

At an IAS Part ___, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on the ___ day of August, 2010.

P R E S E N T

Hon: _____ J.S.C.

16110892

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of CARLA FRANKLIN,

Petitioner,

For an order pursuant to section 3102(c) of the Civil Practice Laws and Rules to compel disclosure from

GOOGLE, INC. and YOUTUBE, LLC,

Respondents,

of the identity of the defendants JOHN DOE and/or JANE DOE being unknown to the Petitioner, in an action about to be commenced.

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FILED
COUNTY CLERK
NEW YORK COUNTY
AUG 16 2010
Unfiled Order to Show Cause

In lieu of a notice of petition, pursuant to Civil Practice Laws and Rules §403(d), UPON the reading and filing of the Affirmation of David M. Fish, and the attached documents, and all other papers and proceedings in this matter,

it is

ORDERED that Respondents show cause at the Supreme Court of the State of New York, in Room _____ at the Courthouse located at 60 Centre Street, New York, New York, on the ___ day of August, 2010, 2009, at ___:___ a.m./p.m., or as soon

thereafter as counsel can be heard why an Order should not be made, pursuant to CPLR §3102(c), compelling pre-action disclosure by Google, Inc. and YouTube, LLC. of the identity or identities, including, but not limited to the name(s), address(es), telephone number(s) and email address(es) of the person or persons who posted the web page located at the uniform resource locators ("URL") <http://www.youtube.com/greyspector09>, <http://www.youtube.com/JimmyJean008>, and <http://www.youtube.com/JoeBloom08>, ("JOHN DOE" and/or "JANE DOE"), on the ground that without that disclosure, a summons and complaint cannot be served upon JOHN DOE and/or JANE DOE, and such other and further relief as the Court deems just and proper;

SUFFICIENT CAUSE BEING ALLEGED THEREFORE, it is further ORDERED that service of a copy of this Order to Show Cause, and all supporting papers upon which it is based, upon (1) an officer of Google New York or other person authorized to accept service at 76 Ninth Avenue, Fourth Floor, New York, New York 10011 and mail a copy of the same upon Google, Inc. 1600 Amphitheatre Parkway, Mountain View, CA 94043, and (2) an officer of YouTube, LLC, by fax to the number 650-253-0001 and mail a copy of the same upon YouTube, LLC, 901 Cherry Avenue, San Bruno, CA 94066 on or before August ___, 2010, shall be deemed good and sufficient service.

ENTER:

J.S.C

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**AFFIRMATION IN
SUPPORT OF ORDER
TO SHOW CAUSE
COMPELLING
DISCLOSURE OF
IDENTITY(IES)**

16110892

FILED

AUG 16 2010

COUNTY CLERK'S OFFICE
NEW YORK

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David M. Fish, an attorney duly licensed to practice law before all Courts of the
State of New York, affirms the following under penalties of perjury:

1. I am the attorney for the Petitioner, Carla Franklin, in the captioned matter before
this Court and, in that capacity, I am familiar with the facts and circumstances described
in this affirmation.

2. I submit this affirmation in support of Ms. Franklin's application for an order,
pursuant to CPLR §3102(c), for pre-action disclosure, and compelling Google, Inc.
and/or its subsidiaries ("Google") and YouTube, LLC and/or its subsidiaries
("YouTube") to disclose the identity of the person or persons ("JOHN DOE" and/or
"JANE DOE") who posted defamatory statements on the Columbia School of Business
website, between approximately June and October of 2009, referring to Petitioner as a
"Whore," (as well as published a YouTube internet channel dedicated to Ms. Franklin,
including footage from a film that Ms. Franklin appeared in several years ago, without

her or the film owner's authorization) under the operation and control of Google and/or YouTube. See supporting documents attached to this affirmation.

3. This application should be granted because the unknown defendants, JOHN DOE and/or JANE DOE, created, among other things, a defamatory posting and webpage located at the URL <http://www.youtube.com/greyspector09>, <http://www.youtube.com/JimmyJean008>, <http://www.youtube.com/JoeBloom08>, and posted statements solely about Ms. Franklin that describe her as a "Whore," which is malicious and untrue. The webpages contain statements that are defamation *per se* in that they obviously impugn the chastity of Ms. Franklin and, further, they negatively reflects on her.

4. As way of background, Ms. Franklin worked part-time as an actor and model from 2001 through 2006. In May 2009, Ms. Franklin graduated from Columbia School of Business with a degree in Finance and International Business; she graduated from Duke University in 1999 with degrees in Biology and Psychology. Today, she is employed as a business strategy consultant.

5. Beginning in July 2009, Ms. Franklin's clients and prospective employers were able to view the unauthorized and defamatory web pages and statements described above (in paragraph 3) which, upon information and belief, damaged her business and job prospects.

6. Specifically, between approximately June and October of 2009, JOHN DOE and/or JANE DOE published a YouTube channel on the internet dedicated to Ms. Franklin, including footage from a film that Ms. Franklin appeared in several years ago, without her or the film owner's authorization.

