

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRIEF OF NGO ANTI-CORRUPTION ACTION CENTER AS AMICUS CURIAE

TABLE OF CONTENTS

I.	INTEREST OF AMICUS CURIAE.....	1
II.	ARGUMENT.....	2
III.	ARGUMENT.....	3-8
IV.	CONCLUSION.....	10

**INTEREST OF AMICUS CURIAE**

The Anti-corruption Action Center (the “AntAC”) is a Ukrainian non-governmental non-profit organization founded in 2012. The main goal of the AntAC is to tackle grand political corruption in Ukraine and establish the rule of law through the proper judicial reform. In particular, to achieve this goal the AntAC conducts its civic investigations, analysis of legislation and court proceedings, initiates criminal and other proceedings before the authorities in Ukraine and abroad, works on the recovery of assets that are the proceeds of corruption.

In 2016, the largest and systemic bank for the Ukrainian economy - Privatbank was nationalized [1]. The reasons for the nationalization were numerous abuses by the owners and management of the bank, use of the bank's financial resources in their own interests, inability to recover from the deep crisis and unwillingness of former owners to recapitalize their bank, as well as unbearable risks of bankruptcy losses. Ultimately, the burden of rescuing Privatbank fell on Ukrainian taxpayers. In total, as of December 2019, Privatbank was recapitalized by UAH 198 billion (at that time, approximately USD 8 billion) from the state budget [2].

The AntaAC conducts civic monitoring of the nationalization and related asset recovery processes, as the case of nationalization of the bank is unique for Ukraine and the results of these processes influence both the financial stability of the country and the further establishment of the rule of law and justice. Thus, the AntAC monitors and analyzes all court proceedings related to the nationalization of the Privatbank based on publicly available information and accumulates information on various types of cases.

The AntAC considers that the issues considered by the Court of Chancery of the State of Delaware are of direct interest to the AntAC as the organization specifically monitors the lawsuits on fraudulent, corrupt schemes and money laundering related to the activities of former owners of Privatbank. The AntAC aims to observe the public interest in these disputes, provide transparency and proper public awareness.

Therefore, the AntAC has filed a motion for leave to file this brief.

### **SUMMARY OF ARGUMENT**

This Amicus is written independently and separately from the parties to the case No. 2019-0377-JRS (the "Delaware Action") in the Court of Chancery of the State of Delaware (the "Court of Delaware").

Among the numerous lawsuits between Privatbank, the former owners and associated legal entities, the AntAC paid specific attention to two decisions of the Kyiv Commercial Court:

- 1) No. 910/13313/20 (rendered by Judge Marchenko);
- 2) No. 910/14224/20 (rendered by Judge Baranov).

The AntAC considers it necessary to draw the attention of the Court of Delaware to the numerous and gross violations of procedural law committed by Ukrainian judges of the Kyiv Commercial Court in the above cases. Both of them were initiated by PJSC Nikopol Ferroalloy Plant (the "NZF"), which is also owned by the former owner of Privatbank, Igor Kolomoisky.

The AntAC considers both the direct violation of the direct norms of the Commercial Procedure Code of Ukraine by judges as well the extreme speed of consideration of such significant cases by the Ukrainian court comparing to the vast majority of cases considered by the Kyiv Commercial Court and specifically by the judges Marchenko and Baranov.

In this brief, the AntAC highlights the most serious violations of procedural law by judges Marchenko and Baranov, which include:

- the absence of the reaction of judges to the abuse of their procedural rights by the NZF directly provided by the procedural law;
- Judge Marchenko's gross violation of the rules for merging cases into one proceeding;
- in both cases, the judges illegally went beyond the subject matter of the lawsuit and established circumstances that were not relevant to the issue of the dispute;
- the courts accepted the new evidence from the plaintiff (NZF) after the expiration of the statutory period for their submission. Moreover, the plaintiff (NZF) in no way justified the

impossibility of providing such evidence before, but the need for such a justification is directly provided by procedural law;

The AntAC also finds facts that indicate the dishonesty of judges in making decisions and extra-procedural interest in their adoption.

A more detailed statement of violations in cases No. 910/13313/20 and No.910/14224/20 is provided in the argument below.

