

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Vadim Mikhlyn, Inga Mikhlyn, and
ABC All Consulting, Inc.,

Plaintiffs,

Index No. CV 08 3367

-against-

Ana Bove, Polina Dolginov,
Anna Bove Company, LLC,
Anna Bove Collections, Inc., and
Anna Bove Embroidery Supplies, Inc.,

DECLARATION OF ANA BOVE IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION AND TEMPORARY
RESTRAINING ORDER

Defendants.
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Anna Bove, being duly sworn, deposes and says:

1. I am a defendant and counter-claimant in the above-captioned action and I submit this affidavit reciting the factual bases in opposition to Plaintiff's motion for a preliminary injunction

2. As demonstrated below, Plaintiffs who are my cousins have stolen my business by misappropriating my original designs, the trademarks for my business and my domains. They continue to reproduce and sell my protected works trading off of the goodwill I have built over many years.

3. I am a citizen of Israel and I currently reside in Brooklyn, New York.

4. I am a professional designer and over many years I developed and perfected techniques for creating high quality embroidery designs. In 1995 I obtained my artistic education at Bezalel Academy of Art and Design – Israel's renowned national school of art and design

Background

5. In 2002, along with my friend Polina Dolginov, I started a business selling my original embroidery designs over the Internet under the "ABC" designation. Our investment and hard work paid off as our business grew rapidly and customers began to associate ABC as a source for high quality embroidery designs.

6. As a result of this expansion, in 2004, we enlisted the help of my cousin, Vadim Mikhlyn and his wife, Inga Mikhlyn who directed the U.S. operations of our business and warehoused the items we sold through our websites.

7. The Mikhlyns stole the company's domains by changing the log-in information thereby locking me out. They have as such misappropriated the domains for their own benefit and have effectively stolen the entire business including the cash, inventory, customer lists and goodwill that I built over many years. They continue to sell my copyrighted works under my trademark without my permission. They also are using my name "Anna Bove" without my permission or authority.

8. I have recently gotten back two of the domains and have been preparing to sue the Mikhlyns when I was preempted by this lawsuit.

9. The Mikhlyns have asserted a partnership that never existed and have claimed that they purchased the domains from Polina. To support their case, they have produced a falsified invoice that was allegedly sent by Polina in July of 2007 requesting payment for the "transfer of domains." The invoice contains two separate critical errors in the Polina's address – errors that could not have been made by Polina writing her

own address. The FedEx envelope sent by the Mikhlyns' attorney to Polina contained the identical two errors. As a result of the address errors, FedEx could not find Polina's apartment and they had to call Polina on the telephone in order to obtain the correct address. The Mikhlyns make many other false assertions and misrepresentations in their papers.

10. In the meantime, the Mikhlyns continue their illegal operation of my business and their unauthorized reproduction and sale of my works. Their (many) websites are identical or strikingly similar to the website I have created and designed over the years – and for which I have recently been awarded a copyright registration (VA1639284).

The Formation of my Embroidery Business

11 In 2002, Polina Dolginov and I founded and began a business largely centered in Israel, which produced embroidery designs to be sold on the Internet.

12 I named our business ABC Embroidery Designs and we adopted the ABC designation for all of our web-based businesses selling my designs

13. Since the inception of my business, I have focused most of my efforts on the creation of designs leaving administrative tasks to be carried out by other employees or family members – under my supervision. See Exhibit N

14. My friend and partner Polina Dolginov of Rehovot, Israel has been assisting me since 2002 in various areas of her expertise. Polina has registered and maintained various websites through which we have sold my design patterns. She also created an e-bay store, which was later misappropriated by the Plaintiffs. (Exhibit A). The domains were maintained by Polina up until they were stolen by the Mikhlyns. (See

Exhibit B to Inga Mikhlyn's Declaration)

15. The e-bay store was called "ABC-embroidery-designs" and the seller was known as "PolyaDolgin2" – Polina's e-bay nickname. (Exhibit A).

16. I am the designer, developer and technologist for the embroidery process. I create the original embroidery designs and have to create the computer programs which, in conjunction with an embroidery machine and supplied threads, produces the attractive embroidery patterns I create.

17. I have supervised the entire business since its inception, which was initially centered in Israel and subsequently in the United States. I have supervised all web design, web content, newsletters, advertising and other aspects of the promotion of the business. (see Exhibit B which shows an e-mail from me to my employees outlining business plans and instructions)

18. I directed and conducted the business from 2002 until 2008, at which time plaintiffs Vadim Mikhlyn and Inga Mikhlyn misappropriated all of our websites and identity, converting them to their own personal use and profit, thereby blocking and preventing me and those in my company from continuing to operate the very same business we had begun in 2002.

