

New York, New York 10007

Re: The Authors Guild, et al.

The Authors Guild, et al. v. HathiTrust, et al., Civil No. 11 CV 6351 (HB) (JLC)

Your Honor:

500 Pearl Street

We represent the universities and university presidents on behalf of their libraries ("Libraries") in the above-referenced action. We write in advance of the May 17 hearing scheduled in this matter to raise a discovery dispute with the court and to request direction from the Court on scheduling as it relates to the parties' filing of summary judgment motions (which, under the Court's current scheduling order, are due to be fully briefed by July 20).

## Discovery Dispute - Scheduling of Plaintiffs' Depositions

For at least the past few weeks we have been in discussions with plaintiffs' counsel concerning scheduling of depositions pursuant to our previously served deposition notices. Our efforts to finalize a schedule for taking the depositions have unfortunately been met with resistance from plaintiffs. They have claimed that plaintiff J.R. Salamanca is in ill health and cannot be deposed regardless of location (even in his home in Maryland). They have also claimed that other noticed plaintiffs residing outside of New York (three witnesses in total) are too busy to appear for a deposition in New York notwithstanding the general and longstanding rule that a plaintiff who brings suit in a particular forum may not avoid appearing for examination in that forum.

<sup>&</sup>lt;sup>1</sup> See, e.g., A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 97 Civ. 4978, 2002 WL 1041356, at \*1 (S.D.N.Y. May 23, 2002) ("[I]t is well settled that a plaintiff is ordinarily required to make him or herself available for a deposition in the jurisdiction in which the action is brought."); Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway and Sons, 54 F.R.D. 280, 281 (S.D.N.Y. 1971) ("Since plaintiff has chosen this forum, it cannot impose upon defendant the extraordinary expense and burden of traveling to a foreign country to conduct a deposition except on a showing of burden and hardship to the plaintiff.").

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We regret having to involve the Court in an issue that we would have hoped to have resolved without Court intervention. However, we believe we have no choice but to raise this dispute with the Court in view of the fast approaching May 20 cutoff for fact discovery. We therefore request that the Court order the noticed plaintiffs (with the exception of Mr. Salamanca) to appear for deposition in New York no later than May 24.<sup>2</sup>

## Scheduling Issue

Sec. 15 2

On May 17, the Court will hear argument in connection with the Libraries' pending motion requesting that the Court dismiss claims: (1) by associational plaintiffs that lack standing to represent unnamed and unknown authors; and (2) relating to non-justiciable "orphan works" issues. As Your Honor will recall, this past March the Court adjourned the hearing on the Libraries' motion in order to consolidate the hearing on a motion filed by plaintiffs days before the then scheduled hearing on the Libraries' motion.

The Libraries' motion, if granted, would substantially narrow the issues before the Court, including issues that would otherwise need to be briefed on summary judgment. We believe, therefore, that it would be beneficial for all parties to have direction from the Court on the pending motions before expending resources drafting summary judgment parers in potentially moot issues.

We hope to have the opportunity to discuss both the densition issue and the scheduling issue with the Court chairly the May 17 hearing.

we thank the Court for its attention to this matter.

Roseletfully submitted,

Joseph Petersen

cc: Ned Rosenthal, Esq. (counsel for Plaintiffs)

<sup>&</sup>lt;sup>2</sup> Plaintiffs have expressed agreement to producing witnesses outside of the May 20 cutoff for fact discover in this Action. We assume that the Court has no objection to our taking such depositions because our doing so would have no effect on any other deadlines set out in the Court's November 19, 2011 Pretrial Scheduling Order.

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Robert J. Bernstein, Esq., Dan Goldstein, Esq. (counsel for Intervenors)

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## Endorsement:

This problem should have been brought to my attention earlier and certainly not on the eve of the discovery cutoff and I trust it will not happen again. (1) I'd like a list of all depositions - name and role and schedule, (2) the three who are "too busy" will appear in NY within the next ten (10) days at their convenience and I'd like a note from Mr. Salamanca's doctor as to his ability or lack thereof to participate at his bedside or wherever in an hour (1) of questions and answers.