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December 28, 2010

Judge Ramon E. Reyes
United States District Court
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Index No. CV 08 3367
Vadim Mikhlyn, et al. v. Ana Bove, et al.
Our file no. 1851.004

Dear Judge Reyes:

We represent the corporate defendants in the above captioned action but not the individuals.

The individual defendants desire to submit the enclosure relating to your hearing next week because they feel all would be better served if they were to submit, in advance, an explicit response to the pending motions you are to consider. The need for this advance document is further enhanced because of the complexity of the case and the difficulty the individuals have in expressing themselves quickly in English.

I submit this merely as a courier and not as a representative of the individuals.

I am also sending this to Boris Kogan and the plaintiffs' counsel as well as the defendants.

Thank you for your consideration.

Respectfully submitted,
LEVISOHN BERGER LLP


Peter L. Berger

PLB:wr

Due to her weak English, within the process of her preparation for the 01.04.2011 Hearings, Anna Bove has put together the next three documents, which she'd like to forward to the Judge ahead:

1. The history of storing and transferring, by the Defendants, of information (email/chat correspondence between the parties) to Mr. Kogan.
2. The "storage device" history of email & chat correspondence between the parties
3. A list of CDs containing emails, chats and financial information that Defendants possessed... (which were provided to Mr. Kogan)

1. The history of storing and transferring, by the Defendants, of information (email/chat correspondence between the parties) to Mr. Kogan

From the Judge's decision about a hearing on 01.04.2011.

**Subject: Activity in Case 1:08-cv-03367-ARR -RER
Mikhlyn et al v. Bove et al Set Motion and R&R
Deadlines/Hearings
1/4/2011 02:00 PM in Courtroom 2E North before
Magistrate Judge Ramon E. Reyes, Jr.**

The Court will hear only those arguments concerning the defendants' alleged non-production and suppression of internet communications and financial records. The Kogan firm is ordered to appear at the hearing. The Kogan firm's appearance, however, is not in a representative capacity of the defendants.

Listen

In Mikhlin's Motion It Says:

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS AND A DEFAULT JUDGMENT

Plaintiffs respectfully submit this memorandum of law in support of their motion for sanctions against defendants pursuant to Rule 37 of the Federal Rules of Civil Procedure and a default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure.

Defendants' failure to complete their discovery obligations, despite Court orders, repeated deadline extensions, and several explicit Court warnings, calls for imposition of the strongest sanction available under Rule 37 against defendants Ana Bove and Polina Dolginov. A stern sanction is especially appropriate here because defendants did not merely obstruct discovery but materially misrepresented facts to the Court in an attempt to suppress evidence.

.....defendants have never produced any of their data in native format. See

Wertheim Declaration, Exhibit 23. On numerous subsequent occasions, Plaintiffs asked defendants to provide data, especially internet chats, in native format as well, but to no avail. See Wertheim Declaration, Exhibit 24.

Anna's Bove:

Plaintiffs and their lawyers lie again, saying that they didn't receive communications in native format.

Anna received her hard drives from Israel, as well as some files from Polina Dolginov and Mariana Tsigelman, in native format. Afterwards all of this was transferred to the Kogan firm on CD #1.

In Mikhlin's Motion It Says:

Defendants' Suppression of Key Evidence.

In a letter to the Court dated May 11, 2009, plaintiffs complained about defendants' failure to produce e-mails and internet chats.

Throughout their business relationship, the parties were in daily electronic communication, and plaintiffs produced thousands of pages of chats between and among the parties. Plaintiff even produced a small number of chats and emails between defendants Ana Bove and Polina Dolginov.

At a conference on June 18, 2009, counsel for defendants explained, for the first

time, why defendants had no emails or chats to produce.¹ According to counsel, Ana left her personal computer with the Mikhlyn's when she was evicted from their house in March 2008, so if there were any emails or chats, they were in plaintiffs' exclusive possession. Wertheim Declaration as Exhibit 13, P.6:9-23. According to counsel, Polina's computer crashed and was discarded (at some unspecified time). See Wertheim Declaration, Exhibit 13, P.10:5-17.

