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Defendant Winston Sie f/i/s/h/a Wilson Xue*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
SANG LAN,

Plaintiff,

-against-

AOL TIME WARNER, INC., THE UNITED STATES  
GYMNASTICS FEDERATION d/b/a USA  
GYMNASTICS, TIG INSURANCE COMPANY, TIG  
SPECIALTY INSURANCE SOLUTIONS,  
RIVERSTONE CLAIMS MANAGEMENT, LLC, TED  
TURNER, K.S. LIU, GINA LIU AKA K.S GINA HIU-  
HUNG, WINSTON SIE, HUGH MO, JOHN DOES  
AND JANE DOES # 1 THROUGH 15, INCLUSIVE,

Defendants.  
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Index No.: 11-CV-2870  
(LBS)(JCF)

**DEFENDANTS' MEMORANDUM OF LAW  
IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S ACTION  
PURSUANT TO FED. R. CIV. P. RULE 12(b)(1)**

**(FILED CONCURRENTLY WITH THE  
DECLARATION OF FRANKLIN K. CHIU  
AND THE EXHIBITS ANNEXED THERETO)**

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**PRELIMINARY STATEMENT**

Defendant Kao Sung Liu i/s/h/a K.S. Liu, (“Mr. Liu”), Defendant Gina Hiu-Hung Liu i/s/h/a K.S. Gina Hiu-Hung, (“Mrs. Liu”), Defendant Winston Sie,<sup>1</sup> (“Mr. Sie”), and Defendant *Pro Se* Hugh Mo, (“Attorney Mo”), (also hereinafter together referred to as the “Moving Defendants”), respectfully submit this Memorandum of Law in support of their Motion to Dismiss this Action by Plaintiff Sang Lan, (“Plaintiff” or “Sang Lan”), pursuant to Fed. R. Civ. P. Rule 12(b)(1), because this Court lacks subject matter jurisdiction, and because jurisdiction cannot be based on diversity of citizenship, federal question or supplemental jurisdiction.

In asserting diversity jurisdiction pursuant to 28 U.S.C § 1332, Plaintiff falsely averred in her first Amended Complaint, (“FAC”),<sup>2</sup> and Second Amended Complaint, (“SAC”),<sup>3</sup> that “Defendant Winston Sie is a U.S. citizen and domiciliary of New York State.” In truth, as Plaintiff admitted in her FAC, Mr. Sie is in fact a citizen of Hong Kong because he previously disclaimed his U.S. citizenship, as confirmed by his Declaration, which is respectfully submitted herewith.<sup>4</sup>

Accordingly, complete diversity of citizenship, as required by 28 U.S.C § 1332, does not exist. Moreover, Plaintiff has not pled damages in excess of \$75,000.00 as required for diversity jurisdiction.

Furthermore, it is undisputed that Sang Lan does not assert any claims against the Moving Defendants that involve a federal question or that arise under federal law. Hence, this Court lacks federal question jurisdiction over Plaintiff’s common law claims against these Moving Defendants pursuant to 28 U.S.C. § 1331. Rather, Plaintiff’s sole remaining basis for

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<sup>1</sup> Mr. Sie also was formerly incorrectly sued herein as “Wilson Xue” in Plaintiff’s Amended Complaint.

<sup>2</sup> References to the first Amended Complaint, Ex. B to the Chiu Declaration are cited “FAC ¶.”

subject matter jurisdiction against the Moving Defendants is supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

However, the claim of supplemental jurisdiction fails. The case against the Moving Defendants bears no relationship to the case against the other defendants. In fact, this Action is really two or three separate cases thrown together haphazardly under the same caption. Indeed, among the twenty-one (21) counts in the SAC, Sang Lan only asserted two (2) causes of action based upon a federal question, which are solely against defendants AOL Time Warner, USA Gymnastics and TIG Insurance Companies. These “federal” claims<sup>5</sup> do not share a common nucleus of operative facts as is required for supplemental jurisdiction. To the contrary, the claims against AOL, USA Gymnastics and TIG Insurance Companies and the claims against the Moving Defendants involve different time periods, different locations, different parties, different damages, different legal theories and different alleged events. Therefore, this Court should decline to exercise subject matter jurisdiction over the case against the Moving Defendants, which is completely separate and distinct from the case against defendants AOL Time Warner, USA Gymnastics, and TIG Insurance Companies.

