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In the Supreme Court in Jerusalem **C. A. 2889/18**

Sitting as a Court of Civil Appeals

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The Appellant

- versus -

1. **Tower Semi Conductor Ltd.**
By Counsel, Attorneys Fischer Behar Chen Well Orion & Co.
of 3 Daniel Frisch Street, Tel Aviv
Tel. 03-6941349; Fax 03-6944103

2. **Brightman Almagor Zohar & Co. Accountants**
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Tel: 03-6072222 Fax: 03-6072220

3 - 12 Amir Elstein et al.
By Counsel, Attorneys Fischer Behar Chen Well Orion & Co.
of 3 Daniel Frisch Street, Tel Aviv
Tel. 03-6941349; Fax 03-6944103

The Respondents

And in the matter of:

Israel Securities Authority
By Counsel, the State Attorney's Office
5 Kiryat HaMada St., Building B3, 5th floor, Har Hotzvim
Jerusalem, 9777605
Tel: 02-6362027; Fax: 02-6362050

The Institute of Certified Public Accountants in Israel
By the firm of Gross, Kleinhendler, Hodak, Halevy, Greenberg & Co.
of Azrieli Center 1, Tel Aviv
Tel: 03-6074460; Fax: 03-5168815

Main arguments on behalf of the Securities Authority

In accordance with the ruling of the Honorable Court dated 26.6.2018, the Israel Securities Authority (hereinafter: the "Authority") is pleased to submit to the Honorable Court the main arguments on behalf thereof with respect to the question that has arisen within the context of the file in the heading, as follows:

A. Preamble

1. We are dealing with an appeal against the judgment of the Tel Aviv District Court (Judge Khaled Kabov in P.A. 44775-02-16 dated 7.11.2017, as well as his complementary judgment in respect of the same procedure dated 20.2.2018, within the context of which the Honorable Court of First Instance rejected the Appellant's application to approve a class action lawsuit against Respondents 1-12, claiming that misleading reports were included in the Financial Statements of Respondent 1 (hereinafter: "**Tower**"), a company registered to trade on the US Stock Exchange and also the Tel Aviv Stock Exchange, within the context of a dual listing arrangement.

2. The central questions that were raised in the Court of First Instance, and even in this appeal are, firstly: **what is the applicable law in relation to the civil liability for reports of dual listing companies** (hereinafter also: "**dual companies**") and secondly: **what is the applicable law in relation to the civil liability of Accountants who audit Reports of dual listing companies?** In respect of these two questions, the Court of First Instance ruled that foreign law is applicable, and not Israeli law.

3. The answer to the questions under discussion might have an extensive impact on the activities of the Stock Exchange in Israel, which constitutes an important economic basis for the Israeli economy, as well as having an impact on the investing public in Israel. The Authority filed a position on its behalf in Tel Aviv (Cent. District) 22300-05-15 **Moshe Haight v. Verifone Holdings, Inc.** (hereinafter: the "**Verifone matter**") within the context of which a question was posed which is similar to the first question which arose in our case, and a position was also filed in the proceedings before the Court of First Instance in respect of the second question that arises in our case.

4. The two positions which were submitted on behalf of the Authority remain unchanged. In essence, the position of the Authority is that the rules of civil liability which are applicable to dual listing companies in connection with the disclosure which they provide in accordance with the foreign law are the rules of civil liability of foreign law. In light of the ruling of this Honorable Court on the submission of the main arguments in this appeal, this position will be explained herein below, by means of integrating the main points as these were presented in the positions submitted on behalf of the Authority in the aforementioned instances.

5. It will be clarified that this position does not address the factual disputes between the parties, and it focuses on the legal matters which are under discussion. Of course, if the Authority does not take a position on any particular subject this should not be viewed as an indication of the position of the Authority in respect thereof.

6. The order of argument of this position shall be as follows: in the **second chapter** we shall present in brief the dual listing arrangement and the background to the establishment thereof; **in the third chapter** we will examine the legislative arrangement, the language and purpose of it, and we will clarify the position of the Authority in relation to the Law applicable to the civil liability of a dual listing company; **in the fourth chapter** we will present the position of the Authority relating to the applicable law with respect to the civil liability of the Auditors of a dual company.

B. The dual listing arrangement - background

B. 1. The purpose of the dual listing arrangement and the assumptions on which it is based.

7. The dual listing arrangement is cemented in Chapter E.3 of the Securities Law, 5729-1968 (hereinafter: the "**Law**" or "**Securities Law**"), which became valid in 2000.

8. The dual listing arrangement was enacted against the background of globalization processes and the application of many Israeli companies - primarily in the field of technology - to raise capital on the Stock Exchanges in the U.S.A. instead of registering to trade and raise capital on the Tel Aviv Stock Exchange. The Brodet Commission - which was appointed to examine whether it is feasible to facilitate listing securities trading, and the reports of companies listed for trading on the Stock Exchange outside of Israel - determined that this 'migration' left a local market which is unattractive to investors, and is characterized by low

marketability, resulting in the Tel Aviv Stock Exchange not being able to effectively fulfill its role as an instrument for raising capital (the Israel Securities Authority **Report of the Commission for dual listing of Securities**, page 7 (5758-1998).

9. Accordingly, the purpose of the dual listing arrangement was to expand the number and range of companies that are traded on the Tel Aviv Stock Exchange, to ensure that significant companies in the economy will be traded on it, and to increase the volume of trade on the Stock Exchange. This can be achieved by encouraging Israeli companies that have already registered for trading overseas to register for trading in Tel Aviv as well. The encouragement will be expressed by providing considerable easement of the burden involved in registering for trade on the Tel Aviv Stock Exchange for the securities of those companies, primarily by means of providing the possibility for companies to be included in the arrangement for reporting in accordance with the provisions of the foreign law. Thus, the disclosure requirements of only one legal system will be applicable for them, and not of two legal systems at the same time.

10. The purpose of encouraging and developing the Israeli capital market was unequivocally at the foundation of the recommendations of the Brodet Commission, and the changes that took place in the arrangement during the legislation thereof also honed the importance of the aforementioned purpose. From the report of the Commission it is possible to learn about the principles on which the recommendations of the Commission were based, which teach us about this approach:

> ***"The provisions of local law do not offer access of foreign companies to the local market and are no longer suitable in their current format for companies that have broken through the borders of the country and have already reached global markets. These authorities standing aside while fortifying the provisions of these laws might leave Israel and its capital market well protected from foreign invasions; however, isolated from both companies and from investors from around the world"*** **(**Securities Authority, **Report of the Commission for dual listing of Securities,** p. 14 (5758))**.**

11. It was assumed that only few companies, if at all, would agree to simultaneously implement the provisions of the Securities Law in accordance with two legal systems. The complexity of the Securities Law and the inevitable differences in the various legal systems - including the language of reporting, the reporting dates, the contents of the reporting as these are reflected in legislation, case law and enforcement by the authorities - make the attempt to maintain two legal systems simultaneously difficult and complex in the extreme. This is the reason for the reliefs which are provided by the dual listing arrangement.

