SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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U.S. IMMIGRATION FUND LLC, et al.,

Petitioners,

Index # 159222/2018

-against-

DOUGLAS LITOWITZ, ESQ, et al.,

Respondents.

LITOWITZ'S REPLY AFFIRMATION IN SUPPORT OF MOTION TO DISMISS, TO STRIKE, AND FOR SANCTIONS

Respondent attorney Douglas Litowitz who is being sued in his personal capacity ("Litowitz") hereby stands on his existing motions, memoranda, and affidavits to (i) dismiss the Amended Complaint for lack of personal jurisdiction, and (ii) impose sanctions on opposing counsel. Litowitz's documents are located at Dkt. #s 16, 18, 40, and 43.

Litowitz takes this opportunity to prove that opposing counsel's memorandum of law (Dkt. #48) is sanctionable. Their claims are not supported under existing law or any good-faith extension of it.

In fact, the slanders, lies, and gratuitous insults in the Complaint have already caused Litowitz problems in other courtrooms. On or about October 11, 2018, Litowitz was served with a motion in a case that he is handling in the Central District of Illinois, which attached in full the Complaint in this case (including Mr. Gerasi's Verification), and serving Litowitz with a Rule

11 motion at approximately the same time. The motion reads as follows:

> In fact, Mr. Litowitz [has] recently been sued in the Supreme Court of New York in New York County by U.S. Immigration Fund LLC, an EB-5 Regional Center and its affiliates. The claims include defamation arising from WeChat posts, whereby false statements were made to investors causing harm to the regional center. See Complaint, attached as Exhibit 1. The claims filed in New York mirror the type of conduct occurring here, which forms the basis for this motion.

Zhan v. CMB Export LLC, 18-cv-04126 (C.D. Ill. 2018) at Dkt #44 pages 2-3. In addition, Litowitz's clients have seen the scandalous Complaint and translated it into Chinese. The Complaint has also been reported in the news on Law360 (Lexis-Nexis) and gone 'viral.'

The harm to Litowitz from this unfounded lawsuit is real. For the reasons set forth below and in Litowitz's previous motions, this case must be immediately dismissed and sanctions must be imposed on the opposing counsel and the lawyer who "verified" the Complaint without actually performing any research which could have easily determined the falsity of its assertions.

I. The Petitioner's Argument for Personal Jurisdiction is Unprecedented and Lacks a Single Case or Statute in Support.

Opposing counsel started this lawsuit by filing a Complaint that lacked provisions on jurisdiction and venue – the most basic elements that any first year law student would know to put into a complaint. See Dkt #1.

Opposing counsel made a choice to file the Complaint in New York State Court, knowing full well that Litowitz is a lawyer in Illinois with no connection to the State of New York: he has no residence in New York, no assets in New York, no office in New York, no telephone or contact information in New York, no property in New York, no family or relatives in New York, no clients in New York, no licenses in New York, and has never appeared as a lawyer or party in any case in New York. In fact, Litowitz has *never* had any connection to the State of New York, and he has only visited New York a few times in his life. There is absolutely no reason for this lawsuit to be heard in New York, when it could have easily been heard as a diversity action in federal court in Illinois.

The only possible reason to file this lawsuit in New York State Court is to deliberately inconvenience Litowitz by filing a lawsuit 800 miles away from his home, forcing him into a system that is on Petitioner's "home court" and thereby making Litowitz expend time and money navigating a foreign legal system that is much older and more complex than the legal system in Illinois, requiring him to obtain local counsel.

The Complaint itself (as well as the Amended Complaint) is virtually impossible to read – completely disjointed, disorganized, vague, switching between defendants without notice, snide, and full of insults. The Complaint fails to make clear what is being alleged and which of the defendants did what. It fails to clarify when Litowitz's supposedly wrongful actions or

statements took place, and it asks for the preposterous sum of $23 million without providing any breakdown whatsoever. Four of the five counts are for torts committed somehow from out of State (which, as we shall see, violates New York precedent), and they are not pled with any particularity; the breach of contract claim is for a contract where Litowitz was not even a party – it is based on the fact that he was the *lawyer* for the party who supposedly breached. And the defamation claim fails to explain what Litowitz supposedly said, when he said it, and what effect it had. Furthermore, the defamation and fraud supposedly took place in Chinese writing, but Litowitz cannot read or write Chinese. No court – including this one - could ever unravel such a monstrous ball of confusion.