AntAC asserts that given those violations these decisions do not establish any prejudicial facts and should not be taken into account by the Court of Delaware in course of the Delaware Action.

## **ARGUMENT**

## I.

### **Abuse of procedural rights by filing frivolous lawsuits.**

The lawsuits filed by NZF with the Kyiv Commercial Court are frivolous and should have been rejected. The lawsuits filed by the NZF against the Privatbank are obviously artificial and lack legal grounds. The NZF claims that Privatbank does not recognize its "right to terminate obligations" under the loan agreements. However, the Privatbank has not denied in any way that the NZF has no debt to Privatbank under any loan agreements.

In turn, in the case of the Delaware Action, the NZF is not a party and has not filed any claims in regards to the subject of the dispute.

The Commercial Procedure Code of Ukraine defines what is the abuse of procedural rights by the parties [3]. Such abuses include the filing of a frivolous lawsuit, a lawsuit in the absence of the subject matter of the dispute or a dispute that is obviously artificial in nature. The consequences of the abuse of the procedural rights by the party is that the court, taking into account the circumstances of the case, has the right to leave without consideration or return a complaint, an application, or a petition [4].

The decisions of the Kyiv Commercial Court indicate that in 2020 the NZF has submitted a certificate issued by Privatbank confirming the absence of any debt by the NZF in favor of the bank.

Representatives of Privatbank in both cases in the Kyiv Commercial Court filed motions for recognition of actions of the NZF an abuse of procedural rights. However, such motions in both cases were ignored by the court. Although, the court had its complete discretion and could independently without the request of the other party, decide on the existence of abuse of procedural rights by the plaintiff and, accordingly, return the claims. In AntAC's opinion, the court rejected the motions unreasonably.

## II.

### **Violation of the rules for merging the cases by Judge Marchenko in case No. 910/13313/20.**

The NZF filed 15 different lawsuits to the Kyiv Commercial Court, which arise from different grounds - different loan agreements, as well as unrelated and cannot be related by common evidence. Based on the subject matter of these claims (recognition of the obligation under each of the loan agreements as terminated), the initial financial documents, each of which relates exclusively to its loan agreement, are subject to examination in each case separately.

However, in violation of para. 1, 2 Art. 173 of the Code of Commercial Procedure of Ukraine, Judge Marchenko with her decision of 05.10.2020 [7] merged into one proceeding 14 other lawsuits of the NZF, not related to each other by the grounds and evidence.

The Commercial Procedural Code of Ukraine establishes the grounds and procedure for merging several cases into one [5]. In particular, it is permissible to merge several actions

brought by one plaintiff against the same defendant in one proceeding, if the claims on such lawsuits are related to the grounds or the evidence presented. Cases that are in the proceedings of the commercial court, in the case of combining them into one proceeding are transferred to a judge who previously opened proceedings in the case before other judges [6].

The violations of the procedural law have become possible due to the fact that the Commercial Procedural Code of Ukraine does not allow to separate already merged claims, and the decision to join cases cannot be appealed to the court of appeal.

The AntAC would like to draw the Court of Delaware's attention to the fact that Ukrainian courts have an automated system for distributing cases between judges. It is performed by a specific computer program and takes into account the workload of judges, their specialization, excludes absent judges, etc. Interference in this system is subject to criminal liability. Therefore, cases of direct interference with a computer system are very rare.

However, the AntAC considers the following actions a covert manipulation of the automatic case distribution system, given the following chronology:

- All 15 lawsuits ( see Table 1) were filed with minor procedural defects that made it impossible to initiate proceedings without eliminating such defects;
- Cases were divided between 12 judges of the Kyiv Commercial Court (some judges were assigned two cases);
- All 15 claims were left without action because the plaintiff did not pay the court fee (probably intentionally);
- Then the plaintiff eliminated the defects (by paying the court fee) with regards to the filing which was distributed to the "necessary" or convenient judge in the first place, waited for the opening of proceedings and only then eliminated the defects of the other 14 lawsuits;
- Subsequently, the plaintiff submitted a request to merge all cases into one to the judge who opened the proceedings first;
- However, the time of the opening of the proceedings, in fact, is managed by the plaintiff, because they decide in which of the 15 cases to eliminate the defects first.

