

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Civil Action No. 1:20-cv-10666-MLW

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ALANNA CARDILLO, LISA CHIANGO, )  
STEPHEN R. COHEN, PAUL DELVECCHIO, )  
LYNN DELVECCHIO, DUNCAN K. JOHNSON, )  
TONY J. PROCTOR, )  
*And others similarly situated,* )

Plaintiffs, )

v. )

TOWN SPORTS INTERNATIONAL, LLC )  
AND TOWN SPORTS INTERNATIONAL )  
HOLDINGS, INC., D/B/A BOSTON )  
SPORTS CLUB/S )

Defendants. )

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**DEFENDANTS’ MOTION FOR RULE 11 SANCTIONS**

The defendants, Town Sports International, LLC and Town Sports International Holdings, Inc., d/b/a Boston Sports Clubs (collectively referred to herein as “TSI”) respectfully request that this Court enter an order requiring plaintiffs to reimburse attorney’s fees and costs incurred by TSI in the defense of this action.

The plaintiffs have filed several frivolous pleadings, including their emergency motion for preliminary injunction; First Amended Complaint; and Second Amended Complaint. TSI has incurred significant fees defending against these frivolous pleadings. In further support of this motion, TSI states the following:

## Relevant Background

### A. Factual Background

TSI operates fitness clubs through the northeast United States, including Massachusetts. Members, such as the plaintiffs, join TSI through a membership agreement. The agreement requires members to provide TSI with thirty days' written notice before terminating their membership. *See, Membership Agreement, Exhibit A.* Members also agree to automatic, recurring payment of membership dues on the first day of each month. A member is obligated to pay any monthly dues arising during the termination notice period.<sup>1</sup>

On March 23, 2020, in response to the COVID-19 pandemic, Governor Baker issued an order requiring temporary closure of all non-essential business through April 7, 2020.<sup>2</sup> In compliance with this order, TSI suspended operation of its fitness clubs in Massachusetts.

On April 1, 2020, TSI's automatic processing system collected the monthly membership dues from current members in accordance with the terms of the membership agreements.<sup>3</sup> On April 9, 2020, TSI offered to compensate Massachusetts members who paid monthly dues for April 2020. Compensation included several different options, including a free extension of membership or free membership upgrades. *See, TSI Members Letter, Exhibit B.* The Massachusetts Attorney General endorsed this compensation plan.

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<sup>1</sup> For example, if a member provided TSI with notice of termination on March 15, 2020, the member would remain obligated to pay TSI membership dues on April 1, 2020. The membership would then terminate on April 14.

<sup>2</sup> See COVID-19 Order No. 13, *Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More Than Ten People*. On April 7, 2020, Governor Baker extended the order through May 3, 2020.

<sup>3</sup> TSI did not collect monthly membership dues on May 1, 2020 and is not collecting further membership dues while its fitness clubs are closed.

Despite TSI's lawful collection of membership dues and subsequent offer to compensate existing members, the plaintiffs persisted with this class action. In the process, plaintiffs' counsel has published a series of defamatory, extrajudicial statements vilifying TSI. Such statements include the following representations:

- "This is a terrible thing that they're doing," said attorney Lenny Kesten. "They deliberately snatched the people's money on April 1 - deliberately and knowingly. There's no excuse for it."<sup>4</sup>
- "These people basically stole money," said Lenny Kesten, one of the attorneys at Brody, Hardoon, Perkins & Kesten, the company representing the plaintiffs. "We've been inundated with phone calls and emails from people who have been ripped off."<sup>5</sup>

### **B. Procedural Background**

On April 5, 2020, the plaintiffs filed their Complaint. On April 9, 2020, the plaintiffs filed their First Amended Complaint. The First Amended Complaint alleged claims for breach of contract; unjust enrichment; and violation of M.G.L. c. 93A. The plaintiffs also sought a preliminary injunction freezing TSI's liquid assets.

In response, TSI began preparing an opposition to the motion for preliminary injunction. TSI also informed plaintiffs' counsel that he had ignored the notice requirement of M.G.L. c. 93A and had not served a demand letter prior to filing the Complaint. Plaintiffs' counsel initially refused to withdraw the pleadings. Eventually, however, the plaintiffs dismissed the c. 93A claim without prejudice. The plaintiffs also withdrew their motion for preliminary injunction.

