**In the District Court**
**In Tel Aviv**

**Liquidation 44348-04-16**
**Motion No. 56**
**Before His Honor the President**
**Judge Eitan Orenstein**

**In the matter of:** **The Companies Law, 5759-1999** **The Law**

**and in the matter of:** **Urbancorp Inc.** Canadian company no. 2471774 **The Company**

**and in the matter of:** **Adv. Guy Gissin – the Company Functionary**

By its attorneys, the advocates from Gissin & Co. Law Offices
Of 38B Habarzel Street, Tel Aviv 69710
Tel.: 03-7467777; fax: 03-7467700 **The Functionary**

**and in the matter of:** **Reznik, Paz, Nevo Trusts Ltd.**

The trustee for the bondholders (Series A)
By its attorneys, the Law Offices of Amir Flamer & Co.

All the emphases

Tel. 03-3730630; Fax. 03-3730650 **The Debenture Trustee**

**and in the matter of:** **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**

**and in the matter of:** **The Official Receiver – Companies Department**

Of 2 Hashlosha Street, Tel Aviv 61090
Tel.: 03-6899695, Fax: 03-6462502 **The Official Receiver**

# The Position of the Official Receiver to the Motion to Determine the Standing of the Members of the Class in the Class Action as Secured Creditors

The Official Receiver respectfully submits its position in the captioned motion, as follows.

All the emphases in the quotations in this position were added.

At the outset we will state that we do not believe that the Charge Agreement dated December 20, 2015 (Exhibit 3 to the Debenture Trustee's Reply (Exhibit 3 to the Debenture Trustee's Reply) applies to the grounds in the motion to certify the class action (Class Action 1746-04-16, the "**Motion to Certify**").

## A. Opening Comments

1. The Official Receiver agrees with the Petitioner's contention in Chapter D.1 of the motion, according to which the application of the surety is not derived from the time of the determination in its claim. The provisions of the relevant law, including Sections 132-33 of the Bankruptcy Ordinance [New Version], 5740-1980 are intended to arrange the manner of the distribution of the dividends to the creditors, and they do not detract from the substantive standing of their creditors. The creditor status and its classification is determined without connection to the time at which the credit was determined and crystallized. This time may impact upon the manner of distribution of the funds *de facto*, but not on the substantive right of the creditor *de jure*.

2. Likewise, the Official Receiver is of the opinion, as in the Petitioner's contention in Paragraph 59 of the motion, that the issue of the strength of the grounds of the Motion to Certify and its chances to be granted are not needed for the motion at hand. the Motion to Certify can include strong and excellent grounds to which the charge does not apply, and can include weak grounds that in the end of the day will be denied, even though, were they to have been granted, they would have been sheltered under the charge.

3. So also as to the contention of the Debenture Trustee in Paragraphs 92-97 of his Reply, and the contention of the Functionary in Paragraph 25 of his Reply, according to which those who sold their holdings cannot still hold onto their causes of action for having held the debentures in the past; beyond the fact that the case law in the securities law absolutely recognizes such a possibility, including obtaining compensation for a decline in value of the securities and even for the loss of alternative profits – that in addition to the right to the payment of the gap value of the debenture located in the hands of the "new" holders;[1] in any event, the determination whether or not the past holders are granted a cause of action under the circumstances is handed over to the court adjudicating the Motion to Certify.

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[1] See, among other things, Permission for Civ. App. 1701/93 **Teva Pharmaceutical Ind. Ltd. v. Zat Economic Consultants Co. Ltd.,** P.D. 47(5) 476 (1993) ( "**Matter of Teva**"); Permission for Civ. App. 3800/15 **T.R.D. Instrom Ltd. v. Zeev Zeevi et al.** (published in Nevo February 8, 2017) (hereinafter: Permission for Civ. App. 3800/15 **T.R.D. Instrom Ltd. v. Zeev Zeevi et al.** (published in Nevo, February 8, 2017) ("**Matter of Instrom**"), in Paragraphs 29-30 (and the references there.

4. The sole issue that must be examined in our opinion within the framework of the proceedings at hand is whether or not the grounds of the Motion to Certify **pursuant to their substance** (and not according to their quality) – are sheltered under the charge.

