

1 BRUCE I. AFRAN
2 CARL J. MAYER
3 STEVEN E. SCHWARZ

4 Attorneys for the Plaintiffs

5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
7 SAN FRANCISCO DIVISION

8 IN RE NATIONAL SECURITY
9 AGENCY TELECOMMUNICATIONS
10 RECORDS LITIGATION

MDL Docket No. 06-1791 (VRW)

PLAINTIFFS' SUPPLEMENTAL BRIEF IN
OPPOSITION TO MOTIONS TO DISMISS
OF CARRIER AND GOVERNMENT
DEFENDANTS.

11 This Document Relates To:

Chief Judge Vaughn R. Walker

12 *McMurray, et al. v. Verizon Comm., Inc.,*
13 *et al.*, No. 09-cv-00131-VRW
14 (*“McMurray II”*).

INTRODUCTION AND BACKGROUND

1 On July 10, 2008, the undersigned attorneys filed the above-captioned action¹ in the
2 United States District Court for the Southern District of New York.

3 On September 19, 2008, the Government Defendants moved to dismiss all claims against
4 telecommunications company defendants before the Court at that time in MDL-1791 and
5 submitted public and classified versions of the certification of the United States Attorney
6 General required under § 802 of the FAA. (Doc # 469, 469-3 at 2, 470.) In his public
7 certification, the Attorney General certified “that the claims asserted in the civil actions *pending*
8 *in these consolidated proceedings* against the electronic communication service provider-
9 defendants fall within at least one provision (of the Act).” (Doc § 469-3 at 7, ¶10, emphasis
10 added.) At that time, the above-captioned-action was not pending in MDL-1791 and thus was
11 not one of the cases covered by the certification of the Attorney General or the motion to dismiss
12 of the Government Defendants.

13 On December 19, 2008, the Judicial Panel on Multidistrict Litigation transferred the
14 above-captioned case to this Court for inclusion in MDL-1791.

15 On January 13, 2009, the above-captioned action was docketed in this Court and given a
16 separate civil action number for these proceedings.

17 On February 19, 2009, the Court denied an administrative motion by the Government
18 Defendants to treat the above-captioned action as subject to dismissal under the Government’s
19 Motion to Dismiss. (McMurray Doc # 8).

20 On June 3, 2009, the Court granted the Government’s Motion to Dismiss with respect to
21 those cases covered by the Government’s motion and the certification of the Attorney General.
22 On that same date, the Court “invite(d) the parties to simultaneous submission of memoranda re
23 the Court’s order in section 802 cases filed today” (Doc # 641.)

ARGUMENT

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27 ¹ *McMurray II* is not to be confused with *McMurray I* (07-cv-02029-VRW) which was dismissed
28 without prejudice by the Court on June 3, 2009 and regarding which the undersigned filed a
motion for leave to file motion for reconsideration on June 17, 2009. (Doc # 648.)

1 The June 3, 2009 Order granting dismissal without prejudice of those cases covered by
2 the Government's motion to dismiss and the certification of the Attorney General has no effect
3 on the above-captioned action because the Attorney General has not certified that it is a "covered
4 action" under § 802 of the FAA. Because no certification has been submitted, the FAA's
5 immunity provision simply does not cover the above-captioned action as the required official has
6 not certified that he examined the case and that it falls within the limited scope of §802 of the
7 Act.

8 Submitting such a certification is not a *pro forma* exercise, as counsel for the
9 Government has represented to the Court that the Attorney General must carefully consider each
10 case and that the process of obtaining a certification is a serious and time-consuming affair. The
11 Government has had nearly a year to obtain and submit such a certification and has elected not to
12 do so. Indeed, one would be hard pressed to imagine that such a certification could be made in
13 good faith when the above-captioned action does not allege any wrongdoing by
14 telecommunications providers during the period between September 11, 2001 and January 17,
15 2007.

16 Instead, the above-captioned action is purely a facial challenge to the legality of the FAA
17 itself. *McMurray II* is more similar to the pending "uncovered" actions of *Jewel, et al. v.*
18 *National Security Agency, et al.*² (Case No. 08-cv-4373-VRW) and *Amnesty International USA,*
19 *et al. v. McConnell, et al*³. (S.D.N.Y. Case No. 08-cv-6259-JGK), both of which, like the above-
20 captioned action, were filed following the enactment into law of the FAA. In neither case has
21 the Government obtained and submitted a § 802 certification similar to the one submitted on
22 September 19, 2008. (Doc # 469, 470.).

23 When the Court found that the constitutional challenges raised by the MDL plaintiffs in
24 defense to the Government's Motion to Dismiss "must be rejected" (Order at 2), the Court was

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26 ² Oral argument on Defendants' Motion to Dismiss and for Summary Judgment scheduled for
July 15, 2009.

27 ³ Oral argument on the parties' Cross-Motions for Summary Judgment scheduled for July 10,
28 2009.

1 ruling on a Motion to Dismiss based on the Attorney General's certification and concluded that
2 plaintiffs' constitutional challenges could not overcome the immunity purportedly conferred by
3 the certification. In contrast, the Government's motion to dismiss in the above-captioned action
4 does not carry with it the overwhelming leverage of the certification and immunity it purportedly
5 confers. Instead, the Court must examine the *McMurray II* Plaintiffs' arguments in their proper
6 context, *i.e.*, as defenses to Fed. R. Civ. P. 12 motions that were brought, without *sui generis*
7 certifications or immunity provisions, for lack of standing and failure to state a claim. As these
8 defenses have already been briefed and argued, they will not be repeated here.

9 10 CONCLUSION

11 Because the Attorney General has not submitted the required certification under the FAA
12 with respect to the above-captioned action, the Court's June 3, 2009 Order granting the
13 Government's Motion to Dismiss has no bearing on *McMurray II*. The Court should consider
14 the briefs and argument of the parties in their proper context and deny the motions to dismiss.

15 Dated: June 19, 2009
16 Chicago, Illinois

Respectfully submitted,

17 By: /s/ Steven E. Schwarz

18 Steven E. Schwarz

19 THE LAW OFFICES OF STEVEN E.
20 SCHWARZ, ESQ., LLC
21 Steven E. Schwarz, Esq.
22 2461 W. Foster Ave., #1W
23 Chicago, IL 60625
24 Telephone: (773) 837-6134
25 Facsimile: (773) 837-6134

26 *Attorney for the Plaintiffs*

27 BRUCE I. AFRAN, Esq.
28 10 Braeburn Drive
Princeton, NJ 08540
Telephone: (609) 924-2075

MAYER LAW GROUP, LLC

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CARL J. MAYER
66 Witherspoon Street, Suite 414
Princeton, NJ 08542
Telephone: (609) 921-8025
Facsimile: (609) 921-6964

Attorneys for the Plaintiffs

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CERTIFICATE OF SERVICE

I, Steven E. Schwarz, an attorney, hereby certify that, on this 19th day of June, 2009, I electronically filed and served the foregoing Supplemental Brief in Opposition to Motions to Dismiss of Carrier and Government Defendants using the CM/ECF system which will send via electronic mail copies to all attorneys who are registered users of that system.

By: /s/ Steven E. Schwarz
Steven E. Schwarz