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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE MATTER OF NATIONAL SECURITY LETTER ISSUED TO [redacted]	No. C 11-2173 **REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH NATIONAL SECURITY LETTER REQUEST FOR INFORMATION** **FILED UNDER SEAL PURSUANT TO THE COURT'S ORDER DATED MAY 11, 2011**

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PRELIMINARY STATEMENT

In its opposition to the government's pending Motion to Compel Compliance With a National Security Letter ("NSL") Information Request, petitioner [redacted] offers rhetoric and unsupported conclusions, but little law and nothing to evince that its assertions of harm to First Amendment associational rights are more than unfounded and conclusory statements. Under the law of this Circuit, that is not enough. The Court should grant the government's Motion and issue an order enforcing compliance with the NSL information request.

This case concerns the government's collection of information under 18 U.S.C. § 2709, which is one of a number of statutes that authorize the government to collect information in service of a national security investigation. Pursuant to § 2709 and as part of an ongoing national security investigation, on [redacted] 2011 the Federal Bureau of Investigation ("FBI") served an NSL – a type of administrative subpoena – on [redacted] a wire and telephone service provider. The NSL seeks only limited information which § 2709 expressly authorizes the FBI to obtain: [redacted]

Petitioner claims that providing this limited information would impinge on the associational rights of its [redacted] but petitioner is mistaken. As an initial matter, petitioner is a telephone company and its [redacted] their association is a commercial one, and it is well established that First Amendment interests do not attach to such a commercial association. And even if petitioner's relationship with its [redacted] was cognizable under the First Amendment, that would not immunize petitioner from responding to the validly issued NSL. Rather, the law of this Circuit would require petitioner to make a prima facie showing based on objective and articulable facts – not speculation and conclusory statements – that responding to the NSL would significantly and substantially burden associational rights. Petitioner has wholly failed to meet this burden, adducing nothing to make the required, prima facie showing. Moreover, even if petitioner had made that showing, the NSL information request here would nonetheless comport with the Constitution because it is rationally related to

the government's compelling interests in national security and law enforcement, and is narrowly tailored to further those interests.

To the extent petitioner argues the NSL impinges on a right to anonymous speech, that argument fails because petitioner has not pointed to any such speech by its [redacted] Indeed, the NSL does not seek the content of any communication, and petitioner has not identified any related First Amendment expression. The only alleged expressive activity at issue here is the [redacted] and, as noted above, the NSL survives petitioner's free association challenge.

Perhaps aware that the law does not support its arguments, petitioner argues that the Court should reject the government's motion to compel compliance with the NSL information request as "premature" because petitioner has also sought review of the NSL. But Congress expressly authorized the government to seek the aid of a district court where, as here, an NSL recipient has not complied with an NSL information request. The government's invocation of its statutory right is neither improper nor premature; to the contrary, it makes good sense and serves judicial economy for the Court to consider the parties' cross-motions together.

This Court should, accordingly, order [redacted] to comply with the NSL request for information pursuant to 18 U.S.C. § 3511(c).

ARGUMENT

I. Standard Of Review

Petitioner does not dispute the general standard of review set forth by the Ninth Circuit and in the government's opening memorandum: an NSL is a type of administrative subpoena authorized by law, and "[t]he scope of the judicial inquiry in an . . . agency subpoena enforcement proceeding is quite narrow." *EEOC v. Children's Hosp. Med. Center*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*). The district court should determine whether (1) "Congress has granted the [agency the] authority to investigate;" (2) the "procedural requirements have been followed;" and (3) the evidence sought is "relevant and material to the investigation." *Id.* [redacted] does not appear to dispute that these factors are met. Accordingly, the court should enforce the subpoena "unless the party being investigated proves the inquiry is unreasonable

because it is overbroad or unduly burdensome." *Id.* Again, [redacted] makes no such argument.

Petitioner argues only that complying with the NSL information request would violate its or its [redacted] First Amendment associational rights. As set forth in the government's opening brief and explained further below, this argument is without merit.

