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JULIUS BAER BANK AND TRUST CO. LTD

8
 9 **UNITED STATES DISTRICT COURT**
 10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN FRANCISCO DIVISION**

12 **BANK JULIUS BAER & CO.**)
 LTD, a Swiss entity; and **JULIUS**)
 13 **BAER BANK AND TRUST CO.**)
 LTD, a Cayman Islands entity,)

14 Plaintiffs,

15 v.

16 **WIKILEAKS**, an entity of unknown)
 form, **WIKILEAKS.ORG**, an entity)
 17 of unknown form; **DYNADOT,**)
 18 **LLC**, a California limited liability)
 corporation, and **DOES 1 through**)
 19 **10**, inclusive,)

20 Defendants.)

CASE NO. CV08-0824 JSW
[Hon. Jeffrey S. White; CRTM 2]

PLAINTIFFS' BRIEF IN OPPOSITION
TO MULTIPLE APPLICATIONS AND
MOTIONS BY PROPOSED AMICI
AND/OR REQUESTS TO INTERVENE

DATE: Submission
 TIME: Submission
 CTRM: 2, 17th FL

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1 Plaintiffs Bank Julius Baer & Co. Ltd's ("BJB") and Julius Baer Bank and
2 Trust Co. Ltd's ("JBBT") (collectively, "Plaintiffs") hereby respectfully submit the
3 following Opposition Brief to the multiple applications by proposed *Amici Curiae*
4 and requests to intervene filed with the Court on February 26, 2008.

5 **MEMORANDUM OF POINTS & AUTHORITIES**

6 **I.**

7 **INTRODUCTION**

8 The applications by proposed *Amici Curiae* and requests to intervene are, in
9 whole or in part, not timely before the court, violate the Court's Standing Order, fail
10 to comply with the Court's briefing schedule set forth in its TRO and OSC re
11 Preliminary Injunction, fail to comply with Federal and Local Rules with regard to
12 notice requirements, fail to show good cause for their failures, and, as otherwise set
13 forth below, are improper and should not be considered by the Court.

14 As of the time of this Notice, the Amici-Intervenor Parties have submitted the
15 following applications and motions to the Court, filed on February 26, 2007:

- 16 (i) Application to Appear as Prospective Intervenors Or, in the
17 Alternative, *Amici Curiae* of Prospective Intervenors Project on
18 Government Oversight, the American Civil Liberties Union, the
19 American Civil Liberties Union Foundation, the Electronic Frontier
20 Foundation and Jordan McCorkle (the parties are referred to herein as
21 "Project on Government Oversight"); Motion to Intervene; and related
22 filings (collectively, the "Project on Government Oversight
23 Application");
- 24 (ii) Motion for Leave to File Brief of *Amici Curiae* of The Reporters
25 Committee for Freedom of the Press, The American Society of
26 Newspaper Editors, The Associated Press, Citizen Media Law Project,
27 The E.W. Scripps Co, Gannett Co., Inc., The Hearst Corporation, The
28 Los Angeles Times, National Newspaper Association, Newspaper

1 Association of America, Radio-Television News Directors Association,
2 and The Society of Professional Journalists (the parties are referred to
3 herein as “The Reporters Committee”); Brief of Amici; and related
4 filings (collectively, the “The Reporters Committee Motion”); and
5 (iii) Motion to Intervene as Defendants or, in the Alternative, to Appear as
6 *Amici Curiae* of California First Amendment Coalition and Public
7 Citizen (the parties are referred to herein as “Public Citizen”); Motion
8 to Dismiss; Brief in Opposition to Injunctive Relief and In support of
9 Dismissal; Motion for Administrative Relief; and related filings (the
10 “Public Citizen Motion”).

11 Project on Government Oversight, The Reporters Committee and Public Citizen are
12 collectively referred to as, the “Amici-Intervenor Parties”. The Project on
13 Government Oversight Application, The Reporters Committee Motion and the Public
14 Citizen Motion are sometimes collectively referred to as, the “Amici-Intervenor
15 Parties’ Applications”.

16 II.

17 ARGUMENT

18 (1) The Amici-Intervenor Parties’ Applications violate the Court’s order
19 with regard to the briefing schedule set forth in its TRO and OSC re Preliminary
20 Injunction (the “TRO and OSC”). The TRO and OSC ordered that “Any Opposition
21 papers shall be served and filed by 12:00 p.m. on February 20, 2008” (emphasis
22 added). As of February 25, 2008, no opposition papers by the defendants or any
23 third-parties had been filed and/or served. The Court has not granted relief from its
24 order as set forth in TRO and OSC, and none of the Amici-Intervenor Parties set
25 forth good cause for disregard of the Court’s TRO and OSC setting forth the briefing
26 schedule. As evident by the vast press coverage and press reports related to this
27 matter, all of the Amici-Intervenor Parties were aware of this case well prior to the
28 opposition papers deadline and could have timely filed an opposition had they chosen

1 to do so. So from that stand point, the Court should simply disregard all the Amici-
2 Intervenor Parties' Applications because they are violative of the Court's TRO and
3 OSC and good cause has not been show to disregard the briefing order.

