

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
 MIKHLYN, et al. : 08-cv-3367 (CPS) (RER)  
                   Plaintiff, :  
                                   :   
       - versus - : U.S. Courthouse  
                                   : Brooklyn, New York  
 BOVE, et al., :  
                   Defendant : September 9, 2009  
 -----X

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

**A P P E A R A N C E S:**

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1 THE CLERK: The Honorable Ramon E. Reyes, Jr.  
2 presiding.

3 Civil Cause for a Status Conference, docket  
4 number 08-cv-3367, Mikhlyn v. Bove.

5 Counsel for plaintiff please state your name  
6 for the record.

7 MR. WERTHEIM: Eric Wertheim, Law Office of Val  
8 Mandel, P.C. for the plaintiffs.

9 THE COURT: Good afternoon.

10 MR. WERTHEIM: Good afternoon.

11 THE CLERK: Counsel for the defendant?

12 MR. KOGAN: Good afternoon, your Honor.

13 Boris Kogan for the defendants and I have with  
14 me, David Binson, my associate and to my right is a law  
15 clerk from my office, Yasseou Abeshouse,  
16 A-b-e-s-h-o-u-s-e. Sorry.

17 THE COURT: It's easy for you to say --  
18 apparently not; no.

19 Is the protective order done?

20 MR. KOGAN: No.

21 MR. WERTHEIM: Well what I had indicated in my  
22 last communication to them and what I am willing to say  
23 is if they want to go with the last draft, I'm okay with  
24 it. I made a suggestion but if they want to reject it,  
25 as I said in my email a long time ago, I will leave it up

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1 to you. I had one last comment. It wasn't a demand.  
2 I'm willing to get up and say that the last draft of the  
3 protective order is it and that's fine.

4 THE COURT: File it by Friday.

5 MR. WERTHEIM: Okay.

6 THE COURT: What else remains?

7 MR. WERTHEIM: Well I think, your Honor,  
8 unfortunately everything remains. We did not make any  
9 progress along the things you directed us to do  
10 specifically on June 28. You issued a few direct rulings  
11 as to what we were supposed to do in the way of producing  
12 things and some guidelines on how we were supposed to  
13 deal with each other. And it has not been followed.

14 One thing you said was on June 28, that they  
15 had to respond in writing to our last document request  
16 which was then already a couple of months overdue. I  
17 haven't received that. It's now about 20 months overdue  
18 -- 20 weeks, excuse me, not 20 months.

19 Big sticking point, I think --

20 THE COURT: Okay.

21 MR. WERTHEIM: -- is this issue of --

22 THE COURT: Let's do things one at a time.

23 MR. WERTHEIM: Okay.

24 THE COURT: What's the problem with the written  
25 response to the document requests?

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1 MR. KOGAN: No problem, your Honor. Protective  
2 order is -- we couldn't get off the ground with the last  
3 issue which counsel is now withdrawn -- we don't have to  
4 get into it but that's -- without a protective order,  
5 they've asked us to produce documents that would be  
6 sensitive in nature and I have no problem once we have a  
7 protective order in place.

8 THE COURT: Okay. The protective order will be  
9 in place --

10 MR. KOGAN: On Friday.

11 THE COURT: Friday.

12 MR. KOGAN: Okay.

13 MR. WERTHEIM: That certainly has nothing to do  
14 with the written response, your Honor.

15 THE COURT: The written response to the  
16 plaintiff's document requests.

17 MR. WERTHEIM: Yes, the second document  
18 requests.

19 THE COURT: By the 16th. If it's not done by  
20 the 16th, a \$500 sanction to the attorneys. Next issue?

21 MR. WERTHEIM: The next issue is, it's called  
22 designs and artwork. The defendants, not us, have  
23 asserted copyright counterclaims. You may recall we've  
24 litigated different facets of the whole copyright issue  
25 of whether there was late filings, whatever. But the

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1 bottom line is they asserted copyright claims. They, in  
2 their last pleading which is a while back now, they claim  
3 to have a -- you know, a numerous list of copyrights and  
4 obviously there are correspondent copyright applications.

5 We had been asking for it for a very long time,  
6 going way back in the case. There didn't seem to be any  
7 dispute. At the last conference in June, counsel got up  
8 and said my client is concerned that if we turn things  
9 over before they give them theirs, we turn over ours. My  
10 clients will take their images and copy them and then  
11 claim that they made them originally. So you said what's  
12 the harm in doing a simultaneous exchange. That was your  
13 order.

14 THE COURT: Yes.

15 MR. WERTHEIM: Okay. We went about doing it.  
16 We actually have 100 plus CD-ROMS and the reason why  
17 there are so many, and I told him that in writing a long  
18 time ago is if you are computer user, you know that  
19 graphics and photographs and images take up a lot of  
20 space.

21 THE COURT: Take up a lot of space.

22 MR. WERTHEIM: Okay. We told him in July in  
23 writing, we have the stuff. They never got back to us.  
24 Actually, truth be told, you told us at the last  
25 conference that we should be talking to each other. And

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1 after an initial meeting, I went to Mr. Kogan's office.  
2 They stopped talking to us. I've left several messages  
3 with Mr. Kogan trying to talk about all of these issues.  
4 I got no response. I eventually wrote a letter saying  
5 hey, you know, we're supposed to talk. I sent  
6 Mr. Binson an email saying Boris hasn't called me back.

7 I finally wrote to them saying look if we're at  
8 an impasse, which we appear to be, you're not talking to  
9 us, let's at least write the joint letter about problems  
10 that Magistrate Reyes told us to do the last time. That  
11 was ignored. That's when I finally wrote to you to get  
12 this thing done. And that's when finally came to life  
13 about discovery issues.

14 Now getting back to the images, we told them it  
15 was ready back in July. I don't remember what month it  
16 was, maybe it was in August, I get an email from  
17 Mr. Kogan's associate, Mr. Binson, saying we have to have  
18 some kind of agreement now about this exchange and you  
19 have to draft it; me. First of all, I don't even know  
20 what's supposed to be in it. I don't agree that an  
21 agreement is needed. This is governed by the discovery  
22 rules.

23 THE COURT: I can circumvent this. Wednesday,  
24 everybody is coming here and you are bringing your  
25 copyright applications, the images, whatever, 100 CD-

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1 ROMS, and you're going to exchange them.

2 MR. KOGAN: Your Honor, I just would like to  
3 respond because a lot of things were said which were a  
4 gross mischaracterization of what had transpired.

5 THE COURT: Okay. You can respond. I am  
6 really -- I'm tired of this. You guys can't work  
7 together. I don't care who it is. You're both, in my  
8 eyes, all of you, are not doing your jobs or you're doing  
9 -- you are over litigating this case. And I really -- I  
10 am not going to have it anymore. But go ahead, respond.

11 MR. KOGAN: Your Honor, specifically when  
12 Mr. Wertheim brought certain issues up during our meeting  
13 in person, we requested certain documents from them.  
14 They promised to give us those documents, the financial  
15 records of the business. So far of all the financial  
16 records of the business, we have only received -- I'm  
17 sorry, we've only received tax returns. That's the only  
18 financial records of the business we've received and --

19 THE COURT: All right. This is not in response  
20 to --

21 MR. KOGAN: No, I am just -- I would like to  
22 show there's actually a pattern --

23 THE COURT: I think --

24 MR. KOGAN: -- the claim that we are not  
25 cooperating with them but in reality, he acknowledged

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1 that the real issue here is with regard to the exchange  
2 -- simultaneous exchange of documents, there are two  
3 concerns that my clients have and he refuses to  
4 acknowledge that they are legitimate concerns and refuses  
5 to enter into an agreement with that -- in that regard.

6           So while we can come here and exchange  
7 documents here -- actually three issues; one is the scope  
8 of the exchange, the fact that he is bringing 100 CDs is  
9 an indication that they are going to be dumping on us  
10 documents that are either irrelevant, immaterial or that  
11 he doesn't either -- Mr. Wertheim or his client, doesn't  
12 understand what it is that is the subject of this  
13 exchange.

14           My clients actually have the original  
15 documents, as well as the -- meaning the original  
16 designs, the public domain designs, as well as the  
17 designs that they created which are a variation on public  
18 domain designs. And all those documents somehow fit into  
19 30 CDs. And his clients don't even have those documents.  
20 They don't even have them. So they couldn't possibly  
21 come up with 100 CDs unless they're dumping on us  
22 materials that are irrelevant.

23           THE COURT: Okay.

24           MR. KOGAN: That's why the scope of the  
25 exchange is important to be defined. And I would like



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1 the scope to be all records of whatever nature that prove  
2 that they -- that anyone's claim that they have copyright  
3 -- copyrightable --

4 THE COURT: So what's --

5 MR. KOGAN: -- claim.

6 THE COURT: So if that's the scope, what's  
7 going to prevent him from dumping?

8 MR. KOGAN: He doesn't --

9 THE COURT: I mean, I --

10 MR. KOGAN: That's fine.

11 THE COURT: Unless you want me to go through  
12 every document that each side produces --

13 MR. KOGAN: I don't; no.

14 THE COURT: -- I can't stop you from dumping.

15 MR. KOGAN: I --

16 THE COURT: If there is dumping, if at the end  
17 of the day you get 100 CDs and you go through it and  
18 it's, you know, the plaintiff's shopping list from two  
19 years ago or nonsense, then you file a motion for  
20 sanctions against Mr. Wertheim and you've probably got a  
21 good shot of hitting it. Okay? So you know, I am not  
22 going to sort it out now.

23 MR. KOGAN: I understand. But, your Honor, the  
24 other issue is the scope is important because I don't  
25 want them to come back. The purpose of the simultaneous

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1 exchange is so that they could not come back the  
2 following day and say oh, that's what you meant, you  
3 meant documents that prove original design by us. That's  
4 what you meant? No, that's not what I gave you. I gave  
5 you emails. I gave you all the emails I had.

6           So I don't want there to be -- I don't want to  
7 frustrate the purpose of the simultaneous exchange which  
8 is that no one can have a leg up on the other guy by  
9 saying well, we're submitting documents which will show  
10 that my client's design took public domain designs,  
11 modified them with creative elements to create a  
12 copyrightable design.

