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 13 **JULIUS BAER BANK AND TRUST CO. LTD**

14 **UNITED STATES DISTRICT COURT**
 15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 16 **SAN FRANCISCO DIVISION**

17 **BANK JULIUS BAER & CO.**)
 18 **LTD, a Swiss entity; and JULIUS**)
 19 **BAER BANK AND TRUST CO.**)
 20 **LTD, a Cayman Islands entity,**)
 21 Plaintiffs,)

22 v.

23 **WIKILEAKS, an entity of unknown**)
 24 **form, WIKILEAKS.ORG, an entity**)
 25 **of unknown form; DYNADOT,**)
 26 **LLC, a California limited liability**)
 27 **corporation, and DOES 1 through**)
 28 **10, inclusive,**)
 Defendants.)

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

PLAINTIFFS' MEMORANDUM OF
POINTS & AUTHORITIES IN
SUPPORT OF APPLICATION FOR
TRO AND OSC RE PRELIMINARY
INJUNCTION; DECLARATIONS OF
CHRISTOPH HIESTAND AND EVAN
SPIEGEL IN SUPPORT THEREOF

[Filed Concurrently With: Ex Parte
 Application for TRO and OSC re
 Preliminary Injunction; Memorandum of
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 Application for TRO and OSC re
 Preliminary Injunction; Ex Parte
 Administrative Motion to File Under Seal
 Selected Evidence Exhibits; Notice of
 Lodgement; [Proposed] Order to Seal
 Selected Exhibits; Request for Judicial
 Notice; [Proposed] TRO and OSC Re
 Preliminary Injunction]; and [Proposed]
 Order Granting Preliminary Injunction]

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MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION

A. Summary of Argument

Plaintiffs Bank Julius Baer & Co. Ltd (“BJB”) and Julius Baer Bank and Trust Co. Ltd (“JBBT”) (collectively, “Julius Baer” and/or “Plaintiffs”), seek a temporary restraining order (“TRO”) and a preliminary injunction to prevent the continued wrongful, unlawful and damaging publication and dissemination of stolen confidential bank documents and account records, belonging to Plaintiffs, on defendants’ “uncensorable” and “untraceable mass document leaking” website Wikileaks.org. Such documents are protected and prohibited from being published under applicable consumer banking and privacy protection laws, including applicable Swiss and Cayman Islands laws, as well as federal and California Constitutional privacy rights and unfair business practices laws.

Defendants WIKILEAKS and WIKILEAKS.ORG, and their owners, operators and agents (collectively herein, “Wikileaks”), through their website operated at their domain name wikileaks.org (the “website”), have the sole purpose of providing a site for the “simple and straightforward means for anonymous and untraceable leaking of documents,” regardless of legality or authenticity. See the accompanying Spiegel declaration (“Spiegel Decl.”) ¶¶4-6, Exhs. “A”. Wikileaks attempts to operate under a veil of anonymity, or as they term it “transparency,” and, at the same time, its owners, operators and agents post and disseminate the personal details and even bank account records of others. (Id., ¶¶4, 8, Exh. “B”).

In this matter, Wikileaks solicits the submission or upload of unlawfully obtained confidential documents. It then publically disseminates the records, including stolen legally protected bank files, records and account information related to Plaintiffs’ bank and certain of its bank customers (the “JB Property”). (Spiegel Decl. ¶¶5-7, 9-10, Exh. “A”; See also, the accompanying Hiestand declaration

1 (“Hiestand Decl.”) ¶¶5-7, 26). Wikileaks not only solicits and receives submissions
2 of unlawfully obtained documents, its operators thereafter summarize and describe
3 the contents of such documents, re-publish information contained therein, and
4 otherwise exploit the stolen documents for their own unfair and unlawful business
5 practices. (Spiegel Decl., ¶¶5-7, 9). Wikileaks’ conduct makes it complicit with its
6 submitters of leaked and stolen documents.

7 Plaintiffs are the sole owners of all right, title and interest in the JB Property.
8 (Hiestand Decl. ¶¶4-6, 12-13, 26). Wikileaks’ conversion, use, display and
9 dissemination of the JB Property on the Website is unauthorized and unlawful. For
10 example, Plaintiffs did not give Wikileaks permission to publish, display or
11 disseminate the JB Property. In fact, Wikileaks display and dissemination violates
12 the rights of Plaintiffs, as well as numerous third-parties, and applicable Swiss and
13 Cayman Islands banking and consumer protection laws. Wikileaks’ dissemination
14 of this information also violates California Constitutional privacy rights.

15 As discussed below, Plaintiffs have established a likelihood of success on the
16 merits as to their claims. And, absent issuance of an injunction to prevent the
17 further dissemination of private and highly confidential bank records and account
18 information, Plaintiffs will suffer irreparable injury. Further, the balance of
19 hardships tip decidedly in Plaintiffs’ favor.

20 The Court should therefore grant Plaintiffs’ Application and issue a TRO and
21 Order to Show Cause (“OSC”) Re Preliminary Injunction.

22 **B. Factual Background**

23 Wikileaks and Defendants

24 Defendants WIKILEAKS and WIKILEAKS.ORG are each anonymous
25 fictitious business names and/or aliases. Wikileaks, through one or more yet
26 unidentified Doe individuals or agents, are the owners, operators and/or registrants
27 of the world wide web website operating under and at the domain name
28 wikileaks.org (the “Website”). (Spiegel Decl., ¶¶4, 8, Exhs. “A”, “B”).

