

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE CITY OF LYNCHBURG**

<b>JENNA DODGE, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. CL07-1917</b>
	)	
<b>RANDOLPH COLLEGE,</b>	)	
	)	
<b>Defendant.</b>	)	

**DEFENDANT’S MOTION TO COMPEL DEPOSITIONS OF PLAINTIFFS**

Randolph College (the “College”), by counsel, respectfully moves this Court to compel Plaintiffs to appear for depositions in Virginia. In support of this Motion, the College states as follows:

**Introduction**

Nineteen Plaintiffs chose to sue Randolph College in Virginia. Some of these nineteen Plaintiffs now have taken the position that they need not be troubled with giving depositions in this case, and that those who live outside Virginia need not come to Virginia to be deposed. These positions are deliberately obstructionist, unfair and not in accordance with the Rules of Court.

The College’s counsel asked Plaintiffs’ counsel on December 28 to arrange for the depositions of four of the nineteen Plaintiffs on January 7 and 8 in Lynchburg. It turned out two of the four were ill, so the College’s counsel agreed to schedule those depositions at a later date. Plaintiffs’ counsel indicated that the other two Plaintiffs would not appear as requested. Plaintiffs’ counsel first indicated that counsel could not find them. Plaintiffs’ counsel has now indicated that the College should not be allowed to take those depositions in Virginia, and that

the College should not be allowed to depose all Plaintiffs. See emails attached collectively as Exhibit A.

### Argument

The College is entitled to depose all nineteen Plaintiffs, and to do so in Virginia. Rule 4:1(a) provides that discovery may be had by, *inter alia*, depositions upon oral examination.

Rule 4:1(b) provides that parties

may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

Each of the nineteen Plaintiffs has chosen to invoke this Court's jurisdiction, has obtained preliminary injunctive relief from this Court, and, in doing so, has imposed exorbitant expense upon the College. The Amended Complaint includes 34 pages of factual allegations and legal claims against the College. The College is entitled to examine each of these Plaintiffs, under oath, about each of these allegations and claims, and about the defenses raised by the College in its Answer.

In particular, the College asserts that Plaintiffs lack standing to pursue their claims, and is entitled to discovery on that issue. Based on the limited record before the Court on the Motion for Temporary Injunction, the Court determined that two Plaintiffs, Margaret Williams and Paul Whitehead, Jr., have standing to bring the suit. The College is entitled to develop fully the factual record regarding those two Plaintiffs' standing. Moreover, those two Plaintiffs presumably will testify at trial. Obviously, the College is entitled to depose them and, at trial, to challenge their stories.

The Court has not ruled on whether any of the other seventeen Plaintiffs has standing. In the event the Court does not sustain the College's Demurrer on this ground, the Court will need

to hear testimony to determine whether these remaining Plaintiffs have standing. The College will not stipulate to anyone having standing. Each of these Plaintiffs has a different story to tell. As to many of them, it is impossible to discern from the Amended Complaint why they are even Plaintiffs or why they themselves believe they have standing.

Two of them claim to be descendants of Louise Jordan Smith, but the College is certainly entitled to dispute that claim and to find out what they know. Two of them are former students, one of whom claims to have left Randolph College because the College “breached its contract and trust with her.” (Amended Compl., ¶4.) The College is entitled to find out why these students left and how their leaving gives them standing in this case. Several Plaintiffs claim to be donors, but those claims are in large part not consistent with the records of the College. Two Plaintiffs claim they have standing because they “had to resign” and have suffered damages as a result. The College disputes those allegations and is entitled to question the witnesses about them. All Plaintiffs claim to be representatives of others, but it is not clear from the Amended Complaint whom they purport to represent or how they were anointed to this position.

Furthermore, all nineteen Plaintiffs assert that the Four Paintings are restricted and that the College is without legal authority to sell them. The College takes the position that the Four Paintings are not restricted. Obviously, the College should be permitted to depose each Plaintiff and discover the factual basis, if any, for the asserted restrictions. Similarly, the College is entitled to depose all nineteen Plaintiffs on the full host of factual allegations made in their Amended Complaint, and the many additional issues raised by the Amended Complaint.

Not only does each of the nineteen Plaintiffs have an obligation to give a deposition in this case, each is obliged to do so in Virginia. Rule 4:5 (a1)(i) provides that depositions of a party:

shall be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may, for good cause, designate. Good cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection.

(Emphasis added.) There is nothing in this Rule, or anywhere else in Virginia law, suggesting that a plaintiff who chooses Virginia as the forum can then either decline to be deposed at all, or decline to come to Virginia for the deposition.

