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 16 PROJECT ON GOVERNMENT OVERSIGHT, *et al.*

17 *Additional Counsel Listed On Signature Page*

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.

No. CV-08-0824 JSW

Action Filed: February 6, 2008

[PROPOSED] ANSWER AND CROSS-
COMPLAINT IN INTERVENTION

[Fed. R. Civ. P. 24(a), 24(b)]

HOWARD
 RICE
 NEMEROVSKI
 CANADY
 FALK
 & RABKIN
 A Professional Corporation

1 PROJECT ON GOVERNMENT OVERSIGHT, a
2 District of Columbia not-for-profit organization;
3 AMERICAN CIVIL LIBERTIES UNION, INC.,
4 a District of Columbia not-for-profit organization;
5 AMERICAN CIVIL LIBERTIES UNION
6 FOUNDATION, INC., a New York not-for-profit
7 organization; ELECTRONIC FRONTIER
8 FOUNDATION, a Massachusetts not-for-profit
9 organization, on behalf of its members; and
10 JORDAN MCCORKLE, an individual,

11
12 Defendants and Cross-
13 Complainants In Intervention,

14 v.

15 BANK JULIUS BAER & CO. LTD, a Swiss
16 entity; and JULIUS BAER BANK & TRUST
17 CO. LTD., a Cayman Island entity; and
18 DYNADOT, LLC, a California limited liability
19 company,

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21 Cross-Defendants In Intervention.
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1 Defendants and Cross-Complainants in Intervention Project on Government Oversight,
2 American Civil Liberties Union, Inc., American Civil Liberties Union Foundation, Inc., Electronic
3 Frontier Foundation, on behalf of its members, and Jordan McCorkle (collectively, “Intervenors”)
4 for their answer to the Complaint filed by Plaintiffs Bank Julius Baer & Co. Ltd. and Julius Baer
5 Bank and Trust Co. Ltd. against Defendants Wikileaks, wikileaks.org, Dynadot, LLC, and Does 1-
6 10, as follows:

7 **The Nature of This Action**

8 1. State that they are without knowledge or information sufficient to form a belief as to the
9 truth of the allegations of paragraph 1.

10 **Jurisdiction and Venue**

11 2. State that they are without knowledge or information sufficient to form a belief as to the
12 truth of the allegations of paragraph 2.

13 3. State that they are without knowledge or information sufficient to form a belief as to the
14 truth of the allegations of paragraph 3.

15 **Intradistrict Assignment**

16 4. State that they are without knowledge or information sufficient to form a belief as to the
17 truth of the allegations of paragraph 4.

18 **The Parties**

19 5. State that they are without knowledge or information sufficient to form a belief as to the
20 truth of the allegations of paragraph 5, except admit, on information and belief, that Bank Julius
21 Baer & Co., Ltd., is a Swiss entity with its principal place of business in Zurich, Switzerland.

22 6. State that they are without knowledge or information sufficient to form a belief as to the
23 truth of the allegations of paragraph 6, except admit, on information and belief, that Julius Baer
24 Bank & Trust Co., Ltd., is a Cayman Islands entity, with its principal place of business in Windward
25 III, Grand Cayman.

26 7. State that they are without knowledge or information sufficient to form a belief as to the
27 truth of the allegations of paragraph 7.

28 8. State that they are without knowledge or information sufficient to form a belief as to the

1 truth of the allegations of paragraph 8.

2 9. State that they are without knowledge or information sufficient to form a belief as to the
3 truth of the allegations of paragraph 9, except admit, on information and belief, that Dynadot LLC is
4 a California limited liability company, with its principal place of business in San Mateo, California.

5 10. State that they are without knowledge or information sufficient to form a belief as to the
6 truth of the allegations of paragraph 10.

7 11. State that they are without knowledge or information sufficient to form a belief as to the
8 truth of the allegations of paragraph 11.

9 12. State that they are without knowledge or information sufficient to form a belief as to the
10 truth of the allegations of paragraph 12.

11 **Facts Common to All Claims For Relief**

12 13. State that they are without knowledge or information sufficient to form a belief as to the
13 truth of the allegations of paragraph 13.