13           They're going to produce nothing of the sort.  
14 That's what my clients are -- believe. Now I don't want  
15 them to be able to come back the following day and say  
16 oh, now that you've given this, we have some additional  
17 documents which will also prove the same thing. We want  
18 it to be a one shot simultaneous exchange. And I am  
19 concerned without a very clear definition of what it is  
20 that we're exchanging that they're going to try to get a  
21 second bite at the apple.

22           THE COURT: Well I assume you're exchanging  
23 things in response to written discovery requests.

24           MR. KOGAN: No, that's not --

25           MR. WERTHEIM: Well, it's both. It's both. I

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1 mean that's the original -- the only thing that's unusual  
2 about --

3 THE COURT: What are the 100 CDs?

4 MR. WERTHEIM: What's on the 100 CDs, these are  
5 artwork, the designs, the records showing the digitizing  
6 process that were done by people other than her. And I  
7 think it also includes things that Anna Bove did, too.

8 THE COURT: I've got a solution. I've got a  
9 solution. It's a one-shot deal. It's happening on  
10 Wednesday in this court. You don't produce it, it's  
11 going to be excluded.

12 MR. WERTHEIM: Okay.

13 THE COURT: All right?

14 MR. WERTHEIM: Yes.

15 THE COURT: Both sides.

16 MR. WERTHEIM: Okay.

17 THE COURT: Okay.

18 MR. KOGAN: That resolves that, your Honor.

19 MR. WERTHEIM: By the way, your Honor, this  
20 whole idea of --

21 MR. KOGAN: Lastly -- I'm sorry, I just would  
22 like to add one item that I would have wanted an  
23 agreement, is I would like it to be clear that these are  
24 obviously attorney's eyes only --

25 THE COURT: We discussed that.

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1 MR. KOGAN: -- and that we've discussed that  
2 last time.

3 THE COURT: Yes.

4 MR. KOGAN: And at the end of the litigation,  
5 each party gets their CDs back and then no copies are  
6 being made. That obviously has to be part of what I  
7 would want to have in an agreement but that has to be the  
8 case. And I wouldn't want to have any ambiguity about  
9 that. I don't want them to afterwards say well we -- at  
10 the end of the litigation, we somehow walk away with your  
11 documents --

12 THE COURT: Why --

13 MR. KOGAN: -- with your records.

14 THE COURT: At the end of the day, why would  
15 you need to keep it?

16 MR. WERTHEIM: I don't -- I don't -- in fact  
17 it's funny you should say that because my last suggestion  
18 on the protective order and this is a common thing in  
19 litigation, is to have just a general provision that says  
20 use anything you get just for the litigation and you get  
21 rid of it or turn it back at the end of the case.

22 MR. KOGAN: That was not discussed, your Honor.

23 MR. WERTHEIM: That was a suggestion that was  
24 objected --

25 MR. KOGAN: I have it in writing. The

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1 suggestion was not that.

2 THE COURT: All right. It's clear on the  
3 record. Whatever you produce -- well we're talking now  
4 mainly about the artwork and the design, all of that?

5 MR. KOGAN: It's designs, it's all designs,  
6 public domain designs and the modified designs which show  
7 how these were -- how the designs are being sold by the  
8 two respective businesses originated.

9 THE COURT: All right. Attorney's eyes only as  
10 we discussed at the last conference. No copies are going  
11 to be made without application to the Court. And at the  
12 end of the day, when the litigation is concluded, you  
13 will each return to your adversary what was produced.

14 MR. WERTHEIM: All right. Your Honor, I have a  
15 real problem with at least part of this attorney's eyes  
16 only. It cannot possibly be that you go to Washington  
17 and publicly file a copyright application and get a  
18 copyright and then say when they turn over their versions  
19 of it, it's attorney's eyes only. I could go to  
20 Washington and get this stuff. It can't be attorney's  
21 eyes only.

22 Plus, it's a copyright case and there are  
23 issues about who did what, who created what. How are we  
24 supposed to go over this?

25 THE COURT: Well I assume there are things that

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1 are going to be produced that were not in the copyright  
2 applications, interim steps maybe.

3 MR. KOGAN: There are but your Honor more than  
4 that, their ability to go to Washington or not go to  
5 Washington, that's not really the issue. The -- it was  
6 in the last conference, this -- we addressed this issue  
7 and attorney's eyes only is appropriate. It's not  
8 appropriate -- the moment that I actually allow them to  
9 see these materials, they are going to be able to conjure  
10 up a story that they originated. They're the ones who  
11 added the three dimensional component to the fonts. They  
12 are going to come up with a --

13 THE COURT: But his point is they could do that  
14 already by looking at the -- what's filed in the  
15 copyright office.

16 MR. KOGAN: And if they can, let them do that  
17 but they're -- they didn't. They're not going to. And  
18 if they can, if they go to Washington and get them, good  
19 luck.

20 MR. WERTHEIM: How could we litigate this case  
21 without each side seeing the artwork that is in dispute  
22 (inaudible).

23 (Interposing)

24 MR. KOGAN: Let's have a hearing on Wednesday,  
25 your Honor. Let's have a hearing on Wednesday and let's

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1 take testimony because they cannot -- right now, they  
2 cannot substantiate their claims that they modified these  
3 public domain designs to become the designs that they're  
4 selling right now because my clients did that.

5           The moment that they review these, they'll say  
6 -- they will come up with a story. Oh, yeah, I added  
7 that. That was my idea to put the green background  
8 there. It was my design -- my idea was to combine these  
9 two fonts into one. Right now they don't know it because  
10 they -- they don't know where it came from. It's all my  
11 client's original ideas.

12           MR. WERTHEIM: I find this to be bizarre,  
13 your Honor, that you're going to accept as a premise that  
14 my clients are dishonest in some made up way that Anna  
15 Bove is concerned about. They make copyright claims.  
16 Artwork and creations are in dispute both ways. This  
17 stuff is publicly filed, copyrighted material. It has  
18 copyright protection. How could it possibly be  
19 attorney's eyes only? I could not find such a thing when  
20 I researched it. How could you assert a copyright claim  
21 when not only is the artwork in dispute in this case, the  
22 application process is in dispute based upon what we know  
23 from earlier in the case.

24           I don't know that she disclosed or the extent  
25 she disclosed the existence of the pre-existing material

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1 for example, this was based upon. How could this be  
2 attorney's eyes only? I just -- I don't understand it.  
3 I don't understand it. They have -- you know, presumably  
4 they have computer records of her taking original artwork  
5 from some public domain source or a license source,  
6 putting it into the computer, pressing buttons. Plus the  
7 stuff is being sold on the internet. They're making it  
8 sound like it's some trade secret in a tank somewhere.

9 MR. KOGAN: What is being sold on the  
10 internet --

11 THE COURT: Yes, but -- no, no. I am --

12 MR. KOGAN: What is actually being sold on the  
13 internet and, your Honor it's very likely that we're  
14 going to go back to the office today and work on an  
15 application for a TRO or a preliminary injunction  
16 actually because on August 25 --

17 THE COURT: Well that's Judge Sifton's problem,  
18 not mine.

19 MR. KOGAN: I understand but on August 25, they  
20 took all the designs that we registered and put them on  
21 sale, 50 percent off because it's a fire sale just to  
22 hurt us during the pendency of the litigation.

23 THE COURT: Let's --

24 MR. KOGAN: So at the end of the day --

25 THE COURT: That's not my issue here.



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1 MR. KOGAN: I understand that.

2 THE COURT: Let's get back to the attorney's  
3 eyes only.

4 MR. KOGAN: About dishonesty, I just wanted to  
5 address what is being -- what is happening meanwhile.  
6 They're using the registrations. The exact designs that  
7 we registered are suddenly worthless to them, so they're  
8 dumping them. And they are dumping them at half price,  
9 making it difficult for anybody to -- if it's not unfair  
10 competition, I don't know what would be.

11 THE COURT: Let's go back to the issue of  
12 attorney's eyes only. I was under the impression that  
13 there may be information that's going to be produced that  
14 is not publicly filed with the copyright office.

15 MR. KOGAN: Some information --

16 THE COURT: Is that correct?

17 MR. KOGAN: Some information is publicly filed  
18 and some information is not publicly filed.

19 THE COURT: Okay.

20 MR. KOGAN: That's correct.

21 THE COURT: As a legal matter, what right do  
22 your clients or your clients have if they filed their own  
23 copyright applications to keep attorney's eyes only or  
24 confidential what has been publicly filed? I understand  
25 your practical concern but as a legal matter, what right

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1 do they have to say in this litigation only the attorneys  
2 can look at what's in the copyright applications?

3 MR. KOGAN: I think the practical concern is  
4 the issue and there is a history of dishonesty here.  
5 This is not something that is sudden. That counsel is  
6 appalled and shocked that anybody is saying that -- the  
7 whole issue in the case is his clients who are agents of  
8 my clients, took over their business. If this is not  
9 dishonesty, I don't know what would be.

10 And we have then they're running a business  
11 billing -- claiming that they had to have an offsite  
12 warehouse which allowed them to purchase a house in  
13 Pennsylvania, a vacation summer home, and that they  
14 needed that Pennsylvania summer home as a warehouse and  
15 they needed two cars, of course, to transport, I don't  
16 know what to where and they needed jewelry, Victoria's  
17 Secret stuff, hundreds of dollars of liquor per week for  
18 -- this is of course necessary for a design business.  
19 And all of that is they've given us the excuse that this  
20 is somehow -- these are business expenses. They are  
21 somehow all deductible, they told that to the IRS as  
22 well. I don't know if anybody's actually going to buy  
23 that we may have to submit amended tax returns on that  
24 issue.

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

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1 You're going to produce it on Wednesday, a simultaneous  
2 production. For the time being, it's attorney's eyes  
3 only. On Friday I want letter briefs of five pages, same  
4 time 5 o'clock on the dot, filed by ECF explaining to me,  
5 you -- why it should not be attorney's eyes only. And  
6 what I am talking about is the publicly filed  
7 information, you know? To the extent there are documents  
8 that were part of the creative process to go from public  
9 domain to copyrightable designs that were not part of the  
10 publicly filed documents, I am with you that that should  
11 not be shown to plaintiffs and vice-a-versa, if there's  
12 anything of that nature.

