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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12	IN RE NATIONAL SECURITY AGENCY)	MDL Docket No. 06-cv-1791-VRW
13	TELECOMMUNICATIONS RECORDS)	
14	LITIGATION)	UNITED STATES' ADMINISTRATIVE
15	<u>This Document Relates To: <i>McMurray v.</i></u>)	MOTION TO TREAT RECENTLY
16	<u><i>Verizon Comm., Inc.</i>, No. 09-cv-0131-VRW</u>)	TRANSFERRED <i>McMurray</i> ACTION
)	AS SUBJECT TO PENDING
)	DISPOSITIVE MOTION

[CIVIL L.R. 7-11]

Chief Judge Vaughn R. Walker

INTRODUCTION

1
2 On December 19, 2008, the United States Judicial Panel on Multidistrict Litigation
3 (“JPML”) transferred to this Court *McMurray et al. v. Verizon Communications, Inc. et al.*, No.
4 08-cv-6264 (S.D.N.Y), a case in which plaintiffs challenge the constitutionality of Section 802
5 of the Foreign Intelligence Surveillance Act of 1978 (“FISA”), which was enacted in the FISA
6 Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2467, Title II, § 201 (July 10, 2008), *see*
7 50 U.S.C. § 1885a(a) (“FISA Act Amendments of 2008”). As the Court is aware, Section 802 of
8 the FISA provides that actions against electronic communication service providers shall be
9 promptly dismissed if the statutory conditions for dismissal are satisfied upon a certification by
10 the Attorney General of the United States. The Government previously moved to dismiss all
11 actions against electronic communication service providers in this MDL proceeding based on
12 this provision, *see* Dkt. 469, and, in opposition to that motion, the plaintiffs in cases against
13 provider-defendants have challenged Section 802 of the FISA on the ground that it violates the
14 constitution, *see* Dkt. 482. That matter was heard on December 2, 2008, and is presently under
15 submission.

16 The newly transferred *McMurray* action is for all relevant purposes identical to a separate
17 action that was originally transferred to this Court in August 2006—*McMurray et al. v. Verizon*
18 *et al.*, 06-cv-03650 (S.D.N.Y.)—and which is one of the cases to which the Government’s
19 dispositive motion applied. The first *McMurray* action raises claims, *inter alia*, against
20 electronic communication service providers for alleged assistance to the intelligence community.
21 The second *McMurray* action just transferred to this Court purports to challenge the lawfulness
22 of Section 802 of the FISA Act of 2008. That is, the *McMurray* plaintiffs filed a *second*,
23 separate lawsuit in another district court challenging application of Section 802 of the FISA to its
24 *first* lawsuit which was pending before this Court. Accordingly, the Government sought
25 consolidation of this second *McMurray* case to this MDL proceeding where the first *McMurray*
26 action still resides, and the JPML concurred.

1 At this stage of proceedings, the lawfulness of Section 802 of the FISA has been briefed
2 in connection with the Government's pending motion to dismiss or for summary judgment in all
3 actions against electronic communication service providers. The Government's motion was
4 specifically directed at the first *McMurray* action filed in 2006, and the plaintiffs' joint
5 opposition to the Government's motion was submitted on behalf of the plaintiffs in the first
6 *McMurray* case as well. Accordingly, as set forth further below, the second *McMurray* action
7 transferred to this Court should be treated as subject to the Government's motion with respect to
8 claims against electronic communication service providers now under submission.^{1/}

9 FACTUAL BACKGROUND

10 On May 12, 2006, the *McMurray* plaintiffs filed their first lawsuit against Verizon
11 Communications Inc., and Cellco Partnership (collectively, the "Verizon Defendants");
12 BellSouth Corporation, AT&T Corporation, and AT&T Inc. (collectively the "AT&T
13 Defendants); President George Bush, and the National Security Agency (collectively, the
14 "Government Defendants") in the United States District Court for the Southern District of New
15 York. This first lawsuit was designated as civil action 06-cv-3650. On April 11, 2007, the clerk
16 of this Court issued a notice docketing *McMurray* in MDL-1791 and designated that as civil
17 action number 07-cv-02029-VRW (N.D. Cal.). See Dkt. 243.^{2/}

18 After enactment of the FISA Act Amendments of 2008, the United States filed a motion
19 to dismiss or for summary judgment in all actions against electronic communication services

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21 ¹ Counsel for the Government has conferred with counsel for the provider-defendants
22 and the provider-defendants have advised that they agree with the relief sought in this motion.