1 The Wikileaks Website is operated by its owners and agents for the express
2 stated purpose of providing “uncensorable,” “simple and straightforward means for
3 anonymous” and “untraceable mass document leaking,” regardless of legality or
4 authenticity, and without regard for the rights of any aggrieved parties. (Spiegel
5 Decl., ¶¶4-6, Exh. “A”). Wikileaks solicits and receives submissions of documents;
6 it posts the leaked documents; and it thereafter posts summaries of the documents
7 and comments on the information. Wikileaks actively participates in the post of the
8 documents and information which appear and are available for download on their
9 Website. (Attached as Exhibit “A” to the Spiegel Declaration are true and correct
10 copies of printouts and/or screen-shots of the “Home” pages, “About” pages,
11 “Legal” pages, “Contact” and “Submissions” pages of the Website, upon which
12 Wikileaks solicits, encourages and facilitates the breach of consumer protection
13 laws, banking privacy laws, written confidentiality agreements and the unlawful
14 dissemination of protected records.) Wikileaks’ “Contact” page also shows that it
15 has a submission address for submission and receipt of “leaked” documents in
16 California. (Spiegel Decl., ¶6, Exh. “A”).

17 The domain name wikileaks.org (the “Domain Name”) was registered through
18 and is currently administered through an account with defendant DYNADOT, LLC
19 (“Dynadot”), and has its DNS services provided by Dynadot. Dynadot has, for a
20 fee and profit, provided a private anonymous who-is registration service to the
21 registrants of the Domain Name which allow Wikileaks’ owners and operators to
22 anonymously operate unlawfully. By virtue of the terms of the anonymous who-is
23 registration service, Dynadot acts as the agent and administrative contact for the
24 registrant of the Domain Name. Dynadot’s domain name server (“DNS”) services
25 allow the wikileaks.org domain name to resolve to and display the Website operated
26 at wikileaks.org. (Id., ¶8). (Attached as Exhibit “B” to the Spiegel Decl. are true
27 and correct copies of the official “who-is” domain registration records for the
28 < wikileaks.org > Domain Name, evidencing that it is registered with Dynadot,

1 under an anonymous registration service intended to hide the true identity and
2 location of the domain's owners and operators.)

3 Plaintiffs

4 Bank Julius Baer & Co. Ltd ("BJB") is one of the leading private banks in
5 Switzerland. BJB forms part and is one of the core companies of Julius Baer Group
6 ("JBG"), the parent company of which is Julius Baer Holding Ltd. ("JBH"), whose
7 shares are listed at the SWX Swiss Exchange. The Julius Baer Group's global
8 presence comprises more than 30 locations in Europe, North America, Latin
9 America and Asia, including Zurich (head office), Los Angeles, New York and
10 Grand Cayman. (Hiestand Decl., ¶2). Julius Baer Bank and Trust Co. Ltd
11 ("JBBT") is, as is BJB, a member of the JBG and a direct subsidiary of JBH, and
12 carries out, amongst other things, private banking and trust services. JBBT operates
13 at Grand Cayman. (Id.). JBBT, as was BJB, is the former direct employer of
14 disgruntled ex-employee Rudolf Elmer ("Elmer"). Elmer unlawfully took the client
15 bank records and data at issue in violation of Swiss and Cayman Islands banking and
16 privacy protection laws. And, Elmer violated his written confidentiality agreement
17 with respect to disclosure of these records. (Id., ¶¶4, 8-10, Exh. "A").

18 Written Employment Contract & Privacy Laws

19 Under the terms of an employment agreement dated September 1, 1987, BJB
20 employed Elmer as an internal auditor in its Zurich office. Between February 1994
21 through August 2002, Elmer went to work in the Cayman Islands at JBBT as an
22 "expatriate," based on employment contracts with JBH and BJB. In September
23 2002, Elmer entered into a subsequent employment and confidentiality agreement
24 ("the Agreement"). That Agreement provided that Elmer was employed directly by
25 JBBT as Senior Vice President and Chief Operating Officer. (Id., ¶¶8-9). (A true
26 and correct copy of the Agreement, which is incorporated by reference herein, is
27 attached to the Hiestand Decl. as Exhibit "A".) The Agreement states, in paragraph
28 11, that: "[Elmer] shall not at any time ... disclose to any person any information

1 as to the practice, business, dealings or affairs of the Employer or any of the
2 Employer's customers or clients” (Hiestand Decl., ¶9, Exh. “A”).

3 All data and records of the Julius Baer banks were and are protected not only
4 under employee confidentiality agreements, but also under a number of different
5 banking and consumer privacy laws. Those laws include Swiss law and the Cayman
6 Islands law – the location from which the JB Property was stolen. (Id., ¶10).

7 The Cayman Islands' Confidential Relationships (Preservation) Law (“CI-CRP
8 Law”), paragraph 3, provides, *inter alia*, that the law “has application to all
9 confidential information with respect to business of a professional nature which
10 arises in or is brought to the Islands and to all persons coming into possession of
11 such information.” (Hiestand Decl., ¶11, Exh. “B”).¹ Given the “expatriate” status
12 of Elmer while working on the Cayman Islands under Swiss-law based employment
13 contracts, respective banking privacy laws of Switzerland are relevant and applicable
14 in this case as well. Article 47 of the Swiss Federal Law on Banks and Savings
15 Banks (“Swiss FLBSB Law”), which protects confidentiality of all Swiss banking
16 records and data, and provides, *inter alia*, that: “whoever divulges a secret entrusted
17 to him in his capacity as officer, employee ... of a bank, ... or has become aware
18 thereof in this capacity, whoever tries to induce others to violate professional
19 secrecy, shall be punished by imprisonment ...” (Hiestand Decl., ¶12, Exh. “C”).
20 Plaintiffs have requested that, pursuant to FRCP 44.1 (through Plaintiffs'
21 contemporaneously filed Request for Judicial Notice), the Court take judicial notice

22 _____
23 ¹ Paragraph 2 of the CI-CRP Law defines the following terms as:
24 (i) ““confidential information” includes information concerning any property
25 which the recipient thereof is not, otherwise than in the normal course of
26 business, authorised by the principal to divulge”;
27 (ii) ““business of a professional nature” includes the relationship between a
28 professional person and a principal, however the latter may be described”;
29 (iii) ““professional person” includes ... a bank ... and every person subordinate
30 to or in the employ or control of such person for the purpose of professional
31 activities”; and
32 (iv) ““property” includes every ... interest or claim direct or indirect, legal or
33 equitable, ... in any money, moneys worth, ... movable or immovable, rights and
34 securities and all documents and things evidencing or relating thereto”.

