

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
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: NOVEMBER 6, 2003
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**MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S APPLICATION FOR BILL OF DISCOVERY**

PRELIMINARY STATEMENT

Defendant Jane Doe hereby opposes plaintiff's Application for a Bill of Discovery in this action in order to preserve and protect her rights under the First, Fourth and Fifth Amendments to the United States Constitution, her right under the Cable Act of 1984¹, and her rights to privacy under federal and state law.

FACTS

In this case, plaintiff La Societe Metro Cash & Carry France (hereinafter "La Societe"), a French corporation, is seeking a "Bill of Discovery" against Time Warner based upon an alleged *ex parte* order of a French court. Plaintiff seeks to have Time Warner compel private subscriber information about the

¹ These rights are also incorporated into her contract for services (i.e., Subscription Agreement) with defendant Time Warner Cable, a division of Time Warner Entertainment Company, L.P. (hereinafter "Time Warner"),

identity of Jane Doe. Plaintiff has not provided a copy of the French judgment, certified or otherwise, and relies upon a layperson's recitation that an electronic mail communication ("e-mail") via a domain registered to Jane Doe was used to commit a crime of "defamation" under French law. In support of this latter contention, plaintiff provided in its written application only the unsworn statement of a Connecticut Attorney, and a memorandum that states in a footnote without support that a French action for defamation includes the "editor of a statement" and that the e-mail therefore violates criminal and civil French law. The application also included only an unsworn translation of the e-mail.

During the hearing, plaintiff relied upon the testimony of its "legal director,"² Alain Jourdan, who inferred French law had been violated.³ Speaking partially in French during direct, and relying upon the unsworn translation of the e-mail at issue during cross-examination, Mr. Jourdan randomly selected text within the e-mail which illustrated, at most, the unknown⁴ author's disapproval with plaintiff's management style.⁵ Mr. Jourdan admitted on cross-examination that the communication originated in France, he believes from one of plaintiff's own employees, and was then routed through

² Mr. Jourdan readily admitted that he is not an attorney, although he obtained a French legal degree.

³ When asked had the e-mail in question been published outside the company, Mr. Jourdan said "No." As set forth later in this brief, such outside publication is a requirement of defamation under French law.

⁴ Mr. Jourdan admits that he does not know who authored the e-mail, but that he believes the author of the e-mail to be an employee of plaintiff in France.

⁵ Mr. Jourdan, during his testimony on November 3, 2003, states that the following ideas expressed in the e-mail are evidence of defamation:

"As enlightened managers, we have understood that, for the past two years, profitability at any cost is the key word for MCCI. The directors of MCCI apply this with extraordinary zeal and "milk" the operating accounts using methods that approach intellectual dishonesty."

Jane Doe's domain and sent only to employees within the plaintiff corporation via a privileged and nonpublic internal distribution list. He further admitted there was absolutely no internal investigation performed by plaintiff in France, that instead plaintiff sought and obtained the *ex parte* order of a French court recited and referred to in plaintiff's application, and then came straight to this Court.

Jane Doe was notified by Time Warner that plaintiff had, subsequent to obtaining the French order, come to Connecticut and was seeking to compel Time Warner to disclose her personally-identifiable information. This firm was retained just prior to the hearing to protect her rights.

As set forth more fully below, the *ex parte* French order is of no weight in this jurisdiction, and the rights of the plaintiff French corporation, which failed to demonstrate by admissible evidence facts sufficient to support a viable cause of action, pale in comparison to Jane Doe's recognized constitutional and statutory rights. Accordingly, plaintiff's Application for Bill of Discovery should be denied.

ARGUMENT

I. PLAINTIFF'S APPLICATION FAILS TO MEET EVEN THE INITIAL REQUIREMENTS FOR AN ORDER OF BILL OF DISCOVERY.

A. NO VIABLE CAUSE OF ACTION HAS BEEN DEMONSTRATED.

A bill of discovery will not be granted where it appears that even if it were, the plaintiff would not be entitled to the monetary or injunctive relief he ultimately seeks. Norwich & W.R. Co. v. Storey, 17 Conn. 364, 370 (1845); Middletown Bank v. Russ, 3 Conn. 135, 140 (1819); Journal Publishing Company, Inc. v. Hartford Courant Company, 261 Conn. 673, 804 A.2d 823 (2002). The plaintiff who brings a petition for a bill of discovery must demonstrate *by detailed admissible facts* that there is probable cause to bring a potential cause of action; an applicant must show more than a mere suspicion