13 MR. KOGAN: But, your Honor, at the --

14 THE COURT: But what was publicly filed --

15 MR. WERTHEIM: The following Friday, after next  
16 Wednesday.

17 THE COURT: Filed -- after this Wednesday, you  
18 look at whatever it is, you know, the 30 CDs that you're  
19 going to get, you're going to look at the 100 CDs.  
20 You're going to say all right. This stuff that was  
21 publicly filed is part of the copyright application,  
22 should remain attorney's eyes only because bah, bah, bah.  
23 Here's the legal basis to make that argument. Then you  
24 say it shouldn't be.

25 MR. WERTHEIM: Okay.

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1           MR. KOGAN: Your Honor, I would just ask that  
2 if there would be a ruling at any point that it should  
3 not be attorney's eyes only, that must not happen before  
4 depositions because their ability to circumvent -- to  
5 make up a story is -- they don't have that ability at  
6 this moment. Once they have the access to these public  
7 domain designs, which they don't -- at this moment they  
8 don't have them, they don't know where it came from, they  
9 have no explanation how they could have created these  
10 documents.

11           THE COURT: Yes, but look, you know, it's --

12           MR. WERTHEIM: There's a simple technical  
13 answer to this. You can hire forensic computer guys to  
14 look at the computers to see when, you know input was  
15 done on the software that creates the designs. If you're  
16 going to call people a liar, do that if it comes down to  
17 it. I'm not going to be able to go back in time.

18           THE COURT: Put that in the letter. Put that  
19 in the letter. If you want that, put that in the letter.  
20 I mean, yo know, if -- I side with you on this argument.  
21 All it means is that they're going to go down to the  
22 copyright -- if they're so dishonest, they're such pieces  
23 of crap, they're going to go down to Washington with a  
24 list of all of the copyright applications and do it  
25 anyway. You'll still have to confront the lies.

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1 MR. WERTHEIM: And vice-a-versa. We're  
2 producing artwork, too.

3 THE COURT: I mean it --

4 MR. KOGAN: Your Honor?

5 THE COURT: And if they're so dishonest, you're  
6 going to be able to cut them up. You're a good lawyer.  
7 Come on.

8 MR. KOGAN: It hasn't -- all is it that a  
9 person needs to do is have a story on how they are the  
10 ones who originated -- who designed it.

11 THE COURT: You've got to have a good story  
12 though. You know, there are eight million stories and a  
13 lot of them are a bunch of bunk.

14 MR. KOGAN: Right now they don't have a story.  
15 They don't have what to base their fictitious  
16 explanations on at this moment.

17 MR. WERTHEIM: I've got an injunction and you  
18 didn't but we don't have a story.

19 THE COURT: Look, hey, hey come on. Guys, you  
20 know?

21 MR. WERTHEIM: Okay.

22 MR. KOGAN: Speaking of an injunction,  
23 your Honor, the injunction was that the -- no, that's  
24 important your Honor. That's my -- one of my main issues  
25 today was that we will not say that they stole from us.

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1 The Judge -- Judge Sifton did not want anyone to say that  
2 the other side stole and we actually had something on our  
3 website that said that they -- what they did was illegal  
4 and he didn't want that conclusion to be a basis for  
5 possibly hurting their business going forward.

6 I have an email here showing that they right  
7 now are telling their customers --

8 THE COURT: If they're --

9 MR. KOGAN: -- exactly that. They are  
10 telling --

11 THE COURT: If they violated the injunction,  
12 then you need to bring a motion for contempt with  
13 Judge Sifton. I can't --

14 MR. KOGAN: No, no, the injunction was -- we  
15 actually had something on our site and the Judge wanted  
16 us to remove it and we were enjoined and we did remove  
17 it.

18 Now at this point they are doing exactly the  
19 same thing and I will have to move for an injunction.  
20 That's another basis. They specifically say I -- that we  
21 worked for them and that we're selling their designs that  
22 we stole from them. That's what they're saying to their  
23 customers now.

24 THE COURT: Bring it to Judge Sifton. I mean,  
25 I -- that's not my -- I got enough to do with my docket.

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1 I -- that's Judge Sifton's call.

2           Look, protective order gets filed Friday.  
3 Wednesday, either here or if you can agree on a location,  
4 you're going to come and you're going to put your cards  
5 on the table, simultaneous production. The following  
6 Friday I am going to get the five page letter briefs on  
7 the issue of attorney's eyes only on the artwork.

8           What else?

9           MR. WERTHEIM: More stuff. There was the issue  
10 of emails. You may remember that we produced thousands  
11 of emails and chats. They produced a few emails and the  
12 story was that either in Anna Bove's case, she left the  
13 computer with us and then Polina, the Israeli defendant,  
14 her computer crashed, so there's no email. So it was  
15 understood well we have to serve subpoenas on internet  
16 service providers. Okay.

17           One of the big subjects of discussion at  
18 Mr. Kogan's office a week or so after we met with you the  
19 last time in June was how we're going to go about this.  
20 We actually volunteered, even though we were the ones  
21 pressing to serve subpoenas because we're looking for  
22 emails we didn't get from their side, we actually  
23 volunteered the idea that the sort of non-serving would  
24 have a review. We would come up with some method of  
25 review to exclude obviously privileged things or you know

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1 highly personal sensitive things. You get to look at the  
2 stuff that's coming from the third party before we saw it  
3 and vice-a-versa.

4           Mr. Kogan said and put in emails that week  
5 saying I want to go talk to my client about this. I will  
6 get back to you. I have actually an email with me from  
7 the following week, him saying I am meeting with the  
8 client, Anna Bove, on I think it was a Thursday in July  
9 and I'm going to call you on Friday about it. Never  
10 heard from them.

11           That's one of the subject that I was calling  
12 Mr. Kogan about and emailing about. That was one of the  
13 open subjects that had to be addressed. Now it turns out  
14 there's been sort of a superseding problem that's going  
15 to require either their consent or a court ruling and  
16 that is you know, all of these internet service providers  
17 being bombarded with, you know e-discovery these days and  
18 there's a statute out there, this big statute involving  
19 electronic communications and they're really not sure but  
20 they think it might be illegal for them to turn over  
21 things in response to a subpoena without either agreement  
22 or a court order. There's this like form letter that's  
23 come up in the business from Yahoo! and all of these  
24 other companies. We got a bunch of them.

25           So basically, we don't have anything. There's



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1 no imminent disclosure from them. We have to work out  
2 some kind of you know, mechanism to direct them to do it  
3 or to get their stipulation allowing there to be a  
4 production. I am not sure there's going to be very much  
5 because it seems like they don't save things for a very  
6 long time these days. But nonetheless, we're at an  
7 impasse about that.

8 MR. KOGAN: Your Honor, may I respond?

9 THE COURT: Yes.

10 MR. KOGAN: What he fails to mention is that he  
11 actually served a subpoena --

12 MR. WERTHEIM: Yes.

13 MR. KOGAN: -- while we were talking. So  
14 instead of -- and the scope of the subpoena is actually  
15 all emails, even until yesterday. It obviously includes  
16 emails from my client to me. It obviously includes all  
17 of the emails between them. Now they're friends, this is  
18 just absolutely invasive, absurd -- the fact that his  
19 clients are husband and wife and happen to live in the  
20 same household, but by the way, I would be entitled to  
21 the same thing, no -- what privilege would they have if  
22 they email each other or text each other during the day,  
23 I would be able to look at that according to that theory.  
24 That doesn't make sense.

25 MR. WERTHEIM: I gave you the (inaudible).

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1 MR. KOGAN: After April of 2008, they're not  
2 entitled to look at our communications because I was  
3 already on board as an attorney. Shortly after that, I  
4 believe in May, there's a lot of communications that are  
5 in preparation for the litigation. He's not entitled to  
6 look at those emails, not now, not ever.

7 Now obviously there are issues in the  
8 litigation about intent and about what the business was,  
9 how they -- what the -- the main question here is what  
10 was the parties' intent. We have four participants here  
11 and my clients' version is that they worked for us and  
12 their version is that we were partners, all four were  
13 partners.

14 You can't look at emails after the business --  
15 after they split up in order to try to prove what the  
16 original intent was. So they can't claim that there was  
17 a purpose for reviewing my client's emails after the date  
18 of separation. It doesn't make -- there's no basis for  
19 it. It's invasive. There is no argument for that  
20 production. This is not a Phillip Morris case where  
21 emails, inter-company emails are -- you know, are being  
22 sent and we're trying to find out did they know, did they  
23 not know certain information at a certain time. This is  
24 all after the fact. He wants to get discovery of emails  
25 after the fact and that is really -- that's been his

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1 agenda all along, I understand that, to pressure my  
2 clients into settlement by being so invasive but it is  
3 really inappropriate. And that is really the objection  
4 here.

5 I have no problem with the procedure that  
6 allows for review of the emails until the date of  
7 separation and we were trying to obtain information from  
8 Yahoo! and Microsoft about what they actually have and  
9 what would they charge for the production of the  
10 documents so that we could figure out what the cost would  
11 be in order to let's say that we would obtain the  
12 documents, review them, redact them, and submit to the  
13 other side. We wanted to engage in that and we received  
14 a subpoena that included a date that is until now. They  
15 want to see the emails that were sent yesterday.

16 MR. WERTHEIM: Your Honor, may I?

17 THE COURT: Wait. So your issue is the date.  
18 That's it.

19 MR. KOGAN: Just the date. And the rest is a  
20 procedure, I think it's a fair procedure. We will  
21 subpoena all of the records or all of our clients emails.  
22 They'll subpoena their clients emails. We'll each  
23 respectively review our own clients emails to either  
24 redact or take out the ones that are not business-  
25 related. And the business-related emails predating April

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1 of 2008, let's say through March 31, 2008; all those  
2 would be subject. After that date they would not be  
3 subject to such a review and production.

4 MR. WERTHEIM: May I, your Honor?

5 THE COURT: Yes. You know they have you down  
6 as Mr. Akselrod in the transcript.

7 MR. WERTHEIM: I raised this with your deputy.  
8 It's something -- you know what happened? In the very  
9 earliest stages of this case, our associate, Daniel, file  
10 the papers.

11 THE COURT: All right.

12 MR. WERTHEIM: Then I made a notice of  
13 appearance and I can't get my name on anything these  
14 days. He's the man. So --

15 THE COURT: Maybe you don't want your name on  
16 anything these days.

17 MR. WERTHEIM: He owes me, I guess if I am  
18 doing okay.

19 THE COURT: All right.

20 MR. WERTHEIM: Your Honor, this whole idea of  
21 post-separation and it not mattering post-separation,  
22 this is kind of an old theme that we've discussed earlier  
23 in this case. The reality is that the focus of the  
24 lawsuit from our end is events that occurred after April  
25 of 2008. The focus of their lawsuit and they've said

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1 this early on in the case is what's occurred before.  
2 They claim that you know there was an imbalance of  
3 compensation or my clients took too much money when they  
4 were working in the business together.

