**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

SANG LAN,

Plaintiff,

-against -

TIME WARNER, INC., KAO-SUNG LIU a/k/a K.S. LIU, GINA HUI-HUNG LIU a/k/a HUI-HUNG SIE a/k/a GINA LIU, individually and as trustees or managers of Goodwill for Sang Lan Fund, HUGH MO, DOES # 1-30, UNKNOWN DEFENDANTS, JOINTLY AND SEVERALLY,

Defendants.

Case No. 11-CV-02870 (AT) (JCF)

# PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HER MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

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Plaintiff Sang Lan ("Plaintiff" or "Sang") respectfully submits this reply memorandum of law in further support of her motion, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, for an order dismissing this action with prejudice.

## ARGUMENT

### I. THERE IS NO AUTHORITY TO DENY A MOTION TO DISMISS WITH PREJUDICE AND MO WILL SUFFER NO PREJUDICE SHOULD THE MOTION BE GRANTED.

Nowhere in defendant Hugh H. Mo, Esq. ("Mo")'s 32-page opposition brief -- a scant five (5) pages of which are actually devoted to Plaintiff's instant Rule 41 motion[1] -- does Mo even address, let alone dispute, Plaintiff's fundamental argument that no authority exists, in this or any other federal jurisdiction, to support denial of a Rule 41 motion seeking dismissal with prejudice. Mo's telling silence on this central point speaks for itself. Apparently hopeful that, by ignoring Plaintiff's argument on this essential point, he will convince the Court to follow suit, Mo instead devotes his time to paying lip service to the *Zagano* buzzwords of "diligence" and "vexatiousness," as applied to the test for dismissal without prejudice.[2] But as set forth in Plaintiff's moving brief, "in exercising its discretion [under Rule 41] and in determining whether any of the parties would be prejudiced by a dismissal, the court should consider the fact that a dismissal with prejudice as the effect of a final adjudication of the merits and is thus a bar to future suits brought by the plaintiff upon the same cause of action." *Hudson Engineering Co. v. Bingham Pump Co.*, 298 F.Supp.387, 389 (S.D.N.Y. 1969) (citing cases, and granting dismissal of action with prejudice). *See also*, *Smoot v. Fox*, 340 F.2d 301, 302 (6th Cir. 1964) ("*No case*

[1] *See* Dkt. 323, Mo's August 27, 2016 Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss ("Opp. Br."), at 22-27.. All page references to Mo's opposition brief refer to this version of the brief, and not the later filed opposition brief (Dkt. 325).

[2] *See* Plaintiff's August 5, 2016 Memorandum of Law in Support of Her Motion to Dismiss ("Mov. Br.") at 3-4, for a discussion of the factors under *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990).

*has been cited to us, nor have we found any, where a plaintiff, upon his own motion, was denied the right to dismiss his case with prejudice*." (Emphasis added)); *John Evans Sons, Inc. v. Majik-Ironers, Inc.*, 95 F.R.D. 186, 190-91 (E.D. Pa. 1982) (noting that "there is *no potential* for prejudice to [defendant] since the dismissal of [plaintiff's] case with prejudice," and in a case, as here, "where the plaintiff has consented to dismissal with prejudice, the contention that the motion should not be granted is unpersuasive."). Plaintiff respectfully submits that, on this authority alone, Plaintiff's motion to dismiss should be granted.

In speciously arguing that he would somehow be prejudiced by having a lawsuit against him dismissed with prejudice, Mo evinces a fundamental misunderstanding of Plaintiff's motion, and the relevant authority. He baldly disputes Plaintiff's position that she desires to dismiss this action in order "cease spending money litigating claims recovery on which may not ultimately justify the legal fees and costs required to bring this action through trial," (Mov. Br. at 11), instead hypothesizing that Plaintiff's actual motive is to "avoid an adverse written decision holding that her claims against Mo were fabricated," (Opp. Br. at 23). But this illogical argument merely serves to beg the question: how does Plaintiff's Rule 41 motion avoid the potential for such a decision? Mo has repeatedly threatened to bring an action for malicious prosecution against Plaintiff, it is his right to do so, Plaintiff fully anticipates Mo will follow through on his threat, and no order issued by this Court can preclude Mo from bringing such an action.