## B. <u>Does the charge at hand apply to the grounds that are claimed in the Motion to Certify</u>

5. The Petitioner's contention regarding the application of the charge on the grounds for the Motion to Certify lies on the fact that in all the relevant agreements – both within the framework of the trust deed and within the framework of the charge documents it was held that the surety that was made available for the benefit of the bondholders was not intended only to guaranty the payments of the principal and the interest stated in the debenture, but for **all of** the obligations of the company pursuant to the terms of the debenture.

6. Thus, the Charge Agreement provides that the surety will guaranty – "*the full and precise payment of the amounts sue and that shall become due to the bondholders (Series A) from the Company, pursuant to the deed of trust, including the payment of the principal and the interest **and additional amounts for which the Company shall be liable pursuant to the debenture and the trust deed***."

7. So also in the binding of the prospectus and in the trust deed was it held that the surety is given – *"to guaranty the full and precise compliance **with all the obligations of the Company pursuant to the terms of the debenture** (Series A) **including** the promise of the full and precise payment of all the payments of **the principal and the interest** for which the Company is obligated...."*

8. The issue therefore is whether the grounds of the Motion to Certify are included in the words "the obligations of the Company pursuant to the terms of the debenture the obligations of the Company pursuant to the terms of the debenture" and in the words "additional amounts for which the Company shall be liable pursuant to the debenture".

9. The damages alleged in the Motion to Certify are the result of deceptive reports and the failure to disclose allegedly material information, including within the framework of the prospectus, and they are being claimed among other things by virtue of grounds determined in the Securities Law, 5728-1968. One can say that every debenture includes by implication an undertaking of the company to indemnify the holders for any damage that may arise from the holding and that shall be caused as a result of any breach of the law in general and the securities laws in particular. (See, for example, Section 52k of the Securities Law, which imposes civil liability on companies that breached the obligations imposed upon them by virtue of the securities laws). Therefore, the obligation of the Company

pursuant to the terms of the debenture implicitly includes the obligations pursuant to the law.

The matter is stated perhaps more strongly in all that relates to false representations and the hiding of material information for which matter express provisions of the Securities Law were provided, which constitutes a specific law that controls the arrangement of the examined system of agreements.

10. One therefore can contend that within the framework of the issuance of the debenture the Company committed that it did not breach any provision of the law, including –

- that there was given to the holding public all the material information regarding the Company, including the strength of the license of its subsidiaries as a promoter of apartments in the Province of Ontario in Canada, and the circumstances that placed it in danger at that time;

- all the details in the prospectus truthfully reflect reality, including the scope of the Company's working capital;

- the controlling party will inject into the Company an owner's contribution at the level of 12 million Canadian dollars.

And that the charge was given to guaranty all the undertakings of the Company pursuant to the terms of the debenture – that contain the aforesaid undertakings.

11. As the Petitioner contends, all the references to the charge that were brought in the system of agreements between the Company and the holding public take a broad and all-inclusive language, which is intended to indicate the intent to guaranty the holders in a broad manner, so that nothing will be deleted from the obligations of the Company to them.

12. We also agree with the contention of the Petitioner in Paragraph 34 of his Reply, that as opposed to the contention of the Debenture Trustee in Paragraph 79 of his Reply, we are not dealing with grounds and damages the possibility of whose existence could not have been foreseen at the time of preparing the agreements.

13. Even taking the Charge Agreement in the language of "obligations" of the Company, and not only "debts" of the Company, will strengthen this interpretation, and see, in this regard, Civ. App. 2181/02 **The Jewish Agency for the Land of Israel v. Beit Nehemia a Workers Settlement of the Zionist Worker for Collective Settlement Ltd.**, P.D. 58(3) 697, "**Matter of the Jewish Agency**" (brought in the Reply of the Debenture Trustee), on p. 703: *"An examination of the language of the debenture supports the conclusion that the contents of the obligation guaranties in the debenture is solely the monetary debt. Both in the preamble to the debenture and in the caption of Section 2 of the*

*debenture, which defines what the guaranteed debt is within its framework, it expressly is stated that the matter of the debenture is guarantying the obligations of the Settlement to the Jewish Agency. Debts is stated – and not obligations or undertakings."*

14. And indeed, the obligations of the Company by virtue of the torts laws and the securities laws are no less in their status than its obligations by virtue of liability for "the principal and the interest".

