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VIA FEDERAL EXPRESS

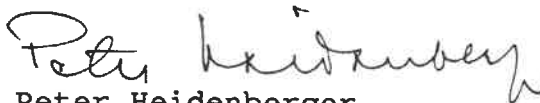
Mr. John T. Adams  
Clerk, Supreme Court of Texas  
Supreme Court Building  
Room 104  
201 West Fourteenth Street  
Austin, Texas 78701

Re: Monceaux v. Volkswagen AG, No. 95-514

Dear Mr. Adams:

Enclosed are the original and eleven copies of the brief amicus curiae of the Federal Republic of Germany in support of Volkswagen AG in the above-captioned case.

Sincerely,

  
Peter Heidenberger

Enclosures

NO. 95-514

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IN THE SUPREME COURT OF TEXAS

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VOLKSWAGEN AG,  
Relator,

v.

THE HONORABLE ROGELIO VALDEZ,  
JUDGE, 357TH JUDICIAL DISTRICT COURT  
OF CAMERON COUNTY, TEXAS,  
Respondent.

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From the 357th Judicial District Court  
of Cameron County, Texas

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BRIEF OF AMICUS CURIAE FEDERAL REPUBLIC  
OF GERMANY IN SUPPORT OF VOLKSWAGEN AG, RELATOR

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## INDEX OF AUTHORITIES

	Page
<b>GERMAN CASES:</b>	
<u>Amtsgericht Bremerhaven</u> , 20 OWi 95 js (b) 93/84, October 16, 1986 . . . . .	15
<u>Amtsgericht Dusseldorf</u> , 102 11 Ls/KLs 810 js 146/83, RDV (1986) . . . . .	15
<u>Amtsgericht Konstanz</u> , Cs 260/81, October 16, 1981 . . . . .	16
<u>Bundesarbeitsgericht</u> , Judgment May 27, 1986 . . . . .	15
<u>Bundesgerichtshof</u> , BGH VI ZR 105/82 . . . . .	16
<u>Entscheidungen des Bundesverfassungsgerichts</u> , 65 BVerfGE 1 (1983). . . . .	13, 17
<u>Landgericht Berlin</u> , 3 Sa 104I78 (2/13/79) . . . . .	14
<u>Oberlandesgericht Bremen</u> , August 27, 1982 . . . . .	14
<u>Oberlandesgericht Karlsruhe</u> , January 12, 1983 . . . . .	16
<u>Oberlandesgericht Koblenz</u> , April 12, 1990 . . . . .	16
<b>AMERICAN CASES:</b>	
<u>Department of Defense, et al. v. FLRA</u> , 127 L.Ed.2d 325 (1994) . . . . .	18, 19, 20
<u>Department of Justice v. Reporters Committee for Freedom of Press</u> , 489 U.S. 749 (1989) . . . . .	19
<u>Hartford Fire Insurance Co. v. California</u> , 112 S.Ct. 2891 (1993) . . . . .	11
<u>Hilton v. Guyot</u> , 159 U.S. 113 (1895). . . . .	10, 11
<u>Reinsurance Company of America, Inc. v. Administratia Asigurarilor de Stat</u> , 902 F.2d 1275 (7th Cir. 1990). . . . .	14
<u>Societe Internationale et Commerciales, S.A. v. Rogers</u> , 357 U.S. 197 (1958). . . . .	23
<u>Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa</u> , 482 U.S. 522 (1987). . . . .	10, 11, 12, 17, 25

**RULES:**

Texas Disciplinary Rules of Professional Conduct, § 9, Rule 4.02 . . . . .	21
---	----

**(GERMAN) LEGISLATION:**

<u>Bundesdatenschutzgesetz</u> ("BDSG") . . .	2, 8, 9, 13, 14, 15, 23, 24
---	-----------------------------

**TREATISES:**

Kommers, <u>The Constitutional Jurisprudence of the Federal Republic of Germany</u> , Duke University Press, Durham and London (1989) . . . . .	17
Restatement (Third) Foreign Relations Law of the United States	
§403, Comment e . . . . .	11
§442. . . . .	7, 20, 21

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VOLKSWAGEN AG,

Relator-Appellant,

-versus-

THE HON. ROGELIO VALDEZ, Judge, 357th  
Judicial Court of Cameron County, Texas,

Respondent.

-----X

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

STATEMENT OF INTEREST

The Federal Republic of Germany is appearing herein as amicus curiae to explain its critical national interest involved in this litigation. The District Court of Cameron County's order requiring Volkswagen AG (hereinafter VWAG) to turn over its current internal telephone directory to private litigants adversely impacts upon and improperly undermines fundamental substantive principles forming part of the constitutional and statutory law of Germany. Because VWAG cannot obey the District Court's order without violating these fundamental aspects of the Federal Republic of Germany's constitutional and statutory law, the order invades German sovereignty. Under the circumstances of this case, this invasion takes place without weighty justification.

The District Court's order creates a direct conflict between the legal systems of two sovereign nations: the United States and the Federal Republic of Germany. This conflict

inflicts harm on the mutual interests of all nations in a smoothly functioning international legal regime. In the interests of comity, the District Court's order should be vacated or, at a minimum, modified to accommodate the Federal Republic of Germany's concerns.

#### STATEMENT OF THE CASE

In an action for damages arising out of an accident involving a 1970 Volkswagen vehicle, the District Court of Cameron County has issued an order requiring Volkswagen AG, a German company and a defendant in the litigation, to produce its current corporate telephone directory. More than 20,000 Volkswagen employees and subsidiary personnel are found in this directory which lists as to each his direct dial business telephone, his job responsibilities, department and subdepartment. Thus, the job directory indicates the position of VWAG's employees within the concern. Moreover, the directory includes the home telephone numbers of most employees in a management position.