14 14. State that they are without knowledge or information sufficient to form a belief as to the
15 truth of the allegations of paragraph 14.

16 15. State that they are without knowledge or information sufficient to form a belief as to the
17 truth of the allegations of paragraph 15.

18 16. State that they are without knowledge or information sufficient to form a belief as to the
19 truth of the allegations of paragraph 16.

20 17. State that they are without knowledge or information sufficient to form a belief as to the
21 truth of the allegations of paragraph 17.

22 18. State that they are without knowledge or information sufficient to form a belief as to the
23 truth of the allegations of paragraph 18.

24 19. State that they are without knowledge or information sufficient to form a belief as to the
25 truth of the allegations of paragraph 19.

26 20. State that they are without knowledge or information sufficient to form a belief as to the
27 truth of the allegations of paragraph 20.

28 21. State that they are without knowledge or information sufficient to form a belief as to the

1 truth of the allegations of paragraph 21.

2 22. State that they are without knowledge or information sufficient to form a belief as to the
3 truth of the allegations of paragraph 22.

4 23. State that they are without knowledge or information sufficient to form a belief as to the
5 truth of the allegations of paragraph 23.

6 24. State that they are without knowledge or information sufficient to form a belief as to the
7 truth of the allegations of paragraph 24.

8 25. State that they are without knowledge or information sufficient to form a belief as to the
9 truth of the allegations of paragraph 25.

10 26. State that they are without knowledge or information sufficient to form a belief as to the
11 truth of the allegations of paragraph 26.

12 27. State that they are without knowledge or information sufficient to form a belief as to the
13 truth of the allegations of paragraph 27.

14 28. State that they are without knowledge or information sufficient to form a belief as to the
15 truth of the allegations of paragraph 28.

16 29. State that they are without knowledge or information sufficient to form a belief as to the
17 truth of the allegations of paragraph 29.

18 30. State that they are without knowledge or information sufficient to form a belief as to the
19 truth of the allegations of paragraph 30.

20 31. State that they are without knowledge or information sufficient to form a belief as to the
21 truth of the allegations of paragraph 31.

22 **FIRST CLAIM FOR RELIEF**

23 For Unlawful and Unfair Business Practices in Violation of Cal. Bus. & Prof. Code §17200
(Against Defendants Wikileaks, wikileaks.org and Does 1-10)

24 32. Repeat and reallege their responses to the allegations contained in paragraphs 1-31.

25 33. State that they are without knowledge or information sufficient to form a belief as to the
26 truth of the allegations of paragraph 33.

27 34. State that they are without knowledge or information sufficient to form a belief as to the
28 truth of the allegations of paragraph 34.

1 35. State that they are without knowledge or information sufficient to form a belief as to the
2 truth of the allegations of paragraph 35.

3 36. State that they are without knowledge or information sufficient to form a belief as to the
4 truth of the allegations of paragraph 36.

5 37. State that they are without knowledge or information sufficient to form a belief as to the
6 truth of the allegations of paragraph 37.

7 38. State that they are without knowledge or information sufficient to form a belief as to the
8 truth of the allegations of paragraph 38.

9 39. State that they are without knowledge or information sufficient to form a belief as to the
10 truth of the allegations of paragraph 39.

11 40. State that they are without knowledge or information sufficient to form a belief as to the
12 truth of the allegations of paragraph 40.

13 41. State that they are without knowledge or information sufficient to form a belief as to the
14 truth of the allegations of paragraph 41, and state that the temporary, preliminary and permanent
15 injunctive relief requested by Plaintiffs is overbroad and barred by the First and Fifth Amendments
16 to the United States Constitution.

17 **SECOND CLAIM FOR RELIEF**

18 For Declaratory Relief
19 (Against All Defendants)

20 42. Repeat and reallege their responses to the allegations contained in paragraphs 1-31.

21 43. State that they are without knowledge or information sufficient to form a belief as to the
22 truth of the allegations of paragraph 43.

23 44. State that they are without knowledge or information sufficient to form a belief as to the
24 truth of the allegations of paragraph 44.

25 45. State that they are without knowledge or information sufficient to form a belief as to the
26 truth of the allegations of paragraph 45.