During her deposition, however, Ana told a completely different story about the fate of her personal computer files. She admitted that before turning her computer over to the Mikhlyns, she downloaded all of files to a laptop and wiped out the files on the computer she returned to the Mikhlyns. She also said that she turned over the hard drive from her Israeli computer to counsel and that the hard drive contained her chats with Polina as well as plaintiff Inga Mikhlyn. Finally, as for the volume of chats that should have been turned over by defendants, Ana admitted that she was, and is, in communication with Polina via chat "all the time." See Wertheim Declaration, Exhibit 20, P. 182:9-20; P.235:10 - P.236:15; 238:18 - P.240:3.

Anna's Bove:

Plaintiffs' attorneys are lying and juggling facts: AB didn't transfer her hard drive from her Israeli computer to her lawyer, but said that it's at her home. See Wertheim Declaration, Exhibit 20, P. 239:10-11;

1

In general, all emails that Mykhlyns requested and claim that we did not give, were available to them at the fusemail.com server, because that server was used by all of us prior to March 30 2008.

>>>>>>> >>

We believe that all communications that survived on our side from that period of time, was provided to Boris.

We also believe that all communications that survived on our side from March 30 2008 to August 18 2008 (lawsuit complaint filed), were provided to Boris as well.

<<<<<<<<<<

We also believe that all emails generated after the lawsuit complaint filed in August 18 2008, were provided to Boris.

We do not know what Boris did with the emails and records that we provided him.

In Mikhlin's Motion It Says:

Polina's deposition also raised serious doubts about her failure to produce chats and emails. Although Polina did experience a computer crash, Polina had a new computer quickly, though the timeline is not clear. Furthermore, Polina testified that she sent the documents retrieved from the crashed computers to Ana, so some chats and emails should have survived, particularly during the critical period preceding the open rupture of the parties' relationship in March 2008. Wertheim Declaration, Exhibit 28, P.26:7 - P.29:24; P.106:8 - P.107:10.

Anna's Bove:

All that Polina kept, she gave to Anna, and it is on the CDs that were referred

to Boris Kogan.

Below are outlined the arguments that Anna Bove has previously written in our Opposition to their Motion.

The access to abc.all@fusemail.com email server, where nearly 100% of all email correspondence of the parties was located, for all these years (e.g. before April 2008), was taken over by Plaintiffs in March 2008. Plaintiffs up to this moment hold all of this information, and we don't have access to it, which puts us, and not Plaintiffs, to a position of unfair disadvantage, since we can't use this information in our proofs against Plaintiffs.

Nevertheless, following the Court's orders, we have transferred to Plaintiffs over 25,000 emails – all that we had left. However, as regular honest citizens, we must agree that it is possible that some part of the emails, and a large part of chats, were lost due to the reasons below, that were outside of our control:

Reason-A. The very first computers, with which Defendants (Anna and Polina) started to work within the embroidery business, were obtained yet in 2001-2002. During all of this time (2001-2008), Defendants “upgraded” computers, and their software. We've been gradually replacing the non-functional hard drives, to new ones and/or larger and faster ones. Several times replacements of morally old computers took place.

Reason-B. Since 2004 through 2008 Anna Bove numerous times moved back and

forth from Israel to USA, and when doing so, Anna had changed computers on which she worked. This must have affected the survival of emails and chats.

Reason-C. In time period since about April 10-12, 2008 until the end of July 2008 (e.g. during 4 months), Defendants Anna and Polina were preparing to launch and start a new business, which launched at the end of July 2008. Due to installing the business, and the need in multiple movements of large data volumes, from one carrier to another, also a significant amount of old-times Emails and Chats could be lost.

Reason-D. Possibly, this is the main reason why we were left with not so many Chat correspondence via MSN.