The conditions under which these kinds of data may be transmitted are regulated by a comprehensive German statute, the Federal Data Protection Act, the Bundesdatenschutzgesetz ("BDSG"). This statute reinforces the right of informational privacy recognized in the German Constitution, known as the "Basic Law." This right of informational self-determination is a fundamental German constitutional right.

## PROPOSITION OF LAW

Whether, when issuing an order for discovery which would subject a foreign corporation to criminal sanctions under its domestic law, United States courts are required to consider and balance the interests of all parties concerned, including the interests of the foreign state where the discovery order is to be carried out and the interests of that state's citizens?

### 1. Proceedings Below

#### (a) The Hearing in the District Court

The transcript ("Tr.") of the September 30, 1993 hearing before the District Court for Cameron County, the Honorable Rogelio Valdez, is 54 pages long. For the first 23 pages, counsel for the real parties in interest argued how Volkswagen had obstructed discovery in this and in some 50 other reported cases. The gist of his argument was that the court had signed an order and Volkswagen had not complied with its terms. Counsel for VWAG, over the course of some 11 pages, defended on the ground that the court had signed an order proffered by counsel for the real parties in interest that improperly failed to reflect what the court had said at an earlier hearing and that VWAG had moved for reconsideration so it was not obligated to comply with the order until the court should rule on its motion for reconsideration (Tr. 23-34). The following colloquies then took place. We set them out at length to make clear that the District Court, when ruling on the request that VWAG produce its

current corporate telephone book, saw itself as ruling on a motion for sanctions instead of making a balancing analysis.

THE COURT: Is that all?

MR. BERSCH [Counsel for Volkswagen]: That's all in response to this particular aspect [that is, Volkswagen's motion for a protective order].

THE COURT: I've heard enough, counsel. I'm going to deny your motion for protection. I'm going to deny your motion to amend the order. That's the order that I intended to order. I'm going to grant the motion to compel. I'm going to -- at this time I'm ready to proceed on the sanctions. So you hit me with what you want. \* \* \*

THE COURT: What else?

MR. JAMISON [Counsel for the real parties in interest]: Additionally, your Honor, we ask for that if the individuals ordered by the Court do not appear again, that they be, that Volkswagen, the defendants jointly and severally be fined ten thousand dollars per day for each day that they do not show up with what you order.

THE COURT: Request granted. What else?

MR. JAMISON: Your Honor, we would ask for sanctions, in view of the fact that we now have been prolonged in this case. We have had to go through this discovery. We would have to miss our trial setting. We've been damaged. In order to make sure and securing that this does not occur again, and in view of the matters Volkswagen has engaged in as a pattern and a national pattern, we would ask for sanctions in the amount of \$25,000.

THE COURT: Request granted. What else?

MR. JAMISON: Also, your Honor, we would ask that Volkswagen be ordered to produce the items.

THE COURT: On the supplemental?

.... Request will be granted. What else?

MR. JAMISON: Judge, give me ten seconds. I'll see if I asked for any other relief

.....  
THE COURT: Furthermore ... I'm going to hereby appoint a master to do my discovery in this case at the expense of the defense. \$200 an hour .... (Tr. 34-37.)



On page 45 of the transcript, Mr. Jamison states that Volkswagen has failed to produce its corporate telephone directory.

MR. JAMISON: ... What we did get was a letter from some German lawyer saying that it was against German law to give us a phone book from Volkswagen. We are here wanting production.

THE COURT: Well, the German lawyer is not here. The American lawyer is. So make sure that you respond to discovery.

MR. BERSCH: I filed that with the Court, your Honor.

MR. JAMISON: This law, I don't know if the Court wants to go into this.

THE COURT: I am not going to. German law doesn't dictate into the United States. So you make sure that you comply with our laws here.

MR. BERSCH: Well, we have a problem in that regard because of --

THE COURT: No, you don't. I'm telling you. I'm not going to follow German law. That's my position at this time, all right? It's very clear. You can take me up on it, if you want to. I'm going to follow our rules of discovery.... You know, if the German law is different, tough. We are in America. Sorry.

MR. BERSCH: We have an objection beyond that, just a basic matter of relevance or reasonably calculated to lead to the discovery of admissible evidence. We are going to produce the phone book from 20 years ago. The current phone book in regard to a car that was made 20 some years ago really has no relevance to anything that we are dealing with in this case.

THE COURT: Whether it does or doesn't, we will cross that bridge when the time comes, all right? But, for purposes of discovery, you produce it please....

(Tr. 45-47.)

The District Court failed to address the two crucial issues. First, in stating that "we will cross that bridge when the time comes," the court explicitly refused to decide whether

the 1969 corporate telephone directory was more likely to provide the relevant information than the current telephone directory. Second, the court made no attempt at a comity analysis. Stating that "German law doesn't dictate into the United States" and "if the German law is different, tough," does not constitute a comity analysis. It is clear, we respectfully submit, that the District Court did not consider any of Germany's interests at all. In the court's view, Volkswagen had misbehaved in discovery and if his discovery order created problems in Germany, "tough."

Despite two motions for reconsideration the Court continued to require the production of the current corporate telephone directory. In the course of these proceedings the discovery master candidly observed, "[q]uite frankly I am not sure that the production of the telephone book will lead to any relevant evidence whatsoever." (Pet.Ex. M).<sup>1</sup> VWAG then applied to the Court of Appeals for the Thirteenth District of Texas for relief by way of mandamus.

