In the District Court **Liquidation 44348-04-16**
In Tel Aviv **Before His Honor the President - Judge Orenstein**
Motion No. 56

In the matter between: **Tuvia Pechthold**
Acting by his attorneys Weksler, Bregman & Co., Law Offices
Of 23 Yehuda Halevy Street, Discount Tower
Tel Aviv 65136
Tel.: 03-5119393, Fax. 03-5119394

The Petitioner;

In the matter of: **The Companies Law, 5759-1999**
The Companies Regulations (Motion for a Settlement or Arrangement), 5762 - 2002

and in the matter of: **Urbancorp Inc.**
(Canadian company no. 2471774)

The Company;

and in the matter of: **Adv. Guy Gissin**
Gissin & Co. Law Offices
Of 38B Habarzel Street, Tel Aviv
Tel.: 03-7467777; fax: 03-7467700

The Functionary;

and in the matter of: **Reznik, Paz, Nevo Trusts Ltd.**
By its attorneys Advs. Amir Flamer and/or Evyatar Kramer *et al* Of 7 Massada Street (4 B.S.R. Tower)
Ramat Gan
Tel. 03-3730630; Fax. 03-3730650

The Trustee;

and in the matter of: **The Official Receiver**
Of 2 Hashlosha Street, Tel Aviv

The Official Receiver;

The Petitioner's Response to the Reply of the Functionary and the Trustee for the Bondholders

The Petitioner, Mr. Tuvia Pechthold, hereby respectfully submits his Response to the Replies of Adv. Guy Gissin, the Functionary for the Company (hereinafter: the

"**Functionary**") and the Trustee for the bondholders, Reznik Paz Nevo Trusts Ltd. (hereinafter: the "**Trustee**") to the Motion to Determine the Status of the Members of the Class in the Class Action as Secured Creditors (hereinafter: the "**Motion**").

Since we are dealing with a precedential legal issue, the Hon. Court is moved, to the extent it deems it appropriate, to set a hearing before it on this Motion prior to handing down its determination therein.

None of the emphases below are in the original unless stated to the contrary.

The terms and definitions in this Response shall have the meaning identical to that given in the Motion.

A. <u>Introduction</u>

1. At the foundation of the Motion there stands to be determined by the Hon. Court an exceptional case of a foreign company that issued bonds in Israel in the sum of approximately NIS 180,000,000, and after only a number of months collapsed, and caused tremendous damage to the bondholders.

2. The Petitioner filed a motion to certify a class action against the Company, the officers therein and the Trustee, within the framework of which he seeks to represent the interests of the bondholders (in the past and in the present) who were damaged as a result of the false representations and the deceptive reports that the Company published, in an estimated sum of approximately NIS 42,000,000 (so according to the opinion of Prof. Barnea that was submitted in support of the Motion to Certify).

3. It is indisputable that the causes of action that were alleged within the framework of the Motion to Certify **<u>against the Company</u>** are good and well-founded grounds, and even the Functionary who filed a Reply **on behalf of the Company** did not raise contentions that contradict what was attributed to the Company by the Petitioner, and even raised similar contentions against the controlling party in proceedings that he took against him by virtue of his status.

4. The Motion to Certify still is pending, and is being handled under the authority of this Hon. Court, in accordance with its decision dated November 6, 2016.

5. It also is indisputable that the causes of action of the members of the class, which includes the bondholders in the past and in the present, are based on their connection to the bonds, and the lawsuit was filed by virtue of their holding of these bonds, where all the bonds that were issued are identical in their language and their status, and there is no distinction among the bondholders by virtue of their holding of the bonds.

6. And now there occurred an exceptional condition, according to which, due to the status of the Functionary and the Trustee, an artificial division was created among the bondholders by virtue of a distinction, the creation of the pen of the Functionary and the Trustee, according to which one must examine the status of the bondholders **pursuant to the cause of action**. Pursuant to this status, to the extent that the bondholders are suing by virtue of the bonds the principal and the interest – then one must recognize them as secured creditors, and to the extent that they are suing by virtue of the bonds compensation for the damages that were caused to them by virtue of their holding of the bonds and their connection to them – then they are not recognized as secured creditors.

7. This distinction has no reference in the bonds themselves, and also not in the charge agreement or in any other document of the Company. The opposite is the case. The language of the documents is broad and even expressly determines that the charge is intended to guaranty all the obligations of the Company, including the interest and the principal, and the matter was detailed in the Motion and will be detailed below.

8. According to the Petitioner, the determination of the Hon. Court on the issue of the status of the members of the class (who are bondholders) as secured creditors, is derived only from the charge documents and from the bonds themselves. Where these do not create a distinction between the various types of grounds, one cannot create such a distinction out of fine cloth, and in a tendentious manner that is intended to exclude the members of the class from their rights to priority.

9. The matter of the members of the class in connection with their priority and their entitlement by virtue thereof should be tested in a two-phased manner as follows:

   9.1 **In the first phase – by testing the type of priority** – that is to say, whether or not the members of the class are secured creditors. This test is made ***ex ante***, in advance, at a time in which the Functionary examines the credit condition of the Company and in this framework he must designate funds for the class (whose priority is guaranteed) but not to distribute them to the members of the class.

   9.2 **In the second phase – in examining the issue whether they are entitled to benefit from the guaranteed funds that were maintained in the Functionary's fund** – this test is made ***ex post***, after the fact, after clarification of the Motion to Certify and in light of its results. To the extent that the claim is accepted and it is held that members of the class have proven their contentions against the Company, then and only then, shall the members of the class be entitled to benefit from the guaranteed creditor funds (and in light of the fact that we are dealing with guaranteed funds, then they are supposed to be kept in the Functionary's fund and not be distributed to the rest of the creditors). If their claim is denied, then they will not be entitled to the funds on this cause of action, not as secured

creditors and not at all, and the funds that were maintained in the Functionary's fund will be distributed to all the other creditors.

10. One way or the other, one cannot mix between the two phases, and there is no relevancy to the strength of the cause of action in the first test phase that is intended to examine the very recognition of the members of the class as secured creditors. The relevancy of the cause of action is tested in light of the results of the legal process, and reflects upon their right actually to receive the funds, **and not on their very status as creditors**, in the *a priori* situation, prior to examining their causes of action.

11. And note well; the fact that the debt of the members of the class was not yet recognized (that is, prior to the recognition of their claim or the strength of their grounds was examined) is relevant only in all that relates to the time of actually receiving the funds. There is no relevancy to examine the cause of action and its strength where we are dealing with secured creditors (pursuant to the charge documents) and their demand is that their pro rata share should not be distributed to the other creditors but should be maintained in the Functionary's fund.

12. Any other determination creates a new priority based on the timing in which the lawsuit is determined and ignores the type of surety and its substance. In such a way there may be created, *de facto*, priority differences among the bondholders, something that is contrary to the provisions of the charge agreement, the bonds, the trust deed and common sense.