12. Another purpose of the dual listing arrangement was to protect the investing public. In this context, the assumption was that the protection of the Israeli investor public would be achieved by means of including in the arrangement of first-class Stock Exchanges around the world, for which a number of "circles" exist, the main ones amongst them being: the quality of the disclosure requirements for the foreign Stock Exchange; the quality of the foreign supervision; and the discipline of the foreign Stock Exchange market. In addition to dependence on the protection of investors in the foreign Stock Exchange, the dual listing arrangement determines within its context a number of additional mechanisms of protection, such as requiring a prospectus to raise funds for a dual listing company (as opposed to listing for trading of securities); agreement to determine the provisions for additional disclosure in regulations; and giving the Securities Authority certain supervisory powers.

13. Adopting the dual listing arrangement, the legislature reconciled with gaps between the format of reporting of those companies which are traded in Israel only, and the reporting format of companies which are traded on another major Stock Exchange. In this matter the legislature has spoken in relation to the considerable economic importance and on the matter of the need that the capital market and the investing public in Israel have for the dual listing arrangement.

14. On the part of the investors, the dual listing arrangement provides direct access to invest in leading companies, diversifies the channels of investment in securities, increases the liquidity of investment in companies, positively impacts the value of securities and reduces the costs of investment. On the part of the companies the dual listing arrangement provides wider availability of capital and an increase in the investor

base; accessibility for local investors who could have a special interest in companies, and a manner in which to overcome the volatility and weakness in one of the markets. All of the aforesaid, alongside the benefits mentioned above but without the dual listing, would involve substantial input.

B. 2. Central provisions in the dual listing arrangement

15. The arrangement involves only Stock Exchanges in the Second and Third Addenda of the Securities Law (hereinafter: "**dual listing Exchange**").

    The second Addendum includes the New York Stock Exchange and the Nasdaq Stock Exchange which were part of the dual listing arrangement from the outset, and the third Addendum is intended to permit the addition of Stock Exchanges to the arrangement, on the condition that their rules and laws will be found applicable to corporations which were incorporated in Israel, and that the securities they list for trade will sufficiently interest the investing public in Israel. The primary Stock Exchanges added over the years to the dual listing arrangement are the London Stock Exchange (in 2005), and the Hong Kong, Singapore and Toronto Stock Exchanges which were added during the past year.[1]

16. The addition of a Stock Exchange to the third Addendum was done with the approval of the Minister of Finance, in accordance with a proposal by the Authority or in consultation with it, and with the approval of the Knesset Finance Committee. Also, deletion of a Stock Exchange from the second and third Addenda, in the event that it is found that these no longer sufficiently guarantee the interest of the investing public in Israel because - as a result of substantial changes - their rules and law are no longer applicable to corporations incorporated in Israel whose securities had been listed for trading there.

17. The arrangement enables a company incorporated in Israel whose securities are listed for trading on a dual Stock Exchange ("**foreign corporation**" as defined in section 1 of the Law) to list its securities for trading on the TASE. Unlike a regular company which is required to publish a prospectus with the permission of the Authority for the purpose of registering for trade as specified, a foreign corporation is required to submit a "registration document" for the purpose of registrating for trading. The contents of the registration document is determined in the Securities (Details, Structure and Form of Listing Document) Regulations, 5761-2000 and it primarily includes identifying details about the corporation, about the foreign Stock Exchange on which it is registered to trade, and a description of the securities to be listed for trading.

18. After listing its securities for trading on the Tel Aviv Stock Exchange as part of the dual listing arrangement, the rules in general of the foreign corporation's reporting replace the reporting obligations applicable to a regular reporting corporation (section 35 (31) of the Law). The "**foreign Law**" is defined in section 1 of the Law as a "**Law which is applicable to a foreign corporation due to its listing of securities for trading on a foreign Stock Exchange, including the rules of the same Stock Exchange overseas**". The Law authorizes determining additional disclosure requirements in the regulations for a foreign corporation, but for a foreign corporation listed in the second Addendum we are referring to a greatly reduced disclosure (Section 35) (31)(c) of the Law). By virtue of this certification the Securities Regulations (Periodic and Immediate Reports of a Foreign Corporation) 5766-2000) were determined (hereinafter: "**Reporting Regulations of dual listing Companies**") which in effect stipulate that a foreign corporation will report in Israel by means of copies of the reports submitted or published overseas.

19. Within the framework of the provisions of Chapter E.3 of the Securities Law, the Authority has been granted certain supervisory powers regarding the compliance of the companies with the foreign disclosure provisions, although these are reduced in nature. Thus, for example, it was determined that the Authority is authorized to immediately demand from a dual listing company the reporting which it was required to submit in accordance with foreign law, and also has the authority to order a dual listing company to issue an amended report immediately, in the event that the Authority finds that the submitted report is not as required (pursuant

[1] See the definition of "stock exchange overseas" in section 1 of the Law, section 35 (17) of the Law and the second and third additions to the Law.

to foreign law) and the Authority is entitled to appeal "**to the body in charge of supervision or enforcement of foreign law in everything relating to this matter**" prior to referring to the company.

20. In practice, the use of these powers is limited, consciously and in recognition of the fact that the dual listing arrangement is based on the understanding that the companies are supervised by a foreign Regulator, specializing in overseeing the foreign law, and that imposing a dual regulatory regime will constitute a burden and will negate the objectives of the dual listing arrangement for which it was created – encouraging and developing the Israeli capital market.

21. Another important provision in the dual listing arrangement is determined in Section 35 (28) of the Law, which grants a foreign corporation the possibility of being deleted for trade on the TASE on its own initiative, provided it has announced its intention to do so with notice of at least three months, and on condition that its securities continue to be traded on the foreign Stock Exchange. This option gives the dual listing corporation the ability to be deleted for trade in Israel quickly, without the need for the approval by the holders of the securities in Israel.

B. 3. Extensions of the dual listing arrangement for additional situations

22. The basic purpose of the dual listing arrangement was to encourage listing shares of Israeli companies – which have been issued and listed for trading on the leading Stock Exchanges overseas - on the Tel Aviv Stock Exchange. However, the arrangement provided for the possibility of extending its applicability to other situations:

A. Corporations already listed for trading on the Tel Aviv Stock Exchange - Section 35 (32) of the Law allows corporations whose securities are listed for trading on the Tel Aviv Stock Exchange and report as usual (in accordance with Chapter 6 of the Law) to become dual listing corporations (which report in accordance with Chapter E3 of the Law). For example, a corporation which issued shares in Israel and after a number of years issued shares on the New York Stock Exchange too, and requests to also report in Israel in accordance with American law. Similarly, the Section enables the corporation to switch from the format of reporting in the dual listing arrangement to the standard listing format (and thus be removed from the dual listing arrangement). In Section 35B the Law determines the conditions for moving from one reporting format to another.

B. Corporations wishing to issue securities in Israel which will be traded on the two Stock Exchanges - in order to issue a public offering of securities, as opposed to listing existing securities of the corporation, the Authority requires the publication of a prospectus. As a part of this proceeding the corporation raises funds from the public in exchange for the issuance of securities. Section 35 (29) of the Law stipulates that the Authority is entitled to exempt a corporation which is included in the dual listing arrangement, or which will be included immediately after the publication of the prospectus, from the provisions relating to disclosure in the prospectus and also to stipulate the conditions of exemption. Pursuant to this Section, the Authority has permitted corporations listed on a Stock Exchange overseas to issue securities in Israel based primarily on the disclosure provided by virtue of the foreign law, alongside specific disclosure requirements relating to the issuance of securities – for example, a description of the issued securities, the schedules of issuance, and so forth and so on.

