

THE COURT IMPROPERLY HELD THE DEFENSE AND THE PROCURACY TO DISPARATE LEGAL STANDARDS ON ADMISSIBILITY/EXCLUSION OF EVIDENCE

A. Improper Exclusion of Defense Expert Testimony.

The defense offered the testimony of eight expert witnesses on critical issues in the case, *e.g.*, the legality of the payment of taxes via promissory notes, and whether the tax administrations or the Russian Property Fund suffered a loss as a result of the Apatit/NIUIF privatizations. The Court went to great lengths to find legal-sounding justifications to exclude this testimony critical to the defense. In doing so, the Court misapplied Russian law, disregarded clearly reliable and probative testimony, and, as a result, blatantly violated Messrs. Khodorkovsky and Lebedev's right to defend themselves. The disingenuousness of the Court's rulings becomes even more apparent when they are compared to its rulings rejecting defense motions to exclude evidence gathered during the numerous questionable searches and seizures, conducted by the Russian authorities, as part of the investigation of the case. The fact that the Court found it necessary to engage in such attenuated legal reasoning or the blatant disregard for the law or inconvenient facts before it, leads to the conclusion that the testimony substantially, or in some instances definitively, demonstrated that the Procuracy failed to prove the commission of a crime.

The following contains examples of various grounds on which the Court excluded several key expert witnesses. However, the reasoning for each such conclusion either is without support in the criminal procedure code or defies common sense.

1. The Defense Improperly Offered the Testimony of Expert Witnesses.

Citing Articles 58 and 86(3) of the Criminal Procedure Code, the Court found that all of the defense experts should be excluded on the ground that the defense improperly offered the testimony of specialists, *i.e.*, experts as the term is used in Western courts. Contrary to the citations, the Criminal Procedural Code does not set forth any such prohibition. Rather, Article 86 identifies the broad rights of the defense to gather proof and does not prohibit the retention of a specialist. Furthermore, Article 58(1) expressly permits a specialist to provide assistance to any party to a criminal case, which includes the defendant, *see* Art. 49 (identifying the defendant as a "party" to a criminal case as the term is used in the Criminal Procedure Code). This assistance is in regard to issues within the specialist's particular knowledge or expertise. The Court's reasoning is a gross contradiction of the defendant's right to offer proof and otherwise participate in criminal cases in a manner equivalent to the Procuracy (Art. 244 of the Criminal Procedure Code).

As an example, the Court refused to accept the expert report prepared by experts from international consulting firm Ernst & Young. This expert report was significant in rebutting the Procuracy's case in that it provided a substantially lower valuation of the 20% shares of Apatit allegedly stolen by Messrs. Khodorkovsky and Lebedev than that

offered by the expert relied upon by the Court. As a basis for the exclusion, the Court held that Ernst & Young is a consulting firm, not a person, and therefore, could not qualify as an expert within the meaning of the Russian Criminal Procedure Code. *See* Criminal Procedural Code, Art. 57. When the defense called one of the signatories of the report, Mr. Gerald Gaige, to testify, the Court denied the defense the opportunity to question Mr. Gaige on the substance of the report. The Procuracy objected to Mr. Gaige's testimony due to the expert's insufficient qualifications. The Court sustained the Procuracy's objections absent any evidence in support and ruled that Mr. Gaige was not qualified to testify also because the report was a product of many consultants and not just Mr. Gaige.

2. The Experts Relied on Improperly Certified Documents.

The Court stated that a ground for excluding the expert testimony of S. Grechishkin (legality of paying 1999 taxes with promissory notes and no harm caused because Yukos redeemed the notes); D. Scheckin (legality of paying 1999 taxes with promissory notes and legitimacy of refunds after notes redeemed, and legality of entrepreneurial licenses); and S. Semyonov (legality of paying 1999 taxes with promissory notes and the corporate *bona fides* of ZATO trading companies) was that the copies of documents from the court record each witness reviewed were not properly certified copies as required by Art. 58 of the RCPC. *See* Verdict, p. 621. Contrary to the assertion by the Court, Article 58 does not set forth such a requirement. Moreover, the rationale is transparently artificial because the appropriate defense lawyers all attested that the copies provided to the experts were accurate and complete and the Court made no finding to the contrary. The exclusion of Mr. Grechishkin was particularly strained because the Court criticized his review of documents printed from a CD of the case file provided to him by one of the defense lawyers.

3. The Experts Relied on Documents Outside of the Case File.

The Court stated that a ground for excluding the expert testimony of Mr. Scheckin and V. Bochko (legality of paying 1999 taxes with promissory notes and the benefit to the Administration of ZATO Lesnoy from receiving those payments) is that they relied on a 2002 study commissioned by the ZATO Lesnoy Duma and Administration entitled "On The Economic Effectiveness of The Investment Program of the Lesnoy Municipality for 1999 and The Subsequent Years" which was not part of the record of the case (*See* Verdict, pp. 623-24). Mr. Bochko was one of the co-authors of the study which definitively demonstrated how promissory notes were regularly used to satisfy tax obligations in 1999 and explained how the City benefited from the investment of their proceeds after redemption. The Court failed to acknowledge that the study was not part of the record because the Procuracy failed to disclose this government document as part of the investigation records and the Court rejected defense counsel's motion to introduce it when they received it from ZATO Lesnoy. *See* March 1, 2005 Trial Transcript. As noted in the section below regarding due process violations, another important issue for an independent court would be why the Procuracy failed to present the study to the defense as exculpatory evidence. The Court offered no criticism of the substance of the study other than it contained information beyond the scope of the trial, which is at best an

