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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 BANK JULIUS BAER & CO. LTD, a Swiss
entity, *et al.*,
22 Plaintiffs,
23 v.
24 WIKILEAKS, an entity of unknown form, *et al.*,
25 Defendants.
26
27
28

No. CV-08-0824 JSW

Action Filed: February 6, 2008

MOTION TO INTERVENE AND
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES
[Fed R. Civ. P. 24(a), 24(b)]

Date: May 9, 2008
Time: 9:00 a.m.
Place: Courtroom 2
Judge: Honorable Jeffrey S. White

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

NOTICE OF MOTION AND MOTION 1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE 1

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

BACKGROUND 3

ARGUMENT 6

 I. MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2). 7

 A. The Motion To Intervene Is Timely. 7

 B. Movants Have Substantial First Amendment Interests In Accessing The Wikileaks Website. 7

 C. The Disposition Of The Lawsuit Already Has Adversely Affected Movants’ First Amendment Rights. 10

 D. The Existing Parties Have Not Adequately Represented Movants’ Interests In This Litigation. 12

 II. ALTERNATIVELY, MOVANTS ARE ENTITLED TO INTERVENE PERMISSIVELY UNDER RULE 24(b)(2). 13

CONCLUSION 15

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1 **TABLE OF AUTHORITIES**

2 **Page(s)**

3 **Cases**

4 *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003) 7, 12

5 *Bartnicki v. Vopper*, 532 U.S. 514 (2001) 2

6 *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) 8

7 *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992) 9

8 *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005) 9

9 *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175 (1968) 10, 11

10 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) 11

11 *Clement v. California Dep’t of Corr.*, 364 F.3d 1148 (9th Cir. 2004) 9

12 *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980) 8

13 *Elrod v. Burns*, 427 U.S. 347 (1976) 12

14 *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) 2

15 *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995) 8

16 *Kleindienst v. Mandel*, 408 U.S. 753 (1972) 2, 8

17 *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) 8

18 *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) 11

19 *Martin v. City of Struthers*, 319 U.S. 141 (1943) 8

20 *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) 9

21 *Natural Res. Def. Council, Inc. v. Gutierrez*, No. C-07-04771, 2008 WL 360852
(N.D. Cal. Feb. 6, 2008) 14

22 *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) 1, 10

23 *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977) 2

24 *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) 10

25 *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986) 1

26 *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) 8

27 *Reno v. ACLU*, 521 U.S. 844 (1997) 9, 11

28

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TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

<i>Schneider v. New Jersey</i> , 308 U.S. 147 (1939)	11
<i>Sierra Club v. EPA</i> , 995 F.2d 1478 (9th Cir. 1993)	7, 8
<i>Smith v. Intercosmos Media Group, Inc.</i> , No. Civ. A. 02-1964, 2002 WL 31844907 (E.D. La. Dec. 17, 2002)	13
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	11
<i>Southwest Voter Registration Educ. Project v. Shelley</i> , 344 F.3d 914 (9th Cir. 2003)	14
<i>Southwestern Ctr. for Biological Diversity v. Berg</i> , 268 F.3d 810 (9th Cir. 2001)	7, 10
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969)	8, 10
<i>Taubman Co. v. Webfeats</i> , 319 F.3d 770 (6th Cir. 2003)	9
<i>Tory v. Cochran</i> , 544 U.S. 734 (2005)	10
<i>United States v. City of Los Angeles</i> , 288 F.3d 391 (9th Cir. 2002)	14
<i>United States v. Stringfellow</i> , 783 F.2d 821 (9th Cir. 1986), <i>vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action</i> , 480 U.S. 370 (1987)	7
<i>Venegas v. Skaggs</i> , 867 F.2d 527 (9th Cir. 1989), <i>aff'd</i> , 495 U.S. 82 (1990)	14
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	11

Statutes

28 U.S.C.	
§1331	14
§1367(a)	13
47 U.S.C. §230(c)(1)	13
Fed. R. Civ. P.	
24	1, 6
24(a)	6, 7, 13, 15
24(a)(2)	7
24(b)	6, 13, 15
24(b)(2)	13

Other Authorities

Fed. R. Civ. P. 24 advisory committee's note	10
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TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

http://www.icann.org/transfers/policy-12jul04.htm	12
http://www.pir.org/PDFs/ORG-RRA-3-April-2007-FINAL.pdf, Section 3.5	12
William W. Schwarzer et al., <i>California Practice Guide: Federal Civil Procedure Before Trial</i> ¶7:261-262 (2004)	14

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE THAT, on Friday, May 9, 2008, at 9:00 a.m., or as soon thereafter
4 as the matter may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San
5 Francisco, California, Movants Project on Government Oversight, American Civil Liberties Union,
6 Inc., American Civil Liberties Union Foundation, Inc., Electronic Frontier Foundation and Jordan
7 McCorkle (“Movants”) will and hereby do move to intervene as Defendants and Cross-
8 Complainants in the above-referenced action pursuant to Federal Rule of Civil Procedure 24 in order
9 to assert the claims and defenses set forth in their proposed Answer and Cross-Complaint In
10 Intervention, a copy of which has been filed concurrently with this Motion.

11 This motion seeks the following relief: an order permitting Movants to intervene as
12 Defendants and Cross-Complainants in the above-referenced action and to file their proposed
13 Answer and Cross-Complaint In Intervention, a copy of which has been filed concurrently with this
14 Motion.