Anna's Bove:

We believe that all emails generated after the lawsuit complaint filed in August 2008, were provided to Boris.

D1 - MSN Messenger doesn't save on their carriers any information. Instead, all information is stored on the user's local hard drive. (See statement of expert/manufacture of MSN)

D2 – The information is stored on the local disk only if an appropriate setup was performed. We didn't have his done much of the time while we've been corresponding, because there was nothing important there, and temporary saving was quite enough for us.(Expert opinion regarding this issue)

D3 – In MSN, once you reach a certain amount of messages, you need to delete or archive messages in order to continue saving new messages. If you choose to delete messages, the oldest messages will be removed first. Before August 2008 (when lawsuit complaint filed), we normally removed the accumulated stuff. Whatever what still remained, that was provided to Plaintiffs. (See expert opinion - Exhibit#25).

D4 - "... You can only have a record of your past Instant Messaging conversations if the sessions were saved...". (See statement of expert/manufacture of MSN – Exhibit#23)

Moreover – even if in MSN settings an auto-save of all messages is on, then anyway a part of the messages is lost, due to a known feature of MSN. Enclose examples of forum discussions of other MSN users, regarding this issue. See Exhibit#26

All of the above said explains the limited and abrupt nature of information that survived in Defendants' hands.

Despite that, we're sure that if we would provide only a few chat messages to Plaintiffs, even then all of the above-mentioned problems with MSN chats, replacement of computers and parts, changes of work place and of the business itself, would easily justify a complete absence of such chats.

The fact that Plaintiffs have a large amount of chat correspondence, and also of personal correspondence between Anna and Polina, most likely is not a norm but an exception, showing that Plaintiffs have been constantly saving it, since they've been preparing for a complete takeover the business for a long time, and did this secretly. The fact that Plaintiffs, like they personally recognize, have some personal correspondence between Anna and Polina, indicates Plaintiffs' stealing of this information.

Everything said in paragraph "Reason-D" (D1-D4), falls under the rule 37 (e), and under the fact that this happened before the litigation began.

Defendants produced (and transferred to Plaintiffs) a large amount of emails and chats – all the ones that survived.

Despite of all the reasons mentioned above, which are objective and force-major reasons of correspondence information loss, Defendants transferred to Plaintiffs a large amount of emails and chats. Here is a list of items that survived, and were produced – and it's really not that little:

.....

Anna's Bove:

Below is given a list of CDs on which are located the emails and chats, about which Plaintiffs claim that they didn't receive them. All of those CDs were

provided to Boris Kogan in September – December 2009. We've written all of this in our Opposition to their motion.

The initial CD #1 contained MSN chats that were not in their native format. However, later on Anna received her hard drives from Israel, as well as some files from Polina Dolginov and Mariana Tsigelman, in original format. All of this was transferred to the Kogan firm, for replacing that CD #1.

- That CD #1 includes all MSN correspondence that survived for 2006-2007 and 2008, that is related to Anna, Polina, the Mikhlyns, Mariana Tsigelman and various third parties.
- CD #3 includes a mix of 4,813 different emails.
- CD #6 includes 19,981 emails.
- Some of Polina's emails are on CD #3, in folder polina80@012.net.il
- Some of Polina's emails are on CD #6, in folders polina80@012.net.il, polina@fusemail.com
- Polina's "Attorney-Client-Privilege" emails are on CD #18, in folder pdolginov@yahoo.com

Defendants' Incomplete Production of Financial Records.

In Mikhlin's Motion It Says:

The Court ordered the parties to produce all financial records, whether characterized as personal or business, during the time period when the parties worked together, all business records following the dispute between the parties in

the Spring of 2008, and all of the bank records of various accounts, especially in Spain and Israel, Ana and Polina maintained before the Mikhlyns joined the business in 2004. See Wertheim Declaration, Exhibit 13, 38:3-44:3.