27 46. State that they are without knowledge or information sufficient to form a belief as to the
28 truth of the allegations of paragraph 46.

47. State that they are without knowledge or information sufficient to form a belief as to the

1 truth of the allegations of paragraph 47.

2 48. State that they are without knowledge or information sufficient to form a belief as to the
3 truth of the allegations of paragraph 48.

4 **THIRD CLAIM FOR RELIEF**
5 For Interference With Contract
(Against Defendants Wikileaks, wikileaks.org and Does 1-10)

6 49. Repeat and reallege their responses to the allegations contained in paragraphs 1-31.

7 50. State that they are without knowledge or information sufficient to form a belief as to the
8 truth of the allegations of paragraph 50.

9 51. State that they are without knowledge or information sufficient to form a belief as to the
10 truth of the allegations of paragraph 51.

11 52. State that they are without knowledge or information sufficient to form a belief as to the
12 truth of the allegations of paragraph 52.

13 53. State that they are without knowledge or information sufficient to form a belief as to the
14 truth of the allegations of paragraph 53.

15 54. State that they are without knowledge or information sufficient to form a belief as to the
16 truth of the allegations of paragraph 54.

17 **FOURTH CLAIM FOR RELIEF**
18 For Interference With Prospective Economic Advantage
(Against Defendants Wikileaks, wikileaks.org and Does 1-10)

19 55. Repeat and reallege their responses to the allegations contained in paragraphs 1-31.

20 56. State that they are without knowledge or information sufficient to form a belief as to the
21 truth of the allegations of paragraph 56.

22 57. State that they are without knowledge or information sufficient to form a belief as to the
23 truth of the allegations of paragraph 57.

24 58. State that they are without knowledge or information sufficient to form a belief as to the
25 truth of the allegations of paragraph 58.

26 59. State that they are without knowledge or information sufficient to form a belief as to the
27 truth of the allegations of paragraph 59.

1 **FIFTH CLAIM FOR RELIEF**

2 For Conversion

3 (Against Defendants Wikileaks, wikileaks.org and Does 1-10)

4 60. Repeat and reallege their responses to the allegations contained in paragraphs 1-31.

5 61. State that they are without knowledge or information sufficient to form a belief as to the
6 truth of the allegations of paragraph 61.

7 62. State that they are without knowledge or information sufficient to form a belief as to the
8 truth of the allegations of paragraph 62.

9 63. State that they are without knowledge or information sufficient to form a belief as to the
10 truth of the allegations of paragraph 63.

11 64. State that they are without knowledge or information sufficient to form a belief as to the
12 truth of the allegations of paragraph 64.

13 65. State that they are without knowledge or information sufficient to form a belief as to the
14 truth of the allegations of paragraph 65.

15 66. State that they are without knowledge or information sufficient to form a belief as to the
16 truth of the allegations of paragraph 66, and state that the temporary, preliminary and permanent
17 injunctive relief requested by Plaintiffs is overbroad and barred by the First and Fifth Amendments
18 to the United States Constitution.

19 **SIXTH CLAIM FOR RELIEF**

20 For Injunctive Relief

21 (Against All Defendants)

22 67. Repeat and reallege their responses to the allegations contained in paragraphs 1-31.

23 68. State that they are without knowledge or information sufficient to form a belief as to the
24 truth of the allegations of paragraph 68.

25 69. State that they are without knowledge or information sufficient to form a belief as to the
26 truth of the allegations of paragraph 69.

27 70. State that they are without knowledge or information sufficient to form a belief as to the
28 truth of the allegations of paragraph 70.

71. State that they are without knowledge or information sufficient to form a belief as to the
truth of the allegations of paragraph 71, and state that the temporary, preliminary and permanent

1 injunctive relief requested by Plaintiffs is overbroad and barred by the First and Fifth Amendments
2 to the United States Constitution.

3 **FOR A FIRST AFFIRMATIVE DEFENSE**

4 72. The temporary, preliminary and permanent injunctive relief sought by Plaintiffs in their
5 Complaint is overbroad and violates Intervenor's rights under the First Amendment to the United
6 States Constitution. In addition, the permanent injunction already entered by the Court violates
7 Intervenor's rights under the First and Fifth Amendments, because it was entered without participa-
8 tion by anyone representing the interests of Intervenor or members of the public in retaining
9 unhindered access to the Wikileaks website and to the documents and information contained thereon
10 that are not the subject of this litigation.