5 THE COURT: I have an easy solution to this.  
6 Whatever is deemed relevant is going to be deemed  
7 relevant by Judge Sifton, whether at a trial or at a  
8 summary judgment motion. If there's a privilege  
9 assertion to be made, attorney/client, work product,  
10 joint defense, whatever, that's -- you assert the  
11 privilege to those types of documents regardless of when  
12 they happened. You produce everything and then when we  
13 get ready for whatever motion practice, you can make your  
14 relevance arguments to Judge Sifton.

15 MR. KOGAN: Your Honor, does that mean that I  
16 am going to be subpoenaing their chat -- husband and wife  
17 chat records which I will be and everybody in that  
18 household because I will do the same thing that they're  
19 doing and I don't believe that that's appropriate. I  
20 don't think that there's any claim -- there isn't even an  
21 argument that they could be relevant.

22 Counsel is saying that the focus of his lawsuit  
23 is whatever happened after March of '08. What is exactly  
24 the lawsuit he is claiming, that my clients left his  
25 business and started another business. Why are my

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1 clients records, communications, relevant? How could  
2 they conceivably --

3 THE COURT: They could say --

4 MR. KOGAN: There's no argument for --

5 THE COURT: They can say things at any point in  
6 time and those things are statements, admissions. And  
7 they could talk about prior events. They could predict  
8 future events. They could -- you know, relevance --

9 MR. KOGAN: There couldn't possibly be an  
10 argument for their admissibility even at such a later  
11 time and in communication, emails, between parties after  
12 the fact.

13 THE COURT: I've made my ruling. You know, if  
14 -- I've made my ruling. It's all fair game for the  
15 purposes of discovery for relevance at trial, that's not  
16 my call. That's Judge Sifton's call.

17 MR. KOGAN: Your Honor, I would like to make  
18 the motion now then because I believe that that is not  
19 something that my client should be exposed to.

20 THE COURT: Make what motion?

21 MR. KOGAN: To preclude all -- for a protective  
22 order.

23 THE COURT: I can't do that. It's not my --  
24 it's an interesting issue and I always struggle it,  
25 whether a magistrate judge who is not the trier of fact,

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1 not the trial judge, not going to decide a summary  
2 judgment motion or a motion to dismiss has the authority  
3 to tie the hands of a district judge by making rulings on  
4 motions to preclude. And I know magistrate judges do  
5 that but it's an awkward thing.

6 I'm going to tell the district judge, okay,  
7 you're going to make this decision on summary judgment  
8 motion but you can't look at this evidence because it's  
9 irrelevant, unlikely to lead to the discovery of  
10 admissible evidence. You know, it's a hard thing to do.

11 Subpoena the records. If something is in  
12 admissible, that's for Judge Sifton to rule. If it's  
13 irrelevant, that's for him to rule.

14 MR. WERTHEIM: And just so I am clear, okay, I  
15 understand the ruling.

16 THE COURT: Both ways.

17 MR. WERTHEIM: Both ways.

18 THE COURT: Both ways.

19 MR. WERTHEIM: Okay. Can defendant be  
20 directed, and I guess we'll have to do the same thing, to  
21 indicate their consent to Yahoo!, et cetera.

22 MR. KOGAN: We will not consent, your Honor.

23 THE COURT: I'll --

24 MR. KOGAN: My client will not be consenting to  
25 this. I know now that my client will not consent to

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1 this.

2 MR. WERTHEIM: We need an order, your Honor.

3 THE COURT: Produce -- listen, produce -- you  
4 want to get his -- their emails, you want to get their  
5 emails.

6 MR. KOGAN: I don't want to get their emails.  
7 I want them not to be -- to do this where this is no --  
8 it's just done to harass and they know that there is no  
9 argument --

10 THE COURT: It's their cost. How is it --

11 MR. KOGAN: No, not to cost. It's done to  
12 harass because they want to reveal the personal emails.  
13 They want to review personal emails from my clients after  
14 the date that the business --

15 THE COURT: Do we know the volume of the  
16 emails?

17 MR. WERTHEIM: Well, you know, all I can tell  
18 you, your Honor, is that you know the greatest volume is  
19 stuff we've already produced without a fight. We've  
20 produced --

21 THE COURT: That's not the question I asked.

22 MR. WERTHEIM: No, I don't.

23 THE COURT: Answer the question; do you know  
24 the volume?

25 MR. WERTHEIM: I don't know the volume because



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1 it's their email communications.

2 THE COURT: Okay.

3 MR. WERTHEIM: It's only, we're talking about a  
4 year maybe.

5 THE COURT: You said you tried to find out from  
6 the providers.

7 MR. KOGAN: We tried to find out.

8 MR. WERTHEIM: No, the providers --

9 MR. KOGAN: But we were not able to find out,  
10 your Honor.

11 MR. WERTHEIM: I don't think the providers keep  
12 things as far back as a year, so I am not even sure how  
13 much we're going to get to tell you the truth. We're  
14 hoping to get a good picture but I don't think it's going  
15 to be--

16 THE COURT: If you don't want to subpoena them,  
17 that's fine. That's your call. Get me the subpoenas and  
18 I will take a look at them and I will so order them if  
19 appropriate.

20 MR. WERTHEIM: Okay.

21 THE COURT: And I want them by Wednesday. And  
22 we'll follow the procedure of prescreening by the non-  
23 requesting party.

24 MR. KOGAN: And if want to make that motion  
25 before Judge Sifton?

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1 THE COURT: You need to have a transcript  
2 produced of this conference and you have, I think it's  
3 ten days to appeal a discovery ruling by a magistrate  
4 judge.

5 MR. KOGAN: No, I mean --

6 THE COURT: Oh, the --

7 MR. KOGAN: -- a motion before Judge Sifton to  
8 -- a motion for a protective order and I could make the  
9 motion, your Honor is saying that you're not comfortable  
10 ruling on something that Judge Sifton might -- that might  
11 restrict the scope of documents that eventually would be  
12 ruled on by Judge Sifton.

13 THE COURT: Yes.

14 MR. KOGAN: So I am asking that --

15 THE COURT: I mean, you could make that right  
16 up until the time of trial, I mean the motion in limine.

17 MR. KOGAN: I understand. I would like to make  
18 that motion -- I would like to make that motion before  
19 Judge Sifton now so that we dispose of this issue prior  
20 to having to produce these records which -- a motion in  
21 limine is ordered to -- so that the

22 THE COURT: Let's -- look, let's take it one  
23 step at a time. There may be nothing. There may be no  
24 emails, no chats. So it will be a motion --

25 MR. KOGAN: No, my client says that there are

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1 emails and my clients are communicating on a regular  
2 basis. One of my clients is in Israel, one is here.

3 THE COURT: About -- it's got to be about  
4 this --

5 MR. WERTHEIM: The business.

6 MR. KOGAN: They're talking every day.  
7 Obviously from April of '08 my clients were frozen out of  
8 a business. Of course they talked about it but this was  
9 all in preparation for this litigation. It's all about  
10 this. We're in constant contact. There are emails going  
11 from me to my clients.

12 THE COURT: Well, but -- yes, but those are  
13 going to be --

14 MR. WERTHEIM: They communicate with --

15 THE COURT: Those are going to be --

16 MR. WERTHEIM: Right, but I email to one client  
17 who is here. The other -- that client emails to the  
18 client who is in Israel. Now they're communicating and  
19 that's not going to be privileged and it doesn't make any  
20 sense. That's obviously in preparation for the  
21 litigation.

22 THE COURT: There is no -- what -- well you  
23 then say a joint defense privilege.

24 MR. WERTHEIM: There was no lawsuit yet. I  
25 couldn't even -- I don't understand that. There was no

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1 lawsuit.

2 THE COURT: You make an argument --

3 MR. WERTHEIM: We filed the lawsuit --

4 THE COURT: My point is the time period is  
5 ultimately irrelevant. What's relevant is is there a  
6 valid privilege to be asserted -- that can be asserted  
7 regardless of the time period. If your argument is  
8 anything after April 1, 2008, regardless of substance,  
9 regardless of who the sender was and who received or who  
10 forwarded it in the email chain, anything after April 1,  
11 2008 should not be produced. I'm rejecting that  
12 argument. I don't think it follows legal -- I think  
13 things can happen subsequent to the freezeout that are  
14 relevant -- things can be said and things can happen  
15 subsequent to the freeze out that are relevant to the  
16 claims that are asserted or the defenses that are  
17 asserted.

18 If after Yahoo!, Verizon, whoever else produces  
19 the emails and the chats and you look through them and  
20 you say okay, here's one from me to Ms. Bove, that's  
21 attorney/client, here's work product, here's joint  
22 defense and you list them and those do not go over, if  
23 there's something that was not initiated by you, not a  
24 question that you posed to one of your clients to ask the  
25 other one to help you defend the case, it's just them

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1 talking, yeah, we froze them out or we -- whatever, you  
2 know, whatever it was, and no privilege can be asserted,  
3 I don't see why that shouldn't be produced. Whether at  
4 the end of the day Judge Sifton lets it in as substantive  
5 evidence is for him to decide.

6 MR. KOGAN: And if I make -- if I file it --

7 THE COURT: So if you want to make the motion  
8 to Judge Sifton, I would suggest you do it after you take  
9 a look at the emails because there may be very little. I  
10 mean he's not getting anything that is privileged, he's  
11 not.

