Claim No. 2013 Folio 354

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

BETWEEN

VICTOR MIKHAYLOVICH PINCHUK

Claimant

-and-

(1) GENNADIY BORISOVICH BOGOLYUBOV
(2) IGOR VALERYEVICH KOLOMOISKY

Defendants

DEFENCE OF THE SECOND DEFENDANT

Introduction

1. In this Defence, save where otherwise indicated:

(a) references to paragraph numbers are to paragraphs in the Particulars of Claim;

(b) the defined terms and headings used in the Particulars of Claim are adopted (without making any admissions thereby); and

(c) the Second Defendant does not plead to allegations insofar as they are matters for the First Defendant.

Summary

2. In broad summary, the Second Defendant's case is as follows:

(a) The essence of the Claimant's case is that he concluded a binding oral agreement with the Defendants and a third party on 4 September 2006 regarding both the creation of the Ferroalloy Holding and the transfer to the Claimant of shares in KZhRK. There was no such agreement. In fact, as one would expect in relation to assets worth many hundreds of millions of dollars, the creation of the Ferroalloy Holding was the subject of a suite of detailed written agreements executed by the parties on 7 November 2006, to which only partial reference is made in the Particulars of Claim. Those written agreements make no reference whatsoever to any transfer of KZhRK shares to the Claimant.

(b) Further, it is a critical part of the Claimant's case that Ukrainian and Russian businessmen, at a meeting where no lawyers were present, specifically applied their mind to questions of governing law and forum and expressly agreed that the supposed oral agreement should be subject to English law and the jurisdiction of the English courts. This contention is advanced even though the sole document (which was never signed) relied on by the Claimant as contemporaneous evidence of the terms of the alleged oral agreement makes no reference to any agreement about English law or jurisdiction. This allegation is unworthy of belief and is denied.

(c) In reality, the Claimant's decision to issue these proceedings stems, not from any contractual right, but from the Claimant's unjustified belief that, as the son-in-law of Mr Leonid Kuchma, the President of Ukraine from July 1994 to January 2005, he was entitled, in return for President Kuchma signing the legislation privatising Ukrrudprom, to demand that the KZhRK Stake be purchased by the Defendants and transferred to him.

(d) As particularised below, the Claimant repeatedly exploited his relationship with President Kuchma and his resulting influence over Ukrainian State-

owned assets as a form of leverage to achieve his own financial and commercial objectives.

(e) However, there was no agreement of any kind between the Claimant and the Defendants (or either of them) in relation to the KZhRK Stake or any KZhRK shares.

(f) In the premises, as set out further below, the Claimant is not entitled to the relief sought or to any relief, and his claim must be dismissed.

Jurisdiction

3. Paragraph 1 is not admitted.

4. The Second Defendant does not plead to paragraph 2 since this is irrelevant to the substantive issues in these proceedings and the Second Defendant has not challenged the jurisdiction of the English court to determine these proceedings.

Parties

5. Paragraph 3 is admitted, save that the Second Defendant does not plead to the alleged financial position of the parties, which is irrelevant to the substantive issues in these proceedings.

6. Paragraph 4 is not admitted, save that it is admitted that the Claimant founded a steel pipes business in 1990.

7. Since 1997, the Claimant has cohabited with (and, since 2002, been married to) the daughter of Mr Leonid Kuchma, who was President of Ukraine from 19 July 1994 to 23 January 2005. The regime of President Kuchma was characterised by corruption, nepotism and ties to organised crime. During the Kuchma presidency, the Claimant held significant influence with the Ukrainian State authorities at the highest levels by reason of his relationship with President Kuchma. For example, such influence resulted, in or about June 2004, in a consortium in which the Claimant had a substantial participation being permitted to acquire Ukraine's largest integrated steel company, Kryvorizhstal, from the Ukrainian State for a price of only about

US$800m. Following the end of Mr Kuchma's presidency, the privatisation was set aside by the Ukrainian courts, following which Kryvorizhstal was sold in October 2005 to Mittal Steel for approximately US$4.81bn. Further particulars are given below in relation to the Claimant's influence over the Ukrainian State's interests in Nikopol and Ukrnafta.

8. In December 2003, notwithstanding the two-term limit established by the Ukrainian Constitution, the Ukrainian Constitutional Court ruled that President Kuchma was eligible to stand for a third five-year term. In the event, following domestic and international criticism of the decision, President Kuchma did not stand in the presidential elections held in 2004. Ultimately, as the result of the so-called Orange Revolution, the leader of the parliamentary opposition, Mr Viktor Yushchenko took office as President on 23 January 2005.

9. As to paragraph 5:

(a) The Second Defendant's case as to the Claimant's interest in Nikopol is set out at paragraphs 14 to 34 below.

(b) It is admitted that Nikopol was the largest ferroalloy producer in Europe.

(c) Save as aforesaid, paragraph 5 is denied.

10. As to paragraph 6:

(a) The Defendants first met one another in about 1990.

(b) The Defendants have conducted certain business ventures together since 1991. The Defendants have described themselves as "*business partners*" in certain of those ventures but it is denied (if it is alleged) that there was, as a matter of English law, a partnership between them at any relevant time. Further, the Second Defendant has been engaged in business ventures without involvement from the First Defendant and *vice versa*. By way of example, the Second Defendant has no interest in ConsMin (which the Second Defendant understands to be wholly owned by the First Defendant) or in some of the First Defendant's real estate projects.

(c) Save as aforesaid, paragraph 6 is denied.

11. As to paragraphs 7 and 8:

(a) It is admitted that the Defendants (alongside others) established PrivatBank on 19 March 1992.

(b) "*Privat Group*" is an expression used by (among others) the Ukrainian media as a loose description for the companies in which the Defendants (or either of them) are believed by the user of that expression to hold interests. There is no legal entity known as Privat Group. There is a banking group known as PrivatBank Group which comprises PrivatBank in Ukraine and its affiliate banks in Russia, Latvia and Georgia. The expression "*Privat Group*" is thus imprecise and lacks definition.

(c) Save as aforesaid, paragraphs 7 and 8 (including the allegation that PrivatBank is the "*core*" of the Privat Group) consist of vague and unparticularised allegations and the Second Defendant is unable to plead to them. In the premises, they are not admitted.

12. As to paragraph 9:

(a) The Second Defendant is unable to plead to the allegation that the assets in question fell within the undefined expression "*Privat Group*" and makes no admissions in that regard.

(b) Unless otherwise indicated, the Second Defendant does not plead insofar as allegations are made about the interests of the First Defendant.

(c) As to sub-paragraph (1) and sub-paragraph (3), insofar as the latter refers to PrivatBank, it is admitted that the Second Defendant has at all material times held interests in PrivatBank and thus had an indirect interest in any companies or shareholdings owned or controlled by PrivatBank. The Second Defendant is legally or beneficially entitled to 46.47 per cent of the share capital of PrivatBank.

(d) As to sub-paragraph (2) and the balance of sub-paragraph (3), it is admitted that the Second Defendant holds indirect interests in Privat Intertrading (and thus in companies or shareholdings owned or controlled by Privat Intertrading).

(e) Sub-paragraphs (4), (5), (6), (7), (8) and (9) are admitted insofar as they relate to the interests of the Second Defendant.

(f) As to sub-paragraph (10), it is denied that the Second Defendant has at any material time held interests in ConsMin. To the best of the Second Defendant's knowledge, ConsMin is owned by the First Defendant.

(g) As to sub-paragraph (11), it is admitted that the Second Defendant has indirect interests in Aerosvit but it is denied that he has held or holds a controlling shareholding in Aerosvit.

(h) As to sub-paragraph (12):

(i) As a result of the privatisation in August 2004, the 93.07 per cent shareholding in KZhRK became held by Solaim, which (as pleaded above) was beneficially owned or controlled by the Second Defendant.

(ii) Following the issue of new shares by KZhRK in August 2005, on 30 September 2005 three other companies which were owned or controlled by the Second Defendant each acquired a shareholding of 20.92505 per cent in KZhRK. As the result of an increase in KZhRK's share capital, Solaim's shareholding in KZhRK decreased to 34.6 per cent.

(iii) On 24 March 2006, certain companies owned or controlled by Mr Rinat Akhmetov acquired, in total, 50 per cent of the shares of each of the three companies referred to in sub-paragraph (ii) above and of Directfield Limited (***Directfield***) (Solaim's parent company), thereby effectively obtaining indirectly 50 per cent of the KZhRK shares held by the said companies.

(iv) Between June and September 2007, Starmill Limited (***Starmill***) acquired the KZhRK shares of the said companies. Starmill is beneficially owned as to 50 per cent by the Second Defendant and as to 50 per cent by Mr Akhmetov.

(v) Save as aforesaid, and save that it is denied that the Claimant has any rights or interests to which the KZhRK shareholding might be subject, sub-paragraph (12) is admitted.

13. As to paragraphs 10 and 11:

(a) As set out further at paragraph 65(e) below, these allegations (which are in any event inadequately particularised) are irrelevant to the issues that arise for determination in these proceedings, not least in view of the concession made in the First Defendant's Defence.

(b) Accordingly, the Second Defendant does not plead to these allegations and makes no admissions thereto.