23 ² The identification of the lead plaintiff in the caption of this lawsuit has changed. When
24 originally filed in the Southern District of New York, civil action 06-cv-3650 was brought by the
25 two attorneys now representing the *McMurray* plaintiffs – Carl Mayer and Bruce Afran – and
26 thus captioned *Mayer et al. v. Verizon Communications Inc., et al.* An amended complaint was
27 later filed in the Southern District listing the *McMurray* plaintiffs, starting with Rev. Joe
28 McMurray. The *McMurray* action (06-cv-3650) was then transferred to this Court by the JPML
and given a separate document number within MDL-1791 (07-cv-02029-VRW) (N.D. Cal.).
This separate MDL docket number lists the *McMurray* plaintiffs alphabetically and, thus, re-
captions the case "*Anderson et al. v. Verizon Communications et al.*" To avoid any further
confusion, we will refer to both the 2006 case as the *McMurray* case.

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1 providers, including the *McMurray* action. See Dkt. 469 (listing among the actions for which
2 dismissal is sought 07-cv-02029-VRW).³ The plaintiffs' opposition to the Government's motion
3 likewise pertained to all actions in this MDL proceeding against electronic communication
4 service providers, including the first *McMurray* action. See Dkt. 482. Indeed, plaintiffs'
5 opposition and reply briefs listed counsel for the *McMurray* plaintiffs. See *id.* at 52; Dkt. 524 at
6 47. Thus, there is no dispute that the first *McMurray* case was subject to the Government's
7 motion to dismiss actions against provider-defendants based on Section 802 of the FISA, and the
8 *McMurray* plaintiffs were subject to briefing on the lawfulness of that provision, which
9 culminated in a hearing on December 2, 2008.

10 On July 10, 2008, the *McMurray* plaintiffs filed a second, separate lawsuit against the
11 same defendants in the United States District Court for the Southern District of New York (Case
12 No. 1:08-6264) (Attachment #1). The complaint in this second lawsuit challenges the lawfulness
13 of Section 802 of the FISA—specifically as it would be applied to the lawsuit the *McMurray*
14 plaintiffs had filed in 2006 and which had been transferred to this Court. See Attachment #2,
15 Compl. ¶ 9. The Government then sought to transfer the second *McMurray* lawsuit filed in 2008
16 for transfer to these multi-district proceedings as a “tag along” case. On August 12, 2008, the
17 JPML issued a Conditional Transfer Order (“CTO-7”) transferring the action to this Court for
18 inclusion in MDL-1791. On September 9, 2008, plaintiffs filed a motion to vacate CTO-7,
19 which the government opposed. The JPML considered plaintiffs' motion without oral argument
20 during its November 20, 2008 sitting and, by Order dated December 19, 2008, transferred
21 *McMurray* to MDL-1791 for “coordinated or consolidated pretrial proceedings occurring there
22 in [that] docket.” Attachment # 2 at 2. In doing so, the JPML recognized that “[w]ith but one
23 exception, plaintiffs in *McMurray* are also plaintiffs in [the earlier *McMurray* action] initially
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25

26 ³ *McMurray* plaintiffs are also listed in master consolidated complaints against the
27 Verizon defendants, see, Dkt. 125, which was also subject to the Government's pending motion,
see Dkt. 469.
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1 centralized in [the Court's] docket in August 2006.” *Id.*⁴ Because the constitutionality of
2 Section 802 of the FISA “is already squarely before” this Court, the JPML found transfer
3 appropriate. *Id.* The second *McMurray* action was docketed in this Court on January 13, 2009
4 and given a separate civil action number for these proceedings (09-cv-0131-VRW). *See* Dkt.
5 541.

6 ARGUMENT

7 After the second *McMurray* case was transferred to this Court, the parties have attempted
8 to confer regarding the appropriate disposition of this action in this MDL proceeding, but have
9 not been able to reach agreement. It is our understanding that the *McMurray* plaintiffs wish to
10 present separate arguments concerning the lawfulness of Section 802 of the FISA, despite the
11 fact that they have already participated in opposition briefing on the Government's motion which
12 is now under submission. The Government's position is that further briefing in connection with
13 the *McMurray* plaintiffs' second lawsuit is not appropriate and that this second action should be
14 subject to the parties' prior briefing on the Government's motion and controlled by the Court's
15 ruling on that now under submission.

