

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

RUDE MUSIC, INC.)	
)	
Plaintiff,)	
)	
v.)	NO.: 1:12-cv-00640
)	JURY DEMAND
NEWT 2012, INC., NEWT GINGRICH, and)	
AMERICAN CONSERVATIVE UNION)	Judge Kennelly
)	
Defendants.)	

**RESPONSE OF DEFENDANTS NEWT 2012, INC. AND NEWT GINGRICH IN
OPPOSITION TO PLAINTIFF’S MOTION FOR LEAVE TO SUPPLEMENT ITS
MOTION TO STRIKE AFFIRMATIVE DEFENSES**

COME NOW, Defendants Newt 2012, Inc. (“Newt 2012”) and Newt Gingrich (“Mr. Gingrich”) (collectively, the “Defendants”), by and through their undersigned counsel and hereby submit their Response in Opposition to Plaintiff’s Motion for Leave to Supplement Its Motion to Strike Affirmative Defenses as follows:

This action was originally filed by the Plaintiff on January 30, 2012. Counsel for the Defendants entered a Notice of Appearance on February 2, 2012 and contemporaneously filed an Agreed Motion to Enlarge Time to Answer and/or Otherwise Plead which this Court granted on February 7, 2012. This Court held its initial status hearing and Defendants filed their Answer on March 5, 2012. At the initial status hearing, Defendants expressed concern over the lack of specificity in the Complaint and requested additional information from the Plaintiff regarding Plaintiff’s allegations. It was agreed at the initial status hearing that Plaintiff would provide additional information to better assist Defendants’ understanding of the claims against them and

assist their investigation of same. On March 7, 2012, a mere two days following the initial status hearing and Defendants' filing of their Answer, Plaintiff filed its Motion to Strike Affirmative Defenses. Plaintiff had provided no additional information regarding the claims prior to filing the Motion to Strike nor had Plaintiff contacted Defendants in any manner to discuss Defendants' Affirmative Defenses. The parties appeared before the Court on March 13 to discuss the Plaintiff's Motion to Strike. Prior to the hearing, Plaintiff advised that a DVD was being provided with additional videos purportedly depicting appearances by Mr. Gingrich during which the subject composition, "Eye of the Tiger," was performed without appropriate authorization. The Court discussed the Plaintiff's Motion to Strike with the parties and ordered that an Amended Answer be filed on March 27, 2012. Defendants filed an Amended Answer on March 27, 2012 in spite of having very little, if any, additional meaningful information with which to understand, evaluate and respond to the claims asserted against them by the Plaintiff. Contrary to Plaintiff's assertion, Defendants did not "disregard the opportunity" to act in good faith and comply with this Court's guidance in amending their Answer. Two days later, again without making any attempt to communicate with Defendants in advance, Plaintiff filed the present Motion for Leave to Supplement Its Motion to Strike Affirmative Defenses on March 29, 2012.

As can be discerned by Defendants at this juncture, Plaintiff has alleged unauthorized public performance by Defendants of "Eye of the Tiger" at four (4) vaguely described campaign events: (1) "...in Doylestown, Pennsylvania, Mr. Gingrich entered the packed Moose Lodge for a speech as the song 'pulsed...'; (2) ...the copyrighted song played as Mr. Gingrich made his entrance and exit at an event in Des Moines...; (3) ...heralded his arrival at an event in Burlington, Iowa...; (4) ...and blared as his campaign bus rolled into an excavation business in Walford, Iowa." (See, Complaint ¶ 12). This constitutes the entire "notice" provided by Plaintiff regarding the allegations against these

Defendants. Performance rights licenses are granted by the performing rights organizations (“PROs” or “PRO”), ASCAP, BMI and SESAC for public performances such as those vaguely described without dates and/or times in Plaintiff’s Complaint. ASCAP, with which Plaintiff is affiliated, offers a “campaign license” for public performance uses associated with political campaigns including public performances at campaign events and on campaign websites. Plaintiff evidently conducted no investigation into whether any PRO licenses existed for the four (4) events depicted in the Complaint. Venue and sponsor information associated with the events would be necessary to investigate and make this determination. As such, venues and sponsors potentially responsible for securing PRO licenses are indispensable parties to this action. Plaintiff fails to address this aspect of Defendants’ Third Affirmative Defense in its supplemental demand that the Affirmative Defense be stricken.