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<sup>4</sup> Simmoneau, Ben. *Federal class action lawsuit filed against Boston Sports Clubs*. [www.wcvb.com](http://www.wcvb.com) (April 7, 2020).

<sup>5</sup> Mastrodonato, Jason. *Lawsuit calls Boston Sports Club 'deplorable' for collecting dues during coronavirus shutdown*. *Boston Herald* (April 7, 2020).

Nevertheless, TSI incurred fees and costs to prepare a response to these pleadings prior to plaintiffs' withdrawal and dismissal.

On May 7, 2020, the plaintiffs attempted to file a motion for leave to file a Second Amended Complaint. The plaintiffs, once again, ignored the necessary procedural requirements to file the pleading – specifically, the requirement to meet and confer with TSI regarding the motion. The Court denied the plaintiffs' motion, without prejudice, based upon this failure.

On May 12, 2020, the plaintiffs re-filed their second motion to amend their Complaint. The Second Amended Complaint contains three causes of action: (1) violation of c. 93A; (2) breach of contract; and (3) unjust enrichment. The plaintiffs proceeded with the unjust enrichment claim despite this Court's clear warning that the cause of action was not viable. *See E.C.F. #10, p. 2.*

### **Legal Standard**

Fed. R. Civ. P. 11 deters litigants from driving up litigation costs through frivolous pleadings. *Fed. R. Civ. P. 11*. A finding of actual "bad faith" is not necessary to impose sanctions. *Orange Prod. Credit Ass'n v. Frontline Ventures Ltd.*, 792 F.2d 797, 800 (9th Cir. 1986). Sanctions are appropriate when a pleading is frivolous, legally unreasonable, or lacking factual foundation. *Id.*, quoting *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

Rule 11 applies to all pleadings filed with the Court. *See Mercado-Salinas v. Bart Enters. Int'l*, 2007 U.S. Dist. LEXIS 112266, at \*21 (D.P.R. Sep. 24, 2007) (awarding sanctions where plaintiffs' attorney pursued a preliminary injunction "without promptly evaluating whether their claims were warranted by existing law or non-frivolous arguments"); *Super Power Supply, Inc. v. Macase Indus. Corp.*, 154 F.R.D. 249, 258 (C.D. Cal. 1994) (awarding sanctions where litigant should have known he had "little cause to seek a preliminary injunction"). Rule

11 allows a court to award sanctions for the cost of responding to a frivolous pleading, even if the moving party subsequently amends or withdraws the pleading. *Tenay v. Culinary Teacher's Ass'n of Hyde Park, N.Y., Inc.*, 225 F.R.D. 483, 486 (S.D.N.Y. 2005) (awarding sanctions where defendant incurred fees responding to frivolous Complaint, despite plaintiff's subsequent amendment curing the frivolity).

### **Argument**

#### **I. THIS COURT SHOULD AWARD FEES AND COSTS INCURRED BY TSI IN RESPONDING TO THE PLAINTIFFS' FRIVOLOUS PLEADINGS.**

Throughout this litigation, the plaintiffs have attempted to drive up defense costs through a series of frivolous pleadings. The plaintiffs' first frivolous pleadings were the First Amended Complaint and emergency motion for preliminary injunction. The plaintiffs filed their First Amended Complaint asserting a cause of action under c. 93A. However, the plaintiffs failed to provide the necessary demand letter thirty days in advance. Instead, the plaintiffs served a c. 93A demand one day after filing their Complaint -- a clear violation of the procedural requirement. In that context, the plaintiffs' cause of action was frivolous.

Along with their frivolous cause of action, the plaintiffs served an emergency motion for a preliminary injunction asking this Court to freeze TSI's liquid assets. The motion lacked any good faith legal basis. *See Foxboro Co. v. Arabian Am. Oil Co.*, 805 F.2d 34, 36 (1st Cir. 1986) (explaining that disputes over money do not create a risk of "irreparable injury" warranting a preliminary injunction); *see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (denying preliminary injunction and reasoning that an injury is not irreparable if it monetary compensation can provide a remedy). The plaintiffs either knew or should have known that their request was frivolous and that they lacked any legal foundation to freeze TSI's liquid assets. Nevertheless, the plaintiffs pursued this bad-faith "emergency" request.

