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March 25, 2015

Honorable James C. Francis, IV
U.S. Magistrate Judge
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street Courtroom 18D
New York, NY 10007-1312

Case No: Sang Lan v. Time Warner, et al 1:11-cv-2870-AT-JCF
Re: Plaintiff's Response to Defendants' Notice Motion for Sanction Under Rule 11

Dear Judge Francis:

We represent plaintiff Sang Lan ("Plaintiff") in the above-referenced action. Last night, March 24, 2015, we received a notice via ECF that Defendants K.S. Liu, Gina Liu and Hugh H. Mo (collectively, "Defendants") were withdrawing their motion for Rule 11 sanctions against Plaintiff and her attorneys. [242]. Though we are aware that this morning, March 25, 2015, Your Honor So Ordered that Notice of Withdrawal, Plaintiff nevertheless hereby reiterates her request, initially set forth in her Memorandum of Law in Opposition to Defendants' Motion for Rule 11 Sanctions ("Opposition Brief" or "Opp. Br.") [241 at 26-29], that Defendants and their attorney be sanctioned by this Court for their filing of their frivolous, procedurally defective, and substantively baseless Rule 11 Motion. Indeed, the absence of any colorable basis for Defendants' motion is made clear by their decision to withdraw it. Plaintiff respectfully submits that, in light of the substantial time and cost expended by Plaintiff and her counsel opposing Defendants' frivolous motion, the fact that, having read Plaintiff's opposition papers, Defendants' have now chosen to withdraw their motion instead of waiting for it to be denied, has no effect whatsoever on the inquiry this Court should undertake to determine whether sanctions against Defendants and their counsel are warranted.

Defendants' latest Rule 11 Motion was the second time Defendants formally moved this Court for sanctions under Rule 11, and the fourth time Defendants have taken steps to make such a motion. As detailed in Plaintiff's Opposition Brief (at 10-18), denial of Defendants' latest motion was required because, *inter alia*, Defendants had failed to provide a "safe harbor" letter as required under Rule 11. Defendants' failure to provide such a letter is difficult to reconcile with the fact that, on September 8, 2014, Defendants filed a letter with the Court, ostensibly addressed to the undersigned counsel for Plaintiff, wherein they instructed the undersigned to "[c]onsider this correspondence to be a 'safe harbor' letter pursuant to Fed. R. Civ. P. 11." [192 at 1]. Although a "safe harbor" letter filed with the Court is, of course, procedurally improper, this letter clearly evinces Defendants' knowledge of Rule 11's "safe harbor" requirements.[1] Thus, in attempting to answer for their failure to provide a "safe harbor" letter prior to filing their latest Rule 11 Motion, Defendants' and their counsel would have been unable to hide behind an argument that they were ignorant of their obligations under Rule 11, an argument which would have, in all events, been insufficient to explain away their failure to adhere the rule. *See, e.g. Farrell v. Hellen*, 2004 WL 433802, at *6 (S.D.N.Y. Mar. 10, 20014) (Francis, J.) (test for sanctions "is an objective one, and the good faith of counsel is irrelevant."); *Guary v. Winehouse*, 235 F.3d 792, 798 (2d Cir. 2000) (Rule 11(b)(2) eliminates the "empty-head, pure-heart" defense). Thus, Defendants' failure to adhere to the "safe

[1] As noted in the Opposition Brief, Plaintiff has her own theory as to why Defendants' chose to file their September 8th safe harbor letter with the Court, as opposed to sending it to counsel, and Plaintiff does not believe it to be a coincidence that within hours of that improper filing, that letter was published by China's Xinhua News Agency. *See* Opp. Br. at 4. A similar timing of events occurred on Defendants' latest Rule 11 Motion. *Id.*

harbor" provisions of Rule 11 is itself sanctionable, and Defendants' strategic decision to withdraw their motion rather than answer for their improper and defective filings does not serve to exculpate them from a sanctions order by this Court.