13. Needless to say, it is indisputable that the Supreme Court already held that one must recognize damage that is caused to bondholders as a result of false representations of the company or deception in its reports (as in the case at hand), beyond the payment of the interest and principal. The question whether they are entitled to compensation for such a component is derived from the nature of the cause of action. A different question, and it is the question at hand, is whether the grounds (good or not good) is secured within the framework of the charge and that is derived only from the language of the charge documents.

14. **In order to illustrate the matter, we will compare the situation to a situation in which the bank sues for a debt from its customer where the repayment of the debt is secured by a mortgage. The customer can contend that he does not owe anything; this does not detract from the validity of the mortgage. Only after clarifying the bank's claim will the court determine whether or not the customer owes the debt to the bank. If the customer owes nothing, the bank will not receive money, neither from the charged property and not at all. If the customer owes money to the bank, the bank can satisfy the debt from the charged property.**

15. **Let us continue with the example of the mortgage and illustrate that for the purpose of examining the issue of whether or not we are dealing with a**

secured debt, there is no relevance to the quality of the cause of action of the bank against its customer. The customer cannot cancel the mortgage that secures the debt, only for the reason that for the customer, the contention of the bank against him is weak, or that the cause of action is not strong. <u>In the example of the mortgage, for the purpose of the issue whether the debt is secured, only the charge documents are examined.</u> Only after examining the contentions by the court will the court determine whether or not a debt exists. If a debt exists, the debt is secured and if no debt exists, one can contend that the charge is void, since it is intended to secure the repayment of the debt. So also in our matter.

16. And as to the contentions of the Functionary and the Trustee, according to which granting the Motion will cause tremendous damage to the bond world and other contentions whose sole objective is to impose fear on the Hon. Court regarding the consequences of granting the Motion. These contentions lack any basis: **<u>at most, such a decision would bring certainty in the bond market; such certainty will bring about literal drafting where the companies seek to include broad undertakings beyond interest and principal and narrow and clear drafting where they seek that the charge will only include the obligation regarding the interest and the principal.</u>**

17. At the margin of the opening one cannot ignore the furious and aggressive language of the Trustee and the Functionary, language that is not appropriate and not in place – not at all and certainly not under the circumstances, from which the impression arises that the Trustee, the individual defendant within the framework of the class action, leverages the proceedings here in order to attempt to weaken what is sought for reasons that are not to the point; the Trustee and the Functionary are supposed to serve as agents of the court and as such to represent the matters of **<u>all</u>** the holders.

18. We also will recall that the Petitioner here is a representative plaintiff, who seeks to bring before the Hon. Court the matters of all the members of the class, within the framework of a proceeding that both the legislator and the courts held that one must incentivize and encourage within the framework of the private enforcement of the securities laws. The Hon. Court is directed to one of many, to Permission for Civ. App. 4556/94 **<u>Tzat et al. v. Zilbershatz</u>** (published in Nevo, May 26, 1996, in which the Supreme Court held:

> **"At the foundation of the class action there rests two central considerations: the one, defense of the interest of the individual by means of providing a remedy to the individual who was harmed. That individual, in most cases, does not trouble to file a lawsuit. Sometimes that is because the damage caused to that individual is relatively small. Nevertheless, the damage to the class is great, so that only a concentration of individual claims into a single lawsuit, which is the class action, makes their**

claims worthwhile…. On the totality of these considerations stood M. Agmon and D. Lachman-Messer, in noting:

…'The idea is to give an incentive to shareholders who suffered a relatively small injury, to claim their rights and thus to enforce on the company the existence of their obligations. The objective at the foundation of the class action is to give the shareholders an effective and cheap tool to preserve their rights even where the damage to each one of them is relatively small and does not justify filing a separate lawsuit. A single shareholder, who might not have stood up for his rights, would do so if he could join a group that conducts proceedings in common, in order to encourage, as stated, individual shareholders to file a claim and to bring about the enforcement of the provisions of the law' (M. Agmon and D. Lachman-Messer, "Enforcement Theories in the Proposed New Companies Law" Mishpatim 26 (5756) 543, 577)….

The main considerations that lay at the foundation of the class action rest, in general, at the basis of the objective of the class action in the securities field. Indeed, securities are scattered in the hands of many investors. Each investor invested a small or medium sum to purchase the securities. Nevertheless, the total of all the investments of the public in the company may be great. A representative plaintiff therefore is required who will claim not only his own right but also the (individual) rights of each one of the members of the class in its entirety. Frequently, the damage to each of the individual members of the classis caused due to a single and solitary event, or a series of uniform events, such as a deceptive detail in a prospectus. That and more: the class action in the securities field – which grants an incentive to the "small" shareholder to sue representatively the company and its officers – constitutes an important device to enforce the securities laws."

19. Therefore and accordingly, one must examine the contentions of the Petitioner here, in the proper jurisprudential setting that is relevant to its position and its intent to benefit the condition of all the members of the class that he represents, and not to examine the circumstances of the case at hand as if we are dealing with a personal private matter only of the petitioner.

20. And note well: the contention of the representative plaintiff here was examined both by the Official Receiver and by the Supreme Court, and it was found to have substance, since it is precedential and it certainly is worthy of adjudication. We are not dealing with an obsessive or spiteful

contention, and it would be better for those who are supposed to represent the matters of **all** the creditors to show restraint in their reactions, as is to be expected from functionaries, certainly under the circumstances here.

21. In light of the fact that the contentions raised, both in the Reply of the Trustee and in the Reply of the Functionary, are similar (not to say identical), we will relate to them jointly and we will bring our response to their main contentions, while showing that they do not have anything on which to be based, and that the Motion should be granted.

B. The basic documents (the debenture, the trust deed and the charge agreement) promise the damages claimed within the framework of the Motion to Certify

22. In this chapter below we will see that the scope of the surety is not derived from the nature of the cause of action but rather from the charge documents (and in our matter, from the debenture, the trust deed and from the prospectus by virtue of which they were issued), and the cause of action and its quality cannot harm the validity of the charge (**and that without derogating from the contention that certainly today, after reviewing the claims that the Functionary filed, it is indisputable that we are dealing with a good claim whose grounds are strong and whose chances to be granted against the Company – are high).**

23. In this matter, there is no dispute between the parties that it suffices to inspect the basic documents in order to determine the issue that is before the Hon. Court for determination: **whether or not the obligations that were breached by the Company, and as a result thereof, the damages that were caused to the Petitioner (as well as also to the members of the class that he wishes to represent) are secured by the charge that was recorded in favor of the bondholders** (the Hon. Court is directed, for example, to Paragraphs 8 and 11 of the Trustee's Reply to the bondholders).

24. The dispute between the parties comes to be expressed on the issue of what the basic documents provide, and what the scope is of the application of their provisions.

    24.1 **According to the Petitioner:** The basic documents were drafted **broadly (“the totality of the obligations”, “all the obligations”, “including…”, “additional amounts”)**, and therefore, they also include **the obligations** and the representations **in the prospectus**, **the obligations** and the representations in the Company reports

(and as a result, the damages that were caused to the members of the class as a result of their breach).