### **SANG LAN’S INITIAL PLEADINGS**

On April 28, 2011, Sang Lan filed a complaint (“Complaint”)<sup>7</sup> seeking *\$1.8 billion* from eight defendants on 18 Counts. Her Action focuses on events that happened *thirteen years ago*, namely her accidental fall and disabling injury while competing in the 1998 Goodwill Games in New York as a gymnast from China. To that end, Sang Lan sued AOL Time Warner, Ted

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<sup>3</sup> References to the Second Amended Complaint, Ex. C to the Chiu Declaration, are cited “SAC ¶[ ].”

<sup>4</sup> References to the Winston Sie Declaration, Ex. F to the Chiu Declaration, are cited “Sie Decl. ¶[ ].”

<sup>5</sup> Sang Lan’s federal claims (3<sup>rd</sup> and 6<sup>th</sup> Counts) also may be barred, in whole or in part, because she may not have prudential standing to invoke the protections of the Constitution since she is a non-U.S. citizen, residing in a foreign country. See *Veiga v. World Meteorological Org.*, 568 F.Supp.2d 367, 374-376 (S.D.N.Y. 2008).

Turner, TIG Insurance Company, Riverstone Claims Management and the U.S. Gymnastics Federation, including federal question claims alleging discrimination based on race and national origin. Plaintiff also brought unrelated common law claims against Mr. and Mrs. Liu, who hosted her and her parents in their home for a few months during her treatment and started a fund to collect charitable donations for her in 1998.

On May 13, 2011, Attorney Hai filed the FAC, which added three (3) causes of action, and two (2) named defendants (plus 15 John and Jane Does) seeking *\$2.1 billion* in damages. The FAC also alleged new, but still time-barred and meritless, claims against the Lius' counsel, Attorney Mo.

On May 20, 2011, Attorney Hai voluntarily dismissed Ted Turner as a defendant to the Action. In doing so, he impliedly admitted that such claims had no merit when alleged. Indeed, Attorney Hai publicly admitted on his web log that he was obligated to dismiss the claim for "Promissory Estoppel/Detrimental Reliance" against Ted Turner, based on alleged oral promises to provide for her lifetime needs and expenses, because the Statute of Frauds barred such a claim.

Despite her recognition of this fatal defect, Sang Lan's SAC preserves her nearly identical claim for "Promissory Estoppel/Detrimental Reliance" against Mr. and Mrs. Liu, based on a separate, similar oral promise, "to provide [Sang Lan] for her needs and living expenses for life," which ostensibly also would be barred by the Statute of Frauds.

On June 8, 2011, Attorney Hai filed a Motion to Amend the FAC,<sup>8</sup> allegedly to conform the pleadings to new facts contained in the "Affidavit of Ping Lu."<sup>9</sup> However, Attorney Hai failed to disclose that the SAC contains substantial, unrelated revisions of the FAC.<sup>10</sup>

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<sup>7</sup> Plaintiff's Complaint is attached to the Chiu Declaration as Ex. A.

<sup>8</sup> Attorney Hai's Motion to Amend the FAC is annexed as Ex. E to the Chiu Declaration.

Most importantly among them, Sang Lan's SAC erased a critical reference in her FAC which stated that, "[Mr. Sie] has [r]enounced his US Citizenship and accepted Hong Kong citizenship." See FAC ¶43; Cf. SAC ¶39. This deletion was not disclosed in either Attorney Hai's Declaration in Support of Plaintiff's Motion to Amend the FAC or the Lu Affidavit. Attorney Hai apparently removed this allegation that Mr. Sie is an alien, citizen of Hong Kong, because it would defeat the complete diversity of citizenship that 28 U.S.C. § 1332 required in order to confer subject matter jurisdiction here.

