

1 MICHAEL F. HERTZ
Acting Assistant Attorney General
2 DOUGLAS N. LETTER
Terrorism Litigation Counsel
3 JOSEPH H. HUNT
Director, Federal Programs Branch
4 VINCENT M. GARVEY
Deputy Branch Director
5 ANTHONY J. COPPOLINO
Special Litigation Counsel
6 MARCIA BERMAN
Trial Attorney
7 U.S. Department of Justice
Civil Division, Federal Programs Branch
8 20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
9 Phone: (202) 514-4782; Fax: (202) 616-8460

10 *Attorneys for the Government Defendants*

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14	IN RE NATIONAL SECURITY AGENCY)	No. M:06-cv-01791-VRW
15	TELECOMMUNICATIONS RECORDS)	
16	LITIGATION)	GOVERNMENT DEFENDANTS’
17	<u>This Document Relates To:</u>)	SUPPLEMENTAL FILING IN
18	<i>McMurray et al. v. Verizon Comm., Inc. et al.,</i>)	SUPPORT OF MOTION TO DISMISS
19	No. 09-cv-00131-VRW)	Chief Judge Vaughn R. Walker
20)	
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)	

21 **INTRODUCTION**

22 At the hearing on June 3, 2009, in which the Court heard argument on the defendants’
23 respective motions to dismiss this action, the Court directed the parties to submit supplemental
24 briefs of no more than 15 pages that would “very briefly tell the Court what, if any, issues remain
25 in the *McMurray* case that need to be addressed specifically” in light of the Court’s Order of June
26 3, 2009. *See* Dkt. 33; Transcript, 6/3/09 (“Tr.”) at 24; *see also* Dkt. 639 (June 3, 2009 Order). As
27 set forth below, the only remaining issues in this case that were not addressed in the Court’s June

28 **Government Defendants’ Supplemental Filing in Support of Motion to Dismiss**
McMurray et al. v. Verizon Comm. Inc. et al., 09-cv-00131-VRW (MDL 06-cv-01791-VRW)

1 Order are: (i) whether Section 802 of the Foreign Intelligence Surveillance Act (“FISA”), 50
2 U.S.C. § 1885a, takes plaintiffs’ claims; and (ii) whether telecommunication carriers are proper
3 defendants in this case. These issues have been briefed previously by the Government and
4 Carrier Defendants.

5 DISCUSSION

6 The Court’s June 3 Order dismisses all claims against electronic communication service
7 providers pursuant to Section 802 of the FISA. The Court’s Order encompasses and dismisses
8 claims against Carrier Defendants raised in the first *McMurray* action that was transferred to this
9 Court in 2007 and designated Case No. 03:07-cv-02029-VRW. The above-captioned *McMurray*
10 action is a separate action originally filed in 2008 in the Southern District of New York,
11 transferred to this Court in 2009, and designated Case No. 3:09-cv-00131-VRW. This second
12 action challenges Section 802 of the FISA on the grounds that it: (1) violates the Takings Clause
13 by extinguishing the claims raised by Plaintiffs in the first *McMurray* action against electronic
14 communication service providers; (2) violates the Separation of Powers doctrine; and (3) violates
15 the Due Process Clause. *See* Complaint, Dkt. 1, Case No. 3:09-cv-00131. The Court’s June 3
16 Order resolves the latter two claims. *See* Dkt. 639 at 12-20, 34-35.

17 However, the Court’s June 3 Order does not address whether Section 802 of the FISA
18 constitutes a taking of the claims raised by Plaintiffs in the first *McMurray* action against Carrier
19 Defendants. The Government Defendants have briefed the takings issue at length and have no
20 more to add at this time to their prior submissions on the takings issue. *See* Dkts. 583/11 and
21 629/29.^{1/} In addition, the Court’s June 3 Order does not address whether telecommunications
22 carriers are proper defendants in this action, which seeks to declare invalid and enjoin
23 enforcement of a statutory provision invoked by the Government—not the Carrier Defendants.
24 The Carrier Defendants contend that they are not proper defendants in this action. *See* Dkt.
25 588/16 at 6-8.

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27 ¹ The respective docket citations are to the MDL Docket (3:06-01791-VRW) and to the
28 docket in this action (3:09-00131-VRW).

1 At the June 3, 2009 hearing, counsel for Plaintiffs argued that Section 802 effects a taking
2 of property without compensation because it allegedly abrogates breach of contract claims that
3 Plaintiffs believe they could assert. *See* Tr. at 17-23. Plaintiffs conceded, however, that the
4 second *McMurray* complaint makes no such allegation and, thus, that Plaintiffs would need to
5 amend their existing complaint to raise such a claim. *See* Tr. at 19.^{2/} Because the Court
6 specifically directed that this supplemental filing address only matters raised in the pleadings, *see*
7 Tr. at 25 (“[I]f it’s not in the pleadings, it’s not before us”), the Government has not
8 addressed that issue in this submission. If, notwithstanding the Court’s instructions, Plaintiffs
9 address this issue in their supplemental filing, the Government respectfully requests that the Court
10 disregard that portion of Plaintiffs’ filing and dismiss the above-captioned action. If Plaintiffs
11 seek to amend the complaint in this action to raise such a claim, the Government Defendants
12 would respond separately.

13 CONCLUSION

14 For the foregoing reasons, and those raised by the Government and Carrier Defendants in
15 their previous filings, the Court should now dismiss the second *McMurray* complaint challenging
16 Section 802 of the FISA (*see* Dkt. 1 Attach. #2 in 09-cv-00131-VRW).

17 June 19, 2009

Respectfully Submitted,

18 MICHAEL F. HERTZ
Acting Assistant Attorney General

19 DOUGLAS N. LETTER
Terrorism Litigation Counsel

20 JOSEPH H. HUNT
Director, Federal Programs Branch

21 VINCENT M. GARVEY
Deputy Branch Director

22 *s/ Anthony J. Coppolino*
23 ANTHONY J. COPPOLINO
Special Litigation Counsel

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26 ² In addition, the underlying first *McMurray* action (07-cv-02029-VRW), which raises
27 the damages claims that Plaintiffs contend are unconstitutionally taken by Section 802, does not
assert breach of contract claims.

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s/ Marcia Berman
MARCIA BERMAN
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-4782; Fax: (202) 616-8460
Email: tony.coppolino@usdoj.gov

Attorneys for the Government Defendants