The Nikopol Agreement

14. In 1997, the State Property Fund of Ukraine (which was originally the sole shareholder of Nikopol) oversaw a partial privatisation of Nikopol whereby 19.39 per cent of Nikopol's shares were issued to private individuals, employees and management of Nikopol and subsequently traded on the open market.

15. In 1999, the State Property Fund of Ukraine announced a further privatisation, initially of a 4.6 per cent shareholding and subsequently of a 26 per cent shareholding.

16. During the night of 13 to 14 April 1999, which was the eve of bidding for the 4.6 per cent shareholding, the Claimant telephoned the First Defendant, who (in conjunction with the Second Defendant) was intending that PrivatBank (as broker for Privat Intertrading) should bid for the Nikopol shares. The Claimant demanded from the First Defendant that the Defendants should withdraw their bid so as to enable the Claimant's bid to be successful. The First Defendant rejected this demand. However, after several further telephone calls from the Claimant, the Claimant proposed, and it

was orally agreed between him and the First Defendant (acting with the express authority of the Second Defendant), that the parties should each bid for half of the 4.6 per cent Nikopol shareholding and thereafter negotiate about future possible co-operation in relation to Nikopol.

17. On or about 14 April 1999, in accordance with that agreement, PrivatBank successfully bid for just over half of the 4.6 per cent Nikopol shareholding (equivalent to 7,010,000 shares in Nikopol) and a company owned or controlled by the Claimant successfully bid for the balance of the 4.6 per cent Nikopol shareholding (6,965,562 shares in Nikopol).

18. As a result of further negotiations, on or about 4 June 1999 the Claimant and the Defendants entered into a written agreement, which was supplemented shortly afterwards by a handwritten addendum (the ***Nikopol Agreement***). The Nikopol Agreement set out principles for co-operation on issues arising from the acquisition, ownership and disposal of corporate rights and the joint management of three enterprises, including Nikopol.

19. The Nikopol Agreement provided, *inter alia*, as follows:

(a) By clause 1, it was agreed that the 26 per cent shareholding in Nikopol would be acquired through the mechanism of a non-commercial tender and then distributed between the Defendants and the Claimant in the proportion 50:50.

(b) By clause 2, it was agreed that the Defendants should assume the expenses relating to (*inter alia*) the acquisition of the 26 per cent Nikopol shareholding. The Claimant was to compensate the Defendants for 50 per cent of all such expenses. It was further agreed that the Claimant would be provided with a credit advance for these purposes, and that the Claimant would pledge his shares in Nikopol as security in respect of such credit.

(c) Clause 3 provided that the title of each of the parties to the corresponding ownership of its part of the 26 per cent Nikopol shareholding would be formalised immediately after the signature by the tender winner of a sale and purchase agreement with the State Property Fund of Ukraine.

(d) Clause 4 provided (*inter alia*) that the parties would establish a business entity, in which they would each hold an equal participation, and would transfer to this entity all of the shares in Nikopol which they held. Further, the Claimant was to confer on this entity the management of a controlling shareholding in Nikopol of 50 per cent plus one share and the Defendants were to do likewise in respect of a controlling shareholding in the manganese ore mining companies which they owned. Clause 4 further provided that the resulting profits would be split by the parties equally.

(e) The final sentence of clause 4 provided that, in the event of a loss of control over the controlling shareholding in Nikopol, or in the event that it proved impossible for the parties to acquire a controlling shareholding in Nikopol (i.e. 50 per cent plus one share), the Defendants would withdraw the shareholdings of the manganese ore mining companies from the business entity. The effect of this provision was that the parties were to seek to acquire a controlling shareholding in Nikopol for their joint benefit, in the event that the controlling shareholding was privatised.

20. The handwritten addendum to the Nikopol Agreement provided:

(a) By clause 1, that differences between the parties in relation to other industrial assets could not be relied upon to justify termination or non-performance of the Nikopol Agreement.

(b) By clause 2, that should it prove impossible to transfer to the Defendants ownership of the shares to which they were entitled, the Claimant would grant the Defendants a 50 per cent stake in the holding company which held such shares.

21. On or about 5 August 1999, the parties entered into a further Protocol for the Approval of the Structure for the Acquisition of the 26 per cent shareholding in Nikopol. This provided (*inter alia*) for PrivatBank to grant credit to Ukrainian-American Limited Liability Company with Foreign Investments Bipe Co. Ltd (***Bipe***), an entity owned or controlled by the Claimant, for the purposes of acquiring the 26 per cent shareholding, subject to the provision of a pledge.

22. On or about 16 July 1999, Bipe entered into an agreement to acquire the 26 per cent shareholding in Nikopol from the State Property Fund of Ukraine. In accordance with the Nikopol Agreement, on 9 September 1999, Bipe transferred approximately half of that shareholding (i.e. a 13 per cent shareholding in Nikopol) to PrivatBank, while pledging the remainder as security for the outstanding credit.

23. Following the 1999 partial privatisation, the State Property Fund of Ukraine retained a controlling shareholding of 50 per cent plus one share in Nikopol. On 31 August 1999, the Dnepropetrovsk Regional State Administration (which had previously been granted by the Ukrainian government the management of the said controlling shareholding) decided to entrust the management of this shareholding to Bank Credit Dnepr, a Ukrainian bank owned or controlled by the Claimant. Given that Bank Credit Dnepr had no prior experience in managing ferroalloy assets, it is to be inferred that this decision was taken by reason of the Claimant's close relationship with President Kuchma. As recorded in clause 4 of the Nikopol Agreement, the Claimant had represented to the Defendants (even before management was entrusted to Bank Credit Dnepr) that he was in a position to exercise decisive influence over the exercise of the voting rights in respect of the 50 per cent plus one share shareholding in Nikopol and thus control Nikopol.

24. By three written share purchase agreements dated 26 October 2000, a company owned or controlled by the Second Defendant acquired further shares in Nikopol, amounting in total to a further shareholding of 12.2 per cent, from companies owned or controlled by Mr Konstantin Grigorishin, namely Parminter Group Inc., Cape Trading Holdings Limited and Wallis Investments Limited.

25. In accordance with the Nikopol Agreement, by a stock purchase contract dated 23 May 2001, that company in turn sold a shareholding in Nikopol of 6.12 per cent (i.e. half of the shareholding referred to in paragraph 24 above) to Wilton Holdings SA (a company owned or controlled by the Claimant).

26. Subsequently, in accordance with the Nikopol Agreement, PrivatBank (acting as broker for a company owned or controlled by the Second Defendant) acquired a

further 3.1 per cent shareholding in Nikopol, from which a 1.5 per cent shareholding was transferred to Wilton Holdings SA.

27. By 2002, the Claimant (or companies owned or controlled by him) had become the beneficial owner of a 22.92 per cent shareholding in Nikopol.

28. By a Resolution of the Cabinet of Ministers of Ukraine made on 25 December 2002, two months after the Claimant's marriage to President Kuchma's daughter, the Ukrainian government announced that it was lifting a three-year moratorium imposed in October 2001 on any further privatisation of Nikopol. In February 2003, the government announced the proposed sale of a 25 per cent stake in Nikopol, with the successful bidder having a pre-emption right to purchase the remaining 25 per cent plus one share stake held by the State Property Fund of Ukraine. The conditions of the proposed sale were designed in such a way that the only entity which could qualify as a bidder was Industrial and Financial Consortium Pridneprovye (***PFK***), a company incorporated under the laws of Ukraine and owned or controlled by the Claimant.

29. In the event, unsurprisingly, PFK was the successful bidder and, in May 2003, it acquired the 25 per cent stake in Nikopol for a consideration of US$38.4m. In August 2003, PFK exercised its pre-emption right to acquire the remaining 25 per cent plus one share stake for a consideration of US$38.5m.

30. Wrongfully and in breach of the Nikopol Agreement, the Claimant did not cause PFK to transfer half of this 50 per cent plus one share stake in Nikopol, or any further Nikopol shares, to the Defendants (or any entity under their control or ownership). Further or alternatively, in breach of clause 2 of the addendum to the Nikopol Agreement, the Claimant did not transfer to the Defendants (or an entity under their control or ownership) 50 per cent of the shares in PFK (the holding company of the Nikopol stake).

31. Subsequently, on or about 5 April 2005, the Ukrainian Prosecutor General's Office filed an action to reverse the 2003 privatisation of Nikopol. On 26 May 2005, the claims of the Prosecutor General's Office were dismissed by the Commercial Court in Kiev. On 25 July 2005, the Kiev Commercial Court of Appeals allowed the

appeal of the Prosecutor General's Office, declared the privatisation illegal on the grounds that the sale did not accord with Ukrainian law governing the privatisation and ordered the return of the shares purchased by PFK. The decision of the Kiev Commercial Court of Appeals was subsequently upheld on 26 August 2005 by the Superior Commercial Court of Ukraine. On 8 September 2005, the Supreme Court of Ukraine refused PFK's appeal and subsequently, on 18 January 2006, closed the case.

32. Thus, immediately prior to the negotiations for the creation of the Ferroalloy Holding, the position as a matter of Ukrainian law was that PFK was not entitled to the shareholding of 50 per cent plus one share in Nikopol. Accordingly, quite apart from the effect of the Nikopol Agreement as set out above, it is denied that (as is pleaded in paragraph 5 of the Particulars of Claim) the Claimant was the beneficial owner of approximately 73 per cent of the shares in Nikopol at that time.