    **Nevertheless, as stated, the Official Receiver believes that the grounds for the Motion to Certify are not protected by the charge at hand.**

15. According to the Petitioner (Paragraph 31 of the Motion and 26 of the Reply), the determination in the Charge Agreement that it was given to guaranty all of the obligations of the Company "**including payments of the principal and the interest and additional sums** for which the Company shall be liable pursuant to the debenture and the trust deed" indicates the guaranty of any sum for which the Company shall be liable toward the holders in addition to and beyond the amounts of the principal and interest.

    The Debenture Trustee (in Paragraph 81 of his Reply) and the Functionary (in Paragraph 35 of his Reply) note that pursuant to the terms of the debenture the Company may be liable to the holder for additional amounts beyond the payment of the principal and the interest stated, such as the increase in the rate of interest for a change in the rating of the debenture (Section 5.2 of the trust deed) or for failure to comply with the financial standards (Section 5.3 of the trust deed); and the sum of $100,000 intended for the payment of expenses under certain circumstances (Section 5.2 of the trust deed) (Section 5.8 of the trust deed); therefore, the very broadening of the obligations of the Company pursuant to the terms of the debenture beyond the mere payment of the principal and interest, **there is nothing** necessarily to indicate that these obligations include damages of the kind claimed in the Motion to Certify.

16. The language of the Charge Agreement and the trust deed limit the undertakings for which the charge was given only to those that are "pursuant to the terms of the debenture". In no place in the motion is it alleged that any of the obligations with which the Motion to Certify deals was provided expressly in the body of "the terms of the debenture", and not for naught – since it was not provided.

17. And not only that they did not determine, but the provisions of the agreements may indicate precisely the opposite:

    - The provisions of Section 4 of the Charge Agreement provides that the surety shall remain valid only "*until the time of the complete repayment of the debenture*" (and not until the time of the complete payment of all of the obligations of the Company to the holders, even if they are not stated

in the debenture), indicates that the scope of the security is limited to the guaranty of the Company's debts only that are provided expressly in the debenture. (See Sections 64-65 of the Debenture Trustee's Reply).

- The provisions of Sections 6.4.3, 6.4.4 and 6.4.8 of the trust deed (Exhibit 2 of the Debenture Trustee's Reply) provides that the Company's obligation to deposit from the Surplus (as defined in the Agreement) in the designated account upon which the charge will apply, is intended "*for the benefit of the payment of the principal and the interest to the bondholders (Series A) (including in the case of setting up the debenture for immediate repayment) and/or making an early redemption of the debenture*", and that this obligation of the Company is limited to the sum "*that is equal to 100% of the value of the commitment value of the debenture, together with amounts that are equal to the payment of future interest up to the time of the final repayment of the debenture… up to the end of the term of the life of the debenture*". This means – not only that the designated account charged in favor of the Trustee includes funds designated for the payment solely of the commitment value of the debenture, it also is limited to the period of the life of the debenture, where liability by virtue of the grounds of the type claimed in the Motion to Certify is intended to arise also years thereafter (see Sections 68-69 to the Debenture Trustee's Reply).

18. Indeed, every agreement contains an implicit obligation to act pursuant to the law. Every debenture contains an implicit obligation not to breach the provisions of the securities laws. But from this it does not follow that a charge that comes to guaranty the obligations provided in the debenture spreads its wings over all the provisions of the law that apply implicitly to that debenture, even if it is not written therein.

19. Such a broad interpretation adds a basis of uncertainty that harms the value of the debenture and its marketability; and in the mirror of the principles of insolvency, it may allow too wide and cloudy an opening to broaden the guaranteed credit.

## C. <u>The principles of insolvency</u>

20. The Official Receiver believes that when a doubt remains in interpretation of the deed and the Charge Agreement, one must determine it in accordance with the insolvency principles.

21. The basic principle in insolvency proceedings is the principle of equality, where any preferred position given to a particular creditor over other creditors deviates from it. Because of this deviation, case law determined that on the issue of recognition of a preferred position of its creditors, one must examine this

preference in a narrow and strict manner. As a rule, where the preferred position of creditors is in doubt and is not unequivocal, the court will lean not to grant it.