4
5 (2) The Amici-Intervenor Parties' Applications violate the Court's Civil
6 Standing Orders ("Standing Orders"). Pursuant to the Standing Orders, counsel are
7 expected to consult and comply with all provisions of the Local Rules and the
8 Federal Rules relating to motions, briefs, ... and all other matters, unless specifically
9 superceded by these Standing Orders." The Standing Orders further provide that
10 "Any failure to comply with any of these rules and orders may be deemed sufficient
11 grounds for monetary sanctions, dismissal ... or other appropriate sanctions." The
12 Amici-Intervenor Parties' Applications fail to comply with the Court's Standing
13 Order with regard to "Scheduling Days" and noticing of a motion. The Court has
14 not granted relief from its Standing Order and none of the Amici set forth good
15 cause for disregard of the Court's Standing Order relating to motions, briefs, and
16 with regard to scheduling. So from that stand point, the Court should simply
17 disregard all the amici briefs because they are violative of the Court's Standing
18 Order and good cause has not been show to disregard the Standing Order.

19
20 (3) To the extent that any of the Amici-Intervenor Parties argue that
21 the TRO and OSC and/or the [Proposed] Preliminary Injunction is a "Prior
22 Restraint," Plaintiffs refer the Court to the Supplemental Brief filed by Plaintiffs,
23 dated February 27, 2008, that fully addresses that issue.

24
25 (4) To the extent that any of the Amici-Intervenor Parties seek an
26 action not sought by the parties (for example, the Motion to Dismiss filed by Public
27 Citizen, or requests to modify or set aside the Permanent Injunction entered pursuant
28 to a Stipulation between represented parties, or the advancement of purported

1 affirmative defenses not advanced by the parties themselves), their motions,
2 applications and proposed Amici briefs are improper. An amicus curiae “lacks
3 standing to prosecute independently any rehearing or appeal.” *United States v.*
4 *Louisiana*, 718 F. Supp. 525, 528 (E.D. La. 1989). State courts are in agreement
5 that “relief beyond that which is sought by the parties cannot be requested by amicus
6 curiae.” *Vermillion Parish Police Jury v. Williams*, 824 So. 2d 466, 470 (La. App.
7 2002). An amicus has “no control over the litigation and no right to institute any
8 proceedings therein; *he must accept the case before the court with the issues made*
9 *by the parties.*” *Pennsylvania v. Cotto*, 708 A.2d 806, 808 (Pa. 1998) (emphasis
10 original). Decisions have held that “[m]otion practice by *amici* is not permitted,”
11 and that a “trial court was not authorized . . . to permit amici curiae to file a motion
12 to dismiss as would a litigant before the court.” *In re Petition to Call Election*, 517
13 N.E.2d 1188, 1190 (Ill. App. 1987); *see Mid-Atlantic Power Supply Ass’n v. Pa.*
14 *Public Utilities Comm’n*, 746 A.2d 1196, 1200 n.8 (Pa. 2000) (holding that amici
15 have no right to institute proceedings in the court.). An amicus has no standing in
16 court, and allowing an amicus to “seek to widen the issues raised by the parties” is
17 inappropriate. *Lyons v. Lederle Labs.*, 440 N.W.2d 769, 770 & n.2 (N.D. 1989).
18 The amicus must “take the case as he finds it.” *Briggs v. United States*, 597 A.2d
19 370, 373 (D.C. Ct. App. 1991). In fact, courts have long held:

20 An amicus curiae can neither take upon himself the management of the
21 cause as counsel; nor file a demurrer; nor take exceptions to the ruling
22 of the court; . . . nor file a petition for a rehearing.

23 *Oregon v. McDonald*, 128 P. 835, 837 (Or. 1912).

24

25 (5) None of the proposed Amici-Intervenor Parties have sought by
26 way of ex parte application an Order Shortening Time for Briefing with respect to
27 their proposed Amici briefs or with respect to their requests to be heard at the
28 hearing on the TRO and OSC in order to afford Plaintiffs adequate opportunity and

1 time to fully brief the Court with respect to all of the issues raised in the multiple
2 Amici-Intervenor Parties' Applications and, therefore, it is unduly prejudicial to the
3 Plaintiffs to consider these amici briefs, applications and motions.¹

4
5 (6) To the extent that a motion has been filed by any of the Amici-
6 Intervenor Parties, there has been no compliance with Federal Rules of Civil
7 Procedure ("FRCP"), nor the Local Rules, regarding proper notice. Any motions,
8 "except as otherwise ordered or permitted by the assigned Judge or these Local
9 Rules, ... , all motions must be filed, served and noticed in writing on the motion
10 calendar of the assigned Judge for hearing not less than 35 days after service of the
11 motion." ND L.R. 7-2(a). The Amici-Intervenor Parties' Applications were filed
12 without an Order Shortening Time, nor even an ex parte motion for an order
13 shortening time. The Amici-Intervenor Parties' Applications fail to conform with
14 provisions of the Local Rules 7-2 and 7-3 relating to motions and briefs and noticing
15 of a motion. The Amici-Intervenor Parties failed to provide proper notice.

