

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

SUPERIOR COURT DEPARTMENT

SUFFOLK, ss.

Civil Action No. 2484CV02931-H

DANY ABOUELHKIER,

Plaintiff / Defendant-in-Counterclaim,
v.

VIRTUAL FULFILLMENT CENTER, LLC,
MOHAMED KASSEM,
OMAR NEAMATALLA,
MOHAMED ALI, and
AHMED KASEM,
Defendants / Plaintiffs-in-Counterclaim.

MOTION TO STRIKE DEFENDANTS' COUNTERCLAIMS AND INCORPORATED

MEMORANDUM OF LAW

NOW COMES the Plaintiff and Defendant-in-Counterclaim, Dany Abouelkhier ("Plaintiff" or "Defendant-in-Counterclaim") pro se, and respectfully moves this Honorable Court to strike the counterclaims filed by Defendants / Plaintiffs-in-Counterclaim, Virtual Fulfillment Center, LLC, Mohamed Kassem, Omar Neamatalla, Mohamed Ali, and Ahmed Kasem ("Defendants" or "Plaintiffs-in-Counterclaim"), on the grounds that the counterclaims were filed improperly, in violation of **Massachusetts Rules of Civil Procedure 13 and 15**, and without leave of court.

Additionally, Defendants' counterclaims appear to be a tactical effort to interfere with Plaintiff's statutory right to pursue claims under **M.G.L. c. 93A**, further warranting their dismissal.

I. FACTUAL & PROCEDURAL BACKGROUND

1. Plaintiff filed this lawsuit against Defendants on November 7, 2024.
2. Defendants filed their Answer to Plaintiff's Complaint on or about November 14, 2024, but failed to include any counterclaims.
3. More than three months later, on February 11, 2025, Defendants filed their Counterclaims without first seeking leave of court, in direct violation of the Massachusetts Rules of Civil Procedure.

Defendants had ample opportunity to file counterclaims in response to Plaintiff's original Complaint and TRO motion in November 2024. Instead, they filed only an opposition and a cross-motion. They did not seek to amend or assert counterclaims until February 2025—nearly three months later—without leave of court. This delay, combined with their failure to utilize the time given by the Court for additional filings, further supports striking the counterclaims as untimely, waived, and filed in bad faith.

The present case was filed as an equitable action seeking a Temporary Restraining Order and Preliminary Injunction, and was assigned to DCM Track F – Fast Track for injunctive relief. At no time was the action converted into a damages proceeding, nor was Plaintiff granted an opportunity to pursue monetary relief.

Defendants' February 11, 2025 filing improperly introduces broad damages-based counterclaims, including tortious interference, defamation, breach of contract,

and a Chapter 93A count, all without leave of court and in direct contradiction to the procedural posture and scope of the original case.

4. Defendants' failure to assert counterclaims in their original Answer constitutes waiver of those claims under **Mass. R. Civ. P. 13(a)**.

5. Defendants' failure to seek leave of court before filing counterclaims violates **Mass. R. Civ. P. 15(a)**, which requires permission to amend a pleading after 21 days.

6. On January 22, 2025, Plaintiff sent Defendants a formal Chapter 93A Demand Letter pursuant to **M.G.L. c. 93A**, which legally required Plaintiff to wait 30 days before filing a lawsuit based on unfair and deceptive business practices.

7. Defendants' sudden filing of counterclaims on February 11, 2025—just before the 30-day waiting period expired—appears to be a deliberate attempt to prevent Plaintiff from filing a separate lawsuit.

8. Massachusetts courts disapprove of procedural tactics designed to gain unfair litigation advantages or to chill the exercise of legal rights. Courts have repeatedly emphasized that litigation should not be used strategically to preempt or obstruct a party's ability to assert claims under statutes such as **M.G.L. c. 93A**.

II. LEGAL ARGUMENT

A. Defendants' Counterclaims Are Procedurally Improper Under Rule 13

9. **Massachusetts Rule of Civil Procedure 13(a)** requires that a party state in its responsive pleading any counterclaim it has against an opposing party if the claim arises out of the same transaction or occurrence that is the subject matter of the

opposing party's claim. Defendants' failure to assert such counterclaims in their original Answer constitutes a waiver of those claims.

10. Defendants failed to include their counterclaims in their Answer and instead filed them months later.

Under **Mass. R. Civ. P. 13(f)**, a party may not later raise an omitted counterclaim unless they first obtain leave of court and demonstrate that the failure to raise the claim earlier was due to oversight, inadvertence, or excusable neglect.

