

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

<hr/>		
THE AUTHORS GUILD, INC.,)	
Associational Plaintiff, BETTY MILES,)	
JOSEPH GOULDEN, and JIM BOUTON,)	
on behalf of themselves and all other)	Case No. 12-3200
similarly situated,)	
)	
Plaintiffs-Appellees,)	
)	
v.)	
)	
GOOGLE INC.,)	
)	
Defendant-Appellant.)	
<hr/>		

**DECLARATION OF ARI HOLTZBLATT IN SUPPORT OF
DEFENDANT-APPELLANT GOOGLE’S UNOPPOSED
MOTION TO STAY DISTRICT COURT PROCEEDINGS
PENDING APPEAL OF CLASS CERTIFICATION ORDER**

I, Ari Holtzblatt, declare as follows:

1. I am a member of the law firm Wilmer Cutler Pickering Hale and Dorr LLP, counsel for Google Inc. in this matter. I make the following declaration based on my personal knowledge and, if called upon to do so, could testify competently to the matters set forth herein.

2. Attached hereto as Exhibit 1 is a true and correct copy of a letter faxed by counsel for Google Inc. to the Hon. Denny Chin, U.S. District Court for the

Southern District of New York, in *The Authors Guild, et al. v. Google Inc.*, No. 05-cv-8136, on August 17, 2012, requesting a stay pending appeal.

3. Attached hereto as Exhibit 2 is a true and correct copy of Judge Chin's order, dated August 29, 2012, denying Defendant-Appellant Google's request for a stay pending appeal.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 10, 2012, in Washington, D.C.

/s/ Ari Holtzblatt
Ari Holtzblatt

Exhibit 1

August 17, 2012

VIA FACSIMILE TO 212-857-2346

Honorable Denny Chin
United States District Court for the Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: The Authors Guild, et al. v. Google Inc.
No. 05-CV-8136

Your Honor:

Google writes to request that this Court enter a stay of proceedings in the above-captioned case pending the Second Circuit's resolution of the class certification issue currently before that court in this case. We understand that Plaintiffs are considering whether to oppose this request.

As this Court is aware, the United States Court of Appeals for the Second Circuit recently granted Google's petition for permission to appeal this Court's order granting class certification in that case. *See* ECF No. 1057; *Authors Guild v. Google*, No. 12-3200 (2d Cir. filed August 14, 2012). Because the issues pending before the Court of Appeals may have a substantial impact on the parties' cross-motions for summary judgment, a stay pending appeal should be entered.

The most efficient and appropriate path is to allow the Second Circuit to resolve the class certification issues before proceeding with dispositive motions on the merits. The parties' merits arguments depend, in part, on the scope of the case: cross-motions for summary judgment directed to the entire class of works must be framed differently from cross-motions for summary judgment directed only to a subset of those works.

In addition, unless a stay is entered, the merits of this case will be adjudicated before a final decision on class certification, before class notice, and before the opt-out period. *See, e.g., Brecher v. Republic of Argentina*, 06 CIV 15297 TPG, 2010 WL 3584001 (S.D.N.Y. Sept. 14, 2010) (recognizing "the importance of class notice before the merits of the case are adjudicated" and deferring summary judgment motions); *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("The purpose of Rule 23(c)(2) is to ensure that the plaintiff class receives notice of the action well *before* the merits of the case are adjudicated."). Proceeding with the merits before the opt-out period risks serious prejudice to Google: if Google prevails on the merits, all class members will have the incentive to opt out and litigate

Honorable Denny Chin
August 17, 2012
Page 2

their claims separately, depriving Google of a classwide victory. Conversely, if Plaintiffs prevail on the merits, no class members will have the incentive to opt out. It is unfair for class members to be able to make an opt-out decision already knowing the outcome of the lawsuit.

For the foregoing reasons, the Court should stay the proceedings in this case pending resolution of the class certification issue currently on appeal, and that the Court set a status conference to be held within 14 days of issuance of the mandate on appeal. A proposed order is attached hereto.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DJD', with a stylized flourish at the end.

Daralyn J. Durie

DJD:jp

cc (via email only): Michael J. Boni, mboni@bonizack.com
Joanne E. Zack, jzack@bonizack.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et
al.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

ORDER

05 Civ. 8136 (DC)

CHIN, Circuit Judge

IT IS HEREBY ORDERED as follows:

The deadlines set forth in the Court's previous scheduling orders are hereby VACATED.

Proceedings are hereby STAYED pending resolution of *Authors Guild v. Google*, Case No. 12-3200 in the United States Court of Appeals for the Second Circuit.

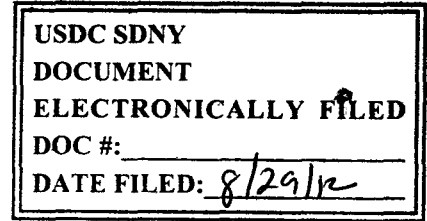
The Court will calendar a status conference within 14 days of issuance of the mandate in the above-noted appeal.

SO ORDERED.

Dated: New York, New York
August __, 2012

DENNY CHIN
United States Circuit Judge
Sitting by Designation

Exhibit 2



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
:
THE AUTHOR'S GUILD, et al.,
:
 Plaintiffs,
:
 - against -
:
GOOGLE, INC.,
:
 Defendant.
:
----- -x

ORDER

05 Civ. 8136 (DC)

CHIN, Circuit Judge

The Court is in receipt of a letter from defendant Google, Inc. ("Google"), dated August 17, 2012, requesting that the Court stay all proceedings in this case pending review by the Second Circuit of this Court's May 31, 2012 Order granting class certification (the "Class Certification Order"). Plaintiffs have not responded to Google's letter. For the following reasons, the application is denied.

Federal Rule of Civil Procedure 23(f) provides that an appellate court may hear, on an interlocutory basis, an appeal of a district court's order granting class certification. Rule 23(f) expressly provides, however, that such an appeal "does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

On August 14, 2012, the Court of Appeals granted Google's petition for permission to appeal the Class Certification Order. The Court of Appeals did not order a stay of proceedings in this Court.

In my view, a stay is not warranted. This case is now some seven years old. Discovery is complete. Both sides have filed summary judgment motions, and but for the fact of plaintiffs' counsel's unfortunate illness, opposition papers would have been submitted by now. A stay pending appeal would significantly delay the merits, perhaps for as much as a year or even more. The merits would have to be reached at some point in any event, and there simply is no good reason to delay matters further.

Google's argument that it would be unfair to decide the merits of the case before the end of the opt-out period for class members is surprising, in light of Google's fervent opposition to class certification. Indeed, should Google prevail on its motion for summary judgment and, as it fears, class members are motivated to opt out of the class, Google would be in no worse a position than it would have been in had it prevailed on the class certification motion and the plaintiffs had been forced to litigate their claims individually. And should plaintiffs

prevail on summary judgment, the goal of efficiency would be well served as fewer plaintiffs are likely to opt out.

The parties shall proceed with the briefing on the cross-motions for summary judgment, as previously ordered.

SO ORDERED.

Dated: New York, New York
August 28, 2012



DENNY CHIN
United States Circuit Judge
Sitting by Designation