### **Conclusion**

This lawsuit has already cost the College hundreds of thousands of dollars. More important, these nineteen Plaintiffs sought and obtained temporary injunctive relief that this Court has found threatens to damage the College in the amount of at least seven million dollars. Yet some Plaintiffs apparently do not believe they have any obligation to appear for depositions to support their claims, nor be bothered with litigating their own case. This position evidences a disregard for the basic notions of fairness, for the Rules of Court and for the Court itself. This position is indefensible, arrogant and should not be countenanced by this Court.

Accordingly, the College seeks an order compelling all nineteen Plaintiffs to appear for depositions in Virginia on a reasonable schedule. In the alternative, the College asks the Court to dismiss, with prejudice, the claims of any Plaintiff who will not come to Virginia for their depositions. The College also asks the Court to award to the College its attorneys' fees and other expenses in preparing and arguing this Motion, which is necessitated by Plaintiffs' obstructionist tactics.

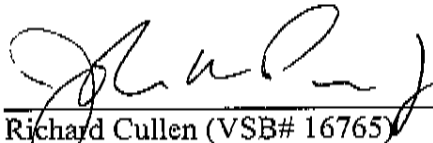
**CERTIFICATION UNDER RULE 4:1(c)**

Counsel for the College certifies that they have conferred in good faith with Plaintiffs' counsel in an effort to resolve this dispute without court action and that the parties were unable to resolve this dispute.

Respectfully submitted,

RANDOLPH COLLEGE

By Counsel



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Counsel for Randolph College

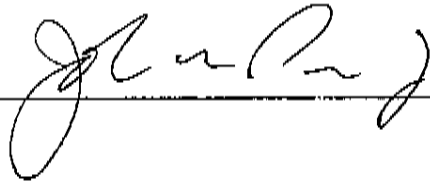
**CERTIFICATE OF SERVICE**

I certify that on January 8, 2008, a true and accurate copy of the foregoing was delivered by facsimile and by first-class mail to:

Anthony F. Troy  
William H. Hurd  
Melissa J. Roberts  
Troutman Sanders LLP  
1001 Haxall Point  
Richmond, Virginia 23218-1122

Theodore J. Craddock  
Caskie & Frost  
2306 Atherholt Road  
Lynchburg, Virginia 24505

Counsel for Plaintiffs



A handwritten signature in cursive script, appearing to read 'Theodore J. Craddock', is written over a horizontal line.

**Schill, Gilbert E. Jr.**

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**From:** Schill, Gilbert E. Jr.  
**Sent:** Wednesday, January 02, 2008 5:03 PM  
**To:** 'Troy, Tony'  
**Cc:** 'Roberts, Melissa J.'; Piepgrass, Stephen C.; tcraddock@caskiefrost.com; Bernard Baldwin; John Perry; Pumphrey, Brian E.  
**Subject:** Randolph College art litigation - depositions

Tony, I really need to know whether those four witnesses are going to appear for depositions next week. If there are legitimate scheduling problems, please let me know, because, as I've said, we will do our best to accommodate any such problems throughout the case. But if any of the witnesses are not coming just because you don't think we should take them in person, I need to know that so that we can move to compel. And if you are going take that position, are you going to take that position with regard to all plaintiffs who live outside Virginia? I just need to know where we stand on this issue. Thanks.

Gilbert E. Schill, Jr.  
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1/7/2008

**EXHIBIT**tabbies  
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**Schill, Gilbert E. Jr.**

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**From:** Schill, Gilbert E. Jr.  
**Sent:** Monday, January 07, 2008 3:37 PM  
**To:** 'Roberts, Melissa J.'; Troy, Tony; Piepgrass, Stephen C.  
**Cc:** tcraddock@caskiefrost.com; Bernard C. Baldwin; John M. Perry; Pumphrey, Brian E.  
**Subject:** RE: Randolph College art litigation - depositions

I have checked and confirmed that school is not in session this week, which I did not know when I wrote you on Friday. That being the case, I agree we cannot do depositions of the current students who live out-of-state and are not in Lynchburg this week.

In the name of efficiency, and since you can't find and, in any event, won't bring, Ms. Maxwell or Ms. Whittle, we will not do Mrs. Whitehead tomorrow.

Your position on depositions is unfair, it is not in accordance with the Rules, and it is frustrating legitimate discovery. We are entitled to depose every plaintiff, and in Virginia.

If you take the position we cannot depose all the plaintiffs, how many do you concede we can depose? And which ones? Are we to expect that each time we propose someone, we will have to wait for you to decide whether or not that particular person is fair game for discovery?

We will be in touch with you shortly regarding depositions next week.