## 2. The Court of Appeals Decision

The Court of Appeals deemed mandamus appropriate because of concerns involving comity and international relations. It concluded that "[b]ased on the affidavits and other evidence presented by Volkswagen ... it has properly pled and proven that German law prohibits the disclosure of its current corporate telephone book." Opinion ("Op.") at 8. Nevertheless, the Court

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<sup>1</sup> Exhibits identified alphabetically are attached to VWAG's Petition for Mandamus.

refused to vacate that order compelling the prohibited disclosure. Stating that it was applying the balancing test set out in § 442 of the Restatement (Third) of the Law of Foreign Relations (hereinafter "Restatement"), the Court of Appeals concluded that comity did not require the trial court to protect Volkswagen's current telephone directory from discovery. It said "the interest of the real parties in obtaining the requested phone book, and the interests of this State and the United States in protecting their right to obtain such information, outweigh that of Germany in prohibiting its disclosure." Id. at 12-13. (footnote omitted.) Without citing any evidence, the Court of Appeals postulated that the real parties in interest "have a compelling interest in obtaining the current phone book in order to communicate with the various professionals within Volkswagen AG who may have knowledge of the design being incorporated into the 1970 automobile or may otherwise be of help in investigating such design." Id. at 11. Disregarding the alternative discovery order submitted by VWAG, the Court said that there was "no suggestion of any alternate means of securing the information in question." Id. at 12. The Court of Appeals questioned whether disobedience to the trial court's order would expose VWAG to criminal sanctions in Germany, expressing confidence that "a German court examining this matter would apply the same general principles of comity to the order of the Texas trial court that we seek to apply in relation to German law." Id. at 12. Finally, the Court suggested that VWAG, if "legitimately concerned about

the privacy of its German employees, may still move for a protective order restricting the disclosure of the phone book...." Id. at 13, n.4.

Accepting the factors listed by the Court of Appeals as appropriate in resolving the issues of comity present here, the Federal Republic of Germany faults their application to the facts of this case. Had the Court of Appeals given the proper consideration to the important interests of the German Government in securing respect for the personal privacy of its citizens, which is a pervasive concern of its constitution, the Basic Law, as well as of its statutes and procedural law, it could not have let stand the discovery order of the District Court, which is in direct conflict with German law. Applying essentially the same balancing test as did the Court of Appeals, that is evaluating the interests of Volkswagen employees in protecting their personal data against the real parties' interests in the disclosure of such data, four authorities on German law have concluded that a German court would not order the broad-scale invasion of privacy<sup>2</sup> compelled by the Trial Court order and would find VWAG in violation of the BDSG. Such violation would expose VWAG to civil and criminal sanctions.

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2 These conclusions are set forth in a letter from the office of State Commissioner for Data Protection of Lower Saxony dated September 24, 1993, signed by Dr. Dronsch (Pet.Ex. F); in a letter from the Federal Ministry of Labor and Social Order, dated October 1, 1994, signed by Mr. Hartleb (Pet.Ex. P); an Aide Memoire from the Embassy of the Federal Republic of Germany, dated January 9, 1995, signed by Mr. Hanel, Consul General (Pet.Ex. U); and an affidavit of Professor Ernst Benda, dated May 3, 1995, attached hereto as Exhibit 1.

As the German Embassy noted in its Aide Memoire to the Court of Appeals, "Virtually none of the thousands of individuals listed in the telephone directory had anything to do with the development, manufacturing and marketing of the 1970 Volkswagen Type 1 Sedan and information regarding such individuals is clearly not required by the plaintiff in the pursuit of his claims." (Pet.Ex. U). Professor Ernst Benda, who for many years served as a member and President of the German Constitutional Court (a court comparable to the United States Supreme Court), has given as his opinion, "In its balancing of the interests of the plaintiff against those 20,000 individuals listed in the 1995 directory, a German court would find that the 1995 time period is too remote from the design and manufacture of the 1970 Volkswagen vehicle and that 'proportionality' (Verhältnismäßigkeit) is lacking in the request of the plaintiff". (Affidavit of Professor Benda, Exhibit 1, supra, par. 5).

In Professor Benda's opinion, "a German court would balance the interests of those individuals whose privacy rights were violated by transmission with those of the plaintiffs in this case [and] would conclude, as did the German authorities, that transmission of the 1995 corporate directory by Volkswagen AG violates the BDSG." Id., par. 6. Professor Benda also notes, "... the BDSG provides for criminal and civil sanctions." Id. Therefore, contrary to the opinion expressed by the Court of Appeals, considerations of comity would not insulate Volkswagen

from criminal law or civil sanctions for obeying the order of the District Court.

#### ARGUMENT

1. THE DIRECT CONFLICT BETWEEN THE LAWS OF TWO SOVEREIGN STATES, THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY, GENERATED BY THE DISTRICT COURT'S DISCOVERY ORDER, CALLS FOR A COMITY ANALYSIS WHICH THAT ORDER CANNOT SURVIVE

As the Court of Appeals correctly recognized, the discovery order entered by the trial court has to be scrutinized for its conformity with established principles of comity.

"Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522, 543 n. 27 (1987) (hereinafter "Société"). In Hilton v. Guyot, 159 U.S. 113, 163-164 (1895), comity is described as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

In the interests of comity the Supreme Court has counseled lower courts to "exercise special vigilance" to protect foreign litigants from the danger that "unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." Société, at 546.

"Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See Hilton v. Guyot, 159 U.S. 113 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. Société, at 546. (Emphasis added)

As noted earlier, the Federal Republic of Germany is submitting this brief to express its sovereign interest in the discovery ordered in the Texas trial court: the order undermines basic interests of the German Government, infringes on its sovereignty, and is destructive of fundamental values firmly embedded in its laws and constitution.

The threshold question in any comity analysis is whether "there is in fact a true conflict between domestic and foreign law." Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891, 2910 (1993), quoting Société, supra at 555. (Blackmun, J., concurring in part and dissenting in part.) The existence of such a conflict has been established here. The Court of Appeals concluded that "[Volkswagen] has properly pled and proven that German law prohibits the disclosure of its current corporate telephone book." Op. at 8. Thus VWAG, a legal person subject to regulation by both Germany and the United States, cannot comply with the laws of both countries. (Restatement, § 403, Comment e). The Court of Appeals

acknowledged this dilemma: "In the present case, the Texas trial court's order for production directly contravenes the German law which would otherwise require Volkswagen to keep confidential information concerning its German employees". Op. at 5.