Although defendants' belated June 1 production did fill in some of the gaps, plaintiffs have not received the complete set (F1) of the Spanish bank accounts, anything resembling the complete set (F2) of the Israeli bank accounts, (F3) no personal financial documents from Polina Dolginov from the 2002-2004 period, (F4) no documents concerning the money transferred and used through U.S. Benefits Corporation, and (F5) no records of Ana's "international" credit/debit card.

Anna's Bove:

- F1) the complete set of the Spanish bank accounts

In reality: All of this information was transferred to Mr. Kogan in August 2009, on CD #7 "«from Anna Bove and Polina Dolginov – Spain Bank Statements»". It includes a complete set of Spain Bank Statements from January 2004 to May 2008. Namely for this period we've managed to obtain information regarding both the Checking Account и Saving Account.

As Polina specified on her deposition, we no longer have access to these accounts, and in order for the Spanish bank to respond to communications, it's necessary to deposit money to the account, which we don't have. Therefore, it's impossible to obtain data for 2002-2003.

Here are the responses that we've given in our Opposition to their Motions:

There was only one account in Spanish bank, with two sub-accounts (savings + current), which belonged to both Anna and Polina. This account was opened by a recommendation letter from our Israeli bank. All documents of this account that were available to us, e.g. the ones that we've managed to obtain from this bank, were transferred to Plaintiffs on CD #7.

The data of 2004 wasn't available in the bank, and our inquiries were ignored, obviously because there is no money on this account, for a long time. Perhaps at personal presence the bank would have given out these documents, but we couldn't go to Spain. We've offered Plaintiffs to send a subpoena to this bank, but we don't know if they received it or not. We've already explained all of this to Plaintiffs, but despite this, Plaintiffs' attorneys keep endlessly demanding these documents from us. While we don't have them, and they aren't available to us.

- F2) anything resembling the complete set of the Israeli bank accounts,

F2.1 – Anna Bove's Israeli “Bank Leumi” statements since 2006 (the year of account opening) – located on CD #5.2. «from Anna Bove and Polina Dolginov – AB Bank»

F2.2 – Anna's and Polinas' joint Israeli “Bank Hapoalim” account - the bank demanded a lot of money for such statements.

Anna's account in Israeli Bank Leumi was open between 2006-2009. Anna provided the information of this account on CD #5.2.

Polina's Israeli Bank Statements

In spring-summer 2009 the Israeli bank wanted 12 shekels for one page. There were several years needed. Polina would have to pay for this significant money, which aren't available. We told Boris Kogan about that, and we were advised: We don't have to provide documents that we don't have. No inquiry with the bank is necessary. If Mr. Wertheim wants the missing docs, he can subpoena the bank.

- Polina's account in Israeli "Discount Bank" was opened in 2006. Just like Polina mentioned on her Deposition, it has been practically inactive - used only a couple of times, years ago. Polina never used to keep these bank statements.

- The account in "Bank Hapoalim" belongs to Anna and Polina since 2002. Bank statements weren't kept as well.

We provided our bank account details for sending a subpoena (sent them to Mr. Boris Kogan).

- F3) no personal financial documents from Polina Dolginov from the 2002-2004 period,

PD – (4) Polina normally doesn't keep the incoming statements, therefore everything should be ordered from the bank, and pay for this significant money, which aren't available.

- F4) - no documents concerning the money transferred and used through U.S. Benefits Corporation,

As Polina testified on her deposition, this wasn't a bank, it was a company offering a service. It never sent any statements, and later on just closed our accounts (in or about 2005). We didn't have any touch with them afterwards, and we just don't have any papers from them. It was an online interface.

Here is the response that we've given in our Opposition to their Motion:

US Benefits Corporation. Plaintiffs call this a credit card account. In reality, it was just a pre-paid card service. As we understand – this was not a real bank account, but just a service. They sent us neither any reports, nor any statements. As far as we remember, accounts of this service were closed in 2005, and we didn't manage to obtain any data from there. We have informed Mr. Kogan about all this, and suggested Plaintiffs to send a subpoena. We're sure that Plaintiffs have sent a subpoena, since we've seen this subpoena. Nevertheless, Plaintiffs' attorneys constantly keep demanding this information, and calling it “credit card account”.

