

<p><b>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</b></p> <p>1437 Bannock Street, Denver, Colorado 80202</p>	<p><b>EFILED Document</b>  <b>CO Denver County District Court 2nd JD</b>  <b>Filing Date: Jun 20 2011 12:07PM MDT</b>  <b>Filing ID: 38234854</b>  <b>Review Clerk: Linda L Gibbs</b></p> <p><b>Δ COURT USE ONLY Δ</b></p>
<p>Plaintiffs:  <b>CREDITANSTALT INVESTMENT BANK AG;  CIS EMERGING FUND LIMITED;  and ZAO CREDITANSTALT-GRANT</b></p> <p>v.</p> <p>Defendants:  <b>HOLME ROBERTS &amp; OWEN, LLP; and  MARGARET B. McLEAN</b></p>	<p>Case Number: 01-CV-1677</p> <p>Courtroom 209</p>
<p align="center"><b>FINDINGS OF FACT,  CONCLUSIONS OF LAW, AND JUDGMENT</b></p>	

This matter was tried to the Court on February 14-17, February 22-25, and March 2, 2011. The Court has reviewed all designations of deposition transcripts, objections and responses thereto, submitted to the Court pursuant to C.R.C.P. 16(f)(3)(VI)(D), the Fifth Modified Case Management Order, and the schedule agreed by the parties and approved by the Court. Closing arguments were received on April 14, 2011.

The Court, having considered the parties' pleadings and all other documents filed of record in this action, having considered all the admissible evidence and arguments of counsel, and being otherwise fully advised, now enters its Findings of Fact, Conclusions of Law, and Judgment with respect to Plaintiffs' claims for breach of contract against both Defendants and claims for personal liability of Defendant Margaret B. McLean.

### **FINDINGS OF FACT**

Plaintiff Creditanstalt Investment Bank AG (“CAIB”), through subsidiaries, operated in all of the former member states of the Union of Soviet Socialist Republics and had become established as a significant investment bank throughout Central and Eastern Europe during the 1990’s. CAIB was aware from the beginning of involvement in these emerging markets that there were inherent risks attendant to doing business in economically developing countries. The CAIB brand name was used consistently in the various countries where CAIB operated. Upon the acquisition of Creditanstalt Bank by Bank Austria, Creditanstalt Investment Bank AG and Investment Bank Austria were merged and Creditanstalt Investment Bank AG was the entity that survived the merger, ultimately named CAIB Investment Bank AG. CAIB continued to operate in Eastern Europe.

AG is the abbreviation for the German word “Aktiengesellschaft,” which means a joint stock company and has both a management board and a supervisory board. The management board is responsible for day to day operation while the supervisory board nominates and controls the management board and approves significant decisions regarding investments and dispositions.

Approximately 1990, CAIB embarked upon establishing an investment banking presence in the Russian Federation (“Russia”) which was the largest and most significant of the former Soviet republics. Through various entities, CAIB began to conduct Russian business activities under the trade name “CAIB Russia.” ZAO Creditanstalt Grant (“CA Grant”) was CAIB’s brokerage house for its Russian program.

In the mid 1990’s defendant Holme Roberts & Owen, LLP (“HRO”) maintained an office in Moscow, Russia and during that same time frame defendant Margaret McLean served as the managing partner of the HRO Moscow office.

In 1995, Creditanstalt Investment Bank AG engaged HRO to serve as legal counsel "for due diligence and proposed acquisition of the Moscow based securities house 'ACTIVE.'" (Ex. D4.) The ACTIVE transaction was never consummated.

In September 1995, the first CEO of CAIB-Russia, George Horton, met with Ms. McLean on various occasions to discuss HRO assisting CAIB-Russia with the acquisition of a Russian brokerage firm, Grant. Mr. Horton testified about his initial meetings with HRO and the "verbal understanding" reached over the course of those several meetings pursuant to which HRO initially provided services in the fall of 1995. Those services focused on the Grant transaction. HRO proceeded to assist Creditanstalt Investment Bank AG with the transaction involving Grant that led to the creation of CA-Grant. Once the CA-Grant transaction was complete, and the entities in Moscow had become operational in 1996, HRO proceeded to work for CA-Grant on a number of new, discrete projects, often in conjunction with PriceWaterhouse, a large accounting and law firm in Moscow. CA-Grant also used other outside legal counsel, including the firm of LeBoeuf, Lamb, Greene & MacRae LLP, for various transactions and although HRO offered various engagements and alternative billing arrangements to Plaintiffs, no proposals were ever accepted.

There is absolutely no evidence of record that suggests that any contractual relationship between Ms. Mclean, individually, and any of the Plaintiffs was ever established. None existed.

Central to this dispute at issue is Gazprom, a large oil and gas company originally owned by the Soviet Union. As Dr. Wolfgang Lafite, CAIB Chief Financial Officer and member of the CAIB Management Board testified: "It is very clear and obvious that there was a very close cooperation between Gazprom and the Kremlin. You could almost say that Gazprom was at the very center of political power in Russia at the time. Still is today, nothing has changed." (May 2, 2007 Dep. of Wolfgang Lafite ("Lafite Dep.") at 78:11-16.) At about the time the parties began this legal odyssey, Gazprom stock was considered to be substantially undervalued and attractive to foreigners. To prevent loss of control to non-Russians, the company charter contained restrictions on the amount of domestic shares that could be held by foreigners.

In 1996, CA-Grant began trading in restricted Gazprom shares for foreigners and designed a method for purchasing restricted shares on behalf of foreign investors. According to Dr. Lafite, CA-Grant informed HRO that through its contacts with Gazprom, it had been able to negotiate approval of its shares held by foreigners.

In March of 1997, Gerhard Unterganschnigg, who had worked for Plaintiffs in Vienna, became the Chief Financial Officer of CAIB-Russia, moved to Moscow, and

spoke with various law firms to ascertain which one would be the most appropriate to assist in "fixing . . . the Gazprom situation," and then utilized HRO for this purpose. (Lafite Dep. at 65:13-15, 66:17 - 67:9.) Mr. Unterganschnigg also retained a tax advisor, PriceWaterhouse, to work on the project.

In early 1997, HRO and PriceWaterhouse analyzed possible Gazprom structures for CA-Grant. CA-Grant was not satisfied with the early approaches HRO analyzed, which would have subjected CA-Grant to taxation in Russia. Instead, CA-Grant wanted a structure that would not be subject to taxation in Russia. In response, HRO and PriceWaterhouse analyzed whether the simple partnership structure ("SP Structure") could achieve CA-Grant's objective.

A major area of contention between the parties is the extent to which HRO warned Plaintiffs of the various risks attendant to utilization of the SP structure. The Court finds that HRO provided a variety of warnings in 1996 and 1997 about the risks of trading in restricted securities and the risks associated with the various Gazprom structures under discussion. The warnings were provided orally in meetings and in a variety of memoranda. Dr. Lafite confirmed in his testimony that, during his meetings and discussions with Ms. McLean, "[t]he legal risks in the structure were of course at the heart of our discussion all the time." (Lafite Dep. at 74:22-24.)

The warnings were abundant and clear and are summarized below.

In her March 6, 1997 memorandum to Mr. Unterganschnigg, Ms. McLean warned:

- The structure has "several drawbacks and some unresolved concerns . . . that should be considered when making the final decision to proceed with this structure."
- "The final structure also should be reviewed in detail by CAIB's tax advisors . . . ."
- "Certain concerns that should be taken into account . . . ."
- "[T]he structure may raise questions with regulators and tax authorities alike."
- "[C]ertain risks exist that the [scheme] may be subject to regulatory scrutiny."
- "[G]iven the projected volumes it may be difficult for CAG to keep a low profile."

(Ex. D46 at 5-6) Ms. McLean also noted that CA-Grant had not yet acquired its brokers license. (*Id.* at 6, fn 6.) On April 6, 1997, after meeting with CA-Grant representatives to discuss the SP Structure specifically, Ms. McLean sent a memo summarizing those

discussions, including five pages of analysis of the structure and a section called "Conclusions and Risk Assessment Comments." (Ex. D53 at 5-6.) In this section, HRO noted:

- "The proposed structure . . . has, however, several drawbacks and some unresolved concerns, as identified below, that should be considered when making the final decision to proceed with this structure."
- "The final structure should also be reviewed in detail by CAIB's tax advisors to give them opportunity to make suggestions on . . . compliance."
- "The SP structure is aggressive . . . ."
- "The pass-through entities, popular in the West for tax structuring purposes, are not well known or well received by Russian tax authorities."
- "[T]his structure is viewed by tax authorities with suspicion as a tax avoidance device."
- "[W]e recommend that you work closely with your tax advisors on compliance. . . ."
- "[T]he structure may raise questions with regulators and tax authorities alike."
- "[C]ertain risks exist that the Derivatives trading scheme and investment in Restricted Shares by SP with assistance from CAG may be subject to regulatory scrutiny."
- "[G]iven the projected volumes, it may be difficult for CAG to keep a low profile."
- "[F]requent and large movements of money in and out of the SP may raise questions and would make the structure more transparent."

(*Id.* at 6.) On April 7, 1997, HRO provided further warnings and cautioned CA-Grant to consult with its tax advisors regarding the structure:

- "[W]e would recommend to discuss with your tax/accounting consultant . . . ."
- "[W]e would recommend to CAIB to raise the issue of withholding taxation with your tax advisors."

- "When weighing advantages and curses of the partnership structure, we would recommend to keep in mind that . . . the issues of permanent establishment creation and withholding taxes should be additionally discussed with CAIB tax advisors."