Having found a true conflict between domestic and foreign law, the courts below should have sought a "reasonable accommodation that reconciles the central concerns of both sets of laws". Société, supra, at 555 (Blackmun, J., concurring in part and dissenting in part). What was required was "a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime." Société at 555.

Unlike the trial court which paid not even lip service to what German law requires, the Court of Appeals, quoting Société, supra, acknowledged that one consideration to be taken into account when an American court issues an order directing the production of information located abroad was "the extent to which ... compliance with the request would undermine important interests of the state where the information is located." Op. at 11. It stopped, however, with stating the principle. Nowhere does the Court of Appeals even articulate, let alone give any weight to, the interests of Germany that were affected by the order compelling production of VWAG's current corporate telephone directory. Had the Court of Appeals done so it could not have concluded that such order was consistent with comity.



2.    PERSONAL PRIVACY AND ITS PROTECTION  
      ARE A PERVASIVE GERMAN CONCERN AND  
      ARE CENTRAL TO ITS LAWS, POLICIES  
      AND JUDICIAL PROCEDURES

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Recognition of the importance of the preservation of individual privacy is central to German law and finds expression in Germany's Constitution ("Grundgesetz," in English "Basic Law"), in its statutes, and in its judicial procedures. German law firmly reflects this societal value and public policy position. Germany's Constitutional Court ("Bundesverfassungsgericht"), the highest court in the Federal Republic of Germany charged with constitutional matters and the German equivalent of the U.S. Supreme Court, has identified in the Constitution a right of informational self-determination. 65 Entscheidungen des Bundesverfassungsgerichts ["BVerfGE"] 1, 44 (1983). Informational self-determination is the right of the person whose personal data is involved to be able to anticipate what use will be made of it. Included in the right of informational self-determination is the general authority of the individual to direct the collection and application of this personal data. This right also protects the individual from the unauthorized collection, storage, application and transmission of personal data. 65 BVerfGE at 43.

Carrying out its constitutional obligation to structure the use of personal data, the German Federal legislature in 1977 passed the BDSG, the statute involved here. The purpose and scope of the law is "to protect the individual against his right to privacy being impaired through the handling of his personal

data." Part 1, Section 1. "Personal data" is broadly defined to mean "any information concerning the personal or material circumstances of an identified or identifiable individual (the data subject)." Section 3.

Unlike the statutes customarily described as "blocking statutes" the BDSG was not enacted to protect German nationals from foreign discovery requests. It was a response to purely domestic concerns and intended to protect fundamental rights recognized by Germany's Basic Law. See Reinsurance Company of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1280 (7th Cir. 1990).

German courts are very sensitive to the damage to personal liberty that can arise from the disclosure of even seemingly unimportant personal facts. As early as 1979, in the first case we have found interpreting the BDSG, the District Court ("Landgericht") of Berlin held "that it is a violation of the BDSG to furnish a third party with data on an employee without his consent". 3 Sa 104I78 (February 13, 1979). At issue in this case was the status of the section of the German Labor Law that permitted an employer after termination of the plaintiff's employment to provide the new employer with the plaintiff's personal data. BAG BB 1960,983; BAG BB 1977, 279. The Berlin court held that after the enactment of the BDSG it was no longer lawful to furnish such data to third parties.

In 1982, the Court of Appeals ("Oberlandesgericht") of Bremen declared that it was a punishable offense under § 41 of

the BDSG when a hospital furnished the police department with the names of patients who were treated after a street demonstration. Decision of August 27, 1982.

In 1985, the District Court ("Amtsgericht") of Düsseldorf stated that "in early 1983 violations of data protections were not considered as seriously as they are today." In that case, the court convicted a man who had assembled and released to an insurance company the names, date of birth, and addresses of certain employees. This is the type of information which could be gleaned from the internal corporate telephone book of Volkswagen AG. In the same case the court convicted an insurance agent who later came into possession of the data. 102 11 Ls/KLs 810 js 146/83, RDV, at 288 (1986).

In 1986, Germany's highest labor court ("Bundesarbeitsgericht") held that a list of telephone numbers were "personal data" within the meaning of the BDSG. Judgment of May 27, 1986.

Later in 1986, the District Court ("Amtsgericht") of Bremerhaven found the management of an association that released customer information to the members of the associations guilty of a civil offense ("Ordnungswidrigkeit"). 20 OWi 95 js (B) 93/84, October 16, 1986, §42 BDSG, RDV 91, at 92 (1987). The court stressed the absolute right of the person whose data were being disclosed to control any disclosure, and held that it is the intent of the BDSG to ensure the integrity of a person's

Constitutional right to the information pertaining to each individual. Id.<sup>3</sup>

The privacy of the home and an individual's right to control the dissemination of personal information are protected as the aforementioned Dr. Dronsch (note 2), the Commissioner of Data Protection of Lower Saxony, found in his 1993/1994 Annual Report with respect to a university in Lower Saxony,

The transfer of telephone data of employees - such as clerks and other office help - who do not have contacts with third parties is prohibited. Publication of the entire telephone directory is therefore not permissible.

In 1984 the German Supreme Court in Civil and Criminal Matters ("Bundesgerichtshof" or "BGH")<sup>4</sup> set out the standard for balancing the interests of the party whose data are released with the interest of the requesting party. BGH VI ZR 105/82. The BGH held that it is not sufficient to examine existing connections to demonstrate a justifiable interest to receive the information. Id. The BGH has also held that to justify data transfer a judgment must be made that the data is "necessary" for the transferee's purposes not just "useful." BGH Judgment of December 15, 1983. See also BGH Judgment of July 7, 1983

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3 See also Amtsgericht Konstanz Judgment (conviction for releasing data in violation of §41 BDSG, Cs 260/81, Oct. 16, 1981); Oberlandesgericht Koblenz Judgment of April 12, 1990 (balancing test); Oberlandesgericht Karlsruhe Judgment of January 12, 1983 (just use of name and address by direct market mailers violation of individual's "legitimate interest" under the BDSG).