cast upon a party, and must also show that there is some describable wrong. The plaintiff must demonstrate good faith that the information sought is material and necessary to his action. Id. at 682; see also Falco v. Institute of Living, 254 Conn. 321, 332, 757 A.2d 571 (2000) (Court emphasizes the need to present evidence regarding the dearth of alternative means of obtaining the desired information, other than disclosure by the defendant. Lack of such evidence lends credence to the conclusion that the petition is being employed as an alternative to diligent investigation.). In addition, merely alleging that there are no other adequate means of enforcing discovery of the desired material is not sufficient to satisfy the burden. Cadle Co. v. Drubner, 64 Conn.App. 69, 73, 777 A.2d 1286 (2001).

In Norwich, supra, our Supreme Court denied plaintiff's bill of discovery where the plaintiff failed to show that he was entitled to relief. The plaintiff creditors sought a bill of discovery from certain individuals who were not connected to the defendant contractor's alleged debt. The court held that the materials requested were not needed to resolve the disputed debt, and furthermore, given the uncertainty of amounts due and owing to both parties, the requested relief could not be granted as the cause of action was not supportable.

Likewise our Appellate Court in Cadle Co., supra, refused to grant plaintiff's bill of discovery stating:

Because the plaintiff put no testimony or other admissible evidence before the court to establish probable cause to bring a potential cause of action and also failed to show that it had no other adequate means of securing the information other than by subjecting the defendant to an equitable petition in the trial court, the court was well within its discretion in denying the petition. Our resolution of this issue is dispositive of the appeal, and we therefore do not address the plaintiff's other claims.

Id. at 74.

In the case at bar, plaintiff cannot be granted a bill of discovery where, even if it were granted, plaintiff failed to demonstrate the requirements for a French (or U.S.) cause of action entitling it to relief. Norwich & W.R. Co. v. Storey, 17 Conn. 364, 370 (1845); Middletown Bank v. Russ, 3 Conn. 135, 140 (1819); Journal Publishing Company, Inc. v. Hartford Courant Company, 261 Conn. 673, 804 A.2d 823 (2002). Simply stated, without a viable cause of action commenced or about to be commenced, there can be no bill of discovery. Cadle Co., *supra*.

(1) **No Action Is Available For Defamation Under Connecticut Law.**

Plaintiff urges the Court to grant its bill of discovery in order for it seek legal recourse for an alleged "defamatory" e-mail. During argument, this Court indicated it was inclined to find the e-mail was, in fact, defamatory. However, plaintiff has ultimately failed to meet its burden of proof of establishing a viable claim of defamation. Mr. Jourdan readily admitted the e-mail was not sent to anyone outside the plaintiff's sphere of employees. Even a precursory look into the law of defamation clearly shows that an actionable claim of defamation *requires* publication outside of the entity claiming defamation.

A defamation action is based on the unprivileged communication of a false statement that tends either to harm the reputation of another by lowering him in the estimation of the community or to deter others from dealing or associating with him. Gillette v. Town of New Milford, Superior Court, judicial district of Tolland at Rockville, Docket No. 054791, 7 Conn. L. Rptr. 820 (September 16, 1992) (Klaczak, J.). See Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 316, 477 A.2d. 1005 (1984). **Publication** and harm to reputation are two necessary elements of the defamation cause of action. Miles v. Perry, 11 Conn.App. 584, 601, n. 11, 529 A.2d.199 (1987). Moreover, [t]he standard of fault applicable to private individuals requires the plaintiff to prove a negligent misstatement of fact." *Id.* at 588. (emphasis added)

Henry v. Perkins, 1996 WL 88425 (Conn.Super.1996) (attached as Exhibit B).

More importantly, intra-corporate communications are not "published" when they are only communicated internally. Hansen v. Berger, Lehman Associates, P.C., 1994 WL 591778 (Conn.Super. 1994) (attached as Exhibit C). In Hansen, the defendant employer had written a document reading "I have found the plaintiff [employee] to be generally lazy and either unwilling or unable to monitor reimbursable costs for state and city police" which was sent to a supervisor within defendant's company. The court in Hansen swiftly granted defendant summary judgment against plaintiff's libel claim where it found the intra-corporate correspondence to have been internal only. See also L. Cohen & Company, Inc. v. Dunn & Bradstreet, Inc., 629 F.Supp., 1425, 1427 (D.Conn.1986) ("the dissemination of an allegedly defamatory material among employees of a corporate defendant does not constitute a separate "publication" of that material under Connecticut law.").