excuse to instruct the defense to limit its use to the relevant portions, but not a basis to exclude the witnesses' testimony in its entirety on issues clearly at the core of the case. The Court's refusal to admit the testimony of Messrs. Scheckin and Bochko regarding the legitimacy of payment with the promissory notes and the ultimate benefits to ZATO Lesnoy is illogical and has no legitimate legal basis. This point is further demonstrated by the corroborating fact testimony of an official from the Lesnoy Administration, Lyubov Myasnikova. *See* 3/3 and 3/4 Myasnikova Test., which the Court also excluded from the record as unreliable. Verdict, p. 653

4. Experts Were Compensated by Mr. Khodorkovsky's Wife.

The Court stated that a ground for excluding the expert testimony of L. Petrova (legality of paying 1999 taxes with promissory notes, legal methodologies for calculating tax obligations and refunds, and the reasonableness of how the trading companies paid their taxes to the ZATO Lesnoy tax administration) and K. Lubenchenko (Banking practices in 94/95 and legality of Bank Menatep Guarantee Letters in regards to the illegal acquisition of Apatit and NIUIF shares) is that they were paid by Mrs. Khodorkovsky rather than a party to the criminal case. *See* Verdict, pp. 621-22. The Court does not cite any specific provision of the Russian Criminal Procedural Code for this proposition, because no such prohibition exists. Moreover, even if such a requirement existed it would make no sense in this case where the court has frozen the assets of the defendants. The Court offered no explanation why it was acceptable for Mrs. Khodorkovsky to compensate her husband's counsel but not the experts. Thankfully, the Court did not exclude counsel for the same reason. No independent court adhering to the rule of law and applying basic due process standards would make a decision concerning a defendant's freedom based on whether one of his relatives paid a disclosed amount to an expert witness.

5. Witness' participation in Yukos tax case.

The Court stated that a ground for excluding the expert testimony of Mr. Scheckin is that he served as counsel to the defense of the civil tax charges levied against Yukos Oil Company and had written articles critical of the tax charges. Verdict, p. 622. The Court offered no basis for why Mr. Scheckin's prior role in the Yukos case diminished his credibility or the admissibility of his testimony. Rather, it demonstrates his familiarity with the subject matter. The Court did refer to Mr. Scheckin having served as a lawyer for the tax inspectorate rather than an auditor, but that is not a credible reason to disqualify him. The Russian Criminal Procedural Code does not set forth a prohibition against lawyers serving as expert witnesses. As is discussed in more detail in the section concerning the denial of procedural rights, the Court improperly gave weight to attacks on Mr. Scheckin's qualifications based on a letter offered by the Procuracy, but refused the defense's request that the author appear in court for cross-examination as to the basis for these criticisms. This form of collateral attack is contrary to fundamental fairness.

B. The Court Unduly Restricted The Defense's Introduction of Evidence.

1. Timing.

The Court denied the Defense an opportunity to impeach the Procuracy's witnesses with relevant documents. During the Procuracy's examination of its witnesses, defense attorneys sought to introduce certain documents that were necessary for cross-examination. However, the Court refused to allow these documents, stating that their introduction was not timely: The Court noted that the documents should be introduced later at trial, after the Defense began presenting its case. *See e.g.*, September 21, 2004 Trial Transcript.

However, most of these witnesses were not available later at trial because the defense did not possess the Procuracy's subpoena power to require their appearance. Although the defense could request the Court to subpoena the witnesses, such requests would be entirely in the Court's discretion. Here, the trial record demonstrates that the Court effectively stripped Messrs. Khodorkovsky and Lebedev of their right to introduce evidence for impeachment purposes. This ruling by the Court violated Art. 121 of the Russian Criminal Procedure Code, which provides that a defendant's requests similar to the one above should be considered and *resolved* immediately after they were made. *See also* Arts. 119, 121 of the Criminal Procedure Code.

2. Unreliable Documents.

Furthermore, the Court refused to give any weight to a series of documents from the Inspectorate of the Russian Federation Ministry for Taxes and Levies and the Head of the Financial Directorate for the City of Lesnoy, respectively. The Inspectorate documents attested to the *bona fides* of the oil trading companies Messrs. Khodorkovsky and Lebedev allegedly caused to illegally pay taxes with the Yukos promissory notes; the Directorate Documents attested to the redemption of all Yukos promissory notes and that there was never any problem with securing payment. These documents establish that the defendants were not guilty of violating either Articles 199 (tax evasion by paying with promissory notes) or 159(3) (theft by securing an illegal tax refund). In order to avoid acquittal, the Court found that the documents were unreliable because the acting head of the Inspectorate and the head of the head of the ZATO Lesnoy Administration were under "preliminary investigation" for granting improper tax benefits and the defense did not offer the documents into the record during the preliminary investigation of Messrs. Khodorkovsky and Lebedev. *See* Verdict, pp. 626-27. The former rationale is convenient since the Procuracy had a clear ulterior motive to initiate said "preliminary investigations."