C. Corporations wishing to issue securities in Israel which will be traded on the Tel Aviv Stock Exchange only - similar to what has been specified herein above, a dual listing corporation is entitled to apply for the issuance of securities which will be traded only on the Tel Aviv Stock Exchange, in addition to those of its securities which are traded on both Stock Exchanges. For example, a dual listing corporation the shares of which are traded on both Stock Exchanges is entitled apply to issue bonds to the public in Israel only, which will subsequently be traded on the Tel Aviv Stock Exchange only. This process of issuing securities requires the publication of a prospectus, and the Authority has in the past exercised its authority pursuant to Section 35 (29) of the Law in order to grant exemptions from disclosure in respect of the prospectus, while determining conditions for granting the exemption. In this context, in April 2013, the Authority published Resolution No. 2013-1, which relates to a model for handling and granting an exemption

for dual listing companies that issue bonds **only** in Israel (hereinafter: the "**hybrid model**"). Within the context of the hybrid model, it is stipulated that in respect to a dual listing company which issues bonds in Israel only, certain provisions of disclosure will be applicable to it by virtue of the Securities (Periodic and Immediate Reports) Regulations, 5730-1970, and all as specified in the ruling.

D. Corporations that were not incorporated in Israel - as specified, the main purpose of the dual listing arrangement was to result in Israeli corporations that issued and listed their shares for trading overseas to also be listed for trading on the Tel Aviv Stock Exchange. Hence also the definition of "foreign corporation" as a corporation incorporated in Israel. Section 35 (30) (E) of the Law allows the Authority to decide that the provisions of the dual listing arrangement, in whole or in part, shall also apply to a corporation incorporated outside Israel, and to base its decision on conditions to be determined. Hence the dual listing arrangement may also include foreign corporations whose securities are traded on the relevant Stock Exchanges overseas.

For the sake of simplicity, all types of corporations listed on the Stock Exchange under the dual listing arrangement are referred to, in this position, as "dual listing corporations", "dual listing companies" or "dual companies").

23. All dual listing corporations report in accordance with the disclosure provisions of foreign law. The common denominator in the last three extensions of the four extensions stipulated above is that in these instances the dual listing corporation may also be subject to local disclosure requirements, by virtue of the provisions of law which authorize the Authority to demand these additional requirements, in addition to the comprehensive disclosure requirements applicable to the foreign corporation. For example, a dual listing company which issues bonds that will be traded only in Israel, and which are backed by collateral, is required by the Authority to provide full disclosure relating to the collateral in accordance with Israeli law. This disclosure, at the date of the prospectus and on condition that the bonds are being held by the public, is a condition of the Authority's permit to publish the prospectus pursuant to Section 35 (29) of the Law. The result will be that in addition to the disclosure by a dual listing company that is in accordance with foreign law, there will also be components of local disclosure pursuant to Israeli law. Similarly, to the extent that the future reporting regulations of dual listing companies will require the addition of local disclosure, the dual listing company will be required to provide it in addition to the disclosure in accordance with the foreign law.

24. **A summary of matters:** The dual listing arrangement was designed and legislated with the intention of allowing companies whose securities are listed for trading on foreign Stock Exchanges to also register for trade in Israel - with a minimum level of ‘friction’ with Israeli law - while at the same time maintaining foreign law as the main law which applies to the corporation. In light of the aforementioned, from the aspect of the obligations of disclosure, Israeli law has almost completely withdrawn from foreign law. Additional disclosures pursuant to Israeli law may be required primarily as a cover for disclosure in accordance with the foreign law, or in situations where it is not just a matter of listing securities traded by an Israeli corporation for trade on a Stock Exchange overseas. It will further be clarified that the aforementioned relates to aspects of disclosure and not to other aspects, such as the prohibition of the use of insider information and fraud in securities trading; in such an instance Israeli law will apply in full, if these offenses are committed on the Tel Aviv Stock Exchange.

25. As of this date, 56 companies are traded on the Tel Aviv Stock Exchange as part of the dual listing arrangement. These include some of the leading companies on the Stock Exchange and in the Israeli market. The dual listing companies currently constitute close to 40% of the market value of all companies traded on the Stock Exchange and some of them are similar in trading volumes on the Stock Exchange. Almost two-thirds of the dual listing companies were not traded on the Stock Exchange prior to the dual listing arrangement and joined within the context thereof. These data indicate the extraordinary importance of the dual listing arrangement for the Stock Exchange, the capital market, and the investing public in Israel. As has been stated above, the dual listing arrangement is based on the assumption that the obligations of disclosure that will be applicable to the companies under its protection will primarily be obligations pursuant to foreign law, and no additional obligations will be imposed on them in accordance with local law. This assumption

was also the basis for the decision made by companies to join the dual listing arrangement, and it is highly probable that withdrawing from it could result in a decision to leave it.

C. Civil liability for the reporting of a dual listing company

26. The assertion in the matter of Tower was that its Financial Statements included misleading details and, as a result of that, damage was caused to the holders of its bonds in Israel. Tower's Financial Statements were published in accordance with the provisions of disclosure pursuant to foreign law. There is no dispute between the parties that, as a dual company, the provisions of disclosure of foreign law are applicable to Tower. The dispute is regarding whether the local rules of liability of the Securities Law are applicable to the provisions of disclosure, as opposed to the rules of liability of foreign law.

27. What are the rules of liability, as opposed to the rules of disclosure? Rules of disclosure determine the contents of the disclosure and the dates for the submission thereof. Rules of civil liability, on the other hand, are intended to provide investors with the right to sue directly for breaching the provisions of disclosure. This right is, for the most part, exercised as part of a class action proceeding. Rules of civil liability deal with issues such as defining the parties who are responsible for the disclosure; the standard of liability that is applicable to them; the circumstances establishing liability and right to compensation; the sum of compensation; protections against the imposition of liability, and so forth. These matters are determined in the provisions of the Law and in the rulings of the Courts.

28. The Securities Law determines the special provisions relating to the civil liability for prospectuses and the ongoing reporting by corporations, which are set forth in sections 31 - 35, 38B and 38C of the Law. The Securities Law and other laws contain additional provisions which relate to civil liability. For example, sections 52 (11) - 52 (14) of the Securities Law determine additional liability arrangements for violation of the provisions of the Law. The fundamental question discussed in the matter of Tower is whether the provisions of the civil liability of the Securities Law apply to a dual listing company in respect of a disclosure it made pursuant to foreign law, or whether the provisions of civil liability pursuant to foreign law are applicable. We will now examine the language and purpose of the dual listing arrangement as it applies to this question.

C.1 The language of the Law

29. It will already be stated now that the position of the Authority in respect of the language of the Law itself does not provide a clear response to the matter before us.

30. In the report of the Brodet Commission there was only a limited reference to the matter of civil liability of dual listing companies. The report proposed that "**The criminal and civil liability that will apply with regard to the registration document shall be applicable in accordance with the Israeli law to a current report submitted to the Authority by companies whose securities are traded on the Tel Aviv Stock Exchange only. The Committee does not see any necessity to change the level of liability within the context of which the annual report was written and submitted by the company at the outset. Thus, equal liability will apply to all periodic reports submitted by a company with a dual listing in the context of its reports, even subsequent to it being listed for trading**". (The Securities Authority, **Report of the Commission for the Dual Listing of Securities** (September 1998), p. 22); and on the matter of civil liability for ongoing reporting, no explicit recommendation was included and the reference was for disclosure only: "**The Commission proposes that the reports of companies traded overseas be received in Israel in the format in which they are submitted in the United States, and in the English language**". (ibid. p 27).