II. The Request For Information In The [redacted] 2011 NSL Does Not Violate The First Amendment.

In its petition to set aside the NSL, [redacted] argued that the NSL information request is "unlawful" under 18 U.S.C § 3511 because it violates the First Amendment by compelling speech or interfering with a right to anonymous association. The government refuted these arguments in its opposition to [redacted] petition and opening brief in support of the Motion to Compel. Now, in its opposition to the Motion to Compel, petitioner appears to have abandoned any argument that the NSL inappropriately seeks to compel speech. Rather, petitioner argues that the NSL information request for information relating to a [redacted] by petitioner implicates First Amendment-protected associational rights. Petitioner's Mem. at 19. Therefore, petitioner argues that heightened scrutiny must apply and that the NSL information request fails such scrutiny.

Petitioner is wrong on all counts. The commercial relationship between [redacted] telephone [redacted] does not give rise to First Amendment associational rights; even if it did, petitioner has adduced nothing to meet its burden to show that compliance with the NSL would substantially burden those rights; and, in any event, the NSL here would survive heightened scrutiny because it is the least restrictive means to serve a compelling government interest.

A. The Request For Information From [redacted] In The [redacted] 2011 NSL Does Not Impinge On The First Amendment Associational Rights Of [redacted]

1. The First Amendment Does Not Protect The Commercial Relationship Between Petitioner, A Telephone Company [redacted]

Petitioner's relationship with the [redacted] that is relevant to the FBI's ongoing national security investigation is a commercial one: the [redacted] telephone services from petitioner. While petitioner [redacted]

[redacted] *see* Declaration of [redacted] ¶¶ 6, 7, the FBI has not sought information concerning [redacted] rather, it seeks only [redacted] *Cf. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (because "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," a statute of general application that imposes an incidental burden on free speech does not implicate the First Amendment.). The purchase of telephone service is plainly a commercial activity, and commercial transactions do not give rise to associational rights. *See, e.g., IDK, Inc. v. County of Clark,* 836 F.2d 1185, 1193 (9th Cir. 1988) (holding that the commercial relationship between an escort and client is not protected by freedom of association). This is true even where the subject of the transaction may involve protected expression. *See, e.g., In re PHE, Inc.*, 790 F. Supp. 1310, 1317 (W.D. Ky. 1992) (holding that commercial relationship between publisher and its customers was not protected "associational right" under First Amendment); *In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc.*, 630 F. Supp. 614, 619 (E.D.N.C. 1986) ("commercial relationship arising from the sale of videotapes by the subpoenaed corporations to their customers is not protected by the first amendment's freedom of association," even though the videos themselves were protected speech).

Because First Amendment rights do not attach to a commercial relationship such as that at issue here, the Court need not consider petitioner's right to association objections to the NSL information request any further. Even if a protected association did exist here, moreover, petitioner has failed to show that the NSL information request significantly burdens the association.

2. Petitioner Has Not Met Its Burden To Make A Prima Facie Showing Of A Substantial Burden On Associational Rights.

Petitioner argues that "the [redacted] here implicates his associational interests." Petitioner's Mem. at 19. Even if the [redacted]

[redacted] did create a First Amendment-protected association as petitioner asserts, however, that would lead to another inquiry that petitioner has not satisfied. Under *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (relied on by petitioner, Petitioner's Mem. at 19), and the established law of this Circuit, a party objecting to a government request for information on the ground that it burdens associational rights must do more than simply assert such a burden. Rather, the objection must be accompanied by an evidentiary showing that a substantial burden on associational rights exists. And as the government noted in its opening brief, "petitioner has failed to show or even argue" that the [redacted] 2011 NSL imposes such a significant or substantial burden. Mem. in Support of Motion to Compel at 12.

The Ninth Circuit set forth the standards governing an objection to a government request for information under *Patterson* in two cases considering a union local fund's objections to a Department of Labor administrative subpoena. In *Brock v. Local 375, Plumbers' Int'l Union, AFL-CIO* ("*Local 375 I*"), 860 F.2d 346 (9th Cir. 1988), the Court of Appeals held that the finding that a First Amendment-protected association exists "does not mean that [a party] can escape lawful governmental investigation." *Id.* at 349. Rather, after showing that there is a protected association , a party objecting to a government information request on those grounds "must demonstrate to the district court . . . a 'prima facie showing of arguable first amendment infringement. . . .'" *Id.* at 349-50 (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.1983)). "This prima facie showing requires [the objecting party] to demonstrate that enforcement of the subpoenas will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* at 350. The required showing should rest on "*objective and articulable facts,* which go beyond broad allegations or subjective fears." *Id.* at 350 n.1 (emphasis added).