24.2 **According to the Trustee and the Functionary:** The language of the basic documents is narrow and intended to include only the "**monetary and the defined undertakings"** (so in the language of the Trustee in Paragraph 63 of the Reply), and therefore does not include damages whose source is false representations on the part of the Company within the framework of the prospectus or deceptive reports of the Company with regard to its undertakings.

25. Let it be said already now, the words "monetary and defined undertakings" – are not found in any one of the basic documents, and we are dealing with the drafting from the pen of the Trustee and the Functionary in their Replies.

26. As was detailed in the Motion, an analysis of the basic documents (the debenture, the prospectus and the charge documents) require the rejection of the contentions of the Trustee and the Functionaries, who seek to compel, after the fact, a narrow interpretation on broad and general language. And this is the language of the basic documents:

26.1 **Within the framework of the debenture** (Exhibit 3 to the Motion) it was expressly held **that the debenture is issued subject to the terms specified in the prospectus** and therefore it is clear that the undertakings in the debenture include the prospectus undertakings (and not for naught, since a debenture is not a document that stands alone separated from the prospectus) (Section 5 of the debenture).

26.2 In addition, **in the debenture there is no distinction between the obligation to pay the principal and the interest and the rest of the undertakings of the Company to the bondholders** (Section 4 of the Debenture).

26.3 In this regard it is noted that the affidavit of the Trustee is poor and lacks support for the factual contentions that appear in the pleadings, including not the interpretation that the Trustee wants to pour into these documents that he signed in real time – and it would appear that this is not for naught.

26.4 **In the Charge Agreement** (Exhibit 4 to the Motion)was defined in a manner **that cannot be interpreted in two ways** that **"the substance of the Charge Agreement"** is given "…to guaranty the full and precise existence of **all** the obligations of the Company to the bondholders pursuant to the debenture and the trust deed, and to guaranty the full payment of the sums due and to become due to the bondholders (Series A) from the Company, pursuant to the trust deed, **including** payments of principal and interest and **additional sums** that the Company shall owe pursuant to the debenture and the trust deed (hereinafter: the "Guaranteed Amounts")".

26.5 As stated, the contention of the Trustee according to which the charge is only intended to secure the "monetary and the defined obligations" was raised by the Trustee from nothing, where **this expression is not found in any of the basic documents**.

26.6 And note well; the scope of the application of the charge are the most substantive subject in the drafting of the charge document, and therefore one cannot suspect that its drafting was done without thought (and in any event, one must interpret it against the draftsman in a manner that broadens the scope of the obligations against which the charge was given to the holders). Where it is written in the charge documents that they are intended to guaranty "**all**" the obligations of the Company, including **"additional amounts"** that were not defined and **including principal and interest**, it is presumed that the matter was done intentionally.

26.7 **Within the framework of the prospectus** (Exhibit 5 to the Motion), the Company again clarified with regard to the sureties that it made available for the benefit of the bondholders, since they are intended to guaranty the full and precise fulfillment of **all the obligations** of the Company pursuant to the terms of the debenture, **including** to guaranty the full and precise repayment **of all the principal and interest payments**.

26.8 **In the Trust Deed** (Exhibit 6 to the Motion) it is noted, in identical language, that the Company would create charges "…to guaranty the full and precise existence of **all** the obligations of the Company pursuant to the terms of the debenture (Series A), **including** to guaranty the full and precise repayment of all the payments of the principal and interest. Where use is made of the term "including" interest and principal, but it is clear that not only the interest and principal are secured since these are **added** to the other secured obligations. **This section suffices alone to knock down the contention of the Trustee and the Functionary.**

27. We again will emphasize: to the extent that there was an intention to limit the charge only to the payment of the principal and the interest and adjustments in the payment of the interest (as appears from the position of the Trustee and the Functionary), it would have been easy to note that expressly and in unequivocal language; the fact that the language of the basic documents differs in purpose' and looks to additional undefined payments, which are described in connection with general obligations of the Company toward the bondholders, evidences that the narrow interpretation of the Trustee and the Functionary cannot stand.

28. Not only does the debenture not set aside the sureties to a particular type of damage that is caused as a result of a breach of an obligation by the Company, but the opposite is the case, **it emphasizes and sharpens the point that it guarantees all the obligations of the Company to the bondholders** and **"additional amounts"** for which the Company shall be liable pursuant to the debenture and the Deed of Trust, including principle and interest, and therefore it is clear that the surety also guaranties the breach of the obligations and the

damages that were caused and for which the motion to certify the class action was filed.

29. **Any other interpretation creates a distinction <u>out of whole cloth</u> among the bondholders themselves, even though their sureties are created and realized pursuant to precisely the same documents.**

30. In this context we will refer the Hon. Court to the fact that while in Paragraph 81 of the Trustee's Response it is contended that the combination of words "additional amounts" means payments defined and known in advance mainly meaning interest adjustment, **<u>then the affiant on behalf of the Trustee to the bondholders refrained from supporting this contention in the affidavit (where also the rest of his affidavit is based on "his understanding" – it is not clear by virtue of what, and while he refrained from noting whether he was a participant in the drafting in real time)</u>**. Under these circumstances, it is presumed that we are dealing with an incorrect contention.

31. Needless to say, limiting the charge to guarantying the sums of interest and principal only apparently was expressed also in the price in which the debentures were issued, and in the rating of these debentures, and also for this reason one cannot compel, retrospectively, a change (which even has an economic significance) on the debenture and its holders.

32. The Hon. Court is directed in this connection to the quotation from the decision in Liquidation 56099-10-12 **Adv. Palmar in his Position as Trustee in the Staying of Proceedings of Yisramrin Building Manufacturing 3000 Ltd. v. Iskoor Metals and Steel Ltd. that is quoted** which is brought in Paragraph 78 of the Reply of the Trustee to the debentures, within the framework of which it was held that in that case **narrow language was taken in order to limit the application of the assignment of rights. <u>That is to say, where one seeks to limit or to narrow any provision, the matter is stated expressly and in a manner that evidences that in our case, in the absence of such narrowing language, one must stick to the broad and general interpretation that is consistent with the language of the charge documents.</u>**

33. Under these circumstances, as the Trustee himself notes in Paragraph 77 of his Reply, where the language is clear one must interpret it literally (in a precise manner).

34. Precisely in order to evade the clear language of the documents, the contention was raised that we are dealing with damages that could not have been foreseen (and therefore was not guaranteed – so in Paragraph 79 of the Trustee's Reply). This contention is a **factual contention that is not supported by an affidavit** and cannot be raised. All the more so are the things appropriate where in the life of a company that issues debentures and most certainly one can anticipate that the company will not meet its various obligations, and/or that its reports will not be accurate, something that will cause damage to the holders, as happens frequently,

and therefore the contention that we are dealing with damages "that cannot be foreseen" is not at all clear.