31. In the original arrangement which was legislated in 2000, Section 35 (25) of the Securities Law appeared, but this was subsequently revoked. This Section determined, *inter alia*, that "**a corporation whose securities are listed for trading under a registration document, or which is reported in accordance with this chapter, is liable towards the holder of the securities for damages caused to him as a result of the corporation violating any of the provisions of this chapter or regulations in accordance therewith, and provisions of Sections 52 (13) and 52 (14) will apply, *mutatis mutandis***".

32. The explanatory memorandum to this Section states that "**It is proposed to facilitate and does not determine the same existing liability that exists in a prospectus, for the purpose of a registration document. The reason is that these are securities that are already traded on Stock Exchanges overseas,** where the roles that apply to them sufficiently guarantee the necessity, in our matter, of the investing public in Israel. It is also proposed that the liability for both the registration document and the current reports of a foreign corporation be equivalent to the liability applicable to the current reporting of corporations in accordance with Israeli law (sections 52 (13) and 52 (14) of the Law)" (Law Proposal 2887, 26.6.2000, p. 443).

33. Section 35 (25) and the aforementioned explanatory statements ostensibly support the assertion that the dual listing arrangement also wished to apply the Israeli rules of liability to civil claims for breach of obligations of reporting. The civil liability that applied to the current reporting was determined at that same time in Section 52 (11) of the Securities Law, which determined (and which still determines) the general civil liability for violating the provisions of the Securities Law.

34. However, even these sections allowed for various interpretive possibilities. According to one possible interpretation, presented by Prof. Licht, a "mixed approach" can be taken which integrates the application of foreign law with the application of Israeli law (Amir Licht, Dual Listing of Securities, **Law Journal** 32 (3) 561, 604 – 610). According to another possible interpretation, presented by Kleinhendler and Hanoch, the Law created a mechanism in which the reporting obligations and the content of the reporting are American, but the responsibility for the non-fulfillment of the aforementioned obligations is Israeli (Yitzhak (Jean) Kleinhendler and Ofer Hanoch "Four years to the dual listing law - impressions from a practical point of view" Corporations A/3 28, 29 (2004). According to a third possible interpretation presented by Yemin and Wasserman[2] in their book, a distinction must be made between violating provisions that are not related to foreign law but apply to the dual listing company in accordance with Israeli law - such as the failure to publish the registration document on the date which was determined for that - and between violating disclosure provisions of foreign law which were adopted for the purpose of disclosure in Israel – for example, the inclusion of a misleading detail in a report submitted as part of the registration document or reports of a dual listing company. The first should and can only apply to the Israeli law. In the second instance, it should and can only apply to foreign law. (Moti Yemin and Amir Wasserman, **Corporations and Securities,** p. 374). This interpretation was proposed after Section 25 of the law had already been revoked, however it would have been possible even when this was still valid.

35. In 2004, Amendment 23 to the Securities Law was legislated based on the conclusions of a Commission that examined the disclosure requirements which apply to companies in the prospectus and in the current reporting (Barnea Committee). One of the objectives of this amendment was to compare, to the extent necessary, the rules of civil liability to disclosure in the prospectus and the rules of civil liability to disclosure in the ongoing reporting of companies. Within the context of the amendment, section 38C of the Securities Law was added, which is entitled "**Liability for damage due to a misleading detail in a report, notification or document**", and it applies to rules of civil liability applicable to a prospectus in companies reports, "**as the case may be and *mutatis mutandis***".

36. Within the context of Amendment 23, section 35 (25) of the Law was also revoked. This was the only civil liability clause in the dual listing arrangement, and after it was revoked there was no explicit reference to the matter in the arrangement. The dual listing arrangement still includes section 35 (26) of the Law, however activity of this Section is at the procedural level and concerns the delay of proceedings in a lawsuit filed on the same ground in Israel and overseas.

37. At the same time Section 35 (31) of the Law continued to apply to the dual listing companies which stipulates their obligations to report. This section stipulates that "**a foreign corporation, as this is stated in subsection (A) shall not be subject to the provisions of Chapter F and regulations pursuant to Section 56 (D)(2) and (3), except for sections 36C, 38 and 38A which shall apply *mutatis mutandis***". In

[2] It should be noted that Amir Wasserman currently serves as the Legal Advisor for the Public Attorney.

accordance with the explicit wording of this section, the provision of Section 38C of the Law referring to the civil liability for reporting does not apply to a dual listing company since this Section is included in Chapter F of the Law, which determines that they will apply notwithstanding the exception.

38. Judge Kabub concluded from the wording of this Section, along with a purposive interpretation of the dual listing arrangement, that the rules of liability of foreign law will apply:
"**Section 35 (31)(B) of the Securities Law determines, as aforementioned, the explicit presumption relating to the non-applicability of the Israeli Law on the matter of liability. It is my opinion that this implies that the provisions of foreign law apply to the matter of the rules of liability (for further information, see: Interpretation of the Legislation, pp. 109-112); in other words, from the provision of section 35 (31)(B) to the Law determining that the rules of liability in the Securities Law which was drawn up on the matter of ongoing reporting, does not apply to the ongoing reporting of dual companies - it can be concluded that the rules of foreign law are the ones that will apply. This is because, as aforementioned, a particular law necessarily applies to the liability for breach of the ongoing obligations of reporting of dual companies. This conclusion fulfills the purpose of the dual listing arrangement**" P.A.(C.A.) 44775-02-16 **David Cohen v. Tower Semiconductor Ltd.** (November 7, 2017), Section 61 of the judgment).

39. Judge Ronen came to a conclusion similar to that of Justice Kabov in the matter of MannKind, which dealt with the same issue, in accordance with which section 38C does not apply to dual listing companies; however, she added that there may be another source of liability which is not included in Chapter F, such as Section 52 (11) of the Law. Therefore, the non-applicability of section 38C of the Law is not the end of the matter on the question of civil liability for reporting by a dual listing company. (See P.A. 28811-02-16 **Damati et al. v. MannKind Corporation et al** (October 12, 2017), Sections 36 – 39 of the judgment).

40. In view of the legislative history and the current language of the Law, the position of the Authority is that the language of the Law itself does not provide us with a clear response to the question before us. The original wording of the Law referred to the Israeli rules of liability, but different significance can also be attributable to this reference. The current wording of the Law explicitly precludes the applicability of section 38C of the Law, but in the absence of an explicit statement that the foreign law will apply to the matter of civil liability, different meanings can also attributed to the negation. Additionally, questions may arise with regard to the significance of the applicability of the general liability provisions of the Securities Law which are not to be found in Chapter F of the Law. Therefore, and in the absence of a clear answer as far as the language of the Law relates to the matter under discussion, we must now turn to the examination of the legislative purpose on which the dual listing arrangement is founded.

C.2. The legislative purpose

41. Prof. Barak adhered to the rules of the system of purposive interpretation currently accepted in legislative interpretation, which is compiled of three components: the language of the norm, its purpose, and in difficult cases - judicial discretion (Aharon Barak, **Interpretation in Law**, Second Volume – Legislation, p. 80 (1993)).