-----Original Message-----

**From:** Roberts, Melissa J. [mailto:melissa.roberts@troutmansanders.com]  
**Sent:** Monday, January 07, 2008 12:18 PM  
**To:** Schill, Gilbert E. Jr.; Troy, Tony; Piepgrass, Stephen C.  
**Cc:** tcraddock@caskiefrost.com; Bernard C. Baldwin; John M. Perry; Pumphrey, Brian E.  
**Subject:** RE: Randolph College art litigation - depositions

Bud,

We plan to file a Motion for Protective Order regarding the deposition issue. We do not believe that the out of state plaintiffs should be required to come to Lynchburg for depositions when you could take the depositions by telephone or video-conference. We also plan to argue that taking the depositions of all 19 plaintiffs is not necessary. As for Kelsey McCune and Jenna Dodge, I have left them phone messages and sent them emails today about a possible deposition tomorrow. However, Ted Craddock informs me that he does not think the students are not back at school yet. If they aren't back yet, then we should wait until they are back in Lynchburg for the depositions. Can we pick some other possible dates in January for the depositions of Kelsey, Jenna and Sandra so we can do all three on the same date? The deposition of Dr. Katzman on 1/24 at 10:00 in Charlottesville is fine with her.

Thanks.

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(804) 697-1874

1/7/2008

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-----Original Message-----

**From:** Schill, Gilbert E. Jr. [mailto:gschill@mcguirewoods.com]  
**Sent:** Friday, January 04, 2008 5:26 PM  
**To:** Troy, Tony; Roberts, Melissa J.; Piepgrass, Stephen C.  
**Cc:** tcraddock@caskiefrost.com; Bernard C. Baldwin; John M. Perry; Pumphrey, Brian E.  
**Subject:** Randolph College art litigation - depositions

Tony, Melissa and Stephen, this follows up in part on our conversation of yesterday afternoon. I'll address the privilege issue separately.

Regarding the depositions, I reiterate that we do not intend to purposely inconvenience any of the plaintiffs, and we will take your word for it when you tell us, as you have with two of them, that they are too ill to travel. You indicated Ms. Priebe has recently given birth and is undergoing some sort of physical therapy, and Mr. Johns just had surgery. I hope they're both ok, and given their circumstances, I will ask only that you let us know as soon as they are able to travel to Virginia.

You indicated you had not been able to reach Ms. Maxwell. These things happen. But we asked about her on December 28, and on December 29 you told me you were checking on her schedule, and now it's January 4 and you haven't reached her yet. Have you emailed her?

You indicated Ms. Whittle's phone number doesn't work. Again, I asked you about her on December 28. Has anyone emailed her? How have you been communicating with her about all the litigation issues if you don't even have the right phone number?

If you are able to reach either of these two young ladies over the weekend, and if either is able to come to Lynchburg next week, then I would like to take their depositions. I would like to know by first thing Monday morning.

This leads to the broader question of whether you are willing to bring non-Virginia plaintiffs to Virginia. You are still playing footsie with me on this. You said yesterday you "reserve the right to seek a protective order" requiring us to take these by phone or videoconference. I want to take all plaintiffs' depositions in Virginia or be paid to travel to take them where the plaintiffs are. These people, who live out of state, chose to sue our client in Virginia. And on April 29, they will presumably come to a courtroom in Virginia to testify. I don't know what they know and am entitled to find out. I have the right to talk with them face-to-face long before then.

Let's do it this way. The non-resident plaintiffs are as follows:

Maxwell  
Whittle  
Priebe  
Johns  
Elliott

Maxwell and Whittle you can't seem to find. Priebe and Johns are ill. Elliott we haven't

asked for yet. But as to all five, will they or will they not, absent a court order, come to Virginia for their depositions? If the answer is no, we will move to compel or, in the alternative, to have them dismissed as plaintiffs. If the answer is yes, then I need to know the available dates for all of them. If you can find Maxwell and/or Whittle by Monday, then I would like to depose them on Tuesday or Wednesday. If they are willing to come but for some reason can't come then, then please indicate for each the first available date in Virginia. If it's easier for them to fly to Richmond, then that would be preferable to Lynchburg, but I'm flexible.

If it turns out neither Ms. Maxwell nor Ms. Whittle is going to be here next week, then I would still like to take Mrs. Whitehead's deposition at Edmunds & Williams beginning at 10 a.m. on January 8, followed by Ms. Dodge, and if for some reason she's not available, Ms. McCune, at approximately 2 p.m.

Per Melissa's note of yesterday, we will take Ms. Katzman's deposition on January 24 in our Charlottesville office. How does 10 a.m. sound?

I will let you know about other depositions in a separate message.

Have a good weekend.

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