Thus, when the same case reached the Ninth Circuit again in *Dole v. Local 375, Plumbers' Int'l Union, AFL-CIO* ("*Local 375 II*"), 921 F.2d 969 (9th Cir. 1990), the Court of Appeals rejected the union fund's attempts to establish a prima facie showing of harm to its

associational interests where it proffered "no 'objective and articulable facts' demonstrating that enforcement of the subpoenas will impact upon first amendment rights," but only a union official's affidavit containing "wholly conclusory" assertions of harm. *Id.* at 372. *See also id.* at 973 ("A subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement.") (citing *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976); *Local 375 I*, 860 F.2d at 350 n.1; *In re Grand Jury Proceeding*, 842 F.2d 1229, 1235 (11th Cir.1988)).

Here, likewise, petitioner has proffered "no 'objective and articulable facts' demonstrating" that compliance with the NSL will result in harassment of [redacted] discouragement of new customers, or anything else that would impinge First Amendment activity. *See id.* at 372. Rather, petitioner relies on conjecture and the conclusory statements of counsel in its brief. Like the union fund in *Local 375 II*, petitioner "equates the mere fact of disclosure with a first amendment chill." 921 F.2d at 973-74. *See* Petitioner's Mem. at 18 (stating "a reasonable presumption exists" that [redacted] "[s]o here the demand that [redacted] implicates both [redacted] First Amendment rights."). This is not sufficient to excuse compliance with the [redacted] 2011 NSL:

> The cases in which the Supreme Court has recognized a threat to first amendment associational rights . . . have consistently required more than an argument that disclosure leads to exposure. Parties . . . must demonstrate that exposure either is itself inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization. In *Brown v. Socialist Workers Comm.*, 459 U.S. at 98-100, the Supreme Court found a first amendment violation where disclosure of names in the past had provoked hate mail, property destruction, harassment by government officials, and employment termination. Likewise, in *NAACP v. Alabama,* 357 U.S. at 462, an infringement of first amendment rights was found because the NAACP showed that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."

Id. at 974.[1] Here, as noted, petitioner has provided nothing but an "argument that disclosure

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[1] *See also Buckley v. Valeo,* 424 U.S. 1, 70-72 (1976) (rejecting right to associate claim "where . . . any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative" and where "the substantial public interest in disclosure . . . outweighs the harm generally alleged"); *California Pro-Life Council, Inc. v. Randolph,* 507 F.3d 1172, 1189 (9th Cir. 2007) (noting specific and uncontroverted evidentiary

leads to exposure." *See Local 375 II,* 921 F.2d at 974. That does not meet petitioner's burden to establish a prima facie showing of harm to petitioner's associational interests.[2] Petitioner's First Amendment association argument therefore fails, and the Court should enforce the NSL request for information. *See id.*

3. In Any Event, The NSL Here Survives Any Applicable Level Of Scrutiny Because It Is Narrowly Tailored To Serve A Compelling Governmental Interest.

Moreover, even if petitioner had made a prima facie showing that [redacted] to the FBI would impose a substantial burden on First Amendment association rights (which, again, petitioner manifestly has not), the NSL here would nonetheless be constitutional because the request for information is narrowly tailored to serve a compelling government purpose.

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showing made by the NAACP in *Patterson*); *Kerr v. United States*, 801 F.2d 1162, 1163-64 (9th Cir. 1986) (in challenge to IRS administrative subpoena, holding that "Kerr's first amendment claims fail because he has made no showing that the summonses will burden the exercise of religious beliefs by himself or anyone else, and because he has not shown that enforcement of the summonses will, by requiring disclosure of the names of church members, infringe his right of freedom of association, or that of his church or its members." (internal citation omitted)); *In re Application of Madison*, 687 F. Supp. 2d 103, 120 (E.D.N.Y. 2009) (finding "reliance" of party objecting to government request for information based "on *Patterson* is misplaced" where the party had made no showing that "the government's review (or its disclosure to the public) of the 'identifying information' of 'like-minded political anarchists' is likely to adversely affect their ability to exercise their right to freedom of association," and also noting that "[t]he courts have regularly upheld warrants authorizing searches for evidence of association between and among participants in a criminal activity." (quoting *United States v. Regan*, 706 F. Supp. 1102, 1113 n.14 (S.D.N.Y. 1989)); *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 206 n.74 (D. Me. 2009) (rejecting First Amendment free association claim where party failed to show providing government with requested information would harm its associational interests).