4 The BGH is Germany's highest court for matters which do not require interpretation of the German Constitution. A number of other European countries, including the Republics of France and Italy, have separate Constitutional supreme courts.

(transfer of data in violation of the BDSG injures Constitutional right of "personality").

In finding parts of the German's Federal Census Act of 1983 to be unconstitutional Germany's Federal Constitutional Court pointed out the threat to individual freedom from the ever-growing ability to computerize personal data. [Text as translated and printed in Kommers, Donald P., The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press, Durham and London (1989))]:

"The [individual's decisional] authority needs special protection in view of the present and prospective conditions of automatic data processing. It is particularly endangered because ... the technical means of storing highly personalized information about particular persons today are practically unlimited and can be retrieved in a matter of seconds with the aid of automatic data processing, irrespective of distance. 65 BVerfGE at 42-43.

\* \* \*

Because of this, the individual must be protected from the unlimited collection, storage, use and transmission of personal data as a condition for free personality development under modern conditions of data processing. Article 2(1) in tandem with Article 1(1) of the basic law guarantees this protection. This basic right guarantees the right of the individual to determine for himself whether [the state] may divulge a user's personal data". 65 BVerfGE at 43.

In its courts and in the taking of evidence Germany recognizes "a constitutional principle of proportionality, pursuant to which a judge must protect personal privacy, commercial property, and business secrets." Société, supra, at

547, 558 [Blackmun, J. concurring in part and dissenting in part]. This principle of proportionality was specifically recognized in the separate concurrence of Justice Blackmun in Société, supra at 558, as a sovereignty principle which had to be taken into account in resolving issues of comity. Obedience to the discovery order of the District Court would do great violence to the doctrine of proportionality and threaten precisely the values which the BDSG was enacted to protect.

3. THE 20,000 VOLKSWAGEN EMPLOYEES  
INCLUDED IN VOLKSWAGEN'S INTERNAL  
TELEPHONE DIRECTORY HAVE A STRONG  
AND LEGITIMATE INTEREST THAT THE  
DATA IN THAT BOOK NOT BE DISCLOSED

The Government of the Federal Republic of Germany believes that the Texas courts have not given adequate weight to the concerns of the 20,000 VWAG employees listed in VWAG's internal corporate telephone directory. Not only are the concerns for personal safety of the individuals and their families to be considered, but at the very least, such employees lose control over the dissemination of personal information that the Constitution and statutes of Germany promise them.

Concern for personal privacy is not unique to Germany. Pointing to considerations similar to those which underlie the BDSG, the Supreme Court of the United States refused to authorize the release to two local unions of the names and home addresses of the employees in the bargaining units represented by the unions. Department of Defense et al. v. FLRA, 127 L.Ed. 325, 337

(1994). The Union had sought release of this information pursuant to the Freedom of Information Act. The Supreme Court recognized that employees' interests in nondisclosure of home addresses "is not insubstantial" and held that the disclosure of their addresses "would constitute a 'clearly unwarranted invasion' of the employees' personal privacy." 127 L.Ed.2d at 331. The Supreme Court noted that the employee's interest in his privacy "encompass[es] the individual's control of information concerning his or her person". 127 L.Ed.2d 325, 337, citing Dept. of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 763, 103 L.Ed.2d 774 (1989). The individual has an interest, the Court said, in controlling the dissemination of information regarding personal matters. Disclosure of home addresses, the Court observed, could result in unwanted mail, telephone calls or visits. Recognizing that many people simply do not want to be disturbed at home, the Court said it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws and traditions." 127 L.Ed.2d at 338.

The same respect accorded the privacy of American citizens should be given the privacy rights of German citizens. The homes of VWAG's German employees are entitled to the same protection against unwarranted intrusions recognized by the Court in protecting federal civil service employees. There are even less reasons here than there were in Department of Defense v.

FLRA, supra at 331, for disregarding the privacy interests of the employees involved.

4. THE DATA IN THE VWAG CURRENT  
CORPORATE TELEPHONE DIRECTORY HAVE  
NO RELEVANCE TO THE ISSUES IN  
PLAINTIFF'S LAWSUIT AGAINST VWAG

The review of the record by the Federal Republic of Germany indicates that no claim has ever been made by the real parties in interest that the data in the directory directly bear on the issues in the underlying lawsuit; they claim to need the data to search for relevant evidence. Even for that limited purpose, the directory would appear to have no value. Knowing who is currently employed will not reveal who knows anything about a vehicle designed twenty-five years ago.

Even as the attorney appointed to monitor discovery in the trial court resolved against VWAG its motion for reconsideration, he candidly acknowledged that he was "not sure that the production of the telephone book will lead to any relevant evidence whatsoever." (Pet.Ex. M).

But even were the matter clearer, § 442 of the Restatement counsels that a discovery request for documents located abroad should be scrutinized more closely than comparable requests for information located in the United States. This section sets out a test of direct relevance and materiality. § 442 states, "it is ordinarily reasonable to limit foreign discovery to information necessary to the action -- typically,



evidence not otherwise readily obtainable -- and directly relevant and material."<sup>5</sup> (Emphasis added.) Comment a to § 442.

The real parties in interest have no need, let alone one that is "directly relevant and material" for the directory. To begin with, direct communication with some of these employees might run afoul of the Texas Disciplinary Rules of Professional Conduct. The Rules prohibit direct communication with certain employees of the opposing party: those having managerial responsibility and those whose statements could give rise to vicarious liability on the part of their employer. (Texas Disciplinary Rules of Professional Conduct, § 9, Rule 4.02, Communication With One Represented By Counsel) (1994). The data in the telephone directory would not appear to be sufficient to distinguish those employees with whom the real parties in interest can communicate consistent with the Disciplinary Rules, from those with whom they cannot.

