

DOCKET NO.: CV-03-0197400-S

LA SOCIETE METRO CASH &
CARRY FRANCE,

Plaintiff,

V.

TIME WARNER CABLE, A Division
Of Time Warner Entertainment
Company, L.P., And JANE DOE,

Defendants.

SUPERIOR COURT

JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

NOVEMBER 6, 2003

AFFIDAVIT OF ISABELLE SMITH MONNERVILLE

Isabelle Smith Monnerville hereby deposes and says:

1. I am over eighteen years of age and understand the obligation of an oath to tell the truth.
2. I am an attorney admitted to practice law in France, and make the following statements under oath and in support of the opposition to the application of plaintiff in the above entitled action.
3. Under the law of France, defamation is defined by article 29 of the Law of 29 July 1881 on the freedom of press as the publication of "Any allegation or imputation which injures the honor or consideration of a person or body to whom the fact is imputed". It is a criminal offence and can give rise to civil liability if the elements of the criminal offence are found to exist.

Publication is a requirement for defamation to be actionable and punishable. Article 23 of the said law, as modified by the law of 1st July 1972, lists the various modes of publication giving cause of action (speeches, shouts, threats, writings, drawings, engravings, paintings, emblems, images or any other material support of writing, speech or image sold or distributed, offered for sale or exposed in public places or public meetings) and the law of 13 December 1985 added "any means of audiovisual communication" to the list (see JCI Pénal Annexes Fasc . n° 12 and following).

Audiovisual communication is defined by article 2, alinea 2 of the law of 30 September 1986, as "any mode of making available to the public or of categories of the public, by a technique of telecommunication, of signs, signals, images, sounds or messages of any nature which do not have the character of private correspondence".

4. Correspondence is, in principle, confidential and therefore is not regarded as a publication in an action for defamation under French law (JCI Penal Annexes Fasc 60 n 53). E-mails are regarded as correspondence and therefore as confidential. This was adjudged by a decision of the Tribunal de Grande Instance of Paris of 20 January 2003 which denied an application to order the disclosure of the identity of the subscriber of an IP address. In that case, the plaintiff complained that an allegedly defamatory e-mail message was sent by someone under the cover of a Lycos address with the name "marco92000" to three of its employees and one client. The ISP had declined to provide the identity of the subscriber on the basis that e-mail is correspondence and as such privileged under the legal rule of secrecy of correspondence I referred to in the prior paragraph. The Court followed the reasoning of the ISP and held that e-mails are indeed privileged under the secrecy of correspondence

with the consequence that the identity of the subscriber may not be disclosed. The Court added that the same privilege forbade that the ISP be ordered to capture and copy the allegedly defamatory messages (JCL Communication-Commerce Electronique May 2003 page 4).

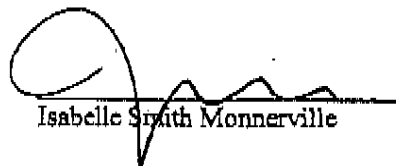
5. The fact that correspondence is sent to several addressees does not make it public for purposes of determining the existence of defamation. A case of particular relevance in the respect is the decision of the French Supreme Court of 24 January 1967 (Bull.crim. n36) that the publicity requirement is not met when a circular letter is sent to the members of a syndical group, however numerous they are. The test in this regard is that the addresses were linked by a community of interest which demonstrates that they, and are not the public in general, were intended to receive the allegedly defamatory message. (JCI Penal Annexes Fasc 60 n 49.)

6. It is highly relevant to note that the decision of the Tribunal de Grande Instance of Paris in the Lycos case above quoted was rendered after full argument on both sides and not *ex parte*. The claim was made on the basis of the same article 145 of the French New Code of Civil Procedure as the one referred to in the copy of the Metro petition to the French Court in the matter at hand. The said article 145 provides that : "Where there is a legitimate reason to preserve or to establish, before any proceedings, the means of proving the factual circumstances upon which the resolution of the dispute shall depend, directions legally permissible may be given at the request of any party further to a petition or by way of a summary interlocutory procedure." (see translation on French governmental web site : http://www.legifrance.gouv.fr/html/codes_traduits/nepcatext.htm).

7. Article 493 of the same New Code of Civil Procedure defines *ex parte* orders as provisional orders given in non adversary procedures where the petitioner is justified in not calling the opposing party. While in practice, the test of justification for not calling in the opposing party is generally low at the stage of the *ex parte* order, this is because such an order is subject to attack by the opposing party who has the right to a new adversarial discussion of the matters subject to the order, before the same judge and, in most cases, before the order is enforced or complied with. In the circumstances of a petition for disclosure, the party who is unwilling to comply with a disclosure order can go back to the judge who has ordered the disclosure and explain the motives for its refusal of compliance, for example that the disclosure is not legally permissible because it would violate a legally protected privilege such as the secrecy of correspondence, as it was adjudged in the Lycos case above quoted.

8. It is incumbent on the party to whom the order of disclosure is notified to take action for its re-discussion and removal, as the case may be. When a third party's rights are involved, that third party can intervene in the proceedings if given notice of the proceedings but in no case can a party appear anonymously, as John or Jane Doe, in French proceedings so that when the anonymity of a party is involved, that party's rights depend on the vigor of the defense put forward by the party holding the information of the identity of the party wishing to defend its anonymity.

9. I am giving this affidavit as a French attorney and a member of the Paris Bar and in full cognizance of the penalties attached to the supply of false testimonial evidence in a court procedure.



Isabelle Smith Monnerville