Expansion of the ABC Embroidery Business

19. In 2003, we expanded our business to include the sale of embroidery threads and other related supplies needed to produce decorative patterns. I selected the palette of colors that we began to sell on our websites. Thread selections were made as a result of vigorous testing and experimentation. Threads of particular colors

and characteristics that were best suited to my unique designs were chosen.

20. The sale of threads and other embroidery supplies began before I made any work contact with the Mikhlyns. (Exhibit C)

21. In 2004 I recognized that because we had a significant customer base in the United States, it would be beneficial to my business to secure an American based warehouse facility for storing threads and embroidery supplies instead of using drop-shippers, which I had been previously doing. I also wanted to have an American PayPal account to facilitate transactions in America.

My Cousins are Brought into the Business in order to Establish an American Presence

22. Vadim Mikhlyn and Inga Mikhlyn are relatives, and they indicated an interest in working for the company and handling the American aspect of the business. The Mikhlyns had been living in the United States for some time, and they possessed a degree of knowledge and sophistication concerning business practices in America, which I did not. They were employed and were paid regular salaries by me. I relied on their know-how and on the information they provided to me and I trusted that they would be honest

23. The Mikhlyns agreed to warehouse all supplies that we sold over the Internet. To my detriment, I also entrusted my cousins with maintaining records for the company and managing the company's bank accounts.

24. I paid Inga Mikhlyn a salary of \$4,000 a month, even while Polina and I were drawing only \$1,000-\$2,000 a month – reinvesting the balance of profits in the

company.

25. In June of 2004, the Mikhlyns registered a company called ABC All Consulting, Inc., for business consulting services thoroughly unrelated to our business. Vadim created ABC All Consulting, Inc. in furtherance of his interest in doing consulting work. The fact that the business is called ABC "consulting" additionally supports this notion. See also Exhibit D, which shows that the company was registered for business consulting services.

26 The Mikhlyns began using ABC All Consulting, Inc. as a vehicle for running my business. They also misled me into believing that they incorporated Anna Bove Collections, Inc. for my benefit. Instead, they registered Anna Bove Collections as a d/b/a of ABC All Consulting and have misleadingly referred to it as a "corporation" owned by me.

Ownership of Domains

27 Prior to the Mikhlyns beginning to work for my business, we had already registered an e-bay store and at least seven independent ABC domains, which became the trademark of my business by which our customers came to recognize us.

The individual domain registrations are listed below, as are the dates of establishment:

<u>Domain</u>	<u>Date of Establishment</u>
ABC-cross-stitch-patterns.com	01/05/2002
e-bay Store "ABC-Embroidery-Designs"	06/05/2002
ABC -embroidery-designs.com	07/25/2002

ABC -embroidery-thread.com.....	07/18/2003
ABC -machine-embroidery-designs.com.....	11/03/2003
ABC -machine-embroidery.com.....	11/03/2003
ABC -embroidery-patterns.com.....	11/03/2003
ABC -embroidery-fonts.com.....	02/07/2004

28. All of these were created by me in conjunction with my Israeli employees before the Mikhlyns ever began working for us.

Copyright for my Original Works

29. Substantially all of the designs offered for sale under the ABC designation on any of our websites and on our e-bay store were designed solely and exclusively by me. I am the author and owner of copyright in substantially all of the designs of the ABC sites commencing in 2002 and continuing on until the present. The few works that have not been authored by me have been assigned to me.

30. The production of high quality embroidery designs requires creativity, skill, expertise, experience and artistic choices. In preparing such works an artist must analyze an image and divide it into objects and layers in order to select colors and shading that best portray the image or reflect a particular mood. Moreover, an artist must select fabric and embroidery threads that are most suitable for a particular design. In addition, other factors such as the type of needle, underlay/stabilizer, embroidery machine specifications and the interrelations of all such factors must be considered when creating machine embroidery designs. In the case of design collections, artistic

choices must be made in selecting complementary designs based on thematic schemes, shapes, styles and the like.

32 Once a design-image is created, it is the turn of digitizing process to begin. The process of digitizing does not include any creativity or artistic choices, but it is rather based on certain concrete rules/parameters. The digitizer is analogous to a printing press that prints an original novel written by an author.

33 The Mikhlyns do not claim, nor could they claim, any right to my authorship or designs, which I created and exclusively own.