More importantly, these investigations do not undermine: a) the testimony of the representative from the Lesnoy Administration, Lyubov Myasnikova, about the legal receipt and redemption of the promissory notes submitted by the four companies in question; b) the substance of the 2002 study prepared by Mr. Bochko, albeit excluded as noted above; and c) the prosecution witnesses from the Administrations of Cheliabinsk Region, Igor Kustov, and the Kirov Region, Sergey Dobrovolsky, who testified to the

redemption of Yukos promissory notes from other companies. Finally, defense counsel's so-called "failure" to submit the documents during the preliminary objection is both in contravention of the Procuracy's burden of proof and provisions in the Criminal procedure code which allow parties to introduce evidence during trial. This further evinces that the Court raised it as a make-weight argument.

3. Technical Grounds.

In denying defense's numerous requests to introduce evidence, the Court often failed to cite to any applicable law, which purportedly gave it grounds for denial. The Court refused to admit certain exculpatory evidence presented by the defense based on various technical grounds. In contrast, the Court applied different standards to the Procuracy. When the Procuracy sought to introduce the documents that should have been dismissed on procedural grounds, the Court always allowed the introduction of these documents. *See* February 18, 2005 Trial Transcript (allowing the introduction of the documents, which did not have witnesses' signatures and names).

In fact, in the overwhelming majority of cases, the Court allowed the Procuracy to introduce the evidence but denied the same right to the Defense. For example, in making an initial determination as to which documents could be introduced by the defense, the Court accepted only two documents and rejected sixteen.

These actions by the Court were in direct violation of the European Convention on Human Rights, Russian Constitution, and Article 244 of the Russian Criminal Procedure Code, which provides that both sides have an equal right to present evidence in court. *See* Art. 244 of the Criminal Procedure Code.

THE COURT ALLOWED THE USE OF DOCUMENTS OBTAINED THROUGH ILLEGAL SEARCHES AND SEIZURES.

The Court's approach to the defense's motions to exclude evidence was completely opposite to the technical bases relied upon to exclude the expert testimony described above. The defense challenged many of the searches conducted by the investigators and detailed how they failed to comply with the requirements established in the Criminal Procedure Code and asserted that the alleged evidence resulting from those searches should be suppressed. The Court could not avoid the fact that certain actions were facially and self-evidently inconsistent with the restrictions established in the Criminal Procedural Code; however, it nevertheless rejected all of the defense's motions to exclude evidence on the grounds that the mistakes made in the process of collecting it were inconsequential or made in good faith, or, alternatively, that the evidence was inherently reliable and the violation did not justify disregarding it. Examples include:

1. Sanction of the Search of Advocate Drel's Office.

The Court rejected the defense's motion to exclude evidence seized in the search of Advocate Anton Drel's office at 88 Zhukovka, despite the undisputed fact that the investigators did not have the proper prior authority to conduct the search. Advocate Drel was the lead lawyer for Mr. Lebedev at the time of the search. The Court acknowledged that prior judicial approval is necessary to conduct a search of an advocate's office. The Court avoided suppressing the extensive materials seized during that raid on the grounds that the investigators were searching a law office, but did not know that it was an advocate's office and specifically did not know it was Advocate Drel's office. The proposition is preposterous because the entrance to the floor of the building had a sign identifying Advocate Drel as an occupant, the file cabinets searched were labeled as containing Advocate's files related to the defense of Defendant P.L. Lebedev, and Advocate Drel's role in the case was well known to the Procuracy and the investigators. At the time of the search, he was scheduled to appear at a pretrial detention hearing for Mr. Lebedev. To the extent the investigators initially were legitimately ignorant of the true status of the premises, they were informed of the mistake by other occupants of the office and by Advocate Drel, who returned while they were searching his files. Notwithstanding this notice of the need to secure additional authorization, the investigators directed Advocate Drel to leave and continued their illegal search and seizure. Over objections by the defense, the Court allowed the seized documents to be part of the trial record and further relied on them in its verdict.

2. Multiple Searches Conducted Based on One Warrant.

The Court rejected the defense's motion to exclude the documents seized in the last three of four searches of the offices of Bank Menatep, Saint Petersburg, conducted on the same warrant. The defense based its challenge on Art. 182 of the Criminal Procedure Code which requires that each search be performed based on the proper "resolution," indicating location to be searched and/or documents subject to search and seizure. The Court reasoned that the Criminal Procedure Code does not require a separate resolution, *i.e.*, warrant, for each search. However, the defense's interpretation is consistent with the

strict construction of the law requiring prosecutorial or judicial approval for every search and seizure. Otherwise, there would be no limit to searches and seizures conducted on a warrant once issued and then used years after without any justification for it.