The Complaint accuses Litowitz (a lawyer of 30 years without a single disciplinary complaint) of being "seedy" and then accuses him of setting up a Hong Kong company (a false statement that could be easily checked against public records); practicing law in Hong Kong without a license (easily proven false); conspiring with a 'willing cohort' for 'nefarious' reasons to form a Hong Kong entity to hurt the Petitioners (easily proven false by checking public records); being an investment adviser without a license (easily proven false under federal law); lying to a federal court (easily proven false by checking with federal officials); and breaching the rules of professional ethics (easily proven false).

More importantly, none of these statements (truthful or not) have anything to do with the causes of action asserted in the case. There is no count in the Complaint for Litowitz being some kind of unregistered investment adviser, so why would opposing counsel allege it? There is no count in the Complaint for Litowitz somehow practicing law without a license in Hong Kong, so why would opposing counsel allege it? The Complaint is a pure smear, an insult, a pure attack. This kind of thing is not tolerated in other courts, and Litowitz hopes and prays that this Court has equal standards.

Once Litowitz made clear to this Court that he had no connection to New York, opposing counsel filed an *Amended* Complaint to rescue the lack of personal jurisdiction. But their new argument has no legal basis and they cannot show a single case where their line of reasoning was adopted by a court.

Their preposterous new argument is that Litowitz has consented to New York jurisdiction because there was once a case (now settled) in which Litowitz was a non-party and non-lawyer but had similarly situated clients to the ones named in the lawsuit, so he wrote to the Judge to determine if the settlement in that case would be binding on his similarly-situated clients. In the process he obtained Court permission to view a summary of settlement terms so long as he signed a Confidentiality Agreement, called an "Attorney Eyes Only" contract in New York. The Confidentiality Agreement specified

that New York was the forum for any disputes "arising out of this Confidentiality Agreement." That was the *Ang v. USIF* case heard by Justice Scarpulla. It is over and done. No one in that case - including the Petitioner - alleged a breach by Litowitz of the Confidentiality Agreement. And assuming *arguendo* that Litowitz had breached the Confidentiality Agreement – which he did not, and was not accused of doing – that would be a matter to be taken up before the presiding judge, Justice Scarpulla. The Confidentiality Agreement had a restrictive New York choice of law provision that applied only to breach of that document itself (in other words, Litowitz agreed to New York jurisdiction only for disputes over *that particular Confidentiality Agreement, not for any other dispute or claim*). Nothing in *that* case would have any effect on *this* case since nothing in *that* case vested personal jurisdiction in New York for any other matters.

Opposing counsel now use science fiction and time-travel to get around this problem. They now assert before *this Court*, for the first time, that unknown to everyone in the now-finished *Ang v. USIF* case, including Justice Scarpulla herself, Litowitz (through time-travel, I suppose) breached the Confidentiality Agreement given to him in the case before Justice Scarpulla, and because of *that* newly discovered breach (which they never asserted in that case), Litowitz has somehow consented in general to being sued in New York for any and all other possible causes of action sounding in tort and contract, including this one.

Opposing counsel does not – and they cannot -- cite a single case where any court has applied this twisted logic. All of their precedents stand merely for the simple proposition that a choice of law provision in a contract which stipulates a New York forum is enforceable in New York *in an action on that very contract*.

Well, that isn't the argument they are making to this Court.

Rather, they assert that if a person agrees to New York forum in a single contract in a single matter in Case X in Courtroom #1, then magically this creates a general free-floating consent to personal jurisdiction in all unrelated, separate and distinct cases in New York such as Case Y for fraud in Courtroom #2, Case Z for breach of contract in Courtroom #3, and so on.

No court has ever held this, and none ever will, because it makes no sense.

First, a forum selection clause is limited by its terms. The forum selection clause that Litowitz signed was never invoked (he was never accused of breaching any contract and he was never brought before any forum in New York), and furthermore, the contract itself specified New York forum only for that single contract only. An unbreached contract that stipulated New York forum only for disputes about that very contract cannot be the basis for general jurisdiction in all other cases in New York. No court has ever held that a forum selection clause limited by its own terms to a specific contract in Case X somehow constitutes consent to personal jurisdiction over the

defendant for separate and distinct matters including torts in cases A, B, C, and D.

Second, if opposing counsel were correct, hundreds of millions of Americans could be hauled into this Court for any tort at any time. A plaintiff's lawyer in Manhattan could pick as a target any person living in Arizona, Texas, Michigan, or Iowa – then find some contract that they have in their possession with a New York forum clause (say, an insurance policy or banking contract), and then retroactively assert that the person breached the contact and that this retroactive breach now means that this person has voluntary consented to New York jurisdiction, so they can be hauled into court in New York and sued for a purported tort.