Because Plaintiff cannot prevent Mo from bringing such an action, in order to argue otherwise, and support his argument that Plaintiff seeks to "deprive" him of that claim, Mo is forced to blatantly misrepresent and misapply Supreme Court precedent as applied by the Second Circuit in *Camilli v. Grimes*, 436 F.3d 120 (2d Cir. 2006), a malicious prosecution action brought

by a plaintiff against her former attorney. After nearly two decades of litigation, the *Camilli* plaintiff moved to withdraw her claims for malicious prosecution and abuse of process, a motion which was granted by the district court, with the caveat that the claims were discontinued "without prejudice to plaintiff's right to reassert her claims in defense to any related suit by defendant," *i.e.*, though plaintiff could not initiate a new suit against defendant, in the event that defendant sued plaintiff, the malicious prosecution and abuse of process claims could be revived. Defendant appealed this order on the grounds that, by denying him a favorable termination of the lawsuit, he had been prejudiced because it would impact his ability to bring his own malicious prosecution action. This argument was rejected by the Second Circuit, which noted that:

> When the Supreme Court identified "plain legal prejudice" to a defendant as a circumstance that would defeat dismissal of a plaintiff's suit without prejudice, *it was not thinking about a defendant's lost opportunity to retaliate against a plaintiff by suing for malicious prosecution.* The Court was concerned about the plight of a defendant who is ready to pursue a claim against the plaintiff *in the same action* that the plaintiff is seeking to have dismissed.

*Camilli* , 436 F.3d at 124 (first emphasis added, second emphasis in original). Rather than support Mo's argument, *Camilli cuts entirely against it*, because Mo is not now, nor has he ever, pursued any claim against Plaintiff in this action.

In emphasizing that dismissal, without prejudice, may be denied where a valid counterclaim has been interposed by the defendant, the *Camilli* court relied the Supreme Court's decision in *In re Skinner & Eddy Corp.*, 265 U.S. 86, 93-94 (1924), which is the case misquoted by Mo in his opposition brief . As the Supreme Court held in *Skinner*:

> The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons, or may not have given the real one, cannot affect his right. The usual ground for denying a complainant in equity the right to dismiss his bill *without prejudice* at his own costs is *that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate*

> *action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree.*

*In re Skinner & Eddy Corp.*, 265 U.S. 86, 93-94 (1924) (emphasis added). This quote merely stands for the unremarkable proposition, itself noted by Plaintiff in her moving brief, that a court may properly deny a motion to dismiss without prejudice under Rule 41 where dismissal would "impair[] the ability of a defendant to pursue a counterclaim in the same action that plaintiff seeks to dismiss." *Brown v. Nat'l Railroad Passenger Corp.*, 293 F.R.D.128, 131 (E.D.N.Y. 2013) (cited at Mov. Br. at 3-4). But this rule is of no moment here, because in five (5) years of litigation Mo has at no point asserted, or even alluded to, any counterclaim against Plaintiff. Mo's artificial complaint now that, if Plaintiff's motion is granted, he would be forced to "commence a separate action against Lan for malicious prosecution, abuse of process and/or defamation against Lan [sic]," (Opp. Br. at 23-24), conveniently rushes past the point that, irrespective of the Court's ultimate decision on Plaintiff's Rule 41 motion, if Mo wants to sue Plaintiff for malicious prosecution, he will need to do so in a separate action. Thus, because Mo cannot articulate any legitimate prejudice that he will suffer should Plaintiff's motion to dismiss be granted, Plaintiff's motion should be granted on this grounds alone.

## II. ALL *ZAGANO* FACTORS FAVOR DISMISSAL.

### A. Plaintiff Has Been Diligent in Bringing This Motion.

Though nowhere disagreeing that Plaintiff did in fact bring her Rule 41 motion as soon as it became apparent that no global settlement was forthcoming, or that she brought the motion in order "in order to facilitate an end to this litigation,"[3] Mo nevertheless complains that Plaintiff has not been diligent in light of the "long 5 year history of this case," "numerous discovery

[3] *Catazano v. Wing*, 277 F.3d 99, 110 (2d Cir. 2001) (reversing district court and granting plaintiff's motion under Rule 41(a)(2) where motion was brought "in order to facilitate an end to this litigation.").

issues," and "defendants' several efforts to depose Lan." (Opp. Br. at 24). But none of these factors have any bearing whatsoever on whether Plaintiff was diligent in bringing her Rule 41 motion because the measure of "diligence is whether plaintiff moved to dismiss the complaint without prejudice within a reasonable period of time after the occurrence of the event that led to the plaintiff's decision not to pursue the action." *United States v. Any and All Funds on deposit at JPMorgan Chase*, 12 Civ 7530, 2013 WL 5511348, at *2 (S.D.N.Y. Oct. 2, 2013); *Lan v. Time Warner, Inc.*, 11 Civ 2870 (AT) (JCF), 2016 WL 554588, at *2 (S.D.N.Y. Feb. 9, 2016)(quoting same). Because Plaintiff moved to dismiss within weeks of concluding no global settlement was forthcoming -- having reached that conclusion only after reaching a settlement in principle with the Liu Defendants and requesting, and receiving, intervention from the Court on the issue of settlement with Mo -- Plaintiff has satisfied the diligence prong under *Zagano*.

