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14 Attorneys for Petitioner

15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 ) Case No. 13-cv-80089 SI  
19 ) Related to Case No. 11-cv-2173 SI  
20 ) **NOTICE OF MOTION AND MOTION TO**  
21 ) **STAY PROCEEDINGS; MEMORANDUM**  
22 ) **OF POINTS AND AUTHORITIES IN**  
23 ) **SUPPORT THEREOF; AND [PROPOSED]**  
24 ) **ORDER**  
25 ) **FILED UNDER SEAL**  
26 ) [F.R.C.P. 7(b)]  
27 ) Judge: Hon. Susan Illston  
28 ) Place: Courtroom 10, 19th Floor  
Date: August 2, 2013  
Time: 9:00 a.m.

IN RE MATTER OF NATIONAL SECURITY )  
LETTERS )

1 TO RESPONDENT AND ITS ATTORNEYS OF RECORD:


2 PLEASE TAKE NOTICE that on August 2, 2013, at 9:00 am, or as soon thereafter as  
3 counsel may be heard in the Courtroom of the Honorable Susan Illston, located at 450 Golden Gate  
4 Avenue, San Francisco, California, Petitioner [REDACTED]

5 [REDACTED] will and hereby do move this Court, pursuant to Federal Rule of  
6 Civil Procedure 7(b), for an order staying all proceedings in the above-captioned action pending  
7 the resolution of the government's appeal of this Court's decision in the related case of *In re Nat'l*  
8 *Sec. Letter*, No. 11-cv-2173 SI, 2013 WL 1095417 (N.D. Cal. Mar. 14, 2013), not only finding the  
9 relevant portions of the national security letter statutes at issue in this case unconstitutional on their  
10 face – 18 U.S.C. §§ 2709 and 3511 – but also doing so in the context of a petition brought by  
11 [REDACTED] itself. This Motion is made on the grounds that this litigation is unduly burdensome on  
12 both [REDACTED] and the Court as the resolution of the government's appeal of this Court's *In re Nat'l*  
13 *Sec. Letter* order will control the outcome of the petitions here, and any order from this Court may  
14 promptly be rendered obsolete. This Motion is based on this Notice of Motion and Motion, the  
15 accompanying Memorandum of Points and Authorities, the pleadings and papers filed in this  
16 action, and on such other evidence as may be presented prior to and at the hearing on this Motion

17 Respectfully submitted,

18 DATED: May 24, 2013

ELECTRONIC FRONTIER FOUNDATION

19  
20 By:   
Matthew Zimmerman

21 CINDY A. COHN  
22 LEE TIEN  
23 MATTHEW ZIMMERMAN  
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28 *Attorneys for Petitioner*

1 Pursuant to Federal Rule of Civil Procedure 7(b), Petitioner [REDACTED]  
2 [REDACTED] (“Petitioner” or [REDACTED] respectfully  
3 moves for a stay of proceedings of the above-captioned matter. Related case No. 11-cv-2173 SI –  
4 between precisely the same parties, addressing the same challenge to the same statutory authority  
5 (18 U.S.C. §§ 2709 and 3511) – was resolved in [REDACTED] favor on March 14, 2013, and that  
6 order has now been appealed by the government to the Ninth Circuit. *See Under Seal v. Holder*,  
7 No. 13-15957 (9th Cir.). As the resolution of the government’s appeal – addressing the  
8 constitutionality of national security letter statutes, a matter of matter of first impression in this  
9 circuit – will control the outcome of this case, Petitioner asks that this identical challenge to the  
10 constitutionality of the NSL statute be stayed pending that appeal.

11 **I. Background**

12 On or around [REDACTED] 2011, [REDACTED] received a national security letter (NSL) from the FBI.  
13 Invoking 18 U.S.C. § 2709, the NSL instructed [REDACTED] to provide certain subscriber records to the  
14 FBI and included a nondisclosure requirement preventing it from discussing the matter publicly.  
15 Pursuant to 18 U.S.C. § 3511, on May 2, 2011, [REDACTED] filed a petition to set aside the NSL on  
16 First Amendment and separation of powers grounds. *See* Petition, *In re National Security Letter*,  
17 No. 11-cv-2173 SI (N.D. Cal. May 2, 2011) (“*In re NSL*”). On March 14, 2013, this Court granted  
18 [REDACTED] Petition and set aside the NSL, declaring the statute to be unconstitutional. *See In re*  
19 *Nat’l Sec. Letter*, No. 11-cv-2173 SI, 2013 WL 1095417 (N.D. Cal. Mar. 14, 2013).

20 On [REDACTED] 2013, [REDACTED]  
21 [REDACTED] Petitioner received two additional national security letters, each again explicitly  
22 invoking section 2709 as the source of its authority for both the NSL itself and the nondisclosure  
23 requirement. The NSLs prohibit Petitioner from disclosing information about them to affected  
24 customers, to most of its employees and staff, to the press, to members of the public, and to  
25 members of Congress. They likewise prohibit Petitioner from engaging in any kind of specific  
26 public criticism about this controversial FBI power, including that it has challenged its legality in  
27 court. On April 23, 2013, [REDACTED] filed a petition in this related case to set aside the [REDACTED]  
28 [REDACTED] NSLs, raising the same constitutional arguments it raised in its prior challenge.