3. Discrepancies in Search Records Repeatedly Excused.

The defense moved to exclude evidence seized during searches based on information in the Procuracy's records. In three instances, the records indicated that the documents were examined by investigators between 29 days and 3 hours before they were seized. In a fourth instance the records indicated that the documents were examined in Moscow just 5 minutes after they were allegedly seized in Murmansk. The Court rejected each challenge on the grounds that the discrepancy clearly was a technical error, probably the result of a clerical error. *See Verdict*, pp. 629-32. The Court noted that the errors were not a basis to doubt the reliability of the records. This logic contradicts the Court's approach to excluding the testimony and/or reports of defendants' expert witnesses for such reasons as the review of improperly certified documents from the court record. Furthermore, the willingness to assume that dates were transposed here is quite different from the Court's analysis of the evidence in the Apatit episode where the Court made much of a debit receipt that was dated the day before a deposit receipt. Rather than entertain the possibility the dates were transposed, the Court drew the most adverse inference possible against the defendants.

4. Failure to Accept Testimony of Witnesses to Illegal Searches.

The defense introduced the testimony of witnesses to the searches of various Group Menatep related offices and the office of Russian Duma Member Dubov, located at the GML company facilities. The witnesses testified to various irregularities including the investigator's failure to have the appropriate witnesses present throughout the search of each office. The witnesses were employees of the GML-related entities who occupied the searched premises. The Court found their testimony to be unreliable because they were employed by the GML-related companies that leased the premises despite the fact that these witnesses were invited by the investigators to participate in the searches and attest to their legality. The Court's logic would eliminate almost all such challenges to a search, since the people present for the search of an office almost always will be employed by, or have some affiliation with the company targeted by the search. Furthermore, the Court held these witnesses to a different standard than the other witnesses utilized by the investigators – Russian military personnel. It is impossible to conclude that these soldiers were more objective witnesses than those who testified for the defense, yet the Court did so.

Motions to suppress evidence such as the ones described above are often considered an effort to hide from the facts behind technical procedural protections. The complaints about how the Court ruled on these motions do not constitute an admission that any of the illegally seized documents support the conviction of either defendant. Moreover, here such an argument is a red herring for two reasons. First, there is nothing technical about relying upon the protections against the illegal search and seizure of documents when faced with the full force of the government waging a political and

economic attack as is the case here. In particular, the search and seizure of documents from a defense attorney's office is uniquely offensive and seriously undermines the most basic tenets of an impartial criminal justice system, which is why Russian law recognizes the sanctity of an Advocate's office and affords these facilities a greater protection from government intrusion. Second, and more important here, the Court's willingness to gloss over the alleged defects in the Procuracy's case while repeatedly relying on flimsy reasons to exclude evidence offered by the defense demonstrates its predisposition to find the defendants guilty. This is precisely the reason why the verdict should not be afforded the presumption of regularity.

VIOLATIONS OF DUE PROCESS DURING THE TRIAL RELEVANT TO THE INTEGRITY OF THE VERDICT

The trial was marred by repeated violations of Messrs. Khodorkovsky and Lebedev's due process rights, and these violations should cause the Appellate Court to set aside the Court's verdict. In addition to the admission of illegally seized evidence discussed in the proceeding section, the Court improperly permitted or engaged on its own in the following violations:

A. Improperly Allowed the Admission of Out of Court Statements from the Preliminary Investigation.

Under Art. 240 of the Criminal Procedure Code, the Court is prohibited from relying on the out of court statement of witnesses except where, *inter alia*, the witness is either unavailable to testify due to death or other just reason. *See* Art. 281 (1) and (2). In violation of this fundamental principle, the Court relied on the statements made by Mr. Spirichev, Kartashov and Karaseva when it convicted Messrs. Khodorkovsky and Lebedev of corporate tax evasion (Art. 199) and fraudulent receipt of tax refunds (Art. 159). *See* Verdict, p. 501. In admitting the testimonies of these witnesses which they provided during the preliminary investigation, the Court did not invoke any of the Art. 281 exceptions to the general rule. Instead, the Court relied on the fact that their statements were found at the office of the Yukos legal department. The Court interpreted this fact to indicate that these witnesses were under the control and influence of Messrs. Khodorkovsky and Lebedev, and therefore could not truthfully testify during the trial. *See* Verdict, pp. 498-500.

Furthermore, Art. 281(3) prohibits the Procuracy from introducing into the Court record the protocol of a witness' interrogation during the preliminary investigation unless the witness' trial testimony contradicts statements made during the preliminary investigation (Art. 281(3) of the Criminal Procedure Code). However, using this narrow exception as an excuse, the Procuracy read the entire interrogation transcript – also called a “protocol” – into the trial record in violation of one of the key principles of the Russian criminal procedure law prohibiting the introduction of out of court evidence (Art. 240 of the Criminal Procedure Code). *See generally* October 4, 2004 Trial Transcript. This universal rule protects the rights of defendants who are not entitled to participate in the interrogation of witnesses by investigators, which generally are tainted with violations of criminal procedural law and result in a confusing testimony. In no less than twelve instances, the Court permitted the Procuracy, over the timely objection of the defense, to read the entire protocol, sometimes constituting more than twenty pages of testimony, where the Procuracy could not point to a single discrepancy in the witness's prior testimony. *See e.g.* October 15, 2004 Trial Transcript. The witnesses repeatedly testified at trial that there were no contradictions, and that the in-court statements were more accurate. *See id.* However, the Court ignored this fact and in all such instances admitted the testimony when the Procuracy requested it, despite the defense's objections and requests to provide specific examples. Notably, the Procuracy could not point to any specific statements it found contradictory; and even when it did, the contradictions were so minor that they did not justify invoking the Article 281(3) exception (calling for

substantial contradictions). In other instances, the Procuracy's examples were so broad that it was impossible to figure out what part of the testimony was contested. To no avail, the defense asked the Court to notice that the contradictions were insignificant. *See id.* p. 58. For example, the Procuracy had once improperly invoked the exception because the witness had said "probably" instead of "most likely." *See id.*

