Ana Bove, Polina Dolginov (pro se Defendants)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VADIM MIKHLYN, INGA MIKHLYN, AND ABC ALL CONSULTING, INC., Plaintiffs, v. ANA BOVE, POLINA DOLGINOV, ANNA BOVE COMPANY, LLC, ANNA BOVE COLLECTIONS INC., AND ANNA BOVE EMBROIDERY SUPPLIES, INC, Defendants.	Index No. CV 08 3367 J. ROSS M. J. REYES
ANA BOVE, ANNA BOVE COMPANY, LLC, AND ANNA BOVE EMBROIDERY SUPPLIES, INC, Counter-Plaintiffs, v. VADIM MIKHLYN, INGA MIKHLYN, AND ABC ALL CONSULTING, INC., Counter-Defendants.	OBJECTION TO REPORT AND RECOMMENDATION OF MAGISTRATE REYES

This letter is being respectfully submitted by pro-se defendants Ana Bove and Polina Dolginov in response to the second R&R of Honorable Magistrate Judge Ramon E. Reyes (Docket #227), filed on 08.03.11. The reason of our current filing is to reverse or lessen the heavy $42,000 penalty, which was imposed upon pro se Defendants, and which can basically cause Defendants to never reach the trial, and never get their stolen assets back. Below we outline several major reasons why we think that the amount of penalty is excessive, and also fatal for the Defendants.

In addition to that, some new facts were discovered several days ago. It appeared that Plaintiffs have been willfully destroying, concealing and making up new financial data related to the case on an intentional and ongoing basis. See Mr. Berger's letter on behalf of the corporate defendants of this same above-referenced litigation, filed simultaneously with pro se letter. To save the Court's time, pro se Defendants incorporate Mr. Berger's statements as their own. We won't repeat all details of these newly discovered facts here. We will just say that had Honorable Judge Reyes seen what Plaintiffs

have deliberately done, we doubt that he would impose such heavy fine upon Defendants, for a much smaller infringement, which was done unintentionally and was basically an accident, and a result of poor attorney work.

Below we outline several reasons why Defendants believe that such a heavy fine of $42,000 is inappropriate in current circumstances.

Reason #1 – Conclusions were drawn based opon a single email written by Alex Sakirski. This email was confusingly written, and also poorly translated to English. Originally, this letter was protected by Attorney-Client privilege, which was waived.

After the privilege got removed, Honorable Judge Reyes has incorrectly interpreted the confusing text of this email, dated 02.21.2010 ("2/21/10 Letter"), sent by Alex Sakirski to Mr. Kogan, Defendants' former attorney, regarding 18,000 emails. See Exhibit #1 with 2/21/10 Letter, point #4 (a), (b), (c).

See interpretation and conclusions of Judge Reyes in part B of doc.227:

> *"B. Partial Reconsideration of Failure to Produce» . «A document dated February 21, 2010 from Alex Sakirski (president of the corporate defendants) to Kogan ("2/21/10 Letter") references Skype chats not previously produced or mentioned, over 18,000 post-April 2008 emails not produced some allegedly containing "trade secrets,""*

Defendants' explanation:

- We'd like to notice that at the time when Alex sent that 2/21/10 Letter, and until 05/10/2010, Mr. Kogan was still Defendants' attorney.

At that time, Defendants personally couldn't give anything to Plaintiffs. Except of that, the decision to give or not to give to Plaintiffs any documents, were made solely by Mr. Kogan's office. Defendants hope that this confirms that all expressions in this email like "we are already to give them," or "we should not give … to Mikhlyns" and other similar ones, are a result of bad English translation. In reality they relate to what Mr. Kogan's law clerk Yossi Abeshouse told us earlier. These expressions don't mean that we gave or didn't give something to Plaintiffs – in fact, we personally didn't give them anything at all before Mr. Kogan left the case.

The expression "that you, Boris, will probably need to look through to determine it's privileges…", which was incorrectly placed in the beginning of point "Fifth", doesn't relate to all documents specified in this point. Below we will show that the number "65,700 documents"

includes in itself only a small part (0.5 – 1%) of attorney-client-privileged documents, therefore Mr. Kogan shouldn't have looked through all of them for privileges. The below-shown email from Alex Sakirski, dated 02.25.2010, completely confirms this.

Such expressions like “We have prepared…” meant that these emails were already in Mr. Kogan's office.

Due to the outlined above, we declare that Honorable Judge Reyes, based on our incorrect expressions in this email, made some incorrect conclusions, which obviously affected His Honor's decision regarding the heavy fine.