15 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
16 **OF MOTION TO INTERVENE**

17 **INTRODUCTION**

18 In addition to protecting the rights of those who engage in expression themselves, the First
19 Amendment “protects the public’s interest in receiving information.” *Pac. Gas & Elec. Co. v. Pub.*
20 *Utils. Comm’n*, 475 U.S. 1, 8 (1986) (plurality opinion). Moreover, “prior restraints on speech and
21 publication are the most serious and the least tolerable infringement on First Amendment rights.”
22 *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Yet—without a word of opposition from
23 any party to this action—the Court has entered a “permanent injunction” pursuant to stipulation that
24 renders inoperable a domain name known as “wikileaks.org,” even though most of the documents
25 and other materials on the site accessed through that domain name (the “Wikileaks website”) have
26 nothing to do with the controversy between Plaintiffs and Defendants.

27 Movants are organizations and a member of the public who have accessed these documents on
28 the Wikileaks site by using the wikileaks.org domain name and who intend to do so in the future.

1 They also want to continue to access such documents in the least burdensome manner possible.
2 They seek leave to intervene in this action so that they can move to vacate the permanent injunction,
3 which will in turn ensure that their First Amendment rights, and the rights of other members of the
4 public, to access the Wikileaks website are not injured by an overbroad prior restraint.¹
5

6 SUMMARY OF ARGUMENT

7 Movants meet each of the requirements for intervention as of right contained in Rule 24(a).
8 *First*, this Motion is timely. Plaintiffs Bank Julius Baer & Co., Ltd. and Julius Baer Bank & Trust
9 Co. Ltd. (“BJB”) commenced this action on February 6, 2008, and the permanent injunction
10 rendering the “Wikileaks.org” domain name totally inoperable was entered less than two weeks ago.
11 Movants brought this Motion as soon as reasonably practicable under the circumstances. *See* Part
12 I(A), *infra*.

13 *Second*, Movants have a clear interest in the subject of this action. The First Amendment
14 encompasses the “right to receive information and ideas.” *Kleindienst v. Mandel*, 408 U.S. 753,
15 762 (1972) (citation omitted). The documents and materials posted on the Wikileaks website
16 concern matters of great public interest, including the U.S. Army’s operations in Guantanamo Bay,
17 human rights abuses in China and political corruption in Kenya. Movants have accessed documents
18 such as these through the wikileaks.org domain name before, and will do so again if they can.
19 Movants’ interests in unfettered access to these materials through wikileaks.org is therefore
20 protected by the First Amendment. *See* Part I(B), *infra*.

21 *Third*, the Court’s disposition of this action has *already* impaired Movants’ rights. The Court
22 has entered a permanent injunction ordering Defendant Dynadot, LLC. (“Dynadot”), the domain
23

24 ¹Movants do not presently seek access to the documents and information that Plaintiffs claim
25 as their property and therefore do not address the significant First Amendment questions raised by
26 Plaintiffs’ motion for a preliminary injunction. We note, however, that Plaintiffs’ request for a
27 preliminary injunction requiring that the documents be removed from the Wikileaks website raises
28 serious First Amendment concerns. Plaintiffs’ Complaint does not appear to allege that Wikileaks
played any role in the alleged theft of the documents at issue. The situation here thus appears to be
analogous to that in *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001), *Florida Star v. B.J.F.*, 491 U.S.
524, 541 (1989), and *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), making it
unlikely that Plaintiffs are entitled to a preliminary injunction.

1 name registrar for the “Wikileaks.org” domain name, to disable that domain name and to block it
2 from being registered by or transferred to any other registrar. In effect, the Court has ordered the
3 domain name “wikileaks.org” to be shut down and locked up permanently, thus interfering with
4 Movants’ access to *all* the materials available through that domain name, including documents and
5 other information that are not even arguably subject to this lawsuit. *See* Part I(C), *infra*.

6 *Fourth*, Movants’ interests have *not* been represented by the existing parties. Wikileaks and
7 Wikileaks.org have not yet appeared in this case. Dynadot stipulated to the permanent injunction
8 and in return received an order requiring Plaintiffs to dismiss it from the case. No party has
9 represented Movants, or other members of the public, who wish to access information that is not
10 subject to Plaintiffs’ claim of ownership. *See* Part I(D), *infra*.

11 Alternatively, the Court should let Movants intervene under Rule 24(b). *See* Part II, *infra*.

12 BACKGROUND

13 Plaintiffs commenced this action on February 6, 2008, asserting six causes of action based
14 solely on the allegation that the Wikileaks website had improperly obtained and published certain
15 confidential documents belonging to BJB. Compl. (Docket No. 1) ¶¶1, 25-27.²

16 The principal Defendants named in the Complaint are “Wikileaks” and “Wikileaks.org,”
17 individuals or entities who are alleged to own and/or operate the “Wikileaks” website. *Id.* ¶¶7-8.
18 The Wikileaks site describes itself as an Internet website where participants can anonymously
19 disclose and comment on documents and other materials of public interest. *See* Proposed Answer
20 and Cross-Complaint in Intervention (“Cross-Complaint”) ¶14. According to the site, its “primary
21 interest” “is in exposing oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan Africa and
22 the Middle East, but we also expect to be of assistance to people of all regions who wish to reveal
23 unethical behavior in their governments and corporations.” *Id.* ¶15.

24 The Wikileaks website utilizes technology designed to permit third parties to post electronic
25

26 ²The Complaint asserts the following causes of action: (1) Unlawful and Unfair Business
27 Practices in Violation of California Business & Professions Code Section 17200; (2) Declaratory
28 Relief; (3) Interference With Contract; (4) Interference With Prospective Economic Advantage; (5)
Conversion and (6) Injunctive Relief.