[2]Just as there is no evidence that disclosure here would chill any First Amendment activity, there is also no logical reason to believe that it would. Though petitioner [redacted] *See Local 375 II*, 921 F.2d at 973. This contrasts with groups that have established disclosure of membership information would lead to harassment or otherwise chill First Amendment associative activity, such as a communist party or the NAACP in Alabama during the early civil rights era. *Cf. Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99-100 (1982); *Patterson*, 357 U.S. at 462-63.

"*If*" petitioner had made "the necessary prima facie showing, the evidentiary burden [would] then shift to the government" to "demonstrate that the information sought through the [NSL] is rationally related to a compelling governmental interest." *Local 375 I*, 860 F.2d at 350 (emphasis added; citing *Buckley v. Valeo*, 424 U.S. at 64, and *Traders State Bank,* 695 F.2d at 1133).[3] Upon such a showing, the Court must determine whether the NSL is narrowly tailored to serve the underlying compelling interest, *i.e.*, whether it is "the 'least restrictive means' of obtaining the desired information." *Id.*, *quoting Buckley v. Valeo,* 424 U.S. at 68. As explained in the government's earlier memoranda and set forth in the classified Declaration of Mark F. Giuliano, submitted to the Court *ex parte* and *in camera* pursuant to 18 U.S.C. § 3511(e),[4] the narrow request for information in the NSL is well tailored to serve the government's underlying and compelling legitimate interests. Indeed, the request is highly narrow and specific – it seeks [redacted] This is a far cry from *Patterson*, where the state of Alabama sought the state NAACP's entire membership list unconnected to any compelling governmental interest. The NSL request for information therefore survives any applicable level of scrutiny under the First Amendment.

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[3]*Cf. Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 548-49 (1963) (finding disclosure demand impermissible where "the entire thrust of the demands on the petitioner was that he disclose whether other persons were members of the NAACP," and where "such disclosure will seriously inhibit or impair the exercise of constitutional rights and has not itself been demonstrated to bear a crucial relation to a proper governmental interest or to be essential to fulfillment of a proper governmental purpose."). These cases involving government investigations, not cases considering civil discovery between private parties such as *Highfields Capital Management, L.P. v. Doe*, 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005), provide the proper standard of review. Because the [redacted] 2011 NSL survives any applicable level of scrutiny, however, the result would be the same: the NSL is valid and enforceable.

[4]In its consolidated memorandum in opposition to the government's motion to compel compliance with the NSL information request and reply in support of the petition to set aside the [redacted] 2011 NSL, petitioner challenges the constitutionality of 18 U.S.C. § 3511(e), which authorizes the government to submit material, including classified material, to the Court *ex parte* and *in camera* in cases such as this one brought under § 3511. That argument is addressed in the government's opposition to [redacted] petition. *See* Opposition to Petition to Set Aside NSL at 25-27 & n.15. For the reasons stated there, the classified Giuliano Declaration is properly before the Court and should be considered *ex parte* and *in camera.*

Accord St. German of Alaska Eastern Orthodox Catholic Church v. United States, 840 F.2d 1087, 1094 (2d Cir. 1988) (enforcing IRS summons that sought "disclosure of contributors' names" because the "compelling governmental interest" in "enforcement of the tax laws" outweighed associational rights of organization's members); *Kerr*, 801 F.2d at 1164 (similar).

The Court should grant the government's motion to compel and enforce the information request in the [redacted] 2011 NSL.

B. The [redacted] 2011 NSL Served On [redacted] Does Not Impinge On The Right To Anonymous Speech.

As explained in the government's earlier memoranda, the NSL here does not target the content of any communication, and the FBI's request for information as part of an ongoing, authorized national security investigation does not violate anyone's right to anonymous speech. Petitioner, however, argues that because [redacted] *But see, e.g., IDK, Inc.*, 836 F.2d at 1193 (commercial relationship not protected by freedom of association); *In re PHE, Inc.*, 790 F. Supp. at 1317; *In re Grand Jury Subpoena*, 630 F. Supp. at 619. This argument solely concerns associational activity, not direct expression, and so it is properly considered as a free association claim under the rubric of *Patterson* and *Local 375 I & II* as discussed *supra*. *Accord* Petitioner's Mem. at 19 (citing *Patterson*). For the reasons set forth above, the argument fails.