42. A basic rule regarding the interpretation of legislation is that the language of the legislation must be interpreted in accordance with its purpose. From among the various linguistic meanings that legislative text endures, it is necessary to choose the one that fulfills the purpose underlying the Law. The purpose of legislation is composed of the subjective purpose and the objective purpose: the subjective purpose is composed of the goals, the values and the policies that the legislature sought to fulfill, which can be understood from the legislation itself, the legislative history as well as the social and legal background to the legislation. The objective purpose is the goals, values, and principles that legislation intends to accomplish in a modern democratic society (ibid., p. 201). If there are a number of meanings which fulfill the purpose of the Law, then one must choose the meaning that most completely fulfills the purpose of the legislation. This is the "overriding principle" of interpretation (ibid. p. 85).

43. A lot has been written in the ruling of the Honorable Court about the method of purposive interpretation, which consists of the rules set forth herein above. For example, in the words of the Honorable Justice

Vogelman in Supreme Court 3943/13 **Lior Almagor v. Minister of Defense** (published in Nevo, 11.2.2016):

"**We will briefly mention basic insights in the interpretation of the legislation, which are also applicable to the interpretation of secondary legislation, as in the case before us. The first stage in the interpretive journey is to examine the language component. This is the stage when we must extract the meanings that have a linguistic anchor in the words of the Law, leaving us only with those meanings that the language can endure ... If, after this filtering, there remains more than one possible meaning, the Court must choose the interpretation that fulfills the purpose of the legislation ... composed both of the subjective purpose, as this is understood from the legislative history and the 'intention of the legislature' in relation to the stated purpose which it sought to achieve by means of the legislature; also from the objective purpose, which consists of the goals, values and principles designed to fulfill an act of legislation in a democratic and modern society ...** "

44. A clear and stated purpose is the foundation of the position of the Authority on the dual listing arrangement - to attract for registration on the Tel Aviv Stock Exchange companies (primarily Israeli) which are listed on other Stock Exchanges, which the legislature has examined, and it has been found that the Laws applicable to listed companies adequately protect the investing public in Israel. In order to achieve this objective, the legislature sought to make it easy for these companies, so that the requirements of the dual listing arrangement would not deter them from listing on the Israeli Stock Exchange. The assumption on which the dual listing arrangement was based was that it would be able to attract companies to list on the TASE only if the additional costs and exposures that were imposed on them as a result of their registration to trade their securities in Israel would be less than the benefits that they would gain from such listing.

45. This purpose is reflected in the explanatory memorandum to the bill to establish the dual listing arrangement: "**The globalization processes that impact the capital markets in the world have not passed over the companies in Israel either. Companies, especially in the fields of technology, mostly high-tech, have increasingly turned to raising capital overseas ... the Securities Bill proposal (Amendment No. 21) (dual listing) 5760-2000 was intended to encourage Israeli companies registered for trading overseas (initially in the United States), to register their securities also to be traded on the Israeli Stock Exchange. The proposed bill allows for a special format for companies to register to trade on the Stock Exchange overseas, with the Securities laws applying to companies and providing proper protection for investors ... The registration would be made in accordance with a registration document that is different from the prospectus, both from the aspect of its content and also on the matter of liability for it. This would also save the company direct and indirect costs involved in preparing documents and reporting in accordance with two different legal systems**. "(Bill proposal 2887, 26.6.2000, p. 440).

46. The aforementioned purpose is also reflected in the words of Adv. Miri Katz - who was at that time the Chairperson of the Authority - as stated in the secondary Commission on the matter of the Capital Market dated July 4, 2000, in accordance with which the dual listing arrangement "**is unique in this section – the first time that Israel adopts reliance on a foreign legal system to facilitate mainly Israeli companies – perhaps at a later date others may also want to come here – companies that have been listed on the major Stock Exchanges in the United States, with <u>the idea being to make it easy for the companies, on the one hand, and reduce to almost nothing the cost for them to come and register on the Israeli Stock Exchange</u>. On the other hand, it provides protection for investors in Israel, because the companies rely on the same documents they published in the United States, and also protects the investors - if for some reason a malfunction is found in both trading and documents published by the company - investors will be able to ability to sue the company in Israel, despite the fact that it will be in accordance with the foreign law, but at the Court in Israel**". (Emphasis added).

47. Scholars have also insisted on the need to interpret the dual listing arrangement in a manner which is careful and calculated, and which is consistent with the purpose of attracting more companies to the Tel Aviv Stock Exchange. They have stressed the need to pay special attention to the implications of the interpretation on the attractiveness of the dual listing arrangement, and the willingness of foreign issuers to "participate in the game" and to register for trading on the Tel Aviv Stock Exchange as well. Thus, for example, Prof. Amir

Licht stated that "**the balance of interests expressed by the dual listing arrangement also obliges the Courts when they apply the provisions thereof**. **In particular, the Courts will be required to uphold the spirit of the Law and rule in a manner that does not make the burden on the issuers heavier, nor does it expand the obligations that are imposed on them, with the intention of allegedly benefiting the investing public. The concession made by the legislature in this sector should be respected** ... " (Amir Licht, Dual Listing of Securities, **Law Journal** 32 (3) 561, 569). (Emphasis added).

48. Recognizing the uniqueness of the dual listing arrangement - and in particular accepting the provisions of disclosure of foreign law over the provisions of disclosure of Israeli law - has been supported by the application of the arrangement over the years since it was legislated. For example, in 2013 the Authority published a legal position relating to the question of whether there could be a disparity in the extent of the obligations of disclosure that apply to Israeli companies that are listed in dual listing when these are compared with the obligations of disclosure that apply to Israeli companies traded only on the foreign Stock Exchange. The position of the legislature was stressed "**in relation to the considerable economic importance that the capital market and the investing public in Israel have for the dual listing arrangement**". This position also emphasized that "**the basic assumption of the dual listing arrangement, which is also cemented in the primary legislation, is that the obligations of disclosure that will apply to dual listing companies will for the most part be the obligations of disclosure pursuant to foreign law, and no additional obligations will be imposed in accordance with the local law**. **This assumption was also the foundation of the decision of companies to join the dual listing arrangement, and this should continue to exist**"; and "**there should be no difference between the reporting obligations that apply to Israeli companies - which Chapter E.3 applies to - and the reporting obligations that apply to Israeli companies traded only on foreign Stock Exchanges**". The reason for comparing the disclosure requirements as explained in that same position paper is that "**the dual listing arrangement is intended to encourage companies traded on foreign Stock Exchanges to come and register for trading on the Tel Aviv Stock Exchange without there being any requirement for further disclosure as a result of this action**". Legal Position number 199-11: Obligations of Disclosure of Dual Listing Companies "18.8.2013 (Emphasis added).[3]

Accordingly, the legislative arrangement of the position of the Authority should be interpreted in a manner which is suited to the intention of legislature to make it easier for companies which are considering listing their securities for trade in Tel Aviv as well, as long as this will not significantly infringe on the rights of those investors holding their securities. Indeed, it is the goal of the Authority to "**safeguard the interests of the public investing in securities**" (Section 2 of the Securities Law), but as far as the interpretation of the dual listing arrangement is concerned, this goal is connected with another important objective, which is to motivate companies to undertake dual listing, thus bolstering the local Stock Exchange and increasing the channels of investments which the investing public has before it - a goal that, as stated above, is of importance and beneficial also for the investing public. The perception is that, as far as these companies is concerned, the interest of the investing public is protected primarily by the rules of foreign law, foreign supervision and the discipline of the foreign Stock Exchange market; and the necessity for satisfying two different systems of laws will be problematic to such an extent that most companies will seek to avoid dual listing.