### SANG LAN'S CAUSES OF ACTION

Sang Lan's SAC consists of at least two separate and unrelated cases joined together under one caption. The first seven counts of the Complaint focus on claims that arose in 1998 and involve exclusively alleged obligations to pay for plaintiff's medical care. The other counts of the Complaint have nothing to do with those alleged allegations. For example, the counts alleging defamation and intentional infliction are said to have occurred thirteen years later than the events alleged in the first seven counts. The remaining counts also allege sexual harassment and battery on the part of two of the Moving Defendants and do not allege that AOL, TIG, or USA Gymnastics had anything to do with those alleged actions.

The first seven counts and the Fifteenth Count claim that the corporate defendants allegedly failed to pay monies for her injuries sustained during the Goodwill Games in 1998 *vis-a-vis* a purported agreement with AOL (and Ted Turner), and failed to pay her benefits for "lifetime medical [insurance] coverage" *vis-à-vis* a "'catastrophic medical' insurance policy" purchased by USA Gymnastics from TIG Insurance. See SAC ¶¶41, 42. Plaintiff alleges that

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<sup>9</sup> References to the Affidavit of Ping Lu, Ex. F to the Chiu Declaration are cited "Lu Affidavit ¶.".

<sup>10</sup> This misconduct will be addressed in Defendants' separate motion pursuant to Fed. R. Civ. P. Rule 11.

TIG Insurance refused to provide the promised coverage at some unspecified point in time because she eventually returned to China twelve (12) years ago, and was no longer receiving medical treatment in the United States. *Id.* Hence, Plaintiff claims that she was a victim of discrimination on the basis of race or national origin. *See* SAC ¶¶61-82.

As a result, the SAC asserts eight (8) causes of action against the corporate defendants:

1. Breach of Agreement against AOL;<sup>11</sup>
2. Breach of Agreement against USA Gymnastics and TIG Insurance;
3. Violation of ADA against TIG Insurance;
4. Violation of New York City Human Rights Laws against TIG Insurance;
5. Violation of New York State Human Rights Laws against TIG Insurance;
6. Violation of Civil Rights Act of 1964, the 5<sup>th</sup> Amendment and/or the 14<sup>th</sup> Amendment against TIG Insurance and USA Gymnastics;
7. Violations of New York State Insurance Law against TIG Insurance;
8. Promissory Estoppel/Detrimental Reliance against AOL;<sup>12</sup>

*See* SAC ¶¶52-82, 118-123.

In sharp contrast, Plaintiff's claims against the Moving Defendants do not concern federal questions or violations of her civil rights. Nor do any of the remaining 13 counts have anything to do with the alleged agreement 13 years ago to provide medical insurance coverage that is the overriding focus of the other eight causes of action. Instead, the remaining thirteen (13) counts are unrelated common law claims, many of which relate to events within the last year that are completely separate from events 13 years ago that form the basis of the former eight (8) counts :

1. Unjust Enrichment against Mr. and Mrs. Liu, and Attorney Mo;
2. Conversion against Mr. and Mrs. Liu, and Attorney Mo;
3. Breach of Fiduciary Duty against Mr. and Mrs. Liu, and Attorney Mo;
4. Defamation against Mr. and Mrs. Liu, Attorney Mo, and Doe Defendants;
5. Civil Conspiracy against Mr. and Mrs. Liu, Attorney Mo, and Doe Defendants;
6. Prima Facie Tort against Mr. and Mrs. Liu, Attorney Mo, and Doe Defendants;

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<sup>11</sup> The SAC still demands judgment against Defendant Ted Turner even though he was dismissed by Plaintiff.

<sup>12</sup> The SAC still alleges wrongdoing by Defendant Ted Turner even though he was dismissed by Plaintiff.



