

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

LARRY KLAYMAN, <i>et al.</i>)	
)	
Plaintiffs,)	Civil Action No.
)	1:13-cv-00851-RJL
v.)	
)	
BARACK OBAMA, President of the United States, <i>et al.</i>)	
)	
Defendants.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
DISMISS CLAIMS AGAINST THE VERIZON DEFENDANTS, OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT, SUBMITTED BY DEFENDANT
UNITED STATES DEPARTMENT OF JUSTICE PURSUANT TO SECTION 802 OF
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, 50 U.S.C. 1885a(a)**

INTRODUCTION

Defendant United States Department of Justice (“DOJ”) moves to dismiss, or for summary judgment, in connection with Plaintiffs’ claims against Verizon Communications and its Chief Executive Officer, Lowell A. McAdam (collectively “Verizon Defendants”), on the ground that no cause of action may lie or be maintained against these private-party defendants pursuant to Section 802 of the Foreign Intelligence Surveillance Act of 1978 (“FISA”), as amended. *See* 50 U.S.C. § 1885a.

Plaintiffs allege that the Verizon Defendants are liable to them under various statutory and common law theories because these defendants allegedly provided the National Security Agency (“NSA”) with “telephony metadata”—certain information about the routing of telephone calls that does not include the content of the call or identities of the callers—pursuant to orders of the Foreign Intelligence Surveillance Court (“FISA Court”) under authority of Section 215 of the USA PATRIOT Act (the “business records” provision), as codified at 50 U.S.C. § 1861.

Section 802 of the FISA, as amended, *see* 50 U.S.C. § 1885a(a), provides, however, that a civil action “may not lie or be maintained” against any person, including electronic communication service providers, “for providing assistance to an element of the intelligence community, and shall be promptly dismissed if the Attorney General certifies” that one of several possible circumstances exist, including, for example, that the provider did not provide the alleged assistance, *see id.* § 1885a(a)(5), or that the provider assisted the Government subject to an order of the FISC, *see id.* § 1885a(a)(1). The Court shall give effect to such a certification and shall promptly dismiss the action against the person unless the certification is not supported by substantial evidence. 50 U.S.C. § 1885a(a). The Deputy Attorney General is authorized to exercise the authority of the Attorney General under this provision. *See id.* § 1885a(e).

The Deputy Attorney General has made the requisite statutory certification in this case supporting dismissal of the Verizon Defendants. In accordance with the statutory framework, the Deputy Attorney General has submitted the specific basis for his certification for *in camera* and *ex parte* review in order to prevent harm to national security that would attend public disclosure of this information. *See id.* 1885a(c)(1). The particular reasons why the Deputy Attorney General’s certification is classified, and thus why it must be submitted *in camera* and *ex parte*, are also supported by a separate classified declaration of the Acting Deputy Director of the NSA, also submitted solely for *in camera*, *ex parte* review. The Deputy Attorney General’s classified certification and the classified NSA declaration, along with any supplemental materials that may be submitted, comprise a classified supplement to the DOJ motion to dismiss the Verizon Defendants. Public versions of the Deputy Attorney General’s certification and the NSA declaration are attached hereto as exhibits to this motion.

The narrow issue presented by this motion is whether the certification, and any supplemental materials submitted with that certification, reasonably supports the conclusion that

one of the five grounds for dismissal of the Verizon Defendants under Section 802 of the FISA exists in this case. For the reasons set forth below and in the classified supplement to this motion, the Court should find that substantial evidence supports the Deputy Attorney General's certification that dismissal of the Verizon Defendants is required under Section 802 and should therefore promptly dismiss these defendants from this action.

BACKGROUND

A. Procedural Background

On June 6, 2013, Plaintiff Larry Klayman, as well as Plaintiffs Charles and Mary Ann Strange, filed suit against the Government Defendants and Verizon Communications as well as its Chief Executive Officer, Lowell C. McAdam. *See* ECF No. 1. Subsequently, after amending the complaint, Plaintiffs sought and were granted permission to amend the complaint a second time. *See* ECF No. 33; Minute Order (Nov. 23, 2013). Plaintiffs filed their Second Amended Complaint (2nd Am. Compl.) on November 22, 2013. *See* ECF No. 37.

