

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIKHLYN, et al.,	* Case No. 08-CV-03367 (CPS)
	*
Plaintiffs,	* Brooklyn, New York
	* June 18, 2009
v.	* 10:40 a.m.
	*
BOVE, et al.,	*
	*
Defendants.	*
	*
* * * * *	*

TRANSCRIPT OF CIVIL CAUSE FOR PRETRIAL CONFERENCE
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: DANIEL AKSELROD, ESQ.
ERIC WERTHEIM, ESQ.
Van Mandel P.C.
80 Wall Street, Suite 1115
New York, NY 10005

For the Defendants: BORIS KOGAN, ESQ.
Boris Kogan & Associates
277 Broadway, Suite 701
New York, NY 10007

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

Fiore Reporting and Transcription Service, Inc.
67Elaine Drive
Shelton, Connecticut 06484 (203)929-9992

1 (Proceedings commenced at 10:40 a.m.)

2 MR. AKSELROD: -- that we initially just let slip
3 through the cracks, too.

4 THE COURT: Okay.

5 MR. AKSELROD: That was an issue that Mr. Kogan
6 had raised.

7 THE COURT: Okay. Let's --

8 MR. AKSELROD: But --

9 MR. KOGAN: Your Honor, there are some outstanding
10 issues that --

11 MR. AKSELROD: Yes.

12 MR. KOGAN: -- we could probably resolve now, but
13 -- and there are some issues that we would -- I think a
14 conversation might --

15 THE COURT: Okay.

16 MR. KOGAN: -- might help and --

17 MR. AKSELROD: Great.

18 MR. KOGAN: -- one -- if I may begin putting some
19 issues on the agenda that we could resolve today --

20 THE COURT: Sure.

21 MR. KOGAN: -- if that's okay?

22 THE COURT: I was -- what I was going to do is go
23 one by one and say what are your outstanding issues and what
24 are your outstanding issues. Let's work through them, get
25 them done so we can tee this case up for Judge Sifton to

1 decide.

2 MR. AKSELROD: Your Honor, I believe there are
3 three broad categories of documents that are important and
4 in contention that are an issue between us.

5 One has to do with communications between and
6 among the parties, and in particular, e-communications; that
7 is, chats and emails. That would be communications between
8 the sides during the course of their business relation and I
9 guess between each side meaning my client -- my clients who
10 are husband and wife, between them, and between Ana Bove and
11 Polina, the individuals on the two sides of the cases.

12 THE COURT: Your clients were talking by email and
13 chat?

14 MR. AKSELROD: Well, the reason why there's a
15 great deal of chat -- no, not with --

16 THE COURT: Don't they --

17 MR. AKSELROD: -- not so much --

18 THE COURT: Okay.

19 MR. AKSELROD: -- with each other.

20 THE COURT: All right.

21 MR. AKSELROD: I mean, that's what it's come down
22 to; people --

23 THE COURT: Okay.

24 MR. AKSELROD: -- sitting next to each other
25 writing each other emails, but not so much between them, but

1 there was a regular course of chat and email principally
2 because Polina is in Israel.

3 So obviously they're not getting on the phone to
4 Israel every day and spending the money, so there's kind of
5 this group discussions that were going on every day between
6 and among the various parties on the computer.

7 THE COURT: Emails shouldn't be a problem. I
8 mean, you'd think that you could -- I don't know what the
9 retention policy is of their email providers, but you should
10 be able to go back as far as you can --

11 MR. AKSELROD: Well, let me --

12 THE COURT: -- and get them produced, but chats I
13 don't know.

14 MR. AKSELROD: Let me contrast the productions.
15 We produced about, I think, 1,500 pages of chats that
16 involve some combination of our people and their people --

17 THE COURT: How do you get chats?

18 MR. AKSELROD: They're on chat -- chat is like
19 real time discussion; MSN chat, where people are actually --

20 THE COURT: And they keep -- MSN keeps --

21 MR. AKSELROD: Well, it's on your -- it's from our
22 computer. I don't think --

23 THE COURT: Oh.

24 MR. AKSELROD: -- they went to MSN. It just -- it
25 records. There's a log that's created. It becomes data on

1 your computer, just like other things. Okay?

2 THE COURT: Okay.

3 MR. AKSELROD: We got that from our clients. We
4 produced it before we even reviewed it. We also produced
5 several hundred emails between my individual clients. They
6 produced, I think, four pages of chats and no emails between
7 them.

8 You should note, Your Honor, we actually produced
9 several emails between them, Ana and Polina. They produced
10 none.

11 Now there's something wrong with that on several
12 fronts. One is we're talking about at least two computers
13 on their side. Polina's in Israel. Ana's here for much of
14 the time. This stuff is on computers. It's mirrored on all
15 the computers.

16 There's no reason why there shouldn't be thousands
17 of chats and emails on one or both of their computers. Even
18 if they, you know, purported to delete it, it's still on the
19 computer and it's questionable whether they can say they
20 deleted it because they found things over the course of the
21 case that they, you know, either like or have produced in
22 the case. If you have that, where's the rest of it?

23 This is going to be -- you know, this has to be
24 resolved in some way either by if we have to go into the
25 hard drives or we're going to get into spoliation practice

1 because the communications are critical in this case. This
2 was a family business, there's no real contracts, and you
3 have to go through this to get the flavor of what both the
4 nature of the relationship was and what did or did not
5 happen during key parts in the chronology of events. It's
6 just not right that we produce 1,500 pages and they produce
7 four.

8 THE COURT: Mr. Kogan?

9 MR. KOGAN: There are a couple things that are
10 important to note, Your Honor. One is that when -- in April
11 of 2008 when my client was kicked out of the business, my
12 client walked out with a computer.

13 Then she received a phone call from their attorney
14 saying it's our computer, you got to bring it back and
15 returned that computer. That computer is the computer from
16 which they were able to produce all these emails and chats.
17 That's our computer. That would have been -- we would have
18 produced those.

19 The fact that that computer was used for the bulk
20 of the communication is the reason why these documents are
21 in existence. So the reason why it was there -- the emails
22 specifically I'm talking about -- is because that's -- on
23 that computer that's all through 2008.

24 Now, my --

25 THE COURT: That was --

1 MR. KOGAN: My client is Ana --

2 THE COURT: That was --

3 MR. KOGAN: -- Ana Bove.

4 THE COURT: Okay.

5 MR. KOGAN: Ana -- Ana's -- Ana had a computer
6 which she was using in -- she was living at the Mikhlyns'
7 home, if Your Honor recalls, and when -- she took the
8 computer in April of '04 and then they demanded the return
9 of that computer so they have it. That's the computer on
10 which the majority of the -- of their production came from.

11 Now, that's -- I'm -- that deals with emails. The
12 chats are actually more interesting. It appears that the
13 Mikhlyns have been recording those chats, logging them in
14 all along. They were planning this.

15 My clients were not planning anything and had no
16 reason to activate this feature. I asked them about this
17 issue and they did not intentionally record any chats and
18 did not intentionally maintain a log of communications,
19 unlike the Mikhlyns who have been doing this for quite a
20 while.

21 THE COURT: This log that you discussed, is that
22 something that automatically happens or is it something that
23 you have to activate?

24 MR. AKSELROD: I don't know the answer, but they
25 produced some chats. Why those are there and not others, I

1 don't understand.

2 It also -- you know, this -- it may be that Ana
3 Bove returned the computer. There's email saying it belongs
4 to you, I'm returning it. But Polina Dolginov is in Israel.
5 She has a computer. Certainly, the emails between Ana and
6 Polina have to be produced.

7 These people were in constant communication with
8 each other on computers. There's -- you know, this stuff --
9 it cannot be that they don't have -- we have -- we produced
10 emails between them. And yet they --

11 MR. KOGAN: Well, that's because that's the
12 computer that was used for those communications and of
13 course those -- all those communications are on that
14 computer.

15 THE COURT: So she didn't use -- Ana didn't use
16 any other computer?

17 MR. KOGAN: No, Ana did use another computer in --
18 from what I understand, she had a computer from 2001 and in
19 2007 she got married and left that computer in Israel. And
20 that computer was given away. It was not -- she doesn't
21 have it anymore.

22 And the majority of the communications that she
23 had -- well, I mentioned the other computer that primarily
24 was used by -- at the Mikhlyns' home.

25 THE COURT: Okay, so the only two computers she

1 had during the period were the first computer that was left
2 in Israel and given away and then the other computer that
3 she returned?

4 MR. KOGAN: And I believe that there was another
5 laptop that was more -- of more recent vintage. I'm not
6 sure exactly when.

7 I think it was around either 2007 or 2008 after
8 that computer was left in Israel, and that's the computer
9 from which the bulk of the -- the bulk of our production
10 came from.

11 And we produced many, many thousands of emails.
12 Those emails that we did produce, the records which were --
13 my client intentionally made an effort to maintain and
14 preserve their -- those were communications with clients.

15 Those were all saved and there were, I would say, tens
16 of thousand of emails that were preserved because they had
17 been client oriented or vendor oriented or customer oriented
18 and these folks, both sides, made it their business to make
19 sure that all of that was preserved for the benefit of good
20 customer relations.

21 Customer returns an item or customer asks a
22 question about an item, all of that was preserved and
23 everybody made an effort to do that.

