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**FILED**

AUG 12 2013

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE MATTER OF NATIONAL SECURITY  
LETTERS

No. C 13-80089 SI

**ORDER DENYING PETITION TO SET  
ASIDE, DENYING MOTION TO STAY  
AND GRANTING CROSS-PETITION TO  
ENFORCE**

**FILED UNDER SEAL**

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Currently before the Court is a petition to modify or set aside two National Security Letters (NSLs) that were issued to petitioner by the Federal Bureau of Investigation on [REDACTED] 2013, under 18 U.S.C. §§ 3511(a) and (b). Petition, filed 4/23/13. The government, in addition to opposing the petition, filed a cross-petition to enforce the two NSLs under 18 U.S.C. § 3511(c). Cross-Petition, filed 5/23/13. Petitioner has also filed a motion to stay proceedings in this case pending the resolution of the government's appeal in *In re NSL*, No. 3:11-cv-2173 SI. These matters were scheduled for a hearing on August 2, 2013. Pursuant to Civil Local Rule 7-1(b), the Court determined that these matters are appropriate for resolution without oral argument, and VACATED the hearing. Having considered the papers submitted, including the classified declaration of Robert Anderson, Jr. submitted *ex parte* for the Court's review, the Court rules as follows.

In a separate case brought by petitioner challenging a 2011 NSL, this Court found unconstitutional portions of the NSL statute governing nondisclosure orders issued in conjunction with NSLs. *See In re NSL*, No. 3:11-cv-2173 SI (March 14, 2013) (finding 18 U.S.C. § 2709(c), 18 U.S.C. §§ 3511(b)(2), (b)(3)) facially unconstitutional). The Court's judgment - as to the

1 enforcement of the particular NSL at issue in that case – was stayed pending appeal. Whether the  
2 challenged nondisclosure provisions are, in fact, facially unconstitutional will be determined in due  
3 course by the Ninth Circuit.

4 On March 29, 2013, a different recipient of NSLs filed a petition in this Court challenging  
5 19 NSLs, and the government filed a cross-petition to enforce those same NSLs. *See In re NSLs*, No.  
6 3:13-mc-80063-SI. The petitioner in that case requested that the Court set aside the NSLs and enjoin  
7 the FBI from issuing future NSLs, on the ground that the portions of the NSL statute governing  
8 nondisclosure orders are facially unconstitutional. In orders filed on May 21 and May 23, 2013, the  
9 Court found, in light of the pending appeal and stay of the judgment in *In re NSL*, No. 3:11-cv-2173  
10 SI, that it was appropriate to review the arguments and evidence on an NSL-by-NSL basis. The  
11 Court concluded that the government had met its burden to enforce the NSLs, granted the  
12 government’s cross petition to enforce, and denied the petitioner’s petition to set aside the NSLs. *See*  
13 *In re NSLs*, No. 3:13-mc-80063-SI (May 21, 2013 and May 23, 2013).

14 On March 14, 2013, another recipient of NSLs filed a petition in this Court challenging two  
15 NSLs, and the government filed a cross-petition to enforce those same NSLs. *See In re NSLs*, No.  
16 3:13-cv-1165-SI. The petitioner in that case mounted the same facial constitutional challenge to the  
17 NSL statute as was brought in the cases discussed *supra*. For the same reasons that the Court  
18 reviewed the arguments and evidence on an NSL-by-NSL basis in *In re NSLs*, No. 3:13-mc-80063-SI,  
19 the Court found it appropriate to do so in *In re NSLs*, No. 3:13-cv-1165-SI. The Court concluded  
20 that the government had met its burden to enforce the NSLs, granted the government’s cross petition  
21 to enforce, and denied the petitioner’s petition to set aside the NSLs. *See In re NSLs*, No.  
22 3:13-cv-1165-SI (Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce, dated  
23 August 12, 2013).

24 Petitioner seeks a stay of this case pending the resolution of the government’s appeal in *In re*  
25 *NSL*, No. 3:11-cv-2173 SI. Petitioner argues that a stay is warranted because that appeal involves the  
26 same parties and the same constitutional challenges to the NSL statute. Petitioner contends that the  
27 Ninth Circuit’s resolution of the appeal will control the outcome of this litigation, and thus that a stay  
28 is in the interest of judicial efficiency and economy. The government opposes a stay of its cross-

1 petition seeking enforcement, and argues that the Court should review and enforce the two NSLs at  
2 issue in this case.