22. See Bankruptcy 30790-02-18 **Hoenigman & Sons Ltd. et al. v. Official Receiver Tel Aviv** (Motion No. 14, handed down on March 1, 2018):

***"Where we are dealing with insolvency proceedings, it is advisable to give a strict interpretation to the terms required for recognition of secured creditors, since any interpretation that expands the circle of secured creditors necessarily harms the other creditors***. In this spirit it was held that:

*"The principle accompanying the insolvency proceedings is the principle of equality among creditors. Pursuant to this principle, the creditor kitty is divided equally among creditors without any preference for one creditor or another, where the preference will only be given in the cases listed in the law. ... The principle of equality among the creditors requires giving a literal interpretation to the creditor debts, according to which there only will be recognized express obligations toward a creditor. The realization proceedings within the framework of insolvency of the company also assumes equality of damages, and it is not conceivable that creditors will attempt to collect their damages by including them within the framework of obligation that are the subject of the charge indirectly. Where it is not expressly agreed as to one debt or another, it will not be possible in insolvency proceedings to insert it by means of interpretation. This principle is consistent with the purpose of the insolvency laws."*

*(Misc. Civ. Motions 1074/08 **Hefziba Housing & Development Ltd. V. Adv. Ilan Shavit – Shtriks** (published in Nevo, November 9, 2008) (Hon. Judge Y. Tzaban, Paragraph 9);*

*See also **Civ. App. 648/82 Assessing Officer for Special Collections v. Yisrael Gafni,** P.D. 38/3 813 (1984):*

*"When a paragraph that comes to grant a preference to a special kind of creditor with regard to the right of priority is suspended, one must interpret what is written in it with a strict interpretation.... The idea at the foundation of this interpretation is that **the general trend in bankruptcy or liquidation of companies must be preservation of equality among creditors, and one should not breach that unless the strict interpretation of what is written justifies that….** That means that the silence in our matter means negating the right of preference for linkage differential and interest, an interpretation that prevents increasing the inequality among creditors." (The Hon. Deputy President M. Ben-Porat, in Para. 6).*

*And see Misc. App. – Civ. 31676-07-16 **Bank Hapoalim Ltd. v. Advocates Adi Figel and Hagai Ullman Special Administrators of Kamor Ltd.** (published in Nevo, May 2, 2017).*

23. See also Bankruptcy (Tel Aviv) 55200-01-17 **Y.R. – Ezra Bros. Constr. Co. Ltd. v. Hermetic Trust (1975) Ltd.** (published in Nevo, September 16, 2017), in Para. 19, there it was held that in insolvency proceedings **one must "give an interpretation to the debts of the debtor in a manner whereby only express debts will be recognized since any recognition of a debt that is not unequivocal necessarily harms the other creditors.**"

24. As was noted in the above quotation in the Matter of Hoenigman, the strict interpretation in granting a higher creditor standing in insolvency proceedings also is provided with regard to the standing in priority laws. See, for example, Bankruptcy (Haifa) 66/02 **Oz Atid Int'l Ltd. v. Gavriel Tarbelsi** (published in Nevo, February 10, 2004), in Paras. 10-11:

    *"The fundamental principle in distributing the assets among creditors in liquidation is the rule of equality.... The rule of equality is materially harmed as the result of the recognition of a group of creditors who achieve a preference. This recognition does not negate the contents of the rule despite the erosion thereof. The realization of the principle of equality is expressed in the narrow interpretation that the court preferred to give to the provisions of the law that relate to the principle of equality.*

    *... Section 354(a) of the Companies Ordinance provides an exception: List of debts that are entitled to preference.... The scholar Zipora Cohen wrote: ' The granting of preference to the debts listed in this section creates an exception to the principle of equality, and as such requires the courts to give a narrow interpretation to the exceptions listed in the section'....*

    *The Supreme Court chose to interpret the exceptions in Section 354(a) in a narrow manner in a long line of cases....'*

    *And in Para 28: 'Excessive broadening of the number of preferred creditors may decrease the liquidation kitty at the expense of the regular creditors, up to the general thwarting of the creditor arrangement."*

25. It appears therefore that if we believe that from the language of the agreements themselves there does not arise a clear intent to guaranty within the framework of the charge the alleged grounds in the Motion to Certify (and perhaps even the opposite thereof), then the strict interpretation that is compelled by the insolvency proceedings shifts the balance so that one should not include in the charge the grounds of the Motion to Certify.