(Ex. D54.) CA-Grant asked HRO to compare the SP Structure with a similar structure implemented by Pacific Regency ("PR Structure"), the legality of which had come under scrutiny by Gazprom. HRO distinguished the PR Structure from the SP Structure, but again warned: "Because the PR Structure is not illegal per se and nevertheless targeted by Ga[z]prom, it would appear that legality of the structure is not in and of itself sufficient to avoid Ga[z]prom scrutiny and targeting. Therefore, there can be no assurances that CAIB partnership structure . . . is failproof against Ga[z]prom scrutiny." (Ex. D55 at 3.) In the face of HRO's warnings, which Plaintiffs considered too conservative (Tr. at 642-43) (Plaintiffs told Ms. McLean she was a "wet blanket"), Plaintiffs, according to none other than Dr. Lafite, made the business decision to implement the SP Structure, this despite warning provided separately by PriceWaterhouse in the capacity as CA-Grant's tax advisor in reviewing the SP Structure. PriceWaterhouse attended meetings with the client and advised CA-Grant directly, not through HRO. Like HRO, PriceWaterhouse warned about risks involved with the structure, both verbally and in writing.

In its audit of CA-Grant for 1996, PriceWaterhouse pointed out that Gazprom had been publicly threatening to make foreign purchases "null and void and prohibit any transfer of title." (Ex. D44 § 1.2.) PriceWaterhouse attached a Moscow Times newspaper article and Gazprom's statement to the London Stock Exchange dated February 27, 1997 on the topic. They also discussed the Gazprom shares and noted as follows: "Russian commercial and tax legislation is ambiguous, and tax authorities may make certain judgments of business activities, including arbitrary and inconsistent classifications of the activities of an enterprise without adequate regulatory basis, and tax authorities operate with budgets which may cause them to take unreasonable and overly aggressive positions, and that auditors' classification of clients' business activities or its interpretation of laws may not coincide with that of the tax authorities." (*Id.* at 4.)

In a memo dated March 4, 1997, after a meeting with Kiril Shostak, Legal Counsel of CA-Grant, and Mr. Unterganschnigg, PriceWaterhouse cautioned CA-Grant about the "blessing" that Gazprom had given to CA-Grant for the structure. (Ex. D45.)

PriceWaterhouse specifically expressed its concern, through its representative, that the structure could be deemed to create a permanent establishment. (Ex. D58 ("The permanent establishment issue is my major concern, which I have raised with [Unterganschnigg]. . . I am concerned that these may lead the tax inspector to argue that, despite the treaty relaxation, there is a PE.").) PriceWaterhouse further warned there is a

"significant risk" that the partnership "will immediately [be] regarded as a PE by Russian tax authorities." (*Id.* at 2.)

Price Waterhouse also sent additional memoranda providing risk warnings on the tax consequences of the SP Structure. (*See e.g.*, Exs. D50, D52, D70.) The PriceWaterhouse partner responsible for advising on the SP Structure (and who gave many of the warnings), Robert Fort, testified that CA-Grant "was willing to accept the risk" and he believed he was ultimately fired by CA-Grant because he was too conservative. (Jan. 24, 2007 Fort Dep. at 142:25-145:3 (when PriceWaterhouse provided warnings, Mr. Unterganschnigg responded that he was seeking "advisers who would provide solutions, not advisers who would only create problems;" Mr. Unterganschnigg saw PriceWaterhouse's approach as "too negative"); 149:24-150:8.)

Although Mr. Fort did not continue to work for Plaintiffs, PriceWaterhouse did. Plaintiffs continued to employ PriceWaterhouse for various tasks well into 1998.

At the end of 1996, CA-Grant held approximately \$18 million in Gazprom and Sberbank shares. In April 1997, CA-Grant held approximately \$118 million in Gazprom and Sberbank shares. At its April 24, 1997 meeting, after CA-Grant had already increased its Gazprom share holdings by approximately \$100 million, the CAIB-Russia Supervisory Board approved the SP Structure and doubled its share holdings. Thus, the record before this Court reflects that CA-Grant had actually increased its shares by approximately \$100 million before its own Supervisory Board had approved the SP Structure. And, when its Supervisory Board did approve the SP Structure, CA-Grant doubled its holdings to approximately \$228 million in shares.

The packet of information that was given to the CAIB-Russia Supervisory Board before the April 24, 1997 meeting included Ms. McLean's memoranda of April 6, 1997 and April 11, 1997 and, in addition, included a summary of the issue and an overview of the structure describing its "legal and tax problems." (Ex. D60 at 18, 19 (referring to "shortfalls" of the structure), 21 (referring to "regulatory risks" and "tax risks" and stating "[a]s Regency Pacific showed, structures built to circumvent the two-tier system are pursued with a high level of scrutiny by GAZPROM" and "[joint activity structures] are subject to higher scrutiny of tax authorities.")) In addition, the minutes of the April 24, 1997 meeting state that one member expressed "concern . . . that the structure might become too transparent" and Dr. Lafite specifically "requested the PriceWaterhouse Moscow memorandum on the tax ramifications of the proposed commercial structures." (Ex. D59 at 3.)

Thus, in spite of the warnings in the memos from HRO and its own internal summary of the structure, and without full analysis on the tax ramifications from PriceWaterhouse,

the CAIB-Russia Supervisory Board approved the SP Structure. The Supervisory Board did not stop at this approval but also decided to double the amount of the holdings in these shares.

Shortly thereafter, on May 31, 1997, Russian President Boris Yeltsin issued an Edict of the Russian Federation President ("Decree 529" or "Edict 529"), which set forth legal restrictions on the extent to which foreign investors could acquire domestic shares of Gazprom. Decree 529 by its own terms excluded application to shares held prior to its issuance, and thus it only applied to new shares acquired after May 31, 1997.

In June, the Supervisory Board of CAIB continued to discuss the structure and understood that they had reached an agreement with Gazprom to grandfather in their existing clients but that no new clients could be added. Mr. Lafite testified: "We had received the blessing from the management of Gazprom and that no new customers could be introduced through this structure." (Lafite Dep. at 72:3-5, 75:19-76:22.)

Plaintiffs did not inform HRO that Gazprom had placed restrictions on new clients. (Tr. at 645:4-24.)

Meanwhile, HRO closed its Moscow office on January 31, 1998. HRO sold assets to Chadbourne and Parke LLP ("Chadbourne") and a number of lawyers from the HRO office joined the Chadbourne office; however Ms. McLean did not join formally Chadbourne. In February 1998, at the request of CAIB, Chadbourne independently reviewed the existing SP Structure, specifically addressed Decree 529, and provided a detailed written opinion to CA-Grant in February 1998 assessing the risks of the SP Structure. (Ex. D121.) Like HRO, Chadbourne concluded that the SP Structure, while not illegal, was risky. (*Id.* at 8-10.) Chadbourne gave numerous warnings, including that the structure may be "viewed by tax authorities with suspicion as a tax avoidance device" and that it "may be subject to greater regulatory scrutiny." (*Id.*) Chadbourne further warned that "[g]iven such political pressure to restrict foreign ownership in RAO 'Gazprom', it is likely that the SP Structure would be viewed as an elaborate way to achieve results that are contrary to the undeclared but clearly visible goals of the government." (*Id.*) They also warned that "[t]here is an inherent risk in interpretation of Russian legislation. No assurances can be made that they will be interpreted in the same way as provided herein." (*Id.*)

Chadbourne continued to advise with respect to the SP Structure through 1998 and 1999 and continued to provide warnings about the risks involved including that the structure "could be deemed null and void as a violation of Presidential Decree No. 529." (*See e.g.*, Exs. D173, D211.)

Others, including the auditing and accounting firm of Ernst & Young, warned Plaintiffs about the structure as well—they also warned of the political risks of doing business in Russia and of the risks of the uncertain legal environment. (*See* Ex. D103 at 20 ("There is a large gap between written laws and their practical implementation."), 46 ("[T]he debate has risen to the point that one company (Gazprom), which carries significant political power within Russia, has publicly stated that all shares owned by foreign interests will be considered null and void."))

In March 1998, Plaintiffs asked Ernst & Young to "determine and assess the tax risks, if any, to CAG by using the simple partnership tax structure for acquiring certain investments." (Ex. D125 at 9.) In response, Ernst & Young made extensive findings and stated that "[t]he use of the SP [S]tructure allows a foreign investor to invest in restricted securities without directly violating Edict No. 529 from a pure 'form over substance' analysis. . . . The overall risk in this 'structure', is it could be voided by legal and/or tax authorities if a review of legislative compliance is performed under the intent of the edict." (*Id.* at 10.)

In addition, the law firm Vinson & Elkins, which was representing a potential client of CA-Grant, raised a number of questions about the legality of the structure. In response, Chadbourne reaffirmed its position that the structure was risky, but legal. Also, in late 1998, Deloitte & Touche, another auditing firm Plaintiffs retained, provided similar warnings in its audit for 1998. (D183, CAIB-Russia Management Letter for the Year Ending 12/31/1998 from Deloitte & Touche at 14.)

Plaintiffs' managers and representatives testified at length that they knew that offering the SP Structure to foreign investors and doing business in Russia was risky, but that Plaintiffs made the business decision to do so because of the potential returns. (July 25, 2006 Dep. of Timothy Medland ("July 26, 2006 Medland Dep.") at 233:4-10 (Russia was "a risk worth taking."); July 26, 2006 Medland Dep. at 486:23-487:4 ("In any trade you weigh risks against benefit."); Lafite Dep. at 48:8-9 (in Russia, there was a "perceived general risk in using offshore structures"); 22:19-24 ("[doing business in Russia] was perceived not just by me but by everybody in the banking world and of course in Creditanstalt as being risky, but very rewarding undertaking."). Dr. Lafite further testified that Russia "was an emerging market where lots of uncertainties existed in the application of the rule of law." (Lafite Dep. at 34:3-17.)