In that complaint, Plaintiffs allege that the Government Defendants have “obtained a top secret court order that directs Verizon to turn over the telephone records of over one hundred million Americans to the NSA,” 2nd Am. Compl. ¶ 25, including those of Plaintiffs, *id.* ¶ 7, and that the collection of these “detailed communication records” continues “on a daily basis.” *Id.* Plaintiffs assert that the Verizon Defendants’ participation in this activity makes them liable to Plaintiffs under the common law tort claims of intentional infliction of emotional distress and intrusion upon seclusion, *see id.* ¶¶ 70-80, and they seek for each cause of action “an award of compensatory and actual damages, punitive damages, equitable relief, reasonable attorneys[’] fees, pre-judgment interest, post-[judgment] interest, costs, and an award in an amount in excess of \$3.0 billion U.S. dollars.” *Id.* ¶¶ 76, 80. Plaintiffs also make statutory claims against the Verizon Defendants for their alleged violation of 18 U.S.C. § 2702, known as the Stored

Communications Act, for which they seek a declaration that the Verizon Defendants violated this statute as well as monetary damages, punitive damages, reasonable attorneys' fees, and litigation costs. *See* 2nd Am. Compl. ¶¶ 86, 88, 93, 95, 100. Finally, Plaintiffs assert that the Verizon Defendants violated the Administrative Procedure Act¹ ("APA") and seek declaratory as well as injunctive relief regarding this alleged violation.

The Verizon Defendants' response to Plaintiffs' Second Amended Complaint is due December 16, 2013. *See* Minute Order (Nov. 23, 2013).

B. Statutory Immunity and Certification Framework

The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 ("FISA Amendments Act of 2008") establishes immunity protections for any person in a civil action in which plaintiffs allege that the person furnished assistance to an element of the Intelligence Community. *See* FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2467, Title II, § 201 (July 10, 2008), codified at 50 U.S.C. § 1885a. Specifically, Section 802 of the FISA, as amended, provides that "a civil action may not lie or be maintained in a Federal or State court against any person² for providing assistance³ to an element of the intelligence community, and

¹ The APA does not extend to suits against private parties such as the Verizon Defendants because it applies only to federal government "agenc[ies]." 5 U.S.C. § 702 (providing right to judicial review to those injured "because of *agency* action" (emphasis added)); *id.* § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *see also Geronimo v. Obama*, 725 F. Supp. 2d 182, 186 (D.D.C. 2010) ("[F]or a claim to arise under the APA, an individual must allege action on the part of an agency[.]"). This is a separate basis for dismissal of this claim.

² The definition of a "person" under the Act includes an "electronic communication service provider," which the Act defines to include a telecommunications carrier as defined in 47 U.S.C. § 153; a provider of electronic communication service as defined in 18 U.S.C. § 2711; "any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored"; a parent, subsidiary, affiliate, successor, or assignee of the foregoing entities; or an officer, employee, or agent thereof. *See* 50 U.S.C. § 1885(6), (8).

shall be dismissed promptly, if the Attorney General certifies to the district court of the United States in which such action is pending” that one of five separate grounds warranting dismissal applies. *See* 50 U.S.C. § 1885a(a).⁴ The Attorney General’s certification also can be made by the Acting Attorney General or the Deputy Attorney General. *See id.* § 1885a(e).

The five separate grounds warranting dismissal are that the person assisted the Government pursuant to an order of the FISA Court, *see id.* § 1885a(a)(1); or the person’s assistance was pursuant to a certification or directive under certain specified statutes, *see id.* § 1885a(a)(2)-(3); or the assistance given by an electronic communication service provider was in connection with an intelligence activity involving communications authorized by the President after the terrorist attacks on September 11, 2001, and ending on January 17, 2007, and was designed to detect or prevent a further terrorist attack on the United States, and was the subject of a written request or directive to that provider indicating that the activity was authorized by the President and had been determined to be lawful, *see id.* § 1885a(a)(4); or the person did not provide the alleged assistance. *Id.* § 1885a(a)(5).

In its review of this certification, the Court may examine any “supplemental materials” submitted by any party. *See id.* § 1885a(b)(2); *see also id.* § 1885a(d). If, in conjunction with his certification, the Attorney General (or his authorized designee) submits any supplemental materials, those may include, and the Court “may examine,” any FISC order directing that the assistance be provided, *see id.* (citing § 1885a(a)(1)), any certification in writing pursuant to

³ “Assistance” is defined to mean “the provision of, or the provision of access to, information (including communication contents, communication records, or other information relating to a customer or communication), facilities, or another form of assistance.” 50 U.S.C. § 1885(1).