33. The Defendants actively supported the efforts of the Ukrainian State to recover and re-privatise the Nikopol shareholding of 50 per cent plus one share pursuant to the Ukrainian court decisions referred to above. The Defendants did so because they intended to bid for the shareholding in the event of such re-privatisation.

34. After the creation of the Ferroalloy Holding, and following an extraordinary appeal by PFK, the Supreme Court of Ukraine by a judgment dated 14 March 2007 quashed its own earlier decision and remitted the matter for a fresh trial. By its judgment dated 6 June 2007, the Commercial Court in Kiev dismissed the claims of all parties, and this judgment was upheld on 17 October 2008 by the Kiev Commercial Court of Appeals. In the end, therefore, PFK was established as the lawful owner of the disputed Nikopol shares.

The Ukrnafta agreements

35. As at late 2002/early 2003, shareholdings in Ukrnafta, a Ukrainian oil and gas company, were held (*inter alia*) as follows:

(a) National Joint Stock Company Naftogas of Ukraine (***Naftogas***), a holding company owned by the Ukrainian state, held a controlling shareholding of 50 per cent plus one share; and

(b) the Defendants were among the beneficial owners of a shareholding of 40.1 per cent.

36. In late November 2002, the Claimant approached the Second Defendant with a proposal which would enable the Defendants to obtain the benefit of the corporate rights attaching to their shareholding in Ukrnafta, including in respect of supervisory board representation. The Claimant said that, by virtue of his relationship with President Kuchma, he was in a position to ensure that Naftogas exercised its voting rights in respect of its Ukrnafta shares in accordance with the Claimant's wishes and that the Ukrainian State's representatives on the supervisory board of Ukrnafta also acted in accordance with the Claimant's wishes. His proposal was that the Claimant and the Defendants should co-operate so as to enable the Defendants to appoint representatives to the supervisory board of Ukrnafta and the chairman of the management board. The Second Defendant expressed his interest in this proposal, following which the Claimant reverted with his proposed terms and conditions, which he said had been personally approved by President Kuchma.

37. On 25 January 2003, the Claimant and the Defendants entered into two written agreements in relation to Ukrnafta.

38. By an Agreement on Co-operation relating to the Attainment of Operational Control over Ukrnafta dated 25 January 2003 (the ***Ukrnafta Agreement***), the parties agreed (*inter alia*) as follows:

(a) By clause 1, that the Claimant (identified as "*Party 2*") would procure that the Defendants' preferred candidates were elected to the office of chairman of the management board and to membership of the supervisory board of Ukrnafta.

(b) By clause 2, that the Claimant would receive from the Defendants (identified as "*Party 1*") an option to acquire a one-third interest in the companies which held the 40.1 per cent shareholding referred to at paragraph 35(b) above, pursuant to the terms of a separate option agreement.

(c) By clause 3.1 that, upon the appointment of the Defendants' representative as chairman of Ukrnafta's management board, the Defendants would arrange for

the management of the day-to-day activities of Ukrnafta to be such that the level of payments to the Ukrainian State would continue to be at least equal to that which had occurred previously.

(d) By clause 3.2, that the Defendants should make payments to a "*special fund*" (details of which were to be provided by the Claimant) of not less than US$5m per month until November 2004. The Claimant had informed the Defendants (including during a conversation with the Second Defendant in late November 2002) that the special fund was to be used for the next presidential election campaign (which was due to be held in October/November 2004). As pleaded above, in December 2003, notwithstanding the two-term limit established by the Ukrainian Constitution, the Ukrainian Constitutional Court ruled that President Kuchma was eligible to stand for a third five-year term.

(e) By clause 3.3, that, until November 2004, the Defendants should pay 50 per cent of the profits received by them from Ukrnafta (after deduction of the sums paid to the special fund) to the Claimant.

39. By a separate Agreement on the Right to Exercise the Option dated 25 January 2003 (the ***Option Agreement***), the parties agreed terms regarding the exercise of the option referred to at paragraph 38(b) above. This provided for the option to be exercisable (a) until the end of November 2004 or until the privatisation of the shareholding of 50 per cent plus one share in Ukrnafta (whichever was earlier) and (b) at a price equal to one-third of US$95.502m plus accrued interest (at a rate of 15 per cent per annum) from the date of the Option Agreement to the date of conclusion of a sale and purchase agreement consequential on exercise of the option.

40. For the purpose of making the payments to the special fund stipulated by clause 3.2 of the Ukrnafta Agreement, the parties entered into a series of share purchase agreements, under which companies owned or controlled by the Defendants agreed to buy certain specified shares from companies owned or controlled by the Claimant. The consideration payable under these share purchase agreements broadly corresponded to the monthly payments of US$5m which, under clause 3.2 of the Ukrnafta Agreement, the Defendants were required to make to the special fund.

41. Between April 2003 and September 2004, the Defendants procured the payment of the consideration under the relevant share purchase agreement, amounting to US$100m in total. In reality, these payments were made for the purpose of discharging the Defendants' obligation to make payments to the special fund under clause 3.2 of the Ukrnafta Agreement.

42. In fact, the Defendants were subsequently informed in about October 2004 that the said payments had not in fact been received by the special fund. It is to be inferred that the payments had instead been diverted to the Claimant's own use.

The acquisition of KZhRK and the Alcross transaction

43. Paragraph 12 is admitted.

44. On 23 March 2004, the Second Defendant met with Mr Rinat Akhmetov, together with Mr Igor Surkis and Mr Grigoriy Surkis, before a football match in Milan. The purpose of the meeting was to agree to put an end to corporate conflicts relating to iron ore assets, to agree how to share out control over those assets and then to reach agreement as to the further privatisation of the assets of Ukrrudprom. The parties reached such an oral agreement (the ***Milan Agreement***). So far as relevant to the present proceedings, it was orally agreed that the Second Defendant would seek to acquire the KZhRK Stake from the Ukrainian State on the basis that the KZhRK Stake would be held as to 50 per cent for the Second Defendant and as to 50 per cent for Mr Akhmetov.

45. Paragraph 13 is admitted. In order to become effective, the law had to be signed by President Kuchma, who had a right of veto.

46. In the course of April 2004, Mr Akhmetov telephoned the Second Defendant to say that the Claimant was threatening to use his influence with President Kuchma to ensure that the legislation was not signed unless the KZhRK Stake was bought for the Claimant. The Second Defendant told Mr Akhmetov that, given the Milan Agreement, Mr Akhmetov was free in his discussions with the Claimant to deal only with his own anticipated shareholding in KZhRK (and not that of the Second Defendant).

47. In the event, President Kuchma signed the legislation on 29 April 2004.

48. Paragraph 14 is admitted. The Claimant had used his influence with the Ukrainian State authorities to ensure that the tender price for the KZhRK Stake was set artificially low (i.e. at substantially less than its true value), namely about US$45.6m (UAH 242,635,000), in the hope that he would subsequently be able to benefit from a sale at such a low price. It was estimated that the true value of the KZhRK Stake was much higher, in the region of UAH 700m, and the Second Defendant decided that Solaim should therefore place a bid at UAH 689,418,880 (approximately US$129.8m), which was the par value of the shares, even though no other bidders participated in the tender.

49. As to paragraph 15:

(a) The Defendants were in Yalta on 26 July 2004 on the occasion of a one-day business forum to promote the Common Economic Space encompassing Russia, Ukraine, Belarus and Kazakhstan. The forum was attended by, among others, President Putin of Russia, President Kuchma and Prime Minister Yanukovich of Ukraine and other political and business figures.

(b) It is admitted that an informal lunch was attended by the individuals referred to in paragraph 15, among others, apart from Mr Igor Surkis. The lunch took place at Tiflis restaurant.

(c) In the course of the lunch, the Claimant said that he wanted to talk about who was going to buy the KZhRK Stake for him. As a result of the discussion between those who were at the lunch, it was decided that discussions concerning this issue should be held between the Claimant and the Second Defendant.

(d) No agreement was made with the Claimant (still less a legally binding agreement) for the sale or transfer of the KZhRK Stake.

(e) Save as aforesaid, paragraph 15 is denied.

50. As to paragraph 16:

(a) As pleaded above, the alleged Yalta Agreement is denied and it is therefore denied that any subsequent steps were taken pursuant to any such agreement.

(b) Sub-paragraph (1) is admitted, save that the execution of the agreement by Solaim was procured by the Second Defendant alone and not by the First Defendant.

(c) Sub-paragraph (2) is admitted, save that the deposit was made in part by OOO Pridneprovye (***Pridneprovye***) (as to UAH 689,420,000) and in part by Scientific Production Investment Group "Interpipe" Corporation (***Interpipe***) (as to UAH 44,134,400), save that the total amount of such deposit was equivalent to approximately US$138.1m (not US$130m as alleged), and save that no admissions are made as to whether the making of the said deposit was procured by the Claimant. It is averred that (as pleaded in footnote 1 of the Particulars of Claim) the respective companies were able to withdraw the said deposit at any time on demand. Further, the Second Defendant had no right or power to use the monies placed on deposit for any purpose.

(d) On or about 21 August 2004, Solaim paid the purchase monies for the KZhRK Stake. The deposit placed by Pridneprovye and Interpipe with PrivatBank has no relevance to the payment of the said purchase monies.

