In the Tel Aviv-Jaffa District Court **LF 44348-04-16**
Application no. _____

Before the Honorable President Judge Eitan Orenstein

In re:
1. **Ronen Nakar, ID 023635436**
2. **Daphna Aviram Nitzan, ID 022491765**
3. **Eyal Geva, ID 031932668**
4. **Doron Rosenblum, ID 024850406**

acting by their attorneys, Advs. Maya Sabari *et al*, of Matry, Meiri & Co., Law Offices, of 7 Menachem Begin Street, Ramat Gan 52681, tel. 03-6109000, fax. 03-6109009

The Applicants

– against –

Urbancorp Inc.

through the official Adv. Guy Gissin, acting by its attorneys, Gissin & Co., Law Office, of 38 Ha'Barzel Street, Tel Aviv 69710, tel. 03-7467777, fax. 03-7467700

The Company

Application for Grant of Leave to File a Third Party Notice Against "the Company"

In view of the ruling in ALA 5635/13, Coral-Tell v. Avihu Raz (published in Nevo, April 1, 2015) (hereinafter - the Coral-Tell ruling), which requires a respondent in an application for approval of a class action to file an application for leave to file a third party notice simultaneously with filing his response to the class application, the Honourable Court is moved to exercise its power and permit the Applicants to file an application for leave to file a third party notice against the Company, in the framework of the application for approval of a class action that was filed in CA 1746-04-16 (hereinafter - the **"class application"**).

Alternatively and at the least, the Honourable Court is moved to order that until the final decision on the class application, the official's fund shall contain enough monies to clarify the Company's liability to the Applicants, if and insofar as the class action is decided against them.

Below, *inter alia*, are the grounds of the application:

A. <u>Recitals, summary of the facts and the Applicant's cause against the Company</u>

1. The Applicants 1 – 3 (hereinafter - the "**Israeli directors**") are three directors who were appointed to serve in the Company on March 14, 2016, and served therein until the date of their resignation on April 21, 2016.

2. The Fourth Applicant (hereinafter - the "**internal auditor**") is the auditor who was appointed to serve in the Company on March 23, 2016, and who resigned from his position on April 21, 2016.

3. On April 3, 2016, **21 days after the Israeli directors' appointment and 12 days after the internal auditor's appointment**, Mr. Pechthold filed the class application, *inter alia* against the Company and against the Israeli directors and the internal auditor.

4. On April 10, 2016, the class applicant filed an application to amend the class application. This application was approved in a decision given by Her Honour Judge Ruth Ronen on May 29, 2016.

5. The essence of the class application is a plea regarding misleading details in the prospectus and immediate report published by the Company on January 2, 2016.

   These are <u>not</u> pertinent to the Israeli directors or the internal auditor, who were appointed, as aforesaid, after these dates.

6. The essence of the application, insofar as it pertains to the Applicants, is one single plea concerning a notice given to various companies which are related to the Company's controlling shareholder, by the insurance company of the Government of Ontario - Tarion, which was reported by the Company in an immediate report of April 4, 2016 (hereinafter - the "**Tarion notice**").

7. According to the applicant in the class application, the Company should have published an immediate report in connection with this notice already on November 30, 2015, or at the latest on March 4, 2016 - that is to say, <u>before the appointment</u> of the Israeli directors and the internal auditor.

8. The applicant in the class application is therefore pleading that the Company and the directors who served therein as of the date of its issue, are liable for the failure to give a report in respect of the Tarion notice.

9. With regard to the Israeli directors, the class applicant is pleading that they should be held liable, since, according to his way of thinking, <u>on an unclear date and in an unclear way, **during approx. 20 days gross of their service (including Fridays and Saturdays)**</u>, from the date of their appointment on

March 14, 2016 until the date of the report of April 4, 2016 - they knew about the said notice, but "nonetheless" did not bother to publicise it.

With regard to the internal auditor, the applicant is pleading that he should be held liable since, supposedly, on an unclear date and in an unclear way, **during approx 10 days gross of his service (including Fridays and Saturdays), from the date of his appointment on March 23, 2016 until April 4, 2016** - he should have acted to find that the Tarion notice had not been reported by the Company.

10. The relief requested in the class application is a sum of NIS 42.2 million, which the applicant is seeking to impose on all the respondents "jointly and severally".

11. On April 24, 2016, the trustee for the bondholders filed an application for the grant of provisional relief and for the appointment of an official for the Company.

12. On April 24, 2016 this Honourable Court gave an order prohibiting the execution of any transaction with the Company's assets of whatsoever type, and on April 25, 2016 this Honourable Court gave a decision for the appointment of an official for the Company.