35. In light of what is stated above, the court is moved to direct as is requested in the motion, since any other determination will bring about **a retroactive change in the terms of the charge by means of forcing an interpretation in contradiction of the simple language of the words ("all" / "all of" / "additional amounts").** Such a determination will create a hierarch of ranking between the holders (where it was held expressly that there is no such hierarchy, and where they are as if based on their connection to the debentures).

36. Similarly, one must reject the attempt to read into Sections 6.4.3 and 6.4.8 of the Charge Agreement indications of an attempt to narrow the scope of the charge as defined in Section 6.2, since we are dealing with the scope of the amount charged but not on the scope of the obligations that it is intended to guaranty.

C. One must reject the contention that that past holders do not have any right of claim and/or charge

37. As was detailed in the motion, the members of the class represented by the Petitioner is composed of two types of holders (present holders and past holders) who constitute a single class of identically interested parties (to these as to these tremendous damage was caused, as detailed in the opinion of Prof. Barnea), all by virtue of their connection to the same debenture.

38. According to the Trustee and the Functionary, whoever acted to narrow his damages and sold the debentures **at a low price**, separated himself, by so doing, from the right to sue, as well as from the charge.

39. This contention is contrary to all logic and is contrary to the legal rule and cannot stand.

40. Pursuant to settled law, as was determined by the Supreme Court, **the relevant holding period is the time at which the cause of action crystallized and not the time of the filing of the lawsuit**.

41. The Hon. Court is directed to Permission for Civ. App. 3800/15 **T.R.D. Instrom Ltd. v. Zeev Zeevi et al.** (published in Nevo, February 8, 2017) (hereinafter: "**T.R.D.**")

> **"29. Instrom and Ziv Haft raised an additional contention according to which Zeevi foes not have an individual cause of action for the reason that he sold the debentures that he owned. This contention was raised in the past (with regard to**

options) and was rejected by this court in Permission for Civ. App. 1701/93 Teva Pharmaceutical Inds. Ltd. v. Zat Economic Consultants Co. Ltd., P.D. 47(5) 476 (1993) (hereinafter: Matter of Teva), there the President M. Shamgar held that:

> **'The holder', so the course of the contentions, is someone who holds a security at the time of filing the claim**. According to the contention, the law does not adopt language 'someone who was a holder' or a similar expression that permits including within the provisions of the law someone who held as any time in the past and does not the security at the time that is determinative according to the petitioners, which is the time of the filing of the proceeding. [….] **Such an interpretation has double the harm to someone who wishes to bring his contention before the court. Its result is simple, that even after the damage was caused and was realized well, the injured party is prevented from mitigating the damage. [….] The position of someone as if he is entitled to sue is determined pursuant to the existence of a cause of action. In the case at hand, it is required that the cause of action shall be that of the possessor [of the security]. The relevant time is the time of the crystallization of the cause of action. Let it be said, that is the time at which the plaintiff was a 'holder' [of the security]; the time of the filing of the lawsuit lacks additional significance, both from the point of view of the plaintiff and from the point of view of the defendant** (*Id.*, at pp. 479-80).

And the words are appropriate to our matter.

30. **One also must reject the contention of Instrom according to which bondholders are entitled only to the repayment of the loan that they made available to the company and are not entitled to claim compensation for the decrease in value of the debenture in their possession. This court already held that the holders of securities are entitled to compensation for the decrease in value of the securities in their possession if this decrease was caused as a result of breaches of the law by the defendant**. Likewise, this court

recognized the principal rights of the holders of securities to sue for compensation for the loss of alternative profits (see Matter of Reichert B, at pp. 517-30; Matter of Weinblatt, at pp. 256-64; Civ. App. 3654/97 Kartin v. Ateret Securities (2000) Ltd., P.D. 53(3) 385, 400-06 (1999) (hereinafter: Matter of Kartin); also see: Motti Yamin and Amir Wasserman, Companies and Securities 334-37 (2006) (hereinafter: Yamin and Wasserman); Fesserman-Yuzpuv, at pp. 568-74). **This suffices in order to reject the contentions of Instrom in this context.'**

That and more, were this contention accepted, the significance would be that the issuers of debentures would never be obligated to pay to the purchasers of the debentures an amount that exceeds the original amount that they obligated themselves to pay to them in consideration for the loan. That, even if the issuers deceived the purchasers and breached the obligations provided in the law toward them. It is clear that such a result according to which the issuers of debentures are not required to pay any price in the civil plane in the event in which they deceived the investing public or breached the securities law and caused damages of the kind that the law intended to benefit, is not worthy and is not desirable. Also appropriate to this matter are the words of President Shamgar in the Matter of Teva in his determining that "a claim relates always to the damage that was caused, and if there is no damage, there also is no relief; if a number of entities were harmed, one after the other, that does not, in any of the legal fields negate their right to sue, **and whoever is afraid of a multiplicity of damages shall direct his steps accordingly'** (*Id.* at p. 480)."

42. The Hon. Court also is directed to the words that were held in Permission for Civ. App. 7998/03 **Ellenberger v. The Israeli Phoenix** (published in Nevo, December 26, 2004):

"A class action in accordance with the new Companies Law in essence is a lawsuit by a holder of any security who has a right to an individual lawsuit for an act or omission that caused him

damages or other harm personally. <u>Replacing the demand according to which the representative plaintiff shall be a 'holder' of a security with a demand that he shall have an 'affinity' to the security, comes to broaden the right to an individual claim so that also the shareholder who ceased to hold shares in the company can sue for any act and/or omission of the company that occurred during the course of the period in which he held the shares and damage was caused to him personally</u>'.

43. **<u>Since the members of the class are suing the Company by virtue of their affinity to the debenture, similar to the bondholders who are claiming the yield for that debenture, then in light of the language of the debenture and the charge documents for it, we are dealing with creditors with an identical hierarchy – and there is no basis for the distinction that the Trustee is trying to create out of whole cloth.</u>**

44. Not only that. The contention as if someone who sold the debenture is not secured by the charge is a contention that, aside from being lacking in legal logic, **does not arise from the charge documents**. There is no demand in the debenture, or in the rest of the Company documents, for a "continuity of holding" as a condition for obtaining the compensation due to someone to whom damages were caused by the Company, and not for naught, since the significance of the matter is that the bondholder forever will be prevented from acting to mitigate his damages and from selling the debenture in his possession.

45. In other words – since the charge is intended to guaranty **<u>all of</u>** the obligations of the Company, then in no place in which some of the obligations of the Company were complied with (interest and principal in light of the sale of the debenture), the charge continues also to guaranty the rest of the obligations of the Company that were not complied with toward that holder, including to guaranty damages that were caused to him at the time of **<u>the crystallization of the cause of action, that is, at the time of the possession (and without any connection to the sale of the holding of the debenture at a later time after the damage was caused)</u>**.