Helmut Horvath, who became CFO and head of risk at CAIB in late 1997, testified that he reviewed HRO's risk warnings, considered the advice "positive," and thought the SP Structure was "clean and waterproof" or devoid of risks. (Tr. at 751:13-752:16, 755:4-19.) Mr. Horvath then testified, somewhat inconsistently, that he had suspicions about the SP Structure based on advice given to him when he worked for Bank Austria and that

is why he ordered the second opinion, given by Chadbourne. (*Id.* at 457:22-758:12.) But, Mr. Horvath considered Chadbourne's advice to be "positive" as well. (*Id.* at 763:8-22.) Mr. Horvath admitted, however, that if a structure was "a tax avoidance device" that it would not be free from risk. (*Id.* at 756:7-16.) Curiously, Mr. Horvath could not recall whether HRO's memos called the structure a tax avoidance device, mentioned that it was aggressive, or warned that it may raise questions with tax authorities. (*Id.* at 756:17-757:21.) Mr. Horvath also, quite remarkably, could not recall what information was relayed to the Supervisory Board about the SP Structure.

Overall, Mr. Horvath's memory of relevant events, specifically including HRO's and Chadbourne's advice about the SP Structure, was consistently vague and riddled with "I don't know(s)." His memory lapses were remarkably convenient and, in the view of the Court, which had an opportunity to observe his demeanor and weigh his testimony, highly problematic. The Court did not find Mr. Horvath's testimony to be at all credible.

The Court finds that CA-Grant did not ask HRO for a formal opinion on the SP Structure because it knew that the decision to employ the SP Structure "was not black and white" and would require a business judgment by the company. (Lafite Dep. at 79:14 - 80:19 (this was "an area which basically requires a business judgment is in my view not one where a lawyer can cover this with an opinion."); *see also* Oct. 25, 2005 Dep. of Andris Simor ("Simor Dep.") at 105:14 - 106:7, 107:4-108:6 (it was the job of management to weigh the risks, and they did weigh the risks, and that "[w]hether the weighing was good or was done well or was done in the wrong way, it could only be decided somewhat later").)

Plaintiffs' internal memos discuss the need "to continue to prevent the Russian authorities from penetrating the CAIB offshore structure." (Ex. D23.) Similarly, a Bank Austria Group Audit Report from September 1997 states: "In order to find a way of letting foreign investors participate in these shares' performance and giving them the right of purchase whenever restrictions will be lifted in future but without obviously violating current laws, the bank created the so-called [SP Structure]." (Ex. D72 (emphasis added).)

Essentially, Plaintiffs claim that the warnings given by HRO were insufficient, and that the SP Structure failed to meet requirements set by Plaintiffs for the structure. Specifically, they assert they told HRO that they wanted "a solution that (i) was in strict compliance with Russian and international law, (ii) minimized taxes both inside and outside of Russia, (iii) had a 'low profile' that would not attract the attention of Gazprom, and (iv) was carefully documented and would withstand regulatory scrutiny." (Proposed Trial Management Order, Jan. 14, 2011, at 3.) In Ms. McLean's April 6, 1997 memorandum, Ms. McLean lists these "goals and objectives" of Plaintiffs and then in a section entitled "Conclusions and Risk Assessment Comments" stated that not all of

Plaintiffs' objectives had been reached, that there were a series of "unresolved concerns," and set forth a variety of items for Plaintiffs to consider before making a final decision. (Ex. D53 at 5.) She warned that the "structure should also be reviewed in detail by CAIB's tax advisors to give them opportunity to [comment on] . . . compliance." (*Id.*) Ms. McLean continued to provide five paragraphs of warnings.

In their own goals for the structure, Plaintiffs recognized the inherent risks involved in the structure. Their objective regarding a "low profile" with Gazprom was explained in more detail by Ms. McLean in the same memorandum: "Low Profile. One of the key goals of CAIB is to create the structure that maintains a low profile in the Russian securities market and does not become a target for the issuers of Restricted Shares . . . who may have business goals, supported by political power, which may interfere with CAIB's business." (*Id.* at 2 (emphasis added).) HRO warned Plaintiffs that the volume of trading that CA-Grant did and wanted to do made it "difficult for CAG to keep a low profile." (*Id.* at 6.)

Meanwhile, the evidence clearly suggests that CAIB was struggling to properly manage CAIB-Russia. Turnover for managers was high. From 1996-2000, CAIB-Russia had a series of non-resident managers, never having the same management team in place for a year at a time. CAIB fired the first head of CAIB-Russia, George Horton, because he could not get control over operations. (Horton Dep. at 199:3-23; Ex. D43 at 2 ("local management [was] unable to direct or control the Russian staff which was creating revenues"). After Horton was removed, Plaintiffs appointed Timothy Medland interim CEO. Medland's tenure as CEO was intended to be temporary, but he lasted in the position longer than Horton. By November 1997, however, Medland reported in a board meeting that "he will not take responsibility for Russia any longer, because they do not accept any control." (Ex. D93.) It is important to note that CAIB implemented the SP Structure during Medland's tenure. Medland was not replaced until June 1998 when another interim CEO, Dan Wilson, started. He only lasted a few months.

The lack of stable management resulted in a situation in which the lead Russian traders who had joined as part of the Grant asset acquisition – Yuri Lopatinsky, Oleg Tsarkov, and Oleg Radzinski – were actually in charge of the operation and making management decisions. The business creativity came from them and as a result, the managers took more risk than CAIB Investment Bank AG preferred, and the Russians bridled under the supervision of foreigners. CAIB recognized that one of the problems with the Russian operation was the refusal of these managing directors to "accept anyone from outside." (Ex. D77 at 2.)

These traders had negotiated huge bonuses as part of the acquisition of Grant – CAIB agreed to give them 50% of CAIB-Russia's profits for the three years following the

merger. The evidence clearly suggests and the Court finds that the bonus structure encouraged extremely risky behavior and illicit actions, like booking trades improperly and making unauthorized loans.

In a December 1997 Ernst & Young Report, the consultants noted numerous risks that "illustrate the overall fragileness" of CAIB-Russia's business, including customer concentration and risk of key employees departing. (Ex. D103 at 33.) Those concerns were echoed in internal memoranda. (See Ex. D118 at 2.) Both of those risks eventually came to fruition.

By the end of 1997, four customers accounted for 68% of CAIB-Russia's profits. Dart Container, CAIB-Russia's largest client, accounted for fully 45% of the profits. Dart and Hermitage were Plaintiffs' largest clients. Plaintiffs lost them both, and ended up in protracted litigation with them, at least in part because CAIB was taking an undisclosed spread on trades. Between spring 1998 and fall 1999, CAIB-Russia ultimately lost all of the key employees that had joined as part of the Grant asset acquisition. These employees, who were Russian citizens or Russian-speaking residents of Moscow, were the day-to-day managers on the ground in Moscow and provided the business and client contacts in Russia, political connections, and ultimately generated much of the operation's revenue. (See Feb. 28, 2006 Dep. of Maxim Volsky at 115:10-22; Simor Dep. at 52:22 - 53:11 (testifying it was very important that CAIB-Russia have Russians with excellent contacts among authorities if anything was ever done "which reached beyond anyone's scope of authority.") CAIB had enormous difficulties finding qualified replacements. The departure of these key employees had a significant negative impact on CAIB-Russia. While newcomers eventually replaced the key employees who left, the new employees did not have the same revenue-generating abilities. Starting in 1998, CAIB-Russia began reporting large losses. According to a June 1998 internal audit report, the loss was, in part, the result of these departures. (Ex. D144 at 6 ("Trading and brokerage business declined substantially due to the fact that - key people left[.]").)

The Court finds that, meanwhile, in 1998 a Russian economic crisis actually precipitated Plaintiffs' business decision to liquidate their Russian operations. That year, indisputably, Russia suffered a staggering economic crisis. Often called the "Russian Winter" or the "Ruble Crisis," the situation developed for months but came to a head on August 17, 1998, when Russia defaulted on its ruble debt. The economic woes led to currency devaluation and had a catastrophic effect on business in Moscow and elsewhere in the country. Many banks failed. Inflation soared, and the high-flying stock market crashed, losing three-quarters of its value in 1998. The Russian economy went into a deep recession. As a result, Plaintiffs began to cut back and wind down the Russian operations "as much as reasonable and possible." (Exs. D127 § 2.12, D127, D139, D165, D169, D171.) By September 1998, the "Grant" name had no value. (Ex. D169.) By October

1998, CAIB-Russia decided to unwind the SP Structure and fired 85 people due to the crisis. (Exs. D172, D177 (CEO Wilson "undertaking a bloodbath . . . having to fire 85 people due to the crisis.")) By mid-1999, CAIB-Russia had effectively "stopped operating" and was "institutionally incapable of effectively and safely operating in Moscow." (Ex. D232.)

As the recession developed further into a true crisis, by May 1999, Plaintiffs made the business decision to effectively liquidate their Russian operations. By the fall of 1999, CAIB-Russia had no securities business whatsoever. As Plaintiffs admitted, to be competitive in the marketplace, they had to offer the full range of services, and they were not. CAIB-Russia lost approximately \$30 million in 1998. By November 1999, CAIB had written down the value of CA-Grant to less than \$1 million.

In early 1999, yet an even more devastating and unexpected event occurred. At that time Plaintiffs held approximately 190 million Gazprom shares in the SP Structure on behalf of their clients. In April and May 1999, CA-Grant employee, Dmitri Arkhipov, stole 108 million Gazprom shares from the Plaintiffs and then left the company. Plaintiffs did not discover the theft until the end of July 1999.