24 My client had no purpose -- no reason -- I'm
25 making an inquiry trying to find out if there are any other

1 places where something was saved intentionally or
2 unintentionally other than the computer that we have.

3 THE COURT: Or any other computers were used?

4 MR. KOGAN: Right.

5 THE COURT: What about Polina?

6 MR. KOGAN: Polina did not -- the records that we
7 produced were either Polina had the same records or if she
8 had something that supplemented, we produced that as well.

9 I'm -- in other words, and Polina did also have --
10 I don't have the exact dates on which she replaced her
11 system, but she had computer failures that -- throughout
12 these years. This is from 2002 until now.

13 Several times her computer was replaced and we're
14 trying to find out if there were any incidents of backing up
15 or hard drive that was replaced or any of that. I don't
16 know have the chronology of that, but I'm trying to find out
17 if there are any other additional records.

18 I do know that there -- I have some objection to
19 generalizing and saying that all communications between
20 Polina and Ana are subject to disclosure because I don't
21 think that all communications between the Mikhlyns are
22 subject to disclosure. They're husband and wife and my
23 clients are friends.

24 There are plenty of communications that do not
25 relate to the subject matter of this lawsuit, the business.

1 They if -- and to the extent that they do not, I do not
2 believe that they're appropriate to be for disclosure.

3 THE COURT: You're not asking for them, are you?

4 MR. AKSELROD: Not -- well, here's the problem,
5 Your Honor. It's tricky with respect to the communications
6 to draw lines --

7 THE COURT: Well, I --

8 MR. AKSELROD: -- because -- and I'll give you
9 examples --

10 THE COURT: I don't think he's -- I know what
11 you're going to say. You're going to -- you know, they
12 could start on a different topic --

13 MR. AKSELROD: Right.

14 THE COURT: -- in an email and go into the
15 business --

16 MR. AKSELROD: It's not just that. There are
17 things that are subtle that a person reviewing their
18 client's documents in good faith might not realize the
19 significance of and I'll give you an example. Okay?

20 Part of our story, our clients -- and we've
21 produced chats and/or emails that are -- we think support
22 this. We did it in the injunction practice and in
23 discovery.

24 We say there came a time in 2007 that Polina was
25 bought out. Her share of the business was bought out and we

1 have some both chats and Ana was actually forwarding our
2 clients' emails about what was being talked about with
3 Polina. Then later on we say Ana left the business,
4 basically left it to us. They denied both of those things.
5 Okay?

6 Now obviously if you're looking at emails and the
7 emails are talking about that, and I think there were emails
8 about that because Ana was telling our clients, that's
9 obvious. There was also comes a time where there's emails
10 from Polina to my clients saying where's Ana, I can't find
11 Ana, I'm trying to reach Ana.

12 Well, if they were still in business together and
13 these things never happened, why are they emailing my
14 clients -- why is she emailing my clients looking for Ana?
15 It kind of suggests they're not together in business if she
16 can't even find the woman.

17 It's supportive of the idea that, A, Polina left
18 the business and later on Ana left the business and they're
19 not operating and working together, or else why would she be
20 sending my clients these emails? It's that kind of thing
21 that I have trouble with.

22 THE COURT: Well, you --

23 MR. KOGAN: If I could respond, Your Honor. Ana
24 lived in the Mikhlyns' house. Calling the person whose
25 house it is -- or emailing have you -- do you know where Ana

1 is, I've been trying to get in touch with her is -- it
2 doesn't prove anything and to claim somehow that my client
3 -- Ana -- there -- these two claims that Polina was bought
4 out or that Ana abandoned the business or walked out, the
5 second one has no legal significance in that if it is a
6 partnership, if you walk out of a partnership, the
7 partnership dissolves by law. And they don't agree that the
8 business dissolved by law and it had to be liquidated.

9 And if it is a corporation, you can't abandon a
10 corporation. You can't say I'm walking out of my shares.
11 I'm a shareholder, I'm an owner of the company, and I walked
12 out. A week later I come back and I say I did not walk out.
13 I changed my mind.

14 There's no legal significance so the claim --
15 there's no colorable claim. There are few of these claims
16 are being made here that they have -- they want to go into
17 an inquiry into communications between my client -- clients
18 which do not involve the subject matter of the lawsuit --

19 THE COURT: Well, you see --

20 MR. KOGAN: -- in a fishing expedition and --

21 THE COURT: This is precisely why you need to
22 talk, as opposed to write emails and letters. Okay. You're
23 not entitled to all of the emails. They could be talking
24 about planning a trip to Cancun. You don't need to see
25 that.

1 MR. AKSELROD: Okay.

2 THE COURT: But there's the -- the subtleties
3 you're talking about that arguably have a bearing on the
4 case, you need to make Mr. Kogan aware of that. That's why
5 you talk --

6 MR. AKSELROD: Okay.

7 THE COURT: -- and you try to focus. I mean,
8 that's putting aside the issue of whether we could even get
9 to these emails --

10 MR. AKSELROD: Right.

11 THE COURT: -- whether they exit anymore. From
12 what I'm hearing, just dealing with Ana, I don't know that
13 there's anything I can do.

14 MR. AKSELROD: I think --

15 THE COURT: If the computer was given up and you
16 have that computer, if this other computer in Israel is
17 wherever it is and there are no other computers, what can we
18 do?

19 MR. AKSELROD: I think what I will have to do is -
20 - and again, it will be subject to a procedure if they're
21 going to be allowed to, you know, eliminate certain ones is
22 we'll have to subpoena the service providers. I think
23 that's what you were getting at earlier on. We'll just --

24 MR. KOGAN: And that should --

25 MR. AKSELROD: At least with respect to emails --

1 MR. KOGAN: -- should be done. That would
2 circumvent any -- there's no reason for us to spend
3 resources on attempting to excavate something from a dead
4 computer, perhaps. Perhaps, I don't know.

5 THE COURT: Identify the service providers --

6 MR. KOGAN: I think they know who they are.

7 MR. AKSELROD: Yes.

8 MR. KOGAN: Everybody knows who they are.

9 MR. AKSELROD: We do.

10 MR. KOGAN: There are only one or two providers
11 and we can just subpoena them and then everything is
12 produced. There's no secrets and there's no reason to go
13 fishing.

14 At that point only -- the other objection they
15 had. You know, then we would have to come up with a
16 reasonable procedure in which we would -- I don't want to
17 know about their personal life any more than they're
18 entitled to know about my clients' emails that do not have
19 to do with --

20 THE COURT: Well let's think that through.

21 Obviously your clients have spousal privilege.

22 MR. AKSELROD: Yes.

23 THE COURT: Right?

24 MR. AKSELROD: Yes.

25 THE COURT: I don't know that your clients have

1 any friend privilege? I don't know how to -- there's no
2 protective order in this case, is there? That's one of --

3 MR. KOGAN: We -- actually, we're negotiating
4 one --

5 MR. AKSELROD: We slowly -- at a turtle's pace
6 we've --

7 MR. KOGAN: We can -- actually, we're close on
8 that and I could articulate I -- I'd like Your Honor's
9 participation in that. We're very close to it. There's one
10 phrase and --

11 THE COURT: Okay. We'll get to that then.

12 MR. KOGAN: -- we're a minute away from there.

13 THE COURT: Subpoena the service providers.

14 MR. AKSELROD: Okay.

15 THE COURT: Share obviously with Mr. Kogan what
16 you get from them, and if we haven't worked out the
17 protective order before you get the documents from the
18 service providers, you will treat them confidential
19 attorney's eyes only. You don't even show them to your
20 clients.

21 MR. AKSELROD: Okay.

22 THE COURT: And if in reviewing the emails and
23 chats there's anything of a nature such that your clients
24 don't -- it's unrelated to this case, your clients don't
25 want even the attorneys to have it, we'll all proceed with

1 the assumption that, you know, you'll let them know and then
2 you will give that back and to keep no copies.

3 It's got to be -- you know, it's got to be
4 clearly, you know, in left field and have nothing bearing on
5 this case.

6 MR. AKSELROD: We will talk about and I guess come
7 up with a list --

8 THE COURT: Like a -- like some sort of clawback
9 type of thing.

10 MR. KOGAN: From both sides. I guess we need all
11 email addresses that we use for the communications. There
12 had to -- there has to be --

13 THE COURT: Yes.

14 MR. KOGAN: -- some cooperation in order to --

15 THE COURT: Yes.

16 MR. KOGAN: -- be able to --

17 MR. AKSELROD: Okay, turning -- should we get to
18 category two now, Judge? I know it's --

19 THE COURT: Yes, please.

20 MR. AKSELROD: -- going to take a while.

21 A second category is copyrights. You may recall
22 that obviously we had motion practice about whether they
23 were going to be able to amend their complaint to add
24 numerous copyrights for specific designs and they were
25 allowed do that.

1 I have been repeatedly asking for the copyright
2 applications and registrations and while nobody says no and
3 objects, I don't have them yet.

4 You may recall when this case up and we had a -- I
5 think a telephone conference about the motion, you know, you
6 said I wasn't going to be prejudiced on the discovery front
7 about that -- about, you know, these additions of -- you
8 know, there was one copyright in the original pleading of
9 theirs. Now there's, I don't know, 4,200 -- I don't know
10 how many there are. Okay?