26. Indeed, as the Petitioner contended, the charge relates to **all** the obligations - but only to all the obligations that are **pursuant to the terms of the debenture**.

**Although the creditor status contended in the Motion to Certify arises from the holding of the debenture, but it does not arise from the provisions of the debenture.**

## D. Additional contentions that were raised by the parties

The assurance of damage grounds in the charge

27. From the contentions of the Debenture Trustee in Section 84 and thereafter to his Reply, it appears that according to him causes of action of the kind claimed in the Motion to Certify never can be covered charges given to guaranty the obligations of the company issuing the debenture.

The Official Receiver does not think so. However, as the Debenture Trustee rightly contends, including additional debts of a tort nature that deviate from the obligatory value of the debenture within the framework of the surety given to the holders adds to the transaction a basis of uncertainty both with regard to the amounts guaranteed and with regard to the period of the validity of the surety. The degree of uncertainty contained in the marketable paper has a clear influence on its value and marketability. Nevertheless, an answer can be given to the lack of certainty stated by various means, including setting defined and limited amounts and times therefor[2] - all in the discretion of the parties.

The general principle is that *"the contents of a contract can be whatever the parties agree upon",*[3] and as a rule, the parties may determine in an agreement between them that the collateral shall apply to debts and obligations that one may owe to the other, even if they are not defined monetary debts stated in the contract. This, for example, it was held that a pledge also may guaranty the right of a creditor to compensation for breach of a contract, and that, in addition to the guaranty of the contractual debt itself.[4]

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[2] Thus, for example, there are debentures whose life's span is longer than the statute of limitations period that is supposed to apply with regard to claims that were conceived at the time of the issuance.

[3] Contracts Law (General Part), 5733-1973, Section 24.

[4] See **Matter of the Jewish Agency**, in Paragraph 6: *"Under the circumstances in which a debenture is intended also to guaranty a debt that is not monetary,* ***such as a contractual obligation****, the expiration of the monetary debt that was guaranteed within its framework does not bring about the expiration of the charge that was imposed by virtue thereof. As Y. Wisman clarifies in his treatise 'The Pledge Law, 5727-1967' interpretation to the contract laws [6], at p. 296: 'The polished determination in Section 15(a) – " The debt is ended, the pledge expires" should not be read literally the original debt that was assured by the pledge may be cancelled and nevertheless the pledge will continue to exist. This may happen where the debtor does not comply with the contractual debt that was guaranteed by the pledge, and the creditor exercises his right to cancel the contract…. The original guaranteed debt will cease to exist but the pledge will not come to its end since in place of the original debt the pledge will guaranty the right of the creditor*

The contention of the absence of a controversy

26. So also we do not believe that there was properly based the contention of the Debenture Trustee in Para. 27 and thereafter in his Reply, according to which the Petitioner lacks any standing against the Company by virtue of the charge and, in effect, there is no controversy in this matter against the Functionary, since the charge is for the benefit of the Trustee and not for the direct benefit of any of the holders.

Since we do not believe that the charge applies to the grounds of the Motion to Certify, we are not required to examine the appropriate procedure and the "correct" respondents in it were we required to realize the charge in relation to the Petitioner's class. Nevertheless, we note that a trustee – is as his title implies – and he has nothing of his own but rather in the name and on behalf of those whom he represents. In this regard we agree with the contention of the Petitioner in Para. 49 of his Reply.

And just as stated, one can, in our opinion, as a rule, determine that a charge will be given also to guaranty liabilities that deviate from the pure and simple obligatory value, so too one can, as a rule, determine clear operating mechanisms for the trustee to exhaust these guaranteed rights. (Indeed, such mechanisms were not set out in the charge agreements at issue, and even that points to the absence of its contents with regard to the grounds of the Motion to Certify).

