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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

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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.

1 documents easily for public availability. Cross-Complaint ¶16. Information on the site states that it
2 was founded “by Chinese dissidents, journalists, mathematicians and startup company technologists,
3 from the US, Taiwan, Europe, Australia and South Africa.” *Id.* ¶17. Among other things, material
4 posted to the website includes the U.S. Army’s operations manual for the Guantanamo Bay
5 detention facility, documents concerning the United States’ expenditures on its military efforts in
6 Afghanistan and Iraq, and reports exposing alleged corruption by Kenyan political leaders. *Id.*

7 In addition to Defendants “Wikileaks” and “Wikileaks.org,” Plaintiffs’ Complaint also named
8 Dynadot as a Defendant to the declaratory and injunctive relief causes of action. *See* Compl. 19, 25.
9 Dynadot is one of several Internet domain name registrars that are accredited by the Internet
10 Corporation for Assigned Names and Numbers (“ICANN”), a non-profit corporation originally
11 chartered by the U.S. Department of Commerce to oversee a number of Internet-related tasks,
12 including the registration of domain names. The “wikileaks.org” domain name is registered—in
13 essence, permitted to function—by Dynadot.³

14 At the same time or shortly after they filed their Complaint, Plaintiffs sought injunctive relief.
15 The Memorandum they filed supporting their motion for a temporary restraining order and an order
16 to show cause regarding the issuance of a preliminary injunction (“Memo”) makes only passing
17 reference to injunctive relief against Dynadot. Indeed, its sole reference to an order compelling
18 Dynadot to shut down the wikileaks.org domain name is contained in a single four-line footnote.
19 *See* Memo 21 n.3. That footnote did not discuss the probability of success of Plaintiffs’ claims
20 against Dynadot or the balance of hardships caused by granting the relief sought. Nor did the
21 footnote discuss the impact of injunctive relief against Dynadot on third parties or the public
22 interest. Indeed, neither the footnote nor the Memorandum as a whole mentioned the First
23 Amendment. Finally, the injunctive relief sought by that footnote was only temporary—*i.e.*, an

24
25 ³At a very simplified level, an Internet website can be accessed through a web browser either by
26 inputting an “IP address”—a unique numerical address in a specified format (such as 88.80.13.160)
27 that is associated with the computer that hosts the website—or by inputting a website’s domain
28 name (such as wikileaks.org), which, if it has been properly registered, will direct traffic to the
website’s IP address. Multiple domain names may be associated with a single IP address. ICANN
holds a complete list of domain names in the world and asserts overall responsibility for managing
the domain name system (“DNS”), a global, distributed Internet database.

1 order compelling Dynadot to shut down the wikileaks.org domain name *until the “JB property” was*
2 *returned. See id.*⁴

3 The “permanent injunction” granted by the Court was, as its name implies, decidedly not
4 temporary. This order, entered on February 15, 2008, on stipulation between Plaintiffs and
5 Dynadot, requires the latter to, among other things, immediately (1) “disable the wikileaks.org
6 domain name” (Order Granting Permanent Injunction (Docket No. 48) ¶2 (“Order”)); (2) “clear and
7 remove all DNS hosting records for the wikileaks.org domain name and prevent the domain name
8 from resolving to the wikileaks.org website or any other website or server other than a blank park
9 page” (*id.* ¶4) and (3) “lock the wikileaks.org domain name to prevent transfer of the domain name
10 to a different domain registrar” (*id.* ¶1).

11 The permanent injunction has the effect of blocking access by anyone in the United States
12 (and the world) to the Wikileaks website through the wikileaks.org domain name. As a result, it
13 impedes access to the entire Wikileaks site, not just the documents that BJB claims are at issue in
14 this litigation. Although there are foreign country domain names that apparently resolve to the same
15 IP address as wikileaks.org and are unaffected by the Court’s injunction, including wikileaks.be
16 (Belgium) and wikileaks.de (Germany), and although sophisticated users or those who have been
17 following the controversy in the press may realize that the Wikileaks website is still reachable
18 through these foreign domain names, the permanent injunction nevertheless precludes anyone who
19 enters wikileaks.org into his or her browser from obtaining access to the site that was once available
20 at that URL.