3         The Court concludes that a stay of this case is not appropriate, and that in light of the fact that  
4 the Ninth Circuit will address the facial constitutional challenges in *In re NSL*, No. 3:11-cv-2173 SI,  
5 and consistent with its approach in the subsequent cases challenging NSLs, this Court will review the  
6 arguments and evidence on an NSL-by-NSL basis.<sup>1</sup>

7         The Government has submitted evidence – both unclassified and classified – intended to  
8 demonstrate that the two NSLs were issued in full compliance with the procedural and substantive  
9 requirements imposed by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Those  
10 requirements include: (1) notifying NSL recipients that the government will initiate judicial review  
11 of the nondisclosure order and underlying NSL if the recipient objects to compliance; (2) certifying  
12 that the nondisclosure order is necessary to prevent interference with an authorized investigation to  
13 protect against international terrorism or clandestine intelligence agencies; (3) upon a challenge in  
14 Court, the government submits evidence to show the District Court judge there is a “good reason”  
15 to believe that absent nondisclosure, some reasonable likelihood of harm to an authorized investigation  
16 to protect against international terrorism or clandestine intelligence agencies will result; and (4) the  
17 District Court is not expected to treat the FBI’s certification as to the necessity of the nondisclosure  
18 as conclusive, but to conduct a searching review of the evidence submitted. *Id.* at 883-84.

19         Although not privy to the classified information, petitioner does not dispute that the FBI has  
20 complied with the strictures imposed by the Second Circuit. The government has, therefore,  
21 complied with procedural and substantive requirements that the Court and petitioner in the Court’s  
22 prior case recognized could result in a constitutional application of the nondisclosure and judicial  
23 review provisions of 18 U.S.C. § 2709(c) and 18 U.S.C. §§ 3511(b)(2), (b)(3). *See In re NSL*, No.  
24 3:11-2173 SI (March 14, 2013) at 7, 21-23. In these circumstances – given the as-applied showings,  
25 given that the constitutionality of the statute as written is under review at the Ninth Circuit, and given  
26

27  
28         <sup>1</sup> In contrast, the Court stayed *In re NSL*, No. 3:11-2667 SI because that case involves the same  
2011 NSL at issue in *In re NSL*, No. 3:11-2173 SI.

1 that petitioner did not raise arguments *specific* to the two NSLs at issue why the nondisclosure orders  
2 should not be enforced – the Court DENIES the petition to modify or set aside the two NSLs.

3       Turning to the government’s cross-petition to enforce, the government argues that in  
4 determining whether to enforce administrative subpoenas (like the NSLs at issue), the Court must  
5 consider: (1) whether Congress has granted the FBI the authority to investigate; (2) whether  
6 procedural requirements have been followed; and (3) whether the evidence sought is relevant and  
7 material to the investigation. *See EEOC v. Children’s Hospital Medical Center*, 719 F.2d 1426, 1428  
8 (9th Cir. 1983). Having reviewed the Government’s arguments and evidence submitted, the Court  
9 finds that as to the two NSLs, Congress has authorized the FBI to seek the information requested, the  
10 procedural requirements set both by the statute and by the Second Circuit’s *Doe v. Mukasey* decision  
11 have been followed, and the evidence sought is relevant and material to the investigation. In  
12 particular, as disclosed in the Government’s pleadings, a senior FBI official has certified that the  
13 information sought is relevant to an authorized investigation to protect against international terrorism  
14 or clandestine intelligence activities; and the investigations, where aimed at a “United States person,”  
15 are not conducted solely on the basis of activities protected by the First Amendment. *See Mem. In*  
16 *Support of Cross-Petition at 17-19* (citing classified Anderson Declaration). The government’s  
17 declarant also explains what information is being sought in and how that information is relevant to  
18 a pending national security investigation. *Id.* at 17-18. As to both NSLs, the government has  
19 shown through the unclassified Anderson Declaration that senior FBI officials certified, pursuant to  
20 the NSL statute, that the nondisclosure requirement was imposed because “otherwise there may result  
21 a danger to the national security of the United States, interference with a criminal, counterterrorism,  
22 or counterintelligence investigation, interference with diplomatic relations, or danger to the life or  
23 physical safety of any person.” 18 U.S.C. § 2709(c)(1). The government has also submitted evidence  
24 explaining further the need for continued nondisclosure of both NSLs. *See Mem. In Support of*  
25 *Cross-Petition at 18-19* (citing classified Anderson Declaration).

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Accordingly, having reviewed the arguments and evidentiary showing made, the Court finds that the government has met its burden to enforce these NSLs and therefore GRANTS the government's cross-petition to enforce.

**IT IS SO ORDERED.**

Dated: August 12, 2013

  
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SUSAN ILLSTON  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: NSL,

Plaintiff,

v.

,

Defendant.

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Case Number: 13-MC-80089 SI

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 13, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

**Cindy Ann Cohn**  
Electronic Frontier Foundation  
815 Eddy Street  
San Francisco, CA 94109

Steven Bressler  
USDOJ  
P.O. Box 883  
Washington, DC 20044

August 13, 2013

Richard W. Wieking, Clerk

By:

