

BACKGROUND

Plaintiffs filed their complaint against Joel Tenenbaum on August 7, 2007. (Case # 1:03-cv-11446, Doc. No. 1.) Proceeding *pro se* with the help of his mother, Joel answered the complaint on September 5, 2007. (Case # 1:03-cv-11446, Doc. No. 5.) In the ensuing months, Joel and his mother became intimately familiar with the nature of RIAA's litigation campaign through their research and their visits to this Court, where they saw firsthand what this campaign has done to families with limited financial resources, limited understanding of the proceedings they faced, and no access to legal assistance. After learning of the nature of Plaintiffs' litigation campaign, Joel – still proceeding *pro se* with his mother's help – supplemented his answer with a counterclaim asserting abuse of process. (Def.'s Am. Ans. and Countercl., Doc. No. 625) (“Original Counterclaim”). The Original Counterclaim asserted that Plaintiffs' suit was not for the primary purpose of seeking redress for harm that Joel caused them. *See* Original Counterclaim (asserting that “in not one [filing] have Plaintiffs mentioned in any way, shape or form that they have suffered any damages”). The Original Counterclaim further asserted that the suit was “not used for legitimate, honorable purposes” and that Plaintiffs were abusing federal process as a mechanism for “pursuit of this and similar lawsuits.” *Id.*

About 8 weeks ago, Joel obtained legal counsel. Defendant (through his counsel) has worked diligently ever since to become acquainted with this case in preparation for trial. Accordingly, Defendant prepared the appended amendment to Joel's original counterclaim. (Ex. A) (“Amended Counterclaim”)¹. The Amended Counterclaim is substantially similar to Joel's Original

¹ On October 27, 2008, Defendant entered an Amendment to Joel's Original Counterclaim onto the Court's docket (Doc. No. 675). The proposed Amendment attached hereto supersedes the October 27, 2008 amendment, and Defendant has requested the clerk to make a note to this effect on the docket. Accordingly, this Court need not address the October 27, 2008 Amendment and need only consider the Amendment appended hereto.

Counterclaim: both assert that Plaintiffs initiated this suit for illegitimate ulterior purposes and not to seek redress from Joel for losses he caused. The Amended Counterclaim adds specificity to the nature of the abuse of process, clarifies that the Court can find abuse under either federal or state law, clarifies that the counterclaim will also be asserted against RIAA (who Defendant is currently attempting to join under Local Rule 15.1 with Motion under Fed. R. Civ. P. 19 and 20 to follow), and clarifies the nature of the actual harm that Joel suffered. The amendment is a good-faith effort to put a *pro se* filing in a form that is more productive for the Parties and to add details that Defendant uncovered during pretrial research.

Plaintiffs indicated that they will not consent to an amendment. Thus, Defendant respectfully requests leave from the Court to amend under Fed. R. Civ. P. 15(a)(2). The Amended Counterclaim is being submitted in good faith by newly appointed counsel just 10 weeks after Joel filed his Original Counterclaim. It will cause no prejudice to Plaintiffs because the Original Counterclaim put them on notice as to the nature of the claim against them. Plaintiffs have not filed a responsive pleading to the Original Counterclaim, discovery is still open, and Plaintiffs have ample opportunity to continue preparing for trial. The Court should grant leave to amend.

REMARKS

Rule 15(a)(2) requires the Court to “freely give leave [to amend] when justice so requires.” “This mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Id.* Rule 15 embodies a “liberal” amendment policy and “unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.” *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 36 (1st Cir. 1988). This liberal standard applies equally for amending

counterclaims as it does for amending complaints. *McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals*, 168 F.R.D. 94, 97 (D. Mass. 1995).

The situations in which courts can deny a motion to amend are “limited,” and include “undue delay, bad faith, futility and the absence of due diligence on the movant's part.” *Torres-Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir. 2007). None of these reasons provide a basis for denying leave to amend in this case. Defendant is requesting leave to amend less than 10 weeks after Joel filed his original counterclaim and about 8 weeks after Joel obtained counsel. *See Torres-Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir. 2007) (allowing amendment where it was requested “only six months” after initial pleading). Defendant did not act in bad faith; in fact, Defendant filed the Amended Counterclaim in a good faith attempt to clarify issues regarding the nature of the claim, jurisdiction, parties that Defendant seeks to join, and damages. *See Spear v. Somers Sanitation Service, Inc.*, 162 F.R.D. 1, 2 (D. Mass. 1995) (allowing amendment where “the amended complaint helps clarify the specific claims which are being made against both the named Defendants, as well as the defendants Plaintiff seeks to add”).

Moreover, it stands to reason that a Defendant who filed a counterclaim *pro se* may amend his counterclaim for matters of form and clarification after retaining counsel. This Circuit affords substantial leniency to *pro se* defendants. *See Glaros v. Perse*, 628 F.2d 679, 686 (1st Cir. 1980) (holding that “since this is a *pro se* complaint, the stated reason for the district court's denial of leave to amend ... cannot withstand scrutiny”).

Plaintiffs have no basis for asserting that this amendment would cause them prejudice. The Original Counterclaim put Plaintiffs on notice regarding the nature of the claim: both the Original and Amended Counterclaims assert abuse of process based on illegitimate ulterior purposes. *See McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals*, 168 F.R.D.

94, 98 (D. Mass. 1995). Discovery is still open and Plaintiffs have ample opportunity to continue preparing their case as they see fit. *New Balance Athletic Shoe, Inc. v. Puma USA, Inc.*, 118 F.R.D. 17, 21 (D. Mass. 1987). In fact, Plaintiffs have not yet even filed a responsive pleading to the Original Counterclaim. *McDonald v. Hall*, 579 F.2d 120, 121 (1st Cir. 1978) (motion to dismiss is not a responsive pleading); *The Richards Group, Inc. v. Brock*, 2008 WL 1722250, at *2 FN 6 (N.D. Tex. 2008) (finding that parties that have yet to file a responsive pleading might be prevented from claiming any prejudice at all).

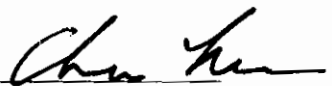
It is unfortunate that Plaintiffs will not consent to an amendment that seeks to clarify a counterclaim filed just 10 weeks ago by a *pro se* Defendant. Because “justice so requires,” this Court should grant leave. Fed R. Civ. P. 15(a)(2).

CONCLUSION

Defendant respectfully requests that this Court grant Defendant leave to amend his counterclaim in accordance with the Amended Counterclaim appended hereto as Exhibit A.

Dated: November 4, 2008

Respectfully submitted,

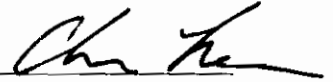
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CERTIFICATE OF SERVICE

I, Charles Nesson, hereby certify that on November 4, 2008, a true copy of the above document was served via email on counsel for Plaintiffs at the addresses below.

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