1 of the applicable Swiss and Cayman Islands privacy laws.

2 Elmer was dismissed by JBBT in December 2002 on grounds of misconduct.
3 (Hiestand Decl., ¶13). After his employment with JBBT had been terminated, it was
4 discovered that Elmer had, without authorization, copied and stored confidential
5 information and documents about some of JBBT's clients on his home and office
6 computers, which were recovered. (Id., ¶13). There was no legitimate reason for
7 such confidential banking and client information to have been stored on Elmer's
8 computers. (Id.). Elmer subsequently demanded and tried to extort a substantial
9 severance package which, of course, JBBT refused to pay. In his correspondence,
10 Elmer threatened to mount a public campaign against JBBT and JBJ unless his
11 extortion demands were met. (Id.).

12 Leak to Swiss Newspaper

13 Plaintiff BJB was contacted in June 2005 by a Swiss newspaper, *CASH*, which
14 had been provided with a CD-rom containing a large number of JBBT's confidential
15 documents that had evidently been stolen and unlawfully provided to the newspaper.
16 (Id., ¶14). The newspaper then published an article about BJB, which stated,
17 amongst other things, that:

18 “An anonymous person sends complete data files about well-to-do
19 customers from around the world. Customer information from the Baer
20 Group was transmitted anonymously to the CASH editors. Customers
21 seeking greater discretion protection, of all people, were affected.
22 Their total holdings are in the billions. ... The contents, ... absolutely
not for general consumption: 169 megabytes of files with customer and
business information from a money institution, whose world fame is
built on secrecy. The data files come from the office of the Julius Baer
Group on the Cayman Islands.”

23 A true and correct copy of the article and an English translation of it are attached to
24 the Hiestand Decl. as Exhibit “D”.

25 The story in *CASH* was then picked up by various other newspapers in a
26 variety of locations. Neither *CASH* nor any of the other publications actually
27 published any of Plaintiffs' bank records or its clients' confidential information or
28 identifications – the Wikileaks defendants are the only ones to do so (as set forth

1 below). (Hiestand Decl., ¶¶14-15). A Swiss newspaper called *Die Weltwoche*
2 published an article on June 23, 2005, in which the initials of the person who had
3 leaked the confidential information were described as being “RE”; and who was also
4 described as having formerly worked for JBBT. (Id.).

5 Investigations by the Authorities

6 Only a very limited number of people, of which Elmer was one, would have
7 had access to the data and documents. Once this and other information came to
8 light, BJB filed a criminal complaint against Elmer with the public prosecutor in
9 Zurich, Switzerland. (Id., ¶16). A subsequent police search of Elmer’s properties
10 unequivocally uncovered further confidential bank-client data and documents in
11 Elmer’s possession. Investigations have implicated Elmer as responsible for the
12 leaked confidential bank-client data. (Id.). Elmer was arrested and detained for
13 approximately one month by the Swiss authorities before he was released pending
14 an on-going criminal investigation and proceedings. (Id., ¶16-17).

15 Elmer is the subject of multi-national criminal investigations related to not
16 only the above referenced theft of confidential records, but also related to his
17 attempted extortion and a campaign of threats and terrorist threats against Plaintiffs
18 and certain of its employees (e.g., death and bomb threats, including reference to
19 “9/11”, and threatening letters containing “white powder” sent to the premises of
20 the Plaintiffs in New York and Zurich). (Id., ¶¶17-19).

21 As one of many such possible examples, BJB’s Deputy Group General
22 Counsel received an e-mail, on August 7, 2007, stating, in part: “*it is about time to*
23 *let you know my hunter is after you. You are number one on my list ... It is not the*
24 *first job the hunter did and execution is his strength. ... Thank you for being so kind*
25 *to me but now we need to get rid of you. Regards the Hunter”*. (Hiestand Decl., ¶18,
26 Exh. “E”).

27 As an example of the multiple terrorist threats, a letter sent September 7, 2007
28 to BJB’s Zurich bank branch, stated:

1 **“There will be an explosion the Bank today, Friday, at**
2 **11.00PM which will remind everyone on [sic] the**
3 **September 11th!”**

4 (Hiestand Decl., ¶19, Exh. “F”).

5 In or about November 2006, Elmer filed a criminal complaint against BJB and
6 several employees on the basis that it/they had allegedly been stalking him (by use
7 of a security expert who traced the various tortious and illegal conduct to Elmer).
8 Elmer’s claim was entirely without merit, and subsequently dismissed as such by the
9 relevant authorities on December 11, 2007. (Id., ¶20). The respective decision,
10 which according to its distribution list was sent by the authorities only to Elmer, was
11 subsequently published on Wikileaks.org (in a folder “Bank Julius Baer v. Rudolf
12 Elmer”) as well. (Id.).