Despite all objections by the defense, the Court subsequently relied on such out of court statements in its verdict, effectively depriving the defense of the means to properly confront the witness regarding those points not covered by their in-court testimony. The prejudice created by the admission of these protocols was exacerbated by the fact that in each instance the Court permitted the Procuracy to supplement the testimony of its own witnesses after they apparently would not testify as the Procuracy wanted.

Several examples illustrate these violations. In 2004, the Procuracy questioned two witnesses at trial, Messrs. Vostruhov and Klassen. Years earlier, these witnesses have been interrogated in the investigator's office. Both witnesses emphasized at trial that there were no significant contradictions between their in-court and out-of-court testimonies.¹ Nevertheless, the Procuracy sought to introduce the out-of-court reports. *See* October 11, 2004 Trial Transcript. The court admitted out-of-court testimony ignoring the defense's argument that neither Messrs. Khodorkovsky and Lebedev or their counsel were present during the interrogations and had no opportunity to object about the manner in which they were conducted.

Under Article 14(3)(e) of the International Covenant on Civil and Political Rights (ratified by Russia on March 23, 1976), the defendants are entitled to the following minimum guarantees when it comes to witnesses: "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Furthermore, the European Convention on Human Rights Article 6(3) states that everyone has a right "to have adequate time and facilities for the preparation of his defense" and a right "to examine or have examined witnesses against him...." As shown below, Messrs. Khodorkovsky and Lebedev were deprived of such guarantees by the Court's continuous and maximally prejudicial disregard of their rights when it relied on the witnesses' out of court testimony.

The Procuracy committed numerous procedural violations when it recorded the witnesses' statements during the preliminary investigation. The Court ignored the fact that most of the interrogation protocols it relied on did not represent the witnesses' true testimony. Instead, the protocols were prepared as a narrative by the interrogator in a

¹ To invoke the narrow exception in Art. 281(3), the Procuracy often rephrased the witness's testimony in a way that it lost its original meaning. For example, the Procuracy claimed that witness Nesheretov admitted during its investigations to being influenced by Mr. Khodorkovsky. However, the witness never made such comments – he merely stated that he "believed Mr. Khodorkovsky to be a director of Bank Menatep." *See* October 15, 2004 Trial Transcript. Mr. Lebedev objected to this improper behavior, but the court ignored his objection. *See id.*

first-person form which represented only a summary of witnesses' responses to the questions. Witnesses that testified at trial confirmed that the investigators used leading and compound questions to solicit the answers they desired. *See* 9/9 Ushanov Testimony; 9/30 Lipatnikov Testimony; 10/15 Nesheretov Testimony. Witness Klassen, complained that the investigator wrote down "what he wanted to hear," not what the witness really had said. *See* 10/11 Klassen Test. Moreover, the investigators read the documents to the witnesses before asking questions, which often caused them to adopt the testimony as their own. *See* 9/9 Ushanov Test. As a result, the protocols did not accurately reflect whether witnesses' testimony was based on first-hand knowledge or instead on the information provided to them by the investigators so as to solicit a "correct" response. *Id.*

Moreover, the Court disregarded the witnesses' complaints that the Procuracy attempted to wear out the witnesses. The interrogations lasted for four-to-six hours at a time. *See* 10/11 Klassen Test.; 9/24 Makhovikov Test. At the end of the interrogations, the witnesses were told to sign lengthy statements prepared by the Procuracy. *See* 10/11 Klassen. At trial, which happened several years later, the witnesses complained that they were reluctant to sign because some statements were inaccurate. However, because they felt pressured by the Procuracy, and because they did not want to spend several more hours correcting the testimony, many witnesses signed the statements that the Procuracy prepared. *Id.* Another witness testified that he was able to review only a small portion of his testimony before he had to sign it. *See* 10/4 Abramov Test. The witnesses also informed the Court that he had to sign the testimony which was presented in part only *See id.* While some reports were typed, most were handwritten by the investigator. *See* Spirichest Test.; Kartashov Test.; Karaseva Test.; Not only was the handwriting illegible, the witnesses often did not get to even view the statements in full. *See* 10/4 Abramov Test. Usually, after the witnesses had been interrogated for hours and were too tired to focus on the accuracy of the statements, they had no choice but to sign. *See* 10/11 Klassen Test.

Lastly, in instances where the interrogations were recorded and then transcribed by the Procuracy, the law required production of such recordings to the defense. *See* Russian Criminal Procedural Code, Art. 47 However, the Procuracy failed to produce the tapes. The Court, nevertheless, ignored the defense's objections in introducing the protocols transcribed from the missing tapes because some pages in the reports were signed only by the investigator, not by the witness. Most importantly, the testimony was often transcribed in the witnesses' absence, and the Procuracy did not offer any proof that these transcriptions were accurate. *See* April 10, 2005 Trial Transcript.