Вот ответ который мы дали в нашем Opposition на их Motions

Here are the responses that we've given in our Opposition to their Motions.
Account in Bank of America – belongs to Anna. Opened in 2008. We've given everything that was requested at that moment, on CD #16.

- F5) no records of Ana's "international" credit/debit card.

Anna's Spanish "4B" bank card never received any statements, that's why they weren't provided. No detailed records were also available via online banking - only the records that we've already provided. That's how the Spanish bank worked back then.

Here are the responses that we've given in our Opposition to their Motions. It should be noted that the system of credit/debit cards in Israel and in Spain substantially differs from credit system in USA. The credits that are given to a person, are given via his current bank account, and all transactions are performed via this same account. Therefore, an account in regular bank is combined with a credit account (if such one exists), and all total transactions are visible in reports of the usual bank account. In other words, there is no separate account number of a credit card.

But we were advised that we do not need to send out for documents that we do not have. No inquiry with the bank is necessary. If Mr. Wertheim wants the missing docs, he can subpoena the bank.

In Mikhlin's Motion It Says:

Defendants Have Suppressed and Withheld Critical Evidence.

There are no written contracts between the parties or corporate bylaws or other

such formal documents to guide the trier of fact about the parties' past legal relationship or the proper division of rights and assets going forward. There is however a wealth of information about the parties' course of dealing during their multi-year business relationship. The parties were in contact via internet chat or e-mail every day. Early on in discovery, plaintiffs produced thousands of pages of such chats and e-mails. As already noted, based on the false excuses offered in open Court on June 18, 2009, defendants produced almost no intra-party communications.

Anna's Bove:

Doesn't this look very odd that among all of these thousands of pages including many intra-party emails that were provided by Plaintiffs, there is not a single confirmation or even a hint about partnership between 4 people? In fact, if this really were a partnership of 4, then the Partners would have said at least something about this to all the four, or would somehow uncover themselves namely as Business Partners. On what basis do Plaintiffs claim that such conversations took place, but only between Anna and Polina, and not between all four people?)

2. The “storage device” history of email & chat correspondence between the parties

Nobody can deny that after Anna Bove was thrown out of the house on March 30, 2008:

- The access to the servers where all email correspondence between the parties, for all the long years, was stored, remained solely in the hands of Plaintiffs. Namely Plaintiffs denied Defendants of this access.
- All email and chat correspondence, which for different reasons survived on Defendants' side, was located only on four computers.

Comp #1 - Personal computer of Polina;

This computer was acquired yet in 2001. In 2007-2008 it malfunctioned often. At the end of 2008 it often got turned on only from the second or third attempt. At the beginning of 2009 it has broken up completely, and a lot of information was lost. Polina had to purchase a new computer. All that survived from whatever Plaintiffs demanded (correspondence between parties), was copied by Polina to several CDs and on March 15, 2009 was mailed to USA, to Alexandr Sakirski. Alex has kept the receipt and the packing envelope. Later on Anna copied this information, and provided to Mr. Kogan (see below "A list of CDs containing emails, chats and financial information that Defendants possessed...").

Computer #2 - Israeli computer of Anna Bove;

The hard drives were brought to USA in summer 2009. All of the emails and chats that were related to Plaintiffs' inquiries, that survived on those HDs, are burnt to CD., and provided to Mr. Kogan. (see below "A list of CDs containing emails, chats and financial information that Defendants possessed...").

Computer #3 - American work computer of Anna Bove.

Anna took it with her when Plaintiffs have forced Anna to leave their house on March 30, 2008. Anna returned this computer to Plaintiffs within just a few days, e.g. in the first days of April 2008.

Prior to returning this computer to Plaintiffs, Anna performed a full Backup of all the information that she needed to continue with her embroidery business. Anna transferred all of this information to her personal laptop. Anna copied the email correspondence with suppliers and clients, and didn't copy all the correspondence between the parties, and for certain didn't copy any chat correspondence.