13 Publication of Documents on Wikileaks

14 Between November and December 2007, Elmer provided several documents
15 relating to BJB and JBBT to the Wikileaks Website. These contained various untrue
16 allegations about the Plaintiffs but did not contain any of Plaintiffs’ confidential
17 information. (Hiestand Decl., ¶21). In or about mid-December 2007, Elmer
18 provided a letter to Wikileaks, which they posted onto the Wikileaks.org Website
19 and commented on and summarized, containing the judicial denial notice issued to
20 Elmer from Swiss authorities. Plaintiffs do not contend that the posting of the
21 document was wrongful or that said document should be removed. However, the
22 posts made it apparent that Elmer was a former employee of Plaintiffs, was bound
23 by a confidentiality agreement and various banking privacy laws of Switzerland and
24 the Cayman Islands, and was the person responsible for providing information about
25 the Julius Baer bank to the owners/operators of the Wikileaks Website. (Id., ¶22).

26 Subsequently, commencing on or about January 13, 2008, Elmer began
27 posting hundreds of documents containing stolen or wrongfully obtained and
28 disclosed confidential banking records belonging to Plaintiffs, including altered

1 and/or forged or semi-forged “leaked” documents. (Hiestand Decl., ¶¶24-25;
2 Spiegel Decl., ¶9). A number of the documents have been altered to falsely appear
3 to have been created after 2002 and/or have been re-named in a manner which is
4 intended to make the documents and folders appear to contain records of nefarious
5 or unethical transactions. (Id.). Elmer and the Wikileaks defendants have posted
6 onto the Website, summarized, repeated, translated and/or re-posted and continue
7 to display or make available approximately 694 different documents and folders
8 which contain confidential bank records and client data. (Hiestand Decl., ¶26;
9 Spiegel Decl., ¶¶9-10, Exhs. “C”, “D”). The JB Property, as disclosed on the
10 Website, references protected consumer bank files, records, data and account
11 information related to or purported to relate to certain of JBBT’s bank customers.
12 All of the files are protected by law, owned by JBBT and/or BJB and have never
13 been authorized to be disclosed to the public. Plaintiffs would not have disclosed,
14 nor knowingly made, the confidential JB Property available to the public. (Hiestand
15 Decl., ¶¶6-12, 26).

16 The “JB Property” includes and is defined herein as any and all documents
17 and information originating from BJB’s and/or JBBT’s banks and affiliated bank
18 branches; which contains private client bank records and/or identifies client names,
19 data, account records and/or bank account numbers; whether or not such documents
20 and information are authentic, semi-altered, semi-fraudulent or forged; and which
21 appears to have originated from or could reasonably be known to be or considered
22 to constitute or have originated from data and documents stolen or misappropriated
23 from one or more of Plaintiff’s bank branches and/or computers. Attached to the
24 Hiestand Decl., ¶5, as Exhibit “C” is an index listing (as titled by Wikileaks and/or
25 Elmer, but semi-redacted) of the JB Property made available by Wikileaks through
26 its Website. A copy printouts showing lists of every document and folder of the JB
27 Property, along with a copy of selected representative samples of the many
28 thousands of pages of the JB Property made available by Wikileaks on its Website

1 have been concurrently hereto lodged with the Court in conjunction with a Motion
2 to File Under Seal. (Spiegel Decl. ¶10).

3 Plaintiffs have not requested nor demanded removal or reference to any
4 articles related to the existence of the dispute with Elmer and/or any of his
5 contentions and/or any public discussion on the various civil and criminal
6 proceedings related to Elmer. Plaintiffs merely seek removal and protection of the
7 specific stolen confidential bank documents or, at minimum, all of the identifying
8 client data and account numbers. (Hiestand Decl., ¶27; Spiegel Decl., ¶¶11-13).

9 Wikileaks is fully knowledgeable of the nature of the unlawfully obtained and
10 protected consumer banking records. Despite notice to Wikileaks' counsel of (i) the
11 nature of the unlawfully leaked documents and (ii) that the source of the documents
12 is bound by a written confidentiality agreement and various banking privacy laws;
13 and reasonable requests that the identifying information be removed; Wikileaks has
14 refused to remove the posted stolen documents, as well as any of the identifying
15 client/customer data. In fact, after a good-faith effort to resolve the matter by a call
16 to and discussion with Wikileaks' counsel, Wikileaks thereafter posted misstatements
17 of the conversation and all of opposing counsel's contact information on the Website,
18 and at the same time, removed the contact information for its own counsel. (Spiegel
19 Decl., ¶¶13-14). Wikileaks has apparently reposted the unlawfully leaked
20 documents and information in an apparent effort to keep the posts at the fore-front
21 of its Website and to unlawfully exploit the information. (Id., ¶15). Wikileaks has
22 sought to capitalize on and further exploit its own unfair and unlawful practices and
23 conduct to increase their Website's notoriety and traffic. The disgruntled ex-bank
24 employee responsible for the leaks continues to provide documents to Wikileaks, and
25 has indicated, as of February 4, 2008, that additional documents are to be released
26 in the coming weeks. (Id., ¶15, Exh. "E").

27 The publication, dissemination and exploitation of stolen legally protected
28 bank files related to Plaintiffs' bank customers has resulted in harm to Plaintiffs'

1 reputations, its customers' confidence in the bank and its customer banking
2 relationships, among other damages. (Hiestand Decl., ¶28). Such publication,
3 dissemination and exploitation is in breach of the relevant banking and privacy laws
4 of Switzerland and the Cayman Islands, as well as California Constitutional privacy
5 rights. (Id., ¶29).