(e) As to sub-paragraph (3):

(i) On or about 18 May 2002, at the direction of Ukrrudprom (as majority shareholder of KZhRK), Mr Fedor Karamanits was appointed as chairman of the management board of KZhRK.

(ii) On or about 30 August 2004, Mr Karamanits went on sick leave and Mr Vladimir Richko was appointed as acting chairman of the management board.

(iii) On 1 September 2004, Ms Chebotaryova (acting on behalf of the Claimant) sent the Second Defendant's representative, Mr Timur Novikov, a draft letter for Solaim to direct the supervisory board of

KZhRK to dismiss Mr Karamanits and replace him with Mr Mikhail Grodensky, a representative of the Claimant.

(iv) On 6 September 2004, the supervisory board of KZhRK resolved to approve the appointment of Mr Grodensky as first deputy chairman and then acting chairman of the management board. This resolution was put into effect by an order dated 7 September 2004.

(v) As pleaded above, the appointment of Mr Grodensky in place of Mr Karamanits was made at the request of the Claimant (as evidenced by the draft letter provided by Ms Chebotaryova on 1 September 2004). The Second Defendant accommodated the request on a temporary basis out of a concern that the Claimant would otherwise use his influence with the Ukrainian State authorities to put pressure on the Defendants.

(vi) It is admitted that, at an extraordinary general meeting of KZhRK on 15 November 2004, it was resolved to replace the existing management board and to appoint Mr Aleksandr Pak as chairman and Mr Grodensky as deputy chairman (and as acting chairman pending the issue of a work permit to Mr Pak). It is admitted that Mr Grodensky and/or Mr Pak were "*representatives of the Claimant*".

(vii) Save as aforesaid, sub-paragraph (3) is not admitted.

(f) As to sub-paragraphs (4) and (5):

(i) By September 2004, with presidential elections only two months away, there was a realistic prospect that President Kuchma would be replaced by a successor with whom the Claimant did not carry influence.

(ii) As pleaded above, the Defendants felt constrained to negotiate with the Claimant concerning a sale or transfer of the KZhRK Stake, without reaching the point of a concluded agreement to sell the KZhRK Stake or an absolute refusal to effect such a sale, until (at least) President

Kuchma's departure from office and the Claimant's resultant loss of influence.

(iii) It is admitted that, in pursuit of the objective referred to in the previous sub-paragraph, and as set out further below, the Second Defendant authorised Mr Novikov to comment on draft contractual documentation prepared by Ms Chebotaryova in September 2004 concerning the possible sale and purchase by Solaim of the KZhRK Stake to Pridneprovye.

(iv) Thus, on 9 September 2004, Ms Chebotaryova sent Mr Novikov a draft agreement for the sale of the KZhRK Stake by Solaim to Pridneprovye and associated draft documentation. Ms Chebotaryova sent a further such draft on 10 September 2004.

(v) Further drafts were exchanged in the second half of September 2004. On 24 September 2004, Ms Chebotaryova sent Mr Novikov a proposal for the signature of an agreement for the sale of the KZhRK Stake by Solaim.

(vi) In the event, none of the draft agreements for the sale of the KZhRK Stake was ever agreed, signed or executed and no agreement was ever concluded for such a sale.

(vii) The unparticularised allegation that an agreement in principle was concluded in or around November 2004 between the Claimant and the Defendants for the Claimant to purchase a company which owned Solaim is specifically denied. No such agreement was concluded, as alleged or at all.

(viii) By January 2005, the Claimant had failed to procure the distribution of profits from Nikopol's business since January 2002. The Claimant procured that companies owned or controlled by him contracted with Nikopol using arrangements, the effect of which was to divert profits from Nikopol to those companies, for example, by procuring that such

companies sold goods and services to Nikopol at a premium to their true value or bought goods from Nikopol at a discounted price. Under the Nikopol Agreement, the profits made by the Claimant's companies from their dealings with Nikopol were required to be shared equally between the Claimant and the Defendants, since they were profits which ought to have been made by Nikopol.

(ix) In the run-up to the inauguration of President Yushchenko on 23 January 2005, the Defendants decided to approach the Claimant about (a) payment of the unpaid share of the profits of Nikopol in relation to the Defendants' 25.6 per cent shareholding in Nikopol (which they estimated to be worth about US$150m), (b) the Claimant's failure to procure the transfer to them by PFK of a 25 per cent shareholding in Nikopol, i.e. half of PFK's shareholding in Nikopol of 50 per cent plus one share, (c) payment of the unpaid share of the profits of Nikopol in respect of the said 25 per cent shareholding, and (d) reimbursement of the sums destined for, but apparently not received by, the special fund. The Defendants estimated that the total sums owed to them by the Claimant were in the region of US$400m.

(x) On 20 January 2005, Ms Chebotaryova sent Mr Novikov a draft agreement. This provided, not for the acquisition of the KZhRK Stake directly from Solaim, but rather for the acquisition by the Claimant (or his companies) of shares in Directfield, Solaim's parent company.

(xi) After President Yushchenko's inauguration, on or about 24 January 2005 the Second Defendant telephoned the Claimant to inform him that the Defendants had several issues to discuss with him and that, depending on how those discussions went, it might be possible to further discuss the KZhRK Stake. The Second Defendant made clear to the Claimant that the issues requiring discussion included the compensation owed to the Defendants in respect of the unpaid share of the profits of Nikopol. He informed the Claimant that the First Defendant would be in Kiev in late February 2005.

(xii) Although it remained the case that the Second Defendant did not wish to sell the KZhRK Stake to the Claimant, the Second Defendant authorised his representatives to begin discussions about the draft agreement which Ms Chebotaryova had provided on 20 January 2005. Comments on the draft were provided by email from Mr Novikov to Ms Chebotaryova dated 25 January 2005. The Second Defendant believed that the Claimant was more likely to comply with his obligation to compensate the Defendants in respect of the matters referred to in sub-paragraph (ix) above if there appeared to be a prospect of his acquiring ownership of the KZhRK Stake.

(xiii) Further draft agreements for a sale of shares in Directfield were exchanged between Ms Chebotaryova and Mr Novikov on 5 and 7 February 2005.

(xiv) In the event, no agreement for the sale of shares in Directfield was ever concluded, signed or executed.

(xv) The allegation that requests were made by the Claimant for the transfer of the KZhRK Stake into his ownership is not particularised. Pending the provision of proper particulars, this allegation is denied.

(xvi) Save as aforesaid, sub-paragraphs (4) and (5) are denied.

(g) During telephone conversations between the Claimant and the Second Defendant in February 2005, the Claimant unconditionally acknowledged his indebtedness to the Defendants in respect of the unpaid share of the profits of Nikopol in respect of the Defendants' 25.6 per cent shareholding in Nikopol and agreed to make a payment on account of such indebtedness. However, the Claimant did not acknowledge any indebtedness in respect of (and refused to make any payment on account of) the unpaid share of the profits of Nikopol in respect of the Defendants' half of the 50 per cent plus one share stake, refused to transfer that half to the Defendants, and refused to repay the US$100m destined for the special fund.

(h) The Claimant did not wish to acknowledge openly that the payment on account referred to in the previous sub-paragraph was in respect of profits that should (but for the diversion referred to at paragraph (f)(viii) above) have been earned by Nikopol, because this would have involved an admission of the Claimant's earlier wrongdoing. It was also necessary to prepare documentation in case this was required by the relevant banks to effect the transfer of monies. At the Claimant's suggestion, therefore, the parties agreed to document the payment on account of the Claimant's indebtedness as involving the acquisition of a company, which in the event was Alcross. The Claimant well knew, however, that Alcross had no assets, and the sole purpose of documenting the Alcross acquisition was for the purpose of facilitating the transfer of funds by the Claimant to the Defendants for the purpose of satisfying in part his existing indebtedness.

(i) On 20 February 2005, following an earlier draft sent on 10 February 2005 (which was silent as to the sums payable), Mr Novikov sent Ms Chebotaryova and Ms Burnosova (an employee of Interpipe and representative of the Claimant) five draft agreements for the sale of interests in Alcross to companies owned or controlled by the Claimant. The draft agreements each referred to a price of US$30m, amounting to a payment of US$150m in total.

(j) As to sub-paragraph (6):

(i) It is not clear whether the alleged "*request*" referred to in the first sentence is alleged to have been made at the meeting between the Claimant and the First Defendant in late February 2005. The Second Defendant did not attend the said meeting and makes no admissions as to what may have occurred. Conversely, if it is alleged that the "*request*" was made on some other occasion, that allegation is unparticularised and, pending the provision of proper particulars, it is not admitted.

(ii) As to the second sentence, it is not alleged that the Second Defendant attended the alleged meeting and accordingly no admissions are made.

(iii) It is denied that any agreement alleged to have been made at the meeting was made with the authority of the Second Defendant or (if this is alleged) that any such agreement was binding on the Second Defendant. The Second Defendant did not authorise the First Defendant to conclude any such agreement.

(iv) Further or alternatively, under Article 237(2) of the Civil Code of Ukraine (which would be the putative governing law of any alleged agency relationship), a person who is authorised merely to negotiate a possible future transaction on behalf of another does not have the power (without more) to conclude a transaction so as to bind that other person.

51. On 23 February 2005, Ms Burnosova sent some suggested amendments to the draft agreements to Mr Novikov. The total price provided for by the five draft agreements remained at US$150m.