7. Invasion of Privacy against Mr. and Mrs. Liu;
8. Promissory Estoppel/Detrimental Reliance against Mr. and Mrs. Liu;
9. Intentional Tort/Battery against “Defendants”;<sup>13</sup>
10. Negligence against “Defendants”;<sup>14</sup>
11. Battery/Sexual Harassment against Mr. Liu and Mr. Sie;
12. Intentional Infliction of Emotional Distress against Mr. and Mrs. Liu, Mr. Sie, Attorney Mo, and Doe Defendants; and,
13. Negligent/Reckless Infliction of Extreme Emotional Distress against Mr. and Mrs. Liu, Mr. Sie, Attorney Mo, and Doe Defendants.

See SAC ¶¶83-117, 124-159.

Whereas Plaintiff’s initial Complaint and FAC previously claimed “\$ 100 millions” [sic] as damages for each cause of action, but without any specificity whatsoever, Plaintiff’s SAC only demands “an amount of damages to be proven at trial” for each of her twenty-one counts. See Complaint ¶¶40, 44, 48, 51, 54, 58, 61, 64, 67, 72, 78, 82, 85, 88, 93, 98, 102, 107; and FAC ¶¶55, 60, 65, 73, 78, 82, 86, 90, 96, 102, 107, 111, 115, 121, 127, 132, 138, 143, 148, 153. *Cf* SAC ¶¶55, 60, 65, 69, 73, 78, 82, 87, 92, 98, 104, 109, 113, 117, 123, 129, 134, 140, 149, 154, 159. Indeed, nowhere in the SAC does Plaintiff plead any amount of damages in excess of the jurisdictional minimum of \$75,000, exclusive of interest and costs, for subject matter jurisdiction under 28 U.S.C. § 1332.

## ARGUMENT

### **I. Legal Standard Under Fed. R. Civ. P. Rule 12(b)(1)**

It is well settled that,

“[a] case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court ... may refer to evidence outside the pleadings. A plaintiff asserting subject

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<sup>13</sup> Plaintiff asserts this Count against “defendants” without specification. However, Plaintiff also fails to specify the basis of the cause of action, including the alleged duty, breach and injury. Hence, it is merely a catch-all.

<sup>14</sup> *Id.*

matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.”

*Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000)(emphasis added).

Moreover,

“In a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, courts construe the complaint broadly and liberally in conformity with the principle set out in Rule 8(f), Fed. R. Civ. Pro., but argumentative inferences favorable to the pleader will not be drawn. *See Mosseri v. FDIC*, 924 F. Supp. 605, 607 (S.D.N.Y. 1996). The mover and the pleader may use affidavits and other materials beyond the pleadings themselves in support of, or in opposition to, a challenge to subject matter jurisdiction. *See Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130 (2d Cir. 1976), *cert. denied sub nom. Chemical Bank v. Arthur Andersen & Co.*, 469 U.S. 884, 105 S.Ct. 253 (1984).”

*GMAC Mortgage Corporation of PA v. Weisman*, 1997 WL 83416, \*4 (S.D.N.Y. 1997).

## II. Diversity Of Citizenship Under 28 U.S.C. § 1332

28 U.S.C. § 1332, in pertinent part, states that:

- “(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between--
- (1) citizens of different States;
  - (2) citizens of a State and citizens or subjects of a foreign state;
  - (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
  - (4) a foreign state, defined in section 1603(a) of this title, as Sang Lan and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.”

*See* 28 U.S.C. § 1332.

Diversity jurisdiction requires complete diversity of the parties:

“To sustain the jurisdiction of a federal court on the ground of diversity of citizenship under 28 U.S.C.A. § 1332(a)(1), there must be complete or total diversity, *such that all parties on one side of the controversy must be of diverse citizenship from those on the*

*other side.* In other words, all of the parties on one side of the controversy must be citizens of different states from all of the parties on the other side. To put it another way, the citizenship of each plaintiff must be diverse from the citizenship of each defendant. A federal court has no jurisdiction on the basis of diversity of citizenship where the opposite parties or any two of the opposite parties to a controversy are citizens of the same state, where such parties are indispensable or necessary parties.”