13. As the Applicants learned retrospectively, on June 19, 2016 the Company filed an application to stay the proceedings against it, which was primarily directed at the class application.

    On that same day, this Honourable Court allowed the application.

14. The Applicants also learned that the applicant in the class application had filed an application in which he was seeking to oppose the stay of proceedings as aforesaid, and this application is pending and fixed for hearing before this Honourable Court on November 6, 2016.

15. However, in accordance with the dates fixed by Her Honour Judge Ruth Ronen, who is hearing the class application, **the Israeli directors and the internal auditor must file their reply to the class application by September 29, 2016 - that is to say, even before the hearing on the stay of proceedings, as aforesaid**.

16. The position of the Israeli directors and the internal auditor is that the class application does not disclose any cause against them, such being, *inter alia* and in summary, for the following reasons:

    16.1 for the reason that the existence of the Tarion notice was first notified to the Israeli directors only on March 31, 2016 in the afternoon - **a fact that was expressly mentioned in the immediate report published by the**

Company on April 4, 2016, which was signed by the Company's controlling shareholder, Mr. Alan Saskin, who served as chairman of the board of directors, CEO and president of the Company;

16.2 for the reason that immediately after the Israeli directors learned of the Tarion notice, they acted to clarify the meaning of the notice;

16.3 For the reason that there is no legal provision requiring a director or internal auditor to perform due diligence examinations for all the Company's business before or after their appointment; on the contrary, under the law and case law, a company's board of directors may rely on the information given to it by the company;

16.4 for the reason that on the date the notice came to light, an audit work plan had not yet been determined for the internal auditor;

16.5 for the reason that at the Company's request and on the initiative of the Israeli directors, from the date on which the Israeli directors learned of the Tarion notice (March 31, 2016), until the date of publication of the immediate report regarding this notice on April 4, 2016, no trade was conducted in the Company's bonds;

16.6 and for other reasons that will be detailed at length in the reply to the application for approval of a class action (which as aforesaid is expected to be filed on September 29, 2016), in which the Applicants will dwell, in addition, on the fact that the application does not fulfil the necessary conditions for its approval as a class action, that the damage claimed therein against the Applicants is unfounded and inflated damage, and more[1].

17. Nonetheless, if and insofar as their pleas are rejected, the Israeli directors and the internal auditor have a right to indemnity and participation from the Company, for two main reasons:

17.1 **for the reason** that the Company undertook to indemnify the Israeli directors for any expense and liability imposed on them as a result of their acts - and the consequences thereof - in their capacity as officers of the Company - an undertaking in respect of which the Israeli directors filed a debt claim with the official, which has not yet been decided;

[1] It is noted and emphasised, for the sake of caution, that the aforesaid is in the nature of a summary only of the Applicants' pleas for the class application's dismissal. The Applicants have many other pleas for the class application's dismissal, which will be detailed at length and in detail in their reply to the class application, the date for the filing of which is September 29, 2016.

17.2 **and for the reason** that if and insofar as the plea of the applicant in the class application is allowed, to the effect that the Company concealed the Tarion notice, the Company's conduct is the reason for the failure and deception of the Israeli directors and the internal auditor, and they are therefore entitled **to full participation and indemnity for any liability imposed on them, that is to say - the Company is liable to fully bear all the liability that is imposed, if at all, in the class application.**

18. It is emphasised already now: as clarified in paragraph 28 below, the Applicants' entitlement to full indemnity and participation is embodied, *inter alia*, in the provisions of sections 34 of the Securities Law, 5728-1968, which provides as follows:

> "Insofar as two or more parties are liable pursuant to sections 31 to 33, they are liable to the injured party jointly and severally; among themselves they are liable pursuant to the rules governing liability in tort."

Accordingly, and in any event, this entitlement is governed by the provisions of section 72(1) of the Bankruptcy Ordinance [New Version], 5740-1980.

19. At any rate, as emerges from the aforesaid, the position of the Israeli directors and the internal auditor is that they have substantial cause against the Company for the purpose of filing a third party notice.

B. The "Coral-Tell" ruling

20. On April 1, 2015 the Supreme Court established the Coral-Tell ruling. In the scope of this ruling, the Supreme Court held that a respondent in an application for approval of a class action who is seeking to file a third party notice must file an application to file a third party notice.

Specifically, this ruling determined that **the date for filing an application as aforesaid is simultaneously with filing the reply to the application for approval of a class action**.