52. On 24 February 2005, Mr Novikov circulated further versions of the five draft agreements (still indicating an overall price of US$150m). The same day, Ms Burnosova reverted with drafts indicating a price of US$26m per agreement, amounting to US$130m in total.

53. On 26 February 2005, Mr Novikov sent Ms Chebotaryova and Ms Burnosova a further version of the five draft agreements, now indicating a price of US$28.6m per agreement or US$143m in total, and providing for staged payments, with initial payments totalling US$130m and subsequent payments totalling US$13m.

54. Save that it is admitted that the Claimant and the Second Defendant met on 5 March 2005 in Dnepropetrovsk or Kiev and on 6 March 2005 in Kiev (with Igor and Grigoriy Surkis and Boris Fuksman) to discuss their respective interests in television businesses, paragraph 17 is denied. The Second Defendant did not make the representations alleged.

55. As to paragraph 18:

(a) It is denied that the Claimant relied on or was induced by the alleged representations, which are denied (as to which, paragraph 54 above is repeated).

(b) It is not admitted that the execution of the Alcross Agreements by the relevant purchasers was procured by the Claimant.

(c) Save as aforesaid, paragraph 18 is admitted. The Alcross Agreements executed on 6 March 2005 were in substantially similar form to the second set of drafts circulated by Mr Novikov on 26 February 2005 (as pleaded in paragraph 53).

56. Paragraph 19 is not admitted. It is denied (if it is alleged) that any such alleged assurance was made on behalf of the Second Defendant.

57. As to paragraph 20:

(a) It is admitted that the said sums were received, save that the sum of US$130m was received in two tranches (of US$78m and US$52m respectively) on 16 and 18 March 2005; the sum of US$13m was received on 7 April 2005.

(b) Save as aforesaid, the first sentence is not admitted.

(c) The second sentence is admitted.

58. Paragraph 21 is admitted, save that the deposit was withdrawn by Pridneprovye and Interpipe in the same proportions in which they had been made (as to which paragraph 50(c) above is repeated).

59. Save that it is denied that the absence of any interest in KZhRK on the part of Alcross was contrary to any representations made on behalf of the Second Defendant (which are themselves denied), paragraph 22 is admitted.

60. As to paragraph 23:

(a) In January 2005, Mr Karamanits commenced legal proceedings in the Zhovtnevyi District Court of Dnipropetrovsk claiming (among other things)

the invalidation of the resolution of the extraordinary general meeting of KZhRK dated 15 November 2004 and his reinstatement as chairman of the management board.

(b) By a decision dated 25 February 2005, the Zhovtnevyi District Court of Dnipropetrovsk upheld Mr Karamanits' claim in full, quashed the resolution of the extraordinary general meeting and ordered his reinstatement as chairman of the management board. In particular, the Court ordered KZhRK to allow Mr Karamanits to discharge his duties as chairman of the management board, to provide him with the relevant stamps and seals of office and to give effect to his orders and instructions as the head of the management body of KZhRK.

(c) On 2 March 2005, the state executor of the Zhovtnevyi office of the State Enforcement Office of the Kryvyi Rih City Justice Directorate, Mr Nichiporov, issued an order for the mandatory enforcement of the Court decision of 25 February 2005.

(d) On 3 March 2005, Mr Karamanits resumed possession of the seals, stamps and relevant documents of KZhRK consequential upon his reinstatement as chairman of KZhRK's management board.

(e) The reference to forcible entry in the first sentence of paragraph 23 is unparticularised and fails to state the date on which it is alleged to have occurred. If it is alleged that the forcible entry took place at the time of Mr Karamanits' reinstatement as chairman of KZhRK's management board (i.e. on 3 March 2005), such reinstatement took place pursuant to a court order and any alleged forcible entry (which is not admitted) would have taken place with the authority of the state enforcement office.

(f) The second sentence is admitted. It is denied (if it is alleged) that the Claimant had any right to exercise management control over KZhRK. Notwithstanding Mr Karamanits' reinstatement on 3 March 2005, the Claimant was prepared to and did sign the Alcross Agreements without demur three days later on 6 March 2005.

(g) Save as aforesaid, paragraph 23 is not admitted.

61. On 6 May 2005, Christodoulos G Vassiliades & Co, the Cypriot law firm acting for the Alcross Buyers, wrote by email to Andreas Sofocleous & Co, the Cypriot law firm acting for Ralkon. The email attached five documents in substantially similar terms, each described as a "*Supplementary Agreement*" and stated to have been made on 22 April 2005, between each of the Alcross Buyers and Ralkon. Each "*Supplementary Agreement*" contained a purported mutual acknowledgment that Ralkon was the ultimate beneficial owner of the KZhRK Stake. Each "*Supplementary Agreement*" was pre-signed by or on behalf of the relevant Alcross Buyer.

62. In fact, Ralkon had not made any agreement on 22 April 2005 to acknowledge that it was the ultimate beneficial owner of the KZhRK Stake (which it was not). Accordingly, on 13 May 2005, Andreas Sofocleous & Co responded to say that Ralkon did not intend to sign any "*Supplementary Agreement*" since the transaction had completed and there was no need to sign any further documents. They added that the information contained in the "*Supplementary Agreement*", i.e. the suggestion that Ralkon was the ultimate beneficial owner of the KZhRK Stake, was neither true nor correct.

63. No response to the letter of 13 May 2005 was received from Christodoulos G Vassiliades & Co or from anyone else representing the Claimant's interests.

Alleged negotiation of the Constitution

64. Paragraph 24 is taken to be a summary of the allegations pleaded in paragraphs 26 and 27. The Second Defendant pleads to those allegations below, and does not plead to the summary.

65. As to paragraph 25:

(a) The Second Defendant pleads below to the allegations pleaded in paragraphs 26 and 27 concerning specific meetings or conversations. Insofar as it is alleged that any other meetings or conversations took place, that allegation is unparticularised and, pending the provision of proper particulars, is not

admitted. Without prejudice to the foregoing, the Second Defendant pleads as follows.

(b) As to sub-paragraph (1), it is denied that the Defendants were partners in the English law sense or that they at any time suggested to the Claimant that such was the case.

(c) Sub-paragraph (2) is denied. The Second Defendant was not holding his interest in KZhRK shares (whether jointly with the First Defendant or otherwise) on the Claimant's behalf and never said (or authorised anyone else to say) to the Claimant that he was.

(d) Sub-paragraph (3) is denied.

(e) As to sub-paragraph (4), no question arises in these proceedings as to the Second Defendant having authority to conduct negotiations or conclude an agreement binding on the First Defendant (or *vice versa*) in relation to a merger of ferroalloy assets. Further, the Second Defendant never concluded any agreement with the Claimant in relation to KZhRK shares and, accordingly, the question of his authority to conclude such an agreement on behalf of the First Defendant does not arise. In any event, by virtue of the concession made in the Defence of the First Defendant in these proceedings, any question of the Second Defendant's authority to bind the First Defendant to the alleged Constitution (or vice versa) is academic and the Second Defendant does not plead thereto. Save as aforesaid, no admissions are made.

66. As to paragraph 26:

(a) As to sub-paragraph (1):

(i) It is admitted that a meeting took place in Sardinia in or about August 2005 which was attended by the Claimant, the Defendants, as well as Mr Babakov and Mr Voevodin at the invitation of the Claimant. The meeting took place over lunchtime at a hotel.

(ii) At the start of the meeting, the Second Defendant asked about the agenda and the reason why those present were in attendance. The Claimant said that he and President Kuchma were entitled to the KZhRK shares in return for having secured the enactment of the privatisation law and demanded that the shares should be registered in his name as they had already been paid for. The Claimant also said that the Defendants should stop assisting the Ukrainian State in seeking the return of the 50 per cent plus one share shareholding in Nikopol.

(iii) The Second Defendant asked Mr Babakov and Mr Voevodin what their role was. Mr Babakov said that they had interests in the Ukrainian energy industry and might be interested in participating in Nikopol, and queried how the conflicts with the Claimant could be resolved. The First Defendant said that he was not prepared to discuss anything with the Claimant until the monies destined for the special fund and appropriated by the Claimant had been returned, and thereafter left the meeting (together with Mr Babakov).

(iv) In the presence of the Claimant and Mr Voevodin, the Second Defendant said that he was the rightful owner of the KZhRK shares and did not intend to transfer them to the Claimant. He also said that there were a number of outstanding issues, including (a) the share of the profits of Nikopol in respect of the 25.6 per cent Nikopol shareholding less US$143m, (b) the Defendants' right to half of the 50 per cent plus one share shareholding in Nikopol and the unpaid share of profits attaching to the same, (c) the monies destined for the special fund, and (d) profits diverted from KZhRK for the period between September 2004 and March 2005 when Mr Grodensky and Mr Pak had management control. The Second Defendant said that it was only upon resolution of these issues that the parties might begin to have any discussions in relation to any sale of KZhRK on commercial terms.

(v) The Claimant said that he did not agree with the Second Defendant's stance but it was agreed that these issues should be revisited after the holidays.

(vi) Sub-paragraph (a) is denied. The Second Defendant made no such statement.

(vii) Save as set out above, sub-paragraph (b) is denied.

(viii) Sub-paragraph (c) is admitted, save that Mr Spektor's name was not mentioned at the meeting in Sardinia, save that the "*negotiations*" envisaged by the Second Defendant were as set out above, and save that no admissions are made as to the relationship between Mr Voevodin, Mr Spektor and/or Mr Babakov (and accordingly the expression "***Third Party***" is used in this Defence without making any admissions).