Plaintiff prematurely seeks to strike Defendants’ Affirmative Defenses that Plaintiff’s claims may be time barred either by the Statute of Limitations and/or the Doctrine of Laches. These Affirmative Defenses are waived under the Federal Rules if not raised in the Defendants’ initial responsive pleading. In addition to alleging very little information in general, Plaintiff fails to provide any specific dates associated with the four (4) events underlying the allegations against these Defendants. It would be fundamentally unfair and contrary to the Federal Rules to strike these Affirmative Defenses prior to any opportunity to conduct meaningful discovery.

Likewise, Plaintiff seeks to strike Defendants’ Ninth Affirmative Defense that a “...co-owner/co-author of the alleged copyright authorized, licensed, or consented to it expressly, by implication, or by conduct...” There is only one co-author of the composition, Jim Peterik. Mr. Peterik has been vocal in the media, most notably during a personal appearance on February 1, 2012 in Chicago, that he is “not on board” with the present lawsuit. In fact, Mr. Peterik cited the potential

existence of PRO license(s) which would authorize the subject performances and stated that he had no knowledge of this lawsuit prior to its filing. Mr. Peterik heralded “Eye of the Tiger” as a “motivational” song which he felt was appropriate for use in motivating people into action like voting and to “shake ‘em out of their doldrums.” Mr. Peterik further stated that, “my publisher is not joining into it at this time...” because “...as long as the venues have a blanket ASCAP or BMI license they’re under the law...” (See, web link: <http://www.myfoxchicago.com/dpp/news/metro/survivor-frank-sullivan-jim-peterik-lawsuit-newt-gingrich-eye-of-the-tiger-song-disagree-20120201>). Evidently the Plaintiff did not investigate this aspect of its allegations and further investigation/discovery is necessary. The existence of these underlying facts and circumstances, and the potential existence of additional facts and circumstances, highlight the necessity for discovery prior to any final determination regarding Defendants’ Affirmative Defenses.

Plaintiff seeks specificity from these Defendants beyond that required by the rules of pleading, and yet Plaintiff’s Complaint is virtually devoid of detail regarding the specific allegations against these Defendants. Defendants asserted in their Answer and Amended Answer that Plaintiff’s allegations “...lack specificity as to which conferences, which public events, and where and when these events allegedly took place...” (See, Answer and Amended Answer ¶ 10). In an effort to conserve judicial resources and efficiently move the present case to resolution, Defendants refrained from filing a Motion for More Definite Statement and attempted to work cooperatively with Plaintiff to discern the exact nature of the claims against them. Paragraph 12 of Plaintiff’s Complaint is the only portion of Plaintiff’s Complaint which broadly references alleged wrongful actions by these Defendants. Plaintiff generally alleges that Defendants have “...caused a recording of ‘Eye of the Tiger’ to be publicly performed at numerous campaign appearances by Mr. Gingrich...” Plaintiff

then generally describes only four (4) “events” without providing dates, and with very little other detail, as “examples” of the allegedly “numerous” public performances of the subject composition. The DVD provided by Plaintiff following the March 13 hearing offers little more in the way of discernible detail and/or fair notice of the claims asserted. The DVD contains videos of events sponsored either by the co-Defendant, American Conservative Union (“ACU”), or by organization(s) other than these Defendants. It is difficult to determine where one of the videos depicting an appearance by Mr. Gingrich was taken and at what event it was associated.