Computer #4 - Personal laptop of Anna bove.

While being in USA, Anna very rarely used her laptop for email correspondence and chats among the parties, since the laptop was very slow. Major part of such correspondence was performed from her work computer, and remained there.

In summer 2008 the HD stopped loading and being read, and was replaced to a newer one, of larger size. All that remained on it, was burnt to different CDs and provided to Mr. Boris Kogan

(see below "A list of CDs containing emails, chats and financial information that Defendants possessed...").

From the above outlined in section "The "storage device" history....", it becomes clear that the Pro Se Defendants just didn't have access to any other information about emails and chats between the parties, except of the one that Anna Bove has burnt to various CDs and transferred to Mr. Boris Kogan (see below "A list of CDs containing emails, chats and financial information that Defendants possessed...").

3.A list of CDs containing emails, chats and financial information that Defendants possessed, which have been provided to Mr. Boris Kogan, for giving to Plaintiffs.

Disk (created on 18.19.2009), with label:

CD 1

1. ABC Trademark
2. Anna Bove & Anna Bove Collections
3. Ebay company name change
4. Correspondence with lawyer Inna Fershteyn
5. Ebay store ABC-embroidery-designs
6. Correspondence with Godaddy
7. Correspondence with Ebay
8. Correspondence with National Arbitration Forum
9. MSN History
10. Inga Mikhlyn Font Commissions
11. Check

Disk (created on 18.09.2009), with label:

CD 2

1. Correspondence with lawyer Inna Fershteyn
2. MSN History (part)
3. Records of investments
4. Sent to eBay

Disk (created on 09.24.2009), with label:

CD 3

1. abcembro@fusemail
2. annabove@bezeqint.net
3. anna997@fusemail
4. ladydin@fusemail

5. polina80@012.net.il
6. vadinga@fusemail.com

Disk (created on 08.09.2009), with label:

CD 4

1. Correspondence with Godaddy
2. Correspondence with National Arbitration Forum

Disk (created on 08.09.2009), with label:

CD 5

1. Anna Bove & Anna Bove Collections, Inc on Mikhlyn's sites
2. Mikhlyn's Newsletters & sites
3. Same content

Disk (created on 09.24.2009), with label:

CD 6

EMAILS - part 2

1. abc.all@fusemail.com 2, 3
2. abcmbro@fusemail.com 2, 3
3. polina80@012.net.il 2
4. polina@fusemail.com 2

Disk (created on 08.09.2009), with label:

CD 7

Work with digitizers (emails without attachments)

Disk (created on 03.19.2009), with label:

From Anna Bove And Polina Dolginov

1. abc.all@fusemail.com
2. abcembro@fusemail.com
3. annabove@bezeqint.net
4. annb997@fusemail.com
5. ladydin@fusemail.com
6. polina80@012.net.il
7. polina@fusemail.com
8. vadinga@fusemail.com
9. Correspondence with lawyer Inna Fershteyn
10. MSN History
11. Received from Godaddy
12. Sent to Ebay
13. Sent to Godaddy
14. Sent to National Arbitration Forum
15. Work with digitizers

Disk (created on 08.02.2009), with label:

From Anna Bove And Polina Dolginov

3

Income & Supplies

Disk (created on 08.19.2009), with label:

From Anna Bove And Polina Dolginov

5.2

AB Bank

Disk (created on 07.30.2009), with label:

From Anna Bove and Polina Dolginov

7

Spain Bank Statements

Disk (created on 07.03.2009), with label:

From Anna Bove and Polina Dolginov

8

AB Tax Report (for exchange)

Disk (created on 01.25.2010), with label:

From Anna Bove And Polina Dolginov

11

Other emails

Disk (created on 01.25.2010), with label:

From Anna Bove And Polina Dolginov

16

AB US Bank, PP, Visa