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

13 UNDER SEAL,

) CIV. NIO. 13-1165

) FILED UNDER SEAL
) PURSUANT TO
) 18 U.S.C. § 3511 (d)

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

IN RE NATIONAL SECURITY
LETTER

CIV. NO. 13-1165

FILED UNDER SEAL
PURSUANT TO
18 U.S.C. § 3511(d)

**CROSS-PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF TWO
NATIONAL SECURITY LETTERS PURSUANT TO 18 U.S.C. § 3511**

Respondent and cross-petitioner Eric Holder, the Attorney General of the United States of America, by his undersigned attorneys, brings this cross-petition for judicial review to enforce compliance with two National Security Letters, including compliance with the National Security Letters' information requests and nondisclosure provisions, and states as follows:

INTRODUCTION

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

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

2. As part of ongoing, authorized national security investigations by the Federal Bureau of Investigation ("FBI"), on [REDACTED] 2013, the FBI served petitioner and cross-respondent [REDACTED] ("petitioner"), with two National Security Letters ("NSLs") dated [REDACTED] 2012, as authorized by statute, 18 U.S.C. § 2709, seeking limited and specific information necessary to the investigations. Authorized FBI officials certified to petitioner that disclosure of the fact or contents of the NSLs sent to petitioner may, *inter alia*, endanger national security. Moreover, disclosure of the fact or contents of the NSL is prohibited by statute, 18 U.S.C. § 2709.

3. Petitioner has not provided the FBI with the information requested in the NSLs, which includes the names, addresses, and electronic communications transactional records associated with particular users of petitioner's Internet traffic services. On or about [REDACTED] 2013, petitioner informed the FBI that its corporate policy is "to notify users of requests for their information prior to disclosure unless we are prohibited from doing so by statute or court order[.]" Therefore, pursuant to petitioner's corporate policy, it wishes to inform the relevant users of the fact and contents of the NSLs. As an authorized FBI official has certified pursuant to law, 18 U.S.C. § 2709(c), disclosure of the fact or contents of the NSLs may, *inter alia*, endanger the national security of the United States. Moreover, petitioner has not provided the requested information to the FBI, and the FBI continues to need the requested information to

further its ongoing, authorized national security investigations. For those reasons, the Attorney General brings this cross-petition to protect the national security and enforce the law. This Court should enter an Order declaring that the petitioner is bound by, and requiring petitioner's compliance with, 18 U.S.C. § 2709 and the NSLs, including the nondisclosure requirements and requests for information.

JURISDICTION AND VENUE

4. The Court has jurisdiction pursuant to 18 U.S.C. § 3511(c), which provides that, when the recipient of an NSL "fail[s] to comply with [the] request for records, a report, or other information," 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 NSL requests here included notification and imposition of the nondisclosure requirement. *Accord* 18 U.S.C. § 2709(c)(2) (among other things, an NSL "notif[ies] the person or entity to whom the request is directed of the nondisclosure requirement."). Under section 3511(c), this Court "may issue an order requiring the person or entity to comply with the request," including its nondisclosure requirement, and failure to obey the order of the court may be punished as contempt. *Id.* The Court also has jurisdiction under 28 U.S.C. § 1345.

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

PARTIES

6. Respondent and cross-petitioner is the Attorney General of the United States. The Attorney General is the nation's chief law enforcement officer and the head of the United States Department of Justice, an Executive Agency of the United States of America. The Federal Bureau of Investigation ("FBI") is a law enforcement agency within the Department of Justice.

7. Petitioner and cross-respondent [REDACTED] ("petitioner") is a corporation organized and existing under the laws of Delaware with headquarters at [REDACTED]

[REDACTED] As a [REDACTED]

[REDACTED] petitioner offers electronic communication services to its customers.