### III.

#### **Going beyond the subject matter of the lawsuit and establishing circumstances that are not relevant to the issue of the dispute**

The conclusions of the decisions of the Kyiv Commercial Court in cases No. 910/13313/20 and No. 910/14224/20 on the intended use of credit funds and sources of repayment of loan obligations are outside of the initial claims set out in the lawsuits filed by the NZF. The established circumstances are not relevant to the issue of the initial dispute in these cases.

According to the procedural legislation of Ukraine, the subject of the lawsuit is a certain substantive claim of the plaintiff to the defendant, in respect of which the plaintiff requests a court decision. The claim is based on the circumstances in which the plaintiff substantiates its claims for the protection of their rights and interests.

The imperative norms of the procedural law stipulate [8] that when making a decision, the court may not go beyond the initial claims. The only circumstances that are the subject of proof in these cases are the establishment of the circumstances of crediting the amounts of funds taken by the NZF the loans, interest and other payments on the loan to the account of Privatbank.

The provisions of the Civil Code of Ukraine governing the relations under the loan agreement shall apply to the relations under the loan agreement [9]. The obligation is terminated by proper performance [10]. The loan is considered repaid at the time of crediting the borrowed amount to the lender's bank account [11].

Instead, in both cases, the judges of the Kyiv Commercial Court went beyond the subject matter of the lawsuit. In violation of Art. 237 of the Code of Commercial Procedure of Ukraine the judges established circumstances (regarding the targeted use of loans and sources of repayment) that have no legal significance for these claims.

However, the NZF tries to use decisions No. 910/13313/20 and No.910/14224/20 to substantiate the motion in Delaware Action with the prejudicial facts established by the Kyiv Commercial Court in violation of the procedural requirements provided by the Ukrainian legislation.

#### IV.

#### **The judges accepted the new evidence from the plaintiff after the launch of the court proceedings.**

Procedural legislation of Ukraine clearly provides that plaintiff shall submit all evidence simultaneously with the filing of the lawsuit. If it is impossible to include some evidence in the initial filing, the plaintiff shall prove this in writing and duly substantiate the reason for such impossibility.

The Commercial Procedural Code of Ukraine [12] clearly regulates the procedure and deadlines for submission of evidence by the parties to the case. If the evidence cannot be submitted within the period established by law for objective reasons, the party to the case must notify the court in writing and indicate:

- Evidence which cannot be submitted;
- Reasons for which the evidence cannot be timely submitted;
- Evidence that confirms that the party has undertaken all necessary actions aimed at obtaining the specified evidence.

If the court finds the reasons for failure to timely submit are valid, it may set an additional deadline for the submission of such evidence (para 4, 5 of Art. 80 of the Code of Commercial Procedure of Ukraine).

However, Judges Marchenko and Baranov of the Kyiv Commercial Court of in cases No. 910/13313/20 and No. 910/14224/20, contrary to the direct and clear requirements of procedural law, accepted the evidence submitted by the plaintiff in violation of the statutory deadline. The evidence considered the target use of loan and sources of loan repayments.

Moreover, in these cases, the particular evidence is copies of the plaintiff's payment documents under each of the loan agreements, which have been in the possession of the NZF at the moment of the filing of the lawsuit. Therefore, there are no objective circumstances that make it impossible to submit such evidence at the moment of the filing of the lawsuit. Instead, the judges accepted those evidence without any justification in violation of established procedure.

## VI.

**Given the volume of court decisions and the speed of preparation of the full text of court decisions, there are reasonable grounds to believe that court decisions were prepared in advance, even before the court hearing.**

The full text of the court decision in case No. 910/13313/20 contains 60,394 characters (with spaces). The full text of the court decision in case No. 910/14224/20 contains 90,958 characters (with spaces). It takes approximately 294 and 443 minutes respectively, to type the texts of this size (at an average typing speed of 205 characters per minute [13]). This is almost 5 hours and 7 hours 23 minutes of net working time. This is purely about the time required for typing of already agreed text.