*Colon v. Bernabe*, 2007 WL 2068093 \*2, 3 (S.D.N.Y. 2007)(emphasis in original)(citing 32A Am.Jur.2d Federal Courts § 636)(other citations omitted).

Moreover, “[t]he Second Circuit has extended the complete diversity requirement to alienage jurisdiction. See *Corporacion Venezolana de Fomento*, 629 F.2d 786, 789-90 (2d Cir. 1980). It is clear, therefore, that federal courts do not possess diversity jurisdiction over lawsuits between aliens even if non-alien parties are also present. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975)(holding that diversity jurisdiction is defeated by ‘presence of aliens both as plaintiffs and as defendants’); *Ex Parte Edelstein*, 30 F.2d 636, 638 (2d Cir. 1929)(Hand, J.) (“an alien may not sue an alien in federal court”).” *Lee v. Trans American Trucking Service, Inc.*, 111 F.Supp.2d 135 (E.D.N.Y. 1999)(emphasis added).

### **III. No Diversity Of Citizenship**

In this Action, there is no diversity of citizenship because both Plaintiff Sang Lan, a citizen of the People’s Republic of China, and Defendant Mr. Sie, a citizen of Hong Kong SAR, (Special Administrative Region, China), are aliens, and neither of whom is a U.S. citizen. Although Plaintiff cleaned up her SAC to solely allege that Mr. Sie is a U.S. citizen, her FAC contains the admission that, “[Mr. Sie] has [r]enounced his US Citizenship and accepted Hong Kong citizenship.” See FAC ¶43; Cf. SAC ¶39. Despite the amendment to the complaint, this court should consider this admission in the FAC. *In re Initial Public Offering Secs. Litig.*, 544 F.Supp.2d 277 (S.D.N.Y. 2008)(“superseded pleadings . . . are still admissions for evidentiary

purposes”); *see also Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 198 (2d Cir. 1929)(“When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent.”); *Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998)(affirming the district court's refusal to permit a plaintiff to amend her complaint to omit certain admissions), *abrogated on other grounds, Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

In any event, Mr. Sie’s Declaration confirms that he has been a citizen of Hong Kong since 2002, and that he was also a U.S. citizen until he renounced his U.S. citizenship in 2008. *See* Sie Decl. ¶¶3-8. The SAC alleges no facts to the contrary, other than the conclusory assertion that Mr. Sie is a United States citizen. *See* SAC ¶ 9.

Hence, Plaintiff’s claim that this Court has subject matter jurisdiction over her Action on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332 is baseless, and this Court should dismiss this Action for lack of subject matter jurisdiction. *Lee v. Trans American Trucking Service, Inc.*, 111 F.Supp.2d 135 (E.D.N.Y. 1999). “[A]n alien may not sue an alien in federal court.” *Ex Parte Edelstein*, 30 F. 636, 638 (2d Cir. 1929)(Hand, J.).

#### **IV. Amount In Controversy Under 28 U.S.C. § 1332**

In determining diversity jurisdiction, “the Supreme Court has made clear that we must rely on the amount claimed in the complaint as dispositive, unless it appears that that amount is not recoverable in good faith.” *Kry v. Poleschuk*, 892 F.Supp. 574, 576 (S.D.N.Y. 1995)(citing

*Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1961); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)).

Plaintiff “has the burden of proving that it appears to a ‘reasonable probability’ that the claim is in excess of the statutory jurisdictional amount.” *Feldman v. Edwab*, 2011 WL 1298717 \*3 (N.D.N.Y. 2011), (quoting *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir.1994)). “Where ... jurisdictional facts are challenged, [Plaintiff] must support those facts with ‘competent proof’ and ‘justify [its] allegations by a preponderance of the evidence.’” *Feldman, Id.*, (quoting *United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc.*, 30 F.3d 298, 305 (2d Cir.1994)(other citations omitted)).