11 They were doing it on an ongoing basis, they told
12 you. There were applications pending.

13 THE COURT: And some of them have since been --

14 MR. AKSELROD: Some have been --

15 THE COURT: -- approved, right?

16 MR. KOGAN: Yes.

17 MR. AKSELROD: Now, it's hard to understand why I
18 don't have them.

19 One, not only are they not objected to and they're
20 obviously central to the cases, I would have thought, first
21 of all, one of the law firms would have had them as a basis
22 for their pleadings and I inferred, maybe incorrectly, that
23 they were involved in actually filing them because it was
24 happening during the case, yet I don't have anything.

25 THE COURT: What's the deal with the copyrights?

1 MR. KOGAN: Your Honor, it's very interesting the
2 nature -- the process here -- if I can take a moment to
3 explain the process by which the business is -- has
4 developed.

5 My client, as your -- as the Court may recall, is
6 a graduate of Israel's premier design school. She's a --
7 and she has been a designer her entire life and she is --
8 she has traveled throughout Europe, spent six figures on
9 identifying designs that are in the public record -- that
10 are in the public domain that are not copyrightable from
11 publications from the 1800s, had then improved on those
12 designs, making them unique and copyrightable, as the
13 copyright office has -- that the PTO has confirmed that
14 really it is -- she does have a copyright in those.

15 Now, the fact that my client elaborated and
16 improved on those original designs is something that at this
17 moment is being disputed by the plaintiffs who claim that
18 these designs are not copyrightable altogether. And the
19 problem that we have in producing the applications and the
20 registrations, we don't want to give them the -- what they
21 don't have.

22 And that is what my client took is the originals,
23 spent six figures on buying and then improving on, and once
24 they have that, they can go ahead and plagiarize to their
25 heart's content --

1 THE COURT: Well --

2 MR. KOGAN: -- in both ways.

3 THE COURT: No, if something is copyrighted, there
4 is a notice -- or, PTO has it and anybody can take a look
5 and see what it is. This -- she has this copyright.

6 You know, I understand maybe the underlying
7 application has additional information in it, but that can
8 be cured by producing it for attorney's eyes only.

9 MR. AKSELROD: Well, I --

10 THE COURT: You're not a design person, are you?

11 MR. AKSELROD: I got to tell you, Your Honor, I
12 mean, if that's your ruling, I'll take attorney's eyes only.

13 I have to say respectfully the idea that it's
14 somehow secrecy that's blocking this is absurd. You're
15 talking about a copyrighted -- first of all, you've made
16 copyright claims and on a number of fronts, not just
17 copyrightability, we challenge it.

18 First of all, we challenge in a number of
19 instances who actually did the so-called improvement, the
20 digitizing. That's number one.

21 MR. KOGAN: Perfect. That's exactly --

22 MR. AKSELROD: Okay? Who actually did it is an
23 issue. That's -- I don't even know what's in your -- I
24 don't know which things --

25 MR. KOGAN: That's exactly -- that is exactly the

1 issue, Your Honor. I would like everybody to produce now
2 simultaneously to Your Honor under seal in a box --

3 THE COURT: I'm not doing it.

4 MR. KOGAN: Okay, so somebody has to do that under
5 seal. Maybe we can do that simultaneously to -- but I don't
6 want them to produce after I've produced my clients' -- my
7 client demonstrate this is how we improved on these original
8 designs, they come back and say no, no, this was our idea.

9 Let them produce now these original designs and
10 how they've improved on them simultaneously; everybody does
11 it at the same time, because what we believe they intend to
12 do is after our production, they will come back and say yes,
13 this was my idea.

14 I'm the one who came up with the idea of
15 elaborating on this 1800 -- the 1880s magazine and changing
16 this particular alphabet font from two dimensional to three
17 dimensional, for instance.

18 We would like that to be done simultaneously so
19 they cannot thereafter come up with a claim that this was
20 their idea and this is how they did it, because we're going
21 to be able to substantiate that at this point that it was
22 uniquely our idea, our design.

23 MR. AKSELROD: Your Honor, this is not rational.
24 You heard from counsel, which is correct, the process here
25 is to go get either a public domain image from these public

1 domain websites or magazines or in some instances, I believe
2 actually from a not public domain where images were licensed
3 under limited terms. You take it, you put it into the
4 computer, you digitize it, quote, unquote, and then you
5 press buttons that like you press a button and it maybe adds
6 a color in an area that was black. That's the process.
7 It's called digitizing.

8 I just -- how -- the actual end product is out
9 there because they're selling it on their website and we're
10 selling it on our website. There's no secret about what the
11 improved image or whatever you want to call it is. It's out
12 there being sold by both of us. We have it on our
13 computers, they have it on their computers --

14 THE COURT: Yes, but --

15 MR. AKSELROD: -- because they took it, and the
16 original thing is some public domain thing --

17 THE COURT: So what's the problem with
18 simultaneous production of copyright registrations and --

19 MR. AKSELROD: I don't have any -- we didn't
20 register any copyrights. But I don't know how you can file
21 something in a public office, get a copyright, and then say
22 it's like secret. I don't understand that.

23 We could probably go to Washington and get the
24 application. How is this secret? This is not secret stuff.
25 This is not some secret -- it's a copyright case.

1 How could you file copyright claims and say I'm
2 not going to give you the stuff? It doesn't make any sense.

3 MR. KOGAN: Your Honor, their objection did not
4 specify one issue and it's lacking in that one aspect.
5 Their -- they say we don't have anything -- any copyright
6 applications. I understand that.

7 But do they have any claims that they have somehow
8 improved on those public domain designs -- if they can
9 substantiate that now and we have all the designs --
10 everybody has all the end result. Everybody has that.

11 But what they don't have, because they didn't do
12 it, is the public domain designs themselves and the process
13 by which they were changed from public domain to this
14 improved image which was -- which is copyrightable. They
15 don't have that and they can't produce it.

16 And if we're going to do simultaneous production,
17 there will be either nothing from their side and everything
18 from our side or maybe they'll come up with something and
19 which case the -- those -- there'll be a dispute about who
20 improved designs number 1 through 50, because they will have
21 the process by which they claimed to have improved them --

22 THE COURT: Well, did you ask them in written
23 discovery request for documents establishing that they've
24 improved on these public domain designs?

25 MR. KOGAN: Not in those words, but we've asked

1 for --

2 THE COURT: I don't know that those are the
3 right --

4 MR. KOGAN: -- the documentation -- right, we did
5 ask about the designs to which they make claim, how is it
6 that they are entitled to those designs. So ultimately
7 that's -- in a roundabout way, that's what we were --

8 THE COURT: Uh-huh.

9 MR. AKSELROD: From our end, to the extent we have
10 -- you know, I'm not sure if counsel has the same
11 understanding as I do about how this stuff is even done.
12 Okay?

13 MR. KOGAN: No, I don't, but I have a different
14 understanding because my client did it --

15 THE COURT: Look if --

16 MR. AKSELROD: I'll produce that stuff --

17 MR. KOGAN: -- and knows exactly how it's done.

18 MR. AKSELROD: I'm willing to produce anything
19 that shows evidence of what our people created or people
20 other than Ana Bove created without -- this is not
21 attorney's eyes only stuff.

22 THE COURT: So then what's the --

23 MR. KOGAN: Absolutely --

24 THE COURT: -- if -- then what's the harm with
25 simultaneous production? I mean --

1 MR. AKSELROD: Fine, I'll do it before. I'll
2 produce -- if it's not already in our production whatever we
3 -- you know, we'll talk about it. I'll produce it before.
4 I think we've produced some stuff already.

5 MR. KOGAN: Your Honor, if we can come up with a
6 procedure for that, then it's not a problem.

7 MR. AKSELROD: I'll produce --

8 THE COURT: All right. So you're going to --

9 MR. AKSELROD: That's fine. Simultaneous
10 production, fine.

11 THE COURT: Copyright applications and
12 registrations on the one hand and --

13 MR. AKSELROD: Process --

14 THE COURT: -- whatever else on the other.

15 MR. AKSELROD: Creative process --

16 MR. KOGAN: Whatever they can claim -- whatever
17 they claim is the backup or the proof that they contributed
18 to the improvement --

19 THE COURT: Okay.

20 MR. KOGAN: -- of public domain designs.

21 THE COURT: All right.

22 What's the third issue?

23 MR. AKSELROD: The third issue is money, which is,
24 you know, finances, who got what, who paid what. I know Mr.
25 Kogan I think in our early conferences and conversations

1 this was his primary issue.

2 We have sort of in pieces, because it's a lot of
3 stuff, been sort of systematically producing bank
4 statements, PayPal account records, eBay, there was a credit
5 card company called 2Checkout, and our internal -- you know,
6 QuickBooks, thousands of pages of financial records.

7 THE COURT: Both --

8 MR. AKSELROD: For the business.

9 THE COURT: For the business?

10 MR. AKSELROD: Now, there has been both ways.
11 We've been uncertain, frankly, and kind of dancing around
12 each other about the issue of quote, unquote personal
13 financial records.

14 And I told Mr. Kogan in my letter I've actually
15 come around to the view that there should be no such
16 distinction; that everybody -- because of the nature of the
17 way the business was run, that, you know, the personal -- I
18 don't think they're personal. He doesn't think things of
19 ours are truly personal. Everything should be produced.