STATUTORY BACKGROUND

8. Title 18 U.S.C. § 2709 authorizes the FBI to issue NSLs in connection with foreign counterintelligence and counterterrorism investigations. The FBI has similar authority to issue NSLs under the National Security Act of 1947, the Fair Credit Reporting Act, and the Right to Financial Privacy Act. *See* 12 U.S.C. §§ 3414(a)(1) and 3414(a)(5); 15 U.S.C. § 1681u, 1681v; 50 U.S.C. § 436.

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

10. To protect the secrecy of counterintelligence and counterterrorism investigations, § 2709(c) permits the placement of a nondisclosure obligation on an NSL recipient. Section 2709(c) prohibits disclosure when a designated FBI official certifies, prior to the issuance of the NSL, that “otherwise there may result 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 any person.” *Id.* § 2709(c)(1). When such a certification is made, the NSL itself notifies the recipient of the nondisclosure requirement. *Id.* § 2709(c)(2).

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

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

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

14. Section 3511(c) authorizes the government to petition a district court for enforcement of an NSL. Section 3511(c) provides that, when the recipient of an NSL “fail[s] to comply with [the] request for records, a report, or other information,” 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.” Where a designated official has certified the need for nondisclosure pursuant to 18 U.S.C. § 2709(c), the NSL “request” includes notification and imposition of the nondisclosure requirement. *Id.* § 2709(c)(2). Pursuant to 18 U.S.C. § 3511(c), a court “may issue an order requiring the person or entity to comply with the request,” including its nondisclosure requirement, and failure to obey the order of the court may be punished as contempt. *Id.*

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

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

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

inter alia, “[y]ou also have the right to challenge the nondisclosure requirement. . . . If you wish to make a disclosure that is prohibited by the nondisclosure requirement, you must notify the FBI, in writing, of your desire to do so within 10 calendar days of receipt of this letter.” Such NSLs have provided an appropriate address or fax number where such objection may be sent, and stated “[i]f you send notice within 10 calendar days, the FBI will initiate judicial proceedings in approximately 30 days in order to demonstrate to a federal judge the need for nondisclosure and to obtain a judicial order requiring continued nondisclosure.”

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

STATEMENT OF THE CLAIM

I. Petitioner and Electronic Communication Services

[REDACTED]

20. The various communications services that petitioner provides to its users and customers are “electronic communications services” as that term is defined in 18 U.S.C. § 2510(15). Petitioner is the provider of this electronic communications service.

II. FBI’s Investigations

A. FBI’s [REDACTED] Field Office Investigation

21. During the course of an ongoing, authorized national security investigation carried on primarily by agents of the FBI’s [REDACTED] Field Office, the FBI obtained information that led it to conclude that the subject of the investigation [REDACTED]

the facilitation of terrorism activities. [REDACTED]

[REDACTED]

22. Pursuant to 18 U.S.C. § 2709, on [REDACTED] 2013, the FBI served petitioner with an NSL dated [REDACTED] 2012, requesting the names, addresses, and length of service and electronic communications transactional records, to include existing transaction/activity logs and all e-mail header information, for the customer of petitioner in question. (“The [REDACTED] Field Office NSL”)

23. The [REDACTED] Field Office NSL served on petitioner was issued and certified by the Special Agent in Charge of the [REDACTED] Field Office under the authority of 18 U.S.C. § 2709. Pursuant to 18 U.S.C. § 2709(b), the FBI certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. The NSL information request was limited to transactional records related to the relevant customer account. Pursuant to § 2709(c), the Special Agent in Charge certified in the NSL that disclosure of the NSL’s contents could 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. Therefore, the [REDACTED] Field Office NSL informed petitioner that petitioner is prohibited from disclosing the contents of the NSL, other than to an attorney to obtain relevant legal assistance or to those to whom disclosure is necessary to comply with the NSL. The letter also notified petitioner that it had a right to challenge the letter pursuant to 18 U.S.C. § 3511(a) and (b) if compliance would be unreasonable, oppressive, or otherwise illegal.