(b) Sub-paragraph (2) is denied. The proposal for a merger of the ferroalloy assets was made by the Claimant in about April 2006.

(c) Save that it is admitted that no agreement had been concluded by March 2006, sub-paragraph (3) is not admitted.

(d) Save that it is denied that the allegations and claims made in the RICO Claim were spurious, and save that the purpose of instituting the RICO Claim was to vindicate the rights of the plaintiffs in respect of the wrongful conduct alleged in the RICO Claim, sub-paragraph (4) is admitted.

67. As pleaded at paragraph 12(h)(iii) above, on 24 March 2006, in pursuance of the Milan Agreement pleaded at paragraph 44 above, companies owned or controlled by Mr Akhmetov effectively acquired an indirect 50 per cent interest in the KZhRK shares held by companies owned or controlled by the Second Defendant.

68. With effect from 1 January 2006, Ukraine became a parliamentary republic, in the sense that the ultimate decision on the appointment of the Prime Minister became a matter for the parliament. Parliamentary elections took place on 26 March 2006 and

the results suggested that the party of Yulia Tymoshenko (in coalition with other parties) was likely to form a majority in parliament, with the result that Ms Tymoshenko was widely expected to become Prime Minister.

69. As to paragraph 27:

(a) The first sentence is admitted. The Claimant said that he was concerned that if Yulia Tymoshenko returned as Prime Minister, there was a real risk that the shareholding in Nikopol of 50 per cent plus one share would be re-registered in the name of the State Property Fund of Ukraine pursuant to the decisions of the Ukrainian courts referred to above. Previously, as pleaded at paragraph 33 above, the Defendants had actively supported the attempts of the Ukrainian State to secure such a re-registration. The Claimant therefore indicated that the solution was for there to be a merger of the parties' ferroalloy assets and for the parties jointly to protect the title to the Nikopol shareholding.

(b) In the course of the meeting in Geneva, the Claimant and the Second Defendant decided that neither party should take any steps to change the status quo with respect to the management control of Nikopol or the disputed Nikopol shareholding of 50 per cent plus one share (the parties described this as the "*water truce*").

(c) Sub-paragraph (1) is admitted, save that the Second Defendant does not plead to the allegation that the Second Defendant was acting on behalf of the First Defendant and save that no admissions are made as to the basis on which Mr Voevodin was acting. The Claimant does not appear to allege that the agreement in principle was legally binding but, if any such allegation is advanced, it is denied.

(d) It was also orally agreed, in anticipation of the creation of the Ferroalloy Holding, that representatives of the Claimant, the Second Defendant and the Third Party should be elected to the supervisory board of Nikopol at a forthcoming general meeting of shareholders.

(e) Sub-paragraph (2) is denied. The Second Defendant never made any such statement.

(f) Save that the transfer of KZhRK shares to the Claimant was not the subject of any actual or future agreement, sub-paragraph (3) is admitted.

70. As to paragraph 28:

(a) By a written contract dated 5 May 2005, Nikopol had appointed Mr Volodymyr Kutsin as chairman of its management committee and chief executive officer for a term of five years.

(b) In the event, on 5 August 2005, Nikopol purported to dismiss Mr Kutsin from those positions.

(c) Mr Kutsin brought proceedings in the Zhovtnevyi District Court of Dnipropetrovsk claiming that his dismissal had been illegal and seeking his reinstatement.

(d) By a ruling made on 7 March 2006 and which entered into force on 20 March 2006, the Zhovtnevyi District Court of Dnipropetrovsk held that Nikopol had lacked grounds for dismissing Mr Kutsin and ordered his reinstatement. The order specifically provided that there should be no interference with Mr Kutsin's entry to his premises or the premises of Nikopol.

(e) Any alleged forcible entry (which is not admitted) would have taken place with the authority of the state enforcement office pursuant to the writ of enforcement issued consequent upon the order of the Zhovtnevyi District Court of Dnipropetrovsk.

(f) The reference to "*employees or agents of the Defendants*" is unparticularised and is not understood. The Second Defendant reserves the right to plead further to it following the provision of proper particulars. In the meantime, this allegation is not admitted. It is denied (if it is alleged) that Mr Kutsin was an employee or agent of the Defendants. Mr Kutsin had been the chairman of

Nikopol's management committee and its chief executive officer since 1999, during which period the Claimant exercised effective control over Nikopol.

(g) As to the second sentence, it is admitted that the Defendants have a good working relationship with Mr Kutsin but it is denied that Mr Kutsin's reinstatement gave the Defendants management control over Nikopol. The allegation that the Defendants have "*refused to return management control of Nikopol to the Claimant*" is unparticularised and, pending the provision of proper particulars, is not admitted.

(h) Save as aforesaid, no admissions are made.

71. Paragraph 29 is not admitted. It is denied (if it is alleged) that any alleged draft terms were provided to the Second Defendant on or around 16 April 2006.

72. As to paragraph 30:

(a) It is admitted that discussions took place between April and September 2006, and indeed until November 2006, regarding the creation of the Ferroalloy Holding. It is denied (if it is alleged) that such discussions took place by reference to the "*Draft Partnership Terms*".

(b) Save that the Claimant's representatives provided the Second Defendant's representatives with the "*Draft Partnership Terms*" (on 5 August 2006), the second sentence is denied. As pleaded above, the "*Draft Partnership Terms*" did not form the basis of the discussions.

(c) By the end of August 2006, a great deal of the preparatory work necessary for the creation of the Ferroalloy Holding had already been carried out. In particular, the holding companies and intermediate companies by which the Ferroalloy Holding was to be structured had been incorporated, assets had been transferred to such companies and drafts of some of the agreements that were ultimately executed on 7 November 2006 were underway. In addition, as had been agreed at the meeting on 13/14 April 2006, at a general meeting of the shareholders of Nikopol on 26 April 2006, representatives of the Claimant,

the Second Defendant and the Third Party were elected to the supervisory board of Nikopol.

The alleged Constitution

73. As to paragraph 31:

(a) It is admitted that a meeting took place on 4 September 2006 at the premises of the Second Defendant in Geneva. The meeting took place in an office on the fifth floor of the premises and was between the Claimant, the Second Defendant and Mr Voevodin. Mr Spektor, Ms Chebotaryova and Mr Boris Baum (an associate of Mr Spektor) were also present at the Second Defendant's premises, but remained in offices on the sixth floor and did not participate in the meeting.

(b) At the outset of the meeting, the Second Defendant asked whether the Claimant was "*in or out*" of a deal concerning the Ferroalloy Holding, which he said had nothing to do with KZhRK. The Claimant said he was "*in*". The balance of the meeting involved a discussion about the financial aspects of the proposed Ferroalloy Holding, including as to the proportions to be held by each party and questions of valuation.

(c) At the end of the meeting, just as the Second Defendant was rushing to leave to take a plane to attend a birthday party for Mr Grigoriy Surkis, Mr Spektor, Ms Chebotaryova and Mr Novikov (who was also on the premises) entered the fifth floor room. The Second Defendant said that he was leaving and that the discussions should be progressed with Mr Novikov in due course.

(d) The alleged oral agreement is denied. As acknowledged in paragraph 27(3) of the Particulars of Claim, agreement in principle had been reached in April 2006 on the creation of the Ferroalloy Holding but it remained necessary for the parties to reach detailed agreement on the terms on which the Ferroalloy Holding was to be established. The meeting on 4 September 2006 was part of a continuum of discussions between the parties for that purpose, all of which took place subject to contract. It was not until the execution of the necessary

contractual documentation on 7 November 2006 (as set out below) that any legally binding agreement with respect to the creation of the Ferroalloy Holding was concluded.

(e) It is admitted that, on 7 September 2006, the Second Defendant's representatives received by email a copy of the document now alleged by the Claimant to be the "*Partnership Terms*". It is denied that the said document constituted or evidenced any agreement reached at the 4 September 2006 meeting or at all.

(f) As to sub-paragraph (10), it is denied that copies of the "*Partnership Terms*" were handed to the Second Defendant at any subsequent meeting. Save as aforesaid, sub-paragraph (10) is not admitted.

(g) Save as aforesaid, paragraph 31 is denied.

(h) It is specifically denied that (as alleged in sub-paragraph (5)) the parties orally agreed to the application of English law and the jurisdiction of the English Courts. Questions of governing law and jurisdiction were not mentioned at any stage during the meeting on 4 September 2006. Indeed, the alleged "*Partnership Terms*" document relied on by the Claimant as a final form of the terms allegedly agreed in the course of the meeting contains no reference to English law or jurisdiction.

(i) Accordingly, if (which is denied) any agreement was concluded at the meeting on 4 September 2006, such agreement would not have contained any express term that it should be governed by English law. Pursuant to the Contracts (Applicable Law) Act 1990 and the Rome Convention on the Law Applicable to Contractual Obligations, any agreement would have been governed by the law of Ukraine as the law of the country with which the alleged agreement was most closely connected.