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5 The Restatement notes that requests for information "that could lead to admissible evidence would ordinarily not be granted on this standard, but a court might in some instances order disclosure of the identity and location of persons who may have knowledge of such information ..." Comment (a) to § 442. The corporate directory embodies far more than the identity and location of persons who may have knowledge of information relevant to the suit. Indeed, the bulk of the 20,000 Volkswagen employees whose privacy the order invades can know nothing about the vehicle involved in this lawsuit since it can be presumed that many first entered the employ of Volkswagen years after the vehicle in question was designed. Furthermore, the telephone book itself in no way helps the real parties identify persons in possession of relevant information. If the real parties know who they are, they can be located without invading the privacy of the tens of thousands of individuals having no relationship to this lawsuit.

In short, the current telephone directory itself contains no relevant evidence; out of the thousands of persons it covers, only a few, at best, can possibly supply information which might lead to relevant information; even as to them the utility of the directory is problematical since communication with many would be inconsistent with professional ethics. The limited information which can be gleaned from the telephone directory relating to a small fraction of the employees it covers can easily be supplied without recourse to that book. For thousands of Volkswagen employees not even a shadow of justification exists for the sweeping invasion by the District Court's discovery order of their right to privacy.

5. BECAUSE THE INTERESTS OF VOLKSWAGEN'S GERMAN EMPLOYEES IN THEIR PERSONAL PRIVACY FAR OUTWEIGH THE QUESTIONABLE VALUE OF VOLKSWAGEN'S INTERNAL DIRECTORY TO THE REAL PARTIES IN INTEREST, DISCLOSURE OF THAT DIRECTORY AS ORDERED BY THE COURT WILL SUBJECT VOLKSWAGEN TO CIVIL AND CRIMINAL SANCTIONS

Only because the Court of Appeals ignored the unjustified invasion of the rights of privacy of thousands of employees having no conceivable connection with plaintiff's lawsuit was it able to conclude that "a German court examining this matter would apply the same general principles of comity to the order of the Texas trial court that [it was applying] in relation to German law" and, therefore, VWAG could not be seriously threatened with criminal sanctions.

But as the scholarly affidavit of Professor Benda, former chief judge of Germany's Constitutional Court, points out: "A German civil court faced with the same question as the U.S. Courts in this case would not order the production of the current corporate directory of Volkswagen AG." (Exhibit 1, supra, par. 5. [Emphasis in original]). In his opinion, a German court balancing the interests of the plaintiffs against the interests of those 20,000 individuals listed in the 1995 directory whose privacy rights would be violated if VWAG produced the corporate telephone directory would reach the same conclusion as did the German authorities, i.e., that transmission of the current corporate directory by VWAG violated the BDSG. Id., par. 6.

Requiring VWAG to run the risk of civil and criminal sanctions in Germany appears to be the type of unnecessary or unduly burdensome discovery which the Supreme Court has counseled should be given the most careful consideration when a discovery order conflicts with a foreign statute.<sup>6</sup>

But not only the interests of VWAG are disregarded by the discovery order entered by the trial court. Likewise, this Order harms the interest of 20,000 Volkswagen employees in protecting their own personal privacy and necessarily, therefore, as it is the purpose of this brief amicus curiae to emphasize, the sovereign interests of Germany in ensuring respect for its laws and values.

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<sup>6</sup> "[F]ear of criminal prosecution constitutes a weighty excuse for nonproduction". Societe Internationale et Commerciales, S.A. v. Rogers, 357 US 197, 211, 2 L.Ed 2d 1255, 1267 (1958).

Although the Court of Appeals suggests that VWAG obtain a protective order, this document would not cure VWAG's violation of the BDSG nor provide an adequate substitute to the 20,000 Volkswagen employees for the BDSG's statutory protection. What would be their remedy were a protective order disobeyed? An action for contempt in a court thousands of miles from their home? The suggestion that an order of protection constitutes a realistic substitute for the statutory safeguards incorporated in German law shows an indifference to the vital German interests for which comity ensures respect.

Had the Court of Appeals, in view of its recognition of a direct conflict between German law and the Order of the District Court made the required comity analysis, it could not have reached the result it did. The order compelling VWAG to violate basic constitutional and statutory law firmly grounded in the fundamental values of the Federal Republic of Germany to satisfy an almost frivolous discovery request of a private party does great violence to the principles of comity which the courts of Texas should respect. Germany has an overriding interest in the statutory and constitutional rights of its citizens over which the discovery order rides roughshod. In deference to the requirements of comity, the order of the trial court should be vacated.

6. A NEW DISCOVERY ORDER SHOULD BE  
FASHIONED CONSISTENT WITH THE  
INTERESTS OF THE TWO SOVEREIGNTIES  
HERE INVOLVED: THE FEDERAL REPUBLIC  
OF GERMANY AND THE UNITED STATES

"The final component of a comity analysis is to consider if there is a course that furthers, rather than impedes, the development of an ordered international system." Société, supra, 547, 567 [Blackmun, J., concurring in part and dissenting in part]. When, as here, there is a true conflict between domestic and foreign law, "a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws." Société, supra, at 547, 555 [Blackmun, J., concurring in part and dissenting in part.]

CONCLUSION

The order of the District Court requiring Volkswagen to produce its current corporate telephone directory should be reversed.