11 **CROSS-COMPLAINT**

12 Defendants and Cross-Complainants in Intervention Project on Government Oversight,
13 American Civil Liberties Union, Inc., American Civil Liberties Union Foundation, Inc., Electronic
14 Frontier Foundation, on behalf of its members, and Jordan McCorkle (collectively, "Intervenor")
15 for their Cross-Complaint against Plaintiffs Bank Julius Baer & Co. Ltd. and Julius Baer Bank and
16 Trust Co. Ltd. and Defendants Dynadot, LLC, allege as follows:

17 **The Nature of This Action**

18 1. This is an action for declaratory relief under 28 U.S.C. §2201.

19 **Jurisdiction**

20 2. Subject matter jurisdiction is conferred upon this Court by 28 U.S.C. §1331 (federal
21 question).

22 3. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) and (c).

23 **The Parties**

24 4. Defendant and Cross-Complainant in Intervention Project on Government Oversight
25 ("POGO") is a District of Columbia not-for-profit Section 501(c)(3) organization, with its principal
26 place of business in Washington, D.C. Founded in 1981, POGO is an independent nonprofit which
27 investigates and exposes corruption and other misconduct in order to achieve a more accountable
28 federal government. POGO works with hundreds of inside sources and whistleblowers to conduct

1 journalistic investigations aimed at improving the functioning of the U.S. government. In recent
2 years, POGO's investigations and outreach programs have addressed shortcomings in national secu-
3 rity, the lack of oversight of government spending, outmoded nuclear weapons programs, inadequate
4 whistleblower protections, excessive government secrecy and Congress' inability to conduct effec-
5 tive government oversight. POGO strongly believes that employees who witness wrongdoing
6 should have outlets for exposing this through websites such as Wikileaks. Websites such as
7 Wikileaks ensure that there are safe havens where whistleblowers can shed light on the inner work-
8 ings of their institutions and ensure that corruption is rooted out. Ultimately, this free flow of
9 information protects citizens and protects democracy from succumbing to special interests. POGO
10 staff members have read and followed postings on the Wikileaks website prior to the filing of
11 Plaintiffs' lawsuit in the regular course of their activities and have strong reason to believe that
12 future postings will be of use in the organization's ongoing investigations. This lawsuit is also of
13 particular interest to POGO because POGO will be unable to encourage whistleblowers who need an
14 outlet for their documents to use the Wikileaks site if it is no longer as easily available as possible.

15 5. Defendant and Cross-Complainant in Intervention American Civil Liberties Union
16 ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedi-
17 cated to the principles of liberty and equality embodied in the United States Constitution. The
18 ACLU comprises two entities, the American Civil Liberties Union, Inc., a District of Columbia not-
19 for-profit Section 501(c)(4) corporation which handles most of the ACLU's lobbying efforts out of
20 the ACLU's legislative office in Washington, D.C., and its affiliate, the American Civil Liberties
21 Union Foundation, Inc., a New York not-for-profit Section 501(c)(3) corporation, which handles
22 most of the ACLU's litigation and public education efforts. Freedom of speech has been a central
23 concern of the ACLU since the organization's founding in 1920, and over the last eight decades the
24 ACLU has repeatedly considered the application of free speech principles to new communications
25 media. Most recently and most relevantly, the ACLU has been involved in numerous state and
26 federal cases involving freedom of expression on the Internet. The ACLU is also frequently invol-
27 ved in litigation and advocacy efforts concerning the rights of whistleblowers and numerous human
28 rights issues, many of which are the subjects of material on the Wikileaks website. Prior to the

1 filing of Plaintiffs' lawsuit, staff members of the ACLU accessed and relied on documents and
2 information posted on the Wikileaks website in the course of their regular advocacy, research, public
3 education and litigation efforts, and they intend to do so in the future because of the material's close
4 connections to the everyday work of the ACLU. As one example, the ACLU previously issued
5 public statements regarding the U.S. Army's operations manual for the Guantanamo Bay detention
6 facility that was first disclosed on the Wikileaks website, and will likely do so again if similar
7 documents are posted on the website.