6 II.

7 **PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING** 8 **ORDER AND PRELIMINARY INJUNCTION**

9 In the Ninth Circuit, "when a party is seeking a preliminary injunction, he or
10 she must show either (1) a combination of probable success on the merits and the
11 possibility of irreparable injury, or (2) that serious questions are raised and the
12 balance of hardships tips in favor of the moving party. These standards 'are not
13 separate tests but the outer reaches of a single continuum.'" *Iconix, Inc. v. Tokuda*,
14 457 F.Supp.2d 969, 975 (N.D. Cal. 2006), quoting *Stuhlberg Int'l Sales Co. v. John*
15 *D. Brush & Co., Inc.*, 240 F.3d 832, 839-40 (9th Cir. 2001) (citation omitted).
16 "These two formulations represent two points on a sliding scale in which the
17 required degree of irreparable harm increases as the probability of success
18 decreases." *Id.*

19 "Under the sliding scale theory, a party seeking an injunction 'need not
20 demonstrate that he will succeed on the merits, but must show that his cause presents
21 serious questions of law worthy of litigation.'" *Iconix, Inc.*, at 975, quoting *Topanga*
22 *Press, Inc. v. City of LA*, 989 F.2d 1524, 1528 (9th Cir. 1993). Additionally,
23 serious questions are "substantial, difficult, and doubtful, as to make them fair
24 ground for litigation and thus for more deliberative investigation." *Id.*

25 Application of these principles to the present facts establishes that injunctive
26 relief is necessary and appropriate in light of Plaintiffs' probable success on the
27 merits and the obvious irreparable injury if relief is not granted, thereby tipping the
28 balance of hardships strongly in Plaintiffs' favor. Here, numerous separate and

1 independent grounds warrant issuance of the injunctive relief requested, including
2 the following:

3 **A. Plaintiffs Have Established a Strong Probability of Success on the Merits,**
4 **the Possibility of Irreparable Injury and the Balance of Hardships Tips**
5 **in Overwhelmingly in Their Favor.**

6 **1. Plaintiffs' Unfair Competition Claims Justify Injunctive Relief to**
7 **Prohibit Defendants' Further Unlawful Use, Display and/or**
8 **Dissemination of the JB Property.**

9 California's unfair competition and business practices law, Business &
10 Professions Code § 17200 et. seq. ("UCL"), defines unfair competition to include
11 "any unlawful, unfair or fraudulent business act or practice." Section 17200
12 prohibits a variety of different types of wrongful conduct, including any "unlawful
13 business act or practice" and/or any "unfair business act or practice."

14 There is no requirement that the activity or conduct sought to be enjoined be
15 commercial – any act or practice which is unlawful or unfair is applicable. *Barquis*
16 *v. Merchants Collection Ass'n*, 7 C.3d 94, 111, 101 Cal.Rptr. 745, 757; See also,
17 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1147 (9th Cir. 1997); *Isuzu*
18 *Motors, Ltd. v. Consumers Union of U.S., Inc.*, 12 F.Supp.2d 1035, 1048 (C.D.
19 Cal. 1998) (allegedly defamatory statements made by a non-profit "consumers
20 union" are covered even though it is completely noncommercial); *Pines v. Tomson*,
21 160 Cal.App.3d 370, 386, 206 Cal.Rptr. 866, 875-76 (1984) (non-profit religious
22 group's activities covered); and see *People v. E.W.A.P., Inc.*, 106 Cal.App.3d 315,
23 320-321, 165 Cal.Rptr. 73, 75-76 (enterprise engaged entirely in criminal conduct
24 is nevertheless a "business" for purposes of § 17200).

25 An unlawful business act or practice includes a violation of any other law. In
26 effect, the "unlawful" prong of § 17200 makes a violation of the underlying
27 "borrowed" law a *per se* violation of § 17200. *Kasky v. Nike, Inc.*, 27 Cal.4th 939,
28 950, 119 Cal.Rptr.2d 296 (2002); *Cel-Tech Communications, Inc. v. Los Angeles*

1 *Cellular Telephone Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 561 (1999).
2 Virtually any law or regulation – state, federal, foreign, statutory or common law
3 – can serve as predicate for a § 17200 “unlawful” violation. *People v. E.W.A.P.,*
4 *Inc., supra*, 106 Cal.App.3d at 319, 165 Cal.Rptr. at 75. As the California
5 Supreme Court has stated, § 17200 “borrows” violations of any other law and treats
6 them as unlawful business practices independently actionable under § 17200.
7 *Farmers Ins. Exch. v. Sup. Ct.*, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 491 (1992).

8 The JB Property is protected by federal law, the California Constitution, and
9 the banking and privacy laws of the Cayman Islands and Switzerland, where the
10 bank records and documents at issue were originally unlawfully obtained and the
11 associated accounts are located.

12 (a) Federal & California Law Each Protect the JB Property

13 Privacy is a value so fundamental to American society that it is protected by
14 both the United States Constitution (implicitly) and the California Constitution
15 (explicitly). See Cal. Const. Art. I, §1. (identifying privacy as among the people’s
16 “inalienable rights”). The constitutional provisions create a zone of privacy that
17 protects against unwarranted disclosure of private information. See *Britt v. Sup.*
18 *Ct.*, 20 Cal.3d 844, 855-856, 143 Cal.Rptr. 695 (1978).

19 Congress has further codified a “Right to Financial Privacy” pertaining to
20 individual’s bank records through enacting Title 12, Chapter 35 of the United States
21 Code. The act specifically recognizes the confidential nature of records relating to
22 every financial institutions’ relationship with its customers, including “all
23 information known to have been derived therefrom.” 12 USCA §3401(2).

24 California’s Supreme Court has specifically and long recognized that
25 individuals have a protected right of privacy in their bank records. See, *Valley Bank*
26 *of Nevada v. Sup. Ct.*, 15 Cal. 3d. 652,656-657, 542 P.2d 977 (1975); *Burrows v.*
27 *Sup. Ct.*, 13 Cal.3d 238, 118 Cal.Rptr. 166 (1974). Indeed, California’s Supreme
28 Court has prohibited the disclosure of individuals’ bank records by a third-party

1 without a court weighing multiple factors, including, but not limited to, the purpose
2 of the information sought, the effect of the disclosure on the parties, the nature of
3 the objections urged by the party resisting disclosure, and the ability of the court to
4 make an alternative order as may be just under the circumstances. *Valley Bank of*
5 *Nevada, supra*, 15 Cal.3d at 656-657.