⁴ These statutory immunity provisions are applicable to civil actions “pending on or filed after July 10, 2008.” 50 U.S.C. § 1885a(i).

which the person provided assistance, *id.* (citing § 1885a(a)(2)), or any directive or written request seeking assistance, *id.* (citing § 1885a(a)(3), (4)).⁵

The Act establishes special procedures that expressly permit the certification by the Attorney General or his designee to be made *in camera* and *ex parte* upon a declaration under 28 U.S.C. § 1746 attesting that disclosure of the certification, or disclosure of any accompanying supplemental materials, would harm the national security of the United States. *See* 50 U.S.C. § 1885a(c)(1). Upon *in camera* and *ex parte* review of the certification and any supplemental materials, the certification by the Attorney General or his authorized designee “shall be given effect” by the Court unless the Court finds that it “is not supported by substantial evidence,” which may be “provided to the court pursuant to this section.” *Id.* § 1885a(b)(1). The Court’s subsequent, unclassified order must be limited “to a statement as to whether the case [against the private-party defendants] is dismissed and a description of the legal standards that govern the order, without disclosing” which provision of the statute is the “basis for the certification.” *Id.* § 1885a(c)(2).

The foregoing immunity provisions and statutory framework reflect Congress’ fundamental policy judgment that litigation should not proceed against persons (including electronic communication service providers) for assistance they may have furnished (or may, if applicable, continue to furnish) under the authorities set forth in Section 802(a) of the FISA, as amended. The Senate Select Committee on Intelligence (“SSCI”)—the committee that originated legislation that ultimately became the FISA Amendments Act of 2008—concluded

⁵ The Court may also permit the other parties (Plaintiffs and the Verizon Defendants) to submit supplemental materials and otherwise “participate in the briefing or argument . . . but only to the extent that such participation does not require the disclosure of classified information to such party.” *Id.* § 1885a(d).

that “electronic surveillance for . . . intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation’s telecommunication system.”

S. Rep. 110-209 (2007) accompanying S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007, SSCI, at 9 (Exhibit A attached hereto).⁶ The SSCI noted that “there is a strong national interest in addressing the extent to which the burden of litigation over the legality of surveillance should fall on private parties,” *id.* at 8, because, if litigation is allowed to proceed against these private parties, “the private sector might be unwilling to cooperate with lawful Government requests in the future” and the “possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.” *Id.* at 10.

⁶ No formal conference was convened to resolve the differences between the original House and Senate versions of the Act (S. 2248 and H.R. 3773). Instead, following an agreement reached without a formal conference, the House passed a new bill, H.R. 6304, which contains “a complete compromise of the differences between the House and Senate versions.” 154 Cong. Rec. S6097, 6129 (daily ed. June 25, 2008) (Section-by-Section Analysis and Explanation of H.R. 6304, the FISA Amendments Act of 2008). H.R. 6304 is a “direct descendant” of the original House (H.R. 3773) and Senate (S. 2248) bills and so the “legislative history of those measures constitutes the legislative history of H.R. 6304.” *Id.* That Section-by-Section Analysis is attached as Exhibit B hereto. This section by section analysis was prepared and submitted by Senator Rockefeller, as SSCI Chairman and as “manager of the bill.” *Id.* at S6129.

ARGUMENT

I. THE ATTORNEY GENERAL HAS CERTIFIED THAT THE CLAIMS AGAINST THE PROVIDER-DEFENDANTS IN THESE PROCEEDINGS FALL WITHIN AT LEAST ONE OF THE PROVISIONS OF SECTION 802(a) OF THE FISA

This Court should grant the Government’s motion to dismiss the Verizon Defendants because the Deputy Attorney General has certified that the Verizon Defendants fall within one of the statutory grounds for dismissal, and this certification is supported by substantial evidence. Additionally, *in camera* and *ex parte* review by the Court of the certification, and of any supplemental materials that may accompany that certification, is proper because the Deputy Attorney General has declared, in accordance with the statute, that public disclosure of this information would cause harm to national security.