“Where federal jurisdiction is challenged and a plaintiff’s pleadings are inconclusive as to the amount in controversy, a court may look beyond those pleadings to other evidence in the record.” *Id.* (other citations omitted). In order to determine whether the requirements of federal jurisdiction are met, this Court may also consider other papers, such as a copy of an amended pleading, motion or other paper. 28 U.S.C. § 1446. *Id.*

#### **V. No Amount In Controversy In Excess Of \$75,000.00**

As noted hereinabove, aside from Sang Lan’s bare, conclusory recitation in her SAC, under “Jurisdiction and Venue,” that the amount in controversy of her Action must exceed \$75,000.00 in order to confer diversity jurisdiction to this Court under 28 U.S.C. § 1332, the SAC wholly fails to specify the actual amount of damages for any count, or the total amount of damages sought by her Action. Rather, the SAC only states that Plaintiff seeks “an amount of damages to be proven at trial.” See SAC ¶55, 60, 65, 69, 73, 78, 82, 87, 92, 98, 104, 109, 113,

117, 123, 129, 134, 140, 149, 154, 159. Therefore, Sang Lan has failed to allege that the amount in controversy in her Action “exceeds the sum or value of \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a)(1).

Previously, Sang Lan’s initial Complaint and the FAC did include a specific amount for damages in the amount of “\$ 100 millions” [sic] for each count, totaling \$1.8 *billion* and \$2.1 *billion*, respectively. See Complaint ¶¶40, 44, 48, 51, 54, 58, 61, 64, 67, 72, 78, 82, 85, 88, 93, 98, 102, 107; and FAC ¶¶55, 60, 65, 73, 78, 82, 86, 90, 96, 102, 107, 111, 115. 121, 127, 132, 138, 143, 148, 153. However, these damage claims were identical for each and every cause of action in her pleading, regardless of the nature of the cause of action or the number of defendants. Therefore, these round figures have no basis in fact or law, and are not plausible.

Clearly, such claims are frivolous and have no good faith basis. Rather, they strongly suggest that Attorney Hai maliciously framed them for the sole purpose of exceeding the jurisdictional requirement, and to harass defendants by publicizing that Plaintiff filed a lawsuit against them for *billions* of dollars. In fact, the baseless nature of Plaintiff’s damages claims (and indeed the strong possibility that these claims actually involve damages of far less than \$75,000) is demonstrated by the fact that Plaintiff’s attorney has suggested that he would withdraw these counts if Attorney Mo pays \$500, or does Attorney Hai an unspecified favor, presumably Attorney Mo’s withdrawal as the Lius’ counsel. See Chiu Decl. ¶10.

Hence, Plaintiff’s initial Complaint and the FAC also fail to prove that the amount in controversy of Plaintiff’s Action exceeds the jurisdiction minimum. Plaintiff has failed to meet her burden to establish that there is a reasonable probability that her claim is in excess of the statutory jurisdictional amount. *Feldman, supra*. Therefore, this Court lacks subject matter jurisdiction under 28 U.S.C. § 1332 for this reason as well.

**VI. No Federal Question Claims Against Defendants Under 28 U.S.C. § 1331**

Also under “Jurisdiction and Venue”, Sang Lan generally asserts in her SAC that this Court has subject matter jurisdiction pursuant to the Civil Rights Act of 1964, etc., 28 U.S.C. § 1331, and 28 U.S.C. § 1343. See SAC ¶¶13, 14. However, she fails to specify which causes of action against which defendants confer subject matter jurisdiction on this basis.

Nonetheless, it is undisputed that Sang Lan does not assert any of her claims under federal laws against Defendants Mr. and Mrs. Liu, Mr. Sie and Attorney Mo. See SAC ¶¶83-117, 124-159. Rather, Sang Lan only asserts her federal question claims against the other defendants, i.e., AOL, USA Gymnastics, and TIG Insurance. See SAC ¶¶61-82.