46. The demand for a continuity of holding (certainly when it is contended after the fact) will benefit the breaching Company (which breached its undertakings and made erroneous reports to the investing public), since under such a circumstance the damaged parties (who sold the debenture) are prevented from suing the Company for the damage that it caused them and they are prevented from relying on the charge that the Company made available to them for those undertakings that it breached, **all only since they no longer in effect hold the debenture**. Such a result common sense and also the law cannot suffer.

    46.1 This result lacks a legal basis, since the bondholders who purchased the debentures under the "error", that is, on the basis of false representations

of the Company, were injured, whether they sold the debenture (cheaply, after disclosure of the information) or if they still hold them.

46.2 This result is inconsistent with the language of the documents and therefore one cannot direct it after the fact.

46.3 This result is contrary to the rules regarding the time of the crystallization of the cause of action and the right of standing given to the past holders of the securities.

46.4 The significance of this result is that the holders will be prevented from selling their holdings in the debenture in order to mitigate their damages and in effect will be required to absorb additional damages to the extent they want to realize their right to sue the Company. Of course, we are dealing with a result that is illogical.

D. <u>One must reject the contention that the charge that the Company made available is a charge for the benefit of the Trustee and not for the benefit of the bondholders</u>

47. According to the Functionary and the Trustee, the charge was given for the benefit of the Trustee and not for the benefit of one or another holder.

48. We are talking about a contention that contravenes **<u>basic legal knowledge</u> (to the point of changing the substance of the trust institution). A trustee is what his name implies.** A trustee **<u>to bondholders</u>**. And the charge that was recorded in his name is **<u>for the benefit of</u>** the bondholders, **<u>they are the beneficiaries</u>**, and we are not talking about a charge for his benefit or for him.

49. Recording the charge for the benefit of the Trustee is purely a technical act, since the Trustee is a kind of "pipe" between the Company and the bondholders, he is the long arm of the bondholders and he himself has no independent rights that are not the rights of the bondholders. He certainly does not constitute an independent and separate entity that acts **for itself**, he does not benefit from the exercise of the charge and does not put in his pocket the charge funds.

50. In order to learn how much the contention is absurd, we will compare the matter to a situation in which an attorney who serves as a trustee of funds for his client contends that the funds do not belong to his client (the beneficiary) but to the trustee (him) himself. It would appear that there is no need to expand regarding the absurdity in the very contention.

51. In addition, we will clarify what is self-explanatory, that not only is the charge not a charge for the Trustee, but that it is intended to serve all the bondholders and not

only some of them, a part of them, or of the one who the Trustee wishes to benefit. That is, in any event, it is incumbent upon the Trustee, who serves as Trustee for all the holders, to act for the good of all the bondholders and for all their contentions against the Company, and not in connection with selective contentions and damages pursuant to his choice and his interests.

52. That and more, the determination in the charge documents and in the debenture, that each of the debentures shall stand ***pair passu*** means that **all** of the obligations that arise from the debenture are at an equal level, and not that one obligation (the principal and interest) are at one level above the others. Any other result creates, in effect, a prohibited discrimination between the holders that has no linguistic anchor and in any event not a legal one.

E. One must reject the contention that in light of the results of the meeting of holders on July 31, 2017 there are no grounds to recognize the damage of someone who currently holds a debenture

53. An additional contention that the Trustee and the functionary raise is that in the meeting of holders that took place on July 311, 2017, a resolution was adopted, in which 68.28% of all the debentures participated, to object **to a delay in the distribution of the funds** that the Petitioner sought, and therefore whoever did not sell the debentures and holds them still today and is among the members of the representative class expressed his opinion that he is not interested in the representation of the Petitioner.

54. This contention cannot stand.

55. **Firstly**, the meeting of holders on July 31, 2017 of holders on July 31, 2017 was not intended to discuss the representation of the members of the class by the Petitioner, and in any event, the Trustee (who himself was sued in the motion to certify and therefore his conduct is dipped in foreign considerations) is prevented from convening such a meeting.

56. **Secondly**, the meeting of holders only considered the issue of the possibility of delaying the distribution of the funds, where among its participants were speculator holders, who purchased the debentures **after** the deceptive information became known, that is, they are not part of the class and their interest is the opposite of that of the members of the class (since, to the extent that the share of the members of the class becomes smaller, the share of the speculative holders will increase). These certainly cannot make decisions for the members of the class and in their name.

57. We are dealing with a decision that relates only to a delay in distribution and one cannot find in it any agreement to waive the guarantied hierarchal standing of the members of the class.

58. **Thirdly**, a securities class action, as the lawsuit that the motion to certify deals with, always is for an unspecified holding public, where in any event there exist bondholders (including individuals) who did not participate in the meeting and whose voice is not heard.

59. **The way of those who wish not to be represented by the Petitioner and to exit the class is provided in the Class Action Law and they may give notice of their opting out of the class. Since they did not do that, and did not do that in the acceptable manner provided in the law, then there is no basis for the Trustee's contention here, which is intended, in all due respect, to deceive. Whoever seeks not to be part of the represented class can give notice thereof to the court hearing the class action, he will not benefit from the amount of damages that shall be awarded to the members of the class, and he must do so in accordance with the provisions provided in the law, and not by means of reaching conclusions of the Trustee and the Functionary from meetings of holders that took place on other matters.**

60. However, not for naught the Trustee and the Functionary refrain from specifying before the Hon. Court what are the representations that were made within the framework of that meeting, what details were given to the participants of that meeting, and what interests were expressed in that meeting. It is very doubtful that there was expressed to the holders the legal situation as it is, and if the things were presented and the holders chose not to give notice of opting out from the represented class, the matter calls for an explanation. Under these circumstances, one certainly cannot contend that we are dealing with a meeting that invalidates, in advance, the Petitioner's position.

61. And if all that does not suffice, then the issue of whether the members of the class are secured by the charge, in all due respect, does not depend on the consent of the Trustee or his will, (even if according to his approach, the vast majority of the holders objected thereto – and as stated above, that is not the case). The determination of the issue is required in any event, both in light of the fact that some of the holders did not waive their standing as secured creditors, and in light of the fact that the bondholders who sold their holdings (and in any event were not invited to the meeting) certainly did not waive their standing as secured creditors.

62. One way or the other, **the proper order of things is that one must determine first the contention itself regarding the hierarchal standing of the members of the class, and only then, and to the extent that any of the members of the class seeks to waive his surety, he may do so by giving an appropriate notice to the court.** The current situation, in which on the basis of secret counselling

given to the holders by the Trustee (who, as stated, was sued in the class action), they "waive" the charge, so according to the contention, cannot stand. **So that each holder can adopt the proper decision for himself, the Hon. Court is moved first to determine the issue of the hierarchal standing and it is very doubtful if the holders will waive the damages and the validity of the charge, whether it is held that in light of the language of the charge documents we are dealing with secured damages.**

F. <u>One must reject the contention that no debt claim was submitted and therefore the members of the class are not entitled to any monetary relief from the Company</u>

63. An additional contention (that, in all due respect, could not have been raised by the Functionary and the Trustee to all the bondholders) is that since no debt claim was submitted by the Petitioner, not in his name and not in the name of the members of the class, then he is not a creditor of the Company.