This is without taking into account the fact that it is a court decision, which sets out both the facts of the case and the assessment of evidence by the court and court conclusions, which are simply physically impossible to do while typing the text of the court decision.

The full text of the court decision in case No. 910/14224/20 was made on January 22, 2021, within a few hours after the decision of Judge Baranov at 3.50 pm (the date of publishing is indicated at the end of the decision). This gives reasonable grounds to believe that the text of the judgment in case No. 910/14224/20 was ready before the adoption of the decision by the judge.

Thus, given the time spent by the judges examining the evidence and examining the merits (see Part VI of the brief), there is a reason to believe that cases No. 910/13313/20 and No. 910/14224/20 were decided by the Kyiv Commercial Court before their consideration on the merits in court.

## VII.

**Judges Marchenko and Baranov of the Kyiv Commercial Court scheduled the hearings in the cases in unprecedented terms.**

In case No. 910/13313/20, the preparatory hearing was held on 18 January 2021 and the case was scheduled for consideration on 22 January 22, 2021, namely three days later. In case No. 910/14224/20 the preparatory hearing was held on 20 January 2021, and the case was also scheduled for consideration on 22 January 2021, namely the next day.

The AntAC analyzed a total of 57 similar rulings of Judge Baranov and 39 rulings of Judge Marchenko [15] made in the period from June-July 2020 till January-February 2021. None of

the two judges scheduled the hearing in the case less than by 9 days from the preparatory hearing[16]. On average, this period is from two weeks to one month.

Therefore, such a speed of consideration of cases No. 910/13313/20 and No. 910/14224/20 is absolutely unprecedented for both of the judges as well as for the court system of Ukraine.

Thus, taking into account other procedure violations, such a speed of consideration of these cases may give reasonable grounds to assume certain corrupt interests of the judges in the speedy consideration of these cases.

## **CONCLUSION**

Judges of the Kyiv Commercial Court Marchenko and Baranov adopted the decisions in cases No. 910/13313/20 and No. 910/14224/20 with unprecedented violations of the procedural legislation of Ukraine.

According to established court practice and under Ukrainian procedural legislation, any of the violations described in this brief shall be a ground for revoking a decision in the court of appeal.

Therefore, given the violations by Judges Marchenko and Baranov in cases No. 910/13313/20 and No. 910/14224/20, the respective decisions should not establish any prejudicial facts and should not be accepted by the Court of Delaware during the consideration of the Delaware Action.

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[1] <https://www.bbc.com/ukrainian/news-38370169>

[2] <https://hromadske.ua/posts/nacionalizaciya-privatbanku-obijshlasya-derzhavi-u-198-mlrd-grn-zastupnicya-golovi-pravlinnya-banku>

[3] Para 2 Art. 43 of the Commercial Procedure Code of Ukraine

[4] Para 3 Art. 43 of the Commercial Procedure Code of Ukraine

[5] Para 1, 2 Art. 173 of the Commercial Procedure Code of Ukraine

[6] Para 8 Art. 173 of the Commercial Procedure Code of Ukraine

[7] <https://reyestr.court.gov.ua/Review/92069146>

[8] Para 2 Art. 237 of the Commercial Procedure Code of Ukraine

[9] Para 2 Art. 1054 of the Civil Code of Ukraine

[10] Art. 599 of the Civil Code of Ukraine

[11] Para 3 Art. 1047 of the Civil Code of Ukraine

[12] Art. 80 of the Commercial Procedure Code of Ukraine

[13] <https://www.ratatype.ua/learn/average-typing-speed/>

[14] Para 3 Art. 2 of the Commercial Procedure Code of Ukraine

[15] <https://docs.google.com/spreadsheets/d/1iibH8K37wKCzKAECUY9ESqD6Q5XD0Nhs-6KM7sfDdgE/edit?usp=sharing>

[16] Case No. 910/8680/20, decision dated 03 February 2021, the court hearing of 12 February 2021

[17] <https://reyestr.court.gov.ua/Review/76887655>

[18] <https://reyestr.court.gov.ua/Review/83413044>

[19] Para 1 Art. 36 of the Law of Ukraine “On judiciary and the status of judges”  
<https://zakon.rada.gov.ua/laws/show/1402-19#n249>