12 MR. KOGAN: Okay. So the subpoena first of  
13 all, it wouldn't be his subpoena, it would be --

14 THE COURT: No, no. He's going to -- what the  
15 -- I thought the process that you guys agreed to --

16 MR. KOGAN: He's going to subpoena the  
17 documents and give them over to me.

18 THE COURT: He's going to subpoena. I would  
19 suggest -- I was going to suggest, just to stick it to  
20 both of you, you're going to subpoena Yahoo!. Yahoo! is  
21 going to produce the documents here. You're going to  
22 come here and look at them. Or it -- you know, if you  
23 can start to cooperate and all take a deep breath.  
24 You'll serve the subpoena. I'll sign it. I will so  
25 order it. It will go to Yahoo!. Yahoo! will send us the

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1 documents. We'll take them and send them to you to your  
2 office. You'll review them and say okay, this is  
3 privileged, that's privileged, this is not, whatever.  
4 Then you make your application to Judge Sifton saying  
5 Judge Reyes said this is your issue to decide. He was  
6 uncomfortable ruling on the preclusion of non-privileged  
7 post-April 1, 2008 communications. Judge, this should  
8 not come in because X. And that's before he sees it.  
9 You know? And I don't think you -- well, you can maybe  
10 make the argument I need to see it, attorney's eyes only  
11 to make an argument to you, Judge Sifton but you'll talk  
12 to him about that.

13 MR. WERTHEIM: Okay. And we'll produce  
14 privilege logs to the extent that a privilege applies --

15 THE COURT: Sure.

16 MR. WERTHEIM: -- like it always did.

17 THE COURT: Sure.

18 MR. WERTHEIM: Okay.

19 THE COURT: I mean I don't know how much --  
20 what the volume is. If it's thousands and thousands of  
21 pages, you know, then you can --

22 MR. WERTHEIM: I don't think there's any chance  
23 of that unfortunately.

24 THE COURT: Well you've produced thousands of  
25 emails.

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1 MR. WERTHEIM: Right. But they claim not to  
2 have from that period. I don't think we're getting from  
3 Yahoo! or MSN things from 2005 and 2006 but hopefully we  
4 will.

5 MR. KOGAN: I guess we'll find out.

6 THE COURT: Yes.

7 MR. KOGAN: I mean, I am not aware of a  
8 limitation in time at all.

9 THE COURT: I don't know what the practices are  
10 in the industry and whether they vary by provider how  
11 long they keep these things.

12 MR. WERTHEIM: There is this one broad subject  
13 that was not entirely resolved the last time. It was  
14 partly resolved and it has to do with financial  
15 disclosure from both sides. And I think to some extent  
16 you left it to Mr. Kogan to decide what scope he was  
17 willing to agree to with the understanding that it's a  
18 two-way street.

19 THE COURT: Yes.

20 MR. WERTHEIM: And that had to do with the  
21 various arguments the parties have made about what was  
22 business and what was "personal." If you recall, you  
23 specifically ordered that they had to do financial  
24 disclosure from the period I think it was -- I'm losing  
25 my sense of -- was it '04 to '06 or was it '02 to '04,

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1 but excluding things like showing, you know -- buying  
2 dresses or something from your bank account but you had  
3 to produce at least the financial picture and bank  
4 records from the business before we were involved. That  
5 was established, okay?

6           Then the issue was going forward and my  
7 position was and I said this the last time I put it in  
8 writing but forget about the distinctions between  
9 personal and business, I thought everybody should produce  
10 everything and that included both tax documents and, you  
11 know, the financial records. And I don't think we  
12 entirely resolved that. And I don't know here Mr. Kogan  
13 stands on that. And that's one of the things I wanted to  
14 resolve when I was making my phone calls is where do we  
15 stand with that.

16           THE COURT: Hold on.

17           MR. WERTHEIM: It came up a couple of times  
18 throughout the discussion on June 18.

19           THE COURT: I'm going to go back to the emails.  
20 If you find emails that are post-April 1, 2008 that have  
21 absolutely nothing to do with this litigation, the  
22 business relationship, obviously those aren't to be  
23 produced. They're not privileged, per se, but Polina  
24 could be emailing Anna and saying --

25           MR. KOGAN: How's your mother's health.



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1 THE COURT: How's your mother's health. Or  
2 like I said last time, talking about their trip to  
3 Cancun.

4 MR. WERTHEIM: Okay. There are a couple of  
5 things that I would say and this came up the last time  
6 too that are relevant that might not be obvious to you,  
7 for example, and that is for example, we -- it's our  
8 position -- they've taken the position that Polina never  
9 left and Polina and Anna have been in this business  
10 continually through the present whereas we have both  
11 emails and information that Polina went off at least for  
12 a while and got involved in another business, I think  
13 maybe with her mother. I don't remember. To the extent  
14 there's comments about Polina talking about doing  
15 different things and therefore substantiating our story  
16 that she left the company, that's a point of contention  
17 between us, that's relevant. That's an issue in the  
18 case. Okay? Or there's things, emails to the effect of  
19 you know, where have you been? I haven't been able to be  
20 in touch with you for months. That's sort of contrary to  
21 the idea of a continuity of their business relationship.  
22 That's been a point of contention in the case from the  
23 beginning.

24 So I just want to be careful about, you know,  
25 when you say just the business. There are things that

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1 might not appear to be about the business but are very  
2 sharp points of contention in this case, that the girls  
3 in fact were not together in business for some period of  
4 time or Polina went off on her own and was doing another  
5 business, supporting out story about how she got bought  
6 out at some point, for example. There are things that  
7 are relevant.

8 MR. KOGAN: I don't know what to say. I mean  
9 it's a -- they could come up with explanations why they  
10 want documents and -- or emails and I guess when we look  
11 at them we could determine whether there's any basis to  
12 produce those. I am -- I don't even know if there is such  
13 an email that discusses but I can just say --

14 THE COURT: I will take it under consideration.

15 MR. KOGAN: I'm sorry?

16 THE COURT: Take it under advisement.

17 MR. KOGAN: And --

18 THE COURT: Then, you know, if you see  
19 something that's arguably fits within these categories  
20 and if Mr. Wertheim articulates any other subcategory of  
21 documents that he thinks -- or emails or chats, whatever,  
22 that he thinks bear on the claims, you know --

23 MR. KOGAN: Okay.

24 THE COURT: -- err on the side of producing it.  
25 They're attorney's eyes only.

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1 MR. WERTHEIM: Okay.

2 MR. KOGAN: Your Honor, I just wanted to  
3 mention that one of the similar issues is that we know  
4 that both plaintiffs, both Vadim and Inga were working  
5 elsewhere when they claimed to be -- to have been running  
6 -- in '04, for example, they clearly had other -- they  
7 were -- in '05, as well, after the establishment of this  
8 entity in New York, they were both working elsewhere and  
9 we've requested -- we've actually served a subpoena on  
10 one of those -- on a former employer of Inga's in order  
11 to get the payroll records from that time and so, we are  
12 certainly going to be --

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

14 MR. KOGAN: Right. If he's --

15 THE COURT: No question. All right.

16 MR. KOGAN: And as far as those subpoenas, one  
17 of the problems that we have and they don't have is since  
18 my client lived in their home, they know exactly what  
19 email address that she was using. We have no idea about  
20 what email addresses they're using. And we would be  
21 entitled to a list of those email addresses.

22 THE COURT: I thought you didn't want the  
23 emails though.

24 MR. KOGAN: Well I am going to -- if he is  
25 going to engage in that, I am certainly going to expose

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1 him to the same risk that this might be a very unpleasant  
2 for his client as well and you know, what's good for the  
3 goose --

4 THE COURT: I don't know why wouldn't, I  
5 mean --

6 MR. KOGAN: Because it's not admissible and  
7 even if it were relevant, it wouldn't be admissible. And  
8 how would it be admissible, your Honor? It's hearsay,  
9 communication between the parties on an --

10 THE COURT: It may or may not be hearsay. I  
11 mean it's --

12 MR. KOGAN: It is --

13 THE COURT: First of all, they're admission --  
14 if it's a party, it's an admission and it might not --  
15 even if it wasn't, it might not be hearsay. Hearsay is  
16 something offered for the truth of the matter asserted.  
17 I mean if you're offering something because it was said,  
18 whether or not it was true or not, you know, I would --  
19 if he is going to do it to you, not that I am one for tit  
20 for tat but to leave no stone unturned, I would go for  
21 it.

22 MR. KOGAN: Your Honor, our --

23 MR. WERTHEIM: I believe you have all our email  
24 addresses, but whatever.

25 THE COURT: Have you produced all of the email

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1 addresses that were used by your clients during the time?

2 MR. WERTHEIM: I don't even recall off the top  
3 of my head, we had massive interrogatories served on us,  
4 but we produced completely the chats and emails from the  
5 whole multiple period of time, so --

6 MR. KOGAN: No, no, no. I mean we're talking  
7 about anything that happened from April of '08 on;  
8 nothing was produced by them from April of '08, nothing  
9 at all. So they're -- we're not -- we are now talking  
10 about emails that -- and communications that we're  
11 talking about personal email addresses that we used for  
12 communications. So I would like a list of those so I  
13 could subpoena them by Wednesday. Your Honor has  
14 requested it by Wednesday. We produced all of the  
15 subpoenas that we would like your Honor to so order.

16 THE COURT: I will give you some flexibility on  
17 that but --

18 MR. WERTHEIM: I would also want yours too  
19 because I don't know all the email addresses you would  
20 use --

21 MR. KOGAN: You have them.

22 THE COURT: But --

23 MR. WERTHEIM: -- post separation?

24 MR. KOGAN: Those were all our emails.

25 THE COURT: Weren't they in the subpoenas that

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1 I saw?

2 MR. WERTHEIM: They were email addresses that I  
3 am aware of from when we were in business together. But  
4 what Mr. Kogan -- we're talking now about the post-  
5 separation period. I don't know what email addresses  
6 they've adopted after we went our separate ways. We're  
7 both in the same boat in that regard. I'm not sure what  
8 all their email addresses are since then. They could  
9 have had other email addresses all of that time.

10 MR. KOGAN: And, your Honor, it's been much  
11 more than 20 weeks that we have requested a list of all  
12 of their bank accounts, business and personal bank  
13 accounts.

14 THE COURT: Right.

15 MR. KOGAN: And they refused to produce those.  
16 They refused to produce any business financial records  
17 other than the tax returns and one file from Quick Books.

18 MR. WERTHEIM: That's totally --

19 MR. KOGAN: That's all we got is a file from  
20 Quick Books and the tax returns. We've subpoenaed the  
21 accountant and we got a letter from the accountant saying  
22 I've got nothing. No underlying records whatsoever;  
23 that's what the accountant claims which I think that's  
24 far-fetched and that doesn't make any sense.

25 MR. WERTHEIM: The letter I got from the

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1 accountant that was copied to says they produced  
2 everything they had. So I don't know what you're talking  
3 about.