III. The Government's Motion to Compel Compliance With The NSL Request For Information Is Not "Premature."

Perhaps aware that the government's Motion to Compel Compliance With NSL Request for Information is well grounded in governing law and should be granted, petitioner would prefer the Court not consider it. Thus, [redacted] argues the motion to compel is "premature" because "the Court has not yet ruled on [redacted] properly filed Petition for relief." Petitioner's Mem. at 24. This argument is meritless; indeed, it makes good sense and serves judicial economy for the

Court to consider the government's motion to compel compliance with the information request as it consider's [redacted] petition to set aside the NSL since they raise closely related issues.

It is undisputed that petitioner has not provided the government with the limited [redacted] 2011 NSL. While petitioner is exercising its statutory right to challenge the NSL, it is nonetheless true that it has not complied with the NSL request for information. And Congress has provided by law that, "[i]n the case of a failure to comply with a request for" information by an NSL pursuant to, *inter alia*, 18 U.S.C. § 2709(b), "the Attorney General may invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request. The court may issue an order requiring the person or entity to comply with the request." 18 U.S.C. § 3511(c). Petitioner has pointed to nothing in the text or structure of the statute (indeed, there is nothing) to indicate that the government is forbidden from seeking the aid of a district court to compel compliance with an NSL's information request while the recipient has also sought review of the NSL, as the statute authorizes it to do.

Petitioner asserts that proceeding with the government's motion to compel compliance with the NSL information request here is "as improper as a civil litigant filing a motion to compel production of discovery while the discovery recipient has a motion pending for a protective order." Petitioner's Mem. at 24. This statement is accurate, although petitioner's intended meaning is flatly wrong: there is nothing "improper" with the timing of the government's motion just as there is nothing improper with a civil litigant filing, and a district court considering, a motion to compel discovery while the court also resolves a related motion for protective order. Indeed, this happens all the time. *E.g.*, *Kilopass Technology, Inc. v. Sidense Corp.*, No. C 10-2066 SI, 2011 WL 2470493 (N.D. Cal. June 21, 2011) (resolving together related motions to compel discovery from one third-party and for a protective order against third-party discovery); *Affinity Labs of Texas v. Apple, Inc.*, No. C 09-4436 CW JL, 2011

WL 1753982 (N.D. Cal. May 9, 2011) (resolving together motion for protective order and related motion to compel).[5]

It bears noting that resolution of [redacted] petition to set aside the NSL in the government's favor will not afford the government the same relief as the government seeks in its own motion: an order by the Court compelling compliance with the NSL information request. [redacted] states that, "should the Court deny [redacted] Petition, the company will either comply with the NSL or exercise other appropriate statutory remedies." Petitioner's Mem. at 25. These "other appropriate statutory remedies" are not specified, but at a minimum they presumably include petitioner taking up to 60 days to consider whether to appeal, as is petitioner's right, and then filing such an appeal without any relief for the government in place. Should the Court grant the government's motion to compel compliance with the NSL information request, however, the government would have the benefit of the Court's Order requiring prompt compliance with an information request made in order to further an ongoing, authorized national security investigation. While petitioner would, of course, be entitled to seek a stay of the Court's order pending appeal, it would at least need to establish its entitlement to such a stay.

Moreover, considering the now-fully-briefed motion to compel compliance with the NSL information request hardly prejudices [redacted] petition for review; it merely permits the Court to consider all issues properly before it at once. The Court should do just that.

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[5]Petitioner relies on Fed. R. Civ. P. 37(d)(2), which is titled "Unacceptable Excuse for Failing to Act" and provides that a failure to respond to discovery "is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." This rule does not prohibit a discovery proponent from moving to compel, nor does it prevent a court from resolving a motion to compel with a motion for protective order; rather, it is intended "to make clear that a party may not properly remain completely silent even when he regards a [request] . . . as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order." Fed. R. Civ. P. 37(d), 1970 Adv. Cmte. Notes.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the government's opening memorandum, the Court should grant the government's motion and compel [redacted] to respond to the information request in the [redacted] 2011 NSL.

Dated: September 22, 2011

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