The Court finds, based on the evidence, that Plaintiffs initially failed to disclose the theft and sent false financial statements to customers after the theft, which failed to reflect the change in holdings. Plaintiffs never reacquired the shares or any compensation for their loss. The theft led to multiple disputes with clients, including Dart and Hermitage, the largest customers Plaintiffs had in Russia. In the aftermath of the Arkhipov theft, Plaintiffs paid out settlements to clients in the approximate amount of \$32 million.

Then, on June 1, 1999, the Russian Tax Police raided CA-Grant's Moscow office and seized nearly all its contents. Plaintiffs acknowledge that Arkhipov orchestrated the raid to cover up his theft and that fact was reported in the press. (Exs. D250, D271, D318, D371 at 26:20-25; Tr. at 799-802, 980, 1014-17.) As a result of the June Tax Police raid, the authorities prosecuted Nina Zemtsova, CA-Grant's CFO, for VAT tax violations that were unrelated to the SP Structure. Zemtsova prevailed at trial, and despite an appeal by prosecutors, ultimately all charges were dismissed. Under Russian law, criminal charges can only be brought against individuals, not entities.

All of this becomes even more significant because the SP Structure was never found by any governmental authority to have violated Decree 529 and no individuals were prosecuted for the SP Structure. There is no evidence that any other structures were prosecuted or found to be illegal.

The Russian governmental agency responsible for enforcement of Decree 529, the Federal Security Service ("FSC"), specifically reviewed the SP Structure in early 1999, as part of an overall operational review of CA-Grant, and permitted it to continue. In February 1999, the FSC suspended CA-Grant's license to operate on the Russian securities market. Following a review, the FSC requested remedial action by CA-Grant with respect to several areas, but not the SP Structure. Once CA-Grant confirmed that it had taken the remedial steps, the FSC actually restored the license.

Dr. Leopold Specht, Plaintiffs' Austrian lawyer assisting Plaintiffs with this and other cases on a contingency basis, apparently informed Plaintiffs that two employees, Mr. Unterganschnigg and Mr. Mader, were subject to criminal investigation. Mr. Horvath claimed to have instructed Mr. Unterganschnigg and Mr. Mader to flee or not return to Moscow because of this threat. By September 1999, however, Mr. Mader was no longer head of the Russian operations, having been fired for poor performance and replaced by Natalia Okuneva. By February 1999, prior to the tax raid, Mr. Unterganschnigg had been terminated.

The Court finds, based on the evidence and reasonable inferences drawn from that body of evidence, that the Arkhipov theft, orchestrated Tax Police raid and seizure of accounts, subsequent bad press, and settlements with customers were debilitating to CAIB-Russia's business. The Court finds Mr. Horvath's testimony that the loss was not significant to be little more than flummery.

It is also worth noting that the Tax Police additionally identified companies unrelated to the SP Structure in their list of companies being investigated. (Mar. 18, 2010 Dep. of Leopold Specht ("Specht Dep.") at 129:11–132:9; Ex. 146 (identifying CISEG, CFSL, CAIAM, and Levandale Enterprises).) Thus, the Tax Police investigation was clearly not limited to concerns about the SP Structure.

The theft also led to a dispute between CAIB-Russia and Gazprom itself (through the affiliated entity that maintains the Gazprom share ownership records, Gazprombank). Plaintiffs sued Gazprombank in Russia, Hungary, and Austria. It appears that the continued "investigations" into CAIB-Russia's business had far more to do with CAIB's lawsuit against Gazprombank than about the SP Structure or any advice given by HRO. Ms. Okuneva, then head of CAIB-Russia operations, testified that she was concerned that all her communications, even personal communications, were being monitored by the tax police. The concern resulted from the fact that "whenever we took any action, like complaining to the General Public Prosecutor Office or trying to communicate with an investigator, then immediately we had somebody from the Tax Police in our office making our life worse." (March 26, 2006 Dep. of Natalia Okuneva ("March 26, 2006 Okuneva Dep.") at 165:4-22; Ex. D268 (mentioning visit from the Tax Police "again").)

Ms. Okuneva considered the Tax Police actions to be retaliation for CAIB-Russia's efforts to recover the stolen shares. In addition, Dr. Specht, who represented Plaintiffs in their suit against Gazprombank, reported difficulties operating his offices in Moscow, including telephone and power outages, that affected only his office but not neighboring offices even within the same building. He learned that these difficulties were connected with the proceedings against Gazprombank. At no time following the Tax Police raids did any of the Plaintiffs ever avail themselves of the relief potentially available to them under Russian court procedures.

For purposes of this Court's findings, it is also important to assess the large body of evidence concerning the state of the Russian legal system and the manner in which the Russian bureaucracy operated during this time frame. Russia was an emerging market and its legal system was imperfect, ambiguous, and constantly in flux. Plaintiffs' expert on Russian law, Professor Alexander Makovsky, agreed that, in Russia, the rules were made as they went along. (Tr. at 177.) Certain practices that would be illegal or unethical in other countries "flourish and are considered appropriate business practice" in Russia. (*Id.* at 189-90.) Between 1995 and 1998, there was a large and significant gap between the written law in Russia and its practical implementation. Corruption was widespread in Russia at the time and was well-known in the business community. (*See* Ex. D103 at 31 ("It has always been common to encounter transactions which require 'below the table' payments. . . . among business circles, [these payments] are often known or presumed to be occurring."); Specht Dep. at 68:22 - 69:5; Tr. at 190, 1673-75, 1683-85.) Practices that would be considered illegal or unethical in many countries were considered appropriate business practices in Russia. (Ex. D103; Tr. at 189-90.)

The Court finds that Plaintiffs certainly recognized the volatility of the Russian market and its vulnerability to improper influence and corruption as the contract under which CAIB acquired the Grant assets had a provision contemplating the need to pay bribes to the extent they were required in the "ordinary course of business and/or customary practice in Russia." (July 25, 2006 Medland Dep. at 225:6 - 227:2; Tr. at 777-78; Ex. D9 § 2.14 (recognizing bribery as a part of the ordinary course of Russian business).) In addition, Plaintiffs were aware that stolen Gazprom shares were subject to an injunction that the fraudulent shareholders were able to avoid through bribery. Additionally, former Plaintiff Financial Partners was subjected to a fraudulent bankruptcy. In fact, the evidence shows that the Tax Police actually solicited bribes from Plaintiffs and engaged in illegal conduct in the investigation into CA-Grant. Arkhipov orchestrated the tax raid in June 1999. Throughout the fall of 1999, Ms. Okuneva documented several interactions she had with purported officials or governmental authorities offering "help" to Plaintiffs resolve the tax matter in exchange for gifts and payments. (Oct. 29, 2009 Dep. of Natalia Okuneva (Oct. 29, 2009 Okuneva Dep.") at 104:9-113:14; Exs. D247 (explaining meeting with former high-ranking KGB to assist

with "call[ing] off the tax police"), D252 ("As for now we have not yet attracted outside assistance."), D256 (noting "great pressure has been already put on behalf of 'Arkhipov's team'"), D263 (recalling meeting with man from Ministry of Internal Affairs of Russia who was ready to help but "not sure about the cost of his services and does not request anything for now, besides a mobile telephone"), D280 (informing Mr. Horvath of meeting with Russian Ministry of Tax Police who "promis[e] us to settle the problem" for "\$50,000 to be paid to the Head of the Moscow Tax Police plus \$10,000 for the services of people [from] the Ministry of Internal Affairs").

Even years later, while Plaintiffs were pursuing their claims against Gazprombank, Dr. Specht testified that he met with officials from the FSB, which was the successor to the Tax Police, to try to resolve the tax issues. Dr. Specht had to have a client arrange a meeting. The meeting took place in the Hotel Savoy in Moscow, in a hotel room, rather than at some official meeting place or the FSB offices. When Dr. Specht asked for identification, the "officials" refused to provide it. When he tried to communicate with them again by calling a cell phone number he was given, Dr. Specht found the number had been disconnected. (Specht Dep. 107:22-117:8, 119:16-123:15, 154:3-12.)

Mr. Horvath incredibly and nonsensically testified he would have fired immediately anyone involved in bribery, but did nothing in response to multiple emails from Ms. Okuneva identifying and perhaps acting on bribery solicitations. More importantly and of great significance to the Court is the fact that Defendants proffered several documents reflecting very large payments by Plaintiffs through their Austrian counsel, Dr. Specht, to "experts" who would help resolve Plaintiffs' troubles in Russia. (*See* Exs. D322, D323, D329, D330, D331; Tr. 1028:1-1036:20.) Mr. Horvath, relying on his already comical memory, could not remember why the payments, totaling several hundred thousand dollars, were made or to whom, nor did Plaintiffs proffer testimony from Dr. Specht or anyone else explaining the payments. The Court regards this as critical evidence belying Mr. Horvath's ridiculous assertions and further decimating his credibility.