Reason #2 – The assumption that Defendants withheld something discoverable was based upon the same 2/21/10 Letter of Alex, which was sent to Defendants' former attorney (Mr. Kogan) long before discovery deadline:

In February 2010 (the time when 2/21/10 Letter was written by Alex), discovery wasn't over yet, and Defendants still had plenty of time until discovery deadline (May-7-2010), to provide any documents to Kogan's office. Therefore the 10% of documents which we hadn't provided to Kogan's office by 2/21/10, can't serve as basis for proving that Defendants concealed or withheld something.

Earlier we've stated that 90% of discovery documents were given away by us yet in Jan-2010, and some in February and March 2010, and that was true. We also explained that the last several documents arrived to Kogan's office on May 3-6 2010, e.g. within the last days of discovery, and there wasn't any infringement about that.

Reason #3 – The Court ignored Mr. Kogan's admission that Kogan firm willfully withheld a large amount of Defendants' discovery documents, without Defendants' knowledge. In reality, Mr. Kogan's ongoing behavior was at least the main cause for Plaintiffs' sanctions motion:

In “Kogan Firm Response to Defendants Allegations” Mr. Kogan admitted by himself that he delayed the entire production, allegedly because we didn't provide something. However, the Court didn't take into account this admission in deliberate, baseless and prolonged withholding of many documents in Kogan's office (many documents were withheld by Mr. Kogan since January 2010 through June 1, 2010). We feel that the Court, when making it's decision, didn't take into account this misconduct of Mr. Kogan, which basically was the reason for most of Plaintiffs' expenses. And therefore, the Court's decision about so much of the sanctions fine to be paid by Defendants and so little by their ex-counsel, the Kogan firm, prejudiced Defendants. Therefore, we respectfully request to reconsider this proportion.

See doc.201, par.38 - (Kogan Firm Response to Defendants Allegations), which we present it here:
”38. At the time that I had moved to be relieved as counsel, I had been holding on to some discovery materials provided by Defendants and obtained through subpoenas, and did not want to provide “filler material” instead of documents which would be responsive to the core of Plaintiffs’ demands.”

Reason #4 – Plaintiffs failed to cooperate, in order to get from Defendants any Discovery CDs that the Kogan firm might have lost. The Court didn't interfere either.

On 01.04.11 Defendants offered Plaintiffs' attorneys to verify the lists of CDs which they received from Kogan's office. Plaintiffs refused to verify this, because this verification would reveal that Plaintiffs received 49,000 emails, among which were CD#11 and CD#19 and others, thus all of these “over 18,000 post-April 2008 emails not produced some allegedly containing “trade secrets,””, all of them were provided to Mr. Kogan's office yet in January 2010. Defendants don't know if Mr. Kogan was withholding this information until June 1, 2010 too, together with the rest of documents, or perhaps he provided this to Plaintiffs earlier, before 02.21.2010. The date of these CDs' creation is 01.24.2010.

Except of the badly written and badly translated 02/21/10 Letter of Alex, Mr. Kogan's office didn't provide even a single document listing what he received from Defendants, and what exactly out of that he gave to Plaintiffs. In fact, Mr. Kogan is an attorney, he must have kept a record of documents received from his clients, and he surely must have kept a record of items which he provided to Plaintiffs. However, none of such documents was provided to the Court, to prove any fault of Defendants.

Plaintiffs also never provided any document saying which CDs exactly they received from Mr. Kogan, and when they received them. There are just naked, multiple statements that Plaintiffs under-received something, or received little.

And if the Court would have ordered all 3 parties to provide such documents, then it would be easy to determine who is not telling the truth here.

For example, in R&R (doc 227) Honorable Judge Reyes expressed some concern regarding alleged lack of correspondence between Defendants (dated after April 2008, but before the case got filed). This is easily explained. The beginning of the case nearly matched the start of work in the new business of Ana and Alex. Before that date, Ana

didn't have her own work place and Internet connection. For a while Ana was living in the house of Alex, and then very near to Alex, and they didn't have a need to correspond. Polina refused to continue the business further because she trusted nobody any longer. She constantly resided in Israel and didn't intend to file to Court in USA, therefore before Mikhlyns' complaint filing there wasn't a need in such conversations. Whatever existed, was burnt to CD #3 and CD #6.

Judge Reyes suggested Plaintiffs to examine our computers, to determine whether we have deleted anything from the computers, but Plaintiffs refused and didn't do this.