16
17 (7) Plaintiffs have alleged and have established clear and credible
18 evidence of subject matter jurisdiction on the basis of diversity jurisdiction pursuant
19 to 28 U.S.C. § 1332(a)(2). Diversity jurisdiction exists where a suit is between
20 citizens of a foreign nation and citizens of the United States. *See* 28 U.S.C.
21 § 1332(a)(2). The citizenship of the parties *at the time the complaint is filed*
22 determines the existence of diversity jurisdiction. *Morongo Band of Mission Indians*
23 *v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988); *LeBlanc v.*

24
25 ¹ Plaintiffs have, prior to the filing of this Opposition, entered into a Stipulated
26 Request for an Order Shortening Time with respect to a hearing and briefing
27 schedule for Project on Government Oversight's Application (the "Stipulation").
28 The Stipulation specifies that it shall not affect the timing of the TRO and OSC
hearing. Notwithstanding the Stipulation, Plaintiffs oppose, as untimely and
improper, Project on Government's Application to Appear as Prospective
Intervenors at the TRO and OSC hearing and oppose its Motion to Intervene.

1 *Cleveland*, 248 F.3d 95, 100 (2d Cir. 2001). Plaintiffs, a Swiss entity and Cayman
2 Islands entity, are subjects of a foreign state. (See, Complaint, ¶¶3, 5, 6, Exh. “B”).
3 In the Complaint, Plaintiffs allege and attach as Exhibit “B” evidence (including
4 party admissions) that, at the time of filing the action, all of the defendants were
5 citizens of and located in California. Dynadot is a California limited liability
6 company, with none of its members citizens of a foreign state. (See, Complaint,
7 ¶¶3, 9). In addition, the self-listed registrant/owner of wikileaks.org and the
8 Wikileaks’ website was a John Shipton with an address of San Mateo, California.
9 (See, Complaint, ¶¶3, 7, 8, Exh. “B”). Whois records list that, prior to the listing
10 of Shipton’s name, the domain name was registered to a citizen of New York, a John
11 Young. There is no credible evidence that anyone else, other than a citizen of
12 California or New York, is an owner, partner or member of wikileaks.org and the
13 Wikileaks’ Website. The fact that complicit agents of and/or advisors to Wikileaks,
14 who are not defendants, may be foreign citizens does not negate diversity
15 jurisdiction. Further, a change of John Shipton’s self-listed address after the time
16 of filing of the action, in an apparent effort to avoid jurisdiction of the Court, does
17 not negate diversity jurisdiction. Plaintiffs have met their burden to establish
18 diversity jurisdiction at the time of filing.

19

20 (8) To the extent that any of the Amici-Intervenor Parties seek leave
21 to file an Amicus brief, they fail to show good cause and/or to satisfy the necessary
22 requirements. Under Rule 29 of the Federal Rules of Appellate Procedure, a party
23 seeking leave to file an amicus brief must state: (i) the movant’s interest, and (ii) the
24 reason why an amicus brief is desirable and why the matters asserted are relevant
25 to the disposition of the case. Fed. R. App. Pro. 29(b)(1)–(2); *see Ryan v.*
26 *Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Under
27 modern case law, an amicus brief is generally only desirable where (i) a party is not
28 represented competently or is not represented at all, (ii) the amicus has an interest

1 in some other case that maybe affected by the present case (though not enough to
2 entitle the amicus to intervene and become a party), or (iii) when the amicus has
3 unique information or a perspective that can help the court beyond the help that the
4 parties are able to provide. *See In re Heath*, 331 B.R. 424, 430 (9th Cir. 2005);
5 *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000); *Ryan*, 125
6 F.3d at 1063 (citing *Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203
7 (9th Cir. 1982); *JPMorgan Chase Bank, N.A. v. Fletcher*, 2008 WL 73233 *1 (N.D.
8 Okla. 2008). Upon satisfying the above, leave to file an amicus brief is still within
9 the discretion of the court. *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir.
10 1991). This case does not present one of the three situations in which leave to file
11 an amicus brief should be granted.