64. As to this matter the Petitioner spread out within the framework of the motion a plethora of grounds that evidence that under the circumstances there is not, nor was there, a need to file a debt claim.

65. These reasons do not merit a substantive reaction from the Trustee and the Functionary, and therefore they are most valid.

66. We will not reiterate the things, but we will just say this, the matter of the class action – its grounds, amount, and a most extensive detail of the Petitioner's contentions, can be found in the hands of the Functionary from the first day, and even prior to the appointment of the Functionary. The Functionary is well aware of the contentions, he defends on behalf of the Company before the Hon. Court within the framework of the conduct of the class action (and in a manner that the mind cannot conceive – even raises the very same contentions that were raised by the Petitioner in the lawsuit against which he defends, against the control person).

67. The submission of a debt claim is intended to crystallize before the Functionary all of the creditors' contention against the Company and he cannot contend, and even does not contend, that the claim, its amount, its grounds, or any detail with regard thereto has disappeared from before his eyes, and these are clear to the Functionary already prior to his appointment and certainly thereafter.

68. Under these circumstances, we are interested in a legal dispute regarding the very **<u>technical</u>** need to submit a debt claim where the lawsuit was filed in court, where it is indisputable that there are no material or substantive consequences to this technical dispute, since the Functionary is well aware of the contentions in depth. The matter is appropriate from the point of view of *a fortiori* where the

Functionary himself expressed his opinion that the submission of a debt claim and the conduct of a legal process are parallel paths and not in the aggregate, and therefore there is no place to submit a debt claim where the creditor chose to go on the parallel path of filing a lawsuit in court.

69. The Functionary was obligated (and certainly the Trustee, who is supposed to see before his eyes the interests of **all of** the bondholders), not to attempt and to take away from the Petitioner and the members of the class their entitlement on the basis of that legal dispute that has no material consequences (where, as stated, the hierarchal mass was spread out before the Trustee and the Functionary).

70. So, according to the Petitioner's understanding, was it the obligation of the Functionary and the Trustee to act, they're being the agents of all the bondholders and representatives of the court.

71. Since they did not do so, and despite the fact that they did not respond to the substance of the Petitioner's reasons in his motion (and certainly that suffices to reject this contention), we will relate briefly to the main arguments of the Functionary and the Trustee also in this matter.

72. **Firstly**, a secured creditor is not required to submit a debt claim. Since it was not proven that the Petitioner and the members of the class are not secured creditors (and since we are dealing with a weighty legal issue, whose importance even the Supreme Court recognized), certainly one cannot say that the time crystallized to submit the debt claim. Only if it is held that the class' hierarchy is not secured (and in light of the language of the charge documents the Petitioner believes it will not so be held), will the time crystallize to submit a debt claim.

This position is expressed also in the position of the Official Receiver (Exhibit 2 to the motion), as was submitted to the Supreme Court within the framework of the appellate proceeding that the Petitioner filed (Permission for Civ. App. 5846/17) and within the framework of which the Official Receiver contended that:

> **"The submission of a debt claim is required when we are dealing with a 'regular' creditor (as distinguished from a 'secured' creditor)) and that, even if his lawsuit / his motion to certify the conduct of his lawsuit was not yet decided and is in the confines of 'a conditional debt'…. And therefore, the issue of the members of the class being within the confines of secured creditors also will influence the question whether they will be required to submit a debt claim to the Functionary, since a secured creditor may rely on his surety without submitting a debt claim at all…." (The emphasis is in the original, Paragraph 25 of the Reply of the Official Receiver).**

73. In this matter we will note that one must reject the contention that the Official Receiver in Motion 23 to which the Petitioner related in the motion does not deal with the question whether one must recognize damages creditor as a secured creditor. The position of the Official Receiver as was brought before the court maintains **that one should not distinguish between a contractual creditor and a damages creditor, and it does not make a distinction between a regular creditor and a secured creditor.**

74 **Secondly**, in contrast to the contention of the Functionary, also in a meeting for a creditor arrangement, counsel for the Petitioner contended that the Petitioner and the members of the class are secured creditors (see pages 14-15 of the protocol that was appended as Exhibit 3 within the framework of Motion No. 42).

75. **Thirdly**, the contention that the Petitioner is not a creditor of the Company cannot stand together with the simple fact that the Hon. Court permitted the Petitioner to continue to clarify the motion to certify against the Company, since the motion to certify was not summarily stricken and was not requested to be summarily stricken. Needless to say that a creditor is someone who contends to the existence of a debt; therefore a debt claim is submitted (or a regular lawsuit, for that matter, as in our case). Only the dismissal of the lawsuit on the merits can bring about a determination that the Petitioner is not at all a creditor.

However, it is very doubtful if such a situation could occur in our matter, where the Functionary himself filed a claim on identical grounds, and with identical contentions, while he himself contends in that claim that the Company reports were erroneous. So that under those circumstances, it is very doubtful that the Petitioner's claim will be rejected and for this reason it is not at all clear how the Functionary can contend that the Petitioner is not at all a creditor, where on the basis of his legal position on the absence of the need (and the ability) to submit a debt claim where a regular claim was submitted, the Petitioner did not submit a debt claim.

And note well: the filing of a debt claim is intended to bring to the attention of the Functionary the condition of the Company's debtsso he can act to repay its debts out of its income, and in order that its creditors will know what are the amount of its debts versus its income and can reach a decision on the manner of their repayment. Under the circumstances at hand, the Functionary, as well as also the Company's creditors, were well aware from the start of the filing of the motion to certify, regarding the Petitioner's contentions and the scope of his claim against the Company, where at the time the motion to certify was filed, the Company reported on it in the electronic disclosure system and the matter of the filing was public and known from the start.

The fact that the motion to certify and the lawsuit that in its essence has yet to be decided does not detract from the creditor standing of the members of the class,

but is relevant only to the timing for obtaining their pro rata share of the creditor receipts, after the lawsuit against the Company is proven. As stated above, we are dealing with two separate stages, and one cannot accept an approach that classifies the Petitioner or members of the class as "creditors" only after accepting the claim, and not in the stage where the claim is pending as a conditional claim that the law recognizes (as can be seen, for example, in the provisions of Section 71 of the Bankruptcy Ordinance, 5740-1980, which also recognizes a conditional or future debt as claimable debts).

76. And as to the contention of the Functionary according to which the Hon. Court held in its decision of July 3, 2017 that the Petitioner should have filed a debt claim. A motion for permission to appeal was filed as to the July 3, 2017 ruling of the Hon. Court, and pursuant to the decision of the Hon. Court, the hearing on the ruling was returned to the Hon. Court, so that one certainly cannot say that we are dealing with a final decision. Needless to say, the raising of the contention by the Functionary is surprising since, as shall be detailed below, he adhered to an opposite legal position in all that related to the obligation of the Petitioner to file a debt claim, the legal position upon which the Petitioner relied.