34 Similarly the creation of an online catalogue displaying such works requires creative and artistic choices that rise to the level of copyright protection. The United States Copyright Office has granted a registration for the online catalogue that I have created. See Exhibit E. This copyrighted material has been copied by the Mikhlyns on their many websites (See Exhibits F which depicts my designs as registered as part of my catalogue, side by side with the designs offered in one of the Mikhlyns' numerous websites

35 Attached hereto as Exhibit G is a CD containing a large number of patterns I have created since the business began. This CD accompanied my application to register the copyright for the web-based catalogue of my designs, for which a registration has been granted VA1639284 (Exhibit E). I have assigned all my right, title and interest to the copyright to these designs to Anna Bove Company LLC, which is defendant and counter-claimant herein. Prior to this assignment, I have maintained all the rights in my works.

Mikhlyns do not Acquire any Partnership Interest in ABC

36. As to the Mikhlyns' claims that they are partners in the business Polina and I founded in 2002, there is absolutely no foundation for that. The business was begun long before they were hired to help us and was successful long before they joined. They made no investment, purchased no partnership interest, have no documents to support any agreement that they are financial partners or part owners in my business. They have created a false story to provide the foundation for which they gradually grasped our business beginning in late 2007. The only significant document they produced to support this assertion is a fabricated invoice that will be recognized by the Court for what it is. The Mikhlyns list many instances of their writing checks and disbursing funds from the various ABC accounts as evidence of their ownership interest. However, the central point is that I gave the Mikhlyns the authority to handle the funds for the company, as I trusted them. I never considered them to be partners, and being in control of the ABC accounts does not constitute a partnership. To my regret, I now realize that the Mikhlyns have used funds for their personal benefit including to pay their mortgages, home improvements and two cars.

37. As can be seen in Exhibit H, Polina and I have contributed funds from our personal accounts for various expenditures relating to our business. The Mikhlyns have not contributed any capital to the company – nor should they have – as they were employees of the company and not partners as were Polina and I.

38. Plaintiffs show an e-mail from Inga in Exhibit F of Vadim's affidavit in support of their false assertion that they bought out Polina's share of the "partnership" for \$30,000. (Note that this sum was never paid to Polina). The Plaintiffs selectively

translated that e-mail from Inga to Polina and have left out a critical line that supports the fact that 1) the payment was for past work done by Polina and 2) that I was in charge of running the business – contrary to the Plaintiffs’ assertion that “no one partner acted like, or was, the employer or boss of any other partner with regard to any aspect of the business”. The segment from Inga is translated: “Polina, your initial conversations regarding spending took place between you and Anna. All instructions about payment for your work and you mother’s work, were given to me by Anna. I followed them exactly as I was told. You never conducted any negotiations with me in this regard.” (See Exhibit M). More evidence of the fact that I directed all of the company’s operations is shown in an e-mail from me to my staff wherein I give direction as to future plans and delegate specific instructions to my staff. (Exhibit B)

39 In Exhibit D to Vadim Mikhlyn’s Declaration Plaintiff presents another misleading document. Exhibit D purports to show a Quick Report of payments made by the Mikhlyns from “ABC All Consulting, Inc ” In fact those transactions were all made out of the “Anna Bove Collections, Inc ” PayPal account. Inga Mikhlyn would send the funds from the Anna Bove Collections, Inc. PayPal account to my PayPal account and I would direct payment accordingly. In Exhibit I, a number of payment confirmations, corresponding to the payments on the Quick Report are shown. As can be seen these payments were made from “Anna Bove Collections, Inc.” PayPal account.

Mikhlyns Hijack our Domains

40 By the middle of 2007 we were in possession of many domains – some registered by Polina and some by Vadim Mikhlyn. The domains were registered under

different accounts and through different Registrars. In order to better keep track of the various domains, I instructed Vadim to transfer all the domains to a single account. I did not authorize him to, nor did I suspect that he would, change the username/passwords in the process – which is exactly what he did. Apparently they had been planning to steal my business. (see Exhibit D to Vadim's Declaration, in which Vadim reports to me via an MSN chat that he has completed his task) The Mikhlyns had previously been given the username and passwords to the domains in order to perform administrative tasks

41 In June of 2007 they switched all of our Internet sites from our control to their independent and sole control. Essentially, they stole my entire business because they had gained sole access to all of the websites through which we have been doing business. At the point they stole such websites, we had increased our business and had around 250,000 registered users on our database who purchased designs and supplies from our website.

42 In March of 2008 I became aware of the extent of the misappropriation by the Mikhlyns' of all of our business activities. I realized the Mikhlyns had totally diverted and stolen our business, with its list of around 250,000 customers. With Internet-based businesses, whoever has access to the website controls the business.