74. Paragraph 32 is denied. The terms agreed by the parties with respect to the Ferroalloy Holding were those set out in the written transaction documentation which

was negotiated between the parties from at least June 2006 onwards and ultimately executed on or about 7 November 2006 and thereafter. In particular:

(a) A Share Swap and Purchase Agreement was made on or about 7 November 2006. The parties were (i) 18 companies owned or controlled by the Second Defendant (the ***Group A Companies***) which were the registered shareholders in 18 specified target companies (the ***A Targets***), and (ii) 7 companies owned or controlled by the Claimant (the ***Group B Companies***) which were the registered shareholders in a target company (the ***B Target***).

(b) According to Schedule B to the Share Swap and Purchase Agreement, the A Targets held the following interests in Ukrainian plants:

(i) a 25.74 per cent shareholding in Nikopol;

(ii) a 97.96 per cent shareholding in Stakhanov;

(iii) a 97.2 per cent shareholding in Ordzhonikidze;

(iv) a 95.67 per cent shareholding in Marganetskiy; and

(v) an indirect 50 per cent shareholding in companies which in turn held an 82.43 per cent shareholding in Zaporozhye.

(c) According to Schedule B to the Share Swap and Purchase Agreement, the B Target held a 22.92 per cent shareholding in Nikopol.

(d) In broad summary, the Share Swap and Purchase Agreement provided as follows:

(i) The Group B Companies were to procure the transfer of title to 86.36 per cent of the shares in the B Target and 70 per cent of the shares in an intermediary company (the ***B Intermediary***) to the Group A Companies.

(ii) The Group A Companies were to procure the transfer of title to 13.64 per cent of the shares in the A Targets and 30 per cent of the shares in

certain intermediary companies (the ***A Intermediaries***) to the Group B Companies.

(iii) The Group A Companies were also to procure the transfer of title to a further 8.18 per cent of the shares in the A Targets and the B Target to the Group B Companies.

(iv) In consideration for the share transfers referred to above, the Group B Companies were to procure the payment of US$90m.

(v) In addition, upon payment of a further sum of US$90m by a company affiliated with the Group B Companies, the Group A Companies were to procure the transfer of title to a further 8.18 per cent of the shares in the A Targets and the B Target to the Group B Companies (or to transfer shareholdings of 0.818 per cent each for each US$9m paid by the Group B Companies).

(vi) Thus, the net effect of the transfers contemplated by the Share Swap and Purchase Agreement is that the Group A Companies would be entitled to a 70 per cent shareholding in the B Target and the B Intermediary and the Group B Companies would be entitled to a shareholding of up to 30 per cent in the A Targets and the A Intermediaries upon completion of the share swap and payment of a total of US$180m.

(e) By an Escrow Agency Agreement made the same day, the Group A Companies and the Group B Companies appointed an escrow agent for the purposes of implementing the sale of certain shares.

(f) By a Share Purchase Agreement also made on 7 November 2006, the entire share capital in three companies was sold to companies owned or controlled by the Second Defendant for a price of US$175m. The said three companies were the registered owners of, in total, 50 per cent of the statutory fund of PFK, which by then had become the owner of the 50 per cent plus one share Nikopol shareholding referred to at paragraph 23 above.

(g) A further agreement (the ***PFK Participants Agreement***) was made on 7 November 2006 between the consortium members of PFK (including the three companies referred to in sub-paragraph (f) above which were now owned or controlled by the Second Defendant). The PFK Participants Agreement made provision, in particular, about the protection of PFK's ownership of its 50 per cent plus one share Nikopol shareholding, which was being disputed by the Ukrainian State.

(h) A Shareholders Agreement was also entered into the same day allocating shareholdings in a holding company in the ratio 50 per cent, 30 per cent and 20 per cent to companies owned or controlled by the Second Defendant, the Claimant and the Third Party respectively.

(i) 18 further shareholders agreements were entered into for the purpose of governing relations between the shareholders in the A Targets and the B Target.

(j) By a Depositary Agency Agreement made the same day, Mr Novikov (expressed to be acting as counsel for the Second Defendant) and Mr Peter Maximov (expressed to be acting as counsel for the Claimant and Mr Spektor) agreed certain provisions for the deposit of a single original copy of the Beneficiaries Agreement. This was superseded by a further Depositary Agency Agreement entered into on 8 November 2006 between the Second Defendant, the Claimant (acting by Ms Chebotaryova) and Mr Spektor.

(k) By a Beneficiaries Agreement also made on 7 November 2006, it was provided (*inter alia*) as follows:

(i) By clause 2.1, it was recorded that the Second Defendant was the beneficial owner of the Group A Companies and of companies holding a 50 per cent shareholding in PFK, that the Claimant was the beneficial owner of the Group B Companies and of companies which held a 30 per cent shareholding in PFK, and that Mr Spektor was the beneficial owner of his holding company which held a 20 per cent shareholding in PFK.

(ii) By clause 2.3, it was agreed that the purpose of concluding the Share Swap and Purchase Agreement, the Shareholders Agreement and the PFK Participants Agreement was the creation of the Ferroalloy Holding and the implementation of an agreed strategy and policy for the management of the underlying assets.

(iii) By clause 2.5, it was agreed that the parties undertook to participate jointly in any other assets of the ferroalloy business and the business of raw materials for the production of ferroalloys in the proportions 50 per cent for the Second Defendant, 30 per cent for the Claimant and 20 per cent for Mr Spektor (which proportions were subject to change for various reasons).

(l) Subsequently, on 22 November 2006, the parties to the RICO Claim (including the Claimant), the Second Defendant and Renova Management AG entered into a Settlement Agreement whereby they agreed (*inter alia*) certain mutual releases and made provision for the dismissal of the RICO Claim.

(m) Thereafter, further written agreements were executed by the parties, including the following:

(i) On 7 May 2007, the Group A Companies entered into a Share Purchase Agreement for the sale of 20 per cent of the issued share capital in the A Targets and the B Target to Mr Spektor's holding company. The effect of this transaction was that the shareholding of the Group A Companies (being companies owned or controlled by the Second Defendant) reduced from 78.18 per cent to 58.18 per cent and the Third Party acquired a 20 per cent shareholding in the companies which held the assets that comprised the Ferroalloy Holding (apart from shares in PFK).

(ii) By an Addendum executed on 7 November 2007, time for completion of the Share Purchase Agreement of 7 May 2007 was extended.

(iii) On 22 January 2008, the parties to the Share Swap and Purchase Agreement executed an Addendum which amended some of its terms.

(iv) As a result of the allotment of new shares by Nikopol, on 6 and 7 March 2008:

(A) Shares in three new holding companies were transferred to the parties to the Ferroalloy Holding.

(B) Shareholders agreements (in substantially identical terms to those referred to at paragraph 74(i) above) were executed with respect to the new holding companies.

(C) Supplemental agreements were executed providing for the redistribution of certain shares in Nikopol to holding companies within the Ferroalloy Holding.

(v) On 26 March 2008, the Claimant sold a shareholding of 5 per cent in the A Targets and the B Target to the Third Party.

(vi) On 6 August 2008, the parties to the Share Swap and Purchase Agreement executed a further Addendum thereto.

(vii) On 29 August 2008, the parties to the PFK Participants Agreement executed a Supplemental Agreement thereto, which made provision (*inter alia*) regarding the transfer of shares held in Nikopol by PFK to other companies that were under the control of the parties to the Ferroalloy Holding.

(viii) On 2 September 2008, a further Supplemental Agreement was executed for the further redistribution of certain shares in Nikopol.

(ix) On 6 October 2010, the Claimant procured payment of the sum of US$90m in return for the transfer to the Group B Companies of a further shareholding of 8.18 per cent in the A Targets and the B Target.

(x) The net effect of these transactions was that interests in the Ferroalloy Holding were held as to 50 per cent by the Second Defendant, 25 per cent by the Claimant and 25 per cent by the Third Party.

75. If (which is denied) the parties made an English law agreement in the terms pleaded in paragraph 32, then such terms are too uncertain to be contractually enforceable and/or amount to an agreement to agree and/or were not intended to be legally binding. Further or alternatively, pursuant to Article 638(1) of the Civil Code of Ukraine and Article 181(8) of the Commercial Code of Ukraine, the alleged agreement was not concluded as a matter of Ukrainian law since the parties failed to reach agreement in due form on all material terms. In particular, the Second Defendant will rely on the fact that, as pleaded in paragraph 32(6), the creation of the Ferroalloy Holding is said to have been conditional on the execution of a Shareholders Agreement which would define the terms of the parties' joint participation in the Ferroalloy Holding but whose terms are not alleged to have been agreed as at 4 September 2006.

76. Paragraphs 33 and 34 are denied.

Alleged acts of performance

77. Save that it is denied that any of the conduct in question was pursuant to terms of the alleged Constitution or amounts to performance of the alleged Constitution (which is itself denied), and save that it is denied that the Beneficiaries Agreement is to be regarded as a "*subsidiary agreement*", paragraph 35 is admitted. The conduct in question was pursuant to the contractual documentation executed on 7 November 2006 (pleaded at paragraph 74 above).

78. As to paragraph 36:

(a) The first sentence is denied.

(b) The second sentence is noted.

(c) The third sentence is admitted.

Alleged attempted reckoning

79. Save that it is denied that the alleged conduct was done pursuant to any term of the alleged Constitution (which is itself denied), paragraph 37 is not admitted.