1 Moreover, it argued that due to the doctrine of issue preclusion, the government was barred from  
2 attempting to enforce the same NSL authority against the same recipient since this Court had  
3 already granted its previous request to set aside the statute as unconstitutional. On May 22, 2013,  
4 the government filed a cross-petition, asking this Court to enforce the new NSLs notwithstanding  
5 its prior ruling on the constitutional of the NSL statute.

6 On May 6, 2013 – after [redacted] filed its petition to set aside the [redacted] NSLs – the  
7 government filed its notice of appeal of this Court’s order in the related *In re NSL* case. See Notice  
8 of Appeal, *In re National Security Letter*, No. 11-2173 (N.D. Cal. May 6, 2013); *Under Seal v.*  
9 *Holder*, No. 13-15957 (9th Cir.).

10 The resolution of the government’s appeal of this Court’s ruling in *In re NSL* striking down  
11 the NSL statute as unconstitutional will control this litigation. [redacted] believes that it is an  
12 unnecessary expenditure of the Court’s and the parties’ time and resources to litigate this all-but-  
13 identical challenge to the NSL statute when the Ninth Circuit will shortly provide this and every  
14 other court in this circuit with guidance on this matter of first impression. Accordingly, [redacted]  
15 asks that the Court stay all proceedings in this matter at least until the government has exhausted its  
16 appeal of the order in *In re NSL*.

## 17 **II. Legal Standard and Argument**

18 A district court has the inherent power to stay cases to control its docket and promote  
19 efficient use of judicial resources. See *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936);  
20 *Dependable Highway Express v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007); *Nelson*  
21 *v. Sisto*, 2:06-cv-02809-JCW, 2009 WL 2579194 (E.D. Cal. Aug. 20, 2009). In determining  
22 whether a stay is appropriate pending the resolution of another case, a district court must consider  
23 various competing interests, including: (1) the possible damage which may result from the granting  
24 of a stay; (2) the hardship to the parties if the suit is allowed to go forward; and (3) the orderly  
25 course of justice measured in terms of the simplifying or complicating of issues, proof, and  
26 questions of law which could be expected to result from a stay. *Lockyer v. Mirant Corp.*, 398 F.3d  
27 1098, 1110–09 (9th Cir. 2005), citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).  
28 These factors favor the stay sought by [redacted]

1 In order to promote efficient use of judicial resources, prevent unnecessary briefing, and to  
2 minimize the burden on the parties, the Court should find that staying the above-captioned matter  
3 pending the outcome of the appeal of the *In re NSL* ruling is appropriate. Judicial economy will  
4 certainly be promoted by granting [REDACTED] motion. If this case is stayed, the Court will be  
5 relieved of the unnecessary task of evaluating additional substantive arguments until the appeals  
6 process has reached a final conclusion regarding the constitutionality of 18 U.S.C. §§ 2709 and  
7 3511.

8 There is no need for the Court to further opine on the statute when the resolution of the  
9 appeal of *In re NSL* may render forthcoming decisions moot. No harm will result to the  
10 government and no hardship will accrue if the stay is granted: this Court has already rejected the  
11 government's argument that NSLs issued to [REDACTED] are enforceable. Failure to get a second bite  
12 at the apple does not constitute harm for purposes of evaluation of a stay. Moreover, the interests  
13 of justice weigh in favor of a stay. [REDACTED] having already obtained a favorable court ruling  
14 setting aside the NSL statute should not be forced to invest additional time and resources to re-  
15 litigate issues already on appeal. And indeed, the heart of [REDACTED] NSL challenge rests on the  
16 collateral burdens imposed on it and other NSL recipients by the FBI through its use of NSLs.  
17 Permitting the government to rehash arguments that it has already lost – and appealed – would  
18 allow the government to pressure recipients and discourage them from bringing future valid  
19 challenges. Moreover, if the government's appeal is ultimately successful, the issues raised by the  
20 petitions in this related case will have already been resolved. Until then, however, the government  
21 can and should press its arguments on appeal, not here.

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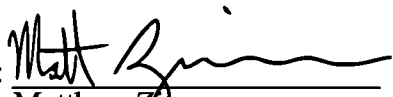
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respectfully asks this Court to stay all proceedings in the above-captioned matter until the resolution of the government's appeal in *Under Seal v. Holder*.

DATED: May 24, 2013

Respectfully submitted,  
ELECTRONIC FRONTIER FOUNDATION

By:   
Matthew Zimmerman

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*Attorneys for Petitioner*

**[PROPOSED] ORDER**

**IT IS HEREBY ORDERED** that the above-captioned action is **STAYED** in its entirety pending the resolution of the government’s appeal in *Under Seal v. Holder*, No. 13-15957 (9th Cir.). The parties shall issue a joint case management statement within 21 days of the resolution of the appeal.

Dated: \_\_\_\_\_

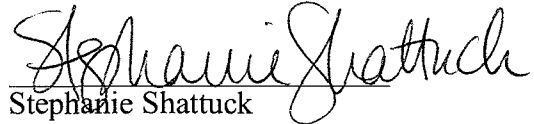
By: \_\_\_\_\_  
Hon. Susan Illston  
United States District Judge

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**CERTIFICATE OF SERVICE**

I, Stephanie Shattuck, certify that on May 24, 2013, pursuant to prior agreement of the parties, I caused the foregoing to be served electronically on the government's counsel, Steven Y. Bressler, Steven.Bressler@usdoj.gov.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 24, 2013, at San Francisco, California.

  
Stephanie Shattuck

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