20 But the bottom line is we've made a systematic
21 production. We have not gotten systematic financial records
22 from them.

23 In particular, records of a type that we've
24 produced showing them getting hundreds of thousands of
25 dollars, for example, straight from the credit card company

1 that accepted credit card payments, I asked for that stuff.
2 I didn't think it was in dispute from our early conferences.
3 I haven't received that.

4 Now, you know, one of the reasons why I'm saying
5 we got to get rid of this concept of personal was there was
6 a period of about a year or so where the girls were -- you
7 know, they set up these domain names and websites -- were in
8 the business and while my people were helping them in
9 various ways, consulting, we weren't in the business yet.
10 Okay?

11 Mr. Kogan says during that period they never had
12 separate quote, unquote business account. Now there was no
13 corporation, so, you know, they didn't have like a DBA --
14 they just used their personal accounts. And because they're
15 personal, Mr. Kogan says you can't get them.

16 My view is if that's the way you do business,
17 that's a business account as well as a personal account.
18 You got to produce the stuff. You can't have everything
19 together and just say because I put my name on it, instead
20 of doing business as ABC Embroidery, it's personal.

21 Now -- and again, I'm saying this works both ways.
22 We've got to produce our personal -- there's a number of
23 reasons why I think we should. That's just one of them.

24 I think we should just drop this idea of personal
25 and just get everybody's finances on the table. I think we

1 have to. It was just not run and managed in a kind of
2 airtight, you know, way that a big company would be run and
3 to get the complete picture, everybody's got to put their
4 bank accounts and stuff on the table.

5 MR. KOGAN: From 2002 through 2004, it's
6 undisputed that the business belonged to my clients. From
7 2004 until 2005, my clients say that the Mikhlyns were --
8 actually, it's the Mrs. was a designer. Yes.

9 THE COURT: 2002 to 2004 --

10 MR. AKSELROD: It was --

11 THE COURT: -- undisputed that it was their --

12 MR. AKSELROD: Yes, late -- I don't know the extent
13 of -- you know, that's one of the things we're trying to
14 explore in discovery.

15 I don't know the extent of their sales whatever,
16 but it is true that the girls started this without us
17 initially. They came up with domain names and they were at
18 some level of activity, upgrading the business from I think
19 like late 2002 through 2003 and we got involved in 2004.

20 THE COURT: Okay. So really what we're -- are you
21 looking for personal bank records from 2002 to 2004?

22 MR. AKSELROD: Those are -- there is no
23 difference. It's a hundred percent commingling.

24 THE COURT: No --

25 MR. AKSELROD: You know what I mean?

1 THE COURT: No, but if your clients aren't
2 involved in the business, what do you need their --

3 MR. AKSELROD: I'll tell you why. There's two
4 reasons; one sort of factual about the stories each side is
5 putting up and one is legal.

6 They make it seem in their pleadings and in the
7 motion practice that they had already kind of established a
8 successful business and we were just hired as employees to
9 do some, you know, discreet task to -- for storage of thread
10 or something. I don't remember what was said. Maybe
11 different things were said in the various payments.

12 I mean, our view -- we doubt that, at a minimum,
13 upon information and belief. We don't think the business
14 became successful until we got involved.

15 And I have no idea whether they had \$10 worth of
16 sales or a hundred dollars worth of sales or a million
17 dollars worth of sales till we got involved. So it has to
18 do with just the story of how this business came to be what
19 it is. That's number one.

20 Number two, it goes right to the heart of their
21 trademark claims. They repeatedly assert -- you know, they
22 make the allegations about how they were using all the
23 various trade names and website names on a regular basis and
24 established its success on the internet before we were
25 involved and among customers.

1 You know, for purposes of the trademark analysis,
2 certainly for secondary meaning -- for example, using your
3 name or using ABC -- the extent of your success, sales,
4 profits, that's a relevant factor to determine whether you
5 have established a trademark. So that's the legal reason.

6 I'm not claiming the money. This isn't a thing
7 where we say that's our money.

8 THE COURT: With the records from 2002 through --
9 beginning of 2004 whenever it is, are you looking for
10 unredacted or redacted?

11 MR. AKSELROD: I certainly want to see -- well,
12 certainly unredacted as to money coming in. I don't care if
13 -- I don't care if they bought dresses or whatever, what
14 they spent their money on.

15 THE COURT: Well --

16 MR. AKSELROD: Although it's relevant because it
17 has to do with profitability --

18 THE COURT: It's got --

19 MR. AKSELROD: -- so it's hard to say.

20 THE COURT: It's got -- well, the money coming in
21 has to be coming in from the business, not --

22 MR. AKSELROD: Right.

23 THE COURT: -- coming in from, you know --

24 MR. AKSELROD: I'm not aware of them getting money
25 any other way. I'm not sure that's an issue, but --

1 MR. KOGAN: Your Honor, I --

2 MR. AKSELROD: -- they can tell me.

3 THE COURT: I have no idea.

4 MR. KOGAN: -- I don't believe that he would be
5 entitled to anything other than something that would support
6 gross receipts, and that would be reflected on bank
7 statements, not -- and bank statements to the extent that
8 they show gross receipts.

9 In other words, at that point if our client spent
10 it on whatever, it really is irrelevant and I understand
11 that the key there would be gross receipts, not --

12 THE COURT: Well, I think -- I mean, he --

13 MR. KOGAN: -- not profitability. I wouldn't have
14 to show --

15 MR. AKSELROD: Gross receipts and spending on
16 business.

17 MR. KOGAN: Well, the spending on business I don't
18 know that he would be entitled to see every check that we
19 spent on the business. At this point I think that the gross
20 receipts would address his concern --

21 THE COURT: Whether it was a profitable company --
22 I mean, that's a fair point.

23 MR. KOGAN: Is irrelevant really though.

24 THE COURT: Whether is a profitable company or not
25 is -- doesn't go to secondary meaning. I mean, you could

1 have a completely --

2 MR. AKSELROD: Well, it doesn't go to secondary
3 meaning --

4 THE COURT: -- you're spending it like Kozlowski
5 on, you know, thousands of dollars of ice sculptures --

6 MR. AKSELROD: Right.

7 THE COURT: -- for parties. But if you're pulling
8 in, you know, a fair amount of money and just -- you're just
9 hemorrhaging it, that's not --

10 MR. AKSELROD: But it does go to the first point
11 about whether did this business first become profitable when
12 my people got involved in it, which my people believe is the
13 case, but we don't know a hundred percent certain because
14 they're going to come into court and say these girls made
15 this great business and these people are just brought in to
16 do as menial, you know, ABC you do this. And our position
17 is when we got involved this business took off.

18 There's actually some evidence of that because
19 profits quadrupled after -- or revenues quadrupled after we
20 got involved.

21 THE COURT: Well, that's revenue.

22 MR. AKSELROD: We're entitled --

23 THE COURT: That's revenue.

24 MR. KOGAN: That's all that matter, really.

25 THE COURT: That's revenue.

1 MR. AKSELROD: It's not all --

2 MR. KOGAN: It's really all about revenue.

3 MR. AKSELROD: It's not all that matters. I think
4 profits matter too because if you're losing money --

5 THE COURT: Does it --

6 MR. AKSELROD: -- you don't have a good business.

7 THE COURT: Is it really -- is -- look, I'm going
8 to give him the records. The question is whether it's going
9 to -- whether and to what exact -- actually, to what extent
10 they're going to be redacted.

11 Is it really that big of a deal? I mean, they're
12 going to show on their bank statements -- personal bank
13 statements, you know, whatever was coming in from PayPal,
14 whatever income from the business, and then, you know, what
15 was going out to support the business. Is there really that
16 much? I mean, I don't know how the business was structured.
17 Is it, you know --

18 MR. KOGAN: I don't know. I don't know. I can't
19 say --

20 THE COURT: And it could also -- you know, I mean,
21 part of it could be their efforts to promote the business.
22 Maybe they had expenditures to, you know --

23 MR. KOGAN: And I do --

24 THE COURT: -- advertise or --

25 MR. KOGAN: I do have some other concern there

1 that I do know that my clients have expressed. They spent
2 six figures on buying those public domain magazines from the
3 1800.

4 They traveled all through Europe to college these
5 items and I don't want to disclose all my sources to -- in
6 other words, they sought these out, they're not easy to
7 locate, they are -- this information is not out there. They
8 don't --

9 THE COURT: But --

10 MR. KOGAN: They can't go out there today and buy
11 what my client has bought.

12 THE COURT: But there's got to be a way of --

13 MR. KOGAN: So -- I could redact --

14 THE COURT: -- redacting and identify -- you know,
15 somehow identifying that this is, you know, business
16 promotion or whatever you want to call it.

17 MR. KOGAN: I can do that. I'm just saying I
18 would like to be able to redact certain specific information
19 that would allow them to -- it goes to the protective order,
20 really. That portion I'd like to be able to redact --

21 THE COURT: I mean, I think all these business
22 records are going to be attorney's eyes only unless there's
23 a strong need to show them to the clients and to --

24 MR. KOGAN: But the -- I'd like to just to make
25 one issue clear. At this point we're talking about my

1 clients' records that have to do with how they ran the
2 business from 2002 to 2004.

3 When we say all these records, there are some that
4 are very different in that we have only been discussing the
5 -- my clients' business records which are really personal
6 bank accounts through which they ran the business. It was
7 not incorporated or set up as a separate entity.