12 To begin with, this is not a case in which a party is “*not represented*
13 *competently*” or “*not represented at all.*” *Ryan*, 125 F.3d at 1063 (emphasis added).
14 To the contrary, Wikileaks most certainly has competent representation in this
15 matter. In correspondence with counsel for JB after the Court made its ruling,
16 Julian Assange (a contact for Wikileaks, as represented to the Court by Julie
17 Turner), stated “I don't know why you have sent this to me” and that JB should
18 “please send Wikileaks.org related legal correspondence to Roger Myers who I
19 understand is acting on behalf of the domain.” (Spiegel Decl., Exh. “B” - an e-mail
20 dated Feb 24, 2008 from Assange to Spiegel). Two days later, Mr. Assange again
21 stated, “Please send [correspondence] to ‘Roger Myers’
22 < Roger.Myers@hro.com> who I understand is representing the rights of the
23 domain holder in this matter.” (Spiegel Decl., Exh. “C” - an e-mail dated Feb 26,
24 2008 from Assange to Spiegel). The biography of Roger Myers, a respected media
25 and 1st Amendment attorney, on his law firm’s website states that his clients include
26 “publishers (of newspapers, magazines, and books), broadcast media (both television
27 and radio networks and their affiliates), and online media.” (Spiegel Decl., Exh.
28 “D” - printout of the Holme Roberts & Owen LLP’s Biography page for Mr.

1 Myers). Mr. Myer's biography also states he is a "Northern California Super
2 Lawyer" who "is a frequent speaker at conferences addressing media, internet and
3 intellectual property issues," and that he "serves as newsroom general outside
4 counsel to more than 20 newspapers ... and as general outside counsel for Business
5 Wire, Inc." (*Id.*). Not coincidentally, Mr. Myers's biography states that he is the
6 "General Counsel" of "California First Amendment Coalition," which, of course,
7 is seeking to file an amicus brief in this matter. Whether or not Wikileaks makes
8 a strategic determination not to appear in the action and/or defend its conduct
9 (possibly to help facilitate a potential amici filing), Wikileaks is nonetheless
10 represented and represented by very competent counsel. Even if Mr. Myers decides
11 not to appear on behalf of Wikileaks in this matter, there has been no showing that
12 Wikileaks is indigent or that it could not otherwise be represented by competent
13 counsel. To the contrary, Wikileaks boasted in a press release concerning the
14 Court's prior order that it "has six pro-bono attorney's [sic] in S[an] F[rancisco] on
15 roster to deal with legal assault." (Spiegel Decl., Exh. "A" - printout of a "Press
16 Release" by Wikileaks dated February 18, 2008) (emphasis added)). Yet Wikileaks
17 maintains its absence. The Court should not allow Wikileaks to make an end-run
18 around an appearance by employing or facilitating potential amici to advance
19 arguments Wikileaks has strategically chosen, for whatever reason, not to advance.

20 Second, none of the would-be amici have "an interest in *some other case* that
21 may be affected by the present case." *Ryan*, 125 F.3d at 1063 (emphasis added).
22 None of the would-be amici are currently facing the same type of claims as
23 Wikileaks. *See Nat'l Org. for Women*, 223 F.3d at 617. The Third Circuit has held
24 that would-be amici who do not represent an individual or organization with a
25 "legally cognizable interest" in the subject matter at issue should be denied leave to
26 file an amicus brief. *See Am. Coll. of Obstetricians and Gynecologists v.*
27 *Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983). Here, none of the persons or
28 organizations seeking leave to file an amicus brief has cited any pending case, let

1 alone a case in which it has a legally cognizable interest that may be affected by this
2 Court’s preliminary injunction, which will not create binding precedent.

3 Finally, none of the would-be amici has demonstrated that it has “unique
4 information or perspective that can help the court *beyond the help that the parties*
5 *are able to provide.*” *Ryan*, 125 F.3d at 1063 (emphasis added). Rather, the would-
6 be amici merely cite case law and make the standard arguments one would expect
7 from Wikileaks had it chosen to make them — case law of which JB certainly *is*
8 *willing and able* to brief for the Court upon its request. In fact, JB has now briefed
9 the Court on the purported First Amendment issues, as contained in Plaintiffs’
10 Supplemental Brief. That the would-be amici are engaged in the business of
11 publishing, journalism, or even First Amendment advocacy and seek to make
12 arguments Wikileaks or Dynadot have *chosen not to make for themselves* does not
13 demonstrate any “unique information or perspective” that the parties are unable to
14 provide.

15
16 **III.**

17 **CONCLUSION**

18 For the reasons stated herein, the Amici-Intervenor Parties’ Applications for
19 leave to file an amicus brief and/or intervene should be denied.

20
21 DATED: February 27, 2008

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22
23
24 /s/ William J. Briggs, II
25 By: _____
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