8 6. Defendant and Cross-Complainant in Intervention Electronic Frontier Foundation
9 ("EFF") is a Massachusetts not-for-profit Section 501(c)(3) organization, with its principal place of
10 business in San Francisco, California. EFF is a donor-supported membership organization working
11 to protect fundamental rights related to technology; to educate the press, policymakers and the
12 general public about civil liberties issues related to technology; and to act as a defender of those lib-
13 erties. EFF currently has over 10,000 paying members nationwide, and over 35,000 subscribers to
14 *EFFector*, its email newsletter. EFF members regularly access information from and/or post infor-
15 mation to Wikileaks.

16 7. Defendant and Cross-Complainant in Intervention Jordan McCorkle is an individual
17 residing in Austin, Texas, where he is a senior at the University of Texas. He is a regular user of
18 Wikileaks, which he visits at least once each week, sometimes more. McCorkle believes it is
19 important to be a well-informed and participatory member of society. He depends on Wikileaks as a
20 source of information that is not available in the more traditional media so that he can keep abreast
21 of recent developments and, where appropriate, make his views known to others about what he has
22 learned from visiting the site. McCorkle wants to be able to continue to access Wikileaks so that
23 both he and the public can retain the ability independently to assess questionable activities under-
24 taken by corporate and governmental entities.

25 8. None of the Defendants and Cross-Complainants In Intervention are associated with,
26 have any connections to, or have any involvement with the maintenance of the Wikileaks website.

27 9. On information and belief, Plaintiff and Cross-Defendant Bank Julius Baer & Co. Ltd. is
28 a Swiss entity, with its principal place of business in Zurich, Switzerland. On information and

1 belief, Plaintiff and Cross-Defendant Julius Baer Bank & Trust Co. Ltd. is a Cayman Islands entity,
2 with its principal place of business in Windward III, Grand Cayman. These Cross-Defendants are
3 referred to collectively herein as the “BJB Parties.”

4 10. On information and belief, Defendant and Cross-Defendant Dynadot, LLC (“Dynadot”),
5 is a California limited liability company, with its principal place of business in San Mateo,
6 California.

7 **FIRST CAUSE OF ACTION**
8 **Declaratory Relief**

9 11. Defendants and Cross-Complainants In Intervention incorporate by reference as though
10 set forth herein each of the preceding allegations in Paragraphs 1 through 10.

11 12. The BJB Parties commenced this action on February 6, 2008.

12 13. The BJB Parties allege in their Complaint that one of their former employees, Rudolf
13 Elmer, has been improperly providing third parties—including the Wikileaks website—with confi-
14 dential documents belonging to the BJB Parties. Specifically, the BJB Parties allege that on or
15 about January 13, 2008, Elmer began posting hundreds of such documents to that site.

16 14. The principal Defendants named in the Complaint are “Wikileaks” and “wikileaks.org,”
17 who are alleged to own and/or operate the “Wikileaks” website.

18 15. “Wikileaks” describes itself as an Internet website where participants can anonymously
19 disclose and comment on documents and other materials of public interest. *See* Wikileaks: About,
20 <http://wikileaks.be/wiki/Wikileaks:About> (last visited Feb. 26, 2008). According to the site, its
21 “primary interest is in exposing oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan
22 Africa and the Middle East, but we also expect to be of assistance to people of all regions who wish
23 to reveal unethical behavior in their governments and corporations.” *Id.*

24 16. The Wikileaks website utilizes technology designed to permit third parties to post elec-
25 tronic documents easily for public availability.

26 17. The Wikileaks website states that it was founded “by Chinese dissidents, journalists,
27 mathematicians and startup company technologists, from the US, Taiwan, Europe, Australia and
28 South Africa.” *Id.* Among other things, material purportedly posted to the website includes the U.S.

1 Army's operations manual for the Guantanamo Bay detention facility, materials concerning the
2 United States' expenditures on its military efforts in Afghanistan and Iraq, and documents exposing
3 alleged corruption by Kenyan political leaders. *Id.*

4 18. In addition to Defendants "Wikileaks" and "wikileaks.org," the BJB Parties' Complaint
5 also named Dynadot as a Defendant to the declaratory and injunctive relief causes of action.