6 Wikileaks' unwarranted disclosure of the private bank information which
7 comprises the JB Property constitutes unlawful business practices by violation of the
8 above referenced California Constitutional and federal privacy rights law.

9 (b) Cayman Islands & Swiss Banking and Privacy Laws Each
10 Protect the JB Property

11 Plaintiffs' privacy rights in their bank records and information are also
12 codified in the jurisdictions where the records originated and the bank accounts are
13 located. Plaintiffs have requested that, pursuant to FRCP 44.1 (through Plaintiffs'
14 contemporaneously filed Request for Judicial Notice), the Court take judicial notice
15 of the applicable Swiss and Cayman Islands banking and privacy laws.

16 The Cayman Islands Confidential Relationships (Preservation) Law protects
17 confidentiality of all Cayman Island banking records and data, and broadly provides,
18 *inter alia*, that it "has application to all confidential information with respect to
19 business of a professional nature ... and to all persons coming into possession of
20 such information at any time thereafter whether they be within the jurisdiction or
21 thereout." CI-CRP Law ¶3(1). (Hiestand Decl., ¶11, Exh. "B")

22 Similarly, Article 47 of the Swiss Federal Law on Banks and Savings Banks
23 protects the confidentiality of all Swiss banking records and data, and provides, *inter*
24 *alia*, that "whoever divulges a secret entrusted to him in his capacity as officer [or]
25 employee ... of a bank, ... or has become aware thereof in this capacity, and
26 whoever tries to induce others to violate professional secrecy, shall be punished by
27 imprisonment ..." (Hiestand Decl. ¶12, Exh. "C").

28 / / /

1 Elmer was a bank employee who was entrusted with confidential and secret
2 bank and client information. Elmer is bound by a confidentiality agreement which
3 provides that the documents and information which comprise the JB Property are
4 confidential and not to be disclosed.² Both the CI-CRP Law and Swiss FLBSB
5 specifically apply to Elmer, as well as anyone who induces him to disclose
6 confidential bank information, whether they come into possession of such
7 information at any time, within the Cayman Islands or anywhere else in the world.

8 Wikileaks induced Elmer to “violate professional secrecy” and to “leak” the
9 “confidential information” which he obtained as a bank officer and employee.
10 Wikileaks has acted in complicity with Elmer in the dissemination of the JB
11 Property; and their conduct constitutes unfair and unlawful business practices by
12 violations of both the Swiss and Cayman Islands privacy laws.

13 (c) Defendants’ Conduct is Unlawful and Warrants Injunctive Relief

14 Plaintiffs contend that the solicitation of upload and posting of leaked
15 confidential consumer bank records and account information, wrongfully obtained
16 from a Cayman Islands and/or Swiss bank, and the subsequent use, posting, display
17 and/or dissemination of the documents and information, was and is wrongful,
18 tortious and unlawful under U.S., California, Cayman Islands and Swiss laws.
19 (Hiestand Decl. ¶¶6-7, 29; Spiegel Decl. ¶¶7, 9-10).

20 Wikileaks’ sole purpose or practice is to facilitate the “mass leaking” of
21 documents. (Spiegel Decl. ¶4-6, Exh. “A”). Wikileaks actively solicits and
22 encourages submission of stolen or unlawfully released documents. Wikileaks has
23 conspired with, implicitly or expressly, and acted in concert with Elmer, who acted
24 on Wikileaks’ solicitation to provide it with the stolen confidential records for public
25

26 ² Elmer’s Agreement provides that he “shall not at any time during his
27 employment ... or at any time after his employment has terminated disclose to
28 any person any information as the business ... or affairs of [the bank] or any of
[its] customers ... or as to any other matters which may come to his knowledge
by reason of his employment.” (Hiestand Decl., Exh. “A”).

1 dissemination. There is no difference between the unauthorized and unlawful
2 posting and dissemination of client bank records and account information and/or of
3 medical files and information and/or of social security numbers or any other id-theft
4 information, all of which are prohibited by law. If Wikileaks' unlawful conduct
5 cannot be enjoined, than all privacy rights and laws will be undermined and
6 effectively made meaningless.

7 Plaintiffs respectfully request this Court to protect their property and privacy
8 rights, and that of their clients and all persons everywhere, by enjoining Defendants
9 from continuing to use, post, display and/or disseminate the JB Property and any
10 information contained therein. Plaintiffs' entitlement to injunctive relief is bolstered
11 by the fact that it would be extremely difficult or impossible to measure and
12 determine the amount of damages to its reputation and business should the JB
13 Property be further disseminated to potentially unlimited numbers of people
14 throughout the world wide web.

15 Here, the overwhelming evidence establishes that Defendants' conduct
16 constitutes unfair and unlawful business practices as violations of Plaintiffs' rights
17 established under the applicable Swiss and Cayman Islands privacy laws, as well as
18 California Constitutional and federal privacy rights. Accordingly, Plaintiffs
19 respectfully requested that the Court issue the requested TRO and OSC re
20 preliminary injunction to preclude any further or additional use, reference, display
21 or dissemination of the JB Property.

22 **2. Plaintiffs' Likelihood of Success on the Merits of their Conversion**
23 **and Tort Claims Supports The Imposition of Injunctive Relief.**

24 Injunctive relief is also appropriate based Plaintiffs' conversion and tort
25 claims. It is widely recognized that courts have the power to enjoin a wide range
26 of common law and statutory torts or threatened torts, including conversion. See
27 *Gladstone v. Hillel*, 203 Cal. App. 3d 977, 988-89, 250 Cal. Rptr. 372 (1988)
28 (citations omitted). One who wrongfully acquires property of another holds the

1 property as an involuntary constructive trustee. *Id.*, at 989.