It is also worth noting that while Plaintiffs claim now that their damages are based on fleeing from the Russian market from 2000-2006, Plaintiffs and their corporate affiliates continued to operate in Russia during that period. In 2000, the members of the corporate finance group formed a company called Tremont Capital Limited ("Tremont") that contracted with CAIB Investment Bank AG to "utilize CAIB's corporate finance know-how, brand, and contacts in Russia." (Pls' Opp'n to Defs' Mot. to Compel Dep. of Oleg Ponomarev and Resp's to Written Disc. at 6.) Tremont and its Russian subsidiary, OOO Tremont Capital, "were provided with access to CAIB's expertise and intellectual property for use in the Russian Federation." (Ex. D400 at Resp. No. 2.) The ubiquitous Dr. Specht curiously established Tremont and a business relationship existed between Tremont and a company Dr. Specht operated. The new Russian entity was staffed by

CA-Grant employees Nina Zemtsova and Oleg Ponomarev. In 2001, CAIB Investment Bank AG was "reorganized into three segments." (Pls' Opp'n to Defs' Mot. to Compel Dep. of Oleg Ponomarev and Resp's to Written Disc. at 6.) The equities business was moved into Bank Austria Creditanstalt. The London and Vienna operations in this group continued to trade in Russian securities for foreign customers. The investment banking and corporate finance businesses were moved to a new subsidiary, Corporate Finance Beratungs GmbH ("CAIB Corporate Finance"). CAIB Corporate Finance then opened an office in Moscow called OOO CAIB Corporate Finance and conducted various operations in Russia including corporate finance functions for foreign clients from 2002 to 2007. CAIB Investment Bank AG surrendered its banking license and renamed GUS Consulting GmbH. Since then, GUS Consulting has not had any employees or substantive operations, and appears to exist for the purpose of pursuing litigation against HRO and Chadbourne.

In addition, after the corporate parent, Bank Austria Creditanstalt, was acquired by a German bank in 2000, Hypovereinsbank, the combined corporate parent continued to operate in Russia through one of its largest banks, International Moscow Bank. Over time, members of CAIB's corporate finance team transitioned to International Moscow Bank's corporate finance group.

All of this suggests, and the Court finds, that Plaintiffs effectively reorganized their operations to protect assets from tax proceedings and continued to do business in Russia under different names and with different corporate affiliates.

## CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes as a matter of law:

Plaintiffs' claim arises under, and is governed by, Russian law. *Creditanstalt Investment Bank AG, et al v. Holme Roberts & Owen, LLP, et al.*, Nos. 03CA1480 & 03CA1882, at 13 (Colo. Ct. App. Sep. 8, 2005).

Under Russian law, Plaintiffs must prove (1) the existence and terms of an enforceable contract; (2) breach of one or more of those terms; (3) the breach directly caused the claimed harm; and (4) the amount of the compensable damages arising from that harm. Plaintiffs have not met their burden.

Under the Civil Code of the Russian Federation, "A contract is an agreement of two or several persons on establishing, changing, or terminating civil law rights and duties." Civil Code of the Russian Federation ("GK RF") Art. 420.1.<sup>1</sup> "A contract shall be considered concluded if an agreement has been reached on all the essential terms of the contract among the parties in the form required in appropriate cases." GK RF Art. 432.1.

A contract, including the alleged contract at issue in this case, must be "made in simple written form." GK RF Art. 161.1; *see also Creditanstalt Investment Bank AG*, Nos. 03CA1480 & 03CA1882, at 16. To prove satisfaction of the simple written form requirement, one can show that the parties reached a specific agreement and signed a single document or exchanged documents expressing their agreement. GK RF Arts. 160.1, 432.2, 434.2, 161.1. Alternatively to the two methods identified in the preceding paragraph, one may also satisfy the simple written form requirement by proving a signed, written offer from one party outlining the essential terms of the agreement, coupled with actions of the other party demonstrating timely acceptance. GK RF Arts. 434.3, 161.1, 438.3.

In contracts involving a foreign (non-Russian) entity, failure to satisfy "simple written form" renders the contract unenforceable. GK RF Art. 162.3 ("Nonobservance of the simple written form of a foreign economic transaction shall entail the invalidity of the transaction."). Professor Paul Stephan, a tenured professor of law at the University of Virginia and renowned Russian legal scholar, testified in highly credible fashion that a foreign economic transaction is an economic transaction among two or more parties, at least one of whom is foreign. (Tr. at 1795-96.) The Court concludes that a transaction between two foreign entities is a foreign economic transaction under Russian law.

The subject, or scope, of the contract is an "essential term." GK RF Art. 432.1. "If a term of a contract is not determined by the parties or a dispositive norm, the respective terms shall be determined by the customs of commerce applicable to the relations of the parties." GK RF Art. 421.5.

Plaintiffs contend that HRO breached the alleged contract by failing to meet Article 721 quality standards. Article 721 requires the quality of work to meet the terms of the contract or, in the absence of terms, to correspond "to the requirements usually made for work of the respective kind" and be "suitable" for the "ordinary use of the result of work of such kind." GK RF Art. 721.1.

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<sup>1</sup> Reference to the Civil Code of the Russian Federation or to GK RF are to the version of the code agreed upon by the parties and introduced into evidence as Exhibit D420.

First, it must be noted that Article 721 is found in Part Two of the Russian Civil Code. Part Two did not come into effect until March 1, 1996. (Ex. D420 at 559.) If the applicable contract was formed in 1995, Article 721 does not apply.

Second, the Court will only look beyond the contract to business custom if the contract is silent on the point. GK RF Art. 721.1.

Under Russian law, an agent may be liable under a contract only where he or she exceeds the authority provided by the principle. GK RF Art. 183.1.

Under Russian law, "[a] person who has not performed an obligation or who has performed it in an improper manner shall bear liability in case of fault (intent or negligence) .... A person is recognized as not at fault, if with the degree of care and caution that was required of him by the nature of the obligation and the conditions of commerce, he has taken all measures for the proper performance of the obligation." GK RF Art. 401.1. "Absence of fault must be proved by the person who has violated an obligation." GK RF 401.2. "[A] person who has not performed an obligation or has performed an obligation in an improper manner in the conduct of entrepreneurial activity shall bear liability unless he proves that proper performance became impossible as the result of force majeure, i.e., extraordinary circumstances unavoidable under the given situation." GK RF 401.3.

In any event, "[i]f nonperformance or improper performance of an obligation occurred by fault of both parties, the court shall accordingly reduce the amount of liability of the [breaching party]." GK RF 404.1. And courts "shall have the right to reduce the amount of liability of the [breaching party] if the [non-breaching party] intentionally or by negligence facilitated an increase in the amount of losses caused by the nonperformance or improper performance, or did not take reasonable measures to reduce it." GK RF Art. 404.1. These provisions apply even where the breaching party is precluded from showing it was not at fault. GK RF Art. 404.2.

Under Russian law, to recover damages, a plaintiff must prove a causal relationship between any alleged breach and the alleged harm. GK RF 393.1.

According to both Defendants' and Plaintiffs' experts, and a recent Ruling from the Russian Federation Supreme Arbitration Court, the causal relationship must be "direct." (Tr. 252:19-255:11, 1811:12-1813:5; Ex. D350.) *See also*, Ruling, Russian Federation Supreme Arbitration Court, No. VAS-13717/10 (October 18, 2010), available at <http://www.arbitr.ru>.

Here, because Plaintiffs allege Defendants breached a contract by improperly advising Plaintiffs regarding the SP Structure, any claimed damages must be tied directly to that allegedly poor advice. This is beyond dispute.

A breaching party must "compensate the [non-breaching party] for the damages caused by the nonperformance or improper performance of the obligation." GK RF Art. 393.1. "A person whose right has been violated may demand full compensation for the losses caused to him unless a statute or contract provides for compensation for losses in a lesser amount." GK RF Art. 15.1. "Losses means the expenses that the person whose right was violated has made or must make to reinstate the right that was violated, the loss of or injury to his property (actual damage), and also income not received that this person would have received under the usual conditions of civil commerce if his right had not been violated (foregone benefit)." GK RF Art. 15.2. "In determination of lost profit, the measures taken by the [non-breaching party] to receive it and the preparations made for this purpose shall be considered." GK RF 393.4. A damaged party is entitled to either restoration of business or cost of losses. (Tr. 165)

As explained by Plaintiffs' expert on the Russian Civil Code, Professor Makovsky, under Russian law, damages cannot be speculative. (Tr. at 259-61.) In addition, unjust enrichment through an award of damages is not permitted under Russian law. (Tr. at 264-65 ("The unjust enrichment as a result of the restitution, of recovering damages – compensation of damages, should not happen, should not happen.").)

In terms of the existence of a contractual relationship, Plaintiffs must prove that an agreement was reached on all the essential terms. GK RF Arts. 432.1. If there is no common will regarding the subject of the contract when the contract was made, there is no enforceable contract. (*See* Tr. at 188 (Makovsky).) Strict compliance with the code is necessary.

In this case, the evidence is clear that the only signatory to the alleged contract, Ms. McLean, intended to enter into an agreement for a fixed fee, \$55,000, to perform due diligence in connection with the possible acquisition of "ACTIVE." No one from the Plaintiffs testified as to their intention in entering into any alleged contract with HRO. The only evidence offered was from Plaintiffs' Russian law expert who, fourteen years after the certain letters were written, opined that the parties intended to enter into a "global" contract for legal services. Since it is not permissible to divine the true common will of the parties on the scope of the agreement, which is an essential term, the Plaintiffs have failed to establish the existence of an enforceable contract that included work on the SP structure. Plaintiffs' claim arises from HRO's work on the SP Structure. Therefore, only a contract addressing HRO's work on the SP Structure can be relevant to Plaintiffs' claims. If HRO and any of the Plaintiffs entered into an enforceable contract with respect

to other work, that contract does not create any obligations that could have been breached with respect to the SP Structure. Clearly, the existence of an attorney-client relationship does not create any basis for liability in this case—only a specific contract can do that under Russian law.