Respectfully submitted,



Peter Heidenberger  
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May 31, 1995



# Urkunde

des

**Notars**

**Martin Kersten**

**Notariat Karlsruhe**

**Helmholtzstr. 9 · 76133 Karlsruhe  
Postfach 46 08 · 76030 Karlsruhe**

Volkswagen Aktiengesellschaft  
in Wolfsburg  
38436  
zum Zwecke der Vorlag beim  
Distrikt - Gericht  
des Cameron - County  
Texas, Vereinigte Staaten von Amerika

**Urkundenrolle 10 UR 657/95**

Notariat 10 Karlsruhe 10 UR 657 195

Geschehen zu Karlsruhe im Anwesen Käthe - Kollwitz - Str. 46, wohin sich der Notar auf Ersuchen der Beteiligten begeben hat, am Dienstag, 2. Mai 1995 - zweiter Mai Neunzehnhundertfünfundneunzig - vor dem Notariat 10 Karlsruhe.

Gegenwärtig: Justizrat Martin Kersten in Karlsruhe als Notar

Anwesend ist:

Herr Professor Doktor Ernst Benda, Präsident des Bundesverfassungsgerichtes außer Dienst, geboren am 15.01.1925, wohnhaft Käthe - Kollwitz - Str. 46, 76227 Karlsruhe,

dem Notar von Person bekannt und unbedenklich geschäftsfähig.

Er erklärt zur Beurkundung folgende

Versicherung an Eides Statt

Ich übergebe dem Notar mit der Bitte um Beifügung an die erste Ausfertigung das Affidavit of Ernst Benda vom heutigen Tag. Es handelt sich um eine Eidestattliche Versicherung zur Glaubhaftmachung des Inhalts Deutschen Rechtes im Rahmen eines US - Amerikanischen Zivilprozeßverfahrens.

Das Gutachten besteht aus vier Blatt und ist in englischer Sprache erstellt. Es wird in Kopie als Anlage zur heutigen Urkunde genommen. Der Notar wird beauftragt, das Original der ersten Ausfertigung der heutigen Urkunde als Anlage beizufügen. Diese erste Ausfertigung ist bestimmt für das Distrikt - Gericht des Cameron - County, Texas.

Ich, Ernst Benda, bestätige hiermit und versichere an Eides Statt, daß ich das heute dem Notar übergebene Gutachten persönlich erstellt habe und mir nichts bekannt ist, was der Richtigkeit und Vollständigkeit der weiteren von mir in der vorliegenden Urkunde gemachten Angaben entgegensteht.

Der Wert der Urkunde wird zu Kostenberechnungszwecken angegeben mit Deutsche Mark 1.000.000,00. Die Kosten trägt die Volkswagen Aktiengesellschaft in Wolfsburg, D - 38436 Wolfsburg, zu deren Händen die Kostenrechnung unter dem AZ 1882 Hb - ge erbeten wird.

## Schluß

Erbeten werden:

1. erste Ausfertigung mit dem Original des übergebenen Gutachtens als Anlage für die Volkswagen AG zu Händen Rechtsanwalt Dr. Pap, Karlsruhe;
2. zweite Ausfertigung für die Volkswagen AG zu Händen Rechtsanwalt Dr. Pap, Karlsruhe;
3. Abschriften: 1 für Rechtsanwalt Dr. Pap, Karlsruhe.

Hierüber Urkunde,  
welche nach Vorlesen von Herrn Benda genehmigt sowie von diesem und dem Notar  
eigenhändig unterschrieben wird wie folgt:

Ernst Thun  
Vize, Notar

Kosten angesetzt,  
Rechnung siehe Sammelakten

Karlsruhe, den 04. MAI 1995

Kostenbeantw.



VOLKSWAGEN AG,  
Relator,

THE HONORABLE ROGELIO VALDEZ,  
JUDGE, 357TH JUDICIAL DISTRICT COURT  
OF CAMERON COUNTY, TEXAS,  
Respondent.

ERNST BENDA, being duly sworn, deposes and says:

1. I am Ernst Benda, Professor Emeritus for Public Law of the University of Freiburg, Federal Republic of Germany. I studied law at the Humboldt University and Free University of Berlin as well as political science and journalism at the University of Wisconsin. I was admitted to the practice of law in Berlin in 1955. Between 1955 and 1957, I was a member of the House of Representatives in Berlin. Between 1957 and 1971, I represented Berlin in the German Bundestag (Federal German Parliament), where, inter alia, I was a member and reported draft legislation and other materials out of the Legal Committee from time to time. In 1967, I became Parliamentary State Secretary (Parlamentarischer Staatssekretär) in the Federal Ministry of the Interior. From 1968 - 1969, I was Federal Minister of Interior of the Federal Republic. In my capacity as Minister of the Interior, I dealt intensively with matters of German law and policy.

In 1971, I was unanimously elected to the German Constitutional Court, which is a judicial body comparable to the Supreme Court of the United States. Subsequently I was unanimously elected as its President (Chief Justice). During my tenure as President of the Court, I dealt with many different constitutional issues, including those dealing with individual rights and the right to privacy. I served as President of the Constitutional Court until the end of my term on December 20, 1983.

In 1984, I assumed the Chair for Public Law at the University of Freiburg where I dealt extensively with matters of German constitutional law and was frequently requested to prepare

analyses and expert opinions on important constitutional issues. Although I retired from my professorship at the University of Freiburg in 1993, I continue to prepare legal analyses and studies on various questions of law.

2. I have read the Court of Appeals decision in the above captioned matter dated 30 March 1995 as well as the orders of the District Court of Cameron County Texas, dated 26 April, 1994 and 21 November 1994. I have also read letters from the Office of the State Commissioner for Data Protection of Lower Saxony, dated 24 September 1993, signed by Dr. Dronsch, and from the Federal Ministry of Labor and Social Order, dated 1 August 1994, signed by Mr. Hartleb, and an Aide Memoire from the Embassy of the Federal Republic of Germany dated 9 January 1995, signed by Mr. Hanel, Consul General. In those communications, the German officials all agree that German law prohibits transmission of the information in question. I agree with these conclusions.