2 In *Gladstone*, the court affirmed an injunction against further conversion based
3 on copyright infringement, stating that the tortfeasors:

4 “owe[d] to the person they had wronged a duty to avoid further harm
5 to his interest resulting from their wrongful act. This duty requires that
6 they take steps to ... refrain from using ... the property they had
7 converted. A breach of this duty would constitute a separate tort which
8 a court of equity could appropriately enjoin.”

9 *Id.*, at 989. The court in *Gladstone* specifically held that the same principles are
10 “directly applicable to the tort of conversion” and a “breach of this duty would
11 constitute a separate tort which a court of equity could appropriately enjoin.” *Id.*

12 Conversion is the wrongful exercise of dominion over the property of another.
13 The elements of a conversion are (i) the plaintiffs’ ownership or right to possession
14 of the property at the time of the conversion; (ii) the defendants’ conversion by a
15 wrongful act or disposition of property rights; and (iii) damages. It is only
16 necessary to show an assumption of control or ownership over the plaintiffs’
17 property, or that the alleged converter has applied the property to its own use.
18 *Spates v. Dameron Hospital Assn.*, 114 Cal.App.4th 208, 7 Cal.Rptr.3d 597 (2003).

19 The law is well established that the rightful owner of property cannot lose title
20 through conversion by a third-party. *See, Swim v. Wilson*, 90 Cal. 126, 128-131, 27
21 P. 33 (1891); *Culp v. Signal Van & Storage Co.*, 142 Cal.App.2d Supp. 859, 861,
22 298 P.2d 162 (1956) (purchaser from one with no title is guilty of conversion).
23 Further, no one can transfer better title than he has. (*Id.*). Therefore, any individual
24 or entity that acquires possession of previously converted property stands in the same
25 position as the original third-party converter. (*Id.*). Title continues in the rightful
26 owner of property. *Swim, supra*, 90 Cal. at 128-131; *Woodsend v. Chatom*, 191
27 Cal. 72, 79, 214 P. 965 (1923); *Barthelmess v. Cavalier*, 2 Cal.App.2d 477, 38
28 P.2d 484 (1934); *Culp, supra*, at 861 (one who, even acting in good-faith, purchases

1 or acquires property from one having no title thereto or right to transfer such
2 property is guilty of conversion as against true owner).

3 As discussed above, Wikileaks has for its own use and benefit displayed on
4 their Website and posted, re-posted, summarized and used derivative portions
5 thereof of the JB Property, to which Defendants have no right, title or interest
6 (Hiestand Decl. ¶¶6, 26). Moreover, Defendants obtained possession of these
7 materials improperly and unlawfully, actively soliciting and encouraging the
8 submission to them of “leaked” confidential bank records. (Spiegel Decl. ¶4-6).

9 Accordingly, and in light of the circumstances described herein and in order
10 to maintain the status quo, injunctive relief should issue prohibiting Defendants from
11 any further use, display, post and/or dissemination of any of the stolen and
12 converted confidential proprietary JB Property.

13 **B. Plaintiffs Have Suffered And Will Continue To Suffer Irreparable Harm**
14 **Should An Injunction Not Issue.**

15 The second factor of the “continuum” test set forth in *Iconix, Inc.* and
16 *Stuhlberg Int’l Sales Co.* and considered by the courts for the issuance of an
17 injunction (as set forth above under Section III), is the “existence of serious
18 questions governing the merits and that the balance of hardships tips in its favor.”
19 *Iconix, supra*, 457 F.Supp.2d at 975 (citations omitted). The factor that “serious
20 questions” be raised has been interpreted as requiring a showing that a “fair chance
21 of success on the merits” exists. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739
22 F.2d 1415, 1422 (9th Cir. 1984). In addition, the factor of “the balance of
23 hardships,” requires merely a showing that the hardship would tip in favor of the
24 moving party. *Id*; *Michaels v. Internet Ent. Group, Inc.*, 5 F.Supp.2d 823, 838
25 (C.D. Cal. 1998); *Iconix, supra*, at 975 (“Under the sliding scale theory, a party
26 seeking an injunction ‘need not demonstrate that he will succeed on the merits, but
27 must show that his cause presents serious questions of law worthy of litigation.’”).

28 / / /

1 Plaintiffs have demonstrated that they are likely to prevail on the merits of
2 both their conversion claims and their unfair competition and business practices
3 claims for violations of Swiss, Cayman Islands and California and federal privacy
4 laws. Plaintiffs have further demonstrated that they have suffered and will continue
5 to suffer irreparable harm at the hands of the Defendants. Here, money damages
6 would not adequately compensate Plaintiffs for continued and future anticipated
7 violations by Wikileaks because it would be difficult, if not impossible, to quantify
8 the damage to Plaintiffs' reputations and to prove the loss of specific clients and
9 business opportunities resulting from the Defendants' continued, further and future
10 dissemination of the JB Property. *AT&T Communications of Cal. v. Pacific Bell*,
11 1996 WL 940836, 11 (N.D. Cal 1996) (preliminary injunction issued, based in part,
12 on loss of control of plaintiff's trade secrets, which is itself an irreparable harm)
13 *citing Peripheral Devices Corp. II v. Ververs*, 1995 U.S. Dist Lexis 11389, 27-28
14 ("once information loses its confidentiality, there is no amount of money or effort
15 that will make it confidential again"). See also, *Perfect 10, Inc. v. Cybernet*
16 *Ventures, Inc.*, 213 F. Supp. 2d 1146, 1190 (C.D. Cal. 2002) ("In copyright and
17 unfair competition cases, irreparable harm is presumed once a sufficient likelihood
18 of success is raised") *citing Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109 (9th
19 Cir. 1998); *Heckmann v. Ahmanson*, 168 Cal.App.3d 119, 214 Cal.Rptr. 177 (1985)
20 (injunction against disposing of property is proper if disposal would render the final
21 judgment ineffectual); *Gladstone v. Hillel, supra*, 203 Cal. App. 3d at 988-89
22 (citations omitted) (tortfeasors owe the person they have wronged a duty to avoid
23 further harm through exploitation of converted property); *BP Chemicals Ltd. v.*
24 *Formosa Chemical & Fibre Corp.*, 229 F.3d 254, 263 (3rd Cir. 2000) (injuries to
25 reputation are difficult to calculate, and thus money damages are an inadequate
26 remedy; injury to goodwill is irreparable).