The Coral-Tell ruling determined in such regard that:

> **"... the application for leave to file a third party notice must be filed at the preliminary stage, i.e. the stage of the application for approval of a class action."**

It was also held in such regard in the Coral-Tell ruling that:

> **"... the correct date for filing the application to give a third party notice is the date for filing the defendant's reply to the application**

for approval of a class action, that is to say - within 90 days of the date on which the respondent is served with the application for approval of a class action."

21. This is the "direction" of the Coral-Tell ruling, by reason of which the Applicants are bound to file, simultaneously with their reply to the class application, an application for leave to file a third party notice, failing which they will not be able to file a third party notice, if and insofar as the class application against them is approved.

22. Thus, for example, it was held in CA (Center), Harel Pia Mutual Funds Ltd v. Landmark Group Ltd (published in Nevo, February 14, 2016) that since the respondents in the application for approval of a class action did not file an application for leave to file a third party notice simultaneously with the filing of their reply, such a notice could not be filed.

23. Let it be noted that were it not for the stay of proceedings order that was given on the Company's application, the Company would in any event be an inherent party to the class application, and in such context the Applicants' pleas against it would be clarified simultaneously with the clarification of the proceedings.

This will also be the case if the Court allows the applicant's application to set aside the decision regarding a stay of proceedings, which is pending and fixed for hearing before this Honourable Court on January 6, 2016 [sic - should be November 6, 2016].

24. However, since a stay of proceedings order has been given, which at this stage has not been set aside, the Company's liability will not be decided directly by the Court when hearing the class application, and accordingly it should the filing of an application for approval to file a third party notice against the Company.

C. It is not possible to file a debt claim to counteract the need to file a third party notice - and the opposite is correct, *inter alia* in view of the provisions of section 72(1) of the Bankruptcy Ordinance [New Version], 5740-1980.

25. In the official's application to stay proceedings, he argued that the Court should order a stay of proceedings against the Company in the class application, in view of the fact that if and insofar as the class application was allowed, the bondholders would be able to file a debt claim with the trustee.

26. However, this possibility is not enough in the circumstances of the case, and it certainly does not derogate from the Applicants' rights; the opposite is true, and for several cumulative reasons:

27. **Firstly**, because as is known and as provided in section 72(1) of the Bankruptcy Ordinance [New Version], 5740-1980:

"**unliquidated damages that do not derive from a contract or promise, and a demand for maintenance due pursuant to a judgment that are payable after the grant of the receivership order, cannot be claimed on bankruptcy**";

In our case, the right of the Israeli directors and internal auditor to the Company's participation in the "damage" alleged in the class application complies precisely with these provisions in that involved is:

(1) a future and conditional claim for damage in an unclear amount;

(2) which is primarily based on a plea regarding the existence of "misleading details" in accordance with the provisions of the Securities Law, 5728-1968;

(3) that is payable after the grant of the orders by this Honourable Court.

In such regard it is noted that, as already stated above, liability for a plea of a misleading detail in accordance with the Securities Law is tort liability, it being expressly provided, in section 34 of the Law, that:

> "Insofar as two or more parties are liable pursuant to sections 31 to 33, they are liable to the injured party jointly and severally; among themselves they are liable pursuant to the rules governing liability in tort."

28. **Secondly**, since the Company is not a party to the application for approval of a class action, it is doubtful that the Honourable Court hearing the class application will consider the Company's liability to the bondholders and/or its liability to indemnify the Israeli directors, in accordance with an indemnity undertaking and/or its liability to indemnify and/or participate in any liability imposed (if at all) on the Israeli directors and/or the internal auditor.

29. **Thirdly**, since even if the Honourable Court considers the aforesaid, the Company might plead that it did not have its day in court, in view of the fact that it did not take part in the proceedings because of the stay of proceedings.

30. **Fourthly**, since in accordance with various publications the official intends acting to distribute monies already in the coming months and there is more than concern that by the date of the decision on the class application, there will be no monies left in the fund, and in any event clarification of the Company's liability to the Applicants will be frustrated.

D. Conclusion

31. For all the reasons mentioned above and *a fortiori* taking into account their cumulative weight, the Honourable Court is moved to allow the Israeli directors and the internal auditor to file an application to file a third party notice against the Company, notwithstanding the stay of proceedings order, in order to prevent oppression of their rights.

32. Merely in the alternative, the Honourable Court will be moved to order that until a final decision on the class application and the class action (if and insofar as the application is allowed), enough funds remain in the official's fund for the purpose of clarifying the Company's liability to the Applicants, if and insofar as the class application and the class action against them is allowed.

33. This application is supported by the affidavit of the Third Applicant, Dr. Eyal Geva.

(Signed)	(Signed)
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Maya Sabari, Adv.	Chen Mor, Adv.

The Applicants' Attorneys