49. These are the general purposes of the dual listing arrangement. And what are the specific purposes of the arrangement in the context of the rules of civil liability for the reporting of dual listing companies? It is the position of the Authority that one purpose of liability for reporting will be applicable: In that way, Israeli investors will be able to sue (in Court, in Israel) for damages that they suffered as a result of misleading reports. A second purpose is that no rules of liability of two different legal systems will apply at the same time. Therefore, no double burden will be imposed on the companies, nor will there be any different requirements imposed on them, and there will be no conflicting rules. A third purpose is that the rules of liability will not affect the concept of disclosure of the dual listing arrangement, which is based on the disclosure provisions of foreign law; and a fourth purpose is that companies and investors will have legal

[3] http://www.isa.gov.il/Download/IsaFile_7865.pdf

certainty with regard to the rules of liability that are applicable to the reports. A combination of all these purposes leads one to the conclusion that the specific purpose of the arrangement is to apply the rules of civil liability of foreign law and not of Israeli law.

50. **The Appellant argues that a separation should be made between the rules of reporting that are applicable to the dual company in accordance with foreign law, and the rules of liability that are applicable to the company when it is sued, which he asserts is pursuant to Israeli law**. Moreover, the Appellant further distinguishes between the laws of liability that are applicable to the company by virtue of the Securities Law, and the general laws such as torts law and company law, which he claims in any event are applicable to the company in accordance with Israeli law.

51. **According to the position of the Authority the approach of the Appellant is fundamentally contradictory to the purposes of the dual listing arrangement and accepting it could cause actual harm. We will explain what this means: Firstly, the approach of the Appellant will result in the application of two different legal systems at the same time with regard to the rules of liability that are applicable to the reports of a dual listing company.** As a result, the same reporting will be subject to different legal systems. For example, a dual listing company that published an immediate report in accordance with foreign law will be exposed to a civil lawsuit by investors in the Stock Exchange overseas in accordance with the rules of civil liability of the foreign law, and also exposed to a civil lawsuit by investors in the Tel Aviv Stock Exchange pursuant to the rules of Israeli law. This refers to exactly the same event and the same report.

Secondly, the rules of liability are not technical rules, but substantive rules that deal with several significant matters. As stated above, the rules of liability deal with issues such as the definition of parties responsible for disclosure, the standard of liability that is applicable to them, the circumstances which establish liability and the right to compensation, the sum of compensation, protection against the imposition of liability and so forth. In respect of each of these matters there may be different determinations in each of the legal systems. For the sake of illustration, the three basic components required for the establishment of civil liability in accordance with Sections 31 -3 5, 38B and 38C of the Securities Law are a misleading detail in a prospectus or report; damage; and a causal connection. Each of these components - as well as other components in the civil liability arrangement - is an entirely separate world. For example: the causal connection required in respect of the Securities Law can be determined in accordance with a particular methodology whereas, pursuant to foreign law, it will be determined in accordance with a different methodology; the rules for proving damage and determining its rate in accordance with the Securities Law can be of a certain type, while pursuant to foreign law these rules will be different; and determining the rate of compensation in accordance with the Securities Law will be of a certain type, whereas pursuant to foreign law these rules will be unrelated; the cycle of responsibility for reporting may include certain entities according to the Securities Law, and according to other entities in accordance with foreign law; the type of protections which exist in accordance to the Securities Law (for example, protection regarding forward-looking information) may not exist in accordance with foreign law, or the requirements could be different, and vice versa.

Third, it is very difficult to disconnect between the rules of disclosure and the rules of liability, and they feed off each other. A company seeking to comply with the legal requirements must comply with both the rules of disclosure and the rules of liability. For example, in the United States there are special rules of liability in regard to the publication known as ‘Press Release’ which precedes the full financial reporting, and is of great importance to the investing public. Determining different rules of liability by a dual company in accordance with Israeli law for such a publication could create contradictions and uncertainty regarding the law which is applicable to the company; or, for example, the application of standards determined in Israeli case law regarding the obligations of company officers regarding its reporting to the public may naturally be different from standards set forth in foreign law in respect of this same matter. This does not mean that one law is better than the other or stricter than the other - however, the very existence of so many differences between them, and the applicability of the two laws at the same time, creates a very problematic legal reality for the companies that are required to comply with them. For the avoidance of doubt, it will be clarified that a

dual company incorporated in Israel will be subject for all intents and purposes to the provisions of the Companies Law (to the extent that reliefs were not given in respect thereof in the regulations). This is also true, for example, of the mechanism for approval of transactions with interested parties, regarding the rules of distribution, and so forth.

Fourth, the rules of liability dictate a company's behavior in respect of its reports. First and foremost, they may dictate the timing and content of company reports. For example, a company wishing to publish a forecast with regard to substantial development that it anticipates in its business will consider publishing the disclosure referred to in accordance with the rules of disclosure and rules of liability that apply to it. In Israel there is protection against the publication of forward-looking information subject to the conditions set forth in the Law (section 32A of the Law also applies to changes that are required for current reporting), and therefore the company will act accordingly in this regard. A company operating under foreign law will act in this regard in accordance with the rules of disclosure and the rules of liability that are applicable in respect thereof. A difference in the rules of liability will therefore lead to different decisions both regarding the actual reporting and its contents. The difference in the rules of liability is almost inevitable between different legal methods because, in practice, they are derived from provisions of law, rulings, acts of regulatory enforcement and market practices. Additionally, the rules of liability might dictate the examinations that the company and its auditors will be required to conduct in order to decide on the contents of the report. For example, if the rules of liability pursuant to a particular law dictate a high standard of due diligence prior to reporting, then the company and its Accountants will be required to comply with that standard. Finally, the rules of liability may dictate how the company conducts itself in other aspects related to reporting - for example, whether the company is entitled to hold investor conferences and what they can announce there; whether the Company is entitled to publish information by means other than reporting, and so forth. Therefore the rules of liability are not only expressed in a lawsuit against the company, but dictate the manner in which the company conducts itself on a day-to-day basis.

52. It follows from the aforesaid that accepting the Appellant's approach will apply two different regimes of liability to the dual listing companies, violate the principle on which the dual listing arrangement is based, impose an unreasonable burden on the dual listing companies in their everyday conduct, and create an incentive for companies not to participate in this arrangement.

53. Moreover, in response to the claim of the Appellant that Israeli law should apply in accordance with the test of maximum affiliation, we will reply that the legislature has the authority to determine a functional arrangement that adapts the rules of private international law to the specific purpose of the legislation in the case before us. See in this regard Celia Fassberg, Private International Law (Vol. II) 2013, pp. 1284-1283 - "The Law anticipated the possibility that some of its provisions did not apply in certain circumstances to a company whose securities are listed for trading outside Israel even though it was incorporated in Israel ... These clauses indicate that even in Israeli law there is no strict rule in accordance with which in every issue where a corporate question arises, the Law of the place of incorporation applies, but distinguishes between different types of questions. Although these provisions are unilateral provisions relating mainly to the application of Israeli law, there are regulatory provisions in the field of securities that are not at the heart of corporate law. However, these provisions form the infrastructure for the liability of the corporation towards its members and to the public, and they illustrate the types of matters in which there may be justification to deviate from the corporation's individual law".