That is degraded logic and it lacks a single precedent. Opposing counsel has made Litowitz come 800 miles to point out that their "theory" of personal jurisdiction has no support in existing or extended New York law. Their object – their goal – is obviously not to comply with the law of their home state, but just to drag Litowitz 800 miles away from his home. Sanctions must apply to an argument that is illogical, pointless, and has no basis in New York law, and no grounds as an extension of existing law.

II. Litowitz is not a "Legal Representative" of his Clients

Opposing counsel's second argument for personal jurisdiction is an offense to dead and disabled persons. See Dkt. #48 at p. 10.

They claim that Litowitz had certain clients that were Chinese investors who settled their claims against Petitioner (U.S. Immigration Fund) under a settlement agreement specifying New York law, and then these clients later breached the settlement agreement. Litowitz has no knowledge of this, and supposedly it was done in Chinese (which Litowitz does not read or write). Petitioners never sued anyone for this suddenly alleged breach of contract by Chinese investors – but magically they hold Litowitz vicariously responsible for his clients' breach because the settlement agreement had boilerplate language saying it applied to "legal representatives" – and under Petitioner's twisted logic, since Litowitz is a lawyer, he is the "legal representative" for his clients.

Now, this Court should take judicial notice that almost every contract in the world includes a provision along the lines of, "This contract is binding on the parties' heirs, assigns, legatees, executors, guardians, and legal representatives."

This language is for when a party to a contract either dies or becomes incapacitated. In such cases, the contract may pass by will to a 'legal representative,' or a guardian may become the 'legal representative' in place of a person who is in a coma, or has Alzheimer's disease, or cancer, or a degenerative problem that affects their legal capacity.

The Appellate Division has held that for more than a Century (100 years of legal precedents) the term "legal representative" has not applied to

lawyers. It simply means a person who takes care of another person and steps into their place when that party cannot answer for himself, due to incapacity or death. The Appellate Division traces this usage back to cases from the Nineteenth Century:

> Consistent with this definition, this Court, going back to the late 1800s, has held "the words 'legal representatives' mean ordinarily executors or administrators, and that meaning will be attributed to them in any instance unless there be facts existing which show that the words were not used in their ordinary sense, but to denote some other and different idea" (*Sulz v Mutual Reserve Fund Life Assn.*, 145 NY 563, 574, 40 NE 242 [1895]; *see also Griswold v Sawyer*, 125 NY 411, 413, 26 NE 464 [1891]; *Matthews v American Cent. Ins. Co.*, 154 NY 449, 462-463, 48 NE 751 [1897]). Even in the rare instances where the term has been found to signify something other than "executors or administrators," the meaning has not extended to a party's attorneys (*see e.g. Greenwood v* [4] *Holbrook*, 111 NY 465, 471, 18 NE 711, 19 NY St. 367 [1888] [holding that in a certain agreement, "the phrase 'legal representatives' relates to children or descendants, and not executors or administrators"]). This definition of "legal representative" corresponds with the case law of virtually every other state and federal court that has defined the term.

Matter of Kese Indus. v Roslyn Torah Found., 914 N.Y.S.2d 704, 15 N.Y.3d 485, 491 (App. Div. 2010). This accords with an earlier ruling:

> "[T]he words 'legal representative' mean ordinarily executors or administrators, and that meaning will be attributed to them in any instance unless there be facts existing which show that the words were not used in their ordinary sense, but to denote some other and different idea" *(Sulz v Mutual Reserve Fund Life Assn.,* 145 NY 563, 574; see, also, *Matthews v American Cent. Ins. Co.,* 154 NY 449; *Geoffroy v Gilbert,* 5 App Div 98, affd 154 NY 741; *Shiya v Erickson,* 156 Misc 738, 745; see, generally, *Briggs v Walker,* 171 U.S. 466, 471). An attorney in fact is

> merely a special kind of agent and ordinarily the power of attorney is revoked by the death of the principal (see, generally, 2 NY Jur, Agency, §§ 64-73). There is nothing here which suggests that, in the context of the power of attorney, the attorney in fact becomes a "legal representative". Furthermore, no legal representative is needed here; the parties [] are before the court.

Etterle v. Excelsior Ins. Co., 74 A.D.2d 436, 441, 428 N.Y.S. 2d 95 (4th Div. 1980).

