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14 Attorneys for Defendant

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

21 IN RE MATTER OF NATIONAL SECURITY
22 LETTERS

18) Case No. ~~13~~¹¹-cv-2667 SI
19) Related to Case No. 11-cv-2173 SI
20)
21) **NOTICE OF MOTION AND MOTION TO**
22) **STAY PROCEEDINGS; MEMORANDUM**
23) **OF POINTS AND AUTHORITIES IN**
24) **SUPPORT THEREOF; AND [PROPOSED]**
25) **ORDER**
26) **LODGED UNDER SEAL PURSUANT TO**
27) **THE COURT'S ORDER DATED JULY 8,**
28) **2011**
[F.R.C.P. 7(b)]
Judge: Hon. Susan Illston
Place: Courtroom 10, 19th Floor
Date: August 2, 2013
Time: 9:00 a.m.

1 TO PLAINTIFF 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, Defendant [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 the
7 resolution of the government's appeal of this Court's decision in the related case of *In re Nat'l Sec.*
8 *Letter*, No. 11-cv-2173 SI, 2013 WL 1095417 (N.D. Cal. Mar. 14, 2013), setting aside both the
9 relevant portions of the national security letter statutes at issue in this case – 18 U.S.C. §§ 2709 and
10 3511 – as well as the specific NSL that the government seeks here to enforce. This Motion is made
11 on the grounds that this parallel litigation is duplicative, unnecessary, and unduly burdensome on
12 both [REDACTED] and the Court. This Motion is based on this Notice of Motion and Motion, the
13 accompanying Memorandum of Points and Authorities, the pleadings and papers filed in this
14 action, and on such other evidence as may be presented prior to and at the hearing on this Motion.

15 Respectfully submitted,

16 DATED: May 23, 2013

ELECTRONIC FRONTIER FOUNDATION

17 By: 
18 Matthew Zimmerman

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Attorneys for Defendant

1 Pursuant to Federal Rule of Civil Procedure 7(b), Defendant [REDACTED]
2 [REDACTED] (“Defendant” 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 precisely the same factual and legal issues – was
5 resolved in [REDACTED] favor on March 14, 2013, and that order has now been appealed by the
6 government to the Ninth Circuit. *See Under Seal v. Holder*, No. 13-15957 (9th Cir.). As the
7 resolution of the Government’s appeal – addressing the constitutionality of national security letter
8 statutes, a matter of matter of first impression in this circuit – will control the outcome of this case,
9 Defendant asks that this parallel and duplicative litigation be stayed until that time.

10 **I. Background**

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

19 Shortly after [REDACTED] filed its initial Petition, the government (on June 2, 2011) filed a
20 separate complaint, alleging that [REDACTED] was in violation of federal law, notwithstanding the
21 pending statutorily-authorized petition it filed to set aside the NSL, because it had not yet turned
22 over the underlying information sought in the NSL. The parties subsequently stipulated to stay this
23 above-captioned separate litigation until 21 days after the Court ruled on [REDACTED] Petition in *In*
24 *re NSL*.

25 After this Court’s resolution of *In re NSL* in favor of the Plaintiff, [REDACTED] sought from the
26 government a long-term stipulated stay of this case pending the outcome of the government’s
27 appeal and was able to obtain multiple short stays while the government entertained its options for
28 appeal. The government has now decided that it will not agree to a long-term stay, however,

1 indicating that notwithstanding this Court's ruling that the NSL statute is unconstitutional and the
2 ongoing appeal, [REDACTED] must still turn over the information sought by the FBI in the NSL; that is,
3 the government is now demanding that [REDACTED] comply with an NSL that this Court has already
4 found to be unconstitutional.

5 As [REDACTED] believes that it is unnecessary and unduly burdensome for it to have to rehash
6 its successful arguments in this parallel litigation during the pendency of the government's appeal
7 of the *In re NSL* decision – and an unnecessary expenditure of the Court's time and resources –
8 [REDACTED] asks that the Court stay all proceedings in this matter at least until the government has
9 exhausted its appeal of the order in *In re NSL* that set aside both the NSL statute and the NSL at
10 issue here.

11 **II. Legal Standard and Argument**

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

23 In order to promote efficient use of judicial resources, prevent unnecessary briefing, and to
24 minimize the burden on the parties, the Court should find that staying the above-captioned matter
25 pending the outcome of the appeal of *In re NSL* is appropriate. Judicial economy will certainly be
26 promoted by granting Defendant's motion. If this case is stayed, the Court will be relieved of the
27 unnecessary task of evaluating additional substantive arguments until the appeals process has
28 reached a final conclusion regarding the constitutionality of 18 U.S.C. §§ 2709 and 3511.

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

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

17 DATED: May 23, 2013

ELECTRONIC FRONTIER FOUNDATION

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19 Matthew Zimmerman

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[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

CERTIFICATE OF SERVICE

I, Stephanie Shattuck, certify that on May 23, 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 23, 2013, at San Francisco, California.


Stephanie Shattuck

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