Then, from where is it known for certain that we deleted or concealed documents? The only document which served as basis for conclusions about concealing and deleting, was the 02.21.10 email from Alex. At the same time, Alex explains what exactly he meant, and why he has written like that, and that what he intended to say was not what Judge Reyes understood, but a result of bad translation or mistakes.

Recently Ana has done a large piece of work, and re-checked all information which we should have provided to Plaintiffs. Due to Plaintiffs' refusal to check whether there exist any CDs which they didn't receive (which they clearly don't really need), Ana has burnt and provided to Plaintiffs all 84 CDs which were earlier provided to Mr. Kogan.

Reason #5 – Another inaccurately set forth statement in 02/21/10 Letter cause Honorable Judge Reyes to assume that Defendants have 65,700 unproduced correspondence between them. This is incorrect.

Honorable Judge Reyes incorrectly interpreted a confusing text of an email sent by Alex Sakirski to Mr. Kogan on 02.21.2010, regarding an existence of 65,700 documents, which allegedly are attorney-client privilege.
For simplicity, we'll note that that email said “Those documents were received …. Writing and sending …. Regarding this case. ” See Exhibit #1 (email from Alex of 02.21.2010).

Here is the interpretation and conclusions of Judge Reyes, from doc 227 part “B”:

This way Judge Reyes has mistakenly interpreted the text of 02/21/2010 Letter as a statement about an existence of 65,700, which are ostensibly attorney-client privileged.

In reality, this calculation was done by Mr. Kogan's request. Mr. Kogan asked Alex to count up absolutely all documents on all of our

computers, which are in any way related to the case.

Among these 65,700 was everything, in any way relating to the case in Defendant understanding: Plaintiffs' claims, their copies, translations and analysis, all documents received by subpoenas (of Plaintiffs and Defendants), e.g. all financial papers of Plaintiffs and Defendants (bank statements, copies of checks etc etc. E.g. everything that in any way related to the case, with multiple copies and translations. In fact, Mr. Kogan requested Alex to count all docs on all of our computers.

In reality, since April 2008 until the date of this email about 23 months passed, which total around 700 days. Thus, in average, within 1 day 93 documents should have been written and received by Defendants, to make attorney-client privileged the “65,700 internal after-case correspondence” assumption true. And this is considering the facts that Anna was working nearly alone in the embroidery business for 12-15 hours a day, Polina was responding to customer's emails and working on another job, and Alex was busy with stock market at list 7 hours a day.

Who, and for what purpose, created such an abundance of documents? Our correspondence with about 15,000 of clients is a little over 13,000 letters for all this years. In reality there are a bit over 4000 such attorney-client privileged documents. If we realize this difference, then Judge Reyes's conclusions may be very different.

To make this more clear, we'd like to explain that the documents which we received were in English, and they should have been translated. To make the translation task easier, we used to scan them in text format. However, on the computer (of Alex) where the scanner which could scan into text (for auto translating) was installed, each page had to be scanned as separate document (our software didn't allow otherwise). This also caused a growth in the number of documents on our computers. Then these scans were sent to Anna and Polina, since at that time only Alex could scan into text format.

In next email from Alex see exhibit #2 (dated February 25, 2010 06:35 AM) Defendants offer to Mr. Kogan to come to his office for a few hours, and define the privileges of all documents, 90% of which Defendants had already provided earlier to Mr. Kogan's office. If the conversation would be about 65,700 documents, then how could their privileges be determined within several hours?

Except of that, it is clear from this email that in the previous email of Alex (the 02/21/10 Letter) the conversation was not about discovery documents that should be given to Plaintiffs, but about “....a large amount of documents, located on our computers”. Within the total amount of 65,700 was included everything that related to

the case in Defendants' understanding: Plaintiffs' claims, their copies, translations and analysis, all documents received by subpoenas (of Plaintiffs and Defendants), e.g. all financial papers of Plaintiffs and Defendants (bank statements, copies of checks etc. E.g. everything that in any way related to the case, with multiple copies and translations. In fact, Mr. Kogan requested Alex to count up all documents on all of our computers. *«...In last email (that specifies a large amount of documents, located on our computers),...»*

-----Original Message-----
From: AnnaBoveEmbroidery.com [mailto:support@annaboveembroidery.com]
Sent: Thursday, February 25, 2010 06:35 AM
To: mk@boriskogan.com
Cc: 'Boris Kogan'
Subject: about Russian papers - Update
02.24.10.
Marina, Boris, hello!
In last email (that specifies a large amount of documents, located on our computers), I forgot to say that 90% of the documents in Russian language has English translations, and was once sent to you, since they are materials of our case.
Except of that, there are many versions of the same documents there (on different stages of their writing), before they were sent to you. I think that if we (I and Anna) will sit together with you (Marina or Boris) to look through them, with the purpose of determining their Privileges, this may take not so much time at all. In fact, the privileges of many of them may be determined just by the name, e.g. even without opening.
Alex
==========

Reason #6 – Defendants were never informed about any need to maintain duplicate copies of their data:

Regarding re-installation of Skype in the beginning of 2009, Mr. Kogan never explained us that we are responsible to save information on another carrier, or otherwise. We realized that we shouldn't delete or conceal, but we didn't know that we are responsible to take care and preserve in any situation.