6 19. Dynadot is one of several Internet domain name registrars that are accredited by the
7 Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-profit corporation origi-
8 nally chartered by the United States Department of Commerce to oversee a number of Internet-
9 related tasks, including the registration of domain names.

10 20. The "wikileaks.org" domain name is registered—in essence, permitted to function—by
11 Dynadot.

12 21. On February 15, 2008, less than ten days after this action was filed, the Court entered its
13 Order Granting Permanent Injunction in the exact form proposed by the BJB Parties and Dynadot.
14 Among other things, the permanent injunction required Dynadot, until further order of the Court, to

15 (1) "immediately lock the wikileaks.org domain name to prevent transfer of the
16 domain name to a different domain registrar, and . . . immediately disable the wikileaks.org domain
17 name and account to prevent access to and any changes from being made to the domain name and
18 account information";

19 (2) "immediately disable the wikileaks.org domain name and account such that the
20 optional privacy who-is service for the domain name and account remains turned off"; . . .

21 (3) "immediately clear and remove all DNS hosting records for the wikileaks.org
22 domain name and prevent the domain name from resolving to the wikileaks.org website or any other
23 website or server other than a blank page"

24 22. After entry of the permanent injunction, Dynadot disabled the wikileaks.org domain
25 name and prevented the domain name from resolving to the Wikileaks website or any other website.
26 In addition, on information and belief, Dynadot locked the wikileaks.org domain name to prevent
27 transfer of the domain name to a different domain registrar.

28 23. Because the permanent injunction hinders Intervenors' access to the Wikileaks website,

1 and to the documents and information contained thereon that are not the subject of this action, it
2 violates Intervenor's rights under the First Amendment to access information without government
3 interference. In addition, the injunction violates Intervenor's due process rights under the First and
4 Fifth Amendments, because it was entered without participation by anyone representing the interests
5 of Intervenor or members of the public in retaining unhindered access to the Wikileaks website and
6 to the documents and information contained thereon that are not the subject of this litigation.

7 24. There is an actual controversy between Intervenor, on the one hand, and the BJB
8 Parties and Dynadot, on the other hand, relating to the constitutionality of the Court's permanent
9 injunction. The BJB Parties and Dynadot contend that the permanent injunction complies with the
10 First and Fifth Amendments of the United States Constitution, while Intervenor contend that it does
11 not.

12 25. The Intervenor therefore request that the Court determine the parties' rights and duties
13 with respect to the permanent injunction, and declare that the Court's permanent injunction is over-
14 broad and violates the Intervenor's rights under the First and Fifth Amendments.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Defendants and Cross-Complainants In Intervention pray that the Court:

17 (a) Declare that the permanent injunction entered against Dynadot on February 15, 2008, is
18 overbroad and barred by the First and Fifth Amendments of the United States Constitution;

19 (b) Permanently dissolve the permanent injunction entered against Dynadot on February 15,
20 2008; and

1 (c) Grant Intervenors such additional relief as the Court deems proper.

2 DATED: February __, 2008.

3 Respectfully,

4 STEVEN L. MAYER
5 CHRISTOPHER KAO
6 SHAUDY DANAYE-ELMI
7 HOWARD RICE NEMEROVSKI CANADY
8 FALK & RABKIN
9 A Professional Corporation

10 ANN BRICK
11 AMERICAN CIVIL LIBERTIES UNION
12 FOUNDATION OF NORTHERN
13 CALIFORNIA, INC.

14 ADEN J. FINE
15 AMERICAN CIVIL LIBERTIES UNION
16 FOUNDATION

17 CINDY A. COHN
18 KURT OPSAHL
19 MATTHEW J. ZIMMERMAN
20 ELECTRONIC FRONTIER FOUNDATION

21 By: _____
22 STEVEN L. MAYER

23 Attorneys for Movants and Prospective Intervenors
24 PROJECT ON GOVERNMENT OVERSIGHT *et al.*

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27
28
HOWARD RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation