**THE LAW FIRM OF HUGH H. MO, P.C.**
225 BROADWAY, 27TH FLOOR
NEW YORK, NEW YORK 10007
(212) 385-1500
FAX: (212) 385-1870 / EMAIL: hhmo8@verizon.net

September 8, 2014

**Via Electronic and First Class Mail**
X. Bing Xu, Esq.
The Bing Law Firm
5705 Hansel Ave.
Orlando, Florida 32809

Re: *Sang Lan v. AOL Time Warner, Inc. et al*
Case No. 1:11-cv-02870 (AT) (JCF)
U.S. District Court, Southern District of New York

Dear Mr. Xu:

Consider this correspondence to be a "safe harbor" letter pursuant to Fed. R. Civ. P. 11. Please be advised that Defendants intend to seek sanctions under Rule 11, unless you immediately dismiss Plaintiff's remaining claims against Defendants for an accounting, conversion, defamation and invasion of privacy. Based on Plaintiff's revised answers to the First Set of Interrogatories and her responses to the First Request for Production of Documents, your filing and continued pursuit of the remaining claims against the Defendants in the Fourth Amended Complaint violate Rule 11(b) because: (1) the claims are being presented for an improper purpose, including to harass Defendants and to cause unnecessary or needless increase in the cost of this baseless litigation brought by Plaintiff; (2) the claims are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) the allegations and other factual contentions are utterly lacking evidentiary support.

Defendants intend to seek sanctions on the additional ground that Plaintiff's revised responses violate Magistrate Francis' July 30, 2014 Order.

We also intend to protect our clients' rights to seek sanctions through the procedure set forth in Rule 11(c) (1) (A), unless you dismiss the claims against Defendants immediately.

Rule 11 provides in relevant part:

> b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying to the

> best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims . . . and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

Fed. R. Civ. P. 11(b).

The Advisory Committee's Notes to the 1993 Amendments to the Rule indicate that:

> [A] litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have merit. . . .

*See*, Advisory Committee Notes to the 1993 Amendments.

Plaintiff's initial responses to Defendants' discovery demands were patently improper since they merely made general references to the entire universe of documents that she and the Defendants produced, without providing any identifying information, thereby preventing Defendants from identifying and locating the specific documents Plaintiff asserts support her causes of action. Defendants have long suspected that this conduct was a thinly veiled attempt to hide the fact that there is no basis in fact supporting any of her allegations and that she intentionally made misrepresentations in her complaint in order to take advantage of the liberal pleading requirements of the Federal Rules. Plaintiff's revised discovery responses made pursuant to Magistrate Francis' July 30th Order, confirm these suspicions. For example, Plaintiff quotes from alleged written statements she claims appeared on internet blogs which, for purposes of deciding a motion to dismiss, the Court assumed to have been actually written. However,

none of the documents identified and produced in Plaintiff's revised responses to Defendants' discovery demands contain the alleged libelous statement. The same is true with all the other claims raised in the Fourth Amended Complaint – none of the documents produced provide any support for her allegations.

We are attaching herewith, as Appendix A, a detailed summary of Plaintiff's revised responses to Defendants' First Set of Interrogatories as they relate to claims of invasion of privacy, libel, conversion and accounting. The summary of responses demonstrate that Plaintiff, once again, produced multiple duplicate copies of the same documents such as the exhibits to the Fourth Amended Complaint, photographs of Plaintiff and others, and Chinese blog posts in violation of Magistrate Francis' July 30th Order. Even more egregiously, after going through the duplicative materials, it is clear that none of the documents even remotely provide factual support for the claims she raises in her Fourth Amended Complaint.

**A. There is No Factual Support for Plaintiff's Claim of Invasion of Privacy.**

In her response to Defendants' Interrogatory No. 2, requesting all documents supporting her claim that Defendants' appropriated her image for their own commercial purposes, Plaintiff produced 197 pages of documents of which 111 pages are duplicate copies. The 86 pages that are not duplicative are utterly irrelevant to Plaintiffs' claim and in no conceivable way provide factual support for a claim of invasion of privacy. For example, Plaintiff produced:

1. A New York Daily News article dated June 3, 1999 (Bates No. 36), reporting Plaintiff's accusation that Ted Turner had reneged on his alleged promise to provide her with financial assistance arising from her accident. See, Appendix A, p. 2. Defendants are nowhere mentioned and Plaintiff's image does not appear in the article. This news article in no possible way provides a factual basis for a claim of invasion of privacy and you appear to have been included this document merely because Plaintiff is quoted as alleging that Ted Turner and Time Warner "did not live up to their promises. In the end, they didn't produce a penny." (See Appendix B). While the document might have relevance to her claims against Time Warner which were dismissed – it is patently non-responsive to Defendants' request. Its inclusion as support for claim of invasion of privacy is baffling and demonstrates vexatious behavior toward Defendants.

2. An excerpt from a Goodwill Games press conference on July 26, 1998 (Bates No. 200) in which Dr. Leone of Nassau County Hospital reported on Plaintiff's surgery after her accident and a new drug given to Plaintiff. Appendix A, p. 2. Again, we are perplexed as to how this document, could possibly provide factual support for an allegation of invasion of privacy. The press report does not contain Plaintiff's image, there is no mention of the Defendants, and it deals solely with Plaintiff's medical condition and treatment. The inclusion of this document,

which is non-responsive to Defendants' request, is designed to force the Defendants to expend time and legal resources in reviewing hundreds of pages of documents which have no relevance to this case. (*See*, Appendix C).

3. A blog post from K.S. Liu (Bates Nos. 52-53) regarding certain Chinese officials in the Chinese "General Administration of Sport" and the China Gymnastics Association and Plaintiff's charge that these entities were "suppressing" her. (*See*, Appendix D). As Magistrate Francis noted in his Report and Recommendation dated April 19, 2013, this "statement cannot be interpreted to refer to this action, because none of the complaints filed here attempted to sue either of these two entities or included any material allegations about them . . . ." *See*, Report and Recommendation, dated April 19, 2013, at p. 52. How this document is responsive to the invasion of privacy claim is lost on Defendants. Rather, Plaintiff is identifying and producing documents which relate to old and discredited claims and irrelevant to the actual remaining claims in this case. This conduct warrants imposition of sanctions.

4. In paragraph 155 of the Fourth Amended Complaint, Plaintiff asserts that the Lius used her celebrity status for "promotional events to promote their lottery business in the name of benefiting disabled persons." In response to Interrogatory No. 3, requesting that she identify the date(s) and location where such appearances occurred, Plaintiff referred to events allegedly occurring in 1998, 2001 and 2002 (See Appendix A, at p. 4), and are therefore barred by the one-year statute of limitations See CPLR § 215(3).

Plaintiff asserts that the Lius used her image and voice as recently as 2012, in connection with the song "The Fate" written by Gina Liu. However, as Plaintiff is fully aware, her husband and agent, Huang Jian, expressly authorized Gina Liu's use of Plaintiff's images and voice in connection with the song. Huang Jian, who Plaintiff states provided information used in the answers to the interrogatories, went so far as to email the song to Gina Liu in 2011 for her blog. *See* excerpts of the email exchanges between Gina Liu and Huang Jian during the period February 3, 2011 through February 9, 2011, Appendix E and F. It is simply outrageous that Plaintiff did not include Huang Jian's email authorizing the use of the song as part of her response to this interrogatory and continued to assert the recording and use of the song as support of a claim for invasion of privacy. This is a text-book example of asserting a completely baseless and frivolous claim.

None of the 14 documents and video identified by Plaintiff's support in any way her claim that Defendants' use of her image for business purposes. (Appendix A, p. 2-5).

**B. There is No Factual Support for Plaintiff's Allegation of Libel against Defendants.**

Plaintiff alleges that K.S. Liu and Gina Liu made the following "untrue statements" which were "published on blogs and broadcast over the internet by the Lius":

a. That "San Lan is too lazy. Can't get a job. I helped her to get the job at Star TV through my connections with high rank Chinese government officials, but she lost that job later because she didn't want to do any work."

Fourth Amended Complaint, ¶185 (a).

Defendants' Interrogatory No. 9 requested that Plaintiff produce all documents evidencing this allegedly libelous statement. In response, Plaintiff produced 43 pages of documents of which 16 are duplicates. The remaining 27 pages, consists of:

1. Exhibit M of Plaintiff's Fourth Amended Complaint and a collection of blog posts which do not contain or even refer to the alleged statement.

2. Blog posts in Chinese, without translation discussing a few issues involving the instant action and in no way referencing the alleged statement.

(Appendix A, p. 6-7)

Plaintiff also alleges that in the same blog posts, the Lius also made a statement to the public that: "San Lan is so lazy, that she was trained to pee on her own, but she didn't [and] I had to use a tube to assist her to pee."

Fourth Amended Complaint, ¶ 185 (b).

