

The Mercury News
The Newspaper of Silicon Valley
MercuryNews.com

750 Ridder Park Drive
San Jose, CA 95190
Tel (408) 920-5456
Fax (408) 271-3696
sgoldberg@mercurynews.com

Susan Goldberg
Executive Editor
Vice President

October 14, 2004

The Honorable Patricia Lucas,
Judge of the Superior Court
Dept. 18
191 North First Street
San Jose, CA 95113

Re: Aamer Latif v. Nishan Systems et al.
C.A. No. 1-03-CV-004939

Dear Judge Lucas:

I write on behalf of the San Jose Mercury News, a daily newspaper published in San Jose, California, with affiliated daily newspapers in Philadelphia, Miami, Detroit and other U.S. cities.

On November 16, 2003, shortly after we heard about the filing of the complaint in *Latif v. Nishan*, our reporter Matt Marshall wrote an article about the new reality in the Silicon Valley, in which down rounds of financing have become very common. Venture capitalists functioning as corporate directors have been struggling to reconcile their fiduciary duties to the companies with their wish to recover high returns on their investments. Because the resolution of these issues may have long-term repercussions for the health of the region's start-up industry, we have followed the *Latif v. Nishan* action closely. We are doing so because we believe the public has a vital and legitimate interest in this case.

We understand that the parties in this case are discussing an order to keep certain documents protected from public viewing. We also understand that the Third Amended Complaint was lodged with the Court under seal, and that the Court has been asked to keep the Complaint and other documents out of the public eye.

Because the issues in this case are so rarely made public or adjudicated, and because the outcome of the case could have a significant impact both in Silicon Valley and beyond—so many people being involved in start-ups and financing agreements similar to those in the *Nishan* case—it is imperative that the media has a meaningful opportunity to cover it.

The Mercury News would like to ensure that the constitutional right of the press and the public and their common law rights of access to court records and proceedings are adequately protected. The courts have emphasized that the interests of the public and the press should be heard and considered in adopting restrictions on access to judicial proceedings. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 n. 24 (1982). Moreover, "[s]ecrecy agreements and protective orders impair the public's access to discovery records as well as the parties' First Amendment right to disseminate information to the public." *Westinghouse Electric Corp. v. Newman & Holtzinger*, 39 Cal. App. 4th 1194, 1208 (1995).

Both pre-trial discovery and court filings are presumptively public, and the party seeking to prevent disclosure of such materials must show that specific harm or prejudice will result from the disclosure of particular documents. See *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th cir. 1999); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

We believe that the showing necessary to justify the broad restrictions on access to and disclosure of discovery and court records cannot be made in this case, based on the fact that the issues relate only to financing and breach of fiduciary duty, and the company no longer exists. We would be happy to further elaborate if necessary to preserve the press's unrestricted access to the pleadings in this case.

We respectfully request that this case remain open to the public to the greatest extent possible.

Respectfully submitted,



Susan Goldberg
Executive Editor

cc: Rony Sagy, Esq.
Sagy Law Associates LLP
930 Montgomery Street
Suite 600
San Francisco, CA 94133
Fax: 415-956-3950
Attorney for Plaintiffs

Meredith Landy, Esq.
Lori Romley, Esq.
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, CA 94025-7019
Fax: 650-473-2601
Attorney for Defendant

Stephen Hibbard, Esq.
Shearman & Sterling LLP
525 Market Street, 15th Floor
San Francisco, CA 94105
Fax: 415-616-1199
Attorney for Defendant

The Mercury News
The Newspaper of Silicon Valley
MercuryNews.com

750 Ridder Park Drive
San Jose, CA 95190
Tel (408) 920-5456
Fax (408) 271-3696
sgoldberg@mercurynews.com

Susan Goldberg
Executive Editor
Vice President

October 14, 2004

The Honorable William Elfving,
Judge of the Superior Court
Dept. 2
191 North First Street
San Jose, CA 95113

Re: Aamer Latif v. Nishan Systems et al.
C.A. No. 1-03-CV-004939

Dear Judge Elfving:

I write on behalf of the San Jose Mercury News, a daily newspaper published in San Jose, California, with affiliated daily newspapers in Philadelphia, Miami, Detroit and other U.S. cities.

On November 16, 2003, shortly after we heard about the filing of the complaint in *Latif v. Nishan*, our reporter Matt Marshall wrote an article about the new reality in the Silicon Valley, in which down rounds of financing have become very common. Venture capitalists functioning as corporate directors have been struggling to reconcile their fiduciary duties to the companies with their wish to recover high returns on their investments. Because the resolution of these issues may have long-term repercussions for the health of the region's start-up industry, we have followed the *Latif v. Nishan* action closely. We are doing so because we believe the public has a vital and legitimate interest in this case.

We understand that the parties in this case are discussing an order to keep certain documents protected from public viewing. We also understand that the Third Amended Complaint was lodged with the Court under seal, and that the Court has been asked to keep the Complaint and other documents out of the public eye.

Because the issues in this case are so rarely made public or adjudicated, and because the outcome of the case could have a significant impact both in Silicon Valley and beyond—so many people being involved in start-ups and financing agreements similar to those in the *Nishan* case—it is imperative that the media has a meaningful opportunity to cover it.

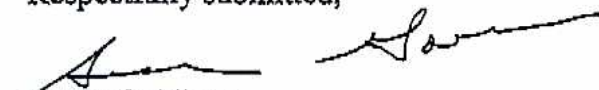
The Mercury News would like to ensure that the constitutional right of the press and the public and their common law rights of access to court records and proceedings are adequately protected. The courts have emphasized that the interests of the public and the press should be heard and considered in adopting restrictions on access to judicial proceedings. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 n. 24 (1982). Moreover, “[s]ecrecy agreements and protective orders impair the public’s access to discovery records as well as the parties’ First Amendment right to disseminate information to the public.” *Westinghouse Electric Corp. v. Newman & Holtzinger*, 39 Cal. App. 4th 1194, 1208 (1995).

Both pre-trial discovery and court filings are presumptively public, and the party seeking to prevent disclosure of such materials must show that specific harm or prejudice will result from the disclosure of particular documents. See *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th cir. 1999); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

We believe that the showing necessary to justify the broad restrictions on access to and disclosure of discovery and court records cannot be made in this case, based on the fact that the issues relate only to financing and breach of fiduciary duty, and the company no longer exists. We would be happy to further elaborate if necessary to preserve the press’s unrestricted access to the pleadings in this case.

We respectfully request that this case remain open to the public to the greatest extent possible.

Respectfully submitted,


Susan Goldberg
Executive Editor

cc: Rony Sagy, Esq.
Sagy Law Associates LLP
930 Montgomery Street
Suite 600
San Francisco, CA 94133
Fax: 415-956-3950
Attorney for Plaintiffs

Meredith Landy, Esq.
Lori Romley, Esq.
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, CA 94025-7019
Fax: 650-473-2601
Attorney for Defendant

Stephen Hibbard, Esq.
Shearman & Sterling LLP
525 Market Street, 15th Floor
San Francisco, CA 94105
Fax: 415-616-1199
Attorney for Defendant