B. Improperly Allowed the Admission of Out of Court Statements from the Other Investigation.

Protocols of witness interrogations conducted during the preliminary investigation of a separate criminal case should not be admitted into the trial record without proper procedural documents. In at least one instance the Court admitted such a collateral protocol.

C. Denial of the Right to Conduct Direct Examination of Expert Witnesses.

The Court refused to allow defense counsel to examine two of the expert witnesses – Messrs. Semyonov and Bochko. As a result, the defense was prohibited from properly establishing the witness's competency and the substance of their expert opinions. This refusal to call important witnesses violated Messrs. Khodorkovsky's and Lebedev's rights under Article 6(3) of the European Convention on Human Rights. Moreover, under Articles 243 and 271 of the Criminal Procedure Code the Court abused its discretion by dismissing defense counsel's questions of Mr. Bochko *sua sponte* and absent any objection by the Procuracy.

D. The Court Restricted Witnesses in their Answers.

The Court interfered with the defense counsel's ability to question the Procuracy's witnesses designed to challenge credibility of the Procuracy's evidence. For example, in answering the defense's questions, Mr. Mustafin relied on a series of tax audits reports. *See* March 23, 2005 Trial Transcript. Because the witness could not specify the answers for lack of memory, counsel presented him with these tax audit reports for recollection. Counsel's questions were designed to discredit the tax audit reports which contained contradicting statements and inaccuracies. However, when the witness was asked to confirm the information stated in the report, the Court *sua sponte* ordered the witness not to answer. The Court reasoned that the witnesses is not authorized to repeat what the document says.

Furthermore, the Court refused the representative of a civil claimant, the Russian Tax Ministry, to ask a question simply because the answer would be against the Procuracy's case. *See* 3/23 Mustafin Test. (The Procuracy's witness, Mr. Mustafin, was precluded from answering a question which, if answered, would reveal that the tax authorities accepted promissory notes as payment of taxes from companies other than the four entities registered in ZATO Lesnoy).

E. Denial of the Right to Call Procuracy Witnesses.

The Court refused the defense's request to call Mr. Schulgin, a high ranking official of the Tax Ministry to testify at the trial. The Court ruled that its decision was based on the prohibition against a civil claimant, *i.e.*, the Tax Ministry, which sought to recover the allegedly unpaid corporate taxes, being called as witness. However, the Court permitted Mr. Schulgin to testify through the Procuracy's introduction of a letter collaterally attacking the competency of the defense expert Mr. Scheckin. The Court also refused to call Procuracy key experts Messrs. Eloyan and Kupriyanov for cross examination in connection with their report related to the Apatit episodes. The Court ignored numerous mistakes and the arbitrary application of methodologies in their report, as well as their lack of expert qualifications. Documents provided by the Procuracy received from these two experts in violation of the Criminal Procedural Code did not provide any information on Mr. Eloyan's education and moreover indicated that Mr. Kupriyanov stopped practicing in 2002 according to his employment records. *See* March 3,

2005 Trial Transcript. Therefore, the Court denied the defense its right to cross-examine the expert report.

This refusal to call important witnesses violated Messrs. Khodorkovsky's and Lebedev's rights under Article 6(3) of the European Convention on Human Rights, which provides that a criminal defendant has a right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

F. Intimidation of Witnesses.

The Procurator threatened at least two key defense witnesses, Mrs. Myasnikova from ZATO Lesnoy who testified regarding payment of taxes, and Mr. Rakhmankulov who testified regarding the illegal searches at Zhukovka. The Court overruled the timely objections of defense counsel and refused to admonish the Procurator. In several instances, the Court allowed the Procuracy to introduce evidence showing that several potential witnesses were either under the criminal investigation or were suspected by the Procuracy in committing crimes relevant to Messrs. Khodorkovsky and Lebedev's charges. *See e.g.* March 23, Trial Transcript. (the Procuracy announced that Mr. Ivannikov, Head of the ZATO Lesnoy administration, was under the criminal investigation and that the witness Myasnikova was a potential suspect in that case). This was designed to discredit the witnesses or the evidence in the defense's case as well as to impose coercive pressure on other witnesses. These tactics are particularly egregious given the politically charged nature of the proceedings and the risks any defense witness took in appearing at the trial. It also is particularly prejudicial because under the Russian Criminal Procedure Code the defense's power to subpoena witnesses to appear at trial is entirely in court's discretion. As a result, the defense's right to call witnesses was substantially limited due to the fear for the safety and well being of witnesses.

G. Continuation of the Investigation During Trial.

Under the Russian Criminal Procedure Code, the Procuracy's right to conduct an investigation and collect evidence is limited to the preliminary investigation stage of the criminal proceedings. In fact, when the Procuracy submits the case to the court for trial, it certifies that it has sufficient evidence to support the charges. The Procuracy ignored this rule and interrogated witnesses just prior to their appearance at the trial under the guise of another criminal investigation. For example, the Procuracy interrogated Mr. Khvostikov five times just a few days before his testimony at trial on the same issues as during the court hearing. *See* September 17 and 20, 2004 Trial Transcript. The Court ignored defense counsel's objections and allowed the Procuracy to improperly influence witness testimony in this manner. At the same time, the Court objected and sanctioned the defense counsel every time he undermined the Procuracy's arguments on cross examination because it viewed counsel's questions as improper influence of witness's testimony.