Plaintiffs contend that the applicable contract in this case was essentially a broad agreement between Creditanstalt Investment Bank AG and HRO for any work that may be needed in Russia. In support thereof, Plaintiffs' expert points at evidence related to a series of letters in May and June 1995. Despite being unable to pinpoint the exact date the alleged contract was formed, Plaintiffs assert that the contract was formed in 1995. (*See* Tr. at 148-50, 240 (Makovksy: "I cannot indicate the exact date, the exact date. I can only indicate the period of time.").) Professor Makovksy essentially bases his conclusion on review of selected documents provided to him by Plaintiffs' counsel, some of which were not translated at all and some of which appear to have been poorly translated long years after the contract allegedly was concluded. (*See* Tr. at 149, 169-71, 221-22, 233-34, 240-41.)

However, from the perspective of the Court, there is no evidence of a true meeting of the minds between the parties in 1995 as to this type of broad contract. There was certainly a business and client relationship between HRO and CAIB and some of its affiliates, but this did not make a contract or create any duty under Russian law at the time. Whatever it might have represented in terms of American jurisprudence and whatever assumptions Plaintiffs may have formed, Plaintiffs must now prove, under Russian law, the existence and terms of a specific contract among identifiable parties governing work on the SP Structure. In fact, Plaintiffs failed to prove a specific on-going contractual obligation over this entire period of time. The relationship portrayed seems typical between law firms and their clients—the law firms perform specific tasks as requested with the hope of continuing to obtain business from the client in the future. The law firms can refuse to do the work and the clients can use other law firms. Plaintiffs' reliance on generic language such as "outside general counsel," "counsel in Russia," or "we would be honored to represent [you]" in memoranda and correspondence between the parties during the relevant time to establish a "global contract" is unavailing. (*See, e.g.,* Exs. 6, 51, 59.) The Court cannot find that the documents exchanged between the parties create a global contract of the nature alleged by Plaintiffs. There is no contract hidden in the muddled mess of communications and assumptions that Plaintiffs now advance to the Court.

Moreover, Plaintiffs failed to prove the true common will of the parties on the scope of any agreement. Both HRO and PriceWaterhouse provided advice to Plaintiffs on the SP Structure, but there is insufficient evidence to determine the intent of the parties on

exactly what HRO was to do and exactly what PriceWaterhouse was to do. The contractual line, if any, between their roles is genuinely and totally unclear.

Professor Makovsky testified that he is unaware of any basis for a contract claim brought by CA-Grant or CISEF. (Tr. at 179-80 (CA-Grant and CISEF are not parties to a contract with HRO), 183-84 (one who is not a party to a contract has no right to bring a claim).) Professor Makovsky's testimony was not contradicted on this point.

Accordingly, the Court finds there is not and never was an enforceable contract between HRO and any of the Plaintiffs that conforms to the requirements of Russian law.

If there is an agreement, it must have been documented in simple written form. GK RF Art. 161.1; *see also Creditanstalt Investment Bank AG*, Nos. 03CA1480 & 03CA1882, at 16. In order to satisfy the simple written form requirements, Plaintiffs must show either (1) the parties to the contract signed a single document or exchanged documents expressing their agreement, GK RF Arts. 160.1, 432.2, 434.2, 161.1, or (2) a signed, written offer from one party outlining the essential terms of the agreement, along with proof of actions by the other party demonstrating timely acceptance, GK RF Arts. 434.3, 161.1, 438.3.

Here, Plaintiffs agree there is no "one document signed by the parties" or even an exchange of a few documents evidencing a contract. (Pl. 30(b)(6) Dep. at 34:6-14; 35:4-13, 53:12 - 54:1, 58:11-20, 101:23-105:1; *see also* Tr. at 145-76, 215 (Makovsky conclusions).) Rather, Plaintiffs assert the simple written form requirement is satisfied by all the documents exchanged by the parties relating to any work HRO ever did over the years for Creditanstalt Investment Bank AG or its affiliates. (Pl. 30(b)(6) Dep. at 34:6-14; 35:4-13, 53:12 - 54:1, 58:11-20, 101:23-105:1.)

The Court finds this argument and the alleged compilation of a "global contract" consisting of all documents between the parties wholly unconvincing. Plaintiffs must show the existence of a written offer, which is "sufficiently definite" and describes the subject of the contract, and acceptance, and a "full and unconditional" written reply or performance. Plaintiffs have not done that. There is no way to ascertain a definite written offer from an amalgamation of hundreds of documents, not a single one of which translates into a meaningful component of such a global agreement.

As to Defendant McLean, for an individual to be a party to a contract under Russian law, there must be some indication that the individual assumed obligations under the contract personally and not as a representative of some other party. *See generally* GK RF Art. 420.1, 432.1. There is no evidence that Ms. McLean assumed any obligations personally or that she exceeded the scope of the authority given to her by HRO. *See* GK RF Art. 183. Rather, the evidence shows Ms. McLean was acting at all times on behalf of

HRO and not for herself. Both Russian law experts opined that there never was a contract between any Plaintiff and Ms. McLean, individually. (Tr. at 180:25-82, 268-69 (Makovsky testimony re: McLean not a party to any contract with any Plaintiff), 285-86 (Makovsky testimony: if HRO does not contend McLean exceeded her authority, McLean has no liability); 1804 (Stephan testimony).)

Accordingly, Ms. McLean is not and never was a party herself individually to any contract with Plaintiffs, and cannot be personally liable for breach of contract.

Even assuming, *arguendo*, the existence of a contract, under Russian law, a party must perform contractual obligations in accordance with the contract's terms. GK RF Art. 309. If there is a breach, it must be of a specific contract term—there is no general obligation to avoid acting negligently, as there was no claim for malpractice at the time under Russian law. *Creditanstalt Investment Bank AG*, Nos. 03CA1480 & 03CA1882, at 13.

Plaintiffs contend Defendants failed to perform their alleged contractual obligations because, in providing legal advice about the SP Structure, they did not advise "that the SP Structure was illegal under then-existing Russian law; [or about] the consequences CAIB might face if the SP Structure did not comply with Russian law." (First Am. Compl. ¶ 21.)

Yet, after weeks of trial and volumes of evidence, the Court finds that Plaintiffs failed to prove the SP Structure was actually illegal. The fact that the SP Structure may have been investigated is not the functional equivalent of proving that it was illegal under Russian law. Instead, Plaintiffs contend that Defendants breached the contract by failing to sufficiently warn Plaintiffs of the risks of use of the SP Structure. Specifically, they argue Defendants should have provided additional and different warnings about the risks of the SP Structure. They assert the SP Structure was "intended to circumvent Decree 529" and carried "considerable risks of exposure" to the Russian authorities. (Proposed Trial Management Order, Jan. 14, 2011, at 4-5.) In fact, the evidence presented shows that these were the precise risks that Defendants warned Plaintiffs about. The Court finds that the warnings provided by Defendants were abundant and sufficient. Thus, even if the Court were to conclude there was an enforceable contract, Plaintiffs have not proven that Defendants' breached the contract.

The Court reiterates, based on the evidence presented, that the law in general was unsettled in Russia at the time and Defendants and others cautioned Plaintiffs that government authorities were inconsistent in their reading and application of the laws. Plaintiffs recognized the dangers.

Plaintiffs argue that the SP Structure violated tax laws because it was designed for "tax avoidance" and because it created a "permanent establishment" subjecting the operations to taxes in Russia that were not paid. There was a risk that Russian tax authorities might determine that the SP Structure created a permanent establishment, but there is no evidence that it in fact did so. No governmental authority concluded the SP Structure actually created a permanent establishment. Indeed, Plaintiffs' tax expert testified only that there was a risk of permanent establishment—not that there was, in fact, a permanent establishment. (July 30, 2010 Dep. of Elena Ovcharova at 25:1-7.) Even if the SP Structure created a permanent establishment, however, that does not mean the SP Structure was illegal or that tax liability is owed. Rather, a determination of permanent establishment merely creates a tax presence in a certain jurisdiction. (Tr. at 395-97 (McLean testimony in response to Plaintiffs' Counsel's questions regarding consequences of permanent establishment).) Without more, Plaintiffs' claim that the SP Structure violated tax laws because it created a permanent establishment fails.

As evidenced in the memoranda to Plaintiffs, they were amply and repeatedly warned about that specific risk by HRO, PriceWaterhouse, and others. Similarly, Plaintiffs' other tax expert testified that there was a risk of the SP Structure being viewed as a tax avoidance device—not that it actually was an illegal tax avoidance device. (July 29, 2010 Dep. of Roustam Rafaelovitch Vakhitov at 18:24 – 19:14.) That expert conceded, however, that the risk he described was the very one highlighted by HRO in its April 6, 1997 memo. (*Id.*)

Plaintiffs concede that they were clearly and repeatedly warned that the SP Structure could be seen by regulators as a "tax avoidance" device and that it could be deemed to create a "permanent establishment." The Court finds that these warnings and the other warnings of the various risks posed by use of the SP Structure, provided by Defendants were clear and sufficient for purposes of these claims.

In any event, Plaintiffs failed to meet their burden of showing that Article 721 applies or, if it does, that there was a prevailing business custom Defendants did not satisfy.

First, Plaintiffs assert that the "global" contract for legal services between Plaintiffs and HRO was formed in 1995. Accordingly, Article 721 is inapplicable.

Second, under Russian law, the Court looks beyond the contract only if the terms of the contract are silent on the point. GK RF 721.1; GK RF Art. 421.5; *see also* GK RF 783. Plaintiffs agreed in the deposition of their corporate designee that the standard of care was embodied in writing in the documents exchanged by the parties. (Pl. 30(b)(6) Dep. at 40:10 - 42:20.) HRO's risk disclaimers are a part of any contract created by the

documents exchanged by the parties related to the SP Structure. HRO expressly disavowed certainty that the structure would survive challenge, and cannot now be subject to liability for breach of contract because some of the very risks it identified may have materialized. Plaintiffs concede the April 6, 1997 memo, and specifically the section on risk assessments, was part of any contract in this matter. (*Id.* at 111:7 - 112:3; 114:12-16.) As a result, Articles 421.5 and 721.1 are inapplicable.