(2) *No Action Is Available To Plaintiff Under French Law.*

Plaintiff has failed to demonstrate what the elements of a French law cause of action for defamation are. There is a conclusive footnote in its memorandum stating merely "it is an allegation of fact which constitutes an attack on the honour of reputation of a person." As set forth in the Affidavit of French Attorney Isabelle Smith Monnerville attached hereto as Exhibit A, defamation under French law also requires publication other than within a corporation by its employees.

Mr. Jourdan, who is not an admitted attorney in France, did not testify as to the elements of a cause of action. Absent the attached affidavit, this would leave this Court only to speculate as to the required elements of a French claim of defamation.

Connecticut courts have held however, that courts "need not take judicial notice of the law of a foreign jurisdiction, whether common law or statutory, under Gen. Stat. §§51-32 [now 52-163a], 52-163 and 52-164 ... unless authoritative sources of the foreign law,

subject to inspection or verification by opposing counsel, are made available to the court...." Heating Acceptance Corp. v. Patterson, 152 Conn. 467, 475, 208 A.2d 341, 345 (1965); e.g., Wood v. Wood, 165 Conn. 777, 780, 345 A.2d 5, 7 (1974). See Angier v. Barton, 160 Conn. 204, 211, 276 A.2d 782, 786 (1970) (court refused to judicially notice confusing foreign law provided by counsel).

Connecticut courts presume that the law of a foreign jurisdiction is the same as Connecticut's, unless shown otherwise. Walzer v. Walzer, 173 Conn. 62, 76, 376 A.2d 414, 421 (1977) (foreign state); McLoughlin v. Shaw, 95 Conn. 102, 106, 111 A. 62, 64 (1920) (foreign country).

Connecticut Trial Evidence Notebook, p. F-10 (2d Ed. 2002).

The attached affidavit in fact demonstrates that French law, just like the law in this State, *requires* publication outside the sphere of plaintiff's employees and has even other, more numerous requirements not met by plaintiff in its presentation. For example, correspondence cannot, under French law, constitute publication. This includes e-mails. (See Affidavit of Isabelle Smith Monnerville attached hereto as Exhibit A.)

Accordingly, as plaintiff has failed to demonstrate even superficially that it can satisfy the basic elements of a defamation claim, the application should be denied.

B. CRIMINAL SANCTIONS ARE INVOLVED, NECESSITATING DENIAL OF PLAINTIFF'S APPLICATION.

Even taking plaintiff's footnote on French law at face value, the application must be denied for an additional reason: the Supreme Court of Connecticut has enumerated instances where a bill of discovery will not be granted.

First, a bill for discovery never lies, in aid of a suit at law, for a tort. . . . Secondly, a bill of discovery is never granted, where it seeks discovery of a crime or offence of the defendant involving moral turpitude; or which is scandalous or injurious to his reputation. Thirdly, a party is not bound to disclose what may subject him to a penalty or forfeiture.

Northrop v. Hatch, 6 Conn. 361, 362 (1827). In H. Wagner & Adler Co. v. Mali, 74 F.2d 666 (2nd Cir. 1935), the court held that since the pending action at law was predicated on laws with criminal sanctions, the bill of discovery was impermissible. "Each of these sections defines a crime, the maximum punishment for which may be a fine of \$5,000 or imprisonment for one year or both. Since it is to prove causes of action arising from the violation of these sections that the plaintiff seeks discovery, it is apparent that the evidence called for may tend to incriminate the defendants. A bill of discovery will not lie if the discovery will incriminate the defendant or subject him to penalty or forfeiture." Id. at 669-670.

The Connecticut Supreme Court reinforced its stance against the granting of Bills of Discovery when criminal sanctions may be levied Benjamin v. Hathaway, 3 Conn. 528, 532 (1821).

It is an established principle, that a person cannot, in a suit against him, be compelled to produce evidence against himself; and by strong analogy, he ought equally to be protected in his interest, when called on to testify for another.

In this case at bar, plaintiff states that it seeks to have Jane Doe sanctioned under French law with tort and criminal offences. Plaintiff states: "In French law, defamation is both a tort (a civil wrong) *and a criminal offence*. It consists of any allegation of fact which constitutes an attack on the honour of reputation of a person (Article 29 of the 1881 Pres Act). If found guilty, *the editor, publisher or author may be ordered to pay a criminal fine* to the State in addition to civil damages to the aggrieved party." (Emphasis supplied.)