Very simply, Plaintiff’s supplemental motion to strike is premature. Plaintiff is attempting to litigate this matter through pre-discovery motions which are not yet ripe. Plaintiff also now seeks fees for hastily filed motions that do nothing to advance the merits of this action and serve only to delay resolution of this matter. Defendants made a good faith effort, following the March 13 hearing, to abide by this Court’s reasoned guidance and reduced their Affirmative Defenses from eighteen (18) in number to thirteen (13). This is not a circumstance in which Defendants are randomly advancing any as yet unsupported defenses. Contrary to Plaintiff’s assertion in its proposed Supplement to its Motion to Strike Affirmative Defenses, these Defendants have not “abandoned” any defenses but merely amended their Answer to re-assert appropriate defenses according to this Court’s direction. Defendants respectfully would suggest to this Court that some measure of discovery be allowed before further Court intervention is required with regard to Defendants’ defenses, affirmative or otherwise. Defendants aver that their Answer and Amended Answer comply with the pleading requirements set forth in the case precedent relied upon by Plaintiff in its initial Motion to Strike Affirmative Defenses.

Plaintiff’s demand that Defendants continue to plead additional facts in support of their defenses begs the similar requirement of Plaintiff to plead additional facts in support of its claims.

Plaintiff's arguments underscore the need for a more definite statement of its claims. Plaintiff seeks to strike Defendants' Third Affirmative Defense (as amended) citing only one of the factual bases offered by Defendants in their amendment. The Complaint joins the ACU as a party Defendant but cites other political events potentially sponsored by entities not joined in this action. This too forms the basis for Defendants' Third Affirmative Defense. In short, the parties should engage in at least limited discovery before Plaintiff's demands for more factual detail are ripe for determination. At this juncture, however, Defendants simply do not have a sufficient factual basis to engage in any further amendment of their Affirmative Defenses.

CONCLUSION

Defendants respectfully request that this Court reserve any further judgment regarding their Affirmative Defenses until Defendants have been afforded a reasonable opportunity to conduct discovery pursuant to the provisions of the Federal Rules. Plaintiff filed the present Motion for Leave to Supplement its Motion barely twenty-four (24) hours after serving its Initial Disclosures and forty-eight (48) hours after Defendants filed their Amended Answer. The issues raised by Plaintiff herein are premature, do not advance the merits of the action at this juncture, and serve only to delay a reasonable opportunity for discovery. If, after a reasonable opportunity for discovery, a party determines that grounds do not exist for a certain defense or defenses, the issue can be addressed appropriately at that time. However, Defendants respectfully request that they be allowed the opportunity to discover more adequately the facts and circumstances allegedly supporting the Plaintiff's claims against them. As set forth above, further discovery is needed to "flesh out" the "bare bones" allegations regarding the four (4) events at which Plaintiff avers the unauthorized public performance of "Eye of the Tiger" by these Defendants.

Defendants respectfully request the opportunity for discovery before any further action is taken

and/or required with regard to their Affirmative Defenses. Defendants also request that Plaintiff's demand for fees associated with its hastily filed pre-discovery Motion for Leave to Supplement its Motion to Strike Affirmative Defenses be denied.

Respectfully submitted,

HALL, BOOTH, SMITH & SLOVER, PC

By: /s/ Karl M. Braun

Karl M. Braun, Esq. (TN BPR# 022371)

Admitted Pro Hac Vice

Byron K. Lindberg, Esq. (TN BPR 019822)

Admitted Pro Hac Vice

611 Commerce Street, Suite 2925

Nashville, TN 37203

(615) 313-9913

(615) 313-8008

By: /s/ Brian A. Rosenblatt

SmithAmundsen LLC (IL ARDC# 6243772)

150 North Michigan Avenue, Suite 3300

Chicago, Illinois 60601

(312) 894-3200

(312) 894-3210 (Fax)

ATTORNEYS FOR DEFENDANTS,

NEWT 2012, INC. and NEWT GINGRICH

CERTIFICATE OF SERVICE

I hereby certify that on April 3rd, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants, and I hereby certify that I have mailed by United States Postal Service the document to any non CM/ECF participants.

/s/ Brian A. Rosenblatt