43 The Mikhlyns additionally removed my profile from my e-bay store and locked me out.

44 The Mikhlyns are relatives who I provided with a source of income and employment when they needed it and quite frankly, I was dumbfounded and somewhat paralyzed when I realized the extent of their misappropriation.

45. I am an Israeli citizen, I am not entirely familiar with the laws of America, and it took a little while for me to focus on how to take back that which had been taken from me. Additionally, since the Mikhlyns had totally misappropriated all of my business activities, I was left substantially without the funds needed to pursue effective action at that time, even if I had an understanding of what such action was.

46. By May of 2008, I was able to organize that which I thought needed to be done to take back our business, and we sent the Mikhlyns a notice letter demanding the return of all of our property rights.

47. My initial concern was to regain control of the "abc-cross-stitch-patterns" and "abc-embroidery-designs websites." To that end we filed a UDRP complaint with the National Arbitration Forum against "Domains by Proxy" - the registrant of record. After the privacy contract was cancelled, we discovered that Polina remained the rightful registrant of the domains. Apparently, the Mikhlyns could not change the registrant from Polina Dolginov to themselves even though they had access to the passwords. GoDaddy, upon the registrant's request and pursuant to standard operating policy transferred the domains to the rightful registrant - Polina Dolginov.

48. Shortly after we obtained control of the domains, the Mikhlyns began giving away my designs for free (See Exhibit J). The Mikhlyns still maintain control of our entire inventory of threads and supplies. Thus, when they give away one of my designs for free – they stand to profit from the sale of my specially selected thread that is needed to achieve the best results. I do not have any threads to sell as my entire inventory of threads and supplies were misappropriated by the Mikhlyns.

49. As seen in Exhibit K, a Google search of the term "abc embroidery

design” returns my new website selling my designs as a first result. The second result is the Mikhlyns’ website giving away those very designs for free. Obviously, it is difficult, to say the least to sell items when the competition is giving those same items away for free. It is a lot more difficult to watch my own items being used to undercut my own business

50. The Mikhlyns continue to operate numerous websites (See Exhibit P), all of which carry the entirety, or significant portions of our catalogue of my designs – in violation of my copyright registration. They do not have the right, permission or authority to use my designs, copy them and offer them for sale to the public when I am the sole author, claimant and owner of those copyright rights. That is absolute out and out copyright infringement for which they must be stopped.

There are two key elements in what the Mikhlyns have misappropriated:

1) The ABC family of trademarks which are source identifiers for my unique embroidery patterns and designs and accessories therefor; and

2) All of my original designs. These designs belong solely to me.

The Mikhlyns misappropriated all of my designs and they continue to reproduce and sell them. They have absolutely no right to utilize my original designs without my permission, which they do not have. Additionally, through additional ABC denominated websites, they continue to mislead customers into believing that they are in fact offering legitimate ABC company designs. As stated above, not only were they offering my designs, they were now giving them away for free so that we could not even begin to collect the fee we had previously been charging for sale of the designs

51. Still further, the Mikhlyns have contacted ABC customers and have sent

an e-mail to all ABC customers asserting their ownership of the company. In fact, some of the loyal Anna Bove customers have reaffirmed my ownership of ABC and deny that the Mikhlyns are any such owners (Exhibit L)

52. To add further insult and injury, my name is Ana Bove, and the Mikhlyns have not only appropriated the ABC family of names for their business identity, they have also appropriated my personal name, which I have been using on my websites (Exhibit O), which is now carried on some of their websites. I have not given them permission, authority, nor do they have any right to use my personal name as identifying anything with which they are associated.

53. The Mikhlyns must be immediately stopped from using all of my designs, from displaying those designs on any websites they control, and immediately terminate any infringement in any media in any way of my original embroidery designs. In addition, the Mikhlyns must be immediately stopped from using any ABC designation for any embroidery business or related supplies, as that represents a clear infringement of the family of trademarks we have had since 2002.

54. Still further, the Mikhlyns must be prevented from using the 250,000 names they have obtained by illegally gaining control of the website with which they are now able to directly communicate to promote their illegal business.

55. If the Mikhlyns want to start an Internet embroidery business, they are certainly free to do so. But they are not free to misappropriate my cash receipts, inventory, name, designs, trademarks, and the customer list generated as a result of my many years of activity.

56. There are many other allegations in Plaintiffs' papers that are false and misleading and will not be responded to at this time.

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under §1001 of Title 18 of the United States Code.



Ana Bove

Dated: 09.09.2008