Accordingly, given the criminal nature and the sanctions asserted as part of plaintiff's claim, the bill of discovery cannot be granted as a matter of law.

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II. THE BROAD AND RECOGNIZED PRIVILEGE OF CONFIDENTIALITY OF INTERNET COMMUNICATIONS IMPLICATES CONSTITUTIONAL RIGHTS THAT FAR OUTWEIGH PLAINTIFF'S CALL FOR DISCLOSURE.

A. PLAINTIFF FAILS TO ADDRESS THE CABLE ACT OF 1984.

Congress passed the Cable Act in 1984 to provide a comprehensive federal regulation of the cable industry. Parker v. Time Warner Entertainment Company, L.P., 1999 WL 1132463 (E.D.N.Y. 1999) (attached as Exhibit D). Section 551(c)(1) of this Act acknowledges the privacy rights of cable subscribers. The legislative history of this Act clearly illustrates the highly-protected nature of the personal information of subscribers.

It is important that the national cable legislation establish a policy to protect the privacy of cable subscribers. A national policy is needed because...privacy issues raise a number of federal concerns, including protection of the subscribers' First, Fourth, and Fifth Amendment rights."

Id. (quoting H.R. Rep. No. 96-934).

Part of the Cable Act of 1994, 47 U.S.C. §551, provides in relevant part:

(c) Disclosure of personally identifiable information

(1) Except as provided in ¶(2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.

Time Warner is allowed, however, under ¶(2) of the Act⁶ to disclose such information pursuant to a court ordering such disclosure, although the terms expressly address only government entities and in such instances allows disclosure only upon a showing of clear and convincing evidence. Parker v. Time Warner Entertainment Company, L.P., 1999 WL 1132463 (E.D.N.Y. 1999) (absent the explicit exceptions in section 551(c)(2), a cable operator may not disclose any personally identifiable information whether collected over the system or otherwise from the subscriber).

B. DISCOVERY REQUESTS SEEKING TO IDENTIFY ANONYMOUS INTERNET USERS MUST BE SUBJECTED TO CAREFUL SCRUTINY BY COURTS.

Federal courts have specifically recognized that the First Amendment protects an individual's anonymity on the Internet. Discovery requests seeking to identify anonymous Internet users must be

⁶ Section (2) provides as follows:

- “(2) A cable operator may disclose such information if the disclosure is—
- (A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;
 - (B) subject to subsection (h) of this section, made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed;
 - (C) a disclosure of the names and addresses of subscribers to any cable service or other service, if—
 - (i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and
 - (ii) the disclosure does not reveal, directly or indirectly, the—
 - (I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or
 - (II) the nature of any transaction made by the subscriber over the cable system of the cable operator; or
 - (D) to a government entity as authorized under chapters 119, 121, or 206 of Title 18, except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator.”

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subjected to careful scrutiny by courts; stripping anonymity by civil subpoena enforced under liberal rules of civil discovery would have a significant chilling effect on communications and thus on basic First Amendment rights. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 45, 28 U.S.C.A. Doe v. 2TheMart.Com, Inc., 140 F.Supp.2d 1088 (2001); ACLU v. Johnson, 4 F.Supp.2d 1029, 1033 (D.N.M.1998), *aff'd*, 194 F.3d 1149 (10th Cir.1999) (upholding First Amendment right to communicate anonymously over the Internet); ACLU of Georgia v. Miller, 977 F.Supp. 1228, 1230 (N.D.Ga.1997) (recognizing constitutional right to communicate anonymously and pseudonymously on the Internet).

In Doe v. 2TheMart.Com, Inc., 140 F.Supp.2d 1088, 1097 (2001), the court recognized that the constitutional rights of Internet users, including the right to speak anonymously, must be carefully safeguarded. The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Id. "Unmeritorious attempts to unmask the identities of online speakers ... have a chilling effect on internet speech." Id. at 1093. Accordingly, the chose to "adopt a balancing test requiring litigants to demonstrate ... that their need for identity information outweighs anonymous online speakers' First Amendment rights." Id. at 1093.