H. Interference with Assistance of Counsel.

During the trial Messrs. Khodorkovsky and Lebedev's access to defense counsel was significantly restricted. The time in which the lawyers could consult with their clients in the detention facilities was reduced, and at one stage of the trial the Court eliminated the Wednesday recess which had been the primary opportunity for client and counsel to communicate after the start of the trial. While in Court, armed guards regularly stepped between counsel and their clients when they attempted to communicate directly through bars of the cage in which the defendants sat. When Mr. Khodorkovsky pursuant to Art. 24(2) of the Constitution requested to disclose the document restricting his communications with counsel, the Court ignored his request for lack of authority to intervene. August 31, 2004 Trial Transcript. The right to counsel is established in Article 48 of the Russian Constitution, and the interference with communications with counsel is a denial of that right.

I. Failure to Disclose Exculpatory Evidence.

It is a fundamental due process right that the prosecuting authority disclose evidence that may exonerate a criminal defendant. *See* Art. 82(5) and 47(12) of the Criminal Procedure Code (requiring the Procuracy to maintain the integrity of evidence collected by the investigation and the right of counsel to review such evidence). In at least three instances of which the defense is aware concerning the allegations of corporate and personal tax evasion and theft, the Procuracy had access to exculpatory evidence from governmental entities but failed to introduce it into the record of the preliminary investigation or provide it to the defense. The first document was a letter issued on December 29, 1999 by the Ministries of Taxation and Finance "grand fathering" the use of promissory notes under pre-existing agreements with regional tax authorities for the year. The defense ultimately introduced it on cross-examination of Procuracy witnesses who could not explain the failure to disclose the letter. The second document was the study commissioned by the ZATO Lesnoy Duma and Administration entitled "On The Economic Effectiveness of The Investment Program of the Lesnoy Municipality for 1999 and The Subsequent Years." The Procuracy unquestionably had access to the files of ZATO Lesnoy during the investigation, and this document was particularly probative because it was prepared before the preliminary investigation had been opened and was not subject to any result driven conclusions by anyone with an interest in the outcome of this case. The third example involves the Procuracy's denial to disclose Mr. Lebedev's American Express credit cards on which it relied to demonstrate personal tax evasion by Mr. Lebedev. The defense counsel argued that if such evidence had been presented to counsel it could show that the Procuracy's reliance was misplaced. Although the Court had denied the defense's motion to compel production of the credit cards for lack of authority to assist counsel in collecting evidence, it later relied on this evidence in its verdict even though such evidence was absent from the record.

The potential prejudice caused by the Procuracy's failure to disclose the document was compounded by the Court's ruling sustaining the Procuracy's objection to the defense's attempt to introduce it into the record. The Court's complicity in each of the above-noted due process violations undermines the reliability of its verdict. Once

again the Court has demonstrated a bias against the defense and held it to a different standard than the Procuracy.

THE DISPROPORTIONATENESS OF THE SENTENCES DEMONSTRATES THE COURT'S LACK OF ADHERENCE TO THE RULE OF LAW

The nine year sentences announced on May 31, 2005 by the three judge panel after the ten month trial of Messrs. Khodorkovsky and Lebedev made it clear that the Court was captured by the political directives of the Kremlin resulting in a sentencing decision which was striking in its intellectual dishonesty and punctuated by its lawlessness. The convictions of Messrs. Khodorkovsky and Lebedev were based on evidence that was, at best, suspect and often wholly nonexistent. Even the most generous interpretation of the government's evidence presented at trial would support nothing more than civil actions, which in several instances were previously litigated and resolved to the satisfaction of the parties-which included the Russian government.

Even if one accepts, *arguendo*, that the evidence presented could sustain a guilty finding, the nine year sentences imposed on Messrs. Khodorkovsky and Lebedev are grossly disproportionate to the purely economic crimes alleged. Moreover, the sentences do not serve any recognized legal goal, underscore the selective nature of the prosecution and defy sentencing precedent in rule of law countries. The sentence, one year short of the maximum possible, stands as an arbitrary and excessive measure which can only be seemingly justified as punishment for perceived political threats.

For this or any sentence to be justified, it must serve a recognized legal goal and be proportionate to the crimes. When analyzed against each of the principal goals of sentencing and punishment it is clear that the sentences imposed are offensive to the values of a democratic society and the rule of law.

Unlike the factors which primarily drive the decision making process for those convicted for violent crimes such as the protection of the public which is achieved by lengthy periods of incarceration, the recognized theory of punishment for economic crimes begins with an assessment of whether incarceration is appropriate. Most courts consider whether there exists an adequate punishment short of incarcerating a non violent offender, especially one that has no prior criminal history of any kind. In those instances where incarceration is deemed appropriate for non violent offenders, the classic justification for such sentencing and punishment is deterrence. Deterrence takes two forms -- specific deterrence and general deterrence. Specific Deterrence is focused on the individual who committed the alleged crime and aims to ensure that he does not repeat his actions when released. General Deterrence seeks to send a message to society, which is that if you commit acts of a similar nature and are ultimately convicted, that you will be punished by a sentence of incarceration. Neither specific nor general deterrence are applicable to justify the sentences imposed in this case.

