



1 counterclaim on December 3, 2009, but did not change any of the allegations against Premium  
2 Fresh. Premium Fresh did not answer the second amended counterclaim, and Paul's Pak did not seek  
3 default judgment.

4 On November 17, 2010, the court found that Paul's Pak was entitled to judgment as a matter  
5 of law in favor of its claim for breach of the 2007 Agreement by Premium Fresh. In that order, the  
6 court declined to consider failure to mitigate damages as a defense to the breach of contract claim  
7 because failure to mitigate damages had not been raised as an affirmative defense in Premium  
8 Fresh's answer to the first amended counterclaim. On November 18, 2010, after partial summary  
9 judgment had been granted and more than nine months after an answer would have been due under  
10 the Rules of Civil Procedure, Premium Fresh filed an answer to Paul's Pak's second amended  
11 counterclaim. The amended answer attempts to raise twenty-four new affirmative defenses,  
12 including failure to mitigate damages, which the court declined to consider in its summary judgment  
13 order, and waiver, which the court considered and rejected in its summary judgment order.

14 Federal Rule of Civil Procedure 12(f) permits the court the strike any pleading filed beyond  
15 the time permitted by the Rules of Civil Procedure if the pleader failed to obtain an extension or  
16 leave from the court to file the pleading late. *See Canady v. Erbe Elektromedizin*, 307 F. Supp. 2d 2,  
17 7-8 (D.D.C. 2004). Motions to strike are disfavored. *Id.* However, the court has already considered  
18 and granted summary judgment on the issues pled in the second amended counterclaim. It is simply  
19 too late for Premium Fresh now to raise new affirmative defenses, particularly issues that were  
20 raised and rejected at summary judgment because they had not been pled. The motion to strike is  
21 granted.

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DATED: 10/5/11

  
RONALD M. WHYTE  
United States District Judge