Indeed, all of the thirteen (13) causes of action in the SAC against Defendants Mr. and Mrs. Liu, Mr. Sie and Attorney Mo are common law claims<sup>15</sup> governed by New York law. Therefore, this Court does not have federal question jurisdiction pursuant to 28 U.S.C. § 1331 over such claims.

**VII. Supplemental Jurisdiction Under 28 U.S.C. § 1367**

28 U.S.C. § 1367 states, in pertinent part, that:

“(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”

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<sup>15</sup> Plaintiff’s Second Amended Complaint refers to her Fourteenth Cause of Action for Invasion of Privacy as a common law cause of action. However, under New York law, a claim for invasion of privacy is codified by statute, and is governed by N.Y. Civ. Rights Law § 51. Nonetheless, we address this cause of action as a common law claim rather than a civil rights claim because Plaintiff’s Second Amended Complaint does not identify the aforementioned statute as a basis for supplemental subject matter jurisdiction.

See 28 U.S.C. § 1367.

“Under § 1367, a federal court shall exercise supplemental jurisdiction ‘over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.’ 28 U.S.C. § 1367(a).” *EUA Cogenex Corp. v. Bankers Trust Co.*, 1993 WL 454205 \*2 (S.D.N.Y. 1993). “Section 1367 confers subject matter jurisdiction over certain related claims even if no federal claim is asserted against the party opposing jurisdiction.” *EUA Cogenex Corp., Id.*, citing *Wilson v. Roberson*, 1993 WL 119695 (S.D.N.Y. 1993).

“Under § 1367(a), state and federal claims are sufficiently related where “(a) they derive from a common nucleus of operative fact, and (b) a plaintiff would normally be expected to try both claims in one judicial proceeding.” *EUA Cogenex Corp., Id.*, citing *Lent v. Mills*, 1991 WL 23994, \*4 (N.D.N.Y. 1991). State claims share a common nucleus of operative fact with federal claims where the evidence involved in the state claim is substantially the same in scope and source as that necessary for the federal claim. *EUA Cogenex Corp., Id.*, citing *LaSorella v. Penrose St. Francis Health Care System*, 818 F.Supp. 1413, 1416 (D.Colo.1993).

“Supplemental jurisdiction has thus been exercised ‘where the facts underlying the federal and state claims substantially overlap or where presentation of the federal claim necessarily brings the facts underlying the state claim before the court.’” *McConnell v. Costigan*, No. 00 Civ. 4598(SAS), 2000 WL 1716273, at \*4 (S.D.N.Y. Nov. 16, 2000)(alterations omitted)(quoting *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir.2000)). Conversely, supplemental jurisdiction should not be exercised ‘when the federal and state claims rest[ ] on essentially unrelated facts.’ *Lyndonville Sav. Bank & Trust Co.*, 211 F.3d at 704.” *Chaluisan v. Simsmetal East LLC*, 698 F. Supp.2d 397, 401 (S.D.N.Y. 2010).



### VIII. No Common Nucleus Of Operative Facts

As discussed above, the claims against AOL, USA Gymnastics and TIG Insurance Companies and the claims against the Moving Defendants involve different time periods, different locations, different parties, different damages, different legal theories and different alleged events. There is no common nucleus of facts between the essentially separate cases that are alleged here under the same caption.

Sang Lan's SAC asserts eight (8) causes of action against Defendants AOL (and Ted Turner), USA Gymnastics, and TIG Insurance, which mainly address Sang Lan's allegations that the corporate defendants failed to provide compensation for her injuries *vis-a-vis* a purported agreement with AOL (and Ted Turner), and "life-time medical [insurance] coverage" *vis-à-vis* a "catastrophic medical' insurance policy" purchased by USA Gymnastics from TIG Insurance. *See* SAC ¶¶52-82. Sang Lan alleges that TIG Insurance refused to provide the insurance coverage promised to her supposedly because she eventually returned to China twelve (12) years ago, and no longer received medical treatment in the United States. *See* SAC ¶¶41, 42.