11. By failing to include these counterclaims in their Answer, Defendants have waived their right to assert them.

Here, Defendants neither sought nor obtained leave of court, and no justification has been offered for the delay. Accordingly, the counterclaims are procedurally improper and must be stricken.

Case Law Supporting Waiver of Counterclaims

12. Massachusetts courts have held that failure to plead a compulsory counterclaim in the Answer results in waiver. See *Barletta Heavy Div., Inc. v. Erie Interstate Contractors, Inc.*, 63 Mass. App. Ct. 160 (2005) (holding that counterclaims not raised in the original Answer are waived unless leave to amend is granted).

13. Here, because Defendants failed to include their counterclaims in their Answer, they waived their right to assert them.

Even if Defendants claim their counterclaims were omitted through oversight, they were still required to seek leave of court under **Mass. R. Civ. P. 13(f)**,

which governs late-asserted counterclaims. Defendants made no such request, and therefore the counterclaims remain procedurally improper.

Rule 13(a) is designed to promote judicial efficiency and prevent piecemeal litigation. Allowing Defendants to assert counterclaims months after their Answer would frustrate this purpose.

B. Defendants Failed to Obtain Leave of Court Under Rule 15(a)

14. **Mass. R. Civ. P. 15(a)** states that after 21 days from serving an Answer, a party may only amend its pleading with leave of court or written consent of the opposing party.

Mass. R. Civ. P. 15(a) requires that once a responsive pleading has been served, a party may amend its pleading only by leave of court or by written consent of the adverse party, and that leave “shall be freely given when justice so requires.”

15. Defendants never sought leave of court before filing their counterclaims and never obtained Plaintiff’s consent to add them.

Here, Defendants neither sought leave of court under **Rule 13(f)**, nor complied with the requirements of **Rule 15(a)**. Their counterclaims were filed unilaterally and without explanation, rendering them procedurally defective and subject to being stricken.

16. Because Defendants failed to follow **Rule 15(a)**, their counterclaims are procedurally defective and must be stricken from the record.

17. Courts have routinely struck late counterclaims when leave of court was not obtained.

Amendments under **Rule 15(a)** are not automatic. Courts may deny leave where there is undue delay, prejudice, or bad faith.

18. Allowing Defendants to now insert counterclaims would unfairly burden Plaintiff and delay the proceedings.

C. Defendants' Counterclaims Were Filed in Bad Faith to Prevent Plaintiff's 93A Lawsuit

19. Plaintiff sent a 93A Demand Letter on January 22, 2025, which legally required a 30-day waiting period before filing a lawsuit under **M.G.L. c. 93A**.

20. Defendants waited over three months before filing counterclaims—only after receiving the 93A Demand Letter—demonstrating an intent to interfere with Plaintiff's legal rights.

21. Massachusetts courts recognize that procedural tactics designed to interfere with another party's legal claims should not be permitted.

22. Because Defendants' counterclaims appear to be a tactical maneuver rather than legitimate claims, they should be stricken.

The strategic timing of the counterclaims—filed mere days before the expiration of Plaintiff's 93A waiting period—further indicates bad faith. Courts may strike pleadings that are filed primarily to frustrate or obstruct another party's statutory rights.

M.G.L. c. 93A, § 9(3) mandates a 30-day notice period to promote settlement and prevent litigation abuse. Defendants' timing circumvents this legislative intent and deprives Plaintiff of meaningful opportunity to exercise consumer protection rights.

D. The Counterclaims Are Incompatible With the Equitable Track and Procedurally Abusive

23. Defendants' counterclaims—filed in an equitable-only action without any procedural motion to convert or amend the nature of the case—constitute an abuse of process. The case was never structured for monetary damages, and Plaintiff has been denied the opportunity to present damages evidence, conduct discovery, or pursue a jury trial. Defendants' belated attempt to insert wide-ranging claims for damages, punitive relief, and a trial by jury into a DCM Track F case violates the structural rules of the Superior Court and warrants striking the counterclaims in their entirety.

III. RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

1. Strike the Counterclaims filed by Defendants on February 11, 2025, in their entirety for failure to comply with **Mass. R. Civ. P. 13 and 15**;
2. Recognize that Defendants' counterclaims were filed in bad faith to interfere with Plaintiff's rights under **M.G.L. c. 93A**;
3. Prohibit Defendants from refiling their counterclaims without first seeking proper leave of court;
4. Strike Defendants' counterclaims with prejudice based on procedural abuse, misclassification, and failure to seek leave of court; and
5. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

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Date: March 30, 2025

/s/ Dany Abouelkhier

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2025 a copy of the foregoing was served via electronic mail and first class mail on all counsel of record.

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Respectfully submitted,

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/s/ Dany Abouelkhier
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