 Amendment in at least four ways:

13 a. The nondisclosure provision of the NSL Statute fails the *Pentagon Papers*
14 test for national security prior restraints as the statute authorizes the FBI to impose a nondisclosure
15 requirement without making a sufficient evidentiary showing that the disclosure of information
16 about the receipt of the NSL will "surely result in direct, immediate and irreparable harm to our
17 nation or its people."

18 b. The nondisclosure provision of the NSL Statute fails the procedural
19 requirements for prior restraints first articulated in *Freedman v. Maryland*, 380 U.S. 51 (1965).

20 c. The nondisclosure provision of the NSL Statute lacks the "narrow, objective,
21 and definite standards" necessary to limit the exercise of executive authority as set forth in
22 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

23 d. The nondisclosure provision of the NSL Statute authorizes overly long prior
24 restraints that are not narrowly tailored to serve a compelling state interest.

25 2. The nondisclosure provision of the NSL Statute violates separation of powers
26 principles by preventing reviewing courts from applying the appropriate level of review mandated
27 by the First Amendment and by binding a court to treat an FBI certification of harm as
28 "conclusive."

1 3. The Government has not demonstrated with sufficient evidence regarding the NSLs
2 issued to the Petitioner that it can meet the requirements for either the compelled production of
3 customer records or the nondisclosure requirement by making the appropriate factual showing for
4 the court to review:

5 a. The Government has made no factual showing of any kind that supports its
6 assertion that the information sought is “relevant to an authorized
7 investigation to protect against international terrorism or clandestine
8 intelligence activities.”

9 b. The Government has made no factual showing of any kind as to whether the
10 authorized investigation is “of a United States person,” and if so, that the
11 investigation “is not conducted solely on the basis of activities protected by
12 the first amendment to the Constitution of the United States.”

13 c. The Government has made no factual showing of any kind that supports its
14 assertion that the disclosure of the existence of the NSLs “may result” in a
15 harm enumerated in the NSL Statute.

16 4. As the nondisclosure provision of the NSL Statute is non-severable from the
17 remaining portions of the statute, including the provision permitting the compelled production of
18 customer records, the NSL Statute must be set aside if the non-disclosure provision is found to be
19 unconstitutional.

20 Petitioner respectfully requests that the gag provisions of the NSLs be set aside and that the
21 NSL Statute be declared unconstitutional as it allows the FBI to impose a prior restraint without
22 prior judicial review, as well as an injunction prohibiting the FBI from seeking to enforce the gag
23 provisions. Petitioner also asks for a declaration that the nondisclosure provision is not severable
24 and that as a result, the compelled disclosure provision must also be struck down. Finally,
25 Petitioner asks that the Court independently find that the Government has not satisfied its burden to
26 support its asserted need for either the underlying records or for the gag and that as a result, the
27 NSLs should be set aside in their entirety.

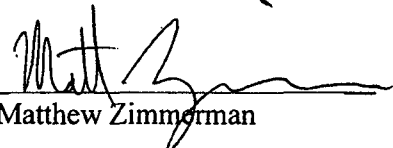
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DATED: March 14, 2013

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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