As a result, Sang Lan's two (2) federal causes of action against TIG Insurance and USA Gymnastics allege violations of her civil rights by discriminating against her on the basis of her race or national origin. *See* SAC ¶¶61-65, 74-78. In sharp contrast, however, Sang Lan's thirteen (13) causes of action against Defendants Mr. and Mrs. Liu, Mr. Sie, and Attorney Mo, as well as the Doe Defendants, do not involve federal questions, but rather are only common law claims under New York law for "unjust enrichment, conversion, breach of fiduciary duty, defamation, civil conspiracy, *prima facie* tort, invasion of privacy, promissory estoppels/detrimental reliance, intentional tort/battery, negligence, battery/sexual harassment,

intentional infliction of emotional distress, and negligent/reckless infliction of extreme emotional distress.” See SAC ¶¶83-117, 124-159.

More importantly, none of the state common law claims against the individual Defendants have the same common nucleus of operative facts as the federal law claims against the corporate defendants. In particular, none of the events that ostensibly give rise to the alleged liability of Defendants AOL, USA Gymnastics and TIG Insurance for their discrimination against Plaintiff on the basis of race or national origin, have any bearing whatsoever on Sang Lan’s state common law claims against Moving Defendants Mr. and Mrs. Liu, Mr. Sie, and Attorney Mo.

Instead, most of the claims asserted against the Moving Defendants are based upon a core allegation of defamation, involving statements made in 2011, mostly about the litigation. Such allegations are apparently the basis for the defamation, prima facie tort, negligence, and intentional infliction. These claims, arising out of events in 2011, have nothing to do with the alleged agreement to provide insurance coverage that is the subject matter of Counts 1-7. Under such circumstances, the courts have rejected the assertion of supplemental jurisdiction. *Obendorfer v Gitano Group*, 838 F.Supp. 950 (D.N.J. 1993)(defamation claim brought by lawyer/boyfriend of main plaintiff is dismissed for lack of subject matter jurisdiction under 28 USCS § 1367(a), where plaintiff is pursuing federal sexual harassment and sex discrimination claims against her employer and supervisor, because boyfriend's defamation claim based on supervisor's referring to him as "cheat" and "liar like all other lawyers" involves different set of parties and time frame, and does not fall within federal "supplemental jurisdiction.").

Equally baseless would be any suggestion that the claims of battery and sexual harassment have anything to do with Counts 1-7. There is no allegation that AOL Time Warner, TIG, and/or USA Gymnastics had anything to do with the alleged battery and sexual harassment.

Finally, the claims of conversion, unjust enrichment and promissory estoppel largely appear to be based on claims relating to the mishandling of money in the so-called Goodwill Fund. But again there is no assertion that AOL, TIG, or USA Gymnastics had anything to do with the Goodwill Fund. The mere fact that the Goodwill Fund and the TIG insurance policy possibly are designed to compensate Sang Lan for the same injuries does not provide a basis for supplemental jurisdiction. *Kramer v Lockwood Pension Servs.* 653 F.Supp.2d 354 (S.D.N.Y. 2000)(court declined to exercise supplemental jurisdiction in action filed by insurance company when action involved different insurance policies and only overlap was fact that one trustee eventually became trustee for both insurance trusts).

Therefore, this Court should decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Sang Lan's claims against Defendants Mr. and Mrs. Liu, Mr. Sie, and Attorney Mo, and dismiss her Action for lack of subject matter jurisdiction.

**CONCLUSION**

For the reasons set forth herein, Defendants respectfully submit that this Court should dismiss Sang Lai's Action against them in its entirety because this Court lacks subject matter jurisdiction on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332, federal question pursuant to 28 U.S.C. § 1331, or supplemental jurisdiction pursuant to 28 U.S.C. § 1367, award Defendants' their costs, expenses and attorney's fees in their defense to this Action, including the instant Motion, and such other and further relief as the Court deems just and proper.

Dated: New York, New York  
June 24, 2011

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