However, in response to Defendants' Interrogatory and 10, Plaintiff merely refers to the documents indentified in the prior interrogatory, which do not contain the alleged libelous statement. Appendix A, p. 6-7

In its Memorandum & Order dated May 9, 2012, the Court, for purposes of deciding Defendants' motion to dismiss, assumed that these statements were in fact made. At that early stage of the litigation, the Court drew all reasonable inferences in Plaintiff's favor when analyzing her pleadings (without the benefit of discovery having been taken) and denied Defendants' motion to dismiss. We are no longer in the early stages of this litigation and, discovery having been taken, Plaintiff has not produced a single blog post or other document showing that the alleged libelous statements were in fact made. A claim for defamation requires

evidence of "a false statement about the plaintiff." See, *Pure Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 549 (S.D.N.Y. 2011). At best, it is obvious that there is no proof in support of her claims of libel against Defendants. At worst, this shows that Plaintiff's allegation of defamation is a complete fabrication.

**C. There is No Factual Support for Plaintiff's Allegation of Commingling of Funds.**

Defendants requested that Plaintiff indentify and produce all documents evidencing her allegation in paragraph 142(i) of the Fourth Amended Complaint that Defendants "[c]omingled or caused the commingling of the funds from the Fund with the Lius' personal accounts." In response, Plaintiff stated that she has no such documents and, incredibly, asserted that Defendants have not produced any such documents. Plaintiff also stated that her "investigation" regarding this allegation is continuing. (Appendix A, p. 8).

Plaintiff's statement that Defendants have not produced any documents is disingenuous. First, Plaintiff has not served any document requests or interrogatories on Defendants. Second, Defendants in their Initial Disclosures produced: Correspondence relating to the establishment of the Fund; bank records for all accounts held by the Fund, such as account statements, canceled checks, deposit tickets, withdrawal slips, certificates of deposit, all savings and transactions histories; trust financial reports; documents relating to fund raising activities; donation checks; payment requests made to the Trustees; summaries of disbursements from the Fund; and Fund closing statements. The information provided conclusively shows that the Fund was at all time properly managed transparently and that all income and disbursements were carefully accounted for. Plaintiff, at this late date, provides no information or evidence showing otherwise. Rather, she claims to still be "investigating" this allegation.

**D. There is No Factual Support for Plaintiff's Allegation of Conversion.**

Defendants requested that Plaintiff identify and produce all documents concerning all communications between Plaintiff and Defendants evidencing her allegation in paragraph 293 of the Fourth Amended Complaint that she demanded from the Lius that they return her personal property, money and memorabilia. In response, Plaintiff produced one document (Bates No. 1915), a July 30, 2008, sina.com.cn news report from China of Plaintiff's "Trip of Gratitude" to New York, ten years after her accident to express her gratitude to Defendants and everyone who had supported her generously. Plaintiff was reported to have given two gifts to the Lius, two tickets to the Opening Ceremony of the 2008 Summer Olympic Games in Beijing and an Olympic torch that Plaintiff had received as a torch bearer at the 2004 Summer Olympic Games in Athens. Plaintiff reportedly expressed that she wanted to pass around the spirit of the Olympics and love to all mankind and that she believed that "aunt" Gina Liu and her whole family would continue to pass their love to others. The article also shows a picture of Plaintiff

receiving a photograph of the late actor Christopher Reeve during her visit to the Christopher and Dana Reeve Foundation in New Jersey during her visit. Furthermore, the article reported that at a farewell party for Plaintiff at the Lius' residence, K.S. Liu made a detailed report of the Fund's history, the use of the funds, an accounting of the $170,000 that was raised and with the balance of the funds to be remitted to Plaintiff, and K.S. Liu expressed thanks to all the guests who were present for their support and assistance. *See*, Appendix A, p. 8 & Appendix G. It is outrageous that Plaintiff cites to this document in support of her allegation of conversion.

**E. There is No Factual Support for Plaintiff's Claim for an Accounting of Funds.**

Defendants requested that Plaintiff identify all documents relating to all communications supporting her claim that she demanded copies of the Fund's bank account records and an accounting. Incredibly, Plaintiff produced the same sina.com.cn Chinese news report of her "Trip of Gratitude" to New York. (Bates No. 1915) and Appendix G.

**F. Defendants are Entitled to Rule 11 Sanctions in the Event Plaintiff does not Dismiss Her Complaint.**

It is well settled that Rule 11 is violated when the pleading has no chance of success and there is no reasonable argument to extend, modify, or reverse the law as it stands. See, *Star Mark Management, Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Lts.*, 682 F. 3d 170 (2nd Cir. 2012); *Corroon v. Reeve*, 258 86, 92 (2nd Cir 2001); *Four Star Financial Serv., LLC v. Common wealth Man. Assoc.*, 166 F. 2d 805, 809 (S.D.N.Y. 2001)("the requirement that the facts alleged have evidentiary support requires, at a minimum, that there is reason to believe that, when all the facts are known, the Court will find they support the relief requested"). Counsel who are substituted into a case have an independent duty to evaluate their client's position, particularly where they sign additional pleadings in the case. *U.S. v. Kirksey*, 639 F. Supp. 634, 636-37 (S.D.N.Y. 1986) (Successor counsel sanctioned for failure to conduct his own "reasonable inquiry").