A. The Deputy Attorney General has Certified that the Claims Against the Verizon Defendants Fall Within at Least One of the Provisions of Section 802(a) of the FISA

Plaintiffs allege that Verizon Communications and its CEO have provided assistance to the intelligence community by turning over telephony metadata to the NSA in compliance with Section 215 “business records” orders issued by the FISA Court. *See, e.g.*, 2nd Am. Compl. ¶¶ 25-27, 97. Regardless of whether this allegation is true, the Verizon Defendants would be entitled to dismissal under Section 802. The Deputy Attorney General has certified that the Verizon Defendants are entitled to dismissal based on at least one of the grounds under the statute, which includes the possibility that they provided such assistance pursuant to orders of the FISA Court (as alleged) or that these particular defendants did not provide such assistance. *See* 50 U.S.C. § 1885a(a)(1) (immunity upon certification that the person furnished assistance pursuant to an order of the FISC); *see also id.* § 1861(e) (“A person who, in good faith, produces tangible things under [a FISC] order pursuant to [Section 215] shall not be liable to any other person for such production.”); *see also id.* § 1885a(a)(5) (immunity upon certification that the

person did not furnish the alleged assistance); *see also* Public Certification of the Deputy Attorney General of the United States (Pub. Cole Cert., Exhibit C attached hereto) ¶ 6.

B. The Deputy Attorney General Has Properly Set Forth in a Declaration that the Basis for His Certification Cannot Be Publicly Disclosed.

Section 802(c)(1) of the FISA, as amended, provides that if the Attorney General (or his authorized designee) attests in a declaration that disclosure of his certification, or any supplemental materials submitted with it, would harm the national security of the United States, then the Court shall review that certification and those materials *in camera* and *ex parte*. *See* 50 U.S.C. § 1885a(c)(1). The Deputy Attorney General has invoked this provision here because his certification identifies the particular statutory provision(s) under which dismissal of the Verizon Defendants is required, and disclosure of that information would cause harm to national security. *See* Pub. Cole Cert. ¶ 8. The Deputy Attorney General’s declaration with regard to the classified nature of his certification is supported by the classified declaration of Frances J. Fleisch, the Acting Deputy Director of the NSA, which explains why identifying whether or not the particular Verizon Defendants have assisted the NSA remains properly classified. *See* Public Declaration of Acting Deputy Director of the NSA Frances J. Fleisch (Exhibit D attached hereto) ¶¶ 6-8.⁷ Accordingly, both the Deputy Attorney General’s classified certification and the classified declaration of the Acting Deputy Director of the NSA have been submitted to the Court for *in camera* and *ex parte* review—pursuant to the express statutory provision so permitting this procedure. *See* 50 U.S.C. § 1885a(c).

⁷ Protecting from public disclosure whether or not the Verizon Defendants assisted the Intelligence Community is consistent with the judgment of the SSCI when it recommended enacting the FISA Amendments Act of 2008. *See* SSCI Report, S. Rep. 110-209 at 9 (“It would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance.”); *see also id.* (“[I]dentities of persons or entities who provide assistance to the U.S. Government are protected as vital sources and methods of intelligence”).

C. The Deputy Attorney General's Certification Is Supported By Substantial Evidence

This Court “shall . . . give[] effect,” *id.* § 1885a(b)(1), to the Deputy Attorney General’s certification that the Verizon Defendants fall within one of the statutory immunity provisions and “shall . . . promptly dismiss[],” *id.* § 1885a(a), the claims against them “unless the court finds that such certification is not supported by substantial evidence provided to the court[.]” *Id.* § 1885a(b)(1). The “substantial evidence” standard of review is well-established and is “highly deferential.” *Cumberland Coal Res. v. Federal Mine Safety & Health Rev. Comm’n*, 717 F.3d 1020, 1028 (D.C. Cir. 2013). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011) (internal quotations omitted). The Court’s review is not *de novo*, that is, “[i]t is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case” or “to substitute its own conclusions for those which the [Deputy Attorney General] had fairly drawn from such findings.” *Illinois Cent. R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 69 (1966) (citations omitted).

The Deputy Attorney General’s certification covers discrete factual findings regarding whether or not the Verizon Defendants furnished assistance to the Intelligence Community in the form of providing telephony metadata pursuant to orders of the FISA Court. Review of his classified certification, as well as the supplemental materials provided (if any), makes clear that the Deputy Attorney General’s certification regarding the Verizon Defendants is amply supported by substantial evidence.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the classified supplement to this motion, the Court should dismiss Plaintiffs’ claims against the Verizon Defendants because the

Deputy Attorney General has certified, and his certification is supported by substantial evidence, that dismissal of the Verizon Defendants is required by Section 802 of the FISA.

Dated: December 16, 2013

Respectfully submitted,

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