UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN DOE, INC.; JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ERIC HOLDER, Jr., in his official capacity as Attorney General of the United States; ROBERT MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE CAPRONI, in her official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF THIS COURT'S OCTOBER 20, 2009 ORDER

04 Civ. 2614 (VM)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF THIS COURT'S OCTOBER 20, 2009 ORDER

Plaintiffs respectfully submit this reply brief in support of their motion for partial reconsideration of this Court's October 20, 2009 Order. Plaintiffs moved for partial reconsideration on the ground that this Court failed to apply the First Amendment narrow-tailoring requirement to the scope of the NSL gag order – specifically, that it declined to assess, under First Amendment standards, whether the gag order appropriately extends to the contents of the NSL Attachment. In their opening brief plaintiffs explained that this Court has both the authority and the obligation to modify the scope of an NSL gag order to the extent that it suppresses more information than is necessary to serve the government's asserted interest in nondisclosure, Memorandum in Support of Plaintiffs' Motion for Partial Reconsideration ("Pl. Br.") 2-5, and that suppression of the NSL Attachment is not necessary to further the government's asserted interest, *id.* at 5-7. Nothing in the government's opposition undermines

plaintiffs' argument. To the extent that the gag order here extends to the NSL Attachment, the gag order is not narrowly tailored and thus violates the First Amendment.

In its opposition, the government does not contest this Court's authority to modify the scope of the gag order. It merely complains that plaintiffs have pointed only to "familiar principles of First Amendment law" rather than "law that governs this particular situation" to support the Court's authority to enforce the narrow-tailoring requirement. Memorandum in Opposition to Plaintiffs' Motion for Partial Reconsideration ("Govt. Br.") 3. As an initial matter, the government is wrong to suggest that well-established First Amendment principles do not govern this case in general and suppression of the Attachment in particular. Although NSL nondisclosure orders are obviously a particular brand of government-imposed gag orders, traditional First Amendment principles do not evaporate in this context. Indeed, the constitutional standard the Second Circuit embraced for judicial review of NSL gag orders derives entirely from "familiar principles" of First Amendment law.

More importantly, however, the government's characterization of plaintiffs' argument is inaccurate. Plaintiffs have established that the Court's authority (and obligation) to ensure that NSL gag orders are no broader than necessary to further the government's interest in nondisclosure is grounded not only in general First Amendment law but in NSL-specific law as well. The Second Circuit's ruling makes clear that the Court has the authority to enforce the narrow-tailoring requirement with respect to the scope of NSL gag orders, Pl. Br. 3, the NSL statute itself grants the Court explicit authority to modify the scope of an NSL gag order, Pl. Br. 3-4, and the only other court to have addressed the constitutionality of a specific NSL gag order modified the scope of that gag order because it was not narrowly tailored, Pl. Br. 3.

Not only does the government concede the Court's authority to modify the scope of the gag order here, the government makes no effort whatsoever to defend suppression of the Attachment on the merits. The government does not argue that suppression of the Attachment furthers the interests it has invoked to justify the need for the remainder of the gag order. This is unsurprising given that disclosure of the Attachment – a generic list of the types of records an NSL recipient might consider to be an "electronic communication transactional record" – does not even remotely implicate the harms the government has identified: the risk of tipping off the target or other individuals that they are under investigation. Pl. Br. 6. Disclosure of the Attachment reveals nothing about the target or subjects of any investigation, it reveals nothing about Doe's identity, and it reveals nothing about any active investigation. Pl. Br. 6-7. Indeed, the government essentially concedes that suppression of the Attachment does not further the interests it has articulated; rather than relying on its existing declaration in support of the gag order, it requests a future opportunity to defend suppression of the Attachment. It is clear that the government has articulated no basis whatsoever for continued suppression of the Attachment. Thus, this Court must modify the gag order appropriately.[1]