8 The Mikhlyns have been commingling personal and --
9 they -- there was a corporation established, but they did
10 deposit sums in their personal bank accounts, none of which
11 -- not a single account has been disclosed despite what
12 counsel says.

13 THE COURT: Well, I think he's --

14 MR. AKSELROD: I'm coming around to the view that
15 all of us --

16 MR. KOGAN: I understand, but I just --

17 MR. AKSELROD: -- have to do that now.

18 MR. KOGAN: There was --

19 THE COURT: It's a two -- it's always a two-way
20 street in this courtroom, so --

21 MR. KOGAN: There was a discussion before that
22 somehow there was production. Whatever was produced was
23 only business records and I only received the tax returns
24 two days ago. I don't know if they're complete. I don't
25 know if they're -- if this was an S Corp. I don't know if

1 there are K-1's if they're included or not.

2 I know for a fact I did not receive any personal
3 tax returns and I know for a fact that they commingled to
4 such an extent that the business has been paying for
5 mortgage payments on their homes, for -- I think about \$400
6 a month on liquor stores. There are food expenses in the
7 thousands.

8 THE COURT: All right. Look, look --

9 MR. KOGAN: There's, you know --

10 THE COURT: -- we're not litigating the case here.

11 MR. KOGAN: There's --

12 THE COURT: You're going to produce --

13 MR. AKSELROD: You want --

14 MR. KOGAN: -- complete commingling --

15 MR. AKSELROD: You want my answer or not?

16 THE COURT: You're -- no, you're -- it's a two-way
17 street.

18 MR. AKSELROD: Right.

19 THE COURT: Personal bank records are fair game.
20 The only issue is to what extent you're going to redact
21 them.

22 MR. AKSELROD: Okay.

23 THE COURT: And you need to be careful on what you
24 argue because it may come back and bite you in the butt,
25 because you might not be able to redact that for your

1 client. So I'm going to leave it to you to try to work out.
2 I think it's fair game though.

3 So that's 2002 to 2004 from you. I mean, is there
4 any -- there's no issue with you for your clients' 2002 to
5 2004 because they weren't involved.

6 MR. AKSELROD: Right.

7 THE COURT: Is that right?

8 MR. KOGAN: That's correct.

9 THE COURT: Okay. So then 2004 going forward I
10 don't see any reason to have a different rule, unless --

11 MR. KOGAN: I'd like to point out that from 2004
12 were -- the only other concern -- I guess there -- no, they
13 would be the same.

14 THE COURT: When did -- I mean, at some point --
15 no, no --

16 MR. KOGAN: From '04 to '05, there's some period
17 of time in which -- through which my client says that Inga
18 Mikhlyn was worked only as a designer, meaning she had
19 specific tasks of design, not bookkeeping, nothing else, for
20 a period of time from '04 to '05 and after that some --
21 actually, I don't know, maybe it's during '04.

22 And then later on at some point they have Mikhlyns
23 run the operation in the U.S. in its entirety, meaning they
24 are -- they warehouse, they get the bookkeeping, they do --
25 they pay the vendors, all the payments are done through

1 them.

2 THE COURT: Uh-huh.

3 MR. KOGAN: Of course, the shots are called from
4 -- by my client, at least that's our story. Their story is
5 that they -- that we're partners at that time. So from 2004
6 until -- or some point in '04 through '08, I guess both
7 sides have personal financial records which are relevant.

8 THE COURT: Okay.

9 MR. KOGAN: And then --

10 THE COURT: Same ruling.

11 MR. KOGAN: -- from 2008 on we have a significant
12 dispute because while they concede that my client is -- was
13 a partner -- both my clients were partners in the company,
14 they claim one has abandoned or walked out and the other one
15 has been bought out. Which by the way, they don't deny that
16 even in that buyout they did not pay the buyout amount that
17 they claim to have agreed on.

18 So the issue is they claim that we would have to
19 give them business records from 2008 on because they claim
20 that my clients have continued with the business. From 2008
21 we have a split and that was the subject of motions before
22 Judge Sifton. Neither side was able to demonstrate the
23 likelihood of success on the merits on that to Judge
24 Sifton's satisfaction to obtain a TRO at that point and a --

25 THE COURT: Preliminary --

1 MR. KOGAN: -- preliminary injunction. And
2 without a colorable claim, I do not believe that they have
3 any entitlement to business records from 2008 on for our
4 businesses, while we do have the right to discovery on their
5 business from 2008 on because they acknowledged that we are
6 partners in their business.

7 So there is no -- it doesn't mirror -- from that
8 point on, there's a distinct split and if -- I believe there
9 should be a bifurcated process after which -- in other
10 words, if they prevail -- if we get to trial -- if they
11 prevail on -- and are able to show a colorable claim on
12 their entitlement somehow to our business going forward,
13 they would be entitled to discovery of financials on the
14 business from 2008 after the divorce, so to speak.

15 But at this point I do not believe that they have
16 made that colorable showing. Judge Sifton --

17 THE COURT: Well --

18 MR. KOGAN: -- didn't think so.

19 THE COURT: Well, this is on a preliminary
20 injunction.

21 MR. AKSELROD: Yes.

22 THE COURT: It's not -- you know, it's not on the
23 merits.

24 Go ahead.

25 MR. AKSELROD: First of all, Your Honor, we have a

1 corporate plaintiff, as well as our individuals. This
2 business was run through a corporation, ABC All Consulting.
3 On paper, my clients are the only shareholders, officers,
4 directors, if you will, of the company.

5 They're a -- it's a complaining entity here
6 against what Ana -- the focus of our lawsuit, which we
7 started this case, was what happened after the divorce.

8 You know, Mr. Kogan and I talk about the divorce
9 and the marriage period. That's the focus of our lawsuit.
10 He's more focused on what happened when we were together
11 because Ana claims that money's owed to her and we took more
12 of the money, whatever.

13 We're focused on what happened after. We say you
14 went and basically misappropriated various business assets
15 to benefit your knew company and attacked us and defamed us,
16 et cetera. The period after the divorce is the spotlight of
17 our claims.

18 Number two, this issue of partnership, you know,
19 Judge Sifton resolved -- this is one issue Judge Sifton
20 resolved and a small part of the decision on the
21 injunctions. He said if you use the -- we did allege
22 partnership in our complaint.

23 But Judge Sifton said in his decision, and he
24 cited New York law and I'm aware of these cases now, that
25 when you use the corporate form, that's it. You're not a

1 partnership. It's a corporation.

2 Now they've added in their amended pleadings to, I
3 guess, tailor to that that since we're the only shareholders
4 of record, that Ana's a de facto shareholder. Maybe she is,
5 maybe she isn't. Okay? But we're talking about a --
6 there's a corporate aspect to this. I think the partnership
7 thing has largely fallen away despite our best pleading
8 efforts.

9 We're talking about a corporation that claims it
10 owned these things. It owned the business and the assets
11 and the websites and that Ana walked off.

12 And after we tried to discuss a buyout for her
13 for her share of the business, whatever it was, she took
14 what we claim to be our assets to build her new competing
15 business, attacked us -- in fact, we did get relief from the
16 judge on this business of, you know, defamation attacking.
17 The only party that got relief in the injunction was us, and
18 the judge said she had to stop saying that basically we were
19 doing illegal things and didn't have rights in the stuff we
20 were selling.

21 We were injured very badly by that. Our money --
22 you know, our income went down. It took my clients a while
23 to climb back up.

24 So like in any case like this, we're saying we
25 were damaged. We're saying they have unjust enrichment by

1 the behavior they engaged in, in those businesses. That's
2 just --

3 THE COURT: Okay.

4 MR. AKSELROD: -- classic stuff that's subject to
5 discovery in a case like this.

6 THE COURT: All right. I'm --

7 MR. KOGAN: Your Honor, I --

8 THE COURT: Go ahead.

9 MR. KOGAN: I'm sorry. If the Court would like me
10 to brief this issue, I would like to take 10 days to brief
11 that.

12 I believe that the proper procedure for that kind
13 of a claim is for them to make a colorable claim, some kind
14 of a showing, and despite counsel's efforts at this time,
15 Judge Sifton had written an extensive decision and it is the
16 opposite of what he claims. He's misreading the decision
17 specifically with respect to that finding by the judge.

18 The implication of there being a corporation and
19 no partnership is not that all of a sudden my clients' claim
20 is reduced to nil. It's the contrary.

21 It's that it's showing that the plaintiffs' claim
22 is just inconsistent with the law and that they have treated
23 this business in a way that it cannot be interpreted
24 according to their interpretation.

25 THE COURT: Okay. Here's what we're going to do.

1 You have an uphill battle, but I'll take a letter brief no
2 more than five pages. Hold on.

3 MR. AKSELROD: Do I wait to respond to that, Your
4 Honor?

5 THE COURT: Hold on, hold on --

6 MR. AKSELROD: I don't know what the law is.

7 THE COURT: -- hold on.

8 MR. AKSELROD: Yes.

9 THE COURT: June 26th, and then July 3rd is a
10 similar -- is the written response, same five pages. No
11 reply.

12 All right. That is the only outstanding issue --

13 MR. AKSELROD: One last thing on our side --

14 THE COURT: -- on the three categories.

15 MR. AKSELROD: One last thing on our side is that
16 I think our second document request is -- the response is
17 about six weeks overdue.