Third, Plaintiffs did not prove Defendants failed to satisfy any applicable business custom. Plaintiffs' own expert, Professor Makovsky, admitted there were no clearly formulated specific standards applicable to paid legal services contracts during the relevant time. (Tr. at 219-20.)

Defendants' expert on business custom, Richard Dean, who the Court finds was experienced and knowledgeable in Russian legal practices at the time and who was credible, also testified that there were no standard practices regarding disclosure of risks by firms advising foreign clients because the Russian system was far too unpredictable at the time. He further testified it was not typical to give warnings about the possibility of a tax raid or of criminal prosecution, and does not recall ever doing so himself. (Tr. at 1670-90.)

The evidence indicates that Plaintiffs decided the risks of the SP Structure were worth taking because of the substantial potential for financial gain. Despite the warnings from HRO and others, Plaintiffs made the business decision to implement the SP Structure and continued to operate the structure even after receiving warnings from others. Defendants never gave Plaintiffs an express guarantee and they were not required to do so. And because Russian law does not provide for an implied guarantee, and HRO provided express disclaimers concerning risks like those that came to fruition, no term of any contract was breached. Plaintiffs' expert, Igor Prihodko, conceded that a transaction that is legal requires no warnings or risks. (July 27, 2010 Dep. of Igor Prihodko at 74:14-17.) Because there was no proof that the SP Structure was illegal, no warnings were required, and certainly no warnings were required beyond those given.

Plaintiffs also appear to contend HRO breached the alleged contract by permitting Ms. McLean, a non-Russian lawyer, to participate in the advice given about questions of Russian law. The Court notes first, as Ms. McLean testified, and the documentary evidence confirms, Russian-qualified lawyers participated materially in all work involving Russian law. Ms. McLean's role was not to perform the Russian legal analysis in the first place, but to work with the Russian lawyers at HRO to get their best work, and then as the one with the best English language skills in the office, to help translate the Russian lawyers' work for clients. (Tr. at 684.)

Second, even if HRO somehow breached an alleged contract by having Ms. McLean practice Russian law, there would still be no causal relationship whatsoever to any harm claimed by Plaintiffs. There is no evidence that there was ever a challenge to the SP Structure based on the fact that Ms. McLean, a non-Russian lawyer, was involved in analyzing it.

Under Russian law, Plaintiffs must prove any breach directly caused the claimed harm. GK RF Art. 393.1; GK RF Art. 15.

In terms of alleged damages and actual harm, Plaintiffs claim that they were harmed because they were foreclosed from the Russian market from 2000, when they allegedly were forced to flee the marketplace, to 2006, when the statute of limitations for criminal prosecution purportedly expired.

This contention is not at all consistent with the findings of the Court and actually makes little sense in light of the evidence or lack thereof. No tax or governmental authority ever found the SP Structure to be illegal. In addition, there is absolutely no credible evidence that a tax or government authority forced Plaintiffs to stop doing business in Russia. The date Plaintiffs choose to support their foreclosure theory is based on the statute of limitations for criminal prosecution. In Russia, however, there is no criminal liability for entities. Only employees involved in the alleged illegal act are subject to prosecution. As a result, the six-year statute of limitations was not running against Plaintiffs or any CAIB-Russia entities. It only could have run against certain employees involved in the alleged illegal act and there is no evidence of prosecution of employees for their involvement with the SP Structure. Moreover, Mr. Hemetsberger's testimony raises serious doubt about the premise of Plaintiffs' claimed harm. Mr. Hemetsberger was head of the Russian business during the relevant period and he testified that he was not concerned about criminal liability, but rather was focused on the possibility of a civil action for tax liability. (Tr. at 888-89.) Plaintiffs offered no evidence on the civil statute of limitations for suits by the government to recover back taxes.

In fact, the evidence demonstrates that Plaintiffs did not truly fear criminal prosecution. Several CAIB employees traveled to Russia during the relevant period, including Mr. Hemetsberger and Mr. Fueger. (Tr. at 886, 1290-91.) There is an unsupported suggestion by Plaintiffs that Mr. Unterganschnigg and Mr. Mader may have been subject to criminal investigation and were told to flee Russia. Even so, as Mr. Hemetsberger acknowledged, "anybody can be replaced," including Mr. Unterganschnigg and Mr. Mader. (Tr. at 1007-08.) It is quite clear that Plaintiffs could have continued their Russian operations under different management but chose not to do so.

Finally, the evidence shows that Plaintiffs did not actually leave Russia. They simply reorganized their operations and continued to do business under different names and with different corporate affiliates. Plaintiffs' corporate parents and subsidiaries maintained Russian operations through different corporate forms throughout 2000 and beyond and continued to trade in Russian securities for clients. None of the currently existing subsidiaries or affiliates of the Plaintiff entities actually suffered any harm.

Thus, the evidence shows that, when confronted with the Tax Police investigation, Plaintiffs continued to liquidate CA-Grant and shift operations in Russia to other corporate affiliates. Accordingly, the Court finds that Plaintiffs were not harmed in any way by any legal advice received from HRO.

In any event, and perhaps most importantly, as shown by the extensive evidence on the matter, any closure or restructuring of Plaintiffs' Russian business was not caused by Defendants' legal advice, but rather was the result of a host of other factors, including: (1) Plaintiffs' own aggressive business decisions, despite repeated risk warnings Plaintiffs received and understood; (2) Plaintiffs' mismanagement of their business; (3) a severe economic crisis that devastated the Russian economy; (4) corrupt acts by an employee and government officials; and (5) warnings given by other parties after HRO gave its advice.

As evidenced by the testimony in this case, Plaintiffs were aware that operating in Russia involved many risks, including arbitrary and corrupt actions by the Russian government. And as evidenced by the many memoranda containing risk warnings and disclaimers sent to Plaintiffs, Plaintiffs knew that offering the SP Structure to foreign investors was risky. HRO and PriceWaterhouse warned about risks at the time the structure was created and subsequently, Plaintiffs received warnings from Chadbourne, Deloitte & Touche, Ernst & Young, and law firms representing potential investors. Chadbourne warned Plaintiffs in February 1998, after HRO had closed its Moscow office: "Given such political pressure to restrict foreign ownership in RAO 'Gazprom,' it is likely the SP Structure would be viewed as an elaborate way to achieve results that are contrary to the undeclared but clearly visible goals of the government." (Ex. D121.) Chadbourne advised and warned Plaintiffs repeatedly with respect to the SP Structure through 1998 and 1999. (*See* Ex. D173.)

The evidence, taken as a whole and based on this Court's assessment of the credibility of a variety of witnesses, indicates that Plaintiffs made the business decision to operate in Russia and offer the SP Structure because of the potentially lucrative returns. The risks are exactly what made the Russian market so attractive. Thus, any harm caused by Plaintiffs' business decision cannot be attributed to Defendants. Plaintiffs themselves were guilty of greed and attendant blindness. This Court has found that Plaintiffs' poor

business decisions were exacerbated by CAIB-Russia's management problems, their loss of key employees and customers, the Arkhipov theft and orchestrated tax raid, the subsequent bad press, Plaintiffs' litigation with customers, and their lawsuits against Gazprombank. In addition, as the Court has further found, Plaintiffs decided to "end the Russia structure" and essentially liquidate the Russian operations by mid-1999. By that time, Plaintiffs were unaware of any investigation into the SP Structure. Indeed, when many of the decisions to terminate the Russian business were made, in 1998 and early 1999, the Russian Tax Police had not yet raided Plaintiffs' Moscow Offices.

In sum, even if Defendants had any culpability (which the Court finds they did not) and even if the Plaintiffs suffered harm, there are simply too many intervening and superseding causes of the alleged harm caused to Plaintiffs. (Tr. at 1816-17 (Stephan: "[I]ntervening acts break the chain of causation.")) The weight of the evidence shows that factors other than HRO's advice on the SP Structure led Plaintiffs both to initiate and continue the SP Structure itself, and caused the effective dissolution of CAIB's Russian operations before the end of 1999.

Moreover, even again, assuming *arguendo*, that Plaintiffs established the existence of a valid contract under Russian law, some form of harm and causation by Defendants, as discussed above, under Russian law, Plaintiffs must prove compensable damages arising from the harm directly caused by the breach.

Plaintiffs' central damage theory is that they were foreclosed from the Russian market from 2000 to 2006. Under this theory, Plaintiffs seek "the amount their Russian business would have been worth at the time they were once again able to work in Russia" in 2006. (Proposed Trial Management Order, Jan. 14, 2011, at 11.) Plaintiffs' expert has purportedly "conservatively quantified this loss as at least \$189 million." (*Id.*) The Court finds this theory to be remarkably speculative and utterly unconvincing.

As the Court has previously articulated, any criminal liability that allegedly existed extended only to individual employees of the Plaintiffs, not to any of the Plaintiff entities. Rather than re-staffing their Russian operations, Plaintiffs chose to abandon them. This damage measure also fails because, as the Court has already found, Plaintiffs' corporate parents and affiliates simply reorganized and continued to operate in the Russian market. Thus, Plaintiffs were not foreclosed from the Russian market.