29. In all that relates to the relational system between the holders and the Company, we will reiterate what was stated **in the Matter of Teva** (footnote 1 above): *"... The lawsuit always relates to damages that were caused, and if there is no damage there also is no remedy; if a number of entities were damaged, one after the other, there is not in that, in any legal field, anything that would negate their right to sue, and someone who is afraid of a plethora of injured parties should plan his steps accordingly."*

So with regard to the grounds of the lawsuit, and so, in our opinion, also with regard to their guaranty in the charge.

See also what is stated in **Matter of Instrom** (footnote 1 above), in Para. 31: *Instrom further contended that the authority to represent the bondholders was relegated solely to the trustee and, as a result thereof, Zeevi is not entitled to file a class action in the name of any of the bondholders. This contention also is not acceptable to me. Indeed, the deed of trust authorizes the trustee to take legal proceedings to enforce the rights of the bondholders, but there is no stipulation from which there is implied an intent to limit or to negate the rights of the class of*

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*to compensation for breach of the original debt. Section 15(a) of the Pledge Law intends that the pledge will expire when any debt guaranteed by it ceases to exist, whether the guaranteed debt is the original debt or that it is a right to compensation for breach of the original debt."*

*bondholders as they were defined in the case at hand from taking legal proceedings, including by way of a class action other than through the trustee."*

So with regard to the causes of action, and so, in our opinion, also with regard to the guaranty in the charge.

<u>Meeting of the holders</u>

30. The Debenture Trustee in Para. 103 of his Reply and the Functionary in Paras. 11, 22 of his Reply further note that in the meeting of holders on July 31, 2017 it was decided unanimously to object to the allocation of funds for the purpose of the Motion to Certify by virtue of a secured creditor, and from here to their contention one can conclude that even that same part of the class that did not sell their holdings is not interested in the actions of the Petitioner in the Motion to Certify that pretends to be done also on their behalf. As to the "new" holders – as the Petitioner contends in Para. 56 of his Reply – but it is clear that they object to the addition of additional creditors (those who sold their holdings) to the anyhow to the depleted creditor kitty. With regard to the "old" holders, it may be that the additional credit that the Motion to Certify will grant them will be set off against the increase in the class and the addition of the "past holders" to it, and therefore the share allotted to them from the credit kitty will remain the same in the end; and therefore they will prefer to advance the payment to the extent possible and to refrain from allocating funds in favor of the Motion to Certify. In practice, additional value that may be received as a result of the Motion to Certify is hidden – within the insolvency proceeding – primarily in the hands of those who sold the debentures; and outside of this procedure – within the framework of the Motion to Certify against additional defendants – also in the hands of the old holders.

31. It should be noted that we do not agree with the contention of the Petitioner in Chapter E of his Reply, according to which there is a presumption on those who do not want the allocation of funds in favor of the lawsuit, that they would give notice of their desire to opt out of the class in accordance with the Class Actions Law, 5766-2006. Opting out of the class will prevent obtaining compensation by the party "opting out" also from the additional defendants in the class action, and on the other hand, will not prevent the participation of the remaining class in the credit kitty, and therefore will not help those holders.

32. In any event, in light of what is stated above, the Official Receiver believes that the significance of this vote is limited to the purpose of the motion at hand, since the main beneficiaries from inclusion in the "Pechthold class" in the Company's credit kitty in any event did not participate in it.

33. The limited significance of the results of the meeting also arises from the fact that we do not know what the scope is of the holdings that were sold and what the scope is of "the new holding", and therefore any significance that we would seek

to relate to such or other distribution among the positions of the various holders (in the past and in the present) in any event merely is theoretical.

34. Nevertheless, it may be that there are grounds to consider the "map of interests" stated to the extent that there shall be examined in the future types of allocations of funds in the case on the issue of whether it is appropriate to allot and to leave behind "a share" of the creditor kitty funds for the benefit of the members of the class and what the appropriate rate is, and that, in accordance with the data that will be before us at that time.