16 It is not clear why the *McMurray* plaintiffs filed an entirely new lawsuit in 2008 in
17 another district challenging application of Section 802 to their 2006 lawsuit that was already
18 pending before this Court. Once Section 802 was applied in this proceeding by the Government,
19 the *McMurray* plaintiffs had an opportunity to challenge the lawfulness of that provision—and
20 they did so. The Government's motion expressly was directed at the original *McMurray* action.

21
22 ⁴ One plaintiff in the newly transferred *McMurray* action is not a party to the first suit
23 before this Court—Amidax Trading Corp. *See* Second *McMurray* Complaint (¶ 10). But that
24 plaintiff has no right to re-litigate the lawfulness of Section 802 of the FISA in this case either.
25 Amidax has filed a separate lawsuit currently pending in the Southern District of New York,
26 *Amidax v. SWIFT SCRL*, No. 08-cv-5689 (S.D.N.Y.), in which it seeks money damages and
27 declaratory and injunctive relief in connection with administrative subpoenas issued by the
28 United States Department of Treasury Office of Foreign Assets Control (“OFAC”) to the Society
for Worldwide Interbank Financial Telecommunications (“SWIFT”). The *SWIFT* case is not
before *this* Court, and to the extent the FISA Act of 2008 is even relevant in that case, any
litigation over the matter would properly be considered by the Southern District of New York.
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1 See Dkt. 469 (listing 07-cv-02029 as among actions for which dismissal was sought). Moreover,
2 on October 16, 2008, a joint opposition was filed to the Government's motion on behalf of *all*
3 MDL Plaintiffs in cases against the provider-defendants—including the *McMurray* Plaintiffs.
4 See Dkt. 482.^{5/}

5 The second *McMurray* complaint should thus be controlled by the submitted briefing on
6 the lawfulness and application of Section 802 of the FISA, and there is no reason why the second
7 *McMurray* action should now be permitted to proceed separately from that submitted matter.
8 This is particularly so where the parties have already devoted considerable effort to briefing and
9 argument on the Government's pending motion now under submission. Thus, to the extent the
10 *McMurray* plaintiffs now seek to use their newly filed action to brief a matter already under
11 submission (which we understand is their intent), they should be foreclosed from doing so.^{6/}

12 CONCLUSION

13 For the foregoing reasons, the Court should enter an order submitting the second
14 *McMurray* action (09-cv-0131-VRW) to the already submitted briefing regarding the
15 constitutionality of Section 802 of the FISA in connection with the Government's pending
16 dispositive motion.^{7/}

17 _____
18 ⁵ Indeed, counsel representing the *McMurray* plaintiffs (Carl Mayer, Bruce Afran, and
19 Steven Schwarz) are listed in the plaintiffs' opposition and reply briefs. See Dkt. 482 at 52 and
20 Dkt. 524 at 47. To the extent the *McMurray* plaintiffs now claim they did not join in that
21 briefing, the plaintiffs' joint organization plan approved by the Court provides that where such a
22 coordinated presentation is made, arguments made by coordinating counsel are binding upon all
23 "actions later instituted, add-ons, or actions coordinated or consolidated . . . that involve similar
24 claims." See Dkt. 58 at 7-8 (¶ 3). That the *McMurray* complaint raises a takings claim, see
25 Attachment #1, Count I, does not alter the fact that plaintiffs are bound by the previously
26 submitted briefing; they had every opportunity to present such claim and chose not to do so.

27 ⁶ While the original *McMurray* action includes claims against the Government, the
28 second *McMurray* lawsuit filed in 2008 (09-cv-1131-VRW) concerns *solely* the lawfulness of
Section 802 of the FISA, which relates to claims against the provider-defendants.

⁷ The Government notes that the defendants' obligation to answer or otherwise respond
to the complaint is currently due on March 19, 2009. To the extent that the Court is unable to
rule on this motion before that date, the Government requests that the defendants' obligation to
answer or otherwise respond to the complaint be stayed until the Court rules on this motion.

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Respectfully Submitted,

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