TSI incurred significant expenses in response to the plaintiffs' First Amended Complaint and emergency motion for preliminary injunction. First, TSI prepared a letter to plaintiffs' counsel highlighting the deficiencies of the pleadings. When the plaintiffs refused to withdraw the pleadings, TSI incurred substantial legal fees preparing an opposition to the emergency motion. The plaintiffs eventually withdrew their First Amended Complaint and emergency motion, indicating that they would re-file after complying with the notice requirements of M.G.L. c. 93A. However, in the interim, TSI suffered unnecessary expenses preparing a response to these frivolous pleadings.<sup>6</sup>

The plaintiffs have now filed a Second Amended Complaint against TSI. The Second Amended Complaint continues to assert frivolous claims against TSI. For example, the plaintiffs' claim for "unjust enrichment" is plainly frivolous, as the membership agreement governs the obligations between the parties. *See Okmyansky v. Herbalife Int'l of Am., Inc.*, 415 F.3d 154, 162 (1st Cir. 2005); citing *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 250 (1993) (where a valid contract exists, "the law need not create a quantum meruit right to receive compensation for services rendered"); *Zarum v. Brass Mill Materials Corp.*, 334 Mass. 81, 85 (1956) ("the law will not imply a contract where there is an existing express contract covering the same subject matter").

Inexplicably, the plaintiffs have proceeded with this cause of action despite the Court's clear warning that the claim was frivolous. *See E.C.F. #10*. This Court's April 10, 2020 order expressly stated "[the plaintiffs] allege unjust enrichment, but that is not a viable claim in view

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<sup>6</sup> This Court noted the numerous deficiencies of the plaintiffs' emergency motion in its April 10, 2020 order. *See ECF #10*, p. 2-3 (noting the motion's procedural and substantive deficiencies, including the lack of a supporting affidavit). This Court also noted that there was no justification for a preliminary injunction in this dispute. *Id.* at p. 3.

of the express contract in this case.” The plaintiffs, defying the Court’s warning, re-asserted this cause of action in their Second Amended Complaint. TSI has now incurred costs to prepare a motion to dismiss this theory, as well as the other frivolous theories discussed below. This Court should award sanctions for the plaintiffs’ blatant disregard of the Court’s April 10, 2020 order.

The plaintiffs have likewise asserted frivolous claims for breach of contract and violation of M.G.L. c. 93A. As discussed in TSI’s motion to dismiss, the plaintiffs’ Second Amended Complaint fails to plead any contractual breach. The entire theory rests upon moral outrage rather than any good-faith legal or factual ground.<sup>7</sup>

Similarly, the plaintiffs have failed to establish a good-faith claim under c. 93A. The Second Amended Complaint fails to establish any unlawful conduct or contractual breach and, therefore, fails to establish any good-faith claim under c. 93A. Consequently, this Court should award sanctions to reimburse TSI for the cost of moving to dismiss these claims.

### **Conclusion**

Throughout this litigation, the plaintiffs have resorted to inappropriate extrajudicial statements and frivolous pleadings to extort a settlement payment from TSI. Rule 11 prohibits these bad-faith tactics and authorizes the Court to award sanctions. TSI respectfully requests that this Court issue an award of sanctions in order to reimburse TSI for the preventable costs and fees incurred in responding to the plaintiffs’ frivolous pleadings.

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<sup>7</sup> Plaintiffs’ counsel exemplified this tactic during his numerous press conferences, in which he claimed TSI “basically stole” and “deliberately snatched” money from the plaintiffs. The Second Amended Complaint contains similarly inflammatory language, but fails to identify any specific contractual breach.

Respectfully submitted,

TOWN SPORTS INTERNATIONAL, LLC  
and TOWN SPORTS INTERNATIONAL  
HOLDINGS, INC., d/b/a BOSTON  
SPORTS CLUBS

By its attorneys,

/s/ Jesse J. Blyth

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DATED: June 1, 2020

**CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(2)**

I hereby certify that my office has attempted to confer with the plaintiffs' counsel in a good faith attempt to discuss this matter and we were not able to resolve or narrow the issues raised in this motion.

/s/ Jesse J. Blyth

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Jesse J. Blyth, Esq.

**CERTIFICATE OF SERVICE**

I certify that on the 1st day of June, 2020, a true copy of the foregoing pleading will be filed through the ECF system and sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be served via first-class mail, postage prepaid, upon anyone indicated as a non-registered participant.

/s/ Stephen J. Orlando

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Stephen J. Orlando, Esq.