4 MR. KOGAN: And that's exactly it. They gave  
5 us tax returns. That's all they gave us. The accountant  
6 produced only tax returns and nothing else. It's  
7 impossible for that to be the case. It's impossible that  
8 they don't have any business records. No business  
9 financial records have been produced.

10 We've subpoenaed one bank account and we got  
11 those records, so we got one bank account, Gotham Bank.  
12 We got tax returns and we got one Quick Books file. When  
13 we were meeting in my office I said it doesn't make  
14 sense. You have more records. Would you please speak to  
15 the accountant so I don't have to make some kind of a  
16 motion in response to that a couple of weeks later, I got  
17 a letter saying I don't have anything else from the  
18 accountant.

19 THE COURT: How could he --

20 MR. WERTHEIM: What am I supposed to do?

21 THE COURT: If he prepared -- you tell him --

22 MR. WERTHEIM: I did in writing and I copied  
23 them and they wrote a letter -- the accountants wrote a  
24 letter which I have with me to them and to us saying I  
25 turned over everything I have.

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1 THE COURT: Take this message back to him.

2 MR. WERTHEIM: Uh-huh.

3 THE COURT: All right? If he prepared a  
4 corporate tax return for these folks, a business tax  
5 return, he's got to have some underlying documents.

6 MR. WERTHEIM: Okay.

7 THE COURT: Otherwise, if he signed it as a tax  
8 preparer, he's committing fraud on the IRS. He's got --  
9 he made the numbers up then. There's got to be something  
10 supporting numbers. I've got records for my taxes. I've  
11 got files all over the place showing all of my charitable  
12 contributions, and this and that and everything. There  
13 have to be records by definition.

14 MR. WERTHEIM: I'm prepared to say anything to  
15 them that helps.

16 THE COURT: And tell him that -- if he says all  
17 he's got is the tax returns, and he never had any  
18 documents, then he is going to come into court and put  
19 that under oath.

20 MR. WERTHEIM: Your Honor?

21 THE COURT: And I'll send the transcript to the  
22 IRS and then he'll be -- and they'll do what they have to  
23 do.

24 MR. WERTHEIM: Your Honor, by the way, speaking  
25 of financial records and this came up earlier -- I mean I



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1 am really shocked to hear this. We have produced  
2 thousands of pages of financial records, bank accounts,  
3 PayPal statements that are least hundreds if not  
4 thousands of pages. I mean PayPal was a central  
5 financial institution, if you will, in this case. I  
6 don't understand this. They're the ones who didn't  
7 produce financial records. That's what I just raised  
8 before when we get off in to their complaints. We're  
9 supposed to be exchanging, you know, bank records and  
10 financial documents. There was an open question of how  
11 personal, you know, Mr. Kogan's willing to go because he  
12 has asked for, for example, personal tax records and I  
13 have said okay, if you want to get them, you've got to  
14 give them. And you've said the same thing.

15           You've already directed them to produce those  
16 things, like I said from '04 to '06, we didn't get them.  
17 We have really not received financial disclosure from  
18 them. We have produced methodically financial disclosure  
19 and I will itemize it for you if you want.

20           MR. KOGAN: These are --

21           MR. WERTHEIM: I will make it part of the  
22 submissions that are due next week, the financial --

23           MR. KOGAN: And I have the list of bank  
24 accounts, personal and corporate.

25           MR. WERTHEIM: You're going to give me yours?

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1 THE COURT: Guys, come on. How can you keep  
2 doing this after I have told you, you know, time and time  
3 again it's a two-way street? Whatever you're asking for,  
4 you've got to give up.

5 MR. WERTHEIM: Absolutely.

6 THE COURT: Whatever you're asking for, you've  
7 got to give up. That's the way I do it.

8 MR. KOGAN: I thought that was clear, your  
9 Honor, the last time and all we had to do was enter into  
10 a protective order and that was ruled on already.

11 THE COURT: That's going to be done Friday.

12 MR. WERTHEIM: Right.

13 THE COURT: And if that's all that it takes,  
14 you should get everything next week, okay? And if you  
15 don't have it by the end of next week, you'll let me  
16 know.

17 MR. KOGAN: Okay. Your Honor. Can I go over  
18 the issues that we have with their --

19 THE COURT: Yes, please.

20 MR. KOGAN: Their response to the  
21 interrogatories are abysmal. Just basically, I will give  
22 an example. We request details about income and  
23 expenses, specifics, that's interrogatories 7, 8, 8(c),  
24 8(d). And the response is take a look at CDs A -- 1, 2,  
25 3 and 4, referring to four CDs. And none of those CDs

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1 make any reference to the information that we're looking  
2 for. We do not have the records of the income and  
3 expenses that they're claiming to have produced.

4 Then we ask for a list of bank accounts and  
5 credit card accounts which now counsel acknowledges that  
6 they never produced that list.

7 THE COURT: You're going to get it. Let --

8 MR. KOGAN: And the interrogatories --  
9 consistently, the interrogatories --

10 THE COURT: Okay.

11 MR. KOGAN: -- always say look all over the  
12 place --

13 THE COURT: No.

14 MR. KOGAN: -- and give me nothing.

15 THE COURT: Doesn't --

16 MR. KOGAN: They give nothing specific.

17 THE COURT: Not in cases that I handle. The  
18 case law is clear, at least in my mind, when you answer  
19 an interrogatory by reference to documents, you have to  
20 state the specific document. It can't be documents 1  
21 through 50,000, unless documents 1 through 50,000 are the  
22 documents that are responsive.

23 MR. KOGAN: I am just --

24 THE COURT: If you have voluminous financial  
25 records that have income and expenses, you know, that's

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1 the way you do it. You don't see CD 1, CD 4 and CD 5.  
2 That's just -- that's not the way it's done.

3 MR. KOGAN: And another example is that we've  
4 asked in interrogatory 11 for documents -- they asked --  
5 we asked for -- in the complaint they claim that the  
6 parties agreed that the business would be run from the  
7 US. That's the statement in the complaint. We've asked  
8 to amplify that and to tell us what -- where -- who,  
9 what, where, when and how. And the response is -- and  
10 what documents support that? The response is again, look  
11 at four different CDs. And we've asked -- it's a very,  
12 narrow, specific question. Where did the parties agree  
13 that the business would be run from the US? And the  
14 answer is like that all over the place. That's how the  
15 interrogatories are. So I don't accept the  
16 interrogatories --

17 THE COURT: Knowing my philosophy, and I'll  
18 hear you out but if that was the response, you know, the  
19 documents that are responsive are in CDs 1, 2, 3 and 4,  
20 you know, I think you should go back and say okay, it's  
21 document -- I assume they're bates stamped within the CD-  
22 ROMs; say document A000153 through whatever.

23 MR. WERTHEIM: Let me --  
24 may I? THE COURT: Okay.

25 MR. WERTHEIM: May I?

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1 THE COURT: Sure.

2 MR. WERTHEIM: Let me just note an objection  
3 and we have to deal with this stuff. We're going to get  
4 to the point. The problem I have with what's going on  
5 right now and it's the same thing that happened at the  
6 last conference is --

7 THE COURT: Wasn't raised with you previously?

8 MR. WERTHEIM: Well not only -- I mean, I am  
9 here just like the last time because they stopped  
10 communicating with me. I call. I left another message.  
11 I sent an email. I wrote a letter to them before writing  
12 to you saying let's jointly, right -- they completely  
13 ignored. And now I have to come in and dance on my toes  
14 here today about things that I don't even know about and  
15 it's inappropriate.

16 We're supposed to be talking about these  
17 things. I tried to talk -- I'm not in a position to make  
18 -- you know, there are interrogatories with subparts.  
19 It's like 120, okay? Violated the rules to begin with.  
20 Nonetheless, the ones that are discretely answerable with  
21 something reasonably discrete, I answered them. The  
22 problem is a lot of them are phrased in a way that asks  
23 us to write novels essentially.

24 For example, how -- showing that the business  
25 was supposed to be run from the United States, well

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1 there's four years of emails and chats showing that the  
2 business was run from our house in the United States.  
3 Which ones am I supposed to pick? There's not going to  
4 be a single email that says you know we're going to run  
5 the business from the United States. There's a whole  
6 record of thousands of days of communications showing  
7 that the business was run from the United States.

8 Am I going to put in a hundred page answer,  
9 writing each email every day, showing their understanding  
10 and action?

11 THE COURT: No, but you could say see CDs 1, 2,  
12 3 and 4 and in particular, documents -- you know, point  
13 them to a couple of the key documents, you know? I mean  
14 you've --

15 MR. KOGAN: Your Honor, it --

16 THE COURT: But --

17 MR. KOGAN: It's subterfuge. In reality, we  
18 didn't ask was the business run from the United States.

19 MR. WERTHEIM: The agreement to run the  
20 business.

21 MR. KOGAN: Right. And they know that that's  
22 what we asked and they know that they're not answering  
23 the question. And counsel is sitting here now and he  
24 knows what he is talking about because he knows  
25 specifically what I am talking about and he still doesn't

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1 want to answer the question.

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

3 MR. KOGAN: So I don't think that that's fair.  
4 And the misrepresentation that counsel is making is just  
5 something I have to address. Never, ever did he say  
6 let's sit down and get over and prepare a list of issues  
7 and then we'll do what the Magistrate instructed us to  
8 do. That was not what happened.

9 What happened was knowing my concerns, knowing  
10 that I am concerned about disclosure of document of the  
11 emails post April of '08, he goes ahead and subpoenas  
12 them and then I write to him and I say, please instruct  
13 them not to respond until we resolve the issue with the  
14 magistrate which was what I did when he -- when I  
15 subpoenaed his client's personal bank records. And he  
16 asked me not to do anything about it until it's resolved  
17 by your Honor. And I instructed them, don't produce  
18 until it's resolved.

19 I asked him for the same courtesy and I got  
20 none. And that's really what's happening here. They're  
21 being very aggressive. It's like a divorce case that's  
22 handled by two -- by a couple that's getting divorced  
23 with -- I really don't appreciate that. I don't like to  
24 litigate in this way and I would like it to be fair but  
25 they're -- the way that they're addressing these issues

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1 is by attacking in every possible direction and an  
2 absolute lack of courtesy as far as I am concerned when I  
3 have asked, please just instruct them not to respond  
4 until we resolve it and the answer was no.