21 Movants are a group of not-for-profit organizations with an interest in receiving the
22 information provided on the Wikileaks website, either themselves or on behalf of their members,
23 and an individual user of the Wikileaks website, each of whom has a demonstrable interest in
24 continued, uninterrupted access to the site:

25 _____
26 ⁴Indeed, the Memorandum is replete with passages indicating that Plaintiffs were seeking only
27 the return of their purported property and did not seek broader relief that would impair the public’s
28 ability to access other information on the Wikileaks site that concerned the Plaintiffs but did not
constitute “confidential” or “private” information over which Plaintiffs claimed ownership. *See*
Memo 8:20-21, 10:3-8.

- 1 ● The Project on Government Oversight (“POGO”) is an independent, non-profit
2 organization that investigates and exposes corruption and other government misconduct.
3 POGO staff members read and followrd postings on the Wikileaks website prior to the
4 filing of Plaintiffs’ lawsuit and have strong reason to believe that future postings will be
5 of use in the organization’s ongoing investigations. This lawsuit is also of particular
6 interest to POGO because POGO will be unable to encourage whistleblowers who need
7 an outlet for their documents to use the Wikileaks website if it is no longer as easily
8 available as possible. (Cross-Complaint ¶4)
- 9 ● The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, nonpartisan
10 organization. The ACLU is frequently involved in litigation and advocacy efforts
11 concerning the rights of whistleblowers and numerous human rights issues, many of
12 which are the subjects of material on the Wikileaks website. Staff members of the
13 ACLU access and rely on documents and information posted on the Wikileaks website,
14 and intend to do so in the future because of the material’s close connections to the
15 everyday work of the ACLU. As one example, the ACLU previously issued public
16 statements regarding the U.S. Army’s operations manual for the Guantanamo Bay
17 detention facility that was first disclosed on the Wikileaks website, and will likely do so
18 again if similar documents are posted on the website. (*Id.* ¶5)
- 19 ● Electronic Frontier Foundation (“EFF”) is a donor-supported membership organization
20 working to protect fundamental rights regardless of technology; to educate the press,
21 policymakers and the general public about civil liberties issues related to technology;
22 and to act as a defender of those liberties. EFF has over 10,000 paying members
23 nationwide. EFF members access information from and/or post information to the
24 Wikileaks website and intend to do so in the future. (*Id.* ¶6)
- 25 ● Jordan McCorkle is a senior at the University of Texas. He is a regular user of the
26 Wikileaks website, which he visits at least once each week, sometimes more. He
27 depends on Wikileaks as a source of information that is not available in the more
28 traditional media so that he can keep abreast of recent developments and, where
appropriate, make his views known to others about what he has learned from visiting
the site. Mr. McCorkle wants to be able to continue to access the site so that both he
and the public independently can assess questionable activities performed by corporate
and governmental entities. (*Id.* ¶7)

None of the Movants are associated with, have any connections to, or have any involvement
with the maintenance of the Wikileaks website. *Id.* ¶8.

ARGUMENT

Intervention is governed by two distinct provisions of Rule 24 of the Federal Rules of Civil
Procedure. Rule 24(a) sets forth the requirements for intervention as of right, while Rule 24(b) sets
forth the requirements for permissive intervention. Movants satisfy the requirements of both and
should be allowed to intervene in this action to challenge the Court’s permanent injunction on First
Amendment grounds.

I.

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

Rule 24(a), governing intervention as of right, is construed by federal courts “liberally in favor of potential intervenors.” *Southwestern Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The decision whether to allow intervention is “‘guided primarily by practical considerations,’ not technical distinctions.” *Id.* (citing *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987)). In considering a motion to intervene, the Court must accept all well-pleaded allegations in Movants’ proposed pleadings. *Southwestern Ctr.*, 268 F.3d at 820.

The Ninth Circuit has adopted a four-part test to resolve applications for intervention as of right:

(1) [T]he applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party’s ability to protect that interest; and (4) the applicant’s interest must not be adequately represented by existing parties. (*Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003))

Movants meet each of these requirements.

A. The Motion To Intervene Is Timely.

Plaintiffs commenced this action on February 6, 2008, and Defendants Wikileaks and Wikileaks.org have yet to answer the Complaint. Accordingly, this litigation is in its infancy, and the Motion is timely. *See Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (application timely when filed at outset of litigation). Although the Court has entered a “permanent injunction,” the Court retained jurisdiction to enforce or modify it. As a result, permitting Movants to intervene to protect their interests will not delay adjudication of the action.