Therefore, the mere fact that it is an Israeli company under discussion does not justify the application of Israeli law to all its actions activities (Fassberg, p. 1284). It should be clarified that it is not the intention to assert that the rules of international law should not be applicable, but that the arrangement that has been selected is compliant with the purposes of the rules of private international law, because it applies the most relevant and appropriate law to the circumstances of the case (Fassberg, p. 1292), although this law is not necessarily the Law of the place of incorporation of the company, or the Law which is applicable in accordance with the maximum affiliations.

54. **According to the position of the Authority, the proper interpretive approach in connection with the reporting of a dual listing company is that the rules of liability follow the rules of disclosure, and that these are inter-dependent**: in civil lawsuits in respect of breaching obligations of disclosure by a dual listing company pursuant to foreign law, both the foreign rules of disclosure and the foreign rules of liability should be applicable, irrespective of the matter of the specific law on which the cause of action is based. Such is the matter of the claim before us, relating to the disclosure made in the Financial Statements of Tower in accordance with foreign law. In contrast, as has been stated above, in civil lawsuits for breaching a specific obligation of disclosure imposed on a dual listing company pursuant to Israeli law, as aforesaid, the rules of liability in accordance with the Israeli Securities Law should be applicable. As has been stated, there are a number of situations in which dual listing companies are also subject to additional disclosure in accordance with Israeli law, and in these cases the Israeli rules of liability should apply.

55. **For the purpose of illustration**:

Most dual listing companies are Israeli companies that have listed their shares on the Tel Aviv Stock Exchange in addition to their being listed on the Stock Exchange overseas. In accordance with the dual listing arrangement, these companies report only in accordance with foreign law, so only the foreign rules of liability apply to their reports. Only in an exceptional case, in which it is alleged that the company violated a local provision of the dual listing arrangement (such as the failure to submit a report in Israel which it had submitted) rules of liability will apply in accordance with Israeli law.
A minority of dual listing companies are obliged to make additional local disclosure. For example, a dual listing company that issued bonds in Israel in accordance with an exemption it received under Section 35 (29) of the Law, is required to provide full disclosure in accordance with foreign law, in addition to a description of the bonds and their securities pursuant to Israeli law. This disclosure is required as a condition for obtaining the exemption for the purpose of issuance. In an instance in which it is asserted that the company violated its obligations of disclosure in accordance with foreign law (for example, including misleading details in its Financial Statements) the rules of liability of the foreign law will apply. In an instance in which it is alleged that the company violated its obligations of disclosure pursuant to Israeli law (for example, including misleading details in the description of their bonds or collateral) the rules of liability that will apply will be those that follow the Israeli law.

56. **This interpretive approach achieves the general purposes of the dual listing arrangement. In addition to this, it achieves the specific purposes of this arrangement in connection with the rules of civil liability for the reporting of dual listing companies.** Firstly, in accordance with this approach, liability will apply to all reports of the dual listing company, including in exceptional instances in which these reports include additional Israeli disclosure. Secondly, the dual listing company will not be subject to parallel rules of liability of two different legal systems. In a normal situation the rules of liability of the foreign law will be applicable and - in exceptional cases - the rules of liability of Israeli law will be applicable. In any event, there will be no imposition of double or contradictory burden on the companies, as no rules of liability of both laws will apply to the same matter at the same time. Thirdly, such aforesaid rules of liability do not impact the concept of disclosure of the dual listing arrangement, since disclosure by virtue of foreign law (which is the overriding majority in the matter of disclosure of companies by virtue of the dual listing arrangement) is accompanied by liability pursuant to foreign law. And lastly, companies and investors will have legal certainty regarding the rules of liability that are applicable to the reports.

57. This interpretive approach, which was also proposed by Yemin and Wasserman in their book (Moti Yemin and Amir Wasserman, **Corporations and Securities**, p. 374), prevents the over-application of rules of liability or non-application of rules of liability (a result that could have been obtained in an instance in which a dual listing company is in violation of a local provision, as opposed to a provision disclosure in accordance with foreign law). It is compatible with the spirit and purpose of the dual listing arrangement - as this has been expressed in the accessibility of the Tel Aviv Stock Exchange - by the reduction of the "friction" between Israeli law and foreign law, on the presumption that the foreign law which has been permitted in accordance with the dual listing arrangement adequately protects the Israeli investor. The position of the Authority that the foreign rules of liability for breach of obligations of disclosure pursuant to foreign law

should be applied is consistent with this basic concept. According to this perception, Israeli law relies in a variety of aspects on the law which is applicable to some of the companies traded on certain Stock Exchanges around the world. The Israeli law relies on the **rules of disclosure** that apply to those companies. Israeli law also trusts the **regulatory regime** that applies to those companies. This being said, there is no reason why Israeli law should not also rely on the **rules of liability** that apply to those companies. It is possible that these rules may not be perfect – it is possible that some of them may be of lesser quality than those which are customary in Israel, but the essence of the dual listing arrangement was the perception that the laws that apply to companies on certain Stock Exchanges - as a whole - provide adequate protection for investors and therefore can also be relied upon in Israel.

58. Indeed, the position of the Authority may make it somewhat more difficult for lawsuits to be brought against dual companies in Israel. Conducting a legal proceeding in Israel in which it will be necessary to prove a violation in accordance with the rules of foreign liability is not a simple matter and it will probably also involve additional costs (see details of the position of the Attorney General submitted in **C.A.A. 5860/16 Facebook Inc et al. v. Ben Hamo** [hereinafter: **the matter of Facebook**] as stated in the ruling handed down on 31.05.18). However, it should be remembered that in such a procedure it will anyway be necessary to bring an expert in foreign law (with regard to the complexity and costs involved in such a matter) in order to prove the foreign rules of disclosure, so it is doubtful whether the additional burden that will also be involved in proving the rules of foreign liability is so dramatic.

59. Marginally it should be noted that the Appellant claimed in his summaries that the position of the Authority supports his claims, referring to a paragraph written in the position of the Authority, in accordance with which - when additional obligations of disclosure apply - the Israeli law will be applicable. This claim is not necessarily factual and it appears that the words of the Authority were not correctly understood by the Appellant. As has been explained in detail above, the intention of the Authority was in respect of specific cases where Israeli law was explicitly applied to dual companies. As the Authority stated in its position in the Tower case: "**When a company in the dual listing arrangement is also subject to the provisions of disclosure in accordance with Israeli law, the method used by the Authority justifies applying rules of liability pursuant to local law (Israel law) for the violation of these provisions, both in relation to the company and in relation to the Accountants**". The example given to illustrate this principle is the requirements of disclosure pursuant to Israeli law in the context of the issuance of bonds in Israel by a dual listing company.

60. Moreover, and without going into the factual dispute itself, we shall note that, as a generality, the statement in the prospectus that 'only the Laws of the State of Israel will apply' is a type of standard statement in proposals of securities and bonds, the objective of which is to clarify that the offer is made only in a particular country and not in other countries. Therefore, the reference to Israeli law indicates a reference to the dual listing arrangement which is cemented in Israeli law and, therefore, it does not necessarily lead to the conclusion that the rules of liability pursuant to Israeli law are applicable.