5 MR. WERTHEIM: No, the answer was in writing  
6 and I have it in my folder here. Okay? You stopped  
7 communicating with me, so I was dealing with David; all  
8 right? Did you answer my phone calls?

9 MR. KOGAN: Oh, someone from my office --

10 MR. WERTHEIM: Did you answer my phone calls?

11 MR. KOGAN: Phone calls? One phone call.

12 MR. WERTHEIM: No, two phone calls.

13 MR. KOGAN: And we answered it in writing. We  
14 answered it --

15 MR. WERTHEIM: I told David in writing that the  
16 internet service providers were not giving us documents.

17 THE COURT: All right.

18 MR. KOGAN: That was --

19 THE COURT: Hold on.

20 MR. KOGAN: His response is I am not going to  
21 get the documents anyway, so I will not instruct them. I  
22 will not -- I am not going to get the documents anyway,  
23 so I will not issue any kind of instruction to them in  
24 the meanwhile.

25 THE COURT: All right.



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1 MR. KOGAN: That's what his response was. I  
2 won't help you because I am not getting any response  
3 anyway. What's the difference. But I --

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

5 MR. KOGAN: My issue is the characterization  
6 that somehow that we are at fault for not making --

7 THE COURT: Here's what we're going to do.  
8 Here's what we're going to do going forward. Any  
9 discovery dispute that I have to resolve, the losing  
10 attorney pays \$100, \$125, \$150, \$175 going up. No end;  
11 all right? That's the rule. That's not incentive -- the  
12 attorney, not the client.

13 If that's not incentive enough for you to  
14 cooperate, I can't think of anything else. Maybe I  
15 should just start at a higher number, start at \$500 and  
16 go up. But here's what we're going to, \$100, \$125, \$150,  
17 increments of \$25 along the way up. Especially egregious  
18 discovery violations, you can ask for increased penalties  
19 but going forward, loser pays.

20 What type of -- what were we talking about, the  
21 bank records?

22 MR. WERTHEIM: The one unresolved -- the  
23 unresolved issue to me that we had talked about the last  
24 time and again I think it was sort of left --

25 MR. KOGAN: It was my issue, your Honor.

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1 THE COURT: It was your --

2 MR. KOGAN: It was not his issue. It was my  
3 concern.

4 THE COURT: We were talking about the  
5 interrogatories responses.

6 MR. KOGAN: Interrogatories and also -- right.

7 THE COURT: Redo them with the understanding of  
8 my philosophy. Cite to specific documents. All right.  
9 If you get -- you had a long list of interrogatories that  
10 you received with subparts, you should have filed a  
11 motion for a protective order saying they've violated the  
12 rules, I am not responding to this.

13 MR. WERTHEIM: Like you said, if there are  
14 open-ended ones and there are because the ones that could  
15 allow discrete answers, I gave. I mean if -- I will cite  
16 key documents but I want to be able to say look, I am not  
17 ruling out that there is, you know, inferences to be  
18 drawn from any of the other thousands of -- you know,  
19 there are four years of almost daily communications,  
20 chats. It's immense.

21 THE COURT: Yes, but --

22 MR. WERTHEIM: And a lot of the answers to what  
23 they're saying are -- there are no agreements in this  
24 case. We're a family business. So a lot of what you're  
25 going to learn comes from the whole course of conduct

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1 between them. That's the problem.

2 MR. KOGAN: So that means that it would be a  
3 40-day trial? Realistically, he can't send me looking in  
4 a pile of thousands of emails. That's just not the  
5 reality. He knows what he tends to rely on at trial and  
6 he can't be vague about his responses.

7 THE COURT: But you didn't -- that's not the  
8 specific question that you asked that led to this --

9 MR. WERTHEIM: I gave you what you asked for.

10 MR. KOGAN: I asked to amplify the complaint  
11 and the allegations that were made in the complaint were  
12 very specific.

13 THE COURT: Go back. Do it again.

14 MR. WERTHEIM: Okay.

15 THE COURT: If you can't respond specifically,  
16 tell him why you can't respond specifically. In the  
17 supplemental written interrogatory response, identifying  
18 the specific documents or explaining the inability to do  
19 so.

20 MR. WERTHEIM: Could you give me something in  
21 writing telling me precisely which interrogatory  
22 responses you have trouble with?

23 MR. KOGAN: All of them. They -- this is  
24 consistently, if you look at every single interrogatory  
25 that refers to four CDs. Virtually every single

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1 interrogatory begins with that response.

2 THE COURT: If in going back you think you have  
3 answered specific interrogatories sufficiently, and you  
4 don't want to revise it, that's your call. If then  
5 Mr. Kogan brings a motion to compel --

6 MR. WERTHEIM: Okay.

7 THE COURT: -- and he wins, \$100 bucks. If he  
8 loses, he's paying \$100 bucks.

9 MR. WERTHEIM: Okay.

10 THE COURT: All right?

11 MR. WERTHEIM: Yes.

12 MR. KOGAN: I have other issues.

13 THE COURT: Yes, please.

14 MR. KOGAN: The list of bank -- with all due  
15 respect to counsel who claims to have produced voluminous  
16 financial business records, what we received -- yes, we  
17 didn't receive PayPal, that was -- we did receive PayPal  
18 records. We received one bank -- one business bank  
19 account which we subpoenaed and we received tax returns.  
20 And we received one Quick Books file.

21 And when we met in my office, I said it's  
22 impossible that there is only one Quick Books file from  
23 2004 until 2008. Quick Books generates -- first of all  
24 at the end of the year, you have to close out a year. I  
25 know that they -- Quick Books opens up another year for

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1 you. So for every year there's a separate file. There  
2 are a lot of financial business records that they have,  
3 they have on their computer and they haven't produced and  
4 they said well, no, they're all subsumed in one file.  
5 And that's just not the truth.

6 So if I have to do forensics on their  
7 computers, I may have to do that. I don't think it needs  
8 to go that route. I think I am entitled to see business  
9 records.

10 THE COURT: Go back to them. Give them the  
11 same warning that I gave the accountant. Not the same  
12 one but a similar one. If there are more documents,  
13 produce them. If nothing else is produced, and Mr. Kogan  
14 can make a good showing that there should be more  
15 documents, I am going to have his computers sent to a  
16 forensic computer person and if he finds more documents,  
17 not only will they pay for that forensic examination but  
18 they will be sanctioned.

19 MR. WERTHEIM: Okay.

20 MR. KOGAN: The list of those bank accounts and  
21 credit card accounts would allow me to subpoena them.  
22 Without that list, I can't subpoena. I need that list.

23 Aside from the actual whatever other financial  
24 business records they have on their own computers, just a  
25 list would allow me to do that. So on Friday, we will

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1 have a protective order in place. There is no reason why  
2 you couldn't get a list --

3 THE COURT: You asked for the list in your  
4 interrogatories?

5 MR. KOGAN: I believe I asked for it in  
6 interrogatories. Yes, I definitely did.

7 THE COURT: And it was not responded to?

8 MR. KOGAN: No.

9 THE COURT: Okay. So I assume after Friday you  
10 will get the supplemental interrogatory response which  
11 lists the bank accounts. Okay?

12 MR. WERTHEIM: And I expect the same thing from  
13 them, as well.

14 THE COURT: Two-way street.

15 MR. KOGAN: And your Honor previously when we  
16 were here, I raised the request for customer records and  
17 your Honor ruled that I am entitled to that. Now they're  
18 taking the position that they're -- what the Court said  
19 specifically is that I cannot get the -- they can redact  
20 the email address of the customer. Fine. But we are  
21 certainly entitled to the account records which means the  
22 communication with the client. What they have is on  
23 every single client, there is a file when orders were  
24 made, what was ordered by the client -- by the customer.

25 And at the time, during the last conference, I

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1 explained to the Court why this would be relevant because  
2 if in 2004 my client had say 50,000 and that's  
3 approximately the right number, 50,000 customers who were  
4 on an email list and they were receiving -- they were  
5 active customers, I would be able to track how these  
6 customers were the ones that were the core of the  
7 business and others were added one, and these are the  
8 ones who ordered such and such throughout the years.

9 I am entitled to that information in discovery  
10 and certainly on relevance and admissibility and all  
11 that. And now they're taking the position that they will  
12 not give us those documents, the client account records.  
13 That's a position that they've taken.

14 MR. WERTHEIM: I'm a little confused. We went  
15 over this issue the last time and you said we can redact  
16 out the email addresses, that you can identify the  
17 clients and if possible, you can produce them in such a  
18 way to show the increase monthly or quarterly base of,  
19 you know, the customer base. And we said we will. I'm  
20 not technological. My client has done this. And we're  
21 going to produce it.

22 I don't -- I have no idea what the fight  
23 Mr. Kogan is talking about. This is an old issue that  
24 was ruled upon already. You told us what to do.

25 THE COURT: Maybe --

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1 MR. KOGAN: So as long as it's clear that we're  
2 getting not just the list, an incremental list on August  
3 of '05, we have 100,000 and on August of '06, we have  
4 125,000, that's not what I am interested in. I want the  
5 account records and I didn't hear counsel acknowledging  
6 that and that's the issue, the actual records.

7 MR. WERTHEIM: We (inaudible) the last time.  
8 The Judge didn't rule that.

9 MR. KOGAN: Okay. So I am not -- this is the  
10 issue, your Honor. He's speaking out of both sides of  
11 his mouth and it's sickening.

12 THE COURT: Stop.

13 MR. KOGAN: I am appalled.

14 THE COURT: Stop. Everybody stop.

15 MR. KOGAN: It's this dishonesty that -- when I  
16 am bringing up an issue and he is saying it was ruled  
17 upon. There is no issue. We've agreed to produce. No,  
18 the issue that I pointed out is really an issue and he's  
19 just trying to somehow not acknowledge that he doesn't  
20 want to produce --

21 THE COURT: And I have ruled on it; right?

22 MR. WERTHEIM: You ruled on; yes.

23 THE COURT: And it's going to be produced.

24 MR. WERTHEIM: The way the Judge said. The way  
25 the Judge said.



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1 MR. KOGAN: Your Honor, these games are just  
2 not --

3 MR. WERTHEIM: What's wrong with that? This is  
4 really offensive, your Honor.

5 THE COURT: I don't even remember what way I  
6 said but --

7 MR. KOGAN: But, your Honor, whether or not the  
8 account -- the underlying account records have been  
9 discussed, we've certainly produced them in thousands of  
10 emails with customers. We've produced that. Why should  
11 they not have to produce that? Is it anymore privileged  
12 than my client's communications past 2008?