In Columbia Ins. Co. v. Seescandy.Com, 185 F.R.D. 573 (N.D. Cal.1999), the plaintiff was unable to identify the defendants when filing the complaint. That complaint named J. Doe defendants, and alleged, *inter alia*, the infringement of a registered trademark when those defendants registered the "Seescandy.com" domain name. The J. Doe defendants had engaged in the allegedly tortious conduct entirely online, and anonymously. Id. at 578. The court considered whether to allow discovery to

uncover the identity of the defendants so that they might be properly served and subject to the jurisdiction of the court. The court recognized the defendant's "legitimate and valuable right to participate in online forums anonymously or pseudonymously." Id. Accordingly, the court ruled that four limiting principles would apply to such discovery.

First, the court in Columbia Ins. Co. required that the plaintiff identify the individual with some specificity so the court could determine if they were truly an entity amenable to suit, and that the plaintiff identify all previous steps taken to locate the defendant, justifying the failure to properly serve. Id. at 578- 579.⁷ Second, the plaintiff was required to show that the case would withstand a motion to dismiss, "to prevent abuse of this extraordinary application of the discovery process and to insure that plaintiff has standing." Id. at 579-80. Third, the plaintiff was required to file a discovery request justifying the need for the information requested. Id. at 580. Therefore, the court required the plaintiff to demonstrate that the suit, and the resulting discovery sought, would support a viable cause of action, and to demonstrate the need for the identifying information having reasonably undertaken other avenues of investigation.

A similar approach is warranted here to protect Jane Doe's rights. Plaintiff has not demonstrated any knowledge, just speculation, as to Jane Doe's involvement. Plaintiff has not shown it can allege a viable claim. Plaintiff has undertaken no investigative efforts. These facts all mandate denial of its application.

⁷ Presumably a failure to make any investigative effort at all, such as in the instant case, would lead to a denial of the discovery.

C. THE EX PARTE FRENCH ORDER HAS NO WEIGHT IN THIS JURISDICTION.

Plaintiff's application originally appeared to rely on its obtaining of the *ex parte* order in France. However, rather curiously, at the hearing, no order was produced or submitted. This Court is therefore entitled to ignore this "evidence." Even if it were submitted, however, "[c]ourts of the United States are not required by federal law to give full force and effect to a judgment granted in a foreign nation." Litvaitis v. Litvaitis, 162 Conn. 540, 544 (Conn. 1972) (citing Hilton v. Guyot, 159 U.S. 113 (1895)). Indeed, in the limited circumstance of foreign judgments for monetary amounts, Connecticut has adopted the Uniform Foreign Money-Judgment Recognition Act. In reviewing a foreign monetary judgment, *ex parte* judgments of the type sought to be enforced here, are not accorded comity. See, C.G.S. §§50a-34(a) and (b) (Foreign judgments not recognized when, *inter alia*, due process not accorded, personal jurisdiction lacking, subject matter jurisdiction lacking, notice and opportunity to defend lacking, or no personal service made); see also Litvaitis, supra (applying similar criteria to Mexican divorce decree); Spilke v. Spilke, 2002 WL 521313 (Conn.Sup. 2002) (applying similar criteria to nonmonetary Israel judgment) (attached as Exhibit E).

Under both the Uniform Foreign Money-Judgment Recognition Act and in case law throughout our land, comity is not appropriate where the decision is repugnant to public policy. See, e.g., C.G.S. §50a-34(b)(3). As one federal appellate court put it:

A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders.... France clearly has the right to enact and enforce laws such as those relied upon by the French Court here....

What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that

nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! Or another U.S.-based Internet service provider, what principles should guide the court's analysis?

Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme, 169 F.Supp.2d 1181, 1186-87 (9th Cir. 2001).

Jane Doe has a right to protect her privacy and, presuming she had any role in promulgating the message at issue (a fact not admitted to), to engage in free speech within the confines of the United States. It is wholly inappropriate for this Court to truncate those rights based upon an *ex parte* foreign judgment. *Id.* at 1192 ("No legal judgment has any effect, of its own accord, beyond the limits of the sovereignty from which its authority is derived") (citing 28 U.S.C. §1738). Thus:

The reason for limiting comity in this area is sound. "The protection to free speech and the press embodied in [the First] amendment would be seriously jeopardized by the entry of foreign [] judgments granted pursuant to standards and deemed appropriate in [another country] but considered antithetical to the protections afforded...by the U.S. Constitution."... Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment.

Id. at 1193 (citations omitted).