## E. Filing a debt claim

35. The Functionary points in this matter to the decision of the Hon. Court dated July 3, 2017 that dealt with the motion to allocate funds (Motion No. 34), in which it was held that the failure to file a debt claim prior to the motion to allocate funds suffices in order to justify denying the motion. But now, the issue of allocating the funds that were requested no longer is on the agenda, and the significance of filing a debt claim at this phase may be only as to additional funds to the extent that they will be distributed in the future [and if our position is accepted – in the standing of a regular (conditional) credit only]. Therefore also this motion does not constitute a proper place to examine considerations to allocate funds for the benefit of its conditional creditors, as was brought in Para. 51 of the Functionary's Reply.

36. As a rule, the Official Receiver believes that there are grounds to file a debt claim by <u>all of the Company's creditors</u>, of every kind and type whatsoever, <u>and in a timely manner</u>, and even if we are speaking about a conditional creditor known to the Functionary and there is conducted in its matter a lawsuit in a court having jurisdiction with the approval of the insolvency court. That, in order that all the contentions, the demands and the claims against the Company by all the entities, will be concentrated in an arranged manner by the Functionary, and the entire and precise picture will be before him of all the credit claims against the Company.

37. This complete picture is required also in order that there be before the other creditors who filed debt claims, who are entitled to inspect all of the debt claims that were filed by virtue of Rule 23 of the Companies Regulations (Motion for a Settlement or an Arrangement), 5762-2002.

38. In this context we will recall also Rules 17 and 18, which require the filing of debt claims in a proceeding that is conducted pursuant to Section 350 of the law for the purpose of calling a meeting of creditors, also by secured creditors.[5]

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[5] Even though the failure to file a debt claim shall not nullify the secured debt, and that is in contrast to an ordinary debt, the recognition of which is conditioned upon the filing of a debt claim for it.

39. Nevertheless, in light of the approval by this Hon. Court of the continued conduct of the Motion to Certify in the court having jurisdiction (within the framework of Motion No. 10); and in light of the full involvement of the Functionary in all the proceedings that dealt with the Motion to Certify, starting from the very being of the Company a respondent therein, through the aforementioned Motion No. 10 and additional motions that dealt with the Motion to Certify, and ending with the representation of the Company as a respondent in the Motion to Certify; and in light of the involvement and also the knowledge of the holders – who "hold" the vast majority of the credit in this case, of all the proceedings that were conducted with regard to the Motion to Certify; -

    we believe that **<u>under the specific and unique circumstances here</u>, one should not give the debt claim a constructive status with regard to the credit contended in the Motion to Certify.**

40. Since that is so, and in light of the formal-like nature of the debt claim in our matter, we do not see a detriment to granting an extension of time to file currently, as was requested in Para. 81 of the Petitioner's Reply, and that, in any event, as clarified above, its practical application only shall be in future distributions (and in our opinion, also in in an ordinary trial).

41. It should be noted in this regard that apparently only the Petitioner himself – Mr. Tuvia Pechthold – has "the right of standing" within the framework of the debt claim, and only that as "a conditional creditor", since while his personal claim has yet to be determined, the class that he seeks to represent has not yet been granted any standing at all, and it is in the position of a "conditional creditor on probation", until and to the extent that the Motion to Certify is determined in its favor – and then the class will join the Petitioner's side to "the waiting bench" of the conditional creditors, until the class action is decided as to its substance.

    This "twilight zone" in which the class is left until the Motion to Certify is decided is not clearly defined in Section 71 of the Bankruptcy Ordinance, and raises many questions: can their "confused" lawsuit at all include a debt claim; can this class be entitled to any status within the framework of creditor meetings on the basis of a debt claim; what is the amount that one should relate to its credit (if at all) within the framework of the meetings, and more.

42. The existing lack of clarity in the law with regard to the nature of the filing of a debt claim by the Petitioner in the motion for recognition of the class action, and with regard to the status of the class that he seeks to represent within the framework of this debt claim, strengthens our opinion according to which, to the extent that the Motion to Certify is in the full knowledge of the Functionary and the court handling the insolvency proceedings and even with its approval, and alongside the very need in principle for the filing of the debt claim – and in a timely manner – as stated above, leads in our opinion to granting an extension to

file the debt claim (and again, as stated above, in an ordinary trial and in the application only to future distributions).

/s/

Gali Itron, Adv.
Companies Department
The Official Receiver