7. Also between approximately June and October of 2009, JOHN DOE and/or JANE DOE posted defamatory statements on the Columbia School of Business website, referring to Ms. Franklin as a "Whore."
8. JOHN DOE and/or JANE DOE posted the above statements under usernames "greyspector09," "JimmyJean008," and "JoeBloom08."
9. The postings and statements were published to, and accessible by, all users of the internet, and contain false and defamatory statements regarding Ms. Franklin.
10. JOHN DOE's and/or JANE DOE's defamatory assertions are untrue and baseless, go far beyond simple assertion of personal opinion, and are calculated to cause distress, to defame Ms. Franklin, and to damage her personal and business interests and affairs.
11. As the postings are libel *per se* (false statements that that impute a lack of chastity are considered defamatory *per se*; the term "whore" imputes a lack of chastity), Ms. Franklin does not need to prove damages, as the legal injury may be presumed from the fact of publication itself.
12. Nonetheless, Ms. Franklin has suffered damages in the form of emotional distress and mental anguish, as well as damage to her reputation in the business community, her ability to gain employment, and to her personal relationships.
13. Ms. Franklin continues to be damaged by the posts and their negative effects on friends, family and business associates.
14. The above statements by JOHN DOE and/or JANE DOE were made with the intention to harm Ms. Franklin's reputation and interfere with her relationships, employment and livelihood.

15. Upon information and belief, Google and YouTube will only provide Ms. Franklin with any information or documents with respect to the person or persons who posted the web pages that defamed Ms. Franklin if they are required to do so pursuant to applicable law, regulation, legal process, or enforceable governmental request.

16. In this affirmation, we have set forth facts and law sufficient for this Court to compel Google and YouTube to disclose the identity of JOHN DOE and/or JANE DOE, including his/her/their name(s), address(es), email address(es), phone number(s), IP Address(es) and any other information that it may possess that would assist in ascertaining JOHN DOE's and/or JANE DOE's identity(ies).

17. These web page postings are unmistakably about Ms. Franklin, the movant in this application, and the would-be plaintiff in a defamation action if only she could ascertain the identity of the person or persons who posted the web pages and statements. Ms. Franklin must be entitled to "unmask" JOHN DOE and/or JANE DOE and obtain their identities.

18. A court may allow pre-action discovery if it is needed to aid a party in bringing an action against a potential defendant, but it may do so only by court order. See, Matter of Cohen v. Google, 25 Misc. 3d 945, 887 N.Y.S.2d 424 (N.Y. Cty. 2009).

19. In order to be to be entitled to this relief, however, the moving party must first show that it "has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong." Liberty Imports v. Bourauet, 146 A.D.2d 535, 536 (1st Dept. 1989); see also Matter of Greenbaum v. Google, Inc., 18 Misc. 3d 185, 188 (Sup. Ct. N.Y.C. 2007).

20. To set forth a meritorious cause of action for defamation, Ms. Franklin must prove (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to her. See, Penn Warranty Corp. v. DiGiovanni, 10 Misc. 3d 998, 1002 (Sup. Ct. N.Y.C. 2005).

21. In this case, Ms. Franklin will proceed under a theory that the web postings are libelous *per se* because they called into question her chastity and as a professional business consultant, they relate to her reputation and her business. The explicit definition of libel *per se* is “any written or printed article . . . [which] tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.” Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977). The statements posted in this case fall into this definition since the Court of Appeals holds that “written charges imputing unchaste conduct to a woman are libelous *per se*.” James v. Gannett Co., 40 N.Y.2d 415, 419, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976).

22. Because the postings on the web page constitute libel *per se*, Ms. Franklin does not have to prove damages or actual injury. See Gannett Co. Inc., 40 N.Y.2d at 419. That being the case, “the law presumes damage to the slandered individual’s reputation so that the cause is actionable without proof of special damages.” 60 Minute Man v. Kossman, 161 A.D.2d 574, 575 (2d Dept. 1990). Therefore, Ms. Franklin “need not establish damages as an element of [her] defamation cause of action, and . . . failure to do so [would] not require [dismissal].” Id. At 576.

23. Despite the fact that proving damages is not necessary in this case, Ms. Franklin has nonetheless suffered damages including personal humiliation, mental anguish and damage to her reputation and standing in her industry.

24. As to whether the statements posted on the web page are statements of fact is a question of law. See Rinaldi, 42 N.Y.2d at 381. JOHN DOE's and/or JANE DOE's use of the word "whore" clearly goes far beyond asserting opinions. They are used to factually define Ms. Franklin and damage her reputation.

25. By posting the web pages, JOHN DOE and/or JANE DOE broadcast the defamatory statements on the internet and published and broadcast the statements to anyone who would find the page.

26. As to whether the information sought from Google and/or YouTube is material and necessary, if Ms. Franklin is unable to ascertain the identities of JOHN DOE and/or JANE DOE with absolute certainty, she will be unable to bring a defamation suit, remedy her damages, and achieve justice, since she will not know who the proper defendants are. Thus, the information sought – the identity of JOHN DOE and/or JANE DOE – is not only material and necessary to the actionable wrong, but if Ms. Franklin is denied the relief sought herein, it will unfairly thwart her ability to bring her meritorious lawsuit.

27. Since Ms. Franklin is able to state a cause of action of defamation against these anonymous defendants, the Court should order, pursuant to CPLR §3102(c), pre-action disclosure by Google and YouTube and order them to identify JOHN DOE and/or JANE DOE who posted the defamatory statements about Ms. Franklin.

28. No prior application for the relief sought herein has been made.

WHEREFORE, is respectfully requested that an order be issued, pursuant to

CPLR §3102(c), for pre-action disclosure, and compelling Google and YouTube to identify JOHN DOE and/or JANE DOE who posted the defamatory statements about Ms. Franklin, together with such other and further relief as the court deems proper.

Dated: New York, New York
August 13, 2010

Respectfully submitted,
DAVID M. FISH
COUNSELOR AND ATTORNEY AT LAW

By: David Fish
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ORDER TO SHOW CAUSE

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