Comity is not even accorded *ex parte* orders between different states *within* the United States. In America Online, Inc. v. Anonymous Publicly Traded Company, 261 Va. 350, 542 S.E.2d 377 (2001),

an anonymous corporation sought a subpoena duces tecum requiring Internet service provider (ISP) to disclose the identities of John Doe defendants who allegedly defamed the corporation and published confidential material and insider information in Internet chat rooms. The Supreme Court of Virginia held that under interstate comity plaintiff corporation could not proceed anonymously and that the trial court erred in acknowledging an out-of-state *ex parte* order stating it could do so. The court went on to explain that given the *ex parte* notice of the out-of-state proceeding on which plaintiff relied, "no evidence was received and no reasons for the decisions were given by the Indiana court, [therefore] we cannot determine whether the procedural and substantive law applied by the Indiana court was 'reasonably comparable to that of Virginia.'" *Id.* at 362.

D. PLAINTIFF HAS DEMONSTRATED NO OTHER BASIS FOR STRIPPING DEFENDANT OF HER CONSTITUTIONAL AND STATUTORY RIGHTS.

As demonstrated above, plaintiff's admissions undermine any claim of an action for defamation under either French or Connecticut law. It admits having conducted no internal investigation to catch the offender, who plaintiff admits is likely its *own* employee in *France*. Given the balancing test required, defendant's interests far outweigh any claim of plaintiff, real or speculative.

III. INTERNATIONAL FORUM-SHOPPING MANDATES THE REFUSAL OF PLAINTIFF'S DISCOVERY REQUEST.

Courts clearly look to prevent international forum-shopping where it poses a threat to comity. Basic v. Fitzroy Engineering, Ltd., 949 F.Supp. 1333 (N.D.Ill.1996); see Eastman Kodak Company v. Kavlin, 978 F.Supp. 1078 (1997); Supermicro Computer, Inc. v. Digitechnic, 145 F.Supp.2d 1147 (N.D.Cal.2001); Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme, 169 F.Supp.2d 1181,

1186-87 (9th Cir. 2001). As demonstrated in the attached affidavit of French counsel, the *ex parte* order, once attacked, will not withstand scrutiny.

In Basic, 949 F.Supp. 1333 (N.D.Ill. 1996), the court dismissed the American plaintiff's declaratory judgment action, finding that the plaintiff essentially was attempting to render null and void a possible future New Zealand judgment, a judgment which "may never come to pass." Id. at 1337. Furthermore, the court found that interests in fostering international comity and preventing forum-shopping weighed in favor of declining jurisdiction to issue a declaratory judgment. Id. at 1339.

The court in Eastman Kodak Company, 978 F.Supp. 1078 (1997), found the reasoning in Basic, supra, persuasive in dismissing plaintiff's declaratory judgment and stated "Quite clearly, Kodak has sought declaratory judgment in the Court in order to preempt the effect of a possible adverse judgment in Bolivia." Id. at 1090.

In Supermicro Computer, Inc. v. Digitechnic, 145 F.Supp.2d 1147 (N.D.Cal.2001), a California manufacturer was sued by a corporate customer in France for selling a defective product. The California company sought a declaratory judgment in the United States that its products were not defective, that the French customer's misuse of the product caused the product to fail, and that if the California company was at fault, only limited legal remedies were available. The court concluded that the purpose of the action for declaratory relief was to avoid an unfavorable result in French courts. It noted that the action was not filed until a year after the French proceedings began, that the French proceedings were still ongoing, and that the French defendants had no intent to sue in the United States.

In the case at bar, plaintiff may have obtained an *ex parte* French order, however French law has an absolute privilege over the type of information and action plaintiff seeks to commence against Jane

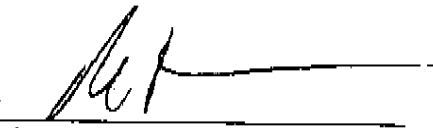
Doc. As demonstrated in the attached affidavit, France accords a privilege to correspondence, including e-mails. Plaintiff has given no indication it intends to bring suit in the United States. Accordingly, plaintiff is attempting to forum-shop, and its efforts to litigate what would ultimately have been an unfavorable decision in France once the *ex parte* order was attacked must not be countenanced by this Court.

CONCLUSION

For all the foregoing reasons, Jane Doe respectfully requests that the Application for Bill of Discovery be denied.

**INTERVENER
JANE DOE**

By



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EXHIBIT A