77. Without derogating from what is stated, then as was specified in the motion, the Petitioner did not have to submit a debt claim:

77.1 Both for the reason that the court approved the request of the Petitioner to continue to conduct the motion to certify, and the conduct of the legal process before the court is **an alternate path**.

77.2 The absurdity in the contentions of the Trustee and the Functionary in this regard can be learned from the result to which adopting the contention would lead. **On the one hand,** the Hon. Court approves clarifying the motion to certify and the Functionary represents the Company within the framework of the process; **and on the other hand,** even if the motion to certify is granted, according to the Functionary, the Petitioner and the members of the class will not be entitled to payment from the Company kitty only because they did not file a debt claim.

77.3 When the Supreme Court directed the clarification of the standing of the members of the class as secured creditors, and where it is indisputable that to the extent that their credit is secured, they have no obligation to file a debt claim (and that, without derogating from the above contention, according to which the conduct of the lawsuit with the approval of the court is a parallel and alternate path to filing a debt claim), it is clear that the time has not yet passed to file a debt claim.

77.4 Moreover, as was detailed within the framework of the motion, the Functionary himself contended in the proceeding here, within the framework of Motions 23 and 24, that the permission that the court gave to

continue to clarify the motion to certify is an alternate path to a debt claim. Therefore, there is in his contention that the Petitioner had to go on the parallel path, more than a modicum of bad faith. In any event, we are dealing with a contention that contradicts the contention that the Functionary himself raised in his pleadings in the proceedings before this Hon. Court and on the same subject, and therefore he is **prevented and estopped** from contending something else today. An identical position also was brought by counsel for the Official Receiver within the framework of Motion 23.

77.5 And in the end, even the Hon. Court held in other decisions in the proceeding at hand, within the framework of Motion 23, that one cannot submit in parallel both a debt claim and a class action.

78. And behold, the [position of the Functionary in real time was the opposite, and according to it, when the Hon. Court approved the Petitioner to conduct the lawsuit against the Company, after it became convinced that one cannot conduct a claim of this kind as a debt claim against the Functionary, then the need to file a debt claim with the Functionary became superfluous, since we are dealing with two alternate paths, and one cannot take both of them jointly; under these circumstances, the Petitioner relied and calculated his steps in accordance with the position of the Functionary and he was not required to file a debt claim.

79. As stated above, even were we to assume that the Petitioner was required to file a conditional debt claim, then we are dealing with an act whose sole purpose is to notify the Functionary regarding the claim so that it can be included in the credit mass, but in our matter, **one must remember that the functionary was a party to the motion that permitted the Petitioner to continue to clarify the motion to certify, and the Functionary is the one who represents the Company in the motion to certify, so that the rationale that is intended to notify the Functionary regarding the proceeding does not exist under the circumstances**.

80. Therefore, the contention that the Petitioner and the represented class were not entitled to have their debt repaid by the Company only because of the fact that that they did not file a debt claim, where their very demand is known to the Functionary and to the Trustee backwards and forwards, cannot stand. Not for that reason did the requirement come for filing a debt claim and implementing the demand in such a draconian manner under these circumstances cannot serve the objective for which the requirement was raised originally.

81. In any event, and the things are stated only beyond the need therefor and solely for the sake of caution, it is clear that it is proper and correct, to the extent that the Hon. Court believes that the Petitioner should have filed a debt claim, then under the unique circumstances and as stated in the motion, the Hon. Court is moved to

extend the time for the filing of the debt claim by 15 days until after the ruling in this motion.

G. One should reject the prophesies of fear on the part of the Trustee and the Functionary

82. In their distress, the Trustee and the Functionary turn to raise contentions, prophesies in substance, whose matter is an attempt to impose fear that perhaps the Hon. Court will acquiesce to the motion, will create chaos in the field of the issuance of debentures, and will lead to tragic results, to the extent that the Hon. Court will hold that the charge also covers "damage grounds", then "tremendous damage" will be caused.

83. Let it be said immediately; we are dealing with demagoguery that is intended to cover the weakness of their legal contentions, and also in these contentions there is no substance.

84. Since, pursuant to the provisions of the basic documents, the charge is supposed to apply both on the payment of the principal and the interest, and on the additional debts that the Company owes to the bondholders, then one cannot accept the contention that this obligation on the part of the Company, which was given to the bondholders in advance, immediately prior to the issuance, upon which they relied and on the basis of which the price of the debenture was weighed, will cause damage where an event occurs that justifies the realization of the obligations of the Company itself.

85. All the contentions of the Trustee and the Functionary regarding the fear that perhaps the position of the Petitioner will create a lack of certainty with regard to the scope of the damages that are covered under the charge, are nothing but mere contentions.

86. **At most, such a decision will bring about certainty in the bond market; such certainty will about a precise drafting where the companies seek to include broad obligations beyond interest and principal and a narrow and clear drafting where they want the charge to include only the obligations regarding the interest and the principal.**

87. One way or the other, in our matter we are not dealing with one obscure sentence that was mixed up in the charge documents upon which the Petitioner tries to boost himself up; the opposite is the case. **In a clear manner and in a number of places**, the Company obligated itself that the charge would apply to all the obligations, including the payment of the principal and the interest. That is to say, the Company, in advance, and deliberately, in a number of places and in a number of different wordings, covenanted to compensate the holders also for additional

damages that will be caused to them, as in our matter, and on the basis of this undertaking there gave rise to the holders the right to be paid for these damages by virtue of the charge.

88. **The same scenario of fear is not at all relevant to our matter** also for the reason that we are not talking about contentions that were discovered after the distribution of the money.

89. It would appear that one also must reject the contention as if adopting the position of the Petitioner would not permit the granting of surety in a fair relationship to the debt and/or that the Company would be exposed in giving the charge to damage claims.

89.1 **Firstly**, a company that seeks to issue debentures does not make available surety of equal value to the monetary scope it seeks to raise by means of the issuance. The scope of the surety, its nature and strength influence the rating of the issued debentures, and in any event are intended to serve the bondholders only in the event the company breaches its obligations to them.

89.1.1 Therefore, in any event, companies to not make available sureties with a scope identical to the amount raised in the issuance or in the scope of the damages anticipated to be caused to the holders as a result of a breach of the undertakings of the company toward them.

89.1.2 We are dealing with mere contentions that contradict the customary practice, as is well known to the Functionary and the Trustee.

89.2 **Secondly**, the scope of the surety and the period of time that it will remain valid are dependent on negotiations, and in contrast to the position of the Trustee specifically, **it is not reasonable that an issuer will not make available surety that will guaranty that his representations and reports shall be correct**. In effect, in this contention the Trustee and the Functionary repeat the contention **that was rejected** by the Supreme Court, according to which, an issuer of debentures only is exposed to pay the principal and the interest and not additional damages. As stated, this contention **was rejected by the Supreme Court a long time ago** in the decision in the matter of Permission for Civ. App. 3800/15 **T.R.D. Instrom Ltd. v. Zeev Zeevi et al.** (published in Nevo February 8, 2017).