This rule is the same in every jurisdiction. An appellate court in Texas conducted an extremely intensive review of the term "legal representative" to arrive at the conclusion that it did not include lawyers, finally citing Black's Law Dictionary as authoritative:

> The classes of persons identified in the agreement, *i.e.*, "predecessor, successor, assigns, heirs, executors, administrators, and legal representatives," refer to people or entities that could stand in the place of or assert the same rights as a party to a lawsuit. *See* BLACK'S LAW DICTIONARY 46, 118, 570, 724, 896, 1177, 1431. The listing of such persons in the release does not include attorneys . . .

McMahon v. Greenwood, 108 S.W.3d 467, 471 (Texas App. 2003).

This makes common sense. If the person who breaches a contract is a competent and identifiable adult, then he can be sued in his own name and there is no reason to name anyone else as a legal representative (least of all his lawyer). Here, if the Petitioner desires, it can track down and sue the actual person who signed the contract which they think has been breached, even if that person is in China. The Petitioner enters into contracts with thousands of Chinese nationals and have many Chinese-speaking staff, so

they can hardly complain that dealing with one of their former Chinese investors is unusual for them. They have offices in China and in America, and if they want to assert a breach by a Chinese former investor, they can do it in either country. The bottom line is obvious: lawyers are advisers to their clients but they are not 'stand-ins' for their clients.

If opposing counsel wants to change more than a Century of established New York law just to assert that this Court has personal jurisdiction over Litowitz as a "legal representative," then they have to provide this Court with extensive citations, policy arguments, research, and a clear demonstration of why this trial Court must deviate from *stare decisis* in New York. They did none of that.

Finally, there is something unseemly about opposing counsel using a term involving dead and incapacitated people to refer to attorney Litowitz. "Legal representatives" are there to help people who are dying and sick – they attend to the elderly, they comfort the afflicted, they mourn the dead, they help to dress and feed people that cannot remember their own name. To say that Litowitz is a 'legal representative' just because he is a lawyer is to demean every person who undertakes the serious task of being a legal representative.

Litowitz finds it inexplicable that he was dragged 800 miles from his home in order to defend himself in New York against opposing counsel's insistence that centuries of law be overturned just to obtain personal

jurisdiction over him. That is sanctionable conduct because it is not supported by existing law or any good faith argument to extent the law.

III. The Mere Allegation of Harm in New York Doesn't Confer Jurisdiction

Opposing counsel's third argument is a one-paragraph assertion that New York has personal jurisdiction over Litowitz because that is where his alleged tortious activity caused the alleged harm, even though the Petitioner is a Delaware company with its headquarters in Florida. Dkt. #48, p. 12.

Regardless, they cite ZERO cases where a foreign defendant was subject to personal jurisdiction in New York solely because he was *alleged* to cause a tort in New York.

Their assertion makes no logical sense. If it were possible to conjure personal jurisdiction out of thin air merely by *alleging* tortious harm that was felt in New York, then every New York plaintiff would do it in every case and they would win every case. All a plaintiff would need to do is put these magic allegations in a complaint, and then personal jurisdiction would magically be created.

New York law is precisely the opposite. New York precludes an assertion of personal jurisdiction for torts unless the defendant is physically present within the state when the tortious act is committed. *Heinfling v. Colapinto*, 946 F. Supp. 260, 264 (S.D.N.Y. 1996). And in the case of *Shatara v. Ephraim*, 137 A.D.3d 1248, 29 N.Y.S.3d 406 (2nd Dept. 2016), the Appellate

Division refused to assert personal jurisdiction over a New Jersey lawyer sued for fraud in New York, since the lawyer did not avail herself of the privileges of conducting activities in New York:

> Accepting as true the plaintiff's allegations that [Respondent] committed tortious acts without New York State causing injury to the plaintiff within the State, the plaintiff failed to present any evidence that [Respondent] regularly did or solicited business, or engaged in any persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this State, or derived substantial revenue from interstate or international commerce.

Id. at 408.

Opposing counsel had the *Shantara* opinion in their hands before they told this Court the exact opposite of its holding. They knew or should have known that the mere allegation of tortious harm felt in New York will not suffice to confer jurisdiction. They made no effort whatsoever to distinguish the relevant case law, and they could not bolster their preposterous argument with a single citation. They just threw up horrendous and unsupported arguments for the sole purpose of making the other side do all the legal work of showing that the accusations has ZERO support under New York law. That is sanctionable.