Moreover, and as detailed in Plaintiffs' Opposition Brief (at 20-26), Defendants' latest Rule 11 motion is also sanctionable because it was filed for the "improper purpose" of having this Court adjudicate the merits of this matter. Such a tactic has been specifically, and repeatedly, rejected by this Court. *See, e.g. Safe-Strap Co., Inc. v. Koala Corp.*, 270 F.Supp.2d 407, 417 (S.D.N.Y. 2003)("In assessing whether Rule 11 sanctions should be imposed, the Court does not judge the merits of an action. Rather, the court determines a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." (Citations omitted)). Defendants' desire to have this Court adjudicate the merits of this case, and have Plaintiff's claims deemed "frivolous" by this Court (while at the same time curtailing discovery) is palpable throughout their twenty-nine (29) page moving brief, the declarations from two (2) of the defendants, and more than thirty (30) exhibits, they submitted in support of their Rule 11 Motion. *See* [219-222]. But insofar as a merit-inquiry is not the proper subject of a Rule 11 Motion, the Court would have been obligated to deny Defendants' motion on that ground as well, and sanction Defendants' for making such arguments in the first instance.[2]

Indeed, sanctions against Defendants and their counsel are all the more appropriate given the fact that, after considerable time and expense incurred by Plaintiff, their motion was withdrawn a mere ***two days*** after receiving Plaintiff's Opposition Brief, in purported "contemplation of serving" a later motion. But this sequence of events is, once again, difficult to reconcile with any motion for sanctions which was filed in good faith or for an acceptable "purpose" under Rule 11. Of course, having sought withdrawal of the motion without prejudice – and this Court now having So Ordered that withdrawal – we can no doubt look forward to yet another round of sanctions motions, perhaps be marred by the same procedural and substantive defects as the first two rounds.

This Court's order of withdrawal without prejudice notwithstanding, the "purpose" behind Defendants' Rule 11 Motion is nevertheless subject to the same inquiry and evaluation as any other motion filed with the Court. It is Plaintiff's contention that this latest Rule 11 Motion is simply the latest in a long line of strategic maneuvers by Defendants whereby they: 1) issue improper and procedurally defective filings with the Court aimed, not at resolution of the issues of this case, but rather at tarnishing Plaintiff's reputation in the press; 2) force Plaintiff to incur substantial costs and legal fees defending against the claims set forth in these frivolous filings, and; 3) continue to delay discovery, and thus provide themselves with refuge from answering the charges Plaintiff has levied against them in her Complaint. Rather than to vindicate an arguable legal position, Defendants' motion resort to intimidate, asserting on every opportunity that Plaintiff's lawsuit is based on "fabrications" "false" claims, "to extort money from defendants". And they did so without paying the slightest attention to whether it was appropriate to do so.

Under Rule 11, "[s]anctions may be … imposed when court filings are used for an 'improper purpose,' or when claims are not supported by existing law, lack of evidentiary support, or are otherwise frivolous." *Ipcon Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 63 (2d Cir. 2012) (citing Fed. R. Civ. P. 11(b)-(c)). "[A] Rule 11 motion that itself does not comply with Rule 11 can warrant sanctions against the moving party," and where "a party's motion for Rule 11 sanctions is not well grounded in fact or law, or is filed for an improper purpose, a court may find itself in the

[2] Defendants' counsel was obligated to be aware of the fact that a Court will not make a merit-inquiry on a Rule 11 motion, and this is especially true in light of his own representations to this Court concerning his own legal experience and expertise. (*See, e.g.*, Dkt. 217)

position of imposing Rule 11 sanctions on the moving party and/or her attorney." *Safe-Strap*, 270 F.Supp.2d at 421. In light of the procedural and substantive deficiencies in Defendants' Rule 11 Motion – deficiencies which have now implicitly been acknowledged by Defendants' in their withdrawal of their frivolous motion – Plaintiff respectfully requests that this Court issue an award of sanctions against Defendants, and order Defendants to pay the legal fees and costs incurred by Plaintiff defending against Defendants' improper Rule 11 Motion.

We would of course be willing to more formally brief the Court on the issues set forth herein, or appear for a conference, in person or telephonically, to discuss Plaintiff's position.

Respectfully,

X. Bing Xu, Esquire

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