The only rationale for the continued suppression of the NSL Attachment that the government has even arguably articulated is the conclusory assertion that because Doe's identity cannot be revealed, the Attachment must be suppressed as well. But this is no rationale at all. The Court found that continued suppression of Doe's identity was justified because disclosure of this piece of information might tip off the target or others that they are under investigation. But, again, disclosure of the Attachment would not reveal Doe's identity and would not tip off the

[1] The Court should reject the government's request for a future opportunity to justify the continued suppression of the Attachment. Gov't Br. 4 n.1. The government has now had two opportunities to do so; twice it has failed to provide any justification for this aspect of the gag order. The government is not entitled to a third bite at the apple.

target or anyone else about any investigation. Moreover, the mere fact that Doe's identity is secret has never prevented disclosure of many other aspects of the NSL at issue here. Pl. Br. 4. In other words, the gag has not been categorically and automatically applied to all details about the NSL or this litigation merely because Doe's identity cannot be revealed.

Finally, the government suggests that plaintiffs' challenge to suppression of the NSL Attachment is "belated." Govt. Br. 4. This argument is puzzling. This remand proceeding is the first (and only) time the Court has been confronted with the question whether the specific gag order imposed on Doe and Doe's counsel is constitutional. In other words, this is the first (and only) opportunity plaintiffs have had to focus upon the scope of the gag order under the First Amendment. Previous stages of this litigation related to the constitutionality of the statute. Thus, plaintiffs' challenge to the suppression of the Attachment is by no means "belated."

Nonetheless, the government suggests that plaintiffs' argument is somehow foreclosed by a redaction dispute that occurred five years ago. Govt. Br. 4. This is a red herring. Up to this point in the litigation, redaction and sealing disputes have been based on a presumption that the gag order here was constitutional. *See Doe v. Ashcroft*, 317 F. Supp. 2d 488, 491 (S.D.N.Y. 2004) ("For now . . . the Court must presume that the statute [and the NSL gag order] is constitutional."). The very purpose of the remand proceeding is to test that presumption and to resolve the constitutionality of the gag order – including the gag order's proper scope. Accordingly, a redaction dispute in 2004 has no bearing on the constitutionality of the suppression of the Attachment now that the Court is assessing the actual validity of the gag order.[2]

[2] Suppression of the Attachment violates the First Amendment because it results from a gag order that is overbroad in scope. In other words, the gag order itself is insufficiently tailored to the government's asserted interests in nondisclosure to the extent that it encompasses the Attachment. Suppression of the Attachment, however, is unconstitutional for an additional and independent reason.

CONCLUSION

For the reasons stated above and in plaintiffs' opening brief, plaintiffs respectfully ask that the Court reconsider its October 20, 2009 ruling to the extent that it permitted the continued suppression of the NSL Attachment.

Respectfully submitted,

MELISSA GOODMAN (MG-7844)
JAMEEL JAFFER (JJ-4653)
LAURENCE M. SCHWARTZTOL (LS-1978)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004

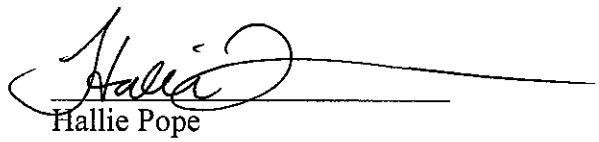
December 1, 2009

The Attachment is a partially sealed document filed on the Court's docket but it no longer meets the First Amendment standard for sealing of court records. Sealing orders must be narrowly tailored to serve the government's interests but suppression of the Attachment is not necessary to further the government's asserted interests here. Pl. Br. 5 n. 2 & 4. Regardless whether suppression of the Attachment is evaluated under First Amendment law pertaining to the scope of gag orders or First Amendment law pertaining to the scope of sealing orders the result is the same.

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009 I delivered by hand true and correct copies of the foregoing: Reply Memorandum in Support of Plaintiffs' Motion for Partial Reconsideration of this Court's October 20, 2009 Order, to:

Jeffrey S. Oestericher
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007



Hallie Pope