

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

**GATEHOUSE MEDIA MASSACHUSETTS I,
INC., DOING BUSINESS AS GATEHOUSE MEDIA NEW
ENGLAND,**

Plaintiff,

Case No. 08-12114-WGY

v.

**THE NEW YORK TIMES CO., DOING BUSINESS
AS BOSTON.COM,**

Defendant.

**RESPONSE (WITHOUT OPPOSITION) TO DEFENDANT'S MOTION (DKT. #30) TO
JOIN THE NEW YORK TIMES' SUBSIDIARIES AND LEAVE TO FILE ANSWER
AND COUNTERCLAIMS**

Plaintiff GateHouse Media Massachusetts I, Inc. ("GateHouse") files this statement of non-opposition to defendant The New York Times Co.'s (the "Times") Motion to Join its subsidiaries Globe Newspaper Company, Inc., and Boston Globe Electronic Publishing, Inc. Plaintiff must file this unusual response not just to correct the Times' errant indication in its LR 7.2 certification that GateHouse's counsel would not assent to the Motion, but to lay bare the Times' disruptive strategy, of which this Motion is just the latest example.

Because as fashioned the Times' Answer and Counterclaim awaits leave to file under the Motion to Join and for Leave, GateHouse seeks to make the record abundantly clear that (1) no Motion was actually necessary both under the rules and because plaintiff indicated its assent; (2) the Answer and Counterclaims can and should be filed forthwith, while the Times' manifestly seeks to use delay as a strategy; and (3) nothing about the Answer and Counterclaims changes the course of this case toward an expeditious trial on the merits of all claims, with which GateHouse's injunction request has been merged.

At the January 5, 2009, Status Conference, and in conference with counsel at the courthouse that day, the Times' counsel noticed its imminent intent to file counterclaims it said would be "conditional" on GateHouse prevailing on its claims. Therefore, the Times wished to reserve the "right" to have later discovery and trial on said counterclaims in the event GateHouse prevailed at the coming trial. GateHouse counsel objected to both the substance and procedure, noting that the proposed Counterclaims mirror the proposed Affirmative Defenses and concern the same substantive issue (fair use under copyright law) as plaintiff's claims not to mention that both parties' internet practices are public. While the burdens of expedited discovery have been great on both parties, given the straightforward issues at play, this is precisely the type of case where such expediency at the liability stage is reasonable and warranted. The Court indicated its agreement that all discovery in the case should proceed expeditiously.

The Times did not file its proposed Answer and Counterclaims at that time. Over the next two weeks, the Times' regrouped from the Status Conference by attempting to position itself to reserve "rights" that GateHouse counsel maintained it did not have. An early January exchange of correspondence between counsel on the subject is attached hereto as Exhibit 1. It is now apparent in light of the Times' actions through and including this unnecessary Motion for leave, that its strategy is to attempt to preserve some argument following an adverse judgment, for (a) a second trial, (b) negotiating leverage, and/or (c) appellate issues, by delaying the filing of its Counterclaims (which pleading still awaits formal docketing).

Rather than promptly filing the proposed Answer and Counterclaims, the Times (i) delayed, and then it (ii) asserted that it needed clarification of aspects of GateHouse's claims, with the possibility of repeat discovery as a result. GateHouse counsel pointed out that neither was necessary. See exchange of correspondence attached as Exhibit 2 (second point therein,

following repeated discussion of how GateHouse is not alleging that the mere act of “linking” *per se* is unlawful). Then, rather than proceeding to file its pleading, the Times’ counsel (iii) raised the issue of needing to submit the full Answer and Counterclaims with a motion to impound, saying the Times needed to attach to its Counterclaims certain GateHouse emails that had been stamped as “Confidential” pursuant to the parties’ initial discovery agreement. GateHouse promptly indicated that no motion to impound was necessary as it had no objection to the public filing of the documents, and suggested instead that the parties should agree to abide by the Court’s rules on the subject that protect the public’s right to access of Court proceedings. The Times’ counsel demurred on the latter suggestion, and then (iv) identified further such documents that needed to be attached to the Counterclaim, and for which it would therefore need consent -- which it promptly received from GateHouse. Correspondence documenting this exchange is attached hereto as Exhibit 3.

Still, rather than file the Answer and Counterclaim, the Times’ counsel late Thursday, January 15, (v) raised for the first time the issue of filing the instant Motion to join parties as counterclaim-plaintiffs and submitting its Answer and Counterclaims by attachment and pending leave to file. Tellingly with regard to the Times’ strategy, the Federal Rules of Civil Procedure require no Motion to join such parties. Fed. R. Civ. P. 14, 19, 20. Rather, they require that they join or be joined, given the relationships as represented by the Times. Fed. R. Civ. P. 19(a)(1) and (2).

Moreover, when GateHouse counsel responded the next day, January 16, that GateHouse would assent as long as the Motion and joinder were not part of the Times’ discovery preservation argument (which the Times’ counsel assured they were not), and provided that the Times would likewise assent to any motion if necessary to add the subsidiaries as parties to

GateHouse's claims, as the Times' counsel itself had been suggesting was proper.¹ The Times' counsel agreed to the logic and reasonableness of the request, subject to conferring with his client. (GateHouse counsel also sought and later received acknowledgment of service of process and offered to reciprocate by accepting service of process on behalf of the GateHouse entities named in the Counterclaim.) However, the Times' counsel indicated Friday afternoon, January 16, 2009, that he had been unable to confirm the understanding with his client and would therefore proceed to file the Motion as not assented to despite the apparent and reasonable agreement, with the Counterclaim attachment to await leave and filing. The written exchanges on this issue are attached hereto as Exhibit 4.

The delayed filing of an unnecessary Motion on Friday, January 16, 2009, with four business days left before trial scheduled for January 26, 2009, is clearly part and parcel of defendant The New York Times' strategy to preserve some type of arguments and therefore leverage following an adverse judgment. Plaintiff GateHouse appreciates the Court's patience with this unfortunately necessary response to an unnecessary Motion, and plaintiff respectfully requests that the Court grant defendant's Motion so that the Clerk's office may file the Answer and Counterclaims forthwith as the parties proceed to a liability trial on the merits of all claims.

Respectfully submitted,

¹ Plaintiff GateHouse expects to file this week its amended complaint to (1) update the allegations as to what copyright registration certificates have been received on applications pending at the time of commencement; (2) add those subsidiary defendants as the Times' counsel has suggested; (3) remove certain allegations (par. 43 and 44) given discovery as to the technology used by the Times' to copy GateHouse's content; and (4) update allegations as to the Times' continuing and expanding activity, including new copyright applications for registration for further articles from which the Times' is presently copying GateHouse's content on three of its Boston.com local Your Town websites. Nothing in the amendment jeopardizes the trial schedule.

PLAINTIFF,
GATEHOUSE MEDIA
MASSACHUSETTS I, INC.
By its attorneys,

/s/ Joseph L. Stanganelli

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CERTIFICATE OF SERVICE

I hereby certify that the above document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non registered participants on January 20, 2009.

/s/ Joseph L. Stanganelli
Joseph L. Stanganelli