In arguing that Plaintiff has not exhibited sufficient diligence, Mo once again blatantly mischaracterizes relevant authority, this time by inventively omitting an operative portion of a quote written by Judge Francis in *Protect-A-Bub USA, LLC v. D'Arcy*, No. 05 Civ. 6092 (JCF), 2006 WL 1408666, at *2 (S.D.N.Y. May 23, 2006). As noted in Plaintiff's moving brief (at 7), dismissal without prejudice was granted in *Protect-A-Bub* based on a finding that "plaintiff moved to dismiss as soon as it became apparent that the parties would be unable to reach an amicable resolution of the case." The *Protect-A-Bub* court continued:

> Next, the action has barely progressed beyond the joinder of issue, and the defendants do not argue that they have expended substantial effort and expense. ***Accordingly**, there would be little duplication of expense if the case were to be refiled in the future.* Thus, this case stands in sharp contrast to *Zagano*, where the plaintiff waited until the eve of trial to seek dismissal. 900 F.2d at 14. Finally, the plaintiff's explanation of the need to dismiss - a desire to "stop the bleeding" and incur no further expenses - is reasonable.

*Protect-A-Bub*, 2006 WL 1408666, at *2 (emphasis added). Contrary to what Mo would have this Court believe concerning its own holding in *Protect-A-Bub*, plaintiff's Rule 41 motion was not granted because the "action has barely progressed beyond the joinder of issue," or because defendant had not "expended substantial time and effort;" indeed, Plaintiff cited in her moving brief numerous cases where, despite the fact that the parties had been litigating for years, a motion to dismiss without prejudice was nevertheless granted.[4] Rather, what was central in *Protect-A-Bub* was that plaintiff expeditiously moved to dismiss when it became clear no settlement was forthcoming, and that there was no potential for a "duplication of expense if the case were to be refiled in the future." Insofar as Mo concedes in his opposition that there is no potential for duplication of expense here (Opp. Br. at 26), it necessarily follows that *Protect-A-Bub* robustly supports Plaintiff's position that dismissal is warranted.[5]

Finally, in arguing that Plaintiff was not diligent in bringing her Rule 41 motion because she had previously represented she had valid claims, (Opp. Br. at 25), Mo ignores the fact that every plaintiff who has ever brought a Rule 41 motion had previously represented that they had valid claims, otherwise the underlying lawsuit would have never been brought in the first instance. Moreover, Plaintiff does have valid claims; we know this because this Court told us so when it denied portions of Mo's motion to dismiss the complaint in February 2014. The fact that, in light of the document discovery provided by Mo and the Liu Defendants, Plaintiff has made a determination that, on balance, the cost of continuing the litigation may not justify the fees incurred, has no bearing on whether the claims are valid and actionable. Further, the majority of

[4] *See* Mov. Br. at 10-11.

[5] Similarly, *Hifin Realty Corp. v. Pittson Co.*, 206 F.R.D 350, 355 (E.D.N.Y. 2002) supports Plaintiff's motion *not* because -- as Mo alludes -- the parties there had not exchanged documents, but rather because the plaintiff there had brought the Rule 41 motion, as here, "immediately after the events that led to [plaintiff's] decision not to pursue the action at this time" had occurred.

the resources incurred by Mo -- or, more precisely, by the Liu Defendants, paying Mo's fees -- since discovery was exchanged in mid-2014, including those incurred trying to compel Plaintiff's attendance at a deposition while she suffered serious post-partum complications, as well as those incurred on multiple procedurally improper and substantively barren sanctions motions, are due to Mo's own litigation strategy, which was of course geared towards forcing Plaintiff to expend resources. In light of this strategy, Mo's complaints concerning expenses incurred rings somewhat hollow, especially when, until early 2016, these expenses were being paid for by the Liu Defendants. [6]