80. As to paragraph 38:

(a) It is admitted that discussions took place between the Claimant and the Second Defendant, in and after December 2006, concerning the sums owed by the Claimant to the Defendants, including in respect of any unpaid share of the profits of Nikopol (whether in relation to the 25.6 per cent Nikopol shareholding or the Defendants' half of the 50 per cent plus one share Nikopol shareholding) during the period from January 2002 until the end of 2004 (insofar as not discharged by the payment on account made pursuant to the Alcross Agreements) and, in addition, during the period from January 2005 until April 2006. It is denied that such discussions came to an end in June 2007. In fact, such discussions continued until shortly before the commencement of the present proceedings.

(b) Sub-paragraph (1) is admitted, save that no admissions are made as to the genuineness of the Claimant's desire to agree the sums owed by him.

(c) As to sub-paragraph (2), in order to determine the true value of the Defendants' unpaid share of the profits of Nikopol, it was necessary to see the primary trading data from the companies (owned or controlled by the Claimant) to which the Claimant had diverted Nikopol's profits. However, the Claimant failed and/or refused to provide adequate trading data, claiming that it had been destroyed. Save as aforesaid, and save that the Claimant's representatives did provide some information, sub-paragraph (2) is denied.

(d) As to sub-paragraph (3), it is admitted that the Claimant made an offer in the terms alleged, but the said offer was not acceptable to the Second Defendant because he considered that the product sold by Nikopol should have traded at a premium to publicly available prices. It is not admitted that any underlying data was unavailable.

(e) As to sub-paragraph (4), it is admitted that the Second Defendant did not offer rival calculations as to the sums owed by the Claimant pending receipt of the primary trading data referred to above and it is further admitted that the Second Defendant did not seek to agree any sums allegedly due to the Claimant. It is denied that the Second Defendant was under any obligation to do either thing. The second sentence is not admitted, save that payment of the sums owed by the Claimant to the Second Defendant would not result in the transfer to the Claimant of any KZhRK shares.

(f) Further, and in any event, in addition to the unpaid share of the profits in relation to the 25.6 per cent Nikopol shareholding, the Claimant's suggested calculation failed to take account of (a) the unpaid share of the profits on the Defendants' half of the shareholding of 50 per cent plus one share in Nikopol, (b) the payments destined for the special fund, and (c) profits diverted from KZhRK for the period between September 2004 and March 2005 when Mr Grodensky and Mr Pak had management control.

81. As to paragraph 39:

(a) It is admitted that no agreement has been reached as to the sums owed by the Claimant to the Second Defendant for the reasons set out above.

(b) It is admitted that the Second Defendant has not sought to substantiate rival calculations pending receipt of the primary trading data referred to above.

(c) Save as aforesaid, paragraph 39 is denied.

82. As to paragraph 40:

(a) The alleged condition precedent is denied.

(b) If (which is denied) there was any such condition precedent, it is admitted that it has not been satisfied.

83. Save that no admissions are made as to the alleged "*requests from the Claimant and the Third Party*" (which are unparticularised), and save that it is denied

that any revenues were due to the Claimant in respect of KZhRK, paragraph 41 is admitted. It is denied that the Second Defendant was obliged to provide any revenue calculations in respect of KZhRK to the Claimant or to pay over any such revenues to him.

84. Paragraph 42 is denied.

Developments since 2007

85. The first sentence of paragraph 43 is admitted, save that PrivatBank acted solely as broker. The balance of the shares in KZhRK was acquired by Starmill. The second sentence is noted but denied.

86. Save that, as pleaded in paragraphs 12(h)(iii) and 67 above, the sale to companies owned or controlled by Mr Akhmetov took place on 24 March 2006 (not in July 2007), paragraph 44 is admitted. It is denied that the Second Defendant had any obligation to inform the Claimant or seek his authorisation for such a sale.

87. Save that no admissions are made as to the alleged "*requests from the Claimant*" (which are unparticularised), paragraph 45 is admitted. It is denied that the Second Defendant had any obligation to transfer to the Claimant the KZhRK shares which they retained, or any of the profits of KZhRK, or the proceeds of the sale to companies owned or controlled by Mr Akhmetov (or any part thereof).

88. Paragraph 46 is admitted.

89. As to paragraph 47:

(a) It is admitted that the Second Defendant met the Claimant in Geneva in about April 2011, in the presence of Mr Voevodin.

(b) It is denied that the Second Defendant assured the Claimant that the issue of a transfer of KZhRK shares could be resolved amicably.

(c) Save as aforesaid, paragraph 47 is admitted.

90. Save that the alleged obligation as to the reckoning is denied, paragraph 48 is not admitted.

Alleged breach of contract

91. Paragraph 49 is denied. As pleaded above, the putative governing law of the alleged Constitution would be the law of Ukraine.

92. As to paragraph 50, the Second Defendant repeats paragraphs 79 to 82 above.

93. Paragraph 51 is denied. In any event, under the Civil Code of Ukraine:

(a) By Article 256, the statute of limitation is defined as the period during which a person may file a claim for the protection of his civil rights or interests.

(b) By Article 257, the general statute of limitations is established at three years.

(c) By Article 261, time for limitation purposes begins to run from the date when the person learned or could have learned about the alleged breach.

(d) The claim form in these proceedings was issued on 12 March 2013. Accordingly, any claim under the law of Ukraine would be time-barred if the Claimant learned or could have learned of the alleged breach of contract prior to 12 March 2010.

(e) On the Claimant's own case, he knew of the alleged breach of contract by July 2007 at the latest. Accordingly, any claim is time-barred.

94. Further or alternatively, if (which is denied) the alleged Constitution was made and was governed by English law:

(a) Clause 3.2 of the alleged Partnership Terms provided that the reckoning should have been carried out within 10 days of the Claimant's payment of US$90m (which payment was made on 7 November 2006).

(b) Accordingly, on the Claimant's own case, any alleged breach of the Constitution (which is also denied) must have occurred by 17 November 2006 or in any event well before 12 March 2007 and thus more than six years prior

to the issue of the claim form and, accordingly, any claim for damages would be time-barred as a matter of English law.

Alleged breach of trust

95. Paragraph 52 is denied. Even if (which is denied) the Second Defendant had agreed to the alleged term pleaded at paragraph 33(1), that term does not constitute a declaration of trust, whether under English law or otherwise. Further or alternatively, if (which is denied) the alleged term pleaded at paragraph 33(1) constituted a declaration of trust, it could only have been a declaration of trust in respect of 100 per cent of the shares in KZhRK (and not "*of the shares held by them [i.e. the Defendants] in KZhRK*", as alleged in paragraph 52), whereas in fact, by 4 September 2006, the Second Defendant owned or controlled less than 50 per cent of the shares in KZhRK.

96. Paragraph 53 is denied. In particular:

(a) The Hague Convention would not in any event apply to a declaration by the Defendants declaring themselves trustees for the Claimant of the shares held by them in KZhRK, since this would not involve a legal relationship created by a settlor whereby assets have been placed under the control of a trustee. Further or alternatively, the Hague Convention does not apply because the alleged declaration of trust is not evidenced in writing.

(b) Whether under the Hague Convention or at common law, the law governing any purported trust would be the law of Ukraine, as the law with which any trust would have its closest connection, not least as Ukraine is the situs of the KZhRK shares.

(c) Even if (which is denied) the term referred to at paragraph 33(1) constituted a declaration of trust as a matter of English law, it would not create any form of interest on the part of the Claimant in the KZhRK shares held by the Defendants as a matter of Ukrainian law. The law of Ukraine does not recognise the concept of a trust and no alternative claim is pleaded under Ukrainian law.

(d) Without prejudice to the foregoing, any claim under Ukrainian law is time-barred for the reasons pleaded above.

97. Save that it is admitted that the Defendants have not transferred any KZhRK shares or the fruits thereof to the Claimant, and that the Defendants have transferred some of the KZhRK shares to companies owned or controlled by Mr Akhmetov, paragraph 54 is denied.

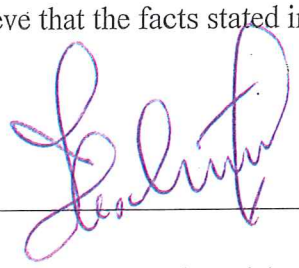
98. Save that the Claimant is required to prove all loss and damages alleged, paragraph 55 is denied.

99. In the premises, it is denied that the Claimant is entitled to the relief claimed or to any relief. Paragraphs 56 and 57 are denied.

100. Save as is hereinbefore expressly admitted, the Second Defendant denies each and every allegation contained in the Particulars of Claim as if the same were set forth herein and specifically traversed.

LAURENCE RABINOWITZ Q.C.
PATRICK GOODALL
CONALL PATTON

I believe that the facts stated in this Defence are true.



Igor Valeryevich Kolomoisky, the Second Defendant.

Date: 27.09.2013.

Served on 30 September 2013 by Freshfields Bruckhaus Deringer LLP, 65 Fleet Street, London EC4Y 1HS, Solicitors for the Second Defendant (Ref: IKT/CM/NA).

Claim No. 2013 Folio 354

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

BETWEEN

VICTOR MIKHAYLOVICH PINCHUK

Claimant

-and-

(1) GENNADIY BORISOVICH BOGOLYUBOV

(2) IGOR VALERYEVICH KOLOMOISKY

Defendants

DEFENCE OF THE SECOND DEFENDANT

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SOLICITORS FOR THE SECOND DEFENDANT