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

The “significantly protectable interest” the Ninth Circuit requires for intervention is “‘primarily a practical guide to disposing of lawsuits by involving as many apparently concerned

1 persons as is compatible with efficiency and due process.” *County of Fresno v. Andrus*, 622 F.2d
2 436, 438 (9th Cir. 1980) (citations omitted). “It is generally enough that the interest [asserted] is
3 protectable under some law, and that there is a relationship between the legally protected interest
4 and the claims at issue.” *Sierra Club*, 995 F.2d at 1484. Where “the injunctive relief sought by
5 plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally protectable
6 interests, that party satisfies the ‘interest’ test.” *Forest Conservation Council v. U.S. Forest Serv.*,
7 66 F.3d 1489, 1494 (9th Cir. 1995).

8 The injunctive relief already granted by this Court more than meets this test. The permanent
9 injunction blocks the public’s access to the Wikileaks site through the domain name wikileaks.org.
10 See Compl. (Docket No. 1) ¶78(g) (requesting that the domain name wikileaks.org be locked, and
11 that its transfer be prevented); Order ¶1 (ordering same). As a result, Movants cannot use that
12 domain name to access *any* of the documents and information that were formerly available or might
13 become available in the future on the Wikileaks website, even documents and information that have
14 no connection to Plaintiffs and that are of national, if not international, interest. See p.6, *supra*.

15 Consequently, the permanent injunction has “direct, immediate, and harmful effects” on the
16 First Amendment rights of Movants and the public to access this information without judicial
17 hindrance. A long line of Supreme Court precedent holds that the First Amendment not only
18 “embraces the right to distribute literature,” it also “necessarily protects the right to *receive* it.”
19 *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (emphasis added); accord *Bd. of Educ. v. Pico*,
20 457 U.S. 853, 867 (1982) (“the right to receive ideas is a necessary predicate to the *recipient’s*
21 meaningful exercise of his own rights of speech, press, and political freedom”) (emphasis in
22 original); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (First Amendment encompasses “‘right
23 to receive information and ideas’”) (citation omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367,
24 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral,
25 and other ideas and experiences which is crucial here. That right may not constitutionally be
26 abridged . . .”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the
27 Constitution protects the right to receive information and ideas”); *Lamont v. Postmaster Gen.*, 381
28 U.S. 301, 308 (1965) (“The dissemination of ideas can accomplish nothing if otherwise willing

1 addressees are not free to receive and consider them. It would be a barren marketplace of ideas that
2 had only sellers and no buyers”) (Brennan, J., concurring).

3 This right to receive information specifically includes information disseminated over the
4 Internet. In *Clement v. California Department of Corrections*, 364 F.3d 1148 (9th Cir. 2004), an
5 inmate at Pelican Bay State Prison alleged that the prison violated his First Amendment rights by
6 prohibiting inmates from receiving material downloaded from the Internet. *Id.* at 1150. The district
7 court denied the prison’s motion for summary judgment on Clement’s claims, *sua sponte* granted
8 summary judgment in Clement’s favor and issued a permanent statewide injunction against
9 enforcement of the policy. *Id.* The Ninth Circuit affirmed, holding that the constitutional right to
10 receive information applies to “material disseminated over the internet as well as by the means of
11 communication devices used prior to the high-tech era.” *Id.* at 1151; *see also Reno v. ACLU*, 521
12 U.S. 844, 874 (1997) (invalidating law that restricted adults’ right to access information on the
13 Internet).

14 Moreover, the protection for Internet speech applies to domain names, which when used for
15 expressive, noncommercial purposes are fully protected by the First Amendment. *Taubman Co. v.*
16 *Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (“the domain name is a type of public expression, no
17 different in scope than a billboard or a pulpit”).⁵ Accordingly, the permanent injunction rendering
18 the domain name inoperable implicates Movants’ First Amendment interests in receiving documents
19 and information from the Wikileaks website, and thus satisfies Rule 24(a)’s “protectable interest”
20 requirement. *Cf. Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 472-73 (9th Cir. 1992)
21 (affirming intervention by third party to seek modification of protective order to access deposition
22 transcripts). Indeed, although the right to receive information and ideas is “fundamental to our free
23

24 ⁵There is an exception when a domain name uses a third party’s trademark for purely
25 commercial purposes, in which case the First Amendment may provide reduced protection. *See*
26 *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005). No such claim is presented
27 here. Where, as here, the domain name is expressive and describes the content of the material on the
28 website, the domain name functions much like the title or author’s name on a book and is fully
protected by the First Amendment. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348
(1995) (“the identity of the speaker is no different from other components of [a] document’s
contents that the author is free to include or exclude”).