18 MR. KOGAN: Your Honor, that's the subject of this
19 issue. They want post-divorce documents and we are
20 objecting to that. That's really the subject of this --

21 THE COURT: Okay. I --

22 MR. KOGAN: -- issue.

23 THE COURT: I have bifurcated things, but it's not
24 my first reaction. My first inclination, I should say. And
25 as far as I see it, there's a lot of discretion. I don't

1 know that there's any law that says I have to do it that way
2 or any -- so you got an uphill battle, but I'm keeping an
3 open mind.

4 MR. KOGAN: Your Honor, can I proceed to my
5 issues --

6 THE COURT: Yes.

7 MR. KOGAN: -- for a moment?

8 With regard to the protective order, I think we're
9 going to be able to work that out and if we -- we had one
10 distinction that I would like to make -- counsel and I have
11 only disagreed about one item. The commercially sensitive
12 documents, counsel wanted them to be attorney's eyes only.

13 I have some concerns with regard to personal
14 banking records. I understand that.

15 But at the same time, his clients' business
16 records -- in order for me to analyze the business records
17 in their entirety, I have to look at his clients' personal
18 business records because there's so much commingling. No,
19 it's his clients' --

20 THE COURT: Personal records.

21 MR. KOGAN: I'm sorry --

22 THE COURT: You got to look at the personal
23 banking records and the business banking records --

24 MR. KOGAN: In order to have the complete picture.

25 THE COURT: -- together.

1 MR. KOGAN: Correct. And I need to be able to
2 review that with my client. So if we mark that commercially
3 sensitive, attorney's eyes only, I don't get to review that
4 with my clients.

5 And I need that in -- because that is -- those are
6 the business records. I can't not review the business
7 records with my client. It hampers my preparation of the
8 case.

9 THE COURT: If we're going to be redacting things
10 so the personal banking records are not going to reflect a
11 timeshare purchase in Boca or whatever --

12 MR. KOGAN: Right.

13 THE COURT: You know, it's just going to be
14 business related. What's the problem?

15 MR. AKSELROD: Just business related? I don't
16 have a problem with just business related. What --

17 MR. KOGAN: Okay.

18 MR. AKSELROD: I don't know -- I'm not sure even
19 what the argument is about since we haven't gotten there
20 yet.

21 MR. KOGAN: Okay --

22 MR. AKSELROD: This is just talking about the
23 language of the protective --

24 MR. KOGAN: Right.

25 MR. AKSELROD: We haven't had a fight about --

1 THE COURT: No, no. No, no, I think --

2 MR. AKSELROD: -- whether some particular --

3 MR. KOGAN: There was one comment that --

4 MR. AKSELROD: -- bank record --

5 MR. KOGAN: You made one comment and I'm trying to
6 resolve that one last comment so we could sign it today.

7 And that's the only thing that's standing in the way of
8 resolving it. If we have -- if we redact the business
9 records as the Court is proposing, then --

10 THE COURT: Personal records.

11 MR. KOGAN: -- the personal records to take out
12 anything that's not business related, then you shouldn't
13 have a problem -- it will still constitute commercially
14 sensitive, in essence, but I'd like commercially sensitive
15 materials to be not attorney's eyes only. Commercially
16 sensitive materials would be -- or at least let's have
17 the --

18 THE COURT: How --

19 MR. AKSELROD: I can't speak in the abstract about
20 --

21 THE COURT: Let's carve out --

22 MR. AKSELROD: -- what is and is not --

23 THE COURT: -- carve -- I wouldn't --

24 MR. AKSELROD: -- commercially sensitive.

25 THE COURT: I wouldn't do that. I would somehow

1 carve out these records --

2 MR. KOGAN: As a separate category, okay.

3 THE COURT: -- as a separate category so you can
4 show them to your clients in an effort to litigate the case.
5 I mean, so have them as a separate category, maybe. Maybe
6 I'm --

7 MR. AKSELROD: I'll tell you -- I mean, just --
8 again, I -- these two subjects weren't together in my mind
9 until right now, but I mean, it seems to me like, for
10 example, if in a quote, unquote, you know, personal bank
11 statement income from the business is shown, that to me is
12 not commercially sensitive.

13 You could show that to your client that there was
14 -- you know, that a deposit from the business, whether it's
15 payment, salary, whatever -- for both of us, that's not
16 commercially sensitive, nor is money going out that's
17 business related --

18 MR. KOGAN: You know what? So maybe we need --

19 MR. AKSELROD: -- commercially sensitive.

20 MR. KOGAN: Okay.

21 MR. AKSELROD: We'll just talk about it. I --

22 MR. KOGAN: We need to talk about that because --

23 MR. AKSELROD: Yes.

24 MR. KOGAN: -- my -- okay.

25 MR. AKSELROD: That's not --

1 MR. KOGAN: We had a different understanding of
2 that --

3 THE COURT: Okay.

4 MR. KOGAN: -- and I thought that that's what you
5 were trying to accomplish by --

6 THE COURT: All right.

7 MR. AKSELROD: Okay.

8 MR. KOGAN: -- changing the phrasing.

9 THE COURT: You'll talk and you'll let me know if
10 you can't work it out.

11 MR. KOGAN: The next issue for me was there was an
12 email list of customers that began -- there was an email
13 list of customers that began in 2002 when my clients started
14 the business.

15 At some point they had tens of thousands of
16 customers on that email list. Later on they had a couple of
17 hundred thousand customers on that list.

18 There must be records that show that customer list
19 expanding throughout the years. I don't have any of those
20 records. They have those records, they have the customer
21 list, and they have whatever records show as it was expanded
22 throughout the years.

23 I don't have that at all. They have the entire
24 list itself. They have --

25 THE COURT: Is this --

1 MR. KOGAN: -- documentation on every customer --

2 THE COURT: Is this an issue?

3 MR. AKSELROD: Yes, it's a huge issue.

4 THE COURT: Why?

5 MR. AKSELROD: This is ground zero for us of
6 confidentiality and business sensitivity. This is a -- you
7 know, a list of 250,000 customers with emails that obviously
8 I do not -- certainly do not want in Ana Bove's hands,
9 because it certainly has obvious competitive relevance.
10 Discovery relevance, I don't see it.

11 My clients don't want to produce it at all. She's
12 in business. She has lots of these customers because they
13 have control of the websites.

14 By the way, this is a repackaging of something
15 they sought and failed to get in the injunction part of the
16 case. Make them give us the list of customers. The court
17 wouldn't give that.

18 I don't want turning it over, A, because it's
19 sensitive and there's already a history of Ana doing extra
20 judicial things to interfere with our business. She's done
21 things with the -- talked about the eBay store. She tried
22 to do it once before. I don't want to give her the list for
23 her to be able to use it competitively.

24 Now, at the end of the day if they win the case,
25 maybe that ends up being hers --

1 THE COURT: What do you need the --

2 MR. AKSELROD: -- on the merits.

3 THE COURT: What do you need --

4 MR. AKSELROD: I don't know.

5 THE COURT: -- the list for?

6 MR. KOGAN: Like I said, it's not so much the
7 snapshot of today, it's the list as it evolved throughout
8 the years. They have all those records from the beginning.
9 In fact, they have records on every single customer and
10 every single purchase from the beginning. It's like the
11 back-end record for each customer of a retail business.

12 So they --

13 THE COURT: Can --

14 MR. KOGAN: -- they have it all and we cannot
15 demonstrate how the business had grown without that. And
16 they have that --

17 THE COURT: Well --

18 MR. KOGAN: -- in its entirety.

19 THE COURT: So --

20 MR. AKSELROD: That could be done without -- if
21 there -- if this is true, and I don't know if technically
22 it's this true, maybe we can proffer the growth -- some type
23 of growth data without giving you the emails of customers.

24 MR. KOGAN: Why would they be entitled to do that
25 and we would not be entitled to hold back all of our bank

1 records from 2002? They want to look at gross sales and be
2 able to verify it with their own eyes --

3 THE COURT: Well, the --

4 MR. KOGAN: -- and we would not be entitled to see
5 the customer list and the records of each customer --

6 MR. AKSELROD: Customer lists are sensitive --

7 MR. KOGAN: -- from 2002?

8 THE COURT: That's --

9 MR. AKSELROD: Customer lists are always --

10 MR. KOGAN: It's our customers from 2002.

11 MR. AKSELROD: -- always considered to be a
12 sensitive matter.

13 THE COURT: Okay. Well, that -- you might end up
14 getting that at the end of the day. What you -- what the --
15 you -- the preface to this discussion was you wanted to see
16 the progression of the business, vis-a-vis the customer
17 list. That can be done a number of ways.

18 It can be a proffer or it could be producing the
19 customer list without the email addresses, because
20 typically, at least with our -- my email systems both at
21 home and at work, when I send out emails, it'll have the
22 person's name and then it'll have the email address. So you
23 can take off the email addresses. Their concern is that
24 they'd be giving you their --

25 MR. AKSELROD: An instant --

1 THE COURT: -- their -- what they consider to be
2 their customer list now and over time, and then your clients
3 would then use that to solicit business. And that's the
4 problem.