13 THE COURT: I'm just looking at the transcript  
14 to see --

15 MR. WERTHEIM: Email list, somewhere around  
16 page 35 perhaps.

17 MR. KOGAN: Your Honor, on page 53 there's a  
18 reference to -- yes, that's the discussion on page 53,  
19 the underlying records. That's what I requested.

20 THE COURT: Okay.

21 MR. WERTHEIM: Yes, page 52, your Honor, you  
22 speaking at the top of page 52.

23 "The Court: Snapshots to show how the customer  
24 list has grown with the names of the customers and redact  
25 the email addresses."

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1 THE COURT: Okay. Hold on.

2 MR. WERTHEIM: Your Honor on page 56 is where  
3 the issue is concluded. Do you want the day-to-day,  
4 every communication with the email address?

5 THE COURT: Yes.

6 MR. KOGAN: Yes.

7 MR. WERTHEIM: Everything? Okay.

8 THE COURT: Yes, you will get it.

9 MR. KOGAN: Okay. This is what frustrates me,  
10 your Honor. That -- and why is there a breakdown in  
11 communication because it's clear that this was --

12 THE COURT: Look, I am not --

13 MR. KOGAN: -- addressed before.

14 THE COURT: I'm not --

15 MR. KOGAN: And they take positions that are  
16 contrary to that and for aggressive litigation, I  
17 understand but this is just -- it's beyond that.

18 THE COURT: I hear the allegations going both  
19 ways; all right?

20 MR. WERTHEIM: You weren't even talking to me.  
21 What position did I backslide on?

22 THE COURT: Okay. Stop.

23 MR. WERTHEIM: I don't want to be called a liar  
24 in open court.

25 THE COURT: Stop.

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1 MR. WERTHEIM: It's offensive.

2 THE COURT: Both of you, stop. Okay? Just, I  
3 mean -- what's your next issue? I really don't like to  
4 figure out who is the bad guy. I have a hard enough time  
5 doing that with my sons.

6 MR. WERTHEIM: Your Honor, I don't really --

7 MR. KOGAN: I don't want to go the route of I  
8 am actually -- I am not happy to hear that the Court is  
9 saying -- when your Honor says \$100 penalty, I don't want  
10 to penalize Mr. Wertheim. I am sure that he is a  
11 gentleman and we've had good interactions, as well. What  
12 I don't understand is that there are times when it's -- I  
13 cannot understand how -- I have it in writing from  
14 Mr. Wertheim that they will not produce the underlying  
15 records. And a moment ago in court in front of your  
16 Honor he said that he will not produce the underlying  
17 records, only a list of progression of how the numbers  
18 increased from an email list of 10,000 to 50,000,  
19 whatever it is. A moment ago that was what was said. So  
20 it's not about lying or not lying. It's simply about one  
21 issue.

22 If we're going to have a regular, normal  
23 communication, this cannot happen that a moment ago one  
24 thing was said and now I don't want to be called a liar,  
25 a moment ago you took that position. You said it was in

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1 the transcript. It was not in the transcript. Instead  
2 of saying you're right, I was wrong. I apologize. I  
3 took a position that was contrary to what I had -- I  
4 misunderstood it, that never happens and he's always  
5 right all of the way to the end.

6 THE COURT: You're lucky I am not Judge Peck in  
7 the southern district. You guys would have been -- both  
8 would have been writing checks already. I mean, I've  
9 litigated cases in front of him. He's a great judge. He  
10 has no patience for things like this. I have more  
11 patience, maybe that's my fault but stop.

12 MR. WERTHEIM: We might not be here -- we might  
13 not have even had to come here and spend money if you  
14 didn't stop talking to me. That's what is so weird about  
15 this. We had one meeting and you disappeared.

16 THE COURT: Is this a broken record? We're  
17 going back and forth.

18 MR. WERTHEIM: Okay.

19 THE COURT: Mr. Kogan, what else is bothering  
20 you?

21 MR. KOGAN: The document responses that counsel  
22 produced, we obviously disagree about it but the core of  
23 my issue is really addressed in terms of my document.  
24 The document responses were inadequate. They were  
25 inadequate because primarily there are two areas in the

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1 document responses, one of them has to do with the origin  
2 of the designs which I think we're addressing by the  
3 simultaneous production. And the other issue is the  
4 business records which are two issues, the business  
5 records which the accountant may have and the business  
6 records that the client may have. And I think we  
7 addressed those categories. And they're just subparts of  
8 my issue with the inadequate document response.

9 I am assuming that there is no deadline that's  
10 been set by the Court for a production of those documents  
11 and I would like there to be a deadline. I know that I  
12 have a deadline to respond to his document demand within  
13 -- by next Wednesday, I believe. I have a week.

14 THE COURT: Yes.

15 MR. KOGAN: I think that they should have the  
16 same time.

17 THE COURT: Two-way street.

18 MR. WERTHEIM: I have a problem with that.

19 MR. KOGAN: By Wednesday they should produce --

20 THE COURT: What's the problem?

21 MR. WERTHEIM: The problem with that is  
22 Mr. Kogan was told on June 28 -- June 28, more than two  
23 months ago, to give me the written response to the  
24 document request. I am being barraged here for the first  
25 time about perhaps legitimate complaints that Mr. Kogan

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1 refused to communicate with me about in the last two  
2 months. And I --

3 THE COURT: When do you need --

4 MR. WERTHEIM: You know if we're talking about  
5 actually producing more documents, and responding to a  
6 very voluminous interrogatory request, I need more than  
7 until next Friday, especially since we have to brief  
8 something and I have to provide subpoenas to the Court.

9 After all, Mr. Kogan has not imposed a deadline  
10 on himself to produce documents, the two-way street  
11 documents including things that he was told to produce on  
12 June 28, like --

13 THE COURT: Let's --

14 MR. WERTHEIM: -- when am I getting my stuff?

15 THE COURT: Let's re-evaluate all the deadlines  
16 right now. We have a final pretrial conference on the  
17 22nd of December. I'll start my holidays off well.  
18 Discovery is closing when, Miriam?

19 THE CLERK: (Inaudible).

20 THE COURT: December 9? Okay. Excuse me.

21 (Off the record)

22 THE COURT: Assume that discovery will conclude  
23 the day of the final pretrial conference on the 22nd of  
24 December. We can set dates now for the disclosure of  
25 documents and all of that or you can reach agreement as

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1 you converse following this conference and let me know  
2 what dates you've picked. You are going to have to  
3 figure out when the depositions are going to be and all  
4 of that. Maybe you will have to travel to Israel to do  
5 some depositions. Maybe you won't. I don't know. What  
6 do you want to do? Do you want me to pick dates for you?

7 MR. KOGAN: I think that would be good,  
8 your Honor.

9 THE COURT: Okay. We'll work backwards.  
10 December (sic) 30, all documents have to be produced.

11 MR. WERTHEIM: December?

12 THE COURT: September 30.

13 MR. WERTHEIM: Outside date; okay.

14 THE COURT: I'm sorry, September 30. I was  
15 looking at September but December stuck in my mind. This  
16 Friday we're still going to get the protective order.

17 MR. WERTHEIM: This Friday.

18 THE COURT: This -- next Wednesday, we're still  
19 going to have the simultaneous production of the images.  
20 All other documents, bank records, emails, all of that by  
21 the 30th of September. Of course you're going to give me  
22 the subpoenas --

23 MR. WERTHEIM: Which --

24 THE COURT: -- next Wednesday. And I guess it's  
25 the 18th, we're going to get the letters on the

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1 attorney's eyes only issue on the copyright stuff.

2 MR. WERTHEIM: Could we just have it, some kind  
3 of rough fairness, the same date whether it's September  
4 30 or not, for Mr. Kogan's written response to my second  
5 document request? And my updated interrogatory  
6 responses?

7 THE COURT: Sure.

8 MR. WERTHEIM: Do you want September 30 for  
9 that Boris, or something earlier? You tell me. I don't  
10 know if you've made any headway on that.

11 MR. KOGAN: Your Honor, the 18th is Rosh  
12 Hashana eve and --

13 THE COURT: Okay. That's all right. I was  
14 wondering about the holidays and how they're going to  
15 effect it. Well that following week is -- are there  
16 holidays, too?

17 MR. KOGAN: Yes.

18 THE COURT: Some of the --

19 MR. KOGAN: Once we begin that holiday season  
20 it's a total of three weeks of being in and out.

21 THE COURT: Okay.

22 MR. KOGAN: Actually it's four weeks.

23 THE COURT: So you have no problem with the  
24 dates, the 16th, for the things that we scheduled for  
25 them.



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1 MR. KOGAN: No, the 16th is not a problem.

2 THE COURT: All right.

3 MR. KOGAN: The 18th, if we could just have a  
4 date in the following week would be okay.

5 THE COURT: Okay. The 25th.

6 MR. KOGAN: On the 25 for the letter briefs on  
7 the copyright issue.

8 THE COURT: And still on the 30th, the  
9 documents and including written responses. So you should  
10 have all of the documents by the 30th. That will leave  
11 You three months to do depositions. You should be able  
12 to do it. Don't expect anymore time because you're  
13 unlikely to get it. All right?

14 MR. WERTHEIM: Okay. Go home.

15 THE COURT: Stop with the letters. Pick up the  
16 phone.

17 MR. WERTHEIM: I did.

18 THE COURT: Be -- you know, I am not -- I am  
19 serious about the hundred bucks and going up in  
20 increments. Don't give me reason to have to make you  
21 write checks. It's distasteful to me but hopefully it  
22 will get you to -- if it's the clients that are driving  
23 some of this, they're going to get sanctioned.

24 MR. WERTHEIM: We'll make it clear to them.

25 THE COURT: Make it clear to them.

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1 MR. WERTHEIM: Yes.

2 THE COURT: You know, this divorce atmosphere  
3 has to end. Maybe I should order them all to go to group  
4 counseling or something. All right. Have a good day,  
5 gentlemen.

6 MR. WERTHEIM: Thank you, your Honor.

7 MR. KOGAN: Thank you.

8 (Matter concluded)

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C E R T I F I C A T E

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 9th day of September, 2009.

  
Rosalie Lombardi  
Transcription Plus II