Mr. Kogan explained us that if something disappeared not due to our plan, and we didn't expect and didn't want this, then this isn't an infringement.
Therefore, when there appeared problems with Skype, and a threat of financial losses after Skype freezing in Alexe's office, the decision about Skype was made considering the forced circumstances which didn't depend on us, and also based on a strong belief that the Skype by itself stores backs up all info, and we will lose nothing. In

reality it appeared that Skype didn't save anything when reinstalling. Later it also appeared that in 2009 the Skype saved information for only a limited period of time. So a special system would be required to somehow back it up on regular basis, to prevent the program from deleting it's own old data.

Reason #7 – Defendants were generally misrepresented by their attorney Mr. Kogan, who failed to properly advise and educate Defendants about their ongoing discovery obligations, and about other discovery matters, including Court Orders.

Mr. Kogan never informed the now pro se Defendants, Ana and Polina, that there are any serious issues with discovery. Defendants have been asking Mr. Kogan questions, but very rarely received any answers. In fact, had Mr. Kogan informed us in timely manner what we must do, and when, we would have never lost those Skype messages, because we always used to carefully follow what our attorneys say.

Reason #8 – Mr. Kogan used to ignore Defendants' emails, he very rarely talked to Ana, and never talked to Polina, who is in Israel (with a single exception of Polina's deposition preparation, which took an hour or so).

Defendants weren't properly informed about what they should do, and how. Mr. Kogan didn't use to instruct them properly by phone or email, or via any other direct mean. This fact is confirmed by the complete lack of any written advice regarding discovery from Kogan firm. Defendants were forced to guess most of the time, what should be done, how, and even when. Despite these obstacles and Mr. Kogan's unresponsiveness, Defendants produced all they were told to produce, and did this in timely manner, before discovery deadline.

Here, we don't intend to shift any blame on Mr. Kogan, but we do ask the Court to recognize realities of what happened, and the fact that we were without proper representation even when Mr. Kogan was officially in the case. If anything was done by us incorrectly, it certainly wasn't intentional.

Reason #9 – The Skype chats which Defendants lost, were of NO BENEFIT WHATSOEVER to Plaintiffs.

As can be seen from other Skype messages which we produced on CD#21, we communicated between ourselves by voice most of the time. In Skype text, we count say just something like “hey, are you here?”. The rest was exchange of copies of correspondence to and from our attorneys (including drafts and translations of this correspondence), which are privileged. See the Skype chats that survived, which we provided to Mr. Kogan on 03.02.10.

Reason #10 - Plaintiffs' Allegations that we didn't provide them a privilege log, are doubtful.

Since we never received any privilege log from Plaintiffs themselves, we assume that they had some sort of arrangement with Mr. Kogan, saying that both parties could skip the trouble of creating this log. But now Plaintiffs are trying to present that we must have done this, and didn't do. This is most probably plain incorrect. And we did provide our Attorney-Client correspondence to Mr. Kogan, in timely manner.

CONCLUSION

Defendants respectfully request the Court to re-consider the harsh confiscatory penalty which was imposed on Defendants for, in the very worst case, a mere misunderstanding on their part. And especially in light of Plaintiffs' misbehaviour, which is absolutely outrageous, to say the least. It's just not fair to punish Defendants so much and take away their chance to reach the Court, while at the same time Plaintiffs behaved a thousand times worse during discovery, stole so much of Defendants' assets, and now escape unpunished.

And if the Court will choose to accept the recommendation of Honorable Judge Reyes, we respectfully request that no judgment be entered until a trial on the merits is concluded, and a decision on the non-jury trial is rendered.

Being duly sworn, we declare under penalty of perjury that all factual allegations contained herein are true and correct, to the best of our knowledge.

Ana Bove Polina Dolginov Alex Sakirski

Thank you for your consideration!
Respectfully submitted pro-se defendants,

Ana Bove Polina Dolginov

08/17/2011
Date