3. During my tenure as President, the Constitutional Court had occasion to consider right of personality which is guaranteed in Article 2, Paragraph 1 in conjunction with Article 1, Paragraph 1 of the German Constitution (Basic Law). Previous decisions of the Court had defined the right to personal self-determination. Noting that the focus of the constitutional order is the worth and dignity of the each individual, the Court had emphasized that each person has a right to unfettered self-determination as a member of a free society. In the Census decision of December 15, 1983 (Entscheidungen des Bundesverfassungsgerichts BVerfGE 65, 1 et seq.), the Court held that existing constitutional rights encompass the right to informational self-determination. This right protects the individual's ability to decide when and within what limits personal information is to be divulged. This right to individual self-determination also requires the State to regulate societal data processing so that personal autonomy will be protected.

As part of this constitutional obligation to provide a legal basis for the processing of personal data, the German Federal legislature has enacted the Federal Data Protection Act, the Bundesdatenschutzgesetz ("BDSG"). The BDSG recognizes that the right of informational privacy is not absolute, but must be balanced against the interests of others. The BDSG also limits the circumstances under which personal data may be transmitted. In deciding whether the transmission of personal data is permitted, German courts would consider whether the transmission was "necessary" to protect legitimate interests of a third party. It would also determine whether an affected party, such as employees of Volkswagen AG, have "interests worthy of protection" in excluding the transmission.

A German court considering the question under the circumstances of this case would decide against transmission of the current Volkswagen corporate directory. This finding would be based, inter alia, on the remoteness of the current directory to the period of time at issue in the American litigation and the availability of effective alternative means to adequately protect the rights of the third party. A German court would not apply foreign law that would violate public policy or fundamental principles of German law (ordre public).

4. A private organization in Germany faced with a request to produce data falling under the protective mantle of the BDSG is required to decide for itself whether a transmission of data is precluded by the act. Specified penalties apply in the event of a failure to comply with the requirements of the BDSG. To decide whether transmission is permitted, private organizations may seek the assistance and counsel of data protection authorities charged with supervisory and enforcement responsibilities under the act. In the event of litigation following transmission, German courts will consider the opinion of the oversight authority. In this case, the responsible oversight authority has found that the BDSG does not permit transmission of the requested information.

5. I understand that the Volkswagen corporate directory is not merely a listing of names and numbers, but rather provides information regarding a listed individual's employment responsibilities and position within the corporate hierarchy, even permitting an outsider to reach conclusions regarding such individual's relative earnings. The directory also contains information pertaining to individuals working for subsidiaries and certain wholly independent entities. These data are among those accorded the specific protection by the BDSG and are of the character contemplated by the concept of informational self-determination.

A German civil court faced with the same question as the U.S. Courts in this case would not order the production of the current corporate directory of Volkswagen AG. An example of the manner in which German authorities would assess and balance the interests of the individual's involved is reflected in the Aide Memoire; the German Embassy noted "virtually none of the thousands of individuals listed in the telephone directory had anything to do with the development, manufacture and marketing of the 1970 Volkswagen Type I sedan and information regarding such individuals is clearly not required by the plaintiff in the pursuit of his claims." The German Embassy also noted that "beyond these overriding considerations, other means are available to the plaintiff in order to obtain information pertaining to his claim." Such broad discovery including the production of such documents is not permissible under the German Code of Civil Procedure. German procedure does, however, contemplate the provision of documents and information required in the context of civil litigation.

In its balancing of the interests of the plaintiff against those 20,000 individuals listed in the 1995 directory, a German court would find that the 1995 time period is too remote from the time of the design and manufacture of the 1970 Volkswagen vehicle and that "proportionality" (Verhältnismäßigkeit) is lacking in the request of the plaintiff. Cognizant of the fact that the German Rules of Civil Procedure provide other effective means of protecting the rights of the plaintiff and assuring access to necessary information involving the identity of knowledgeable persons remaining in the employ of a defendant corporation after more than twenty-five years, the German court would not require such broad scale invasion of privacy through the provision of information regarding such a large number of those persons currently employed by Volkswagen. This result is also supported by the corporation's voluntary provision of appropriate portions of the 1969 directory. Such information constitute a very appropriate starting point for further inquiry as to the current employment status of those then responsible for pertinent aspects of the vehicle's design and manufacture.

6. In litigation in Germany following transmission of the corporate directory pursuant to the order of the Texas trial court, a German court would balance the interests of those individuals whose privacy rights were violated by transmission with those of the plaintiffs in this case. In my opinion, this court would conclude, as did the German authorities, that transmission of the 1995 corporate directory by Volkswagen AG violates the BDSG. It should also be noted that the BDSG provides for criminal and civil sanctions when it is violated.

Further, affidavit sayeth not.

*Kreisgericht, am 2. Mai 1995*

*Ernst Benda*  
ERNST BENDA

Vorstehende Ausfertigung, deren Übereinstimmung mit der Urschrift  
beurkundet wird - die Anlage der Ausfertigung ist ein Original -, erhält

Volkswagen Aktiengesellschaft in Wolfsburg  
38436 Wolfsburg


zum Zwecke der Vorlage beim

Distrikt - Gericht  
des Cameron - County  
Texas, Vereinigte Staaten von Amerika

76133 Karlsruhe, den 03.05.1995

Notariat 10 Karlsruhe

Justizrat

  
(Kersten), Notar



CERTIFICATE OF SERVICE

I hereby certify that the original and 11 copies of the foregoing instrument have been filed with the Supreme Court of Texas, together with this proof of service thereof, and that a true and correct copy of same has been forwarded on the 31st day of May, 1995, to the following parties:

The Honorable Rogelio Valdez  
Judge, 357th Judicial District Court  
Cameron County Courthouse  
964-974 East Harrison Street  
Brownsville, Texas 78520  
Respondent

Via Federal Express

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