24. The [REDACTED] Field Office NSL further advised that, if petitioner informed the FBI within 10 days that petitioner desired to challenge the nondisclosure provision, the FBI would seek judicial review of the NSL within approximately 30 days.

B. The [REDACTED] Division Investigation

25. During an ongoing, authorized national security investigation carried on by the FBI’s [REDACTED] Division into [REDACTED]

[REDACTED]

26. As part of its ongoing investigative efforts, the FBI issued an NSL pursuant to 18 U.S.C. § 2709 to petitioner dated [REDACTED] 2012, and served on petitioner on [REDACTED] 2013. (“The [REDACTED] Division NSL”) The [REDACTED] Division NSL requested the names, addresses, length of service, and electronic communication transactional records for certain specified IP addresses and a domain name related to FBI’s ongoing investigation.

27. The [REDACTED] Division NSL was issued and the need for nondisclosure appropriately certified by the Special Agent in Charge of the [REDACTED] Division pursuant to 18 U.S.C. § 2709. In accordance with 18 U.S.C. § 2709(b), the FBI certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.

28. The [REDACTED] Division NSL informed petitioner of the prohibition against disclosing the fact that the FBI had sought the information requested in the NSL, certifying, in accordance with 18 U.S.C. § 2709(c), that such disclosure could “endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of a person.”

29. The [REDACTED] Division NSL notified petitioner that, in accordance with 18 U.S.C. § 3511(a) and (b), petitioner had a right to challenge the letter if compliance would be unreasonable, oppressive, or otherwise illegal.

30. The [REDACTED] Division NSL also advised petitioner that if it notified the FBI within 10 days that it desired to challenge the nondisclosure provision, the FBI would seek judicial review of the [REDACTED] Division NSL within approximately 30 days.

III. Petitioner’s Objections to Compliance with 18 U.S.C. § 2709(c)

31. In a letter sent via facsimile to the General Counsel of the FBI on [REDACTED] 2013, but dated [REDACTED] 2013, petitioner advised that it received the [REDACTED] Field Office NSL

on [REDACTED] 2013, and that it was “challenging the nondisclosure requirement for disclosure of customer information” requested in the [REDACTED] Field Office NSL.

32. In a separate letter sent by facsimile to the FBI’s [REDACTED] Division on [REDACTED] 2013, petitioner advised that it “is challenging the nondisclosure requirement for disclosure of customer information requested” in the [REDACTED] Division NSL.

33. To date, petitioner has not provided the FBI with the information requested in the [REDACTED] Division NSL or the [REDACTED] Field Office NSL. The FBI continues to need that information to further its ongoing, authorized national security investigations.

34. It remains the case today, as a designated FBI official has certified pursuant to 18 U.S.C. § 2709, that disclosure of the fact that the FBI has sought or obtained access to the information sought by the NSLs to petitioner may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of a person. *Accord* 18 U.S.C. § 2709(c)(1).

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

36. Petitioner has stated its objection, absent a court order, to compliance with the nondisclosure requirements of two NSLs lawfully issued pursuant to 18 U.S.C. § 2709.

37. Petitioner’s failure to comply with the lawfully issued NSLs, including their information requests and nondisclosure requirements, would violate federal law, 18 U.S.C. § 2709.

38. Petitioner’s failure to comply with the lawfully issued NSLs, including their information requests and nondisclosure requirements, would interfere with the United States’ vindication of its sovereign interests in law enforcement, counterintelligence, and protecting national security.

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

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

RELIEF REQUESTED

WHEREFORE, the Attorney General of the United States 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] Field Office and [REDACTED] Division NSLs to petitioner, including the requirements that petitioner provide the requested information to the FBI and the nondisclosure provisions of 18 U.S.C. § 2709(c) and the NSLs.

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 the information requested in the [redacted] Field Office NSL and the [redacted] Division NSL to the FBI.

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

Dated: March 26, 2013

Respectfully submitted,

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