It appears that these issues were not considered by Plaintiffs' damages expert, Thomas Blake. Mr. Blake admittedly did not perform a valuation of the business or a lost profits analysis. Instead, Mr. Blake was instructed to measure Plaintiffs' damages based on what "it would have cost to restart the business in 2006." In doing so, Mr. Blake relies on the sale price of only two companies during 2000-2006, out of twelve comparables

that he reviewed. Because three of the twelve companies failed during that period, Mr. Blake discounted the sale price of the two transactions by 25% to account for the "failure rate." He then deducted \$30 million, for the required capital infusion going forward, to arrive at a damage figure of \$189 million, the cost to restart the Plaintiffs' business in 2006. There are significant and astonishing flaws in Mr. Blake's analysis. Mr. Blake knew virtually nothing about the two companies whose sale prices he used. He does not know the size of the companies, their revenues, their profitability, their management abilities, their number of employees or any other specific business information in order to know that they are indeed "comparable." Thus, it is complete and utter speculation to suggest that the sale of two of these businesses is an accurate gauge of the cost to "restart" the business that CAIB had as of 2000. Errors in Mr. Blake's analysis were highlighted by David Hall, Defendants' expert witness and were otherwise apparent to the Court. (*See* Tr. at 1555-58.)

In fact, the evidence shows that the two "comparable" companies on which Mr. Blake based his calculation were not comparable to CAIB-Russia in 1999. For example, UFG, one of the "comparables" had more than six times the capital of CAIB-Russia and more than three times the assets in the 1998-99 period. (Tr. at 1485-86.) And, critically, UFG's capital and assets increased in 1999, while CAIB-Russia was falling apart. (*Id.*) Mr. Blake conceded that Brunswick, another alleged "comparable," was capturing CAIB-Russia's market share in 1999—before they claim to have been foreclosed. (*Id.* at 1486-88.) And, Mr. Blake conceded that based on overall market conditions, Brunswick suffered a \$440 million loss this period, but contends they were comparable to CAIB-Russia, whose total trading book was only \$12 million. (Tr. at 1462-64.) Brunswick's research team was 15 times the size of CAIB-Russia's in 1999. (Tr. at 908-09.)

The evidence also shows that other of the twelve "comparable" companies Mr. Blake considered were not comparable to CAIB-Russia in 1999. For example, another company Mr. Blake claimed was "comparable," Renaissance, had a \$200 million trading book compared to CAIB-Russia's \$12 million. (Tr. at 1469.)

One of CAIB-Russia's key employees left for another firm, Troika Dialog, which Mr. Blake also testified was comparable. Mr. Fueger explained, however, that Troika Dialog was not comparable because it had a different business model from CAIB-Russia. (Tr. at 493, 1238-39.)

Additionally, significantly and inexplicably, Mr. Blake ignored the effect of the theft of over 100 million Gazprom shares (which cost Plaintiffs over \$30 million dollars in settlements with investors) and the attendant bad publicity that resulted from the theft. Mr. Hemetsberger conceded this bad press damaged the business. (Tr. at 934-35.) Blake also ignored the fact that none of his "comparable" companies experienced a

similar theft. He further ignored the "going concern" language in the financial statements of the CAIB-Russia companies. (Tr. at 1565-66.) In other words, Mr. Blake failed to exclude other likely causes of loss. (Tr. at 1431-32, 1553-55.) The Court views these as more than mere oversights, but rather as fundamental flaws in Mr. Blake's conclusion.

Mr. Blake corroborated his damage calculation by showing that an investment of \$30 million in the Russian stock market during 2000-2006 would generate returns of approximately \$200 million. Yet, when asked what CAIB actually did with the \$30 million, Mr. Blake testified he does not know. (Tr. at 1519-21.) He completely failed to discount his damage calculation by the amount the Plaintiffs earned in the real world on the funds he opined they would have had to invest in the Russian operations—an amount that, by his own calculations, could equal the damages they seek. CAIB did not invest the \$30 million in OOO CAIB Corporate Finance, the entity through which CAIB continued its Russian corporate finance business during the relevant years. (Tr. at 1267.) Mr. Horvath testified that additional capital was not provided to the Russian operations when requested in 1998. (Tr. at 1883-84.) Mr. Blake's assumption that CAIB would have provided the \$30 million required capital infusion is, again, mere speculation.

The alleged "corroboration" of a hypothetical \$30 million investment in the Russian stock market shows that the CAIB Russia business was in fact worthless as of 2000. The investment of \$30 million in the Russian stock market would yield more than Plaintiffs seek in this case. Since Plaintiffs acknowledge that the \$30 million capital infusion was necessary to go forward, this case is nothing more than a claim for that investment, an investment never made, for which Plaintiffs have provided no evidence of what they actually did, and which would have yielded more than \$200 million if invested in the Russian stock market.

In the final analysis, Plaintiffs' expert had no basis to analyze CAIB-Russia's market position in 1999 for purposes of comparability. The Court finds that the comparability of the two sales transactions evaluated by Mr. Blake to CAIB-Russia is neither helpful nor credible. In addition, Plaintiffs' damage theory does not account for the theft of the Gazprom shares and the attendant reputational damage. Further, it ignores the enormous operational losses of the business in the two years before it was closed. Plaintiffs did not show that they maintained the \$30 million capital allegedly required to reenter the market and thus have failed to prove this was a viable business option for them.

The Court finds that Plaintiffs' damages theory that it was foreclosed from the Russian market from 2000 to 2006 is speculative and unsupported by the evidence. Further, the Court finds Mr. Blake's calculation to be an improper measure of damages under Article 15.

Plaintiffs argue damages should be calculated using the "yardstick" method outlined in *Anchor Savings Bank v. United States*, 81 Fed. Cl. 1 (Fed. Cl. 2008). The "yardstick" method is a lost profits approach. (Tr. at 1393-94.) Blake testified he did not perform a lost profits analysis. (Tr. at 1391.) In addition, lost profits and other consequential and incidental damages are recoverable only where such damages are foreseeable to the breaching party at the time of the contract and where such damages can be established with reasonable certainty. *Anchor Savings*, 81 Fed. Cl. at 57. Damages are appropriate to place the non-breaching party in the position it would have been in had the breach not occurred "where their loss is the proximate result of the breach and the fact that there would have been a profit is definitely established, and there is some basis on which a reasonable estimate of the amount of profit can be made." *Id.* (internal citations omitted). To obtain lost profit damages, "[t]he breach must be more than just a 'substantial factor' in the plaintiff's loss; the causal connection between the breach and the loss of profits must be 'definitely established.'" *Id.* at 59 (internal citations omitted). While the breach does not have to be the sole cause of the loss, a plaintiff may only recover for those losses that would not have occurred but for the breach. *Id.* at 60. Mr. Blake did not perform this analysis. (Tr. 1431-32.) His calculation is fatally flawed and the *Anchor Savings* case does not provide assistance to Plaintiffs' damages theory.

Plaintiffs' alternate damages theory is much simpler. They claim the cost to acquire Grant. (Ex. D401 at 2 (Claiming "the amount paid in connection with the acquisition of Plaintiffs' Russian business.")) Plaintiffs assert that the "amount exceeds \$48 million, which consists of approximately \$400,000 in an initial acquisition payment, at least \$5 million in capitalization of the Russian business, and \$42.6 million in deferred acquisition payments through an earn-out arrangement with the prior owners." (Proposed Trial Management Order, Jan. 14, 2011, at 11.)

As a preliminary matter, this damage theory fails because it is predicated on Plaintiffs' assertion that they lost their business and thus it is subject to all the causation arguments discussed above.

In addition, however, this theory is not a permitted measure of damages under Russian law. Cost may, in appropriate circumstances, be relevant to the second measure of damages under Article 15.2 (loss or harm to property). But that measure of actual damage is calculated at the time of loss. The fact that Plaintiffs may have paid certain amounts to open the business in 1996 is not evidence of what it was worth when it was lost. GK RF Art. 15.2. Again, by the end of the year 1999, according to Plaintiffs' own financial records, the CAIB-Russia business was worth less than \$1 million. (Exs. D215, D285, Tr. at 954, 957-58.)

Further, Plaintiffs failed to prove who paid the amounts claimed or that they were actually paid. The alleged loss, the cost of CA-Grant, cannot have been suffered by CA-Grant or CISEF. Plaintiffs did not offer bank records, wire receipts, or any other documentation showing payments. The Court cannot simply assume the payments described in the Master Transaction (Ex. D9) were made, by Plaintiffs or anyone else.

Moreover, Plaintiffs admit that \$42.6 million of the alleged damages of \$48 million consist of employee bonuses paid from the profits of the business—and Plaintiffs made much more than that for themselves from the business. Again, Plaintiffs failed to prove that such bonuses were paid or by whom. The contract with the key employees detailing the bonus is not in evidence so the Court does not know its terms. Nor is there evidence of subsequent CAIB Supervisory Board approval of the bonus arrangement.

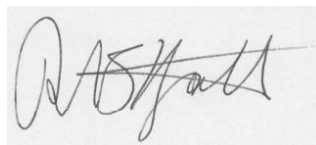
For all of these reasons, the Court finds that Plaintiffs' damages theory seeking the cost incurred to acquire Grant in 1996 is impermissible under Russian law and unsupported by the evidence.

To summarize, this Court finds that Plaintiffs did not prove the existence of a contract, breach by the Defendants, resultant harm or causation or even, assuming all of that, the existence of any definable and established measure of damages.

For all of the above reasons, and based on the Court's findings of fact and conclusions of law, this Court hereby enters judgment in favor of Defendants Holme Roberts & Owen, LLP and Margaret B. McLean and against Plaintiffs Creditanstalt Investment Bank AG, CIS Emerging Fund Limited, and ZAO Creditanstalt-Grant.

Dated this 20<sup>th</sup> day of June, 2011

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. S. Hyatt", is written over a light gray rectangular background.

Robert S. Hyatt  
District Court Judge