5 My preference would be, if possible, to give them
6 snapshots over time show -- to show how the customer list
7 has grown with the names of the customers and redact the
8 email addresses because the email addresses is the access.
9 I mean, they could -- theoretically I guess they could take
10 the names and then do a search somehow and try to find email
11 addresses and get to -- you know, but --

12 MR. AKSELROD: Or -- yes, or maybe we could just
13 do like first initial and last -- I don't know, whatever.
14 The names --

15 THE COURT: They're -- I think they're entitled to
16 the information --

17 MR. AKSELROD: Okay.

18 THE COURT: -- in a way that can be controlled and
19 I think this definitely whether it -- however it's redacted
20 or produced is -- what was it --

21 MR. KOGAN: Attorney's eyes?

22 THE COURT: -- confidential business records or
23 whatever it is?

24 MR. KOGAN: Commercially sensitive?

25 THE COURT: Commercially sensitive documents. So

1 we'll do it that way.

2 MR. AKSELROD: Okay.

3 THE COURT: Now, do you want -- other than showing
4 how the customer list has grown, do you want underlying
5 emails to the customers?

6 MR. KOGAN: I would like the underlying records
7 that show the -- in other words, let's say in 2004 they have
8 a list of 50,000 clients and in 2007 they show that these
9 same customers have bought, I don't know, a million dollars
10 worth of goods over the last three years.

11 I'm entitled to that, because that means that my
12 customer list, my base is what brought this business to
13 where it is. The base that they had no part in, in 2004 and
14 received access to in 2004.

15 THE COURT: I -- no, I hear that, but I'm sort of
16 trying to think what are the documents at issue here.

17 MR. AKSELROD: I'm concerned about the just the --
18 if this is easy to do by pressing buttons, I mean what are
19 we -- what's the workload here --

20 MR. KOGAN: My understanding --

21 MR. AKSELROD: -- we're talking about?

22 MR. KOGAN: -- is that it is -- I could be wrong.
23 My understanding is that the entire back end is a system.
24 It's not a -- it's not manually done one by one. It is a --
25 like a database system that all you have to do is do a

1 search by when did this client enter our database and then
2 -- that's my understanding. If I'm incorrect on that, I
3 guess we need to explore how -- what you actually are able
4 to produce and how --

5 THE COURT: Explore it, but I thought that you
6 were also looking for let's say customer A sends an email
7 saying I'm looking for a pattern about this and, you know,
8 and you want those emails, too.

9 MR. KOGAN: We gave them all the customer emails
10 that we had.

11 MR. AKSELROD: We got a lot of that from them.
12 Look, it's --

13 MR. KOGAN: We had like 30,000 customer emails --

14 MR. AKSELROD: Yes.

15 MR. KOGAN: -- that we've had and we gave them
16 over in their entirety, not redacting anything, completely
17 giving them everything we've had. And communications with
18 the vendors in their entirety. You know, no redaction
19 whatsoever.

20 No commercially sensitive meaning the clients were
21 -- you know, we had -- everybody had access to that in April
22 of '08. All of a sudden we're not entitled to it? I mean,
23 that's really --

24 MR. AKSELROD: I didn't say you're not entitled to
25 that --

1 MR. KOGAN: I understand, but I'm saying my
2 clients were able to look at it the day before because they
3 were in the business the day before.

4 THE COURT: Well, that's what happens when people
5 leave businesses, right? You know --

6 MR. KOGAN: Or out -- are frozen out of a
7 business.

8 THE COURT: Or --

9 MR. KOGAN: That's --

10 THE COURT: Well, it shouldn't happen when they're
11 frozen out, but --

12 MR. AKSELROD: If I might, Your Honor. I mean,
13 what Mr. Kogan produced, these kinds of routine back and
14 forth with the customers and thank you and -- you know, he
15 did produce a lot of that stuff.

16 It's responsive and, you know, we both asked for
17 that kind of thing.

18 Frankly, it's kind of slight in the grand scheme
19 of this case and, you know, I don't know what we've -- if
20 you really want that --

21 MR. KOGAN: It's important to our client. We've
22 given you everything we've had in that aspect without any
23 limitation.

24 THE COURT: I think --

25 MR. AKSELROD: You know, the day-to-day -- I mean,

1 we -- you know --

2 THE COURT: If he wants it, you know --

3 MR. AKSELROD: But again -- well, we're going to
4 have to redact the email addresses then.

5 THE COURT: But that's a burden you're going to be
6 taking on --

7 MR. AKSELROD: Okay.

8 THE COURT: -- you know.

9 MR. AKSELROD: Then we'll do it. We'll do it.

10 THE COURT: Next issue?

11 MR. KOGAN: Your Honor, I'm not prepared to
12 address something and I just want to be fair to counsel
13 about that because counsel has given me some documents in
14 the last 10 days or so and I appreciate the production.

15 I'm not prepared to respond to it just because I
16 have been -- I'm getting the client into the office to
17 review some of the issues and concerns about that, but I
18 know that we're not done.

19 I do have interrogatories where there was some
20 response -- I know that I was not -- in my initial glance at
21 the responses to the interrogatories, they're
22 unsatisfactory.

23 They were vague and not specific in their response
24 like for example in -- with regard to documents that I
25 sought on a particular issue, the response was look at CD

1 three and CD four, which contains many, many documents and
2 I'm not prepared to go item by item at this point just --

3 THE COURT: I would rather not do that if -- you
4 know, so --

5 MR. KOGAN: Okay. I would like to just make it
6 clear to counsel that I would like to attempt before we
7 bring anything to the Court's attention if we can try to
8 address it and resolve it, that would be great.

9 THE COURT: Okay.

10 MR. AKSELROD: Okay.

11 MR. KOGAN: And I will do it by phone call, Your
12 Honor --

13 THE COURT: All right.

14 MR. AKSELROD: Could --

15 MR. KOGAN: -- without wasting paper or --

16 MR. AKSELROD: I know focused on the -- just on
17 the -- your briefing the issue of post-divorce monies from
18 your new businesses, but we had a lot of questions on our
19 most recent document request and I would like to know that
20 we're getting a written response to that.

21 It wasn't just about that. There's a lot of
22 questions on there.

23 MR. KOGAN: I'm working on an additional
24 production with regard to that, but this -- a substantial
25 portion of it was that. That was the -- the bulk of it was

1 post-divorce issues.

2 THE COURT: Okay. Well --

3 MR. AKSELROD: I'm entitled to a written response.
4 I would like to have that at least.

5 THE COURT: Give him a written response.

6 MR. AKSELROD: Well, just by -- by way -- request
7 number 1, just by way of example, "All documents concerning
8 defendants' ownership or operation or use of any websites or
9 domain names from 2002 to the present."

10 MR. KOGAN: To the present --

11 MR. AKSELROD: Yes, but I understand.

12 MR. KOGAN: So all those demands were -- you know,
13 counsel even -- we've met before then and counsel was saying
14 to me I'm primarily focused on my -- the bulk of my case, my
15 primary interest is from 2008 --

16 THE COURT: Thousand eight.

17 MR. KOGAN: -- going forward and I'm going to give
18 you a second document demand with regard to that -- the
19 financials going forward and I understand.

20 MR. AKSELROD: Okay.

21 MR. KOGAN: Almost every response has a component
22 of going forward and I -- if you're telling me no, really my
23 focus was from 2002, I understand, but that's not what I
24 understood your primary direction --

25 MR. AKSELROD: But events pre-divorce are highly

1 probative of, you know, the issues in terms of who owns what
2 and who has rights to websites --

3 MR. KOGAN: I'll give you a written response to
4 that.

5 MR. AKSELROD: -- and stuff like that.

6 MR. KOGAN: That's no problem.

7 THE COURT: Okay. All right. We -- there are
8 still a lot of issues apparently to be worked out in written
9 discovery, and then we have depositions.

10 MR. AKSELROD: Yes.

11 THE COURT: There are at least four --

12 MR. AKSELROD: Yes.

13 THE COURT: -- correct?

14 MR. AKSELROD: Yes, sir.

15 MR. KOGAN: Yes. And one of them we have to work
16 out logistics for because she's in Israel.

17 THE COURT: Going to go to Israel and take the
18 deposition?

19 MR. AKSELROD: I don't know.

20 THE COURT: Why not?

21 MR. AKSELROD: I mean, I'm -- I'd love to go.

22 MR. KOGAN: Nice trip --

23 MR. AKSELROD: It's expensive, but we'll -- either
24 we'll --

25 MR. KOGAN: Like to join us?

1 MR. AKSELROD: -- do that or we'll --

2 THE COURT: I would love to, frankly.

3 MR. AKSELROD: -- we'll work out a high tech
4 virtual thing or one of us will go, whatever. We'll work it
5 out.

6 THE COURT: All right.

7 MR. AKSELROD: I mean, I believe, you know, this
8 is a case -- and I'm not a long-winded person. I very
9 rarely take more than a one-day deposition in any case.

10 I don't -- I think Mr. Kogan will agree that these
11 are not one-day -- this is not a one-day deposition case.
12 It's too many years. It's thousands of documents, four
13 parties, there's language issues.

14 And I also think getting started, maybe taking a
15 day of each of them, will help us focus on our document
16 issues as well because of the sort of relative messiness of
17 the management of the business. I mean, we have to get
18 started. You know, we've been going at this for a while.