**B. Plaintiff Has Exhibited No Vexatiousness.**

Mo cites zero authority on the issue of Plaintiff's vexatiousness, merely arguing that "it is clear that Lan never intended to allow herself to be deposed…." (Opp. Br. at 26). Plaintiff and the Court are left to guess as to the basis for this proposition. Mo further argues that Plaintiff "refused an order to have this case reopened," apparently arguing that Plaintiff's instant motion to dismiss is, somehow, a demonstration of ill-motive on her part, when in actuality it is an attempt to bring a conclusion to a litigation only Mo seems interested in pursuing. Again, though Plaintiff fully anticipates that Mo will follow through on his threat to sue Plaintiff for malicious prosecution, and will answer that charge at the appropriate time, there is absolutely nothing in Mo's opposition brief which supports the denial of Plaintiff's motion under Rule 41, on the issue of vexatiousness, or otherwise.

[6] Plaintiff respectfully reminds the Court that, according to Mo's own sworn testimony, he billed the Liu Defendants more than $44,000 in *preparation for a single deposition, which never occurred* (*see* Dkt. 217, Mo's February 18, 2015 Affidavit for Costs and Attorneys' Fees, at 5), and that these are the fees received by Mo after discounting his purported $1,000/hour fee to $540/hour "as a special consideration" to the Liu Defendants. *Id.* at 6-7. Plaintiff submits that Mo's complaints concerning the expenses incurred in this litigation must be evaluated in the context of the extraordinary fees which, according to his own sworn testimony, Mo received in his capacity as counsel to the Liu Defendants in this action.

**C. Mo Has Expended No Effort or Expense in Preparation for Trial.**

In arguing that dismissal is inappropriate because the case was commenced in 2011, Mo once again misapplies the relevant authority: the evaluation under *Zagano* is not when the action was filed, or whether a defendant has expended resources in the litigation, but rather is focused on "the extent to which the suit has progressed, *including the defendant's effort and expense in preparation for trial*…." *Cantanzano v. Wing*, 277 F.3d 99, 109 (2d Cir. 2001) (citing *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990) (emphasis added). Discovery in this action is nowhere near complete, and the fact that Plaintiff spent years fighting off multiple motions to dismiss, and that, from early 2015 through February 2016, the action was essentially in a standstill, has no bearing on the substantive progression of this lawsuit under *Zagano*. Because Mo has not expended any effort or expense whatsoever preparing for trial, this factor likewise supports dismissal.[7]

**D. Plaintiff Has Adequately Explained the Reason for the Instant Motion.**

Mo deems "not credible" Plaintiff's purported desire to bring a global resolution to this matter, and instead argues, once again, that the true motive behind her motion is to avoid having to answer for filing a frivolous lawsuit. As explained *supra*, however, Plaintiff cannot, and does not, seek to prevent Mo from bringing the malicious prosecution action he has threatened. As such, Mo's argument on this point is entirely unavailing, and though he may disagree all he likes with Plaintiff's rationale in bringing this Rule 41 motion, it has absolutely no bearing on whether this Court should grant it.

[7] As noted *supra*, Mo acknowledges that there is no potential for duplication of expense, the fourth prong under *Zagano*. *See* Opp. Br. at 26.

## III. MO'S SANCTIONS MOTION IS NOT PROPERLY BEFORE THE COURT.

Having already previously moved, on three (3) separate occasions, for sanctions in this matter, Mo must by now know that his informal request for sanctions in his opposition brief (at 27-32), does not meet the procedural requirements under the relevant rules. *See, e.g. Lancaster v. Zufle*, 170 F.R.D. 7, 8 (S.D.N.Y. 1996) ("[T]he plain language of the Rule expressly requires the serving of a formal motion, and with good reason, for by serving such a motion a movant ... places its adversary on notice that the matter may not be viewed as simply part of the paper skirmishing among adversaries that too often characterizes litigation in this uncivil age."); *Gal v. Viacom Intern., Inc.*, 403 F.Supp.2d 294, 309 (S.D.N.Y. 2005) ( "To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, ... the 'safe harbor' period begins to run *only upon service of the motion.*" (Citing Fed.R.Civ.P. Advisory Committee's note (emphasis added))). Because Mo has not moved for sanctions, Plaintiff does not now respond to his arguments in support of an imposition of same against her or her former counsel.

## CONCLUSION

For the reasons set forth above, as well as those set forth in Plaintiff's moving brief, Plaintiff respectfully requests that her motion to dismiss this action with prejudice be granted.

Dated: New York, New York
September 9, 2016

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