It is well settled that counsel has a duty to assess the evidentiary viability of a claim under Rule 11 not only at the time the claim was made but when subsequent information obtained during discovery indicates that the claim has no basis in fact or law. *See*, *Perry v. S.Z. Rest. Corp.*, 45 F. Supp. 2d 272, 274-75 (S.D.N.Y. 1999) (Sanctions appropriate for pursuing claim that had survived two summary judgment motions. Information plaintiff received from defendants would have prompted an objectively reasonable attorney to make a more thorough investigation of his client), *appeal dismissed*, 201 F. 3d 432 (2d Cir. 1999); *See also, Int'l Union v. Aguirre*, 410 F. 3d 297, 304 (6th Cir. 2005) (Sanction imposed for pursuing claim after discovery had revealed that it was factually meritless, despite fact that plaintiff had withstood motion to dismiss).

It is obvious that you have not complied with the Rule 11 affirmative duty of inquiry. Counsel has a continuing duty to reassess the validity of his or her client's claim. The Advisory Committee notes to the 1993 Amendment to Rule 11 state that the revision "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable . . . ."

In *Rodriguez v. Banco Cent.*, 155 F. R.D. 403, 407 (D.P.R. 1994) the court held that plaintiffs' attorney earned sanctions by "continuing to litigate [the] case when it became clear that any viable legal theory . . . had long before been foregone" as to some of the defendants and "[t]he remaining legal claims had no basis in fact." The Court also noted that because at earlier stages, the court had gone "out of its way to allow the plaintiffs the opportunity to try their case," the court's accommodation "made it incumbent upon plaintiffs to examine their evidence honestly." *Id. See also, Int'l Union v. Aguirre*, 410 F. 3d 297, 304 (6th Cir. 2005) (Sanction imposed for pursuing claim after discovery had revealed that it was factually meritless, despite fact that plaintiff had withstood motion to dismiss).

The total lack of substance to Plaintiff's claims for libel, conversion, invasion of privacy and an accounting evidenced in her responses to Defendants' discovery requests shows an utter failure on your part to comply with Rule 11's "reasonable inquiry" requirement. *See, Banco de Ponce v. Buxbaum*, No. 90 Civ. 6344 (SWK), 1992 WL 309565, at *20 (S.D.N.Y. Oct. 14, 1992) (Attorney sanctioned where "he took at face value the version of the facts that [client's husband] was giving out" without any reasonable inquiry.); *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175 (JSM) 2002 WL 59434 at *1 (S.D.N.Y. Jan. 16, 2002) (Sanctioning attorneys who "simply closed their eyes to the overwhelming evidence that statement in [their] client's affidavit were not true."); *Abner Realty, Inc. v. Administrator of General Services Administration*, No. 97 Civ. 3075 (RWS) 1998 WL 410958 at *7 (S.D.N.Y. July 22, 1998) ("[t]he total lack of substance in the fraud claim . . . and the egregious and unjustified neglect to (sic) the 'reasonable inquiry' requirement of Rule11give rise to the inference that the action was filed for improper purposes.").

For all the foregoing reasons, Defendants demand that Plaintiff agree to dismiss her complaint. It is outrageous that, three years after commencing this case, Plaintiff claims she still needs to go through an "investigation" to determine whether she has any evidentiary support for the very specific allegations raised in the Fourth Amended Complaint. Plaintiff is merely engaged in a "document dump" with no idea as to whether the materials contain evidence that in fact support her claims. In fact, the documents she has identified and produced are not responsive to Defendants' requests and do not support any of her claims.

Plaintiff's refusal to provide documents responsive to Defendants' requests is an intentional and willful effort to hinder Defendants' ability to get to the bottom of Plaintiff's

assertions and hamper their ability to take a meaningful deposition of the Plaintiff. Defendants object to their having to incur the substantial costs involved in deposing Plaintiff when she obstructs discovery and the documents that she has produced are irrelevant, non-responsive and, in many instances, flatly contradict the assertions in the Fourth Amended Complaint.

In the event Plaintiff refuses to dismiss her complaint, Defendants will seek leave to file a motion for Rule 11 Sanctions and move for summary judgment in accordance with the Court's rules and a stay of discovery.

Very truly yours,

Hugh H. Mo

HHM/lh
cc: Hon. James C. Francis, U.S.M.J w/enclosures