19 THE COURT: Okay. We are coming up on our one-
20 year anniversary in August.

21 MR. KOGAN: Your Honor, getting started is --
22 there's some part that's really -- we're deceptively far.
23 We really are to -- very close to -- in reality, I just got
24 the tax returns two days ago.

25 THE COURT: Uh-huh.

1 MR. KOGAN: I've asked for them from day one and
2 -- and that's just the beginning. That's a partial tax
3 returns. As far as I'm concerned, there's the individual
4 tax returns which I'm -- you know, I haven't received and I
5 don't know what they're going to show about other income and
6 other alleged expenses whether being deducted in both
7 personal and business returns.

8 In any events, the -- I have very, very incomplete
9 business financial records. I --

10 THE COURT: We have a lot of work to do in other
11 words.

12 MR. KOGAN: Right. I think that commencing -- you
13 know, doing a deposition tomorrow really is not appropriate.

14 THE COURT: I don't anticipate you folks doing
15 them tomorrow.

16 (Pause.)

17 THE COURT: On September the 9th at 2:00, we're
18 going to have a status conference. I really would like to
19 know at that point that all document issues are done; that
20 you each have a complete set of documents that you need and
21 you're ready to take depositions.

22 MR. AKSELROD: Okay.

23 THE COURT: And final pretrial conference,
24 although this was originally scheduled as a final pretrial
25 conference, we will do that on December 22nd at 10:00 a.m.

1 MR. AKSELROD: Okay.

2 THE COURT: If prior to the status conference you
3 still have outstanding discovery issues, I would like a
4 joint letter laying out issue one. Describe it; plaintiffs'
5 position, defendants' position. Issue two -- so that'll be
6 -- okay -- August 28th.

7 MR. AKSELROD: Okay.

8 MR. KOGAN: Your Honor?

9 THE COURT: Yes.

10 MR. KOGAN: I apologize. We had issued a subpoena
11 to the tax preparer a long time ago, about three months ago.

12 THE COURT: Uh-huh.

13 MR. KOGAN: That person, although counsel
14 indicated in a letter a couple days ago that that tax
15 preparer had been instructed to release records, had not
16 responded to the subpoena to date.

17 THE COURT: Okay.

18 MR. KOGAN: We would like to receive a complete
19 cooperation on that subpoena if this is a person under their
20 control and if not, do I really -- if I need to, I'll make a
21 motion before the Court to --

22 THE COURT: I think you should --

23 MR. KOGAN: -- compel or punish for --

24 MR. AKSELROD: I don't have an issue with control.
25 You know, what I've -- maybe what's sort of between the

1 lines here is an issue that was never resolved back months
2 ago that had to do with the issue of personal versus
3 corporate tax returns.

4 We had a conference call with you or a meeting
5 with you many months ago and I stated the law about the
6 higher burden for getting personal tax returns and objected.
7 It was not resolved as far as I recall. That's number one.

8 Number two is I haven't heard from Mr. Kogan on
9 his position about the same kinds of requests. You know, we
10 went tit for tat and we said okay, give us your tax --
11 personal tax stuff. I don't know what their position is on
12 their personal tax stuff either.

13 So, A, we have an objection that was not resolved
14 and, B, I don't know what their position is. Regarding the
15 corporate stuff, I don't know why it took so long. We told
16 them to produce it. It --

17 THE COURT: Okay.

18 MR. AKSELROD: -- whatever happened --

19 THE COURT: Again --

20 MR. AKSELROD: -- they have it.

21 THE COURT: -- it's a two-say street on the
22 personal side. So if you want it, you'll get it, but your
23 side's going to have to give it up, too.

24 Call him or her and say that, you know, the Judge
25 would like this done right away. You can make a joint call.

1 You can -- one of you can make the call.

2 I mean, I don't think it makes sense for Mr. Kogan
3 to be the one because --

4 MR. AKSELROD: Telling him to produce the rest of
5 the corporate stuff if there's stuff missing?

6 THE COURT: Yes, and the personal stuff. I mean,
7 get it out there.

8 MR. AKSELROD: Are you --

9 THE COURT: Both ways --

10 MR. AKSELROD: You're going to produce personal
11 tax records?

12 MR. KOGAN: My clients' personal tax records I do
13 not see why those would be relevant in the same way.

14 THE COURT: It's a two-way street.

15 MR. AKSELROD: We're in the exact same position.

16 THE COURT: It's a two-way street. I'll -- that's
17 all I'm going to say. What --

18 MR. AKSELROD: Do you want to discuss it?

19 THE COURT: Are we going to the mat on this? On
20 this case?

21 MR. AKSELROD: We could --

22 THE COURT: I want to move on from there. It's a
23 two-way street. If you want personal tax returns, you're
24 going to have to give them up.

25 MR. KOGAN: With regard to the corporate tax

1 returns, I still -- I just received tax returns. I didn't
2 receive any underlying records. I mean, I'm sure the
3 accountant has them.

4 THE COURT: He's --

5 MR. KOGAN: I'd like to get them --

6 THE COURT: Give him a call and get them.

7 MR. AKSELROD: You'll get them.

8 MR. KOGAN: Okay.

9 MR. AKSELROD: I'll tell them -- I don't know what
10 there is. I've never seen them, but if there's support for
11 the tax returns, you can have --

12 MR. KOGAN: Well, I presume, I mean, they're
13 saying that there's \$100,000 in building improvements. They
14 can't make that number up. They must have something that
15 supports building improvements for a hundred thousand
16 dollars.

17 MR. AKSELROD: Whatever's in his work file, his
18 work papers for the corporation, I don't -- I will tell him
19 to produce.

20 THE COURT: Okay.

21 MR. AKSELROD: Okay? I have no problem with that.

22

23 THE COURT: Are we going to the mat on this case,
24 or are you going to be able to work this out?

25 MR. AKSELROD: Well, you know, it's -- we went to

1 a mediator in Long Island without success. He spoke to both
2 of us separately. It is -- you know, my clients are still
3 going and paying, but it is a very expensive lawsuit.

4 This is a very expensive lawsuit for essentially
5 what are little people who had a reasonably successful
6 family business. I don't really know. You know, we haven't
7 talked about it in a long time. I don't know if we're going
8 to the mat on it or not.

9 MR. KOGAN: I know that my client -- my clients
10 have tried to -- I believe that mediation would make sense
11 -- still make sense. I always said to my clients that --
12 and I believe that we're -- they didn't want to proceed with
13 the mediation.

14 In private they communicated to my client that
15 they don't believe they'll ever have to produce any business
16 records. Maybe after production of the personal records, it
17 would make sense to sit down because everybody will see that
18 everything's on the table.

19 At this point maybe they thought we could hide
20 something or whatever --

21 THE COURT: Maybe even the specter of having to
22 produce the personal records will get them to reconsider.

23 I would like to know -- I mean, I think you should
24 talk to your folks and in two weeks give me a status report
25 on whether you want to have a settlement conference. I will

1 give you as much time as you need, but I would want people
2 here.

3 MR. KOGAN: I agree --

4 THE COURT: I don't want to have, no offense, just
5 -- I don't want it just to be us.

6 MR. KOGAN: Oh, I think that --

7 MR. AKSELROD: Guilty.

8 MR. KOGAN: -- it would be very effective -- no
9 matter what, I think it would be very effective for -- it's
10 -- parties always only -- don't really -- fail to see the
11 complete picture and I think it's always helpful.

12 I think that the Mikhlyns and my clients would
13 benefit from such a conference. I don't know if counsel --
14 I would consent to that, of course.

15 I don't know if counsel --

16 MR. AKSELROD: I got to talk to them. I'm always
17 open to that kind of thing in general, but let's talk to the
18 clients.

19 One last housekeeping thing, Your Honor, if -- I
20 may have missed it. I don't recall you saying when we would
21 respond to Mr. Kogan's letter brief on the issue of
22 bifurcating --

23 THE COURT: July 3rd.

24 MR. AKSELROD: Oh, we got that. Okay. I'm sorry.
25 I think we're set.

1 THE COURT: Okay, so send me a letter on whether
2 you want to have a settlement conference --

3 MR. KOGAN: When would the Court be --

4 THE COURT: On -- geez, July 3rd is two weeks
5 away, right? Pretty much. Wow. I -- the only time I do
6 not have available this summer is, I'll tell you, the week
7 of July 13th, the week of August 17th, and the week of
8 August 3rd we actually have a trial that day.

9 Although it's a jury trial, so I give my full
10 attention to my juries. So those are the only three weeks
11 that I would be unavailable this summer.

12 Are your clients going to be in country anytime
13 soon?

14 MR. KOGAN: Not the person who's abroad, but we --
15 we're quite capable of making the -- making any settlement
16 decisions on that person's behalf.

17 THE COURT: Okay.

18 MR. KOGAN: So I have principals here who could
19 participate --

20 THE COURT: All right.

21 MR. KOGAN: -- and resolve --

22 THE COURT: All right, let me know.

23 MR. AKSELROD: Thank you.

24 THE COURT: Thank you, gentlemen.

25 MALE VOICE: Thank you.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. KOGAN: Thank you, Your Honor.

(Proceedings concluded at 11:56 a.m.)

I, CHRISTINE FIORE, court-approved transcriber and certified electronic reporter and transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



June 29, 2009

Christine Fiore, CERT
Transcriber