C.3 The ruling

61. **The question under discussion has been heard three times by the District Courts. Their conclusion in all instances has been that the current disclosure of dual listing companies pursuant to foreign law is subject to the rules of liability in accordance with foreign law**. See:
The ruling of Judge Gerstel in the application for approval of a class action lawsuit against Verifone within the context of P.A. 3912-01-08 **David Stern v. Verifone Holdings, Inc.** (the "**first Verifone case**") dated 11.9.2008), and the decision to reject the request for a repeated review and to delay the proceedings dated 25.8.2011;

The ruling of Judge Ronen in the matter of P.A. (C.A.) 28811-02-16 **Gabriel Damati v. MannKind Corporation et al**. dated 12.10.2017; and Judge Kabov's rulings in the matter of P.A. (C.A.) 4475-02-16 **David Cohen v. Tower Semi Conductor Ltd**. dated 7.11.2017 and 20.2.2018, which are the subject of the appeal in question.

62. In these judgments, a comprehensive examination was made of the language of the relevant sections and the purpose on which the dual listing arrangement is based. It is only natural there are some differences between the judgments, but as it is clear from the facts thus far, the Authority is convinced that the rulings which were made in them - in accordance with which the rules of liability which are applicable to disclosure provided by dual listing companies in accordance with foreign law are the rules of liability pursuant to foreign law - are correct.

D. The Law which is applicable to the auditing Accountants of a dual listing company

63. **Within the context of the procedure in the Tower case, the Court ruled that the company is subject to the rules of liability of foreign law and requested the position of the Authority in the matter of the Law applicable to the Accountants of the company. The position of the Authority was that the applicable law regarding the liability of the company is also valid and applicable in respect of the liability of the auditing Accountant of the company.** There are three main reasons for this: the purpose of the dual listing arrangement regarding the reports of companies listed for trading within its framework; contradictions that may arise if different arrangements apply in the matter of the Company and its Accountants; and the ostensible lack of justification to apply a different law to the Accountants of the company.

64. **The purpose of the dual listing arrangement:** As has been explained in detail above, the purpose of the dual listing arrangement is to permit trading of securities of companies listed for trading on foreign exchanges in Israel as well, while relying on the law that is applicable to them overseas instead of on Israeli law, for the protection of the investing public. One basic assumption is that the applicability of foreign law, together with foreign supervision and the market discipline which is practiced on the foreign Stock Exchange, should be sufficient substitutes for the applicability of reporting obligations pursuant to Israeli law. A second basic assumption is that companies will find it very problematic dealing with two systems of law in parallel. Therefore, in the absence of an exemption from the application of Israeli law, the dual listing arrangement will not be sufficiently effective and beneficial.

65. Naturally this purpose would be valid not only in relation to the company that publishes the report and is primarily responsible for its content, but also in relation to the parties involved, in the report - in one form or another - amongst them the Accountants of the company.

66. **Contradictions that could possibly arise if different arrangements apply to the Company and to its Accountants:** As stated above, the dual liability companies should be subject to the foreign rules of liability in connection with the disclosure provided in accordance with foreign law. The application of rules of disclosure and the rules of liability which are not of foreign law alone could lead to uncertainty regarding the requirements of disclosure, and also to the matter that these will not be *de facto* requirements of disclosure pursuant to foreign law only, which will be contrary to the purpose of the dual listing arrangement.

67. A similar result may occur if different rules of liability apply to the company and to its Accountants. The Accountant must, after all, submit his opinion on the Financial Statements of the reporting company. The regime of liability in Israeli law may impose obligations on the Accountant in relation to the manner in which his opinion is submitted. Thus, for example, in certain circumstances, in order not to be obliged in accordance with Israeli law, the Accountant – who is subject to the regime of liability pursuant to the Israeli Securities Law - must include in his opinion attention to certain details in the reports, and even include in his opinion a remark regarding the reporting corporation's ability to continue as a living business. For the purpose of complying with this obligation on the part of the Accountant, the corporation may be required to perform a number of operations that exceed their processes and they will be bound by the regime of disclosure and liability established by the foreign law.

68. The conduct and responsibility of Accountants pursuant to Israeli law is conducted in accordance with a wide range of norms, including market practice (derived from, *inter alia*, the provisions of disclosure of Israeli law), the auditing rules applicable to Accountants in Israel, the positions of the Securities Authority and its activities of enforcement and, of course, Court rulings. It is not likely that these norms will "leak" into the conduct and reporting of a company required to act in accordance with the provisions of foreign law and

other norms, which would then result in uncertainty, inconsistencies, and deviations from the principles of the dual listing arrangement.

69. **The ostensible lack of justification for applying a different law to the Accountants of the company**: it is not disputed that the Accountant of a reporting company is a critical factor in protecting the investing public of the company. The Accountant has a crucial role to play in ensuring that the Financial Statements of the company are adequate, since these are a primary source of information on its status, and for making investment decisions in regard thereto. There is good reason for the Accountant being recognized as a very important 'gatekeeper' in the capital market, and it has even been determined that he should be held liable in instances where he did not comply with his professional duties in auditing the reports of the corporation.

70. However, in light of the unique purpose of the dual listing arrangement - which justifies the application of foreign law to the corporations and their officers - there is no apparent reason to impose on the auditors of a dual arrangement company an additional liability to that which applies to them in accordance with the foreign law, so that a dual mask of rules of liability will apply to them - in accordance with Israeli law and in accordance with foreign law. This is especially so, since the premise of the dual listing arrangement is that the regime of supervision of the parties responsible for the company's reports, including the auditing Accountants, will be adequate.

71. Accountants operating in the United States (where most dual companies are traded) are subject to a supervisory regime under a dedicated and independent body established for this purpose, which is the PCAOB (Public Company Accounting Oversight Board), which conducts audits and enforcement against accounting firms. Similar bodies exist in many developing markets. It should be noted that in Israel - despite the efforts made by the Securities Authority in recent years - there is not yet a similar dedicated body that oversees the work of Accountants. There is no reason to assume, therefore, that the supervision of Accountants in the United States is deficient in any manner that would justify the application of a civil liability regime in accordance with Israeli law, where this law does not apply to the corporation and its officers.

72. For the aforementioned reasons, the position of the Authority is that it is unlikely that the question of the Company's liability for its current reports will be heard in accordance with foreign law, while the question of the liability of the Accountants for those reports will be heard in accordance with Israeli law.

E. Conclusion

73. The issue of rules of liability applicable to the disclosure of dual listing companies in accordance with foreign law has been extensively discussed by the District Courts and it has been ruled by them that these will be the rules of liability pursuant to foreign law. The Authority believes that these rulings are correct. In its position the Authority has sought to again emphasize the purpose of the dual listing arrangement and its importance; the considerable difficulty of the position of the Appellant and the harsh consequences that could result from accepting his position; and the proper interpretation of the position of the Authority regarding the rules for regular reporting of dual listing companies. In the latter instance the Authority has presented an interpretation that provides a proper and consistent response to its approach, both in connection with the cases discussed so far in the verdict - in which allegations have been made of breach of obligations of disclosure pursuant to foreign law - and in connection with more exceptional cases that may arise in the future in which allegations of violation of the obligations of disclosure in accordance with Israeli law may be discussed.

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