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January 7, 2011

VIA ECF
Honorable Ramon E. Reyes, Jr.
United States Magistrate Judge
United States District Court
225 Cadman Plaza East
Brooklyn, NY 11201

Re: **Vadim Mikhlyn, Inga Mikhlyn and ABC All Consulting, Inc. v. Ana Bove, Polina Dolginov, *et al.***
Docket No.: 08 CIV. 3367

Dear Judge Reyes:

We are writing to request that the Court issue a Report and Recommendation regarding the reopening of discovery, or regarding plaintiffs' sanctions motion before any additional discovery takes place, so that this matter can be addressed promptly by Judge Ross before our clients incur the significant additional expenses now confronting them.

When the defendants' attorneys were allowed to withdraw from the case, one thing was certain: the Court was standing by the last of several warnings and final orders regarding the completion of discovery. The Court gave one final deadline for outgoing counsel to produce any additional responsive documents, to be followed by our motion for sanctions. The idea was to give defendants one final opportunity to narrow the scope of the prospective sanctions motion. That final opportunity was May 26, 2010 to be followed by the filing of our sanctions motion no later than June 4, 2010.

The Court's instructions at the May 11th hearing were unambiguous:

> The withdrawal is not going to stop the parties' discovery obligations. What it will do is require the defendants to find another lawyer if they want to

> continue to defend the case and it will, since the discovery period is formally closed, I'm going to entertain, whether it's directed to me or to Judge Ross, a motion for appropriate relief. And you're going to have to wait until you get whatever remaining discovery is in the hands of the Kogan firm. So once you get that you say okay, we don't have everything, we're going to make our motion. And the motion has to be, since notice has been provided, I'm not so concerned about it being made now. I had forgotten that I had given notice to the defendants that this is a possibility. But the motion must be very, very detailed. It says, you know, these are the items that were ordered produced, they have not been produced to date. They are necessary for us to prosecute this case. The Judge gave them a deadline to do it. It's passed. They were warned that if they didn't -- both sides were warned that if discovery was not produced, the Court would entertain motions for appropriate relief under 37(b)(2)(a) which provides -- well, that's the relief we want. So that's what we're going to do.

See Transcript of Pretrial Conference held on May 11, 2010 (Docket No. 105), P. 8:22 – P. 9:17.

This echoed the Court's earlier Order in docket entry:

> ORDER granting 100 Motion for Extension of Time to Complete Discovery. Good cause having been shown, the discovery period is extended an additional 60 days. In light of the protracted nature of this case, however, NO FURTHER EXTENSIONS WILL BE PERMITTED. The Court notes that this is the second such warning the Court has given. If the parties do not completely satisfy their respective discovery obligations by 5/7/10, the Court will entertain a motion for appropriate relief pursuant to FRCP 37(b)(2)(A). If appropriate, the Court will issue a report and recommendation to the assigned district judge recommending that the action be dismissed or a default judgment be entered against defendants.

> Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/6/2010. (Reyes, Ramon) (Entered: 03/06/2010)

In reliance upon the Court's unambiguous direction and orders, plaintiffs filed a legally and factually substantial motion for sanctions that, to date, has cost in excess of $30,000.00.

If Your Honor was inclined to show further patience with defendants and attempt to salvage discovery, we respectfully submit that the time to do so was before our clients' expended over $30,000.00 (after a substantial discount) in reliance on the Court's orders. The Court's rulings on January 4, 2011 are irreconcilable with the schedule the Court set on May 11, 2010, which plaintiffs rightfully relied on to their detriment.

Although, unlike defendants, we have been disinclined, to date, to "cry poverty," our clients want you to understand the situation they are in. This lawsuit, and the hostile actions of defendants that precipitated it, have been a financial disaster for them. They had to take out a $57,000.00 home equity loan at the beginning of the case, and later had to borrow an additional $100,000.00 to keep it going. They have mortgages to pay and a child in college. In contrast, the pro se defendants are no longer paying any fees.[1]

Yet plaintiffs are now painfully surprised to find that they are not only confronted with the expense of continuing discovery (after having spent a small fortune throughout the case just getting defendants to participate in discovery), but are also saddled with new burdens flowing in one way or another from defendants' conduct - the payment of supposed bank fees, even though defendants never reimbursed us for such costs and never cited such costs when they were first ordered to obtain such documents in 2009; the redaction of a breathtaking volume of QuickBooks records, originally produced under the assurance of "attorneys eyes" protection, because defendants parted with their attorneys; the unknown expense of hiring computer experts to review their hard drives because of our inability to obtain defendants' indisputably substantial internal email communications, even though defendants never

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[1] The Berger firm has made it clear that they reappeared to avoid a default judgment against the corporate defendants, and plan to do as little work as possible which, incidentally, violates Your Honor's Order that "If I dismiss, as I'm inclined to do, grant the withdrawal of Mr. Binson and Mr. Kogan, Mr. Berger is the one who's going to have to pick the case up. If he's not willing to do that, then I'm going to have to dismiss him too. I can't have a lawyer sitting on a case only for some things and not for others." See May 11, 2010 transcript, P.2:15-20.

once questioned the integrity of our email production.

At this point, we believe the Court's repeated patience with, and forgiveness of, defendants' non-compliance with Court Orders has crossed the line into punishment of the plaintiffs.

In fairness to us, we made it clear on the record at the May 11th conference that if plaintiffs were going to be pressed for more discovery after the long history of non-compliance and obstruction by defendants, and after the last of many final discovery deadlines, we would be appealing to Judge Ross.

Accordingly, we request that the Court issue a Report and Recommendation on the reopening of discovery, or on the plaintiff's Rule 37 motion, and hold discovery in abeyance until we have had a chance to raise the issue with Judge Ross.

Respectfully submitted,

Daniel Akselrod

DA/st

cc: Ms. Ana Bove (via e-mail)
Ms. Polina Dolginov (via e-mail)
Peter L. Berger, Esq. (via e-mail)