90. What is stated also is prompted in light of the stand of the Functionary himself (Paragraph 64 of his Reply) and from which it appears that in Section 4 of the Charge Agreement there is a clear distinction between the scope of the charge(all the obligations of the Company) and the time until which the charge will be valid (repayment of the amounts stated pursuant to the debenture or that were removed by virtue thereof), and from there it follows that there is no basis for the fears of

the Trustee that adopting the position of the Petitioner will expose the issuing companies for many years in all that is connected to the charge.

H. The summary reference to additional contentions that the Trustee and the Functionary raised in their Replies, and they should be rejected

91. In order to place before the Hon. Court a complete and full picture, we wish to relate, briefly, to additional contentions that were raised by the Functionary and the Trustee in their Replies and that, in the opinion of the Petitioner, should be rejected.

H.1 One should reject the contention that the Petitioner is not permitted at this stage, prior to the granting of the motion to certify, to represent the members of the class

92. According to the Trustee, the Petitioner filed a motion to certify a class action, and therefore, at this stage, prior to the approval of the motion, he is not authorized to represent already now the members of the class in this case.

93. One must reject this contention:

93.1 As any petitioner in any motion to certify a class action, the standing of the Petitioner as someone who is acting for the members of the class is position that the courts wish to encourage and to advance. The fact that the lawsuit itself is conditioned on the certification of its submission after clarification of the motion certification phase does not detract from the ability and authority of the petitioner to represent the members of the class also in the preliminary phase of the motion to certify, and to act to protect their interests, from the point of view of their creditor standing, where indeed they will succeed in their claim against the company.

93.2 The fact that the contentions of the Petitioner and the members of the class against the Company by virtue of those debentures have yet to be decided, in light of the fact that the motion to certify still is pending before the economic court, does not detract from the creditor standing of the Petitioner and the members of the class and by virtue of the charge against them.

93.3 The validity of the charge is independent and is not dependent on a legal proceeding, and certainly the validity of the charge and the scope of its application are not derived from the results of the determination of the legal process. As stated above, only the **realization** of the charge (that is – the distribution of the funds to the class) is dependent upon the results of

the determination of the legal process. However, the determination of whether we are dealing with **a valid charge** (whose significance is leaving the funds in the Company kitty and preventing their distribution) is dependent solely on the language of the charge documents.

93.4 As stated above, the level of the credit is not derived from the timing in which the contentions of the creditor is decided against the company, but rather from the charge documents in his possession. Any other determination will create **a new credit arrangement based on the random timing in which a determination is handed down on the debt of the insolvent company against its secured creditors**. There cannot be a situation in which two creditors hold an identical charge, and it is held that the charge of one whose claim was proven prior to the distribution of the funds is valid, and the charge of the creditor whose claim has not yet been proven will lapse and the charged funds will be distributed in whole only to the secured creditors whose claims were proven at the time of the distribution of the funds.

93.5 Therefore, one should not examine the validity of the charge pursuant to the time of the determination in the motion to certify, but one must conduct an examination in advance of the scope of the charge *vis-à-vis* the Petitioner and the members of the class.

H.2 One must reject the contention that the contention for a secured creditor was raised in retrospect

94. The Trustee and the Functionary complain about the timing of the raising of the contentions regarding the credit standing of the members of the class.

95. One must absolutely reject this contention.

96. First of all – and this is the substance: **the timing of the raising of the contention does not detract from its validity and consequences** (the things even were brought in the words of counsel for the Official Receiver in his Reply to Permission for Civ. App. 5846/17).

97. Secondly – also the substance of the contention deals with an erroneous and deceptive contention.

98. The Petitioner raised the contention regarding the members of the class being secured creditors already at the meeting of the holders that took place on May 24, 2017, in which the proposed arrangement was discussed, as cab be seen from the protocol pf the meeting (pp. 14-15, appended as Exhibit 3 to Motion 42 by the Functionary in the case at hand).

99. The contention was brought to a determination only when it became apparent to the Petitioner that without a legal basis, the Functionary is making a distinction among bondholders who are identical in substance, and prior thereto there was no basis to raise the contention, since the Petitioner did not imagine that in complete contrast to the language of the debenture, the Functionary would try to distinguish among the standing of identical bonds.

100. In addition, the need to bring about to a judicial determination the dispute with regard to the credit standing of the members of the class arose **prior to the initial distribution and without any action having been taken that can be said to be irreversible**. For this reason also no damages were alleged from the time of raising the contention; we are dealing with a contention lacking any consequences just for the sake of saying them without meaning it and without it having any significance, and as stated, it has no substance.

H.3 <u>One must reject the contention that the Petitioner did not present any documentary evidence that he is a bondholder</u>

101. Also the contention that the Petitioner did not present any documentary evidence to the Functionary of his holding a debenture must be rejected, and its very raising is infuriating.

102. It suffices for us to refer to the protocol of the arrangement meeting that was appended to the Hon. Court within the framework of Motion 42, at the time when there was presented to the Functionary an affirmation of the Petitioner's holding the debenture, and that, as a condition to his participation in that meeting (and as that affirmation of holding also was appended to the motion to certify itself).

103 So as to avoid any doubt, the Petitioner proved his holding within the framework of the motion to certify, as well as the cause of action to which he was entitled.

104. One cannot but be impressed that these contentions are intended to attempt to create, out of full cloth, contentions against the Petitioner that have no substance, and it is a pity that the Trustee and the Functionary do not concentrate their contentions on the legal contentions and refrain from conducting the dispute between the parties in a substantive manner.

I. <u>Conclusion</u>

105. On the basis of all that is stated in the motion and in this Reply, the court is moved to grant the motion:

105.1 To hold that the Petitioner and the members of the class whom he wishes to represent within the framework of the motion to certify the class action that he filed against the Company in the framework of Class Action 1746-04-16 are secured creditors.

105.2 To hold that, under the circumstances, when the Hon. Court gave its approval to conduct the lawsuit against the Company within the framework of an appropriate legal proceeding, then the Petitioner (and the members of the class whom he wishes to represent in the motion to certify) did not have to file a debt claim, including a monetary debt claim, and in the alternative solely for the sake of caution, to extend the time for the filing of the conditional debt claim, so that it be submitted within 15 days from the time of the determination in this motion.

106. Likewise, the Hon. Court is moved to assess the Respondents with court costs and attorneys' fees.

107. For the sake of good order, it is noted that this Reply (as the motion) relies on the legal grounds and on the contentions that were raised in the pleadings within the framework of the proceedings between the parties, and therefore is not supported by an affidavit.

/s/ **/s/**

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Counsel for the Petitioner

Tel Aviv, this 11th day of March, 2018