IV. Gratuitous Insults do not belong in this Court – they are Sanctionable

A complaint can legitimately contain hurtful, personal statements that humiliate a defendant, *on the condition that they are related to the causes of action asserted in the complaint, and that they are well founded.*

Conversely, a complaint cannot just be a method of publishing a laundry list of everything negative about a defendant's life, disguised as a cause of action and made to look serious by appending a ridiculous demand for tens of millions in damages.

The problem with the Complaint and the Amended Complaint is that they throw dirt without any purpose other than harassment.

Litowitz is described as "seedy." Why? What count of the Complaint does this support? Is this a "fact?" How would it be proved? Why is this accusation included in the Complaint?

Litowitz is described as an unlicensed investment adviser. Why? He is not being sued for giving investment advice without a license. So, what count of the Complaint does this support? Why is this accusation included in the Complaint?

Litowitz is described as practicing law in Hong Kong without a license. Why? He is not being sued for this, and in fact he cannot be sued for it, as anyone who has done a modicum of research on Hong Kong law would know. What count of the Complaint does this support?

Litowitz is described as the owner and principal of a Hong Kong jewelry company formed to attack the Petitioners. This can be easily refuted by looking at the Hong Kong Companies Directory business search (similar to the New York Secretary of State Business Search). That only takes fifteen minutes at most, but instead they simply threw in a statement that could be easily refuted by the public records in Hong Kong. Why? Why throw in a deliberate lie that could have been corrected with a few minutes of research?

Litowitz is described as running a blog on a particular web site that says bad things about the business in which Petitioner is engaged. A simple search of the Internet ownership of the web site in question will reveal that Litowitz has no interest in any blog and that he only owns two web sites that are totally unrelated to this action (one of which has been inactive for five years and one that is simply his own name followed by dot com), Why even alleged these false statements? To what end? For what purpose?

The Complaint attaches Litowitz's *entire* bankruptcy petition, page for page. Why? This lawsuit is not about Litowitz's bankruptcy and that is not an element in any cause asserted, so why is it attached? The bankruptcy is tied to Litowitz's child support matter in Illinois and to the Stage 3 lymphoma cancer of his father-in-law. Does the Court think that these personal matters have any place in this lawsuit? Why are they included? Why wasn't the personal information redacted?

Conclusion

The Complaint and the Amended Complaint have no substance.

Opposing counsel do not state EXACTLY the precise defamatory words that Litowitz spoke, on what date, to whom, and to what effect.

Opposing counsel do not state EXACTLY what contract Litowitz signed and then breached.

Opposing counsel do not state EXACTLY the precise time, circumstance, causation, effect, and damages of the vague 'fraud' that they think Litowitz imposed on them.

Opposing counsel include a one paragraph Count for some ancient concept of "prima facie fraud" that doesn't even exist in Illinois, without explaining what it involves, and then magically assert that Litowitz owes them millions of dollars for it, even though the most basic research on New York law indicates that "prima facie tort" is only recognized when damages are specifically detailed to the penny, which opposing counsel failed to do.

The Complaint and the Amended Complaint have no purpose to win a victory in a courtroom. They do not state any coherent narrative. They are full of basic mistakes that could have been corrected by a cursory review of public documents. And they are "verified" by a lawyer who obviously didn't do homework on facts which could be easily disproved by public records, and he has no concept of the applicable New York law. The entire endeavor is meant to insult and degrade someone from 800 miles away.

This Court has to decide whether it will let itself be manipulated and used as an instrument for New York lawyers to inconvenience and spew invective on foreign lawyers, without any basis in the law.

WHEREFORE, Respondent asks this Court to dismiss the Amended Complaint for lack of personal jurisdiction and to strike the Complaint and Amended Complaint, and to impose sanctions on opposing counsel and the lawyer who 'verified' the Complaint.

Dated: November 27, 2018

Respectfully Submitted,

/s/ Douglas Litowitz

State of Illinois)
) ss.
County of Lake)

AFFIRMATION / VERIFICATION /AFFIDAVIT

Now comes Douglas Litowitz of Deerfield, Illinois, and being duly sworn, states as follows: the facts set forth in the foregoing *pro se* Reply Affirmation are true to the best of my knowledge after diligent inquiry. The Complaint and Amended Complaint contain a great many falsehoods that could be easily refuted with reference to public records, and they contain other assertions with no legitimate legal purpose to state any claim, but merely for the shock and humiliation of revealing personal information about me. The legal claims by the Petitioners and Opposing Counsel have no basis in New York law or any good faith extension of such law.

/s/ Douglas Litowitz
Respondent