27 In addition, the factor of "the balance of hardships" clearly tips in Plaintiffs'
28 favor. If an injunction is immediately granted, Defendants will merely be required

1 to do what they are already legally obligated to do -- not use, display or disseminate
2 the confidential bank records which comprise the JB Property. To be prohibited
3 from engaging in wrongdoing is not a hardship. *See, Caterpillar, Inc. v. Nationwide*
4 *Equip.*, 877 F. Supp 611, 617 (M.D. Fla. 1994) (in trademark context, "Defendants
5 will suffer no harm from being restrained from doing that which is illegal"). On the
6 other hand, the continued dissemination of the JB Property continues to and further
7 harms Plaintiffs' reputations and businesses, its customers' confidence in the bank,
8 its customer banking relationships and could potentially undermine the banks' ability
9 to effectively operate, among other harms.

10 With every day, Defendants continue to display and further disseminate
11 private information found within the JB Property and attempt to further capitalize on
12 and exploit their unlawful conduct to increase their Website's traffic, furthering the
13 irreparable harm suffered by Plaintiffs. The print-outs of the "history" pages of the
14 posts related to the JB Property show that Wikileaks is responsible for the posts, and
15 engaged in numerous edits and revisions to the posts. (Spiegel Decl. ¶¶9, 15, Exhs.
16 "C" and "E"). A long comment post dated February 4, 2008, apparently from
17 Elmer writing in the third-person, states that:

18 "Elmer might be inveigled into supporting or even executing a terrible
19 act of destruction of human lives [*sic*] as other did in Zurich (Tschanun
20 case 7 deaths, Kantonalbank Zurich three deaths etc.); and

21 "It is believed that there are many other cases [documents] to surface
22 in the next few weeks." (emphasis added).

23 The statements are clear that, absent injunctive relief, additional JB Property will be
24 posted, furthering the irreparable harm suffered by Plaintiffs. (Id., ¶15, Exh. E).

25 Further, Defendants' intentional conduct of creating a "means for anonymous
26 and untraceable leaking of documents," regardless of legality, renders injunctive

27 / / /

28 / / /

1 relief all the more appropriate.³ See, *Ocean Garden, Inc. v. Marktrade Co., Inc.*,
2 953 F.2d 500, 508 (9th Cir. 1991) (balance of hardships favors plaintiff where there
3 is "substantial evidence" of defendant's "bad faith," by intentional infringement).
4 Here, Defendants' possession of, use and dissemination of hundreds of stolen
5 confidential bank records and documents, which belong to Plaintiffs, in violation of
6 the applicable Swiss and Cayman Islands privacy laws and the California
7 Constitutional right to privacy, has resulted in irreparable harm to Plaintiffs. The
8 injunctive relief requested is therefore necessary and appropriate.

9 III.

10 **PLAINTIFFS SHOULD BE REQUIRED TO POST NO, OR ONLY** 11 **A MINIMAL, BOND IN LIGHT OF DEFENDANTS' CONDUCT**

12 In construing the language of Federal Rule of Civil Procedure, Rule 65(c), the
13 courts have stated that, "especially in view of the phrase – 'as the court deems
14 proper' – the district court may dispense with security" where the district court
15 determines that the risk of harm is remote, or that the circumstances otherwise
16 warrant it, or that there has been no proof of likelihood of harm to the party
17 enjoined. The Court has the discretion to require only a nominal bond, or even no
18 bond at all. See, e.g., *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356
19 (2d Cir 1974) (approving district court's fixing bond amount at zero in the absence
20 of evidence regarding likelihood of harm) citing *Ferguson v. Tabah*, 288 F.2d 665,
21 675 (2d Cir. 1961); *Urbain v. Knapp Brothers Mft'g Co.*, 217 F.2d 810 (6th Cir.
22 1954), cert. denied, 349 U.S. 930, 75 S.Ct. 772 (1955). See also, *GoTo.com, Inc.*
23 *v. The Walt Disney Co.*, 202 F.3d 1199 (9th Cir. 2000) (\$25,000 bond required to
24 enjoin use of defendant's logo and commercial website which infringed on pay-for-
25 placement search engine website's logo).

26 _____
27 ³ It also makes it necessary to issue injunctive relief requiring Dynadot to remove
28 the DNS records to prevent the website from displaying the JB Property until
such time as the Wikileaks defendants stop hiding behind anonymity and comply
with the law and the Court's order.

1 Based on the above, including that injunctive relief will not cause any
2 economic or other harm to Defendants, it is respectfully requested that the Court
3 require that Plaintiffs post no bond, or, at most, only a nominal bond in connection
4 with the requested injunctive relief.

5 **IV.**

6 **CONCLUSION**

7 Based on the foregoing, Plaintiffs respectfully request that this Court issue a
8 Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction
9 in the form set forth in the [Proposed] Temporary Restraining Order and Order to
10 Show Cause re Preliminary Injunction submitted herewith, and for such other
11 alternative and further relief as the Court may deem to be just and appropriate.

12 Respectfully submitted,

13 DATED: February 7, 2008

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