One of the purposes of sentencing is to tailor the punishment to the individual, taking into consideration the nature and seriousness of the offense, the individual's prior criminal record, his educational background, employment history, and contributions to society. It is this calculation, on balance, that often results in alternatives to incarceration for non violent first offenders, especially where individual victims are few and restitution for wrongful conduct is made or possible. In this case, both Messrs. Khodorkovsky and

Lebedev were "first time offender"; they led exemplary lives as businessmen and entrepreneurs contributing enormously to both the economic and social fabric of a country that changed virtually overnight. Obviously ignored by the Court, they provided the leadership, business acumen and financing that turned major companies from virtual bankruptcy to models of economic efficiency, profitability and corporate governance. This not only had a direct positive impact on the quality of life of the hundreds of thousands of workers but contributed to the overall economic growth of the Russian Federation. On a personal level, together they personally funded a pension plan for Yukos workers which was worth several billion dollars before the government nullified the effort on its way to expropriating the company. Both Messrs. Khodorkovsky and Lebedev funded, at great expense, many social programs which were designed to promote the free exchange of ideas in a "democratic" country. These contributions alone should cause an independent court to consider fashioning a sentence without further jail time, such as one that would allow both men to provide monitored community service as an alternative to jail which would take advantage of their special skills and vast knowledge and benefit society.

When you also consider that they were detained after arrest and through the trial (Mr. Khodorkovsky 18 months and Mr. Lebedev 23 months), "restitution" was made by the government takeover of Yukos, "restitution" was offered and refused for the personal income tax counts, their educational background and strong family ties and the medical condition of Mr. Lebedev, incarceration becomes particularly unwarranted and extreme.

Any argument for specific deterrence in this case fails before it begins. The principal economic crimes for which this Court rendered convictions stem from the period of privatization which occurred in the mid 1990's are now incapable of repetition. That chapter in the history of the Russian Federation has long since been closed. Moreover, the government in essence divested Messrs. Khodorkovsky and Lebedev of their interest in Yukos, initially by freezing the Group Menatep owned shares and subsequently by dividing and taking ownership through highly suspicious and illegal means of what was once the largest company in the country. Thus, it is now impossible to deter them from similar conduct because the conditions which gave rise to privatization are no longer present and moreover they are without means to commit "crimes" of a similar nature.

Any attempt to justify any period of incarceration, much less one of this length, based on the concept of general deterrence is similarly without merit. Messrs. Khodorkovsky and Lebedev were prosecuted not for improper activity, but for the perceived threat they posed to the Kremlin. Virtually all of the other "oligarchs" who acquired vast wealth resulting from successful privatizations engaged in precisely the same conduct as Messrs. Khodorkovsky and Lebedev, and many to a far greater degree. However, none were as generous with their contributions to society. But selective prosecution aside, only a few individuals possibly could be targets of a general deterrence argument because they were involved in the privatization of previously state owned companies. These individuals are now no longer subject to prosecution and thus cannot be deterred. As the trial of Messrs. Khodorkovsky and Lebedev illustrates, even with the tortured factual backdrop of "leaders of an organized criminal group," the statue of

limitations for crimes committed can only extend ten years. The Court was unable to sentence on the Apatit charge because it fell outside that ten year statute. Putting all potential argument to rest and effectively precluding any possible future prosecution for activities that occurred in the period of privatization, the Kremlin recently reduced the statute of limitations to three years. Thus, in addition to highlighting the selective nature of Messrs. Khodorkovsky and Lebedev prosecution, the recent law prevents general deterrence in this case. If you cannot be prosecuted then general deterrence is not possible.

Another separate theory of sentencing currently used in some courts may be described as a "cost / benefit" analysis, which states that punishment by incarceration is only justified when society benefits more than it suffers. This is a totality of the circumstances approach in which a court considers when deciding whether and to what degree punishment should be imposed, asks the question: Is society better off with this individual in prison or as part of society? This analysis is, by definition, esoteric and discretionary. Under this recognized legal theory, incarceration for any period would be most difficult to justify. Should two men who made substantial contributions to Russian society and played a significant role helping Russia develop into a modern capitalist power be imprisoned for crimes which lacked evidentiary support, were the only ones prosecuted and in some cases would not be crimes if prosecuted today? For the past two years, society has been denied the resources, intellect, and loyalty to their country that Messrs. Khodorkovsky and Lebedev have demonstrated through their life and works. This further analysis does not support their continued incarceration.

In the final analysis, fairness must be the true test of whether justice has been served. When a constitution provides for individual rights for the accused, those rights ultimately are exercised in a trial setting where an independent court allows evidence, makes factual determinations and applies those facts to the law and renders a verdict. That is the rule of law. That is precisely what did not occur in this case and the verdict and resulting sentence is as flawed as it is unfair.